Nos. 15A773, 15A776, 15A778, 15A787, and 15A793

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, ET AL., APPLICANTS
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

BASIN ELECTRIC POWER COOPERATIVE, ET AL., APPLICANTS
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

MURRAY ENERGY CORPORATION, ET AL., APPLICANTS
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

CHAMBER OF COMMERCE, ET AL., APPLICANTS
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

STATE OF NORTH DAKOTA, APPLICANT
v.
EPA, ET AL.

ON APPLICATIONS FOR IMMEDIATE STAY OF FINAL AGENCY ACTION

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

The Solicitor General, on behalf of federal respondents, respectfully files this memorandum in opposition to the applications for a stay pending judicial review.

INTRODUCTION

The Clean Power Plan (the Rule) addresses the Nation's most important and urgent environmental challenge -- climate change -- by securing critical reductions in carbon dioxide (CO_2) emissions from fossil-fuel-fired power plants. The Rule implements the Clean Air Act (CAA), 42 U.S.C. 7401 et seq., and establishes a process under which the Environmental Protection Agency (EPA) and the States will work cooperatively to plan for and achieve such reductions over the coming decades. 80 Fed. Reg. 64,663-64,664 (Oct. 23, 2015). Under the Rule, States need not complete their plans until September 2018, and the Rule does not require regulated power plants to reduce their emissions until 2022 at the earliest. Id. at 64,669.

Applicants have filed petitions for judicial review of the Rule in the D.C. Circuit, and they sought a stay of the Rule pending that review. A panel of the D.C. Circuit unanimously denied that request, concluding that applicants had not satis-

fied the traditional requirements for such a stay. App., infra, 2a. Instead, the court established an expedited schedule for considering the merits of applicants' challenge to the Rule. Ibid. Under that schedule, all briefs will be filed by the end of April 2016, and oral argument will be held on June 2, 2016. Ibid. The D.C. Circuit therefore can reasonably be expected to issue its decision by late summer or early fall 2016.

Applicants now ask this Court to stay the Rule pending the final resolution of their petitions for review by the D.C. Circuit and, if necessary, by this Court. In requesting a "stay," however, applicants appear to seek much more than interim relief that would "temporarily divest[] [the Rule] of enforceability" while review is ongoing. Nken v. Holder, 556 U.S. 418, 428 (2009). Rather, they explicitly or implicitly ask this Court to toll all of the relevant deadlines set forth in the Rule, even those that would come due many years after the resolution of their challenge, for the period between the Rule's publication and the final disposition of their lawsuits. See, e.g., Appl. of Util. & Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review (Util. Appl.) 22. Entry of such a "stay" would mean that, even if the government ultimately prevails on the merits and the Rule is sustained, implementation of each sequential step mandated by the Rule

would be substantially delayed. A request for such tolling is inherent even in the applications that do not explicitly address that subject, as all of them rest on the premise that a stay would forestall harms alleged to arise from future deadlines.

The relief that applicants request would be extraordinary and unprecedented, and their applications should be denied. Applicants seek a stay before any court has expressed a view about, let alone rendered a final decision concerning, the merits of their legal claims. This Court is ordinarily "a court of final review and not first view," Department of Transp. v. Association of Am. R.Rs., 135 S. Ct. 1225, 1234 (2015) (citation omitted), and its traditional reluctance to address novel legal arguments in the first instance -- without the benefit of any sustained analysis by a lower court -- weighs strongly against intervention at this time. Applicants identify no case in which this Court has granted a stay of a generally-applicable regulation pending initial judicial review in the court of appeals. Applicants likewise have identified no case in which this Court has granted a "stay" that would have the sweeping prospective consequences, extending far beyond the actual pendency of the relevant judicial proceedings, that their current requests for relief would entail.

Such intervention is especially unwarranted in light of the nature of this case and the D.C. Circuit's considered decision to deny a stay and expedite its review. On the merits, applicants' challenge to the Rule implicates complex questions of statutory interpretation and environmental policy. Congress has channeled the review of nationally-applicable CAA regulations to the D.C. Circuit, which accordingly has specialized expertise on relevant CAA programs. 42 U.S.C. 7607(b)(1). The court of appeals should have the first opportunity to analyze the issues and render an opinion that would provide useful guidance to this Court.

In any event, the D.C. Circuit's analysis was correct: Applicants are not entitled to relief under the traditional stay factors. First, they cannot establish a likelihood that they will ultimately succeed on the merits of their claims. EPA has well-established authority under Section 111(d) of the CAA, 42 U.S.C. 7411(d), to limit CO_2 emissions from power plants. The Rule establishes standards of performance for power plants that reflect reasonable conclusions about the measures that regulated entities can take -- and in many cases are already taking -- to minimize pollution.

Applicants also have not shown that they will suffer irreparable harm during the relatively brief period of expedited

review in the D.C. Circuit. States can delay their submission of a plan for implementing the Rule's emission guidelines until September 2018. 80 Fed. Reg. at 64,669. Regulated entities face no compliance deadlines whatsoever until 2022 at the earliest, and they are not required to achieve full compliance until 2030. Ibid.; see id. at 64,785-64,786. At least one applicant has now acknowledged -- in a separate filing with EPA -- that some of the harms predicted in its application are unlikely to occur in the near term. See pp. 67-68, infra. Moreover, to the extent that applicants rely on harm that they will allegedly suffer after a potential D.C. Circuit decision rejecting their challenge, they remain free to seek a stay of the Rule if and when such a decision is actually issued. In ruling on such a request, this Court would have the benefit of the D.C. Circuit's merits analysis and could exercise its traditional function as a reviewing court.

Finally, applicants' proposed stay would disserve the public interest. A stay that delays all of the Rule's deadlines would postpone reductions in greenhouse gas emissions and thus contribute to the problem of global climate change even if the Rule is ultimately sustained.

For all of these reasons, the applications should be denied and this case should proceed in the expedited fashion mandated

by the D.C. Circuit. In no event should this Court grant a stay that would necessarily and irrevocably extend every deadline set forth in the Rule.

STATEMENT

Atmospheric greenhouse gases such as CO_2 have risen to unprecedented levels as a result of human activities, and they are the root cause of ongoing global climate change. 74 Fed. Reg. 66,517 (Dec. 15, 2009). Fossil-fuel-fired power plants are by far the highest-emitting stationary sources of CO_2, generating approximately 37% of all man-made CO_2 emissions in the United States.[1] The Rule at issue in this case is EPA's principal initiative to reduce CO_2 emissions from stationary sources in accordance with the CAA's mandates.

1. The CAA's core purpose is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). The CAA establishes a comprehensive and detailed program for controlling air pollution through a system of shared federal and state responsibility.

[1] EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2013, EPA 430-R-15-004, at 3-14 (Apr. 15, 2015), http://www3.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2015-Main-Text.pdf; see 80 Fed. Reg. at 64,689.

The CAA's regulatory program addresses three general categories of pollutants emitted from existing stationary sources: (1) criteria pollutants (which are addressed under the National Ambient Air Quality Standards (NAAQS) program, see 42 U.S.C. 7408-7410); (2) hazardous air pollutants (which are addressed under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program, see 42 U.S.C. 7412); and (3) "pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled under [42 U.S.C. 7408-7410 or 7412]" (which are addressed under the New Source Performance Standards (NSPS) program, see 42 U.S.C. 7411). 40 Fed. Reg. 53,340 (Nov. 17, 1975). Together, these three programs constitute a comprehensive scheme to regulate air pollutants with "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 1196, 91st Cong., 2d Sess. 20 (1970) (Senate Report).

2. EPA promulgated the Rule under the NSPS program, authorized by 42 U.S.C. 7411. Section 7411(b)(1)(A) directs the Administrator to list "categories of stationary sources" that "in [her] judgment * * * cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." Section 7411(b) requires

EPA to prescribe federal "standards of performance" for emissions of pollutants from new or modified sources for each category of sources listed by the Administrator. 42 U.S.C. 7411(b)(1)(B). Section 7411(d), in turn, provides that EPA "shall prescribe regulations" addressing existing sources of such pollutants, subject to various conditions and exceptions. 42 U.S.C. 7411(d).

a. Until 1990, Section 7411(d)(1)(A) authorized EPA to prescribe regulations addressing existing sources of any air pollutant "for which air quality criteria have not been issued [under the NAAQS program] or which is not included on a list published under [S]ection 7408(a) [also under the NAAQS program] or 7412(b)(1)(A) [under the NESHAP program]." 42 U.S.C. 7411(d) (1988). Section 7411(d) thus operated as a gap-filling provision that empowered EPA to regulate pollution from existing sources that would otherwise escape regulation under the NAAQS and NESHAP programs.

In 1990, Congress completely redrafted 42 U.S.C. 7412, the provision establishing the NESHAP program. CAA Amendments of 1990 (1990 Amendments), Pub. L. No. 101-549, Tit. III, § 301, 104 Stat. 2531. That revision required Congress to update Section 7411(d)(1)(A)(i)'s cross-reference to Section 7412(b)(1)(A). The law that Congress enacted to accomplish that

purpose, however, contained two different provisions amending that cross-reference as part of its broader amendments to the CAA. As part of a provision entitled "Miscellaneous Guidance" and set forth at Section 108 of the 1990 Amendments, 104 Stat. 2465, Congress replaced Section 7411(d)(1)(A)(i)'s words "or [74]12(b)(1)(A)" with the phrase "or emitted from a source category which is regulated under [S]ection [74]12." § 108(g), 104 Stat. 2467. In a "Conforming Amendment[]" set forth at Section 302(a) of the 1990 Amendments, Congress replaced Section 7411(d)(1)(A)(i)'s reference to "[Section] [74]12(b)(1)(A)" with "[Section] [74]12(b)." 104 Stat. 2574.

When the 1990 Amendments were subsequently codified in the revised United States Code, the Law Revision Counsel responsible for the codification updated Section 7411(d)(1)(A)(i)'s cross-reference in the manner set forth by the first of those two amendments. 42 U.S.C. 7411 (Amend. 1990, Subsec. (d)(1)(A)(i)). The Law Revision Counsel declined to incorporate the second amendment, however, asserting that it "could not be executed" in light of the first. Ibid. Congress has not ratified that determination by re-enacting the codified version of Section 7411(d) as positive law.

b. As it now appears in the United States Code, Section 7411(d) requires EPA to establish regulations governing existing stationary sources, as follows:

> The Administrator shall prescribe regulations which shall establish a procedure * * * under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under [S]ection 7408(a) of this [T]itle or emitted from a source category which is regulated under [S]ection 7412 of this [T]itle but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance.

42 U.S.C. 7411(d)(1).

As that text makes clear, Section 7411(d) regulations promulgated by EPA do not directly regulate stationary sources. Rather, such regulations establish the process by which States submit plans establishing "standards of performance" for existing sources of relevant pollutants. Section 7411 elsewhere defines the term "standard of performance" as:

> a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated.

42 U.S.C. 7411(a)(1). Under that definition, the specific emission requirements imposed on particular sources must "reflect[]" a more overarching, preliminary determination -- made

by EPA -- of "the degree of emission limitation achievable through the application of the best system of emission reduction." Ibid. In making that determination, EPA (1) identifies the "system[s] of emission reduction" that are "adequately demonstrated" for a particular source category; (2) determines the "best" of those systems, based on the relevant criteria; and (3) derives from that system an "achievable" emission performance level for the relevant sources. 80 Fed. Reg. at 64,720 (brackets in original).

EPA promulgates its determination in a set of regulations known as "emission guidelines." See 40 C.F.R. Pt. 60, Subpt. B. The emission guidelines also set forth procedures for EPA's receipt and approval of individualized state plans, which, inter alia, specify the emission limitations applicable to particular sources within a State. 42 U.S.C. 7411(d)(1). If a State elects not to submit a plan to EPA, or submits a plan that EPA does not find "satisfactory," EPA must promulgate a federal plan that directly limits emissions from the State's existing sources. 42 U.S.C. 7411(d)(2).

3. In October 2015, EPA published two rules addressing CO_2 emissions from power plants. The first rule -- which is not directly at issue here -- establishes CO_2 emission standards under Section 7411(b) for new, modified, and reconstructed

plants. 80 Fed. Reg. at 64,510. The second rule is the Clean Power Plan, and it establishes Section 7411(d) emission guidelines for States to follow in developing plans to limit CO_2 emissions from existing power plants. Id. at 64,662.[2]

a. In the Rule, EPA explained that Section 7411(d) authorizes the agency to regulate CO_2 emissions from power plants. Acknowledging the two statutory amendments to that provision that Congress enacted in 1990, EPA interpreted Section 7411(d) to authorize EPA to regulate pollutants emitted by a particular source category so long as such pollutants are not otherwise regulated under the NAAQS or NESHAP programs. 80 Fed. Reg. at 64,712-64,715. EPA emphasized, inter alia, that its interpretation was the only one consistent with (1) Section 7411(d)'s longstanding purpose of filling any gap between the other regulatory programs, and (2) both of the statutory amendments that Congress enacted in 1990. Id. at 64,714-64,715.

b. The Rule also set forth EPA's determination that the "best system of emission reduction" "adequately demonstrated" for existing plants includes a combination of three measures, referred to as "building blocks":

---

[2] On the same day, EPA proposed two approaches to a federal plan for States that do not submit an approvable plan, which can also serve as models for States in developing their own plans. 80 Fed. Reg. at 64,966.

> (1) improving heat rate at coal-fired steam plants;
>
> (2) substituting increased generation from lower-emitting existing natural gas combined cycle plants for generation from higher-emitting steam plants (which are primarily coal-fired); and
>
> (3) substituting increased generation from new zero-emitting renewable energy generating capacity for generation from fossil-fuel-fired plants (which are primarily coal- or gas-fired).

See 80 Fed. Reg. at 64,666-64,667. EPA determined that these measures were "adequately demonstrated" because each of them is already a "well-established" technique for reducing CO_2 emissions from power plants. Id. at 64,709. EPA further determined that these measures taken together constitute the "best system of emission reduction" because they can achieve substantial CO_2 reductions at reasonable cost, without adverse impacts on energy availability or otherwise. Id. at 64,744-64,751. EPA also determined that individual sources can implement all of these measures, including the second and third generation-shifting measures, through a set of actions that range from making direct investments in zero- or low-emitting plants to purchasing emission-rate credits from entities that have made such investments. Id. at 64,709.

Having identified the "best" CO_2 reduction system, EPA then quantified the degree of emission reduction achievable under that system for two subcategories of sources: steam units

(which are primarily coal-fired) and combustion turbines (which are primarily gas-fired). 80 Fed. Reg. at 64,663. To best reflect the Nation's interconnected electrical system, EPA quantified the reductions achievable in 2030 for each subcategory in each of three regions. Ibid.; see id. at 64,738. EPA then established uniform performance levels for each subcategory based on the least stringent of the three calculated regional rates. Id. at 64,741-64,742, 64,961 (Tbl. 1).

To enhance state planning flexibility, the Rule translates the uniform performance rates into equivalent statewide emission goals for 2030, expressed in terms of both the rate of emissions per unit of energy production ("rate-based goals") and the total mass of emissions ("mass-based goals"). 80 Fed. Reg. at 64,820. The Rule then gives each State the option of submitting a plan that either (1) simply applies the uniform performance rates to all sources within the State, or (2) otherwise satisfies either the equivalent rate-based or mass-based statewide goals. Id. at 64,832-64,838. Under the latter option, States can assign emission standards for particular plants that depart from the uniform performance rates, so long as the equivalent state goals are met. The Rule thus does not require any particular amount of reductions by any particular source at any particular time.

The Rule does not require that States or sources apply the specific "building block[]" measures that EPA identified as the "best system." 80 Fed. Reg. at 64,710. Instead, States and sources may choose from a wide range of measures, including technological controls such as carbon sequestration or gas co-firing, to achieve the emission limitations.[3] The Rule also accommodates (but does not require) trading-based emission programs and other compliance strategies that significantly enhance flexibility and cost-effectiveness for sources. Id. at 64,834-64,835.[4]

c. The Rule directs States to provide either a plan or an initial submission in September 2016. 80 Fed. Reg. at 64,669. By filing an initial submission, a State may extend until September 2018 the deadline for completing its plan. Id. at

---

[3] To enhance state flexibility, the Rule also authorizes States to pursue a "state measures" approach, under which they may avoid imposing any direct Section 7411(d) emission standards on power plants, and may instead choose to pursue other state-law-only measures (e.g., programs that encourage more efficient energy usage) to reduce power-plant emissions, subject only to a Section 7411(d) "backstop" program if the state measures prove insufficient to attain the interim and final state goals. 80 Fed. Reg. at 64,836-64,837.

[4] Trading-based emission programs can take different forms. Generally speaking, however, they provide incentives to develop cost-effective emission-reduction strategies by enabling companies to earn credits or allowances for projects that reduce emissions, which can then be sold to other facilities to meet emission requirements.

64,947. Such an initial submission must include only minimal information concerning the status of the State's planning efforts, specifically: (1) an identification of the various plan approaches under consideration, including any progress to date; (2) a description of opportunities for public input on the plan; and (3) an appropriate explanation for why the State requires more time. Ibid.[5]

The Rule makes clear that its requirements are to be gradually phased in over an extended period of time. The Rule does not require power plants to begin reducing their CO_2 emissions until 2022 at the earliest. 80 Fed. Reg. at 64,669, 64,785. In fact, most States could delay requiring reductions until 2024 and still meet the Rule's requirements. Id. at 64,785-64,786 & n.621. And regulated entities need not achieve full compliance until 2030. Id. at 64,785-64,786.

d. When promulgating the Rule, EPA also released a detailed assessment of its likely economic impact. EPA concluded that the Rule will not result in any substantial increase in elec-

[5] If a State declines to prepare and submit its own plan, the only consequence is that EPA will promulgate a federal plan for power plants in that State. 80 Fed. Reg. at 64,942. EPA is not authorized to impose sanctions on a State for failure to submit a state plan. Ibid. A State that declines to submit a plan by the applicable deadline could still choose, at any later point, to adopt an approvable state plan that would supplant any federal plan. Ibid.

tricity costs to the public. 80 Fed. Reg. at 64,679-64,681, 64,748-64,751; EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule, EPA-452/R-15-003, at 3-35 to 3-40 (Oct. 2015). EPA further explained that the Rule will not reduce the reliability of the electricity system and is consistent with long-term trends in the generation of energy. 80 Fed. Reg. at 64,671, 64,694-64,696, 64,709.

4. In October 2015, applicants sought judicial review of the Rule in the D.C. Circuit. See 15-1363 Docket (consolidated challenges to rule addressing existing power plants' CO_2 emissions). At the same time or shortly thereafter, applicants requested a stay of the Rule pending that court's decision on the merits. Numerous States, industrial entities, environmental organizations, public-health groups, and others intervened in support of the Rule and participated in briefing the stay motions. See generally ibid. Collectively, the parties' briefing on the stay requests encompassed approximately 360 pages of text and relied on more than 2500 pages of supporting declarations and exhibits. See ibid. Briefing on the stay motions was completed on December 23, 2015.

On January 21, 2016, a unanimous panel of the D.C. Circuit denied those motions, concluding that applicants "have not satisfied the stringent requirements for a stay pending court

review." App., infra, 1a-2a (citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). The court further ordered that consideration of the appeals be expedited and that oral argument will take place on June 2, 2016. Ibid. Applicants did not ask the en banc court to overturn the panel's denial of a stay.

ARGUMENT

Applicants ask this Court to stay the Rule pending judicial review in the court of appeals and, if necessary, in this Court. Courts typically consider four factors when deciding whether to grant a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting Hilton v. Braunskill, 481 U.S. 770, 776, (1987)). The last two factors "merge when the Government is the opposing party." Id. at 435.

In cases where an individual Justice is asked to stay an order while a case is pending in the court of appeals, that Justice must also "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the

[order] without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302-1303 (2006) (Kennedy, J., in chambers) (citation omitted). A stay on a matter currently pending before a court of appeals is an extraordinary remedy that is "rarely granted." Heckler v. Lopez, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers) (quoting Atiyeh v. Capps, 449 U.S. 1312, 1313 (1981) (Rehnquist, J., in chambers)). The danger of premature intervention in lower-court proceedings is particularly acute here, where no court has yet analyzed the merits of applicants' claims. Applicants identify no case, and we are aware of none, in which the Court has granted a stay of an administrative rule before that rule has been reviewed by any court.

As noted above, the D.C. Circuit has already considered and denied applicants' requests for a stay. App., infra, 2a. The "general practice" in such circumstances is "not to disturb * * * interim determinations of the Court of Appeals in matters pending before it." O' Rourke v. Levine, 80 S. Ct. 623, 623-624 (1960) (Harlan, J., in chambers); see Williams v. Zbaraz, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers). That general practice is particularly apt where, as here, (1) the governing

statutory scheme provides for initial review in the court of appeals, (2) this Court is asked to grant relief before any court has ruled on applicants' claims, and (3) the court of appeals' proceedings have been expedited. A lower court's decision to deny a stay "weigh[s] heavily" in the analysis of whether a stay should be granted, particularly in regard to that court's assessment of "the existence of potentially irreparable harm." Graves v. Barnes, 405 U.S. 1201, 1203-1204 (1972) (Powell, J., in chambers); see Williams, 442 U.S. at 1312.

Applicants thus bear a heavy burden to establish their entitlement to a stay. "Where there is doubt, it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents." Williams, 442 U.S. at 1316. Applicants cannot satisfy their burden here. They are not likely to succeed on the merits; they will not suffer irreparable harm during the relatively brief period during which this case is likely to be pending before the D.C. Circuit; and the public interest weighs strongly in favor of leaving the Rule in place. After the D.C. Circuit issues its merits decision, the Court will be in a far better position to determine whether some form of interim relief is appropriate pending the disposition of any requests for this Court's review. The applications for a stay should be denied.

I. APPLICANTS CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS

Applicants are unlikely to succeed in their challenge to the Rule. Contrary to applicants' contention, Section 7411(d)(1)(A) does not deprive EPA of authority to issue the Rule. The Rule is also consistent with the statute's other provisions, and with the Tenth Amendment and relevant federalism principles.

A. Section 7411(d)(1)(A)(i) Grants EPA Statutory Authority To Promulgate The Rule

EPA has well-established authority under Section 7411 to limit air pollution emitted by power plants. See generally American Elec. Power Co. v. Connecticut, 564 U.S. 410, 423-425 (2011) (AEP). Indeed, the existence of such authority was central to the AEP Court's conclusion that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." Id. at 424; see id. at 423-429.

As it appears in the United States Code, Section 7411(d)(1) authorizes EPA to prescribe regulations under which States shall submit plans establishing standards of performance for any existing source with respect to:

> any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under [S]ection 7408(a) of this [T]itle or emitted from a source category which is regulated under [S]ection

> 7412 of this [T]itle but (ii) to which a standard of performance under this section would apply if such existing source were a new source.

42 U.S.C. 7411(d)(1). The Rule interprets that language to permit EPA to regulate emissions of specific pollutants that are not themselves regulated under either the NAAQS program (set forth in Section 7408-7410) or the NESHAP program (set forth in Section 7412). 80 Fed. Reg. at 64,712-64,715; see p. 12, supra.

Applicants argue that, because EPA has regulated power-plant emissions of other pollutants under the NESHAP program, Section 7411(d)(1) no longer authorizes EPA to regulate CO_2 emissions from existing power plants. See, e.g., Appl. by 29 States & State Agencies for Immediate Stay of Final Agency Action During Pendency of Pets. for Review (States Appl.) 29-38; Appl. by Coal Indus. for Immediate Stay of Final Agency Action Pending Judicial Review (Coal Indus. Appl.) 12-23. They argue that this result follows if Section 7411(d)(1) is interpreted in accordance with its "literal," "straightforward," and "plain" meaning. See, e.g., States Appl. 29-31; Coal Indus. Appl. 13, 15-16. Applicants are mistaken. Literally construed, Section 7411(d)(1)(A) unambiguously authorizes EPA to regulate the CO_2 emissions at issue here. Applicants' interpretation also ignores Section 7411(d)'s gap-filling purpose within the CAA's comprehensive regulatory scheme, and it impermissibly disregards

the statutory text that Congress enacted in Section 302(a) of the 1990 Amendments. Applicants are not likely to succeed on this aspect of their challenge to the Rule.

1. Applicants' statutory argument cannot be squared with the literal, plain meaning of Section 7411(d)(1). As noted above, Section 7411(d)(1)(A) empowers EPA to prescribe regulations with respect to any air pollutant "[1] for which air quality criteria have not been issued * * * under [the NAAQS program] or [2] which is not included on a list published under [S]ection 7408(a) of this [T]itle or emitted from a source category which is regulated under [S]ection 7412 of this [T]itle." 42 U.S.C. 7411(d)(1)(A) (emphasis added). Under a literal interpretation, Congress's use of the word "or" to separate [1] and [2] in the preceding quotation means that Section 7411(d)(1)(A) identifies two independent bases on which EPA may regulate air pollutants for existing sources. See, e.g., Horne v. Flores, 557 U.S. 433, 454 (2009) ("Use of the disjunctive 'or' makes it clear that each of the provision's three grounds for relief is independently sufficient.").

It is undisputed that EPA has not issued air quality criteria for CO_2 emissions under the NAAQS program. See 80 Fed. Reg. at 64,713. Under a literal interpretation of Section 7411(d)(1)(A), that fact alone ensures that EPA has authority to

regulate such emissions from existing power plants. Ibid. Applicants simply ignore that aspect of the statutory text.

2. Applicants' argument focuses exclusively on Section 7411(d)(1)(A)(i)'s grant of authority to regulate with respect to pollutants that are not "emitted from a source category which is regulated under [S]ection 7412 of this [T]itle." 42 U.S.C. 7411(d)(1)(A)(i). In their view, that language means that, because EPA has identified power plants as a source category whose emissions of hazardous pollutants are regulated under Section 7412's NESHAP program, EPA cannot regulate any other harmful power-plant emissions under Section 7411(d). That argument lacks merit.

Section 7411(d)(1)(A)(i)'s words must be interpreted "in their context and with a view to their place in the [CAA's] overall statutory scheme." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (Brown & Williamson) (citation omitted). In particular, Section 7411(d)(1)(A)(i)'s cross-reference to Section 7412 must be interpreted in light of the text and purpose of that companion provision. Section 7412 addresses only "hazardous air pollutants" that appear on the statutory list of such pollutants set forth at Section 7412(b)(1) or are listed pursuant to Section 7412(b)(2), and EPA lacks authority under that provision to regulate other harmful

pollutants. Given Section 7412's exclusive focus on hazardous air pollutants -- and Section 7411(d)(1)'s historic gap-filling function -- EPA reasonably interpreted Section 7411(d)(1) to authorize regulation of other harmful pollutants that would otherwise escape regulation under the CAA altogether. 80 Fed. Reg. at 64,714-64,715; 40 Fed. Reg. at 53,340. That is precisely the sort of "reasonable, context-appropriate meaning" that this Court has directed EPA to give such ambiguous terms in prior cases. Utility Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2440 (2014) (UARG).[6]

---

[6] Applicants assert that EPA adopted their own more restrictive interpretation of Section 7411(d)(1)(A) in connection with a 2005 rulemaking. See, e.g., States Appl. 30-32. In fact, EPA made clear in that rulemaking that Section 7411(d)(1)(A) is most reasonably interpreted -- in light of its overarching purpose and the two changes to the provision that were enacted as part of the 1990 Amendments -- to allow EPA to regulate non-hazardous pollutants even when those pollutants are emitted from source categories whose emissions of hazardous pollutants are regulated under Section 7412. See, e.g., 70 Fed. Reg. at 16,031-16,032 (concluding that, "[w]here a source category is being regulated under [S]ection [74]12, a [S]ection [74]11(d) standard of performance cannot be established to address any [hazardous air pollutant] listed under [S]ection [74]12(b) that may be emitted from that particular source category.") That conclusion is consistent with EPA's conclusion in the Rule, and it supports EPA's authority to regulate CO_2 emissions from existing power plants. Notably, several of the state applicants in this case supported EPA's 2005 interpretation at that time. See, e.g., Joint Br. of State Resp.-Intervenors et al., New Jersey v. EPA, No. 05-1097, 2007 WL 3231261, at *25 (D.C. Cir. July 23, 2007) ("EPA developed a reasoned way to reconcile the conflicting language and the Court should defer to EPA's interpretation.").

Applicants' unduly restrictive interpretation of Section 7411(d)(1)(A)(i) plainly was not intended by Congress. Most importantly, their interpretation creates an unexplained gap in the CAA's otherwise comprehensive regulatory regime. It creates a category of pollutants -- non-hazardous, non-criteria pollutants that are emitted by existing sources whose emission of hazardous pollutants is regulated by Section 7412 -- that are subject to no CAA regulation whatsoever. That approach would disrupt Congress's longstanding view that the CAA should permit "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." Senate Report 20; see 80 Fed. Reg. at 64,711. As a practical matter, applicants' reading would strip Section 7411(d) of nearly all effect, since EPA has regulated more than 140 source categories for one or more hazardous pollutants.

Applicants suggest that Congress in the 1990 Amendments intentionally created this regulatory gap when it "replac[ed] [Section 7412's] prior pollution-specific focus (see 42 U.S.C. § 7412 (1988)) with an expansive new 'source category' structure and aligned Section [74]11(d) with this new source-category approach." Coal Indus. Appl. 13. But although the 1990 Amendments made certain changes to the Section 7412 NESHAP program, that program remains "pollution-specific" in the relevant sense,

i.e., it authorizes EPA to regulate only a specified category of hazardous air pollutants. See 42 U.S.C. 7412(b) (listing such pollutants and providing criteria for listing). None of the changes Congress made to the Section 7412 program requires or implies any determination that EPA's listing of a particular source category for regulation of hazardous pollutants under Section 7412 divests the agency of authority to regulate emissions of non-hazardous pollutants from the same sources. It is particularly unlikely that Congress would have made such a fundamental change -- and created a gap at odds with the CAA's historically comprehensive regulatory scheme -- through a "Miscellaneous Guidance" provision that appeared to generate no significant discussion at the time. 1990 Amendments § 108, 104 Stat. 2465; cf. Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes.").[7]

[7] The Coal Industry applicants describe (Appl. 17) Section 108 as "a substantive provision occupying five pages of the Statutes at Large * * * which rewrote Section [74]11 to mirror the new source-category focus and structure of Section [74]12." In fact, Section 108's "Miscellaneous Guidance" provision -- which appears in Title I of the 1990 Amendments, which was focused on making changes to the NAAQS program, see 104 Stat. 2399-2471 -- contained 17 different subsections, only three of which addressed Section 7411, see 104 Stat. 2465-2469.

Under applicants' interpretation of Section 7411(d)(1)(A)(i), EPA's prior decision to regulate power-plant emissions of hazardous pollutants under Section 7412 would have dramatic and unintended consequences. Section 7412(n)(1)(A) directs EPA to regulate power plants under Section 7412 "if the Administrator finds such regulation is appropriate and necessary." The statute makes clear that, when deciding whether to list power plants for regulation under Section 7412, EPA must assess the health and environmental effects posed by the emission of hazardous air pollutants by such plants. 42 U.S.C. 7412(n)(1)(A), (B), and (C). This Court held last Term that EPA could not decline to consider the financial costs that regulation would entail in determining whether regulation of power plants under Section 7412 is "appropriate and necessary." Michigan v. EPA, 135 S. Ct. 2699, 2706-2712 (2015).

If EPA's decision to regulate power plants under Section 7412 had the dramatic legal effect that applicants attribute to it -- i.e., if that decision foreclosed the agency from subsequently regulating power-plant emissions of non-hazardous pollutants under Section 7411(d) -- EPA would have been expected to take that consequence into account in determining whether regulation under Section 7412 was "appropriate and necessary." Nothing in the CAA suggests, however, that Congress expected EPA

to evaluate that tradeoff in deciding whether power plants should be regulated under Section 7412. Applicants likewise identify no evidence that EPA considered, or was asked to consider, this purported consequence of Section 7412 regulation when the agency listed power plants as a NESHAP source category.[8]

3. Applicants' interpretation of Section 7411(d)(1)(A) also directly contradicts the unambiguous text and purpose of Section 302(a) of the 1990 Amendments. As explained above, see pp. 8-9, supra, that provision modified the obsolete cross-reference that had appeared in the pre-1990 version of Section 7411(d)(1), updating that provision to refer to "[Section] [74]12(b)"

---

[8] Contrary to applicants' suggestion, footnote seven of this Court's opinion in AEP, 564 U.S. at 424 n.7, did not decide the interpretive question presented here. That footnote states that "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the [NAAQS] program, §§ 7408-7410, or the [NESHAP] program, § 7412." Ibid. Applicants interpret the footnote to support their view that Section 7411(d) prohibits regulation of any pollutant emitted by a source regulated under Section 7412. See, e.g., Coal Indus. Appl. 13. Applicants' interpretation of footnote seven logically suggests, however, that the same prohibition would apply to any pollutant emitted by a source that also emits criteria pollutants regulated under the NAAQS program. That result plainly contradicts the text of Section 7411(d)(1)(A)(i), which forecloses regulation of criteria pollutants under that provision but contains no barrier to regulation of non-criteria pollutants that are emitted by sources that also emit criteria pollutants. Footnote seven is best read simply to reflect the Court's recognition that EPA may not invoke Section 7411(d) to regulate pollution that is regulated under the NAAQS or NESHAP program.

instead of "[Section] [74]12(b)(1)(A)." 1990 Amendments § 302(a), 104 Stat. 2574; see 42 U.S.C. 7411(d)(1)(A)(i) (1988). Section 302(a) thus preserved EPA's longstanding authority to regulate non-hazardous pollutants emitted from stationary sources whose hazardous pollutants are regulated under Section 7412. 80 Fed. Reg. at 64,711-64,712 (explaining EPA's view of Section 302(a) and its relationship to the pre-1990 version of Section 7411(d)(1)(A)(i)).

a. Section 302's change to Section 7412(d)(1)'s cross-reference plainly differs from the text of Section 108(g) of the 1990 Amendments, which instead replaced the former cross-reference to "[Section] [74]12(b)(1)" with the phrase "or emitted from a source category which is regulated under [S]ection [74]12." 104 Stat. 2467. Applicants' primary solution to the difficult interpretive problem posed by the inconsistent statutory amendments is simply to ignore Section 302(a). See States Appl. 35-38; Coal Indus. Appl. 16-21. On their view, Section 302's status as a "conforming amendment" that appears on a subsequent page of the Statutes at Large means that it can appropriately be disregarded. Indeed, applicants claim that "Congress'[s] handiwork" in amending Section 7411(d)(1)(A)(i) -- despite the need to completely ignore a duly-enacted provision

of the statute -- is "clear and unambiguous." Coal Indus. Appl. 21.

Applicants cite no decision of this Court or any other court that has adopted their interpretive methodology. Section 108(g) and Section 302(a) are both properly classified as "conforming amendments," since each is "an amendment of a provision of law that is necessitated by the substantive amendments or provisions of the bill [here, the 1990 Amendments' wholesale revision of Section 7412]." Office of Legislative Counsel, U.S. Senate, Legislative Drafting Manual § 126(b), at 28 (1997) (Senate Drafting Manual) (defining "conforming amendment"). Such amendments are entitled to substantive effect. See, e.g., CBS, Inc. v. FCC, 453 U.S. 367, 381-382 (1981).

The fact that Section 108(g) appears before Section 302(a) in the text of the 1990 Amendments is irrelevant. See Coal Indus. Appl. 17-20. Both provisions were enacted by Congress as part of the same statute, and both simultaneously became law upon the President's signature. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 189 (2012) (Scalia & Garner) (rejecting view that lower-numbered statutory section should take precedence in reconciling inconsistent provisions within a single enacted law).

Applicants purport to ground their approach in the drafting manuals prepared by the respective Offices of Legislative Counsel of the Senate and House of Representatives. See, e.g., Coal Indus. Appl. 19 & n.21. Those manuals of course do not bind this Court. In any event, applicants misconstrue the relevant provisions, which address "Cumulative Amendments" (i.e., those that are intended to be executed together, in sequence) rather than a circumstance in which a single statutory term is simultaneously amended in two different ways. Senate Drafting Manual § 126(d), at 33; Office of Legislative Counsel, U.S. House of Representatives, House Legislative Counsel's Manual on Drafting Style § 332(d), at 42 (1995). Sections 108(g) and 302(a) were obviously not intended to be "[c]umulative." Ibid.[9]

When courts address potentially conflicting statutory provisions, the proper approach is to "fit, if possible, all parts into a harmonious whole." Brown & Williamson, 529 U.S. at 133

[9] The Law Revision Counsel's decision to incorporate Section 108(g) instead of Section 302 into the revised version of Section 7411(d) that appears in the United States Code is also irrelevant. The Statutes at Large constitute the legal evidence of the laws where, as here, the relevant provisions of the Code have not been enacted into positive law. See 1 U.S.C. 204(a); United States v. Welden, 377 U.S. 95, 98 n.4 (1964) (noting that "the Code cannot prevail over the Statutes at Large when the two are inconsistent") (citation omitted).

(citation omitted). Here, that means interpreting EPA's statutory authority under Section 7411(d)(1)(A) in a manner that is consistent with the underlying purpose of both Section 108(g) and Section 302(a). As the Rule explains, EPA's interpretation of Section 7411(d)(1)(A) is the most reasonable way of reconciling those provisions. 80 Fed. Reg. at 64,713-64,714.

b. Applicants alternatively contend that Sections 108(g) and 302(a) should be reconciled by applying both provisions simultaneously, such that "EPA would be prohibited from using Section [74]11(d) both for source categories regulated under Section [74]12 and for pollutants regulated under Section [74]12." Coal Indus. Appl. 16-17; see States Appl. 38. That approach is unreasonable. Section 7411(d)(1)(A) is framed as an affirmative grant of regulatory authority to EPA, not as a prohibition. If both Sections 108(g) and 302(a) are given full effect, EPA therefore must have authority to regulate existing sources pursuant to either affirmative grant of authority. Under that approach, EPA is entitled to regulate CO_2 emissions from existing sources in accordance with Section 302(a), irrespective of Section 108(g).[10]

[10] If this Court concludes that Sections 108(g) and 302(a) of the 1990 Amendments are irreconcilable, one possible interpretive approach would be to disregard them both. See Scalia & Garner 189 ("If a text contains truly irreconcilable provisions

4. At a minimum, the complexities associated with construing Section 7411(d)(1)(A) refute applicants' contention that the provision unambiguously forecloses EPA's interpretation of the statute. EPA's interpretation is reasonable, and it should accordingly be upheld under Chevron USA Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

B. EPA Reasonably Established Emissions Guidelines Based On Its Determination Of The "Best System Of Emissions Reduction"

As explained above, Section 7411(d)(1)(A) empowers EPA to establish guidelines for States' submission of plans for establishing "standard[s] of performance" for existing sources that "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." 42 U.S.C. 7411(a)(1) and (d)(1). The Rule comports with that statutory mandate. Although applicants challenge various aspects of EPA's analysis -- most

---

at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect."). Under that approach, EPA would have authority to regulate such emissions because CO_2 "is not included on a list published under * * * [the now non-existent] Section 7412(b)(1)(A)." 42 U.S.C. 7411(d)(1)(A)(i) (1988).

notably, EPA's reliance on generation-shifting measures when determining the "best system of emission reduction" -- their arguments lack merit. Congress did not require EPA, in determining the "best system of emission reduction" for the largest CO_2 sources, to disregard the proven strategies that these sources are already effectively employing.

1. The Rule's emissions guidelines satisfy all of the key requirements of Section 7411. First, the guidelines are based on the application of a "system of emission reduction." 42 U.S.C. 7411(a)(1). The word "system" is expansive, encompassing a "set of connected things or parts forming a complex whole" or a "set of principles or procedures according to which something is done." Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/system (last visited Feb. 4, 2016). The three measures that form the basis of the emission guidelines -- (1) improving heat rates at coal-fired plants, (2) increasing utilization of existing low-carbon power generation, and (3) increasing utilization of new zero-carbon power generation -- indisputably constitute a "system of emission reduction" within the plain meaning of that phrase, whether those measures are viewed collectively or independently. 80 Fed. Reg. at 64,717.

Second, that system of emission reduction is "adequately demonstrated" in practice. 42 U.S.C. 7411(a)(1). All three measures that are the basis for the guidelines are already widely employed by power plants and are well-demonstrated and effective pollution-control strategies. 80 Fed. Reg. at 64,724-64,726.

Generation-shifting measures have functioned as particularly effective pollution-control strategies within the power industry as a result of that industry's uniquely integrated nature. 80 Fed. Reg. at 64,667, 64,762 n.468, 64,768-64,773, 64,795-64,811. Power generators produce a fungible product (electricity), and they operate within "an interconnected 'grid' of near-nationwide scope." FERC v. Electric Power Supply Ass'n, No. 14-840 (Jan. 25, 2016), slip op. 4. In that grid, electricity generally cannot be stored in large volumes, so generation and use must be balanced in real time. Id. at 4-5. Unlike in other industries where sources make decisions independently, electric generators therefore must closely coordinate their operations at all times. 80 Fed. Reg. at 64,725.

Because of these circumstances unique to the power industry, generation shifting is readily available to power generators -- and is widely utilized by them -- as a pollution-control strategy. 80 Fed. Reg. at 64,731. The Rule's preamble de-

scribes in detail the specific steps that any individual source may take to shift generation in order to comply with a particular emission standard that a State might adopt for that source. Id. at 64,731-64,735, 64,796, 64,804-64,806. For example, if a State established a mass-based trading program (i.e., a limit on the total mass of emissions from its sources), each source would be able to buy and sell emission allowances through a market. That approach provides market-based economic incentives that will shift generation to lower-emitting sources. Id. at 64,796. Similarly, if a State established rate-based limitations (i.e., limits expressed in the form of a maximum rate of emissions per unit of energy production) for its sources, a particular source might make direct investments in cleaner power generation, for which it could receive "emission rate credit[s]," or it could purchase credits from other sources that had invested in eligible measures. Id. at 64,731-64,732.

Third, EPA reasonably concluded that the system of emission reductions identified in the rule is the "best" such system available, taking into consideration "cost[s]," "health and environmental impact[s]," and "energy requirements." 42 U.S.C. 7411(a)(1); see 80 Fed. Reg. at 64,745-64,751. As the Rule explains, alternative systems for reducing CO_2 emissions either would be far more expensive to implement or would fail to

meaningfully reduce emissions of the pollutant. 80 Fed. Reg. at 64,748-64,751. While EPA found that other technology-based measures to reduce CO_2 (such as gas co-firing and carbon sequestration) are feasible for a segment of the industry, those technologies are currently much more expensive to implement than the demonstrated generation-shifting strategies that the electricity sector has been employing for decades to reduce pollution. Id. at 64,727-64,728. And even if EPA had based emission guidelines for CO_2 on the application of those more expensive technologies, sources likely would have used more cost-effective generation-shifting strategies to satisfy their resulting obligations. Ibid.

Finally, the Rule's emissions guidelines are based upon a reasonable determination of what emissions reductions are "achievable." 42 U.S.C. 7411(a)(1). As the Rule explains, there are sufficient amounts of unused existing natural gas-fired generation capacity and potential for new renewable energy capacity to enable all sources to successfully employ generation-shifting pollution-control strategies at reasonable cost and without causing adverse impacts on energy supply. 80 Fed. Reg. at 64,797-64,802, 64,806-64,811.

The Rule's emission-reduction requirements will be implemented gradually over a period of eight years beginning in 2022,

and they are consistent with prevailing trends in the energy sector towards more renewable and gas-fired generation. 80 Fed. Reg. at 64,785; see generally App., infra, 77a (noting that between 2004 and 2014, the share of electricity generated from coal fell from 50% to 39%, while the share of electricity generated from natural gas increased from 18% to 27%, and the share of electricity from renewables increased from nine percent to 14%); see also App., infra, 86a-87a (discussing trends). Overall, EPA expects that by 2030 the Rule will decrease total emissions by a total of 16% from 2020 levels. App., infra, 10a-11a. The Rule thus does not require any "fundamental redirection of the energy sector," 80 Fed. Reg. at 64,785, and it builds on industry trends that would likely continue even in its absence. EPA projects that the overall costs of implementing the Rule are in line with -- and in some cases less than -- the costs of other CAA rules for power plants. App., infra, 36a-37a.

2. Applicants contend that, rather than including generation-shifting measures within the best system of emission reduction, EPA should have confined its emission guidelines to certain limited actions that each power plant can take within the physical boundaries of its own facility. See, e.g., States Appl. 15-23, Coal Indus. Appl. 23-24, Util. Appl. 10-12; Appl.

of Bus. Ass'ns for Immediate Stay of Final Agency Action Pending Appellate Review (Bus. Appl.) 8-19. As the Rule makes clear, however, that approach either would have failed to achieve meaningful emissions reductions or would have resulted in a substantially more expensive rule. 80 Fed. Reg. at 64,745, 64,748, 64,756. EPA's reliance on generation shifting was both reasonable and consistent with the CAA.

a. EPA's reliance on generation-shifting measures comports with common sense. Electricity is generated by power-generation sources in an interconnected grid using processes that have vastly disparate air-pollution impacts. Because of the interconnection among such sources, EPA's guidelines reasonably take account of the fact that power plants may reduce or offset their emissions by entering into arrangements that shift production to cleaner forms of power generation. 80 Fed. Reg. at 64,768-64,769. Other CAA requirements have already relied on generation shifting, and power plants already engage in that practice to comply with those requirements. Id. at 64,770-64,773.[11] State programs that reduce CO_2 emissions from power plants also rely on generation shifting. 79 Fed. Reg. 34,880 (June 18,

[11] See EPA, Legal Memorandum Accompanying Clean Power Plan for Certain Issues, EPA-HQ-OAR-2013-0602-36872, at 88-104 (Nov. 2015), http://www.epa.gov/sites/production/files/2015-11/documents/cpp-legal-memo.pdf.

2014). Such increased use of clean-energy production will often be far less costly for high-polluting plants than requiring them to engage in fuel substitution or to apply end-of-the-stack technologies such as carbon sequestration. 80 Fed. Reg. at 64,756. It is both sensible and consistent with established practice for EPA to exercise its statutory authority to incentivize regulated entities to produce electricity using the cleanest methods possible. App., infra, 38a; cf. EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1593 (2014) (EME Homer) (upholding CAA regulation that incentivized production of electricity using cost-effective pollution controls premised in part on generation shifting).

b. Relying on this Court's decision in UARG, applicants argue that EPA lacks "clear congressional authorization" to rely on generation-shifting measures to abate power-plant contributions to climate change. See States Appl. 15 (citing UARG, 134 S. Ct. at 2444). They are mistaken. Although Section 7411(d)(1) does not expressly address such measures, it grants EPA discretion to issue emissions guidelines based on its assessment of the "best system of emission reduction." 42 U.S.C. 7411(a)(1) and (d)(1). It is "altogether fitting" that Congress designated EPA -- an "expert administrative agency" -- to serve "as primary regulator of greenhouse gas emissions."

AEP, 564 U.S. at 427-428. Nothing in UARG undermines the Rule's careful assessment of the "best system of emission reduction" under Section 7411(d)(1). See pp. 35-39, supra.

c. Applicants further argue that EPA's reliance on generation shifting is impermissible because Section 7411 addresses "standards of performance for any existing source," Bus. Appl. 8-13, or standards that "[a]pply" to such sources, States Appl. 21. But the fact that those standards are "for" or "[a]pply" to particular sources does not undermine EPA's reliance on generation shifting when determining what degree of emission reductions the standards must achieve. As explained above, EPA promulgates emissions guidelines based on its assessment of the "degree of emission limitation achievable through the application" of the "best system of emission reduction." 42 U.S.C. 7411(a)(1) and (d)(1). States then translate those guidelines into specific "standards of performance" for individual sources that "reflect[]" the prescribed degree of emission limitation. Ibid. The fact that standards of performance apply to particular sources does not preclude EPA from concluding that the "best system" of reduction encompasses steps that sources (and their owners) can take to shift energy production to cleaner sources.

More generally, applicants are wrong to suggest that Section 7411 emission standards must be achieved solely through

measures that particular source owners can implement at their own facilities. To comply with emission standards applicable to their own facilities, owners and operators of power plants routinely contract with other entities for the performance of off-site services whose ultimate effect is the reduction of on-site emissions. For example, owners and operators of power plants routinely arrange for third parties to pretreat coal or oil (i.e., to perform fuel-cleaning) off-site to enable the plants to meet Section 7411(b) sulfur emission standards. In determining the "best system" for achieving those standards, EPA has taken into account the availability and widespread use of third-party off-site fuel cleaning. See 80 Fed. Reg. at 64,765-64,766. Owners and operators likewise routinely rely on emissions averaging and trading programs in order to satisfy a wide range of other CAA compliance obligations. Id. at 64,770-64,773; 60 Fed. Reg. 65,402, 65,415 (Dec. 19, 1995). The Rule identifies numerous ways in which sources of all types and in all locations will be able to implement measures -- including generation shifting -- to comply with standards of performance applicable to individual sources. 80 Fed. Reg. at 64,731-64,735, 64,796, 64,804-64,806; see EME Homer, 134 S. Ct. at 1597 n.10.

Applicants are also wrong to suggest that EPA should not have based its analysis on measures that must be taken by source owners or operators, as distinct from the sources themselves. Bus. Appl. 9-11. The CAA holds owners and operators responsible for implementing the emissions limitations that EPA or States impose on sources. See 42 U.S.C. 7411(e) (requiring owners and operators of sources to comply with emission standards for sources). To satisfy those requirements, owners and operators routinely undertake such measures as purchasing and installing pollution-control equipment, changing fuels, reducing generation levels, and purchasing emission allowances or credits. "[S]tationary source[s]," defined by Section 7411(a)(3) as "[b]uilding[s], structure[s], facilit[ies], [and] installation[s]," obviously are incapable of taking such steps on their own. EPA correctly recognized that source-specific generation-shifting measures, like other pollution-control efforts, must ultimately be implemented by owners and operators on behalf of the regulated sources. 80 Fed. Reg. at 64,762.

d. Applicants also argue that the Rule's performance-rate guidelines for existing sources must be defective because they appear to impose less stringent standards than those that EPA promulgated for new sources under Section 7411(b). Bus. Appl. 13-15. But applicants' premise -- that the existing source

guidelines are necessarily more stringent than the new source standards -- is incorrect. In any event, the comparative stringency of the two is irrelevant to the legal issues raised here.

As EPA explained, the separate rules governing new and existing sources become applicable at very different points in time and have significantly different compliance periods. 80 Fed. Reg. at 64,785. Whereas the standards for new sources are immediately effective, ibid.; see 42 U.S.C. 7411(a)(2) and (b)(1)(B), existing sources do not become subject to any CO_2 performance standards until 2022 at the earliest (and in fact, States may delay imposing requirements until 2024 in most cases), and the standards are then gradually phased in through 2030. 80 Fed. Reg. at 64,785-64,786 & n.621. EPA is required to review and, if appropriate, revise the new-source standards no less frequently than every eight years -- i.e., by 2023. 42 U.S.C. 7411(b)(1)(B). The relative stringency of the new- and existing-source requirements therefore cannot cogently be assessed at this time.

In any event, "[n]o provision in [S]ection [74]11, nor any statement in its legislative history, nor any of its case law, indicates that the standards for new sources must be more stringent than the standards for existing sources." 80 Fed.

Reg. at 64,787. EPA gave a reasoned explanation for its conclusion that generation-shifting measures are part of the best system of emission reduction for existing sources but not for new sources. 80 Fed. Reg. at 64,626-64,628. Specifically, EPA noted that the robust trading market available to existing sources would not be available to new sources. Ibid. Applicants offer no reason to doubt EPA's conclusion.

3. Applicant North Dakota contends that EPA lacks authority to set any substantive emission guidelines for States. Appl. by the State of N.D. for Immediate Stay of Final Agency Action Pending Appellate Review (N.D. Appl.) 23-24. That is incorrect.

Section 7411(d)(1) provides that "[t]he Administrator shall prescribe regulations which shall establish a procedure * * * under which each State shall submit to the Administrator a plan which * * * establishes standards of performance for any existing source for any air pollutant." Section 7411(d) further requires States to submit a "satisfactory" plan to EPA, and it authorizes EPA to promulgate a plan for a State if EPA concludes that the state plan is not satisfactory. 42 U.S.C. 7411(d)(2)(A). In 1975, EPA promulgated regulations implementing Section 7411(d). See 40 Fed. Reg. at 53,340; see also 40 C.F.R. 60.21(e), 60.22(a). EPA noted that the emission guidelines that it promulgates under Section 7411(d)(1) should

provide States with the substantive criteria that would govern EPA's review of whether state plans are "satisfactory." See 40 Fed. Reg. at 53,343. EPA further noted that such guidelines would "reflect [EPA's] judgment of the degree of control that can be attained." Ibid.; see AEP, 564 U.S. at 424 (noting EPA's authority to promulgate substantive emission guidelines under Section 7411(d) and citing EPA's implementing regulations). That determination was based on a reasonable interpretation of the statutory text.[12]

North Dakota's application is mistaken in other respects as well. The Rule does not dictate specific emission limits that particular regulated sources in a State "must meet." N.D. Appl. 24. Rather, the Rule provides considerable flexibility to States in establishing emission standards for specific plants. 80 Fed. Reg. at 64,832-64,837. North Dakota also asserts (Appl. 25-26) that the Rule deprives States of the authority to consider the remaining useful lives of regulated sources. In fact, States are permitted to regulate particular plants more leniently based on their remaining useful lives or otherwise to design

[12] North Dakota's argument is also defective because it constitutes an untimely challenge to EPA's longstanding Section 7411(d) implementing regulations. See 42 U.S.C. 7607(b) (requiring a petition for review of any CAA regulation to be filed within 60 days after the rule is promulgated).

standards that reasonably account for the remaining useful lives of sources. 80 Fed. Reg. at 64,869-64,874.

C. The Rule Does Not Violate The Tenth Amendment Or Federalism Principles

Applicants contend that the Rule's emissions guidelines violate the Tenth Amendment and federalism principles. See, e.g., States Appl. 18-20, 23-29; Coal Indus. Appl. 25-29. But the Commerce Clause "permit[s] congressional regulation of activities causing air or water pollution * * * that may have effects in more than one State." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282 (1981). Congress expressly authorized EPA to issue emissions guidelines that establish a procedure by which States -- if they so choose -- can issue standards of performance for regulated sources under the CAA. 42 U.S.C. 7411(d); see Hodel, 452 U.S. at 288-289 (upholding similar program).

1. The Rule is a textbook exercise of cooperative federalism. States can develop their own plans to reduce power plants' CO_2 emissions under the Rule's flexible standards, or they can leave to EPA the task of directly regulating those sources' emissions. 80 Fed. Reg. at 64,986; see 42 U.S.C. 7411(d)(2). As in Hodel, "the States are not compelled to * * * participate in the federal regulatory program." 452 U.S. at 288. Rather, "[t]he most that can be said is that [Section 7411(d)]

establishes a program of cooperative federalism that allows the States * * * to enact and administer their own regulatory programs." Id. at 289.

Under the Rule, States retain the same authorities they have always exercised, such as the power to regulate retail electricity sales in intrastate markets and to license new power-generation facilities. While the Rule may ultimately cause some power generators to spend more to comply with CO_2 standards applicable to their plants, the imposition of such costs on sources does not usurp a State's authority over its energy market. As with all air-pollution standards, state regulators will continue to decide the rates that state ratepayers should bear, and they can choose to reflect the costs of CO_2 controls in those rates. States also retain their prior authority over licensing decisions for new proposed power facilities. The fact that emission requirements might indirectly affect the types of projects that power generators propose does not usurp state authority to determine whether to license those projects. See 80 Fed. Reg. at 64,782-64,785.

As explained above, the Rule does not require States to impose the same emission-limitation measures that EPA relied upon when determining the achievable degree of emission limitation. A State can impose different obligations on its sources, so long

as the overall level of emission limitation is at least as stringent as the level specified in the guidelines. 80 Fed. Reg. at 64,736. For example, States may require technological controls (e.g., gas co-firing or carbon sequestration) at regulated plants. States can also rely on state-law mechanisms, such as existing or planned programs for increasing energy efficiency and reducing energy demand, to achieve CO_2 reductions from sources indirectly. Id. at 64,835-64,836.

2. Applicants argue that the Rule unlawfully commandeers state officials by using them as "implements of regulation" in violation of the Tenth Amendment. States Appl. 24 (quoting New York v. United States, 505 U.S. 144, 161 (1992)). They are mistaken. A State that declines to issue its own plan will face no new federal regulatory obligations as a result. 80 Fed. Reg. at 65,054. In such circumstances, sources within that State will be directly regulated by EPA through an appropriate federal plan, see id. at 64,986; see also 42 U.S.C. 7411(d)(2), which will be subject to judicial review upon promulgation. 42 U.S.C. 7607(b)(1).

If a particular State declines to promulgate its own plan, the State will retain its traditional authority to issue permits and take other regulatory actions at the request of private parties, but nothing in the Rule will compel the State to

implement the federal plan. See FERC v. Mississippi, 456 U.S. 742, 764-765 (citing Hodel, 452 U.S. at 288). A State would be free, for example, to refuse to grant a permit that would otherwise be required under state law for an action that a power plant wishes to take to comply with a federal plan. In such circumstances, the full burden of complying with the federal plan will rest with the power plant, which may, for example, pursue an alternative compliance method that is agreeable to state regulators or that does not require their approval.

The two decisions of this Court that applicants principally invoke in support of their commandeering argument are inapposite here. In Printz v. United States, 521 U.S. 898 (1997), the federal statute in question required state officers to conduct federally-mandated background checks. Id. at 904. Here, by contrast, neither the CAA nor the Rule requires state officials to implement the federal plan if a State chooses not to enact its own plan. Because the federal plan in those circumstances would "regulate individuals, not States," it would pose no Tenth Amendment problem. Id. at 920 (citation omitted).

Nor is this case analogous to New York, where the statute at issue presented States with an unenviable choice between regulating the disposal of hazardous waste and "tak[ing] title to the waste." 505 U.S. at 153-154; see id. at 175-177. In

that circumstance, a State's decision not to regulate triggered an even more burdensome mandate that Congress lacked authority to impose "as a freestanding requirement." Id. at 175. Here, by contrast, the alternative to state participation is the promulgation of a federal plan, under which EPA regulates sources -- not States -- directly under its Commerce Clause authority. As this Court explained in New York, there is no compulsion where, as here, "any burden caused by a State's refusal to regulate will fall on those [individuals] who generate waste and find no outlet for its disposal, rather than on the State as a sovereign." Id. at 174. Congress has "power to offer States the choice of regulating * * * activity according to federal standards or having state law pre-empted," and such cooperative federalism programs are "replicated in numerous federal statutory schemes." Id. at 167.

3. Applicants are likewise wrong in contending that the Rule is unconstitutionally coercive because it denies them a "legitimate choice" about whether to participate in the Section 7411(d) regulatory program. States Appl. 27 (quoting National Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (NFIB)). In NFIB, this Court held unconstitutional a provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, under which a State would lose federal

funds representing a significant portion of its budget if it declined to expand its state Medicaid programs. 132 S. Ct. at 2604-2605. The Rule, by contrast, expressly prohibits EPA from withholding "any existing federal funds." 80 Fed. Reg. at 64,942 (amending 40 C.F.R. 60.5736). A State that does not submit a Section 7411(d) plan thus faces no sanctions, pecuniary or otherwise. Id. at 64,882, 64,968.

Applicants argue that the Rule leaves States with no real choice because a State that declines to implement its own plan must nonetheless undertake "substantial regulatory actions to achieve the emission reductions that will apply under a Federal Plan." States Appl. 24. As noted above, however, if a State opts not to submit a plan, EPA will "not directly impose specific requirements on state and U.S. territory governments," but only "on affected [sources] located in states." 80 Fed. Reg. at 65,054. As noted above, there is no constitutional impediment to a federal program that "regulate[s] individuals, not States." Printz, 521 U.S. at 920.

II. APPLICANTS WILL NOT SUFFER IRREPARABLE HARM WHILE THIS CASE IS PENDING BEFORE THE D.C. CIRCUIT

Applicants have not established any likelihood of irreparable harm during the D.C. Circuit's expedited consideration of this case. The D.C. Circuit has scheduled oral argument on the consolidated petitions for review for June 2, 2016, and it can

be expected to issue a decision a short time thereafter. App., infra, 2a. States, with a readily obtained extension, need not submit plans to EPA until September 2018. The Rule does not require sources to begin reducing their CO_2 emissions until 2022 at the earliest. And applicants have identified no near-term effects that are traceable to the Rule and could justify a stay.

A. State Applicants Have Not Established A Likelihood Of Irreparable Harm

The state applicants assert that, unless a stay is granted, they will suffer irreparable harm during the pendency of the litigation, both because the Rule will impair their sovereign interests and because state officials will be forced to devote resources to the development of acceptable plans. Those arguments lack merit. The Rule does not intrude on States' sovereign interests, but rather balances federal and state prerogatives in a manner characteristic of cooperative-federalism programs. Compliance costs ordinarily are not treated as irreparable harm, and the state applicants identify no sound basis for applying a different rule here. In particular, the state applicants are very unlikely to suffer irreparable harm before the D.C. Circuit issues its decision, at which point this Court can assess -- with the benefit of the D.C. Circuit's analysis -- whether any interim relief is warranted during the remainder of the case.

1. State applicants argue (Appl. 39-41) that they will suffer irreparable harm to their purported sovereign interest in regulating the generation of electricity. That argument fails for many of the reasons set forth above. See pp. 48-53, supra. Consistent with principles of cooperative federalism, the Rule establishes guidelines for EPA's receipt and approval of individualized state plans, but each State retains its traditional authority to specify emission limitations applicable to particular existing sources within its borders. And although the Rule identifies statewide emission goals, it leaves to States the responsibility and flexibility to determine how to meet them. The Rule thus has a similar structure to numerous other CAA rules, including new and revised NAAQS and EPA requirements for States to implement those NAAQS. See App., infra, 18a-19a.

State applicants identify no decision holding that a State suffers irreparable harm simply because its exercise of regulatory authority is constrained by a federal law under a scheme of cooperative federalism. The decisions on which they rely (States Appl. 39) involved situations where the Court stayed a judicial decision that prevented a State from exercising its regulatory authority at all.[13]

[13] See Maryland v. King, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (staying decision enjoining enforcement of

2. State applicants also assert (Appl. 41-45) that their environmental and public-utility agencies must expend resources to comply with the Rule. But they cite no case in which costs incurred by a State to comply with its statutory responsibilities was held to constitute irreparable harm. In any event, the Rule gives States considerable flexibility to determine the level and timing of any effort required to implement the Rule, including the option of obtaining an extension of the plan-submission deadline until September 2018.

a. In other contexts, "ordinary compliance costs are typically insufficient to constitute irreparable harm." Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 115 (2d Cir. 2005); see, e.g., A.O. Smith Corp. v. FTC, 530 F.2d 515, 527-528 (3d Cir. 1976). That principle applies here. The fact that States may devote staff time to development of a plan to implement CAA

Maryland statute that provided for collection of DNA samples); New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351, 1353 (1977) (Rehnquist, J., in chambers) (staying decision enjoining enforcement of State's automobile franchise law); see also Kansas v. United States, 249 F.3d 1213, 1218 (10th Cir. 2001) (affirming injunction against enforcement of administrative decision preventing State from regulating casino construction on disputed property) (cited at N.D. Appl. 16). State applicants also cite (Appl. 39) Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982), but that case did not involve either a stay or an alleged intrusion on state sovereignty. Rather, the disputed issue concerned the nature of the quasi-sovereign interests that can give rise to parens patriae standing. Id. at 600-601.

requirements pursuant to an EPA rule before judicial review is complete is an inherent and foreseeable consequence of the CAA's basic design. The CAA requires both that States submit plans to EPA following promulgation of EPA regulations, e.g., 42 U.S.C. 7410(a), and that any petitions for review of those regulations be filed within 60 days, 42 U.S.C. 7607(b)(1). Because judicial review will thus necessarily take place during the period allotted for plan preparation, the CAA clearly contemplates that States will begin developing their plans before judicial review is complete.[14]

b. There is no reason to suppose that States' duties under the Rule will be especially onerous. A State can elect not to prepare a plan at all, but instead may allow EPA to develop and implement a federal plan for the sources in that State. See 80 Fed. Reg. at 64,986; 42 U.S.C. 7411(d)(2); see also App., infra, 26a-27a (noting that at least two state applicants have indicat-

[14] Under the CAA, States have been required to prepare within a few years many state plans of different types following action by EPA. See App., infra, 19a-25a, 89a-91a. Some of those state plans were of comparable complexity to the state plans required by the Rule and had a shorter submission schedule. See id. at 19a-25a, 90a-93a. Others, including state plans to achieve attainment of a NAAQS for an area with numerous stationary and mobile sources, had similar, or even shorter, submission schedules but were more complex because they entailed preparing source inventories for multiple source categories and complex air-quality modeling. Id. at 21a-24a.

ed that they will not or might not submit a plan); Mary Fallin, Exec. Dep't Exec. Order 2015-22 (Apr. 28, 2015), https://www.sos.ok.gov/documents/Executive/978.pdf (Oklahoma Governor's executive order forbidding state officials from working on a plan). A State that chooses to develop its own plan can join existing state trading programs (such as the Regional Greenhouse Gas Initiative), reduce generation through demand-side energy-efficiency measures, or simply adopt the Rule's emission performance standards without elaboration, leaving to the regulated facilities the decisions about how to meet those limits. 80 Fed. Reg. at 64,832-64,836; App., infra, 16a-18a. States may also adopt one of the model plans that EPA has proposed and intends to promulgate in the near future. See App., infra, 17a-18a (noting that EPA expects to finalize two model plans by the summer of 2016, and that some States have already expressed interest in such plans).

c. For purposes of this Court's stay decision, the relevant irreparable-harm question (even assuming that state compliance costs can constitute irreparable harm at all) is whether the Rule will require States to incur substantial costs while applicants' legal challenges are pending before the D.C. Circuit. There is no reason to suppose that the Rule will have that effect. Under the Rule, a State need not submit a plan

until September 2018 if it seeks a readily procurable extension. The submission required by September 2016 to obtain the extension is not burdensome and requires only that a State (1) generally identify the plan approaches under consideration, (2) describe opportunities for public input during plan development, and (3) explain why the State requires additional time. 80 Fed. Reg. at 64,856; App., infra, 12a-15a. State applicants make no substantial argument that preparing this submission will require significant resources. See App., infra, 12a-15a, 90a.[15]

Given the expedited briefing and argument schedule announced by the court of appeals, it is reasonable to expect that court to decide the case on the merits during the late summer or early fall of 2016, approximately two years before the September 2018 deadline for submitting a plan that applies to any State that obtains an extension. As explained above, it would be extraordinary and apparently unprecedented for this Court to stay an agency rule that has not yet been reviewed by any court. The Court should not take that step absent a showing that it is necessary to protect applicants from irreparable harm while this case is pending before the D.C. Circuit. Applicants cannot make

[15] North Dakota's claim of irreparable harm based on lost tax revenue (Appl. 19-20) lacks merit for the same reason, since there is no evidence that any such loss will occur while this case is before the D.C. Circuit.

that showing. Once the D.C. Circuit has issued its decision, the Court will be in a far better position to determine whether any form of interim relief should be granted during the pendency of further proceedings.

B. Industry Applicants Fail To Show That The Rule Will Inflict Irreparable Harm During The Pendency Of The D.C. Circuit Litigation

Industry applicants likewise fail to show that they will suffer irreparable injury as a result of the Rule during the expedited period in which the D.C. Circuit considers the Rule's merits. The Rule does not require regulated sources to reduce emissions until 2022 at the earliest, long after judicial review will be complete. And until States submit their plans (which for States that obtain extensions will occur in 2018), regulated parties will not know precisely what those requirements will be. Moreover, the Rule provides for gradual implementation of requirements over a number of years, and full compliance is not due until 2030.

1. Applicants' central claim is that the Rule will force the power industry to immediately retire high-emitting plants and focus on lower-emitting sources, which allegedly will lead to various immediate economic effects such as the closure of coal mines. See, e.g., Util. Appl. 17; Coal Indus. Appl. 29-30. Those claims are wholly speculative.

First, plant owners cannot know what requirements will be imposed on specific plants -- or what steps they will take in response to such requirements -- until they see the content of state plans. In all States that obtain extensions of the September 2016 deadline, those plans need not be submitted until September 2018, well after the D.C. Circuit can be expected to rule on the merits. See App., infra, 12a, 15a, 17a-18a. Compliance obligations under the Rule do not begin until 2022 at the earliest, and they are gradually phased in over eight years. Id. at 44a-45a; see 80 Fed. Reg. at 64,785-64,786; see also App., infra, 129a. As discussed above, moreover, the Rule gives States broad flexibility in developing source-specific requirements (including significant latitude to decide which sources to control, by how much, and when), and States may allow their sources comparable flexibility in meeting those requirements (as by purchasing allowances or credits). Applicants thus cannot reliably identify what their compliance obligations will be, and they likely will not know them until 2018.

For example, the compliance cost estimate derived by applicant Basin Electric Power Cooperative -- which applicants claim is illustrative of the Rule's overall compliance burden (see Util. Appl. 13-15) -- depends on a number of speculative assumptions, including: (1) that all of the States in which Basin

Electric operates will adopt rate-based rather than mass-based plans; (2) that each State's plan will require Basin Electric's plants to meet the performance levels for plant subcategories calculated by EPA in the guidelines; and (3) that emission trading will not be a functional part of any State's plan. See App., infra, 157a-158a. As Basin Electric's own Vice President for Cooperative Planning acknowledges, "it is not clear what requirements Basin Electric will be required to comply with under a mass based system until completion of state plans in 2016 or 2018." Id. at 157a. Other utility declarants likewise acknowledge that they will not know what the Rule actually "requires" -- and therefore cannot determine what steps to take in response -- until their States adopt finalized plans. See, e.g., id. at 148a-150a (noting that plant has no plans to shut down and that it is "far from clear" what the State will do); id. at 167a-168a (quoting recent public comments from the utility industry expressing similar views). Under this Court's precedents, it is not enough for a stay applicant to "simply show[] some 'possibility of irreparable injury.'" Nken, 556 U.S. at 434 (citation omitted).

Second, EPA's record also refutes applicants' general supposition that the Rule requires sources to take immediate action to build a significant amount of infrastructure. For example,

if States require sources to shift from coal-fired to gas-fired electric generation at existing natural gas combined cycle facilities, this measure would not require any construction of new capacity. The Rule's gradual implementation schedule also allows ample time to complete infrastructure improvements that might be needed to support greater use of such existing facilities, and there is no need for such sources to commence those improvements immediately. 80 Fed. Reg. at 64,798, 64,800-64,801. EPA similarly determined that application of the potential measure for shifting from fossil-fuel fired generation to new cleaner energy sources would not add significant transmission requirements in order to maintain grid reliability, as that measure too is phased in incrementally and capped at reasonable levels. See id. at 64,806-64,810.

By treating 2022 as though it were the deadline for full compliance, moreover, applicants underestimate the amount of lead time that the Rule will afford to plan for whatever infrastructure improvements may ultimately be necessary. See, e.g., Util. Appl. 20 ("[T]he rule forces utilities to act now to ensure necessary infrastructure is in place by 2022."). In fact, the Rule requires only that affected power plants begin achieving reductions in 2022; full compliance is not required until 2030. 80 Fed. Reg. at 64,785-64,786; see App., infra,

135a, 137a-142a. Indeed, the Rule contemplates that the overall emission reduction from covered sources will be one percent in 2022, and will increase another one to three percent each year thereafter until 2030, as compared to the baseline emission levels projected for 2020 without the Rule. App., infra, 11a.

Third, to the extent applicants elect to retire any coal-fired power plants during the period of litigation, they have not demonstrated that such retirements are required by the Rule or that a stay would prevent them from occurring. For many years, the Nation has been experiencing a significant and ongoing shift away from coal-fired power generation and towards greater generation from cleaner sources. 80 Fed. Reg. at 64,694-64,695, 64,795, 64,803-64,804; App., infra, 75a-80a. That "market shift towards gas-fired and renewable generation" is due to a variety of factors, including an "abundant supply of comparatively inexpensive natural gas," the "increasing competitiveness of renewable generation," and the "ability of gas-fired and renewable sources to produce electricity" with fewer or zero greenhouse gas emissions. App., infra, 133a; see id. at 79a-80a, 82a-86a.

Fourth, the industry applicants have represented to this Court, and presumably believe, that they are likely to prevail on the merits of their challenges to the Rule. If (as the

applicants anticipate) their lawsuit culminates in a judicial decision vacating the Rule, the requirements about which the industry applicants complain will be rendered nugatory years before their implementation is scheduled to begin. Applicants' claim of irreparable harm depends on the inherently unlikely premise that, during the pendency of the D.C. Circuit proceedings, numerous owners or operators will close power plants whose continued operation would otherwise be economically advantageous, simply in anticipation of regulatory requirements that will not take effect for several years and that applicants themselves believe will never take effect at all.

None of the declarants supporting the stay applications appears to identify a specific power plant or coal mine whose continued operation will depend on whether the Court enters or denies a stay. An analysis by utility applicants' own expert states that "it is very unlikely that there are significant numbers of coal retirements scheduled for 2016 that have not yet been announced." App., infra, 152a. And the coal applicants' expert agreed (as of October 2015) that "any unit intending to retire by the end of 2015 or even in 2016 would long since have announced that fact." Id. at 137a (citation omitted).

2. Instead of providing direct evidence that the Rule will force specific plants to close during the pendency of this

litigation, applicants rely on the forecast of 2016 coal generation capacity reductions that was produced by EPA's Integrated Planning Model (Model). See, e.g., Coal Indus. Appl. 29 (asserting that EPA's Model shows that the Rule will cause 53 coal-fired generating units to close in 2016); Util. Appl. 16; see generally EPA, Analysis of the Clean Power Plan, http://www.epa.gov/airmarkets/analysis-clean-power-plan (last visited Feb. 4, 2016) (providing links to Model Run files). Applicants' reliance on that Model is misplaced.

The Model's forecasts are not regulatory requirements of any kind. App., infra, 59a-60a. In addition, the Model is designed not to predict the impacts of control requirements on individual sources, but instead to gauge the overall, power-sector-wide impacts of control requirements in terms of costs, emission reductions, and economic impacts, primarily for the 2020-2030 period. Id. at 49a. The simplifications and constraints built into the Model mean that it is not designed to reliably forecast the Rule's impacts on specific power plants, particularly in the near-term period at issue here (i.e., during the pendency of this litigation). Ibid.; see id. at 51a. That is in part because the Model only forecasts impacts on "model plants," which are aggregates of actual electrical generating units and do not bear a direct relationship to those units. Id.

at 49a-50a. The Model also cannot account for the informational constraints that actual power-plant owners face, including their inability to predict what their state plans will eventually require and their uncertainty about the ultimate outcome of the pending lawsuits. Id. at 55a-56a.

Recent comments submitted by industry participants to EPA in the context of a different rulemaking -- EPA's proposed revisions to the Cross-State Air Pollution Rule (CSAPR) -- directly refute the predicted power plant closures described in the stay applications that are currently before the Court. See App., infra, 159a-170a; see also 80 Fed. Reg. 75,706 (Dec. 3, 2015). For example, utility applicants cite the EPA Model and assert (Appl. 19) that the Rule "will cause a net retirement" of 53 power plants "this year alone." But one of those applicants (the Utility Air Regulatory Group) commented during the CSAPR rulemaking that EPA should exclude the Clean Power Plan from CSAPR's baseline air quality modelling because the Model assumes the retirement of an amount of coal-fired generation by 2018 "that in fact will not be retired by that time." App., infra, 165a (citation omitted). In a similar vein, Arkansas Electric Cooperative -- a member of applicant National Rural Electric Cooperative Association -- commented that "any effects from the [Clean Power Plan] prior to 2020 are essentially nonexistent."

Ibid. (citation omitted). And although utility applicants assert (Appl. 16) that EPA's Model "predicts the immediate closure of 20% of the Southern Company's existing coal-fired fleet," the Southern Company itself has stated that it does not plan to close many of those plants by 2018. See App., infra, 166a-167a.

EPA has now conducted a review of information regarding the power plants that utility applicants assert are at risk of closure according to EPA's Model. App., infra, 160a-161a (discussing report cited at Util. Appl. 3 n.5). EPA has determined that few, if any, of the plants upon which utility applicants rely will actually retire in the near future -- and that those that do retire will do so for reasons not attributable to the Rule. Id. at 162a-163a. The available evidence thus refutes applicants' reliance on the Model as evidence that they will suffer irreparable harm during the pendency of this litigation unless the Rule is stayed.

3. Applicants also contend that their experience with the Mercury Air Toxics Standards (MATS) Rule demonstrates the need for a stay of the current Rule. See, e.g., Util. Appl. 3-4; Coal Indus. Appl. 3-4; see generally Michigan, supra; 77 Fed. Reg. 9304 (Feb. 16, 2012). In their view, EPA was able to obtain substantial compliance with the MATS Rule -- even though

it was ultimately held unlawful by this Court -- because the MATS Rule was allowed to go into effect even while litigation over its validity was ongoing.

The MATS rulemaking and litigation have no bearing on applicants' ability to show irreparable harm in this case. Unlike the extended schedule of compliance at issue here -- in which States can obtain extensions until 2018 to submit plans, and power plants need not reduce emissions until 2022 at the earliest -- the MATS Rule required full compliance within less than three and a half years, with the possibility of a one-year extension. 40 C.F.R. 63.9984 (requiring compliance for existing sources by Apr. 16, 2015); see 77 Fed. Reg. at 9304. And whereas the MATS Rule imposed specific requirements directly on covered sources, 77 Fed. Reg. at 9367-9370, the Clean Power Plan will be implemented through the state planning process, and the Rule gives States significant flexibility to devise appropriate requirements for particular plants. Nothing in the MATS Rule or in the litigation concerning it suggests that a stay of the Clean Power Plan is needed to protect applicants from irreparable harm.

III. THE BALANCE OF THE EQUITIES FAVORS EPA

The equities also weigh strongly against applicants' request for a stay. Climate change is the most significant

environmental challenge of our day, and it is already affecting national public health, welfare, and the environment. See, e.g., 80 Fed. Reg. at 64,677, 64,686-64,688; see generally App., infra, 95a-110a. Because atmospheric CO_2 is cumulative and long-lived, any delay in reducing emissions of greenhouse gases will increase the accumulation of these gases in the atmosphere and further contribute to, or even accelerate, the resulting public and environmental harms, such as the risk of more severe storms and droughts. 80 Fed. Reg. at 64,682-64,683; App., infra, 96a, 98a-107a. In Massachusetts v. EPA, 549 U.S. 497 (2007), this Court recognized that reductions in domestic greenhouse gas emissions can slow the pace of global emissions increases and mitigate the risk of "catastrophic harm" -- "no matter what happens elsewhere." Id. at 526. Fossil-fuel-fired power plants are the largest emitting stationary CO_2 generators in the United States, and by 2025 the Rule will generate a projected $10 billion in monetized climate benefits. 80 Fed. Reg. at 64,681, 64,688-64,689, 64,928-64,931.

As noted above, applicants appear to ask this Court not simply to suspend the Rule's legal effect for the duration of this litigation, but also to toll all of the Rule's deadlines, even those that do not come due until many years after applicants' challenge will likely have been resolved, for the period

of time between the Rule's publication and the ultimate disposition of this suit. Utility applicants explicitly request that relief (Appl. 22); no other applicant articulates any alternative understanding of what the requested "stay" would entail; and a central premise of all applicants' stay requests is the expectation that such relief will forestall alleged harm arising from future deadlines. The effect of such relief would be that, even if the Rule is ultimately held to be valid, every sequential step in the Rule's implementation (including, for example, the 2030 deadline for full compliance by regulated sources) would be delayed for a significant period. Applicants identify no case in which the Court has granted comparable relief under the rubric of a temporary "stay."

Granting the relief that applicants seek would create an obvious incentive for delay by the applicants in the conduct of the litigation. If the Rule is upheld, entry of such a "stay" would also needlessly delay the emission reductions that are the Rule's ultimate objective. Granting such relief would harm the public's interests in implementing this duly-promulgated Rule, in reducing the accumulation of greenhouse gases in the atmosphere, and in preventing the risk of "catastrophic harm." Massachusetts, 549 U.S. at 526. Delaying the Rule's implementation would also disrupt the United States' leadership on the

international stage, which has facilitated new emission-reduction commitments by countries representing 98% of global CO_2 emissions. See App., infra, 122a, 124a.

Applicants argue that the Rule should be stayed because coal-unit retirements and new infrastructure investments will rapidly transform the electricity sector, and could lead to rising electricity rates, employment losses, and costs to customers and States. See, e.g., States Appl. 45-47; Coal Indus. Appl. 34-36; Util. Appl. 14-17; N.D. Appl. 26-27. But applicants face no imminent compliance obligations, and they need not make any decisions to close existing generation sources or to build new generation or transmission during the period of expedited judicial review. See generally pp. 56-68, supra. Furthermore, similar prior warnings by the power industry that environmental regulation would disrupt the electric grid and raise electric bills have not proven accurate. App., infra, 36a-40a.

Some applicants contend that the equities favor a stay of the Rule because the electricity sector is already moving towards renewable and energy efficiency technologies and reducing CO_2 emissions. See Bus. Appl. 23. While near-term CO_2 reductions reflect market trends -- a fact that undercuts applicants' assertions of irreparable harm -- the Rule will

ultimately secure substantial additional reductions, particularly in later compliance years. Although the Rule imposes very little near-term burden, applicants' requested stay would rewrite the deadlines for more substantial, later-required reductions, and it would thus result in significant and irretrievable additional CO_2 emissions if the Rule is ultimately upheld.

In short, the balance of the equities weighs strongly against applicants' stay requests. This Court should allow the Rule to remain in effect while the D.C. Circuit conducts its expedited review of their claims.

CONCLUSION

The applications for an immediate stay of the Rule should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

FEBRUARY 2016