No. 23A349

In the Supreme Court of the United States

OHIO, ET AL.
Applicants

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.
Respondents.

ON APPLICATION FOR STAY OF ADMINISTRATIVE ACTION TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY IN SUPPORT OF STATE APPLICANTS' EMERGENCY APPLICATION FOR A STAY OF ADMINISTRATIVE ACTION

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The Clean Air Act leaves the States with "the primary responsibility for assuring air quality" in this country. 42 U.S.C. §7407(a). But, over the last two years, the EPA has tried to seize control. Most relevant here, after years of delay, the EPA recently rejected state-implementation plans governing upstate emissions for nearly *half* the country. It then rushed to insert its own federal plan as a replacement. *See Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality*, 88 Fed. Reg. 36654 (June 5, 2023). The EPA's power grab turns the Clean Air Act's cooperative-federalism structure on its head. And the federal plan resulting from that power grab is arbitrary and capricious. Quite tellingly, the plan is already a failure. Given judicial stays and interim rulemaking, the federal plan—published only a few months ago—now applies to less than half of the States, and less than 25% of the emissions, that the EPA intended to cover. The EPA, however, insists that its plan remain in place for some upwind States, even with most upwind States exempt.

Because this case is of great importance, because the state applicants (Ohio, Indiana, and West Viginia) are likely to succeed on their challenges, and because the federal plan will cause irreparable harm in the meantime, the Court should stay application of the federal plan while the state applicants and others challenge the plan in the D.C. Circuit.

I. The Court should apply its standard for stays pending appeal, not its standard for injunctions pending certiorari.

A. Begin with the legal standard that governs. The state applicants request a stay pending review in the court of appeals. Four factors guide consideration of this

request: "(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, 434 (2009) (quotation omitted). As explained below, all four of these factors favor awarding a stay here.

B. The EPA sees things differently. It suggests that the state applicants need to clear the Court's injunction standard, which they argue requires a higher justification than a request for a stay. EPA Opp. 16. The EPA is wrong. This Court has previously "*stayed*" illegal agency actions "pending disposition of … petitions for review." *West Virginia v. EPA*, 577 U.S. 1126 (2016) (emphasis added); *accord Nat'l Fed'n of Ind. Bus. v. Dep't of Labor*, 595 U.S. 109, 113 (2022) (*per curiam*). And the lower court similarly denied a stay—not an injunction.

When deciding whether to grant a stay pending review in the court of appeals, this Court considers whether the applicant "is likely to succeed on the merits." *Nken*, 556 U.S. at 434. By way of comparison, to obtain a stay "pending the filing and disposition of a petition for certiorari" *by this Court*, an applicant must also show "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*); *see also Doe v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., joined by Kavanaugh, J., concurring in the denial of application for injunctive relief pending disposition of a forthcoming petition for a writ of certiorari). But when an applicant seeks a stay

pending further review as of right in the court of appeals, this Court's merits inquiry need consider only the underlying strength of the applicant's claim. Indeed, just a year ago, the Court stayed federal-agency action without discussing whether the Court would later grant review. *See generally Nat'l Fed'n of Ind. Bus.*, 595 U.S. 109. Likewise here, the Court should assess the present request using the ordinary *Nken* factors.

Disregarding this case's posture, the EPA faults the state applicants for failing to expressly address the likelihood of future review in this case. EPA Opp. 16–17, 41–42. But even if that was an applicable factor, the significance of this case is obvious, both because of its federalism implications and because of its practical implications. And the EPA's attempt to seize nationwide control of air-quality regulation has sparked litigation across the circuits. On top of that, the state applicants' challenge raises a significant question about arbitrary-and-capricious review: specifically, what obligations do federal agencies have to account for contemporaneous rulemaking and significant changes in circumstances before final publication? Finally, the panel below was divided; one judge would have granted the state applicants a stay pending review. Combining these characteristics, this is the type of case that the Court is reasonably likely to hear down the road.

II. The States will likely prevail on the merits.

A. In finalizing the federal plan, the EPA failed to account for the likely illegality of its contemporaneous rulemaking.

Turn then to the merits. And start with the statutory principle that federal agencies, including the EPA, must refrain from action that is "arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); 42 U.S.C. §7607(d)(9)(A). In other words, federal agencies must "engage in reasoned decisionmaking." *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quotation omitted). Among other things, agencies must keep track of "contemporaneous and closely related rulemaking." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) (*per curiam*); *see also Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1150 (10th Cir. 2016). That is, an agency must "acknowledge and account for" the "regulatory posture the agency creates" through close-in-time rulemaking. *Portland Cement Ass'n*, 665 F.3d at 187.

The rulemaking process here fell well short of reasoned decisionmaking. To understand why, recall both what the Clean Air Act requires and how it divides compliance responsibilities. Under the Act's "good neighbor" provision, "upwind States" must "reduce emissions to account for pollution exported beyond their borders." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 499 (2014); 42 U.S.C. §7410(a)(2)(D). The Act makes *the States* primarily responsible for assuring the nation's air quality. §7407(a). The Act thus leaves it to each State to formulate a plan for meeting its good-neighbor obligations. *See* §7410(a)(2)(D)(i)(I). The EPA reviews each state plan, but its review is "ministerial" in nature. *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) (quotation omitted). The EPA "shall approve" any state plan that meets statutory requirements, §7410(k)(3), regardless of whether the EPA has a differing vision of how best to meet statutory goals. Correspondingly, the EPA has

authority to issue a federal-implementation plan for a State *only if* the agency properly disapproves of the State's implementation plan. *See* §7410(c)(1).

The EPA desires a larger role in this regulatory program. Last year, it launched a coordinated attack, announcing its intent to reject the implementation plans of nearly half the States in the Union. *See* States' Appl. 6–7. The agency soon unveiled a federal plan to "resolve" the good-neighbor obligations for the disapproved States. *Federal Implementation Plan Addressing Regional Ozone Transport*, 87 Fed. Reg. 20036, 20038 (Apr. 6, 2022). This past February, the EPA finalized its disapprovals of state plans. Several States immediately challenged those disapprovals in court. *See, e.g.*, *Texas v. EPA*, No. 23-60069 (5th Cir.) (filed Feb. 14, 2023); *Utah v. EPA*, No. 23-9509 (9th Cir.) (filed Feb. 13, 2023); *Arkansas v. EPA*, No. 23-1320 (8th Cir.) (filed Feb. 16, 2023); *Kentucky v. EPA*, No. 23-3216 (6th Cir.) (filed March 13, 2023). The EPA pressed on anyway, publicly announcing its final plan in mid-March. Press Release, *EPA Announces Final "Good Neighbor" Plan to Cut Harmful Smog, Protecting Health of Millions from Power Plant, Industrial Air Pollution* (Mar. 15, 2023), https://perma.cc/Q6RG-U3UG. By May, States were already receiving judicial relief staying the EPA's actions as to state-plan disapprovals. *Texas v. EPA*, No. 23-60069, 2023 U.S. App. LEXIS 13898 (5th Cir. May 1, 2023) (*per curiam*); Order, *Arkansas v. EPA*, No. 23-1320 (8th Cir. May 25, 2023); Order, *Missouri v. EPA*, No. 23-1719 (8th Cir. May 26, 2023). The EPA nonetheless continued on, publishing its federal plan in early June. 88 Fed. Reg. at 36656.

Only a few months in, the federal plan is already a failure. Because of judicial stays, and the EPA's own interim rulemaking exempting certain States, the federal plan currently applies to only 11 of the 23 States it was supposed to cover. *See Stays of SIP Disapproval Action for Certain States,* 88 Fed. Reg. 49295 (July 31, 2023); *Response to Additional Judicial Stays of SIP Disapproval Action for Certain States*, 88 Fed. Reg. 67102 (Sept. 29, 2023). With so many States exempt, the plan now covers less than 25% of the emissions it initially intended to regulate. *See* EPA, *Good Neighbor Plan for 2015 Ozone NAAQS* (last updated June 30, 2023)*, computed from data maps available at* https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs (last visited Oct. 31, 2023).

The plan's failure was *inevitable*. The EPA's efforts to convert the Clean Air Act into a top-down system of regulation were always going to cause trouble later on. For example, to disapprove the plans of so many States all at once, the EPA needed to "move the administrative goalpost" by going back on its earlier guidance and using information not available when the States crafted their own implementation plans. *Texas*, 2023 U.S. App. LEXIS 13898 at *23–25; *see also Kentucky v. EPA*, Nos. 23-3216/3225, 2023 U.S. App. LEXIS 18981, *10–11 (6th Cir. July 25, 2023). Unsurprisingly, given this workaround, every one of the seven circuits to have considered a state-plan disapproval has stayed the EPA's actions. *See* States' Appl. 9, 11–12.

But just as important, the federal plan's failure was *foreseeable*. During the rulemaking process, commenters previewed the many legal problems with the EPA's disapprovals of state plans. *See* 88 Fed. Reg. at 36671–72; EPA, *Response to Public*

Comments at 2–6, 9–11, 145–48, 152–55, https://perma.cc/N7CK-3YTE. And, as detailed more fully below, courts were already staying the EPA's actions before the EPA took final agency action through its publication of the federal plan.

The final wrinkle is that the problems with the state-plan disapprovals were always going to be *fatal* to the federal plan. The EPA's legal authority to issue a nationwide federal plan for 23 States was predicated on proper disapproval of each State's implementation plan. *See* §7410(c)(1). And a key feature of the federal plan was its nationwide scope and that upwind States would be collectively responsible for good-neighbor obligations. More precisely, given "the 'thorny' causation problem of interstate pollution," the EPA set out to allocate responsibility for emissions reductions in "an efficient and equitable" manner among the 23 upwind States the plan purports to cover. *Id.* at 36741.

Connecting the dots, the federal plan is arbitrary and capricious. The EPA failed "to acknowledge and account for" the regulatory complications *it created* through near-simultaneous rulemaking. *See Portland Cement Ass'n*, 665 F.3d at 187. During its rulemaking on the federal plan, the EPA downplayed the many flaws in its decisions to disapprove state plans. As a result, the EPA never engaged with the strong likelihood that the federal plan would *not* go into effect for many of the States the plan intended to cover. The EPA, in turn, never seriously considered whether its plan would remain an effective, efficient, and equitable solution for dividing emission responsibilities among upwind States if the plan did not apply to all of the intended

States. *See* 88 Fed. Reg. at 36719, 36741. In fewer words, the EPA set out to develop a coordinated, nationwide plan, but it arbitrarily ignored that it was overstepping.

B. The EPA's contrary arguments are unpersuasive.

The EPA and other respondents make multiple attempts to avoid and refute the state applicants' arguments. None are convincing.

Process. The EPA hopes that the Court will simply dodge the merits. The EPA argues, incorrectly, that no commentor raised the state applicants' concerns during rulemaking. EPA Opp. 19–21. By way of background, the Clean Air Act limits judicial review to objections which were "raised with reasonable specificity during the period for public comment." §7607(d)(7)(B). That language is phrased in passive voice, thus "pull[ing] the actor off the stage." *Bartenwerfer v. Buckley*, 598 U.S. 69, 75 (2023). It follows that a litigating party "need not have *personally* raised" an objection so long as there is "a commenter who did." *Masias v. EPA*, 906 F.3d 1069, 1080 (D.C. Cir. 2018). And "the word 'reasonable' cannot be read out of the statute": "the Act does not require that precisely the same argument that was made before the agency be rehearsed again, word for word, on judicial review." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817–18 (D.C. Cir. 1998) (*per curiam*).

Here, commentors raised the objections the state applicants now press with reasonable specificity. The EPA argues otherwise, but it grounds its argument in a false premise. The agency suggests that, to preserve the state applicants' challenge, commentors needed to identify judicial stays already in place. *See* EPA Opp. 20. But the state applicants' challenge is about more than judicial stays—it is about the EPA overlooking the inevitable, foreseeable, and fatal problems with its plan. *Above* 6–7.

With the state applicants' actual argument in mind, turn to the comments. Many commentors argued that the flaws in the EPA's disapproval of state plans deprived the EPA of authority to promulgate a federal plan. *Response to Public Comments* at 2–6, 9–11, 145–48, 152–55, https://perma.cc/N7CK-3YTE. One commentor, for example, argued that the EPA's actions were "the exact opposite of cooperative federalism." *Id.* at 4. Others argued that the EPA contradicted its previous guidance. *Id.* at 9. Still others argued that the EPA erred by using data unavailable to the States when they submitted their plans. *Id.* at 10–11.

Other commentors went on to stress that the legal problems with the EPA's actions would lead to enforcement problems downfield. One such commentor warned that the EPA's rushed approach was "at the expense of a reasoned and defensible rule." Interstate Natural Gas Ass'n of Am. Comments at 7 (June 21, 2022), https://perma.cc/E9TC-TAZL. "Pushing forward" with the federal plan, that commentor went on, "will have unintended consequences that will negatively impact regulated parties" and will "invite[] litigation alleging that EPA has acted arbitrarily and capriciously." *Id.* Another commentor likewise predicted that the EPA's broad interpretation of its authority would lead to "legal challenges to any final rule in the same form as the Proposed Rule." U.S. Steel Corp. Comments at 9 (June 21, 2022), https://perma.cc/34KL-4SKP. The EPA's actions, that commenter explained, risked "stringing out any rulemaking in constant challenges" and "likely jettisoning the uniformity that [the] EPA purports to seek." *Id.* at 10.

The EPA also requested comments on the effects of its exemptions, issued as part of the agency's interim rulemaking. 88 Fed. Reg. at 49300. At that point, with the EPA exempting several "large source[s] of emissions," Ohio submitted that the EPA should withdraw its federal plan until the agency was able to take "all the appropriate state emissions" into account. Ohio EPA Comments at 1–2 (Aug. 25, 2023), https://perma.cc/7QTD-6GWM.

All told, these public comments should have been more than enough to spark meaningful consideration of whether litigation would upend uniform application of the EPA's ambitious federal plan. The EPA is thus wrong to cast the state applicants' arguments as being "based on events that postdated" the federal plan. *See* EPA Opp. 19. And, because commenters had already set forth the federal plan's legal flaws—along with the likely ramifications of those flaws—the state applicants did not need to request the agency's reconsideration before bringing their challenges. *Contra* EPA Opp. 21.

A related—but distinct—argument about the timing of events is also worth unpacking. As the state applicants stressed in their initial filing, courts were already beginning to stay the EPA's actions when, in June, the agency published its final plan in the Federal Register. It is true, as the EPA counters, that the agency had publicly announced its federal plan in mid-March—shortly before the judicial stays began piling up. *See* EPA Opp. 20. What are the statutory implications of this sequence? Under the Clean Air Act, after a "rule" is "promulgated," the EPA may not "base[]" its rule "on any information or data which has not been placed in the docket."

§7607(d)(6)(C). The D.C. Circuit has held that a rule is "promulgated" when a "rule is signed and announced" to the public. *American Petroleum Institute v. Costle*, 609 F.2d 20, 24 (D.C. Cir. 1979). Taking that understanding, the EPA could not have added new information upon which to "base"—that is, support—its "rule" after the agency publicly announced it in mid-March. But it does not follow that the EPA could ignore the surrounding world the second it announced its federal plan. Rather, the EPA had a *separate* statutory obligation to refrain from arbitrary and capricious "action." *See* §7607(d)(9). And agency "action" does not become final, this Court has taught, until "the consummation of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quotation omitted). For rulemaking, that typically means publication. *See FTC v. Std. Oil Co.,* 449 U.S. 232, 239 (1980); *Trout Unlimited v. Pirzadeh*, 1 F.4th 738, 750 (9th Cir. 2021).

In this case, the EPA published its final rule in June—so its action did not become final *until after* courts were staying state-plan disapprovals. The EPA, it follows, was wrong to ignore the judicial stays that were issued before it published the federal plan. But even if those stays came too late for consideration, they still confirm what the agency should have seen coming.

Merits. The EPA's arguments on the merits fare no better. Consider first the relationship between the federal plan and the EPA's disapproval of state plans. The EPA insinuates that any problems with its disapproval of States' implementation plans are separate from—and irrelevant to—the agency's decision to finalize the federal plan. *See* EPA Opp. 21–22. That cannot be right. Again, the EPA had authority

to issue a federal plan for 23 States only if it properly disapproved the implementation plans of 23 States. *See* §7410(c)(1). Thus, the validity of the federal plan is necessarily tied to the validity of the EPA's state-plan disapprovals. If anything, the EPA's rushed approach made things even worse for the agency. By timing the federal plan on the heels of the state-plan disapprovals, the EPA guaranteed that problems with the state-plan disapprovals would unravel the federal plan as well.

The EPA seems to accept that its plan is—at present—a shadow of what the agency intended. *See* EPA Opp. 25. The EPA submits, however, that its plan remains a fair allocation of responsibilities because (1) the federal plan "operates State by State," (2) exempting some covered States from the plan does "not alter the obligations that" the plan imposes on non-exempt States, and (3) there was no minimum number of States needed for the plan to "operate coherently." *Id.* at 24–25.

The problem with these arguments is that the agency did not make them earlier. As this Court has explained, an agency cannot rely on post-hoc rationalizations in support of its rulemaking. *Michigan*, 576 U.S. at 758. The EPA did not develop the just-stated line of reasoning during its rulemaking process. At that point, the EPA reasoned that its plan was an equitable allocation of responsibilities for the 23 covered States. *E.g.*, 88 Fed. Reg. at 36719, 36741. And the agency ignored the strong possibility that courts would disagree with its actions and, consequently, that its plan would not go into effect for many of the intended States. As a result, the EPA never contemplated whether its plan would remain equitable if it applied unevenly to the States it purported to cover. Rather, the EPA emphasized during rulemaking that

uniform application was a critical part of its plan's equity. The agency said, for example, that "consistency in rule requirements across all jurisdictions" was "vital" to ensuring an "efficient and equitable" "remedy for ozone transport." *Id.* at 36691 (quotations omitted). Noticeably, the EPA's current rationales move the goalposts from an "equitable" plan that fairly divides responsibilities, *id.* at 36741, to a plan that merely "operate[s] coherently," *see* EPA Opp. 24. But the EPA cannot now shift its reasoning in litigation.

It was also not enough for the EPA to declare its plan severable. *Contra* EPA Opp. 24. Within its final rulemaking, the EPA offered a cursory discussion about the severability of the federal plan. 88 Fed. Reg. at 36693. But that discussion—like the remainder of the EPA's final rule—did not address whether the federal plan would remain a fair division of responsibilities if it did not apply equally to the 23 upwind States the EPA intended to cover. Similarly, the EPA did not address whether allowing for severability would put covered States at a competitive disadvantage to exempted States. Nor did the EPA address whether the federal plan's trading program (for emission allowances) would remain effective with "fewer States participat[ing]." *See* EPA Opp. 26. Put it this way: to succeed on their challenge, the state applicants do not need this Court (or the D.C. Circuit) to reach an answer as to "what minimum number of States" the federal plan must cover to be equitable and effective. *Contra* EPA Opp. 22–23. The point is instead that the EPA did not ever grapple with that and related questions, even though it chose to write a rule that presumed to cover—and fairly allocate responsibility among—23 upwind States.

The EPA's optimism about litigation over state-plan disapprovals is also no reason to withhold relief now. *See* EPA Opp. 22. The agency suggests that it may ultimately prevail in litigation concerning the state-plan disapprovals, which would in turn lift the stays currently in place. The suggestion is a shaky one, given the agency's poor results in the circuits so far. Regardless, the mere possibility of the EPA's future success is not a good reason for allowing unequal application of the federal plan now, while the federal plan remains stayed for most of the intended States.

In addition to the EPA, other respondents—consisting of advocacy groups and other States—also oppose a stay. Their arguments largely overlap with the EPA's arguments; and those arguments fail for the reasons just discussed. But the state respondents further argue that this case amounts to an improper collateral attack on state-plan disapprovals. State Resp. Opp. 25–27. That is incorrect. West Virginia, for its part, does not need to mount any collateral attack, as it directly challenged its state-plan disapproval in another suit. *West Virginia v. EPA*, No. 23-1418 (4th Cir.). Ohio and Indiana, for their parts, did not challenge the disapproval of their plans. Those States thus accept that they will be subject to a plan that is different from the ones they initially proposed. But that does not mean Ohio and Indiana must accept a federal plan that is the product of unreasoned decisionmaking. This Court's procedural analysis in *EME Homer*, 572 U.S. 489, shows as much. There, the Court allowed States to proceed on challenges to a federal plan even though they failed to submit an adequate state plan. Many of the States' arguments related to the disapproval of state plans, but the "gravamen" of the challenge was about the EPA's later

action. *Id.* at 507. The same holds true here: even if the EPA validly disapproved of Ohio's and Indiana's plans, the EPA made an unreasoned decision in promulgating a nationwide federal plan when so many *other* States would be exempt.

III. The States, their industries, and their citizens will be irreparably harmed without a stay.

A. Without a stay, the States have sustained—and will continue to sustain—serious, irreparable injuries. As a reminder, the federal plan is currently effective in Ohio and Indiana. An administrative stay remains in place for West Virginia, at least as of the date of this filing. But it is unclear how long that temporary stay will last, as the Fourth Circuit tied it to the resolution of West Virginia's pending motion to stay, on which the court heard oral argument last week. *See* States' Appl. 12, 23.

With every day that passes, non-exempt States must spend a significant amount of time and money on complying with the federal plan. States' Appl. 23. The States must commit these resources to satisfy their obligations to review and issue permits under the new plan; and they must also expend resources to ensure that emission sources within their borders are able to comply with the federal plan. *Id.* at 23–25. Of course, the States cannot later recover these spent resources from the federal government—so these injuries are necessarily irreparable.

The federal plan injures the States in other ways, too. Because the States must expend resources complying with the federal plan, they have had to stop or slow progress on other infrastructure projects. *See* App.C-15–16 (Crowder Decl. ¶43). Making matters worse, the federal plan undermines the States' electricity-generation

capacity and destabilizes their power grids. *See* States' Appl. 25. Finally, the federal plan injures the States' sovereign authority to regulate air quality themselves.

B. The contrary arguments of the EPA and its supporters fold under scrutiny. For instance, the EPA submits that the States face no burden because compliance obligations apply to emission sources, not to the States themselves. EPA Opp. 47. But, in arguing as much, the EPA does not refute the state applicants' evidence that the federal plan imposes increased permitting obligations and other compliance-related tasks on the States. Again, since the federal plan went into effect, the States must shoulder the arduous task of issuing and updating Title V permits and updating monitoring capabilities to reflect the federal plan's requirements. *See, e.g.*, App.B-7–8 (Hodanbosi Decl. ¶¶18–19); App.C-14–16 (Crowder Decl. ¶¶41–43). That the EPA views the costs associated with these tasks as "traditional" costs that the States should incur, EPA Opp. 47, does not make these costs disappear. And just because the States must take on *some* permitting and compliance costs under the statutory scheme does not mean that the EPA can force the States to incur *extra* costs through unlawful action. The EPA's position also downplays that the States will naturally incur costs to help ensure industries comply with the federal plan. *See Ohio EPA Correspondence with State Sources* (Aug. 23, 2023), https://perma.cc/83CB-9BZW; App.B-10 (Hodanbosi Decl. ¶24).

Contrary to the state respondents' suggestions, State Resp. Opp. 22, it is not overly speculative to say that the federal plan shifts resources away from other projects. Time and money spent adjusting to the federal plan cannot be spent elsewhere.

In West Virginia, adjusting to the federal plan will place a "significant strain" on that State's permitting division. App.C-15–16 (Crowder Decl. ¶43). The result will be to shift state personnel's attention away from other projects, including the State's first combined-cycle energy plant. *See id.*; Associated Press, *After climate bill passage, WVa natural gas plant unveiled* (Sept. 16, 2022) https://perma.cc/WJD7-ZJNR.

The state applicants' grid-stability concerns are also far from speculative. *Contra* EPA Opp. 47; State Resp. Opp. 23. One electric-grid emergency recently came to pass, threatening Ohio among other jurisdictions. *See* App.B-5–6, 14–21 (Hodanbosi Decl. ¶13 and Exhibit A). In that instance, emergency action (suspending regulatory limits) averted disaster. *Id.* But that near miss provides little comfort moving forward. Further, it is no solution to say that compliance deadlines remain a few years away. *See* State Resp. Opp. 2. Like other regulated industries, power plants must make proactive investment decisions in advance to comply with future requirements. *See* App.E-6 (Farach Decl. ¶15). These decisions—about engineering, design, procurement, and construction—cannot be undone or quickly become too costly to undo. *See id.* And some plants, after contemplating the investments needed for compliance, may well decide (before the courts give an ultimate answer here) that the costs of operating are simply too great.

Finally, the EPA brushes aside the state applicants' concerns about their sovereignty. But in doing so, the EPA presumes that it is right on the merits. *See* EPA Opp. 48. If the EPA is wrong on the merits, then its unlawful actions necessarily

harm the state applicants' sovereignty, including by subjecting some States to less favorable regulation than others.

IV. The other *Nken* factors warrant a stay.

The final two *Nken* factors call "for assessing the harm to the opposing party and weighing the public interest." 556 U.S. at 435. "These factors merge when the Government is the opposing party." *Id.* And the "public interest lies in a correct application" of the law. *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (Sutton, J.) (quotation omitted). Combining these points, the equities and the public interest also favor a stay. If the federal plan is unlawful, the state applicants should be relieved from the harms the plan is imposing now.

The EPA argues otherwise, trumpeting the purported benefits of its federal plan and the purported harms of delay. EPA Opp. 48–49; *see also* State Resp. Opp. 14–19. But, if the EPA's actions violated the requirements Congress has placed on agency decisionmaking, then it is not this Court's role to weigh the policy "tradeoffs" of the federal plan. *See Nat'l Fed'n of Ind. Bus.*, 595 U.S. at 120. In any event, the EPA's arguments overstate the implications of a stay. In terms of emissions reductions, judicial stays across the country have already dramatically reduced the effectiveness of the federal plan. As for any delay in further regulation, the EPA has itself to blame for that. The EPA sat nearly five years on the state applicants' proposed implementation plans—well past its statutory deadline for acting, *see* §§7410(k)(1)(B), (k)(2)—so its present calls for urgency ring hollow.

CONCLUSION

The Court should stay the federal-implementation plan pending judicial review.

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