No. 23A_____

In the Supreme Court of the United States

AMERICAN FOREST & PAPER ASSOCIATION; AMERICA'S POWER; ASSOCIATED ELECTRIC COOPERATIVE, INC.; DESERET POWER ELECTRIC COOPERATIVE; MIDWEST OZONE GROUP; NATIONAL MINING ASSOCIATION; THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; OHIO VALLEY ELECTRIC CORPORATION; THE PORTLAND CEMENT ASSOCIATION; WABASH VALLEY POWER ALLIANCE,

Applicants,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, ADMINISTRATOR,

Respondents.

EMERGENCY APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING DISPOSITION OF PETITION FOR REVIEW

To the Honorable John G. Roberts, Jr.,
Chief Justice of the Supreme Court of the United States and Circuit Justice for the District of Columbia Circuit

Michael B. Schon
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave NW
Washington, DC 20001
(512) 693-8350

Mithun Mansinghani
LEHOTSKY KELLER COHN LLP
629 W. Main St.
Oklahoma City, OK 73102
(512) 693-8350

Counsel for National Mining Association

Jonathan Y. Ellis
Counsel of Record
Allison D. Wood
Makram B. Jaber
MCGUIREWOODS LLP
888 16th Street N.W., Suite 500
Black Lives Matter Plaza
Washington, DC 20006
(202) 857-2420
jellis@mcguirewoods.com

Counsel for America's Power, Associated Electric Cooperative, Inc., Deseret Power Electric Cooperative, the National Rural Electric Cooperative Association, Ohio Valley Electric Corporation, the Portland Cement Association, Wabash Valley Power Alliance

David M. Flannery
Kathy G. Beckett
Keeleigh S. Utt
Steptoe & Johnson, PLLC
707 Virginia Street, East
Post Office Box 1588
Charleston, WV 25326
(304) 353-8000
Dave.Flannery@steptoe-johnson.com
Kathy.Beckett@steptoe-johnson.com
Keeleigh.Utt@steptoe-johnson.com

Edward L. Kropp
Steptoe & Johnson PLLC
PO Box 36425
Indianapolis, Indiana 46236
317-946-9882
Skipp.kropp@steptoe-johnson.com

Counsel for American Forest & Paper Association and Midwest Ozone Group

PARTIES TO THE PROCEEDINGS

A. Parties to this Application

i. D.C. Cir. No. 23-1190, *Am. Forest & Paper Assoc. v. EPA*

Petitioner: American Forest & Paper Association.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

ii. D.C. Cir. No. 23-1191, *Midwest Ozone Group v. EPA*

Petitioner: Midwest Ozone Group.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri

iii. D.C. Cir. No. 23-1195, *Associated Electric Cooperative, Inc. v. EPA*

Petitioners: Associated Electric Cooperative, Inc.; Deseret Generation & Transmission Co-Operative, d/b/a Deseret Power Electric Cooperative; Ohio Valley Electric Corporation; Wabash Valley Power Association, Inc., d/b/a Wabash Valley Power Alliance; America's Power; National Rural Electric Cooperative Association; Portland Cement Association.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri

iv. D.C. Cir. No. 23-1199, *National Mining Association v. EPA*

Petitioner: National Mining Association.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri

B. Additional Parties to these Consolidated Cases

i. D.C. Cir. No. 23-1157, *State of Utah v. EPA*

Petitioner: The State of Utah, by and through its Governor, Spencer J. Cox, and its Attorney General, Sean D. Reyes.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri; City of New York; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; District of Columbia; Harris County, Texas; State of Connecticut; State of Delaware; State of Illinois; State of Maryland; State of New Jersey; State of New York; State of Wisconsin; Air Alliance Houston; Appalachian Mountain Club; Center for Biological Diversity; Chesapeake Bay Foundation; Citizens for Pennsylvania's Future; Clean Air Council; Clean Wisconsin; Downwinders at Risk; Environmental Defense Fund; Louisiana Environmental Action Network; Sierra Club; Southern Utah Wilderness Alliance; Utah Physicians for a Healthy Environment.

ii. D.C. Cir. No. 23-1181, *Kinder Morgan v. EPA*

Petitioner: Kinder Morgan, Inc.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; District of Columbia; Harris County, Texas; State of Connecticut; State of Delaware; State of Illinois; State of Maryland; State of New Jersey; State of New York; State of Wisconsin; City of New York.

iii. D.C. Cir. No. 23-1183, *State of Ohio v. EPA*

Petitioners: State of Ohio; State of West Virginia; State of Indiana.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri; City of New York; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; District of Columbia; Harris County, Texas; State of Connecticut; State of Delaware; State of Illinois; State of Maryland; State of New Jersey; State of New York; State of Wisconsin.

iv. D.C. Cir. No. 23-1193, *Interstate Natural Gas Association of America v. EPA*

Petitioners: Interstate Natural Gas Association of America; American Petroleum Institute.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

v. D.C. Cir. No. 23-1200, *American Iron and Steel Institute v. EPA*

Petitioners: American Iron and Steel Institute.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

vi. D.C. Cir. No. 23-1201, *State of Wisconsin v. EPA*

Petitioners: State of Wisconsin.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri; Sierra Club; Midwest Ozone Group.

vii. D.C. Cir. No. 23-1202, *Enbridge (U.S.) Inc. v. EPA*

Petitioners: Enbridge (U.S.) Inc.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

viii. D.C. Cir. No. 23-1203, *American Chemistry Council v. EPA*

Petitioners: American Chemistry Council; American Fuel & Petrochemical Manufacturers.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

ix. D.C. Cir. No. 23-1205, *TransCanada Pipeline USA Ltd. v. EPA*

Petitioners: TransCanada Pipeline USA Ltd.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

x. D.C. Cir. No. 23-1206, *Hybar LLC v. EPA*

Petitioners: Hybar LLC

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

xi. D.C. Cir. No. 23-1207, *United States Steel Corporation v. EPA*

Petitioners: United States Steel Corporation.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

xii. D.C. Cir. No. 23-1208, *Union Electric Company v. EPA*

Petitioners: Union Electric Company, d/b/a Ameren Missouri.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

xiii. D.C. Cir. No. 23-1209, *State of Nevada v. EPA*

Petitioners: State of Nevada.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

xiv. D.C. Cir. No. 23-1211, *Arkansas League of Good Neighbors v. EPA*

Petitioners: Arkansas League of Good Neighbors.

Respondents: The United States Environmental Protection Agency; Michael S. Regan, EPA Administrator.

Intervenors: City Utilities of Springfield, Missouri.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, applicants state as follows:

AMERICAN FOREST & PAPER ASSOCIATION

The American Forest & Paper Association ("AF&PA") is a continuing association of individuals operated for the purpose of promoting the general interests of its membership. The AF&PA represents nearly 87% of the pulp, paper, packaging, and tissue products industry which employs 925,000 skilled workers. The AF&PA is a trade association and has no outstanding shares or debt securities in the hand of the public. It has no parent company, and no publicly held company has a 10% or greater ownership interest in AF&PA.

AMERICA'S POWER

America's Power is a nonprofit membership corporation organized under the laws of the District of Columbia and is recognized as a tax-exempt trade association by the Internal Revenue Service under Section 501(c)(6) of the Internal Revenue Code. America's Power is the only national trade association whose sole mission is to advocate at the federal and state levels on behalf of coal-fueled electricity, the coal fleet, and its supply chain. America's Power supports policies that promote the use of coal to assure a reliable, resilient, and affordable supply of electricity to meet our nation's demand for energy.

America's Power is a trade association. It has no parent corporation, and no publicly held company owns a 10% or greater interest in America's Power.

ASSOCIATED ELECTRIC COOPERATIVE, INC.

Associated Electric Cooperative, Inc. ("AECI") is a rural electric cooperative that provides wholesale power and high-voltage transmission to its six regional generation and transmission cooperative member-owners. In addition to providing power sales and transmission service to its member cooperatives, AECI also takes and provides transmission service through enabling transmission agreements with and makes off-system power sales to various counterparties in the United States. These six regional generation and transmission cooperatives, in turn, supply wholesale power to fifty-one distribution cooperatives in Missouri, three distribution cooperatives in southeast Iowa, and nine distribution cooperatives in northeast Oklahoma, serving more than 2,000,000 customers at 910,000 meters. AECI has no parent company, and no publicly held company has a 10% or greater ownership interest in AECI.

DESERET POWER ELECTRIC COOPERATIVE

Deseret Generation & Transmission Co-Operative d/b/a Deseret Power Electric Cooperative ("Deseret") certifies that it is a nonprofit, regional generation and transmission cooperative, owned by its five member systems, serving approximately 65,000 customers in Utah, Colorado, Wyoming, Nevada, and Arizona. Neither Deseret, nor its member cooperatives issue stock, and therefore no publicly held company owns 10% or more of their stock.

MIDWEST OZONE GROUP

The Midwest Ozone Group ("MOG") is a continuing association of organizations and individual entities operated to promote the general interests of its membership on matters related to air emissions and air quality. MOG has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public, although specific individuals in the membership of MOG have done so. MOG has no outstanding shares or debt securities in the hands of the public. It has no parent company, and no publicly held company has a 10% or greater ownership interest in MOG.

NATIONAL MINING ASSOCIATION

The National Mining Association ("NMA") is a nonprofit national trade association that represents the interest of the mining industry, including every major coal company operating in the United States. NMA has approximately 280 members, whose interests it represents before Congress, the administration, federal agencies, the courts, and the media. NMA is not a publicly held corporation. It has no parent corporation, and no publicly held company has 10% or greater ownership interest in NMA.

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

The National Rural Electric Cooperative Association ("NRECA") is the nonprofit national trade association for electric cooperatives. On behalf of its members, NRECA participates in administrative and judicial proceedings involving or affecting its members' interests. NRECA has no parent company, and no publicly

held company has a 10% or greater ownership interest in NRECA. NRECA is an incorporated entity.

OHIO VALLEY ELECTRIC CORPORATION

The Ohio Valley Electric Corporation ("OVEC") is a corporation originally formed by a consortium of utility companies for purposes of constructing and operating electric generating units to serve the electric energy needs of uranium processing facilities owned by the United States Department of Energy. OVEC owns the Kyger Creek generating station in Ohio, and OVEC's wholly owned subsidiary Indiana-Kentucky Electric Corporation owns the Clifty Creek generating station in Indiana. OVEC has no parent company. American Electric Power Company, Inc., and Buckeye Power, Inc., each owns greater than 10% of the equity in OVEC.

PORTLAND CEMENT ASSOCIATION

The Portland Cement Association ("PCA"), founded in 1916, is the premier policy, research, education, and market intelligence organization serving America's cement manufacturers. PCA represents a majority of U.S. cement production capacity. PCA promotes safety, sustainability, and innovation in all aspects of construction, fosters continuous improvement in cement manufacturing and distribution, and generally promotes economic growth and sound infrastructure investment. PCA is a trade association and has no parent corporation, and no publicly held company owns a 10% or greater interest in PCA.

WABASH VALLEY POWER ALLIANCE

Wabash Valley Power Association, Inc. d/b/a Wabash Valley Power Alliance ("WVPA") certifies that it is a nonprofit, generation and transmission cooperative, owned by twenty-three member-owned rural cooperative systems, serving more than 330,000 homes, businesses, farms, and schools – impacting more than a million people – across 50 counties in Indiana, 30 counties in Illinois, and four counties in Missouri. Neither WVPA, nor its member cooperatives issue stock, and therefore no publicly held company owns 10% or more of their stock.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

The Applicants, ten industry parties consisting of national trade associations and individual electric generating companies, respectfully request an immediate stay of the Environmental Protection Agency's ("EPA") final rule entitled "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 36,654 (June 5, 2023) ("Federal Plan"). The Applicants have petitions for review of the Federal Plan pending in the United States Court of Appeals for the District of Columbia Circuit and, due to the immediate harm from the Federal Plan, moved for a stay pending that court's review. A divided panel of that court denied the motion, with Judge Walker stating he would have stayed the Federal Plan.

The Applicants agree with and incorporate the Application by Ohio, Indiana, and West Virginia filed with this Court on October 13, 2023. The Applicants will not repeat the States' arguments here but will amplify the reasons why the Federal Plan merits this Court's review, is likely unlawful, and poses immediate and irreparable harm to various industries, including electric generation, paper, steel, cement, and mining, as demonstrated in more detail in the declarations accompanying this application.

INTRODUCTION

This case involves a stubborn refusal by EPA to admit that the legal foundation for a massive, multi-state, regulatory program (the "Federal Plan") is irreparably flawed—as an extraordinary consensus of seven courts of appeals have

recognized. EPA's willful decision to move forward has simultaneously abrogated the rights of States to regulate air pollution within their borders and improperly forced industries regulated by the Federal Plan into the immediate expenditure of hundreds of millions of dollars pending the lower court's review, all while jeopardizing the reliability of the electric grid.

The Clean Air Act's "core principle" is "cooperative federalism." *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489, 511 n.14 (2014). States assume "primary responsibility for assuring air quality…." 42 U.S.C. § 7407(a). EPA may step into the role of the States and issue a rule like the Federal Plan only if EPA lawfully determines that a State's plan violates the statute. *Id.* § 7410(c)(1).

After missing its statutory deadline to review State plans by years, EPA disapproved 21 State plans *en masse*. 88 Fed. Reg. 9336 (Feb. 13, 2023). State and industry commenters informed EPA that those State-plan disapprovals were likely unlawful, and federal courts of appeals began agreeing, swiftly issuing stays of individual state plan disapprovals. Relying on its unlawful state-plan disapprovals as the legal predicate, EPA nevertheless published the Federal Plan for those 21 States, plus an additional two States. 88 Fed. Reg. at 36,654. Ultimately, entities in 12 of the 23 affected States challenged and sought stays of their disapprovals in various courts of appeals. Every single one of those courts (the Fourth,[1] Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits) have granted stays.

[1] The stay of the disapproval of West Virginia's State plan is administrative, pending the Fourth Circuit's consideration of that State's stay motion. *West Virginia* v. *EPA*,

When seven courts of appeals find that the legal prerequisite for the Federal Plan is likely unlawful, EPA should realize that something has gone awry. Rather than admit the error of its ways, however, EPA has pressed forward with implementing its Federal Plan in the remaining 11 States—despite the fact that EPA premised the rule on its applicability to 23 states, arguing "[n]ationwide consistency in approach is particularly important in the context of interstate ozone transport…." *Id.* at 36,673. Because of the removal of the 12 stayed States, the Federal Plan is a shell of its original design, eviscerating EPA's analysis underpinning the rule, which addressed only a 23-State program as a whole. In other words, EPA is implementing an 11-state mutant rule that it did not analyze, provide notice of, or take comment on. That momentous action to force its multi-state federal plan, heedless of warnings from court after court that its central pillars are fundamentally unsound, violates the Clean Air Act and the Administrative Procedure Act.

Yet, this irredeemably flawed Federal Plan is now in effect. If this Court does not enter a stay, the Federal Plan will continue to harm the sectors of industry subject to it. By EPA's own estimates, the Federal Plan will cost between $8.2 and $13 billion, with regulated entities like Applicants and their members incurring between $770 and $910 million per year during the course of litigation. *Id.* at 36,852. Costs on individual entities are crushing and are being imposed with full force in the 11 States where the Federal Plan is in effect. For example, just one regulated source, Applicant

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No. 23-1418 (4th Cir. Aug. 10, 2023) (stay pending argument scheduled for October 27, 2023).

Ohio Valley Electric Corporation, states that it "will begin to incur costs within the next six months" and will be "required to spend between $80-$100 million in the next two years." Brown Decl. ¶¶32, 36. A stay from this Court is the only way for sources subject to the Federal Plan to avoid this irreparable harm.

Accordingly, Applicants respectfully request the Court to enter a stay of EPA's Federal Plan during the pendency of their petitions for review.

OPINION BELOW

The D.C. Circuit's order denying the Applicants' motion for a stay is unpublished and may be found at App'x 1. EPA's Federal Plan is published at 88 Fed. Reg. 36,654 (June 5, 2023) and reprinted beginning at App'x 2. The unpublished order notes that while the majority of the panel comprised of Judges Pillard, Walker, and Childs denied the stay, "Judge Walker would stay the federal implementation plan in question."

JURISDICTION

This Court has jurisdiction over this Application pursuant to 28 U.S.C. § 1254(1) and authority to grant the Applicants relief under the Administrative Procedure Act, 5 U.S.C. § 705, the Clean Air Act, 42 U.S.C. § 7607, and the All Writs Act, 28 U.S.C. § 1651(a).

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory and regulatory provisions are reprinted beginning at App'x 268.

STATEMENT

I. Statutory Background

Congress embedded directly into the Clean Air Act the principle of cooperative federalism, expressly stating that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State…." 42 U.S.C. § 7407(a). EPA establishes national ambient air quality standards ("NAAQS") for certain pollutants, including ozone. *Id.* §§ 7408, 7409. Each State then must develop within three years a State implementation plan that "specif[ies] the manner in which [the NAAQS] will be achieved and maintained." *Id.* §§ 7407(a), 7410(a)(1).

These plans must satisfy several statutory requirements, including the Act's "Good Neighbor" provision. *Id.* § 7410(a)(2)(D)(i)(I). That provision delegates to each State the task of ensuring no "emissions activity within the State" will emit "in amounts which will … contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any" NAAQS." *Id.*

Once a State develops and submits its plan, EPA "shall approve" the plan within 18 months "if it meets all of the applicable requirements of" the Clean Air Act. *Id.* § 7410(k)(3); *see also Union Elec. Co.* v. *EPA*, 427 U.S. 246, 257 (1976). Only if EPA lawfully determines that a State plan violates the statute may EPA promulgate a "Federal implementation plan" for that State. 42 U.S.C. § 7410(c)(1).

When EPA is permitted to issue a federal plan, it "cannot require a State to reduce its output of pollution by more than is necessary" to ensure the State will not contribute significantly to another State's inability to attain or maintain the NAAQS.

EME Homer, 572 U.S. at 521-22. If EPA does, it engages in unlawful "over-control." *Id.* "EPA has a statutory duty to avoid over-control…." *Id.* at 523.

II. EPA's Promulgation of State Implementation Plan Disapprovals and the Federal Plan

In 2015, EPA lowered the NAAQS for ozone from 75 to 70 parts per billion. 80 Fed. Reg. 65,292, 65,293-94 (Oct. 26, 2015). This required States to develop implementation plans for the revised NAAQS, including plans addressing the Good Neighbor provision, within three years (*i.e.*, by October 26, 2018). 42 U.S.C. § 7410(a)(1). After States submitted their plans, EPA had a statutory duty to approve or disapprove them within eighteen months (*i.e.*, no later than April 2020). *Id.* § 7410(k)(1)-(3). After blowing past this statutory deadline by years, EPA issued proposed disapprovals for 19 States on February 22, 2022,[2] followed by proposed disapprovals for an additional four States on May 24, 2022.[3] Commenters repeatedly warned EPA that these proposed disapprovals were unlawful because they were based on unlawful reasoning. *See, e.g.*, EPA, 2015 Ozone NAAQS Interstate Transport SIP Disapprovals – Response to Comment (RTC) Document at 12, 15, 29, 33, 57, 81, 189, *available at* https://t.ly/ikB1A.

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[2] 87 Fed. Reg. 9545 (Feb. 22, 2022) (Alabama, Mississippi, Tennessee); 87 Fed. Reg. 9798 (Feb. 22, 2022) (Arkansas, Louisiana, Oklahoma, Texas); 87 Fed. Reg. 9838 (Feb. 22, 2022) (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin); 87 Fed. Reg. 9498 (Feb. 22, 2022) (Kentucky); 87 Fed. Reg. 9463 (Feb. 22, 2022) (Maryland); 87 Fed. Reg. 9533 (Feb. 22, 2022) (Missouri); 87 Fed. Reg. 9484 (Feb. 22, 2022) (New York, New Jersey); 87 Fed. Reg. 9516 (Feb. 22, 2022) (West Virginia). Comments on each of these proposals were due on April 25, 2022.

[3] 87 Fed. Reg. 31,443 (May 24, 2022) (California); 87 Fed. Reg. 31,485 (May 24, 2022) (Nevada); 87 Fed. Reg. 31,470 (May 24, 2022) (Utah); 87 Fed. Reg. 31,495 (May 24, 2022) (Wyoming). Comments on each of these proposals were due on July 25, 2022.

Before the deadline for submitting comments on the proposed disapprovals of the State plans had even expired (and before EPA had even proposed to disapprove some of the States' plans), EPA proposed a comprehensive *federal* implementation plan to regulate emission sources through a single multi-state program. 87 Fed. Reg. 20,036, 20,073 (Apr. 6, 2022) (noting it was "promulgating FIPs to address these obligations on a nationwide scale"). Commenters again repeatedly warned EPA that going forward with a federal plan would be unlawful because the state-plan disapprovals—which are the legal predicate of a federal plan under the Clean Air Act—were unlawful. *See* 88 Fed. Reg. at 36,672-75; EPA, Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards: Response to Public Comments on Proposed Rule [87 FR 20036, April 6, 2022] at 2-6, 9-11, 145-48, 152-55, *available at* bit.ly/3EaNAi8.

Despite the warnings regarding the unlawful nature of EPA's proposed disapproval, the Agency finalized the disapprovals of the plans for 21 States in February 2023. 88 Fed. Reg. 9336 (Feb. 13, 2023). A mix of states and industry parties in 12 States challenged their state-plan disapprovals in their respective circuits and moved for stays of the disapprovals. By late May 2023, the Fifth Circuit, Sixth Circuit, and the Eighth Circuit had issued stays of the disapprovals for five States,[4]

[4] *Texas v. EPA*, No. 23-60069 (5th Cir. May 1, 2023) (Texas and Louisiana); *Arkansas v. EPA*, No. 23-1320 (8th Cir. May 25, 2023); *Missouri v. EPA*, No. 23-1719 (8th Cir. May 26, 2023); *Kentucky v. EPA*, No. 23-3216 (6th Cir. May 31, 2023) (administrative stay pending consideration of stay motion that was granted in July 2023, *see infra* note 5).

concluding that EPA's state plan disapprovals were likely unlawful. Meanwhile, stay motions were pending for various other courts of appeals.

EPA nonetheless moved forward on June 5, 2023, with publishing the Federal Plan, which covers 23 States and became effective August 4, 2023. 88 Fed. Reg. at 36,654. During the time between the publication of the Federal Plan and its effective date, the wave of federal courts of appeals issuing stays of the state plan disapprovals became a tsunami. Every single one of the 12 state-plan disapprovals that was challenged has now been stayed.[5]

In sum, every circuit to have considered the issue—the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits—has stayed EPA's disapprovals, explicitly or implicitly finding that the States and industries challenging those disapprovals are likely to succeed on the merits.

III. The Federal Plan Before and After the Court-Ordered Stays of the State Plan Disapprovals

EPA has recognized in two interim final rules that it cannot impose its plan in the 12 States where EPA's state-plan disapprovals have been stayed because those state plan disapprovals form the legal predicate for the Federal Plan.[6] As a result of

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[5] *Texas v. EPA*, No. 23-60069 (5th Cir. June 8, 2023) (Mississippi); *Nevada Cement Company v. EPA*, No. 23-682 (9th Cir. July 3, 2023) (Nevada); *Allete, Inc. v. EPA*, No. 23-1776 (8th Cir. July 5, 2023) (Minnesota); *Kentucky v. EPA*, No. 23-3216 (6th Cir. July 25, 2023); *Oklahoma v. EPA*, No. 23-9514 (10th Cir. July 27, 2023); *Utah v. EPA*, No. 23-9509 (10th Cir. July 27, 2023); *Alabama v. EPA*, No. 23-11173 (11th Cir. Aug. 17, 2023); *West Virginia v. EPA*, No. 23-1418 (4th Cir. Aug. 10, 2023) (administrative stay pending argument scheduled for October 27, 2023).

[6] Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards: Response to Judicial Stays of SIP Disapproval Action for Certain States, 88 Fed. Reg. 49,295 (July 31, 2023) (Arkansas, Kentucky, Louisiana, Mississippi,

the removal of these 12 States from the Federal Plan, however, the plan that EPA is now imposing in the remaining 11 States bears little resemblance to the one it proposed, took comment on, and finalized.

This Court in *EME Homer* described EPA's chosen methodology for constructing a federal Good Neighbor plan; EPA started with that same methodology for the Federal Plan at issue here. *See id*. at 36,741, 36,748. Under this methodology, EPA identifies the (upwind) States that its air quality modeling predicted would be contributing more than *de minimis* amounts of ozone to (downwind) States that will have difficulty attaining the NAAQS. *See EME Homer*, 572 U.S. at 500-01. It then determines what emissions controls would be "cost-effective" by calculating which controls would produce the "combined effect … on air quality in downwind States" necessary to eliminate significant upwind ozone contribution, assuming every upwind State uniformly expended the same amounts to control their emissions. *Id.* at 501. "EPA estimated, for example, the amount each upwind State's [ozone-causing] emissions would fall if all pollution sources within each State employed every control measure available at a cost of $500 per ton or less." *Id.* So if upwind States A and B were both linked to downwind State C, EPA's methodology requires the reductions necessary to make upwind contributions to State C insignificant, assuming both

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Missouri, Texas); Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards: Response to Additional Judicial Stays of SIP Disapproval Action for Certain States,88 Fed. Reg. 67,102 (Sept. 9, 2023) (Alabama, Minnesota, Nevada, Oklahoma, Utah, West Virginia).

States A and B expended the same amount per tons of emissions in control measures. *See id.* at 519-20.

Next, "[f]or each regulated upwind State, EPA created an annual emissions 'budget,'" which "represented the quantity of pollution an upwind State would produce in a given year if its in-state sources implemented all pollution controls available at the chosen cost thresholds." *Id.* at 502. Thus, the emissions budget for each State stems from EPA's "cost-effectiveness" methodology, which assumes the same expenditure on emissions controls "applied uniformly to all regulated upwind States" to achieve EPA's desired "combined effect" downwind. *Id.* at 501-02. Finally, EPA pairs these budgets with a "cap-and-trade" system allocating each upwind State's "emission budget among its in-state sources" and allowing sources emitting below their allocation to "sell unused 'allocations' to sources" in any other upwind State that is part of the federal plan. *Id.* at 503 & n.10.

EPA thus describes the Federal Plan as a "national-scale, multi-state" federal implementation plan to address "interstate transport of ozone-causing pollutants through a series of integrated multi-state emissions allowance trading programs for power plants [and] uniform requirements for certain, high-emitting non-power plant industrial sources." EPA Resp. to Pet.'s Mot. To Sever, Doc. No. 2018488, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Sept. 22, 2023). Indeed, this is how EPA designed the Federal Plan to operate. *See* 88 Fed. Reg. at 36,673 ("The approach of this [federal implementation plan] ensures both national consistency across all states and consistency and continuity with our prior interstate transport actions for other NAAQS."); *id.* at 36,691 (noting "the purpose of this rule is to address the interstate

transport of ozone on a national scale" and that "upwind regions associated with each receptor typically span at least two, and often far more, states").

The Federal Plan that EPA originally designed no longer exists as a result of the court-ordered stays. Nearly 90% of the power plant emissions that EPA contemplated serving as both the basis for its emissions limitations and for a robust emissions allowance trading market have been removed from the program. Similarly, 60% of the emission reductions from all other sources are now excluded from the Federal Plan. *See* EPA, *Good Neighbor Plan for 2015 Ozone NAAQS Maps*, https://t.ly/zQK9L ("Good Neighbor Maps") (App'x 296-97). Moreover, EPA never analyzed the costs, efficacy, and burdens of the version of the rule it is now implementing. Nor did it ever examine the effect of the removal of 12 states on the trading program for electric generating units.

IV. Differences Between the Federal Plan and Past Federal Implementation Plans

While the Federal Plan is similar to prior federal Good Neighbor plans in some respects, it also creates a host of never-before-seen regulatory programs. As with prior plans, EPA's trading program starts by using "preset emissions budgets" for each State. 88 Fed. Reg. at 36,662. EPA claims the emissions reductions required by each statewide budget are in the amount necessary to eliminate that State's alleged significant contribution to any downwind State's inability to attain or maintain the NAAQS. *Id.* at 36,657, 36,667. But on *top* of those budgets, EPA here decided to impose "enhancements" to require that "pollution controls will be operated" even if

the States would no longer contribute significantly to other States' ozone issues without such operation. *Id.* at 36,662.

For the first time in any interstate transport program, EPA also has subjected non-power generating industries to stringent emission limitations. The Federal Plan covers, among others, cement kilns and boilers in iron mills, steel mills, pulp, paper, and paperboard mills, and pipeline engines. *Id.* at 36,658.

REASONS FOR GRANTING THE APPLICATION

This Court should stay the Federal Plan, which has a legal foundation premised on the disapprovals of State plans that seven Circuits have confirmed are likely unlawful. The 11-State Federal Plan now being implemented was never analyzed by EPA nor made available for notice-and-comment rulemaking.

Under the Administrative Procedure Act, this Court—as a "reviewing court … to which a case may be taken … on application for certiorari or other writ"—"may issue all necessary and appropriate process to postpone the effective date of an agency action." 5 U.S.C. § 705; *see also* 28 U.S.C. §§ 1254, 1651, 2101; *Nken v. Mukasey*, 555 U.S. 1042 (2008). And under "well settled" principles, such "equitable relief" is appropriate here. *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers).

In addition, to the extent required for such relief, there is: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court w[ould] vote to reverse [a] judgment below [upholding the Federal Plan]; and (3) a likelihood that irreparable

harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see Nken v. Holder*, 556 U.S. 418, 427-29 (2009).

This Court should stay the Federal Plan pending further review.

I. Applicants Are Likely to Succeed on the Merits in this Case, which Warrants this Court's Discretionary Review.

Given the wide-ranging impact of the Federal Plan and the faulty foundation of unlawful state plan disapprovals on which it rests, this Court would likely grant certiorari in this case and reverse any decision by the D.C. Circuit upholding the Federal Plan. The Federal Plan is an enormous federal regulation with national importance, which EPA itself estimates will cost between $8.2 billion and $13 billion. This Court has granted certiorari in several similarly important Clean Air Act cases arising over the past decade. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *EME Homer*, 572 U.S. at 506.

More than just the toll on the economy, the Federal Plan also represents an unprecedented abrogation of the congressionally granted rights of States. In remarkable unanimity, seven courts of appeals have found that EPA's disapprovals of 12 State plans, which formed a crucial basis for the 23-State Federal Plan, were likely unlawful. Despite its Federal Plan being fundamentally undermined, EPA insists it remains viable. And now, this gigantically expensive rule has gone into effect in 11 States and will cause irreparable harm to States, industry, and consumers.

Accordingly, this case merits this Court's discretionary review and, for the reasons given below, Applicants are likely to succeed on the merits.

A. The Federal Plan as Promulgated No Longer Exists, and EPA Never Analyzed or Allowed Comment on the Smaller, Transformed Version.

The 23-State Federal Plan is likely to be vacated by the D.C. Circuit or by this Court because it rests on a legally faulty foundation—EPA's disapproval of State plans. Every circuit that has reviewed those disapprovals has issued stays recognizing that EPA's action was likely unlawful. *See supra* at pp. 7-8 & nn. 4, 5. While EPA has removed the 12 States that are the subject of the stays from the Federal Plan, the Federal Plan was premised on inclusion of those States. It thus cannot lawfully be implemented anywhere consistent with the Clean Air Act and the Administrative Procedure Act.

EPA never noticed, analyzed, or took comment upon the 11-State Federal Plan it is now implementing—a clear violation of all the procedures required under the Clean Air Act and the Administrative Procedure Act for notice-and-comment rulemaking. 42 U.S.C. § 7607(d)(3); 5 U.S.C. § 553. Moreover, EPA's insistence on moving forward in the remaining States regardless of this fundamental flaw is almost certain to be held arbitrary and capricious. EPA's attempt to make workable its collapsing Federal Plan by severing the inseverable—as if it would have imposed the same plan on 11 States that it would have if all 23 States were included—is unlawful and contrary to its own statements and analysis justifying its Federal Plan.

1. EPA Premised the Federal Plan on the Inclusion of all 23 States.

The administrative record clearly demonstrates that in many fundamental respects, EPA premised its Federal Plan on the inclusion of all 23 States. EPA's Federal Plan started by distributing emissions limitations among all upwind States

in the Plan by assuming sources within all of those States would impose controls at the same costs. *See supra* at pp. 9-10. As this Court explained, EPA's "cost-effective" methodology assumes the same expenditure on emissions controls "applied *uniformly* to *all* regulated upwind States" at a level sufficient to achieve EPA's desired "*combined* effect" downwind. *EME Homer*, 572 U.S. at 501-02 (emphasis added); *see also* 88 Fed. Reg. at 36,741. EPA justified "[a]pplying these emissions control strategies on a *uniform* basis across *all* linked upwind states" as "an efficient and equitable solution to the problem of allocating upwind-state responsibility for the elimination of significant contribution." 88 Fed. Reg. at 36,741 (emphasis added). It then sets its emissions "budgets" for each State based on this analysis that assumed all 23 States would be included in its Federal Plan. *See EME Homer*, 572 U.S. at 501-02.

In addition to its interdependent state budgets (the "cap" in its "cap-and-trade" program), another fundamental feature of EPA's Federal Plan is its interstate emissions allowance trading program (the "trade"). *See id.*, 572 U.S. at 503 & n.10. Necessarily, EPA's analysis of the benefits and efficiencies of that trading program presumed inclusion of all 23 States in the program. 88 Fed. Reg. at 36,657. EPA itself explained the emissions trading marketplace depended on breadth because "[b]roader marketplaces generally provide greater market liquidity and therefore make trading programs better at providing … advantages" such as "cost minimization" and "operational flexibility." *Id.* at 36,766 n.295; *see also id.* at 36,760 (noting EPA was adopting a trading program "because of the inherently greater flexibility that [it] can provide"); *id.* at 36,771 (responding to commenters concerned with grid reliability by

pointing to the interstate trading program). As with any market, the price of emission allowances depends heavily on the supply of those allowances, and therefore the number of States in the program. *See id.* at 36,775. Indeed, EPA recently stated that "the Plan depends on the continuing operation of 'interdependent' interstate mechanisms, like the allowance trading program, that reach beyond state or regional borders." EPA's Motion to Dismiss or Transfer Petitions for Improper Venue, *Tulsa Cement et al. v. EPA*, at 16, No. 23-9551 (10th Cir. July 20, 2023) ("EPA Motion to Dismiss or Transfer").

Moreover, EPA justified the Federal Plan based on its claimed benefits: the purported "meaningful" air quality improvements that would result "collectively" from the inclusion of all 23 States in the Federal Plan. *See* 88 Fed. Reg. at 36,683; *accord id.* at 37,648; *see also EME Homer*, 572 U.S. at 502. EPA claimed: "When the effects of these emissions reductions are assessed *collectively* …, the *cumulative* improvements in ozone levels at downwind receptors … are both measurable and meaningful…." 88 Fed. Reg. at 36,741 (emphasis added). Indeed, this cumulative analysis was EPA's basis for showing it was acting within the bounds of the Good Neighbor provision: EPA's analysis of "whether the rule achieves a full remedy to eliminate 'significant contribution' while avoiding over-control" was based on "the identified reductions" from all 23 States in the Federal Plan as "*combined and collectively analyzed* to assess their effects on downwind air quality." *Id.* at 36,719 (emphasis added); *see id.* at 36,743, 36,747-48 (listing only the "aggregate" and "collective" air quality improvements); *see also EME Homer*, 572 U.S. at 523.

As EPA describes it, its 23-State Federal Plan is one that is "interstate" and "interdependent." EPA Motion to Dismiss or Transfer at 16. EPA emphasizes that its Federal Plan is a "coordinated, 23-state program … in a long line of national-scale, multi-state federal implementation plans that have addressed interstate transport of ozone-causing pollutants through a series of integrated multi-state emissions allowance trading programs." EPA Resp. to Pet.'s Mot to Sever, Doc. #2018488, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Sept. 22, 2023); *see also* EPA Opp. to Admin. Stay, Doc. #2008854, *Utah v. EPA*, No. 23-1157 at 1 (D.C. Cir. July 20, 2023) (describing the Federal Plan as a "coordinated, interstate emissions control program" covering "23 states"). The premise that the Federal Plan would include all 23 States in an interdependent program undergirded everything from EPA's cost-effectiveness analysis to its benefits determinations and from the emissions caps to the trading program.

2. The Current 11-State Federal Plan Violates the Basic Principles of the Clean Air Act and the Administrative Procedure Act.

EPA is now implementing its interdependent 23-State Federal Plan in only 11 States. It is required to do so because numerous federal courts of appeals have held that EPA likely violated the most basic requirement of the Clean Air Act by undermining the careful balance between state and federal authority that Congress prescribed. *See supra* at p. 5. Despite commenters and courts informing EPA of the Federal Plan's unlawful foundations—the disapproval of individual State plans—EPA published and is implementing it anyway in 11 States. Applicants are likely to succeed in demonstrating EPA's actions are unlawful for at least three reasons.

First, the Federal Plan violates basic requirements of the Clean Air Act and the Administrative Procedure Act by failing to provide notice and comment on an 11-State federal implementation plan rather than the 23-State plan originally contemplated. 42 U.S.C. § 7607(d)(1)(B), (3); 5 U.S.C. § 553(b), (c). The stays of the Federal Plan in 12 States have forced EPA to remove those States from its Plan, but EPA's decision to nonetheless implement an 11-State plan is unlawfully enforcing a rule EPA never proposed, received comments on, analyzed, or lawfully promulgated. As explained above, EPA analyzed only a 23-State plan, justifying many fundamental parts of that Plan on the inclusion of all 23 States. The difference is especially stark because removing 12 States with stays from the Federal Plan means nearly 90% of the power plant emissions reductions and 60% of the non-power plant emission reductions that EPA analyzed as part of its rulemaking are now excluded from the Federal Plan. *See* Good Neighbor Maps at App'x 296-97.

The 11-State plan that is currently being implemented has never been analyzed by EPA. For example, EPA never performed an 11-State analysis of: (i) cost-effective emissions controls (the basis for each State's emissions budget); (ii) the efficacy of the trading program; or (iii) the downwind air quality benefits. *See* 88 Fed. Reg. at 36,666, Table 1.C-1; EPA, Regulatory Impact Analysis for the Final Federal Good Neighbor Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard at 24-25, *available at* https://t.ly/x6P5l (examining various scenarios none of which involved removal of more than half the States or a State-level analysis). No one—not States, nor members of the public, nor

even EPA itself—has analyzed or commented on this completely altered version of a rule that is now imposing enormous costs.

Second, the Federal Plan is arbitrary and capricious because it "entirely fail[s] to consider an important aspect of the problem…." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Namely, EPA failed to appreciate that its state plan disapprovals—the necessary legal predicate for the Federal Plan—are likely unlawful and thus not in effect. The agency never considered the likely scenario that a significant number of its state plan disapprovals would be stayed or vacated, rendering large portions of the Federal Plan inoperable. Commenters alerted EPA to the unlawfulness of the state plan disapprovals, those disapprovals were challenged in a dozen states with litigants moving for stays, and now seven courts of appeals have granted those stays, confirming that those disapprovals were likely unlawful. *See supra* at pp. 7-8 nn. 4, 5. Those court-ordered stays did not make EPA's state plan disapprovals likely unlawful; they simply declared what the law always was, including when EPA finalized the Federal Plan. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C. Cir. 1995). Indeed, three courts stayed the state plan disapprovals in five States *before* EPA published its Federal Plan in the Federal Register. *Supra* at pp. 7-8 & n.4. Yet, EPA entirely failed to reconsider its analysis based on this reality before consummating its final agency action. Despite all of the warnings and everything EPA knew before it published the Federal Plan, EPA charged forward.

This mess is one of EPA's own making. It proposed the Federal Plan before its state plan disapprovals were finalized (or, in some cases, before the disapprovals of

some states' plans had even been proposed), *see supra* at p. 7, began to finalize the Federal Plan despite warnings that the state plan disapprovals were likely unlawful and court challenges to them began to mount, and published the Federal Plan in the Federal Register even after three courts of appeals started declaring its state disapprovals were likely unlawful. That is arbitrary and capricious.

Third, EPA's rulemaking makes no sense with 12 States excised and is thus arbitrary and capricious for this reason too. These 12 States are not severable from EPA's analysis and justifications for the Federal Plan; those things "cannot function sensibly without" including all 23 States that were part of EPA's uniform cost-thresholds, trading program, downwind benefits justification, and the like. *Belmont Mun. Light Dep't v. FERC*, 38 F.4th 173, 188 (D.C. Cir. 2022). EPA does not and cannot argue that "the agency would have adopted" the same plan for 11 States by, for example, imposing the exact same emissions controls on those 11 States had it known a bevy of upwind States would not also have been subject to those controls. *Am. Fuel & Petrochemical Manufacturers v. EPA*, 3 F.4th 373, 384 (D.C. Cir. 2021). EPA cannot lawfully salvage a rule in shambles by implementing the bits and pieces still left. The Federal Plan is a shell of its original self, rendering the analysis underpinning the rule incoherent and irrelevant. It will likely be vacated after full merits consideration and therefore must be stayed now.

B. Even if the Federal Plan Still Consisted of All 23 States, It Would Nonetheless Violate the Clean Air Act.

Even assuming that the Federal Plan EPA is now implementing is the one that underwent notice-and-comment rulemaking, Applicants are likely to prevail

because the Plan violates the Clean Air Act and this Court's precedent. It unlawfully "over-controls" emissions and capriciously includes non-power generating industrial sources, contrary to the statutory requirements and EPA's own analysis.

1. This Court has explained that EPA cannot "over-control": it "cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State" or by more than would be necessary for a particular state to eliminate all of its "significant[]" contributions to downwind sites. *EME Homer*, 572 U.S. at 521-22. But that is exactly what the Federal Plan is designed to do.

EPA first determined what emissions budgets are necessary to ensure compliance with the Good Neighbor provision, as it had with prior rulemakings. 88 Fed. Reg. at 36,754 (projecting emissions budgets to be a "full remedy" by the conclusion of the 2026 ozone season). Then, on top of that, EPA imposed "enhancements" for power plants to further ratchet the budgets downward—regardless of whether further ratcheting is needed to eliminate significant contribution. *See id.* at 36,764 (explaining "enhancements" are to "better sustain incentives to control emissions over time"); *id.* at 36,751 (declining to evaluate over-control after EPA's dynamic budget enhancements take effect in 2030); *see also id.* at 36,685.

For example, EPA set each State's annual emissions budgets for its cap-and-trade program at the level of emissions sufficient to eliminate significant downwind contributions. But beginning in 2030, an enhancement called "dynamic budgeting" will reduce the State's budget if a power plant shuts down or limits operation, or if a

State otherwise does not use allowances available to it. *Id.* at 36,663. In each of those scenarios, changes on the ground mean a large amount of the emissions that EPA deemed to be "contributing significantly" to downwind ozone are not occurring, making the State's contribution to downwind locations less significant or possibly insignificant. Nonetheless, dynamic budgeting would shrink the entire budget for the State, making the budgets more stringent and well-below what EPA already determined was necessary to eliminate significant contribution. That facially and systematically over-controls.

Similarly, EPA's "enhancements" require certain power plants to relinquish some of their unused allowances when they bank more than enough to comply with the cap-and-trade budgets or emit above certain amounts. *Id.* at 36,664, 36,766. EPA tacitly concedes that this is not to prevent significant contribution, but rather to "continuously incentiviz[e] sources to reduce their emissions even when they already hold sufficient emissions allowances…." *Id.* at 36,766. Because those power plants would have already created or purchased sufficient allowances to eliminate significant contribution, however, the Federal Plan facially requires more than is necessary.

2. EPA also capriciously shoe-horned other sectors of the economy into the Federal Plan in excess of its authority.

EPA completely disregarded whether the substantial costs of including those sources could justify the nearly immeasurable benefit on air quality. EPA proposed a "uniform cost" framework to determine the "amount of emissions that is in excess of the emissions control strategies that EPA has deemed cost-effective" to eliminate

significant contributions. 88 Fed. Reg. at 36,676. In other words, it set a threshold ($7,500 per ton of reduction) above which control measures are too expensive to justify the purported benefit. As other Applicants explain with respect to pipeline engines, EPA then proceeded to ignore it. *See* Emergency Application for Stay of Final Agency Action During Pendency of Petitions for Review, *Kinder Morgan, Inc., et al. v. EPA* (Oct. 13, 2023).

For example, when EPA looked at cement kilns in its proposal, it wrongly assumed the kilns did not already have emissions controls for the relevant pollutants and determined they could achieve substantial reductions below the cost threshold on an industry-wide basis. *See* Portland Cement Association Comments at 9 (June 21, 2022) ("PCA Comments") (App'x 306) But three-quarters of the kilns EPA evaluated already had controls in place, so the tons of reduction would be much smaller (and therefore, the cost per ton much higher) than EPA predicted. *Id.* Despite being provided actual data on kiln emissions, *id.* at 9-10, EPA doubled down on its false assumptions in the Federal Plan. 88 Fed. Reg. at 36,826; *see also id.* at 36,739 (showing projections of reductions with what EPA falsely assumed would be "additional" controls). If EPA had simply relied on the actual, verifiable data, rather than assumptions, it would have excluded cement kilns.

EPA's treatment of the costs for the paper industry is similarly baffling. EPA concluded that it could achieve a grand total of 0.0117 parts billion in ozone reductions (recall that the standard is 70 parts per billion) by requiring boilers at pulp and paper mills to install equipment that has never been used on them in the United States. *See* American Forest & Paper Association Comments at 6 (June 21,

2022), Docket ID No. EPA-HQ-OAR-2021-0668-0516 ("AF&PA Comments") (App'x 335); EPA's Non-EGU Screening Assessment Memo at 16, Docket ID No. EPA-HQ-OAR-2021-0668-0150, Table 5, *available at* https://t.ly/pzIM6; Noe Decl. ¶12. EPA wrongly estimated that it would cost $3,800 per ton to do so. Noe Decl. ¶10. That was off by an order of magnitude; the industry calculated the average cost at $37,900 per ton. *Id.* Rather than exclude these boilers, EPA came up with a new cost estimate of $14,134 per ton, 88 Fed. Reg. at 36,740, Table V.C.2-3, and provided new excuses for exceeding the original $7,500 per ton threshold, without providing any fair notice or opportunity to comment on this new threshold. *Id.* at 36,746.

Worse still, some of Federal Plan's requirements are completely unmoored from the proposal. The Federal Plan requires steel industry reheat furnaces to have in place a plan by August 2024 to install equipment called "Low NOx Burners" and to achieve a 40% reduction in nitrogen oxide emissions from those furnaces by 2026. *Id.* at 36,879. But this requirement was not in the proposal at all. So, the steel industry had no opportunity to comment on it. Accordingly, regulated sources need to make immediate decisions in 2023 on whether to upgrade or retire furnaces and natural gas boilers in advance of judicial review of the Federal Plan. Balserak Decl. ¶¶6-8.

In short, even EPA's Federal Plan as originally envisioned was fundamentally flawed. Applicants are therefore likely to succeed on the merits for these reasons, too.

II. Absent a Stay, the Applicants and Their Members Will Suffer Substantial Irreparable Harms.

The Applicants and their members will suffer irreparable harm if the Federal Plan is not stayed. "[C]omplying with a regulation later held invalidated almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring) (emphasis in original). In *Philip Morris v. Scott*, 131 S. Ct. 1 (2010) (Scalia, J., in chambers), Justice Scalia recognized that "[i]f expenditures cannot be recouped, the resulting loss may be irreparable." *Id.* at 4. He accordingly found irreparable harm had adequately been demonstrated where the applicants showed they would irrevocably expend $270 million before the Court could even consider the claim. *Id.* Economic injuries are also irreparable when unlawful agency action deprives companies of "very significant future revenues" which will be "permanently" lost, even if the action is ultimately overturned. *In re NTE Connecticut, LLC*, 26 F.4th 980, 991 (D.C. Cir. 2022).

Applicants and their members face both kinds of irreparable harm. The Federal Plan requires Applicants and their members to reduce emissions drastically. To reach compliance in time, they will have to immediately begin the process of installing prohibitively expensive emissions controls, incurring "hundreds of millions of dollars in capital compliance and construction costs." Farah Decl. ¶12; *see also* Brown Decl. ¶36; Balserak Decl. ¶¶9-10; Maule Decl. ¶6; Piotrowski Decl. ¶5; Toso Decl. ¶34-36.

Sources that cannot feasibly install new emissions controls will be forced to buy emissions allowances from other parties, decrease their production, or cease

operations altogether. Marshall Decl. at 2-3 (explaining sources may need to "reduce generating hours to meet emission restrictions" if "sufficient allowances" are not available); Balserak Decl. ¶8 (explaining sources "will need to immediately make a decision … on whether to upgrade or retire" units); Alban Decl. ¶27 (Federal Plan will "likely force many baseload generation assets to retire"); Brown Decl. ¶21 (explaining the Federal Plan will require OVEC to either transition a unit to only seasonal production or consider retirement); Toso Decl. ¶37 (PCA member has identified a real possibility it may cease operations). And because there will be both fewer emissions allowances and higher demand as a result of 12 States being removed from EPA's intended Federal Plan, utility sources will be forced to either purchase allowances at a significantly higher premium or curtail operations. Farah Decl. ¶11 (explaining a spike in demand for allowance prices in 2022 imposed an additional $50 million in operating costs for a single plant); Brown Decl. ¶20 ("OVEC can no longer rely on a viable allowance trading market … to meet future compliance obligations.").

Even setting aside the costs of the emissions controls themselves, electric generating units and industrial facilities will incur significant additional costs related to "the process of initiating engineering, design, and procurement" of controls by 2026 that "would be unnecessary" if the Federal Plan is held invalid. Balserak Decl. at 3-4; *see also* Brown Decl. ¶32 (OVEC must begin the "process immediately" and will "incur costs within the next six months"); Alban Decl. ¶24 (utilities have "very little time to develop power supply plans and environmental compliance plans"); Purvis Decl. ¶32; Farah Decl. ¶15 ("Mon Power will need to take imminent action in order to comply"); Champion Decl. ¶9 (Georgia Pacific will be required to "start

contracting immediately" to comply "with the tight timeframe"); Maule Decl. ¶7; Kotara Decl. ¶5; Piotrowski Decl. ¶7; Toso Decl. ¶30.

The paper industry, in particular, will incur significant costs to design, install, and operate new controls, some of which have never been applied in that industry. Noe Decl. ¶12. The capital costs of these investments for only three units of one company range from $45 to $125 million and will impact the market competitiveness of affected mills. Champion Decl. ¶¶6-8; *see also* Kotara Decl. ¶4. The total capital cost for such units in the paper industry would be $660 million. AF&PA Comments at 2.

As noted above, some companies may cease operations at specific sources altogether. For those sources that must reduce or cease their use of coal to comply with the Federal Plan, the Plan will also drastically harm the coal mine operators that supply those sources with their fuel. Brock Decl. ¶¶15-17; Adams Decl. ¶¶10-13; Hamilton Decl. ¶¶12-14; Bridgeford Decl. ¶¶11-14.

III. The Balance of Equities and the Public Interest Favor a Stay.

"In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. Any such balancing also favors a stay. First, a stay will not harm any other parties. EPA ignored its statutory deadline to disapprove the State plans it now proposes to replace for years. It cannot now argue a brief stay will cause sweeping public harms. *See Texas v. EPA*, No. 23-60069, Stay Order, Slip Op. at 24 (5th Cir. May 1, 2023). Despite the Federal Plan's immediate harms to Applicants, it would not actually result in any significant emission reductions for years. *See* 88 Fed. Reg.

at 36,785-86, Table VI.B.4.c-1. Nor will a stay interfere with projected future declines in nationwide ozone levels due to existing, robust ozone controls and regulations already in place.

Second, the public interest strongly supports a stay. The significant compliance costs to electricity generators that the Federal Plan will inflict may be passed on to ratepayers, including some ratepayers who will not be able to bear additional energy costs. Brown Decl. ¶45; Alban Decl. ¶24; Purvis Decl. ¶¶24, 33, 58; Farah Decl. ¶14.

In addition, if regulated companies reduce operations or stop operating altogether, communities around the country will lose jobs and tax revenue. *See, e.g.*, Fuentes Decl. ¶¶5-7; Purvis Decl. ¶¶33, 35, 58; Farah Decl. ¶10; Brock Decl. ¶15. Because the Federal Plan will require sources to reduce their reliance on the most reliable power—like coal-fired generation—it will increase grid instability and unreliability. Fuentes Decl. ¶¶5, 8; Alban Decl. ¶¶26, 28; Purvis Decl. ¶¶25, 33, 54; Brown Decl. ¶27.

In addition, electric reliability experts and grid operators have noted reliability troubles that the Federal Plan will exacerbate. *See* PJM, Energy Transition in PJM (Feb. 24, 2023) at 7, *available at* bit.ly/3YirOCr (noting the combined result of the Federal Plan and others has "the potential to result" in "significant generation retirements" in a condensed time); North American Electric Reliability Corporation, 2023 Summer Reliability Assessment Infographic (May 2023) (noting reliability concerns), *available at* bit.ly/3qa6Jh4.

Finally, EPA's disapproval of State plans is being litigated in multiple circuits, and those courts have issued multiple stays. EPA's decision to forge ahead anyway

threatens an impossible tangle of regulatory obligations on sources, especially since the Federal Plan was designed to work with 23, not 11 States. A stay by this Court will allow orderly review of EPA's unlawful actions.

CONCLUSION

For the foregoing reasons, Applicants respectfully request an immediate stay of EPA's Federal Plan.

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Respectfully submitted,

/s/ *Mithun Mansinghani*
Michael B. Schon
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave NW
Washington, DC 20001
(512) 693-8350
mike@lkcfirm.com

Mithun Mansinghani
LEHOTSKY KELLER COHN LLP
629 W. Main St.
Oklahoma City, OK 73102
(512) 693-8350
mithun@lkcfirm.com

Counsel for National Mining Association

/s/ *Jonathan Y. Ellis*
Jonathan Y. Ellis
Counsel of Record
Allison D. Wood
Makram B. Jaber
Aaron M. Flynn
MCGUIREWOODS LLP
888 16th Street N.W., Suite 500
Black Lives Matter Plaza
Washington, DC 20006
jellis@mcguirewoods.com
awood@mcguirewoods.com
mjaber@mcguirewoods.com
aflynn@mcguirewoods.com

Counsel for America's Power, Associated Electric Cooperative, Inc., Deseret Power Electric Cooperative, the National Rural Electric Cooperative Association, Ohio Valley Electric Corporation, the Portland Cement Association, Wabash Valley Power Alliance

/s/ *David M. Flannery*
David M. Flannery
Kathy G. Beckett
Keeleigh S. Utt
STEPTOE & JOHNSON, PLLC
707 Virginia Street, East
Post Office Box 1588
Charleston, WV 25326
(304) 353-8000
Dave.Flannery@steptoe-johnson.com
Kathy.beckett@steptoe-johnson.com

Edward L. Kropp
STEPTOE & JOHNSON PLLC
PO Box 36425
Indianapolis, Indiana 46236
317-946-9882
Skipp.kropp@steptoe-johnson.com

Counsel for American Forest & Paper Association and Midwest Ozone Group