No. 23A351

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.

APPLICANTS' REPLY IN SUPPORT OF 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. N.W.
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

Edward L. Kropp
Steptoe & Johnson PLLC
PO Box 36425
Indianapolis, Indiana 46236
317-946-9882

Counsel for American Forest & Paper Association and Midwest Ozone Group

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INTRODUCTION

What EPA is attempting here is unprecedented. Never before in a rulemaking of this type has EPA encountered multiple courts of appeals telling it that the underlying legal foundations for its rule are likely unlawful and then proceeded to publish and implement it anyway. Rather than recognize that what is left of its Federal Plan bears no resemblance to the one it analyzed and took comment on, EPA has gone rogue, charging ahead despite the core assumptions undergirding the rule being seriously undermined.

A stay is necessary to preserve the status quo while this extraordinary tactic is litigated. No one disputes that the Federal Plan will cost billions of dollars that cannot be recovered. 88 Fed. Reg. 36,654, 36,852 (June 5, 2023). Those costs begin now. *Infra* 17-20. Meanwhile, there would be little to no harm to EPA, Intervenors, or the public from a stay pending judicial review. Contrary to EPA's hyperbolic claims, a stay would not leave ozone forming emissions uncontrolled. *See* EPA Resp. 4, 23. There are a whole suite of state and federal regulatory requirements in place that actively and vigorously control ozone pollution, including intrastate requirements addressing the very same national ambient air quality standards that triggered this proceeding. *Infra* 20-21. What is more, the projected ozone reductions from implementing the 23-State Plan that EPA analyzed, rather than the 11-State Plan it is now implementing, are so small that they would be considered *de minimis* even under EPA's own standards. *Infra* 21-22.

EPA's attempt to excuse its behavior on the merits is similarly unavailing. It claims that it could not have known its State plan disapprovals were likely unlawful, even though three courts of appeals stayed those disapprovals in five States *before* EPA published the Federal Plan in the Federal Register—the relevant time a rule becomes final such that it can impose legal obligations and be challenged in court. Had EPA not charged forward, it would have then had the ability to analyze and take comments on the impacts of removing the additional seven States for which the plan's legal predicate was stayed by four additional courts of appeals soon thereafter. In fact, Congress provided EPA with two years to issue a federal implementation plan following its disapproval of the State plans. 42 U.S.C. § 7410(c)(1).

EPA's procedural artifice, that no court can review the Federal Plan because no objections were raised during the comment period, is similarly flawed. Numerous commenters alerted EPA that the Federal Plan would require alteration because of the serious flaws with its very legal foundation, the unlawful State plan disapprovals. Moreover, the Clean Air Act specifically authorizes judicial review of claims "based solely on grounds arising" after the comment period and initial deadline for judicial review, 42 U.S.C. § 7607(b)(1), especially where judicial decisions alter a rule.

EPA's decision to blind itself to the reality that removing 12 States from a program that it says is designed to be nationally applicable and that it analyzed only as a 23-State whole is inherently inconsistent with the Administrative Procedure Act ("APA") and the Clean Air Act. To preserve the core principles of administrative law

that an agency must analyze its regulations and allow the public an opportunity for comment, and to prevent irreparable harm, this Court should grant the applications.

ARGUMENT

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

There is a reasonable probability that four Justices will consider the issues raised in this case sufficiently important to grant certiorari. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). EPA and Intervenors try to portray this case as a routine matter unworthy of this Court's attention. Yet even they claim that the challenged rulemaking is one of immense importance. *See* EPA Resp. 49-50; Pub. Int. Resp. 31-34; NY Resp. 14-15; *see also* Appl. 13.

Moreover, this case is about far more than "highly complex and technical facts." EPA Resp. 41. It poses an important question of administrative law: whether an agency may publish and implement a rule despite a core legal basis of the rule being fundamentally unsound, as confirmed by "judicial decisions that significantly 'changed the legal landscape'" of the rule. *Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 646 (D.C. Cir. 2019) (quoting *Honeywell International, Inc. v. EPA*, 705 F.3d 470, 473 (D.C. Cir. 2013) (Kavanaugh, J.)). This Court often grants certiorari in cases like this that present important questions of administrative law, even those that arise in mundane circumstances. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452 (1997) (supplying an important administrative law principle regarding deference to agency interpretations in the context of an overtime pay dispute between police officers and

the City of St. Louis). Certiorari is hardly limited to questions of statutory interpretation, as EPA suggests. *See* EPA Resp. 42.

Here, States and the regulated community should not be forced to comply with a rule where EPA ignored that several courts of appeals found the rule likely rests on an unlawful foundation and where the rule is a shell of the form EPA proposed and analyzed. Administrative agencies cannot disregard their obligations to provide a reasoned analysis of the regulation at hand and to provide an opportunity for notice and comment on the rule that the agency is actually implementing. Because this case warrants this Court's review and because Applicants are likely to succeed on the merits, a stay is warranted to prevent irreparable harm.

A. EPA failed to provide an opportunity for comment on the 11-State plan it is actually implementing and failed to consider the likely unlawfulness of the State plan disapprovals when it published the Federal Plan.

EPA does not dispute that it never took comment on or analyzed the 11-State version of the plan it is now implementing or that it never analyzed the important question of what effect removing one or more of the 23 States from the Federal Plan would be if the States' comments were correct. *See* Appl. 18-20. And it cannot deny that every court to examine the issue has now confirmed what commenters warned: that the State plan disapprovals are, in fact, likely unlawful. Instead, EPA attempts several inartful dodges to salvage its rule.

EPA starts by sidestepping the reality that several courts of appeals had already found EPA's State plan disapprovals were likely unlawful (starting in early May) *before* publication of the Federal Plan in the Federal Register (on June 5, 2023).

See Appl. 19. Instead, EPA claims its rule was final when it issued a press release revealing the pre-publication version of the Federal Plan on March 15, 2023, arguing this makes the later-issued court stays irrelevant. EPA Resp. 14, 20, 26-27; *see also* NY Resp. 29. EPA provides no legal basis for that claim. To the contrary, a regulation "does not have legal effect until it is published in the Federal Register." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 106 (2d Cir. 2018); *see also Nat. Res. Def. Council v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009) ("Agencies must publish substantive rules in the Federal Register to give them effect" as "[a]n unpublished final rule … can have no legal consequences[.]"); 88 Fed. Reg. at 36,811 (acknowledging "the effective date of the rule will be 60 days after the date of the final rule's publication in the Federal Register") (emphasis omitted).

The Clean Air Act similarly contemplates that a regulation under the statute has the force of law only after it is published in the Federal Register. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (time for seeking judicial review tied to Federal Register publication). Before the Federal Plan was published in the Federal Register, the Fifth, Sixth, and Eighth Circuits had stayed the State plan disapprovals for five States. Appl. 7 & n.4. And stay motions were pending in other courts for other States. EPA did not have to move forward with finalizing the Federal Plan through publication in the Federal Register. *See* 1 C.F.R. § 18.13(a) ("A document that has been filed for public inspection with the Office of the Federal Register but not yet published, may be withdrawn from publication or corrected by the submitting agency."). By doing so without stopping to think what effect these decisions had on

the Federal Plan and its underlying analysis, EPA "entirely failed 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).

EPA and Intervenors next attempt to characterize Applicants' arguments as improper attacks on EPA's disapprovals of State plans. EPA Resp. 21; NY Resp. 25-27. Not so. No one disputes that EPA may issue a federal implementation plan only after EPA has lawfully determined that a State's plan is inadequate. *See* 42 U.S.C. § 7410(c)(1); EPA Resp. 14-15. Nor does anyone dispute that 12 States are no longer subject to the Federal Plan as a result of the stays issued by seven courts of appeals. Applicants are not challenging here the State plan disapprovals themselves. Rather, Applicants contend that, as the legal and factual predicate for the 23-State Federal Plan, the State plan disapproval's likely unlawfulness fundamentally undermines the Federal Plan's analytical rationales and justifications, and that no one was allowed to comment on this 11-State version of the Federal Plan in violation of the Clean Air Act and the APA. *See* Appl. 17-20.

EPA's principal argument is that the "record and the reasoning underlying the Rule make plain" that it can "apply the Rule to the 11 States whose plan disapprovals have not been challenged." EPA Resp. 22. EPA's reasoning presumed inclusion of all 23 States in analyzing and justifying core aspects of its Plan. Appl. 14-17; *see also* 88 Fed. Reg. at 36,671. Neither EPA nor the Intervenors point to any analysis of the Federal Plan on either a State-by-State or an 11-State basis. Indeed, EPA has characterized the Federal Plan as an "interdependent," "national-scale," "integrated,"

and "coordinated, interstate emissions control program" covering "23 states." Appl. 17 (citations omitted).

EPA acknowledges that it defined what downwind contributions are "significant" by reference to the potential "total emissions reductions" from uniform emissions controls "to reduce the States' collective contribution." EPA Resp. 7-8. EPA's methodology for setting statewide budgets "is based primarily on analysis of several alternative levels of [ozone-forming] emissions control stringency *applied uniformly across all of the linked states*," which EPA claims "serves to apportion the reduction responsibility among collectively contributing upwind states … that are collectively responsible for downwind air quality impacts." 88 Fed. Reg. at 36,719 (emphasis added). EPA "select[s] a level of control stringency" only after analyzing those *collective* "downwind air quality impacts" and assuming they are imposed on all States in the plan. *Id.* That analysis, which assumes all 23 States are in the Federal Plan, is "central to EPA's … quantification of significant contribution." *Id.*

EPA nonetheless insists that under the statute, it "*could* have promulgated 23 separate rules[.]" EPA Resp. 24-25 (emphasis added). But the Court has before it what EPA *did* do, not some counterfactual amalgam. Thus, while EPA *could* have pursued 23 completely independent State plans, EPA long ago abandoned that course. It rejected an approach where it defined the emissions amount any given State would be required to eliminate wholly independently from all other upwind States, choosing instead to formulate its Federal Plan by reference to the collective

downwind effects of imposing emissions controls on all States in the Plan at uniform costs. *See EME Homer*, 572 U.S. at 514-20.

No matter, EPA argues, because it has decreed that the Federal Plan is severable. EPA Resp. 27. EPA points to its bald statement that "this rule is severable along … state … jurisdictional lines, such that the rule can continue to be implemented as to any remaining jurisdictions." 88 Fed. Reg. at 36,693. But this conclusory statement alone does not make it so, especially where it lacks any analytical support. EPA does not—and cannot—point to any analysis of what controls would be cost-effective on a State-by-State basis, the efficacy of the trading program, or the effects on downwind air quality if even a single State was removed from the Federal Plan. *Cf.* Appl. 9-10, 14-16. Administrative law principles require something more than a baldfaced, unsupported statement. *See State Farm*, 463 U.S. at 48-49 ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner[.]") (citations omitted).

Rather, to demonstrate severability, EPA must show that it "would have adopted" the same rule had it known 12 States could not be included because their State plan disapprovals were likely unlawful. *Am. Fuel & Petrochemical Mfrs. v. EPA*, 3 F.4th 373, 384 (D.C. Cir. 2021). But despite being challenged to prove as much, Appl. 20, EPA can point to no evidence that its calculations, analyses, and budgets would have been the same had only 11 States been included.

Instead, EPA incredibly argues that Applicants failed to "specify what minimum number of States they believe the Rule must cover in order to constitute a

rational exercise of agency authority." EPA Resp. 22-23. But the problem is that *EPA* did not analyze any variation of its 23-State rule or provide the bases and rationale for imposing its 11-State plan and subject those to public comment. Those responsibilities fall squarely on EPA, and it has failed to meet them.

EPA's final argument is that it had a "statutory obligation to establish" a federal plan for the remaining 11 States. EPA Resp. 23; *see also* NY Resp. 28. Although it is true that once EPA has disapproved a State's plan it must issue a federal plan for that State, Congress gave EPA *two years* to do so. 42 U.S.C. § 7410(c)(1). Here, that means EPA has until February 2025 to issue a Federal Plan. There is no need under the statute for EPA to issue a federal plan justified by no analysis and subject to no comment in the remaining 11 States *right now*. EPA also notes that it needs to issue federal plans before certain attainment deadlines. EPA Resp. 23. But EPA was *years* late in acting on the State plans. *See* Appl. 6. Had it done so in a timely manner, the attainment deadlines would not be an issue. EPA cannot disregard its obligations under the Clean Air Act and then expect the regulated community to suffer the consequences of an unlawful rule. The same is true with regard to Intervenors' argument that EPA could not postpone the rule because of a court-ordered deadline. NY Resp. 28. EPA's agreement to an unreasonable deadline in a consent decree, *id.* at 7 n.6, cannot justify a rule that no longer makes sense and that lacks a lawful foundation.

B. Applicants' claims are procedurally proper.

Perhaps recognizing that EPA's State plan disapprovals, and the bevy of court decisions holding them likely unlawful, form a crumbling foundation on which to base the Federal Plan, EPA and Intervenors invoke a procedural gambit. They claim that Applicants' challenge to the 11-State Federal Plan being implemented is unexhausted. EPA Resp. 19-21; NY Resp. 28. That is wrong for at least three reasons.

First, with respect to the original 23-State Federal Plan, commenters *did* alert EPA with "reasonable specificity during the period for public comment," 42 U.S.C. § 7607(d)(7)(B), that the Federal Plan: (1) was fatally flawed due to EPA's unlawful disapproval of State plans; and (2) would require revision and a new round of comments on that basis. When EPA initially proposed to disapprove the State plans, commenters repeatedly warned EPA that the proposals were based on unlawful reasons and faulty analyses, and they did so again when EPA proposed its Federal Plan. *See* Appl. 6-7. Every single one of the States that have obtained stays of EPA's disapproval of their State plans warned EPA about its unlawful treatment of their plans. The Applicants here did the same. *See, e.g.,* Comment of the Midwest Ozone Group at 10-13, https://t.ly/ensMc (collecting comments from various States asserting that their plans were lawful and explaining that it was "legally necessary and appropriate that EPA revise its [proposed Federal Plan] to allow states the Clean Air Act's enumerated opportunity to respond to EPA's findings . . . before proposing a [federal plan]" and pointing out that if the States were correct that alternative

thresholds for what constitutes a "significant contribution" were acceptable, many States would be removed from the program).

Commenters further explained that moving forward despite EPA's unlawful disapproval of State plans would vitiate the analysis underpinning the rule and necessitate a new proposal. *See, e.g.*, Comments of Air Stewardship Coalition at 14, https://t.ly/vByeY (EPA's unlawful State plan disapprovals "would require [EPA] to conduct a new assessment and modeling of contribution [for public comment]"). Contrary to EPA and Intervenors' assertions, it took no speculation to understand that EPA built the Federal Plan on a faulty foundation that would require substantial revision, even without the court rulings that confirmed those concerns.[1]

Second, even if the sole basis for Applicants' arguments were the later-issued court stays (and not also the public comments that predicted those stays), the Clean Air Act specifically authorizes petitions for review based on grounds "arising after" both the comment period and the default deadline for seeking judicial review. 42 U.S.C. § 7607(b) (petitioners may pursue claims based "solely on grounds arising after" the 60-day period for judicial review if they file them "within sixty days after such grounds arise"). As then-Judge Kavanaugh explained, one quintessential ground "arising after" the comment period is a court decision that alters the rule or

[1] *See also* Comment of Mo. Dept. of Nat. Res. at 14, https://t.ly/4O1kl (instructing EPA to redo its evaluation of costs to covered facilities to address major changes to the Federal Plan); Comment of U.S. Steel at 43, https://t.ly/gFDT3 (explaining that part of the problem with EPA prematurely issuing its Federal Plan was that significant changes would require additional comment).

its bases and therefore "change[s] the legal landscape" faced by petitioners. *Honeywell International, Inc. v. EPA*, 705 F.3d 470, 473 (D.C. Cir. 2013).

Meanwhile, the provision EPA relies upon is a "non-jurisdictional exhaustion requirement" that "merely fills a narrow gap" by creating a reconsideration process for objections that solely arose during the limited period "after the close of the comment period, yet within the time specified for judicial review." *Alon Refining*, 936 F.3d at 647-48. Here, commenters objected that the State plan disapprovals forming the basis of the Federal Plan were unlawful *during* the comment period, *supra* 10-11, courts began holding that these disapprovals were likely unlawful *before* the period for judicial review began, Appl. 7 & n.4 (stays issued as to five States on May 1, 25, 26, and 31, 2023), and courts continued so holding *after* the initial time for judicial review closed, *see, e.g.*, *Alabama v. EPA*, No. 23-11173 (11th Cir. Aug. 17, 2023). *See* 88 Fed. Reg. at 36,654 (Federal Plan published on June 5, 2023, commencing the initial time for judicial review, which closed sixty days later on August 4, 2023, under 42 U.S.C. § 7607(b)).

Third, the exhaustion provision EPA cites for matters that "arose after the period for public comment," 42 U.S.C. § 7607(d)(7)(B), is inapplicable because, for the 11-State rule EPA is implementing, there was no public comment period *at all*. Both the Clean Air Act and the APA make it unlawful for EPA to implement legislative rules that have not been subject to notice and comment. *Id.* § 7607(d)(1)-(9); 5 U.S.C. §§ 553, 706. It is undisputed that the 11-State version of the rule that EPA currently is implementing was never subject to notice and comment. *See* Appl. 18-19. Neither

EPA nor the public have had an opportunity to analyze the "basis and purpose" for this new rule, its altered "factual data," its altered "methodology," or its altered "major legal interpretations and policy considerations." *See* 42 U.S.C. § 7607(d)(3). EPA's attempt to completely shield its mutant rule from review should not be countenanced.

C. 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 could move forward with only 11 States, the Federal Plan violates the Clean Air Act and this Court's precedent because it impermissibly "over-controls" emissions and arbitrarily includes non-power generating industrial sources, contrary to the statute and EPA's own analysis.

1. The Federal Rule results in impermissible over-control.

EPA designed its Federal Plan in a manner that results in unlawful over-control of power plants through its emissions budget "enhancements," in direct contravention to this Court's precedent. Appl. 21-22. EPA acknowledges these "enhancements" are designed to reduce a State's emissions budget when, for instance, a power plant shuts down. EPA Resp. 40. Thus, if EPA determined that budgeting a State 2,000 tons of emissions is sufficient to eliminate its significant downwind contributions by 2026, and afterwards a plant in that State that emits 500 of those tons shuts down, dynamic budgeting would reduce the State's emissions budget to account for the shutdown. That necessarily over-controls emissions more than necessary to ensure a State does not "contribute significantly" to another State's

ozone issues, since the original budget was designed by EPA to purportedly eliminate significant contributions. *See EME Homer*, 572 U.S. at 521-22.

EPA justifies this by saying the enhancements are meant to ensure individual sources within a State do not "idle controls." EPA Resp. 40. But the Good Neighbor Provision is not a part of the Clean Air Act concerned with ensuring individual sources are running emissions controls to the maximum extent. *Cf.* 42 U.S.C. § 7412 (authorizing EPA to set standards for new sources based on "the maximum degree of reduction" achievable). Rather it is focused on "amounts" of emissions *statewide* that "contribute significantly" to downwind issues. *Id.* § 7410(a)(2)(D)(i). Since the statewide "amounts" will be reduced below EPA's own significant contribution budget after, for example, a power plant retires, EPA's further enhancements to that budget have nothing to do with preventing significant contribution. They therefore exceed EPA's limited statutory authority.

As a rearguard, EPA claims its "analysis" confirmed that no "over-control" would occur. EPA Resp. 40. But that analysis was conducted only through "the 2026 analytic" year, and EPA refused to engage in "further overcontrol analysis" beyond 2026. 88 Fed. Reg. at 36,751. Meanwhile, enhancements like dynamic budgeting only go into effect *after* 2026, as EPA acknowledges. EPA Resp. 11. Thus, EPA's "analysis" of the 2026 budgets did not address at all, much less support, that its enhancements

do not over-control as budgets nosedive in subsequent years.[2] *See* 88 Fed. Reg. at 36,907.

2. EPA's efforts to address challenges to the merits of the Federal Plan related to other sectors of the economy are without merit.

EPA completely fails to address the concerns that have been raised about the Federal Plan's unsupported attempt to justify controls on cement kilns, the paper industry, and the steel industry. EPA Resp. at 37-39.

EPA based its inclusion of the cement industry in the Rule on a snowball of inaccuracies. EPA falsely assumed cement plants in affected States lacked any existing controls. *See* Appl. 23. This allowed EPA to artificially inflate the impact of new controls and suppress the actual costs of those controls. PCA Comments at 9 (App'x 306). EPA does not dispute it misapprehended the number of cement kilns with controls; it just claims that "[a]ny kiln whose existing control technology enables it to meet the applicable emissions limit need not change anything to comply with the Rule." EPA Resp. 37. That is beside the point. EPA's assumption that no kilns had any existing controls greatly inflated the assumed emissions benefit of requiring all kilns to install costly controls. If the analysis had been done properly, *no one* in the cement industry would be subject to this Rule at all, because the proposed additional

[2] EPA also claims that "as-applied" challenges to the Federal Plan's enhancements can be brought after 2026, EPA Resp. 41, but because the enhancements facially are designed to over-control, an as-applied challenge is not necessary. Moreover, if such a challenge is brought years from now, EPA will surely argue that the 60-day statute of limitations has expired. *See* 42 U.S.C. § 7607(b)(1).

controls would not be cost-effective—even under EPA's own definition. Had EPA relied on empirical evidence in the record, *see* Appl. 9-10, 23, rather than wrong assumptions, its own methodology would have *excluded* that industry. *See Sierra Club v. EPA*, 884 F.3d 1185, 1198 (D.C. Cir. 2018) (citing *State Farm*, 463 U.S. at 43) (finding EPA decision arbitrary and capricious where its "conclusion appears to be counter to the only empirical evidence EPA had before it").

EPA's assessment of costs for the paper industry is similarly misplaced. *See* Appl. 23-24. EPA's only response is to baldly assert that the expertise and data provided by the paper industry were merely "commenter submitted data" that EPA can disregard at its whim. EPA Resp. 38. Reasoned decision making requires more.

And EPA does not dispute that the requirement in the Federal Plan that steel industry reheat furnaces install and operate "Low NOx Burners" is not found in the proposed rule at all. *Id.* at 40. Rather, the Agency contends denying the steel industry (and the public in general) an opportunity to comment on errors in EPA's analysis and assumptions regarding that technology, Balserak Decl. ¶¶6-8, somehow provided "more flexibility." EPA Resp. at 39. That makes no sense.

For all of these reasons, Applicants are likely to succeed on the merits.

II. Petitioners Will Suffer Irreparable Harm Absent a Stay.

"[C]omplying with a regulation later held invalid 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). Worse, because of the time it takes to litigate a massive rule like this one, the result

would be a sizeable unrecoverable expenditure on unnecessary equipment and services, even if the rule is later overturned and that result is held unlawful.[3] *See* Appl. 25-27.

No one disputes compliance with the Federal Plan by 2026 requires construction of expensive controls. *See, e.g.*, EPA Resp. 44; 88 Fed. Reg. 36,768 (A "control stringency reflecting universal installation and operation of [selective catalytic reduction ("SCR")] technology at large coal-fired [power plants] … is appropriate at Step 3."). And EPA recognizes sources without such controls must immediately initiate engineering, designing, and procuring them. *See* 88 Fed. Reg. 20,036, 20,101 (Apr. 6, 2022) (companies must "begin engineering and financial planning now to be prepared to meet [EPA's] implementation timetable"); 88 Fed. Reg. at 36,755; *see also* Appl. 25-27 (citing declarations). EPA, however, seeks to minimize these expenditures as "initial design and planning" and "preliminary analysis and engineering steps." EPA Resp. 44.

As the Applicants declare, however, engineering, designing, and procuring controls of the types required by the Rule by 2026 are not small expenditures. *See, e.g.*, Appl. 25-26; Brown Decl. ¶36 (App'x 481)[4] (OVEC "will be required to spend

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[3] For instance, when this Court rejected EPA's justification for its Mercury Air Toxics Standards in *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015), EPA boasted that because of the time it took to litigate that rule "investments have been made and most plants are already well on their way to compliance." Timothy Cama & Lydia Wheeler, *Supreme Court overturns landmark EPA air pollution rule*, THE HILL, June 29, 2015, https://t.ly/hrRKK.

[4] Page 8 of the Brown Declaration, which contains paragraphs 36-43, was inadvertently out of place in the Appendix. This page can be found at page 481 of the

between $80-$100 million in the next two years."); Talley Decl. ¶¶29-31 (Even if the Rule is "overturned by the Court one year from now, initial costs would likely amount to millions of dollars in unrecoverable costs."); Zahn Decl. ¶17 ("A substantial portion of [the $1 billion] cost [of SCRs at NRG] would be required to be expended in 2023…."). EPA's declarants believe otherwise, yet provide no data, only *ipse dixit*. Unlike Applicants' declarants, however, EPA's declarants do not have first-hand knowledge of operating a power plant or an industrial facility, commissioning the engineering, design, and procurement of these types of controls, or entering into contracts with substantial cancellation clauses. Not surprisingly, seven federal courts of appeals have stayed underlying State plan disapprovals on a standard that required consideration of the irreparable harm the Federal Plan would cause. *See, e.g., Texas v. EPA*, No. 23-60069, Stay Order, Slip Op. at 22-23 (5th Cir. May 1, 2023).

Intervenors note that the controls the Federal Plan would require for power plants by 2026 have already been installed at about 66% of coal plants. *See, e.g.,* Pub. Int. Resp. 21. They do not—and cannot—claim, however, that these are inexpensive controls. And if 66% of coal plants have them already, 34% do not, and the cost of additional controls, depending on their size and the number of units to be retrofitted, is between hundreds of millions and one billion dollars. *See* Brown Decl. ¶36 (App'x 481); Zahn Decl. ¶17. Intervenors also speculate that every unit has previously evaluated these types of controls. Pub. Int. Resp. 29. There is no evidence of that, and

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Appendix. The remainder of the Brown Declaration is at pages 289-295 of the Appendix.

in any event, a preliminary economic evaluation for whether it would make sense to install SCR controls is a far cry from the detailed and costly engineering, design, and procurement of the equipment for such controls.

In short, "[b]ecause plant emission controls take several years to install," Petitioners "will have to begin installation almost immediately." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016). By the time this case comes to a final decision, sources would have had to already conduct project development, complete detailed engineering, and perform site work and mobilization, and they will have likely entered into contracts for construction with substantial cancellation fees. Brown Decl. ¶¶32-35; Balserak Decl. ¶¶7-8; Noe Decl. ¶¶10-14. These massive compliance costs would irreparably harm Applicants because they would be unnecessary without the Federal Plan and unrecoverable if the plan is vacated. App. 26-27.

EPA also suggests industries outside the power sector can avoid immediate harm simply because they have the "potential for compliance extensions of up to three additional years." EPA Resp. 43. Not so. No source that postpones installation activity while awaiting the court's decision would be eligible for an extension on that basis. *See* 88 Fed. Reg. at 36,870 ("Each request for a compliance extension shall demonstrate that the owner or operator has taken *all steps possible* to install the controls necessary for compliance….") (emphasis added). Moreover, even for eligible plants, extensions are discretionary. Alternatively, industrial sources struggling to gain timely compliance strategies are required to submit case-by-case emission limit requests by August 5, 2024. 40 C.F.R. § 52.40(e). Those sources must demonstrate

technical "impossibility or extreme economic hardship"; therefore, the industrial facility must invest in third party engineering and relevant data gathering now. *See* Appl. 26-27. So, industrial sources are required to invest millions of dollars to avoid aimlessly investing hundreds of millions in unproven EPA strategies. *See id.* at 27.

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

After attempting to downplay the immediate irreparable injuries that Applicants suffer, EPA claims that Applicant's injuries are outweighed by purported injuries to the government and the public interest. EPA Resp. 48. EPA has failed to explain, however, how its perceived harm or the public interest outweighs preserving the status quo.

First, EPA is flat out wrong to suggest that a stay would leave "emissions within [upwind States] not controlled at all during the pendency of these proceedings." EPA Resp. 23, 49. As EPA is well aware, a robust array of federal and state regulations, coupled with industry initiatives, are in place, and they have led to a 29% decrease in national average ozone concentrations from 1980 to 2022. EPA, Ozone Trends, https://t.ly/7G47K. EPA itself touts that it already has in place "numerous rulemakings pursuant to the Good Neighbor Provision," Resp. 6, and will "continue implementation of requirements addressing good neighbor obligations" for ozone, 88 Fed. Reg. at 49,300; 88 Fed. Reg. at 67,105. In addition, pollutants that contribute to ozone remain subject to in-state restrictions from state and federal requirements addressing the prior (2008) and current (2015) national ambient air quality standards for ozone, the national ambient air quality standards for nitrogen

dioxide, vehicle transportation standards, and regional haze and visibility rules. U.S. EPA, Ground Level Ozone Basics, https://t.ly/OJe0S; U.S. EPA, Rules that Help States Reduce Emissions and Meet Ozone Standards, https://t.ly/JOyIG; *see also* Ohio Application App. C, Crowder Decl. ¶46.

Second, EPA and Intervenors claim that a stay would prevent "significant benefits to the residents of downwind States." EPA Resp. 48-49; NY Resp. 14 (characterizing the harm to downwind States from a stay as "severe"). That is belied by EPA's own rulemaking record. EPA has long maintained that contributions less than one percent of the applicable national ambient air quality standard are "*de minimis*." *EME Homer*, 572 U.S. at 499. For the ozone national ambient air quality standards, which are set at 70 parts per billion ("ppb"), one percent is 0.70 ppb. Here, EPA's own data show that if *all* 23 States were included in the Federal Plan, the average benefit at downwind locations would be a mere 0.06 ppb reduction in 2023 and a 0.66 ppb reduction by 2026. 88 Fed. Reg. at 36,742-43, 36,747-48. Thus, while Intervenors allege harms in 2023 in places like Cook County, Illinois, and Fairfield County, Connecticut,[5] NY Resp. 19; Env. Resp. 34, the data show that the air quality improvements in those areas in 2023 from a 23-State Federal Plan's controls is tiny: between 0.02 ppb and 0.10 ppb, 88 Fed. Reg. at 36,743. And over 75% of the purported benefits of even these minuscule air quality improvements are no longer in place

[5] With regard to Fairfield, Connecticut, none of the Intervenors, including New York, acknowledge the observation by the D.C. Circuit that a "significant share" of the ozone impacting Fairfield, Connecticut is from one state alone—New York. *Wisconsin v. EPA*, 938 F.3d 303, 317 (D.C. Cir. 2019).

because the Federal Plan has been stayed in 12 States, Appl. 11, rendering irrelevant these benefits and those touted in the Intervenors' response, NY Resp. 16. Any way you slice it, that is categorically *de minimis*.

Third, EPA's urgency to meet statutory deadlines is concocted. While it is true that EPA *may* develop a federal plan any time after it disapproves a State plan, *EME Homer*, 572 U.S. at 509, the Clean Air Act gives EPA up to two years to do so, 42 U.S.C. § 7410(c)(1). Thus, because EPA issued its final State plan disapprovals in February 2023, it has until February 2025 to issue a federal plan. It has plenty of time to craft a federal plan that actually analyzes emissions sources, costs, controls, and amounts of emissions in any States for which it has *validly* disapproved State plans within the statutory deadline. Moreover, had EPA not missed its deadlines to approve or disapprove State plans by years, none of its purported concerns about future attainment deadlines would exist. *See* Appl. 6, 27; *contra* EPA Resp. 49-50. EPA should not be heard to complain that its own delay betrays the public interest in preventing irreparable harm from its own unlawful actions.

CONCLUSION

For the foregoing reasons, Applicants respectfully request an immediate stay of EPA's Federal Plan.[6]

[6] EPA also claims that Applicants' arguments challenge only particular aspects of the Federal Plan, such that the whole plan should not be stayed. EPA Resp. 50-51. But Applicants' contention—that the core bases for the 23-State plan are likely unlawful—relates to the *entire* rule. Unsurprisingly, Judge Walker in dissent stated he would have stayed the Federal Plan—not just part of it. In any event, at a minimum, this Court should stay the Federal Plan as to the industries seeking a

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Respectfully submitted,

/s/ *Mithun Mansinghani*
Michael B. Schon
LEHOTSKY KELLER COHN LLP
200 Massachusetts Ave. N.W.
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

/s/ *Jonathan Y. Ellis*
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
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

/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

Edward L. Kropp
STEPTOE & JOHNSON PLLC
PO Box 36425
Indianapolis, Indiana 46236
317-946-9882

Counsel for American Forest & Paper Association and Midwest Ozone Group

stay—power (electric generating units), cement, paper, steel, and pipelines—and as to all industries in the States seeking stays—Ohio, Indiana, and West Virginia.