Case No. _____

In the Supreme Court of the United States

UNITED STATES STEEL CORPORATION,

Applicant,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, ADMINISTRATOR,

Respondents.

On Application for Stay to the Honorable John G. Roberts, Jr., Chief Justice and Circuit Justice for the District of Columbia Circuit

EMERGENCY APPLICATION FOR STAY OF FINAL AGENCY ACTION PENDING JUDICIAL REVIEW

October 26, 2023

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PARTIES TO THE PROCEEDINGS BELOW

The proceeding below is *United States Steel Corporation v. EPA, et al.*, Case No. 23-1207 (D.C. Cir.). The petitioner is United States Steel Corporation. The respondents are the United States Environmental Protection Agency and Michael S. Regan, U.S. EPA Administrator.

This case has been consolidated with the following D.C. Circuit cases under lead case 23-1157:

No. 23-1157, *Utah v. EPA*

> Petitioners: State of Utah, by and through its Governor, Spencer J. Cox, and its Attorney General, Sean D. Reyes
>
> Respondents: United States Environmental Protection Agency; Michael S. Regan, Administrator, U.S. EPA
>
> Intervenors: 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

No. 23-1181, *Kinder Morgan v. EPA*

> Petitioner: Kinder Morgan, Inc.
>
> Respondents: United States Environmental Protection Agency; Michael S. Regan, Administrator, U.S. EPA
>
> Intervenors: 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;

No. 23-1183, *Ohio v. EPA*

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

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

Intervenors: 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

No. 23-1190, *Am. Forest & Paper Assoc. v. EPA*

Petitioner: American Forest & Paper Association

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

Intervenors: 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

No. 23-1191, *Midwest Ozone Group v. EPA*

Petitioner: Midwest Ozone Group

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

No. 23-1193, *Interstate Natural Gas Assoc. of Am. v. EPA*

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

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

No. 23-1195, *Assoc. Electric Coop., 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: United States Environmental Protection Agency; Michael S. Regan, Administrator, U.S. EPA

No. 23-1199, *Nat'l Mining Assoc'n. v. EPA*

Petitioner: National Mining Association

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

No. 23-1200, *AISI v. EPA*

Petitioner: American Iron and Steel Institute

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

No. 23-1201, *Wisconsin v. EPA*

Petitioner: State of Wisconsin

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

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

No. 23-1202, *Enbridge (U.S.) Inc. v. EPA*

Petitioner: Enbridge (U.S.) Inc.

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

No. 23-1203, *Am. Chem. Council v. EPA*

Petitioners: American Chemistry Council; American Fuel & Petrochemical Manufacturers

Respondents: United States Environmental Protection Agency

No. 23-1205, *TransCanada Pipeline USA Ltd. v. EPA*

Petitioner: TransCanada Pipeline USA Ltd.

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

No. 23-1206, *Hybar LLC v. EPA*

Petitioner: Hybar LLC

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

No. 23-1208, *Union Elec. Co. v. EPA*

Petitioner: Union Electric Company, d/b/a Ameren Missouri

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

No. 23-1209, *Nevada v. EPA*

Petitioner: State of Nevada

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

No. 23-1211, *Arkansas League of Good Neighbors v. EPA*

Petitioner: Arkansas League of Good Neighbors

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

Petitions challenging the same final rule have also been filed in the following Circuit Courts:

Fifth Circuit

No. 23-60300, *Texas v. EPA*

Petitioners:

State of Texas; Texas Commission on Environmental Quality; Public Utility Commission of Texas; Railroad Commission of Texas; Association of Electric Companies of Texas; BCCA Appeal Group; Texas Chemical Council; Texas Oil & Gas Association; Luminant Generation Co., LLC; Coleto Creek Power, LLC; Ennis Power Co., LLC; Hays Energy, LLC; Midlothian Energy, LLC; Oak Grove Management Company, LLC; Wise County Power Company, LLC; State of Louisiana; Louisiana Department of Environmental Quality; State of Mississippi; Mississippi Department of Environmental Quality; Mississippi Power Company; Texas Lehigh Cement Company; Louisiana Public Service Commission; Energy Transfer, LP; Entergy Louisiana, LLC; Cleco Corporate Holdings, LLC; Louisiana Energy & Power Authority; Lafayette Consolidated Government / Lafayette Utilities System; NACCO Natural Resources Corporation; Mississippi Lignite Mining Company; Louisiana Chemical Association; Louisiana Mid-Continent Oil and Gas Association; Kinder Morgan, Inc.

Respondents:

United States Environmental Protection Agency; Michael S. Regan, Administrator, U.S. EPA

Intervenors:

Air Alliance Houston; Clean Wisconsin; Downwinders at Risk; Louisiana Environmental Action Network; Sierra Club

Sixth Circuit

No. 23-3605, *Kentucky Energy & Envt. Cabinet v. EPA*

Petitioner: Kentucky Energy and Environment Cabinet

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

No. 23-3624, *Kentucky v. EPA*

Petitioner: Commonwealth of Kentucky

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

No. 23-3641, *Energy Transfer LP v. EPA*

Petitioner: Energy Transfer LP

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

No. 23-3647, *Buckeye Power, Inc. v. EPA*

Petitioners: Buckeye Power, Inc.; Ohio Valley Electric Corporation

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

Seventh Circuit

No. 23-2510, *Energy Transfer LP v. EPA*

Petitioner: Energy Transfer LP

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

No. 23-2511, *Energy Transfer LP v. EPA*

Petitioner: Energy Transfer LP

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

Eighth Circuit

No. 23-2769, *Arkansas v. EPA*

Petitioners: State of Arkansas; Arkansas Department of Energy and the Environment, Division of Environmental Quality

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

No. 23-2771, *Missouri v. EPA*

Petitioner: State of Missouri

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

No. 23-2773, *Energy Transfer LP v. EPA*

Petitioner: Energy Transfer LP

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

No. 23-2774, *Energy Transfer LP v. EPA*

Petitioner: Energy Transfer LP

Respondent: United States Environmental Protection Agency

Ninth Circuit

No. 23-1098, *Nevada Cement Co. v. EPA*

Petitioner: Nevada Cement Company

Respondent: United States Environmental Protection Agency

Tenth Circuit

No. 23-9551, *Tulsa Cement, LLC v. EPA*

Petitioner: Tulsa Cement LLC, d/b/a Central Plains Cement Company, LLC

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

No. 23-9557, *PacfiCorp v. EPA*

Petitioners: PacifiCorp; Deseret Generation & Transmission Cooperative; Utah Municipal Power Agency; Utah Associated Municipal Power Systems

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

No. 23-9561, *Oklahoma v. EPA*

Petitioners: State of Oklahoma; Oklahoma Department of Environmental Quality

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

No. 23-9569, *Energy Transfer LP v. EPA*

Petitioners: Energy Transfer LP

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

Eleventh Circuit

No. 23-12528, *Alabama v. EPA*

Petitioners: State of Alabama; Attorney General, State of Alabama; Alabama Department of Environmental Management

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

No. 23-12531, *Alabama Power Co. v. EPA*

Petitioners: Alabama Power Company, Powersouth Energy Cooperative

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

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Applicant United States Steel Corporation states:

United States Steel Corporation is organized under the laws of Delaware and its corporate headquarters are located at 600 Grant Street, Pittsburgh, PA 15219.

United States Steel Corporation produces iron and steel products for the automotive, construction, appliance, energy, containers, and packaging industries.

United States Steel Corporation is a publicly held company that has no parent corporation and that no publicly held company owns 10% or more of U. S. Steel's stock.

Dated: October 26, 2023

Respectfully submitted,

/s/ John D. Lazzaretti
John D. Lazzaretti

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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:

Applicant United States Steel Corporation ("U. S. Steel") respectfully requests a stay of the United States Environmental Protection Agency's ("EPA's") final rule: Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654, App.1 (June 5, 2023) ("Plan") as it applies to reheat furnaces (40 CFR 52.43) and boilers at iron and steel mills (40 CFR 52.45).

U. S. Steel moved for a stay pending judicial review in the United States Court of Appeals for the District of Columbia Circuit, which was denied on October 11, 2023. App.266. Previously, the D.C. Circuit denied motions to stay the Plan filed by petitioners in other cases that have been consolidated with U. S. Steel's case. *See* App.268. Three applications for stay of the Plan were submitted to this Court following that prior order. *See Ohio, et al. v. EPA*, Case No. 23A349, App.291 ("Ohio Application"); *Kinder Morgan, Inc., et al. v. EPA*, Case No. 23A350, App.327 ("Kinder Morgan Application"); *American Forest & Paper Assoc., et al. v. EPA*, Case No. 23A351, App.366 ("AF&P Application").[1] Responses to these applications have been requested by October 30, 2023.

[1] For ease of use, the appendices to these applications are not included in the Appendix unless directly cited in this Application.

U. S. Steel agrees with and incorporates by reference these other applications for stay and submits its own application to raise additional grounds for stay particular to U. S. Steel and that further support stay of the iron and steel provisions in the Plan.

INTRODUCTION

This case arises from EPA's attempt to take over the States' role as the primary regulator of interstate transport of pollutants that contribute to ozone by simultaneously disapproving the States' plans and imposing the Agency's own comprehensive Plan for 23 "upwind" States. As other applicants have raised, the Plan is legally and factually unsound and likely to be vacated in its entirety. It was built on the premise that EPA could impose the Plan on every State that contributes significantly to downwind ozone concentrations. This was a foundation of sand that has now washed away. Seven Circuit Courts have stayed EPA's disapprovals of the state implementation plans for 12 States—a statutory prerequisite for EPA to promulgate the Plan for those States. In recognition, EPA has issued two interim final rules staying the Plan in these States. Yet while EPA has itself stayed the Plan in more than half the States to which it was designed to apply, EPA insists on maintaining its edifice on the backs of the remaining 11 States. The result is an inconsistent and inequitable patchwork of regulations that finds no support in the administrative record. Even as originally intended, the Plan was unsound and

likely to be vacated because it improperly usurped the States' primary authority to regulate interstate transport of ozone in violation of fundamental cooperative federalism principles embodied in the Clean Air Act. In addition, EPA acted arbitrarily and capriciously when it included iron and steel requirements in the Plan for which EPA lacked a factual foundation and that violate basic requirements of the Clean Air Act.

While the entire Plan is likely to be vacated, the legal and factual infirmities in the iron and steel regulations are particularly stark. The very inclusion of iron and steel in the Plan was due to EPA grossly overstating the industry's emissions and purported impact on downwind states. Furthermore, in the Plan, EPA vastly overcounts the emissions reductions that could be achieved from this industry when it initially "screened" for sources to regulate. EPA has acknowledged the errors in its screening assessment but never corrected them. The result is a Plan that arbitrarily and capriciously regulates iron and steel without a factual basis for doing so. EPA then ran into similar problems in developing emission regulations for iron and steel. Due to fundamental misunderstandings of the emissions control technologies that could apply, EPA proposed emission limitations that could not be supported by the record. Again, EPA acknowledged these flaws in finalizing the Plan, but rather than withdraw all of the standards that it could not support, EPA attempted a workaround for two sources, reheat furnaces and boilers, by

promulgating part of the emission limitations now, with the rest to be filled in later—by Agency fiat and not through notice-and-comment rulemaking—as it obtains new information. This is both arbitrary and capricious and a violation of the plain language of the Clean Air Act.

The result is a rule that imposes millions of dollars in preparation and compliance costs on U. S. Steel, which it now incurs and continues to incur, to prepare for rule that is likely never to be vacated after judicial review. On the other side of the equation, a stay pending judicial review, particularly of the iron and steel requirements, will have no appreciable impact on the environment of public welfare. While costs are being incurred now to implement the Plan, emission reductions from iron and steel do not occur under the Plan until 2026, at the earliest. A stay of the Plan pending judicial review is therefore justified.

INTEREST OF THE APPLICANT

United States Steel Corporation produces iron and steel products for the automotive, construction, appliance, energy, containers, and packaging industries. It is directly regulated by the Plan and, absent a stay will be required to incur millions in engineering and compliance costs while the Plan is pending judicial review. U. S. Steel will not be able to recover these costs following a favorable ruling, nor will it be able to seek remedy for the competitive disadvantages, lost

production capacity, and additional permitting burdens U. S. Steel will be forced to incur while judicial review is pending.

OPINION BELOW

On October 13, 2023, the D.C. Circuit issued an Order denying U. S. Steel's motion for stay. App.266.

JURISDICTION

The D.C. Circuit's judgment with respect to the Rule will be subject to review by this Court under 28 U.S.C. § 1254(1). The Court therefore has jurisdiction to entertain and grant a request for a stay pending review under 28 U.S.C. § 2101(f). The Court also has authority to issue a stay pursuant to 5 U.S.C. § 705, as well as under 28 U.S.C. § 1651(a) and U.S. Supreme Court Rule 23. *See, e.g., Murray Energy Corp. v. EPA*, 577 U.S. 1127 (2016) (staying EPA's Clean Power Plan while a petition for judicial review was pending in the D.C. Circuit); *Nken v. Mukasey*, 555 U.S. 1042 (2008) (staying agency action while petition for review was pending before the Fourth Circuit).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are provided in the included Appendix. Since other stay applications have summarized the applicable

statutory and regulatory provisions,[2] U. S. Steel provides only a short summary below of the elements most significant to its stay application.

I. The Clean Air Act Gives States the Primary Role in Regulating Interstate Transport of Ozone.

Cooperative federalism is a "core principle" of the Clean Air Act. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 511, n.14 (2014). For the National Ambient Air Quality Standards ("NAAQS") program, this principle is embodied in a basic division of labor: while EPA sets ambient air quality standards for pollutants like ozone, states have the "primary responsibility" for assuring compliance in "the entire geographic area comprising such State." 42 U.S.C. §7407(a). This includes assuring compliance with the so-called "Good Neighbor" requirement in the Act that prohibits "any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard…." 42 U.S.C. §7410(a)(2)(D).

States set out their approach to compliance with the NAAQS requirements, including the Good Neighbor requirements, in a state implementation plan ("SIP"). 42 U.S.C. §7410(a)(1). EPA has a role in reviewing SIPs, but it is limited. EPA

[2] Ohio Application at 2-13, App.299-310; Kinder Morgan Application at 4-9, App.339-344; AF&P Application at 1-4, App.384-387.

first has 12 months to review the SIP for completeness, then one year to determine whether it meets the requirements of the Clean Air Act. 42 U.S.C. §7410(k)(2) and (3). These "ministerial" reviews are not for EPA to substitute its judgment for the State's. *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) (quotations omitted). EPA looks only to whether the SIP is "reasonably moored to the Act's provisions" and "based on a reasoned analysis." *Alaska Dept. of Envt'l. Conserv. v. EPA*, 540 U.S. 461, 485 and 490 (2004) (quotations omitted). If it is, EPA must approve it. *Id*. at §7410(k)(3). Only if a SIP is incomplete or does not meet the Act's requirements can EPA impose its own regulations in a State through a federal implementation plan ("FIP"). *Id*. at §7410(c)(1). EPA has two years to do this, during which the State can still correct deficiencies in its SIP and bar EPA from promulgating a FIP. *Id*.

II. When EPA Promulgates a FIP, It Must Comply with the Clean Air Act.

The Clean Air Act subjects "the promulgation or revision" of a FIP to the rulemaking requirements of 42 U.S.C. § 7607(d). 42 U.S.C. § 7607(d)(1)(B). These include establishing a public docket of the factual data and methods on which the FIP is based and the major legal interpretations and policy considerations underlying the proposed FIP; opportunity for public comment; and a prohibition against promulgating any requirement "based (in part or whole) on

any information or data which has not been placed in the docket as of the date of such promulgation." *Id.* at § 7607(d)(3).

Further, in determining emission limitations, EPA's discretion is bounded by the same substantive requirements of the Clean Air Act as the State would have been. For example, to comply with the Good Neighbor requirements, EPA cannot "require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State to which it is linked." *EME Homer*, 572 U.S. at 521-22. To do so would go beyond the statutory authority of the Good Neighbor requirements and constitutes "unlawful over-control." *Id.* at 522.

III. EPA Disapproved 23 SIPs *en masse* in a Rush to Promulgate the Plan.

On October 1, 2015, EPA promulgated revised NAAQS for ozone. 80 Fed. Reg. 65,292 (Oct. 26, 2015). States were thus obligated to submit SIP revisions to EPA by October 1, 2018. *See* 42 U.S.C. §7410(a)(1). Many states did so, but while they were found complete, EPA took no further action for years.

While EPA was holding these SIPs in stasis, it developed its own Plan and, in early 2022, proposed to disapprove 23 State SIPs[3] and its own "nationwide"

[3] 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); 87 Fed. Reg. 31,443 (May 24, 2022) (California); 87 Fed. Reg. 31,485

Plan in quick succession. 87 Fed. Reg. 20,036, 20,073 (Apr. 6, 2022). Many commenters, including U. S. Steel warned EPA that its action was unlawful. *See, e.g.* 88 Fed. Reg. at 36,672; U. S. Steel Comments, at 111-113, App.528-530.[4] Despite these warnings, EPA finalized both actions in early 2023. 88 Fed. Reg. 9,336 (Feb. 13, 2023) ("SIP Disapproval"); 88 Fed. Reg. at 36,654 (published June 5, 2023 but signed March 15, 2023).

IV. EPA's Struggles to Understand and Rationally Regulate Iron and Steel.

EPA's rush to finalize the Plan for iron and steel created significant problems. When EPA proposed the Plan, it never reached out to the industry, and had instead assembled little information on the emissions control technologies available to the industry. As a result, when it conducted the first step in its assessment, a "Screening Assessment"[5] to identify which industries to subject to regulation, EPA vastly overestimated the emissions and emissions reduction potential of numerous operations later found to have no emissions reduction potential. *See* 88 Fed. Reg. at 36,827 and 36,833. This was a critical error, since the purpose of the Screening Assessment was to identify industries with potentially

(May 24, 2022) (Nevada); 87 Fed. Reg. 31,470 (May 24, 2022) (Utah); 87 Fed. Reg. 31,495 (May 24, 2022) (Wyoming).

[4] For ease of use, exhibits to U. S. Steel's comments are not included in the Appendix.

[5] Screening Assessment of Potential Emission Reductions, Air Quality Impacts, and Costs from Non-EGU Emissions Units for 2026, App. 532 (Feb. 28, 2022).

significant emissions and then screen out those industries that lacked significant emissions reduction potential. Screening Assessment at 2, App.533. Yet while EPA acknowledged the inaccuracy of its assessment of the iron and steel industry in the Plan, its solution was simply to remove those emission units that it had miscounted from regulation in the final Plan. 88 Fed. Reg. at 36,827. EPA never corrected its Screening Assessment to establish whether iron and steel met the criteria for regulation in the first place. *See* Response to Comments ("RTC"), at 128, App.570 (declining to revisit the Screening Assessment).

EPA's lack of adequate technical information also plagued the Agency's efforts to set emission limitations for iron and steel in the Plan. The Plan attempts to establish emission limitations for two sources at iron and steel facilities: reheat furnaces and boilers. But here too, EPA lacked sufficient information to establish emission limitations for all units. Rather than omit these emission units from the Plan, however, EPA has attempted workarounds for its lack of record support.

For reheat furnaces, rather than promulgate any emission limitations at all, the Plan promulgates a process to establish *future* emission limitations while avoiding notice-and-comment rulemaking on the final requirements. 88 Fed. Reg. at 36,879, 40 CFR 52.43(d)(3). Specifically, iron and steel facilities are to install costly pollution controls designed to reduce emissions by "at least 40%" from a baseline rate (which is itself to be established in the future), and then use a "test-

and-set" approach (which is also to be established in the future) to support a final emission limit, which EPA will set by electronic notice. *Id*. at 36,818 and -28. This entire process was developed without opportunity for public comment and provides no criteria to cabin the arbitrary exercise of the Administrator's final decision-making authority, nor does it include any process to challenge the Administrator's final decision.

For boilers, EPA proposed to regulate units that exceeded an annual emissions threshold. 87 Fed. Reg. at 20,145. In the final Plan, EPA, without notice or explanation, changed to a "design capacity" standard that EPA acknowledges "captured more units than the EPA intended." 88 Fed. Reg. at 36,819. This resulted in the inclusion of many boilers that do not operate near their design capacity, have little emissions impact, and have technical aspects that render EPA's chosen pollution control technologies infeasible or cost prohibitive. EPA added exemptions to the Plan, which were also not subject to notice and comment, in an apparent attempt to remove boilers for which EPA lacked the technical grounds to regulate, *see id.* at 36,833, but these exemptions do not address many of the unsuspected, newly regulated boilers, leaving many boilers still subject to the Plan without a valid technical basis for their inclusion.

PROCEDURAL POSTURE

Numerous petitioners have challenged both EPA's disapprovals of individual SIPs and the Plan. To date, seven Circuits have stayed EPA's SIP Disapproval for 12 States.[6] An additional motion for stay is pending.[7] Since SIP disapproval is a prerequisite for EPA to promulgate its Plan, *see* 42 U.S.C. §7410(c)(1), EPA has recognized it must stay the Rule for States in which its SIP Disapproval is stayed, and has promulgated two interim final rules staying the Plan for these 12 States.[8] For the remaining States subject to the Rule, EPA has taken no action, and appears set on applying the Rule as promulgated.

U. S. Steel petitioned for reconsideration and stay of the Plan on August 4, 2023. App.571. EPA acknowledged receipt on August 14, 2023, but has not otherwise responded to U. S. Steel's petition.

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[6] Unpublished Order, *Texas v. EPA*, No. 23-60069, ECF 269-1 (5th Cir. May 1, 2023); Order, *Arkansas v. EPA*, No. 23-1320, ECF 5280996 (8th Cir. May 25, 2023); Order, *Missouri v. EPA*, No. 23-1719, ECF 5281126 (8th Cir. May 26, 2023); Unpublished Order, *Texas v. EPA*, No. 23-60069, ECF 359-2 (5th Cir. June 8, 2023); *Nevada Cement Co. v. EPA*, No. 23-682, ECF 27.1 (9th Cir. July 3, 2023); Order, *ALLETE, Inc. v. EPA*, No. 23-1776 (8th Cir. July 5, 2023); Order, *Kentucky v. EPA*, No. 23-3216, ECF 39-2 (6th Cir. July 25, 2023); Order, *Utah v. EPA*, No. 23-9509, ECF 010110895101 (10th Cir. July 27, 2023); Interim Stay Order, *West Virginia v. EPA*, No. 23-01418, ECF 39 (4th Cir. Aug. 10, 2023); Order, *Alabama v. EPA*, No. 23-11173 (11th Cir. Aug. 17, 2023).

[7] *See Ohio v. EPA*, Case No. 23-1183 (D.C. Cir).

[8] *See* 88 Fed. Reg. 49,295 (July 31, 2023); 88 Fed. Reg. 67,102 (Sept. 9, 2023).

At the same time, cases have been filed challenging the Plan in several Circuits. *See* Parties to the Proceedings Below, *supra.* U. S. Steel's challenge has been consolidated with others filed in the D.C. Circuit. *Id.* Several petitioners moved for stay of the Plan, including U. S. Steel. In late September, a divided panel for the D.C. Circuit Court of Appeals denied several consolidated motions for stay without opinion, App.268, and on October 11, 2023, a panel of the D.C. Circuit denied U. S. Steel's motion for stay. App.266.

STANDARD OF REVIEW

A stay pending judicial review is an exercise of judicial discretion guided by four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotations omitted). When the government is the opposing party, however, the third and fourth factors merge. *Id.* at 435.

Similarly, in issuing a stay pending a petition for *certiorari*, the Court looks to whether 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 will vote to reverse the judgment below; and (3) a likelihood

that irreparable harm will result from the denial of 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 v. Perry*, 558 U.S. 183, 190 (2010).

REASONS TO GRANT THE APPLICATION

I. U. S. Steel is Likely to Prevail on the Merits.

Because the Plan is legally, technically, factually, and procedurally flawed, U. S. Steel is likely to prevail on the merits below and, if not, there is a reasonably probability that four Justices will grant *certiorari* and a fair prospect that a majority of the Court will reverse a judgment upholding EPA's Plan.

A. EPA Lacked Authority for the Plan and Cannot Sustain What is Left.

EPA cannot sustain a rule that is based on a false premise. *Motor Vehicle Mfrs. Assn. of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (arbitrary and capricious if the agency offers "an explanation for its decision that runs counter to the evidence"). When EPA promulgated the Plan, it assumed it had authority to regulate 23 States—virtually every state with a potentially significant contribution to downwind nonattainment of the 2015 ozone NAAQS. 88 Fed. Reg. at 36,654. EPA itself asserted that application of the Plan "across all jurisdictions" was "vital" to "efficien[cy] and equit[y]." 88 Fed. Reg. at 36,691 (quotations omitted). While the Rule was never efficient or equitable for

iron and steel facilities, EPA cannot now apply the Plan in 12 States, undermining even the Agency's own attempts to justify the Plan.

As EPA notes, for example, this uniformity was vital to avoiding a free rider problem arising from shifting production (and associated emissions) from States subject to the Plan to other upwind States. *Id.* at 36,680 ("Upwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution. They will have to reduce their emissions by installing devices of the kind in which neighboring States have already invested.").

Seven Circuits have now stayed EPA's disapproval of the SIPs for 12 States, in turn depriving EPA of the statutory authority to promulgate any FIP, including the Plan, for these States. 42 U.S.C. § 7410(c)(1). Having built the Plan on the assumption that it would uniformly regulate 23 upwind States, and indeed hitched the very equity and viability of the Plan to this requirement, EPA cannot defend continued application in only 11 States.

Even if EPA could justify a narrower federal plan for 11 States, it has not done so on the current record, or addressed how it would avoid the very free-rider problems EPA claimed to be addressing in the Plan. EPA also cannot make up the deficient record in litigation, under either the Clean Air Act or general principles of administrative law. 42 U.S.C. § 7607(d)(6)(C); *State Farm*, 463 U.S. at 50 ("the

courts may not accept appellate counsel's post hoc rationalizations for agency action"). Since EPA cannot defend the Plan on the current record, U. S. Steel is likely to prevail on the merits.

B. The Rule Violates the Clean Air Act and Cooperative Federalism.

EPA must follow both the text of the Clean Air Act and interpret its obligations "with a view to their place in the overall statutory scheme." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 322 (2014) (quotation omitted). EPA violated both of these obligations when it delayed its statutory duty to approve state plans to develop a superseding federal plan, and then rushed out its SIP Disapproval and Plan before the States could timely address them.

The Clean Air Act is "an experiment in cooperative federalism." *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). EPA sets the NAAQS, but the States are given "primary responsibility" for ensuring emissions within the State comply with them. 42 U.S.C. § 7407(a). The majority of States subject to the Plan submitted state plans that met the applicable statutory requirements. EPA was required to approve them. *Id.* at § 7410(k)(3). Instead, it delayed for years until it had produced new modeling it contended undermined the States' analyses. But failure to timely act on a state plan does not empower EPA to disregard its statutory obligations, let alone permit EPA to move the goalposts on the States after the fact, or require them to address new modeling that was not mandated by

the Clean Air Act. *See Wyoming v. EPA*, 78 F.4th 1171, 1181 (10th Cir. 2023) (approving a state plan only if it followed nonbinding guidelines would "effectively re-write the Act"). In doing so, EPA improperly extended its statutory authority to States that had properly submitted a state plan.

EPA then compounded its error by rushing to simultaneously disapprove the State plans and promulgate its own Plan. The Clean Air Act sets no minimum time EPA must wait after disapproving a SIP before it can issue a FIP, but Congress clearly intended cooperative federalism to apply during this time. It expressly gives States the ability to correct deficiencies and, if timely corrected, prevent EPA from promulgating a FIP. 42 U.S.C. §7410(c)(1)(B). By simultaneously promulgating both, EPA cut off any meaningful opportunity for States to address EPA's concerns through amended state plans, or even to obtain judicial review of EPA's decision before becoming subject to a FIP.

EPA attempts to justify its conduct by citing the Court's statement in *EME Homer* that "EPA is not obliged to wait two years or postpone its action even a single day" after EPA disapproves a state plan because "[t]he Act empowers the Agency to promulgate a FIP 'at any time' within the two-year limit." *EME Homer*, 572 U.S. at 509. But the Court's ruling was based on the D.C. Circuit's attempt to create "an exception to the Act's precise deadlines," which would rewrite "a decades-old statute whose plain text and structure establish a clean

chronology of federal and State responsibilities." *Id.* (quotation omitted). The Court did not sanction the gamesmanship EPA employed here. Nor did the Court sanction EPA promulgating a federal plan *before* properly disapproving the State's plan, which is itself barred by the "plain text and structure" of the same "decades-old statute." *See* 42 U.S.C. § 7410(c)(1). EPA's misuse of the Court's precedent to turn the cooperative federalism of the Clean Air Act on its head is another reason why U. S. Steel is likely to prevail on the merits.

C. EPA Did Not Support the Regulation of Iron and Steel Mills.

EPA is obligated to avoid over-control (imposing more obligations on upwind States than necessary to meet the requirements of the Clean Air Act). *EME Homer*, 572 U.S. at 523. Thus, the Plan does not regulate every source in each applicable State. Instead, EPA focused on "the most impactful industries and emissions units." 88 Fed. Reg. at 36,682. This was done by first identifying industries that had "the most emissions reductions" that could be achieved at a marginal cost threshold. Screening Assessment at 2, App.533. "[W]ell-controlled sources" were expressly "excluded from consideration" at this stage. *Id*. at 3, App.534.

For iron and steel, EPA assumed, incorrectly, that emissions from numerous sources, including co-fired boilers, blast furnaces, and basic oxygen furnaces among others, had "potentially controllable emissions." *See id*. at 17, Table 6,

App.548. This led EPA to conclude iron and steel should be one of only nine "non-EGU" (industries other than electricity generation), subject to emission reduction requirements. *Id.* EPA subsequently acknowledged that emission reductions from most of these sources are in fact not technologically or economically feasible. *See* 88 Fed. Reg. at 36,827. EPA therefore removed these sources from the Plan. *Id*. But EPA failed to recognize that this also meant its Screening Assessment significantly overcounted emissions from iron and steel mills, and that EPA therefore lacked a basis for including iron and steel in the Plan at all.

Once EPA established a screening threshold, it was required to apply it consistently and in a manner that reflected the facts in the record. *State Farm*, 463 U.S. at 43 (arbitrary and capricious to offer an explanation that "runs counter to the evidence before the agency"). Instead, EPA continued to rely on its original incorrect Screening Assessment and simply removed the emission units it could not support regulating from the Plan. *See* 88 Fed. Reg. at 36,732-33 and 36,827. This was arbitrary and capricious and makes it likely that the iron and steel requirements in the Plan will be vacated.

D. The Iron and Steel Requirements Were Not Subject to Notice and Comment.

Key aspects of the Plan applicable to iron and steel mills were neither referenced in, nor logical outgrowths of, the proposed rule. Under both the Clean

Air Act and Administrative Procedure Act, "the final rule must be a 'logical outgrowth' of the agency's proposal." *Small Ref.*, 705 F2d at 543 (quoting *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981)). The entire regulation of reheat furnaces (40 CFR 52.43) is based on a "test-and-set" approach that can be found nowhere in EPA's proposed plan. 88 Fed. Reg. at 36,818, 36,879-81. For boilers, EPA proposed to regulate units based on annual emissions or production. 87 Fed. Reg. at 20,181. Yet without notice, EPA switched to regulating boilers by "design capacity." 88 Fed. Reg. at 36,884. This was a significant departure, which EPA acknowledges captured "more units than the EPA intended." *Id*. at 36,819.

EPA did not afford notice and opportunity for comment on the most fundamental elements of its reheat furnace and boiler regulations for iron and steel mills. This was arbitrary and capricious and violated the procedural requirements of the Clean Air Act. *Small Ref.*, 705 F.2d at 543; 42 U.S.C. §7607(d). For this reason as well, the iron and steel requirements of the Plan are likely to be vacated.

E. EPA's "Test-And-Set" Approach Reheat Furnaces Is Illegal and Lacks Record Support.

EPA's test-and-set approach for reheat furnaces was adopted in response to comments that the emission limits in the proposed plan were unsupported by the record. 88 Fed. Reg. at 36,818. EPA correctly concluded that the proposed limits were unsupported, but rather than take no action where it lacked record support,

EPA has attempted an unprecedented and illegal work-around of requiring owners and operators to install controls and then have EPA set the emission limit in a future action without notice-and-comment rulemaking. *Id*. This approach exceeds EPA's statutory authority and confers on EPA a power to decide who can and cannot operate that the Clean Air Act never intended.

Specifically, the Rule requires owners and operators to "install and operate" pollution control technology "designed to achieve at least a 40% reduction from baseline" emissions. 88 Fed. Reg. at 36,879, 40 CFR 52.43(c). No further guidance is offered on what designs will be accepted by EPA. The Rule also does not say how an emission limit is then to be set, other than that the owner or operator is to submit a work plan and "establish an emissions limit in the work plan that the affected unit must comply with." *Id.*, 40 CFR 52.43(d)(3).

This approach is legally unsound. If EPA lacks the relevant data to support an action, it cannot act. *State Farm*, 463 U.S. at 43 (an agency must offer a "rational connection between the facts found and the choice made") (quotations omitted). EPA cannot promulgate a placeholder, and then add information to support its decision after the fact. *Id.*; 42 U.S.C. § 7607(d)(6)(C) ("The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.").

The Clean Air Act also sets forth procedural requirements EPA must follow to impose emission limits in a FIP. 42 U.S.C. § 7607(d). These include publication of the proposed rule in the Federal Register, provision of a statement of basis and purposes, creation of a public docket of supporting material, public comment, and response to significant comments. *Id.* at § 7410(d)(3)-(6). Public participation must be for "a reasonable period" and "at least 30 days" unless expressly provided for otherwise in the Clean Air Act. *Id.* at § 7607(h). Final emission limitations are also subject to judicial review. *Id.* at § 7410(d)(7). For example, when EPA adopted a test-and-set process in another FIP, it promulgated a range of emission limits, a procedure to establishing final limits within that range, including the data and equations that would be used, and provided that a final emission limit would become enforceable "only after EPA's confirmation or modification of the emission limit" in a final agency action published in the Federal Register. *See, e.g.*, 40 CFR 42.1235(b)(1)(ii)(A)(1)-(7).

The Plan provides no such procedures. There is no publication of proposed or final emission limits in the Federal Register; the Administrator will simply notify owners and operators electronically whether their plan is approved. 88 Fed. Reg. at 36,880, 40 CFR 52.43(d)(4)(iv). If the Administrator does not approve, the owner or operator has only 15 calendar days to present additional information or arguments, after which the Administrator can issue a final decision disapproving

the work plan. *Id.*, 40 CFR 52.43(d)(4)(iii). If the Administrator disapproves a work plan or finds a work plan was not timely submitted or completed, "[e]ach day that the affected unit operates following such disapproval or failure to submit shall constitute a violation." *Id.*, 40 CFR 52.43(d)(v).

In other words, EPA can prohibit operation on 15 days' notice without a hearing or notice-and-comment rulemaking. This finds no support in the Clean Air Act. Indeed, where Congress has granted EPA authority to limit emissions from specific sources to address interstate transport violations, Congress required both a public hearing and at least three months for the source to come into compliance. 42 U.S.C. § 7426(b). EPA's regulations for reheat furnaces fall short of this process and any other process that might satisfy the requirements of the Clean Air Act and are therefore likely to be vacated.

II. Absent a Stay, U. S. Steel Will Suffer Imminent Irreparable Harm.

The Plan poses substantial and imminent injuries to U. S. Steel. EPA itself warned owners and operators that they should "begin engineering and financial planning" as of the date of *the proposed rule* to be able to meet EPA's implementation timetable. 87 Fed. Reg. at 20,036. Notwithstanding the fact that it is unreasonable to suggest that significant funds and resources be expended on a proposal subject to change (as the Plan has changed), EPA followed through on its threat, and imposed an unreasonably short compliance schedules. For iron and

steel facilities, the Plan does not allow sufficient time for design, permitting, and installation of controls; likely years less than what will be required. Piscitelli Declaration, at ¶¶6-10, App.716-17. As a result, absent a stay, U. S. Steel cannot wait before it must incur substantial costs on work plans that EPA does not have the authority to impose, and on the design, permitting and installation of boiler and reheat furnace modifications that are unnecessary and may be subject to withdrawal or modification in a revised rule. *Id.*; *see also* AF&P Application at 24, App.407 and App'x 385-86, App.416-17. These substantial costs are imposed without adherence to law and constitute an irreparable harm. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) ("complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs") (Scalia, J., concurring in part and in the judgment).

U. S. Steel has already needed to incur significant compliance costs. Piscitelli Declaration at ¶¶3, 11-20, App.715, 717-720. The capital expenditures alone (excluding testing, monitoring, recordkeeping, and reporting costs) for just one U. S. Steel facility will cost between $28 and $46 million. *Id.* at ¶15, App.719. These costs are not recoverable "in the ordinary course of litigation," and are an irreparable harm as well. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quotations omitted).

The immediate incurrence of significant and irrecoverable compliance costs, combined with the Plan's requirement for a mad rush to commit resources to meet unreasonable timelines that will likely not apply following judicial review supports a stay.

III. A Stay Is in the Public Interest.

While the Plan requires U. S. Steel to incur significant costs and permitting obligations now—to modify facilities, perform testing, and generate data and reports to meet the Plan's unreasonable compliance schedule—emissions reductions from iron and steel sources will not occur under the Plan until 2026 at the earliest. 88 Fed. Reg. at 36,654. As a result, a stay of the iron and steel requirements during judicial review will not impact emissions, ambient air quality, or downwind NAAQS compliance status. EPA cannot contend otherwise. It has already stayed the Plan for 12 States through two interim final rules without any mention of adverse impacts on public health or welfare.

On the other hand, a reliable and sufficient supply of domestic steel is in the public interest. The cumulative effect of the Plan, especially when combined with several other regulations EPA has imposed or proposed recently for the domestic steel industry, is having a compounding impact that places unnecessary strain on domestic steel production. *See* Piscitelli Declaration at ¶¶21-29, App.720-722. This has both national economic and national security implications. *See id*. To

comply with the Plan, U. S. Steel will need to take multiple outages to retrofit reheat furnaces and boilers, which will impact production capabilities. *See id.* at ¶¶18-19. It will also lead to wasteful flaring of by-product fuel and increased reliance on energy from a grid facing potentially significant reliability issues from the same Plan. *Id.* at ¶19; AF&P Application at 28, App.411; Ohio Application at 25-26, App.322-23; Kinder Morgan Application at 23-24, App.358-59. Furthermore, the availability of qualified vendors and experts to implement the Plan is limited, which exacerbates the scheduling problems, further rendering the Plan unworkable. Piscitelli Declaration at ¶¶6-10, App.716-17. It is not in the public interest to maintain a rule during judicial review that immediately threatens the reliable supply of electricity and domestic steel while deferring environmental benefit for years.

The substantive and procedural infirmities of the Plan also weigh in favor of stay. "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. Eept' of HHS*, 549 U.S. __, 141 S. Ct. 2485, 2490 (2021). Thus, the public also has a fundamental interest "in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). The Plan seeks to impose immediate and irreversible burdens through a clearly illegal rule. The result will be needless public expenditures on a Plan likely

to be vacated. *See* Ohio Application at 23-25, App.320-22. On the other hand, denying a stay will create an incentive directly opposed to the public interest by encouraging EPA and other agencies to promulgate rules, not in the hopes of withstanding judicial scrutiny, but in the hope of inflicting enough irreversible commitments while judicial review is pending to achieve their policy goals regardless of the outcome.

A stay is necessary to prevent the waste of private and public resources, and to avoid the implementation of a clearly unlawful rule pending judicial review.

CONCLUSION

EPA's Plan is likely to be vacated, in particular as applied to iron and steel facilities. Yet U. S. Steel is required to commit scarce specialized resources and expend millions and commit to permitting obligations while judicial review is pending, none of which will be reparable after a decision is made. A stay will preserve the *status quo* and avoid these injuries without any adverse environmental impact. Under these circumstances, a stay of the Plan, and in particular the iron and steel requirements, is justified. For the foregoing reasons, Applicant United States Steel Corporation respectfully requests that the Court stay the Plan for reheat furnaces (40 CFR 52.43) and boilers at iron and steel mills (40 CFR 52.45).

October 26, 2023

Respectfully Submitted,

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Case No. _____

In the Supreme Court of the United States

UNITED STATES STEEL CORPORATION,

Applicant,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, ADMINISTRATOR,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the Supreme Court Bar and that, on this 26th day of October, 2023, I caused copies of the EMERGENCY APPLICATION FOR STAY OF FINAL AGENCY ACTION PENDING JUDICIAL REVIEW to be sent via e-mail and commercial carrier for delivery within 3 calendar days to the persons in the attached Service List:

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