No. 16-____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA,
STATE OF TEXAS, *et al.*,

Applicants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
REGINA A. MCCARTHY, Administrator,
United States Environmental Protection Agency

Respondents.

APPLICATION BY 29 STATES AND STATE AGENCIES FOR IMMEDIATE STAY OF FINAL AGENCY ACTION DURING PENDENCY OF PETITIONS FOR REVIEW

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

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

The States of West Virginia, Texas, Oklahoma, and 26 other States and state agencies (the "States") respectfully request an immediate stay of the final rule of the United States Environmental Protection Agency ("EPA") entitled, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015). On the day this so-called "Clean Power Plan" (hereinafter "Power Plan" or "Plan") became subject by statute to judicial review, the States filed petitions for review of the Plan with the D.C. Circuit and, due to the immediate harm from the Plan, also moved simultaneously for a stay pending the court's review. In light of the present and ongoing harm from the Plan, this application is being submitted as soon as practicable following the D.C. Circuit's denial of those motions for a stay late in the day last Thursday, January 21, 2016.

INTRODUCTION

This Court's decision last Term in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), starkly illustrates the need for a stay in this case. The day after this Court ruled in *Michigan* that EPA had violated the Clean Air Act ("CAA") in enacting its rule regulating fossil fuel-fired power plants under Section 112 of the CAA, 42 U.S.C. § 7412, EPA boasted in an official blog post that the Court's decision was effectively a nullity. Because the rule had not been stayed during the years of litigation, EPA assured its supporters that "the majority of power plants are already in compliance

or well on their way to compliance."[1] Then, in reliance on EPA's representation that most power plants had already fully complied, the D.C. Circuit responded to this Court's remand by declining to vacate the rule that this Court had declared unlawful. *See* Per Curiam Order, *White Stallion v. EPA*, No. 12-1100, ECF 1588459 (Dec. 15, 2015). In short, EPA extracted "nearly $10 billion a year" in compliance from power plants before this Court could even review the rule, *Michigan*, 135 S. Ct. at 2706, and then successfully used that unlawfully-mandated compliance to keep the rule in place even after this Court declared that the agency had violated the law.

In the present case, EPA is seeking to similarly circumvent judicial review, but on an even larger scale and this time directly targeting the States. In sworn declarations submitted to the D.C. Circuit below, numerous state regulators describe the Plan as the most far reaching and burdensome rule EPA has ever forced onto the States. Relying on five words in a rarely-used provision of the CAA—"best system of emission reduction"—EPA claims the authority to require States to achieve massive carbon dioxide emission reductions that EPA has calculated based on "shifting" electric generation away from fossil fuel-fired power plants to other sources of energy—such as wind and solar—that EPA prefers. 80 Fed. Reg. at 64,726. And because there is no way to meet the Plan's targets solely by making performance improvements at fossil fuel-fired power plants, it is undisputed that the Plan will force a massive reordering of the States' mix of generation facilities.

[1] This source may be found here: https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/.

Indeed, the Plan is presently compelling States and regulated entities to take irreversible actions—amending state laws and regulations, making irrecoverable expenditures, and undertaking planning and investment decisions, including retiring plants. Thus, the Administration has freely admitted that the Power Plan is designed to "aggressive[ly] transform[] . . . the domestic energy industry."[2]

This power grab—under which the federal environmental regulator seeks to reorganize the energy grids in nearly every State in the nation—violates the CAA and this Court's precedents in numerous respects, while also raising serious federalism concerns. Most obviously, the Plan cannot be reconciled with *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG*"), in which this Court told EPA in a case also involving the regulation of carbon dioxide emissions that the agency must point to "clear[]" congressional authorization whenever it "claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Id.* at 2444 (quotation omitted). The "generation shifting" at the heart of the Plan, 80 Fed. Reg. at 64,729, is a power that EPA has "discover[ed]" in Section 111(d) for the first time in that provision's 45-year history, *UARG*, 134 S. Ct. at 2444. And there simply is no argument that the statute can be read to "clearly" confer on EPA such transformative authority over the American economy.

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[2] Joby Warrick, *White House set to adopt sweeping curbs on carbon pollution*, WASH. POST (Aug. 1, 2015) (quoting White House Fact Sheet), *available at* https://www.washingtonpost.com/national/healthscience/white-house-set-to-adopt-sweeping-curbs-oncarbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html.

Nor is there any statutory indication, as this Court's cases require, that Congress authorized EPA to intrude on an "area[] of traditional state responsibility." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014). The Power Plan invades the States' "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 260 (1983), and is a blatant act of commandeering that leaves the States no choice but to alter their laws and programs governing electricity generation and delivery to accord with federal policy.

If this Court does not enter a stay, the Plan will continue to unlawfully impose massive and irreparable harms upon the sovereign States, as well as irreversible changes in the energy markets. In the proceedings before the D.C. Circuit, the 27 States that sought to stay the Plan and the 18 States that defended it submitted declarations explaining that States are already expending significant time and resources to implement the Power Plan. These federally mandated efforts are forcing States to expend money and resources, displacing the States' ability to achieve their own sovereign priorities, and requiring some States to change their laws to enable or accommodate a "shift" from fossil fuel-fired generation to other sources of energy. And parties on all sides agree that the Plan is currently forcing businesses to shutter plants and make other decisions with long-term and fundamental impacts on energy markets, further compounding the injury to States as market regulators and energy consumers.

Only a stay from this Court now can ensure that EPA will not, in another year or two, once more boast that it has rendered this Court's review practically meaningless. Absent a stay, the Power Plan will—throughout the lifespan of this litigation—force massive, irreversible changes in terms of state policies and resources, power plant shutdowns, and investments in wind and solar power. As in *Michigan*, EPA will have accomplished much of its objectives even if this Court ultimately declares that the agency did so illegally, in contravention of the CAA and the Constitution. Indeed, the fundamental changes to the Nation's energy policy that EPA would unlawfully achieve here without a stay would eclipse what it did in *Michigan*.

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

OPINION BELOW

The D.C. Circuit order denying the States' motion for a stay of the Power Plan is unpublished. App. 1A. The rule at issue, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, is published at 80 Fed. Reg. 64,662 (Oct. 23, 2015). *See also* App. 40B.

JURISDICTION

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

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Pertinent constitutional, statutory, and regulatory provisions are reprinted in the Appendix beginning at App. 1B.

STATEMENT

1. Enacted in 1970, Section 111 of the CAA permits EPA to regulate the emission of air pollutants from stationary sources in certain circumstances. 42 U.S.C. § 7411. The provision's primary focus—as reflected in its title, "standards of performance for new stationary sources"—is the regulation of *new* sources under the robust Section 111(b) program. EPA has employed Section 111(b) to adopt new source regulations "for more than 70 source categories and subcategories . . . [including] fossil fuel-fired boilers, incinerators, [and] sulfuric acid plants . . . ." 73 Fed. Reg. 44,354, 44,486-87 nn.239 & 242 (July 30, 2008).

In contrast—and most importantly in this case—Section 111 contains in subsection (d) a separate, narrow, and rarely-used program for *existing* sources. Subject to certain prohibitions (one of which applies in this case), *see infra* at p. 29, once EPA establishes a "standard of performance" for a new source category under Section 111(b), EPA may under Section 111(d) require *States* to establish a "standard of performance for" existing sources in the same source category. 42 U.S.C. § 7411(d)(1)(B). EPA has lawfully invoked Section 111(d) only five times in its 45-year history, and just once since the 1990 Amendments to the CAA. 80 Fed. Reg. at 64,703; *see infra* at p. 29. Section 111(d) is the provision upon which EPA purports to base the Power Plan.

Under both Sections 111(b) and 111(d), a "standard of performance" must be "appl[icable] . . . to a[] particular source" within a regulated source category. 42 U.S.C. § 7411(d)(1)(B); *accord id.* § 7411(a)(2) (discussing standards of performance "which will be applicable to" individual new sources). By definition, a "standard of performance" must "reflect[] the degree of emission limitation achievable through the *application* of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." *Id.* § 7411(a)(1) (emphasis added). The principal difference between a performance standard for new sources under Section 111(b) and one for existing sources under Section 111(d) is that EPA itself sets the former and States set the latter. Notably, *every* prior rule that EPA has adopted under Section 111(b) or (d)—either setting performance standards itself or providing guidelines for the States to set performance standards—has been based upon sources adopting pollution control techniques that are applicable to individual sources within the regulated source category.

2. The infrequent use of Section 111(d) stems from an important limitation on EPA's authority contained in that provision itself: the Section 112 Exclusion. Since the 1990 Amendments to the CAA, Section 111(d) has included an express prohibition on EPA's use of Section 111(d) to require States to regulate "any air pollutant . . . emitted from a source category which is regulated under section [1]12." 42 U.S.C. § 7411(d)(1)(A). As this Court observed in *American Electric Power*

Company, Inc. v. Connecticut, 131 S. Ct. 2527 (2011) ("*AEP*"), "EPA may not employ § [1]11(d) if existing stationary sources of the pollutant in question are regulated . . . under . . . § [1]12." *Id.* at 2537 n.7.

Congress's decision to adopt the Exclusion traces back to its significant expansion of Section 112—the regulatory regime for hazardous air pollutants ("HAPs") that was at issue in this Court's recent decision in *Michigan*—in the 1990 Amendments to the CAA. As originally enacted in 1970, Section 112 was a narrow program, due in part to the limited definition of HAPs as those pollutants that "may cause, or contribute to, an increase in mortality or an increase in serious irreversible[] or incapacitating reversible[] illness." Pub. L. No. 91-604, § 112, 84 Stat. at 1685-86. In the 1990 Amendments, Congress broadly expanded the stringency and reach of Section 112, including by re-defining HAPs as any pollutants that pose "a threat of adverse human health effects" "through inhalation or other routes of exposure" or "adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise." 42 U.S.C. § 7412(b). With the expansion of the Section 112 program in 1990, Congress also limited the reach of Section 111(d) with the prohibition on double regulation now found in the Section 112 Exclusion.

3. EPA published the final Power Plan in the Federal Register on October 23, 2015, asserting that the Plan is a regulation of existing fossil fuel-fired power plants under Section 111(d). The Plan is an enormously complicated document, covering 303 pages of the Federal Register, as well as 152 pages of a supporting legal

memorandum[3] and 7,565 pages of responses to comments.[4] Three features of the Plan are particularly relevant here.

First, the Plan sets carbon dioxide emission reduction requirements for the States that cannot be achieved through measures "appl[icable] . . . to" individual existing power plants. 42 U.S.C. § 7411(d)(1)(B). Specifically, EPA calculated required emission reductions for existing fossil fuel-fired power plants from three "building blocks": (1) altering coal-fired power plants to increase efficiency; (2) increasing the use of existing natural gas capacity, thereby shifting coal-fired electricity generation to natural gas; and (3) shifting fossil fuel-fired electricity generation to renewable sources such as wind and solar. 80 Fed. Reg. at 64,745. Using those source-category-level requirements, EPA then calculated state-wide reduction mandates for virtually every State.

Building blocks 2 and 3—which make up the vast majority of the Power Plan's emission reductions, *id.* at 64,663, 64,727-28, 64,734—are not measures that existing sources can take to make their operations more environmentally friendly. Rather, they assume a decrease in operations of those sources and increased utilization of entirely different kinds of sources. It follows, and EPA does not dispute, that States and individual power plants cannot come close to meeting the Plan's aggressive emission limits through any improvements that can be "appl[ied] . . . to" those sources. 42 U.S.C. § 7411(d)(1)(B). EPA did not employ this novel

[3] This document can be found here: http://www.epa.gov/sites/production/files/2015-11/documents/cpp-legal-memo.pdf.

[4] The collection can be found here: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-37106.

approach when setting the emission limits for *new* power plants, which EPA adopted under Section 111(b) on the same day that it finalized the Power Plan. As a result, the emission limits for new plants are actually *less stringent* than the limits calculated for existing power plants under the building-block approach in the Power Plan.[5]

EPA's mandate that States require such steep emission reductions is based on a regulatory concept that the agency has never used in establishing emission reductions for any source category in any Section 111 rule in the provision's 45-year history: "generation shifting." As EPA itself explains, "generation shifting" involves "replacement of higher emitting generation with lower- or zero-emitting generation." 80 Fed. Reg. at 64,728. Put another way, EPA claims that it can require States to force emission reductions premised on a fossil fuel-fired power plant's "owners or operators" buying or investing in their "cleaner" competitors' businesses. *Id.* at 64,726, 64,767-68. This can be done by power plant owners shutting down or curtailing operations at their plants, and then replacing the lost energy by "invest[ing]" in natural gas, wind, and solar, "purchasing" or "building"

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[5] The limits for new power plants are based on a combination of improved technology (boilers that operate at higher pressure) and emission controls (carbon capture and sequestration). 80 Fed. Reg. 64,510, 64,540 (Oct. 23, 2015) ("state-of-the-art means of control"). Those limits are 1,400 lb CO_2/MWh for new coal-fired power plants as compared to 1,305 lb CO_2/MWh under the Power Plan for existing coal-fired power plants, *compare* 80 Fed. Reg. at 64,510, *with* 80 Fed. Reg. at 64,707, and 1,000 lb CO_2/MWh for new gas-fired power plants as compared to 771 lb CO_2/MWh under the Power Plan for existing gas-fired power plants, *compare* 80 Fed. Reg. at 64,513, *with* 80 Fed. Reg. at 64,707. In the Power Plan, EPA found that carbon capture and sequestration, the system that would reduce CO_2 by approximately 30 percent at new power plants, was not a "demonstrated" system of emission reduction for existing coal-fired power plants.

those sources of energy, or "purchasing" "in the form of a credit" emission reductions from competitors engaged in those forms of electricity generation. *Id.* at 64,726.

Second, the Plan regulates existing power plants under Section 111(d), even though those plants are regulated under Section 112. By its terms, the Section 112 Exclusion prohibits EPA from regulating a source category under Section 111(d) where that source category is already "regulated under section [1]12." § 7411(d)(1)(A). Abandoning the understanding of that text that EPA has taken for 20 years (and honored in practice), the agency now claims that "the phrase 'regulated under section [1]12'" is ambiguous and "only exclud[es] the regulation of HAP emissions under [S]ection [74]11(d) and only when that source category is regulated under [S]ection 112." 80 Fed. Reg. at 64,714. On this basis, EPA asserts that it may impose carbon dioxide limitations under Section 111(d) on power plants notwithstanding its Section 112 regulation of those same plants. *Id.*

Third, the Plan requires States to act now. A State Plan or extension request is due by September 2016. Even with an extension, a State Plan must be submitted by September 2018. 80 Fed. Reg. at 64,669. If a State does not submit a timely State Plan or extension request that meets EPA's approval, EPA will impose a Federal Plan. *Id.* at 64,828. By EPA's own admission, these deadlines are meant "to assure that states begin to address the urgent needs for reductions quickly." *Id.* at 64,675. What is more, whether under a State Plan or the Federal Plan, States and sources must achieve extreme reductions in emissions starting as early as 2022. *Id.* at 64,664. To take just one example, West Virginia currently obtains 95% of its energy

from coal-fired power plants, and yet must reduce carbon dioxide emissions 26% by 2022, and a staggering 37% by 2030.[6] Given the long lead times required for infrastructure projects like generation and transmission capacity, decisions on compliance with the Power Plan are being made now.

As a result, the Power Plan is having massive impacts upon the States and energy markets right now. *E.g.,* Hyde Decl. ¶¶ 10, 22; Lloyd Decl. ¶¶ 86, 93; Stevens Decl. ¶¶ 5-10; Thomas Decl. ¶ 7; Bracht Decl. ¶¶ 7-8. The Plan is currently forcing States to take action to accommodate the forced retirement or reduced utilization of massive amounts of generating capacity, as well as undertake substantial legislative, regulatory, planning, and other activities that are necessary to carry out the Plan and to maintain electric service. *E.g.*, Lloyd Decl. ¶¶ 78-81, 88-93; Nowak Decl. ¶¶ 7, 16-17; Bracht Decl. ¶¶ 12-13; McClanahan Decl. ¶¶ 4, 11; Wreath Decl. ¶¶ 2, 4, 6, 15-20. Indeed, *all* of the States that submitted a declaration below, including States that strongly support the Plan, explained that they are presently expending time and substantial resources as a direct result of the Plan, and will continue to do so throughout this year. *E.g.*, Durham Decl. ¶ 6; McClanahan Decl. ¶ 6; Gore Decl. ¶ 6; Hyde Decl. ¶ 9; Stevens Decl. ¶¶ 5-10. The Plan's present impacts on the energy markets are also profound. As EPA's own modeling shows, and declarations submitted below confirm, the Plan will force the shutdown of coal-fired power plants *this year*. *E.g.*, Schwartz Reply Decl. ¶¶ 19-32; Gaebe Decl. ¶ 12;

[6] *See* 80 Fed. Reg. at 64,824 tbl. 12 (emission targets by State); U.S. Energy Information Administration, State Profiles and Energy Estimates, http://www.eia.gov/state/?sid=US (coal reliance by State).

Glatt Decl. ¶ 14; Christman Decl. ¶ 12. Correspondingly, the Plan is presently driving "billion[s]" of dollars in investments to wind and solar power. Advanced Energy Opp. at 7-8 (citing declarations); *see also* Storch Decl. ¶ 18.

REASONS FOR GRANTING THE APPLICATION

This Court should stay the Power Plan, which is an unprecedented power grab by EPA that seeks to reorder the Nation's energy grid. Under 5 U.S.C. § 705, this Court "may issue all necessary and appropriate process to postpone the effective date of an agency action." *Id.*; *see also* 28 U.S.C. §§ 1254, 2101; *Nken v. Mukasey*, 555 U.S. 1042 (2008). And under "well settled" principles, such "equitable relief" is appropriate here. *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). There is: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court w[ould] vote to reverse [a] judgment below [upholding the Power Plan]; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *San Diegans for the Mt. Soledad Nat'l War Memorial v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *see also Nken v. Holder*, 556 U.S. 418, 427-29 (2009). "[B]alanc[ing] the equities and weigh[ing] the relative harms to the applicant and to the respondent" also favors issuing a stay. *Hollingsworth*, 558 U.S. at 190.[7]

[7] Alternatively, if this Court concludes that 5 U.S.C. § 705 does not provide sufficient authority to stay the Power Plan, the States respectfully request the same relief be granted through a writ of mandamus under 28 U.S.C. § 1651(a). *See Hollingsworth*, 558 U.S. at 190. "Before a writ of mandamus may issue, a party must establish that (1) no other adequate means exist to attain the relief he desires,

I. If The D.C. Circuit Upholds The Power Plan, There Is A Reasonable Probability That Four Justices Would Vote To Grant Review And A Fair Prospect That A Majority Would Declare The Plan Unlawful.

Given the wide-ranging impact of the Power Plan and its clear illegality, this case more than satisfies the stay factors concerning the likelihood that this Court would grant certiorari and reverse a decision of the D.C. Circuit upholding the Power Plan. Just in the last two Terms, this Court has granted review and declared at least partly unlawful two major EPA rules under the CAA. *See Michigan v. EPA*, 135 S. Ct. 2699 (2015); *UARG v. EPA*, 134 S. Ct. 2427 (2014). In terms of scope and significance, the Power Plan far outstrips those recent EPA rulemakings that this Court decided to review. The Plan is also unlawful from multiple perspectives: it directly contravenes (1) *UARG*, (2) the anti-commandeering and coercion principles recognized by the Court in numerous cases, and (3) the statutory interpretation adopted by this Court in *American Electric Power Company, Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011). There is at least a fair probability that if the D.C. Circuit upholds the Power Plan, four Justices of this Court would vote to grant a petition for a writ of certiorari and at least a fair prospect that the court majority would declare the Plan unlawful.

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(2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances." *Id.* (quotation omitted); *accord Atiyeh v. Capps*, 449 U.S. 1312, 1313-14 (1981) (Rehnquist, J., in chambers). The States' showings that the Power Plan is unlawful, that irreparable harm will occur in the absence of a stay, and that the public interest favors equitable relief would satisfy the mandamus standard as well.

A. The Power Plan's Central Premise That States May Be Required To Meet Emission Reductions Based On The Shifting Of Electricity Generation Away From Coal-Fired And Fossil Fuel-Fired Power Plants Is Unprecedented And Unlawful.

1. EPA's Vast Assertion Of Authority Fails *UARG*'s Clear Statement Rule.

Just two years ago, this Court made clear in *UARG* that an agency cannot exercise significant and transformative power unless it has clear congressional authorization. In *UARG*, EPA attempted to expand two CAA programs to cover stationary sources based solely on their carbon dioxide emissions. 134 S. Ct. at 2437-38. This Court rejected that effort, holding that when an agency seeks to make "decisions of vast 'economic and political significance'" under a "long-extant statute," it must point to a "clear[]" statement from Congress. *Id.* at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). This Court found that "EPA's interpretation" of the CAA "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id.*

The Power Plan's reliance on the concept of "generation shifting," 80 Fed. Reg. at 64,677, 64,709; EPA Opp. 16, is precisely the sort of significant and transformative assertion of authority that is subject to *UARG*'s clear-statement rule. This novel concept is breathtaking in its audacity: EPA claims that it can require States to force emission reductions premised on the regulated sources' owners buying or investing in competitor industries that are determined by EPA to be "cleaner," and then shutting down or curtailing their own operations. 80 Fed. Reg. at 64,726, 64,767-68. This is no less than an assertion of authority to pick

winners and losers among competitor industries in a marketplace, and is thus unquestionably an unprecedented attempt by EPA to make "decisions of vast 'economic and political significance'" that requires a clear statement from Congress. *UARG*, 134 S. Ct. at 2444 (quotation omitted). As the Administration has admitted, the Power Plan is designed to "transfor[m] . . . the domestic energy industry." *See supra* at p.3.

The far-reaching logical consequences of EPA's claim that it may force emission reductions based on generation shifting further confirms that "EPA's interpretation" of Section 111(d) "would bring about an enormous and transformative expansion in EPA's regulatory authority." *UARG*, 134 S. Ct. at 2444. Under EPA's logic, the agency could eventually require emission reductions premised on a *complete* shift of electric generation away from fossil fuel-fired power plants, if the power grid could produce sufficient substitute electricity from sources designated by EPA as "cleaner," such as wind and solar power. EPA would no longer be an environmental regulator, but rather the nation's central energy planning authority, with the unilateral authority to end the use in this country of certain kinds of energy generation.

But that is not all, as EPA's logic could not be limited to just the energy field. Under the same authority, for example, EPA could require States to reduce pollutant emissions from municipal landfills (the last source category regulated under Section 111(d)) by switching to recycling plants. More generally, the agency could effectively require substitution of *any* disfavored class of stationary sources

with those that it prefers and believes are "cleaner"—a vast power nowhere reflected in the statutory design.

The absence of any precedent for the use of generation shifting under Section 111(b) or (d) underscores the transformative nature of EPA's view of the statute and the need for clear congressional authorization under *UARG*. In the proceedings below, EPA's sole alleged example of "generation shifting" in Section 111's 45-year history was its failed attempt in 2005 to authorize States to implement unit-specific control technology-based standards for mercury emissions, using a cap-and-trade compliance regime in the Clean Air Mercury Rule ("CAMR"), 70 Fed. Reg. 28,606 (May 18, 2005). But CAMR is not a valid precedent for the use of "generation shifting" under Section 111. *First*, the D.C. Circuit vacated CAMR on other grounds in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), *see infra* at p. 35, and never addressed the scope of permissible pollution-reduction measures under Section 111. *Second*, EPA did *not* base its emission reduction requirements in CAMR on the "shifting" of generation to preferred categories of sources. CAMR's emission reduction requirements were calculated "based on *control technology* available in the relevant timeframe" for power plants, 70 Fed. Reg. at 28,617, 28,620 (emphasis added)), and it thus set caps based on an analysis of technology that individual units could install. Trading was not necessary to achieve the emission caps, but rather was a compliance option that might have been more efficient for some plants. In contrast, the Power Plan's emission reduction requirements are based expressly on shifting generation to competitors outside the regulated source category, and

cannot be achieved by *any* existing power plant with control techniques applicable to that plant. *See supra* at p. 9.[8]

It therefore cannot be disputed that *UARG*'s clear-statement rule applies, and that is fatal to the Plan. EPA failed in the Power Plan to make any attempt to show the clear congressional authorization for "generation shifting" that is required under *UARG*. The agency sought only to distinguish *UARG*, and relied exclusively on a *Chevron* deference argument to defend its interpretation of Section 111. 80 Fed. Reg. at 64,783-85; *id.* at 64,719 n.31. Because agency action can only be sustained on "grounds upon which the agency itself based its action," *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943), a holding that *UARG*'s clear statement rule applies would thus be sufficient to hold the Plan unlawful.

2. EPA's Invasion Of The States' Historic Powers Is Unsupported By The Required Clear Statement Of Congressional Intent.

Though *UARG* alone mandates a clear statement from Congress to justify EPA's use of "generation shifting" under Section 111(d), clear congressional authorization is further required here because the Power Plan raises serious federalism concerns. It is a "well-established principle that it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law

[8] In the Power Plan, EPA relies heavily upon Congress's authorization of a cap-and-trade regime for sulfur-dioxide emissions under Title IV of the CAA. 80 Fed. Reg. at 64,665, 64,734, 64,761, 64,770-71, 64,778. In their stay motions below, the States pointed out that this only shows that Congress knows how to authorize a cap-and-trade regime when it wants to, and it did not do so under Section 111(d). Joint States Mot. 9. Indeed, Congress specifically rejected this Administration's effort to pass Title IV-like cap-and-trade authority for carbon dioxide emissions from coal-fired power plants. *See* Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009).

overrides the usual constitutional balance of federal and state powers." *Bond*, 134 S. Ct. at 2089 (internal quotations omitted). "This principle applies when Congress 'intends to pre-empt the historic powers of the States' or when it legislates in 'traditionally sensitive areas' that 'affec[t] the federal balance.'" *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2001); *see also Gregory v. Ashcroft*, 501 US 452, 460–61 (1991) (applying same principle).

The Power Plan cannot be squared with that principle. The States' authority over the intrastate generation and consumption of energy is "one of the most important functions traditionally associated with the police powers of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Congress specifically protected this state authority in the Federal Power Act, which recognizes the States' "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas*, 461 U.S. at 205; *see also* 16 U.S.C. § 824(b)(1) (recognizing States' exclusive jurisdiction over intrastate generation and transmission); 42 U.S.C. § 2021(k) (recognizing presumptive role of States in power regulation). And historically, the "economic aspects of electrical generation"—which lie at the very heart of the Plan—"have been regulated for many years and in great detail by the states." *Pac. Gas.*, 461 U.S. at 206.

EPA's interpretation of Section 111 intrudes on that traditional state authority. By arrogating to itself the authority to choose favored and disfavored industries in the domestic energy field, EPA undermines the States' authority to

independently assess the intrastate "[n]eed for new power facilities, their economic feasibility, and rates and services." *Id.* at 205; *e.g.*, Lloyd Decl. ¶¶ 9-93; Nowak Decl. ¶ 7; McClanahan Decl. ¶¶ 5, 11; Bracht Decl. ¶ 13. EPA has set emission limits that effectively require States to transform their domestic energy markets in line with EPA's—and not the States'—policies.

In addition, as explained more fully below, the Power Plan "use[s] the States as implements of regulation" by requiring the exercise of state regulatory authority to facilitate the changes to electricity generation that are needed to meet the Plan's emission limits. *See infra* at p. 24. That violates the Constitution's bar on commandeering and coercion of the States, and is an independent reason for finding the Plan unlawful. But at a minimum, in the absence of any clear statement by Congress, the Court's analysis may begin and end with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

3. Even If The *Chevron* Framework Applies, Section 111 Unambiguously Prohibits "Generation Shifting."

The text of Section 111 unambiguously bars generation shifting, which would make the Plan illegal even under *Chevron*'s deferential framework. Section 111(d) permits EPA, in certain circumstances, to require States to establish "standards of performance for any existing source." 42 U.S.C. § 7411(d)(1)(A). By definition, a "standard of performance" is "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the *application* of the best system of emission reduction." *Id.* § 7411(a)(1) (emphasis added). For both new

and existing sources, a "standard of performance" must be "*appl[icable] . . . to* a[] particular source" within a regulated source category. 42 U.S.C. § 7411(d)(1)(B) (emphasis added); *accord id.* § 7411(a)(2) (discussing standards of performance "which will be *applicable to*" individual new sources (emphasis added)). In sum, Section 111(d) authorizes EPA to require States to set standards of performance "for" existing sources, which must be "appl[icable] . . . to" those sources and "reflect . . . the application of the best system of emission reduction."

The unambiguous requirement that standards of performance must "appl[y] . . . to" individual sources within a regulated source category forecloses EPA's claim to generation shifting authority. "Apply" in this context means "[t]o administer *to*, to bring (a thing) to bear upon, in order to produce an effect." 1 Oxford English Dictionary 576 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989) (emphasis in original). Generation shifting does not involve "administering *to*" or "bring[ing] to bear" any "thing" upon an individual source in order to "produce" the "effect" that the CAA contemplates—*i.e.*, more environmentally friendly operation of the source. Rather, generation shifting involves replacing or reducing the operation of the source category in question with that of entirely different kinds of sources, deemed by EPA to be cleaner. That is plainly beyond what the statutory text permits.

Generation shifting is also prohibited because it gives no meaning to Congress's use of the word "performance" in the phrase "standard of performance." Performance means "[t]he accomplishment, execution, carrying out, working out of anything ordered or undertaken, the doing of any action or work." 11 Oxford

English Dictionary 544. Generation shifting does not involve power plants doing any action or work, but ceasing to do work through *non*-performance. As this Court explained in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001), courts must give statutory terms meaning, even where they are part of a larger statutorily defined phrase. *Id.* at 172 (requiring that the word "navigable" in the Clean Water Act's statutorily defined term "navigable waters" be given "effect").[9]

Having no answer to the plain text, EPA attempts an interpretive sleight of hand. EPA argues that Section 111(d) permits the agency to calculate emission reductions based on measures that can be implemented by a source's "owners and operators." 80 Fed. Reg. at 64,726, 64,767-68. And because "owners and operators" can move into or invest in other types of energy generation, EPA claims that Section 111 permits the agency to establish emission requirements premised on such generation shifting. *Id.*

This is simply an impermissible attempt to "rewrite clear statutory terms to suit [EPA's] own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446. Section 111(d) contemplates "standards of performance" that can be "appl[ied] . . . to" "*source[s]*," not the sources' owners and operators. 42 U.S.C. § 7411(d)(1)(A) (emphasis added). In fact, the statute separately defines the term "stationary

[9] Similarly, a "standard of performance" and the "best system of emission reduction" must be "achievable" and "adequately demonstrated," § 7411(a)(1), but those requirements would be nullified if generation shifting were a permissible basis for a performance standard. Indeed, the D.C. Circuit has long held that "achievability" must be demonstrated with respect to the regulated source category itself. *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973).

source" ("any building, structure, facility, or installation which emits or may emit any air pollutant," *id.* § 7411(a)(3)), and the term "owner or operator" ("any person who owns, leases, operates, controls, or supervises a stationary source," *id.* § 7411(a)(5)). It also includes an independent prohibition on "owners or operators" of the sources that are subject to "standards of performances," providing that it is unlawful for "any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." *Id.* § 7411(e). EPA's attempt to equate "sources" with their "owners or operators" is flatly prohibited by the statutory text.

EPA also argued in the D.C. Circuit that "the description of 'standards of performance' as applying to sources . . . does nothing to limit the scope of measures that can be considered part of the 'best system of emission reduction.'" EPA Opp. 23-24, arguing that the term "system" has an "expansive" dictionary definition, *id.* at 14. But this contradicts EPA's candid acknowledgment in the final Plan that "the system must be limited to measures that can be implemented—'appl[ied]'—by the sources themselves." 80 Fed. Reg. at 64,720. That concession follows from the plain statutory language. Because a "standard of performance" must be "appl[icable] . . . to a[] particular source," so too must the best system of emission reduction, which sets the "degree of emission limitation" for the standard. 42 U.S.C. § 7411(a)(1).

B. The Power Plan Unconstitutionally Commandeers And Coerces States And Their Officials Into Carrying Out Federal Energy Policy.

By attempting to use an obscure Clean Air Act program to fulfill a major regulatory role for which it was never intended, the Power Plan not only clashes

with the statutory text, but also unconstitutionally burdens the States by requiring them to carry out federal policy *even if they refuse to implement a State Plan to carry out federal policy*.

1. The Power Plan Unlawfully Commandeers the States and Their Officials.

At the center of the Power Plan is a mismatch between the duties that EPA's actions require the States to carry out and those that the agency is capable of doing on its own. While EPA could conceivably preempt state action with respect to the Plan's first "building block" (which concerns efficiency improvements at existing power plants), the agency lacks the authority itself to carry out the numerous planning and regulatory activities necessary to accommodate the retirements and construction and integration of new capacity entailed by its generation shifting approach. Due to EPA's undisputed lack of authority to preempt State action in these areas, much less to take the necessary regulatory actions, even States that decline to submit and implement a State Plan will nonetheless be forced to take substantial regulatory actions to achieve the emission reductions that will apply under a Federal Plan. This commandeering of the States and state officials to carry out federal policy is unconstitutional.

The Constitution prohibits the federal government from "us[ing] the States as implements of regulation"—in other words, to commandeer them to carry out federal law. *New York v. United States*, 505 U.S. 144, 161 (1992). On that basis, *New York* struck down a provision of the Low–Level Radioactive Waste Policy Amendments Act that required States either to legislate to provide for the disposal

of radioactive waste according to the statute or to take title to such waste and assume responsibility for its storage and disposal. *Id.* at 153-54. It explained that the federal government may "offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 167. But merely providing States flexibility in how to carry out federal policy is unlawful because it "only underscores the critical alternative a State lacks: A State may not decline to administer the federal program." *Id.* at 176-77. *Printz v. United States*, 521 U.S. 898 (1997), reaffirmed and extended these principles to the commandeering of state officials, striking down a federal statute that directed state law enforcement officers to conduct background checks on gun buyers and perform related tasks. State officials, it held, may not be "dragooned . . . into administering federal law." *Id.* at 928 (quotation marks omitted).

Yet achieving the Plan's emissions targets requires far more than just emissions-control requirements of the kind EPA could impose and administer itself; instead, compliance requires States to fundamentally revamp their regulation of their utility sectors and undertake a long series of regulatory actions, many of which are necessarily underway, all at EPA's direction. *E..g.,* Wreath Decl. ¶¶ 2, 4, 6, 15-20. Even States that refuse to submit State Plans—thereby leaving the means of achieving CO_2 goals to EPA in a Federal Plan, *see* 42 U.S.C. § 7411(d)(2)—will still be forced either to facilitate the generation shifting measures identified by EPA or to otherwise account for the disruption and dislocation caused by the imposition of impossible-to-achieve emission limits on power plants. For example, States must

alter their laws regulating utilities to achieve a mix of generation sources that satisfies EPA's dictates and adopt electricity efficiency mandates and programs where generation shifting alone proves insufficient to achieve the Plan's targets. *See infra* at pp. 42-43.

The Power Plan not only commandeers the States but also their officials, whom the Power Plan leaves responsible for permitting and regulating new generation capacity, clearing rights of way for necessary transmission and pipeline projects, and undertaking the planning and associated regulatory actions necessary to integrate new capacity or otherwise shift generation among sources. If EPA effectively mandates through a Federal Plan the retirement of coal-fired and fossil fuel-fired plants or reductions in their utilization (including by mandating the purchase of exorbitantly expensive emissions allowances), state utility and electricity regulators will have to respond in the same way as if the State itself had ordered the retirements. Likewise, if EPA orders through a Federal Plan that power-plant owners construct new capacity, state utility and electricity regulators will have to plan for and oversee its construction and integration into the electric system as if the State itself had issued the order. And even EPA acknowledges that State actors are the ones responsible for addressing the Plan's impact on electric reliability. 80 Fed. Reg. at 64,678. The result is that States have no choice but to act, as they are now doing.

Before the D.C. Circuit, EPA called this arrangement a "textbook example of cooperative federalism." EPA Opp. 44. But it declined to identify any authority by

which it might supplant the States in carrying out these aspects of the Plan—the essential trade-off that this Court has always required for a program to be truly "cooperative." *See New York*, 505 U.S. at 176 ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all."); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) ("If a State does not wish to [regulate consistent with statute], the full regulatory burden will be borne by the Federal Government.").

In short, while EPA makes much of the "state flexibilities" the Plan allegedly includes, what States lack, as in *New York*, is the one option the Constitution requires: choice to "decline to administer the federal program." 505 U.S. at 177. Instead, the Power Plan regards States as "administrative agencies of the Federal Government." *Id.* at 188. For that reason, it impinges on the States' sovereign authority and, like the actions under review in *New York* and *Printz*, exceeds the federal government's power.

2. The Power Plan Unlawfully Coerces the States.

Just as the federal government may not commandeer States to carry out federal policy, it also may not coerce them to the same end by denying them "a legitimate choice whether to accept the federal conditions." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.). The Power Plan violates the Tenth Amendment's anti-coercion principle by threatening to punish States that do not carry out federal policy.

Federal action directed at States "has crossed the line distinguishing encouragement from coercion" when it leverages an existing and substantial

entitlement of a State in order to induce the State to implement federal policy. *Id.* at 2603 (quotation marks omitted). When, "'not merely in theory but in fact,'" such threats amount to "economic dragooning that leaves the States with no real option but to acquiesce" to federal demands, they impermissibly "undermine the status of the States as independent sovereigns in our federal system." *Id.* at 2602, 2604–05 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987)).[10]

That describes the Power Plan. EPA has stated that if the States decline to implement its terms, the agency will impose a Federal Plan that does so. 80 Fed. Reg. at 64,942. The implicit threat is that, because efficiency improvements that could be federally administered are nowhere near sufficient to achieve the reduction in emissions targeted by EPA, a Federal Plan will still require States to take regulatory action to administer and facilitate generation shifting, on pain of suffering massive injury and dislocation if they refuse to do so. Indeed, EPA is quite clear that it expects state actors to exercise "responsibility to maintain a reliable electric system" in the face of the Plan's disruptions. *Id.* at 64,678. If state officials decline to do so, the consequences in terms of state services and operations, public

[10] While the claim at issue in *NFIB* concerned conditional exercise of the Spending power, it was premised (as is the claim here) on the principle that a federal threat that overrides States' policymaking discretion "violates the Tenth Amendment by coercing them into complying" with federal prerogatives. 132 S. Ct. at 2482. The Tenth Amendment, of course, equally cabins exercises of the Commerce Clause power like the Plan. *See New York*, 505 U.S. at 175 (finding that exercise of Commerce Clause power "crossed the line distinguishing encouragement from coercion"); *see also id.* at 186–87 (upholding another exercise of Commerce Clause power because it did "not pose any realistic risk of altering the form or the method of functioning of [state] government").

safety, and economic disruption are predictably catastrophic: very bad things happen when the electricity goes out.

The whole point is to force States to pick up the slack necessary to maintain reliable and affordable electric service by taking regulatory actions that are beyond EPA's authority, either with a State Plan or with regulatory action taken in the context of a Federal Plan. In neither instance could it be said that the decision to adopt or reject EPA's preferred policies "'remain[ed] the prerogative of the States.'" *NFIB*, 132 S. Ct. at 2604 (alteration in original) (quoting *Dole*, 483 U.S. at 211). Instead, EPA's "inducement" "is a gun to the head," *id.*, in light of the disruption and dislocation to citizens and the State itself if EPA were to carry out its threat. This, again, is why States have no choice but to carry out EPA's dictates.

C. The Section 112 Exclusion Unambiguously Prohibits The Power Plan.

The Section 112 Exclusion is an independent bar on the Power Plan. Under EPA's own longstanding reading of the text in the U.S. Code, the Exclusion prohibits EPA from employing Section 111(d) to regulate a source category that is already regulated under Section 112. And because it is undisputed that fossil fuel-fired power plants remain regulated under Section 112, *see* 77 Fed. Reg. 9,304 (Feb. 16, 2012), the Exclusion acts here to prohibit EPA's attempt in the Power Plan to invoke Section 111(d) to doubly regulate those same plants.

1. EPA May Not Employ Section 111(d) To Regulate A Source Category That It Has Chosen To "Regulate Under Section [1]12."

The Exclusion's prohibition against employing Section 111 to regulate "any air pollutant" emitted from a "source category . . . regulated under section [1]12" has

a straightforward and unambiguous meaning. "Regulated" means "[g]overned by rule, properly controlled or directed, adjusted to some standard, etc." 13 Oxford English Dictionary 524. Thus, if a source category is "governed by [a] rule" under Section 112, EPA may not require States to set a standard of performance for sources in that category under Section 111(d). Or, as this Court put it, "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated . . . under . . . § [1]12." *AEP*, 131 S. Ct. at 2537 n.7.

EPA has repeatedly agreed that this prohibition against regulating under Section 111(d) any existing "source category . . . regulated under section [1]12" means what it says. In five analyses spanning three different Administrations—in 1995, 2004, 2005, 2007, and 2014—the agency has consistently concluded that this text means that "a standard of performance under section [1]11(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section [1]12," *repeatedly* describing this as the text's "literal" meaning. 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004); *see* EPA, *Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and Guidelines*, Pub. No. EPA-453/R-94-021, 1-6 (1995) ("1995 EPA Analysis") at 1-6; [11] Fed. Reg. 15,994, 16,031 (Mar. 29, 2005); 2007 EPA Brief, 2007 WL 2155494; EPA Legal Memorandum for proposed Power Plan (June 2, 2014).[12]

[11] This source is available here: http://www3.epa.gov/ttn/atw/landfill/bidfl.pdf.

[12] This document may be found here: http://www.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf.

This "literal' reading of the Exclusion is, as EPA itself has explained, consistent with the statutory and legislative history of the CAA's 1990 Amendments. Before 1990, Section 112 covered an extremely narrow category of life-threatening pollutants, while Section 111(d) acted as a gap-filler. *See* S. Rep. No. 91-1196, at 20 (1970). As then-written, the Exclusion authorized EPA to employ Section 111(d) to regulate pollutants that fell outside of Section 112's confined pollutant definition and the CAA's National Ambient Air Quality Standards ("NAAQS") program. 42 U.S.C. § 7411(d) (1977); 70 Fed. Reg. 15,994, 16,030 (Mar. 29, 2005). But in 1990, Congress greatly expanded the reach of the Section 112 program, broadening the definition of pollutants under Section 112 to resemble that under Section 111(d), and increasing the stringency of regulation on those source categories subject to the Section 112 program. *See supra* at p. 8. As EPA has said in the past, the House of Representatives (where the current text of the Exclusion originated) responded to this fundamental change in the relationship between Section 111(d) and Section 112 by "chang[ing] the focus of [the Exclusion] by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112." 70 Fed. Reg. at 16,031. That is, given the expansion of pollutants covered by Section 112, the House determined that existing sources, which have "significant capital investments" and sunk costs, 70 Fed. Reg. at 16,032, should not be burdened by both the expanded Section 112 program and performance standards under Section 111(d).

The House, EPA has also explained, was especially concerned about "duplicative or otherwise inefficient regulation" when it came to existing power plants, the source category at issue here. 70 Fed. Reg. at 15,999. In the 1990 Amendments, the House drafted a new provision that—similar to the provision now codified at Section 112(n)(1)—gave EPA authority to decline entirely to regulate power plants under Section 112. 70 Fed. Reg. at 16,031. The House revised the Exclusion also to work in tandem with this new provision, so that EPA had a choice between regulating existing power plants under the national standards of Section 112 or under the state-by-state standards of Section 111(d). *See* 70 Fed. Reg. at 16,031.

2. EPA's Attempts To Escape The Literal Reading Of The Exclusion Are Unavailing.

In the Plan, EPA offers two arguments to avoid what it has consistently concluded is the "literal" meaning of the Section 112 Exclusion. *First*, the agency claims for the first time in 20 years that the phrase "regulated under section [1]12" is ambiguous. *Second*, EPA exhumes an argument it advanced during its unsuccessful CAMR rulemaking that a second "version" of the Exclusion exists in the 1990 Statutes at Large. Neither argument withstands scrutiny.

a. EPA's New Assertions Of Ambiguity Lack Merit.

Despite 20 years and three Administrations of consistency, EPA now claims to find the phrase "source category . . . regulated under section [1]12" to be ambiguous. 80 Fed. Reg. at 64,713. EPA admits that it could be read in the way the agency has always read it, to "preclude the regulation under [S]ection 111(d) of a

specific source category for any pollutant if that source category has been regulated for any HAP under [S]ection 112." *Id.* at 64,714. But EPA now claims the phrase could also be read "only [to] exclud[e] the regulation of HAP emissions under [S]ection 111(d) and only when th[e] source category [at issue] is regulated under [S]ection 112." *Id.*

EPA's belated attempt to manufacture ambiguity and rewrite the Exclusion is impermissible. There is no ambiguity in the phrase "source category . . . regulated under section [1]12." As noted above, "regulated" means "[g]overned by rule, properly controlled or directed, adjusted to some standard, etc." 13 Oxford English Dictionary 524. Clearly, if a source category is subject to Section 112's stringent standards for HAP emissions, that source category is "governed by" Section 112. EPA's interpretation would read new words into the Exclusion's plain terms, turning the straightforward prohibition against regulating under Section 111(d) any source category "regulated under section [1]12" into a prohibition against the regulation of any "source category which is regulated under section 112 *only where the air pollutant is a hazardous air pollutant regulated under section 112*." As this Court explained in *UARG*, where EPA similarly sought to evade what it had previously admitted was "a literal reading" of the CAA, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010), the agency has no authority to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446.

EPA attempts to bolster its statutory rewrite with a plea to legislative history, but this argument cuts against the agency's position. According to EPA,

reading the Exclusion as prohibiting Section 111(d) regulation of non-HAPs emitted from a source category regulated under Section 112 would create an impermissible "gap" in the CAA, contrary to the intent of those who wrote the 1970 version of the CAA. 80 Fed. Reg. at 64,741 (discussing legislative history from the 1970 CAA).

First, *UARG* forecloses such atextual appeals to purpose or legislative history where a statute's literal terms are clear and unambiguous. This Court stated unequivocally that an agency's authority "does not include a power to revise clear statutory terms that turn out not to work in practice." 134 S. Ct. at 2446.

Second, EPA's argument is based upon an outdated understanding of the CAA, which ignores entirely the fundamental change in the Section 112 program that Congress enacted in 1990. As explained above, *see supra* at p. 8, the 1990 Congress expanded Section 112 from a program that covered only a small universe of extremely dangerous pollutants into an expansive program, which eliminated the need for gap-filling by Section 111(d). Indeed, since 1990, EPA has never identified a single pollutant that it believes to meet the definition of pollutant under Section 111 but not Section 112—including carbon dioxide. *E.g.*, 73 Fed. Reg. 44,354, 44,493-95 (July 30, 2008).

Third, EPA's own limited activity under Section 111(d) since 1990 shows that there is no real-world concern about a "gap" in coverage under the Exclusion's literal terms. Since 1990, EPA has enacted only two Section 111(d) regulations, and both were consistent with the Exclusion's plain terms. Until now, EPA has never attempted to regulate a source category simultaneously under Section 112 and

111(d). In the first rule, the Clinton-era EPA expressly acknowledged the Exclusion's prohibition against regulating a source category under Section 111(d) where that source category is already regulated under Section 112, but explained that its Section 111(d) regulation of MSW landfills was permissible because the landfills were not "actually being regulated under [S]ection 112." 1995 EPA Analysis at 1-6. The second rule was CAMR, in which EPA sought first to delist power plants entirely under Section 112 before regulating those plants under Section 111(d). 70 Fed. Reg. 15,994 (Mar. 29, 2005) (delisting); 70 Fed. Reg. 28,606 (May 18, 2005) (imposing standards).[13]

b. The Failed Clerical Amendment Is Entirely Irrelevant.

EPA's alternative avenue to avoiding the "literal" meaning of the Section 112 Exclusion, as it appears in the U.S. Code, is the argument that a second "version" of the Exclusion exists in the 1990 Statutes at Large and creates ambiguity as to the Exclusion's meaning. This second "version" theory, 80 Fed. Reg. at 64,714 n.294, derives from the fact that in 1990, Congress passed an erroneous "conforming amendment" that appears in the Statutes at Large but was not included in the U.S. Code.

EPA's contention is that the non-partisan Office of Law Revision Counsel of the U.S. House of Representatives, *see* 2 U.S.C. §§ 285a-285g, erred in compiling the U.S. Code. By law, the Code "establish[es] prima facie the laws of the United

[13] In *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), the D.C. Circuit held that EPA violated the CAA in the manner it delisted power plants under Section 112, rejected the agency's delisting effort, and vacated the Section 111(d) regulation of those power plants under the Section 112 Exclusion. *Id.* at 582-83.

States." 1 U.S.C. § 204(b). It is controlling unless the Law Revision Counsel has made an error, such that the Code is "inconsistent" with the Statutes at Large. *Stephan v. United States*, 319 U.S. 423, 426 (1943).

Under recognized and longstanding practices, the Law Revision Counsel did not err. As explained in Congress's official legislative drafting guides, there are "substantive amendments" and "conforming amendments," the latter of which make clerical adjustments to "tables of contents" and corrections to pre-existing cross-references that are "necessitated by the substantive amendments."[14] The issue here is that in 1990, Congress passed one of each type of amendment that altered the same text in the Exclusion. *See also* Pet'rs' Br., 2014 WL 6687575 at *40-51, No. 14-1146, ECF 1524569 at 40-51 (D.C. Cir. Nov. 26, 2014).

The Law Revision Counsel properly excluded the conforming amendment from the U.S. Code. Consistent with Congress's drafting manuals, the Law Revision Counsel follows a regular practice of first executing substantive amendments, then executing subsequent conforming amendments, and excluding as "cannot be executed" conforming amendments rendered unnecessary by previously executed substantive amendments.[15] That is what happened here: the conforming

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[14]http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf.

[15] *See, e.g.*, Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 15 U.S.C. § 2064; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 1201; Revisor's Note, 42 U.S.C. § 1395u; Revisor's Note, 42 U.S.C. § 1395ww; Revisor's Note, 42 U.S.C. § 1396b; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 42 U.S.C. § 9875; *see also* Revisor's Note, 7 U.S.C. § 2018; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note,

amendment could not be executed because it sought to make a clerical correction to a cross-reference that the substantive amendment had already deleted.[16] *See* Revisor's Note, 42 U.S.C. § 7411. Writing five years after the amendments, the Clinton EPA agreed, explaining that the conforming amendment should be disregarded because it was a clearly erroneous clerical update: "a simple substitution of one subsection citation for another, [made] without consideration of other amendments of the section in which it resides." 1995 EPA Analysis, 1-5–1-6.

Despite many opportunities, EPA has never identified a single example of the Law Revision Counsel—or any court or even other agency—giving *any* meaning to a conforming amendment that could not be executed as a result of a previously executed substantive amendment. Importantly, if the courts were to adopt EPA's approach to interpreting un-executable conforming amendments, then every one of the numerous instances of such amendments—which are common in modern,

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10 U.S.C. § 2533b; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 2081; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C. § 4014; Revisor's Note, 22 U.S.C. § 3651; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 37 U.S.C. § 414; Revisor's Note, 38 U.S.C. § 3015; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 290bb–25; Revisor's Note, 42 U.S.C. § 300ff–28; Revisor's Note, 42 U.S.C. § 1395x; Revisor's Note, 42 U.S.C. § 1396a; Revisor's Note, 42 U.S.C. § 1396r; Revisor's Note, 42 U.S.C. § 5776; Revisor's Note, 42 U.S.C. § 9601; Revisor's Note, 49 U.S.C. § 47415.

[16] Further evidence that the conforming amendment was passed in error is found in the legislative history of the 1990 Amendments. The conforming amendment had originated in the Senate and the substantive amendment in the House, and records of the floor discussion of the 1990 Amendments show that the Senate Manager specifically "recede[d]" to seven substantive changes in Section 108 of the House bill. S. 1630, 101st Cong., § 108 (Oct. 27, 1990), *reprinted in* 1 LEG. HISTORY at 885 (1998). One of those changes is the substantive amendment.

complex legislation—would become previously unnoticed versions-in-exile, causing severe disruptions throughout the U.S. Code. *See supra* at pp. 36-37.[17]

In any event, even if this Court agrees with EPA's "second version" theory, that would not save the Power Plan. Assuming that there are two "versions" of the Exclusion, EPA would need to give "effect" to "every word" of *both* Exclusions. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The only way to do that would be to prohibit EPA *both* from regulating under Section 111(d) any "source category regulated under Section [1]12" (the text in the U.S. Code), *and* from regulating any HAP under Section 111(d) (EPA's view of the Conforming Amendment). And the Power Plan would still be unlawful because the prohibition in the U.S. Code against regulating under Section 111(d) any "source category regulated under Section [1]12" would remain fully intact.[18]

II. Absent A Stay, The States Will Suffer Substantial Irreparable Harms.

If this Court does not stay the Power Plan, the States will continue to suffer immense sovereign and financial harms as a direct result of the Plan, on a scale exceeding any environmental regulations the States have ever faced. Gross Decl.

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[17] EPA is currently objecting to the Law Revision Counsel's long-running effort to codify the CAA into a new positive law title in the U.S. Code. Among its objections is the second "version" theory of the Section 112 Exclusion. The Law Revision Counsel has responded that EPA's objection is "unfounded" and cautioned that it could have wide-ranging implications for any "codification bill dealing with any other subject." Letter from Ralph V. Seep, Law Revision Counsel, to Tom Marino, Chairman, Subcommittee Regulatory Reform at *12 (Sept. 16, 2015), http://goo.gl/xtskmv.

[18] *Scialabba v. Cuellar De Osorio*, 134 S. Ct. 2191 (2014), on which EPA relies in the Power Plan, 80 Fed. at 64,715, thus provides no support for the agency's position. That case dealt with a situation where—unlike here—the U.S. Code contained two irreconcilable, substantive commands.

¶ 3; Stevens Decl. ¶ 8. Both immediately and over the next year, States will enact new laws, revise regulations, and devote many millions of dollars and tens of thousands of hours of employee time. Moreover, the Plan will impose *per se* irreparable injury by unconstitutionally invading States' sovereign authority.

A. The States Are Suffering And Will Continue To Suffer Irreparable Harm To Their Sovereignty.

The Plan is inflicting upon the States significant sovereign harms, which are irreparable *per se*. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982).

In response to the Power Plan, the States need to design and enact transformative legislative and regulatory changes, to give their state regulators the authority both to require generation shifting and to react to the rate and reliability impacts of such shifting. Specifically, as several States explained in declarations before the D.C. Circuit, compliance with the Plan will require new legislation in the next 1 to 2 years to ensure that there is sufficient growth in their domestic natural gas, wind, and solar power sectors to meet the Power Plan's reductions in coal-fired generation. *E.g.*, Lloyd Decl. ¶¶ 78-81; Nowak Decl. ¶ 17; Bracht Decl. ¶ 12; McClanahan Decl. ¶ 11. The sources of energy that EPA assumes will replace coal take years to plan, develop, approve, and then build. *E.g.*, Lloyd Decl. ¶¶ 6, 55, 58-59, 75. Indeed, EPA admitted in the Plan that at least some States will need to enact legislation to comply. 80 Fed. Reg. at 64,859. In addition, States have to revise

numerous regulations to ensure that state public utility commissions can respond to and mitigate the Plan's energy price and reliability impacts. *E.g.*, Lloyd Decl. ¶¶ 88-93; Bracht Decl. ¶¶ 12-13; Nowak Decl. ¶¶ 7, 16; Hodanbosi Decl. ¶¶ 5, 8; McClanahan Decl. ¶ 4; Hyde Decl. ¶ 35; Hays Decl. ¶¶ 5, 9.

These massive legislative and regulatory changes, which are irreparable harms in and of themselves, will also undermine the States' ability to maintain or achieve their own sovereign priorities. Requiring state regulators to design, mandate, and then implement federally-mandated "generation shifting" will displace contrary policies that many States have carefully crafted over decades. Lloyd Decl. ¶¶ 31-46, 87. Once made, many changes will be "impossible" to reverse. Lloyd Decl. ¶ 47; McClanahan Decl. ¶ 11; Nowak Decl. ¶ 12; Bracht Decl. ¶¶ 11, 14; Mroz Decl. ¶¶ 3, 8. In addition, the time spent by legislators and state agencies to comply with the Power Plan will limit the finite time that they can devote to their own sovereign priorities. *E.g.*, Lloyd Decl. ¶¶ 31-46, 75, 80, 87; Parfitt Decl. ¶ 10; Easterly Decl. ¶ 9. This problem is particularly acute because many state legislatures sit every year or every other year, and only for a relatively brief period of time. *E.g.*, Lloyd Decl. ¶¶ 39, 75, 80; Parfitt Decl. ¶ 10; Easterly Decl. ¶ 9.

Moreover, EPA's invasion of the States' Tenth Amendment rights constitutes ongoing and *per se* irreparable harm. As explained above, EPA is commandeering the States' regulatory agencies by requiring them to be involved with decommissioning dozens of coal-fired power plants, and granting regulatory and siting approval to many new renewable energy and transmission projects. *E.g.*,

Lloyd Decl. ¶¶ 6, 57, 59; Nowak Decl. ¶ 12; McClanahan Decl. ¶ 7. The invasion of the States' constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

B. The States Have Expended And Will Continue To Expend Significant And Unrecoverable Resources.

The Power Plan will also entail massive financial expenditures by States, which are entirely irreparable. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring) ("[A] regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs."); *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages . . . renders the harm suffered irreparable.").

1. The States' efforts under the Plan will cost them tens of thousands of unrecoverable hours and millions of unrefundable dollars. *See, e.g.*, Durham Decl. ¶ 6 (7,100 hours of 9 senior staff members); McClanahan Decl. ¶ 6 ($500,000 to $1 million on consultants alone); Gore Decl. ¶ 6 ($760,000 per year); *see also* AP, *Wyoming regulators seek $550K for climate change planning*, Casper Star Tribune (Jan 18, 2016) ("Wyoming environmental regulators have asked for about $550,000 to prepare for [the Power Plan]."). [19] States on *both* sides of this case submitted declarations below explaining that they are responding to the Plan right now. Efforts are being made by those opposing the Plan, *see, e.g.*, Hyde Decl. ¶ 10; Lloyd

[19] This source may be found here: http://trib.com/business/energy/wyoming-regulators-seek-k-for-climate-change-planning/article_19e5e28f-0de8-5f7a-9c61-c63406a495dd.html.

Decl. ¶¶ 86, 93; Stevens Decl. ¶¶ 5-10; Thomas Decl. ¶ 7; Bracht Decl. ¶¶ 7-8, and also those supporting the Plan, *see, e.g.*, Snyder Decl. ¶ 47; Chang Decl. ¶ 30; Clark Decl. ¶ 16; McVay Decl. ¶ 18; Wright Decl. ¶ 24. Indeed, EPA's Administrator recently boasted that the Plan "is being actively engaged by every state in the United States." Joel Kirkland, *Obama's A-Team touts Clean Power Plan's enforceability*, E&E News (Dec. 7, 2015).[20]

Just a few examples of the States' responsibilities under the Power Plan illustrate the scale of the States' obligations over the next 1 to 3 years. To design State Plans that shift the energy grids in some States away from coal-fired generation, and in others away from natural gas-fired generation, States will need to conduct interagency analyses and consult with stakeholders to determine what changes can plausibly be made to shift generation among sources and add renewable energy generation. Nowak Decl. ¶¶ 4-13; McClanahan ¶¶ 4-10. This process will include an assessment of the State's available forms of energy, whether developing more new energy sources is feasible, and the changes required to state law. Bracht Decl. ¶¶ 2, 8, 10, 12; McClanahan Decl. ¶¶ 5, 7-8; Hodanbosi Decl. ¶ 5; Gore Decl. ¶¶ 5-6; Lloyd Decl. ¶¶ 47-48, 82-87. States will then need to undertake to change state laws and regulations governing their electricity markets. Gustafson Decl. ¶ 15. And since the Power Plan contemplates interstate regimes, States will

[20] In addition to the activities documented in the declarations submitted by all States here and below, the attached table shows that States are actively engaged with the Plan. *See* App. 3A.

also need to engage in time-consuming interstate consultation. *E.g.*, Lloyd Decl. ¶¶ 85-86; Bracht Decl. ¶ 14; Stevens Decl. ¶ 10; Macy ¶ 5; McClanahan Decl. ¶ 14.

By September 2016, the States must submit their Plans or seek extensions by: (1) identifying the State Plans that are "under consideration"; (2) providing an "appropriate explanation" for the extension; and (3) describing how they have provided for "meaningful engagement" with the public. 80 Fed. Reg. at 64,856. Even the steps for an extension require immediate and unrecoverable expenditures, Hyde Decl. ¶ 9; Stevens Decl. ¶¶ 5-10; McClanahan Decl. ¶¶ 4-10; Bracht Decl. ¶¶ 2, 7-8, 12; Spencer Decl. ¶ 4; Nowak Decl. ¶¶ 4-13; Hodanbosi Decl. ¶¶ 5-6; Gore Decl. ¶¶ 5-6, a fact EPA itself does not dispute, EPA Opp. 56. States that await the end of this litigation to begin these efforts will miss the September 2016 deadline, which would permit EPA to impose a Federal Plan. 80 Fed. Reg. at 64,856-57.

States that intend to seek an extension until September 2018 cannot simply do the work required for the extension and then await completion of this litigation. The Power Plan is the most complex rule the States have faced. It will take some States 3 to 5 years to finish their State Plans. Gross Decl. ¶ 3; Stevens Decl. ¶ 8. And because the massive changes required by the Power Plan can take years to implement, States have to take immediate action. *E.g.,* Lloyd Decl. ¶ 86; Hyde Decl. ¶¶ 9, 20, 22. For example, the Power Plan requires States to submit an "update" to EPA by September 2017, describing "the type of approach it will take in the final plan submittal and to draft legislation or regulations for this approach." 80 Fed. Reg. at 64,859. Crafting such legislation and rules is a complex endeavor, which will

divert significant resources. *E.g.,* Lloyd Decl. ¶ 93; Hyde Decl. ¶ 31. By comparison, a state implementation plan under the CAA's NAAQS program is something with which state regulators are familiar, typically impacts a limited geographic area within a State, and does not expressly require an electric reliability assessment. 80 Fed. Reg. at 64,876.

2. EPA's attempts below to diminish the irreparable harm from state expenditures are meritless.

First, the agency's assertion that treating state expenditures as irreparable harm would lead to stays of "virtually any agency action" and "disrupt the entire statutory scheme for . . . air quality standards as well as other pollution control programs that rely on state plans," EPA Opp. 55, is baseless. EPA cited no authority for this principle, and there is none. The check on this alleged slippery slope is that courts do not look only to irreparable harm in granting a stay. They also consider likelihood of success, the balance of equities, and the public interest—factors that are satisfied here but that would not be in challenges to most rules.

Second, EPA's assertion that all of the States can do nothing now and default to a Federal Plan that the agency has not even finalized, EPA Opp. 46, is a made-for-litigation fiction. In the Power Plan, EPA told the States to phase out the Nation's most common form of energy, while devoting 94 pages in the Federal Register to detailing the various approaches the States could take to achieve this transformation. 80 Fed. Reg. at 64,820-914. The agency then said that it will impose some form of a Federal Plan on States that reject all of these state-run methods. *Id.*

at 64,856-57. Designing and then modeling the impacts of each of EPA's suggested state-run approaches is a complex, interagency endeavor that States must engage in now, if they want a complete picture of their options before being forced to choose between a federal or state approach. *See supra* at p. 11. Given the Plan's deadlines, those States cannot simply wait until whenever EPA finalizes the model Federal Plan to begin this design, modeling, and evaluation effort. *E.g.*, Hyde Decl. ¶ 22 ("Texas [has] little choice but to being allocating[] time, effort and resources immediately" because "Texas will have virtually no time to review the final Federal Plan.").

Moreover, States must prepare for the impact of the Power Plan's shift in electricity generation, regardless of whether that shift is imposed under a state-run approach or under the yet-to-be-finalized Federal Plan design. States need to act now to mitigate the impacts on price and reliability that drastically reducing reliance on coal will impose. *E.g.*, Wreath Decl. ¶ 3. That is why States on *both* sides of this case are actively working right now in response to the Power Plan. *See supra* at pp. 41-42. These massive efforts will be entirely wasted and irreparable if and when this Court ultimately decides that the Plan is unlawful.

III. The Equities And Relative Harms Favor A Stay.

In the words of EPA's Administrator, the Plan's monumental consequences for each State's energy markets are being "bak[ed] into the system" right now.[21] In those markets, decisions must be made many years in advance, given the long lead

[21] Interview of EPA Administrator Gina McCarthy (Dec. 7, 2015), *available at* https://archive.org/details/KQED_20151207_235900_BBC_World_News_America#start/1020/end/1080.

time necessary to plan, approve, finance and then build new sources of energy. *See* Utility Mot. at 18-19 (citing declarations). For example, construction of new natural gas facilities takes 5 years, with 6 to 15 years needed for new transmission infrastructure. *Id.* at 15 (citing Greene Decl. ¶ 6). Even if planning began today, such a facility might not be fully operational and placed in service until 2023 at the soonest. *Id.*

Absent a stay, the Power Plan will have massive and immediate impacts on both sides of the generation shifting equation, none of which is in the public interest. As noted above, EPA's own modeling demonstrates that that the "shift" the Power Plan portends will lead to closures of numerous coal-fired power plants in 2016 alone. *See* Schwartz Decl. ¶4; Energy Ventures Analysis, "Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry," at 16, 66-68 (Sept. 2015).[22] This modeling is based upon the well-accepted understanding that owners and operators of coal-fired power plants, including those plants already straining under Section 112 requirements, will not make the additional costly investments necessary to keep operations running in the face of the Plan's effective mandate that those owners "shift" to competitor industries. *See* Schwartz Report at 63. The shutdown of these plants will cause the closures of related coal mines, resulting in the loss of jobs in some of this country's most economically depressed, rural communities. *Id.* at 70-72. On the other side of the generation shifting calculus, renewable energy businesses supporting EPA explained below that the

[22] This source may be found here: http://www.nma.org/pdf/EVA-Report-Final.pdf.

Plan is "driving" *billions* of dollars of investments to their industry. *See* Advanced Energy Opp. 7-8. Such a dramatic reallocation of capital resources, in reliance on a rule that this Court is likely to find unlawful, is also contrary to the public interest.

Before the D.C. Circuit, EPA sought to avoid a stay by pointing to what it described as the Power Plan's urgent and needed impacts, including its effect on the Administration's political efforts in the international community. EPA Opp. 1, 68. But EPA has not previously demonstrated urgency in the Plan's deadlines, having missed its own commitments to issue the Plan by more than three years. 77 Fed. Reg. 22,392, 22,404 (Apr. 13, 2012); 75 Fed. Reg. 82,392 (Dec. 30, 2010). Furthermore, "the public has no interest in the enforcement of what is very likely" an illegal rule. *Odebrecht,* 715 F.3d at 1273. If this Court agrees with the States that the Power Plan is unlikely to survive judicial review, then *any* compliance or diplomatic commitments the Federal Government can lock in before the Plan is declared illegal are contrary to the public interest as a matter of law.

In the end, a stay would preserve the status quo, allowing the States to continue to exercise their traditional policy discretion over utilities and the electric systems. *See San Diegans for Mt. Soledad Nat'l War Mem'l*, 548 U.S. at 1304 (Kennedy, J., in chambers) (stay warranted to "preserv[e] the status quo"). EPA's argument to the contrary is a transparent effort to "bak[e] into the system" the Power Plan's "aggressive[] transform[ation] . . . [of] the domestic energy industry," and to deploy again the cynical tactic that EPA successfully used just last term to nullify this Court's holding in *Michigan v. EPA*, 135 S. Ct. 2699 (2015). A federal

agency's exertion of raw power cannot be allowed to trample the courts' orderly and effective adjudication of important disputes like this one.

Although the D.C. Circuit has expedited its consideration of the petitions for review, *see* App. 2A, oral argument will not be heard until June 2, 2016. That means that a decision on the merits is at least half a year away, and likely more. In addition, possible rehearing or rehearing *en banc* proceedings may take many additional months. An immediate stay from this Court is necessary to prevent the irreversible changes and harms that will continue to occur during the D.C. Circuit proceedings, which could stretch well into 2017. *Cf. White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (petition for review filed February 16, 2012, argued December 10, 2013, and decided April 15, 2014), *rev'd by Michigan v. EPA*, 135 S. Ct. 2699 (cert. petition filed July 14, 2014, argued March 25, 2015, and decided June 29, 2015).

CONCLUSION

For the foregoing reasons, the States respectfully request an immediate stay of the Power Plan.

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Respectfully submitted,

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I certify that on this 26th day of January, 2016, I caused to be served the above document on the following by overnight commercial carrier and electronic mail where available:

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