No. _____

In the Supreme Court of the United States

OHIO, ET AL.
Applicants

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.
Respondents.

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

STATE APPLICANTS' EMERGENCY APPLICATION FOR A STAY OF ADMINISTRATIVE ACTION

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The petitioners below included Ohio, Indiana, and West Virginia. This application refers to these States collectively as "the state applicants."

Other petitioners below included: Case No. 23-1157: State of Utah; Case No. 23-1181: Kinder Morgan, Inc.; Case No. 23-1190: American Forest & Paper Association; Case No. 23-1191: Midwest Ozone Group; Case No. 23-1193: Interstate Natural Gas Association of America and American Petroleum Institute; Case No. 23-1195: 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, and Portland Cement Association; Case No. 23-1199: National Mining Association; Case No. 23-1200: American Iron and Steel Institute; Case No. 23-1201: State of Wisconsin; Case No. 23-1202: Enbridge (U.S.) Inc.; Case No. 23-1203: American Chemistry Council and American Fuel & Petrochemical Manufacturers; Case No. 23-1205: TransCanada Pipeline USA Ltd.; Case No. 23-1206: Hybar LLC; Case No. 23-1207: United States Steel Corporation; Case No. 23-1208: Union Electric Company, d/b/a Ameren Missouri; Case No. 23-1209: State of Nevada; Case No. 23-1211: Arkansas League of Good Neighbors.

The respondents are Environmental Protection Agency and Michael S. Regan, Administrator, U.S. EPA.

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

The Clean Air Act pictures a world where the States and the EPA share responsibility for ensuring the nation's air quality. Relevant here, the Act allows each State to develop a plan to prevent emissions within its borders from significantly affecting other States' air quality. The EPA then reviews each State's plan. But that review is deferential: if a State's plan meets statutory requirements, the EPA "shall approve" it, regardless of whether the EPA has a better idea for how to accomplish the Act's goals. 42 U.S.C. §7410(k)(3). Correspondingly, the EPA has power to impose a federal plan *only if* a State fails to submit a statutorily compliant plan. *See* §7410(c)(1).

The EPA views its role much differently. In early 2022, it announced a plan to reject the air-quality plans of roughly half of the country's States. At nearly the same time, the EPA revealed its own federal plan, which relied on a coordinated, nationwide approach to emissions reductions. Despite many objections, the EPA finalized that plan in June. *Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality*, 88 Fed. Reg. 36654 (June 5, 2023). This federal plan purports to establish emission-reduction standards for "23 upwind states." *Id.* at 36656. But due to a combination of litigation and interim rulemaking, a dozen of those States and over three quarters of the emissions that the plan sought to regulate, are already exempt from the plan. Nonetheless, the EPA insists that its federal plan should still apply in the remaining States.

The Court should stay application of this federal plan while many parties—including Ohio, Indiana, and West Virginia—challenge the plan in the D.C. Circuit. The challengers are likely to succeed on their claims under the Administrative Procedure Act. That Act requires federal agencies to reach decisions in a considered matter, so as to avoid arbitrary and capricious government action. 5 U.S.C. §706(2)(A). In promulgating the federal plan, the EPA did not meet that threshold. Tellingly, in just a few months, the federal plan is down to a sliver of what the EPA intended. And the federal plan's failures were both foreseeable and inevitable. Most glaringly, the EPA's rulemaking ignored obvious problems with its attempt to twist the Clean Air Act into a system of top-down regulation instead of the system of cooperative federalism that Congress intended.

The remaining stay factors also favor pausing the federal plan. The plan inflicts irreparable, economic injuries on the States and others every day it remains in effect. Worse still, the plan is likely to cause electric-grid emergencies, as power suppliers strain to adjust to the federal plan's terms. To prevent these harms, the Court should step in now.

JURISDICTION

This Court has jurisdiction to resolve this application under 28 U.S.C. §§1331 and 2101(f).

STATEMENT

1. In our federalist system, counteracting air pollution is supposed to be a cooperative effort. "Air pollution is transient, heedless of state boundaries." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 496 (2014). Notwithstanding that

transience, "States and local governments" have traditionally shouldered the "primary responsibility" for controlling air pollution. *See* 42 U.S.C. §7401(a)(3). Against this backdrop, Congress passed the Clean Air Act "to encourage and assist the development and operation of regional air pollution prevention and control programs." §7401(b)(4). The Act is "an experiment in cooperative federalism" *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). On the one hand, the Act tasks the EPA with establishing National Ambient Air Quality Standards for certain air pollutants. *Homer*, 572 U.S. at 498. (In this acronym-heavy field, regulators and stakeholders often refer to these standards as "NAAQS." The state applicants simply call them "air-quality standards.") On the other hand, the *States* retain "the primary responsibility for assuring air quality" within their borders, including the power to choose the "manner in which" they will satisfy the Act's demands. §7407(a).

States meet their obligations under the Act by crafting "state-implementation plans," often called "SIPs" in the field. These state plans implement air-quality standards by incorporating measures adequate to assure "compliance with the Act's requirements." *Homer*, 572 U.S. at 507. Among other things, a state plan must show that the State will comply with the Act's "good neighbor" provision, which requires "upwind States to reduce emissions to account for pollution exported beyond their borders." *Id.* at 499; *accord* §7410(a)(2)(D). To account for a State's good-neighbor obligations, a state plan must "contain adequate provisions" to prohibit in-state emissions from "contribut[ing] significantly to nonattainment in, or interfer[ing] with maintenance by, any other State" in its own compliance with air-quality standards.

§7410(a)(2)(D)(i)(I). But as "long as the ultimate effect of a State's choice of emission limitations is compliance with" national air-quality standards, "the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975).

The EPA, for its part, serves a "ministerial" role when reviewing state-implementation plans. *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) (quotations omitted). If a state plan meets the Act's requirements, the EPA "shall approve" it. §7410(k)(3). As a result, the EPA cannot disapprove a state plan merely because it believes there is a better way to achieve the Act's requirements. The Clean Air Act thus leaves "[e]ach State … wide discretion in formulating its plan." *Union Electric Co. v. EPA*, 427 U.S. 246, 250 (1976); *see also Train*, 421 U.S. at 79.

The EPA shall issue a "federal implementation plan" for a State to follow—sometimes called a "FIP"—*only if* the State's plan "does not satisfy the [Act's] minimum criteria." §7410(c)(1)(A). Federal plans, like state plans, must meet the Act's requirements. *See* §§7410(c)(1), 7602(y). Although the EPA has authority to promulgate a federal-implementation plan "at any time" after it disapproves of a State's plan, §7410(c)(1), the Act expects continued cooperation between the EPA and the State. For instance, if the EPA finds state plan inadequate, the Act anticipates that the EPA will provide an opportunity for "the State" to "correct[] the deficiency." §7410(c)(1)(B). To facilitate this back and forth with the States, the Act gives the EPA a two-year cushion between (1) the date it "disapproves a State implementation plan submission in whole or in part" and (2) the date it needs to issue a federal-

implementation plan. §7410(c)(1)(B). Consistent with that cushion, a State may submit a revised state plan any time in the two-year period before any federal plan would go into effect. *See* §7410(c)(1). All this fits with the Act's foundational principle that the *States* retain the "primary responsibility for assuring air quality." §7407(a). Congress viewed federal plans as a last resort.

2. In October 2015, the EPA revised air-quality standards for ozone pollution. *National Ambient Air Quality Standard for Ozone*, 80 Fed. Reg. 65292, 65301 (Oct. 26, 2015). That change triggered the States' obligation to update their state-implementation plans. §7410(a)(1). Relevant here, the updated state plans needed to include plans for how each State would satisfy the Act's "good neighbor" provision. §7410(a)(2)(D).

For a while, the process remained cooperative. In 2018, the EPA issued guidance to "assist states in developing" state-implementation plans for the new standards. *See Memorandum from Peter Tsirigotis* at 3 (Mar. 27, 2018), https://perma.cc/Y8YF-CQMB ("March Memorandum"); *see also Memorandum from Peter Tsirigotis* (Aug. 31, 2018), https://perma.cc/G8EN-RN8Q ("August Memorandum"); *see also Texas v. EPA*, No. 23-60069, 2023 U.S. App. LEXIS 13898, *6–7 & n.2 (5th Cir. May 1, 2023) (*per curiam*). The EPA included modeling parameters that the States could use in developing their plans, along with explanations of the appropriate threshold for determining whether emissions contributions are significant. *See* March Memorandum at Attachments B & C; August Memorandum 4. Further, the EPA "recommend[ed] that states reach out to EPA Regional offices and work together

to accomplish the goal of developing, submitting, and reviewing approvable" state plans. March Memorandum 6. Many States—including state applicants—accepted this offer and worked closely with the EPA to formulate compliant state plans. *See* App.C-6 (Crowder Decl. ¶¶14–15).

The States then submitted their state-implementation plans according to the EPA's advice. Ohio submitted its state plan in September 2018, Indiana in November of the same year, and West Virginia in February 2019. *See Air Plan Disapproval; Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin*, 87 Fed. Reg. 9838, 9845, 9849 (Feb. 22, 2022); *Air Plan Disapproval; West Virginia*, 87 Fed. Reg. 9516, 9522 (Feb. 22, 2022). Under the Act, the EPA had eighteen months to approve or disapprove of the proposed state plans. *See* §§7410(k)(1)(B), (k)(2). But it sat on the States' submissions for much longer. And for all that time, the EPA never hinted at a problem with the state plans.

Things suddenly changed in February 2022. On a single day, the EPA proposed to disapprove the submissions of nineteen different States. *See, e.g.*, 87 Fed. Reg. at 9852 (Ohio and Indiana); 87 Fed. Reg. at 9516 (West Virginia); *Air Plan Disapproval; Alabama, Mississippi, Tennessee*, 87 Fed. Reg. 9545 (Feb. 22, 2022); *Air Plan Disapproval; Arkansas, Louisiana, Oklahoma, Texas*, 87 Fed. Reg. 9798 (Feb. 22, 2022); *Air Plan Disapproval; Kentucky*, 87 Fed. Reg. 9498 (Feb. 22, 2022); *Air Plan Disapproval; Maryland*, 87 Fed. Reg. 9463 (Feb. 22, 2022); *Air Plan Disapproval; Missouri*, 87 Fed. Reg. 9533 (Feb. 22, 2022); *Air Plan Disapproval; New York and New Jersey*, 87 Fed. Reg. 9484 (Feb. 22, 2022). A few months later, the EPA

disapproved four more States' plans, bringing the total number of disapproved state plans to twenty-three. *See Air Plan Disapprovals*, 88 Fed. Reg. 9336, 9337 n.6 (Feb. 13, 2023).

At that point, the EPA might have worked with the States to correct the perceived deficiencies in the state plans. *See* §7410(c)(1)(B). The EPA, however, chose a different course. Less than two months after proposing to disapprove the plans of nineteen States, and before the deadline for commenting on the disapprovals even expired, the EPA proposed its own federal-implementation plan. *Federal Implementation Plan Addressing Regional Ozone Transport*, 87 Fed. Reg. 20036 (Apr. 6, 2022). The proposed federal plan sought to "resolve" the good-neighbor obligations for roughly half of this country's States. *Id.* at 20038. More precisely, the EPA imposed a single, coordinated plan to reduce air pollution from 23 States based on a combined analysis of those States' upwind contributions to ozone pollution in downwind States. *Id*. Under this multi-state approach, the EPA purported to apportion the responsibility of reducing emissions "collectively" among "contributing upwind states." *Id.* at 20076. The EPA said that this coordinated approach would yield an "'efficient and equitable solution'" by imposing "uniform cost[s]" on "states that are collectively responsible for air quality." *Id.* (quoting *Homer*, 572 U.S. at 519); *see also id.* at 20060.

3. Over vehement protests, the EPA pushed on with its plan to control the nation's air quality. This past February, it finalized disapprovals for the state-implementation plans of over twenty States, including Ohio, Indiana, and West Virginia. 88 Fed. Reg. at 9336. Many States filed petitions in the courts of appeals challenging

the EPA's disapprovals. *See, e.g.*, *West Virginia v. EPA*, No. 23-1418 (4th Cir.); *Texas v. EPA*, No. 23-60069 (5th Cir.); *Kentucky v. EPA*, No. 23-3216 (6th Cir.); *Arkansas v. EPA*, No. 23-1320 (8th Cir.); *Utah v. EPA*, No. 23-9509 (10th Cir.); *see also* §7607(b)(1). Other States—including Ohio and Indiana—chose not to pursue litigation, hoping to work with the EPA to come up with a solution acceptable to all sides. *See* §7410(c)(1).

Litigation quickly highlighted the serious flaws in the EPA's mass disapproval of state-implementation plans. One court, for example, concluded that rather than performing a ministerial review of state plans under the Clean Air Act, *see above* 4, the EPA "exceeded its authority" by utilizing "non-statutory factors" during its evaluation. *Texas*, 2023 U.S. App. LEXIS 13898 at *16–18. That "approach invert[ed]" the Clean Air Act by denying the States their "primary" role in the regulation of air pollution. *Id.* at *19–20 (quotations omitted). Another problem was that the EPA analyzed state plans using modeling data that was not available when the States made their submissions. *Id.* at *24–25; *Kentucky v. EPA*, Nos. 23-3216/3225, 2023 U.S. App. LEXIS 18981, *10–11 (6th Cir. July 25, 2023). That choice unlawfully moved the "goalpost" on the States. *Texas*, 2023 U.S. App. LEXIS 13898 at *25. Yet another problem was that the EPA's review relied on "a material shift" from the earlier guidance it had offered to the States about how to meet their requirements. *Id.* at 23. And many States had used the EPA's earlier guidance, to their detriment, when crafting their state plans. *See id.* at *26; 87 Fed. Reg. at 9840–41.

As proves important later on, the EPA had not yet finalized its federal-implementation plan when the just-discussed litigation commenced. And as part of the comment process for the federal plan, commenters previewed the many legal problems with the EPA's disapprovals of state plans. *See* 88 Fed. Reg. at 36672; EPA, *Response to Public Comments* at 2–6, 9–11, 145–55, https://perma.cc/N7CK-3YTE. Those commenters proved prescient: before the EPA finalized the federal plan, the Fifth Circuit held that the EPA likely behaved unlawfully when it disapproved the state plans. *Texas*, 2023 U.S. App. LEXIS 13898 at *16. A panel of that court thus stayed the EPA's regulatory actions as to Texas and Louisiana. *Id.* at *31. The Sixth and Eighth Circuits also stayed the EPA's state-plan disapprovals pending judicial review. *See, e.g.*, *Kentucky*, 2023 U.S. App. LEXIS 13442 at *2; Order, *Arkansas v. EPA*, No. 23-1320 (8th Cir. May 25, 2023); Order, *Missouri v. EPA*, No. 23-1719 (8th Cir. May 26, 2023). Because only an operative state-plan denial can trigger the EPA's obligation to impose a federal one, *see* §7410(c)(1), the EPA necessarily lost its authority to impose a federal plan as to those States.

4. The EPA pressed on anyway, finalizing its federal-implementation plan in early June. 88 Fed. Reg. 36654. Notwithstanding litigation that threatened to disrupt the federal plan's multi-state approach, and courts staying the EPA's actions in several critical States, the EPA stuck with its nationwide plan. That is, the federal plan tries to resolve the good-neighbor obligations of "23 upwind states"—including Ohio, Indiana, and West Virginia—even though the EPA could not enforce it against

many of those same States from the outset. *Id.* at 36656; *see, e.g.*, *Texas*, 2023 U.S. App. LEXIS 13898.

The federal plan requires emissions reductions for each State that are based, in large part, on the "combined effect of the entire program across all linked upwind states." 88 Fed. Reg. at 36749. According to the EPA, the federal plan ensures "national consistency" by imposing "a uniform framework of policy judgments" across the country. *Id.* at 36673. And the EPA explained that a consistent rule across "all jurisdictions" was "vital" to ensuring that the burdens of regulation were divided efficiently and equitably among the States. *Id.* at 36691–92; *see also id.* at 36676–77, 36719, 36741. The final rule, the EPA concluded, is a "nationally applicable" action within the meaning of the Clean Air Act, "given the interdependent nature of interstate pollution transport" and the "large number of states" to which the federal plan applied. *Id.* at 36860. Pursuant to executive order, the EPA also assessed the federalism implications of its rulemaking. Surprisingly, the EPA claimed that its plan did "not have federalism implications" and would not "have substantial direct effects on the states." *Id.* at 36858.

The finalized federal plan is ambitious. It imposes specific emissions reductions on several new industrial stationary sources (referred to as "non-Electric Generating Units" or "non-EGUs") for the first time in decades with respect to the Act's good-neighbor provision. *See id.* at 36654, 36681. It also permits power plants within the States to participate in an overhauled cap-and-trade program, but imposes "enhancements" that reduce flexibility and create costly compliance challenges. *See*

id. at 36762–70. Specifically, the federal plan shrinks the tradeable allowance bank by removing "surplus … allowances" that "diminish[] the intended stringency" of the program. *Id.* at 36767. Future allowances will be so hard to come by that sources may be forced to choose between steep penalties, changing their operations, or shutting down.

Ostensibly, the EPA left open the possibility that a State could "replace" the federal plan with its own plan. *Id.* at 36838. But that is, in any real sense, impossible under the EPA's own logic. The EPA, for example, warned that the agency "does not anticipate revisiting its" regulatory framework and that any state plan will have to be "equivalent to" the federal plan. *Id.* at 36839. That is, the EPA "anticipate[s] that states seeking to replace the" federal plan with a state plan "that takes an alternative approach" will "need to establish, at a minimum, an equivalent level of emissions reduction to what the [federal plan] requires." *Id.* The EPA further said that "[t]he most straightforward method for a state to submit a presumptively approvable" state plan is to provide a plan that looks much like the federal plan. *See id.* at 36842.

5. After finalizing the federal plan, the EPA continued to receive bad news in courts around the country. The Sixth, Ninth, and Tenth Circuits joined the Fifth in concluding that the States had a strong case that the EPA's state-plan disapprovals were illegal. *Kentucky*, 2023 U.S. App. LEXIS 18981 at *10–11; Order at 2, *Nevada Cement Co. v. EPA*, No. 23–682 (9th Cir. July 3, 2023); Order at 4, *Utah v. EPA*, No. 23-9509 (10th Cir. July 27, 2023). The Fourth and Eleventh Circuits also stayed the EPA's actions, without analysis, to allow for judicial review of challenges to state-

plan disapprovals. *See* Order, *West Virginia v. EPA*, No. 23–1418 (4th Cir. Aug. 10, 2023); *Alabama v. EPA*, No. 23-11173 (11th Cir. Aug. 17, 2023). At this point, *every circuit* to have considered staying a state-plan disapproval—seven in total—has granted a stay.

Eventually, the EPA acknowledged the broad implications of this nationwide litigation for its federal-implementation plan. In late July, the EPA issued an interim final rule reacting to litigation over state-plan disapprovals. *Response to Judicial Stays of SIP Disapproval Action for Certain States*, 88 Fed. Reg. 49295 (July 31, 2023). The interim rule stayed the federal plan's application to Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Texas. *Id.* at 49295.

A few weeks ago, the EPA issued another interim final rule responding to the next wave of judicial orders halting its state-plan disapprovals. *Response to Additional Judicial Stays of SIP Disapproval Action for Certain States*, 88 Fed. Reg. 67102 (Sept. 29, 2023). In this second interim rule, the EPA expanded its stay of the federal plan to six additional states: Alabama, Minnesota, Nevada, Oklahoma, Utah, and West Virginia. *Id.* at 67102. For West Virginia, however, the stay may be lifted in a matter of weeks. The length of the Fourth Circuit's stay is tied to an oral argument, scheduled for October 27, in litigation pertaining to West Virginia's state-plan disapproval. *See id.* at 67103. Notably, during its interim rulemaking the EPA again concluded without explanation that its actions would have no federalism implications. 88 Fed. Reg. at 49301; 88 Fed. Reg. at 67105.

At this point, the federal plan—a plan designed to apply collectively to the "interdependent" emissions from "23 upwind states," *see* 88 Fed. Reg. at 36656, 36860—applies to only 11 States. That means, in comparison to the federal plan's stated intent, it now regulates only 11% of the emissions from electric-generating units and about 40% of the emissions from industrial sources. *See* EPA, *Good Neighbor Plan for 2015 Ozone NAAQS* (last updated June 30, 2023)*, computed from data maps available at* https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs. All in all, *over 75%* of the emissions that the federal plan originally set out to control are presently exempt from the federal plan. *See id.*

6. The federal-implementation plan became effective on August 4, 2023. 88 Fed. Reg. at 36654. Before that effective date, Ohio, Indiana, and West Virginia filed a petition in the D.C. Circuit challenging the federal plan. Several other petitioners, representing various other States and various private industries, also challenged the federal plan. Shortly after filing their petitions, the States and private petitioners moved to stay the federal plan pending judicial review. The States argued, among other things, that the EPA's rulemaking process circumvented the Clean Air Act's cooperative-federalism mandate by forcing its own top-down control over state-level air-pollution reduction.

In late September, a divided panel of the D.C. Circuit Court of Appeals denied the motions to stay without analysis. App.A-1–2. One judge—Judge Walker—dissented stating that he would have granted the stay. App.A-1.

7. The States now bring this application for a stay.

REASONS TO GRANT THE APPLICATION

In deciding whether to issue a stay, this Court considers "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) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors "are the most critical." *Id.*

Here, each factor favors a stay. Although the States retain "the primary responsibility for assuring air quality," 42 U.S.C. §7407(a), the EPA persists in unlawfully imposing its vision of air-quality regulation. After disapproving the state-implementation plans of nearly half the States in the Union, the EPA finalized a *single* federal-implementation plan for all of them. *Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality*, 88 Fed. Reg. 36654 (June 5, 2023). The EPA purported to set emission-reduction standards through a coordinated plan designed to reduce the collective emissions of "23 upwind States" under the Clean Air Act's good-neighbor provision. *Id.* at 36656, 36860. Yet, after just a few months, the federal plan is already a disaster. The plan now applies to only 11 of the 23 States it was supposed to cover. And it reaches less than 25% of the emissions it set out to regulate. But rather than admitting failure and returning to the drawing board, the EPA has doubled down on its "dictatorial" quest for top-down control on reducing air pollution. *Texas v. EPA*, No. 23-60069, 2023 U.S. App. LEXIS 13898, *28 (5th Cir. May 1, 2023).

Because this case presents important issues, because the States will likely prevail on the merits, and because the States will suffer in the meantime, the Court should step in now to stay the federal plan pending judicial review.

I. The States will likely prevail on the merits.

A. The Administrative Procedure Act requires federal courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). Applying this text, "administrative agencies are required to engage in reasoned decisionmaking." *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quotations omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.* (quotations omitted). This means that "agency action is lawful only if it rests on a consideration of the relevant factors." *Id.* (quotations omitted). And an agency must "display awareness" of the surrounding context in which it operates and "provide reasoned explanation for its action." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009). Along the same lines, "an agency may not entirely fail to consider an important aspect of the problem when deciding whether regulation is appropriate." *Michigan*, 576 U.S. at 752 (alterations accepted, quotations omitted).

It follows from these principles that an agency has an "obligation to acknowledge and account for" the "regulatory posture the agency creates." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) (*per curiam*); *accord Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1150 (10th Cir. 2016). Said another way, an agency cannot ignore the effects—or likely effects—of

"contemporaneous and closely related rulemaking." *Portland Cement Ass'n*, 665 F.3d at 187; *see also Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1441–42 (D.C. Cir. 1983). An agency must instead offer a "satisfactory explanation," which takes a "hard look" at any "salient problems" arising from the regulatory landscape. *Portland Cement Ass'n*, 665 F.3d at 187 (quotations omitted). To be sure, an agency "must promulgate rules based on the information it currently possesses." *Id.* But that does not give an agency license to ignore "obvious" trends, *see Zen Magnets, LLC*, 841 F.3d at 1150, particularly when those trends are a product of the agency's "own process," *see Portland Cement Ass'n*, 665 F.3d at 187.

B. Turning to this case, the federal plan is already a failed experiment. It applies to less than half of the States, and under a quarter of the emissions, that it set out to regulate. In reality, the federal plan was always doomed; the EPA's carefully timed gambit to work around the Clean Air Act's structure of cooperative federalism was never going to work. With any reasoned consideration, the EPA would have known as much. Indeed, *every circuit* to have considered a state-plan disapproval—seven in total—has stayed the EPA's action. And some did so before the federal plan was even finalized. All told, the EPA failed "to acknowledge and account for" the surrounding regulatory landscape. *See Portland Cement Ass'n*, 665 F.3d at 187. As a result, the state applicants are likely to succeed on the merits.

Begin with where we are now. Since promulgating its federal-implementation plan (just a few months ago), the EPA has issued two interim rules that exempt a dozen States from the plan. *Response to Judicial Stays of SIP Disapproval Action for*

Certain States, 88 Fed. Reg. 49295 (July 31, 2023); *Response to Additional Judicial Stays of SIP Disapproval Action for Certain States*, 88 Fed. Reg. 67102 (Sept. 29, 2023). These exemptions block the federal plan from achieving its purpose. As the EPA suggests, upwind States' contribution to pollution in downwind States will "substantial[ly] decrease" when upwind states "collectively" participate in the emissions-reduction program. *See id.* at 36683. The data bears this out. After exempting a dozen States, the federal plan regulates only (1) about 11% of the emissions from electric-generating units it intended to regulate and (2) about 40% of emissions from industrial sources it intended to regulate. *See* EPA, *Good Neighbor Plan for 2015 Ozone NAAQS* (last updated June 30, 2023)*, computed from data maps available at* https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs. Overall, more than 75% of the emissions that the federal plan set out to control are now exempt from the federal plan. *See id.* The federal plan is but a shell of its original self.

This result was entirely foreseeable. It stems from the EPA's refusal to engage with the cooperative federalism the Clean Air Act requires. Recall that the Act establishes a system under which the States retain the "primary responsibility for assuring air quality." 42 U.S.C. §7407(a). As Congress wrote it, the EPA plays a secondary, "ministerial" role when reviewing state-implementation plans. *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) (quotations omitted). But here, the EPA has cast itself in the leading role. In February 2022, the EPA launched a coordinated attack on the state plans of nearly twenty States. *See Air Plan Disapproval; Alabama, Mississippi, Tennessee*, 87 Fed. Reg. 9545 (Feb. 22, 2022); *Air Plan Disapproval;*

Arkansas, Louisiana, Oklahoma, Texas, 87 Fed. Reg. 9798 (Feb. 22, 2022); *Air Plan Disapproval; Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin*, 87 Fed. Reg. 9838 (Feb. 22, 2022); *Air Plan Disapproval; Kentucky*, 87 Fed. Reg. 9498 (Feb. 22, 2022); *Air Plan Disapproval; Maryland*, 87 Fed. Reg. 9463 (Feb. 22, 2022); *Air Plan Disapproval; Missouri*, 87 Fed. Reg. 9533 (Feb. 22, 2022); *Air Plan Disapproval; New York and New Jersey*, 87 Fed. Reg. 9484 (Feb. 22, 2022); *Air Plan Disapproval; West Virginia*, 87 Fed. Reg. 9516 (Feb. 22, 2022). As it just so happened, the EPA had a single federal plan ready to go for all of these States in less than two months. *Federal Implementation Plan Addressing Regional Ozone Transport*, 87 Fed. Reg. 20036 (Apr. 6, 2022). And the EPA's finalized federal plan drives home the agency's mindset. It appears that in the EPA's view, the only acceptable state plan is one that is functionally equivalent to its own. *See* 88 Fed. Reg. at 36839.

Unsurprisingly, the EPA's thinly veiled attempt to transform the Clean Air Act into a top-down system of regulation led to problems in the EPA's decisionmaking process. Two related features of the federal-implementation plan contribute to the problems. *First*, the EPA's authority to issue a federal-implementation plan kicks in only if the agency properly disapproves a state-implementation plan. *See* 42 U.S.C. §7410(c)(1). Thus, the EPA had authority to issue a nationwide federal-implementation plan only if the EPA properly disapproved the state plan of every covered State. *Second*, the federal plan at issue here relied on a multi-state analysis to reach an "efficient and equitable solution" for how to "apportion emissions reduction responsibilities among upwind states that are collectively responsible for downwind air

quality." 88 Fed. Reg. at 36719 (quotations omitted). In other words, the EPA's multi-state analysis was based on the participation of all "23 upwind states" that would be subject to the federal plan. *See id.* at 36667. Thus, as the EPA has since admitted in litigation, its plan "depends on the continuing operation of 'interdependent' interstate mechanisms, like the allowance trading program, that reach beyond state or regional borders." EPA Motion to Dismiss or Transfer at 16, *Oklahoma v. EPA*, 23-9561 (10th Cir. July 20, 2023); *see also* 88 Fed. Reg. at 36691 (explaining that "consistency" across "all jurisdictions is vital").

Putting all of this together, the EPA failed to consider a relevant factor during its decisionmaking: namely, the numerous and obvious flaws in its decisions to disapprove state-implementation plans. For one thing, the EPA began by disapproving state plans *en masse*. And it used non-statutory factors to deny those plans, relied on data unavailable to the States at the time of their submissions, and contradicted its own earlier guidance. *See Texas*, 2023 U.S. App. LEXIS 13898 at *16–28. Importantly, the EPA was well *aware* of these flaws when it was finalizing its federal plan. Many States had immediately gone to court upon disapproval of their plans. *See above* 7–8. And commenters had pointed out the many legal issues with the EPA's disapproval. *See* EPA, Response to Public Comments at 2–6, 9–11, 145–55, https://perma.cc/N7CK-3YTE. The Fifth Circuit had too. Recall that it granted a stay, and held the EPA's actions likely unlawful, *before* the EPA finalized the federal plan. *Texas v. EPA*, No. 23-60069, 2023 U.S. App. LEXIS 13898 at *16–28. And other circuits had also begun to stay the EPA's actions by late spring, before the federal

plan was finalized. *See Kentucky v. EPA*, Nos. 23-3216/3225, 2023 U.S. App. LEXIS 13442 (6th Cir. May 31, 2023); Order, *Arkansas v. EPA*, No. 23-1320 (8th Cir. May 25, 2023); Order, *Missouri v. EPA*, No. 23-1719 (8th Cir. May 26, 2023).

Thus, by the time the EPA finalized its federal plan, there was a strong likelihood—if not a near certainty—that the federal implementation would *not* go into effect for all "23 upwind states," as intended. 88 Fed. Reg. at 36667. Armed with that likelihood, any reasonable decisionmaker would have stopped to consider this question: Will the federal-implementation plan still be an effective, "efficient[,] and equitable solution" for the covered upwind States if it does not apply collectively to all of them? *See id.* at 36719. The EPA never seriously grappled with that inquiry, even though many courts had already stayed its actions. Instead, the EPA uncritically proceeded under the assumption that its plan would go into effect for all "23 upwind states." *Id.* Along related lines, the EPA never acknowledged the serious federalism implications of its plan, including the likelihood that the federal plan would *not* apply uniformly to all 23 upwind states that the EPA intended to cover. *See id.* at 36858; *see also* 88 Fed. Reg. at 49301; 88 Fed. Reg. at 67105.

The EPA also never adequately considered a smaller, severed version of the federal plan. True, the EPA asserted, without legal analysis, that its plan would be severable. *Id.* at 36693. But its reasoning was conclusory at best: that the federal plan should be severable because some air-quality regulation is better than none. *See id.* That broad brush dodges the key question of whether the federal implementation plan remains a fair and effective division of emission-reduction responsibilities when

its application is not uniform. Take, as just one consideration, the issue of competitive balance among States. Upwind states actually subject to the federal plan will face significant compliance burdens and other economic injuries. *Below* 23–26. They will thus be at a competitive disadvantage to upwind States exempt from the plan. The EPA's severability rationale gives this and other consequences of unequal application (including consequences for private parties) no thought. In short, if the EPA's some-regulation-is-better-than-nothing approach counts as reasoned decisionmaking, then anything does.

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At bottom, the federal-implementation plan is arbitrary and capricious. It no longer achieves its original goal to set federal emission-reduction standards for 23 upwind States. And the federal plan's failures were both predictable and inevitable. During its rulemaking, the EPA failed to grapple with the regulatory mess it created when it took a combined regulatory action against more than 20 different States; and then forced them to accept a *single*, coordinated federal plan. The EPA's desire to force a square peg (a federal air-quality plan) into a round hole (a cooperative, state-driven system) was always going to be a poor fit. Because the EPA failed to confront that reality, it failed to engage in the reasoned decisionmaking required under the Administrative Procedure Act.

3. The D.C. Circuit did not explain its reasons for denying the States a stay. *See* App.A-1–2. But two objections to the States' arguments, that the EPA raised in briefing below, are worth addressing here.

First, the state applicants' arguments do *not* amount to a collateral attack on the disapprovals of their state-implementation plans. As mentioned already, Ohio and Indiana did not challenge the EPA's disapproval of their state plans. (Remember, however, that West Virginia did. *West Virginia v. EPA*, No. 23–1418 (4th Cir.).) It follows that Ohio and Indiana will be subject to regulatory plans that are different from the plans they proposed. But it does not follow that they must accept an unlawful federal-implementation plan. Here, because the federal plan takes a multi-state approach, its lawfulness is necessarily intertwined with the lawfulness of the EPA's various state-plan disapprovals. Put another way, the potential effects of "a contemporaneous and closely related rulemaking" process were something the EPA needed to consider when promulgating its federal plan. *Portland Cement Ass'n*, 665 F.3d at 187. The EPA's failure to do so renders the federal plan unlawful. The state applicants—as regulated States under the federal plan—are free to challenge the federal plan, and they could not have done so before the EPA finalized the plan.

Second, this Court's decision in *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014), does nothing to upset the States' arguments. There, the Court resolved a procedural issue and two merits issues. Procedurally, the Court held that States could challenge a federal-implementation plan even though they had not challenged the disapproval of their "particular" state-implementation plans. *Id.* at 507. The Court said that the "gravamen" of the States' challenge was not the illegality of disapproval, but instead that the EPA failed to meet statutory obligations before imposing a federal-implementation plan. *Id.* at 507. So too for Ohio and Indiana. The

gravamen of their challenge is not the disapproval of their particular state plans. Rather, they challenge the EPA's failure to engage in reasoned decisionmaking, based on its failure to consider the consequences of litigation involving *other* States. On the merits, *Homer* held that once the EPA has found a state plan inadequate, it may issue a federal plan without giving the State further guidance. *Id.* at 508. The Court further held that the EPA may consider costs in allocating "emission reductions among upwind States." *Id.* at 524. Neither of those holdings relieve the EPA of its obligation to ensure that any federal plan is reasoned and follows the law—so those holdings are irrelevant to this case.

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

Without a stay, the States have sustained—and will continue to sustain—serious, irreparable injuries. Before explaining why, however, the States pause for a coda. Although the Fourth Circuit stayed the EPA's state-plan disapproval as to one of the state applicants (West Virginia), absent further action that stay lasts only through October. *See Order*, ECF. 39, *West Virginia v. U.S.*, No. 23-1418 (4th Cir. Aug. 10, 2023). Thus, a stay is still essential for preventing further irreparable harm to all the state applicants.

Turn now to the harm inflicted by the federal-implementation plan. As explained in full shortly, the States are being harmed by the time, money, and other resources spent on complying with an unlawful federal mandate. *See, e.g.*, App.B-6, 9–10 (Hodanbosi Decl. ¶¶14–15, 22–25); *see* App.C-13–16 (Crowder Decl. ¶¶40–44); App.D-3, 4–11 (Lane Decl. ¶¶5, 7–22); App.E-5–6 (Farah Decl. ¶¶12–15). Because

these costs are unrecoverable against the federal government, the States are irreparably harmed every day that passes without a stay. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part); *see also Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 58 (D.D.C. 2020) (same and collecting examples); *Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023).

For one thing, the federal plan directly imposes significant compliance burdens on the States. Under the federal plan, the States are responsible for issuing or updating Title V permits for covered sources within the State. *See* 88 Fed. Reg. at 36843–44; App.B-7–8 (Hodanbosi Decl. ¶¶18–19); App.C-14 (Crowder Decl. ¶41). Because each permit is unique to the needs of each facility, each permitting process will require rounds of drafting, staff review, public notice, public meetings, and responses to public comments. App.C-14–16 (Crowder Decl. ¶¶41–43); *see* App.B-7–8 (Hodanbosi Decl. ¶¶18–19). The permitting process is thus lengthy, resource intensive, and costly. The States should not have to deplete their coffers while waiting to see how this litigation—which could go on for months or, likely, years—plays out.

The compliance costs borne by the States do not end there. The federal plan also makes States responsible for ensuring that covered sources adequately monitor their emissions. *See* 88 Fed. Reg. at 36843; 40 C.F.R. §70.4. As a result, the States are currently expending significant resources to ensure that sources in their boundaries are aware of their obligations under the federal plan—which include monitoring, recordkeeping, and reporting obligations. *See Ohio EPA Correspondence with State*

Sources, (Aug. 23, 2023), https://perma.cc/83CB-9BZW. The States, in addition, ensure that covered sources within their borders are fitted with the necessary technology for monitoring emissions so that the sources can show compliance with the federal plan. *See id.*; App.B-10 (Hodanbosi Decl. ¶24). Consequently, the States must divert resources away from permitting other infrastructure projects—such as new and expanding power facilities—in order to comply with their compliance burdens under the federal plan. *See* App.C-15–16 (Crowder Decl. ¶43). That is no small matter: stopping or slowing progress on other critical infrastructure projects harms the public welfare.

The federal plan inflicts still other economic injuries on the petitioner States. It will severely undermine the States' electricity-generation capacity and destabilize the States' power grids. *See, e.g.*, App.B-3–6 (Hodanbosi Decl. ¶¶7–15); App.D-3–8, 10–11 (Lane Decl. ¶¶5–14, 17–19, 22); App.E-4–6 (Farah Decl. ¶¶10–15); PJM Interconnection, *Energy Transition in PJM: Resource Retirements, Replacements & Risk* (Feb. 24, 2023), https://perma.cc/PQA7-9P6K; *see also* North American Electric Reliability Corporation, *2023 Summer Reliability Assessment Infographic* (May 2023) at 6, https://perma.cc/A9G6-B398. PJM Interconnection—an entity that coordinates power in Ohio, West Virginia, and parts of Indiana—specifically identified the federal plan as a potential catalyst, among others, for "a significant amount of generation retirements within a condensed time frame." *Energy Transition in PJM: Resource Retirements, Replacements & Risk* at 7.

These electric-grid emergencies are not distant possibilities. One such emergency recently came to pass. App.B-5–6, 14–21 (Hodanbosi Decl. ¶13 and Exhibit A). In December 2022, PJM notified the United States Department of Energy that impending cold weather would threaten the electric grid that PJM operates and potentially cause an electricity shortage. *Id*. The Department responded by issuing an Emergency Order that temporarily suspended air-quality regulations and capacity limits on power sources, thus narrowly avoiding a disaster. *Id.* These emergencies are certain to increase in frequency as the federal plan forces more electricity generators into early retirement. And they threaten the States' operations and industries, and could leave the States' citizens unable to heat or cool their homes affordably, if at all. *See, e.g.*, App.D-3, 4–11 (Lane Decl. ¶¶5, 7–22).

Finally, the EPA's attempt at top-down control contradicts its obligation to respect the States' sovereign authority to regulate air quality within their borders under the Act. This "dictatorial" approach impedes the States' sovereignty by elevating the EPA to the role of primary regulator. *Texas*, 2023 U.S. App. LEXIS 13898 at *28; *Texas*, 829 F.3d at 434. A stay will protect the States' sovereignty from unlawful infringement while this case is decided on the merits.

III. Staying the federal plan will promote the public interest and will not substantially harm others.

The "public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants" seek relief. *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (Sutton, J.) (quotations omitted). That is why the balance of the equities and the public interest merge when

the government is a party: enjoining unlawful government action inflicts no legally cognizable harm. *See Nken*, 556 U.S. at 435. Taken independently, too, both of these factors counsel in favor of a stay.

For one thing, the EPA faces no undue harm if the federal plan is stayed. The EPA is responsible for delaying the implementation of the 2015 air-quality standards. It sat for several years on the various state-plan submissions—well past the eighteen-month deadline by which it was to act—before denying them and imposing the federal plan. Any delay is thus a problem of the EPA's own doing. True enough, a stay would reduce the incentives to bring emissions into immediate compliance with the federal plan. But if the plan is illegal, the States should not be forced to comply with it. And the EPA's own actions, exempting a dozen States from the plan and over 75% of the emissions it sought to reduce, confirms that a pause while this case is decided on the merits will not harm the EPA or the country at large. At any rate, covered sources within the States would remain subject to the prior good-neighbor regimes, so this is not an all-or-nothing scenario.

Staying the federal plan also promotes the public interest in applying the law "correct[ly]." *Biden*, 57 F.4th at 556 (quotations omitted). Because the federal plan is arbitrary and capricious, staying its implementation is one step closer to applying the law correctly. Further, the public has a strong interest in having reliable electricity. The affected sources, which includes providers of natural gas, "provide power to … homes, farms, businesses and industries." *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 588 F. Supp. 2d 919, 934 (S.D. Ind. 2008). If

sources' ability to provide reliable electricity "is imperiled," the States may lose the "ability to fulfill [their] mission to the public." *Id.* After all, "a steady supply of electricity"—for example, to heat and cool facilities housing "the elderly, hospitals and day care centers"—is "critical." *Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) (*per curiam*). Staying a rule that threatens grid reliability thus serves the public interest.

CONCLUSION

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

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Respectfully submitted,

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