ORAL ARGUMENT NOT YET SCHEDULED
No. 15-1363 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petitions for Review of a Final Action of the
United States Environmental Protection Agency

JOINT REPLY OF WEST VIRGINIA, ET AL., OKLAHOMA, ET AL., NORTH DAKOTA, AND MISSISSIPPI DEQ IN SUPPORT OF MOTIONS FOR STAY AND FOR EXPEDITED CONSIDERATION

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Joel Kirland, *Obama's A-Team touts Clean Power Plan's enforceability*,
E&E News (Dec. 7, 2015).. 22

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Act (or CAA)	Clean Air Act
Advanced Energy Opp.	Response of Advanced Energy Associations In Opposition to Motion for Stay, No. 15-1363 (and consolidated cases), ECF 1587482 (Dec. 8, 2015)
CAMR	Standards of Performance for New and Existing Stationary Sources: Electric Utility Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005)
Energy Opp.	Response of Power Companies in Opposition to Motions for Stay, No. 15-1363 (and consolidated cases), ECF 1587423 (Dec. 8, 2015)
EPA	United States Environmental Protection Agency
EPA Opp.	Respondent EPA's Opposition to Motions to Stay Final Rule, No. 15-1363 (and consolidated cases), ECF 1586661 (Dec. 3, 2015)
Envtl. Opp.	Environmental and Public Health Respondent-Intervenors' Opposition to Motions for Stay, No. 15-1363 (and consolidated cases), ECF 1587490 (Dec. 8, 2015)
FERC	Federal Energy Regulatory Commission
HAP	Hazardous Air Pollutant
Intervenor Peabody Reply	Reply of Peabody Energy Corp. in Support of Motions for Stay of EPA's Final Rule, No. 15-1363 (and consolidated cases) (D.C. Cir. Dec. 23, 2015)
Joint Non-State Reply	Joint Reply of Utility, Coal, Labor, and Business Movants in Support of Motions for Stay of EPA's Final Rule, No. 15-1363 (and consolidated cases) (D.C. Cir. Dec. 23, 2015)

Joint States Mot.	State Petitioners' Motion for Stay and For Expedited Consideration of Petition for Review, No. 15-1363, ECF 1579999 (Oct. 23, 2015)
NAAQS	National Ambient Air Quality Standards
ND Mot.	Petitioner State of North Dakota's Motion for Stay of EPA's Final Rule, No. 15-1380, ECF 1580920 (Oct. 29, 2015)
Ok. Mot.	Petitioner Oklahoma's Motion for Stay of EPA's Existing Source Performance Standards for Electric Generating Units, No. 15-1354, ECF 1580577 (Oct. 28, 2015)
Power Plan (or Plan)	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)
SIP	State Implementation Plan
States Opp.	Opposition to Petitioners' Motions for a Stay On Behalf of the States of New York, et al., No. 15-1363 (and consolidated cases), ECF 1587450 (Dec. 8, 2015)
1995 EPA Memo	EPA, Air Emissions from Municipal Solid Waste Landfills, Pub. No. EPA-453/R-94-021 (1995)

INTRODUCTION

Attempting to walk a line between downplaying the need for a stay and advocating for the Power Plan's immediate importance, EPA's opposition spins a self-contradictory tale of two rules. EPA asserts that the Plan is central to "establish[ing] this country's leadership" right now, EPA Opp. 68, and is "critically important" to combating "the nation's most important and urgent environmental challenge," such that any delay "would adversely affect public health and welfare," *id.* at 1, 68. In the next breath, EPA denies that this momentous rule is covered by the clear statement rule of *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG*"), for "agency decisions of vast economic and political significance," *id.* at 2444, and belittles the notion that Petitioners "must devote substantial efforts during the period of judicial review to develop plans," EPA Opp. 56.

But no amount of obfuscation can conceal that the Power Plan is an unprecedented attempt by this nation's environmental regulator to force States to reorder their mix of electricity generation. The Plan is the first time EPA has ever used "generation-shifting" to define emission limits under Section 111(d). And while no one contends that the Plan precisely "dictates the required mix of generation facilities in each state," *id.* at 53, it is undisputed that the Plan is intended to, and will, force a massive reordering of each State's mix of generation facilities. EPA itself admits there is no way to meet the Plan's targets solely by making efficiency improvements at coal-fired power plants. *Id.* at 12-13.

Moreover, the declarations from EPA and its supporters—as well as the numerous declarations from Petitioners, including the 27 Petitioner States—establish beyond any serious doubt that the Power Plan is already having far-reaching, immediate, and irreversible consequences. In a declaration submitted by EPA, the Power Plan is described as having "cemented the U.S. commitment to action" in the international community. Stern Decl. ¶ 10. Planning activity in the States on both sides of this case is already significant and well underway, requiring the expenditure of taxpayer resources, changes in state laws, and redirected legislative time. *See infra* pp. 17-22. And EPA's intervenors explain that the Plan is now providing substantial "market signals," Mendelsohn Decl. ¶ 11, which are driving capital and consumer decisions in the energy generation field to the tune of "billions" of dollars, Energy Opp. 7-8.

When the Sixth Circuit recently stayed another far-reaching EPA rule, it did so in light of the "the sheer breadth of the [rule's] ripple effects" and to "silence[] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing" while also "honor[ing] the policy of cooperative federalism." *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015). Here, the Plan is forcing the unrecoverable expenditure of massive taxpayer resources, displacing state sovereign functions, and influencing business and diplomatic decisions right now. This Court should stay the Power Plan until it has a full opportunity to review this unlawful Rule.

ARGUMENT

I. Petitioners Are Likely To Prevail On The Merits.

A. EPA's Use Of Generation-Shifting To Calculate Emission Standards Under Section 111(d) Is An Assertion Of "Vast" Authority Without "Clear" Congressional Authorization.

1. The Power Plan's central methodology—basing emission reductions on power plant owners "shifting" business to other forms of energy generation—cannot be reconciled with the Supreme Court's *UARG* decision. Joint States Mot. 8-10. In the rulemaking at issue in *UARG*, EPA expanded two CAA programs to cover stationary sources solely because those sources emitted more than a particular amount of CO_2. 134 S. Ct. at 2437-38. Notwithstanding "*Chevron*'s deferential framework," *id.* at 2442, the Court rejected EPA's effort as a "decision[] of vast economic and political significance," based upon a "long-extant statute," without "clear[]" congressional authorization, *id.* at 2444 (quotation omitted).

EPA now takes a head-in-the-sand approach to *UARG*. Though *UARG* involved the same agency regulating emissions of the same gas, EPA carefully avoids quoting the *UARG* language that controls this Court's determination. EPA Opp. 26-27, 31. EPA does not argue that its interpretation is clearly authorized by Section 111. Instead, the agency claims *Chevron* deference, *id.* at 12, 19, 24, 26, an argument that becomes irrelevant once the *UARG* clear statement rule is triggered, 134 S. Ct. at 2444; *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

UARG decisively forecloses the Power Plan. The vast majority of the Plan's emission reductions come from "generation-shifting." EPA Opp. 7. This concept is both straightforward and breathtaking in its audacity: EPA claims it can require States to force emission reductions premised on a regulated source's owners buying or investing in their competitors' businesses, determined by EPA to be "cleaner." 80 Fed. Reg. at 64,726, 64,767-68. EPA claims that this is just "pollution regulation" that "result[s]" in "an indirect effect on energy markets." EPA Opp. 30, 33. But this misrepresents the Plan, which expressly picks favored and disfavored sources of energy in the process of calculating emission limitations, unquestionably making decisions of "vast economic and political significance" under *UARG*. And the fact that some power plant owners have voluntarily pursued certain measures does not diminish that significance, *see* EPA Opp. 1, 2, 12, 13, 14, 15, 27, as there is a stark difference between those choices and government mandates for an entire industry.[1] That is why the Administration has readily admitted that the Power Plan seeks to "transfor[m] . . . the domestic energy industry." Joint States Mot. 1.

Critically, EPA's generation-shifting methodology would eventually allow EPA to require a complete "shift" away from fossil fuel-fired generation. Joint States Mot. 8. The agency baldly asserts that requiring a complete phase-out "would be an action entirely different in nature." EPA Opp. 30 n.18. But its legal interpretation in this case

[1] Nor is it legally relevant what plant *owners* can or cannot do, as Section 111(d) concerns the regulation of *sources*. *See infra* pp. 6-7; Joint Non-State Reply 7.

has no logical end. Nothing prevents EPA from arguing one day that circumstances not only permit but compel a rule requiring a total phase-out of fossil fuels.

EPA's methodology is also a power recently discovered in a "long-extant" statute. *UARG*, 134 S. Ct. at 2444. The sole alleged example of generation-shifting in Section 111's 45-year history is the Clean Air Mercury Rule ("CAMR"), 70 Fed. Reg. 28,606 (May 18, 2005). CAMR provides no support for EPA because it was vacated by this Court, and, in any event, did not set emission limits based upon shifting generation to another industry. Joint Non-State Reply 16-17.

2. *UARG*'s clear statement rule is reinforced in this case by the canon of statutory construction that an agency must have "clear" congressional authorization to intrude upon "areas traditionally regulated by the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see* Joint States Mot. 10; Ok. Mot. 7-8. EPA's response that "states retain the same authorities . . . to regulate retail electricity sales in intrastate markets and to license new power generation facilities," EPA Opp. 33, misses the point. By using generation-shifting to set emission limits that cannot be achieved solely by improving the performance at an individual power plant, EPA is forcing States to restructure the mix of "power generation facilities" from which their citizens will receive retail energy. This mandate that States reduce reliance on certain energy generation intrudes on States' ability to "regulat[e] electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

3. Even if EPA's use of generation-shifting should be analyzed under *Chevron*, *but see supra* p. 3, the Plan would still fail review because EPA unreasonably interprets Section 111(d), as explained fully by the private movants. *See* Joint Non-State Reply 4-9. To avoid duplicative briefing, the States emphasize only that generation-shifting violates the statutory requirement that "standard[s] of performance" be "appl[icable] . . . to a[] particular source." 42 U.S.C. § 7411(d)(1).

EPA argues 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 position in the final Plan, *see* 80 Fed. Reg. at 64,720 ("the system must be limited to measures that can be implemented—'appl[ied]'—by the sources themselves"), and throughout its brief, *see, e.g.*, EPA Opp. 7 ("individual sources can implement all of these measures"), 17, 23-24 n.10. 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. Joint States Mot. 7 (quotations omitted). Generation-shifting does not satisfy that requirement because it is not a measure applied to the source, but rather to the source's owner or operator. 80 Fed. Reg. at 64,767-68.

EPA further disputes the States' argument that generation-shifting is not about improving a source's "performance," but simply about shifting generation *away from*

the source. *See* Joint States Mot. 7. The statutory word "performance" is irrelevant, the agency insists, because it is "part of the fuller statutorily-defined term 'standard of performance.'" EPA Opp. 26. But this method of statutory interpretation—ignoring a word that Congress used because it is part of a statutorily defined term—is contrary to Supreme Court precedent. *See Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (requiring that the word "navigable" in the Clean Water Act's statutorily defined term "navigable waters" be given "effect").

B. The Section 112 Exclusion Prohibits EPA From Requiring States To Regulate Fossil Fuel-Fired Power Plants.

The Section 112 Exclusion independently bars the Power Plan. Joint States Mot. 11-15. The Exclusion prohibits EPA from invoking Section 111(d) to require States to regulate "any air pollutant" emitted from a "source category which is regulated under [Section 112]." 42 U.S.C. § 7411(d)(1)(A)(i). Given EPA's voluntary decision to regulate power plants under Section 112, EPA cannot through the Power Plan require States to regulate those plants under Section 111(d). Joint States Mot. 12.

EPA raises four arguments to defend the Power Plan against the plain terms of the Section 112 Exclusion. Each argument fails.

First, to support its view that the Exclusion is ambiguous, EPA contends that the Section 112 Exclusion could be read to prohibit a Section 111(d) rule only where "air quality criteria have [also] been issued" for the air pollutant at issue. EPA Opp. 39. But EPA specifically rejected that interpretation in the final Power Plan as "not a

reasonable reading of the statute," 80 Fed. Reg. at 64,713, and agency action can only be upheld on "grounds upon which the agency itself based its action," *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).[2]

Second, EPA defends the interpretation actually adopted in the final Plan: that the Section 112 Exclusion applies only where the air pollutant being regulated under Section 111(d) is a HAP listed under Section 112. EPA claims that "when construing the phrase 'regulated under section [112],' one must consider *what* is being regulated," and points out that "[o]nly hazardous pollutants are addressed by section [112]." EPA Opp. 39. Thus, EPA asserts, the Section 112 Exclusion "only exclud[es] the regulation of HAP emissions under [S]ection 111(d) *and* only when that source category is regulated under [S]ection 112." 80 Fed. Reg. at 64,714 (emphasis added).

But the Exclusion's terms are clear on their face. They prohibit EPA from regulating the emission of "*any* air pollutant" emitted from a "source category which is regulated under [Section 112]." 42 U.S.C. § 7411(d)(1)(A)(i) (emphasis added). As EPA has consistently explained for 20 years, this text has only one "literal" meaning: "if source category X is 'a source category' regulated under section 112, EPA could not regulate HAP or non-HAP from that source category under section 111(d)."

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[2] This interpretation is also foreclosed by *New Jersey v. EPA*, in which this Court vacated CAMR as violating the Section 112 Exclusion—even though no relevant air quality criteria had been issued. 517 F.3d 574, 583 (D.C. Cir. 2008).

70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005).[3] Nothing in the language "qualifies or restricts" the type of air pollutant covered by the Exclusion, and EPA is wrong to now suggest that the silence creates a lack of clarity. *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 592 (D.C. Cir. 2015) (quotations omitted). This Court recently rejected a similar argument from another federal agency as "manufactured ambiguity," and it should do so here, too. *Id.*

As the States have argued, EPA's interpretation simply adds language to the plain text, rewriting it from a prohibition against regulation of any "source category which is regulated under Section 112" into a prohibition against regulation of any "source category which is regulated under Section 112, *where the air pollutant is a hazardous air pollutant actually regulated under Section 112*." Joint States Mot. 13.[4]

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[3] EPA's claim that it has not changed position on the *literal reading* of this statutory text, EPA Opp. 39 n.25, is false. It is undisputed that the Clinton-era EPA, writing just 5 years after the 1990 CAA Amendments, adopted the States' understanding of the Exclusion. EPA, *Air Emissions from Municipal Solid Waste Landfills*, Pub. No. EPA-453/R-94-021, 1-6 (1995) ("1995 EPA Memo"). Then, in the CAMR rulemaking in 2005 and in last year's proposed version of the Power Plan, EPA again concluded that the "literal" reading of the Exclusion's text, as it appears in the U.S. Code, means exactly what the States have said. 70 Fed. Reg. at 16,031; EPA Legal Memo at 26-27 (2014), http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf. While EPA has argued since the CAMR rulemaking that an uncodified amendment in the 1990 Statutes at Large creates an ambiguity, it has consistently agreed that the "literal" reading of the text in the U.S. Code is consistent with the States' understanding. Joint States Mot. 14-15.

[4] EPA also has no meaningful answer to footnote 7 of *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"), where the Supreme Court explained that under the Exclusion, "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated . . . under [Section 112]." *Id.* at 2537

Third, EPA makes the policy argument that reading the Exclusion by its literal terms would "render [Section 111(d)] practically moot, since over 140 source categories are regulated under section [112]." EPA Opp. 42. But that is no reason to ignore the clear statutory language, which EPA has previously honored. Since Congress expanded both the Section 112 program and the Section 112 Exclusion in 1990, EPA has only sought to invoke Section 111(d) twice. Joint States Mot. 13-14. Both times, EPA's actions were consistent with the States' view that EPA cannot regulate under Section 111(d) if a source category is already regulated under Section 112. *Id.*[5] It is EPA that is now acting in a way that fundamentally expands the reach of Section 111(d), by using it for the first time ever to regulate a source category already regulated under Section 112.[6]

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n.7. While it is true that the Court concluded that Section 111(d) "'speaks directly to emissions of [CO_2] from defendants' [power] plants,'" EPA Opp. 42 n.29 (quoting *AEP*, 131 S. Ct. at 2537, the language quoted above reflects the Supreme Court's further recognition that there are limitations on EPA's authority under Section 111(d) which, if triggered, divest EPA of its authority to regulate under that provision.

[5] EPA claims that there is no "legislative history" from "either house of Congress" to support the States' position, EPA Opp. 42—ignoring entirely that EPA explained to this Court during the CAMR litigation that the drafting history of the 1990 Amendments establishes that the House of Representatives specifically intended to change the meaning of the Exclusion to that currently advanced by the States. Brief of EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494 (D.C. Cir. July 23, 2007).

[6] Environmental Intervenors assert that the States' reading of the Exclusion would create a "gap" in the CAA. Envtl. Opp. 5 n.6. But they do not respond to the fact that EPA has never identified any pollutant under Section 111(d) that fell outside the post-1990 definition of a HAP under Section 112, including carbon dioxide. Joint States Mot. 13. Tellingly, EPA does not argue that there would be any gap.

Fourth, EPA exhumes the meritless argument that a second "version" of the Exclusion exists in the 1990 Statutes at Large. EPA Opp. 40-41. The "Senate amendment" to which EPA refers is a failed attempt to update an obsolete cross-reference—not a separate "version" of the Exclusion. Joint States Mot. 14-15. This sort of erroneous clerical correction is common in modern, complex legislation, and EPA still has never identified *any* court or agency giving any meaning to such an amendment.[7] *Id.* at 15. EPA's argument that this Court "must account for the Senate amendment[]," EPA Opp. 41, is contrary to this Court's controlling caselaw, *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013), dozens of examples of uniform legislative practice, *see* Letter of 17 States, EPA-HQ-OAR-2013-0602-25433, at *5-6 (posted Dec. 15, 2014),[8] and EPA's own position just five years after the 1990 CAA Amendments, *see* 1995 EPA Memo, at 1-6. Though EPA has long been aware of these authorities, *see* Joint States Mot. 15, it does not address any of them.

Assuming, *arguendo*, there is a version-in-exile of the Exclusion, that would not salvage the Power Plan. If EPA were correct, then the agency's duty would be to give "*full* effect to [both]" the Exclusion in the U.S. Code and the failed Senate

[7] The only cases cited by EPA are irrelevant to the circumstances here. They stand for either: (1) the uncontroversial proposition that the Statutes at Large control over the U.S. Code when there is a substantive conflict between the two, which is not true here; or (2) the fact that this Court gives effect to conforming amendments that are not clearly clerical errors, which is also not the case here. EPA Opp. 40-41.

[8] The Letter of 17 States is available here: http://goo.gl/epGmXm. *See also* Letter to Tom Marino, Chairman, Subcommittee Regulatory Reform, from Ralph V. Seep, Law Revision Counsel (Sep. 16, 2015), http://goo.gl/xtskmv.

amendment, which EPA contends would prohibit only the regulation of any HAP under Section 111(d). EPA Opp. 41 (emphasis added); *accord 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 [112]" (the text in the U.S. Code), *and* from regulating any HAP under Section 111(d) (EPA's view of the failed Senate amendment). And under this straightforward reading, the Power Plan is still unlawful. *Scialabba v. Cuellar De Osorio*, 134 S. Ct. 2191 (2014), on which EPA relies, thus provides no support for the agency's position. Unlike here, that case involved two irreconcilable, substantive commands in the U.S. Code.[9]

C. The Plan Unlawfully Establishes Performance Standards And Fails To Allow States To Take Account Of The Remaining Useful Life Of Regulated Sources.

EPA's responses to two additional statutory arguments in North Dakota's stay motion, *see* ND Mot. 15-17, also lack merit.

First, EPA fails to persuasively rebut the argument that the Power Plan violates Section 111(d) by establishing "standards of performance," rather than simply providing "a procedure" for States to do so. *Id.* at 16. EPA responds that the Plan's emission targets are merely "substantive" "guidelines" for evaluating state plans, EPA Opp. 50, but that mischaracterizes the rule. The Power Plan prescribes hard emission

[9] *Scialabba* is also distinguishable because that case involved an agency's power to resolve an arguable conflict between two unclear provisions in the U.S. Code. Here, EPA claims the antecedent authority to decide which of two amendments to the same statutory text to make operative. *See* Intervenor Peabody Reply 2-3.

limits, *see* 80 Fed. Reg. at 64961-64, that each State's plan must achieve in a legally-enforceable way. This is nothing less than dictating the level of emissions reduction for regulated sources. EPA also argues that North Dakota's argument is an untimely challenge to two 1975 regulations, EPA Opp. 50 (citing 40 C.F.R. §§ 60.21(e), 60.22(a)), but those regulations refer only to "guideline[s]" and "guideline documents"; they do not allow EPA to dictate, contrary to Section 111(d)'s plain text, specific emission limits that regulated sources *must* meet.

Second, EPA cursorily asserts in one paragraph that the Plan's "flexibilities" permit States to take account of the remaining useful lives of regulated sources. EPA Opp. 50. By that logic, any statute requiring an agency to "take into consideration" a specific factor would be satisfied anytime the regulated parties have flexibility in responding. But the plain import of the statutory directive is that any Section 111(d) rule must contain a specific provision that permits accommodation of remaining useful life, *see* ND Mot. 17, which EPA's general Section 111(d) regulations do, *see* 40 CFR 60.24(f), but the Plan does not. This is of particular concern where tax levies have already been approved to pay to retrofit state utilities under other EPA rules—tax dollars that will be wasted under the Plan. *E.g.*, McClanahan Decl. ¶ 10.

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

By compelling States to restructure their electric systems, the Power Plan "use[s] the States as implements of regulation" and thereby violates the Constitution's

bar on commandeering and coercion of the States and their officials to achieve federal ends. *New York v. United States*, 505 U.S. 144, 161 (1992). EPA provides no direct response to this point or to the argument that the statutory text discussed above must be construed to avoid these constitutional problems.

First, EPA does not dispute that extensive state regulatory action is required to achieve the Plan's mandatory transition from carbon-intensive generation to increased utilization of natural gas and renewables. Instead, EPA argues that the Plan gives States a permissible choice: promulgate a state plan or allow EPA to impose a federal plan. EPA Opp. 43-44.

But that aspect of the Plan "only underscores the critical alternative a State lacks: A State may not decline to administer the federal program," *New York,* 505 U.S. at 176–77, through the exercise of its "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.*, 461 U.S. at 212. As EPA itself acknowledges in the Plan, *see* Ok. Mot. 10-11, exercise of that state regulatory authority is necessary regardless of whether a State's electric system is subject to a state or federal plan. In either event, state agencies will have to be involved with decommissioning dozens of coal-fired plants, and granting regulatory and siting approval to many new renewable energy and transmission projects. *See, e.g.*, Lloyd Decl. ¶¶ 6, 57, 59; Nowak Decl. ¶ 12; McClanahan Decl. ¶ 7. Without these actions, there will be grid failure and blackouts; indeed, EPA's proposed federal plan expressly

depends on state authorities to address reliability concerns. 80 Fed. Reg. 64,966, 64,981 (Oct. 23, 2015). In that respect, the choice to carry out federal policy under either a state plan or a federal plan is indistinguishable from the regulate-or-take-title choice put to States in *New York* that was soundly rejected as "infringing upon the core of state sovereignty reserved by the Tenth Amendment." 505 U.S. at 177.

Second, confirming that this is no "textbook example of cooperative federalism," EPA Opp. 44, EPA does not even attempt to identify federal authority that could displace the need for state actors to implement the Plan. While EPA declares itself prepared to "directly regulate [in-state] sources' CO_2 emissions," *id.* at 44, it cites no authority by which it or another federal agency could accomplish the Plan's forced retirement or reduced utilization of massive amounts of generating capacity, as well as the substantial legislative, regulatory, planning, and other activities that are necessary to carry out federal implementation of the Plan while maintaining electric service. *See, e.g.*, Wreath Decl. ¶¶ 2, 4, 6, 15–20; Lloyd Decl. ¶ 61 (describing current efforts by state officials to create new electric generation, transmission, and infrastructure capacity). Instead, as EPA's silence concedes, all those activities are pushed on the States—again, just like the low-level nuclear waste program struck down in *New York*. *See* 505 U.S. at 176 ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all.").

Third, EPA identifies no precedent for this invasion of state sovereignty. "[H]aving the power to make decisions and to set policy is what gives the State its

sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). Consistent with that principle, the mining statute at issue in *Hodel v. Virginia Surface Mining & Reclamation Association allowed* States to displace federal mining regulation with their own programs, but did not *require* them to do anything. 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."); *see also Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 175 (D.C. Cir. 2015) (same).[10] But, as in *New York* and *NFIB*, the Power Plan deprives the States of that core aspect of their sovereignty, requiring them to exercise regulatory authority while stripping them of policymaking discretion. This is not cooperative federalism. It is a plain violation of the principle that "the Federal Government may not compel the States to implement . . . federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997).

Finally, the claim by States supporting EPA that the Plan advances state sovereignty, States Opp. 7-11, is utterly false. The difference between the Plan and other rules that may affect state regulatory efforts is that the Plan relies on and compels state implementation—which EPA and its Intervenors concede. *See id.* at 8. If EPA's supporters were correct, the federal government could demand obedience in any area of traditional state authority, and States would be powerless to resist.

[10] As concerns coercion, the prospect of the lights going out, which would frustrate a State's exercise of its police powers, is far more of a "gun to the head," *NFIB v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (Roberts, C.J), than the minor diversion of federal funding at issue in *Miss. Comm'n on Envtl. Quality*. *See* 790 F.3d at 177-78.

II. A Stay Is Necessary To Prevent Irreparable Harm To Petitioner States.

Absent a stay, the Plan will continue to immensely and immediately impact the sovereignty and resources of Petitioner States, on a scale exceeding any environmental rule the States have seen. Joint States Mot. 15. Complying with the Plan, both immediately and over the next year, will entail enacting new laws, revising regulations, and devoting many millions of dollars and tens of thousands of hours of employee time. *Id.* at 15-17. If the Court finds the Plan unlawful, all these efforts and disruptions will be wasted and, in many cases, impossible to reverse. *Id.* at 16. Moreover, the Plan will cause substantial, unrecoverable losses of tax revenue, ND Mot. 13-15, and impose *per se* irreparable injury by unconstitutionally invading States' sovereign authority, Ok. Mot. 17-18; ND Mot. 12-13.

A. EPA offers little to rebut the States' claims of irreparable sovereign harm. EPA asserts only that it is not irreparable harm to a State's sovereignty "for a state to exercise its regulatory authority subject to nationwide constraints in implementing a scheme of cooperative federalism." EPA Opp. 53. But this assumes that the Plan is a constitutional scheme of cooperative federalism, which it is not. *See supra* pp. 15-16.

The agency barely addresses the changes in state laws and lost legislative time that will occur during this litigation, irrevocably infringing on States' sovereign power "to create and enforce a legal code," *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). As EPA acknowledges in the Plan, at least some States will need to enact legislation to comply with the Plan's generation-shifting

requirement. 80 Fed. Reg. at 64,859; *see also* Joint States Mot. 16. And because many state legislatures sit briefly every year or every other year, some changes will occur during this lawsuit, if a stay is denied. Lloyd Decl. ¶¶ 80, 93; Hyde Decl. ¶¶ 34-35.

In a footnote, EPA attempts to walk back its concession, arguing that "there is no basis to claim that the Rule requires immediate legislative changes" because "state environmental agencies can [simply] set emission limits for power plants." EPA Opp. 57 & n.38. This *post-hoc* rationalization by legal counsel must be ignored. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Furthermore, some state environmental agencies "currently ha[ve] no regulatory program or mechanism to inventory or track generation and/or CO_2 emissions." Hyde Decl. ¶ 25. And it is unrealistic to assume that States can simply impose the Plan's strict limits without making changes to state laws or regulations to ensure sufficient alternatives to the fossil fuel-fired generation shuttered by the Plan.

EPA also ignores that the massive CO_2 reductions required by the Power Plan intrude on state sovereignty by greatly limiting—and effectively eliminating—state regulatory discretion. ND Mot. 10-13. For example, the Plan mandates that North Dakota reduce CO_2 emissions by nearly 45%. This staggering requirement constrains the ability of the State's agencies to take into account considerations other than compliance with the Power Plan—such as the interests of North Dakotans themselves—in making decisions about electricity generation policy and facilities in North Dakota. And the threat of a federal plan that would still require extensive

action by North Dakota officials only exacerbates the pressure on the State to compromise—or forego—current sovereign priorities by drafting a state plan that conforms to the Power Plan's requirements.

The imposing constraint on the agencies' authority is a clear intrusion on North Dakota's sovereignty. It is not true, as EPA asserts, that impairment of state sovereign authority is irreparable only if a State is "prevented . . . from exercising its authority at all." EPA Opp. 53. The court in *Kansas v. United States* found sovereign harm irreparable not because of the degree of harm, but simply because the State had not had "a full and fair opportunity to be heard on the merits." 249 F.3d 1213, 1227 (10th Cir. 2001). But even if EPA were correct, the impairment of sovereign authority in North Dakota, which must sacrifice other considerations to achieve the draconian 45% emission reduction, is effectively total.

B. EPA and its supporting States spend more time disputing that the Plan is currently requiring Petitioner States to expend significant, irretrievable resources, but their arguments are equally unavailing.

1. EPA first wrongly asserts that the expenditure of unrecoverable state resources cannot constitute irreparable harm. EPA Opp. 54-55. "[N]umerous courts have held that the inability to recover monetary damages . . . renders the harm suffered irreparable." *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013). This Court applied that rule in *American Public Gas Association v. Federal Power Commission*, 543 F.2d 356, 358 (D.C. Cir. 1976), issuing a stay where a

company showed that federal action imposed unrecoverable financial costs upon the firm. *Id.* at 358. The principle applies with particular force when, as here, the harms are imposed upon States. Thus, in *Michigan v. EPA*, Order, No. 98-1497 (D.C. Cir. May 25, 1999), this Court stayed the petitioner States' obligation to submit revised State Implementation Plans (SIPs) to EPA to prevent just such harms. Other courts recently have recognized the same possible injury to States in cases involving EPA.[11]

Citing *Wisconsin Gas Company v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985), EPA argues that "economic losses do not constitute irreparable injury except . . . where the 'very existence' of a company is threatened." EPA Opp. 52. What this Court actually said, however, was that "*[r]ecoverable* monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisc. Gas Co.*, 758 F.2d at 675 (emphasis added). Here, it is undisputed that Petitioner States are spending resources that are and will be *unrecoverable*. Moreover, a requirement that lost resources threaten the "very existence" of a State before becoming irreparable would be nonsensical. *Cf.* U.S. Const. Art. IV, Sec. 3.[12]

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[11] *E.g.*, *In re EPA*, 803 F.3d at 808 ("unrecoverable expenditure of resources" by States "to comply with the new [regulatory] regime" would constitute "irreparable harm"); *North Dakota v. EPA*, No. 3:15-cv-59, --- F. Supp. 3d ---, 2015 WL 5060744 (D.N.D. Aug. 27, 2015) ("[I]f the States incur monetary losses as a result of an unlawful exercise of regulatory authority, no avenue exists to recoup those losses.").

[12] EPA's only other citations to support its argument are several out-of-circuit decisions that the agency misleadingly suggests are about "the 'cost of doing business' for a state regulatory agency," but in fact concern regulatory burdens borne by private firms. EPA Opp. 58. Those cases are irrelevant to the instant matter where significant

EPA's further 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. In *Michigan*, several parties opposing the States' stay motion made the same arguments. They warned that if this Court credited the States' arguments about "expend[ing] time and resources to promulgate revised SIPs[,] . . . staying agency action pending judicial review would be the norm, rather than the rare exception." Indus. Intervenors Opp. 7-8, No. 98-1497 (D.C. Cir. Mar. 5, 1999). This Court properly discounted those predictions, which have not come to pass because 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 satisfied here but that would not be in challenges to most rules.

2. States supporting EPA assert that, in any event, the Plan does not require immediate expenditures by the States. States Opp. 14. But this is refuted by their own declarants, who admit that their States have "*already begun* [their] efforts to develop a state plan for compliance with the Clean Power Plan . . . includ[ing] stakeholder outreach, ongoing modeling and other analyses of the electric power system, [and] collaboration" among state agencies. Snyder Decl. ¶ 47 (New York) (emphasis

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burdens have been placed upon sovereign States and, in any event, are foreclosed by this Court's controlling decision in *American Public Gas*.

added).[13] And EPA's Administrator boasted during international negotiations 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).[14]

3. Finally, EPA and its supporting States argue that Petitioner States will not suffer as much irreparable harm as they have alleged.

The main argument of EPA's supporting States is that the Plan tracks what those States have already been doing. *See, e.g.*, Dykes Decl. ¶ 26 ("very similar to the process . . . RGGI participating states undertook"); Thornton Decl. ¶ 23 (Power Plan "reflect[s] many strategies that Minnesota has demonstrated"). Put another way, the Plan now requires *all* States to adopt the generation-shifting approach that States supporting EPA have voluntarily adopted over a period of many years and even "decades." Eisdorfer Decl. ¶ 13. For example, the Regional Greenhouse Gas Initiative ("RGGI") framework was developed over nearly six years, among States whose sovereign priorities aligned with the goal of generation-shifting.[15]

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[13] *Accord* Chang Decl. ¶ 30 (California) ("planning process began . . . in 2015, and is expected to unfold throughout 2016); Clark Decl. ¶ 16 (Washington) ("begun its efforts"); Klee Decl. ¶ 31 (Connecticut) ("already begun"); McVay Decl. ¶ 18 (Rhode Island) ("already begun"); Pedersen Decl. ¶ 12 (Oregon) ("begun working"); Wright Decl. ¶ 24 (New Hampshire) ("already").

[14] In addition to the activities documented in the declarations submitted by all States in this case, the attached table shows that States across the country are actively engaged with the Plan. *See* Table of State Compliance Actions, Exh. A.

[15] RGGI Design Archive, http://rggi.org/design/history.

That certain States have already been phasing out coal-fired generation as a matter of their own policy choices, however, says nothing about the burden the Plan places on States that have made different choices or are more heavily coal-reliant. For example, California and New York have measures to promote generation-shifting, currently obtain only 0.67% and 7% of their energy from coal-fired power plants, and need to reduce CO_2 emissions by just 13% and 19%. In comparison, Petitioners West Virginia and North Dakota have not likewise facilitated generation-shifting, currently obtain 95% and 77% of their energy from coal-fired power plants, and must design State Plans in less than three years to reduce emissions by 37% and 45%.[16]

EPA and its supporters also equate the Plan's obligations to creating a SIP under the National Ambient Air Quality Standards (NAAQS) program and other similar CAA duties. EPA Opp. 55; States Opp. 14-15. Even if correct, these assertions would not support denying a stay, as this Court has previously stayed a rule requiring a SIP *revision*. Order, *Michigan v. EPA*, No. 98-1497 (D.C. Cir. May 25, 1999). In any event, the comparison is wrong. Gross Decl. ¶ 3; Stevens Decl. ¶ 8. No EPA rule has required a State to design state-wide plans to achieve massive emission reductions (up to 45%) that are premised on and can only be accomplished by "shifting" from the State's largest energy source to an entirely different method of generation—let alone

[16] *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).

design such ambitious plans in less than three years. *See supra* p. 23 n.16 and accompanying text. In more than 1,400 pages of declarations, neither EPA nor any supporter points to any federal environmental rule requiring a change of this scale over any time period. A NAAQS SIP, for example, 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.

Lastly, EPA argues that States will not suffer irreparable harm because of the Plan's "flexibility," which "includ[es] the option of doing nothing" and acceding to a federal takeover, adopting a yet-to-be-promulgated "Model Plan[]," or entering into "existing state trading programs." EPA Opp. 46, 57. But under any approach, the Plan requires Petitioner States to phase out the most commonly used, reliable form of energy. And deciding among options to achieve this mandate—a subject discussed over 500 pages of the prepublication final Plan—and then designing any appropriate approach will involve complex interagency analyses, evaluation of the natural gas and renewable-source capacity that could be added, and evaluation and the implementation of needed changes to state laws and regulations.[17] EPA does not dispute that unrecoverable resources are required even to request an extension in 2016. *Id.* at 56. States must also assess what measures are needed for credits under the

[17] Nowak Decl. ¶¶ 4-13; McClanahan ¶¶ 4-10; Bracht Decl. ¶¶ 2, 8, 10, 12; Hodanbosi Decl. ¶ 5; Gore Decl. ¶¶ 5-6; Lloyd Decl. ¶¶ 47-48, 82-87; Gustafson Decl. ¶ 15; Rikard Decl. ¶¶ 5, 8.

Clean Energy Incentive Plan, because statements of intent are due with 2016 submissions. 80 Fed. Reg. at 64,669. Thus, even States supporting EPA, who have been in the generation-shifting business, are not waiting to begin work. *See supra* p. 21.

Although States may choose to default to the federal plan or adopt one of EPA's not-yet-promulgated "models," this does not relieve the States from immediate and irreparable harm. EPA's assertion that States can accept, sight unseen, a yet-to-be-finalized plan and "do nothing," EPA Opp. 46, is premised on the entirely unrealistic notion that States can leave the functioning and reliability of their power sectors to faith and chance. *E.g.*, Hyde Decl. ¶ 22 ("Texas [has] little choice but to begin allocating[] time, effort and resources immediately" because "Texas will have virtually no time to review the final Federal Plan."). EPA suggests that a federal plan could be abandoned at any time if it proves undesirable, EPA Opp. 11, but that cannot be done unless States spend resources now reviewing and preparing ready alternatives to the federal plan. Moreover, even those States that have decided to default to the federal plan must expend resources today to prepare for the reliability impacts of the federal plan. *E.g.*, Wreath Decl. ¶ 3; *see also* Lloyd Decl. ¶ 48; *supra* p. 17.

C. EPA does not seriously dispute North Dakota's claim of irreparable harm from lost tax revenue and the impact on critical state services. ND Mot. 6-9, 13-15. The agency does not contest that losses will occur, arguing that "there is no evidence that such loss would occur before judicial review is complete." EPA Opp. 54 n.36. But the lost tax revenues will result from reduced lignite mining, which will follow the

closure in 2016 and 2018 of several coal-fired power plants in North Dakota. The first of the closures, which are predicted by EPA's own model[18] and independently confirmed by North Dakota officials,[19] fall well within the lifespan of this litigation.[20]

III. Allowing The Power Plan's Immense, Immediate Consequences To Continue Is Contrary To The Public Interest And The Equities.

No one disputes that the Power Plan is having massive and immediate impacts; the disagreement is only over which of the Plan's impacts are being most felt. The declarations from *all* States show that substantial public funds are being expended now to comply with the Plan's obligations. *See supra* pp. 21-23. EPA and its supporters attest that the Plan is having immediate consequences for international negotiations, Stern Decl. ¶¶ 13-18, 31; Albright Decl. ¶¶ 1-6, and multi-"billion" dollar investment and consumer decisions in the renewable energy field, Advance Energy Opp. 7-8. Declarations by Industry Petitioners show that the Plan is leading to imminent power plant closures and other substantial changes to fossil-fuel capital allocation decisions. Joint Non-State Reply at 28; *see also* Lloyd Decl. ¶¶ 31, 33, 41-46. And States supporting EPA confirm that utilities in their States "have already begun factoring the specific requirements of the . . . Power Plan" into their planning. Eisdorfer Decl. ¶ 19.

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[18] EPA's attempt to dispute its own modeling is unfounded. Joint Non-State Reply 26-28; Schwartz Reply Decl. ¶¶ 19-32.

[19] *See, e.g.*, Gaebe Decl. ¶ 12; *see also* Glatt Decl. ¶ 14; Christman Decl. ¶ 12.

[20] EPA also argues that North Dakota can increase tax rates and types to cover any shortfall, but requiring the State to change its laws is itself a harm. *See supra* p. 17.

All of these substantial and present impacts are contrary to the public interest because the Power Plan is unlawful. There is an "overriding public interest" in "an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 58-59 (D.C. Cir. 1977). If this Court agrees that the Plan is unlikely to survive judicial review, then *any* changes or commitments that manifest before the Plan is invalidated are contrary to the public interest as a matter of law. *Id.* In other words, "the sheer breadth of the ripple effects caused by the [Plan] . . . counsels strongly in favor of maintaining the status quo for the time being." *In re EPA*, 803 F.3d at 808. Thus, EPA and its supporters have matters exactly backwards. The Power Plan's ongoing consequences are not a reason to deny a stay; they demand one.

Taking EPA's approach would repeat the unseemly spectacle that followed its recent loss in *Michigan v. EPA*, 135 S. Ct. 2699 (2015). When the Plan is declared unlawful, EPA will again brag that regulated parties are "already in compliance or well on their way to compliance,"[21] and oppose vacatur because power plants have shuttered, billions have poured into renewable energy, and international commitments have been cemented.

CONCLUSION

The States respectfully request that their motions for stay be granted.

[21] Janet McCabe, https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2015, I caused the foregoing document to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system and hand-delivered four copies to the clerk's office. All registered CM/ECF users will be served by the Court's CM/ECF system. The following non-CM/ECF counsel will be served by U.S. mail:

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