No. 15–____

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

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

APPLICATION OF BUSINESS ASSOCIATIONS FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING APPELLATE REVIEW

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, applicants state as follows:

1. The Chamber of Commerce of the United States of America (the "Chamber") states that it is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than 3 million companies, state and local chambers, and trade associations of every size, in every industry sector, and from every region of the country. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

2. The National Association of Manufacturers ("NAM") states that it is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

3. The American Fuel & Petrochemical Manufacturers ("AFPM") states that it is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM's members supply consumers with a wide variety of products

that are used daily in homes and businesses. AFPM has no parent corporation, and no publicly held company has 10% or greater ownership in AFPM.

4. The National Federation of Independent Business ("NFIB") states that it is a nonprofit mutual benefit corporation that promotes and protects the rights of its members to own, operate, and grow their businesses across the fifty States and the District of Columbia. NFIB has no parent corporation, and no publicly held company has 10% or greater ownership in NFIB.

5. The American Chemistry Council ("ACC") states that it represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. ACC is committed to improved environmental, health, and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is an $801 billion enterprise and a key element of the nation's economy. ACC has no parent corporation, and no publicly held company has 10% or greater ownership in ACC.

6. The American Coke and Coal Chemicals Institute ("ACCCI") states that, founded in 1944, it is the international trade association that represents 100% of the U.S. producers of metallurgical coke used for iron and steelmaking, and 100% of the nation's producers of coal chemicals, who combined have operations in 12 states. It also represents chemical processors, metallurgical coal producers, coal and coke sales agents, and suppliers of equipment, goods, and services to the industry.

ACCCI has no parent corporation, and no publicly held company has 10% or greater ownership in ACCCI.

7. The American Foundry Society ("AFS") states that, founded in 1896, it is the leading U.S. based metalcasting society, assisting member companies and individuals to effectively manage their production operations, profitably market their products and services, and equitably manage their employees. The association is comprised of more than 7,500 individual members representing over 3,000 metalcasting firms, including foundries, suppliers, and customers. AFS has no parent corporation, and no publicly held company has 10% or greater ownership in AFS.

8. The American Forest & Paper Association ("AF&PA") states that it is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent of the total U.S. manufacturing gross domestic product. The industry makes products essential for everyday life from renewable and recyclable resources, producing about $210 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately $50 billion. AF&PA has no parent corporation, and no publicly held company has 10% or greater ownership in AF&PA.

9. The American Iron and Steel Institute ("AISI") states that it serves as the voice of the North American steel industry and represents 19 member companies, including integrated and electric furnace steelmakers, accounting for the majority of U.S. steelmaking capacity with facilities located in 41 states,

Canada, and Mexico, and approximately 125 associate members who are suppliers to or customers of the steel industry. AISI has no parent corporation, and no publicly held company has 10% or greater ownership in AISI.

10. The American Wood Council ("AWC") states that it is the voice of North American traditional and engineered wood products, representing over 75% of the industry that provides approximately 400,000 men and women with family-wage jobs. AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. AWC has no parent corporation, and no publicly held company has a ten percent (10%) or greater ownership interest in AWC.

11. The Brick Industry Association ("BIA") states that, founded in 1934, it is the recognized national authority on clay brick manufacturing and construction, representing approximately 250 manufacturers, distributors, and suppliers that historically provide jobs for 200,000 Americans in 45 states. BIA has no parent corporation, and no publicly held company has 10% or greater ownership in BIA.

12. The Electricity Consumers Resource Council ("ELCON") states that it is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of industrial commodities and consumer goods from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities in all regions of the United States. Many ELCON members also cogenerate electricity as a by-product to serving a manufacturing steam requirement. ELCON has no parent corporation,

and no publicly held company has 10% or greater ownership in ELCON.

13. The Lignite Energy Council ("LEC") states that it is a regional, non-profit organization whose primary mission is to promote the continued development and use of lignite coal as an energy resource. The LEC's membership includes: (1) producers of lignite coal who have an ownership interest in and who mine lignite; (2) users of lignite who operate lignite-fired electric generating plants and the nation's only commercial scale "synfuels" plant that converts lignite into pipeline-quality natural gas; and (3) suppliers of goods and services to the lignite coal industry. LEC has no parent corporation, and no publicly held company has 10% or greater ownership in LEC.

14. The National Lime Association ("NLA") states that it is the national trade association of the lime industry and that it is comprised of U.S. and Canadian commercial lime manufacturing companies, suppliers to lime companies, and foreign lime companies and trade associations. NLA's members produce more than 99% of all lime in the U.S., and 100% of the lime manufactured in Canada. NLA provides a forum to enhance and encourage the exchange of ideas and technical information common to the industry and to promote the use of lime and the business interests of the lime industry. NLA is a non-profit organization. It has no parent corporation, and no publicly held company has 10% or greater ownership in NLA.

15. The National Oilseed Processors Association ("NOPA") states that it is a national trade association that represents 12 companies engaged in the

production of vegetable meals and vegetable oils from oilseeds, including soybeans. NOPA's member companies process more than 1.6 billion bushels of oilseeds annually at 63 plants in 19 states, including 57 plants which process soybeans. NOPA has no parent corporation, and no publicly held company has 10% or greater ownership in NOPA.

16. The Portland Cement Association ("PCA") states that it is a not-for-profit "trade association" within the meaning of Circuit Rule 26.1(b). It represents companies responsible for more than 80 percent of cement-making capacity in the United States. PCA members operate manufacturing plants in 35 states, with distribution centers in all 50 states. PCA conducts market development, engineering, research, education, technical assistance, and public affairs programs on behalf of its members. Its mission focuses on improving and expanding the quality and uses of cement and concrete, raising the quality of construction, and contributing to a better environment. PCA has no parent corporation, and no publicly held company owns a 10% or greater interest in PCA.

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B) Declaration of Brad Rinas, District Superintendent, Washburn Public School District

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D) Declaration of Josh Howard, President, Aquatic Resources Management

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Exhibit 8 Additional Materials

A) EPA, *Clean Energy Now and in the Future*, *available at* http://www.epa.gov/airquality/cpp/fs-cpp-clean-energy.pdf ("EPA Factsheet")

B) U.S. Energy Information Administration, *Most States Have Renewable Portfolio Standards*, *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=4850 ("EIA Renewable Statistics")

C) Press Release, H.R. Energy & Commerce Comm. (July 23, 2014), *available* at http://energycommerce.house.gov/press-release/pollution-vs-energy-lacking-proper-authority-epa-can%E2%80%99t-get-carbon-message-straight ("House Press Release")

D) Coral Davenport, *Strange Climate Event: Warmth Toward U.S.*, N.Y. Times (Dec. 11, 2014), *available at* http://www.nytimes.com/2014/12/12/world/strange-climate-event-warmth-toward-the-us.html?_r=4 ("Kerry Statement")

E) Joby Warrick, *White House set to adopt sweeping curbs on carbon pollution*, Wash. Post (Aug. 1, 2015), *available at* https://www.washingtonpost.com/national/health-science/white-house-set-to-adopt-sweeping-curbs-on-carbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html ("White House Factsheet")

F) Remarks of Gina McCarthy, Administrator, EPA, at RFF Leadership Forum (Sept. 25, 2014), *available at* http://www.rff.org/files/sharepoint/Documents/Events/RFF-Sept25-GinaMcCarthyPLF.pdf ("McCarthy Remarks")

G) Brian Deese, *President Obama's Clean Power Plan Is a Strong Signal of International Leadership* (Aug. 5, 2015), *available at* https://climate.america.gov/clean-power-plan-strong-signal-international-leadership/ ("Deese Article")

H) Interagency Working Group on Social Cost of Carbon, *Technical Support Document: - Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis* (Revised July 2015), *available at*

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J) U.S. Energy Information Administration, *Monthly power sector carbon dioxide emissions reach 27-year low in April* (Aug. 5, 2015), *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=22372 ("EIA Chart")

K) Settlement Agreement between EPA and New York *et al.*, attached to *West Virginia v. EPA*, No. 14-1146, Dkt. No. 1510473 (Sept. 3, 2014) ("Settlement Agreement")

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

The Business Associations[1] respectfully request an immediate stay of the final rule of the United States Environmental Protection Agency ("EPA") entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 FR 64662 (Oct. 23, 2015) (the "Rule"). As demonstrated in the Application by 29 States and State Agencies for Immediate Stay of Final Agency Action Pending Appellate Review, Case No. 15A773, which the Business Associations agree with and incorporate, a stay of EPA's Rule is warranted.[2] The Business Associations submit this Application to emphasize that the Rule transgresses EPA's statutory authority in multiple respects and imposes massive harms on local businesses and communities. The Court should grant the Applications and stay the EPA's unprecedented Rule so that judicial review may take place before, rather than after, implementation of the Rule has begun.

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[1] "The Business Associations" represent a broad range of electricity, energy, industrial, manufacturing, and commercial interests that are directly and indirectly impacted by EPA's rule. They consist of the Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American Foundry Society; American Forest & Paper Association; American Iron & Steel Institute; American Wood Council; Brick Industry Association; Electricity Consumers Resource Council; Lignite Energy Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association.

[2] The Business Associations also agree with and incorporate the Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review and the Coal Industry Application to Stay Agency Rule Pending Judicial Review, which they understand have or soon will be filed with the Court.

INTRODUCTION

As the States have shown, the Court should stay EPA's attempt to "'aggressive[ly] transform[] … the domestic energy industry.'" White House Factsheet, Ex. 8-E. The Rule exceeds the established bounds of EPA's authority under the Clean Air Act ("Act" or "CAA"), sweeping virtually all aspects of electricity production within EPA's control. States and industry must begin now to overhaul the power sector, including passing new laws to ensure the permitting, construction, and funding of EPA's preferred power sources, as well as shuttering existing disfavored plants that would otherwise be dispatched to meet demand.

EPA's Rule rests entirely on a single, terse phrase plucked from a rarely used provision of the Act authorizing EPA to establish "a procedure" for States to issue "standards of performance" for existing "sources." CAA §111(d)(1). But this Court has made clear that absent a clear mandate from Congress EPA may not seek to bootstrap from a "long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*"). That is particularly true where, as here, Congress has repeatedly considered and rejected giving EPA the new authority it now claims, and where EPA is attempting to assert primacy over a sector traditionally regulated by the States. *See, e.g.*, *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). Certainly, a provision that exclusively addresses *existing* sources cannot supply a clear statutory basis for EPA to mandate those sources subsidize construction of EPA's *new* preferred power plants.

The Rule seeks to create a new "clean energy economy," EPA Factsheet 2, Ex. 8-A, by, in the words of a senior administration official, "decarboniz[ing]" the electricity sector, Deese Article, Ex. 8-G. This mandate will impose enormous, immediate, and unrecoverable costs not only on States, who never have been asked to make such extensive changes in so little time, but also on the Business Associations' member companies. A stay is warranted so the courts may assess whether EPA has the unprecedented legal authority the Rule purports to exercise. Indeed, a stay by this Court is particularly necessary in light of EPA's response to this Court's decision in *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015), which struck down the agency's mercury rule. On remand in that case, EPA successfully argued against vacatur on the grounds that power plants had already been forced to comply with the agency's unlawful rule. *See* Application by 29 States for Immediate Stay of Final Agency Action Pending Appellate Review at 1-2; *see also* Heath Knakmuhs, *Two Wrongs Make a Blackout*, Inst. for 21st Century Energy, http://www.energyxxi.org/two-wrongs-make-blackout (last visited Jan. 26, 2016).

OPINION BELOW

The D.C. Circuit's order denying the Business Associations' motion for a stay of the Rule is unpublished and may be found at App. 1A of the Application by 29 States and State Agencies for Immediate Stay of Final Agency Action Pending Appellate Review. EPA's Rule is published at 80 FR 64662 (Oct. 23, 2015) and reprinted in Ex. 3.

JURISDICTION

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

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Pertinent constitutional, statutory, and regulatory provisions are reprinted in Ex. 2 and in the Appendix to the Application by 29 States and State Agencies for Immediate Stay of Final Agency Action Pending Appellate Review beginning at App. 1B.

BACKGROUND

While the details of the Rule are quite complex, the essential requirements of the Rule relative to this Application are fairly straight-forward. The Rule's "chief regulatory requirement" consists of numerical "emission rates"—1,305 lbs. of CO_2 per megawatt hour ("MW-hour") for coal plants and 771 lbs. CO_2/MW-hour for natural gas plants. 80 FR at 64667, 64823. These rates represent a cap on the CO_2 emissions plants may emit per megawatt-hour of generation. *Id.* at 64667. Reduced operations alone cannot satisfy the rates, because producing fewer megawatt-hours of generation does not change how much CO_2 a source emits per megawatt-hour it produces. The Rule's rates are far more stringent than existing coal- and gas-fired plants can meet with any combination of onsite pollution controls or efficiency improvements. *Id.* at 64727, 64769.

In fact, the rates are more stringent than those imposed on *new* sources with "state-of-the-art" systems. *See id.* at 64626-27, 64667; 80 FR 64510, 64512-13, 64540

(Oct. 23, 2015). Contemporaneous with the Rule, EPA issued emission rates for new sources of 1,400 lbs. CO_2/MW-hour for coal and 1,000 lbs. CO_2/MW-hour for natural gas plants, far less stringent than the requirements imposed on existing sources that must be retrofitted with any new control technology. 80 FR at 64512-13.

Emissions Ceilings for New and Existing Sources		
	Newly-constructed	**Existing**
Coal	1,400 lb. CO2/MW-hours	1,305 lb. CO2/MW-hours
Natural Gas	1,000 lb. CO2/MW-hours	771 lb. CO2/MW-hours

The Rule's rates for existing sources are so stringent because they were *not* set on the basis of what individual sources could actually achieve. EPA acknowledged that "measures" that could be implemented at individual fossil fuel-fired generating units "yield only a small amount of emission reductions." 80 FR at 64769. Instead, EPA determined its stringent emissions rates based primarily on actions it believed source *owners* could take to shift production to other "cleaner" generation—what EPA euphemistically calls "generation shifting." *Id.* at 64728 ("generation-shifting" involves "replacement of higher emitting generation with lower- or zero-emitting generation"). Specifically, EPA says owners of existing plants can meet its emission rate by "shifting generation" through subsidization of new renewable generation. For example, EPA says that a coal-fired source can satisfy the emission limit because the owner of the source theoretically can build new renewable plants and get "credit" for generation shifted to those plants or the owner can buy "credits" from another renewable energy generator in a trading market. *Id.* at 64753. Under the Rule, when an existing source owner constructs a

new renewable energy plant (or otherwise subsidizes new renewable generation), EPA treats the existing fossil fuel-fired source and the new renewable plant as a single unit for purposes of determining compliance with EPA's "emission rate."

None of these actions by themselves reduces the actual emissions rate at any regulated fossil-fuel fired source. Instead, *each* such measure forces plant owners to pay for construction and generation of renewable energy that will ultimately displace generation from coal- and gas-fired plants. *Id.* at 64728, 64731. EPA's so-called "generation-shifting" assumption accounts for the vast majority of the Rule's emission reductions. 80 FR at 64728 ("most" of the reductions come from "replacement of higher emitting generation with lower- or zero-emitting generation"). EPA projects coal-fired generation will fall nearly 50% from current levels under the Rule. *See* RIA 2-3, 3-24, Ex. 6-B.

As such, the Rule "does not require any particular amount of reductions by any particular source at any particular time." Opposition to Stay of EPA 9, Nos. 15-1363 *et al.* (D.C. Cir.) (Dkt. No. 1586661) ("EPA Br."). It demands that the industry, including regulated *and* non-regulated generators, *in aggregate* achieve the total emission rate reductions EPA has targeted for each State's total grid. 80 FR at 64667.

ARGUMENT

The Business Associations support the States' Application for a stay. The Business Associations file this separate Application to emphasize that the Rule is

far in excess of EPA's statutory authority under the CAA and the irreparable harms the Associations' members will suffer if a stay is not granted.[3]

I. THE COURT WILL LIKELY FIND EPA'S RULE UNLAWFUL.

As explained, the reductions in emissions sought by EPA's Rule could not be achieved under EPA's established CAA powers through "standards of performance" for "existing sources." CAA §111(d). Instead, EPA's desired reductions require a fundamental shift in energy policy—one requiring States to enact a host of new laws to ensure construction of costly new energy sources and infrastructure and the shuttering of plants that currently provide efficient, reliable, and cost-effective electricity for businesses and consumers.

Section 111(d) provides no authority for EPA to "aggressive[ly] transform[]" the domestic electricity sector to achieve EPA's vision of how that sector should be constituted. The Administration may be frustrated that Congress has repeatedly rebuffed attempts to enact laws authorizing the "cap-and-trade" regime that the Rule now seeks to replicate, *e.g.* H.R. 2454, 111th Cong. (2009); S.2191, 110th Cong. (2007), but EPA cannot circumvent the political process by legislating through regulation. The parties challenging EPA's Rule raise important issues of federal law, which have a strong probability of success.

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[3] The standards governing issuance of a stay are set forth in the States' Application for a stay and incorporated here by reference. Application by 29 States and State Agencies for Immediate Stay of Final Agency Action Pending Appellate Review 13. The States demonstrate that there is a "fair probability" that this Court would vote to grant a petition for a writ of certiorari if the D.C. Circuit were to uphold the Rule. *Id.* As explained in the States' Application, and further below, there is a substantial likelihood that this Court would, after granting certiorari, strike down the Rule as unlawful.

A. The Rule's Requirement That Existing Generating Sources Subsidize Alternative Generation Preferred By EPA In Order To Continue To Operate Is Unlawful.

The Rule compels a fundamental restructuring of the electric grid in violation of the text, structure, and history of the CAA.

1. The Act, at most, permits EPA to impose emission reduction obligations based only on the reductions that can be achieved by the actual fossil fuel-fired generating unit subject to regulation under §111(d). Section 111(d)(1)(A) addresses "standards of performance *for any existing source*." CAA §111(d)(1)(A) (emphasis added). The CAA defines "source," in turn, as "any building, structure, facility, or installation which emits or may emit any air pollutant." CAA §111(a)(3). Thus, §111(d) permits EPA to require States to establish performance standards only for the building, structure, facility, or installation whose "emi[ssions]" are being controlled.

This is reinforced by §111(d)(1)'s express authorization for States to take into consideration "the remaining useful life of the existing *source*" when "applying a standard of performance" to "*any particular source*." CAA §111(d)(1) (emphases added). EPA's reading of §111(d)(1) contorts this provision beyond recognition by purporting to allow EPA to determine an emission performance rate on the basis of aggregate reductions achieved by shifting generation to non-sources while directing States to "apply" standards of performance to "a[] particular source." EPA's reading also conflicts with §111(d)(2), which provides that if EPA promulgates a federal plan in lieu of an unsatisfactory state plan, EPA "shall take into consideration …

remaining useful lives of the *sources* in the category of *sources* to which [the applicable standard] applies." CAA §111(d)(2) (emphases added).

In the few instances in which EPA has applied §111(d), it has read the statute consistently with the plain text and established emission guidelines based on reductions achievable by implementing emission-reducing technology or practices only at the regulated source. *See* 61 FR 9905, 9907 (Mar. 12, 1996); 45 FR 26294, 26294 (Apr. 17, 1980); 44 FR 29828, 29829 (May 22, 1979); 42 FR 55796, 55797 (Oct. 18, 1977); 42 FR 12022, 12022 (Mar. 1, 1977). Indeed, just last year EPA acknowledged that standards of performance are "based on the [best system of emission reduction] *achievable at [the regulated] source*." 79 FR 36880, 36885 (June 30, 2014) (emphasis added).

2. EPA concedes, as it must, that §111(d) permits it to require only actions "that are implementable by the sources themselves." 80 FR at 64762; *id.* at 64720. But EPA's own analysis conclusively demonstrates that the Rule regulates far more than "the sources themselves." *Id.* at 64762. EPA found that "control measures" that could be implemented at individual fossil fuel-fired generating units "yield only a small amount of emission reductions." *Id.* at 64769.

Thus, EPA ultimately concedes that it is, in fact, regulating beyond the regulated source. 80 FR at 64761 (acknowledging the Rule regulates "actions that may occur off-site and actions that a third party takes"). EPA tries to justify its approach by claiming it may regulate any "action[] taken by the *owners or operators* of the sources" that can reduce emissions. *Id.* at 64720 (emphasis added); *see also id.*

at 64762 ("As a practical matter, the 'source' includes the 'owner or operator' of any building, structure, facility, or installation for which a standard of performance is applicable."). For example, EPA says a coal-fired plant can "average [the plant's] emission rate with [credits] issued on the basis of incremental generation" from a new renewable facility the coal-fired plant's owners builds. *Id.* at 64753-54. The coal-fired unit's owner could, EPA says, also enter into "a bilateral transaction with the owner/operator of [a renewable] unit" to obtain credits, or enter into "a transaction for [credits] through an intermediary," such as in an emissions trading market. *Id.* at 64753. In short, EPA asserts §111(d), a provision concerning performance standards for *existing* sources, authorizes the agency to require owners of those sources to ensure the construction of a vast fleet of *new* generating sources that EPA prefers.

But EPA has no authority to require an *owner* of a source to take specific action beyond the regulated source merely because that action might impact EPA's stated goal of reducing global carbon emissions. Section 111(d)(1)(A) permits EPA only to require States to establish "standards of performance *for any existing source,*" and an existing source is specifically defined in §111(a) as "any building, structure, facility, or installation which emits or may emit any air pollutant." CAA §111(a), (d)(1)(A) (emphasis added). Section 111(a)(5) separately defines "owner or operator," but §111(d) does not authorize "standards of performance" for "owners or operators," only for an "existing source." CAA §111(a)(5).

Indeed, §111 itself confirms EPA's error in claiming that "the 'source' includes the 'owner or operator.'" 80 FR at 64762. Section 111(a)(5) *separately* defines "[t]he term 'owner or operator'" to "mean[] any person who owns, leases, operates, controls, or supervises a stationary source." CAA §111(a)(5). If Congress had wished to include a facility's owner or operator within the term "source," it would not have separately defined those terms. The Act further goes on to state that it is unlawful "for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." CAA §111(e). Thus, in these provisions, Congress specifically distinguished the "sources" subject to performance standards from the "owners or operators" of those "sources." *See Transbrasil S.A. Linhas Aereas* v. *Dep't of Transp.*, 791 F.2d 202, 205 (D.C. Cir. 1986) ("[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings.") (citation omitted). Congress had to adopt a specific provision to hold an "owner or operator" of a new source liable precisely because, contrary to the Rule's central assumption, the owner or operator of a source is legally distinct from the "source" itself. Section 111(d) gives EPA no authority to extend the Rule's reach beyond the regulated "source" by imposing obligations on sources' "owners and operators."

In addition to improperly conflating "sources" with their "owners," EPA's interpretation of §111(d) is independently unlawful because it regulates sources collectively rather than on an individual basis. EPA asserts that it may require reductions at a coal plant because the owner of the plant can, for example, construct

a renewable plant elsewhere or agree to shift demand to a different gas plant—even a plant located thousands of miles away. 80 FR at 64753-54. In effect, EPA treats these distant and unrelated facilities as the same "stationary source." But this improperly creates standards of performance for entire *source categories* in each State rather than for individual sources. The Rule is indifferent to how much—and even whether—any particular source reduces its emissions; it insists only that each State's generating units shift enough generation for the category of sources *as a whole* within each State to achieve the reductions EPA wants. *See, e.g.*, *id.* at 64812 n.735 ("The state has the option to comply with [its] statewide goal through a compliance pathway of its choice[, which] may or may not involve requiring its affected units to meet the emission performance rates."). Congress knows how to refer to source categories when it wishes; in fact, the §111(d) regulation process begins when EPA determines whether a "category of sources … causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," CAA §111(b)(1)(A), and only after has been done can standards of performance be established for a "source." Had Congress wished to address standards of performance for source *categories* under §111(d), rather than "for any existing source," *id.* §111(d)(1), it would have said so. *See, e.g.*, *See Meghrig* v. *KFC W., Inc.,* 516 U.S. 479, 485 (1996). EPA's Rule disregards Congress's intent expressed in the clear text of §111(d).

In all, EPA's limitless interpretation is not only without precedent for the electricity sector, but, if affirmed, could be applied by the agency to fundamentally

restructure any industry as long as EPA can allege that shifting production among market participants may reduce emissions.

3. Even apart from the fact that EPA's reinvention of §111(d) is contrary to the text of that provision, its reading is inconsistent with the overall "broader context of the statute as a whole." *UARG*, 134 S. Ct. at 2442.

As a textual matter, the Rule adopts a definition of a "standard of performance" for §111(d) that is fundamentally inconsistent with the definition of the same statutory term as used in §111(b). For both provisions, the term "standard of performance" is defined by §111(a)(1). In its parallel rulemaking to establish standards of performance for new units, EPA determined that the term "best system of emission reduction" in §111(a)(1) would not reflect the ability to shift generation from new plants to other sources with lower emissions but would only consider reductions that those plants could themselves achieve. 80 FR at 64627. But §111(a)'s term "system" cannot plausibly be given one meaning when applied in §111(b) and a radically different reading when applied in §111(d). *See Brown* v. *Gardner*, 513 U.S. 115, 116 (1994).

And by adopting these inconsistent interpretations of "system," EPA has stood §111 on its head: it has arbitrarily required States to establish performance standards for *existing* coal and gas plants that are more stringent than the standards that EPA itself established for *new* coal and gas plants. *See supra* pp. 4-5.

It makes no sense that the "best system of emission reduction," after consideration of cost and other relevant factors, would lead to standards that are

more stringent for existing plants (which must retrofit controls) than new plants (which can incorporate controls into their design). EPA recognized as much when it first published its programmatic §111(d) regulations in 1975, explaining that the "consideration [of cost for existing sources] is inherently different than for new sources because controls cannot be included in the design of an existing facility and because physical limitations may make installation of particular control systems impossible or unreasonably expensive in some cases." 40 FR 53340, 53344 (Nov. 17, 1975); *see also* Robert J. Martineau, Jr. & Michael K. Skagg, *New Source Performance Standards*, in Robert J. Martineau, Jr. & David P. Novello, eds., *The Clean Air Handbook, American Bar Association Section of Environment, Energy and Resources*, at 299 (2d ed. 2004) (section 111 "reflects the basic notion that it is cheaper and easier to design emission controls equipment into production equipment at the time of initial construction than it is to engage in costly retrofits.").

Precisely because new coal units can be designed to accommodate new controls while existing coal plants cannot, EPA determined that carbon capture and storage technology is not the best system for emission reduction for existing coal plants, 80 FR at 64751 (carbon capture and sequestration costs too high for existing plants), while at the same time determining that partial carbon capture and sequestration is the best system of emission reduction for new plants, *see* 80 FR at 64558 (carbon capture and sequestration costs reasonable for new coal plants). Yet,

EPA set a performance rate for existing plants that is substantially more stringent than for new plants employing this state-of-the art capture technology.

Having effectively reversed the §111 regulatory paradigm, EPA then had to deploy *ad hoc* fixes to address the consequences of doing so. 80 FR at 64821. Under the new source and existing source §111 rules simultaneously promulgated by EPA, overall emissions in a State could *increase* if the State encouraged construction of new sources to replace existing sources, because new sources—even though required to use carbon capture and sequestration technology—are subject to less stringent standards than existing sources. *Id.* EPA thus ordered states to take steps to *prevent* shifting of generation from older plants to newer, more efficient plants. *Id.*

But this "fix" again underscores that the Rule has enacted a regulatory program the *opposite* of what Congress conceived. *Cf. MCI Telecomms. Corp.* v. *AT&T Co.,* 512 U.S. 218, 231 (1994) (disapproving agency statutory interpretation as leading to a "highly unlikely" outcome); *Am. Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid … unreasonable results whenever possible.").

EPA's actions in this regard are particularly unlawful because they are inconsistent with the regulations the agency adopted to implement §111(d). When EPA first adopted these regulations in 1975, it concluded that, because of the interrelationship of §111(b) and §111(d), "the general principle (application of best adequately demonstrated control technology, considering costs) will be the same in both cases." 40 FR at 53341.

B. EPA Must Point To Clear Authorization For The Rule, But Fails To Do So.

The CAA's plain text and structure is more than sufficient to foreclose EPA's "capacious" reading of §111(d). 80 FR at 64761. But even if there were some ambiguity on this score—and there is not—controlling canons of construction preclude EPA's assertion of authority to fundamentally restructure the power sector.

1. When Congress wishes to assign a "question of deep 'economic and political significance' ... to an agency," Congress speaks "expressly." *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015). Such a clear statement is doubly necessary in this case, where EPA claims to discover for the first time vast powers "in a long-extant statute"—a claim courts greet with well-deserved skepticism. *UARG*, 134 S. Ct. at 2444.

Certainly, §111(d) contains no clear mandate. Until now, EPA viewed §111(d) as an unimportant provision: "Over the last forty years, under CAA section 111(d), the agency has regulated four pollutants from five source categories," 80 FR at 64703, with only one of these rulemakings in the last three decades, *see* 61 FR 9905 (Mar. 12, 1996). EPA now contends that Congress intended in this obscure provision to confer authority on it to govern electricity production, distribution, and reliability—a field which has long been subject to extensive regulation by the States and, to a lesser extent, the Federal Energy Regulatory Commission ("FERC"), but not EPA. Under EPA's reading, §111(d)'s importance would dwarf the remainder of §111—and indeed, the remainder of the CAA. But "Congress ... does not alter the

fundamental details of a regulatory scheme in ... ancillary provisions" like §111(d). *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

In any event, even if Congress had intended to assert federal power *sub silentio* over the mix of generation facilities that must exist in each State, it is inconceivable that Congress would have selected *EPA* (rather than FERC) to exercise such authority. As the Court recently restated, Congress is "especially unlikely" to make an implicit delegation of regulatory power to an agency with "no expertise" in the statute's subject matter. *King*, 135 S. Ct. at 2489; *see also Del. Dep't of Natural Res.* v. *EPA*, 785 F.3d 1, 18 (D.C Cir. 2015) ("[G]rid reliability is not a subject of the Clean Air Act and is not the province of EPA.").

EPA cannot dispute that this Rule is of "deep economic and political significance." As the Administration emphasized, the Rule is intended to "transform[]" and "decarboniz[e]" the energy industry. White House Factsheet, Ex. 8-E; Deese Article, Ex. 8-G. The Rule imposes a broad new "cap-and-trade" regime comparable to failed legislative efforts. *E.g.* H.R. 2454, 111th Cong. (2009); S. 2191, 110th Cong. (2007). EPA's analysis shows the Rule requires nationwide decommissioning of coal plants and constructing a vast fleet of new renewable power plants. *Supra* p. 5; *infra* p. 20. And EPA recognized the Rule can undermine the reliability of the nation's grid, and required States to try to mitigate those impacts. 80 FR at 64668.

2. If Congress wishes to intrude into the States' sovereign prerogative over the regulation of electric utilities and "alter the 'usual constitutional balance

between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will*, 491 U.S. at 65 (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)). "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States," *Ark. Elec. Coop. Corp.* v. *Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983), and the States retain "traditional responsibility in the field of regulating 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) ("*PG&E*"). Particularly relevant here, the "[n]eed for new power facilities [and] their economic feasibility … are areas that have been characteristically governed by the States"—indeed, the "franchise to operate a public utility … is a special privilege which … may be granted or withheld at the pleasure of the State." *Id.* Congress has guaranteed, time and again, that federal regulation of the power sector may not deprive the States of this traditional role. *See, e.g.*, 16 U.S.C. §§824(a), 824(b)(1), 824o(i)(2). Indeed, the United States recently acknowledged to the Supreme Court that "promot[ion of] new generation facilities" is "an area expressly reserved to state authority." Pet. for Cert. at 26, *FERC* v. *Elec. Power Supply Ass'n*, No. 14-840 (S. Ct. Jan. 15, 2015).

Under the Rule, however, EPA, not the States, would exercise these important "police powers" and determine the "need for new power facilities." Until now, the States have determined for themselves the extent to which they should (or should not) mandate particular levels of renewable generation, balancing such

generation's benefits against the risks that energy dependent on weather events (such as wind speeds and hours of cloud cover) often pose to the grid's reliability.[4] Indeed, the very reason EPA seeks to adopt the Rule is because, to date, States have not sought to "decarboniz[e]" their economies at the pace and to the extent favored by EPA. Correlatively, the Rule requires decommissioning of coal-fired generation throughout the country, *see supra* p. 5; *infra* p. 20, even in States that have decided, as a policy matter, to encourage diversified generation within their borders. Whatever level of ambiguity exists in §111(d)—and, as shown, there is none—it does not provide a "clear and manifest" intent to legislate "in a field which the States have traditionally occupied." *PGE*, 461 U.S. at 206.

II. PETITIONERS WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

The dramatic change to the power industry—and the national economy—required by the Rule presents the type of extraordinary circumstances that warrant a stay. The Rule requires a fundamental restructuring of the power sector, compelling States, utilities, and suppliers to adopt EPA's preferred sources of power and fuel and to redesign their electricity infrastructure in the process. Never before in the CAA's history have the States and industry been ordered to do so much in so little time. Such an extraordinary alteration of the national economy warrants the exercise of this Court's extraordinary authority so it can review the petitions before

[4] EIA Renewable Statistics, Ex. 8-B (while Congress has rejected federal renewable portfolio standards, "30 States and the District of Columbia had enforceable RPS or other mandated renewable capacity policies," and seven had adopted voluntary renewable energy goals).

these fundamental changes to the economy occur and cannot be undone. *See Nken* v. *Holder*, 556 U.S. 418, 429 (2009) (the fundamental purpose of a stay is to preserve the *status quo*).

A stay is also warranted because these fundamental changes will cause the Business Associations' members immediate, irreparable harm. According to Secretary Kerry, the Rule's purpose is to "'take a bunch of [coal-fired power plants] out of commission,'" Kerry Statement, Ex. 8-D, and the Rule's own modeling confirms that will start happening soon. Under the modeling, the Rule would cause scores of generating units representing at least 10,793-11,430 megawatts of coal-fired generation (and almost certainly more) to retire in 2016. *See* Harbert Decl. ¶17, Ex. 7-A.[5] The loss of these primary assets would irreparably harm their owners, businesses, and workforces. *See id.* ¶¶17, 21. Consumers will see their electricity rates rise as affordable power sources close and utilities are forced to build expensive new plants. *See id.* ¶¶18-19. The closures will also cause immediate, collateral harms. Coal mines associated with the shuttered plants will have to reduce operations or close entirely, laying off numerous employees in the process. *See id.* ¶¶20, 22. Thousands of businesses providing support services to coal-fired plants and coal mines will see their customer base shrivel; many will have to lay off

[5] The reason why EPA's modeling shows immediate plant closures is that maintaining coal-fired plants is very expensive; if the Rule will render the plants inoperable when it comes fully into effect, many plant owners will choose to shut down their plants during the period of judicial review rather than make pointless investments in units that will ultimately have to be closed. Harbert Decl. ¶¶14, 19, Ex. 7-A. Administrator McCarthy herself has emphasized that the Rule is already causing significant shifts in investments. McCarthy Remarks, Ex. 8-F.

workers and face the prospect of closing their doors. *See, e.g.*, Howard Decl. ¶¶4-8, Ex. 7-D; Thompson Decl. ¶¶5-6, Ex. 7-G; Young Decl. ¶7, Ex. 7-E; Voigt Decl. ¶¶7-12, Ex. 7-C; Hammes Decl. ¶¶9-10, Ex. 7-K.

These losses will cause immediate, irreparable harm to the surrounding areas. In many areas, power generation and mining jobs are the principal drivers for the local economy. Harbert Decl. ¶26, Ex. 7-A; Blanton Decl. ¶¶7-8, Ex. 7-J; Witherspoon Decl. ¶¶4-6, Ex. 7-N. Taxes from utilities and mines are crucial for many counties and towns, *see, e.g.*, Taylor Decl. ¶5, Ex. 7-F, and the loss of that revenue would dramatically affect those communities, potentially causing counties to reduce civil services and schools to reduce staff and make cuts to educational programs. *See* Rinas Decl. ¶¶10-11, Ex. 7-B; Pierce Decl. ¶10, Ex. 7-H; Smith Decl. ¶13, Ex. 7-L. These harms will be exacerbated as towns and counties located near power plants and mines see their populations dwindle when laid-off employees are forced to relocate in search of new employment. *See, e.g.*, Rinas Decl. ¶¶6-7, Ex. 7-B; Dick Decl. ¶¶5-10, Ex. 7-I; Kennedy Decl. ¶¶8-11, Ex. 7-M.[6]

[6] Although the D.C. Circuit has expedited its consideration of the petitions for review, a decision on the merits is still at least half a year away. Possible rehearing or rehearing en banc proceedings may add even more months to that timeline. An immediate stay from this Court is necessary to prevent the irreversible changes and harms that will continue to occur during the D.C. Circuit proceedings, which could stretch well into 2017. *Cf. White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (petition for review filed February 16, 2012, argued December 10, 2013, and decided April 15, 2014), *rev'd by Michigan v. EPA*, 135 S. Ct. 2699 (2015) (cert. petition filed July 14, 2014, argued March 25, 2015, and decided June 29, 2015).

III. THE BALANCE OF EQUITIES FAVORS A STAY.

Although the Rule will immediately harm States and industry, *supra* §II, its immediate implementation will not protect the environment. The balance of harms and public interest favor a stay.

President Obama has stated that "[n]o single action[] [and] no single country will change the warming of the planet on its own." President's Remarks, Ex. 8-I. Indeed, the government acknowledges that "[e]ven if the United States were to reduce its greenhouse gas emissions to zero, that step would be far from enough to avoid substantial climate change," Interagency TSD 14, Ex. 8-H, and that the Rule is merely a "step" in a "series of long-term actions" to combat climate change, 80 FR at 64677. Furthermore, EPA admits the purported benefits the Rule, along with other measures, is intended to achieve will not be realized in the near term. EPA's "Endangerment Finding"—the basis of EPA's finding of the harm to be addressed by the Rule—explains that the relevant timeframe for considering climate effects is "the next several decades, and in some cases to the end of this century," 74 FR 66496, 66524 (Dec. 15, 2009)—not the limited time implementation would be delayed by a stay. After all, emission reductions are intended to bring about benefits over "centuries and millennia." 80 FR at 64682. EPA's own three-year delay in issuing the Rule demonstrates that it is not designed to alleviate immediate harm. *See* Settlement Agreement, Ex. 8-K (committing to release Rule by May 2012). In light of EPA's delay, the timeframe at issue in the Rule, and the many additional measures, domestic and foreign, the Administration admits are needed to address climate change, a short stay of the Rule will not impair the public interest.

Finally, EPA cannot contend that, without the Rule, no progress towards its goals will be made. EPA acknowledges the electricity market "is already changing," as "advancements in innovative power sector technologies," renewable energy, and efficiency technologies are implemented. 80 FR at 64678. In fact, in the last decade, America reduced "total carbon pollution more than any other nation on Earth," President's Remarks, Ex. 8-I, and monthly CO_2 emissions from coal-fired plants reached a 27-year low this year, *see* EIA Chart, Ex. 8-J. At the same time, even with a stay, States that wish to do so can independently seek to achieve even further reductions.

The public interest is best served by allowing the courts to address petitions for review before the Rule's sweeping changes begin to occur. *See Nken*, 556 U.S. at 429.

CONCLUSION

For these reasons, and those in the Applications, the Court should grant the requested stay.

Respectfully submitted

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I certify that on this 27th day of January 2016, I caused to be served the foregoing document on the following by overnight commercial carrier and electronic mail where available:

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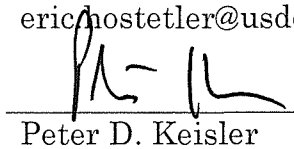

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