Nos. 23A349, 23A350, 23A351

In The
Supreme Court of the United States

State of OHIO, et al.,
Applicants,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

KINDER MORGAN, INC., et al.,
Applicants,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

AMERICAN FOREST & PAPER ASSOCIATION, et al.,
Applicants,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

Brief for States of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin, and the District of Columbia, the City of New York, and Harris County, Texas, Respondents in Opposition to Applications for Stays

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INTRODUCTION

The Clean Air Act requires the U.S. Environmental Protection Agency to impose a federal plan to limit cross-state air pollution whenever a State fails to submit an adequate plan of its own. After EPA promulgated new federal ozone standards in 2015, 23 upwind States failed to submit adequate plans to limit their emission of harmful ozone-forming pollutants that travel into downwind States, including State Respondents.[1] For each of those upwind States, EPA issued the "Good Neighbor Rule" to protect downwind States and their residents—including children and the elderly in particular—from high levels of cross-state ozone pollution. Federal "Good Neighbor Plan" for the 2015 National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023).

Applicants here—three States[2], eight trade associations, and seven companies—challenged the Good Neighbor Rule as arbitrary and capricious and moved to stay enforcement of the rule pending review. A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit (Pillard, Walker, and Childs, JJ.) denied Applicants' stay motions. Applicants now ask this Court to take the extraordinary step of granting a stay that was denied by the court of appeals, before that court (or any court) has reached the merits.

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[1] This brief is submitted on behalf of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, Wisconsin, the District of Columbia, the City of New York, and Harris County, TX (collectively referred to herein as "State Respondents").

[2] These States are Ohio, Indiana, and West Virginia (collectively referred to herein as "State Applicants").

This Court should deny the stay applications. The equities and public interest weigh decisively against a stay. The Rule was promulgated under the Clean Air Act's Good Neighbor Provision, the core purpose of which is to protect downwind States from being forced to bear the burdens of pollution emitted in upwind States. A stay would do the opposite, inequitably inflicting on downwind States, and on their residents and industry, the very public health, economic, and environmental harms that the Good Neighbor Provision is supposed to prevent. By contrast, Applicants will not suffer irreparable injury absent a stay. Applicants speculate about costs to comply with the Rule, but the Rule imposes no permitting or administrative requirements that are materially different from the requirements imposed by EPA's prior cross-state ozone rules, including a rule that this Court upheld in 2014. And currently, the Rule only requires power plants to operate pollution controls that they have already installed. It imposes no emissions-reduction obligations for sources other than power plants until 2026, at the earliest.

Applicants are also unlikely to succeed on the merits of their challenge to the Rule, or to obtain certiorari if they eventually were to seek it. Many of Applicants' arguments are improper and untimely collateral attacks on an EPA rule that disapproved state pollution-reduction plans—a separate rule that is not at issue in this litigation. In any event, Applicants' arguments about that prior rule are incorrect. For example, the Act requires EPA to establish a federal pollution-control plan for *each* upwind State that fails to submit an adequate pollution-control plan. EPA cannot disregard this statutory mandate for any State, including State

Applicants here, based on litigation involving *other* States in other circuit courts. And contrary to Applicants' suggestion, the Good Neighbor Rule's requirements are state-specific, and its execution does not depend on the participation of all 23 upwind States. Instead, the Good Neighbor Rule will deliver necessary pollution protections to downwind States and should not be stayed.

STATEMENT

A. Interstate Ozone Pollution and the Good Neighbor Provision

Ozone pollution poses major health threats. Exposure to high levels of ozone can trigger asthma, worsen bronchitis and emphysema, and cause early death. EPA, *Health Effects of Ozone Pollution* (last updated May 24, 2023).[3] To protect their residents from ozone's harmful effects, State Respondents stringently regulate power plants, industrial facilities, and other in-state sources that emit ozone-forming pollution. Comment Letter from Att'ys Gen. 8 (June 21, 2022).

Although State Respondents tightly regulate such sources within their borders, power plants and other sources located in upwind States generate ozone-forming pollutants (known as "precursors") that travel with the prevailing winds into downwind States, sometimes thousands of miles away. *See* 88 Fed. Reg. 36,654, 36,658 (June 5, 2023). "Most upwind States propel pollutants to more than one

[3] *See also* Rachel Rettner, *High Ozone Levels Linked to Cardiac Arrest*, Fox News (updated Oct. 25, 2015); Jim Carlton, *Study Links Deaths in Many Urban Areas to Increases in Ozone*, Wall St. J. (Nov. 17, 2004). For sources available online, full URLs appear in the Table of Authorities.

downwind State," and "many downwind States receive pollution from multiple upwind States." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 496 (2014). As a result, the interstate transport of pollutants "is a major determinant of local air quality." S. Rep. No. 101-228, at 264 (1989).

Ozone precursors transported from upwind States contribute substantially to the elevated ozone levels in State Respondents' jurisdictions. *See Midwest Ozone Grp. v. EPA*, 61 F.4th 187, 189 (D.C. Cir. 2023). For example, ozone-forming emissions from upwind States contribute as much as 57 percent of the ozone in Fairfield County, Connecticut; almost 28 percent of the ozone in Cook County, Illinois; and approximately 48 to 52 percent of the ozone in Kenosha, Racine, and Sheboygan Counties, Wisconsin—all areas that struggle to meet EPA's federal air quality standards for key pollutants, including ozone. *See* EPA, *Air Quality Modeling Technical Support Document: 2015 Ozone NAAQS SIP Disapproval Final Action* app. D at D-2 (2023).

To compensate for such pollutant contributions from upwind States, downwind States must regulate their in-state sources even more stringently—at greater cost to these in-state sources. But further tightening already stringent precursor emissions regulations is both more costly and less effective than requiring upwind sources to reduce their own emissions—particularly when many upwind sources have not been required to install low-cost, widely available pollution-control equipment. *Cf. EME Homer City*, 572 U.S. at 519-20 (discussing comparative costs of reduction efforts).

Congress enacted the Clean Air Act's Good Neighbor Provision to address these interstate pollution problems. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I). Under the Act, EPA

must periodically review and set federal standards for the amounts of certain pollutants, including ozone or its precursor pollutants, that can safely be present in the air. *See id.* § 7409(a); *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 469 (2004). When EPA promulgates or revises a federal air quality standard, the Act requires each State to submit a state implementation plan (SIP) consisting of air pollution regulations or other requirements that ensure that the State will achieve and maintain compliance with the federal standard by a statutory deadline. *See* 42 U.S.C. § 7410(a)(1). The Good Neighbor Provision, in turn, requires that each State's SIP submission contain "adequate provisions" to prohibit emissions that play a significant role in causing other States to violate the federal air quality standards. *See id.* § 7410(a)(2)(D)(i)(I). These provisions must curb upwind emissions in time to allow downwind States to attain the relevant air quality standards by the statutory deadline. *North Carolina v. EPA*, 531 F.3d 896, 911-13 (D.C. Cir.), *amended in part on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008).

The Clean Air Act authorizes EPA to approve a SIP only "if it meets all of the applicable requirements of" the Act, including the Good Neighbor Provision. 42 U.S.C. § 7410(k)(3). If EPA determines that a SIP is inadequate to eliminate harmful interstate pollution, EPA must disapprove the SIP. *Id.* § 7410(c)(1). Within two years of such disapproval, EPA *must* issue a federal implementation plan (FIP) to replace the inadequate SIP. *Id.*; *see also EME Homer City*, 572 U.S. at 507-08.

On several prior occasions, EPA has issued FIPs that apply to multiple States to correct deficient SIPs that failed to fully address interstate pollution. *See* Interstate

Transport of Fine Particulate Matter and Ozone, 76 Fed. Reg. 48,208 (Aug. 8, 2011) ("Cross-State Air Pollution Rule") (27 States); Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016) (22 States); Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 86 Fed. Reg. 23,054 (Apr. 30, 2021) (12 States). In these past FIPs, EPA established emissions budgets that capped the quantity of ozone-forming pollution that sources in each State could collectively emit during each May-to-September ozone season. These past FIPs also established interstate emissions-credit trading programs to help sources comply with their emissions budgets. *See* 88 Fed. Reg. at 36,668-69.

B. EPA's Disapproval of State Implementation Plans

In 2015, EPA strengthened the relevant air quality standards for ozone, and set deadlines for States to achieve these standards. National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015). Around this time, EPA's modeling projected that ozone-forming emissions from two dozen upwind States would impair the ability of multiple downwind States to attain or maintain the strengthened federal ozone standards by these deadlines.[4]

But many of these upwind States, including State Applicants Ohio et al., failed to propose emissions reductions in their SIPs to address their contributions to ozone pollution in downwind States—as required by the Good Neighbor Provision. Instead,

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[4] *See* Notice of Availability of the Environmental Protection Agency's Preliminary Interstate Ozone Transport Modeling Data for the 2015 Ozone National Ambient Air Quality Standard, 82 Fed. Reg. 1,733, 1,739-40 (Jan. 6, 2017).

State Applicants (and other States) submitted SIPs that downplayed the severity of ozone pollution in downwind States or the significance of their in-state sources' contributions to such pollution. *See, e.g.*, Air Plan Disapproval; Illinois et al., 87 Fed. Reg. 9,838, 9,845-47, 9,849-51 (Feb. 22, 2022) (describing Indiana and Ohio submissions); Air Plan Disapproval; West Virginia, 87 Fed. Reg. 9,516, 9,522-24 (Feb. 22, 2022) (describing West Virginia submission).

EPA failed to timely act on these inadequate SIP submissions. The State and Industry Applicants did not seek to compel EPA to act on these SIPs, despite now complaining about EPA's delay.[5] Instead, New York and other downwind States sued EPA to obtain action on State Applicants' deficient SIP submissions (among others) because they faced a strong likelihood that upwind emissions would prevent them from meeting the federal ozone standards by the statutory deadline. The parties to that deadline-enforcement litigation ultimately entered into a consent decree establishing deadlines for EPA to act. *See* Consent Decree, *New York v. Regan*, No. 21-cv-252 (S.D.N.Y. Nov. 15, 2021), ECF No. 38.[6]

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[5] The Industry Applicants are American Forest & Paper Association, America's Power, Associated Electric Cooperative, Inc., Deseret Power Electric Cooperative, Midwest Ozone Group, National Mining Association, the National Rural Electric Cooperative Association, Ohio Valley Electric Corporation, the Portland Cement Association, Wabash Valley Power Alliance, Kinder Morgan, Inc.; Enbridge (U.S.) Inc., TransCanada PipeLine USA Ltd., Interstate Natural Gas Association of America, and American Petroleum Institute.

[6] Several nongovernmental organizations also sued and obtained a court-ordered deadline for EPA to act on outstanding SIP submissions for State Applicants, among others. Consent Decree, *Downwinders at Risk v. Regan*, No. 4:21-cv-3551 (N.D. Cal. Jan. 12, 2022), ECF No. 23. And nongovernmental organizations separately sued

(*continued on the next page*)

In compliance with the consent-decree deadlines, EPA proposed to disapprove the SIPs of State Applicants and 18 other States in February 2022, and then finalized its disapproval in February 2023. Air Plan Disapprovals, 88 Fed. Reg. 9,336 (Feb. 13, 2023) (the "SIP Disapproval Rule"). In the SIP Disapproval Rule, EPA explained that many SIP submissions acknowledged that ozone emissions from that State impaired air quality downwind, yet failed to justify that State's conclusion that its pollution contributions were not significant or that additional emissions controls were inappropriate. *See id.* at 9,343 & n.43.

C. EPA's 2023 Good Neighbor Rule

The SIP Disapproval Rule triggered EPA's mandatory duty under the Clean Air Act to promulgate a FIP for each of the 21 States that had submitted a disapproved SIP, within two years of the disapproval. 42 U.S.C. § 7410(c)(1). EPA may promulgate a required FIP any time before the two-year period expires; it is not required to wait the full two years or to "postpone its action even a single day." *EME Homer City*, 572 U.S. at 509.

On March 15, 2023, EPA finalized the Good Neighbor Rule at issue in this litigation. *See* EPA, *Good Neighbor Plan for the 2015 Ozone NAAQS* (last updated Oct. 18, 2023). The Rule contained FIP requirements for the 21 States referenced above, plus two States that had not submitted SIPs. To comply with consent-decree

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to obtain a court-ordered deadline for EPA to promulgate FIPs for certain States. *See* Consent Decree, *Sierra Club v. Regan*, No. 3:22-cv-01992 (N.D. Cal. Jan. 24, 2023), ECF No. 37.

deadlines (see *supra* at 7 & n.6) and to ensure reductions as expeditiously as practicable in time for the 2023 ozone season, *see Wisconsin v. EPA*, 938 F.3d 303, 313-15 (D.C. Cir. 2019), EPA finalized and submitted the Rule to the Office of the Federal Register on March 15, 2023, and posted the Rule on its website the same day. After three months of internal processing, the Office of the Federal Register published the Rule on June 5, 2023. *See* 88 Fed. Reg. 36,654.

In the Good Neighbor Rule, EPA confirmed that pollution-emitting sources in many upwind States were contributing significantly to ozone pollution in downwind States. *Id.* at 36,656. EPA's analysis indicated that many power plants' emissions of ozone-forming pollutants, namely, nitrogen oxides (NOx), could be better controlled with reasonable cost and effort. EPA determined that, starting in 2023, appropriate reductions in NOx pollution from power plants could be achieved through better operation of controls that were already installed at these plants. EPA further determined that, starting in 2026, additional reductions could be achieved by having power plants install control technologies that are already widespread and commonly used across the power-generation sector. *See id.* at 36,659-61.

EPA's analysis also considered other industrial stationary sources, such as cement kilns and industrial boilers. As to these sources, EPA found that, starting in 2026, appropriate reductions in ozone pollution could be achieved by installing cost-effective and feasible control technologies for NOx. *Id.* at 36,661.

In the Rule, EPA assumed that both power plants and other industrial sources would adopt these strategies and technologies in the near term or beginning in 2026,

as appropriate. Based on this assumption, EPA then calculated emissions budgets for each State for each ozone season from 2023 to 2030, and established a methodology to calculate emissions budgets after 2030. To provide both upwind States and their sources with flexibility in meeting these seasonal budgets, the Rule also extended a preexisting program for trading "allowances," i.e., emissions credits. The trading program permits sources covered by the Rule to buy and sell allowances from sources in the same State and other States. *Id.* at 36,904-18.

D. Petitions for Review of EPA's SIP Disapproval Rule

States and other regulated parties filed petitions for review challenging EPA's SIP Disapproval Rule. These petitions were filed in seven different circuit courts, even though the Clean Air Act expressly specifies that petitions for judicial review of "nationally applicable" regulations must be filed solely in the D.C. Circuit. *See* 42 U.S.C. § 7607(b)(1); *see also* 88 Fed. Reg. at 9,380-81. EPA opposed venue in each proceeding filed in a circuit court other than the D.C. Circuit. *See* Resp't EPA's Mot. to Confirm Venue and to Expedite Consideration 8, *Utah v. EPA*, No. 23-1102 (D.C. Cir. May 15, 2023), Doc. #1999261 (summarizing litigation landscape).

Two of the State Applicants here, Ohio and Indiana, did not file any petition for review of the SIP Disapproval Rule. The third State Applicant, West Virginia, filed a petition for review in the Fourth Circuit, challenging the SIP Disapproval Rule as applied to its SIP only. *See* Pet. for Review, *West Virginia v. EPA*, No. 23-1418 (4th Cir. Apr. 14, 2023), ECF No. 3-1.

Several circuit courts have preliminarily stayed implementation of the SIP Disapproval Rule as applied to a particular State or States, with a total of 12 States' SIP disapprovals temporarily stayed pending adjudication of the underlying petitions for review. Merits briefing is proceeding at different paces in those circuits, and no court has issued a decision on the merits of EPA's disapproval determinations.

In response to these judicial stays, EPA issued two interim final rules pausing the Good Neighbor Rule's FIP requirements for these 12 States. *See* Response to Judicial Stays of SIP Disapproval Action for Certain States, 88 Fed. Reg. 49,295 (July 31, 2023); Response to Additional Judicial Stays of SIP Disapproval Action for Certain States, 88 Fed. Reg. 67,102 (Sept. 29, 2023). The Good Neighbor Rule's FIP requirements remain in place for 11 States. EPA's data modeling establishes that the Rule's requirements for these 11 States will deliver meaningful air-quality improvements to downwind States, and critical health protections for their residents. See *infra* at 37-38.

E. Petitions for Review of the Good Neighbor Rule and the D.C. Circuit's Denial of Stay Motions

The Applicants here filed petitions for review of the Good Neighbor Rule in the D.C. Circuit. They also filed motions seeking to stay implementation of the Good Neighbor Rule pending the D.C. Circuit's adjudication of their respective petitions for review. Respondent EPA opposed the stay motions. State Respondents intervened in support of the Rule and opposed the stay motions. Several nongovernmental organizations also intervened in support of the Rule and opposed the stay motions.

On September 25, 2023, a panel of the D.C. Circuit denied Applicants' stay motions. Judge Walker dissented. Order, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Sept. 25, 2023), Doc. #2018645.

REASONS TO DENY THE STAY APPLICATIONS

A stay pending review in the court of appeals is an "intrusion into the ordinary processes of administration and judicial review.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks omitted). This Court will grant such a stay "only in extraordinary circumstances," *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers), and "upon the weightiest considerations," *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers) (quotation marks omitted). For such applications, the Court considers:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 434 (quotation marks omitted). And the applicant must also show a reasonable probability that four Justices will vote to grant certiorari if the applicant seeks it. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief) (first *Nken* factor incorporates inquiry into reasonable probability of certiorari).

Moreover, the posture of this case requires Applicants to satisfy an especially heavy burden to obtain a stay, for three reasons. First, Applicants here invite this

Court to inject itself into the earliest stages of a case and into issues that *no* court has decided on the merits. Indeed, because the Clean Air Act requires that petitions for judicial review of EPA rules be filed directly in circuit courts, not in district courts, *see* 42 U.S.C. § 7607(b)(1), no court has received briefing on, much less adjudicated, the merits of Applicants' petitions. Applicants thus improperly seek to "use the emergency docket to force the Court to give a merits preview" outside the normal course of judicial review. *See Does 1-3*, 142 S. Ct. at 18 (Barrett, J., concurring). Second, Applicants' effort to short-circuit the judicial process is contrary to Congress's directive to centrally locate initial review of nationally applicable Clean Air Act regulations in the D.C. Circuit. *See* 42 U.S.C. § 7607(b)(1). As the congressionally selected forum, the D.C. Circuit should have a full opportunity to apply its expertise to reviewing the Good Neighbor Rule, before this Court weighs in. Third, the D.C. Circuit's decision to reject Applicants' stay requests is due considerable deference. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316-17 (1983) (Blackmun, J., in chambers); *see also Packwood*, 510 U.S. at 1320 (Rehnquist, C.J., in chambers).

Here, Applicants fail to meet their heavy burden. Applicants ignore the severe harms to State Respondents and the public that would result from a stay; fail to demonstrate that they would be irreparably harmed absent a stay; and are unlikely to succeed on the merits or to obtain certiorari if they ultimately seek it.

I. THE EQUITIES AND PUBLIC INTEREST WEIGH DECISIVELY AGAINST A STAY.

In determining whether to deny a stay, "[i]t is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers) (quotation marks omitted). Here, a stay would cause significant health and economic harms to State Respondents and their residents that cannot be undone later. These harms to State Respondents weigh dispositively against a stay not only because they are severe, imminent, and irreparable, but also because they are the precise harms that Congress enacted the Good Neighbor Provision to prevent. *See Nken*, 556 U.S. at 433-34.

As this Court has recognized, the Good Neighbor Provision's core purpose is to protect downwind States from the health hazards and economic costs caused by pollution emitted by sources in upwind States. *See EME Homer City*, 572 U.S. at 495. Downwind States cannot directly regulate pollution-emitting sources located in upwind States. *Cf. id.* at 497-99 (discussing EPA's role); *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011) (Clean Air Act displaces common-law public nuisance claims that might otherwise be asserted to limit interstate pollution). Further, absent the Good Neighbor Provision, upwind States have little incentive to require industries operating in their States to reduce emissions that harm people in other States. Rather, upwind States are incentivized to engage in a deregulatory race to the bottom to attract industry away from other States—at the expense of public health and welfare. *See Alaska Dep't of Env't Conservation*, 540 U.S. at 486; *see also*

H.R. Rep. No. 95-294, at 134 (1977) (warning against "new industrial plants that will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls"). The Good Neighbor Provision, and EPA's rules implementing it, are thus critical to preventing upwind States from foisting the public health and economic costs of their pollution onto downwind States. *See EME Homer City*, 572 U.S. at 507-08, 511 n.14.

A stay of the Good Neighbor Rule would inflict on State Respondents the same public health, economic, and environmental harms that the Good Neighbor Provision was designed to prevent. *First*, a stay would allow sources in upwind States, including in State Applicants' jurisdictions, to continue emitting high levels of ozone-forming pollutants that contribute to both persistently high levels of ozone and dangerous ozone spikes in downwind States.[7] "In humans, acute and chronic exposure to ozone is associated with premature mortality" and other health harms, such as asthma (an incurable disease) or the worsening of preexisting respiratory conditions. 88 Fed. Reg. at 36,671. High-ozone days pose the greatest risk to children "because their lungs are still developing and they are more likely to be active outdoors when ozone levels are high." EPA, *Health Effects of Ozone Pollution*, *supra*. And older adults, outdoor workers, and adults with underlying respiratory conditions are at increased risk of health-related harms. *Id.* Studies show that, on days with higher outdoor ozone levels, both hospitalizations for respiratory conditions and daily mortality rates

[7] *See, e.g.*, EPA, *Massachusetts* (n.d.) (measuring ozone levels in excess of the federal standards at seven different monitoring sites across Massachusetts in 2021).

increase.[8] Indeed, in 2023 alone, the Good Neighbor Rule is estimated to avoid 200 emergency room visits for respiratory symptoms and to prevent 640 new cases of asthma. And in 2026 and in each following year, the Rule will avoid 2,100 emergency room visits and 6,600 new asthma cases.[9] The public interest in avoiding these irreparable and severe health impacts on downwind States' residents weighs heavily against a stay. *See Barnes*, 501 U.S. at 1305 (Scalia, J., in chambers).

Second, a stay would also allow Applicants to unfairly shift the economic burdens of controlling upwind pollution onto industry operating in downwind States. For example, if a stay were granted, then State Respondents would be required to impose more restrictive and more costly measures on sources located in their respective jurisdictions to compensate for pollution emitted by upwind sources.[10] State Respondents have already worked diligently to reduce in-state sources' emissions year after year, whereas many upwind States do not require installation or consistent operation of pollution control equipment that has long been common in downwind States. To illustrate, under the Rule, EPA estimated that sources in Ohio can lower their emissions by 1,154 tons of NOx in 2023 by installing or running basic

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[8] New York Dep't of Health, *Ozone and Health* (revised Oct. 2023).

[9] EPA, *Regulatory Impact Analysis for the Final Federal Good Neighbor Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard* 214-16 (Mar. 2023).

[10] *See, e.g.*, Connecticut Dep't of Energy & Env't Prot., *Reasonably Available Control Measures and Reasonably Available Control Technology Analysis Under the 2015 8-Hour Ozone National Ambient Air Quality Standard* 3 fig. 1 (May 22, 2023) (showing escalating emissions-reductions measures).

control equipment; while sources in New York can additionally reduce their emissions by only 64 tons because they already have installed and operate stringent controls. *See* 88 Fed. Reg. at 36,737, tbl. V.C.1-1. Indeed, New York already requires in-state sources to install and operate pollution controls that cost up to $5,500 per ton of ozone precursors that are reduced—far greater than the $1,600 per ton that the Rule requires in the near term for sources in States like Ohio, Indiana, and West Virginia. *Compare* Air Plan Disapproval; New York and New Jersey, 87 Fed. Reg. 9,484, 9,490 (Feb. 22, 2022), *with* 88 Fed. Reg. at 36,720.

It is thus downwind States (including State Respondents here) that will suffer "competitive disadvantage," not upwind States (*see* Ohio Appl. 21), if the Court grants a stay. This inequitable result is not altered by several upwind States having obtained temporary stays of EPA's disapproval of their SIPs. *See id.* at 19-20. State Applicants' claims that they will purportedly have difficulty keeping pace in the very type of deregulatory race to bottom that Congress sought to prevent does not tilt the equities in their favor. *Cf. Alaska Dep't of Env't Conservation*, 540 U.S. at 486.

Third, a stay would foreclose time-sensitive emissions reductions by upwind States, which downwind States urgently need for the 2024 ozone season and beyond. In this respect, entering a stay would be tantamount to a decision on the merits because the ozone measurements for each passing ozone season get locked into and materially affect a State's attainment status for subsequent years. Specifically, attainment status in any given year is calculated by averaging ozone measurements from the three most recent prior annual ozone seasons. *See* 88 Fed. Reg. at 36,670.

The deadlines for these attainment calculations are dictated by a separate framework and cannot be changed even if the Good Neighbor Rule were to be stayed.[11] Here, a stay of the Rule during this litigation would allow emissions from upwind States to increase the amount of ozone measured in downwind States during the 2024 ozone season—which ends in September 2024. And those unfairly high 2024 measurements would be locked in and be used to calculate downwind States' attainment status for the next attainment deadline in 2027. Thus, a stay now would severely threaten States Respondents' ability to satisfy the ozone standards by the next attainment deadline even if they ultimately prevail in the litigation and the Rule is upheld.

Failing to meet the attainment deadline has severe repercussions for downwind States. When the Good Neighbor Rule was finalized, many counties and metropolitan areas in State Respondents' jurisdictions were in "moderate" nonattainment status for ozone under the most recent federal standards. *See* 88 Fed. Reg. at 36,696. If these areas do not achieve attainment by the deadline, these areas will likely be downgraded to "serious" nonattainment status—a status that imposes additional regulatory requirements on downwind States and their industries. *See id.* at 36,668; *see also* 42 U.S.C. § 7511(b)(2). It is unfair for downwind States and their power plants and industrial sources to be subject to further requirements with additional costs, based on pollution emitted by power-plant and industrial sources in upwind States.

[11] *See* EPA, *Ozone NAAQS Timelines* (last updated Oct. 26, 2023).

Nor is there any question that emissions from upwind States, including State Applicants, significantly contribute to nonattainment status for downwind States, including several State Respondents. For example, EPA projected that in 2023, Indiana would contribute ozone in amounts equal to 7 to 10 percent of the federal ozone standard to Cook County, Illinois, and 8 to 15 percent of the standard to multiple counties in Wisconsin that are struggling with attainment.[12] Upwind States also contribute ozone in amounts equal to more than 50 percent of the federal ozone standard to Fairfield, Connecticut.[13] And these figures are similar for other downwind States.[14]

These harms to State Respondents and their residents from a stay would also be irreparable and continue for years, even if the Rule is ultimately upheld. After each ozone season concludes, State Respondents cannot protect residents from harmful air that they have already breathed; retroactively reduce ozone levels that have already been locked into the attainment calculations; or meet attainment deadlines that have already passed. Postponing necessary pollution reduction any further would severely and irreparably harm State Respondents and the public.

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[12] EPA, *Final GNP O3 DVs_Contributions*, at tab 4, lines 237/S-246/S, 704/S-705/S, 713/S-714/S (2023) ("2023gf Ozone Contributions").

[13] EPA, *Air Quality Modeling Final Rule Technical Support Document: 2015 Ozone NAAQS Good Neighbor Plan*, at D-4 (2023).

[14] *See id.* app. D.

II. APPLICANTS FAIL TO DEMONSTRATE THAT THEY WILL EXPERIENCE ANY IMMINENT, IRREPARABLE HARM ABSENT A STAY.

To obtain a stay pending appeal, "simply showing some possibility of irreparable injury" is insufficient. *Nken*, 556 U.S. at 434 (quotation marks omitted). Instead, Applicants must put forth evidence that "irreparable injury is *likely*" without a stay. *See Winter v. Natural Res. Def. Counsel, Inc.*, 555 U.S. 7, 22 (2008); *see Nken*, 556 U.S. at 435; *Murthy v. Missouri*, No. 23-411, 2023 WL 6935337, at *2 (U.S. Oct. 20, 2023) (Alito, J., dissenting from grant of application for stay). Applicants have failed to put forth such evidence here. They primarily rely on the purported costs of complying with the Good Neighbor Rule. But these asserted costs are either unconnected to the challenged Rule or too remote and speculative to justify a stay—let alone the extraordinary remedy of a stay from this Court before the court of appeals has ruled on the merits.

For example, State Applicants assert that, without a stay, they would be forced to update permits required by title V of the Clean Air Act. Ohio Appl. 24; *see id.* App. B-9 (stating that most of Ohio's industrial sources affected by the FIP already have title V permits). But State Applicants fail to identify any such costs from the Good Neighbor Rule that are independent from their preexisting statutory obligation to update title V permits when federal or state pollution requirements change—a longstanding obligation that is not challenged here and that will continue even if a stay were granted. *See, e.g.*, 40 C.F.R. §§ 70.7(e)(4), (f), 71.7(f). Indeed, title V permits consolidate into a single permit all of a facility's obligations under the Act, including all emissions limitations and standards that apply to that facility, and associated

inspection, monitoring, and reporting requirements. *See Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 309 (2014).[15]

State Applicants thus routinely need to update title V permits as emissions limitations or other permit requirements change, and their contention (Ohio Appl. 24-25) that the Good Neighbor Rule imposes unique burdens is unsupported and entirely speculative. The Rule at issue here "does not establish any permitting requirements independent of those under Title V." 88 Fed. Reg. at 36,843. And "most if not all of the sources" affected by the Rule "are already subject to title V permitting requirements and already possess a title V operating permit." *Id.*; *see* Ohio App. B-7, B-9. If the need to update existing permits were enough to establish the irreparable harm needed for a stay (as State Applicants argue), then such harm would follow and support a stay whenever a regulation adjusts *any* of the many standards and requirements that must be reflected in a title V permit. That reasoning is plainly incorrect because a stay pending a lower court's review of agency action is an extraordinary remedy—not routine practice. *See Williams*, 442 U.S. at 1311.

EPA's prior cross-state ozone rules further undermine Applicants' claims of irreparable harm. EPA explained that permitting under the Good Neighbor Rule will operate like permitting under EPA's prior cross-state ozone rules, all of which required similar updates to existing title V permits. 88 Fed. Reg. at 36,843. Yet State Applicants do not identify any excessive administrative burdens caused by those prior

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[15] *See also* EPA, *Basic Information About Operating Permits* (last updated Feb. 6, 2023).

rules. There is thus no basis for their speculative assertion that updating existing title V permits in response to *this* Rule would "stop[] or slow[] progress on other critical infrastructure projects." *See* Ohio Appl. 25. Indeed, State Applicants complain about the hypothetical future volume of permit-modification applications or state-agency staffing shortages (*see* Ohio Appl., App. C-15-16), without providing any facts or figures to support their speculation. This type of unsupported speculation cannot support a stay. *See Nken*, 556 U.S. at 434-35; *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

There is also no support for State Applicants' contention that they will be irreparably harmed by other costs, such as ensuring that sources comply with the Rule's monitoring, recordkeeping, and reporting requirements. *See* Ohio Appl. 24. State Applicants rely on a provision of the Good Neighbor Rule explaining that monitoring, recordkeeping, and compliance requirements "must be addressed in the permits," 88 Fed. Reg. at 36,843. *See* Ohio App. C-15-16. To the extent that the Rule generates any additional reporting and monitoring requirements (*see* Ohio App. B-8), sources may generally satisfy those requirements "using the data that are already collected by the current monitoring systems," 88 Fed Reg. at 36,808. And State Applicants have not even attempted to establish how the Rule will purportedly change their oversight obligations or costs in any meaningful way.[16] To the contrary,

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[16] State Applicants provide no support for their assertion that they are forced to expend "significant resources" to ensure that "sources in their boundaries are aware of their obligations under the federal plan," other than to cite a single email

(*continued on the next page*)

even if this Court were to grant a stay, the substantially similar monitoring and reporting regime required by EPA's most recent cross-state air pollution rule would remain in place. *See, e.g.*, 86 Fed. Reg. at 23,143.

There is also no evidence that the Rule will cause "electric-grid emergencies." *See* Ohio Appl. 25-26; Am. Forest & Paper Ass'n et al. (AFPA) Appl. 28. Applicants speculate that some utility companies will choose to retire power plants rather than install the required control equipment, thereby decreasing grid capacity and reliability. *See, e.g.*, Ohio Appl. 25. But sources in other upwind States and almost all downwind States have been operating with similar pollution-control equipment in place for years, without experiencing reliability problems. *See* 88 Fed. Reg. at 36,772 ("no commenter has cited a single instance where implementation of an EPA trading program has actually caused an adverse reliability impact"); *cf. Murthy*, 2023 WL 6935337, at *2 (Alito, J., dissenting) ("speculation" that a party may suffer irreparable harm at some point in the future "does not establish irreparable harm").

State Applicants misplace their reliance on an irrelevant cold-weather grid-reliability emergency. *See* Ohio Appl. 26. There is no indication that this incident was related to emissions-control requirements at all, let alone the requirements in the Rule challenged here—which had not yet gone into effect. Instead, the incident resulted from "operating difficulties due to cold weather or fuel limitations, primarily

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from Ohio's environmental agency to regulated sources informing them of the Good Neighbor Rule. Ohio Appl. 24-25.

gas." Ohio App. B-14. Ultimately, State Applicants failed to provide any evidence to support their purely speculative assertions of harm to electric grids.

In addition, State Applicants fundamentally misunderstand the cooperative-federalism principles at the heart of the Good Neighbor Provision in arguing that the Rule intrudes on their "sovereign authority to regulate air quality within their borders under the Act" (Ohio Appl. 26). *See id.* at 2, 13, 16-17. When upwind States refuse to cooperate by complying with their good-neighbor obligations, EPA must step in to protect downwind States. See *supra* at 14-15. Indeed, Congress *required* EPA to reject a missing or noncompliant SIP and to promulgate a FIP in its place unless the State first "corrects the deficiency," *id.* § 7410(c)(1)—which State Applicants have not done here. *See EME Homer City*, 572 U.S. at 498.

Finally, the other harms alleged by the Industry Applicants, including their purported compliance costs, are exaggerated and speculative. *See* Kinder Morgan Appl. 27-28; AFPA Appl. 25. For example, these purported costs are not imminent because the Rule does not impose emissions-reduction obligations for sources other than power plants until 2026, at the earliest. As the Rule explains, these industrial sources will have "three to four years . . . to install whatever controls they deem suitable to comply with required emissions reductions by the start of the 2026 and 2027 ozone seasons." 88 Fed. Reg. at 36,755. Moreover, for industrial sources, the Rule "provides a process for individual facilities to seek a one year extension, with the possibility of up to two additional years, based on a specific showing of necessity." *Id.* at 36,657. And many power plants already employ the technology necessary to

comply with the Rule's requirements. For these reasons and those given by EPA and the Environmental and Public Health Respondents, the Industry Applicants do not face immediate and irreparable harm.

III. APPLICANTS ARE EXCEEDINGLY UNLIKELY TO SUCCEED ON THE MERITS.

Applicants are unlikely to succeed on the merits of their petitions for review or to obtain certiorari if they ultimately seek it. Most of their arguments are improper collateral attacks on the SIP Disapproval Rule, which is not challenged in this litigation. And Applicants are incorrect that events that occurred after the Good Neighbor Rule was finalized render the rule arbitrary and capricious. Such arguments must first be raised in a petition for reconsideration, and subsequent events do not block the Rule's design or operation in any event.[17]

A. State Applicants' Challenge Is an Improper Collateral Attack on the Earlier and Separate SIP Disapproval Rule.

Rather than challenge the substance of the Good Neighbor Rule that is at issue here, State Applicants instead contend that EPA failed to consider purported flaws in the *SIP Disapproval Rule* when promulgating the Good Neighbor Rule. *See* Ohio Appl. 15-16. These arguments are untimely and improper collateral attacks on the SIP Disapproval Rule. *See EME Homer City*, 572 U.S. at 507; *Wisconsin v. EPA*, 938 F.3d 303, 335 (D.C. Cir. 2019).

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[17] For the reasons stated in the EPA's and the Environmental and Public Health Respondents' oppositions, Applicants are also unlikely to succeed on the merits of their other arguments not discussed herein.

Procedural or substantive challenges to an agency's rule "must be presented in a timely direct challenge to such a rule." *Flat Wireless, LLC v. Federal Commc'ns Comm'n*, 944 F.3d 927, 930 (D.C. Cir. 2019); *see* 42 U.S.C. § 7607(b)(1) (petitions for review must be filed within sixty days). But here, two of the three State Applicants (Ohio and Indiana) never sought review of the SIP Disapproval Rule at all. Their assertion that they failed to challenge the SIP Disapproval Rule because they were "hoping to work with the EPA to come up with a solution" is baseless. *See* Ohio Appl. 8. Ohio and Indiana submitted SIPs that proposed to do nothing to reduce interstate pollution generated from sources in their respective jurisdictions. *See* 88 Fed. Reg. at 9,356 (Indiana), 9,359 (Ohio). And no State Applicant submitted a revised SIP after being formally notified in February 2022 that EPA proposed to disapprove its SIP, despite being told it could do so. *See, e.g.*, 87 Fed. Reg. at 9,877. Moreover, West Virginia (the third State Applicant here) challenged the SIP Disapproval Rule only as applied to its own SIP, and it filed that challenge in the U.S. Court of Appeals for the Fourth Circuit rather than in the D.C. Circuit.[18] Accordingly, none of the State Applicants challenged the entire SIP Disapproval Rule, let alone did so in this litigation.

Indeed, just four years ago, in a case involving a prior EPA ozone rule, the D.C. Circuit rejected Ohio's attempt to argue that purported flaws in a predicate SIP

[18] West Virginia did not move to consolidate its petition challenging the SIP Disapproval Rule in the Fourth Circuit with its petition challenging the Good Neighbor Rule in the D.C. Circuit. *See EME Homer City*, 572 U.S. at 503 n.11.

Disapproval Rule required vacating a subsequent FIP rule. *Wisconsin*, 938 F.3d at 335. As the D.C. Circuit correctly explained, Ohio's argument was an improper collateral attack on the SIP-disapproval rule because it concerned alleged agency delays in promulgating the earlier SIP disapprovals rather than any substantive challenges to the FIP rule under review. *See Wisconsin*, 938 F.3d at 335-36. The same reasoning bars State Applicants' arguments here.

State Applicants incorrectly represent that they are actually challenging the Good Neighbor Rule rather than the SIP Disapproval Rule. *See* Ohio Appl. 22. They contend that the Good Neighbor Rule is itself arbitrary and capricious because EPA should have known that there were purported flaws in the SIP Disapproval Rule; that other litigants would use these purported flaws to attack the SIP Disapproval Rule in multiple circuit courts rather than in the D.C. Circuit; and that some circuit courts would temporarily stay enforcement of the SIP Disapproval Rule as applied to the States involved in those challenges, thereby temporarily delaying application of the Good Neighbor Rule to those States. *See* Ohio Appl. 15-19. But contending that EPA should have predicted a hypothetical chain of events stemming from purported flaws in the SIP Disapproval Rule *is* a collateral challenge to the SIP Disapproval Rule because it asks this Court to assess those purported flaws on the merits. Their arguments are thus barred.

B. In Promulgating the Good Neighbor Rule, EPA Was Not Required to Predict Future Litigation Challenging a Separate Rule.

In any event, there is also no merit to State Applicants' argument that, in promulgating the Good Neighbor Rule, EPA was required to predict and consider the course of hypothetical challenges to the SIP Disapproval Rule. As a threshold matter, a reviewing court may not reach this argument because State Applicants failed to raise it during the Good Neighbor Rule's notice-and-comment period. *See* 42 U.S.C. § 7607(d)(7)(B) (only objections raised during the public-comment period may be raised during judicial review); *EME Homer City*, 572 U.S. at 511.

Exhaustion notwithstanding, Applicants' arguments about predictions that EPA was purportedly required to make fail for multiple reasons. *First*, the law would have prohibited the agency from rescinding or delaying the Good Neighbor Rule regardless of any discretionary considerations about possible litigation risk. Congress required EPA to promulgate a FIP for *each* State that submits a SIP that is disapproved for failure to comport with the Clean Air Act. *See* 42 U.S.C. § 7410(c)(1). Thus, EPA could not withdraw the Rule for States with disapproved SIPs based on hypothetical concerns about litigation involving *other* States. *Cf. Natural Res. Def. Council v. Regan*, 67 F.4th 397, 404 (D.C. Cir. 2023) (agency has no discretion to withdraw a rule that Congress has required it to promulgate). Nor could EPA postpone the Rule, as a court-ordered deadline (*supra* at 7 & n.6) required EPA to issue any required FIPs by the 2023 ozone season. Indeed, withdrawing or postponing the Good Neighbor Rule based on concerns about possible litigation over the SIP Disapproval Rule would have been arbitrary and capricious and would have invited

lawsuits for violating both the Clean Air Act and the consent decree. *Cf. Organized Vill. of Kake v. USDA*, 795 F.3d 956, 970 (9th Cir. 2015) (noting that agency "traded one lawsuit for another").

Second, Applicants misrepresent the relevant chronology in contending that EPA proceeded with crafting the Good Neighbor Rule after circuit courts stayed implementation of the SIP Disapproval Rule as to certain States. *See* Ohio Appl. 9, 19; *see also* AFPA Appl. 7-8. No stays were in effect when EPA was drafting or finalizing the Good Neighbor Rule. Rather, EPA finalized the Rule on March 15, 2023, when the Rule was signed, posted to EPA's website, and submitted to the Office of the Federal Register for publication—where EPA estimated the Rule would be published five to six weeks later. *See* Decl. of Rona Birnbaum ¶¶ 6, 22, Ex. 8 to Resp'ts' App. to Consolidated Resp. in Opp'n to Mots. for Stay of the Final Rule, *Texas v. EPA*, No. 23-60069 (5th Cir. Mar. 27, 2023), ECF No. 110, at p. 1042 (referencing publication timeline for prior cross-state ozone rules). At that time, petitioners from only two States (Texas and Utah) had moved for partial stays of the SIP Disapproval Rule. The first court to issue a stay did not do so until early May, well after EPA had finalized the rule and after the date by which EPA expected the Rule to have been published. *See* Order, *Texas v. EPA*, No. 23-60069 (5th Cir. May 1, 2023), ECF No. 269-2. EPA thus finalized the Good Neighbor Rule months before the strategy and scope of the challenges to the SIP Disapproval Rule became clear.

Third, EPA cannot be faulted for failing to predict an unprecedented and aggressive strategy of challenging the SIP Disapproval Rule across multiple improper

forums. While an agency must consider the relevant factors when taking final action, it is not required to consider speculative possibilities.[19] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51-52 (1983); *Action for Children's Television v. FCC*, 821 F.2d 741, 748 (D.C. Cir. 1987). Here, there was no reasonable basis for EPA to have anticipated that challengers would file 34 petitions for review of the SIP Disapproval Rule across seven circuit courts.[20] Indeed, the 2011 ozone transport rule, which applied to the same number of States as the SIP Disapproval Rule, had largely gone unchallenged, with only three out of 27 States (ultimately unsuccessfully) challenging EPA's determinations that their SIPs were inadequate. *See EME Homer City*, 572 U.S. at 503 & n.11. And two of those three challenges had been lodged in the D.C. Circuit, as the law requires. *See Westar Energy, Inc. v. EPA*, 608 F. App'x 1 (D.C. Cir. 2015) (denying petition); Order, *Georgia v. EPA*, No. 11-1427 (D.C. Cir. Nov. 25, 2014), Doc. #1524411 (granting voluntary dismissal); Order, *Ohio v. EPA*, No. 11-3988 (6th Cir. Nov. 26, 2014), ECF No. 83-2 (granting voluntary dismissal).

EPA also had no basis to predict that circuit courts would entertain these challenges rather than dismiss them for lack of venue or transfer them to the D.C.

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[19] State Applicants' reliance on *Portland Cement Association v. EPA*, 665 F.3d 177 (D.C. Cir. 2011) (per curiam), is misplaced. *See* Ohio Appl. 15-16, 22. There, EPA based the challenged rule "on a premise *the agency itself* . . . already planned to disrupt" in another EPA rulemaking. 665 F.3d at 187 (emphasis added). Here, by contrast, State Applicants improperly fault EPA for not accurately predicting the outcome of litigations brought by third parties. *See* Ohio Appl. 23.

[20] *See* Resp't EPA's Mot. to Confirm Venue at 8, *Utah*, No. 23-1102, *supra*.

Circuit. *Cf. Southern Ill. Power Coop. v. EPA*, 863 F.3d 666, 671 (7th Cir. 2017) (transferring challenge to EPA rule involving multiple SIPs). Shortly after petitions for review were filed, at least two circuit courts ordered priority briefing on the venue question.[21] Two circuits that denied EPA's motion to transfer did so over dissents.[22] And the venue issue remains largely outstanding to this day, with three circuits having referred the issue to merits panels and one circuit having heard oral argument on it three days ago.[23] There is no reason that EPA should have foreseen, much less designed the Good Neighbor Rule around, such unlikely events.

Fourth, State Applicants are wrong about the purported flaws in the SIP Disapproval Rule that, they contend, EPA should have predicted would trigger a chain of litigation events. *See* Ohio Appl. 17, 19-20. For example, State Applicants contend that the SIP Disapproval Rule was impermissible because EPA has only a "ministerial" role in reviewing SIPs under the Clean Air Act. *See* Ohio Appl. 4, 8, 17. But as multiple courts of appeals have correctly recognized, that is plainly incorrect.

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[21] *See* Jurisdictional Question 2, *Alabama v. EPA*, No. 23-11173 (11th Cir. Apr. 28, 2023), ECF No. 9-2; Order, *Utah v. EPA*, No. 23-9509 (10th Cir. Mar. 16, 2023) (minute entry).

[22] *See* Order at 27, *Texas*, No. 23-60069 (5th Cir. May 1, 2023), ECF No. 269-2 (Douglas, J., dissenting); Order at 10, *Kentucky v. EPA*, No. 23-3216 (6th Cir. July 25, 2023), ECF No. 39-2 (Cole, J., dissenting).

[23] *See* Order, *Alabama v. EPA*, No. 23-11173 (11th Cir. July 12, 2023), ECF No. 24 (referring venue issue to merits panel); Order, *Nevada Cement Co. v. EPA*, No. 23-682 (9th Cir. July 3, 2023), ECF No. 27.1 (same); Order, *Utah v. EPA*, No. 23-9509 (10th Cir. Apr. 27, 2023), Doc. 010110851072 (same); Order, *West Virginia v. EPA*, No. 23-1418 (4th Cir. Aug. 10, 2023), ECF No. 39 (calendaring oral argument on venue issue for October 27, 2023).

"EPA has substantive authority to assure that a state's proposals comply with the Act, not simply the ministerial authority to assure that the state has made some determination." *See Arizona ex rel. Darwin v. EPA*, 815 F.3d 519, 531 (9th Cir. 2016); *see Nebraska v. EPA*, 812 F.3d 662, 667 (8th Cir. 2016); *see also Alaska Dep't of Env't Conservation*, 540 U.S. at 490 (Congress vested EPA with "explicit and sweeping authority" to verify States' "substantive compliance" with the Act's permitting provisions). Indeed, the Good Neighbor Provision would be rendered meaningless if EPA were required to rubber-stamp deficient SIPs.

Contrary to State Applicants' contentions (Ohio Appl. 18-19), there is nothing improper or unprecedented about a single rule addressing multiple States' SIPs at the same time, particularly when, as here, each of those SIPs was deficient for many of the same reasons. In 2011, for example, EPA promulgated a cross-state ozone rule that not only rescinded approval of 22 States' good-neighbor SIPs, but also simultaneously promulgated FIPs covering those same 22 States. 76 Fed. Reg. at 48,220-22. This Court upheld that rule, *see EME Homer City*, 572 U.S. at 509, and the D.C. Circuit upheld the rescissions on remand, *see EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132-35 (D.C. Cir. 2015) (Kavanaugh, J.). In 2015, EPA issued a rule that made findings applicable to 24 States' SIP obligations. *See* Findings of Failure to Submit a Section 110 State Implementation Plan, 80 Fed. Reg. 39,961 (July 13, 2015). And in 2016, another EPA rulemaking disapproved Indiana and Ohio's good-neighbor SIP submissions for an earlier ozone standard. *See* Indiana; Ohio; Disapproval, 81 Fed. Reg. 38,957 (June 15, 2016). Moreover, every prior cross-

state ozone rule issuing a FIP for States with defective SIPs has applied to multiple States. *See, e.g.*, 86 Fed. Reg. at 23,054 (covering 12 States); 81 Fed. Reg. at 74,504 (covering 22 States); Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 70 Fed. Reg. 25,162 (May 12, 2005) (covering 28 States); Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (covering 22 States). A "*single*, coordinated federal plan" is thus the norm, not the exception. *See* Ohio App. 21.

State Applicants also miss the mark in criticizing EPA for proposing the Good Neighbor Rule "less than two months" after it proposed to disapprove various SIPs. *See* Ohio Appl. 18. As this Court squarely held when Ohio raised the same argument a decade ago, "EPA is not obliged to wait two years or postpone its action even a single day." *EME Homer City*, 572 U.S. at 509. Rather, "[t]he Act empowers the Agency to promulgate a FIP 'at any time' within the two-year limit" for replacing a deficient SIP. *Id.*

Finally, contrary to State Applicants' contention (Ohio Appl. 18), the SIP Disapproval Rule did not impose a blanket disapproval of state plans. Instead, EPA carefully analyzed each State's SIP on its own terms, and thoroughly explained its well-supported reasons for proposing to disapprove each SIP. *See* 88 Fed. Reg. at 9,354-61 & nn.83-241; *see also* Ohio Appl. 17-18 (listing February 2022 *Federal Register* entries). And each proposed disapproval was published approximately one year before EPA ultimately finalized that disapproval, *see* Ohio Appl. 17-18 (listing

entries), giving States ample time to submit comments, correct identified deficiencies, or withdraw and reissue their SIPs. Notably, State Applicants (and other upwind States) have not attempted to correct or reissue their SIPs.

Ohio is illustrative. In 2018, Ohio submitted a SIP that relied on its choice of non-EPA modeling data and preferred numerical threshold for what would constitute a "significant contribution" of emissions to downwind States. *See* 87 Fed. Reg. at 9,869-71. But Ohio's preferred data and numerical threshold still showed that sources within Ohio were significantly contributing ozone-forming pollutants to multiple downwind locations, as Ohio acknowledged.[24] *Id.* at 9,870-71. Ohio nonetheless argued that the modeling data on which it had relied overestimated future ozone levels in downwind States. And Ohio contended—without analyzing the feasibility of any additional emissions-reductions measures—that assorted regulations designed for the prior, less stringent ozone standards still satisfied Ohio's good-neighbor obligations. *Id.* at 9,871-72. In February 2022, EPA reasonably proposed to find that Ohio's submission failed to satisfy the Good Neighbor Provision for these reasons. *Id.* at 9,875. One year later, after Ohio took no action, EPA finalized that disapproval as part of the SIP Disapproval Rule. *See* 88 Fed. Reg. at 9,359. Nothing about this tailored process suggests that EPA applied a blanket disapproval.

[24] Each State Applicant acknowledged that, under its chosen modeling data, it was still linked to a downwind receptor. *See, e.g.*, 87 Fed. Reg. at 9,855 (Indiana); 87 Fed. Reg. at 9,524-25 (West Virginia).

C. Subsequent Events Have Not Compromised the Good Neighbor Rule.

Applicants also err in arguing that EPA's interim final rules (IFRs)—which temporarily pause the Good Neighbor Rule for States subject to judicial stays of the SIP Disapproval Rule (see *supra* at 11)—"block" the Good Neighbor Rule from achieving its purpose and render the Rule arbitrary.[25] *See* Ohio Appl. 17; AFPA Appl. 3, 14-20; Kinder Morgan Appl. 11-13.

This argument fails at the outset because it is unexhausted. Both the IFRs and the judicial stays they implement were issued *after* the Good Neighbor Rule's comment period had concluded. Congress has expressly required that objections arising from events after a rule's public-comment period must first be raised in a petition for reconsideration to EPA, filed within 60 days of the rule's effective date, and may not be raised for the first time in a petition for judicial review of that rule. 42 U.S.C. § 7607(d)(7)(B); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1191 (D.C. Cir. 1981). Here, none of the Applicants suggests that it has timely filed any petition for reconsideration, much less one concerning events postdating the Rule. This Court may not consider arguments raised in violation of congressionally prescribed review procedures. *See American Petroleum Inst.*, 665 F.2d at 1191.

In any event, the Good Neighbor Rule is not arbitrary simply because it is currently in force for sources in fewer than 23 States. *See* Kinder Morgan Appl. 11-

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[25] The IFRs do not "exempt" States from the Good Neighbor Rule as State Applicants claim. *See* Ohio Appl. 17, 21. These States remain subject to the Rule, but its effectiveness with respect to individual States is temporarily paused during the litigation of the respective challenges to EPA's SIP Disapproval Rule.

12; AFPA Appl. 14-17. The Clean Air Act's good-neighbor requirements apply to *each* covered State individually, not to all covered States collectively. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I) (requiring each State to include good-neighbor provisions in its SIP), (c)(1) (requiring EPA to promulgate FIPs for sources in each State whose SIP is disapproved); *see also* 88 Fed. Reg. at 36,693. And it is irrelevant that contributions from the 11 States currently subject to the Good Neighbor Rule may not succeed in bringing a downwind State fully into attainment with the new federal ozone standards. *See* Ohio Appl. 17; Kinder Morgan Appl. 12. The Good Neighbor Provision does not require that any single upwind State or group of States be the "but-for" cause of a downwind State's nonattainment. In fact, the Act was amended to shift away from such a requirement. A previous version of the Act required upwind States to reduce pollution that would "'*prevent* attainment or maintenance.'" *See EME Homer City*, 572 U.S. at 499 (emphasis added) (quoting 42 U.S.C. § 7410(a)(2)(E) (1976) & Supp. II). This requirement "proved ineffective" at reducing interstate pollution because it was "often 'impossible to say that any single source or group of sources is the one which actually prevents attainment' downwind." *Id.* (quoting S. Rep. No. 101-228, at 21 (1989)). Congress therefore amended the Act in 1990, to require upwind States to limit in-state sources' emissions that "*contribute significantly* to nonattainment in, or interfere with maintenance by" a downwind State, even if those emissions are not the but-for cause of the downwind area's nonattainment. *Id.* (emphasis added) (quoting 42 U.S.C. § 7410(a)(2)(D)(i) (2006)); *see also id.* at 519 (affirming same).

Contrary to Applicants' suggestions, the Rule's emissions budgets for each State are not "interdependent." *See, e.g.*, AFPA Appl. 15. EPA did not derive the emissions budgets by apportioning among all upwind States responsibility to achieve a particular ozone reduction target. Instead, as in prior cross-state ozone rules upheld by this Court, EPA derived the budgets by (*i*) assuming that sources in each upwind State will operate or install certain emissions-control technologies, and (*ii*) multiplying the emissions reductions that those technologies can achieve by the number and capacity of sources in each respective State that can feasibly and cost-effectively operate or install them. 88 Fed. Reg. at 36,778-80. The calculation for each State is thus inherently *independent*: it depends on the number of sources in that State that have the potential to operate or install a given technology, not the emissions budget of any other participating State. As a result, no upwind State is required to make up any shortfall in emissions reductions in another State.[26]

Finally, even though the Rule is currently in effect for sources in only 11 States, those sources significantly contribute to ozone problems in downwind States, and keeping the Rule in force for those sources remains critical. For example, sources in the States currently subject to the Rule, including Ohio and Indiana, are responsible

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[26] EPA's commonsense observation, in a footnote to the Rule, that "'[b]roader marketplaces generally provide greater market liquidity'" does not remotely suggest that the Rule's allowance trading network will collapse if fewer than 23 States participate. *See* AFPA Appl. 15 (quoting 88 Fed. Reg. at 36,766 n.295). Indeed, prior cross-state ozone rules established trading networks with approximately the same number of States that are currently subject to the Rule. *See, e.g.*, 86 Fed. Reg. at 23,054 (12 States).

for approximately 40 percent of the ozone measured at Wisconsin's nonattainment and maintenance receptors, with Indiana alone responsible for 12 percent of the ozone in Sheboygan County.[27] Sources in Ohio and West Virginia contribute more than the federal ozone screening limit to every receptor in New Jersey, and sources in Indiana contribute more than the screening limit to ten receptors across New Jersey.[28] And notwithstanding the IFRs, the Rule is also estimated to reduce ozone season NOx emissions by more than 1,500 tons in 2024, as compared to EPA's preexisting ozone transport rule. *Compare* 88 Fed. Reg. at 36,785, *with* 86 Fed. Reg. at 23,124. The Rule thus produces meaningful reductions in ozone for multiple downwind States and their residents.

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[27] *See* EPA, *Final GNP O3 DVs_Contributions*, *supra*, tab 4. The 0.4 figure is determined by the following calculation on each of lines 704, 705, 713, and 714: add the values in J, R, S, Y, AA, AI, AK, AN, AQ, and AY, and then divide by the value in D.

[28] *Id.*, tab 4. Compare the federal ozone screening limit (0.70) with lines (*i*) 426/S, 428/S, 430-433/S, 435/S, 437-438/S, 440/S (Indiana), (*ii*) 426-442/AN (Ohio), and (*iii*) 426-442/BA (West Virginia).

CONCLUSION

The Applications for a Stay should be denied.

Respectfully submitted,

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