Nos. 23-1157, 23-1181, 23-1183, 23-1190, 23-1191, 23-1193, 23-1195, 23-1199, 23-1200, 23-1201, 23-1202, 23-1203, 23-1205, 23-1206, 23-1207, 23-1208, 12-1209, 23-1211

In the United States Court of Appeals for the District of Columbia Circuit

STATE OF UTAH, BY AND THROUGH ITS GOVERNOR, SPENCER J. COX, AND ITS ATTORNEY GENERAL, SEAN D. REYES,
PETITIONERS,
v.
ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS.

CITY OF NEW YORK, ET AL.,
INTERVENORS.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' MOTION TO STAY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), *amicus curiae* states as follows:

I. Parties and *Amici Curiae*

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in Petitioners' Joint Opposed Motion to Stay Final Rule ("Petitioners' Motion" or "Mot."), filed by American Forest & Paper Association, et al. (No. 23-1157, Aug. 2, 2023), at pages iii–vi:

Amicus curiae in support of Petitioners is the Chamber of Commerce of the United States of America.

II. Rulings Under Review

References to the rulings at issue appear in Petitioners' Motion at page vi.

III. Related Cases

References to related cases appear in Petitioners' Motion at pages iv–vi.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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GLOSSARY

EPA	U.S. Environmental Protection Agency
Final Rule[1]	Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (Jun. 5, 2023)
NAAQS	National Ambient Air Quality Standards
FIP	Federal Implementation Plan
SIP	State Implementation Plan

[1] The Final Rule is provided as Exhibit A to the Joint Opposed Motion to Stay Final Rule filed by Petitioners American Forest & Paper Association, et al. ("Petitioners' Motion" or "Mot.").

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members include a wide range of businesses that are subject to the EPA's *Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards*, 88 Fed. Reg. 36,654 (June 5, 2023) ("Final Rule"), as well as many other businesses that depend on reliable, affordable energy.[2]

Petitioners consent to the Chamber's participation as amicus. Respondents consent, conditioned on compliance with Fed. R. App. P. 29.

[2] The Chamber states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

In addition to its other defects, the Final Rule is arbitrary and capricious, and warrants a stay here, because the Federal Implementation Plans ("FIPs") EPA adopted are predicated on a trading program involving *23 States*, where EPA's blanket disapprovals of at least 12 of the State Implementation Plans ("SIPs") were themselves unlawful. The shrunken trading program that will remain once those SIP-disapprovals are finally vacated was never contemplated by the agency during the rulemaking process and will drive up costs in the affected States. These costs, and other burdens imposed by the rule, will inflict substantial harms on regulated entities and downstream energy consumers, and thus on our Nation's economy overall.

ARGUMENT

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS

As Petitioners have explained, the Final Rule requires emissions reductions beyond those needed to comply with the Good Neighbor provision of the Clean Air Act (CAA). Mot. 6-9; *see EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 523 (2014). Petitioners are likely to prevail on the merits for that reason alone. Petitioners are also likely to prevail on their arbitrary and capricious challenge, Mot. 10-17, because, *inter alia*, the rule EPA originally issued has been gutted by the stays issued by the Fifth, Sixth, Eighth, Ninth, and Tenth Circuits in petitions for review brought by 10 different States. Mot. 14–17. EPA's disapproval of those 10 SIPs—as well as its disapproval of Alabama's and West

Virginia's SIPs[3]—will almost certainly be vacated due to the agency's failure to comply with the CAA's plain text. Implementing the rule, absent the 10 (or 12) FIPs applicable to those States, would be arbitrary and capricious because the trading program the rule contemplates would not exist. Mot. 15–16.[4]

The CAA's cooperative federalism framework gives States "'wide discretion' in formulating their SIPs," including "broad authority to determine the methods and particular control strategies they will use." *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 845 (5th Cir. 2013) (cleaned up). This is because "air pollution prevention … is the primary responsibility of States." 42 U.S.C. § 7401(a)(3); *see also id.* § 7407(a). EPA's authority to promulgate a FIP under the CAA's Good Neighbor provision is triggered only when a SIP fails to "contain adequate provisions" prohibiting emissions that will contribute significantly to nonattainment in other states. *Id.* §§ 7410(a)(2)(D)(i)(I), 7410(c). The CAA thus "confines the EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements." *Luminant*, 714 F.3d at 846.

Here, EPA rejected not one or two SIPs, but more than 20 separate SIPs for purportedly failing to comply with the Good Neighbor provision.

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[3] Alabama and West Virginia have filed stay motions that are pending in the Fourth and Eleventh Circuits. Mot. 5 n.2.

[4] *See Utah v. EPA*, No. 23-9509 (10th Cir. July 27, 2023) ("Because EPA may not enforce a [FIP] without first disapproving a [SIP], EPA may not enforce its federal Good Neighbor plan for the 2015 ozone NAAQS against Oklahoma or Utah while the stay remains in place."); *Oklahoma v. EPA*, No. 23-9514 (10th Cir. July 27, 2023) (same).

The SIP-disapprovals subject to the stays (and pending motions for stay) noted above are likely to be vacated, for three reasons.

First, EPA failed to act on the SIPs as required by law. The CAA gives the Administrator 18 months to act on a SIP submission. 42 U.S.C. § 7410(k)(1)-(3). But here, EPA delayed for nearly *five years* before purporting to reject the SIPs. This delay appears to have been part of a deliberate strategy to substitute a comprehensive federal policy for the States' plans. The CAA provides that if the Administrator determines that a SIP is inadequate, he "shall require the State to revise the plan as necessary to correct such inadequacies" and "notify the State of the inadequacies." *Id.* § 7410(k)(5). But EPA never provided a meaningful opportunity to revise the SIPs before issuing the Final Rule. Indeed, EPA took less than four months to issue the Final Rule after issuing its final decision disapproving the SIPs. *See Air Plan Disapprovals*, 88 Fed. Reg. 9,336 (Feb. 13, 2023) (final rule). EPA's attempted federal takeover betrays a fundamental disregard for the CAA's "core principle" of "cooperative federalism." *EME Homer II*, 572 U.S. at 511 n.14.

Second, EPA exceeded its "ministerial" role by imposing a "4-step interstate transport framework" to "evaluate each state's [SIP]." 88 Fed. Reg. at 9,338. That 4-step framework has no basis in the text of the CAA, yet EPA required states to "substantially justif[y]" any deviation from it. 88 Fed. Reg. at 9,340. That "approach inverts the CAA and 'reflects a misapprehension by the EPA of its authorized role in the SIP-approval process.'" *Texas v. EPA*, No. 23-60069, ECF No. 269-1 at 16 (5th Cir. May

1, 2023) (citing *Luminant Generation Co. v. EPA*, 675 F.3d 917, 928 n.8 (5th Cir. 2012)).

Third, EPA improperly rejected the States' SIPs for failure to abide by an EPA memo that was "issued *after* the statutory deadline for [the States] to submit [their] SIP[s]." *Id.* at 18 (citing 88 Fed. Reg. 9,364, 9,370). EPA also disapproved the SIPs based "in part on modeling data and policy changes developed after the [the states] had submitted [them]." *Kentucky v. EPA, et al.*, Nos. 23-3216/3225, ECF No. 39-2 at 7 (6th Cir. July 25, 2023). The "reasoned agency decisionmaking that the [CAA] demands does not allow the EPA to keep moving the finish line" in this manner. *New York v. EPA*, 964 F.3d 1214, 1223 (D.C. Cir. 2020).

In short, "the EPA ignored its statutory deadline by a measure of *years*; used that extra time to collect more data, issue novel guidance, and develop new modeling; denied [the] SIPs in part based on that new information; then created FIPs imposing the EPA's policy preferences on the States." *Texas*, No. 23-60069, ECF No. 269-1 at 21 (emphasis in original). Accordingly, the stayed SIP-disapprovals (and those subject to pending motions for stay) will likely be vacated, leaving the Final Rule applicable to States accounting for less than a quarter of the power-plant emissions reductions, and less than half the other reductions, required by the rule. See Mot. 15 (citing Mot. Ex. G). The shrunken, zombie rule EPA defends here will thus entail much higher trading costs than the agency anticipated, which, in addition to rendering the rule arbitrary and capricious, will inflict substantial added injury on both regulated entities and downstream consumers of energy, as discussed below.

II. THE EQUITIES MILITATE STRONGLY IN FAVOR OF A STAY

The Final Rule will impose significant financial hardship on regulated entities, which cannot be remedied even if the rule is ultimately vacated. That damage will have serious downstream consequences for broad swaths of the economy that depend on affordable and reliable power, cement, paper, and other commodities whose costs will greatly increase if the rule takes effect. These costs are imminent and immediate. *See* Mot. 18–20 (citing numerous declarations).

Power plants must upgrade their pollution control equipment to comply with the Final Rule. 88 Fed. Reg. 36,654. This requires upgrading combustion controls and installing new emissions reduction systems,[5] which will significantly increase facility investment costs and operating costs. *See Texas*, No. 23-60069, ECF No. 269-2 at 23 (costs imposed by rule "include[] the costs of buying new equipment and retrofitting existing equipment; installing, operating, and maintaining that machinery; and purchasing allowances (at greater cost) on the emissions-trading market"); *Kentucky*, Nos. 23-3216/3225, ECF No. 39-2 at 8–9 (petitioners are likely to establish "that Kentucky faces irreparable injury due to unrecoverable compliance costs, which it faces immediately."). EPA's own regulatory impact analysis estimates the cost of complying with the rule to be $910 million *annually* from 2023 to

[5] U.S. EPA, *Technical Support Document (TSD) for the Final Federal Good Neighbor Plan for the 2015 Ozone National Ambient Air Quality Standards,* at 2 (Mar. 2023), https://tinyurl.com/2nz77844.

2042.[6] Yet this massive estimate drastically understates the cost of compliance.[7] For example, EPA assumes that regulated entities will install new combustion hardware within approximately 12 months, which is about *half* the time it will likely take for many of these upgrades.[8] In the meantime, regulated entities will be required to purchase credits at prices well in excess of EPA's estimates, because the States whose SIPs were unlawfully rejected are no longer in the same trading "Group." *See* 88 Fed. Reg. at 49,305.

EPA's cost projections also assume existing equipment can achieve the same NOx rates they have historically achieved while entities install new equipment, but EPA fails to account for the necessary capital expenditures and substantial maintenance costs required to keep those units functioning at current levels.[9]

The Final Rule will likely force financially vulnerable power plants to shut down. As the Arkansas Public Service Commission has explained, the rule leaves that State with the choice between retiring power plants

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[6] U.S. EPA, *Regulatory Impact Analysis for Final Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard* at Table 4-23, https://tinyurl.com/yckc8va8 (hereinafter "*Regulatory Impact Analysis*").

[7] See Cichanowicz, et al., *Technical Comments on Electric Generating Unit Control Technology Options and Emission Allocations Proposed by the Environmental Protection Agency in Support of the Proposed 2015 Ozone NAAQS Transport Rule*, at 3 (June 17, 2022), https://tinyurl.com/54bxd26e.

[8] *Id.* at 16–17.

[9] *Id.* at 18.

and spending millions of dollars on compliance.[10] EPA projects that the rule will cause only 13 percent of national coal-fired generating capacity to be retired by 2030.[11] But several regulated states and organizations predict that dozens of power plants will shut down much earlier because they cannot afford to comply.[12] For example, Minnesota estimates that a power plant scheduled to be retired in 2030 faces compliance costs of $100 million under the rule.[13] Because those costs cannot be recovered in the next seven years, the plant may be forced to prematurely shut down if the rule takes effect.

Moreover, the rule's provisions for natural gas pipeline engines create serious energy supply and reliability challenges. *See generally* Petitioners' Motion for Stay at 25, *Interstate Natural Gas Association of America v. U.S. EPA*, No. 23-1193 (D.C. Cir. July 27, 2023) (retrofitting shutdowns required by Final Rule "will cause capacity restrictions that could result in significant interruptions to the supply of natural gas to households and businesses"; modeling suggests "that a significant share

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[10] Arkansas Public Service Commission, *Comments on Proposed Ozone Transport Rule* (June 21, 2022), https://tinyurl.com/3jxhajus.

[11] *Regulatory Impact Analysis*, *supra* note 5, at 162 & Table 4-14 https://tinyurl.com/yckc8va8.

[12] Unions for Jobs & Environmental Progress Agency, *Comments on Proposed Ozone Transport Rule* (June 8, 2022), https://tinyurl.com/5yetfrxr. (focusing concerns on "dozens" of "units that will shut down because SCR retrofits are not economic due to site-specific engineering").

[13] Minnesota Pollution Control Agency, *Comments on Proposed Ozone Transport Rule* (June 21, 2022), https://tinyurl.com/2zp67xtr.

of the public will suffer electric power outages, heating outages, delays to industrial supply chains, and increases in the price of electricity").

Additional power plant closures and energy supply disruptions would exacerbate the nation's energy reliability challenges. *See Texas*, No. 23-60669, ECF No. 269-2 at 23 ("[T]he final FIP will strain Texas's and Louisiana's power grids."); *see also Kentucky*, Nos. 23-3216/3225, ECF No. 39-2 at 9 ("Petitioners provide evidence that Kentucky residents will face higher prices and that Kentucky's power grid faces destabilization."). The North American Electric Reliability Corporation's ("NERC's") 2023 summer reliability assessment forecasted that two-thirds of the U.S. would experience an elevated risk of power outages this summer.[14] The grid-reliability crisis is compounded by the administration's "separate actions to significantly increase demand for electricity due to electrification of the nation's vehicle fleet."[15] Taken together, the Administration's initiatives are causing existing generation units to retire at a rate that renewable sources cannot replace, while simultaneously increasing demand on the grid. This is a recipe for serious economic disruption. It will also exacerbate economic inequality by

[14] NERC, *2023 Summer Reliability Assessment*, at 6 (May 2023), https://tinyurl.com/33fw8ejv.

[15] Electric Power Supply Association, *Proposed EPA Power Plant Rules Could Intensify Reliability Challenges: Statement from the Electric Power Supply Association on the U.S. Environmental Protection Agency's Proposed Rules to Revise New Source Performance Standards for Electric Generating Units* (May 11, 2023), https://tinyurl.com/3zwk3v86.

driving up energy costs in the "most socio-economically disadvantaged regions of the nation."[16]

The Final Rule will also harm domestic manufacturers, which depend on stable and affordable supplies of energy.[17] For large manufacturers, the cost of an outage can escalate into "millions of dollars per hour of downtime."[18] One estimate suggests that manufacturers are losing up to $1.5 trillion a year to production outages and other unplanned downtime.[19] Increased energy costs and diminished energy reliability would discourage manufacturers from investing in the United States—or even induce them to relocate existing plants overseas—contrary to the Administration's goal to "revitalize American manufacturing."[20]

The Final Rule also applies beyond the energy sector, such as to cement kilns and boilers in iron mills, steel mills, and pulp, paper, and paperboard mills. 88 Fed. Reg. at 36,658. The rule will not only harm

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[16] Louisiana Electric Utility Environmental Group, *Comments on Proposed Ozone Transport Rule*, at 7 (June 22, 2022), https://tinyurl.com/2p9rpjbp.

[17] *See, e.g.*, Douglas Anderson & Meghan Murray, *Inflation, supply chain snarls and the incredible shrinking margin: What do manufacturers do now?* PWC (Feb. 16, 2022), https://tinyurl.com/bdym4zm9.

[18] Assim Hussain, *A day without power: Outage costs for businesses,* Bloom Energy (Oct. 8, 2019), https://tinyurl.com/3kssxwm7.

[19] Senseye Predictive Maintenance, *The True Cost of Downtime 2022*, Siemens (2023), https://tinyurl.com/59fnu7u7.

[20] White House, *The Biden-Harris Plan to Revitalize American Manufacturing and Secure Critical Supply Chains in 2022* (Feb. 24, 2022), https://tinyurl.com/pnayrjsx.

businesses in these industries, but will increase the prices of these industries' products, impacting downstream businesses that rely on them and the remainder of the national economy.

CONCLUSION

For these reasons, the motion to stay should be granted.

Dated: August 9, 2023

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CERTIFICATE OF COMPLIANCE

This brief contains 2,510 words excluding the parts of the brief that Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1) exempt. The brief thus complies with Federal Rules of Appellate Procedure 27(d)(2) and 29(a)(5).

The brief also complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and Federal Rule of Appellate Procedure 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word in Century Schoolbook 14-point font.

Dated: August 9, 2023

/s/ *Robert E. Dunn*
Robert E. Dunn

CERTIFICATE OF SERVICE

I hereby certify that, on August 9, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit via the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by that system.

/s/ *Robert E. Dunn*
Robert E. Dunn