No. 15A773, 15A776, 15A778, 15A787, 15A793

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, et al.,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

and four related cases

On Applications for a Stay of Final Agency Action Pending Review in the United States Court of Appeals for the District of Columbia Circuit

Opposition of States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami, and Broward County, Florida

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INTRODUCTION

The undersigned intervenor-respondent States and Municipalities include eighteen states, the District of Columbia, and six municipalities (collectively, "State Respondents") that have intervened in support of respondent Environmental Protection Agency in pending actions in the U.S. Court of Appeals for the D.C. Circuit challenging EPA's Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule").[1] As this Court recognized in *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007), State Respondents have a compelling interest in reducing carbon-dioxide emissions in order to protect their residents' health and welfare from the dangers of climate change. State Respondents accordingly join EPA in opposing the multiple applications asking this Court to stay the Rule. These applications make the extraordinary request that this Court intercede in a matter that is still pending in the court of appeals by overturning that court's unanimous and considered judgment to deny a stay pending expedited briefing and argument in Petitioners' challenges. State Respondents agree with EPA and the other Intervenor-Respondents that such a stay is not warranted.

Rather than repeat EPA's arguments, State Respondents here focus on responding to the assertions of irreparable harm and balance of the equities raised

[1] In addition to these parties, municipalities in six States challenging the Rule have successfully moved in the court of appeals to participate as amici in support of EPA. *See* Unopposed Mot., *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Dec. 22, 2015) (Doc. #1589943) (motion by, *inter alia*, Houston, Texas; Salt Lake City, Utah; Grand Rapids, Michigan; Jersey City, New Jersey; Coral Gables, Pine Crest, and West Palm Beach, Florida; and Boulder County, Colorado).

in the stay application filed by the States of West Virginia, Texas, and others (collectively, "State Petitioners").[2] State Petitioners have failed to demonstrate that they will suffer any irreparable injury before the court of appeals rules on the merits of their claims below. Under the Rule's familiar cooperative-federalism model, State Petitioners could opt out completely from developing their own plans to implement the Rule's emission limits and rely instead on a federal plan. State Petitioners' argument that their sovereignty is irreparably harmed under this scheme cannot be squared with this Court's consistent recognition that similar cooperative-federalism schemes fully respect state sovereignty and impose no illegitimate burdens on the States. Moreover, even for States that decide to prepare their own plans, the Rule's generous timeframes for plan submissions and compliance undermine State Petitioners' assertion that they will be forced to make significant or irreversible decisions before their claims on the merits are heard.

The equities also weigh heavily against a stay. State Respondents are continuing to experience climate change harms firsthand—including increased flooding, more severe storms, wildfires, and droughts. The harms of climate change that the Rule is designed to mitigate are lasting and irreversible. Any stay that results in further delay in emission reductions would compound the harms that climate change is already causing.

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[2] At this time, five separate applications have been filed to stay the Clean Power Plan. *See* Dkt. Nos. 15A773, 15A776, 15A778, 15A787, 15A793. The Chief Justice has ordered a response to the Application by 29 States and State Agencies for Immediate Stay (Dkt. No. 15A773) ("App."). State Respondents oppose all five applications but focus on State Petitioners' application here.

REASONS TO DENY THE STAY APPLICATIONS

I. State Petitioners Have Not Demonstrated Imminent Irreparable Harm Sufficient to Justify a Stay.

"Where the lower court has already performed" the task of weighing the equities on a stay application, "its decision is entitled to weight and should not lightly be disturbed." *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J.). Here, the court of appeals weighed and considered thousands of pages of arguments and declarations and held that State Petitioners had not satisfied the "stringent requirements" for a stay pending appeal.[3] *See* Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016) (Doc. #1594951). The court of appeals did not abuse its discretion in reaching this carefully considered judgment, and there is no basis for this Court to take the extraordinary step of interfering with the court of appeals' management of a pending proceeding.

State Petitioners have failed to make "the most unequivocal showing of a right to immediate federal equitable relief" necessary to warrant any such interference. *O'Rourke v. Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, J.). In particular, State Petitioners have not demonstrated that they will suffer imminent irreparable harm while the case remains pending below. *See Rubin v. United States ex rel. Indep. Counsel*, 524 U.S. 1301, 1301 (1998) (Rehnquist, J.) (interim enforcement of

[3] The declarations that were submitted in the court of appeals by Respondent-Intervenors are being submitted with this brief as Appendix A of the Appendices Supporting Respondent-Intervenors' Opposition to Applications for Stay of Final Agency Action Pending Appellate Review. The page numbers beginning with "A" and "B" used herein refer to the page numbers in Appendix A.

subpoenas did not constitute irreparable harm sufficient to second-guess court of appeals' denial of a stay). State Petitioners assert that they face irreparable harm because they will be required to immediately design and implement plans to meet the Rule's emission limits on power plants—obligations that they assert cause *per se* irreparable injury to their sovereignty. App. at 40-41; *see also* Application by the State of North Dakota for Immediate Stay ("N.D. App.") at 20 (Dkt. No. 15A793). But the Rule does not *require* States to design state plans because EPA can directly implement and enforce the Rule under a federal plan if States choose not to submit a plan. Moreover, even for States that wish to develop their own plans, the Rule requires no irreversible steps. In particular, States do not need to finalize their plans before the end of the year, when the court of appeals is likely to have issued a decision on the merits below. Given the absence of imminent irreparable injury, State Petitioners' stay application should be denied. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J.) (the Court need not consider likelihood of success on the merits "if the applicant fails to show irreparable injury from the denial of the stay").

1. Like other Clean Air Act regulations, the Rule sets emissions limits for power plants—here, focused on carbon dioxide. As is typical of cooperative-federalism schemes, the Rule gives each State the option of either implementing these limits through a state plan, or opting out of developing its own plan and having EPA issue a federal plan to directly regulate power plant emissions instead. 80 Fed. Reg. at 64,881-82; 80 Fed. Reg. 64,966, 64,970 (Oct. 23, 2015); 42 U.S.C.

§ 7411(d)(2) (authorizing federal plan).[4] The federal-plan option means that no State is compelled to implement the Rule itself; instead, States "can elect to expend no effort at all and simply opt to" not submit any plan. Declaration of Janet G. McCabe ("McCabe Decl.") ¶ 34.[5] This feature of the Rule fatally undermines State Petitioners' assertions of irreparable sovereign harm, and removes any "suggestion that the [Rule] commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1980). *See also Texas v. EPA*, 726 F.3d 180, 196 (D.C. Cir. 2013).[6]

State Petitioners assert that the federal-plan option does not prevent sovereign harms because, even under a federal plan, they will still be compelled to act now (a) to "facilitate" any federal plan's emission limits (App. at 25) and (b) to "mitigate the impacts on price and reliability" that they believe will be caused by power plants' efforts to comply with any federal plan (App. at 45). *See also* Coal

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[4] A State's initial decision to accept direct federal regulation of the State's power plants is not an irreversible one, because States that initially decline to submit a state plan are free to submit a state plan later. 40 C.F.R. § 60.5720(b).

[5] The Declaration of Janet G. McCabe is being submitted with EPA's opposition to the Applications for a Stay.

[6] Contrary to State Petitioners' claims (App. at 24-25), the Rule also bears no similarity to the federal statutes that were found to impermissibly commandeer States in *Printz v. United States*, 521 U.S. 898, 904, 932-33 (1997) (no choice to opt out of duty to perform background checks on gun purchasers) and *New York v. United States*, 505 U.S. 144, 167-68, 176-77 (1992) (drawing contrast between cooperative-federalism approach and "unique" statutory scheme at issue, which directed states to regulate low-level waste as prescribed by Congress or take title to such waste, effectively offering them no choice).

Industry Application for Immediate Stay at 27 (Dkt. No. 15A778). But these actions are not compelled by the Rule and the need for them is not certain or imminent enough to establish an injury sufficient to warrant a stay.

The "facilitation" that State Petitioners complain about is not any new mandate imposed by the Rule, but rather the States' continued exercise of their traditional role overseeing power plants' decisions, as regulators of the retail electricity market. *See* App. at 47. As State Respondents explained in their opposition to State Petitioners' stay motions in the court of appeals,[7] the Rule merely anticipates that state regulators will continue exercising their traditional oversight in reviewing measures taken by power plants to comply with the Rule, just as state regulators would review any changes caused by other regulations, economic forces, industry practice, or power-plant owners' business decisions. States have extensive experience with providing regulatory oversight of power plants' compliance decisions, including decisions taken to comply with federal emission limits for many other pollutants. In this way, the Rule respects rather than interferes with the States' regulation of their energy sectors.

State Petitioners' assertion that, even under a federal plan, they will be forced to take steps now to "account for the disruption and dislocation caused by" the Rule (App. at 25) is equally baseless. Any actions States must take to oversee power plants' decisions in complying with the Rule are not imminent, because no state or

[7] *See* Opp. to Pets.' Mots. for a Stay at 7-10, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Dec. 8, 2015) (submitted in Appendix B with this opposition).

federal plans have yet been finalized. Even once those plans are finalized, power plants will still not need to comply with the Rule's emissions limits until several years later. *See* Tierney Decl. ¶ 56 (B45-46). State Petitioners' fears of future "disruption and dislocation" to the provision of electricity are thus "unknown" and too speculative to justify a stay. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 23 (2008).

2. States that intend to develop their own state plans to implement the Rule also face no imminent burdens warranting a stay. The earliest deadline for State submissions in the Rule is September 2016, and—as even State Petitioners concede (App. at 11)—States can comply with the Rule's timeline by requesting an extension until September 2018. *See* 80 Fed. Reg. at 64,669.[8] Contrary to State Petitioners' assertions (App. at 43), providing the information needed to request an extension imposes little burden on the States, and certainly nothing approaching "irreparable harm." States can submit an extension request by providing basic information to EPA about: (i) the plan options under consideration, (ii) the reasons more time is needed to prepare the plan, and (iii) a description of the State's public participation process. 40 C.F.R. § 60.5765(a). None of this information requires States to make

[8] The three-year timeframe for submitting a state plan is consistent with the typical time period for preparing such plans under the Clean Air Act, including for the relatively more-complicated state implementation plans required to comply with the National Ambient Air Quality Standards. *See* 42 U.S.C. § 7410(a)(1). McCabe Decl. ¶ 27. And State Respondents have finalized plans under similar regulations in shorter time. *See* A156 (Thornton Decl. ¶ 34) (section 111(d) plan for large municipal waste combustors developed in twenty-eight months); A14-15 (Chang Decl. ¶ 21) (State developed plan to achieve particulate matter standard in Los Angeles area within two years, including extensive air-quality modeling and stakeholder input); A76 (Klee Decl. ¶ 41) (state plan to implement nitrogen oxides trading program for power plants developed in twelve months).

final decisions now on what will be in their plans, let alone immediately enact legislation or regulations to implement those decisions, as State Petitioners mistakenly assert. App. at 3-4, 39-40. The Rule's 2016 submission deadline for state plans thus imposes at most an "interim obligation[]" that does not rise to the level of irreparable harm sufficient to justify a stay. *See Rostker v. Goldberg*, 448 U.S. 1306, 1310 (1980) (Brennan, J.).[9]

To be sure, States that intend to submit their own plans may find it beneficial to begin developing those plans during the time the challenges remain pending in the court of appeals. *See* 80 Fed. Reg. at 64,855. But any such work is voluntary and need not be overly burdensome because EPA has proposed two "presumptively approvable options" for state plans, which would allow States to avoid many of the burdens in developing a plan from scratch. *See* 80 Fed. Reg. at 64,826, 64,833-35; McCabe Decl. ¶ 18-19. Moreover, the work of preparing a state plan, seeking an extension for the state plan, or considering whether to accept a federal plan does not constitute irreparable injury—even if it requires the States to expend some resources, as State Petitioners contend. App. at 41-42, 45. Preparation to develop a state plan or consider other compliance options is inherent in every cooperative-federalism scheme. If the cost of such preparatory work were sufficient to establish irreparable harm, then opponents could cite such efforts to support a stay of any rule

[9] States are well-positioned to prepare timely extension requests. *See* McCabe Decl. ¶¶ 12-17. State Respondents are prepared to make this straightforward and simple request for an extension where necessary. *See, e.g.*, A35-36 (Clark Decl. ¶ 16); A72 (Klee Decl. ¶ 32); A92 (McVay Decl. ¶ 19); A106 (Pedersen Decl. ¶ 14).

issued under a cooperative-federalism approach, contrary to settled precedent. Such a rule would transform a stay from an "extraordinary remedy" into a commonplace event. *See Nken v. Holder*, 556 U.S. 418, 428, 433 (2009) (quotation marks omitted).

3. The Rule's extended deadlines for power plants to achieve compliance with emission limits further undermine State Petitioners' claim that in practice they must immediately make "irreversible changes in terms of state policies and resources" to ensure compliance. App. at 5. The Rule does not call for final compliance until 2030, with interim deadlines not beginning until 2022. 80 Fed. Reg. at 64,785-86, 64,828. This lengthy period between final plan submission and compliance was included specifically to provide States with sufficient flexibility to modify their plans if circumstances change. 80 Fed. Reg. at 64,828-29; *see also* McCabe Decl. ¶¶ 32-33.

State Respondents' past experience with implementing comparably complex rules to address power plant pollution under the Clean Air Act demonstrates that, in practice, States will not be required to make any final or irrevocable decisions to implement the Rule within the coming months before the court of appeals rules on the merits of their challenges. *See* McCabe Decl. ¶ 36 (explaining that "immediate decision-making" is not needed to enable compliance). The Rule's earliest 2022 interim compliance deadline is more distant than the compliance deadlines in many previous Clean Air Act rules of similar magnitude and complexity. For example, under the Clean Air Interstate Rule, a cap-and-trade program requiring power plants to reduce their emissions of nitrogen oxides and/or sulfur dioxide, the

deadlines were four-and-a-half years for initial compliance and nine-and-a-half years for final compliance (compared to seven years and fourteen years under the Rule). 70 Fed. Reg. 25,162, 25,216-17 (May 12, 2005). *See also* McCabe Decl. ¶¶ 47-51 (discussing similar Cross-State Air Pollution Rule).

In short, nothing in the Rule's extended deadlines for submitting plans and achieving the Rule's carbon-dioxide emission limits threatens any imminent irreparable injury to States, as would be necessary to consider staying the Rule pending the court of appeals' expedited review. This Court's inquiry should end there. *See Ruckelshaus*, 463 U.S. at 1317.

II. A Stay Is Not in the Public Interest.

Even where a moving party can identify irreparable harm, a stay should be denied if "the balance of equities and consideration of the overall public interest" weigh against such interim relief. *Winter*, 555 U.S. at 26. Regardless of any burdens faced by State Petitioners, the stay should not be granted due to the harm that it may cause to the State Respondents and to the public—including State Petitioners' own residents. *See Ruckelshaus*, 463 U.S. at 1317.

1. The States have faced significant harms and costs from climate change for many years. Substantial research demonstrates that greenhouse gases pose a serious danger to public health and welfare. *See* 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009). *See also Mass.*, 549 U.S. at 521-522 ("The harms associated with climate change are serious and well recognized."); *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 120-121 (D.C. Cir. 2012) (upholding EPA's finding that

greenhouse gases pose a danger to public health and welfare), *rev'd on other grounds sub nom. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). Climate change increases the risk of mortality (especially in children and the elderly) during extreme heat events and from infectious and waterborne diseases, as well as threats to coastal communities and infrastructure from storms and rising sea levels. 80 Fed. Reg. at 64,683.

In South Florida, for example, flooding exacerbated by rising seas is now commonplace, harming homes, roads, bridges, drinking water, and sewage systems.[10] Many other cities and States face more severe storms, wildfires, and droughts.[11] In addition, the increased heat waves, droughts, fires, storms, and freezes resulting from climate change all threaten reliability of the electric grid. A202-04 (Randolph Decl. ¶¶ 20-22), A53-54 (Dykes Decl. ¶ 21). For these reasons, to spur federal action, several State Respondents have, for years, sought reductions in carbon-dioxide emissions. *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2009); *Mass.*, 549 U.S. 497; *New York v. EPA*, No. 06-1322 (D.C. Cir., filed Sept. 13, 2006).

2. In their applications, several petitioners expressly seek a stay that extends the compliance dates of the Rule. *See* Application of Utility & Allied Parties for Immediate Stay at 5 (Dkt. No. 15A776). Any stay that results in postponed emission

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[10] A250-51, 266-70 (Stoddard Decl. ¶¶ 7-13 & Ex. C (South Miami, FL).

[11] *See* A2-6 (Chang Decl. ¶ 2 (California), A28-29 (Clark Decl. ¶¶ 4-5 (Washington), A60-61 (Klee Decl. ¶ 6 (Connecticut)), A101-02 (Pedersen Decl. ¶¶ 4-5 (Oregon)), A112-13 (Snyder Decl. ¶ 4 (New York), A156-57 (Thornton Decl., ¶¶ 36-37 (Minnesota), A161 (Wright Decl., ¶ 6 (New Hampshire), A243 (Jones Decl. ¶ 39 (Boulder, CO).

reductions would be extremely damaging because more emissions will continue to intensify the climate change that has been harming State Respondents. Decl. of Christopher B. Field ¶¶ 7, 29;[12] *see also* A98 (McVay Decl. ¶ 35) (citing recent experience of three-year delay in emission reductions from Cross-State Air Pollution Rule from stay granted at litigation's outset). Even if State Petitioners had shown that they would suffer some adverse impact from beginning to take steps to implement the Rule, any such impact "is balanced to some considerable extent by the irreparable injury" that could be caused by a stay that results in continued air pollution. *Beame v. Friends of the Earth*, 434 U.S. 1310, 1314 (1977) (Marshall, J.). "Where there is doubt" about where the equities lie, "it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents." *Williams*, 442 U.S. at 1316.

Given this balance of the equities, there is no reason to disturb the court of appeals' considered decision not to grant a stay. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506 (2013) (Scalia, J., concurring) (refusing to reverse stay decision below because it was not "demonstrably wrong" (quotation marks omitted)); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring) (voting with court to deny stay even though she questioned the lower court's analysis); *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207, 1218 (1972) (Burger, J.)

[12] The Declaration of Christopher B. Field is being submitted with EPA's opposition to the Applications for a Stay.

(declining to second-guess lower court's judgment that "there was danger to the environment outweighing" economic risk to regulated entities).

CONCLUSION

For the above reasons, the Applications for a Stay should be denied.

Dated: February 4, 2016

Respectfully submitted,

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