No. 15A787 (related to 15A773, 15A778, and 15A793)

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

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

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

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

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

The Business Associations[1] respectfully submit this brief reply in support of their application for an immediate stay of the final rule of the United States Environmental Protection Agency ("EPA") entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 FR 64662 (Oct. 23, 2015) (the "Rule"). In their reply, the States demonstrate that that there is more than a "fair probability" that this Court would vote to grant a petition for a writ of certiorari if the D.C. Circuit were to uphold the Rule and there is a substantial likelihood that this Court would, after granting certiorari, strike down the Rule as unlawful. We write to emphasize that EPA has no meaningful response to three arguments separately advanced by the Business Associations.

First, EPA has no justification for its inconsistent interpretation of the phrase "best system of emission reduction." In the Rule, EPA interprets the phrase "best system of emission reduction" as incorporated into section 111(d) as "any set of measures for reducing emissions," but, in regulating new sources under the related section 111(b) of the Clean Air Act, it construed the very same term on the very

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

same day to mean only measures that can be undertaken by a source itself. Cf. Bus. Appl. 4-5, 13-14.

EPA does not dispute that statutorily defined terms are presumptively given a consistent definition throughout the Act. EPA instead tries to salvage (Resp. 46) its inconsistent and unreasonable statutory interpretation of two related subsections in section 111 by claiming that, in practice, new sources may be few in number and thus a trading compliance option may be difficult for new sources. The Rule, however, finds that new sources can engage in the same "beyond the-source" actions as existing sources and even participate in the same trading program. See 80 FR at 64734, 64834 n.793. The Rule itself thus forecloses EPA's proffered justification for adopting conflicting interpretations of "system."[2]

EPA also makes the remarkable assertion that emission rates for existing sources are not "necessarily more stringent than the new source standards," EPA Resp. 45, but cites no support for this claim. Nor could it, as EPA expressly set emission rates for existing sources more stringent than those for new sources. Bus. App. 4-5 (citing EPA's emission rates for new and existing sources).

Indeed, because EPA flipped section 111's regulatory paradigm on its head—for the first time regulating existing sources constrained by their already

[2] EPA also notes (Resp. 45) that it has phased in obligations for existing sources but not new sources, but never explains why this justifies giving the term "best system of emission reduction" a radically different interpretation when applied in section 111(b) than in section 111(d).

constructed facilities more stringently than new plants[3]—EPA then had to deploy arbitrary fixes to address the consequences of doing so. 80 FR at 64821-23. Because of EPA's conflicting and inconsistent interpretation of "best system of emission reduction," overall emissions in a State could increase if the State encouraged construction of new sources to replace existing sources, because new sources are subject to less stringent standards than existing sources. *Id.* To fix this "problem," EPA ordered States to take steps to prevent shifting of generation from older plants to newer, more efficient plants deploying state-of-the-art control technology. *Id.* EPA offers no plausible explanation that Congress could have intended this result.

Second, EPA fails to rebut the specific showing of irreparable harm. EPA does not dispute that the Rule is intended to "take a bunch of [coal-fired power plants] out of commission." Bus. Appl. 20 (quoting Secretary Kerry). EPA does not dispute that achievement of this goal will cause massive and irreparable harm.[4] Most critically, in many areas, power generation and associated mining jobs are the principal lifeblood for a local economy. *Id.* at 21. The taxes these operations pay are crucial for many counties and towns. *Id.* Loss of these revenues will lead to cuts for

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[3] *Cf.* 40 FR 53340, 53344 (Nov. 17, 1975) ("consideration [of cost for existing sources] is inherently different than for new sources because controls cannot be included in the design of an existing facility and because physical limitations may make installation of particular control systems impossible or unreasonably expensive in some cases."); Robert J. Martineau, Jr. & Michael K. Skagg, *New Source Performance Standards*, THE CLEAN AIR ACT HANDBOOK 321 (Robert J. Martineau, Jr. & David P. Novello, eds., 2d ed. 2004) (section 111 "reflects the basic notion that it is cheaper and easier to design emissions control equipment into production equipment at the time of initial construction than it is to engage in costly retrofits.").

[4] To be sure, while EPA now tries to downplay the impact of the Rule on existing fossil fuel-fired plants, as explained by the Utility and Allied Parties and the Coal Industry in their respective applications and replies, the Rule will cause substantial plant closures in the near term.

important civil services and educational programs. *Id.* These are textbook irreparable harms justifying a stay.

Third, EPA has no effective response to the point that a stay of the Rule cannot harm the public during the pendency of judicial review for several reasons, including ongoing efforts that are lowering emissions now. Bus. Appl. 23. EPA does not dispute this, but argues that the Rule will require deeper reductions years into the future. EPA Resp. 72-73. EPA, however, offers no explanation as to how delaying imposition of the near term requirements during the pendency of judicial review will result in any environmental harm. The Rule by itself will achieve no significant climate change benefits in the near or long term; EPA itself admits the Rule, even once fully implemented in 2030, is merely a "step" in a "series of long-term actions" to combat climate change. 80 FR at 64677. Indeed, the Administration has acknowledged that "[e]ven if the United States were to reduce its greenhouse gas emissions to zero, that step would be far from enough to avoid substantial climate change."[5]

CONCLUSION

For these reasons, and those in the Business Associations' Application, the Court should grant the requested stay.

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[5] Interagency Working Grp. on Social Cost of Carbon, *Technical Support Document: - Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis* 15 (rev. July 2015), https://www.whitehouse.gov/sites/default/files/omb/inforeg/scc-tsd-final-july-2015.pdf.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Peter D. Keisler, do hereby certify that, on this fifth day of February, 2016, I caused a copy and an electronic copy of the foregoing document to be served by overnight commercial carrier, and by email, on the following parties:

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