ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-1277 & 15-1284

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: STATE OF WEST VIRGINIA, *et al*.

Petitioners.

On Petition for Extraordinary Writ to the
United States Environmental Protection Agency

PETITIONERS' REPLY BRIEF IN SUPPORT OF EMERGENCY PETITION FOR EXTRAORDINARY WRIT

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GLOSSARY

CAA	Clean Air Act
EPA	Environmental Protection Agency
OFR	Office of Federal Register

INTRODUCTION AND SUMMARY OF ARGUMENT

In the final Section 111(d) Rule, EPA took an unusual departure from its established rulemaking practice and precedent by ignoring the date of Federal Register publication in setting the effective date for the Rule. Instead, EPA made the States' obligations due on date-certain deadlines, which remain fixed no matter how long Federal Register publication takes and no matter what EPA says about the Rule's technical "effective date." Put another way, though it could have tied the compliance deadlines to publication, EPA deliberately severed the traditional link between when the Rule's deadlines accrue and when a petition for review and a stay application can be filed. The purpose of this stratagem is plain: the longer it takes for publication, the greater the benefit to EPA as States work to meet their date-certain deadlines with no ability to seek an ordinary stay of the Rule.

With EPA's response to this Court's briefing order, it is now clear that the States will suffer months of irreparable harm before they can possibly obtain a stay under the ordinary statutory procedures. EPA has been forced to admit that it believes the Rule will not be published until *mid-to-late October*. Resp. 10. As of the time of the submission of its brief, EPA had not even sent the Rule to the Office of Federal Register ("OFR"). Even after this submission occurs, EPA can only hope that publication of the 3,083 page "package"—which includes the Section 111(d) Rule and two other related regulations—will occur sometime in "middle-to-

late October." EPA Resp., Beauvais Decl. ¶¶ 11, 17. But EPA admits it lacks control over the process, and publication could be delayed months because of the Rule's large "number of pages to be edited and formatted." *Id.* ¶ 10.

EPA asserts that there is nothing this Court can do about this situation. Under the agency's categorical position, this Court can *never* remedy irreparable harms imposed by final rules until Federal Register publication occurs. This is directly contrary to principles of this Court's longstanding equitable authority, particularly as exemplified in this Court's decision in *American Public Gas Association v. Federal Power Commission*, 543 F.2d 356 (D.C. Cir. 1976).

Once EPA's threshold arguments are properly set aside, its opposition falls apart. On the merits, EPA refuses to address several of the States' arguments, including that the Rule is contrary to the Supreme Court's decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG*"). And with regard to irreparable harms, EPA's argument reduces to the assertion that the sworn statements of multiple State regulators that they are expending substantial taxpayer resources *now* are an insufficient basis for the limited relief the States seek.

ARGUMENT

I. *American Public Gas* Forecloses EPA's Argument That This Court Lacks Jurisdiction To Stay The Final Section 111(d) Rule

EPA devotes a substantial portion of its opposition to arguing that this Court lacks jurisdiction to stay the Rule because the statutory period for challenging the

Rule has not yet begun. Resp. 12-21. This argument is foreclosed by this Court's binding decision in *American Public Gas*. As the States have explained, in that case the Federal Power Commission's order ("FPC Order") was final, but not yet judicially reviewable under the relevant statutory scheme. Pet. 9-10. Because this Court determined that the final FPC Order was already imposing irreparable harms upon regulated parties, this Court stayed the order under the All Writs Act "to prevent even temporary immunity from judicial scrutiny of agency actions before statutory review provisions become available." *Am. Pub. Gas*, 543 F.2d at 358-59. That holding was a straightforward application of the Supreme Court's prior decision in *FTC v. Dean Foods Co*., 384 U.S. 597 (1966), which held that the All Writs Act is available to "preserve the court's jurisdiction *or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels*." *Id.* at 604 (emphasis added).[1]

EPA's attempt to minimize the relevance of *American Public Gas* fails. EPA argues that the "critical difference" between the FPC Order and the Section 111(d) Rule is that the FPC Order was "already effective," whereas the Rule will not be "effective" until 60 days after publication. Resp. 20. This is a red herring. In the context of the FPC Order, the relevant date was the Order's effective date

[1] In attempting to distinguish *Dean Foods*, EPA misleadingly omits the second, critical passage in this quotation, emphasized above. *See* Resp. 21 n.17.

because that is when the Order's obligations began to accrue. Here, the eventual date of the Rule's publication—and the "effective date" 60 days after that—have absolutely no impact on when the States' obligations apply. Those obligations began accruing on the date the Administrator signed the Rule as final.

EPA also points out that *American Public Gas* ordered "very narrow" relief, "leaving the order (and the rates set therein) otherwise in effect." Resp. 20 (quotation omitted). But the States similarly seek narrow relief here: a postponement of the Rule's deadlines, leaving the bulk of the Rule in place until litigation on its legality can occur after publication.[2]

Having no real answer for *American Public Gas*, EPA asserts that this Court's decision in *In re Murray Energy* "squarely foreclose[s]" the States' request for relief, going so far as to assert that this Petition is barred by issue preclusion. Resp. 18, 19 n.16. But *In re Murray* dealt with a request that this Court *prohibit entirely the Section 111(d) rulemaking*. 788 F.3d 330, 333-34 (D.C. Cir. 2015). Here, the States simply ask for a stay of the deadlines in the Rule pending judicial review. Nothing in *In re Murray* calls into question the holding of *American Public Gas* that once an agency action is final, but not yet statutorily reviewable, the

[2] *American Public Gas* also disposes of EPA's assertion that the All Writs Act is available only "(1) to compel a lower court to act or to prohibit it from acting unlawfully; (2) to forestall future error in trial courts by addressing important issues that may otherwise be lost to appellate review; and (3) to compel agency action that is unreasonably delayed." Resp. 17 (quotation omitted).

All Writs Act gives this Court authority to stay that action to prevent irreparable harm.

EPA also argues that the relief the States seek is unavailable under the All Writs Act because the States can seek that same relief after publication in the Federal Register. Resp. 21 n.17. That is simply not true. The States are seeking relief from the harms the Rule is imposing *right now*, and nothing this Court would be able to do after publication can remedy those harms. This is precisely a circumstance where the All Writs Act is available because there is no "'other adequate means to attain the relief [the States] desire.'" Resp. 15 (quoting *In re al-Nashiri*, 791 F.3d 71, 78 (D.C. Cir. 2015)).

Finally, EPA claims that issuing an extraordinary writ here will "open[] the floodgates for pre-publication challenges to any number of future agency actions." Resp. 13. But as the States have explained, EPA's decision to decouple the Rule's compliance deadlines from the date of Federal Register publication, in order to obtain compliance by regulated parties before the statutory scheme permits review, appears to be *sui generis*. EPA's only alleged counterexamples—the agency's inclusion of date-certain state implementation plan ("SIP") submission deadlines under Section 110 of the CAA, *see* Resp. 24-25 n.19—are inapposite because those all involved *statutorily required* deadlines. 42 U.S.C. §§ 7407(d)(1)(A), 7410(a)(1). Here, contrary to what it has done in every other rule without a statu-

tory deadline—including every prior Section 111(d) rule—EPA has chosen to detach the Rule's deadlines from the Federal Register publication date.

II. EPA's Failure To Respond To The States' Arguments That The Rule Is Illegal Effectively Concedes The States' "Clear And Indisputable" Entitlement To Relief

A. In their Petition, the States argued that the Rule's building block regime—under which the agency requires States to shift their energy economies away from coal-fired generation to natural gas and renewable sources—is illegal. EPA's approach goes beyond the statutory authority to "hold the industry to a standard of improved design and operational advances," Pet. 24 (quoting *Sierra Club v. Costle*, 657 F.2d 298, 364 (D.C. Cir. 1981))), violates the Supreme Court's *UARG* opinion by making decisions of "vast economic and political significance" based upon an "long extant" provision of the CAA, Pet. 24-26 (quoting *UARG*, 134 S. Ct. at 2444), and invades the States' sovereign authority over intrastate generation and consumption of electricity, Pet. 27 (citing *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)).

In opposition, EPA ignores the majority of these arguments and authorities, including the Supreme Court's decision in *UARG*. Instead, EPA pleas for additional briefing. Resp. 32 n.29. But this Court ordered EPA to respond to the

States' Petition, allotting a generous 40 pages.[3] Order, ECF 1569374 (Aug. 24, 2015). EPA's tactical decision to disregard this Court's briefing order and refuse to answer the States' cited authorities constitutes forfeiture on the issue of the Rule's legality. *See Texas v. United States*, -- F.3d --, --, 2015 WL 4910078, at *4-6 (D.C. Cir. Aug. 18, 2015); 16AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3974.2 (4th ed. 2015).

The few arguments that EPA does briefly offer are meritless. EPA points to a single broad dictionary definition of "system," Resp. 36, but does not even acknowledge the CAA's repeated references to "applying" a system to a "particular source." Nor does it explain how that definition of "system" comports with the *UARG* canon of statutory construction. Pet. 24-26. And EPA does not dispute that, under its integrated grid theory, EPA could issue a rule requiring coal-fired power plants to shut down entirely, which cannot possibly be considered a standard of *performance* under Section 111(d). Pet. 23-24.

EPA also asserts that it has not claimed novel authority because, in its view, *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011) ("*AEP*"), held that EPA could regulate carbon dioxide emissions from power plants. Resp. 37-38. Even if one were to accept EPA's erroneous reading of

[3] EPA also responded to the arguments raised by Peabody, and devoted only three and a half pages to those unique arguments. Resp. 15 n.12, 16, 28-30.

AEP—*but see AEP*, 131 S. Ct. at 2537 n.7; *UARG*, 134 S. Ct. at 2441 n.5—that would not salvage EPA's novel approach. Nothing in *AEP* permits EPA to disfavor coal-fired power plants vis-à-vis other sources. *Delaware v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015) (recognizing EPA lacks expertise over electricity markets).

B. While EPA's failure to offer a meaningful defense of its building block approach is sufficient to demonstrate the States' "clear and indisputable" entitlement to relief, *In re al-Nashiri*, 791 F.3d at 78, EPA also fails to explain how the Rule is consistent with the Section 112 Exclusion. The Exclusion prohibits EPA from regulating "any air pollutant" emitted from a "source category . . . regulated under [Section 112]." 42 U.S.C. § 7411(d)(1). As EPA has consistently explained over the last 20 years, from the Clinton Administration to the proposed version of the Rule, the "literal" terms of this text prohibit EPA from regulating a source category under Section 111(d)'s state-by-state standards, where—as here—that category is already regulated under Section 112's national standards. Pet. 17.

Foremost, EPA's arguments are dedicated entirely to attempting to show that the meaning of the Section 112 Exclusion is unclear. But this misses the point entirely. The question is whether EPA's interpretation of the Exclusion, as set forth in the final Rule, is erroneous. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). On that issue, EPA fails to respond to the States' argument that EPA's newly cre-

ated reading of the Exclusion merely "rewrite[s] clear statutory terms to suit its own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446.

In any event, EPA's arguments lack merit. *First*, EPA claims that both the 1990 amendment to the CAA reflected in the U.S. Code and the excluded obsolete cross-reference are equally weighty "conforming amendments." Resp. 32-34. This argument is not only contrary to the headings and context of the amendments, as EPA has itself explained,[4] but directly foreclosed by *American Petroleum Institute v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013)—a case EPA simply ignores. Pet. 21. *Second*, EPA disparages the States' reading of the Exclusion as "non-literal," Resp. 32, contrary to what EPA has itself said for 20 years, including in the proposed version of the Section 111(d) Rule. Pet. 17. *Third*, EPA claims that the States' interpretation would "dramatically reduce the scope of the section 111(d) program." Resp. 35. But it has no answer to the fact that the States' interpretation is consistent with the *only* two EPA attempts to invoke this obscure pro-

[4] *Compare* Brief of EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494 n.35 (D.C. Cir. July 23, 2007) ("2007 EPA Brief") (the U.S. Code amendment is "included with a variety of substantive provisions" and "change[s] the focus of" the Exclusion), *with id.* (obsolete cross-reference appears among a list of "[c]onforming [a]mendments" that make clerical changes to the CAA), *and* EPA, Air Emissions from Municipal Solid Waste Landfills, 1-5 (1995) (obsolete cross-reference "is a simple substitution of one subsection citation for another").

vision since the 1990 Amendments, and was specifically adopted by the Clinton-era EPA in the first of those rules. Pet. 18-19.

III. Absent Immediate Relief From This Court, The States Will Continue To Suffer Irreparable Harms For An Indefinite Period Of Time

A. In their Petition and supporting declarations, the States demonstrated that the Rule is imposing substantial irreparable harms upon the sovereign States. The declarations explain that the States will need to spend millions of dollars per year to comply with the Rule. *See* Durham Decl. ¶ 6; McClanahan Decl. ¶ 6; Gore Decl. ¶ 6. And given the Rule's unprecedented complexity, as well the limited 1-year and 3-year timeframes for State Plan submissions, these expenditures began "immediately." *See* Stevens Decl. ¶¶ 5-10; McClanahan Decl. ¶¶ 6-8; Bracht Decl. ¶¶ 7-9. These substantial harms—almost certainly greater than the unrecoverable funds at issue in *American Public Gas*—are more than sufficient for relief under the All Writs Act. *See Am. Pub. Gas*, 543 F.2d at 358-59; *accord Cmty. Broad. of Boston, Inc. v. FCC*, 546 F.2d 1022, 1028 (D.C. Cir. 1976).

The States also raised the possibility that EPA's decoupling of the compliance deadlines from publication would mean that the States will be forced to suffer the above-described harms for as much as half a year before an ordinary stay motion can be decided. Pet. 16. Given the history of publication delay of less lengthy rules, it could take "several months" for the Rule to be published in the Federal Register. Pet. 15. And a stay motion could take months more to brief and decide.

EPA's opposition exceeds the States' worst fears. EPA represents that it hopes that the Rule will be published in the Federal Register by "late October." Resp. 10. While EPA's General Counsel previously represented to the States on a conference call on August 6, 2015, that he "hoped" the Rule would be published three to six weeks after the August 3 finalization date, EPA has now been forced to admit that, as of the time of its filing in this Court, it had not even sent the Rule to OFR. *Id.*, Beauvais Decl. ¶ 14. Moreover, "EPA does not control the timing of Federal Register publication after a rule is sent to the OFR," and publication can be delayed based upon "number of pages to be edited and formatted, the number of citations and quotations to be checked, the complexity of the formatting." *Id.* ¶ 10. The 3,000 plus page package in which EPA will publish the Section 111(d) Rule is surely among the most onerous projects in OFR's history. That means that the States are facing an indefinite period of time before they can possibly obtain relief under the ordinary stay process, all while the clock on their State Plan submission deadlines continues to tick. Indeed, even accepting EPA's projected late October timeframe, it could be *almost half a year* from the Rule's finalization before the States could obtain a ruling on a post-publication stay motion. Pet. 3, 16.

B. EPA's opposition unpersuasively attempts to downplay the States' harms. *First*, EPA argues that the States will not need to expend any resources before the Rule's publication. Resp. 23. But as demonstrated in 12 sworn declarations, the

States will need to expend resources *immediately* to comply with both the September 2016 and September 2018 deadlines. *See, e.g.*, Stevens Decl. ¶¶ 5-10; McClanahan Decl. ¶¶ 6-9; Bracht Decl. ¶¶ 7-8. Indeed, EPA explained in the Rule that the deadlines are "warranted" by "the need to begin promptly what will be a lengthy effort to implement the requirements of" the Rule. Final Rule at 1001. EPA wants and expects the States to be working *now*; that is the only explanation for its unusual decoupling of the deadlines from publication, and why it is now vigorously resisting the States' request to postpone the deadlines.

With regard to the September 2016 deadline, the States will be required (1) to identify the State Plans that are "under consideration," (2) provide an "appropriate explanation" for the additional time they will need, and (3) describe how they have provided for "meaningful engagement" with the public leading up to the submission. Final Rule at 1008-09. The States have not, and could not have, waited the unknown period it will take to publish the Rule before beginning these efforts. Satisfying these three steps requires *immediate* expenditures, as deciding between the Rule's various options—outlined in *500 pages* (Final Rule at 848-1312)—involves a massive effort by each of the States. Pet. 12. This will require, *inter alia*, identifying the amount of natural gas and renewable capacity that can be developed; understanding the timeframe on which such new capacity could be developed consistent with the public's ability to obtain reliable, affordable energy;

engaging in intrastate communications with public utilities commissions; engaging in interstate outreach to other States possibly interested in multistate options; holding meetings with the public and industry; and, determining what implementing legislation could plausibly be adopted by legislatures that often sit once a year, or even once every two years. *See, e.g.*, Nowak Decl. ¶¶ 4-16; McClanahan ¶¶ 4-10; Bracht Decl. ¶¶ 2, 8, 10, 12; Hodanbosi Decl. ¶ 5; Gore Decl. ¶¶ 5-6. They must also assess what measures are needed to obtain credits under the Clean Energy Incentive Plan, because the 2016 submission must include a statement of intent if a State wishes to participate. And finally, failure to file with EPA by the September 2016 deadline is not without consequences; EPA will impose a federal plan on any States that miss the deadline.[5] Final Rule at 1005. In recognition of the need for these immediate efforts, EPA has begun scheduling webinars for State regulators in September and October on how to comply with the final Rule. *Id*. 1428.

As to the September 2018 date, that deadline also requires immediate expenditures of resources. As the States demonstrated through sworn declarations, the Rule is the most complex rule they have ever been required to implement, such

[5] EPA suggests that States can avoid immediate harm by doing nothing and accepting a federal plan. But it is no answer to suggest that a State can avoid irreparable expenses by surrendering its sovereignty. *See Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (infringement on State's sovereignty constitutes irreparable harm); *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015) ("A plaintiff suffers an injury even if it can avoid that injury by incurring other costs.").

that it will take some States as long as 3 to 5 years to finish their State Plans. Gross Decl. ¶ 3; Stevens Decl. ¶ 8.[6] Moreover, States are subject to a mandatory "progress update" in September 2017, which requires a specific plan approach along with draft legislation and regulations. Final Rule at 1023-24. That is why EPA said in the Rule that the date-certain deadlines are to "assure that states begin to address the urgent needs for [carbon dioxide] reductions quickly." *Id.* at 73.

Second, EPA argues that the Rule's "flexibility" militates against any finding of irreparable harm. Resp. 26. But this cuts against EPA. Each of the items on the menu of options that EPA has given the States to completely reorganize their energy economies will require immediate and comprehensive analysis, so that the State can identify what is the best ultimate path for it to adopt.

Finally, EPA argues that the States' expenditure of unrecoverable resources to comply with the Section 111(d) Rule are not "irreparable harms" sufficient to justify a stay. Resp. 27. This argument is foreclosed by *American Public Gas*,

[6] EPA's unsubstantiated and wholly incorrect assertion that preparation of SIPs under Section 110 is "equally if not more complicated as the one required by the Rule," Resp. 24, is not enough to rebut the 12 sworn declarations from State environmental and energy officials from across the country. Nor does it make sense, in light of this Rule's unprecedented attempt to force States to entirely reorder their energy supply. Similarly, the assertion by prospective NGO Intervenors that the work required by States before the September 2016 deadline is "minimal and uncomplicated," NGO Resp. 2 (quoting Tierney Decl. ¶ 11), is based on a single declaration from a former Massachusetts state environmental official, who has no experience in a coal-energy-reliant State and whose State is part of an existing multi-State carbon trading program.

which issued an All Writs Act stay based entirely upon the loss of unrecoverable funds to comply with an agency order. Indeed, the States pointed to numerous cases in which courts found the loss of unrecoverable funds to comply with government mandates to constitute irreparable harm. *See, e.g.*, *Am. Pub. Gas*, 543 F.2d at 358; *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996); *Nalco Co. v. EPA*, 786 F. Supp. 2d 177, 188 (D.D.C. 2011). EPA's only response to these authorities is that they involved the loss of funds by private companies. Resp. 27-28. But it is implausible that the loss of a State's funds—which were redirected from other sovereign priorities—are somehow less worthy of judicial protection than financial harms suffered by private firms.[7]

CONCLUSION

For the foregoing reasons, the States respectfully request that this Court issue a writ by September 8 staying the Rule's deadlines until litigation over the Rule's legality is completed. At minimum, those deadlines should be stayed until the Rule is published and ordinary stay applications are briefed and decided.

[7] EPA also argues that resources devoted to developing state plans cannot constitute irreparable harm because that would mean resources devoted to developing SIPs under Section 110 might also constitute irreparable harm. Resp. 24. But EPA offers no citation for its categorical claim that state plan-based regimes under the CAA can never be stayed. If EPA issued an illegal SIP rule under Section 110 that required massive expenditures from the States, and the public interest favored a stay of that rule, nothing would prevent this Court from issuing a stay.

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CERTIFICATE OF SERVICE

I certify that today, September 4, 2015, a copy of the foregoing *Petitioners' Reply Brief In Support Of Emergency Petition For Extraordinary Writ* was filed and served electronically through the Court's CM/ECF system on all registered counsel. In addition, pursuant to this Court's August 24, 2015 Order, and Circuit Rule 21(d), four copies of the foregoing *Petitioners' Reply Brief In Support Of Emergency Petition For Extraordinary Writ* were hand-delivered to the Court today.

/s/ Elbert Lin
Elbert Lin