ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma, *et al.*, Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 15-1364 Lead Case No. 15-1363 (and consolidated cases)

Petitioner Oklahoma's Motion for Stay of EPA's Existing Source Performance Standards for Electric Generating Units

DAVID B. RIVKIN, JR.
MARK W. DELAQUIL
ANDREW M. GROSSMAN
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
PATRICK R. WYRICK
SOLICITOR GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-4396
(405) 522-0669 (facsimile)
Scott.Pruitt@oag.ok.gov

Attorneys for Petitioners

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Pursuant to Rule 18, the State of Oklahoma hereby moves the Court to stay implementation by Respondent United States Environmental Protection Agency ("EPA") of its Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015), Att. B ("Section 111(d) Rule" or "Rule"). The Rule is unlawful and is currently causing Oklahoma immediate and irreparable harm, without any countervailing benefit to third parties or the public interest. Its effectiveness should therefore be stayed pending review.

Introduction

The Clean Air Act does not empower the U.S. Environmental Protection Agency to compel States to fundamentally restructure the generation, transmission, and regulation of electricity within their borders. To the contrary, it specifically denies the agency that authority, as does the U.S. Constitution's bar on federal commandeering and coercion of the States. Nonetheless, EPA is now acting, under the purported authority of the Clean Air Act, to force States to restructure their electric systems by phasing out coal-fired generation in favor of natural gas and renewables. The Section 111(d) Rule leaves States no choice but to alter their laws and programs governing electricity generation and delivery, to make irreversible decisions regarding electricity generation and delivery, and ultimately to effect a wholesale transformation of their energy economies to accord with EPA's preferences. The speed with which States must undertake these tasks frustrates the ordinary process of judicial review: the whole point is to create irreversible facts on the grounds—alterations to State laws, long-term investment decisions, plant retirements, etc.—before any court has an opportunity to review the Rule's merits.

The Rule must be stayed because its implementation invades the States' sovereign interests, exceeds federal power under Article I of the United States Constitution, and violates the Tenth Amendment's limitations on federal power.[1] Regulation of the generation and intrastate transmission of electricity remains the exclusive province of the States, and no federal actor possesses the authority necessary to undertake the planning, project approval, rate regulation, and other steps necessary to accommodate the Rule's restrictions on traditional power sources. As a result, whether or not a State chooses to implement the rule's emissions standards under the Clean Air Act's cooperative federalism provisions, that State *has no choice* but to facilitate the changes to electricity generation and transmission that the Rule requires.

In this way, the Rule seeks to "use the States as implements of regulation," in plain violation of the Constitution's bar on commandeering the States and their officials to achieve federal goals. *New York v. United States*, 505 U.S. 144, 161 (1992). And even if a State could refuse EPA's marching orders, doing so would throw its electricity markets, economy, and general welfare into turmoil, as plants are forced offline with no capacity available to replace them. In this respect, the Rule denies States "a legitimate choice whether to accept the federal conditions," *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.), violating the constitutional bar on coercion. This serious constitutional doubt as to the Rule's validity may be avoided only by interpreting Section 111(d)'s "best system of emission reduction" standard consistent with its

[1] Oklahoma also joins the arguments made by the State of West Virginia and other States that the Rule is *ultra vires* because it exceeds EPA's statutory authority under the Clean Air Act.

plain meaning as limited to facility-based measures like control systems and work practices.

To avoid substantial irreparable harm to the States' sovereign and financial interests, as well as injury to the public, the Court should stay the Section 111(d) Rule pending its review.

Background

A. Statutory Background

In 2009, the Obama Administration pushed Congress to enact legislation capping carbon-dioxide emissions by fossil-fuel-fired power plants. The effort ultimately failed, which was recognized at the time as a major defeat for the President's policy agenda. Now the Administration seeks to achieve the same goal via the exercise of purported authority under Section 111(d) of the Clean Air Act that, if it actually existed, would have rendered the 2009 legislation completely superfluous.

Section 111(d), 42 U.S.C. § 7411(d), charges States to establish and apply "standards of performance" for certain existing stationary sources of air pollutants. A "standard of performance" is "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction." § 7411(a)(1). Under Section 111(d), EPA "establish[es] a procedure" for States to submit plans establishing such standards and providing for their implementation and enforcement. EPA's procedure must allow States "to take into consideration, among other factors, the remaining useful li[fe]" of a source. Only if a State fails to submit a compliant plan may EPA step in and promulgate a federal plan to regulate sources within a State directly. § 7411(d)(2).

B. The Section 111(d) Rule Compels the State of Oklahoma To Reorganize Its Energy Economy

At the same time that utilities are making final decisions whether to upgrade or retire coal-fired facilities in response to the EPA's Section 112 rule—which EPA projected will result in the retirement of 4,700 megawatts of coal-fired generating capacity and require tens of billions of dollars in investments for the remaining facilities to achieve compliance by the April 16, 2016 deadline[2]—EPA promulgated a rule to regulate greenhouse gas emissions from existing fossil-fuel-fired power plants pursuant to Section 111(d). The Section 111(d) Rule aims to reduce carbon-dioxide emissions from the power sector by 32 percent by 2030, relative to 2005 levels. 80 Fed. Reg. at 64,665/1. These emissions reductions are premised on States' actions to overhaul their electric sectors, shifting from coal generation to natural gas and from fossil fuels to renewable sources like wind and solar.

The Rule specifies numerical emissions rate- and mass-based CO_2 goals for each State, based on its existing coal-fired and gas-fired generation fleet. These goals are based on projected emissions reductions that EPA believes can be achieved through the combination of three "building blocks" that it says represent a baseline "best system of emission reduction": (1) require coal-fired power plants to make changes to increase their efficiency in converting fuel into energy, (2) replace coal-fired generation with increased use of natural gas, and (3) replace fossil-fuel-fired generation with generation from new, zero-carbon-emitting renewable-energy sources,

[2] *See* EPA, MATS Rule RIA 6A-8, ES-2 (2011), *available at* http://www.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf.

such as wind and solar. 80 Fed. Reg. at 64,667/1. In other words, the Section 111(d) Rule requires States to transition away from coal-fired generation and take all steps that are necessary to integrate other generating sources and to maintain electric service. EPA, however, itself lacks the authority to carry out all but the first of these building blocks, as well as supporting actions necessary to reorganize the production, regulation, and distribution of electricity.

The situation in Oklahoma is illustrative of the Clean Power Plan's forced energy restructuring throughout the country. Coal accounts for over 33 percent of electricity generated within Oklahoma, and the Section 111(d) Rule requires Oklahoma facilities to slash emissions by 21.9 percent in 2020 and 31.8 percent in 2030.[3] But EPA acknowledges that "inside-the-fenceline" efficiency improvements are insufficient to achieve anywhere near that magnitude of reductions. 80 Fed. Reg. at 64,727/2 (finding that efficiency measures could reduce emissions by only between 4.3 and 2.1 percent, depending on the region).[4] Compounding that problem, EPA projects that the Section 111(d) Rule will cause an increase of approximately 200 percent in retiring generating capacity in and around Oklahoma relative to current expectations,[5] and

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[3] *See* U.S. Energy Information Administration, Oklahoma State Energy Profile (Mar. 27, 2014), *available at* http://www.eia.gov/state/print.cfm?sid=OK; E&E Publishing, Power Plan Hub: Oklahoma, *available at* http://www.eenews.net/interactive/clean_power_plan/states/oklahoma; 80 Fed. Reg. at 64,824, Table 12.

[4] EPA cannot impose greater source-level emissions limitations because they would not be "achievable" or "adequately demonstrated." § 7411(a)(1). *See also* 80 Fed. Reg. at 64,776/3.

[5] Southwest Power Pool, SPP's Reliability Impact Assessment of the EPA's Proposed Clean Power Plan 2 (2014) (discussing EPA projections), available at

Oklahoma's utility regulator, among other State entities, will have to act to accommodate that loss of capacity. In this way, the Section 111(d) Rule forces the State of Oklahoma to undertake "beyond-the-fenceline" measures, as well as substantial legislative, regulatory, planning, and other activities, simply to maintain electric service throughout the State—regardless of whether the State adopts a State plan to meet these targets or EPA promulgates a federal plan.

Because the Section 111(d) Rule requires its goals to be met at a rapid clip, and constructing and integrating new capacity is a years-long process, States have no choice but to begin carrying out EPA's commands at this time. Wreath Decl., Att. A, ¶¶ 3, 15–16, 19–22. The Oklahoma Corporation Commission ("OCC"), the State's chief utility regulator, is currently hard at work to ensure that the Section 111(d) Rule does not cause interruptions of electric service in Oklahoma or unacceptably undermine reliability or affordability. Wreath Decl. ¶¶ 2–3, 19–20. The OCC has to undertake these activities, because no federal government entity has the authority to do them, and none have offered to do them. Wreath Decl. ¶ 3. In short, due to the Section 111(d) Rule, simply maintaining electric service across the State of Oklahoma requires the State and its utilities to make important and irreversible long-term planning decisions in the immediate future. Wreath Decl. ¶¶ 7, 19.

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http://www.spp.org/documents/23336/cpp%20reliability%20analysis%20results%20final%20version.pdf. *See also* EPA, Technical Support Document: Resource Adequacy and Reliability Analysis 30, EPA-HQ-OAR-2013-0602-36847 (Aug. 2015) (projecting 4,576 megawatts in retirements above baseline for the Southwest Power Pool region).

Argument

I. Oklahoma Is Likely To Succeed on the Merits Because the Section 111(d) Rule Exceeds EPA's Statutory and Constitutional Authority

By attempting to contort an obscure Clean Air Act program to fulfill a major regulatory role for which it was never intended, EPA's actions under Section 111(d) fundamentally not only clash with the statutory text, but also impose unconstitutional burdens on the States. The statutory text must be given its plain meaning to avoid violation of the anti-commandeering and -coercion principles of the U.S. Constitution.

A. The Clean Air Act Contains No Clear Statement That Congress Intended To Alter the Balance of Regulatory Authority Over Electricity Between the Federal Government and the States

EPA's assertion of authority to impose "beyond-the-fenceline" regulation must be rejected because it is unsupported by any clear indication that Congress intended to invade areas traditionally reserved to the States. "[W]hen legislation 'affects the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (alteration omitted) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). The Court has "applied this background principle when construing federal statutes that touched on several areas of traditional state responsibility." *Id.* (citing cases). And, in particular, "[t]his principle applies when Congress 'intends to pre-empt the historic powers of the States' or when it legislates in 'traditionally sensitive areas' that 'affec[t] the federal balance.'" *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2001) (second alteration in original) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)).

EPA's interpretation of the Clean Air Act's "best system of emissions reduction" language offends these principles. To support its "building block approach," EPA claims authority to prescribe any "actions taken by the owner/operator of a stationary source designed to reduce emissions from that affected source, including actions that may occur off-site and actions that a third party takes pursuant to a commercial relationship with the owner/operator." 80 Fed. Reg. at 64,761/1. But such actions are subject to exclusive State regulation. Federal law expressly recognizes States' exclusive jurisdiction "over facilities used for the generation of electric energy[,] over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, [and] over facilities for the transmission of electric energy consumed wholly by the transmitter." 16 U.S.C. § 824(b)(1). *See also* 42 U.S.C. § 2021(k) (recognizing presumptive role of States in power regulation). And historically, the "economic aspects of electrical generation"—which lie at the very heart of the Rule—"have been regulated for many years and in great detail by the states." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983). That includes States' "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Id.* at 212.

In the absence of any clear statement to the contrary by Congress, the Court's analysis must begin and end with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). And that is enough to find that Oklahoma is likely to succeed on the merits here.

B. The Section 111(d) Rule Unlawfully Commandeers Oklahoma and Its Officials

At the center of the Section 111(d) Rule is a mismatch between the duties that EPA's actions require the States to carry out and those that the agency is capable of doing on its own. While EPA could conceivably preempt State action with respect to the Rule's first "building block," concerning efficiency improvements at existing power plants, the agency lacks the authority to mandate preferential use of natural gas-fired facilities, the construction and operation of new renewable generation capacity, and other measures that reduce or substitute for traditional generation—that is, every possible means of reducing coal-fired plants' emissions but for relatively minor source-level efficiency improvements and "achievable" emissions reductions. Due to EPA's inability to preempt State action in these areas, much less to take associated regulatory actions, even States that decline to submit and implement a State plan will nonetheless be forced to take substantial regulatory actions to achieve the emission-reduction targets that will apply under a federal plan, so as to avoid the loss of electric service and all that that entails. This commandeering of the State and State officials to carry out federal policy is unconstitutional.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Among the powers reserved to the States, and denied to the federal government, is the power to "use the States as implements of regulation"—in other words, to commandeer them to carry out federal law. *New York v. United States*, 505 U.S. 144, 161 (1992). On that basis, *New York* struck down a provision of the Low–Level Radioactive Waste Policy Amendments Act that required

States either to legislate to provide for the disposal of radioactive waste according to the statute or to take title to such waste and assume responsibility for its storage and disposal. *Id.* at 153–54. The court explained that the federal government may "offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 167. But merely providing States flexibility in how to carry out federal policy is unlawful because it "only underscores the critical alternative a State lacks: A State may not decline to administer the federal program." *Id.* at 176–77. *Printz v. United States*, 521 U.S. 898 (1997), reaffirmed and extended these principles to the commandeering of State officials, striking down a federal statute that directed State law enforcement officers to conduct background checks on gun buyers and perform related tasks. State officials, the court held, may not be "dragooned…into administering federal law." *Id.* at 928 (quotation marks omitted).

Yet that is precisely what the Section 111(d) Rule does. EPA has been remarkably candid that the Rule requires State action. It expects that compliance will require State "PUC [public utility commission] orders." 80 Fed. Reg. at 64,848/3. It recognizes that "affected entities" under the Rule will not be limited to the source category nominally being regulated (fossil-fuel-fired power plants), but will include other entities such as renewable-energy and energy-efficiency resources that may be subjected to "State measures" rendering them "responsible for compliance and liable for violations." 80 Fed. Reg. at 64,819/3, 64,843/3, 64,853/1, 64,948/1. It even identifies as a "fundamental requirement" that each State "have adequate legal authority to implement and enforce" measures against entities other than power plants that EPA has no

ability to regulate itself under the Rule. 80 Fed. Reg. at 64,853/3. These things reflect EPA's awareness that achieving its emissions targets will require far more than just emissions controls of the kind the agency could impose and administer itself; instead, compliance will require States to fundamentally revamp their regulation of their utility sectors and undertake a long series of regulatory actions, all at EPA's direction.

These actions can only be carried out by the States and their officials. Indeed, federal law recognizes States' exclusive jurisdiction "over facilities used for the generation of electric energy[,] over facilities used in local distribution or only for the transmission of electric energy in interstate commerce, [and] over facilities for the transmission of electric energy consumed wholly by the transmitter." 16 U.S.C. § 824(b)(1). So has the Supreme Court, recognizing that the "economic aspects of electrical generation have been regulated for many years and in great detail by the states." *Pac. Gas*, 461 U.S. at 206. That includes States' "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like"—the very things the Rule targets. *Id.* at 212.

While EPA makes much of the "state flexibilities" on offer, what States lack, as in *New York*, is the choice to "decline to administer the federal program." 505 U.S. at 177. Even States that refuse to submit implementation plans—thereby leaving the means of achieving CO_2 goals to EPA in a federal plan—will still be forced either to carry out the beyond-the-fenceline measures identified by EPA or to otherwise account for the disruption and dislocation caused by the imposition of impossible-to-achieve emissions limits on power plants. If EPA effectively mandates the retirement of coal-fired plants or reductions in their utilization (including by mandating the pur-

chase of exorbitantly expensive emissions allowances), State utility and electricity regulators will have to respond in the same way as if the State itself had ordered the retirements. Whatever flexibility the States may have in facilitating implementation of the Rule, it denies them the one option that the Constitution requires: the choice to do nothing and decline to carry out federal policy.

The Section 111(d) Rule treats States as "administrative agencies of the Federal Government." 505 U.S. at 188. For that reason, the Section 111(d) Rule impinges on the States' sovereign authority and therefore, like the actions under review in *New York* and *Printz*, exceeds the federal government's power.

C. The Section 111(d) Rule Unlawfully Coerces Oklahoma

Just as the federal government may not commandeer States to carry out federal policy, it also may not coerce them to the same end by denying them "a legitimate choice whether to accept the federal conditions." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.). The Section 111(d) Rule violates this anti-coercion doctrine by threatening to punish the citizens of States (as well as the States themselves) that do not carry out federal policy.

Action taken under the Commerce Clause power "has crossed the line distinguishing encouragement from coercion" when it leverages an existing and substantial entitlement of the citizens of a State or the State itself on a conditional basis in order to induce the State to implement federal policy. *Id.* at 2603 (quotation marks omitted). When, "'not merely in theory but in fact,'" such threats amount to "economic dragooning that leaves the States with no real option but to acquiesce" to federal demands, they impermissibly "undermine the status of the States as independent sover-

eigns in our federal system." *Id.* at 2602, 2604–05 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987)).

That describes the Section 111(d) Rule. EPA has stated that, if the States decline to implement its terms, the agency will impose a federal plan that does so. 80 Fed. Reg. at 64,942/2–3. Yet, because efficiency improvements are nowhere near sufficient to achieve the reduction in emissions targeted by EPA, any federal plan would still rely primarily on the Rule's second and third building blocks—that is, reducing coal-fired and, more broadly, fossil-fuel-fired generation—raising the very same need for State regulatory actions as if the State had adopted its own plan instead. Indeed, EPA's proposed federal plan recognizes that State "planning authorities," "public utility commissions," and other agencies will have to take action to implement and accommodate a federal plan. 80 Fed. Reg. 64,966, 64,981/2 (Oct. 23, 2015).

The whole point is to force States to pick up the slack necessary to maintain affordable and reliable electric service through "beyond-the-fenceline" measures that are beyond EPA's authority, either with a State plan or with regulatory action taken in the context of a federal plan. In neither instance could it be said that the decision to adopt or reject EPA's preferred policies "'remain[ed] the prerogative of the States.'" *NFIB*, 132 S. Ct. at 2604 (alteration in original) (quoting *Dole*, 483 U.S. at 211). Instead, EPA's "inducement" "is a gun to the head," *id.*, in light of the disruption and dislocation to citizens and the State itself if EPA were to carry out its threat. This, again, is why States like Oklahoma have no choice but to carry out EPA's dictates.

D. The Section 111(d) Rule Is Not a Proper Exercise of "Cooperative Federalism"

The preemption power is the basis of all Commerce Clause-based cooperative federalism. In *Hodel v. Virginia Surface Mining and Reclamation Association*, the Court upheld the Surface Mining Control and Reclamation Act, but only because Congress possessed preemptive power to regulate mining activities that affected interstate commerce. 452 U.S. 264, 289–90 (1981). The Court emphasized, "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." *Id.* at 290. Likewise, in *FERC v. Mississippi*, the Court upheld portions of the Public Utilities Regulatory Policies Act ("PURPA") because, "[a]s we read them, [the PURPA provisions] simply establish requirements for continued state activity *in an otherwise pre-emptible field*." 456 U.S. 742, 769 (1982) (emphasis added).

Hodel and *FERC* teach that commerce-based cooperative federalism involves a choice between: (1) regulating according to federal instructions; or (2) federal preemption. As the *FERC* Court put it, because the first choice (regulating according to federal instructions) occurs in the context of "an otherwise pre-emptible field," the choice is not coercive. *Id.* When the federal government has authority to preempt, it may abstain from exercising that power and offer States the less aggressive option of continued State regulatory primacy, albeit exercised pursuant to federal instructions. *Hodel* and *FERC* also illustrate that the choices posed by a Commerce Clause-based cooperative federalism regime must occupy the same preemptive scope—i.e., federal preemptive authority must encompass the instructions it is encouraging States to fol-

low. If such preemptive harmony exists between choice one (regulate according to federal instructions) and choice two (federal preemption), States have a meaningful, voluntary choice and may, if they wish, simply relinquish their entire regulatory authority and allow the federal government to "take the wheel."

But even EPA does not contend that the Clean Air Act preempts State law in areas *unrelated* to emissions, such as the transmission, distribution, or consumption of energy. Accordingly, EPA lacks authority under the Act to regulate in these areas. Yet this is precisely what EPA is attempting to do: coerce States into regulating areas in which EPA itself has no preemptive authority.

This "preemptive mismatch" uniquely threatens federalism. In a preemptive mismatch, the federal government gives States a choice between: (1) regulating according to federal instructions; or (2) preemption of a *different* field. Such a preemptive mismatch "choice" is inherently coercive, because it would allow the federal government to coerce States into altering their laws that do not conflict with federal law and that the federal government itself cannot impose via preemption. "The National Government received [from the Constitution] the power to enact its own laws and to enforce those laws over conflicting State legislation. *The States retained the power to govern as sovereigns in fields that Congress cannot or will not pre-empt.*" *FERC*, 456 U.S. at 795 (O'Connor, J., concurring in part and dissenting in part) (emphasis added).

Sanctioning such a "choice" under the guise of "cooperative federalism" would grant the federal government a power to accomplish indirectly what it cannot do directly, thereby circumventing the limits of the Commerce Clause, eviscerating the principle of limited and enumerated powers, and coercing the States.

E. "Best System of Emission Reduction" Must Be Given Its Plain Meaning To Avoid Serious Constitutional Doubt

Even assuming for the sake of argument that the scope of the statutory term "best system of emission reduction," standing alone, is somewhat ambiguous, EPA's anything-to-reduce-emissions interpretation must still be rejected to avoid serious constitutional doubt with respect to commandeering and coercion of the States. Federal courts must construe a statute, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Such an acceptable construction is available here: consistent with plain meaning, "best system of emission reduction" must be limited to inside-the-fenceline measures to avoid constitutional infirmity. The Supreme Court, viewing this language, easily recognized that it refers to "technologically feasible emission controls"—that is, emission-reduction technologies implemented at the source.[6] Indeed, EPA has reached the same conclusion in the context of Section 111(b) standards, which rely on

[6] *Hancock v. Train*, 426 U.S. 167, 193 (1976). *See also PPG Indus., Inc. v. Harrison*, 660 F.2d 628, 636 (5th Cir. 1981) ("Setting standards which in effect require a use of a certain type of fuel, without regard to other types of emission control, appears to be a work practice or operation standard beyond the statutory authority of the EPA."); *Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 869 (3d Cir. 1981) ("system" is something that a source can "install").

the same term, explaining that that provision "assur[es] cost-effective controls are installed on new, reconstructed, or modified sources."[7] This reading, limited to source-level measures, also avoids constitutional doubt, because it concerns only sources of emissions themselves, which Congress unquestionably has the authority to regulate and where EPA generally has authority to preempt State action.

II. The Section 111(d) Rule Irreparably Injures Oklahoma

The Section 111(d) Rule is causing the State of Oklahoma to suffer ongoing irreparable injury to its sovereign and other interests. Unless this Court stays the Rule, Oklahoma's injuries will increase dramatically, as the State is forced to undertake implementation actions that will be difficult or impossible to reverse.

To begin with, EPA's unconstitutional invasion of Oklahoma's sovereign interests inflicts *per se* irreparable injury on the State. In general, "'[a]lthough a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes.'" *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (alteration in original) (quoting *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998)). And in particular, interference with sovereign status is "sufficient to establish irreparable harm." *Kansas v. United States*, 249 F.3d 1213, 1227–28 (10th Cir. 2001). *See also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., joined by Thomas & Alito, JJ., concurring in denial of application to

[7] Standards of Performance for Portland Cement Plants, 73 Fed. Reg. 34,072, 34,073/2 (June 16, 2008).

vacate stay entered by circuit court) (state irreparably harmed where it is prevented "from effectuating statutes enacted by representatives of its people" (quotation omitted)); *Maryland v. King*, 133 S. Ct. 1, 3 (Roberts, Circuit Justice 2012); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 98 S. Ct. 359, 363 (Rehnquist, Circuit Justice 1977); *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870) (interference with State tax collection "may derange the operations of government, and thereby cause serious detriment to the public").

Here, the Section 111(d) Rule unconstitutionally commandeers and coerces the instruments of the State in theory and in fact. As described above, States like Oklahoma have no choice but to begin work now to implement the Section 111(d) Rule, whether or not they intend to submit a State plan. And as a factual matter, this is what Oklahoma officials are doing right now, because they have to, Wreath Decl. ¶¶ 2–3, 6, 16, 19–22, despite unified opposition to the policies underlying the Section 111(d) Rule expressed by the State legislature, Okla. SB No. 676 (enrolled but vetoed bill rejecting Section 111(d) Rule approach), and its Executive Branch, Okla. Exec. Order No. 2015-22 (Apr. 28, 2015) (prohibiting Dept. of Environmental Quality from preparing State plan). Given the choice, Oklahoma would decline to carry out this perversion of federal law, but the State is being deprived of that choice, suffering injury and insult to both its sovereignty and rights under the United States Constitution.

Oklahoma will also soon suffer additional injury as it and its utilities are forced to make irreversible decisions affecting future investments in energy resources within the State. Due to the combination of the Section 111(d) Rule's aggressive deadlines and the long lead-time required to bring new energy infrastructure online, regulatory

and investment decisions with long-term impacts are being made now. *See, e.g.*, Wreath Decl. ¶¶ 21–22. Moreover, States and utilities are making decisions now about the future viability of coal-fired power plants in the face of impending compliance deadlines under EPA's Section 112 rule, and the risk of millions in additional expenditures to comply with the Section 111(d) Rule will tip the balance for some facilities. Decisions made in the coming months to shutter existing coal-fired facilities, to authorize new natural gas and renewable capacity, and to expand grid capacity to replace lost capacity all involve irreversible aspects. And that is the point of the Section 111(d) Rule: to change the facts on the ground, irreversibly, before this Court has the opportunity to review the Rule. The Court should not countenance this blatant attempt to circumvent judicial review to impose long-term burdens on States, utilities, and ultimately electricity consumers.

III. The Public Interest and Balance of Equities Support an Injunction

"[E]nforcement of an unconstitutional [regulation] is always contrary to the public interest." *Gordon*, 721 F.3d at 653. *See also, e.g.*, *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). And the public-interest and balance-of-equities factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Petitioners' likelihood of success on the merits is therefore reason enough to enter a preliminary injunction.

In addition, a preliminary injunction would do little more than preserve the *status quo* that has existed from the dawn of electricity generation in the United States, allowing Oklahoma to continue to exercise its traditional policy discretion over utili-

ties and the State's electric system. The Obama Administration EPA, having waited six years to regulate power plants' greenhouse gas emissions, cannot now claim that there is any particular urgency to its regulatory actions during the few months necessary for this Court to consider and rule on the merits of Petitioners' challenge—particularly when its own Rule's deadlines are several years in the future. Indeed, EPA has already allowed its deadlines regarding issuance of the Rule to slip numerous times, amounting to several years' delay.[8] And the projected reductions in CO_2 emissions at issue, even when the Rule is fully implemented, are *de minimis*, amounting to far less than one percent of total global emissions in 2030. *See* RIA, Table ES-2 at ES-6. EPA does not even estimate the Rule's impact on future temperature.

Finally, the public has a substantial interest "in having legal questions decided on the merits, as correctly and expeditiously as possible," rather than through administrative fiat. *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Absent a stay, the Rule will remain in force, forcing the States to adopt burdensome laws and regulations that cannot be easily repealed, and to make decisions that cannot be reversed, even if the Rule is ultimately vacated. The public should not have to bear that burden.

Conclusion

The Rule should be stayed pending this Court's review of its lawfulness.

[8] *See* Settlement Agreement ¶¶ 1–4, EPA-HQ-OGC-2010-1057-0002 (settlement obligating EPA to sign final Section 111(d) standards by May 26, 2012).

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Respectfully submitted,

/s/ David B. Rivkin, Jr.
DAVID B. RIVKIN, JR.
MARK W. DELAQUIL
ANDREW M. GROSSMAN
Baker & Hostetler LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
PATRICK R. WYRICK
SOLICITOR GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-4396
(405) 522-0669 (facsimile)
Service email: fc.docket@oag.state.ok.us
Scott.Pruitt@oag.ok.gov

Attorneys for Petitioners