

No. 24A117

In the Supreme Court of the United States

OHIO, ET AL.

Applicants

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

ON APPLICATION FOR STAY OF ADMINISTRATIVE ACTION TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY IN SUPPORT OF STATES OF OHIO AND KANSAS EMERGENCY APPLICATION FOR A STAY OF ADMINISTRATIVE ACTION

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REPLY

This Court has long said that “what cannot be done directly cannot be done indirectly.” *Cummings v. Missouri*, 71 U.S. 277, 325 (1867). The government cannot evade substantive limits on its conduct “by the form” such conduct takes, “however disguised.” *Id.* But the EPA’s most recent charge against reliable power generation in pursuit of its climate agenda does just that. The Clean Air Act does not empower the EPA to force generation shifting on this Nation’s power plants. *West Virginia v. EPA*, 597 U.S. 697, 735 (2022). Now, through another aggressive reading of its statutory authority, *see* 42 U.S.C. §7411, the EPA tries to accomplish as much indirectly. Specifically, the EPA promulgated a Rule that forces power plants to make this choice: either (1) risk billions on unproven technology to meet unrealistic benchmarks, or (2) close. The result? For the second time, the EPA attempts to force generation shifting away from coal-fired power—an agenda this Court has already held to be unlawful. *West Virginia*, 597 U.S. 697.

The EPA’s imposition of unlawful “choices” do not stop there. As the EPA sees it, the States are to either (1) immediately spend unrecoupable money and resources complying with a Rule that is likely to prove illegal or (2) give up their role as co-sovereigns and make way for a federal plan. *See* EPA Opp.54. These choices are, in reality, impossible choices designed to strip States of their primacy in implementing standards under the Clean Air Act. *See Ohio v. EPA*, 144 S. Ct. 2040, 2048 (2024).

The Court should grant the motion of Ohio and Kansas (“the States”) to stay the Rule. Notwithstanding the EPA’s other arguments, all the traditional stay factors favor such relief. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Before explaining

why, however, the States pause for a coda: the EPA argues that applicants seeking emergency relief from this court *must* also establish certworthiness. EPA Opp.13. While some justices have certainly looked to that factor, not all have accepted likelihood of certiorari as a requirement for emergency relief. *Compare Ohio*, 144 S. Ct. at 2052, *with id.* at 2060 (Barrett, J., dissenting); *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Nevertheless, the States have established that this case is indeed certworthy. If executive seizure of most of Ohio’s steel mills was certworthy, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952), so too is a Rule designed to force Ohio’s coal plants into shuttering, *see* App.14–15; App.F-11–12.

I. The States are currently suffering irreparable harm without a stay.

Since the Rule went into effect in July, the States and their industries have been suffering irreparable harm. Ohio App.6–8. The Rule has already infringed, and continues to infringe, on the States’ sovereignty by preventing the States from exercising their expressly reserved power to account for the remaining useful life of power plants in developing their state-implementation plans. *See* §7411(d)(1); *below* 13–15. And if the Rule is ultimately held unlawful, the States and their power plants cannot recoup from the federal government the costs they are currently incurring by complying with an unlawful regulation. *See Ala. Ass’n of Realtors v. HHS*, 594 U.S. 758, 765 (2021) (*per curiam*); *Rest. Law Ctr. v. United States DOL*, 66 F.4th 593, 597 (5th Cir. 2023). The EPA’s arguments to the contrary all fail to refute these harms.

The EPA first dismisses the immense sums power plants are spending *now* to achieve compliance with the Rule on its timeline. For one thing, the EPA is wrong to diminish the magnitude of these outlays as just “feasibility work.” EPA Opp.51–52. Power plants are making decisions upfront that have immense financial consequences. *See* App.F-42 (Grooms Decl. ¶63). Because these investment decisions are irreversible, the power plants are bearing the financial consequences now, as they make the decisions. *See* App.F-25–26, F-41–42 (Grooms Decl. ¶¶40, 62). Even if these upfront expenditures were, as the EPA says, relatively small, that misses the relevant inquiry. The irreparable-harm inquiry asks whether the amounts spent are unrecoverable, *see Ohio*, 144 S. Ct. at 2053 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220– 21 (1994)), and not whether they pass the EPA’s big-enough-to-matter test. *See Rest. Law Ctr.*, 66 F.4th at 597. Tellingly, the EPA does little to explain how these expenditures can be recouped or the consequential decisions reversed should the Rule be held unlawful later. At any rate, the EPA itself estimates that the Rule will cost the power industry *billions* of dollars, much of which will be borne upfront. *See* 89 Fed. Reg. 39798, 40021 (May 9, 2024). A stay now protects against the irreparable harm of expending enormous sums that will be unrecoverable if this Rule is ultimately reversed. *Ohio*, 144 S. Ct. at 2053 (quotation omitted).

Having failed to discount the immense sums being spent on compliance, the EPA changes tack; it argues that States and industries will have to comply with *some* rule, even if not this one. Any errors in this Rule, the argument goes, can be cured by remand without vacatur, so that the agency may recalibrate the capture rate and

compliance timeline until the courts are satisfied. But that does violence to the remedy to which the States are “entitled” under the Clean Air Act if the Rule is held unlawful: “reversal.” *Id.* at 2054, 2055 n.11 (quoting §7607(d)(9)(A)) (alterations accepted); *see also Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2460–70 (2024) (Kavanaugh, J., concurring). The Act—and general principles of administrative law—does not allow such iterative rulemaking. Under the Act, Courts may not “consult[] explanations and information offered after the rule’s promulgation.” *Ohio*, 144 S. Ct. at 2055 n.11 (citing §§7607(d)(6)(C), 7607(d)(7)(A)). That means, if this Rule is held unlawful, the EPA should not have an opportunity to “consider setting a different capture rate or a different compliance timetable” as it claims it should. EPA Opp.52–53. It must go back to the drawing board. Nor can the EPA iteratively recalibrate the capture rate where, as here, the EPA set the “best system of emission reduction” as carbon capture and sequestration *at a 90% rate*. Having defined the “best system of emission reduction”—a core aspect of this rulemaking under §7411—to include a 90% capture rate, the EPA will have to restart its rulemaking process to establish any new system that incorporates a new capture rate if this system is later held to be unlawful. And, should the EPA be allowed to engaged in such ping-pong rulemaking—that is, continuously reconsidering, remanding, and reviewing a rule until reasonable—it can, and will, circumvent the age-old *Chenery* principle, by crafting new post-hoc explanations to justify an old rule. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943).

The EPA next takes aim at the likely plant closures and resulting grid instability by arguing that the Rule does not “direct” any plant to close. EPA Opp.53. Perhaps so. But the combination of time pressure, unproven technology, and extensive construction will predictably lead to widespread premature retirement of coal plants. Ohio App.6–7. This Court has already said that “what cannot be done directly cannot be done indirectly.” *Cummings*, 71 U.S. at 325. It should reject the EPA’s attempt to circumvent *West Virginia*, 597 U.S. 697, by giving coal plants the illusory “option” to risk billions on unproven technology, *see below* 10–13, or close. Most will choose the latter, straining an already strained power grid further. *See* Ohio App.6–7.

The EPA next argues, wrongly, that the States are not irreparably harmed. It does not contest that the States are currently expending resources developing state-implementation plans. But it says those expenditures do not count as irreparable harm, because the Act’s timeline for judicial review coincides with the Act’s two-year timeline to develop state-implementation plans. EPA Opp.53–54. So, the EPA posits, the unrecoverable sums are inevitable. But that misconstrues the irreparable-harm inquiry. Again, the irreparable-harm question is not whether the costs expended on an unlawful rule are *inevitable* under a particular statutory scheme, but whether they are *recoverable*. *See Ohio*, 144 S. Ct. at 2053 (citation omitted); *Ala. Ass’n of Realtors*, 594 U.S. at 765. The EPA next argues that the States should simply forgo making state-implementation plans, and accept the EPA’s federal-implementation plan, if they do not want to expend unrecoverable sums complying with a rule that may be later held unlawful. EPA Opp.54. This your-money-or-your-sovereignty

argument should be rejected out of hand. The EPA cannot force a federal plan on the States by putting them to this unacceptable choice.

Last, as the States discuss more later on, *below* 14–15, the Rule injures the States’ sovereignty by eliminating their authority to consider certain factors in the planning process. The EPA disagrees on the merits, but it does not seriously refute the underlying harm to state sovereignty. So, if the States are right on the merits, they are right on this harm and entitled to relief.

II. The States are likely to prevail on the merits.

The EPA must refrain from action that is “arbitrary, capricious, ... or otherwise not in accordance with law.” 42 U.S.C. §7607(d)(9)(A). The Rule violates this obligation in multiple ways.

A. The EPA cannot force power plants to experiment with carbon capture and sequestration at a 90% rate.

Under Section 111 of the Clean Air Act, the EPA must set performance standards that are “achievable through the application of the best system of emission reduction” that the agency “determines has been adequately demonstrated.” 42 U.S.C. §7411(a)(1). Although the EPA blends the statutory text together, this language assigns two tasks: first, identify an adequately demonstrated system; second, set an achievable standard.

An “adequately demonstrated system” must have “been shown to be reasonably reliable [and] reasonably efficient.” *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973). An achievable standard must be realistic, not “purely theoretical or experimental.” *Id.* at 434. Both tasks require the EPA to consider the entire

industry it is regulating. *See Sierra Club v. Costle*, 657 F.2d 298, 341 n.157, 380 (D.C. Cir. 1981). Put it this way. Even if a few exceptional baseball players might hit 50 home runs in a year, it is unreasonable to expect that “all baseball players” will do so every year. *Id.* at 363. The same goes for power plants.

Here, the Rule assumes that certain power plants (existing long-term coal-fired plants and new base-load natural-gas-fired plants) will be able to employ carbon capture and sequestration at a 90% rate. But only a handful of power plants have even attempted carbon capture; and they have done so on small scales, with inconsistent results. *See* 89 Fed. Reg. at 39848–51, 39926–27. That minuscule sample does not “adequately demonstrate” carbon capture at this high rate. Nor does it show that the EPA’s ambitious standard is reasonably achievable on an industrywide level. The EPA’s contrary arguments are unconvincing.

1. The Rule rests on a misreading of the EPA’s authority.

Despite the EPA’s suggestions, this case does present a “fundamental statutory-interpretation issue” that “warrant[s] this Court’s intervention.” *See* EPA Opp.2. Within the Rule’s executive summary, the EPA claimed that it “may reasonably *project the development* of a control system at a future time.” 89 Fed. Reg. at 39801 (emphasis added). That contradicts Section 111’s text.

Return to the statute’s passage about performance standards, which states:

The term “standard of performance” means 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 which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

§7411(a)(1). For the “adequately demonstrated” inquiry, the statute’s tense (that is, the present-perfect tense) unambiguously requires a backward-looking analysis. *See Carr v. United States*, 560 U.S. 438, 448 (2010); *see also Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). And as any English speaker knows, to “demonstrate” something is to “prove” or “make clear by example, experiment, etc.” *Webster’s New World Dictionary* 376 (2d College ed. 1972); *cf.* John P. Gulliver, “A Talk with Abraham Lincoln,” *Independent* (Sept. 1, 1864), 16. What is more, for a demonstration to be “adequate” it must be “enough or good enough for what is required or needed.” *Webster’s New World Dictionary* 16 (2d College ed. 1972). The demonstration must be “suitable” for the task at hand. *See id.* Putting the tense and words together, the EPA must look to the *past* to decide whether a system of emission reduction has been proven to be good enough to fit what a given rule is contemplating. If Congress intended a forward-looking approach, it would have written Section 111 differently: in other settings, statutory text *does* allow the EPA to project which technologies “will be available.” 42 U.S.C. §7521(a)(3); *see also* §7411(j)(1)(A).

The EPA offers no good response on the text; instead, it runs from the Rule’s internal logic. Specifically, the agency cites a few stray footnotes to suggest that the Rule does not actually rely on future projections. *See* EPA Opp.30. But the overall message of the Rule is quite different. Throughout the Rule, the EPA extolled its ability to “project,” make “forward-looking” decisions, and “extrapolate.” *See, e.g.*, 89 Fed. Reg. at 39801, 39830, 39831 n.215, 39832 n.221, 39878 n.610, 39889. And, in application, the Rule’s selection of carbon capture and sequestration (at a 90% rate)

relies heavily on examples that are not yet operational; projects that remain in the “proposed,” “target[ed],” or “planned” stages. *Id.* at 39850–51, 39927–28. In short, the Rule openly embraces projection as to what emission-reduction systems “will be available” rather than what systems “have been adequately demonstrated.”

Indeed, even in its current response, the EPA cannot help but slip into forward-looking analysis. For instance, when the EPA discusses the challenges that one of its main examples of carbon capture (the Petra Nova Project) has faced, it says that such challenges “could be overcome” in the future. EPA Opp.37. In a similar vein, the EPA continues to defend the use of unfinished projects that are in “development”; projects that are being “designed” to achieve the EPA’s ambitious capture rate. EPA Opp.27; *see also* EPA Opp.37.

Significantly, the EPA does not receive any deference when it comes to this textual analysis. To be sure, the Clean Air Act tasks the EPA with “determin[ing]” the best system of emission reduction that “has been adequately demonstrated.” §7411(a)(1); *see* EPA Opp.24–25. That phrasing delegates a task to the EPA, and this Court “must respect the delegation.” *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). But the Court must also “ensur[e] that the agency acts within” the scope of the delegation. *Id.* Thus, whatever discretion the Clean Air Act gives the EPA, it does not allow the agency to reimagine the underlying task Congress assigned. In choosing an adequately demonstrated system, the statute requires the EPA to make a backward-looking assessment, not a forward-looking one. What is more, while Congress delegated some authority to the agency to determine what is a “best system of

emission reduction,” that delegation does not extend to the EPA’s determination of whether the corresponding standards are “achievable.” The EPA’s attempt to muddle the two, here, is as revealing as it is unavailing. *See* EPA Opp.25.

The EPA’s guesswork at Congress’s desires does not save the Rule’s misreading of the statute. Specifically, the EPA points to tax credits and funding legislation that Congress has enacted to incentivize the increased use of carbon-capture technology. EPA Opp.5, 45. The EPA takes that to be implicit support for its Rule. But the inference is unjustified: that Congress wants to incentivize voluntary use of carbon capture does not mean that Congress blesses the EPA forcing experimental technology on an entire industry. The isolated statements of one member of Congress are not enough to conclude otherwise. *See* EPA Opp.46. If a single member’s statement was enough, then Ohio Senator Sherrod Brown’s statement to the contrary, that “[t]his is an unrealistic, unachievable rule,” is entitled to equal weight. Press Release, Sherrod Brown, Standing with Ohio energy workers and rural electric co-ops, Brown will vote to overturn final EPA Power Plant Rule (June 12, 2024), <https://perma.cc/S2YJ-QKGA>.

2. By selecting an unproven system, the EPA made an unreasoned decision.

Armed with a poor reading of Section 111, the EPA made poor choices. Carbon capture and sequestration at a 90% rate remains experimental and unready for industrywide use. It is neither adequately demonstrated nor reasonably achievable.

As an initial matter, the issue must be framed properly. The EPA cannot prevail just by showing that carbon capture at *some* rate has been adequately demonstrated.

See EPA Opp.26. The EPA chose a 90% rate as a requirement of its system. 89 Fed. Reg. at 39801, 39917. It must therefore show that a 90% rate of capture has been adequately demonstrated for industrywide application. And contrary to the EPA's suggestions, the problem here goes well beyond a lack of "routine" or "widespread" applications. See EPA Opp.32, 35. No existing examples show that power plants have been able to capture (much less transport and sequester) 90% of their carbon emissions consistently on a large scale.

To see why, it helps to look closer at the handful of *existing* carbon-capture projects the Rule identified. See EPA Opp.27–28. None of those projects shows that the EPA's ambitious rate of capture is adequately demonstrated or reasonably achievable. The EPA highlights coal-plant projects like SaskPower's Boundary Dam and Petra Nova, but it must admit that such projects have encountered technical problems. EPA Opp.36–37. The EPA thus retreats to some highly selective statistics. See EPA Opp.27. For example, while Boundary Dam achieved an 89.7% capture rate, *id.*, the EPA omits that Boundary Dam achieved that rate for only "a 72-hour test," 89 Fed. Reg. at 39848. And while Petra Nova achieved a 92.4% capture rate "during its operation," 89 Fed. Reg. at 39850, recurring outages at Petra Nova prevented the project from achieving a 90% capture rate in every year of its three-year study, see *W.A. Parish Post-Combustion CO2 Capture and Sequestration Demonstration Project: Final Scientific/Technical Report*, at 41, 47 (Mar. 31, 2020), <https://www.osti.gov/servlets/purl/1608572>. The EPA also mentions Plant Barry, a coal plant that the EPA's lengthy Rule mentioned only in passing. 89 Fed. Reg. at

39850. But Plant Barry’s carbon-capture project was incredibly small in scale—making it wholly unrepresentative of a full-scale application. See The Buckeye Institute Comment, 10 (Aug. 8, 2023), <https://perma.cc/E5SK-KVWE>.

The Rule’s natural-gas-plant examples suffer from similar flaws. For instance, while the Rule relies on the Bellingham Energy Center, that was a small-scale project that captured carbon emissions from a slipstream that accounted for roughly a *tenth* of the facility’s overall projection. See 89 Fed. Reg. at 39926–27. The EPA does not argue otherwise, but it downplays the importance of the discrepancies between the scale of its examples (many of which involve slipstreams) and the scale of its emission-reduction system (which anticipates carbon capture at a 90% *plantwide* scale). See EPA Opp.36. Notwithstanding the EPA’s suggestions, these discrepancies in scale matter to the adequately demonstrated inquiry. See *Costle*, 657 F.2d at 341 n.157.

To appreciate these scale concerns, a deeper dive into the technical details is warranted. A slipstream system processes only a partial amount of a facility’s total emissions at controlled pressures and volumes. See 89 Fed. Reg. at 39849, 39853 n.358. Not so with a full-stream system, which must flexibly adapt to changing pressures and volumes. Thus, the fact that capture can occur at a slipstream does not mean that a plant can reliably capture the same amount of carbon emissions across an entire facility. One of the EPA’s prime examples, Boundary Dam, shows as much. Although that project was designed to operate at “full nameplate capacity,” it had to reduce that objective “[t]o maintain long-term reliable operation.” SaskPower Comment, 1 (Aug. 13, 2023), <https://perma.cc/6GFJ-5Y59>. As a result, Boundary Dam has

only targeted capture of “65 to 70” percent of the unit’s “emissions on an ongoing basis.” *Id.*

The Rule also sets unrealistic expectations and timelines for transportation and storage of captured emissions. For transportation, the Rule accepts that power plants will need to build thousands of miles of new pipelines. 89 Fed. Reg. at 39856. The construction of those pipelines will obviously pose significant permitting and safety concerns. But the EPA attacks a caricature of those concerns, suggesting that only individual plants can be expected to face compliance difficulties. *See* EPA Opp.40. As for storage, the EPA relies on the availability of “potential storage sites.” EPA Opp.38. But the Rule is premised on existing coal plants having closely available, viable sequestration sites. If “potential” sites are unworkable, then the EPA underestimates what the Rule demands. And to guarantee that sites the EPA has identified are indeed viable for the kind of large-scale injection the Rule requires, sources have to conduct expensive geologic surveys. App.C-15 (Hodanbosi Decl. ¶¶31–33). Given that federal permitting for underground injection remains a developing (and historically slow) process, *cf.* 89 Fed. Reg. at 39870–71, there is much reason to question the EPA’s say-so as to how achievable the EPA’s compliance timeline will be, *see* EPA Opp.39.

B. The Rule removes the States’ authority to consider remaining useful life and other factors.

Under the Act, the States retain the authority to make individualized determinations, based on the “remaining useful life of the existing source” and “other factors,” when applying a standard of performance to any existing power plant. §7411(d)(1).

But the Rule deprives the States of this authority in two respects. First, it requires that States show a “fundamental difference[]” between what “the EPA considered” and “the information specific to a facility” before deviating from the federal standards, a standard found nowhere in the text. Ohio App.12–13 (quoting 89 Fed. Reg. at 39966). Second, the Rule bakes in the remaining life of the coal-power plants by sub-categorizing them by retirement date so that States cannot use that consideration to deviate from the EPA’s standards, as the statute permits. *Id.* at 13.

The EPA’s conclusory rebuttal does nothing to refute these problems. *See* EPA Opp.49–50. It argues that States may consider remaining useful life because the Rule recognizes that “States ‘have the discretion’ to adopt plans” that account for such factors. EPA Opp.49. This *ipse dixit* does not clarify, in any way, what a permissible deviation looks like. Ultimately, the EPA’s bald “any color you like so long as it’s black” assertion lays bare its intent to deprive the States of their authority to deviate from the standards for each retirement subcategory based on a State’s individualized assessment of a coal plant’s actual remaining useful life.

Next, the EPA claims that the States are collaterally attacking a different rule in which the agency first announced the fundamental-difference standard. EPA Opp.49–50. That makes little sense. The EPA embedded the fundamental-difference standard within the *current* Rule. If the fundamental-difference standard is unlawful, this Rule is unlawful. The fact that the standard might also render another agency action unlawful is beside the point. Regardless, the States’ challenge here is not to the fundamental-difference standard *itself*. The States’ challenge is to how

that standard interacts with this Rule’s other features to effectively rewrite the statute. Ohio App.12–13. That challenge is specific to *this* Rule and so is not a collateral attack on a separate rulemaking.

C. The Rule double regulates power plants in violation of the statutory text.

As Ohio and Kansas noted in their opening application, the Clean Air Act houses multiple programs governing air pollution. *See* Ohio App.1. Section 112 outlines one of the Act’s “major” programs, which targets hazardous air pollutants. *West Virginia*, 597 U.S. at 708. The program lists a variety of hazardous air pollutants, §7411(b), and commands that the EPA “directly require all covered sources to reduce their emissions to a certain level,” *West Virginia*, 597 U.S. at 708. By way of comparison, Section 111(d) of the Act—which “authorizes regulation of certain pollutants from *existing* sources”—is more modest in scope. *Id.* at 709–10. Section 111(d), in other words, is an “ancillary” provision of the Act, which “operates as a gap-filler.” *Id.* at 710 (quotation omitted).

Given the different roles of these programs, and the potential for overlap, the Clean Air Act includes a protection against double regulation. Specifically, under Section 111(d) the EPA may only “prescribe regulations ... for any air pollutant ... which is not ... emitted from a source category which is regulated under” Section 112. §7411(d)(1). Under a natural reading of this text, if the EPA regulates *an emission source* under Section 112, it may not also regulate that source under Section 111(d). That matters here because the EPA undeniably regulates mercury emissions from

coal plants under Section 112. 89 Fed. Reg. at 39827. Thus, it cannot also regulate coal plants under Section 111(d).

The EPA argues otherwise, but not persuasively. The agency says that the above language only prohibits the EPA from regulating specific air pollutants that the agency regulates under Section 112 (as opposed to sources). EPA Opp.22–23. But that reading tortures the plain text. *See Am. Lung Ass’n v. EPA*, 985 F.3d 914, 1011–12 (D.C. Cir. 2021) (Walker, J., concurring in part and dissenting in part).

The EPA quickly moves on to a consequentialist argument, which fares no better. It says, specifically, that the States’ reading of the Clean Air Act would allow the EPA to regulate a source under Section 111(d) so long as the EPA promulgates such regulations before regulating the same source under Section 112. EPA Opp.23. In the EPA’s view, there is no rational explanation for why Congress would want the sequence of regulations to matter that much. *Id.* This argument fails on multiple levels. For one thing, what matters is not “what Congress was *thinking*,” but what it said in the statute. *Am. Lung Ass’n*, 985 F.3d at 1011–12 (Walker, J., concurring in part and dissenting in part). Regardless, while Congress could have prohibited any Section 111(d) regulations for sources covered under Section 112, there is nothing irrational about Congress striking a slightly different balance: namely, preventing *further* Section 111(d) regulations once there are Section 112 regulations in place. That the EPA wants Section 111(d) to be “more than a rarely used gap-filler,” *Am. Lung Ass’n*, 985 F.3d at 1012 (Walker, J., concurring in part and dissenting in part), does not render a natural reading of the text absurd.

III. The remaining factors favor a stay.

The remaining stay factors support the States. The EPA argues that a stay will harm the public by delaying the agency's climate-change agenda. EPA Opp.56–58. However laudable that agenda may be, it is bedrock law that no agency can “act unlawfully even in pursuit of desirable ends.” *Ala. Ass’n of Realtors*, 594 U.S. at 766. The EPA cannot circumvent this by appealing to noble ends.

CONCLUSION

The Court should stay the Rule.

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Respectfully submitted,

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