No. 23A384

In The
Supreme Court of the United States

UNITED STATES STEEL CORPORATION,

Applicant,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Brief for States of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin, and the District of Columbia, the City of New York, and Harris County, Texas, Respondents in Opposition to Application for a Stay

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INTRODUCTION

EPA issued the "Good Neighbor Rule" to protect downwind States and their residents from high levels of cross-state ozone pollution. *See* Federal "Good Neighbor Plan" for the 2015 National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023). On October 13, 2023, three groups of entities that challenged the Rule each filed an application seeking to stay enforcement of the Rule.[1] Two weeks later, United States Steel Corporation (U.S. Steel) submitted the instant application, seeking to stay enforcement of the Rule's provisions that require certain iron and steel mills to reduce ozone-forming emissions beginning in May 2026.

This Court should deny the stay application for the reasons set forth in State Respondents' opposition to the other three stay applications.[2] *See* Br. for State Respondents in Opp. to Applications for Stays, Nos. 23A349, 23A350, 23A351 (Oct. 30, 2023) ("State Resp'ts' Opp."). In addition, as to U.S. Steel's application in particular, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit (Millett, Pillard, and Pan, JJ.) unanimously concluded that U.S. Steel had not satisfied the stringent requirements for a stay pending judicial review. That correct determination is due substantial deference. U.S. Steel will not suffer irreparable injury absent a stay. The Rule imposes no emissions-reduction obligations

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[1] Those applications are full briefed and currently pending.

[2] This opposition is submitted on behalf of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, Wisconsin, the District of Columbia, the City of New York, and Harris County, TX (collectively referred to herein as "State Respondents").

on the steel industry until 2026, at the earliest. And U.S. Steel fails to establish that merely planning to install pollution-control technology at a single plant (in Gary, Indiana) by 2026 constitutes immediate, irreparable harm.

Conversely, a stay would harm State Respondents and the public interest. U.S. Steel seeks a stay to push the Rule's compliance deadline for the steel industry beyond May 2026. But such a stay would delay critical relief for downwind States from dangerous ozone-forming pollution that is emitted from upwind sources, including from U.S. Steel's Gary facility. And a stay would compromise downwind States' ability to attain the federal air quality standards, even if the Rule is ultimately upheld.

U.S. Steel is also unlikely to succeed on the merits of its challenge to the Rule, or to obtain certiorari if it eventually were to seek it. Like the other stay applicants' arguments, many of U.S. Steel's arguments are untimely collateral attacks on an EPA rule that disapproved state pollution-reduction plans—a separate rule that is not at issue in this litigation. U.S. Steel's arguments about that prior rule fundamentally misapprehend EPA's statutorily required role under the Clean Air Act. And contrary to U.S. Steel's suggestion, the Good Neighbor Rule remains lawful and equitable, even though its implementation is temporarily stayed for some States.

STATEMENT

The full background of this proceeding is set forth in State Respondents' October 30 brief. See State Resp'ts' Opp. 3-12. For the Court's convenience, below is an abbreviated summary of background most relevant to U.S. Steel's application.

A. Interstate Ozone Pollution, the Good Neighbor Provision, and the Good Neighbor Rule

To protect their residents from ozone's harmful effects, State Respondents regulate emissions of ozone-forming pollutants (known as "precursors") from sources within their borders. Comment Letter from Att'ys Gen. 8 (June 21, 2022). But sources located in upwind States emit ozone precursors that travel with the prevailing winds into downwind States, including State Respondents, raising levels of ozone. *See* 88 Fed. Reg. at 36,658. These contributions are substantial, *see Midwest Ozone Grp. v. EPA*, 61 F.4th 187, 189 (D.C. Cir. 2023), and severely increase the burden on State Respondents to further drive down ozone levels in their own jurisdictions, *cf. EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 519-20 (2014) (discussing comparative costs of reduction efforts). See State Resp'ts' Opp. 3-4.

Congress enacted the Clean Air Act's Good Neighbor Provision to address these interstate pollution problems. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I). When EPA promulgates or revises a federal air quality standard, including the standards for ozone or its precursors, the Act requires each State to submit a state implementation plan (SIP) consisting of air pollution regulations or other requirements that ensure that the State will achieve and maintain compliance with the federal standard by a statutory deadline. *See* 42 U.S.C. § 7410(a)(1). The Good Neighbor Provision requires

that each State's SIP submission contain "adequate provisions" to prohibit emissions that will significantly impede other States' achievement of the standard. *See id.* § 7410(a)(2)(D)(i)(I). These provisions must curb upwind emissions in time to allow downwind States to achieve the relevant air quality standard by the statutory deadline. *North Carolina v. EPA*, 531 F.3d 896, 911-13 (D.C. Cir.), *amended in part on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008).

The Clean Air Act authorizes EPA to approve a SIP only "if it meets all of the applicable requirements of" the Act, including the Good Neighbor Provision. 42 U.S.C. § 7410(k)(3). If EPA determines that a SIP is inadequate to eliminate harmful inter-state pollution, EPA must disapprove the SIP and issue a federal implementation plan (FIP) to replace the inadequate SIP. *Id.* § 7410(c)(1); *see also EME Homer City*, 572 U.S. at 507-08.

In 2015, EPA strengthened the federal air quality standards for ozone, and set deadlines for States to achieve these standards. National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015). Although available information showed that emissions from two dozen upwind States would significantly impede multiple downwind States' ability to achieve the federal ozone standards, *see* Notice of Availability, 82 Fed. Reg. 1,733, 1,739-40 (Jan. 6, 2017), many upwind States failed to propose any emissions reductions in their SIPs to address their contributions to ozone pollution in downwind States—as required by the Good Neighbor Provision. *See, e.g.*, Air Plan Disapproval; Illinois et al., 87 Fed. Reg. 9,838, 9,845-47 (Feb. 22, 2022) (describing Indiana submission). EPA proposed to disapprove

21 SIPs in February 2022, and finalized these disapprovals in February 2023. Air Plan Disapprovals, 88 Fed. Reg. 9,336 (Feb. 13, 2023) (the "SIP Disapproval Rule"). The SIP Disapproval Rule triggered EPA's mandatory duty under the Clean Air Act to promulgate a FIP for each of the 21 States that had submitted a disapproved SIP. 42 U.S.C. § 7410(c)(1). See State Resp'ts' Opp. 6-8.

On March 15, 2023, EPA finalized the Good Neighbor Rule at issue in this litigation. *See* EPA, *Good Neighbor Plan for the 2015 Ozone NAAQS* (last updated Oct. 18, 2023). In the Good Neighbor Rule, EPA confirmed that sources in these 21 States, plus two other States that had not submitted SIPs, were contributing significantly to ozone pollution in downwind States. 88 Fed. Reg. at 36,656. See State Resp'ts' Opp. 8-10.

As relevant to U.S. Steel's application, the Rule analyzed emissions from certain industrial sources, including boilers and reheat furnaces[3] at iron and steel mills. EPA found that, starting in 2026, these sources could achieve reductions in nitrogen oxides ("NOx"), a significant ozone precursor, by installing certain cost-effective control technologies. *Id.* at 36,661. The Rule establishes numerical or percentage-based emissions limitations for boilers and reheat furnaces based on the assumption that these sources will adopt those cost-effective technologies beginning in 2026. *Id.* at 36,739. The Rule does not require boilers and reheat furnaces to have

[3] A reheat furnace is a furnace that is used to heat steel product—such as metal ingots—for the purpose of deformation and rolling. *See* 88 Fed. Reg. at 36,879.

installed any specific pollution-control technology, provided the numerical emissions limitation is met. *Id.* at 36,835.[4]

After EPA finalized the Good Neighbor Rule, several circuit courts temporarily stayed implementation of the SIP Disapproval Rule for 12 States. In response to these judicial stays, EPA issued two interim final rules pausing the Good Neighbor Rule's FIP requirements for these 12 States. *See* Response to Judicial Stays of SIP Disapproval Action for Certain States, 88 Fed. Reg. 49,295 (July 31, 2023); Response to Additional Judicial Stays of SIP Disapproval Action for Certain States, 88 Fed. Reg. 67,102 (Sept. 29, 2023). The Good Neighbor Rule's FIP requirements remain in place for 11 States.

B. U.S. Steel's Petition for Review of the Good Neighbor Rule and the D.C. Circuit's Denial of Its Stay Motion

U.S. Steel and other challengers filed petitions for review of the Good Neighbor Rule in the D.C. Circuit. Several challengers filed motions seeking to stay implementation of the Rule pending the D.C. Circuit's adjudication of their respective petitions for review. Respondent EPA opposed the stay motions. State Respondents intervened in support of the Rule and opposed the stay motions. Several nongovernmental organizations also intervened in support of the Rule and opposed the stay motions.

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[4] *See also* EPA, *Final Non-EGU Sectors TSD* 35 (Mar. 2023) (Good Neighbor Rule requires the "use of low-NOx burners (LNB) *or equivalent low-NOx technology* that achieves at least a 40% reduction from baseline NOx emissions." (emphasis added)).

Four days after those oppositions were filed, U.S. Steel filed a separate stay motion. EPA, State Respondents, and the nongovernmental respondent-intervenors filed oppositions.

On September 25, 2023, a panel of the D.C. Circuit (Pillard, Walker, and Childs, JJ.) denied the first round of stay motions. Judge Walker dissented. Order, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Sept. 25, 2023), Doc. #2018645. On October 11, 2023, a separate panel of the D.C. Circuit (Millet, Pillard, and Pan, JJ.) unanimously denied U.S. Steel's stay motion. Order, *Utah*, No. 23-1157 (D.C. Cir. Oct. 11, 2023), Doc. #2021268.

On October 13, 2023, three separate groups of challengers (three States, eight trade associations, and seven companies) each filed an application with this Court seeking to stay enforcement of the Good Neighbor Rule. U.S. Steel did not join those applications. Instead, two weeks later, U.S. Steel filed this application, seeking to stay enforcement of the Rule's provisions applicable to certain iron and steel mills.

REASONS TO DENY THE STAY APPLICATION

As explained in State Respondents' October 30 brief, the posture of this case—in which neither the D.C. Circuit nor any other court has yet obtained briefing on the merits—requires applicants to satisfy an extraordinarily high bar to obtain a stay from this Court. See State Resp'ts' Opp. 12-13. U.S. Steel has not come close to satisfying that high bar here.

I. U.S. STEEL FAILS TO DEMONSTRATE THAT IT WILL EXPERIENCE ANY IMMINENT, IRREPARABLE HARM ABSENT A STAY.

To support a stay, the claimed harms must be not only irreparable but also imminent. *See Williams v. Zbaraz*, 442 U.S. 1309, 1315 (1979) (Stevens, J., in chambers); *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J. in chambers). Further, "[w]here the injuries alleged are purely financial or economic, the barrier to proving irreparable injury is higher . . . , for it is well settled that economic loss does not, in and of itself, constitute irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quotation marks omitted). Here, U.S. Steel primarily relies on capital expenditures that it anticipates incurring years down the road, and on unspecified planning costs that it asserts it must undertake sooner. But these asserted costs are too remote or insubstantial to justify the extraordinary remedy of a stay.

The Rule does not require steel mills to achieve reductions in their ozone precursor emissions until May 2026—more than two years from now. 88 Fed. Reg. at 36,755-57. This extended deadline undermines U.S. Steel's claim that it will incur any imminent, substantial harms while its challenge proceeds in court. *See* U.S. Steel Appl. 24 (discussing capital expenditures). EPA included a lengthy period between the Rule's effective date and the compliance deadline for industrial sources specifically to provide such sources with ample time to install their desired form of pollution-control equipment. 88 Fed. Reg. at 36,755. And although U.S. Steel estimates that it may eventually incur capital expenditures to install the particular pollution-control equipment that it has chosen to meet the Rule's requirements at one steel mill in

Indiana, U.S. Steel's own estimates state that it will not finish evaluating contractor bids for such equipment before December 2024 (*see* U.S. Steel App. 734), or even place an order for equipment before March 2025 (*see id.* 735). U.S. Steel thus fails to demonstrate any "present or imminent" injuries justifying a stay. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010).

Given that no capital expenditures are imminent, U.S. Steel principally claims that it will incur unspecified costs merely to *plan for* the installation of pollution-control equipment at this Indiana steel mill by 2026. *See* U.S. Steel Appl. 23-25; U.S. Steel App. 714-723. But minimal costs associated with planning for future compliance do not constitute irreparable injury. Such planning costs are inherent in nearly every regulation. If the cost of such preliminary planning work were sufficient to establish irreparable harm, then opponents could rely on such costs to support a stay of nearly *any* federal regulation. But allowing such a low bar to establish irreparable harm would improperly transform a stay from an "extraordinary remedy" into a common-place event. *See Nken v. Holder*, 556 U.S. 418, 428 (2009); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220 (1994) (Scalia, J., concurring) (observing that assertions about nonrecoverable compliance costs should not upset longstanding restrictions on pre-enforcement judicial review); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("ordinary compliance costs are typically insufficient to constitute irreparable harm").

There is also no merit to U.S. Steel's contention (U.S. Steel Appl. 24) that its planning costs constitute irreparable injury because EPA might later withdraw the

Rule or issue a revised rule. U.S. Steel's pure speculation about hypothetical events cannot support a stay. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Nken*, 556 U.S. at 435; *Murthy v. Missouri*, No. 23-411, 2023 WL 6935337, at *2 (U.S. Oct. 20, 2023) (Alito, J., dissenting from grant of application for stay).

The other harms alleged by U.S. Steel, including purported threats to the domestic steel supply and national security, are likewise speculative and unsubstantiated. *See* U.S. Steel Appl. 25-26. U.S. Steel asserts that furnaces at its Gary facility will need to go offline when emissions-control equipment is installed. U.S. Steel Appl. 26. But U.S. Steel's declaration and supporting documents merely speculate, without any supporting evidence, that short-term furnace outages at a single U.S. facility could compromise "a reliable and sufficient supply of domestic steel." *See* U.S. Steel Appl. 25; U.S. Steel App. 721-722 (speculating that combined impacts of the Good Neighbor Rule and various proposed EPA regulations that have not been finalized "could have a material impact on the domestic steel industry"). And such speculation is not credible. U.S. Steel has installed low-NOx furnaces at several of its other U.S. facilities, but does not contend that outages required for those installations disrupted the domestic steel supply at all, let alone compromised national security.[5] Moreover, any outages—and therefore any hypothetical risks to the domestic steel supply—are not imminent because the Rule does not impose emissions-reduction obligations on

[5] *See* United States Steel Corp., Annual Report (Form 10-K) 51 (Feb. 15, 2013) (discussing installation of low-NOx burners); United States Steel Corp., Annual Report (Form 10-K) 48 (Feb. 22, 2011) (same).

steel mills until 2026, at the earliest. *Cf. Monsanto Co.*, 561 U.S. at 162 (no "present or imminent risk" warranting injunction); *Williams*, 442 U.S. at 1315 (Stevens, J., in chambers) (movant's obligation to "demonstrat[e] immediate irreparable harm"). For these reasons, and those given by EPA and Public Interest Respondents, U.S. Steel does not face any immediate and irreparable harm absent a stay.

II. THE EQUITIES AND PUBLIC INTEREST WEIGH DECISIVELY AGAINST A STAY.

Here, "the relative harms to applicant and respondent, as well as the interests of the public at large" also weigh decisively against a stay. *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers) (quotation marks omitted). U.S. Steel seeks a stay to postpone necessary emissions reductions beyond 2026. But postponing these reductions would cause significant health and economic harms to State Respondents and their residents and industry. These severe health and economic harms cannot be undone, even if the Good Neighbor Rule is ultimately upheld.

First, a stay of the Rule's provisions covering iron and steel mills would inflict on State Respondents and their residents the same public health harms that Congress enacted the Good Neighbor Provision to prevent. *See EME Homer City*, 572 U.S. at 507-08, 511 n.14. For example, in 2026 and in each following year, the Rule's requirements for industrial sources alone—a category that includes iron and steel mills—are estimated to avoid 1,400 emergency room visits for respiratory symptoms, prevent

4,400 new cases of asthma, and avoid 290,000 school absence days due to illness.[6] The public interest in avoiding these irreparable and severe health impacts on downwind States' residents weighs heavily in favor of keeping the Rule's industrial-source requirements in effect. *See Barnes*, 501 U.S. at 1305 (Scalia, J., in chambers).

Second, a stay would also allow U.S. Steel and other iron and steel mills in upwind States to unfairly shift the economic burdens of controlling pollution onto industry operating in downwind States. State Respondents have already worked diligently to reduce in-state sources' emissions year after year, whereas U.S. Steel and other industrial sources have not installed basic pollution control equipment that has long been common in the industry. The Rule illustrates this disparity. Under the Rule, EPA estimates that iron and steel mills can lower their emissions by 848 tons of NOx annually by installing basic control equipment. By comparison, EPA estimates that *all* industrial sources in New Jersey that are subject to the Rule can reduce their emissions by only 242 tons—approximately one quarter of this amount—because they have already installed basic control equipment. *Compare* 88 Fed. Reg. at 36,738, tbl. V.C.1-2, *with id.* at 36,739, tbl. V.C.2-1.

Third, delaying the Rule's requirements for iron and steel mills beyond the 2026 deadline, as U.S. Steel's application expressly aims to do, would severely harm downwind States. *See* U.S. Steel Appl. 23-24. As explained in State Respondents'

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[6] EPA, *Regulatory Impact Analysis for the Final Federal Good Neighbor Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard* 215-16 (Mar. 2023). These numbers increase by around 50 percent when considering emissions reductions from power plants.

October 30 brief, ozone measurements taken for any year in which the Good Neighbor Rule is not in effect become locked into and materially affect a State's attainment status for subsequent years. See State Resp'ts' Opp. 17-18. A stay of the Rule extending compliance deadlines for iron and steel mills beyond 2026 would allow persistently high emissions from those facilities to continue sending streams of ozone precursors into downwind States through the 2026 ozone season, and potentially longer. The correspondingly high ozone measurements that such upwind emissions cause in downwind States would become locked into downwind State's attainment calculations. Thus, even if the Rule is ultimately upheld, a stay now would severely threaten State Respondents' ability to satisfy the ozone standards by the 2027 attainment deadline, as well as severely harm the health and welfare of State Respondents' residents.

Indeed, it is for the foregoing reasons that State Respondents' comments on the Rule specifically supported EPA's proposal to include industrial sources in the Rule. *See* Comment Letter from Att'ys Gen., *supra*, 15-16 (2022). These comments followed years of efforts by many State Respondents to obtain regulation of upwind industrial sources, including iron and steel mills, that impede attainment of the federal ozone standards in downwind States. *See e.g.*, Comment Letter from Att'ys Gen. 27-28 (Dec. 14, 2020) (urging EPA to include non–power-plant sources in a prior cross-state ozone rule). In fact, U.S. Steel's Gary facility has been a specific concern for State Respondents. In 2018, New York submitted a petition under section 126(b) of the Clean Air Act that identified U.S. Steel's Gary facility as an upwind source

violating the Good Neighbor Provision.[7] N.Y. State Pet. for a Finding Pursuant to Clean Air Act Section 126(b), at 17 & Ex. B (Mar. 2018). That petition identified U.S. Steel's Gary facility as the fourth-largest industrial source of upwind NOx emissions that travel from Indiana into New York. *Id.* More recent data show that U.S. Steel's Gary facility emits roughly 3,000 tons of NOx annually—the second highest annual NOx emissions of any steel mill or foundry nationwide, and more than the fourth and fifth highest combined.[8] Further postponing necessary pollution reduction from this facility and others like it would severely and irreparably harm State Respondents and the public.

[7] Section 126(b) of the Act allows a State or a local subdivision to petition EPA to directly regulate a specific upwind source that emits any air pollutant in violation of the Good Neighbor Provision. *See* 42 U.S.C. § 7426(b).

[8] *See* EPA, 2020 NEI Data Retrieval Tool (n.d.). In the *Facility Data* tab, under *Pollutant* column, search for and select "Nitrogen Oxides"; under *Facility Type* column, first search for and select "Foundries, Iron and Steel" and then search for and add "Steel Mill"; then click *Emissions (Tons)* column to sort the results in descending order of annual NOx emissions. The highest-emitting steel mill, which emits over 7,700 tons of NOx per year, is also located in Indiana.

III. U.S. STEEL IS EXCEEDINGLY UNLIKELY TO SUCCEED ON THE MERITS.

The stay application should be denied for the additional reason that U.S. Steel is unlikely to succeed on the merits of its petition for review or to obtain certiorari.[9]

A. U.S. Steel Raises Improper Collateral Attacks on the Earlier and Separate SIP Disapproval Rule.

U.S. Steel's arguments about cooperative federalism fail because they require this Court to assess the merits of a separate EPA rule, the SIP Disapproval Rule, rather than the Good Neighbor Rule at issue in the current litigation. *See* U.S. Steel Appl. 16-18. For the reasons explained in State Respondents' October 30 brief, such collateral attacks on the SIP Disapproval Rule are untimely and improper.[10] See State Resp'ts' Opp. 25-27.

In any event, U.S. Steel's cooperative federalism arguments are incorrect. *First*, U.S. Steel fundamentally misconstrues the Clean Air Act in arguing that EPA was "required to" approve SIPs. *See* U.S. Steel Appl. 16. Contrary to U.S. Steel's contention (*id.*), many upwind States submitted state plans that plainly failed to satisfy the Act's requirements because they contained no measures to mitigate harmful cross-state ozone emissions. See State Resp'ts' Opp. 33-34. The Act does not require EPA to automatically approve SIPs, much less deficient ones. Instead, "EPA

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[9] For the reasons stated in EPA's and Public Interest Respondents' oppositions, U.S. Steel is also unlikely to succeed on the merits of its other arguments not discussed herein.

[10] U.S. Steel did not file a petition for review of the SIP Disapproval Rule, and the time to do so has expired.

has substantive authority to assure that a state's proposals comply with the Act," *Arizona ex rel. Darwin v. EPA*, 815 F.3d 519, 531 (9th Cir. 2016), and "does not have to accept unreasonable analyses that lead to an unreasonable" state determination, *Wyoming v. EPA*, 78 F.4th 1171, 1181 (10th Cir. 2023). *See also Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 490 (2004) (Congress vested EPA with "explicit and sweeping authority" to verify States' "substantive compliance" with the Act's permitting provisions).

Second, the Supreme Court has squarely rejected the argument that the Act requires EPA to postpone FIPs until States have a chance to cure their deficient SIPs, as U.S. Steel acknowledges (*see* U.S. Steel Appl. 17). *See EME Homer City*, 572 U.S. at 509. See State Resp'ts' Opp. 33. Contrary to U.S. Steel's assertions, EPA's issuance of a *proposed* FIP did not "cut off any meaningful opportunity for States to address EPA's concerns through amended state plans" (U.S. Steel Appl. 17). Then, as today, any State may propose a revised SIP that remedies the deficiencies identified by EPA. *See* 88 Fed. Reg. at 36,842 (providing that States may exit the Good Neighbor Rule by proposing adequate SIPs). And EPA must review any such revised SIP and determine whether it satisfies the Act's requirements. 42 U.S.C. § 7410(c)(1).

Nor does the Clean Air Act prevent EPA from *proposing* a FIP before it finalizes a SIP Disapproval. *See* U.S. Steel Appl. 17-18. In a prior cross-state ozone rulemaking, EPA proposed to find numerous States' SIPs insufficient under the Good Neighbor Provision and to issue FIPs for those States in a single *Federal Register* notice. *See* Federal Implementation Plans to Reduce Interstate Transport of Fine

Particulate Matter and Ozone, 75 Fed. Reg. 45,210, 45,214, 45,341-42 (Aug. 2, 2010). The final version of that rule likewise rescinded approvals for 22 SIPs and issued FIPs for those States in a single *Federal Register* notice. Interstate Transport of Fine Particulate Matter and Ozone, 76 Fed. Reg. 48,208, 48,220-22 (Aug. 8, 2011). Accordingly, the FIPs were proposed before the SIP disapprovals were finalized, and the FIPs were finalized at the same time that the SIP disapprovals were finalized. This Court upheld the final version of that rule, *see EME Homer City*, 572 U.S. at 509, and the D.C. Circuit upheld the rescissions on remand, *see EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132-35 (D.C. Cir. 2015) (Kavanaugh, J.). Moreover, EPA has a statutory mandate to promulgate FIPs consistent with the Clean Air Act's compliance deadlines for downwind States. *See North Carolina*, 531 F.3d at 912. In order to satisfy both this statutory mandate and the Administrative Procedure Act's notice-and-comment requirements, it is sometimes the case that EPA must propose FIPs in advance of finalizing SIP disapprovals.[11] *Cf.* 42 U.S.C. § 7601(a) (EPA rulemaking power); 5 U.S.C. § 553 (rulemaking procedures). The Clean Air Act does not prohibit that course of action. Rather, as soon as EPA finalizes a SIP disapproval, it may issue the final FIP. *See EME Homer City*, 572 U.S. at 509 (after EPA has disapproved a SIP, EPA may issue FIP at any time and "is not obligated to

[11] EPA did not finalize every FIP it proposed. For example, EPA proposed FIPs for Tennessee and Wyoming in the proposed Good Neighbor Rule, but did not finalize those FIPs in the final Good Neighbor Rule. *See* 88 Fed. Reg. at 36,656.

wait to years or postpone its action even a single day"). U.S. Steel's unsupported assertions provide no basis to stay the Good Neighbor Rule here.

B. Subsequent Events Have Not Compromised the Good Neighbor Rule.

U.S. Steel also errs in arguing that the Rule's current application to fewer than 23 States renders the Rule inequitable. *See* U.S. Steel Appl. 14-16.

This argument fails at the outset because it is unexhausted. The judicial stays and administrative actions that have temporarily paused the Good Neighbor Rule's enforcement in 12 States issued *after* the Good Neighbor Rule's comment period had concluded. Objections arising from events occurring after a rule's public-comment period may not be subject to judicial review unless they are first raised in a timely petition for reconsideration to EPA, and until EPA has acted on that petition for reconsideration. *See Utility Air Regul. Grp. v. EPA*, 744 F.3d 741, 747 (D.C. Cir. 2014) ("Objections raised for the first time in a petition for reconsideration must await EPA's action on that petition."). See State Resp'ts' Opp. 35. Conducting judicial review only after EPA adjudicates a relevant petition for reconsideration "serves the important function of assuring that the agency has had an opportunity to explicate and evaluate objections before [a court] review[s] them." *Mexichem Specialty Resins*, 787 F.3d at 553.

Here, U.S. Steel filed a petition for reconsideration less than three months ago. *See* U.S. Steel Appl. 12; U.S. Steel App. 571-601. EPA has not yet acted on the

petition. U.S. Steel's claims about the effects of the judicial stays are thus not properly before the Court.[12] *Utility Air Regul. Grp.*, 744 F.3d at 747.

In any event, the Good Neighbor Rule is not arbitrary simply because it is currently in force for sources in fewer than the 23 States for which it was originally finalized. See State Resp'ts' Opp. 35-38; EPA Response to the Applications for a Stays 18-28, Nos. 23A349, 23A350, 23A351 (Oct. 30, 2023); Public Interest Resp'ts' Response in Opp. to Emergency Applications for Stay of Final Agency Action 12-20 Nos. 23A349, 23A350, 23A351 (Oct. 30, 2023). U.S. Steel raises just one argument in support of this claim—viz., that the Rule's administration is no longer "equitable." U.S. Steel Appl. 14-16. But U.S. Steel is wrong. As explained in State Respondents' October 30 brief, there is nothing inequitable about applying the Rule to fewer than all 23 States because the Act's good-neighbor requirements apply to each State individually, and because no covered State or source within a covered State will be required to make up any shortfall in emissions reductions from any other covered State. See State Resp'ts' Opp. 35-38.

U.S. Steel misconstrues two observations by EPA in the Rule's preamble. First, U.S. Steel relies on EPA's observation "that application of the Plan 'across all jurisdictions' was 'vital' to 'efficien[cy] and equit[y].'" U.S. Steel Appl. 14 (quoting 88 Fed. Reg. at 36,691). But this observation simply echoed the Court's conclusion in *EME Homer City* that EPA may reasonably elect to effectuate the Good Neighbor

[12] U.S. Steel does not contend that any of the "narrow exceptions" to the statutory exhaustion requirement apply. *See Mexichem Specialty Resins*, 787 F.3d at 553.

Provision's statutory requirements by imposing uniform cost thresholds, in dollars per ton of NOx reduced, on all sources covered by Rule. The current rule continues to impose such uniform cost thresholds on all sources within the 11 States for which it is currently in force. *See* 88 Fed. Reg. at 36,846 (citing uniform control stringencies of $1,800 per ton of NOx removed in 2023 and $11,000 per ton of NOx removed in 2026).

Second, U.S. Steel misplaces its reliance on EPA's observation that the purpose of the Good Neighbor Rule is to stop States "'that have not yet implemented pollution controls of the same stringency as their neighbors . . . from free riding on their neighbors' efforts.'" U.S. Steel Appl. 15 (citing 88 Fed. Reg. at 36,680). As used in the Rule, "neighbors" does not refer to upwind States that have temporarily avoided the Good Neighbor Rule's application by securing judicial stays of the SIP Disapproval Rule. *See* U.S. Steel Appl. 15. Rather, "neighbors" refers to *downwind* States, like State Respondents, that have made substantial and consistent efforts to reduce ozone pollution. 88 Fed. Reg. at 36,680; *see also EME Homer City*, 572 U.S. at 519 (describing free-riding States as those who "run old, dirty plants"). Indeed, the 11 States that remain subject to the Good Neighbor Rule cannot have been "free riding" on the efforts of the 12 States that secured judicial stays. Those 12 States historically lacked adequate pollution controls—and continue to lack them today. It is thus those 12 States that inequitably continue to free ride on the efforts of downwind States and the sources in downwind States. This Court should not perpetuate those free-rider problems by staying the Rule.

CONCLUSION

The Application for a Stay should be denied.

Respectfully submitted,

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