Opponents of EPA's landmark climate rule, the Clean Power Plan (a/k/a 111(d) regulation), are seeking to stay the effectiveness of the rule. A stay is a variety of preliminary injunction, and the Supreme Court laid down four requirements for such orders in *Winter v. NRDC*:

*"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest."*

It's not at all clear that even a single one of these requirements is satisfied, let alone all four of them. Taking them in order:

**1. Likelihood of success.** The plaintiffs have two significant arguments against the plan. The first is the "glitch" involving the dueling House and Senate versions of section 111(d), both of which were mistakenly enacted into law. You can find discussions of the merits of the issue in earlier posts, here, here, and here. The other argument is that it is unprecedented for EPA to define a system of pollution control that includes anything beyond the fence-line of each individual plant. A recent position paper from NYU Law School makes it clear that this is incorrect: there actually *are* significant precedents. The government's response to the stay order makes cogent arguments against all these contentions. The industry has respectable arguments here, but they seem unlikely to carry the day — especially at this preliminary stage of the case — except for judges who begin with a strong antipathy towards the regulation.

**2. Irreparable harm.** The claims of irreparable harm are that states will have to start working hard now to create plans and that industry will be subject to regulatory uncertainty. Given that the litigation is likely to be over well before the regulatory requirements go into effect, these claims aren't too compelling. Besides, they are claims that apply to many, many Clean Air Act regulations, and it may be hard to persuade the court that there's anything really extraordinary here to justify a stay.

**3. Balance of equities.** It's really hard to see how this one favors the challengers. The states say that the Clean Power Plan will require them to engage in regulation, or at least plan to do so. Aside from the fact that they can avoid this by letting the Feds come up with a plan, it's not clear why their desire to do nothing about climate change should get more weight than EPA's desire to take action. In terms of industry's worry about regulatory uncertainty, this again seems like a routine problem, no different from many other regulatory cases.

**4. Public interest.** The challenger states claim that EPA's rule will interfere with grid reliability and raise consumer rates when it goes into effect in 2022, and the Feds say it will help fight climate change and incidentally reduce other harmful types of air pollution. It's hard to see how a court can say that the state's interest is definitely the more important, particularly given that the Supreme Court took the harms caused by climate change so seriously in *Massachusetts v. EPA*. If anything, Congress assigned the job of considering these conflicting interests to EPA, not the courts.

According to *Winters*, "a preliminary injunction is an extraordinary remedy never awarded as of right." The plaintiffs do not seem to have made a case for such extraordinary relief. A court does not even need to consider all four of the factors — it can simply pick the factor where the challengers are weakest and dismiss the request on that basis. Perhaps the challengers can persuade the judges that this is simply an extraordinary case, involving not just an ordinary major regulation but something altogether graver and unprecedented. Conservative judges may go for this "the heavens are falling" argument, just as four Justices did in the Supreme Court's first Obamacare case. Justice Thomas will no doubt use the case at some later stage to fulminate about the horrors of the modern administrative state. But without getting a boost from that kind of "motivated reasoning" (as the psychologists call it), the case for staying the order seems weak.