No. ___

In the Supreme Court of the United States

STATE OF WEST VIRGINIA,
STATE OF INDIANA, *et al.*,

Applicants,

v.

ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN,
Administrator, United States Environmental Protection Agency,

Respondents.

TO THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT

STATES' EMERGENCY APPLICATION FOR AN IMMEDIATE STAY OF ADMINISTRATIVE ACTION PENDING REVIEW IN THE D.C. CIRCUIT

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PARTIES TO THIS PROCEEDING

Applicants in this Court and Petitioners below are the States of West Virginia, Indiana, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.

Respondents in this Court and Respondents below are the United States Environmental Protection Agency and Michael S. Regan, Administrator, United States Environmental Protection Agency.

Respondents in this Court and Petitioners below are, by court of appeals case number, as follows:

24-1121: State of Ohio and State of Kansas

24-1122: National Rural Electric Cooperative Association

24-1124: National Mining Association and America's Power

24-1126: Oklahoma Gas and Electric Company

24-1128: Electric Generators for a Sensible Transition

24-1142: United Mine Workers of America, AFL-CIO

24-1143: International Brotherhood of Electrical Workers, AFL-CIO

24-1144: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO

24-1146: Midwest Ozone Group

24-1152: Edison Electric Institute

24-1153: NACCO Natural Resources Corporation

24-1155: Idaho Power Company

24-1222: Appalachian Region Independent Power Producers Association

24-1226: Rainbow Energy Center, LLC

24-1227: Montana-Dakota Utilities Co.

24-1233: Westmoreland Mining Holdings LLC, Westmoreland Mining LLC, and Westmoreland Rosebud Mining LLC

Respondents in this Court and Intervenors for Petitioner below are the Louisiana Public Service Commission and Tennessee Valley Public Power Association, Inc.

Respondents in this Court and Intervenors for Respondent below are the American Lung Association, American Public Health Association, California Air Resources Board, City and County of Denver, City of Boulder, City of Chicago, City of New York, Clean Air Council, Clean Wisconsin, Commonwealth of Massachusetts, Commonwealth of Pennsylvania, District of Columbia, Edison Electric Institute, Natural Resources Defense Council, State of Arizona, State of Colorado, State of Connecticut, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Maryland, State of Michigan, State of Minnesota, State of New Mexico, State of New York, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, State of Wisconsin, State of New Jersey, Consolidated Edison, Inc., New York Power Authority, Pacific Gas and Electric Company, Power Companies Climate Coalition, and Sacramento Municipal Utility District.

RELATED PROCEEDINGS

This application arises from a July 19 order denying eight motions to stay filed in 17 consolidated cases:

- *West Virginia* v. *EPA*, No. 24-1120 (D.C. Circuit) (main docket)
- *Ohio* v. *EPA*, No. 24-1121 (D.C. Circuit)
- *National Rural Electric Cooperative Association* v. *EPA*, No. 24-1122 (D.C. Circuit)
- *National Mining Association* v. *EPA*, No. 24-1124 (D.C. Circuit)
- *Oklahoma Gas and Electric Company* v. *EPA*, No. 24-1126 (D.C. Circuit)
- *Electric Generators for a Sensible Transition* v. *EPA*, No. 24-1128 (D.C. Circuit)
- *United Mine Workers of American* v. *EPA*, No. 24-1142 (D.C. Circuit)
- *International Brotherhood of Electrical Workers* v. *EPA*, No. 24-1143 (D.C. Circuit)
- *International Brotherhood of Boilermakers* v. *EPA*, No. 24-1144 (D.C. Circuit)
- *Midwest Ozone Group* v. *EPA*, No. 24-1146 (D.C. Circuit)
- *Edison Electric Institute* v. *EPA*, No. 24-1152 (D.C. Circuit)
- *NACCO Natural Resources Corporation* v. *EPA*, No. 24-1153 (D.C. Circuit)
- *Idaho Power Company* v. *EPA*, No. 24-1155 (D.C. Circuit)
- *Appalachian Region Independent Power Producers Association* v. *EPA*, No. 24-1222 (D.C. Circuit)
- *Rainbow Energy Center, LLC* v. *EPA*, No. 24-1226 (D.C. Circuit)
- *Montana-Dakota Utilities Co.* v. *EPA*, No. 24-1227 (D.C. Circuit)
- *Westmoreland Mining Holdings LLC* v. *EPA*, No. 24-1233 (D.C. Circuit)

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TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

INTRODUCTION

Several years ago, the Environmental Protection Agency tried to use Section 111(d) of the Clean Air Act to reshape America's power grid. Driven by a distaste for fossil-fuel-fired facilities, EPA sought to force coal-fired plants to close and shift over to EPA's preferred methods of power generation. But Congress never gave EPA the go-ahead to impose that massive effort—especially not in a statutory backwater like Section 111. So at the urging of West Virginia and many other States, this Court stepped in and stayed the so-called "Clean Power Plan" before its draconian effects could turn our power industry upside down. See *West Virginia* v. *EPA*, 577 U.S. 1126 (2016).

Sure enough, the Court confirmed a few years later that the Clean Power Plan could not proceed unless Congress clearly authorized it—and Congress had not. See generally *West Virginia* v. *EPA*, 597 U.S. 697 (2022). Section 111(d) is a "a gap filler" that "had rarely been used in the preceding decades." *Id.* at 724. In contrast, EPA had tried to use the statute as a battering ram to pound through its "policy judgment" that "it would be 'best' if coal made up a much smaller share of national electricity generation." *Id.* at 728. The statute and EPA's objectives were thus an ill fit. And the Court saw an "obvious difference" between "a rule that may end up causing an *incidental* loss of coal's market share" versus "requiring plants to reduce operations or subsidize their competitors" to hit an EPA target. *Id.* at 731 n.4 (emphasis added). The latter task is the sort of major question that Congress must clearly assign to EPA. Yet EPA had found only a "vague statutory grant" to justify its Rule. *Id.* at 732. Such thin gruel wasn't good enough.

That brings us to today, where it's déjà vu all over again. Once more, EPA looks to Section 111 to justify imposing major, jarring shifts in the nation's power market. The effort is perhaps subtler than EPA's last try; it hasn't given the Rule a special name or coined any new terms. But it's no less problematic, setting impossible-to-meet standards for regulated facilities, stripping away the States' discretion to patch up the damage, and ultimately pushing regulated sources into early retirements. And the end game is a familiar one, too. The EPA Administrator has said that "expedited retirement" of disfavored plants is "the best tool for reducing greenhouse-gas emissions," so the Rule (alongside other EPA actions) is designed to create a decision point at which "industry" could "look at the cost and say no, it's time to pivot and invest in a clean energy future." Chris Horner, *The EPA Defies the Supreme Court*, WALL ST. J. (Aug. 17, 2023, 6:41 PM), https://bit.ly/4fagmB1.

Faced with this recognizable story, one might at least expect a stay to be an easy call. But a D.C. Circuit panel—including the same two judges who authored the now-reversed decision that spawned *West Virginia*—denied Applicants' request for one. The panel's one-page order obliquely held that the record supported EPA's decisions on what a "best system of emission reduction" would look like for coal- and natural-gas-fired facilities, ignoring a breakdown from players from all corners of the market explaining why that's not so. Worse still, it refused to acknowledge that *West Virginia* applies, apparently concluding that source-level measures never present a "major question" no matter what practical effects they might have. And adding injury to insult, the court concluded that the lack of a stay would harm nobody—even though regulators, industry experts, and reams of sworn statements say otherwise. The Rule now continues to race ahead.

The Court should once more act to ensure a critical industry is not irreparably damaged by an unlawful regulatory campaign that's likely to be set aside. The Court should grant Applicants' request and stay the entire Rule.

DECISION BELOW

The D.C. Circuit's order denying the States' motion for a stay pending review is unpublished. It is reproduced at App. 1a-3a. The relevant rule, "New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule," is published at 89 Fed. Reg. 39,798 (May 9, 2024) and reproduced at App. 12a-278a.

JURISDICTION

This Court has jurisdiction over this Application under 28 U.S.C. §§ 1254(a) and 2101(f). It has the authority to grant Applicants' requested relief under both the Administrative Procedure Act, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651.

BACKGROUND

1. "The Clean Air Act is an exercise in cooperative federalism." *Myersville Citizens for a Rural Cmty., Inc.* v. *FERC*, 783 F.3d 1301, 1317 (D.C. Cir. 2015) (cleaned up). In Section 111's part of that exercise, EPA's "central determination," *West Virginia*, 597 U.S. at 720, is to identify a "best system of emission reduction" for regulated stationary source categories, 42 U.S.C. § 7411(a)(1). Congress gave EPA clear limits and direction in doing that. EPA must "determine[]" that the best system of emission reduction is "adequately

demonstrated," "taking into account" "cost," "any nonair quality health and environmental impact," and "energy requirements." *Id.*

Under the "seemingly universal view" of that command, Congress intended the best system to "focus[] on improving the emissions performance of individual sources." *West Virginia*, 597 U.S. at 726-27 (cleaned up). EPA cannot pick a system that would cause expenses "greater than the [regulated] industry could bear and survive." *Portland Cement Ass'n* v. *Train*, 513 F.2d 506, 508 (D.C. Cir. 1975). Instead, Section 111 expressly requires that the technology (and corresponding emission limits) "be achievable" in the real world. *Essex Chem. Corp.* v. *Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973); see also 42 U.S.C. § 7411(a)(1) (emission reduction must be "achievable" through use of the best system).

When it comes to the States, Congress recognized that air pollution control is *their* "primary responsibility." 42 U.S.C. § 7401(a)(3). So it gave each State "leeway to select means" for controlling pollution "consistent with its particular circumstances and priorities." *Env't Comm. of Fla. Elec. Power Coordinating Grp.* v. *EPA*, 94 F.4th 77, 93 (D.C. Cir. 2024). While EPA sets standards for new sources under Section 111, 42 U.S.C. § 7411(b), States develop "plan[s]" setting the "standards of performance" for the existing sources, *id.* § 7411(d)(1). The States' Section 111(d) plans must "reflect[]" the "degree of emission limitation achievable" through EPA's best system of emission reduction. *Id.* § 7411(a)(1). But Congress also said EPA "shall" respect the States' discretion to account for source-specific considerations, including (but not limited to) a facility's "remaining useful life." *Id.* § 7411(d)(1). EPA may directly regulate existing sources only if States fail to submit or enforce a "satisfactory plan." *Id.* § 7411(d)(2).

2. For decades, Section 111 was a "gap filler"—really, a "backwater"—that EPA "rarely" used. *West Virginia*, 597 U.S. at 724, 730. In its 2015 Clean Power Plan rule, though, EPA purported to "improve the overall power system" by choosing a best system of emission reduction that "forc[ed] a shift throughout the power grid from one type of energy source to another." *Id.* at 727-28 (cleaned up). Given the incongruence between the narrow statutory language and the broad mission undertaken by EPA, this Court was forced to grant a first-of-its-kind stay that kept the rule from going into effect back in 2016. *Id.* at 715.

EPA later repealed the 2015 rule, and many of the same parties returned to this Court to litigate that choice. *West Virginia*, 597 U.S. at 715-17. And this Court confirmed that EPA's so-called "generation shifting" strategy was not on the table. The Clean Power Plan "assert[ed] highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* at 724. The plan sought to "restructur[e] the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal." *Id.* at 720. But a "decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation." *Id.* at 735. Every marker of a "major questions case" confirmed it: EPA's claimed authority was "unheralded," it would have "transformative[ly] expan[ded]" agency power into an area "Congress had conspicuously and repeatedly declined to enact itself," EPA lacked "comparative expertise" as an energy regulator, and the result would have been "unprecedented power over American industry." *Id.* at 724, 728 (cleaned up). For power like that, EPA's purported statutory authority was nowhere "close to the sort of clear authorization" precedent requires. *Id.* at 732.

3. This Rule is EPA's third try at regulating power plants' greenhouse gas emissions under Section 111. This time, EPA chose carbon capture and sequestration/storage, or CCS, as the best system of emission reduction for existing coal-fired steam generating units operating beyond 2038. App. 54a. CCS reroutes a plant's exhaust, isolates and extracts the carbon (often offsite), then transports it for use or long-term storage. Plants must begin operating CCS systems at a 90% capture rate by 2032—the genesis of an aggressive "presumptive standard" of 88.4% reductions from current annual emissions. App. 54a-55a.

Considering the "significant capital expenditures involved in deploying CCS technology," EPA set a separate best system for coal plants set to retire before 2039. App. 14a-15a. They must convert to co-firing 40% natural gas by 2030. App. 15a. Coal-fired plants retiring by 2032 have an "applicability exemption" from the Rule. App. 19a. Plants in either early retirement category cannot change course: To avoid the 90% CCS mandate, retirement commitments are binding. App. 19a, 172a.

The Rule also sets standards for natural gas- and oil-fired steam generating units tied to plant use, App. 110a-113a, and standards for new and modified fossil fuel-fired combustion turbines, App. 116a-166a.

State plans setting source-specific standards of performance are due in a little over 21 months from now. App. 211. The Rule announced that EPA generally will not approve a state plan with standards below EPA's "presumptive" standards. App. 170a-174a. Instead, state plans "must achieve at least the level of emission reduction that would result if each affected [plant] was achieving its presumptive standard of performance." App. 170a. And EPA warns that States must show "fundamental differences between the

circumstances of a particular facility and the information" EPA considered before using their discretion to tailor standards to remaining useful life and other factors. App. 176a.

4. The same day EPA published the Rule, Applicants and other petitioners began filing petitions for review in the D.C. Circuit. See, *e.g.*, Pet. for Review, *West Virginia* v. *EPA*, No. 24-1120 (D.C. Cir. filed May 9, 2024). The D.C. Circuit consolidated Applicants' challenge with sixteen other cases. It also granted several motions to intervene filed by various States, localities, energy groups, public-interest organizations, power companies, and others. Applicants and other petitioners below then filed eight motions to stay, beginning just a few days after the initial petitions for review were filed. States, energy cooperatives, trade groups, unions, and others all explained why the Rule was an unlawful and ill-advised attempt to restructure the entire power industry. Among other things, the Rule imposes inadequately demonstrated technologies on unworkable timeframes, effectively squeezing plants into retirement. Relatedly, it causes serious immediate harms by either pushing plants into binding commitments for retirement or pressing them to start spending large sums to hit compliance dates.

Although Applicants and other stressed the immediacy of the Rule's harms, no decision on a stay came for more than two months.

On July 19, the D.C. Circuit denied all eight motions with a one-page per curiam order. See App. 2a. In short, the court held that the petitioners below didn't satisfy the "requirements for a stay pending" review. App. 2a. Although Applicants had argued that the technologies EPA sought to impose were not adequately demonstrated (and that the emission reductions tied to them were not achievable), the court decided—without

explanation—that Applicants "ha[d] not shown they are likely to succeed on those claims given the record in this case." App. 2a. The court also believed that EPA was just "causing the regulated source[s] to operate more cleanly," App. 2a. (quoting *West Virginia*, 597 U.S. at 725), so the Rule couldn't implicate the major-question doctrine. On irreparable harm, the court thought most of the oppressive deadlines were years off—and any advance planning was irrelevant "because the risk remains that the distant deadlines in EPA's rule will come back into force at the end of this case" even with a stay. App. 2a. Though the States faced a submission deadline for their state implementation plans much sooner, the court was indifferent. "[T]he only consequence of failing to submit a state plan is the promulgation of a federal plan," and the court thought the prospect of such a federal plan was no great concern because "the States can [purportedly] replace [that plan] with their own plans later." App. 2a.

5. Applicants now bring this emergency application for a stay. Just as they did a few years ago, they now need the Court to step in and hit pause so that the fossil-fuel-fired power industry isn't pushed out of existence while this case wends its way through the judicial-review process.

REASONS TO GRANT THE APPLICATION

The CAA's requirements must be respected. And EPA can't force the energy industry to dance to EPA's preferred tune by making the only real option retirement for disfavored facilities. These ideas are straightforward enough—but they'll never amount to anything if the Court doesn't act now. The Court should stay the Rule because the States will likely succeed on the merits, they face likely irreparable harm, a stay will not

substantially injure other interested parties, and the public interest favors a stay. *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Recall that the first two factors are "most critical," while factors three and four merge here. *Nken* v. *Holder*, 556 U.S. 418, 434-35 (2009). But really, all the factors weigh in the States' favor. So like this Court did last time it faced a rule poised to remake the electricity-generation sector, *West Virginia*, 577 U.S. 1126, this Court should issue a stay.

I. The States will likely prevail.

The Rule's 90% CCS, 40% co-firing, and onerous new-source requirements all fail as best systems of emission reduction. They don't line up with what the statute expressly requires. And they're really a backdoor avenue to forcing coal plants out of existence—a major question that no clear congressional authority permits. The Rule likely cannot stand.

A. The Rule violates Section 111's terms.

1. EPA's "best systems" flunk Section 111 when they are impossible to implement in the near term (at least with any degree of economic sense). A "best system" "has been adequately demonstrated"—note the past tense—and must produce "achievable" emission reductions. 42 U.S.C. § 7411(a)(1). Those terms expect proven technology, not aspiration. Again and again, courts have reminded EPA that no matter how "laudable" its "objectives," Section 111 "expressly requires" that the technology (and the emission limits flowing from it) "be achievable." *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973). EPA's pick must be "reasonably reliable, reasonably efficient," and not "exorbitantly costly." *Essex*, 486 F.2d at 433. And EPA must show they work under the "most adverse conditions which can reasonably be expected to occur." *Nat'l Lime Ass'n* v. *EPA*, 627 F.2d

416, 431 n.46 (D.C. Cir. 1980). Though some "projection[s] based on existing technology" are allowed, *Portland Cement*, 486 F.2d at 391, "crystal ball inquir[ies]" and EPA's "subjective understanding of the problem" are not, *Essex*, 486 F.2d at 433 (cleaned up). EPA may not move ahead "on mere speculation or conjecture," *Lignite Energy Council* v. *EPA*, 198 F.3d 930, 934 (D.C. Cir. 1999), no matter how important the underlying policy objectives, 42 U.S.C. § 7411(a)(1).

CCS is an important emerging technology—many of the States are invested in its success—but it's not feasible on the Rule's scale or timetable.

Real-world examples are crucial to proving a technology represents "the industry as a whole." *Nat'l Lime*, 627 F.2d at 431. Yet no large-scale power plants are achieving the 90% capture that the Rule mandates. No wonder a host of entities say 90% CCS isn't feasible—from the Congressional Research Service to the GAO to the United Nations to the Southern Company to the Institute for Energy Economics and Financial Analysis. App. 298a-299a. We know we can capture carbon, move it through pipelines, and put it in the ground. But what the energy sector hasn't seen—and what Section 111 demands—is evidence that deploying these technologies in energy contexts, at size, with reliability, and without exorbitant costs is possible.

To be sure, EPA recites a list of CCS projects and operations. See, *e.g.*, App. 27a-28a (saying there are "at least 15 operating CCS projects in the U.S., and another 121 that are under construction or in advanced stages of development"). But this recitation is quantity over quality. Nearly all named CCS operations are from the industrial rather than energy sector—an important difference because the energy sector has unique demands,

like reliability. See, *e.g.*, App. 60-65a. These facilities are all a fraction of the size of power-generating units; none of them are close to scale. App. 60-65a. And the many "projects" EPA cites are just that—experiments *projecting* success, not operational power plants *achieving* success. EPA tries to paper over these holes by insisting that "all components have been demonstrated simultaneously" and that "specific, currently available, minor technological improvements" can bridge the gap. App. 61a. But proving individual components doesn't guarantee scalability, and EPA never shares the specific technological advancements it's got up its sleeve. No wonder the Department of Energy continues to solicit CCS demonstration proposals to "prove feasible scalability" for CCS in the energy sector. App. 295a; see also, *e.g.*, Mot. for Stay of Edison Elec. Inst., et al. at 14-18, *Edison Elec. Inst.* v. *EPA*, No. 24-1152 (D.C. Cir. filed May 24, 2024), Doc. No. 2056352 (detailing why examples do not demonstrate present CCS viability on expedited timelines).

Ultimately, EPA offers only two legitimate examples of a power plant with CCS: Petra Nova and Boundary Dam's Unit 3. App. 61a. Neither gets the job done. They both work with a fraction of the flue gas a typical coal plant produces: Boundary Dam has CCS on a 75% slip stream from a single 110 MW unit, and Petra Nova has CCS on a 240 MW-equivalent unit—a 37% slipstream from a single 654 MW unit. App. 61a-62a; Tex. Comm'n on Env't Quality, Comment Letter on Proposed Rule for GHG Emissions Standards 4 (Aug. 16, 2023), https://tinyurl.com/msr2w322. Neither captures at 90%, and neither even attempts to capture the plant's entire exhaust stream. Both plants also sold their captured CO_2 for enhanced oil recovery (or "EOR") efforts, making them more economically viable than most of CCS operations that would exist under the Rule. App. 296a-297a. Even so,

Petra Nova faced many "technical challenges" in its first three years (a compliance buffer the Rule refuses) and shut down from 2020 to 2023. App. 63a-64a. Boundary Dam managed only 37% capture in 2021. Karin Rives, *Only still-operating carbon capture project battled technical issues in 2021*, S&P GLOBAL (Jan. 6, 2022), https://tinyurl.com/4bphb934. EPA champions its "more recent[]" success, but even that short-term pinnacle was "capable of achieving capture rates of 83 percent" only. App. 62a.

Unable to live up to the "full-scale deployments" the Rule promises, EPA had no basis to "determin[e] that 90 percent capture of CO_2 is adequately demonstrated" *now*. App. 27a, 61a. Indeed, EPA confirmed below that it isn't dealing in reality when it relied on an old press release promising "commercial scale" 90% capture *by 2015*. C.A.EPA.Opp.52. In contrast, Applicants' declarants (and those from other petitioners) showed that the Rule demands the impossible today. *E.g.*, App. 579a-597a; App. 661a-664a; App. 758a-761a.

Perhaps the most troubling aspect of EPA's examples is that nearly every one is funded by the Energy Policy Act of 2005, sometimes called EPAct05. By law, EPA must show CAA achievability without relying on EPAct05-funded facilities: "[n]o technology or level of emission reduction" "shall be considered … adequately demonstrated" under Section 111 "solely" because that technology was used or emission-reduction achieved "by [one] or more facilities receiving assistance under th[e] Act." 42 U.S.C. § 15962(i)(1). But Petra Nova and nearly every other CCS project or demonstration is EPAct05-funded. Indeed, EPA lists only three, tiny U.S.-based CCS operations without EPAct05 funding: a CCS operation on a 63-MW plant (capturing only a few thousand tons of CO_2 a year); a 180-MW plant with a 10% capture rate; and a 5% slipstream on a 320-MW plant. App. 63a.

EPA knows that's not remotely enough to justify the heavy-handed Rule, so it relies heavily on Boundary Dam. That reliance is questionable as well, though, because Boundary Dam received $240 million under the Canadian government's version of EPAct05. *Boundary Dam Integrated Carbon Capture and Storage Demonstration Project*, GOV'T OF CANADA (Jan. 5, 2016), https://tinyurl.com/sshb9y7j. And it makes sense that these projects can't be rightfully considered. After all, the point of Section 15962(i)(1) is to keep trailblazing and cutting edge publicly funded R&D from becoming the national power-sector standard. Yet putting Boundary Dam and its nearly quarter billion dollars of EPAct05-equivalent money on the scale does exactly that, allowing the EPA to hold businesses to an unachievable standard based on examples Congress explicitly forbade "adequately demonstrated." Respect for legislative intent demands that the Court assign Boundary Dam the same strictly limited evidentiary value it does Petra Nova.

Nor can EPA's optimism that CCS will come through soon make up the difference. Too many hurdles persist at each step. Start with the exorbitant construction costs. Even EPA estimates that 90% capture systems for new units (read: built-to-order, not retrofitted units as existing must be) increase capital costs by 115% and operating costs by 35%. App. 146a. But the record evidence shows it'll be even worse. Detailed studies conducted in 2022 by and for power plants in South Dakota, Wyoming, and Texas, found (optimistically) that the capital costs of installing CCS would be about $500 million for each plant. App. 301a. This expense could double energy prices. App. 301a. The Rule is wrong to calculate costs by assuming that input costs will remain static and that every source will either sell CO_2 or get a 45Q tax credit. App. 302a. EPA's vague promises that DOE-funded

studies "could" reduce costs doesn't fix this problem, either. App. 301a. It's not enough to point to studies that might at some unidentified future time morph into support that CCS is adequately demonstrated. EPA was right in 2019 to say that CCS is cost-effective in only rare circumstances. App. 301a. That's still true today.

Ongoing operational costs are also burdensome. Installing CCS reduces plants' sellable energy by up to 36%—instantly slashing plants' ongoing profitability. App. 303a. CCS will cause *ten times* the increase in heat rate (a measure for inefficiency) that coal electric generating units, or EGUs, suffered in the last decade; it also wipes out twice the heat-rate gains natural gas EGUs have made. App. 303a. This efficiency reduction requires owners to buy more fuel to make up the difference (several million dollars' worth per unit), and it significantly increases pollution, too. App. 303a. When the complicated CCS technology breaks down, it affects the whole plant. In just the three years Petra Nova was operational, issues with its CCS caused nearly 100 days of plant stoppages. App. 303a. And CCS limits unit flexibility, lengthening startup times and limiting combustion turbines' ability to operate at low loads. App. 304a. All this means EPA failed its *separate* duty to consider "cost." 42 U.S.C. § 7411(a)(1). So too with "adequately demonstrated": The Rule relies heavily on federal credits to potentially make costs bearable. *E.g.*, App. 14a, 148a. But as noted above, 42 U.S.C. § 15962(i) tightly restricts EPA's ability to use these federal credits in its calculations.

The Rule also allows too little time to build and deploy CCS. The National Center for Carbon Capture estimates the first CCS demonstration projects won't go online until 2030 to 2032—after an eight-to-ten-year process. App. 295a-296a. Yet EPA demands all

non-retiring coal plants hit 90% capture in 7.5 years. App. 54a-55a. That wishful thinking colors how the Rule discusses the few in-process, full-scale CCS plants, too. For example, it says Project Tundra initially "planned completion in April 2024." App. 64a-65a. But Project Tundra hasn't broken ground and now slates commercial operations for 2028—*thirteen years* after discussions began. App. 65a; see also App. 579a-597a (describing Project Tundra).

Transporting extracted carbon presents a similar problem. Although EPA knows little about laying pipelines, it ignores the experts and predicts industry will build enough new CO_2 pipelines by 2032. App. 69a. EPA's own modeling, though—which relies on best-case assumptions that all plants will be able to use the closest theoretically viable "saline sequestration site"—calls for 5,000 miles above the country's current 5,385. App. 69a-70a. Given the difference between EPA's 5,000-mile estimate and a competing Princeton study's 66,000-mile estimate, App 306a, it seems fair to assume EPA's estimate is too optimistic. In any event, at $2.5 million per mile, even the EPA's unrealistically optimistic estimate would still cost owners $12.5 billion to build pipelines over the next several years. App. 306a (solving for 5,000 miles at $2.5 million per mile). With the last eleven years' "14 percent" increase in CO_2 pipeline capacity to go on, App. 69a, banking on almost 100% more and several years faster is unjustified hope, not adequate demonstration. What's worse, EPA hasn't demonstrated how *non-regulated parties* will build out pipelines and sequestration facilities in time (unless EPA expects plants to do it).

Carbon use and storage is a problem, too. Recall that 95% of captured CO_2 is used for EOR. App. 308a. Yet EPA has no idea how strong that demand is. App. 308a. And

many States like California are banning or strictly regulating that use. App. 308a. It thus seems imprudent to suppose that many plants will be able to sell carbon. But the sequestration is not much better. Despite EPA's current Pollyannaish predictions, just a few years ago it admitted that 19 States have "either no/unassessed storage capacity or very limited storage capacity." App. 308a (cleaned up). And while new EGUs can "consider proximity and access to geologic sequestration sites," App. 77a, existing plants cannot. Even assuming site-specific testing proves all or even most of EPA's "potential" sites viable, App. 77a, someone must build facilities there before plants can use them. Yet EPA admits that "only sequestration facilities with Federal funding are currently operational." App. 78a. *If* industry chooses to build, EPA (or one of a few approved States) must also permit storage sites for Class VI injection or storage. App. 84a-85a. Yet EPA has issued just eight Class VI permits so far, and even with the new resources it promises to this "multidisciplinary process," it only "aims" to issue new permits in two years "when appropriate." App. 84a-85a. Add lead time to analyze and secure funding for dozens of permits needed for the Rule's success—not to mention years more to build, connect (new) pipelines, and ramp up operations—and EPA's storage assumptions are more "speculation or conjecture" than demonstration. *Lignite Energy Council*, 198 F.3d at 934.

Thus, EPA isn't offering "fair[] … project[ions]." *Portland Cement*, 486 F.2d at 391. It leaps from reasonable, record-grounded "projection[s]" into choosing "best systems" with lightning timelines and burdens "greater than the industry could bear *and survive*." *Portland Cement*, 513 F.2d at 508 (emphasis added). CCS has promise—but the "greater the imprint of the new technology," "the more demanding" Section 111 becomes when

reviewing its "capabilities." *Sierra Club* v. *Costle*, 657 F.2d 298, 348 (D.C. Cir. 1981). Looking "cumulative[ly]" at all the question marks of 90% CCS by 2032, *Nat'l Lime*, 627 F.2d at 431, the States will likely show it is far from "adequately demonstrated."

Given these costs, it's no surprise that EPA admits that the Rule works only if liberally lubricated with federal subsidies from the Inflation Reduction Act and Infrastructure Investment and Jobs Act. See, *e.g.*, App. 14a. But EPA never explains how it expects this money to be spent. And the GAO has recently told us that, historically, federal CCS subsidies have been terribly inefficient because agencies rush the process and choose high-risk ventures. App. 322a. What's more, funding often comes through 45Q tax credits, which are complex and difficult to get—especially for smaller companies; likewise, they are unforgiving of construction delays. App. 322a-323a. That's why hardly anyone uses them even though they've been around for 16 years. App. 323a. Despite this, EPA unjustifiably estimates their effectiveness roughly two to three times more aggressively than the already optimistic Joint Committee on Taxation and CBO's estimates. App. 323a.

Many of these issues would sink the 90% CCS best system on their own. But especially considered "cumulative[ly]," they establish that 90% CCS is not adequately demonstrated. *Nat'l Lime*, 627 F.2d at 431. Like the dry scrubbers in *Sierra Club*, CCS exposes the "inherent tension" in pushing "innovative" technology and "adequately demonstrated" technology. 657 F.2d at 341 n.157. As in *Sierra Club*, "no full scale" examples and open scalability questions "limit the overall acceptability of" CCS. *Id.* EPA has not met its heavy burden of showing how its "limited" data can "predict performance in full scale plants throughout the industry." *Id.* The "major uncertainty" around CCS's

nationwide commercial scalability means it is not one of those rare emerging technologies that could "conceivabl[y]" be adequately demonstrated. *Id.*

The intermediate "best system" of 40% natural gas co-firing (for plants closing between 2032 and 2039) suffers from similar problems. Only about a third of plants co-fire at all, and those few plants average about 4%, not 40%. See, *e.g.*, Otter Tail Power Co., Comment Letter on Proposed Rule for GHG Emissions Standards 30-32 (Aug. 8, 2023), https://tinyurl.com/2p88hefu. Transitioning to 40% co-firing would require plants to replace or upgrade the boiler and supporting systems—all expensive and technically challenging options. *Id.* The plants would then need a large, reliable supply of natural gas—a commodity already in high demand. *Id.* More natural-gas co-firing also means more natural-gas pipelines, yet EPA ignores the problems and time impossibilities from permitting, siting, financing, and eminent domain. And finally, EPA has not shown that co-firing is an available option for "the industry as a whole." *Nat'l Lime*, 627 F.2d at 431. So this "intermediate" option is no option at all.

2. Aside from the serious technical problems, the Rule also bungles the States' statutory authority to set existing sources' "standards of performance" and account for source-specific factors like a plant's "remaining useful life." 42 U.S.C. § 7411(d)(1). Reflecting Congress's directive that controlling air pollution "is the primary responsibility of States and local governments," *id.* § 7401(a)(3), "the States set the actual rules governing existing" sources, *West Virginia*, 597 U.S. at 710. State plans must "reflect[]" the emission limitations EPA's best system can achieve, 42 U.S.C. § 7411(a)(1), not mirror them. That, plus the promise EPA will permit source-specific tailoring, *id.* § 7411(d), means Section

111(d) "gives substantial latitude to the states in setting emission standards," *Nat'l-Southwire Aluminum Co.* v. *EPA*, 838 F.2d 835, 838 (6th Cir. 1988).

These provisions mark the daylight between EPA's primary responsibility for new-source regulation, 42 U.S.C. § 7411(b), and its secondary role for existing ones. But the Rule blurs it—States must rubber-stamp EPA's impossibilities and can't meaningfully mitigate harms the resulting harms. This dooms *all* the Rule's existing-source regulations.

First, the Rule makes EPA's "presumptive standards" virtual requirements. App. 170a. The extra-statutory presumptions go beyond ostensibly helpful shortcuts: EPA will not declare plans "satisfactory" if they fail to "achieve at least the level of emission reduction" the "presumptive standards" do. App. 170a. In fact, the Rule affirms States' "authority to deviate" from EPA's path only where they seek "to apply a more stringent standard of performance"—EPA will accept *those* standards without additional justification. App. 171a. Otherwise, instances warranting a different methodology "will be limited to anticipated changes in [plant] operation." App. 172a.

So the presumptive standards veer too close to unlawful direct regulation. While EPA may voice a "preferred approach" for state plans, it cannot erase the States' discretion by insisting on it. See *Train* v. *Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 69 (1975). Its role is to "guide States" in setting standards. *West Virginia*, 597 U.S. at 728 n.3; accord *Wyoming* v. *U.S. Dep't of the Interior*, 493 F. Supp. 3d 1046, 1071 n.23 (D. Wyo. 2020). Under the CAA, state plans need only "reflect[]" EPA's guidelines, not follow them lockstep, and EPA "shall permit" source-specific variances. 42 U.S.C. § 7411(d). Those statutory directives mean Section 111(d) "gives substantial latitude to the states in setting

emission standards." *Nat'l-Southwire*, 838 F.2d at 838. Yet without the "real choice" the statute affords, *Michigan* v. *EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000), the Rule makes the States agents instead of co-regulators.

EPA's role in approving "satisfactory" plans doesn't empower it to command and control the States, either. 42 U.S.C. § 7411(d)(2)(A). State tailoring isn't limitless. But neither is EPA's review. EPA may reject "only" unsatisfactory state plans. *Wyoming*, 493 F. Supp. 3d at 1071 n.23. And "satisfactory" is a low bar—it can mean "[a]cceptable," "[a]dequate," or "just good enough." *Satisfactory*, BLACK'S LAW DICTIONARY (12th ed. 2024). So EPA lacks broad power to reject state plans. Indeed, Congress gave it a *non*discretionary duty to "permit" the States' reasonable judgments. 42 U.S.C. § 7411(d).

Second, the Rule doubles down on EPA's wrongheaded approach to "remaining useful life" and "other factors." 42 U.S.C. § 7411(d)(1). EPA insists the Rule only repeats a new policy it issued elsewhere. App. 176a. Many of the States are challenging that policy, too. See *West Virginia* v. *EPA*, No. 24-1009 (D.C. Cir. filed Jan. 16, 2024). But EPA can't justify misreading Section 111(d) here just because it made the same error elsewhere first.

And it is error. For one thing, the Rule treats "remaining useful life" as a potential way to mitigate the presumptive standards' rigidity—if EPA agrees with the State's assessment, it might approve a variance. *E.g.*, App. 170a. EPA forgets States have authority to consider remaining useful life "in *applying* a standard of performance to any particular source," not just in setting it. 42 U.S.C. § 7411(d)(1) (emphasis added). Tailoring is a back-end failsafe to the standards' front-end regulation. In any case, the Rule leaves little room for source-specific discretion anywhere in the analysis. Only "fundamental

differences" satisfy EPA when a State tries to deploy discretion. App. 176a. The Rule permits deviation only to the extent "necessary to address the fundamental difference." *Id.* And despite making its presumptive standards near-binding, the Rule refuses to "provid[e] presumptively approvable circumstances or analyses" for source-specific considerations—suggesting few, if any, exist. App. 178a.

Inflexibility might be okay were EPA correct that Congress meant to let States account for "exceptional circumstances" only. App. 104a. But in a statute expressly protecting the States' pollution-management role, 42 U.S.C. § 7401(a)(3), Congress said EPA "shall permit" their source-specific judgments, *id.* § 7411(d). See also *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("shall" "normally creates an obligation impervious to judicial discretion"). So requiring States to give exceedingly persuasive reasons why they can exercise discretion Congress has already said EPA *must* allow is wrong. The Rule turns "shall" into a virtual "shall *not*," at least absent non-statutory, ill-defined, EPA-approved exceptional circumstances.

Rules that "overthrow" the CAA's "structure and design" are illegal. *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 321 (2014). This Rule's cavalier approach to Section 111's text shows it's one of them.

B. *West Virginia* v. *EPA* confirms the Rule is unlawful.

Leaving aside infidelity to what Section 111 says, the Rule also fails because of what the statute doesn't say. In considering EPA's 2015 Clean Power Plan, this Court said that sometimes even "a colorable textual basis" cannot justify regulation. *West Virginia*, 597 U.S. at 722. The Rule lacks even that—see above. But EPA's venture back into major-questions territory is another reason the States will likely win.

Contrary to the D.C. Circuit's order, App. 1a-3a, the Rule remains in *West Virginia*'s crosshairs. Contra App. 113a-114a. Addressing the same statute and same segment of power generation, this Court saw EPA's task as regulating the industry as it finds it—not remaking it by "direct[ing] existing sources to effectively cease to exist." *West Virginia*, 597 U.S. at 728 n.3. It meant fossil-fuel-fired power plants. Whether "it would be 'best' if coal made up a much smaller share of national electricity generation" is a "very different kind of policy judgment" than Section 111 allows. *Id.* at 728. Congress kept the question of "how much coal- based generation" should exist for itself. *Id.* at 729.

Nothing's changed to suggest the Court would view the Rule with a different eye. The Rule still involves issues of nationwide "economic and political significance," "compliance costs" are still prohibitive, EPA still lacks energy "expertise," Congress still hasn't legislated despite the "well known" issues at stake, and EPA still lacks "clear authorization" to act in its stead. *West Virginia*, 597 U.S. at 701, 714, 731; see also, *e.g.*, H.R. 2519, 117th Cong. (2021) (failed congressional attempt to impose CCS); H.R. 4535, 114th Cong. (2016) (same); S. 4280, 117th Cong. (2022) (same). Even so, the Rule would functionally and intentionally eliminate coal and other fossil fuel-fired source categories from the market. This case doesn't involve "incidental" effects. *Id.* at 731 n.4. It involves power regulation—something that does *not* "fall[] well within EPA's bailiwick." App. 2a. Indeed, in calling for co-firing or reductions in output in lieu of CCS, it even embraces the same "generation shifting" that was directly at issue in *West Virginia*.

But let's be clear: retirement will be the only real option for most facilities subject to the Rule. As explained above, most coal plants could not reach 90% capture by 2032 even

if money were no object. No commercial-scale facilities have reached that benchmark. And despite CCS's promise, too much still needs to be done—funded, permitted, built, tested, and deployed for the capture, transport, and storage phases—to meet the Rule's mandates. EPA knows it.

EPA is indifferent to that consequence because it thinks that coal plants are already retiring. See, *e.g.*, App. 89a-90a. But this regulation-by-nihilism is wrong; EPA's own estimates show many plants were slated to stay open. App. 26a. The Rule admits that modeling shows "*most sources* that install CCS [will] retire due to the costs of meeting" the Rule's standards by 2045. App. 114a (emphasis added). It admits that the Rule will kill all non-CCS coal by 2035 and produce a net loss of 32 coal GW by that same year:

	Year	Capacity (GW)	
		Updated Baseline	Integrated Proposal
Coal Coal with CCS	2028	100 0	99 0
Coal Coal with CCS	2030	60 9	44 12
Coal Coal with CCS	2035	33 11	0 12
Coal Coal with CCS	2040	28 8	0 9

Created using EPA, *Integrated Proposal Modeling and Updated Baseline Analysis*, Table 12, https://tinyurl.com/3xsprzv5 (July 7, 2023). At bottom, the Rule will drive retirements across the country—and much sooner. App. 842a-844a (Rule puts "in jeopardy" *all* West Virginia coal plants not slated for pre-2039 retirement); see also App. 350a-354a; App. 382a; App. 401a-402a; App. 423a; App. 432a, 435a, 440a; App. 510a-512a; App. 814a-815a, 818a; App. 851a-852a; App. 880a-881a.

EPA would sidestep *West Virginia* because CCS is a "traditional, add-on emissions control" instead of "generation shifting," App. 113a-114a, and the D.C. Circuit thought must the same, App. 2a. But even if all emission controls fell under EPA's "bailiwick" under Section 111, App. 2a, this Rule stretches far beyond that. Rather, it mandates a massive pipeline network and off-site storage—neither of which is an emission "add-on control"—asserting an "unprecedented" new authority that changes from "one sort of scheme of regulation into a different kind." *West Virginia*, 597 U.S. at 728. It wants the power sector to foot the bill for a whole new infrastructure.

Further, although *West Virginia* didn't resolve if EPA may ever regulate beyond the source, 597 U.S. at 734, it also didn't hold that "traditional" or facility-specific measures never involve major questions. Rather, it's the "basic and consequential tradeoffs" at stake that make something "major." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2375 (2023) (cleaned up). And *West Virginia* considered the 2015 rule's effects, not its nomenclature: The "emissions ceilings [were] so strict that no existing coal plant" could achieve them without shifting generation or stopping operations. 597 U.S. at 714.

That's why it doesn't matter that EPA took care not to say the quiet part too loudly this time. It knows the Rule will mean "less electricity" from "coal- fired power plants" and more from "other sources" instead. App. 113a. "What cannot be done directly cannot be done indirectly." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (cleaned up). Remember that this Court held the first time around that although EPA's view of "system" was in the realm of "definitional possibilities," "precedent counsel[ed] skepticism" toward "empower[ing]" EPA that enormous way. *West*

Virginia, 597 U.S. at 732. Likewise, allowing EPA to employ an elastic view of "adequately demonstrated" and "achievable" would enable it to "force a nationwide transition away from the use of coal" that Congress has not clearly authorized. *Id.* at 735. Indeed, by making outright closure the inevitable outcome for so many facilities here, this Rule might be even more pernicious than the version the Court grappled with in *West Virginia*.

Several of the cases EPA cites in the Rule confirm that this closure-first strategy is unlawful. *Massachusetts* v. *EPA*, for example, held that the "unambiguous" statutory term "any air pollution agent" empowered EPA to "*regulate*" pollutants—unlike the more serious power to "ban." 549 U.S. 497, 529, 531 (2007) (emphasis in original). And *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011), didn't affirm EPA's power to regulate despite massive industry and economic shifts. Quite the opposite: it "said nothing about the ways in which Congress intended EPA to exercise its power." *West Virginia*, 597 U.S. at 730. These cases confirm that, if businesses cannot comply at a reasonable (or any) cost, then EPA cannot hide behind vague "market forces" as the trigger for otherwise unanticipated retirements in the years ahead. App. 14a. In short, practical realities matter.

So the question stands: did Congress let EPA decide whether "it would be 'best' if coal made up a much smaller share of national electricity generation"? *West Virginia*, 597 U.S. at 728. And contrary to the D.C. Circuit's holding, which cast this lawsuit as a disagreement over technology, App. 2a, this issue raises questions of *statutory* interpretation. Whether EPA's "best systems" qualify as "adequately demonstrated" and "achievable" are *statutory* requirements, and whether this campaign tackles a major question, is different from the deferential arbitrary-and-capricious review the D.C. Circuit

discussed. App. 2a (suggesting that Applicants "dispute whether [EPA] acted arbitrarily and capriciously). While the Court could reject the Rule on the more prosaic statutory grounds above, the States will also likely prevail in showing EPA cannot set impossible-to-meet standards that drive regulated sources to close. Congress simply did not clearly authorize EPA to set standards that "direct existing sources to effectively cease to exist." *West Virginia*, 597 U.S. at 728 n.3.

II. The States will suffer irreparable harm without a stay.

The Rule will damage the energy grids, threatening dangerous, irreparable harm. *All* of it—its retirement-inducing CCS and co-firing mandates and its construction-stifling rules for new plants—injures the States.

1. Energy regulators and grid experts say reliability margins are painfully thin. *E.g.*, App. 434a, 438a, 441a (Midcontinent Independent System Operator); App. 780a-781a (North American Electric Reliability Corporation); App. 769a-771a (Electric Reliability Council of Texas). Just a few months ago, the PJM regional transmission organization warned that the Rule may "drive premature retirement of coal units that provide essential reliability services and dissuade new gas resources from coming online" "in the very years" demand increases will leave no capacity to spare. App. 872a-875; see also App. 446a-447a (forecasting upcoming Kentucky demand increase at "average of 1.5 percent per year"). Combined with other regulatory burdens adding to the supply-side crush, the grids cannot handle that loss. App. 357a-358a (Rule will cost Arkansas utility 335 megawatts on top of 1,168-megawatt loss from prior regulations); App. 784a (Rule-based retirements "are amplified by … other rules EPA has proposed or issued"); App. 325a (noting that EPA's other rules and copycat state policies are driving much of this crush (e.g., 25 of 40 retiring

GW in PJM's region)). EPA should have approached its task with particular caution considering how "losing even one or two" plants can be devastating. App. 777a-778a; see also App. 819a ("significant, adverse" consequences when Rule forces Virginia's two coal-fired plants offline). Instead, it imposed a Rule that will seriously and directly undermine grid reliability. App. 717a-725a (describing models showing capacity shortfalls from the Rule).

EPA's attack on fossil-fuel generation is unwise. Fossil fuels are essential to safely transition the grid to a higher percentage of renewables. App. 326a. More renewables means a higher percentage of intermittent, non-dispatchable generation. Grid reliability and safety demand this less predictable generation be counterbalanced by natural gas-fired plants, which use fast-start and quick-ramping capabilities to compensate for renewables' unpredictability. App. 326a. And coal plays a uniquely important role supporting the grid during extreme weather events. App. 326a. The Rule's attack on fossil-fuel-fired EGUs threatens the grid's safety and reliability. See also, *e.g.*, Mot. for Stay of Elec. Generators for a Sensible Transition at 27-36, No. 24-1128 (D.C. Cir. filed May 24, 2024), Doc. No. 2056364 (providing industry's perspective concerning the grave harms imposed during pendency of litigation).

EPA's approach to subcategorization threatens reliability, too. Traditionally, EPA regulated two categories of plants: baseload and peaking. Adding an "intermediate" level of operation, as the Rule does, will put many utilities in a bind. App. 327a. They will want to use their new simple cycle combustion turbines as a peaking resource—especially to comply with state regulations that require reliability and consistency. App. 327a. But they'll also try to avoid using a source so much that it moves from the peaking subcategory

into the intermediate subcategory. App. 327a. This rock-and-hard-place scenario will only become more common as more renewables and natural gas turbines come online. App. 327a. As Kentucky's Division for Air Quality told EPA: "It is impossible to anticipate … whether a unit is going to be 'in' or 'out' of the state plan as its capacity factor fluctuates between 48% and 52%. The practical aspects of how to enforce an 'in' and 'out' based upon capacity factor is unmanageable." Ky. Div. for Air Quality, Comment Letter on Proposed Rule for GHG Emissions Standards 7 (Aug. 14, 2023), https://tinyurl.com/7z74p7cc.

Make no mistake—these consequences are severe. Forced reliance on "less reliable sources" destabilizes the grids and pushes "major" rate hikes. App. 435a-439a; see also App. 740a-741a (saying the Rule will undermine Oklahoma's ability to build a "nimble and robust fleet"); App. 792a-794a (detailing categories of costs Rule will foist onto ratepayers). The Rule makes our residents "unnecessarily vulnerable to brownouts and blackouts," App. 384a—which can be deadly. See, *e.g.*, FERC, FERC-NERC-Regional Entity Staff Report: The February 2021 Cold Weather Outages in Texas and the South Central United States 9 (Nov. 16, 2021), https://bit.ly/3QEwO1w (reporting over 200 fatalities during winter storm, most "connected to the power outages"); see also App. 523a (CCS renders sources less reliable). Skyrocketing electricity rates threaten "businesses, jobs and even human health." App. 841a; see also App. 843a (West Virginia fossil power generation sector represents "$93,000,000 in annual wages"); App. 621a-622a (lignite industry generated "over $1 billion"). And the hundreds of millions of dollars in "stranded investments" when plants prematurely retire means residents' rates will go up to pay for deadweight plants *and* "billions of dollars in new investment"—all to keep the lights on. App. 854a; see App.

620a (recovering costs of lost power and abandoned investments will be passed to ratepayers); App. 499a-500a (Rule imposes billions in costs in Montana); App. 843a-845a (replacing coal-fired power in West Virginia would cost $39 to $129 billion); App. 424a. ("replacing lost capacity" costs "orders of magnitude [more] than" other "options").

Below, EPA brushed these reliability concerns away by saying that Rule-driven plant closures would be "incremental[]." C.A.EPA.Opp.103. But even if that turns out to be true, that reality still creates irreparable harm; a slow bleed can be just as deadly. And although EPA promised plants won't close sooner than "seven years from now," C.A.EPA.Opp.103, that assurance rings hollow when (as explained below) planning in this sector extends at least a decade.

2. Moving to the specifics, EPA mainly insists that not much happens for at least a year. But without a stay, States and others must make key decisions and take preliminary steps—and trigger all the costs and consequences that flow from them—now.

Although plants may not go offline tomorrow, the decisions leading there have begun and will not be unwindable. Given financing, permitting, and interconnection challenges, "[u]tility planning horizons extend" out "to a decade." App. 424a. So "[d]ecisions about whether plants can continue to operate" under the Rule "cannot be delayed." App. 382a; see also App. 436a (no "luxury of waiting for future developments before making decisions"); App. 862a-863a (possible "favorable future court ruling" doesn't change "need to begin planning" "immediately"); cf. App. 678a-683a (explaining "immediate, irreparable harms" for operator). Changed bargaining positions in view of the Rule are already "fundamentally disrupting" utilities. App. 680a-682a. Companies face "immediate

decisions" that "cannot be delayed." App. 385a; see also App. 485a-486a, 492a (entities have no "time to spare"). They "don't "have the luxury of waiting for" litigation to end before acting. App. 436a; accord App. 360a. They'll start spending long "before precise regulatory obligations are known." App. 418a; accord 357a-359a.

Even sources that have started already worry if they'll make the Rule's deadlines. App. 518a-519a, 521a, 525a-527a; App. 609a. For example, North Dakota companies—among the most CCS-experienced in the country—strongly agree. They'll have to start working "immediately" and simultaneously on *each* CCS phase, they say, to finish in time. App. 518a-519a, 521a, 525a-527a; App. 609a (Minnkota must "immediately begin taking steps" like "engineering studies, design studies, and purchase contracts" to identify the best compliance alternative); App 622a ($30 million acquisition decision "must be made now"). Really, industry should've already begun. App. 544a, 547a-549a. And perhaps most importantly, decisions about whether to elect retirement and forego the requirements entirely—that is, some of the most consequential decisions in the process—must be made within the two-year state submission plan window.

The experienced CCS entities also disagree with specific steps in EPA's timeline. One predicts that even ignoring the storage phase entities will have to begin working by January 2025. App. 564a-565a. Another said just EPA's FEED study estimates are off by 50%. Compare App. 593a, with C.A.EPA.Opp.99. EPA's total timeline is short by four years. App. 597a. There are so many extra steps and potential delays EPA never bakes into their calculations. App. 671a-672a. EPA admits that States and industry must work *simultaneously* because States need EGU details to effectively craft a SIP.

C.A.EPA.Opp.99. But its timeline ignores that fact. And it forgets that many States require *legislatures* to sign off on regulations. *E.g.*, App. 825a-826a. In short, States and industry are incurring costs far faster than EPA predicts.

We've seen this dynamic before: By the time this Court rejected another illegal rule in *Michigan* v. *EPA*, 576 U.S. 743 (2015), industry had made critical business decisions consistent with the rule. Pet. for Cert. at 23, *West Virginia* v. *EPA*, No. 20-1530 (filed Apr. 29, 2021). EPA celebrated how many regulated entities had been forced into compliance by the time the rule was overturned. *A Supreme Carbon Rebuke*, WALL ST. J. (Feb. 10, 2016, 7:09 PM), https://tinyurl.com/zwstzuw3. Agencies and utilities say the same is happening now. See, *e.g.*, App. 418a. Judicial review here could thus have no practical effect.

The D.C. Circuit thought these costs and immediate compliance efforts were unavoidable even *with* a stay. App. 2a. But it's hard to understand how that's so—in the unlikely event the Rule survives judicial review, entities trust tolling would be appropriate as a matter of basic fairness. See, *e.g.*, *Michigan* v. *EPA*, No. 98-1497 (D.C. Cir. June 22, 2000), Doc. No. 524995 (tolling the revised state submission deadline after the stayed rule survived judicial review). That's how it played out with the Clean Power Plan: sheltered by this Court's stay, essentially no State was concerned with submitting a plan on the original deadlines, and EPA never threatened anyone with findings of non-compliance as a result.

Aside from crushing and immediate planning costs, the Rule brings other irreparable harms, too. As "the object of" the Rule's requirements, *West Virginia*, 597 U.S. at 719 (cleaned up), the States must take steps now even while seeing its bad ends ahead. App. 737a (Oklahoma regulator must "begin working … immediately"). The Rule is

complex and state plans require many-faceted, multi-agency phases. *E.g.*, App. 413a-414a; App. 879a-881a. They take "hundreds of thousands of dollars" and thousands of personnel hours. App. 794a; see App. 389a-390a (Georgia's "near-term costs would be at least $683,484"); App. 564a-565a (North Dakota regulator will "dedicate at least 28,000 hours of staff time"). Given agencies' limited budgets, that time and money comes at the expense of other duties—including under the CAA. App. 389a-390a; App. 879a, 883a. And with a two-year deadline, States can't wait on litigation before getting to work on "the most complex, byzantine regulations" the agencies have seen. App. 830a; see also App. 372a-375a; App. 414a; App. 557a. They must devote time and money "start[ing] immediately." App. 389a; see also App. 554a, 557a-558a (North Dakota regulators must "begin immediately," and costs will "immediately begin to increase drastically"); App. 835a (West Virginia must "immediately invest time, effort and resources to develop a state plan"); accord App. 737a; App. 788a, 796a; App. 853a-854a.

State agencies have spent "[t]housands of hours of staff time and extensive monetary resources" "backtracking and undoing" other EPA rules where judicial relief came too late. App. 338a. And "when a plaintiff's alleged damages are unrecoverable, such as here, due to the sovereign immunity enjoyed by Defendants, courts have recognized that unrecoverable economic loss can indeed constitute irreparable harm." *Xiaomi Corp.* v. *Dep't of Def.*, No. 21-cv-280, 2021 WL 950144, at *10 (D.D.C. Mar. 12, 2021). Given this "irreparable harm of nonrecoverable compliance costs," success without a stay threatens an empty victory. *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 221 (1994) (Scalia, J., concurring in part and in the judgment).

Below, EPA dismissed the costs as "limited and reasonable." CA.EPA.Opp.114-15. And it appears the D.C. Circuit agreed. App. 2a. But the expert agencies doing the actual work say they're "immense," App. 349a; "significant," App. 376a-377a; App. 442a; App. 879a; and "substantial," App. 414a; App. 531a. Nor is the work typical of what's required in implementing other federal air-pollution rules. Contra C.A.EPA.Opp.114-15. The States have "never had to develop and implement a State Plan of this magnitude and complexity before." App. 389a; App. 554a, 556a (noting the "enormity of the task at hand" and the "tremendous undertaking" of complying). Apart from its technical complexity, the Rule requires state agencies, utilities, grid operators, and federal regulators to coordinate extensively. See, *e.g.*, App. 830a, 835a; App. 884a-885a. These wide-ranging consultations require agencies to decide on the availability of electricity affordability, generation portfolios, grid reliability, stranded investments, rate increases, and discern the Rule's effect on demographics, employment, economic development, and tax revenues. App. 370a; see also App. 413a-414a (predicting coordination between six agencies just within Indiana's executive branch). Wrangling these many interests—and getting legislative sign-off—will take at least a year beyond ordinary rulemaking calendars. App. 429a; App. 735a-736a. Even EPA's declarant admitted that implementing the Rule will be uncommonly complicated. C.A.EPA.Opp.Ex.1 ¶ 86.

These factors explain why specific costs dwarf EPA's cumulative $12 million guess. *E.g.*, App. 338a ("[t]housands of hours of staff time and extensive monetary resources"); App. 389a-390a (~$700,000 and another 1.5 FTEs); App. 556a-557a ("significant additional resources" of about 4,000 staff hours); App. 654a (estimating 2,700 hours and $2 million);

App. 831a ($10 million); App. 863a-865a (a million dollars and multiple FTEs during this legislative cycle). EPA criticized West Virginia's numbers as too high, C.A.EPA.Opp.116, but West Virginia was the only State to submit a state plan under the last set of rules, App. 52a—so its agencies know what to expect. And even "low" numbers are significant because they often represent a "substantial portion" of agency resources for States with budgets far lower than the federal government's. App. 881a-882a.

EPA also wrongly argued that state "administrative costs" from "changing" federal programs rarely justify equitable relief. *Ledbetter* v. *Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers). Little authority supports that new rule. Take *District of Columbia* v. *U.S. Department of Agriculture*, 444 F. Supp. 3d 1, 33 (D.D.C. 2020), where the court found "significant administrative burdens," "staffing," and "expanding employment costs" related to SNAP changes were irreparable harm. As here, the States' declarations asserted that States would have to "allocate" significant resources to staff these changes. *Id.* at 35. That the States were already implementing the statute didn't matter. *Id.* at 35-37 (noting the harm wasn't self-inflicted). Providing "representative estimates of the monetary costs"—a couple million per State—was enough. *Id.* at 37-39. So too here. The States have shown that the Rule will cost them far more than EPA predicts, and those expenses start today. That alone justifies a stay.

3. The Rule also invades the States' sovereignty—"intangible harm[]" that cannot be redressed. *Kentucky* v. *Biden*, 23 F.4th 585, 611 n.19 (6th Cir. 2022). States have "sovereign interests" in regulating emissions and crafting "public polic[y]." *Kansas* v. *United States*, 249 F.3d 1213, 1227 (10th Cir. 2001). And here specifically, "inver[ting]"

the CAA's "federalism principles" is irreparable injury. *Texas* v. *EPA*, 829 F.3d 405, 434 (5th Cir. 2016).

The D.C. Circuit dismissed this harm, holding that States can't be hurt by having to immediately start drafting state plans because nothing happens other than a federal plan being implemented if the States don't timely submit. App. 2a. EPA and the D.C. Circuit seem to think the States should just spare themselves the trouble and wait to begin drafting. In other words, they say the States should let EPA take the wheel during litigation. But while EPA and the D.C. Circuit may not think much of giving up regulatory power in an area of traditional State authority, that kind of sovereignty loss is quintessential irreparable harm. See *Abbott* v. *Perez*, 585 U.S. 579 602 n.17 (2018) (holding that a State's inability to enforce its own laws is a well-established irreparable injury); see also App. 670a (explaining loss of sovereignty); accord App. 771a; App. 816a-817a. Even a loss of sovereignty for one day is an affront to our constitutional structure; there's a reason, after all, why States so aggressively resist federal implementation plans in the CAA context. And even a temporary loss of sovereignty shouldn't be countenanced, lest the federal government be tempted to take small bites of state power whenever it can. Cf. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (loss of a constitutional right for "even minimal periods of time" is irreparable harm warranting relief).

What's more, the lower court underappreciated the damaging effect of an untimely submission. If a State does not submit a plan in time to hit EPA's deadline, it might be *years* before EPA reviews and approves a late-filed state implementation plan down the road. See, *e.g.*, *Ohio* v. *EPA*, 144 S. Ct. 2040, 2049 (2024) (describing how it took years for

EPA to act and finalize decisions on ozone good-neighbor state implementation plan submissions). By that point, sheer inertia will likely dissuade EPA from lifting its own plan out of deference to the States.

The Rule also injures States' quasi-sovereign interests. States have an interest in "challeng[ing] actions whose clear and direct effects would be the substantial disruption of the state's internal economy and impairment of the well-being of the citizenry." *Pennsylvania by Shapp* v. *Kleppe*, 533 F.2d 668, 674 (D.C. Cir. 1976); see also, *e.g.*, *New York* v. *Microsoft Corp.*, 209 F. Supp. 2d 132, 150 (D.D.C. 2002). Coal and natural gas are foundational to most States' economies and energy production. The Rule threatens that foundation. EPA-caused costs and plant closures limit state and local budgets and long-term energy-sector planning. Economic development and growth will be stymied. And none of that can be unwound after the fact. All this comes at a time when many of these same States are reeling from other EPA rules that likewise threaten hundreds of thousands of jobs. See generally, *e.g.*, OXFORD ECONOMICS, U.S. AIR QUALITY STANDARDS AND THE MANUFACTURING SECTOR (Apr. 2023), https://tinyurl.com/44tre397 (describing economic impact of EPA's recent $PM_{2.5}$ rule).

4. Below, EPA offered two generalized arguments in response to these many irreparable harms, both of which fail. EPA first insisted the timeframe for irreparable harm is a year because litigation supposedly won't take longer. C.A.EPA.Opp.96. But the *full* timeline for potential review must count. It's not "speculative" to consider this Court's review, C.A.EPA.Opp.96, as this Court intervened both times earlier rules went up. And EPA's one-year estimate in the D.C. Circuit is bullish. The D.C. Circuit put a challenge in

abeyance 18 months after the first rule came down. Order, *West Virginia* v. *EPA*, No. 15-1363 (D.C. Cir. Apr. 28. 2017). Its decision on the second took 18 months. *Am. Lung Ass'n* v. *EPA*, 985 F.3d 914, 937 (D.C. Cir. 2021), rev'd and remanded, *West Virginia*, 597 U.S. 697. And then, of course, there's the process for actually seeking, obtaining, briefing, and arguing over review in this Court. This rulemaking's interconnected, years-long history confirms that the Court should weigh harms beyond just a year.

Second, EPA argued that the Court must defer to its record findings whenever they "intertwine[] with" evidence of irreparable harm unless they're arbitrary and capricious—and so the court should defer to its insistence that the Rule is harmless in the near term. C.A.EPA.Opp.96-97. EPA gives zero support for trying to subtly shift the standard of review by importing any merits-stage deference into the irreparable-harm analysis. EPA isn't owed the deference of a trial court; it's a creature of Congress and so is given exactly the deference Congress wants. And Congress hasn't extended that deference past the merits. See 5 U.S.C. § 706. That's why this Court didn't suggest it ignored the parties' declarations when it corrected the D.C. Circuit's last failure to issue a stay. *West Virginia*, 577 U.S. 1126. And the cases EPA cited below don't say otherwise. *American Electric Power*, 564 U.S. 410, isn't about equitable relief. And *South Bay* dealt with an injunction's "significantly higher justification than a request for a stay" at a time local officials were "actively shaping their response to changing facts on the ground." *S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613-14 (2020).

Anyway, the broad, generalized findings EPA made in the Rule are useless for the irreparable-harm analysis because irreparable harm is a party-specific inquiry. The Rule

predicts only sweeping averages—it says nothing about *specific* businesses' and States' costs. Last, but not least, EPA hasn't even tried to rebut the movant-specific harms the record shows are "likel[y]." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). A kneejerk mistrust of Applicants' estimates—especially when EPA so blindly trusted company press releases in forming this Rule, see, *e.g.*, 89 Fed. Reg. at 33,294—isn't enough. Yet that's all EPA offers, and it's insufficient. See, *e.g.*, *Sierra Forest Legacy* v. *Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011) ("If the federal government's experts were always entitled to deference concerning the equities of an injunction, substantive relief against federal government policies would be nearly unattainable.").

III. Other parties' and the public's interest favor a stay.

The remaining factors support a stay, too. Keeping the status quo would not harm other parties. EPA's actions belie any emergency: it issued the Rule almost two years after *West Virginia*. Considering how EPA stopped defending the prior administration's rule well before then, Br. for the Fed. Resps., *West Virginia* v. *EPA*, No. 20-1530 (D.C. Cir. Jan. 18, 2022), that delay is inexplicable.

Any climate-based claims don't undercut relief. EPA admits that coal-based generation will fall from 181 GW in 2023 to 52 GW in 2035 without the Rule; "it is likely that many other[]" coal plants retirements will take place, too. App. 90a. EPA also trumpets how the "power sector achieved a deeper level of reductions" than the Clean Power Plan forecast while that rule was stayed. App. 27a ("[E]ven in the absence of Federal regulations," CO_2 emissions fell by "nearly 36 percent" below 2005 levels—nearly "a decade ahead" of EPA's schedule.); accord Am. Petroleum Inst., Comment Letter on Proposed

Rule for GHG Emissions Standards 30 (Aug. 18, 2023), https://tinyurl.com/msdt4zrj; App. 742a-743a. Today, nearly 20 States have long implemented their own laws and regulations governing GHG—from statutorily mandated reductions to market-based policies to regional agreements. NCSL, *Greenhouse Gas Emissions Reduction Targets and Market-based Policies*, https://tinyurl.com/yuzyvjut (Sept. 5, 2023). A suite of other federal GHG-related rules applies, too, including the recent methane, light-duty vehicles and heavy-duty trucks, and hydrofluorocarbons rules, among others. EPA, *Climate Change Regulatory Actions and Initiatives*, https://tinyurl.com/yeytuctx (Feb. 1, 2024). Beyond that, "EPA's asserted injury" was "unconvincing" where a rule "would not reduce emissions for at least three years." *Texas*, 829 F.3d at 434. Even more with compliance deadlines 7.5 years out.

On the last factor, there is "no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S.* v. *Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). In contrast, there's strong public interest in respecting the APA's requirements. See *R.I.L-R* v. *Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015). The public is "particular[ly]" interested in preserving federalism's "constitutional balance." *Withrow* v. *Williams*, 507 U.S. 680, 687 (1993) (cleaned up). It's also strongly interested in cheap, reliable electricity. If a source's ability to "provide power to … homes, farms, businesses and industries … is imperiled, so may be its ability to fulfill its mission to the public." *Hoosier Energy Rural Elec. Coop., Inc.* v. *John Hancock Life Ins.,* 588 F. Supp. 2d 919, 934 (S.D. Ind. 2008). "[A] steady supply of electricity during the summer months, especially … air conditioning to the elderly, hospitals and day care centers, is critical." *Sierra Club* v. *Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999); see *Tri-State Generation & Transmission Ass'n* v. *Shoshone River*

Power, Inc., 805 F.2d 351, 357 (10th Cir. 1986) (public interest in residents not "los[ing] their source of electric power"). The same goes for cold months, when fossil-fuel EGUs are crucial to keeping furnaces on. But all this is imperiled, and the grid's reliability threatened, if the Rule takes effect. See Elec. Power Supply Ass'n, Comment Letter on Proposed Rule for GHG Emissions Standards 4-5, 16 (Aug. 10, 2023), https://tinyurl.com/34kdbbsr.

A stay is justified even by EPA's telling. Emission reductions won't start until at least 2028, and EPA insisted below that the litigation here will end before compliance burdens kick in. C.A.EPA.Opp.96. Expedited briefing has already been ordered. App. 2a. EPA can't have it both ways: If Applicants aren't harmed because there's little to do in the short term, then the public won't be harmed by a stay formalizing that situation. The D.C. Circuit ignored those truths. The Court now has a chance to make the right equitable call.

* * * *

The Rule will impose serious, irreversible harms on States, producers, consumers, and others involved in our nation's critical power industry. It forces producers to decide between launching a Hail Mary bid to squeak by under a painful new regime or just bowing out of the game entirely. A few years ago, the Fifth Circuit stayed a rule likely to destabilize the grid from coal plant closures because of painful choices like these. *Texas*, 829 F.3d at 434. The Court stayed *this* Rule's precursor the same year, presumably for much the same reason. *West Virginia*, 577 U.S. 1126. The time has come for a repeat performance.

CONCLUSION

This Court should stay the Rule pending resolution of the merits, including through the resolution of any petition for certiorari.

Respectfully submitted.

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