No. 24A106

IN THE
SUPREME COURT OF THE UNITED STATES

ELECTRIC GENERATORS FOR A SENSIBLE TRANSITION,

Applicant,

v.

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

Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING DISPOSITION OF PETITION FOR REVIEW

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLISON D. WOOD
MAKRAM B. JABER
AARON M. FLYNN
MCGUIREWOODS LLP
888 16th Street NW, Suite 500
Black Lives Matter Plaza
Washington, DC 20006
(202) 857-2420

PAUL D. CLEMENT
Counsel of Record
C. HARKER RHODES IV
NICHOLAS A. AQUART*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Applicant Electric Generators for a Sensible Transition

August 23, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

Only two years ago, this Court made clear that Congress has not granted EPA the authority to "substantially restructure the American energy market." *West Virginia v. EPA*, 597 U.S. 697, 724 (2022). Instead of respecting that ruling or obtaining new authority from Congress, EPA has viewed that ruling as an obstacle to be circumnavigated, relying on the same statutory authority to set new emissions standards that aim to achieve the same forbidden generation-shifting result. 89 Fed. Reg. 39,798 (May 9, 2024) ("Rule"). The sole difference is that EPA now seeks to reach that result indirectly rather than directly, by setting standards that cannot be achieved through any existing adequately demonstrated technology. And one of EPA's new standards is not even indirect; it simply demands that coal plants convert to 40% natural gas. That modest variation in approach should not change the outcome. Just like the Clean Power Plan, EPA's renewed effort to transform the Nation's energy industry exceeds its statutory authority under §111 of the Clean Air Act. And just like the Clean Power Plan, EPA's renewed effort to dictate fuel choice and phase out disfavored generation should be stayed pending judicial review.

EPA's opposition only confirms that a stay is warranted. The agency does not contest the Rule will have sweeping economic impact and will substantially shift the Nation's overall mix of electric generation; it argues only that the major questions doctrine should not apply because the Rule purports to rely on technology-based standards rather than openly mandating generation-shifting. But that is not even true as to the 40% "co-firing" requirement—a euphemism for a mandate that coal plants convert to natural gas for nearly half their heat input—and beside the point

in all events. Every major questions case involves an agency purporting to ground transformative change in existing statutory authority. The fact that EPA's last power grab was unusually overt does not give EPA a pass to achieve the same generation-shifting end via more conventional means. As the Court has already recognized, EPA lacks the statutory authority to tackle pollution by restructuring the Nation's energy sector and generation mix. This latest effort may be slightly more subtle, but it is no less unlawful. If the federal government is going to require a fundamental shift in the Nation's generation mix or phase out coal generation, that policy change must come from Congress, not unelected officials at EPA.

Even setting aside the major questions doctrine, the Rule cannot be reconciled with the requirements of §111. After convincing the D.C. Circuit to deny a stay based on circuit precedent that allowed EPA to rely on projections rather than technology that has already been adequately demonstrated, EPA now shifts gears and concedes that the statute limits the agency to imposing a system of emission reduction that "has been adequately demonstrated" today, not one that might be demonstrated in the future. 42 U.S.C. §7411(a)(1). That concession is fatal, as EPA still cannot point to *any* power plant that has ever demonstrated carbon capture and storage with a 90% carbon dioxide capture rate ("90% CCS") on a consistent facility-wide basis. EPA's reliance instead on experimental uses, planned future projects, and vendor promises is nearly the opposite of adequate demonstration. EPA also has no meaningful response to the extensive (and expensive) infrastructure that would have to be built to implement 90% CCS, which confirms that its standards based on that

technology are not "achievable" under §7411(a)(1). EPA's attempts to justify its 40% co-firing standards are even less successful; not only are those standards based on direct generation-shifting, but they are unachievable as well, which EPA implicitly recognizes by giving coal plants an "irrevocable" retirement out from this infeasible conversion. EPA's effort to pass this off as "regulatory flexibility" ignores that this retirement option must be invoked early and irrevocably. For any and all of these reasons, Applicant and the many others challenging the Rule are overwhelmingly likely to succeed on the merits.

The remaining stay factors are amply satisfied. As Applicant's members have attested in their declarations, they face immediate and devastating impacts if the Rule is not stayed, including significant compliance costs and the need to make imminent and irreversible decisions about plant closures and replacement generation. EPA's contrary assertion that electric generators need do nothing at all to comply with the Rule for nearly a year, and nothing but minimal "feasibility work" for another year after that, is neither correct nor entitled to any deference. And given the concrete harms that the Rule poses to the public at large in the form of higher electricity prices, reduced grid reliability, and job losses, the balance of harms and the public interest tip heavily in favor of a stay. This Court should grant the application and stay the Rule pending judicial review.[1]

---

[1] EPA asserts that a party seeking a stay from this Court "must also show a reasonable probability that the Court would grant certiorari." U.S.Opp.13. That is incorrect. *See, e.g.*, *Ohio v. EPA*, 144 S.Ct. 2040, 2052 (2024). In any event, if the

REASONS FOR GRANTING THE APPLICATION

I. The Rule Exceeds EPA's Statutory Authority And Contravenes The Clean Air Act.

A. Congress Has Not Granted EPA the Authority to Restructure the Nation's Overall Mix of Electricity Generation.

This case "is a major questions case." *West Virginia*, 597 U.S. at 724. Like the Clean Power Plan, the Rule affects "a significant portion of the American economy," *id.* at 722, targets an industry that is "among the largest in the U.S. economy, with links to every other sector," *id.* at 745 (Gorsuch, J., concurring), and "require[s] 'billions of dollars in spending' by private persons or entities," *id.* at 744. And like the Clean Power Plan, allowing the Rule to stand would represent "a 'transformative expansion in [EPA's] regulatory authority,'" enabling EPA to "restructur[e] the Nation's overall mix of electricity generation" by the facile expedient of mandating coal plants to either shift nearly half their heat input to natural gas, comply with emissions standards that disfavored sources cannot meet, or commit to retire by 2032. *Id.* at 720, 724 (majority op.). As this Court explained just two years ago, Congress simply did not task EPA with "balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy." *Id.* at 729. Those "basic and consequential tradeoffs" are instead "ones that Congress"—representatives of the People, including people living in states with important coal and gas resources—"would likely have intended for itself." *Id.* at 730.

D.C. Circuit were to uphold the Rule, this Court would likely grant certiorari for the same reasons as in *West Virginia*.

1. EPA does not dispute the vast economic significance of the Rule or its "substantial aggregate costs on regulated entities." U.S.Opp.21-22. Instead, EPA dismisses those costs as not "unusually large within the specific context of power-plant regulation" and insists that "cost alone does not trigger major-questions analysis." U.S.Opp.21. But the fact that this Court "often resolves multibillion-dollar cases without invoking the major-questions doctrine," U.S.Opp.21, simply reflects that Congress sometimes expressly charges an agency with financially consequential decisions. And this Court has already held that the financially consequential decisions concerning the optimal mix of generation sources and phasing out fossil generation are not ones that Congress has granted to EPA. *West Virginia*, 597 U.S. at 728-30. The financial costs of those weighty and controversial decisions are just one factor that this Court has pointed to in definitively deciding that these issues lie beyond EPA's ken. *See id.*; *accord, e.g.*, *Biden v. Nebraska*, 143 S.Ct. 2355, 2373 (2023) (agency action whose "economic and political significance" was "staggering by any measure" plainly "triggered analysis under the major questions doctrine"); *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 594 U.S. 758, 764 (2021) (per curiam) (relying on "economic impact" in finding the major questions doctrine applicable).

Costs aside, EPA never disputes that the Rule would "substantially restructure the American energy market"—precisely what *West Virginia* held EPA lacks the authority to do. 597 U.S. at 724. Instead, EPA argues that all that matters is *how* it goes about restructuring the market, such that it is only prohibited from using the *direct* "generation-shifting approach that the Court disapproved in *West Virginia*,"

not from reaching the same result through a purported "source-based approach," even one requiring thousands of miles of new pipelines and vast storage sites. U.S.Opp.14. Because EPA has opted for the latter approach, the agency claims, neither the major questions doctrine nor *West Virginia*'s clear limits on EPA's authority have any application. *See* U.S.Opp.15, 20-21; States.Opp.18-19; Power.Cos.Opp.7-8.

That narrow reading of *West Virginia* misses the mark. Every one of this Court's major questions decisions involved an agency that purported to ground its overreach in existing statutory authority. *MCI Telecommunications Corp. v. AT&T Co.* purported to involve just another detariffing, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.* purported to involve just another drug regulation, 529 U.S. 120 (2000); and so on down the line. The fact that EPA's last overreach was unusually unsubtle does not give it license to achieve the same forbidden generation-shifting result via a purported exercise of more ordinary statutory authority. The fundamental problem with the Clean Power Plan was not that it relied on a novel approach to standard-setting, but that it set standards that would "forc[e] a shift throughout the power grid from one type of energy source to another." *West Virginia*, 597 U.S. at 727-28; *see id.* at 714 (explaining that the Clean Power Plan's standards were "so strict that no existing coal plant would have been able to achieve them" without engaging in generation-shifting). This Court rejected that claim of "unprecedented power over American industry," explaining that Congress had not tasked EPA with "deciding how Americans will get their energy." *Id.* at 728-29. That reasoning does not depend on whether EPA tries to impose its decision about how

Americans will get their energy through an explicit generation-shifting mandate or through indirect "technology-based" standards. *Contra* U.S.Opp.15. And the Rule at issue here does both—explicitly requiring many coal plants to shift 40% of their generation to natural gas, or to comply with impossible technology-based standards that effectively force early retirements and radically shift the generation mix across the energy sector.

2. EPA argues that courts "generally must accept 'an agency's stated reasons for acting,'" and so the Rule's stated goal of reducing emissions should make it immune to major questions scrutiny because reducing emissions generally falls within EPA's statutory authority. U.S.Opp.16 (quoting *Dep't of Com. v. New York*, 588 U.S. 752, 781 (2019)); *see* U.S.Opp.16-17 (arguing that the major questions doctrine does not apply because "[i]n promulgating the Rule … EPA stated that the Rule 'is not directed at improvement of the overall power system'" (quoting 89 Fed. Reg. at 39,899)); Power.Cos.Opp.9-10. That is a pure non sequitur. Everyone in *West Virginia* understood that shifting the generation mix in the Nation's energy sector would impact emissions; indeed, that was the point of the Clean Power Plan, *see* 80 Fed. Reg. 64,662, 64,662-63 (Oct. 23, 2015). The problem was that EPA's more modest statutory mission is to address the emissions of the Nation's existing mix of generation sources, not to attack the perceived source of the problem by restructuring the national economy or the energy sector. The Rule here runs afoul of that fundamental limitation.

3. EPA contends that there is nothing special about the Rule, because all emissions standards "impose some costs on regulated plants" and so "may prompt some plants to close or reduce their operations," meaning that all emissions standards may have some effect on the nationwide generation mix. U.S.Opp.17; *see* Power.Cos.Opp.8-9. But as in *West Virginia*, there is an "obvious difference" between standards that "may end up causing an incidental loss of coal's market share" and standards that will "restructur[e] the Nation's overall mix of electricity generation." 597 U.S. at 720, 731 n.4; *see id.* at 730-31 (rejecting EPA's asserted "authority to require a large shift from coal to natural gas, wind, and solar"). Here, the Rule underscores that there is nothing incidental about its effect on the generation mix, as it effectively mandates partial conversion from coal to gas and envisions (and locks in) forced retirements. Like the Clean Power Plan, the Rule here is anything but "just business as usual," and the dramatic effects it will have on nationwide energy markets are anything but "incidental." *Id.* at 731 n.4.

4. As emphasized, EPA's overreach in the Rule is not even disguised when it comes to the 40% natural gas co-firing standard, which literally relies on generation-shifting as EPA's purported "best system of emission reduction." *See* 89 Fed. Reg. at 39,801, 38,841. That cannot remotely be reconciled with *West Virginia*. *See* 597 U.S. at 728 n.3 ("doubt[ing]" that EPA could "simply requir[e] coal plants to become natural gas plants"); Appl.21. EPA claims again that *West Virginia* is satisfied as long as the system "operates at the level of an individual facility rather than at the grid level," U.S.Opp.19, but *West Virginia* made clear that even at the facility level,

EPA cannot require a plant "to effectively cease to exist" or to transform into one powered by a different fuel. 597 U.S. at 728 n.3. Indeed, EPA ultimately concedes the point, admitting that it "could not carry fuel-switching to the point of … requiring that an existing power plant effectively become a different kind of plant." U.S.Opp.19. But *West Virginia*'s reasoning is not limited to generation-shifting mandates that require complete transformation, *contra* U.S.Opp.19 (misreading 597 U.S. at 728 n.3); a mandate to shift 40% of a coal plant's generation to natural gas is no more defensible than mandating a 51% or 100% shift. It is still a naked generation-shifting mandate, and it is still forbidden by *West Virginia* and the major questions doctrine.[2]

5. Given the economic significance and transformative nature of the power it claims, EPA needs "more than a merely plausible textual basis" for its asserted authority; instead, the agency must point to "clear congressional authorization" for its action. *West Virginia*, 597 U.S. at 723. EPA cannot do so here—and indeed, it does not even try. *See* U.S.Opp.13-22 (never asserting clear congressional authorization). As in *West Virginia*, EPA's general statutory authority to set emissions standards does not clearly authorize it to set standards that would substantially restructure the American energy market. 597 U.S. at 732-35. Instead,

---

[2] While *West Virginia* noted that EPA itself had described "fuel-switching" as a "traditional air pollution control measure[]," the Court said nothing remotely approving of that approach. 597 U.S. at 727. Instead, the Court specifically rejected the assertion that EPA could rely on fuel-switching to force coal plants to become natural gas plants. *Id.* at 728 & n.3; *contra* U.S.Opp.19; States.Opp.18.

"[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *Id.* at 735. Because no such clear delegation exists here, the Rule cannot stand.

B. The Rule Cannot Be Reconciled with Section 111's Requirements.

1. 90% CCS has not been "adequately demonstrated."

By its plain text, §111 requires a system of emission reduction that *already* "has been adequately demonstrated"—not one that EPA believes will be or may be adequately demonstrated in the future. *Id.*; *see Carr v. United States*, 560 U.S. 438, 448 (2010) ("Congress use[s] the present perfect tense to 'denot[e] an act that *has been completed*.'" (emphasis added) (citation omitted)). That statutory language forecloses the Rule's selection of 90% CCS as a best system of emission reduction. While that approach may be a promising avenue for future emission reduction efforts, it is not adequately demonstrated today. On the contrary, EPA's opposition confirms that it cannot point to a single full-scale facility that has *ever* achieved a consistent 90% capture rate—which is the standard that EPA now seeks to impose on *every* existing coal plant that intends to operate past 2038 and *every* new gas plant that intends to generate more than 40% of its capacity. The limited experimental results that EPA cites to justify that standard only underscore that adequate demonstration is lacking and that the agency's approach cannot be squared with the statutory text.

1. EPA recognizes—in a shift from its position below—that the "plain text" of §111 requires that the technology EPA selects as its system of emissions reduction must "*currently* be demonstrated," not that it be adequately demonstrated at some point in the future. U.S.Opp.30 (quoting 89 Fed. Reg. at 39,830); *cf.* U.S. C.A.Br.38-

39 (asserting based on D.C. Circuit precedent that adequate demonstration can be based on a "reasonable projection of what can be achieved" in the future by "extrapolating from reliable data"). That concession creates obvious problems for EPA given the experimental nature of the system that EPA has mandated and the reality that no plant today operates with 90% CCS.

Those problems are exacerbated in the post-*Chevron* world where claims to agency deference to second-best constructions of statutes no longer carry the day. EPA tries to revive a plea for deference by claiming that §111 "'expressly delegate[s]' to EPA the responsibility to judge adequate demonstration." U.S.Opp.24-25 (quoting *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2263 (2024)). But even when a statute "delegates authority to an agency," courts must still "independently identify" and "police the outer statutory boundaries of those delegations," to "ensur[e] that the agency acts within" its authority. *Loper Bright*, 144 S.Ct. at 2268, 2273. And the whole point of the "adequate demonstration" language is to focus the agency and reviewing courts on what has been adequately demonstrated in the real world today to guard against mandating the future or imposing aspirational standards in a mandate-it-and-they-will-comply manner. The question whether a technology that has never been implemented anywhere and has been unable to sustain the mandated levels even in experiments has been "adequately demonstrated" is a question of statutory interpretation, not a question of agency discretion.

2. EPA's reliance on 90% CCS as a best system of emission reduction fails the statutory text under any standard. EPA begins by arguing that "carbon capture writ

large has been adequately demonstrated," because the technology "was patented nearly 100 years ago in the 1930s" and "has been used in a variety of industrial applications." U.S.Opp.26; *see* NGOs.Opp.9-11. But the Rule is not based on "carbon capture writ large," or on 1930s-era carbon capture technology; it is based on *90% CCS*, which EPA does not dispute has never been consistently achieved at any full-scale facility. EPA cannot show adequate demonstration of the technology selected in the Rule by relying on the demonstration of its Depression-era predecessor.

As to 90% CCS for coal plants, EPA relies on three facilities that it claims have "already achieved" "the 90% rate required by the Rule": Petra Nova, Plant Barry, and Boundary Dam Unit 3. U.S.Opp.27; *see* NGOs.Opp.12-15. None comes close to providing adequate demonstration of 90% CCS.

Petra Nova operated for only three years, 89 Fed. Reg. at 39,849-50, and was offline with technical problems for more than a third of that time, NRECA Comments at 11 (EPA-HQ-OAR-2023-0072-0770). EPA's view that the "challenges faced by the plant could be overcome," U.S.Opp.37, cannot substitute for adequate demonstration *today*, which EPA concedes is what the statute requires, U.S.Opp.30. Moreover, Petra Nova came nowhere near achieving "92.4 percent" capture of the whole plant's carbon emissions, *contra* U.S.Opp.27; instead, it was a slipstream system designed to capture only 33% of the carbon emissions from one of the plant's four units, and it fell short of even that goal. *See* 89 Fed. Reg. at 39,850. EPA also ignores emissions from the "auxiliary" unit used to power its capture equipment, further reducing the total capture rate. *See id*. Overall, applying the continuous, facility-wide standards of the

Rule itself, Petra Nova captured less than 10% of the facility's emissions—a tiny fraction of the rate the Rule requires. *See* Buckeye Institute Comments at 14 (EPA-HQ-OAR-2023-0072-0622). On top of all that, Petra Nova was funded by the Energy Policy Act of 2005, which precludes EPA from relying on Petra Nova (and other similarly funded projects) alone to show adequate demonstration. 42 U.S.C. §15962(i)(1); *see* 89 Fed. Reg. at 39,849 n.304, 39,852 n.334, 39,878-79 & n.613.

Plant Barry does equally little to show adequate demonstration, which is why EPA gave it all of a paragraph in its 267-page Rule. *See* 89 Fed. Reg. at 39,850. It is also a slipstream system, and it achieved less than 5% carbon capture from the plant as a whole under the Rule's facility-wide standards. *See* Buckeye Institute Comments at 10. Plant Barry also received funding under the Energy Policy Act, *see* 89 Fed. Reg. at 39,849-50, which precludes EPA from relying on it.

As for Boundary Dam Unit 3, another slipstream system, EPA concedes that it did not achieve 90% CCS. U.S.Opp.27. More important, the system "has not consistently operated at … total capture efficiency," as the plant "ran less than 100 percent of the flue gas through the capture equipment" and achieved no carbon capture at all whenever the system was "offline for maintenance." 89 Fed. Reg. at 39,848. The Rule itself acknowledged that the system fell short of 90% due to "technical challenges." *Id.*; *contra* U.S.Opp.36-37. And the Canadian owner felt the need to correct the record to clarify that the "CCS facility *is not capturing 90 per cent* of emissions from Boundary Dam Unit 3" and "target[s]" a "65 to 70"% capture rate. *See* SaskPower Comments (EPA-HQ-OAR-2023-0072-0687).

Unable to cite any coal plant that has actually achieved 90% CCS on a consistent facility-wide basis, EPA turns to projects "in advanced stages of development" "designed to exceed 90% capture," and vendor statements "guarantee[ing]" 90% capture rates. U.S.Opp.27-28. At the risk of stating the obvious, plans and promises for the future cannot show adequate demonstration now.

3. The record is even worse for gas plants. EPA begins by relying on its purported demonstration of 90% CCS at coal plants, claiming that evidence is sufficient because carbon capture is "'identical' … in all its 'essentials'" at coal and gas plants. U.S.Opp.28 (brackets omitted) (quoting 89 Fed. Reg. at 39,926); *see* U.S.Opp.37-38; NGOs.Opp.16. For all the reasons already described, the projects on which EPA relies cannot show adequate demonstration of 90% CCS even as to coal plants, let alone gas plants with completely different fuel that produces completely different exhaust. *See* Comments of the Power Generators Air Coalition, Attachment C, at 2 (EPA-HQ-OAR-2023-0072-0710) ("Power Generators Comments") (explaining the large difference in carbon dioxide concentrations in gas plant and coal plant exhaust); Appl.17 n.4; *cf.* U.S.Opp.40 (declining to address this issue).

EPA briefly mentions two gas plants that it claims achieved 90% CCS, U.S.Opp.28, but says little more about either one—and for good reason. The Bellingham Cogeneration Facility, which closed *in 2005*, used CCS only on a tiny 40-megawatt slipstream, meaning that it achieved only about 10% capture with respect to the entire facility. 89 Fed. Reg. at 39,926. And the Technology Centre Mongstad is an even tinier 12-megawatt *pilot plant testing site* in Norway, *id.* at 39,852, 39,927

& n.768, which is exactly the kind of experimental use that is insufficient to show adequate demonstration. *Contra* U.S.Opp.28, 38. EPA's reliance on those experimental projects simply highlights the lack of adequate demonstration today. EPA protests that adequate demonstration does not require mandated technology to be in "routine use" across the industry. U.S.Opp.32-35. But EPA's problem is not that adequately demonstrated technology is not yet in routine use; EPA's problem is that it is mandating technology that has not progressed beyond the experimental stage and the promises of promotional materials. That problem is fatal under the plain text.

2. 90% CCS is not "achievable."

The Rule's reliance on 90% CCS also defies the statutory requirement that standards be "achievable." 42 U.S.C. §7411(a)(1). By its plain terms, that statutory requirement mandates that EPA set standards that are achievable *now*—not theoretically attainable at some point in the future. The Rule contravenes that requirement, relying not just on technology that has not yet progressed beyond the experimental stage but also on infrastructure that has not yet been built. Appl.19.

EPA has no meaningful response. It does not dispute that "the necessary CO_2 infrastructure does not exist today," U.S.Opp.30 (quotation marks omitted); instead, it simply insists that "regulated plants would be expected to install" the "pipelines and sequestration sites" needed to meet the Rule's requirements. U.S.Opp.31; *see* U.S.Opp.29. A standard that requires constructing some *5,000 miles* of pipelines for carbon transport, 89 Fed. Reg. at 39,856, and storage facilities for some *1.4 billion*

metric tons of carbon dioxide, *id.* at 39,863, cannot plausibly be described as "achievable" today, 42 U.S.C. §7411(a)(1), or even in 2032 given construction realities.

The massive costs that the Rule would impose further underscore the problem. As EPA concedes, §111 prohibits it from setting a standard whose cost "would be 'excessive' or 'unreasonable.'" U.S.Opp.41 (quoting 89 Fed. Reg. at 39,832). The staggering costs of implementing 90% CCS, including billions of dollars to install the systems, build the necessary pipelines, and develop the requisite storage capacity, confirm that the Rule violates §111's achievability requirement. *See* Appl.30; Power Generators Comments at 35-37. EPA does not seriously dispute the evidence supporting those costs; instead, it simply demands deference to its contrary view. U.S.Opp.43. Even EPA itself, however, estimates the compliance costs of the Rule in the billions of dollars. *See* 89 Fed. Reg. at 40,005. And notably, the agency makes no attempt to defend the Rule's implausible assertion that, contrary to the views of the relevant industry, installing CCS would result in a "significant economic benefit" to existing coal plant owners. 89 Fed. Reg. at 39,789; *see* Appl.20-21.

3. Co-firing coal-fired plants with natural gas is impermissible generation-shifting and not achievable.

The Rule's reliance on 40% co-firing for coal plants that commit to shut down before 2038 is even more obviously unlawful. That system of emission reduction explicitly requires shifting from coal to natural gas, which is precisely what *West Virginia* held EPA lacked authority to do, 597 U.S. at 728 & n.3, and it *requires* those plants to commit now to shutting down altogether by 2039. Calling that approach

"fuel-switching" rather than "generation-shifting" does not make it any more lawful. *Supra.* p.9; *contra* U.S.Opp.19.

The Rule's 40% co-firing standard is also unachievable. EPA claims that "many existing coal plants already use some amount of natural gas," and that enabling co-firing "generally requires minor modifications to existing boilers." U.S.Opp.29 (brackets and quotation marks omitted). In reality, as the Rule itself concedes, only about 4% of existing coal plants co-fire natural gas at a 40% level. *See* 89 Fed. Reg. at 39,892 (counting 29 of 565 plants). Converting the rest to 40% co-firing would require not only significant modifications to the plants themselves, but (as EPA recognizes) would also require constructing new "natural gas supply pipelines," U.S.Opp.29 (quoting 89 Fed. Reg. at 39,893)—which would cost $4 million to $10 million per mile, require countless permits, and could not be completed in time to comply with the Rule in any event, *see* Power Generators Comments at 59-60. EPA's cursory assertion that it "analyzed the costs" involved, U.S.Opp.43, does nothing to show that its standard is remotely achievable "for the industry as a whole," *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 431 (D.C. Cir. 1980).

C. Other Statutes Underscore that the Rule Is Unlawful.

EPA claims that the Energy Policy Act and the Inflation Reduction Act of 2022 indirectly support the Rule by showing congressional support for CCS. U.S.Opp.45-46; *see* States.Opp.19-20. That gets matters exactly backwards. In the Energy Policy Act, Congress provided funding for carbon capture research and development, while explicitly precluding EPA from relying on any projects funded by the Act as sufficient to show adequate demonstration under §111. *See* 42 U.S.C. §15962(i)(1). And in the

Inflation Reduction Act, Congress provided a tax credit for power plants that capture and store carbon dioxide. *See* 26 U.S.C. §45Q(a). Both statutes demonstrate that Congress sought to provide incentives for industry to develop and adopt CCS technology voluntarily—underscoring both that Congress understood that technology was not yet developed (let alone demonstrated), and that Congress preferred incentives to a mandatory restructuring of the industry. Neither of those statutes—nor the floor statement from a single Congressman that EPA quotes at length, *see* U.S.Opp.46—remotely suggests that Congress has authorized EPA to restructure the American energy market, especially when the relevant technology has never been demonstrated at any plant on a consistent facility-wide basis.

II. The Rule Will Cause Substantial Irreparable Harm.

The Rule will cause substantial irreparable harm absent a stay. As Applicant explained in detail (and supported with numerous declarations), compliance with the Rule requires major investments and irrevocable decisions that cannot be postponed during judicial review. Appl.23-33. Leaving the Rule in place will saddle electric generators with millions of dollars in short-term costs, force premature retirement of existing coal plants, and obstruct the development of new gas plants. *Id.* The Rule should not be allowed to impose those harms—and threaten a potentially irrevocable shift in the American energy market—while judicial review remains pending.

None of EPA's responses is persuasive. EPA does not attempt to defend the D.C. Circuit's plainly erroneous assertion that "a stay will not help" because the Rule might "come back into force at the end of the case." App.2; *see* Appl.27-28. Instead, EPA claims that plants need do *nothing* until June 2025, and incur only "limited cost"

for "feasibility work" until June 2026. U.S.Opp.51-52; *see* States.Opp.34-35; NGOs.Opp.21. Those projections are refuted by the declarations in the record, which make clear that electric generators face millions of dollars in immediate costs for tasks that must be accomplished *now* if the Rule remains in effect, such as "soliciting and securing bids from contractors, procuring equipment, mobilizing resources and employees, securing approvals for major capital expenditures, applying for and securing the necessary local, state and federal permits and approvals, and communicating and working with numerous stakeholders, including state environmental agencies and local communities." App.209 (Lafser ¶5); *see also, e.g.*, App.37 (Beam ¶65); App.136-37 (Crockett ¶21); App.156-57 (Glenn ¶8).

Recognizing as much, EPA asks this Court to ignore those declarations entirely, claiming that its own assessment of harm is "controlling." U.S.Opp.54-55. EPA cites no authority remotely supporting that proposition, and it is flat wrong. The Clean Air Act (like the APA) applies an "arbitrary [or] capricious" standard *to the merits*, 42 U.S.C. §7607(d)(9)(A); it does not extend that standard to the agency's assessment of irreparable harm. On that question, the government is entitled to no more deference than any other litigant. *See, e.g.*, *Ohio v. EPA*, 144 S.Ct. 2040, 2052-53 (2024) (reviewing asserted harms without deference); *contra* U.S.Opp.54-55.

EPA also disputes that leaving the Rule in place could force some existing coal plants to shut down, claiming that "nothing in the Rule would force those plants to close before 2032." U.S.Opp.53. But if the Rule remains in effect, plants will have to make irrevocable compliance decisions well before then—including whether to invest

in other pollution control measures, *see* Appl.31-32, and committing to retirement in federally enforceable state plans due by May 2026, *see* 40 C.F.R. §§60.5785b. Absent a stay, plants will have no choice but to make those decisions on the assumption that the Rule will remain in effect, committing them to their only feasible course (shutting down before 2032) and effectively denying them the benefit of judicial review. That is more than enough to establish irreparable harm.

III. The Balance Of Equities And The Public Interest Favor A Stay.

The equities and interests favor a stay. Allowing the Rule to remain in effect threatens harm to generators and the public, who will bear the resulting increased electric rates, reduced grid reliability, and job losses—none of which EPA seriously denies. Appl.34-36. There is also "no public interest in the perpetuation of unlawful agency action," *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016), and no climate-change exception to that rule, *see West Virginia*, 597 U.S. at 735.

Still, EPA emphasizes the threat of climate change, and that any delay in enforcing the Rule will add to that threat. U.S.Opp.56-57. But it does not quantify the incremental threat that a brief stay would cause—presumably because any such effect would be infinitesimally small and immeasurable. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 543-45 (2007) (Roberts, C.J., dissenting) (explaining "the complexities of global warming"). Those speculative concerns do not outweigh the substantial and immediate costs to the public if the Rule is not stayed. *See* Appl.34-36.

CONCLUSION

This Court should stay the Rule pending judicial review.

Respectfully submitted,

ALLISON D. WOOD
MAKRAM B. JABER
AARON M. FLYNN
MCGUIREWOODS LLP
888 16th Street NW, Suite 500
Black Lives Matter Plaza
Washington, DC 20006

PAUL D. CLEMENT
Counsel of Record
C. HARKER RHODES, IV
NICHOLAS A. AQUART*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Applicant Electric Generators for a Sensible Transition

August 23, 2024