Nos. 24A95, 24A96, 24A97, 24A98, 24A105, 24A106, 24A116 and 24A117

In the Supreme Court of the United States

WEST VIRGINIA, et al.,
Applicants,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

NATIONAL RURAL ELECTRIC COOPERATIVE,
Applicant,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

Directed to the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit

POWER COMPANY RESPONDENTS' OPPOSITION TO APPLICATIONS FOR STAY OF FINAL AGENCY ACTION PENDING APPELLATE REVIEW

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August 19, 2024

[Additional Captions Listed on Following Page]

NATIONAL MINING ASSOCIATION AND AMERICA'S POWER,
Applicant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

NACCO NATURAL RESOURCES CORPORATION,
Applicant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

MIDWEST OZONE GROUP,
Applicant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

ELECTRIC GENERATORS FOR A SENSIBLE TRANSITION,
Applicant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

EDISON ELECTRIC INSTITUTE, et al.,
Applicants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

OHIO, et al.,
Applicants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Power Company Respondents provide the following disclosure statements.

Pacific Gas and Electric Company states that it is a public utility incorporated in the state of California and a wholly owned subsidiary of PG&E Corporation. No publicly held corporation directly owns more than 10 percent of PG&E Corporation's shares.

Consolidated Edison, Inc. ("Con Edison") states that it is a holding company that owns several subsidiaries, including Consolidated Edison Company of New York, Inc., which delivers electricity, natural gas and steam to customers in New York City and electricity and natural gas to customers in Westchester County, New York; Orange & Rockland Utilities, Inc., which together with its subsidiary, Rockland Electric Company, delivers electricity and natural gas to customers primarily located in southeastern New York State and Northern New Jersey; and Con Edison Transmission, which through its subsidiaries invests in electric transmission projects supporting Con Edison's effort to transition to clean, renewable energy and through joint ventures manages both electric and gas assets while seeking to develop electric transmission projects. Con Edison has outstanding shares and debt held by the public and may issue additional securities to the public. Con Edison has no parent corporation and no publicly held company has a ten percent or greater ownership interest in it.

New York Power Authority ("NYPA") states that it is a New York State public-benefit corporation. It is the largest state public power utility in the United

States, with 16 generating facilities and more than 1,400 circuit-miles of transmission lines. NYPA sells electricity to more than 1,000 customers, including local and state government entities, municipal and rural cooperative electric systems, industry, large and small businesses and non-profit organizations. NYPA has no parent corporation and no publicly held company owns greater than 10 percent ownership interest in it.

Sacramento Municipal Utility District ("SMUD") states that it is the nation's sixth largest community-owned utility, with a service population of approximately 1.5 million located in Sacramento County, California, and small portions of Placer and Yolo counties. SMUD has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Power Companies Climate Coalition states that it is an unincorporated association of companies engaged in the generation and distribution of electricity and natural gas, organized to advocate for responsible solutions to address climate change and reduce emissions of greenhouse gases and other pollutants, including through participation in litigation concerning federal regulation. Its members include each of the foregoing entities and the Los Angeles Department of Water and Power ("LADWP").

LADWP states that it is a vertically integrated publicly-owned electric utility of the City of Los Angeles, serving a population of over 4 million people within a 465 square mile service territory covering the City of Los Angeles and portions of the Owens Valley. LADWP is the third largest electric utility in the state, one of five

California balancing authorities, and the nation's largest municipal utility. LADWP owns and operates a diverse portfolio of generation, transmission, and distribution assets across several states. LADWP's diverse portfolio includes electricity produced from natural gas, hydropower, coal, nuclear, wind, biomass, geothermal, and solar energy resources. LADWP owns and/or operates the majority of its conventional generating resources, with a net dependable generating capacity of 7,967 megawatts. Its transmission system, which includes more than 3,700 circuit-miles of transmission lines, transports power from the Pacific Northwest, Utah, Wyoming, Arizona, Nevada, and elsewhere within California to the City of Los Angeles. LADWP's mission is to provide clean, reliable water and power in a safe, environmentally responsible, and cost-effective manner.

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INTRODUCTION

Power Company Respondents are some of the nation's largest electric utilities and owners of electricity generating units ("EGUs"). Together, they own and operate over 25,000 megawatts of total generating capacity and serve over 30 million people across the country. First and foremost, Power Company Respondents are in the business of delivering affordable, reliable power to their customers. At the same time, they are significantly reducing greenhouse gas ("GHG") emissions across their generation resources and from the electricity they deliver to their customers.

Well-designed and durable emission standards and guidelines promulgated pursuant to Section 111 can help reduce GHG emissions from electricity generators and mitigate their contribution to climate change. Such emission standards and guidelines can also provide Power Company Respondents with regulatory predictability to help them make informed decisions regarding investments in the technologies and resources needed to deliver a clean, affordable and reliable supply of electricity to their customers. For that reason, Power Company Respondents have participated in EPA's Section 111 rulemakings for the power sector over the last decade.

Prior to the current Rule,[1] EPA made two attempts to establish Section 111 emission guidelines for GHG emissions from existing EGUs. Courts (including this

[1] *See* 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, 89 Fed. Reg. 39,798 (May 9, 2024) ("the Rule").

one) held that these earlier efforts reflected mistaken interpretations of EPA's statutory authority. First, consistent with Power Company Respondents' arguments, the D.C. Circuit held that EPA's 2019 Affordable Clean Energy ("ACE") Rule had "rest[ed] squarely on the erroneous legal premise that the statutory text *expressly* foreclosed consideration of measures other than those that apply at and to the individual source." *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 995 (D.C. Cir. 2021) (emphasis added). For example, the ACE Rule had improperly ruled out compliance mechanisms like averaging and trading, which often result in more efficient emission outcomes.

Second, in 2022, this Court determined that EPA's 2015 Clean Power Plan ("CPP") violated the major questions doctrine. *West Virginia v. EPA*, 597 U.S. 697 (2022). In devising the CPP, EPA had based the "best system of emission reduction" ("BSER") for existing sources on the Agency's preferred approach of "generation shifting" from higher-emitting sources to lower-emitting sources. This Court held that, in doing so, the Agency had "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *Id.* at 724 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)) (alteration in original). But *West Virginia* also made clear that EPA could—as it has for five decades—promulgate a BSER based on "the application of measures that would reduce pollution by causing the regulated source to operate more cleanly." *Id.* at 725. In that case and at oral argument, Power Company Respondents again

argued against an overly constrained interpretation of EPA's authority under Section 111 that would preclude established, cost-effective mechanisms like trading.

Following this Court's decision in *West Virginia*, Congress passed the Inflation Reduction Act ("IRA"). Pub. L. No. 117-169, 136 Stat. 1818 (2022). The IRA extended and substantially expanded the tax credit for carbon capture and sequestration ("CCS") to facilitate its deployment on sources such as power plants and industrial facilities. *Id.* § 13104, 136 Stat. at 1924–29 (codified as amended at 26 U.S.C. § 45Q). Congress also amended the Clean Air Act, directing EPA to "ensure that reductions in greenhouse gas emissions are achieved through use of the existing authorities of [the Clean Air Act]"—including Section 111. *Id.* § 60107, 136 Stat. 2069–70 (codified at 42 U.S.C. § 7435(a)(5)–(6)); *see also* 168 Cong. Rec. E868 (Aug. 23, 2022) (Rep. Pallone noting "[t]hese 'existing authorities' include [Clean Air Act] Section 111").

In May 2024, EPA finalized its Rule to regulate emissions of carbon dioxide from existing fossil fuel-fired steam generating units and new stationary combustion turbines. This Rule is categorically different from the CPP. In keeping with half a century of regulatory precedent under the Clean Air Act, EPA analyzed potential at-the-source technology-based systems to reduce pollution and then selected its BSER. *See West Virginia*, 597 U.S. at 726. EPA determined that CCS with a 90 percent capture rate was the best system of emission reduction for new baseload stationary combustion turbines and existing coal-fired plants operating past January 1, 2039. *See* 89 Fed. Reg. at 39,903 (new baseload gas plants); *id.* at 39,841 (existing coal plants). EPA preserved a role for flexible compliance measures such as averaging

and trading. *Id.* at 39,978–79. Also, the Agency designed additional types of compliance flexibility, including one-year extensions for sources that are unable to comply due to challenges outside of their control or when needed by a grid operator for reliability. *See id.* at 39,960 (existing coal plants); *id.* at 39,952 (new baseload gas plants).

Petitioners challenged the Rule in the D.C. Circuit, and eight of them moved for an emergency stay while litigation proceeds. As they do before this Court, Applicants generally characterized EPA's Rule as an attempt to flout *West Virginia*, remake the electricity grid, and "require generation-shifting" to cleaner sources.

On July 19, 2024, a unanimous panel of the D.C. Circuit—composed of Judges Millett, Pillard, and Rao—denied the emergency stay. C.A. 24-1120 Doc. 206543, Order Denying the Motions to Stay (D.C. Cir. July 19, 2024) ("Stay Order"). In a reasoned order, the court held that the Applicants had neither shown a likelihood of success on their arbitrary and capricious claim nor on their claim that the Rule implicates the major questions doctrine. Stay Order 2. On irreparable harm, the panel underscored that the Rule's "actual compliance deadlines do not commence until 2030 or 2032—years after this case will be resolved." *Id.* The panel also requested expedited briefing "to ensure this case can be argued and considered as early as possible in the court's 2024 term." *Id.* A decision will likely issue early in 2025.

Applicants have now moved for an emergency stay from this Court, but there remains no basis to grant it. "A stay is not a matter of right," but is rather "an exercise

of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 627 (1926)). Despite Applicants' claims to the contrary, this case does not implicate the major questions doctrine and raises no meaningful dispute about the boundaries of EPA's delegated authority. Rather, the case turns largely on a fact-intensive review of whether EPA acted reasonably when it reviewed thousands of comments and technical documents and "determine[d]" that CCS "has been adequately demonstrated" with respect to certain classes of large power plants, with compliance deadlines starting in 2032. The D.C. Circuit will act expeditiously in assessing the merits of this record-based claim and will do so many years before the relevant compliance deadlines. Especially in the absence of imminent compliance deadlines, the Court should decline to grant the extraordinary relief of a stay pursuant to its emergency docket.

ARGUMENT

I. Applicants Cannot Demonstrate Success on the Merits Because They Mistakenly Assert That the Rule Oversteps EPA's Delegated Authority Under the Major Questions Doctrine.

Many Applicants insist that EPA acted beyond the boundaries of its delegated authority because the Rule implicates a major question that required clearer congressional authorization. *See, e.g.*, Stay Application of Electric Generators for a Sensible Transition ("EGST Stay Appl.") 12 ("Just like *West Virginia*, this case 'is a major questions case.'" (quoting *West Virginia*, 597 U.S. at 724)); Stay Application of West Virginia et al. ("W. Va. Stay Appl.") 21 ("*West Virginia v. EPA* confirms the Rule is unlawful."); Stay Application of National Mining Association & America's Power ("NMAP Stay Appl.") 11–12 (arguing that the rule is "in direct contravention of this

Court's explicit holding in *West Virginia*"); Stay Application of National Rural Electric Cooperative Association ("NRECA Stay Appl.") 30 ("[T]his is no ordinary case, because the major-questions doctrine applies."). This is incorrect. As required by *West Virginia*, EPA based each BSER on "the application of measures that would reduce pollution by causing the regulated source to operate more cleanly." 597 U.S. at 725. Applicants cannot now use *West Virginia* to shoehorn their fact-intensive argument going to the reasonableness of EPA's determinations into a claim that EPA overstepped its delegated authority.

Section 111 requires EPA to promulgate standards and emission guidelines for categories of stationary sources that cause or contribute significantly to air pollution that may endanger public health or welfare. 42 U.S.C. § 7411(b)(1)(A), (b)(1)(B), (d)(1); *see also West Virginia*, 597 U.S. at 709. For new and modified sources, Section 111(b) directs EPA to establish standards of performance that reflect the degree of limitation achievable through application of the best system of emissions reduction that the Administrator determines has been "adequately demonstrated," taking into account cost and "any nonair quality health and environmental impact and energy requirements." *Id.* § 7411(a)(1), (b)(1)(B). For existing sources, Section 111(d) requires EPA to prescribe emission guidelines under which states submit plans establishing standards of performance that reflect the degree of limitation achievable through application of the best system of emission reduction. *Id.* § 7411(d)(1). As noted, the IRA expressly directed EPA to ensure achievement of GHG emission reductions through its existing Clean Air Act authorities. *Id.* § 7435(a)(5)–(6).

In the Rule, EPA considered the statutory factors and chose BSERs from among technological systems that can be applied at the source. *See* 89 Fed. Reg. at 39,829. For new baseload combustion turbines and existing coal-fired power plants that plan to operate past January 1, 2039, EPA selected a BSER based on deployment of CCS with a 90 percent capture rate. *Id.* at 39,903, 39,841. For other subcategories of units, EPA similarly selected BSERs based on technological systems that can be applied at the source. *E.g.*, *id.* at 39,841 tbl. 1 (summarizing the BSERs for existing EGUs).

In attempting to invoke the major questions doctrine, Applicants misunderstand both *West Virginia* and this Rule. In *West Virginia*, this Court emphasized that, for most of Section 111's history, EPA had generally selected "best system[s] of emission reduction" that were technology-based systems involving "the application of measures that would reduce pollution by causing the regulated source to operate more cleanly." 597 U.S. at 725. In the CPP, according to the Court, EPA had "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority'" by basing the best system for existing sources on EPA's preferred approach of "generation shifting" from higher-emitting sources to lower-emitting sources. *Id.* at 724, 728–29 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324) (alteration in original).

But *West Virginia* also made clear that the trigger for the major questions doctrine was not that EPA's "best system of emission reduction" would *result in* a shift in generation to lower-emitting units. As Power Company Respondents

explained to this Court, changes in market share are an inevitable consequence of any rule limiting power-sector emissions. In an interconnected electricity grid, "[a]ny measure that increases the variable costs for one facility to produce power will make that facility less competitive as compared to other facilities, rendering it less attractive to utilities and grid operators." Brief for Power Company Respondents at 37, *West Virginia*, 597 U.S. 697 (No. 20-1530), 2022 WL 209768, at *37. Recognizing this, this Court emphasized the "obvious difference between (1) issuing a rule that may end up causing an incidental loss of coal's market share, and (2) simply announcing what the market share of coal, natural gas, wind, and solar must be, and then requiring plants to reduce operations or subsidize their competitors to get there." *West Virginia*, 597 U.S. at 731 n.4.

Some Applicants nonetheless insist that, because this Rule may result in less coal-fired generation, it triggers the same major question that the Supreme Court identified in the CPP. *See, e.g.*, NMAP Stay Appl. 11; EGST Stay Appl. 12; W. Va. Stay Appl. 21. Not so. Due to the dynamics governing how the electricity grid is operated, *any* system of emission reduction that changes generators' relative costs will result in higher-emitting units operating less. Indeed, if Applicants were correct that the Rule amounts to impermissible generating shifting simply because it will reduce the operation of coal-fired power plants, then *any* rule requiring coal plants to control their emissions would implicate the major questions doctrine. Applicants' arguments that such changes amount to impermissible generation shifting ignore the critical distinction the Court made between regulations that cause an incidental loss

of market share of one type of resource and regulations that "announce" the Agency's preferred market shares of different resources. *See West Virginia*, 597 U.S. at 731 n.4.[2]

Lacking record evidence that EPA's rule is based on generation shifting, Applicants turn to speculation and suspicion. They accuse EPA of "once again trying to transform the power sector by forcing a shift in electricity generation to its favored sources" while "t[aking] care not to say the quiet part too loudly this time." NRECA Stay Appl. 1; W. Va. Stay Appl. 24. EGST alleges that EPA is "attempt[ing] to frame its generation-shifting mandate as a garden-variety technology-based emission reduction program" and "pretending" in order to achieve "broad policy goals this Court has already held lie beyond EPA's current authority." EGST Stay Appl. 11. West Virginia charges that the standards are "really a backdoor avenue to forcing coal plants out of existence." W. Va. Stay Appl. 9; *see also* NMAP Stay Appl. 11 (similar). But judicial review of agency rules turns on the record, not speculative motives. Courts review "the agency's contemporaneous explanation in light of the existing administrative record," *Dep't of Com. v. New York*, 588 U.S. 752, 780–81 (2019), and apply a "presumption of regularity" to agency action, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). Applicants' "accusations of pretext, deceit, and illicit motives" are therefore simply not germane. *Dep't of Com.*,

[2] Some Applicants state that the resulting loss of coal's market share from this Rule is more than "incidental." *E.g.*, W. Va. Stay Appl. 22 ("This case doesn't involve 'incidental' effects." (quoting *West Virginia*, 597 U.S. at 731 n.4)). These conclusory statements do not meet Applicants' burden to show a likelihood of success in their argument that the Rule implicates a major question.

588 U.S. at 786–87 (Thomas, J., dissenting); they only underscore that Applicants cannot meet their burden to show that the Rule lies outside the boundaries of EPA's delegated authority and implicates a major question.

II. Applicants' Fact-Bound Arbitrary and Capricious Challenge Does Not Warrant the Extraordinary Remedy of a Stay through this Court's Emergency Docket.

While framed in many different ways, the core of Applicants' arguments boils down to an ordinary arbitrary-and-capricious argument under the Clean Air Act—*i.e.*, that the Rule is unreasonable or unsupported by the record. *See* 42 U.S.C. § 7607(d)(7)(A), (d)(9); *Ohio v. EPA*, 144 S. Ct. 2040, 2053 (2024). Because analyzing the merits of this claim would involve careful review of an administrative record of tens of thousands of pages, it is a poor fit for emergency relief at this time.

This Court's recent decision in *Loper Bright* confirms that Applicants' claims sound in arbitrary and capricious review. As this Court explained, "Congress has often enacted [ ] statutes" that "empower an agency to . . . regulate subject to the limits imposed by a term or phrase." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024). Terms such as "appropriate" or "reasonable" "leave[] agencies with flexibility" when exercising the discretion granted by statute. *Id.*; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) (noting that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred"). As an example, the Court pointed to the Clean Water Act's grant of discretion to the EPA Administrator to use his "judgment" to determine when "discharges of pollutants from a point source or group of point sources . . . would interfere with the attainment or maintenance of that water quality . . . which shall

assure" multiple outcomes. *See Loper Bright*, 144 S. Ct. at 2263 n.6 (citing 33 U.S.C. § 1312(a)).

Applicants do not—and could not—seriously dispute that the Clean Air Act delegates to the Administrator the task of determining the best system of emission reduction that has been adequately demonstrated, taking into account several criteria. *See* 42 U.S.C. § 7411(a).[3] Therefore, under the *Loper Bright* framework, Applicants' arguments about CCS are best understood as disputing not the "boundaries of [EPA's] delegated authority," but that "the agency has engaged in 'reasoned decisionmaking' within those boundaries" when establishing the BSER. 144 S. Ct. at 2263 (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)).

Applicants make a series of factual assertions regarding whether CCS is adequately demonstrated. Certainly, a reviewing court must ensure that the agency has offered "a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made" and cannot ignore "an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). But an assessment of whether Applicants' factual assertions demonstrate that EPA's ultimate conclusions are arbitrary and capricious

[3] *See also West Virginia*, 597 U.S. at 709–10 ("[T]he statute directs EPA to (1) 'determine,' taking into account various factors, the 'best system of emission reduction which has been adequately demonstrated,' (2) ascertain the 'degree of emission limitation achievable through the application' of that system, and (3) impose an emissions limit on new stationary sources that 'reflects" that amount. . . .The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does by again determining, as when setting the new source rules, 'the best system of emission reduction that has been adequately demonstrated for existing covered facilities.'" (cleaned up)).

is highly record- and fact-intensive. *Cf. Ohio*, 144 S. Ct. at 2049–52 (describing the myriad complexities of EPA's federal implementation plan under the Clean Air Act's Good Neighbor Provision).

The record in this case is voluminous and the product of an extensive rulemaking effort. EPA opened a preproposal in September 2022 to collect initial input on at-the-source methods to reduce emissions. *See* Reducing Greenhouse Gas Emissions from New and Existing Fossil Fuel-Fired Electric Generating Units, Docket ID No. EPA-HQ-OAR-2022-0723 (Sept. 8, 2022). On May 23, 2023, it released a proposed rule of 181 pages. *See* 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, 88 Fed. Reg. 33,240 (May 23, 2023). It provided an extended 75-day comment period as well as a supplemental comment period. 88 Fed. Reg. at 39,390; 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, 88 Fed. Reg. 80,682, 80,682 (Nov. 20, 2023). It then reviewed and responded to the 8,188

comments on the docket, including comments by some Power Company Respondents.[4] In addition to the Rule, which fills 267 pages of the Federal Register (*see* 89 Fed. Reg. at 39,798–40,064), the docket contains 968 supporting and related documents, amounting to thousands of pages of technical support documents, studies and other materials. Resolving the question of whether EPA's determinations are arbitrary and capricious based upon the information before the Agency will necessarily entail a "fact-intensive and highly technical" inquiry into a "voluminous record." *Ohio*, 144 S. Ct. at 2058 (Barrett, J., dissenting).

The D.C. Circuit is poised to address the complex factual merits at issue in this case as expeditiously as it can. *See* Stay Order at 2 (ordering prompt submission of briefing schedules to "ensure this case can be argued and considered as early as possible in the court's 2024 term"). In the Clean Air Act, Congress entrusted the D.C. Circuit to review nationally applicable rules, in light of that court's expertise in administrative law. 42 U.S.C. § 7607(b)(1). The D.C. Circuit routinely handles such challenges. *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 389 (2006) (highlighting the "extensive body of administrative law developed" in the D.C. Circuit). Ample precedent and expertise will guide the D.C. Circuit's assessment of whether, based on the factual record before the agency, EPA reasonably determined that its selected BSERs have been

[4] *See* Comment submitted by Energy Strategy Coalition, Docket ID No. EPA-HQ-OAR-2023-0072-0672 (Aug. 7, 2023); Comment submitted by Clean Energy Group (CEG), Docket ID No. EPA-HQ-OAR-2023-0072-0496 (Aug. 7, 2023); Comment submitted by Energy Strategy Coalition, Docket ID No. EPA-HQ-OAR-2023-0072-8192 (Dec. 19, 2023); Comment submitted by Clean Energy Group (CEG), Docket ID No. EPA-HQ-OAR-2023-0072-8166 (Dec. 19, 2023).

adequately demonstrated. *See Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973); *Portland Cement Ass'n v. EPA*, 513 F.2d 506, 508 (D.C. Cir. 1975); *Sierra Club v. Costle*, 657 F.2d 298, 343 (D.C. Cir. 1981); *Lignite Energy Council v. EPA*, 198 F.3d 930, 933 (D.C. Cir. 1999).

As the D.C. Circuit held, this case is likely to be resolved years before the actual compliance deadlines of 2030 or 2032 (only the latter of which applies to CCS). Stay Order at 2. Because of this timing, sources will not need to "restructure their operations" during the period that "the legality of the regulations is being challenged in court." *Labrador v. Poe*, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring in the grant of stay).

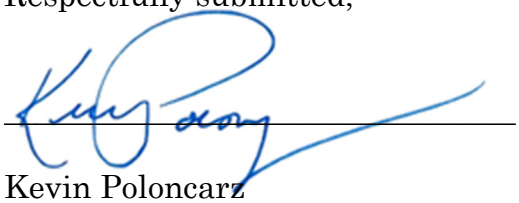
To be sure, if four or more justices later determine that the D.C. Circuit appears to have committed a significant error in its fact-intensive assessment of the merits, this Court can grant certiorari. But briefing, oral argument, and a reasoned decision before the D.C. Circuit on the merits will likely "shed more light on this case than in the nature of things [is] afforded" at the emergency stay stage. *Moyle v. United States*, 144 S. Ct. 2015, 2020 (2024) (Barrett, J., concurring) (citation omitted). Applicants will also have the opportunity to make a showing to this Court that they satisfy the stay factors *then*. But no precedent supports the grant of an emergency stay *now*. *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers) (denying the "extraordinary relief" of a stay). Indeed, "in cases like this one with voluminous, technical records and thorny legal questions," the Court "should proceed all the more cautiously," before "evaluat[ing] the merits of

applications without the benefit of full briefing and reasoned lower court opinions." *Ohio*, 144 S. Ct. at 2070 (Barrett, J., dissenting).

CONCLUSION

The applications for a stay of the Rule should be denied.

Respectfully submitted,



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