No. 24A95

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

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

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INTRODUCTION

In opposing the States' application for a stay, EPA tells an appealingly simple story. EPA claims nearly absolute discretion for itself in implementing the Clean Air Act. It thinks its discretion is especially broad when a case involves technical questions. And it believes this case rests on a big record. From these premises, EPA surmises that the Court must effectively roll over to the agency.

Yes, the story's simple—but it's wrong. The CAA limits what EPA can and can't do; it doesn't leave EPA to its own devices. Among other things, EPA can't merely regulate from its imagination. It needs to show that the requirements it imposes—and the technologies that underlie them—are *real* options in the *real* world. The States here have explained (alongside many other Applicants) why the power-plant regulations at issue don't fulfill that responsibility. And the Rule and its many failings don't present questions of extreme technical complexity; the flaws in the Rule go more than anything to EPA's legal misunderstandings of what the Act demands. Meanwhile, EPA can't wield the number of pages in its analysis as a shield against relief (as it tries to do at least a half-dozen times). No, its record is a paper tiger.

The earlier lessons from *West Virginia* v. *EPA*, 597 U.S. 697 (2022), also confirm that EPA's account isn't right. Respondents want to blue pencil that case to hold only that EPA can't expressly announce its plans to close coal plants through Section 111. But *West Virginia* never imposed such a direct-evidence requirement. And though the Rule's structure may be a bit different from *West Virginia*'s Clean Power Plan, the bottom line is the same: faced with no real chance of implementing carbon capture at the scale and speed

that EPA has commanded, coal-fired power plants will be effectively forced to shift over to operating as part-time *gas* plants or shutter entirely. *West Virginia* weighs against such a result. A reconfiguration of the national energy system of that sort is a question for Congress, not EPA.

The agency's mistakes will have significant, immediate, and painful consequences for the States and others unless the Court stays the Rule right now. Our nation's electricity supply will become less reliable and more expensive. Power plants will close. And States will be forced to march ahead with complex, time-consuming, and expensive implementation efforts that will be all for naught once the Rule gets a closer look. EPA tries all kinds of maneuvers to minimize these harms: it shrinks the relevant period of harm, paints coerced closures as voluntary decisions, touts the dangers of climate change (even while insisting the Rule won't address those dangers for years), and waves away crippling compliance costs as inevitable. But like the Rule itself, none of these strategies hold up under scrutiny.

Of course, the Court has heard this story before, and it acted to pause EPA's misguided work back then. See *West Virginia* v. *EPA*, 577 U.S. 1126 (2016). Faced with much the same problem here, the Court should act again. If the Court were to instead endorse EPA's simple-but-skewed view of the CAA, that stamp of approval would fail to "take account of the far-reaching influence of agencies and the opportunities such power carries for abuse"—all at a time when EPA is pushing the CAA's limits to the brink in several ways. *Kisor* v. *Wilkie*, 588 U.S. 558, 589 (2019). The Court has already shown it knows better.

The Court should thus stay the Rule until it resolves any petition for certiorari.

ARGUMENT

"The authority to hold an order [or rule] in abeyance pending review allows an appellate court to act responsibly." *Nken* v. *Holder*, 556 U.S. 418, 427 (2009). And here, all the relevant factors confirm that this Court should stay the Rule to allow for careful, responsible review of this far-reaching regulation.

I. The States Will Prevail.

In many ways, and in many places, the Rule takes unlawful steps. The States here focus on some of the most obvious offenses: how the Rule inappropriately fails to employ an "adequately demonstrated" system that produces "achievable" emission limitations, how it unjustifiably cabins state discretion, and how it incorrectly forgets the real message from *West Virginia* v. *EPA*.

A. The Rule Is Inconsistent With Section 111.

This case can start and end with the plain text of Section 111 of the CAA. EPA traverses congressional limits in that section in at least two distinct instances that warrant immediate relief.

1. The Rule Unlawfully Imposes An Impossible "Best System Of Emission Reduction."

Carbon capture and co-firing are not "adequately demonstrated" systems that lead to "achievable" emission limitations. 42 U.S.C. § 7411(d)(1). EPA and its Respondents devote plenty of attention to showing otherwise—but their responses ignore many issues the States raised. Appl. 9-21. The silence is telling; at least at the pace, scale, and efficiency that EPA demands, these systems aren't ready for primetime. So the States will likely prevail on their challenge.

a. First, let's level set. EPA and its supporters begin by seeking shelter in the familiar embrace of agency deference. See EPA Opp. 24-25; see also Power Co. Opp. 10; Enviro. Opp. 4. But as even EPA is forced to concede (before quickly forgetting), no deference is appropriate when deciding what this statute means.

"[T]he role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2263 (2024). And make no mistake: the questions the States present here are questions of congressional will, not granular factual judgments. In particular, the States object to how broadly EPA understands its own power. Because Section 111 draws some clean boundaries around the delegations it defines, judges must "police the outer statutory boundaries of those delegations." *Id.* at 2268. So EPA is wrong to urge deference to its "expertise" in matters like these—indeed, it gives away that it has this idea all wrong when it relies in a roundabout way on the now-defunct *Chevron* doctrine. See EPA Opp. 25 (quoting *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 428 (2011) (citing "generally" *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984))).

Even if some degree of "deference" (in the form of arbitrary-and-capricious review) is appropriate as to some aspects of this case, it's not the very-nearly-blind deference that EPA seems to want. *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (explaining that under the "arbitrary and capricious" standard, a "reviewing court should not attempt itself to make up for [an agency action's] deficiencies"); see also, *e.g.*, *Qwest Corp.* v. *Boyle*, 589 F.3d 985, 998 (8th Cir. 2009) ("We will not blindly

defer to an agency decision that is uninformed or unexplained."). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan* v. *EPA*, 576 U.S. 743, 750 (2015). As lower courts have explained, to confirm that happened, courts must "scrutinize the record." *MCR Oil Tools, LLC* v. *DOT*, No. 24-60230, 2024 WL 3579112, at *3 (5th Cir. July 30, 2024). That means the "*entire* administrative record," *Defs. of Wildlife* v. *U.S. Forest Serv.*, 94 F.4th 1210, 1230 (10th Cir. 2024) (emphasis added), not just the agency's preferred bits. And though the agency says scientific matters call for some higher standard, it mistakenly relies on a case addressing the separate substantial-evidence standard in pressing that point. See *Balt. Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983).

So in this case, the Court should be careful about leaning too much on deference, discretion, and similar agency-related concepts.

b. Now on to the statute. App. 9a-10a. The best system needs to be "demonstrated." EPA therefore must "make sure the best system has a proven track record." *West Virginia*, 597 U.S. at 759 (Kagan, J., dissenting). By requiring that a system be "demonstrated," rather than "suggested" or "known," for instance, Congress called on EPA "to show clearly" that the system would work for the regulated source. *Demonstrate*, WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 220 (1967). By tacking on the "adequately" modifier, Congress stressed that the technology must be "sufficient for [the] specific requirement" it is designed to address. *Adequate*, *supra* at 11. Read together, then, an "adequately demonstrated" system must be one that EPA "has … shown to be reasonably reliable" and "reasonably efficient" in achieving emission control at the relevant

facility. *Essex Chem. Corp.* v. *Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973). Section 111's references to the Administrator's role do not give EPA a "roving license" to do otherwise. *Am. Elec. Power Co.*, 564 U.S. at 427.

Compare these relatively high standards—based on a *proper* understanding of the statute—with the spin on the statute that EPA offers in response. EPA Opp. 26-29.

It's not enough, for example, for EPA to say that a technology might have existed at some abstract level for a long time, as that says nothing about whether the technology is fit for the requirement to which it will now be applied (90% capture across an entire facility). EPA Opp. 26. Nor is it particularly compelling that several projects are in development. See *id.* (referring to development numbers); *id.* at 27 (referring to Project Tundra and Diamond Vault). Without seeing whether those projects ultimately succeed, they don't "show" or "prove" anything, let alone establish a "track record." *Id.* Use of carbon capture in drips and drabs does not by itself suggest that the technology can be scaled up, either. That's why projects like those at Argus Cogeneration Plant (which doesn't transport, store, or reflect a specific capture rate, let alone 90%) or Bellingham Cogeneration Plant (which doesn't transport, store, or capture more than 10% of carbon emissions) provide next to no real help. EEI Appl. 12, 15. And of the "multiple coal plants" that EPA identified, EPA Opp. 27, none have *actually* captured carbon at the rate targeted by the Rule to any consistent degree, let alone throughout their operation and at the massive scale the Rule anticipates. See Appl. 11-15; see also, *e.g.*, NRECA Appl. 16-18; EEI Appl. 15-16; Ohio Appl. 10-11; EGST Appl. 16-17; NMA Appl. 12-14; NACCO Appl. 15-16.

No wonder, then, that even the most ardent environmentalists have observed how "high-profile [carbon-capture] projects, including … the Petra Nova and Boundary Dam projects at coal-fired power plants, … have all missed capture targets advertised by proponents, have claimed high capture rates by only capturing a minute fraction of total facility emissions, or both." Ctr for Int'l Env't L., Comment Letter on Proposed Rule For the Enhancement and Standardization of Climate-Related Disclosures For Investors (SEC Release No. 33-11042; File No. S7-10-22), 2022 WL 18672611, at *3. Some Respondents here likewise recognize there's no real track record for capture, but they mistakenly assume (without explanation) that the missing evidence stems from "the sector's long history of operating without any CO_2 standards." N.Y. Opp. 15.

And that's only part of the Rule's incongruence with the statute. The States and others have also laid out how transport and storage facilities wouldn't come close to meeting the demand that would be created by the Rule, and there's no hope of building either of these networks on the timeline that the Rule imposes. Appl. 15-16. EPA responds by just reciting what transport and storage *does* presently exist, such as pipelines (which tend to be heavily concentrated in one region of the country) or storage locales that might be positioned near some facilities (but not others). EPA Opp. 28-29. But even it doesn't suggest that today's transport and storage would be nearly enough. Instead, it just declares that energy producers will design, construct, and develop all the necessary elements successfully in a short time (often in the face of significant regulatory hurdles, such as permitting requirements) without ever explaining how to bridge the gap between what we have now and what EPA imagines will be needed. EPA Opp. 29. At most, it seems to have

done a few back-of-the-envelope timing calculations based on a single hypothetical project. App. 88a. But that's essentially a hopeful wish about how things will come to be soon in areas far outside the agency's realm of expertise. That's not the same as saying that a particular technology is, in fact, "adequately demonstrated" *today*, as the statute requires. See App. 46a n.223 (describing lead time for "the development of projected technology"). And anyway, even if the statute left room for a little prognostication, an agency still must "engage in reasoned decisionmaking" when it makes predictive judgments. *Int'l Ladies' Garment Workers' Union* v. *Donovan*, 722 F.2d 795, 821-22 (D.C. Cir. 1983). EPA hasn't.

It's reasonable that Congress would not have wanted EPA to just take a gamble on a system of emission reduction in the way the Rule does. If a system is impossible to implement, then the facility will need to close. Perhaps it will even go through the painful expense of *trying* to implement the system, only to limp along, find itself unable to meet the standards, and give up in the end. None of these constitute the right outcome considering how the statute contemplates continued operation; a "standard of performance," after all, expects that the unit will indeed continue to "perform." And EPA could respect that congressional command by looking to firmly understood and practically adaptable technologies of *today*.

c. Lastly, other of the States' practices that might be seen as endorsing carbon capture don't change things. N.Y. Opp. 14-15. It's hard to understand how Respondents think *state-level* work transforms a *federal* statute. But in any event, state efforts that fund or otherwise support aspirational efforts are consistent with what the States already said: "CCS is an important emerging technology … but it's not feasible on the Rule's scale or

timetable." Appl. 10. The States take a more grounded approach in working toward the use of the technology without mandating a rushed, aggressive, and expansive rollout of the kind the Rule insists on.

2. The Rule Unlawfully Hampers The States.

The Rule also impairs the discretion that Congress meant to give States. That's true in at least two ways.

One problem arises from EPA's "presumptive standards" of performance. The statute expressly assigns to the States the task of writing plans that "establish[] standards of performance for any existing source." 42 U.S.C. § 7411(d)(1). Yet by dubbing its preferred standard the "presumptive" one, EPA has embraced its own standard "as true until [the standard] is shown not to be true." *Presume*, BLACK'S LAW DICTIONARY (12th ed. 2024). Put another way, a "presumption" establishes some "predicate fact" that "produces a required conclusion in the absence of an explanation," so the party against whom a presumption is directed has "the burden of producing an explanation to rebut" it. *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506-07 (1993) (cleaned up). So States must now overcome a non-statutory barrier if they want to go their own way (as the statute expects)—even in a way that produces an equivalent emission limitation. And really, the Rule does not even leave room for States to set *equivalent* standards. According to the Rule, unless a State is considering remaining useful life or other source-specific factors, States may "deviate" from the presumptive standard only "to apply a more stringent standard of performance." App. 171a.

Neither EPA nor any of its fellow Respondents find specific statutory authority for these constraints. Instead, they emphasize how State standards of performance must

"reflect[]"—and, in their view, be no less stringent than—the "degree of emission limitation" produced "through the application of the [EPA-identified] best system of emission reduction." 42 U.S.C. § 7411(a)(1). But that argument conflates three distinct concepts: (1) the best system of emission reduction (which EPA sets); (2) the emission limitation (which, theoretically, flows straight from the best system); and (3) the standard of performance (which States first set and EPA then approves if "satisfactory"). EPA's role in identifying the first item and perhaps calculating the second does not give it some front-end power as to the third. In fact, even the court that once endorsed the Clean Power Plan recognized that these delineated roles "give[] the States broad discretion in achieving th[e] emission limitations." *Am. Lung Ass'n* v. *EPA*, 985 F.3d 914, 962 (D.C. Cir. 2021), overruled on other grounds by *West Virginia* v. *EPA*, 597 U.S. 697 (2022); see also *Nat'l-Southwire Aluminum Co.* v. *EPA*, 838 F.2d 835, 838 (6th Cir. 1988) ("[Section 111(d)] gives substantial latitude to the states in setting emission standards."). EPA cannot "simply throw[] the burden of persuasion onto the states." *Michigan* v. *EPA*, 213 F.3d 663, 683 (D.C. Cir. 2000). Presumptive standards effectively put broad state discretion back in the box.

Another problem appears when one looks to the States' ability to consider the "remaining useful life of the existing source," along with "other factors," when setting performance standards. 42 U.S.C. § 7411(d)(1). Yes, the Rule pays lip service to that concept. EPA Opp. 49. But remember: before EPA will free the States to tailor standards to remaining useful life and other factors, States must now show "fundamental differences between [(1)] the circumstances of a particular facility and the information" EPA thinks it

has already considered and (2) the information now relied on by the States. App. 176a. Worse still, the Rule contemplates that States' discretion becomes relevant in only "exceptional circumstances." App. 12a, 104a n.674. Congress never said it wanted States to be so limited. See, *e.g.*, *Jimenez-Castro* v. *Sessions*, 750 F. App'x 406, 408 (6th Cir. 2018) (explaining, in the immigration context, that "[t]he exceptional-circumstances standard sets a high bar that will be met in only rare cases" (cleaned up)).

EPA tries to solve this self-created problem by saying that its new restrictions on the use of "remaining useful life and other factors" arise from another, separate EPA rule. EPA Opp. 49-50; see also N.Y. Opp. 22. Yet once more, EPA never explains how it can make the same legal error twice and answer for it once; it has no legal authority for such an idea. The unlawful restrictions are operating here and harming the States here, so relief is appropriate here, too. Some other Respondents say that Congress couldn't have meant to provide the States broad discretion when it told EPA that it "shall permit" that discretion. N.Y. Opp. 23 (citing 42 U.S.C. § 7411(d)(1)). But "shall" means "shall"—it is a "language of command." *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935). And even if EPA could impose a few reasonable limits on States' discretion, the limits it employed here *aren't* reasonable given that they allow only for rare discretion. To borrow Respondents' example, N.Y. Opp. 23, it would be as if a prosecutor could satisfy an instruction that he "shall permit" defense counsel to examine "tangible objects" by making those objects available for five short minutes on a random day.

EPA's decision to tie the States' hands via the Rule is especially bad because the Rule concerns power production. Regulating utilities, including electricity generation, is

"one of the most important … functions traditionally associated with the police power of the States." *Ark. Elec. Co-op Corp.* v. *Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983); see also *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 568-69 (1980). States have "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). They also have wide discretion when modifying existing energy systems or exploring new ones. See *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 165-66 (2016). So if there's anywhere EPA should've tread carefully, it's here. Instead, it stomped a hole right through the center of the State's traditional realm—just as it has tried to do before.

Thus, the Court should stay the Rule to ensure that States retain their congressionally contemplated central role under Section 111.

B. The Major-Questions Doctrine Confirms Again That This Rule Is Unlawful.

As the States explained before, "EPA's venture back into major-questions territory is another reason the States are likely to win." Appl. 21.

1. Everyone correctly focuses in on *West Virginia* v. *EPA*. That case described how EPA had long employed measures under Section 111 that would "caus[e] plants to *operate* more cleanly." 597 U.S. at 706 (emphasis added). In contrast, the unlawful plan at issue in *West Virginia* required coal-fired facilities to "reduce their own production of electricity[] or subsidize increased generation by natural gas" and other sources. *Id.* Using the "ancillary" "gap filler" of Section 111(d) for such broad-sweeping aims went too far. *Id.* at 710, 724. If EPA was going to "restructure the American energy market," then it first

needed a clear statement from Congress that it was empowered to do so. *Id.* at 724. Yet nothing in the statute suggested that Congress wanted EPA to declare "that it would be 'best' if coal made up a much smaller share of national electricity generation." *Id.* at 728. Certainly, nothing suggested that Congress wanted to push that view by "forcing coal plants … to cease making power altogether." *Id.*; see also *id.* at 730-31 (resisting EPA's claim of authority to "require a large shift from coal to natural gas" and other sources).

So even with reassurances from EPA that this shift would be "practically feasible" without "exorbitant" energy price increases, *West Virginia* held that EPA simply couldn't stretch Section 111 as far as it wanted. *West Virginia*, 597 U.S. at 729. The statute creates neither a national energy-regulation scheme nor a greenlight for national command and control. "The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself." *Id.* at 730. EPA thus could not "direct existing sources to effectively cease to exist." *Id.* at 728 n.3. And it couldn't use more roundabout ways of pushing coal out of the way, either; the Court "doubt[ed]," for instance, that EPA could "simply requir[e] coal plants to become natural gas plants." *Id.*

West Virginia forecloses the Rule because it once more tries to do what the Court said EPA could *not* do: squeeze out coal and push production to EPA-favored sources. To be sure, EPA did not announce the endgame in the same way it did in *West Virginia*'s Clean Power Plan. EPA at least dresses this effort in the trappings of "technology-based" standards. But *West Virginia* never announced that EPA may do whatever it wishes so long as it uses technology or presses measures at an individual source. Contra EPA Opp. 14-15; Power Co. Opp. 7. Rather, the Court probed the "nature of the question" and the

"highly consequential power" at stake. *West Virginia*, 597 U.S. at 721, 724. It was the "scope, cost, and political salience" of EPA's efforts that mattered, not the specific means employed. *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring). And those factors remain the same here as they were in *West Virginia*.

2. Perhaps recognizing that all the same indicia of a major-questions case are back again, EPA tries to either recast them, minimize them, or ignore them.

Cost is one example. The States have never suggested that cost *alone* is enough to present a major question, contra EPA Opp. 21, but it's a relevant factor. See *Ala. Ass'n of Realtors* v. *DHHS*, 594 U.S. 758, 764 (2021) (citing program's "billions" in "economic impact"); *King* v. *Burwell*, 576 U.S. 473, 485 (2015) (same). And EPA never fights the reality that its Rule will again impose "billions" in compliance costs, not even to mention the broader economic impact that will come from pushing the coal industry into the grave. Instead, it shrugs, remarking (without authority) that Congress "surely contemplated" those costs might arise. EPA Opp. 21. Yet the major-questions doctrine isn't concerned with dreaming up what Congress might've imagined. Cf. *West Virginia*, 597 U.S. at 723 (explaining that a "merely plausible textual basis for the agency action" is not enough to empower it to address a major question). It's about what Congress *clearly* said.

The issue EPA purports to tackle in the Rule also remains just as politically charged as it was two years ago. Everyone agrees "[c]limate change has staked a place at the very center of this Nation's public discourse." *Nat'l Rev., Inc.* v. *Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari). The present administration itself has claimed that climate issues are among the most politically significant of our time. See, *e.g.*,

Exec. Order No. 13,990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021). "[E]arnest and profound debate" like that seen on this issue provides another signal that the question EPA seized is major. *Gonzales* v. *Oregon*, 546 U.S. 243, 249 (2006).

And EPA is wrong to think that Congress somehow defused the issue by passing a few renewable energy laws. EPA Opp. 45 (citing the Energy Policy Act of 2005 and the Inflation Reduction Act of 2022); see also N.Y. Opp. 19 (relying on the IRA). At most, those statutes show that Congress was interested in testing the waters when it came to carbon capture. But Congress funds underdeveloped and even experimental measures all the time; a little funding doesn't signal that Congress wants the funded technology to be imposed across an entire industry no matter its cost or efficacy. See 42 U.S.C. § 15962(i)(1) (limiting how EPA can consider Energy-Policy-Act-funded technology in evaluating whether a system is "adequately demonstrated" under Section 111). Indeed, it has rejected measures to impose carbon capture or shutter fossil-fuel fired facilities. See, *e.g.*, H.R. 2519, 117th Cong. (2021); H.R. 4535, 114th Cong. (2016); S. 4280, 117th Cong. (2022).

Even more obviously, the Court shouldn't follow EPA's lead in taking a single floor statement from a single representative as a congressional endorsement of its work. EPA Opp. 46; *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012) (explaining why "the views of a single legislator" aren't that helpful). A 2022 statement from a representative is particularly little help in understanding the CAA, passed 50 years earlier. See *United States* v. *Clark*, 445 U.S. 23, 32 (1980). And if this case is to become a battle of congressional statements, then there's other strong evidence to the contrary. See Press Release, Joe

Manchin, Manchin Sets the Record Straight on Coal and Inflation Reduction Act (Aug. 4, 2022), https://bit.ly/3WSX6Q9 (quoting key IRA supporter Senator Joe Manchin: "The Inflation Reduction Act does not provide any new authority for EPA to shut down coal plants or to require 'generation shifting.' The text does not grant EPA any new authority to do anything to power plants or coal facilities.").

Cost and political salience aside, the Rule's scope seals the deal when it comes to the major-questions doctrine. Section 111(d) is the same as it always was: an ancillary, limited, "little-used backwater." *West Virginia*, 597 U.S. at 730. But once more, EPA is trying to use it to push coal out in favor of other sources. Appl. 22-23. EPA even greases the skids by giving plants a compliance avenue consisting of early retirement. App. 19a, 172a. EPA says some of those pushed-out plants can keep operating for a little while longer *if* they also become gas plants, App. 14a-15a—a scenario the Court expressly anticipated and "doubt[ed]" in *West Virginia*, 597 U.S. at 728 n.3. But while all this presents an existential attack on the industry, EPA is indifferent. The Clean Power Plan at least tried to balance "how much of a switch" in generation was "practically feasible." *Id.* at 729. Now, EPA does not disclaim plant closures.

All this asks too much. EPA wants to rejigger an "essential" industry, *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 132 (2016) (Sotomayor, J., dissenting), based on hopes and projections. That massive shift in turn affects most every American—"a significant encroachment" by any measure, *Nat'l Fed'n of Indep. Bus.* v. *OSHA*, 595 U.S. 109, 117 (2022); see also *West Virginia*, 597 U.S. at 745 (Gorsuch, J., concurring) (noting how this industry is "among the largest in the U.S. economy, with links to every other

sector"). Congress did not clearly authorize EPA to set standards that "direct existing sources to effectively cease to exist." *Id.* at 728 n.3. Nor did it permit the agency to decide—directly or indirectly—"how much coal-based generation there should be over the coming decades." *Id.* at 729.

But EPA tries to find a life raft in a single word from a single footnote in *West Virginia*. There, the Court distinguished between market reconfiguration and "a rule that may end up causing an incidental loss of coal market's share." *West Virginia*, 597 U.S. at 731 n.4. EPA tries to shoehorn the Rule into the Court's latter caveat using fuzzy statements that the Rule "may" cause some "incremental reduction in the number of coal plants" just because those plants might not "choose to remain in operation." EPA Opp. 18; see also N.Y. Opp. 20; Power Co. Opp. 7-8 (similar, citing losing argument in *West Virginia*). Two things say otherwise.

First, there's nothing "incremental" or "incidental" about pervasive, market-wide closures. Appl. 22. Something is "incidental" when it has only a "minor role." *Incidental*, BLACK'S LAW DICTIONARY (12th ed. 2024). In other contexts, courts have said that items aren't incidental when they are a "great and substantial" part of an activity, *Hartford Fire Ins.* v. *Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 555 (2d Cir. 2000), when they are "significant … for [their] own sake," *Stevens* v. *United States*, 302 F.2d 158, 163 (5th Cir. 1962), or when they are "central" to a relationship, *Rowe* v. *Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1034 (9th Cir. 2009). The plant closures here meet all those standards; no one can rightly say the impact is "minor." EPA seems to instead believe that anything that's not the first intended consequence of an act is merely incidental. EPA Opp. 16-17;

see also EPA Opp. 20 (referring to "forbidden intent"). But the consequences of an act can be more than incidental even when they're not specifically intended. Fishing with dynamite might be primarily intended as a quick and easy way to catch something to eat—but nobody would call it an "incidental" effect when the lakebed gets wrecked in the process.

Second, there's no voluntary choice happening here. When Congress withholds power to act directly, it also withholds power to act indirectly (or coercively). *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023). In fact, the Court has long "repudiated" the idea that "the national government may do indirectly what it cannot do directly." *Nat'l Bank* v. *United States*, 101 U.S. 1, 4 (1879). The Court must instead "consider the natural operation" of the Rule. *Bailey* v. *Alabama*, 219 U.S. 219, 244 (1911). And the "natural operation" here is that plants are responding to conditions that are directly and irrefutably created by the Rule itself. It is "economic dragooning that leaves the [plants] with no real option but to acquiesce." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 582 (2012) (Roberts, C.J.).

3. In the end, a little clear-eyed realism is enough to resolve this stay motion. EPA should not be permitted to ignore what the Court said just by reciting a few different words on the way to the same place the Court has already said it cannot go. And indeed, EPA and its supporters have tried to use semantics in this way to rationalize otherwise unjustifiable actions before. See, *e.g.*, Joseph Goffman & Laura Bloomer, *Disempowering the EPA: How Statutory Interpretation of the Clean Air Act Serves the Trump Administration's Deregulatory Agenda*, 70 CASE W. RSRV. L. REV. 929, 943-44, 950-51 (2020) (current EPA Air Office Director arguing that "generation-shifting" is just a

standard "pollution-control program[]"). If *West Virginia* is to mean anything, then the Court cannot endorse this repeat performance.

II. The States Will Be Irreparably Harmed Without A Stay.

When it comes to irreparable harm, the States and their co-Petitioners showed plenty. But EPA and its fellow Respondents largely respond by either fixating on the Rule's compliance deadlines or refusing to grapple with the specific evidence the States presented. That's a failing strategy.

A. Start with the relevant period for any harms that would arise without a stay. According to EPA, it would be "premature" for this Court to consider any harm that might arise between the time of a decision in the D.C. Circuit and the end of review in this Court. EPA Opp. 55; see also Power Co. Opp. 14. Yet this Court often grants stays through the disposition of any timely petition for certiorari even while proceedings are still advancing below. See, *e.g.*, *Labrador* v. *Poe*, 144 S. Ct. 921 (2024); *Garland* v. *Vanderstok*, 144 S. Ct. 44 (2023); *Danco Lab'ys, LLC* v. *All. for Hippocratic Med.*, 143 S. Ct. 1075 (2023). That usual practice shows this Court is concerned with harm through the *whole* appeals process—even when an administrative rule is involved. See *Ohio* v. *EPA*, 144 S. Ct. 2040, 2058 (2024); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 121; *West Virginia*, 577 U.S. at 1126. It seems particularly appropriate to account for this Court's review when it comes to this case, seeing as how the Court intervened *both* times that earlier iterations of the Rule came up.

In the face of that ordinary relief, EPA suggests only that the Court would be in a "better position" to decide on any pre-certiorari harms later because it might benefit from hearing more from the D.C. Circuit. EPA Opp. 55-56. That's true as far as it goes, but it

doesn't decide whether a stay should issue now. Stay or no stay, the D.C. Circuit will still have a chance to decide these issues on a fully briefed, complete record, and it will still be able to "evaluate the merits and certworthiness of [the States'] claims." *Id.* at 56.

In truth, the D.C. Circuit could have "evaluate[d] the merits and certworthiness" of these claims already, but it instead chose to issue a summary order that hampers review now. The States should not be forced to come back to the Court repeatedly merely because the lower court declined to provide much of a reasoned decision when the States asked the first time. And as a practical matter, EPA's approach would create a whiplash effect that would only multiply the parties' harms. States, for instance, would be compelled to launch into regulatory efforts, only to perhaps pause them again (or perhaps not), only to perhaps resume them again (or perhaps not). Some Respondents outright invite this compliance back-and-forth. See N.Y. Opp. 35. In contrast, Applicants' request—allowing orderly resolution *before* the train is down the tracks—avoids those problems of confusion and chaos.

So the Court should consider harm through the duration of any decision on a petition from the States to *this* Court.

B. Looking, then, to that relevant "near-term," it's plain enough that the States and others will suffer real, irreparable harms in all three of the forms that EPA addresses. EPA Opp. 51-56.

1. Take first the industry's costs of compliance. Recall how 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. 382a; see also

App. 485a-486a, 492a. Even sources that have started working to comply with the Rule already worry that they won't make the Rule's deadlines. App. 518a-519a, 521a, 525a-527a, 609a. All in all, substantial evidence shows that EPA is wrong in maintaining that no one needs to be in a hurry to comply. See Appl. 29-31. The money spent on these early efforts will be unrecoverable thanks to sovereign immunity. And if the States' home-state energy producers do miss those deadlines, then States could in turn face spillover effects from reduced energy and weakened economies—irreparable harms in every way. Cf. *California* v. *Am. Stores Co.*, 492 U.S. 1301, 1307 (1989) (O'Connor, J., in chambers) (finding harm to a state's market justified stay).

EPA responds by leaning on its own projections that industry will have to do only "preliminary" and "conceptual" tasks. EPA Opp. 52. Even putting aside the States' substantial contrary evidence, EPA's own statements don't get it very far. EPA quotes its finding that the costs for these tasks will be "substantially less than other components of the project schedule." *Id.* But without knowing how much EPA thinks those other components will cost, it's hard to know where EPA gets the idea that even the initial costs will be "limited." After all, if the later stages cost *billions* (as is, in fact, the case, see, *e.g.*, NACCO Appl. 24-32), then even an earlier stage that racks up hundreds of millions could be accurately described as "substantially less." And as a matter of plain sense, even if the need to plan and conceptualize were the only real cost, those costs could still be enormous when the planning requires producers to create vast new capture, transport, and storage systems on a previously unheard-of scale. And those substantial sums are still irreparable. *Ohio*, 144 S. Ct. at 2053.

Left with the unavoidable reality that the Rule promises serious and irreparable costs, EPA resorts to speculation. The costs won't "necessarily be wasted," the agency imagines, because the D.C. Circuit might remand and allow the agency to re-implement carbon capture as a best system of emission reduction (albeit on a different timetable or capture rate), which might in turn allow plant owners to use any already completed planning work. EPA Opp. 52. But EPA never explains why carbon-capture of a different form would be the next best choice to what it did here. If this case gets remanded, then EPA will need to reevaluate whether other technological options offer faster, better results within the confines of the statute. And even if carbon capture in some modified form did prove to be EPA's next choice, EPA assumes—without explanation—that planning for one carbon capture system is interchangeable with another. Assumptions stacked on assumptions don't justify denying relief.

EPA and other Respondents are also wrong to reject the Applicants' evidence on compliance costs out of hand merely because EPA incorrectly found, in promulgating the Rule, that compliance dates provided a long enough runway to avoid real harm. See EPA Opp. 51, 54-55; Power Co. Opp. 14; N.Y. Opp. 34. The Rule predicts nothing about individual businesses' and States' costs—much less rebut the movant-specific harms the record shows are "likel[y]." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). Even so, EPA specifically believes that Section 111 renders its contrary judgments on timelines and costs "controlling" in all but the rarest of circumstances. EPA Opp. 54. That's an odd choice given that these energy-centric logistical judgments—implicating questions of "electricity transmission, distribution, and storage"—are outside EPA's real area of

expertise. *West Virginia*, 597 U.S. at 729; cf. *Texas* v. *EPA*, 829 F.3d 405, 432 (5th Cir. 2016) (noting how "EPA has no expertise on grid reliability"). There's also no hint in Section 111 that Congress meant to constrain a court's ability to grant equitable relief in some unusual way. "Absent the *clearest command* to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979) (emphasis added).

No, in pressing this argument, EPA once again asserts authority it does not have. "It is the responsibility of this Court, not the administrative agency, to … find facts relevant to, irreparability of harms or prejudice to any party or to the public interest through grant or denial of injunctive relief." *PGBA, LLC* v. *United States*, 60 Fed. Cl. 567, 568 n.1 (2004). For good reason: "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, as government experts will likely attest that the public interest favors the federal government's preferred policy." *Sierra Forest Legacy* v. *Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011). EPA's cases don't say otherwise. *Hedges* just held that a court couldn't equitably enforce a void contract; that's consistent, of course, with the notion that an applicant must show some likelihood of success on the merits. *Hedges* v. *Dixon County*, 150 U.S. 182, 192 (1893). *American Electric Power*, 564 U.S. 410, isn't about equitable relief at all. And *South Bay* rested chiefly on a locality's broad powers to police public health and safety; it also dealt with the need for a "significantly higher justification than a request for a stay" when an applicant sought an affirmative injunction at a time when local officials were "actively shaping their response

to changing facts on the ground." *S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

Lastly, one group of Respondents seems to argue that no relevant compliance costs arise in the near-term because carbon capture "will … work," so those making "immediate and costly decisions" are just creating self-imposed harms from "voluntary choices." N.Y. Opp. 32-33. The argument is hard to follow. EPA concedes that implementing carbon capture would give rise to costs even if one were to assume the technology works. See App. 219a (estimating present value of compliance costs at $19 billion in 2019 dollars at a 2% discount rate). If the Rule is unlawful, these compliance costs are lost all the same. And it is hardly a "voluntary" choice to make a rational judgment, compelled by costs and other circumstances the Rule creates directly, that continuing business as usual is not an option anymore.

2. Second, EPA improperly downplays the real risks to our energy grid. Rule-driven plant closures will be irreparable. Reliability issues are at the breaking point—prematurely "losing even one or two" more plants would have sobering consequences. App. 777a-778a. EPA promises plants won't be compelled to close sooner before 2032, EPA Opp. 53, but here it too relies too much on the notion that plants "choos[ing]" to close because of the *practical* force of the Rule are somehow distinguishable from plants closing because of the *legal* force that arises a few years from now. Legally, that distinction is not meaningful. And factually, EPA ignores that planning in this sector extends at least a decade. Appl. 29-30. So making and *implementing* operational decisions—including

retirement decisions—starts today, not in 2032. See App. 717a-725a; see also App. 173a (explaining that retirement elections must be "enforceable requirement[s]")

Certain Respondents envision that these risks can be ameliorated by "compliance options and flexibilities" that don't turn out to be supported by facts. N.Y. Opp. 29, 31-32. For example, after questioning West Virginia's understandings of its own facilities, New York and others tell the Court that West Virginia's coal-fired power plants can operate for a few more years by co-firing with "West Virginia's plentiful natural gas supply and 16,000-mile pipeline network." N.Y. Opp. 29. But Respondents forget that West Virginia faces a serious "lack of pipeline takeaway capacity" already; the newly opened Mountain Valley Pipeline, for example, is already "fully subscribed under long-term, binding contracts." Richard McDonough, *Challenges to Growth Remain Key Story in Appalachian Basin*, PIPELINE & GAS J. (May 2024), https://bit.ly/3yLDBkt. That capacity constraint would make it hard to feed coal-fired facilities. The same set of Respondents say that a coal-fired unit "may be eligible for a less stringent standard under a remaining useful life analysis," saving it from early retirement. N.Y. Opp. 29; but see N.Y. Opp. 38 (arguing that remaining useful life should not be "invoked across the board for all sources"). But they forget that EPA has significantly tightened the criteria for considering remaining useful life, making eligibility only a distant prospect. See *supra* Part I.A.2. And they believe that the Rule "allow[s] for continued (or greater) operation of a power plant if necessary to maintain grid reliability. N.Y. Opp. 32. But read the Rule: it offers only a (1) "short-term reliability mechanism" for "system emergenc[ies]" and (2) a temporary "reliability assurance mechanism" for individual plants that *must* end with the plant in question

permanently shuttering. 40 C.F.R. § 60.5740b(a)(12)-(13). Considered carefully, then, these options aren't "flexibilities" at all.

Respondents also offer a variety of reassurances that amount to unvarnished hope. They tell us state regulators will fix it—though they don't say what those regulators will do. N.Y. Opp. 27. They say those same regulators could just refuse to approve a plant retirement—apparently suggesting that States will compel facilities to remain open even when they're no longer economically viable. *Id.* at 29. They argue that new technologies like battery storage or "enormous amounts of replacement capacity" from green energy projects will bridge the gap—but they give no details about how much those technologies can offer, when they'll come online, where they are, or anything else of the sort. *Id.* at 30, 33. And they say that new gas plants are coming under the Rule—even though they can cite only a handful of projects in the early planning stages. *Id.* at 30-31. None of these wishes should foreclose relief. If speculation isn't enough to justify issuing injunctive relief, then it shouldn't be enough to justify denying it, either. See, *e.g.*, *FTC* v. *Food Town Stores, Inc.*, 539 F.2d 1339, 1346 (4th Cir. 1976).

Lastly, some Respondents essentially respond to these serious harms by saying "good riddance" to coal-fired plants. See N.Y. Opp. 27 & n.6; *id.* at 30 n.7. In their eyes, coal is on its way out, and it's not reliable, anyway. *Id.* The States here would question that view. See, *e.g.*, C. Boyden Gray, *Climate Realism and a Positive Vision for American Energy*, 21 GEO. J.L. & PUB. POL'Y 149, 166 (2023) ("Coal and nuclear power represent stable and reliable baseload power. But the wind, solar, and natural gas energy that have replaced them are far less stable."). But it's ultimately beside the point. In the end, the

relevant point is that the Rule is pushing premature retirements—so even if coal-fired power has been declining, the Rule forces plants to shutter faster and more destructively than markets would have otherwise. And as for reliability, at least up to this point, even those who supported carbon capture were compelled to recognize that "[c]oal will continue to serve as the primary fuel source in baseload power generation because of its abundance and relative low cost." Cyrus Zarraby, *Regulating Carbon Capture and Sequestration: A Federal Regulatory Regime to Promote the Construction of a National Carbon Dioxide Pipeline Network*, 80 GEO. WASH. L. REV. 950, 957 (2012).

3. Lastly, EPA barely engaged with a third category of harm: the significant compliance costs that the States themselves will bear for implementing this new regulatory regime.

States will "incur unrecoverable compliance costs," *Kentucky* v. *Biden*, 57 F.4th 545, 556 (6th Cir. 2023), "start[ing] immediately," App. 389a; see also, *e.g.*, App. 554a, 557a-558a; App. 853a-854a. Some Respondents dismiss these costs as reasonable. Enviro. Opp. 20-21; N.Y. Opp. 36-37. They do that in part by myopically focusing on just one aspect of the work, the onerous remaining-useful-life analysis that EPA has contrived. See N.Y. Opp. 37. But the experienced agencies doing *all* the work say the costs that result are "immense," App. 349a; "significant," App. 376a; App. 442a; App. 879a; and "substantial," App. 414a; App. 531a. 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. Wrangling these many interests—and getting legislative sign-off—will take at least a year beyond ordinary rulemaking calendars. App.

429a; App. 735a-736a. Below, even EPA's Assistant Administrator for the Office of Air and Radiation was forced to admit that implementing the Rule will be uniquely complicated. See Decl. of Jospeh Goffman, ¶ 86, *West Virginia* v. *EPA*, No. 24-1120 (D.C. Cir. filed June 11, 2024), ECF No. 2059170-2, at 51 ("[I]t is true that developing plans for the power sector may take more time than other state planning under CAA section 111(d) because it involves elements that may be lacking in other sectors."). And the work is made unnecessarily difficult by EPA's insistence on throwing up barriers to State discretion, see *supra* Part I.A.2; if States want to make a run at overcoming those obstacles, they'll have to pour in even more time and money.

Factors like these explain why the States' specific costs dwarf EPA's cumulative $12 million guess. See, *e.g.*, App. 338a; App. 556a, 557a; App. 664a; App. 863a-865a. Although some Respondents attack West Virginia's numbers as too high, N.Y. Opp. 37-38, West Virginia was the only State to submit a plan under the last set of rules, App. 52a—so its agencies know what to expect. And Respondents critique other States based on an apparent misunderstanding of what they said. For instance, New York faults North Dakota for claiming that remaining-useful-life review will be required at every facility, which will create big costs. N.Y. Opp. 38. New York maintains this figure must be too high because remaining-useful-life factors apply "on a case-by-case basis," not "across the board." *Id.* But that's the point: North Dakota can only discern when a facility's standards might require adjustment for remaining useful life and other factors by first *examining* each facility—a costly endeavor precisely because it is "case-by-case." And anyway, even "low" numbers are significant here because they often represent a "substantial portion"

of department resources for States with budgets far lower than the federal government's. App. 881a-882a. So even if the standard were whether costs are "unusual and severe," N.Y. Opp. 36, the States here would easily meet that standard. But see *Texas*, 829 F.3d at 433-34 ("[W]hen determining whether injury is irreparable, it is not so much the magnitude but the irreparability that counts." (cleaned up)).

EPA is wrong to contend "administrative costs" from "changing" federal programs rarely justify equitable relief. *Ledbetter* v. *Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers). Particularly where those "administrative burdens" and "expanding employment" costs tally up to millions per State, *District of Columbia* v. *U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 33 (D.D.C. 2020), the Court should intervene. Nothing about the CAA's judicial review process changes that idea, either. Contra EPA Opp. 54. If it did, then States could never claim harm from an administrative action, as judicial review is available in most every administrative case because of the Administrative Procedure Act or other subject-specific review provisions. Contra *Nken*, 556 U.S. at 433 (explaining how the Court is generally "loath to conclude that Congress would, without clearly expressing such a purpose, deprive [an appellate court] of its customary power to stay orders under review" (cleaned up)). Yet no court has ever held that States should be forced to uniquely suffer avoidable burdens in that way. Quite the opposite: the Court recently cited the States' non-recoverable compliance costs in issuing a stay under the CAA. *Ohio*, 144 S. Ct. at 2053. And though some Respondents fret that this standard approach will turn stays into "commonplace event[s]," N.Y. Opp. 36, that worry would only manifest if EPA and other agencies routinely violate the law.

EPA also dismissively tells States they can avoid any harm by opting out of the state plan submission process for now. EPA Opp. 54. The States already explained why this philosophy shows no respect for either state sovereignty or Congress's specific intention in the CAA to keep States in a key position of control. Appl. 35. EPA never tries to address those ideas. Even if the States could try to avoid crushing costs by allowing a federal plan to go into place for a time, that federal takeover "necessarily impairs [the States'] sovereign interests in regulating their own industries and citizens—interests the [Clean Air] Act expressly recognizes." *Ohio*, 144 S. Ct. at 2053. The States should not be forced to bear one kind of harm to avoid another.

C. All in all, when an administrative rule causes States to suffer unstable power grids, higher energy prices, unrecoverable compliance costs, and threats to their own sovereignty, irreparable harm is manifest. See, *e.g.*, *West Virginia* v. *EPA*, 90 F.4th 323, 331 (4th Cir. 2024); *Texas* v. *EPA*, No. 23-60069, 2023 WL 7204840, at *10-11 (5th Cir. May 1, 2023); *Kentucky* v. *EPA*, No. 23-3216, 2023 WL 11871967, at *4 (6th Cir. July 25, 2023); *Texas*, 829 F.3d at 433-34. But there's one last type of harm that no Respondent even bothers to address: the harm to this Court's ultimate ability to award effective relief. As the States explained in their application, the Court has encountered a situation more than once before where EPA forces entities into compliance, effectively nullifying the parties' right to relief from a rule because the damage had been done. See Appl. 31 (discussing *Michigan* v. *EPA*, 576 U.S. 743 (2015)). That danger lurks here, too. Without a stay, irreversible decisions will be made now, and "a favorable judgment might well be useless." *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). That additional factor would warrant

relief all on its own. "The choice for a reviewing court should not be between justice on the fly or participation in what may be an idle ceremony." *Nken*, 556 U.S. at 427 (cleaned up).

III. A Stay Would Serve The Public Interest And The Balance Of The Equities.

Lastly, the public interest—and other interests—also support a short stay of the Rule. Respondents' arguments confirm it.

EPA and other Respondents insist that the Rule should go into effect immediately because of climate change. See, *e.g.*, EPA Opp. 57. "This argument is obviously colored by [EPA]'s view of the merits." *R.J. Reynolds Vapor Co.* v. *FDA*, 65 F.4th 182, 195 (5th Cir. 2023). But as the States have already explained, Appl. 38, concern over climate change can't justify unlawful agency action. "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 594 U.S. at 766. And "EPA's well-intentioned policy objectives with respect to climate change do not on their own authorize the agency to regulate. The agency must have statutory authority for the regulations it wants to issue." *Mexichem Fluor, Inc.* v. *EPA*, 866 F.3d 451, 460 (D.C. Cir. 2017) (Kavanaugh, J.). Elsewhere, even the federal government has recognized that "it has a duty to uphold … the substantive and procedural standards and limitations Congress has prescribed for the Executive Branch and its agencies to follow in addressing climate issues." Reply in Supp. of Mot. for a Stay 9, *Juliana* v. *United States*, No. 6:15-cv-01517-AA (D. Or. Filed Feb. 15, 2024), ECF No. 589. So too here. Were it otherwise, agencies could act unilaterally anytime they perceived a problem that Congress has—for whatever reason—not chosen to give them the power to address. Yet "no public interest [lies] 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).

Indeed, considering the lack of "certainty of the harm being counteracted or the effectiveness of the proposed steps," "the public interest almost never will militate in favor of denying a stay" of a rule "conceived as the initial step in combatting a perceived long-term threat" like "global climate change." Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 ADMIN. L. REV. 225, 250 (2017). This case isn't the rare exception. EPA does not even argue that the Rule will serve as a tipping point or the like in the agency's efforts against climate change. Instead, it only suggests that the Rule "makes a meaningful contribution toward addressing that problem." EPA Opp. 57. The vague suggestion of good things is not enough to overcome the definite, ascertainable harms from the Rule. That's especially true in the near term, when emission reductions won't start for years (and other measures are already cutting emissions apart from the Rule, Appl. 38-39), but the compliance burdens start right away.

Some Respondents also think the Court should put the Rule on the fast track because "standards for power plants are long overdue." Enviro. Opp. 22; see also N.Y. Opp. 39-40. But any delays resulted from EPA's own efforts to overextend itself beyond the limits of its authority. See, *e.g.*, EPA Opp. 14 (describing how the "Clean Power Plan departed significantly" from the statutory "framework"). And as the States flagged before, Appl. 38, EPA's own slower pace in adopting the Rule here belies any notion that it saw a particular need for speed. Meanwhile, no one explains why this purportedly time-based

public harm remains a real concern now that the D.C. Circuit has chosen to expedite merits briefing below. EPA Opp. App. 4a-5a; see also, *e.g.*, *Doe* v. *Gonzales*, 546 U.S. 1301, 1309 (2005) (Ginsburg, J., in chambers) (refusing to vacate stay given that lower court was "swiftly proceeding" to a final decision). And if the Rule is indeed unlawful, then starting a wide-scale compliance effort immediately only to grind it to a halt later and start all over again might only *impair* the agency's ability to get meaningful, lawful standards in place.

Finally, concerns about grid reliability and energy prices favor the States, not Respondents. Again, the States have already described how experts on the ground think the Rule will drive out significant grid capacity (particularly baseload power), making electricity less predictable and more expensive. See Appl. 26-29; see also, *e.g.*, La. PSC. Resp. 3-7 (detailing why the Rule "will immediately begin undermining the reliability of the electricity grid"). Respondents' own authorities confirm that "shifts in the energy generation mix that lower greenhouse gas (GHG) emissions" are creating new "vulnerabilities" in energy systems. U.S. GLOBAL CHANGE RSCH. PROGRAM, FIFTH NATIONAL CLIMATE ASSESSMENT 5-4 (2023) (cited at N.Y. Opp. 40). But in trying to flip the narrative, Respondents rely on a chain of suppositions: greenhouse gas releases during the period of stay will "contribute" to "extreme weather events" that will then cause power outages that will then cause increased costs to power companies. N.Y. Opp. 40; but see, *e.g.*, FERC, *One-Time Informational Reports on Extreme Weather Vulnerability Assessments; Climate Change, Extreme Weather, and Electric System Reliability*, 87 Fed. Reg. 39414, 39426 (July 1, 2022) (Danly, Commissioner, concurring) ("That the policies of … government bodies are undermining reliability is far more obvious than the question of

whether, and how, the weather is getting worse and what specific effects that worsening weather might have on the stability of the electric system."). Suppositions aren't evidence. And note how the Rule does not purport to strengthen grid reliability or resiliency. Respondents don't explain how further burdening energy producers with unlawful regulation will better equip them to deal with any impending challenges from climate change. It won't.

So the public interest—and the general balance of the equities—favors the States here, too.

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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