No. 24A97

In the Supreme Court of the United States

NATIONAL MINING ASSOCIATION *and* AMERICA'S POWER,
APPLICANTS,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *and*
MICHAEL S. REGAN, *in his official capacity as Administrator of the United States Environmental Protection Agency*, ET AL.,
RESPONDENTS.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

On Application For Stay To The
U.S. Court Of Appeals For The District of Columbia

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

CARROLL WADE MCGUFFEY III
TROUTMAN PEPPER
HAMILTON SANDERS LLP
600 Peachtree St. N.E.
Suite 3000
Atlanta, GA 30308

MISHA TSEYTLIN
Counsel of Record
KAITLIN L. O'DONNELL
CARLY ROTHMAN SIDITSKY
KEVIN M. LEROY
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for Applicants

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INTRODUCTION

EPA's Opposition makes a mockery out of this Court's holding in *West Virginia v. EPA*, 597 U.S. 697 (2022), while seeking to render judicial review of EPA's actions under Section 111(d) effectively meaningless. If EPA's arguments prevail, the agency will have found a way to bypass this Court's holding that EPA may not mandate generation shifting by setting "standards" that are impossible to achieve and then insulating those "standards" from both meaningful judicial review and any possibility of a stay. EPA's position cannot be reconciled with basic principles of equity, the text of Section 111(d), *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), or this Court's order staying the Clean Power Plan (which order EPA does not even mention in its 67-page response).

On the merits, EPA urges this Court to defer to EPA's technical expertise as to whether the Final Rule's lead "best system of emission reduction" ("BSER")—full-unit, continuous 90% carbon capture and sequestration ("CCS")—is "adequately demonstrated" under Section 111. But that is merely an effort to "fak[e] out" this Court. *Clinton v. City of New York*, 524 U.S. 417, 469 (1998) (Scalia, J., concurring in part). EPA appears to now concede that a BSER is not "adequately demonstrated" unless EPA can show that the *BSER itself* has been successfully implemented by a source in the real world. That concession should be the end of the Final Rule because, as EPA knows, continuous 90% CCS has never been successfully applied to the exhaust of an entire generating unit for a year. Not once. The closest any unit has come to achieving what the Rule would require is a small unit in Canada that did so

for only a few days before the system broke. To meet what EPA now (correctly) admits "adequately demonstrated" means, EPA would need to point to a unit that actually implemented 90% CCS to all of its emissions for a full year. EPA cannot point to any such unit because none has ever existed, contrary to EPA's claim that its BSER is in "existence." Resp.30 (citation omitted).

On the equities, EPA does not meaningfully contest the numerous irreparable harms that Applicants National Mining Association's and America's Power's members will suffer from the Final Rule—such as significant and unrecoverable work for the few plants that try to remain operational under the Rule, the irrevocable decision to retire for all other plants, and the devastating effects the Rule will have for the coal mining industry as coal mines close and demand for coal is gutted. Further, and remarkably, EPA does not even try to dispute Applicants' point that the irreparable harms that the Final Rule will cause are indistinguishable from the harms that the Clean Power Plan would have caused absent a stay, which harms justified this Court's stay decision in 2016. Instead, as with its merits arguments, EPA's core irreparable-harm argument is that this Court should abdicate its independent judgment in favor of EPA's allegedly technical findings in the very Rule being challenged here. That is a radical departure from this Court's precedent—including the Court's Clean Power Plan stay decision and *Ohio v. EPA*, 144 S. Ct. 2040 (2024)—and would make stay relief practically unavailable in administrative-law cases, as no agency would ever admit in the administrative record that its rule causes more harm than benefit.

This Court should stay the Final Rule pending review on the merits of Applicants' petition for review.

ARGUMENT

I. This Court Would Likely Grant Review And Reverse If The D.C. Circuit Upholds The Final Rule

A. This Court is likely to grant review and reverse any D.C. Circuit decision upholding the Final Rule. The Rule requires coal-fired plants to (1) implement CCS technology at a continuous capture rate of 90% CO_2 from an entire unit throughout the entire year before 2032; (2) shift 40% of the plant's energy production to natural gas by 2030 and then shut down before 2039; or (3) shut down before 2032. NMA & AP Appl.12. Continuous, full-unit 90% CCS by 2032 is not "adequately demonstrated" because no power plant has ever been able to apply CCS at that level for more than a few days, and even if 90% CCS were to be feasible in the future, its costs would be exorbitant. NMA & AP Appl.12–15 (citation omitted). Forcing coal-fired units to convert to at least 40% natural gas is unlawful "generation shifting," *see West Virginia*, 597 U.S. at 728–29, requiring plants to swap one fuel resource for another before shutting down in favor of other energy types, *see id.* at 730–31; NMA & AP Appl.15–16. And requiring sources to shut down by 2032 to avoid these two infeasible control options violates this Court's prohibition on forced generation shifting, *see West Virginia*, 597 U.S. at 732, as EPA has no authority to decide whether coal plants should "cease making power," *id.* at 728; NMA & AP Appl.16–17.

B. As an initial matter, EPA has no response to Applicants' point that forcing coal-fired power plants to shut down is generation shifting on its face, in violation of

this Court's core holding in *West Virginia*. EPA obliquely acknowledges, *see* Resp.17–18—and EPA's own modeling expressly projects, *see* App.448a–50a (Schwartz Decl. ¶¶ 10–13); App.456a (Schwartz Decl. ¶ 22); App.297a–99a (Bloodworth Decl. ¶¶ 14–18)—that the Final Rule will shut down many coal-fired power plants, eliminating a critical portion of the Nation's electricity supply. Yet the agency avoids discussing which alternative electricity sources will shoulder the demand of consumers who currently rely on the coal-fired facilities that the Rule will force into early retirement. *See* Resp.11, 17–18, 28–29. The answer will not be more coal units, as the present regulatory and economic landscape makes adding new coal capacity impossible. *See* App.5a; 89 Fed. Reg. 39,798, 39,802 (May 9, 2024). Accordingly, the only possibility is an unlawful generation shift to another energy source that EPA would prefer over coal. EPA cannot use Section 111(d) to "direct existing sources to effectively cease to exist," *West Virginia*, 597 U.S. at 728 n.3, even indirectly by allowing no other viable option, and so the Final Rule's retirement option is unlawful.*

EPA's claim that the Final Rule "does not *direct* any plant to close," Resp.53 (emphasis added); *see id.* at 20, is based upon a claimed distinction without a difference. The Final Rule gives coal plants an existential ultimatum: implement

* That EPA has labeled the Final Rule's shut-down-before-2032 option an "exemption," rather than a "subcategory," is legally irrelevant. *See* Resp.20. Any regulated entity can avoid a regulation by declining to comply and facing the consequences associated with such noncompliance, regardless of whether EPA writes any "exemption" for these entities. The shut-down-before-2032 option is, in reality, a subcategory that exceeds EPA's statutory authority to set "standards of performance." *See* App.272a; 42 U.S.C. § 7411(b)(1)(B). A plant's retirement date is not a "system of emission reduction," App.271a; 42 U.S.C. § 7411(a)(1), but rather is an economic decision made by the plant's owner.

full-unit, continuous 90% CCS before 2032 (an incredibly costly technology that no plant has ever successfully implemented, and which few will even try), or else shut down before 2032 or 2039. In offering coal-fired plants the untenable "option" of 90% CCS as the only way to stay open beyond 2038, EPA designed the Final Rule to force plants into retiring prematurely. EPA's own modeling shows that few coal-fired power plants will even attempt the Final Rule's 90% CCS. *See* App.448a–50a (Schwartz Decl. ¶¶ 10–13); App.456a (Schwartz Decl. ¶ 22); App.297a–99a (Bloodworth Decl. ¶¶ 14–18). Although couched in the language of performance standards, the Final Rule is just another unlawful effort to "transform the Nation's electrical power supply." *See West Virginia*, 597 U.S. at 749 (Gorsuch, J., concurring).

Nor can EPA rescue the Final Rule's fatally flawed first "option," where full-unit, continuous 90% CCS does not yet exist and so has not been "adequately demonstrated" by EPA's own definition. EPA does not defend the Final Rule's untenable assertion that a BSER that is merely "anticipated" or "reasonably project[ed]" is nevertheless "adequately demonstrated" under Section 111. *See* App.4a; 89 Fed. Reg. at 39,801. Instead, the agency now admits that CCS must be "*shown* to be reasonably reliable" and "reasonably efficient." Resp.24 (emphasis added) (quoting *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973)). EPA then engages in misdirection, arguing that "carbon capture writ large has been adequately demonstrated." Resp.26 (citing 89 Fed. Reg. at 39,846). But the question of whether CCS "writ large"—whatever that means—has been "adequately

demonstrated" is not the legally relevant inquiry.† The Final Rule does not mandate partial or slipstream CCS as the BSER for existing power plants; the BSER it selected is full-unit, continuous 90% CCS. *See* App.41a; 89 Fed. Reg. at 39,838 ("CCS with 90 percent capture of CO_2"). That is the system that coal-fired power plants will need to implement before 2032 if they wish to avoid mandatory retirement. Full-unit, continuous 90% CCS is the system that EPA must show to have been "adequately demonstrated," not CCS "writ large," and EPA has not provided a single example to support its existence in the real world. EPA's assertion that "the basic [CCS] technology already exists," App.54a; 89 Fed. Reg. at 39,851, is beside the point under what EPA now admits Section 111(d) requires. EPA must show that the best *system* of emission reduction is adequately demonstrated, not any component technology. *See West Virginia*, 597 U.S. at 726–27, 733 (discussing meaning of "system"). Here, that system is full-unit, continuous 90% CCS, and EPA has made no such showing.

None of the existing facilities that EPA relies upon "show or prove," Resp.24 (quoting *Demonstrate*, Webster's Third New International Dictionary of the English Language 600 (1971)), that 90% CCS has been adequately demonstrated:

† EPA's reliance on the New Source Rule, 80 Fed. Reg. 64,510 (Oct. 23, 2015), is misplaced. The agency contends that it "first found carbon capture to be adequately demonstrated" in that rule, "which remains in effect." Resp.27. In other words, EPA suggests CCS is adequately demonstrated because the agency made that determination a decade ago via a new-unit rule that remains in place. But EPA's 2014 determination pertained only to 40% CCS, not 90% CCS. 80 Fed. Reg. at 64,510, 64,545. Further, courts have not yet resolved the legality of the New Source Rule: while the New Source Rule was challenged in court, that case was held in abeyance during the prior administration and has never been reinstated. Per Curiam Order, *North Dakota v. EPA*, No.15-1381, Dkt.1688176 (D.C. Cir. Aug. 10, 2017).

- Petra Nova: The Petra Nova project—the only large U.S. commercial electric generating plant ever equipped with CCS—involved only a "slipstream" CCS application (meaning only about a third of the unit's exhaust is directed to the capture system), and so has never achieved the continuous 90% CCS that the Final Rule contemplates. *See* EPA, Memorandum, Review of the Current Status of the Carbon Capture and Sequestration Projects, at 21–24 (Mar. 2018), Doc. ID No. EPA-HQ-OAR-2013-0495-11947.
- Project Barry: Project Barry in Alabama had only a small pilot CCS project capable of 25 MW slipstream capture, not full-unit 90% CCS. App.408a (McLennan Decl. ¶ 25).
- Boundary Dam: The Boundary Dam Power Station in Canada achieved 90% CO_2 capture for a few days after it was commissioned in 2014, but after those few days the system broke and never again hit that 90% mark. Comment from Jeff Jickling, SaskPower (Aug. 4, 2023), Doc. ID No. EPA-HQ-OAR-2023-0072-0687.
- Project Tundra: EPA says that Project Tundra in North Dakota is "designed to achieve '95 percent' capture rates," Resp.27 (quoting 89 Fed. Reg. at 39,850), but as Minnkota Power Cooperative, the developer of Project Tundra, explained to EPA, "Project Tundra would not fully comply with EPA's mandate" of 90% CCS. Comment from Shannon R. Mikula, Minnkota Power Cooperative, at 2 (Aug. 8, 2023), Doc. ID No. EPA-HQ-

OAR-2023-0072-0632. Project Tundra is designed to achieve 95% capture rates "from approximately 530 MW of the 734 MW produced *at full load* from a combination of Unit 2 and Unit 1 flue gas." *Id.* at 13 (emphasis added). "Minnkota has no technical data or testing assurance that EPA's value of 90% capture can be achieved across varying unit loads," making "EPA's aspirational 90% value . . . clearly speculative and unsupported." *Id.*

- Project Diamond Vault: As for Project Diamond Vault in Louisiana, EPA acknowledges that this is still years away from even being operational, let alone demonstrated. App.54a; 89 Fed. Red. at 39,851.

EPA's reliance on "attest[ations]" of technology vendors—rather than any evidence of existing coal-fired plants actually implementing continuous, full-unit 90% CCS, *see* Resp.27–28 (quoting 89 Fed. Reg. at 39,852)—is inconsistent with its now admitted understanding of "adequately demonstrated." A third-party vendor bragging that it can meet an aspirational future goal does not "*show*[ ]" that a BSER has been adequately demonstrated. Resp.24 (emphasis added; citation omitted).

With respect to the Final Rule's option to implement 40% gas co-firing and then retire, EPA incorrectly argues that this is permissible "fuel-switching," a "traditional air pollution control." Resp.19 (quoting *West Virginia*, 597 U.S. at 727). Requiring 40% co-firing unlawfully directs plants to shift almost half of their energy production from coal to natural gas—precisely the sort of change in energy-type that this Court held to be unlawful generation shifting. *West Virginia*, 597 U.S. at 731–32; *see id.* at

729 ("[t]here is little reason to think Congress assigned" to EPA "such decisions" as to "how much of a switch from coal to natural gas is practically feasible"). And, of course, requiring plants to shut down by 2039 is illegally mandated generation-shifting on its face, a point that EPA does not address. *See* NMA & AP Appl.16–17.

This option is arbitrary and capricious, in any event. EPA claims that most coal plants already have access to and use natural gas to some extent, *see* Resp.19 (quoting 89 Fed. Reg. at 39,902), but only 4% of coal plants now burn gas *for generation*. *See* Comment from Tawny Bridgeford, National Mining Association at 48 (Aug. 8, 2023), Doc. ID No. EPA-HQ-OAR-2023-0072-0695. The rest use gas for startup only, and obtaining access to sufficient gas pipeline capacity to reach 40% would require extensive, costly changes. *Id.*; *accord* EPA, Regulatory Impact Analysis, at 3-31–32 tbl.3-14 (Apr. 2024), Doc. ID No. EPA-HQ-OAR-2023-0072-8913. Indeed, EPA itself has twice previously concluded that natural gas co-firing is not the BSER for reducing CO_2 from coal-fired power plants. *See* 80 Fed. Reg. 64,510, 64,727–28 (Oct. 23, 2015); 84 Fed. Reg. 32,520, 32,544–46 (July 8, 2019). EPA has presented no basis to justify its change of mind here.

EPA falsely suggests that this Court in *West Virginia* endorsed the use of "fuel-switching" as a BSER. Resp.19 (quoting *West Virginia*, 597 U.S. at 727). Here, EPA relies solely on a bit of background dicta describing EPA's own prior discussion of potential options for "traditional" control systems—essentially, EPA's own say-so. 597 U.S. at 727 (quoting 80 Fed. Reg. at 64,784). In fact, *West Virginia* made clear that it does *not* support EPA's position, doubting whether EPA could "simply requir[e]

coal plants to become natural gas plants," 597 U.S. at 728 n.3, and rejecting any notion that EPA should be able to decide "how much of a switch from coal to natural gas is practically feasible," *id* at 728. The dissent understood this issue when it recognized that "fuel-switching" has the potential to "restructure the Nation's overall mix of electricity generation" in a way that would contravene the majority's holding. *Id.* at 775 (Kagan, J., dissenting) (citations omitted). Plainly, EPA's out-of-context citation does not demonstrate that *West Virginia* authorizes EPA to force coal plants to burn 40% gas—the argument is as backward as it sounds.

II. Applicants And Their Members Will Suffer Irreparable Harm If This Court Does Not Grant A Stay

A. As Applicants explained—with extensive supporting declarations—that their members are likely to suffer multiple irreparable harms from the Final Rule's generation-shifting effects if this Court does not grant a stay, which harms are indistinguishable from the harms faced by the applicants who sought a stay of the Clean Power Plan from this Court. NMA & AP Appl.17–26. Unless this Court grants a stay, generating facilities hoping to remain operational under the Final Rule must immediately begin work—including planning, engineering, and other efforts—to even attempt to install 90% CCS before 2032. NMA & AP Appl.18–19. Deciding to attempt such a momentous installation is irreversible, and will impose immediate, exorbitant, and nonrecoverable costs on these facilities. NMA & AP Appl.19–20. The majority of generating facilities will decide not to engage in that herculean effort and will instead make irrevocable decisions to retire, unless this Court grants a stay. NMA & AP Appl.20–22. Those forced plant closures will devastate the Nation's coal mining

industry—including by forcing a scaling back of capital investment, production, and jobs—in a manner that cannot be unwound at the end of this litigation. NMA & AP Appl.22–24. These harms are materially identical to those applicants presented to this Court when it stayed the Clean Power Plan in 2016, a rule that similarly required power plants to commence large-scale projects, make near-term commitments to ensure replacement generation facilities would be operational, and cancel coal contracts and close coal mines during the pendency of their challenge. NMA & AP Appl.24–25.

B. EPA does not engage with Applicants' well-supported harms or refute their numerous supporting declarations. *See generally* Resp.50–56. Further, and remarkably, the agency does not even try to dispute that the harms caused by the Final Rule here are identical in all material respects to the harms that the Clean Power Plan would have caused absent a stay. *Compare* NMA & AP Appl.3–4, 18, 24–25, *with* Resp.50–56. Instead, EPA takes the unprecedented position that this Court should defer to EPA's own technical judgment as to whether a stay is warranted, Resp.51–52, 54–55, which would make a stay of *any* rule impossible, as no agency will ever admit in its rulemaking that its rule will cause more harm than benefit.

EPA's theory of irreparable harm radically departs from basic principles of equity, including in the stay context. "Stay applications are nothing new," and this Court applies the "same sound principles as other federal courts" when considering whether to "grant or deny" a stay, even when the stay applicant "seek[s] to stay the enforcement of a federal regulation against them." *Ohio*, 144 S. Ct. at 2052 (citations

omitted; alterations omitted); *accord Scripps-Howard Radio v. FCC*, 316 U.S. 4, 17 (1942) ("[T]he power to stay [is] a power as old as the judicial system of the nation."); *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024). With respect to the irreparable-harm factor, in particular, those "sound principles" call for the judiciary's *independent* review of a stay-applicant's claims of harm—including by considering and weighing the movant's supporting declarations and in light of the non-movant's competing declarations. *See Ohio*, 144 S. Ct. at 2052; *see also, e.g.*, *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) ("It is ultimately necessary, in other words, to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" (citation omitted)); *Labrador v. Poe by & through Poe*, 144 S. Ct. 921, 923 (2024) (mem.) (Gorsuch, J., concurring) ("A court's discretion to enter a stay is [ ] not left up to its mere inclination, but to its judgment[.]" (citations omitted)); *FCC v. Radiofone, Inc.*, 516 U.S. 1301, 1301–02 (1995) (Stevens, J., in chambers) ("I am [ ] persuaded that the harm . . . would outweigh the possible harm to respondent."). And this Court's application of these principles in the context of a "stay [of] the enforcement of a federal regulation" will "often" result in the conclusion that the stay-applicant has established irreparable harm from the challenged regulation. *Ohio*, 144 S. Ct. at 2052.

EPA's novel understanding of the irreparable-harm inquiry also conflicts with this Court's grant of a stay of the Clean Power Plan in 2016. There, the stay-applicants supported their arguments that the Plan would cause them irreparable

harm absent a stay—the same kinds of harms that the National Mining Association and America's Power have shown here, *supra* Part II.A—with multiple declarations, *see, e.g.*, Stay App. at 38–48, *West Virginia v. EPA*, No.15A773 (U.S. filed Jan. 26, 2016); Stay App. at 12–21, *Basin Elec. Power Coop. v. EPA*, No.15A776 (U.S. filed Jan. 27, 2016). EPA, for its part, disputed the substance of those declarations, *see, e.g.*, Stay App. Opp'n at 54–69, *West Virginia v. EPA*, Nos.15A773, 15A776, 15A787, 15A793 (U.S. filed Feb. 2016), and offered declarations of its own, *see id.* (appendix), with no argument that this Court should simply accept its say-so in the rule, *see generally id.* at 54–69. After considering these competing declarations from the stay-applicants and EPA, this Court granted a stay of the Clean Power Plan, necessarily concluding that the stay-applicants had established the irreparable-harm factor. *See West Virginia v. EPA*, 577 U.S. 1126 (2016) (mem.).

This Court's grant of a stay in *Ohio* followed the same course. The stay-applicants supported their claims of irreparable harm from EPA's "Good Neighbor" provision and Federal Implementation Plan with numerous declarations. *See* Stay App. at 23–26, *Ohio v. EPA*, No.23A349 (U.S. filed Oct. 2023). Then, EPA attempted to refute those declarations and submitted its own, Stay App. Opp'n at 43–51, *Ohio v. EPA*, Nos.23A349, 23A350, 23A351 (U.S. filed Oct. 2023), without telling this Court it should not make its own independent judgment, as it does here, *see generally id.* This Court granted the stay, concluding that "each side has strong arguments about the harms they face and equities involved," including because of the arguments presented in their supporting declarations. *See Ohio*, 144 S. Ct. at 2052–53

(ultimately granting stay due to the stay-applicants' showing on the likelihood-of-success-on-the-merits factor).

Aside from its nonstarter claim that this Court should defer to the agency's technical judgment regarding the Final Rule's harms, EPA does not meaningfully dispute Applicants' robust showing of irreparable harms absent a stay.

EPA claims that power plants and the coal mines that supply them will not suffer significant harm while their challenge to the Final Rule is pending because EPA concluded in the Final Rule that power plants will only need to conduct "initial" or "preliminary" "feasibility work'" before "the June 2026 deadline for submitting state plans." Resp.51–53 (citations omitted). But Applicants submitted multiple declarations refuting EPA's assessment in the Final Rule and showing that, in fact, the Final Rule imposes significant and immediate burdens upon their members. NMA & AP Appl.17–26. EPA does not even attempt to respond to those declarations, relying only on the erroneous assertions in the very Rule in dispute. *See generally* Resp.50–56.

EPA's effort to belittle the harms that power plants will face under the Final Rule absent a stay as "initial" or "preliminary," Resp.51–53, is legally unsound and factually wrong. A party that suffers significant monetary losses that "cannot be recouped," *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers), or "nonrecoverable" compliance "costs" from a regulation, *Ohio*, 144 S. Ct. at 2053 (citation omitted), suffers irreparable harm, no matter whether those costs are "initial" or "preliminary," Resp.52; *see, e.g.*, App.459a–63a (Short Decl. ¶ 3)

(estimating a minimum of $300 million in upfront expenditures over the next 24 months). That is why, again, the stay-applicants challenging the Clean Power Plan could show that that rule inflicted irreparable harm upon them, although its compliance deadline was at that point some years away. *See* Stay App. at 12–21, *Basin Elec. Power Coop. v. EPA*, No.15A776 (U.S. filed Jan. 27, 2016). Moreover, the work that needs to be done is not merely "preliminary," but rather final, as the majority of generating facilities will be forced to make irrevocable decisions to retire. NMA & AP Appl.20–22.

Finally, EPA argues that the compliance costs that power plants will incur from the Final Rule "will not necessarily be wasted if [they] eventually prevail" because EPA could impose a different capture-rule in the future. Resp.52–53. But EPA offers no reason to believe that after it loses this case, the agency will impose a different CCS requirement in the future. EPA could decide not to impose any CCS requirement at all, opting instead to create a different kind of rule, based upon a different type of technology. Consider the recent regulatory history of Section 111(d) with respect to coal-fired power plants. After this Court issued the stay that "prevented [the Clean Power Plan's generation-shifting mandate] from taking effect," the rule was "repealed [by EPA] after a change in Presidential administrations." *West Virginia*, 597 U.S. at 699. Then, under that new administration, EPA subsequently promulgated "the Affordable Clean Energy (ACE) rule," which rule required "a combination of equipment upgrades and [certain] operating practices," and no generation shifting or anything like it. *Id.* After the

most recent change in Presidential administration, EPA then repealed the ACE rule itself and replaced it with the Final Rule here. App.1a. What the next EPA would do after it loses this case is thus entirely uncertain.

III. The Final Rule's Devastating Consequences Are Contrary To The Public Interest

A. The public interest weighs strongly for a stay, as it did in 2016 when this Court stayed the Clean Power Plan. NMA & AP Appl.26–30. The Rule's mandated, irreversible mine closures and operational reductions will eliminate well-paying jobs in communities where such jobs are rare. NMA & AP Appl.26–27. Mine closures will cost federal, state, and local governments millions of dollars attributable to mining jobs, in addition to the substantial royalties now paid to state and local governments and the Navajo Nation. NMA & AP Appl.27–28. Absent a stay, the Final Rule will jeopardize the Nation's vulnerable electricity grid, risking many electricity consumers' access to reliable and affordable electricity and raising costs while power demand soars. *See* NMA & AP Appl.28–29. Other federal agencies have recognized that the Final Rule forces the hand of existing power plants. As a Commissioner of the Federal Energy Regulatory Commission ("FERC") recently explained, the Final Rule "will force the retirements of nearly all remaining coal generation plants and will prevent the construction of vitally needed new combined-cycle baseload gas generation." Comm'r Mark C. Christie, FERC, Letter Responding to House Comm. on Energy & Com.'s Questions Regarding Clean Power Plan 2.0 at 2 (Aug. 13, 2024). Further, these concerns are analogous to those set forth by the States when seeking a stay of the Clean Power Plan. *See* NMA & AP Appl.29–30. Neither EPA nor the

public will suffer any harm from a stay, as the public interest favors stopping illegal agency rules, and the public is not harmed by ensuring the continued operations of the coal-fired power plants that help sustain the country's economy and electricity grid. NMA & AP App.30.

B. EPA does not engage with these public-interest arguments, including the point that the public's interest here is the same as it was when this Court stayed the Clean Power Plan in 2016. *Compare* NMA & AP Appl.26–30, *with* Resp.56–58. Instead, the agency claims only that a stay of the Final Rule will delay the realization of its purported benefits in combating climate change. Resp.56–58. In the proceedings below, however, EPA repeatedly claimed that "market forces and other factors" have already "been driving a transition of the electric power sector away from coal generation," and that this "market-driven decrease in coal generation is expected to continue," D.C. Cir. No.24-1120, Doc. 2059170 at 9; *see also id.* at 24–25, 28, 93–94, echoing views rejected by a majority of this Court in *West Virginia,* 597 U.S. at 774–75 (Kagan, J., dissenting); *see id.* at 724–32. Thus, if EPA believes that this trend away from coal-fired power plants will continue in the absence of its own heavy-handed regulations, then it cannot claim now that implementation of its Final Rule is necessary to stem the "serious harm," Resp.58, of climate change.

CONCLUSION

This Court should stay the Final Rule pending judicial review.

Respectfully submitted,

/s/ Misha Tseytlin

MISHA TSEYTLIN
Counsel of Record
KAITLIN L. O'DONNELL
CARLY ROTHMAN SIDITSKY
KEVIN M. LEROY
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, Illinois 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

CARROLL WADE MCGUFFEY III
TROUTMAN PEPPER
HAMILTON SANDERS LLP
600 Peachtree St. N.E.
Suite 3000
Atlanta, GA 30308

August 2024