No. _____

In the Supreme Court of the United States

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Applicant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency,
Respondents.

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

APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING APPELLATE REVIEW

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IDENTITY OF PARTIES, CORPORATE DISCLOSURE STATEMENT, AND RELATED PROCEEDINGS

Applicant is the National Rural Electric Cooperative Association (NRECA). Pursuant to Rule 29.6, Applicant NRECA states that it represents nearly 900 consumer-owned, not-for-profit electric cooperatives, public power districts, and public utility districts in the United States. NRECA's mission is to promote, support, and protect the community and business interests of electric cooperatives, to power communities, and to empower members to improve the quality of life in their communities. NRECA has no parent company, and no publicly held company owns 10% or more of NRECA's stock.

Respondents are the United States Environmental Protection Agency (EPA) and Michael Regan, in his official capacity as Administrator of the EPA.

The other parties to the consolidated proceedings below are:

Petitioners: State of West Virginia; State of Alabama; State of Alaska; State of Arkansas; State of Florida; State of Georgia; State of Idaho; State of Indiana; State of Iowa; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Mississippi; State of Missouri; State of Montana; State of Nebraska; State of New Hampshire; State of North Dakota; State of Ohio; State of Oklahoma; State of South Carolina; State of South Dakota; State of Tennessee; State of Texas; State of Utah; Commonwealth of Virginia; State of Wyoming; America's Power; Appalachian Region Independent Power Producers Association; Edison Electric Institute (also an Intervenor); Electric Generators for a Sensible Transition; Idaho Power Company; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers

and Helpers, AFL-CIO; International Brotherhood of Electrical Workers, AFL-CIO; Midwest Ozone Group; Montana-Dakota Utilities Co.; NACCO Natural Resources Corporation; National Mining Association; Oklahoma Gas and Electric Company; Rainbow Energy Center, LLC; United Mine Workers of America, AFL-CIO; Westmoreland Mining Holdings LLC; Westmoreland Mining LLC; and Westmoreland Rosebud Mining LLC.

Intervenors: State of New York; State of Arizona; State of Colorado; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of Michigan; State of Minnesota; State of New Jersey; State of New Mexico; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania; State of Rhode Island; State of Vermont; State of Washington; State of Wisconsin; District of Columbia; City and County of Denver; City of Boulder; City of Chicago; City of New York; California Air Resources Board; American Lung Association; American Public Health Association; Clean Air Council; Clean Wisconsin; Consolidated Edison, Inc.; Edison Electric Institute (also a Petitioner); Louisiana Public Service Commission; Natural Resources Defense Council; New York Power Authority; Pacific Gas and Electric Company; Power Companies Climate Coalition; Sacramento Municipal Utility District; and Tennessee Valley Public Power Association.

Amici Curiae: Chamber of Commerce of the United States of America; Environmental Defense Fund; Professor Rachel Rothschild; and Sierra Club.

The related proceedings are:

West Virginia v. EPA, No. 24-1120 (D.C. Cir. July 19, 2024) (lead case) (order

denying motions for stay), consolidated with: *Ohio v. EPA*, No. 24-1121 (D.C. Cir. July 19, 2024); *National Rural Electric Cooperative Association v. EPA*, No. 24-1122 (D.C. Cir. July 19, 2024); *National Mining Association v. EPA*, No. 24-1124 (D.C. Cir. July 19, 2024); *Oklahoma Gas and Electric Company v. EPA*, No. 24-1126 (D.C. Cir. July 19, 2024); *Electric Generators for a Sensible Transition v. EPA*, No. 24-1128 (D.C. Cir. July 19, 2024); *United Mine Workers of America v. EPA*, No. 24-1142 (D.C. Cir. July 19, 2024); *International Brotherhood of Electrical Workers v. EPA*, No. 24-1143 (D.C. Cir. July 19, 2024); *International Brotherhood of Boilermakers v. EPA*, No. 24-1144 (D.C. Cir. July 19, 2024); *Midwest Ozone Group v. EPA*, No. 24-1146 (D.C. Cir. July 19, 2024); *Edison Electric Institute v. EPA*, No. 24-1152 (D.C. Cir. July 19, 2024); *NACCO Natural Resources Corporation v. EPA*, No. 24-1153 (D.C. Cir. July 19, 2024); *Idaho Power Company v. EPA*, No. 24-1155 (D.C. Cir. July 19, 2024); *Appalachian Region Independent Power Producers Association v. EPA*, No. 24-1222 (D.C. Cir. July 19, 2024); *Rainbow Energy Center, LLC v. EPA*, No. 24-1226 (D.C. Cir. July 19, 2024); *Montana-Dakota Utilities Co. v. EPA*, No. 24-1227 (D.C. Cir. July 19, 2024); and *Westmoreland Mining Holdings LLC v. EPA*, No. 24-1233 (D.C. Cir. July 19, 2024).

American Lung Association v. EPA, No. 19-1140 (D.C. Cir., June 25, 2024) (lead case) (order holding cases in abeyance pending disposition of *West Virginia v. EPA*, No. 24-1120 (D.C. Cir.)), consolidated with: *Appalachian Mountain Club v. EPA*, No. 19-1166 (D.C. Cir., June 25, 2024); *State of New York v. EPA*, No. 19-1165 (D.C. Cir., June 25, 2024); *Chesapeake Bay Foundation, Inc v. EPA*, No. 19-1173 (D.C. Cir., June 25, 2024); *The North American Coal Corporation v. EPA*, No. 19-1179 (D.C. Cir., June 25, 2024); *Robinson Enterprises, Inc., v. EPA*, No. 19-1175 (D.C. Cir., June 25, 2024);

Westmoreland Mining Holdings LLC v. EPA, No. 19-1176 (D.C. Cir., June 25, 2024); *Biogenic CO2 Coalition v. EPA*, No. 19-1185 (D.C. Cir., June 25, 2024); *City and County of Denver v. EPA*, No. 19-1177 (D.C. Cir., June 25, 2024); *Advanced Energy Economy v. EPA*, No. 19-1186 (D.C. Cir., June 25, 2024); *American Clean Power Association v. EPA*, No. 19-1187 (D.C. Cir., June 25, 2024); *Consolidated Edison, Inc. v. EPA*, No. 19-1188; and *State of Nevada v. EPA*, No. 19-1189 (D.C. Cir., June 25, 2024).

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GLOSSARY

Act	Clean Air Act, 42 U.S.C. §§ 7401 to 7671q
CCS	Carbon Capture and Sequestration (or Storage)
CO_2	Carbon Dioxide
EPA (or agency)	U.S. Environmental Protection Agency
EPA Tech. Supp.	EPA, *Greenhouse Gas Mitigation Measures for Steam Generating Units Technical Support Document*, (April 2024), https://perma.cc/LEY3-VC2F
NRECA	National Rural Electric Cooperative Association
Rule	*New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, 89 Fed. Reg. 39,798 (May 9, 2024)
Unit	Electric Generating Unit

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:

The National Rural Electric Cooperative Association (NRECA) respectfully requests an immediate stay of the United States Environmental Protection Agency's (EPA) final rule entitled "New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule." 89 Fed. Reg. 39,798 (May 9, 2024) (the Rule).

INTRODUCTION

EPA is once again trying to transform the power sector by forcing a shift in electricity generation to its favored sources. This Court rejected that ploy in *West Virginia v. EPA*, because Congress has not authorized EPA to "decid[e] how Americans will get their energy." 597 U.S. 697, 729 (2022). EPA's new plan is just as bad, presenting covered power plants with a Hobson's choice. They must implement an emissions-reduction system that has not been demonstrated anywhere (an annual 90% rate of carbon-capture-and-sequestration, also known as "CCS," for each electric-generating unit). Or they must shift electricity generation by shuttering coal units and curtailing generation at new gas units. EPA's chosen "system" of an annual 90% CCS rate for each covered unit, therefore, far exceeds its authority to impose a system of emission reduction that "has been adequately demonstrated" with emission limitations that are "achievable." 42 U.S.C. § 7411(a)(1).

NRECA and its members know that better than anyone. They are at the forefront

of exploring carbon capture at a significant scale, and they hope this emerging technology will someday be deployable. *See* App.446-64a (McLennan ¶¶21-52); App.351a (McCollam ¶18). Indeed, EPA relies on two NRECA members' projects in this Rule: Minnkota Power Cooperative's ("Minnkota") "Project Tundra" and Basin Electric Power Cooperative's ("Basin") "Dry Fork" project. *E.g.*, 89 Fed. Reg. at 39,814; *id.* at 39,850; Resp. Opp. to Motions to Stay at 41, 43, 47, 50 (D.C. Cir. No. 24-1120, June 11, 2024).

But each project is still just in the planning phase, neither project would comply with this Rule, and both projects might not be completed if this Rule takes effect. App.771-73a (Minnkota Comments 16-18); App.687a, App.689a (Basin Comments 17, 19); App.351-52a (McCollam ¶19); App.437-38a (McLennan ¶6). Project Tundra, which is still in the pre-construction planning phase, is the Nation's leading CCS project. App.280a (NRECA Comments 7); App.446a (McLennan ¶21). If it is built, Project Tundra would "be the largest [CO_2] capture system in the world." App.768a (Minnkota Comments 13). But even it would not comply with this Rule. App.757a, App.771a (Minnkota Comments 2, 16). Consequently, the Rule's unachievable requirements would force Minnkota to either abandon nine years of planning, or else design a new capture system from scratch. App.766-68a (Minnkota Comments 11-13). Dry Fork is also in the planning phase, and it would not comply with the Rule either. App.689a (Basin Comments 19); App.351-52a (McCollam ¶19). Basin would need to spend $1.5 billion to attempt to demonstrate only 70% capture at just one unit. App.689a (Basin Comments 19). Both projects confirm what NRECA repeatedly told the EPA in comments and the court below: (1) no *entire* power plant has ever

captured (2) anything near *90%* of (3) its *annual* carbon-dioxide ("CO_2") emissions. EPA's brief below could not point to a single example.

EPA's imposition of this 90% CCS "system" thus violates key limits Congress set in Section 111 of the Clean Air Act (Act). The Rule's "system of emission reduction" has not "been adequately demonstrated" anywhere, and the Rule's emissions caps based on that system are not "achievable." 42 U.S.C. § 7411(a)(1). The "system" EPA's Rule selects is "90 percent CCS": capturing, transporting, and storing 90% of the annual CO_2 emissions from each entire unit covered by the Rule. 89 Fed. Reg. 39,801-02. But the Rule does not identify a single power plant that has ever done this. On the contrary, there have been only a few experimental efforts to use *any* type of CCS at power plants. Almost all these experimental efforts have captured CO_2 from just a *subset*—that is, a "slipstream"—of a unit's total emissions. *E.g.*, *Id.* at 39,848-52. And they suffered constant breakdowns along the way. *Id.*

Even if the technology for achieving a 90% annual capture rate for all of a unit's CO_2 emissions became feasible, the Rule's CCS "system" further requires that the captured CO_2 be *transported* and *stored*. But CO_2 transport pipelines and storage sites are still missing almost everywhere. Project Tundra, for example, is a possibility only because it happens to be uniquely located one-quarter mile from a permitted sequestration site, requiring only a small, mostly on-site, pipeline. App.769a (Minnkota Comments 14); App.463-64a (McLennan ¶51). Few plants enjoy such luxuries. So EPA's emissions limitations are not "achievable."

With no way to comply with the 90% CCS system, the Rule requires operators to shift electricity generation. Existing coal units that cannot reach 90% CCS have two

options: commit to shut down by 2039 and convert the unit to burn at least 40% natural gas until then, or shut down by 2032. 89 Fed. Reg. at 39,841. New gas units that cannot reach 90% CCS must curtail their electricity generation to no more "than 40 percent of their potential electric output." 89 Fed. Reg. at 39,917 tbl.3 n.1. Meanwhile, electricity must come from somewhere. The mandated shutdowns and curtailments thus require operators to shift electricity generation to other sources to meet demand. Yet this Court just held that EPA cannot "force a nationwide transition away from the use of [fossil fuels] to generate electricity." *West Virginia*, 597 U.S. at 735. The right mix of electricity generation is a major question of "economic and political significance" for Congress—not EPA—to decide. *Id.* at 730 (citation omitted).

Worse yet, EPA's Rule will impose enormous irreparable injuries. Forced shutdowns will slash electric reliability across the country and impose other enormous, "nonrecoverable" compliance costs. *Ohio v. EPA*, 144 S. Ct. 2040, 2053 (2024) (cleaned up). Multiple NRECA members face costs of *$10 billion* or more *each*. *E.g.*, App.346a (McCollam ¶11); App.409a (Purvis ¶38). Part of that is replacement power to offset the electricity supply that the Rule eliminates. Buying new power from an already constrained market is enormously expensive. *E.g.*, App.497-98a (Tudor ¶¶23-24). So is building new units, App.527-28a (Hasten ¶31), or buying new equipment to retrofit existing units, App.352a (McCollam ¶20) (estimating retrofits would cost "more than 150% of what it cost to construct the [unit] in the first place barely a decade ago"). Premature shutdowns will strand hundreds of millions in assets. *E.g.*, App.428-29a (Purvis ¶60); App.479-80a (McLennan ¶82).

The Rule's enormous costs will fall disproportionately on those least able to

shoulder them. NRECA member cooperatives own over 75 of the coal-fired units affected by this Rule. *See* 89 Fed. Reg. at 39,876; App.329a (Matheson ¶33). These not-for-profit cooperatives serve mostly rural areas, where low populations and incomes have not attracted for-profit power companies. That includes 92% of the persistent-poverty counties in the United States, with average (mean) household incomes 12% below the national average. App.318a (Matheson ¶10). Under EPA's Rule, NRECA members must spend billions to experiment on technology that has never been demonstrated, or shutdown and build gas plants with constrained capacity. *E.g.*, App.346a (McCollam ¶11); App.412a (Purvis ¶43); App.479-80a (McLennan ¶82); App.488-89a (Tudor ¶8); App.527-28a (Hasten ¶31); App.553-54a (Grooms ¶28). Compared to other covered entities, the Rule's costs for NRECA member cooperatives will be borne across a base of fewer consumers and by families that spend a higher percentage of their limited resources on electricity. *E.g.*, App.317-18a (Matheson ¶9); App.334-37a (Purvis ¶¶40-42).

All these harms start *immediately*. The Rule itself "assumes" that work toward complying with this Rule will begin in "June 2024." 89 Fed. Reg. at 39,874, 39,893. For NRECA members who cannot even attempt using CCS—which is all of them except Minnkota (Project Tundra) and Basin (Dry Fork)—the Rule requires imminent retirement commitments. *Id.* at 39,997. NRECA member cooperatives will also need to secure replacement power for the units that the Rule shuts down or curtails. That new generation cannot be conjured overnight, and it requires huge new investments. *See* App.595a (Porath ¶24). "[D]esign, engineering, consulting, site studies, and numerous other pre-construction activities" can easily exceed tens of millions per

unit. App.447a (McLennan ¶24). Even early-stage "[e]ngineering costs typically represent approximately five percent of project costs." App.353a (McCollam ¶21). The upshot is hundreds of millions in imminent spending.

There is no meaningful difference between substituting or prioritizing renewable units (invalidated by *West Virginia*) and shutting down or curtailing production from fossil-fuel units (required by this Rule). Both schemes require generation-shifting, which exceeds EPA's authority. *West Virginia*, 597 U.S. at 735. Applicant therefore respectfully requests an immediate stay of EPA's unlawful Rule preserving the status quo pending judicial review—just as this Court did in the *West Virginia* litigation. *See Chamber of Com. v. EPA*, 577 U.S. 1127 (2016) (mem.).

OPINION BELOW

The D.C. Circuit's order denying NRECA's motion for a stay pending judicial review is reproduced at App.270a. EPA's final rule is published at 89 Fed. Reg. 39,798 (May 9, 2024) and reprinted at App.2a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) and has authority to grant relief under the Administrative Procedure Act, 5 U.S.C. § 705; the All Writs Act, 28 U.S.C § 1651; and Supreme Court Rule 23.

STATUTORY PROVISIONS INVOLVED

"The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental

impact and energy requirements) the Administrator [of the EPA] determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

STATEMENT

A. Statutory overview of Clean Air Act Section 111

Section 111 of the Act authorizes EPA to set "standards of performance" for new stationary sources of certain air pollutants, and to establish guidelines that States then use to set standards of performance for existing sources. 42 U.S.C. § 7411(b), (d). Both types of "emissions limits under Section 111" aim to "reduce pollution by causing the regulated source to operate more cleanly." *West Virginia*, 597 U.S. at 725.

For new sources, EPA sets the standards itself. 42 U.S.C. § 7411(b). The agency begins by identifying the "best system of emission reduction" (accounting for things like "cost" and "energy requirements") that "has been adequately demonstrated." *Id.* § 7411(a)(1). EPA then quantifies the amount of emissions limitations "achievable" by all sources in the category using that system. *Id.* Next, EPA translates that amount into an "emissions cap" for individual units. *West Virginia*, 597 U.S. at 709.

For existing sources, EPA issues emissions guidelines for States to use in setting their own standards of performance. *See* 42 U.S.C. § 7411(d)(1). To do this, EPA again identifies a "system" that has been "adequately demonstrated," and quantifies the amount of limitation "achievable" using that system. *Id.* § 7411(a)(1). States then translate that amount into a standard of performance using State "plan[s]." *Id.* § 7411(d)(1). But States can also consider other factors, including "the remaining useful life" of an existing source. *Id. West Virginia* held that Section 111(d) gives EPA no authority to cap CO_2 "emissions at a level that will force a nationwide transition

away from the use of coal to generate electricity." 597 U.S. at 735. EPA also has no authority to "direct existing sources to effectively cease to exist." *Id.* at 728 n.3.

Because a standard of performance must reflect the "best system of emission reduction" that "has been adequately demonstrated" for the covered sources, 42 U.S.C § 7411(a)(1), Section 111 requires at a minimum that EPA "make sure the best system has a proven track record," *West Virginia*, 597 U.S. at 759 (Kagan, J., dissenting). And the emissions limitation based on that system must be "achievable" by covered sources across the Nation. *See* 42 U.S.C. § 7411(a)(1).

B. EPA's 90% carbon-capture-and-sequestration ("CCS") Rule

The Rule establishes CO_2 emissions guidelines for three subsets of *existing coal-fired* electric-generating units, under Section 111(d). 89 Fed. Reg. at 39,840-41. The Rule also sets CO_2 standards of performance for three subcategories of *new gas-fired* combustion-turbine units, under Section 111(b). *Id.* at 39,902. These subcategories are all based on binding commitments to implement the equivalent of an annual 90% CCS system for every unit, or else either shut down (for existing coal units) or substantially curtail electric output (for new gas units). *Id.* at 39,805, 39,838, 39,841.

1. Existing coal-fired units

The Rule divides existing coal-fired units into three subsets: two are "subcategories" and one is an "applicability exemption." *Id.* at 39,805.

The first (and default) subcategory is for "long-term" units. *Id.* at 39,838. All coal units that "intend to operate past January 1, 2039" are part of this subcategory. *Id.* EPA says that the best system for this subcategory is CCS that captures 90% of the annual CO_2 emissions from the entire unit. *Id.* at 39,845. This system requires the

design, engineering, and installation of bespoke CO_2 capture technology. *Id.* at 39,846. The captured CO_2 must then be transported (usually via pipeline) to a site that has a permit to permanently store it underground. *Id.* EPA "assumes" that "work" toward "each component of CCS" will begin in "June 2024." *Id.* at 39,874. And operators must complete that work before January 1, 2032. *Id.* at 39,801.

The second subcategory is for "medium-term" units. *Id.* at 39,841. All units that commit "to permanently cease operation after December 31, 2031, [but] before January 1, 2039" are part of this subcategory. *Id.* at 39,890. EPA says that the best system for this subcategory is "40 percent natural gas co-firing." *Id.* That means transforming a coal unit into one that combusts both coal and natural gas. *See id.* Just "[a]s in the timeline for CCS," EPA "assumes" that "work" toward co-firing will begin in June 2024. *Id.* at 39,893. Medium-term units must complete that work before January 1, 2030, and then they must retire nine years later. *Id.* at 39,845.

Third, the Rule establishes an "applicability exemption" for units that commit "to permanently cease operation before January 1, 2032." *Id.* at 39,841. These units "are not regulated" by any other requirements of the Rule. *Id.* at 39,843.

The Rule imposes a multistep process to opt out of the default, "long-term" first subcategory. The choice is not effective unless it is "included in a State plan." *Id.* at 39,958. States must submit their plans to EPA by May 11, 2026. *Id.* at 40,056. Thus, an operator must choose its subcategory in time for the State to include that choice in the plan that it submits to EPA. Once EPA approves a plan, each subcategory's prerequisites become federally enforceable against the unit. *Id.* If any of that goes wrong, the unit stays in the default, long-term subcategory (90% CCS by 2032). *See*

id. at 40,049.

2. New gas-fired units

For new and modified gas-fired combustion turbines, the Rule creates three subcategories. These subcategories are defined by a unit's "electric sales (i.e., utilization) relative to the [unit's] potential electric output." *Id.* at 39,908.

"Base load" units, those that sell more than 40% of their potential output, must comply with a "multi-phase standard of performance." *Id.* at 39,923. Phase I is "based on the performance of a highly efficient" unit and has "an immediate compliance date." *Id.* at 39,903. Phase II is based on an annual 90% CCS rate and has "a compliance date of January 1, 2032." *Id.* "Intermediate load" units, those that commit to sell no more than 20-40% of their potential output, must comply with a standard based on "high-efficiency simple cycle turbine[s]." *Id.* at 39,918. "Low load" units, those that commit to sell "20 percent or less of their potential electric output," must comply with a standard of performance based on "lower-emitting fuels." *Id.* at 39,917 & tbl.3 n.1.

C. Procedural history

Applicant filed its Petition for Review on May 9, 2024. That same day, Applicant asked EPA to stay the Rule pending judicial review. EPA has not responded to that request. Applicant filed its motion for a stay pending judicial review with the D.C. Circuit on May 13. The D.C Circuit denied Applicant's stay motion on July 19, 2024.

REASONS FOR GRANTING THE APPLICATION

This Court should stay EPA's latest attempt at shifting electricity generation, just as it did in the litigation leading up to *West Virginia v. EPA*. *See Chamber of*

Com., 577 U.S. at 1127. Under 5 U.S.C. § 705, this Court "may . . . postpone the effective date of any agency action." "In deciding whether to issue a stay," this Court asks "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio v. EPA*, 144 S. Ct. at 2052. All four factors support a stay of EPA's unlawful rule.

I. If the D.C. Circuit upholds EPA's 90% carbon-capture-and-sequestration (CCS) Rule, there is a reasonable probability that four Justices would vote to grant review and a fair prospect that a majority would hold the Rule unlawful.

EPA's 90% CCS Rule would remake the Nation's energy grid. It requires Applicant's not-for-profit members to spend billions trying to achieve carbon-capture-and-sequestration at a level never demonstrated before—or else either shut down or curtail output. Even if these high annual capture rates were possible, the pipelines and storage sites needed to pull this off do not exist. So this Rule is a thinly veiled attempt at forcing the electricity-generation industry to produce power from EPA's preferred sources. The Rule is thus unlawful under the plain text of Clean Air Act Section 111, as confirmed by *West Virginia v. EPA* and the major-questions doctrine.

NRECA satisfies the likelihood-of-success prong of the stay test. There is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," plus "a fair prospect that a majority of the Court w[ould] vote to reverse [a] judgment below [upholding the Rule]." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). No circuit split can emerge, because the D.C. Circuit's jurisdiction is exclusive. 42 U.S.C. § 7607(b)(1). This Court often

reviews the D.C. Circuit's decisions about EPA's use of the Clean Air Act to attempt major transformations of the national economy. *E.g.*, *Chamber of Com.*, 577 U.S. at 1127 (staying the Clean Power Plan); *West Virginia*, 597 U.S. at 697.

A. The Rule exceeds EPA's Clean Air Act Section 111 authority.

Under the Act's plain text, the Rule exceeds EPA's Section 111 authority. The Rule creates a mandate for existing coal plants that do not commit to retire, and for new gas plants that produce 40% or more of their capacity. They must reduce their emissions based on a 90% CCS "system" integrating CO_2 capture, transport, and storage. The Rule is lawful only if this tripartite "system" "has been adequately demonstrated." 42 U.S.C. § 7411(a)(1). The Act's statutory text—"has been adequately demonstrated"—uses the present perfect tense. *Id.* And "Congress use[s] the present perfect tense to denote an act that has been *completed*." *Carr v. United States*, 560 U.S. 438, 448 (2010) (emphasis added; cleaned up). A system "has been adequately demonstrated," 42 U.S.C. § 7411(a)(1), *only if* its actual use "has been completed" in the past, *Carr*, 560 U.S. at 448.

EPA has not identified any power plant that has ever demonstrated 90% annual capture from an entire unit. Yet EPA interprets "has been adequately demonstrated" to reach such a never-before-used system. Even if 90% *capture* had been demonstrated, 90% CCS depends on the additional ability to *transport* CO_2 to a permitted *storage* site. The pipelines for transport and the storage sites for sequestration are severely lacking. That is another reason that the Rule's integrated 90% CCS system has not "been adequately demonstrated" and its emissions levels are not "achievable." *Id.* Meanwhile, EPA's alternative compliance paths require

generation-shifting, rendering the Rule invalid under *West Virginia*, 597 U.S. at 735.

1. An annual carbon capture rate of 90% for an entire power plant has not been "adequately demonstrated" anywhere.

This Rule does far more than require power plants to use carbon capture in some generalized sense. The capture element of EPA's selected emission-reduction "system" requires power plants to capture (1) 90% of CO_2 emissions (2) from an entire unit (3) for an entire year. *See* 89 Fed. Reg. at 39,801 (existing coal-fired units); *id.* at 39,802 (new gas-fired units). The Rule cites no example of any power plant that has ever done this. Instead, EPA points to power plants that have implemented lower levels of capture, non-power-plant "industrial" sources that have implemented lower levels of capture using entirely different processes, speculative sales pitches from vendors, and future demonstration projects that are planned but have not been built. From this, EPA makes the legal conclusion its 90% CCS system "has been adequately demonstrated." 89 Fed. Reg. at 39,845. This violates the Act's plain text, so the entire Rule is unlawful.

a. EPA's best example—Boundary Dam—has never demonstrated anything close to 90% annual carbon capture from the entire unit.

EPA's leading purported example of a 90% CCS system is Boundary Dam, a Canadian project that began operating in 2015. *See* 89 Fed. Reg. at 39,847. Boundary Dam has never achieved 90% capture from an entire unit for an entire year. It can capture CO_2 only from a partial "slipstream" of the unit's emissions, and it has suffered constant breakdowns and disruptions. Rather than supporting the Rule, Boundary Dam shows just how far off 90% CCS still is. This is exactly why Congress

required a system to be adequately demonstrated *before* EPA mandates its use.

First, Boundary Dam has never demonstrated EPA's *90%* capture system. EPA's Proposed Rule said it had.[1] But the Canadian company operating Boundary Dam commented to set the record straight. App.784a (SaskPower Comments 1). It unequivocally told EPA: "SaskPower's CCS facility *is not capturing 90 per cent* of emissions from Boundary Dam." *Id.* (emphasis added). During a mere 72-hour test in 2015, Boundary Dam once captured "89.7 percent" of total emissions. 89 Fed. Reg. at 39,848. Since then, Boundary Dam has suffered constant "technical issues," requiring "consistent[] . . . modifications . . . to stabilize operations" and "improve reliability." App.784a (SaskPower Comments 1). So, "[t]o ensure a higher level of overall equipment reliability and process efficiency," the plant "targets" a capture rate of "65 to 70 per cent." *Id.*

Second, Boundary Dam has not demonstrated carbon capture from an *entire* unit. Boundary Dam captures only from what the industry calls a "slipstream" system. 89 Fed. Reg. at 39,848. Slipstream systems siphon and process a *partial*, fixed, constant stream of a unit's total emissions. *See, e.g.*, App.849a (EERC Comments 5). The rest "is released to the atmosphere." App.784a (SaskPower Comments 1). Slipstreams function reliably because gas pressures and volumes are static and controllable within that partial stream. *See* 89 Fed. Reg. at 39,853 n.358 ("[P]rocess value[s], such

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[1] *New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, 88 Fed. Reg. at 33,240, 33,291 (proposed May 23, 2023) (Proposed Rule).

as flowrate, throughput or capacity . . . are designed to operate within specific ranges . . . ."). In stark contrast, a *full*-stream system would need to contend with dynamic pressure and volumes, shifting as the unit responds to electricity demand. *See* App.796a (Cichanowicz Comments 3 & n.7). These two systems are categorically different. *See id.*

Boundary Dam captures from only a slipstream because the full stream of emissions "*cannot* be processed through the CCS facility." App.784a (SaskPower Comments 1 (emphasis added)). That is especially notable because Boundary Dam was "designed" to operate as a full-stream capture system. 89 Fed. Reg. at 39,848. But the full-stream design did not reliably work, even after almost a decade. App.784a (SaskPower Comments 1). That failure shows the folly in EPA's near-total reliance on projects that are merely "proposed," 89 Fed. Reg. at 39,927; "designed," *id.* at 39,848; "planned," *id.* at 39,851; or "targeted for completion," *id.*

Third, Boundary Dam has not demonstrated capture for an *entire year*. EPA claims Boundary Dam "achiev[ed] capture rates of 83 percent *when the capture plant is online*." 89 Fed. Reg. at 39,848 (emphasis added). That qualifier obscures this project's persistent breakdowns. App.284a (NRECA Comments 11). From early 2021 to early 2023, Boundary Dam's CCS system was "online" only about 65% of the time. *Id.* at 19. EPA concedes this system was continually "affected by technical issues." 89 Fed. Reg. at 39,848. SaskPower acknowledged the same. App.784a (SaskPower Comments 1).

So the system that Boundary Dam's operator says it cannot use, *id.*, is the very same system EPA says has "been adequately demonstrated" by Boundary Dam, 89

Fed. Reg. at 39,847. Boundary Dam has not demonstrated anything close to the 90% CCS system required by the Rule—and that is the very *best* example EPA can cite.

b. EPA's other examples of existing power plants using some form of carbon capture likewise have never demonstrated 90% annual capture from an entire unit.

EPA's Rule focuses on eight other power plants that have implemented limited degrees of carbon capture. *See* 89 Fed. Reg. at 39,848-51. These are even further afield than Boundary Dam, many have shuttered, and none of them ever demonstrated EPA's 90% CCS system.

"Petra Nova" is a slipstream system at a coal-fired power plant that operated for three years. *See* 89 Fed. Reg. at 39,849. It "was designed to *capture 33%* of the carbon emissions from one of four units" at that plant.[2] It fell short of even that lower capture rate. App.850a (EERC Comments 6). Technical problems kept it "offline for more than a third of the time that it was operational before it was shut down in 2020 . . . [and] sold for a fraction of its initial investment." App.284a (NRECA Comments 11). Plus, a separate "auxiliary" unit had to power the capture equipment. *See* 89 Fed. Reg. at 39,850. EPA ignores that separate unit's emissions in discussing Petra Nova's capture rates. *See id.* Regardless, Petra Nova was funded by the Energy Policy Act of 2005. *Id.* at 39,852 n.334. That statute precludes EPA from relying on projects receiving its funding to establish that a system is demonstrated under Section 111.

[2] Nichola Groom, *Problems plagued U.S. CO_2 capture project before shutdown: document*, Reuters, Aug. 7, 2020, https://perma.cc/LM4F-PND3 (emphasis added); *see* App.850a (EERC Comments 6) (citing this article and noting that Petra Nova "missed its carbon capture targets by ~17%").

42 U.S.C. § 15962(i)(1); *see infra* p.22. EPA acknowledges this, begrudgingly. *See* 89 Fed. Reg. at 39,878 & n.613.

"Barry" is a slipstream that captured "*three percent* of . . . total CO_2 emissions" from a coal-fired unit in Alabama. App.735a (Buckeye Inst. Comments 10). EPA calls this "a capture rate of 90 percent" from a "25 MWe" unit. 89 Fed. Reg. at 39,850. This rosy view ignores that Barry was just a slipstream from a larger "770 MW" unit. App.735a (Buckeye Inst. Comments 10). Barry also received funding under the Energy Policy Act of 2005, *see* 89 Fed. Reg. at 39,849, again precluding EPA from relying on it for the Rule, 42 U.S.C. § 15962(i)(1).

"Argus" is a power plant in California. *See* 89 Fed. Reg. at 39,846-47. Commenters estimate that its capture "rate *approximates to 18%*." App.849a (EERC Comments 5 (emphasis added)); *see* App.796a (Cichanowicz Comments 3) (estimating the rate equates to "33% removal"). EPA attempts to mask this low percentage rate by describing Argus's capture only in terms of "metric tons of CO_2 per year." 89 Fed. Reg. at 39,846.

"Warrior Run," another slipstream at a coal-fired unit, captures "approximately *10 percent* of the plant's CO_2 emissions." *Id.* at 39,849 (emphasis added).

"Shady Point" is a coal-fired power plant that "captured CO_2 from an approximate *5 percent* slipstream" from 2001 through 2019. *Id.* (emphasis added).

"Bellingham," EPA claims, is "[t]he most prominent example of the use of carbon capture technology" at a *gas* unit. *Id.* at 39,926. But it closed in 2005. *Id.* It captured "85-95 percent of the CO_2 that would have otherwise been emitted from . . . a 40 MW slip stream." *Id.* That is only about *10% capture* from the entire "386 MW" unit. *Id.*

"Mongstad" is a slipstream "demonstration facilit[y]," *id.* at 39,852, that can "treat a 12 MWe flue gas stream from a natural gas . . . power station" in Norway, *id.* at 39,927. While Mongstad has "achiev[ed] capture rates of over 98 percent" from this slipstream, *id.*, that equates to less than a *5% capture rate* for the entire unit.[3]

"La Porte" is a "test facility" in Texas that its owner describes as "one-of-a-kind." App.864a, App.867a (NET Power Comments 3, 6). It uses a proprietary process for producing electricity that combusts a fuel with purified oxygen. *See* App.864-66a (NET Power Comments 3-5). This process "is not currently applicable to coal-fired steam generating utility boilers." 89 Fed. Reg. at 39,925. Therefore, it cannot show that 90% CCS is demonstrated for existing coal-fired units. Regardless, this single "test facility" operated on average only about *10 days per year* since 2018. *See id.* at 39,927. That is far short of 90% CCS *annually*, so La Porte's proprietary process has not demonstrated that system for new gas-fired units either.

These eight projects (plus Boundary Dam) are the *only* examples that EPA highlights in which CCS has ever been used at a power plant anywhere. None of them ever achieved anything close to 90% annual capture for an entire unit.

c. The non-power-plant sources EPA cites have never demonstrated 90% annual capture from an entire unit.

EPA cannot identify a single power plant that has demonstrated its 90% CCS system. So EPA points to "industrial applications" of CO_2 capture—that is, CCS

[3] The Proposed Rule's preamble did not cite this facility. But the Mongstad Power Plant produces 280 MW in electricity and 350 MW in heat, of which the "demonstration facilit[y]" captures only a "12MWe" slipstream. 89 Fed. Reg. 39,852; *see id.* at 39,927.

applications at sources *other than* power plants. 89 Fed. Reg. at 39,846. But the Rule's system requires power plants to capture the CO_2 that they generate by burning fuel. *See id.* By contrast, the "industrial applications" EPA names remove CO_2 from a fuel *before* combustion. That is markedly distinct from the Rule's 90% CCS "system." Regardless, EPA does not identify the CO_2 capture rates for these industrial applications, whether they captured from an entire unit (or equivalent), or whether they did so annually.

"Great Plains Synfuels" is owned and operated by NRECA's member Basin. 89 Fed. Reg. at 39,864 & n.472. It is the "only" project of its kind and has reduced "CO_2 emissions . . . by 45%" at the Great Plains plant. App.846a (EERC Comments 2). But the project uses "*precombustion* CO_2 capture," which "is not considered a leading technology for . . . electrical generation." *Id.* (emphasis added). Indeed, in defining "CCS," the Rule itself says "[t]his technology [*i.e.*, CCS] is referred to as '*post*-combustion capture.'" 89 Fed. Reg. at 39,846 (emphasis added). Thus, a *pre*-combustion system cannot show that the *post*-combustion capture that the Rule is premised on has been demonstrated. *See id.* at 39,848 (similar).

"Quest" is a Canadian chemical plant capturing CO_2 from a "methane reforming process" that "does not reflect combustion products." App.796a (Cichanowicz Comments 3). Further, at Quest, "CO_2 content is elevated compared to utility application." *Id.* Because the CO_2 is "elevated," it is much easier to capture CO_2 at Quest than to do the same at a power plant. *Id.* Even so, Quest has been able to achieve only an annual average "capture rate of 79.4%." App.850a (EERC Comments 6); *see* 89 Fed. Reg. at 39,847 ("approximately 80 percent").

"Shute Creek" is another pre-combustion system. *Id.* at 39,847. It "uses a solvent-based process to remove CO_2 from natural gas" so that the gas can then be marketed and sold for electricity-generation and other applications. *Id.*

Despite those crucial differences, these and other so-called "industrial applications" account for 14 of what the Rule repeatedly refers to as "at least 15 operating CCS projects in the U.S." *E.g.*, *id.* at 39,813, 38,847. (The fifteenth project is the Petra Nova power plant, discussed above at p.16.). But "operating CCS" in non-power-plant industrial applications is nothing like the 90% CCS system EPA's Rule mandates for covered power plants. *See id.* at 39,847. In any event, the Rule does not identify the capture rates for these industrial applications. Thus, these non-power-plant sources have not "adequately demonstrated" 90% capture for power plants.

d. The Act does not allow EPA to use forward-looking guesswork to show that 90% capture has been demonstrated.

With no examples of 90% capture having "been" demonstrated, EPA rewrites the Act and engages in speculative "extrapolation." 89 Fed. Reg. at 39,831. Under EPA's interpretation of its statutory delegation, "an adequately demonstrated standard of performance may reflect the EPA's reasonable projection of what that particular system may be expected to achieve going forward." *Id.* Such "projection," *id.*, contradicts the Act's directive for EPA to identify a system that "has been adequately demonstrated," 42 U.S.C. § 7411(a)(1); *see Carr*, 560 U.S. at 448.

Contrary to the Act's plain text, the D.C. Circuit sometimes has allowed EPA to make *minor* extrapolations in setting standards for *new* sources (not existing sources). *See, e.g.*, *Lignite Energy Council v. EPA*, 198 F.3d 930, 934 (D.C. Cir. 1999);

Sierra Club v. Costle, 657 F.2d 298, 377 (D.C. Cir. 1981); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 438 (D.C. Cir. 1973). But even under the D.C. Circuit's atextual caselaw, the Rule's predictions are prohibited "speculation," not incremental "extrapolation." *Lignite*, 198 F.3d at 934. EPA does not identify even one power plant that has ever achieved anything near 90% CCS annually for an entire unit.

The Rule repeatedly cites things that have not happened, like vendor statements about what an engineering firm or manufacturer thinks it could do *in the future.* 89 Fed. Reg. at 39,851. EPA also relies heavily on "planned" or "designed" projects that may (or may not) be built *in the future*. *E.g., id.* at 39,848-50. And the Rule constantly extrapolates from CCS technology in general to the specific 90% CCS system the Rule would require. *E.g.*, *id.* at 39,846-55. That guesswork is all "crystal ball" thinking, which even the D.C. Circuit's cases prohibit. *See, e.g., Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973).

EPA's prominent reliance on NRECA members' planned projects makes this abundantly clear. The Rule devotes an entire subsection of the preamble to Project Tundra, which is being developed by NRECA member Minnkota. *See* 89 Fed. Reg. at 39,850-51. If it is built, Project Tundra would "be the largest [CO_2] capture system in the world." App.768a (Minnkota Comments 13). But even with substantial state and federal funding, and "exceptional geology" yielding a storage site just a quarter-mile away, Project Tundra's future is in doubt because it "would not fully comply with" the Rule. *Id.* at 2, 16. That is because it was "designed" to capture *only 70%* of emissions from the plant's two existing generating units. *Id.* at 13. Project Tundra's design alone "took almost nine years of study and engineering." *Id.* at 16. The Rule would require

Minnkota to ditch those plans and either draw up new designs or shutter the units. *Id.* at 2.

Similarly, EPA relies on the Dry Fork Power Plant owned by NRECA member Basin Electric Power Cooperative. *E.g.*, 89 Fed. Reg. at 39,814. Basin completed a CCS study two years ago, evaluating whether Dry Fork could target a "70% capture" rate. App.689a (Basin Comments 19). The study concluded that even attempting this 70% milestone would be "prohibitively expensive—with total costs for the capture system alone exceeding 1.5 billion dollars." *Id.* In other words, attempting even 70% capture "would exceed the costs . . . to actually construct the Dry Fork Station" itself. *Id.* As with Boundary Dam and Project Tundra, EPA attempts to flip these facts on their head, reasoning that a prohibitively expensive 70% CCS system that has not been built somehow shows that 90% capture has already been adequately demonstrated. *E.g.*, 89 Fed. Reg. at 39,814.

Dry Fork and Project Tundra are also funded by the Energy Policy Act of 2005. *See id.* at 39,849. That statute says "[n]o technology . . . shall be considered to be . . . adequately demonstrated for purposes of" Section 111 "solely by reason of the use of the technology . . . [at a] facilit[y] receiving assistance under" the statute. 42 U.S.C. § 15962(i)(1). So, if a project receives such funding, that project cannot be used as necessary support for showing that a specific technology has been "adequately demonstrated." *Id.* Project Tundra and Dry Fork got that funding, so the Rule cannot use them as necessary support. In fact, Project Tundra received public funding only because it is *attempting to demonstrate* a technological feat—a full 70% CCS system—that has not yet been achieved. *See* App.767a (Minnkota Comments 12).

2. A "system" that combines 90% carbon capture, transport, and storage has not been "adequately demonstrated" anywhere.

Even if carbon capture, transport, or storage had been demonstrated in isolation, these elements have not been adequately demonstrated as an integrated "system." 42 U.S.C. § 7411(a)(1). This is yet another reason the Rule violates Section 111's text.

First, EPA identifies only two power plants in North America that have ever used a "system" combining capture, transport, and storage: Boundary Dam and Petra Nova. 89 Fed. Reg. at 39,847. Both are coal-fired. *See id.* at 39,927. The flawed Petra Nova experiment cannot show that CCS has been demonstrated for multiple reasons discussed above (at p.16). Boundary Dam also cannot show that CCS has been demonstrated. Apart from its limited capture discussed above (at p.16), it sells some of the captured CO_2, and transports the rest to a storage site just "2 km" away. App.801a (Cichanowicz Comments 8). That storage site "is not subject to EPA's . . . Class VI rules for the storage of CO_2." App.852a (EERC Comments 8). By contrast, EPA's system requires units to: capture 90% of CO_2, 89 Fed Reg. 39,846; transport CO_2 long distances, *id.* at 39,864; and store unsold CO_2 in a "Class VI well[]," *id.* at 39,872.

Second, the Rule's 90% CCS system would be exorbitantly costly even if it could be built, and EPA failed to "tak[e] into account the cost" of such a system. 42 U.S.C. § 7411(a)(1). EPA counterfactually estimates that the Rule's *total* compliance costs are between 7.5 and 19 billion dollars. 89 Fed. Reg. at 40,005. But costs for Dry Fork's capture equipment alone (which planned to target only 70% capture) would exceed "1.5 billion dollars." App.689a (Basin Comments 19). That enormous cost is just for one unit at one plant. Similarly, EPA says that the Rule will cause only a "one

percent" increase in the "levelized cost to produce electricity" nationwide. 89 Fed. Reg. at 40,005. That is fanciful given Dry Fork's cost projections alone, and EPA's cost estimates are off by orders of magnitude. NRECA's comments and declarations confirm this, showing that rural cooperatives would need to spend billions—ultimately passing these costs on to consumers. *See* App.291-93a (NRECA Comments 18-20); App.346a (McCollam ¶11); App.412a (Purvis ¶43); App.479-80a (McLennan ¶82); App.488-89a (Tudor ¶8); App.527-28a (Hasten ¶31); App.553-54a (Grooms ¶28).

Third, EPA's 90% CCS system also has not "been demonstrated" because EPA failed to address the impact on electric reliability "energy requirements." 42 U.S.C. § 7411(a)(1). Commenters alerted EPA to the "direct threats to electric grid reliability." *E.g.*, App.275a, App.278-79a, App.299-305a (NRECA Comments 2, 5-6, 26-32). EPA responded by offering what it tellingly calls "compliance flexibilities." 89 Fed. Reg. at 39,803. These discretionary possibilities include a one-year "compliance date extension mechanism," *id.* at 39,960; a "short-term reliability mechanism," *id.* at 40,014; and a "reliability assurance mechanism," *id.* at 40,017. EPA cannot sidestep its duty to set standards that account for energy requirements, 42 U.S.C. § 7411(a)(1), by directing regulated parties to seek discretionary dispensations. *See, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 326-27 (2014).

3. The Rule's emissions limits are not "achievable."

The Rule's emissions limits are also unlawful because they are not "achievable." 42 U.S.C. § 7411(a)(1). EPA used the undemonstrated 90% CCS "system" to set a "standard" for new units and a "presumptive standard" for existing units. 89 Fed. Reg. at 39,801; *see id.* at 39,956. These standards take the form of an emissions cap:

units must achieve an "an 88.4 percent reduction in annual emission rate." *Id.* at 39,801 (existing coal-fired units); *see id.* at 39,802 (same for new gas-fired units).

A standard is "achievable" only if the system is "available for installation," *Portland Cement*, 486 F.2d at 391, to "the industry as a whole," *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 431 (D.C. Cir. 1980). EPA must "identify variable conditions that might contribute to" the standard's *nationwide* achievability, and "establish that" it used data "representative of potential *industry-wide* performance." *Sierra Club*, 657 F.2d at 377 (emphases added); *see* 89 Fed. Reg. at 39,835 (same). As EPA's former New Source Review Section Chief once explained, a standard of performance under Section 111 "represents the best technology available nationwide, regardless of climate, water availability, and many other variable case-specific factors"—so the Rule's standards should reflect "what every source can achieve, not the best that a source could do."[4] This Rule fails that test.

First, the technology for attempting 90% capture is not "available for installation." *Portland Cement*, 486 F.2d at 391. The few CCS projects identified by EPA are working to someday demonstrate sub-90% capture in an experimental context. App.280a (NRECA Comments 7). Nor has EPA identified any non-CCS system that could achieve the required "88.4 percent reduction in annual [CO_2] emission rate[s]" that EPA equates with its 90% CCS system. 89 Fed. Reg. at 39,801.

[4] Ltr. from Gary McCutchen, EPA to Richard E. Grusnick Ala. Dep't Env't Mgmt. (July 28, 1987), https://perma.cc/3CJM-WL9E.

Pipelines are missing too.[5] Yet pipelines are required for any level of CCS, because they are the necessary transport link between CO_2 "capture" and CO_2 "storage." App.288-89a, App.296a (NRECA Comments 15-16, 23). Realizing EPA's vision would require an enormous pipeline infrastructure buildout in eight years. EPA speculates that a network of CO_2 pipelines "may develop" "in the coming years." 89 Fed. Reg. at 39,855. While the Proposed Rule touted nearly 4,000 miles of newly "announced" CO_2 pipelines, 88 Fed. Reg. at 33,294, the lion's share has since been "delayed or canceled," 89 Fed. Reg. at 39,861. This is unsurprising. Surveying, permitting, right-of-way disputes, and protracted litigation are obstacles nationwide. The CO_2 pipelines that do exist are in limited areas and mostly transport CO_2 to enhance oil and gas extraction. *See* EPA Tech. Supp. at 34. EPA has therefore failed to show that 90% CCS is "capable of being met under most adverse conditions which can reasonably be expected to recur." *Nat'l Lime*, 627 F.2d at 431 n.46.

Storage locations are similarly scarce or absent. *See* App.288-89a (NRECA Comments 15-16). EPA dismisses this concern because it has identified "potential geolog[y]" for storage within 100 kilometers of every state with existing units affected by the Rule. 89 Fed. Reg. at 39,857; EPA Tech. Supp. at 33. But speculation about "potential" storage does not make actual storage achievable. These "potential" sites have not been permitted (or even studied), which takes years of design and

[5] EPA itself offers a map that strikingly illustrates this absence. *See* EPA, *Greenhouse Gas Mitigation Measures for Steam Generating Units Technical Support Document* at 34 (April 2024), https://perma.cc/LEY3-VC2F ("EPA Tech. Supp.").

engineering. 89 Fed. Reg. at 39,857. Even EPA acknowledges that these sites "would require site-specific characterization to determine their suitability for geologic sequestration and the potential capacity for storage." *Id.* at 39,855 n.378. These are not storage sites that can be used today, and EPA's hope that they will materialize by 2032 is unsubstantiated.

Second, EPA's timelines are unrealistic and "cannot be achieved." App.771a (Minnkota Comments 16); *see, e.g.*, App.278-79a, App.296-97a (NRECA Comments 5-6, 23-24). Start with carbon capture. For Project Tundra, the Nation's leading effort to realize CCS, "project development took almost nine years of study and engineering analysis." App.771a (Minnkota Comments 16). Yet EPA says that sources across the country can develop brand-new, never-before-used 90% CCS systems in less time than it took just to *plan* Tundra. Even "Project Tundra would not be completed in the time EPA has proposed, had the project begun today." *Id.* If the Nation's leading CCS effort could not meet the Rule's timelines, other units stand no chance.

Carbon transport has similar problems. EPA again relies on "unworkable timelines that will be impossible to achieve." App.275a (NRECA Comments 2). For pipelines, just securing right-of-way can take many years of litigation. *See* App.855-56a (EERC Comments 11-12). Furthermore, just "17 states explicitly allow CO_2 pipeline operators to exercise eminent domain authority." 89 Fed. Reg. at 39,858. In the other 33, pipeline operators must rely on "negotiation with landowners." *Id.*

EPA's timelines for storage are likewise unachievable. For example, with Project Tundra, "four years were required" just for permitting the storage site. App.771a (Minnkota Comments 16). EPA allows just half that. 89 Fed. Reg. at 39,875. Yet the

90% CCS system would require a fully permitted sequestration site for every existing "long-term" plant and every new "base load" plant that cannot sell the CO_2 it captures. 89 Fed. Reg. at 39,840, 39,902. This kind of storage requires a "Class VI" underground-storage permit from EPA. *See id.* at 39,870. The "Class VI" permitting rule took effect in 2011. *Id.* Since then, EPA has received 130 permit applications but has issued only "eight Class VI permits." *Id.* The rest are still pending. *Id.* EPA dismisses this bottleneck because it "expect[s] . . . increased efficiencies" in the future. *Id.* That speculation cannot show that storage is achievable today.

The Rule's unachievable timelines are even further out of reach because, in developing them, "EPA d[id] not assume that CCS projects are, in general, subject to [the National Environmental Policy Act (NEPA)]." *Id.* at 39,875. CCS projects cannot escape NEPA review and its accompanying delays. NEPA review is necessary for: "sources receiving federal funding," "projects on federal lands," or where a federal permit is necessary "for construction of the pipeline . . . or for sequestration." *Id.* According to EPA, "if one aspect of a project is subject to NEPA, then the other project components could be as well." *Id.* "NEPA review . . . averages more than four years." App.296a (NRECA Comments 23). NEPA requires that agencies "take a 'hard look' at the environmental consequences before taking a major action." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citation omitted). EPA cannot just "assum[e]" those delays away. *Contra* 89 Fed. Reg. at 39,875.

The Rule's emissions caps are especially unachievable for NRECA's members. As not-for-profit cooperatives, they cannot access the same financing available to for-profit utilities. App.277a (NRECA Comments 4). Instead, NRECA members must rely

on "debt sourced from entities such as the United States Department of Agriculture's (USDA) Rural Utilities Service." *Id.* This financing itself can implicate NEPA, and it is "unlikely to be secured until all permits are in place." App.296a (NRECA Comments 23). NRECA members must therefore work in stages—permitting first, then procurement, then construction. This pushes timelines well beyond EPA's estimates. *See, e.g.*, App.771-72a (Minnkota Comments 16-17).

Third, the Rule's emission limits for other subcategories are not "achievable." 42 U.S.C. § 7411(a)(1). Consider the second subcategory for existing coal-fired units, which requires "medium-term" units to become combined coal and natural gas units through co-firing natural gas for at least 40% of their fuel (and retire by 2039). 89 Fed. Reg. at 39,801. Many units cannot retrofit for co-firing. App.291a (NRECA Comments 18). Even where co-firing might be technologically possible, the natural gas pipelines needed to supply the large amount of fuel for co-firing have the same regional variability and obstacles as CO_2 pipelines. *E.g.*, App.288a (NRECA Comments 15). This technology is not "available for installation," *Portland Cement*, 486 F.2d at 391, to "the industry as a whole," *Nat'l Lime*, 627 F.2d at 431.

4. The Rule's alternative compliance options unlawfully require generation-shifting.

Under this Rule, if covered units cannot achieve an annual 90% CCS rate for the entire unit, then they are forced to shift electricity generation to EPA's preferred sources. *Supra* p.12. Regardless of which subcategory applies, a covered unit that cannot achieve 90% CCS must either retire completely, convert to another fuel and then retire, or limit its output. *E.g.*, 89 Fed. Reg. at 39,801. To make up the shortfall,

operators across the country will need to buy power from others or build new plants.

But this Court just held that the Clean Air Act does not grant EPA this authority: The Clean Power Plan similarly required that "facilities reduce their own production of electricity," but EPA has no authority to "'shift' away virtually all their generation" or "requir[e] coal plants to become natural gas plants." *West Virginia*, 597 U.S. at 706, 728 & n.3. EPA styles its subcategories as "flexibilities" for an unachievable standard. 89 Fed. Reg. at 39,803. But no matter the agency's label, all of this is prohibited generation-shifting. *See, e.g., Util. Air Regul. Grp.*, 573 U.S. at 326-27.

B. The major-questions doctrine confirms that the Rule is unlawful.

The Rule is unlawful under ordinary principles of statutory interpretation. *See supra* Part I.A. But this is no ordinary case, because the major-questions doctrine applies. *See West Virginia*, 597 U.S. at 723-24. EPA therefore needs "clear" statutory language granting it the power asserted by this Rule. *Id.* at 732. Congress never used clear language in Section 111 delegating EPA power to impose a system never before accomplished or to force generation-shifting. *Id.* Nor did Congress use clear language giving EPA the transformative power to remake the Nation's energy grid through *future-looking* "extrapolat[ions]." 89 Fed. Reg. at 39,889. Rather, Congress directed the EPA to focus on what "has been adequately demonstrated" *in the past*. 42 U.S.C. § 7411(a)(1); *see Carr*, 560 U.S. at 448.

The Court below asserted that this case does not implicate the major questions doctrine because "EPA has claimed only the power to set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly." App.271a (internal quotation

omitted). But multiple independent factors confirm that "this is a major questions case" of "vast economic and political significance." *West Virginia*, 597 U.S. at 716, 724 (citation omitted).

First, the practical stakes are the same as in *West Virginia*. As NRECA's declarations make clear, covered units would have to spend *billions*—whether trying to build a new 90% CCS system that no one has ever built before, or trying to address the fallout from the shutdowns and curtailments demanded by the Rule. *See* App.346a (McCollam ¶11); App.412a (Purvis ¶43); App.479-80a (McLennan ¶82); App.488-89a (Tudor ¶8); App.527-28a (Hasten ¶31); App.553-54a (Grooms ¶28). Had Congress wished to assign EPA a question involving "billions of dollars in spending each year" affecting the price of electricity for millions of Americans, it "surely would have done so expressly." *King v. Burwell*, 576 U.S. 473, 485-86 (2015).

Second, EPA has not promulgated a run-of-the-mill regulation under Section 111—as the D.C. Circuit seemed to believe. It instead claims "newfound" and "transformative" authority. *West Virginia*, 597 U.S. at 724 (citation omitted). EPA has long set standards based on what has "been . . . demonstrated" *in the past* and is "achievable" *currently*. *West Virginia*, 597 U.S. at 708; *see* 42 U.S.C. § 7411(a)(1). But the Rule relies on projects with unknown capture rates that merely "ha[ve] been announced," 89 Fed. Reg. at 39,928; pipelines that EPA "anticipates . . . may develop," *id.* at 39,855; and potential storage sites "in the process of completing . . . studies," *id.* at 39,862. EPA rewrites the Act from focusing on what has been demonstrated in the past to what the agency predicts will be possible in the future. This is an extravagant power grab, regardless of whether this Rule would "caus[e] the regulated source to

operate more cleanly"—to quote the D.C. Circuit. App.271a.

Third, EPA claims "unprecedented power over American industry." *West Virginia*, 597 U.S. at 728 (citation omitted). By using an undemonstrated 90% CCS "system" to set unachievable standards, the Rule forces electricity generation to shift elsewhere. This is a monumental change that involves "balancing . . . many vital considerations of national policy" in an arena where EPA has "no comparative expertise." *Id.* at 729 (citation omitted).

Fourth, mandatory CCS and generation-shifting are approaches that "Congress [has] considered and rejected multiple times." *West Virginia*, 597 U.S. at 731 (citation omitted). Congress has supported development of CCS and other new generation through *voluntary funding incentives*—not stringent mandates. *See, e.g.*, Angela C. Jones & Ashley J. Lawson, Cong. Rsch. Serv., *Carbon Capture and Sequestration (CCS) in the United States* (Oct. 5, 2022), https://perma.cc/L73B-JXAW (discussing tax credits for CCS). Congressional *incentive* programs lend no support for an agency's prescriptive *mandates*. *E.g.*, *NFIB v. OSHA*, 595 U.S. 109, 119 (2022) (per curiam). Congress has even rejected legislation that would require fossil-fuel cessation or CCS at certain units. *See, e.g.*, H.R. 2519, 117th Cong. (2021); H.R. 4535, 114th Cong. (2016); S. 4280, 117th Cong. (2022). The major-questions doctrine precludes this Rule.

C. The Rule is arbitrary and capricious.

To top it off, the Rule is "arbitrary" and "capricious" in multiple ways. 5 U.S.C. § 706; *see Ohio v. EPA*, 144 S. Ct. at 2053.

First, EPA relied on CCS projects by NRECA members and others to support the

Rule's 90% capture rate, while disregarding comments from the owners of those projects who told the agency that this Rule places them in an "impossible position." App.764a (Minnkota Comments 9). For example, EPA relies heavily on Project Tundra. *E.g.*, 89 Fed. Reg. at 39,850-51. Minnkota "shares EPA's enthusiasm for the promise of . . . CCS" and—at least up until the Rule—was developing "the largest capture system in the world" to help "prove that large scale coal-fired application is possible." App.765a, App.768a (Minnkota Comments 10, 13). But based on its unmatched experience designing and planning for a CCS system, Minnkota concluded that "EPA's aspirational 90% value is clearly speculative and unsupported." App.768a (Minnkota Comments 13).

Similarly, EPA relies on NRECA member Basin's Dry Fork unit. *E.g.*, 89 Fed. Reg. at 39,814. But Basin concluded that "Dry Fork Station show[s] that costs remain prohibitively expensive and a significant impediment to the adoption of CCS" at *any* level. App.687a (Basin Comments 17). It was arbitrary and capricious for the agency to rely on these projects to show that 90% CCS "has been demonstrated" when the owners themselves showed EPA that their as-yet-unbuilt units will not achieve that.

EPA's reliance on Boundary Dam is likewise "not 'reasonable'" and "[not] 'reasonably explained.'" *Ohio v. EPA*, 144 S. Ct. at 2053 (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)). EPA so badly misconstrued this project that the owner filed comments to offer a "correction" of EPA's misstatements. App.784a (SaskPower Comments 1); *see supra* 14. EPA's obstinate reliance on Boundary Dam as a paragon of 90% CCS epitomizes unreasonable and unreasoned decisionmaking.

Second, EPA disregarded comments demonstrating that adequate pipelines for

CO_2 transport do not exist and cannot be built by the Rule's deadlines. *See, e.g.*, App.685a (Basin Comments 15); *see* App.289-90a (NRECA Comments 16-17). EPA instead asserted that, "in the coming years, a large-scale interstate pipeline network *may* develop to transport CO_2." 89 Fed. Reg. at 39,855 (emphasis added). It speculated that only "relatively short" pipelines would be needed, because most affected units are in "relatively close proximity to deep saline formations that have the *potential* to be used as long-term CO_2 storage sites." *Id.* (emphasis added). EPA cannot dismiss commenters' concerns by arguing that pipelines *might* be "relatively short" because "potential" storage sites *might* someday be suitable. *Id.*

Third, NRECA and others emphasized that "geologic storage options[] . . . simply do not exist" and cannot be sited, permitted, and constructed within the Rule's timelines. App.289a (NRECA Comments 16); *see* App.766a (Minnkota Comments 11). EPA responded that "[m]any projects are in the process of completing thorough subsurface studies of these deep saline formations to determine their suitability for regional-scale storage." 89 Fed. Reg. at 39,862. EPA cannot counter evidence that storage sites "do not exist," App.289a (NRECA Comments 16), with evidence that studies may someday reveal these sites.

Fourth, EPA's cost estimates for 90% CCS are fundamentally irrational, as explained above (at p.23-24). Commenters highlighted the Rule's massive compliance costs. *E.g.*, App.689a (Basin Comments 19); App.291-93a (NRECA Comments 18-20). Yet EPA insists that units will actually earn net *revenue* by attempting to use an undemonstrated 90% CCS system. *E.g.*, 89 Fed. Reg. at 39,879. If that were true, then a massive rulemaking would not be required. Electric utilities—especially cost-

sensitive rural electric cooperatives—would respond to market incentives even absent government mandates. EPA's cost conclusions are therefore not "logical and rational." *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (citation omitted).

II. Applicant NRECA's members will suffer substantial irreparable harms absent a stay.

An immediate stay is necessary to protect NRECA's members from the "hundreds of millions, if not billions of dollars" in "nonrecoverable" compliance costs that they will incur "during the pendency of this litigation." *Ohio v. EPA*, 144 S. Ct. at 2053 (cleaned up); *see NFIB*, 595 U.S. at 120 (citing "billions of dollars in unrecoverable compliance costs" to support stay of agency's rule). NRECA's members also face "irreparable harm" from imminent power-plant shutdowns and the replacement-power costs, weakened energy-grid reliability, and skyrocketing energy rates that will follow. *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 765 (2021) (per curiam).

A. NRECA's individual members must incur *billions* of dollars in compliance costs and other expenses to just attempt compliance with the Rule. *See* App.346a (McCollam ¶11); App.412a (Purvis ¶43); App.479-80a (McLennan ¶82). Both CCS and co-firing require massive capital investments. *E.g.,* App.405-06a (Purvis ¶34) ("$10.7 billion" for CCS); App.413a (Purvis ¶45) ("$500 million" just for a new pipeline for co-firing). For example, Basin's costs alone will exceed *$14 billion*. App.346a (McCollam ¶11).

This spending needs to start *now*. "Working backwards from the Final Rule's compliance dates, the engineering should have already begun." App.377a (McCollam ¶64). Pipeline operators "must begin design, permitting, siting, procurement, and

construction immediately" to achieve co-firing by the Rule's deadline. App.413-14a (Purvis ¶46). EPA itself "assumes" the "work" toward achieving compliance will begin in "June 2024." 89 Fed. Reg. at 39,874. That is long before the expected "end of this litigation," *Ohio v. EPA*, 144 S. Ct. at 2053.

Speed is also imperative for NRECA's not-for-profit electric cooperatives, because they face unique delays in securing financing for these enormous compliance costs. App.319-20a (Matheson ¶15). NRECA's members have no shareholders, no access to private-equity markets, and no recourse to municipal bonds. App.322-323a (Matheson ¶21). They must issue debt that is recovered through rate hikes paid by rural consumers. *Id.* At the same time, NRECA's members will be on the hook for debts related to electricity-generating assets forced into premature retirement by the Rule. App.322a (Matheson ¶20); App.529-30a (Hasten ¶33) (stranded asset costs exceeding $250 million); App.428-29a (Purvis ¶60) (remaining stranded asset debt of $774.8 million upon shutdown in 2031). As a result, members' "equity-to-total-capitalization ratio will be adversely affected," hurting their credit ratings and increasing their cost of borrowing. App.325a (Matheson ¶25).

These harms are irreparable, because the expenditures are "nonrecoverable." *Ohio v. EPA*, 144 S. Ct. at 2053 (citation omitted). Bespoke equipment cannot be returned. App.530a (Hasten ¶34). Dollars spent on design, permitting, engineering, and studies cannot be refunded. App.595a (Porath ¶26). Long-term power supply contracts cannot be discarded. App.499-500a (Tudor ¶26). Outstanding debts must be repaid. App.336-37a (Matheson ¶42). And sovereign immunity precludes recovery from the government. *See Ohio v. EPA*, 144 S. Ct. at 2053.

B. Where these new investments in CCS and co-firing cannot even be attempted, shutting down is the only choice left. *E.g.*, App.553a (Grooms ¶26) ("Imminent retirement is the only option."). Plans for new facilities that cannot satisfy EPA's unachievable mandates will also be abandoned. App.437-38a (McLennan ¶6).

Each megawatt of power lost to shutdowns or cancelled projects must be replaced. *E.g.*, App.571a (Grooms ¶54). Otherwise, the electric grid would collapse. *See* App.432-33a (Purvis ¶66); App.471-72a (McLennan ¶66-67). But all forms of replacement power are extremely expensive. *E.g.*, App.553-54a (Grooms ¶28) ($1.3 billion to replace lost capacity); App.527-28a (Hasten ¶31) ($3 billion in replacement-power costs). Short-term fuel costs will spike even higher as suppliers prepare to lose major purchasers because of premature retirements. App.616a (Soderberg ¶21); App.363a (McCollam ¶39). These prices will only soar as operators rush to secure replacement power to meet the demands from electric vehicles, data centers, and countless other consumers. App.632-33a (Hochstetler ¶¶12-14); App.557-58a (Grooms ¶34).

The resulting shortfall in capacity will pose an immediate threat to the already vulnerable power grid. App.414a (Purvis ¶47) ("At a time when Kentucky has already experienced rolling blackouts . . . based upon the *existing* resource portfolio, forcing the arbitrary, premature closure of thousands of megawatts of existing baseload capacity will place even greater strain on the ability of grid operators to keep power flowing and meet demand."); App.637a (Hochstetler ¶20) ("[W]ithout the addition of new, always available generation, the utilities in South Carolina will likely be incapable of providing generation to match demand during peak periods."); App.372-

73a (McCollam ¶56) ("Systemic premature retirement of baseload EGUs increases the likelihood of blackouts and other reliability failures.").

The Court below dismissed all these harms and claimed that "a stay will not help because the risk remains that the distant deadlines in EPA's rule will come back into force at the end of the case." App.271a. But sources must inform States of their federally enforceable commitment to retire in time for States to include them in their plans under the Rule, which are due to EPA in May 2026. 89 Fed. Reg. at 40,056. And EPA says work must begin in "June 2024." *Id.* at 39,874. While the D.C. Circuit expedited the briefing in this case, merits litigation including any potential review by this Court is unlikely to be completed by May 2026. And a stay would alleviate the high compliance costs of preparing for the farther-out deadlines, because those deadlines must be tolled if a stay is issued.[6]

C. The Rule leaves NRECA's members no choice but to dramatically increase rates to cover their compliance costs and debt obligations. App.325-26a (Matheson ¶26). Because NRECA's members serve rural communities, these costs will be spread across fewer consumers than in more densely populated areas, and the impact on individual households will be especially acute. App. 317-18a, App. 325-26a (Matheson ¶¶9, 26. One member estimates that electricity bills for households will *double* because of the Rule. App.410-11a (Purvis ¶42); *see also* App.503a (Tudor ¶32)

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[6] *See, e.g.*, EPA, *Rulemaking to Amend Dates in Federal Implementation Plans Addressing Interstate Transport of Ozone and Fine Particulate Matter*, 79 Fed. Reg. 71,663 (Dec. 3, 2014) (delaying compliance deadlines by three years after D.C. Circuit lifted stay of rule).

(estimating a 50% rate hike).

These debilitating rate hikes will fall upon the communities least able to absorb the burden of higher energy bills. App.650a (Hollandsworth ¶8). Many of these consumers already face "a daily choice between food, electricity, and medicine." App.388-89a (Purvis ¶7). For struggling households, these "staggering" increases are simply "not possible." App.410a (Purvis ¶40). But not-for-profit cooperatives have nowhere else to turn to recoup the immense capital outlays necessary to comply with the Rule.

III. The equities and relative harms favor a stay.

When "parties seek to stay the enforcement of a federal regulation against them, often 'the harms and equities [will be] very weighty on both sides.'" *Ohio v. EPA*, 144 S. Ct. at 2052 (quoting *Labrador v. Poe*, 144 S. Ct. 921, 929 (2024) (opinion of Kavanaugh, J.)). In such cases, the resolution of a stay request "ultimately turns on the merits." *Id.* at 2053. At any rate, the balance of equities and harms also favors a stay. "[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; *see NFIB*, 595 U.S. at 120.

Without a stay, NRECA's members must begin making binding commitments and taking other irreversible steps to comply with the Rule. EPA's Rube Goldberg machine of discretionary "compliance flexibilities" is of no use to those who have an obligation to keep America's lights on. EPA has a history of exploiting this dynamic if its major rules are not stayed pending appellate review. *E.g.*, EPA, *In Perspective: the Supreme Court's Mercury and Air Toxics Rule Decision* (June 30, 2015), https://perma.cc/D9NK-CNBB (celebrating that "the majority of power plants are

already in compliance or well on their way to compliance" with rule that had just been held unlawful in *Michigan v. EPA*, 576 U.S. 743 (2015)).

Electricity costs will skyrocket. App.305-06a (NRECA Comments 32-33); *see* App.410a (Purvis ¶40). As existing units are shuttered and plans for new units are abandoned, communities around the country will see jobs and tax revenue crater. *E.g.*, App.474-75a (McLennan ¶72). By targeting always-available generation from coal- and gas-units (compared to intermittent forms like wind and solar), the Rule threatens the reliable electricity supply. *E.g.*, App.356a (McCollam ¶27); App.651a (Hollandsworth ¶10). When that happens, investment dwindles, productivity declines, competition freezes, and innovation stagnates. *See* App.642a (Hochstetler ¶33); App.432-33a (Purvis ¶66). An unreliable power grid also threatens public health. App.432-33a (Purvis ¶66). NRECA members' customers rely on electricity to heat and cool their homes. *Id.* Medical providers depend on consistent power to treat patients. *Id.* By forcing the premature retirement of reliable generation capacity, the Rule exacerbates power outage risks during extreme weather events, which could lead to increased morbidity among vulnerable populations. *Id.*

EPA's unlawful Rule will inflict a multitude of irreparable harms on NRECA's not-for-profit members, who provide crucial energy to some of our Nation's most in need. This Court therefore should stay the Rule pending judicial review, preventing EPA from once again jeopardizing the electricity grid's reliability.

CONCLUSION

The Court should grant the requested stay.

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Respectfully submitted,

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