

In the Supreme Court of the United States

NACCO NATURAL RESOURCES CORPORATION (No. 24A178),
WESTMORELAND MINING HOLDINGS LLC et al. (No. 24A179),
STATE OF NORTH DAKOTA et al. (No. 24A180),
MIDWEST OZONE GROUP (No. 24A186),
TALEN MONTANA, LLC & NORTHWESTERN CORPORATION (No. 24A197),
AMERICA'S POWER & ELECTRIC GENERATORS MATS COALITION (No. 24A199), and
NATIONAL RURAL ELECTRIC COOPERATIVE ASS'N et al. (No. 24A203),

Applicants,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, ADMINISTRATOR,

Respondents.

**Response of State and Municipal Respondents Massachusetts, Minnesota,
Connecticut, Illinois, Maine, Maryland, Michigan, New Jersey, New York,
Oregon, Pennsylvania, Rhode Island, Vermont, Wisconsin, District of
Columbia, City of Baltimore, City of Chicago, and the City of New York in
Opposition to the Applications for a Stay**

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INTRODUCTION

Mercury is an astonishingly potent neurotoxin. It causes death or major, irreversible neurological damage in incredibly small amounts. Ingestion of mercury in any amount larger than 1% of a grain of sugar is not considered safe.¹ Children, including children *in utero* when the mother is exposed, are especially vulnerable to mercury poisoning, which can result in irreversible damage to developing brains and other organs. Along with mercury, the other hazardous air pollutants at issue here—metals like arsenic, chromium, and lead—are some of the most dangerous pollutants on Earth, associated with a wide range of health disorders. Mercury and other hazardous metals emitted by coal-fired power plants harm not only neighboring communities, but also distant ones, often across state lines. *Infra* pt.II.B.

As explained in detail below, those facts led the U.S. Environmental Protection Agency (EPA)—at the express direction of Congress—to require dramatic reductions in power plant emissions of mercury and other toxic metals as pollution-control technology develops. Remarkably, the vast majority of coal-fired power plants in this country not only *exceeded* EPA’s targeted reductions of mercury and other hazardous metals set over a decade ago but did so *at lower cost* than EPA had anticipated.

Until now, however, plants that burn so-called “lignite coal” have been subject to a less stringent mercury emission-reduction requirement, with a predictable

¹ In one tragic example, a renowned research scientist at Dartmouth College died of mercury poisoning several months after spilling “a drop or so” of dimethylmercury on her gloved hand. *Mercury Poisoning Kills Lab Chemist*, Science, June 11, 1997, <https://tinyurl.com/3r97m4wd>.

result: those plants emit 30 percent of all mercury emitted by coal plants, despite only generating about 7 percent of the total electricity output from regulated coal-fired plants. And a small minority of coal-fired plants have done little to reduce their emissions of hazardous non-mercury metals over the years, even as the rest of the industry has made impressive progress. *Infra Stmt. C.*

In the Rule challenged here—the National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electricity Utility Steam Generating Units Review of the Residual Risk and Technology Review, 89 Fed. Reg. 38,508 (May 7, 2024)—EPA has merely required the holdout lignite-fired plants to meet the same mercury emission standard—no more, and no less—that the rest of the industry achieved long ago, and to do so with existing, already installed controls. And just 13 coal-burning units out of over 300 regulated units need to make any capital investments—with new controls required at only *one* plant, the Colstrip plant in Montana—to reduce their emissions of toxic non-mercury metals to the level other plants already achieve. Neither task is a tall order. *Infra Stmt. C.*

Applicants' briefs tell a very different story, but their claims distort the limited scope, yet important benefits, of the challenged Rule. The applications do not come close to meeting this Court's high standard for a stay. First, for the reasons set forth in the responses of EPA and the Health and Environment Non-Governmental Organizations (NGO Br.), Applicants have failed to establish a likelihood of success

on the merits.² Second, on irreparable harm, Applicants’ claims regarding grid reliability, plant closures, compliance costs, and electricity price increases are speculative, unsupported, and far from imminent. Applicants’ “if”s, “may”s, and “could”s are not up to the task of demonstrating the likely, substantial, and immediate irreparable harm that this Court demands. And such harms, in any event, would not arise in the time period relevant to Applicants’ request—before the court of appeals issues a merits decision, likely by the end of this term. Third, on the equities, the mercury and other hazardous air pollutant emissions limited by the Rule are dangerous chemicals that pose significant risks to public health and the environment, including underserved Tribal communities and vulnerable individuals such as children and pregnant women. Contrary to Applicants’ claims of “zero” benefits, the Rule provides important and tangible benefits by bringing holdout plants in line with their peers to reduce harmful hazardous air pollution, just as Congress directed. The applications should be denied.

STATEMENT

A. Statutory Framework

Congress first authorized EPA to regulate hazardous air pollutants in section 112 of the Clean Air Act Amendments of 1970. Pub. L. No. 91-604, § 112, 84 Stat. 1676, 1685 (Dec. 31, 1970) (codified as amended at 42 U.S.C. § 7412 (1988)). There,

² To avoid duplication, State and Municipal Respondents (State Respondents), who are Respondent-Intervenors below, rely on and adopt the likelihood-of-success-on-the-merits arguments in the EPA and NGO responses and focus this Response on irreparable harm and the equities.

Congress directed EPA to publish a list of hazardous air pollutants, *id.* § 112(b)(1)(A), and to establish emission standards for each one “at the level which . . . provides an ample margin of safety to protect the public health,” *id.* § 112(b)(1)(B). But section 112’s initial risk-based approach failed, with EPA establishing standards for only seven hazardous air pollutants in twenty years. *See Nat’l Mining Ass’n v. EPA*, 59 F.3d 1351, 1353 & n.1 (D.C. Cir. 1995); S. Rep. No. 101-228, at 128 (1989), *reprinted in* V Env’t & Nat. Res. Pol’y Div. of Cong. Rsch. Serv., *A Legislative History of the Clean Air Amendments of 1990*, at 8468 (1993) (hereinafter 1990 Legislative History). And it failed largely because of the scientific challenges of determining “appropriate levels of protection under [the 1970 Act’s] risk-based regime.” *Sierra Club v. EPA*, 353 F.3d 976, 979 (D.C. Cir. 2004); *see also* 89 Fed. Reg. at 38,515–16 (explaining why, even today, it remains challenging to quantify health impacts of hazardous air pollutants).

Congress “well understood [those] challenges,” 88 Fed. Reg. 13,956, 13,971 (Mar. 6, 2023), and responded by revising section 112 in the Clean Air Amendments of 1990 “to assure that each and every source w[ould] employ the control methods which assure the greatest reduction in emissions which are achievable,” 1990 Legislative History, *supra*, at 8510; *see also id.* at 8472–73; Pub. L. No. 101-549, Tit. III, sec. 301, 104 Stat. 2399, 2531 (Nov. 15, 1990) (codified as amended at 42 U.S.C. § 7412 (2018)). That was Congress’s “goal—the maximum reduction achievable.” 1990 Legislative History, *supra*, at 8510. This time, Congress specified more than 180 hazardous air pollutants that EPA had to regulate, 42 U.S.C. § 7412(b)(1), and

directed EPA to publish “a list of all categories and subcategories of major sources” of hazardous air pollution, *id.* § 7412(c)(1).

Congress also replaced the 1970 Act’s risk-based standard-setting approach with a technology-based approach aimed at eliminating HAPs altogether. *See generally Sierra Club*, 353 F.3d at 979–80. Under subsection 112(d), EPA must set standards that “require the *maximum* degree of reduction in emissions of the [listed] hazardous air pollutants . . . that [EPA] . . . determines is achievable for new or existing sources in the category or subcategory to which such emissions standard applies,” 42 U.S.C. § 7412(d)(2) (emphasis added), “including a *prohibition* on such emissions where achievable,” *id.*; *see also id.* § 7412(d)(2)(A)–(B) (methods of emission reductions to include “measures which reduce the volume of, or *eliminate* emissions of, such pollutants” and “measures which[] enclose systems or processes to *eliminate* emissions” (emphases added)).

The revised statute provides a two-step process for setting subsection 112(d) standards. In step 1, EPA establishes the emission reductions required by paragraph 112(d)(2) (known as the Maximum Achievable Control Technology (MACT) floor) at a level that, as relevant here, “shall not be less stringent . . . than [] the average emission limitation achieved by the best performing 12 percent of the existing sources.” *Id.* § 7412(d)(3), (d)(3)(A). The technology-based MACT floor is set without regard to risk. *Sierra Club*, 353 F.3d at 980. In step 2, EPA may impose a stricter standard (known as a “beyond-the-floor” limit) that it determines is achievable after

“taking into consideration the cost . . . and any non-air quality health and environmental impacts and energy requirements.” *Id.* § 7412(d)(2).

EPA’s work does not end there. Instead, EPA must review existing standards on two “distinct, parallel” tracks. *Nat’l Ass’n for Surface Finishing v. EPA*, 795 F.3d 1, 5 (D.C. Cir. 2015). In one of the reviews, paragraph 112(f)(2) requires EPA to conduct a *one-time* residual risk review within eight years of promulgation and to set a stricter standard if “required . . . to provide an ample margin of safety to protect public health” or “prevent . . . an adverse environmental effect.” 42 U.S.C. § 7412(f)(2); *see also Nat’l Ass’n for Surface Finishing*, 795 F.3d at 5 (describing residual risk review process).

In the other review, paragraph 112(d)(6) requires EPA to conduct a *recurring* technology review of existing standards at least every eight years. 42 U.S.C. § 7412(d)(6). Specifically, EPA “shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under” paragraph 112(d)(2). *Id.* Unlike in the paragraph 112(f)(2) residual risk review, Congress did not direct EPA to consider “public health objectives or risk reduction achieved by additional controls” in its paragraph 112(d)(6) technology review. *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 672 (D.C. Cir. 2013). Instead, like the initial technology-based standard-setting process, EPA’s technology review aims to eliminate hazardous emissions “where achievable,” 42 U.S.C. § 7412(d)(2) (“prohibit[]”); § 7412(d)(2)(A) (“eliminate”), (B) (“eliminate”), and requires EPA to tighten existing standards when “developments in practices,

processes, and control technologies” make it possible to do so, *id.* § 7412(d)(6).

Recognizing that the Clean Air Act’s other, non-hazardous pollutant programs might “have the collateral effect of reducing power plants’ emissions of hazardous air pollutants,” *Michigan v. EPA*, 576 U.S. 743, 748 (2015), Congress in 1990 created a different procedure to guide EPA’s decision whether to list coal- and oil-fired power plants for regulation under section 112. Congress directed EPA to conduct a study of hazardous power plant emissions. 42 U.S.C. § 7412(n)(1)(A). If EPA “finds such regulation is appropriate and necessary after considering the results of” the study, EPA “shall regulate” power plants, like all other listed sources, under section 112. *Id.*; see also *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1243–44 (D.C. Cir. 2014).

B. Regulatory History

EPA completed the required power plant study in 1998, after reviewing emissions data from hundreds of power plants.³ The data revealed that coal-fired power plants were the largest source, nationwide, of emissions of mercury, 1998 Study, *supra* note 3, at ES-5 tbl.ES-1, a persistent neurotoxin that, after depositing in waterbodies, bioaccumulates through the aquatic food chain and is highly toxic to humans even in minute quantities, *id.* at ES-15–16. EPA found that humans are primarily exposed to mercury through fish consumption and that, once ingested, mercury is readily distributed throughout the body, including across the placenta to

³ EPA, Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units -- Final Report to Congress (Feb. 1998) (vol.I), <https://tinyurl.com/3trucr26> (hereinafter 1998 Study).

the fetal brain. *Id.* “The primary targets” of mercury’s toxic effects “are the nervous system, kidney, and developing fetus,” while it also can cause adverse effects to the “respiratory, cardiovascular, gastrointestinal, hematologic, immune, and reproductive systems.” *Id.* at 7-17. EPA also found that fossil fuel-fired power plants emit 66 other listed hazardous air pollutants, *see id.* at ES-4, which (like arsenic) cause a variety of adverse health effects (like cancer), *see, e.g., id.* at ES-20.

After considering the results of this study, EPA found in 2000 that regulation of power plant hazardous air pollutant emissions was “appropriate and necessary.” 65 Fed. Reg. 79,825, 79,826 (Dec. 20, 2000); *see also* 67 Fed. Reg. 6521, 6522 (Feb. 12, 2002) (updating source category list to include power plants). More than a decade later, EPA promulgated the first standards under subsection 112(d) to protect the public from the toxic effects of mercury and other hazardous power plant emissions. *See* 77 Fed. Reg. 9304 (Feb. 16, 2012). EPA found that power plants “remain[ed] the largest domestic source” of mercury emissions and were “among the largest contributors” of emissions of arsenic, chromium, nickel, and cyanide. *Id.* at 9310.

Accordingly, EPA listed various subcategories of power plants, and established two subcategories for coal-fired power plants. *Id.* at 9367 & tbl.3. EPA set distinct mercury standards for each of those subcategories—one for units burning “low rank” (i.e., lignite) coal, and another, with a stricter standard, for units burning all other coal—based on the particular methods of controlling emissions from different fuel types. *Id.*; *see also* 76 Fed. Reg. 24,976, 25,036–37 (May 3, 2011). EPA also established standards for non-mercury metals emissions and an alternative,

surrogate standard for non-mercury metals emissions to control filterable particulate matter of which hazardous air pollutants are a part. 77 Fed. Reg. at 9367–69. Those 2012 standards were all “based on available control technologies and other practices already used by the better-controlled and lower-emitting” units under paragraph 112(d)(2). 76 Fed. Reg. at 24,980.

Numerous parties challenged the 2012 Rule, but no party sought a stay from the D.C. Circuit or this Court. See *White Stallion*, 748 F.3d at 1229; *Michigan v. EPA*, S. Ct. No. 14-46 (docket sheet), <https://tinyurl.com/4bkutjt7>. Those challenges led to this Court’s opinion in *Michigan*, 576 U.S. at 743. There, this Court held “that it was unreasonable for EPA to read [subparagraph] 112(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate power plants,” but made clear that “[i]t w[ould] be up to the Agency to decide . . . how to account for cost.” *Id.* at 759–60. This Court then remanded, without vacating the Rule, to the court of appeals, *id.*, which in turn remanded, also without vacating the Rule, to EPA, *White Stallion Energy Ctr., LLC, v. EPA*, No. 12-1100, 2015 WL 11051103, *1 (D.C. Cir., Dec. 15, 2015) (per curiam). Chief Justice Roberts then denied an application to stay the 2012 Rule pending disposition of a petition for certiorari seeking review of the remand order, *Michigan v. EPA*, No. 15A886, 2016 WL 11900291 (Mar. 3, 2016), and this Court later denied the petition, *Michigan v. EPA*, 579 U.S. 903 (2016) (mem.).

In 2016, after taking cost into account and weighing the disadvantages and advantages of regulation in accordance with *Michigan*, EPA issued a supplemental finding that it was “appropriate and necessary” to regulate hazardous power plant

emissions. 81 Fed. Reg. 24,420 (Apr. 25, 2016). EPA re-affirmed its prior assessment that power plants “are by far the largest U.S. anthropogenic source of mercury” and several other hazardous air pollutants, *id.* at 24,423, and that those emissions present “significant hazards to public health and the environment,” *id.* at 24,427.

In 2020, EPA reversed its 2016 appropriate and necessary finding, 85 Fed. Reg. 31,286 (May 22, 2020), but concluded that it could not also delist power plants from regulation under section 112 because power plant hazardous air pollutant emissions continue to threaten public health and the environment, *see id.* at 31,312 & n.57. EPA also finalized its paragraph 112(f)(2) residual risk review and its paragraph 112(d)(6) technology review—independent of its residual risk review—of the 2012 standards and determined that neither review justified revising those standards. *Id.* at 31,315–19; *see also* 84 Fed. Reg. 2670, 2670 (Feb. 7, 2019).

C. The Rule

In January 2021, President Biden directed EPA to revisit regulations from the preceding four years to promote public health and protect the environment, among other priorities. Exec. Order No. 13990, 86 Fed. Reg. 7037, 7037–38 (Jan. 20, 2021). As a result, EPA undertook a comprehensive review of the agency’s 2020 reversal of the “appropriate and necessary” finding and its conclusion that stricter standards were unwarranted based on the residual risk and technology reviews of the 2012 standards. 87 Fed. Reg. 7624 (Feb. 9, 2022).

EPA solicited information from both the public and power plants, 87 Fed. Reg. at 7672; 88 Fed. Reg. 24,854, 24,862 (Apr. 24, 2023), and considered multiple other

information sources, 88 Fed. Reg. at 24,862. While acknowledging that hazardous air pollutant emissions from power plants had declined significantly since promulgation of the 2012 standards, EPA found that “coal- and oil-fired” units “remain the largest domestic emitter of” mercury and many other hazardous air pollutants, and that those emissions cause “a variety of adverse health effects,” including (but not limited to) cancer. *Id.* at 24,857; *see also id.* at 24,876.

EPA also revoked the 2020 reversal of its “appropriate and necessary” finding in 2023, 88 Fed. Reg. at 13,957, and, after reconsidering its 2020 paragraph 112(d)(6) technology review, finalized the Rule at issue here. The Rule includes a revised mercury standard for all lignite units and a revised surrogate filterable particulate matter standard for non-mercury metals for all existing coal-fired units, based on emissions levels that coal units can meet and many have already achieved. 89 Fed. Reg. at 38,508–10, 38,524, 38,541. In its data-driven technology review, EPA found that “available cost-effective control technologies and improved methods of operation” would now allow lignite-fired units to meet the same mercury standard as all other coal-fired units. *Id.* at 38,537. EPA also “found that a majority of” coal-fired units were achieving emission levels “significantly below the [2012] emission limit” for non-mercury metals and “that the fleet achieved [those performance levels] at lower costs than the EPA estimated when it promulgated” them. *Id.* at 38,521. Based on those developments, EPA aligned the mercury standard for lignite-fired units with the standard that non-lignite units have met since 2012, *id.* at 38,541–42, and established a stricter standard for non-mercury metals (antimony, arsenic, beryllium,

cadmium, chromium, cobalt, lead, manganese, nickel, and selenium) that most units already achieve, *id.* at 38,520, 38,510 n.2.

The vast majority of power plants across the country will not need to invest in any new pollution controls to meet the revised standards. *See, e.g.*, 89 Fed. Reg. at 38,522, 38,529–30, 38,537, 38,549. As EPA explained, the revised mercury standard is unlikely to require any units to make “significant additional capital investment[s],” *id.* at 38,549, as lignite coal-fired units can meet the revised standard by dialing up existing controls, *id.* at 38,540. Of the 33 coal-fired units that will have to make any changes to comply with the revised non-mercury metals standard, only 13 will require capital investments, most in the form of upgrades to existing control technology. *Id.* at 38,522. Only two of those units—both of which are at the Colstrip power plant highlighted by Applicants Talen (10–11, 32–36), Westmoreland (9–10, 29–30), and America’s Power (16, 19), which is uniquely lagging behind all other power plants—must install new equipment to attain the revised standard. *See* 89 Fed. Reg. at 38,522. In total, only 27 power plants (some with multiple affected units) will need to make any changes to comply with the revised standards.⁴ EPA determined those requirements would not cause any power generation capacity changes or plant retirements and would have only “small” impacts on electricity prices. 2024

⁴ U.S. EPA, Mercury & Air Toxics Standards (MATS) for Coal-Fired Power Plants 11 (Apr. 25, 2024), <https://tinyurl.com/yx6mjktr> [hereinafter, RTR Presentation]. Several units will need to make changes to comply with the revised standards for both mercury and hazardous non-mercury metals. *Id.* at 11.

Regulatory Impact Analysis (RIA) 3-25⁵; *see also id.* at 3-16, 3-18; 89 Fed. Reg. at 38,526, 38,555–56. EPA also found that the costs to comply with the Rule would constitute a small percentage of power sector revenues and plant operating costs. 89 Fed. Reg. at 38,549, 38,533.

Despite those limited costs, EPA found that the Rule would yield important benefits—reducing mercury emissions by 900 to 1000 pounds annually and 9,500 pounds between 2028 and 2037—thereby lowering atmospheric deposition of mercury, reducing bioaccumulation of methylmercury in wildlife, and reducing methylmercury exposure and cumulative body burden for heavy consumers of fish. 89 Fed. Reg. at 38,511, 38,554; RIA 4-5. And EPA projected that the Rule would reduce hazardous non-mercury metals pollution by at least 7 tons in 2028, 89 Fed. Reg. at 38,554, with 49 tons of hazardous non-mercury metals reduced between 2028 and 2037, *id.* at 38,511.

EPA did not revise its 2020 residual risk review, 88 Fed. Reg. at 24,863–65, and a petition for reconsideration is pending before EPA urging the agency to do so, 88 Fed. Reg. at 24,866 & n.18. As EPA explained, Congress “recognize[d] the ability for [] EPA to achieve substantial reductions in” hazardous air pollutants “based on technological improvements without the inherent difficulty in quantifying the risk associated with [hazardous air pollutant] emission exposure.” 89 Fed. Reg. at 38,526.

⁵ U.S. EPA, Office of Air & Radiation, Regulatory Impact Analysis for the Final National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review (Apr. 2024), <https://tinyurl.com/yb3x4awa> [hereinafter RIA].

D. Proceedings Below

Applicants—states, energy and mining companies, and other groups—filed nine petitions for review of, and motions to stay, the Rule in the court of appeals. D.C. Cir. Nos. 24-1119, 24-1154, 24-1179, 24-1184, 24-1190, 24-1194, 24-1201, 24-1217, 24-1223. On August 6, 2024, the court of appeals (Henderson, Pan, Garcia, JJ.) denied the stay motions, finding that “Petitioners ha[d] not satisfied the stringent requirements for a stay” App. 1. On August 29, the court of appeals ordered briefing to be completed on December 10, 2024. App. 3–5. Petitioners filed seven applications with this Court to stay the Rule pending review in the court of appeals.

REASONS TO DENY THE STAY APPLICATIONS

“A stay is an intrusion into the ordinary processes of administration and judicial review,” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks omitted), that is granted “only in extraordinary circumstances,” *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., in chambers). Applicants must: (1) make “a strong showing that [they are] . . . likely to succeed on the merits; (2) demonstrate that they “will be irreparably injured absent a stay;” (3) show that “issuance of the stay will [not] substantially injure the other parties interested in the proceeding”; and (4) justify that “the public interest” supports their requested relief. *Nken*, 556 U.S. at 434 (internal quotation marks omitted). The last two factors “merge when the Government is the opposing party.” *Id.* at 435. In this Court, an applicant also must show a reasonable probability that the Court would grant certiorari if the applicant seeks it at the appropriate time. *Hollingsworth v. Perry*, 558 U.S. 183, 190

(2010) (per curiam). And where, as here, the Court must evaluate an extensive record and EPA’s numerous, highly technical judgments in issuing the Rule, it is “especially important” for this Court “to hold the [Applicants] to their burdens.” *Murthy v. Missouri*, 144 S. Ct. 1972, 1991 & n.7 (2024). Applicants have not met their burden.

I. Applicants Fail to Demonstrate That They Will Experience Any Irreparable Harm While This Case Is Pending in the D.C. Circuit.

Applicants must show that “substantial and immediate irreparable injury,” *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974), is “like[ly]” absent a stay, *Hollingsworth*, 558 U.S. at 190, and that they will suffer such harm “in advance of the expeditious determination of the merits toward which the [D.C.] Circuit is swiftly proceeding,” *Doe v. Gonzales*, 546 U.S. 1301, 1309 (2005) (Ginsburg, J., in chambers). Irreparable harm is a “critical” and indispensable element. *Nken*, 556 U.S. at 434. “If the moving party has not demonstrated irreparable harm, then this Court can avoid delving into the merits.” *Labrador v. Poe*, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring). Applicants’ conclusory claims of harm fall far short of that high bar.

A. Applicants’ Grid Reliability Claims Are Speculative and Unsupported.

Applicants do not—and cannot—sufficiently support their attenuated claims of plant closures and rolling blackouts. *E.g.*, ND 15–18; NRECA 28–29; Talen 35–36. As EPA explained, the Rule is expected to require only 27 coal-fired power plants—just 2 percent of the nation’s generating capacity and 3 percent of its electricity generation—to improve operations, upgrade controls, or, in the case of just one holdout, add new controls, leveling the playing field with the plants that have been

meeting these standards for years. *See* RTR Presentation, *supra*, at 11; 89 Fed. Reg. at 38,529 (“a small number of units [are] lagging behind and emitting significantly higher levels of these [hazardous air pollutants] in communities surrounding those units”). EPA—the expert agency Congress tasked with evaluating the feasibility of pollution controls and “energy requirements” under paragraph 112(d)(6), 42 U.S.C. § 7412(d)(6)—found that the Rule’s limited effects on those 27 plants would cause “no significant incremental changes in capacity,” RIA 3-17, nor cause any plants to retire, *id.* at 3-19; *see also* 89 Fed. Reg. at 38,526, 38,555. Indeed, as EPA noted, the 2012 standards, which affected 430 coal-fired power plants,⁶ were implemented in 2015 and 2016 “without challenges to grid reliability.” 89 Fed. Reg. at 38,519. Against that history, this Court should not disturb EPA’s technical, well-supported record findings as to the limited impacts of this Rule, particularly at the stay stage. *Cf. Moyle v. United States*, 144 S. Ct. 2015, 2022 (2024) (Barrett, J., concurring) (stay should be lifted where State’s claim of irreparable harm is inconsistent with factual record).

Citing extra-record declarations, North Dakota nonetheless claims “there is substantial evidence in the record” that the Rule will “likely” cause power plant retirements and those retirements will in turn “threaten” grid reliability.” ND 16–17; *see also id.* 2, 15–18; Westmoreland 29. That claim fails at every turn.

⁶ U.S. EPA, Office of Air & Radiation, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards 3-3 (Dec. 2011), <https://tinyurl.com/4kete68e>.

First, the factual submissions upon which North Dakota and other Applicants rely fall far short of meeting their burden. Many of the cited declarations are unsubstantiated *ipse dixit*. *E.g.*, ND App. 603a (Webb Decl. ¶6) (asserting without support: “[t]he Final Rule will make electricity less reliable in Arkansas and throughout the grid by forcing the retirement of base load resources”); ND App. 293a (Lane Decl. ¶33) (asserting without support: “[t]he Final Rule . . . would force retirement of the very resources needed for reliability”). And many more are riddled with uncertainty. *E.g.*, ND App. 598a (Vigesaa Decl. ¶20) (“*If* the Rule forces even more coal generation sources to shut down” (emphasis added)); *id.* 598a ¶21 (“reliability of lignite power plants to maintain grid stability and meet grid operator requirements *may* be compromised, raising *concerns*” (emphases added)); *id.* 599a ¶24 (“*if* lignite-fired facilities in North Dakota that serve the [Midcontinent Independent System Operator] market are forced to retire in the near future as a result of the Rule (*or otherwise*)” (emphases added)); ND App. 165a (Fedorchak Decl. ¶14) (“loss of a single thermal plant *could* be the difference between a stable grid and load shedding or brownouts” (emphasis added)).⁷ Tellingly, nowhere in any of the

⁷ See also ND App. 286a (Lane Decl. ¶20) (“Such closure [of coal-fired power plants] will become a *possible alternative*.” (emphasis added)); *id.* 288a ¶23 (“*If* compliance costs continue to mount” (emphasis added)); N.D. App. 551a (Rickerson Decl. ¶15) (“*If* insufficient generation is available at any time” (emphasis added)); N.D. App. 273a (Huston Decl. ¶12) (“*If* the Final Rule forces even more coal generation sources to shut down prematurely, it *could* impact grid reliability and the provision of reliable electricity.” (emphases added)); *id.* 273a ¶14 (“The Final Rule *may* cause coal plants in the MISO and PJM grids to close” (emphasis added)); N.D. App. 520a (Nowakowski Decl. ¶8) (“*potential* impacts to electric system reliability” from “*potential* closure of impacted EGUs” (emphases added)).

seven emergency applications to this Court or their many extra-record declarations is there any claim that any plant owner has concrete plans to retire even a single unit as a result of this Rule. *Accord* App. 458 (Tierney Decl. ¶40) (“No plants will retire in the near term as a result of the 2024 MATS Rule.”); App. 287 (Saha Decl. ¶6) (“Rule is not likely to result in any incremental retirements, all else being equal.”). Indeed, many of the declarations that Applicants cite in support of their grid reliability claims do not speak to plant closures at all. *E.g.*, ND 18 (citing ND App. 306a–09a (McCollam Decl. ¶¶34–43), ND App. 533a–55a (Purvis Decl. ¶¶15–19)).

Applicants also overstate the conclusions of the North Dakota-focused study on which they repeatedly rely. *E.g.*, ND 16; ND App. 598a–600a (Vigesaa Decl. ¶¶22–25); America’s Power 19–20. That study did not include a *reliability* analysis, which would examine system-wide power flows and resource adequacy, but instead a limited analysis of whether *particular* power plants are likely to be available to generate electricity in the future. App. 445–46, 458–59 (Tierney Decl. ¶¶18, 41); *see also id.* 443–46 ¶¶11–18 (explaining “reliability” in electric industry context). Even then the study’s authors admit that “a full study of the technological feasibility of complying with the new emissions standards is beyond the scope of this report,” and they therefore “assume the regulated facilities and state regulator,” including some Applicants here, “were forthright in their concerns about the feasibility of lignite-based facilities meeting the new standards.” ND App. 200a (Friez Decl., Att. A, at 15). And it relies on inaccurate data, exaggerates claims about capacity shortages, App. 262–63 (Konidena Decl. ¶35) (Vigesaa report relies on unrealistically low

assumptions of generation capacity resources), and focuses on concerns raised at the proposal stage and thus fails to account for EPA’s analysis in the Rule, *compare, e.g.*, ND App. 206a–07a (Friez Decl., Att. A, 21–22) (identifying high sulfur trioxide content in lignite coal combustion flue gas as limiting lignite plants’ ability to reduce mercury emissions), *with* 89 Fed. Reg. at 38,539 (EPA “conducted a more robust evaluation” of sulfur trioxide and concluded it does not affect lignite coal-fired plants’ ability to comply), *and id.* at 38,546–49 (describing new “effective controls and strategies” that minimize sulfur trioxide impact).

Second, Applicants’ claims ignore the reality that States, utilities, and grid operators actively manage today’s complex, interconnected, and carefully orchestrated electric grids to prevent grid reliability impacts from changes to individual plant operations, as EPA also recognized here. 89 Fed. Reg. at 38,526. Many States, including Applicants North Dakota and West Virginia, require utilities to prepare and regularly update “integrated resource plans” to ensure short- and long-term reliability in the face of changing market, regulatory, and other conditions, processes that expressly consider and compensate for capacity retirement. *See* N.D. CENT. CODE. § 49-05-05.4; W. VA. CODE § 24-2-19; App. 291–92 (Saha Decl. ¶10); *accord* App. 308–10 (Scott Decl. ¶¶7-10) (explaining measures to ensure Illinois’s competitive energy market provides reliable, affordable power). Independent system operators and regional transmission organizations, too, work to ensure that any changes to individual plant operations do not undermine reliability. *See* App. 247–

57, 259–60 (Konidena Decl. ¶¶18–30, 32); App. 440, 448–50 (Tierney Decl. ¶¶6, 24–28).

For example, the Midcontinent Independent System Operator (MISO)—in which North Dakota operates—iteratively plans for and manages the generation and transmission of electricity across interconnected electricity grids to optimize reliability and affordability. *See* App. 244–52 (Konidena Decl. ¶¶13–24). The MISO network controls 75,000 miles of transmission lines across 15 states and Manitoba, has close to 3,000 generating units, and operates as a centrally dispatched market that can call on resources across MISO and other interconnected grids to ensure reliability. App. 246–51, 261–62 (Konidena Decl. ¶¶16, 19–22, 34). Power generated in North Dakota, a net exporter of electricity, travels through MISO’s transmission network to serve other users in the MISO region as needed. *See* App. 459–60 (Tierney Decl. ¶44) (North Dakota’s in-state generation “greatly exceeds its in-state demand as of 2023”); *accord* App. 206–08, 210 (Goggin Decl. ¶¶3, 4, 6) (large generation surplus in Montana could replace Colstrip plant generation and, because Colstrip often fails to perform during peak periods, replacement resources could match or exceed its reliability contributions). And as a further backstop, any unit in MISO considering retirement must provide a year’s notice, and MISO can pay the generator to stay online if it anticipates reliability issues. App. 254–56 (Konidena Decl. ¶28); *accord* ND App. 289a–90a (Lane Decl. ¶26) (describing similar process in the Pennsylvania-New Jersey-Maryland Interconnection); *see also* 89 Fed. Reg. at 39,526 (describing Department of Energy’s use of Federal Power Act § 202(c) authority to

ensure operation of units to maintain local reliability); App. 442, 455–56 (Tierney Decl. ¶¶8, 34) (same). Applicants fail to contend with those many safeguards.

Third, Applicants’ claims that plants would close, rather than incur the limited compliance costs needed to bring their emissions in line with nearly all other plants, *infra* pt.I.B., are unfounded. *See* 89 Fed. Reg. at 38,526, 38,555 (no units expected to retire given limited scope of Rule); RIA 3-16 (additional operating costs for lignite units will not cause any retirements); App. 287–90 (Saha ¶¶6–8). As has been true over the last two decades, independent market factors—like low natural gas prices, falling costs of (and increased reliance on) renewables, and increased maintenance costs for aging coal plants—will continue to be the primary drivers of coal-fired plant retirements. *See* App. 292–99 (Saha Decl. ¶¶11–18); App. 442–43, 446–47, 459–61 (Tierney Decl. ¶¶9, 19, 22, 42–45); *see also* NGO Br. 10-11. Indeed, many coal-fired power plants—to the tune of 46 gigawatts of capacity—announced they planned to retire *before* EPA issued the Rule. App. 447 (Tierney Decl. ¶22).

On this point, past is once again prologue: Independent market forces also caused plant closures Applicants inaccurately attribute to the 2012 standards. *E.g.*, ND 17–18. For example, competition from lower priced natural gas and flat electricity demand were the main retirement drivers during the 2015 and 2016 compliance period, and more than half of the 60 gigawatts of retirements Applicants cite, *e.g.* ND 13, occurred over a year before the earliest compliance deadline. App. 460–61 (Tierney Decl. ¶45 & nn.56–57) (additional 76 gigawatts has retired since 2016, “driven by fundamental market economics making continued operations

of coal plants unprofitable”). Applicants commit a classic causal error by blaming the Rule for plant closures with other causes.

Fourth, even if credited, Applicants’ alleged reliability harms are far from imminent and certainly not forthcoming before the court appeals determines the merits, “toward which the [D.C.] Circuit is swiftly proceeding.” *Doe*, 546 U.S. at 1309; *see also* App. 3–5; *Nat’l Treasury Emps. Union v. United States*, 927 F.2d 1253, 1255 (D.C. Cir. 1991) (even “foreseeable long-term effects do not entitle the [movants] to preliminary, injunctive relief”). Applicants fail to explain why plant owners—particularly those who believe that such retirement is “premature,” *see, e.g.*, NRECA 28, 33; Talen 15–16, 32; ND App. 345a–46a (McLennan Decl. ¶75); ND App. 289a–90a (Lane Decl. ¶26); ND App. 149a (Bohrer Decl. ¶ 24); ND App. 600a (Vigesaa Decl. ¶26)—would choose to cease operations ahead of the compliance deadline, which is at least three years away, and up to four years away if power plants obtain a one-year extension from their State permitting agencies (some of whom are represented by State Applicants here), 89 Fed. Reg. at 38,519; 42 U.S.C. § 7412(i)(3)(B). And they certainly do not explain why such retirements would need to occur within the time period relevant to their Applications, i.e., the pendency of their merits claims in the court of appeals this term. *See* App. 457–58 (Tierney Decl. ¶¶ 38, 40); *see infra* pt.I.B. That failure is dispositive.

Applicants’ conclusory claims of grid reliability harms are thus neither “like[ly]” nor “imminent.” *Nken*, 556 U.S. at 434. Electricity grid reliability experts agree: “[e]lectric system reliability will not be adversely harmed, and certainly not in

the next two years, in the absence of a stay.” App. 457–58 (Tierney Decl. ¶38); *see also* App. 244 (Konidena Decl. ¶12) (“I do not believe that closure of one or more generating units—should such closure(s) come to pass in the first place—would cause blackouts or other serious adverse reliability impacts within the MISO region.”). In short, Applicants’ attempt to pin irreparable harm to reliability fails.

B. Applicants Fail to Show Imminent, Irreparable Economic Harms.

Nor do Applicants’ claims of economic harm—whether from compliance costs or electricity prices—amount to “substantial and immediate,” *O’Shea*, 414 U.S. at 502, or “likel[y]” harm, *Hollingsworth*, 558 U.S. at 190. As an initial matter, many of Applicants’ claims center on alleged harms to third parties. *E.g.*, *Talen* 35–36 (increases to others’ electricity prices); *Westmoreland* 31 (economic harms to communities and state tax base from mine closure); *NRECA* 29–30 (harms to businesses that rely on lignite mines). But private entities cannot rely on asserted impacts to third parties to demonstrate irreparable harm required for a stay. *Nken*, 556 U.S. at 434 (evaluating “whether *the applicant* will be irreparably injured absent a stay” (emphasis added) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987))); *cf. Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“The Art. III judicial power exists only to . . . protect against injury to the complaining party . . .”). And in any event, all of Applicants’ alleged harms fail under scrutiny.

Compliance Costs: Applicants first point to costs that regulated power plants will incur complying with the Rule or the prospect of plants shutting down to avoid such costs. *America’s Power* 16-18; *Midwest Ozone Group* 6–8; *NRECA* 25–31; *Talen*

32–35. But Applicants fail to supply any definitive evidence of any substantial costs they would incur during the relevant period—while the case is pending in the D.C. Circuit—and why they would need to incur those costs within that short timeframe. *E.g.*, Midwest Ozone Group 6 (summarily asserting Rule’s “new costs of operations . . . will force merchant coal-fired generating plants out of business”). Nor can they.

First, Applicants again cannot and do not demonstrate any imminent harm within the court of appeals review period. Most affected units will only need to improve operation of existing controls, so have no reason to incur costs before the compliance deadlines. 89 Fed. Reg. at 38,549 (no lignite-affected units require upgrades). And the upgrades that 13 filterable particulate matter-affected units need to make to comply with the Rule are expected to take only one to two years. *See id.* at 38,522; App. 329–30 (Staudt ¶¶6–7) (upgrades to meet mercury limit would take less than one year, sometimes just a few months, while most significant upgrades for surrogate standard could take two). As a result, those few power plants requiring upgrades will not incur significant costs until mid-2026 or early 2027 upon procurement and installation of controls, toward the end of the three- (or, if extended, four-) year compliance timeline. App. 337–39 (Staudt ¶¶17–20) (power plant owners typically plan to complete compliance projects close to the compliance date). Meanwhile, again, this case is “swiftly proceeding” before the D.C. Circuit, *Doe*, 546 U.S. at 1309, with briefing set to be completed by December 10, 2024, and the case on track for a decision this court term—a year or more before any plant will need to incur anticipated compliance costs. *See* App. 3–5; *Dep’t of Educ. v. Louisiana*, 144 S.

Ct. 2507, 2510 (2024) (per curiam) (denying stay where, among other things, court of appeals had “expedited its consideration of the case”); *Biden v. Missouri*, No. 24A173, ___ S. Ct. ___, 2024 WL 3958856, at *1 (Aug. 28, 2024) (denying stay based on “expect[ation] that the Court of Appeals will render its decision with appropriate dispatch”).

Second, Applicants also cannot demonstrate that the compliance costs are “substantial.” *O’Shea*, 414 U.S. at 502. Again only 27 power plants (some with multiple affected units) will need to make any changes to comply with the Rule. RTR Presentation, *supra*, at 11. As EPA explained, the 22 affected lignite units can meet the revised mercury standard simply through enhanced operation of their existing pollution controls, so their compliance costs will be a “small fraction of the total revenues for the impacted lignite-fired units.” 89 Fed. Reg. at 38,549; RTR Presentation, *supra*, at 11; *see also* App. 339 (Staudt Decl. ¶21 n.19) (lignite unit compliance costs likely below \$5 million per unit). Similarly, only 33 units—out of 314 units expected to be operational in 2028—currently operate above the non-mercury metal surrogate standard, and only 13 of those need to make any capital investments. 89 Fed. Reg. at 38,515, 38,522, 38,530. Even the full costs of compliance—both capital and operating costs—with the non-mercury metal standard are a small percentage of revenues and operating costs. 89 Fed. Reg. at 38,533; *see also* App. 289–90 (Saha Decl. ¶8) (total 2023 capital expenditure by all U.S. investor-owned utilities more than 200 times all of the Rule’s required capital expenditures for all affected units). And neither Applicants nor their declarants dispute the fact

that many power plants can demonstrate compliance by averaging emissions from their regulated units, which allows some units to emit above the standard. *See* App. 374 (Staudt ¶69) (providing example). Given the modest compliance costs of the Rule, it is not surprising that expert analysis of affected plant profitability (net present value) and electricity production costs (levelized electricity costs) show minimal impacts to plant economics. App. 287–90 (Saha ¶¶6–8).

Electricity Prices: State Applicants’ claims of increased electricity prices likewise fail. ND 19. EPA found that the Rule would have “limited impacts on energy prices,” 89 Fed. Reg. at 38,555–56, increasing, by 0.5% or less, average retail electricity costs in only a handful of regions, RIA 3-25–3-27, tbls.3-18, 3-19 & 3-20; *see also* App. 295, 299–300 (Saha ¶¶13, 18) (ratepayer impacts “likely to be minimal” due to relatively low compliance costs and recovery of capital costs over upgrades’ lifetimes). And Applicants do not contend with the fact that electricity ratemaking processes can take years, placing any price impacts well outside of the court of appeals review period relevant here. *See* App. 290–91 (Saha ¶9).

In contrast, State Applicants speculate that the Rule will “inevitably” increase their electricity costs, ND 19, but do not demonstrate that such increases would cause “substantial” and “imminent” harm to them specifically. *See e.g.*, ND App. 168a (Fedorchak Decl. ¶ 26) (predicting, at unspecified date, “at least a 0.5 percent increase” for “North Dakota customers” from compliance by a single plant); ND App. 287a-88a (Lane Decl. ¶23) (claiming, with no timeframe, \$40 million in costs to “West Virginia customers”); *see also* ND App. 274a (Huston Decl. ¶17). Thus, even if

Applicants could claim generalized harm to consumers as “irreparable harm” to themselves, they have not come close to showing that such harm is “imminent,” or that it would occur before the court of appeals issues its opinion.

In short, Applicants’ conclusory claims of irreparable harm all come up short.

II. Applicants Also Fail to Show that the Equities and Public Interest Justify a Stay.

Because Applicants seek to toll the Rule’s compliance deadlines, *e.g.*, ND 14; Westmoreland 30, their requested stay would delay important reductions in mercury and other hazardous air pollution that Congress sought to eliminate, *see* 1990 Legislative History, *supra*, at 8510 (“The purpose of the [1990 Clean Air Amendments] is to assure that each and every source will employ the control methods which assure the greatest reduction in emissions which are achievable . . .”). Those foregone emission reductions would cause substantial harm to the public interest—including to residents and natural resources in State Respondents’ jurisdictions. Such real harms, to real people across the Nation and in our communities, far outweigh Applicants’ speculative and specious claims of harm here. *Supra* Pt. I.

A. Mercury and Non-Mercury Metals Emitted by Coal-Fired Power Plants Are Potent and Persistent Pollutants That Cause Significant Health Harms Across the Nation.

As EPA has consistently documented, mercury is a toxic metal that can cross the placenta and blood-brain barrier and cause severe neurological, renal, cardiovascular, and other harms to humans and animals—including life-long impacts to IQ, cognitive thinking, memory, attention, language, fine motor skills, and visual spatial skills. *See* 89 Fed. Reg. at 38,515, 38,556; 1998 Study, *supra* note 3, at ES-16,

7-17 to 7-18; RIA 4-6; *see also* App. 51–52 (States’ 2023 Cmts. 3–4); 400–01, 409–10, 415–17 (Sunderland Decl. ¶¶2, 17, 26–27). Because of their developing brains, fetuses and young children are especially vulnerable to mercury’s harmful effects. 89 Fed. Reg. at 38,515, 38,556. Hundreds of thousands of babies are born annually in the United States with mercury exposures above the EPA reference dose—the amount “likely to be without appreciable risk of adverse health effects,” 65 Fed. Reg. at 64,703—an estimate that is itself outdated and likely underestimates harm. App. 411–14 (Sunderland ¶¶19, 22). And 7.4 million adults exceed thresholds associated with elevated risks of cardiovascular disease. *Id.* 412 ¶19. Exposure to many non-mercury metals emitted by coal-fired power plants—including arsenic, chromium, and lead—is also associated with a wide range of serious health conditions, including adverse neurological effects like blindness and quadriplegia, as well as cancer and cardiovascular, immunological, reproductive, liver, kidney, and respiratory effects. 89 Fed. Reg. at 38,515, 38,556; *see also* App. 53–54 (States’ 2023 Cmts. 5–6).

Mercury pollution harms not only the people who live, work, and go to school near power plants, but also downwind communities—including those in State Respondents’ jurisdictions. Mercury can be readily transported once released to the air by industrial sources like the power plants controlled by the Rule. 89 Fed. Reg. at 38,515; App. 54 (States’ 2023 Cmts. 6); *see also, e.g.*, App. 238 (Johnson Decl. ¶18); App. 273 (Loyzim Decl. ¶6); App. 322, 323-24 (Smith Decl. ¶¶15, 17). Once it deposits onto soil and into waterbodies, it transforms into methylmercury and bioaccumulates

through the food chain. RIA 4-5-4-6. Consumption of contaminated fish is the primary source of human exposure to mercury. 89 Fed. Reg. at 38,515.

Across the United States, mercury contamination of waterbodies—largely due to deposition of mercury from sources like coal-fired plants—is a widespread and substantial problem. App. 182–86, 193–95 (Bouchareb Decl. ¶¶10, 12, 14, 16, 30–33); App. 600–01 (Zellmer Decl. ¶15); App. 273 (Loyzim Decl. ¶6). Tens of thousands of miles of rivers and streams and millions of acres of lakes, reservoirs, and ponds are designated as impaired under the Clean Water Act, 33 U.S.C. §1313(d), due to mercury contamination, including many waterbodies located on state lands or held in public trust within State Respondents’ jurisdictions. App. 85 (States’ 2022 Cmts. 7); App. 598–99 (Zellmer Decl. ¶¶8–10); App. 322 (Smith Decl. ¶14); App. 273–75 (Loyzim Decl. ¶¶7, 9, 10). That contamination has harmed State Respondents’ valuable recreational and commercial fishing industries and required many to implement state- and region-wide “total maximum daily loads” to meet federal water quality standards and to issue widespread fish consumption advisories that cause our agencies to incur monitoring and implementation costs. App. 52–53 (States’ 2023 Cmts. 4–5); App. 182–83, 188–89 (Bouchareb Decl. ¶¶10–12, 19–21, 23); App. 599–60 (Zellmer Decl. ¶¶11–13); App. 316–19, 322–23 (Smith Decl. ¶¶7, 9–10, 16); App. 273–76, 278–79 (Loyzim Decl. ¶¶ 7–8, 10–13, 18).

Minnesota, for example, has a state-wide mercury total maximum daily load, 1,696 mercury-impaired waterbodies, and mercury-based fish consumption advisories in place for hundreds of lakes and streams. App. 182 (Bouchareb

Decl. ¶¶10–11). Most of Minnesota’s mercury contamination is due to atmospheric deposition, and an estimated thirty percent of the anthropogenic deposition originates from regional sources, including the holdout lignite plants subject to the Rule. *Id.* 185, 194–95 ¶¶14, 32–33). In the Northeast, which is subject to a region-wide mercury total maximum daily load, atmospheric deposition must be reduced by 98 percent before states can lift fish consumption advisories, a feat that will require significant reductions from out-of-state sources such as coal-fired power plants. App. 278–79 (Loyzim Decl. ¶18); App. 316–17, 322–23 (Smith Decl. ¶¶7, 16); *see also* App. 598 (Zellmer Decl. ¶8) (139 Wisconsin waters are federally listed as impaired due to mercury contamination, largely by atmospheric deposition of mercury).

B. Granting a Stay Would Delay Important Emission Reductions at Great Detriment to Public Health and the Environment.

The Rule requires new controls at only 27 of the nation’s most polluting plants given the rest of the industry’s major strides in reducing emissions over the last decade. But it nonetheless will prevent significant harms to the public interest because of those plants’ outsized mercury and non-mercury metals emissions. 89 Fed. Reg. at 38,553–56. For example, while coal-fired power plants, as a whole, are among the nation’s largest mercury emitters, lignite-burning units—concentrated in North Dakota and Texas—emitted nearly 30 percent of all mercury (and generated just 7 percent of the power) produced by all coal-fired units. *Id.* at 38,537; Sarah Benish et al., U.S. EPA/OAR, 2024 Update to the 2023 Proposed Technology Review for the Coal- and Oil-Fired EGU Source Category 27–28 (Jan. 2024), <https://tinyurl.com/bdfry69a>. Indeed, Congress directed EPA to address outliers such

as these to prevent the well-established, significant, and often inequitable impacts that hazardous air pollution wreaks on public health. *See* 1990 Legislative History, *supra*, at 8472 (intent to address uneven “exposur[e] [sic] to toxic air pollutants”), 8469 (recognizing inequitable distribution of hazardous air pollutant health impacts). Granting the applications would delay those reductions of both mercury and hazardous non-mercury metals to the detriment of communities across the Nation and in State Respondents’ jurisdictions.

First, as EPA explained, the Rule’s revised mercury limit is projected to reduce emissions by about 900 to 1000 pounds annually, and 9,500 pounds between 2028 and 2037. 89 Fed. Reg. at 38,511, 38,554; RIA 3-10, 7-8. That is no small thing. *Contra* Westmoreland 19. EPA’s reference dose for mercury is only *0.1 micrograms per kilogram per day*, 87 Fed. Reg. at 7638, equivalent in amount to approximately 1% of a grain of sugar.⁸ EPA also found that the Rule’s revised limits are expected to lower deposition of mercury, reduce bioaccumulation of methylmercury in wildlife, 89 Fed. Reg. at 38,556, and, in turn, reduce methylmercury exposure and cumulative body burden for heavy consumers of fish, including subsistence fishers who disproportionately belong to vulnerable populations like those with low socioeconomic status. RIA 4-5; *see also* App. 57–58 (States’ 2023 Cmts. 9–10); App. 412, 414–16 (Sunderland Decl. ¶¶20, 23–26). Indeed, mercury emissions from the highest-emitting lignite plants in Texas and North Dakota in 2020 were large enough to push

⁸ For the average, 70 kg adult, the reference dose is equivalent to consuming 7 micrograms of mercury a day, while a grain of table sugar weighs about 625 micrograms.

the daily consumption of some high-frequency fish consumers living adjacent to those plants above EPA’s reference dose. App. 412–13, 416–17 (Sunderland Decl. ¶¶20–21, 27). Thus, “any delay” of the Rule “would cause unnecessary health risks for the affected populations surrounding lignite coal-fired EGUs, particularly in Texas and North Dakota, where the largest emitters of mercury remain.” *Id.* 402 ¶4; *see also* App. 203–04 (Byron ¶¶24–26); App. 568 (Wetherelt Decl. ¶18).

Second, EPA estimated that the revised non-mercury metals standard will yield reductions of 7 tons of hazardous non-mercury metals, and 49 tons of hazardous non-mercury metals between 2028 and 2037. 89 Fed. Reg. 38,510-11, 38,554; RIA ES-8. Because hazardous air pollutants are part of that particulate matter, “PM controls are expected to reduce [hazardous] metals emissions and therefore reduce exposure to [hazardous] metals for the general population including those living near . . . facilities.” RIA 4-6. And “projected emissions reductions [of non-mercury metals] should reduce levels of exposure to carcinogenic [hazardous air pollutants] in communities near the impacted facilities.” *Id.* at 4-7. Harms from this pollution, too, disproportionately fall on vulnerable populations. App. 237–38 (Johnson Decl. ¶¶14–16); App. 53–54 (States’ 2023 Cmts. 5–6). In Pennsylvania, for example, where five plants will need to upgrade pollution controls to meet the revised non-mercury metal limit, compliance with the Rule will reduce emissions of those pollutants by nearly 20 percent in the counties where the plants are located. App. 559 (Wenrich Decl. ¶18). Three of those five plants are in areas “characterized by increased pollution burden, and sensitive or vulnerable populations based on demographic and

environmental data.” *Id.* 559–60 ¶¶18–20.

The Rule’s projected mercury and hazardous non-mercury metal reductions are particularly important for Tribal communities, for whom fish and fishing are of great cultural importance, and who are exposed to methylmercury at rates three to ten times higher than the U.S. average. App. 600 (Zellmer Decl. ¶14); App. 181–82 (Bouchareb Decl. ¶9); App. 57–58 (States’ 2023 Cmts. 9–10). For example, the Northern Cheyenne Tribe’s approximately 11,000 members have been disproportionately impacted by mercury and hazardous nonmercury metal emissions from the Colstrip plant, which lies only twenty miles from the Tribe’s reservation. 89 Fed. Reg. at 38,531; App. 47–48 (N. Cheyenne Cmts. 1–2); App. 563 (Wetherelt Decl. ¶¶2–3). Colstrip is the *only* plant in the country without industry-standard particulate matter controls. 89 Fed. Reg. at 38,522, 38,531; *see also* App. 48 (N. Cheyenne Cmts. 2). Unsurprisingly, its two units are the first and third highest emitters of filterable particulate matter in the nation, increasing the risk of cardiovascular and respiratory issues, poor birth outcomes, and dementia in the surrounding communities like the nearby Northern Cheyenne reservation. App. 200, 201–03 (Byron Decl. ¶¶13–15, 18, 22–23); App. 565 (Wetherelt Decl. ¶8) (incidence of cancer on Northern Cheyenne reservation elevated compared to rest of Montana). Minnesota Tribal communities, who depend on subsistence fishing, are also harmed by mercury emitted by highly polluting lignite coal-fired plants in neighboring North Dakota. App. 57–58 (States’ 2023 Cmts. 9–10); App. 193–95 (Bouchareb Decl. ¶¶31–

33). Those are not isolated examples.⁹

Finally, a stay of the Rule would compromise State Respondents’ ability to attain regulatory requirements and goals, causing them to suffer economic harm and incur regulatory costs. For example, a stay would delay many State Respondents’ abilities to lift fish consumption advisories, which would slow the revitalization of recreational and commercial fisheries. App. 52–53 (States’ 2023 Cmts. 4–5). And, in addition to hindering federal water quality compliance, a stay would hamper states’ attainment of the National Ambient Air Quality Standards for particulate matter. *See* App. 560 (Wenrich ¶19); App. 279–80 (Loyzim Decl. ¶19) (noting benefits of out-of-state particulate matter reductions to meeting federal regional haze requirements); App. 56 (States’ 2023 Cmts. 8) (describing harms from particulate matter emissions).

On the equities, as on the merits, Applicants attempt to minimize these impacts with the repeated refrain that EPA found the Rule would have “zero” benefits. *E.g.*, ND 10, 31; NACCO 22; *see also* America’s Power 12 (“infinitesimally

⁹ *See also* App. 45 (Cmts. of Fond du Lac Band of Lake Superior Chippewa, Grand Traverse Band of Ottawa and Chippewa Indians, and Little Traverse Bay Bands of Odawa Indians 1) (emphasizing importance of Rule to “health and cultural integrity of many Native American Tribes”); App. 42–43 (Cmts. of the Ute Mountain Ute Tribe 1–2) (“[G]eneration from the coal-fired boilers has been a major contributor to airborne [mercury and other toxic metals] pollution in the . . . Tribal airshed. . . . Mercury contamination of Tribal environments including fish, shellfish and other essential food supplies injects this potent neurotoxin into our vulnerable populations”); App. 38 (Cmts. of Nat’l Tribal Air Ass’n 1) (“The health, environments, and lifeways of Tribes in much of the U.S. have been impacted by the emissions of mercury and other toxic metals. Electric power generation from coal-fired and oil-fired boilers has been a major contributor to this airborne pollution.”).

small benefits”); NRECA 16 (“no meaningful health benefits”); Talen 1 (“without any meaningful benefits”). But as just described, EPA identified numerous important benefits attributable to the Rule and supported by the record. That EPA did not put a dollar figure to all of those impacts is of no moment. See NGO Br. 8–11, 26–31; *Sinclair Wyo. Refining Co. v. EPA*, 101 F.4th 871, 889 (D.C. Cir. 2024) (“That those benefits are not easily monetizable does not mean they are less valuable.”). The agency has detailed the benefits of reducing both mercury and hazardous non-mercury metals emissions, both generally, in EPA’s 2023 appropriate and necessary finding, which went unchallenged, 88 Fed. Reg. at 13,972, and, specifically, in this Rule. And EPA explained, and no Applicant disputes, that difficulties undertaking epidemiologic studies on hazardous air pollutant exposure stemming from difficulties detecting unevenly distributed impacts, limited data in critical microenvironments, insufficient economic research on valuation, and the wide array of hazardous air pollutants and possible synergistic hazardous air pollutant effects, make it impracticable to fully estimate the monetary benefits of limiting human exposure to hazardous air pollutants. 89 Fed. Reg. at 38,511, 38,515–56, 88 Fed. Reg. at 13,965; see also *id.* at 13,970–71; App. 400–01, 405–08, 410–11 (Sunderland Decl. ¶¶1, 3, 12–13, 15, 18).

Indeed, “Congress well understood [those] challenges.” 88 Fed. Reg. at 13,971. And it replaced the 1970 Act’s risk-based standard-setting approach with the technology-based approach utilized here to ensure that those very difficulties would not stand in the way of securing the well-established and important benefits of

reducing mercury and other hazardous air pollution where achievable. 1990 Legislative History, *supra*, at 8510 (“The purpose of the [1990 amendments] is to assure that each and every source will employ the control methods which assure the greatest reduction in emissions which are achievable”); 89 Fed. Reg. at 38,526 (Congress “recognize[d] the ability for [] EPA to achieve substantial reductions . . . based on technological improvements without the inherent difficulty in quantifying the risk associated with [hazardous air pollutant] emission exposure.”).

A stay thus would harm public health, impair State Respondents’ waterbodies, and impose regulatory burdens on State Respondents—harms that outweigh Applicants’ speculative, unsupported, and far-off claims here.

CONCLUSION

The applications for a stay should be denied. If the Court, however, is inclined to grant relief, such relief must be narrowly tailored to those aspects of the Rule for which Applicants have both expressly sought a stay and satisfied all of the stay factors. *Gill v. Whitford*, 585 U.S. 48, 68 (2018); *see* NGO Br. 39–40.

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