No. 24A180
(Related Case Nos. 24A178, 24A179, 24A186, 24A197, 24A199, 24A203)

In the Supreme Court of the United States

STATE OF NORTH DAKOTA, STATE OF WEST VIRGINIA, et al.,

Applicants,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

TO THE HONORABLE JOHN G. ROBERTS, JR.,
CHIEF JUSTICE OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT

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

PATRICK MORRISEY
Attorney General

MICHAEL R. WILLIAMS
Solicitor General

Office of the Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25301
Phone: 304.558.2021
michael.r.williams@wvago.gov

Counsel for State of West Virginia

DREW H. WRIGLEY
Attorney General

PHILIP AXT
Solicitor General
*Counsel of Record

NESSA HOREWITCH COPPINGER
DAVID M. FRIEDLAND
Special Assistant Attorneys General

Office of the Attorney General
600 E Boulevard Ave., Dept. 125
Bismarck, ND 58505
Phone: 701.328.2210
pjaxt@nd.gov

Counsel for State of North Dakota

[additional counsel listed after signature page]

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INTRODUCTION

Twenty-three states and many other Petitioners have challenged this nationwide Mercury and Air Toxics (MATS) Rule, which ratchets down certain hazardous air pollutant (HAP) emission levels for coal-fired power plants by 66-70%. *See* Nos. 24-1119; 24-1154; 24-1179; 24-1184; 24-1190; 24-1194; 24-1201; 24-1217; 24-1223 (D.C. Circuit). By EPA's own calculations (which Applicants contend are far too low), the Rule will, at minimum, impose costs of nearly a billion dollars. And it will impose those costs with no demonstrable or measurable benefit to public health or the environment from the mandated reduction in HAP emissions.

Three years is not a long time when it comes to making power plant investment decisions. And while the parties litigate the Rule's legal and factual deficiencies, the clock is ticking for power plants to make the investment decisions required to either come into compliance with the Rule, or to commit to retirement tracks if they determine compliance is not technically feasible (or not feasible in any way that allows them to remain economically viable). In the absence of a stay, decisions need to be made now. And those decisions will not be reversible if Applicants ultimately prevail on the merits. In the best-case scenario, forcing those compliance decisions to be made now will mean higher electricity prices for Applicant States and their citizens; in the worst-case scenario, it risks destabilizing the long-term reliability of the power grids upon which Applicant States and their citizens rely.

In their briefs in opposition to a stay, Respondents engage in a lot of hand waving, asserting that the costs of the Rule are relatively small and that there is nothing to worry about because the EPA-made power grid model concludes that the

EPA Rule will have no impact on power grid reliability. But any model is only as good as its inputs. And here, states, power plants, and grid regulators have all told EPA that its inputs and assumptions are wrong.

Despite claiming that this action is not a redux of *Michigan v. EPA*, the legacy of that case looms like an inescapable shadow. There, like here, Petitioners alleged that EPA promulgated a MATS Rule without properly considering its costs and benefits. There, like here, EPA promised the country that the Rule would have less impact on the power grid than power plants and grid regulators warned it would (only for history to prove EPA profoundly wrong). And there, like here, power plant compliance and retirement decisions needed to be made while the merits of the dispute were still being adjudicated—resulting in billions expended and numerous plant closures from a Rule that was ultimately invalidated by this Court.

The stay applications filed with this Court identified numerous legal infirmities with the Rule. Among other issues, the Rule disregards the statutory command that revising emission standards under Section 112(d)(6) of the Clean Air Act must be "necessary" and which, in context, can only mean that doing so achieves some relevant benefit to public health or the environment. The Rule also stretches the term "development" beyond what the statute and common sense allow. And it is arbitrary and capricious multiple times over, including for its indefensible cost-benefit analysis and its failure to meaningfully engage with the many comments putting EPA on notice that the assumptions underlying its grid reliability determination are fundamentally flawed.

But beyond the likelihood of success, this is a case where the equities strongly tilt for maintaining the status quo while the merits are heard. If Applicants are wrong on the merits, the impact of a temporary stay is that public health and the environment will continue to remain more-than-sufficiently protected from any meaningful risk from the relevant HAP emissions. EPA is unable to demonstrate that imposing the Rule would cause the already-ample margin of safety to become larger in any meaningful way, other than blithely proclaiming that mandating fewer emissions must *ipso facto* result in some sort of unquantifiable health benefit. Conversely, if EPA is wrong on the merits, prices for electricity will increase, and numerous state and grid regulators from around the country have attested to the significant likelihood that long-term grid reliability will be threatened.

The Court should consequently stay the Rule until it resolves any petition for certiorari. The duration for any such stay will potentially be reduced given that the D.C. Circuit has scheduled this case for expedited briefing, with final briefs to be submitted on December 10, 2024. However, that schedule does not obviate the need for this Court to preserve the status quo while the merits are resolved.

ARGUMENT

"The authority to hold an order [or rule] in abeyance pending review allows an appellate court to act responsibly." *Nken v. Holder*, 556 U.S. 418, 427 (2009). And here, all the relevant factors confirm that this Court should stay the Rule to allow for careful review of a regulation that power plants and grid regulators attest will threaten the long-term reliability of our power grids, for no quantifiable benefit.

I. THE RULE THREATENS APPLICANT STATES WITH IRREPARABLE HARM

Respondents do not dispute that undermining the long-term reliability of our nation's power grids would be an irreparable harm that weighs in favor of a stay. Instead, they summarily assert "[t]here is no sound basis to think that those harms will arise … given EPA's determination that no coal plants will retire as a result of the rule." EPA Br. at 39. But "EPA has no expertise on grid reliability." *Texas v. EPA*, 829 F.3d 405, 432 (5th Cir. 2016). And Applicant States have proffered an array of declarations attesting that our nation's power grids are already operating on dangerously thin margins of dispatchable power, and that the assumptions upon which EPA relied to determine that the Rule would result in no power plant closures were fundamentally flawed. Contrary to EPA's conclusory statements otherwise, there is a "basis" to think such harms will arise.

A. Power Grids Around the Nation Are Dangerously Strained

The unfortunate reality is that, in only a few years' time, the demand for electricity is projected to exceed the supply of dispatchable power across large swaths of our nation, even during normal weather conditions. And for much of the rest of the country, the demand for electricity is projected to exceed the supply of dispatchable power during severe weather events, when it is needed the most. To illustrate, a graphic from the North American Electric Reliability Corporation's (NERC) 2023 Long-Term Reliability Assessment is perhaps worth a thousand words.

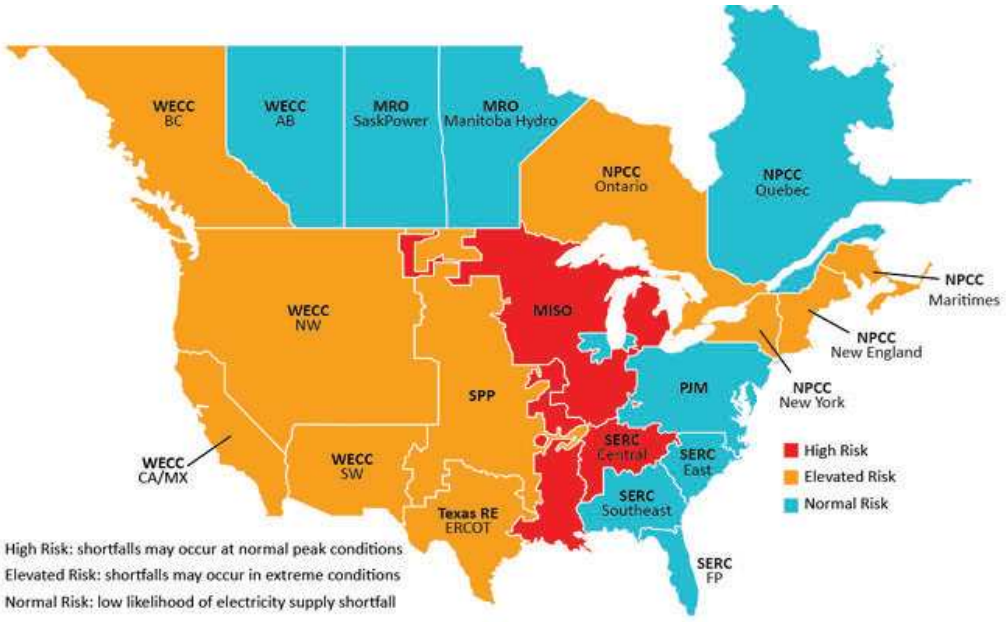

Figure 1: Risk Area Summary 2024–2028[8]

App. 596a-597a (Vigesaa Decl. ¶17).

In the above graphic, regions in red are projected to have a shortage of dispatchable generation even during normal weather as early as 2028. And areas in orange are projected to have shortages during severe weather events. App. 596a-597a (Vigesaa Decl. ¶17). These are not historically normal projections, and the reason is not a mystery. App. 596a (Vigesaa Decl. ¶16). As one regional transmission organization has explained, "[w]idespread retirements of dispatchable resources, lower reserve margins, … and increased reliance on weather-dependent renewables and emergency-only resources have altered the region's historic risk profile, creating risks … that rarely posed challenges in the past." App. 597a-598a (Vigesaa Decl. ¶18) (quoting MISO's Response to the Reliability Imperative (2024)).

Rather than grappling with this reality, EPA claims that its conclusions on grid reliability should be trusted for this iteration of the MATS Rule because its

promulgation of the 2012 MATS Rule did not cause power grid failures. *See* EPA Br. at 30-31; 89 Fed. Reg. 38508, 38526 (May 7, 2024). But pretending like the grid has the resiliency that it did in 2012 is to ignore a fundamental aspect of the problem. App. 595a-596a (Vigesaa Decl. ¶¶11-17); App. 282a (Lane Decl. ¶¶12-13); App. 272a-273a (Huston Decl. ¶¶8-14); *see also Ohio v. EPA*, 144 S. Ct. 2040, 2051 (2024) (citation omitted) (agency cannot ignore an important aspect of the problem).

B. EPA's Determination That the Rule Will Cause Zero Power Plant Retirements Is Not Entitled to Deference

EPA bases its conclusion that the Final Rule will have no impact on grid reliability solely on its own modeling. EPA Br. at 28-29; 89 Fed. Reg. at 38526.

However, numerous commenters and declarants have attested that the assumptions upon which EPA relied for its model were fundamentally flawed. *See* States' Stay App. at 16-17; *see also, e.g.,* App. 329a-332a, 343a-344a (McLennan Decl. ¶¶34-39, 70) ("Recent test data suggest that Minnkota will not be able to meet the New Mercury Limitation even at the higher PAC injection rates that EPA assumed to be sufficient to meet the New Mercury Limitation."); App. 537a-539a (Purvis Decl. ¶¶24-25) (upgrades to comply "will certainly fail, despite best engineering and maintenance practices, due to the lack of any margin to meet the aggressively low new fPM limitation"); App. 627a-633a (Cichanowicz Report at 39-44) (outlining flaws in EPA's modeling, including erroneously assuming retirement of 55 units in "baseline" analysis not planned to retire, and understating compliance impacts).

And State and grid regulators from around the country have attested that if the Rule forces any coal-fired power plants to retire, the effect on long-term power

grid reliability will be significant. *See* States' Stay App. at 16. EPA never meaningfully grapples with this information in either the Rule or in its Response Brief, simply asserting, and then re-asserting, that it concluded no power plants will close as a result of the Rule, and that its conclusion should be trusted. However, as Applicants noted in their stay applications, the Court should be hesitant to trust EPA's contested grid reliability conclusions, given the magnitude by which it was off the last time it promulgated a MATS Rule. *See* States' Stay App. at 17-18.[1]

EPA also denies the Rule poses any threat to grid reliability by making vague claims that EPA consulted with other federal agencies about grid reliability. EPA Br. at 31. However, as Applicants' stay application noted, the only support EPA cites for its supposed consultation with other agencies on grid reliability is a generic Memorandum of Understanding with the Department of Energy, which EPA admits is "not linked to any one regulatory effort or final action." App. 676a-677a (Response to Comments at 156-57). There is nothing in the record to suggest that EPA consulted with FERC, NERC, or any similar entity with grid reliability expertise on the potential grid impacts *of this Rule*.

[1] EPA acknowledges that in the wake of its 2012 MATS Rule, "more coal-fired units eventually retired than EPA had predicted." EPA Br. at 30. EPA then tries to shift the blame for those retirements to unrelated market forces. *Id.* However, if there was a chorus of warnings that the rule would force many retirements, then there were many such retirements, and then virtually every power plant that retired attributed its decision to retire, at least in part, to the rule, then it does not take an advanced degree in economics to conclude the rule likely had something to do with the retirements. *See* App. 644a (NACCO Cmts. at 17).

C. The Rule Threatens to Undermine Long-Term Grid Reliability Now, Even If Retirements Do Not Occur Immediately

EPA also contends that there is no likelihood that threats to the power grids "will materialize during the pendency of expedited judicial review." EPA Br. at 39. But this claim too is mistaken.

If the D.C. Circuit holds oral argument and renders a decision as soon as possible after the final briefs are submitted on December 10, 2024, nearly a third of the three-year compliance period will have already elapsed. And assuming certiorari is sought thereafter, several more months are likely to pass before the merits are ultimately resolved. But electric utility steam generating units (EGUs) cannot wait even until the end of the D.C. Circuit briefing period to make their compliance or retirement decisions. Consequently, as power plants, grid operators, and state regulators have made clear, the threats to grid reliability will occur well before the end of the three-year implementation period. App. 609a-611a (Bohrer Decl. ¶¶24-28); App. 338a (McLennan Decl. ¶58); App. 560a-561a (Tschider Decl. ¶¶25-30); App. 306a-309a (McCollam Decl. ¶¶34-43); App. 179a (Friez Decl. ¶¶16-17); App. 533a-535a (Purvis Decl. ¶¶15-19). Compliance or retirement decisions made now will not be reversible one or two years from now when a decision on the merits is reached. And EPA's defense that those power plants may not close for a couple of years is legally irrelevant when the immediate impact of failing to stay the Rule now is to irreversibly set in motion such potential plant closures in a few years' time.

Not once does EPA cite to, much less grapple with, *Texas v. EPA*, the case most directly analogous to the circumstances here. 829 F.3d 405 (5th Cir. 2016). The *Texas*

petitioners raised the same kinds of harms that Applicants here have raised, and the *Texas* court clearly explained why those harms warrant a stay. *Id.* at 434 ("Even setting aside the costs of compliance for the power company petitioners, if the Final Rule causes plant closures, the threat of grid instability and potential brownouts alone constitute irreparable injury…"). That decision is persuasive authority here, and EPA's refusal to address it is notable.

Moreover, even assuming *arguendo* that every power plant is able to come into compliance with the Rule, EPA still fundamentally misunderstands the effect that simply coming into compliance will have on the power grids. Implementing and installing the necessary compliance measures will require multiple plants within regional grids to spend extensive amounts of time offline, threatening the state and regional grids that "are already operating on dangerously thin margins of dispatchable power." App. 609a-610a (Bohrer Decl. ¶¶22-23, 26-27) (implementation of new control technologies would concentrate "danger of an unstable, unreliable grid on North Dakota and its residents").

In short, the specter of Applicant States suffering significant and irreversible injury to their power grids from implementation of the Rule is real and it is imminent. The Court can prevent those harms by preserving the status quo while the merits of this EPA rulemaking are fully adjudicated.

II. THE BALANCE OF HARMS TILTS SHARPLY IN FAVOR OF A STAY

The balance of harms and public interest weigh strongly in favor of a stay here. As discussed *supra*, the threats to power grid reliability in the absence of a stay are significant, and the public interest strongly favors preserving the status quo when

the public's access to affordable electricity is threatened. *Texas*, 829 F.3d at 435; *see also, e.g., West Virginia v. EPA*, 90 F.4th 323, 332 (4th Cir. 2024) ("the public [] has an interest in the efficient production of electricity and other industrial activity in the State, even as such production is balanced with environmental needs"); *Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) (denying preliminary injunction where it threatened to reduce power generation, as "[a] steady supply of electricity … especially … [for] the elderly, hospitals and day care centers, is critical").

Conversely, the status quo already protects public health with an "ample margin of safety," *e.g.*, 89 Fed. Reg. at 38508, and EPA is unable to demonstrate that implementing the Rule would result in any actual increase for that already-large margin of safety, aside from offering a hand wave that less emissions must *ipso facto* increase public health outcomes in some unquantifiable way. EPA Opp. Br. at 4-5.[2]

Unable to point to any demonstrable public health benefits to be achieved from the Rule's HAP emission reductions, EPA claims that the public interest will be served by denying a stay because it argues the Rule is lawful, and granting a stay would "deny the public the benefits that Congress sought to confer." EPA Br. at 39

[2] Since the original MATS rule was promulgated, there has been a 90% decrease in mercury emissions from coal-fired EGUs. 89 Fed. Reg. at 38537. And while some Respondents anecdotally discuss the dangers of mercury exposure (*e.g.,* State Respondents Br. at 28), such anecdotes cannot overcome the fact that EPA is unable to demonstrate any actual health benefit to be achieved from the further reductions in HAP emissions that are mandated by the Rule. Even for subsistence fishers that live in the vicinity of coal-fired power plants, who in the past have been disproportionately harmed by mercury exposure, and whom Respondents gesture towards as benefiting from the Rule (*see* State Respondents Br. at 31), EPA acknowledges that the level of exposure is now "well below the reference dose" for causing adverse effects from mercury exposure. 89 Fed. Reg. at 38541.

(citation omitted). But setting aside the fact that EPA is unable to demonstrate how implementing the Rule's HAP emissions reductions would bestow any demonstrable public health or environmental benefits, EPA's argument on this last point is simply a contention that because it believes it will prevail on the merits it should also prevail on the equities. Applicants of course dispute that EPA will prevail on the merits, and there conversely is "no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

III. APPLICANTS WILL LIKELY PREVAIL ON THE MERITS

A. The Rule Is Contrary to Clean Air Act Section 112(d)(6)

1. The Rule Is Not "Necessary"

With regard to Section 112(d)(6)'s command that EPA revise emission standards under that section only as "necessary," EPA's brief attempts to contort the statute to fit the Rule's contours, rather than making the Rule fit into the statute.

As its first maneuver to deflect from the statutory requirement to establish that the Rule is "necessary," EPA asserts (at least 24 separate times) that HAP emission standards can (and perhaps must) be ratcheted down under Section 112(d)(6) every time a lower emissions limit is "achievable." EPA Br. at 3-4, 12, 15-17, 19-20, 22-25. But that is a fundamental mischaracterization of the statute.

When regulating a source's HAP emissions for the first time, Section 112 requires EPA to base the initial emission standards on the "maximum achievable control technology" (MACT)—in other words, the best emission control technology that provides the lowest achievable rate of HAP emissions and is available at the time

of the rulemaking. 42 U.S.C. § 7412(d)(2), (3). EPA set initial MACT standards for coal- and oil-fired EGUs in 2012. 77 Fed. Reg. 9304 (Feb. 16, 2012).

Whether an emissions limit is "achievable" is only contemplated by the statute when setting *new* emission limits under Sections 112(d)(2) and (d)(3). In contrast, when EPA is revising an *existing* emissions limit under Section 112(d)(6), the statute requires EPA to conduct an entirely different analysis—one that uses the term "necessary" and does not use the term "achievable" in any way whatsoever. This recurring review is known as a "Technology Review" and, despite EPA's contentions to the contrary, is not based on the "achievability" criteria that is used when calculating the initial MACT standard. *Id.*

EPA's importation of an "achievable" standard into Section 112(d)(6) is contrary to the statutory scheme and would permit (or perhaps require) the agency to re-calculate the MACT floor every time that it conducts a Technology Review. The D.C. Circuit has expressly rejected such a reading of the statute several times. *See Ass'n of Battery Recyclers, Inc. v. EPA,* 716 F.3d 667, 673-74 (D.C. Cir. 2013) (rejecting argument that when EPA revises emissions standards under Section112(d)(6), it must recalculate MACT in accordance with Sections 112(d)(2) and (d)(3)); *Nat'l Ass'n for Surface Finishing v. EPA,* 795 F. 3d 1, 7-9 (D.C. Cir. 2015) (similar).

And that distinction makes sense in real life; it is not an "oddity." *Cf.* EPA Br. at 20. Plants need to build in a compliance margin, and if EPA were allowed (or required) to apply the "achievable" test every time that it undertook a Section 112(d)(6) technology review, it would be able to drive any disfavored source out of

business by simply using past compliance to tighten the noose, until a plant is unable to comply at all times. EPA itself has previously acknowledged that Section 112(d)(6) cannot be abused in that way. *E.g.,* 70 Fed. Reg. 19992, 20008 (Apr. 15, 2005) ("We reiterate that there is no indication that Congress intended for section 112(d)(6) to inexorably force existing source standards progressively lower and lower in each successive review cycle…").

If EPA's interpretation of Section 112(d)(6) were correct, the statute would read: "The Administrator shall review, and revise as *achievable* (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years." But that is not what Section 112(d)(6) says. "Necessary" and "achievable" are very different words, and EPA cannot simply swap its preferred word into the relevant provision.

For its second maneuver to avoid the fact that the Rule at issue cannot reasonably be deemed "necessary," EPA takes the position that a Section 112(d)(6) rule can be "necessary" even when it does not achieve any demonstrable public health or environmental benefit. EPA Br. at 15-16.

As an initial matter, the statement in EPA's brief (EPA Br. at 14) that the Rule "correctly determined" that a revised emission standard is deemed "necessary" only by looking at technological developments and ignoring the existence (or non-existence) of public health benefits is a *post hoc* conclusion. Nowhere in the Rule itself does EPA make an express determination that this Rule was "necessary" under *any* reading of Section 112(d)(6). Accordingly, EPA's litigation argument that it

determined the Rule was "necessary" is *post hoc* rationalization that should not be considered by the Court to justify the Rule. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action").

But regardless, EPA's interpretation of "necessary" to mean it can revise HAP emission standards under Section 112(d)(6) even when doing so will result in no demonstrable benefit from the mandated reduction in HAP emissions is not a reasonable interpretation of the statute, let alone the "best" interpretation of it. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2247 (2024).

As Applicants explained in their stay application (*see* States' Stay App. at 22), the meaning of the term "necessary" is determined by context, and in the context of Section 112, the clear purpose of the statute is to protect public health and the environment from the adverse effects of the regulated HAPs. *See, e.g.*, 42 U.S.C. §§ 7412(b)(3)(B), (C) (substances shall be included or deleted from regulation under Section 112 based on "adverse effects to human health or adverse environmental effects"). This mandate is especially clear for power plants, which are treated "differently from other sources for purposes of the hazardous-air-pollutants program," *Michigan v. EPA*, 576 U.S. 743, 751 (2015), and which can only be regulated under Section 112 after "a study of the *hazards to public health* reasonably anticipated to occur as a result of [their] emissions." 42 U.S.C. § 7412(n)(1)(A) (emphasis added).

EPA itself has previously understood that whether a rule is "necessary" is inherently intertwined with whether the rule achieves a public health benefit from

HAP emission reductions, because that is the goal of the statute. *E.g.,* 69 Fed. Reg. 48338, 48351 (Aug. 9, 2004) (where a standard already provides "an ample margin of safety to protect public health and prevent adverse effects, one can reasonably question whether further reviews of technological capability are 'necessary'"); *see also, e.g.*, 71 Fed. Reg. 76603, 76606 (Dec. 21, 2006) (considering the "effect in reducing public health risk" in determining that it was not "necessary" to revise HAP emission standards).

EPA is mistaken in its argument that interpreting the term "necessary" to require at least some demonstrable benefit to public health or the environment from HAP emissions reductions "conflates the technology-based approach in subsection (d) with the separate legacy risk-based approach in subsection (f)." *Cf.* EPA Br. at 17.

To the contrary, it is perfectly sensible to read the two provisions together while still understanding Section 112(d)(6)'s use of the term "necessary" requires at least some showing of public health benefit from revised HAP emission standard. Section 112(f)(2) directs the agency to tighten the standards if the initial MACT standard did not achieve an adequate margin of safety. *See* 42 U.S.C. § 7412(f)(2). And then Section 112(d)(6) allows the agency to further tighten the standards every eight years when there are "developments" that would justify doing so—but the command that such revisions also be "necessary" still requires the agency to demonstrate at least some relevant public health benefit for doing so. Contrary to EPA's suggestion, Applicant States do not contend that once an adequate margin of safety is achieved, further revisions of the emission standard under Section 112(d)(6)

can never be "necessary." *Cf.* EPA Br. at 20. Instead, Applicant States merely contend that it order to be "necessary" such a revision must be able to at least demonstrate some expansion of that margin of safety—for example, by dropping the lifetime risk of cancer for the person most exposed from 10-in-a-million to 9-in-a-million. That would be some form of relevant public health benefit. But EPA made no such demonstration for this Rule.

Consequently, EPA's inability to demonstrate any public health or environmental benefit from Rule's mandated reduction in HAP emissions means that it cannot be reasonably interpreted as "necessary." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999) (statutory direction that the FCC consider whether an action is "necessary" required the FCC to apply a standard "related to the goals of the Act").

2. There Are No "Developments" that Justify the Revised Emission Standards

EPA's brief claims that in promulgating this Rule it identified "developments" which "improve how effectively coal-fired units can reduce emissions of hazardous air pollutants. EPA Br. at 21. But in the Rule itself, what EPA actually claimed as "developments" were that (a) many coal-fired plants have been able to comply with the prior emission standards with (b) more cost efficiency than assumed during promulgation of the original MATS Rule:

Proposed Rule

- "Although our review of fPM compliance data for coal-fired EGUs indicated *no new practices, processes, or control technologies for non-Hg metal HAP*, it revealed *two important developments* that inform the EPA's decision to propose revisions to the standard. First, it revealed that most existing coal-fired EGUs are reporting fPM well below the current fPM emission limit of 3.0E-02lb/MMBtu. . . Second, it revealed that the fleet is achieving these performance levels at lower costs than

assumed during promulgation of the original MATS fPM emission limit." 88 Fed. Reg. at 24868 (emphasis added).

Final Rule

- "As described in the proposal preamble, the Agency conducted a review of the 2020 Technology review pursuant to CAA section 112(d)(6), which focused on identifying and evaluating *developments* in practices, processes, and control technologies for the emission sources in the source categories that occurred since promulgation of the 2012 MATS Final Rule. Based on that review, the EPA found that a majority of sources were not only reporting fPM emissions significantly below the current emission limit, but also that the fleet achieved lower fPM rates at lower costs than the EPA estimated when it promulgated the 2012 MATS Final Rule." 89 Fed. Reg. at 38521 (emphasis added).

Cost-efficient compliance with existing standards is not a "development" under Section 112(d)(6). *See* States' Stay App. at 26-27. Interpreting the term to mean achieving compliance with the existing standards would, again, be an interpretation that allows EPA to continually ratchet down a standard until regulated sources can no longer consistently meet them. And that is an interpretation of Section 112(d)(6) which EPA has rejected in the past. *See* 70 Fed. Reg. at 20008.

EPA contends that Section 112(d)(6)'s use of the term "developments" encompasses the sort of "incremental improvements" that EPA identifies here. EPA Br. at 20-21, 25. But if Congress wanted to say "improvements," it could have said "improvements." Instead, Congress said "developments," and the best interpretation of the term "development" in the context of Section 112(d)(6) is that it must mean some considerable change or evolution in control technology or process that is correlated to a revision of the emission standard. *E.g.*, Am. Heritage Dictionary (5th ed. 2011), *Development* ("A significant event, occurrence, or change"). Even EPA has agreed with this definition in the past. *See* Final Brief for Respondents EPA and

Gina McCarthy, *Nat'l Ass'n for Surface Finishing v. EPA*, No. 12-1459, Entry 1514442 at 40-41 (D.C. Cir. Sep. 29, 2014) (describing a "development" as among other things, a "significant event, occurrence, or change").

Finally, EPA accuses Applicants of "nitpicking" EPA's alleged "development" of increased filter durability when they observed that any improvement in "durability" could not be a development warranting further ratcheting down the standards when the standards already expressly assume the filter will never break to begin with. EPA Br. at 22. But EPA's response is simply to whistle by the graveyard, stating in the next sentence that increased durability lowers the wear and tear which impairs efficiency. *Id.* But that sentence is non-responsive at best. And given that the standards already in place already assume (counterfactually) that the filters never fail, any decrease in "wear and tear" from increased durability cannot be a "development" that warrants ratcheting further ratcheting down the standard. States' Stay App. at 29-30. The same goes for the use of brominated powder to control mercury emissions, which has not changed in the last ten years. *Id.*

B. The Final Rule Is Arbitrary and Capricious

1. EPA's Cost-Benefit Analysis Cannot be Defended

As discussed *supra*, this Rule cannot reasonably be deemed "necessary" under Section 112(d)(6) when EPA can demonstrate no benefit to public health or the environment from the mandated reduction in HAP emissions. But even if EPA were able to demonstrate some relevant benefit, or even if EPA's hand wave that less emissions must equate to some unquantified benefits was sufficient, the Rule should still be struck down because its costs so grossly outweigh any relevant benefit.

EPA is therefore mistaken in its contention that the cost-benefit problems with the Rule "simply restate[] the argument that the revised standards are not 'necessary.'" EPA Br. at 24. EPA is also mistaken in its contention that so long as the agency makes a conclusory statement that the benefits of the Rule outweigh the costs, any "disagreement with that balancing does not warrant a stay." *Id.* If it is arbitrary and capricious for an agency to impose significant economic costs "for a few dollars" of benefit, *Michigan,* 576 U.S. at 752, then it is even more so where an agency imposes substantial costs with "no meaningful benefit." *Mexican Gulf Fishing Co. v. U.S. Dep't of Commerce,* 60 F.4th 956, 966 (5th Cir. 2023).

EPA does not dispute that rulemaking under Section 112(d)(6) requires appropriate consideration of cost and benefit. *See* 89 Fed. Reg. at 38553 (claiming that "when all of the costs and benefits are considered (including nonmonetized benefits), this final rule is a worthwhile exercise of" the agency's authority). However, as discussed *supra*, the relevant demonstrated health benefits of the Rule are zero. To excuse its inability or refusal to quantify any relevant public health benefits of this Rule, EPA claims that the public health benefits of the Rule's mandated reduction in HAP emissions escape quantification. *See* EPA Br. at 27-28. But there are at least two problems with that statement.

For one, quantifying the public health benefits of reducing HAP emissions is entirely possible. EPA did just that the last time it promulgated a MATS Rule. *See* 77 Fed. Reg. at 9425 (concluding the 2012 MATS rule's reduction of 20 tons of mercury emissions would provide $4-6 million in benefits). Given that this Rule will only

reduce net mercury emissions by an additional 900 to 1,000 pounds—a tiny fraction of the 20 tons which yielded only $4-6 million in benefits last time—EPA's inability to quantify the relevant benefits of the Rule appears to stem more from the minuscule size of those benefits, rather than their inherent nature. *See* 89 Fed. Reg. at 38512.

And for another, EPA's claim that the mandated reduction in HAP emissions yields some sort of unquantifiable benefit also runs headlong into the fact that EPA cannot demonstrate how, in any way, the already tiny 0.344-in-a-million risk of adverse health effects will be further reduced by the mandated reduction in HAP emissions. EPA does not claim, for example, that risk will be reduced to some value below 0.344-in-a-million.[3] So at the end of the day, all we are left with is EPA's assurance that there is some relevant benefit to the Rule, though it can't quantify it, and it can't explain how it reduces the risk of adverse health effects. All we can do is trust EPA that it is worth the nearly $1 billion price tag (according to EPA's math).[4] *Cf. GPA Midstream Ass'n v. DOT*, 67 F.4th 1188, 1200 (D.C. Cir. 2023) ("Without quantified benefits to compare against costs, it is not apparent just how the agency went about weighing the benefits against the costs.").

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[3] To the contrary, while EPA found that reducing HAP emissions under the Rule would reduce *exposure*, it did not find that reducing HAP emissions would cause *health benefits*. *See* 89 Fed. Reg. at 38511. (EPA "expects that emissions reductions under the final rulemaking will result in reduced exposure to Hg and non-Hg HAP metals. The EPA also projects health benefits due to improvements in particulate matter…(PM2.5) and ozone and climate benefits from reductions in carbon dioxide emissions.").

[4] Like the Respondent States, EPA also throws out a list of health disorders that can be caused by HAP exposure. *See* EPA Br. at 27. But a list of disorders is meaningless if EPA cannot demonstrate that the Rule's mandated reduction in HAP emissions will improve anyone's chances of not being afflicted by such disorders.

Unable to point to relevant benefits, EPA pivots to pointing to irrelevant ones—*i.e.*, alleged ancillary "climate" benefits. 89 Fed. Reg. at 38512. Applicants explained why such benefits cannot drive a Section 112(d)(6) rulemaking, *see* States' Stay App. at 23-24, 31-32, and EPA does not dispute the point (claiming it calculated the "climate" benefits to comply with an executive order, EPA Br. at 27). But even considering those alleged ancillary benefits, the costs of the Rule still outweigh the alleged benefits by over $400 million.

In short, if cost-benefit analysis is to impose any constraints on reasoned decision-making at all, this Rule simply cannot survive it.

2. EPA Failed to Adequately Consider Power Grid Impacts

For rulemaking under Section 112, "'[c]osts' can mean many different things, including the cost associated with increased risk" of grid unreliability. *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015). But "EPA has no expertise on grid reliability." *Texas v. EPA,* 829 F.3d. at 432. And due to that lack of expertise on grid reliability, "EPA must support its arguments [regarding grid reliability] more thoroughly than in those areas in which it has considerable expertise and knowledge." *Id*

However, as Applicants noted in their stay applications, numerous commenters warned EPA that its assumptions regarding power grid reliability, including its assumption that no power plants were likely to close as a result of the Rule, were flawed. *See* States' Stay App. at 34. Nonetheless, EPA's response in this Court, just as it responded to commenters, is simply to push those concerns aside, assert that the Rule cannot conceivably cause grid reliability issues, and point to its

"well-accepted, peer-reviewed" model. EPA Br. at 28-29. But EPA "cannot simply ignore 'an important aspect of the problem.'" *Ohio v. EPA*, 144 S. Ct. at 2051 (citation omitted); *see also Del. Dep't of Nat. Res.*, 785 F.3d at 14 (holding that "EPA should have, but did not, respond properly to their well-founded concerns" about grid reliability). There is nothing in the record to suggest that EPA meaningfully considered input from the current grid operators or power plants in its grid reliability modeling inputs, or that it changed those inputs in response to comments.

Notably, EPA doubles down on the Rule's assertion that it does not need to undertake any further analysis of grid reliability because if EPA ends up being wrong, and the Rule causes coal-fired EGUs to no longer be commercially viable, State and regional regulators would be able to use temporary emergency powers to prevent them from retiring. EPA Br. at 29-30; 89 Fed. Reg. at 38526. EPA's reliance on State and regional regulators being able to use emergency stopgap powers to prevent the Rule from breaking the grid is emblematic of the dismissive way EPA treated grid reliability concerns throughout the notice and comment process. But "EPA [cannot] excuse its inadequate responses by passing the entire issue off onto a different agency." *Del. Dep't of Nat. Res.*, 785 F.3d at 16.

3. The Final Rule Is Pretextual

Finally, as the Applicant States' stay application detailed, there is considerable evidence that EPA engaged in this rulemaking as part of a regulatory effort to impose retirement-inducing costs on coal-fired power plants in order to force a nationwide transition away from coal for putative climate change reasons. *See* States' Stay App. at 37-40. That evidence includes multiple public statements from the EPA

Administrator where he readily made it known that EPA would attempt to get around this Court's decision in *West Virginia v. EPA* by using "health-based" regulations, including MATS, to achieve climate change-related policy goals. It also includes materials produced through FOIA indicating that EPA briefed the White House *Climate Office* on a suite of rulemaking authorities that EPA could use against the power sector, including the MATS Rule.

To defend its actions in light of the Administrator's repeated statements, EPA first invokes the presumption of regularity, and asserts that the agency's explanation for its decision to promulgate this Rule—to benefit public health from reducing HAP emissions—is entitled to be taken at face value and not subject to judicial scrutiny. EPA Br. at 34-35. This Court has explained that only in "unusual circumstances" will courts examine whether any agency's decision-making process for promulgating a rule matches its stated reason. *Dep't of Commerce v. New York*, 588 U.S. 752, 785 (2019). Yet this is such a case given the agency's own record and public statements demonstrating that its basis for promulgating the Rule is not aligned with the reasons given in the Rule. As such, EPA's contention that the Court cannot consider extra-record evidence like press statements (EPA Br. at 35), is mistaken. *See Dep't of Commerce*, 588 U.S at 782 (evaluating "pretext in light of all the evidence in the record before the court, including the extra-record discovery"). Moreover, this is not a case where the Court must risk substantial intrusion into the Administrator's "mental processes," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), as his public statements already lay bare those motivations.

And secondly, EPA claims that the Administrator's statements and other extra-record materials don't evidence pretext, as "even if EPA had both hazardous-air-pollution and climate-change goals in mind when promulgating the 2024 rule," that would not be sufficient to establish pretext. EPA Br. at 35. But while it is true that courts generally "may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities," *Dep't of Commerce v. New York*, 588 U.S. at 781, there cannot be a "mismatch between the decision the [agency] made and the rationale [it] provided." For example, in *Dep't of Commerce*, this Court concluded that the agency "considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for [its] decision" to put a citizenship question on the census. *Id.* at 775. Nonetheless, extra-record evidence indicated that the Secretary had a pre-established conclusion, instructed his staff to make it happen, and only adopted the stated justification "late in the process." *Id.* at 783.

That also seems to be the case here, where available evidence indicates the Administrator announced an intention to use a variety of rulemaking authorities to get around this Court's *West Virginia v. EPA* decision, the MATS rule was developed as part of a "suite" of rules to impose retirement-inducing costs on coal-fired power plants, and then the agency ultimately justified its action by claiming the Rule was promulgated to better protect public health from HAP emissions (even though it can neither demonstrate nor quantify any such benefit).

Moreover, while *Dep't of Commerce* involved a court ordering discovery into the agency's decision-making process to uncover the pretext, here the "incongruent" explanation for the agency's action is publicly available. EPA said it would use "bread and butter" health-based regulations like MATS to address criteria pollutants and climate change. And then it did so, while nonetheless claiming that the Rule was instead being promulgated to better protect against HAP emissions (which it doesn't do). Pretext thus explains why EPA is using rulemaking authority for HAPs to impose nearly a billion dollars in additional costs on a disfavored source of energy with no demonstrable benefit from the Rule's mandated reduction in HAP emissions, and Applicants are likely to prevail on their claim.

CONCLUSION

For the reasons set forth above, the Court should stay the Rule pending resolution of the merits, including through resolution of any petitions for certiorari.

Respectfully submitted,

PATRICK MORRISEY
Attorney General

MICHAEL R. WILLIAMS
Solicitor General

Office of the Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25301
Phone: 304.558.2021
michael.r.williams@wvago.gov

Counsel for State of West Virginia

DREW H. WRIGLEY
Attorney General

PHILIP AXT
Solicitor General
*Counsel of Record

NESSA HOREWITCH COPPINGER
DAVID M. FRIEDLAND
Special Assistant Attorneys General

Office of the Attorney General
600 E Boulevard Ave., Dept. 125
Bismarck, ND 58505
Phone: 701.328.2210

pjaxt@nd.gov

Counsel for State of North Dakota

TREG TAYLOR
Attorney General

GARRISON TODD
Assistant Attorney General
Alaska Department of Law
1031 W. 4th Ave. Ste. 200
Anchorage, AK 99501
(907) 269-5100
Garrison.Todd@alaska.gov

Counsel for State of Alaska

TIM GRIFFIN
Attorney General

NICHOLAS J. BRONNI
Solicitor General
DYLAN L. JACOBS
Deputy Solicitor General
Office of the Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-2007
nicholas.bronni@arkansasag.gov

Counsel for State of Arkansas

CHRISTOPHER M. CARR
Attorney General

STEPHEN J. PETRANY
Solicitor General
Office of the Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov

Counsel for State of Georgia

RAÚL R. LABRADOR
Attorney General

JOSHUA N. TURNER
Chief of Constitutional Litigation and Policy
ALAN M. HURST
Solicitor General
Office of Idaho Attorney General
P.O. Box. 83720
Boise, Idaho 83720
(208) 334-2400
Josh.Turner@ag.idaho.gov
Alan.Hurst@aga.idaho.gov

Counsel for State of Idaho

THEODORE E. ROKITA
Attorney General

JAMES A. BARTA
Solicitor General
Indiana Attorney General's Office
IGCS – 5th Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-0709
james.barta@atg.in.gov

Counsel for State of Indiana

BRENNA BIRD
Attorney General

ERIC H. WESSAN
Solicitor General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 823-9117
eric.wessan@ag.iowa.gov

Counsel for State of Iowa

KRIS W. KOBACH
Attorney General

ANTHONY J. POWELL
Solicitor General
Office of Kansas Attorney General
120 SW 10thAvenue, 2ndFloor
Topeka, Kansas 66612
(785) 368-8539
Anthony.Powell@ag.ks.gov

Counsel for State of Kansas

RUSSELL COLEMAN
Attorney General

MATTHEW F. KUHN
Solicitor General
JACOB M. ABRAHAMSON
Assistant Solicitor General
Office of Kentucky Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
Matt.Kuhn@ky.gov
Jacob.Abrahamson@ky.gov

Counsel for Commonwealth of Kentucky

ELIZABETH B. MURRILL
Attorney General

J. BENJAMIN AGUIÑAGA
Solicitor General
Louisiana Department of Justice 1885
N. Third Street
Baton Rouge, Louisiana 70802
(225) 506-3746
aguinagab@ag.louisiana.gov

Counsel for State of Louisiana

LYNN FITCH
Attorney General

JUSTIN L. MATHENY
Deputy Solicitor General
Office of the Attorney General
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3825
justin.matheny@ago.ms.gov

Counsel for State of Mississippi

ANDREW T. BAILEY
Attorney General

SAMUEL C. FREEDLUND
Deputy Solicitor General
Office of the Attorney General
815 Olive St., Suite 200
St. Louis, Missouri 63101
(314) 340-4869
Samuel.Freedlund@ago.mo.gov

Counsel for State of Missouri

AUSTIN KNUDSEN
Attorney General

CHRISTIAN B. CORRIGAN
Solicitor General
PETER M. TORSTENSEN, JR.
Deputy Solicitor General
Montana Department of Justice
215 N. Sanders Helena, MT 59601
(406)444-2707
Christian.Corrigan@mt.gov

Counsel for State of Montana

MICHAEL T. HILGERS
Attorney General

ERIC J. HAMILTON
Solicitor General
Nebraska Attorney General's Office
2115 State Capitol
Lincoln, NE 68509
(402) 471-2683
eric.hamilton@nebraska.gov

Counsel for State of Nebraska

GENTNER DRUMMOND
Attorney General

GARRY M. GASKINS, II
Solicitor General
JENNIFER L. LEWIS
Deputy Attorney General
Office of the Attorney General of Oklahoma
313 NE Twenty-First St.
Oklahoma City, OK 73105
(405) 521-3921
garry.gaskins@oag.ok.gov
jennifer.lewis@oag.ok.gov

Counsel for State of Oklahoma

ALAN WILSON
Attorney General

THOMAS T. HYDRICK
Assistant Deputy Solicitor General
Office of the Attorney General of South Carolina
1000 Assembly Street
Columbia, SC 29201
(803) 734-4127
thomashydrick@scag.gov

Counsel for State of South Carolina

MARTY J. JACKLEY
Attorney General

STEVE BLAIR
Deputy Attorney General
Office of the Attorney General of South Dakota
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215
atgservice@state.sd.us
steven.blair@state.sd.us

Counsel for State of South Dakota

JONATHAN SKRMETTI
Attorney General

WHITNEY HERMANDORFER
Director of Strategic Litigation
MATTHEW RICE
Solicitor General
Office of the Attorney General and
Reporter of Tennessee
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-7403
Whitney.Hermandorfer@ag.tn.gov
Matthew.Rice@ag.tn.gov

Counsel for State of Tennessee

KEN PAXTON
Attorney General

JOHN R. HULME
Assistant Attorney General
BRENT WEBSTER
First Assistant Attorney General
JAMES LLOYD
Deputy Attorney General for Civil
Litigation
KELLIE E. BILLINGS-RAY
Chief, Environmental Protection
Division
Office of the Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
John.hulme@oag.texas.gov

Counsel for State of Texas

SEAN REYES
Attorney General

STANFORD PURSER
Solicitor General
Office of the Utah Attorney General
160 East 300 South, Fifth floor
Salt Lake City, Utah 84111
(385) 366-4334
Spurser@agutah.gov

Counsel for State of Utah

JASON MIYARES
Attorney General

KEVIN M. GALLAGHER
Principal Deputy Solicitor General
BRENDAN T. CHESTNUT
Deputy Solicitor General
Virginia Attorney General's Office
202 North 9th Street
Richmond, VA 23219
(804) 786-2071
kgallagher@oag.state.va.us
bchestnut@oag.state.va.us

Counsel for Commonwealth of Virginia

BRIDGET HILL
Attorney General

D. DAVID DEWALD
Deputy Attorney General
Wyoming Attorney General's Office
Water & Natural Resources Division
109 State Capitol
Cheyenne, WY 82002
(307) 777-7895 phone
david.dewald@wyo.gov

Counsel for State of Wyoming

Dated: September 18, 2024