No. 24A_____

In the Supreme Court of the United States

AMERICA'S POWER AND ELECTRIC GENERATORS MATS COALITION,

Applicants,

v.

ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, United States Environmental Protection Agency,

Respondents.

EMERGENCY APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING DISPOSITION OF PETITION FOR REVIEW

To the Honorable John G. Roberts, Jr.,
Chief Justice of the Supreme Court of the United States and Circuit Justice for the District of Columbia Circuit

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August 21, 2024

PARTIES TO THE PROCEEDINGS

Applicants in this Court and Petitioners below are America's Power and Electric Generators MATS Coalition.

Respondents in this Court and Respondents below are the United States Environmental Protection Agency and Michael S. Regan, Administrator, United States Environmental Protection Agency.

Respondents in this Court and Petitioners below are, by court of appeals case number, as follows:

24-1119: State of North Dakota, State of West Virginia, State of Alaska, State of Arkansas, State of Georgia, State of Idaho, State of Indiana, State of Iowa, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Mississippi, State of Missouri, State of Montana, State of Nebraska, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of Texas, State of Utah, Commonwealth of Virginia, and State of Wyoming.

24-1154: NACCO Natural Resources Corporation.

24-1179: National Rural Electric Cooperative Association, Lignite Energy Council, National Mining Association, Minnkota Power Cooperative, Inc., East Kentucky Power Cooperative, Inc., Associated Electric Cooperative Inc., Basin Electric Power Cooperative, and Rainbow Energy Center, LLC.

24-1184: Oak Grove Management Company LLC and Luminant Generation Company, LLC.

24-1190: Talen Montana, LLC.

24-1194: Westmoreland Mining Holdings LLC, Westmoreland Mining, and Westmoreland Rosebud Mining LLC.

24-1217: NorthWestern Corporation.

24-1223: Midwest Ozone Group.

Respondent in this Court and Intervenor for Petitioners below is San Miguel Electric Cooperative, Inc.

Respondents in this Court and Intervenors for Respondents below are (1) Air Alliance Houston, Alliance of Nurses for Healthy Environments, American Academy of Pediatrics, American Lung Association, American Public Health Association, Chesapeake Climate Action Network, Citizens for Pennsylvania's Future, Clean Air Council, Clean Wisconsin, Downwinders at Risk, Environmental Defense Fund, Environmental Integrity Project, Montana Environmental Information Center, Natural Resources Council of Maine, Natural Resources Defense Council, the Ohio Environmental Council, Physicians for Social Responsibility, and Sierra Club; and (2) Commonwealth of Massachusetts, State of Minnesota, State of Connecticut, State of Illinois, State of Maine, State of Maryland, State of Michigan, State of New Jersey, State of New York, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, State of Wisconsin, District of Columbia, City of Baltimore, City of Chicago, City of New York.

RELATED PROCEEDINGS

This application arises from an August 6 order denying seven motions to stay filed in nine consolidated cases:

North Dakota v. EPA, No. 24-1119 (D.C. Cir.) (lead case)

NACCO Natural Resources Corporation v. EPA, No. 24-1154 (D.C. Cir.)

National Rural Electric Cooperative Association v. EPA, No. 24-1179 (D.C. Cir.)

Oak Grove Management Company LLC v. EPA, No. 24-1184 (D.C. Cir.)

Talen Montana, LLC v. EPA, No. 24-1190 (D.C. Cir.)

Westmoreland Mining Holdings LLC v. EPA, No. 24-1194 (D.C. Cir.)

America's Power v. EPA, No. 24-1201 (D.C. Cir.)

NorthWestern Corp. v. EPA, No. 24-1217 (D.C. Cir.)

Midwest Ozone Group v. EPA, No. 24-1223 (D.C. Cir.)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Applicants America's Power and Electric Generators MATS Coalition state as follows:

America's Power is a nonprofit membership corporation organized under the laws of the District of Columbia and is recognized as a tax-exempt trade association by the Internal Revenue Service under Section 501(c)(6) of the Internal Revenue Code. America's Power is the only national trade association whose sole mission is to advocate at the federal and state levels on behalf of coal-fueled electricity, the coal fleet, and its supply chain. America's Power supports policies that promote the use of coal to assure a reliable, resilient, and affordable supply of electricity to meet our nation's demand for energy. America's Power has no parent corporation, and no publicly held company owns a 10% or greater interest in America's Power.

Electric Generators MATS Coalition is an *ad hoc* coalition of electric generating companies that have joined together for the purpose of challenging this Final Rule. The members of the *ad hoc* coalition own and operate electric generating units that are subject to the Final Rule at issue in this case. The members of the *ad hoc* coalition are the Salt River Project Agricultural Improvement and Power District; Talen Energy Supply, LLC; and NorthWestern Energy Public Service Corporation. Electric Generators MATS Coalition has no parent corporation, and no publicly held corporation has a 10% or greater ownership in it.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Applicants America's Power and Electric Generators MATS Coalition respectfully request an immediate stay of the U.S. Environmental Protection Agency's ("EPA" or "Agency") final rule entitled "National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review," 89 Fed. Reg. 38,508 (May 7, 2024) ("Final Rule"). Applicants have a petition for review of the Final Rule pending in the United States Court of Appeals for the District of Columbia Circuit and, due to the immediate harm their members face from the Final Rule, moved that court for a stay pending its review. That court denied Applicants' motion for a stay, forcing Applicant to seek relief from this Court.

Applicants agree with and incorporate by reference the application for a stay of the Final Rule filed in this Court by North Dakota and 22 other States on August 16, 2024. Applicants file their own stay application to elaborate on the Final Rule's illegality and the harms it inflicts.[1]

INTRODUCTION

On April 25, 2024, EPA issued four major regulations targeting the fossil-fired electric generating industry: two Clean Air Act rules concerning greenhouse gas

[1] Multiple Petitioners below have filed applications for a stay of the Final Rule. Applicants support these requests, which amply demonstrate the substantial, immediate harms to the industry from the Final Rule. To avoid burdening the Court, Applicants here seek to avoid duplicative arguments.

emissions and hazardous air pollutant emissions, a third rule under the Clean Water Act, and a fourth under the Resource Conservation and Recovery Act. *See* EPA Press Release, "Biden-Harris Administration Finalizes Suite of Standards to Reduce Pollution from Fossil Fuel-Fired Power Plants" (Apr. 25, 2024). These rules, together with the "Good Neighbor Plan," *see Ohio v. EPA*, 144 S.Ct. 2040 (2024), are part of a concerted effort to restructure the power industry by shutting down coal-fired power plants and severely restricting natural gas-fired power plants. They impose devastating, imminent, irreparable harm on the industry. For this reason, they are all being challenged vigorously in the courts.

This application concerns one of the two Clean Air Act regulations issued that day, revising the standards for hazardous air pollutant emissions from coal-fired power plants. Both Clean Air Act rules have a pedigree in this Court. Both rules are currently before this Court on emergency stay applications. Both rules should be stayed pending judicial review.

The 2024 greenhouse gas rule, 89 Fed. Reg. 39,798 (May 9, 2024), was promulgated after the Agency's last major attempt was set aside by this Court in *West Virginia v. EPA*, 597 U.S. 697, 720, 730 (2022). That rule seeks an end run around *West Virginia*. *See* States' Emergency Application for Immediate Stay, No. 24A95 (U.S. July 23, 2024); Electric Generators for a Sensible Transition Emergency Application for Immediate Stay, No. 24A106 (U.S. July 26, 2024). This Final Rule is the next installment for regulating power plants under Section 112 of the Clean Air Act, following this Court's admonition in evaluating EPA's first round that "[o]ne

would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 576 U.S. 743, 752 (2015). The Final Rule flatly contradicts *Michigan*.

The Final Rule imposes hundreds of millions of dollars in costs on coal-fired power plants, in return for, at most, a trivial benefit attributable to further reducing hazardous air pollutant emissions. Applicants are likely to succeed on their challenge because the rule is irrational. *Id.* In the meantime, absent a stay, the Final Rule causes substantial, irreparable harm to many coal-fired power plants and the states in which they operate. And, by the same token, a stay will not harm the Respondents or the public. The Court should grant a stay.

OPINION BELOW

The D.C. Circuit's order denying Applicant's motion for a stay is unpublished, but reproduced at App.1-2. The Final Rule is published at 89 Fed. Reg. 38,508 (May 7, 2024).

JURISDICTION

This Court has jurisdiction over this stay application under 28 U.S.C. § 1254(1), and has authority to grant Applicant relief under the Clean Air Act, 42 U.S.C. § 7607; the Administrative Procedure Act, 5 U.S.C. § 705; and the All Writs Act, 28 U.S.C. § 1651(a).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Clean Air Act are reproduced at App.3-33.

STATEMENT

I. Legal Background

A. Section 112 of the Clean Air Act directs EPA to set nationally applicable emission standards for hazardous air pollutants ("HAPs") for source categories that emit more than a given amount of HAPs, except steam electric generating units (i.e., power plants). 42 U.S.C. § 7412. Once a source category is listed under Section 112 based on the amount of HAPs it emits, EPA first must determine a minimum emission limitation that reflects the "maximum achievable emission technology" or "MACT" floor for new and existing sources in the category *Id.* § 7412(d)(3) (providing that for a category or subcategory, MACT "shall not be less stringent" than the MACT floor). The MACT floor is technology-based (i.e., based solely on the performance of existing technology), and does not consider cost: for existing sources, for example, the MACT floor must reflect the actual performance of the best 12% of sources in the category. *Id*. The second step in establishing the standard is a "beyond the floor analysis," in which EPA determines an achievable "maximum degree of reduction in emissions of" HAPs, "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements." *Id.* § 7412(d)(2).

Eight years after establishing a standard for a source category, EPA must evaluate the residual risk remaining from the source category after the MACT is implemented and tighten the standard as needed to ensure an "ample margin of safety." *Id.* § 7412(f)(2). While the "aspirational" goal is to reduce cancer risk from HAP emissions to essentially zero—i.e., to a lifetime cancer risk of no more than 1-

in-1-million,[2] *id.*—Congress adopted into Section 7412(f)(2) EPA's pre-1990 "*Benzene* standard" interpretation, which "established a maximum excess [cancer] risk of *100*-in-one million" as providing the ample margin of safety. *See NRDC v. EPA*, 529 F.3d 1077, 1081-83 (D.C. Cir. 2008) (emphasis added). For non-carcinogen HAPs, EPA uses a measure of potential harm to human health called a "hazard index" or a "hazard quotient." The threshold for potential delisting of a source category for non-carcinogen HAPs (i.e., the equivalent to a cancer risk of 1-in-1-million) are hazard index and quotient of 1. *See, e.g.,* 89 Fed. Reg. 26,835, 26,838 (Apr. 16, 2024) (explaining the delisting threshold for non-cancer effects is chronic and acute hazard indices less than one).

In addition to this one-time residual risk review, EPA must undertake a technology review on an eight-year recurring schedule, "and revise as necessary (taking into account developments in practices, processes, and control technologies)" the standard. 42 U.S.C. § 7412(d)(6). In both the one-time risk review and the recurring technology review, EPA considers cost as well as non-air quality health and environmental effects and energy requirements. *See* 88 Fed. Reg. 24,854, 24,865, 24862-63 (Apr. 24, 2023); *See also Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 673 (D.C. Cir. 2013).

Finally, Congress singled out power plants—probably the most regulated stationary source category under the Clean Air Act generally—for a different

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[2] Indeed, Congress provided that the entire source category may be removed from regulation under Section 112 if all sources in that category present a risk of less than 1-in-1-million. 42 U.S.C. § 7412(c)(9).

treatment. Power plants may be regulated under Section 112 only if EPA finds such regulation "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A).

B. When EPA issued the current standards for coal-fired and oil-fired power plants in the 2012 "Mercury and Air Toxics Standards (MATS)" rule, EPA made such an appropriate-and-necessary finding. See 77 Fed. Reg. 9304, 9306, 9362-64 (Feb. 16, 2012). Even though EPA calculated merely $4 to $6 million of benefits from HAP reductions at a cost of $9.6 billion a year, EPA refused to consider cost in making the determination. EPA reasoned that decisions whether to regulate under Section 112 for other categories and the minimum required level of regulation—i.e., the listing step and the MACT floor—do not consider costs. 77 Fed. Reg. 9304, 9327 (Feb. 16, 2012). According to EPA, the prime directive of the statute is to reduce the amount of HAPs from large sources—at least in the first steps of listing and setting a MACT floor. *Michigan*, 576 U.S. at 756-57 (EPA argued Congress generally required listing decisions be based upon the "volume of pollution emitted.").

In *Michigan*, this Court emphatically rejected EPA's view. As the Court explained, "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan*, 576 U.S. at 752. The Court thus held that EPA *must* consider costs in regulating power plants under Section 112 and reversed.

Although the Supreme Court determined EPA's action was unlawful, ultimately, the Petitioners did not obtain meaningful relief. And, unfortunately, EPA failed to properly heed this Court's direction. On remand from this Court, the D.C.

Circuit remanded MATS to EPA without vacating the standard. The Agency (after much back and forth due to changing administrations in 2017 and 2021) eventually reaffirmed its appropriate-and-necessary finding. 88 Fed. Reg. 13,956 (Mar. 6, 2023). Rather than engaging in any meaningful comparison between the MATS rule's benefits from reducing HAP emissions and its costs—i.e., evaluating whether "the costs of its decision outweighed the benefits," *Michigan*, 576 U.S. at 750—EPA devised multiple approaches for declaring that the unquantified (and purportedly unquantifiable) benefits of reducing HAPs necessarily outweighed the costs of the MATS rule. 88 Fed. Reg. at 13,980-88 (describing the "administrator's … preferred, totality-of-the-circumstances approach").

In its "preferred approach," EPA compared the costs of the MATS rule to several metrics (e.g., compliance costs as percent of power sector sales; compliance expenditures compared to power sector's annual expenditures; impact on retail price of electricity; impact on power sector generating capacity) that are unrelated and not compared to benefits. *See* 87 Fed. Reg. 7624, 7656-58 (Feb. 9, 2022). Under this approach, for example, EPA found the costs of the rule, while in the billions of dollars, were a small portion of the industry's revenues, and that this supported its conclusion that the rule's unquantified benefits were "worth the cost." 88 Fed. Reg. at 13,987.

The only genuine comparison of benefits and costs that EPA offered in the 2023 rulemaking—though it presented it as an "alternative" to its "preferred" approach—was between the costs of the rule and the "co-benefits" EPA calculated for incidental reductions in fine particulate matter. 88 Fed. Reg. at 13,988-90. Fine particulate

matter, however, is not a HAP and is not the subject of Section 112. In fact, it is a criteria pollutant subject to Section 109 of the Act. At the *Michigan* oral argument, the Chief Justice described relying on co-benefits to justify the rule as "an end run" around Section 109's restrictions. App.37-39 (Tr. of Oral Arg. at 59-61, *Michigan* (No. 14-46)); see also App.40-41 (Tr. of Oral Arg. at 62-63) (noting EPA's citation of co-benefits "raises the red flag").

Industry commenters voiced strong objections to EPA playing fast and loose with the Court's direction to rationally consider the costs and benefits of Section 112 regulation of power plants.[3] But by the time the finding was made, any attempt to obtain judicial review would have been futile: power plants had already expended billions of dollars to meet the standards and many of them shut down permanently instead. *See, e.g.,* PGen Comments at 2-3. Indeed, even by the time this Court decided *Michigan* in 2015, three years after the MATS rulemaking, EPA had run out the clock on judicial review. As a practical matter, not even a reversal by this Court did or could have mattered. *See* Timothy Cama & Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, THE HILL (June 29, 2015), https://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule/ (Shortly before the Court's decision, then-EPA Administrator Gina McCarthy said that she was confident EPA would prevail, "[b]ut even if we don't, it

[3] *See, e.g.*, Comments of Power Generators Air Coalition on EPA's 2022 proposed Appropriate and Necessary Supplemental Finding, at 6-10 (Apr. 11, 2022) ("PGen Comments") (Docket ID EPA-HQ-OAR-2018-0794-4957), https://www.regulations.gov/comment/EPA-HQ-OAR-2018-0794-4957.

was three years ago. Most of them are already in compliance, investments have been made, and we'll catch up. And we're still going to get at the toxic pollution from these facilities."); *id.* (After the decision, an EPA spokesperson echoed: "EPA is disappointed that the Court did not uphold the rule, but this rule was issued more than three years ago, investments have been made and most plants are already well on their way to compliance.").

II. Factual and Procedural Background

This rulemaking is the next step in the regulation of power plants under Section 112. The rulemaking consists of both the residual risk review and the first technology review for power plants. *See* 42 U.S.C. §§ 7412(f)(2) (risk review), 7412(d)(6) (technology review). EPA's risk assessment demonstrated an "ample margin of safety" under Section 112(f)(2). No source in the category caused cancer risk that exceeded 100-in-1-million. See 85 Fed. Reg. 31,286, 31,316 (May 22, 2020). The standards were therefore not revised on the basis of the risk review. Indeed, only oil-fired units caused risks that exceed the "aspirational" threshold of 1-in-1-million. See *id.* 31,319. All coal-fired units demonstrated a lifetime cancer risk of less than 1-in-1-million and a similarly trivial non-carcinogen hazard index of less than 1. EPA, *Residual Risk Assessment for the Coal- and Oil-Fired EGU Source Category in Support of the 2020 Risk and Technology Review Final Rule*, App.10, Tables 1 and 2a. (Sept. 2019) (Docket ID EPA-HQ-OAR-2018-0794-4553) ("MATS Risk Assessment").

Notwithstanding those determinations, EPA's technology review focused solely on coal-fired units. Claiming generalized "developments in practices, processes, and control technologies," EPA revised the standard for filterable particulate matter

("fPM") emissions (as a surrogate for non-mercury metal HAPs) from all coal-fired units and the standard for mercury emissions from lignite-fired units. 89 Fed. Reg. at 38,520-37, 38,527-49.

The costs of the revised standards are staggering, in the hundreds of millions of dollars. *Id*. at 38,555. Yet EPA did not even attempt to estimate any quantifiable benefits from HAP reductions from these revised standards. Instead, EPA used the same sleight of hand it employed in the 2023 appropriate-and-necessary finding. According to EPA, the costs of the rule, spread over the entire industry, are small with respect to the industry's revenues and similar metrics. *Id*. 38,532-33. So, EPA concluded, revising the standards for coal-fired units is "worthwhile," because there are unquantifiable benefits to HAP reductions, *Id*. 38,553. After all, EPA asserts, "Congress's view on toxic air pollution is simple: Less is better." EPA's Combined Opp. to Mots. to Stay, *North Dakota v. EPA*, No. 24-1119 (D.C. Cir. filed July 22, 2024).

Applicants, as well as other entities including 23 States, challenged the Final Rule in the D.C. Circuit, and several of them moved to stay the Final Rule pending judicial review to avoid immediate, irreparable harm to regulated plants and the states in which they operate. In a terse, two-sentence order, the court below denied the motions without explanation (other than a generalized reference to the legal standard for a stay). App.1 ("Petitioners have not satisfied the stringent requirements for a stay pending court review.").

REASONS FOR GRANTING THE APPLICATION

"Stay applications are nothing new," and indeed "seek a form of interim relief perhaps 'as old as the judicial system of the nation.'" *Ohio*, 144 S.Ct. at 2052 (quoting

Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 17 (1942)). In deciding whether to grant a stay, this Court "appl[ies] the same 'sound principles' as other federal courts," examining "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Id.* (ellipsis omitted) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).[4]

All four of those factors weigh heavily in favor of a stay here. The Final Rule is inconsistent with the statute and directly contradicts this Court's direction in *Michigan*. It imposes hundreds of millions of dollars in control costs that power plants must start expending now and must complete in less than 3 years, about the time it may take such a complex case to be resolved. If these controls cannot meet the revised standards or are economically irrational, the sources must start planning for premature retirement before this case ends. A stay would cause *no* measurable harm, if any, to the Respondents or public health. Finally, there is a strong public interest in preserving an affordable and reliable power grid, in preserving the jobs of plant employees and the local economies that depend on them, and in avoiding wasteful expenditures. This Court should grant a stay.

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[4] To the extent "cert-worthiness" should be examined, *see Labrador v. Poe*, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J. concurring), this case easily meets the test, given the importance of the rule at issue, its scope, and its relationship to an important precedent from this Court. *See Michigan*. This rule has substantial impact on an important sector that is foundational to the American economy; it threatens grid reliability in several regions; and it imposes a wasteful expenditure in the hundreds of millions of dollars for no measurable benefit to anyone. *See infra* 18-20.

I. Petitioners Are Likely to Prevail on the Merits: A Rational Rule Cannot Impose Hundreds of Millions of Dollars in Economic Costs in Return for Trivial Benefits.

Under 42 U.S.C. § 7412(d)(6), EPA may revise HAP standards based on "developments in practices, processes, and control technologies," considering costs, energy, and other factors. *See Ass'n of Battery Recyclers,* 716 F.3d at 673. Applicants are likely to prevail in demonstrating that EPA exceeded that authority in this case for multiple reasons.

The States cogently explain in their application to this Court that EPA's assertion of authority to revise the power plant HAP standards on the basis of a general observation that some power plants are emitting less than allowed by the existing standard and an after-the-fact identification of minor, incremental actions that may or may not have any nexus to the observed overperformance of some power plants, does not square with the best interpretation of the statutory text. ND, et al. Appl., No. 24A180, at 24-30 (U.S. Aug. 16, 2024). And as briefed in the court below, several additional arbitrary-and-capricious shortcomings that infected EPA's technical basis for selecting the new standards. *See* Applicants' Mot. for Stay, at 9-27 (D.C. Cir. filed Jul. 8, 2024); NRECA et al.'s Mot. for Stay, at 11-16 (D.C. Cir. filed June 21, 2024). Although Applicants intend to present these arguments fully in the court below and in this Court at an appropriate time, we do not elaborate here to avoid unnecessary duplication and burden on this Court.

Most important for present purposes, EPA's Final Rule irrationally imposes hundreds of millions of dollars for reducing HAPs from power plants in return for infinitesimally small benefits. As the Court admonished in *Michigan*, concerning the

first phase of these very standards, the "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." 576 U.S. at 753. The Court faulted EPA's refusal to "consider whether the costs of its decision outweighed the benefits," *id.* at 750, explaining "[o]ne would not say that it is even rational … to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id.* at 752.

Cost is a major consideration in all technology review rulemakings like the Final Rule. *See, e.g.*, *Ass'n of Battery Recyclers*, 716 F.3d at 673. That is particularly true for coal-fired EGUs: the source category *Michigan* examined and Congress singled out for regulation only upon a determination that it is "appropriate and necessary" to do so. *Id.* at 743; 42 U.S.C. § 7412(n)(1)(A). Because *Michigan* held cost and benefits must be considered in determining whether it is "appropriate and necessary" to regulate EGUs under Section 112 in the first place, it necessarily follows that the same consideration applies in this rulemaking, which is a follow-on to the initial rulemaking. Under *Michigan*, therefore, EPA must consider the costs of *this* regulation in relation to benefits intended by Congress in Section 112 mandating *this* regulation—protecting public health from HAPs. *See* 576 U.S. at 751.

Contrary to EPA's claim, the purpose of Section 112 is not reduction of HAP emissions for the sake of reduction. *See* 89 Fed. Reg. at 38,525 ("Congress sought to minimize the emission of hazardous air pollution wherever feasible…."). It is to protect the public from the potential effects of HAPs. The best (maybe only) way to

assess the impact of non-mercury metal HAP emissions—which are carcinogenic compounds—is to look at cancer risk. For that, a maximum individual risk ("MIR") of 1-in-1-million *is* the gold standard.[5] That gold standard is the ultimate yardstick in Section 7412(f)(2), *see Nat. Res. Def. Council, v. EPA*, 529 F.3d 1077, 1082 (D.C. Cir. 2008) (describing 1-in-1-million cancer risk as the "aspirational goal" of Section 112), and the threshold below which an entire source category could be delisted, i.e., not regulated at all under Section 112.[6] 42 U.S.C. § 7412(c)(9). And the best way to assess the impact of the non-carcinogen effects of all HAPs (including HAPs, such as mercury, that are not carcinogens) is through the "hazard index" or a "hazard quotient." *See supra* 5; 89 Fed. Reg. at 26,838. A hazard quotient and/or index of less than 1 indicates negligible risk. *See id.*

Here, only three *oil*-fired units in Puerto Rico exceed the 1-in-1-million cancer-risk aspirational standard, *see* 85 Fed. Reg. 31,286, 31,319 (May 22, 2020), and *no* power plant has a hazard index or hazard quotient that exceed 1, *id.* Table 2 (and accompanying text); MATS Risk Assessment, Appx. 10, Tables 1 and 2a. Indeed, all *coal*-fired units have cancer risks one to several orders of magnitude less than 1-in-1-million and hazard quotient/index one to several orders of magnitude less than 1.

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[5] "The MIR is defined as the cancer risk associated with a lifetime [(70 years)] of [continuous] exposure at the highest concentration of HAP where people are likely to live." MATS Risk Assessment at 10, 15.

[6] The origins of the 1-in-1-million standard is a U.S. Food & Drug Administration rulemaking where the agency determined that standard "can properly be considered of insignificant public health concern." 42 Fed. Reg. 10,412, 10,421 (Feb. 22, 1977). Congress and agencies have since extensively used it as the gold standard for risk evaluation.

Yet the Final Rule targets only *coal*-fired units. The hundreds of millions of dollars this rule requires power plants to expend for these infinitesimal benefits is not a rational result from reasoned decision-making. An irrational regulation cannot stand. *Michigan*, 576 U.S. at 750.

Neither EPA's comparison of costs to the industry's revenues and other similar financial data, nor its reliance on "unquantifiable benefits" of reducing HAPs can save the Final Rule. The former involves no consideration of benefits at all, much less of "whether the costs of its decision outweighed the benefits." *Id.* at 750. The latter purports to consider benefits but it does not in any rational way compare them to costs. EPA's only basis for claiming these unquantifiable benefits outweigh the costs is a supposed congressional command of "less is better." The Court all but rejected this argument in *Michigan*. *See* 576 U.S. at 749 (noting EPA "could not fully quantify the benefits of reducing power plants' emissions of hazardous air pollutants"); *id.* at 756-57 (noting EPA's focus on the "volume of pollution emitted").

EPA in the original MATS rule and the 2023 appropriate-and-necessary remand rulemaking suggested that a formal benefit-cost analysis, which was included in the regulatory impact analyses for those rulemakings, could justify the rule. But that rationale is no help to the EPA here. Those analyses compared the rule's costs—the costs of regulating HAPs under Section 112—to the purported "co-benefits" of reducing fine particulate matter from the controls that the rule would require. *See Michigan*, 576 U.S. at 749-50. As the Chief Justice noted at the *Michigan* argument, that approach "raises the red flag." App.40-41 (Tr. of Oral Arg. at 62-63).

But in any event, in this rulemaking, the costs of the Final Rule far outweigh even the co-benefits of the rule. *See* 89 Fed. Reg. at 38,511 ("The EPA estimates negative net monetized benefits of this rule.").

This Final Rule is unlikely to survive judicial review. The only question is whether that will make a difference in the end. Only a stay of the Final Rule while judicial review is ongoing would ensure it.

II. The Final Rule Will Cause Substantial Irreparable Harm.

The Final Rule is not only unlawful, but also threatens to cause substantial irreparable harm absent a stay. *See* ND, et al. Appl. at 15-20 (discussing harm to states and power plants operating in them). Several of America's Power members—e.g., Lignite Energy Council, Minnkota Power Cooperative, and others—describe in their own stay application the substantial harm the Final Rule would cause, including expensive controls both to meet the revised fPM standard and the mercury standard for lignite-fired plants, as well as premature retirements where these controls prove technically or economically infeasible. *See* NRECA et al.'s Mot. for Stay, at 11-16. The Montana affiliates of Electric Generators MATs Coalition members are co-owners of the Colstrip power plant in Montana. The Final Rule is nothing short than an existential threat to Colstrip. *See* Talen MT, et al. Appl. Indeed, EPA itself estimates 42 percent of the cost of the entire rule falls on Colstrip. 89 Fed. Reg. at 38,533.

History and the plain record of this rulemaking fully support these concerns. The original MATS Rule was invalidated by this Court about 3 years after the rule had been promulgated. *See Michigan*, 576 U.S. at 743, 748 (invalidating on June 29,

2015 regulation promulgated on February 16, 2012). By that time, the compliance deadline for the rule, April 16, 2015, had passed, and most power plants had either (1) installed (with a few other plants well on their way to install) the controls MATS required—which cost billions of dollars—or (2) shut down permanently (or made plans to do so shortly thereafter). *See supra* 8-9 (EPA statements shortly before and after *Michigan*).

Here, the compliance deadline for the rule is also about three years after its promulgation. EPA's own analysis found the Final Rule would impose up to $860 million in cost, most of which is upfront capital cost. 89 Fed. Reg. at 38,555. By the time this litigation is complete, that upfront cost cannot be unspent. That is irreparable harm. *See, e.g.*, *Ohio*, 144 S.Ct. at 2053; *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (Scalia, J., concurring in part) (because sovereign immunity bars recovering compliance costs from the government, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs"); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (economic injuries are irreparable where no "adequate compensatory or other corrective relief will be available at a later date in the ordinary course of litigation"). Many power plants that would have to install expensive controls to meet the revised standards will find it prohibitively expensive to do so, especially that the companion greenhouse gas rule, should it also survive, all but guarantees the vast majority of coal-fired power plants would have to shut down by 2032. *See* Talen MT, et al. Appl. at 14. These plants would have to make irreversible plans to shut down

by the compliance date of the Final Rule, which would cause serious power grid reliability concerns. *See, e.g., Id*. at 14-16; 35-36.

The availability of possible extensions of the compliance deadline cannot avoid all of this harm. True, Section 112(i) provides for the possibility of obtaining a one-year extension, but only "if such additional period is necessary for the installation of controls." 42 U.S.C. § 7412(i)(3)(B). If the rule is not stayed, power plants cannot ask for an extension just to hedge their bets regarding the outcome of the litigation. They must comply. And there is no reason to expect the permitting authorities or EPA would grant an extension without a showing that the power plants did their best to meet the regulatory deadline for compliance.

For these reasons, and as an empirical matter, the availability of a possible extension did not relieve the harm in the first round of these very standards. Most power plants met the April 16, 2015 deadline for MATS, whether by installing necessary controls or shutting down permanently before that date, because they had to do so. *See supra* 8-9 (EPA statements shortly before and after *Michigan*). A handful of plants were unable to meet the deadline and needed a one-year extension to comply, but even for these plants that does not mean that substantial expenditures on controls or preparations for shutdown had not started before June 2015. There is no reason to expect a different result here.

III. The Balance of Equities and the Public Interest Also Favor a Stay.

The final two factors also weigh in favor of granting a stay. As to the balance of equities, there is no risk that a stay will "substantially injure" Respondents or the public, *see Ohio*, 144 S.Ct. at 2052. In *Ohio*, which involved an ambient air quality

rule, this Court accepted that "each side has strong arguments about the harms." *Id.* at 2052. Here, the residual risk from coal-fired power plant HAP emissions, the only target of this rulemaking, is a negligibly small, even "aspirational," level of risk. *See supra* at 9. Therefore, any harm to respondents (or the public, for that matter) that would result from a stay is infinitesimally small. Postponing the applicability of this Rule by 2-3 years while the courts decide its legality will practically cause *no* damage, much less substantial injury. In addition, a stay protects regulated entities against an agency's abuse of the administrative process. At most, a stay will just prevent EPA from effectively escaping judicial review by forcing industry participants to make irrevocable plans based on the Final Rule before a court can determine its legality.

The public interest, on the other hand, heavily favors a stay: allowing an unlawful Final Rule to remain in effect during judicial review threatens substantial harm not only to electric generators but to related industries (e.g., mines), the public that they serve, and the communities in which they operate. The cost of this Final Rule is not only massive (close to a billion dollars, by EPA's own admission); it also falls disproportionately on a subset of the power plants and the communities in which they operate and serve. For example, by EPA's estimate, 42 percent of the cost of the entire Final Rule falls on the two-unit Colstrip power plant in Montana. 89 Fed. Reg. at 38,533. Such a staggering cost threatens to decimate the Montana community in which Colstrip is located and threaten the reliability of the power grid in Montana. *See* Talen MT, et al. Appl. at 35-36. The cost of the revised mercury standard falls, naturally, on lignite-fired power plants in North Dakota and Texas. As the former

attests, retirement of even one of these lignite plants in North Dakota risks the reliability of the grid in the entire Midwest and substantial economic disruption. *See* ND, et al. Appl. at 16.

The public interest is rarely served by a "less is better" policy regardless of costs (and, in this case, energy impacts). *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 766 (2021) ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends."). Given the nonexistent risk this Final Rule would ostensibly mitigate, the public interest is in avoiding wasteful expenditures. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part) ("[T]oo much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.").[7]

CONCLUSION

This Court should stay the Final Rule pending judicial review.

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[7] The cost of this Final Rule, according to EPA, is up to $860 million. 89 Fed. Reg. at 38,555. This is one of two Clean Air Act rules and four major environmental rules targeting power plants issued by EPA on April 25, 2024. In addition to this Final Rule, EPA issued: (1) a greenhouse gas emissions rule, with an estimated cost of up to $7.5 billion, 89 Fed. Reg. at 40,005; (2) effluent limitations guidelines under the Clean Water Act, with an estimated cost of more than $1 billion, *annually*, 89 Fed. Reg. 40,198, 40,263 (May 9, 2024); and (3) a regulation of legacy coal combustion residuals surface impoundments, with an estimated cost of up to $240 million annually, 89 Fed. Reg. 38,950, 39,094 (May 8, 2024).

Respectfully submitted,

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