No. 24A199

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.

REPLY IN SUPPORT OF 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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INTRODUCTION

The Environmental Protection Agency refuses to learn the fundamental lesson of *Michigan*. As this Court recognized, "[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." *Michigan v.* EPA, 576 U.S. 743, 752 (2015). Yet the Final Rule imposes hundreds of millions of dollars of cost for trivial benefits because, for hazardous air pollutants ("HAPs"), EPA believes that Congress's standard is "[l]ess is better." EPA's Combined Opp. to Mots. to Stay, *North Dakota v. EPA*, No. 24-1119, at 1 (D.C. Cir. filed July 22, 2024). EPA is wrong. Applicants are likely to prevail on the merits.

Moreover, absent a stay from this Court, the Final Rule is likely to cause substantial irreparable harm. The States and other applicants well explain the likely harms, both in their applications and replies. Applicants join those arguments. EPA attempts to question those harms by disputing Applicants' explanation for why industry declined to challenge the 2023 reaffirmance of the "appropriate and necessary" finding. But the industry parties' contemporary comments in that rulemaking explain that they eschewed such a challenge not because the changes would not have caused harm but because the harm had already occurred—the industry had already expended billions of dollars complying with MATS. That provides no reason to doubt Applicants' attempts to avoid similar harms here.

Finally, EPA's refrain that the vast majority of units are already complying with the new filterable particulate matter standard and thus will not have to expend

substantial capital is false. EPA's own analysis shows that several power plants (in addition to Colstrip) will have to undertake substantial capital projects, and the record shows many more will too. This Court should stay the Final Rule to prevent EPA from forcing them to incur those irrecoverable cost before obtaining judicial review.

ARGUMENT

I. Applicants Are Likely to Prevail on the Merits.

A. Imposing Exorbitant Costs for Trivial Benefits Is Irrational and Unlawful Under *Michigan*.

1. EPA describes *Michigan* as inapposite because it dealt with a different Clean Air Act provision that asks whether regulating power plants under Section 112 is "'appropriate and necessary,' a capacious phrase that the Court held included consideration of costs." EPA Resp. 3. But the "capaciousness" of the term appropriate was relevant in *Michigan* for *whether* costs must be considered. Here, there is no dispute costs must be considered under Section 7412(d)(6). EPA Resp. 7. *Michigan* teaches that "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions," *Michigan*, 576 U.S. at 753, and that "[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. That holding flows not from Section 7412(n)(1)(A)'s language, but the bedrock administrative law principle that reasonable regulations must be "logical and rational." *Id.* at 750

(quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). It applies equally here.

2. EPA next argues that it can blind itself to the negligible benefit the Rule seeks to achieve (at a cost in the hundreds of millions of dollars) by knocking down a strawman. It is not "applicants' view" that "the only cognizable benefit of reducing hazardous air pollution is to provide an 'ample margin of safety' to protect public health, so that further reduction is superfluous if emissions already are low enough to provide that margin." EPA Resp. 3. Petitioners argue that when the risk from *all* sources affected by a rulemaking is *trivial*—i.e., a lifetime risk of less than 1-in-1-million—*Michigan* commands it is irrational to impose hundreds of millions of dollars to reduce that trivial risk even further.

"Ample margin of safety" has a technical meaning under the Clean Air Act that differs from *trivial* risk. Congress adopted into Section 7412(f)(2) EPA's pre-1990 "*Benzene* standard" interpretation, which "established a maximum excess 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). The Final Rule thus found an ample margin of safety for oil-fired units, even though the risk from those units exceeded the trivial standard of 1-in-1-million (but was less than 100-in-1-million). *See* Am. Power App. 9. We do not argue that reducing emissions from oil-fired units would not have been worthwhile just because an ample margin of safety exists. For oil-fired units in this rulemaking, EPA would not necessarily have run afoul of *Michigan* if it had elected

to tighten the standards for those units under Section 7412(d)(6) even though it found an ample margin of safety for them under Section 7412(f)(2).

But that is not what EPA did. To the contrary, the Final Rule focuses on only *coal*-fired units, for which the existing standards provide not only an ample margin of safety, but eliminate all but trivial risks—less than 1-in-1-million. *See* Am. Power App. 9 (citing 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"). Those units are, in other words, already meeting Congress's gold standard. Where a category is meeting that standard, Congress has authorized EPA to delist an entire source category from Section 7412—that is, to decline to regulate their emission at all under Section 112. *See* 42 U.S.C. § 7412(c)(9). And yet EPA is imposing hundreds of millions of dollars of irrecoverable costs on those units to further lower the risk.

EPA misses the point when it argues that Section 7412(c)(9) only authorizes it to delist such categories, not require it. *See* EPA Resp. 19 (criticizing "Applicants' passing reliance … on the 'delisting' criteria in subsection (c)(9)). Whether or not EPA was required or simply permitted to delist coal-fire units, Section 7412(c)(9) confirms that Congress sees a critical difference between an ample margin of safety (100-in-1-million) and a trivial risk (1-in-1-million, two orders of magnitude smaller). Under *Michigan* and basic administrative law, a Section 7412(d)(6) rule is *de facto* irrational

when its only benefit is to lower the risk below the level Congress found so trivial as to justify altogether delisting the source category.

3. EPA argues it need not consider the benefits of its Rule, no matter how small, because Congress required technology-based standards under Section 7412(d)(6) to reflect the maximum degree of reduction achievable. *E.g.*, EPA Resp. 24. In the court below, EPA was even more forthcoming, describing Congress's policy choice as "less is better." EPA's Combined Opp. to Mots. to Stay, *North Dakota v. EPA*, No. 24-1119, at 1 (D.C. Cir. filed July 22, 2024). But, again, there is no dispute that both Section 7412(d)(2) and Section 7412(d)(6) require consideration of costs. EPA Resp. 7. Consideration of cost necessarily requires paying attention both to the advantages and disadvantages of regulation. Otherwise, what is the point?

In *Michigan*, EPA considered benefits but argued it need not consider costs in listing power plants under Section 7412(n)(1)(A) because Congress generally required listing decisions be based upon the "volume of pollution emitted." 576 U.S. at 756-57. This Court rejected this "less is better" approach there, and it should do so here also. If it is not "'appropriate,' to impose" large costs for minute benefits, *id.* at 752, it is not "necessary," 42 U.S.C. § 7412(d)(6). It is plainly not rational. *Michigan*, 576 U.S. at 750, 752.

Finally, EPA contends that "if EPA were promulgating subsection (d)(2) standards for the first time today, the Act would not only permit the two emission standards in the 2024 rule, but would arguably require them." EPA Resp. 20 (emphasis omitted). Not so. While subsection (d)(3) sets a MACT floor without

consideration of cost (and, therefore, benefit), subsection (d)(2) does require consideration of cost. *See id.* For the same reasons that the consideration of costs under (d)(6) requires weighing those costs against the benefits, EPA must engage in the same rational exercise of its authority under (d)(2). That was the point of *Michigan*.

B. EPA Did Not Properly Consider Costs and Benefits or Provide a Rational Basis for Concluding the Rule Is "Worthwhile."

1. EPA further protests that it did "consider" both costs and benefits, concluding that the Rule "is a 'worthwhile' exercise of' the agency's authority." EPA Resp. 24 (quoting 89 Fed. Reg. at 38,553). *Michigan*, however, requires more than acknowledging "the advantages *and* the disadvantages of agency decisions." 576 U.S. at 753. *Michigan* requires "paying attention" by weighing costs against benefits, and reasoned decisionmaking requires some cogent *explanation* of *how* "the costs of its decision [are] outweighed [by] the benefits." *Id.* at 750. Here, EPA nods towards the proposition that toxics generally (at some dose and exposure) are "associated with a variety of adverse health effects," 89 Fed. Reg. at 38,515, and then declares the Rule "a 'worthwhile' exercise" of its authority because the rule reduces hazardous air pollutants.[1] EPA Resp. 24. That is not weighing costs against benefits, much less

[1] EPA's approach to weighing benefits and costs is reminiscent of a "Churchill Martini," "a glass of cold gin with a nod in the direction of France in lieu of vermouth." Tony Sachs, *History's Greatest Drunks: Winston Churchill*, YahooFinance (Aug. 17, 2016), https://finance.yahoo.com/news/history-greatest-drunks-winston-churchill-010000121.html.

explaining how "the costs of its decision [are] outweighed [by] the benefits." *Michigan*, 576 U.S. at 750. That is arbitrary and capricious.

2. EPA claims that it is too difficult to "monetize" reductions in hazardous air pollutant emissions. EPA Resp. 28. The Court should be skeptical about this claim—after all, while there may be uncertainties and assumptions to any such evaluation, EPA seems to have no problem putting a dollar amount on the benefits of emission and discharge reductions in all manners of rulemakings, including something called the "social cost of carbon," which purports to assign a benefit for reducing every ton of carbon dioxide a single source emits. But in any event, monetization is not the only way to quantify benefit. And here, there is a ready method for quantifying (even if not monetizing) the benefit of reducing hazardous air pollutants from power plants beyond the substantial reductions already achieved by the current regulations: it is the reduction in lifetime cancer risk (for the carcinogen effects of hazardous air pollutants) and in hazard index and hazard quotient (for the "variety of [non-cancer] adverse effects," 89 Fed. Reg. at 38,515, of hazardous air pollutants).

Reasoned decisionmaking requires a cogent evaluation of benefits and costs. Here, EPA's only cogent measure of benefit under Section 7412 is the amount of avoided risk. Although EPA did not quantify that either, its risk review assesses the residual risk from the units the Rule regulates—i.e., the maximum risk the Rule could avoid. That maximum is 1 to several orders of magnitude *smaller* than the trivial-risk-level-equivalent. Am. Power App. 14. Because the Rule irrationally

requires exorbitant costs for these negligible benefits, it is unlawful. *See Michigan*, 576 U.S. at 750, 752.

3. EPA also seeks to minimize the cost impacts of the Rule by claiming that (1) the cost impact of the Rule falls almost exclusively on two units at the Colstrip power plant in Montana; (2) the cost of the Rule is a small fraction of the typical capital and total expenditures for the power sector and its revenues. The first claim is false. Both are irrelevant.

Colstrip is not the only power plant that would have to make substantial capital expenditures to comply with the Rule. To be sure, Colstrip would have to construct new fabric filters, the most expensive types of controls for filterable particulate matter. But several other units, by EPA's own accounting, would have to make substantial capital expenditures to upgrade their electrostatic precipitators (ESPs) at a cost of $40 per kilowatt (KW) or to completely rebuild their ESPs at a cost of $80/KW. *See* EPA, *2024 Update to the 2023 Proposed Technology Review for the Coal- and Oil-Fired EGU Source Category (2024 Technical Memo)*, at pdf 15 (Jan. 2024) (Docket ID EPA-HQ-OAR-2018-0794-6919), https://www.regulations.gov/document/EPA-HQ-OAR-2018-0794-6919; *id.*, Attach. 1 (0.010 limit assumptions tab). This translates, for example, to a capital cost of $29 million for the 728-MW Mayo power plant in North Carolina, $26 million for each of the three 650-MW Harrison units in West Virginia, and $47.5 million for each of the four 593-MW Labadie units in Missouri. *Id.* The total capital cost for these units is about $300

million.[2] And those are just the costs that EPA is willing to concede in the Final Rule. In reality, many more plants will be affected and will have to make substantial capital expenditures. *See infra* 11-13 (discussing the record on compliance margin).

That the power industry is large and thus has large revenues is entirely irrelevant to any weighing of benefits and costs. The industry's total revenue says nothing about whether "the costs of [EPA's] decision [are] outweighed [by] the benefits." *Michigan*, 576 U.S. at 750. As this Court explained, "[c]onsideration of cost … reflects the reality that 'too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.'" *Id.* at 753 (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009) (BREYER, J., concurring in part and dissenting in part)). Indeed, if the standard for whether it is "worthwhile" to impose a new regulation on an industry with about $400 billion in annual revenues, *see* 89 Fed. Reg. at 38,533 (discussing the revenues of the power industry), is a general nod towards "less is better" and whether the cost of the rule is smaller than annual revenues, there would be practically no rational bound on EPA's discretion.

II. The Rule Will Cause Substantial Irreparable Harm.

In their applications and replies, the States and other applicants well explain the irreparable harm that flows from the Final Rule absent this Court's intervention.

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[2] Moreover, it is unclear why that matters. The Rule is still requiring Colstrip and these plants to spends tens to hundreds of millions of dollars *each*, for trivial benefits for each of these plants. That is arbitrary and capricious.

Applicants join those arguments, in addition to their own. Applicants add only two more points.

A. EPA disputes Applicants' explanation that industry did not challenge the 2023 reaffirmance of the "appropriate and necessary" finding, 88 Fed. Reg. 13,956 (Mar. 6, 2023), because a challenge would have been pointless after industry had already implemented the MATS requirements. EPA Resp. 18 n.5. But contrary to EPA's suggestion, this is no post hoc rationalization. Industry parties explained in their comments in the 2023 rulemaking that they eschewed such a challenge because it would be not only futile (the industry had already expended billions of dollars complying with MATS) but highly disruptive to the industry if it resulted in the elimination of MATS. Indeed, such a result could have had unintended consequences relating to cost recovery by regulated utilities. One commenter stated:

> Given these circumstances, [Commenter] believes there is no reason to rescind or significantly amend the MATS. Doing so would upend a regulatory landscape that has been settled for a decade and subject the industry to regulatory uncertainty and disruption of reliable operations. This is particularly inappropriate here, where owners and operators have already invested large amounts of capital to install control technology and other measures to comply with the existing standards, which have already resulted in a dramatic reduction in HAP emissions. Rescinding MATS could also have unintended consequences, such as making cost recovery for MATS-required controls more difficult. While it may be intuitive that controls that were legally required at the time they were installed are justified, rescinding MATS at this time would provide unnecessary fodder for unreasonable arguments against such cost recovery.

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

4957; *see also* Comments of the Edison Electric Institute, et al., at 1 (Apr. 11, 2022) (Docket ID EPA-HQ-OAR-2018-0794-4968), https://www.regulations.gov/comment/EPA-HQ-OAR-2018-0794-4968 (multiple industry organization supporting the "restor[ation of] the 'appropriate and necessary' determination underpinning the Mercury and Air Toxics Standards (MATS) given the industry's full implementation of MATS. Such a restoration provides critical regulatory and business certainty to the industry regarding regulation under Clean Air Act (CAA or Act) section 112."). Nothing about that experience calls into question Applicants' attempts to avoid similar harms here.

B. EPA's refrain that the vast majority of units are already complying with the new filterable particulate matter standard and thus will not have to expend substantial capital for controls installation, upgrades, and rebuilds is false. Again, EPA's own analysis shows that several additional power plants will have to undertake substantial capital projects. *Supra* 8-9. And that estimate is artificially low. In the Final Rule, EPA refused to account for a compliance margin in determining the units that would have to make such expenditures—even though EPA has repeatedly acknowledged the importance of accounting for a compliance margin in setting and evaluating emission standards,[3] and even did so elsewhere in this same

[3] EPA has long recognized the central importance of compliance margins: "when developing standards [under Section 112], we take into account the uncertainty associated with measuring emissions and we assume that plants operate with a compliance buffer to minimize the likelihood of exceeding the standard." 77 Fed. Reg. 58,220, 58,231 (Sept. 19, 2012). In its 2011 MATS proposal, EPA explained "the numerical standard should account for variability … and provide sufficient

rulemaking, conceding that a compliance margin of 50% is appropriate here. EPA, *PM CEMS Random Error Contribution by Emission Limit*, at 2 (Mar. 22, 2023) (Docket ID EPA-HQ-OAR-2018-0794-5786) ("PM CEMS Memo"), https://www.regulations.gov/document/EPA-HQ-OAR-2018-0794-5786 (noting "an operational target limit … [of] one-half of the emission limit" and setting "target compliance levels" at half the limit). If the units that are subject to a standard of 0.010 lb/MMBtu must target an emission rate of 0.005 lb/MMBtu (i.e., half the standard), many more units would have to make major capital expenditures to upgrade or rebuild their ESPs, and even construct new fabric filters (just as Colstrip would have to do).

The record demonstrates that accounting for a compliance margin makes a significant difference. Responding to comments, EPA estimated that even a modest 20% compliance margin would (1) increase the Rule's cost by approximately 70% ("from $87.2M to $147.7M," annualized), and (2) almost double the number of units that would have to upgrade their controls, at great cost ("the number of ESP upgrades (previously 11) … would also increase (to 20 …)"). 89 Fed. Reg. at 38,521. The record further demonstrates that the result would be even more stark if EPA accounted for a 50% compliance margin, which it elsewhere recognizes as the likely "target" rate, PM CEMS Memo at 2. EPA did not do that analysis, but it did consider an alternative,

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compliance margin for owners/operators …." 76 Fed. Reg. 24,976, 25,066 (May 3, 2011). In another HAP rulemaking, EPA established a standard "at a level higher than all measured values (to account for the inability to reliably measure any lower standard) and [to] … provide[] an ample compliance margin." 75 Fed. Reg. 54,970, 54,984 (Sept. 9, 2010).

proposed standard of 0.060 lb/mmBtu, which is the equivalent of the final standard of 0.01 lb/mmBtu with a compliance margin of 40%. *See* 89 Fed. Reg. at 38,518. Based on EPA's own analysis, accounting for a more realistic 40% compliance margin would (1) increase the Rule's cost almost 5 folds (from $87.2M to $398.8M, annualized), and (2) almost triple the number of units (from 33 to 94) affected by the Rule. *See* 2024 Technical Memo at 16-17, Table 4. The number of units that would have to install fabric filters, which EPA acknowledges (at least in connection with Colstrip) as the most expensive capital expenditures that the Final Rule may require, would increase from two to twelve. *Id.*, Attach. 1 (0.006 limit assumptions tab). Absent a stay, these capital expenditures will have to start immediately and will never be recovered.

CONCLUSION

This Court should stay the Final Rule pending judicial review.

Respectfully submitted,

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