No. ________

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

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PARTIES TO THIS PROCEEDING

Applicants in this Court and Petitioners in the D.C. Circuit Court of Appeals are the 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.

Respondent in this Court and Respondent in the D.C. Circuit Court of Appeals is the United States Environmental Protection Agency.

Intervenor for Petitioner in the D.C. Circuit Court of Appeals is San Miguel Electric Cooperative, Inc.

Intervenors for Respondent in the D.C. Circuit Court of Appeals 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; (2) the State 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, State 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 8 Order from the D.C. Circuit Court of Appeals denying six motions to stay filed in eight consolidated cases:

- No. 24-1119: *State of North Dakota, et al v. EPA* (lead case)
- No. 24-1154: *NACCO Natural Resources Corporation v. EPA, et al*
- No. 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, Rainbow Energy Center, LLC v. EPA, et al*
- No. 24-1184: *Oak Grove Management Company, LLC, et al v. EPA, et al*
- No. 24-1190: *Talen Montana, LLC v. EPA, et al*
- No. 24-1194: *Westmoreland Mining Holdings LLC, Westmoreland Mining, and Westmoreland Rosebud Mining LLC v. EPA, et al*
- No. 24-1201: *America's Power, and Electric Generators MATS Coalition v. EPA*
- No. 24-1217: *NorthWestern Corporation, d/b/a NorthWestern Energy v. EPA*
- No. 24-1223: *Midwest Ozone Group v. EPA, et al*

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

INTRODUCTION

Applicants, including nearly half the States in the country, seek to stay an EPA Rule which reduces the Mercury and Air Toxics Standards ("MATS") for coal-fired power plants by 66-70%. With one sentence, and without any indication of why it determined a stay was unwarranted, the D.C. Circuit denied six motions and disregarded thousands of pages of briefing and declarations attesting that the Rule will impose tremendous costs and risk destabilizing the nation's power grids without creating *any* relevant or quantifiable benefit to public health.

Under Section 112 of the Clean Air Act, EPA has rulemaking authority to set emission levels for specifically listed hazardous air pollutants ("HAPs"). That authority is for protecting public health and the environment from those listed HAP emissions. Section 112 does not bestow EPA with a general rulemaking authority for combating climate change or achieving other environmental policy goals.

The Rule at issue here loses sight of that purpose. EPA cannot quantify any relevant or meaningful public health or environmental benefit from the mandated reduction in HAP emissions. None. EPA acknowledges that the standards already in place have achieved HAP emission levels that are **well below** any threshold that would impact public health. Indeed, health risks from HAP emissions for the worst performing coal-fired plant in the country are already orders of magnitude below the Clean Air Act's aspirational standard, where, by statute, EPA could discontinue regulating the emission source entirely.

Conversely, implementation costs for the Rule will be substantial, there is a significant likelihood power plants will be forced to retire, and, at minimum, prices for electricity will increase. Without a stay, the Rule will require investment and shutdown decisions to be made immediately, and those decisions will not be reversible if Applicants later prevail on the merits. Not coincidentally, grid regulators around the country are warning that the long-term reliability of our nation's already-precarious power grids will be threatened.

"When States … seek to stay the enforcement of a federal regulation … often the 'harms and equities [will be] very weighty on both sides.'" *Ohio v. EPA*, 144 S. Ct. 2040, 2052 (citation omitted). But that's not the case here. The disparity between injuries likely to result from not granting a stay and the lack of injuries from granting a stay could not be more stark. *Cf. Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1305 (2010) (Scalia, J.) (granting stay where "[r]efusing a stay may visit an irreversible harm … but granting it will apparently do no permanent injury").

EPA knows that to impose this Rule on the nation it doesn't need to prevail on the merits, all it needs to do is prevent a stay of the Rule during the pendency of the challenge—the multi-year timelines for powerplant investment decisions and time needed to get a Clean Air Act merits decisions will do the rest. EPA knows this because they've already ran that play before, using the MATS Rule.

The last time the MATS Rule was litigated, this Court eventually held that EPA acted "unreasonably when it deemed cost irrelevant to the decision to regulate power plants." *Michigan v. EPA*, 576 U.S. 743, 760 (2015). But that victory proved

hollow, because without a stay during the years it took for a merits decision, power plants were forced to make and implement compliance and retirement decisions, resulting in billions expended and a multitude of plant closures in response to an unlawful regulation. Rather than showing contrition for upending an entire industry with an unlawful regulation, EPA celebrated how many power plants had been forced into compliance by the time the rule was declared unlawful. Joe Rago, *A Supreme Carbon Rebuke*, Wall St. J. (Feb. 10, 2016), https://tinyurl.com/zwstzuw3. The last time the MATS Rule was litigated became a textbook example for when agency rules should be stayed. *E.g.,* Ronald Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 Admin. L. Rev. 225, 254-57 (2017).

And beyond the sharp imbalance of imminent and irreparable harms, Applicants also have a high likelihood of prevailing on the merits.

Under Section 112(d)(6) of the Clean Air Act, EPA may only revise HAP emission standards "as necessary (taking into account developments in practices, processes, and control technologies)." 42 U.S.C. § 7412(d)(6). The operative statutory phrase is "revise as necessary," yet EPA never determined that this Rule was "necessary." Nor could it. A Section 112 rule that imposes tremendous costs without achieving *any* relevant health benefit could hardly be "necessary." EPA's failure to establish that the Rule is "necessary" renders it unlawful out of the gate.

Rather than trying to establish any necessity, EPA claims that power plants have been able to comply with the current standard at lower cost than anticipated, and interprets that to be a "development" under Section 112(d)(6). But even setting

aside EPA's failure to address Section 112(d)(6)'s use of the term "necessary," EPA's interpretation of the term "development" does not hold water. The primary emission control technologies have not changed in the last decade. And the alleged cost efficiencies EPA points to for using long-existent control technologies cannot justify the Rule's dramatic ratcheting down of the standards.

The Rule is also arbitrary and capricious multiple times over. For one, the Rule's cost-benefit analysis is indefensible. Even taking EPA's calculations at face value, the estimated cost per ton of HAP removed exponentially exceeds cost-benefit ratios that EPA itself has rejected as unreasonable for other Section 112 rulemakings. Yet in exchange for those astronomical costs, EPA cannot point to any relevant, quantifiable public health benefit to be gained. EPA has never before used its Section 112(d)(6) rulemaking authority to impose costs of such a magnitude without any corresponding, quantifiable benefit to public health to show for it.

For another, EPA failed to adequately consider the Rule's significant and foreseeable impacts on our nation's already-strained power grids. EPA promulgated this Rule as one part of a "suite" of rules targeting coal-fired power plants with retirement-inducing costs. EPA's perfunctory conclusion that the tremendous costs of this Rule (and related rules) will have no effect on the power sector does not reflect reasoned analysis entitled to any degree of deference. EPA is not an expert on the power grid, and, despite the Rule's foreseeable impact on the power grid, EPA did not seek input from the Federal Energy Regulatory Commission (FERC), the North

American Electric Reliability Corporation (NERC), or any other similar entity that could have apprised it of *this* Rule's likely impact on long term grid reliability.

And finally, there is considerable evidence that EPA's stated reason for engaging in this rulemaking is pretextual. *Cf. Dep't of Commerce v. New York*, 588 U.S. 752, 784-85 (2019) ("[T]he evidence tells a story that does not match the explanation the Secretary gave for his decision. … Accepting contrived reasons would defeat the purpose of the enterprise."). Contrary to EPA's stated purpose of protecting public health from HAP emissions (which the Rule doesn't do), there is evidence that EPA is using its rulemaking authority under Section 112(d)(6) as part of an effort to force a nationwide transition away from coal for putative climate change reasons—pursuing a national policy choice this Court has expressly held the agency lacks authority to make. *Contra West Virginia v. EPA*, 597 U.S. 697, 735 (2022) (holding it "not plausible" that the Clean Air Act empowers EPA to "force a nationwide transition away from the use of coal to generate electricity").

"Stay applications are nothing new. They seek a form of interim relief perhaps 'as old as the judicial system of the nation.'" *Ohio*, 144 S. Ct. at 2052 (citation omitted). The D.C. Circuit's one-sentence denial of the stay motions filed below demonstrates a failure to learn from the *Michigan v. EPA* saga, and it did not identify (for the parties, or for this Court) which prong of the stay analysis its decision rested upon. To avoid imminent and irreparable harms from a rule likely to be set aside, this Court should stay the Rule's implementation pending resolution of the merits.

DECISION BELOW

The D.C. Circuit's order denying the motions for a stay pending review of the Rule is unpublished. It is reproduced at App. 1a-2a. The relevant Rule, *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review*, is published at 89 Fed. Reg. 38508 (May 7, 2024) and reproduced at App. 59a-144a.

JURISDICTION

This Court has jurisdiction over this Application under 28 U.S.C. §§ 1254(1) and 2101(f). It has the authority to grant Applicants' requested relief under both the Administrative Procedure Act, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651.

BACKGROUND

Section 112 of the Clean Air Act (codified at 42 U.S.C. § 7412) provides EPA with statutory authority to set emission levels for protecting public health and the environment from certain HAPs specifically enumerated in Section 112(b)(1). 42 U.S.C. § 7412(b)(1); *see also Sierra Club v. EPA*, 895 F.3d 1, 7 (D.C. Cir. 2018) ("There are 189 hazardous air pollutants subject to regulation"). Carbon dioxide and other greenhouse gases are not HAPs subject to EPA's Section 112 authority, and combating climate change is not the purpose of Section 112.

When setting emission levels for the HAPs regulated under Section 112, the statute first requires EPA to set standards based on what is achievable with current technology. *See* 42 U.S.C. § 7412(d)(1), (3). Then, the Clean Air Act requires EPA to periodically evaluate whether to revise them. For public health, the Clean Air Act requires that eight years after setting a standard, EPA must evaluate if any "residual

risks" remain to public health from those HAP emissions (the "Residual Risk Review"). 42 U.S.C. § 7412(f). And for technological advances, the Clean Air Act requires that every eight years after setting a standard, EPA must review and revise "as necessary," by "taking into account developments in the practices, processes and control technologies" (the "Technology Review"). 42 U.S.C. § 7412(d)(6).

EPA has promulgated over 100 HAP standards for a wide variety of emission sources under Section 112. *See* 40 C.F.R. 63 Subparts F through HHHHHHH. The Final Rule challenged here pertains to certain HAP emissions from coal- and oil-fired power plants (referred to as electric utility steam generating units or "EGUs").

In 2012, EPA issued the original MATS rule for mercury and other specified HAPs from coal- and oil-fired EGUs. *See* 77 Fed. Reg. 9304 (Feb. 16, 2012). The original MATS rule identified different emission standards for mercury from power plants that use lignite coal compared to other types of coal. That distinction was based on science: lignite is more variable (in terms of heat, moisture, and mercury content) than other types of coal, and available technologies cannot consistently achieve the same control levels. *See* 77 Fed. Reg. at 9393. For all other covered HAPs (i.e., the non-mercury metal HAPs), the original MATS Rule allowed for measuring filterable particulate matter (fPM) as a surrogate for total non-mercury metal HAPs.

Several parties challenged the original MATS Rule, arguing that EPA failed to consider the substantial costs the Rule would impose on the already heavily regulated power sector. *See Michigan*, 576 U.S. at 747-50. This Court agreed and found the original MATS Rule unlawful because EPA unreasonably "deemed cost irrelevant to

the decision to regulate power plants." *Id.* at 760. But without a stay while the merits were litigated, EGUs were forced by the original MATS Rule to incur compliance costs or make retirement decisions in the interim, resulting in billions expended and many plant closures in response to an unlawful regulation.

This "results first, legality second" approach was intentional. Then-EPA Administrator Gina McCarthy proclaimed this Court's ruling on the lawfulness of the MATS Rule did not matter, because given the time it took to litigate, "[m]ost of [the EGUs] are already in compliance, [and] investments have been made." Timothy Cama & Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule,* The Hill (June 29, 2015), https://tinyurl.com/yw5b3z8u. And on remand to the D.C. Circuit, EPA argued (and that court accepted) that costs had by then become a moot point because they'd already been imposed. App. 792a-93a (EPA Resp. to Petitioners' Motions To Govern Future Proceedings, *White Stallion Energy Ctr., LLC. v. EPA*, No. 12-1100, Entry 1579186 at 14-15 (D.C. Cir. Oct. 21, 2015)); *see also* App. 794a-95a (D.C. Cir. Order, *White Stallion Energy Ctr., LLC. v. EPA*, No. 12-1100, Entry 1588459 at 1-2 (D.C. Cir. Dec. 15, 2015)). So ultimately, EPA unlawfully failed to consider the rule's costs, yet succeeded in having those costs imposed anyway.

In 2020, EPA conducted the 8-year Residual Risk and Technology Reviews. In its Residual Risk Review, EPA "determined that the current [standard] provides an ample margin of safety to protect public health and prevent an adverse environmental effect." 85 Fed. Reg. 31286, 31314 (May 22, 2020). And in the Technology Review, EPA determined there were no developments in emission control

technologies, practices, or processes that warranted revising the rule. 85 Fed. Reg. at 31298 ("there are no developments in HAP emissions controls to achieve further cost-effective reductions beyond the current standards"). Accordingly, EPA concluded it was not "necessary" to revise the original MATS rule. 85 Fed. Reg. at 31314.

But six months later there was a change in presidential Administration, and the current Administration issued Executive Order 13990, entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." 86 Fed. Reg. 7037 (Jan. 25, 2021). Without identifying any legal or factual basis to do so, the Executive Order directed EPA to consider "suspending, revising, or rescinding" the 2020 Residual Risk and Technology Reviews for the MATS Rule—a rule that has nothing to do with greenhouse gases or climate change.

Following Executive Order 13990, EPA reconsidered its 2020 Residual Risk and Technology Reviews for the MATS Rule. For public health, EPA reached the exact same conclusion—that the original rule provided an ample margin of safety to protect public health. 88 Fed. Reg. 24854, 24895 (Apr. 24, 2023). As EPA noted, its 2020 residual risk analysis was "a rigorous and robust analytical review using approaches and methodologies that are consistent with those that have been utilized in residual risk analyses and reviews for other industrial sectors … [and] the results of the 2020 residual risk assessment … indicated low residual risk from the coal- and oil-fired EGU source category." 88 Fed. Reg. at 24866.

EPA's longstanding practice is that an ample margin of safety is a maximum excess cancer risk to the most exposed individual of less than 100-in-a-million. *See*

Nat. Res. Def. Council v. EPA, 529 F.3d 1077, 1082 (D.C. Cir. 2008). And under the Clean Air Act, EPA has discretion to delete a source category from regulation entirely if its HAP emissions do not "cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed." 42 U.S.C. § 7412(c)(9)(B)(i); *see also Nat. Res. Def. Council*, 529 F.3d at 1082 (one-in-one million standard is the Clean Air Act's "aspirational goal"). Here, under the standards already in place, the lifetime cancer risk of the person most exposed to coal-fired HAP emissions in the country is 0.344-in-a-million—significantly lower than the one-in-a-million threshold where EPA can stop regulating a source category entirely. App. 642a (NACCO Cmt. at 15, EPA-HQ-OAR-2018-0794-6000) (citing App. 650a-661a (Residual Risk Assessment for the Coal- and Oil-Fired EGU Source Category in Support of the 2020 Risk and Technology Review Final Rule, EPA-HQ-OAR-2018-0794-4553, App. 10, Tbls. 1 & 2a. (Sept. 2019)).

That should have been the end of it. In other Section 112(d)(6) rulemakings, EPA itself has taken the position that if its standards already "provide an ample margin of safety to protect public health and prevent adverse environmental effects, one can reasonably question whether further reviews of technological capability are 'necessary.'" 69 Fed. Reg. 48338, 48351 (Aug. 9, 2004); *see also* 71 Fed. Reg. 76603, 76608 (Dec. 21, 2006). But in this rulemaking, where the risk from coal-fired units is less than the negligible level of one-in-one-million, EPA did not even ask the question. Instead, EPA reversed course, deciding to see if it could interpret "development" in a way that would allow it to lower HAP emission standards for coal-

fired EGUs in the absence of any significant new practices, processes, or control technologies, and without quantifiable public health benefit from that reduction in HAP emissions. And lo and behold, EPA claimed to find "developments" that would justify dramatically revising the MATS rule in two ways: (1) reducing the surrogate fPM emission standard for all coal-fired EGUs by 66%; and (2) reducing the mercury emission standard for lignite coal-fired EGUs by 70%.

For the surrogate fPM standard, EPA's Technology re-Review again found "no new practices, processes, or control technologies" for the relevant HAP emissions. 88 Fed. Reg. at 24868. The primary control technologies used in 2012 are the same as today. *See* App. 662a (2023 Tech Review at 1). Nonetheless, EPA justified ratcheting down the standards under Section 112(d)(6) on the grounds that existing control technologies "are more widely used, more effective, and cheaper." 88 Fed. Reg. at 24866-72. EPA further concluded that "…most EGUs were reporting fPM emission rates well below the 0.030 lb/MMBtu standard. The fleet was achieving these performance levels at lower costs than estimated" during promulgation of the original MATS rule. 89 Fed. Reg. at 38530.

EPA's "development," in other words, was that EGUs were meeting the standard at lesser costs than estimated in 2012. EPA also determined there were marginal improvements in fPM control technology since the original MATS rule, stating that "industry has learned and adopted 'best practices' associated with monitoring ESP operation," and more "durable" materials for fabric filters have been developed since the original MATS rule. 89 Fed. Reg. at 38530.

And for the mercury emission standard, EPA revised the standard for lignite-firing EGUs because of alleged cost efficiencies for activated carbon injection control technology—the same technology that was in place at the time of the original MATS Rule. 88 Fed. Reg. at 24880. Then, with almost no record support, and in the face of numerous comments to the contrary, EPA determined those alleged cost efficiencies make lignite-firing EGUs capable of meeting the same control standard as other types of coal, dropping the emission standard by 70%. 89 Fed. Reg. at 38586.

EPA also prepared an analysis of the potential costs and benefits of the Rule in its Regulatory Impact Analysis ("RIA"). App. 685a, 718a-19a (RIA 3-1, 4-1–4-2). Able to point to no quantifiable public health benefit from the Rule's reduction in HAP emissions, EPA attempted to justify the Rule by claiming climate change benefits. 89 Fed. Reg. at 38561-62 (quantifying alleged particulate matter, ozone, and "climate" benefits); *see also* App. 723a-24a (RIA 4-16–4-17) (assessing climate impacts in its benefits analysis). EPA also claimed vague and unquantifiable benefits from mercury-reduction for subsistence fish consumers but recognized that these postulated benefits are so small they cannot be reliability extrapolated or quantified. App. 722a (RIA 4-5).

In exchange for zero quantifiable benefits from the mandated reduction in HAP emissions, the Rule imposes tremendous costs. For surrogate fPM emissions, the cost-effectiveness is $10.5 million per ton of HAP removed. 89 Fed. Reg. at 38532-33. Commenters noted this cost is much higher than the cost-benefit ratios EPA itself has explicitly *rejected* in other Section Rule 112 rulemakings for being excessive. And

EPA admits as much. 89 Fed. Reg. at 38523 ("EPA acknowledges that the cost-effectiveness values for these standards are higher than cost-effectiveness values that the EPA concluded were not cost-effective … for some prior rules.").

Commenters also stressed that the Rule's substantial compliance costs will result in serious economic harm and threaten power grid reliability. Yet EPA failed to address power outages or grid reliability in its RIA, matter-of-factly stating that the Rule will have no significant impact on the power grid or energy prices. *See* App. 685a-717a (RIA Section 3); 89 Fed. Reg. at 38555-56. And while EPA claims it consulted with the Department of Energy, the agency points only to a generic Memorandum of Understanding with DOE regarding interagency cooperation. Nothing in the record indicates EPA consulted with DOE (or any other grid operator or reliability expert) on *this specific rule*. *See* App. 676a-677a (Response to Comments at 156-57) ("This process is not linked to any one regulatory effort or final action.").

Moreover, EPA is promulgating this Rule against the backdrop of its failure to accurately estimate the impact the last MATS Rule would have on power plant operations. The last time the MATS Rule was litigated, EPA claimed it would only cause about 5,000 MW of generation to go offline. 77 Fed. Reg. at 9407 ("…expected retirements of coal-fueled units as a result of this final rule (4.7 GW) are fewer than was estimated at proposal and much fewer than some have predicted"). EPA was wrong. It ended up being closer to 60,000 MW.[1] Our power grids do not have the

[1] *See, e.g.,* U.S. Energy Info. Admin., *Planned coal-fired power plant retirements continue to increase* (Mar. 20, 2014), bit.ly/4dbYwfM (between 2012 and 2020, "about 60 gigawatts of coal-fired capacity is projected to retire … assum[ing] implementation of the MATS standards"); Pratson et. al., *Fuel Prices,*

same buffer of dispatchable generation that they did a decade ago. App. 595a (Vigesaa Decl. ¶11-12); App. 282a (Lane Decl. ¶¶12-13); App. 272a-273a (Huston Decl. ¶¶8-14).

Applicant States, along with many other petitioners, moved the D.C. Circuit to stay implementation of the MATS Rule pending litigation and provided an array of declarations describing the imminent harms threatened by the Rule's compliance deadlines. During the D.C. Circuit stay briefing, this Court issued its decisions in *Loper Bright* and *Ohio v. EPA*. *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244 (2024); *Ohio v. EPA*, 144 S. Ct. 2040 (2024). The D.C. Circuit denied the stay motions on August 6, 2024, stating only that "Petitioners have not satisfied the stringent requirements for a stay pending court review." App. 1a. Applicants now move this Court for a stay of the Rule pending resolution of the merits.

REASONS TO GRANT THE APPLICATION

This Court should stay the Rule until the merits of the challenges to it are resolved because the States will suffer irreparable harm absent a stay, a stay will not injure other parties or the public interest, and the States will likely succeed on the merits. *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008).

Of course, this application is not the only Clean Air Act-related emergency stay this Court has seen recently. States' Emergency Application for an Immediate Stay,

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Emission Standards, and Generation Costs for Coal v Natural Gas Power Plants, Am. Chem. Soc'y, Env'l Sci. & Tech., 4929 (Mar. 2013), bit.ly/3w7yLN2 (most coal-fired EGU retirements in the wake of the original MATS Rule were due to "stronger regulations," not unrelated market forces); *see also* App. 620a (Nat'l Min. Ass'n Cmt. at 2 & n.4, EPA-HQ-OAR-2009-0234-20531) (for the nearly 60 gigawatts of coal-fired EGU retirements announced between 2012 and 2016, "virtually all" the stated closures were "either fully or partially attributable to MATS and other EPA regulations").

West Virginia v. EPA, No. 24A95 (docketed July 26, 2024), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24a95.html. But these stay applications are the result of EPA's decision to bundle and simultaneously promulgate a "suite" of rules targeting coal-fired power plants with retirement-inducing costs. S*ee* EPA, *Biden-Harris Administration Finalizes Suite of Standards to Reduce Pollution from Fossil Fuel-Fired Power Plants* (Apr. 25, 2024), https://tinyurl.com/y5u92sx3. Serial agency actions that ignore congressional direction in order to destroy an entire industry require serial remedies.

I. THE STATES WILL SUFFER IRREPARABLE HARM WITHOUT A STAY

Absent a stay, Applicant States will suffer imminent and irreparable injury from the Rule. Applicant States, grid operators, and regulated EGUs provided an array of declarations establishing that the Rule will seriously undermine the long term reliability of our nation's power grids. Though retirements necessitated by the Final Rule may not happen for several years, irreversible decisions to put power plants on retirement tracks will need to be made now. But even short of potential power grid failures, the Rule will cause imminent and significant cost increases for ratepayers and consumers of electricity, including Applicant States themselves as major consumers of electricity.

A. The Rule Jeopardizes the Stability of the Nation's Power Grids.

Power grid instability and failures are frequently paid for in human lives. *E.g.,* App. 680a-82a (FERC-NERC-Regional Entity Staff Report: The February 2021 Cold Weather Outages in Texas and the South Central United States at 8-10 (Nov. 16,

2021) (over 200 fatalities during weather event "with most of the deaths connected to the power outages")). Consequently, threats to power grid reliability constitute irreparable harm. *E.g., Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016) ("the threat of grid instability and potential brownouts alone constitute irreparable injury."). And here, State and grid regulators have attested to the Rule's significant, foreseeable, and negative impacts on grid reliability. *See, e.g.*, App. 595a-600a (Vigesaa Decl. ¶¶11-26; App. 162a-168a (Fedorchak Decl. ¶¶7-24); App. 285a-293a (Lane Decl. ¶¶18-34); App. 550a-551a (Rickerson Decl. ¶¶13-15); App. 518a-525a (Nowakowski Decl. ¶¶7-12); App. 603a-604a (Webb Decl. ¶¶6-10); App. 273a (Huston Decl. ¶12).

According to a study commissioned by the North Dakota Transmission Authority, if the Rule causes any of North Dakota's lignite-fired EGUs to retire—which it appears designed to do—it will risk causing the entire MISO grid (which covers all or part of 15 states and parts of Canada) to experience black-outs resulting in economic damages ranging from $29 million to over $1 billion. App. 598a-600a (Vigesaa Decl. ¶¶22-25). Other declarants have attested to the devastating effects of grid failure, including documented health impacts and morbidity. App. 341a-342a (McLennan Decl. ¶67); App 541a-542a (Purvis Decl. ¶31) ("Other concrete damages would occur such as business shutdowns, food spoilage, property damage, and lost labor productivity").

Notwithstanding EPA's nothing-to-see-here attitude, there is substantial evidence in the record indicating that coal-fired power plant shutdowns are not only possible but likely due to the Rule, and that those retirements will cause significant

threats to the long term reliability of the power grid. *E.g.,* App. 609a-610a (Bohrer Decl. ¶¶21-24); 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. 558a-559a (Tschider Decl. ¶¶21-23); App. 306a-308a (McCollam Decl. ¶¶34-43); 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").

EPA has never grappled with this information, preferring to stick its head in the sand and rely on its unrealistic and counterfactual model which predicts that absolutely zero EGU retirements or shutdowns will occur as a result of the Rule. 89 Fed. Reg. at 38526. Though in a telling section, EPA dismisses widespread concerns about the Rule's foreseeable impact on power grid reliability by assuming that State or regional regulators will be able to use emergency powers to prop up the power grid if the Rule makes EGUs no longer commercially viable. 89 Fed. Reg. at 38526.

Moreover, this Rule is not the first time EPA has significantly underestimated the impact that its regulations will have on the power grid. As noted *supra*, the last time the MATS Rule was litigated EPA claimed that the Rule would only cause about 5,000 MW to go offline. But that ended up being wrong by over a factor of ten. Our power grids do not have the same buffer of dispatchable power that they had ten or even five years ago, and an error of the same magnitude as EPA's last profound error

will risk catastrophic impacts to our nation's power grids. App. 595a (Vigesaa Decl. ¶11-12); App. 282a (Lane Decl. ¶¶12-13); App. 272a-273a (Huston Decl. ¶¶8-14).

"EPA has no expertise on grid reliability." *Texas*, 829 F.3d at 432. Nor did EPA seek input from FERC or NERC before promulgating the Rule, entities entrusted with maintaining the reliability of our nation's power grids and which could have apprised it of the Rule's likely impact on grid reliability. EPA's lack of expertise, its pattern of grossly underestimating its Rules' impacts on power plant operations, and the seriousness of the attendant consequences weigh strongly in favor of a stay.

B. The Rule Will Impose Irreparable Economic Injury

In addition to the Rule's threats to grid reliability, Applicant States will suffer irreparable economic harm as a result of the Rule. EPA recognizes that compliance with the Rule will impose nearly a billion dollars in costs (presuming plants are able to comply at all). 89 Fed. Reg. at 38513, 38561. And as noted *supra*, complying with the Rule's three-to-four-year implementation period requires EGUs to make compliance and retirement decisions *now*. 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).

Without a stay, EGUs must immediately begin incurring costs. As of yet, it has not actually been established that EGUs will be able to consistently meet the Rule's new emission standards, and testing is needed to determine a pathway to compliance, if compliance is even possible. *E.g.,* App. 334a (McLennan Decl. ¶45) ("Minnkota must immediately begin mercury testing"); App. 555a (Tschider Decl.

¶11) ("must begin implementing the required controls and monitoring system immediately"). And beyond initial testing, supply constraints and the realities of power plant modification mean that meeting the Rule's three or four year deadlines require work to begin imminently. 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).

And even if EGUs are able to find a way to consistently comply with the Rule, and even if they can meet the Rule's deadlines for doing so, implementing the Rule will inevitably result in increased electricity prices for ratepayers, including Applicant States themselves as consumers of electricity. *E.g.*, App. 168a-170a (Fedorchak Decl. ¶¶25-33) (compliance costs for just *one* lignite-fired plant in North Dakota will cause *at least* a 0.5 percent rate increase); *see also* App. 287a-288a (Lane Decl. ¶23); App. 274a (Huston Decl. ¶¶16-17); App. 608a-609a (Bohrer Decl. ¶¶18-21); App. 333a-334a (McLennan Decl. ¶43); App. 561a (Tschider Decl. ¶29); App. 306a-307a (McCollam Decl. ¶¶33-35); App. 531a-532a (Purvis Decl. ¶11); App. 274a (Huston Decl. ¶17) (explaining how costs of installations are passed on to consumers). Indeed, EPA doesn't dispute that complying with the Rule will necessarily impose costs resulting "in the form of higher electricity bills." App. 782a (EPA Br. 44).

Applicant States (and their ratepaying citizens) will not be able to recover these costs even if they prevail on the merits, making those injuries irreparable. *E.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring

in part and in the judgment) ("complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs").

II. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR A STAY

The balance of harms and public interest weigh strongly in favor of a stay because, as discussed *supra*, EPA cannot point to any relevant, quantifiable harm to the public in staying the Rule. EPA acknowledges that the status quo, without the new Rule, already protects public health with an "ample margin of safety." 89 Fed. Reg. at 38508. Indeed, the current standard already far exceeds the Clean Air Act's aspirational standard for protecting public health, where, by statute, EPA could discontinue regulating the EGUs entirely. Conversely, the economic injuries and threats to power grid stability in the absence of a stay are real and imminent.

The public interest also strongly favors preserving the status quo when the public's access to affordable electricity is threatened. *Texas*, 829 F.3d at 435 (granting stay of EPA action that threatened to impose retirement-inducing costs on coal-fired plants because the "public interest in ready access to affordable electricity" outweighed "inconsequential" emissions reductions that implementation would have achieved during the pendency of the litigation); *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"); *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 357 (10th Cir. 1986) (public interest in residents not "los[ing] their source of electric power").

In short, even EPA acknowledges that current levels of HAP emissions from the worst performing coal-fired EGUs in the country already provide more than an ample margin of safety. There is no relevant, quantifiable public health benefit that will be gained by denying a stay, whereas the risks of not imposing a stay are tremendous. The balance of equities and public interest tilt sharply in favor of a stay.

III. APPLICANTS WILL LIKELY PREVAIL ON THE MERITS

In promulgating the challenged Rule, EPA disregarded the statutory text constraining its ability to exercise Section 112(d)(6) rulemaking authority only when doing so is "necessary." A revision can hardly be "necessary," when there is no relevant health benefit from it (as EPA itself has recognized in the past). And EPA's capacious interpretation of Section 112(d)(6)'s use of the term "development" to mean meeting the standard at lower costs is not a rational, let alone the "best" reading of the statute, and not entitled to any deference. *Loper Bright*, 144 S. Ct. at 2273.

Moreover, EPA's cost-benefit analysis of the Rule is indefensible, and the agency largely ignored evidence about one of the most critical aspects of the problem—the impact the Rule would have on grid reliability. All of which leads to the inexorable conclusion that the Rule's claimed public health benefits are merely pretext for EPA's true purpose in promulgating the Rule: regulating criteria pollutants related to climate change. *Contra West Virginia*, 597 U.S. at 735.

A. EPA Has Exceeded the Authority Delegated by Congress

Section 112(d)(6) of the Clean Air Act directs EPA to "review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years." 42 U.S.C. § 7412(d)(6). The "operative" phrase is "revise as necessary," and "EPA must consider practical and technological advances" when determining whether revision is "necessary." *La. Envtl. Action Network v. EPA,* 955 F.3d 1088, 1097-98 (D.C. Cir. 2020). Here, EPA has not even attempted to satisfy the statutory requirement that the Rule be "necessary," and its legal theory about what constitutes a "development" is unmoored from the statute.

1. Revising the MATS Standard Is Not "Necessary"

As a matter of common understanding and parlance, "necessary" means "needed for some purpose or reason; essential." Black's Law Dictionary, *Necessary* (11th ed. 2019); *see also, e.g.,* Merriam Webster's Collegiate Dictionary, *Necessary* (10th ed. 1994) ("absolutely needed"). Use of the term "necessary" is context-dependent, and requires answering the question necessary *for what*? *Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944) ("the word 'necessary,' [] has always been recognized as a word to be harmonized with its context"). And in the context of Clean Air Act Section 112, the "for what" can only be protecting public health and the environment from 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"). And that is doubly true for power plants, where Congress required EPA to

"perform a study of the hazards to public health" before it undertook any regulation of power plants under Section 112. 42 U.S.C. § 7412(n)(1)(A).

Here, the Rule's revisions to the MATS standard can hardly be deemed "necessary" when EPA is unable to point to *any* meaningful public health benefit to be gained from the Rule. Indeed, in other Section 112(d)(6) rulemakings, EPA itself has acknowledged that when its HAP emission standards already "provide an ample margin of safety to protect public health and prevent adverse environmental effects, one can reasonably question whether further reviews of technological capability are 'necessary.'" 69 Fed. Reg. at 48351; *see also* 71 Fed. Reg. 34422, 34437 (Jun. 14, 2006) (where an existing HAP emission standard "obtains protection of public health with an ample margin of safety and prevents adverse environmental effects, it is unlikely that it would be 'necessary' to revise the standard further, regardless of possible developments in control options").

EPA makes no attempt to quantify any public health or environmental benefits from the Rule's mandated reduction in HAP emissions. 89 Fed. Reg. at 38518-19; 38562. Instead, the only alleged "benefits" EPA purports to quantify in the Rule are reducing criteria pollutants and greenhouse gas emissions. *See* 89 Fed. Reg. at 38561 (pointing to alleged particulate matter, ozone, and "climate" benefits). But these alleged ancillary benefits cannot be used to justify EPA's exercise of rulemaking authority under Section 112(d)(6). As Chief Justice Roberts recognized the last time the MATS Rule was litigated, it is improper for EPA to use its Section 112 authority to "get at the criteria pollutants that you otherwise would have to go through a much

more difficult process to regulate. In other words, you can't regulate the criteria pollutants through the HAP program ...." App. 798a-99a (Transcript of Oral Argument at 59:19–60:5, *Michigan v. EPA*, Nos. 14-46, 14-47, 14-49 (Mar. 25, 2015)); *cf., e.g., Wyoming v. Dep't of Interior*, 493 F. Supp. 3d 1046, 1079 (D. Wyo. 2020) (agency "cannot rationally claim the Rule's objective is waste prevention while justifying its considerable costs almost entirely on climate change benefits").

Rather than trying to meet Section 112(d)(6)'s necessary requirement by establishing any relevant, quantifiable benefit to the Rule, EPA claims Section 112(d)(6) gives it the power to ratchet down HAP emission standards simply on the basis that "less is better." App. 739a (EPA Br. 1) (arguing its Section 112(d)(6) authorities are guided by a "[l]ess is better" standard). But this "less is better" assertion has no basis in the text of Section 112(d)(6) and ignores the statutory language constraining EPA's ability to make Section 112(d)(6) revisions only when doing so is "necessary." Congress could have said that EPA should revise these standards whenever "possible." But it didn't.

In short, the Rule is not "necessary" under the language of Section 112(d)(6) and any common sense meaning of that term, and EPA's failure to make any necessity determination before promulgating the Rule contravenes the statutory text.

2. There Has Not Been a "Development" to Justify Revising the MATS Rule

Rather than establishing that the Rule's revisions are "necessary" because the reduction in HAP emissions provides any relevant public health benefit, EPA grounds the Rule solely on the contention that there have been "developments" that enable

dramatically ratcheting down the standards. 89 Fed. Reg. at 38518. But even setting aside its failure to grapple with the term "necessary," EPA's capacious interpretation of the term "development" is also wrong.

As used in the context of Section 112(d)(6), "development" must mean some new, significant change that is correlated to revision of the emission standard. *E.g.*, Am. Heritage Dictionary (5th ed. 2011), *Development* ("A significant event, occurrence, or change"). Congress cannot have intended to empower EPA to revise the Section 112(d)(6) standards every time there is some alleged cost savings or some minor change or modification equivalent to a cell phone software patch.

EPA itself has previously recognized that a determination there are no substantially new practices, processes or control technologies means there are no "developments" that would allow revising an emission standard under Section 112(d)(6). *See* App. 646a-647a (2018 Tech Review Memo at 9-10); *see also* 76 Fed. Reg 81328, 81341 (Dec. 27, 2011) (defining "developments" for purposes of Section 112(d)(6) as: "(1) Any add-on control technology or other equipment that was not identified and considered during development of the [prior standard]; (2) Any improvements in add-on control technology or other equipment (that were identified and considered during development of the [prior standard]) that could result in significant additional emissions reductions; (3) Any work practice or operational procedure that was not identified or considered during development of the [prior standard]; and (4) Any process change or pollution prevention alternative that could

be broadly applied to the industry and that was not identified or considered during development of the [prior standard]"). None of these criteria are met here.

Nonetheless, to advance a policy goal of forcing coal-fired EGUs out of the market by setting dramatically reduced emission standards, EPA now interpreted the term "development" in Section 112(d)(6) to include the fact that EGUs have been able to comply with the existing standards at less costs than previously predicted. EPA purports to have found that many coal-fired plants have been able to comply with the surrogate fPM emission standards with more cost efficiency than EPA assumed when it promulgated the original MATS Rule. For surrogate fPM emissions, EPA claims as a "development" its alleged finding "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. Similarly, for mercury emissions from lignite-fired EGUs, EPA claims that alleged cost efficiencies for controlling mercury emissions from lignite-fired EGUs mean that those EGUs can be held to the same mercury emission standard as other coal-fired EGUs, and it "expect[s] that the units could meet the final, more stringent, emission standard of 1.2 lb/TBtu by utilizing brominated activated carbon at the injection rates suggested in the beyond-the-floor memorandum from the 2012 MATS Final Rule." 89 Fed. Reg. at 38547.

But those alleged cost efficiencies are not "developments" under Section 112(d)(6). The "core requirement" for tightening HAP emission standards under

Section 112(d)(6) is for EPA to identify new *technological* developments. *Natural Res. Def. Council v. EPA*, 529 F.3d at 1080, 1084 (summarizing Section 112(d)(6) as commanding "the Administrator to 'review, and revise as necessary' the *technology-based* standards in light of *technological developments*") (emphasis added). And that interpretation makes sense; Congress intended Section 112(d)(6) to serve as a periodic review of whether there were substantial changes in control technologies that would allow EPA to revise previously issued standards. There must be a substantial change in control technology or processes that is directly correlated to the mandated reduction in emission levels.

EPA now claims that a Section 112(d)(6) "development" can mean any "incremental changes," to include alleged cost efficiencies. App. 749a (EPA Br. 11). But the flaws in EPA's legal theory are obvious. All regulated sources must comply with a HAP emission standard once it is issued, or they must stop emitting. And for emission sources with variable fuel supplies (like coal-fired EGUs), they must do so at a level that ensures continuous compliance. If meeting an emission standard with alleged cost efficiency qualified as a "development," then the simple fact that a facility was complying with the relevant HAP emissions standard would allow EPA to continually tighten that standard in perpetuity until regulated sources can no longer meet the standards and are forced to shut down. This ever-tightening squeeze cannot be what Congress intended. *See, e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, (1982) (interpretation of a statute that would produce absurd results is to be avoided if alternative interpretations, consistent with legislative purpose, are

available). Even EPA has previously recognized that Section 112(d)(6) puts meaningful constraints on its ability to continuously ratchet down HAP emission standards. *See* 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 …").

EPA has relied upon the D.C. Circuit's decision in *Nat'l Ass'n for Surface Finishing v. EPA* to justify its capacious interpretation of the term "development." *See* App. 751a (EPA Br. 13 (citing 795 F.3d 1 (D.C. Cir. 2015)). But for a variety of reasons, EPA's invocation of that decision is not persuasive.

For one, in *Surface Finishing*, the D.C. Circuit specifically noted that the petitioner trade association *did not challenge* EPA's broad legal interpretation of the word "developments" under Section 112(d)(6). 795 F.3d at 8. Consequently, the Court did not address, let alone rule upon, the validity of EPA's capacious interpretation of the term. *Cf. Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Here, Applicants *do affirmatively* challenge EPA's interpretation.

Second, the *Surface Finishing* court specifically relied upon "the familiar deferential standard announced in *Chevron*." 795 F.3d at 7. *Chevron* is of course no longer good law, and courts must now "exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright*, 144 S. Ct at 2273. The D.C. Circuit's one-sentence denial of

Petitioners' motions to stay gives no indication that the court gave proper, or any, consideration to these critical issues and changes in law.

And third, in *Surface Finishing* EPA identified several technologies—emissions elimination devices, HEPA filters, enclosing tank hoods and fume suppressants—in support of its determination that there had been "developments" that warranted a reduction there. 795 F.3d at 11. Here, by contrast, EPA has not identified any such new technologies. Electrostatic precipitators and fabric filters were available for surrogate fPM control under the original MATS rule in 2012, and EPA itself determined those are the same technologies used today. *See* 88 Fed. Reg. at 24865. Similarly, activated carbon injection was available for control of mercury emissions under the original MATS rule in 2012, and that is the same technology used to control mercury emissions today. *See* 89 Fed. Reg. at 38517.

Finally, the marginal purported "developments" (other than alleged cost efficiencies) that EPA identified in the Final Rule cannot save it. For surrogate fPM emissions, EPA claims that increased durability in filter-bag material for baghouse controls is a development that warrants a ratcheting down of the fPM standard. 89 Fed. Reg. at 38530. But improvements in filter durability cannot be a "development" under the Clean Air Act, because in setting the HAP emission standard EPA already presumed that no malfunctions will occur. *See* 77 Fed. Reg. 9304, 9393 (Feb. 16, 2012). In other words, the MATS standard already assumes that the filter-bags will *never* break, so any alleged improvement in their durability is not a "development" that would justify further tightening the standard. Similarly, for mercury emissions,

activated carbon injection has been used since 2011, when EPA first proposed the original MATS standard, and the Final Rule's emphasis on the effectiveness of brominated powdered activated carbon is misplaced—as this product was both available and in use when EPA set the mercury standard in the original MATS rule. 89 Fed. Reg. at 38547; 76 Fed. Reg. 24976, 25014 (May 3, 2011). It cannot be a "development" justifying revising the standard.

* * * *

In summary, EPA can only revise HAP emission standards under Section 112(d)(6) when doing so is "necessary." EPA failed to make any determination that the challenged Rule's revision to the MATS standard were "necessary," and revisions without any corresponding benefit to either the public health or the environment from the mandated reduction in HAP emission can scarcely be described as "necessary." But even if a "development" in control technologies could be used to justify a Section 112(d)(6) revision without any corresponding benefit to public health or the environment, there has been no such development that would support the Rule's dramatic revisions to the standard here, and EPA's capacious interpretation of the term is not entitled to any degree of deference.

B. The Final Rule is Arbitrary and Capricious

An agency's rulemaking is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem…or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v.*

State Farm, 463 U.S. 29, 43 (1983). This Rule is arbitrary and capricious for many reasons, each of which warrants vacating it.

1. EPA's Cost-Benefit Analysis is Indefensible

This Rule makes clear that EPA has not learned the lessons this Court set forth in *Michigan v. EPA* regarding the agency's previous attempt to regulate HAP emissions for the coal and oil-fired EGU source category.

In *Michigan*, this Court made clear that Clean Air Act Section 112(n)(1)(A)'s use of the term "appropriate and necessary" "plainly subsumes consideration of cost." 576 U.S. at 753, 756. And EPA acknowledges that consideration of costs is similarly relevant for Section 112(d)(6) rulemakings. *See* App. 754a (EPA Br. 16 ("EPA considers 'costs, technical feasibility, and other factors when evaluating whether it is necessary to revise existing emission standards under [Section 7412](d)(6)) (quoting 89 Fed. Reg. at 38531); *see also Ass'n of Battery Recyclers v. EPA*, 716 F.3d 667, 673-74 (D.C. Cir. 2013) (rejecting argument that cost is irrelevant to emission standard revisions under Section 112(d)(6)).

EPA's cost-benefit analysis for this Rule, to the extent it can be called a cost-benefit analysis at all, provides no basis to justify the Rule. EPA anticipates that that the Rule will impose compliance costs of at least $860 million. 89 Fed. Reg. at 38512. Those costs of nearly a billion are weighed against zero quantifiable public health benefits from the mandated reduction in HAP emissions. In order to claim some "benefits" of the Rule, EPA pivots to pointing to alleged benefits that are unrelated to HAP emissions. 89 Fed. Reg. at 38512 (claiming $300 million in health benefits from reductions of non-HAP pollutants and $130 million in other "climate

benefits"). As noted *supra*, alleged benefits unrelated to the Rule's mandated reduction in HAP emissions cannot drive Section 112 rulemaking. And yet, even with these impermissibly considered ancillary benefits, EPA acknowledges that the Rule *still* has a "negative net monetized benefit"—meaning the costs of the Rule still outweigh the benefits by at least $440 million. *Id*. at 38511.

Moreover, under EPA's own calculations, the estimated cost-per-ton of HAP removed exponentially exceeds cost-benefit ratios that EPA has *rejected* for other Section 112 rulemakings. For surrogate fPM emissions, by EPA's own math, the cost effectiveness is $10.5 million per ton of HAP removed. 89 Fed. Reg at 38532-33. That is orders of magnitude higher than dollars per ton costs that EPA has explicitly rejected as being excessive. *See* 89 Fed. Reg. at 38522-23; 80 Fed. Reg. 75178, 75201 (Dec. 1, 2015) ($23,000 per ton of surrogate fPM emissions deemed excessive); 85 Fed. Reg. 42074, 42090 (Jul. 13, 2020) ($14,000 per ton volatile HAP emissions deemed excessive); 78 Fed. Reg. 10006, 10020-21 (Feb. 12, 2013) ($268,000 per ton of surrogate fPM emissions deemed excessive); 88 Fed. Reg. 11556, 11565 (Feb. 23, 2023) ($4.7M per ton of lead emissions deemed excessive). These costs will likely force power plant retirements and threaten grid reliability, *see supra*, but, even if they didn't, they will increase the price of electricity for consumers.

Having found that the costs of the Rule outweigh its benefits by at least $440 million (even when counting alleged ancillary benefits), 89 Fed. Reg. at 38512, EPA decided to ignore that analysis and rely instead on "alternative metrics." 89 Fed. Reg. at 38532. EPA claims that the benefits of the Rule's mandated reduction in HAP

emissions escape quantification. *See* 89 Fed. Reg. at 38559. That claim is in stark contrast to the original MATS rule, wherein EPA was able to quantify the alleged benefits of reducing the very same HAP emissions. *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). And regardless, EPA's attempt to avoid accountability for this Rule's indefensible cost-benefit analysis by pointing to unquantifiable (and unchallengeable) benefits is contrary to the reasoned decisionmaking demanded from the agency by this Court in *Michigan*. *Accord, e.g., 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.").

Moreover, *every* single past instance of rulemaking cited by EPA to justify abandoning any attempt to quantify the relevant benefits of this Rule either found the cost effectiveness to be within the range of acceptable values before considering other cost metrics, or declined to enact the rule due to facility-specific determinations of "poor cost effectiveness" even after considering other cost metrics. *See* 89 Fed. Reg. at 38532 n. 52 (citing 87 Fed. Reg. 27002, 27008 (May 6, 2022); 87 Fed. Reg. 1616, 1635 (proposed Jan. 11, 2022); 80 Fed. Reg. 50386, 50398 (Aug. 19, 2015); 80 Fed. Reg. 37366, 37381 (Jun. 30, 2015); 80 Fed. Reg. 14248, 14254 (Mar. 18, 2015); 77 Fed. Reg. 58220, 58226 (Sep. 19, 2012); 77 Fed. Reg. 49490, 49523 (Aug. 16, 2012)).

EPA's inability (or refusal) to quantify *any* HAP-related benefits of the Rule speaks volumes about the Rule's necessity and the adequacy of existing regulations.

And given that it is arbitrary and capricious for EPA to impose significant economic costs "for a few dollars" of benefit," *Michigan,* 576 U.S. at 752, so too where EPA 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).

2. EPA Failed to Adequately Consider Power Grid Impacts

In *Ohio v. EPA*, this Court recently issued a stay after the D.C. Circuit refused to, admonishing the agency must materially address comments relevant to its rulemaking. Here again, the D.C. Circuit denied a stay where EPA has done the same thing, this time regarding the Rule's foreseeable impact on our power grids.

Numerous commentators for this Rule put EPA on notice that our nation's power grids are already extremely strained, and that the Rule will likely force at least some coal-fired plants to retire. *See, e.g.,* App. 636a (Rainbow Energy Center Cmt. at 4, EPA-HQ-OAR-2018-0794-5990); *see also* App. 614a (MISO Cmt. on Docket ID Nos. EPA-HQ-OLEM-2021-0283, EPA-HQ-OLEM-2021-0282, EPA-HQ-OLEM-2021-0280, at 3); App. 617a-618a (Minnkota Power Coop. Inc. Cmt. at 2-3, EPA-HQ-OAR-2018-0794-5978); App.639a (Power Generators Air Coalition Cmt. at 12, EPA-HQ-OAR-2018-0794-5994); App. 625a-626a (NRECA Cmt. at 5-6, EPA-HQ-OAR-2018-0794-5956); App. 628a-633a (Cichanowicz Technical Cmt. at 39-44). Yet EPA failed to meaningfully address grid reliability in its Regulatory Impact Analysis, *see* App. 685a-717a (RIA Section 3), and EPA has never meaningfully considered the voluminous information it received describing the Rule's serious risks to the power grid.

EPA's perfunctory conclusion that the significant costs the Rule imposes on coal-fired EGUs will have <u>no</u> effect on the power sector, 89 Fed. Reg. at 38555-56, does not reflect reasoned analysis entitled to any degree of deference. "EPA has no expertise on grid reliability," *Texas*, 829 F.3d at 432, and comment after comment put EPA on notice that the Rule will foreseeably have significant impacts on power grid reliability. Nonetheless, the Final Rule does not reflect any attempt by EPA to seek input from FERC, NERC, or any similar entity that could have apprised it of the Rule's likely impact on grid reliability. *Cf. Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015) (encouraging EPA to solicit input from FERC on remand, as "[t]here is no indication that either FERC, the federal entity responsible for the reliability of the electric grid, 16 U.S.C. § 824o (b)(1), or NERC, FERC's designated electric reliability organization … was involved in this rulemaking or submitted their views to EPA.").

While EPA claimed in its briefing below that it "consult[ed] 'other federal agencies, reliability experts, and grid operators'" on the Rule, App. 772a (EPA Br. 34), that assertion appears to be a red herring. In support of that claim, EPA cited only on its own response to comments, where it describes a generic Memorandum of Understanding with the Department of Energy for interagency cooperation on certain aspects of grid reliability. App. 772a (EPA Br. 34). EPA does not indicate it consulted with DOE (or any other grid operator or reliability expert) on *this specific rule.* App. 676a-677a (Response to Comments at 156-57) ("This process is not linked to any one regulatory effort or final action.").

In its briefing below, EPA also pointed to its "state-of-the art" model, which assumes the Rule will cause *zero* plant retirements, to defend its conclusion that the Rule will have no impact on power grid reliability. App. 772a (EPA Br. 34). But EPA made no effort to ensure its model reflected the many comments it received warning that its baseline assumption of zero coal-fired power plants being forced to retire was likely incorrect, resulting in the agency reaching a conclusion that entirely ignores away a significant aspect of the problem. *Cf. Small Ref. Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983) ("agency must explain the assumptions and methodology used in preparing [a] model and, if the methodology is challenged, must provide a complete analytic defense") (internal quotations omitted). EPA's failure to adequately consider one of the Rule's most important impacts was arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Moreover, as noted *supra*, EPA has a history of dramatically underestimating the impact of its MATS rules on power plant operations. The last time EPA promulgated a MATS Rule it assured the country it would only cause about 5,000 MW to go offline, and it ended up being wrong by over a factor of ten. The dramatic difference represents a profound failure on EPA's part to analyze the rule's impacts on power generation and provides "proof that the harm has occurred in the past and is likely to occur again." *Wis. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985). Consequently, EPA's perfunctory conclusion that this Rule (dropping emission standards by 66-70%) will not cause a single retirement, App. 700a (RIA at 3-16),

should be viewed with extreme skepticism given the number of comments and declarations attesting EPA has gotten it profoundly wrong again.

Lastly, EPA's analysis of the Rule's power grid impacts is also arbitrary and capricious because it fails to "acknowledge and account for" the impacts of "contemporaneous and closely related rule[s]." *Portland Cement Ass'n v. EPA,* 665 F.3d 177, 187 (D.C. Cir. 2011). EPA expressly issued this Rule as part of a "suite" of rules targeting coal-fired power plants. *See* EPA, *Biden-Harris Administration Finalizes Suite of Standards to Reduce Pollution from Fossil Fuel-Fired Power Plants* (Apr. 25, 2024), https://tinyurl.com/y5u92sx3. EPA's failure to meaningfully assess how the confluence of these (and many other) rules targeting coal-fired power plants will affect the power grid further cements its arbitrary and capriciousness.

3. EPA's Basis for Promulgating the Rule is Pretextual

As an independent problem, EPA's stated justifications for the Rule appear to be pretextual. *Dep't of Com.*, 588 U.S. at 785. When an agency promulgates a rule, it must truthfully "disclose the basis of its action," and courts must set aside the rule if "the evidence tells a story that does not match the explanation." *Id.* at 780, 784. Accepting "contrived reasons" would vitiate the reasoned-explanation requirement and convert judicial review into an "empty ritual." *Id.* at 784-85. There is considerable evidence that is the case here. And in such cases, courts must evaluate "pretext" in light of "all evidence in the record before the court." *Id.* at 782.

Despite claiming it engaged in this rulemaking to protect the public from HAP emissions, 89 Fed. Reg. at 38509-10, available evidence indicates that EPA is using

its Section 112(d)(6) authority as part of an effort to force a nationwide transition away from coal for putative climate change reasons. *Contra West Virginia*, 597 U.S. at 735 (2022) (declaring it "not plausible" the CAA empowers EPA to "force a nationwide transition away from the use of coal to generate electricity").

The current EPA Administrator has made no secret that the agency would respond to this Court's curtailment of its authority to implement climate change-related rules by issuing a "suite" of rules designed to close fossil fuel-fired power plants using a variety of regulatory authorities unrelated to climate change.

As just one example, Administrator Regan said his agency would "couple" climate regulations with "health-based" regulations to regulate greenhouse gases and get around the *West Virginia v. EPA* decision.

> **PBS**: How much of a setback is [the *West Virginia v. EPA* decision] to your efforts to regulate greenhouse gases?
>
> **Regan**: …We still will be able to regulate climate pollution. And we're going to use all of the tools in our toolbox. …
>
> **PBS**: Well, can you give us a couple of examples of the kind of tools that you believe you still can use to regulate this industry?
>
> **Regan**: …We also have a suite of regulations that are facing the power sector. And so, *as we couple the regulation of climate pollution with the regulation of health-based pollution*, we are providing the power sector with a very clear picture of what regulations they're facing so that they can make the right investment decisions.

PBS, *EPA Administrator Michael Regan discusses Supreme Court ruling on climate change*, YouTube (June 30, 2022) (emphasis added), https://www.youtube.com/watch?v=Ic_1UxwsXj8 (accessed May 7, 2024); *see also, e.g.*, White House, *Press Gaggle by Principal Deputy Press Secretary Karine Jean-Pierre & Env't Prot. Agency Adm'r Michael Regan* (Feb. 17, 2022) (stating if the Supreme Court limits EPA's

ability to regulate greenhouse gas emissions, EPA will respond with "bread-and-butter regulations," such as "regulating mercury"), https://tinyurl.com/bddpr22j; Chemnick et al., *What the EPA's New Plans for Regulating Power Plans Mean for Carbon*, Sci. Am. (Mar. 11, 2022) (noting that when asked about the impending *West Virginia* decision, Administrator Regan said he "[doesn't] believe [EPA] ha[s] to overly rely on any one regulation" and suggested EPA could still achieve its climate goals by using authorities for protecting the public from mercury and air toxins).

Such public comments match internal documents that have been produced through FOIA indicating that EPA and the White House Climate Office contrived revising the MATS Rule as a means of reducing power plant emissions for climate change reasons. For example, in February 2021, EPA prepared a presentation for the White House *Climate Advisor*. *See* Power Sector Strategy: Climate, Public Health, Environmental Justice, Briefing for Gina McCarthy and Ali Zaidi (Feb. 4, 2021). App. 145a (Chang Decl. ¶¶3-5). While heavily redacted, the document evidences EPA's intent to use its regulatory authority under various programs, including the MATS Rule, for reducing power plant emissions to implement the Administration's climate agenda. App. 146a (Chang Decl. ¶¶6-7).

EPA's public statements and internal documents show that the "sole stated reason" for the Rule—*i.e.*, protecting the public from exposure to the regulated HAPs—was likely "contrived." *Dep't of Com.*, 588 U.S. at 784. This is not a case where the Court must risk substantial intrusion on Administrator Regan to inquire about his "mental processes," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401

U.S. 402, 420 (1971), as his public statements already lay bare his motivations. And the fact that EPA can identify no quantifiable public health benefits from the Rule's mandated reduction in HAP emissions, and instead claims millions of dollars in "climate" benefits, resolves any doubt as to EPA's true intent.

The purpose for EPA's "suite" of rules targeting coal-fired plants is recognized around the world, *e.g.,* Milman, *New US climate rules for pollution cuts 'probably terminal' for coal-fired plants*, Guardian (May 2, 2024), https://tinyurl.com/ykmb9xvn, and courts are "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com.*, 588 U.S. at 785 (citation omitted).

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.

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