ORAL ARGUMENT NOT YET SCHEDULED
Case No. 24-1119 (and consolidated cases)

United States Court of Appeals
For the District of Columbia Circuit

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

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Judicial Review of Final Agency Actions of the United States Environmental Protection Agency, 89 Fed.Reg. 38508 (May 7, 2024)

AMENDED MOTION FOR STAY

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Date: **June 07, 2024**

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 18(a)(4), 27, and 28(a)(1)(A), Petitioners certify:

A. Parties, Intervenors, and *Amici* to this Case (No. 24-1119)

Petitioners: 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: The United States Environmental Protection Agency.

Proposed Intervenors: (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 moved to Intervene on June 3, 2024; (2) 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 moved to intervene on June 6, 2024; (3) San Miguel Electric Cooperative, Inc. moved to intervene on June 7, 2024.

Proposed *Amici*: None at present.

B. Rulings Presented for Review

Final rule entitled *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review*. 89 Fed.Reg. 38508 (May 7, 2024).

C. Parties, Intervenors, and Amici in Related Cases in this Circuit

Consolidated cases: (1) *NACCO Natural Resources Corp. v. EPA and Michael S. Regan*, No. 24-1154; (2) *National Rural Electric Cooperative Association, Lignite Energy Council, National Mining Association, Minnkota Power Cooperative, Inc., East Kentucky Power Cooperative, Inc., Associated Electric Cooperative Inc., Basin Electric Power Cooperative, and Rainbow Energy Center, LLC v. EPA and Michael S. Regan,* No. 24-1179; and (3) *Oak Grove Management Company LLC and Luminant Generation Company LLC v. EPA and Michael S. Regan*, No. 24-1184.

/s/ Philip Axt
PHILIP AXT
Solicitor General of North Dakota

CERTIFICATE OF COMPLIANCE WITH RULES 18(A)(1) AND (A)(2)

The undersigned certifies that this motion complies with Fed. R. App. P. and D.C. Cir. R. 18(a)(1). On May 14, 2024, Petitioners submitted to EPA a Request for Administrative Stay Pending Judicial Review of the *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review*, published in the Federal Register at 89 Fed.Reg. 38508 (May 7, 2024). EPA acknowledged receipt of this request on May 21, 2024, but has not otherwise responded.

In accordance with Fed. R. App. P. and D.C. Cir. R. 18(a)(2), counsel for Petitioners notified EPA's counsel by voicemail and email on June 3, 2024, that Petitioners planned to file this motion. EPA opposes this motion.

/s/ Philip Axt
PHILIP AXT
Solicitor General of North Dakota

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GLOSSARY OF KEY ABBREVIATIONS AND ACRONYMS

Abbreviation Or Acronym	Defined
CAA	Clean Air Act
EGU	Electric Utility Steam Generating Units
EPA	Environmental Protection Agency
fPM	Filterable Particulate Matter
HAP	Hazardous Air Pollutant
Hg	Mercury
MATS	Mercury and Air Toxics Standards
RIA	Regulatory Impact Analysis

INTRODUCTION

With this Rule, EPA is ratcheting down the Mercury and Air Toxics Standards (MATS) for coal-fired power plants by 66-70%. The implementation costs will be substantial, power plants may be forced onto early retirement tracks, and power grid reliability will be threatened. Conversely, there is no relevant public health benefit from the mandated reduction in hazardous air pollutant (HAP) emissions. None. EPA recognizes that the 2012 MATS rule already reduced HAP emissions **well below** any threshold that would impact public health.

Petitioners will establish multiple legal infirmities on the merits requiring the Rule be set aside. But that victory will be meaningless absent a stay, because to comply with the Rule's three-year deadline for implementing the mandated changes (or retiring if they cannot), power plants need to take action immediately. EPA knows this. The last time the MATS Rule was litigated, the Supreme Court held 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 the victory proved hollow, because without a stay while the merits were heard, power plants were forced to make compliance and retirement decisions, resulting in billions expended and many plant closures in response to an unlawful regulation. The last time the MATS Rule was litigated is 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).

While EPA claims this Rule will have no impact on the power grid or energy prices, Petitioners have included with this motion an array of declarations from power plants and State regulators attesting that is not the case. And EPA has an established record of grossly understating the effect its rules will have on the power grid. The last time the MATS Rule was litigated, EPA assured the country that it would only cause about 5,000 MW to go offline. EPA was wrong. The number ended up being closer to 60,000 MW. Our power grids do not have the same buffer of dispatchable energy that they did a decade ago. If EPA is wrong to the same degree that it was last time, the impact to our power grids will be substantial.

Petitioners ask the Court to preserve the status quo by staying the Final Rule until the merits of this dispute are resolved. An expedited briefing schedule will limit the duration of any such stay.

BACKGROUND

Section 112 of the Clean Air Act (CAA) (codified at 42 U.S.C. § 7412) provides EPA statutory authority to set emission levels for certain HAPs enumerated in Section 112(b)(1). *Sierra Club v. EPA*, 895 F.3d 1, 7 (D.C. Cir. 2018). As EPA acknowledges, "Congress intended for CAA Section 112 to achieve significant reductions in HAP." 89 Fed.Reg. at 38535.

EPA issued the original MATS rule for HAP emissions from coal- and oil-fired electric generating units (EGUs) in 2012. 77 Fed.Reg. 9304 (Feb. 16, 2012). That rule identified different achievable control standards for mercury from EGUs that use lignite coal compared to other types of coal. The distinction was based on science: lignite is more variable than other types of coal and available technologies cannot consistently achieve the same control levels. 77 Fed.Reg. at 9393.

Eight years after a HAP emission level is set, EPA must evaluate if any "residual risks" remain to public health from those HAP emissions and whether there have been any developments in available control technologies. 42 U.S.C. §§7412(f)(2), (d)(6). EPA calls these the Residual Risk and Technology Reviews.

In 2020, EPA conducted those reviews for the MATS Rule. For the 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 for the Technology Review, EPA determined there were no developments in emission control technologies, practices, or processes that warranted revising the MATS Rule. *Id*. at 31298.

But six months later there was a change in presidential Administration and Executive Order 13990, entitled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which directed EPA to consider "suspending, revising, or rescinding" the 2020 Residual Risk and Technology

Reviews for the MATS Rule. 86 Fed.Reg. 7037 (Jan. 25, 2021). That was so despite the fact that EPA's authority for promulgating the MATS Rule under CAA Section 112 has nothing to do with climate change—it is about protecting the public from specified HAPs, not greenhouse gases.

Following Executive Order 13990, EPA reconsidered its 2020 Residual Risk and Technology Reviews for the MATS Rule. For public health, EPA reached the same conclusion. 88 Fed.Reg. 24854, 24895 (Apr. 24, 2023) ("the residual risk assessment showed all modeled exposures to HAP to be below thresholds for public health concern."). That should have been the end of it. In other Section 112(d)(6) rulemakings, EPA 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 EPA pressed on.

For its technology re-review, EPA again found "no new practices, processes, or control technologies" for the relevant HAP emissions. 88 Fed.Reg. at 24868. The control technologies used in 2012 are the same as today. *See* 2023 Technology Review for the Coal- and Oil-Fired EGU Source Category ("2023 Tech Review") at 1; 2024 Update to the 2023 Proposed Technology Review for the Coal- and Oil-

Fired EGU Source Category ("2024 Tech Update") at 17, 50.[1] Undeterred, to justify revising the standards, EPA points to alleged cost efficiencies for using those technologies, concluding those alleged efficiencies mean that all coal-fired plants, regardless of configuration or coal type, can now meet a 66% lower surrogate fPM emission standard for non-mercury HAPs. 89 Fed.Reg. at 38530.[2] For mercury, EPA concludes lignite is now capable of meeting the same control standard as other types of coal, dropping the emission standard by 70%. 89 Fed.Reg. at 38586. Coal-fired power plants must meet the new standards in three years or be on a retirement track. 89 Fed.Reg. at 38519.

ARGUMENT

The Court should stay the Rule while the merits are resolved because Petitioners are likely to prevail on the merits of their claims, Petitioners will suffer irreparable harm in the absence of a stay, and the balance of harms and public interest favor a stay. D.C. Cir. R. 18(a)(1).

[1] For non-mercury HAPs, the control technology remains electrostatic precipitators and fabric filters, and for mercury the control technology remains activated carbon injection. 2023 Tech Review at 16–18; 2024 Tech Update at 30–32.

[2] The Final Rule uses filterable particulate matter (fPM) as a surrogate for measuring the non-Hg metal HAP emissions. 89 Fed.Reg. at 38508.

I. Petitioners Are Likely to Prevail on the Merits

A. The Rule Violates Clean Air Act Section 112(d)(6) Because Revising the MATS Standard Is Not "Necessary"

EPA issued this Rule under CAA Section 112(d)(6), which permits revising HAP emission standards only as "necessary (taking into account developments in practices, processes, and control technologies)." 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).

The Rule's revisions are not "necessary" for several reasons.[3] For one, there is no relevant public health benefit. EPA acknowledges current HAP emission standards provide an ample margin of safety to protect public health and does not identify *any* quantifiable health benefit from the Rule's further reduction in HAPs. 89 Fed.Reg. at 38558-59. The alleged health "benefits" EPA purports to quantify—reducing criteria pollutants and greenhouse gases, *id.* at 38561-62—cannot serve as a basis for exercising Section 112(d)(6) authority.

Absent any relevant public health benefits from the Rule, EPA claims the revisions are "necessary" due to "developments" in controlling HAP emissions. *Id.* at 38518. But even if a "development" in control technologies could make revising

[3] Black's Law Dictionary (11th ed. 2019) (*Necessary*: "needed for some purpose or reason; essential.").

a HAP emission standard that provides no relevant health benefits "necessary" under Section 112(d)(6), EPA identified no new technologies, practices, or processes that would justify revising the MATS Rule. 42 U.S.C. § 7412(d)(6). The primary control technologies used today are the same as they were the last two times EPA undertook a technology review. 89 Fed.Reg. at 38517-18.

Rather than pointing to any new technology, EPA interprets "development" to mean cost-efficient compliance with already-existent technology. *Id.* at 38510. That interpretation of "development" is an atextual attempt to expand EPA's regulatory reach. *Cf. Nat. Res. Def. Council v. EPA*, 529 F.3d 1077, 1084 (D.C. Cir. 2008) (Section 112(d)(6) rulemaking revises "*technology-based* standards in light of *technological* developments" and requires identification of "*technological innovations*") (emphases added).

EGUs are *required* to comply with HAP emission standards after they are issued, and they must comply with a margin that accounts for fuel variability to consistently meet the emission standard 100% of the time. EPA's interpretation of such compliance as a "development" warranting further rulemaking constitutes a significant power grab—ignoring Section 112(d)(6)'s constraint to only revise the standards as "necessary," and empowering EPA to drive any disfavored source out of the market by tightening HAP emission limits until an emission source with a variable fuel supply is unable to comply *at all times.*

B. The Rule is Arbitrary and Capricious for Multiple Reasons

A rule 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.

First, EPA's cost-benefit analysis is indefensible. Section 112(d)(6) rulemaking requires reasonable consideration of cost. *See Ass'n of Battery Recyclers v. EPA,* 716 F.3d 667, 673-74 (D.C. Cir. 2013) (rejecting argument cost is irrelevant to emission standard revisions under Section 112(d)(6)). Yet EPA candidly admits the Rule has a "negative net monetized benefit." 89 Fed.Reg. at 38511. Under the standards already in place, EPA found the lifetime cancer risk of the person most exposed to coal-fired HAP emissions is 0.344-in-a-million—significantly less than the Clean Air Act's one-in-a-million threshold where EPA can stop regulating a source entirely. 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 CAA's "aspirational goal").

Even EPA's qualitative generalizations don't evidence any meaningful health benefits from the mandated reduction in HAPs. EPA admits the benefits of Hg reduction associated with the Rule are so small they can't be reliably extrapolated to

the broader population of fish consumers. RIA 4-5. And where risk to subsistence fishers located near lignite-fired plants has been studied, fisherman are already not exposed at a level associated with appreciable risk—and that is before the further reductions associated with this Rule. RIA 4-4. EPA's analysis of non-Hg HAP emissions is much the same, with EPA acknowledging "cancer risk was … within the acceptable range for multipathway exposure to the persistent and bioaccumulative non-Hg HAP metals." RIA 4-7. Likewise, noncancer risks did not exceed current thresholds for adverse health effects. *Id*.

To the extent EPA identified any quantifiable "benefits" of the Rule, they are *all* ancillary to the Rule's reduction in HAP emissions and cannot drive a Section 112 cost-benefit analysis. *E.g.,* 89 Fed.Reg. at 38561 (pointing to alleged particulate matter, ozone, and "climate" benefits). As Chief Justice Roberts noted during oral argument in *Michigan v. EPA,* it is improper for EPA to use 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…" Transcript of Oral Argument at 59:19–60:5, *Michigan v. EPA*, 576 U.S. 743 (2015). *Cf. 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").

In exchange for zero relevant public health benefits, the Rule will impose tremendous costs on coal-fired EGUs and electricity consumers. 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 cost-benefit ratios EPA has explicitly *rejected* as being excessive. *E.g.,* Westmoreland Mining Holdings Cmt. at 4, EPA-HQ-OAR-2018-0794-5935 (compiling examples). 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.") 89 Fed.Reg. at 38523. These costs will likely force power plant retirements and threaten grid reliability, *see infra*, but, even if they didn't, they will increase the price of electricity for consumers. Just as 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 Comm.,* 60 F.4th 956, 966 (5th Cir. 2023).

Second, even assuming cost-efficient compliance using existing technology can lawfully be considered a "development" in practices, processes or control

technologies warranting further restrictions under Section 112(d)(6), EPA has not provided a reasoned explanation to support its conclusion that coal-fired EGUs are capable of consistently meeting the Rule's new emission standards with available control technologies. Comment after comment put EPA on notice that the Rule's conclusions regarding compliance feasibility were flawed.[4] But to support its contrary conclusion, the Final Rule relies almost entirely on a single comment (the "Andover Report") that largely parrots EPA's conclusions from the proposed rule without sufficient factual basis or explanation and is woefully inadequate to support EPA's conclusions. *E.g.,* 89 Fed.Reg. at 38523, 38528, 38530, 38538.

Third, EPA failed to adequately consider the Rule's foreseeable impact on our nation's already-precarious power grids. Where, as here, EPA promulgates a Rule under Section 112(d) that will foreseeably impact grid reliability, it must thoroughly address the concern. *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015) ("'Costs' can mean many different things, including the cost associated with increased risk" of grid unreliability).

EPA's perfunctory conclusion that the significant costs the Rule imposes on coal-fired EGUs will have no effect on the power sector, 89 Fed.Reg. at 38555-56,

[4] *E.g.,* Lignite Energy Council Cmt. at 8-9, EPA-HQ-OAR-2018-0794-5957; Nat'l Mining Ass'n Cmt. at 10-15, EPA-HQ-OAR-2018-0794-5986; Westmoreland Mining Holdings Cmt. at 16-17 (proposed fPM standard is not achievable or feasible); Coal Conversion Counties Ass'n Cmt. at 8, EPA-HQ-OAR-2018-0794-6003 (proposed mercury standard is not achievable or feasible).

does not reflect reasoned analysis entitled to any degree of deference. "EPA has no expertise on grid reliability," *Texas v. EPA*, 829 F.3d 405, 432 (5th Cir. 2016), and comment after comment put EPA on notice that the Rule will foreseeably have significant impacts on power grid reliability.[5] Nonetheless, the Final Rule does not reflect any attempt by EPA to seek input from the Federal Energy Regulatory Commission (FERC), the North American Electric Reliability Corporation (NERC), or any similar entity that could have apprised it of the Rule's likely impact on grid reliability. EPA also failed to address power outages or grid reliability in its Regulatory Impact Analysis. *See* RIA Section 3. 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; *see also Del. Dep't of Nat. Res.*, 785 F.3d at 18 (encouraging EPA to solicit input from FERC).

Moreover, as noted *supra*, the last time the MATS Rule was litigated, EPA claimed it would only cause about 5,000 MW 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

[5] *E.g.,* Rainbow Energy Center Cmt. at 4, EPA-HQ-OAR-2018-0794-5990; *see also id.*, Attachment A at 3-4 (MISO Cmt. on Docket ID Nos. EPA-HQ-OLEM-2021-0283, EPA-HQ-OLEM-2021-0282, EPA-HQ-OLEM-2021-0280); Minnkota Power Coop. Inc. Cmt. at 3, EPA-HQ-OAR-2018-0794-5978; Power Generators Air Coalition Cmt. at 12, EPA-HQ-OAR-2018-0794-5994.

predicted"). EPA was wrong. It ended up being closer to 60,000 MW.[6] That dramatic difference represents a profound failure on EPA's part to analyze the rule's impacts on power generation. Consequently, EPA's perfunctory conclusion that this Rule (dropping emission standards by 66-70%) will not cause a single retirement, 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.

EPA's analysis of the Rule's grid impacts also 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 power plants with retirement-inducing costs. *See* EPA, *Biden-Harris Administration Finalizes Suite of Standards to Reduce Pollution from Fossil Fuel-Fired Power Plants* (Apr. 25, 2024).[7] EPA's

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[6] *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, 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* 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" stated the closures were "either fully or partially attributable to MATS and other EPA regulations").

[7] Available at https://tinyurl.com/y5u92sx3.

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.

Fourth, the Rule is arbitrary and capricious because EPA's stated reasons for it are pretextual. When an agency promulgates a rule, it must truthfully "disclose the basis of its action," and courts must set aside rulemaking when "the evidence tells a story that does not match the explanation." *Dep't of Commerce v. New York,* 139 S. Ct. 2551, 2575-76 (2019). Despite claiming it engaged in this rulemaking to protect the public from specified HAP emissions, 89 Fed.Reg. at 38509-10, available evidence—not least of which is the Executive Order *on climate change* which EPA admits spurred this rulemaking—indicates 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 v. EPA*, 597 U.S.697, 735 (2022) (declaring it "not plausible" the CAA empowers EPA to "force a nationwide transition away from the use of coal to generate electricity").

Internal documents produced through FOIA indicate 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). Ex.15 (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. *Id.* ¶¶6-7.

Those internal documents match public comments from the EPA Administrator, who repeatedly stated EPA would issue a "suite of rules" designed to close fossil fuel-fired power plants, with the co-benefit of combating climate change. *E.g.*, Geman, *EPA floats path on electricity CO2 emissions—with an asterisk*, Axios (Mar. 11, 2022).[8]

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

[8] Available at https://www.axios.com/2022/03/11/epa-electricity-co2-emissions.

> 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);[9] *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").[10]

EPA's public statements and documents evidence this Rule was not promulgated to protect the public from exposure to the regulated HAPs. The purpose for EPA's recent "suite" of rules targeting coal-fired plants is recognized around the world,[11] and courts are "'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Commerce*, 139 S. Ct. at 2575 (citation omitted).

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[9] Available at https://www.youtube.com/watch?v=Ic_1UxwsXj8 (accessed May 7, 2024).

[10] Available at https://tinyurl.com/bddpr22j.

[11] *E.g.,* Milman, *New US climate rules for pollution cuts 'probably terminal' for coal-fired plants*, Guardian (May 2, 2024), https://www.theguardian.com/us-news/2024/may/02/us-climate-rules-coal-plants-pollution.

II. Petitioners Will Suffer Imminent and Irreparable Harm Absent a Stay

A. Petitioner States Will Suffer Irreparable Economic Harm

Petitioner States will suffer irreparable economic harm if the Rule is not stayed during the pendency of litigation.

EPA's claim that the Rule will have almost no impact on electricity prices, 89 Fed.Reg. at 38555-56, does not reflect reasoned decision-making. EPA acknowledges that complying with the Rule will impose millions in costs (presuming plants are able to comply at all). 89 Fed.Reg. at 38561. Those costs must be borne somewhere, and Petitioners have provided declaration after declaration attesting that implementing the Rule will inevitably require prices to increase. Ex.2 (Fedorchak Decl.) ¶¶25-33; Ex.3 (Lane Decl.) ¶23; Ex.7 (Huston Decl.) ¶¶16-17; Ex.8 (Bohrer Decl.) ¶¶18-21; Ex.9 (McLennan Decl.) ¶43; Ex.10 (Tschider Decl.) ¶29; Ex.11 (McCollam Decl.) ¶¶33-35; Ex.16 (Purvis Decl.) ¶11. Any increase in retail electric rates will impose unrecoverable costs on Petitioner States and their residents, including the States as consumers of electricity. *E.g.*, *California v. Azar,* 911 F.3d 558, 581 (9th Cir. 2018) (economic injury sustained by states due federal agency action "is irreparable … because the states will not be able to recover monetary damages").

Moreover, absent a stay of the Final Rule during the pendency of litigation, State regulators will need to expend substantial resources overseeing

implementation of the Final Rule and attempting to mitigate its deleterious effects. Ex.2 (Fedorchak Decl.) ¶7; Ex.3 (Lane Decl.) ¶¶29-31.

B. The Rule's Compliance Costs and Infeasible Standards Risk Catastrophic Consequences for the Power Grid

Even more concerning than the imposition of unrecoverable economic costs, the Rule also threatens irreparable harm by undermining power grid reliability, as power outages are frequently paid for with human lives. *E.g.,* FERC-NERC-Regional Entity Staff Report: The February 2021 Cold Weather Outages in Texas and the South Central United States (Nov. 16, 2021) (over 200 fatalities during weather event "with most of the deaths connected to the power outages").

Although the Rule includes a three-year implementation period, absent a stay during the pendency of litigation, complying with that deadline (or commencing retirement plans if they cannot) requires EGUs to make decisions and take requisite actions *now*. Power plants cannot start and stop instantaneously; actions taken now will be irreversible and will affect power grids for years to come. Ex.8 (Bohrer Decl.) ¶¶24-28; Ex.9 (McLennan Decl.) ¶58; Ex.10 (Tschider Decl.) ¶¶25-30; Ex.11 (McCollam Decl.) ¶¶34-43; Ex.12 (Friez Decl.) ¶¶16-17; Ex.16 (Purvis Decl.) ¶¶15-19. As discussed *supra*, that is precisely what happened the last time the MATS Rule was litigated. Even though the Supreme Court ultimately held EPA acted unreasonably in promulgating the last MATS rule, *Michigan*, 576 U.S. at 743,

regulated EGUs had already been required to spend billions in compliance costs (or begin shutdown operations).

Power plants are again saying this Rule will result in substantial costs and may result in plant closures. Ex.8 (Bohrer Decl.) ¶¶21-24; Ex.9 (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."); Ex.10 (Tschider Decl.) ¶¶21-23; Ex.11 (McCollam Decl.) ¶¶34-43; Ex.16 (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"). That injury will be irreparable. *Texas v. EPA*, 829 F.3d at 434 (potential closures threatened "the very existence of some of Petitioner's businesses and, even assuming, *arguendo*, that the plant operators could recover their costs from…their consumers, this would not be a recovery made in the course of the litigation").

EPA's perfunctory conclusion this Rule will not affect the power grid at all, 89 Fed.Reg. at 38519, should not be trusted. "EPA has no expertise on grid reliability." *Texas v. EPA,* 829 F.3d at 433. That expertise resides in FERC and NERC, yet EPA did not consult either before finalizing the Rule. Nor does EPA's Regulatory Impact Analysis reflect a long-term assessment of grid reliability, despite receiving comment after comment that the Rule would have significant impacts on

the power grid. *See* RIA at 3-23–3-24. And EPA's feasibility determinations are supported almost entirely by a single comment that is woefully inadequate to support EPA's conclusions. *See* Ex.13 (Holmes Decl.) ¶11 (summarizing EPA's reliance on the Andover Report as "bootstrapping at its worst").[12] State and grid regulators attest the foreseeable impacts of this Rule on power grid reliability will be significant. Ex.1 (Vigesaa Decl.) ¶¶11-26; Ex.2 (Fedorchak Decl.) ¶¶7-24; Ex.3 (Lane Decl.) ¶¶18-34; Ex.4 (Rickerson Decl.) ¶¶13-15; Ex.5 (Nowakowski Decl.) ¶¶7-12; Ex.6 (Webb Decl.) ¶¶6-10; Ex.7 (Huston Decl.) ¶12.

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 Final Rule makes EGUs no longer commercially viable. 89 Fed.Reg. at 38526. EPA's reliance on such emergency, stopgap powers to prevent the Rule from breaking the power grids is the epitome of arbitrary and capricious agency action.

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, it will risk causing the entire MISO grid to experience black-outs resulting in economic damages ranging from $29 million to over $1 billion. Ex.1 (Vigesaa Decl.) ¶¶22-

[12] Further, an author of one of the few other studies EPA relies upon for its feasibility determination attests EPA is also misusing that study. Ex.14 (Benson Decl.) ¶¶6-8.

25. Given that the Rule will likely have the effect—if not the deliberate goal—of setting HAP emission standards that coal-fired EGUs in North Dakota and elsewhere will be unable to comply with, undermining long-term grid reliability is a foreseeable impact of the Rule that EPA failed to take seriously.

Furthermore, as noted *supra*, EPA's conclusion the Rule will have no impact on power plant operations should be viewed with skepticism given EPA's history of woefully underestimating the impact that its rules—and the MATS Rule specifically—will have on power plant operations. The last time EPA promulgated the MATS Rule, its claim that it would impact only about 5,000 MW of power ended up being wrong by over a factor of ten. The power grids today do not have the same buffer of dispatchable power that they had a decade ago, and an error on the same magnitude as EPA's last profound error would likely have catastrophic results. Ex.1 (Vigesaa Decl.) ¶11-12; Ex.3 (Lane Decl.) ¶¶12-13; Ex.7 (Huston Decl.) ¶¶8-14.

In similar circumstances, the Fifth Circuit stayed an EPA rule that a state plausibly alleged would result in grid instability due to the likely closure of coal-fired power plants during the pendency of litigation. *Texas v. EPA*, 829 F.3d at 434. In that case, Texas argued that the changes mandated by the challenged rule would cost power plants upwards of "$2 billion, rendering them uneconomical and forcing the plants to close" potentially "remov[ing] 3,000 MW to 8,400 MW of generating

capacity." *Id.* at 416. Consequently, the court held that "the threat of grid instability and potential brownouts alone constitute irreparable injury." *Id.*

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

Staying the Rule while Petitioners' challenge is heard on the merits will maintain the status quo, and EPA acknowledges the status quo already protects public health. 89 Fed.Reg. at 38508 (existing standards already provide an "ample margin of safety").

The public interest also favors a stay when that rule would potentially threaten the public's access to affordable electricity. *Texas v. EPA*, 829 F.3d at 435 (granting stay where "public interest in ready access to affordable electricity" outweighed "inconsequential" emissions reductions that rule implementation would have achieved during the pendency of the litigation); *see also, e.g.*, *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."); *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").

And courts have found "unconvincing" the suggestion that the public will be injured from a stay pending litigation where, as here, complying with the rule "would

not reduce emissions for at least three years." *Texas v. EPA,* 829 F.3d at 434. That is particularly the case where, as here, the existing conditions already far exceed federal safety or environmental goals. *Id.* at 434–35.

CONCLUSION

Petitioners ask the Court to stay implementation of the Final Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), (f) and (g) and Circuit Rule 32(e)(1), because it contains 5,193 words, excluding exempted parts, according to the count of Microsoft Word 2010. I further certify that the foregoing brief also complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared using Microsoft Word 2010 in 14-point proportionally spaced Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2024, the foregoing Amended Motion for Stay was served electronically on all registered counsel through the Court's CM/ECF system.

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