Nos. 24A178, 24A180, 24A179, 24A186, 24A197, 24A199, 24A203

In the Supreme Court of the United States

NACCO NATURAL RESOURCES CORPORATION (NO. 24A178);
STATE OF NORTH DAKOTA et al. (NO. 24A180);
WESTMORELAND MINING HOLDINGS LLC et al. (NO. 24A179);
MIDWEST OZONE GROUP (NO. 24A186);
TALEN MONTANA, LLC & NORTHWESTERN CORPORATION (NO. 24A197);
AMERICA'S POWER & ELECTRIC GENERATORS MATS COALITION (NO. 24A199), AND
NATIONAL RURAL ELECTRIC COOPERATIVE ASS'N et al. (NO. 24A203),

Applicants,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, ADMINISTRATOR,

Respondents.

Response of Environmental and Public Health Respondents in Opposition to Applications for a Stay

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RULE 29.6 DISCLOSURE STATEMENT

Air Alliance Houston, American Academy of Pediatrics, Alliance of Nurses for Healthy Environments, 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, National Resources Council of Maine, Natural Resources Defense Council, Ohio Environment Council, Physicians for Social Responsibility, and Sierra Club are nonprofit environmental and public health organizations. None of the organizations has any parent corporation or any publicly held company that owns 10% or more of its stock.

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The Environmental and Public Health Respondents (Respondent-Intervenors in the Court of Appeals) respectfully submit this consolidated response to the seven emergency applications for a stay of the final Environmental Protection Agency (EPA) rule titled *National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review*, 89 Fed. Reg. 38,508 (May 7, 2024) ("Update Rule"). A D.C. Circuit panel unanimously denied motions to stay the rule on August 6, 2024.

INTRODUCTION AND SUMMARY OF ARGUMENT

The applications do not satisfy any of the requirements for a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). The separate submission from the State Respondents explains that Applicants will suffer no irreparable harm during the lower court's review and that the equities disfavor emergency injunctive relief. This response demonstrates that Applicants are unlikely to succeed on the merits and that the case is unlikely to warrant this Court's review following plenary review below.

Two key misconceptions underlie Applicants' assertion that this case will eventually merit certiorari, as well as their demand for immediate relief. First, they mistakenly portray the Update Rule's predecessor, the 2012 Mercury and Air Toxics Standards (MATS), as an object lesson on the need for judicial stays. However, after this Court in *Michigan v. EPA*, 576 U.S. 743 (2015), found that EPA had erred by failing to consider cost, both it and the D.C. Circuit panel declined pleas to block MATS while the agency addressed its error. As corrected on remand after an exhaustive examination of costs and benefits (and unchallenged by any party), MATS

is a lawful rule that has delivered massive emissions reductions at costs far lower than predicted. MATS's history also refutes two other claims made by Applicants: that the health benefits of cutting hazardous air pollutants (a.k.a. "air toxics") from power plants are insignificant, and that limits on toxic emissions caused a large fraction of coal-burning plants to retire.

Second, the Applicants falsely portray EPA's Update Rule as imposing heavy burdens across the coal-burning power fleet. In fact, the vast majority of coal plants already meet both of the emissions standards that the Update Rule incrementally tightens; plants that need to reduce emissions to comply are only a small lagging subset of facilities. Of that subset, the great majority can meet the standards through better operation of existing controls; only a single facility—one with uniquely antiquated pollution controls, Colstrip—will need to make substantial capital investments in new controls. In the unlikely event three years is insufficient to make these modest improvements, states can grant sources a fourth to achieve compliance.

On the merits, Applicants' statutory attacks on the Update Rule are unlikely to succeed. They contend that by instructing EPA to "revise" standards "as necessary," 42 U.S.C. § 7412(d)(6), the statute requires EPA to "quantify" the "public health and environmental benefits" of its standards. *E.g.,* ND 23. That interpretation disregards the statutory text, which specifies what is "necessary" to the standards EPA has revised here: the "*maximum* degree of reduction in emissions … (including a *prohibition* on emissions, where achievable)" that can be accomplished "through application of measures, processes, methods, systems, or techniques" of pollution

control. 42 U.S.C. § 7412(d)(2) (applying those requirements to all "standards promulgated under" subsection 7412(d)) (emphasis added). Those defined necessities do not require EPA to quantify or weigh health and environmental effects. *Sierra Club v. EPA*, 353 F.3d 976, 990 (D.C. Cir. 2004). And they inscribe the congressional mandate Applicants deride: Less hazardous air pollution is better.

That text reflects Section 7412's core feature: technology-based standards, independent of EPA's assessment of the risks posed by the pollutants listed in Section 7412. Adoption of that technology-centered approach was the "central purpose of the 1990 Amendments" to Section 7412, enacted after EPA's inability to reliably quantify the health risks associated with hazardous air pollution produced twenty years of regulatory paralysis. *Sierra Club*, 353 F.3d at 979, 990. Applicants offer no plausible reason to believe Congress meant to reimpose that failed regime through paragraph 7412(d)(6)—indeed, that provision's terms confirm its focus on "practices, processes, and control technologies" rather than measurable health impacts. *Ass'n of Battery Recyclers v. EPA,* 716 F.3d 667, 672 (D.C. Cir. 2013) ("[N]othing in [paragraph 7412(d)(6)]'s text suggests that EPA must consider" public health benefits.).

Applicants also insist that "developments" cannot include incremental improvements in pre-existing technologies. *E.g.*, Westmoreland 27. But that interpretation defies the word's normal meaning, which encompasses gradual and steady changes, and the statutory context, which contains nothing limiting EPA to the wholly novel. 42 U.S.C. § 7412(d)(6) (instructing EPA to consider developments in "practices" and "processes" as well as "control technologies").

The factual predicate of Applicants' merits arguments—that EPA found the Update Rule to lack meaningful health benefits—is untrue. The agency identified an array of such benefits and explained the serious difficulties of monetizing the health impacts of hazardous air pollution. As EPA has repeatedly explained, that these benefits are unmonetized does not mean that they are small or unimportant.

Applicants' scattershot challenges to EPA's record determinations are unlikely to succeed (and even more unlikely ultimately to warrant certiorari). EPA adequately explained the challenged features of the Update Rule, and its technical judgments are well grounded in the record, including, for example, EPA's assessment of the Rule's very limited effects on the power grid.

Finally, Applicants have offered no basis to stay the Update Rule's separate, and severable, provisions requiring continuous (rather than quarterly) emissions monitoring or its revised startup definition.

BACKGROUND

The background is set forth in EPA's and the State Respondents' submissions.

REASONS FOR DENYING THE APPLICATIONS

I. APPLICANTS ARE UNLIKELY TO SUCCEED ON THE MERITS

A. Applicants Take the Wrong Lessons from *Michigan v. EPA*.

In advocating for a stay, Applicants mischaracterize *Michigan* in fundamental ways. First, they repeatedly suggest that the absence of a stay of the 2012 MATS rule forced the *Michigan* petitioners to comply with an unlawful rule and that by the time of this Court's decision in 2015, it was too late to matter. *E.g.*, NACCO 1; Talen 4.

Second, Applicants invoke *Michigan* for the thesis that benefits of controlling toxic pollutants are insignificant. And third, they claim the standards at issue in *Michigan* caused coal-plant retirements on a grand scale. All of those claims are incorrect.

1. *Michigan*'s Procedural History in No Way Supports a Stay Here.

Contrary to Applicants' retelling, the MATS litigation history corroborates this Court's and the D.C. Circuit's decisions to leave the standards in place while EPA filled the analytic gap identified in *Michigan*–an administrative response that no one, in the end, even challenged.

After the D.C. Circuit rejected a welter of challenges to the 2012 MATS rule (unaccompanied by any stay motions), *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), this Court granted certiorari on only a single issue—whether EPA had erred when it declined to consider costs before determining that it was "appropriate and necessary" to regulate power plants' mercury emissions under section 7412. This Court held that EPA had erred, and that the directive to decide whether regulation is "appropriate," 42 U.S.C. § 7412(n)(1)(A) requires "at least some attention to cost." *Michigan*, 576 U.S. at 752. However, it did not agree that MATS "should be vacated," No. 14-46, Br. of Michigan, et al. at 78; accord Br. of National Mining Ass'n 74, instead remanding to the D.C. Circuit for further proceedings with the guidance that "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." 576 U.S. at 759. The D.C. Circuit, after briefing and oral argument on remedy, remanded to EPA without vacating the MATS rule. *White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100, 2015

WL 11051103 *1 (D.C. Cir. Dec. 15, 2015). The Chief Justice denied petitioners' application to stay MATS pending disposition of a petition for certiorari on the remand/vacatur question, *Michigan v. EPA*, No. 15A886, 2016 WL 11900291 (Mar. 3, 2016). The petition was denied, 579 U.S. 903 (2016).

EPA promptly undertook a new notice-and-comment rulemaking to consider whether regulating hazardous emissions from coal- and oil-fired power plants was "appropriate," 80 Fed. Reg. 75,025 (Dec. 1, 2015), and concluded that, after considering costs, regulating power plants' emissions of air toxics was both appropriate and necessary, 81 Fed. Reg. 24,420 (Apr. 25, 2016).[1] States and industry parties filed petitions for review, *Murray Energy Corp. v. EPA*, D.C. Cir. No. 16-1127, but as in the 2012 litigation, no one sought a stay. With the assent of all petitioners, the case was placed in abeyance with a new presidential administration, Order, *Murray Energy Corp. v. EPA*, D.C. Cir. No. 16-1127 (Apr. 27, 2017) (#1672987). EPA reversed its finding in May 2020 (while leaving the emission standards in effect), *see* 85 Fed. Reg. 31,286, 31,312 (May 22, 2020), but following another change of administration, EPA reaffirmed that, considering cost, regulation is appropriate. 88 Fed. Reg. 13,956 (Mar. 6, 2023). EPA decided that the proper measure of appropriateness was "to consider *all* of the impacts of the regulation using a totality-of the-circumstances approach rooted in the *Michigan* court's direction to 'pay[] attention to the advantages *and* disadvantages of [our] decision[].' 576 U.S. at 753[.]"

[1] EPA balanced various measures of costs against what it found to be substantial (and almost completely unmonetized) benefits of reducing air toxics, and also conducted a formal benefit-cost analysis. 81 Fed. Reg. 24,420, 24,423-24 (Apr. 25, 2016); 80 Fed. Reg. 75,025, 75,038-40 (Dec. 1, 2015). Under each approach, EPA found regulation appropriate. 81 Fed. Reg. at 24,427.

88 Fed. Reg. at 13,957.[2] No one challenged EPA's 2023 decision. With all parties' assent, the D.C. Circuit dismissed the challenges to EPA's 2016 and 2020 actions.[3]

The MATS story was not, as Applicants would have it, one of an unauthorized regulation kept alive by judicial lassitude or bad-faith machinations. In a complex rulemaking, EPA made a discrete legal error, one the agency duly corrected. Both this Court, the D.C. Circuit, and the Chief Justice as Circuit Justice rejected arguments that MATS should be vacated or enjoined before EPA had a chance to correct its error. The corrected MATS rule is entirely lawful, and Applicants chose not to claim otherwise when they had the opportunity to do so.

Since MATS went into effect, mercury emissions from power plants have dropped by 86 percent compared to 2010, *id.* at 13,963 – a large decline in *national* mercury emissions given coal-burning power plants' former place as the dominant sources in overall national emissions. Other hazardous pollutant emissions reductions have been comparably large. See 88 Fed. Reg. at 13,963 (noting declines

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[2] EPA noted that the MATS compliance costs were "likely significantly less than the EPA's projected estimate in the 2011 RIA," in part because "the controls that were used were less expensive than projected." 88 Fed. Reg. at 13,958; *id.* at 13,976 ("[P]rojected control-related costs for 2015 of about $7 billion were likely overestimated by $2.2 to $4.4 billion, and possibly more.").

[3] *See, e.g.*, Order, *Murray Energy Corp. v. EPA*, No. 16-1127 (July 7, 2023) (#2006881); Order, *Westmoreland Mining Holdings v. EPA*, No. 20-1160 (July 13, 2023) (#2007767); Order, *American Academy of Pediatrics v. EPA*, No. 20-1221 (July 13, 2023) (#2007748). It is no answer that challenges to EPA's 2023 finding "would have been futile," America's Power 8, because firms had already complied with MATS. In a similar posture, myriad parties in fact challenged the 2016 finding. *Murray Energy Corp. v. EPA*, D.C. Cir. No. 16-1127 (filed Apr. 25, 2016) (#1610467); *Oak Grove Mgmt. Co., LLC v. EPA*, D.C. Cir. No. 16-1206 (filed June 24, 2016) (#1622139); *S. Co. Servs., Inc. v. EPA*, D.C. Cir. No. 16-1208 (filed June 24, 2016) (#1621874). Even where capital investments have been made, compliance with MATS is an ongoing matter with substantial annual operating costs, *see* EPA, Supplemental Data and Analysis Technical Support Document for the MATS Appropriate and Necessary Reaffirmation at 11, tbl. A-3, EPA-HQ-OAR-2018-0794-4586 (Sept. 21, 2021) (showing $1 billion in annual operations and maintenance costs in retrospective analysis of 2012 MATS rule). Vacatur would have eliminated those costs, and also obviated the updated standards Applicants complain of here.

of 96 percent in toxic acid gas emissions and 81 percent in non-mercury metal hazardous air pollutants). MATS's success has been a huge boon for public health: before MATS was implemented, about four million women of childbearing years faced methylmercury exposures exceeding the reference dose reflecting risk of permanent neurodevelopmental harms to developing fetuses with over 500,000 having faced exposures at least 3 times the reference dose, 88 Fed. Reg. at 13,983. About half of the nation's lakes and streams (including waterbodies in every state) were subject to mercury advisories warning of health risks from consuming mercury-contaminated fish.[4] MATS's broad success in reducing toxic emissions has not been universal; it is the remaining gaps, with corresponding dangers for affected populations, that the Update Rule addresses.

2. The *Michigan* Remand Proceedings Confirmed the Weighty Health Benefits of Limiting Hazardous Air Pollution and that those Benefits Could Not Be Readily Monetized.

Applicants' misconception that only monetized benefits count when considering the "advantages and disadvantages" of regulating these emissions misconstrues *Michigan*. Applicants' description of the Update Rule's benefits as "trivial" (America's Power 3), nonexistent (NRECA 2), or not "meaningful" (NRECA 16; Talen 1) rely on this misconception. First, the Court in *Michigan* did not question the serious health hazards of congressionally-designated toxic air pollutants, and

[4] Nearly 73,000 river and stream miles and 8,508,000 acres of lakes, reservoirs, and ponds nationwide are designated impaired under 88 Fed. Reg. 13,956, 13,983 (Mar. 6, 2023). As of 2011, all 50 states had mercury-related fish consumption advisories in place, affecting thousands of waterbodies. EPA, 2011 National Listing of Fish Advisories 4 (2013), https://archive.epa.gov/epa/sites/production/files/2015-06/documents/technical-factsheet-2011.pdf.

expressly did not construe the statute to require EPA to rely on analysis in which "each advantage and disadvantage [of regulation] is assigned a monetary value," 576 U.S. at 759. Furthermore, in the remand proceeding following *Michigan*, EPA explained that data gaps make it "technically challenging to quantitatively estimate" the health benefits of reducing emissions despite the richly documented, serious hazards associated with mercury, arsenic, selenium and the other hazardous air pollutants emitted by coal-burning power plants. 88 Fed, Reg, at 13,970.

EPA also explained that such challenges did "not mean that these benefits are small, insignificant, or nonexistent." *Id*. To the contrary,

> [t]he nature and severity of effects associated with HAP exposure, ranging from lifelong cognitive impairment to cancer to adverse reproductive effects, implies that the economic value of reducing these impacts would be substantial if they could be quantified and monetized completely.

Id. at 13,972. EPA did consider quantified benefits where possible, noting that its upper-bound estimates of the fatal heart attacks that would have resulted from power plant mercury emissions without MATS would be valued at $720 million per year, and IQ losses from in utero exposures to mercury at $50 million per year. *Id.* EPA noted: "These estimates … illustrate the point that the HAP impacts are large and societally meaningful," but were not "even close to the full monetized benefits of reducing HAP." *Id*. EPA concluded that regulating toxic emissions from power plants under section 7412 "greatly improves public health by reducing the risks of premature mortality from heart attacks, cancer, and neurodevelopmental delays in children, and by helping to restore economically vital ecosystems used for recreational

and commercial purposes." *Id.* at 13,968. These benefits would be "particularly pronounced" for vulnerable groups like children. *Id.*

3. Applicants' Claims that MATS Caused Massive Coal Retirements Are Wrong.

It is not true that MATS "produced 'a wave of coal unit retirements' resulting in the loss of around 19% of the Nation's total coal capacity (60 GW out of 315 GW)," NACCO 9 (quoting NMA Comment at 2 (Jan. 15, 2016), https://perma.cc/7WNL-NKLG), or that EPA's initial estimate that MATS "would only cause about 5,000 MW to go offline" was "wrong by over a factor of ten," ND 36. In fact, the dominant cause, by a wide margin, of U.S. coal retirements in the mid-2010s was plummeting natural gas prices. In promulgating MATS in December 2011, "EPA projected a 2015 natural gas price of roughly $5/MMBtu"; however, "[s]everal years later, as MATS compliance began, prices averaged roughly $2.75/MMBtu for the years 2015 through 2019." 87 Fed. Reg. 7624, 7653 (Feb. 9, 2022). "This market shift greatly changed the economics of power plant operation for fossil fuel-fired facilities, with the electric sector surpassing the industrial sector to become the largest consumer of natural gas …, and gas-fired generators becoming the leading source of electric generation in the electric sector, representing 40 percent of total generation in 2020." *Id.* at 7653.

Independent studies of coal facility retirements in the mid-2010s "[g]enerally … attribute closures primarily to the decrease in natural gas prices, and they also note smaller factors such as advances in the cost and performance of renewable generating sources, lower-than-anticipated growth in electricity demand, and environmental regulations." *Id.* at 7653. One peer reviewed study found "that lower

electricity consumption and natural gas prices account for a large majority of the declines in coal plant profitability and resulting retirements," and that MATS and other environmental regulations "played a relatively minor role in declines of coal plant profitability and retirements." *Id.* (citing J. Linn & K. McCormack, *The Roles of Energy Markets and Environmental Regulation in Reducing Coal-Fired Plant Profits and Electricity Sector Emissions*, 50 RAND Journal of Economics 733–767 (2019)). Another study found that

> declines in natural gas prices explained about 92 percent of the decrease in coal production between 2008 and 2016. Air regulations, including MATS, explained about 6 percent of the drop in coal production. The study attributed about 5.2 GW of coal-fired EGU retirements to MATS.

87 Fed. Reg. at 7653 (citing J. Coglianese et al., *The Effects of Fuel Prices, Environmental Regulations, and Other Factors on U.S. Coal Production, 2008–2016*, 41 The Energy Journal 55 (2020)).

B. Applicants Mischaracterize the Scope of EPA's Update Rule.

The stay applications persistently mischaracterize the scope and effect of the Rule as well as facts in the record about the number of plants and units affected, the degree of adjustments needed, and the time allotted to comply. By mischaracterizing or omitting these facts, Applicants imply that the entire coal-fired power industry will face difficult-to-meet requirements.

This is far from the truth. In fact, the Update Rule affects only a small, outlying fraction of coal-fired power plants, generally with outdated or poorly maintained controls, that produce outsized emissions. *See, e.g.*, 89 Fed. Reg. at 38,520, 38,537.

Even among this small subset of plants, many will have to make only minimal adjustments to attain compliance.

Most coal-fired power plants *already* comply with both new standards, with only a minor fraction—27 plants—having units projected to require changes.[5] The units in these 27 plants requiring additional reductions in air toxics emissions are projected to generate less than two percent of total U.S. electricity generation in 2028. 89 Fed. Reg. at 38,555. By contrast, the 2012 MATS rule affected 600 power plants with 1,100 coal-fired units, accounting for a large share of U.S. power generation. EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards 3-3 (Dec. 2011); *id.* at 2-2 tbl. 2-3 (coal comprised approximately 45% of 2009 electricity generation, the greatest share of any generation type).

In fact, of the 314 coal-fired Electric Utility Steam Generating Units ("units," or "EGUs") EPA expects to be operational at the Update Rule's compliance date, 93 percent have already met the Rule's revised standard for non-mercury metals like nickel and arsenic (for which EPA uses a filterable particulate matter standard as a surrogate, hereinafter called the "surrogate standard"), set at 0.010 lb/MMBtu. 89 Fed. Reg. at 38,530, 38,553; 2024 Technical Memo, EPA-HQ-OAR-2018-0794-6919, at 12, 13 fig. 4. And 77 percent of those units emit far below that threshold, at 0.006 lb/MMBtu. 2024 Technical Memo 13, fig. 4. Only 33 units operate above the revised surrogate standard, 89 Fed. Reg. at 38,530, and of those, more than half (20 units)

[5] *See* EPA, 2024 Technical Memo, EPA-HQ-OAR-2018-0794-6919, at 35-36 tbl.10 (Jan. 2024) ("2024 Technical Memo"); *id.*, Attachment 1 (0.010 Limit Assumptions tab); *see also* EPA, MATS for Coal-Fired Power Plants ("EPA Presentation") 11 (Apr. 25, 2024), https://www.epa.gov/system/files/documents/2024-04/presentation_mats_final-2024-4-24-2024.pdf.

can come into compliance with only improved maintenance and operation of existing controls, with very minimal costs and no capital investments needed, 89 Fed. Reg. at 38,522; 2024 Technical Memo 15. Of the 13 units that may need to make some level of capital investments, only a single plant—Colstrip, the sole plant in the country that has chosen to forgo modern particulate controls—will need to make substantial improvements. 89 Fed. Reg. at 38,522, 38,533. The technology employed at Colstrip, venturi wet scrubbers, has been abandoned as obsolete by other coal-burning facilities. *Id.* at 38,522, 38,531; *see also* Northern Cheyenne Cmts. on Proposed Rule at 2, EPA-HQ-OAR-2018-0794-5984 (June 23, 2023) (Colstrip "is the only plant still operating without industry-standard particulate matter controls"). Claims that Colstrip has been "able to meet the [2012 Rule's] control technology limitation" with wet scrubbers, Westmoreland App. 10, are also misleading. By choosing to use outdated, 40-year-old scrubbers, Colstrip has struggled to meet even the original 2012 standard, violating its permits and incurring penalties. 89 Fed. Reg. at 38,531.

The other standard at issue, the revised mercury standard for lignite-fired EGUs, will also require relatively minor improvements to operation of existing controls for only a small number of units: at most 22 units at 12 plants. 2024 Technical Memo at 30-32, tbl. 8; *see also* 89 Fed. Reg. at 38,540 ("Most Hg [mercury] control technologies are 'dial up'" technologies—for example, sorbents or chemical additives have injection rates that can be 'dialed' up or down to achieve a desired Hg emissions rate."). Lignite-fired units are expected to utilize the same controls they already have in place, and to comply with the revised standards simply by increasing

the treatment rate with an existing sorbent or using a different commercially-available sorbent. 89 Fed. Reg. at 38,540, 38,549. Many units will need to improve their control percentages by 5% or less, and no significant capital investments are anticipated for *any units*. 2024 Technical Memo at 35-36 tbl.10 (comparing 2022 mercury control percentage to the percentage required to meet the Update Rule's limits). Other types of units burning similar fuels already emit 80% less mercury than those 12 plants. 2024 Technical Memo at 38 (comparing average annual emissions rate of 0.6 lb Hg/TBtu for EGUs firing subbituminous coal with average annual emissions rate of 3.0 lb Hg/TBtu for units firing lignite).

Finally, while Applicants describe the relevant compliance deadline as three years, Westmoreland 30; NACCO 23; NRECA 25, they largely ignore that coal plants can obtain an optional one-year extension at the discretion of their own State permitting authorities (most of which are Applicants here). 89 Fed. Reg. at 38,519; 42 U.S.C. § 7412(i)(3)(B); EPA Presentation at 11 (showing 18 of the 27 plants are in Applicant states). The same extension option was available under the 2012 Rule, 77 Fed. Reg. at 9409, and several affected source operators requested and were granted extensions by their state permitting authorities. 89 Fed. Reg. at 38,519. Applicants offer no evidence that such an extension would not be available to them now.

C. Statutory Text, Context, and Design Establish that Paragraph 7412(d)(6) Prescribes a Technology-Focused Inquiry.

1. Congress Enacted Subsection 7412(d) to Repudiate the Standard-Setting Regime Proposed by Applicants.

Congress designed section 7412 deliberately and expressly to repudiate the regime proposed by Applicants, in which EPA's ability to "quantify [the] public health or environmental benefits" caused by "reducing [toxic] emissions," ND 23, would serve as the "benchmark" for EPA's emission standards, NACCO 16. The Act, before the 1990 Amendments, took that approach: "EPA followed a *risk-based* analysis to set emission standards," dependent upon the agency's ability to assess the "levels of [hazardous air pollutants] at which health effects are observed." *Sierra Club v. EPA,* 353 F.3d 976, 979 (D.C. Cir. 2004). *See also NRDC v. EPA*, 824 F.2d 1146, 1165 (D.C. Cir. 1987) (rejecting EPA standard in absence of "finding as to the risk of health").

Congress found that scheme "worked poorly," producing a dismal "record of false starts and missed opportunities." S. Rep. No. 101-228, at 128, 132 (1989), reprinted in V Env't & Nat. Res. Div. of Congressional Res. Serv., A Legislative History of the Clean Air Amendments of 1990, at 8468, 8471 (1993) ("Leg. Hist.")). In 20 years of risk-based standards EPA regulated only "a small fraction of the many substances associated … with cancer, birth defects, neurological damage, or other serious health impacts." II Leg. Hist. at 3175 (H.R. Rep. No. 101-490, at 151). This failure was driven, in large part, by the inherent difficulty of reliably identifying the "increase in death or serious illness" and other health risks resulting from exposure to air toxics. *Id.* at 8471 (S. Rep. No. 101-228 at 131). *See Sierra Club* 353 F.3d at 979 (Risk-based approach "proved to be disappointing … [i]n part because of uncertainty of appropriate levels of protection under a risk-based regime."). The "risk of adverse health effects" from exposure to hazardous air pollution is "not distributed evenly

across the population," even as "Americans living within the vicinity of concentrated industrial activity … may face relatively high risks." V Leg. Hist. at 8472 (S. Rep. No. 101-228 at 132); *see id.* at 3177 (H.R. Rep. No. 101-490 at 157) (recognizing concentrated effects "near large industrial sources"). Epidemiological studies into hazardous air pollutants' harms are, as a result, frustrated by "small population size" and lack "sufficient statistical power to detect effects." 89 Fed. Reg. at 38,516. Moreover, the hazardous substances regulated by section 7412 "express their toxic potential only after long periods of chronic exposure," obscuring EPA's ability to characterize their effects. V Leg. Hist. at 8522 (S. Rep. No. 101-228 at 182) (observing that the "public health consequences" of hazardous air pollution were consequently unlikely to be "given sufficient weight in the regulatory process").

The 1990 Clean Air Act Amendments responded with "fundamental changes" to the air toxics program meant to end the "inertia that … plagued the health-based, standard-setting process." V Leg. Hist. at 8473, 8496 (S. Rep. No. 101-228 at 133, 156). The centerpiece was a shift to "technology-based standards" as "the principal focus of activity under section [7412]." *Id.* at 8473 (S. Rep. 101-228 at 133). To avoid the stasis that had resulted from the 1970 Act's risk-based standard-setting program, Congress itself selected the hazardous pollutants whose harms it deemed serious enough to warrant regulation, 42 U.S.C. § 7412(b)(1), specifying 191 substances that "posed especially serious health risks," compared to "more pervasive, but less potent" pollutants, II Leg. Hist. at 3339 (H.R. Rep. No. 101-490 at 315). Congress then confined EPA to a standard-setting regime—set out in subsection 7412(d)—"based

on the performance of technology, and *not* on the health and environmental effects of the hazardous air pollutants" Congress had listed for regulation. V Leg. Hist. at 8488 (S. Rep. No. 101-228 at 148) (emphasis added); *see id.* at 8509 (S. Rep. No. 101-228 at 169) ("The number of cancers prevented per dollar is not any part of the definition of maximum achievable control technology as used here (or elsewhere in the Act).").

The amended statute "preserved" risk-based standards in a separate subsection 7412(f), as a backstop "for especially serious pollution problems," V Leg. Hist. at 8473 (S. Rep. No. 101-228 at 133). 42 U.S.C. § 7412(f)(2) (containing risk standard). But it gave such "health and environmental concerns … no expression" in subsection 7412(d)'s separate technology-based standards. V Leg. Hist. at 8473 (S. Rep. No. 101-228 at 133); *see Sierra Club,* 353 F.3d at 980 (standards under subsection 7412(d) are "based not on an assessment of the risks posed by" air toxics "but instead on the maximum achievable control technology"). For subsection 7412(d)'s technology-based standards, the statute narrowly cabins the role of "health and environmental benefit": "where health thresholds are well-established" at which "the pollutant presents *no risk* of … adverse health effects," EPA may consider such thresholds, V Leg. Hist. at 8511 (S. Rep. No. 101-228 at 171) (emphasis added). Congress codified that discretionary authority in section 7412(d)(4). 42 U.S.C. § 7412(d)(4).

2. <u>The Statutory Text and Context Confirm Paragraph 7412(d)(6) Does Not Instruct EPA to Weigh Health and Environmental Risk When Devising "Necessary" Revisions</u>.

Statutory text and context demonstrate that the operative statutory terms here—EPA's obligation to "revise" its standards "as necessary (taking into account developments in practices, processes, and control technologies)"—conform to the basic congressional design described above. 42 U.S.C. § 7412(d)(6). Contrary to Applicants' claims, the word "necessary" does not authorize EPA to review its standards against the abstract "goal or end" of "preventing harm to public health or the environment." Westmoreland 12-13; ND 22 (same); NACCO 16 (same). Rather, paragraph 7412(d)(6) requires EPA to revise a standard when necessary to ensure that the standard meets the applicable statutory requirements—here, subsection 7412(d)'s demand for technology-based standards securing the maximum achievable reduction in hazardous air pollution. 42 U.S.C. § 7412(d)(2). *See Louisiana Envtl. Action Network v. EPA*, 955 F.3d 1088, 1097 (D.C. Cir. 2020) (Paragraph 7412(d)(6) "is a mandate to address the adequacy of each emission standard on the books against the statutory demand of [paragraph 7412(d)(2)].").

The statutory text directly explains what is necessary for standards revised pursuant to paragraph 7412(d)(6). Paragraph 7412(d)(2) contains the criteria applicable to "[e]missions standards promulgated under this subsection"—*i.e.*, all of subsection 7412(d), which includes paragraph 7412(d)(6). 42 U.S.C. § 7412(d)(2). And paragraph 7412(d)(2) decisively refutes Applicants' claims. First, that paragraph establishes technology-based criteria wholly independent of EPA's assessment of the risks posed by the hazardous air pollutants Congress listed for regulation: EPA's standards must secure "the maximum degree of reduction in emissions" that is

"achievable" by "application of measures, processes, methods, systems, or techniques" of pollution-control, "taking into consideration the cost" and "any non-air quality health and environmental impacts and energy requirements" *Id.*; s*ee Sierra Club*, 353 F.3d at 265 ("non-air quality" impacts do not include non-air health impacts of hazardous air pollution, given statutory selection of "technology-based solutions").

Second, paragraph 7412(d)(2) instructs EPA to secure the "*maximum degree of reduction*," up to and "*including a prohibition on emissions,* where achievable." 42 U.S.C. § 7412(d)(2) (emphasis added); *see also id.* § 7412(d)(2)(A)-(B) (requiring application of "measures which … eliminate emissions"). That text could not be plainer: Less is better. *Contra* NACCO 14; America's Power 20; Talen 37. It was written to "instruct[] EPA to select the strategy which maximizes the overall emission reduction that can be achieved," and to prevent pursuit of any other "goal." V Leg. Hist. at 8510 (S. Rep. No. 101-228 at 170).

Those textually defined necessities are not, as Applicants suggest, limited to standards promulgated under paragraph 7412(d)(2). NACCO 21. They apply to all "standards promulgated under *this subsection*"—that is, under the entirety of subsection 7412(d). 42 U.S.C. § 7412(d)(2) (emphasis added). Congress drafted section 7412 with a "hierarchical scheme[]—section, subsection, paragraph, and on down the line." *NLRB v. SW Gen. Inc.*, 580 U.S. 288, 300 (2017). The text carefully distinguishes among numbered paragraphs, lettered subsections, and the section as a whole. *E.g.* 42 U.S.C. § 7412(d)(5) (describing "area sources listed pursuant to *subsection (c)*," for which alternative standard may be set "in lieu of the authorities

provided in *paragraph (2)* and *subsection (f)* of this *section*") (emphases added). Subsection 7412(d) consistently uses "this subsection" to refer to the entirety of that lettered subsection. *E.g.,* 42 U.S.C. §§ 7412(d)(8)(A) (requiring EPA to "promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection"), 7412(d)(10) ("Emission standards or other regulations promulgated under this subsection shall be effective upon promulgation."). "When Congress wanted to refer only to a particular subsection or paragraph, it said so," *NLRB*, 580 U.S. at 300, and in paragraph 7412(d)(2) Congress said "subsection," encompassing the revised standards required by paragraph 7412(d)(6).

Nothing in paragraph 7412(d)(6) authorizes EPA to diverge from the subsection's maximum-achievable technology command based on the agency's ability to "quantify" a standard's "public health or environmental benefits." ND 23. Where the Act allows that sort of departure, it does so explicitly. *E.g.*, 42 U.S.C. § 7411(b)(1)(B) ("Notwithstanding the requirements of the previous sentence, [EPA] need not review any such standard if [EPA] determines that such review is not appropriate in light of readily available information on the efficacy of such standard."). Paragraph 7412(d)(6), in contrast, echoes the subsection's technology-based command by focusing EPA's review on "practices, processes, and control technologies," rather than quantification of health hazards. *Id.* § 7412(d)(6); *see Ass'n of Battery Recyclers v. EPA*, 716 F.3d 667, 673 (D.C. Cir. 2013) ("[N]othing in section [7412](d)(6)'s text suggests that EPA" should consider "public health objectives," or "risk reduction achieved by additional controls").

Context underscores the point. Paragraph 7412(d)(4) specifies the narrow circumstances in which EPA may consider health-related concerns when setting subsection 7412(d)(2) standards. Only if "a health threshold has been established" *may* EPA "consider such threshold level … when establishing emission standards under this subsection" (again, including paragraph 7412(d)(6)). 42 U.S.C. § 7412(d)(4). No thresholds satisfying paragraph 7412(d)(4) have been established for mercury or other Update Rule pollutants. *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 625-26 (D.C. Cir. 2016) (describing required showing). That narrowly bounded exception reflects Congress' chosen balance between "prevent[ing] undue regulation" and the danger of re-creating "the history of abuse and abdication which … characterized" a less constrained risk-based regime. V Leg. Hist. at 8516 (S. Rep. No. 101-228 at 176).

The statute thus directly answers the concern Applicants would shoehorn into the word "necessary"; paragraph 7412(d)(4) is Congress's chosen "means to avoid regulatory costs which would be without public health benefit." *Id.*; *see also id.* at 8511 (S. Rep. No. 101-228 at 171) (paragraph 7412(d)(4) included "[t]o avoid expenditures by regulated entities which secure no public health or environmental benefit"). Congress provided that "limited, specific authorization" to consider health impacts as part of a "comprehensive scheme" that "deliberately target[s] specific problems with specific solutions," precluding Applicants' effort to concoct a "general authorization" to rely on health criteria via paragraph 7412(d)(6)'s unrelated terms. *RadLAX Gateway Hotel, LLC v. Amal. Bank,* 566 U.S. 639, 645 (2012) (cleaned up).

Applicants' interpretation of the word "necessary" to demand that EPA weigh the quantifiable health-related benefits of standards promulgated under paragraph 7412(d)(6) thus contradicts statutory text, context, and design. Their interpretation would "collapse the technology-based/risk-based distinction at the heart of the Act, undermining the central purpose of the 1990 Amendments" and "reintroduc[e] the very problem Congress sought to exorcize—that the pursuit of the perfect (risk-based standards) had defeated timely achievement of the good (technology-based standards)." *Sierra Club*, 353 F.3d at 990; *see Snyder v. United States*, 144 S. Ct. 1947, 1955 (2024) (refusing to interpret statute "to mean the same thing now that it meant" before amendment overhauling statute).

3. **Applicants' Appeals to Far-Flung "Context" and Long Discarded Agency Interpretations Do Not Illuminate Paragraph 7412(d)(6)'s Meaning.**

Against that text, immediate context, and design, Applicants' invocations of distant portions of section 7412—let alone the Constitution's Necessary and Proper Clause—provide no useful contextual insight. *E.g.*, ND 22 (citing terms from subsection 7412(b)'s provisions governing listing of additional pollutants); Talen 21 (citing terms from subsection 7412(f)'s risk-based standards); Westmoreland 13 (citing Necessary and Proper Clause). Applicants, for example, invoke subparagraph 7412(n)(1)(A), arguing that because it required EPA to assess "the hazards to public health" before deciding whether it was "appropriate and necessary" to regulate electric generating units, EPA must return to those public health considerations when deciding what might be "necessary" under paragraph 7412(d)(6); NACCO 16.

But that argument ignores (again) section 7412's "hierarchical" structure and "precise cross-references." *NLRB v. SW General*, 580 U.S. at 300. Once EPA has made the threshold determination that regulation is "appropriate and necessary," subparagraph 7412(n)(1)(A) requires EPA to regulate electric generating units "under *this section*"—that is, under all of section 7412's applicable provisions, including subsection 7412(d). 42 U.S.C. § 7412(n)(1)(A) (emphasis added). Subparagraph 7412(n)(1)(A) accentuates the specificity of that cross-reference with its contrasting requirement to "consider[] the results of the [health] study required by *this subparagraph"*—but only in deciding that it is "appropriate and necessary" to regulate electric generating units. *Id.* (emphasis added). That text offers no basis to conclude that Congress relieved EPA of subsection 7412(d)'s technology-based criteria when regulating electric generating units, much less that it reintroduced the risk-balancing structure that Congress overhauled the statute to excise. *See White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1243-44 (D.C. Cir. 2014) (upholding EPA's interpretation as requiring regulation under "the framework set forth in [§ 7412(c) and (d)] rather than another, hypothetical framework, not elaborated in the statute"), *overruled in unrelated part by Michigan*, 576 U.S. 743.

EPA's recent rules have consistently interpreted paragraph 7412(d)(6) as focusing exclusively on technology. *See, e.g.*, 86 Fed. Reg. 66,045, 66,047 (Nov. 13, 2021) (recognizing that paragraph 7412(d)(6) addresses "technology-based standards," which is "different" from an evaluation of "risk to public health"); 76 Fed. Reg. 22,566, 22,577 (Apr. 21, 2011) ("[C]hanges in costs or availability of control

technology" may be sufficient reason to revise standard under paragraph 7412(d)(6), rejecting view that EPA should also consider "the main purpose of [section 7412], which is to reduce the public's exposure to air toxics"). Applicants cite a nearly twenty-year-old contrary agency interpretation in which EPA claimed discretion to import the health-related "findings that underlie a [subsection 7412(f)] determination" into paragraph 7412(d)(6)'s technology review, 70 Fed. Reg. 19,992, 20,009 (Apr. 15, 2005). NACCO 19 (citing four other rules adopting same interpretation between 2005 and 2008). But that interpretation—which EPA acknowledged at the time departed from "the specifically enumerated factors" in the text, 73 Fed. Reg. 62,384, 62,404 (Oct. 20, 2008)—made no effort to apply "the traditional tools of statutory construction" to identify the "single, best meaning" of the statute, *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024). 70 Fed. Reg. at 20008-09 (claiming "ambiguity" in statute and stating that Agency "believe[s]" that subsection 7412(f)'s residual risk criteria should be included in paragraph 7412(d)(6) technology reviews). And EPA has since—as it must, given the law's contrary indicia—abandoned it. 89 Fed. Reg. at 38,525 & nn. 29-30. *See Ass'n of Battery Recyclers,* 716 F.3d at 672 (upholding current interpretation because "nothing in [paragraph 7412(d)(6)]'s text suggests that EPA must consider" either "public health objectives or risk reduction achieved by additional controls").

4. <u>EPA Correctly Continues to Interpret "Developments" to Include Improvements in Existing Pollution Controls as Well as Introduction of New Kinds of Controls</u>.

EPA based the Update Rule on, *inter alia*: improved maintenance and operation practices and the emergence of "more durable materials" less prone to degradation, 89 Fed. Reg. at 38,530 (describing developments supporting updated metals standard); changes in manufactured monitoring instruments and reduced "overall costs," 88 Fed. Reg. at 24,872 (developments supporting updated monitoring requirements); and operational practices and newly available "[sulfur trioxide] tolerant [mercury] sorbents," 89 Fed. Reg. at 38,539 (developments supporting updated mercury standard). Applicants insist that EPA must ignore such incremental improvements to pre-existing control technologies because they are insufficiently "new" and "significant" to be "developments" under paragraph 7412(d)(6). *E.g.,* Westmoreland 27-29; ND 26-30; NRECA 18-20. The statute offers no basis for that counterintuitive interpretation.

The word "development" is not restricted to the earth-shattering or previously unknown; all the changes identified by EPA, from changes in cost to changes in operations and maintenance practices (or even better understanding of pollution-control methods) are within the common understanding of "developments." *See* Black's Law Dictionary (Bryan A. Garner, ed., 12th ed. 2024) ("[t]he process by which something or someone becomes bigger, better, stronger, or more advanced; progress made through growth or maturation"). Indeed, the word connotes gradual emergence, rather than abrupt or significant change. Compact Oxford English Dictionary 707 (1971) ("[a] gradual unfolding, a bringing into further view"); Merriam-Webster's Collegiate Dictionary 341 (11th. ed. 2003) ("develop" means "to

become gradually manifest"). Developments in mobile phone technology include the widespread adoption of facial recognition, touch-screen styles, and improved batteries, not just the invention of cellular telephony. "Developments in the law," as the title of an annual law review issue or otherwise, are not limited to sudden or unprecedented changes. *See, e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (responding to claim of novelty by stating that doctrine "developed over a series of significant cases").

Paragraph 7412(d)(6) uses "developments" in that vernacular sense. It directs EPA's attention to "practices" and "processes," not just wholly new "technologies," and lacks any modifiers suggesting the significance or novelty threshold Applicants demand. *Compare* 42 U.S.C. § 7412(d)(6), *with id.* § 7411(j)(1)(A) (referring to "innovative technological systems"). Paragraph 7412(d)(2) also demands that EPA consider "the cost of achieving … emission reduction[s]," as well as all "measures, processes, methods, systems or techniques" that reduce pollution, including "work practice" and "operational standards." 42 U.S.C. § 7412(d)(2) (applying to all standards "promulgated under" subsection 7412(d)). The statute thereby requires EPA to consider—as it did here—the costs associated with pollution reduction, as well as improved operational practices and techniques, among the "developments" that may necessitate more stringent standards. 42 U.S.C. § 7412(d)(6).

D. Applicants' Contentions that EPA Determined that the Rule Would Have No or Negligible Health Benefits Are False.

The premise of Applicants' statutory arguments—that EPA found no meaningful health benefits from the Rule—mischaracterizes the record. *See, e.g.*,

America's Power 15 ("infinitesimal benefits"); NACCO 18 ("lack of any marginal health benefits"); NRECA 16 ("no meaningful health benefits"); Talen 1 ("without any meaningful benefits"). To the contrary, EPA identified multiple significant benefits resulting from the Rule's reduced toxic emissions. Even though EPA was unable to quantify or monetize "the full range of benefits," this "does not mean that these benefits are small, insignificant, or nonexistent." RIA at 4-12.

EPA projects that the Rule will reduce mercury emissions by 9,500 pounds and emissions of non-mercury metal hazardous air pollutants (antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, nickel, and selenium) by 49 tons between 2028 and 2037. 89 Fed. Reg. at 38511, 38554-55. The vast majority of existing coal-fired units have already achieved emissions rates below the new standards, so the rule only affects a small fraction of outliers—coal-fired units with particularly high emissions rates, *see* Part I.C., *supra.* Additionally, the number of sources and total power-plant emissions have fallen significantly since MATS was promulgated, 88 Fed. Reg. at 24857, leaving fewer total emissions to reduce, consistent with Congress's directive to reduce emissions even to the point of prohibiting them. 42 U.S.C. § 7412(d)(2). However, the emissions reduced by this rule are still significant compared to standards considered in other section 112 rulemakings,[6] including technology review rules,[7] because coal-fired power plants

[6] *See* 89 Fed. Reg. at 38,524 (in comparing this rule to standards considered in two prior rulemakings, "EPA estimates significantly greater [hazardous air pollutant] emission reductions, and fPM emission reductions that are orders of magnitude greater than both prior rulemakings").

[7] *See, e.g.*, [Title Condensed] National Emission Standards for Hazardous Air Pollutants for Lead Acid Battery Manufacturing Area Sources Technology Review, 88 Fed. Reg. 11,556, 11,576 (Feb. 23, 2023)

can emit large amounts of hazardous air pollutants and the plants affected by this rule have such high emissions rates compared to their peers. Exposure to these toxic pollutants is associated with "a variety of adverse health effects," including "developmental neurotoxicity" in fetuses, cardiovascular harms, "chronic health disorders," and cancer. 89 Fed. Reg. at 38,515.[8] Among the Rule's "numerous [hazardous air pollutant]-related benefits" are "reduced exposure" to these pollutants, especially for residents of "communities located near" "facilities with largely outdated or underperforming controls [that] are emitting significantly more than their peers." *Id.* at 38,553, 38,524.

That EPA could not monetize these benefits does not mean that they are illusory or small. The White House Office of Management and Budget (OMB) has long recognized that it is sometimes impossible to quantify or monetize important benefits; its 1996 "best practices" guide for regulatory impact analyses cautioned that "monetization of some of the effects of regulations is often difficult if not impossible, and even the quantification of some effects may not be easy."[9] From then until its most recent guidance, OMB has consistently emphasized that "some important benefits and costs may be either difficult to quantify or difficult to monetize." OMB Circular A-4: Regulatory Analysis 44 (2023); *accord* OMB Circular A-4: Regulatory

("The revised lead emission standard for paste mixing operations will achieve an estimated 0.6 tpy reduction of lead emissions.").

[8] These are non-cancer harms. But that does not render them meaningless, as Applicants suggest by equating EPA's assessment of the number of cancers caused by power plants' air pollution with the absence of any relevant harm. *E.g.* NACCO 2. Section 7412 is equally concerned with the non-cancer-related harms identified here. *See* 42 U.S.C. §§ 7412(a)(2) & (c)(9).

[9] OMB, Economic Analysis of Federal Regulations Under Executive Order 12866 (Jan. 11, 1996), https://georgewbush-whitehouse.archives.gov/omb/inforeg/riaguide.html.

Analysis 26-27 (2003).[10] As a result, OMB concludes, "the policy that most enhances social welfare will not necessarily be the one with the largest quantified and monetized net-benefit estimate." OMB, Circular A-4, at 44 (2023); *accord* OMB, Circular A-4, at 2 (2003). Multiple Presidents have also issued Executive Orders directing agencies to consider "qualitative" measures of benefits that are difficult to quantify." Exec. Order No. 13,563 § 1(a), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011); *see also* Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51735, 51735 (Sept. 30, 1993).

In practice, agencies frequently find it impossible to monetize important regulatory benefits. Empirical studies have found that agencies across the federal government are rarely able to fully monetize all regulatory costs and benefits,[11] even when the unmonetized benefits are "important," "significant," or "substantial."[12]

Moreover, as EPA explained both in the Update Rule and its 2023 appropriate-and-necessary finding, it is particularly difficult to monetize the benefits of hazardous air pollutant emissions reductions. Exposure to air toxics is typically "uneven and … highly concentrated" and there is often a "multi-year time lag between exposure and the onset of … disease." 89 Fed. Reg. at 38515, 16. Moreover, "[m]ultiple types" of air toxics "may be emitted from a single source," and individual communities can be affected by "multiple sources" with varying air toxics emissions from each, "such that

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[10] *See also* OMB, Memorandum M-00-08 (Mar. 22, 2000), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/memoranda/m00-08.pdf; OMB, Memorandum M-01-23 (June 19, 2001), https://obamawhitehouse.archives.gov/omb/memoranda_m01-23/.

[11] Jonathan Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 Cornell L. Rev. 87, 100-101 (2016).

[12] Amy Sinden, *The Problem of Unquantified Benefits*, 49 Envtl. L. 73, 107 (2019).

combinations of individual [hazardous air pollutants] to which people are exposed across communities tend to be highly varied." 88 Fed. Reg. at 13971. As a result, it "is inherently more challenging" to conduct epidemiological studies for air toxics than for more widely distributed pollutants such as particulate matter or ozone. 89 Fed. Reg. at 38516; *see also* 88 Fed. Reg. at 13971 (whereas criteria pollutants have been the subject of "hundreds of epidemiological studies," air toxics are less "well studied"). In addition, "there remains insufficient economic research to support valuation of [hazardous air pollutant] benefits," 89 Fed. Reg. at 38511, especially for non-fatal harms such as "heart attacks, IQ loss, and renal or reproductive failure." 88 Fed. Reg. at 13972. These challenges do not mean the benefits of reducing air toxics exposure are small; to the contrary, "[t]he nature and severity of effects associated with [air toxics] exposure, ranging from lifelong cognitive impairment to cancer to adverse reproductive effects, implies that the economic value of reducing these impacts would be substantial if they could be quantified and monetized completely." *Id. See also Sinclair Wyo. Refining Co. v. EPA*, 101 F.4th 871, 889 (D.C. Cir. 2024) ("That those benefits are not easily monetizable does not mean they are less valuable.").

EPA "has long acknowledged the difficulty of quantifying and monetizing [hazardous air pollutant] benefits," as illustrated by a 2008 expert panel review that had enumerated the "challenges" of monetizing the benefits of hazardous air pollutant emissions reductions, including "lack of exposure-response functions, uncertainties in emissions inventories and background levels, the difficulty of extrapolating risk estimates to low doses and the challenges of tracking health

progress for diseases, such as cancer, that have long latency periods." 88 Fed. Reg. at 13972. Congress recognized these difficulties when revising section 7412 in 1990. *See* Part I.C.1, *supra*. Applicants' argument wrongly faults EPA for the fact that the statute is designed to yield benefits that Congress deemed important but understood are not easily monetizable. *See Sinclair Wyo. Refining Co.*, 101 F.4th at 889.

Finally, EPA relied on statutory factors, not so-called "ancillary" benefits, to determine and set the stringency of the standards in the Rule.[13] EPA took "into account the numerous [hazardous air pollutant]-related benefits of the final rule in deciding to take this action." 89 Fed. Reg. at 38,553. At no point did the agency suggest it chose the revised standards in the Rule based on benefits unrelated to hazardous air pollutant emissions, and though the agency "carefully considered both the advantages and disadvantages of the revisions," *id.*, its consideration of costs was consistent "with comments arguing that the EPA should focus its decision-making on the standard on the anticipated reductions in [hazardous air pollutants]" *id.* at 38552. EPA estimated ancillary benefits for the benefit-cost analysis, but made clear that "it is not the EPA's practice (and the EPA does not think it is appropriate) to rely on the results of benefit-cost analyses undertaken to comply with E.O. 12866 in determining whether to revise a CAA section 112 standard." RTC at 144. As EPA noted, the

[13] EPA did not, as some Applicants suggest, "consider [the Update Rule]'s costs without considering its corresponding benefits." NACCO 3. EPA considered cost-effectiveness–the cost per ton of pollutant the Rule would eliminate. That approach weighs costs against the benefit the statute instructs EPA to pursue: "reduction in emissions of … hazardous air pollutants." 42 U.S.C. § 7412(d)(2). EPA correctly declined to second-guess the wisdom of that goal by revisiting Congress's determination that the pollutants listed in the statute do, in fact, cause harms worth eliminating.

ancillary benefits of this rule were estimated to comply with Executive Order 12,866 and OMB guidance. *Id.* at 147.

E. Applicants' Record Challenges Are Meritless.

As EPA demonstrates, Applicants' other challenges to the Rule are meritless. We add only the following observations.

Using the Integrated Planning Model, the gold-standard peer-reviewed model for evaluating impacts of regulations on the power sector, EPA evaluated the effects of all of the power sector rules finalized as of April 2024 and concluded that they are "unlikely to adversely affect resource adequacy." Resource Adequacy Analysis 3; see RIA 3-3 to 3-4. *Contra* ND 37 (alleging that EPA failed to consider the combined effects of those rules); Westmoreland 24-25 (similar). Those rules include the present Rule, as well as limits on greenhouse gas emissions under Clean Air Act section 111 and effluent limitations guidelines under the Clean Water Act, accounting for projected increased electricity demand from recently finalized limits on emissions from vehicles. Resource Adequacy Analysis 13. Given the projection of zero retirements from this Rule, RIA at 3-18, Tbl. 3-10, and modest impacts of the entire set of rules affecting the power sector, Resource Adequacy Analysis at 15, Tbl. 1, Applicants' concerns about grid reliability are unfounded.

The claims that EPA's Resource Adequacy Analysis "makes generalized observations about the nation's grid reliability," Talen 27, also are wrong. As EPA explained, its power sector modeling examines "separate regions that tend to align with the zones that [grid operators] use for resource adequacy planning." Resource

Adequacy Analysis 10 n.28. The results "maintain adequate reserves in each region." *Id.* at 15. Accordingly, Applicants' accusations that EPA failed to account for grid effects at the regional scale fall flat.

Seeking to pin their own potential compliance choices on the agency, some Applicants argue that EPA should have evaluated the capital costs of this Rule as if they could only be amortized within the timeframe in which coal-fired power plants would be exempt under the final GHG Rule (*i.e.*, through 2031). *E.g.*, Westmoreland 25. Yet coal-fired power plants can meet both sets of requirements, spreading out the costs of installing controls to comply with this Rule. *See* EPA Stay Opp., No. 24-1119, ECF #2065849, at 20 (filed July 22, 2024). And coal-fired power plants can also choose to co-fire with natural gas to meet the GHG emission limitation for medium-term coal-fired units through 2038, which would assist those units in complying with the hazardous pollutant limits of this Rule. *See* 89 Fed. Reg. at 38,538 (noting that gas co-firing is a means of complying with the mercury limit); *id.* at 39,845 (setting forth best system of emission reduction for medium-term coal units); EPA, 2023 Technology Review for the Coal- and Oil-Fired EGU Source Category, at 2 (Jan. 2023) (noting that units firing gas already meet the lowest fPM limit considered).[14]

Applicants next argue that EPA should have at least considered providing a "retirement subcategory" for the Colstrip plant, to match the limited exemption in

[14] The fact that cofiring with gas presents a compliance option refutes applicants' contention that periods in which some coal-fired units burned higher quantities of gas are not "representative" for purposes of analyzing incremental costs of complying with the revised PM limit. *Contra* NRECA 21. Units that historically achieved low PM rates by cofiring significant percentages of gas may continue to do so to comply with the revised limits, avoiding capital costs of upgrading or replacing particulate-matter controls.

the GHG Rule for coal-fired power plants retiring before 2032. Talen 29-31. Yet EPA correctly rejected the approach of treating this plant differently solely because of its inadequate pollution controls. Colstrip's singularly poor performance does not, as a legal matter, render it of a different "class[], type[], [or] size[]" that could justify a subcategory under section 7412(d)(1).[15] The only thing that makes Colstrip different is its own decision to forgo pollution controls that are now standard across its peers. 89 Fed. Reg. at 38,522, 38,531. Further, to the extent that a near-term retirement date could warrant a subcategory, effectively granting a compliance extension through that date would circumvent the express requirement that emission limits must apply on the statutory timetable. *See* 42 U.S.C. § 7412(d)(1). EPA thus properly considered and rejected Applicants' request to create a "retirement subcategory" for Colstrip and any other plants opting for an extension.

Applicants contend that the cost-effectiveness values of the Rule's particulate matter surrogate standard are inordinately high, ND 12-13, in particular for the Colstrip plant. Talen 25-26. Again, EPA has no obligation to conduct a separate regulatory analysis for the worst performer, given that there is no statutory basis for treating that source differently from its peers. As EPA explained, the Rule results in "orders of magnitude greater" reductions in air toxics than other rules, 89 Fed. Reg. at 38,524, and the metals emitted by coal plants are particularly toxic, causing cancer or damaging the nervous system, lungs, or kidneys, *id.* These considerations justify

[15] EPA, Summary of Public Comments and Responses on Proposed Rule, EPA-HQ-OAR-2018-0794-6922 at 52 (Apr. 2024), https://www.regulations.gov/document/EPA-HQ-OAR-2018-0794-6922.

the dollar-per-ton figures here.[16] Further, "[b]ecause of the relative size of the power sector, while cost effectiveness of the final standard is relatively high as compared to prior CAA section 112 rulemakings involving other industries, costs represent a much smaller fraction of industry revenue." 89 Fed. Reg. at 38,534.[17]

Regarding the overall costs and benefits of the Rule, EPA appropriately accounted for these factors in determining that revisions were "necessary," as discussed above. Some Applicants contend that the agency departed from *Michigan v. EPA* by acknowledging all of the Rule's costs and all of its benefits, whether those benefits were from hazardous-pollutant reductions or other pollutant reductions. *See, e.g.*, America's Power 13, 15. Yet *Michigan* indicates that "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions," 576 U.S. at 753, not some subset of advantages and disadvantages. The *Michigan* Court explained that ignoring cost could obscure disadvantages of regulation in the form of health or environmental harms, *see id.* at 751-52; if such hypothetical harms qualify as costs, then surely the full health and environmental improvements brought about by the Rule must be counted as benefits in any comparison of its costs and benefits. It is Applicants' skewed approach, America's Power 15, that is "irrational," not EPA's.

Relatedly, Applicants suggest that EPA revised the standards unreasonably because some of the regulated sources clear a cancer-based threshold for delisting a

[16] Applicants are silent on the cost-effectiveness of the revised mercury standards.

[17] That analytical approach is consistent with the agency's principal evaluation of costs in the unchallenged "appropriate and necessary" finding. *See* 88 Fed. Reg. at 13,976.

source category under section 7412(c)(9). *See, e.g.*, America's Power 14-15. As noted above, however, air toxics emitted by coal-fired power plants are known to cause serious health harms entirely unrelated to cancer. At any rate, Applicants do not seek delisting here,[18] and a listed source category continues to be subject to updates to standards under the statute's established mechanisms. *E.g.*, 42 U.S.C. § 7412(d)(6).

Applicants' remaining scattershot attacks on EPA's technical analysis all miss the mark. Although the agency did examine fPM emissions from the quarter with the lowest reported emissions available, it selected the *99th percentile* of emissions within that quarter, 2024 Technical Memo 13—hardly the "best of the best," NRECA 21. In its cost analysis, EPA assumed that units would have to improve controls if their average fPM emissions rates were above the revised limit, even if their lowest achieved emission rate fell below the limit. 2024 Technical Memo 14 & Fig. 5.

Nor did EPA err in analyzing the required level of fPM performance, rather than some lower rate that operators could target to assure themselves that they will meet the standard. The Rule's combination of both 30-day averaging of emissions rates to determine compliance on a rolling basis, and continuous emissions monitoring, which enables swift correction of emissions exceedances, obviates the need for compliance margins. *See* 89 Fed. Reg. at 38,521-22. Thus, it would be unreasonable to assume that sources will need to emit at rates significantly below the limit to ensure compliance. *Contra* NRECA 22.

[18] Nor could they; this rulemaking did not reopen the issue, which was conclusively resolved in the 2020 rulemaking. 85 Fed Reg. at 31,312-13.

Regarding particulate matter control measures, Applicants further misrepresent that EPA already accounted for improved bag materials—and thus fPM emissions performance for purposes of this Rule—in setting the 2012 standards–because the agency declined to consider malfunctions as part of the original standard-setting exercise. *See* NRECA 19-20. Thus, the argument goes, EPA already calculated low standards by excluding higher emissions from bag leaks. But EPA explained in 2012 why it would not artificially *increase* emission limits to accommodate malfunctions, defined as "sudden, infrequent, and not reasonably preventable failure of air pollution control . . . equipment." 77 Fed. Reg. at 9382 (quoting 40 C.F.R. § 63.2). Leaks preventable through improved bag materials should not even qualify as malfunctions under this definition. In any event, EPA did *not* remove emissions data in its floor-setting analysis specifically to account for bag leaks, instead excluding sources with unusually high emissions for any reason.[19]

Finally, regarding mercury control, the record supporting EPA's conclusion that lignite-fired units can meet the same standard as other coal-fired units is far more robust than Applicants insinuate. *Contra* NRECA 22-24. Advanced sorbents that have become available since 2012 have been shown to achieve greater than 90 percent capture rates, including on low-rank (*i.e.,* lignite) coals, and at far lower injection rates than earlier-generation sorbents.[20] *See also* 89 Fed. Reg. at 38539

[19] *See* National Emission Standards for Hazardous Air Pollutants (NESHAP) Maximum Achievable Control Technology (MACT) Floor Analysis for Coal- and Oil-fired Electric Utility Steam Generating Units for Final Rule, EPA-HQ-OAR-2009-0234-20132, at 3, 12 (Dec. 2011).

[20] Andover Technology Partners, Analysis of PM and Hg Emissions and Controls from Coal-Fired Power Plants, EPA-HQ-OAR-2018-0794-4583, at 50 & Tbl. 9 (Aug. 2021).

(evaluating new "information on the availability of advanced 'SO3 tolerant' Hg sorbents and other control technologies"). Therefore, concerns about the achievability of the revised mercury standard or the need for capital investments to augment controls to enable higher injection rates are unfounded.

F. The Case Does Not Present a Certworthy Issue.

In this Court, the likelihood of success factor properly includes consideration of "whether the Court should grant review in the case." *Does 1–3 v. Mills*, 142 S.Ct. 17, 18 (2021) (Barrett, J., concurring) (citing *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*) and Sup. Ct. Rule 10). This requirement prevents applicants from "us[ing the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument." *Does 1–3*, 142 S. Ct. at 18 (Barrett, J., concurring).

Applicants identify no arguments likely to meet Rule 10's certiorari standards. There was no dissent on the D.C. Circuit stay panel; none of Applicants' issues has prompted a circuit split or even controversy within the D.C. Circuit. As noted above, the great majority of regulated entities already meet the challenged emissions standards – and the Rule impacts a small subset of sources (for the non-mercury metals standard, a single plant). *See Labrador v. Poe by and through Poe*, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J.) ("an emergency application to this Court where the issue concerns only a few individual parties may not clear the certworthiness bar").

The D.C. Circuit's consideration of the merits is moving forward promptly, with opening briefs due on October 1, and briefing to be completed by December 10,

2024. Order, 24-1119 (Aug. 29, 2024) (ECF #2072376). If Applicants were to lose below, they would have an opportunity to seek a stay pending certiorari from the D.C. Circuit or this Court. At that point, both courts would be much better positioned to assess whether there are any issues warranting this Court's review.[21]

II. IN ANY EVENT, APPLICANTS HAVE PROVIDED NO GROUNDS FOR AN IMMEDIATE STAY OF THE ENTIRE RULE

Even if their arguments had merit (and, as noted, they do not), Applicants would not be entitled to a stay of the Update Rule "in its entirety." MOG 1; *see also* ND 40 ("stay the Rule"); NRECA 34 ("stay the Final Rule"). Targeting the Update Rule's two strengthened emissions standards, Applicants do not challenge two separate, important provisions: (1) a revised regulatory definition of "startup" that removed an alternative definitions previously in effect, *see* 40 C.F.R. § 63.10042; *see* 89 Fed. Reg. at 38519, and (2) a requirement that, beginning in 2027, sources measure filterable particulate emissions through Continuous Emissions Monitoring Systems (CEMS, previously one of two monitoring options, along with four-time-a-year stack tests), 89 Fed. Reg. 38510; 40 C.F.R. §§ 63.10020(e)(3)(i), 63.10021(c). These provisions importantly benefits the public—for example, CEMS provide "transparency regarding emissions performance for sources, regulators, and the surrounding

[21] One applicant (NACCO 25) asks this Court to treat its application as a petition for a writ of certiorari before judgment, grant it, and resolve the petitions for review in the first instance. But this case appears to fall outside this Court's original jurisdiction. *See* U.S. Const. Art. III, § 2, Cl. 2.

communities" as well as "real-time identification of when control technologies are not performing as expected, allowing for quicker repairs." 89 Fed. Reg. at 38520.[22]

Applicants do not (and did not below) challenge the startup or CEMS provisions. Accordingly, there is no basis for staying these provisions, especially since EPA expressly "intend[ed] each portion of this rule to be severable from each other as it is multifaceted and addresses several distinct aspects of MATS for independent reasons." 89 Fed. Reg. at 38,518; *id.* at 38,519 (noting that CEMS and startup-provisions are "independent," and "a source can abide by any one of these individual requirements without abiding by any others"). *See Gill v. Whitford*, 585 U.S. 48, 68 (2018) ("a 'remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established'"). Such restraint is particularly important at this early and interlocutory stage. *See Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 921 (2024) (Gorsuch, J., concurring) ("Ordinarily, [preliminary] injunctions . . . may go no further than necessary to provide interim relief to the parties.").[23]

CONCLUSION

The stay applications should be denied.

Respectfully submitted.

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[22] Much of the coal fleet already uses CEMS, *id.* 89 Fed. Reg. at 38527, and the incremental costs of substituting CEMS for quarterly stack testing are "about $12,000 per year per unit," RIA at 3-13.

[23] Similarly, the Court should limit the scope of any stay, should it deem one appropriate (which it should not for the reasons stated above and in the EPA and State Respondents' responses), of either of the emissions standards to the facilities that have actually demonstrated a likelihood of success and irreparable harm. *See* Part I.B, supra (describing limited effect of the Rule); *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (remedies "operate with respect to specific parties" rather than "on legal rules in the abstract") (cleaned up).

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