No. 15A886

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MICHIGAN, ET AL.,
Applicants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

On Application for a Stay or Injunction of the Mercury and Air Toxics Rule Pending a Petition for a Writ of Certiorari

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Opposition of the State, Local Government, and Public Health Respondent-Intervenors to Application for a Stay or Injunction of the Mercury and Air Toxics Rule Pending Petition for a Writ of Certiorari

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To the Honorable John G. Roberts, Chief Justice of the United States, in His Capacity as Circuit Justice for the D.C. Circuit

States, local governments, and public health organizations—all respondent-intervenors in the court of appeals—respectfully submit this opposition to the application for a stay or injunction filed by the State of Michigan, *et al*. (collectively, "Applicants").

Applicants ask that the Mercury and Air Toxics Standards ("Air Toxics Rule" or "Rule") be stayed or enjoined pending disposition of a petition for certiorari seeking review of the unanimous, unpublished decision of the D.C. Circuit that remanded the Rule, without vacatur, to the Environmental

Protection Agency ("EPA") to give effect to this Court's decision in June 2015 in *Michigan v. EPA*, 135 S. Ct. 2699. Applicants' request comes despite their failure to seek a stay from the D.C. Circuit; is filed more than two months after the D.C. Circuit's December 15, 2015 remand order, and only weeks before EPA is expected to reach a final (and judicially reviewable) decision effectuating *Michigan*'s mandate.

Applicants have not satisfied the requirements for a stay or an injunction. The D.C. Circuit's December 15, 2015 remand order is plainly unsuited for certiorari review. Far from flouting this Court's directives in *Michigan*, both the D.C. Circuit and the EPA honored them. This Court's remand to the D.C. Circuit pointedly left to that court the question of how to handle the interim status of a complex set of regulations, and the D.C. Circuit exercised that responsibility carefully, inviting and considering extensive briefing from the parties and holding oral argument on the interim remedy question. In those proceedings, EPA demonstrated that it was expeditiously undertaking the consideration of costs that this Court required in *Michigan*. Respondents submitted extensive evidence concerning the impact of vacating the Rule on public health, on state law enforcement, and on industry, during the brief pendency of that costs-consideration proceeding. Among these were eight scientific and public health expert declarations showing that halting the Rule would result in power plants emitting large

volumes of multiple hazardous air pollutants—toxic compounds specifically identified by Congress as warranting the most stringent level of control—and that such emissions would harm public health and interfere with multiple state air and water pollution programs that depend upon the Rule.

For their part, Applicants failed to rebut this evidence concerning harms to public health and downwind states or evidence from EPA and industry respondents that vacatur would needlessly disrupt the power industry. Applicants introduced no evidence that leaving the Rule in place would cause them irreparable harm. Instead, Applicants insisted that vacatur of the Air Toxics Rule was required regardless of the practical impacts or the impacts upon the parties or public health. But that argument runs against decades of D.C. Circuit precedent holding that equitable and practical considerations should inform such remedial questions. The argument also lacks support in *Michigan*, in this Court's other precedents, or in case law of courts outside the D.C. Circuit. It would make no sense to grant review to consider the propriety of the interim regime when the EPA's final action responding to *Michigan* will be published in weeks, with a full opportunity for judicial review.

BACKGROUND

In *Michigan*, this Court concluded that EPA had acted unreasonably when it declined to consider costs before determining that it was "appropriate and necessary," under 42 U.S.C. 7412(n)(1)(A), to regulate emissions of hazardous air pollutants from power plants. 135 S. Ct. at 2704. *Michigan* did not hold that EPA lacked statutory authority to regulate power plants' highly toxic air emissions. Rather, it established that "the Agency must consider cost," and that it had not adequately explained its failure to do so—and that EPA could not rely upon grounds that it had not relied upon in making its decision. *Id.* at 2710-11 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Although the Applicants and other petitioners requested that this Court vacate the Air Toxics Rule, it did not do so. Instead, it remanded the case to the D.C. Circuit for further proceedings, noting that "[i]t will be up to the Agency to decide (as always within the limits of reasonable interpretation) how to account for cost" following that remand. *Id.* at 2711-12.

In response, EPA has embarked on a supplemental rulemaking to provide that necessary "account[ing] for costs." *Michigan,* 135 S. Ct. at 2710. On December 1, 2015, the Agency published a proposed finding, reviewing the extensive materials collected by the Agency as to industry costs, and tentatively determining that, considering those costs, regulation of coal- and oil-fired power plants' toxic emissions is "appropriate" as well as necessary.

80 Fed. Reg. 75,025.[1] EPA intends to complete that supplemental rulemaking by mid-April 2016. Appl. Appendix A at 2.

Following the remand from this Court, the D.C. Circuit panel entertained motions as to the relief required to further effectuate this Court's decision. Applicants sought to vacate the Rule.[2] EPA and Respondent-Intervenors each asked the court of appeals to remand the Rule without vacatur, noting EPA's prompt action to comply with *Michigan,* and submitting evidence of the substantial, industry-wide progress made towards compliance, as well as evidence of serious harms to public health, interference with State planning efforts, and disruption for power companies, that would result from vacatur.[3] On December 4, 2015, the D.C. Circuit heard

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[1] EPA's proposed supplemental finding was signed by the Administrator on November 20, 2015; published in the Federal Register on December 1, 2015; it provided for a period for public comment that closed on January 15, 2016. EPA expects to reach a final decision on or about April 15, 2016. EPA Mot., ECF No. 1574825, McCabe Decl. ¶¶ 18-19.

[2] Certain State and Industry Petitioners' Joint Mot. to Govern, ECF No. 1574809 ("Pet'r Joint Motion"). Another party, the power generation company Tri-State, initially sought a stay of the Air Toxics Rule as power plants that had obtained compliance extensions and had not yet come into compliance. Tri-State Mot. to Govern 3, ECF No. 1574817. After learning that "no other companies … are interested" in such relief, however, Tri-State withdrew that request, and argued that the Rule should be stayed only as to one of its own facilities (a single operating unit in Colorado), and only as to the Rule's acid gas/hydrogen chloride requirements. *See* Tri-State Reply 3, ECF No.1581995.

[3] EPA Mot.; Industry Resp't-Intervenor Mot., ECF No. 1574838; State, Local Government, and Public Health Resp't-Intervenor Mot., ECF No. 1574820 ("State/NGO Motion"); EPA Resp., ECF No. 1579186; Industry Resp't-Intervenor Resp., ECF No. 1579252; State/NGO Resp., ECF No. 1579245; EPA Reply, ECF No.

oral argument on the interim remedy question. The court issued its unanimous decision remanding the Rule to EPA without vacatur on December 15, 2015. Applicants filed their Application with this Court more than 10 weeks later, on February 23, 2016.

REASONS FOR DENYING THE APPLICATION

Applicants offer no valid grounds for a stay or injunction of the Rule. To understand why, two clarifications of their unusual request are helpful. First, the only decision from which Applicants could seek certiorari is the court of appeals' December 15, 2015 order remanding the Rule without vacatur, Appl. App. *See* 28 U.S.C. 1254, 2101(f).[4] Any preliminary relief under 28 U.S.C. 2101(f) is limited to a stay of *that* "final judgment or decree," because that provision, by its terms, does not authorize a direct stay of an agency's decision. *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Reg'y Comm'n,* 479 U.S. 1312, 1312-13 (1986) (Scalia, J., in chambers), *see* pp. 22-24, below. To obtain a stay pending certiorari, applicants must show that a

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1581996; Industry Resp't-Intervenor Reply, ECF No. 1582027; State/NGO Reply, ECF No. 1581955.

[4] There is no proper basis for this Court to exercise jurisdiction over—or to stay or enjoin—EPA's *yet-to-be issued* supplemental finding. *See* 42 U.S.C. § 7607(b)(1) (limiting judicial review of Clean Air Act rulemakings to final actions); *id.* 7607(e) (other methods of review not authorized); *In re: Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015) (rejecting effort to use All Writs Act to challenge proposed regulations). *See also Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999) (All Writs Act does not "enlarge" a court's jurisdiction and is "not an independent grant of appellate jurisdiction").

grant of certiorari is likely to review the December 15, 2015 order—not the court of appeals' 2014 merits decision.

Second, the court of appeals' December 15, 2015 order will present a live controversy only for the few weeks remaining before EPA completes the consideration of costs demanded by *Michigan.* Appl. 13-14 (recognizing that petition for certiorari may be "moot" after EPA completes *Michigan*-responsive rulemaking). But Applicants are not requesting that this Court stay or enjoin EPA's nearly completed consideration of costs (understandably, given *Michigan*'s instructions to the Agency). They instead request an injunction of the *Rule*—relief that would not prolong the life of any challenge to the court of appeals' December 15, 2015 order (the target of their yet-to-be-filed certiorari petition), Appl. 14. Even if the All Writs Act authorized an injunction to preserve an otherwise moot controversy (which it does not), the injunction requested by the Applicants is thus disconnected from this Court's jurisdiction over the December 15, 2015 order. No useful purpose could be served by Applicants' requested short-term blocking of the Rule, which would harm public health, create difficulties for states that depend upon the Rule, and introduce instability in the power industry.

I. APPLICANTS FAILED TO REQUEST A STAY BELOW, AND UNDULY DELAYED REQUESTING ONE IN THIS COURT

"Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." Sup. Ct. Rule 23.3. Applicants did not request a stay of the Rule from the D.C. Circuit at any point during this extensive litigation, including on remand after *Michigan*. Nor did any party request the court of appeals to stay the Rule or its mandate on the December 15, 2015 remand decision, pending the disposition of a petition for certiorari. Applicants fail to establish any "extraordinary circumstance" that would excuse that failure.

Furthermore, Applicants waited more than ten weeks after the D.C. Circuit's December 15, 2015 decision before presenting their current plea to this Court. That delay, alone, warrants a denial of the equitable relief Applicants now seek; it both increased the substantial reliance interests for all affected entities, and undermines any claims by Applicants that the Rule's application is causing them irreparable harm.

II. APPLICANTS FAIL TO SATISFY THE STANDARDS FOR A STAY PENDING DISPOSITION OF A PETITION FOR CERTIORARI

Moreover, Applicants have not shown, and cannot show, "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair

prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (citations omitted).

A. It is Unlikely this Court would Grant Certiorari to Review the D.C. Circuit's Unanimous, Unpublished Remand Order.

Applicants fail to demonstrate a reasonable likelihood that this Court will grant certiorari to review the question presented here: Whether the court of appeals was obligated to vacate the Rule even while EPA promptly undertook the cost consideration required by this Court's *Michigan* decision.

Applicants' legal argument in favor of mandatory vacatur is predicated in significant part upon Administrative Procedure Act language providing that the court "shall … hold unlawful and set aside" unlawful agency action, 5 U.S.C. 706(2), which Applicants appear to believe *requires* vacatur every time a reviewing court identifies an agency error. Appl. 8-9, 12-13. Review of the Rule, however, is not governed by the APA, but by the Clean Air Act's distinct judicial review provisions. *See* 42 U.S.C. 7607(d)(1)(C) (stating that section 7607(d) applies to emission standards promulgated under section 7412(d)); 77 Fed. Reg. 9304, 9307 (Feb. 16, 2012). Section 7607(d)(1) provides that section 706 of the APA does not apply to actions listed in CAA section 7607(d)(1) except as expressly provided. And CAA section 7607(d)(9) further

makes clear the applicable standard of review for actions listed in 7607(d)(1) (including this Rule), stating that "the court *may* reverse any [] action found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* 7607(d)(9) (emphasis added); *see also NRDC v. EPA*, 489 F.3d 1250, 1263 (D.C. Cir. 2017) (Randolph, J. concurring).

The other criteria point strongly against the cert-worthiness of Applicants' yet-to-be-filed challenge to the D.C. Circuit's December 2015 remedial order. The D.C. Circuit decision below is unanimous,[5] unpublished, and establishes no broad new rules of law. Applicants identify no court of appeals (or even district court) that has endorsed the automatic-vacatur position they advance here.[6]

Nor is there any merit to Applicants' charge (Appl. 5-6) that *Michigan* itself resolved the remedy question in their favor. To the contrary, *Michigan* declined the explicit invitation of Applicants and other petitioners to vacate the Air Toxics Rule. *See* States Br. in Nos. 14-46, *et al.* at 48 ("EPA's final rule should be vacated."); NMA Opening Br. 45 ("The Court should vacate the MATS rule."); *see also* NMA Reply Br. 15; States Reply Br. 22. Instead, this

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[5] Judge Kavanaugh, who had earlier dissented on the cost consideration issue, joined in the December 15, 2015 decision to remand without vacatur.

[6] Even individual judges who have criticized remand-without-vacatur have urged that the important public interests it serves can be accommodated through the similar tool of staying the mandate while the agency corrects the error. *See NRDC v. EPA*, 489 F.3d at 1263 (Randolph, J., concurring).

Court remanded the remedial question to the D.C. Circuit. 135 S. Ct. at 2711. Nor did the Applicants or any other parties seek rehearing with this Court to urge their current claim that *Michigan* compels vacatur of the Rule.[7]

Furthermore, EPA's ongoing proceeding responding to *Michigan* will be completed in a matter of weeks. If EPA determines after considering cost that regulation is "appropriate," that final decision will moot Applicants' current claim; if, to the contrary, EPA determines that regulation is not "appropriate," then the Rule will no longer be effective. In either event, EPA's final decision will itself be reviewable by petition for review to the D.C. Circuit under 42 U.S.C § 7607(b). It would not make sense to grant review now over a matter that will soon become moot.

B. It is Highly Unlikely that a Majority of this Court Would Reverse the D.C. Circuit's Unanimous Decision Remanding Without Vacatur

Even if certiorari were granted, Applicants have not met their burden of demonstrating a "fair prospect," *King*, 133 S.Ct. at 2, that a majority of the Court would vote to reverse the December 15, 2015 remedial decision.

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[7] Nor are Applicants' positions advanced by claiming that *Michigan* mandates vacatur because it goes to EPA's "authority" to regulate. *See*, *e.g.*, Appl. 5, 8. Because agencies' "power to act and how they are to act is authoritatively prescribed by Congress," *City of Arlington v. FCC*, 133 S. Ct. 1863, 1865 (2013), *every* agency interpretation of a statute (even its compliance with procedural requirements) goes to an agency's "authority." *Michigan*'s ruling that EPA misread the statute goes to EPA's "authority" in this universal sense shared by every agency statutory error, but it does not mandate vacatur on that basis.

The D.C. Circuit's standard for remand without vacatur, which has been in place for decades, inquires into the likelihood that the agency that has erred would be able to reach the same result on remand and whether vacatur of the agency's action during a corrective administrative proceeding would be disruptive, as by causing harm to public health or disrupting settled expectations. *See*, *e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citing *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.,* 920 F.2d 960, 966-967 (D.C. Cir. 1990)); *Ass'n of Oil Pipe Lines v. FERC*, 281 F.3d 239, 248 (D.C. Cir. 2002); *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013).

As is typical in these cases, the application of the interim remedy test here was intensely fact-specific. Respondents submitted detailed evidence on those points to the court of appeals—including the significant health harms resulting from vacatur, *see* Addendum, which Applicants failed to contest. Applicants equally failed to introduce below any evidence purporting to show that irreparable harm would befall them if the Rule were allowed to remain in effect during EPA's supplemental administrative proceedings.

For Applicants to prevail, despite this entirely one-sided record, they would need a rigid rule of law that deems the consequences of vacatur irrelevant. But this Court's precedents provide no support for such a rule. Nor is there justification for such a rule in circumstances like those presented

here—where the agency's error can be expeditiously corrected and there is undisputed evidence that vacatur would cause serious harms to important public interests. Far from supporting such a rule, this Court has emphasized that equitable discretion is a deeply rooted feature of equity practice from which departures "should not be lightly implied." *See*, *e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944)). This Court has rejected the proposition that even a clear violation of federal law automatically merits an injunction, insisting on an examination of the practical consequences, *Romero-Barcelo*, 456 U.S. at 312, and has emphasized that such remedial choices require "particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id. See also Winter v. NRDC*, 555 U.S. 7, 24 (2008).

The many court of appeals cases adopting a remand-without-vacatur remedy recognize that because administrative decisions (especially rulemakings) can affect millions of people, engender substantial reliance interests, and represent years of policy development, it sometimes makes good sense—and avoids gratuitous difficulties—to leave the agency action in place while the agency conducts further administrative proceedings necessitated by a judicial decision. No statutory restriction, and certainly no principle of equity, requires automatic vacatur, and the unrebutted evidence before the D.C. Circuit overwhelmingly supported its remedial choice here.

C. Applicants Have Failed to Show That the Rule Will Cause Them Irreparable Harm.

Applicants have wholly failed to meet their "heavy burden" of showing they will suffer any irreparable harm in the absence of a stay. *See Ruckelhaus v. Monsanto*, 463 U.S. 1315, 1316-17 (1983) (Blackmun, J., in chambers) (citation omitted). On this basis alone, their stay application should be denied. *See Rubin v. United States*, 524 U.S. 1301, 1301 (1998) (Rehnquist, C.J., in chambers) ("An applicant for stay first must show irreparable harm if a stay is to be denied.").[8]

Applicants have failed to provide any evidence to show irreparable injury is *likely*—to them—absent a stay. *See Winter*, 555 U.S. at 21-22; *see also Nken v. Holder*, 556 U.S. 418, 434-35 (2009) (applicant must do more than "simply show[] some 'possibility of irreparable injury'") (citation omitted). The harms Applicants do briefly discuss are past ones falling on other actors; they focus largely on the compliance costs of the Rule that the regulated industry has *already* incurred to date—past costs which are

[8] Applicants claim that they are not obligated to demonstrate irreparable harm here, Appl. 7, but this case is entirely different from the two cases they cite for that proposition, both of which involved a lower court ruling in obvious conflict with a decision of this Court. *See Jaffree v. Bd. of Sch. Comm'rs of Mobile Cty.*, 459 U.S. 1314, 1315 (1983) (Powell, J., in chambers) (stay allowed where Alabama federal district court had "ruled 'that the United States Supreme Court has erred'" in applying the Establishment Clause to the states); *Pacileo v. Walker*, 446 U.S. 1307, 1309-10 (1980) (Rehnquist, J.) (stay allowed where California Supreme Court had barred prisoner's extradition despite Supreme Court precedent establishing that the extradition request at issue was lawful).

entirely irrelevant to the required showing of irreparable harm here. *See* Appl. at 9, 10.[9]

As set forth above, Applicants never sought a stay in any of the prior proceedings challenging the Rule. Applicants' prior inaction and delay in filing this Application belies their claims of substantial or imminent irreparable injury. *See Ruckelhaus*, 463 U.S. at 1318 ("EPA Administrator's failure to act with greater dispatch tends to blunt his claim of urgency and counsels against the grant of a stay.").

Applicants' position contrasts notably with that of the regulated industry itself, which tellingly did not seek vacatur or a stay below. *See* Response of Util. Air Reg. Grp. ("UARG") to Fed. Resp. Mot. to Govern, ECF No. 1579258. As the respondent electric generators who intervened in support of the Rule demonstrated, suspending the Rule would cause significant disruption for the electric-generating industry and harm generators who had already come into compliance. Industry Resp.-Intervenor Mot. at 12-18. Applicants have offered no evidence here or below of any harm

[9] Applicants assert that EPA's initial estimate of compliance costs *to industry* demonstrates harm. But not only does this estimate reflect costs to industry, and not to the states that are the sole moving parties here, but the figure cited dramatically overstates the actual costs of the rule. *See* Industry Resp.-Intervenor Mot. (ECF No. 1574838) at 8 (noting study finding that industry's annual compliance costs are approximately $2 billion, less than one-quarter of the annual cost EPA initially estimated) (citing Declaration of Dr. James E. Staudt ("Staudt Decl.") ¶¶ 5, 12, 14.

to them (or to their residents) that would result from continued operation of the Rule until EPA issues its Supplemental Finding in a few weeks.

In contrast, the record squarely demonstrates that the requested stay would be very harmful to the public, and to the Respondent-Intervenor States.[10] EPA and State and Public Health Respondent-Intervenors filed eight detailed declarations below, including from leading health scientists, showing that vacating the Rule in its entirety or suspending it as to plants with a future compliance deadline would result in large emissions of highly toxic pollutants that otherwise would be avoided if the Rule remained in effect. *See* State/NGO Mot., Exs. 1-6; EPA Mot., McCabe Decl.; State/NGO Resp., Ex. 1.[11] Power plants that have installed controls can save money by not operating them. Issuing a stay now, for any period, would mean that power plants across the country that have made the capital investments necessary to install pollution controls and are complying with the Rule could elect to simply turn those controls off, and the plants that obtained

[10] The Rule is delivering, for the first time, substantial reductions in highly toxic power plant air pollution. EPA estimated that by this year, 2016, the Rule would reduce emissions of mercury by 75 percent, 77 Fed. Reg. at 9424, hydrochloric acid gas by 88 percent, *id.*, and emissions of non-mercury metals such as arsenic, chromium, and nickel, which are known or suspected carcinogens, by 38 percent, 76 Fed. Reg. at 24,978, 25,015.

[11] The declarations cited herein that were submitted by the State, Local Government and Public Health Respondent-Intervenors below are reproduced in the Addendum to this brief.

extensions and are not yet operating controls could cease all efforts to comply—resulting in substantial additional emissions of toxic air pollution.

This unrebutted evidence showed that vacating the rule would result in the release of large quantities of extremely toxic pollution—including mercury; hydrogen chloride, hydrogen fluoride, hydrogen cyanide, and chlorine gases; and arsenic, chromium, cadmium, and other non-mercury metals associated with primary and secondary particulate matter. State/NGO Mot., Ex. 3, Sahu Decl. ¶¶ 7-9 (estimating that vacatur would result in forgoing 59 to 72 percent of the mercury reductions and 61 to 75 percent of the acid gas and particulate matter reductions expected by April 2016 from the Rule). It showed, as well, that suspending the Rule solely with respect to the units that had received a one-year extension would result in substantial additional emissions. Sahu Response Decl. ¶¶ 5-7 (estimating annual emission increases of approximately seven to eight tons of mercury and 17,000 to 40,000 tons of hydrochloric acid gas, as well as a 43 to 52 percent increase in secondary particulate matter pollution, as compared to full implementation of the Air Toxics Rule by April 2016).

Congress listed these pollutants under section 7412, the Clean Air Act's "most-wanted" list of contaminants, because those pollutants are *extremely* dangerous to humans. They cause serious, debilitating public heath harms, including increased risk of permanent neurological damage (especially to

developing fetuses and children) from mercury exposure, State/NGO Mot. Ex. 1, Grandjean Decl. ¶¶ 11, 15; increased risk of acute and chronic respiratory illnesses from acid gas exposure, *id.*, Ex. 6, Rosenstein Decl. ¶¶ 11-19; and increased risk of heart attack, stroke, and premature death from particulate matter exposure, *id.*, Ex. 5 Dockery Decl. ¶¶ 10-11.

Respondents demonstrated below that suspending the Rule would mean that people living near power plants and the broader public would face numerous serious health harms during the remand period. *Id.*, Grandjean Decl. ¶¶ 12, 30 (even short term changes in atmospheric mercury load will increase deposition in aquatic systems causing harmful bioaccumulation in fish, birds and mammals); Miller Decl. ¶ 20 (any delay in reductions required by Rule poses risks of human exposure to higher mercury levels through fish consumption); Rosenstein Decl. ¶¶ 31-32 (during a period when Rule is not in effect, populations living near power plants would likely experience direct adverse health impacts from exposure to uncontrolled acid gas emissions); Dockery Decl. ¶¶ 10-11, 24 (direct health impacts, such as respiratory symptoms, heart attack, stroke, and premature death will result if reductions in particulate matter and sulfur dioxide emissions are not achieved during any period Rule is not in effect). *See also* 77 Fed. Reg. at 9429 (Table 9) (full implementation of Rule in 2016 would result in 4,200 to 11,000 fewer premature deaths related to fine particulate matter exposure alone).

In addition, staying the Rule would also exacerbate pollution that contaminates water bodies throughout the United States, and renders fish unsafe for human consumption. EPA's 2011 national-scale risk assessment completed in support of the Rule showed that, by 2016, power-plant emissions alone would cause exceedances of safe mercury levels in 10 percent of 3100 watersheds modeled, and would significantly contribute to exceedances of safe mercury levels in 29 percent of those watersheds. 77 Fed. Reg. at 9311, 9362. Due to mercury pollution, all fifty states have put fish consumption advisories into effect;[12] and in some states, all or nearly all waters are unsafe for fish consumption due to mercury contamination.[13]

Mercury contamination of water bodies is significant enough to require the development of state-wide mercury "pollution budgets," known as "total maximum daily loads" ("TMDLs"), for mercury-polluted waterbodies in eight Northeastern states and four states in the Southeast and Midwest in order to meet federal Clean Water Act water quality standards. *See* 33 U.S.C. 1313(d)(1) (requiring development of TMDLs for impaired waters).[14]

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[12] *See* EPA, 2011 National Listing of Fish Advisories, EPA-820-F-13-058 at 4 (2013).

[13] *See, e.g.,* North Carolina Mercury Total Maximum Daily Load 20 (2012) (NC TMDL) (all state waters impaired); Statewide Michigan Mercury Total Maximum Daily Load: Public Review Draft 9 (2013) (MI TMDL) (all inland lakes and hundreds of river miles impaired).

[14] Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont are implementing a regional mercury TMDL, while Florida, Michigan, Minnesota, New Jersey, and North Carolina are implementing or finalizing state-

Achievement of many of those states' TMDL goals depends upon the nation-wide reductions in mercury emissions from coal-fired power plants that the Air Toxics Rule will provide.[15]

The Air Toxics Rule is also important to state efforts to meet other health-protective Clean Air Act obligations. States are required to satisfy National Ambient Air Quality Standards, see 42 U.S.C. 7409, 7410, for various pollutants that are affected by the Rule, in particular sulfur dioxide and filterable particulate matter. Because the Rule will result in significant reductions in emissions of those pollutants, as a result of controlling acid gas and metal toxics emissions, EPA guidance on compliance with air quality standards for SO_2 and particulate matter specifically contemplates incorporation of Air Toxics Rule reductions into state implementation plan submissions. *See* 80 Fed. Reg. 51052, 51062 (Aug. 21, 2015) (implementation schedule for 2016 round of SO_2 nonattainment designations designed to allow

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wide mercury TMDLs. *See* Regional Mercury Total Maximum Daily Load vi, 44 (2007) (Northeast TMDL); Final Report: Mercury TMDL for the State of Florida (2013); MI TMDL, *supra*, note 13; Minnesota Statewide Mercury Total Maximum Daily Load (2007) (MN TMDL); Total Maximum Daily Load for Mercury Impairments Based on Concentration in Fish Tissue Caused Mainly by Air Deposition to Address 122 HUC 14s Statewide (2009); NC Mercury TMDL, *supra*, note 13.

[15] The Northeast states' TMDL concludes that EPA action to "implement significant reductions from upwind out-of-region sources, primarily coal-fired power plants" is needed to return fish methylmercury concentrations to safe levels. *See* Northeast TMDL, *supra* note 14, 44; Miller Decl. ¶ 9. *See also* MN TMDL, *supra*, note 14, 20-21, 45 (30 percent of Minnesota's mercury deposition originates from out-of-state domestic sources; federal regulation of those sources, including power plants, holds most promise for reaching TMDL goals).

states to "account for SO_2 reductions that will occur over the next several years as a result of implementation of [other] requirements (such as the ([Air Toxics Rule]))"); 80 Fed. Reg. 15,340, 15,349-50 & n.47 (Mar. 23, 2015) (instructing states with moderate nonattainment areas to incorporate SO_2 reductions (a $PM_{2.5}$ precursor), such as those from the Air Toxics Rule, into nonattainment modeling).[16]

The balance of equities thus easily tips in favor of Respondents here, providing no basis for the requested stay. *See Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J, in chambers) (denying stay in Clean Air Act case where applicants delayed in seeking stay and their affidavits "contain[ed] little, if any, specific information as to the harm to be expected over the two months remaining" until Court could review cert petition).

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[16] Reducing sulfur dioxide emissions from coal-fired power plants, as is required for acid gas control, also is important to state efforts to reduce regional haze and meet federal visibility goals in national parks and wilderness areas. *See* 42 U.S.C. § 7491; 64 Fed. Reg. 35,747 (Jul. 1, 1999) (regional haze rule); EPA, *General Principles for the 5-Year Regional Haze Progress Reports for the Initial Regional Haze State Implementation Plans* 8 (2013) ("[R]eductions in SO2 and NOx emissions from EGUs are generally critical elements of each state's regional haze strategy."). As a result, many states' recent regional haze progress reports recognize that the Rule will help assure that regional haze goals are met. *See, e.g.*, State Implementation Plan Regional Haze Periodic Progress Report for the State of Florida 17 (2015) (Air Toxics Rule, along with other federal regulations, will provide "extra assurances" of the required "reasonable progress" toward national visibility goals); Regional Haze 5-Year Periodic Review State Implementation Plan for North Carolina Class I Areas 24 (2013) (same). *See also* Kentucky State Implementation Plan (SIP) Revision: Regional Haze 5-Year Periodic Report 2008-2013 for Kentucky's Class I Federal Area App. C-5, 4 (2014) ("The [Air Toxics Rule] … is one of the federal control measures … that is an important part of Kentucky's Regional Haze SIP.").

III. APPLICANTS ARE NOT ENTITLED TO AN INJUNCTION

The applicants are not entitled to an injunction against the Agency, which would require an "original writ" pursuant to the All Writs Act, 28 U.S.C. 1651(a), a power which should be used "'sparingly and only in the most critical and exigent circumstances.'" *Ohio Citizens,* 479 U.S. at 1312.[17] Because such a writ "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts," it requires "a significantly higher justification" than a stay of a lower court judgment under 28 U.S.C. 2101(f): (1) "the applicant must demonstrate that the injunctive relief" it requests "is 'necessary or appropriate in aid of [the Court's] jurisdictio[n]'"; and (2) the "legal rights at issue" must be "indisputably clear." *Ohio Citizens*, 479 U.S. at 1313-14 (alterations in original and citation omitted).

The Applicants have not shown that the requested injunction is necessary or appropriate to the Court's jurisdiction. *See* 28 U.S.C. §1651(a) (All Writs Act). Applicants claim that the rulemaking that EPA is conducting to comply with *Michigan's* instruction to "account for cost," 135 S. Ct. at 2711,

[17] Because the relief Applicants seek targets an Executive agency – not a court – it can only be granted under the All Writs Act, 28 U.S.C. 1651(a). *See Hobby Lobby Stores v. Sebelius,* 133 S. Ct. 641, 642-43 (2012) (Sotomayor, J., in chambers). *See also Ohio Citizens,* 479 U.S. at 1313 ("[I]t is only the execution or enforcement of *final* orders that is stayable under [28 U.S.C. 2101(f)]."). Applicants' failure to "satisfy the demanding standard for [such] extraordinary relief" would require denial of the application, even if they had met the less severe standards for a stay under section 2101(f). *Hobby Lobby Stores,* 133 S.Ct. at 642.

threatens to "moot" their proposed certiorari petition, because it will provide a "valid authorization" for the Rule, and thereby render the court of appeals' December 15 order irrelevant. Appl.13-14. But Applicants do not seek to enjoin EPA's reconsideration of its "appropriate and necessary" finding—they request an injunction against the Rule itself. That injunction is wholly unrelated to the 'jurisdictional' threat that applicants allege; even if this Court granted it, EPA's imminent completion of the costs-consideration required by this Court in *Michigan* would vitiate any petition for certiorari.

Moreover, that a case or controversy may soon be moot does not render an injunction "necessary or appropriate" in aid of the Court's jurisdiction under 28 U.S.C. 1651(a). As this Court has observed in applying the similarly worded provisions of the Anti-Injunction Act, "[n]o case of this Court has ever held that an injunction necessary to 'preserve' a case or controversy" is "necessary in aid of its jurisdiction." *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 642-43 (1977). Applicants ask for an injunction that would manufacture a controversy where none would otherwise exist. That is a reason to forego review, not justification for the "extraordinary relief" of an injunction under the All Writs Act. *Ohio Citizens,* 479 U.S. at 1314.

And applicants have no "indisputably clear" right to the judicial remedy of vacatur. They have not even made the lesser showing of likelihood of success in their challenge to the court of appeals' order. *See* pp. 11-13, *supra*.

No Circuit—or even a single Circuit Judge—has concluded that the Clean Air Act constrains the courts of appeals to a single remedy of immediate vacatur. *See* pp. 9-10, *supra* (noting distinction between text of Clean Air Act and Administrative Procedure Act). The absence of any decision from any court supporting applicants' right to vacatur precludes any suggestion that their right to that remedy is either 'indisputable' or 'clear.' *See Brown v. Gilmore,* 533 U.S. 1301 (2001) (Rehnquist, C.J., in chambers). If anything, it is "indisputably clear" that Applicants' argument for automatic vacatur must fail.

CONCLUSION

The Application should be denied.

Respectfully submitted,

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Dated: March 2, 2016.

No. 15A886

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MICHIGAN, ET AL.,
Applicants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

On Application for a Stay or Injunction of the Mercury and Air Toxics Rule Pending a Petition for a Writ of Certiorari

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Opposition of the State, Local Government, and Public Health Respondent-Intervenors to Stay or Enjoin the Mercury and Air Toxics Rule Pending Petition for a Writ of Certiorari

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RULE 29.6 STATEMENT

Nongovernmental Respondent-Intervenors American Academy of Pediatrics, American Lung Association, American Nurses Association, American Public Health Association, Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Clean Air Council, Conservation Law Foundation, Environment America, Environmental Defense Fund, Izaak Walton League of America, National Association for the Advancement of Colored People, Natural Resources Council of Maine, Natural Resources Defense Council, The Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, and Waterkeeper Alliance, all of which were respondent-intervenors in the court of appeals, are nonprofit public interest organizations. None of them has any corporate parent, and no publicly held corporation owns an interest in any of them. The remaining Respondent-Intervenors submitting this opposition are state or local governments for which no Rule 29.6 Statement is required.