No. _____

In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., APPLICANTS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

APPLICATION BY 20 STATES TO STAY OR ENJOIN THE MERCURY AND AIR TOXICS RULE PENDING A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice John G. Roberts,
Chief Justice of the Supreme Court of the United States and
Circuit Justice for the D.C. Circuit

INTRODUCTION

Unless this Court stays or enjoins further operation of the Mercury and Air Toxics Rule, this Court's recent decision in *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015), will be thwarted. *Michigan* v. *EPA* held that the Clean Air Act requires EPA to consider costs *before* it may regulate power plants—that is, *before* it may impose any rule, including the Mercury Rule. Yet the Rule remains in effect, even though EPA has never fulfilled this precondition and so has never acquired the authority to regulate—to this day it has not found, as 42 U.S.C. § 7412(n)(1) requires, that it is "appropriate and necessary," *taking into account costs*, to regulate power plants.

On remand, the D.C. Circuit nonetheless refused to vacate the unauthorized Rule, and instead left it in place with the effect of binding law. Because this Court's ruling means that EPA never acquired authority to impose this Rule, this Court should stay the unauthorized Rule pending a petition for certiorari asking that the Rule be vacated.

A stay or injunction is appropriate because this Court has *already held* that the finding on which the Rule rests is unlawful and beyond EPA's statutory authority: "EPA strayed far beyond" "the bounds of reasonable interpretation" of the Clean Air Act "when it read [42 U.S.C.] § 7412(n)(1) to mean that it could ignore cost when deciding to regulate power plants." *Michigan* v. *EPA*, 135 S. Ct. at 2707.

This is an unmistakable example of agency overreach: an executive agency strayed far beyond the limited authority the legislative branch gave it, and then, when this Court corrected the agency's error, EPA requested on remand that the unauthorized, unlawful regulation should be left in place to have the force of law. And, to make matters worse, the D.C. Circuit acquiesced. Just two weeks ago this Court correctly granted a stay of an EPA rule (commonly known as the Clean Power Plan) *before* the rule had undergone judicial review, presumably because this Court recognized that there was a strong likelihood that the rule was likely to be held to be unlawful and in excess of the agency's authority under the Clean Air Act. Order, *West Virginia* v. *EPA*, No. 15A773 (Feb. 9, 2016) (granting a pre-review stay of EPA's Clean Power Plan). A stay is even more warranted here, *after* this Court has reviewed EPA's finding authorizing the Mercury Rule and has found it to be unlawful and in excess of EPA's authority under that same Act.

Accordingly, the undersigned applicants respectfully move this Court to stay or enjoin operation of the Rule, so that the applicants and citizens across the Nation will not continue to be subjected to EPA's unauthorized Rule and so that this Court's decision in *Michigan* v. *EPA* will be given effect.

JURISDICTION

On remand from this Court, the D.C. Circuit asked the parties to file motions to govern further proceedings and, on December 15, 2015, rejected the States' request that the Rule be vacated. (Appendix A.) These motions addressing whether the Rule should be vacated took the place of a motion to stay the Rule. Under the D.C. Circuit's decision, the Rule remains in effect because "EPA has represented that it is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15, 2016." (*Id.*) This Court has jurisdiction under 28 U.S.C. § 2101(f) and § 1651(a), and an individual Justice can issue a stay under Supreme Court Rule 23.

STANDARDS FOR GRANTING RELIEF

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). Further, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

To obtain an injunction pending appeal, an applicant must show that the injunction is "necessary or appropriate in aid of [this Court's] jurisdiction," 28 U.S.C. § 1651(a), and that "the legal rights at issue are 'indisputably clear,'" *Turner Broadcasting Sys., Inc.* v. *FCC*, 507 U.S. 1301, 1301 (Rehnquist, C.J., in chambers).

The current circumstances satisfy both tests because this Court has *already* granted certiorari to consider the lawfulness of EPA's finding and has *already* held that EPA strayed far beyond the bounds of its statutory authority when making the appropriate-to-regulate finding. As a result, it is indisputably clear that EPA lacks any authority to regulate power plants by imposing any rule, including the Mercury Rule. And if EPA is able to complete, for the first time, a lawful "appropriate and necessary" finding within the next several months, as it hopes to, it will no doubt assert that the issue—its imposition of an unauthorized rule on the public since February 2012—is moot. This Court therefore should stay or enjoin the Rule to preserve this Court's jurisdiction to enforce its ruling in *Michigan* v. *EPA*.

REASONS FOR GRANTING THE APPLICATION

Ordinarily, this sort of motion would be necessary only *before* this Court examined whether an agency-promulgated rule is lawful. But here, this Court has already determined that the Rule is unlawful. By holding that EPA "must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary," *Michigan* v. *EPA*, 135 S. Ct. at 2711, this Court has already concluded that EPA's "appropriate" finding was unlawful. *Id.* at 2712 ("We hold that EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants."). And it follows, like night follows day, that if that prerequisite finding was unlawful, then EPA had no authority to regulate power plants—not in 2012 when it promulgated the Rule, and still not today.

Ordinarily, then, an unlawful agency action would not just be *temporarily* stayed or enjoined, but *permanently* vacated and set aside. E.g., 5 U.S.C. § 706(2) ("The reviewing court *shall* . . . hold unlawful and *set aside* agency . . . findings . . . found to be . . . in excess of statutory . . . authority.") (emphasis added); *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414 (1971) ("In *all cases* agency action must be set aside . . . if the action failed to meet statutory, procedural, or constitutional requirements.") (emphasis added), abrogated on other grounds by *Califano* v. *Sanders*, 430 U.S. 99 (1977). Here, though, EPA requested that the Rule be left in effect, and the D.C. Circuit refused on remand to vacate the unauthorized Rule, necessitating this application and the filing of a petition for a writ of certiorari. See *Blodgett* v. *Campell*, 508 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers) (single justice lacks authority to unilaterally vacate en banc court's order).

I. This Court already granted certiorari to resolve whether the finding that authorized the Mercury Rule was lawful and held that it was not, so a stay of the unauthorized Rule is necessary.

The first two factors governing this Court's stay analysis—a reasonable probability that certiorari would be granted and a fair prospect that the lower court would be reversed—do not just weigh in favor of granting the motion; they have actually been met. As to the first, this Court granted certiorari in *Michigan* v. *EPA* to address "whether it was reasonable for EPA to refuse to consider cost when making" the § 7412(n)(1)(A) finding that authorizes EPA to regulate power plants. 135 S. Ct. at 2704. And as to the second, this Court reversed the D.C. Circuit: "We hold that EPA

interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants. We reverse the judgment of the Court of Appeals for the D.C. Circuit and remand the cases for further proceedings consistent with this opinion." *Id.* at 2712.

This Court's ruling expressly recognized that the finding is a statutory condition that must be met *before* EPA has the authority to impose regulations, such as the Mercury and Air Toxics Rule, on power plants: "The Agency must consider cost—including, most importantly, cost of compliance—*before* deciding whether regulation is appropriate and necessary." *Id.* at 2711 (emphasis added). That necessarily means that EPA, which has never cleared this statutory hurdle, has no authority to impose any regulation, including the Mercury Rule. After all, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); see also *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (agency "exceed[ed] [its] authority" when it promulgated a rule based on its unreasonable interpretation of a statute). Indeed, in its briefing before the D.C. Circuit, EPA did not even argue that it had authority; instead it merely argued that leaving the Rule in place until EPA can complete an § 7412(n)(1)(A) finding would help the environment. EPA C.A. Mot. to Govern 1 (arguing for "remand without vacatur" to "preserve the important public health and environmental benefits achieved by the Rule").

The first two stay factors are dispositive. S. Shapiro et al., *Supreme Court Practice* 899 (10th ed.) ("[I]f the decision below is a refusal to follow the law as announced by the Supreme Court, . . . a judgment may be stayed without explicitly mentioning irreparable injury or any other factor."); accord *Jaffree* v. *Bd. of Sch. Comm'rs of Mobile Cty.*, 459 U.S. 1314, 1316 (1983) (Powell, J., in chambers) ("Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated to follow them. . . . Accordingly, I am compelled to grant the requested stay."); *Pacileo* v. *Walker*, 446 U.S. 1307, 1310 (1980) (Rehnquist, J., in chambers) ("It seems to me that the order issued by the Supreme Court of California is very much at odds with principles set forth in [two of this Court's cases], and I have therefore decided to grant the application" for a stay pending a petition for certiorari.).

And it makes sense that the first two factors would be dispositive here. For one, the irreparable-harm and balance-of-the-equities factors go to the risk that *incorrectly* staying a judgment or rule will harm someone. See Dan B. Dobbs, *Law of Remedies* § 2.11(2) at 189 (2d ed.1993) ("[T]he judge should grant or deny preliminary relief with the possibility in mind that *an error* might cause irreparable loss to either party. Consequently the judge should attempt to estimate the magnitude of that loss on each side and also *the risk of error.*") (emphasis added). But here there is no risk of error, because this Court has already held that the finding on which EPA's authority to regulate is premised is unlawful. For another, under the circumstances at issue here, requiring the public to comply with a regulation imposed by an agency that has

"strayed far beyond" its statutory authority, *Michigan* v. *EPA*, 135 S. Ct. at 2707, is a form of irreparable harm. After all, it undermines the most fundamental principles of our system of limited government and enumerated powers to allow an administrative agency to impose binding laws on the public without any grant of authority underlying its actions.

Indeed, the stay analysis itself should be unnecessary, because agency action that is not based on any legislative authorization must be *vacated*, not merely stayed. This is a basic principle of administrative law in our system of enumerated powers and limited government. The Administrative Procedure Act spells out this principle: "The reviewing court *shall* . . . hold unlawful *and set aside* agency action, findings, and conclusions found to be . . . in excess of statutory . . . authority." 5 U.S.C. § 706(2) (emphasis added); see also 42 U.S.C. § 7607(d)(9)(C). And this Court's cases spell it out too. E.g., *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414 (1971) ("In *all cases* agency action *must* be set aside . . . if the action failed to meet statutory, procedural, or constitutional requirements.") (emphasis added), abrogated on other grounds by *Califano* v. *Sanders*, 430 U.S. 99 (1977); *FCC* v. *NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act *requires* federal courts to set aside federal agency action that is 'not in accordance with law,' 5 U.S.C. § 706(2)(A).") (emphasis added). In fact, it is more than a little ironic that the D.C. Circuit's refusal to *vacate* the unauthorized *Rule* operates to *stay* the effect of *this Court's decision.*

In any event, leaving this unlawful Rule in place for more than four years since it was promulgated in 2012, 135 S. Ct. at 2705, and for more than seven months since this Court's decision in *Michigan* v. *EPA*, has already caused irreparable harm. It has imposed literally billions of dollars of compliance costs on utilities (and by extension, on all members of the public who use electricity), *id.* at 2706, and even if a similar rule is lawfully imposed at some time in the future, the quite substantial time-value of that money has already been lost and is irrecoverable. There is no adequate remedy at law, as there is no claim that could be asserted to recover on that injury. E.g., *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) ("Normally the mere payment of money is not considered irreparable, but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable.") (citation omitted).

Further, the Rule continues, today, to impose unlawful costs. It imposes monitoring, reporting, and recordkeeping requirements, requirements that impose (by EPA's own calculations) $158 million each year. Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards, EPA-HQOAR-2009-0234-20131, at 3-30 (averaging costs over the first three years the Rule is in effect). These compliance costs *by themselves* exceed the projected annual $4 to $6 million in environmental benefits from the Rule's reduction of hazardous-air-pollutant emissions, *Michigan* v. *EPA*, 135 S. Ct. at 2706, by a ratio of at least $26 of costs for every $1 of benefit. The Rule also requires running environmental controls, which is an additional ongoing cost. These ongoing expenditures too will never be recoverable as damages, even after this Rule

is properly vacated. And power plants could be subject to penalties for alleged violations of the unlawful Rule. So the Rule should be stayed now, to prevent the irreparable injuries from continuing to pile up and to halt the ongoing, irrecoverable costs it continues to unlawfully impose.

As to the balance of the equities, the Rule has already imposed $9.6 *billion* in annual costs without any statutory authorization for only $4 to $6 million in environmental benefits, 135 S. Ct. at 2706, so the equities weigh heavily against continued imposition of the Rule. And given that "equity follows the law," *Hedges* v. *Dixon Cty.*, 150 U.S. 182, 192 (1893), it is inequitable to leave an unauthorized regulation in place with the effect of law.

The D.C. Circuit disregarded these points, based on a doctrine that it has developed, which this Court has never approved, of allowing agency actions to be remanded without vacatur under certain circumstances. See *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). In *Allied-Signal*, the agency failed to provide "a reasoned explanation" for its rule, and the D.C. Circuit stated that "[a]n inadequately supported rule . . . need not necessarily be vacated." *Id.* The court then set out a two-part test: "The decision whether to vacate depends on [1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed." *Id.* at 150–51. The D.C. Circuit has applied this test for years in instances where an agency has failed to adequately explain the basis for its administrative action. E.g., *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755 (D.C. Cir.

2002) ("[A]s the administrative record now stands, the court is unable to determine whether the Secretary's interpretation of the regulations was inconsistent with the plain language of the 2000 Appropriations Act, and as such, contrary to law."); *Heartland Reg'l Med. Ctr v. Sibelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur.").

Perhaps that approach has merit in instances where the agency had authority for its action but failed to adequately explain its reasoning, thereby making it difficult for a court to determine whether the action was arbitrary and capricious. Compare *Checkosky* v. *SEC*, 23 F.3d 452, 463 (D.C. Cir. 1994) (opinion of Silberman, J.) ("Since 'courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review,' reviewing courts will often and quite properly pause before exercising full judicial review and remand to the agency for a more complete explanation of a troubling aspect of the agency's decision.") (citation omitted), with *id.* at 491 (opinion of Randolph, J.) ("Once a reviewing court determines that the agency has not adequately explained its decision, the [APA] requires the court—in the absence of any contrary statute—to vacate the agency's action.").

But leaving an agency rule in place cannot be justified when the agency lacked authority to promulgate it in the first place and where full judicial review, all the way up to this Court, has already rejected the agency's reasoning. Indeed, applying the D.C. Circuit's *Allied-Signal* test in this context gets the analysis backward—it ignores

the factors relating to the likelihood of success (even though the regulation has already been found to be unlawful) and focuses on the balance of equities of leaving the unlawful Rule in place (even though the party that acted unlawfully should be the one bearing any risk of error). Even worse, its weighing of the equities is focused on only the "interim change," *Allied-Signal*, 988 F.2d at 150–51, and therefore ignores the most significant equitable fact in this case—that *billions* of dollars have already been spent in an effort to meet the unauthorized Rule's future compliance deadlines. A proper balancing of the equities would examine the irreparable harms already caused by the unlawful agency action, instead of allowing those harms to continue simply because the bulk of the harms from the unlawful regulation have already been suffered.

The D.C. Circuit's decision to allow a regulation to remain in effect even after this Court has held it to be unauthorized is an issue that warrants this Court's review. Indeed, the authority of a court to leave in place an unlawful regulation is an important question of administrative law, particularly given the D.C. Circuit's exclusive jurisdiction over the review of many agency actions. The petition thus will further explain not only how the decision below conflicts with this Court's decision in *Michigan* v. *EPA*, but also why the *Allied-Signal* test cannot be used to allow "remand without vacatur" in situations like this one. In short, the test runs contrary to the Administrative Procedure Act and principles of administrative law when it allows a reviewing court to leave an unauthorized rule in place, rather than "set[ting] aside

agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2). Instead, the D.C. Circuit should vacate administrative actions taken without authority, as it has correctly done in the past. E.g., *New York* v. *EPA*, 413 F.3d 3, 40 (D.C. Cir. 2005) ("[W]e hold that EPA lacks authority to promulgate the Clean Unit provision, and we vacate that portion of the 2002 rule as contrary to the statute under *Chevron* Step 1.") (citation omitted); *Sierra Club* v. EPA, 705 F.3d 458, 469 (D.C. Cir. 2013) ("We grant the Sierra Club's petition as to the parts of the EPA's rule establishing a [significant monitoring concentration for fine particulate matter], and vacate them because these parts of the rule exceed the EPA's statutory authority."); *Nat. Res. Def. Council* v. *EPA*, 489 F.3d 1250, 1254 (D.C. Cir. 2007) ("[W]e conclude that EPA's definition of 'commercial or industrial waste' . . . is inconsistent with the plain language of section 129 [of the Clean Air Act] and that the CISWI Definitions Rule must therefore be vacated.").

II. An injunction is warranted to preserve this Court's authority to vacate the unlawful Rule.

When EPA imposed the Rule in 2012 without having considered costs as part of its "appropriate" finding, it failed to comply with § 7412(n)(1)(A) and therefore acted without authority. And EPA still has not made a lawful finding that it is appropriate and necessary to regulate power plants, taking into account costs.

But EPA, ever optimistic, expects to acquire authority soon—it aims to satisfy the statutory precondition in a few months. (Appendix A ("EPA has represented that it is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15,

2016.").) Once it has done so, at that time (assuming EPA lawfully considers the costs of compliance), it will acquire the authority to support the Rule. And once that has happened, EPA will likely contend that any petition for certiorari will then be moot, because the Rule will then rest on a valid authorization. While the applicants believe the case will not then be moot (because this circumstance falls within the capable-of-repetition-yet-evading-review exception to mootness), EPA will likely contend that this Court will lack jurisdiction to effectuate its decision in *Michigan* v. *EPA*. Accordingly, this Court should act to preserve its jurisdiction by staying the Rule now, while the issue is indisputably ripe, until either (1) EPA actually completes a valid § 7412(n)(1)(A) finding or (2) the Court resolves the applicants' petition for a writ of certiorari. *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 604 (1966) (recognizing " 'a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels' ").

As to the second part of the injunction standard, the legal rights at issue are " 'indisputably clear.' " *Turner Broadcasting*, 507 U.S. at 1301 (Rehnquist, C.J., in chambers). It is "axiomatic" that EPA's "power to promulgate" regulations governing power plants "is limited to the authority delegated by Congress." *Bowen*, 488 U.S. at 208. It is indisputably clear that EPA has exceeded that authority. *Michigan* v. *EPA*, 135 S. Ct. at 2707 ("EPA strayed far beyond [the bounds of reasonable interpretation] when it read § 7412(n)(1) to mean it could ignore cost when deciding whether to regulate power plants."); *id.* at 2711 ("The Agency must consider cost—including, most

importantly, cost of compliance—before deciding whether regulation is appropriate and necessary."); *id.* at 2712 ("We hold that EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants."). Accordingly, the rights of the applicants and indeed of the general public to be free from EPA's unauthorized rule is obvious.

The hope that EPA may make a proper "appropriate and necessary" finding in the future does not lessen the importance of this issue. It is no answer to the fact that EPA has imposed an unlawful rule on the public for four years now to say EPA may gain authority sometime in the future. Imagine if a court did what EPA did. Imagine if a federal court issued a permanent injunction when the court lacked jurisdiction. No reviewing court would leave that ultra vires injunction in place on the theory that the lower court might acquire jurisdiction at some point in the future.

Enforcing this Court's authority by ensuring that its decisions are actually given effect—rather than stayed by a lower court—is an important part of aiding this Court's jurisdiction, 28 U.S.C. § 1651(a). Accordingly, the undersigned States respectfully ask this Court to stay or enjoin the Mercury and Air Toxics Rule until either (1) EPA acquires authority to regulate power plants by making a § 7412(n)(1)(A) finding that such regulation is appropriate and necessary, taking into account costs, or (2) until this Court resolves the applicants' petition for a writ of certiorari.

CONCLUSION

For these reasons, the States respectfully request an immediate stay of the Mercury and Air Toxics Rule.

Respectfully submitted,

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APPENDIX A:
Order of the D.C. Circuit (Dec. 15, 2015)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1100 **September Term, 2015**

EPA-77FR9304

Filed On: December 15, 2015

White Stallion Energy Center, LLC,

Petitioner

v.

Environmental Protection Agency,

Respondent

American Academy of Pediatrics, et al.,
Intervenors

Consolidated with 12-1101, 12-1102, 12-1147, 12-1172, 12-1173, 12-1174, 12-1175, 12-1176, 12-1177, 12-1178, 12-1180, 12-1181, 12-1182, 12-1183, 12-1184, 12-1185, 12-1186, 12-1187, 12-1188, 12-1189, 12-1190, 12-1191, 12-1192, 12-1193, 12-1194, 12-1195, 12-1196

BEFORE: Garland, Chief Judge; Rogers and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the joint motion of Certain State and Industry petitioners to govern further proceedings, the motion of Tri-State Generation and Transmission Association Inc. to govern proceedings on remand from the U.S. Supreme Court and supplement thereto, the joint motion of the State, Local Government, and Public Health respondent-intervenors for remand without vacatur, the motion of respondent EPA to govern future proceedings, the motion of Industry respondent-intervenors to govern future proceedings, the response of EPA to petitioners' motions to govern future proceedings, the response of Certain State and Industry petitioners to motions to govern further proceedings of respondent and respondent-intervenors, the response of Tri-State Generation and Transmission Association Inc. to motions to govern and the supplement

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1100 **September Term, 2015**

thereto, the joint response of the State, Local Government, and Public Health respondent-intervenors to State and Certain Industry petitioners' motions to govern, the consolidated response of Industry respondent-intervenors to petitioners' motions to govern future proceedings, the response of the Utility Air Regulatory Group ("UARG") to federal respondent's motion to govern future proceedings, the joint reply brief of the State, Local Government, and Public Health respondent-intervenors, the reply brief of Certain State and Industry petitioners in support of their joint motion to govern further proceedings, the reply of Tri-State Generation and Transmission Association Inc. and the supplement thereto, the reply of EPA in support of its motion to govern future proceedings, the reply of Industry respondent-intervenors in support of their motion to govern future proceedings, and the oral arguments of counsel, it is

ORDERED that the proceeding be remanded to EPA without vacatur of the Mercury and Air Toxics Standards final rule. *See Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). In so doing, we note that EPA has represented that it is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15, 2016.

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. The Clerk is directed to withhold the issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk