No. _____

In the Supreme Court of the United States

NACCO NATURAL RESOURCES CORPORATION,

Applicant,

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, ADMINISTRATOR,

Respondents.

To the Honorable John G. Roberts, Jr.,
Chief Justice of the United States and
Circuit Justice for the District of Columbia Circuit

**EMERGENCY APPLICATION
FOR IMMEDIATE STAY OF FINAL AGENCY ACTION
PENDING DISPOSITION OF A PETITION FOR REVIEW**

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PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Applicant is NACCO Natural Resources Corporation (NACCO).

Respondents are the United States Environmental Protection Agency (EPA) and Michael Regan, in his official capacity as Administrator of the EPA.

The other parties to the consolidated proceedings below are:

Petitioners: State of North Dakota; State of West Virginia; State of Alaska; State of Arkansas; State of Georgia; State of Idaho; State of Indiana; State of Iowa; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Mississippi; State of Missouri; State of Montana; State of Nebraska; State of Oklahoma; State of South Carolina; State of South Dakota; State of Tennessee; State of Texas; State of Utah; Commonwealth of Virginia; State of Wyoming; America's Power; Associated Electric Cooperative, Inc.; Basin Electric Power Cooperative; East Kentucky Power Cooperative, Inc.; Electric Generators MATS Coalition; Lignite Energy Counsel; Luminant Generation Company LLC; Midwest Ozone Group; NorthWestern Corporation; Minnkota Power Cooperative, Inc.; National Mining Association; National Rural Electric Cooperative Association; Oak Grove Management Company, LLC; Rainbow Energy Center, LLC; Talen Montana, LLC; Westmoreland Mining Holdings LLC; Westmoreland Mining; Westmoreland Rosebud Mining LLC.

Intervenors: Air Alliance Houston; Alliance of Nurses for Healthy Environments; American Academy of Pediatrics; American Lung Association; American Public Health Association; Chesapeake Climate Action Network; Citizens

for Pennsylvania's Future; City of Baltimore; City of Chicago; City of New York; Clean Air Council; Clean Wisconsin; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; District of Columbia; Downwinders at Risk; Environmental Defense Fund; Environmental Integrity Project; Montana Environmental Information Center; Natural Resources Council of Maine; Natural Resources Defense Council; Ohio Environmental Council; Physicians for Social Responsibility; San Miguel Electric Cooperative, Inc.; Sierra Club; State of Connecticut; State of Illinois; State of Maine; State of Maryland; State of Michigan; State of Minnesota; State of New Jersey; State of New York; State of Oregon; State of Rhode Island; State of Vermont; State of Wisconsin.

The related proceedings are:

North Dakota v. EPA, No. 24-1119 (D.C. Cir. Aug. 6, 2024) (lead case) (order denying motions for stay), consolidated with: *National Rural Electric Cooperative Association v. EPA*, No. 24-1179 (D.C. Cir. Aug. 6, 2024); Oak Grove Management Company, LLC *v. EPA*, No. 24-1184 (D.C. Cir. Aug. 6, 2024); *Talen Montana, LLC v. EPA*, No. 24-1190 (D.C. Cir. Aug. 6, 2024); *Westmoreland Mining Holdings LLC v. EPA*, No. 24-1194 (D.C. Cir. Aug. 6, 2024); *America's Power v. EPA*, No. 24-1201 (D.C. Cir. Aug. 6, 2024); *NorthWestern Corporation v. EPA*, No. 24-1217 (D.C. Cir. Aug. 6, 2024); *Midwest Ozone Group v. EPA*, No. 24-1223 (D.C. Cir. Aug. 6, 2024).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, NACCO submits the following corporate-disclosure statement: NACCO is a wholly owned subsidiary of NACCO Industries, Inc. NACCO is not publicly held, but NACCO Industries, Inc., its parent, is a publicly traded corporation that owns more than 10% of the stock of NACCO. No other publicly held corporation owns more than 10% of the stock of NACCO.

TABLE OF CONTENTS

Page

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

Pursuant to Rule 23 of this Court, 5 U.S.C. § 705, and 28 U.S.C. §§ 1651 and 2101(f), NACCO respectfully requests an immediate stay of a final 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. 38508 (May 7, 2024) (Rule). NACCO filed a petition for review of the Rule in the D.C. Circuit and sought a stay of the Rule during litigation. On August 6, 2024, the D.C. Circuit denied that and other stay motions.

INTRODUCTION

Twelve years ago, EPA imposed new emission standards for power plants that were projected to cost $9.6 *billion* each year while producing only $4 to $6 *million* in annual benefits. The Clean Air Act authorized this type of regulation only if it was "appropriate and necessary," but the agency argued that these exorbitant costs did not factor into that equation. 42 U.S.C. § 7412(n)(1)(A). Three years later, this Court called hogwash: "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan v. EPA*, 576 U.S. 743, 752 (2015). But by then it was too late. Because the standards had not been stayed during those three years, EPA boasted that the majority of power plants had already been forced to comply. EPA, *In Perspective: the Supreme Court's Mercury and Air Toxics Rule Decision* (June 30, 2015), https://perma.cc/D9NK-CNBB (*2015 Post*).

Here we go again. Nearly a decade after *Michigan*, EPA has revised these standards, forcing emissions to drop by another 67% or more. This time, the agency "considered" the Rule's costs, which it pegged at $860 million. *See* Rule 38552, 38555. But EPA fell off the other side of the horse, refusing to consider whether there are any resulting *benefits* to public health. Reminiscent of its rejected reasoning from the last go-around, the agency insisted that the statutory mandate to determine whether a tighter standard was "necessary" merely required it to ask if "additional reductions can be obtained, without evaluating" whether any "risk … would be reduced." Rule 38514. In short, the agency said it would follow this Court's directive to "consider" the costs of its new regulation—but refused to *weigh them* against anything.

Science boxed EPA into that absurd position. Coal plants had been subjected to § 7412 regulation based on the risk of carcinogenic and neurotoxic emissions. Yet by 2020, those emissions had already fallen "below levels of concern from a public health standpoint." EPA, *Regulatory Impact Analysis for the Final National Emission Standards for Hazardous Air Pollutants* ES-12 (2024) (RIA), https://perma.cc/VCG2-RESL. The highest lifetime cancer risk from emissions from any coal plant was just 0.344-in-1 million—far below the Act's 1-in-1 million threshold for *deregulating* a category of sources, *see* NACCO Comment 15 (June 23, 2023), https://perma.cc/T36U-567X—and EPA could identify no other "appreciable" health risks either, RIA 4-4. Because EPA could not claim that further reductions would result in any meaningful health benefit, it was left to deny that there was a need "to identify hazards to public health … to justify regulation" at this stage, no matter the cost. Rule 38514.

This case is therefore the flipside of *Michigan*. It is meaningless to consider a rule's costs without considering its corresponding benefits. If anything, the violation here is even more obvious as a matter of both statutory text and common sense. To borrow from this Court's decision, it is not even rational to force plants to shoulder nearly $1 billion in costs in exchange for *no benefits* to public health, when those benefits are the entire point of this Clean Air Act provision. *See* 576 U.S. at 752. Regulation for the sake of regulation is not "appropriate," let alone "necessary."

The D.C. Circuit nevertheless denied relief, stating only that "Petitioners have not satisfied the stringent requirements for a stay pending court review." App. 1a. And with that, history is poised to repeat itself. As in *Michigan*, the Rule's three-year compliance window virtually guarantees that the Nation's coal plants will be forced to get with the program (or close) *before* this Court can review a final judgment, leaving EPA with a win on the ground even if it suffers a loss on the books.

This Court should act now to ensure that does not occur. The case for a stay is straightforward: The Rule's benefits-blind approach will not survive on the merits, and the harms from allowing these standards to take effect in the meantime will be both swift and irreparable. And given that the Rule concededly does not come with any meaningful public health benefit, it is not as if EPA can credibly worry about any harms from a stay. In the alternative, this Court should treat this application as a petition for a writ of a certiorari before judgment, grant the petition, and review the Rule in the upcoming Term. Given the nature and effect of EPA's error, there is much to be lost, and little to be gained, from prolonging these proceedings.

OPINIONS BELOW

The D.C. Circuit's order denying applicant's motion for a stay is not reported but is reproduced at App. 1a-2a. The Rule is published at 89 Fed. Reg. 38508 (May 7, 2024), and reproduced at App. 56a-141a.

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction under 42 U.S.C. § 7607(b)(1). This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1651, and it may grant the requested relief under 5 U.S.C. § 705 and 28 U.S.C. §§ 1651(a) and 2101(f).

STATUTORY PROVISIONS INVOLVED

The core provision at issue, 42 U.S.C. § 7412, is reproduced at App. 3a-55a.

STATEMENT OF THE CASE

A. Statutory Background

"The Clean Air Act establishes three main regulatory programs to control air pollution from stationary sources such as power plants." *West Virginia v. EPA*, 597 U.S. 697, 707 (2022). The program here is known as the "Hazardous Air Pollutants (HAP) program, set out in Section 112, § 7412." *Id.* As its name suggests, this program "targets pollutants"—apart from ones "already covered by" another scheme—"that present 'a threat of adverse human health effects,' including substances known or anticipated to be 'carcinogenic, mutagenic, teratogenic, neurotoxic,' or otherwise 'acutely or chronically toxic.'" *Id.* at 707-08. There are currently "more than 180 specified 'hazardous air pollutants,'" ranging from asbestos and benzene, to mercury and manganese, to selenium and beyond. *Michigan*, 576 U.S. at 747; *see* § 7412(b)(1).

In general, the HAP program covers sources based on "how much pollution the source emits." *Michigan*, 576 U.S. at 747. Sources that annually emit over 10 tons of a single hazardous pollutant or over 25 tons of a combination of hazardous pollutants qualify as "major" sources subject to automatic regulation. *Id.* Sources with emissions below those thresholds are known as "area" sources; such a source is subject to HAP limits "if it 'presents a threat of adverse effects to human health or the environment warranting regulation.'" *Id.* at 748 (quoting § 7412(c)(3)) (ellipsis omitted).

Sensitive to the impacts of regulation on electricity costs, however, Congress created "a unique procedure" to "determine the applicability of the program to fossil-fuel-fired power plants"—known in this provision as "electric utility steam generating units." *Id.* Specifically, Congress instructed EPA to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by power plants of hazardous air pollutants," taking into account that these plants already face various other requirements under the Clean Air Act. *Id.* (quoting § 7412(n)(1)(A)) (brackets omitted). If EPA determines that "regulation is *appropriate and necessary* after considering the results of the study," only then shall it regulate power plants under the HAP program. § 7412(n)(1)(A) (emphasis added).

EPA has "interpreted the Act to mean" that if it finds it to be "appropriate and necessary" to regulate power plants under the HAP program, they "become subject to regulation on the same terms as ordinary major and area sources." *Michigan*, 576 U.S. at 748. This Court has "assume[d] without deciding" that this is a permissible construction of the statute—a question on which EPA is owed no deference. *Id.*

For other sources covered by the HAP program, "EPA must first divide [them] into categories and subcategories in accordance with statutory criteria." *Id.*; *see* § 7412(c)(1). EPA then sets "certain minimum emission regulations, known as floor standards," or "MACT" standards, for "each category or subcategory." *Michigan*, 576 U.S. at 748. These standards generally "reflect the emissions limitations already achieved by the best-performing 12% of sources within the category or subcategory." *Id.* at 748-49 (citing § 7412(d)(3)). EPA "may also impose more stringent emissions regulations," dubbed "beyond-the-floor standards," *id.* at 749, if it concludes that the stricter target is "achievable" after "taking into consideration the cost of achieving such emission reduction" and other considerations, § 7412(d)(2).

EPA's work is not done, however. "[W]ithin 8 years after" it sets standards—whether at the floor or beyond—it must adopt a more stringent limit if "required to provide an ample margin of safety to protect public health" or "to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect." § 7412(f)(2). The agency refers to this check as the "'residual risk review.'" Rule 38513. It treats a health risk as "'presumptively acceptable'" for these purposes if "no individual would face an excess lifetime cancer risk of greater than 100-in-one million." *NRDC v. EPA*, 529 F.3d 1077, 1080 (D.C. Cir. 2008).

In addition to this one-time process focused exclusively on risk, the Act compels EPA to more generally "review, and revise *as necessary* (taking into account developments in practices, process, and control technologies), emission standards" under the HAP program "every 8 years." § 7412(d)(6) (emphasis added).

There is one off-ramp from this endless cycle. Since the purpose of § 7412 is to combat *hazardous* pollutants, the Act contemplates that EPA will deregulate sources that no longer pose health risks. EPA may delist a category when none of its sources emits carcinogens at a level that "may cause a lifetime risk of cancer greater than one in one million" to the "most exposed" individual. § 7412(c)(9)(B)(i). The agency may likewise delist a category whose sources do not produce non-carcinogenic emissions above "a level which is adequate to protect public health with an ample margin of safety," or produce an "adverse environmental effect." § 7412(c)(9)(B)(ii).

B. The Mercury and Air Toxics Standards

In 2000, after completing the study required by § 7412(n)(1), EPA concluded that regulating power plants under the HAP program was "appropriate and necessary." 65 Fed. Reg. 79825, 79826, 79830 (Dec. 20, 2000). Flip-flopping ensued over the next decade, but EPA ultimately reverted to that finding in 2012. 77 Fed. Reg. 9304 (Feb. 16, 2012). In its view, regulation was "'appropriate' because (1) power plants' emissions of mercury and other hazardous air pollutants posed risks to human health and the environment and (2) controls were available to reduce these emissions." *Michigan*, 576 U.S. at 749. And regulation was "'necessary' because the imposition of the Act's other requirements did not eliminate these risks." *Id.*

In addition to reaffirming this finding, the 2012 rule "divided power plants into subcategories[] and promulgated floor standards." *Id.* Existing power plants had three years to comply with these new standards—known as the "Mercury and Air Toxics Standards (MATS)." 77 Fed. Reg. at 9304, 9399.

At a steep price: According to the regulatory impact analysis included with the rule (a step required by Executive Order), the original MATS rule was projected to "force power plants to bear costs of $9.6 billion per year" in exchange for only "$4 to $6 million" in annual benefits. *Michigan*, 576 U.S. at 749. EPA nevertheless issued the rule on the premise "that 'costs should not be considered' when deciding whether power plants should be regulated under § 7412." *Id.*

The 2012 rule was challenged in the D.C. Circuit the day it was published. More than two years later, the court of appeals upheld the regulation over a dissent by then-Judge Kavanaugh, who emphasized that it is "just common sense and sound government practice" to account for both "the benefits from the regulations" and "how much the regulations would cost." *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1258-59 (D.C. Cir. 2014) (Kavanaugh, J., dissenting in part).

More than a year after that, this Court reversed. *Michigan*, 576 U.S. at 760. It explained that "[r]ead naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost," consistent with the background "understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Id.* at 752-53. Because "EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant," this Court sent the case back to the D.C. Circuit, *id.* at 760, which remanded the matter to EPA while leaving the MATS rule in place. Order, *White Stallion*, No. 12-1100 (D.C. Cir. Dec. 15, 2015). The following year, EPA issued a supplemental appropriate-and-necessary finding that accounted for cost. 81 Fed. Reg. 24420 (Apr. 25, 2016).

By the time of this Court's June 2015 decision, however, the MATS rule—which had not been stayed in the interim—had largely achieved EPA's desired effect. The day after this Court's ruling, EPA trumpeted that "the majority of power plants are already in compliance or well on their way to compliance" with "the rule, which remains in effect today." *2015 Post*. What the agency left unsaid was that the rule had also 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). NMA Comment 2, 190 n.2 (Jan. 15, 2016), https://perma.cc/7WNL-NKLG. Nor did the agency mention that 40,000 coal miners had lost their jobs since 2012. *Id.* at 4.

C. Revisions to the Mercury and Air Toxics Standards

Eight years after issuing its 2012 standards, EPA conducted the reviews called for by § 7412(f)(2) and § 7412(d)(6). It concluded that no revisions were necessary. 85 Fed. Reg. 31286 (May 22, 2020). With respect to the one-time residual risk review, EPA found the existing standards "provide[d] an ample margin of safety to protect public health and prevent an adverse environmental effect." *Id.* at 31314. As for the recurring review, EPA likewise determined a change was "not necessary" because there had been "no cost-effective developments" in technology. *Id.* at 31318.

Less than a year later, President Biden ordered EPA to consider "suspending, revising, or rescinding" those findings. *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037, 7038 (Jan. 25, 2021). So EPA redid both reviews. 88 Fed. Reg. 24854 (Apr. 24, 2023).

When it came to the one-time residual risk review, there was no way around the science. EPA's original primary justification for regulating power plants under the HAP program was that power plants emitted high levels of mercury. *See* 65 Fed. Reg. at 79827. Mercury turns into highly toxic methylmercury, accumulates in fish, and can then be ingested by humans who eat that fish. Rule 38515, 38556. Although EPA could not quantify "how much of the methylmercury in fish consumed by the U.S. population is due to electric utility emissions relative to other mercury sources," it determined in 2012 that regulation was warranted due to the significant volume of mercury emissions from power plants. 65 Fed. Reg. at 79828.

EPA acknowledged, however, that since 2012, methylmercury exposure from power plant emissions had dropped "below levels of concern from a public health standpoint." RIA ES-12. Indeed, even for the most vulnerable human populations (subsistence fishers), methylmercury exposure was already "below the presumptive acceptable cancer risk threshold and noncancer health-based thresholds." RIA 4-5; *see* Rule 38556 ("Methylmercury exposure to subsistence fishers from lignite-fired units is below the current [reference dose]," which means it is "unlikely to be associated with appreciable risk of deleterious effects across the population."); Rule 38541 (similar). Further reduction of mercury emissions would thus yield benefits so small that they could not reliably be extrapolated to the "broader population of fish consumers." RIA 4-5. Likewise, EPA observed that the cancer risk from non-mercury HAP emissions already "fall[s] within the acceptable range," and it could not "identify or quantity noncancer benefits" from a further reduction. RIA 4-7.

Revisiting its work at the Administration's behest, EPA was forced to concede that its 2020 analysis was "rigorous and robust" and had properly found "low residual risk" to public health from power plants. 88 Fed. Reg. at 24866. In particular, "the estimated maximum individual lifetime cancer risk" for all covered plants "was 9-in-1 million," with "the major contributor" being four "oil-fired" plants in Puerto Rico. *Id.* at 24863 & n.16. Indeed, those four facilities were the *only* sources posing a "cancer risk at or above 1-in-1 million," the threshold for *delisting*. *Id.* Looking at coal plants alone, the risk was lower still. The highest lifetime cancer risk for *any* coal-fired plant was just 0.344-in-1 million. NACCO Comment 15 (citing EPA, *Residual Risk Assessment for the Coal- and Oil-Fired EGU Source Category in Support of the 2020 Risk and Technology Review Final Rule*, App. 10, Tbls. 1 & 2a (2019)).

Based on the absence of public health risks, EPA thus agreed that no "revisions to the 2020 Residual Risk Review" were warranted. 88 Fed. Reg. at 24866. As to the recurring review under § 7412(d)(6), however, the agency thought the statute gave it more room to maneuver. So it took the Executive Order's hint and changed course. EPA now concluded that more demanding standards were "necessary" under § 7412 even though they would not advance public health. *Id.* In 2024, EPA finalized these revisions to the 2012 standards in the Rule here, which tightens the standard "for toxic metals by 67 percent" and the one for "mercury from existing lignite-fired" coal plants by "70 percent." EPA, *Biden-Harris Administration Finalizes Suite of Standards to Reduce Pollution from Fossil Fuel-Fired Power Plants* (Apr. 25, 2024) (*Suite*). Power plants must comply by July 8, 2027. Rule 38519.

As in *Michigan*, the agency complied with an Executive Order by performing a "Regulatory Impact Analysis" that recounted the costs and benefits of the more stringent standards. Rule 38510. That analysis estimated power plants would incur $860 million in compliance costs. Rule 38513. But EPA could not quantify *any benefits* to public health from the reduced emissions of hazardous air pollutants. *Id.* Instead, EPA could only quantify "ancillary benefits," meaning those unrelated to the HAP program's purposes. *Michigan*, 576 U.S. at 749. Specifically, EPA identified $300 million in health benefits from the reduction of ozone and particulate matter (substances *not* regulated by the HAP regime), and $130 million in ostensible "climate benefits." Rule 38513. Even with these ancillary benefits taken into account, EPA could only estimate "negative net monetized benefits." Rule 38511, 38513.

As in *Michigan*, EPA made clear it "did not rely on" this cost-benefit "analysis in choosing the appropriate standard." Rule 38553; *see Michigan*, 576 U.S. at 750. To the contrary, EPA thought it could determine that tighter standards were "necessary" under the Act without considering whether they would have the benefit of reducing any health "risks" from HAP emissions. Rule 38525. Instead, the agency read § 7412(d)(6) to require it to "continually reassess standards to determine if additional reductions can be obtained, *without evaluating the specific risk associated with the HAP emissions that would be reduced*." Rule 38514 (emphasis added). It therefore brushed aside the concern that the Rule would "impose high costs" without offsetting any meaningful "risk to the environment or public health." *Id.*

D. Procedural History

Numerous states and industry participants, including NACCO, challenged the Rule in the D.C. Circuit and sought a stay pending review. In a short, unsigned order, the D.C. Circuit denied the stay. App. 1a-2a. The court's explanation consisted, in its entirety, of this sentence: "Petitioners have not satisfied the stringent requirements for a stay pending court review." App. 1a.

REASONS FOR GRANTING THE APPLICATION

When faced with a request to stay a regulation, this Court asks "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio v. EPA*, 144 S. Ct. 2040, 2052 (2024). All factors weigh in favor of a stay here.

On the merits, this case follows *a fortiori* from *Michigan*. EPA acknowledges it must consider *costs* in evaluating whether revisions are necessary. How could it not also be required to consider *benefits*? Considering one without the other is incoherent. This is like buying an electric car because of the tax credits, even though you cannot drive. EPA originally subjected power plants to regulation under this program to address the health risks posed by their emissions, yet those threats are already far below any level of health concern, and further reductions will not help. In light of that undisputed scientific predicate, how could tightening up those original standards be remotely "necessary"? It is not, and if the D.C. Circuit thinks otherwise, its decision would be certworthy, as *Michigan* itself confirms.

As for the equities, it is hard to imagine an easier case for a stay. Even if EPA were correct that the Clean Air Act requires it to impose exorbitantly costly standards that will not improve public health by one measurable iota, the very premises of that question presented leave no doubt where the balance of equities lies. Delaying this Rule's effective date would not forestall any benefits to public health, yet allowing it to take effect immediately will impose real-world costs—and, in all likelihood, make it impossible for this Court to ever order any meaningful relief. EPA should not once again be permitted to win by losing; this Court should therefore grant relief.

I. EPA'S REVISED STANDARDS ARE NOT "NECESSARY" UNDER § 7412 BECAUSE THEY DO NOT ADVANCE PUBLIC HEALTH.

By EPA's own account, its revisions to the 2012 MATS rule impose exorbitant costs in exchange for no meaningful public health benefits—yet are nonetheless both "necessary" and "appropriate" under the Clean Air Act. That makes no more sense now than it did in *Michigan*; this time, EPA has simply blinded itself to the *other* side of the scale. According to the agency, benefits are irrelevant: "less is better" when it comes to these emissions, period. C.A. Stay Opp. 1. EPA is wrong. Section 7412(n)(1) standards "are a safety measure," designed to curtail public health "harms caused by power plants." *Michigan*, 576 U.S. at 783 (Kagan, J., dissenting). It follows that EPA must account for public health benefits in deciding whether revisions to those standards are "necessary." Because EPA nonetheless plowed ahead with this costly Rule, blind to its lack of public health benefits, applicants are likely to succeed in vacating the Rule—if not in the D.C. Circuit, then in this Court.

A. EPA's Own Analysis Establishes That the MATS Rule Revisions Are Not "Necessary."

Section 7412(d)(6) permits EPA to revise HAP standards only "as necessary." The HAP program's objective is to address *hazardous* pollutants. Revisions that will not help abate the relevant hazard are therefore, almost by definition, not "necessary." Because, by EPA's own assessment, its revisions to the MATS rule will not reduce the public health risks that subjected coal plants to regulation in the first place, those revisions are plainly not "necessary" under the Clean Air Act, but instead arbitrary and capricious under the APA. All of this seems so obvious it should really go without saying, particularly after *Michigan* (and even more so after *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)). But here we are.

"It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). That is particularly true when it comes to "the word 'necessary,' which has always been recognized as a word to be harmonized with its context." *Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944). Something may be "necessary" if it is "absolutely needed," *Merriam Webster's Collegiate Dictionary* (10th ed. 1994), or "essential, indispensable, or requisite," *Random House Collegiate Dictionary* (rev. ed. 1980). Only context can answer the obvious question raised by the term—"needed" or "essential" *for what*? In particular, one cannot evaluate necessity without having an objective in mind. Statutory context supplies that objective.

Determining whether revisions are "needed" under § 7412(d)(6) thus requires understanding the statutory scheme as a whole. EPA issued the 2012 MATS rule under a provision that authorizes it to regulate power plants only if "such regulation is appropriate and necessary" after considering the results of "a study of the *hazards to public health* reasonably anticipated to occur as a result of [their] emissions." § 7412(n)(1)(A) (emphasis added). As that text makes plain, § 7412(n)(1)(A) is meant to address *hazards to public health*. That is, these standards "are a safety measure." *Michigan*, 576 U.S. at 783 (Kagan, J., dissenting). EPA recognized as much in the 2012 rule, stating that its regulation of power plants under § 7412 was "necessary" because hazardous pollutants from these sources were (then) "reasonably anticipated to pose hazards to public health." 77 Fed. Reg. at 9363.

It follows that EPA must again use public health as the benchmark when deciding whether revisions are "necessary" under § 7412(d)(6). Whether regulation is "necessary" turns on whether there is a "need for regulation." *Michigan*, 576 U.S. at 757. And the relevant "need" is to preserve public health. It is therefore not enough that, as EPA emphasized, tighter standards will (by definition) reduce emissions and exposure to them. *E.g.*, RIA 4-1, 4-2, 4-5. Reduced exposure in the abstract is not a benefit to public health; if it were, the required study of anticipated health hazards would have been much simpler. For this provision at least, the question is whether the emissions will cause public health harms. Reduction for reduction's sake is not the objective. Reducing emissions for its own sake therefore cannot be what this provision means when it asks if revised standards are "necessary."

EPA's obligation to consider the benefits of its rule is reinforced by background APA principles. Reasoned decisionmaking requires "a consideration of the relevant factors," and, with rare exception, those factors will include both "the advantages and the disadvantages of agency decisions." *Michigan*, 576 U.S. at 750, 753 (emphasis omitted). As this Court explained in admonishing EPA for ignoring costs in deciding the 2012 MATS rule was "appropriate and necessary" in the first place, "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id.* It is equally irrational and inappropriate to consider only the costs of regulation, while ignoring that it will not yield any marginal benefits to the statutory goal.

As Justice Breyer put it, "every real choice requires a decisionmaker to weigh advantages against disadvantages." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 232 (2009) (opinion of Breyer, J.). Any other approach "would bring about irrational results"—"it would make no sense to require plants to 'spend billions to save one more fish or plankton,'" "even if the industry might somehow afford those billions." *Id.* at 232-33. That is particularly true "in an age of limited resources available to deal with grave environmental problems," where "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Id.* at 233. That is why *every* Justice in *Michigan* agreed that "[u]nless Congress provides otherwise, an agency acts unreasonably" if it refuses to "take costs into account in some manner before imposing significant regulatory burdens." 576 U.S. at 769 (Kagan, J., dissenting).

By ignoring public health, EPA fell into the same trap as in *Michigan*, and the same trap that Justice Breyer warned about. As set forth above, the original MATS rule determined that power plants should be regulated under § 7412 because their mercury emissions threatened public health. Whether because those standards did their job or for other reasons, EPA acknowledged a decade later that there is now a "lack of quantifiable risks" from these power plants' emissions; they have dropped "below levels of concern from a public health standpoint." RIA 4-5, ES-12. Again, the *highest* lifetime excess cancer risk from *any* coal plant now stands nearly an order of magnitude *below* EPA's threshold for *delisting* a category of sources. *See* NACCO Comment 15. And the dissipation of health risks is not limited to cancer; EPA was, by its own express admission, unable to identify any other "appreciable" risks either. RIA 4-4. Put simply, the original reason for subjecting coal-fired power plants to HAP regulation was gone. *See supra* at 10-11. Yet instead of declaring victory and packing up shop, EPA decided it was time to double down, insisting that it was now "necessary" for the industry to shoulder nearly a billion dollars in additional costs, despite the lack of any marginal health benefits. That cannot withstand scrutiny. By ignoring half of the cost-benefit equation, EPA once again "entirely fail[ed] to consider an important aspect of the problem." *Michigan*, 576 U.S. at 752 (alteration omitted).

In short, imposing massive compliance costs for no public health benefits is not "necessary" under the Clean Air Act, and EPA's insistence otherwise is arbitrary and capricious under the APA. For both reasons, applicants are likely to prevail.

B. EPA's Counterarguments Misunderstand the Statute.

Incredibly, EPA insists public health need not be considered under § 7412(d)(6). That is a marked change from its past rulemakings, which recognize the centrality of public health to the analysis. For decades, EPA noted that the findings that underlie an evaluation of whether a regulation provides an ample margin of safety for public health "should be key factors" in deciding whether regulation is necessary under § 7412(d)(6). 70 Fed. Reg. 19992, 20009 (Apr. 15, 2005); *see* 71 Fed. Reg. 17729, 17731-32, 17736 (Apr. 7, 2006) (same); 71 Fed. Reg. 76603, 76608-09 (Dec. 21, 2006) (same); 72 Fed. Reg. 50716, 50730 (Sept. 4, 2007) (same); *see also* 73 Fed. Reg. 62384, 62404 (Oct. 20, 2008) ("the instruction to revise 'as necessary' indicates EPA" may consider "relevant factors" beyond technology, "such as costs and risk"). As even the Rule notes (with considerable understatement), "EPA has considered risks as a factor in some previous [§ 7412(d)(6)] reviews." Rule 38525. This change in position is alone reason to be dubious of EPA's interpretation. *See West Virginia*, 597 U.S. at 725.

Regardless, EPA is wrong on the merits. EPA defends its refusal to account for the absence of public health benefits by characterizing § 7412 as a technology-based statute that reflects Congress's goal to reduce emissions as much "as achievable." C.A. Stay Opp. 15. In theory, Congress could demand that an agency regulate to the max, regardless of benefits. But Congress should not lightly be assumed to have demanded that regulation occur "in a fundamentally silly way," *White Stallion*, 748 F.3d at 1261 (Kavanaugh, J., dissenting), and it certainly did not do so here.

Most importantly, the statutory text cannot be reconciled with EPA's reading. Where Congress wanted EPA to reduce emissions as much as "achievable," it said so. In regulating power plants under the neighboring § 7411, for instance, Congress ordered EPA to "revise" an emission standard for new plants if the existing limit "no longer reflects the greatest degree of emission limitation achievable." § 7411(g)(B)(4). In contrast, § 7412(d)(6) asks whether revisions are "necessary," not whether they are "achievable." As explained, this "comprehensive criterion," *Michigan*, 576 U.S. at 756, compels an inquiry into whether the revisions advance the statutory objective of the regulations at issue—which, here, is protecting public health. *Supra* at 16.

True, § 7412(d)(6) does expressly tell EPA to take technological developments "into account" as part of its necessity evaluation. But there is a difference between accounting for developments in evaluating whether revisions are "necessary" in light of the statute's public health goals (what the Act demands), and imposing tighter standards whenever developments make them possible (what EPA demands). Had Congress wanted the latter, it would not have limited EPA to "necessary" revisions—those for which there is a "need." *Michigan*, 576 U.S. at 757. To paraphrase, "[i]t is unreasonable to infer that, by expressly making [technological change] relevant," this provision "implicitly makes [public health benefits] irrelevant." *Id.* at 755.

EPA's position is also out of step with the structure of § 7412. EPA construes § 7412(d)(6) to point it back to § 7412(d)(2), which demands "the maximum degree of reduction … achievable." Rule 38530-31. That is mistaken. Section 7412(d)(2) only applies to standards "promulgated *under this subsection*," § 7412(d)(2) (emphasis

added), meaning subsection (d). Power plants are regulated under subsection (n), and only as "appropriate and necessary" after a study of health hazards. § 7412(n)(1)(A). EPA does have to revisit its power plant standards every eight years, since they are still "promulgated *under this section*." § 7412(d)(6) (emphasis added). But, in doing so, the agency must look back to § 7412(n)(1)(A)'s special "appropriate and necessary" framework, not § 7412(d)(2)'s general "maximum degree of reduction" test. They are distinct sources of authority. *See* § 7607(d)(1)(C) (referring separately to actions "under section 7412(d)" and ones "under section 7412(m) or (n)"). At minimum, EPA cannot lose sight of § 7412(n)(1)(A) when asking if revisions are "necessary."

EPA's contrary theory of how these provisions interlock makes a mess of things. On its view, EPA would take rules Congress permitted only to address public health, and then revise them under a different standard, to advance other goals, and even if the original goal is already met. That makes no sense. For standards issued under § 7412(d)(2) in the first place, perhaps that provision sets the benchmark for whether revisions are "necessary." But Congress elected to "treat[] power plants *differently* from other stationary sources." *Michigan*, 576 U.S. at 756. The special nuance found in § 7412(n)(1)(A) does not go out the window just because eight years have elapsed.

Finally, EPA argues that § 7412(d)(6) authorizes it to revise standards even if they provide an "ample margin of safety" to protect public health under § 7412(f)(2). C.A. Stay Opp. 13-15. True. But that does not mean § 7412(d)(6) authorizes EPA to regulate in the absence of *any* public health benefits. EPA presumptively finds an "ample margin of safety" if nobody faces an excess lifetime cancer risk "greater than

100-in-one million." *NRDC*, 529 F.3d at 1080. So if current standards presented a cancer risk of 90-in-one million, § 7412(f)(2) would not compel tightening them; but if technological developments allowed the risk to be reduced by 90% (to 9-in-one million) in a cost-effective way, § 7412(d)(6) would empower EPA to impose that revision. Here, though, the problem is *there is no meaningful risk to reduce*—indeed, the cancer risk is already below the level at which Congress allows EPA to stop regulating a source altogether, *see* § 7412(c)(9)(B), and the Rule will not improve it. Nothing in the statute prescribes indefinite regulation beyond the point of zero marginal returns.

II. THE EQUITIES FAVOR A STAY.

The equitable analysis here may be even easier than the merits. Per EPA's own account, a delay of the Rule's effective date would do nothing to harm public health in any measurable way. Because a benefitless regulation and costless stay are two sides of the same coin, half of the equitable analysis here is a cinch.

The remainder is not much harder. The Rule will impose $860 million in costs under EPA's own estimates, Rule 38555, which is why "[n]o one here disputes that some coal-fired units will have to spend money to comply," C.A. Stay Opp. 44. And those costs threaten to put plants out of business, especially as the Rule's stringent standards are just one in a "suite" of regulations EPA unleashed on the coal industry earlier this year to accomplish "the transition to a clean energy economy." *Suite*; *see* App. 142a-43a, 150a-51a. This regulatory carpet bombing—the latest iteration of the Clean Power Plan included—makes it near certain that some coal plants will be forced to shutter. *See* App. 142a-43a, 150a-51a; NACCO Stay Appl. No. 24A98.

As the coal plants go, so will NACCO's coal mines, leaving the company with hundreds of millions of dollars of losses. App. 143a. For example, closure of the Red Hills plant in Mississippi—a facility "particularly vulnerable" to the Rule—would cause NACCO to lose over $50 million in stranded investments. App. 150a; *see* Rule 38540 n.71 ("The lignite output from the adjacent mine is 100 percent dedicated to the [Red Hills] power plant."). The Rule thus creates a "risk of irreparable harm," as there is "no guarantee of eventual recovery," to say the least, if it is later vacated. *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 765 (2021); *see Ohio*, 144 S. Ct. at 2053.

Nor can there really be any dispute that these harms will occur during this litigation. Coal plants must slash their emissions by 67% or more before July 8, 2027, a date less than three years off. Rule 38519. If *Michigan* is any guide, the normal course of litigation will yield a final decision shortly before then at the earliest. The 2012 MATS rule was issued on February 16, 2012, and challenged the same day; thanks to a two-year-plus process in the D.C. Circuit, this Court's decision in *Michigan* came on June 29, 2015. *See supra* at 7-9. Here, the Rule was challenged on May 8, 2024—the day after publication—and the D.C. Circuit has yet to even set a briefing schedule. *See* 24-1119 Dkt. (D.C. Cir.). That means a June 2027 decision from this Court under the best of circumstances.

By that point, even a victory will not have been worth the wait. As EPA admits, coal plants cannot sit back until the month before the Rule's compliance date. *See* C.A. Stay Opp. 45 (claiming that compliance should "typically take[] two years or less"). And NACCO cannot structure its business decisions on the assumption this Court

will grant a last-minute stay of execution. *See* App. 146a-47a, 149a; *see also Columbia Broad. Sys. v. United States*, 316 U.S. 407, 423 (1942) (finding "threat of irreparable injury" based on allegation that business's affiliates are "threatening to cancel their contracts in order to conform to the regulations"). In fact, the new standards are "already immediately impacting the operation" of NACCO's Falkirk Mine in North Dakota, just by way of example, as "the uncertainty created by" the Rule has made "it difficult to attract and retain employees who know they may not have a job in a few years." App. 146a-47a.

EPA knows all this, just as it knows what happened in *Michigan*. By the time this Court held the original MATS rule unlawful in 2015, plants representing 19% of the Nation's total coal capacity had retired, putting over 40,000 coal miners out of a job. *Supra* at 9. Indeed, more coal capacity was retired in 2012 than in the previous ten years combined. NMA Comment 3. The plants that hung around had no choice but to accept the agency's diktat, leading EPA to crow the day after this Court's decision that "the majority of power plants are already in compliance or well on their way to compliance" with "the rule, which remains in effect today." *2015 Post*. And remain in effect it did. On remand, EPA urged the D.C. Circuit to leave the 2012 rule in place because "most sources have already complied … or have taken steps towards complying, and therefore have already made the necessary capital investments to install controls." EPA's Resp. at 14-15, *White Stallion*, No. 12-1100 (D.C. Cir. Oct. 21, 2015). The D.C. Circuit evidently found this persuasive, for it declined to vacate the rule this Court had just held unlawful. *See supra* at 8.

EPA is undoubtedly counting on the same outcome this time around—closure or compliance, no matter what this Court says. That makes the stay proceedings here pretty much "the whole ball game." *Winter v. NRDC*, 555 U.S. 7, 33 (2008). Given the lopsided equities (and merits), it should not be a hard one to umpire. *See Ohio*, 144 S. Ct. at 2053 (explaining that when "each side has strong arguments about the harms they face and equities involved, our resolution of … stay requests ultimately turns on the merits").

If this Court declines to issue a stay, however, it should treat this application as a petition for a writ of certiorari before judgment under 28 U.S.C. § 2101(e), grant the petition, and set the case for briefing and argument during the upcoming Term. This Court has repeatedly taken this approach to cases on its emergency docket, as full briefing and argument "help [it] better decide important emergency applications." *Labrador v. Poe*, 144 S. Ct. 921, 933 (2024) (Kavanaugh, J., concurring in grant of stay); *see Biden v. Nebraska*, 143 S. Ct. 477 (2022); *United States v. Texas*, 143 S. Ct. 51 (2022). A final decision from this Court by June 2025 would at least allow for the "two years" EPA admits are necessary for "compliance work" if the Rule survives, C.A. Stay Opp. 45—and for meaningful practical relief if the Rule is invalidated.

CONCLUSION

This Court should grant an immediate stay of the Rule, or treat this application as a petition for a writ of a certiorari before judgment and grant review.

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Respectfully submitted,

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