No. 24A98

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

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION PENDING DISPOSITION OF A PETITION FOR REVIEW

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INTRODUCTION

EPA cannot keep its story straight. In successfully opposing a stay below, the agency told the D.C. Circuit that its CO_2 emission standards for power plants could rest on a "projection of what can be achieved" rather than what "has regularly been." C.A. Stay Opp. 38. It had to take that position, for EPA conceded that "no commercial power plant is consistently achieving 90% capture" of its CO_2 emissions today. *Id.* at 44. But while that approach may have been good enough under 1970s-era D.C. Circuit cases, it did violence to the statute, which requires the agency to set "achievable" targets based on technology that "has been adequately demonstrated." § 7411(a).

Recognizing that it cannot defend this interpretation as a matter of law, EPA now insists the only dispute here is a matter of fact—which would not warrant this Court's review if the D.C. Circuit upholds the Rule. But the agency's authority over greenhouse gases does not extend to gaslighting the Judiciary. EPA's concessions (to say nothing of the record) leave no doubt that this case turns on whether the agency has the power to order an entire industry to get with the future—and thus to dictate the Nation's electricity supply. There is nothing "routine" about that. Opp. 3.

EPA is no more persuasive in defending the Rule's price tag. The Rule treated a massive bill to taxpayers in the form of green subsidies as a *reduction* rather than a *redistribution* of costs that the agency had previously determined were unduly high. EPA now pretends it was deferring to a "legislative judgment" in doing so. Opp. 48. But neither the Rule nor Congress said any such thing, and EPA cannot save its work by replacing economic illiteracy with revisionist history.

EPA likewise cannot make up its mind on the equities. On the one hand, it dismisses the possibility of irreparable harm during this litigation because the Rule's "deadlines do not commence until 2030 or 2032." Opp. 50. Yet in the same breath, it asserts that merely staying the Rule for "'2 to 3 years' … would cause serious harm" to "the climate." Opp. 58. EPA cannot have it both ways: Either the Rule will lead to "substantial reductions" in CO_2 emissions over the next several years—as coal plants faced with its unachievable emission targets read the writing on the wall and begin winding down—or it will not. Opp. 57. And if this Court is troubled by this supposed equitable equipoise, it can simply proceed with briefing and argument on the merits, providing everyone with a definitive answer in under a year. Apart from summoning the specter of a jurisdictional "question" that is no more than a distraction, EPA never explains why that approach would be inappropriate in the absence of a stay. Opp. 59.

I. EPA CANNOT RUN FROM THE RULE'S FORWARD-LOOKING CONSTRUCTION.

To stave off this Court's review, EPA tosses overboard the "future"-oriented construction of § 7411(a) it used to both issue the Rule and defeat a stay request below. Opp. 29-30. Understandably so, for that theory was at war with the Clean Air Act's text (the statute permits only "achievable" standards based on technology that "has been adequately demontrated"), its structure (neighboring provisions show Congress invited projection when it wanted to do so), and its history (early rulemakings were grounded in reality rather than imagination). NACCO Appl. 18-24. EPA was only able to get away with these interpretive shenanigans below by virtue of outdated D.C. Circuit cases that this Court has never endorsed and would never follow.

So EPA now pretends that everyone agrees about the "fundamental statutory-interpretation issue" and only disputes its "application." Opp. 2. Nonsense. While the agency's "technical and scientific judgments" are deeply flawed in their own right, there is no need to get into that today. *Id.* The record is clear that, until this point, EPA saw its role under the statute as soothsayer rather than scientist—and that it *had* to do so given the conceded facts that 90% capture, transportation, and storage are all currently unproven. NACCO Appl. 10-11, 18. Once its rewrite of history falls away, EPA is left with a rewrite of the statute it cannot bring itself to defend.

A. Start with EPA's own words on the subject. The agency admits it "discussed cases permitting 'some amount of projection,'" but claims all of that was meaningless throat clearing. Opp. 30. Hardly. EPA invoked those cases for a reason. For instance, after noting that "[p]recedent" allowed it to "make projections based on existing data to establish a more stringent standard than has been regularly shown," EPA "[f]ollow[ed] this legal standard" to conclude that "the available data regarding performance and testing at Boundary Dam" was sufficient to justify its "adequate demonstration finding for a 90 percent standard." Rule 39889. Similarly, in defending its decision to set targets that would "require the building of capture facilities and pipelines to transport captured CO_2 to sequestration sites," plus "the development of sequestration sites," EPA contended that "D.C. Circuit caselaw supports this approach," as it allows the agency to "extrapolate based on its findings and project technological improvements in a variety of ways." Rule 39878 & nn.610-11.

EPA continued riding this horse before the D.C. Circuit. Confronted with the fact that "no commercial power plant is consistently achieving 90% capture," the agency responded that § 7411 targets may be "'set at a level that is higher than has been actually demonstrated over the long term by currently operating' sources." C.A. Stay. Opp. 44; *see id.* at 45 (similar). Thus, in EPA's telling, its lack of any "examples" of real-world 90% CCS was neither here nor there, as "Section 7411 does not require EPA to set performance standards that sources currently in operation can at all times and under all circumstances meet." *Id.* at 67 (cleaned up). In response to criticism that it had relied "on '*potential* geologic sequestration sites,'" EPA again claimed "that Section 7411(a) is forward-looking," so there was no need to show that "potential sequestration sites be already commercially utilized." *Id.* at 64.

From start to finish, both the Rule and EPA's defense of it below rested on the agency's "projection of what" technology "may be expected to achieve going forward." Rule 39831; *see* C.A. Stay. Opp. 38 (limits "may reflect EPA's reasonable projection"). That is why the agency's allies concede "*some* extrapolation … is required" for EPA's system, and defend "EPA's extrapolations" on the merits. Envt'l Org. Opp. 7-8.

B. These arguments were no accident. EPA *had* to engage in predictions to adopt the Rule, since it is undisputed that "no commercial power plant is consistently achieving 90% capture," C.A. Stay Opp. 44; no relevant "commercial sequestration facilities" are "currently operational in the United States," Rule 39864; and "new pipeline" to potential sequestration sites needed to be "projected," C.A. Stay Opp. 58; *see* NACCO Appl. 15-17. EPA does not disavow those factual concessions.

Instead, the agency denies it engaged in "projection" because CCS technology "is already in existence." Opp. 30. It emphasizes that "carbon capture writ large" has been used since the 1930s and deployed in "coal and gas plants" since the late 1970s. Opp. 26. That is too high a level of generality. By that reasoning, one could say a manned mission to Mars was "adequately demonstrated" since the launch of Sputnik, or the smartphone since Alexander Graham Bell—or, for that matter, that *100%* CCS clears the bar, which would shutter all coal plants overnight. That makes nonsense of § 7411's promise that EPA's chosen system must have "a proven track record." *West Virginia v. EPA*, 597 U.S. 697, 759 (2022) (Kagan, J., dissenting). The "specific rate of capture that the Rule requires" is thus no mere "technical" nicety. Opp. 4.

Turning to pipelines and sequestration facilities, EPA insists there is "nothing unusual" about requiring construction of off-site infrastructure. Opp. 31. That misses the point. Unlike EPA's lone example, which describes a single plant that elected to dispose of scrubber waste by pumping it into a nearby ravine, a new national system of carbon pipelines and storage vaults cannot be constructed by any individual source itself, particularly on the Rule's aggressive timeline. EPA, *Electric Utility Steam Generating Units—Flue Gas Desulfurization Capabilities as of October 1978*, at 2-10 (Jan. 1979); *see* Opp. 30. Rather, as EPA admits, coal plants—especially the 20% of them far from any possible storage site—may need to overcome "permitting hurdles" (exacerbated by EPA's lengthy delays), "difficulties in obtaining the necessary rights of way over such a distance," as well as "other considerations"—assuming "potential sequestration sites" ever become a reality in the first place. Rule 39855-56, 39860; *see*

NACCO Appl. 16-17. Relying on such a chain of contingencies involving third parties belies EPA's claim that, this time around, it has chosen a "system" that "operates at the level of an individual facility." Opp. 19 (quoting *West Virginia*, 597 U.S. at 715).

EPA therefore admits the Rule's emission target will not "be 'achievable' for every single source," and suggests that the states may be able to propose "case-specific" exceptions allowing them to survive. Opp. 40. But even by the agency's lights, that category consists of 20% of all long-term coal-plants, and the Rule is much less sanguine about approval of state-proposed exceptions. Rule 39860; NACCO Appl. 17, 20. At best, it notes an exception "may be warranted" "if a state can demonstrate that there is a fundamental difference" between a plant's situation and "the information the EPA considered." Rule 39860. But Congress required *EPA* to "demonstrate[]" the availability of its chosen system, § 7411(a), not *the states* to show why their resident power plants should be exempted from a bureaucratic pipedream.

* * *

What EPA has done here is akin to identifying the world's fastest sprinter and then mandating that all marathon runners exceed that sprinter's pace for 26 miles. As EPA well knows, most participants will simply choose not to run the race. And that is really the point. The agency does not expect sources to even try to implement the undemonstrated 90% CCS target. But by setting that unrealistic goal, EPA will induce coal plants to close, causing indirectly the "generation shifting" this Court outlawed directly in *West Virginia.* 597 U.S. at 720. More duplicitous, but no more lawful. The "adequately demonstrated" requirement is a "meaningful constraint[]" on

EPA's authority, *id.* at 758-59 (Kagan, J., dissenting), yet the Rule replaces it with an "adequately projected" standard that would give EPA free rein under the guise of its "expert[]" judgments. Opp. 3.[1] That interpretation, from which the agency cannot now run, presents a certworthy question on which applicants are likely to prevail.

II. EPA CANNOT HIDE FROM ITS FAILURE TO CONSIDER THE RULE'S FULL COST.

EPA fares no better in its defense of the staggering "cost[s]" of the Rule. § 7411(a). The agency acknowledges that just five years ago, it "found that the high costs of carbon capture prevented that technology from qualifying as the best system of emission reduction." Opp. 41 (cleaned up). It concedes that those astronomical sums—which could surpass $100 billion by the early 2030s—have not vanished in the intervening inflationary years, but merely been shunted onto taxpayers through a "loss of revenue to the Treasury" in the form of IRA tax credits. Opp. 47; *see* NACCO Appl. 27-28. And it never denies that instead of accounting for these costs, the Rule deemed this transfer a "significant stream of revenue" amounting to "significant *reductions* in the cost of implementing CCS." Rule 39814, 39882 (emphasis added).

[1] For what it's worth, those who actually have "'technical and policy expertise'" in "electricity transmission, distribution, and storage," *West Virginia*, 597 U.S. at 729, have concluded that the "overwhelming weight of the expert evidence indicates that a 90% carbon capture standard applied to generation units fueled by gas or coal is neither technically nor commercially feasible," FERC, Letter from Comm'r Christie to Rep. Rodgers et al. 2 (Aug. 13, 2024), https://perma.cc/C83A-M9G3. Consistent with EPA's concessions, there appear to be no "generating units that are commercially successful in energy or capacity markets today that have met such an unrealistic standard." *Id.*

Treating "billions of dollars in economic costs" as free money qualifies as a textbook case of unreasoned decisionmaking. *Michigan v. EPA*, 576 U.S. 743, 752 (2015). EPA nevertheless mounts several defenses of this magical thinking.

First, EPA notes that § 7411 does not require it to consider "'cost' in general," but "only 'the cost of achieving such reduction.'" Opp. 47. That does not help anything. The point remains that Congress did not arbitrarily limit the analysis to costs borne by certain parties. EPA thus must add words to the statute to get from "the cost of achieving such reduction," § 7411(a), to "the cost *to the regulated source* of 'achieving' the reduction," Opp. 47 (emphasis added; brackets omitted). Nothing in the statutory text excludes a $100-billion-plus addition to the national debt. § 7411(a).

Indeed, EPA's "cost to the regulated source" construction would allow it to bypass cost considerations *entirely*, on the theory that many power plants pass along their costs to ratepayers in the form of higher electricity bills. *See West Virginia*, 597 U.S. at 714 (noting the CPP "would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices)"). That cannot be right, which is why EPA has consistently treated "the costs to the regulated facility" as "relevant costs," but not the only ones. Rule 39801; *see West Virginia*, 597 U.S. at 729 (observing that EPA's view of the "statutory factor[] of 'cost'" required it to consider "how high energy prices can go … before they become unreasonably 'exorbitant'"); NACCO Appl. 30.

Second, lacking a textual foothold in the *Clean Air Act*, EPA pivots to argue that the Rule defers to a "legislative judgment" in the *IRA* that the "potential public benefits" to the environment from the tax credits "outweighed the burdens on the

public fisc." Opp. 48. But that argument "contradicts the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan*, 576 U.S. at 758. In accounting for the cost of its chosen system, EPA did not say it was respecting a considered cost-benefit judgment by the 2022 Congress. Still less did EPA say it had made its own determination that "the total costs of carbon capture"—harms to the federal fisc included—were less than "the total benefits to the public." Opp. 47. What it said was that the IRA had "provide[d] a significant stream of revenue" that "*offsets*" the Rule's "costs." Rule 39881-82 (emphasis added). "EPA's action must be measured by what it did, not by what it might have done." *Michigan*, 576 U.S. at 759 (cleaned up).

Even if the agency could hurdle this *Chenery* obstacle, it would still come up short, for nothing in the IRA reflects EPA's imaginative reconstruction of Congress's cost-benefit analysis. That Congress wanted to "facilitate[] *power plants'* use of [CCS] technology" through *voluntary* behavior says nothing about whether it wanted *EPA* to *mandate* adoption of that technology, let alone in an economically illiterate fashion. Opp. 48 (emphasis added). There is nothing "evident" about that leap in logic. *Id.*

In all events, EPA ignores that the tax credits will "expire" after 12 years. Rule 39902. But wielding "the 'exorbitant' costs" of "carbon-capture" to "'force the closure' of all affected 'coal-fired power plants'" is unlawful whether the bill comes due now or in 12 years. *West Virginia*, 597 U.S. at 776 (Kagan, J., dissenting). By setting limits that are not financially "achievable" in the long run, EPA is once again impermissibly "direct[ing] existing sources to effectively cease to exist." *Id.* at 728 n.3 (majority).

Finally, EPA argues forfeiture to try to sweep its financial chicanery under the rug. Opp. 47. Yet this point was made both during the comment period (which is why EPA addressed it), and in the D.C. Circuit, where applicants argued the agency had "failed its *separate* duty to consider 'cost'" and emphasized that "[t]he Rule relies heavily on federal credits to potentially make costs bearable." *E.g.*, W. Va. C.A. Stay Mot. 8; *see* NACCO C.A. Stay Joinder. In all events, parties "can make any argument in support of" a "claim [that] is properly presented." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Because no one disputes that applicants have advanced the "consistent claim" that EPA's cost analysis was deficient, that should be the end of the matter. *Id.*; *see* C.A. Stay Opp. 78 (arguing that applicants' "challenge [to] EPA's cost assessment" is meritless).

III. EPA CANNOT HAVE IT BOTH WAYS WHEN IT COMES TO THE EQUITIES.

On the equities, EPA waves away any threat of irreparable harm "during the pendency" of this litigation on the premise that plants need not comply "until 2030 or 2032." Opp. 5. At the same time, the agency claims staying the Rule for "2 to 3 years while the courts decide its legality" will harm the public in the form of "irretrievable" emissions. Opp. 57-58. Both of these things cannot be true at the same time. The only way a stay will result in irreparable emissions "in the meantime," Opp. 5, is if coal plants would otherwise begin to wind down *now* in response to this unachievable mandate—precisely what EPA is counting on. Put differently, "due to the need for long-term planning," the emissions EPA fears will continue if the Rule is stayed are just the flipside of the "irreparable harm" applicants face if it is not. App. 2a.

That is why EPA retreats to the observation that "a stay would not eliminate uncertainty" because the Rule could "eventually" be held lawful. Opp. 53. But that risk is *always* present in this area, and is addressed through the "tried-and-true" method of asking "which party is most likely to prevail in the end." *Labrador v. Poe*, 144 S. Ct. 921, 929-30 (2024) (Kavanaugh, J., concurring in the grant of stay).

To the extent EPA is concerned only with "irretrievable additional carbon dioxide emissions" *in the early 2030s* from "tolling the Rule's deadlines" by two to three years to account for the period of the stay, Opp. 57, that is not a basis for denying relief *now*. If this Court both grants a stay and then rules for applicants on the merits, those harms will drop out of the analysis, for there is no "public interest" in having "agencies … act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758, 766 (2021). And if this Court grants a stay but then rules for EPA down the road, the intervening years "will not necessarily be wasted," as new evidence (including the stay) could cause the agency to ultimately adopt a new rule "setting a different capture rate or a different compliance timetable." Opp. 52-53; *see West Virginia*, 597 U.S. at 715 (noting that EPA "reconsider[ed]" and eventually "repealed" the CPP in the wake of this Court's 2016 stay). But if this Court denies a stay and then rules for applicants years from now, there will be no way to recoup the "costs [they] will incur during" this case, Opp. 52, much less unwind any closures of power plants, losses of businesses (and jobs), or dangerous grid failures that occur in the interim.

In all events, this Court can cut through any equitable thicket by treating this application as a petition for a writ of certiorari before judgment, granting review, and setting the case for briefing and argument during the upcoming Term. Doing so would permit a definitive decision by June 2025 that would both protect applicants from a regulatory whipsaw and shield EPA from any (imagined) harms associated with "tolling the Rule's deadlines." Opp. 5; *see* NACCO Appl. 35. It would also avoid the need to litigate this challenge in the shadow of outdated D.C. Circuit precedents that even EPA now realizes must be shucked aside. NACCO Appl. 35; *see supra* at 2-4.

While not denying these upsides, EPA "question[s]" whether this Court would have "appellate jurisdiction" under Article III to take this sensible approach. Opp. 59. But this is a sideshow. As EPA concedes, this Court unquestionably has jurisdiction to review the D.C. Circuit's stay order. Opp. 60. The only question is whether, in exercising that jurisdiction, this Court can "rule on the merits." *Id.* Yet it "has long been the rule" that "a reviewing court has the power on appeal from an interlocutory order 'to examine the merits of the case,'" such as when this Court held the steel-seizure order unlawful on the "merits" while reviewing an appellate court's "stay of [a] preliminary injunction." *Munaf v. Geren*, 553 U.S. 674, 691-92 (2008) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85 (1952)). EPA identifies no obstacle to following that path here. But to the extent this Court has any concerns, it can order merits-length "briefing" and/or "oral argument" on the stay applications to reach the same destination in practice. *Labrador*, 144 S. Ct. at 933 (Kavanaugh, J., concurring in grant of stay); *see, e.g.*, *NFIB v. OSHA*, 595 U.S. 109, 120 (2022).

CONCLUSION

This Court should grant an immediate stay of the Rule. In the alternative, it should treat this application as a petition for a writ of a certiorari before judgment and grant review, or order briefing and argument on the stay applications to occur during the upcoming Term.

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Respectfully submitted,

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