No. 24A178

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's theory here is astounding. As the agency admits, the statutory objective of capping emissions from power plants under § 7412 is to prevent "harm to public health." Opp. 17. That is why EPA subjected power plants to these emission limits in the first place. *Michigan v. EPA*, 576 U.S. 743, 749 (2015). As the agency also admits, the current risks from these power-plant emissions are "below levels of concern from a public health standpoint." RIA ES-12. One might say: Mission accomplished! But not EPA. No, instead the agency now claims it is "necessary" for power plants to slash their emissions by *67% or more*, at a cost approaching *$1 billion*, "regardless of any residual risk to public health." Opp. 14. Why? Simply because they *can*.

Because EPA cannot ground that irrational view of regulation in logic, it claims "Congress made me do it." According to the agency, the statute requires it to ignore "public-health concerns" and consider only technological "changes that may make stricter emission standards achievable." Opp. 16. That is wrong, and if the D.C. Circuit disagrees, certiorari would be warranted, as in *Michigan*. Congress chose to treat power plants "*differently* from other stationary sources," to protect the public from excessive electricity costs. *Michigan*, 576 U.S. at 756. While EPA concedes that is true for the "threshold determination" whether to subject the plants to § 7412 regulation at all, it dismisses this inquiry as a box-checking exercise that has no bearing on "the nature and contours" of its subsequent regulatory "reviews." Opp. 19. But that would make a hash of the statute and permit the agency to hijack public-health standards in service of other aims, such as "climate-change goals." Opp. 35.

As for the equities, EPA's alleged injuries fall away with its misreading of the statute, as Congress did not seek to give the public "the benefits" of regulation for regulation's sake. Opp. 39. And while EPA tries to minimize the irreparable harms flowing from a stay denial, it admits there would be at least some (unrecoverable) "up-front capital investments that would have to be made during the pendency of judicial review." Opp. 37. Indeed, that is why EPA insists that any stay would impair the public interest, even though the revised standards will not kick in until 2027. *See* Opp. 39-40. EPA cannot have it both ways. In any event, this Court can slice through any equitable thicket by proceeding with briefing and argument on the merits, giving everyone a definitive answer by next June. In the absence of an immediate stay, that would be much more effective than counting on the D.C. Circuit's "expedited" schedule, which, if *Michigan* is any guide, will still lead to a ruling from this Court in June 2027. Opp. 2. This time at least, EPA should not be allowed to run out the clock.

I. EPA'S THEORY OF "NECESSARY" IS INDEFENSIBLE.

EPA tacitly concedes its revised emission limits for power plants will not advance public health by a measurable iota. It nevertheless maintains that these tightened standards are "necessary" under § 7412(d)(6) simply because a "technology review" concluded that tighter standards were "achievable." Opp. 14-15. Even if that were how § 7412 regulation operated for other stationary sources, it cannot work that way for power plants, which Congress singled out for special treatment in § 7412(n)(1) and subjected to regulation only as "appropriate and necessary" for public health. None of EPA's contrary arguments can overcome that fundamental hurdle.

A. EPA Overlooks the Act's Special Treatment of Power Plants.

Whatever can be said about EPA's view of § 7412(d)(6) revisions in general, it makes no sense when it comes to power plants specifically. As the agency agrees, § 7412(d)(6)'s directive to revise emission limits as "necessary" requires asking "what goal the revision must be necessary to attain." Opp. 15. And it is hardly challenging to divine Congress's objective when it comes to regulating hazardous air pollutants from power plants: Section 7412(n)(1)(A) directs EPA to "regulate" power plants "under this section" only if "appropriate and necessary" after studying "the hazards to public health reasonably anticipated to occur as a result of" their emissions. The agency therefore does not dispute that if § 7412(d)(6) and § 7412(n)(1)(A) are read in tandem, a revision to emission standards for power plants is "necessary" only if the revision would protect public health. NACCO Appl. 16, 20-22.

Instead, EPA contends that once it satisfies its "threshold" obligation under § 7412(n)(1)(A) to decide to subject power plants to hazardous-air-pollutant standards in the first place, this special provision goes out the window, and has no role to play in the agency's subsequent "periodic reviews" of these same power-plant standards. Opp. 19. Statutory text, structure, and purpose all say otherwise.

1. Start with the text of § 7412(n)(1)(A), which instructs EPA to "regulate" power-plant emissions under § 7412 only if "regulation is appropriate and necessary" in light of "public health" considerations. As the agency previously told this Court, under "any usual understanding of the statutory term, EPA 'regulates' power plants under Section 7412 not only at the moment when it lists them as a covered source

category, but on an ongoing basis thereafter for so long as power plants are subject to the requirements and prohibitions that Section 7412 imposes." Pet. 13, *EPA v. New Jersey*, 555 U.S. 1162 (2009) (No. 08-512), 2008 WL 4619509 (brackets omitted). Because the decision to *revise* a power-plant emission standard under § 7412(d)(6) is no less regulatory than the decision to *subject* the plant to the HAP program in the first place, EPA cannot blind itself to the public-health objective of § 7412(n)(1)(A) in renewing its consideration of whether regulation is "necessary" at that later stage.

Contrary to EPA's suggestion, reading § 7412(d)(6) in light of § 7412(n)(1)(A) does not cause the meaning of "necessary" to "change with the statute's application." Opp. 19. The *meaning* of "necessary" remains the same in all cases. *See* Opp. 15. What changes is the answer to "necessary *for what*?" That obviously depends on the type and purpose of the regulation at issue, just like the inquiry under the Necessary and Proper Clause depends on which congressional power is being executed. *See, e.g.*, *Jinks v. Richland County*, 538 U.S. 456, 461 (2003). Whatever may be true for other sources, public health is *the* dispositive factor when it comes to regulating power plants, and § 7412(d)(6)'s "necessary" inquiry must therefore track it.

2. The Act's structure further forecloses EPA's view. While the agency tries to read § 7412 "in a way that 'harmonizes' the program's treatment of power plants with its treatment of other sources"—this time, by adopting a one-size-fits-all view of § 7412(d)(6)—that yet again "overlooks the whole point of having a separate provision about power plants: treating power plants *differently*." *Michigan*, 576 U.S. at 756. EPA's "preference for symmetry cannot trump an asymmetrical statute." *Id.* at 757.

To answer the question "necessary *for what*," EPA says it must look back to "the factors set forth in subsection (d)(2)" that it "would consider as an initial matter" in applying (d)(6). Opp. 7; *see* Opp. 16. If it were adopting standards under § 7412(d)(2) "for the first time" today, the agency contends, it would be empowered to adopt the revised standards, even though they go much further than necessary to protect public health. Opp. 20. Not so. EPA is assuming that, in setting initial standards, it must always "maximize reductions in emissions wherever achievable," regardless of "the margin of safety for protecting public health." *Id.* But that is not the case for power plants, because (once again) § 7412(n)(1)(A) requires that "regulation" of power plants be limited to what is "appropriate and necessary" to address the identified "hazards to public health." *See supra* at 3-4. Both with respect to the initial § 7412 standards and any revised ones, EPA's inquiry into what is "necessary" must be driven by what justified power-plant regulation in the first place—"hazards to public health."

EPA's contrary reading also proves too much. If § 7412(d)(6) is just a "*recurring*" § 7412(d)(2) analysis requiring the "maximum" reduction currently "achievable," then EPA would be *forbidden* from considering "risks to public health" at this stage. *Id.* Yet EPA has long taken the position that public-health risks "'should be key factors'" in deciding whether to revise a standard under § 7412(d)(6), NACCO Appl. 19, and it clings to its "discretion" to consider such matters even now, Opp. 3; *see* Rule 38525. That just gives the game away: If EPA *may* consider public health under § 7412(d)(6) generally, then it *must* do so in this instance, given the interplay with § 7412(n)(1)(A) and the underlying objective of the power-plant emission standards.

3. Excising § 7412(n)(1)(A) from the § 7412(d)(6) inquiry would also ignore *why* Congress opted for unique treatment of power plants. Notably, Congress declined to adopt a proposal in which power plants would be "automatically regulated" under § 7412(d). *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1264 (D.C. Cir. 2014) (Kavanaugh, J., dissenting). Instead, it opted for § 7412(n)(1)(A)'s appropriate-and-necessary requirement "to provide 'protection of the public health while avoiding the imposition of excessive and unnecessary costs on … consumers of electricity.'" *Id.* (emphasis omitted). In other words, Congress chose this lighter-touch regime because of the particularly burdensome impacts of regulating power plants.

That "congressional compromise" designed to protect ordinary consumers from "unwarranted financial burdens" would have little force if EPA could take emission limits meant only to address public health and revise them under a different standard, to advance other goals, after the original objective was met. *Id.*; *see* NACCO Appl. 21. For this reason too, EPA's interpretation of the statute must be wrong.

B. EPA's Counterarguments Fail To Justify Ignoring Public Health.

EPA claims other parts of the Act cut against treating § 7412(d)(6)'s "necessary" inquiry in the context of power plants as focused on public health. EPA is wrong.

1. First, EPA turns to § 7412(d)(6)'s "parenthetical." Opp. 15. Because that parenthetical requires it to "tak[e] into account developments in practices, processes, and control technologies" in determining whether revisions are "necessary," the agency infers Congress must have wanted it to increase regulatory burdens whenever technological developments would make tighter standards possible. *Id.*

That is not what the parenthetical says. Technological developments are one, non-exhaustive factor EPA must consider in deciding whether revisions are necessary. The agency must "tak[e] into account" whether developments have made tightened standards *possible*, but that alone does not mean they are *necessary* for any purpose, including to advance public health. After all, Congress did not direct EPA to revise emission standards *based on* "developments in practices, processes, and control technologies" alone; it instructed the agency to revise standards only as "necessary," while *accounting for* such technological developments. EPA's interpretation amounts to reading the word "necessary" out of the statute. NACCO Appl. 20.

EPA's hypothetical proves the point. It describes a law-firm partner who hands her associate a draft brief with the instruction to "revise as necessary (taking into account the court's word limits)" and asserts that the "parenthetical constraint sheds light … on what goal the revision must be necessary to attain." Opp. 15. But that associate would not keep his job for long if he cut words at random until reaching the applicable word limit—or, for that matter, if he added superfluous string-cites or meaningless jargon right up to that point. That is because adhering to the word limit is not his *only* task. "Revise as necessary (taking into account the court's word limits)" is not a command to make any, all, or no changes so long as the word limit is respected; it is a directive to *improve the brief* without exceeding the word cap. Fixating solely on brief length (rather than quality) would commit the same mistake as EPA in focusing exclusively on intervening technology (rather than health). Both the hapless associate and the hapless agency miss the forest for the trees.

2. EPA next goes after a strawman, asserting § 7412(d)(6) allows it to revise power-plant standards even if the current limits do not trigger its "separate duty to act under Section 7412(f)," the provision calling for a one-time risk review of all original emission standards. Opp. 3; *see* Opp. 17. True enough, but NACCO has never said otherwise. To the contrary, NACCO explained that even if the current standards "provide an ample margin of safety" under § 7412(f)(2)—*i.e.*, no one faces an excess lifetime cancer risk over 100-in-1 million—EPA still remains free to tighten them under § 7412(d)(6) to further reduce public-health risks. NACCO Appl. 21-22. In other words, § 7412(f) is a floor. But that does not mean there is no ceiling. Rather, EPA hits the "necessary" ceiling under § 7412(d)(6) where, as here, no meaningful health risk is left to address at all. Going further is reduction *ad absurdum*.

Perhaps recognizing this problem, the organizational respondents insist the revised standards *do* advance public health. NGO Opp. 26-31. Tellingly, EPA does not (and cannot) make that argument to justify the Rule—the agency did not rely on health benefits in crafting the Rule, nor did it find that the Rule would advance public health. *See* Rule 38553; NACCO Appl. 24. Because "EPA's action must be measured by what it did, not by what it might have done," this fallback theory offered by other respondents is dead on arrival. *Michigan*, 576 U.S. at 759 (alterations omitted).

In any event, the organizations are wrong. They argue that the relevant emissions are (at high enough levels) associated with various health issues, and that the Rule would reduce those emissions—but fail to make any showing that the marginal reductions effected by the Rule would have any effect on public health. NGO

Opp. 27-28. Indeed, EPA itself found no evidence that they would. *See* NACCO Appl. 10-11, 18. To cover that up, the organizations digress to a discussion about how some benefits are hard to monetize, but that is beside the point. NGO Opp. 28-31. NACCO has not argued EPA must *quantify* the health benefits of its Rule, and EPA did not say the Rule was justified by health benefits that were *hard to monetize*. Rather, EPA denied it had to consider health benefits at all, *see, e.g.*, Rule 38553, and NACCO's point is that the Rule cannot be "necessary" absent some benefits to public health.

In short, EPA's interpretation of the statute is wrong. If the D.C. Circuit were to adopt it, certiorari would be warranted. This factor strongly supports a stay.

II. EPA'S ACCOUNT OF THE EQUITIES IS UNTENABLE.

Turning to the equities, the only harm from a stay that EPA can muster is the frustration of Congress's purported "judgment" that § 7412(d)(6) revisions must obtain the "maximum degree of reduction … achievable." Opp. 39; *see* Mass. Opp. 34-36 (similar). But once that false premise collapses on the merits, EPA is left with a Rule with no benefits, and hence a stay with no harms. NACCO Appl. 22.

On the other side of the ledger, EPA tries to downplay the magnitude of the Rule's harms by comparing *applicants'* total compliance costs with the "typical expenditures" of the *entire industry*, before admitting that some plants will need to make "up-front capital investments … during the pendency of judicial review." Opp. 37. While the agency quibbles over exactly how many "plants" will need to make these investments, and whether those outlays should be characterized as "significant" or "substantial," the reality is that power plants will have to spend millions to update

their systems while this litigation plays out (if they do not close). *Id.*; *see, e.g.*, NRECA Appl. 26-27. For example, Coal Creek Station in North Dakota, one of the handful of buyers of NACCO's lignite coal production, must begin "immediately" installing "an activated carbon injection ('ACI') system"—to the tune of $5 million—to comply. NRECA Appl. App. 538a; *see* NACCO Appl. App. 143a. Because EPA cannot deny such costs will be "'nonrecoverable'" on the back end, applicants will "suffer irreparable injury without a stay." *Ohio v. EPA*, 144 S. Ct. 2040, 2052-53 (2024); *see* NACCO Appl. 22-24.

Applicants thus face the *Michigan* maneuver again. Absent a stay, power plants (at least those that do not shut down) will have complied with the Rule before this Court can determine whether it is even lawful. NACCO Appl. 23-25. EPA resists the comparison by dismissing any fears of "prolonged judicial review" as "unfounded" due to the D.C. Circuit's "expedited" schedule. Opp. 36-37. But that timetable will still end up tracking the three-year review process of *Michigan*, which (following the same case trajectory) should result in decision from the D.C. Circuit in January 2026 and decision from this Court in June 2027. *See* NACCO Appl. 23.[1]

[1] The rule in *Michigan* was challenged on February 16, 2012. 12-1100 Dkt. (D.C. Cir.). Briefing ended on April 8, 2013 (14 months later), the D.C. Circuit held argument on December 10, 2013 (8 months after that), and it issued its decision on April 15, 2014 (4 months after that). *Id.* Here, the Rule was challenged on May 8, 2024, and briefing in the D.C. Circuit will conclude on December 10, 2024 (7 months later). 24-1119 Dkt. (D.C. Cir.). Assuming an eight-month gap between the close of briefing and oral argument (and accounting for the D.C. Circuit's summer recess), this case should be argued around September 2025 and decided around January 2026, meaning it will be heard by this Court during October Term 2026.

Indeed, it is hard to take seriously EPA's dismissive treatment of applicants' harms when the agency simultaneously contends that a stay of the Rule would "deny the public the benefits" of § 7412's regulatory regime. Opp. 39. If EPA truly believes that the D.C. Circuit's "expedited schedule" will result in a prompt decision before applicants have to incur any meaningful costs, it is unclear why it fears a stay in the meantime. Opp. 37. A stay cannot be both unnecessary and devastating at once.

In all events, this Court can sidestep the equitable balancing 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, thereby limiting applicants' unrecoverable compliance costs while also shielding EPA from any imagined harms from tolling the Rule's deadlines. It would also avoid the need to litigate this challenge against the backdrop of a patchwork of dubious D.C. Circuit precedents construing § 7412(d)(6) in other contexts that EPA seeks to extend to power plants. *See, e.g.*, Opp. 17.

EPA "question[s]" the Court's jurisdiction to grant certiorari before judgment here. Opp. 41. But this is a distraction. EPA concedes this Court has jurisdiction to review the D.C. Circuit's stay order. *Id.* 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. Green*, 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 that path here. But to the extent this Court has any concerns, it can order merits-length "briefing" and "oral argument" on the stay applications to reach the same destination in practice. *Labrador v. Poe*, 144 S. Ct. 921, 933 (2024) (Kavanaugh, J., concurring in the 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.

September 18, 2024

Respectfully submitted,

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