

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

Charles T. Wehland
JONES DAY
110 N. Wacker Dr., Ste 4800
Chicago, IL 60601

Jeffery D. Ubersax
KUSHNER & HAMED CO., LPA
1375 E. Ninth St., Ste 1930
Cleveland, OH 44114

Yaakov M. Roth
Counsel of Record
Brinton Lucas
S. Matthew Krsacok
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-7658
yroth@jonesday.com

Counsel for Applicant NACCO Natural Resources Corporation

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 West Virginia; State of Alabama; State of Alaska; State of Arkansas; State of Florida; 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 New Hampshire; State of North Dakota; State of Ohio; 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; Appalachian Region Independent Power Producers Association; Edison Electric Institute (also an Intervenor); Electric Generators for a Sensible Transition; Idaho Power Company; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO; International Brotherhood of Electrical Workers, AFL-CIO; Midwest Ozone Group; Montana-Dakota Utilities Co.; National Mining Association; National Rural Electric Cooperative Association; Oklahoma Gas and Electric Company; Rainbow Energy Center, LLC; United Mine Workers of America, AFL-CIO; Westmoreland Mining Holdings LLC; Westmoreland Mining LLC; and Westmoreland Rosebud Mining LLC.

Intervenors: State of New York; State of Arizona; State of Colorado; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of Michigan; State of Minnesota; State of New Jersey; State of New Mexico; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania; State of Rhode Island; State of Vermont; State of Washington; State of Wisconsin; District of Columbia; City and County of Denver; City of Boulder; City of Chicago; City of New York; California Air Resources Board; American Lung Association; American Public Health Association; Clean Air Council; Clean Wisconsin; Consolidated Edison, Inc.; Edison Electric Institute (also a Petitioner); Louisiana Public Service Commission; Natural Resources Defense Council; New York Power Authority; Pacific Gas and Electric Company; Power Companies Climate Coalition; Sacramento Municipal Utility District; and Tennessee Valley Public Power Association, Inc.

Amici Curiae: The Chamber of Commerce of the United States of America; Environmental Defense Fund; Professor Rachel Rothschild; and Sierra Club.

The related proceedings are:

West Virginia v. EPA, No. 24-1120 (D.C. Cir. July 19, 2024) (lead case) (order denying motions for stay), consolidated with: *Ohio v. EPA*, No. 24-1121 (D.C. Cir. July 19, 2024); *National Rural Electric Cooperative Association v. EPA*, No. 24-1122 (D.C. Cir. July 19, 2024); *National Mining Association v. EPA*, No. 24-1124 (D.C. Cir. July 19, 2024); *Oklahoma Gas and Electric Company v. EPA*, No. 24-1126 (D.C. Cir. July 19, 2024); *Electric Generators for a Sensible Transition v. EPA*, No. 24-1128 (D.C. Cir.

July 19, 2024); *United Mine Workers of America v. EPA*, No. 24-1142 (D.C. Cir. July 19, 2024); *International Brotherhood of Electrical Workers v. EPA*, No. 24-1143 (D.C. Cir. July 19, 2024); *International Brotherhood of Boilermakers v. EPA*, No. 24-1144 (D.C. Cir. July 19, 2024); *Midwest Ozone Group v. EPA*, No. 24-1146 (D.C. Cir. July 19, 2024); *Edison Electric Institute v. EPA*, No. 24-1152 (D.C. Cir. July 19, 2024); *NACCO Natural Resources Corporation v. EPA*, No. 24-1153 (D.C. Cir. July 19, 2024); *Idaho Power Company v. EPA*, No. 24-1155 (D.C. Cir. July 19, 2024); *Appalachian Region Independent Power Producers Association v. EPA*, No. 24-1222 (D.C. Cir. July 19, 2024); *Rainbow Energy Center, LLC v. EPA*, No. 24-1226 (D.C. Cir. July 19, 2024); *Montana-Dakota Utilities Co. v. EPA*, No. 24-1227 (D.C. Cir. July 19, 2024); and *Westmoreland Mining Holdings LLC v. EPA*, No. 24-1233 (D.C. Cir. July 19, 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
INTRODUCTION	1
OPINIONS BELOW	5
JURISDICTIONAL STATEMENT	5
STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE.....	5
A. Statutory Background.....	5
B. The Clean Power Plan.....	7
C. The Affordable Clean Energy Rule.....	8
D. The Carbon Capture and Sequestration Rule.....	10
E. Procedural History	12
REASONS FOR GRANTING THE APPLICATION	12
I. EPA’S TARGETS ARE NOT ACHIEVABLE USING EXISTING TECHNOLOGY.....	14
A. EPA has not shown existing sources can achieve a 90% reduction of their emissions using carbon capture and sequestration.	14
B. The statute does not allow EPA to base its “best system” on future predictions, projections, or speculation.....	18
II. EPA FAILED TO ACCOUNT FOR THE FULL COST OF ITS CHOSEN SYSTEM.	24
A. As EPA has long admitted, carbon capture and sequestration is prohibitively costly.	25
B. EPA obscured the Rule’s true costs through an accounting trick.	27
III. THE EQUITIES FAVOR A STAY.	33
CONCLUSION.....	36

INDEX OF APPENDICES

Appendix A	Order of the United States Court of Appeals for the District of Columbia Circuit Denying Motions for Stay (July 19, 2024)
Appendix B	42 U.S.C. § 7411
Appendix C	<i>New Source Performance Standards for GHG Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired EGUs; Emission Guidelines for GHG Emissions From Existing Fossil Fuel-Fired EGUs; and Repeal of the ACE Rule</i> , 89 Fed. Reg. 39798 (May 9, 2024)
Appendix D	Declaration of Christoper D. Friez (May 24, 2024)

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Advoc. Health Care Network v. Stapleton</i> , 581 U.S. 468 (2017)	32
<i>Alabama Ass’n of Realtors v. HHS</i> , 594 U.S. 758 (2021)	13, 34
<i>Am. Elec. Power Co. v. Connecticut</i> , 564 U.S. 410 (2011)	20
<i>Am. Lung Ass’n v. EPA</i> , 985 F.3d 914 (D.C. Cir. 2021)	9
<i>Biden v. Nebraska</i> , 143 S. Ct. 477 (2022)	34
<i>Bob Jones Univ. v. United States</i> , 461 U.S. 574 (1983)	28
<i>Carr v. United States</i> , 560 U.S. 438 (2010)	20
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006)	28
<i>Epic Sys. Corp. v. Lewis</i> , 584 U.S. 497 (2018)	31
<i>Gundy v. United States</i> , 588 U.S. 128 (2019)	19
<i>Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.</i> , 484 U.S. 49 (1987)	20
<i>King v. Burwell</i> , 576 U.S. 473 (2015)	28
<i>Labrador v. Poe</i> , 144 S. Ct. 921 (2024)	13, 34

TABLE OF AUTHORITIES

	Page(s)
<i>Loper Bright Enters. v. Raimondo</i> , 144 S. Ct. 2244 (2024)	23
<i>Massachusetts v. EPA</i> 549 U.S. 497 (2007)	7
<i>Michigan v. EPA</i> , 576 U.S. 743 (2015)	5, 25, 26, 28
<i>Moyle v. United States</i> , 144 S. Ct. 2015 (2024)	35
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	33
<i>NLRB v. SW Gen., Inc.</i> , 580 U.S. 288 (2017)	31
<i>NRDC v. Thomas</i> , 805 F.2d 410 (D.C. Cir. 1986)	23
<i>Ohio v. EPA</i> , 144 S. Ct. 2040 (2024)	12, 28, 33, 34
<i>Portland Cement Ass’n v. Train</i> , 513 F.2d 506 (D.C. Cir. 1975)	25
<i>Potomac Elec. Power Co. v. ICC</i> , 702 F.2d 1026 (D.C. Cir. 1983).....	33
<i>Sierra Club v. Costle</i> , 657 F.2d 298 (D.C. Cir. 1981)	23
<i>United States v. Texas</i> , 143 S. Ct. 51 (2022)	34
<i>West Virginia v. EPA</i> , 577 U.S. 1126 (2016)	8

TABLE OF AUTHORITIES

	Page(s)
<i>West Virginia v. EPA</i> , 597 U.S. 697 (2022)	1, 2, 3, 6, 8-10, 14, 21-23, 25-27, 30, 31
<i>Whitman v. Am. Trucking Ass'ns</i> , 531 U.S. 457 (2001)	25, 29

STATUTES

2 U.S.C. § 632.....	28
5 U.S.C. § 705.....	1, 5
28 U.S.C. § 1254.....	5
28 U.S.C. § 1651.....	1, 5
28 U.S.C. § 2101.....	1, 5, 34
31 U.S.C. § 1105.....	28
42 U.S.C. § 7411.....	1-3, 5, 6, 8-11, 13-16, 19-21, 24, 27-30, 32
42 U.S.C. § 7425.....	29
42 U.S.C. § 7521.....	21
42 U.S.C. § 7607.....	5

OTHER AUTHORITIES

40 C.F.R. § 60.22.....	6
168 Cong. Rec. E879 (Aug. 26, 2022)	32
41 Fed. Reg. 48706 (Nov. 4, 1976).....	22
42 Fed. Reg. 12022 (Mar. 1, 1977).....	22
44 Fed. Reg. 29828 (May 22, 1979)	22
45 Fed. Reg. 26294 (Apr. 17, 1980)	23

TABLE OF AUTHORITIES

	Page(s)
56 Fed. Reg. 24468 (May 30, 1991)	23
74 Fed. Reg. 66496 (Dec. 15, 2009)	7
80 Fed. Reg. 64510 (Oct. 23, 2015).....	6-10, 22, 25, 26, 31
84 Fed. Reg. 32520 (July 8, 2019)	8, 9, 22, 27, 30
89 Fed. Reg. 39798 (May 9, 2024)	1, 2, 5, 10-12, 14-18, 23, 25, 28, 31, 34
CBO, <i>Carbon Capture and Storage in the United States</i> (Dec. 13, 2023).....	28
Comment from J. Jickling, SaskPower (Aug. 4, 2023).....	15
EPA, <i>Biden-Harris Administration Finalizes Suite of Standards to Reduce Pollution from Fossil Fuel-Fired Power Plants</i> (Apr. 25, 2024).....	10
EPA, <i>Response to Comments</i> (Apr. 2024).....	29
M. Friedman, <i>There’s No Such Thing as a Free Lunch</i> (1975)	24
Heritage Foundation Comment (Aug. 5, 2023)	30
<i>Webster’s Seventh New Collegiate Dictionary</i> (1970).....	19
White House, <i>Fact Sheet: President Biden to Catalyze Global Climate Action Through the Major Economies Forum on Energy and Climate</i> (Apr. 20, 2023)	10

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 rule of EPA titled *New Source Performance Standards for GHG Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired EGUs; Emission Guidelines for GHG Emissions From Existing Fossil Fuel-Fired EGUs; and Repeal of the ACE Rule*, 89 Fed. Reg. 39798 (May 9, 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 July 19, 2024, the D.C. Circuit denied that and other stay motions.

INTRODUCTION

Just two years ago, this Court confirmed that EPA could not hijack 42 U.S.C. § 7411 to effectively compel “coal plants” to “cease to exist.” *West Virginia v. EPA*, 597 U.S. 697, 728 & n.3 (2022). Instead, that provision merely allows the agency to require existing sources to “reduce pollution”—while continuing to function as coal plants—by taking measures that would cause them “to operate more cleanly.” *Id.* at 706. Specifically, EPA can set emission limits that are “achievable” via the use of a technology that “has been adequately demonstrated” to be effective in the real world (while accounting for “cost”). § 7411(a).¹ In other words, EPA’s task is simply to ensure that sources are using the most up-to-date tools that are *available* and *affordable*.

¹ Unless otherwise noted, all statutory citations refer to Title 42 of the U.S. Code.

Unable to tell “coal plants to ‘shift’ away virtually all of their generation—*i.e.*, to cease making power altogether,” *West Virginia*, 597 U.S. at 728—EPA scrapped its unlawful Clean Power Plan (CPP) and went back to the drawing board. This year, it came back with a new ultimatum for the Nation’s coal plants: either use carbon capture and storage (CCS) to cut 90% of your CO₂ emissions, or shut down.

To EPA’s credit, this mandate at least appeared to revert to the agency’s “traditional” use of § 7411 to “improv[e] the emissions performance of individual sources” rather than transform the grid as a whole. *Id.* at 727. But that just swapped one statutory violation with another, because using CCS to eliminate 90% of CO₂ emissions never “has been adequately demonstrated” to work—let alone in a “cost”-efficient manner—meaning the resulting limits are not “achievable.” § 7411(a). Indeed, that is *why* the agency had previously (and repeatedly) determined that CCS was not a permissible solution. And nothing material has changed since EPA told this Court two years ago that CCS was not an available option. To the contrary, the agency acknowledged just last month that “no commercial power plant is consistently achieving 90% capture.” C.A. Stay Opp. 44.

Imagining what can be, unburdened by what has been, EPA decided that the time to mandate this technology had come. Relying on a handful of D.C. Circuit cases largely dating from the 1970s, the agency insisted that § 7411 was a “forward-looking” provision that authorized it to “project the development” of a technology “at a future time,” and thereby “set a standard more stringent than has regularly been achieved.” 89 Fed. Reg. 39798, 39801, 39830 (May 9, 2024) (Rule).

EPA further reasoned that the unsustainable costs of CCS were no longer a barrier because the Inflation Reduction Act (IRA) had provided for offsetting tax credits (at least in the short term). The agency treated that as if it means *no one* will bear these exorbitant expenses, which could exceed *\$100 billion* by the early 2030s.

By demanding unachievable reductions using an unavailable and unaffordable technology, the Rule drives a different route to the same destination as the CPP: mass “retirement” of “coal-fired plants.” *West Virginia*, 597 U.S. at 714. Of course, that is precisely the objective. The only difference is that instead of *directly* achieving that result through generation shifting, the new Rule causes it *indirectly* by imposing impossible targets. As yesterday’s dissenters presciently explained, “a rule requiring the use of carbon-capture technology would have shifted far more electricity production from coal-fired plants than the Clean Power Plan,” because “the ‘exorbitant’ costs” of that tool “‘would almost certainly force the closure’ of all affected ‘coal-fired power plants.’” *Id.* at 773 n.5, 775-76 (Kagan, J., dissenting). Yet even those dissenters agreed that traditional “statutory constraints” of adequate demonstration and cost consideration prevent EPA from “forc[ing] the elimination of coal plants,” including “through technological controls” such as “carbon capture” or switching fuels. *Id.* at 776 n.7 (contending that there was no need to read § 7411 to foreclose generation shifting, because the “cost” and “adequately demonstrated” limitations would preclude attempts to eradicate coal plants). Thus, the statutory violation here is no less egregious than the one this Court confronted two years ago; it is simply more devious.

As in the original CPP litigation, the D.C. Circuit denied a stay of the Rule. In a cursory order, it stated that applicants were unlikely to succeed on the merits, the only conceivable explanation being that its 1970s-era precedents gave EPA a free pass. App. 2a. And while the court effectively conceded applicants would suffer irreparable injury “due to the need for long-term planning,” it claimed “a stay will not help” because the Rule might spring back into effect “at the end of the case.” *Id.*

This Court should not repeat the same errors. As to the merits, the only way to sustain this Rule is to rewrite the statute. Given the undisputed reality of the still-nascent CCS technology, EPA is forced to replace the phrase “has been adequately demonstrated” with “may be adequately demonstrated sometime in the future,” and thereby substitute speculation for science. And given the conceded costs of this novel regime, EPA is forced to replace the phrase “taking into account the cost” with “taking into account the net cost *to the source*,” and thereby enable cheap accounting tricks. As to the equities, it is *always* the case that an ultimate loss in a regulatory challenge means the “rule will come back into force,” but that truism does not obviate the need for a stay. In any event, this Court can eliminate this inherent uncertainty by treating this application as a petition for a writ of certiorari before judgment, granting the petition, and reviewing this exceptionally important Rule during the upcoming Term. If this Court does not stay the Rule outright, it should at least free applicants from having to spend years litigating this challenge in the shadow of outdated lower-court precedents that lack any anchor in statutory text, all the while incurring substantial compliance costs that can never be recouped on the back end.

OPINIONS BELOW

The D.C. Circuit’s order denying applicant’s motion for a stay is not reported but is reproduced at App. 1a-3a. The Rule is published at 89 Fed. Reg. 39798 (May 9, 2024) and reproduced at App. 13a-279a.

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 statutory provisions at issue are reproduced at App. 4a-12a.

STATEMENT OF THE CASE

A. Statutory Background

“The Clean Air Act establishes a series of regulatory programs to control air pollution from stationary sources (such as refineries and factories).” *Michigan v. EPA*, 576 U.S. 743, 747 (2015). The program here is set forth in § 7411. Titled “Standards of performance for new stationary sources,” this provision “directs EPA to list “categories of stationary sources” it determines “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” § 7411(b)(1). After listing such a category, EPA must set rules establishing emissions limits from new sources in that category. § 7411(b)(1)(B). “[N]ew source[s]” are those built after the relevant regulation is proposed. § 7411(a)(2).

Although § 7411 is focused (as its title suggests) on *new* sources, subsection (d) addresses *existing* sources. In parallel to the definition of a “new” source, an “existing” source is any “building, structure, facility, or installation which emits or may emit any air pollutant” built *before* the regulation is proposed. § 7411(a)(3), (6). This “ancillary” subsection “operates as a gap-filler,” authorizing EPA to “regulate harmful emissions not already controlled under the Agency’s other authorities.” *West Virginia*, 597 U.S. at 710.

After EPA publishes “standards of performance” for new sources—and assuming the pollutant at issue is one of the rare few not already subject to regulation under certain other programs in the Act—it must “prescribe regulations” calling for States to establish “standards of performance for any existing source” of that type. § 7411(d). A “standard of performance” is one that “reflects the degree of emission limitation achievable through the application of the best system of emission reduction” that “has been adequately demonstrated,” “taking into account the cost of achieving such reduction,” health and environmental impact, and energy needs. § 7411(a)(1).

This is a multi-step process. EPA first issues an “emission guideline that reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities.” 40 C.F.R. § 60.22(b)(5). States then develop and impose a “standard of performance” based on the achievable emission reductions identified by EPA “for any existing source” in the category. § 7411(d)(1). If a State fails to impose a plan, EPA can do so directly. § 7411(d)(2).

B. The Clean Power Plan

In *Massachusetts v. EPA*, this Court held that CO₂ and other greenhouse gases could fit within the Clean Air Act's general definition of air pollutants. 549 U.S. 497, 511 (2007). In 2009, EPA issued an "endangerment finding," concluding that a mix of six greenhouse gases emitted by motor vehicles may "reasonably be anticipated both to endanger public health and to endanger public welfare." 74 Fed. Reg. 66496, 66497 (Dec. 15, 2009). Largely on the basis of that finding, EPA in 2015 published a rule, known as CPP, regulating the emission of CO₂ from existing power plants under § 7411(d). 80 Fed. Reg. 64510 (Oct. 23, 2015).

In the CPP, EPA set "final emission guidelines" for States to use in establishing performance standards for those plants. *Id.* at 64512. The performance rates and targets in those guidelines were derived from what EPA had then identified as the "best system of emission reduction" for existing fossil-fuel-fired plants. *Id.*

At that time, EPA considered CCS as a potential system of emission reduction, but found that "the scale of infrastructure required to directly mitigate CO₂ emissions from existing [sources] through CCS can be quite large and difficult to integrate into the existing fossil fuel infrastructure." *Id.* at 64690. EPA therefore rejected CCS as the "best system of emission reduction," as the "costs were too high when considered on a sector-wide basis." *Id.* at 64751; *see id.* at 64756 (concluding "full or partial CCS technology should not be part of the" best system for existing sources "because it would be more expensive").

Instead, EPA resorted to what it viewed as a less expensive “system” comprised of three “building blocks.” *Id.* at 64667. The first building block—“‘heat rate improvements’ at coal-fired plants”—was unobjectionable; these were “source-specific, efficiency-improving” measures “plants could undertake to burn coal more cleanly ... similar in kind to those” the agency had adopted in the past. *West Virginia*, 597 U.S. at 697. But the other building blocks were not technologies or systems that could be adopted or applied by any given plant. Rather, they were methods of “generation shifting” across the grid, meaning a reduction in electricity generated by the source in favor of more supply from other energy sources, such as gas-fired plants or renewable sources like solar or wind. 80 Fed. Reg. at 64728.

The CPP unsurprisingly sparked immediate challenge. Consistent with the Clean Air Act’s judicial-review provision, § 7607(b)(1), a group of states and private parties filed petitions for review in the D.C. Circuit. After they unsuccessfully sought a stay of the CPP pending review in that court, this Court stayed the rule. *West Virginia v. EPA*, 577 U.S. 1126 (2016).

C. The Affordable Clean Energy Rule

Following the stay, EPA reassessed its position; the litigation was held in abeyance and ultimately dismissed. Rather than defend the CPP, the agency took the hint and replaced it. *See West Virginia*, 597 U.S. at 715. In its 2019 Affordable Clean Energy (ACE) Rule, EPA explained that the CPP’s generation-shifting scheme had exceeded the agency’s “statutory authority” under § 7411 by attempting to regulate the power sector “‘at the grid level.’” 84 Fed. Reg. 32520, 32523 (July 8, 2019).

In its place, the agency promulgated standards and limits that could be applied at and achieved by a source itself, through a mix of equipment upgrades and practices that would improve the heat rates of existing plants. *Id.* at 32522, 32537. In settling on this approach, EPA again rejected CCS as an option. *Id.* at 32547-49. The agency determined that “[t]he high cost of CCS, including the high capital costs of purchasing and installing CCS technology and the high costs of operating it” meant that CCS could not be the “best system of emissions reduction.” *Id.* at 32548. Instead, the “exorbitant” costs of CCS technologies “would almost certainly force the closure of the coal-fired power plants that would be required to install them.” *Id.*

The ACE Rule was immediately challenged in the D.C. Circuit, which vacated it 18 months later. *Am. Lung Ass’n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021). This Court reversed. *West Virginia*, 597 U.S. at 735. As this Court explained, under the agency’s “‘traditional’” view of § 7411(d), EPA could adopt “technology-based standard[s]” aimed at “improving the emissions performance of individual sources.” *Id.* at 726-27. In the CPP, however, the agency had “adopted what it called a ‘broader, forward thinking approach’” to § 7411 that would allow it to “forc[e] a shift throughout the power grid from one type of energy source to another.” *Id.* at 727-28. This Court rejected that “unprecedented” reading, observing that § 7411(d) “empowers EPA to guide States in ‘establishing standards of performance’ for ‘existing sources,’ not to direct existing sources to effectively cease to exist.” *Id.* at 728 & n.3 (cleaned up). So the Court agreed that the CPP had been properly repealed three years earlier.

While the dissenters agreed EPA could not use § 7411(d) to “force[] the elimination of coal plants”—including through “technological controls”—they did not derive this limit from a statutory bar on “generation shifting.” *Id.* at 776 n.7 (Kagan, J., dissenting). Rather, they thought “the statutory constraints” dealing with cost and adequate demonstration would “prevent [EPA] from doing so.” *Id.*; *see id.* at 758-59.

D. The Carbon Capture and Sequestration Rule

Consistent with the Administration’s repeated commitment to “achieving a carbon pollution-free power sector by 2035,” EPA released a “suite of standards” in April 2024 to accomplish “the transition to a clean energy economy.”² The centerpiece of this regulatory package was the Rule here, which requires existing coal plants to reduce their CO₂ emissions by 88.4% by 2032. Rule 39840. In setting this limit, EPA determined that “CCS with 90 percent capture of CO₂” was the “best system of emission reduction” for purposes of § 7411, “including being adequately demonstrated and achieving significant emission reductions at reasonable cost.” *Id.*

In concluding that this limit was “achievable” using a system that “has been adequately demonstrated,” EPA did not identify any power plant that had ever consistently captured 90% of its CO₂ emissions. Rule 39847; *see* Rule 39847-55. It also acknowledged that when it came to the storage of captured CO₂, no relevant “commercial sequestration facilities” are currently operational. Rule 39871. And the

² The White House, *Fact Sheet: President Biden to Catalyze Global Climate Action Through the Major Economies Forum on Energy and Climate* (Apr. 20, 2023); EPA, *Biden-Harris Administration Finalizes Suite of Standards to Reduce Pollution from Fossil Fuel-Fired Power Plants* (Apr. 25, 2024).

agency conceded further that to even access “potential” CO₂ “sequestration sites” in the future, coal plants and others would need to essentially double the Nation’s CO₂ pipelines by 2032—a likely impossible task for the nearly 20% of plants that would need to build these carbon highways across state lines. Rule 39855-56, 39860.

EPA nevertheless concluded it was enough that it “expected” or “anticipate[d]” that, in the future, coal plants would consistently be able to capture 90% of their carbon emissions, “more commercial [sequestration] sites will be developed,” and approximately 5,000 miles of CO₂ pipeline “would be constructed.” Rule 39856, 39871, 39889. Drawing on “case law” from “the D.C. Circuit” since “the early 1970s,” the agency claimed § 7411(a) was a “forward-looking” provision that let it “project the development of a control system at a future time” and rely on “anticipated improvements in control technologies.” Rule 39801. EPA therefore thought it could set a “standard at levels more stringent than has regularly been achieved,” and thereby “spur the development” of green technology. Rule 39830.

Turning to its new system’s price tag, EPA acknowledged that it had twice determined (in “the CPP and ACE Rule”) that “CCS did not qualify” as the best system “due to cost.” Rule 39882. It decided “to reevaluate this conclusion,” however, in light of the 2022 “extension and increase in the IRC section 45Q tax credit” in the IRA. *Id.* Specifically, Congress had made an existing tax credit for the sequestration of CO₂ “more generous” in “the Bipartisan Budget Act of 2018 and ... the IRA.” Rule 39800. In EPA’s view, these credits would “provide a significant stream of revenue” and thus “significantly improve[] the cost reasonableness of CCS.” Rule 39882.

In a telling signal of EPA’s true objective, the Rule exempted from its carbon-capture mandate coal plants that pledged to close their doors. Rule 39801. If a plant promised to shutter by 2032, it could spend its twilight years undisturbed. *Id.* And if a plant swore to retire by 2039, it could putter along for the seven extra years if it merely adopted “co-firing with natural gas, at a level of 40 percent of the unit’s annual heat input.” *Id.* Any plant that wanted to live into the 2040s, however, had to slash its CO₂ emissions by nearly 90% before 2032. *Id.*

E. 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-3a. The court asserted that applicants were unlikely to succeed on the merits. App. 2a. And while the court did not deny that applicants faced irreparable harm now “due to the need for long-term planning,” it concluded that a “stay will not help because the risk remains” that the Rule’s 2032 deadline could “come back into force at the end of the case” if their challenge proved ultimately unsuccessful. *Id.*

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 a favor of a stay here.

On the merits, “applicants not only have a substantial likelihood of success,” but “it is difficult to imagine them losing.” *Alabama Ass’n of Realtors v. HHS*, 594 U.S. 758, 763 (2021). In its latest bid to cancel coal, EPA blew past its statutory guardrails by setting “[un]achievable” emissions targets based on technology that never “has been adequately demonstrated.” § 7411. And to avoid having to account for that system’s unsustainable “cost[s],” *id.*, the agency cooked the books, pretending that the (short-term) availability of tax credits somehow means that no one will have to pay the piper. In essence, § 7411 limits EPA to *available* and *affordable* measures; the agency has cast off both constraints. If the D.C. Circuit misreads the statute to permit those evasions, its decision would plainly be certworthy, as this Court’s prior interactions with EPA’s efforts in this area confirm. *See supra* at 7-10; *see also Labrador v. Poe*, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring in grant of stay) (explaining that whether “businesses have to restructure their operations or build new facilities to comply with” “major new environmental regulations” during the pendency of litigation is “*itself*” a “question of extraordinary significance”).

As for the equities, the D.C. Circuit did not deny that applicants would suffer “irreparable harm” in light of “the need for long-term planning”; it merely raised the specter of the Rule’s mandate springing “back into force” later if their challenge ultimately fails. App. 2a. But that risk is *always* present when a party seeks a stay of a regulation, and here, applicants’ strength on the merits reduce the odds of such harm to nil. In all events, this Court can solve that “problem” by granting certiorari before judgment and addressing the Rule during the upcoming Term.

I. EPA’S TARGETS ARE NOT ACHIEVABLE USING EXISTING TECHNOLOGY.

CCS may turn out to be the technology of the future. But for now it remains a pipe(line) dream. No commercial plant has successfully used it to consistently capture 90% of carbon emissions. No sequestration sites are currently available to store the carbon even if it could be captured. And getting from Point A to Point B is yet another hurdle; that transportation infrastructure does not exist today. EPA thought none of that mattered. It read old D.C. Circuit caselaw to permit it to treat § 7411 as a tool to force development of new technology. That is legally wrong. Since the Rule hinges on that misinterpretation, applicants are likely to succeed in vacating it.

A. EPA has not shown existing sources can achieve a 90% reduction of their emissions using carbon capture and sequestration.

In setting emission standards for existing sources, the “central determination” EPA must make is to identify “the ‘best system of emission reduction.’” *West Virginia*, 597 U.S. at 720. As part of that decision, the agency must confirm its chosen system “has been adequately demonstrated.” *Id.* (quoting § 7411(a)). In other words, EPA must “make sure” its choice “has a proven track record.” *Id.* at 759 (Kagan, J., dissenting). That follows from the text. Section 7411 requires emission standards that are actually “achievable” by each “existing source,” § 7411(a), (d)(1)—meaning the agency cannot establish unachievable standards that would cause “existing sources to effectively cease to exist.” *West Virginia*, 597 U.S. at 728 n.3. And to ensure an emission limit is in fact achievable, EPA must prove that the system it thinks can accomplish that feat actually works.

The Rule’s chosen system of using CCS to consistently capture and store 90% of a power plant’s CO₂ emissions, however, has never “been adequately demonstrated” to work in practice, rendering its emission limit not “achievable.” § 7411(a). The agency has effectively *admitted as much*—as to each of the three key phases of CCS technology.

First, EPA openly acknowledged below that “no commercial power plant is consistently achieving 90% capture” of its CO₂ emissions. C.A. Stay Opp. 44. It could hardly have denied it, since the Rule’s examples only prove the point. The Rule’s *best* example comes from the SaskPower Boundary Dam Project in Canada, and even it shows that EPA’s goal here remains far more dream than reality. *See* Rule 39847-48. During “a 72-hour test” in 2015, a single unit at the Boundary Dam facility was able to achieve “approximately 89.7 percent capture.” Rule 39848. But that was the peak, and a short-lived one at that. Ever since, “technical challenges” have prevented this plant from “consistently operat[ing] at this total capture efficiency,” and subsequent improvements have only enabled “capture rates of 83 percent *when the capture plant is online*.” *Id.* (emphasis added). Even this portrayal may be too rosy, as this plant’s owner and operator felt compelled to file a “correction” in response to EPA’s proposed rule relying on the project. Comment from J. Jickling, SaskPower (Aug. 4, 2023), <https://perma.cc/VQ97-7DA7>. As the owner explained, its “first of its kind” Boundary Dam project “is not capturing 90 per cent,” and it has currently “optimized” the project’s capture rate at only “65 to 70 per cent” of the unit’s “total ... emissions.” *Id.*

EPA's other examples of 90% carbon capture are even farther afield. Some of these projects are funded through the Energy Policy Act of 2005, which says that the fact a technology is used or an emission reduction is achieved by a facility "receiving assistance under this Act" is not enough for it to "be considered to be ... adequately demonstrated" under § 7411. § 15962(i)(1); *see* Rule 39849-51. And even the agency's best example among these facilities—the Petra Nova project—suffered repeated "[o]utages attributable to the CO₂ capture facility" and was forced to close down for three years due to the "poor economics of utilizing captured CO₂." Rule 39850.

Second, even if the *capture* of 90% of CO₂ emissions from existing plants had been adequately demonstrated, EPA failed to prove that all of this captured carbon can be *stored*. Again, EPA conceded that no "commercial sequestration facilities" (apart from ones "funded under" the Energy Policy Act of 2005) are currently in operation. Rule 39871; *see* Rule 39864 ("[O]nly sequestration facilities with Federal funding are currently operational in the United States"). That means the massive amount of CO₂ to be captured will—as of now—have no place to go, making EPA's emission limit definitionally not "achievable" for yet another reason.

Third, even if all this captured carbon could find a new home, it would need to be *transported* there. Here too, EPA came up short. And here too, EPA conceded as much. The agency acknowledged that coal plants complying with its new mandate "will need to construct new CO₂ pipelines to access CO₂ storage sites, or make arrangements with pipeline owners and operators who can do so," in order to access the "potential" carbon "sequestration sites" EPA identified. Rule 39855.

Indeed, even if all these *potential* sites became *actual* sequestration facilities, coal plants would have to create approximately “5,000 miles” of CO₂ pipeline “by 2032” to reach them. Rule 39856. To put that into perspective, only “5,385 miles” of CO₂ pipeline existed in the United States as of 2022, despite these pipelines being used “across the country for nearly 60 years.” Rule 39855. EPA is thus counting on the Nation’s coal industry to virtually *double* the total miles of pipeline available over the next seven-and-a-half years. *Id.*

Moreover, as EPA concedes, this breakneck expansion in CO₂ infrastructure may not be possible for the 20% of long-term coal plants that reside over 62 miles (or 100 kilometers) from “the nearest potential deep saline sequestration site.” Rule 39860. That is because 98% of those plants’ closest potential “sequestration site is located outside state boundaries,” meaning the Rule “would require building an interstate pipeline and coordinating with multiple state authorities for permitting purposes” for those plants to survive. *Id.* And, as EPA admits, “permitting hurdles, difficulties in obtaining the necessary rights of way over such a distance, or other considerations ... may make it unreasonable” for those plants to satisfy the Rule’s aggressive “compliance schedule.” *Id.* In other words, the agency concedes that roughly one fifth of the Nation’s long-term coal plants will unlikely be able to achieve the Rule’s limit. By definition, that is not an “achievable” standard.

Whatever the future may bring, there is thus no serious doubt in the record that *current* CCS technology and infrastructure does not allow coal-fired plants to capture, transport, or store carbon at the scale required by the Rule.

B. The statute does not allow EPA to base its “best system” on future predictions, projections, or speculation.

Given all these admissions, EPA did not—and could not—maintain that the use of CCS to eliminate 90% of CO₂ emissions was *currently* achievable. Instead, it premised its emission target on a chain of “prediction[s].” Rule 39878 n.610. *First*, the agency “extrapolate[d]” from the “testing” at Boundary Dam to “make projections” that plants would be able to consistently capture at least “90 percent” of their carbon emissions in the future. Rule 39889. *Second*, EPA “anticipate[d]” that “commercial carbon sequestration capacity” would be sufficient to house this massive influx of CO₂, as “[m]ultiple” projects “are in construction or advanced development,” and “more commercial sites will be developed” as “the demand for commercial sequestration grows.” Rule 39871. *Third*, the agency concluded it would be “feasible” for existing sources to construct approximately 5,000 miles of CO₂ pipeline “over a several year period” in order to transport this captured carbon to locations “that have the potential to be used as long-term CO₂ storage sites.” Rule 39855-56.

Based on these *expectations*, EPA concluded that “CCS has been adequately demonstrated at a capture efficiency of 90 percent, is technically feasible, and is achievable.” Rule 39847. And to justify the predictive nature of this enterprise, the agency claimed that “case law” from the D.C. Circuit dating back to “the early 1970s” has treated § 7411 as a “forward-looking” and “technology forcing” provision that “authorizes the EPA to set an emissions standard at levels more stringent than has regularly been achieved.” Rule 39801, 39830; *see* Rule 39829-32, 39888-89.

The problem for EPA, however, is that the statute does not say that. To the contrary, § 7411’s text, structure, and history confirm that while EPA can demand that all existing sources use the latest technology *available*, it cannot mandate they accomplish something no existing source has yet been able to achieve.

Text. To start, EPA’s crystal-ball construction is at war with § 7411’s text. Again, the agency must show that a technology “has been adequately demonstrated” for it to qualify as “the best system of emission reduction.” § 7411(a). When § 7411 was enacted, “demonstrate” meant what it does today—namely, “to prove or make clear by reasoning or evidence” or “to illustrate or explain esp. with many examples.” *Webster’s Seventh New Collegiate Dictionary* 220 (1970). And for a demonstration to be “adequate,” it must be “sufficient for a specific requirement.” *Id.* at 11. By definition, then, a system “has been adequately demonstrated” only when it “has been” “prove[n]” or “ma[d]e clear”—by virtue of “evidence” or “many examples”—that the system would be “sufficient for the specific requirement.” *Id.* That necessarily means a system must have been actually *used* for its intended purpose. Otherwise, it cannot be said that “many examples” have “prove[n]” the system to be “sufficient.”

The verb tense drives this home. “This Court has often looked to Congress’ choice of verb tense to ascertain a statute’s temporal reach.” *Gundy v. United States*, 588 U.S. 128, 142 (2019) (plurality). Had Congress wanted to prescribe a forward-looking inquiry into technology that *could be* developed in the future, it could have said as much. Instead, Congress used the present perfect tense, requiring EPA to select a system of emissions reduction that “*has been*” demonstrated. “Congress use[s]

the present perfect tense to denote an act that has been completed.” *Carr v. United States*, 560 U.S. 438, 448 (2010) (cleaned up). Congress therefore expected that the “adequate demonstration” would *have already occurred* by the time EPA selected the system, and its choice of verb tense prescribes a backward-looking inquiry into what “has been” demonstrated *in the past*. Cf. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) (“the prospective orientation of that phrase could not have escaped Congress’ attention”).

Confirming the point, a “forward-looking” interpretation of “has been adequately demonstrated” would put that term on a collision course with the rest of § 7411. Recall that this provision allows EPA to establish only emission standards that are “achievable” by “*existing* source[s].” § 7411(a), (d) (emphasis added); *see supra* at 14. Mandating an emission limit based on a system that is “not ... ‘in actual, routine use somewhere,’” creates the distinct risk that existing sources will no longer be able to *exist*, such as the roughly 20% of long-term coal plants that will unlikely be able to construct an interstate CO₂ pipeline in time. Rule 39831; *see supra* at 17.

Structure. Statutory structure points in the same direction. If Congress had wanted to enact a forward-looking requirement in § 7411(a), it knew how to do so. A neighboring subsection, for example, expressly authorizes EPA to “waive compliance with emission limits to permit a facility to test drive an ‘innovative technological system’ that has ‘not [yet] been adequately demonstrated.’” *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (quoting § 7411(j)(1)(A)). Section 7411(a), however, uses precisely the opposite formulation.

Moving beyond § 7411 to other provisions of the Clean Air Act, § 7521 expressly permits EPA to set “standards” for non-stationary sources (such as cars) “which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines *will be available* for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.” § 7521(a)(3)(A)(i) (emphasis added). That language, by its terms, requires EPA to make a projection about the future. By contrast, in § 7411(a)—an otherwise similar provision—Congress used the backwards-facing language of “*has been* adequately demonstrated.” EPA’s construction would ignore that deliberate choice, conflating an empirical inquiry into the present with a speculative projection about the future.

EPA’s reading would also remove one of the most “meaningful constraints” on its authority to define the “best system” of emission reduction—namely, the duty to establish a “proven track record.” *West Virginia*, 597 U.S. at 758-59 (Kagan, J., dissenting). Had Congress wanted the agency to simply select the “best” system of emissions reduction, period, it could have omitted any such limiting language. Yet as even EPA has acknowledged, Congress instead added the “adequately demonstrated” requirement as an “express constraint[]” that “guard[s] against the possibility of emissions guidelines that have transformative consequences.” US Br. at 42, 49, *West Virginia*, 597 U.S. 697 (Nos. 20-1530 et al.) (2022 US Br.). Congress required EPA to show its work and prove the viability of its “best system” before wrangling the States to adopt conforming plans. EPA’s interpretation circumvents that restriction.

Finally, EPA’s interpretation is also irreconcilable with § 7411(d)’s recognized role as an “ancillary” “gap-filler” provision that allows EPA only to regulate emissions for existing sources “not already controlled under the Agency’s other authorities.” *West Virginia*, 597 U.S. at 709-10. Section 7411(d) is a “little-used backwater” and “[t]he last place” one would expect Congress to put industry-transforming power. *Id.* at 730. A futuristic construction of “adequately demonstrated,” however, would arrogate to EPA the power to forcibly modernize an entire industry—or bury it with unsustainable compliance costs. “Extraordinary grants of regulatory authority” such as these, this Court explained, “are rarely accomplished through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s]’” found in § 7411(d). *Id.* at 723. The phrase “adequately demonstrated” is no exception.

History. The history of § 7411(d) standards underscores that EPA must ground these emission limits in science rather than science fiction. In the ACE Rule, the agency identified six pre-CPP rulemakings under § 7411(d), most of which date from the Carter administration. 84 Fed. Reg. at 32526 n.63. In those early regulations, EPA at least pointed to *some* technology then in commercial use and capable of achieving the emissions guidelines set by the agency. *See* 42 Fed. Reg. 12022, 12022 (Mar. 1, 1977) (describing “the plants having SCPB scrubbers that underwent emission tests to obtain background data”); 41 Fed. Reg. 48706, 48706 (Nov. 4, 1976) (proposed rule noting that “[m]any sulfur burning plants presently have horizontal dual pad or vertical panel type mist eliminators installed”); 44 Fed. Reg. 29828 (May 22, 1979) (noting that emissions limitations were based on “control systems which

meet this [emissions] level” and that timelines were “based on actual retrofit experience”); 45 Fed. Reg. 26294, 26294 (Apr. 17, 1980) (explaining that “[f]our ... plants [had] achieved secondary scrubbing efficiencies of at least 75 percent”); *see also* 56 Fed. Reg. 24468, 24482 (May 30, 1991) (proposed rule noting that technology had been “adequately demonstrated” because “[c]ollection systems and control systems with 98 percent efficiency are demonstrated at about 25 landfills”).

The absence of futuristic regulations from the get-go is telling, for “the want of assertion of power by those who presumably would be alert to exercise it[] is ... significant in determining whether such power was actually conferred.” *West Virginia*, 597 U.S. at 725; *see Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2258 (2024) (explaining that “respect” for “an Executive Branch interpretation” “was thought especially warranted when [it] was issued roughly contemporaneously with enactment of the statute and remained consistent over time”).

Even the counter-textual D.C. Circuit precedents invoked in the Rule do not go as far as the agency claims. 89 Fed. Reg. at 39831-32. In fact, that court eventually noted the “inherent tension” between the concept of “adequately demonstrated technology” and “emerging technology.” *Sierra Club v. Costle*, 657 F.2d 298, 341 n.157 (D.C. Cir. 1981); *see also NRDC v. Thomas*, 805 F.2d 410, 428 n.30 (D.C. Cir. 1986) (“[A] standard cannot both require adequately demonstrated technology and also be technology-forcing.”). And it has never permitted the agency to project technological developments three presidential administrations into the future and then mandate that projection as the standard binding for the entire industry, as it has done here.

At bottom, § 7411’s text, structure, and history all confirm that the statute is “technology forcing” only in the sense that it can force the *adoption* of technology that already exists. It is not a tool to allow EPA to force the *development* of new technology entirely. The Rule is thus premised on (yet another) fundamental misreading of the limited power Congress conferred on this agency. That makes this challenge likely to succeed, and it makes certiorari likely if the D.C. Circuit goes astray again.

II. EPA FAILED TO ACCOUNT FOR THE FULL COST OF ITS CHOSEN SYSTEM.

Even if EPA’s chosen system had “been adequately demonstrated” and “achievable” as a *technological* matter, the prohibitive “cost” of CCS would still doom the Rule. § 7411(a). To get around this problem, the agency resorted to fudging the numbers. It contended that the massive subsidies Congress recently provided in the form of CCS tax credits have substantially cut that technology’s exorbitant costs. But that is a glaring example of economic illiteracy. Far from *reducing* the costs of the Rule, such legislative largesse merely *shifts* them onto taxpayers. *See generally* M. Friedman, *There’s No Such Thing as a Free Lunch* (1975). And the statute requires EPA to “account” for the true “cost of achieving” a carbon-free energy sector; it cannot simply blind itself to tens or hundreds of billions in costs just because they will be borne by other parties. § 7411(a). On this front too, the massively consequential Rule therefore hinges on a legally flawed construction of the statute—an error that makes vacatur likely, if not in the D.C. Circuit, then on certiorari review thereafter.

A. As EPA has long admitted, carbon capture and sequestration is prohibitively costly.

In determining whether its preferred system of emission reduction “has been adequately demonstrated,” EPA must “tak[e] into account the cost of achieving such reduction.” § 7411(a). As the agency has long understood, this means it cannot require measures that come at an “‘excessive’ or ‘unreasonable’ cost.” Rule 39832; *see, e.g., West Virginia*, 597 U.S. at 729 (discussing EPA’s understanding that it cannot require “‘exorbitantly costly’” steps); *Portland Cement Ass’n v. Train*, 513 F.2d 506, 508 (D.C. Cir. 1975) (approving EPA’s view that there cannot be “a gross disproportion between achievable reduction in emission and cost of the control technique”). Instead, EPA must ask whether “the costs” of a technology “are considered to be reasonable as a general matter across the fleet of existing sources.” 80 Fed. Reg. at 32541.

Even in the absence of a specific statutory mandate to consider cost, the default rule is that an agency “must consider cost,” for “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.” *Michigan*, 576 U.S. at 753, 759. Indeed, unless Congress has taken cost off the table, it would not be “reasoned decisionmaking” to ignore such a critical factor. *Id.* at 751; *cf. Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 465 (2001) (addressing provision that “does not permit the EPA to consider costs”).

Section 7411’s explicit directive to account for “the cost” of cutting emissions therefore only underscores the seriousness of that endeavor. And it means that some emission reductions are off limits, as it would not be “rational” for EPA “to impose

billions of dollars in economic costs,” for instance, “in return for a few dollars in ... environmental benefits.” *Michigan*, 576 U.S. at 752. Instead, as the agency told this Court two years ago, it can only mandate measures “of reasonable ‘cost.’” 2022 US Br. 44. That is why EPA acknowledged it could not use § 7411(d) to, for example, reduce the operations of disfavored plants to “two hours per day,” “cancel coal entirely,” or require “the installation of solar panels on tens of millions of homes.” *Id.* at 41-44; see *West Virginia*, 597 U.S. at 759 n.1 (Kagan, J., dissenting) (claiming the cost constraint, among others, has “had real effect” at the agency, causing “EPA in prior rulemakings to exclude a number of pollution-control measures” from the options available).

Applying that principle, EPA consistently rejected CCS as too costly. In the CPP, for instance, it rejected “carbon capture and storage” on the ground that it would be “substantially more expensive” than even its multibillion-dollar generation-shifting scheme. 80 Fed. Reg. at 64769. As EPA explained, “the scale of infrastructure required to directly mitigate CO₂ emissions from existing [plants] through CCS can be quite large and difficult to integrate into the existing fossil fuel infrastructure.” *Id.* at 64690. Moreover, requiring “CCS (or even partial CCS)” for existing plants “could affect the reliability of the supply of electricity,” meaning the agency could “not find the cost to implement” this system “to be reasonable.”³ In short, the “costs” of mandating “CCS retrofits” were simply “too high.” 80 Fed. Reg. at 64751.

³ EPA, *Technical Support Document (TSD) for Carbon Pollution Guidelines for Existing Power Plants: Emission Guidelines for Greenhouse Gas Emissions from Existing Stationary Sources: Electric Utility Generating Units* at 7-5, Dkt. ID No. EPA-HQ-OAR-2013-0602 (June 10, 2014).

Four years later, the agency’s assessment remained unchanged. In the ACE Rule, EPA confirmed that “the high cost of CCS, including the high capital costs of purchasing and installing CCS technology and the high costs of operating it, ... prevent CCS or partial CCS from qualifying” as a permissible system under the Clean Air Act. 84 Fed. Reg. at 32548. Indeed, the “exorbitant” costs of CCS technologies “would almost certainly force the closure of the coal-fired power plants that would be required to install them.” *Id.* Thus, “a rule requiring the use of carbon-capture technology would have shifted far more electricity production from coal-fired plants than the Clean Power Plan would have”—by shutting coal plants across the board. *West Virginia*, 597 U.S. at 773 n.5 (Kagan, J., dissenting).

B. EPA obscured the Rule’s true costs through an accounting trick.

Faced with this difficulty, EPA decided to fix the books. While acknowledging that it had concluded “[i]n the CPP and ACE Rule” that “CCS did not qualify” as a permissible system “due to cost considerations,” the agency insisted that the introduction of “higher tax credits” under the IRA in 2022 “significantly improves the cost reasonableness of CCS for purposes” of § 7411. Rule 39882. Specifically, the IRA had “extended and significantly increased the tax credit” for CO₂ captured and stored “from \$50/metric ton to \$85/metric ton,” thereby providing “a significant stream of revenue for sequestered CO₂ emissions.” Rule 39800, 39882. While the total amount of these credits will depend on how much CCS is used in the future, estimates collected by the Congressional Budget Office (CBO) range from “about \$5 billion over the 2023-2027 period” to “anywhere from \$30 billion to well over \$100 billion” “by the

early 2030s.” CBO, *Carbon Capture and Storage in the United States* 17 (Dec. 13, 2023) (*CBO Study*), <https://perma.cc/ME3K-TUWC>. In EPA’s view, these massive sums qualify as “significant reductions in the cost of implementing CCS.” Rule 39814.

But as a matter of basic economics, these billions of dollars in tax credits do not *cut* the costs of EPA’s carbon-capture mandate; they *transfer* them—namely, from power-plant owners to the taxpayers. “When the Government grants exemptions or allows deductions all taxpayers are affected,” as conferring such benefits force the non-exempt to become “indirect and vicarious ‘donors’” of the favored class. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983). That is why “tax credits” are treated as “tax-expenditures”—costs the President must include in his annual budget to Congress—because they “reduce amounts available to the treasury.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343 (2006); *see* 2 U.S.C. § 632(e)(2)(E); 31 U.S.C. § 1105(a)(16). And that is why the CBO measures the effect of the IRA’s tax credits as a “loss” or “reduc[tion]” to the public fisc. *CBO Study* 17.

EPA thus transparently erred by treating “billions of dollars in spending each year” as an unalloyed benefit. *King v. Burwell*, 576 U.S. 473, 485 (2015). It is plainly not “taking into account the cost of achieving” an emission reduction to write off billions from that expense on the theory that the American taxpayer will eventually foot the bill. § 7411(a). Indeed, by “fail[ing] to consider an important aspect of the problem” before it, EPA did not even satisfy the bedrock requirement of “reasoned decisionmaking.” *Michigan*, 576 U.S. at 750-52; *see Ohio*, 144 S. Ct. at 2054 (staying EPA action because the agency “ignored” an important consideration).

EPA never directly responded to this problem in the Rule itself. Instead, its analysis of this critical issue consisted of a terse paragraph in a separate “Response to Comments” document posted on the rulemaking docket. EPA, *Response to Comments* 2.15.2.2 (Apr. 2024) (*Response*), <https://perma.cc/EUN4-LT8J>. None of the agency’s defenses of this accounting chicanery holds up to scrutiny.

First, EPA suggested that it had to consider only “the cost *to the source*” in mandating CCS, such that the burdens on “the taxpayer” were irrelevant. *Id.* (emphasis added); see Rule 39889 (“It is reasonable to account for the IRC section 45Q tax credit because the costs that should be accounted for are the costs to the source.”). But one will search § 7411(a) in vain for any such qualification. Congress required EPA to “tak[e] into account *the cost* of achieving” the chosen emission “reduction”—period—with no limit based on *who bears* that cost. § 7411(a) (emphasis added).

By contrast, when Congress wishes to limit the types of costs EPA must consider, it knows how to do so, as other provisions in the Clean Air Act show. In one provision, for example, Congress directed the relevant official to “take into account[] the final cost *to the consumer*” of prohibiting certain “major fuel burning stationary source[s] ... from using fuels other than locally or regionally available coal.” § 7425 (emphasis added). In another, Congress called for “consideration” of the “*capital cost* of the technological system or systems being used.” § 7411(j)(D)(i) (emphasis added). Section 7411(a)’s “cost” requirement contains no such restriction, and this Court does not “infer in certain provisions” of the Clean Air Act “limitations that ha[ve] been expressly imposed elsewhere.” *Whitman*, 531 U.S. at 468.

Even EPA itself does not really believe § 7411(a) permits such a blinkered cost analysis. The Rule elsewhere asserts that “the costs to the regulated facility” are “*the most relevant costs*,” not the *only* ones. Rule 39801 (emphasis added). And the agency told this Court just two years ago that in light of § 7411(a)’s “cost” requirement, it could not adopt emission limits that “would be exorbitantly costly *for ratepayers*,” who are distinct from the sources themselves. 2022 US Br. 42; *see West Virginia*, 597 U.S. at 729 (understanding EPA to claim the power to decide “how high energy prices can go as a result before they become unreasonably ‘exorbitant’”).

Meanwhile, limiting § 7411(a)’s cost analysis to the burdens borne by sources would neuter that statutory requirement. Under that approach, “Congress could pass a law subsidizing” the achievement of an emission limit that “cost more than \$2 trillion every year,” thereby “increasing the overall federal budget by half,” yet EPA could “say that the costs of such a standard are ‘zero.’” Heritage Foundation Comment 15 (Aug. 5, 2023), <https://perma.cc/YT8A-TE58>. That cannot be right.

In all events, EPA did not even fully account for the cost of the Rule to the sources themselves. Taxes may be as certain as death, but tax credits are not. As the agency thus acknowledged, these massive tax credits will “expir[e]” after 12 years, which could “significantly affect the costs to” coal plants, and “lead to reductions in the amount of their generation.” Rule 39902. Indeed, that is why the ACE Rule declined to rely on the pre-IRA tax credits for CCS: because they were “limited in time,” the credits “would not be available to offset much of the capital costs of the CCS systems that are recovered over a 30-year period.” 84 Fed. Reg. at 32549.

Faced with this problem, EPA speculated that these power plants “may well be able to replace” the wealth transfers from the tax credits through “the sale of CO₂” they capture, and that in any event, it would consider “revis[ing]” the Rule by the early 2040s. Rule 39902. But that just gives the game away: If the Rule’s costs are so burdensome that they cannot be maintained *in the future* in the absence of federal subsidies (or a speculative carbon market), it is unreasonable to impose them *now*. Put differently, once these tax accounting tricks fade away, it becomes quite clear that the costs of CCS remain exorbitant. All of this underscores that EPA’s reliance on the tax credits is no more than budgetary prestidigitation designed to obscure the Rule’s true objective—use “the ‘exorbitant’ costs” of “carbon-capture equipment” to “‘force the closure’ of all affected ‘coal-fired power plants.’” *West Virginia*, 597 U.S. at 776 (Kagan, J., dissenting).

Second, EPA invoked a “Floor Statement” from a single legislator—Rep. Pallone—as justification for using the tax credits to reduce the Rule’s costs. *Response* 2.15.2.2. According to EPA, this “legislative history ... makes clear that Congress was well aware” that the agency could base a § 7411(d) rulemaking on “utility of the tax credit in reducing the costs of ... CCS.” Rule 39881. “But legislative history is not the law,” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018), and even those who are willing to consider it agree that “floor statements by individual legislators rank among [its] least illuminating forms,” *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017). Accordingly, the stray statement EPA sifted from the legislative record cannot cabin § 7411(a)’s mandate to consider the entire “cost” of an emissions control.

Plus, “even those lowly sources speak at best indirectly to the precise question here.” *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 481 (2017). While Rep. Pallone opined that “EPA may consider the impact of the ... tax credits in lowering the costs of [CCS]” to the sources, 168 Cong. Rec. E879 (Aug. 26, 2022), that assertion does not explain *how* the agency is to account for the concomitant increase in costs to the taxpayer (or for the fact that the credits will expire). So even if one treats this legislator’s statement as authoritative, EPA is still the same position as it was before.

Finally, and perhaps most incredibly, EPA suggested that “the taxpayer” may ultimately not have “to pay the cost” of the tax credits because the federal government could “fund” these massive subsidies through “borrowing.” *Response 2.15.2.2*. But just as costs do not disappear when they are shifted to taxpayers, they do not disappear when they are shifted to *future* taxpayers. Increasing the national debt by potentially over \$100 billion is not a cost-free proposition, even if its effects are not borne by taxpayers (and others) in the immediate future. That massive addition to the federal deficit will have to be paid for eventually, making it very much a “cost of achieving” the agency’s desired emission “reduction.” § 7411(a). The fact that the agency believes such borrowing comes at no cost only highlights its deficient analysis. While EPA can take certain steps to protect the trees, it cannot pretend money grows on them.

EPA engaged in speculation to bypass the adequately demonstrated constraint, and it engaged in a shell game to bypass the cost constraint. But the statute allows neither. For this reason too, applicants are likely to prevail in setting aside the Rule—and to secure certiorari if the D.C. Circuit holds otherwise.

III. THE EQUITIES FAVOR A STAY.

The equitable factors likewise warrant a stay. Applicants plainly have “strong arguments about the harms they face” during the pendency of litigation, including the impairment of the “sovereign interests” of the States, the “nonrecoverable” costs to industry of “complying with” the Rule, and the need to alter business operations to account for EPA’s latest attempt to rejigger the energy sector. *Ohio*, 144 S. Ct. at 2053; see *West Virginia Appl.* 26-40; *NRECA Appl.* 35-40; *NMA Appl.* 16-30; *App.* 280a-82a, 284a-88a; see also *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034-35 (D.C. Cir. 1983) (injury to business’s “ability to make future plans” from regulatory “uncertainty” qualifies as “irreparable harm”).

The D.C. Circuit effectively conceded as much by asserting that “irreparable harm” stemming from “the need for long-term planning” would resurface if applicants obtained a stay but then ultimately lost this litigation. *App.* 2a. But that possibility is *always* lurking when it comes to staying a rule pending the resolution of a regulatory challenge. That is in part why this Court considers the merits in its stay calculus—the more likely a challenger is to ultimately prevail, the more likely the stay will be effective in protecting against irreparable harm. And given the strength of applicants’ case on the merits, there should be little concern about a stay being dissolved at the end of litigation.

The remaining equitable factors—which “merge” here given that “the Government is the opposing party,” *Nken v. Holder*, 556 U.S. 418, 435 (2009)—do not counsel against this interim relief. It does not serve “the public interest” to “permit

agencies to act unlawfully even in pursuit of desirable ends.” *Alabama Ass’n of Realtors*, 594 U.S. at 766. In any event, a stay should not have an appreciable effect on the environment given that any emissions reductions resulting from the Rule will not begin until 2028. Rule 39863. And even if EPA could point to any “air-quality benefits” from denying a stay, that would just make the equities a wash, causing the stay inquiry here to “ultimately turn[] on” on which side “is likely to prevail at the end of this litigation.” *Ohio*, 144 S. Ct. at 2053.

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 the benefit of full briefing and argument provided by certiorari before judgment can “help [it] better decide important emergency applications.” *Labrador*, 144 S. Ct. at 934 (Kavanaugh, J., concurring in grant of stay); *see, e.g., Biden v. Nebraska*, 143 S. Ct. 477 (2022); *United States v. Texas*, 143 S. Ct. 51 (2022). If this Court declines to stay the Rule immediately, it should follow that path here. This “case is of such imperative public importance as to justify deviation from normal appellate practice,” Sup. Ct. R. 11, as confirmed by the fact that this Court entered a stay of the predecessor CPP before the D.C. Circuit could review it on the merits. *See supra* at 8; *Labrador*, 144 S. Ct. at 933 (Kavanaugh, J., concurring in grant of stay) (describing that stay as an “important decision[] for the Nation”). The current Rule, colloquially known as CPP 2.0, is no less consequential.

Granting review now would also come with two benefits for the parties and the Judiciary. *First*, if this Court shares the D.C. Circuit’s concern that a stay could subject applicants to a regulatory whipsaw, a definitive decision from this Court during October Term 2024 would definitely resolve—one way or the other—whether the States and industry members need to comply with EPA’s latest energy mandate. *Second*, the D.C. Circuit’s counter-textual precedents on which the agency and the panel below relied are likely to infect any further proceedings in that court, making “further proceedings below ... unnecessary to the Court’s resolution of the question presented.” *Moyle v. United States*, 144 S. Ct. 2015, 2021 (2024) (Barrett, J., concurring); *see supra* at 18-19. In the absence of a stay, there is no good reason to allow these proceedings to languish for years in a forum governed by a line of cases that long ago cast statutory text aside.

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, grant review, and set the case for briefing and argument during the upcoming Term.

July 24, 2024

Charles T. Wehland
JONES DAY
110 N. Wacker Dr., Ste 4800
Chicago, IL 60601
(312) 269-4388
ctwehland@jonesday.com

Jeffery D. Ubersax
KUSHNER & HAMED CO., LPA
1375 E. Ninth St., Ste 1930
Cleveland, OH 44114
(216) 696-6700
jdubersax@kushnerhamed.com

Respectfully submitted,

/s/ Yaakov M. Roth
Yaakov M. Roth
Counsel of Record
Brinton Lucas
S. Matthew Krsacok
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-7658
yroth@jonesday.com
blucas@jonesday.com
mkrsacok@jonesday.com

Counsel for Applicant NACCO Natural Resources Corporation