

ARTICLE

THE BONFIRE OF THE EQUITIES:
JUDICIAL STAYS OF FEDERAL ENVIRONMENTAL REGULATIONS

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I. INTRODUCTION

The Supreme Court’s emergency docket is now a central part of federal environmental law despite being completely absent just ten years ago. As Professor Stephen Vladeck and others have documented, the Court has entertained and granted emergency relief, such as stays or injunctions of regulations and lower court rulings, far more commonly in recent years than at any other time in its history.¹ A notable number of the Court’s recent high-profile

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¹ See STEPHEN VLADECK, THE SHADOW DOCKET 12, 17 (2023); *see also generally*, e.g., Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 NOTRE DAME L. REV. Reflection 1 (2022); *Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the Senate Comm. on the Judiciary*, 117th Cong. (Sept. 29, 2021) (Testimony of Stephen Vladeck); *The Supreme Court’s Shadow Docket: Hearing Before the*

emergency docket actions have involved rulemakings by the Environmental Protection Agency (EPA), for instance: the historic order blocking the Obama EPA’s “Clean Power Plan,” devised to fulfill the Agency’s Clean Air Act’s command to curb climate pollution by fossil-fuel power plants—the Court’s first-ever emergency injunction of a federal rulemaking before any merits decision by a lower court;² the Court’s stay of a district court order vacating the Trump EPA’s controversial revisions of Clean Water Act regulations governing States’ review of projects affecting their waters;³ and, most recently, another Clean Air Act case, *Ohio v. EPA*, in which the Court, after months of considering industry and State applications to halt implementation of the Biden EPA’s “Good Neighbor Rule,” limiting cross-state ozone pollution, decided to hear oral argument⁴—a step the Court has taken only three times in the last half-century.⁵ And beyond these particular disputes, the Court’s greater receptivity to emergency applications seeking to halt federal executive actions implies a looming threat to environmental regulations.⁶ Reading those signals, all the key players in the federal environmental policymaking landscape—from agency staff developing regulations, to regulated entities, advocates seeking to shape agency decisions, reporters covering environmental policy, and students and scholars—now must take into consideration the real possibility that the Supreme Court will block significant national pollution-control and public-health regulations shortly after the ink dries in the Federal Register.

The ascendance of the Supreme Court’s emergency docket in environmental cases is troubling. In general, the Court’s increasing willingness to halt agency action in emergency orders raises constitutional, statutory, judicial-administration, and institutional-legitimacy concerns;⁷ and in the complex rulemaking challenges that characterize much of federal environmental law, basic problems of institutional capacity compound those concerns. Federal

Subcomm. on Courts, Intellectual Property, and the Internet of the House Comm. on the Judiciary, 117th Cong. (Feb. 18, 2021) (Testimony of Loren L. AliKhan); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court’s Emergency Stays*, 44 HARV. J.L. & PUB. POL’Y 827 (2021); William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 NYU J.L. & LIBERTY 1 (2015).

² *West Virginia v. EPA*, 577 U.S. 1126, 1126 (2016); *see also* Adam Liptak & Coral Davenport, *Supreme Court Blocks Obama’s Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016).

³ *Louisiana v. American Rivers*, 142 S. Ct. 1347, 1347 (2022) (mem.).

⁴ *See Ohio v. EPA*, 144 S. Ct. 538, 539, No. 23A349 (2023) (mem.) (ordering oral argument).

⁵ *See* Stephen Vladeck, *Making Sense of the “Good Neighbor” Applications*, One First (Feb. 19, 2024), <https://stevevladeck.substack.com/p/67-making-sense-of-the-good-neighbor> [<https://perma.cc/9CYT-PUQJ>].

⁶ *See, e.g., Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (per curiam) (granting application to stay pending judicial review nationwide eviction moratorium implemented in response to COVID-19 pandemic); *Nat’l Fed’n of Indep. Bus. v. Occupational Safety & Health Admin.*, 595 U.S. 109, 120–21 (2022) (per curiam) (granting application to stay pending judicial review OSHA’s temporary standard mandating that certain employers require COVID-19 vaccination in certain circumstances).

⁷ *See* VLADDECK, *supra* note 1, at 18–25.

environmental cases tend to involve: (1) sprawling records that require substantial time for a reviewing judicial panel to absorb; (2) factual complexities unique to the particular regulatory regime, such as highly technical, industry-specific problems and solution sets, intricate regulatory histories, and abstruse analytical methodologies; (3) a large number of legal issues that often have not previously been addressed by more than one court of appeals; (4) a diversity of interested parties, many of whom are not before the court (including members of the public who stand to benefit from healthier air, water, ecosystems, and products, as well as businesses with high-polluting, underregulated competitors); and (5) costs to regulated industry that are readily stated in dollars, but benefits (such as fewer asthma attacks, higher IQ, or lower cancer risk) that, while recognized and valued by Congress, are difficult to value in monetary terms. Because of these features, emergency applications seeking to block important environmental regulatory programs tend to implicate the Supreme Court’s institutional weaknesses.⁸

One response to these challenges might be for the Supreme Court to manage its emergency docket so as to avoid reliance on its own fact-finding. For example, the Court could refuse to award relief not supported by explicit factual findings from a lower court and remand cases for such fact-finding. Or the Court could, in minimalist and passively virtuous fashion, reaffirm that it will seldom disturb lower courts’ rulings on preliminary relief in the absence of a well-defined and important legal issue that likely will warrant a grant of certiorari.⁹ That approach could find support in dozens of in-chambers opinions and merits cases emphasizing the extraordinary character of emergency relief—particularly after a lower court has denied such relief.¹⁰ And one might expect that the Court would, for its own reasons, seek to discourage emergency applications. Among other drawbacks, emergency applications delay regular adjudication of cases in lower courts and take time away from the Court’s principal responsibility: deciding, based on full briefing and argument, the merits of legal questions presented in cases—principally “[f]inal judgments” of federal appellate and state high courts¹¹—that it has accepted for its plenary review docket.¹²

⁸ See *infra* Section II.B.

⁹ See generally Note, *The Role of Certiorari in Emergency Relief*, 137 HARV. L. REV. 1951 (2024) (reviewing and contrasting the tests for stays and injunctions in the Supreme Court, and the relevance of certworthiness); see also S. Ct. R. 10 (considerations governing certiorari review). On the Court’s venerable history of controlling its workload through interpretation of jurisdictional grants, see VLADECK, *supra* note 1, at 27–92.

¹⁰ See *infra* notes 33 & 34; see also Note, *Halting Administrative Action in the Supreme Court*, 137 HARV. L. REV. 2016, 2022 n.42 (2024) (collecting cases).

¹¹ 28 U.S.C. § 1257 (state courts certiorari review); see also *id.* § 1254 (courts of appeals certiorari review).

¹² For instance, in recent public remarks, Justices Thomas and Kavanaugh both expressed concern that the recent increase in emergency applications is putting stress on the Court and interfering with management of its merits docket. See Ryan Autullo & Chris Marr,

But there are signs that the Court is not trending in that direction. Quite the opposite. The Court appears to be remolding the traditional standard for emergency relief by erasing the requirement that the equities of granting a stay must clearly favor the applicant.¹³ For instance, in Justice Kavanaugh’s recent concurrence in *Labrador v. Poe*,¹⁴ which Justice Barrett joined, he opined that when there are applications to stay “important new laws” like national environmental regulations, the “harms and equities are very weighty on both sides.”¹⁵ “In those cases,” he continued, “this Court has little choice but to decide the emergency application by assessing likelihood of success on the merits.”¹⁶

Such an approach to the equities of emergency applications, if adopted more broadly, could pose a major impediment to the administration of laws that protect the public’s health, safety, and other welfare interests. In many circumstances, it is economically rational for an industry facing regulations that would require new capital expenditures or adversely affect its profit-making to seek preliminary injunctive relief, regardless of the likelihood the challenged rule ultimately will be upheld. If the existence of at least superficially “weighty” harms “on both sides” of a case is enough to warrant a Supreme Court ruling reflecting the Justices’ analysis of the merits, the Court is likely to see emergency applications all the time. For unlike certiorari petitioners, who must overcome long odds to get the Court to exercise its discretion to take up their cases, applicants on the emergency docket can wield a rule’s wide-ranging costs and benefits to force a circuit Justice, or the whole Court, to rule preliminarily on the merits of a suite of legal issues—without regard to the multiplicity of factors that would render cases uncertworthy.¹⁷

Combined with new judicial trends toward non-deferential review of agency decisions,¹⁸ Supreme Court emergency intervention might come to resemble near-automatic merits review of important administrative regulations—and even toward a new norm that no Executive Branch rules implementing statutes are really law until the Supreme Court says so. Such a regime would seem to defy venerable understandings of the relationships among the branches, as well as constitutional and statutory limits on the Court’s jurisdiction. The All Writs Act

Kavanaugh, Thomas Raise Concerns Over Shadow Docket Pressure (2), Bloomberg Law, May 10, 2024, <https://news.bloomberglaw.com/litigation/kavanaugh-laments-pressure-shadow-docket-puts-on-supreme-court> [<https://perma.cc/4WPE-4DYT>].

¹³ See *infra* Section II.A.

¹⁴ 144 S. Ct. 921 (2024) (mem.).

¹⁵ *Id.* at 929 (2024) (Kavanaugh, J., concurring in the grant of stay).

¹⁶ *Id.*

¹⁷ See S. Ct. R. 10.

¹⁸ See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 722 (2022) (holding that in certain extraordinary cases, the major questions doctrine requires agencies to point to clear congressional authorization for its action); *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari to review the scope of judicial deference to agency statutory interpretations); *Relentless v. Department of Commerce*, 144 S. Ct. 325 (2023) (mem.) (same).

limits the Court to granting emergency injunctions “in aid of [its *appellate*] jurisdiction” and only if consistent with traditional equitable standards,¹⁹ which limited emergency relief to “extraordinary cases”²⁰ where the likelihood of irreparable harm to the applicant “clearly exceed[s]” harm to others from an injunction.²¹

A regime of preliminary Supreme Court merits review in “important” regulatory cases, available as of right to any party that has failed to secure an injunction from a lower tribunal, also would seem inconsistent with the role of Congress’s designated court of first instance review. Many federal environmental statutes direct challenges to agency regulations to the courts of appeals, and in some instances, to the D.C. Circuit exclusively.²² In some cases, those statutes provide for a highly structured judicial review process that allows all of the parties injured by a rule (and, often, beneficiaries who believe it should have been more far-reaching) to contest it in one consolidated mega-proceeding, subject to limitations designed to protect these massive agency undertakings from being lightly disturbed.²³ Supreme Court intervention before the statutorily designated court has an opportunity to winnow the record and decide the merits would short-circuit this process, especially since a doctrinal shift toward treating the equities as offsetting would mean that a grant or denial of an application is very likely an expression of the Court’s views on the merits.²⁴ A related concern

¹⁹ 28 U.S.C. § 1651(a) (authorizing the Court to “issue all writs necessary or appropriate in aid of [its] jurisdiction and agreeable to the usages and principles of law”); *see also* U.S. CONST. art. III, § 2, cl. 2 (excepting the narrow categories of original jurisdiction cases, “the supreme Court shall have appellate Jurisdiction”).

²⁰ *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

²¹ *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers).

²² *See, e.g.*, 42 U.S.C. § 7607(b), (d) (Clean Air Act judicial review provisions); 33 U.S.C. § 1369(b) (Clean Water Act judicial review provision); 15 U.S.C. § 2618 (Toxic Substances Control Act judicial review provision); 15 U.S.C. § 717r(b), (d) (Natural Gas Act judicial review provisions).

²³ *See, e.g.*, 42 U.S.C. § 7607(b), (d) (in certain challenges to Clean Air Act rulemaking, establishing an administrative exhaustion requirement, barring collateral attacks, limiting the duration of any agency stays pending reconsideration, and setting a strong harmless error standard for procedural errors).

²⁴ Historically, the Court recognized significant distinctions between the Justices’ decisions on preliminary relief and the Court’s merits decisions. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 n.10 (2007) (chastising parties for relying on an in-chambers opinion denying a stay application, and distinguishing “[t]he propriety of preliminary relief” from “resolution of the merits”). But recently, the Court has appeared to treat as precedential the analysis of likely merits success in certain of its decisions granting emergency relief by citing those orders in subsequent decisions in other cases, including merits-docket opinions (particularly as to the major questions doctrine). *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2372–73 (2023) (citing *Alabama Ass’n of Realtors v. DHHS*, 594 U.S. 758, 764 (2021) (per curiam)); *West Virginia v. EPA*, 597 U.S. 697, 700 (2022) (citing

is that the Supreme Court is fundamentally predisposed and conditioned to reach merits questions in cases where it grants review; if the Court is also reflexively deciding more preliminary relief applications with quick “likelihood of success” determinations, it might fail to give attention to mundane but important procedural issues like administrative exhaustion that Congress deemed important, or to take account of the likely final relief—such as whether, even if the applicant were to succeed on the merits, the challenged rule should be remanded without vacatur.²⁵ That regime is not what Congress intended in establishing carefully wrought and detailed judicial-review regimes for environmental laws. Neither does such a regime seem workable for carrying out important statutory programs.

The Supreme Court can still correct course, and we think it should for all the above reasons; but we leave to others to vet the various strategies for persuading it to return to a more restrained approach to emergency relief. Here, we offer some practical thoughts for lower courts, lawmakers, agencies, and other litigants who must adjust to new emergency docket trends in the context of national regulatory programs. First, we review concerning trends in the Court’s approach to the equities of preliminary relief and use examples from federal environmental cases to elucidate the importance of careful equitable balancing.²⁶ Then we offer some initial recommendations on how lower courts could adjust to a regime in which the Court is willing to engage early and aggressively in rulemaking review cases; how advocates might take account of these new realities; and how lawmakers and rule-drafters might address the issue.²⁷

We are hardly disinterested observers. Both of us have been involved in several of the cases we discuss here.²⁸ While our more typical posture has involved defending federal environmental rules against emergency motions from state attorneys general and industry, we have occasionally been in the opposite posture, representing environmental interests seeking to halt agency

opinions regarding emergency relief in *Alabama Ass’n of Realtors* and *NFIB v. OSHA*, 595 U.S. 109 (2022) (per curiam) as “[p]recedent” to support application of the major questions doctrine). *See also* *Labrador v. Poe*, 144 S. Ct. 921, 933–34 (2024) (Kavanaugh, J., concurring in grant of stay) (“A written opinion by this Court assessing likelihood of success on the merits at a preliminary stage can create a lock-in effect because of the opinion’s potential vertical precedential effect (*de jure* or *de facto*)”).

²⁵ *See, e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (remand without vacatur standard).

²⁶ *See infra* Part II.

²⁷ *See infra* Part III.

²⁸ Both of us represent Environmental Defense Fund (EDF), a respondent-intervenor in the pending *Good Neighbor Rule* cases (*Utah v. EPA*, No. 23-1157 (D.C. Cir.); *Ohio v. EPA*, No. 23A349 (U.S.)); our firm represents respondent-intervenor EDF in the pending *Oil and Gas Methane Rule* litigation discussed below (*Oklahoma v. EPA*, No. 24-1054 (D.C. Cir.)); and Donahue represented respondent-intervenor EDF throughout the *Clean Power Plan* litigation, including the stay proceedings, and Herzog represented amici curiae in support of EPA on the merits (*West Virginia v. EPA*, No. 15-1363 (D.C. Cir.); No. 15A773 (U.S.)).

action.²⁹ We agree that courts' ability to intervene early in litigation has a place in an orderly and fair system of environmental law. But as we explain here, we think current trends threaten to subvert those ends.

II. THE SUPREME COURT'S EVOLVING APPROACH TO THE EQUITIES OF PRELIMINARY RELIEF

The Supreme Court appears to be changing its approach to consideration of the equities on its emergency docket. The traditional standard requires all federal courts to examine four factors in deciding whether to grant preliminary relief—“(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”³⁰ When the government is the opposing party, the final two factors are said to merge.³¹ Preliminary relief is “never awarded as of right;”³² even if a movant faces irreparable injury, a stay is supposed to be “extraordinary” relief.³³ Decades of decisions and in-chambers opinions embraced a particularly demanding standard for emergency relief from the Supreme Court.³⁴

In practice, however, Supreme Court stays are seemingly becoming decreasingly “extraordinary”—especially where the applicant seeks to halt a federal regulatory program.³⁵ Though not the sole cause of this phenomenon,

²⁹ See, e.g., Order, *Environmental Defense Fund v. EPA*, No. 18-1190 (D.C. Cir. July 18, 2018), Doc. 1741224 (D.C. Circuit administrative stay blocking challenged “non-enforcement policy” relating to ultra-high-emitting “glider trucks”); Gregory Wallace, *EPA Reverses Pruitt-Era Rule on Glider Truck Emissions*, CNN POLITICS, July 28, 2018, <https://www.cnn.com/2018/07/27/politics/epa-scott-pruitt-glider-trucks/index.html> [<https://perma.cc/4H5T-PZBX>] (noting that agency abandoned non-enforcement policy after court entered administrative stay); *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017) (on motion for stay or summary vacatur, vacating agency-imposed stay of Clean Air Act regulation). Donahue was co-counsel for EDF in these cases.

³⁰ *Nken v. Holder*, 556 U.S. 418, 434 (2009) (affirming lower-court stay standard); see also *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (affirming substantially similar preliminary injunction standard); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (affirming the Supreme Court’s stay standard, which also includes consideration of certworthiness).

³¹ *Nken*, 556 U.S. at 435.

³² *Winter*, 555 U.S. at 25.

³³ *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers); see also *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).

³⁴ See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring in denial of application for injunctive relief) (“emergency relief is appropriate only “where ‘the legal rights at issues are indisputably clear’ and even then, ‘sparingly and only in the most critical and exigent circumstances’”) (quoting STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* § 17.4 (11th ed. 2019)); *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (“Denial of ... stay applications is the norm; relief is granted only in ‘extraordinary cases’”) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

³⁵ See generally VLADECK, *supra* note 1.

recent shifts in the Court’s approach to analyzing irreparable injury and balancing the equities of a stay appears to be increasing the probability that the Court will stay federal regulations, as well as encouraging, cyclically, more stay applications. This should be a cause for concern for anyone who supports implementation of national regulatory programs—particularly new social-welfare or public-health rules with nationwide scope and broad public benefits.

Here, we discuss two interrelated facets of the problem facing national rulemaking cases on the Court’s emergency docket: (1) the Court’s abruptly evolving approach to balancing the equities of emergency relief, and particularly to comparing alleged harms to applicants, respondents, other parties, and the public, and (2) the Court’s limited institutional capacity for the fact-finding essential to that task.

A. *Vanishing Equities*

Equitable balancing ensures that emergency applications do not regularly turn into preliminary, rushed consideration of the unfiltered merits issues, often with not even a single lower court opinion as a guide.³⁶ This was long the Supreme Court’s default approach to emergency relief.³⁷ But the Court’s response to ever-more-frequent applications to block national regulations appears now to be trending in the opposite direction. In recent emergency docket actions, the Court has signaled that its consideration of irreparable harm allegations and the relative equities is far *less* important than the Court’s evaluation of likely merits success—and perhaps, in practice, little more than a box-checking exercise.

Take, for instance, the highly unusual oral arguments the Court called for on applications to halt the Occupational Safety and Health Administration’s

³⁶ Cf. *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1348–49 (2022) (mem.) (Kagan, J., dissenting) (In the absence of “traditionally required” showing of harm, “the Court’s emergency docket . . . becomes only another place for merits determinations, except made without full briefing and argument”).

³⁷ See, e.g., *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) (“The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction”); *Yakus v. United States*, 321 U.S. 414, 440 (1944) (the Court’s task in considering emergency relief is to “balance[] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction”); *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) (federal courts’ equity practice has “a background of several hundred years of history” in which “equity [is] the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims”); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction”); *Winter*, 555 U.S. at 32 (“[T]he balance of equities and consideration of the public interest . . . are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent”); *id.* at 31 n.5 (consideration of the equities alone can serve as the basis for a court’s denial of a request for preliminary injunctive relief “even if plaintiffs are correct on the underlying merits”).

(OSHA) COVID-19 vaccine mandate (*NFIB v. OSHA*)³⁸ and the EPA’s Good Neighbor Rule (*Ohio v. EPA*).³⁹ While in some respects these arguments were a welcome indication that the Court is invested in increasing transparency and procedure on the emergency docket, the arguments also signaled the Court’s unwillingness to engage in robust interrogation of irreparable harm claims in complex agency cases, even where the challenged regulations afford vitally important public health protections. In *NFIB*, for example, the Court’s unsigned order identified the competing equities implicated by staying OSHA’s vaccine rule—economic costs to challengers versus deaths and hospitalizations from a viral pandemic—but then announced that “it is not [the Court’s] role to weigh such tradeoffs.”⁴⁰ This was a striking conclusion considering the centrality of just such weighing to the historic test for granting or denying provisional equitable relief.⁴¹

The same theme was reprised at the Good Neighbor Rule oral argument in February 2024.⁴² Multiple States and industry groups filed emergency applications asking the Court to halt implementation of an EPA rule requiring “upwind” States to prevent significant amounts of dangerous smog-forming pollution from flowing across their borders and interfering with “downwind” States’ ability to meet national air quality standards. The D.C. Circuit had denied motions to stay the rule in summary orders with no express findings.⁴³ The Supreme Court was thus presented with undistilled evidentiary declarations expressing claims of harm from, on the one hand, the EPA’s regulation of emissions from power plants and other heavy industry, or on the other, harm

³⁸ 595 U.S. 109, 120–21 (2022) (per curiam) (granting applications to stay OSHA’s COVID vaccine mandate following expedited oral argument).

³⁹ 144 S. Ct. 538, 539 (2023) (mem.) (ordering oral argument on applications to stay the EPA’s Good Neighbor Rule).

⁴⁰ 142 S. Ct. at 666; *see also* VLADECK, *supra* note 1, at 253 (“This pattern” of the Court disclaiming responsibility to weigh competing equities on its emergency docket “was arguably already clear from the shadow docket rulings in [prior] Trump Administration and COVID cases, but here was the majority finally saying the quiet part out loud”).

⁴¹ *See, e.g.*, *Barnes*, 501 U.S. at 1305 (Scalia, J., in chambers) (In reviewing a stay application, “[i]t is ultimately necessary” for the Court “to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large... The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others”) (internal quotation omitted); *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers) (“In addressing the irreparable-injury issue, the task of a judge or Justice is to examine the competing equities, ... a task that involves balancing the injury to one side against the losses that might be suffered by the other”) (cleaned up); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (in considering a stay motion, “a Circuit Justice should ‘balance the equities’ ... and determine on which side the risk of irreparable injury weighs most heavily”) (quoting *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308–09 (1973) (Marshall, J., in chambers)).

⁴² Orders on applications to stay the Good Neighbor Rule are still pending as of the time of publication.

⁴³ Order, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Sept. 25, 2023), Doc. 2018645; Order, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Oct. 11, 2023), Doc. 2021268.

from allowing that pollution to continue unabated (or, at the least, abated at vast cost to the downwind states)—and the Court, at least at the argument, showed little interest in sifting through the evidence and weighing the relative magnitudes of the harm.

Justice Kavanaugh, for example, declared at oral argument that “both sides have irreparable harm, so that’s a wash.... [B]oth sides have a strong public interest in my view. So, then the only other factor on which we can decide this under our traditional standard is likelihood of success on the merits.”⁴⁴ However, Justice Kavanaugh offered no explanation for why he believed that the harms to regulated industry from denying a stay canceled out harms to the downwind public and States from granting one (and, in fact, they do not). Instead, it appeared that the mere presence of *some* claimed harm on either side sufficed to take consideration of the relative hardships out of play.

Justice Kavanaugh picked up on the same idea in his concurring opinion in *Labrador*. Much as he had suggested in the Good Neighbor argument that the harm arguments of the applicants and respondents were “a wash,” his concurrence seems to argue for the casting aside laborious irreparable harm and public interest balancing when applicants are seeking to halt “important” national rules:

In those emergency cases, the plaintiffs—including individuals and businesses—often will suffer irreparable harm if the relevant government officials are not enjoined from enforcing the law during that multiyear period. But on the flip side, other parties—including the Federal Government, the States, or other individuals and businesses—often will suffer irreparable harm if the relevant government officials are enjoined from enforcing the law during that multiyear period.

If the moving party has not demonstrated irreparable harm, then this Court can avoid delving into the merits. But not infrequently—especially with important new laws—the harms and equities are very weighty on both sides. In those cases, this Court has little choice but to decide the emergency application by assessing likelihood of success on the merits.⁴⁵

This approach, if accepted, would represent a major transformation. The Court’s usual way of acknowledging the limits of its institutional competence is to deny certiorari.⁴⁶ In cases that entail review of a massive administrative record and factual skirmishes between an agency and regulated industry, the Court will almost invariably refuse to grant review, at least unless the case presents the

⁴⁴ Transcript of Oral Argument at 74, *Ohio v. EPA* (U.S. Feb. 21, 2024) (No. 23A349).

⁴⁵ *Labrador v. Poe*, 144 S. Ct. 921, 929 (2024) (mem.) (Kavanaugh, J., concurring).

⁴⁶ Or, in the extreme case, the Court may declare a question nonjusticiable. *See, e.g., Rucho v. Common Cause*, 588 U.S. 684 (2019) (holding that partisan gerrymandering claims raised nonjusticiable political questions).

chance to guide lower courts by announcing some high-level legal principle. But emergency applications demand the Court’s attention—under its current practice, apparently, the Court cannot decline to rule.⁴⁷ The Court thus needs some mechanism to regulate the flow of emergency applications, lest the preliminary-relief come to overtake and dominate normal merits adjudication.

Traditionally, the Court’s *balancing* of the competing equities has largely provided that check—ensuring that Supreme Court emergency relief truly is exceptional, granted only where the applicant faces genuinely irreparable harm, akin to an emergency, and also limited to cases where the public and private harms from *granting* relief are clearly less burdensome.⁴⁸ The notion of a comparative judicial *weighing*—comparing potential harms that granting or denying relief would cause the moving party, the opponent, other parties, and the public—is definitional to courts’ task in ruling on requests for preliminary relief.⁴⁹ Indeed, so integral is the balancing of equities to the traditional emergency relief test that it is questionable whether the Court *could* downgrade its role absent changes to the tradition-oriented statutory provision that authorizes emergency injunctions.⁵⁰ And while the Court has long been mindful of limitations on its ability to be a first-instance fact finder, its members historically have expressed that recognition by according weight to lower courts’ assessments of the competing equities.⁵¹

⁴⁷ See *Labrador*, 144 S. Ct. at 928 (Kavanaugh, J., concurring) (“The Court has no authority to reject or turn away emergency filings without deciding them”).

⁴⁸ See *supra* notes 33 & 34.

⁴⁹ See *supra* notes 37 & 41.

⁵⁰ See All Writs Act, 28 U.S.C. § 1651(a) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”).

⁵¹ See, e.g., *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320, (1994) (Rehnquist, C. J., in chambers) (“Because this matter is pending before the Court of Appeals, and because the Court of Appeals denied his motion for a stay, applicant has an especially heavy burden”); *Fargo Women’s Health Organization v. Schafer*, 507 U.S. 1013, 1014 (1993) (O’Connor, J., concurring in denial of stay application) (“When a matter is pending before a court of appeals, it long has been the practice of Members of this Court to grant stay applications only ‘upon the weightiest considerations’”) (quoting *O’Rourke v. Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers)); *Graves v. Barnes*, 405 U.S. 1201, 1203 (Powell, J., in chambers) (“Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity”); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers) (a stay applicant’s “burden is particularly heavy when ... a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals”); *Certain Named and Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers) (“[I]nterference with an interim order of a court of appeals cannot be justified solely because [a Circuit Justice] disagrees about the harm a party may suffer”); *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers) (“Respect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition”).

Sometimes, of course, justice will require a court to provide relief before it has decided that the movant has won the case, but a court should be very reluctant to do that and should hold the movant to a high bar. This is perhaps especially so where applicants are seeking to halt duly adopted regulations that implement congressional commands. Courts should hesitate to disturb rulemakings that are the culmination of elaborate, participatory public processes, reflecting the policy judgments and technical expertise of conscientious Executive Branch officials—sworn, like judges, to uphold the law.

The alternative approach suggested by Justice Kavanaugh’s opinion in *Labrador* and by the per curiam Court in *NFIB*—that so long as regulations implicate irreparable harms on both sides, emergency applications should be decided by likelihood-of-success-on-the-merits review—would point in the wrong direction. Such proceedings may also invite parties to advance extreme claims of harm, comfortable that the Court’s processes will not involve adversarial testing of those claims (and maybe not even close examination). It would result in the Court’s leapfrogging statutory judicial review proceedings and bypassing lower courts’ judgments on the equities. That outcome, one would think, also would not be good for the Court in an era of vivid partisan coloration of almost every significant regulatory dispute. But it is where the Court has now positioned itself.

B. The Court’s Difficulties in Accounting for Public Benefits and Limited Means to Assess Extravagant Claims of Imminent Harm

The emergency docket pushes the limits of the Court’s institutional competence. Three of the four factors of the traditional emergency relief analysis—“whether the applicant will be irreparably injured absent a stay;” “whether issuance of the stay will substantially injure the other parties interested in the proceeding;” and “where the public interest lies”—all turn on facts.⁵² But unlike civil litigation in district courts, defined procedures for eliciting facts from evidence are scant in appellate courts. And for various reasons described below, the Supreme Court is especially ill-suited to engage in fact-finding. This fundamental mismatch is likely to be both contributing to stay orders that appear to devalue consideration of the equities, and prompting, in part, Justice Kavanaugh’s rationale in *Labrador*.

1. Lack of Procedures and Structures to Support Fact-Finding

Supreme Court stay proceedings are very different from the preliminary-injunction proceedings that form a routine part of district courts’ dockets. A district court preliminary injunction proceeding allows for formal adversarialism, often including live testimony, cross-examination, and extensive briefing under the Federal Rules of Evidence. The Federal Rules of Civil Procedure require that a district judge ruling on a motion for a preliminary injunction must explicitly “state the findings and conclusions that support its

⁵² *Nken v. Holder*, 556 U.S. 418, 434 (2009).

action,”⁵³ and must explicitly “state the reasons why [the preliminary injunction] issued” as well as describe the terms “specifically” and the relief “[in] detail.”⁵⁴ And, upon an appeal of a grant or denial of a preliminary injunction, it is hornbook law that the trial court’s decision is reviewed deferentially for “abuse of discretion”—in part because of the extensive opportunities to present and test evidence the appealing party had in the district court.⁵⁵

In appellate court stay proceedings, the situation is starkly different. Courts of Appeals often provide no explanation for their decisions on emergency motions.⁵⁶ The Federal Rules of Appellate Procedure provide no right to present live testimony, and even if such testimony is a theoretical possibility, it just is not done. Further, upon Supreme Court consideration of an emergency application, the Court is not formally *reviewing* the district court’s or the appellate court’s decision to grant or deny a stay at all; instead, each application is treated as a brand-new request for the Court to provide interim relief under the All Writs Act.⁵⁷ Despite this, there is little structure to support and guide first-order fact-finding at the Court. The Court has a rigid calendar set by custom, and the Justices do not gather very often. Lengthy hearings of any kind, or any hearings of live testimony, do not fit well with the Court’s traditional toolkit. And fact-finding by multi-member bodies is messy, especially where there are nine people. Indeed, in original-jurisdiction cases where it must perform the nominal role of fact-finder, the Court delegates that task to special masters.⁵⁸ Moreover, the Court is accustomed to deciding only issues that it

⁵³ Fed. R. Civ. P. 52(a)(1).

⁵⁴ Fed. R. Civ. P. 65(a).

⁵⁵ See, e.g., *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171 (2d Cir. 2001).

⁵⁶ See, e.g., *Labrador v. Poe*, 144 S. Ct. 921, 922 (Gorsuch, J. concurring) (noting that the court of appeals below “denied [movant’s] stay request in a brief unreasoned order”). D.C. Circuit orders on significant EPA Clean Air Act rules have typically contained only conclusory statements as to whether the stay standard had been met, see, e.g., Order, *EME Homer City Generation, LP v. EPA*, No. 11-1302 (D.C. Cir. Dec. 30, 2011), Doc. 1350421 (stating only that petitioners challenging the Cross-State Air Pollution Rule “have satisfied the standards required for a stay pending court review”); Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016), Doc. 1594951 (stating only that petitioners challenging the Clean Power Plan “have not satisfied the stringent standards for a stay pending court review”); Order, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Oct. 11, 2023), Doc. 2021268 (same for petitioner challenging the Good Neighbor Rule). Cf. Order, *Coalition for Responsible Regulation v. EPA*, No. 09-1322 (D.C. Cir. Dec. 10, 2010), Doc. 1282558 (“Petitioners have not satisfied the stringent standards required for a stay pending court review.... Specifically, with regard to each of the challenged rules, petitioners have not shown that the harms they allege are ‘certain,’ rather than speculative, or that the ‘alleged harm[s] will directly result from the action[s] which the movant[s] seeks to enjoin’”) (citation omitted).

⁵⁷ See 28 U.S.C. § 1651.

⁵⁸ See generally Anne-Marie C. Carstens, *Lurking in the Shadows of the Judicial Process: Special Masters in the Supreme Court’s Original Jurisdiction Cases*, 86 MINN. L. REV. 625 (2002); see also *Arizona v. California*, 140 S.Ct. 684, 684–85 (2020) (mem.) (Thomas, J. dissenting from denial of motion for leave to file complaint) (criticizing the Court’s reading of Article III’s grant of original jurisdiction over suits between states to be permissive rather than mandatory).

carefully selects—almost invariably *legal* issues that are clearly presented and that have been elucidated and debated in multiple lower court decisions. The Court is not well equipped to decide preliminary relief motions *ab initio*, particularly when they turn on disputed facts.

2. Difficulties in Giving Fair Weight to Regulatory Beneficiaries Whose Interests May be Affected by a Delay in Implementing Regulations

Even when respective harms and equities implicated by a regulatory challenger’s emergency application are “very weighty,”⁵⁹ it should be the very rare case in which they are actually *equally* weighty.⁶⁰ In the atypical litigation context of challenges to federal environmental rules, the stakes of granting relief can often be particularly large and disruptive. The collateral damage of a stay may extend across the nation and against millions of members of the public who are supposed to be protected from health harms or otherwise benefited (of course, there may be many non-litigants benefited by a stay as well). And the beneficiaries of a regulation should not be given any less solicitude from a court simply because they did not intervene in the lawsuit (assuming a court would have granted intervention⁶¹). Due respect for the laws means that courts should give fair and thorough consideration to the impact of stays on the people that Congress intended to benefit from regulations of the kind under review.

When parties seek to block national rules that agencies have determined will provide large net benefits to millions of people, the equitable balance should not treat that aggregate benefit as a simple checkmark in a binary inquiry that asks only whether the two sides of the case both have some irreparable harms. If the applicant is seeking a stay or preliminary injunction that will halt implementation of the rule as to anyone, then the entire public cost of the injunctive relief should weigh against the applicant’s plea for temporary relief. If, say, a company seeking a stay of a new environmental regulation shows that, for it, compliance will cause significant harm (say, \$2 million in economic losses) over the time it might take for a court to reach a decision on the merits, but the agency can show that the requested relief would sacrifice \$200 million in net benefits, this 100-fold difference in comparative harms should tip any equitable balancing, excepting perhaps some extraordinary legal error.⁶² It

⁵⁹ *Labrador*, 144 S. Ct. at 929 (Kavanaugh, J., concurring).

⁶⁰ Accord Stephen Vladeck, *Justice Kavanaugh’s Defense of the Shadow Docket*, One First (Apr. 18, 2024), <https://stevevladeck.substack.com/p/bonus-76-justice-kavanaughs-defense> [https://perma.cc/Y8TZ-UZMJ].

⁶¹ See, e.g., *Massachusetts Sch. of L. at Andover, Inc. v. United States*, 118 F.3d 776, 779–80 (D.C. Cir. 1997) (intervention in appellate court is governed by the same standards as in district court, including Federal Rule of Civil Procedure 24’s requirement that a movant demonstrate their interest is not adequately represented by existing parties).

⁶² As noted below, if a stay movant is seeking relief only as to itself or is seeking to enjoin only a portion of the rule, the “costs of a stay” would be correspondingly reduced. See *infra* Section III.B. Note that parties seeking to block environmental and public health rules are virtually

would be wrong for a court to deem this a “wash,” to use Justice Kavanaugh’s phrasing in the Good Neighbor Rule argument,⁶³ and resolve the case as if likelihood of success were the sole outcome-affecting consideration.

3. The Difficulties Inherent in Adequately Probing Parties’ Non-Record Allegations Regarding Impacts of Regulation

It is vital as well that the Court do more than simply accept parties’ claims of irreparable harm (and this goes for both sides of any litigation, of course). In our experience, stay litigation over environmental regulation has yielded some particularly extreme harm allegations that would benefit from the sort of rigorous adversarial testing that is difficult to come by in stay proceedings as typically conducted.

a. Clean Power Plan

In 2016, the Supreme Court voted 5-4 to stay the Clean Power Plan,⁶⁴ which implemented the EPA’s statutory duty under the Clean Air Act to limit climate-warming carbon dioxide emissions from existing (i.e., already built and operating) fossil-fuel power plants.⁶⁵ In the Plan, the EPA determined that a combination of measures were the “best system” for reducing power-plant carbon dioxide emissions, including shifting power generation to less-polluting sources like gas and renewable energy sources.⁶⁶ It is impossible to know what led the Supreme Court majority to vote for a stay, but it is certainly true that the Clean Power Plan’s many challengers succeeded in creating surround-sound publicity and court filings warning that the Clean Power Plan was nothing short of a national emergency.

Challengers to the Clean Power Plan—led by Republican state attorneys general, coal companies, and coal-heavy power companies—immediately moved to stay the rule (indeed, some pursued unsuccessful but tone-setting lawsuits asking courts to block the Plan even before it was finalized).⁶⁷ They placed before the courts reams of declarations asserting massive harms, characterizing the Plan as an enormity that would crush the private economy and

never required to post a bond to cover the defendant governmental agencies or other parties’ losses from an “erroneous” stay (i.e., one followed by a merits decision for the defendant). *Cf.* Fed. R. Civ. P. 65(c) (“The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained”). The health and environmental harms caused by blocking such regulations are typically irreparable in the sense that no monetary compensation is available.

⁶³ Transcript of Oral Argument at 74, *Ohio v. EPA*, No. 23A349 (U.S. Feb. 21, 2024).

⁶⁴ *West Virginia v. EPA*, 577 U.S. 1126 (2016).

⁶⁵ *See* 80 Fed. Reg. at 64,662 (Oct. 23, 2015); *see also* 42 U.S.C. § 7411(d).

⁶⁶ *See* 80 Fed. Reg. at 64,667.

⁶⁷ *In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). The Murray company was represented by Professor Laurence Tribe, who had argued that the Clean Power Plan was so blatantly unlawful and harmful that it warranted a departure from normal finality requirements.

state governments alike, and “threaten[] blackouts.”⁶⁸ The agency countered that the Plan was actually in line with where the power sector was already going, and that its generation-shifting approach was favored by many power companies as the cheapest and most realistic way to reduce climate-destabilizing pollution.⁶⁹ But the Plan’s complexities made it difficult for the agency and its supporters to reframe the challengers’ characterization.

One large coal company, Peabody, claimed that the mere announcement of the Clean Power Plan had precipitated a steep decline in the company’s stock value;⁷⁰ would cause “irreparable harm on a massive, multi-state and unprecedented scale” “every day that judicial review is pending;” and would “forc[e] the coal industry to curtail production, idle operations, lay off workers, and close mines.”⁷¹ Coal companies went on to say that the EPA had “condemn[ed] the coal industry to a greatly diminished future” and “ensured immediate irreparable harm.”⁷²

Peabody’s claims were doubtful and, it soon became clear, not shared even by its own executives. When Peabody filed for bankruptcy less than three months after the Supreme Court stayed the Clean Power Plan, its Chief Financial Officer (CFO) explained in a sworn affidavit that Peabody had been harmed by low natural gas prices and the declining value of coal *worldwide*, belying the claim that U.S. environmental regulations caused the downturn.⁷³ The CFO also

⁶⁸ See Utility Air Regulatory Group and Public Power Association Motion to Stay, *West Virginia v. EPA*, No. 15-1363, pp. 14–19 & declarations cited (D.C. Cir. filed Oct. 23, 2015); State Petitioners’ Motion for Stay, *West Virginia v. EPA*, No. 15-1363, pp. 15-19 and declarations cited (D.C. Cir. filed Oct. 23, 2015). The reference to blackouts is from the State Petitioners’ Motion to Stay (p. 20, citing Lloyd Decl. ¶¶ 31, 33, 41–46).

⁶⁹ See, e.g., Respondent EPA’s Opposition to Motions to Stay Final Rule, *West Virginia v. EPA*, No. 15-1363 at 2 (D.C. Cir. Filed Dec. 3, 2015) (“Many sources are already implementing the measures discussed in the Rule, at least to some degree, on their own. Contrary to Movants’ position, Congress did not require that EPA, in determining the ‘best system of emission reduction’ for the largest CO₂ sources, disregard the proven strategies these sources are *already* effectively employing, in favor of little or no CO₂ limitation”).

⁷⁰ See Emergency Renewed Petition for Extraordinary Writ by Intervenor Peabody Energy Corporation at 7, *Murray Energy Corp. v. EPA*, No. 14-1112 (D.C. Cir. Aug. 13, 2015). See also Peabody Energy Corp.’s Motion to Stay, *West Virginia v. EPA*, No. 15-1363, at 18–19 (filed Oct. 23, 2015) (“[f]rom the day before the Rule was announced to the close of the markets the day after the announcement, Peabody’s public shares and bonds lost more than \$90 million in value”) (citing Galli Decl. ¶¶ 29–30).

⁷¹ Peabody Energy Corp.’s Motion for Stay at 3, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Nov. 5, 2015); Coal Industry Application for Immediate Stay of Final Agency Action pending Judicial Review at 32, *Murray Energy Corp. & Peabody Energy Corp. v. EPA*, No. 15A778 (U.S. Jan. 27, 2016).

⁷² Coal Industry Application for Immediate Stay of Final Agency Action pending Judicial Review at 33, *Murray Energy Corp. & Peabody Energy Corp. v. EPA*, No. 15A778 (U.S. Jan. 27, 2016).

⁷³ Declaration of Amy B. Schwetz, Executive Vice President & Chief Financial Officer of Debtor Peabody Energy Corporation, in Support of First Day Motions of Debtors and Debtors in Possession ¶¶ 50–54, *In re Peabody Energy Corp. et al.*, No. 16-42529 (Bankr. E.D. Mo. Apr. 13, 2016).

cited the company's decision to "finance[] a number of investments with debt" in 2011 and 2012. By 2016, falling coal prices, "coupled with lower volumes, resulted in the Company's debt burden becoming unsustainable."⁷⁴ She referenced "increased regulatory hurdles" only in passing, and the Clean Power Plan garnered no mention at all.⁷⁵

Although the Supreme Court's stay orders contained no reasoning (or even recital of what legal test had been applied), the orders profoundly shaped the ensuing litigation and supercharged the challengers' narrative that the Plan was a hyperaggressive and statute-ignoring action by the EPA, rather than a relatively modest rule that followed industry trends and largely heeded the industry's design. The stay orders came only five days after the filing of response briefs—as compared to the six-week period that the D.C. Circuit had considered motions before denying them.⁷⁶ One is left to wonder whether more deliberate scrutiny of the harm assertions advanced by Peabody and other challengers would have led to a different outcome—or at least to a more measured understanding of the Clean Power Plan itself—which in retrospect was not the incipient national emergency claimed at the time.⁷⁷

⁷⁴ *Id.* ¶ 11.

⁷⁵ *See id.* ¶ 51. Stay movants submitted other jaw-dropping claims of harm: Peabody and fellow coal company Murray Energy also cited a declaration submitted by the National Black Chamber of Commerce claiming the Rule would cause \$565 billion in increased electric bills, "increase consumer retail electric rates by 12-17%," "increase African-American poverty numbers by 23% and Hispanic poverty by 26%," and "lead to the loss of 7 million African-American and 12 million Hispanic jobs." Peabody Energy Corp.'s Motion for Stay, *supra* note 71, at 20.

⁷⁶ In the D.C. Circuit stay briefing, 10 separate emergency motions were filed in late October and early November 2015; the EPA filed a consolidated response on December 3 and respondent-intervenors on December 8, and replies were filed on December 23. *See* D.C. Circuit Docket, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.) The panel issued its unanimous Per Curiam Order denying a stay on January 21, 2015. Per Curiam Order, *West Virginia v. EPA*, No. 15-1363, (Doc. 1594951). By contrast, in the Supreme Court, five emergency applications were filed with Chief Justice Roberts as circuit Justice on January 26, 2016; responses were filed on February 4, replies on February 5, the case was formally referred to the full Court on and stay orders issued on Tuesday, February 9, 2016. *See* U.S. S. Ct. Dockets, *West Virginia v. EPA*, No. 15A773 (2016); *Basin Elec. Power Co-op. v. EPA*, No. 15A776 (2016); *Murray Energy Corp. v. EPA*, No. 15A778 (2016); *Chamber of Commerce v. EPA*, No. 15A787 (2016); *North Dakota v. EPA*, No. 15A793 (2016); *see also* *West Virginia v. EPA*, 577 U.S. 1126, 1126–27 (2016) (stay orders).

⁷⁷ When the Trump Administration EPA repealed the never-implemented Clean Power Plan years later, it concluded that repeal offered no economic benefits because market forces had driven power-sector emissions below the Clean Power Plan's target even in the absence of federal controls. *See* EPA, REGULATORY IMPACT ANALYSIS FOR THE REPEAL OF THE CLEAN POWER PLAN, AND THE EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS 2–5 (2019) ("[T]he EPA believes repeal of the CPP under current and reasonably projected market conditions and regulatory implementation is not anticipated to have a meaningful effect on emissions of CO₂ or other

b. Good Neighbor Rule

Pending applications to stay the EPA's Good Neighbor Rule⁷⁸ offer another example of irreparable harm claims that require careful review. The Rule's near-term requirements apply only to power plants and principally entail plants' turning on controls they have already installed.⁷⁹ There are *no* emissions-reduction requirements for industrial emitters until 2026 or later, and those future requirements, too, reflect proven controls already in use in many regions across the country.⁸⁰ But applicants' declarations catastrophized about threats to power and heating reliability, national security, consumer pocketbooks, and so on.⁸¹

For example, a set of gas pipeline company applicants claimed that the Rule would pose sweeping gas and electricity reliability problems,⁸² supported in large part by a declaration describing a computer simulation that one company conducted to model the Rule's impact on two gas pipelines near Chicago.⁸³ On careful reading of the submission, however, the computer simulation raises more questions than it answers. For instance, the company modeled system impacts assuming the retrofits that it "reasonably believe[d] it can accomplish [on time]," and then assumed it would *shut down* any engines where retrofits were not completed⁸⁴—a strange assumption, as the Rule does not require such an outcome and businesses do not usually stop operating profit-making assets. In addition, the company calculated the simulation's results in terms of the number of homes served with gas, even though it never specifically claimed that the Rule would result in lost service to those homes.⁸⁵ In general, a particular pipeline

pollutants or regulatory compliance costs"). That the initial projections of the Plan's costs were soon proven to be wrong by the operation of the market is hardly atypical for environmental regulations. *See, e.g.*, 88 Fed. Reg. 13,956, 13,975–76 (Mar. 6, 2023) (noting that industry's actual compliance costs with air toxics regulations were under \$3 billion despite initial projections of \$9.6 billion per year); NESCAUM, ENVIRONMENTAL REGULATION AND TECHNOLOGY INNOVATION: CONTROLLING MERCURY EMISSIONS FROM COAL-FIRED BOILERS (Sept. 2000) (collecting case studies in which compliance cost projections were far over stated).

⁷⁸ 88 Fed. Reg. 36,654 (June 5, 2023).

⁷⁹ *See id.* at 36,744, 36,755, 36,758.

⁸⁰ *See id.* at 36,659; *see also generally* EPA, FINAL NON-EGU SECTORS TSD (2023).

⁸¹ *See, e.g.*, Am. Forest & Paper Assoc. et al. Emergency Application at 28, Am. Forest & Paper Assoc. v. EPA, No. 23A351 (U.S. Oct. 13, 2023); U.S. Steel Corp. Emergency Application at 25–26, U.S. Steel Corp. v. EPA, No. 23A384 (U.S. Oct. 26, 2023); State Applicants' Emergency Application at 25–28, Ohio v. EPA, No. 23A349 (U.S. Oct. 13, 2023).

⁸² *See* Kinder Morgan, Inc. et al. Emergency Application at 23–28, Kinder Morgan, Inc. v. EPA, No. 23A350 (U.S. Oct. 13, 2023).

⁸³ *See id.* at 686a–693a (Declaration of Kenneth W. Grubb).

⁸⁴ *Id.* at 688a.

⁸⁵ *See, e.g., id.* at 692a ("there *could* be loss of [electric] service") (emphasis added); *id.* at 693a (applicant is "greatly concerned about providing reliable service"); *id.* at 25 (describing interruptions in pipeline service that "equates to approximately 1,761,000 homes' worth of natural gas usage").

facility’s being down would almost certainly *not* mean that homes lose heat.⁸⁶ Upon a cursory read, however, the analytical results framed in terms of 1.7 million impacted homes *seems* alarming.

Another stay applicant, United States Steel Corporation, stated that the Rule has “national security implications” because “sufficient supply of domestic steel is in the public interest.”⁸⁷ But the cited support for this ominous claim was a few paragraphs in a declaration by a U.S. Steel employee stating generally that the steel industry is a “critical infrastructure industry,” and the Rule, in combination with other regulations, “*could* have a material impact.”⁸⁸

c. Oil & Gas Methane Standards

Efforts at winning a stay with superficially eye-grabbing claims of harm continue. In a recent challenge to Clean Air Act limits on emissions of methane from oil and gas operations, a large group of Republican-led states moved for a stay principally on the basis that the EPA’s rules impose undue burdens on state agencies.⁸⁹ West Virginia’s declaration claims that implementing the Rule will require the state to add some *2,708 full-time employees*.⁹⁰ West Virginia’s co-movant, the State of Utah, by contrast, estimated that implementation will require the work of just one full-time employee, with support from two others.⁹¹ Faced with assertions like this, which would typically invite further investigation in regular litigation, the ability of a court considering motions for preliminary relief to probe harm allegations is important. A court applying the traditional stay test will have to do some fact-finding and party-specific harm quantification, inexact as that science may be.

* * *

Claims raising the specter of Brobdingnagian compliance costs or catastrophic damage to vital institutions—the national economy, the power system, national security, state governments—are now commonplace in litigation challenging environmental standards. In the Supreme Court, time constraints and institutional limitations make it difficult for the Court to conduct a rigorous evaluation of the evidentiary basis for such claims. The Court has

⁸⁶ See Public Interest Respondents’ Response in Opposition to Emergency Applications at 200a–201a, *Ohio v. EPA*, No. 23A349 (U.S. Oct. 30, 2024) (Declaration of Victoria R. Stamper).

⁸⁷ U.S. Steel Corp. Emergency Application at 25, *U.S. Steel Corp. v. EPA*, No. 23A384 (U.S. Oct. 26, 2023).

⁸⁸ *Id.* at App.609–App.610 (Declaration of Alexis Piscitelli in Support of Motion for Stay) (emphasis added).

⁸⁹ Petitioners’ Motion to Stay, *Texas v. EPA*, No. 24-1054 (5th Cir. Apr. 12, 2024) (seeking stay of “Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review,” 89 Fed. Reg. 16,820 (Mar. 8, 2024)).

⁹⁰ Petitioners’ Motion to Stay, *Texas v. EPA*, No. 24-1054 (5th Cir. Apr. 12, 2024) (citing Crowder (WV) Decl. ¶ 10 (Exh. 11)).

⁹¹ Petitioners’ Motion to Stay, *Texas v. EPA*, No. 24-1054 (5th Cir. Apr. 12, 2024) (citing Exh. Bird Decl. ¶ 13 (Exh. 8)).

some means to deal with those limitations—such as giving weight to the judgments of lower courts, which typically have more time to dig below the surface of factual claims—but the Court has instead seemed more inclined to lean ever more upon an early-stage assessment of the merits. In effect, the Court is treating its limited competence to evaluate the equities as a basis for granting relief rather than denying it. This is a stark departure from historic practice and is seemingly a poor way to resolve complex administrative law disputes.

III. RECOMMENDATIONS

If the Supreme Court continues to trend toward further devaluation of equitable considerations in its review of emergency applications in administrative rulemaking cases, proponents of national regulatory programs should respond with new strategies. Here we offer a few initial suggestions for courts of appeals, agencies and other litigants, and Congress that we think might ameliorate some of the adverse effects of the Court's current approach.

A. Federal Courts of Appeals

If almost routine Supreme Court emergency applications in administrative rulemaking cases are here to stay, lower courts could take several actions to improve their own chances of not being de facto reversed via emergency-docket rulings, as well as to help address some of the Supreme Court's institutional shortcomings in reviewing emergency applications.

First, in cases where the parties' initial submissions do not seem to fully answer the questions needed to determine where the equities lie, appellate courts have authority to engage in more robust fact-finding. Federal Rule of Appellate Procedure 48 authorizes courts of appeals to appoint a special master to hold hearings and gather evidence, and the All Writs Act authorizes all federal courts to issue orders regarding factual inquiries in aid of their jurisdiction.⁹² Appellate courts might direct or authorize limited discovery to explore key allegations regarding harm caused by the agency's action, or by a potential stay.

Second, appellate courts could provide a more tractable basis for assessing the equities by providing more detail on their own rulings on preliminary relief motions—particularly on fact-intensive matters where they are likely to have some institutional advantages over the Supreme Court. Unlike district courts, appellate courts are not bound by rule to provide an express judicial rationale and factual findings in preliminary relief orders; as noted above, they often resolve important emergency motions by conclusory orders lacking any such explanation.⁹³ That practice has considerable merit; it conserves judicial time and effort to a preliminary phase of litigation and prevents the motion panel from commenting about the merits in ways that might complicate the merits panel's later consideration.

⁹² 28 U.S.C. § 1651(a).

⁹³ See *supra* note 56 (citing examples of unexplained orders on emergency motions).

But courts have discretion to provide more fulsome explanation of rulings on stay motions,⁹⁴ and should consider doing so in appropriate cases (e.g., unanimous orders on motions to block federal regulations). In a world in which the Supreme Court’s emergency docket is active and the Court does not seem eager to delve into facts, such explanations are more important. While there may be sound reasons for motions panels to avoid fulsome discussion of the legal merits at a motions stage, specific, detailed *factual* findings—especially concerning the nature and extent of any harms, and of potential impacts of a stay on third parties or the public—would be particularly useful in cases where the lower court has in fact grappled with the record.⁹⁵ While the Supreme Court might not be obligated to defer to those findings, in practice, the Court likely would give them weight—and such findings might persuade the Supreme Court that the large pile of paper on the balance of harms, despite its magnitude, does not, upon close scrutiny, amount to a “wash.” Moreover, merely helping the Court better navigate large factual records through explicit findings would improve any follow-on proceedings in the Court.

B. Federal Agencies and Other Litigants

Below, we briefly enumerate some strategies that federal agencies and other litigants might consider in responding to a shifting approach to equities in the Supreme Court.

- 1) Litigants could affirmatively ask appellate courts to provide some of the procedures mentioned above—for example, specifically asking for the opportunity for discovery or supplemental briefing when opposing parties advance claims of harm (or absence of harm) that seem dubious.
- 2) Litigants could explicitly ask appellate courts to issue reasoned opinions—or at least Federal Rule of Civil Procedure 65-style explanations—with their stay orders, and to include specific fact-finding. As noted above, such explanations might induce greater deference from the Supreme Court, as compared to unexplained orders. They might also help guide the Court toward the parts of the record most salient to the balance of equities.
- 3) Agency counsel and other stay opponents who believe that stay applicants’ irreparable harm claims are without arguable basis could

⁹⁴ See, e.g., *In re NTE Connecticut, LLC*, 26 F.4th 980, 992 (D.C. Cir. 2022) (explaining decision to stay FERC order staying company’s authorization to sell electricity from power plants).

⁹⁵ The D.C. Circuit has specified in some instances that it was the absence of sufficient showing on irreparable harm, rather than a merits defect or something else, that prompted a denial of a stay. See, e.g., *Order, District of Columbia v. Exxon*, No. 22-7163 (D.C. Cir. Jan. 30, 2023), Doc. 1983821; *Order, Wynnewood Refining Co. v. EPA*, No. 22-1015, 2022 WL 2761047, at *1 (D.C. Cir. July 11, 2022); *Order, Coalition for Responsible Regulation v. EPA*, No. 09-1322 (D.C. Cir. Dec. 10, 2010), Doc. 1282558. General explanation like that is perhaps marginally useful to the Supreme Court, but specific factual finding, as is the rule for district court preliminary injunction rulings (*see* Fed. R. Civ. P. 65), would be more helpful.

consider filing motions to strike especially egregious claims and/or seeking Federal Rule of Civil Procedure 11-style sanctions under federal courts' inherent powers.⁹⁶

- 4) Agencies could, as part of rulemakings, make findings specifically directed to the factual issues likely to be most important in potential judicial stay proceedings. For example, the agency could make conspicuous, specific findings regarding the public benefits of the rule during the likely judicial review period (often in the range of 1–2 years), or regarding expected compliance costs or other costs during that particular period. The agency might even invite comment on these findings in its proposed rulemaking. Having agency findings on the record would likely aid rule defense, in part because courts are more skeptical of extra-record submissions, and because stay movants would have to contend with those record findings in advancing harm and public interest claims. In addition, such findings would help prepare the agency and its supporters to swiftly draft oppositions during emergency motion litigation.
- 5) In certain circumstances, agencies issuing rules they know will be challenged could consider administratively staying the rule pending the conclusion of at least first-instance judicial review. For instance, an agency might reasonably conclude that the benefits of self-staying the challenged rule outweigh the costs in situations where emergency motion litigation is likely to sap agency resources and/or result in a rushed presentation of matters that is disadvantageous to an effective defense. The Securities and Exchange Commission (SEC) took this course with respect to its recent rule enhancing and standardizing climate-related disclosures by public companies.⁹⁷ Of course, there needs to be statutory authority for such a stay, and any limitations or prerequisites must be satisfied.⁹⁸ The agency must perform a difficult calculus where the benefits of avoiding the burdens and uncertainties of stay litigation are worth the temporary loss of the advantages the regulation is meant to secure. But, in some circumstances, this approach may be preferable to running the gauntlet of unfavorable preliminary relief scenarios (including spillover merits effects) that now afflict federal environmental litigation.
- 6) Litigants responding to Supreme Court emergency docket applications could consider asking the Supreme Court to employ more procedure—

⁹⁶ *Cf.* *Pirri v. Cheek*, 851 F. App'x 183, 192 (Fed. Cir. 2021) (finding an appeal frivolous and awarding double costs).

⁹⁷ *See* Letter from John R. Rady, Off. of Gen. Counsel, Sec. & Exch. Comm'n to Michael E. Gans, Clerk of Court, *Iowa v. SEC*, No. 24-1522 (8th Cir. Apr. 4, 2024) (enclosing Commission order staying rule).

⁹⁸ *See, e.g.*, 5 U.S.C. § 705 (Administrative Procedure Act provision authorizing agencies to stay rules “pending judicial review” upon “agency find[ing] that justice so requires”).

e.g., oral argument or taking more time where appropriate, as Justice Kavanaugh suggests in *Labrador*.⁹⁹ But a word of caution here—argument is no panacea. Oral argument is destined primarily for probing lawyers as to the implications of their legal arguments; it is not designed as a means for winnowing, synthesizing, and evaluating evidence from attestors who are not in the courtroom and have never been cross-examined. One might argue that offering the opportunity for oral argument, if it becomes normalized, might provide something of a check against profligate uses of the Court’s emergency super-powers, giving affected parties at least a day (or thirty minutes) in Court. And, to be sure, a public courtroom session does help to bring stay motions out of the shadows. But there remain fundamental and inherent difficulties with a multi-member legal-generalist institution schooled in cases involving well-defined, well-“percolated” legal questions attempting to replicate, *de novo*, but subject to fewer rules, a district judge ruling on a routine preliminary injunction motion.

- 7) Litigants should insist that judicial stays, like other forms of injunctive relief, be no broader than necessary.¹⁰⁰ And just as standing to sue is “not dispensed in gross,”¹⁰¹ a movant that has satisfied the stay standard as to part A of an agency rule is not necessarily entitled to a stay that also enjoins parts B and C.¹⁰² Similarly, just as courts regularly embrace “remand without vacatur” as a remedy after merits review, to avoid unnecessary disruption, courts considering interim remedies should (a

⁹⁹ See *Labrador v. Poe*, 144 S. Ct. 921, 933 (2024) (Kavanaugh, J., concurring).

¹⁰⁰ See, e.g., *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (“injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs”) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (standing requirement that plaintiff demonstrate concrete injury helps to ensure that any relief will be “no broader than required by the precise facts”); *McLendon v. Cont’l Can Co.*, 908 F.2d 1171, 1182 (3d Cir. 1990) (“In granting injunctive relief, the court’s remedy should be no broader than necessary to provide full relief to the aggrieved plaintiff”); *United States v. Miami University*, 294 F.3d 797, 816 (6th Cir. 2002) (“If injunctive relief is proper, it should be no broader than necessary to remedy the harm at issue”).

¹⁰¹ *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quoting *Lewis v. Casey*, 518 U.S. 343, 358, n.6 (1996)).

¹⁰² The Supreme Court majority emphasized this point in staying, in part, a preliminary injunction barring enforcement of a new presidential policy restricting immigration from certain countries. See *Trump v. International Refugee Assistance Project*, 582 U.S. 571, 579–80 (2017) (“Crafting a preliminary injunction is an exercise of discretion and judgment,” and in balancing the equities, “a court need not grant the total relief sought by the applicant” but instead “may, in its discretion, tailor a stay so that it operates with respect to only some portion of the proceeding”) (internal quotations omitted). The majority proceeded to grant the motion to stay in part because the district court’s injunction had swept “much further” than required by the facts before it, and had enjoined the challenged rule with respect to “foreign nationals abroad who have no connection to the United States at all”—a category of plaintiffs as to whom “[t]he equities relied on by the lower courts do not balance the same way in that context.” *Id.* at 581.

fortiori) be sensitive to the consequences for stakeholders and the broader public.¹⁰³

- 8) Recent bipartisan calls to limit “nationwide injunctions” certainly should lend support to tailored relief at the motions stage.¹⁰⁴ Limiting the scope of a stay or preliminary injunction—whether by declining to enjoin the entirety of a rule where only certain provisions have been shown to be legally vulnerable or irreparably harmful, or by simply limiting the scope of relief to the particular movant—could actually reduce movants’ burden to obtain relief, since the harms to third parties and the public from staying or otherwise enjoining a rule will often be less for a narrower order.¹⁰⁵
- 9) Litigants should advocate for a heightened standard of review of likely merits success in Supreme Court applications to enjoin agency action. There is currently uncertainty about the standard the Supreme Court should apply when assessing an applicant’s likelihood of success on the merits in an application for an injunction pending appeal.¹⁰⁶ Justices considering emergency applications in chambers often have concluded that an injunction requires an “indisputably clear” showing on the merits,¹⁰⁷ “because, unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’”¹⁰⁸ But in other cases, the Court has issued injunctions without applying the “indisputably clear” standard or seemingly any heightened standard of review.¹⁰⁹ Then, in support of the Court’s 2021 denial of an application for emergency injunctive relief in

¹⁰³ See *Allied-Signal v. Nuclear Regulatory Commission*, 988 F.3d 146 (D.C. Cir. 1993).

¹⁰⁴ For a summary of some of the lead arguments against nationwide injunctions, see *Labrador*, 144 S. Ct. at 921 (Gorsuch, J., concurring).

¹⁰⁵ There is a potential tension between a more modest understanding of reviewing courts’ equitable powers and the doctrine of associational standing, which nominally allows an entire association (such as an industry trade association) to sue based upon the demonstrated injury of a subset of its members (often one or a few). One of the requirements for associational standing—whether the “claim asserted [or] the relief requested requires the participation of individual members,” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)—might require denial of associational standing where standing could effectively entitle a class of entities to preliminary relief even though only a small subset of those entities could meet the standard for such relief.

¹⁰⁶ See *Halting Administrative Action in the Supreme Court*, *supra* note 10, at 2016.

¹⁰⁷ *Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235, 1235 (1972) (Rehnquist, J., in chambers); see also *Halting Administrative Action in the Supreme Court*, *supra* note 10, at 2022–23; *The Role of Certiorari in Emergency Relief*, *supra* note 9, at 1956.

¹⁰⁸ *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (mem.) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Reg. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

¹⁰⁹ See *Halting Administrative Action*, *supra* note 10, at 2024 (citing *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam); *The Role of Certiorari in Emergency Relief*, *supra* note 9, at 1956 (collecting cases)).

Does 1–3 v. Mills,¹¹⁰ Justice Barrett, joined by Justice Kavanaugh, suggested that an injunction was not warranted because the case was not certworthy.¹¹¹ This was notable because consideration of certworthiness has traditionally been part of the Court’s test for granting a stay,¹¹² but not its test for injunctions pending appeal.¹¹³ Justices Barrett, Kavanaugh, and Kagan again suggested certworthiness was part of the Court’s injunction standard in the recent *Good Neighbor* oral argument.¹¹⁴

We think there are good reasons for the Court to apply a heightened standard of review when applicants seek to prevent a duly promulgated federal rule from taking effect. The likelihood of error in abbreviated review of complex regulatory programs is high, as is the likelihood of disruption from court intervention. And in a hierarchical judiciary, that the Supreme Court (or even a single Justice) has ventured an answer, even if ostensibly provisional, to the ultimate legal questions is quite likely to influence the lower-court proceedings. Moreover, the Supreme Court’s merits-evaluation standard and its approach to the equitable factors are intertwined: if the Court both applies an unheightened standard in its assessment of likely merits success *and* adopts a standard where even a modicum of irreparable harm to the applicant suffices to make the “likelihood of success” dispositive, then the Court really would be asserting itself, and at the earliest stage, as the *de facto* decider of cases challenging important regulatory programs. Some of the Court’s most complex and consequential actions effectively would be decided on a basis entirely different from the selective, deliberate review model that prevails for virtually all of the Court’s other work. And the number of regulatory challenges on the Court’s emergency docket would swell.

In the present moment, while the standard that applies to applications for emergency injunctions appears to be in some flux, it would behoove respondents to insist that the Court apply a heightened test for likely merits success.

C. Congress

Congress could exercise its considerable authority to shape how the Supreme Court and other federal courts review motions to block implementation of

¹¹⁰ 142 S. Ct. 17 (2021) (mem.).

¹¹¹ *Id.* at 18 (Barrett, J. concurring in the denial of application for injunctive relief).

¹¹² See *Hollingsworth*, 558 U.S. at 190.

¹¹³ See *The Role of Certiorari in Emergency Relief*, *supra* note 9, at 1958; see also *Nken*, 556 U.S. at 434.

¹¹⁴ See Transcript of Oral Argument at 22, 74, 78–81, *Ohio v. EPA*, No. 23A349 (Feb. 21, 2024).

federal regulations.¹¹⁵ For instance, new legislation could require federal courts to give due consideration to the balance of the equities and the public interest, to grant preliminary relief only where the equities clearly favor the movant, and possibly to consider specific aspects of irreparable harm claims, such as whether any alleged economic harms are especially great and certain. Congress could also codify a heightened standard of review to govern the Supreme Court’s consideration of likely merits success on applications for emergency injunctions or stays, as discussed above.¹¹⁶

There are admittedly practical limits on what codification of a national standard could achieve, as any workable standard is likely to be somewhat open-ended and subject to some judicial discretion. Indeed, *Nken v. Holder* is already technically binding precedent, and the rules of numerous appellate courts already require stay movants to show irreparable harm and/or that a stay would be in the public interest.¹¹⁷ Nonetheless, courts, including the Supreme Court, continue to defy those standards. As such, an act of Congress could send a stronger signal, and with greater durability, than any judicial rule. Clear direction from Congress could potentially encourage and empower lower courts to invest further in their assessment of the equities. And the impacts of codification of the stay standard could be further amplified if accompanied by other proposed reforms to curtail the related problems of forum-shopping and the proliferation of nationwide injunctions of federal policies—such as proposals designating special forums or panels for parties seeking nationwide injunctive relief from federal regulations.¹¹⁸

In addition, a nationalized stay standard could help correct the troublingly lax approach to irreparable harm by some appellate court panels, which may pair with a merits-ascendent Supreme Court approach. For instance:

- Some appellate courts, like the Supreme Court, have been trending toward heavily weighting the likelihood-of-merits-success factor, effectively erasing the equitable factors.¹¹⁹

¹¹⁵ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution”); see also VLADECK, *supra* note 1, at 256 (“Congress ... has unquestioned power to prescribe the standards that the justices follow in granting emergency relief”).

¹¹⁶ See *supra* Section III.B.

¹¹⁷ See, e.g., D.C. Cir. R. 18; 11th Cir. R. 27-1(b)(2); 10th Cir. R. 8.1; 5th Cir. R. 27.3.

¹¹⁸ For comprehensive discussion of this topic, see *District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701 (2024). See also VLADECK, *supra* note 1, at 254–56 (describing some of the avenues available to Congress to reform the Court’s emergency docket practice).

¹¹⁹ Compare, e.g., *White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989) (emphasizing that “there is no nexus between the strength and nature of the underlying claim and the element of irreparable harm,” which “must be proven separately and convincingly”), with *Robinson v. Ardoin*, 37 F.4th 208, 227 (5th Cir. 2022) (likelihood of merits success is “arguably the most

- Some have suggested or held that any economic harms that cannot be recovered from federal government respondents due to sovereign immunity are thus irreparable.¹²⁰ In those jurisdictions, courts may not separately require movants to demonstrate that unrecoverable harm is great or severe—theoretically, even one dollar in unrecoverable losses could suffice.
- Some circuits have developed law, based on Supreme Court precedent, that the federal government has no interest in enforcing an illegal law, and doing so per se causes irreparable harm and is against the public interest.¹²¹ This circular reasoning effectively erases all traditional stay factors, save for likelihood of merits success.
- Some appellate courts, and some Justices, have taken the position that lower court injunctions that block state laws *ipso facto* constitute irreparable harm to the State’s sovereign interests¹²² (it is unclear whether this same reasoning would extend to federal laws).

Notably, that lower-court patchwork application of the traditional stay factors has other undesirable consequences: it offers hooks for future stay applicants to seek further erosion of equitable considerations across federal courts, it supports appeals to the Supreme Court, and it encourages venue-shopping. A national stay standard might help address these adverse effects.

We note also that there is at least one congressional bill now pending to reform the emergency docket: the “Shadow Docket Sunlight Act of 2024,” led by Senator Blumenthal.¹²³ This legislation would require the Court and individual Justices to “publish[] a written explanation of reasons supporting” any order regarding injunctive relief in appellate-jurisdiction cases and to disclose vote counts.¹²⁴ While transparency requirements like these may well be worthy policy pursuits, they seem unlikely, on their own, to affect the Court’s approach to consideration of the equities of a preliminary injunction. The Court

important factor”) (quoting *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005)), and *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021) (other stay factors “will not overcome our holding [regarding] the merits”).

¹²⁰ See, e.g., *Wages & White Lion Invs. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021) (“[C]omplying with [an agency order] later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs”) (quoting *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)).

¹²¹ See, e.g., *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 251 (5th Cir. 2023) (“neither [the government] nor the public has any interest in enforcing a regulation that violates federal law”) (citing *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022)).

¹²² *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, J., in chambers) (“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *United States v. Texas*, 97 F.4th 268, 295 (5th Cir. 2024) (quoting same statement).

¹²³ S. 4388, 118th Cong. (2024).

¹²⁴ *Id.* § 2.

could simply explain, in conclusory fashion, that it deemed harm claims on both sides of a dispute to be sufficiently weighty and thus proceeded to evaluate likely merits success. Transparency requirements could be more impactful if paired with statutory standards to affirm and guide equitable balancing.

IV. CONCLUSION

The Supreme Court's apparent shift toward more cursory treatment of equitable factors on its emergency docket is troubling. The upshot is that district courts require far more rigor when parties seek a preliminary injunction in private disputes than will the Supreme Court for requests to block (potentially for years) federal regulations designed to effectuate congressional directives and benefit millions of people—sometimes, in the case of important public health and safety standards, with literal life-or-death implications. The Court's approach seems like a perverse response to an increasing volume of emergency applications—and certainly, there has been no change to the All Writs Act or the other venerable statutes governing preliminary relief. Moreover, this approach poses concerning risks to important regulatory programs that protect public health and welfare, and to the institutional sustainability of the Court itself.

Instead of retreating further from fact-finding, we think the Court should restore considerations of irreparable harm and the public interest to its traditional prominence in the standard for preliminary relief. And while Supreme Court consideration of an emergency application is not technically an appellate-review proceeding, as decades of Court orders on emergency motions have recognized, the same respect for lower courts' judgment and opportunity to engage with the evidence that merits deferential review in such proceedings, and the same considerations of judicial competence and humility that govern review on certiorari, should inform the Court's emergency docket actions. As suggested above, there are steps that lower courts, agencies, legislators, and others could take now to promote corrective behavior by the Justices and to reduce some of the unfavorable consequences of vanishing equitable considerations.