Judicial Stays of Agency Actions: Amplifying the Public Interest Factor in Ohio v. EPA

Diego Antonio Morales[*]

INTRODUCTION

Federal courts have the tremendous power to grant stays, which temporarily stop administrative agencies from implementing and enforcing new regulations. By delaying the benefits or harms of agency actions, these stays can have wide-ranging impacts, even before courts decide the legality of those actions. But the Supreme Court infrequently adheres to its own standard for granting or denying stays, which has been the primary focus of the existing literature.[1]

DOI: https://doi.org/10.15779/Z38N87323C

[*] J.D. Candidate, University of California, Berkeley, School of Law, 2026. This Article was adapted from a Note written for the Environmental Law Writing Seminar under the guidance of Professor Sharon Jacobs.

1. *See, e.g.*, Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 ADMIN. L. REV. 225 (2017); Kristen E. Parnigoni, Note, *Shades of Scrutiny: Standards for Emergency Relief in the Shadow Docket Era*, 63 B.C. L. REV. 2743 (2022); Portia Pedro,

The Court's stay standard recognizes the public interest as one of four factors. The factors are: "(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."[2]

But the Court has offered little guidance on how to evaluate the public interest, which has allowed the courts to overlook it. This oversight occurred in *Ohio v. EPA*, where both the majority and dissent failed to discuss the public interest when adjudicating the plaintiffs' requested stay.[3] The Court instead disproportionately focused on the other factors of the standard to grant the emergency relief. The resulting stay thwarts measures to improve air quality across many states while the parties argue and brief the merits of the challenges in the D.C. Circuit.

This Article focuses on the public interest factor of the stay test, using *Ohio v. EPA* to propose a framework for more robust consideration of the public interest. Part I offers background on the EPA's Good Neighbor Plan at issue in the case. Part II discusses how the Court formulated and applied the stay standard. Based on the Court's failure to consider the public interest factor, Part III explores how courts can more comprehensively consider the public interest factor moving forward. Finally, Part IV provides the missing public interest analysis based on the information presented to the Supreme Court in the parties' briefing materials and the agency's record. Examining the benefits delayed by the stay highlights the importance of the public interest factor in courts' evaluations of requests to stay administrative agency actions.

I. BACKGROUND ON INTERSTATE AIR POLLUTION

Interstate air pollution has long been a regulatory challenge for the EPA and states. While the EPA has promulgated multiple rules to enforce national pollution standards between states, these plans have proven contentious time and again.[4] *Ohio v. EPA* follows this trend.

Stays, 106 CALIF. L. REV. 869 (2018); Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 FLA. STATE U. L. REV. 1319 (2016); Evan Wiese, Note, *Equity & the Environment: Proposing a Flexible Approach to Stays Pending Appeal*, 46 HARV. ENV'T L. REV. 597 (2022); Sean H. Donahue & Megan M. Herzog, *The Bonfire of the Equities: Judicial Stays of Federal Environmental Regulations*, 62 HARV. J. ON LEGIS. 1 (2024).Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941 (2022);

2. *Ohio v. EPA*, 603 U.S. 279, 291 (2024).

3. *Id*. Not to be confused with *Ohio v. EPA*, 98 F.4th 288, 293 (D.C. Cir. 2024), *rev'd and remanded sub nom. Diamond Alternative Energy, LLC v. EPA*, 145 S. Ct. 2121 (2025), which concerns the EPA's decision "to waive federal preemption of two California regulations regarding automobile emissions under the Clean Air Act."

4. *See* Angela Luh, Note, *Being A Good Neighbor: Evaluating Federal Regulation of Interstate Air Pollution Under the Cross-State Air Pollution Rule*, 48 ECOLOGY L.Q. 435, 451–57 (2021) (discussing the conflicts underlying the cases that have interpreted the Clean Air Act's Good Neighbor Provision, including: *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); *North Carolina v. EPA*, 531 F.3d 896, 921 (D.C. Cir.), *modified on reh'g in part per curiam*, 550 F.3d 1176 (D.C. Cir. 2008); *EPA v. EME Homer*

The EPA develops National Ambient Air Quality Standards (NAAQS) for air pollutants that "may reasonably be anticipated to endanger public health or welfare."[5] After the EPA sets the NAAQS, states must submit State Implementation Plans (SIPs) to the EPA, detailing how the state will implement the NAAQS.[6] If a state fails to submit a SIP, or submits an inadequate SIP and fails to correct the deficiencies, the EPA must promulgate a Federal Implementation Plan (FIP).[7] The requirements[8] for SIP approval include the Good Neighbor Provision.[9] The Good Neighbor Provision directs states to include "adequate provisions" in their SIPs to reduce air pollution that travels into other states.[10] Specifically, SIPs must explain how each state will prohibit emissions that "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any" NAAQS.[11]

The EPA's 2015 ozone NAAQS is the impetus for the Supreme Court's decision in *Ohio v. EPA*.[12] In 2015, the EPA lowered the air quality standard for ozone to seventy parts per billion (ppb) from seventy-five ppb.[13] As a result of the revised NAAQS, states were required to submit new SIPs.[14] After two years of reviewing the submitted SIPs, the EPA proposed a FIP—the Good Neighbor Plan—to implement the Good Neighbor Provision that would cover twenty-three states who submitted deficient SIPs or did not submit SIPs.[15] The Good Neighbor Plan proposed "to establish nitrogen oxides emissions limitations applicable to

---

City Generation, L.P., 572 U.S. 489 (2014); *Maryland v. EPA*, 958 F.3d 1185 (D.C. Cir. 2020); and *New York v. EPA*, 964 F.3d 1214, 1219 (D.C. Cir. 2020)).

5. 42 U.S.C. § 7408(a)(1)(A); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498 (2014); Arnold W. Reitze, Jr, *The National Ambient Air Quality Standards for Ozone*, 6 ARIZ. J. ENV'T L. & POL'Y 420, 422 (2015).

6. *See* 42 U.S.C. § 7419(a)(1); *Ohio v. EPA*, 603 U.S. 279, 283 (2024); *see also* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2347 (1996) ("NAAQS . . . establish the minimum levels of environmental quality . . . . They do not directly constrain the activities of any polluter.").

7. *See* 42 U.S.C. § 7410(c)(1); *Ohio v. EPA*, 603 U.S. 279, 284 (2024); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498 (2014).

8. 42 U.S.C. § 7410(a)(2).

9. 42. U.S.C. § 7410(a)(2)(D)(i)(I).

10. 42 U.S.C. § 7410(a)(2)(D).

11. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Justice Ginsburg's majority opinion in *EPA v. EME Homer City Generation* traces the various iterations of the Good Neighbor Provision, emphasizing how it has become stronger over time. 572 U.S. 489, 498–99 (2014). The 1970 version only required "cooperation," while the 1977 version only covered "individual sources," not "collective emissions." *Id.* Congress again amended the provision as part of the 1990 Clean Air Act Amendments, providing the current version of the statute. *See id.*

12. *See id.* at 284.

13. *Overview of the EPA's Updates to the Air Quality Standards for Ground-Level Ozone*, EPA (Oct. 1, 2015), https://www.epa.gov/sites/default/files/2015-10/documents/overview_of_2015_rule.pdf; *see* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292, 65293–94 (Oct. 26, 2015) (to be codified at 40 C.F.R. pts. 50, 51, 52, 53, and 58).

14. *See Ohio*, 603 U.S. at 284 (citing National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. at 65437).

15. *See id.* at 285–86 (citing Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard, 87 Fed. Reg. 20036 (Apr. 6, 2022) (to be codified at 40 C.F.R. pts. 52, 75, 78, and 97)).

certain . . . industrial stationary sources."[16] States and industry groups quickly challenged the EPA's FIP, and the plaintiffs in the consolidated cases requested a stay of the Good Neighbor Plan on the Supreme Court's emergency or "shadow" docket while the D.C. Circuit would decide the merits of the challenges.

The Supreme Court granted a stay of the Good Neighbor Plan by a five to four vote, preventing the EPA from implementing the Plan for the duration of the litigation.[17] As a result, this stay delays action towards attaining the ozone standard and its associated public health and environmental benefits, particularly improved respiratory health outcomes.[18]

II. *OHIO V. EPA*'S STAY ANALYSIS

Many initial reactions have focused on the "shadow" docket and the case's procedural irregularities.[19] This Article, though, focuses on the Court's key holdings related to the stay analysis, including the applicants' likelihood of success on the merits,[20] the balance of harms to each party, and the public interest factor.[21]

---

16. Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard, 87 Fed. Reg. 20036 (Apr. 6, 2022) (to be codified at 40 C.F.R. pts. 52, 75, 78, and 97).

17. *See Ohio*, 603 U.S. at 281.

18. *See infra* Part IV.

19. For instance, the timeline of *Ohio v. EPA* and the Court's decision to schedule oral arguments calls into question the imminence of the harm claimed by the applicant states and industry groups. *See* Jeff Neal, *Like a Good Neighbor, the Supreme Court is There*, HARV. L. TODAY (Feb. 13, 2024), https://hls.harvard.edu/today/previewing-supreme-court-arguments-about-ozone-pollution-and-the-good-neighbor-plan-in-shadow-docket-case-ohio-v-epa/. The applicants appealed the D.C. Circuit's denial of stay in October 2023. Over two months later, the Court scheduled oral argument for the combined cases. *Ohio v. EPA*, BALLOTPEDIA, https://ballotpedia.org/Ohio_v.EPA (last visited Oct. 11, 2024). Oral argument on just the stay request was held in February 2024, and the Court published its order in late June 2024. *Id.* This timeline is important for at least two reasons. First, rather than quickly deny or grant the request for stay, as the emergency docket usually signals, the Court decided to hear oral arguments. *See* Neal, *supra* note 19. Second, the drawn-out process means that nine months passed between when the D.C. Circuit denied the requests and when the Court ultimately granted those requests, a relatively long amount of time for the Court to sit on an emergency request. This timing perhaps indicates that the applicants did not truly face irreparable injury without the stay of the EPA's plan. *Cf.* Ohio, 603 U.S. at 322 (2024) (Barrett, J., dissenting) ("The Court, seizing on a barely briefed . . . theory, grants relief anyway . . . [and] justifies this decision based on an alleged procedural error that likely had no impact . . . .").

20. *See* Bob Needham, *5Qs: Bagley on* Ohio v. EPA*, SCOTUS Citation, and the Future of the Administrative State*, MICH. L. NEWS (July 9, 2024), https://michigan.law.umich.edu/news/5qs-bagley-ohio-v-epa-scotus-citation-and-future-administrative-state; Kyle Bradley, *The Court's Environmental Evolution*, REGUL. REV. (Aug. 4, 2024), https://www.theregreview.org/2024/08/04/the-courts-environmental-evolution/; Daniel Deacon, Ohio v. EPA *and the Future of APA Arbitrariness Review*, YALE J. ON REGUL. (June 27, 2024), https://www.yalejreg.com/nc/ohio-v-epa-and-the-future-of-apa-arbitrariness-review/.

21. *See* Stephen Vladeck, *92. How* Ohio v. EPA *Reshapes Equitable Relief*, ONE FIRST (July 29, 2024), https://www.stevevladeck.com/p/92-how-ohio-v-epa-reshapes-equitable; Sambhav Sankar, *How SCOTUS Granted Donald Trump an Immortal Veto*, PROGRESSIVE MAG. (July 17, 2024), https://progressive.org/op-eds/how-scotus-granted-donald-trump-an-immortal-veto-sankar-20240717/; Justine Calma, *SCOTUS pauses EPA plan to keep smog from drifting across state lines*, VERGE (June 27,

Stays are a form of "interim relief" that "pause" a court decision or rule implementation.[22] For instance, parties can request appellate courts to stay lower court decisions while appeals are pending.[23] Parties can also request a stay to "pause" an agency's implementation of a new rule.[24] Because litigating appeals can take years, stays can have tremendous impacts to the course of litigation.[25] And while the Supreme Court has articulated a standard for assessing stay requests, federal courts inconsistently apply this test and have no obligation to explain their rationales.[26]

The standard for evaluating emergency requests for stay has been developed and articulated by the Court in two cases: *Hilton v. Braunskill* and *Nken v. Holder*.[27] When evaluating a stay request, courts examine "(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."[28]

Hilton and *Nken* also clarified how the factors interact with one another. *Hilton* first articulated the test, emphasizing that it should not be treated as "a set of rigid rules," but should instead be flexible to the facts.[29] *Nken* then elaborated that the first and second factors, the likelihood of success on the merits and the applicant's showing of irreparable injury, are the "most critical."[30] Applicants must demonstrate "more than a mere possibility" of both.[31] Only then do courts assess the third and fourth factors: harm to the opposing parties and the public interest.[32] Importantly, "when the Government is the opposing party" to the stay, the injury to the government and the public interest "merge."[33] However, "the Government's role as the respondent . . . does not make the public interest . . . negligible."[34]

2024), https://www.theverge.com/2024/6/27/24186454/ohio-v-epa-nox-good-neighbor-plan-smog-pollution-stay.

22. *Ohio*, 603 U.S. at 290; Wiese, *supra* note 1, at 598 (cleaned up).

23. *See generally* Pedro, *supra* note 1, at 871–72 (outlining the wide-ranging areas of the law where stays have played an instrumental role).

24. This is the type of request for stay at issue in *Ohio v. EPA*. *See also* Bayefsky, *supra* note 1, at 1948 ("A court may stay its own judgments or those of tribunals it is charged with reviewing—including both lower courts and administrative agencies.").

25. S*ee* Pedro, *supra* note 1, at 869.

26. *See id.* [26] at 891–92 (providing examples of the various and inconsistent tests applied in lower courts); *see also* Parnigoni, *supra* note 1, at 2764 (discussing the Court's inconsistent standards for emergency relief).

27. *Hilton v. Braunskill*, 481 U.S. 770 (1987); *Nken v. Holder*, 556 U.S. 418 (2009).

28. *Ohio v. EPA*, 603 U.S. 279, 291 (2024) (citing *Nken*, 556 U.S. at 434 (2009)).

29. *Hilton,* 481 U.S. at 777 (1987).

30. *Nken*, 556 U.S. at 434. The Court's emphasis on the merits question has received criticism as being "inconsistent" with both the history of stays and the Court's own theoretical justifications. *See* Lens, *supra* note 1, at 1320.

31. *Nken*, 556 U.S. at 434–35 (cleaned up).

32. *Id.* [31] at 435.

33. *Id.* [31] at 435.

34. *Id.* [31].

In *Ohio v. EPA*, the Court overlooked much of its own guidance for applying this test to assess stays. The majority glossed over the harm to the federal government (as the party opposing the stay) and the public interest. The dissent, too, lacked meaningful inquiry into the government and public interests. It instead criticized the majority for improperly reviewing the case on the emergency docket based on speculative injury and for creating unduly onerous requirements for the EPA.[35] Both the majority and the dissent focused almost entirely on the "likelihood of success on the merits" factor at the expense of analyzing the other factors: the parties' harms and the public interest. This failure to address the extensive public health and environmental benefits described in the briefing documents ignores the real-world consequences of the stay, such as reducing short-term breathing issues and long-term respiratory illnesses.[36]

A. The Likelihood of Success on the Merits

The Court determined that the petitioners were likely to succeed on the merits, citing the EPA's insufficient responses to public comments and the Plan's unclear severability provision. The majority opinion stated that an agency "cannot simply ignore an important aspect of the problem," especially concerns raised in public comments.[37] The majority contended that commentors questioned how the Plan would function if not all twenty-three states participated.[38] In response to those comments, the EPA added a severability provision to clarify that the Plan would continue even if states dropped out.[39] However, this provision alone was not enough, and the Court deemed the Plan likely to be arbitrary and capricious under the Clean Air Act because it lacked sufficient explanation.[40]

B. Balancing the Parties' Harms and Ignoring the Public Interest

Because both the majority and dissent focused on the likelihood of success on the merits, the Court's lack of inquiry into the equities and the public interest begs attention. *Nken* instructs courts to consider the harms to applicants, the injuries to the other parties in the litigation, and "where the public interest lies."[41] The Court needed to analyze harms to the government as the party opposing stay. So, after discussing the merits, the Court's own stay test required a consideration of the equities.

However, the majority opinion offered sparse analysis of the government's interests, and no word on the public interest. To emphasize how little the Court

35. *See id.* [22] at 300–23.
36. *See infra* Part IV.
37. *Ohio*, 603 U.S. at 292–93 (cleaned up).
38. *Id.* [37] at 287–88.
39. *Ohio*, 603 U.S. at 289.
40. *Id.* [39] at 289, 293–94.
41. *See Ohio,* 603 U.S. at 279; (citing *Nken*, 556 U.S. at 434).

examined the harms, below is the majority's full discussion of the "latter three *Nken* factors":

> On one side of the ledger, the federal government points to the air-quality benefits its [Plan] offers downwind States. On the other side, the States observe that a [Plan] issued unlawfully (as they contend this one was) necessarily impairs their sovereign interests in regulating their own industries and citizens—interests the Act expressly recognizes. The States observe, too, that having to comply with the [Plan] during the pendency of this litigation risks placing them at a "competitive disadvantage" to their exempt peers. The States and the private applicants also stress that complying with the [Plan] during the pendency of this litigation would require them to incur "hundreds of millions[,] if not billions of dollars." Those costs, the applicants note, are "nonrecoverable."[42]

The opinion afforded just one sentence to the government interest, presumably "merged" with the public interest because the opinion makes no mention of the public interest and allocates four sentences to the challengers' costs.[43] The dissent also focused on the likelihood of success on the merits and failed to examine the injuries to the parties.[44]

III. THE SCOPE OF THE PUBLIC INTEREST FACTOR

By paying little attention to the government's harms or benefits and the public interest in *Ohio v. EPA*, the Court's stay analysis raises concerns about "merging" the government and public interests. Particularly in cases that involve broad impacts, it is difficult to imagine the government and the public sharing a complete overlap of interests. To address this distinction, this Article proposes that courts should ensure that the public interest receives due attention. But that then raises the question of whose interests courts should consider as being representative of the public.

A. Applying Nken *in the Lower Courts*

An examination of federal district and appellate court decisions applying the *Nken* stay test[45] reveals that lower courts have distinguished the government and public interests, even when the stay test instructs that those interests "merge"

---

42. *Ohio*, 603 U.S. at 291–92 (alterations in original) (cleaned up).

43. *See* Calma, *supra* note 21 ("The Supreme Court . . . disregard[ed] the public health benefits for communities that are impacted by smog from highly polluting upwind states . . . ."); Donahue & Herzog, *supra* note 1, at 18 ("There [were] *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."). *But see* Cass, *supra* note 1, at 250 (arguing that in the context of many environmental regulations with "little or no evidence of the importance of immediate action, the public interest almost never will militate in favor of denying a stay . . . .").

44. *See Ohio*, 603 U.S. at 304 (Barrett, J., dissenting) ("In my view, the applicants cannot satisfy the stay factors. Most significantly, they have not shown a likelihood of success on the merits.").

45. The methodology for this analysis was as follows: In Westlaw, I looked at citing decisions for *Nken*. I filtered for federal district and appellate court decisions. I then filtered for the word "merge" in the same paragraph as a citation to *Nken*. This yielded 1031 cases. I reviewed the top one hundred cases, in order of most discussion of *Nken* to least.

because the government opposes the stay.[46] Rather than allow the government to define the public interest in a particular case, numerous court decisions separately analyze the government and public interests when those interests diverge (*i.e.,* when the government does not adequately represent the public or when the government is acting unlawfully). This part emphasizes that the Supreme Court failed to engage with public interest considerations in *Ohio v. EPA* and argues that the Court should have—at least—discussed public health and safety impacts, just as many lower courts have done.

Courts identify the public interest as fitting into two categories: (1) the public interest in lawful and efficient government action[47] and (2) the public interest in health and safety concerns.[48] While the first, narrower category is explicitly identified in *Nken*, the second category has emerged from a body of caselaw that views the public interest more expansively.

As demonstrated by the following examples, courts routinely consider health and safety issues when broadly analyzing the public interest.[49] In *Sweet v. Cardona*, the District Court for the Northern District of California denied stay because it would cause "financial, physical, and emotional" harms and "substantially injure plaintiffs and defendants."[50] Similarly, the Sixth Circuit

46. *See, e.g.*, *Pueblo of Pojoaque v. New Mexico*, 233 F. Supp. 3d 1021, 1146–47 (D.N.M. 2017) ("Despite that state actors are the 'opposing party,' however, there are compelling reasons to analyze these factors separately in this case . . . [because] this case implicates additional public interests . . . ."); *Blasko v. Boyden*, No. 1:18-cv-01649-DAD-SAB (HC), 2022 WL 3969648 (E.D. Cal. Aug. 31, 2022), at *6–7 (analyzing the public interest on both sides of an extradition matter, even where the government opposed stay); *Tenn. ex rel. Slatery v. Tenn. Valley Auth*., No. 3:17-CV-01139, 2018 WL 3092942 (M.D. Tenn. June 22, 2018), at *6 (finding that delay would go against the public interest, especially considering that "the case involves time-sensitive data and expert work"); *Index Newspapers LLC v. U.S. Marshals Serv*., 977 F.3d 817, 838 (9th Cir. 2020) ("Our court has consistently balanced the public interest on the side of the plaintiffs against the public interest on the side of the government to determine where the public interest lies.").

47. *See Nken v. Holder*, 556 U.S. 418, 436 (2009) ("There is always a public interest in prompt execution of removal orders . . . ."); *see, e.g., E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 679 (9th Cir. 2021) ("Finally, the government and the public have an interest in the 'efficient administration of the immigration laws at the border.'"); *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 205 (3d Cir. 2024) ("'There is always a public interest in prompt execution' of the laws."); *Osorio-Martinez v. Att'y Gen. U.S. of Am.*, 893 F.3d 153, 179 (3d Cir. 2018) ("[I]t is squarely in the public interest to enable individuals to partake of statutory and constitutional rights and meaningful judicial review . . . ."); *Tex. v. U.S. Dep't of Homeland Sec.*, 88 F.4th 1127, 1136 (5th Cir. 2023) ("'There is generally no public interest in the perpetuation of unlawful agency action.' And there is 'substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.'"); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066, 1075 (D. Colo. 2019) ("[T]he public interest is furthered by the timely conclusion of legal disputes . . . ."); *Weaver v. Stroman*, No. 1:16-CV-01195-ADA, 2020 WL 3545655, at *4 (W.D. Tex. June 30, 2020) ("However, 'the public interest disfavors the grant of a stay where it would hinder the speedy adjudication of constitutional claims.'").

48. *See infra* Part III.A.

49. *See Sierra Club v. Trump*, 929 F.3d 670, 705 (9th Cir. 2019) (stating that "[p]ublic interest is a concept to be considered broadly"); *SEC v. Wilde*, No. SA CV 11–0315–DOC(AJWx), 2013 WL 2303761, at *8 (C.D. Cal. May 20, 2013) (stating that "[i]n litigation involving the administration of regulatory statutes designed to promote the public interest . . . this factor necessarily becomes crucial) (citations omitted).

50. *Sweet v. Cardona*, 657 F. Supp. 3d 1260, 1278–79 (N.D. Cal. 2023) (student-loan settlement).

weighed the public interest in a COVID-19 vaccination requirement, which would "'save over 6,500 worker lives and prevent over 250,000 hospitalizations' in just six months," while "[a] stay would risk compromising these numbers, indisputably a significant injury to the public."[51] In the environmental context, too, courts have identified broad public interests reflecting concerns for public health and safety. The Fifth Circuit denied staying subpoenas from the Chemical Safety and Hazard Investigation Board because delaying investigations of hazardous releases would jeopardize the public interest in "workplace and public safety."[52]

As exemplified above, lower courts applying the *Nken* test—and "merging" the government and public interests—have still opted to define the public interest broadly, considering not only the interest in efficient government action but the interest in health and safety as well. Identifying and discussing both categories of public interest in every stay analysis allows courts to thoroughly weigh the impacts of granting or denying stay.

B. Distinguishing the Government and Public Interests

This Article amplifies the public interest inquiry as distinct from the government's interest. This subpart is intended to emphasize the importance of that distinction and provide courts guidance on giving the public interest factor the attention it deserves. First, a context-specific examination of *Nken*'s "merge" rule reveals that it may make less sense applied in the context of agency rules. Second, this rule does not account for cases in which state and federal governments are on opposite sides. Lastly, in stay analyses, courts can rely on information from briefing materials and the agency's record to assess the public interest. While this solution may be imperfect, courts nevertheless have a duty to analyze the public interest based on materials presented and available to them.

1. Comparing Hilton*,* Nken*, and* Ohio

In the contexts of *Hilton* and *Nken*, the Supreme Court's decisions to merge the government and public interests made sense because the government action in both cases only affected one person. In *Hilton*, New Jersey sought a stay of a district court order granting an individual's petition for a writ of habeas corpus, pending the state's appeal.[53] And in *Nken*, an individual requested a stay of his deportation order, pending appeal of the denial of his motion to reopen his

51. MCP NO. 165, 21 F.4th 357, 388 (6th Cir. 2021); *see also Fla. v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1293 (11th Cir. 2021) (upholding a COVID-19 vaccination rule because "[i]mposing an injunction to bar enforcement of the interim rule would harm the public interest in slowing the spread of COVID-19 and protecting the safety of Medicare and Medicaid patients and staff").

52. *United States v. Transocean Deepwater Drilling, Inc.,* 537 F. App'x 358, 364 (5th Cir. 2013); *see also MCR Oil Tools, LLC v. U.S Dep't of Transp.*, No. 24-60230, 2024 WL 2954416 (5th Cir. June 12, 2024), at *8 (considering the "public safety" interest in ensuring the safety of oil extraction operations); *United States v. Guam*, No. CV 02-00022, 2017 WL 1347667 (D. Guam Apr. 7, 2017), at *12 (considering the health and safety of employees and customers of the company at issue in a Clean Water Act case).

53. *Hilton v. Braunskill*, 481 U.S. 770, 772–773 (1987).

asylum application.[54] But context matters. Comparing these circumstances with that of *Ohio v. EPA* casts doubt on the value of merging these distinct interests when they are not so neatly aligned.

Discussed in more detail in Part IV, briefing materials and amicus briefs identified widespread public interest in *Ohio v. EPA*'s health and environmental implications. The government and public interests may align in a case impacting an individual, especially where broader interest may be difficult to discern. But where courts have notice that a government action will impact the public across numerous states, the government and public interests diverge. As the party opposing stay, the federal government must foremost defend its action in the context of the litigation and protect its administrative authorities.[55] While this role may be related to the public interest, the agency's interests can be meaningfully distinguished from the public's. Though government interests should always reflect public interests, at least in theory, the converse is not always true—public interests may be entirely distinct from government interests. By considering the government and public interests separately, courts can avoid shifts in the government's position during changes in control of the executive branch, even if the public interest remains the same. Analyzing these interests individually can also foster uniformity of analysis by the courts by clearly discussing all four factors in each stay analysis, no matter the context.

2. Adversarial State and Federal Governments

The state and federal governments' divergent positions in *Ohio v. EPA* underscore the importance of individually analyzing the government and public interests. The opposing interests of the state and federal governments muddy *Nken*'s instruction that the government and public interests "merge" when the government opposes stay. On one hand, the states challenging the Plan argued that the public interest would be served by "applying the law correctly" and ensuring "grid reliability."[56] On the other hand, the federal government framed the public interest in terms of maintaining the EPA's authority to regulate air pollution among the states.[57] Furthermore, a group of states that joined the federal government in opposing the stay focused on their "ability to satisfy the ozone standards."[58] Individually, each of these state and federal government

54. *Nken v. Holder*, 556 U.S. 418, 422–23 (2009).

55. The majority's discussion of the federal government's interest aligns with this understanding, too, framing the EPA's interest in federalism terms of protecting the agency's role in regulating emissions among the states. *Cf. Ohio,* 603 US at 291.

56. State Applicants' Emergency Application for a Stay of Administrative Action at 27–28*, Ohio v. EPA*, 603 U.S. 279 (2024) (No. 10252023) [hereinafter States' Application for Stay].

57. *See* Response in Opposition to the Application for a Stay at 31–33, *Ohio v. EPA*, 603 U.S. 279 (2024) (No. 23A384) ("Stays of two prior rules implementing the Good Neighbor Provision led to implementation delays of up to three years, even though the rules were later largely upheld.") (cleaned up).

58. Brief for States of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin, and the District of Columbia, the City of New York, and Harris

arguments provides an incomplete understanding of the public interest, underscoring the importance of analyzing the public interest as a distinct and comprehensive consideration.

3. Relying on Briefing Materials and the Agency Record

Though defining the "public interest" in a given case may be difficult for courts, it is nevertheless crucial, especially when the record indicates that a stay would have broad impacts. In *Ohio v. EPA*, the Court should have recognized the substantial public interests involved based on the parties' briefs, amicus briefs, and the agency's record. This approach, though, raises issues of its own. Relying on this information may result in people with less resources from having their interests considered.[59] And encouraging increased public interest filings may complicate courts' analysis of stays.[60] But, these issues are no reason to forego a public interest analysis. The declarations of individuals' experiences compiled by non-profits can be an especially insightful resource, for instance.[61] Also, increased filings can signal which cases implicate broad public concerns. While weighing the public interest is not straightforward, courts must meaningfully analyze this factor when deciding stays.

IV. *OHIO V. EPA*'S MISSING PUBLIC INTEREST ANALYSIS

Though the Court recited the *Hilton* and *Nken* stay standard in *Ohio v. EPA*, neither opinion discussed the public interest. A detailed public interest analysis could have tilted the equities in favor of denying stay. Part IV seeks to fill this identified gap using the parties' filings, amicus briefs, and the agency's decision-making documents. In particular, the briefing documents from *Ohio v. EPA* and the agency's record highlight the benefits delayed by the Supreme Court staying the Plan.

Below, Part IV uses the approach suggested in Part III to analyze the public interest when considering a request for stay. Because stays may be requested in a wide variety of cases, the public interest analysis is fact specific. Therefore, the

County, Texas, Respondents in Opposition to Application for a Stay at 18, *Ohio v. EPA*, 603 U.S. 279 (2024) (No. 23A349, No. 23A350, No. 23A351) [hereinafter Brief for State Respondents].

59. Future research could explore how groups without access to lawyers and the courts can be considered, perhaps through existing judicial notice processes. Relatedly, as an additional avenue for information, Donahue and Herzog suggest that federal appellate courts can request additional evidence via Federal Rule of Appellate Procedure 48 to craft more detailed emergency orders that may be less vulnerable to Supreme Court review. *See* Donahue & Herzog, *supra* note 1, at 20.

60. *See* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1759–61 (2014) (surveying amicus brief literature and finding that the amicus curiae serve an important "educating" role in providing courts with more background and factual information); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 745–47 (2000) (describing another viewpoint that amicus briefs are "largely a nuisance" that burden the judiciary and privilege already powerful interest groups).

61. *See, e.g.*, Declarations of Petitioner-Intervenor Sierra Club, *Ohio v. EPA*, 603 U.S. 279 (2024) (No. 23A349, No. 23A350, No. 23A351, No. 23A384) (providing declarations of individuals sharing their experiences dealing with the impacts of ozone pollution).

sub-headings used in Part IV may only be transferable to other environmental cases. In structuring public interest analyses, courts should simply pay attention to the recurring and significant public interests raised in the case and agency records. Furthermore, each stay analysis must balance the four *Nken* factors. So, even if a government action would have tremendous public benefits, if it is nevertheless clearly unlawful, a court would likely grant a stay request.

A. Human Health

By reducing interstate ozone pollution, the Good Neighbor Plan aims to protect the health of downwind states—clearly a matter of public interest.[62] Ozone exposure can lead to heart disease, lung damage, worsening of asthma, and premature death, among other respiratory illnesses.[63] Long-term exposure can also aggravate and even cause asthma.[64] If implemented, the Plan would annually save an estimated 1,300 lives and reduce over one million incidents of asthma attacks[65] These benefits outweigh compliance costs. The EPA forecasted that compliance costs in 2026 would be about $570 million annually,[66] while "benefits range from $4.3 billion to $15 billion that same year."[67] The state challengers did identify that the public has an interest in "reliable electricity," arguing that the Plan would negatively affect energy supply and result in blackouts.[68] But this risk, which is unsubstantiated, pales in comparison to the improved health outcomes from reducing ozone emissions.[69] The Plan would provide substantial health benefits even when compared to compliance costs and speculative concerns about energy reliability.

---

62. Brief of Amici Curiae the American Thoracic Society and the American Lung Association in Support of Respondents at 7–8, *Ohio v. EPA*, 603 U.S. 279 (2024) (No. 23A349, No. 23A350, No. 23A351, No. 23A384) [hereinafter Brief of American Thoracic Society & American Lung Association].

63. Brief of Robert Perciasepe as Amicus Curiae in Support of Respondent at 7, *Ohio v. EPA*, 603 U.S. 279 (2024) (No. 23A349, No. 23A350, No. 23A351, No. 23A384).

64. *Health Effects of Ozone Pollution*, EPA (last accessed Nov. 16, 2024), https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution.

65. Proof Brief of Public Interest Respondent-Intervenors at 28, *Ohio v. EPA*, 603 U.S. 279 (2024) (No. 23A349, No. 23A350, No. 23A351, No. 23A384); *see also* Brief of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae in Support of Respondents at 14–15, Ohio v. EPA, 603 U.S. 279 (2024) (No. 23A349, No. 23A350, No. 23A351, No. 23A384) ("[T]he monetized health benefits from ozone reductions alone are estimated at up to $9.4 billion per year.").

66. *Id.* [65].

67. *Id.* [65].

68. States' Application for Stay, *supra* note 56, at 27–28.

69. Besides vague gesturing towards energy impacts, the state applicants provided no concrete examples of the risk or explanation how the EPA's rule would impact electricity supply. Indeed, an amicus brief from leading energy engineers and analysts plainly rebuke this argument. *See* Brief of Amici Curiae Grid Experts Benjamin F. Hobbs, Brendan Kirby, Kenneth J. Lutz, & Susan F. Tierney in Support of Respondents, *Ohio v. EPA*, 603 U.S. 279 (2024) (No. 23A349, No. 23A350, No. 23A351, No. 23A384) [hereinafter Grid Experts Brief]. The grid experts point out that there is "[n]o evidence in the record, or that we otherwise know of, suggest[ing] that the Plan will push the grid or grid operators beyond their ability to adapt to such changes and maintain reliable service." *Id.* at 2. Furthermore, grid reliability faces more serious and pressing threats from "extreme weather and aging electricity infrastructure," among other factors, but not the EPA's rule, which in fact "has the potential to alleviate, rather than exacerbate" the risks facing the energy grid. *Id* at 3.

B. Environmental Justice

The Plan would reduce pollution that disproportionately affects communities of color, children, and older adults.[70] Ozone exposure is correlated with socioeconomic and racial inequalities, and people of color are more likely to have existing chronic conditions that aggravate their responses to air pollution.[71] Children of color are also more susceptible to spikes in ozone pollution, and childhood exposures are especially concerning because children's undeveloped respiratory and immune systems are more vulnerable to long-term damage.[72] Older adults, too, face increased risks from ozone exposure as a result of pre-existing conditions and weakened immune systems.[73] Implementing the Good Neighbor Rule would reduce air pollution that affects vulnerable and overburdened populations.[74]

C. Environmental Health and Co-benefits

Compounding these health impacts, ozone pollution damages plant and ecosystem health, and continued fossil fuel reliance intensifies climate change's impacts. Ozone can negatively alter the productivity of crops and trees by stunting plant growth.[75] As for climate change, delaying the transition to cleaner energy sources "will contribute to an increasing frequency of those same extreme weather events that challenge grid reliability."[76] Moreover, while the Plan

---

70. The fundamentals of environmental justice and the policies and mechanisms responsible for environmental injustices are beyond the scope of this Article, but for further reading I suggest starting with Richard L. Revesz, *Air Pollution and Environmental Justice*, 49 ECOLOGY L.Q. 187, 193–95 (2022) (discussing Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENV'T L. 371(2008); Julia C. Rinne & Carol E. Dinkins, *Environmental Justice: Merging Environmental Law and Ethics*, 25 NAT. RES. & ENV'T 3 (2011)).

71. Final Opening Brief of Petitioner-Intervenor Sierra Club at 3, n.3, *Ohio v. EPA*, 603 U.S. 279 (2024) (No. 23-1205) [hereinafter Sierra Club Brief].

72. *Id.* [71] at 18–19; Brief of American Thoracic Society & American Lung Association, *supra* note 62, at 9–10.

73. Brief for State Respondents, *supra* note 58, at 15; *see also* Sierra Club Brief, *supra* note 71, at 3 (citing STATE OF THE AIR: 2022, AMERICAN LUNG ASSOCIATION 26 (2022)).

74. As an aside, the framing of public health benefits as advancing environmental justice and distributional equity make up relatively little of the briefs and amicus documents. Perhaps, framing the benefits in more neutral terms without addressing in detail disproportionate pollution exposure and health impacts was an intentional decision to try to appeal to the Supreme Court Justices. So, while substantial research exists at the intersection of environmental justice and air pollution, this intersection is notably absent from documents presented to the Court. *See, e.g.*, Yanelli Nunez et al*., An environmental justice analysis of air pollution emissions in the United States from 1970 to 2010*, NATURE COMMC'NS 15, 268 (2024).

75. Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36654, 36671 (June 5, 2023) (to be codified at 40 C.F.R. pts. 52, 75, 78, and 97); Respondent EPA's Final Brief at 12, *Ohio v. EPA*, 603 U.S. 279 (2024) (No. 23-1205).

76. Grid Experts Brief, *supra* note 69, at 14. Additionally, scientists at the EPA forecast that climate change will result in increased ozone levels, especially during summer months, along with altered temperatures and atmospheric conditions. Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. at 36670. "Climate change could also contribute to higher than anticipated ozone levels in future years through wildfires and heat waves, which can contribute directly and indirectly to higher levels of ozone." *Id.* at 36750. As a result, "[c]limate change has the

focuses on ozone, it would provide co-benefits such as carbon dioxide emissions reductions and water quality improvements, among others.[77] For example, the Plan would result in reductions of emissions of nitrogen oxides and sulfur oxides, which are linked to the acidification of waterways and biodiversity loss.[78]

Now, while the D.C. Circuit decides the merits of *Ohio v. EPA*, ozone levels will continue to persist at substandard levels across the country, and communities will have one less regulatory safeguard to protect them from the effects of interstate pollution.[79]

CONCLUSION

The Court's stay of the Good Neighbor Plan in *Ohio v. EPA* overlooked the public interest and thus delayed significant public health and environmental benefits, underscoring the need for more detailed public interest consideration in stay analyses. Merging the government and public interests, as the Court did in *Ohio v. EPA*, obfuscates the distinct stakes of each interest and results in inconsistent applications of the *Nken* stay test. Courts should perform context- and fact-specific inquiries that recognize the divergent interests of the government and the public. Careful consideration of the public interest in promoting health and safety is critical in realizing the goals of lawful administrative agency actions and avoiding harmful delays from stays.

This Article was largely written during the Fall 2024 semester. In the present moment of destructive government action, this takeaway must be contextualized, even though the analysis of the four stay factors remains the same. Courts should pay careful attention to health and safety benefits *and harms* raised by the public when assessing whether to stay agency actions. For instance, the government has glaringly adversarial interests in the environmental cases of the present.[80] Giving the public interest factor its due attention will allow courts to fully appreciate the real-world implications of agency actions without relying on the government's characterization of the public interest.

---

potential to *offset* some of the improvements in ozone air quality, and therefore some of the improvements in public health, that are expected from reductions in emissions of ozone precursors." *Id.* at 36670.

77. *See Regulatory Impact Analysis for the Final Federal Good Neighbor Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard*, EPA-452/R-23-001, at 220–47 (March 2023) (discussing the other climate co-benefits).

78. *See id.* [77] at 240–41.

79. As of May 2, 2025, the D.C. Circuit Court of Appeals decided to hold the case in abeyance because the EPA told the court it was reconsidering the Good Neighbor Plan and planning to propose a new rule in 2026. *See generally Utah v. EPA*, No. 23-1157, 2025 WL 1354371 (D.C. Cir. May 2, 2025).

80. *See* Alex Lemonides et al., *Tracking the Lawsuits Against Trump's Agenda*, N.Y. TIMES, https://www.nytimes.com/interactive/2025/us/trump-administration-lawsuits.html (last updated June 6, 2025) (compiling the lawsuits challenging the second Trump administration's climate and environment policies).