

## HALTING ADMINISTRATIVE ACTION IN THE SUPREME COURT

“It takes time to decide a case on appeal.”<sup>1</sup> Time can be the helpful friend or the potent foe of a litigant. It depends. Will the litigant’s favored legal position, or his opponent’s, govern his legal rights and obligations as his case plods through the appellate process? When federal agencies are on one side of the “v,” this question becomes important not only for individual litigants, but also for the content of federal law: Will an agency regulation stay in effect as the plaintiff’s challenge to it slowly works its way through the federal courts?

The Supreme Court has not articulated a clear standard for deciding whether to allow agency regulations to stay intact over the course of litigation. When a litigant asks the Court to temporarily halt agency action while he mounts his merits challenge to that action, the litigant is requesting a form of preliminary relief. The Supreme Court issues two primary forms of preliminary relief: stays and injunctions.<sup>2</sup> The Court has not answered the question whether its test for a stay or its test for an injunction should govern its analysis of preliminary requests to halt administrative action. This Note provides an answer.

Part I introduces the central relevant statute, 5 U.S.C. § 705. The Administrative Procedure Act<sup>3</sup> (APA) structures the exercise of executive power by administrative agencies and contains provisions regarding judicial review of administrative action. Section 705 is one such provision. It governs the issuance of preliminary relief pending full review of agency action.<sup>4</sup> After defining stays and injunctions and noting the differences between the two, Part I argues that § 705 offers reviewing federal courts a choice between issuing stays and injunctions when temporarily halting administrative action.

Part II lays out the existing standards for the Court’s granting of stays and injunctions in order to determine which standard should govern the Supreme Court’s issuance of § 705 relief. The Court has not been consistent about how clear the applicant’s legal rights must be to warrant a preliminary injunction.<sup>5</sup> Part II defends the traditional position that applicants must clear an especially high bar to obtain injunctive relief from the Supreme Court.

Finally, Part III argues that the traditional heightened standard for injunctive relief, as defended in Part II, should govern § 705 relief

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<sup>1</sup> *Nken v. Holder*, 556 U.S. 418, 421 (2009).

<sup>2</sup> See Greg Goelzhauser, *The Applications Docket*, 58 GA. L. REV. 97, 115, 117 (2023) (noting that a majority of the Court’s applications docket consists of requests for stays and injunctions).

<sup>3</sup> See 5 U.S.C. §§ 551–559, 701–706.

<sup>4</sup> *Id.* § 705.

<sup>5</sup> Compare *Respect Me. PAC v. McKee*, 562 U.S. 996 (2010) (adopting a heightened standard), with *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam) (making no mention of a heightened standard).

regardless of whether the Court issues it in the form of a stay or an injunction. The considerations counseling in favor of adhering to such a heightened standard apply with full force to § 705 stays and § 705 injunctions alike. The Court’s precedents do not counsel otherwise. In fact, there is long-standing precedent in support of Supreme Court deference to lower courts when those courts decline to stay agency action or enjoin an agency.

### I. 5 U.S.C. § 705: OFFERING REVIEWING FEDERAL COURTS A CHOICE BETWEEN STAYING AGENCY ACTION AND ENJOINING AGENCIES

The APA imposes a host of timing and procedural requirements on agencies’ exercise of executive power. It also subjects agency action to judicial review. Section 706 empowers reviewing courts to definitively “set aside” illegal agency action.<sup>6</sup> Section 705 authorizes reviewing courts to temporarily halt agency action; it empowers courts to “issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.”<sup>7</sup> During oral argument, at least one Justice has referred to relief under § 705 as “an injunction.”<sup>8</sup> At times, the Court has issued preliminary relief against agency action and termed that relief a “stay” without explaining its use of that term,<sup>9</sup> which is traditionally associated with the temporary suspension of judicial orders. Most importantly, the Court has never explained what standard guides its issuance of § 705 relief.

Stays and injunctions are similar. As the Court explained in *Nken v. Holder*,<sup>10</sup> “[b]oth can have the practical effect of preventing some action before the legality of that action has been conclusively determined.”<sup>11</sup> But stays and injunctions achieve that same real-world result in importantly distinct ways. An injunction runs directly against a party.<sup>12</sup> It is “a means by which a court tells someone what to do or not to do,”<sup>13</sup>

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<sup>6</sup> 5 U.S.C. § 706.

<sup>7</sup> *Id.* § 705.

<sup>8</sup> Transcript of Oral Argument at 40, *Whitman v. Dep’t of Transp.*, 547 U.S. 512 (2006) (No. 04-1131) (statement of Breyer, J.), <https://www.supremecourt.gov/pdfs/transcripts/2005/04-1131.pdf> [<https://perma.cc/9FMY-HUD6>] (positing that petitioner “can go in . . . under 705 of the APA and ask for an injunction”).

<sup>9</sup> *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 666 (2022) (per curiam) (staying a Department of Labor rule); *West Virginia v. EPA*, 577 U.S. 1126, 1126 (2016) (staying the EPA’s Clean Power Plan); *West Virginia v. EPA*, 142 S. Ct. 2587, 2604 (2022) (observing that the Court had “granted a stay” of the Clean Power Plan, thereby “preventing the rule from taking effect”); *Coleman v. PACCAR Inc.*, 424 U.S. 1301, 1301, 1308 (1976) (Rehnquist, J., in chambers) (“vacat[ing]” lower court’s “stay” of Department of Transportation motor vehicle safety standard).

<sup>10</sup> 556 U.S. 418 (2009).

<sup>11</sup> *Id.* at 428.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

and is thus a form of in personam relief.<sup>14</sup> Although a stay can be conceived of as “a kind of injunction,”<sup>15</sup> a stay does not run directly against a party. Instead, a stay “temporarily suspend[s] the source of authority to act — the order or judgment in question — not by directing an actor’s conduct.”<sup>16</sup>

In *Nken*, the Supreme Court assessed whether a petition to “stay” a Board of Immigration Appeals (BIA) removal order amounted to a request for a stay or an injunction.<sup>17</sup> The practical stakes of this distinction were particularly high because a statute — the Illegal Immigration Reform and Immigrant Responsibility Act of 1996<sup>18</sup> (IIRIRA) — required a showing of “clear and convincing evidence that the entry or execution of [the BIA removal] order [was] prohibited as a matter of law” in order to “enjoin the removal of an alien” — that is, to obtain injunctive relief.<sup>19</sup> The Court concluded that the traditional, less stringent standard for a “stay” of a lower court order should govern, thereby saving the petitioner from having to clear IIRIRA’s higher hurdle for injunctions.<sup>20</sup> “An alien seeking a stay of removal . . . does not ask for a coercive order against the Government” (an injunction), “but rather for the temporary setting aside of the source of the Government’s authority to remove” (a stay).<sup>21</sup> The fact that the underlying authority being set aside was an exercise of executive power rather than judicial power was of no moment; the touchstone under *Nken* for distinguishing between a stay and an injunction is the difference between (1) suspension of underlying authority (judicial or executive) and (2) a direct order to a party, like the executive, to take or not to take some action.<sup>22</sup>

When read in light of *Nken*’s distinction between stays and injunctions, § 705 countenances both “stays” of administrative action and “injunctions” running against administrative agencies.<sup>23</sup> Section 705 empowers reviewing courts to postpone the effective date of agency action; the court may suspend the agency’s underlying authority for some period of time. That is a stay. To use *Nken*’s own phrasing: in pushing back the effective dates of agency actions under § 705, a reviewing court

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<sup>14</sup> *Id.*

<sup>15</sup> Brief for Respondent at 14, *Nken*, 556 U.S. 418 (No. 08-681), 2009 WL 45980, at \*14 (quoting *Stay*, BLACK’S LAW DICTIONARY (6th ed. 1990)); see also *Nken*, 556 U.S. at 441–42 (Alito, J., dissenting) (quoting same).

<sup>16</sup> *Nken*, 556 U.S. at 428–29 (majority opinion).

<sup>17</sup> *Id.* at 425–26.

<sup>18</sup> Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of the U.S. Code).

<sup>19</sup> 8 U.S.C. § 1252(f)(2) (emphasis added).

<sup>20</sup> *Nken*, 556 U.S. at 433.

<sup>21</sup> *Id.* at 429.

<sup>22</sup> See *id.* at 428–29, 429 n.\*.

<sup>23</sup> See Frank Chang, Essay, *The Administrative Procedure Act’s Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 GEO. WASH. L. REV. 1529, 1548 (2017).

“temporarily divest[s]” agency rules and orders “of enforceability.”<sup>24</sup> As Professor Mila Sohoni writes: “There is no question that this judicial power to preserve the status quo [under § 705] was understood to encompass the power to *suspend* a rule on a wholesale basis . . . .”<sup>25</sup> Section 705 thus allows a reviewing court to alter the underlying source of the agency’s legal authority. The administrative order or rule that once provided the agency with legal authority to take action at a given time no longer provides the agency with said authority to take said action at said time. In other words, § 705 empowers reviewing courts to stay agency action.

Section 705 also empowers courts to issue all “necessary and appropriate process” to “preserve status or rights” as challenges to agency action proceed.<sup>26</sup> That authority includes courts’ traditional equitable authority to issue injunctions. In his treatise titled *Judicial Control of Administrative Action*, Professor Louis Jaffe made exactly this point when he likened § 705 to the All Writs Act<sup>27</sup>:

It is important . . . to keep in mind that the power granted to the court by Section 10(d) [(§ 705)] is not limited to the power to grant stays of administrative orders. The court is also authorized “to preserve status or rights pending conclusion of the review proceedings.” Section 10(d) thus relates the power granted under the All Writs statute to the review of administrative orders, at least while review is actually pending. As we have seen, this power can be exercised to *command*, as well as to *prohibit*.<sup>28</sup>

In sum, reviewing courts may issue either stays or injunctions under § 705. Whichever route a court chooses, the practical effect is the same: the agency will be unable to enforce its order or rule for the time being. The critical question is which standard should guide the Supreme Court’s issuance of this relief.

## II. THE STANDARDS FOR THE SUPREME COURT’S ISSUANCE OF STAYS AND INJUNCTIONS

Litigants have begun fighting over whether relief from the Supreme Court under § 705 should be governed by the standard for stays or the more stringent standard that has traditionally governed preliminary injunctions. The Solicitor General consistently argues that plaintiffs’ applications to halt administrative action amount to requests for preliminary injunctive relief, such that the traditional heightened standard

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<sup>24</sup> *Nken*, 556 U.S. at 428; see also *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 254 (5th Cir. 2023) (explaining that a section 705 stay “temporarily voids the challenged authority” (emphasis added)).

<sup>25</sup> Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1157–58 (2020) (emphasis added).

<sup>26</sup> 5 U.S.C. § 705.

<sup>27</sup> 28 U.S.C. § 1651.

<sup>28</sup> LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 661–62 (1965) (emphasis added) (quoting 5 U.S.C. § 705).

for injunctions applies.<sup>29</sup> In response, plaintiffs typically contend that “[a] heightened standard does not apply to [their] stay request” because they “seek a stay of the Rule’s effectiveness pending judicial review, as expressly authorized by 5 U.S.C. § 705. The standard for granting a stay — not an injunction — thus applies . . . .”<sup>30</sup>

To set up the resolution of this dispute in Part III, this Part surveys the case law on the stay and preliminary injunction standards. The discussion unearths the Supreme Court’s underlying rationales for the time-honored principle of imposing a higher bar on requests for injunctive relief. Those rationales control Part III’s answer to the critical question of which standard should govern the issuance of § 705 relief from the Supreme Court.

### A. *The Standard for Stays*

To obtain a stay of a lower court order from the Supreme Court, an applicant traditionally “must demonstrate (1) ‘a reasonable probability’ that [the Supreme Court] will grant certiorari, (2) ‘a fair prospect’ that the Court will then reverse the decision below, and (3) ‘a likelihood that irreparable harm [will] result from the denial of a stay.’”<sup>31</sup> And “[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the [stay] applicant and to the respondent.”<sup>32</sup> This test, courtesy of *Hollingsworth v. Perry*,<sup>33</sup> is the “most common formulation of the [Supreme Court’s] standard of review” for stay applications.<sup>34</sup> It includes consideration of certworthiness. Although some dissenting Justices in recent years have instead applied the standard lower court test for issuing stays laid out in *Nken*,<sup>35</sup> which does not include a certworthiness consideration, “[t]he Court has

<sup>29</sup> See, e.g., Response in Opposition to the Applications for a Stay at 16, *Ohio v. EPA*, No. 23A349 (Oct. 30, 2023), 2023 WL 7221236, at \*16 (quoting, inter alia, *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010); *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers)); Response in Opposition to the Applications for a Stay at 16, *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661 (2022) (No. 21A244), 2021 WL 8945197, at \*16; cf. *Coleman v. PACCAR Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers) (addressing Transportation Secretary’s argument that appeals court’s “stay” of Department of Transportation motor vehicle safety standard was “equivalent to a preliminary injunction”).

<sup>30</sup> Reply Brief in Support of Emergency Application for Stay of Final Agency Action During Pendency of Petitions for Review at 3, *Kinder Morgan, Inc. v. EPA*, No. 23A350 (Nov. 1, 2023), 2023 WL 7221170, at \*3 (citing *Nken*, 556 U.S. at 428–29).

<sup>31</sup> *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (second alteration in original).

<sup>32</sup> *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); see also *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)).

<sup>33</sup> 558 U.S. 183.

<sup>34</sup> Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court’s Emergency Stays*, 44 HARV. J.L. & PUB. POL’Y 827, 839 (2021).

<sup>35</sup> *Nken*, 556 U.S. at 425–26, 434; see, e.g., *Smith v. Hamm*, 144 S. Ct. 414, 415 (2024) (mem.) (Sotomayor, J., dissenting from the denial of application for stay and denial of certiorari); *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (mem.) (Kagan, J., dissenting from grant of application for stays).

never explicitly used the *Nken* formulation in granting or denying stay applications.”<sup>36</sup>

### B. *The (Unclear) Standard for Injunctions*

To obtain a preliminary injunction, a plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”<sup>37</sup> It is unclear how strong an applicant’s case must be in order to obtain preliminary injunctive relief from the Supreme Court. There are two conflicting lines of case law on this question — one old, one new. The older line, housed in single-Justice, in-chambers opinions and an unsigned order of the full Court, favors applying a higher standard to the issuance of injunctions against litigants than to the issuance of stays of judicial orders. These cases require that an applicant’s rights — his likelihood of success on the merits, in effect — be especially clear. Such precedents reason that it should be harder to convince the Court to issue a preliminary injunction than a stay because that injunction would give litigants relief that lower courts refused to provide and would itself alter the legal status quo. A distinct, newer line of case law, found primarily in very recent per curiam opinions, does not apply any such heightened standard to the issuance of preliminary injunctive relief. The Supreme Court has not yet resolved the tension between these two lines of case law. Having laid bare this tension, this Part defends the application of a heightened standard to such requests. It does so on the grounds of history, tradition, and common sense.

1. *The Traditional Heightened Standard for Preliminary Injunctive Relief.* — The first, older line of case law provides that the Court’s test for granting preliminary injunctions sets out a much higher bar for litigants to clear than the test for granting stays. In an unsigned order in *Respect Maine PAC v. McKee*,<sup>38</sup> the full Court wrote that a successful request for injunctive relief “‘demands a significantly higher justification’ than a request for a stay 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.’”<sup>39</sup>

Tracing the lineage of this principle — that preliminary injunctive relief is more difficult to obtain from the Supreme Court than a stay — makes clear that it is grounded in respect for the sound discretion of lower courts and a distaste for judicial upending of the legal status quo. In articulating this heightened standard, *Respect*

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<sup>36</sup> McFadden & Kapoor, *supra* note 34, at 841.

<sup>37</sup> *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

<sup>38</sup> 562 U.S. 996 (2010).

<sup>39</sup> *Id.* at 996 (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

*Maine PAC* quoted Justice Scalia’s in-chambers opinion in *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission*.<sup>40</sup> There, Justice Scalia wrote: “[I]ssuance of such a writ [of injunction] — which, unlike a . . . stay, does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts — demands a significantly higher justification than that described in the . . . stay cases cited by the applicant.”<sup>41</sup> That bar is especially high in light of the fact that obtaining a stay is itself no easy task. In the words of Justice Powell: “The judgment of the court below is presumed to be valid, and absent unusual circumstances [the Supreme Court] defer[s] to the decision of that court not to stay its judgment.”<sup>42</sup>

In reasoning that obtaining injunctive relief “demands a significantly higher justification” than obtaining a stay, Justice Scalia in *Ohio Citizens for Responsible Energy* drew on then-Justice Rehnquist’s in-chambers opinion in *Communist Party of Indiana v. Whitcomb*.<sup>43</sup> There, then-Justice Rehnquist explained that although the petitioners had labelled their application a “stay,” they were really seeking a “partial summary reversal” of the lower court’s order in the form of a “mandatory injunction.”<sup>44</sup> For such an injunction to “be available, the applicants’ right to relief must be *indisputably clear*.”<sup>45</sup>

Other Justices have since reiterated the “indisputably clear” standard, though the full Court has not yet endorsed it. For example, concurring in the denial of an application for injunctive relief in *South Bay United Pentecostal Church v. Newsom*,<sup>46</sup> Chief Justice Roberts first quoted verbatim *Respect Maine PAC*’s observation that a heightened standard governed requests for injunctive relief.<sup>47</sup> He then quoted the *Supreme Court Practice* treatise, itself quoting then-Justice Rehnquist’s “indisputably clear” standard: “This power [to issue injunctive relief] is used where ‘the legal rights at issue are indisputably clear’ and, even

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<sup>40</sup> 479 U.S. 1312 (Scalia, J., in chambers).

<sup>41</sup> *Id.* at 1313.

<sup>42</sup> *Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers); *see also* *United States ex rel. Knauff v. McGrath* (Jackson, Circuit Justice, 1950), 96 CONG. REC. app. at 3751 (1950) (statement of Rep. Franklin D. Roosevelt, Jr.) (“As Circuit Justice for the Second Circuit, it is my almost invariable practice to refuse stays which the Court of Appeals or its judges have denied. This is because they are closer to the facts, have heard the merits fully argued, and because I have confidence that they would grant stays in worthy cases.”), *quoted in* *Breswick & Co. v. United States*, 75 S. Ct. 912, 915 n.\* (1955) (Harlan, J., in chambers); *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers) (lower court’s denial of stay is “presumptively correct”).

<sup>43</sup> 409 U.S. 1235 (1972) (Rehnquist, J., in chambers).

<sup>44</sup> *Id.* at 1235.

<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> 140 S. Ct. 1613 (2020).

<sup>47</sup> *Id.* at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).

then, ‘sparingly and only in the most critical and exigent circumstances.’<sup>48</sup> Similar examples abound.<sup>49</sup>

A skeptic might ask whether, even if the Justices may *say* that the standard for obtaining injunctive relief is higher than the already-exacting standard for obtaining a stay, the fact that the Court’s prevailing test for granting a stay requires the applicant to clear the additional (and exceptionally high) hurdle of certworthiness renders the stay standard more stringent in practice. For example, the existence of a circuit split is a key consideration that counsels in favor of granting certiorari,<sup>50</sup> yet given the time-sensitive nature of requests for emergency relief against new government action, a relevant circuit split will rarely have time to take shape.<sup>51</sup>

In the unlikely event that such a split does emerge, that development helps a stay applicant’s chances of obtaining preliminary relief yet hurts an injunctive relief applicant’s chances. Consider Chief Justice Roberts’s in-chambers opinion in *Lux v. Rodrigues*.<sup>52</sup> There, the petitioner was running as an independent candidate for Congress.<sup>53</sup> State law placed certain restrictions on his ability to collect out-of-district signatures to obtain ballot access.<sup>54</sup> The petitioner alleged that these restrictions violated his First Amendment rights, and he filed an application for a preliminary injunction to require the state elections board to count the out-of-district signatures he had collected.<sup>55</sup> In appealing the district court’s denial of his request for injunctive relief, the petitioner pointed to an emergent circuit split.<sup>56</sup> The Chief Justice responded that the fact that “the courts of appeals appear to be reaching divergent results in this area” counseled *against* granting the petitioner a preliminary injunction: given that split, “it cannot be said that his right to relief is ‘indisputably clear.’”<sup>57</sup>

The point here is that even when a circuit split emerges that would help support an application for stay relief, that rare development will cut *against* the granting of an application for injunctive relief. The fact that certworthiness does not factor into the injunctive relief inquiry

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<sup>48</sup> *Id.* (quoting STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 17.4, at 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases)).

<sup>49</sup> *See, e.g.*, *Chrysafis v. Marks*, 141 S. Ct. 2482, 2483 (2021) (Breyer, J., dissenting from grant of application for injunctive relief); *Wheaton Coll. v. Burwell*, 573 U.S. 958, 964 (2014) (Sotomayor, J., dissenting); *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers); *Lux v. Rodrigues*, 561 U.S. 1306, 1306–07 (2010) (Roberts, C.J., in chambers).

<sup>50</sup> SUP. CT. R. 10(a).

<sup>51</sup> *See generally* Note, *The Role of Certiorari in Emergency Relief*, 137 HARV. L. REV. 1951 (2024).

<sup>52</sup> 561 U.S. 1306 (Roberts, C.J., in chambers).

<sup>53</sup> *Id.* at 1306.

<sup>54</sup> *Id.* at 1306–07.

<sup>55</sup> *See id.* at 1307.

<sup>56</sup> *Id.* at 1308.

<sup>57</sup> *Id.*



helps clarify that it is different in kind from the stay inquiry. When confronted with a request for a preliminary injunction withheld by lower courts, certworthiness is neither here nor there. Rather, in this context, the Supreme Court has been in the business of correcting grievous errors by the lower courts. Perhaps because the Supreme Court is “not a court of error correction,”<sup>58</sup> it has traditionally proven loathe to provide such relief.<sup>59</sup> Hence the Court’s repeated invocation of the exceptionally high bar to obtaining preliminary injunctive relief on appeal when the lower courts have withheld it. The lower court’s error must be clear. Thus, the skeptic ought to take the Court at its word: injunctive relief really has been subject to a uniquely high bar, and the great height of that hurdle stems from the Court’s due regard for the discretion of lower courts. Moreover, as reiterated in then-Justice Rehnquist’s and Justice Scalia’s opinions, that respect for lower courts is complemented in the injunctive relief context by a wariness to upset the legal status quo during the preliminary stages of litigation. While a request for a stay asks the Court to undo a lower court’s own alteration of the legal status quo, an application for injunctive relief requests that the Supreme Court itself step in and upend the legal status quo where the lower courts refused.

2. *Cases Not Adhering to the Traditional Heightened Standard.* — The Justices’ application of a heightened standard to the provision of injunctive relief has not always been a model of consistency.<sup>60</sup> But in recent years in particular, the Court at times has not adhered to a stringent standard at all — let alone then-Justice Rehnquist’s “indisputably clear” standard — in issuing injunctive relief.<sup>61</sup> In this second, novel line of case law, the Court has focused almost entirely on the merits of the relief application.<sup>62</sup> Moreover, the Court has arguably articulated and relied upon new substantive legal tests when granting relief, such that the merits of the successful applicant’s claim could not have been “indisputably clear” to begin with.<sup>63</sup> Most prominently, in *Tandon v. Newsom*,<sup>64</sup> the Court granted plaintiffs’ request to enjoin the

<sup>58</sup> *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (statement of Alito, J., respecting the denial of certiorari).

<sup>59</sup> See Amici Curiae Response in Opposition to Application for Writ of Injunction at 1 n.1, *Respect Me. PAC v. McKee*, 562 U.S. 996 (2010) (No. 10-A362) (finding that at that time the Court had not issued a preliminary injunction pursuant to the All Writs Act since 1987 and that there were “only seven reported cases in which such an application had been granted”).

<sup>60</sup> See, e.g., *Am. Trucking Ass’ns v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers).

<sup>61</sup> For a fuller discussion of this phenomenon, see generally Note, *The Role of Certiorari in Emergency Relief*, *supra* note 51.

<sup>62</sup> See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam).

<sup>63</sup> Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 735 (2022); see Amici Curiae Response in Opposition to Application for Writ of Injunction, *supra* note 59, at 4 (“[A] legal right cannot be ‘indisputably clear’ where it is ‘novel or uncertain.’” (quoting *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers))).

<sup>64</sup> 141 S. Ct. 1294 (per curiam).

enforcement of California's COVID-19 at-home gathering restrictions as violative of the First Amendment's free exercise guarantees.<sup>65</sup> The Ninth Circuit had refused to grant such relief.<sup>66</sup> In issuing the injunction, the Supreme Court made no mention of an "indisputably clear" standard or anything akin to it. Professor Stephen Vladeck argues that the Court even articulated a "new understanding" of the Free Exercise Clause in issuing the injunctive relief.<sup>67</sup> Granted, critics of this development like Vladeck are incorrect to state that "the Court had explained for decades" that such preliminary injunctive relief "depended upon the violation of rights that were already 'indisputably clear.'"<sup>68</sup> As explained above, the full Court has never adopted then-Justice Rehnquist's particularly stringent "indisputably clear" standard. Still, the Court's recent decisions that seem to require no heightened showing, let alone an indisputably clear one, are in tension with the older line of case law summarized above.

3. *In Support of the Heightened Standard.* — The Supreme Court should hold fast to the principle that a heightened showing is necessary for it to issue preliminary injunctive relief. That principle is firmly grounded in our law. It also makes sense.

Then-Justice Rehnquist and Justice Scalia were not striking out into uncharted territory when they stressed that litigants must clear an especially high bar in convincing the Court to grant them injunctive relief. In 1968, for example, when confronted with a request for temporary injunctive relief to force Ohio to put George Wallace on the presidential ballot, Justice Stewart wrote that such relief should be granted "sparingly and only in the most critical and exigent circumstances."<sup>69</sup>

More generally, the principle that granting preliminary injunctive relief is not in the bailiwick of an appellate court, including the Supreme Court, is deeply rooted in the history and tradition of the federal courts' exercise of their equitable powers. In the 1920 case of *Meccano, Ltd. v. Wanamaker*,<sup>70</sup> the Supreme Court observed that "[t]he correct general doctrine" is that the decision to grant a preliminary injunction "rests in [the] sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion."<sup>71</sup> In *Meccano*, the Second Circuit had overturned the Southern District of New York's grant of a preliminary injunction to halt alleged infringement of Meccano's patent for mechanical toys.<sup>72</sup> The district

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<sup>65</sup> *Id.* at 1297.

<sup>66</sup> *Id.* at 1296.

<sup>67</sup> Vladeck, *supra* note 63, at 735.

<sup>68</sup> *Id.*

<sup>69</sup> *Williams v. Rhodes*, 89 S. Ct. 1, 2 (1968) (Stewart, J., in chambers).

<sup>70</sup> 253 U.S. 136 (1920).

<sup>71</sup> *Id.* at 141.

<sup>72</sup> *Id.* at 137–38, 140.

court had “very naturally” relied upon the Southern District of Ohio’s reasoning in granting Meccano a preliminary injunction in a nearly identical suit.<sup>73</sup> As the Southern District of New York’s grant of the injunction was being appealed to the Second Circuit, the Sixth Circuit reversed the Southern District of Ohio’s grant of preliminary injunctive relief.<sup>74</sup> The Second Circuit followed suit vis-à-vis the Southern District of New York, whose grant of injunctive relief lacked any “adequate ground.”<sup>75</sup> On appeal, the Supreme Court declined to upend the Second Circuit’s considered judgment: “The informed judgment of the Circuit Court of Appeals exercised upon a view of all relevant circumstances is entitled to great weight. And, except for strong reasons, this court will not interfere with its action.”<sup>76</sup>

In advocating deference to lower courts’ determinations regarding the grant or denial of preliminary injunctive relief, *Meccano* drew on a bevy of circuit court precedents. For example, *Meccano* relied on the 1903 Fourth Circuit case of *Rahley v. Columbia Phonograph Co.*<sup>77</sup> There, the court expressly “adopt[ed]” the reasoning of an 1897 Ninth Circuit case, *Southern Pacific Co. v. Earl*,<sup>78</sup> because it was “so well stated.”<sup>79</sup> The Ninth Circuit had written:

Inasmuch as the granting of an injunction pendente lite [a preliminary injunction] is committed to the discretion of the trial court, it necessarily follows — and so the authorities uniformly hold — that upon an appeal from such an order the only question which the appellate court is called upon to determine is whether the court, in making such an order, abused its discretion.<sup>80</sup>

Therefore, an appellate court would not upend a lower court’s order granting or denying preliminary injunctive relief “unless it appears, after a consideration of all the evidence upon which [the lower court’s] action was based, that [its] legal discretion to grant or withhold the order was improvidently exercised.”<sup>81</sup> The Supreme Court would subsequently employ the same “improvident exercise” standard that *Southern Pacific Co.* did, while also citing *Meccano*, in the 1929 case of *United Fuel Gas Co. v. Public Service Commission of West Virginia*.<sup>82</sup> There, the Court stated that a lower court order “denying an interlocutory injunction will

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<sup>73</sup> *Id.* at 140; *see id.* at 137–38.

<sup>74</sup> *Id.* at 138.

<sup>75</sup> *Id.* at 140.

<sup>76</sup> *Id.* at 141.

<sup>77</sup> 122 F. 623 (4th Cir. 1903).

<sup>78</sup> 82 F. 690 (9th Cir. 1897).

<sup>79</sup> *Rahley*, 122 F. at 625.

<sup>80</sup> *S. Pac. Co.*, 82 F. at 692.

<sup>81</sup> *Id.*

<sup>82</sup> 278 U.S. 322 (1929).

not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion.”<sup>83</sup>

Such appellate court deference to lower courts’ conclusions regarding preliminary injunctive relief has its roots in the statutory development of federal appellate jurisdiction. In support of this deferential approach, *Meccano* also cited the 1912 Fifth Circuit case of *Texas Traction Co. v. Barron G. Collier, Inc.*<sup>84</sup> There, the court noted that prior to the passage of the Evarts Act of 1891,<sup>85</sup> which instituted the modern federal circuit court system,<sup>86</sup> “the granting of [preliminary injunctions] was in the absolute discretion of the primary court; no appeal being allowed.”<sup>87</sup> In light of this history, federal courts construed the Evarts Act to provide “that the granting of an injunction pending the suit is in the sound discretion of the trial court, and that its order will not be disturbed on appeal unless it is violative of the rules of equity, or unless there has been an abuse of discretion.”<sup>88</sup>

In sum, imposing a heightened standard on the issuance of injunctive relief is deeply rooted in traditional federal court and Supreme Court practice. It also makes good sense. Time helps judges exercise sound judgment.<sup>89</sup> So do extensive briefing and oral argument. At a preliminary stage in the litigation, when the normal aides of an appellate court’s reasoning — time, comprehensive briefing, the back and forth of oral argument — are lacking, it makes sense for the appellate court to be wary of interfering with the lower court’s judgment. To upset the lower court’s judgment, more is needed than bare disagreement with its conclusion.<sup>90</sup>

The federal courts have long shared this intuition and its underlying rationale. In *Rahley*, upon appeal of a district court’s grant of a preliminary injunction, the court of appeals expressly stated that its task “at this stage is . . . to decide . . . whether the court below, having the discretion to grant or refuse the temporary injunction, has in this instance abused its discretion.”<sup>91</sup> Arguments merely going to “the merits of the

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<sup>83</sup> *Id.* at 326 (citing, inter alia, *Meccano, Ltd. v. Wanamaker*, 253 U.S. 136, 141 (1920)); see also *Prendergast v. N.Y. Tel. Co.*, 262 U.S. 43, 50–51 (1923) (citing same); *Nat’l Fire Ins. Co. of Hartford v. Thompson*, 281 U.S. 331, 338 (1930) (same); *Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 290 (1940) (same).

<sup>84</sup> 195 F. 65 (5th Cir. 1912).

<sup>85</sup> Act of March 3, 1891 (Evarts Act), ch. 517, 26 Stat. 826 (codified in scattered sections of 28 U.S.C.).

<sup>86</sup> *Id.* § 2, 26 Stat. at 826–27.

<sup>87</sup> *Tex. Traction Co.*, 195 F. at 66.

<sup>88</sup> *Id.*

<sup>89</sup> Cf. GREG WEINER, *MADISON’S METRONOME: THE CONSTITUTION, MAJORITY RULE, AND THE TEMPO OF AMERICAN POLITICS* 64 (2012) (characterizing James Madison’s political thought as holding that “[t]ime is a passive mechanism” whose passage safeguards “the normal and healthy condition in which people are able to use reason”).

<sup>90</sup> See *Tex. Traction Co.*, 195 F. at 66 (“The appellate court is not to decide as to what it would have done as to allowing the injunction, but it must recognize that the law has imposed on the primary court the responsibility of the exercise of this power . . .”).

<sup>91</sup> *Rahley v. Columbia Phonograph Co.*, 122 F. 623, 625 (4th Cir. 1903).

controversy” were of no moment, for those “could very properly be discussed if the case were here *after a full hearing*.”<sup>92</sup>

*Rahley*’s insight retains its force today. When a litigant asks the Supreme Court for a preliminary injunction refused by lower courts, he is asking the Court to upend a lower court’s judgment not to grant him preliminary relief. He requests that the Court do so without the help of time, full briefing, and argument. And he makes this request in spite of the fact that lower courts have historically been in the driver’s seat when deciding whether to grant such preliminary relief. Such a litigant should be required to clear a higher bar than merely a straightforward merits assessment. A standard guided by language like “indisputably clear,” “demonstrable error,” or “abuse of discretion” is appropriate.

### III. SECTION 705 RELIEF: WHICH STANDARD SHOULD GOVERN?

Whether the Court opts to issue a § 705 stay or a § 705 injunction, the traditional, heightened standard for injunctive relief should govern.

When litigants seek temporary relief from agency action under § 705 from the Supreme Court, even if that relief technically takes the form of a stay under the *Nken* framework, the considerations counseling in favor of a heightened injunctive relief standard hold true: the sought-after relief (1) will not have been granted by lower courts and (2) would amount to a judicial alteration of the legal status quo. Therefore, the insights from the Supreme Court’s decision in *Meccano*, its nineteenth- and early twentieth-century circuit court analogues, then-Justice Rehnquist’s and Justice Scalia’s in-chambers opinions, and the full Court’s order in *Respect Maine PAC* sounding in a restrained conception of an appellate court’s role at a preliminary stage in the litigation all hold true. Those insights should guide the Court’s standard for granting preliminary relief under § 705.

The Court should not allow labels (that is, whether it technically opts for a “stay” or an “injunction”) to govern its analysis. It would be odd for one standard to govern preliminary injunctive relief running against executive branch agencies and a distinct, more relaxed standard to govern “stays” of the authority of those same agencies: § 705 itself countenances both forms of relief, and the practical effect of each form of relief is the same (the agency cannot take the action in question for the time being).

#### A. *Nken Is Not an Obstacle*

Although *Nken* is the source of the conclusion that postponing agency action under § 705 technically constitutes a stay, *Nken* does not preclude the distinct conclusion that the Supreme Court should

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<sup>92</sup> *Id.* (emphasis added).

nonetheless adhere to its traditional, heightened injunctive relief standard when issuing § 705 stays and § 705 injunctions alike.

*Nken* was a case about statutory interpretation: Did 8 U.S.C. § 1252(f)(2)'s restrictive standards for injunctive relief apply to the petitioner's request for a "stay" of the BIA's removal order or not? The Court held that they did not.<sup>93</sup> *Nken* was concerned with interpreting a precise statutory term: the word "enjoin."<sup>94</sup> In enacting the IIRIRA, Congress made a choice. It imposed stringent standards on the issuance of court orders "enjoin[ing]" the removal of aliens.<sup>95</sup> It did not impose such standards on *staying* removals. The Court enforced the precise statutory language upon which members of Congress agreed.<sup>96</sup>

In enacting § 705 as part of the APA, Congress in 1946 made no such precise choice; it drew no sharp distinction between stays of agency actions and injunctions against agencies. As explained above, § 705 is best read as authorizing reviewing courts to choose between stays or injunctions. Moreover, § 705 was authored in an era when the distinction between "stays" and "injunctions" was not hard and fast. Consider, for example, the 1946 Northern District of Ohio case of *Avon Dairy Co. v. Eisaman*.<sup>97</sup> At one point in the opinion, the court characterized the relief that the plaintiffs were seeking pursuant to § 705 as a "preliminary injunction."<sup>98</sup> Later in the opinion, the court characterized that same relief as an "application for stay."<sup>99</sup> The Northern District of Ohio was not alone. Professor Jaffe sometimes characterized § 705 relief as a "stay," and other times he characterized it as a "preliminary injunction."<sup>100</sup> And as late as 1970, the Solicitor General's Office was toggling back and forth between the language of "injunctions" and "stays" when describing relief under § 705.<sup>101</sup>

The fact that early APA-era courts and commentators blurred stays and injunctions when interpreting § 705 makes sense; so did the APA's drafters. The *Attorney General's Manual on the Administrative Procedure Act* is a case in point. The Manual wrote that § 705 "prescribes no procedure for the exercise of the power which it confers upon

<sup>93</sup> *Nken v. Holder*, 556 U.S. 418, 433 (2009).

<sup>94</sup> *Id.* at 425–26, 428.

<sup>95</sup> 8 U.S.C. § 1252(f)(2) (emphasis added).

<sup>96</sup> Cf. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1317 (2010) ("[A] judge's task is to ensure that the clear terms of a statute are enforced . . .").

<sup>97</sup> 69 F. Supp. 500 (N.D. Ohio 1946).

<sup>98</sup> *Id.* at 501.

<sup>99</sup> *Id.* at 502.

<sup>100</sup> See, e.g., JAFFE, *supra* note 28, at 687 ("The power to stay, *Scripps-Howard Radio v. FCC* teaches, is part of a court's traditional equipment for the administration of justice. . . . Because a preliminary injunction may determine the ultimate outcome, the power is exercised with some caution.")

<sup>101</sup> See Brief for the United States, the Secretary of Agriculture, and the Interstate Commerce Commission at 40, *Atl. City Elec. Co. v. United States*, 400 U.S. 73 (1970) (No. 78), 1970 WL 121924, at \*40.

reviewing courts to postpone the effective date of agency action,”<sup>102</sup> that is, the power to stay agency action by temporarily suspending the source of the agency’s authority to act. Thus, the “general procedural provisions governing the issuance of *preliminary injunctions* and restraining orders” would apply to § 705 relief.<sup>103</sup> Preliminary injunctions and § 705 stays were so similar that the same procedural mechanisms could govern each. That similarity, taken together with the frequent linguistic slippage at the time between “stays” and “injunctions,” counsels against the notion that § 705 stays and § 705 preliminary injunctions should be subject to distinct standards. The practical effect was the same. The procedural mechanism was the same. The standard for issuing each form of relief should be the same. *Nken*’s narrow holding regarding 8 U.S.C. § 1252 — in a specific context in which Congress had employed one precise legal term of art and not the other — has no bearing on the proper standard for the issuance of § 705 relief.

B. Scripps-Howard, *Nken n.\**, and Virginian Railway Co.

*Nken*’s narrow holding poses no obstacle to the application of a heightened injunctive relief standard to all forms of § 705 relief — stays and injunctions alike. Nor do the 1942 Supreme Court precedent of *Scripps-Howard Radio, Inc. v. FCC*<sup>104</sup> and *Nken*’s characterization thereof.

Drawing upon Justice Scalia’s in-chambers opinion in *Ohio Citizens for Responsible Energy*, Justice Alito’s dissent in *Nken* emphasized that the petitioner was not seeking a suspension of “*judicial* alteration of the status quo,”<sup>105</sup> but rather was asking the Court for “an order barring *Executive Branch* officials” from doing something — namely, removing him from the United States.<sup>106</sup> After similarly citing the reasoning of *Ohio Citizens for Responsible Energy* and in-chambers opinions authored by Chief Justice Rehnquist advancing the “indisputably clear” standard for preliminary injunctive relief,<sup>107</sup> Chief Justice Roberts’s majority opinion responded to Justice Alito in a footnote.<sup>108</sup> The Chief Justice wrote: “[T]he relief sought here would simply suspend *administrative* alteration of the status quo, and we have long recognized that such temporary relief from an administrative order — just like

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<sup>102</sup> U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 107 (1947).

<sup>103</sup> *Id.* (emphasis added); see also Sohoni, *supra* note 25, at 1158.

<sup>104</sup> 316 U.S. 4 (1942).

<sup>105</sup> *Nken v. Holder*, 556 U.S. 418, 444–45 (2009) (Alito, J., dissenting) (emphasis added) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

<sup>106</sup> *Id.* at 445 (emphasis added).

<sup>107</sup> *Id.* at 429 (majority opinion) (citing, inter alia, *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers)).

<sup>108</sup> *Id.* at 429 n.\*.

temporary relief from a court order — is considered a stay.”<sup>109</sup> In support of this proposition, the Chief Justice cited the 1942 case of *Scripps-Howard Radio, Inc. v. FCC*.

In *Scripps-Howard*, a radio station licensee asked the FCC to vacate an order that advantaged one of its competitors.<sup>110</sup> The FCC denied the licensee’s petition.<sup>111</sup> The licensee appealed to the D.C. Circuit, and it simultaneously sought a stay of the adverse FCC order.<sup>112</sup> The D.C. Circuit certified the question of whether it possessed the authority to temporarily stay the FCC order to the Supreme Court.<sup>113</sup> The Court held that the D.C. Circuit did have such authority. Citing the All Writs Act, Justice Frankfurter’s majority opinion stated: “It has always been held . . . that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.”<sup>114</sup> The Court then reasoned that this same traditional power obtains in the context of appeals of administrative orders.<sup>115</sup> And “Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review.”<sup>116</sup> Thus, *Scripps-Howard* held that appellate courts’ traditional power to suspend — that is, stay — a lower court order under review applied with full force to administrative orders, even without express congressional authorization to that effect.

The *Nken* majority sought to leverage the language of a foundational precedent, *Scripps-Howard*, to honor the precise language that Congress chose to employ in 8 U.S.C. § 1252(f)(2). It would be a mistake to read this footnote in *Nken*, as well as *Scripps-Howard* itself, as providing support for the argument that the stay standard should necessarily govern the Supreme Court’s issuance of stays under § 705.

*Scripps-Howard* was concerned solely with the question of whether a federal court possessed the authority to “stay” administrative action in the absence of express congressional authorization. The Court was not confronted with the distinction between a “stay” and an “injunction.” *Scripps-Howard* has nothing to say about what the standard governing stays of administrative action should be. In fact, Justice Frankfurter closed his majority opinion in *Scripps-Howard* by expressly stating: “We merely recognize the existence of the power to grant a stay. *We are not concerned here with the criteria which should govern the Court in exercising that power.*”<sup>117</sup> In addition, as the Supreme Court has observed,

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<sup>109</sup> *Id.* (citing *Scripps-Howard*, 316 U.S. at 10–11).

<sup>110</sup> *See Scripps-Howard*, 316 U.S. at 5.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 6.

<sup>114</sup> *Id.* at 9–10.

<sup>115</sup> *Id.* at 10–11; *see also* JAFFE, *supra* note 28, at 690.

<sup>116</sup> *Scripps-Howard*, 316 U.S. at 11; *see also* Sampson v. Murray, 415 U.S. 61, 73–74 (1974).

<sup>117</sup> *Scripps-Howard*, 316 U.S. at 17 (emphasis added).



§ 705 was understood to “reflect existing law under the *Scripps-Howard* doctrine.”<sup>118</sup> As explained above, in reflecting *Scripps-Howard*, § 705 did not draw fine lines between stays and injunctions.<sup>119</sup>

Moreover, *Scripps-Howard* approvingly cited case law that affirms this Note’s argument that a heightened standard should govern the Court’s issuance of temporary relief under § 705, whatever its form, in accordance with respect for the sound discretion of lower courts and long-standing equitable practice. *Scripps-Howard* quoted the 1926 Supreme Court precedent of *Virginian Railway Co. v. United States*<sup>120</sup> for the proposition that the decision of whether to issue a stay rests in the court’s sound discretion and hinges on “the circumstances of the particular case.”<sup>121</sup> *Nken* quoted that same language from *Virginian Railway Co.*<sup>122</sup>

What did *Virginian Railway Co.* mean when it said that the issuance of a stay of agency action would hinge on “the circumstances of the particular case”? It explained: a heightened standard would apply if the lower court had already denied the stay. Specifically, after having observed that the issuance of a “stay” is not a matter of right,<sup>123</sup> *Virginian Railway Co.* made two important moves: (1) it countenanced both “stays” of agency action and “injunctions” running against agencies in the same breath,<sup>124</sup> and (2) it reasoned that a lower court’s decision *not* to preliminarily enjoin an agency counsels against an appellate court’s doing the same by way of a temporary stay of the agency’s action. “[T]o justify a stay [of agency action] pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and of the validity of the [agency’s] order.”<sup>125</sup> That is, when an applicant seeks to temporarily stay an agency rule or order after the lower court has already rejected the applicant’s attempt to enjoin the agency’s enforcement of that rule or order, the stay application is subject to a heightened standard. More “must be shown” than if the applicant were attempting to stay the agency action “prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision” of the lower court.<sup>126</sup> Why? Out of respect for the sound discretion

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<sup>118</sup> *Sampson*, 415 U.S. at 69 n.15.

<sup>119</sup> See *supra* Part I, Section III.A.

<sup>120</sup> 272 U.S. 658 (1926).

<sup>121</sup> *Scripps-Howard*, 316 U.S. at 10–11 (quoting *Virginian Ry. Co.*, 272 U.S. at 672–73).

<sup>122</sup> *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co.*, 272 U.S. at 672–73).

<sup>123</sup> *Virginian Ry. Co.*, 272 U.S. at 672.

<sup>124</sup> *Id.* at 669, 671–72. For a similar reading of *Virginian Railway Co.* on this point, see *Nken*, 556 U.S. at 442 n.\* (Alito, J., dissenting).

<sup>125</sup> *Virginian Ry. Co.*, 272 U.S. at 673.

<sup>126</sup> *Id.*

of the lower court, whose decision not to grant relief is afforded “a strong presumption of . . . correctness.”<sup>127</sup>

*Virginian Railway Co.* aligns with *Meccano* and its modern analogues in *Communist Party of Indiana*, *Ohio Citizens for Responsible Energy*, *Respect Maine PAC*, and the like: in light of appellate courts’ respect for lower courts’ decisions regarding preliminary relief, a lower court’s denial of said relief counsels in favor of forcing the applicant to surmount a particularly high bar to win on appeal. In affirmatively relying upon *Virginian Railway Co.*, neither *Scripps-Howard* nor *Nken* counsels otherwise.

### CONCLUSION

Reviewing federal courts have the power to either stay agency action or enjoin agencies under 5 U.S.C. § 705. When the Supreme Court decides whether to issue this preliminary relief, even though the relief may suspend the agency’s underlying authority for a time and thus constitute a “stay” under *Nken*’s framework, it nonetheless ought to adhere to the traditional, heightened standard for issuing preliminary injunctive relief. The Court’s precedents, respect for lower courts’ historic discretion, and a time-honored, humble conception of an appellate court’s role during the preliminary stages of litigation all counsel in favor of adhering to this heightened standard.

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<sup>127</sup> *Id.*; see also Note, *Stays of Federal Administrative Action*, 67 HARV. L. REV. 876, 880 n.22 (1954) (“Where a stay is granted by the courts on appeal from an agency decision, respect for the agency order grows with each decision in its favor. Where a lower court has determined that the agency action is proper and the plaintiff seeks a stay pending appeal to a higher court, more than a substantial claim is required before the lower court should grant a stay; the lower court’s decision supports the presumption that the agency order is correct and valid.” (citing *Virginian Ry. Co.*, 272 U.S. 658)).