No. _____

In the Supreme Court of the United States

CONTINENTAL RESOURCES, INC., ET AL.,
APPLICANTS,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *AND*
MICHAEL S. REGAN, *in his official capacity as Administrator of the United States Environmental Protection Agency*, ET AL.,
RESPONDENTS.

APPLICATION FOR IMMEDIATE STAY OF FINAL AGENCY ACTION DURING PENDENCY OF PETITIONS FOR REVIEW

On Application For Stay To The United States Court of Appeals For The District of Columbia

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit

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IDENTITY OF PARTIES, CORPORATE DISCLOSURE STATEMENT, AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Applicant: Applicants in this court and Petitioners and Intervenor for Petitioners below are Continental Resources, Inc. ("Continental Resources") (Intervention filed in No. 24-1054 but applicable to all pending petitions), Michigan Oil and Gas Association ("MOGA"), Miller Energy Company II, LLC ("MEC"), Independent Petroleum Association of America (No. 21-1101); Arkansas Independent Producers and Royalty Owners; Domestic Energy Producers Alliance; Eastern Kansas Oil & Gas Association; Gas and Oil Association of West Virginia; Illinois Oil and Gas Association; Independent Petroleum Association of New Mexico; Indiana Oil and Gas Association; International Association of Drilling Contractors; Kansas Independent Oil and Gas Association; Kentucky Oil and Gas Association; National Stripper Well Association; North Dakota Petroleum Council; Ohio Oil and Gas Association; Petroleum Alliance of Oklahoma; Panhandle Producers and Royalty Owners Association; Pennsylvania Independent Oil & Gas Association; Permian Basin Petroleum Association; Petroleum Association of Wyoming; Texas Alliance of Energy Producers; Texas Independent Producers and Royalty Owners Association; and the Western Energy Alliance (No. 24-1103); the Independent Petroleum Association of America, Arkansas Independent Producers and Royalty Owners, Domestic Energy Producers Alliance, Eastern Kansas Oil & Gas Association, Gas and Oil Association of West Virginia, Illinois Oil & Gas Association, Independent

Petroleum Association of New Mexico, Indiana Oil and Gas Association, International Association of Drilling Contractors, Kansas Independent Oil & Gas Association, Kentucky Oil & Gas Association, National Stripper Well Association, North Dakota Petroleum Council, Ohio Oil and Gas Association, Petroleum Alliance of Oklahoma, Panhandle Producers & Royalty Owners Association, Pennsylvania Independent Oil & Gas Association, Permian Basin Petroleum Association, Texas Alliance of Energy Producers, Texas Independent Producers & Royalty Owners Association, and Western Energy Alliance (No. 24-1103) ("Industry Associations").

All applicants here will be collectively referred to as "Industry Applicants".

Respondents: Respondents in this Court and below are the United States Environmental Protection Agency ("EPA") and Michael S. Regan, Administrator, U.S. EPA.

Petitioners: Additional Petitioners below are as follows:

24-1054 (Lead): State of Texas; Railroad Commission of Texas; and Texas Commission on Environmental Quality.

24-1059: State of Oklahoma, State of West Virginia; State of Arkansas; State of Alabama; State of Alaska; State of Florida; State of Georgia; State of Idaho; State of Indiana; State of Iowa; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Mississippi; State of Missouri; State of Montana; State of Nebraska; State of North Dakota; State of Ohio; State of South Carolina; State of Tennessee; State of Utah; Commonwealth of Virginia; State of Wyoming; and the Arizona Legislature.

24-1103: Independent Petroleum Association of America, Arkansas Independent Producers and Royalty Owners, Domestic Energy Producers Alliance, Eastern Kansas Oil & Gas Association, Gas and Oil Association of West Virginia, Illinois Oil and Gas Association, Independent Petroleum Association of New Mexico, Indiana Oil and Gas Association, International Association of Drilling Contractors, Kansas Independent Oil and Gas Association, Kentucky Oil and Gas Association, National Stripper Well Association, North Dakota Petroleum Council, Ohio Oil and Gas Association, Petroleum Alliance of Oklahoma, Panhandle Producers and Royalty Owners Association, Pennsylvania Independent Oil & Gas Association, Permian Basin Petroleum Association, Petroleum Association of Wyoming, Texas Alliance of Energy Producers, Texas Independent Producers and Royalty Owners Association, Western Energy Alliance

24-1101: Michigan Oil and Gas Association, Miller Energy Company II, LLC.

24-1111: GPA Midstream Association.

24-1114: Texas Oil and Gas Association.

24-1115: Interstate Natural Gas Association of America.

24-1116: American Petroleum Institute.

24-1117: American Exploration & Production Council.

24-1118: Air Alliance Houston; Clean Air Council; and the Environmental Integrity Project.

Intervenors:

Intervenors for Petitioners: There are no additional Intervenors for Petitioners.

Intervenors for Respondents: Intervenors for Respondents are: Center for Biological Diversity; Clean Air Council*; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; Dakota Resource Council; District of Columbia; State of Wisconsin; Earthworks; Environmental Defense Fund; Environmental Law & Policy Center; Food & Water Watch; Fort Berthold Protectors of Water and Earth Rights; GreenLatinos; Natural Resource Defense Council; Sierra Club; State of California; State of Colorado; State of Connecticut; State of Delaware; State of Illinois; State of Maine; State of Maryland; State of Michigan; State of New Jersey; State of New Mexico; State of New York; State of North Carolina; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; Interstate Natural Gas Association of America; American Exploration and Production Council**.

*The Clean Air Council is both a Petitioner in 24-1118 and an Intervenor for Respondent in 24-1054, 24-1059, 24-1101, 24-1103, 24-1111, 24-1114, 24-1115, 24-1116, 24-1117.

**The American Exploration and Production Council is a Petitioner in 24-1117 and an Intervenor for Respondent in 24-1118 only.

Amicus Curiae: None.

Related Proceedings: A separate application seeking a stay off the Final Rule challenged herein was filed on August 23, 2024 by the State of Oklahoma, State of Alabama, State of Alaska, State of Arkansas, State of Florida, State of Georgia,

State of Idaho, State of Iowa, State of Indiana, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Mississippi, State of Missouri, State of Montana, State of Nebraska, State of North Dakota, State of Ohio, State of South Carolina, State of Utah, Commonwealth of Virginia, State of West Virginia, State of Wyoming, and the Arizona Legislature in in No. 24A____. To Petitioners' knowledge, no other applications seeking a stay of the Final Rule are currently before this Court.

Industry Applicants are also aware of numerous related cases challenging previous iterations of the Final Rule (defined below) being challenged here. The designated lead case for those related cases is *American Petroleum Institute, et al. v. EPA* (No. 13-1108). The cases consolidated with that case are *American Petroleum Institute v. EPA* (No. 13-1289), *Gas Processors Ass'n v. EPA* (No. 13-1290), *Texas Oil and Gas Ass'n v. EPA* (No. 13-1292), *Independent Petroleum Ass'n of America v. EPA* (No. 13-1293), *Western Energy Alliance v. EPA* (No. 13-1294), *Independent Petroleum Ass'n of America v. EPA* (No. 15-1040), *Gas Processors Ass'n v. EPA* (No. 15- 1041), *Texas Oil and Gas Ass'n v. EPA* (No. 15-1042), *Western Energy Alliance v. EPA* (No. 15-1043), *American Petroleum Institute v. EPA* (15-1044), *State of North Dakota v. EPA* (No. 16-1242), *State of Texas, et al. v. EPA* (16-1257), *Independent Petroleum Ass'n of America, et al. v. EPA* (No. 16-1262), *Interstate Natural Gas Ass'n of America v. EPA* (No. 16-1263), *State of West Virginia, et al. v. EPA* (No. 16-1264), *Western Energy Alliance v. EPA* (No. 16-1266), *GPA Midstream Ass'n v. EPA* (No. 16-1267), *Texas Oil and Gas Ass'n v. EPA* (No. 16-1269), and *American Petroleum Institute v. EPA* (No. 16-1270).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Continental Resources hereby identifies all parent companies and any publicly held company that has a 10% or greater ownership interest (such as stock or partnership shares) in Continental Resources:

None.

Pursuant to Rule 29.6, MOGA hereby identifies all parent companies and any publicly held company that has a 10% or greater ownership interest (such as stock or partnership shares) in MOGA:

None.

Pursuant to Rule 29.6, MEC hereby identifies all parent companies and any publicly held company that has a 10% or greater ownership interest (such as stock or partnership shares) in MEC:

MEC is a wholly owned subsidiary of Miller Energy Partners LLC. No publicly held company owns more than ten (10) percent ownership in MEC or Miller Energy Partners LLC.

Pursuant to Rule 29.6, the Independent Petroleum Association of America, Arkansas Independent Producers and Royalty Owners, Domestic Energy Producers Alliance, Eastern Kansas Oil & Gas Association, Gas and Oil Association of West Virginia, Illinois Oil & Gas Association, Independent Petroleum Association of New Mexico, Indiana Oil and Gas Association, International Association of Drilling Contractors, Kansas Independent Oil & Gas Association, Kentucky Oil & Gas Association, National Stripper Well Association, North Dakota Petroleum Council,

Ohio Oil and Gas Association, Petroleum Alliance of Oklahoma, Panhandle Producers & Royalty Owners Association, Pennsylvania Independent Oil & Gas Association, Permian Basin Petroleum Association, Texas Alliance of Energy Producers, Texas Independent Producers & Royalty Owners Association, and Western Energy Alliance hereby identify all parent companies and any publicly held company that has a 10% or greater ownership interest (such as stock or partnership shares) as follows.

The Independent Petroleum Association of America ("IPAA") is an incorporated trade association that represents thousands of independent oil and natural gas producers and service companies across the United States that are active in the exploration and production segment of the industry, which often involves the hydraulic fracturing of wells. IPAA serves as an informed voice for the exploration and production segment of the industry, and advocates its members' views before the United States Congress, the Administration and federal agencies. IPAA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Arkansas Independent Producers and Royalty Owners ("AIPRO") is an incorporated trade association that represents independent oil and natural gas producers and service companies across the state of Arkansas that are active in the exploration and production segment of the industry, which often involves the hydraulic fracturing of wells. AIPRO serves as an informed voice for Arkansas oil and gas producers, and advocates for its members' views before the Arkansas General Assembly, state agencies and commissions, United States Congress, the

Administration and federal agencies. AIPRO has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Domestic Energy Producers Alliance ("DEPA") is a nationwide collaboration of 25 coalition associations, representing about 10,000 individuals and companies engaged in domestic onshore oil and natural gas production and exploration. Founded in 2009, DEPA gives a loud, clear voice to the majority of individuals and companies responsible for enduring work to secure our nation's energy future. DEPA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Eastern Kansas Oil & Gas Association ("EKOGA") is a nonprofit organization founded in 1957 to become a unified voice representing the unique interests of eastern Kansas oil and gas producers, service companies, suppliers and royalty owners on matters involving oil and gas regulations, safety standards, environmental concerns and other energy related issues. EKOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Formed in 2021, through the merger of the West Virginia Oil and Natural Gas Association and the Independent Oil and Gas Association of West Virginia, the Gas and Oil Association of WV, Inc. ("GO-WV") remains one of the oldest trade organizations in the State and is the only association that serves the entire oil and natural gas industry. The activities of our members include exploration, drilling, completion, gathering, transporting, distribution, processing, and environmental

services. GO-WV has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Illinois Oil & Gas Association ("IOGA") was organized in 1944 to provide an agency through which oil and gas producers, land owners, royalty owners, and others who may be directly or indirectly affected by or interested in oil and gas development and production in Illinois, may protect, preserve and advance their common interests. IOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Independent Petroleum Association New Mexico advances and preserves the interests of independent oil and gas producers while educating the public to the importance of oil and gas to the state and all our lives. IPANM continues to grow and provide the services that protect, defend, and promote the industry that is the very foundation of our way of life. IPANM is member-drive non-profit association and has no parent corporation. There is no publicly held corporation that owns 10% or more of its stock.

The Indiana Oil and Gas Association ("INOGA") has a rich history of involvement in the exploration and development of hydrocarbons in the State of Indiana. INOGA was formed in 1942 and historically has been an all-volunteer organization principally made up of representatives of oil and gas exploration and development companies (operators), however, it has enjoyed support and membership from pipeline, refinery, land acquisition, service, supply, legal, engineering and geologic companies or individuals. INOGA has been an active representative for the

upstream oil and gas industry in Indiana and provides a common forum for this group. INOGA represents its membership on issues of state, federal, and local regulation/legislation that has, does and will affect the business of this industry. INOGA is a 501(c)(6) trade association incorporated as Non-Profit Domestic Corporation under the statutes of Indiana. INOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Since 1940, the International Association of Drilling Contractors ("IADC") has exclusively represented the worldwide oil and gas drilling industry. IADC's contract-drilling members own most of the world's land and offshore drilling units that drill the vast majority of the wells producing the planet's oil and gas. IADC's membership also includes oil-and-gas producers, and manufacturers and suppliers of oilfield equipment and services. Through conferences, training seminars, print and electronic publications, and a comprehensive network of technical publications, IADC continually fosters education and communication within the upstream petroleum industry. IADC has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Kansas Independent Oil & Gas Association ("KIOGA") is a nonprofit organization founded in 1937 to represent the interests of oil and gas producers in Kansas, as well as allied service and supply companies. Today, KIOGA is a trade association with nearly 3,000 members involved in all aspects of the exploration, production, and development of crude oil and natural gas resources. KIOGA has no

parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Kentucky Oil & Gas Association ("KOGA") was formed in 1931 to represent the interests of Kentucky's crude oil and natural gas industry, and more particularly, the independent crude oil and natural gas operators as well as the businesses that support the industry. KOGA is comprised of over 130 companies and individual members which consist of over 600-member representatives that are directly related to the crude oil and natural gas industry in Kentucky. KOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The National Stripper Well Association ("NSWA") was founded in 1934 as the only national association solely representing the interests of the nation's smallest oil and natural gas wells before Congress, the Administration and the Federal bureaucracies. It is the belief of NSWA that producers, owners, and operators of marginally-producing oil and gas wells have a unique set of needs and concerns regarding federal legislation and regulation. NSWA is a member-based trade association with over 1000 members nationwide across 30 states. NSWA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The North Dakota Petroleum Council ("NDPC") is a trade association representing more than 520 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, and

storage, as well as mineral leasing, consulting, legal work, and oil field service activities in North Dakota, South Dakota, and the Rocky Mountain Region. Established in 1952, NDPC's mission is to promote and enhance the discovery, development, production, transportation, refining, conservation, and marketing of oil and gas in North Dakota, South Dakota, and the Rocky Mountain region; to promote opportunities for open discussion, lawful interchange of information, and education concerning the petroleum industry; to monitor and influence legislative and regulatory activities on the state and national level; and to accumulate and disseminate information concerning the petroleum industry to foster the best interests of the public and industry. NDPC has no parent corporation and there is no publicly held corporation that owns 10% of more of its stock.

The Ohio Oil & Gas Association ("OOGA") is a trade association with members involved in all aspects of the exploration, production, and development of crude oil and natural gas resources within the State of Ohio. OOGA represents the people and companies directly responsible for the production of crude oil, natural gas, and associated products in Ohio. OOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Petroleum Alliance of Oklahoma was formed in 2019 by the mergers of the Oklahoma Oil and Gas Association and the Oklahoma Independent Petroleum Association and represents more than 1,400 individuals and member companies from the Mid-Continent oil and natural gas industry. The Alliance is the state's largest oil and natural gas association and one of the industry's strongest advocacy groups,

representing upstream, midstream, and downstream industry sectors. The Alliance has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Panhandle Producers & Royalty Owners Association was founded in 1929 and registered in 1939 by the Texas Secretary of State as an oil and gas membership association registered as a 501c3, governed by a board of directors, whose mission is to protect our industry segments from overreach harmful to our members. We are not owned nor operated by a parent company and are not publicly traded. Our primary purpose is to lobby and represent membership before political parties, state, and federal agencies, to develop policy and position papers, and to act as an informed voice for exploration and production of clean, affordable, abundant fuel with regard to proposed legislation that impacts our industry.

The Pennsylvania Independent Oil & Gas Association ("PIOGA") is a non-profit corporation that was initially formed in 1978 as the Independent Oil and Gas Association of Pennsylvania ("IOGA of PA") to represent the interests of smaller independent producers of Pennsylvania natural gas from conventional limestone and sandstone formations. Effective April 1, 2010, IOGA of PA and the original trade association representing Pennsylvania conventional oil and natural gas producers founded in 1918, the Pennsylvania Oil, Gas and Minerals Association (POGAM), merged and the name of the merged organization changed to its present name. PIOGA's membership currently is over 300 members: oil and natural gas producers developing both conventional and unconventional formations in Pennsylvania;

drilling contractors and service companies; engineering companies; manufacturers; marketers; Pennsylvania Public Utility Commission-licensed natural gas suppliers ("NGSs"); professional services firms and consultants; and royalty owners. PIOGA promotes the interests of its members in environmentally responsible oil and natural gas operations, as well as the development of competitive markets and additional uses for Pennsylvania-produced natural gas. PIOGA has no parent corporation and has not issued any stock.

The Permian Basin Petroleum Association ("PBPA") is the largest regional oil and gas association in the United States. We represent the men and women who work in the oil and gas industry in the Permian Basin of West Texas and southeastern New Mexico. The Permian Basin is the largest inland oil and gas reservoir and the largest oil and gas producing region in the world. PBPA consists of the largest producers as well as the smallest operators in the Permian Basin. Part of PBPA's mission is to promote environmentally conscious operations and sustainable economic profitability among all our members, large and small. PBPA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Texas Alliance of Energy Producers ("Texas Alliance") became a statewide organization in 2000 with the merger of two of the oldest oil & gas associations in the nation: the North Texas Oil & Gas Association and the West Central Texas Oil & Gas Association. The Texas Alliance is now the largest statewide oil and gas association in the country representing Independents. With members in 34 states, the Texas

Alliance works on behalf of our members at the local, state, and federal levels on issues vital to the industry. The Texas Alliance is a non-profit entity, has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

The Texas Independent Producers & Royalty Owners Association ("TIPRO") is a trade association representing the interests of nearly 3,000 independent oil and natural gas producers and royalty owners throughout Texas. As one of the nation's largest statewide associations representing both independent producers and royalty owners, members include small family businesses, the largest, publicly-traded independent producers, and mineral owners, estates, and trusts. Members of TIPRO are responsible for producing approximately 90 percent of the oil and natural gas within Texas, and own mineral interests in millions of acres across the state. TIPRO has no parent corporation and there is no publicly-held corporation that owns more than 10% of its stock.

Western Energy Alliance is the leader and champion for independent oil and natural gas companies in the West. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Our expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. Most independent producers are small businesses, with an average of fourteen employees. The Alliance has no parent

corporation and there is no publicly held corporation that owns 10% or more of its stock.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Pursuant to Rule 23 of this Court, 5 U.S.C. § 705, and 28 U.S.C. §§ 1651 and 2101(f), Industry Applicants respectfully request an immediate stay of EPA's final rule entitled *Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review*, 89 Fed. Reg. 16,820 (March 8, 2024) ("Final Rule").

Continental Resources intervened in support of various Petitioners seeking review of the Final Rule in the D.C. Circuit Court of Appeals ("D.C. Circuit"). Two groups of Petitioners – 24 States and one State Legislature (24-1059); and Industry Association Petitioners (24-1101 and 24-1103) – sought a stay of the Final Rule from the D.C. Circuit, which Continental Resources supported. Those motions for a stay were denied on July 9, 2024.

INTRODUCTION

Industry Applicants request a stay of the Final Rule to halt the irreparable harm it is causing to Industry Applicants' existing and planned new oil and gas operations. As operators directly impacted by the Final Rule's requirements, Industry Applicants have an unmistakable interest in a stay.

The Final Rule is an authoritarian national command from EPA to the States and operators, such as Industry Applicants, that the States regulate, that violates the cooperative federalism embedded by Congress in Section 111 of the Clean Air Act ("CAA"). 42 U.S.C. § 7411. The Final Rule imposes national "presumptive standards" that States must implement for existing sources of air emissions, effectively removing

the States' discretion and flexibility long enshrined in Section 111(d) of the CAA. EPA's usurpation of the States' authority to set performance standards has severe and immediate effects on the individual sources of air emissions operated by Industry Applicants, who planned existing operations based on State requirements.

Just two years ago, this Court confirmed that EPA could not commandeer Section 111 of the CAA to impose national transformative changes to the regulation of individual sources of air emissions. *West Virginia et al. v. EPA*, 597 U.S. 697, 734-735 (2022). Yet that is exactly what EPA has done again in the Final Rule with its national "presumptive standards," which deprive the States of their authority and discretion to establish tailored performance standards for operators (such as Industry Applicants) in their States.

The Final Rule's flaws are not just limited to existing sources, but also harm Industry Applicants' operations of new sources. The Final Rule's onerous standards for new sources are neither "adequately demonstrated" nor "achievable" as required by Section 111(a). 42 U.S.C. § 7411(a). The Final Rule imposes draconian prohibitions that are neither cost-effective nor practicably implementable. These requirements impose significant irreparable harms on Industry Applicants, including operational costs and barriers to continued operations, that have already required Industry Applicants to forego continued production under the threat of significant penalties and enforcement.

Without a stay, the Final Rule will require (and is currently requiring) Industry Applicants (including Continental Resources) to immediately make

investments and operational decisions, and those decisions will not be reversible if Industry Applicants later prevail on the merits. The Court should stay the Final Rule now.

OPINION BELOW

The D.C. Circuit's July 9, 2024, Per Curiam Order denying Petitioners' motions to stay the Final Rule is not reported but is reproduced at Appendix A, App. 2a. The Final Rule was published at 89 Fed. Reg. 16,820 (March 8, 2024) and is reproduced at Appendix C, App. 13a-420a.

JURISDICTION

This Court has jurisdiction over this Application pursuant to 28 U.S.C. § 1254(1) and 1651, and may grant the requested relief under the Administrative Procedure Act, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651 and 2101; and Supreme Court Rule 23.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The core statutory provision at issue, 42 U.S.C. § 7411, is reproduced at Appendix B, App. 4a-11a.

STATEMENT OF THE CASE

A. Overview of Clean Air Act Section 111.

The CAA controls air emissions "from stationary sources (such as refineries and factories)." *Michigan v. EPA*, 576 U.S. 743, 747 (2015). To accomplish this, Congress established in the CAA "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). Congress

was clear about the central role of State authority, declaring that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . ."(42 U.S.C. § 7407(a)), and that "air pollution prevention . . . and air pollution control at its source *is the primary responsibility of States and local governments*." 42 U.S.C. § 7401(a)(3) (emphasis added). In this "experiment in cooperative federalism," *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C Cir. 2001), improving the nation's air quality will be pursued by "States and the federal government working together," where controlling the sources of air pollution is the "primary responsibility" of the States. *Ohio v. EPA*, 144 S. Ct. 2040, 2048 (2024).

Section 111 of the CAA, 42 U.S.C. § 7411, establishes the process for setting "standards of performance" for new and existing stationary sources. Section 111(d) establishes how EPA and the States work together to establish standards of performance for existing sources.[1] A "standard of performance," is "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable" by applying the "best system of emission reduction" ("BSER") to the source, "taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements [EPA] determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

[1] An "existing" source is any "building, structure, facility, or installation which emits or may emit any air pollutant" built *before* the regulation is proposed. 42 U.S.C. § 7411(a)(3), (6).

Section 111(d) implements the CAA's cooperative federalism framework for existing sources by requiring EPA to "establish a procedure" for States to submit State plans (typically referred to as State implementation plans, or "SIPs") that "establish[] standards of performance for [certain] existing source for any air pollutant[s]." *Id.* at (d)(1). EPA then reviews and approves SIPs if the SIPs' performance standards are "satisfactory" (42 U.S.C. § 7411(d)(2)(A)), based on the BSER guidelines (not mandates) established by EPA.

Following the requirements that standards of performance be "achievable" and "adequately demonstrated," Section 111(d) requires that "[r]egulations of the Administrator under this paragraph shall permit the State in applying a standard of performance *to any particular source* under a plan submitted under this paragraph *to take into consideration*, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d)(1) (emphasis added). Thus, States are given the primary authority to create their own SIPs for reducing emission at *existing* sources in their States, subject to EPA review and approval. Congress specifically give States the authority to consider source-specific factors in their States when creating those SIPs and applying the BSER. *Id.*

Under Section 111(d), EPA may not set and impose blanket national emission reduction requirements on States or existing sources. EPA is only authorized to review and approve SIPs; EPA cannot transform this limited authority to erase the States' central role in setting performance standards in their SIPs.

These express statutory limitations on EPA's authority are reinforced by Section 111(d)(2), which establishes that EPA may only step into the shoes of a State and impose a Federal Implementation Plan ("FIP") directly regulating existing sources in a State if that State fails to submit a satisfactory SIP. 42 U.S.C. § 7411(d)(2). Thus, EPA does not have the authority under Section 111(d) to establish and impose a "national FIP": it may only create FIPs on a case-by-case basis for individual States that have failed to meet their obligations in the cooperative federalism framework of the CAA.

Finally, Section 111(b) governs how EPA sets standards of performance for *new* stationary sources, which are those sources built or modified after the relevant regulation is proposed. 42 U.S.C. § 7411(a)(2). In setting emissions limits for new sources, EPA must first "determine[]" the "best system of emission reduction" that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated." 42 U. S. C. § 7411(a)(1). EPA then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. *Ibid*.

B. EPA Regulation of Oil and Gas Sources Under Section 111.

In 1979, EPA published a list of source categories for which EPA would promulgate standards of performance; the list included "Crude Oil and Natural Gas Production." 42 U.S.C. § 7411(f); 44 Fed. Reg. 49,222 (Aug. 21, 1979). In 2016, for the first time, EPA sought to directly regulate methane emissions from oil and gas facilities (along with certain other greenhouse gases and VOCs). 81 Fed. Reg. 35,824 (June 3, 2016) ("2016 Rule"). Several States and industry associations challenged the 2016 Rule in the D.C. Circuit. *See e.g.*, Nos. 16-1242; 16-1257; 16-1262; 16-1263; 16-

1216; 16-1266; 16-1267; 16-1269; 16-1270. The D.C. Circuit held the consolidated cases in abeyance to allow the Agency time to reconsider the 2016 Rule. EPA promulgated a revised rule in 2020, (85 Fed. Reg. 57,018 (Sept. 14, 2020) ("2020 Rule")), which was rescinded when President Biden signed a joint resolution under the Congressional Review Act. S.J. Res. 14, 117th Cong., 135 Stat. 295 (2021) (enacted).

C. The Final Rule.

EPA promulgated the Final Rule on March 8, 2024, which became effective on May 7, 2024. The Final Rule creates 40 C.F.R. Part 60 Subparts OOOOb and OOOOc. New Subpart OOOOb creates rigid new source performance standards for methane and VOC emissions from new (or modified) oil and gas sources in the production, processing, transmission, and storage segments of the oil and gas industry that were constructed, reconstructed, or modified after December 6, 2022. See App. 13a-16a (89 Fed. Reg. at 16,820–23). EPA directly enforces Subpart OOOOb.

New Subpart OOOOc requires States to issue SIPs within two years that establish and implement standards of performance in their States for existing oil and gas sources constructed on or before December 6, 2022. App. 180a (89 Fed. Reg. at 16,978). Rather than allowing States to develop their SIPs, Subpart OOOOc imposes national "presumptive standards" which States must include in their SIPs. State plans will be "thoroughly reviewed" by EPA for any "components" that "differ" from the national "presumptive standards." *Id*. at 19a, 196a (89 Fed. Reg. at 16,829, 17,006). States must document that any State standards of performance have met

"equivalency criteria" to the presumptive national standards. *Id*. at 332a (89 Fed. Reg. at 17,142)).

The Rule further creates a new "Super Emitter Program" under which non-governmental third parties are deputized by EPA to investigate and report methane release events, which reports can then obligate operators to respond and/or be subject to penalties. *Id.* at 69a-74a (89 Fed. Reg. at 16,876-81). Third parties may submit reports of so-called "super emitter" events to EPA within 15 days of observation. App. 243a (89 Fed. Reg. at 17,050 (§60.5371b(c)(9))). EPA has an unlimited amount of time to review the third-party notification before publicly posting the alleged "super emitter" event online. *Id.* (§60.5371b(c)). The operator need not be informed of the third-party report during EPA's unlimited review period, nor does the operator have an opportunity to review the third-party report before it is made public. Upon notification of a private third party's report (and after it is made public), Industry Applicants will be obligated to investigate and respond to the report under the threat of penalties and injunctive relief regardless of whether the allegations are remotely valid or even involve Industry Applicants' facilities. In addition, Industry Applicants face the risk of unknowingly accumulating penalties for the period between the private party's initial report to EPA and EPA's eventual notification to the operator.

The Final Rule also imposes restrictions concerning "associated gas" (the Final Rule defines "associated gas" as "the natural gas from wells operated primarily for oil production." App. 322a (89 Fed. Reg. at 17,129)) and requires that well owners and operators to either: (1) recover and route the gas into a pipeline for commercial

sales ("sales line"); (2) use the gas onsite as a fuel source; (3) use the gas for another useful purpose; or (4) reinject the recovered gas into the well or another well. *Id.* at 22a (89 Fed. Reg at 16,832–35). Operators can only avoid these requirements by making a technical infeasibility demonstration that routing associated gas is technically impossible (which cannot take cost into account). App. 144a (89 Fed. Reg. at 16,951).

D. Procedural History.

Numerous States and industry associations filed petitions in the D.C. Circuit seeking review of the Final Rule. Continental Resources was granted leave to intervene on behalf of Petitioners in all consolidated cases. Two groups of Petitioners – 24 States and one state legislator (24-1059); and Industry Association Petitioners (24-1101 and 24-1103) – sought a stay of the Final Rule from the D.C. Circuit, which Continental Resources supported. Those motions were denied by the D.C. Circuit on July 9, 2024. App. 2a.

REASONS FOR GRANTING THE STAY

When faced with a request to stay a regulation, this Court asks "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio*, 144 S. Ct. at 2052. All factors weigh heavily in a favor of a stay here.

On the merits, "applicants not only have a substantial likelihood of success," but "it is difficult to imagine them losing." *Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758, 763 (2021). *First*, EPA's Final Rule destroys the cooperative federalism of

the CAA by removing all discretion from the States to set "standards of performance" in SIPs for existing sources, instead imposing draconian and rigid national "presumptive standards." The Final Rule eviscerate the States' "primary responsibility" for developing plans to achieve air-quality goals, effectively imposing a national FIP on the States and industry. *Ohio*, 144 S. Ct. at 2048 (citing 42 U.S.C. § 7401(a)(3)).

Second, Congress has not granted EPA the authority to deputize non-governmental third parties to enforce SIPs (or FIPs). Such deputization upsets Congress' carefully designed implementation and enforcement structure, which prescribes specific roles for Federal and State enforcement authorities, as well as tailored provisions allowing citizen enforcement actions that do not include the broad deputization EPA creates in the Final Rule.

Third, the Final Rule's new source performance standards in Subpart OOOOb on new sources are arbitrary and capricious and violate the CAA because: (1) EPA did not "adequately demonstrate" the emission control technologies selected as the BSER in compliance with Section 111 and EPA's flawed cost-benefit analysis improperly relies on alleged "global benefits" such as the "Social Cost of Methane;" (2) the net heating value (NHV) monitoring requirements are technically impossible to comply with; and (3) EPA failed to adequately account for the Final Rule's impact on "marginal" wells (marginal wells represent approximately 78% of all producing wells in the United States, but are typically legacy wells with low production (less than 15 barrels of oil per day or 90,000 cubic feet of natural gas), and correspondingly

low GHG emission potential). EPA violated Section 111 in setting unachievable emissions standards that were never "adequately demonstrated," and then compounded that error by attempting to justify the costs of those emission standards on U.S. citizens by relying on allegedly global climate benefits to citizens outside the U.S. in its cost benefit analysis.

Industry Applicants (and other operators and the States) will be irreparably harmed by the national one-size-fits-all "presumptive standards" of what is essentially an unlawful FIP, unauthorized enforcement by newly deputized private citizens, and the arbitrary and capricious new source standards. Both industry operators such as Industry Applicants and Petitioner States will have to restructure their regulatory programs and oil and gas operations immediately. *See Labrador v. Poe*, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring in grant of stay) (explaining that whether "businesses have to restructure their operations or build new facilities to comply with" "major new environmental regulations" during the pendency of litigation is "*itself*" a "question of extraordinary significance").

I. The Final Rule's "Presumptive Standards" and Super Emitter Program Violate Section 111 of the Clean Air Act.

A. The Presumptive Standards in the Final Rule Violate the Cooperative Federalism and State Authority Enshrined in the Clean Air Act.

Under the CAA, "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Under Section 111(d), it is the States who ultimately set "standards of performance for any existing source" by following "regulations" set by EPA which

establish "procedure[s]" for States to follow in setting the standards of performance. 42 U.S.C. § 7411(d)(1). In setting standards of performance, EPA "shall permit the State[s]" to "take into consideration" factors such as the "remaining useful life of the source." *Id.*

The Final Rule violates the statutory structure of the CAA and removes the States' flexibility to balance statutorily required factors because it imposes mandatory nationwide one-size-fits-all presumptive emissions standards that leave the States no flexibility in regulating existing sources. This diktat violates the cooperative federalism created by CAA Section 111(d). Turning Section 111(d) on its head, the Final Rule has created and imposed a FIP on all the States, depriving States of their Congressionally-established "primary" role in controlling air emissions in their States.

States execute their "primary role" by establishing performance for existing sources through their SIPs, taking into account state-specific facts and circumstances as well as EPA's BSER. 42 U.S.C. § 7411(a)(1). However, as reflected in the title of the Final Rule ("emission *guidelines* for existing sources") BSER is a guideline, and EPA's BSER does not itself establish source-specific "emission limitations."[2] Section 111(d) explicitly provides that it is the States, not EPA, that establish the binding standards of performance for existing sources in each of their States.

[2] A "requirement established by the State or the [EPA] which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." *See* 42 U.S.C. § 7602(k).

Thus, States have the primary authority to establish performance standards applicable to specific sources of emissions in their SIPs (*i.e.*, the source-specific achievable emissions limitations, applying EPA's BSER guidelines), subject to EPA review and approval.

However, instead of honoring the States authority to set standards of performance for existing sources, the Final Rule transforms BSER "guidelines" into *presumptive standards* to be imposed on a national basis, even listing specific technologies and methods that should be employed to comply with the presumptive standards. App. 26a-28a (89 Fed. Reg. at 16,833-35). SIPs must either include those presumptive standards or meet stringent "equivalency criteria" if States wish to "deviate" from the presumptive standards. *Id.* at 335a (89 Fed. Reg. at 17,142).[3]

EPA has the authority to impose source-specific emission limitations for existing sources only in States that fail to develop and implement satisfactory SIPs. 42 U.S.C. § 7411(d)(2). EPA can only do this by following the case-by-case administrative process of determining the inadequacy of a State's SIP and creating a specific FIP for that State, a process that includes opportunities for public notice and comment, and such determinations can be individually challenged in court. This limited authority to create State-specific FIPs demonstrates that EPA does not have the authority to do what it has done in the Final Rule, which is effectively to impose a FIP on all States simultaneously through a single rulemaking. Completely by-

[3] EPA ominously warned in the proposed rule that "it would likely be difficult for States to demonstrate that the presumptive standards are not reasonable for the vast majority of designated facilities." 86 Fed. Reg. 63,110, 63,251 (Nov. 15, 2021).

passing both the SIP and FIP processes mandated by Congress, EPA has already decided in the Final Rule, before a single SIP has been submitted, that any SIP that does not implement its national "presumptive standards" is unsatisfactory, and that EPA's source specific standards will be imposed nationally one way or another, either through "federalized SIPs" or FIPs.

EPA's imposition of national presumptive standards violates the cooperative federalism requirements of the CAA. By leaving the States' with no "real choice with regard to the control measure options available to them," EPA has impermissibly intruded on the States' right to fashion their own SIPs with which Industry Applicants must comply. *Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000). This power grab using an "ancillary" provision of the CAA used "only a handful of times since the enactment of the statute in 1970" (*West Virginia*, 597 U.S. at 710) should be treated with "skepticism" without "clear congressional authorization" to the contrary (*id.* at 732). That skepticism is particularly heightened where, as here, EPA has removed all authority from the States to exercise their Congressionally granted discretion to "submit plans containing the emissions restrictions that they intend to adopt and enforce." *Id.* at 710. Reading out the statutory role Congress provided States in Section 111 is not the "best" interpretation of Section 111. *Loper Bright Enterprises v. Raimondo, Secretary of Commerce,* 603 U.S. ____ (2024) at 23 ("In the business of statutory interpretation, if it is not the best, it is not permissible.").

The Final Rule is fatally flawed because it leaves the States no real choice, and Industry Applicants with no flexibility, regarding emissions control measures

because the Final Rule imposes EPA's inflexible national "presumptive standards" on existing sources at the State level. *See* No. 24A____ at 25-30.

B. The Super Emitter Program in the Final Rule Exceeds EPA's Authority under the Clean Air Act.

Congress did not grant EPA the authority to deputize non-governmental third parties to enforce the Final Rule. EPA can only exercise the authority Congress has delegated to it. *Massachusetts v. EPA*, 549 U.S. 497, 534-35 (2007). It is well established that federal agencies may not delegate their statutory authorities to private parties. *See Perot v. Federal Election Comm'n*, 97 F.3d 553, 559 (D.C. Cir. 1996) ("[W]hen Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor . . ."). EPA plainly lacks authority under the CAA to delegate its monitoring duties to private third parties.

The Final Rule's deputization of third parties also upends the cooperative federalism enshrined in the CAA by Congress. CAA Section 114 has specific provisions for State enforcement, allowing EPA's administrator to "delegate to such State any authority he has to carry out this section." 42 U.S.C. § 7414(b)(1). Section 114 does not authorize EPA to delegate any part of its enforcement or monitoring authority to private third parties. Industry Applicants already, as the law requires, work with the States and EPA to monitor and report emissions, and the Super Emitter Program unlawfully creates and devolves federal enforcement authority to otherwise uncontrolled private parties.

Congress has already carefully established the public's right to information and enforcement under the CAA. Section 114 includes requirements that air emissions reports maintained by owners and operators "shall be available to the public" (42 U.S.C. § 7414(c)) and places requirements and limitations on how EPA may access those records (42 U.S.C. § 7414(a)(2); *id.* at (d)). Further, Section 304 of the CAA, which authorizes citizen suits to enforce certain provisions of the CAA, contains strict restrictions on the types of actions a citizen can initiate, the notice it must provide to alleged violators, and the process in which to do so. *See* 42 U.S.C. § 7604. Nowhere did Congress grant EPA the authority to delegate its information gathering or monitoring duties to private entities.

Nonetheless, EPA claims its authority to delegate its monitoring and enforcement authority "is based on EPA's authority under CAA Section 114(a) to require 'any person who owns or operates an emission source' (except mobile sources) to provide information necessary for purposes of carrying out the CAA and its authority to regulate sources under CAA Section 111." App. 70a (89 Fed. Reg. at 16,877). CAA Section 114(a) establishes requirements on *owners or operators* of emissions sources to report and provide information *to EPA*. CAA Section 114 does not grant authority to *third parties,* who do not own or operate emission sources to collect or report such information, or allow EPA to delegate any of its information gathering authority to such third parties. *See* 42 U.S.C. § 7414(a)(1); 42 U.S.C. § 7414(b)(1) (noting that EPA's administrator may only "delegate to such *State* any authority he has to carry out this section." (emphasis added)). Nothing in the CAA

gives EPA the authority to delegate its information gathering power to private parties or impose penalties on Industry Applicants based on reports generated by unlawfully deputized private parties. EPA's effort to shoehorn the Super Emitter program into Section 114(a) is not even a permissible, much less the "best," interpretation of the statute. *Loper Bright Enterprises v. Raimondo, Secretary of Commerce,* 603 U.S. ____ (2024) at 23 ("In the business of statutory interpretation, if it is not the best, it is not permissible.").

II. The Final Rule's New Source Performance Standards Violate the Clean Air Act and are Arbitrary and Capricious.

The Final Rule violates the CAA as to *new sources* in several ways and is additionally arbitrary and capricious. The Final Rules unlawful requirements on new sources are effective *now*, causing ongoing irreparable harms to Industry Applicants.

A. The BSER for Associated Gas is not Adequately Demonstrated.

A BSER developed by EPA must "tak[e] into account the cost of achieving [any] such [emission] reduction and any nonair quality health and environmental impact and energy requirements" and be "adequately demonstrated." 42 U.S.C. § 7411(a)(1). These provisions prevent EPA from mandating measures that impose "exorbitant," "unreasonable," or "excessive" costs. *Lignite Energy Council v. EPA*, 198 F.3d 930, 933 (D.C. Cir. 1999); *Sierra Club v. Costle*, 657 F.2d 298, 383 (D.C. Cir. 1981).

Violating these mandates, the Final Rule imposes a BSER for handling of "associated gas" from oil wells that is neither cost-justified or adequately demonstrated. Under normal circumstances, operators will almost always choose to recover and sell the associated gas generated from producing oil wells. But, in cases

where the associated gas cannot be sold (*e.g.*, when there is no sales line availability or capacity), prior iterations of both EPA and State regulations required associated gas to be controlled through flaring (*i.e.*, burned) at a set efficiency percentage to reduce the amount of methane emissions.

In the Final Rule, EPA selected a BSER for associated gas of "rout[ing] associated gas to a sales line" that effectively prohibits flaring. App 23a (89 Fed. Reg. 16,833). Under section 60.5377b of the Final Rule, operators of a well that produces associated gas have only four options under the BSER: (1) routing (recovering) the associated gas into a sales line; (2) using the associated gas onsite as a fuel source; (3) using the associated gas for another useful purpose; or (4) reinjecting the recovered associated gas into the well or another well. The BSER, therefore, essentially prohibits new sources from flaring associated gas. *See* App. 246a (89 Fed. Reg. at 17,053 (§ 60.5377b)).[4] These BSER requirements can only be avoided if an operator makes a technical infeasibility demonstration showing that all of the BSER options are technically impossible (which demonstration cannot take cost into account). App. 144a (89 Fed. Reg. at 16,951).

[4] The Final Rule also imposes these requirements on existing sources modified after December 6, 2022. Under the CAA, the statutory term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (*or, if earlier, proposed regulations*) prescribing a standard of performance under this section which will be applicable to such source. 42 U.S.C. § 7411(a)(2). Notably, EPA's earlier December 6, 2022, proposed regulation, 87 Fed. Reg. 74,702, did not contain any proposed regulatory language, meaning that EPA's decision to subject sources constructed after December 6, 2022, to immediate requirements is regulating *existing sources* without any phase in period, further justifying the compelling need for a stay of the Final Rule.

The BSER violates Section 111 of the CAA in three key ways: (1) EPA did not consider the costs of routing associated gas; (2) EPA did not demonstrate that routing gas to a sales line is achievable for all associated gas sources; and (3) the technical infeasibility demonstrations are arbitrary and capricious because they are unduly vague.

i. EPA did not adequately demonstrate that routing associated gas to a sales line is cost-justified.

EPA failed to adequately demonstrate that routing associated gas to a sales line is cost-justified, instead simply assuming that because this control can be cost-effective where adequate sales line capacity is present, that it is cost-effective in all situations, even where existing sales lines lack capacity (or no sales line access is available). Under Section 111(a)(1), the BSER selected by EPA must "tak[e] into account the cost of achieving such reduction." Section 111(a)(1) is further limited by Section 111(b)(1)(B) which requires that EPA promulgate standards of performance for new sources "as [it] deems *appropriate*" and "shall . . . review and, if *appropriate*, revise such standards . . . ." 42 U.S.C. § 7411(b)(1)(B) (emphasis added); App. 40a (89 Fed. Reg. at 16,847 (acknowledging EPA's "discretion to determine the pollutants and sources to be regulated" based on this statutory provision); *Id.* at 53a (89 Fed. Reg. at 16,860) ("the final NSPS OOOOb and EG OOOOc reflect the EPA's unique authority and responsibility under the CAA to ensure that new and existing sources throughout the nation are subject to appropriate standards of performance through NSPS").

This Court has stated that "'appropriate' is 'the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the

relevant factors.'" *Michigan*, 576 U.S. at 752. "Read naturally," the word "requires at least some attention to cost." *Id.* Indeed, "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id.* Cost is traditionally a "centrally relevant factor when deciding whether to regulate," and considering costs "reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decision." *Id.* at 753 (emphasis in original).

Violating these considerations, EPA eschewed its obligation to account for the costs of routing associated gas to a sales line compared to other potential BSER technologies, and instead simply concluded that because routing gas to a sales line allows operators to receive a positive return where adequate sales line capacity is available, there would be minimal costs associated with the BSER. *See* App. 133a (89 Fed. Reg. at 16,940). EPA *assumed* "that in situations where gas sales line infrastructure is available, there is minimal cost to owners and operators to route the associated gas to the sales line. While situations at well sites can differ, which would impact this cost, the EPA believes that in every situation the value of the natural gas captured and sold would outweigh these minimal costs of routing the gas to the sales line." *Id.* (quoting 86 Fed. Reg. 63,110, 63,237 (Nov. 15, 2021)). Instead of "taking into account" the costs of achieving such reductions, 42 U.S.C. § 7411(a)(1), the Final

Rule simply assumes, without any data or analysis, that there are no cost impacts "in every situation." [5]

The fact that operators will generally choose to route associated gas to a sales line belies EPA's logic. Operators would not forego routing gas to a sales line *but for* a barrier to doing so - meaning that there is a cost impact or practical barrier discouraging operators to do so. For example, operators frequently cannot route gas to a sales line when there is no available and adequate sales line capacity, either because there is no sales line at all, or the capacity of an existing line is insufficient. In such instances, there is indeed a cost impact as operators must either resort to one of the other options in the BSER (injection, use as a fuel source, or using the associated gas for another useful purpose) or demonstrate technical infeasibility (discussed below). EPA's assumption ignores the critical fact that "midstream" companies - not operators - construct and control the capacity of sales line. Operators cannot force midstream companies to provide sales line availability or capacity. Thus, requiring operators to route gas to a sales line imposes an emission "control" entirely out of operators' control. When EPA "by design" imposes a rule where there are "no particular controls a[n] [ ] operator can install and operate to attain the emissions limits established," EPA oversteps its authority. *West Virginia*, 597 U.S. at 725. Here, the Final Rule's requirement to prohibit source-controlled flaring and

[5] EPA cannot claim that its Regulatory Impact Analysis ("RIA") justifies its BSER determinations because EPA noted in the Final Rule that "the benefits analysis [in the RIA] is distinct from the statutory BSER determinations," explaining that its "assessment of benefits . . . is presented solely for the purposes of complying with E.O. 12866." App. 29a (89 Fed. Reg. 16,836); *see also* App. 59a (89 Fed. Reg. 16,866).

instead require operators to route associated gas to a sales line over which they have no control is exactly such an overstep.

Further, EPA did not consider costs of alternative control technologies, such as enclosed combustion devices, thermal oxidizers, catalytic incinerators, and deep well injection, instead solely analyzing a control prohibition (routing to a sales line) and comparing it to the cost of flaring. *See* App. 133a-134a (89 Fed. Reg. at 16,940-41). EPA also did not analyze the costs of its other three allowable control options, instead simply concluding that (i) use as a fuel source, (ii) use for other beneficial use, and (iii) reinjection all constitute "regulatory alternative[s]" because they "achieve equivalent emissions reductions." App. 135a-136a (89 Fed. Reg. at 16,942-16,943). EPA should have evaluated all three options to determine the "cost of achieving such reduction" in order to be adequately demonstrated. 42 U.S.C. § 7411(a)(1). EPA thus prohibited flaring without analyzing the costs of three of the compliance options and, for the fourth (routing to sales lines), assumed, without data or analysis, that it was practically available and cost-effective in "every situation." App. 133a (89 Fed. Reg. at 16,940) (only analyzing situations "where gas sales line infrastructure is available").

The fact that the Final Rule allows operators to flare associated gas if the operator can demonstrate the technical infeasibility of the four options for handling associated gas does not remedy the Final Rule's flawed BSER. App. 246a (89 Fed. Reg. at 17,053 (§ 60.5377b(b) and (c)). The demonstration required by Section 60.5377b(g) is as to *technical* infeasibility only and does not allow operators to

consider the costs of the four BSER options because EPA claims it has already taken costs into account. *See* App. 144a (89 Fed. Reg. at 16,951 ("The EPA disagrees that economic feasibility is a valid criterion on which to allow routine flaring or routing to control as part of the standard . . . the EPA has already considered costs when setting the standard. As such, there is no reason to allow for the type of 'economic feasibility' showing that commenters are requesting.")). This is demonstrably false: EPA did not evaluate the cost of three of the options, and in the case of sales lines did not evaluate the cost where sales line capacity was not present or adequate: precisely the situations where a technical infeasibility demonstration would be triggered. EPA's refusal to allow consideration of economic feasibility as a factor forces operators like Industry Applicants to bear exorbitant costs, even when routing to an associated sales line is economically infeasible. *See West Virginia,* 597 U.S. at 729 (confirming EPA's argument that it could not demand "exorbitantly costly" controls).

ii. EPA did not adequately demonstrate that routing associated gas to a sales line is achievable.

Similarly, EPA failed to demonstrate that routing associated gas to a sales line is "achievable" for all regulated sources which, as a practical matter, means the availability of adequate sales line capacity. EPA did not demonstrate that the recovery and sale of associated gas is "achievable" at oil wells that produce "stranded gas" (*i.e.*, associated gas that cannot captured and sold). App. 426a at ¶¶16-18. This includes instances when Industry Applicants drill modern horizontal wells in areas with existing legacy production and no existing or suitable gas takeaway pipelines through which associated gas can be routed for sale. App. 426a-427a at ¶22. In

Industry Applicants' experience, midstream providers will not provide or invest in sales gas takeaway infrastructure until after an operator can prove sufficient volumes of associated gas will be produced to make the gas line investment economically attractive to the midstream company (not the oil well operator). App. 427a at ¶24. Since EPA did not take this into account, the Final Rule will require Industry Applicants to shut-in or curtail production until takeaway infrastructure and capacity is provided by a midstream operator (if at all), all while Industry Applicants are subject to contractual obligations from to produce oil from the wells – an untenable alteration of contractual and business operations, and imposition of significant costs. App. 428a at ¶27; App. 133a (89 Fed. Reg. at 16,940) (only analyzing situations "where gas sales line infrastructure is available"); App. 143a (89 Fed. Reg. at 16,950) (EPA acknowledging receipt of comments "that objected to the proposal to require a demonstration of infeasibility . . . in instances when the primary option (*e.g.*, routing the associated gas to a sales line, using it as onsite fuel or for another beneficial purpose, or injecting/reinjecting it) is unavailable" and instead of examining the costs impacts of such circumstances in the BSER determination, providing only a limited list of *temporary* flaring allowances). Further, there are frequently situations where a well will produce more associated gas than the existing gas takeaway capacity can handle the associated gas volumes, again requiring shut-in or curtailment of production under the Final Rule. App. 426a at ¶17. Thus, the Final Rule effectively imposes a "fifth option" for controlling associated gas and for

which EPA did not evaluate either costs or achievability: shutting down oil wells where there the sales line capacity is either not present or inadequate.

Despite these realities, the Final Rule makes only limited *temporary* allowances for these situations, while still ignoring the costs of *permanently* remedying these situations in its BSER analysis. The Final Rule only allows operators to avoid routing associated gas to a sales line where they show it is "technically infeasible" to route gas to a sales line (or engage in the other three "equivalent" BSER options). App. 246a-247a (89 Fed. Reg. at 17,053-17,054). The technical infeasibility analyses cannot take costs into consideration because EPA assumed in its BSER determination that operators would build any necessary sales line infrastructure, despite their lack of expertise, control, or cost ability to do so.

iii. The technical feasibility demonstrations for associated gas under the Final Rule are arbitrary and capricious.

For operators such as Industry Applicants to avoid the onerous requirements to route associated gas to a sales line, the Final Rule requires that operators prove to EPA that it is "technically infeasible" to: (1) route into a gas gathering flow line or collection system to a sales line, (2) recover from the separator and use as an onsite fuel source, (3) recover from the separator and use for another useful purpose that a purchased fuel, chemical feedstock, or raw material would serve, or (4) recover from the separator and reinject into the well or inject into another well. App. 80a (89 Fed. Reg. at 16,887). EPA admits that the third prong—proving that there is no other useful purpose for the associated gas—is unbounded. *Id.* ("The final rule does not specify the 'other useful purpose' solutions that must be evaluated, but it is the

responsibility of the owner and operator, along with the qualified professional . . . to ensure that the list of options evaluated is comprehensive to address technically viable solutions."). This language is so vague that an unlimited amount of "useful purposes" would have to be evaluated to effectively demonstrate technical infeasibility, giving EPA unbound discretion to deny any such demonstration. It gives no clarity to operators such as Industry Applicants, who must submit any technical infeasibility analyses to EPA who will determine if the "useful purposes" evaluated are sufficiently "comprehensive."

This inability of operators to suitably demonstrate technical infeasibility under the BSER will prevent Industry Applicants and other operators from developing new and existing oil and gas assets effectively. This will lead to limits on production, the loss of leaseholds, and damage to artificial lift equipment, resulting in the reduction of royalty payments and related tax revenue owed to royalty owners, the States, and to the federal government. App. 428a-429a at ¶¶32-33. This will also create delays in development and construction activities as operators are forced to wait on midstream providers to complete their infrastructure development or upgrades. *Id.*

B. The Net Heating Value Monitoring Requirements in the Final Rule are Impossible to Meet and Serve No Purpose.

The Final Rule imposes net heating value ("NHV") monitoring requirements for all new sources with emissions routed to a process or control device (*e.g.*, a flare) that are literally impossible to meet. Impossible requirements imposed by an agency are *per se* unreasonable: "Conditions imposed by [the] order are . . . unreasonable by virtue of being impossible to meet." *D.C. Transit Sys., Inc. v. Washington*

Metropolitan Area Transit Comm'n, 466 F.2d 394, 402 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 1086 (1972).

Section 60.5417b of the Final Rule requires operators of new sources that route emissions to a flare to "[c]ontinuously monitor or collect a sample of the inlet gas to the enclosed combustion device or flare twice daily to determine the average NHV of the gas stream for 14 consecutive operating days." App. 298a (89 Fed. Reg. at 17,105). These requirements are literally impossible given the intermittent flow of gases to flares. App. 430a at ¶37. Gas flow to a flare may occur for as little as a few minutes at a time, making continuous monitoring or collection of a single one-hour sample impossible, let alone the 28 one-hour samples over 14 consecutive days as required by the Final Rule impossible. *Id.*

In addition, the NHV monitoring requirements serve no meaningful purpose. EPA set the NHV monitoring requirements to determine compliance with the NHV *minimum* of 300 British thermal units per standard cubic foot ("Btu/scf") for the input gas. However, commenters such as Industry Applicants pointed out to EPA that the NHV of flaring streams "is typically fixed or well above the minimum NHV requirements, as these vent streams consist of mostly hydrocarbons and the simplest hydrocarbon has a NHV of approximately 900 [Btu/scf], which is well above the minimum NHV" of 300 Btu/scf in the Final Rule. App. 158a (89 Fed. Reg. at 16,965); App 446a-447a at ¶ 29. EPA, without substantive explanation, rejected this comment by claiming (without supporting evidence) that flare streams "may contain large amounts of inert materials" with a lower NHV. App. 159a (89 Fed. Reg. at 16,966).

EPA, recognizing the problems with the NHV requirements, stated it was granting a request for reconsideration of the requirements on May 6, 2024, and "intend[s] to issue a *Federal Register* notice" on that issue. Letter from Tomás E. Carbonell, EPA Deputy Assistant Administrator for Stationary Sources, May 6, 2024 at 1.[6] Yet, as of the time of this Application, EPA has not issued any such *Federal Register* notice, and operators are under a fast-approaching November 3, 2024 deadline by which to complete all the NHV testing for which EPA recognized merit reconsideration. *Id.* at 2.

Further complicating the NHV requirements, SPL Inc., a leading provider of compliance and testing services for the oil and gas industry, published a letter to EPA dated March 19, 2024 stating that the "amount of additional natural gas samples this requirement will result in is vastly greater than the capacity that laboratories have to collect and process such samples." App. 431a at ¶¶41-43; App. 437a.

As it stands today, certain Industry Applicants, including Continental Resources, simply cannot meet the fast-approaching November 3, 2024 sampling deadline to comply with a monitoring requirement that is technically impossible to implement, and even attempting to do so will come at significant expense and hardship in short order. Continental Resources alone estimates that it has at least 175 sites that are subject to these NHV monitoring requirements. App. 445a at ¶25. For these 175 sites to become compliant, Continental Resources estimates it will

[6] Available at https://www.epa.gov/system/files/documents/2024-05/letter-to-api-and-apx.-5.6.24-signed_1.pdf (last visited Aug. 26, 2024).

require over 400 days to conduct the required sampling *after* it makes the necessary expenditures to procure the necessary testing equipment (ignoring that the sampling may not satisfy the NHV requirements and that laboratories likely cannot analyze the required testing in time). *Id.* Continental Resources estimates that the total cost of this testing will be over $3,500,000, *which costs Continental Resources is currently incurring*. App. 446a at ¶26. Setting aside this significant cost, Continental Resources simply does not have time to complete the required NHV testing requirements by the November 3, 2024 compliance deadline, thereby rendering them impossible.

C. The Enforceable Limits of the Final Rule are Arbitrary and Capricious.

The Final Rule requires new or reconstructed "batteries" of oil storage tanks with the potential for emissions of 6 tons per year ("tpy") of VOCs or 20 tpy of methane to comply with new LPE requirements, including: initial emissions testing, initial NHV testing, continuous flow monitoring, monthly visual observations for emissions, and recordkeeping and reporting requirements. App. 237a-240a. (89 Fed. Reg. 17,044-17,047 (§ 60.5365b)). In a vacuum, these requirements would not be problematic. Traditionally, operators have been required to calculate the potential for uncontrolled emissions—*e.g.*, where a well generated 100 tpy of VOCs but had flare controls that eliminated 95% of emissions, that facility's potential emissions would only be 5 tpy, thereby not triggering the requirements of § 60.5365b.

However, the Final Rule now does not allow operators to account for *existing* control devices in place *unless* the State where the source is located has in place

"legally and practicably enforceable limits" meeting six specific criteria found at § 60.5365b(e)(2). App. 238a (89 Fed. Reg. 17,045 (§ 60.5365b(e)(2)(i)(A)-(F))). While the States in which Industry Applicants operate generally already have robust permitting schemes requiring 95%+ emissions controls, to date and to Industry Applicants' knowledge, Texas and Oklahoma are the only States to have provided operators a method for certifying that "legally and practically" enforceable limits are in place for calculating potential emissions under the Final Rule. App. 447a-448a at ¶¶33-34. Importantly, neither Texas' or Oklahoma's certification options have been endorsed by EPA, so operators cannot be certain today whether storage tanks in Texas or Oklahoma meet the Final Rule's LPE requirements for purposes of calculating potential emissions. *Id.*

Thus, while almost all States have permitting requirements that mandate emissions controls at tank batteries in excess of 95%, operators cannot take credit for those controls under the Final Rule because there is as yet no mechanism to demonstrate that the State regulations meet EPA's newly-created criteria. Practically, this means that operators who modify any existing oil storage facility must comply with § 60.5365b's onerous requirements, just to demonstrate that the emissions control which were already installed and required under State law are "legally and practically" enforceable, all while generating *zero* emissions benefits.

Confoundingly, EPA acknowledged "that 11 states already required control devices for storage vessels, including both Texas and New Mexico, such that the EPA could subtract the storage vessels in these states "from the overall count of storage

vessels that would be subject to the final rule." App. 170a (89 Fed. Reg. at 16,977). Despite acknowledging the existing control device requirements for storage vessels and removing tanks in those States from its regulatory impact analysis, EPA went on to conclude that it had not made any "'determination' as to the adequacy of the state permitting regulations for purposes of determining applicability of the NSPS.'" *Id.* at 171a (89 Fed. Reg. at 16,978). EPA, by its own admission, has imposed significant and burdensome requirements on operators of new or reconstructed storage vessels that already have emissions controls – which will generate *zero* emissions benefits and which EPA excluded from its regulatory impact analysis. These requirements for storage tanks under the Final Rule are arbitrary and capricious.

D. The Fugitive Emissions Monitoring Requirements Cannot be Achieved by Marginal Well Owners.

EPA initially proposed to use the amount of annual emissions of methane as a way to categorize wells and determine what fugitive emission monitoring and repair requirements would apply to different well sites - notably exempting from monitoring requirements smaller-producing well sites emitting less than three tpy (so-called "marginal" wells). *See* 86 Fed. Reg. at 63,118–21. The significant costs of conducting Optical Gas Imaging ("OGI") monitoring do not outweigh the miniscule benefits such monitoring would provide at these marginal well sites which do not generate significant fugitive emissions. EPA nonetheless changed course in the Final Rule, and adopted arbitrary and capricious monitoring requirements based on the number of pieces of certain types of equipment associated with a well site, ignoring numerous

comments explaining why equipment count should not be utilized over throughput or emissions to categorize well sites, to determine whether a well site was "small" (or marginal) and therefore exempt from OGI monitoring requirements. *See* App 327a, 410a (89 Fed. Reg. at 17,134, 17,217).

In doing so, EPA arbitrarily classified smaller producing (and emitting) marginal wells, which typically have less than three tpy of methane emissions, but nonetheless often require two or more pieces of relevant equipment, the same as major well sites with more potential for much higher emissions. In so doing, EPA explicitly acknowledged that it failed to adequately consider the regulatory compliance costs the Final Rule would impose on marginal well operators. *See* App. 99a (89 Fed. Reg. 16,906) (acknowledging EPA's difficulty in determining the impacts of the Final Rule on marginal well owners).

As set forth by commenters and acknowledged by EPA, these monitoring requirements will render compliance with the Final Rule unachievable because the costs will be "prohibitive for small owners and operators and will result in the end of their operations." 89 Fed. Reg. at 16,905 (citing comments). Accordingly, these monitoring requirements are simply not achievable for a significant portion of the well sites in the United States and further highlight the arbitrary and capricious nature of the Final Rule. *See also National Lime Association v. EPA*, 627 F.2d 416, 431–33 (D.C. Cir. 1980) (emphasizing EPA's duty to ensure that its standards are "achievable" and focusing on EPA's failure to adequately consider "the representativeness for the industry as a whole of the tested plants on which it relies,

at least where [EPA's] central argument is that the standard is achievable because it has been achieved (at the test plants).").

III. Industry Applicants Will Suffer Irreparable Harms Absent a Stay.

A. The Final Rule's Presumptive Emission Standards Implicate Serious Reliance Interests for Industry Applicants and are Arbitrary and Capricious.

The Final Rule's usurpation of State statutory authority causes immediate irreparable harm on Industry Applicants (and oil and gas operators across the nation) who have planned and developed their operations for existing sources in reliance on the flexibility and options encompassed in SIPs. App. 424a-429a at ¶¶8-33.

For decades, Industry Applicants have invested, planned, and developed their operations based on the longstanding application of *State* regulations, through SIPs, to its existing operations. App. 424a at ¶8. The Final Rule turns that substantial reliance on its head, erasing States from the picture, and requiring Industry Applicants to immediately begin the time consuming and costly process of adjusting their existing operations to comply with the Final Rule's presumptive standards. For example, under EPA's presumptive standards, Continental Resources will no longer be able to rely on considerations such as remaining useful life of its facilities (since EPA has written out such considerations from the States' hands with its presumptive standards), or which tank batteries are covered facilities (App. 424a-425a at ¶¶10-11) which Continental Resources planned for in developing and constructing its existing operations. This substantially impairs Industry Applicants' funding and ability to allocate resources and is already affecting Industry Applicants' day-to-day operations. *Id.* at ¶¶ 7-14.

When an agency changes policy (as EPA does with the Final Rule), it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016), (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515) (2009)). Accordingly, an agency must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020). If an agency changes its policy despite reliance interests, it must provide a "reasoned explanation" therefor. *Id.* at 35. EPA has not provided the required reasoned explanation for its decision to impose presumptive federal emissions standards for existing sources in the Final Rule, nor has it assessed Industry Applicant's material reliance interests.

B. Industry Applicants' Operational Harms.

The Final Rule's prohibition on flaring associated gas causes immediate and irreparable harm to Continental Resources. Continental Resources was required to shut-in or curtail wells starting May 7th (the effective date of the Final Rule) until it could make a technical infeasibility determination, or a midstream company could provide pipelines to such wells with sufficient capacity to accept the associated gas. App. 444a at ¶19. Continental Resources has estimated the technical infeasibility demonstrations would have taken over 7,000 man hours for the obviously affected wells. App. 443a-444a at ¶18.

Similarly, in addition to the NHV monitoring requirements being *technically* impossible to implement (Section II.B, *supra*; *see also* App. 430a at ¶37), they are also

logistically impossible for operators to comply with by the Final Rule's November 3, 2024, compliance date. Continental Resources estimates that, even if compliance had been technically feasible, the NHV monitoring testing would have taken over 400 days from the Final Rule's promulgation at a cost of approximately $3,500,000. App. 445a-447a at ¶¶22-29

Finally, Continental Resources has estimated the costs of completing the legally and practically enforceable limit start up testing for modified or newly constructed oil tank batteries to cost in the range of $2 to $3 million dollars over Continental Resources approximately 100 subject facilities. App. 448a. at ¶¶34-37.

C. The Super Emitter Program Will Cause Immediate Irreparable Harm to Industry Applicants.

The Super Emitter Program in the Final Rule irreparably harms Industry Applicants in three ways: First, "deputized" third parties may submit reports of "super emitter" events to EPA within 15 days of observation. App. 243a (89 Fed. Reg. at 17,050 (§60.5371b(c)(9))). EPA then has an unlimited amount of time to review and verify the third-party notification before sharing it with the operator and publicly posting the alleged "super emitter" event online. *Id.* (§60.5371b(c)). Significant amounts of time could pass before operators such as Industry Applicants are notified of the alleged event, delays that could increase both potential emissions and fines in the event of verified excess emission events. These outcomes are not only inconsistent with the intent of the CAA Section 111's monitoring provisions, but also financially harm operators and raise significant due process concerns.

Second, operators such as Industry Applicants also face risks of reputational harm under the Super Emitter Program. Third-party super emitter notifications will be made public after EPA determines a notification is "complete and does not contain information that the EPA finds to be inaccurate to a reasonable degree of certainty." App. 243a (89 Fed. Reg. at 17,050 (§60.5371b(c))). This is *not* a determination that the notification covers a *bona fide* super emitter event, just that emissions in some form (whether allowable under the Final Rule or not) were observed.[7] The public release of these notifications will be made before operators such as Industry Applicants have the opportunity to review or rebut the allegations in the notification (*e.g.*, by showing it was not from one of their facilities, technically flawed, was an otherwise allowable emission event, etc.). Operators like Industry Applicants thus face reputational harm from publicized reports that, in many instances, contain incorrect information or otherwise do not include evidence of a violations of the Clean Air Act. Reputational harm has been recognized as a harm that can confer Article III standing. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021).

Third Industry Applicants face immediate administrative harms from super-emitter reports from the federally deputized private parties. The remote sensing technology EPA authorizes "qualified" third-parties to use may detect and generate allegations regarding lawfully permitted emissions or even emissions from other

[7] While EPA may not initially post the Super Emitter Notifications with the owner/operator specifically identified, information such as the "latitude and longitude coordinates in decimal degrees" allows identification of individual operators. App. 243a (89 Fed. Reg. at 17,050).

facilities. Industry Applicants will have to investigate and respond to Super Emitter notifications by these deputized private parties under the threat of penalties and injunctive relief regardless of whether the allegations are remotely valid or even involve Industry Applicants' facilities.

As just one example, before the Super Emitter Program taking effect, Continental Resources received a notification from Bloomberg NEF utilizing NASA data alleging a super emitter event, which was in fact determined to be an allowable well maintenance activity. App. 432a-433a at ¶¶48-49. However, Continental Resources' staff was required to spend significant time investigating the alleged emissions event to confirm it was a routine (and allowed) well maintenance activity. *Id*. The unlawful Super Emitter Program thus will be just as likely to divert resources from the goals of the CAA as to help identify true excess emissions events.

IV. The Balance of the Equities Weigh in Applicants' Favor for a Stay of the Final Rule.

Industry Applicants plainly have a "strong argument[] about the harms they face" during the pendency of litigation, including the "'nonrecoverable'" costs to Industry Applicants and similar operators of "complying with" the Final Rule, and the need to alter business operations to account for EPA's latest attempt to drastically rework its regulation of emissions in the oil and gas sector. *Ohio*, 144 S. Ct. at 2053.

The remaining equitable factors "merge" here given that "the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009) and do not overcome the need for a stay of the Final Rule. It does not serve "the public interest" to "permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Ass'n of*

Realtors, 594 U.S. at 766. And even if the balance of the equities did not weigh in Petitioners favor, where "each side has strong arguments about the harms they face and equities involved, [the Supreme Court's] resolution of these stay requests ultimately turns on the merits and the question who is likely to prevail at the end of this litigation." *Ohio*, 144 S. Ct. at 2053.

CONCLUSION

For those reasons, the Court should immediately stay the Final Rule pending the D.C. Circuit's resolution on the merits of Industry Applicants' petitions for review, including through resolution of any petitions for certiorari.

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