No. 24-

IN THE

Supreme Court of the United States

JAMES SHEPHERD, TRUSTEE FOR THE JAMES B. SHEPHERD TRUST, AND NEW MILLENIUM CONCEPTS, LIMITED,

Petitioners,

v.

MICHAEL S. REGAN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; CHRISTINE TOKARZ; DAVID COBB; CAROL KEMKER; AND KERIEMA NEWMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Article III Standing:** Did the Fifth Circuit err in concluding that the Appellants lacked Article III standing despite their well-pleaded allegations of concrete and particularized injuries caused by the Environmental Protection Agency's ("EPA") Stop Sale, Use, or Removal Orders ("SSUROs"), which directly impacted their business operations and property interests?

2. **Third-Party Standing:** Did the Fifth Circuit err in concluding that the Appellants lacked Third-Party Standing despite their well-pleaded allegations of concrete and particularized injuries caused by the EPA's SSUROs to entities with which Appellants have close relationships, which directly impacted their business operations and property interests?

PARTIES TO THE PROCEEDING

Petitioners:

1. **James Shepherd, Trustee for the James B. Shepherd Trust**—James Shepherd is the Trustee of the James B. Shepherd Trust, which holds equitable title to the controlling member position in Berkey Int'l, LLC, and controlling partnership interest in New Millennium Concepts, Ltd. ("NMCL"). Mr. Shepherd, as Trustee, oversees operations of Berkey Int'l and NMCL.

2. **New Millennium Concepts, Ltd.**—NMCL is a Texas-based company that manufactures and distributes Berkey water filtration systems and related products. NMCL has been in operation since 1998 and has built a reputation for its innovative water filtration technology.

Respondents:

1. **Michael S. Regan, Administrator, Environmental Protection Agency**—Michael S. Regan is the Administrator of the EPA. In that capacity, Mr. Regan oversees the enforcement of federal regulations, including the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

2. **Environmental Protection Agency**—The EPA is a federal agency tasked with implementing and enforcing environmental laws and regulations, including FIFRA.

3. **Christine Tokarz**—Christine Tokarz is an EPA agent involved in the investigation and enforcement actions against Berkey water filtration products. Ms. Tokarz has played a key role in the agency's decision to issue Stop Sale, Use, or Removal Orders against the Petitioners.

4. **David Cobb**—David Cobb is an EPA official involved in the enforcement actions against Berkey water filtration products.

5. **Carol Kemker**—Carol Kemker is an EPA official involved in the enforcement actions against Berkey water filtration products.

6. **Keriema Newman**—Keriema Newman is an EPA official involved in the enforcement actions against Berkey water filtration products.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company that owns 10% or more of Petitioner's stock.

RELATED PROCEEDINGS

United States District Court, District of Puerto Rico—No. 3:24-cv-01106-CVR—*Berkey International LLC vs. Environmental Protection Agency et al.*, still ongoing. This case challenges the same SSUROs as in this case, but was filed in the District of Puerto Rico. A denied temporary injunction from that case is also in process before the First District Court of Appeals was filed in October of 2024, given case no. 24-1917.

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PETITION FOR WRIT OF CERTIORARI

The undersigned, on behalf of Petitioners James Shepherd, Trustee for the James B. Shepherd Trust, and New Millenium Concepts, Limited, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order of the United States District Court for the Northern District of Texas dismissing the case for lack of standing is unreported but is reprinted in the appendix at App. 12. The District Court's order denying the motion for preliminary injunction is also unreported and is reprinted in the appendix at App. 2-9.

The affirming opinion of the United States Court of Appeals for the Fifth Circuit (App. 23-11189) is reported at *Shepherd v. Regan*, 2024 U.S. App. LEXIS 20100 (5th Cir. Tex., Aug. 9, 2024). The opinion of the district court is reported at *Shepherd v. Regan*, No. 4:23-cv-00826-P, 2023 U.S. Dist. LEXIS 206246 (N.D. Tex. 2023).

JURISDICTION

The judgment of the court of appeals was entered August 9, 2024. This Court has jurisdiction under 28 U.S. Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article III, Section 2

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATEMENT OF THE CASE

This case arises from the U.S. Environmental Protection Agency's issuance of stop orders against distributors of Berkey water filters to prevent sale of water filter systems manufactured by New Millennium Concepts, Ltd. and Berkey Int'l, LLC. ROA.883-938. After decades of deliberate disinterest from the EPA, one EPA agent reclassified Berkey water filters from "pesticide devices" to "pesticides" under the FIFRA, thereby subjecting them to stringent regulatory requirements and costs. ROA.851-857, 883-938.

The EPA's latest attempt at regulatory overreach was aimed at Berkey International, LLC ("Berkey Int'l"), a

manufacturer for Appellants that is located in Puerto Rico. During these events, the EPA explicitly and directly threatened Appellant New Millenium Concepts, Ltd. ("NMCL"), located in northern Texas, which arranges for third-party manufacture and sale of Berkey water filters. ROA.851-857, 861-862, 875-876.

The business structure of Berkey is complicated. To start, the beneficiaries of the express *inter vivos* trusts, James B. Shepherd Trust and JMDBC Trust, own equitable title to the controlling member position in Puerto Rico-based Berkey International, LLC and the controlling partnership interest in NMCL, as assets of the trusts. James "Jim" B. Shepherd is a beneficiary in the trust and acts as its trustee. ROA.851. Shepherd, as trustee of the trusts, licensed Berkey Int'l to manufacture Berkey filtration systems. ROA.851. These systems include Black Berkey filters, the subject of the EPA's concerns. ROA.851, 854.

Additionally, Shepherd, as trustee, licensed NMCL to have exclusive marketing rights for Berkey Water Filtration systems and products. ROA.851. As already stated, NMCL's headquarters are in Arlington, Texas. ROA.851. The general partner in NMCL is Transglobal Management, LLC, a Texas company; Shepherd and the other beneficiaries are limited partners holding a majority interest. ROA.851. NMCL is a longstanding American company that has manufactured Berkey water filters and related products for more than twenty-five years without enforcement of the EPA's pesticide regulations. ROA.851, 854-855, 858, 867-868, 883-938.

The signature Berkey product is its Black Berkey Water filter, which employs proprietary, trade-secret technology to ensure superior performance, providing safer and more effective operation than competing household and camping water filters. ROA.866, 1400. Berkey distributes its filters through authorized retailers. ROA.851, 1399.

James Shepherd, trustee for the James B. Shepard Trust, and NMCL (collectively "Appellants"), filed suit seeking to enjoin enforcement of the SSUROs and challenge the EPA's reclassification under FIFRA and the Administrative Procedures Act. ROA.8-56,794-850. Appellants assert that the EPA's actions are arbitrary and capricious and exceed the agency's statutory authority under FIFRA. ROA.794-850.

In the events leading up to the stop orders issued by the EPA, the EPA was engaged in labelling issues with NMCL in Texas. This began in April of 2022, when the EPA stopped an incoming shipping container in Denver that was bound for NMCL's office in Hurst, Texas. ROA.869, 872. That event resulted in a virtual compliance call between the EPA and NCML on May 4, 2022, as documented in the "Closeout Letter" letter written *to NCML*. The Closeout Letter released the shipment, but warned NMCL of various statements that were potentially false and misleading, and disallowed under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), stating:

> New Millennium Concepts, Ltd may be in violation of FIFRA section 12(a)(1)(F), 7 U.S.C. § 136j(a)(1)(F), for distributing a device that is misbranded.

> Nothing in this letter shall limit or preclude EPA from assessing penalties or taking any other action authorized under FIFRA. The EPA reserves the right to bring an action against New Millennium Concepts, Ltd assessing or seeking penalties or other relief for any FIFRA violations.

ROA.876.

In trying to work with the EPA, its agent acted at all times as though NMCL was the major actor and decision-maker with regard to Berkey products, writing at one point, on June 8, 2022 about a Texado, Ltd., a Colorado packager for Berkey products:

> "Appreciate the follow up, but would like to note that simply adding the EPA Establishment number to the pesticide device label does not meet all the FIFRA requirements. Also note that there seems to be quite a few new establishments that are not submitting their Initial 30-day report, rendering them 'delinquent.'"

ECF No. 14-1, p.3, para. 10; ECF No. 14-2, p. 11, 12.

In the last half of 2022, NMCL worked with the EPA on various labeling options in an attempt to satisfy an ambiguous and never articulated standard, including one rejection of Berkey labels because the proposal included an image of a lake, which was rejected because the EPA agent claimed that a client might believe the filter would be effective to clean lake water and would thus constitute a false claim. ROA.855, 997-1077.

On December 27, 2022, the EPA began issuing SSUROs to several Berkey distributors and business partners across several states, including James Enterprises in Colorado (Dec. 27, 2022), Vendor B in Alabama (February 3, 2023), Fritz Wellness in Colorado on February 27, 2023, Eden Valley Farms LLC in Utah, on March 6, 2023, Mountain Mama Natural Foods, Inc. in Colorado, on March 7, 2023, Good Earth Natural Foods Co., in South Dakota, on May 2, 2023, and Berkey Int'l in Puerto Rico on May 8, 2023. ROA.883-938.

Appellants filed suit based on the EPA's interaction with NMCL, the damage caused to it by the EPA, and third-party standing regarding NMCL's business network.

The District Court dismissed the action for lack of Article III standing and third-party standing, finding that Appellants failed to demonstrate a concrete and particularized injury traceable to the EPA's actions or a reason as to why Berkey Int'l could not bring suit. ROA.1718-1727. Specifically, the court held the connection between the SSUROs and Appellants' financial losses was too attenuated and speculative. ROA.1718-1727.

On appeal, the Fifth Circuit affirmed the District Court's ruling "in light of the briefs and the record." App. 12. The Fifth Circuit did not provide any other analysis.

Appellants now petition this Court for a writ of certiorari, asserting that the lower courts erred in their application of Article III standing principles. Appellants argue that they have suffered concrete injuries directly attributable to the EPA's regulatory actions, including

the cessation of royalty payments, the shutdown of manufacturing operations, and vast increased regulatory compliance costs. Further, Berkey Int'l did not join suit because the EPA has been primarily negotiating with NMCL and there was a mutual understanding between the parties that NMCL was the point of contact for the EPA regarding Berkey water filters companies. These injuries, Appellants contend, are sufficient to establish standing under Article III and third-party standing.

ARGUMENT

Summarizing: Appellants have specific, legally cognizable injuries. Therefore, Appellants have Article III standing. Further, Appellants have third-party standing.

Question Presented #1, Article III Standing:

Did the Fifth Circuit err in concluding that the Appellants lacked Article III standing despite their well-pleaded allegations of concrete and particularized injuries caused by the Environmental Protection Agency's Stop Sale, Use, or Removal Orders, which directly impacted their business operations and property interests?

The Fifth Circuit's conclusion that the Appellants lacked Article III standing is in direct conflict with established Supreme Court precedent, which requires that a plaintiff demonstrate an injury in fact, causation, and redressability to satisfy Article III's standing requirements. The Appellants in this case have provided well-pleaded allegations that satisfy all three prongs of this test. The Fifth Circuit's decision to dismiss the case

on standing grounds contradicts the principles set forth by this Court and undermines the Appellants' ability to seek redress for tangible harms inflicted by the EPA.

I. Legal Framework for Article III Standing

To satisfy the prerequisites of Article III standing, "[the] plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

II. The Appellants Have Demonstrated an Injury in Fact.

To prove an injury in fact and survive dismissal, a plaintiff must show that it has suffered a concrete and particularized injury that is actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 560.

Appellants have suffered legally cognizable injuries. Specifically, Berkey-related businesses are unable to obtain new Black Berkey filters due to the EPA's enforcement actions or threats thereof, as those actions interfere with not just one Berkey-related facility but have had a tremendous impact on the entire supply chain of Berkey vendors, dealers, and customers, worldwide. ROA.859-863. Appellants have stated that the compliance costs will put NMCL and Berkey Int'l out of business. ROA.851-868, 1397-1399. Appellants face legal threats from EPA to comply with its new interpretation of FIFRA definitions to avoid prosecution and have created

commercial uncertainty among Berkey's sales channels. ROA.1397-1407. Such uncertainty and pressure chill constitutional and ownership rights. The JBS trust has suffered legally cognizable injuries to their property because the EPA's actions are depriving the trust of royalties from Berkey Int'l, beneficiaries of their present vested property interests in Berkey businesses and the benefits that result. ROA.851, 1400, 1397-1407.

The Fifth Circuit dismissed these allegations as "conclusory," yet the record shows detailed, specific statements of harm, including the complete halt of royalty streams and the closure of Berkey International's manufacturing plant, and increased compliance costs. ROA.859-862. This Court has held that economic injuries, such as lost revenues and increased compliance costs, are sufficient to constitute concrete injuries. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013). The Appellants' injuries are real, particularized, and directly traceable to the EPA's actions, thus satisfying the injury-in-fact requirement of Article III standing.

III. The EPA's SSUROs are the obvious cause of Appellant's injury.

The second prong of standing requires that the injury be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Appellants have shown that their injuries are directly attributable to the EPA's SSUROs. The record demonstrates that the SSUROs were issued against third parties in the Appellants' supply chain, which directly impacted the Appellants' ability to

manufacture and sell their products. ROA.859-862, 883-892, 899-938.

The EPA's enforcement actions have created a chilling effect on the Appellants' business operations, leading to a loss of revenue, business opportunities, increased compliance costs, and threatens the continuing ability to operate. ROA.859-862, 1398-1400. The Fifth Circuit erroneously concluded that these injuries were too attenuated to satisfy the causation requirement. App. 13. This conclusion is contrary to this Court's precedent, which recognizes that plaintiffs need only show that the defendant's actions are a substantial factor in bringing about their injury. *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997).

Appellants raised three claims under the APA, constitutional infringement claims, and sought a declaratory judgment regarding the EPA's enforcement of its new rule. ROA.794-850. The District Court dismissed these claims, opining that: 1) Appellants have not been harmed by the financial losses resulting from the SSUROs issued to their vendors and suppliers; and 2) Appellants have not directly received a SSURO from the EPA. ROA.1721, 1725.

Yet, Appellants have been clearly harmed by the SSUROs, and Article III standing does not require Appellants to receive a SSURO to have standing if they can still show all the elements are met. *Bennett*, 520 U.S. at 168-69. Appellants have shown above that they suffer increased compliance costs, costs related to the inability to operate their manufacturing plants, including storage and employment related costs, as well as ceased royalty payments. ROA.859-862, 1398-1400. Appellants have

shown above that these injuries are directly related to EPA's demands of unlawful enforcement action and regulatory compliance requirements. ROA.851-868, 1398-1407.

Further, "Plaintiffs need not wait for Defendants to bring an actual prosecution to vindicate their rights." *See Nat'l Ass'n for Gun Rights, Inc. v. Garland*, 697 F. Supp. 3d 601, 629 (N.D. Tex. 2023). As *Garland* unequivocally shows, a credible threat of civil or criminal prosecution from an agency constitutes more than a de minimis harm justifying the need for equitable protection until a full decision on the merits is rendered. *Id.* The court also concluded that threats that lead an individual to comply often lack compensation after the fact for the deprived use and enjoyment of the surrendered regulated property (assuming the property is even returned). *Id.* Further, empty guarantees by agencies to not seize property in the immediate future provide little, if any, reassurance. *Id.* Irreparable injury is found "where the loss threatens the very existence of the movant's business" *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021) (citing *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)).

Here, the EPA has been primarily using NMCL to communicate its new regulations to all related companies and has repeatedly threatened NMCL. ROA.851-858, 879, 997-1077, 1725. The EPA's threats toward NMCL and Berkey products are credible and represent more than a de minimis harm justifying the need for equitable protection. ROA.851-858, 997-1077, 1725. *See Garland*, 2023 U.S. Dist. LEXIS 181775, at *51; *See also Texas v. BATFE*, 700 F. Supp. 3d 556, 568 (S.D. Tex. 2023).

The EPA has given no instruction or assurance that NMCL can escape prosecution in the future by taking any action other than register Berkey filters as pesticides. Further, Appellants have testified that the cost of compliance will put NMCL and Berkey Int'l out of business, which will frustrate the trust property for the beneficiaries, to say the least. ROA.851-868, 1397-1399. The threatened prosecution, compliance costs, and the impact on Appellant's business is more than enough injury-in-fact to satisfy Article III standing.

IV. The Appellants' Injuries are Redressable by a Favorable Judicial Decision.

The final prong of standing requires that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. The Appellants seek injunctive relief to prevent the EPA from enforcing the SSUROs, which would enable them to resume their business operations and restore their revenue streams. ROA.861-862. Further, Appellants seek injunctive relief from registering their products as "pesticides" rather than "pesticide devices", avoiding the excessive compliance costs and incorrect classification. ROA.834-848. The Fifth Circuit's assertion that a favorable decision would not guarantee an increase in royalty payments or business operations ignores the practical realities of the EPA's administrative enforcement actions. By vacating the SSUROs, this Court would remove the regulatory barriers that have caused the Appellants' injuries, thereby providing a clear path to redress. ROA.851-868, 1397-1407. *Lujan*, 504 U.S. at 561.

Appellees enforce their pesticide registration demands through the SSUROs. ROA.871-949. A judicial

order vacating the SSUROs would directly alleviate the economic and operational harms the Appellants have suffered and favorably redirect EPA's compliance requirements to reflect the true nature of Berkey filters as "pesticide devices" or "treated articles", but not "pesticides". ROA.851-868, 1397-1407.

V. Conclusion

The Fifth Circuit's decision to dismiss the Appellants' claims for lack of standing is inconsistent with established principles of Article III jurisprudence. The Appellants have demonstrated concrete and particularized injuries that are directly traceable to the EPA's actions and are redressable by a favorable judicial decision. This Court should grant the petition for a writ of certiorari to correct the Fifth Circuit's and the District Court's erroneous application of standing doctrine and to ensure that the Appellants have an opportunity to seek redress for the significant harms they have suffered.

Question Presented #2, Third-Party Standing:

Did the Fifth Circuit err in concluding that the Appellants lacked Third-Party Standing despite their well-pleaded allegations of concrete and particularized injuries caused by the EPA's SSUROs to entities that Appellants have close relationship, which directly impacted their business operations and property interests?

The Fifth Circuit's conclusion that Appellants lacked third-party standing, despite their well-pleaded

allegations of concrete and particularized injuries caused by the EPA's SSUROs, warrants review by this Court. The Appellants, intimately intertwined with the entities subject to the SSUROs, have demonstrated that the EPA's actions directly impacted their business operations and property interests. ROA.851-868, 1397-1407. The Fifth Circuit's decision disregards the established principles of third-party standing and misinterprets the factual and legal context of the case.

I. Legal Framework for Third-Party Standing

A party seeking third-party standing must generally satisfy three criteria: (1) a close relationship with the person who possesses the rights; (2) a hindrance to the possessor's ability to protect their own interests; and (3) an injury-in-fact that is concrete and particularized. See *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

II. Appellants Have a Close Relationship with SSURO Recipients.

The Appellants, James Shepherd, Trustee for the James B. Shepherd Trust, and NMCL, have a demonstrably close relationship with the entities subjected to the SSUROs. Berkey Int'l, a principal manufacturer for NMCL, and other distributors form an integrated network essential to Appellants' business operations. ROA.851-862, 871-949. The EPA's SSUROs targeted these entities, effectively paralyzing the production and distribution of Berkey water filter products. ROA.851-862, 871-949. This relationship is further evidenced by the EPA's direct

communications with Appellants regarding regulatory compliance, demonstrating the interdependence of the entities involved. ROA.861-862, 871-949. The Fifth Circuit's failure to recognize this close relationship is a fundamental oversight.

III. The SSURO Hinder Recipients' Ability to Protect Their Own Interests.

The entities subjected to the SSUROs face significant hindrances in protecting their own interests. ROA.861-862, 871-949, 1397-1407. The EPA's enforcement actions impose substantial compliance costs and legal uncertainties, effectively crippling their ability to challenge the SSUROs independently. ROA.861-862, 871-949, 1397-1407. The burden of compliance and the threat of further regulatory actions create an environment where these entities are unable to litigate without risking their economic viability. ROA.861-862, 871-949, 1397-1407. Further, the EPA has recognized Appellant NMCL's authoritative position in the integrated network, as the EPA has used NMCL as the point of contact for the rest of the entities that were issued an SSURO. ROA.851-859, 861-862. Appellants, therefore, are in a unique position to advocate on their behalf, given their vested interest in the continuation of their business operations.

IV. There are Concrete and Particularized Injuries to Appellants.

The injuries claimed by Appellants are concrete and particularized, stemming directly from the EPA's SSUROs. The SSUROs have caused immediate and

substantial harm to Appellants' business operations, loss of access to manufacturing facilities, disruption of their supply chain, increased compliance costs, and the cessation of royalty payments to the JBS Trust. ROA.861-862, 871-949, 1397-1407. These injuries are not speculative but are supported by specific, well-pleaded allegations and sworn testimony. ROA.851-868, 869-1149, 1397-1479. The Fifth Circuit's conclusion overlooks the clear and direct impact of the SSUROs on Appellants' property interests and business operations.

V. Conclusion

The Fifth Circuit erred by not applying established principles of third-party standing correctly. The decision failed to appreciate the depth of the relationship between Appellants and the SSURO recipients, the actual hindrance faced by these entities, and the direct injuries sustained by Appellants. ROA.851-868, 869-1149, 1397-1479. This misapplication of the law necessitates review to correct the significant deviation from established judicial standards and to ensure that entities with legitimate standing are not denied access to judicial review.

For the foregoing reasons, this Court should grant the petition for writ of certiorari to address the significant errors in the Fifth Circuit's conclusion regarding Appellants' standing. The Appellants have a close relationship with the SSURO recipients, substantial hindrance to those entities' ability to protect their own

interests, and concrete and particularized injuries directly resulting from the EPA's actions.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 9, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-11189

JAMES SHEPHERD, TRUSTEE FOR THE JAMES B. SHEPARD TRUST; NEW MILLENNIUM CONCEPTS, LIMITED,

Plaintiffs-Appellants,

versus

MICHAEL S. REGAN, ADMINISTRATOR; ENVIRONMENTAL PROTECTION AGENCY; CHRISTINE TOKARZ; DAVID COBB; CAROL KEMKER; KERIEMA NEWMAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CV-826

Before JONES, SMITH, and HO, *Circuit Judges*.

PER CURIAM:*

We have carefully considered this appeal in light of the briefs and the record. There is no error that would affect the judgment of dismissal, which we therefore AFFIRM.

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* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 9, 2024

No. 23-11189

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES SHEPHERD, *TRUSTEE FOR* THE JAMES B. SHEPARD TRUST; NEW MILLENNIUM CONCEPTS, LIMITED,

Plaintiffs-Appellants,

versus

MICHAEL S. REGAN, *ADMINISTRATOR*; ENVIRONMENTAL PROTECTION AGENCY; CHRISTINE TOKARZ; DAVID COBB; CAROL KEMKER; KERIEMA NEWMAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:23-CV-826

Before Jones, Smith, and Ho, *Circuit Judges.*

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

Appendix B

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellants pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

Certified as a true copy and
issued as the mandate on Oct 01, 2024

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED OCTOBER 25, 2023

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:23-cv-00826-P

JAMES SHEPHERD, *et al.*,

Plaintiffs,

v.

MICHAEL S REGAN, *et al.*,

Defendants.

ORDER

Before the Court is Plaintiffs' Amended Motion for Preliminary Injunction. ECF No. 14. Under Federal Rule of Civil Procedure 65, "[b]efore or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing." Fed. R. Civ. P. 65.

Having reviewed the related briefing regarding Plaintiffs' Motion, the Court intends to consolidate as it appears that the Parties have presented their case and no evidence of significance would be forthcoming at trial. The Court **ORDERS** the Parties to file written objections

to the Court advancing Plaintiffs' Amended Motion for Preliminary Injunction to a determination on the merits **on or before November 6, 2023**.

SO ORDERED on this **25th day of October 2023.**

/s/ Mark T. Pittman
Mark T. Pittman
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED NOVEMBER 17, 2023

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:23-cv-00826-P

JAMES SHEPHERD, *et al.*,

Plaintiffs,

v.

MICHAEL S. REGAN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants.

MEMORANDUM OPINION & ORDER

Before the Court is Plaintiffs' amended request for a Preliminary Injunction filed August 24, 2023. ECF No. 14. On October 25, 2023, this Court issued an Order advancing Plaintiffs' Amended Motion for Preliminary Injunction to a determination on the merits. ECF No. 30. However, due to Plaintiffs' lack of standing to bring this case, the Court must **DISMISS** Plaintiffs' claims.

Appendix D

BACKGROUND

This case centers around the Environmental Protection Agency's ("EPA") issuance of a Stop, Sale, Use, or Removal Order ("SSURO") to manufacturers and sellers of Berkey water filtration products.

In 2022, the EPA became aware that Berkey water filtration systems contain silver for antimicrobial purposes. The EPA has regulated silver in microbial pesticide products since 1954. After investigating, the EPA determined Berkey water filtration systems are not registered as required by the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA"). Between December 2022 and March 2023, the EPA issued SSUROs to certain third-party distributors and manufactures of Berkey filtration products. These SSUROs required each recipient to stop the sale, use, and distribution of the offending products, and to provide the EPA with an update on compliance with the SSURO every thirty days until the offender no longer had FIFRA-violating products.

In August 2023, Plaintiffs James Shepherd, on behalf of the James B. Shepherd Trust, and New Millennium Concepts, LTD ("NMCL") filed this suit against the EPA. In their lawsuit, Plaintiffs requested a temporary restraining order ("TRO"), along with preliminary and permanent injunctions estopping the EPA from issuing SSUROs pertaining to the Berkey filtration systems. But neither Shepherd nor NMCL ever received an SSURO from the EPA. On August 10, this Court denied Plaintiffs' TRO request and set an expedited briefing schedule

for Plaintiffs' preliminary injunction. On October 25, the Court issued an order advancing the request for a preliminary injunction to a determination on the merits under Federal Rule of Civil Procedure 65. However, before the Court can reach the merits of the case, it must first address standing under Federal Rule of Civil Procedure 12(b)(1).

LEGAL STANDARD

A Rule 12(b)(1) motion "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). A court must dismiss the action if it determines that it lacks jurisdiction over the subject matter. FED. R. CIV. P. 12(h)(3); *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). A dismissal under Rule 12(b)(1) "is not a determination of the merits," and it "does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction." *Id.* Accordingly, considering Rule 12(b)(1) motions first "prevents a court without jurisdiction from prematurely dismissing a case with prejudice." *Id.*

A district court may dismiss for lack of subject matter jurisdiction based on (1) the complaint alone; (2) the

complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). A motion to dismiss based on the complaint alone presents a "facial attack" that requires the court to decide whether the complaint's allegations, which are presumed to be true, sufficiently state a basis for subject matter jurisdiction. *See Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1998). If sufficient, those allegations alone provide jurisdiction. *Id.*

ANALYSIS

A. Plaintiffs Have No Article III Standing

Defendants argue in their Response in Opposition to Plaintiffs' First Motion for Preliminary Injunction that Plaintiffs lack Article III standing. *See* ECF No. 10 at 21. While Defendants' subsequent briefing assumes arguendo that Plaintiffs "may" have Article III standing, Defendants reserved the right to address Article III standing at a later stage. ECF No. 18 at 21. The Court is duty-bound to address standing at this juncture. *See Filer v. Donley*, 690 F.3d 643, 646 (5th Cir. 2012) (It is the duty of a federal court to first decide, *sua sponte* if necessary, whether it has jurisdiction before the merits of the case can be addressed).

"Article III of the Constitution limits federal 'Judicial Power,' that is, federal-court jurisdiction, to 'Cases' and 'Controversies.'" *U.S. Parole Comm'n v. Geraghty*, 445

U.S. 388, 395, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980). "One element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997). Similar to other jurisdictional requirements, this standing requirement cannot be waived. *See Lewis v. Casey*, 518 U.S. 343, 349 n.1, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). The Supreme Court insists upon strict compliance with the standing requirement. *See Raines*, 521 U.S. at 811. "Even when standing is not raised by the parties, the Court must, where necessary, raise the issue *sua sponte*." *Reed v. Rawlings*, 3:18-CV-1032-B, 2018 U.S. Dist. LEXIS 179768, 2018 WL 5113143, at *3 (N.D. Tex. Oct. 19, 2018) (citing *Collins v. Mnuchin*, 896 F.3d 640, 654 n.83 (5th Cir. 2018)) (Boyle, J.). Courts are to assess a plaintiff's "standing to bring each of its claims against each defendant." *Coastal Habitat Alliance v. Patterson*, 601 F. Supp. 2d 868, 877 (W.D. Tex. 2008) (citing *James v. City of Dall.*, 254 F.3d 551, 563 (5th Cir. 2001)).

A plaintiff must have standing to request a preliminary injunction. *See Speech First, Inc. v. Fenves*, 979 F.3d 319, 329 (5th Cir. 2020). To satisfy the prerequisites of Article III standing, "[the] plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements[, and when] a

case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element." *Id.* (citations omitted); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). At the pleading stage, general factual allegations are sufficient to establish standing. *See Stallworth v. Bryant*, 936 F.3d 224, 230 (5th Cir. 2019). But, if the allegations are not sufficient to establish standing, the district court is powerless to create jurisdiction on its own accord. *See Whitmore v. Arkansas*, 495 U.S. 149, 155-56, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). "[I]f the plaintiff does not carry his burden clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute, then dismissal for lack of standing is appropriate." *Hotze v. Burwell*, 784 F.3d 984, 993 (5th Cir. 2015) (internal citation omitted).

I. Injury In Fact

The Court first addresses the first prong in *Spokeo*—injury in fact. To demonstrate an injury in fact, a plaintiff "must show that [he] suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo. Inc.*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560). A "particularized" injury "affect[s] the plaintiff in a personal and individual way." *Id.* A "concrete" injury must "actually exist... [the injury must be] real, and not abstract." *Id.* at 340. (cleaned up).

Here, Plaintiffs have not established how they have suffered an invasion of a legally protected interest that is either concrete or particularized. Plaintiffs claim that

the royalties they receive from licensing the right to sell Berkey water filters to Berkey International, LLC provide them with standing because the diminishing royalties serve as an injury in fact. *See* ECF No. 14 at 23-24. This connection is too attenuated to the EPA's actions to be considered a "concrete" injury. Plaintiffs are unable to specify and quantify any potential losses of royalties beyond mere conclusory statements that such losses would occur. *See generally* ECF Nos. 14 and 20. These statements fall far short of the particularized injury required to establish Article III standing.

Further, the Court is flummoxed as to why Berkey, a recipient of an SSURO, has not been impleaded into this case.[1] Considering Plaintiffs acknowledge that the James B. Shepherd Trust has a controlling interest in both NMCL and Berkey, it makes little sense to the Court why Plaintiffs would not implead a party that is directly impacted by the actions at issue, instead of rolling the proverbial standing dice with a significantly attenuated injury—or better yet, why Berkey has not filed suit on its own accord against the EPA. Plaintiffs cite an unreported, out-of-district case to support their argument that owed royalties serve as grounds for standing. *See* ECF No. 14 at 23 (citing *Pizza Hut, LLC v. Ronak Foods, LLC*,

1. In a September 12, 2023 Order, the Court instructed Plaintiffs to provide briefing as to why Berkey International, LLC was not bringing this action as an actual recipient of an SSURO from the EPA. The Court was perplexed when Plaintiffs provided no rational explanation, but instead focused on how the two Plaintiffs, neither of whom received an SSURO, had standing. *See* ECF Nos. 22 and 23.

2022 U.S. Dist. LEXIS 150454, 2022 WL 3544403 (E.D. Tex. June 17, 2022), *aff'd sub nom. Pizza Hut L.L.C. v. Pandya*, 79 F.4th 535 (5th Cir. 2023)). However, in *Pizza Hut*, the "royalties" at issue were advertising fees that franchisees had to pay in order to receive credit to offset payment obligations owed to Pizza Hut. *See Pizza Hut, LLC*, 2022 U.S. Dist. LEXIS 150454, 2022 WL 3544403 at *11-12. Further, in *Pizza Hut*, the defendants alleged that Pizza Hut had no standing as to advertising fees because the fees were payable to the International Pizza Hut Franchise Holders Association, who were not a party to the case. *Id.* at 12. The Court held that Pizza Hut had standing to recover the advertising fees because if they were not paid to the Franchise Holders Association, the payment obligations defendants owed to Pizza Hut would not be offset and Pizza Hut would be owed the amount due in any event. *Id.* at 39. Thus, payments to the non-party Franchise Holders Association ipso facto served as payments to Pizza Hut, who *was* a party to the case.

This case is different. The case here does not deal with royalties or fees the defendant owes the plaintiff, but rather potential royalties owed by a third party to a plaintiff. Further, the royalties in *Pizza Hut* were a concrete injury that was enumerated and specified, not merely hypothesized as is the case here. *Id.* at 20. The royalties were also tied directly to the cause of action in that case, not a tangential, conjectural outcome affecting a third-party. Even further, Plaintiffs cite *Pizza Hut* in their Amended Complaint to support the notion that standing can be achieved based on diminished royalty payments "due to an agency action." ECF No. 14 at 23-24. But *Pizza*

Hut never mentions agency action as a causal factor for the relevant dispute. Thus, the Court sees no relevance to this out-of-district, unreported case and is unconvinced there is an injury in fact facing the Plaintiffs here.

II. Traceability

The Court next turns to whether Plaintiffs' injury is fairly traceable to Defendants' challenged conduct. Assuming arguendo that there was an injury in fact (the Court determined there is not), the supposed injury that Plaintiffs claim (loss of royalties) must be traceable to the EPA issuing SSUROs to third-parties. *See California v. Texas*, 141 S. Ct. 2104, 2113, 210 L. Ed. 2d 230 (2021). The Court determines they are not. There could be a multitude of reasons as to why Plaintiffs have received diminished royalties. There could be a change in consumer preferences to water filters, change in market conditions generally, and as Defendants point out, a class action lawsuit has been filed against NMCL concerning Berkey products in this district. *See* ECF No. 18 at 32; *see also Farrell, et al. v. New Millennium Concepts, LTD*, 3:22-cv-728-M (N.D. Tex.) (Lynn, J., presiding). Plaintiffs offer no substantive evidence to show that their supposed injury is fairly traceable to the EPA issuing SSUROs to third parties.

III. Redressability

The Court finally addresses the question of redressability. Here, Plaintiffs cannot show that a favorable decision would redress Plaintiffs' supposed injuries. Once again, even assuming Plaintiffs satisfy the

first two prongs of *Spokeo*, there is no guarantee a stay of the EPA's issuances of SSUROs to third parties would increase the royalties that Plaintiffs receive. As discussed above, there are outside factors that can affect the sales for which Plaintiffs receive royalties. For example, consumers could be aware that it took an injunction for the SSUROs to be lifted, not action taken by the EPA themselves, and still decide to not purchase Berkey products until they get assurances from the EPA that they are safe. There is no guarantee an injunction will redress the Plaintiffs' supposed injury here.

While the higher courts have done no favors for the district court by giving them a distinct blueprint to identify standing[2] , the Court simply does not see an

2. Standing jurisprudence has been aptly described as a "morass of imprecision." *N.H. Rt. to Life Pol. Action Comm. v. Gardner*, 99 F. 3d 8, 12 (1st Cir. 1996). Recent decisions from the Supreme Court on this issue are notoriously difficult to reconcile. *See, e.g., Haaland v. Brackeen*, 599 U.S. 255, 277, 143 S. Ct. 1609, 216 L. Ed. 2d 254 (2023) (holding that a state lacks standing to challenge federal law preempting state laws on foster child placement, despite that "Congress's Article I powers rarely touch state family law."); *contra. Massachusetts, et al. v. EPA, et al.*, 549 U.S. 497, 519, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (holding that a state had standing to challenge the EPA's decision not to regulate emissions of greenhouse gases because that power was preempted and greenhouse gases affected "the earth and air within [their] domain"); *contra. United States v. Texas*, 599 U.S. 670, 671, 143 S. Ct. 1964, 216 L. Ed. 2d 624 (2023) (holding that states near an international border lacked standing to challenge the federal government's immigration enforcement policies because the state's financial injury was not "legally cognizable"); *but see Biden, et al. v. Nebraska, et al*, 600 U.S. 477, 143 S. Ct. 2355, 2358, 216 L. Ed. 2d 1063 (2023) (holding that Missouri established standing by showing

injury in fact facing the Plaintiffs, cannot fairly trace the supposed injury to conduct by the EPA, and does not believe granting an injunction would redress Plaintiffs' alleged injury. Royalties from sales from a third party are not enough to support standing and the Court has found no precedent in this Circuit to find standing under such circumstances.

IV. NMCL is not "Effectively and Constructively" Stopped

Plaintiffs also claim the third-party SSUROs "effectively and constructively" stop NMCL from selling Berkey filtration systems, thus granting them standing to challenge the SSUROs. ECF No. 23 a 4-5. However, as the facts stand currently, neither James Shepherd, on behalf of the James Shepherd Trust, nor NMCL are at the risk of being held liable by any EPA actions. While Plaintiffs state that NMCL may become subject to the stop orders, the relief sought is a preliminary injunction enjoining the EPA from issuing such SSUROs. *Id.* at 3-4. The Court is unable to grant relief vis-à-vis *existing* SSUROs that would ameliorate a threat of *future* action. Thus, the Court currently has no subject matter jurisdiction to any potential claims NMCL might have in the future. The

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that it "suffered ... a concrete injury to a legally protected interest, like property or money"); *contra. Dept. of Ed. v. Brown*, 600 U.S. 551, 568, 143 S. Ct. 2343, 216 L. Ed. 2d 1116 (2023) (holding that individual loan borrowers lacked standing to allege the federal government unlawfully excluded them from a one-time direct benefit program purportedly designed to address harm caused by an indiscriminate global pandemic).

mere possibility of future harm does not confer Article III standing. *See Clapper*, 568 U.S. at 409 (threatened injury must be certainly impending to constitute injury in fact and allegations of possible future injury are not sufficient).

B. Plaintiffs Lack Third-Party Standing

The Supreme Court generally frowns upon third-party standing. A plaintiff must "assert his own legal rights and interests, and cannot rest his claims to relief on the legal rights of interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). To invoke third-party standing, a party must have a close relationship to the holder of the rights and the holder must face obstacles to bringing the lawsuit personally. *See e.g., Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004); *Singleton v. Wulff*, 428 U.S. 106, 114-116, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) (plurality opinion).

As discussed above ad nauseum, the Court struggles to understand why Berkey cannot bring suit on its own behalf for alleged wrongs it has faced at the hands of the EPA. While Plaintiffs have a close relationship with Berkey, there is nothing in the record or briefing to suggest that Berkey, the holder of the rights at issue, cannot bring suit on its own behalf. Accordingly, the Court finds that Plaintiffs do not have third-party standing to bring this suit on Berkey's behalf. If Berkey wants to challenge the EPA's actions, it should bring a lawsuit itself, as this Court signaled in a prior Order. *See* ECF No. 22.

C. Conclusion

Given a preliminary injunction cannot be requested by a plaintiff who lacks standing, the Court had to first determine whether Plaintiffs have standing to challenge the EPA's SSUROs at issue here. *See Fenves*, 979 F.3d at 329. As explained above, the Court finds that they do not. Accordingly, this case must be **DISMISSED** for want of subject matter jurisdiction.[3]

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3. In finding that standing is lacking in this case, the Court is in no way disparaging, or opining on, Plaintiffs' claims. Indeed, if true, the claims are quite concerning. However, it is incumbent on the judicial branch to always keep in mind its proper role under our Constitution. The concepts of standing and the case or controversy requirement helps ensure that federal judges "stay in their lane." Otherwise, we risk fulfilling Thomas Jefferson's prediction written 45 years after he wrote the Declaration of Independence:

> It has long however been my opinion, and I have never shrunk from its expression, ... that the germ of dissolution of our federal government is in the constitution of the federal judiciary; ... working like gravity by night and by day, gaining a little to-day and a little tomorrow, and advancing it's noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the states, and the government of all be consolidated into one. To this I am opposed; because whenever all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the center of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated.

Letter from Thomas Jefferson to Charles Hammond (August 18, 1821), in 15 THE WRITINGS OF THOMAS JEFFERSON 330-33 (Albert Ellery Bergh Ed.) (1905).

Appendix D

SO ORDERED on this **17th day of November 2023**.

/s/ Mark T. Pittman
Mark T. Pittman
UNITED STATES DISTRICT JUDGE

APPENDIX E — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED NOVEMBER 17, 2023

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

No. 4:23-cv-00826-P

JAMES SHEPHERD, *et al.*,

Plaintiffs,

v.

MICHAEL S. REGAN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants.

FINAL JUDGMENT

This final judgment is issued pursuant to Federal Rule of Civil Procedure 58(a). In accordance with the Court's Order on this same day (ECF No. 32), this case is **DISMISSED**. The Clerk of the Court shall transmit a true copy of this judgment to the parties.

SO ORDERED on this **17th day of November 2023.**

/s/ Mark T. Pittman
Mark T. Pittman
UNITED STATES DISTRICT JUDGE