No. _____

In the Supreme Court of the United States

STATE OF LOUISIANA; STATE OF ARKANSAS; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF WEST VIRGINIA; STATE OF WYOMING; STATE OF TEXAS; AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *and* NATIONAL HYDROPOWER ASSOCIATION,
APPLICANTS,
v.
AMERICAN RIVERS; MICHAEL S. REGAN; *and* U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.
RESPONDENTS.

APPLICATION FOR STAY PENDING APPEAL

On Application For Stay, Or, In The Alternative, On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Ninth Circuit

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

GEORGE P. SIBLEY, III
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8262
(804) 788-8218 (fax)
gsibley@huntonak.com

DEIDRE G. DUNCAN
ERICA N. PETERSON
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037

MISHA TSEYTLIN
Counsel of Record
SEAN T.H. DUTTON
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

TIMOTHY L. MCHUGH
TROUTMAN PEPPER
HAMILTON SANDERS LLP
1001 Haxall Point,
15th Floor
Richmond, VA 23219

Attorneys for Applicants

[Additional counsel on following page.]

CLARE ELLIS
HUNTON ANDREWS KURTH LLP
50 California Street
Suite 1700
San Francisco, CA 94111

Attorneys for Applicants American Petroleum Institute and Interstate Natural Gas Association of America

ELIZABETH B. MURRILL,
SOLICITOR GENERAL
JOSEPH S. ST. JOHN,
DEPUTY SOLICITOR
LOUISIANA DEPARTMENT
OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70804
(225) 326-6739
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov

Attorneys for Applicant State of Louisiana

CHARLES SENSIBA
TROUTMAN PEPPER
HAMILTON SANDERS LLP
401 9th Street NW
Suite 1000
Washington, DC 20004-2146

ELIZABETH HOLT ANDREWS
TROUTMAN PEPPER
HAMILTON SANDERS LLP
Three Embarcadero Center
Suite 800
San Francisco, CA 94111-4057

Attorneys for Applicant National Hydropower Association

JAMES KASTE
DEPUTY ATTORNEY GENERAL
WYOMING ATTORNEY GENERAL'S OFFICE
109 State Capitol
Cheyenne, WY 82002

Additional Counsel:

AUSTIN KNUDSEN
Attorney General of Montana

KEN PAXTON
Attorney General of Texas

PATRICK MORRISEY
Attorney General of West Virginia

LESLIE RUTLEDGE
Attorney General of Arkansas

LYNN FITCH
Attorney General of Mississippi

ERIC SCHMITT
Attorney General of Missouri

Attorneys for Applicants

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are as follows:

Applicants State of Arkansas, State of Louisiana, State of Mississippi, State of Missouri, State of Montana, State of West Virginia, State of Wyoming, and State of Texas were intervenors in the district court and intervenors appellants in the court of appeals.

Applicants American Petroleum Institute, Interstate National Gas Association of America, and National Hydropower Association were intervenor defendants in the district court and appellants in the court of appeals.

Respondents are American Rivers, American Whitewater, California Trout, Idaho Rivers United, Columbia Riverkeeper, Sierra Club, Suquamish Tribe, Pyramid Lake Paiute Tribe, Orutsararmiut Native Council, State of California, State Water Resources Control Board, State of Oregon, State of New Jersey, State of New York, State of Maryland, State of Rhode Island, State of Colorado, District of Columbia, State of North Carolina, Commonwealth of Virginia, State of New Mexico, State of Vermont, State of Minnesota, State of Connecticut, State of Washington, State of Michigan, Commonwealth of Massachusetts, State of Nevada, State of Wisconsin, State of Maine, and State of Illinois. Respondents were plaintiffs in the consolidated cases before the district court and appellees in the court of appeals.

Defendants are Michael S. Regan[1] and the United States Environmental Protection Agency ("EPA"). These defendants did not appeal the district court's decision to vacate the Section 401 Rule rulemaking, but opposed Applicants' appeal of that vacatur on jurisdictional grounds before the court of appeals.

[1] EPA Administrator Regan was automatically substituted for his predecessor, Andrew R. Wheeler, under Fed. R. App. P. 43(c)(2).

CORPORATE DISCLOSURE STATEMENT

As required by this Court's Rule 29.6, Applicants hereby submit the following corporate-disclosure statement.

Applicants American Petroleum Institute, Interstate Natural Gas Association of America, and National Hydropower Association state that they have no parent companies and no publicly held companies with a 10% or greater ownership interest in them.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Can a single district court vacate a rule that an agency adopted through notice-and-comment rulemaking without first finding that the rule is unlawful? The answer is plainly "no"—the Administrative Procedure Act ("APA") only allows courts to "set aside" an agency action that is arbitrary, capricious, or contrary to law. But in the decision below, a district court vacated nationwide a landmark rule adopted by the prior Administration, without even engaging with the APA, and without bothering to discuss most of the Rule's provisions. While that decision is clearly wrong, absent stay relief from this Court, Applicants will not have any effective relief. By the time the Ninth Circuit decides this appeal on the merits, the new Administration likely will have completed its new rulemaking. In the meantime, the district court's decision will become an easy-to-replicate blueprint for a new Administration's premature elimination of rules adopted by the prior Administration, with the help of aligned plaintiffs and a single, sympathetic district court. Moreover, the new Administration can do so without having to acknowledge and justify the regulatory change.

The rule at issue here is the 2020 Clean Water Act ("CWA") Section 401 Certification Rule (the "Rule"), a landmark and complicated rule the prior Administration adopted after a lengthy notice-and-comment rulemaking process to address concerns raised by States and regulated parties, including Applicants. The Rule's opponents challenged it in cases filed in three federal district courts around the country. While those cases were pending, the nation elected a new President,

who upon assuming office, ordered EPA to revisit the Rule. In June 2021, EPA initiated the administrative process to evaluate whether to repeal or revise the Rule. Because the potential changes could address challengers' arguments against the Rule, EPA asked the courts to remand it without vacatur.

Two of the district courts agreed to remand the Rule only, but the Northern District of California took an entirely different path. Even though the court had not found the Rule unlawful under the APA—indeed, it had not received a single merits brief or reviewed the administrative record—it took the extraordinary and unlawful step of vacating the Rule in its entirety and nationwide. The new Administration not-so-subtly welcomed the result. Relieved of the burden of changing the Rule through the administrative process, EPA did not appeal the district court's unlawful decision and sought actively to thwart Applicants' attempt to obtain a stay on appeal.

This Court is likely to grant certiorari in this case and Applicants will likely prevail on the merits, including through summary reversal. The district court did not even attempt to grapple with the APA's clear text, which permits courts to "set aside" agency actions only when such actions are "found" to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "without observance of procedure required by law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U.S.C. § 706(2), or this Court's holding that courts may "set aside" federal agencies' actions "only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy

with the result reached." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (citation omitted) (emphasis added).

Considerations of irreparable harms and the equities call out for a stay. Absent a stay, Applicants will suffer irreparable harm from the loss of the Rule's protections, which protections Applicants had successfully sought to stop certain States' abuses. Now, these States will return to their abusive practices, infringing upon Applicant States' sovereignty, while financially harming all Applicants. A stay will not impose harm on Plaintiffs, as they can always litigate the Rule's legality and cannot retain an ill-gotten vacatur of the Rule without having to do the work of proving any legal deficiency.

OPINIONS BELOW

The district court's order remanding the Rule with vacatur is *In re Clean Water Act Rulemaking*, __ F.Supp.3d __, 2021 WL 4924844 (N.D. Cal. Oct. 21, 2021). The order of the district court denying a stay pending appeal is *In re Clean Water Act Rulemaking*, Nos. 3:20-cv-04636-WHA, 3:20-cv-04869-WHA, 3:20-cv-06137-WHA, 2021 WL 5792968 (N.D. Cal. Dec. 7, 2021). The order of the U.S. Court of Appeals for the Ninth Circuit denying a stay pending appeal is *In re: Clean Water Act Rulemaking*, Nos. 21-16958, 21-16960, 21-16961 (9th Cir. Feb. 24, 2022).

JURISDICTION

The district court entered its order vacating the Rule and remanding the rulemaking proceedings to EPA on October 21, 2021. App. 552–69. The district court entered judgment on November 17, 2021. App. 570. The district court denied

Applicants' Motion For Stay Pending Appeal on December 7, 2021. App. 612–25. The Ninth Circuit denied Applicants' Motion For Stay Pending Appeal in an unsigned order on February 24, 2022. App. 799–802. This Court has jurisdiction under 28 U.S.C. § 1254(1) and has the authority to grant Applicants relief under the APA, 5 U.S.C. § 705, and the All Writs Act, 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The APA provides, in relevant part, that federal courts may "set aside" agency actions when such actions are "found" to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "without observance of procedure required by law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). The APA further provides that before "making [those] determinations, the court shall review the whole record or those parts of it cited by a party." *Id.* The APA also expressly preserves all "other limitations on judicial review" and the "duty of the court[s] to . . . deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702(1).

STATEMENT

A. The Clean Water Act

Since 1970, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91, 108 (Apr. 3, 1970). In 1972, Congress enacted the Clean Water

Act ("CWA"), a "total restructuring" and "complete rewriting" of the nation's water-pollution control laws. *City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 317 (1981) (quoting legislative history); *see also* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 877 (Oct. 16, 1972) (codified at 33 U.S.C. § 1341). Of particular relevance here, Congress narrowed the certification requirement from "*activity* [that] will not violate applicable *water quality standards*," 84 Stat. at 108 (emphases added), to a certification only "that any such *discharge* will comply with the applicable provisions of section 301, 302, 306, and 307 of this Act," 86 Stat. at 877 (emphasis added). Congress also created a prominent role for States and Tribes in implementing this new program. 33 U.S.C. § 1251(b).

The CWA uses a "cooperative federalism" approach to achieve its aims, carving out complementary roles for federal agencies, on the one hand, and States and Tribes, on the other. *See PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) ("*PUD No. 1*"). As relevant here, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1). Such certification shall state "that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1316, and 1317." *Id.* If the State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived." *Id.* Section 401 authority is powerful—when

triggered, state certification or waiver is an essential requirement for the federally licensed activity to proceed. *See Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1992); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987). But to preserve the CWA's federal-state balance, that authority is limited, as Section 401 only authorizes States to address water quality, and only within reasonable time limits. *See PUD No. 1*, 511 U.S. at 712; *Int'l Paper Co.*, 479 U.S. at 490; 33 U.S.C. § 1341.

B. Certain States Abuse Their Section 401 Certification Authority

Despite the statutory change in 1972, EPA failed to revise its 1971 regulations governing the certification process until the regulation at issue here. As a result, for nearly fifty years, EPA's regulations remained incongruent with the new statutory language. *Cf. NPDES; Revision of Regulations*, 44 Fed. Reg. 38,854, 32,856 (June 7, 1979) (indicating the need for updated certification rules). Certain States began using the incongruity and ambiguities in EPA's prior regulations to veto projects based on non-water quality considerations, such as preferences regarding energy policy, which infringes on the federal government's exclusive authority.

A particularly egregious example is Washington State's treatment of the Millennium Bulk Terminals – Longview LLC project. In the course of a five-year review of the project, the State of Washington compiled an Environmental Impact Statement that expressly concluded that the terminal would not result in significant adverse effects on water quality, aquatic life, or designated uses; and that any potential water quality impacts could be fully mitigated. *See* App. 497–548. And yet, Washington denied the certification request based on concerns about capacity of the

interstate rail system, the impact of trains operating anywhere in that system, and impacts on the overall capacity of the Federal Columbia River Navigation Channel to accommodate additional vessels at state ports. App. 538–39.

Other examples abound in the administrative record. In December 2017, Virginia approved a water quality certification for the Atlantic Coast Pipeline, a $5.1 billion pipeline project that would transport gas produced in the Marcellus Shale region to the Mid-Atlantic region of the United States. App. 110. Virginia then included conditions regulating activities in upland areas that may indirectly affect state waters beyond the scope of federal CWA jurisdiction and the project's direct discharges to navigable waters. *Id.* According to Virginia, "all proposed upland activities associated with the construction, operation, maintenance, and repair of the pipeline, any components thereof or appurtenances thereto, and related access roads and rights-of-way," are subject to the stringent conditions of the certification. *Id.* Another example took place in August 2020, when North Carolina denied water quality certification for Mountain Valley Pipeline Southgate, one of INGAA's members, for reasons outside of water quality. *Id.* North Carolina determined that the purpose of the project was "unachievable" due to the "uncertainty" of completing a different pipeline project even though FERC had determined that the public convenience and necessity required approval of the $468 million, 75-mile natural gas pipeline project. *Id.*

States also exploited the regulatory ambiguity to extend the amount of time they have to act on a certification request, which can effectively kill a project. One

example is the Constitution Pipeline, a $683 million, 124-mile natural gas pipeline designed to connect natural gas production in Pennsylvania to demand in northeastern markets. App. 108–09. The New York State Department of Environmental Conservation ("NYSDEC") requested additional information and deemed the request complete in December 2014. *Id.* In April 2015, NYSDEC requested the API member withdraw and resubmit its request in order to restart the statutory period of time that NYSDEC had to act on the request. *Id.* In April 2016, nearly three years after the project's initial request for certification, NYSDEC denied water quality certification. Following litigation over NYSDEC's determination, the Federal Energy Regulatory Commission ("FERC") determined in August 2019 that NYSDEC had waived the Section 401 certification requirement. *Id.* Nevertheless, after years of delay, the project's sponsor halted investment in the pipeline and cancelled the project in February 2020. *Id.*

The Millennium Pipeline Company faced a similar roadblock when it submitted a certification request to NYSDEC for the Millennium Valley Lateral project, a 7.8-mile pipeline connecting a natural gas mainline to a new natural gas-fueled combined cycle electric generation facility in New York. App. 109. Nearly two years after the project's initial request for certification, NYSDEC denied certification on the grounds that FERC's environmental review of the project lacked an adequate analysis of the potential downstream greenhouse gas emissions, not water quality concerns. *Id.* In September 2017, FERC concluded that NYSDEC's twenty-one-month delay constituted waiver of the certification requirement, and the Second

Circuit agreed. *See N.Y. State Dep't of Env't Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018); App. 109.

A number of courts have recognized that allowing States to delay the start of the period of review violates the CWA's plain text. The Second Circuit concluded that the CWA creates a "bright-line rule" that the "receipt" of a Section 401 request is the beginning of the State's one-year period for review. *N.Y State Dep't of Env't Conservation*, 884 F.3d at 455. As the D.C. Circuit explained, "the purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). The D.C. Circuit thereafter invalidated the process of withdrawing and refiling the same Section 401 request in order to restart the review period. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019).

C. EPA Adopts The Section 401 Certification Rule

Pointing to these abuses, a coalition of States led by Louisiana petitioned for an update to the 1971 regulations to conform them to the 1972 CWA amendments, and to provide clarity and transparency. EPA agreed and decided to undertake a rulemaking to update and replace parts of the existing regulations.

The APA "establishes the procedures federal administrative agencies [must] use," outlining the entire "process of 'formulating, amending, or repealing a rule.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015); 5 U.S.C. § 551(5). First, the rulemaking agency is required to "issue a '[g]eneral notice of proposed rule making,'

ordinarily by publication in the Federal Register." *Perez*, 575 U.S. at 95; 5 U.S.C. § 553(b). Then, "if notice [is] required, the agency must give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" and "must consider and respond to significant comments received during the period for public comment." *Perez*, 575 U.S. at 96 (citations omitted); 5 U.S.C. § 553(c). Finally, when the agency promulgates a final rule, it must "include in the rule's text 'a concise general statement of [its] basis and purpose.'" *Perez*, 575 U.S. at 96; 5 U.S.C. § 553(c). Because "rule making" includes the "repeal" of any existing rule, *id.*, agencies must comply with the same notice-and-comment rulemaking procedures to rescind or replace an extant rule. 5 U.S.C. § 551(5); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (agencies must supply a "reasoned analysis" to change course from prior rule).

Following these APA processes, on August 22, 2019, EPA published a proposed rule to update and replace the 1971 regulations. *Updating Regulations on Water Quality Certifications*, 84 Fed. Reg. 44,080 (Aug. 22, 2019). A 60-day public comment period followed, wherein "EPA reviewed and considered more than 125,000 comments on the proposed rule from a broad spectrum of interested parties," summarizing "the most salient" comments and responses in the Federal Register and making available a separate, complete response-to-comments document "available in the docket for the final rule at Docket ID No. EPA-HQ-OW-2019-0405." *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210, 42,213 (July 13, 2020).

EPA then published the Rule at issue here. *Id.* The Rule explained that "[t]he Agency's longstanding failure to update its regulations created the confusion and regulatory uncertainty that were ultimately the cause of th[e] controversial section 401 certification actions" that underlay Louisiana's petition. *Id.* at 42,227. In particular, and among other noted abuses, EPA cited the D.C. and Second Circuit decisions discussed above as recognizing that allowing States to continue to extend their review beyond one year is contrary to the CWA. *Id.*

The Rule fixes many of the problems, ambiguities, and loopholes that allowed States to abuse their Section 401 certification authority for decades. The Rule begins by defining fourteen key terms, most of which are not defined in the CWA. 40 C.F.R. § 121.1; *see also* 85 Fed. Reg. at 42,237 (describing the need for definitional clarity achieved through EPA's rulemaking process). It then reaffirms EPA's longstanding interpretation of when CWA Section 401 requires a water quality certification. 40 C.F.R. § 121.2; 85 Fed. Reg. at 42,237 ("Section 121.2 of the final rule is consistent with the Agency's longstanding interpretation and is not intended to alter the scope of applicability established in the CWA."). It also sets out the permissible scope of certification, as developed through the rulemaking process. 40 C.F.R. § 121.3.

The Rule provides a procedure to ensure meaningful coordination between project proponents and State and Tribal certifying authorities before the certification process even begins. 40 C.F.R. § 121.4 (pre-filing meeting request). The Rule also lays out a uniform procedure for establishing the reasonable time period for States and Tribes to act on a certification request, clear rules for when that period begins

and ends, and a procedure for communicating to all parties when the period begins and ends, 40 C.F.R. §§ 121.5–9, specifically codifying recent circuit decisions interpreting the CWA's one-year period for acting on a certification request, *see, e.g.*, *Hoopa Valley Tribe*, 913 F.3d at 1099. The Rule requires an action on a certification request, whether it is a grant, grant with conditions, or a denial of certification, to be in writing and to contain certain information that explains the State's or Tribe's action. 40 C.F.R. § 121.7; 85 Fed. Reg. at 42,256 (explaining that such requirements are intended to promote the development of comprehensive administrative records for certification actions and to increase transparency). It describes the effect of certain actions and explains how waiver of the certification requirement can occur proactively or by operation of law. 40 C.F.R. §§ 121.8–9. It also provides a procedure for neighboring jurisdictions to participate in the certification process, 40 C.F.R. § 121.12; describes how certification conditions are to be enforced, 40 C.F.R. § 121.11; and describes EPA's role as a certifying authority and advisor, 40 C.F.R. §§ 121.13–16.

D. The District Court Vacates The Section 401 Rule Without Adjudicating Whether The Rule Is Lawful Under The APA

In July and August of 2020, a number of groups filed lawsuits in three district courts across the country alleging that the Rule was unlawful. A coalition of environmental groups led by the South Carolina Coastal Conservation League filed their complaint in the U.S. District Court for the District of South Carolina. *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-03062 (D.S.C. filed Aug. 26,

2020). The Delaware Riverkeeper Network filed in the U.S. District Court for the Eastern District of Pennsylvania. *Del. Riverkeeper Network v. U.S. EPA*, No. 2:20-cv-03412 (E.D. Pa. filed July 13, 2020). The cases below were filed by three groups in the U.S. District Court for the Northern District of California: a group of environmental organizations, twenty States and the District of Columbia, and conservation associations and Indian Tribes. App. 116–147, 165–223. Applicants here—American Petroleum Institute, Interstate Natural Gas Association of America, National Hydropower Association, and the States of Louisiana, Wyoming, Arkansas, Mississippi, Missouri, Montana, Texas, and West Virginia ("State Applicants")—intervened to defend the Rule. App. 1–95, 115, 626–666.

In January 2021, President Biden directed agencies to "take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with" his Administration's objectives, EO 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021), including the Rule.[2] EPA then announced its intention to reconsider the Rule, 86 Fed. Reg. 29,541 (June 2, 2021), and moved for remand without vacatur in all three of the pending challenges, App. 226–43; ECF No. 67, *Del. Riverkeeper Network v. U.S. EPA*, No. 2:20-cv-3412 (E.D. Pa. July 1, 2021); ECF No. 67, *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-03062 (D.S.C. Aug. 2, 2021). The district courts in the District of South Carolina and Eastern District of Pennsylvania

[2] Fact Sheet: List of Agency Actions for Review, White House (Jan. 20, 2021), https://www.whitehouse.gove/briefing-room/statements-releases/2021/01/20/fact-sheet-listofagency-actions-for-review/.

granted EPA's motions, remanding the Rule to EPA without vacatur. *Del. Riverkeeper Network v. U.S. EPA*, No. 2:20-cv-3412, 2021 WL 3476173, at *1 (E.D. Pa. Aug. 6, 2021); ECF No. 69, *S.C. Coastal Conservation League v. Wheeler*, No. 2:20-cv-03062 (D.S.C. Aug. 2, 2021).

The Northern District of California, in the case at issue in this Application, took a decidedly different approach. In response to EPA's motion for remand without vacatur, Plaintiffs argued that the district court should remand to EPA while vacating the Rule in the interim. App. 244–98, 424–50. EPA nominally opposed these vacatur requests but only meekly, App. 450–60, leaving Applicants here as the only parties that submitted full-throated oppositions to vacating the rule, App. 473–96.

On October 21, 2021, the district court vacated the Rule, App. 552–69, and entered final judgment, App. 570—without ever receiving (let alone reviewing) the administrative record, without receiving (let alone considering) merits briefing on the Rule's legality, and without making a decision of whether the Rule is actually unlawful under the APA. The court reasoned that it had authority to take this step because nothing in the APA "expressly preclude[d]" it from issuing the equitable remedy of vacatur "without a decision on the merits." App. 559. Instead of making any determination that the Rule is "unlawful" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA, 5 U.S.C. § 706(2), the court relied on a prior district court decision, *see Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241–42 (D. Colo. 2011), inapposite Ninth Circuit cases,

Pollinator Stewardship Council v. EPA, 806 F.3d 520, 532 (9th Cir. 2015); *Cal. Cmtys. Against Toxics v. EPA* (*CCAT*), 688 F.3d 989, 992 (9th Cir. 2012), and principles of equity to conclude it could vacate the Rule nationwide, App. 558–60.

The district court then improperly applied the two-step test for "considering vacatur of agency actions *found to be erroneous*," that the D.C. Circuit had announced in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.3d 146 (D.C. Cir. 1993). App. 559–60. The district court concluded that although EPA did "not admit fault," one aspect of the Rule was "antithetical" to *PUD No. 1*, 511 U.S. 700, and noted that the court "harbor[ed] significant doubts" about other aspects, without specifying which ones it was concerned about, App. 564–65. The court also reasoned that because the Rule "has only been in effect for thirteen months," and "has been under attack since before day one," there was no justifiable reliance on the Rule. App. 566. Applicants moved in the district court for a stay pending appeal, App. 571–611, which the district court denied on December 7, 2021, App. 612–25.

E. The Ninth Circuit Denies Applicants' Motion For A Stay, After EPA Opposes Both Their Appeal And Any Stay

Applicants thereafter appealed and moved for a stay pending appeal from the Ninth Circuit. App. 667–756. On appeal, EPA *opposed* Applicants' attempts to stay the district court's unlawful vacatur decision, and even sought to have Applicants' appeal dismissed on entirely meritless grounds. App. 757–98. On February 24, 2022, the Ninth Circuit denied Applicants' stay request for failure to show a likelihood of

irreparable harm but permitted Respondents to renew their arguments in favor of dismissal before the merits panel. App. 799–802.

REASONS FOR GRANTING THE APPLICATION

This Court may grant a stay of a district court's order, including in a case still pending before the court of appeals, if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *Anderson v. Loertscher*, 137 S. Ct. 2328 (2017); *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *see also Nken v. Holder*, 556 U.S. 418, 427–29 (2009); *West Virginia v. EPA*, 577 U.S. 1126 (2016); Applicants have plainly satisfied these standards here.

I. This Court Should Issue A Stay Pending Appeal

Given the district court's clear disregard for the APA's statutory limitations on its authority and this Court's caselaw as to those limits, as well as the nationwide importance of the core issue in this case—whether rules adopted by a prior Administration using notice-and-comment can be judicially repealed without any decision that the rules are actually unlawful—this Court is likely to grant review in this case and reverse the district court's decision.

A. This Court Is Likely To Grant Review, And Reverse, On The Question Of Whether The APA Authorizes A Court To Vacate An Agency-Issued Rule Without The Court Deciding Whether The Rule Actually Satisfies The APA's Conditions For Vacatur

1. Federal courts may "set aside" federal agencies' actions "only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached." *Vt. Yankee*, 435 U.S. at 558 (citation omitted). Judicial authority is limited in this manner by the doctrine of sovereign immunity, which provides that "[t]he United States cannot be [sued] in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination." *Schillinger v. United States*, 155 U.S. 163, 166 (1894). In reviewing agency action, federal courts must be mindful not to go "[b]eyond the letter of" congressional consent to such judicial review, "no matter how beneficial [courts] may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government." *Id.* at 166.

The APA vests federal courts with authority to "set aside" agency actions in specific, statutorily defined circumstances. 5 U.S.C. § 706(2). Courts may only vacate agency actions when, as relevant here, those actions are "found" to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "without observance of procedure required by," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.*; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v.*

Sanders, 430 U.S. 99 (1977). Prior to making a finding of noncompliance with the APA's preconditions to "set aside" an agency action, 5 U.S.C. § 706(2), a reviewing court may only "to the extent necessary to prevent irreparable injury, . . . issue all necessary and appropriate process to *postpone* the effective date of an agency action or to *preserve status or rights* pending conclusion of the review proceedings." 5 U.S.C. § 705 (emphases added); *see generally Sampson v. Murray*, 415 U.S. 61, 69 (1974). Congress further provided that before making any of "the foregoing determinations, the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706(2); *Volpe*, 401 U.S. at 419–20.

The APA does not grant to federal courts roving, unbounded authority to vacate or set aside federal government rulemaking as those courts conclude equity supports. Instead, when Congress waived sovereign immunity in the APA, it expressly preserved all "other limitations on judicial review" and the "duty of the court[s] to . . . deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702(1); *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) ("The elimination of the defense of sovereign immunity [in § 702] did not affect any other limitation on judicial review that would otherwise apply under the APA."). Importantly, the ultimate remedy for an APA violation—vacatur of agency action—cannot be awarded until after the parties' rights are adjudicated on the merits. *See Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976) ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."); *Franklin v. Gwinnett Cnty. Pub. Schools*, 503

U.S. 60, 74 (1992) ("Federal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action."); *see also* H.R. Rep. 94-1656 (1976) at 12 (non-exclusive list of grounds for denying relief "[un]affected or change[d]" by § 702); S. Rep. 94-996 (1976) at 11 (same). Thus, absent a rule being administratively repealed or judicially set aside in strict accordance with the APA, it "remains in force . . . and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." *United States v. Nixon*, 418 U.S. 683, 696 (1974).

Under these bedrock principles, a court has the authority to vacate a rule that an agency adopts through notice-and-comment rulemaking *only* if it finds "substantial procedural or substantive reasons [for doing so] as mandated by statute." *Vt. Yankee*, 435 U.S. at 558 (citation omitted). "The APA establishes the procedures federal administrative agencies [must] use for 'rule making,' defined as the process of 'formulating, amending, or repealing a rule.'" *Perez*, 575 U.S. at 95; 5 U.S.C. § 551(5); *see also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) ("There is no warrant in law for the Board to replace the [APA] statutory scheme with a rule-making procedure of its own invention."). "Section 4 of the APA, 5 U.S.C. § 553, prescribes a three-step procedure for [the] so-called 'notice-and-comment rulemaking.'" *Perez*, 575 U.S. at 95–96 (*i.e.*, notice, a public comment period, and a concise general statement of the rule's basis and purpose); *see supra* pp. 9–10. Any contrary view would permit agencies to wipe away rules of a prior Administration, supplanting Congress's carefully laid plan for the repeal of regulations, based only

upon policy preferences and not "constitutional prescriptions or [otherwise] rooted in the language of the APA itself." Antonin Scalia, Vermont Yankee*: The APA, The D.C. Circuit, and The Supreme Court*, 1978 Sup. Ct. Rev. 345, 363.

2. The district court's decision below to vacate the Rule exceeds its statutory authority. The court purported to vacate an agency rule that is subject to the APA, without complying with any of the requirements for doing so under the APA.

As an initial matter, EPA adopted the Rule through notice-and-comment rulemaking, which makes it subject to repeal only in accordance with the APA. *See supra* pp. 9–10; 5 U.S.C. § 706(2). In August 2019, EPA published notice of a proposal to update the existing regulations on CWA water quality certifications to, among other things, finally bring them in line with the 1972 CWA amendments. 84 Fed. Reg. 44,080. EPA then considered and responded to numerous public comments on the proposal. 85 Fed. Reg. at 42,213. In July 2020, EPA promulgated the Rule in the Federal Register, after which time it went into legal effect in September 2020. *Id.* at 42,210. Neither EPA nor any court stayed the effectiveness of the Rule. 5 U.S.C. § 705. As a result, until and unless the Rule is either repealed by EPA through notice-and-comment rulemaking or set aside by a court in accordance with the APA, it "remains in force . . . and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." *Nixon*, 418 U.S. at 696.

Yet, the district court committed legal error by purporting to "set aside" the Rule *without* observance of the APA process required of courts to do so. The court did not have before it the whole record of the agency action, which EPA was still in the

process of completing when the court stayed all deadlines pending EPA's potential reconsideration of the Rule, App. 224,–25, or even only the relevant parts of it, as required by the APA, 5 U.S.C. § 706(2). The court also only had before it limited papers filed by the parties, none of which actually discussed the substantive merits of the Rule and merely addressed the *Allied-Signal* factors for vacatur, App. 226–472. Indeed, the court did not even permit or consider merits briefing on the legality of each aspect of the Rule and had before it, at most, only limited briefing on one aspect—the so-called "scope of certification" provision, App. 562–64—and a list of "potential revisions EPA is *considering*" to the Rule, App. 565 (emphasis added).

The court did not purport to reach the merits of the plaintiffs' challenges or find that every aspect of this complicated Rule—or even *any* aspect of the Rule—was actually "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," after a "review [of] the whole record," further underscoring the illegality of the court's actions. 5 U.S.C. § 706(2). Having found for itself the power to vacate agency action outside of the APA's exclusive judicial processes, the district court purported to rely on the D.C. Circuit's *Allied-Signal* test for remand without vacatur, *see* 988 F.2d 146, but that test *only applies to vacate rules already determined to be legally "flawed" under the APA*, *CCAT*, 688 F.3d at 992; 5 U.S.C. § 706(2). Although Plaintiffs presented an obviously insufficient record and argument as to the first *Allied-Signal* factor, focusing only on a fraction of the Rule's provisions based on litigation statements by EPA, App. 289–90, 433–39; *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988); *Volpe*, 401 U.S. at 419, the district court focused

on the Rule's scope-of-certification provision as "antithetical" to this Court's decision in *PUD No. 1*. App. 564 (emphasis omitted). The court scolded EPA for "depart[ing] from what the Supreme Court dubbed the most reasonable interpretation of the statute," *id.*, but itself ignored that this Court held only that EPA's then-applicable construction of Section 401 was "a reasonable interpretation," *PUD No. 1*, 511 U.S. at 712; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *Rust v. Sullivan*, 500 U.S. 173, 186 (1991).

The district court's decision is all the more indefensible because the court nullified the Rule without any authority under the APA, while running roughshod over *multiple* provisions of the Rule that the district court never even discussed, and without even attempting to conduct a severability analysis. *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984); 5 U.S.C. §§ 706, 551(13). For example, the plaintiffs did not submit any briefing on the Rule's definition of fourteen key terms under the CWA, most of which are undefined in the statute. 40 C.F.R. § 121.1. Nor did they discuss in their briefing the Rule's establishment of a pre-filing meeting request process by which project proponents and State and Tribal certifying authorities can meaningfully coordinate before a certification application is even filed, *id.* § 121.4, or the Rule's procedure for neighboring jurisdictions to participate in the certification process once commenced. *Id.* § 121.12. Moreover, many of the Rule's changes merely codify what federal courts have held the CWA unambiguously requires since EPA's promulgation of the 1971 regulations, like that the one-year review period commences when an agency receives a request for water quality certification. *Id.* § 121.16; *see*

generally 85 Fed. Reg. at 42,222, 42,235–36. These portions of the Rule went unmentioned by Plaintiffs in their vacatur briefing papers. App. 474–75; *see also* App. 232–36. The district court made all of these errors and then exacerbated them by vacating the rule across the entire nation, rather than fashioning only relief "necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

c. The district court's justifications for its vacatur decision are contrary to the statutory text and this Court's caselaw. The district court inferred that the Ninth Circuit's endorsement of remand without vacatur *in cases where agency action was found erroneous* meant that remand with vacatur is appropriate in cases where the action has not been found erroneous. App. 557–59. It also concluded that "because vacatur is an equitable remedy, and because the APA does not expressly preclude the exercise of equitable jurisdiction, the APA does not preclude the granting of vacatur without a decision on the merits." App. 559 (citation omitted). Neither contention can withstand scrutiny under the APA and this Court's caselaw.

The district court's reasoning gets the APA exactly backwards. The APA only permits vacatur of a rule in limited, statutorily defined circumstances, 5 U.S.C. § 706(2), consistent with this Court's own interpretations of the APA, requiring courts "to engage in a substantial inquiry" about whether a rule is lawful before even considering vacatur, *see Volpe*, 401 U.S. at 415–16. And, given that the APA expressly preserves all "other limitations on judicial review" and the "duty of the court[s] to . . . deny relief on any other appropriate legal or equitable ground," 5 U.S.C.

§ 702(1), there is simply no ground faithful to the text of the APA that would allow a court to vacate a rule never found unlawful under 5 U.S.C. § 706.

The district court's reliance on "equity" as authorizing it to vacate the Rule without an adjudication on the merits is also inconsistent with the APA. App. 558–59. The court never explained, beyond broad assertions of its equitable jurisdiction, from where any such broad authority might derive. Under the APA, courts may only vacate agency actions when those actions are "found" to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "without observance of procedure required by," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2); *Volpe*, 401 U.S. at 416. And the court may do so only after reviewing the "whole record," or relevant parts cited by the parties. 5 U.S.C. § 706(2). Nothing in "equity" allowed the district court to ignore the clear statutory limitations on judicial review established by Congress to set aside a rule without finding it unlawful.

Further, Congress's limited waiver of sovereign immunity in the APA also forecloses the district court's reasoning. "The elimination of the defense of sovereign immunity [in 5 U.S.C. § 702] did not affect any other limitation on judicial review that would otherwise apply under the APA." *Darby*, 509 U.S. at 153. Given that "Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination," *Schillinger*, 155 U.S. at 166, the APA's precise (and exclusive) grounds upon which an agency action may be "set aside," 5 U.S.C. § 706(2), clearly limit the courts'

discretion. Thus, rule set aside may occur "*only* for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached." *Vt. Yankee*, 435 U.S. at 558 (emphasis added) (citation omitted). No principle of equity allowed the district court to ignore the APA's and sovereign immunity's limitation on its authority.

B. Applicants Will Suffer Irreparable Harm Absent A Stay, And All Equitable Considerations Favor Such Relief

1. Intervenors will continue to suffer grave, irreparable harm absent stay relief from this Court.

The district court's vacatur deprived Applicants of the Rule's protections, a rule that Applicants successfully convinced EPA to adopt in order to thwart certain States' ongoing, well-established abuses of the Section 401 permitting process. *See* 85 Fed. Reg. 42,210 (July 13, 2020); *supra* pp. 6–9. For example, the Rule provides important "clarity" by establishing regulatory definitions for key statutory terms not defined in the CWA. 40 C.F.R. § 121.1. It also establishes that the "scope of certification" under Section 401 "is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." *Id.* § 121.3. And it establishes clear rules for when the one-year certification period begins and ends, *id.* §§ 121.5–9, explains how waiver of the certification requirement can occur proactively or by operation of law, *id.* §§ 121.8–9, and further defines EPA's role as a certifying authority and advisor, among other things, *id.* §§ 121.13–16. Applicants intervened in the case below precisely to defend the Rule against challenges designed to

eliminate these and others of the Rule's protections and return to the exact prior system of abuses, *see* App. 1–115, which the district court's vacatur order ostensibly reinstates. To have the Rule repealed nationwide by a single judge—without even finding the Rule unlawful—deprives them of the Rule's protections, and does so by circumventing one of the APA's core protections. 5 U.S.C. §§ 553(b), (c), 551(5).

This unlawful deprivation of the Rule's protections imposes harms on the regulators and regulated industries—including Applicants—who have faced and will continue to face substantial disruptions in Section 401-related enterprises as a result of the whipsawing effect of the district court's nationwide vacatur. The district court essentially "restructure[d]" this corrective regulatory regime, to the detriment of the reliance interests the regulated industries developed on the Rule. *See California v. FERC*, 495 U.S. 490, 500 (1990). For example, without the Rule, previously offending States can now return to their prior practice of delaying their consideration of Section 401 certifications beyond one year, contrary to the Rule's clear limitation. *See* 40 C.F.R. §§ 121.5–9. Similarly, without the Rule's "scope of certification" provision, certifying authorities are no longer limited by the Section 401 regulations "to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements" only, and will likely resume considering non-water-quality-related, project-killing conditions when granting their "water quality" certifications for disfavored industries or projects. 40 C.F.R. § 121.3; *see supra* pp. 6–8 (discussing the Millennium Bulk Terminals – Longview LLC, Atlantic Coast

Pipeline, Mountain Valley Pipeline Southgate, Constitution Pipeline, and Millennium Valley Lateral projects).

Absent this Court's stay, Applicants will likely never be able to obtain relief from the district court's actions. Briefing in the Ninth Circuit is not scheduled to complete until May, even before any routine extensions, App. 799–802, and a decision from the Ninth Circuit may well take a year after that. That means the earliest Applicants could expect a restoration of the Rule would be in early-to-mid 2023, and potentially longer than that. The EPA has announced that it expects to issue a proposed new rule in Spring of 2022, with notice and comment to follow thereafter. EPA, *Clean Water Act Section 401 Water Quality Certification Question and Answers on the 2020 Rule Vacatur* (Dec. 17, 2021).[3] Thus, it is probable this stay application is Applicants' last chance to obtain relief against the district court's unlawful vacatur decision. In the interim, the abuses that EPA designed the Rule to combat will return in full force, preventing Applicants from recouping the substantial expenses combatting the recurring abuses without the Rule's protections. *See Phillip Morris USA Inc. v Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) ("If expenditures cannot be recouped, the resulting loss may be irreparable.").

Vacatur also deeply harms State Applicants' constitutional rights and sovereign interests. Allowing certain "individual States free to burden commerce . . . among themselves" was among "the major defects of the Articles of Confederation,

[3] Available at https://www.epa.gov/system/files/documents/2021-12/questions-and-answers-document-on-the-2020-cwa-section-401-certification-rule-vacatur-12-17-21-508.pdf.

and a compelling reason for the calling of the Constitutional Convention of 1787." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976). Indeed, particular "dissatisfaction" came from "the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, [through] whose ports, their commerce was carr[i]ed on." *Id.* (quoting Records of the Federal Convention of 1787 (M. Fanand ed. 1966)). But now, a State is not permitted to "use the threat of economic isolation" to control its sister states. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 379 (1976). Yet, certain States violating this quintessential norm and attempting to control other States' commerce through the Section 401 permitting process was one of the reasons Applicants petitioned for the Rule, *see, e.g.*, App. 51–54, 96–114, 550–51, and such foundational constitutional harms will assuredly return in light of vacatur.

2. Granting a stay pending appeal will not harm Plaintiffs and would serve the public interest. Plaintiffs have no equitable interest or entitlement to an unlawful vacatur, *see supra* Part I.A, so staying that decision would not impose any legal, cognizable harm, *NFIB v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666 (2022). Moreover, if this Court summarily reverses the district court, as it also should do, Plaintiffs will be free to continue their challenge to the Rule *in this litigation* and try to prove to the district court what they never did here—that the Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," after a "review [of] the whole record." 5 U.S.C. § 706(2). And the public interest strongly supports a stay. The Rule fills a gaping regulatory void,

setting basic rules for the Section 401 process, including a rule for defining when the clock starts on a State's reasonable time period to act on a certification request, and clearly defining the scope of authority granted by Congress in Section 401. Each of these regulatory improvements aids the public interest, and returning to the prior dysfunction fostered by EPA's decades-long failure to set basic rules for the Section 401 process would harm industry and government actors.

II. In The Alternative, This Court May Construe This Application As A Petition For A Writ Of Certiorari, Grant The Petition, And Summarily Reverse

This Court could treat this application as a petition for a writ of certiorari before judgment and hear the case on the merits, including considering the possibility of summary reversal. *See Nken v. Mukasey*, 555 U.S. 1042 (2008). The same considerations that justify a stay support this Court granting certiorari before judgment. "A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted upon a showing that the case is of such imperative importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11; 28 U.S.C. § 2101(e). The district court's decision vacating a validly enacted federal agency rule without any finding that the rule is plainly unlawful under the APA and this Court's caselaw satisfies this standard. The decision below raises important questions about a district court's authority to grant parties challenging agency action full relief without proving the merits of their claims and effectively circumventing the APA's fundamental notice-and-comment requirements

for repeal of a rule. This Court's immediate review is necessary because EPA is likely to finish its new rulemaking before a full appeal can be briefed and decided.

CONCLUSION

This Court should stay the vacatur of the Rule or, in the alternative, construe this Application as a petition for a writ of certiorari and grant the petition.

Respectfully submitted,

GEORGE P. SIBLEY, III
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8262
(804) 788-8218 (fax)
gsibley@huntonak.com

DEIDRE G. DUNCAN
ERICA N. PETERSON
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037

CLARE ELLIS
HUNTON ANDREWS KURTH LLP
50 California Street
Suite 1700
San Francisco, CA 94111

Attorneys for Applicants American Petroleum Institute and Interstate Natural Gas Association of America

ELIZABETH B. MURRILL,
SOLICITOR GENERAL
JOSEPH S. ST. JOHN,
DEPUTY SOLICITOR
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third Street
Baton Rouge, LA 70804
(225) 326-6739
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov

Attorneys for Applicant State of Louisiana

MISHA TSEYTLIN
Counsel of Record
SEAN T.H. DUTTON
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

TIMOTHY L. MCHUGH
TROUTMAN PEPPER
HAMILTON SANDERS LLP
1001 Haxall Point,
15th Floor
Richmond, VA 23219

CHARLES SENSIBA
TROUTMAN PEPPER
HAMILTON SANDERS LLP
401 9th Street NW
Suite 1000
Washington, DC 20004-2146

ELIZABETH HOLT ANDREWS
TROUTMAN PEPPER
HAMILTON SANDERS LLP
Three Embarcadero Center
Suite 800
San Francisco, CA 94111-4057

Attorneys for Applicant National Hydropower Association

JAMES KASTE
DEPUTY ATTORNEY GENERAL
WYOMING ATTORNEY GENERAL'S OFFICE
109 State Capitol
Cheyenne, WY 82002

Additional Counsel:

LESLIE RUTLEDGE
Attorney General of Arkansas

AUSTIN KNUDSEN
Attorney General of Montana

LYNN FITCH
Attorney General of Mississippi

KEN PAXTON
Attorney General of Texas

ERIC SCHMITT
Attorney General of Missouri

PATRICK MORRISEY
Attorney General of West Virginia