No. 16-1168

IN THE

Supreme Court of the United States

AMERICAN MUNICIPAL POWER, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.2(b), Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the Petitioner.

Counsel of record for both Petitioner and Respondent Environmental Protection Agency received timely notice of *amicus*'s intent to file the attached brief under Rule 37.2. These parties have consented to the filing, and copies of their letters of consent are on file with the Clerk's Office.

However, after the ten-day deadline to provide notice of intention to file an *amicus curiae* brief had passed, an additional counsel of record for Environmental Respondent-Intervenors entered an appearance. As such, counsel for *amicus* was unable to provide the requisite ten-day notice to counsel of record for Environmental Respondent-Intervenors.

The interest of *amicus* arises from its commitment to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has participated extensively as *amicus curiae* in this Court, lower federal courts, and state courts to urge adoption of environmental policies that strike a proper balance between environmental, safety, and economic well-being.

WLF has particular interest in this litigation because EPA's issuance of emission standards under

Clean Air Act Section 112(d) that effectively outlaw inevitable accidents implicates WLF's core commitment to free-market principles, limited government, and—especially—the rule of law. WLF is concerned about the penalties for noncompliance with Clean Air Act regulations that are impossible to comply with and the collateral effects they will have on the American economy.

Amicus has no direct interest, financial or otherwise, in the outcome of this case. Its sole interest in filing this brief is to defend the constitutional right to due process and ensure that the government not command its citizens to do the impossible, and then penalize them when they inevitably fail in that task.

For the foregoing reasons, WLF respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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APRIL 2017

QUESTION PRESENTED

This brief addresses the following question:

Whether EPA's issuance of emission standards under Clean Air Act Section 112(d) that require the impossible—perfect emissions performance at all times with no exception—and outlaw accidental releases violates longstanding due process constitutional norms.

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE PETITION 5

I. Constitutional Norms Require the Federal Government to Promulgate Laws with Which People Can Comply 5

II. Section 112 of the Clean Air Act Can—and Therefore Must—Be Interpreted Not to Penalize Sources for Unavoidable Emissions 8

III. Certiorari Is Required to Address This Important Issue 11

A. The Major Boilers and Area Boilers Rules Affect Nearly All Industries 11

B. Treatment of Accidental Emissions from Malfunctions Is Important to the Clean Air Act's Functioning 12

C. Certiorari Is Appropriate at This Time 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 7

Beckles v. United States, 137 S. Ct. 886 (2017) ... 5, 8

Clark v. Martinez, 543 U.S. 371 (2005) 9

Comm'r v. Standard Life & Accident Ins. Co., 433 U.S. 148 (1977) 11

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568 (1988) 9

Fidelity Fed. Bank & Trust v. Kehoe, 547 U.S. 1051 (2006) 11

Lake Carriers' Ass'n v. EPA, 652 F.3d 1 (D.C. Cir. 2011) 7

Luminant Generation Co. v. EPA, 714 F.3d 841 (5th Cir. 2013) 14

McDonnell v. United States, 136 S. Ct. 2355 (2016) 7

Nat. Res. Def. Council v. EPA, 749 F.3d 1055 (D.C. Cir. 2014) 14

Nat'l Lime Ass'n v. EPA, 627 F.2d 416 (D.C. Cir. 1980) 10

PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016) 6

Sabetti v. DiPaolo, 16 F.3d 16 (1st Cir. 1994) 5

Sierra Club v. EPA, 551 F.3d 1019 (D.C. Cir. 2008) 3, 4, 12, 13, 14

United States v. Dexter, 165 F.3d 1120 (7th Cir. 1999) 7

United States v. Donovan, 429 U.S. 413 (1977) 7, 12

United States v. Mitchell, 463 U.S. 206 (1983) 11

United States v. Ruzicka, 329 U.S. 287 (1946) 12

United States v. Stevens, 559 U.S. 460 (2010) 7

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 8

Constitutional and Statutory Provisions

U.S. Const. amend. V. 5, 7, 11

42 U.S.C. § 7401 ..... 4, 5

42 U.S.C. § 7412 ..... 5, 8, 9, 10, 14

42 U.S.C. § 7413 10

42 U.S.C. § 7602 ..... 8, 9, 12

42 U.S.C. § 7604 ..... 4, 10

42 U.S.C. § 7607 14

Other Authorities

Ferromanganese and Silicomanganese Production: National Emission Standards for Hazardous Air Pollutants, 80 Fed. Reg. 37,366 (June 30, 2015) 13

National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, 78 Fed. Reg. 7,138 (Jan. 31, 2013) 3

National Emission Standards for Hazardous Air Pollutants for Primary Aluminum Reduction Plants, 80 Fed. Reg. 62,390 (Oct. 15, 2015) 13

National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Production, 80 Fed. Reg. 56,700 (Sept. 18, 2015).... 13

National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry, 80 Fed. Reg. 44,772 (July 27, 2015) 13

Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program, 81 Fed. Reg. 38,645 (proposed June 14, 2016) 13

State Implementation Plans: Response to Petition for Rulemaking, 80 Fed. Reg. 33,840 (June 12, 2015)..... 12

W. LaFave, 1 Subst. Crim. L. § 6.2(c) (2d ed.) 7

INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. Founded nearly 40 years ago, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has participated extensively as *amicus curiae* in this Court, lower federal courts, and state courts to urge adoption of environmental policies that strike a proper balance between environmental safety and economic well-being. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Mingo Logan Coal Co. v. EPA*, 134 S. Ct. 1540 (2014); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). Moreover, WLF has filed formal comments with EPA to discourage the implementation of regulations that have a deleterious impact on economic growth and overburden employers. *See, e.g.*, "Source Determination for Cer-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Pursuant to Rule 37.2, counsel of record for Petitioner and Respondent Environmental Protection Agency received notice of *amicus*'s intent to file this brief at least ten days before the due date. These parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

tain Emission Units in the Oil and Natural Gas Sector" (Sept. 18, 2015; Docket No. EPA-HQ-OAR-2013-0685); "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Sources" (Dec. 1, 2014; Docket No. EPA-HQ-OAR-2013-0602).

Additionally, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles addressing the Clean Air Act's burdensome and overreaching regulations. *See, e.g.*, Richard O. Faulk, *Public-Nuisance Rulings Undermine National Clean Air Act Enforcement and Federal Preemption*, WLF Legal Backgrounder (Jan. 15, 2016); Donald W. Fowler & Richard O. Faulk, *Federal Clean Air Act Preemption of Public Nuisance Claims: The Case for Supreme Court Resolution*, WLF Contemporary Legal Note (Nov. 2014); Mark Latham, Victor E. Schwartz & Christopher E. Appel, *Is EPA Ignoring Clean Air Act Mandate to Analyze Impact of Regulations on Jobs?*, WLF Legal Backgrounder (June 6, 2014); Patrick Morrisey, Randy Huffman & Elbert Lin, *Last Call for Cooperative Federalism? Why EPA Must Withdraw SIP Call Proposal on Startup, Shutdown, & Maintenance*, WLF Legal Backgrounder (Sept. 16, 2013).

WLF has particular interest in this litigation because EPA's issuance of emission standards under Clean Air Act Section 112(d) that effectively outlaw inevitable accidents implicates WLF's core commitment to free-market principles, limited government, and—especially—the rule of law. WLF is concerned

about the penalties for noncompliance with Clean Air Act regulations that are impossible to comply with and the collateral effects they will have on the American economy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our federal government may not command its citizens to do the impossible and then penalize them when they inevitably fail in that task. But that is just what the Court of Appeals has sanctioned in the case below, upholding from legal challenge a $4.7 billion rule, 78 Fed. Reg. 7,138, 7,155 (Jan. 31, 2013), that regulates the operation of hundreds of thousands of industrial boilers in the United States, but that *no one believes can be complied with at all times*.

The rationale for the appeals court's decision is weak: circuit precedent had "stymied" EPA both from promulgating standards that were achievable at all times and from pursuing "reasonable alternatives" to unavoidable noncompliance during periods of inevitable source malfunction. Pet. App. 38–39 (citing *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008)). In other words, D.C. Circuit precedent compelled EPA to ignore the actual operating characteristics of regulated (not banned) sources and set a standard for compliance that no source can meet.

The penalty for noncompliance with the impossible is steep. The Clean Air Act authorizes up to $37,500 in civil penalties and up to five years in prison per

violation. It also devolves enforcement authority to private attorneys general, who may seek to impose civil penalties and to recover legal fees for enforcing the impossible standard. 42 U.S.C. § 7604(d).

Nor is the legal jeopardy engendered by the Court of Appeals limited just to the hundreds of thousands of industrial boilers implicated by this case. The circuit precedent on which the Court of Appeals relied, *Sierra Club v. EPA*, interprets the Clean Air Act's general definition of "emission standard" to bar the Agency from setting standards that sources can comply with at all times, even where the specific Clean Air Act program in question requires EPA to promulgate "achievable" standards. The rotten fruit of that precedent blackens the regulatory landscape, affecting state plans and operations that attempt to make the type of reasonable accommodations for accidental emissions that the Court of Appeals disallowed.

Review is warranted under these extreme circumstances, particularly given the D.C. Circuit's exclusive jurisdiction over nationwide emission standards. The Clean Air Act does not just promote air pollution control, but it also promotes "the productive capacity of [America's] population." 42 U.S.C. § 7401(b)(1). Subjecting the owners and operators of every major industrial source in the United States to severe legal jeopardy for operating sources that are not themselves prohibited by law—simply because there is no perfect machine—runs counter to the Constitution, to the statute, to the rule of law, and to basic common sense.

REASONS FOR GRANTING THE PETITION

I. Constitutional Norms Require the Federal Government to Promulgate Laws with Which People Can Comply

As interpreted by the Court of Appeals and EPA, Section 112(d) of the Clean Air Act requires EPA to establish standards with which, all acknowledge, the regulated community cannot possibly comply. Any such law raises serious due process concerns. Review is warranted to determine whether EPA's adoption of its constitutionally problematic Boiler MACT Rule is a plausible interpretation of the Act.

This Court has repeatedly held that any law that "invites arbitrary enforcement" by government officials violates due process rights. *See, e.g.*, *Beckles v. United States*, 137 S. Ct. 886, 892 (2017) ("[T]he Due Process Clause prohibits the Government from taking away someone's life, liberty, or property under a criminal law ... [that is] so standardless that it invites arbitrary enforcement.") (quotation marks omitted); *see also Sabetti v. DiPaolo*, 16 F.3d 16, 17 (1st Cir. 1994) (Breyer, J.) ("The idea is that ordinary individuals trying to conform their conduct to law should be able to do so by reading the face of the statute.") (emphasis omitted). The Boiler MACT Rule invites arbitrary enforcement by declaring that everyone in the regulated community is a lawbreaker—thereby granting federal environmental officials and citizen-suit filers unfettered discretion to decide whom to target for enforcement actions.

The D.C. Circuit rationalized this counter-intuitive result by suggesting that prosecutorial discretion could ameliorate problems faced by businesses that make good-faith efforts to comply with the Boiler MACT Rule. Pet. App. 39–40. Yet another D.C. Circuit panel recently rejected a similar effort by a federal agency to rely on its alleged prosecutorial discretion to justify the agency's claim to largely unlimited enforcement authority. The Consumer Financial Protection Bureau (CFPB) asserted that it possessed unlimited authority to reach back in time—even as far as 100 years—to bring administrative enforcement actions against alleged violators of consumer financial laws. The D.C. Circuit panel rejected that assertion, finding that a three-year statute of limitations applied to such actions. *PHH Corp. v. CFPB*, 839 F.3d 1, 55 (D.C. Cir. 2016), *reh'g en banc granted, order vacated*, (Feb. 16, 2017) ("This Court looks askance ... at the idea that the CFPB is free to pursue an administrative enforcement action for an indefinite period of time after the relevant conduct took place."). Dismissing CFPB assurances that it would use its vast enforcement discretion responsibly, the panel stated, "'trust us' is normally not good enough." *Id.*

Similarly, this Court recently rejected claims by federal prosecutors that the Hobbs Act should be broadly construed to cover an extremely wide range of interactions between elected officials and their constituents. In discounting assurances from prosecutors that Hobbs Act charges would not be filed in

cases involving good-faith interactions, the Court stated, "we cannot construe a criminal statute on the assumption that the government will 'use it responsibly.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016) (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). So too, the due process concerns created by interpreting the Clean Air Act, a statute that allows for the imposition of both criminal and civil penalties, in a manner that grants regulators unlimited discretion to choose their targets are not eliminated by assurances that they (and reviewing courts) will use their powers wisely.

Simply put, EPA cannot ask every operator of a boiler or incinerator to roll the dice and expose herself to liability, knowing full well that some will inevitably lose. The Due Process Clause does not tolerate the promulgation of laws and regulations that are "impossible to comply with." *See, e.g.*, *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 8 (D.C. Cir. 2011) (per curiam) (observing that regulations that are "impossible to comply with" raise due process issues) (quotation marks omitted); *United States v. Dexter*, 165 F.3d 1120, 1125 (7th Cir. 1999) (questioning "the validity of a law with which it is impossible to comply") (quotation marks omitted); W. LaFave, 1 Subst. Crim. L. § 6.2(c) (2d ed.) ("[O]ne cannot be criminally liable for failing to do an act which he is physically incapable of performing."); *see also Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (noting the right to be free from "arbitrary and irrational" government decisions).

And promising to compensate for the vagaries of chance and the impossibility of compliance by exercising "enforcement discretion," Pet. App. 39, does nothing to remedy the constitutional infirmity. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001). To the contrary, it only invites "arbitrary enforcement," *Beckles*, 137 S. Ct. at 892, which is the antithesis of due process.

II. Section 112 of the Clean Air Act Can—and Therefore Must—Be Interpreted Not to Penalize Sources for Unavoidable Emissions

Although the constitutional implications of subjecting industrial sources to civil and criminal liability for inevitable accidental emissions are dire, this case easily may be disposed of by applying the traditional tools of statutory construction.

The emission standards primarily at issue in this case are "maximum achievable control technology" standards under Section 112(d) of the Clean Air Act. These standards are set at the level "that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines *is achievable* for new or existing sources in the category." 42 U.S.C. § 7412(d)(2) (emphasis added). Additionally, these emission standards presumptively should meet the general definition of that term, "a requirement established by … the Administrator which limits the quantity, rate, or concentration of emissions of air

pollutants on a continuous basis, ..." 42 U.S.C. § 7602(k).[2]

The Court of Appeals should have applied the canon of constitutional avoidance to prevent liability under the Clean Air Act from becoming regulatory Russian roulette.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). This is a "means of giving effect to congressional intent, not of subverting it," "resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005).

The Boiler MACT Rule's construction of Section 112 penalizes sources for unavoidable emissions. Indeed, failure to comply with Section 112's source requirement brings with it steep penalties. These include administrative compliance and penalty orders, civil penalties in actions brought by the government

[2] The other emission standards before the Court of Appeals, the "generally available control technology" limits applicable to area source boilers, are less stringent than the "achievable" MACT limits. *See* Pet. App. 15 (noting that "unlike the EPA's duty to consider a beyond-the-floor MACT standard, it need not consider a more stringent GACT standard").

and private plaintiffs, and criminal charges carrying up to five years in prison. 42 U.S.C. §§ 7413(a)–(d), 7604. As a result, a change in the definition of what constitutes a violation of Section 112 source requirements also transforms the scope of potential civil and criminal liability under the Clean Air Act.

Moreover, an alternative construction of the statute that better fits the Clean Air Act's plain language is readily available. The plain text of Section 112(d) requires that emission standards be "*achievable*." 42 U.S.C. § 7412(d)(2) (emphasis added). An achievable emission standard is one that "must be capable of being met under the most adverse conditions which can reasonably be expected to recur." *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 431 n.46 (D.C. Cir. 1980). There is no dispute that malfunctions can and do occur for even the best controlled and maintained sources. The Act's "achievability" and "continuousness" mandates can easily be interpreted together to ensure that the emission standards generally applicable to sources apply continuously at all times where doing so is achievable, but not during malfunction events where it is not achievable. In such an interpretation, there would be ample room for EPA to ensure that malfunction events involve situations that are beyond source owners' and operators' reasonable control, and guarantee that any exclusion or alternative standard does not swallow the rule.

Given the existence of a plausible interpretation—indeed, one more faithful to the plain text—that

avoids EPA's collision with the Due Process Clause, the canon of constitutional avoidance requires that the Court adopt it.

III. Certiorari Is Required to Address This Important Issue

A. The Major Boilers and Area Boilers Rules Affect Nearly All Industries

That a matter has a large economic impact and "turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) (citation omitted); *see also United States v. Mitchell*, 463 U.S. 206, 211 n.7 (1983); *Comm'r v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 n.5 (1977).

Because of the ubiquity of the boilers and solid-waste incinerators affected by the regulation, certiorari is necessary to resolve the uncertainty felt by nearly all industries.

The Major Boilers Rule and the Area Boilers Rule alone will cause over $4.7 billion in compliance costs and affect "over 200,000 boilers at over 100,000 separate facilities." Pet. App. 8. These boilers are located in myriad industrial, commercial, and residential establishments—everywhere from shopping malls, apartment complexes, and restaurants to medical centers, schools, churches, and prisons. For its part, the Commercial and Industrial Solid Waste Incineration Unit Rule affects incineration units at com-

mercial and industrial establishments, as well as incinerators available to the general public. *Id.* There are, in short, few areas of the economy that are not affected in some way by the regulation's imposition of potential liability for failing to avoid the unavoidable.

B. Treatment of Accidental Emissions from Malfunctions Is Important to the Clean Air Act's Functioning

The significance of the question presented, as to EPA's administration of the Clean Air Act, is an important factor in deciding whether to grant certiorari, *see United States v. Ruzicka*, 329 U.S. 287 (1946), as is the question of the proper "construction of a major federal statute," *United States v. Donovan*, 429 U.S. 413, 422 (1977).

The statutory linchpin of the Court of Appeals' reasoning in this case and in *Sierra Club v. EPA* is the Act's general definition of an "emission standard." *See* 42 U.S.C. § 7602(k). Accordingly, as far reaching as the Boiler MACT Rule is, this case is not a one-off, for the underlying logic has the potential to extend it further still.

Among other things, the EPA has relied on *Sierra Club* and its progeny to demand that states rewrite their Clean Air Act state plans to remove commonsense provisions to address accidental emissions, *see* 80 Fed. Reg. 33,840, 33,852 (June 12, 2015), and propose the removal of emergency affirmative defense provisions from source operating per-

mits, *see* 81 Fed. Reg. 38,645, 38,648 n.12, 38,651 (proposed June 14, 2016). Moreover, the decision has been used to eliminate or propose the elimination of affirmative defenses for malfunctions from the Clean Air Act emission standards for many other core American industries, including aluminum manufacturing, *see* 80 Fed. Reg. 56,700, 56,704 (Sept. 18, 2015), 80 Fed. Reg. 62,390, 62,395 (Oct. 15, 2015), Portland cement manufacturing, *see* 80 Fed. Reg. 44,772, 44,774 (July 27, 2015), and ferroalloy production, *see* 80 Fed. Reg. 37,366, 37,369 (June 30, 2015).

If the Boiler MACT Rule is allowed to stand, the federal government will have a blank check to impose civil and criminal liability on accidental malfunctions from nearly all significant industrial machinery.

C. Certiorari Is Appropriate at This Time

The time is appropriate for this Court to resolve the constitutional and statutory questions raised by the Boiler MACT Rule.

The issue of EPA's regulation of unanticipated emissions under Section 112(d) has percolated in the Court of Appeals for the District of Columbia Circuit for almost a decade. In fact, the D.C. Circuit first set this train in motion in the waning days of the George W. Bush administration, when the court ruled that Congress unambiguously required either a Section 112(d) or a Section 112(h) standard to apply at all times. *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir.

2008). In the intervening years, EPA has labored to craft a workable solution to the problems engendered by *Sierra Club*, but to no avail. *See Nat. Res. Def. Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (striking down EPA regulation permitting cement kiln operators to assert malfunction as an affirmative defense to emission standard violations).

The Court should definitively resolve the long-standing uncertainty. Under 42 U.S.C. § 7607(b)(1), only the D.C. Circuit has jurisdiction to hear challenges to "any emission standard or requirement under section 7412." And last December, the D.C. Circuit denied petitions for panel rehearing and rehearing *en banc*, signaling the conclusion of its consideration of the issue. Thus, while the issue of the Clean Air Act's treatment of emissions during malfunctions may arise occasionally in regional circuits in the context of state plans, *see Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013) (denying petition to review EPA decision to approve a Texas state Clean Air Act plan on grounds that it included an affirmative defense for emissions during certain malfunction events), there is no reason to believe that the D.C. Circuit will again entertain the question or that it will be as squarely presented as in this case. All that remains is for this Court to resolve the matter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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