

**In the Supreme Court of the United States**

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STATE OF OKLAHOMA, ET AL. (No. 24A213);  
CONTINENTAL RESOURCES, INC., ET AL. (No. 24A215),  
APPLICANTS

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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**RESPONSE OF FEDERAL RESPONDENTS  
IN OPPOSITION TO APPLICATIONS  
FOR STAY PENDING APPELLATE REVIEW**

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Section 111 of the Clean Air Act (CAA or Act), 42 U.S.C. 7411, directs the Environmental Protection Agency (EPA or Agency) to limit emissions of air pollutants from “stationary sources” when such emissions cause, or contribute significantly to, air pollution that may reasonably be anticipated to endanger public health or welfare. EPA first identifies the “best system of emission reduction” (BSER) that “the Administrator determines has been adequately demonstrated.” 42 U.S.C. 7411(a)(1). EPA then sets emission standards for new sources either by quantifying the degree of emission reduction that is “achievable” through application of that system, *ibid.*, or by identifying “a design, equipment, work practice, or operational standard, or [a] combination thereof,” for such sources based on that system, 42 U.S.C. 7411(h)(1) and (2). The CAA also directs EPA to establish emission guidelines for existing sources in an analogous manner to guide States in setting standards for those sources. 42 U.S.C. 7411(d).

In the Rule at issue here, EPA promulgated new-source numeric and work-

practice emission standards for methane and volatile organic compounds (VOCs) for certain crude-oil and natural-gas facilities. The Rule also establishes existing-source emission guidelines for state standards governing methane emissions from existing oil and gas facilities. Applicants have challenged the Rule in the D.C. Circuit. A panel of that court unanimously determined that Applicants had not made the showings needed to warrant a stay.

This Court should likewise deny the stay applications. Of the various grounds for a stay that applicants assert, only two grounds even purport to rest on challenges to EPA's interpretation of the CAA. Neither challenge is substantial, and neither would warrant this Court's review. First, both groups of applicants argue that, by describing parts of its emission guidelines for States as "presumptive standards," EPA has superseded the States' proper role in regulating existing sources of air pollution under the CAA. But neither the Agency's use of that term, nor EPA's complete explanation of the guidelines' role within the plan-submission process, suggested any intent to deviate from the CAA's allocation of responsibility between federal and state authorities. To the contrary, in promulgating the Rule, EPA repeatedly expressed its understanding and intent that its review of state methane-emission plans would be conducted under the generally applicable statutory and regulatory provisions that govern the state-plan-submission process. Second, the industry applicants assert that EPA exceeded its authority by establishing a structured process through which certified persons may voluntarily provide data to the Agency about methane super-emitter events. That challenge is plainly meritless, and it would not provide a proper basis for relief from this Court in any event because no party asserted that challenge as a ground for a stay in the court of appeals.

Applicants also argue that five discrete aspects of the Rule are arbitrary and

capricious. Those arguments—some of which have been raised for the first time in this Court—lack merit. They also involve factbound challenges to expert determinations that EPA made based on a voluminous administrative record. Applicants are unlikely to prevail on those challenges, and this Court is unlikely to grant certiorari to review them.

The remaining stay factors also weigh against entry of emergency relief. Both groups of applicants have failed to establish that they will suffer irreparable harm during the pendency of the judicial-review proceedings. By contrast, the government and the public will suffer irreparable harm if a stay is granted. Climate change is the Nation’s most pressing environmental challenge; the primary cause of climate change is the buildup of greenhouse gases in the atmosphere; methane is a highly potent greenhouse gas that drives climate change and additionally results in ground-level ozone; and the oil and gas industry is the largest industrial emitter of methane in the United States. A stay of the Rule would postpone the substantial methane-emission reductions that EPA sought to achieve, with consequent harms to the public health. The applications for stays should be denied.

## STATEMENT

### A. Statutory Background

1. Congress enacted the CAA to protect the public from harmful air pollution. Section 111 of the Act directs EPA to identify categories of stationary sources that cause or contribute significantly to air pollution that EPA determines “may reasonably be anticipated to endanger public health or welfare.” See 42 U.S.C. 7411(b)(1)(A). EPA must then establish “standards of performance” for “new sources” in such categories. 42 U.S.C. 7411(b)(1)(B); see 42 U.S.C. 7411(a)(2).

Section 111 defines the term “standard of performance” as:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. 7411(a)(1). A standard of performance thus is a limit on “emissions of air pollutants.” *Ibid.* To set the limit, EPA must first identify the “best system of emission reduction” that “has been adequately demonstrated.” *Ibid.* EPA must then quantify “the degree of emission limitation achievable through the application” of that system. *Ibid.*

If EPA determines that it is not feasible to prescribe or enforce a quantified standard of performance, the Agency may instead adopt “a design, equipment, work practice, or operational standard, or combination thereof” that “reflects the best technological system of continuous emission reduction” that EPA has determined to be “adequately demonstrated.” 42 U.S.C. 7411(h)(1) and (2). That standard for new sources is then “treated as a standard of performance” under the Act. 42 U.S.C. 7411(h)(5); see 40 C.F.R. 60.21a(f).<sup>1</sup>

2. Section 111 establishes different standard-setting processes for “new source[s]” (*i.e.*, those constructed or modified after a proposed standard has been published, 42 U.S.C. 7411(a)(2)) and “existing source[s],” 42 U.S.C. 7411(a)(6). See 42 U.S.C. 7411(b) and (d). For *new* sources, EPA sets the limit on permissible emissions as governing federal “standards of performance” by identifying the best system; identifying the degree of emission reduction achievable through that system; and then prescribing based on that system a numeric emission-limit standard (*e.g.*, 10 lbs/hour of pollutant) or, if a numeric limit is not feasible, a non-numeric standard such as an

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<sup>1</sup> This brief uses “§” to refer to provisions of the Rule at issue here, and “40 C.F.R.” to refer to provisions of other relevant EPA regulations.

“equipment” or “work practice” standard. 42 U.S.C. 7411(b)(1)(B) and (h); see 42 U.S.C. 7411(a)(1). When EPA establishes a quantified emission limit in a federal “standard of performance,” a new source need not use the particular system that EPA has identified as the best, but instead may achieve that quantified limit in any way it chooses. 42 U.S.C. 7411(b)(5).

For *existing* sources, the CAA establishes a cooperative-federalism framework with defined responsibilities for EPA and the States in which “EPA \* \* \* retains the primary regulatory role.” *West Virginia v. EPA*, 597 U.S. 697, 706, 710 (2022); see 42 U.S.C. 7411(d). Section 111(d) requires EPA to publish guidelines for States that address existing sources’ emissions of a particular air pollutant when those emissions are not already regulated under certain other parts of the Act. See 42 U.S.C. 7411(d)(1). To perform that task, EPA uses the same methodology described above to identify numeric emission limits or non-numeric limits based on (for example) equipment or work practices. 42 U.S.C. 7411(a)(1), (d)(1), and (h); see *West Virginia*, 597 U.S. at 706, 710; 40 C.F.R. 60.22a(b)(5). Each State then submits to EPA a plan containing the standards that it will impose and enforce, which must achieve at least the amount of emission reduction that EPA has specified, subject to one exception. See 42 U.S.C. 7411(d)(1); 40 C.F.R. 60.24a(b). Under that exception, a State may adopt a less stringent standard or an extended compliance schedule for a source or category of sources if the State justifies such a variance based on, *inter alia*, “the remaining useful life of the existing source.” 42 U.S.C. 7411(d)(1); 40 C.F.R. 60.24a(e) and (f).

EPA reviews each state plan for existing sources to determine whether it is “satisfactory.” 42 U.S.C. 7411(d)(2)(A); see 40 C.F.R. 60.24a(c), 60.27a(b)(1); cf. 42 U.S.C. 7410(k)(1)(A) (parallel review procedure “determine[s] whether the plan sub-

mission complies with the provisions of [the Act]”). If a State fails to submit a satisfactory plan, EPA must directly regulate existing sources in the State’s stead by using notice-and-comment rulemaking to promulgate a federal plan within 12 months. 42 U.S.C. 7411(d)(2); see 42 U.S.C. 7410(c)(1); 40 C.F.R. 60.27a(c). “[E]ven after the state plan submission deadline,” however, such a State “may submit a plan to replace a Federal plan” that EPA is developing or has promulgated. 88 Fed. Reg. 80,480, 80,495 (Nov. 17, 2023). The State’s plan, if approved by EPA, will then “supplant an already promulgated Federal plan or abrogate the EPA’s responsibility to timely promulgate [one].” *Ibid.*; see 42 U.S.C. 7410(k)(2) and (3) (requiring approval of state plan), 7411(d)(1) (requiring procedure similar to that in Section 7410); 40 C.F.R. 60.27a(b).

3. The Act vests the D.C. Circuit with exclusive jurisdiction to review EPA rules that implement Section 111. See 42 U.S.C. 7607(b)(1). That court “may reverse any such action found to be \* \* \* arbitrary, capricious, \* \* \* or otherwise not in accordance with law,” or “in excess of statutory jurisdiction, authority, or limitations.” 42 U.S.C. 7607(d)(9)(A) and (C).

## **B. Regulatory Background**

The air pollutants covered by the Act include greenhouse gases, one of which is methane. See *Massachusetts v. EPA*, 549 U.S. 497, 528-529 (2007). Greenhouse gases released into the atmosphere act “like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat.” *Id.* at 505. The release of such gases drives climate change. See *ibid.*

EPA has long listed crude-oil and natural-gas facilities as a category of stationary sources regulated under Section 111. See, e.g., 44 Fed. Reg. 49,222, 49,226 (Aug. 21, 1979) (40 C.F.R. 60.16). “The oil and gas industry is the United States’ largest



industrial emitter of methane, a highly potent [greenhouse gas]” that is “83 times more powerful” at trapping climate-warming heat than carbon dioxide over a 20-year timeframe. *Id.* at 16,823-16,824, 16,843. Human-caused methane emissions have resulted in “one-third of the [global] warming” attributable to greenhouse gases. *Id.* at 16,843. Because methane is such a powerful greenhouse gas and “is emitted in large quantities,” “reductions in methane emissions provide a significant benefit in reducing near-term warming.” *Ibid.*

In 2016, EPA promulgated new-source performance standards for methane and VOCs for oil and gas facilities. 81 Fed. Reg. 35,824 (June 3, 2016).<sup>2</sup> That action for new sources triggered EPA’s duty to promulgate parallel emission guidelines for existing sources. See *West Virginia*, 597 U.S. at 710.

In 2020, however, EPA promulgated two final rules to roll back portions of the 2016 rule and an earlier rule. The 2020 “policy” rule would have deregulated transmission and storage activities and eliminated methane regulation at all other oil-and-gas-facility sources, which would have precluded EPA from promulgating emission guidelines for existing sources. 85 Fed. Reg. 57,018 (Sept. 14, 2020). The 2020 “technical” rule revised the remaining VOC regulations, including by eliminating or curtailing mandatory monitoring for VOC leaks. 85 Fed. Reg. 57,398 (Sept. 15, 2020).

In 2021, consistent with the Congressional Review Act, 5 U.S.C. 801 *et seq.*, Congress disapproved and nullified the 2020 policy rule. Pub. L. No. 117-23, 135 Stat. 295; see 5 U.S.C. 801(b)(1). As a result, EPA is barred from adopting any future rule that is “substantially the same.” 5 U.S.C. 801(b)(2). And by overturning the rollback of EPA’s 2016 federal methane standards of performance for new sources, Congress

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<sup>2</sup> This response refers to oil and gas facilities as shorthand for the crude oil and natural gas source category.

effectively reinstated EPA’s obligation to publish parallel methane-emission guidelines for state standards governing existing sources.

EPA subsequently noticed the proposed rulemaking at issue here, including provisions for methane-emission regulation. 86 Fed. Reg. 63,110 (Nov. 15, 2021); see 87 Fed. Reg. 74,702 (Dec. 6, 2022) (supplemental notice of proposed rulemaking).<sup>3</sup> In 2022, while that rulemaking was ongoing, Congress amended the Act to create a methane-emission-reduction program. 42 U.S.C. 7436. The new provision imposes escalating monetary “charge[s] on methane emissions” for certain facilities in the oil and gas industry that exceed specified emission thresholds. 42 U.S.C. 7436(c)-(f)(1). The provision exempts from those charges any facility that is “subject to and in compliance with methane emissions requirements” pursuant to Section 111(b) or (d) if EPA determines that, *inter alia*, those requirements will result in at least as much “emissions reduction[] as would be achieved by the [then-pending] proposed rule” at “86 Fed. Reg. 63110.” 42 U.S.C. 7436(f)(6)(A)(ii). Federal and state methane regulations under Section 111(b) and (d) must be in effect before any facility may seek that exemption. 42 U.S.C. 7436(f)(6)(A)(i).

### C. The Rule

In December 2023, EPA posted on its website the signed final Rule that is at issue in this litigation.<sup>4</sup> On March 8, 2024, EPA published that Rule in the Federal

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<sup>3</sup> EPA posted in its rulemaking docket for public review proposed regulatory text accompanying its December 2022 supplemental notice of proposed rulemaking. See EPA, *Content of Proposed NSPS OOOOb* (Dec. 6, 2022), <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0317-1551>; EPA, *Content of Proposed NSPS OOOOc* (Dec. 6, 2022), <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0317-1552>. Industry Applicants’ contrary assertion (Appl. 18 n.4) is incorrect.

<sup>4</sup> EPA, *EPA’s Final Rule for Oil and Natural Gas Operations Will Sharply Reduce Methane and Other Harmful Pollution*, <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-operations/epas-final-rule-oil-and-natural-gas>; see Final

Register. 89 Fed. Reg. 16,820 (reproduced at 24A213 Appl. App. 1a-408a). As relevant here, the Rule encompasses two “distinct groups of actions,” each of which “is severable from the other.” *Id.* at 16,826-16,827.

First, the Rule adopts updated federal standards of performance under Section 111(b), codified in Subpart OOOOb to 40 C.F.R. part 60, for methane and VOC emissions from new (including newly modified) oil and gas facilities. See 89 Fed. Reg. at 16,826, 17,043-17,140 (codified at 40 C.F.R. 60.5360b-60.5432b). Second, the Rule adopts methane-emission guidelines under Section 111(d), codified in Subpart OOOOc, “for States to limit methane pollution” from certain existing oil and gas facilities. *Id.* at 16,827, 17,140-17,219 (codified at 40 C.F.R. 60.5360c-60.5430c). EPA adopted the federal standards and the analogous emission guidelines to achieve emission reductions “based on proven, cost-effective technologies already required by prior EPA regulations or states’ regulations or deployed by industry leaders.” *Id.* at 16,823.<sup>5</sup>

1. *Section 111(b) standards of performance for new sources.* Five limited components of the Rule’s Section 111(b) standards of performance for new sources are relevant to the Court’s consideration of the stay applications.

a. *New oil wells with associated gas.* The Rule’s federal standards of performance apply to nine subcategories of new oil and gas facilities. § 60.5365b(a)-(i). The first subcategory covers any new “well drilled for the purpose of producing oil or natural gas.” § 60.5365b(a).

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Rule (as posted online), [https://www.epa.gov/system/files/documents/2023-12/eo12866\\_oil-and-gas-nsps-eg-climate-review-2060-av16-final-rule-20231130.pdf](https://www.epa.gov/system/files/documents/2023-12/eo12866_oil-and-gas-nsps-eg-climate-review-2060-av16-final-rule-20231130.pdf).

<sup>5</sup> The Rule also includes a set of actions arising from Congress’s disapproval of the 2020 policy rule and a protocol for use of optical gas imaging in leak detection. 89 Fed. Reg. at 16,827. Those provisions have not been challenged in this case.

“[W]ells operated primarily for oil production” can produce natural gas—known as “[a]ssociated gas”—“that is released from the liquid hydrocarbon during the initial stage of separation after the wellhead.” § 60.5430b (emphasis omitted). The Rule’s associated-gas provision requires such wells to recover associated gas from the separator, instead of releasing it to the atmosphere, and either (1) route it to a sales line, (2) use it as an onsite fuel source, (3) use it for another useful purpose, or (4) reinject it into the same or another well. § 60.5377b(a). The provision establishes temporary exceptions for circumstances such as malfunctions or equipment maintenance, § 60.5377b(d) and (e), and allows wells for which construction commenced between December 2022 and May 2026 to comply using other means (including by using a flare to reduce emissions) upon a showing that it is infeasible due to technical reasons to implement any of the Rule’s four control options, § 60.5377b(b), (c), (f), and (g).

b. *New storage vessels and legally and practicably enforceable emission limits.* The Rule’s fifth subcategory of facilities, § 60.5365b(e), covers new “[s]torage vessel[s],” *i.e.*, “tank[s] or other vessel[s] that contain[] an accumulation of crude oil, condensate, intermediate hydrocarbon liquids, or produced water.” § 60.5430b. A “single storage vessel” or a group of “storage vessels that are manifolded together for liquid transfer” constitute a “[t]ank battery,” *ibid.*, which qualifies as a “storage vessel affected facility” regulated under the Rule if it has the potential to emit at least 20 tons/year of methane or six tons/year of VOCs. § 60.5365b(e).

A tank battery’s emission potential “must be calculated using a generally accepted model or calculation methodology that accounts for” specified factors. § 60.5365b(e)(2)(ii), (iii)(A) and (B). The Rule permits, but does not require, the estimated emission-potential determination to account for the emission “limit [specified]

in an operating permit or other requirement established under a Federal, state, local, or Tribal authority” when the limit being relied upon is “legally and practicably enforceable.” § 60.5365b(e)(2); see 89 Fed. Reg. at 16,974-16,975.

*c. Fugitive emissions at new well sites, centralized production facilities, and compressor stations.* “[F]ugitive emissions are unintended emissions that can occur from a range of components at any time due to leaks.” 89 Fed. Reg. at 16,871. Fugitive emissions “[c]ollectively \* \* \* constitute one of the largest sources of methane” emissions from oil and gas facilities. *Ibid.* Fugitive emissions can result from “[c]hanges in pressure” or “mechanical stresses” in equipment, as well as from “[p]oor maintenance or operating practices.” 86 Fed. Reg. at 63,186.

To reduce methane and VOC emissions from “fugitive emissions components affected facilit[ies],” § 60.5397b, the Rule requires periodic monitoring of those facilities for gas leaks (including a monitoring plan), § 60.5397b(b)-(g); the repair of all sources of fugitive emissions, § 60.5397b(h); and a showing of initial compliance, § 60.5397(i). See § 60.5397b(a). Monitoring may be performed with (1) an audio, visual, and olfactory (AVO) detection method; (2) optical gas imaging (OGI) equipment (a specialized handheld camera); or (3) a handheld detection instrument using EPA’s established “Method 21” procedures. § 60.5397b(c)(2); see 40 C.F.R. Pt. 60, App. A-7 (Method 21).<sup>6</sup> At single wellhead and small well sites, AVO detection may be

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<sup>6</sup> The Rule adopts the same equipment standards for OGI cameras that have been in effect since 2016 under earlier federal standards providing for the use of OGI equipment in the detection of fugitive VOC leaks. Compare 40 C.F.R. 5397b(c)(7)(i), with 40 C.F.R. 60.5397a(c)(7)(i) (2016). Handheld OGI cameras that allow the user to “see” gas leaks through infrared detection are now widely available. See, e.g., Teledyne FLIR, *Industrial Optical Gas Imaging*, <https://www.flir.com/instruments/optical-gas-imaging>; Opgal, *Handheld OGI Solutions*, <https://www.opgal.com/handheld-optical-gas-imaging-ogi-cameras>.

Detection instruments meeting EPA’s longstanding Method 21 specifications, see 40 C.F.R. Part 60, App. A-7, Method 21 § 6.0, are likewise widely available and

used for all required monitoring. § 60.5397b(f)(1), (g)(1)(i) and (ii). At all other covered sites, at least some required monitoring must be performed using either OGI or Method 21. § 60.5397b(f)(2), (g)(1)(iii)(B), (iv)(F), (v)(B), and (vi).

d. *Net heating value (NHV) monitoring of certain emission-control devices at new sources.* The Rule also includes different monitoring requirements for eight separate subcategories of emission-control devices used in new affected facilities to ensure that the devices are operating at an appropriate level of efficiency. § 60.5417b(d)(1)-(8). As relevant here, one of those subcategories involves certain “enclosed combustion devices” and (unenclosed) “flares” that reduce methane emissions through combustion. § 60.5417b(d)(8). When methane (CH<sub>4</sub>) is combusted with oxygen (O<sub>2</sub>) in the air, the chemical reaction destroys the methane and yields carbon dioxide (CO<sub>2</sub>) (a less potent greenhouse gas) and water vapor (H<sub>2</sub>O). Combustion control devices like flares that are “commonly used throughout each segment of the oil and gas industry” utilize such chemical reactions to reduce emissions into the atmosphere, but “[i]mproperly operating flares are a well-documented large source of emissions.” 89 Fed. Reg. at 16,825, 16,843. A sufficiently high “net heating value of the vent gases being combusted” in such a device is a key factor for “good combustion” and, hence, for better control of those emissions. See 86 Fed. Reg. at 63,246. Section 60.5417b(d)(8) requires monitoring that “continuously determine[s] the NHV of the inlet gas” to certain enclosed combustion devices and flares at new affected facilities to ensure that they are operating properly; identifies four alternative ways to satisfy that requirement; and provides exceptions in certain contexts. § 60.5417b(d)(8)(ii) and (iii).

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marketed based on their Method 21 compliance. See, e.g., <https://lifeprotectors.com/products/rki-721-101-p1-eagle-2-gas-monitor-vocs-pid-0-50ppm>.

e. *Super-emitter events.* The Rule establishes procedures to address super-emitter events, which involve abnormally large methane emissions of at least 100 kg/hr (2.6 tons/day), *i.e.*, approximately 125,000 cubic feet (3530 cubic meters) or more of methane per day. § 60.5371b.<sup>7</sup> Super-emitter “events are unpredictable and can occur in between routine inspections and/or fugitive emissions monitoring surveys.” 89 Fed. Reg. at 16,877. EPA accordingly developed procedures for the reporting of such events to EPA so that the Agency can “promptly notify owners and operators of such events for appropriate follow-up action.” *Ibid.*

EPA’s reporting procedures apply only to super-emitter events that are detected using an EPA-approved method utilizing one of three reliable technologies: satellite detection, aircraft-based remote-sensing equipment, or mobile monitoring platforms. § 60.5371b(a). A person “may submit information on super-emitter events to the EPA” under this program only if the Agency has first certified that the person satisfies EPA’s qualification requirements based on documentation of the person’s use of an EPA-approved detection method and technology, its certifying official’s education and background for evaluating the results, its standard operating procedures, and its quality management plan. § 60.5371b(b).

A person with EPA certification may provide the Agency with data about a super-emitter event no later than 15 days after the event. § 60.5371b(c). If EPA determines that the submission is complete and does not impermissibly contain erroneous or inaccurate information, EPA will notify the owners/operators identified in the notification and post the notification online (but without any “owner/operator attribution”). *Ibid.* An owner/operator so notified by EPA must complete an investiga-

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<sup>7</sup> See Air Liquide, *Gas Encyclopedia* (methane mass-volume conversion calculator), <https://encyclopedia.airliquide.com/methane>.

tion and report the results to EPA within 15 days of that notice. 40 C.F.R. 60.5371b(d) and (e). EPA will then post the owner/operator's report online. § 60.5371b.

2. *Section 111(d) methane emission guidelines for existing sources.* The Rule's Section 111(d) emission-guideline provisions for oil and gas facilities, §§ 60.5360c-60.5430c, establish guidelines for state standards governing methane (but not VOC) emissions from existing sources. §§ 60.5361c(a), 60.5362c(a). The Rule extends the generally applicable 18-month period for submitting a State's Section 111(d) plan to EPA to two years, § 60.5362c(c); see § 60.23a(a)(1), and requires that each state plan must provide for compliance by regulated facilities within three additional years, 40 C.F.R. Pt. 60, Subpt. OOOOc, App. Tbl. 1 (89 Fed. Reg. at 17,218). The Rule thus gives existing facilities subject to state plans up to five years after publication of EPA's emission guidelines (*i.e.*, until March 2029) to comply with state methane-emission standards. See 89 Fed. Reg. at 17,012.

EPA's methane-emission guidelines include a "model rule" (§§ 60.5379c-60.5430c) that is "organized in regulation format" and includes "presumptive standards for designated facilities." § 60.5376c(a); see §§ 60.5388c-60.5402c. Each State "must develop a state \* \* \* plan that is at least as protective as the model rule," § 60.5376c(a), "or comply with [a separate regulation]" (*ibid.*) that governs the variance process, under which a State may adopt a "less stringent" standard for a facility (or class of such facilities) based on the facility's "remaining useful life and other factors," § 60.24a(e)-(f); see § 60.5365c. The Rule identifies two ways for a State to satisfy that obligation. First, a State "may use the model rule language as part of [its] state \* \* \* plan." § 60.5376c(a). Second, "[a]lternative language may be used in [the] state \* \* \* plan if [the State] demonstrate[s] that the [State's] alternative language is



at least as protective as the model rule” or “compl[ies] with [the regulation governing facility-specific variances].” *Ibid.*

The Rule further provides that “EPA will review [each] state \* \* \* plan according to [40 C.F.R.] 60.27a.” § 60.5367c. That preexisting regulation, which governs EPA approval of state plans under Section 111(d), provides that “the Administrator shall approve [a state] plan or plan revision as a whole if it meets all of the applicable requirements of [Subpart Ba of the Part 60 regulations].” 40 C.F.R. 60.27a(b)(1). As relevant here, Subpart Ba requires that a state plan’s “standards of performance \* \* \* be no less stringent than the [EPA’s] corresponding emission guideline(s),” except for facilities for which the State may adopt a “less stringent” standard based on “that facility’s remaining useful life or other factors.” 40 C.F.R. 60.24a(c) and (e).

#### **D. Proceedings Below**

After the March 8, 2024 Federal Register publication of the Rule, applicants and other groups petitioned for review of the Rule in the D.C. Circuit. In April 2024, a group of the state applicants moved the court of appeals for a stay. States’ C.A. Mot. to Stay (Apr. 12, 2024). One month later, industry association applicants filed a separate stay motion. Industry Ass’ns C.A. Mot. to Stay (May 17, 2014). Applicant Continental Resources, an oil and gas company that intervened below, filed briefs supporting both stay motions but did not file its own motion for a stay pending appeal. See Intervenor’s C.A. Resp. in Supp. of States’ Stay Mot. (May 6, 2024); Intervenor’s Resp. in Supp. of Industry Ass’ns Stay Mot. (June 11, 2024).

On May 6, 2024, EPA granted administrative reconsideration of the Rule on two issues, including, as relevant here, the Rule’s provisions in § 60.5417b(d)(8) governing “vent gas net heating value (NHV) monitoring and alternate sampling demon-

stration requirements for flares and enclosed combustion devices.” Letter from Tomás E. Carbonell to Holly Hopkins et al. 1 (May 6, 2024).<sup>8</sup>

On July 9, 2024, a unanimous panel of the court of appeals denied the motions for a stay pending appeal. 24A213 Appl. (States Appl.) App. 409a. The court determined that the movants “have not satisfied the stringent requirements for a stay pending court review.” *Ibid.* (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

On August 23, 2024, more than six weeks after the court of appeals’ stay denial, a group of States (State Applicants) applied to this Court for a stay of the Rule’s Section 111(d) emissions guidelines. States Appl. 1. On August 26, a group of oil and gas industry associations and entities (Industry Applicants) applied for a stay of the entire Rule. 24A215 Appl. 1 (Industry Appl.).

The court of appeals subsequently severed the challenges to the Rule’s NHV-monitoring/sampling requirements for flares and enclosed combustion devices, assigned a new docket number (D.C. Cir. No. 24-1289) to those challenges, and “held [those challenges] in abeyance pending further order of the court.” 9/4/2024 C.A. Order 1-2.

## ARGUMENT

A stay is “not a matter of right” but a matter of “judicial discretion,” and an applicant “bears the burden of showing that the circumstances justify an exercise of that discretion.” *Nken v. Holder*, 556 U.S. 418, 433-434 (2009) (citations omitted). The applicant must show that (1) it would likely succeed on the merits, (2) it will suffer irreparable harm without a stay, and (3) the equities and the public interest support a stay. See *Ohio v. EPA*, 144 S. Ct. 2040, 2052 (2024). An applicant seeking

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<sup>8</sup> [https://www.epa.gov/system/files/documents/2024-05/letter-to-api-and-apx.-5.6.24-signed\\_1.pdf](https://www.epa.gov/system/files/documents/2024-05/letter-to-api-and-apx.-5.6.24-signed_1.pdf).

emergency relief from this Court must also show a reasonable probability that the Court would grant certiorari. See *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Applicants have not made the necessary showings here.

**I. APPLICANTS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS OR TO OBTAIN THIS COURT'S CERTIORARI REVIEW**

Applicants are not likely to succeed on the merits of any of their challenges, and this Court would not likely grant certiorari to review those challenges. Applicants raise only two arguments that purport to reflect disputes about the proper interpretation of the CAA. Those arguments concern (1) Section 111(d)'s approach to cooperative federalism for regulating existing sources, State Appl. 15-20; Industry Appl. 11-15, and (2) EPA's legal authority to establish a super-emitter-reporting program for new sources, Industry Appl. 15-17. But neither challenge actually presents a significant legal question or otherwise suggests that any aspect of the Rule is inconsistent with the CAA. And because applicants' statutory arguments rest on misunderstandings of the Rule's operation and effect, this Court would not likely grant review to consider those claims.

Applicants further argue that EPA acted arbitrarily and capriciously in promulgating the Rule's two-year deadline for States to submit state plans in response to EPA's methane-emission guidelines, State Appl. 20-25, and in promulgating four disparate technical provisions in the Rule's federal standards of performance for new sources, Industry Appl. 17-33. Applicants fall far short of showing that those provisions should be set aside under the deferential arbitrary-and-capricious standard of review. In any event, this Court would not likely grant certiorari to consider those contentions. The federal standards and analogous emission guidelines set forth in the Rule are "based on proven, cost-effective technologies already required by prior

EPA regulations or states’ regulations or deployed by industry leaders,” 89 Fed. Reg. at 16,823, and applicants’ record-intensive challenges raise no legal issue of general importance. See *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring). Emergency relief therefore is not warranted.

**A. EPA’s Methane-Emission Guidelines For State Standards Governing Existing Sources Are Lawful**

**1. The Rule’s emission guidelines are consistent with Section 111(d)’s approach to cooperative federalism**

Applicants’ lead argument (State Appl. 11-15; Industry Appl. 15-20) is that the Rule’s methane-emission guidelines for States violate Section 111(d) by including “presumptive standards of performance” that allegedly “supplant[] the States’ authority to develop standards for existing sources,” State Appl. 16. But EPA’s methane-emission guidelines fully comport with Section 111(d). Like all EPA emission guidelines under that provision, those guidelines allow the States to decide what particular regulations to adopt. The “presumptive standards” that EPA included as part of the emission guidelines do not prevent States from adopting a different approach, but simply give States a model that they may rely on if they choose. Indeed, applicants’ understanding of Section 111(d)’s requirements does not appear to differ from the government’s. Instead, applicants’ contentions reflect a misunderstanding of the emission guidelines’ legal status and effect—demonstrating that their claims lack merit and would not warrant this Court’s review.

a. “Although the States set the actual rules governing existing [sources], EPA itself \* \* \* retains the primary regulatory role in Section 111(d).” *West Virginia v. EPA*, 597 U.S. 697, 710, 720 (2022). EPA determines “the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities” and identifies “the degree of emission limitation achievable” under that system as the

basis for “[EPA’s emission] guidelines” for the States, *id.* at 710, 720 (citations omitted). See 42 U.S.C. 7411(a)(1), (d)(1), and (h); 40 C.F.R. 60.22a(b)(2), (3), and (5) (describing components of emission guidelines); see also p. 5, *supra*. Each State then submits to EPA a plan containing the standards that State will impose and enforce. A State’s plan must achieve at least the amount of emission reduction that would result from implementing EPA’s guidelines, see 42 U.S.C. 7411(d)(1); 40 C.F.R. 60.24a(b), unless the State shows that a variance is warranted for a facility, or class of facilities, based on the “consideration [of], among other factors, the remaining useful life of the existing source,” 42 U.S.C. 7411(d)(1); see 40 C.F.R. 60.24a(e) and (f). Under Section 111(d)’s plan-submission process, which uses a regulatory “procedure similar to that provided by [S]ection [110],” EPA determines whether the plan submission is “satisfactory.” 42 U.S.C. 7411(d)(1) and (2)(A); see 40 C.F.R. 60.24a(c), 60.27a(b)(1); cf. 42 U.S.C. 7410(k)(1)(A) (plan submission must “compl[y] with the provisions of [the Act]”).

EPA’s methane-emission guidelines follow this cooperative federalism approach. Certain portions of those guidelines are expressed as a “model rule” (§§ 60.5379c-60.5430c) that is “organized in regulation format” and includes “presumptive standards for designated facilities.” § 60.5376c(a); see §§ 60.5388c-60.5402c (presumptive numeric emission standards and work-practice standards). But the emission guidelines themselves impose no obligations on oil and gas sources. EPA explained that a State “must [either] develop a state \* \* \* plan that is at least as protective as the model rule,” § 60.5376c(a), or undertake a variance process under which a State may adopt a “less stringent” standard for a “facility (or class of such facilities)” based on “remaining useful life and other factors,” 40 C.F.R. 60.24a(e)-(f); see § 60.5365c. EPA emphasized that the Rule does not “demand[] the state plan be

identical to the [emission guidelines],” and the Agency reiterated that States may “adopt standards that diverge from the presumptive standards finalized here,” including “by considering [remaining useful life or other factors] in the development of their state plans.” 89 Fed. Reg. at 16,999-17,000.

Like model codes that are developed for States to adopt or build upon in various legal contexts, EPA’s model rule gives state regulators a convenient starting point that, if adopted, will achieve the requisite degree of methane-emission reductions. The emission guidelines accordingly explain that a State “may use the model rule language as part of [its] state \* \* \* plan.” § 60.5376c(a). But the guidelines reiterate that “[a]lternative language may be used in [the] state \* \* \* plan if [the State] demonstrate[s] that the [State’s] alternative language is at least as protective as the model rule,” or if a State “compl[ies] with [a regulation governing variances for a facility or class of facilities].” *Ibid.* EPA thus sought to assist state regulators in devising compliant plans while providing the flexibility that Section 111(d) requires. Indeed, EPA’s decision to extend the state-plan-submission deadline from 18 to 24 months (see pp. 26-27, *infra*), in recognition of the particular complexities associated with regulating oil and gas facilities, would make little sense if EPA expected or intended that all States would mechanically incorporate the model-rule provisions into their own plans.

b. In arguing that the Rule intrudes upon the proper sphere of the States, Applicants do not challenge any EPA determination regarding the degree of methane-emission reduction that is achievable for existing sources in the oil and gas industry. Rather, Applicants argue that the Rule unlawfully constrains States’ ability to achieve the requisite degree of emission reduction through a mix of controls different from those reflected in the EPA guidelines. Applicants identify no sound basis for

finding the Rule's existing-source guidelines to be inconsistent with the CAA's allocation of responsibility between EPA and the States. State Applicants observe (Appl. 16) that EPA must "respect[] the States' authority to adopt any appropriate standards of performance under Section 111(d) that reflect EPA's determinations as to the amount of emission reduction, after the States' consideration of remaining useful life and other factors." That observation is correct, but nothing in the Rule is inconsistent with it.

Applicants repeatedly quote EPA's characterization of the guidelines as "presumptive standards," and they describe the guidelines as "unlawfully ratchet[ing] up EPA's scrutiny of state plans under Section 111(d)." State Appl. 17-18; see Industry Appl. 13-14. Industry Applicants assert (Appl. 14) that EPA has "already decided in the Final Rule \* \* \* that any [state plan] that does not implement" the "presumptive standards' is unsatisfactory." Those arguments reflect a misunderstanding of the guidelines and their role in EPA's review of state-plan submissions.

EPA's references to "presumptive standards" in part convey that plans incorporating aspects of the model rule can more readily be developed and approved. See 89 Fed. Reg. at 16,829 ("EPA anticipates that providing these presumptive standards will create a streamlined approach for states in developing state plans and for the EPA in evaluating state plans."); *id.* at 17,006 (referring to "presumptively approvable aspects of the" emission guidelines). Those references also reflect the fact that the emission guidelines will serve as a benchmark, since a state plan can be approved only if it will produce at least the degree of emission reduction that EPA has identified. See 42 U.S.C. 4711(d)(1); 89 Fed. Reg. at 16,848 ("While States are authorized to establish standards of performance for designated facilities, there is a fundamental requirement under CAA section 111(d) that a state's standards of performance in its

state plan submittal are no less stringent than the presumptive standard determined by the EPA.”). Nothing in the guidelines or the preamble suggests, however, that EPA will either categorically reject state-plan submissions that depart from the model rule, or apply an unlawfully demanding standard in reviewing such submissions.

To the contrary, the guidelines explain that “EPA will review [each] state \* \* \* plan according to [40 C.F.R.] 60.27a,” a generally applicable regulation that governs EPA approval of *all* state plans submitted under Section 111(d). § 60.5367c. Under that pre-existing regulation, “the Administrator *shall* approve [a state] plan or plan revision as a whole if it meets all of the applicable requirements of [Subpart Ba of EPA’s Part 60 regulations].” 40 C.F.R. 60.27a(b)(1) (emphasis added). And like Section 111(d) and the guideline provisions noted above, Subpart Ba specifies that a state plan’s “standards of performance” must “be no less stringent than the [EPA’s] corresponding emission guideline(s),” except when a State adopts a “less stringent” standard based on a “facility’s remaining useful life and other factors.” 40 C.F.R. 60.24a(c) and (e)(1). EPA’s inclusion of “model rule” provisions in the emission guidelines here does not change the binding regulations that govern the state-plan submission process, and publication of a model rule reflects an approach that the Agency has often used in the past. See, *e.g.*, 40 C.F.R. 60.1570, 60.1575, 60.2996, 60.2997 (describing effect of model rules that have been adopted for more than two decades).

State Applicants (Appl. 19) seize upon a narrative statement in EPA’s preamble indicating that EPA will “thoroughly review[]” portions of state plans that differ from the model rule. That language simply refers to EPA’s use of notice-and-comment rulemaking to review state-plan submittals. See 89 Fed. Reg. at 17,006 (stating, in the sentence immediately preceding the one quoted by applicants, that “EPA reviews



all state plan submittals for approvability through notice and comment rulemaking”). Indeed, the preamble here cautions that, even when a proposed state plan *does* incorporate aspects of the model rule, “EPA’s action on each state plan submission is carried out via rulemaking, which includes public notice and comment. Inclusion of presumptive standards in the final [emission guidelines] does not predetermine the outcomes of any future rulemaking on state plan submittals.” *Id.* at 16,829.

State Applicants also cite (Appl. 19) a preamble statement indicating that, if a particular model-rule provision “does not require upfront capital expenditures, then the EPA believes it would be extremely unlikely that a [S]tate could” justify a variance under 40 C.F.R. 60.24a(e)(2) “based on costs relative to remaining useful life.” 89 Fed. Reg. at 17,004 (reproduced at State Appl. App. 185a). That narrative statement simply reflects EPA’s view that, if application of a standard does not require any upfront capital improvement whose costs would ordinarily be amortized over time, a particular source’s short remaining useful life is unlikely to justify a departure from the otherwise-applicable standard based on “[u]nreasonable cost of control resulting from plant age.” 40 C.F.R. 60.24a(e)(1)(i).<sup>9</sup> As discussed above, the emission guidelines’ binding regulatory text confirms that EPA intends to—and must—apply its usual standards in reviewing the plans that States submit to reduce methane emissions from existing oil and gas facilities.

At bottom, State Applicants’ concern is that, if particular States submit methane-emission plans that differ from EPA’s model rule, the Agency will apply an unduly stringent standard in determining whether those state plans should be ap-

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<sup>9</sup> EPA explained that the discussion State Applicants cite “is specific to application of 40 CFR 60.24a(e) based on unreasonable cost of control resulting from plant age (remaining useful life) within the context of this specific [emission guidelines] (OOOOC) and does not speak to application of the other circumstances provided in 40 CFR 60.24a(e).” 89 Fed. Reg. at 17,004.

proved, and will disapprove state plans that in fact satisfy applicable requirements. But any present challenge to such hypothetical EPA disapproval actions is both speculative and unripe. EPA will review each state-plan submission “via rulemaking, which includes public notice and comment,” 89 Fed. Reg. at 16,829, and the Agency’s decision will be subject to judicial review, 42 U.S.C. 7607(b). Speculation about the possibility of improper future EPA disapproval actions provides no present basis to stay the methane-emission guidelines at issue here.

**2. The Rule’s two-year period for submitting a state plan is neither arbitrary nor capricious**

State Applicants further argue (Appl. 20-25) that the Rule’s two-year deadline for submitting a state methane-emission plan is arbitrary and capricious. Those applicants assert that EPA did not adequately consider “an important aspect of th[e] problem” and did not explain how the deadline provides “sufficient time [for States] to develop their own standards of performance,” which the applicants assert will take “at least three years.” *Id.* at 21. Those contentions lack merit and present no potentially certworthy issue.

a. State Applicants’ concerns appear to rest in substantial part on misapprehensions about the States’ obligations. For instance, State Applicants assert that they “must regulate for the first time methane *and* VOC emissions” from existing oil and gas facilities. Appl. 21 (emphasis added). But unlike the Rule’s federal standards of performance for *new* facilities, which address methane *and* VOC emissions, § 60.5360b(a), the Rule’s emission guidelines for *existing* sources—the only sources that state plans will cover—address “emissions of methane” alone. § 60.5361c. That fact has an obvious bearing on the achievability of the two-year deadline.

State Applicants also contend that “gathering an inventory of [the thousands of] designated facilities’ [within each State] alone [is] overly time consuming,” and that “collect[ing] an emission inventory” from such sources requires even more time. Appl. 22 (citations omitted). But no such inventories are required. Although 40 C.F.R. 60.25a(a) would ordinarily require that such inventories be included in a state plan under Section 111(d), EPA recognized that “the large number of existing oil and natural gas sources” would make an inventory of all designated facilities burdensome and would produce little practical benefit, since existing data already provide an adequate basis for performing the relevant emission analysis. 87 Fed. Reg. at 74,827. EPA therefore determined that, in this context, “state plans are not required to include an inventory and emissions data.” 89 Fed. Reg. at 17,006; accord 87 Fed. Reg. at 74,827; see 86 Fed. Reg. 63,253. The Rule provision that identifies what must be included in a state methane-emission plan for existing oil and gas facilities therefore specifies that, with respect to an “[i]nventory of designated facilities” and “emissions [there]from,” “[Section] 60.25a(a) does not apply.” § 60.5363c(a)(1) and (2). EPA has since repeatedly confirmed that, under the emission guidelines here, “[n]o inventory of designated facilities” and “[n]o inventory of emissions [there]from” is “required.” EPA, Summary of Requirements for Clean Air Act Section 111(d) State Plans: Crude Oil and Natural Gas Source Category 11 Tbl. 2, 16 (Aug. 2024);<sup>10</sup> see Gov’t C.A. Opp. to States’ Mot. to Stay, Ex. A ¶ 71 (May 6, 2024) (Carbonell Decl.).

State Applicants’ concern that they must “assess *all* affected sources in light of their remaining useful lives, and other factors,” Appl. 24 (citation omitted), is likewise misplaced. A state plan need not and would not reasonably devise bespoke methane

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<sup>10</sup> <https://www.epa.gov/system/files/documents/2024-08/ooooc-summary-of-requirements-for-state-plans-final-8-23-2024.pdf>.

regulations for each covered facility in a State. A State would at most need to tailor regulations for *subcategories* (i.e., classes) of existing facilities by grouping facilities with materially similar characteristics, which is the standard practice in this context.

b. On the merits of State Applicants' challenge, EPA explained in detail its decision to adopt a two-year submission deadline, and its explanation is neither arbitrary nor capricious.

i. The arbitrary-and-capricious standard requires agency action to be "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). "That is not a high bar," *Judulang v. Holder*, 565 U.S. 42, 45 (2011), and a reviewing court may not "substitute its judgment for that of the agency," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted). Judicial review under that standard is thus "narrow," *ibid.* (citation omitted), and "deferential," especially when a court reviews a "scientific determination," *Baltimore Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 103 (1983).

EPA reasonably considered relevant factors and adequately explained why two years is a sufficient period for development and submission of a state methane-emission plan. From 1975 to 2019, the general deadline for Section 111(d) state plans was nine months. See *American Lung Ass'n v. EPA*, 985 F.3d 914, 940 (D.C. Cir. 2021) (per curiam), reversed in part on other grounds, *West Virginia*, 597 U.S. 697. In 2023, EPA revised its regulations to establish a generally applicable 18-month deadline for such plans. 40 C.F.R. 60.23a(a)(1).<sup>11</sup> And in the Rule at issue here, EPA concluded that an extension of that deadline to 24 months was warranted. § 60.5362c(c); 89 Fed. Reg. at 17,008-17,010.

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<sup>11</sup> That regulation is currently the subject of pending litigation, but the rule has not been stayed. See *West Virginia v. EPA*, No. 24-1009 (D.C. Cir.).

In considering that extension, EPA stated that the Agency “has long recognized the unique nature of the Crude Oil and Natural Gas source category” in this regulatory context. 87 Fed. Reg. at 74,833. EPA explained that the oil and gas source category “is geographically spread out covering multiple industry segments”; that EPA’s methane-emission guidelines for those sources would cover “an extraordinary number of designated facilities,” including “around 1 million producing onshore oil and gas wells” nationwide; and that “for many designated facilities[,] the standards are complex compared to other [emission guidelines].” *Ibid.* In its final Rule, EPA relied on that earlier analysis in responding to conflicting comments variously suggesting that the 18-month period that EPA had initially proposed should be maintained, shortened, or lengthened. Based in part on its “evaluation of the comments received,” and in part on the Agency’s prior analysis of “the characteristics and unique nature of the crude oil and natural gas source category,” EPA concluded that a “time-line of 24 months strikes an appropriate balance \* \* \* between the state’s need for time and the EPA’s responsibility to ensure expeditious implementation in consideration of the important benefits of the pollution reductions.” 89 Fed. Reg. at 17,010 (citing EPA’s prior discussion at 87 Fed. Reg. at 74,831-74,385).

EPA thus determined that factors specific to this source category provided “compelling reasons to allow [S]tates even more time to develop and submit their plans for this [emission guideline],” beyond the recently lengthened 18-month period that generally applies to Section 111(d) state plans under EPA’s revised regulations. 89 Fed. Reg. at 17,010. EPA “f[ound] that 24 months will accommodate the challenges commenters identified and help ensure states have the time to ensure their plans are complete and approvable.” *Ibid.* EPA reached that conclusion against the backdrop of the D.C. Circuit’s earlier rejection of regulations extending the deadline

for state plans under Section 111(d) to three years. See *American Lung Ass'n*, 985 F.3d at 993-995; 89 Fed. Reg. at 17,010 (stating that the balance struck in adopting the 24-month deadline under the Rule “also comports with the court’s reasoning in *American Lung Ass’n*”) (citation omitted).

ii. State Applicants assert that EPA’s explanation was insufficient because it addressed “only” the concern that “state administrative processes,” “public hearings,” and stakeholder engagement required more time. Appl. 22-23 (citation omitted). But the Rule’s preamble discussed in detail a range of additional factors that can make the development of state plans for this source category more challenging. See 89 Fed. Reg. at 17,010; cf. Carbonell Decl. ¶¶ 49-58 (describing factors EPA considered that support the reasonableness of 24 months). And the States do not acknowledge that EPA decisions concerning extensions of the submission period are governed by D.C. Circuit precedent confirming EPA’s duty to ensure expeditious implementation and safeguard the public. See *American Lung Ass’n*, 985 F.3d at 993-995. EPA’s explanation here fully satisfies the requirements for reasoned decisionmaking.

Finally, missing the state-plan submission deadline neither produces any immediate regulatory effect nor forecloses the State from adopting its own standards. If a State does not submit a timely plan, EPA must undertake a notice-and-comment rulemaking process to promulgate a federal plan that regulates existing sources within that State. 40 C.F.R. 60.27a(c)(1); see p. 6, *supra*. In formulating a federal plan, EPA must, *inter alia*, consider requests to adopt less stringent standards or longer compliance schedules for a designated facility based on its “remaining useful life and other factors.” 40 C.F.R. 60.24a(e)(1); see 40 C.F.R. 60.27a(e)(2). EPA’s regulations set a 12-month deadline to develop such a federal plan, 40 C.F.R. 60.27a(c)(1), but the plan is then subject to judicial review, 42 U.S.C. 7607(b)(1). And

at any time during—or even after—that process, a State may belatedly submit its own plan for approval. See p. 6, *supra*. Thus, as EPA explained below, even “[i]f a federal plan is promulgated on a [S]tate’s behalf, the [S]tate is free to replace it at any time by submitting an approvable state plan to EPA.” Carbonell Decl. ¶ 58.

The arbitrary-and-capricious standard “required [EPA] to consider the evidence and give reasons for [its] chosen course of action. [It] did so.” *Department of Commerce v. New York*, 588 U.S. 752, 777 (2019). In any event, because the question whether EPA acted arbitrarily and capriciously in adopting the 24-month deadline here could not plausibly be thought to warrant this Court’s certiorari review, this aspect of State Applicants’ challenge provides no basis for emergency relief.

#### **B. EPA’s Super-Emitter Reporting Provisions Are Lawful**

Industry Applicants contend (Appl. 15-17) that the Rule’s super-emitter reporting provisions that apply to new sources (§ 60.5371b) are unlawful because “Congress did not grant EPA the authority to deputize non-governmental third parties to enforce” and undertake “monitoring duties” for EPA. Appl. 15. That contention, which applicants present for the first time in this Court, lacks merit and presents no substantial legal question on which the Court would likely grant review.

1. No stay from this Court is warranted based on applicants’ super-emitter contentions because no party sought a stay of the Rule on that ground below. See *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (“[W]e are a court of review, not of first view”). Two isolated sentences in the States’ stay motion below mentioned EPA’s separate super-emitter provisions in the Rule’s emission guidelines for state plans for *existing* facilities, see § 60.5388c, asserting that those guidelines “presumptively require[] States to adopt an extra-statutory” program by allowing reports by third parties. States’ C.A. Mot. to Stay 8 (Apr. 12, 2024). The States did not seek relief based

on § 60.5371b, which adopts a federal super-emitter reporting program for *new* sources. Applicant Continental Resources addressed EPA’s super-emitter program in a responsive brief supporting the States’ stay motion, but Continental Resources did not file its own stay motion or move for any similar relief in the court of appeals. Intervenor’s C.A. Resp. in Supp. of States’ Stay Mot. 1, 17-22 (May 6, 2024). And the stay motion filed below by industry associations did not discuss the Rule’s super-emitter provisions. Industry Ass’ns C.A. Mot. to Stay 1-22 (May 17, 2024).

2. In any event, Industry Applicants’ arguments on this point are insubstantial. The Rule’s super-emitter provisions at issue do not create any new emission-reduction obligations or enforcement mechanisms. Rather, they simply create a pathway for certain third parties to *voluntarily* provide EPA with information about super-emitter events after having been certified by EPA in advance as meeting EPA qualifications to report upon substantial emissions of methane using satellite detection, aircraft-based remote-sensing equipment, or mobile monitoring platforms. § 60.5371b(a) and (b); see pp. 13-14, *supra* (discussing § 60.5371b). Those third parties do not need federal authorization to document super-emitter events using equipment on satellites, aircraft, or mobile platforms, and applicants identify no legal prohibition on such activities. Nor does EPA require specific statutory authorization to receive information voluntarily submitted by third parties.

Industry Applicants contend (Appl. 15) that EPA lacks power to “deputize” third parties to “monitor[]” and “enforce” the Rule’s methane standards for new sources. But far from authorizing third parties to perform monitoring activities that would otherwise be unlawful, the Rule *limits* the circumstances under which EPA will consider and act upon third-party submissions. Section 60.5371b imposes monitoring-technology, certification, and documentation requirements on persons who



seek to assist EPA through the program. § 60.5371b(a)-(c). EPA must review each documented super-emitter notification submitted by certified persons, and must “determine[]” both that “the notification is complete” and that it “does not contain information that the EPA finds to be inaccurate to a reasonable degree of certainty,” before EPA may require any oil-and-gas-facility owner or operator to investigate and report on the reported event. § 60.5371b(c) and (d). And as Industry Applicants acknowledge (Appl. 16), the Rule’s imposition of that requirement on facility owners and operators is expressly authorized by Section 114 of the Act, which states that under specified circumstances EPA may “require” the submission of relevant information and reports from “any person who owns or operates any emission source.” 42 U.S.C. 7414(a)(1)(B) and (G).

**C. The Four Challenged Technical Components Of EPA’s Standards Of Performance For New Sources Are Neither Arbitrary Nor Capricious**

Industry applicants further contend (Appl. 17-33) that four discrete aspects of EPA’s federal standards of performance for new sources are arbitrary and capricious. None of those record-based contentions has merit or presents an issue on which this Court would likely grant certiorari.

**1. Associated gas at new-source oil wells**

Industry Applicants challenge (Appl. 17-26) Section 60.5377b’s standards for reducing emissions of associated natural gas from new oil wells. Those standards were developed from EPA’s determination that the “BSER” (best system of emission reduction) for associated gas is to recover and “[r]oute [that] gas to a sales line.” 89 Fed. Reg. at 16,832. EPA ultimately established standards requiring that all new oil wells built after a specified time must recover associated gas and either route it to a sales line; use it as an onsite fuel source; use the gas for “another useful purpose” that

purchased fuel or raw material would serve; or reinject the gas into the same or another well. *Id.* at 16,832, 16,942-16,943; see § 60.5377b(a); cf. § 60.5377b(d) and (e) (authorizing temporary venting and flaring for, *inter alia*, maintenance or safety purposes). For new wells for which the start date of construction is between December 2022 and May 2026, the source may route the gas to an appropriate flare or control device if it is “not feasible \* \* \* due to technical reasons” to utilize one of the other methods identified above. § 60.5377b(b), (c), (f)(1)-(2), and (g); see 89 Fed. Reg. at 16,832. The last of those options is available indefinitely for new wells that began construction less than two months after EPA’s publication of the final rule (*i.e.*, before May 7, 2024), § 60.5377b(c) and (f)(2), and is available until May 7, 2026, for new wells that began construction two months or more after the Rule’s publication, § 60.5377b(b) and (f)(1).

Industry Applicants contend that EPA’s “best system” analysis regarding the option of routing to a sales line is flawed because EPA did not “adequately demonstrate” that “routing associated gas to a sales line” is “cost-effective in all situations” (Appl. 19) or “‘achievable’ for all regulated sources” (Appl. 23). See Appl. 19-24. Industry Applicants separately contend that the phase-in option to route the gas to a flare, which requires a showing that it is “‘technically infeasible’” to use associated gas for another “useful purpose,” is arbitrary and capricious because the term “useful purpose” is “so vague” that companies will be unable to demonstrate technical infeasibility. Appl. 25-26. Those contentions lack merit and would not warrant his Court’s review.

a. Industry Applicants’ first contention—that EPA did not “adequately demonstrate” that routing associated gas to a sales line is “cost-effective in all situa-

tions,” Appl. 19-23, or “‘achievable’ for all regulated sources,” Appl. 23-25—was not presented below and lacks merit.

In the court of appeals, the industry association petitioners argued that EPA had failed to conduct any cost-benefit analysis for any new source standard. Industry Ass’ns C.A. Mot. to Stay 8-12. They did not argue, as applicants do now, that EPA’s cost analysis had insufficiently analyzed sales-line routing; nor did they address whether EPA had shown that sales-line routing is achievable. Applicant Continental Resources’ responsive brief supporting the States’ stay motion acknowledged that EPA had conducted a “cost analysis of routing associated gas to a sales line” and had “compar[ed] [that cost] to the cost of flaring.” Intervenor’s C.A. Resp. in Supp. of States’ Stay Mot. 10. That response argued, however, that EPA had “fail[ed] to conduct a cost analysis of *other* potential technologies.” *Id.* at 11 (emphasis added). And as the government argued below, because Continental Resources did not file its own stay motion or move for any similar relief in the court of appeals, any of its arguments going beyond the scope of those made in the States’ and industry association petitioners’ stay motions were not properly before that court. Gov’t C.A. Reply Addressing Continental’s Response 1 (May 17, 2024).

In any event, EPA adequately addressed both cost and feasibility before promulgating Section 60.5377b. And applicants’ challenge is foreclosed because it was not specifically raised to the agency during the rulemaking process.

EPA’s “best system” analysis properly addressed the routing of associated gas to a sales line and Section 60.5377b’s alternative options. The Agency’s initial 2021 proposed rule would have required that associated gas be routed to a sales line, or that specified alternative measures be used if “access to a sales line is not available.” 86 Fed. Reg. at 63,238. After EPA received public comment, the Agency’s December

2022 supplemental proposal recognized that “the sales line is typically not under the control of the well owner, and that the gathering system owner dictates when gas can be routed to a sales line.” 87 Fed. Reg. at 74,779. “[T]his understanding,” the Agency concluded, “supports allowing other uses of associated gas,” which EPA identified in the updated proposal as using associated gas “as a fuel,” using it “for another useful purpose,” or “reinjecting” it into the same or another well. *Ibid.*

Before issuing the Rule, EPA analyzed the costs of routing associated gas from an oil well to a “gathering system/sales line” for natural gas up to fifty miles away, and the Agency determined that those costs were “reasonable” for new wells. 89 Fed. Reg. at 16,942. EPA further determined that, “[i]n cases where the cost of construction of [a] gathering line or gas volume differs significantly,” “the other options for managing associated gas are available under [Section 60.5377b].” *Ibid.* EPA observed that “[n]ew wells benefit from new investment and [have] the benefit of planning to accommodate each option best suited to the site.” *Id.* at 16,944. EPA noted, for instance, one industry commentor’s explanation that its “standard practice is to only bring wells online where adequate sales line capacity exists.” *Ibid.* EPA also recognized that at least “54 oil companies” had already “made voluntary commitments to eliminate flaring in the near future, by 2030,” which would require alternative measures for dealing with associated gas like those EPA had proposed. *Id.* at 16,944 & n.407. And after reviewing the public comments concerning its 2022 supplemental proposal, EPA found that no “operators [had] demonstrate[d] *or even explain[ed]* that routing to a sales line or the alternatives were infeasible, only that specific circumstances could make certain alternatives more attractive than others.” *Id.* at 16,944 (emphasis added). Thus, “[w]here distances or logistics might make connection to sales lines less attractive, commenters provided cost and qualitative

support that the other alternatives would likely be used rather than connecting to sale.” *Ibid.*

EPA accordingly determined that, for wells for which construction begins after May 7, 2026, “at least one of the options to avoid routine flaring will be feasible” “with advance planning.” 89 Fed. Reg. at 16,886. And for new wells for which construction commenced or commences between December 2022 (when EPA’s supplemental proposal was published) and May 2026, EPA adopted a “phase in period” and flaring alternative to account for the possibility that the prescribed options might be temporarily infeasible. *Ibid.*

Industry Applicants contend that EPA failed to demonstrate that routing to a sales line “is cost-effective *in all situations*,” Appl. 19 (emphasis added), or that such routing is achievable for “all regulated sources,” including in well contexts in which there are no “suitable gas takeaway pipelines” or where a pipeline has “capacity” constraints, Appl. 23-24. But EPA found that such costs are generally reasonable, and the Agency made alternative compliance options available as well. Applicants have not argued that, with advance planning or the benefit of Section 60.5377b’s phase-in provisions, it would be infeasible for new wells to comply with *at least one* of those options.

Industry Applicants’ challenge to the feasibility of routing associated gas to a sales line also is foreclosed. “Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment \* \* \* may be raised during judicial review.” 42 U.S.C. 7607(d)(7)(B). As noted, during the public comment period on EPA’s supplemental proposed rulemaking, no well operators “demonstrate[d] or even explain[ed] that routing to a sales line or the alternatives were infeasible.” 89 Fed. Reg. at 16,944. As a result, applicants largely rest their

feasibility contentions on unsupported assertions, *e.g.*, Appl. 21, or on a post-Rule declaration that is not in the administrative record and thus cannot be considered on review, Appl. 23-24 (repeatedly citing Appl. App. 426a-428a). See *Ohio*, 144 S. Ct. at 2055 n.11 (“[T]he Clean Air Act prevents [reviewing courts] from consulting \* \* \* information offered after the rule’s promulgation.”); 42 U.S.C. 7607(d)(7)(A) (restricting the “record for judicial review”).

Finally, Industry Applicants’ criticism of EPA’s analysis rests heavily on a misdescription of EPA’s reasoning. Applicants assert that EPA’s “Final Rule simply assume[d], without any data or analysis, that there are no cost impacts [of routing to a sales line] ‘*in every situation*’” because EPA believed that “operators [will] receive a positive return where adequate sales capacity is available.” Appl. 20-21 (emphasis added). The passage from the final Rule’s preamble that applicants quote (Appl. 20) contradicts that assertion. That passage observes that, in EPA’s initial “November 2021 Proposal,” the Agency had “assumed ‘that in situations *where gas sales line infrastructure is available, there is minimal cost* to owners and operators to route the associated gas to the sales line,” and that “*in every situation* the value of the natural gas captured and sold would outweigh *these minimal costs*.” 89 Fed. Reg. at 16,940 (emphases added). That explanation reflects that EPA initially assumed—before it refined the cost analysis as reflected in its final Rule—that the value of gas would outweigh the minimal connection costs that exist “where gas sales line infrastructure is available.” *Ibid.* The preamble then adds: “EPA also recognized [in its 2021 proposal] that there are situations where there would not be access to a sales line and therefore also evaluated the costs and impacts” of an alternative option. *Ibid.* In 2022, EPA issued a supplemental proposal, which included multiple alternatives to sales-line routing, and the Agency subsequently adopted that proposal as a final rule

after receiving further comments that did not dispute the feasibility of that *menu* of options.

b. Under Section 60.5377b, the availability of alternative compliance measures depends in part on whether associated gas can feasibly be used for “another useful purpose” other than as an onsite fuel source. § 60.5377b(a)(2)-(3). Industry Applicants contend (Appl. 25-26) that the phrase “useful purpose” is “so vague” that it arbitrarily and capriciously forecloses use of alternative phase-in options (*e.g.*, flaring) because companies will be unable to demonstrate the technical infeasibility of those alternatives as required by Section 60.5377b(g). That contention lacks merit.

EPA explained that “technical infeasibility” encompasses infeasibility due to a wide variety of “physical, logistical, or legal factors.” 89 Fed. Reg. at 16,888. The regulatory option of using associated gas for a “useful purpose that a purchased fuel or raw material would serve,” § 60.5377b(a) (3), is “more open ended” than Section 60.5377b(a)’s other options of “rout[ing]” gas to a sales line, using it as “an onsite fuel source,” or “reinject[ing]” it into a well, 89 Fed. Reg. at 16,887. Rather than disadvantaging regulated parties, that feature provides oil well owners and operators desirable flexibility to identify such uses.

When properly read in context, the phrase “useful purpose” is not impermissibly vague. The regulation refers specifically to a “useful purpose that a purchased fuel or raw material would serve.” § 60.5377b(a)(3). The relevant category of useful purposes is thus limited to those in which associated gas serves as a substitute for fuel or raw material that an owner or operator would otherwise purchase.

EPA accordingly instructed that a “technically viable ‘other useful purpose’ is likely to require the routing of the associated gas to on-site or nearby equipment that compresses, liquifies, or transforms the gas into a physical state that can be trans-

ported by pipeline or other transportation mode to an eventual user.” 89 Fed. Reg. at 16,887. EPA stated that, “[t]o demonstrate that the ‘other beneficial use’ option is not technically feasible,” “an owner or operator could show that there is an observable or demonstrable reason that the operator cannot install equipment to convert associated gas to compressed natural gas (CNG) at the well site due to physical or technical constraints and/or that CNG transport in the region is not available.” *Id.* at 16,888. In other words, owners and operators would simply need “to ensure that the list of options evaluated is comprehensive [enough] to address technically viable solutions” and show that “site-specific conditions \* \* \* make these operations infeasible.” *Id.* at 16,887-16,888. That showing does not require that “an unlimited amount of ‘useful purposes’ \* \* \* be evaluated to effectively demonstrate technical feasibility,” nor would it give EPA “unbound[ed] discretion to deny any such demonstration” of technical infeasibility. Appl. 26.

**2. Net-heating-value monitoring of certain emission-control devices at new sources**

Industry Applicants contend (Appl. 26-29) that certain monitoring requirements for measuring the net heating value (NHV) of the inlet gas for emission-control devices, see § 60.5417b(d)(8), are arbitrary and capricious. Those contentions were not properly presented below, lack merit, and would not warrant this Court’s review.

a. Neither of the stay motions filed in the court of appeals mentioned the Rule’s NHV monitoring requirements. Continental Resources’ brief in response to the States’ stay motion argued that those requirements for enclosed combustion devices and flares were arbitrary or capricious, see Intervenor’s C.A. Resp. in Supp. of States’



Stay Mot. 15-17, but Continental Resources never sought a stay or any similar relief on that or any other ground in the court of appeals.

b. Industry Applicants' current challenge is meritless. EPA's Rule adopts distinct continuous monitoring requirements for eight separate subcategories of emission-control devices. § 60.5417b(d)(1)-(8). Industry Applicants challenge one portion of the requirements that apply to the eighth subcategory, *i.e.*, certain enclosed emission-control devices and (unenclosed) "flare[s]," which destroy methane and VOC emissions through combustion. § 60.5417b(d)(8). As relevant here, Section 60.5417b(d)(8)(ii) instructs that specified methods be used to "continuously determine the NHV of the inlet gas" to such devices, "[e]xcept as provided" in paragraphs (ii) and (iii). § 60.5417b(d)(8)(ii); see p. 12, *supra* (discussing control efficiency function of NHV monitoring). Paragraph (iii), in turn, provides that "continuous monitoring of the NHV is not required" if certain alternative demonstrations are made. § 60.5417b(d)(8)(iii). One of those demonstrations, specified in Subparagraph (A), is made through a performance test by "[c]ontinuously monitor[ing] or collect[ing] a sample of the inlet gas to the enclosed combustion device or flare twice daily to determine the average NHV of the gas stream for 14 consecutive operating days." § 60.5417b(d)(8)(iii)(A). Subparagraph (A) further provides that, if twice-daily sampling is conducted, "the minimum time of collection for each individual sample [must] be at least one hour." *Ibid.*

Industry Applicants argue (Appl. 27) that it is "literally impossible given the intermittent flow of gases to flares" to conduct the measurements that Subparagraph (A) requires in order for flares to be exempted from continuous NHV monitoring. But that contention relies solely on a post-Rule declaration outside the administrative

record. See *ibid.* (citing Appl. App. 430a ¶ 37). It therefore provides no basis for overturning EPA’s action. See p. 36, *supra*.

In any event, Subparagraph (A) addresses the possibility of intermittent flows and identifies an alternative means of measurement: “If inlet gas flow is intermittent such that there are not at least 28 samples over the 14 operating day period, you must continue to collect samples of the inlet gas beyond the 14 operating day period until you collect a minimum of 28 samples.” § 60.5417b(d)(8)(iii)(A). Applicants ignore that provision. Applicants also do not address their ability to obtain approval of alternative test methods or monitoring plans as identified in EPA’s rules. See EPA, *Frequently Asked Questions: Control Devices* (addressing “the monitoring requirements for flares”), <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-operations/frequently-asked-questions-control-devices#flaremon>.<sup>12</sup> Applicants thus have not shown that EPA acted arbitrarily and capriciously by limiting Section 60.5417b(d)(8)(iii)’s exception to the Rule’s continuous NHV monitoring requirement for new sources—a distinct requirement that applicants do not challenge—to situations in which a sufficiently reliable alternative NHV measurement is available.

c. Industry Applicants separately argue (Appl. 27) that “NHV monitoring requirements serve no meaningful purpose” (presumably in the context of flares) be-

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<sup>12</sup> Although the relevant demonstration must as a general matter be made in accordance with the test methods and monitoring procedures specified in Section 60.5417b(d)(8), the Rule provides for the submission of “request[s] \* \* \* to monitor different operating parameters,” § 60.5417b(d), as well as “request[s] for an alternative test method” to demonstrate the emission-reduction efficiency of “a flare or enclosed combustion device,” § 60.5412b(d). EPA also has more general authority, which may be exercised upon request, to approve alternative test methods involving, for example, “shorter sampling times and smaller sample volumes when necessitated by process variables or other factors.” § 60.8(b)(5); see EPA, *Response to Public Comments*, at II-17-4, II-17-61 (Nov. 2023), <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0317-4009>. Applicants do not appear to have requested authorization for any alternative test method or monitoring plan.

cause certain comments on the proposed rule indicated that “flaring streams” will “typically” exceed EPA’s minimum NHV value of 300 BTU/ft<sup>3</sup>. That argument was not presented in any stay briefing below, even by Continental Resources. See, e.g., Intervenor’s C.A. Resp. in Supp. of States’ Stay Mot. 15-17. It also lacks merit. Citing evidence reflected in a public comment, EPA concluded that “the variability of gas compositions can have a dramatic effect on the combustion efficiency of flares.” 89 Fed. Reg. at 16,966. EPA therefore “disagree[d] with the commenters’ assumption that the NHV value will always (or is expected to always) be above the minimum NHV values.” *Ibid.*

Applicants note (Appl. 28) EPA’s statement that, as an exercise of the Agency’s discretion, EPA “is granting reconsideration” of the Rule on two issues, one of which EPA described as “vent gas net heating value (NHV) monitoring and alternate sampling demonstration requirements for flares and enclosed combustion devices.” Letter from Tomás E. Carbonell to Holly Hopkins et al. 1 (May 6, 2024).<sup>13</sup> EPA also stated that it “intend[s] to issue a *Federal Register* notice initiating public review and comment on these issues.” *Ibid.* That letter does not, as industry applicants assert (at 28), “recogniz[e] \* \* \* problems with the NHV requirements.” A grant of reconsideration simply reflects that submissions received after promulgation of a rule have led an agency to investigate further. It does not reflect an EPA determination that there is any deficiency in the rule itself.

### **3. Legally and practicably enforceable emission limits for new-source storage vessels**

Industry Applicants challenge (Appl. 29-31), as arbitrary and capricious, one of the Rule’s criteria for utilizing an optional method to determine the methane-emis-

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<sup>13</sup> [https://www.epa.gov/system/files/documents/2024-05/letter-to-api-and-apx.-5.6.24-signed\\_1.pdf](https://www.epa.gov/system/files/documents/2024-05/letter-to-api-and-apx.-5.6.24-signed_1.pdf).

sion potential of a new or modified tank battery, which allows that determination to take into account certain regulatory emission limits if those limits are “legally and practicably enforceable.” See § 60.5365b(e)(2). That challenge was not raised below, lacks merit, and would not warrant this Court’s certiorari review.

a. Applicants asserted their current challenge for the first time in this Court. The industry association petitioners did not mention this issue in their stay motion below. Industry Ass’ns C.A. Mot. to Stay 1-22. Nor did Continental Resources in its relevant responsive brief. Intervenor’s C.A. Resp. in Supp. of States’ Stay Mot. 1-22. And while the States’ stay motion briefly mentioned legally and practicably enforceable emission limits in two sentences, the States contended only that applying that criterion would “undermine federalism” and require additional “regulatory effort.” States’ C.A. Mot. to Stay 10, 15. No litigant suggested below that use of this criterion was arbitrary and capricious.

b. Applicants’ arbitrary-and-capricious challenge is meritless. Section 60.5365b provides that a new tank battery’s methane-emission potential “must be calculated using a generally accepted model or calculation methodology that accounts for” specified factors. § 60.5365b(e)(2)(ii), (iii)(A) and (B). Section 60.5365b further provides that the determination of that emission potential “may take into account” the emission “limit [specified] in an operating permit or other requirement established under a Federal, state, local, or Tribal authority” if certain requirements are satisfied showing that the regulatory requirement—the emission limit—is “legally and practicably enforceable.” *Ibid.*; see 89 Fed. Reg. at 16,974 (“including legally and practicably enforceable limits is an option, not a requirement”). That provision reflects the common-sense recognition that, if a facility’s emission-potential determination is to be based on a requirement specified in a permit or other regulatory author-

ization, that regulatory limit must be legally or practicably enforceable to be a reliable measure of the facility's real-world emission potential.

The precise bases for Industry Applicants' challenge to the legally-and-practicably-enforceable criterion are not entirely clear. See Appl. 29-31. Applicants suggest that Section 60.5365b(e)(2) "requires" tank-batteries "to comply with new [legally and practicably enforceable] requirements." Appl. 29. But as explained above, that standard applies only if an owner or operator chooses to invoke the alternative compliance option of calculating its facilities' actual emission potential based on regulatory emission limits. Applicants do not challenge the Rule's requirement that *some* "generally accepted model or calculation methodology" "must" be used to determine emission potential. § 60.5365b(e)(2)(ii), (iii)(A) and (B). Industry Applicants also suggest (Appl. 30) that "no mechanism [exists] to demonstrate that [a] State[']s regulations" are legally and practicably enforceable. But EPA has specified the criteria for what qualifies as a legally and practicably enforceable limit, using familiar "terms in air permitting programs" that have "widely accepted" meanings. 89 Fed. Reg. at 16,979.

#### **4. Fugitive-emission monitoring at new-source well sites**

Finally, Industry Applicants contend (Appl. 31-33) that Section 60.5397b's fugitive-emission monitoring requirements for new well sites are arbitrary and capricious when applied to "marginal wells" because EPA did not adequately consider the cost of monitoring marginal wells for such leaks with handheld optical gas imaging (OGI) cameras. That factbound contention lacks merit, and this Court would not likely grant certiorari to consider it.

EPA acted reasonably in devising Section 60.5397b's new-source fugitive-emission monitoring requirements for marginal wells. Industry Applicants contend (Appl.

32) that EPA acted arbitrarily by classifying “smaller producing (and emitting) wells” with “two or more pieces of relevant equipment[] the same as major well sites with more potential for much higher emissions.” But EPA specifically considered and rejected classifications based on well production rates because—as reflected in “the [Department of Energy’s] marginal well study”—well production is a poor predictor of the “frequency and magnitude” of fugitive methane emissions, which are “more strongly correlated with [on-site] equipment counts.” 89 Fed. Reg. at 16,906; see 87 Fed. Reg. at 74,730 & n.69. That study shows that, on average, marginal wells producing less than two barrels per day of oil equivalent actually emit *more* methane than those that produce two to six barrels per day. 89 Fed. Reg. at 16,990. EPA further found that, as a group, marginal wells produce very significant emissions relative to their production rates. Marginal oil wells, for instance, produce only about “7 percent of the total oil production” yet result in about “59 percent \* \* \* of cumulative methane emissions.” Background Technical Support Document, at 6-2 to 6-3. EPA therefore reasonably concluded that “low production levels at well sites” would not be a sound basis for a monitoring exemption for marginal wells. 89 Fed. Reg. at 16,906; see *id.* at 16,990.

Industry Applicants further contend (Appl. 31-32) that it was arbitrary and capricious not to exempt “smaller-producing” (marginal) wells “from OGI monitoring requirements” because the purportedly “significant costs of conducting Optical Gas Imaging (‘OGI’) monitoring do not outweigh [its] miniscule benefits.” Applicants ignore the substantial methane-emission reductions that are available at marginal wells as just discussed. And in any event, Section 60.5397b does not require any facility, including marginal wells, to monitor for fugitive emissions using OGI. While certain facilities are required to conduct initial and periodic monitoring using meth-

ods other than audio/visual/olfactory observation, those facilities always have the option to conduct such non-AVO monitoring using either “OGI or Method 21.” § 60.5397b(f)(2), (g)(1)(iii)(B), (iv)(F), (v)(B), and (vi). EPA’s longstanding Method 21 requires the use of a commercially available handheld detection instrument to monitor relevant equipment, see p. 11 & n.6, *supra*, and applicants do not contend that such periodic inspections are infeasible at marginal wells. Allowing facilities to choose between the Method 21 procedure and monitoring with a handheld OGI camera (or hiring a contractor to do so) is neither arbitrary nor capricious.

Finally, Industry Applicants assert (Appl. 32) that OGI monitoring requirements are “not achievable for a significant portion of the well sites in the United States,” and that EPA “explicitly acknowledged that it failed to adequately consider the [relevant] compliance costs.” That is incorrect. EPA’s detailed economic analysis showed that average net annual profits from marginal oil and gas wells in 2021 were more than \$42,000 and \$5600 respectively *for each well*,<sup>14</sup> and that approximately 50-60% of all *well sites* (which can include one or more marginal or non-marginal wells) would qualify as either “wellhead only or small [well] sites” for which only quarterly AVO is required, costing about \$336-\$660 annually. Background Technical Support Document, at 6-8 to 6-9; see § 60.5397b(g)(1)(i) and (ii). EPA further determined that the annual cost of EPA’s more stringent monitoring programs for well sites—when the option of OGI monitoring is elected—ranged from \$2651 (for semiannual OGI plus quarterly AVO at multi-wellhead only sites) to \$4232 (for quarterly OGI plus bimonthly AVO at well sites at centralized production facilities containing major production and processing equipment). 87 Fed. Reg. at 74,733 Tbl. 12, 74,734-74,735

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<sup>14</sup> Approximately 92% of all marginal oil and gas wells appear to be owned by large companies with average annual revenues exceeding \$100 million. See *Response to Public Comments*, at II-4-43 & n.88.

Tbl. 14; see § 60.5397b(g)(1)(iii)(A)-(B) and (iv)(E)-(F). EPA acknowledged that “the full impact of regulation on the financial status of marginal well owners” was “difficult to determine” because “[m]any factors can affect the [wells’] profitability.” 89 Fed. Reg. at 16,906. EPA explained, however, that it had “limited” Section 60.5397b’s monitoring requirements “to include only what is necessary to meet [the best system of emission reduction] and demonstrate compliance.” *Ibid.* That economic analysis fully satisfied EPA’s obligations.

## **II. APPLICANTS HAVE NOT SATISFIED THE EQUITABLE REQUIREMENTS FOR A STAY**

### **A. Applicants Will Not Suffer Irreparable Harm During The Pendency Of Judicial Review**

The “basic requisites” of equitable relief include “substantial and immediate irreparable injury.” *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974). In assessing irreparable harm, a court must focus on the period of time needed to complete judicial review. The “historic office” of a stay, after all, is to resolve the “dilemma” of “what to do when there is insufficient time to resolve the merits and irreparable harm may result from delay.” *Nken*, 556 U.S. at 432. If an applicant does not show that it will suffer irreparable harm during the pendency of judicial review, this Court can deny relief on that basis alone and “avoid delving into the merits.” *Labrador v. Poe*, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring in the grant of stay). Applicants have not made the necessary showing of irreparable harm.

1. Industry Applicants offer several bases (Appl. 33-37) for concluding that they will sustain irreparable injury unless the Rule is stayed. None of those arguments is persuasive.

Industry Applicants assert (Appl. 33-34) that they are “immediately” harmed by the Rule’s emission guidelines for States to use in developing state plans because



Industry Applicants have “invested, planned and developed their operations” in the expectation that their operations will generally be governed by state law. But no State has yet developed any state plan under the March 2024 emission guidelines. Operators could not reasonably rely on features of state plans that have not yet been developed. In any event, the emission guidelines provide that compliance with any resulting plan need not occur until March 2029. See p. 14, *supra*.

With respect to the Rule’s federal standards of performance for new sources, Industry Applicants likewise have not demonstrated irreparable harm warranting a stay. Applicants have not asserted any injury from Section 60.5397b’s fugitive-emission monitoring requirements for new sources, which forecloses emergency relief on that ground. See Appl. 33-37.

Industry Applicants’ assertion of harm from Section 60.5371b’s super-emitter program are speculative and self-contradictory. The possibility that “third parties *may* submit reports of super-emitter events” to EPA, Appl. 35 (emphasis added), does not show that any submission will pertain to a super-emitter event connected to Industry Applicants, much less that any such submission will occur during the pendency of judicial review. And applicants’ concern (*ibid.*) that EPA will “delay[]” informing them of such reports, which could allow super-emitting events to continue and thus potentially lead to increased fines for noncompliance with emission requirements, is a reason to *expedite*, not stay, EPA’s implementation of the super-emitter reporting program.

Industry Applicants contend (Appl. 36) that they “face risks” of reputational harm if EPA publicly posts third-party notifications of super-emitter events including longitude-latitude information for the event (without owner/operator identification). Any such harm is both speculative and non-imminent. Furthermore, the purpose of

Section 60.5371b is to allow “EPA to promptly notify owners and operators of [super-emitter] events for appropriate follow-up action,” 89 Fed. Reg. at 16,877, and relevant owners and operators then have 15 days to submit to EPA their own investigation reports, § 60.5371b(e)(1), which EPA subsequently posts on its website, § 60.5371b. There is no reason to suppose that any owner/operator will suffer cognizable harm during the short interim period between the posting of a super-emitter notification and the posting of the owner/operator’s responsive report.

Industry Applicants’ remaining assertions of irreparable harm (Appl. 34-35) focus only on asserted harms to Continental Resources. But Continental Resources never sought a stay or similar relief from the court of appeals, even though EPA’s signed Rule has been publicly available since December 2023. For that reason alone, applicants’ claims of irreparable harm would not provide a sound basis for relief now. In any event, applicants’ contention (Appl. 34) that Continental Resources must spend 7000 hours documenting the technical infeasibility of Section 60.5377b’s options for using associated gas appears to be based on a misreading of the provision. See pp. 37-38, *supra*. Applicants’ contention (Appl. 35) that it is technically and logistically impossible to perform an alternative demonstration that would exempt flares and enclosed combustion devices from continuous NHV monitoring under Section 60.5417b(d)(8) is likewise based on an incomplete and incorrect understanding of that regulation. See p. 40 & n.12, *supra*. And it is unclear on what basis applicants assert (Appl. 35) that Continental Resources must spend \$2-\$3 million to complete “legally and practicably enforceable limit start up testing” for approximately 100 tank batteries.

2. State Applicants contend (State Appl. 25-30) that, if the Court does not stay the Rule’s Section 111(d) emission guidelines, State Applicants will suffer irreparable

harm in two forms: monetary losses from the cost of developing state plans, and a sovereign injury from heightened requirements that EPA would purportedly apply when reviewing each state plan. Those assertions do not justify emergency relief.

First, the state planning process is part of the CAA's design, not a source of harm to be avoided. Given the Act's timeline for judicial review, see 42 U.S.C. 7607(b)(1), judicial review of EPA's emission guidelines and state-plan development usually occur in parallel. To treat the need to develop a state plan as a sufficient ground for finding irreparable harm would subvert the principle that a stay "is an extraordinary remedy that should not be granted in the ordinary case." *Nken*, 556 U.S. at 437 (Kennedy, J., concurring).

Moreover, any State that does not wish to incur the expense of drafting a plan may simply refrain from doing so. EPA would then assume responsibility for developing a federal plan for that State. See 42 U.S.C. 7411(d)(2). And even then, the State could replace EPA's plan with its own plan later. See p. 6, *supra*.

In arguing that the Rule intrudes on their authority under the CAA, State Applicants do not challenge any of EPA's determinations regarding the degree of emission reduction that is achievable through applying the best system of emission reduction to existing oil-and-gas-industry sources. See pp. 1, 4-5, *supra*. State Applicants instead appear to argue (Appl. 15-20, 27-29) that, by describing the guidelines as "presumptive standards," EPA has deterred States from devising state plans that employ a different mix of controls to achieve the same degree of emission reduction that EPA has determined to be achievable.

It remains open to each State, however, to develop its own state plan to achieve the requisite degree of methane-emission reduction. If EPA denies approval of any State's plan, that State can challenge the Agency's denial action in the appropriate

court of appeals, including on the ground that EPA applied an unduly demanding standard in reviewing the state-plan submission. To be sure, a State might prefer to know the ultimate outcome of that process *ex ante*, before expending the resources needed to develop a plan that deviated in some way from EPA's model rule. But if that uncertainty were sufficient to establish irreparable harm, a stay would no longer be a form of extraordinary relief.

Nor will State Applicants be irreparably harmed by EPA's choice of a two-year rather than a three-year deadline for state-plan submissions. As previously discussed, State Applicants' misunderstanding of what is actually required to develop a state plan under the Rule's methane-emission guidelines significantly undermines their estimates of how long that development will take. See pp. 24-26, *supra*. State applicants' assertion that some States will "need to hire hundreds of new employees and reallocate scarce financial resources from other state programs," Appl. 29, is premised in significant part on resources that they assert will be needed to *implement* state plans *after they are approved*, not to develop such plans within the two-year deadline. See Gov't C.A. Opp. to States' Mot. to Stay 15-16. And even if a State misses that deadline, the State can still submit an untimely plan that, if it is satisfactory, EPA must approve. See 40 C.F.R. 60.27a(b)(1); p. 6, *supra*.

Finally, even if the D.C. Circuit or this Court ultimately holds that EPA acted arbitrarily and capriciously in establishing a two-year deadline for submitting state methane-emission plans, State Applicants are unlikely to suffer irreparable harm during the pendency of the litigation because none of their plan-development efforts will be wasted. Rather, those efforts will directly further State Applicants' efforts to submit compliant plans by whatever alternative deadline is ultimately imposed. And the possibility of a judicial determination that EPA's current deadline is unreasona-

bly short provides no basis for delaying *commencement* of plan-development efforts.

**B. A Stay Would Harm The Government And The Public**

On the other side of the balance, a stay would harm governmental and public interests, which “merge” here. *Nken*, 556 U.S. at 435. Industry Applicants seek (Appl. 1, 38) a stay of the entire Rule, while State Applicants seek (Appl. 1, 33) a stay limited to the Rule’s Section 111(d) emission guidelines for States. Any such postponement would cause significant harm to the government and the public—harm that outweighs any injuries that applicants may suffer during the pendency of the litigation.

Climate change is the Nation’s most pressing environmental challenge and “touches nearly every aspect of public welfare” in this country. 89 Fed. Reg. at 16,837. Its effects include “sea level rise”; increased “storm surge and flooding”; an “increased frequency of [both] drought” and “extreme rainfall events” adversely affecting “water supply and quality”; “more intense and larger wildfires”; and “the potential for significant agricultural disruptions and crop failures.” 89 Fed. Reg. at 16,837; see Carbonell Decl. 6-16 (further describing harms).

The primary cause of those harms is “the well-documented buildup of [greenhouse gases]” in the atmosphere. 89 Fed. Reg. at 16,836-16,837. In particular, human-caused emissions of methane—a highly potent greenhouse gas that is “83 times more powerful” at trapping climate-warming heat than carbon dioxide over a 20-year timeframe—are responsible for “one-third of the [global] warming” that is attributable to greenhouse gases. *Id.* at 16,843. Methane also reacts in the atmosphere to produce ground-level ozone globally, which can make breathing difficult and can lead to “emergency room visits,” “hospital admissions,” and “premature death.” *Id.* at 16,840-16,841.

“The oil and natural gas industry is the United States’ largest industrial emitter of methane.” 89 Fed. Reg. at 16,823. And because methane is such a powerful greenhouse gas and “is emitted in large quantities,” “reductions in methane emissions provide a significant benefit in reducing near-term [global] warming.” *Id.* at 16,843. Tolling the Rule’s deadlines and postponing eventual compliance would delay the substantial methane reductions required by the Rule, irreparably harming both the government and the public.

A stay could also harm oil-and-gas-industry participants. A stay would delay implementation of the Rule’s federal standards for methane emissions and the development of state plans based on the Rule’s methane-emission guidelines. That would in turn delay the availability of exemptions from methane charges under 42 U.S.C. 7436 based on operators’ compliance with federal methane standards or state-plan methane requirements. See p. 8, *supra*. Such exemptions are available only where the relevant federal or state requirements are “approved and in effect” and will result in at least as much emission reduction as would have been achieved under the proposal for the Rule at issue here. 42 U.S.C. 7436(f)(6)(A). A stay of the Rule therefore could cost oil-and-gas-industry actors hundreds of millions of dollars annually. See 89 Fed. Reg. 5318, 5363 Tbl. 6 (Jan. 26, 2024).

### **III. THIS COURT SHOULD TAILOR THE SCOPE OF ANY RELIEF**

At a minimum, this Court should limit any stay relief to the specific portions of the Rule that applicants have contested and for which the Court finds that they have made the required showings. Applicants do not challenge any aspect of the two groups of actions that arise from Congress’s disapproval of the 2020 policy rule and that establish a protocol for use of optical gas imaging in leak detection. 89 Fed. Reg. at 16,827; see p. 9 & n.5, *supra*. And applicants challenge only discrete portions of

the Rule’s federal standards of performance for new sources—specifically, Section 60.5371b’s super-emitter program; Section 60.5377b’s associated-gas standard for oil wells; Section 60.5417b(d)(8)’s NHV monitoring provision; Section 60.5365b(e)(2)’s alternative option for calculating the emission potential of a tank battery; and Section 60.5397b’s provision for fugitive-emission monitoring at new well sites. There is no sound basis for staying any of the non-challenged portions of the Rule, or any of the challenged portions for which the Court finds that applicants have not made the required showings. See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”).

#### CONCLUSION

The applications for stays should be denied.

Respectfully submitted.

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SEPTEMBER 2024