No. 16-1168

# In The
# Supreme Court of the United States

AMERICAN MUNICIPAL POWER, INC.,

*Petitioner,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2, Southeastern Legal Foundation (SLF) respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Petitioner American Municipal Power, Inc. Petitioner and named-Respondents the U.S. Environmental Protection Agency, et al. have consented to the filing of this *amicus curiae* brief. SLF learned of Respondent Earthjustice's appearance less than 10 days prior to the filing of this motion and accompanying *amicus curiae* brief, and thus, was unable to seek consent as required by Supreme Court Rule 37.2(a) at least 10 days before the due date. On April 21, 2017, SLF provided Respondent Earthjustice notice of its intent to file this motion and accompanying *amicus curiae* brief. Accordingly, because SLF was unable to obtain consent from Respondent Earthjustice, 10 days prior to this filing, this motion for leave to file is necessary.

SLF is a non-profit, public interest law firm and policy center founded in 1976 and organized under the laws of the State of Georgia. SLF is dedicated to bringing before the courts issues vital to the preservation of private property rights, individual liberties, limited government, and the free enterprise system.

SLF regularly litigates before this Court. *See, e.g.*, *Util. Air Regulatory Grp., et al. v. EPA*, 134 S. Ct. 2427 (2014), and *Murray Energy Corp. v. United States Dep't of Def.*, 817 F.3d 261 (6th Cir. 2016), *petition for cert.*

*granted*, 2017 U.S. LEXIS 690 (U.S. Jan. 13, 2017) (No. 16-299). For over 40 years, SLF has also regularly appeared as *amicus curiae* before this and other federal courts to defend the United States Constitution. *See, e.g.*, *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

SLF agrees with Petitioner that the D.C. Circuit's opinion warrants review because the provision of the Boiler MACT Rule banning malfunctions is an unconstitutional overreach, is unconstitutionally vague, and was formulated through an unlawful collaboration with outside interests.

SLF believes that the arguments set forth in its brief will assist the Court in resolving the issues presented by the petition. SLF has no direct interest, financial or otherwise, in the outcome of the case. Because of its lack of a direct interest, SLF believes that it can provide the Court with a perspective that is distinct and independent from that of the parties.

For the foregoing reasons, SLF respectfully requests that this Court grant leave to participate as *amicus curiae* and to file the accompanying *amicus curiae* brief in support of Petitioner American Municipal Power, Inc.

Respectfully submitted,

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## QUESTION PRESENTED

The regulation upheld by the court of appeals in this case requires impossible perfect performance that even EPA admits has never been achieved and is in fact unachievable because accidents are an inevitable fact of industrial life. This ruling leaves hundreds of thousands of sources across the country at the mercy of EPA enforcement and citizen suits and threatens to generate unnecessary and unproductive litigation in federal district courts across the country.

The question presented is:

Can EPA lawfully issue emission standards under Clean Air Act Section 112(d) that require impossible perfect performance and outlaw accidental releases?

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## INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, regularly files *amicus curiae* briefs with this Court and litigates regularly before this Court, including such cases as *Utility Air Regulatory Group, et al. v. EPA*, 134 S. Ct. 2427 (2014), and *Murray Energy Corp. v. United States Department of Defense*, 817 F.3d 261 (6th Cir. 2016), *petition for cert. granted*, 2017 U.S. LEXIS 690 (U.S. Jan. 13, 2017) (No. 16-299).

*Amicus* asks this Court to grant the Petition for Writ of Certiorari because the provision of the Boiler MACT Rule banning malfunctions is an unconstitutional overreach, is unconstitutionally vague, and was

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[1] No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Petitioner American Municipal Power, Inc. and named-Respondents U.S. Environmental Protection Agency, et al. were notified of *amicus curiae*'s intention to file this brief as least 10 days prior to the filing of this brief and all consented to the filing of this brief in a letter on file with the Clerk of Court. *See* Sup. Ct. R. 37.2(a). As discussed in the accompanying Motion for Leave to File Brief of *Amicus Curiae*, *amicus curiae* learned of Respondent Earthjustice's appearance in the case less than 10 days prior to the filing of this brief. *Amicus curiae* provided notice to Respondent Earthjustice on April 21, 2017.

formulated through an unlawful collaboration with outside interests.

## SUMMARY OF ARGUMENT

The Boiler MACT Rule purports to ban the unavoidable.[2] Under the Clean Air Act[3] regulations, malfunctions are "not reasonably preventable." 40 C.F.R. § 63.2 (2007). Nothing an operator can do will prevent their occurrence. Machines will break. Technology will disappoint. "[E]ven equipment that is properly designed and maintained can sometimes fail." 76 Fed. Reg. at 15,613. Despite these truisms, the Rule prohibits air emissions exceedances caused by malfunctions. This Court should grant American Municipal Power's Petition for Writ of Certiorari, because the provision at issue suffers from three constitutional infirmities, and, if it stands, will soon proliferate across all CAA regulations and affect nearly every industry in the country.

First, the ban on malfunctions is an executive and judicial branch overreach because it rewrites the clear language of the CAA. The CAA requires "maximum achievable control technology" (MACT) standards be set at a level that is "achievable." 42 U.S.C. § 7412(d). By definition, preventing malfunctions is not achievable. Instead, the CAA regulates malfunctions

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[2] *See* 76 Fed. Reg. 15,608 (Mar. 21, 2011); 78 Fed. Reg. 7138 (Jan. 31, 2013); 76 Fed. Reg. 15,554 (Mar. 21, 2011); and 78 Fed. Reg. 7488 (Feb. 1, 2013) (Boiler MACT Rule or Rule).

[3] 42 U.S.C. §§ 7401-7671q (CAA).

separately in a lengthy and detailed section governing the "prevention of accidental releases." *Id*. at § 7412(r). This separate section creates a board to study and provide recommendations regarding accidental releases and requires EPA to develop regulations specific to accidents. But EPA and the D.C. Circuit disregarded that CAA section and instead shoehorned malfunction regulation into the section for MACT standards (§ 112(d), 42 U.S.C. § 7412(d)). *See Sierra Club v. EPA*, 551 F.3d 1019, 1021 (D.C. Cir. 2008); *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 606-09 (D.C. Cir. 2016). EPA and the D.C. Circuit justified that conclusion by excerpting a single phrase from the definition of "emission standard": "a requirement . . . which limits . . . emissions of air pollutants *on a continuous basis*." *See id.* (both citing 42 U.S.C. § 7602(k)). Not only is this phrase not nearly so limiting, but it also does not excuse EPA's and the lower court's decision to regulate emissions at a level *unachievable* in direct contradiction with Congress's stated methodology for regulating malfunctions.

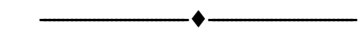
Second, the ban is unconstitutionally vague because it fails to establish clearly what conduct is prohibited and what penalties will result for any violation. *See Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (noting that a law violates the Fifth Amendment and is unconstitutionally vague when "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement"). Because malfunctions are not preventable, their prohibition does not elucidate what affirmative conduct is unlawful. By definition, nothing an

operator can do will ensure it does not run afoul of the regulation. EPA's promise to exercise enforcement discretion and that courts will be prudent in their penalty calculations is little comfort and compounds the Rule's uncertainty. *See City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) ("The Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.") (internal quotation and citation omitted).

Third, EPA developed the Rule pursuant to a Consent Decree as part of a long-standing practice of capitulating to outside interests' legal challenges. *See Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 49 (D.D.C. 2006) (noting consent decree to resolve the litigation and setting deadlines for compliance). This blocked the regulated community's involvement in the initial development of the Rule, including the important step of determining the scope of issues and hence the anticipated drafting time. This also blocked all input into Agency priorities by executive order or congressional appropriation. Allowing outside interests to dictate EPA's agenda violates the Constitution's balance of power and the spirit of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (APA). More troubling, this practice of "sue and settle" will proliferate the faulty *Sierra Club* decision throughout all CAA regulation, quickly subjecting every industry in the country

to an impossible malfunctions ban. EPA is already under court order to issue new regulations for dozens of sources, and more consent orders are likely to follow.

This case provides this Court an opportunity to overturn EPA's unlawful ban on malfunctions before it takes root in all CAA regulation.



## ARGUMENT

The D.C. Circuit and EPA have overstepped their constitutional authority by rewriting clear provisions of the CAA to ban excess air emissions caused by equipment malfunctions. As explained in the Petition, this overreach began nearly ten years ago in the still-unreviewed decision *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). There, the D.C. Circuit isolated the phrase "on a continuous basis" in interpreting the CAA section on setting MACT emissions standards (§ 112(d)) and ignored the entirely separate CAA section on regulating accidents (§ 112(r)) to find EPA must set emissions standards applicable to malfunctions. *See id.* at 1027-28. EPA responded by creating an affirmative defense precluding penalties whenever the emissions exceedance was caused by a malfunction. The D.C. Circuit overturned that approach. *See Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1057 (D.C. Cir. 2014). Here, EPA is taking the extraordinary step of outlawing malfunctions altogether, with the promise that it and the courts will exercise their discretion when evaluating enforcement and penalties.

This outright prohibition is an unconstitutional executive and judicial branch rewrite of the CAA. By contradicting Congress's intentions as set forth in the CAA, the Rule violates the constitutionally-mandated separation of powers between the legislative and judicial branches of government. By imposing indeterminate penalties, the Rule violates the Constitution's due process prohibitions against vague laws. EPA's approach to malfunction regulation is now proliferating throughout all CAA regulations in part due to EPA's collusive regulation-forcing litigation with non-governmental organizations, known as "sue and settle." This case provides this Court with an opportunity to stop EPA from inserting the unconstitutional ban on malfunctions into dozens of CAA regulations affecting nearly every industry in the country.

## I. The Boiler MACT Rule's ban on malfunctions is unconstitutional because it is a product of executive and judicial branch overreach.

EPA and the D.C. Circuit exceeded the bounds of their constitutional authority by performing the legislative function of rewriting the unambiguous language of the CAA. The CAA mandates all MACT emissions standards be "achievable" and establishes a separate process for regulating malfunctions. *See* 42 U.S.C. §§ 7412(d), (r). EPA and the *Sierra Club* court ignored this statutory structure. In an attempt to mitigate the obvious contradiction of outlawing the unpreventable,

EPA employed a series of enforcement-side fixes, ultimately landing on a promise to exercise its discretion. These machinations should have alerted EPA and the court that their statutory interpretation was incorrect.

### A. EPA and the D.C. Circuit exceeded their executive and judicial branch authority by performing the legislative function of rewriting the CAA.

"Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, faithfully execute[s] them." *Util. Air Regulatory Grp., et al. v. EPA*, 134 S. Ct. 2427, 2446 (2014). "[T]he Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988). Similarly, in a court's "anxiety to effectuate the congressional purpose of protecting the public, [it] must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *62 Cases of Jam v. United States*, 340 U.S. 593, 600 (1951). As "[t]he Framers saw . . . if the power of judging . . . were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1332 (2016) (internal quotation marks and citation omitted). Therefore, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as

the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

In the CAA, Congress set forth several different regulatory schemes to regulate the various types of air emissions. One is in Section 112(d) and covers emissions standards for certain intentional releases. *See* 42 U.S.C. § 7412(d) (requiring EPA to establish "[e]missions standards . . . [for] new or existing sources of hazardous air pollutants" that reflect "the maximum degree of reduction in emissions . . . that the Administrator . . . determines is achievable"). Another is in Section 112(r) and covers the "prevention of accidental releases." *Id*. at § 7412(r). The CAA section on accidental releases is lengthy and involves the creation of a five-person expert board to study the causes and consequences of accidental releases and to promulgate reporting requirements. *See id*. at § 7412(r)(6). Following its two-year investigation, the Board was to recommend to EPA "the adoption of regulations for the preparation of risk management plans and general requirements for the prevention of accidental releases of regulated substances into the ambient air." *Id.* at § 7412(r)(6)(K). The CAA required EPA to consider the Board's recommendations and issue regulations within three years "to provide . . . for the prevention and detection of accidental releases of regulated substances." *Id*. at § 7412(r)(7)(B).

By this intricate process, Congress showed it understood regulating accidents such as equipment

malfunctions is difficult. The unintentional and unexpected nature of malfunctions requires a more nuanced regulatory mechanism than that governing deliberate air emissions. Congress anticipated experts would need two years to understand the myriad causes of accidental releases and the best ways to limit those releases or their effects. Congress anticipated EPA would then need a year to consider that expert analysis and design appropriate corresponding regulations.

EPA and the D.C. Circuit ignored that statutory framework and instead excerpted a single phrase from its context: "'emission standard' [is] a requirement . . . which limits the . . . emissions of air pollutants on a continuous basis." *Sierra Club*, 551 F.3d at 1027 (quoting 42 U.S.C. § 7602(k)). The *Sierra Club* court reasoned that "continuous" regulation means MACT emissions standards must apply to equipment malfunctions. *See id.* at 1028 (finding that "the SSM [startup, shutdown and malfunction] exemption violates the CAA's requirement that some section 112 standard apply continuously"). To counteract the argument that MACT emissions standards must also be "achievable" and generally "achieved in practice by the best controlled similar source," 42 U.S.C. § 7412(d)(3), the D.C. Circuit here further justified its position with the incorrect and rogue conclusion that "[t]he 'best controlled similar source' . . . is unlikely to be a malfunctioning source." *U.S. Sugar Corp.*, 830 F.3d at 608.

But, as this Court has cautioned, statutory "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513

U.S. 115, 118 (1994). "[A] fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotations and citations omitted).

Here, the phrase "continuous basis" is contextually limited both by the entirely separate scheme for regulating accidents and by the clarifying phrase within Section 112(d): "is achievable." 42 U.S.C. § 7412(d)(2). Malfunctions are by definition unpreventable. *See* 40 C.F.R. § 63.2 ("Malfunction means any sudden, infrequent, and *not reasonably preventable* failure . . . which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded. Failures caused in part by poor maintenance or careless operation are not malfunctions.") (emphasis added). Because nothing an operator does will prevent malfunctions, even the "best controlled" sources may at some time malfunction. 42 U.S.C. § 7412(d)(3). EPA concedes: "[E]ven equipment that is properly designed and maintained can sometimes fail." 76 Fed. Reg. at 15,613. Therefore, banning malfunctions is not "achievable." 42 U.S.C. § 7412(d)(2). The solution is not to outlaw equipment malfunction but, like Congress provided, explore the best ways to reduce the

occurrence of malfunctions and respond to them when they happen. *See id.* at § 7412(r).

EPA, the *Sierra Club* court, and the court below exceeded the bounds of their constitutional authority by disregarding this separate statutory scheme for malfunctions and legislating contradictory new requirements inconsistent with the clear language of the CAA.

### B. EPA's enforcement-side response to the absurdity of banning the unpreventable is ineffective and illuminates its and the court's misinterpretation of the CAA.

To mitigate the irrationality of outlawing equipment malfunctions, EPA first instituted an affirmative defense allowing the regulated entity to avoid penalties. *See* 76 Fed. Reg. at 15,613 ("EPA is . . . adding to this final rule an affirmative defense to civil penalties for exceedances of numerical emission limits that are caused by malfunctions."). When the D.C. Circuit invalidated that approach in a separate case,[4] EPA announced in the reconsidered Boiler MACT Rule it would instead exercise its enforcement discretion. *See id*. (explaining malfunctions call for an "administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation"). Because the CAA authorizes citizen suits, even the best-executed EPA discretion does nothing to prevent regulated entities from incurring penalties. Moreover, the need for an

[4] *See Nat. Res. Def. Council*, 749 F.3d at 1057.

affirmative defense or enforcement discretion should have showcased to EPA and the court that they were fundamentally misinterpreting the CAA.

This Court has already recognized the insufficiency of enforcement discretion when citizen suits are available:

> EPA itself has recently affirmed that the "independent enforcement authority" furnished by the citizen-suit provision cannot be displaced by a permitting authority's decision not to pursue enforcement. 78 Fed. Reg. 12477, 12486-12487 (2013). The Solicitor General is therefore quite right to acknowledge that the availability of citizen suits made it necessary for EPA, in seeking to mitigate the unreasonableness of its greenhouse-gas-inclusive interpretation, to go beyond merely exercising its enforcement discretion.

*Util. Air Regulatory Grp.*, 134 S. Ct. at 2445.

Even if EPA does not prosecute an emissions exceedance caused by a malfunction, the citizen-suit provision in the CAA enables third parties to enforce the Rule's prohibition on equipment malfunctions in EPA's place. Therefore, EPA's promise of enforcement discretion is an empty promise. It provides little comfort to regulated entities who are now subject to an impossible standard banning the unpreventable.

Moreover, just as in *Utility Air Regulatory Group*, EPA's enforcement-side gymnastics should have

alerted it and the court they were misinterpreting the statute:

> We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. EPA therefore lacked authority to "tailor" the Act's unambiguous numerical thresholds to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers. Instead, the need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn.

*Id.* at 2446.

The absurdity of banning the unpreventable and its associated enforcement conundrum should have alerted EPA and the court that their statutory interpretation had strayed far from Congress's intent. When Section 112(d)'s requirement of "achievable" standards and Section 112(r)'s provision for accidents are read back into the statute, the CAA becomes a cohesive whole without the need for any enforcement-side machinations.

## II. The Rule's vague handling of malfunctions violates the Constitution's promise of due process.

EPA's enforcement-side response to the malfunctions quandary runs afoul of the basic constitutional cannon that "[n]o person shall . . . be deprived of life,

liberty, or property, without due process of law." U.S. Const., amend. V. Administrative enforcement discretion and judicial flexibility in determining penalties are unconstitutionally vague because they do not establish what conduct is prohibited and what penalties will ensue for a violation.

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). A law is unconstitutionally vague when "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556.

EPA's explanation of how it will decide whether to enforce against an entity for experiencing an equipment malfunction is imprecise and equivocal:

> In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, "sudden, infrequent, not

> reasonably preventable" and was not instead "caused in part by poor maintenance or careless operation." 40 CFR 63.2 (definition of malfunction).

76 Fed. Reg. at 15,613. Even if an operator performs some of these vague tasks, EPA does not disavow its right to bring an enforcement action for a malfunction. Instead, EPA says it will "determine an appropriate response," with no guidance as to what that might be. *Id.*

"[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her *conduct* to the law." *City of Chicago*, 527 U.S. at 58. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of *conduct* that is forbidden or required. . . . [R]egulated parties should know what is required of them so they may act accordingly." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (emphasis added). Because malfunctions are "not reasonably preventable failure[s]," 40 C.F.R. § 63.2, the cause of the emissions exceedance is not human conduct but the entirely unpreventable technological failure of the boiler or emissions control device. The Rule's ban on malfunctions does not specify any conduct an operator must do or avoid in order to steer clear of enforcement. By law, this is unconstitutionally vague. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) ("[T]he ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.").

When private entities exercise their right to enforce the prohibition on malfunctions in EPA's place, the situation becomes even muddier. EPA explains in a different rule that it then essentially trusts a judge to do the right thing: "the source can raise any and all defenses in that enforcement action, and the federal district court will determine what, if any, relief is appropriate." 80 Fed. Reg. 50,386, 50,410 (Aug. 19, 2015). This assurance that "the federal district court will determine what, if any, relief is appropriate" further compounds the Rule's vagueness because it establishes amorphous penalties for any violation.

"Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964). This is because "[t]he Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *City of Chicago*, 527 U.S. at 60 (citation omitted). EPA has done precisely this. The prohibition on boiler malfunctions ensnares all operators and leaves it to EPA and the courts to determine which of those operators should be punished and which should not.

One of the reasons the Constitution requires clear punishments for any infraction is the risk of arbitrary and discriminatory enforcement. Not all administrators and judges will agree as to when and how much penalties are appropriate and, therefore, the same conduct will net different results in different jurisdictions. "[I]f arbitrary and discriminatory enforcement is to be

prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). *See also Fox Television Stations, Inc.*, 132 S. Ct. at 2318 ("[T]he due process protection against vague regulations does not leave regulated parties at the mercy of *noblesse oblige* . . . the Government's assurance it will elect not to [use its statutory authority to issue penalties] is insufficient to remedy the constitutional violation.") (internal quotation and citation omitted). Because the Boiler MACT Rule's prohibition on malfunctions has no check against arbitrary and discriminatory enforcement, it is unconstitutionally vague in violation of the Constitution's due process requirements.

"[S]ome measure of predictability" is required to "comport[] with due process." *Army Corps of Eng'rs v. Hawkes, Co.*, 136 S. Ct. 1807, 1816-17 (2016) (Kennedy, J., concurring). The Boiler MACT Rule's ban on malfunctions does not alert operators to what conduct is prohibited or what penalties may result. Instead, the operators of 100,000 facilities across the country must guess as to whether they will be subject to enforcement and penalties when their equipment malfunctions. This case provides an opportunity to overturn the Rule's unconstitutionally vague prohibition of malfunctions.

## III. EPA developed the Rule through unlawful collaboration with outside interests, in violation of the Constitution and the APA.

Many of the problems in the Boiler MACT Rule stem from the extra-legal process EPA employed to develop the Rule. Through a series of collaborations with outside groups, EPA acquiesced to court orders mandating EPA promulgate the Rule and dozens of others on an impossibly tight schedule. The Rule was then hastily drafted without the comprehensive stakeholder input and research needed to regulate such a large and varied set of sources effectively. Complying with the court order also occupied a significant percentage of EPA's resources at the expense of other priorities. EPA, in collaboration with non-governmental groups, thereby set its own agenda outside the congressional appropriations process and free of any direction from executive orders. This practice, known as "sue and settle," usurps the government branches' constitutionally-mandated balance of power and violates the spirit of the APA's public involvement provisions. If left unchecked, it will cause the malfunctions ban to proliferate quickly throughout all CAA regulation.

### A. History of the "sue-and-settle" process.

As it pertains to this Rule, the collaboration between EPA and select outside interests began in 2003 when EPA and the Sierra Club lodged a Consent Decree setting deadlines for the promulgation of certain emissions standards. *See Sierra Club*, 444 F. Supp. 2d at 49. When EPA failed to meet those deadlines, the

Sierra Club again brought suit, and EPA conceded defeat on the merits, leading to another court order mandating Agency action. *See id.* After EPA and the Sierra Club agreed on several extensions, the D.C. district court set the final deadline for this Rule of January 16, 2011 (ultimately extended only a month at EPA's request to Feb. 21, 2011). *See Sierra Club v. Jackson*, No. CIV.A. 01-1537, 2011 WL 181097, at *4 (D.D.C. Jan. 20, 2011); *Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 38 (D.D.C. 2014).

This sue-and-settle history is not unique to this matter. Environmental non-profit organizations have sued EPA in many courts across the country to force new regulations, and EPA's practice in each instance is to concede liability. *See, e.g., Cal. Cmtys. Against Toxics v. Pruitt*, No. 15-00512, 2017 WL 978974, at *1 (D.D.C. Mar. 13, 2017) (noting that "EPA does not contest liability for the underlying failure to act" because EPA conceded this point in its 2016 motion for summary judgment pleadings); Mem. In Opp'n to Pls.' Mot. For Summ. J. at 2, *Blue Ridge Envtl. Def. League v. Pruitt*, No. 16-cv-00364 (D.D.C. Sept. 26, 2016), ECF No. 20 ("EPA does not dispute that it has not yet completed its duty to conduct the technology and residual risk reviews pursuant to 42 U.S.C. § 7412(d)(6) and (f)(2) for the 13 categories. . . ."); Order at 1, *Sierra Club v. McCarthy*, No. 15-cv-01165 (N.D. Cal. Mar. 15, 2016), ECF No. 41 ("Plaintiffs and Defendant agree that there is no dispute the EPA has failed to fulfill certain mandatory rulemaking duties under the

Clean Air Act, 42 U.S.C. §§ 7604(a), 7412(d)(6), and 7412(f)(2).").

Once EPA has conceded the merits in each of these cases, the court issues an order establishing rigorous deadlines for EPA to promulgate new rules. EPA is now bound by court order to review the emissions standards for dozens of additional source categories in the next three years. *See, e.g., Cal. Cmtys. Against Toxics*, 2017 WL 978974, at *6 (ordering EPA to complete review of 20 source categories within three years); Order, *Blue Ridge Envtl. Def. League*, No. 16-cv-00364 (D.D.C. Mar. 22, 2017), ECF No. 38 (ordering EPA to complete its "Risk and Technology Review" rulemakings for 7 of the 13 overdue source categories by December 31, 2018, and for the remaining 6 overdue source categories by June 30, 2020); Order at 12, *Sierra Club v. McCarthy*, No. 15-cv-01165 (N.D. Cal. Mar. 15, 2016), ECF No. 41 (mandating EPA complete the §7412(d)(6) and (f)(2) technology-based reassessment for two source categories by October 1, 2017).

These rulemakings have and will continue to dominate EPA's limited time and resources. The EPA director responsible for drafting these court-ordered rules explains: "[D]ue to SPPD's considerable workload, the available staff, and budgetary constraints, SPPD must prioritize work, and it is usually the case that the available resources are insufficient to allow all of the required work to be completed in a timely fashion." Tsirigotis Aff. at ¶17, *Cal. Cmtys. Against Toxics*, No. 15-cv-00512 (D.D.C. Mar. 2, 2017), ECF No. 47. In requesting an extension of time to promulgate the rules,

a former EPA Administrator justifies: "This amount of time also takes into account the fact that during the same time period for this rulemaking, EPA's Office of Air and Radiation will be working on many other major rulemakings involving air pollution requirements for a wide variety of stationary and mobile sources, many with court-ordered or settlement agreement deadlines." Decl. of Regina McCarthy at ¶ 20, *Am. Lung Ass'n v. EPA*, No. 12-cv-00243 (D.D.C. May 4, 2012), ECF No. 28-4.

By subjecting itself to the priorities of outside interests, EPA has confined itself to an impossible schedule resulting in an illogical and unlawful Rule.

### B. EPA's extra-legal collaboration with outside interests encroaches upon the legislative and executive branches' constitutionally delegated powers and improperly bars the regulated community from the Rule's development.

Allowing outside interests to reorder EPA's priorities infringes on the autonomy of the executive branch, blocks any congressional ability to direct Agency policy, and excludes the regulated community from the process. EPA has thereby violated the Constitution's delegation of powers and the spirit of the APA's requirement of public involvement in the development of rules.

The autonomy of the executive branch is a central constitutional tenet, and allowing outside interests to

undermine that power and independence hinders the proper execution of the law. *See Mistretta v. United States*, 488 U.S. 361, 380-82 (1989) ("[W]ithin our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty. . . . Accordingly, we have not hesitated to strike down provisions of law that . . . undermine the authority and independence of one or another coordinate Branch."). EPA, as directed by the President through executive order, is best-suited to determine how to direct its limited resources, not outside groups unfamiliar with the full spectrum of Agency responsibilities. EPA has abdicated that responsibility by acquiescing to the demands of outside interests.

Congress is similarly authorized to use its appropriations process to direct EPA's priorities and signal how its laws should be understood and administered. This appropriations power is fundamental to the legislative branch of government. U.S. Const., art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) ("[N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress."). This appropriations process and the President's use of executive orders are the only ways elected officials can influence the execution of laws. EPA's practice here has blocked that measure of public influence over Agency action replacing it with the inclinations of unelected officials and outside interests.

Congress was concerned about this possibility when it initially enacted the CAA, and considered whether it warranted eliminating the citizen suit provision altogether:

> [The citizen suit provision] will result in a multiplicity of suits which will interfere with the Executive's capability of carrying out its duties and responsibilities. . . . [T]he agency might not be at fault if it does not act promptly or does not enforce the act as comprehensively and as thoroughly as it would like to do. Some of its capabilities depend on the wisdom of the appropriations process of this Congress. . . . Notwithstanding the lack of capability to enforce this act, suit after suit after suit could be brought. The functioning of the department could be interfered with, and its time and resources frittered away by responding to these lawsuits. The limited resources we can afford will be needed for the actual implementation of the act.

Sen. Hruska, arguing against the citizen suit provision of the CAA during Senate debate on S.4358 on Sept. 21, 1970.[5] Congress was rightfully worried outside interests would block Congress's constitutionally-authorized appropriations authority to direct EPA's priorities.

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[5] Environmental Policy Division, Cong. Research Serv., 93d Cong. 2d Session, A Legislative History of the Clean Air Amendments of 1970 at 278 (Comm. Print 1974), https://babel.hathitrust.org/cgi/pt?id=mdp.39015077941642;view=1up;seq=285.

EPA's practice here also excludes the regulated community from the initial development of regulations, in contravention of the spirit of the APA. *See United States v. Utesch*, 596 F.3d 302, 308 (6th Cir. 2010) (explaining the purpose of the APA's public comment process is "to get the wisest rules, to ensure fair treatment for persons to be affected by regulations, and to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage") (citations and quotations omitted). Involving the regulated community at an early stage, before EPA begins drafting the rules, is necessary for the Agency even to understand the complexity of the issue. Without that early dialogue, EPA cannot estimate how long it needs to draft a rule. The resulting court-ordered deadlines are then uninformed. The arbitrariness of the Rule's initial deadline forced the illogical result of EPA promulgating and reconsidering the Rule simultaneously.

This Court should grant the Petition and overturn the Boiler MACT Rule as a product of unlawful agency collaboration with outside interests that excluded the regulated community and encroached upon the powers constitutionally delegated to the legislative and executive branches of government.

### C. EPA's extra-legal practice of forcing rulemaking upon itself will cause the malfunctions ban to permeate all CAA regulation.

Without this Court's intervention, EPA's collaboration with outside interests will continue and proliferate the malfunctions ban across dozens of additional source categories and affect nearly every industry. EPA is already under court order to promulgate new regulations for thirty-five sources, and many more are likely to follow. *See* Tsirigotis Aff. at ¶ 5, *Cal. Cmtys. Against Toxics*, No. 15-cv-00512 (D.D.C. Mar. 2, 2017), ECF No. 47 (50 source categories for MACT standards and all § 129 solid waste incinerator rules are either overdue or due soon); *id.* at ¶ 9 (60 source categories in EPA's national emission standards for hazardous air pollutants (NESHAP) program under CAA § 112(b) require regular agency review).

As EPA promulgates new or updated MACT and NESHAP rules, EPA is systematically replacing all malfunction-specific regulations with universal emission standards. *See, e.g.*, 80 Fed. Reg. at 50,410. As part of a settlement agreement with the Sierra Club, EPA is also attempting to force the states to remove malfunction-specific rules from their regulation of stationary sources under the National Ambient Air Quality Standards Program. *See* 80 Fed. Reg. 33,840, 33,875-76 (Jun. 12, 2015) (describing "settlement agreement . . . by the Agency and the Sierra Club in order to resolve allegations that the EPA . . . was illegally ignoring existing deficiencies in the SIPs of many states,

including existing allegedly deficient provisions concerning the treatment of excess emissions during SSM events"). Litigation over that action is pending. *See Walter Coke, Inc. v. EPA*, No. 15-1166 (D.C. Cir. filed Jun. 12, 2015).

As EPA capitulates to each of these challenges, the ban on malfunctions will quickly infect all CAA regulation. This Court should grant the Petition to hear this issue now to prevent the unconstitutional regulation from expanding further.

## CONCLUSION

For the foregoing reasons and those stated by Petitioner, *amicus curiae* respectfully requests this Court grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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