

NOT YET SCHEDULED FOR ORAL ARGUMENT

---

---

**United States Court of Appeals  
for the District of Columbia Circuit**

---

---

**No. 21-1028  
Consolidated with 21-1060**

---

---

STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF  
CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF ILLINOIS; STATE  
OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF  
MINNESOTA; STATE OF NEW JERSEY; STATE OF OREGON;  
COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND;  
STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF  
WASHINGTON; STATE OF WISCONSIN; CITY OF NEW YORK,

*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY; JANE NISHIDA, IN HER  
OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE UNITED  
STATES ENVIRONMENTAL PROTECTION AGENCY,

*Respondents.*

-----  
*Petition for Review of a Decision by a Federal Agency*

---

---

**MOTION OF ENERGY POLICY ADVOCATES FOR LEAVE TO FILE  
AS AMICUS CURIAE**

---

---

Christopher C. Horner  
D.C. Bar #440107  
1725 I Street NW, Suite 300  
Washington, DC 20006  
(202) 262-4458  
Chris@chornerlaw.com  
*Counsel for Amicus Curiae*

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

STATE OF NEW YORK, et al.	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	Docket No. 21-1028
	)	Consolidated with 21-1060
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, et al.	)	
	)	
Respondents.	)	
	)	

---

**MOTION OF ENERGY POLICY ADVOCATES**  
**FOR LEAVE TO FILE AS AMICUS CURIAE**

Pursuant to Federal Rule of Appellate Procedure 29(a) Energy Policy Advocates (Proposed Amicus, or “EPAA”) moves for leave to file the accompanying *amicus curiae* brief in support of the Respondent U.S. Environmental Protection Agency (“USEPA”) in the above-captioned case (and any current and future cases regarding the same agency action). As described, below and in the accompanying proposed brief, the Proposed Amicus has obtained a substantial volume of correspondence, privilege logs and other documents through public records requests and litigation. EPAA respectfully submits that these records illuminate the origins of -- and collaboration on -- this litigation between friendly parties to vacate a properly enacted Rule. Vacating the existing Rule will necessarily

require the agency to promulgate a replacement rule, as a pretext to attempt a reinvention of the Clean Air Act's National Ambient Air Quality Standards ("NAAQS") program as a backdoor mechanism to regulate non-criteria pollutants, over which EPA has other statutory authority to regulate, but which it has failed to find a legally sanctioned means of regulating.

The challenge at issue in this suit seeks to vacate the recent *Review of the Ozone National Ambient Air Quality Standards*, 85 Fed. Reg. 87,256 (Dec. 31, 2020), which this Motion will call "the Rule." Proposed Amicus EPAA seeks to provide this Court with those records revealing that the challenge at issue here claiming the Rule is arbitrary and capricious, filed the day before the new administration took office, is pretextual and long-planned friendly litigation to attain a regulatory end that has been denied the Parties to date through the proper means of the political, regulatory and judicial processes.

The December Ozone NAAQS Rule (maintaining the current standards) is not arbitrary and capricious, nor is it an abuse of discretion, nor is it otherwise noncompliant with the law. Demonstrating the pretextual nature of the Petitioners' complaint that this Rule proposed in July 2020 is arbitrary and capricious, the records obtained by Proposed Amicus show the collaboration between Petitioners and Respondent USEPA's current official in charge of the Rule, to develop this backdoor GHG regulation, began in approximately October 2019.

Proposed Amicus EPAA is a nonprofit based in Washington State with no direct interest, financial or otherwise, in the outcome of the case, aside from its interest in good governance and advocating for the proper role of the federal judiciary. Because of its lack of a direct interest combined with its intimate and firsthand knowledge of the records illustrating the above-cited concerns about the Parties' desire to use this friendly litigation to replace a properly enacted Rule as supposedly "arbitrary and capricious," as part of a truly arbitrary and capricious effort to end-run the Clean Air Act and other political constraints, EPAA can provide the Court with a perspective that is distinct and independent from that of the parties. Further, the courts have acknowledged that collusive litigation is improper. This appears to be collusive litigation. Proposed Amicus also seeks to provide this Court with records strongly suggesting that this is collusive litigation. For the foregoing reasons, EPA respectfully requests that this Court grant leave to file the accompanying *amicus curiae* brief.<sup>1</sup>

Congruent with the Rule, counsel for Proposed Amicus EPAA provided notice of the *amicus*'s desire to file the brief to all counsel of record and counsel for the federal government on February 16, 2021. Counsel for the United States

---

<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Department of Justice have not responded with a position indicating whether the USEPA does or does not consent to the filing of this *amicus* brief. On February 18, 2021, Counsel of Record for the Petitioners Claiborne Walthall informed Proposed Amicus that they took no position on this Motion for Leave to File.

Respectfully submitted this the 22<sup>nd</sup> day of February, 2021,

/s/ Christopher C. Horner  
Christopher C. Horner  
D.C. Bar #440107  
1725 I Street NW, Suite 300  
Washington, DC 20006  
(202) 262-4458  
[Chris@chornerlaw.com](mailto:Chris@chornerlaw.com)

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE  
REQUIREMENTS**

1. This Motion complies with the type-volume limitation.

  X   The Motion contains 663 words, excluding the parts of the motion exempted by rule.

2. This motion complies with the typeface requirements and the type style requirements.

  X   The motion has been prepared in a proportionally spaced typeface using MS Word in a 14 point Times New Roman font or

February 22, 2021

/s/ Christopher C. Horner  
Christopher C. Horner  
D.C. Bar #440107  
1725 I Street NW, Suite 300  
Washington, DC 20006  
(202) 262-4458  
[Chris@chornerlaw.com](mailto:Chris@chornerlaw.com)

## **CERTIFICATE OF FILING AND SERVICE**

I, Christopher C. Horner, hereby certify pursuant to Fed. R. App. P. 25(d) that, on February 22, 2021 the foregoing Motion of Energy Policy Advocates for Leave to File as Amicus Curiae was filed through the CM/ECF system and served electronically on registered parties.

/s/ Christopher C. Horner  
Christopher C. Horner