

ORAL ARGUMENT NOT YET SCHEDULED

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

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)	
STATE OF CALIFORNIA, et al.,)	
)	
<i>Petitioners,</i>)	
)	No. 20-1357
v.)	(and consolidated cases)
)	
ANDREW WHEELER, Administrator,)	
United States Environmental Protection)	
Agency, et al.,)	
)	
<i>Respondents.</i>)	
)	
)	

MOTION OF THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, DOMESTIC ENERGY PRODUCERS ALLIANCE, EASTERN KANSAS OIL & GAS ASSOCIATION, ILLINOIS OIL & GAS ASSOCIATION, INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INC., INDIANA OIL AND GAS ASSOCIATION, KANSAS INDEPENDENT OIL & GAS ASSOCIATION, KENTUCKY OIL & GAS ASSOCIATION, MICHIGAN OIL AND GAS ASSOCIATION, OHIO OIL AND GAS ASSOCIATION, PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION, TEXAS ALLIANCE OF ENERGY PRODUCERS, TEXAS INDEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIATION, AND WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION FOR LEAVE TO INTERVENE AS RESPONDENT

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the Independent Petroleum Association of America ("IPAA"), Domestic Energy Producers Alliance ("DEPA"), Eastern Kansas Oil & Gas

Association ("EKOGA"), Illinois Oil & Gas Association ("IOGA"), Independent Oil and Gas Association of West Virginia, Inc. ("IOGA-WV"), Indiana Oil and Gas Association ("INOGA"), Kansas Independent Oil & Gas Association ("KIOGA"), Kentucky Oil & Gas Association ("KOGA"), Michigan Oil and Gas Association ("MOGA"), Ohio Oil and Gas Association ("OOGA"), Pennsylvania Independent Oil & Gas Association ("PIOGA"), Texas Alliance of Energy Producers ("Texas Alliance"), Texas Independent Producers & Royalty Owners Association ("TIPRO"), and West Virginia Oil and Natural Gas Association ("WVONGA") (collectively, "Independent Producers"), respectfully move for leave to intervene as a Respondent in the above-captioned case. On September 14, 2020, Petitioners filed a petition for review challenging a final action of the United States Environmental Protection Agency ("EPA" or "Agency") under the Clean Air Act ("CAA" or "Act") entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review," published at 85 Fed. Reg. 57,018 (Sept. 14, 2020) ("2020 Rule"). Pursuant to Federal Rule of Appellate Procedure 15(d), this motion to intervene has been timely filed within 30 days after Petitioners filed their petition for review and the Independent Producers meet the standards for intervention as described below.

BACKGROUND

The 2020 Rule amended the 2012 New Source Performance Standards ("NSPS") pursuant to Section 111 of the CAA for certain emissions source in the oil and natural gas industry, codified at 40 C.F.R. part 60, Subpart OOOO ("2012 Rule").

Many of the associations that are currently included in the Independent Producers filed comments when the 2012 Rule was proposed and ultimately petitioned for review of the 2012 Rule. The 2012 Rule underwent various revisions in 2013 and 2014. Many of the associations included in the Independent Producers participated in the rulemakings associated with 2013 and 2014 revisions and petitioned for review of the revisions. The NSPS for certain aspects of the oil and natural gas industry were added or modified in 2016 and codified at 40 C.F.R. part 60, Subpart OOOOa ("2016 Rule"). The Independent Producers filed comments on the proposed 2016 Rule and petitioned for review of the 2016 Rule. The various challenges to the 2012 Rule; revisions to the rule; and the 2016 were consolidated in *Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir. filed Apr.3, 2013). Various associations that make up the Independent Producers have been actively involved in all aspects of the promulgation and legal challenges to the 2012 Rule and 2016 Rule.¹

On September 24, 2019, EPA proposed changes to the 2012 Rule and 2016 Rule that was generally characterized as "policy amendments". 84 Fed. Reg. 50244 (Sept. 24, 2019). The Independent Producers filed extensive comments on the proposed revisions.² In the 2020 Rule, EPA determined that Subpart OOOO and

¹ See Independent Producers Comments, No. EPA-HQ-OAR-2010-0505-4216 (Nov. 11, 2011), No. EPA-HQ-2010-0505-4236 (Nov. 11, 2011), No. EPA-HQ-OAR-2010-0505-4626 (May 23, 2013), No. EPA-HQ-OAR-2010-0505-6983 (Dec. 4, 2015).

² See Independent Producers Comments, No. EPA-HQ-OAR-2017-0757-2077 (Nov. 25, 2019).

Subpart OOOOa improperly included the transportation and storage segments of the oil and natural gas industry into the existing single source category focused on production and gas production. 59 Fed. Reg. at 57,019. EPA corrected this problem in the 2020 Rule by removing these segments from the source category that originally had been defined to include only crude oil and natural gas production in 1979. *Id.* EPA also determined that establishing emissions standards for methane in Subpart OOOOa was redundant to existing NSPS for the same sources to control volatile organic compounds ("VOC"). In the 2016 Rule, EPA admitted the controls and methods to control VOCs were exactly the same controls and methods necessary to control methane. Consequently, EPA concluded in the 2020 Rule that the methane NSPS were an unreasonable and unwarranted extension of the regulations promulgated to control VOCs. Additionally, the 2016 methane standards accomplished no more environmental protection than the previously established VOC standards. EPA rescinded the methane standards to simplify the Rule and eliminate unnecessary duplicative regulations.

The Independent Producers are trade associations representing entities and individuals within the oil and gas industry, including oil and gas producers and extractors, royalty owners, oilfield service companies, and state and national independent oil and gas associations. The individual members of the Independent Producers number in the thousands and are spread out across the country and operate thousands of new and existing oil and natural gas wells. Many of these members are

"mom and pop" operations – owning hundreds, sometimes thousands of existing wells producing very little gas and oil – generally referred to as "marginal wells". These wells are marginal not only in their production but also with regard to their economic viability. These existing wells are dramatically different than the hydraulically fractured wells drilled in the late 2000's with horizontal legs producing historically large volumes of gas or oil. The 2012 Rule and 2016 Rule were in response to the latest technology that caused a boom in new oil and natural gas wells. The rules were not focused on existing wells or newly drilled marginal wells which are considerably smaller, producing much less gas and oil and emissions.

On September 14, 2020, Petitioners filed a petition for review to challenge the 2020 Rule that provided some relief to existing wells. Independent Producers are requesting leave to intervene as a respondent to protect its unique interests in ensuring that the 2020 Rule be upheld.

ARGUMENT

The Court should allow the Independent Producers to intervene as a respondent because, as discussed below, they meet the standard for intervention in petition for review proceedings in this Court.

I. The Legal Standard for Intervention

Federal Rule of Appellate Procedure 15(d) and Circuit Court Rule 15(b) establish the criteria for intervention in petition for review proceedings in this Court. A motion for leave to intervene "must be filed within 30 days after the petition for

review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d). Although neither the Federal Rule 15 nor Circuit Rule 15 establish additional criteria, Federal Rule of Civil Procedure 24 governing intervention, while not binding in cases originating in courts of appeals, provides guidance for the intervention inquiry under Federal Rule of Appellate Procedure 15(d). *See, e.g., Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Scofield*, 382 U.S. 205, 216 n.10 (1965); *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) (per curiam). The requirements for intervention of right under Federal Rule of Civil Procedure 24(a)(2) are that: (1) the intervention motion is timely; (2) the movant claims a cognizable interest in the action; (3) movant's absence will impair or impede its ability to protect its stated interest; and (4) existing parties inadequately represent movant's interests. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003).

Additionally, the Independent Producers have standing to participate in litigation on its members behalf. The interests of the members of the Independent Producers have in the Rule being upheld will be harmed if Petitioners prevail in their fundamental challenge to the 2020 Rule as well as their motions for stay and summary vacatur. Members of the Independent Producers therefore would have standing to intervene in their own right. Further, the interests that the Independent Producers seek to protect are germane to its purpose of participating in the past (2012 and 2016 Rules) and current proceedings (2020 Rule) and related litigation that affect its

members. Participation of individual members of the Independent Producers in this litigation is not required.

II. Movant-Intervenor Meets the Standard for Intervention.

A. The Motion Is Timely.

The Petitioners filed their petition for review on September 14, 2020 and their Emergency Motion for Stay and Summary Vacatur on September 15, 2020. The Independent Producers' motion is timely because it was filed within 30 days after the petition for review was filed. Additionally, this motion is being filed at an early stage of the proceeding and intervention will not disrupt or delay any proceedings and no briefing schedule or format has been established.

B. Independent Producers and Its Members Have Cognizable Interests That Will Be Impaired If Petitioners Prevail.

As the Emergency Motion makes clear, a primary concern of the Petitioners is the 2020 Rule's removal of the methane requirements which render the provisions of Section 111(d) pertaining to existing sources no longer relevant. As a result of the 2020 Rule, existing sources are no longer exposed to regulation pursuant to Section 111(d) of the CAA. A significant percentage of the individual members of the Independent Producers operate thousands of existing wells. As Petitioners detail in their motion, EPA initiated the rulemaking process shortly after the 2016 Rule to potentially regulate existing sources (purportedly pursuant to 111(d)). That rulemaking was halted, in part, as a result of the proposed revisions to the 2016 rule.

Many of the same Petitioners sued EPA to force continuation of the rulemaking exposing existing sources to new and burdensome regulation. If the judicial stay of the 2020 Rule remains in place or the 2020 Rule is vacated, the members of the Independent Producers will be subject to regulations promulgated pursuant to Section 111(d). Clearly the Petitioners' challenge to the 2020 Rule threatens the interests of the Independent Producers and its respective members. If the stay granted by this Court on September 17 remains in place; if the summary vacatur is granted; or the 2020 Rule is ultimately vacated, the interests of the Independent Producers will be harmed. As discussed above, the economic viability of many members of the Independent Producers is marginal and additional regulation pursuant to Section 111(d) will represent a tipping point to the viability of many members – putting many members out of business. Thus, to the extent the "interests" prongs of Federal Rule of Civil Procedure 24 are relevant and helpful, the Independent Producers clearly meet those requirements.

C. Existing Parties Cannot Adequately Represent Independent Producers.

The Petitioners are clearly adverse to the interests of the Independent Producers. As the Petitioners' Emergency Motion makes clear, a primary concern with the 2020 Rule is that it removes any debate as to whether existing sources can be regulated under Section 111(d). The majority of oil and natural gas wells in the United States are existing wells, with many of the existing wells characterized as

marginal wells. From EPA's initial efforts to promulgate additional regulations on new or modified sources in 2012, the Independent Producers have argued that EPA failed to recognize the unique operating aspects of existing and marginal wells – that EPA's "one-size-fits all" to regulation disproportionately impacts existing wells. EPA's focus has historically been and continues to be on new sources, often to the detriment of existing sources.

As previously discussed by this Court, the burden of showing inadequate representation in a motion for intervention "is not onerous" and "[t]he applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). In the same case, this Court found that EPA cannot adequately represent the interests of entities such as the Independent Producers as the EPA represents the broader "general public interest." *Dimond*, 792 F.2d at 192-93 ("A government entity ... is charged by law with representing the public interest of its citizens. ... The [government entity] would be shirking its duty were it to advance th[e] narrower interest [of a business concern] at the expense of its representation of the general public interest."). Perhaps in favor of or representation of the general public interest, EPA has demonstrated since 2012 that it does not represent the interests of existing sources, and, thus, the interests of Independent Producers.

For the reasons set forth above, the existing parties do not and cannot adequately represent the Independent Producers interests in this case.

CONCLUSION

For the foregoing reasons, the Independent Producers respectfully request leave to intervene as a respondent.

Respectfully Submitted,

/s/ James D. Elliott

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Dated: September 28, 2020

Association ("EKOGA"), Illinois Oil & Gas Association ("IOGA"), Independent Oil and Gas Association of West Virginia, Inc. ("IOGA-WV"), Indiana Oil and Gas Association ("INOGA"), Kansas Independent Oil & Gas Association ("KIOGA"), Kentucky Oil & Gas Association ("KOGA"), Michigan Oil and Gas Association ("MOGA"), Ohio Oil and Gas Association ("OOGA"), Pennsylvania Independent Oil & Gas Association ("PIOGA"), Texas Alliance of Energy Producers ("Texas Alliance"), Texas Independent Producers & Royalty Owners Association ("TIPRO"), and West Virginia Oil and Natural Gas Association ("WVONGA") (collectively, "Independent Producers") files the following statement:

The Independent Petroleum Association of America ("IPAA") is an incorporated trade association that represents thousands of independent oil and natural gas producers and service companies across the United States that are active in the exploration and production segment of the industry, which often involves the hydraulic fracturing of wells. IPAA serves as an informed voice for the exploration and production segment of the industry, and advocates its members' views before the United States Congress, the Administration and federal agencies. IPAA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Domestic Energy Producers Alliance ("DEPA") is a nationwide collaboration of 39 coalition associations representing individuals and companies engaged in domestic onshore oil and natural gas exploration and production (E&P). We believe in seeking common ground, and in common-sense solutions to the challenges that face us in our businesses, including our relationship with the federal, legislative and executive branches of government. In just over ten years, DEPA now represents a majority of the individuals and companies responsible for the current renaissance in American oil and natural gas production. DEPA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Eastern Kansas Oil & Gas Association ("EKOGA") is a nonprofit organization founded in 1957 to become a unified voice representing the unique interests of eastern Kansas oil and gas producers, service companies, suppliers and royalty owners on matters involving oil and gas regulations, safety standards, environmental concerns and other energy related issues. EKOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Illinois Oil & Gas Association ("IOGA") was organized in 1944 to provide an agency through which oil and gas producers, land owners, royalty owners, and others who may be directly or indirectly affected by or interested in oil and gas

development and production in Illinois, may protect, preserve and advance their common interests. IOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Independent Oil and Gas Association of West Virginia, Inc. ("IOGA-WV"), is a statewide nonprofit trade association that represents companies engaged in the extraction and production of natural gas and oil in West Virginia and the companies that support these extraction and production activities. IOGA-WV was formed to promote and protect a strong, competitive, and capable independent natural gas and oil producing industry in West Virginia, as well as the natural environment of our state. IOGA-WV has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Indiana Oil and Gas Association ("INOGA") has a rich history of involvement in the exploration and development of hydrocarbons in the State of Indiana. INOGA was formed in 1942 and historically has been an all-volunteer organization principally made up of representatives of oil and gas exploration and development companies (operators), however, it has enjoyed support and membership from pipeline, refinery, land acquisition, service, supply, legal, engineering and geologic companies or individuals. INOGA has been an active representative for the upstream oil and gas industry in Indiana and provides a common forum for this group. INOGA represents its membership on issues of state, federal, and local regulation/legislation that has, does and will affect the business of

this industry. INOGA is a 501(c)(6) trade association incorporated as Non-Profit Domestic Corporation under the statutes of Indiana. INOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Kansas Independent Oil & Gas Association ("KIOGA") is a nonprofit organization founded in 1937 to represent the interests of oil and gas producers in Kansas, as well as allied service and supply companies. Today, KIOGA is a trade association with nearly 3,500 members involved in all aspects of the exploration, production, and development of crude oil and natural gas resources. KIOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Kentucky Oil & Gas Association ("KOGA") was formed in 1931 to represent the interests of Kentucky's crude oil and natural gas industry, and more particularly, the independent crude oil and natural gas operators as well as the businesses that support the industry. KOGA is comprised of 220 companies which consist of over 600 member representatives that are directly related to the crude oil and natural gas industry in Kentucky. KOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Michigan Oil and Gas Association ("MOGA") represents the exploration, drilling, production, transportation, processing, and storage of crude oil and natural gas in the State of Michigan. MOGA has nearly 850 members including independent

oil companies, major oil companies, the exploration arms of various utility companies, diverse service companies, and individuals. Organized in 1934, MOGA monitors the pulse of the Michigan oil and gas industry as well as its political, regulatory, and legislative interest in the state and the nation's capital. MOGA is the collective voice of the petroleum industry in Michigan, speaking to the problems and issues facing the various companies involved in the state's crude oil and natural gas business. MOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Ohio Oil & Gas Association ("OOGA") is a trade association with over 2,600 members involved in all aspects of the exploration, production, and development of crude oil and natural gas resources within the State of Ohio. OOGA represents the people and companies directly responsible for the production of crude oil, natural gas, and associated products in Ohio. OOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Pennsylvania Independent Oil & Gas Association ("PIOGA") is a non-profit corporation that was initially formed in 1978 as the Independent Oil and Gas Association of Pennsylvania ("IOGA of PA") to represent the interests of smaller independent producers of Pennsylvania natural gas from conventional limestone and sandstone formations. Effective April 1, 2010, IOGA of PA and another Pennsylvania trade association representing conventional oil and natural gas producers, Pennsylvania Oil and Gas Association ("POGAM"), merged and the name

of the merged organization changed to its present name. PIOGA's membership currently is approximately 380 members: oil and natural gas producers developing both conventional and unconventional formations in Pennsylvania; drilling contractors; service companies; engineering companies; manufacturers; marketers; Pennsylvania Public Utility Commission-licensed natural gas suppliers ("NGSs"); professional firms and consultants; and royalty owners. PIOGA promotes the interests of its members in environmentally responsible oil and natural gas operations, as well as the development of competitive markets and additional uses for Pennsylvania-produced natural gas. PIOGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

The Texas Alliance of Energy Producers ("Texas Alliance") became a statewide organization in 2000 with the merger of two of the oldest oil & gas associations in the nation: the North Texas Oil & Gas Association and the West Central Texas Oil & Gas Association. The Texas Alliance is now the largest statewide oil and gas association in the country representing Independents. With members in 34 states, the Texas Alliance works on behalf of our members at the local, state, and federal levels on issues vital to the industry. The Texas Alliance is a non-profit entity, has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

The Texas Independent Producers & Royalty Owners Association ("TIPRO") is a trade association representing the interests of 3,000 independent oil and natural

gas producers and royalty owners throughout Texas. As one of the nation's largest statewide associations representing both independent producers and royalty owners, members include small family businesses, the largest, publicly-traded independent producers, and mineral owners, estates, and trusts. Members of TIPRO are responsible for producing more than 85 percent of the natural gas and 70 percent of the oil within Texas, and own mineral interests in millions of acres across the state. TIPRO has no parent corporation and there is no publicly-held corporation that owns more than 10% of its stock.

Chartered in 1915, the West Virginia Oil and Natural Gas Association ("WVONGA") is one of the oldest trade organizations in the State, and is the only association that serves the entire oil and gas industry. The activities of our members include construction, environmental services, drilling, completion, gathering, transporting, distribution, and processing. WVONGA has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Respectfully Submitted,

/s/ James D. Elliott

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Dated: September 28, 2020

("EKOGA"), Illinois Oil & Gas Association ("IOGA"), Independent Oil and Gas Association of West Virginia, Inc. ("IOGA-WV"), Indiana Oil and Gas Association ("INOGA"), Kansas Independent Oil & Gas Association ("KIOGA"), Kentucky Oil & Gas Association ("KOGA"), Michigan Oil and Gas Association ("MOGA"), Ohio Oil and Gas Association ("OOGA"), Pennsylvania Independent Oil & Gas Association ("PIOGA"), Texas Alliance of Energy Producers ("Texas Alliance"), Texas Independent Producers & Royalty Owners Association ("TIPRO"), and West Virginia Oil and Natural Gas Association ("WVONGA") (collectively, "Independent Producers") certifies that the parties, including intervenors, and *amici curiae* in this case are as set forth below. Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), a disclosure statement for Movant-Intervenor as required by Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 is being filed herewith. Because this case involves direct review in this Court of agency action, the requirement to furnish a list of parties, including intervenors, and *amici curiae* that appeared below is inapplicable.

Petitioners:

No. 20-1357: State of California, by and through Attorney General Xavier Becerra, and the California Air Resources Board; the State of Colorado, by and through Attorney General Philip J. Weiser and the Colorado Department of Public Health and Environment; State of Connecticut; State of Delaware; State of Illinois; State of Maine; State of Maryland; Commonwealth of Massachusetts; People of the State of Michigan; State of Minnesota; State of New Jersey; State of New Mexico;

State of New York; State of North Carolina; State of Oregon; Commonwealth of Pennsylvania; State of Rhode Island; State of Vermont; Commonwealth of Virginia; State of Washington; the City of Chicago; the District of Columbia; the City and County of Denver.

No. 20-1359: Environmental Defense Fund; Sierra Club; Natural Resources Defense Council; National Parks Conservation Association; Ft. Berthold Protectors of Water and Earth Rights; Food & Water Watch; Environmental Integrity Project; Earthworks; Clean Air Council; and Center for Biological Diversity.

No. 20-1363: Environmental Law and Policy Center.

Respondents: Andrew R. Wheeler, Administrator, U.S. Environmental Protection Agency, and the United States Environmental Protection Agency are the Respondents.

Intervenors: The American Petroleum Institute, the Western Energy Alliance and the GPA Midstream Association have filed motions to intervene but it does appear that the Court has acted upon those motions at the time of this filing.

Amici Curiae: There are no *amici curiae* at the time of this filing.

Respectfully Submitted,

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Dated: September 28, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(f) and (g), I hereby certify that the foregoing motion complies with the type volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,302 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in 14-point Garamond font.

Respectfully Submitted,

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Dated: September 28, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of September 2020, I am causing the foregoing motion and accompanying documents to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

Respectfully Submitted,

/s/ James D. Elliott

James D. Elliott (DC Bar #46965)