

ORAL ARGUMENT NOT YET SCHEDULED

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

STANDING ROCK SIOUX TRIBE;
YANKTON SIOUX TRIBE, ROBERT
FLYING HAWK, CHAIRMAN OF THE
YANKTON TRIBE BUSINESS AND
CLAIMS COMMITTEE; OGLALA SIOUX
TRIBE,

Plaintiffs-Appellees,

and

CHEYENNE RIVER SIOUX TRIBE;
STEVE VANCE,

Intervenors for Plaintiff-Appellees

v.

No. 20-5197

UNITED STATES ARMY CORPS OF
ENGINEERS,

Defendant-Appellee,

and

DAKOTA ACCESS LLC

Intervenor for Defendant-Appellant

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Proposed *Amici Curiae* the American Fuel & Petrochemical Manufacturers

(“AFPM”), American Petroleum Institute (“API”), Association of Oil Pipe Lines

(“AOPL”), Chamber of Commerce of the United States of America (“Chamber”), and the National Association of Convenience Stores (together, the “Proposed *Amici*”), through undersigned counsel, respectfully move this Court, pursuant to Federal Rule of Appellate Procedure 29(3), for leave to file a brief of *amici curiae* in this matter. The proposed amicus brief is attached hereto.

Amici’s Interest. *Amici* are associations whose members have a significant interest in the uninterrupted and safe transportation of North American-produced crude oil, including entities that account for the overwhelming majority of petroleum products that are transported, manufactured, and sold in the United States.

The American Fuel & Petrochemical Manufacturers is a national trade association representing most U.S. refining and petrochemical manufacturing capacity. AFPM’s member refineries and petrochemical facilities receive crude oil and other liquids products via the midstream sector, which includes pipelines, rail roads, barges, tankers, and trucks. AFPM’s member companies have an interest in ensuring that they consistently and reliably receive the North American crude oil volumes that are necessary to meet U.S. energy consumption demand. AFPM’s member refineries and petrochemical facilities rely on pipelines as the safest and most cost-efficient way to transport their feedstocks and products.

The American Petroleum Institute is a national trade association that represents all aspects of America’s oil and natural gas industry. API’s more than

600 corporate members, from the largest major oil company to the smallest of independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry.

The Association of Oil Pipe Lines is a nonprofit national trade association that represents the interests of oil pipeline owners and operators before the United States Congress, regulatory agencies, and the judiciary. AOPL's members operate pipelines that carry approximately 97% of the crude oil and petroleum products moved by pipeline in the United States, extending over 218,000 miles in total length. These pipelines safely, efficiently, and reliably deliver more than 21 billion barrels of crude oil and petroleum product each year, consistent with safety regulations implemented by the federal Pipeline and Hazardous Materials Safety Administration ("PHMSA").

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members, and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the

Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

Founded in 1961, the National Association of Convenience Stores is a non-profit trade association representing more than 1,900 retail and 1,800 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience store operators. In 2019, the convenience and fuel retailing industry employed approximately 2.46 million workers and generated \$647.8 billion in total sales, representing approximately 3 percent of U.S. Gross Domestic Product. Of those sales, approximately \$395.9 billion came from fuel sales alone.

Desirability and Importance of This Amicus Brief. The standard for issuing a stay pending appeal requires this Court to consider irreparable harm and the public interest. The amici's member-companies represent all facets of the energy industry, from pipelines to producers to refiners to convenience stores that sell refined products made from DAPL-transported crude oil directly to consumers. Amici's members represent extensive national, regional, and local business interests affected by the operation of, any closure of, the pipeline. Amici are thus well positioned to help this Court fully evaluate the effect that the District Court's orders have on the industry and the public as a whole, as well as the merits of the legal issues in this case.

Dated: July 13, 2020

/s/ David H. Coburn

David H. Coburn (DC # 241901)
Joshua H. Runyan (DC # 977664)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036
Telephone: (202) 429-8063
Facsimile: (202) 429-3902
dcoburn@steptoe.com

*Attorneys for American Fuel &
Petrochemical Manufacturers, the
American Petroleum Institute, the
Association of Oil Pipe Lines and
National Association of Convenience
Stores*

Richard Moskowitz
Tyler J. Kubik
AMERICAN FUEL &
PETROCHEMICAL
MANUFACTURERS
1800 M Street, NW
Suite 900 North
Washington, D.C. 20036
(202) 457-0480
*Counsel for American Fuel &
Petrochemical Manufacturers*

Andrea S. Miles
John Wagner
Paul G. Afonso
AMERICAN PETROLEUM
INSTITUTE
200 Massachusetts Avenue, NW
Suite 1100
Washington, D.C., 20001
(202) 682-8000
Counsel for American Petroleum Institute

Steven M. Kramer (DC # 416762)
ASSOCIATION OF OIL PIPE
LINES
900 17th Street, NW, Suite 600
Washington, D.C. 20006
(202) 408-7970
*Counsel for Association of Oil Pipe
Lines*

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337
*Counsel for Chamber of Commerce
of the United States*

CERTIFICATE OF SERVICE

I, David H. Coburn, hereby certify that on July 13, 2020, I caused a true and correct copy of a copy of the foregoing document to be served on all parties of record via the CM/ECF system.

/s/ David H. Coburn

David H. Coburn (DC # 241901)

STEPTOE & JOHNSON LLP

1330 Connecticut Ave., NW

Washington, D.C. 20036

Telephone: (202) 429-8063

Facsimile: (202) 429-3902

dcoburn@steptoe.com

*Attorneys for American Fuel &
Petrochemical Manufacturers, the American
Petroleum Institute, the Association of Oil
Pipe Lines and National Association of
Convenience Stores*

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David H. Coburn
Joshua H. Runyan
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 429-3000
dcoburn@steptoe.com
jrunyan@steptoe.com

***AMICI CURIAE* BRIEF OF THE AMERICAN FUEL &
PETROCHEMICAL MANUFACTURERS, AMERICAN PETROLEUM
INSTITUTE, ASSOCIATION OF OIL PIPE LINES, CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA, AND
NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT
OF DAKOTA ACCESS, LLC'S EMERGENCY MOTION FOR STAY
PENDING APPEAL**

CORPORATE DISCLOSURE STATEMENT

The *Amici Curiae* state that they have no parent corporations and no publicly held company owns 10% or more of any amicus's stock.

/s/ David H. Coburn

David H. Coburn

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GLOSSARY

AFPM	American Fuel & Petrochemical Manufacturers
API	American Petroleum Institute
AOPL	Association of Oil Pipe Lines
Chamber	Chamber of Commerce of the United States of America
Corps	U.S. Army Corps of Engineers
Dakota Access	Dakota Access, LLC
DAPL	Dakota Access Pipe Line
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
NACS	National Association of Convenience Stores
NEPA	National Environmental Policy Act
PHMSA	Pipeline and Hazardous Materials Safety Administration

INTRODUCTION

Hundreds of millions of barrels of oil (amounting to 4.5% of the nation's crude oil supply) have been safely transported by the Dakota Access Pipe Line ("DAPL") for over three years. Producers and refineries have come to rely on DAPL, and consequently so have fuel retailers and consumers. Thousands of jobs in the North Dakota oil industry and thousands more outside that state depend on DAPL for their employment. The District Court's June 20 Order forcing the indefinite closure of DAPL by August 5, 2020 would cause substantial disruption to the nation's energy supply during a time of unprecedented economic uncertainty. To prevent the inevitable and irreparable injury that would result from any DAPL shut down, *Amici* file this brief in support of Dakota Access, LLC's ("Dakota Access") motion for emergency stay.

STATEMENT OF COUNSEL

Pursuant to Rule 29(d), amici certify that a separate brief is necessary to provide the perspective of these business and industry amici. Amici further state that no counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 39(a)(4)(E).

INTEREST OF AMICI

Amici are associations whose members have a significant interest in the uninterrupted transportation of North American-produced crude oil, including entities that account for the overwhelming majority of petroleum products that are transported, manufactured, and sold in the United States.

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workers and generated \$647.8 billion in total sales, representing approximately 3 percent of U.S. Gross Domestic Product. Of those sales, approximately \$395.9 billion came from fuel sales alone.

ARGUMENT

A stay is warranted because of the substantial and irreparable injury that will befall a broad range of energy businesses, state governments, workers and consumers were the District Court's orders to become effective. The public's interest in continued DAPL operations is unmistakable, while Plaintiffs will suffer no injury because DAPL's safety is comprehensively regulated by PHMSA. Coupled with the likelihood that Dakota Access will prevail on appeal, the case for a stay is overwhelming.

I. Absent a Stay, Amici's Members and the Public Interest Will Be Irreparably Harmed

The irreparable injury and public interest factors of the stay analysis under D.C. Cir. Rule 8(a)(1) strongly support a stay and likewise militate against vacatur under the applicable *Allied-Signal*, 988 F.2d 146 (D.C. Cir. 1993) test. Pipelines such as DAPL safely transport significant volumes of unrefined petroleum products from extraction points to refinery destinations in North America and beyond.

Pipeline systems are “the safest means to move these products,”¹ enabling the safe delivery of billions of tons of energy products each year.²

DAPL plays an integral role in our nation’s economy, transporting over a third of all oil produced in the Bakken (ER446-447 ¶¶5-7), amounting to 4.5% of all crude produced in the United States (ER1315-1316 ¶6), some of which is refined into jet fuel for the Department of Defense. Since the pipeline was placed into service in 2017, DAPL has enhanced market access to regional-produced crude by creating the most cost-effective solution for the transportation of North Dakota crude to sought-after refinery markets, which has in turn allowed Bakken producers to substantially grow production. ER447-448 ¶10.

Without DAPL, the closure of some North Dakota wells is inevitable. DAPL is the only pipeline purposefully designed to provide an economic conduit to transport 40% of Bakken crude output to refineries in Illinois and the Gulf Coast. *Id.* If DAPL closes, the use of indirect pipelines to reach refineries could cause the transportation of Bakken crude to become uneconomical, even assuming that other pipelines have sufficient excess capacity (which they do not). ER448-449 ¶¶11-13. The loss of DAPL’s refinery markets would in turn lead to up to 7,000 job losses in

¹ See PHMSA FAQs, available at <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs>.

² See <https://www.phmsa.dot.gov/data-and-statistics/pipeline/annual-report-mileage-hazardous-liquid-or-carbon-dioxide-systems>.

oil and gas extraction alone. ER1334 ¶11(e); ER460 ¶27 (Hess will be required to furlough or layoff some of its 1,500 workforce). There is also no certainty that such jobs would return – typically, 50-80% of shuttered wells are permanently abandoned. ER435 ¶10.

The closure of DAPL for at least a year while an EIS is prepared would severely impact the refineries it services and disrupt the distribution of product to end-users. ER449-450 ¶15. DAPL connects to other pipelines that serve refineries located in the Midwest and the Gulf Coast, where 80% of the U.S. refining capacity is located. These refineries depend on the pipeline for the reliable shipment of crude oil to produce gasoline, diesel, and other products for consumers and to further U.S. energy security. The refineries that receive DAPL-transported crude are configured to refine the crude's unique characteristics. *Id.* Given recent economic events that have adversely impacted crude production, substitute crude may not be immediately available to these refineries and, even if available, may not be economic, resulting in production cuts. While production has already been cut due to the pandemic, a recovery has begun. A DAPL closure will irreparably devastate the competitiveness of numerous refineries that rely on its crude, impairing their ability to fully recover in this economic climate and putting them at risk of possible closure and concomitant

job loss. For consumers, less refined product will translate into higher prices for gasoline at the pump.³

Other pipeline companies have constructed and developed gathering systems that collect Bakken crude from production sites and feed that crude directly into the DAPL pipeline. ER450 ¶16. If DAPL closes, the pipeline infrastructure operated by these companies would become worthless. *Id.* Absent significant and immediate investment in new infrastructure – which is highly unlikely in the current economic environment – much North Dakota crude will effectively have no outlet. Accordingly, a DAPL shutdown “threaten[s] national security by making the entire national crude oil transportation system less efficient.” ER1259 ¶19.

DAPL operations also benefit local and regional economies up and down the supply chain. ER447 ¶9. The closure of DAPL for the thirteen months that it would take the Corps to prepare an EIS would cost North Dakota over \$1 billion in lost oil and gas tax revenues. ER431 ¶10. Not only would this tax revenue be irreparably lost at this worst possible time of economic contraction, but DAPL also supports additional economic activity for surrounding states. ER447 ¶9. Its closure would

³ There are 142 billion gallons of gasoline sold in the United States each year. <https://www.eia.gov/energyexplained/gasoline/use-of-gasoline.php>. Given those figures, a price increase of 1 cent per gallon of gasoline across the country would cost American consumers \$3,890,410.96 per day.

thus have a domino effect, lessening revenue and annual sales, thereby leading to “higher unemployment in these states,” and less money for schools, etc. *Id.*

These certain, extensive, and irreparable impacts at a local, regional, and industry-wide level warrant that this Court stay the District Court’s orders. *Nat’l Parks Conservation Ass’n v. Semonite*, 422 F. Supp. 3d 92, 100 (2019) (declining to vacate a Corps permit while agency prepared EIS to avoid “serious, disruptive consequences” resulting from vacatur).

II. Plaintiffs Will Not be Harmed By a Stay

Plaintiffs, by contrast, will not be harmed by a stay. They have suffered no environmental harm to their resources over the last three years of DAPL operation and will not be harmed by its continuation. The miniscule risk of a major discharge from the pipeline is 1 in about 200,000 years. *Dakota Access Br.*, ER941 ¶21; *see also* ECF 551-1, at 22. PHMSA’s enforcement of its safety standards and emergency preparedness requirements under 49 C.F.R. Parts 194 and 195 will ensure that DAPL continues to safely operate while the Corps prepares any required EIS. ER663 ¶8 (DAPL was installed via a tunneling method known as HDD to virtually “eliminate any foreseeable risk of oil reaching . . . Lake Oahe”).

Should any release occur, PHMSA requires Dakota Access to have adequate measures in place to respond to any release and mitigate impacts to Plaintiffs’ resources. 49 C.F.R. Part 194. EPA can also require the full clean-up and

remediation of the release. 33 U.S.C. 1321. And the Oil Spill Liability Trust Fund will reimburse Plaintiffs for any costs and damages, including natural resource damages, resulting from a release, thereby ensuring that no irreparable injury results. 33 C.F.R. Part 136. The harms Plaintiffs seek to avoid are thus already mitigated through extensive federal regulation.

Nor will Plaintiffs suffer any procedural harm under NEPA while the Corps prepares any required EIS – the Corps has already confirmed that it will conduct an impartial review regardless of whether DAPL remains operational. *See* ECF 507, at 10. In fact, the continued impacts from DAPL’s operation, which have been occurring over the last three years, will only help to inform any Corps’ EIS, should one be required.

III. Dakota Access is Likely to Prevail on the Merits

The Corps was correct in concluding that it need not prepare an EIS because there are no “highly controversial” issues concerning the spill-related issues identified by the District Court that an EIS might resolve. 40 C.F.R. 1508.27. A federal action is “controversial” “where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use.” *Town of Cave Creek, Ariz. v. FAA*, 325 F.3d 320, 332 (D.C. Cir. 2003). The controversy surrounding a project is “especially intense” where “many of those raising concerns-methodological or otherwise-are themselves government agencies

with special expertise.” *Nat’l Parks Conservation Ass’n v. Semonite*, 916 F.3d 1075, 1084 (D.C. Cir. 2019).

The District Court erred in finding that Plaintiffs’ safety and spill-related concerns create a significant enough controversy unaddressed in the Corps’ EA to warrant an EIS. PHMSA, the federal agency that heavily regulates pipeline safety and spill response, raised no objection to the EA. PHMSA’s regulations directly address all supposed “controversial” issues identified by the District Court, leaving the Corps with nothing to resolve in an EIS. For example, the District Court ordered the Corps to further assess the sensitivity of DAPL’s leak detection, but PHMSA already requires DAPL to have in place leak detection systems to identify potential releases within the sensitivity levels available under existing technology. 49 C.F.R. 195.452(i)(3); ER957 ¶9 (confirming DAPL’s leak detection system can detect a “pinhole” leak). The District Court ordered an EIS to further assess spill records of DAPL’s operators, but PHMSA regulations expressly require that an operator’s leak detection system must account for leak history. *See* 49 C.F.R. 195.452(i)(3) (“[a]n operator’s evaluation [to identify an appropriate leak detection system] must, at least, consider . . . leak history”). And PHMSA’s regulations already answer the District Court’s call for an EIS study of DAPL’s worst-case discharge methodologies and Dakota Access’ ability to respond to a release in “adverse weather.” 49 C.F.R. 194.5 and 194.105 (specifying methodology for assessing a

worst-case discharge in adverse weather).

Further study of these issues through an EIS would not better inform the Corps' easement decision because they are already comprehensively regulated. Nor would an EIS change the unchallenged fact that the risk of a leak is exceedingly small. Further, an EIS is unlikely to lead to any additional measures to enhance the pipeline's safety beyond PHMSA requirements and DAPL procedures already in place. NEPA regulates procedures; it cannot preclude the Corp's substantive reissuance of the easement to Dakota Access. *See Myersville Citizens for a Rural Comm., Inc., v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015).

Even assuming that an EIS is required, the vacatur of the Corps' easement for DAPL while that EIS is prepared "is simply not the law."⁴ *See, e.g., Ocean Advocates v. USACE*, No. C00-1971L, 2005 WL 2035053, at *2 (W.D. Wash. Aug. 22, 2005) (remanding to prepare an EIS without vacating the Corps' approval); *Backcountry Against Dumps v. DOE*, No. 3:12-cv-03062-L-JLB, 2017 WL 3712487 at *6 (S.D. Cal. Aug. 29, 2017) (ECF No. 128) (declining to vacate permit after finding EIS deficient).

The District Court erred in applying *Allied-Signal* by focusing on what it perceived as the "serious" need for the Corps to prepare an EIS under NEPA, instead of whether the Corps can "reach[] the same result" after preparing that EIS. *Black*

⁴*Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002).

Oak Energy, LLC v. F.E.R.C., 725 F.3d 230, 244 (D.C. Cir. 2013). The District Court having already found that the Corps sufficiently addressed all other environmental issues raised by DAPL opponents, it is reasonable to assume that the Corps would exercise its “informed discretion,” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989), to reaffirm its easement decision on remand based on PHMSA regulation. The unprecedented step of requiring DAPL to cease operating in the interim was thus unwarranted.

CONCLUSION

The continued operation of DAPL to safely and reliably transport crude to refineries in the Midwest and elsewhere is consistent with the safe transportation of oil about which the Plaintiffs profess concerns. The public interest weighs heavily in favor of staying the District Court’s orders. The continued operation of DAPL will cause no irreparable harm, and its closure will extensively harm industry, state governments, workers, and the consuming public.

RESPECTFULLY SUBMITTED this 13th day of July 2020.

/s/ David H. Coburn

David H. Coburn (DC # 241901)
Joshua H. Runyan (DC # 977664)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036
Telephone: (202) 429-8063
Facsimile: (202) 429-3902
dcoburn@steptoe.com

*Attorneys for American Fuel &
Petrochemical Manufacturers, the
American Petroleum Institute, the
Association of Oil Pipe Lines and
National Association of Convenience
Stores*

[Additional counsel listed on next page]

Richard Moskowitz
Tyler J. Kubik
AMERICAN FUEL &
PETROCHEMICAL
MANUFACTURERS
1800 M Street, NW
Suite 900 North
Washington, D.C. 20036
(202) 457-0480
*Counsel for American Fuel &
Petrochemical Manufacturers*

Andrea S. Miles
John Wagner
Paul G. Afonso
AMERICAN PETROLEUM
INSTITUTE
200 Massachusetts Avenue, NW
Suite 1100
Washington, D.C., 20001
(202) 682-8000
Counsel for American Petroleum Institute

Steven M. Kramer (DC # 416762)
ASSOCIATION OF OIL PIPE
LINES
900 17th Street, NW, Suite 600
Washington, D.C. 20006
(202) 408-7970
*Counsel for Association of Oil Pipe
Lines*

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337
*Counsel for Chamber of Commerce
of the United States*

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume requirements of Federal Rule of Appellate Procedure 27(d)(2) because the motion contains 2,577 words;

and

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman font.

Dated: July 13, 2020

/s/ David H. Coburn

David H. Coburn (DC # 241901)

STEPTOE & JOHNSON LLP

1330 Connecticut Ave., NW

Washington, D.C. 20036

Telephone: (202) 429-8063

Facsimile: (202) 429-3902

dcoburn@steptoe.com

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I, David H. Coburn, hereby certify that on July 13, 2020, I caused a true and correct copy of a copy of the foregoing document to be served on all parties of record via the CM/ECF system.

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David H. Coburn (DC # 241901)

STEPTOE & JOHNSON LLP

1330 Connecticut Ave., NW

Washington, D.C. 20036

Telephone: (202) 429-8063

Facsimile: (202) 429-3902

dcoburn@steptoe.com

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

Case Caption: Standing Rock Sioux Tribe et al.

v.
U.S. Army Corps of Engineers et al.

Case No: 20-5197

ENTRY OF APPEARANCE

The Clerk shall enter my appearance as [X] Retained [] Pro Bono [] Appointed (CJA/FPD) [] Gov't counsel
for the [] Appellant(s)/Petitioner(s) [] Appellee(s)/Respondent(s) [] Intervenor(s) [X] Amicus Curiae below:

Party Information

(List each represented party individually - Use an additional blank sheet as necessary)

American Fuel & Petrochemical Manufacturers

American Petroleum Institute

Association of the Oil Pipe Lines

National Association of Convenience Stores

Counsel Information

Lead Counsel: David H. Coburn

Direct Phone: (202) 429-8063 Fax: (202) 429-3902 Email: dcoburn@steptoe.com

2nd Counsel: Joshua H. Runyan

Direct Phone: (202) 429-8129 Fax: (202) 429-3902 Email: jrunyan@steptoe.com

3rd Counsel:

Direct Phone: () - Fax: () - Email:

Firm Name: Steptoe & Johnson LLP

Firm Address: 1330 Connecticut Avenue, NW, Washington, DC 20036

Firm Phone: (202) 429-3000 Fax: (202) 429-3902 Email:

Notes: This form must be submitted by a member of the Bar of the U.S. Court of Appeals for the D.C. Circuit.
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