No. _____

In the Supreme Court of the United States

SAN CARLOS APACHE TRIBE

Petitioner,

v.

STATE OF ARIZONA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Queen Creek is sacred to members of the San Carlos Apache Tribe. For over a century, nearby mines have discharged copper into Queen Creek, causing it to fail water quality standards, harming Apache Holy Beings (Ga'an), and interfering with traditional Apache religious beliefs. The policy of the United States is that the chemical, physical, and biological integrity of Queen Creek be restored and maintained. *See* 33 U.S.C. § 1251(a). Accordingly, federal regulations impose strict requirements on new sources of pollution before they discharge into impaired waterways. *See*, *e.g.*, 40 C.F.R. § 122.4(i), Part 440.

In 2007, Resolution Copper Mining, LLC ("Resolution") began constructing one of the largest copper mines in modern history near an old mine that had been exhausted in 1996. In 2017, Resolution applied to the Arizona Department of Environmental Quality ("ADEQ") to renew the old mine's discharge permit and included the new mine with it.

Rather than conduct a "new source analysis" as required by governing regulations, ADEQ capitulated and renewed the permit, treating the new mine as part of the existing source. The Arizona Supreme Court affirmed, also departing from the regulation's plain text, thereby committing an error of law. Rather than consider whether the new mine is operationally independent, as 40 C.F.R. § 122.29(b) requires, the court invented a "material connection" test out of whole cloth and determined that the gargantuan new mine is merely an extension of the exhausted mine.

By departing from the regulation's plain text, the Arizona Supreme Court failed to apply the method of interpretation this Court requires. *See Cty. of Maui v.*

Haw. Wildlife Fund, 590 U.S. 590, 140 S. Ct. 1462 (2020); R. Sup. Ct. 10(c). As the only published opinion explaining how to perform a new source analysis, the state court opinion will have catastrophic consequences not only on Queen Creek, but also on waterways throughout the Nation. This Court should grant certiorari and direct regulators and courts across the Nation how to determine when newly constructed sources of pollution may be included within an existing discharge permit and when, like here, they must be treated as new sources.

The questions presented are:

(1) Did the Arizona Supreme Court err by determining that 40 C.F.R § 122.29(b)'s new source analysis is satisfied by merely finding a "material connection" between a newly constructed source of polluted discharge and an existing source rather than considering whether the new source operationally depends on the existing source?

(2) Did the Arizona Supreme Court err by determining that new source performance standards for copper mines in 40 C.F.R. § 440.104 do not "independently apply" to Resolution's new mine?

PARTIES TO THE PROCEEDINGS

Petitioner, the San Carlos Apache Tribe, a federally recognized Indian Tribe, was the appellant before the Arizona Superior Court, appellant before the Arizona Court of Appeals, and respondent before the Arizona Supreme Court.

Respondents the State of Arizona and Arizona Department of Environmental Quality were respondents before the Arizona Superior Court, Appellees before the Arizona Court of Appeals, and Petitioners before the Arizona Supreme Court.

Respondent Resolution Copper Mining, LLC was an intervenor before the Arizona Superior Court, Intervenor/Appellee before the Arizona Court of Appeals, and Petitioner before the Arizona Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner the San Carlos Apache Tribe represents that it does not have any parent entities and does not issue stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *San Carlos Apache Tribe v. State of Arizona, et al.*, Superior Court of Arizona, Maricopa County, No. LC2019-00264-001. Judgment entered March 25, 2021.
- *San Carlos Apache Tribe v. State of Arizona, et al.*, Arizona Court of Appeals, No. 1 CA-CV 21-0295. Opinion filed November 15, 2022.
- *San Carlos Apache Tribe v. State of Arizona, et al.*, Arizona Supreme Court, No. CV-22-0290-PR. Opinion filed June 27, 2024.

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Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 167 (2012) 16, 17, 20

PETITION FOR CERTIORARI

Queen Creek is a tributary of the Gila River that flows east to west from the Superstition Mountains through the central Phoenix Basin. Since time immemorial, Queen Creek and its surrounding streams, creeks, springs, and seeps have been considered sacred to members of the San Carlos Apache Tribe ("Tribe") and their ancestors. To this day, Queen Creek bears tremendous cultural and religious importance in traditional Apache religious practice, because spiritual beings (Ga'an) reside in its waters.[1] Queen Creek is also a source of Apache food and medicine.

For over a century, nearby mines have discharged copper into Queen Creek, causing it to fail water quality standards under the Clean Water Act ("CWA"), harming Apache Ga'an, and thus, threatening traditional Apache religion and spirituality. The express policy of the CWA is to "restore and maintain the chemical, physical and biological integrity" of the Nation's navigable waters, including Queen Creek. *See* 33 U.S.C. § 1251(a); *see Cnty. of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 140 S. Ct. 1462 (2020). Consequently, federal regulation imposes strict regulations on new sources that would discharge pollution into impaired waterways. *See* 40 C.F.R. § 122.4(i), Part 440.

In 2007, Resolution Copper, LLC ("Resolution") began constructing a new copper mine near Queen Creek. While new copper mines are hardly

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[1] *See* Testimony of Chairman Terry Rambler, San Carlos Apache Tribe, Hearing before the Committee on Energy and Natural Resources, United States Senate (Feb. 9, 2012), https://www.congress.gov/event/112th-congress/senate-event/LC3611/text; Goodwin, Grenville, White Mountain Apache Religion, *American Anthropologist*, 40:24-37, 1938, at 24, 27.

uncommon in Arizona, *this* massive copper mine will be unlike any ever constructed in the United States. Resolution anticipates that over the mine's forty-year lifespan it will produce 20 million tons of copper—equivalent to 25 percent of the United States' copper demand. It will also cause the land above the mine to subside up to 1,000 feet and drain the entire Apache Leap tuff aquifer that has stood above the ore body for eons.[2] Water that flows into this new mine will become contaminated with copper, and Resolution seeks authorization to discharge that copper-contaminated water into Queen Creek.

The Clean Water Act does not outright prohibit Resolution from obtaining a permit to do so, but it first imposes strict requirements. The threshold issues—and subjects of this petition—are (1) how to perform the new source analysis required by 40 C.F.R. § 122.29(b); and (2) whether the Resolution Mine is a new source.

By its plain text, subsection 122.29(b) establishes a three-prong test: a source is a new source if (1) its construction began after applicable new source performance standards were promulgated; (2) it is operationally independent from existing sources; and (3) new source performance standards "independently apply" to it.

ADEQ, Arizona's regulatory agency charged by Environmental Protection Agency with administering discharge permits, misinterpreted and misapplied this simple test, allowing Resolution to completely

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[2]Wells, James, *The Proposed Resolution Copper Mine and Arizona's Water Future*, September 21, 2021, available at https://static1.squarespace.com/static/556e05ade4b0b54303ce3544/t/6470ef67e2f78b310b8f56b1/1685122922028/Dr.+Wells+Report+on+Water+Impacts+from+Resolution+Copper+Mine+%289-28-21%29+%28003%29.pdf (last visited, September 21, 2024).

bypass the CWA's protections. ADEQ, and later the Arizona Supreme Court, determined that this unprecedented new mine was a mere extension of the nearby Magma Mine, which has been shuttered for nearly 30 years.

Under subsection 122.29(b), the Resolution Mine is not an "existing source" of copper-contaminated discharge, but a "new source" because (1) its construction began after new source performance standards for copper mines were promulgated; (2) it is operationally independent of the Magma Mine; and (3) new source performance standards independently apply to its discharge. *See* 40 C.F.R. § 122.29(b).

Queen Creek is worthy of protection, and the Tribe seeks no more protection than what the CWA provides to all waterways across the country. Yet, the Arizona Supreme Court in *SCAT II* sets a bad precedent that threatens to undo federal regulation and the intent of Congress under the CWA. This Court should grant certiorari to provide definitive, final guidance on Subsection 122.29(b)'s "new source" analysis, which governs the challenging balance between government efforts to protect and develop two of our Nations' most vital natural resources: copper and clean water.

OPINIONS BELOW

The Arizona Supreme Court's opinion is published at 550 P.3d 1096 ("*SCAT II*"). The Arizona Court of Appeals' opinion is published at 254 Ariz. 179, 520 P.3d 670 ("*SCAT I*").

JURISDICTION

The Arizona Supreme Court filed its opinion on June 27, 2024. *See* R. Sup. Ct. 13.1. That opinion turns on the interpretation of federal statutes and regulations that the Tribe pressed below, particularly 40 C.F.R. §§ 122.2, 122.29, 440.104 and 440.132. This

Court has jurisdiction. *See* 28 U.S.C. § 1257; *Illinois v. Gates*, 462 U.S. 213, 216-217 (1983). Supreme Court Rule 14.1(e)(v) does not apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the federal statutes and regulations cited in this petition, including 40 C.F.R. §§ 122.2, 122.29, 440.104 and 440.132, are reproduced at APP-156-66.

STATEMENT OF THE CASE

A. Development and Exploitation of the Magma and Resolution Mines.

The Magma and Resolution mines and the ore bodies they exploit are vastly separate and distinct; the mines are built centuries apart, utilize different mining methods, and the new mine will outproduce the old mine fifteen times over.

The facts are not in material dispute. *SCAT II*, 550 P.3d 1096, ¶ 70. In 1911, the Magma Copper Company ("Magma") began constructing a mine on the West Plant Site northwest of Superior that would yield 1.3 million tons of copper by the time it was exhausted in 1996. *Id.* at ¶ 4; APP-109-10. The Magma Mine chased the vein of the high-grade Magma Ore Body using the "adit" (tunnel) mining method accessed through eight mine shafts that Magma drilled around the West Plant Site. APP-109-10. In 1971, Magma constructed "Shaft 9" on the East Plant Site, a non-contiguous parcel two miles east of Superior, to mine the Magma Ore Body from the east. APP-110. At that time, Magma also constructed the Never Sweat Tunnel to connect the East and West Plant Sites. *Id.*

In 1996, all operations related to the Magma Mine ceased when its ore body was depleted, and BHP Copper, Inc. ("BHP") succeeded Magma. *Id.* BHP allowed the Magma Mine to flood and backfilled much of its underground workings including Shafts 1 through 7. *Id.* This marked the end of the Magma Mine.

In 1994, Magma discovered what would become known as the Resolution Ore Body—a new, large, virgin lode of low-grade copper ore sitting beneath Tonto National Forest. *See SCAT II*, 550 P.3d 1096, ¶¶ 9-13. The Resolution Ore Body lies 4,500 to 7,000 feet below the surface, far deeper than the Magma Ore Body and so deep that it can only be mined by robots due to temperatures that exceed 150 degrees. APP-109.

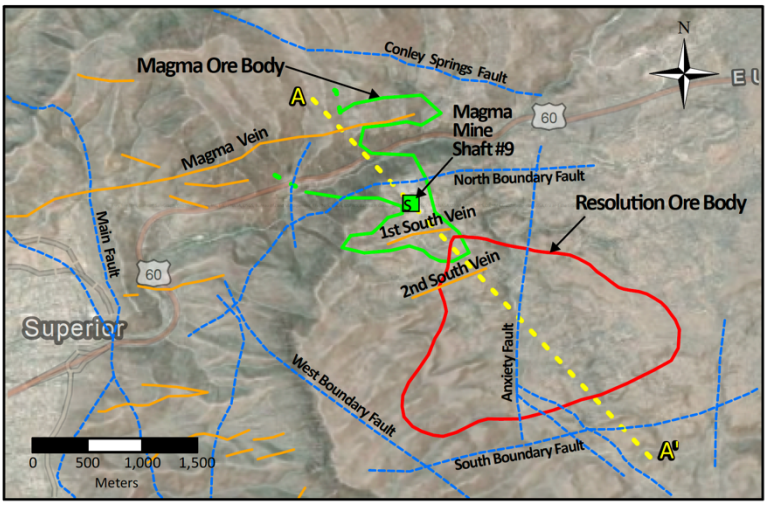

FIGURE 1. OBLIQUE VIEW SHOWING RESOLUTION ORE BODY IN RELATION TO MAGMA ORE BODY

Note: Adapted from Hehnke, et. al., 2012

The Resolution Ore Body sits south and east of the East Plant Site and is separate from, and unrelated to, the Magma Ore Body. APP-108-09.

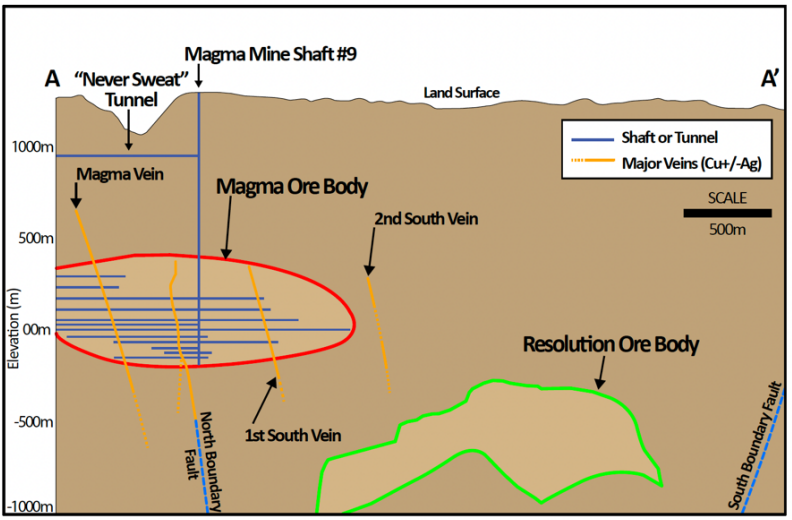

FIGURE 2 - GEOLOGIC CROSS-SECTION SHOWING RESOLUTION ORE BODY IN RELATION TO MAGMA ORE BODY

Notes: 1. Adapted from Hehnke, et al. 2012;
2. Refer to Figure 1 for the location of cross-section.

In 2004, BHP and Rio Tinto formed Resolution as a joint venture and transferred to it all interests and rights they held in the West Plant Site, East Plant Site, and the Resolution Ore Body.[3] *SCAT II*, 550

[3]Because the Resolution Ore Body sits beneath Tonto National Forest, Resolution began lobbying Congress to transfer that land to it in exchange for far less valuable land elsewhere in Southeastern Arizona. Those efforts resulted in hearings before Congress in which members of the Tribe testified about the sacred character of Oak Flat and the devastating impact of its destruction by Resolution's mine. Resolution's efforts to obtain the land failed eight times between 2005 and 2013 until the land exchange was appended at the last minute to a must-pass National Defense Authorization Act for fiscal year 2015 without being reviewed and considered by Congress at the time of voting. *See* 2005 H.R. 2618, 2005 S.1122; 2006 H.R. 6373, 2006

P.3d 1096, ¶ 12. In 2007, Resolution began constructing active mining areas that will support the Resolution Mine, including Shaft 10, which extends 7,000 feet below ground, as well as cooling towers, a wash bay, and water treatment plant. *Id.*; APP-110-11.

Once completed, the Resolution Mine will consist of a complex network of underground mineworks that will extract ore using the panel caving method. APP-109. The Resolution complex will include the Resolution Mine and numerous facilities on the East and West Plant Sites, some of which were formerly associated with the Magma Mine. Resolution projects that over its 40-year production life, the new mine will yield 20 million tons of copper and consume some 750,000 acre-feet of water, most of which will be discharged as copper effluent in one form or another.

B. ADEQ Erroneously Treats the Resolution Mine as an Existing Source, and the Tribe's Files Its Challenge

In 2017, Resolution applied to renew the discharge permit[4] that ADEQ previously issued for the shuttered Magma Mine and included active mining areas that will exclusively serve the new Resolution Mine. This includes the newly drilled "Shaft 10" on the East Plant Site and the beginnings of a complex network of automated mineworks that Resolution is

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S.2466; 2007 H.R. 3301, 2007 S.1862; 2008 S.3157; 2009 H.R.2509; 2010 H.R. 4880; 2011 H.R.1904; 2013 H.R. 687, 2013 S.339; and 2014 H.R.39979.

[4]The Environmental Protection Agency authorized ADEQ to administer the National Pollution Discharge Elimination Systems within Arizona on December 5, 2002. Arizona Statute applies the federal standards to all tributaries and reaches of the Gila River, among others. *See* A.R.S. §§ 29-201-38, 49-221(G)(1)(b), 49-255(2)(a).

constructing beneath the Resolution Ore Body. ADEQ renewed the permit—without conducting a "new source" analysis—treating the Resolution Mine as an existing source and part of the old, defunct Magma Mine. *SCAT I*, 520 P.3d 670, ¶ 15-16.

The Tribe challenged ADEQ's decision before the Water Quality Appeals Board ("Board") arguing that the Resolution Mine is a "new source" under 40 C.F.R. §§ 122.2 and 122.29. *Id.*; APP-98, 101-02. In November 2018, the Board remanded the matter to ADEQ instructing it to conduct a "new source" analysis. *Id.* ¶ 17.

In 2019, ADEQ completed a truncated new source analysis, in which it determined that the Resolution Mine was an existing source. *Id.* ADEQ erroneously reasoned that because performance standards apply to "the mine as a whole" (*i.e.*, the combination of all "active mining areas" on both sites), the analysis begins and ends with the date that Magma began constructing its original "mine"—1911. *Id.* The Tribe appealed this decision to the Board, which affirmed. *Id.* ¶ 18.

The Tribe appealed the Board's 2019 decision to the Arizona Superior Court arguing under 40 C.F.R. §§ 122.2 and 122.29 that the Resolution Mine is a new source and that the Board's erroneous new source analysis was inconsistent with federal regulations. *Id.* ¶ 20; APP-83-83. However, the Superior Court deferred to ADEQ and affirmed the Board's decision. *SCAT I*, 520 P.3d 670, ¶ 20.

The Tribe appealed to the Arizona Court of Appeals, which reversed, determining that the Resolution Mine was a new source under 40 C.F.R. §§ 122.2 and 122.29. *Id.* ¶ 72. The Court of Appeals rejected ADEQ's erroneous "mine-as-a-whole"

interpretation, which had confused the regulatory definitions of "mine," "active mining area," and "site."[5] *Id.*¶¶ 30-61; *see* 40 C.F.R. §§ 122.2, 440.132(a), (g). The Court of Appeals correctly determined the Resolution Mine is a "new source" because its construction began after 1982, it is "substantially independent" of the Magma Mine, and new source performance standards independently apply to it. *SCAT I*, 520 P.3d 670, ¶¶ 52-61.

Resolution and ADEQ sought review with the Arizona Supreme Court, which accepted review, reversed the Court of Appeals, and determined that the Resolution Mine is not a "new source." Although the court agreed with the Tribe that §§ 122.2 and 122.29(b) require regulators to consider only newly constructed items and not "the mine as a whole," it determined that the Resolution Mine was not independent of the Magma Mine because the two shared a "material connection." *SCAT II*, 550 P.3d 1096, ¶ 63. Further, the court failed to analyze the mineworks that Resolution is constructing under the Resolution Ore Body, but instead focused its analysis on a solitary mineshaft, "Shaft 10"—a term that the Parties and lower courts used as shorthand for all the new active mining areas associated with the Resolution Mine. *Id.* ¶¶ 69-71. In other words, the

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[5]In short, an "active mining area" is a place where "extraction, removal, or recovery of metal ore" takes place. 40 C.F.R. § 440.132(a). A "mine" is a type of active mining area; it is defined as "an active mining area . . . used in or resulting from the work of extracting metal ore . . . from [its] natural deposits." 40 C.F.R. 440.132(g). A "site" is the broadest term and means "the land or water area where any 'facility or activity' is physically located or conducted, including adjacent land used in connection with the facility or activity." Thus, any mining site may include multiple active mining areas some of which may be mines.

court failed to analyze the mine itself that will be the source of copper-contaminated discharge.

REASONS TO GRANT CERTIORARI

This Court provides the definitive and final interpretation of federal law to guide lower courts and agencies fulfilling federal mandates. Presently, the only published opinion interpreting how agencies must perform a new source analysis is the Arizona Supreme Court's erroneous decision that departs from the plain text of the very regulation establishing that analysis. *See* 40 C.F.R. § 122.29(b). *See* R. Sup. Ct. 10(c) (certiorari warranted when "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court").

Further, because new source analyses are frequently the domain of state administrative function, federal judicial review is not only rare, but often subject to the factual determinations of agency officials. As such, published opinions presenting pure legal questions on undisputed facts are infrequent and this Court should take the opportunity to weigh in and provide a consistent framework for Subsection 122.29(b)'across the various jurisdictions in the country.

Moreover, the undisputed facts of the case warrant asking this Court to take a fresh look and definitively interpret the governing regulations. The new Resolution Mine is a colossal undertaking that is legally, factually, and facially independent of the Magma Mine. Resolution projects that its new mine will supply the equivalent of 25% of the Nation's

copper demand,[6] making it one of the most profitable copper mines in the world and a project that Resolution would pursue apart from any connection to the Magma Mine. Further, the Resolution Mine will mine an entirely separate, virgin ore body, use a different extraction method, and will out-produce the Magma Mine fifteen times over in half the time.

Presently, *SCAT II* is the only published authority instructing regulators how to perform a "new source" analysis under 40 C.F.R. § 122.29(b). *Cf. National Wildlife Federation v. E.P.A.*, 286 F.3d 554, 568-70 (D.C. Cir. 2002) (determining specific regulation categorizing new fiber lines as a "new source" did not create an irrebuttable presumption); *Manasota-88, Inc. v. Thomas*, 799 F.2d 687 (11th Cir. 1986)

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[6]This is a projection of volume, not a commitment to deliver copper to producers or consumers in the United States. Resolution Copper Mining Limited Liability Company is owned by Rio Tinto (Australia/England) and BHP (Australia). Rio Tinto owns 55% of Resolution Copper, and BHP owns 45%. Shining Prospect Private Limited Company, based in Singapore, is a holding company that owns over 14% of Rio Tinto, making it the single largest shareholder of Rio Tinto, *see* https://www.sharecafe.com.au/2024/04/05/rio-tintos-annual-share-buyback-battle/ (last visited Sept. 23, 2024). Shining Prospect PLC is wholly owned by Chinalco, a holding company of the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) of the People's Republic of China, *see* https://www.chinalco.com.cn/en/en_gywm/en_qyjj/ (last visited Sept. 23, 2024).
Resolution has long been exploring expansion at the Port of Guaymas to ship its copper to China. *See Port of Guaymas Set to Expand*, Arizona Daily Star (Apr. 5, 2012), https://tucson.com/business/local/port-of-guaymas-set-to-expand/article_1faea8eb-20bf-5fa3-b22c-95d98727a374.html (last visited Sept. 23, 2024).

(summarily determining disposal area "cannot logically be viewed apart" from its source).

Allowing *SCAT II* to stand would not only have grave consequences for Queen Creek and the Tribe, but it would also jeopardize all impaired waterways across the country, as the Arizona Supreme Court's opinion is the only authority on the subject. Most importantly, *SCAT II's* test completely undermines Congress' intent for the CWA to restore Queen Creek and other similarly situated waters faced with the discharge from new mines and other new sources of pollution.

This Court must provide definitive, final guidance to regulators and courts by establishing how to perform a new source analysis under 40 C.F.R. § 122.29(b). *See* R. Sup. Ct. 10(c). This Court should not allow this erroneous state court decision to stand because it involves an important question of federal law and has been decided in a manner that conflicts with relevant decisions of this Court. *See id.*

THE ARIZONA SUPREME COURT DISREGARDED THE THREE-PRONG TEST IN THE PLAIN TEXT OF SUBSECTION 122.29 AND ADOPTED AN UNSUPPORTED "MATERIAL CONNECTION" TEST

Federal regulation establishes a three-prong test to determine whether new construction constitutes a new source. *See* 40 C.F.R. § 122.29(b). New construction is a new source if:

> (1) . . . it meets the definition of "new source" in § 122.2,[7] and

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[7] 40 C.F.R § 122.2 defines a new source, in relevant part, as: "any building, structure, facility, or installation from which

> (i) It is constructed at a site at which no other source is located; or
>
> (ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
>
> (iii) Its processes are substantially independent of an existing source at the same site. . . .
>
> (2) A source meeting the requirements of paragraphs (b)(1) (i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger.

Put in simpler terms, new construction is a "new source" when (1) its construction begins after EPA promulgates new source performance standards, *see* 40 C.F.R. § 122.2; (2) it is operationally independent of other sources, *see* 40 C.F.R. § 122.29(b)(1)(i)-(iii); and (3) it is independent for regulation. *See* 40 C.F.R. § 122.29(b)(2).

Rather than interpret and apply the plain text of these regulations in context, the Arizona Supreme Court departed from it, cutting a new "material connection" test out of whole cloth. This contradicts this Court's precedent regarding the interpretation of federal regulations. *See Green v. Brennan*, 578 U.S. 547, 553 (2016) ("we begin our interpretation of the regulation with its text"); *also, S.D. Warren Co. v.*

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there is or may be a 'discharge of pollutants,' the construction of which commenced . . . [a]fter promulgation of standards of performance under section 306 of CWA which are applicable to such source . . . ."

Maine Bd. of Envtl. Prot., 547 U.S. 370, 376 (2006) (absent regulatory definition, courts must construe terms "in accordance with [their] ordinary or natural meaning"). Only when the text is unclear does this Court turn to other canons of construction. *Green*, 578 U.S. at 553; *Cty. of Maui*, 150 S. Ct. at 1468 (determining plain text of "from" in statute did not mean "fairly traceable" or proximately caused).

A. First Prong: Do Performance Standards Predate Construction?

The first prong of the new source analysis requires determination of whether the new construction meets the definition of a "new source" in 40 C.F.R. § 122.2. Section 122.2 defines a "new source" as "any building, structure, facility or installation from which there is or may be a 'discharge of pollutants,' the construction of which commenced . . . [a]fter promulgation of standards of performance . . . which are applicable to such source." Under § 122.2, the newly constructed facilities alone are at issue and nothing else.

The Arizona Supreme Court correctly determined that the first prong focuses solely on the new construction and not the date that construction began on an entire site. *SCAT II*, 550 P.3d 1096, ¶¶ 41-50. Thus, the court properly rejected ADEQ's interpretation of this prong that focused on the date that Magma originally began construction on the West Plant Site in 1911.[8] Under 40 C.F.R. § 122.2,

[8]Below, ADEQ and Resolution advanced an erroneous "mine-as-a-whole" interpretation that would render § 122.2 and § 122.29(b) meaningless surplusage. They argued that because construction of the Magma Mine began in 1911, no copper mine on site could ever have a later date. If the inquiry began and ended with whether operations existed on site (or a related site) before 1982, there would be no need to evaluate the remaining prongs. A new source analysis would only occur on vacant sites.

the Resolution Mine is a "new source" because its construction began in 2007, a quarter century after new source performance standards for copper mines were promulgated. *See Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards,* 47 Fed. Reg. 54598–600 (Dec. 3, 1982).

B. Second Prong: Is the New Source Operationally Independent.

Section 122.29(b)(1) provides three paths to establishing that new construction is operationally independent. It states, in part:

> [A] source is a 'new source' if . . . :
>
> (i) it is constructed at a site at which no other source is located; or
>
> (ii) it totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
>
> (iii) its processes are substantially independent of an existing source at the same site.

Here, the Resolution Mine either totally replaces the Magma Mine or is substantially independent from the Magma Mine. Either way, the Arizona Supreme Court, applying its "material connection" test, failed to analyze the Resolution Mine with an eye toward whether it is operationally independent of the depleted Magma Mine.

1. The Resolution Mine Totally Replaces the Magma Mine.

The Resolution Mine is operationally independent of the Magma Mine because it totally replaces it. A new source is independent in fact when it "totally

replaces the process or production equipment that causes the discharge of pollutants at an existing source." 40 C.F.R. § 122.29(b)(1)(ii). Within a mine, the source of pollution is the mine drainage that is "drained, pumped, or siphoned" from extraction areas. *See* 40 C.F.R. § 440.132(g), (h). In a mine, the process or production equipment associated with extraction is the same equipment which causes a discharge, as opposed to equipment associated with removal or recovery of metal ore. *See* 40 C.F.R. § 440.132(a), (g).

Here, neither Resolution, Magma, nor any other person or entity extracts metal ore from the Magma Mine. Accordingly, the Resolution Mine's new mineworks will totally replace the process and production equipment formerly used in the Magma Mine, which has not extracted metal ore since 1996.

2. The Resolution Mine is "Substantially Independent" of the Magma Mine.

Even if the Resolution Mine does not totally replace the Magma Mine, it is nevertheless "substantially independent" of the Magma Mine. *See* 40 C.F.R. § 122.29(b)(1)(iii). Whether a new source is "substantially independent" is determined under the totality of the circumstances. Section 122.29(b)(1)(iii) directs courts and regulators to "consider *such factors as* [(1)] the extent to which the new facility is integrated with the existing plant; and [(2)] the extent to which the new facility is engaged in the same general type of activity as the existing source." (Emphasis supplied). The phrase "such factors as" compels that these two factors are not exclusive.

Therefore, regulators and courts must, on a case-by-case basis and under the totality of the circumstances: consider all the relevant factors; determine how to evaluate them; and decide how

much weight each one deserves. In doing so, regulators and courts must interpret the plain text of these factors in context. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 167 (2012) (explaining that courts must interpret a statute's plain language in context).

Here, the necessary context for interpreting each factor is to ascertain whether a dependent relationship exists between the new and existing sources, such that the new depends upon the existing. Further, because the test considers all the circumstances, regulators and courts, in simplest terms, "just need to look at it." The Arizona Supreme Court erroneously interpreted the two express factors and failed to consider any others.

On the undisputed facts, the Resolution Mine is "substantially independent" from the Magma Mine because (1) the Resolution Mine operationally replaces the exhausted Magma Mine; (2) Resolution's repurposing of vestigial active mining areas does not show integration between the two mines; (3) by using a different mining method, the Resolution Mine will engage in a different type of activity than the Magma Mine; and (4) several more factors indicate that the Resolution Mine does not depend at all on the Magma Mine. Indeed, if one "just looks at" the Resolution Mine, it is obvious that it is substantially independent of the Magma Mine.

a. The Resolution Mine Replaces the Exhausted Magma Mine.

Even if the Resolution Mine does not totally replace the Magma Mine within the meaning of Subsection 122.29(b)(1)(ii), the facts supporting that ground are strong evidence that the Resolution Mine is "substantially independent" of the Magma Mine.

Again, the Magma Mine has been exhausted and it no longer creates mining discharge consequent to extraction of any ore. As such, all activity occurring in the Resolution Mine—and all discharge produced thereby—occurs independent of what may occur or formerly occurred in the Magma Mine.

The Resolution Mine is complete in and of itself and it does not depend on or owe its existence or operations to the Magma Mine. The convenient re-use of active mining areas that formerly supported the Magma Mine is merely an accident of history and a beneficial economic advantage that does not show a dependent relationship. This factor heavily weighs in favor of the conclusion that the Resolution Mine is "substantially independent" of the Magma Mine.

b. The Resolution Mine Is Not Integrated into the Magma Mine; Vestiges of the Magma Mine Are Integrated into It.

The first express factor in Subsection 122.29(b)(1)(iii) is "the extent to which the new facility is integrated with the existing plant." EPA guidance states that *minor* additions like "a new purification step" are highly integrated, while sharing "utilities" or a "treatment plant" constitutes nominal integration. *New Source Criteria* (40 CF 122.29(b)), 49 Fed. Reg. at 38,044 (Sept. 26, 1984).

As a starting point, the Resolution Mine is not a "*minor* addition" to the Magma Mine. Even if the Magma Mine were still in its heyday, the Resolution Mine with its thirty-fold increase in annual production would utterly dwarf it.

Moreover, the examples provided in the Federal Register are illustrative. A new purification step depends on the existing source. If an existing mine does not produce copper ore, the new step would have

nothing to purify. Such integration is strong evidence of dependence. Shared support facilities, however, such as utilities or a treatment plant, constitute nominal integration. If two mines draw electricity from a common power plant or send discharge to a common treatment plant, the shared plants do not place the mines in a dependent relationship with one another. Each mine will otherwise operate independently of the other and curtailing or expanding one will not impact the other.

The direction of any integration is also critical. If a new source is integrated into a dominant existing source, the new source is most likely dependent. By contrast, if vestiges of an existing source are subsumed into a new source such that the new dominates, then the new source is independent. Connections, borne out of mere convenience or economic prudence, do not evidence meaningful integration and do not show that a new source depends on an existing source.

Here, the undisputed evidence overwhelmingly demonstrates that the Resolution Mine is not integrated with the Magma Mine and that any integration is either nominal or shows that vestiges of the Magma Mine have been integrated into the Resolution Mine's operations. This includes the repurposing of the Never Sweat Tunnel and Shafts 8 and 9, which have not facilitated any extraction in the Magma Mine since 1996 but will be repurposed to support the Resolution Mine. The continued use of these vestiges depends on operations within the Resolution Mine. Any integration between them shows that the Resolution Mine dominates useful vestiges of the Magma Mine.

The Arizona Supreme Court failed to consider whether any integration between the mines shows a

dependent or independent relationship. Instead, the court simply asked whether the two mines shared a "material connection," which it found in the Never Sweat Tunnel and Shafts 8 and 9. *SCAT II*, 550 P.3d 1096, ¶¶ 53-56. By doing so, the court set a much lower bar. The "material connection" test the court invented falls short the plain text of the regulation by shifting the inquiry away from one focused on operational independence to one of mere physical connection. The court's test contradicts the regulation's text which requires determination of whether the new mine is "substantially independent."

The Arizona Supreme Court's interpretive shift is not permitted by the text of Subsection 122.29(b)(iii) and contradicts the method of interpretation required by this Court. In *County of Maui*, this Court reversed the Ninth Circuit when it similarly departed from the statutory text. *See* 140 S. Ct. at 1470. There, the lower court interpreted "from" in the CWA's prohibition on adding any pollutant to navigable waters "from any point source" not as a direct discharge or its "functional equivalent," but merely as "fairly traceable."[9] *Id.*; *see also* Scalia & Garner, *Reading Law*, 167 (2012) (explaining that courts must interpret a statute's plain language in context). Here, "material connection" does not fairly rise from regulatory text requiring analysis of whether a new source is so integrated into an existing source that it is operationally dependent on that existing source.

Further, the Arizona Supreme Court's new test is so unbounded that no new source may ever be

[9]In *County of Maui*, a wastewater treatment facility pumped partially treated sewage through four wells hundreds of feet underground, which then traveled half a mile or more through groundwater to the ocean. 140 S. Ct. 1469.

regarded substantially independent when located on site with another source—unless, of course, it meets the express examples of shared utilities or shared treatment facilities. *See* 49 Fed. Reg. at 38,044. The Resolution Mine is not in any way integrated with the shuttered Magma Mine, and this factor compels the conclusion that the Resolution Mine is "substantially independent" of the Magma Mine. This Court should grant certiorari lest other courts follow this flatly erroneous test.

c. Adit Mining Is Not the Same General Type of Activity as Panel Cave Mining.

The second nonexclusive factor is "the *extent* to which the new facility is engaged in the same general type of activity as the existing source." 40 C.F.R. § 122.29(b)(1)(iii) (emphasis added). By the regulation's plain text, the inquiry is not binary; *i.e.* the question is not whether both mines extract copper. Rather, regulators and courts are directed to consider the "*extent*" to which new and old "*engage*[] in the same general type of activity." *Id. (*emphasis supplied*).* The regulation begins with the premise that new and existing sources may engage in the same general type of activity (e.g. copper mining) but directs regulators and courts to consider the *degree* of similarity. This is a qualitative analysis aimed at facts that are material to whether a dependent relationship exists.

As with integration, EPA provides an explanation and example: if a plant "producing a final product . . . adds new equipment to produce the raw materials for that product . . . the proposed structure would likely constitute a new source." 49 Fed. Reg. at 38,043-44. Nevertheless, even if the new construction is engaged in the same type of activity, but "essentially replicates, without replacing, the existing source," it

too would be a new source.[10] *Id.* While this second example seems to counter the second express factor because the activities are identical, the thrust of the test is consistent. Like integration, the question is whether the operational characteristics of the new and existing sources evince a dependent relationship between them.

In other words, this factor is not a procrustean bed that allows a willing regulator to stretch the analysis to meet the requisite level of abstraction that will yield the desired result (*e.g.* copper mines become mines become exploitation of natural resources becomes economic activity). Rather, the factor must illuminate whether an otherwise new source is operationally independent of an existing source.

Here, the Magma Mine and Resolution Mine both mine copper but they are entirely dissimilar. The Magma Mine was an adit mine. While active, it chased a high-grade vein through tunnels in a manner that prevented collapse of the overburden. Consequently, it had a comparatively lower impact on the surface and aquifers that lie above.

By contrast, the Resolution Mine will use panel caving—a brute-force method that collapses an ore body from below along with the entire earth above it. As panels of ore collapse, a subsidence zone will form on the surface a thousand feet deep, and the depression will drain the entire Apache Leap tuff aquifer lying above. That aquifer, fed by rainwater and streams from time immemorial, will drain into the Resolution Mine in volumes far exceeding discharges from the Magma Mine. These mining methods are sharply different.

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[10]Note that total replacement is an independent ground for establishing independence in fact. *See* 40 C.F.R. 122.29(b)(1)(ii).

Additionally, the Resolution mine will more than replicate the production of the Magma Mine. *See* 49 Fed. R. 38,044. Indeed, the new mine is thirty times larger in terms of its projected annual production. The Resolution Mine is not a continuation of the Magma Mine, but a new, entirely separate mine that will produce additional discharge on top of any dewatering that occurs in the Magma Mine.

The Arizona Supreme Court erroneously characterized the Resolution Mine as a mere increase in capacity that results from adding equipment in one or two production steps. *SCAT II*, 550 P.3 1096, ¶ 59 (quoting 49 Fed. Reg. at 38,044). Further, the court analyzed only Shaft 10 and ignored the entire mineworks where extraction will occur. *Id.* ¶¶ 59-60. In other words, the court failed to analyze the Resolution Mine itself, and instead focused on a single mineshaft. *Id.* Worse, the court viewed the factor at a high level of abstraction—"the mining process"—and missed the forest for the trees. *Id.* ¶ 61.

To the extent the Magma Mine is engaged in any kind of activity (it is not), the difference in mining method between the two mines demonstrates that that they are not engaged in the same general type of activity. This factor weighs heavily in favor of substantial independence and warrants a new source designation. This Court should grant certiorari to articulate the correct test under this factor as well.

d. Several Other Factors Demonstrate that the Resolution Mine is Substantially Independent of the Magma Mine.

Several other factors support that the Resolution Mine is substantially independent of the Magma Mine. These include the extraordinary size and scale of the Resolution Mine and tremendous investment

that Resolution has made in constructing it. Whereas the Magma Mine produced 1.3 million tons of copper in eighty years from a high-grade ore body, the Resolution Mine will produce 20 million tons of copper in forty years from a separate, low-grade body.[11] This thirty-fold increase in annual production only represents the copper yield. Because the Resolution Mine will target a low-grade ore, it will extract more material per ton of copper produced.

Additionally, Resolution has invested over $2 billion in constructing the new mine since 2004.[12] Final construction will still take an additional ten years, and Resolution remains uncertain when the final stages will begin.[13]

Further, Resolution must also acquire title to U.S. Forest Service land through a land exchange.[14] To accomplish this, Resolution invested untold sums lobbying Congress for ten years before it passed legislation authorizing a land exchange that would allow it to exploit the Resolution Ore Body.[15] Indeed, the land exchange shows the Resolution Mine is completely disjoined from the Magma Mine insofar as it lies beneath Tonto National Forest and such areas as Oak Flat and Apache Leap. These areas are

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[11] *See* https://resolutioncopper.com/project-overview/ (last visited Sept. 23, 2024).

[12] *See* https://resolutioncopper.com/rio-tinto-approves-an-additional-302-million-investment-in-resolution-copper-project/) (last visited Sept. 23, 2024).

[13] https://www.riotinto.com/en/news/releases/2021/Resolution-Copper-project-enters-next-phase-of-public-consultation (last visited Sept. 23, 2024).

[14] This land exchange is the subject of a separate, unrelated petition for certiorari filed with this court in *Apache Stronghold v. U.S.*, No. 24-291.

[15] *See* fn. 4, *supra*.

spiritually, culturally, and historically significant to members of the Tribe.[16]

Resolution's extraordinary investment and the obstacles it seeks to overcome shows that the new mine is so valuable that Resolution would pursue it regardless of any supposed connection to the depleted Magma Mine. Instead, the proper lens to view any connection between the two is that in Arizona's Copper Triangle, exploration is the norm, and active mining areas associated with old mines often present beneficial opportunities for those looking to start new mines. Simply put, the Resolution Mine is not a continuation of the depleted Magma Mine.

The enormous size, cost, and complexity of the Resolution Mine are additional compelling factors demonstrating substantial independence. The Arizona Supreme Court failed to consider any of them despite that the regulatory text demands that regulators and courts consider all relevant factors. *See* 40 C.F.R. § 122.29(b)(1)(iii). Applying the text as written, all the relevant factors that one can conjure, including those expressly stated in Subsection 122.29(b)(1)(iii), show that the Resolution Mine is operationally independent of the Magma Mine and that it is a new source.

C. Third Prong: Do Regulations Independently Apply to the New Source?

Whether a "new source" is independent for regulation turns on whether a new source performance standard is "independently applicable" to it. 40 C.F.R. § 122.29(b)(2). If not, "the source is a new discharger." *Id.* The analysis begins with the new construction and simply considers whether that

[16] *See* fn. 1, *supra.*

construction—standing alone—would be subject to a "new source" performance standard. Here, 40 C.F.R. § 440.104(a) establishes new source performance standards for mine drainage. Subsection 440.132(h) defines "mine drainage" as "any water drained, pumped, or siphoned from a mine." Subsection 440.132(g) defines a mine as "an active mining area . . . used in or resulting from the work of extracting metal ore . . . from [its] natural deposits."

The Resolution Mine consists of all the new mineworks that Resolution is constructing below the Resolution Ore Body to extract copper ore from natural deposits. This new construction in and of itself independently meets the regulatory definition of a "mine." Further, Resolution will discharge mine drainage "drained, pumped, or siphoned" from those mineworks into Queen Creek. Accordingly, new source performance standards independently apply to the Resolution Mine; it is a "new source" for all purposes under § 122.29(b).

The Arizona Supreme Court made three legal errors in evaluating whether new source performance standards independently apply to the Resolution Mine. First, the court transformed the test into one that considers whether the performance standards at issue also apply to other sources on site; *i.e.*, whether the standards *only* apply to the new source and no other sources. *See SCAT II*, 550 P.3d 1096, ¶¶ 67-68. This is not the question. Rather, looking only to the new construction, the question is whether performance standards apply to that new construction.

Indeed, evaluating whether the same standards apply to other sources on a site would duplicate the analysis of the second prong (operational independence) by focusing on whether (1) the new

source is the only source on site; (2) the new source totally replaces an existing source; or (3) the new source is engaged in the same type of activity as an existing source.

Second, even if the regulation directed regulators and courts to evaluate all sources on site, the Arizona Supreme Court applied the test incorrectly. The Magma Mine is not subject to *new* source performance standards but standards for *existing* sources. *Compare* 40 C.F.R. § 440.102-03 (establishing "best practicable control technology" and "best available technology economically achievable" for existing sources) *with* 40 C.F.R. § 440-104 (new source performance standards). Even applying the court's erroneous test, new source performance standards *only* apply to the Resolution Mine.

Third, the Arizona Supreme Court constrained its analysis to Shaft 10 as a simple mineshaft and ignored all the new mineworks that Resolution is constructing that will extract copper ore and that will be the source of the mine drainage. *SCAT II*, 550 P.3d 1096, ¶¶ 69-71; *see* 40 C.F.R. § 440.132(g), (h) ("mine drainage" means "any water drained, pumped, or siphoned from a mine"; "mine" means "active mining area . . . used in or resulting from work of removing metal ore . . . from [its] natural deposits"). In other words, the court entirely failed to analyze the Resolution Mine itself, as the regulation requires. This analysis conflicts with ADEQ's stipulation that Shaft 10 and the other items under construction—*i.e.*, the Resolution Mine—are sources of mine drainage, and therefore, must be a mine. APP-146-47.

In summary, the Resolution Mine meets all three prongs of the "new source" analysis. *See* 40 C.F.R. § 122.29(b). First, Resolution began constructing its new mine in 2007, long after EPA promulgated

performance standards for copper mines. Second, the Resolution Mine is "independent in fact" either as a total replacement of the Magma Mine or as substantially independent of the Magma Mine. Third, the Resolution Mine is "independent for regulation" because it is a "mine" as defined in the regulations and will discharge mine drainage. *See* 40 C.F.R. §§ 440.104, 440.132(g), (h). This Court should grant certiorari, announce the proper method of conducting a new source analysis, and expressly determine that the Resolution Mine is new source under the CWA.

CONCLUSION

Few things are as important to the American Southwest as water and mining; and both often stand in conflict. While the mining sector plays a critical role in supplying essential minerals like copper, the CWA balances those interests against the need to maintain the quality of the Nation's waters. Congress' intent under the CWA is that common law principles alone cannot effectively control pollution and that waterways like Queen Creek must be restored and maintained; without review, the unchecked precedence of *SCAT II* will undermine that intent. This Court should grant certiorari and establish the proper interpretation of the new source analysis required by 40 C.F.R. § 122.29(b). Further, this Court should determine that the Resolution Mine is a new source.

Respectfully Submitted,

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September 25, 2024