

No. \_\_\_\_\_

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IN THE  
Supreme Court of the United States

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CHARLES THOMAS CLAYTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Consumer Price Index,<sup>1</sup> which is used to determine the “minimum filing requirement” amount for the filing of federal income tax returns, is a “rule” for Administrative Procedures Act purposes and is consequently void if not duly promulgated?

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<sup>1</sup> The petition for writ of certiorari filed in December, 2007, by Rachel McElhinney also raises an issue concerning the Consumer Price Index.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Thomas Clayton, M.D. (“Clayton”) respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit.

### OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a, is reported at 506 F.3d 405. The opinion of the district court, App., *infra*, 21a, is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 29, 2007. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### STATUTES INVOLVED

This petition concerns the definition of “rule” as set forth in the Administrative Procedures Act, and the relevant law provides in pertinent part as follows:

“For the purpose of this subchapter -

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“(4) ‘rule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice

requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;”

5 U.S.C. § 551.

This petition also concerns the requirement to make a federal income tax return, and the relevant law provides in pertinent part as follows:

“(a) General rule.

“Returns with respect to income taxes under subtitle A shall be made by the following:

“(1)(A) Every individual having for the taxable year gross income which equals or exceeds the exemption amount, \* \* \*.”

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“(D)(ii). The term ‘exemption amount’ has the meaning given such term by section 151(d).”

26 U.S.C. §6012.

The above section of the 1986 Internal Revenue Code references and is dependent on §151(d)(4), that provides in pertinent part as follows:

“(4) Inflation adjustments.

“(A) Adjustment to basic amount of exemption.

“In the case of any taxable year beginning in a

calendar year after 1989, the dollar amount contained in paragraph (1) shall be increased by an amount equal to –

“(i) such dollar amount, multiplied by

“(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting ‘calendar year 1988’ for ‘calendar year 1992’ in subparagraph (B) thereof.”

26 U.S.C. §151.

Section 151(d)(4) is dependent on the above referenced §1(f)(3), which provides as follows regarding calculation of the above mentioned “cost-of-living adjustment”:

“(3) Cost-of-living adjustment.

“For purposes of paragraph (2), the cost-of-living adjustment for any calendar year is the percentage (if any) by which –

“(A) the CPI for the preceding calendar year, exceeds

“(B) the CPI for the calendar year 1992.

“(4) CPI for any calendar year.

“For purposes of paragraph (3), the CPI for any calendar year is the average of the Consumer Price Index as of the close of the 12-month period ending on August 31 of such calendar year.

“(5) Consumer Price Index.

“For purposes of paragraph (4), the term ‘Consumer Price Index’ means the last Consumer Price Index for all-urban consumers

published by the Department of Labor. For purposes of the preceding sentence, the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1986 shall be used.”

26 U.S.C. §1(f)(3).

## STATEMENT OF THE CASE

### 1. Introduction.

This petition presents a crucial question affecting not only the federal government but also the American public. It concerns the method by which the rate of inflation, the Consumer Price Index (“CPI”), is determined. Presently, the CPI is calculated by the Department of Labor (“DoL”) and this calculation directly and indirectly affects hundreds of millions of people as well as the budget of the federal government itself. However, the American public, including any interested economist or statistician, plays no role in the determination of any CPI. Instead, for all that is known regarding the actual process by which the DoL determines any CPI, it is calculated in the hidden backrooms of government buildings by unelected bureaucrats.

Dr. Clayton’s petition directly raises the question of the legal validity of the DoL’s calculation of the CPI. While this issue is raised solely in the context of the CPI’s relationship to the requirement to make federal income tax returns, it is undeniable that this question is vastly broader than this context. Dr. Clayton contends that the determination and publication of the CPI by the DoL, which affects both

the American public and the federal government, must be adopted via the procedures mandated by the Administrative Procedures Act (“APA”), if any CPI is to be accorded the force and effect of law.

## 2. Factual Background.

Prior to indictment, Dr. Clayton was a Texas radiologist who practiced in Houston. Generally, through the years up to and through 1998, Dr. Clayton filed federal income tax returns and reported what he made from his medical practice on those returns. However starting in 2000, he commenced a study of the Internal Revenue Code, and that study lead him to conclude that he was not required to either file income tax returns or pay income taxes. He thereafter ceased filing income tax returns for the years 1999 and following. In 2001 and 2002, he filed returns to amend his previously filed tax returns for the years 1997 and 1998, and claimed therein that his income for these two years was “zero.” These actions lead to his indictment. See App., *infra*, 2a – 3a.

On April 4, 2006, a federal grand jury sitting in the Western District of Texas at Austin returned an 8 count indictment against Dr. Clayton. Counts 1 and 2 thereof charged violations of 26 U.S.C. §7206(1), and alleged that on April 10, 2001, Dr. Clayton filed a false, Form 1040X federal income tax return to amend his previously filed tax return for the year 1997 (count 1), and that on April 6, 2002, Dr. Clayton filed a false, Form 1040X federal income tax return to amend his previously filed tax return for the year 1998 (count 2). Counts 3 through 8 charged violations of 26 U.S.C. §7203 and asserted that for the tax years 1999 through 2004, Dr. Clayton had willfully failed to filed federal income tax returns.

On June 30, 2006, Dr. Clayton filed a motion to dismiss counts 3 through 8 of the indictment, which charged willful failure to file federal income tax returns. In this motion, Dr. Clayton asserted that the requirement to make federal income tax returns is governed by 26 U.S.C. §6012, which in turn relies upon 26 U.S.C. §151(d) for determination of the minimum, threshold filing requirement amount (the “exemption amount” in the terms of the statute). Dr. Clayton noted in his motion that since 1990, this minimum filing requirement amount has been indexed to the rate of inflation, the CPI, but there is nothing in either the tax code itself or relevant tax regulations that sets forth that amount for any year since 1990. Since an element of a willful failure to file a tax return case concerns the requirement to file such returns, and since the threshold filing requirement amount is not established by law, Dr. Clayton asserted that these counts of the indictment should be dismissed as a matter of law.

The prosecution’s reply to this motion was short, and its primary argument was set forth in a footnote in its brief: “To determine one’s exemption amount, a taxpayer has the choice of (1) reading the Form 1040 and/or the accompanying instructions for the pertinent tax year, both of which explicitly state the exemption amount for the various filing statuses, or (2) going through the more complicated process of cross referencing the statutes, regulations, and the consumer price index to calculate the same number referenced in option one. Either way, the taxpayer can accurately determine the threshold filing requirement for any given year.” The prosecution concluded its reply to Dr. Clayton’s motion with the argument that “[w]hether the exemption amount is enumerated in a code or

regulation is irrelevant to defendant's argument that he is not required to comply with a mere directive, as the exemption amount does not compel the defendant to act – section 7203 does.”

### 3. The District Court's Decision.

On August 2, 2006, the district court denied Dr. Clayton's motion, stating, “[t]he Court agrees with the Government that Defendant could easily have determined the exemption amount triggering the filing requirement in every year at issue by: (1) simply reading the Form 1040 and/or the accompanying instructions for the pertinent tax year, both of which state the exemption amount, or (2) going through the process of cross referencing the statutes, regulations, and the consumer price index to calculate the figure referenced in option one. The statutory requirement to file income tax returns is located in 26 U.S.C. §§ 6001, 6011, and 6012, while § 7203 makes the willful failure to file income tax returns a criminal offense. *See United States v. Bowers*, 920 F.2d 220, 221–23 (4th Cir. 1990) (upholding convictions in a tax evasion case because the federal regulations set forth sufficient advice on how to obtain the forms or information necessary to prepare a tax return). Here, if Defendant had taken the time to follow the cross references within the statutes and regulations, he would have been able to determine the amount of gross income that triggers the duty to file a tax return.” See App., *infra*, 22a – 23a.

The problem with the argument asserted by the prosecution and adopted by the district court is that it avoided addressing Dr. Clayton's central point: the CPI constitutes a “rule” for APA purposes and must be adopted accordingly, and this argument offered by the

prosecution simply assumed without question the validity of the CPI. The government has never asserted that any CPI has actually been adopted via APA procedures.

#### 4. The Fifth Circuit's Decision.

On appeal, Dr. Clayton alleged that the district court erred in denying the above mentioned motion to dismiss counts 3 through 8 of the indictment. As to the government's and district court's position that the minimum filing requirement amount (determined via the CPI) could legally be provided by the Form 1040 instruction manuals, Dr. Clayton argued that a wealth of decisional authorities,<sup>2</sup> including *Coliseum Square*

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<sup>2</sup> See also *Lynch v. United States Parole Com'n.*, 768 F.2d 491, 497 (2nd Cir. 1985); *Gatter v. Nimmo*, 672 F.2d 343, 347 (3rd Cir. 1982); *Appalachian Power Company v. Train*, 566 F.2d 451, 455 (4th Cir. 1977); *United States v. Harvey*, 659 F.2d 62, 64 (5th Cir. 1981); *Kwon v. INS*, 646 F.2d 909, 918 (5th Cir. 1981); *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 621 (5th Cir. 1994); *First Family Mortgage Corp. v. Earnest*, 851 F.2d 843, 845 (6th Cir. 1988); *Hocor v. U.S. Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996); *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 376 (8th Cir. 1974); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996); *Ramey v. Reinertson*, 268 F.3d 955, 963 (10th Cir. 2001); *Dufresne v. Baer*, 744 F.2d 1543, 1549-50 (11th Cir. 1984); *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1020-21 (D.C.Cir. 2000); and *Coalition for Common Sense in Government Procurement v. Secretary of Veterans Affairs*, 464 F.3d 1306 (Fed.Cir. 2006).

*Ass'n., Inc. v. Jackson*, 465 F.3d 215, 229 (5th Cir. 2006), precluded such use as a matter of law. In reference to Dr. Clayton's argument that the CPI constituted a "rule" for APA purposes, he relied on two cases from the D.C. and Federal Circuits: *Alaniz v. Office of Personnel Management*, 728 F.2d 1460 (Fed.Cir. 1984), and *Batterton v. Marshall*, 648 F.2d 694 (D.C.Cir. 1980). If the Fifth Circuit had adopted the rule established in *Alaniz* and *Batterton*, it would have held that Dr. Clayton's motion should have been granted and these counts of the indictment dismissed.

Instead, the Fifth Circuit established a new rule at variance with that in *Alaniz* and *Batterton*. The essence of the decision of the court of appeals is contained in a single sentence: "The fact that § 6012 incorporates by reference the CPI, which is compiled and published by an agency of the DOL, does not cause the APA to be invoked. In this context, the CPI is simply an ascertainable numerical standard, and there is no requirement that such a standard incorporated into a statute be itself an enforceable rule of law." App., *infra*, at 7a – 8a.

The courts in *Alaniz* and *Batterton* have concluded that numerical calculations by federal agencies (including the DoL), like "cost-of-living adjustments" and the rate of unemployment, are "rules" for APA and are void if such are not determined via the procedural requirements of the APA. In sharp contrast, the Fifth Circuit here has concluded precisely the opposite of that reached by the courts in *Alaniz* and *Batterton*.

## REASONS FOR GRANTING THE WRIT

All U.S. courts of appeals, including the Fifth Circuit, have rendered decisions<sup>3</sup> analogous to that asserted here by Dr. Clayton: edicts and commands of federal agencies affecting the public at large by having the effect of law constitute “rules” for purposes of the APA, 5 U.S.C. §551, et seq., and are void if the procedures required thereby are not followed. Regarding this petition and the question raised here, the Federal and D.C. Circuits have concluded that agency actions identical to the determination of the CPI constitute “rules” for APA purposes. In contrast, the Fifth Circuit in this case has decided that the determination of the CPI by the DoL, while clearly affecting the public, is not a “rule” for APA purposes. Certiorari should be granted to resolve this split in the circuits regarding a very important matter of concern.

1. Significance and Importance of the CPI.

There exists, for at least two reasons, an institutional motivation to determine the CPI as lower than the actual rate of inflation. First, via a wide number of federal laws, expenditures for items such as welfare benefits, salaries for federal employees, payments to private contractors, etc., are increased when the rate of inflation increases. Under-reporting the actual rate of inflation results in the reduction of the rate of increase for federal expenditures, a substantial cost-saving benefit.

Second, under-reporting the CPI results in greater tax revenues received by the government. Tax

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<sup>3</sup> See footnote 1.

receipts derived from the federal income tax are directly connected to the rate of inflation because tax rates are indexed to the CPI as set forth in 26 U.S.C. §1. As inflation pushes taxpayers into higher tax-brackets, tax revenues grow. If the tax-brackets do not rise as fast as the rate of inflation, real revenue growth occurs. Consequently for these two reasons, those DoL employees who actually calculate any CPI encounter a tremendous financial incentive to determine that rates of inflation are lower than they actually are.

These conclusions were reached by a 1996 federal Advisory Commission To Study The Consumer Price Index. This commission's report titled *Toward A More Accurate Measure Of The Cost Of Living*,<sup>4</sup> stated as follows:

“The CBO has provided the Commission with updated projections of the impact of hypothetical corrections (reductions) of 0.5 and 1.0 percentage point in cost of living adjustments for fiscal years 1997-2006. With a reduction of 0.5 percentage point the total contribution to deficit reduction rises to \$67.5 billion in 2006. Of this amount, an increase in revenue accounts for \$22.3 billion and reductions in outlays, including debt service, amounts to \$45.3 billion (of which debt service is \$13.1 billion).

“CBO projections for the impact of a hypothetical correction (reduction) in cost of

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<sup>4</sup> Available on the Internet at:  
<http://www.ssa.gov/history/reports/boskinrpt.html>

living adjustments of 1.0 percentage point are, of course, even more dramatic. The total change in the deficit in the year 2006 is \$134.9 billion. Federal revenues would be increased by \$44.5 billion and federal outlays reduced by \$90.5 billion; of the reduction in outlays \$26.1 billion can be attributed to lower debt service and \$64.4 billion to lower outlays on indexed programs.

“Stated differently, if the change in the CPI overstated the change in the cost of living by an average of one percentage point per year over this period, this bias alone would contribute almost \$135 billion to the deficit in the year 2006. That is one-third the projected baseline deficit (which assumes no policy changes such as the current balanced budget proposals). More remarkably, the upward bias by itself would constitute the fourth largest federal outlay program, behind only social security, health care and defense. By 2008, the increased deficit would be \$180 billion and national debt \$1 trillion.”

As shown by this report, understating or lowering any CPI results in a tremendous financial benefit for the federal government, including an actual increase in tax revenues. But, the CPI is not determined by Congress itself, which alone possesses the legislative power to tax, but instead by the DoL's Bureau of Labor Statistics, a federal agency lacking constitutional power to tax. Dr. Clayton asks via this petition a simple question: should not this number, upon which billions of dollars depend and which affects

millions of people, be determined with public participation according to the procedural requirements set forth in the APA?

Review of the relevant statute containing the APA definition of “rule” clearly demonstrates that the CPI really is a rule. A “rule” encompasses “the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing”; 5 U.S.C. § 551(4). The CPI prescribes for the “future” a “rate” commonly described as the “rate of inflation”, and it is effective at least until a new CPI is determined and published. To the extent it is used to increase the wages and salaries of federal employees, it fits this definition precisely. Furthermore, the CPI is directly composed by “valuations” of “prices” and thus is not merely a “practice[ ] bearing on” these matters. But most certainly, the CPI fits the more common definition of a “rule” because it plainly implements the law. Here, it implements the law regarding the making of an income tax return.

Almost a quarter century ago, the Illinois Supreme Court was confronted with the question of whether a state agency’s calculation of an “inflation-update factor” determined by the CPI was a rule for APA purposes. In *Senn Park Nursing Center v. Miller*, 104 Ill.2d 169, 178, 470 N.E.2d 1029 (1984), at issue were reimbursable costs owed to various nursing homes by a state agency, the amounts of such costs to be calculated via the CPI. That court held that there “is no doubt that the amended inflation-update procedure is an agency statement of general applicability. It does

implement a policy of the agency and is not a statement dealing only with the internal management of the agency. The rule does affect the rights and procedures available to people and entities outside the agency.”

At the time of the decision in *Senn Park*, the D.C. Circuit had already decided *Batterton v. Marshall*, 648 F.2d 694 (D.C.Cir. 1980). In *Batterton*, that court reviewed a change in the DoL’s method of measuring unemployment for the purpose of allocating CETA funds to the States. In noting that a change in this method would have a substantial impact on a State’s right to receive CETA funds, that court held:

“Advance notice and public participation are required for those actions that carry the force of law. These ‘legislative’ or ‘substantive’ rules can be issued only if Congress has delegated to the agency the power to promulgate binding regulations in the relevant area. Legislative rules thus implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed. Finally, legislative rules have substantive legal effect. They cannot be set aside by the courts unless found ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’,” *Id.*, at 701-02.

“Therefore, the development of statistics no longer serves merely informational purposes,

nor does it simply assist preliminary determinations prior to taking effective agency action. Instead, the chain of agency actions leading to allocation of funds under the emergency job program provides for agency discretion at only one link: the selection of statistical methodology for collecting and analyzing unemployment data. This certainly places DOL's selection of a statistical methodology within the APA's broad definition of rule as 'an agency statement . . . designed to implement . . . law,'" *Id.*, at 705.

"The critical question is whether the agency action jeopardizes the rights and interest of parties, for if it does, it must be subject to public comment prior to taking effect," *Id.*, at 708.

A few years later in *Alaniz v. Office of Personnel Management*, 728 F.2d 1460, 1467 (Fed.Cir. 1984), that court was required to determine the validity of a reduction in the increase of "cost-of-living adjustments" for federal employees living in Alaska. The percentage annual increase in COLAs for these employees was found to be a "rule" for APA purposes, although void:

"We have little difficulty in concluding that the district court correctly held that OPM's changes in the COLA methodology fit within the APA's definition of rulemaking. Section 551(5) (1982) defines rulemaking as 'agency process for formulating, amending, or repealing a rule.'

"These changes [modifications of the criteria in

the COLA methodology based on more recent data, changes in consumer preference, and changes in sociological patterns] can be characterized as legislation on an administrative level. They were intended to have a future effect on federal employees receiving COLA compensation in the Anchorage area. In addition, the court has no problem perceiving the changes as amendments to a prescription for wage rates. Based on the foregoing, OPM's modifications of the COLA methodology constitute rulemaking'."

*Alaniz* and *Batterton* are directly relevant to the issue raised in this petition by Dr. Clayton. There is no substantive difference between COLAs (the subject of *Alaniz*) and annual changes in the CPI, which is a factor used to determine the minimum filing requirement amount ("exemption amount") for the filing of tax returns. To determine this minimum filing requirement amount, the DoL must compile each CPI, which is a statistical methodology no different (in a legal sense) from the one used for unemployment purposes by the same DoL in *Batterton*.

*Alaniz* and *Batterton* conform to the general principles of a wide variety and large number of cases concerning the APA. All of these cases hold that any agency edict, command or declaration designed to implement or enforce law enacted by Congress and which affects the public are rules, and must be properly adopted as required by the APA. Typical of these decisions is *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1020-21 (D.C.Cir. 2000), which held:

“EPA tells us that its Periodic Monitoring Guidance is not subject to judicial review because it is not final, and it is not final because it is not ‘binding.’ \* \* \* It is worth pausing a minute to consider what is meant by ‘binding’ in this context. Only ‘legislative rules’ have the force and effect of law. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 & n. 31 (1979). A ‘legislative rule’ is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act. If this were all that ‘binding’ meant, EPA’s Periodic Monitoring Guidance could not possibly qualify: it was not the product of notice and comment rulemaking in accordance with the Clean Air Act, 42 U.S.C. § 7607(d), and it has not been published in the Federal Register. But we have also recognized that an agency’s other pronouncements can, as a practical matter, have a binding effect. See, e.g., *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988). If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes ‘binding.’ See Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the*

*Like — Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1328-29 (1992), and cases there cited.”

But the Fifth Circuit in this case involving Dr. Clayton has traversed the decisions not only in *Alaniz* and *Batterton*, but also decisional authorities in the same circuit<sup>5</sup> and many others. Its decision even conflicts with this Court’s opinion in *Christensen v. Harris County*, 529 U.S. 576 (2000), by giving to a number calculated by the DoL and published only on the Internet and in a few financial newspapers and periodicals the force and effect of law.

It is entirely possible that the CPI is perhaps the most significant “underground” regulation ever to exist in American society. It affects hundreds of millions of people and determines the flow of billions of dollars annually. An agency edict this profound deserves to be publicly determined, contrary to the decision of the Fifth Circuit here.

## CONCLUSION

The petition for writ of certiorari should be

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<sup>5</sup> See *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 621 (5th Cir. 1994)(“This change in valuation technique dramatically affects the royalty values of all oil and gas leases. Thus, the Procedure Paper should have been published in the Federal Register and offered for notice and comment. A party may not be adversely affected by a rule promulgated in violation of these requirements. 5 U.S.C. § 552(a)(1)”).

granted.

Respectfully submitted,

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