Andy Oldham

From:	Andy Oldham
Sent:	Monday, May 22, 2017 7:48 PM
To:	Kingo, Lola A. (OLP)
Cc:	(b)(6) - Andrew Oldham Email Address; Talley, Brett (OLP); Shannon, Gail
Subject:	Re: Background Investigation
Attachments:	SCAN_20170522184215.pdf

Dear Lola -- thank you very much. I am looking forward to working with you, too.

Attached are the SF86 Supplement, the Credit Check Waiver, and the Tax Waiver. The Immigration Addendum does not apply to me.

I will get started on the SF86 ASAP. And I already have two fingerprint cards, which I will take to the police station first thing in the morning. Thank you again.

Andy

On Mon, May 22, 2017 at 6:15 PM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:

> Dear Andrew,
>
> I work with Deputy Assistant Attorney General Brett Talley (copied) in the U.S. Justice Department's Office of Legal Policy, which vets candidates for federal judgeships. The White House has asked us to work with you on a series of forms that will be used in connection with your FBI background investigation. Our goal is to initiate your background investigation no later than **Friday, May 26.** Before we can initiate your background investigation, there are a number of documents for you to review and complete, mainly the:
>
> - **SF86 (completed via e-QIP)** — We have generated an SF86 for you to complete in e-QIP in connection with the FBI's background investigation. You should receive an email inviting you to get started on your SF86 from the Office of Personnel Management. To get started, please follow the attached e-QIP applicant instructions. If you have any trouble accessing e-QIP, please contact Gail Shannon (copied), who can be reached via email or during business hours at (724) 794-5612 x7764 (office) and after business hours at (724) 612-8679 (mobile).
>
> - **SF86 Supplement (attached Word DOC)** — In addition to the SF86 that you complete via e-QIP, please complete the attached SF86 Supplement.

- **Additional Instructions (attached Word DOC)** — The attached instructions are especially important because they contain instructions that **supersede** some of the instructions on the forms themselves (for example, we ask you to list your Residence and Employment Histories back to age 18, rather than just going back 7 years as the SF86 specifies). Please remember to sign the Additional Instructions.

- **Credit Check Waiver (attached PDF) and Tax Check Waiver (attached PDF)** — These are additional waivers needed for aspects of your background investigation. Please do not date or sign the tax check waiver electronically as it will delay processing, rather please handwrite the date and sign the hard copy.

- **Immigration Addendum (attached PDF)** — Only complete the Immigration Addendum if applicable to you.

- **Fingerprint Cards (sent via FedEx)** – We have mailed you two sets of fingerprint cards, which you should promptly take to your local police station, FBI office, or a private company, to get your fingerprints taken.

Once you have completed the SF86 via e-QIP, please release it back to OLP for review. Also, once you complete the SF86 Supplement, Additional Instructions, Waivers, and Immigration Addendum (if applicable), please email them to me. Finally, once your fingerprints are taken, please return the cards via overnight mail to the address in my signature block.

We look forward to working with you. If you have any questions about the forms, please let me know. I can be reached at 202-514-1818 (office) and (b) (6) (mobile). Thank you.

Lola A. Kingo

Senior Nominations Counsel

Office of Legal Policy (OLP)

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Room 4239

Washington, D.C. 20530

(202) 514-1818

Lola.A.Kingo@usdoj.gov

SF-86 Supplement

Note: For all of the following questions, *please provide as much detail as possible.*

1. Have you or your spouse ever registered as an agent for, performed work for, received any payments from and/or made any payments to, any foreign government, foreign business, or non-profit organization with any foreign government ownership? If yes, please provide:

a. Name of foreign government/business/non-profit with which you dealt;

b. Address/telephone of the organization(s);

c. Date of payment;

d. Amount of payment;

e. Circumstances.

(b) (6)

2. Has a tax lien or other collection procedure ever been instituted against you or your spouse by federal, state, or local authorities? If yes, please provide:

a. Date of tax lien/collection procedure;

b. Recipient of action (you and/or your spouse);

c. Source of action (specific local/state/federal authority);

d. Circumstances;

e. Resolution of the action.

(b) (6)

3. Have any claims of sexual harassment, racial discrimination, or any other workplace misconduct, ever been made against you or any employee directly supervised by you? If yes, please provide:

a. Type of claim;

b. Organization/business/entity where it took place;

c. Date of claim;

d. Your involvement in the claim;

e. Nature of allegations/circumstances;

f. Resolution of the claim.

(b) (6)

4. To your knowledge, have you or your spouse, or has either of your conduct been the subject of any civil or criminal case, administrative proceeding, or government investigation, other than a minor traffic infraction? If yes, please provide:

a. Type of proceeding (e.g., civil case);

b. Date(s) of proceeding;

c. Nature of your involvement, issue(s) and disposition;

d. Location of Records (e.g., court);

e. issues(s) and disposition;

f. Location of records (e.g. court).

g. Name/address/telephone of General counsel/other official

(b) (6)

5. Have you ever paid late or had lapses in payment of child support and/or alimony owed by you? If yes, please provide:

a. Date of late payment(s)/lapse(s);

b. State/local authority handling the matter;

c. Circumstances;

d. Resolution of the matter.

(b) (6)

6. Do you have any current or former professional licenses/membership such as bar associations, medical licenses, real estate licenses, etc.? If yes, please provide:

a. Type of license/membership;

b. Location;

c. License number;

d. Date issued/expiration;

e. Details of any complaints, citations, disciplinary actions, etc. against you.

I have three bar licenses.

Virginia State Bar, License Number 71330, Issued October 2005

District of Columbia Bar, License Number 999098, Issued February 7, 2011

Texas State Bar, License Number 24081616, Issued June 21, 2012

(b) (6)

7. With as much detail as possible, please provide any other information, including information about other members of your family, which could suggest a conflict of interest, be a possible source of embarrassment, or be used to coerce or blackmail you.

(b) (6)

(1/9/10)

THE WHITE HOUSE
WASHINGTON

PRIVACY ACT PROTECTED INFORMATION
(When Completed)

Disclosure and Authorization
Pertaining to Consumer Reports
Pursuant to the Fair Credit Reporting Act

This is a release for the Federal Bureau of Investigation and/or the Office of Counsel to the President, acting on the President's behalf, to obtain one or more consumer/credit reports about you in connection with consideration of your appointment to a position within the Executive Branch or the Federal Judiciary, or in the course of your employment with the Federal Government. One or more reports about you may be obtained for employment purposes, including evaluating your fitness for employment, promotion, reassignment, retention, or access to classified information.

I, ANDREW STEPHEN OLDHAM, hereby authorize the Federal Bureau of Investigation and/or the Office of Counsel to the President, acting on the President's behalf, to obtain such reports from any consumer/credit reporting agency for employment purposes.

Signature

May 22, 2017

(b) (6)

Social Security Number

U.S. Department of Justice **Tax Check Waiver**

I am signing this waiver to permit the Internal Revenue Service to release information about me which would otherwise be confidential. This information will be used in connection with my appointment or employment by the United States Government. This waiver is made pursuant to 26 U.S.C. §6103(c).

I request that the Internal Revenue Service release the following information to Lola Kingo (Senior Nominations Counsel), Bridget C. Coehins, or designee of U.S. Department of Justice:

1. Have I failed to file any Federal income tax return for any of the last three years for which filing of a return might have been required? (If the filing date without regard to extensions and normal processing period for most recent year's return has not yet elapsed on the date IRS receives this waiver, and the IRS records do not indicate a return for the most recent year, the "last three years" will mean the three years preceding the year for which returns are currently being filed and processed.)

2. Were any of the returns in #1 filed more than 45 days after the due date for filing (determined with regard to any extension(s) of time for filing)?

3. Have I failed to pay any tax, penalty or interest during the current or last three calendar years within 45 days of the date on which the IRS gave notice of the amount due and requested payment?

4. Am I now or have I ever been under investigation by the IRS for possible criminal offenses?

5. Has any civil penalty for fraud been assessed against me during the current or last three calendar years?

I authorize the IRS to release any additional relevant information necessary to respond to the questions above.

To help the IRS find my tax records and the Department of Justice to evaluate my tax history, I am voluntarily giving the following information:

MY NAME: ANDREW STEPHEN OLDHAM MY SSN: (b) (6)
(Please print or type)

CURRENT ADDRESS: (b) (6)

TELEPHONE NUMBERS: (HOME) (b) (6) (WORK) (b) (6)
(Please include area codes)

IF MARRIED AND FILED A JOINT RETURN:

SPOUSE'S NAME: (b) (6) SPOUSE'S SSN: (b) (6)

NAMES AND ADDRESSES SHOWN ON RETURNS (IF DIFFERENT FROM ABOVE)

YEAR	NAME	ADDRESS

1. If a tax return for any of the last three years was not filed, please explain why in the space provided below.

2. If a tax return for any of the last three tax years was filed more than 45 days after the due date for filing, please explain why in the space provided below.

3. If a tax payment for any of the last three tax years was made more than 45 days after notice and demand, please explain why in the space provided below.

4. If there was insufficient income to meet filing requirements or filing requirements were met by filing with a foreign tax agency (e.g., Puerto Rico or the Virgin Islands), please describe the circumstances in the space provided below.

DATE: May 22, 2018
(Waiver Invalid Unless Received
By the IRS Within 60 Days of This Date)

(Signature of Taxpayer Authorizing the
Disclosure of Return Information)

DOJ-488A (Rev. 10/97)

Andy Oldham

From:	Andy Oldham
Sent:	Monday, May 29, 2017 7:35 PM
To:	Kingo, Lola A. (OLP)
Cc:	Talley, Brett (OLP)
Subject:	Re: Background Investigation
Attachments:	SCAN_20170529182228.pdf

Lola -- I completed the SF86, uploaded the signatures and certifications, and then released everything back to you using the E-QIP site. Also, I am attaching a signed version of the "Additional Instructions" for the SF86, which I followed.

I think I have completed all of the background investigation paperwork. And my FedEx records show that my fingerprint cards were delivered last week. But please let me know if there's anything else you need from me.

Thank you again for everything.

Sincerely,
Andy Oldham
(b) (6)

On Mon, May 22, 2017 at 6:15 PM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:

Duplicative Material

Additional Instructions for Completing Standard Form 86
"Questionnaire for National Security Positions"

YOU MUST READ AND FOLLOW CAREFULLY THE FOLOWING INSTRUCTIONS WHEN COMPLETING THE STANDARD FORM 86 (SF-86). NOTE THAT IN A NUMBER OF IMPORTANT RESPECTS THESE ADDITIONAL INSTRUCTIONS VARY FROM THE INSTRUCTIONS PRINTED ON THE FORM ITSELF.

GENERAL INSTRUCTIONS

Although many of the questions of the SF-86 ask you to provide information for the last seven years, the FBI requires that you answer the following questions with information since your 18th birthday: Q.11, Q.13, Q.15(d), Q.19, Q. 20, Q.21, Q.22(a)and(b), Q.23(a),(c)and(d), Q.24, Q.26, Q.27, and Q.28. Question 16 is the only exception to this instruction. For Q.16 you only need to cover the last 7 years when providing the names and contact information for people who know you well.

Although the instructions on the SF-86 indicate that you may legibly print your answers, you must type this form and all attachments.

It is essential that all information be provided in as much detail as requested. Ambiguous and incomplete information will impede the FBI's investigation and will cause valuable time to be lost. Be specific: exact and complete names, dates, and addresses and explanations of answers are necessary for an expeditious handling of the investigation. Do not abbreviate the names of cities. The inclusion of zip codes is particularly helpful.

INSTRUCTIONS REGARDING PARTICULAR QUESTIONS

Q.9 **Citizenship**: If you are a U.S. citizen other than by birth, you must also execute the "Immigration Addendum to the SF-86."

Q.11 **Where You Have Lived**: For apartment complexes, include the name of the complex and the specific unit number. If you lived in a residence that was leased or rented, include the name of the individual in whose name the rental agreement or lease was established.

Q.12 **Where You Went to School**: Please list all education received <u>including</u> high school.

Q.13 **Employment Activities**: Provide complete addresses (street/city/state/zip code) for each employment listed. Be as specific as possible (i.e., include divisions or departments, etc.)

Include all periods of unemployment, self-employment, volunteer employment, or internships. Provide names, complete addresses and telephone numbers of persons who can verify periods of unemployment or self-employment.

Q.13C **Employment Record:** If you have ever been denied employment while undergoing or upon completion of a background investigation or polygraph examination, please identify the prospective employer and the date and reason for voluntary/involuntary withdrawal from consideration.

Q.14 **Your Selective Service Record:** Inquiries regarding your own registration can be directed to the Selective Service at 847-688-6888.

Q.15 **Your Military History:** If you are a member of a military reserve component or National Guard unit, list the organization, its location, the name of your immediate officer and telephone number, if known.

Q.18 **Relatives:** Although the SF-86 requests only the country of birth, also provide the city and state or city and country of birth. If relatives live overseas, please indicate whether or not they are serving in the military. Provide their complete address, including city and country. Do not list APO or FPO address.

If any relatives or cotenants were born outside the United States and/or are a U.S. citizen other than by birth, complete the "Immigration Addendum to the SF-86" with respect to those persons.

Q.22 **Police Record:** List all arrests, charges, and convictions since your 18th birthday (except traffic fines of less than $300.00).

Q.23 Q.24 **Illegal Use of Drugs or Drug Activity/Use of Alcohol:** If you have ever abused legal or prescription drugs to the point of dependency, also list. In addition, list treatment for drug or alcohol dependency. **Please note that Question 23(a) refers to any drug use since your 18th birthday.**

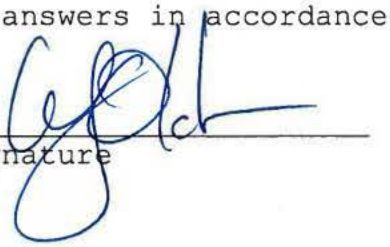
Q.26 **Financial Record:** If a collection procedure has ever been instituted against you by Federal, state, or local authorities, please give full details. In addition, list any incidents of bankruptcy.

SF-86 Supplement Form

Q.1S(d) **Professional License/Memberships:** Please include all professional licenses, current and former, particularly all former bar admissions.

Certification

I have read and understand these supplemental instructions and have provided my answers in accordance with such instructions.



Signature

ANDREW STEPHEN OLDHAM 5-29-17

Printed/Typed Name Date

Andy Oldham

From:	Andy Oldham
Sent:	Tuesday, May 30, 2017 11:41 AM
To:	Kingo, Lola A. (OLP)
Subject:	Re: Vetting Paperwork
Attachments:	OLP Data Form.doc

Lola -- Here's the OLP Data Form. Thanks again, Andy

On Tue, May 30, 2017 at 10:12 AM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:

> Terrific; thanks, Andy.
>
> **From:** Andy Oldham [mailto[redacted (b) (6)]
> **Sent:** Tuesday, May 30, 2017 9:44 AM
> **To:** Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
> **Subject:** Re: Vetting Paperwork
>
> Dear Lola - thank you. I will fill out the data form today and send it back to you. And I will start the SJQ immediately, [redacted (b) (5)]
>
> Thank you again.
>
> Andy
>
> On Tue, May 30, 2017 at 8:36 AM Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:
>
> > Dear Andy,
> >
> > OLP has received your SF86 via eQIP and is reviewing it. Should we have any changes, OLP will circle back with you. Otherwise, our office will forward your paperwork to the FBI. While the FBI conducts its background investigation, there is some additional paperwork to fill out in connection with your OLP vet, including the attached Senate Judiciary Questionnaire (SJQ). We hope you'll be able to circulate a first draft of the SJQ, by next **Monday, June 5**. One of our colleagues will be your vetter and will be in touch with you to assist with your SJQ. In the meantime, here are some

your vetter and will be in touch with you to assist with your SJQ. In the meantime, here are some SJQ tips:

The SJQ should be filled out thoroughly and completely. If you are nominated, the SJQ will be submitted to the Senate Judiciary Committee and carefully scrutinized.

(b) (5)

- Please email us your completed SJQ in Microsoft Word. With respect to SJQ attachments, we only need one copy (not four, as the SJQ requests). If your attachments exceed a total of 10 MB, our computers cannot receive them (in a single email) so please send them to us on a CD or flash drive.

- You don't need to answer Questions 22 and 23 of the SJQ (requesting financial information) at this time. We will be in touch with additional instructions when it is time to complete these forms.

In addition to the SJQ, please fill out and email us the attached "OLP Data Form" within the next two weeks.

If you have any questions about the forms, please let me know. I can be reached at **202-514-1818** (office) and (b) (6) mobile).

Many thanks!

Lola A. Kingo

Senior Nominations Counsel

Office of Legal Policy (OLP)

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Room 4239

Washington, D.C. 20530

(202) 514-1818

Lola.A.Kingo@usdoj.gov

OLP CANDIDATE DATA FORM

Work Address:

1100 San Jacinto Blvd
Fourth Floor
Austin, Texas 78701

Work Phone: (b) (6)

Home Address:

(b) (6)

Home Phone (if an (b) (6)

Cell Phone: (b) (6)

Preferred E-mail Address: (b) (6)

Preferred Phone Number: ____ Work **X Cell** ____Home

Birth date: (b) (6)

Please specify how you would like your name listed on any formal document, including on nomination paperwork and a Presidential Commission (full middle name, just middle initial, etc.—including any suffix to the name, and placement of commas).

Enter nomination name.

Andrew Stephen Oldham

The Department of Justice specifies ethnicity on biographical paperwork circulated to nominations staff and placed in permanent files at the time of nomination; the Federal Judicial Center uses this as its source for demographic information. Please indicate how your ethnicity should be reported if you are nominated by the President.

(b) (6)

[redacted]

(b)(6) - Andrew Oldham Email Address

From: (b)(6) - Andrew Oldham Email Address
Sent: Tuesday, May 30, 2017 4:40 PM
To: Kingo, Lola A. (OLP)
Subject: RE: SF-86 Medical Release and WH Waiver
Attachments: SCAN_20170530153240.pdf; SCAN_20170530153226.pdf

Hi Lola. Yes, of course. Both forms are attached.

From: Lola.A.Kingo@usdoj.gov
Sent: Tue, 30 May 2017 20:14:57 +0000
To: (b)(6) - Andrew Oldham Email Address
Cc:
Subject: SF-86 Medical Release and WH Waiver

Good afternoon—when you have a free moment, would you please sign the attached page and send it back to me? (b) (5) Also, would you please complete the attached WH waiver? Thanks very much.

Lola A. Kingo
Senior Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(202) 514-1818
Lola.A.Kingo@usdoj.gov

(DOJ-OLP-1/12/10)

THE WHITE HOUSE
WASHINGTON

Date: _____

To: Federal Bureau of Investigation
Attn: SIGBIU (Room 10861)

From: The White House
White House Counsel's Office

Subject's Full Name: Andrew Stephen Oldham

Other names used (incl. birth, prior married, nickname) Andy Oldham

SSN (b) (6) DOB (b) (6) Place of Birth (b) (6)

Permanent Address: (b) (6)

(also current residence, if different) _____

Current employer(s) State of Texas, Office of the Governor

SUBJECT'S CONSENT: I hereby authorize the FBI to provide the information specified below to the White House.

(Subject's Signature) 05/30/17 (Date)

Request of FBI (Use of this form to request information developed by the FBI or contained in FBI files requires the subject's consent. Exceptions will only be permitted as authorized by the Attorney General / Deputy Attorney General.)

☒ Full field investigation ◉ Level 1 ○ Level 2 ○ Level 3

The applicant is being considered for:

☒ Presidential Appointment ☒ Position Requiring Senate Confirmation

Attachments: ☒ SF-86 ☒ SF-86 Supplement ☒ SF-87 Fingerprint Card

Remarks / special instructions: _____
(position of possible appointment)

I certify, subject to 18 U.S. C. § 1001, that the above is sought for official purposes only and I understand that obtaining this information under false pretenses or any unauthorized disclosure may be a violation of the Privacy Act, 5 U.S.C. § 552a.

Requested by: _____
(Signature)

This request has been reviewed and approved by the White House Counsel's Office.

Approved by: _____
(Signature, White House Counsel's Office)

Standard Form 86
Revised December 2010
U.S. Office of Personnel Management
5 CFR Parts 731, 732, and 736
OMB No. 3206-0005

QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS

UNITED STATES OF AMERICA

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION PURSUANT TO THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

If you answered "Yes" to Question 21, carefully read this authorization to release information about you, then sign and date it in ink.

Instructions for Completing this Release
This is a release for the investigator to ask your health practitioner(s) the questions below concerning your mental health consultations. Your signature will allow the practitioner(s) to answer only these questions.

Authorization
I am seeking assignment to or retention in a national security position. As part of the clearance process, I hereby authorize the investigator, special agent, or duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain the following information relating to my mental health consultations.

In accordance with HIPAA, I understand that I have the right to revoke this authorization at any time by writing to the U.S. Office of Personnel Management. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization. Further, I understand that this authorization is voluntary. My treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditioned upon my authorization of this disclosure.

I understand the information disclosed pursuant to this release is for use by the Federal Government only for purposes provided in the Standard Form 86 and that it may be disclosed by the Government only as authorized by law, but will no longer be subject to the HIPAA privacy rule.

Photocopies of this authorization with my signature are valid. This authorization is valid for one (1) year from the date signed or upon termination of my affiliation with the Federal Government, whichever is sooner.

Signature *(Sign in ink)*	Full name *(Type or print legibly)*	Date signed *(mm/dd/yyyy)*
[signature]	Andrew Stephen Oldham	05/30/2017

Other names used	Date of birth	Social Security Number
Andy Stephen Oldham	(b) (6)	(b) (6)

Current street address	Apt.#	City *(Country)*	State	Zip Code	Home telephone number
(b) (6)		(b) (6)	(b	(b)	(b) (6)

For Use By Practitioner(s) Only

Does the person under investigation have a condition that could impair his or her judgment, reliability, or ability to properly safeguard classified national security information?

☐ **YES** ☐ **NO**

If so, describe the nature of the condition and the extent and duration of the impairment or treatment.

What is the prognosis?

Dates of treatment?

Signature *(Sign in ink)*	Practitioner name	Date signed *(mm/dd/yyyy)*

Andy Oldham

From: Andy Oldham
Sent: Wednesday, May 31, 2017 4:13 PM
To: Berry, Jonathan (OLP); Kingo, Lola A. (OLP)
Subject: References

Jon--

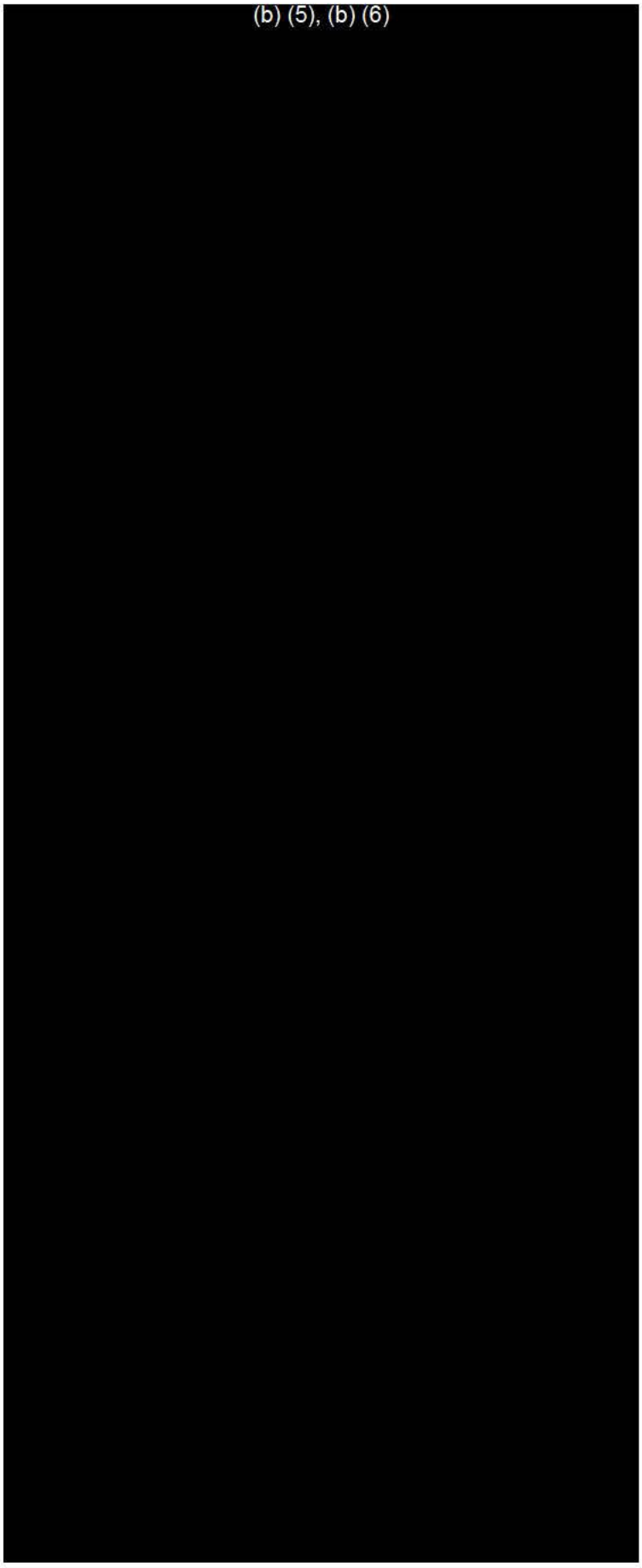
It was great to talk with you yesterday. Here's a list of 10 references, ranked in descending order of familiarity. I tried to pick a mix of people, to cover each job I've had since law school, and to include folks who know me both professionally and personally. Please let me know if you need more names. And thank you again.

Andy

* * * * *

(b) (5), (b) (6)

[redacted]


(b) (5), (b) (6)

Andy Oldham

From: Andy Oldham
Sent: Wednesday, May 31, 2017 4:48 PM
To: Kingo, Lola A. (OLP); Berry, Jonathan (OLP)
Subject: SF86

Lola --

(b) (5), (b) (6)

(b) (5), (b) (6)

Andy

Andy Oldham

From:	Andy Oldham
Sent:	Sunday, June 04, 2017 6:22 PM
To:	Kingo, Lola A. (OLP)
Subject:	Re: Vetting Paperwork
Attachments:	2017 06 04 SJC Questionnaire ASO.docx

Lola -- here is a draft of my SJQ. I will send the appendices on a CD or flash drive tomorrow. Best, Andy

On Tue, May 30, 2017 at 11:21 AM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:

> Thank you.
>
> **From:** Andy Oldham [mailto: (b) (6)
> **Sent:** Tuesday, May 30, 2017 11:41 AM
>
> **To:** Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
> **Subject:** Re: Vetting Paperwork

Duplicative Material

Andy Oldham

From: Andy Oldham
Sent: Monday, June 5, 2017 4:13 PM
To: Berry, Jonathan (OLP)
Subject: Re: Vetting Paperwork
Attachments: 2017 06 05 SJC Questionnaire ASO.docx

Here's a slightly revised draft of the SJQ.

On Mon, Jun 5, 2017 at 2:32 PM, Andy Oldham [redacted (b) (6)] > wrote:
Yes, happy to do so. Will resend when I get back to my desk. And whenever you have 5 minutes, can I ask you a quick question on [redacted (b) (5)]?

On Mon, Jun 5, 2017 at 2:03 PM Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
Thanks, Andy. Can you shoot me a revised SJQ?

Sent from my iPhone

On Jun 5, 2017, at 2:02 PM, Andy Oldham [redacted (b) (6)] wrote:

Thank you very much, Lola.

[redacted (b) (5)]

Best, Andy

On Mon, Jun 5, 2017 at 5:47 AM, Kingo, Lola A. (OLP) <Lola.A.Kingo@usdoj.gov> wrote:

> Thank you, Andy. I'm adding Jon to this chain, who will be your vetter. He will review your SJQ and work with you to finalize it.
>
> **From:** Andy Oldham [mailto: [redacted (b) (6)]
> **Sent:** Sunday, June 04, 2017 6:22 PM
>
> **To:** Kingo, Lola A. (OLP) <lakingo@jmd.usdoj.gov>
> **Subject:** Re: Vetting Paperwork

Duplicative Material

Andy Oldham

From: Andy Oldham
Sent: Thursday, June 08, 2017 12:26 PM
To: Kingo, Lola A. (OLP); Berry, Jonathan (OLP)
Subject: Re: SJQ Appendices
Attachments: 2612_001 (1).pdf

Here's the last part of my SJQ appendices -- it's for Item 12.a. I think (hope!) that is all I have.

Thank you again, Andy

On Wed, Jun 7, 2017 at 4:10 PM, Andy Oldham <[redacted (b) (6)]> wrote:

> Lola and Jon --
>
> I overnighted a thumb drive with my SJQ appendices. The password to unlock the drive is:
>
> [redacted (b) (5)]
>
> It's case-sensitive. Please let me know if you have any trouble accessing the files.
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> Best, Andy

Chapter 13

The Insider's Guide to the United States Court of Appeals for the District of Columbia Circuit

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I. Top Tips for Out-of-State Practitioners

1. In cases involving direct review of agency action, the appellant or petitioner must include in both its docketing statement and its principal brief arguments and evidence demonstrating the basis for the appellant's or petitioner's standing, unless the basis for standing is apparent from the administrative record. *See* D.C. Cir. R. 15(c)(1) and 28(a)(7).
2. The D.C. Circuit normally requires aligned parties (whether petitioners/appellants, intervenors, or amici) on the same side of a case to join in a single brief to the extent practicable, and will normally require a motion before approving separate briefs of aligned parties. *See* D.C. Cir. R. 28(d)(4) and 29(d). This requirement does not apply to governmental entities.
3. The court readily accepts briefing with a deferred joint appendix. The appellant or petitioner need only file a "statement regarding use of deferred appendix" in accordance with the scheduling order received from the clerk's office after the case is docketed.

II. Appellate Resources

A. Court Websites and Dockets. The official website of the D.C. Circuit is (http://www.cadc.uscourts.gov).

B. Practice Guides. The "Rules & Procedures" tab of the D.C. Circuit's website contains the Circuit Rules, a helpful, 59 page Frequently Asked Questions document ("FAQ"), and the Handbook of Practice and Internal Procedures for the District of Columbia Circuit ("H.B.").

C. Contacting the Clerk's Office. The public office of the clerk is located on the fifth floor of the courthouse, in Room 5523. This room is where the dockets are kept, all permitted paper filings with the court are made (the court adopted mandatory electronic filing for most filings starting September 1, 2009), and orders of the court are issued. Room 5523 is also where the public may inspect filings. Both the file room and the public office are open between 9:00 a.m. and 4:00 p.m., Monday through Friday, except legal holidays. A filing depository, available 24 hours a day and seven days a week, is located inside the Third Street entrance to the courthouse, and any filings left in the depository should be date-and-time stamped using the machine located next to the drop box. The main telephone number for the clerk's office is (202) 216-7000, and specific numbers for various personnel in that office can be found on the D.C. Circuit's website. Whenever the parties are engaged in serious settlement discussions—before or after oral argument—counsel should advise the clerk's office of that fact. *See* H.B. § II.C.2.

D. Electronic Notices. When an order or judgment is entered in a case assigned to the court's CM/ECF system (*see* "Filing and E-Filing," *infra*), the clerk's office will electronically transmit a Notice of Docket Activity to all parties who have consented to electronic service. Note, however, that only pro se parties and attorneys who have entered an appearance will receive electronic notices. *See* H.B. §§ II.B.3, XII.E; Section III.C., "Appearance of Counsel on Appeal," *infra*.

III. Admission to Practice and Representation of Counsel

A. General. In general, an attorney must be a member of the D.C. Circuit Bar to practice before the court. As a general rule, the clerk's office will not file briefs or other pleadings unless signed by a member of the D.C. Circuit Bar. The clerk's office will make exceptions to this rule only (i) to allow the filing of a notice of appeal in the district court or a petition for review, (ii) to allow a filing where compliance with the admission requirement might make the filing untimely, and (iii) to allow law students to participate in a case under the direction of a supervising attorney. *See* Fed. R. App. P. 46; D.C. Cir. R. 46; H.B. § II.A.1.

The court admits to its bar attorneys admitted to the bar of the highest court of a state or to the bar of another federal court. Applicants must fill out an Application for

Admission to Practice.[1] The court requires two attorneys to sponsor an application, and the two sponsors must be either members of the D.C. Circuit Bar or the bar upon which the applicant bases his or her admission. Attorneys may be admitted on the written application without a personal appearance. The current fee for admission to the D.C. Circuit Bar is $200, and checks must be made payable to "Clerk, U.S. Court of Appeals."

B. Admission Pro Hac Vice. The D.C. Circuit may grant leave for an attorney to present oral argument *pro hac vice*, but not for purposes of filing pleadings. At least five days before oral argument, the counsel of record should notify the clerk's office that a motion for leave to argue *pro hac vice* will be made. A member of the D.C. Circuit Bar must sponsor the motion for leave, and the attorney who wishes to argue *pro hac vice* must arrive at the courtroom with his or her sponsor at least 20 minutes prior to the start of the oral argument; at that time, the courtroom deputy clerk will furnish both attorneys with the appropriate forms and instructions. The court typically grants a motion to argue *pro hac vice* on the morning of argument, but if the court decides to deny such a motion, it will inform counsel beforehand. *See* H.B. § II.A.1.

C. Appearance of Counsel on Appeal. The court will note the appearance only of counsel who are members of the D.C. Circuit Bar, who have been granted leave to argue *pro hac vice*, and law students who qualify to enter an appearance under Circuit Rule 46(g). *See* D.C. Cir. R. 46(g); H.B. § II.A.1.

D. Withdrawal and Substitution of Counsel on Appeal. In order to withdraw, appointed counsel must submit to the court and serve on the other side a motion stating specific reasons for doing so. If appointed counsel in a criminal case wishes to withdraw because there is no merit to the appeal, he or she must file a motion under *Anders v. California*, 386 U.S. 738 (1967), and *Suggs v. United States*, 391 F.2d 971 (D.C. Cir. 1968). When filing a motion under *Anders* and *Suggs*, appointed counsel also must submit to the court and serve on the appellant—but *not* on government counsel—a confidential memorandum under seal that explains the points the appellant wishes to assert, any other points counsel has considered, and the most effective arguments counsel can make on the appellant's behalf. The appellant has 30 days to respond to appointed counsel's confidential memorandum, and the court will thereafter rule on appointed counsel's withdrawal motion. *See* H.B. § VI.D.2.

E. Ethical Rules and Standards. The Code of Professional Responsibility, as adopted by the D.C. Court of Appeals and as amended from time to time by that court, governs all proceedings in the D.C. Circuit. *See* D.C. Cir. Rule of Disciplinary Enforcement I(b) (available under the "Attorney & Pro Se Information" tab of the court's website). The current version of the code can be found at (http://www.dcbar.org/for_lawyers/ethics/legal_ethics/index.cfm). The D.C. Circuit also has created a Committee on Admissions and Grievances, which is comprised of six members of the court's bar. The court may

1. D.C. Circuit forms are available at (http://www.cadc.uscourts.gov/internet/home.nsf/content/Stub+-+AZ+Forms).

refer to the committee, for investigation, hearing, and report, any allegation of professional misconduct by any member of the court's bar. *See* H.B. § I.C.3.b.

F. Rule Amendments. In the D.C. Circuit, readers can go to (http://www.cadc.uscourts.gov/internet/home.nsf/content/Court+Rules+and+Operating+Procedures) to see the current set of rules in effect, the date of the last amendment to those rules, any proposed amendments to the rules, general notices regarding the rules, and the court's Handbook of Practice and Internal Procedures.

IV. The Appellate Court System

A. Structure. The D.C. Circuit serves as an intermediate federal appellate court, which sits below the Supreme Court of the United States and reviews decisions of the U.S. District Court for the District of Columbia, as well as decisions of numerous federal administrative agencies.

B. Jurisdiction. The historical evolution of the D.C. Circuit's jurisdiction dates back to the Judiciary Act of 1801 and John Adams's "midnight judges"; an entertaining account of that history can be found in a lecture by the current chief justice of the United States (given while he still sat on the D.C. Circuit). *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375 (2006). Today, the D.C. Circuit has exclusive jurisdiction to review many of the decisions taken by federal administrative agencies (including, for example, some decisions by the Federal Communications Commission, *see* 47 U.S.C. § 402(b), and the Environmental Protection Agency, *see* 42 U.S.C. § 7607(b)), and many other administrative law statutes (such as the National Labor Relations Act, *see* 29 U.S.C. § 160(f)) give aggrieved parties the option to petition for review in their home jurisdiction or the D.C. Circuit. Consequently, more than a third of the D.C. Circuit's docket is consumed by administrative law cases. *See* James C. Duff, *Judicial Business of the United States Courts: 2010 Annual Report of the Director* 84 (Table B-1). Roughly 9 percent of the court's docket involves criminal appeals from the federal district court in the District of Columbia, and the remaining 56 percent of the court's cases are civil. Because the circuit does not have a prison within its boundaries, prisoner petitions traditionally made up a relatively small proportion of the D.C. Circuit's docket, *see* Roberts, *supra*, at 376, but the court's jurisdiction over cases involving detainees at Guantanamo Bay resulted in the number of such filings jumping dramatically in recent years, *see* Duff, *supra*, at 84 (Table B-1).

C. Certification to Other Courts. In cases that turn on questions of D.C. law, the D.C. Circuit may certify a question to the D.C. Court of Appeals. *See* D.C. Code § 11-723(a); *see also, e.g., Sturdza v. Gov't of the United Arab Emirates*, 281 F.3d 1287, 1303 (D.C. Cir. 2002) (employing the procedure). The D.C. Circuit also may certify questions to courts in states that have adopted the Uniform Certification of Questions of Law Act.

See, e.g., Matusevitch v. Telnikoff, 1998 U.S. App. LEXIS 10628 (D.C. Cir. May 5, 1998) (certifying a question to the Maryland Court of Appeals).

V. Commencing the Appeal

A. Notice of Appeal. To appeal as of right from an adverse judgment in the federal district court, counsel must file a notice of appeal with the clerk of the district court, at which time the fees for filing and docketing the appeal (currently $455) must be paid to the district court clerk.[2] *See* Fed. R. App. P. 3(a)(1), (e); FAQ § II.A.2. The notice must state the court to which the appeal is taken, the ruling being appealed, and the party who is appealing. *See* Fed. R. App. P. 3(c)(1). Generally, the notice of appeal must be filed within 30 days of the final judgment in civil cases or within 10 days of final judgment in criminal cases, *see* Fed. R. App. P. 4(a)(1)(A), (b)(1)(A), but there are many exceptions; *see* H.B. § III.B.2 for full details and citations to the relevant rules.

To seek review of agency action, counsel must file a petition for review with the clerk's office of the D.C. Circuit. The petition for review must identify the parties seeking review, name the agency as a respondent, and specify the order to be reviewed. *See* Fed. R. App. P. 15(a). The timing for filing a petition for review is dictated by the statute that governs the relevant agency's proceedings. The fee for filing such a petition in the D.C. Circuit is $450 and must be paid to the clerk's office. *See* Fed. R. App. P. 15(e). Because many agency actions are potentially subject to review in multiple courts of appeals, counsel seeking to ensure that a case is heard by the D.C. Circuit are advised to follow the procedure set out in 28 U.S.C. § 2112(a). Under § 2112(a), if petitions for review of an order are filed in multiple circuits within 10 days after issuance of the agency order, the circuit to hear the case will be determined by random selection. Otherwise, the first to file rule applies. To ensure that a petition is included in the random selection process, counsel must ensure not only that the petition is filed within the 10-day period, but also that a copy of the date-stamped petition is provided to the agency within that period, as provided for in the relevant agency's rules. *See, e.g.*, 47 C.F.R § 1.13(a)(1) (setting forth the Federal Communications Commission's rules implementing § 2112(a)).

Appeals from the Tax Court are commenced by filing a notice of appeal with the clerk of the Tax Court in the District of Columbia. The notice may be filed by mail addressed to the clerk. The notice must identify the court to which the appeal is taken, the ruling being appealed, and the party who is appealing. Generally, the notice must be filed within 90 days after entry of the Tax Court's decision. *See* Fed. R. App. P. 13; H.B. § III.D.

B. Docketing Statement. After docketing the appeal (*see* "Docketing the Appeal," *infra*), the clerk's office will issue a preliminary scheduling order, which generally gives the appellant 30 days to submit to the court and serve on all other parties (including

2. The "Court of Appeals Miscellaneous Fee Schedule" (under the "About the Court"/"Court Fees" tabs on the D.C. Circuit's webpage) fully explains the applicable fees. Counsel should also note that natural persons who qualified for *in forma pauperis* status in the district court also may be able to obtain a waiver of fees under FRAP 24. *See* FAQ § II.A.2.

intervenors and amici) the docketing statement. The docketing statement must be on a form furnished by the clerk's office and must include information about the type of case; the district court or agency case number; relevant dates; the order sought to be reviewed; related cases; relevant statutes; and counsel's name, address, and telephone number. *See* D.C. Cir. R. 12(b). A copy of the judgment or ruling under review must be submitted with the docketing statement, as well as a preliminary statement of the issues for appeal and a transcript status report. Appellants must attach to the docketing statement a provisional certificate setting forth the information specified in Circuit Rule 28(a)(1) (identifying parties, intervenors, and amici in the district court proceedings and in the D.C. Circuit), and a disclosure statement under Circuit Rule 26.1 (if required). *See* H.B. § IV.A.3. For cases involving review of administrative agency action, the docketing statement also must include a brief statement justifying the appellant's or petitioner's standing. *See* H.B. § IV.B. A note of caution in petitioning for review of administrative action: the court will generally construe a docketing statement (and petition for review) that mentions only an agency order denying reconsideration as a petition that seeks review *only* of that order, and not also the underlying agency order. The D.C. Circuit has dismissed a number of appeals on the ground that the order denying reconsideration—which was the only order mentioned in the petition and docketing statement—is not subject to judicial review. *See, e.g., Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 313 (D.C. Cir. 2000).

C. Bonds and Stays. In civil cases, the district court may require a bond or other security to cover the costs of an appeal. *See* H.B. § III.B.1. A party may move to stay the judgment under review, but the D.C. Circuit may condition such relief on the posting of a bond or other security under FRAP 8(a)(2)(E), 8(b), and 18(b). The costs associated with such bonds fall within the purview of the district court, not the D.C. Circuit. *See* H.B. § XIII.A.4.

D. Other Initial Documents. Appellees (along with any amici or intervenors) must file, within seven calendar days of service of the docketing statement, or upon filing a motion, response, or answer, whichever occurs first, any disclosure statement required by Circuit Rule 26.1. *See* Fed. R. App. P. 26.1(b); D. C. Cir. R. 12(f). Any disclosure statement required by Circuit Rule 26.1 must also accompany a motion to intervene, a written representation of consent to participate as amicus curiae, and a motion for leave to participate as amicus curiae. *See* D.C. Cir. R. 12(f) & 15(c)(6); H.B. § IV.A.3.

E. Docketing of the Appeal. In an appeal from the district court, the case administrator in the clerk's office dockets the appeal upon receiving the preliminary record (which includes a copy of the notice of appeal and a certified copy of the district court docket entries). *See* Fed. R. App. P. 12(a). The case administrator then assigns a six-digit number to the appeal and gives notice of the filing to all parties by issuing an order scheduling certain submissions (including the docketing statement and initial submissions, procedural motions, and dispositive motions). The first two numbers correspond to the year in which the appeal or petition was filed, and the remaining four numbers correspond to the type of case. The 1,000 series represents petitions for review of agency action; the

3,000 series represents criminal cases; the 5,000 series represents most other cases where the federal government is a party; and the 7,000 series represents most other civil appeals from the district court. *See* FAQ §§ II.A.4; II.B.1. At the time of docketing, the case administrator checks to see that the docketing fee has been paid and sends appropriate notice if it has not. *See* H.B. §§ IV.A–B.

F. Intervention in Pending Appeals. In petitions to review administrative action, a party must file a motion for leave to intervene with service on all parties (unless the applicable statutes provides otherwise). The motion must contain a concise statement of the party's interest in the case and the grounds for intervention. In all cases (administrative or otherwise), a motion to intervene must be filed within 30 days of docketing and must be accompanied by a disclosure statement under Circuit Rule 26.1 (if required). *See* H.B. § VII.A. A useful point to note is that the D.C. Circuit will deem such a motion to be a motion to intervene in all cases before the court involving the same agency action or order, *including* later filed cases, unless the moving party specifically advises otherwise, and an order granting such a motion has the effect of granting intervention in *all* such cases. *See* H.B. § III.E.3. Because many cases seeking review of an agency action involve multiple petitions, a prospective intervenor can seek leave to intervene within 30 days of the filing of the latest timely petition for review, and thereby become an intervenor in all earlier filed petitions for review of the same order.

VI. Record Composition and Transmittal

A. Form of Record. For appeals from the district court, the record on appeal includes the original papers and exhibits filed in the district court; the transcript of proceedings, if any; and a certified copy of the docket entries prepared by the clerk of the district court. *See* Fed. R. App. P. 10(a). For petitions to review administrative decisions, the record on review consists of the order sought to be reviewed or enforced; the findings or report on which it is based; and the pleadings, evidence, and proceedings before the agency. *See* Fed. R. App. P. 16(a).

B. Requesting, Selecting, Compiling, and Transmitting the Record. The district court routinely transmits the preliminary record a few days after the notice of appeal is filed. The parties may correct errors or omissions in the record by stipulation. Disputes about the accuracy of the record must first be submitted to the district court. *See* H.B. §§ IV.A.1–2.

Because of a lack of storage space, the record before the administrative agency is not transmitted to the D.C. Circuit at the time of docketing; only a certified index to the record is submitted by the agency. Any party to the proceeding may move that part or all of the record be transmitted to the court, or the court on its own may require transmission of the record.

C. Transcripts and Trial Exhibits. Within 10 days of filing the notice of appeal in a civil case, or entry of an order disposing of the last timely remaining motion as specified in Fed. R. App. P. 4(a)(4)(A), the appellant must order from the court reporter the parts of the transcript that the appellant considers necessary to dispose of the appeal. *See* Fed. R. App. P. 10(b)(1), (3). Counsel in criminal cases should be aware that the D.C. Circuit expedites criminal appeals, so the transcript in such cases should be requested as soon as possible. In cases where the defendant proceeded *in forma pauperis* at trial, the federal district court requires appointed counsel to request the transcript at the same time as filing the notice of appeal. *See* H.B. § IV.A.1. Unless the appellant orders the full transcript, the appellant must serve the appellee with a designation of the parts ordered, along with a statements of the issues presented on appeal. The appellee then has 10 days to file and serve a cross-designation of additional parts of the transcript. In all events, parties should include in the appendix only those portions of the transcript that are relevant to resolving the issues on appeal. Costs or sanctions may be imposed if a party includes unnecessary material in the appendix. *See* H.B. § IX.B.

If a party wants an exhibit in the courtroom during oral argument before the D.C. Circuit, counsel must notify the court in writing at least five days before the argument and deliver the exhibit to the clerk's office. *See* H.B. § IV.A.1.

VII. Appellate Mediation or Conference Programs

The D.C. Circuit's Appellate Mediation Program is described in Appendix III of the Circuit Rules. The program is available only for civil cases. Parties may request mediation by completing a confidential "Request to Enter Appellate Mediation" form and submitting it to the clerk in duplicate. Such requests are not automatically granted but are given preference. The legal division of the clerk's office also screens eligible cases after dispositive motions have been filed. In making its screening decisions, the legal division's staff takes into consideration numerous factors, including the nature of the underlying dispute, the relationship of the issues on appeal to the underlying dispute, the availability of incentives to reach settlement or limit the issues on appeal, the susceptibility of these issues to mediation, the possibility of effectuating a resolution, the number of parties, and the number of related pending cases.

Within 15 days of the selection of a case for mediation, counsel for both sides must submit position papers, not to exceed 10 pages each, to the mediator. (The court chooses mediators from a pool of senior members of the bar, academics from local law schools, and attorneys with experience mediating complex civil cases.) Position papers should outline the key facts and legal issues in the case and should include a statement of motions filed and their status. Position papers are not briefs, are not filed with the court, and need not be served on the other party unless the mediator so directs. The mediator will set the date for the first mediation session, which is generally held at the court, and which must be held within the first 45 days after the case is selected for mediation. The mediator may schedule additional meetings or teleconferences, if necessary. The content of mediation discussions and proceedings, including any statement made or document prepared by any

party, attorney, or other participant, is privileged and shall not be disclosed to the court. *See* H.B. § IV.D.

VIII. Filing and Service Requirements

A. Filing and E-filing. All cases initiated on and after September 1, 2009, will be assigned to the court's Case Management/Electronic Case Files ("CM/ECF") system. *See* Administrative Order Regarding Electronic Case Filing (filed May 15, 2009), ¶ 1 (available under the "CM/ECF Information" tab of the court's website). Parties should be aware that case-initiating documents (such as petitions for permission to appeal and petitions for review of agency action) must be filed in paper form. *Id.* Almost all subsequent documents—including briefs, motions, and petitions for rehearing—must be filed electronically. *Id.* Note, however, that dispositive motions and certain procedural motions must be filed in both paper copy and electronically. *Id.* at ¶ 6(B). Electronic documents are deemed "filed" on the date and time stated on the Notice of Docket Activity transmitted from the court to all registered CM/ECF users. *Id.* at ¶ 5(C). Unless otherwise specified by court order, filings must be submitted before midnight eastern time to be considered timely filed that day. *Id.*

B. Service. Registration as an ECF user constitutes consent to electronic service. *See* D.C. Cir. R. 25(c); Administrative Order Regarding Electronic Case Filing, *supra*, ¶ 2(D). A party who has not consented to electronic service must be served by an alternative method of service, in accordance with D.C. Cir. R. 25(c). *See* Administrative Order Regarding Electronic Case Filing, *supra*, ¶ 7.

IX. Motions

A. Motions in General. Procedural motions must be filed within 30 days after docketing, and dispositive motions must be filed within 45 days of docketing; the specific due dates for both types of motions will be included in the clerk's initial scheduling order. *See* H.B. § VII.A (defining both types of motions). Motions should be formatted in accordance with FRAP 27(d)(1) and (2), and must comply with the same typeface rules that apply to briefs. *See* Fed. R. App. P. 27(d)(1)(E) (incorporating by reference Fed. R. App. P. 32(a)(5) and (6)); H.B. § VII.A; "Physical Requirements" for briefs, *infra*. Motions must include the contents specified in FRAP 27(a)(2) and cannot exceed 20 pages in length absent permission from the court. Any response (also not to exceed 20 pages) is due within 10 days after service of the motion, and any reply is due within 7 days after service of the response. *See* Fed. R. App. P. 27(a)(3)–(4).

Motions are processed in one of three ways, depending on the timing and nature of the relief sought. First, the clerk will handle routine procedural motions. *See* D.C. Cir. R. 27(e). Second, the legal division of the clerk's office will refer non-routine procedural motions and all dispositive motions to a special panel (which consists of two judges who

are assigned on a rotating basis throughout the year to consider and decide such motions), although this panel may refer motions to the merits panel. Third, after a case is assigned to a merits panel, all motions filed in the case are submitted to the panel. *See* H.B. § VII.E. Note that emergency motions are processed differently. *See* "Emergency Motions," *infra*.

B. Motion for Extension of Time. Circuit Rule 27(h) establishes the requirements for seeking time extensions for motions, responses, and replies. Such motions must be filed five calendar days before the pleading is due. Counsel should be sure to indicate in the first paragraph when the motion, response, or reply is currently due. The opening paragraph also must state whether opposing counsel consents to the motion. *See* H.B. § VII.A. If the motion otherwise complies with Circuit Rule 27 and the court does not act on the motion by the end of the second business day before the filing deadline, the deadline is automatically extended until the court rules on the motion. *See* D.C. Cir. R. 27(h)(4).

C. Motion for Extension of Length. The federal rules set page limits on motions, responses, and replies. *See* Fed. R. App. P. 27(d)(2); "Motions in General," *supra*. Requests to exceed those limits are disfavored and will be granted "only for extraordinarily compelling reasons." D.C. Cir. R. 27(h)(3). The opening paragraph of a motion to exceed the specified page length must state whether opposing counsel consents to the motion. *See* H.B. § VII.A.

D. Motion to Stay Appeal. Application for a stay must first be made to the district court or agency whose order is being appealed, or the motion filed before the D.C. Circuit must explain why such relief was not sought. If the district court or agency denies the relief requested, an application may then be made to the D.C. Circuit. A motion for a stay must describe any prior applications for relief and their outcome. The movant also must include a copy of the order or judgment involved. *See* H.B. § VIII.A. The motion for stay must specifically discuss four factors: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest. *See, e.g., Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

E. Emergency Motions. Emergency motions are governed by Circuit Rules 8, 18, and 27(f). In particular, counsel must make sure to file such motions at least seven calendar days before the date on which the court's action is necessary, or otherwise state why the emergency motion could not be filed sooner. The motion should also include, in a prominent place, a statement of the time exigencies involved. The motion for emergency relief must discuss the same four-factor test that applies to stay motions. *See* "Motions to Stay Appeal," *supra*. Emergency motions are referred immediately to a special panel or a merits panel (if one already has been assigned). *See* H.B. § VIII.A.

F. Motions for Reconsideration. Within 10 days of entry of a motion-related order, any party may move for reconsideration, and the motion will be submitted to a special

panel or to the merits panel (if one already has been assigned). *See* H.B. § VII.C. If a party disagrees with the special panel's disposition of a motion, it may move for reconsideration by the same panel or by the full court. *See* H.B. § VII.D. The court rarely grants these motions.

X. Briefing Schedule

A. Rules and Scheduling Orders. Counsel should keep in mind that, unlike many other federal circuits, briefing schedules in the D.C. Circuit are not computed from the date on which the record is filed. Rather, under the court's Case Management Plan, briefing schedules are established by order from the clerk's office. Usually, the final brief is due at least 50 days before oral argument. *See* H.B. § IX.A.1. In cases with numerous parties, the clerk's office will normally request that the various parties present it with proposals on an appropriate briefing schedule and format. Although proposals to which all parties consent are likely to be approved, proposals that include over-length briefs or multiple briefs on one side of a case will be referred to a special panel. *See* "Motions in General," *supra*.

B. Cross-Appeals. The first party to appeal is deemed the appellant, and if cross-appeal notices are filed on the same day, the plaintiff is deemed the appellant (subject to modification by court order or the parties' agreement). *See* Fed. R. App. P. 28.1(b). In cross-appeals, each appellant has the right to file two briefs, *see* Fed. R. App. P. 28.1(c)(1)–(4), the schedule for which will be established by the clerk's briefing order.

C. Briefing with Deferred Records or Appendices. Briefing with a deferred joint appendix is common in the D.C. Circuit. The clerk's initial scheduling order generally directs the appellant or petitioner to file a deferred appendix statement, if any, along with the docketing statement and other initial submissions. Absent objection by the appellee or respondent, each party serves on the other parties (but not on the court) its designation of the proposed contents of the joint appendix at the time of filing that party's main brief. Once briefing is complete, the appellant or petitioner compiles the joint appendix based on the designation letters and files it in accordance with the briefing schedule issued by the court. *See* D.C. Cir. R. 30(c); H.B. § IX.B.3. In briefs filed before the filing of the deferred appendix, all parties should include placeholders in their briefs for appendix citations (*e.g.*, "(JA___)"); after the appendix is filed, all parties will file "final briefs" that replace those placeholders with citations to the appendix pages. *See* "Physical Requirements," *infra*.

XI. Brief Format and Citations

A. Physical Requirements. The physical requirements for briefs are specified in FRAP 32(a). Briefs may use either a proportionally spaced or a monospaced font face and must be set in a plain, roman style, although italics and boldface may be used for emphasis. As a result of a recent change to D.C. Circuit local rules, a proportionally spaced font

face must be at least 14-point and must include serifs, but sans-serif type may be used in headings and captions. A monospaced font face may have no more than 10.5 characters per inch. Briefs must be double-spaced and printed on one side of the page only. A principal brief is limited to 30 pages unless the brief complies with the type-volume limitation of 14,000 words or uses a monospaced face and contains no more than 1,300 lines of text. *See* Fed. R. App. P. 32(a)(7). A reply brief is limited to half the type-volume of the principal brief or 15 pages. An intervenor's brief may not exceed 19 pages unless the brief complies with the type-volume limitation of 8,750 words or uses a monospaced face and contains no more than 813 lines of text. *See* D.C. Cir. R. 32(a)(2). These limits do not include the table of contents; table of citations; statement with respect to oral argument; certificate of parties, rulings, and related cases; the glossary; any addendum containing statutory material, regulations, or evidence supporting the claim of standing; and certificates of service and compliance with type-volume limitations. But the page limits do include the summary of argument, footnotes, and citations. *See* H.B. § IX.A.7.

The cover of an appellant's principal brief must be blue; the cover of the appellee's brief is red; the cover of an intervenor's or amicus's brief must be green; the cover of a reply brief must be gray; and the cover of any supplemental brief must be tan. *See* Fed. R. App. P. 32(a)(2). The cover must state in all capital letters whether oral argument has been scheduled (and, if so, provide the date and the panel), or whether the brief is being submitted without oral argument. *See* D.C. Cir. R. 28(a)(8). In cases the clerk's office has designated as "Complex," the cover of the briefs should be marked "Complex." *See* H.B. § IX.A.6. Where the deferred joint appendix method is used, the briefs filed prior to the filing of the joint appendix should be labeled "INITIAL BRIEF" in the upper right-hand corner; the briefs filed after the filing of the joint appendix should be labeled "FINAL BRIEF" in the upper right-hand corner. It is normally acceptable, when adding joint appendix page numbers to prepare the final brief, to correct typographical errors and update citation formats. However, care should be taken in preparing both the initial and final brief to ensure that the creation of the final brief does not change pagination, as the judges will review the final briefs in preparation for argument, yet references in one brief to other briefs will be based on the pagination in the initial versions. The court prefers spiral binding for all briefs. *See* H.B. § IX.A.6.

B. Citation Form Rules and Conventions. Citation requirements for briefs are set out in FRAP 32.1 and D.C. Circuit Rule 32.1. Counsel must cite D.C. Circuit decisions to the *Federal Reporter*; state court decisions should be cited to the *National Reporter System*; and parties need not include parallel citations. All federal statutes must be cited by the current official code or its supplement or, if there is no current official code, to the current unofficial code or its supplement. All citations (to the record, cases, or otherwise) must refer to specific pages of the source; "*Passim*" or similar terms may not be used. The court prefers that substantive arguments not be made in footnotes; the use of footnotes should be minimized and reserved primarily for citations. *See* H.B. § IX.A.8.

C. Citable Authorities. Parties may cite any authority, published or unpublished, for its res judicata, law of the case, or preclusive effect. The D.C. Circuit's unpublished dispositions entered on or after January 1, 2002, may be cited for precedential effect. Other federal courts' unpublished dispositions entered on or after January 1, 2007, may be cited in accordance with FRAP 32.1. If an unpublished disposition is not available in an electronic database (such as Lexis or Westlaw), the party should include a copy of it as an addendum to its brief. *See* H.B. § IX.A.8.

XII. Brief Contents

A. Appellant's Brief. The contents of the brief are governed by FRAP 28 and 32.1 and D.C. Circuit Rules 28 and 32.1. *See also* H.B. § IX.A.8.

1. Certificate as to Parties, Rulings, and Related Cases. This section should appear immediately inside the cover and before the table of contents. It should include all parties, intervenors, and amici who appeared before the district court or administrative agency, along with a disclosure statement under D.C. Circuit Rule 26.1 (if required). It should also identify the ruling(s) under review, including the date, name of the district court judge, the appendix citations for the ruling(s), and an official citation for the ruling(s) (if available). The certificate also must identify "related cases," as defined in Circuit Rule 28(a)(1)(C), or state that there are none.

2. Tables. This section should include a table of contents with page numbers. It should also include separate tables of cases, statutes, and other authorities, with page numbers and either asterisks in the left margin to denote those authorities upon which the brief chiefly relies or a statement that there are none. The use of *Passim* is prohibited.

3. Glossary. This section should include a glossary defining abbreviations and acronyms. *See* D.C. Cir. R. 28(a)(3). Even with a glossary, uncommon acronyms should be avoided. *See* Notice, Jan. 26, 2010.

4. Jurisdictional Statement. This section should identify the basis of the D.C. Circuit's jurisdiction, as well as the jurisdictional basis for the district court's or agency's decision.

5. Pertinent Statutes or Regulations. These should be reproduced prior to the issues presented. If the statutes or regulations are extensive, a party may instead reproduce them in the appendix. *See* D.C. Cir. R. 28(a)(5).

6. Issues Presented. This section must identify the questions presented for the court's review.

7. Statement of Facts. This section should include only relevant facts and references to the record.

8. Summary of the Argument. This section should include a succinct and clear summary of the body of the brief and should not merely repeat the argument headings.

9. Standing. This section is necessary only in cases involving direct review of administrative agency action. In general, an appellant or petitioner whose standing is not self-evident from the administrative record must establish its standing by presenting arguments and evidence (including attaching any affidavits or other evidence) in its opening brief. *See Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002); *see also* D.C. Cir. R. 28(a)(7). There is no guarantee that the court will permit an appellant or petitioner to supplement its showing as to its standing in its reply brief, *see, e.g., Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 685 (D.C. Cir. 2004), yet in other cases the court may request supplemental, post-argument submissions on the issue, *see, e.g., American Library Ass'n v. FCC*, 401 F.3d 489, 494–96 (D.C. Cir. 2005).

10. Argument. This section should be preceded with a statement of the standard of review, and it should contain all of the party's contentions. The D.C. Circuit routinely applies the rule that arguments raised for the first time in a reply brief are waived.

11. Conclusion or Prayer for Relief. This section should succinctly state the precise relief sought.

12. Signature Block. If the brief is submitted electronically, a member of the court's bar should "sign" it by typing "/s/" before his or her name in the signature block. *See* Administrative Order Regarding Electronic Case Filing (filed May 15, 2009), ¶ 3(A) (available under the "CM/ECF Information" tab of the court's website).

B. Response and Reply Briefs. The appellee's brief generally must contain the same contents listed above but may omit the jurisdictional statement, the statement of the issues, the statement of the case, the statement of the facts, and the statement of the standard of review if the appellee is satisfied with the appellant's statement(s). *See* Fed. R. App. P. 28(b). Reply briefs are governed by FRAP 28(c).

C. Cross-Appeals. In cross-appeals, the appellant first files its principal brief (with the contents listed above). The appellee then files its principal brief, which includes both a response to the appellant's brief and the appellee's cross-appeal. (Because the appellee's principal brief serves two purposes, its length limits are slightly more generous; it may include 35 pages or 16,500 words.) The appellant then may file a response to the appellee's cross-appeal. (The appellant's response brief is limited to 30 pages or 14,000 words.) Finally, the appellee may file a reply brief, limited to 15 pages or 7,000 words. *See* Fed. R. App. P. 28.1; D.C. Cir. R. 28.1; H.B. § XIII.A.3.

XIII. Appendices and Excerpts of Record

A. Process for Compiling. The appellant or petitioner bears the burden (financially and logistically) of compiling the appendix. If the deferred joint appendix method is not used, and if the parties cannot agree on the contents of the appendix, then within 14 days after the record is filed, the appellant must serve on the appellee a designation of the parts

of the record that the appellant wants to include. The appellee then has 14 days to designate additional parts of the record for inclusion in the appendix. *See* H.B. § IX.B.2; "Briefing with Deferred Records or Appendices," *supra*.

B. Filing Procedures. Appellant must file eight paper copies of the appendix (seven if the appendix is filed electronically) and serve one paper copy on each separately represented party. *See* H.B. §§ IX.B.4–5. An appellant appearing *in forma pauperis*, however, need not file an appendix and may file only the relevant transcript pages. *See* H.B. § IX.B.6.

C. Content and Format. Unlike the brief, the appendix may be photocopied on both sides of each page. If it is reproduced apart from the appellant's or petitioner's brief, it should have a white cover. *See* H.B. § IX.B.4.

XIV. Amicus Curiae Practice

A. Participation as of Right or by Motion. An amicus curiae brief may be filed only by consent of the parties or leave of the court. A motion for leave to file an amicus brief must set forth the movant's interest, the reason why briefing is desirable, and why the matters asserted are relevant to the court's disposition of the case. *See* Fed. R. App. P. 29(b); H.B. § IX.A.4.

B. Timing. An amicus brief must be filed "no later than 7 days after the principal brief of the party being supported is filed"; if an amicus supports neither party, its brief is due "no later than 7 days after the appellant's or petitioner's principal brief is filed." Fed. R. App. P. 29(e). The clerk's briefing schedule, however, may alter those deadlines. To "enable the court to accommodate amici briefs in setting the briefing format and schedule in each case," H.B. § IX.A.4, the court "encourages" individuals to file motions for leave or representations of consent to participate as amici "as promptly as practicable after the case is docketed in this court," D.C. Cir. R. 29(b). As of December 1, 2010, the D.C. Circuit no longer requires amici to file motions for leave to participate within 60 days of docketing.

C. Content and Format. An amicus is limited to one-half the maximum length authorized for a party's principal brief. Fed. R. App. P. 29(d); D.C. Cir. R. 32(a)(3). All amici on one side must file a single brief to the extent practicable. D.C. Cir. R. 29(d); H.B. § IX.A.4. If amici on one side seek to file multiple briefs, they must file a motion with the court explaining why; "[g]rounds that are not acceptable as reasons for filing a separate brief include representations that the issues presented require greater length than allowed under the rules, that counsel cannot coordinate filing a single brief because of geographical dispersion, or that separate presentations were permitted in the proceedings below." H.B. § IX.A.4. An amicus must disclose whether a party authored or funded the brief in whole or in part. Fed. R. App. P. 29(c).

D. Responses to Amicus Briefs. Parties are expected to respond to amici in their regularly scheduled briefs. *See* Notes of Advisory Committee on 1998 Amendment to Fed. R. App. P. 29(e).

XV. Supplemental Authorities

A. Submission as of Right or by Motion. When pertinent and significant authorities come to a party's attention after briefing or oral argument but before decision, a party may promptly advise the clerk by writing a letter pursuant to FRAP 28(j).

B. Timing and Consideration by Court. A letter submitted under FRAP 28(j) should be submitted "promptly" after discovery of the supplemental authority.

C. Content and Format. Rule 28(j) letters are limited to 350 words, and they must be submitted with an original and four copies to the court, along with copies to all other parties. *See* D.C. Cir. R. 28(f). The letter must state the reasons for the supplemental citations (including legal argument, if necessary) and must include references to pages of the party's brief or citations to points argued orally. *See* Fed. R. App. P. 28(j); Notes of Advisory Committee on 2002 Amendment to Fed. R. App. P. 28(j). Other parties may file a response, but it must be similarly limited and served.

XVI. Oral Argument

A. Argument as of Right or by Motion; Waiver. Although FRAP 34(a)(1) states that "[a]ny party may file . . . a statement explaining why oral argument should, or need not, be permitted," such statements are not commonly included in briefs in the D.C. Circuit. A party that does not file a brief may not present oral argument without permission from the court. *See* D.C. Cir. R. 34(f). During the 12-month period ending on September 30, 2010, the court decided 44 percent of its cases after oral argument and 56 percent after submission on the briefs. *See* James C. Duff, *Judicial Business of the United States Courts: 2010 Annual Report of the Director* 44 (Table S-1).

B. Procedures for Granting and Calendaring Oral Argument. Currently, the clerk calendars a case for oral argument shortly before or shortly after briefing is completed. The order scheduling a case for argument will also identify the judges on the panel. One panel member serves as the screening judge, determines the amount of argument time, and may set a particular format for oral argument. The D.C. Circuit typically sets arguments for 10 or 15 minutes per side, although in cases designated as Complex, the screening judge will set 30 minutes or more per side, as the panel hearing a Complex cases hears only that case on the argument day. *See* H.B. § XI.C.1. When the court allocates 15 minutes or fewer per side, only one counsel per side is permitted absent an order from the court; because the time allocation order is often released two weeks (or less) before argument,

parties may (and often do) file a motion seeking leave to share argument time before the allocation order is released. When the court allocates more than 15 minutes per side, two counsel may argue per side without the need to seek leave of the court, and may share time as they see fit. *See* D.C. Cir. R. 34(d); H.B. § XI.D.

The parties also may agree to enter the "stand-by pool," which allows the case to be used as a replacement for a case removed from the argument calendar. *See* H.B. § X.E.4 (listing requirements for entering the stand-by pool).

A case that has been set for oral argument may be removed from the argument calendar by unanimous decision of the panel and be submitted without oral argument pursuant to Circuit Rule 34(j). If that happens, counsel have 10 calendar days to move for restoration of the case to the oral argument calendar; such motions, however, are rarely granted. H.B. § XI.C.1.

The median interval between completion of briefing and oral argument in the D.C. Circuit is 3.0 months, *see* Duff, *supra*, at 105 (Table B-4), though that number is probably skewed somewhat by the fact that the court normally does not hear oral arguments between the end of May and beginning of September, *see* H.B. § X.

C. Identification of Panel Members. In civil cases, the D.C. Circuit ordinarily discloses the identity of panel members in the order setting the case for oral argument. In criminal cases, the court does not decide whether to schedule the case for oral argument until after receiving the appellant's opening brief, and the panel generally will not be disclosed until after both parties have filed their briefs. *See* H.B. § II.B.8.a. When the Supreme Court remands a case to the D.C. Circuit, the clerk assigns it to the original panel that previously considered it. *See* H.B. § X.E.3.

D. The Day of Argument. Counsel must arrive at the courtroom at least 20 minutes before the start of argument for the day. Counsel may call the clerk's office in the afternoon of the day before argument to find out the order in which the cases will be heard (such information will also appear on the court's website and will be posted outside the courtroom on the day of argument). Facing the bench, counsel for the appellant or petitioner sits to the right of the lectern, and counsel for the appellee or respondent sits on the left. The lectern has three lights (green, yellow, and red)—when counsel begins his or her argument, the green light will come on; when counsel has two minutes remaining, the yellow light will come on; and when counsel's time has expired, the red light will come on. Counsel for the appellant or petitioner must inform the courtroom deputy clerk whether he or she wishes to reserve time for rebuttal because the deputy clerk will use that information to calibrate the lights on the lectern. However, the judges are active questioners and often continue asking questions after the red light has come on, which will reduce (or eliminate) the time counsel sought to reserve for rebuttal; in such circumstances, the presiding judge will often grant counsel for the appellant or petitioner one or two additional minutes of rebuttal time.

XVII. Decisions

A. Internal Procedures for Disposing of Cases. After oral argument, the court typically holds a conference to discuss the day's cases. At the conference, the judges reach agreement over the form and substance of the court's judgment. The most-senior judge in the majority then assigns the responsibility for writing an opinion. *See* H.B. § XII.B. Opinions that are to be published are circulated among all the judges on the court for at least two weeks before they are released publicly. The median time interval between oral argument and the court's decision is 2.6 months. *See* James C. Duff, *Judicial Business of the United States Courts: 2010 Annual Report of the Director* 105 (Table B-4).

B. Draft Decisions. The D.C. Circuit does not issue draft decisions.

C. Published or Unpublished Opinions. Although certain decisions are not published, all unsealed judgments and memoranda are available to the public upon proper application to the clerk's office, and those issued since June 2000 are posted on the court's website. *See* H.B. § XII.E. Published opinions are released on Tuesdays and Fridays, normally at (or shortly after) 10:00 a.m. The clerk's office will call counsel who argued a case between 9:20 a.m. and 10:00 a.m. on a day when the opinion is to be released to inform counsel that the opinion will be released that morning. Notification of the release of the opinion will also be transmitted via the ECF system.

XVIII. Motions for Rehearing and Rehearing En Banc

A. Grounds. There are two ways to seek reconsideration of a panel's opinion—a petition for rehearing by the panel or a petition for rehearing en banc. The grounds and rules for filing petitions for rehearing and rehearing en banc are set forth in FRAP 35 and D.C. Circuit Rule 35. Either petition must begin with a statement that either (i) the panel's opinion conflicts with a decision of the U.S. Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case(s)), or (ii) the panel's opinion implicates one or more questions of exceptional importance, each of which must be concisely stated.

B. Briefing. A party may simultaneously submit petitions for panel rehearing and rehearing en banc, but when doing so, should include them in the same document. Regardless of whether the party seeks rehearing by the panel, en banc, or both, the petition may not exceed 15 pages in length, and it must comply with the typeface and other formatting requirements of FRAP 27(d)(1). *See* H.B. § XIII.B.1. The petition must be filed within 30 days after entry of judgment if the United States is not a party (which is longer than the 14-day period provided for in the Federal Rules of Appellate Procedure) or 45 days after entry of judgment if the United States (or an officer or agency thereof) is a party. *See* D.C. Cir. R. 35(a). The content of both petitions are governed by FRAP 35, along with D.C. Circuit Rule 35. The court's rules do not provide a right of reply for either petition, except

by invitation of the court. Petitions in either category are very rarely granted, and it is even more rare that the court will grant a petition for rehearing without first inviting a response. When filing a petition for rehearing by the panel, counsel must include the original and four copies; when filing a petition for rehearing en banc (whether or not combined with a petition for panel rehearing), counsel must include the original and 19 copies. *See* H.B. § XIII.B.1–2.

XIX. Costs and Attorneys' Fees

A. Taxable Costs. Costs, when requested, are usually charged to the losing party. Counsel has 14 days after entry of judgment to calculate allowable costs (which are set forth in D.C. Circuit Rule 39(a)) and serve an itemized list of costs on opposing counsel. Forms for itemizing costs are available from the clerk's office or the D.C. Circuit website. The clerk's office will review the bill, along with any objections filed by opposing counsel, and prepare a statement for inclusion in the mandate. If a party is ordered to pay costs, the matter is effectively terminated in the D.C. Circuit; any further disputes (regarding, e.g., enforcement) must be handled in the district court. *See* H.B. § XIII.A.4.

B. Other Recoverable Expenses. Only the costs set forth in D.C. Circuit Rule 39(a) are recoverable.

C. Attorneys' Fees. Absent an independent statutory or contractual basis, attorneys' fees are not awarded by the D.C. Circuit, save for exceptional circumstances where sanctions are appropriate. *See* H.B. § IX.A.1.

D. Objections and Replies. Losing counsel may object to winning counsel's itemized costs. *See* "Taxable Costs," *supra*; H.B. § XIII.A.4.

XX. Further Appellate Review in Multi-Level Systems

The only level of review beyond the D.C. Circuit is the Supreme Court of the United States. See chapter 1 of this Book. A petition for a writ of certiorari must be filed within 90 days of the entry of judgment by the D.C. Circuit or the denial of a petition for rehearing, if rehearing is sought. Counsel should remember that the judgment is entered on the day of the court's decision—not when the mandate issues. *See* H.B. § XIII.C. In 2010, where the losing party in the D.C. Circuit petitioned for certiorari in the Supreme Court, they were successful less than 1 percent of the time. *See* James C. Duff, *Judicial Business of the United States Courts: 2008 Annual Report of the Director* 93 (Table B-2).

XXI. Mandate

A. Procedure for Issuance. The court will enter its judgment in a case on the same date its decision is issued. Ordinarily, the clerk's office will issue a certified copy of that judgment in lieu of a formal mandate seven calendar days after the period for seeking rehearing has expired or a petition for rehearing has been decided. The court, however, retains discretion to direct immediate issuance of its mandate in an appropriate case, and any party may move at any time for expedited issuance of the mandate upon a showing of good cause. *See* H.B. § XIII.A.2.

B. Stay or Recall of Mandate. A party may move to stay the mandate for good cause shown. Unless the opposing side does not object to a stay, the court will wait for 10 days to allow the opposing side to file a response. Subject to these limitations, the clerk has authority to grant unopposed motions for stays for a period of up to 90 days. The clerk also may refer the motion to the panel that decided the case. If the court grants a stay, and the party who obtained a stay then files a petition for a writ of certiorari, that party should notify the clerk in writing; the stay will then remain in effect until the Supreme Court's final disposition. *See* H.B. § XIII.A.2.

Andy Oldham

From: Andy Oldham
Sent: Thursday, June 08, 2017 3:14 PM
To: Berry, Jonathan (OLP)
Subject: Updated SJQ
Attachments: 2017 06 08 SJC Questionnaire ASO.docx

Jon --

Great to talk with you today. Here's an updated SJQ that incorporates our discussion.

Best, Andy

Andy Oldham

From: Andy Oldham
Sent: Thursday, June 15, 2017 1:13 PM
To: Berry, Jonathan (OLP)
Subject: SJQ Questionnaire
Attachments: 2017 06 15 SJC Questionnaire ASO.docx

Please see attached. Best, Andy

Andy Oldham

From: Andy Oldham
Sent: Wednesday, July 05, 2017 1:04 PM
To: Berry, Jonathan (OLP)
Subject: Confidential questionnaire
Attachments: Confidential Questionnaire ASO.docx

[redacted] (b) (5) . But in the meantime, here's the confidential questionnaire.

Best, Andy

Andy Oldham

From: Andy Oldham
Sent: Thursday, July 6, 2017 7:51 PM
To: Berry, Jonathan (OLP)
Subject: Re: Confidential questionnaire
Attachments: 11-889_pet_amcu_texas.authcheckdam.pdf; 12-246_resp.authcheckdam.pdf; 12-1146_pet_state.authcheckdam.pdf; 12-1146_reply_state_pet.authcheckdam.pdf; 12-118212-1183_resp_sl.authcheckdam.pdf; SCOTUS-brief.pdf; 2017 07 06 SJC Questionnaire ASO.docx

Jon -- here you go. (b) (5) Please let me know what else I can do to help.

Thank you again. Andy

On Thu, Jul 6, 2017 at 10:37 AM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

> Great – thanks, Andy. (b) (5) Thanks! -Jon
>
> **From:** Andy Oldham [mailto: (b) (6)
> **Sent:** Wednesday, July 5, 2017 9:01 PM
> **To:** Berry, Jonathan (OLP) <jberry@jmd.usdoj.gov>
> **Subject:** Re: Confidential questionnaire
>
> (b) (5). So we are good to go.
>
> On Wed, Jul 5, 2017 at 12:03 PM Andy Oldham (b) (6) > wrote:

Duplicative Material

No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,
Petitioner,

v.

RUDOLF JOHN HERRMANN, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Petitioner Tarrant Regional Water District, a political subdivision of the State of Texas, is responsible for supplying water to nearly two million people in North Central Texas, one of the fastest growing and most productive regions of the country. Tarrant has identified certain water within Oklahoma as the most practical source for supplying the region's immediate and long-term needs. *See* Pet'r Br. at 15.

Critically, Texas has "equal rights to . . . use" that water under Section 5.05(b)(1) of the Red River Compact, an interstate compact approved by Congress. 1JA at 25. By upholding Oklahoma's protectionist water-permitting laws, however, the Tenth Circuit thwarted Tarrant's ability to obtain any water from within the Oklahoma portion of the Red River Basin. Texas has a substantial interest in ensuring that its residents have access to their share of that water.

SUMMARY OF ARGUMENT

The Red River Compact grants Texas a right to use a fixed percentage of water from within Reach II, Subbasin 5 of the Red River Basin, a geographically defined area that traverses parts of Oklahoma, Texas, and Arkansas. Nonetheless, the Tenth Circuit concluded that Oklahoma may apply its discriminatory laws to prevent Texas users like Tarrant from acquiring any portion of Texas's share of Subbasin 5 water from within the physical boundaries of Oklahoma even if that water cannot be accessed from inside Texas's border.

Relying upon a presumption against the implied preemption of state laws, the Tenth Circuit determined

that Section 5.05(b)(1) of the Compact could be squared with Oklahoma's challenged statutes by narrowly construing each Signatory State's "equal rights to the use of" Subbasin 5 water to include only water from within each State's own physical boundaries. The Tenth Circuit's use of the presumption to interpret the Compact was misplaced and prejudicial. The rationale underlying the presumption against implied preemption that Congress does not lightly interfere with the States' ability to enact and enforce their own laws is inapposite here, where the federal law at issue is an interstate compact that was negotiated by several States themselves. Applying the presumption was particularly inappropriate because the Compact sets forth the Signatory States' specific intent to preempt any state laws that conflict with water apportionments made in the agreement.

Under a proper "plain terms" analysis of Section 5.05(b)(1) of the Compact, and especially when compared to other sections of the agreement, it is clear that Texas (and each Signatory State) is entitled to use up to 25% of Subbasin 5 water without reference to state borders. The Compact, therefore, provides Texas with the right to obtain its share of Subbasin 5 water from that portion of the subbasin that sits within the physical boundaries of Oklahoma. At a minimum, Oklahoma cannot prevent Texas users from accessing the State's share of Subbasin 5 water from within Oklahoma if that water cannot be obtained from inside the Texas portion of the subbasin, which lies downstream from Oklahoma.

Instead of providing access to Texas's share of Subbasin 5 water, however, Oklahoma enacted a series of laws that effectively prevent out-of-state users like Tarrant from appropriating any water from within Oklahoma. The Court should reverse the Tenth Circuit's judgment to ensure that Oklahoma may not escape its compact obligations and deprive Texas users of the water they are entitled to use under the cover of Oklahoma's statutes.

ARGUMENT

TEXAS'S "EQUAL RIGHT[] TO THE USE OF" A FIXED PERCENTAGE OF WATER LOCATED WITHIN REACH II, SUBBASIN 5 OF THE RED RIVER COMPACT PREEMPTS OKLAHOMA'S PROTECTIONIST WATER LAWS.

For nearly a century, the States have negotiated compacts to govern the use and control of interstate waters in the arid West. With Congress's approval, such compacts become federal law, superseding inconsistent state laws, *Del. River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 433-34 (1940), and other preexisting state-granted water rights, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938).

Compacts, therefore, enable States to plan for future demand with certainty that water will be available when the need arises irrespective of competing claims based upon priority or other interests. *See Montana v. Wyoming*, 131 S. Ct. 1765, 1779 (2011) (Compacts may be used "to guarantee [States] a set quantity of water . . . ."); *see also Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 n.20 (1982) ("[T]his Court has encouraged

States to resolve their water disputes through interstate compacts rather than by equitable apportionment adjudication.") (citation omitted).[1]

The Red River Compact is one such compact joined by the States of Arkansas, Louisiana, Oklahoma, and Texas. One of its "principal purposes" is "[t]o provide a basis for state . . . planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof." 1JA at 9-10 (Compact, § 1.01(e)). Whether those apportionments conflict with and therefore preempt Oklahoma's challenged water-permitting laws requires interpretation of the Compact. *Cf. Hinderlider*, 304 U.S. at 110-11 (Court may determine the effect of an interstate compact even where the contracting States are not parties to the suit).

A. An Interstate Compact Must Be Read According to Its Plain Terms Not with a Presumption Against Preemption of Conflicting State Laws.

1. While an interstate compact approved by Congress is federal law, *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), it is also a type of contract that is construed according to ordinary principles of contract law, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). The primary goal of contract interpretation is to effectuate the

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1. Despite best intentions, the mere existence of an interstate water compact does not foreclose the possibility that the Court may be required to interpret its language to resolve a dispute that arises between the compacting States. *Cf. Texas v. New Mexico*, 462 U.S. 554, 568 (1983).

contracting parties' intent. *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-71 (1984). That is accomplished by adhering to and enforcing the "plain terms" of the contract. *Montana*, 131 S. Ct. at 1779; *see also New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008) ("Interstate compacts, like treaties, are presumed to be 'the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.'") (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)).

Faced with Tarrant's Supremacy Clause challenge to Oklahoma's water-permitting statutes, the Tenth Circuit disregarded these cardinal tools of compact construction and instead interpreted the Red River Compact under the distorting effect of a "presumption against implied conflict preemption." *See* Pet. App. at 34-35, 40-41, 43.

2. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Consistent with the plain command of the Supremacy Clause, state laws that conflict with federal law are "'without effect.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

State laws may be preempted by force of the Supremacy Clause through express language in a congressional statute, by implication arising from the

breadth of federal enactments occupying a particular legislative field, or by implication based upon an actual conflict with federal law. *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265-66 (2012) (citations omitted). Conflict preemption occurs in cases where compliance with both federal and state law is a physical impossibility and in those instances in which state law stands as an obstacle to the accomplishment of federal objectives. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (citations omitted).

Although the Court has employed a presumption against implied conflict preemption, under which federal law is construed to avoid a conflict with state law to the extent possible, s*ee, e.g., Wyeth v. Levine*, 555 U.S. 555, 565 (2009), the Court also has held that the presumption should not be used to interpret the "substantive (as opposed to pre-emptive) *meaning*" of federal law when there is no doubt that the law is intended to preempt state laws, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996) (the "meaning" of a federal statute is a separate question from "whether" it is preemptive) (emphasis in original). *See also Cuomo v. Clearing House Ass'n,* 557 U.S. 519, 555-56 (2009) (Thomas, J., concurring in part and dissenting in part) (The act of statutory construction "may clarify the pre-emptive scope of enacted federal law . . . .").

More recently, in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), the Court expressed uncertainty regarding the continuing vitality of the presumption. *Compare id.* at 2580 (Thomas, J., plurality op.) (Courts "should not strain to find ways to reconcile federal law with seemingly conflicting state law," but should instead

"look no further than the ordinary meaning of federal law" without "distort[ing] federal law to accommodate conflicting state law.") (internal quotation marks omitted), *with id.* at 2583 (Sotomayor, J. dissenting) ("[A] plurality of the Court tosses aside our repeated admonition that courts should hesitate to conclude that Congress intended to pre-empt state laws governing health and safety.").

3. Despite any lingering uncertainty over the proper tool of construction for interpreting federal statutes and regulations in a typical conflict-preemption case, the presumption against preemption should not have been applied here, where the federal law at issue is an interstate compact.

The Court utilizes the presumption out of "respect for the States as 'independent sovereigns in our federal system,'" under the assumption that Congress does not "'cavalierly'" act to eliminate the States' authority to enact and enforce their own laws. *Wyeth*, 555 U.S. at 565 n.3 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Accordingly, it makes little sense to apply the presumption when interpreting an interstate compact that was negotiated, drafted, and executed by a group of States at least when the Court is tasked with determining whether the compact conflicts with one of the party State's own laws.

Employing the presumption effectively favors one State's interpretation of the compact over the objective meaning of its terms, and in turn, will often deprive non-breaching States of bargained-for compact benefits under the guise of respecting State sovereignty. Not surprisingly, the Court long ago recognized that States

may not unilaterally determine the effect of their compact obligations by force of their own laws:

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State.

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951); *see also Hinderlider*, 304 U.S. at 106 ("Whether the apportionment of the water of an interstate stream be made by compact . . . with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact."); *Kentucky v. Indiana*, 281 U.S. 163, 176-77 (1930) (States cannot determine their rights under an interstate compact "inter sese," but instead, the Court "must pass upon every question essential to such a determination, although local legislation . . . may be involved.").

At bottom, the Tenth Circuit was able to salvage Oklahoma's challenged water statutes only by erroneously subverting the other Signatory States' rights under the Red River Compact.

4. What is more, the Tenth Circuit overlooked the fact that the Signatory States had anticipated the potential for conflict between the Compact and state laws, and explicitly proclaimed in two places that the

Compact must prevail in all such instances. First, Section 2.01 of the Compact states:

> Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state [and] may freely administer water rights and uses in accordance with the laws of that state, *but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact*.

1JA at 10 (emphasis added). Section 2.10(a) then states:

> Nothing in this Compact shall be deemed to: [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, *not inconsistent with its obligations under this Compact*.

Id. at 12 (emphasis added).

Although the Tenth Circuit cited portions of these provisions to support its conclusion that Congress and the Signatory States intended to preserve the States' ability to regulate the usage and control of water within their boundaries, *see* Pet. App. at 33, 35, the court omitted and failed to account for the overriding effect of the italicized language. The cited provisions make unmistakably clear that, although the Signatory States are generally permitted to administer water rights within their borders, they may not legislate away their Compact commitments. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-72 (2000) (a "saving" clause

preserving the operation of state law does not bar or affect the ordinary working of conflict preemption principles).

Simply put, there is no basis for employing a presumption against implied preemption when the Signatory States specifically provided that the Compact must prevail in the event of any conflict with state law. *See Medtronic,* 518 U.S. at 485 (Preemptive "purpose . . . is the ultimate touchstone in every preemption case.") (internal quotation marks omitted). Instead of endeavoring to reconcile the Compact with Oklahoma law, the Tenth Circuit should have aimed to give effect to the plain meaning of the Compact's text. *See Smiley*, 517 U.S. at 744 ("What *is* at issue here is simply the meaning of a provision that does not . . . deal with pre-emption [itself], and hence does not bring into play the considerations" warranting usage of a presumption against preemption.) (emphasis in original).

B. Section 5.05(b)(1)'s "Equal Rights" Provision Supercedes Oklahoma's Water-Permitting Scheme.

1. Oklahoma's challenged water-permitting statutes cannot be reconciled with the plain command of Section 5.05(b)(1) of the Compact. That section declares that the Signatory States "shall have *equal rights to the use of* runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more," further providing that "no state is *entitled* to more than 25 percent of the

water in excess of 3,000 cubic feet per second." 1JA at 25 (emphases added).[2]

Section 5.05(b)(1) does not limit Signatory States to water usage they can obtain from within their own borders. Neither does it limit States to water that trickles down from upstream States from within the subbasin. Instead, Section 5.05(b)(1) entitles each Signatory State to use up to 25% of water that originates in or flows into an interstate area. No other subbasin established in the Compact allocates water in the same fashion.

To begin with, Subbasin 5 is not defined by state lines: it traverses parts of Oklahoma, Texas, and Arkansas. This contrasts with other subbasins that are defined by State boundaries. *See* 1JA at 18-19 (Compact § 4.02(a)); *id.* at 19 (Compact § 4.03(a)); *id.* at 22 (Compact § 5.01(a)); *id.* at 23 (Compact § 5.02(a)); *id.* at 38 (Compact § 8.01). But unlike several subbasins that do cross state lines, Section 5.05(b)(1) does *not* limit the Signatory States' "equal rights to the use of" water in Subbasin 5 to the usage they can obtain from within their respective borders. *Compare id.* at 25 (Compact § 5.05(b)(1)), *with id.* at 23-24 (Compact § 5.03(b)) (Oklahoma and Arkansas "shall have free and unrestricted use of the water of this subbasin *within their respective states* . . . .") (emphasis added), *id.* at 33 (Compact § 6.03(b)) ("Texas and Louisiana *within their respective boundaries* shall each have the unrestricted

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2. The Red River meets these minimum flow conditions over 95% of the time. 1JA, at 30.

use of the water of this subbasin . . . .") (emphasis added).

Moreover, Section 5.05(b)(1) does not limit downstream States to a percentage of "flow into" their borders from upstream States in Subbasin 5, which, again, contrasts with the Compact's mode for allocating water in other interstate subbasins. *Compare id.* at 25 (Compact § 5.05(b)(1)), *with id.* at 36-37 (Compact § 7.02(b)) ("The State of Arkansas shall have free and unrestricted use of the water of this reach subject to the limitation that [it] shall allow a quantity of water equal to forty (40) percent of the weekly runoff . . . to flow into Louisiana.").

Instead, Section 5.05(b)(1) provides all four Signatory States with "equal rights to the use of runoff originating in . . . and undesignated water flowing into" any part of Subbasin 5 without reference to state lines. The differing terminology used throughout the Compact is presumptively meaningful. *See New Jersey*, 552 U.S. at 615-16; *cf. Miller v. Robertson*, 266 U.S. 243, 251 (1924) (intention of parties to an agreement should be gathered from the whole instrument); NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES & STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

2. Under its plain terms, and particularly when compared to other sections of the Compact, Section 5.05(b)(1) provides each Signatory State with the right to use up to 25% of the water from anywhere within Subbasin 5. Consequently, Texas has the right to

obtain Subbasin 5 water from within the Oklahoma portion of the subbasin, provided that Texas does not appropriate more than its 25% allotment.[3] Indeed, Oklahoma cannot use more than its own 25% share of Subbasin 5 water before the water crosses out of the State. *Cf.* 1JA at 30 (Interpretive Comment) ("If the states have competing uses and the amount of water available in excess of 3000 cfs cannot satisfy all such uses, each state will honor the other's right to 25% of the excess flow."). Requiring Oklahoma to allow Texas users to access Texas's share of Subbasin 5 water from within Oklahoma will not upend other compact arrangements across the country because, as Oklahoma recognizes, the specific language used in Section 5.05(b)(1) does not appear in any other compact in the United States. Br. Opp'n at 17; Suppl. Br. at 9.

At a minimum, Oklahoma cannot prevent Texas users from accessing Texas's share of Subbasin 5 water from within Oklahoma if such water is unavailable inside Texas's own borders. To that end, Tarrant

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3. The Court need not determine whether or how much water Tarrant is entitled to appropriate from within the Oklahoma portion of Reach II, Subbasin 5 at this stage of the lawsuit. The question presented is whether Oklahoma may apply its laws to prevent Texas users like Tarrant from accessing Subbasin 5 water in the face of Texas's rights under Section 5.05(b)(1) of the Compact. If the Court concludes that the Compact preempts the challenged laws at issue, the State of Texas will have authority to administer rights to its share of Subbasin 5 water. 1JA at 10 (Compact § 2.01) ("Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state . . . .").

maintains that the Texas portion of Subbasin 5 does not yield sufficient quantities of water to support Texas's allotment. Pet'r Br. at 9 n.5. But in endeavoring to salvage Oklahoma's challenged laws, the courts below forbade Tarrant from adducing evidence to make that showing, deeming it irrelevant. *See* Pet. App. at 44 n.3 ("The only fact we take the parties to dispute whether Texas can receive a 25 percent share of the excess water in the Texas part of Reach II, Subbasin 5 is not necessary to our disposition of this issue because we hold that § 5.05(b)(1) does not allocate water located in Oklahoma to Texas regardless of what amount of water Tarrant and other Texas users can appropriate in Texas."). Texas plainly loses the benefits of the bargain it made with Oklahoma (among others) if Texans are both physically unable to access the State's share of Subbasin 5 water from within Texas, and legally prevented from obtaining it in Oklahoma on account of their residency.

3. By establishing a series of legal obstacles that restrict out-of-state water users like Tarrant from obtaining water, Oklahoma's challenged laws conflict with and burden Texas's rights under Section 5.05(b)(1) of the Compact. While Oklahoma is entitled to regulate and administer water rights within its boundaries, it may not prevent Texas users from accessing, with Texas's regulatory approval, Texas's rightful share of Subbasin 5 water from within Oklahoma. 1JA at 10, 12 (Compact §§ 2.01, 2.10(a)).

Although the Tenth Circuit correctly concluded that Section 5.05, as a whole, is designed to "ensure that an equitable share of water from the subbasin reaches the

states downstream from Oklahoma and Texas," Pet. App. at 36, the court overlooked the remainder of the rights established by the section in its effort to accommodate the challenged Oklahoma laws. Sections 5.05(b)(2)-(3) do require the upstream States to allow certain amounts of water to flow into Louisiana under low-flow conditions. But nothing changes the fact that the Signatory States also are entitled to enjoy their equal share of Subbasin 5 water under ordinary flow conditions. As Tarrant points out, the Compact would not have established an interstate subbasin providing the Signatory States with "equal rights to the use of" water therein, 1JA at 25, had the drafters intended only to ensure downstream flows to Louisiana, *see* Pet'r Br. at 36-37.

4. Because Oklahoma's water-permitting statutes cannot be reconciled with Section 5.05(b)(1) of the Compact, they must "give way" to the Compact as a matter of law. *PLIVA*, 131 S. Ct. at 2577. The Court should reverse the Tenth Circuit's judgment and hold that Oklahoma's challenged laws cannot be applied to restrict Tarrant from obtaining Texas's share of Subbasin 5 water from within Oklahoma.

CONCLUSION

The Court should reverse the judgment of the Tenth Circuit and remand for further proceedings.

Respectfully submitted.

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February 26, 2013

Nos. 12-1146 and consolidated cases

In the Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, ET AL., PETITIONERS

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE STATE PETITIONERS

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QUESTION PRESENTED

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

PARTIES TO THE PROCEEDING

The Court has consolidated No. 12-1269 with Nos. 12-1146, 12-1248, 12-1254, 12-1268, and 12-1272. Petitioners in No. 12-1269, petitioners below, are the States of Texas, Alabama, Florida, Georgia, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota, and the Louisiana Department of Environmental Quality.

Respondents in this Court, respondents below, are the U.S. Environmental Protection Agency and Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency. Lisa P. Jackson ceased to hold the office of Administrator, U.S. Environmental Protection Agency, on February 15, 2013; that office is currently held by Gina McCarthy.

The following parties are considered respondents in No. 12-1269 under Supreme Court Rule 12.6, and are grouped according to their respective positions in the court below:

Petitioners

Alliance for Natural Climate Change Science and William Orr; Alpha Natural Resources, Inc.; American Chemistry Council; American Farm Bureau Federation; American Forest & Paper Association, Inc.; American Frozen Food Institute; American Fuel and Petrochemical Manufacturers; American Iron and Steel Institute; American Petroleum Institute; U.S. Representative Michele Bachmann; Haley Barbour, Governor of Mississippi; U.S. Representative Marsha Blackburn; U.S.

Representative Kevin Brady; Brick Industry Association; U.S. Representative Paul Broun; U.S. Representative Dan Burton; Center for Biological Diversity; Chamber of Commerce of the United States of America; Clean Air Implementation Project; Coalition for Responsible Regulation, Inc.; Collins Industries, Inc.; Collins Trucking Company, Inc.; Competitive Enterprise Institute; Corn Refiners Association; U.S. Representative Nathan Deal; Energy-Intensive Manufacturers' Working Group on Greenhouse Gas Regulation; Freedomworks; Georgia Agribusiness Council, Inc.; Georgia Coalition for Sound Environmental Policy, Inc.; Georgia Motor Trucking Association, Inc.; Gerdau Ameristeel Corporation; U.S. Representative Phil Gingrey; Glass Association of North America; Glass Packaging Institute; Great Northern Project Development, L.P.; Independent Petroleum Association of America; Indiana Cast Metals Association; Industrial Minerals Association-North America; J&M Tank Lines, Inc.; Kennesaw Transportation, Inc.; U.S. Representative Steve King; U.S. Representative Jack Kingston; Landmark Legal Foundation; Langboard, Inc.-MDF; Langboard, Inc.-OSB; Langdale Chevrolet-Pontiac, Inc.; Langdale Company; Langdale Farms, LLC; Langdale Ford Company; Langdale Forest Products Company; Langdale Fuel Company; Mark R. Levin; U.S. Representative John Linder; Massey Energy Company; Michigan Manufacturers Association; Mississippi Manufacturers Association; Missouri Joint Municipal Electric Utility Commission; National Association of Home Builders; National

Association of Manufacturers; National Cattlemen's Beef Association; National Environmental Development Association's Clean Air Project; National Federation of Independent Businesses; National Mining Association; National Oilseed Processors Association; National Petrochemical & Refiners Association; North American Die Casting Association; Ohio Coal Association; Pacific Legal Foundation; Peabody Energy Company; Portland Cement Association; U.S. Representative Tom Price; U.S. Representative Dana Rohrabacher; Rosebud Mining Company; Science and Environmental Policy Project; U.S. Representative John Shadegg; U.S. Representative John Shimkus; South Carolina Public Service Authority; Southeast Trailer Mart Inc.; Southeastern Legal Foundation, Inc.; Specialty Steel Industry of North America; Tennessee Chamber of Commerce and Industry; Texas Agriculture Commission; Texas Attorney General Greg Abbott; Texas Commission on Environmental Quality; Texas Department of Agriculture; Texas General Land Office; Texas Governor Rick Perry; Texas Public Utilities Commission; Texas Public Utility Commission Chairman Barry Smitherman; Texas Railroad Commission; Utility Air Regulatory Group; Commonwealth of Virginia ex rel. Attorney General Kenneth T. Cuccinelli; West Virginia Manufacturers Association; Western States Petroleum Association; U.S. Representative Lynn Westmoreland; Wisconsin Manufacturers and Commerce;

Respondent

National Highway Traffic Safety Administration;

Intervenors for Petitioners

State of Alaska; American Frozen Food Institute; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Arkansas State Chamber of Commerce; Associated Industries of Arkansas; Haley Barbour, Governor for the State of Mississippi; Chamber of Commerce of the United States of America; Colorado Association of Commerce & Industry; Corn Refiners Association; Glass Association of North America; Glass Packaging Institute; Idaho Association of Commerce and Industry; Independent Petroleum Association of America; Indiana Cast Metals Association; Kansas Chamber of Commerce and Industry; State of Kentucky; Langboard, Inc.-MDF; Langboard, Inc.-OSB; Langdale Chevrolet-Pontiac, Inc.; Langdale Farms, LLC; Langdale Ford Company; Langdale Fuel Company; Louisiana Oil and Gas Association; Michigan Manufacturers Association; Mississippi Manufacturers Association; National Association of Home Builders; National Association of Manufacturers; National Electrical Manufacturers Association; National Oilseed Processors Association; Nebraska Chamber of Commerce and Industry; North American Die Casting Association; Ohio Manufacturers Association; Pennsylvania Manufacturers Association; Portland Cement Association; Steel Manufacturers Association; Tennessee Chamber of Commerce and Industry;

State of Utah; Virginia Manufacturers Association; West Virginia Manufacturers Association; Western States Petroleum Association; Wisconsin Manufacturers and Commerce;

Intervenors for Respondents

Alliance of Automobile Manufacturers; American Farm Bureau Federation; State of Arizona; Brick Industry Association; State of California; Center for Biological Diversity; State of Connecticut; Conservation Law Foundation; State of Delaware; Environmental Defense Fund; Georgia ForestWatch; Global Automakers; State of Illinois; Indiana Wildlife Federation; State of Iowa; State of Maine; State of Maryland; Commonwealth of Massachusetts; Michigan Environmental Council; State of Minnesota; National Environmental Development Association's Clean Air Project; National Mining Association; National Wildlife Federation; Natural Resources Council of Maine; Natural Resources Defense Council; State of New Hampshire; State of New Mexico; State of New York; City of New York; State of North Carolina; Ohio Environmental Council; State of Oregon; Peabody Energy Company; State of Rhode Island; Sierra Club; South Coast Air Quality Management District; Utility Air Regulatory Group; State of Vermont; State of Washington; Wetlands Watch; Wild Virginia.

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The opinion of the D.C. Circuit (J.A. 191-267) is reported at 684 F.3d 102. The D.C. Circuit's orders denying panel rehearing and rehearing en banc (J.A. 139-90) are unreported.

JURISDICTION

The D.C. Circuit entered judgment on June 26, 2012, and denied timely petitions for rehearing en banc on December 20, 2012. On March 8, 2013, the Chief Justice extended the time for filing a certiorari petition to and including April 19, 2013. The petition was filed on April 19, 2013 and granted on October 15, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Clean Air Act, 42 U.S.C. §§ 7407 *et seq.*, are reproduced at Pet. App. 591a-619a. Relevant EPA rules are reproduced at J.A. 268-682, 1399-418.

STATEMENT

State Petitioners incorporate by reference the statement provided by the American Chemistry Counsel in No. 12-1248.

SUMMARY OF ARGUMENT

EPA is seeking to improve upon rather than implement the Clean Air Act. After declaring that it would begin regulating greenhouse-gas emissions

from stationary sources, EPA replaced unambiguous numerical permitting thresholds in the PSD and Title V programs with numbers and metrics of EPA's own creation, and then applied those agency-created criteria *solely* to greenhouse-gas emissions. EPA cannot use the "absurdity doctrine" as an excuse for departing from the Act's rigid, unambiguous permitting requirements, as the entire point of legislating by rule is to tolerate suboptimal policies in exchange for constraining an agency's discretion and forcing it to seek legislation (and therefore congressional input) before embarking on novel regulatory regimes.

EPA is correct to acknowledge the absurdity of applying the Act's 100/250 tons-per-year permitting requirements to CO_2 and other greenhouse gases, but the absurdity is caused entirely by EPA's questionable conclusion that greenhouse gases qualify as air pollutants subject to regulation under the PSD and Title V programs. An agency cannot construe *ambiguous* statutory language to *create* an absurdity, and then construe *unambiguous* statutory language to *avoid* that absurdity. The far-reaching and near-ridiculous regulatory burdens required by EPA's decision to regulate greenhouse-gas emissions under the PSD and Title V programs prove that the Act never delegated to EPA the authority to regulate greenhouse-gas emissions as "air pollutants" under those programs.

ARGUMENT

I. THE CLEAN AIR ACT CANNOT BE CONSTRUED TO AUTHORIZE EPA TO REGULATE GREENHOUSE GAS EMISSIONS UNDER THE PSD AND TITLE V PROGRAMS.

The statutory permitting thresholds established in the PSD and Title V programs require facilities to obtain permits if they emit more than 100 tons per year (or in some cases, more than 250 tons per year) of "any air pollutant." 42 U.S.C. §§ 7475(a), 7479(1), 7602(j), 7661(2), 7661a(a). These numerical thresholds are set far too low to accommodate rational regulation of greenhouse-gas emissions. As EPA has acknowledged, applying the 100/250 tons-per-year (tpy) thresholds to CO_2 and other greenhouse gases "would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the title V program." 75 Fed. Reg. 31,514, 31,533 (June 3, 2010) ("Tailoring Rule") (J.A. 355). This not only would expand the number of "major" sources subject to permitting requirements from 15,000 to more than 6,000,000, but it would also increase annual permitting costs from $12,000,000 to $1,500,000,000, and boost the number of man-hours required to administer these programs from 151,000 to 19,700,000. *See id.*, J.A. 381-88. Countless numbers of buildings, including churches and schools, would be subjected to EPA permitting requirements based on the CO_2 emissions from their water heaters.

The Clean Air Act cannot be interpreted to allow EPA to regulate greenhouse-gas emissions under either the PSD or Title V programs when the unambiguous statutory requirements would compel such preposterous consequences. The low, mass-based permitting thresholds established by the PSD and Title V provisions simply do not fit with a world in which EPA treats greenhouse-gas emissions as air pollutants for purposes of those programs. EPA must therefore obtain more specific authorization from Congress before asserting a prerogative to regulate greenhouse-gas emissions under either the PSD or Title V programs.

EPA cannot salvage its efforts to regulate greenhouse-gas emissions under these programs by pointing to ambiguities in the Act's definition of "air pollutant" or other provisions and insisting on *Chevron* deference. *See, e.g.*, 75 Fed. Reg. 17,004, 17,007 (Apr. 2, 2010) ("Timing Rule") (J.A. 721-22) ("Because the term 'regulation' is susceptible to more than one meaning, there is ambiguity in the phrase 'each pollutant subject to regulation under the Act' that is used in both sections 165(a)(4) and 169(3) of the CAA."). In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court refused to extend *Chevron* deference to FDA's decision to assert jurisdiction over tobacco products even though those products fell squarely within the statutory definitions of "drugs" and "devices" because the statutes governing FDA would have required the agency to ban cigarettes from interstate commerce.

Given that this outcome was incompatible with any semblance of rational regulation, the Court concluded that Congress could not have delegated to FDA the power to decide whether to regulate tobacco products. *Brown & Williamson* controls here and should lead the Court to disapprove EPA's attempt to regulate stationary-source greenhouse-gas emissions.

The facts of *Brown & Williamson* are remarkably similar to this case. The Food, Drug, and Cosmetic Act (FDCA) established FDA and authorized it to regulate drugs, among other items. The FDCA defined "drug" to include "articles (other than food) intended to affect the structure or any function of the body." 21 U.S.C. § 321(g)(1)(C). For many years, FDA declined to regulate tobacco products, even though the nicotine in those products is "intended to affect the structure or any function of the body." But in 1996 FDA changed tracks, declaring that nicotine qualified as a "drug" and asserting jurisdiction over tobacco products.

But once FDA asserted jurisdiction over tobacco products, the FDCA required the agency to remove all tobacco products from the market. The statute required preapproval of any new drug, with limited exceptions, and required FDA to disapprove any new drug not safe and effective for its intended purpose. *Id.* § 355(d)(1)-(2), (4)-(5). The statute also prohibited "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded," *id.* § 331(a), and defined

"misbranded" to include drugs or devices "dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof," *id.* § 352(j).

FDA was understandably reluctant to take this drastic step. Following these unambiguous statutory requirements would have produced, in EPA parlance, an "absurd result," a regulatory regime so heavy-handed as to fall outside the bounds of reasonable policymaking. So rather than enforcing a nationwide ban on tobacco products, FDA crafted an intermediate regulatory regime, one that merely restricted the marketing of tobacco products to children. *Brown & Williamson*, 529 U.S. at 127-29. Much like the Tailoring Rule that EPA promulgated to avoid the drastic consequences of its decision to regulate greenhouse gases, FDA's tobacco-advertising rule similarly spurned an unambiguous statutory command in an effort to soften the impact of its decision to regulate tobacco as a drug.

The Court, however, vacated FDA's rule in its entirety, refusing to allow the agency to chart its own regulatory course when an unambiguous statutory provision required the agency to ban all "dangerous" drugs or devices within its jurisdiction. And because the statute would produce this absurdity of banning all cigarettes from the market, the Court concluded that FDA could not assert jurisdiction over tobacco products in the first place *even though nicotine fell squarely within the FDCA's definition of "drug."* The

Court explained: "[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id*. at 160.

Brown & Williamson should lead the Court to similarly disapprove EPA's attempts to regulate greenhouse-gas emissions under the PSD and Title V programs. EPA's decision to regulate stationary-source greenhouse-gas emissions, like FDA's attempt to assert jurisdiction over tobacco, would produce irrationally onerous regulatory burdens that can be avoided only by rewriting unambiguous statutory language. And EPA's actions, like FDA's failed tobacco effort, involve a novel assertion of agency power that does not fit with the regulatory regime envisioned by the decades-old governing statute. Finally, it is unlikely that Congress would have "intended to delegate" to EPA the power to regulate stationary-source greenhouse-gas emissions unilaterally, and render decisions of such "economic and political significance," especially when the numerical thresholds in the PSD and Title V provisions would render such a project unworkable. *Id*. at 160. Just as the Court required FDA to obtain legislation from Congress extending its regulatory authority to tobacco, so too should it require EPA to seek legislation from Congress authorizing it to regulate greenhouse-gas emissions under the PSD and Title V programs.

The unambiguous (and low) mass-based numerical thresholds in sections 7479(1) and 7602(j)

foreclose any inference that the Act implicitly delegates to EPA the power to decide whether to treat greenhouse-gas emissions as air pollutants under the PSD and Title V programs. The inability to regulate these emissions rationally while simultaneously remaining faithful to the rigid, agency-constraining numerical thresholds in the Act demonstrates that greenhouse-gas regulation does not fit with the PSD and Title V provisions.

II. IF THIS COURT CONCLUDES THAT THE CLEAN AIR ACT AUTHORIZES EPA TO REGULATE STATIONARY SOURCE GREENHOUSE GAS EMISSIONS, THEN EPA MUST ENFORCE THE STATUTORY PERMITTING THRESHOLDS AND SEEK CORRECTIVE LEGISLATION FROM CONGRESS.

If the Court nevertheless concludes that the Act authorizes or requires EPA to regulate greenhouse-gas emissions from stationary sources, then it should vacate the Tailoring Rule and require EPA to enforce the statute's unambiguous permitting requirements. If EPA thinks the statutory permitting thresholds in the PSD and Title V programs are set too low to allow for rational regulation, then EPA must seek corrective legislation from Congress, rather than replace the statute's numerical, mass-based permitting thresholds with numbers and metrics of EPA's own choosing. Neither the unwillingness of Congress to enact this legislation, nor the unwillingness of the Executive Branch to spend its political capital to obtain this legislation, can justify

an agency's flagrant disregard of unambiguous statutory language.*

EPA's Tailoring Rule is one of the most brazen power grabs ever attempted by an administrative agency. Rather than apply the unambiguous permitting requirements that the Act establishes for *all* air pollutants regulated under the PSD and Title V programs, EPA's Tailoring Rule invents its own permitting thresholds for CO_2 and other greenhouse-gas emissions, and sets them at approximately *750 to 1000 times* the threshold levels specified in the statute. J.A. 310-19. If that were not enough, EPA's Tailoring Rule also departs from the mass-based approach to significance levels established in the text of the Act, as it measures the threshold quantities of greenhouse-gas emissions according to their heat-trapping potential. J.A. 305-10, 340-49. This flouts the rule-based thresholds that the Act established to constrain EPA's discretion.

EPA concedes the incontestable, admitting that its Tailoring Rule "do[es] not accord with a literal reading of the statutory provisions for PSD applicability." J.A. 448. Yet EPA tries to defend its Tailoring Rule by noting that obeying the statutory language "would create undue costs for sources and

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* The court of appeals refused to address the legality of the Tailoring Rule by holding that the petitioners lacked standing to challenge it, but this conclusion is mistaken for the reasons explained in State Petitioners' certiorari petition. Pet. 22-28, *Texas v. EPA*, No. 12-1269 (U.S. Apr. 19, 2013).

impossible administrative burdens for permitting authorities," J.A. 418, and attempts to create a legal veneer for its unilateral rewriting of the Act by invoking "congressional intent," the "absurdity doctrine," and *Chevron* deference. None of this can justify an agency's decision to countermand unambiguous statutory language and expand its discretion by converting statutory rules into standards.

A. EPA Cannot Subordinate The Clean Air Act's Unambiguous, Rule Bound Numerical Thresholds To Actual Or Imagined "Congressional Intent."

In defending its insouciance toward the enacted text of the Act, EPA makes an audacious claim: that "clear" congressional intent can trump unambiguous statutory language and liberate agencies to convert statutory rules into agency-empowering standards. EPA writes: "[I]f congressional intent for how the requirements apply to the question at hand is clear, the agency should implement the statutory requirements not in accordance with their literal meaning, but rather in a manner that most closely effectuates congressional intent." J.A. 285.

That is nonsense. Even the clearest expressions of "congressional intent" cannot license an agency to convert the Act's rule-bound numerical thresholds into standards that empower EPA administrators to weigh costs against benefits. This much is clear from *INS v. Chadha*, 462 U.S. 919 (1983). Once Congress confers discretionary powers on an agency

administrator, it cannot revoke that discretion by deploying a one- or two-house "legislative veto" over the agency's decisions. *Id.* at 954-55. A two-house legislative veto is as clear a manifestation of "congressional intent" as one can imagine, yet even these "clear" congressional intentions cannot control an agency's decisionmaking unless they are codified in a statute that successfully runs the bicameralism-and-presentment process.

In like manner, once agency discretion is *restricted* by statute, it cannot be loosened by unenacted congressional wishes. Suppose that each house of Congress approved a nonbinding resolution urging EPA to ignore the Act's statutory thresholds for all air pollutants and replace them with thresholds chosen by the EPA Administrator. One would think this should qualify as a "clear" manifestation of congressional intent and it is far more clear than anything that EPA has offered in its Tailoring Rule. Yet no one would maintain that these unenacted aspirations could liberate EPA from an unambiguous statutory constraint. Surely less reliable indicators of congressional intent such as opinion polls of current or former legislators, or facile and unsupported assertions of "congressional intent" cannot be invoked to displace unambiguous, agency-controlling statutory language either.

EPA's Tailoring Rule treats enacted statutory language not as law, but as mere evidence of what the law might be. The "real" law, according to EPA, is "congressional intent," and statutory text serves as

little more than a guide to agencies as they attempt to discover or construct how "Congress" would want them to deal with problems. *See, e.g.*, J.A. 285 ("*To determine congressional intent*, the agency must first consider the words of the statutory requirements, and if their literal meaning answers the question at hand, then, *in most cases*, the agency must implement those requirements by their terms.") (emphases added); J.A. 409 ("If the literal meaning of the statutory requirements is clear then, absent indications to the contrary, the agency must take it to indicate congressional intent and must implement it.").

EPA's efforts to equate the law with "congressional intent" rather than enacted text of federal statutes is irreconcilable with the jurisprudence of this Court. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005) (holding that arguments based on legislative "intent" have no relevance when interpreting unambiguous statutes); *Penn. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (assuming that "Congress did not 'envisio[n] that the [statute] would be applied to state prisoners,'" but holding that "in the context of an unambiguous statutory text that is irrelevant" (citation omitted)); *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.").

EPA's intentionalism is also irreconcilable with modern understandings of how the legislative process functions. First, this Court has recognized that legislation embodies compromises between competing interests, and that abstract speculations about congressional "intent" and "purpose" can unravel bargains memorialized in the enacted language. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002); *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986); *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-19 (1980). The Act's provisions reflect compromises along many different dimensions. Most obviously, its provisions trade off the goals of providing clean air against the need to avoid excessive regulatory burdens. Congress "intended" to pursue each of these competing goals, yet *how much* an agency should pursue clean air and *how much* it should seek to avoid onerous regulation can be determined only by following the enacted statutory language. *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President.").

Second, the Act, like all statutes, must decide whether to pursue these goals by establishing statutory rules ("drive no faster than 55 miles per hour") or standards ("drive at a speed reasonable under the circumstances"). Legislating by rule has many virtues but also drawbacks. On the plus side,

statutory rules can promote predictability and planning, avoid arbitrary treatment of regulated entities, and reduce decision costs for those who implement the law. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). But statutory rules can be crude; they are sometimes insensitive to context, or over- or under-inclusive in relation to their underlying goals. Standards, by contrast, confer discretion on future decisionmakers to avoid suboptimal outcomes in particular cases, but this type of regime comes at the price of increased decision costs, the potential for arbitrary or unpredictable decisions, and (perhaps) increased error costs if future decisionmakers are untrustworthy. Rules and standards also allocate power between the legislature and the agencies and courts that implement the law. Standards delegate power to future decisionmakers such as agencies and courts, while statutory rules withhold discretion from these institutions and force them to seek legislative approval before deviating from the codified regime. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992). How to calibrate these tradeoffs between rules and standards is an essential component of the legislative compromise necessary to produce statutes such as the Clean Air Act. But allowing agencies or courts to invoke abstract notions of "congressional intent" empowers those institutions to convert statutory rules into standards and withhold from Congress the prerogative of

legislating by rule. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994) (declaring that courts and agencies are "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes").

Third, this Court has recognized that Congress, as a multi-member body, is incapable of having "intentions" or "purposes." *See Barnhart*, 534 U.S. at 461; *Dimension Fin.*, 474 U.S. at 374; *Mohasco*, 447 U.S. at 818-19; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . . ."); KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); Kenneth A. Shepsle, *Congress Is a "They," Not An "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992); *United States v. Mitra*, 405 F.3d 492, 495 (7th Cir. 2005) ("Congress is a 'they' and not an 'it'; a committee lacks a brain (or, rather, has so many brains with so many different objectives that it is almost facetious to impute a joint goal or purpose to the collectivity)."). Legislative outcomes can be manipulated by agenda control and logrolling, clouding any efforts to discover congressional "intentions" from the voting records of its members. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) ("[J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little

more than wild guesses."). Legislatures simply produce outcomes, which must be enforced by courts and agencies.

In all events, even if one accepts "congressional intent" as a coherent concept, EPA's empirical claims regarding "congressional intent" are demonstrably false. There is no "clear" congressional intent from the legislators who enacted the Act or the 1977 amendments because the issues of global warming and greenhouse-gas emissions were not salient at the time of enactment. That means we not only do not know, but we cannot even reconstruct, how the Congresses of 1970 or 1977 would have wanted EPA to deal with this problem. As for the Congress that enacted the 1990 Clean Air Act Amendments, that Congress *rejected* several legislative proposals to regulate greenhouse-gas emissions, a fact that EPA conveniently ignores throughout its Timing and Tailoring Rules. *See, e.g.*, H.R. 5966, 101st Cong. (1990); S. 1224, 101st Cong. (1989). The statute's rigidity demonstrates that the legislatures that enacted the Clean Air Act's provisions expected EPA to come to Congress to seek statutory amendments and authorization to regulate newfound hazards such as global warming. And if the present-day Congress "intends" for EPA to disregard the numerical thresholds in the Act, as EPA suggests, then EPA should have no trouble securing corrective legislation from Congress.

B. EPA Cannot Disregard The Clean Air Act's Unambiguous, Agency Constraining Numerical Thresholds By Invoking The "Absurdity Doctrine."

EPA's efforts to defend the Tailoring Rule by invoking the "absurdity doctrine" fail for several reasons.

First, agencies cannot rely on "absurd results" as an excuse to convert unambiguous statutory rules into standards. *Every* rule will produce suboptimal or even absurd results at the margins. Yet the entire point of legislating by rule is to tolerate these less-than-ideal outcomes in exchange for the benefits of cabining agency discretion, minimizing decision costs, and preserving the legislature's power vis-à-vis the agency. EPA's theory of "absurd results" would empower agencies to smuggle cost-benefit analysis into *any* statutory mandate, even when the statute expressly rejects this type of utilitarian calculus. *See* J.A. 356 ("For both programs, the addition of enormous numbers of additional sources would provide relatively little benefit compared to the costs to sources and the burdens to permitting authorities."). And it would disable Congress from using statutory rules as a means of forcing agencies to obtain congressional authorization and input before regulating novel and unforeseen environmental problems.

Second, EPA's Tailoring Rule wrongly conflates the canon of constitutional avoidance with a generalized prerogative of agencies to avoid "absurd

results" by converting statutory rules into standards. Many of the authorities that EPA cites involve cases in which the Court bent enacted statutory language to avoid an actual or potential *constitutional violation*. *See* J.A. 393-95 (citing *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132-33 (2004); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542-45 (2002); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989); *Pub. Citizen v. DOJ*, 491 U.S. 440, 453-54 (1989)). Yet there is a great distance between the constitutional-avoidance canon and the absurdity doctrine applied by EPA. The avoidance doctrine is narrow; it applies only when the enacted statutory language would violate the Constitution or present a serious constitutional question. It is rooted in principles of constitutional supremacy and promotes judicial restraint by enabling courts to avoid unnecessary constitutional pronouncements. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988); *see also Ashwander v. TVA*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring). EPA's notions of "absurdity" extend far beyond these situations, allowing agencies or courts to depart from unambiguous statutory language merely to avoid a suboptimal policy outcome, even when a straightforward textual interpretation would comply with all constitutional requirements. No matter how undesirable as a matter of policy, there is nothing

unconstitutional, or even constitutionally questionable, about imposing onerous regulatory burdens on buildings that emit greenhouse gases when the text of the Act establishes unambiguous numerical permitting thresholds.

Indeed, in this case the canon of constitutional avoidance *compels* EPA to adhere to the Act's specific numerical thresholds. As explained in Part II.C, EPA's decision to depart from these statutory rules empowers EPA to choose its own numerical thresholds without an "intelligible principle" provided by Congress. And even if one thinks that EPA's actions can be salvaged under the Constitution, it cannot be denied that EPA's unilateral revision of these numerical guidelines at least presents serious constitutional questions under the Court's nondelegation precedents. EPA's atextual interpretation aggravates rather than alleviates constitutional problems, by seizing discretionary powers without an "intelligible principle" provided by Congress. The Tailoring Rule's attempt to rely on the Court's constitutional-avoidance cases boomerangs.

Finally, even if one accepted the legitimacy of EPA's generalized "absurdity doctrine," it *still* would not justify EPA's unilateral departure from the Act's numerical thresholds. It would indeed be absurd to apply the Act's numerical thresholds to greenhouse-gas emissions, but it hardly follows that EPA may "cure" the absurdity by disregarding unambiguous statutory text. The proper means of avoiding this

absurdity is not by replacing the unambiguous numerical thresholds in the Act with arbitrary targets of EPA's own choosing, but by concluding that stationary-source greenhouse-gas emissions cannot qualify as "air pollutants" subject to regulation under the PSD and Title V programs. Nothing in the Act *compels* EPA to include greenhouse gases within the ambit of air pollutants regulated by the PSD and Title V programs; the relevant statutory provisions can be construed to exclude greenhouse-gas emissions from stationary sources, as the other petitioners explain in their briefs. When an agency can avoid an "absurd" result by adopting a plausible construction of statutory language, it cannot decline to follow that course and insist on curing the absurdity by disregarding *unambiguous* statutory language.

C. EPA's Permitting Requirements For Stationary Sources That Emit Greenhouse Gases Violate The Constitution By Seizing Discretionary Powers Where No "Intelligible Principle" Has Been Provided By Statute.

EPA's agency-created permitting requirements violate not only the Act, but also the Constitution. Agencies are allowed only to administer the laws; they may not exercise legislative powers that Article I vests exclusively in Congress. It is of course inevitable that agencies will exercise discretion when they implement federal statutes. Congress is not omniscient and cannot establish mechanical rules for every conceivable scenario that may arise. But the

Constitution requires federal statutes to authorize agency discretion *and* provide an "intelligible principle" to guide that discretion. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Any agency that exercises discretionary powers absent an "intelligible principle" from Congress has crossed the line into constitutionally forbidden lawmaking.

EPA's decision to replace the Act's numerical thresholds with targets of its own creation is not and cannot be based on any intelligible principle provided by Congress. The Act envisions that EPA will either comply with the numerical thresholds or seek corrective legislation from Congress; as a result, it does not supply any intelligible principle for the improvisation project that EPA has undertaken in the Tailoring Rule. So even if EPA could conjure up a non-arbitrary justification for choosing 75,000 tpy CO_2e and 100,000 tpy CO_2e as the "new" threshold levels for greenhouse-gas emissions, it cannot link these decisions to any guideline provided in a federal statute, and it therefore cannot characterize its regulatory regime as anything but agency legislation.

EPA declares in its Tailoring Rule that future phase-ins will apply PSD and Title V "at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point." J.A. 310. Putting aside whether this can qualify as "intelligible," this reflects at most an effort *by EPA* to supply itself with a guiding

principle for the new threshold levels that it will choose. But *Whitman* squelches the notion that agency-supplied guidelines can satisfy the constitutional demand that *Congress* provide an intelligible principle to guide agency discretion. *See* 531 U.S. at 473. EPA's decision to establish new threshold levels for greenhouse-gas emissions is not governed by a congressionally supplied intelligible principle, and should be vacated as an unconstitutional exercise of legislative power.

D. EPA's Tailoring Rule Arrogates Powers That Congress Reserved To Itself In The Clean Air Act.

When Congress enacted and amended the Act, it chose to establish and retain specific numerical thresholds in the statute rather than instruct EPA to promulgate "reasonable" or "sensible" threshold levels for individual air pollutants. By doing this, Congress established that the threshold levels of pollutants would be governed by a rule rather than a standard. One reason legislatures establish rules is to reduce decision costs for those who implement the law, even though this may incur error costs by binding agency administrators to a crude statutory regime. But statutory rules serve another important function: They allocate power between the legislature and the agency that implements the legislative command.

When a federal statute delegates broad discretionary powers to an agency, it becomes more difficult for Congress to influence the agency's future

decisionmaking. Had the Act simply instructed EPA to "regulate air pollution in the public interest," then EPA would have free rein to regulate greenhouse-gas emissions (or any future air pollution) without seeking permission or input from Congress. But by establishing rigid numerical thresholds in the text of the Act, Congress sought to hamstring EPA from *unilaterally* attacking some new and unforeseen problem of air pollution while relegating Congress to the sidelines. The decision to allocate power in this manner is an essential component of the bargaining that produced the Act and its amendments; for EPA to disregard this choice reflects nothing more than a raw power grab and a denigration of congressional prerogatives.

EPA apparently does not fancy the prospect of waiting for Congress to amend these numerical thresholds through legislation. Any efforts to obtain corrective legislation will require bargaining and concessions from both Congress and the Administration. EPA might not get everything that it wants, and the President will have to spend political capital that he might wish to preserve for other matters. How much easier to rewrite unilaterally the Act's numerical thresholds and avoid the bother of negotiating with the people's elected representatives. Yet the temptation to stray from the allocations of power memorialized in statutes is precisely why the Act provides for judicial review of agency action. If this Court decides that EPA has the statutory authority to regulate greenhouse-gas

emissions from stationary sources, it should disapprove the Tailoring Rule and force EPA to bargain with Congress over these matters.

III. *MASSACHUSETTS V. EPA* SHOULD BE RECONSIDERED OR OVERRULED IF IT COMPELS EPA TO REGULATE STATIONARY SOURCE GREENHOUSE GAS EMISSIONS.

Before 2007, EPA held that greenhouse gases did not qualify as "air pollutants" under the Act, which defines "air pollutant" as

> any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.

42 U.S.C. § 7602(g). EPA explained that it had traditionally construed the term "air pollution agent" as limited to pollutants "that occur primarily at ground level or near the surface of the earth . . . not higher in the atmosphere." 68 Fed. Reg. 52,922, 52,926-27 (Sept. 8, 2003) (J.A. 1350); *see also id.* at J.A. 1350 (noting that greenhouse gases such as CO_2 are "fairly consistent in concentration throughout the world's atmosphere up to approximately the lower stratosphere"). This view led EPA to refrain from regulating greenhouse-gas emissions under *any* of the Act's provisions not only the stationary-source regulations in the PSD and Title V programs, but also the motor-vehicle regulations in Title II.

Massachusetts v. EPA, 549 U.S. 497 (2007), held that EPA could no longer refuse to regulate *motor-vehicle* greenhouse-gas emissions simply by insisting that greenhouse gases fail to qualify as "air pollutants." *Id.* at 528-32. This holding rested on two propositions. First, this Court observed that the four greenhouse gases emitted by motor vehicles "[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons" qualify as "physical [and] chemical . . . substances[s] which [are] emitted into . . . the ambient air" within the meaning of section 7602(g). *Id.* at 529. Second, this Court distinguished *Brown & Williamson* by noting that EPA regulation of motor-vehicle greenhouse-gas emissions "would lead to no . . . extreme measures." *Id.* at 531. *Massachusetts* never considered whether EPA could or should regulate *stationary-source* greenhouse gases as air pollutants under the PSD and Title V programs, where the Act's rigid permitting thresholds would produce burdens that exceed any semblance of rational regulation.

Massachusetts's holding need not and should not be extended to stationary-source greenhouse-gas emissions. *Massachusetts*'s decision to regard motor-vehicle greenhouse-gas emissions as "air pollutants" under section 7602(g) rested in part on the absence of preposterous consequences. *Id.* Here, by contrast, EPA itself recognizes that including stationary-source greenhouse-gas emissions within the meaning of "air pollutant" will produce ridiculous outcomes, and for this reason the agency refuses to obey the

unambiguous permitting thresholds specified in the PSD and Title V provisions. *See* Part II, *supra*. And the *Massachusetts* Court never had the opportunity to consider the implications of defining the term "air pollutant" to include greenhouse-gas emissions from stationary sources, as not one of the twenty-nine briefs submitted by the parties and their amici informed the Court of the absurdities that would arise from extending the PSD and Title V permitting requirements to every building that emits more than 100 (or 250) tpy of CO_2. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (holding that when an issue "was not . . . raised in briefs or argument nor discussed in the opinion of the Court[,] . . . the case is not a binding precedent on this point").

None of this would matter if the statutory definition of "air pollutant" were clear enough to *compel* EPA to regulate stationary-source greenhouse gases. But it isn't; the phrase "air pollution agent" leaves wiggle room, *see Massachusetts*, 549 U.S. at 555-60 (Scalia, J., dissenting), and there is nothing paradoxical about interpreting section 7602(g)'s definition of "air pollutant" to include greenhouse-gas emissions from motor vehicles but not stationary sources, given the implausibility of regulating greenhouse-gas emissions in a manner consistent with PSD and Title V permitting regimes. The briefs submitted by the Industry Petitioners offer several ways for the Court to interpret the Act in a manner that excludes

greenhouse-gas emissions from the PSD and Title V programs, or that prevents greenhouse-gas emissions from triggering the permitting requirements of those programs.

EPA claims that it can interpret the Act to require the regulation of stationary-source greenhouse-gas emissions, and then avoid the absurd consequences of extending the PSD and Title V permitting requirements to greenhouse gases by replacing the unambiguous numerical thresholds specified in the Act with numbers and metrics of its own choosing. EPA's analysis is backward. Agencies can rewrite unambiguous statutory language in the name of avoiding "absurdity," if at all, only when no other permissible construction of the statute is available to avoid that absurdity. Indeed, EPA's analysis reflects a perverse brand of agency self-aggrandizement: The more mischief an agency causes by its interpretations of a statute, the more power it will have to rewrite the unambiguous provisions of a statute. To find *any* possible construction of the Act that avoids extending the PSD and Title V permitting regimes to greenhouse gases is to *require* a ruling that disapproves EPA's interpretation of the statute.

If this Court concludes that *Massachusetts* compels EPA to regulate greenhouse-gas emissions under the PSD and Title V programs, then the State Petitioners respectfully request that this Court reconsider *Massachusetts*'s holding that CO_2 and other greenhouse gases unambiguously qualify as

"air pollutant[s]" within the meaning of the Act. Even EPA recognizes that the term "air pollutant" cannot possibly extend to "all airborne compounds of whatever stripe," nor can it extend to all "physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air." *Massachusetts*, 549 U.S. at 529 (majority opinion) (internal quotation marks omitted). EPA insists that the term "air pollutant" extends only to "physical, chemical [or] biological" substances *subject to regulation under the Clean Air Act* even though this limiting construction finds no support from *Massachusetts*, which equated the term "air pollutant" with "all airborne compounds of whatever stripe," and further insisted that this construction of "air pollutant" was *compelled* and could not be narrowed by EPA. *See id.* at 529; *see also id.* at 558 n.2 (Scalia, J., dissenting).

The problems with *Massachusetts*'s interpretation of "air pollutant" are made painfully apparent by this case. With CO_2 as an "air pollutant," every building that emits more than 100 or 250 tpy of CO_2 becomes subject to permitting requirements, a result that imposes extreme and unacceptable regulatory burdens on EPA and the more than 6,000,000 buildings that would suddenly become required to obtain permits. *See* Part I, *supra*. EPA deems these results so absurd that it refuses to apply the Act as written. *See* J.A. 280-88, 459-68. EPA also does not agree with *Massachusetts*'s all-encompassing definition of "air pollutant" because it refused to deem stationary-source greenhouse-gas emissions

"air pollutant[s]" under the statute until after it had promulgated its Endangerment Finding and the Tailpipe Rule. *See* J.A. 709.

Stare decisis is "not an inexorable command," *see Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991), and this Court has not hesitated to reconsider or overrule cases that have proven "unworkable" or "legitimately vulnerable to serious reconsideration," *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). *Massachusetts*'s holding that CO_2 and other greenhouse gases "unambiguous[ly]" qualify as "air pollutant[s]" under the Act should be reconsidered in light of the preposterous results that are produced under the PSD and Title V programs.

* * *

Fusing the law-making power with the law-execution power contradicts the Constitution's most fundamental principles of limited government and separation of powers. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1952) (Douglas, J., concurring); THE FEDERALIST NO. 47 (Madison). Yet EPA believes it can disregard unambiguous, agency-constraining statutory rules and unilaterally establish a new regulatory regime to deal with novel environmental challenges. Few propositions could be more subversive of the rule of law, or the notion that agency power must be authorized rather than assumed. A ruling that approves this agency-created regulatory regime will allow EPA to become a law unto itself.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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December 9, 2013

Nos. 12-1146 and consolidated cases

In the Supreme Court of the United States

UTILITY AIR REGULATORY GROUP, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE STATE PETITIONERS

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Massachusetts v. EPA interpreted "air pollutant" to include "all airborne compounds of whatever stripe." 549 U.S. 497, 529 (2007). EPA agrees that extending this understanding of "air pollutant" into PSD and Title V produces numerous absurdities. Its proposed solution is to re-write the unambiguous statutory language of those programs. The proper response is to cabin *Massachusetts*'s understanding of "air pollutant" to Title II and NSPS. *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"). The statutory definition of "air pollutant" is capable of sustaining a more narrow construction in the context of PSD and Title V. *See* 42 U.S.C. § 7602(g); *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575-76 (2007) (allowing defined statutory terms to be interpreted differently in different provisions of a statute). Agencies and courts must first construe *ambiguous* statutory language to avoid absurdity, before re-writing *unambiguous* statutory language to avoid that absurdity.

I. THE CLEAN AIR ACT DOES NOT AUTHORIZE EPA TO REGULATE GHGS UNDER PSD OR TITLE V.

EPA's construction of "air pollutant" has produced at least three absurdities in the PSD and Title V programs. EPA's attempts to avoid these absurdities are foreclosed by the unambiguous language of the Act.

First, PSD and Title V require permits if a source emits more than 100 or 250 tons per year ("tpy") of "*any* air pollutant." 42 U.S.C. §§ 7475(a), 7479(1), 7602(j), 7661(2), 7661a(a) (emphasis added). By equating "air pollutant" with "all airborne compounds of whatever stripe," EPA is left with a statute that requires permits from entities that emit harmless or beneficial substances such as oxygen. EPA purports to have "solved" this problem by re-writing the statutory language. Rather than requiring permits for entities that emit threshold amounts of "any air pollutant," as the statute commands, EPA instead imposes these requirements only on sources that emit air pollutants subject to regulation under the Act. *See* EPA Br. 43.

None of the respondents explains how "*any* air pollutant" can refer only to a *regulated* air pollutant. Nor do they explain how EPA can sustain this construction when a separate statutory provision requires "the best available control technology for each pollutant *subject to regulation under this chapter*." 42 U.S.C. § 7475(a)(4) (emphasis added). When Congress wanted to refer only to *regulated* air pollutants, it knew how to do so. Yet the qualification that appears in section 7475(a)(4) is conspicuously absent from the permitting triggers for the PSD and Title V programs. *See id.* §§ 7479(1), 7602(j), 7661(2); *see also Russello v. United States*, 464 U.S. 16, 22 23 (1983) ("'[W]here Congress includes particular language in one section of a

statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (alteration in original) (citation omitted)).

EPA claims that the "relevant statutory context" supports its atextual construction because "[t]he requirements of the PSD program address only pollutants that are regulated in some way under the Act." EPA Br. 43. That only strengthens the contrast with the statute's definition of "major emitting facility," which uses the phrase "any air pollutant" without qualification. And in all events, EPA's reliance on these PSD provisions does nothing to support its atextual construction of Title V, whose permitting requirements extend to sources that emit more than 100 tpy of "any air pollutant." *Compare* 42 U.S.C. §§ 7602(j), 7661(2), 7661a(a), *with* EPA Br. at 55-56.

The second absurdity created by EPA's interpretation of "air pollutant" arises from the unambiguous 100/250 tpy permitting thresholds of the PSD and Title V programs, which are set far too low to allow for rational regulation of GHGs. *See* J.A. 381-88.[1] And the third absurdity comes from

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[1] As EPA recognizes, the States' reliance on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and their argument for a narrow construction of "air pollutant" are equally applicable to PSD and Title V. *See* EPA Br. 56. The State petitioners preserved these arguments and they have not

section 7475(a)(4)'s requirement to impose the "best available control technology," which as applied to GHGs would not only empower but *require* EPA to micromanage every aspect of energy consumption in EPA-regulated buildings. *See* Joint Industry Reply Br. Here, too, EPA re-writes unambiguous statutory requirements, by scratching out the legislatively enacted permitting thresholds, and by excluding from the BACT requirement entities that emit GHGs in amounts below EPA-concocted thresholds. *See* EPA Br. 17 n.4; J.A. 506-09.

The only way the statute can be construed (rather than re-written) to avoid these absurdities is to narrow EPA's interpretation of "air pollutant" in the PSD and Title V programs. The Clean Air Act defines "air pollutant" as:

> any air pollution agent or combination of such agents, including

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been forfeited. *See* Final Brief of State Petitioners and Supporting Intervenor at 59, *Coal. for Responsible Reg., Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1073) ("The low, mass-based permitting thresholds established by the PSD *and Title V* provisions simply do not fit with a world in which EPA treats greenhouse-gas emissions as air pollutants under those programs. EPA must therefore obtain more specific authorization from Congress before asserting a prerogative to regulate greenhouse-gas emissions under either the PSD *or Title V* programs." (emphases added)). The D.C. Circuit's claim that the petitioners "forfeited" their challenge to EPA's interpretation of Title V is indefensible, and EPA does not rely on it. J.A. 241; EPA Br. 55-56.

> any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

42 U.S.C. § 7602(g). On its face, it is possible to construe this language as extending only to "air pollution agents," *i.e.*, substances that "pollute" the air by rendering it "impure or unclean." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1910 (2d ed. 1949) (defining "pollute" as "[t]o make or render impure or unclean"); *Massachusetts*, 549 U.S. at 559 (Scalia, J., dissenting). EPA's all-things-airborne view leaves the phrase "air pollution agent" without any work to do, and renders superfluous the entire second sentence of section 7602(g). It is also possible to interpret "air pollution agent" to exclude GHGs. Heat-trapping gases are not inherently harmful; to the contrary, *some* presence of GHGs is not only beneficial but necessary to keep the Earth's climate from slipping into another ice age. Whether we have reached the point at which GHG emissions should be

deemed harmful is a highly subjective question, which requires a theory of optimal climate and involves picking winners and losers across the globe.

EPA says that any such narrowing construction of "air pollutant" is foreclosed by *Massachusetts*, and EPA implies (though it does not explicitly argue) that "air pollutant" must have a uniform meaning throughout the Act. *See* EPA Br. 45-46. EPA is mistaken on both counts. Although EPA correctly observes that *Massachusetts* equated "air pollutant" with "all airborne compounds of whatever stripe" in the context of Title II, this Court has also held on multiple occasions that statutory terms even defined statutory terms need not be given uniform interpretations throughout an act. *See, e.g.*, *Duke Energy*, 549 U.S. at 575-76 ("There is, then, no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically. Context counts." (citations and internal quotation marks omitted)); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997); *see also* EPA Br. 46 n.12 (acknowledging that EPA "has interpreted the term 'any pollutant,' within the definition of 'major stationary source' that appears in the CAA provision addressing visibility protection, as including only 'visibility-impairing pollutants'"). It is not only permissible but imperative to adopt differing constructions of a statutory term when that is the only way to satisfy the competing demands of

avoiding absurdity, preventing agencies from re-writing unambiguous statutory language, and accommodating *stare decisis* considerations. Section 7602(g)'s definition of "air pollutant" is ambiguous on its face, and EPA cannot pretend that its hands are tied by *Massachusetts* when *Duke Energy* and other rulings of this Court allow defined statutory terms to carry different meanings in different surrounding contexts.[2]

II. IF THE COURT CONCLUDES THAT THE CLEAN AIR ACT AUTHORIZES EPA TO REGULATE GHGS UNDER PSD AND TITLE V, THEN THE COURT SHOULD ENFORCE THE STATUTORY PERMITTING THRESHOLDS AND DISAPPROVE THE TAILORING RULE.

EPA tries to pass off its "Tailoring Rule," 75 Fed. Reg. 31,514 (June 3, 2010), as akin to an act of prosecutorial discretion. *See* EPA Br. 49 (claiming that the Tailoring Rule falls within EPA's "broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated

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[2] The American Chemistry Council offers a way to avoid the absurdity of imposing PSD permitting on entities that emit more than 250 tpy of GHGs, but that does not prevent the absurdities of imposing Title V permitting on sources that emit more than 100 tpy of "any air pollutant," nor does it address the fact EPA's approach would result in nullifying or distorting central PSD provisions such as the BACT requirement and the mandatory local-impact analysis.

responsibilities" (quoting *Massachusetts*, 549 U.S. at 527)); *cf. Heckler v. Chaney*, 470 U.S. 821 (1985).

The problem with this argument is that the statute specifically defines the scope of EPA's discretion to exempt sources from the permitting requirements of PSD and Title V, and it expressly withholds the "discretion" that EPA has claimed for itself. Title V, for example, grants EPA discretion to "exempt one or more source categories (in whole or in part)" from its permitting regime if EPA "finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories," but it goes on to say that EPA "*may not exempt any major source* from such requirements." 42 U.S.C. § 7661a(a) (emphasis added); *see also id.* § 7479(1) (authorizing States to exempt "nonprofit health or education institutions," but nothing else, from the "major emitting facilit[ies]" subject to PSD). To allow an agency to invoke "discretion" in the teeth of these statutory provisions would effectively give the executive a dispensing power over the Clean Air Act.[3]

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[3] EPA denies that it has "flatly exempt[ed]" sources from PSD or Title V because the Tailoring Rule contains aspirational statements that EPA *might*, at some unknown point in the future, impose Title V permitting on all sources emitting more than 100 tpy of CO_2. *See* EPA Br. at 16-18; J.A. 497 ("With the tailoring approach, over time, more sources *may* be included in title V, consistent with those provisions and legislative history." (emphasis added)). *But see* J.A. 498 ("However, as part of the tailoring approach, we recognize that we may at some point

The respondents also suggest that the legality of the Tailoring Rule is outside the question presented. *See* N.Y. Br. 20 n.10. But "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." SUP. CT. R. 14(a). The task of resolving whether EPA "permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases" fairly encompasses disputes regarding the scope of those "permitting requirements," as well as the substantive obligations imposed on entities subjected to PSD permitting. *See, e.g.*, 42 U.S.C. § 7475(a)(4); EPA Br. 6, 24 (acknowledging that disagreements over the scope of section 7475(a)(4) are within the question presented).

The legality of the Tailoring Rule is also relevant to whether EPA lawfully asserted jurisdiction over GHGs in the PSD and Title V programs, which is undoubtedly within the scope of the question presented. If EPA's Tailoring Rule is unlawful, as the States maintain, then it is more difficult to

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determine that it is appropriate to exclude certain sources, such as the smallest of the GHG sources."). Apparently EPA believes that temporary exemptions are not "exemptions" under section 7661a(a), even when indefinite in duration and when the agency has made no commitment to enforce Title V against all major sources in the future. That is not a tenable argument.

justify a construction of the statute that treats GHGs as "air pollutants" under PSD and Title V.

III. *MASSACHUSETTS* SHOULD BE RECONSIDERED OR OVERRULED IF IT COMPELS EPA TO REGULATE GHGS UNDER PSD OR TITLE V.

The Court need not reconsider or overrule *Massachusetts* unless it rejects the States' reliance on *Duke Energy* and concludes that "air pollutant" must have the same meaning in PSD and Title V that it has in Title II. If (and only if) this Court decides that "air pollutant" must have a uniform interpretation throughout the Act, then the States respectfully ask this Court to reconsider *Massachusetts*'s holding that "air pollutant" unambiguously includes "all airborne compounds of whatever stripe." Forcing EPA to treat *every* airborne substance as an "air pollutant" is demonstrably untenable in light of the provisions in the PSD and Title V programs.

EPA purports to rely on *Massachusetts*'s definition of "air pollutant," yet EPA refuses to impose Title V or PSD permitting requirements on sources that emit more than 100 or 250 tpy of unregulated airborne substances even though the statute requires permits for entities emitting more than 100 or 250 tpy of "*any* air pollutant." The only way EPA can defend its interpretation of the PSD and Title V permitting triggers is for this Court either to cabin *Massachusetts*'s holding so that its all-encompassing definition of "air pollutant" does

not carry over to PSD and Title V, or overrule it. Otherwise EPA is left to claim that statutes do not mean what they say that the word "any" can somehow be construed to mean "a subset of."

The respondents contend that limiting or overruling *Massachusetts* would undercut *AEP*, as well as EPA's decision to regulate mobile-source GHGs under Title II. *See* EPA Br. 35-36; N.Y. Br. 16 n.6. Not so. The States are not asking this Court to hold that section 7602(g)'s definition of "air pollutant" unambiguously excludes GHGs. They are asking this Court to recognize only that section 7602(g)'s definition is flexible enough on its face to accommodate either a GHG-inclusive or a GHG-exclusive reading. Whether that definition can or should be construed to include GHGs (or everything airborne) depends on the context provided by surrounding statutory provisions. *See Duke Energy*, 549 U.S. at 575-76; *see also Chevron, USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) (holding that courts should employ all "traditional tools of statutory construction" at *Chevron* step one).

Massachusetts's construction of "air pollutant" was plausible in the context of Title II, because Title II does not permit regulation of "air pollutants" until EPA issues an endangerment finding, and construing "air pollutant" broadly to include GHGs would not trigger "extreme" or absurd results in Title II. *See Massachusetts*, 549 U.S. at 531. The same is

true of the NSPS program at issue in *AEP*. *See* 42 U.S.C. § 7411(b)(1)(A) (limiting NSPS regulations to sources that contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare"). By contrast, Title V and PSD require permits for every source emitting more than 100 or 250 tpy of "*any* air pollutant" regardless of whether the pollutant is regulated or harmful. It is absurd to impose this requirement on every entity that emits threshold amounts of CO_2 or harmless substances such as oxygen. In the context of these two programs, "air pollutant" cannot reasonably be construed to include "all airborne compounds of whatever stripe."

Massachusetts never considered the implications of its holding for PSD and Title V, and none of the 30 briefs in that case alerted the Court to the problems that would arise under those programs if "air pollutant" means "all airborne compounds of whatever stripe." EPA parrots the D.C. Circuit panel's statement that the *Massachusetts* briefs "explicitly raised the argument that interpreting 'air pollutant' to include greenhouse gases could have tremendous consequences for stationary-source regulation." EPA Br. 35 n.8 (quoting J.A. 142 (Sentelle, C.J., Rogers and Tatel, JJ., concurring in the denials of rehearing en banc)). But the panel cited only one brief to support that claim a brief that never so much as mentions Title V and whose

sole discussion of PSD appears in the following passage:

> In addition to imposing controls on existing sources through SIPs or FIPs, state and EPA regulatory authorities also are directed to impose requirements on the construction of new major sources of air pollution and the modification of existing major sources. CAA §§ 160-169, 42 U.S.C. §§ 7470-7479 (Prevention of Significant Deterioration ("PSD") requirements for areas attaining NAAQS); and CAA section 173, 42 U.S.C. § 7503 (new source review ("NSR") requirements for areas not attaining NAAQS). Among other things, these preconstruction permitting programs required by the Act mandate that new or modified sources utilize the Best Available Control Technology (in attainment areas), CAA §§ 165(a)(4), 169(3), 42 U.S.C. §§ 7475(a)(4), 7479(3), or meet even more stringent Lowest Achievable Emission Rates (in non-attainment areas), CAA §§ 171(3), 173(a)(2), 42 U.S.C. §§ 7501(3), 7503(a)(2).

Brief of Respondent CO_2 Litigation Group, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 3043971, at *19. There is no mention of the fact that the 100/250 tpy permitting thresholds in PSD and Title V are set too low for CO_2 emissions. Nor does the brief point out that PSD and Title V permitting requirements are triggered by the emission of "*any* air pollutant" which cuts strongly against the notion that "air pollutant" *must* be construed to encompass "all airborne compounds of whatever stripe." There was no reason for the Court to consider these implications for the PSD and Title V programs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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February 14, 2014

Nos. 12-1182 & 12-1183

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS
and
AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS
v.
EME HOMER CITY GENERATION, L.P., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Through its provisions governing "state implementation plans" ("SIPs"), the Clean Air Act gives States the first opportunity to satisfy, consistent with their unique regulatory agendas, the bottom-line air-quality obligations that EPA mandates. 42 U.S.C. § 7410(a). If the States fail to satisfy those obligations and certain other conditions are met, EPA may promulgate "federal implementation plans" ("FIPs"), which serve as federal backstops to satisfy EPA requirements that the States could have satisfied, but did not satisfy, in SIPs. *Id.* § 7410(c)(1). In the rule at issue here (the "Transport Rule," 76 Fed. Reg. 48,208 (Aug. 8, 2011) (Pet. App. 117a)), EPA defined a new region of 27 upwind States and announced new obligations for those States to mitigate interstate transport of air pollution under the Act's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I). But instead of giving the Transport Rule States a chance to satisfy those new obligations through SIPs, EPA immediately imposed FIPs on all of them.

The questions presented are:

1. Whether the court of appeals had jurisdiction to consider the challenges to the Transport Rule.

2. Whether the court of appeals correctly vacated the Transport Rule for imposing FIPs to implement obligations that EPA had not previously announced.

3. Whether the court of appeals correctly vacated the Transport Rule for exceeding the substantive limits of the good-neighbor provision.

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STATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Air Act And Its Good-Neighbor Provision

1. Under the Clean Air Act, the prevention of air pollution has always been "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); *see id.* § 7407(a). As the Court explained in 1975, "[t]he Act gives [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [42 U.S.C. § 7410(a)(2)]." *Train v. Natural Res. Defense Council, Inc.*, 421 U.S. 60, 79 (1975). The same is true today: EPA sets air-quality requirements, but the States get the first chance to implement those requirements through SIPs. *See* 42 U.S.C. §§ 7407(a), 7410(a).

The process begins with EPA announcing a national ambient air quality standard ("NAAQS") and designating geographic areas as "nonattainment," "attainment," or "unclassifiable" with respect to that NAAQS. *Id.* §§ 7407(c) (d), 7409. After EPA promulgates a NAAQS, States have up to three years to submit SIPs that "provide[] for implementation, maintenance, and enforcement" of the NAAQS on an appropriate compliance schedule. *Id.* § 7410(a)(1), (a)(2)(A); *see* NY Br. 4 (explaining that a SIP is not a single document, but rather a "collection of state laws, regulations, and other measures").

After a SIP is submitted, EPA reviews it for compliance with the Act's requirements. 42 U.S.C. § 7410(k)(1) (4). If a SIP meets the Act's requirements, EPA "shall approve" it. *Id.* § 7410(k)(3). If EPA later concludes that a previously approved SIP has become "substantially inadequate" to maintain the relevant NAAQS or fails to comply with any requirement of the Act, EPA "shall require the State to revise the [SIP] as necessary to correct such inadequacies." *Id.* § 7410(k)(5) (the "SIP call" provision).

EPA cannot impose a FIP unless it either disapproves a State's SIP submission or finds that a State has failed to make a SIP submission. *Id.* § 7410(c)(1). If EPA disapproves a State's SIP submission or issues a finding of failure to submit, EPA must issue a FIP within two years of that disapproval or finding. *Id.* But EPA's FIP authority is extinguished if the State "corrects the deficiency," and EPA approves the SIP or SIP revision, before a FIP is promulgated. *Id.*

2. The Clean Air Act requires SIPs to comply with the requirements of 42 U.S.C. § 7410(a)(2), including the requirements of the good-neighbor provision. As EPA explains, this provision evolved from a directive enacted 50 years ago to "encourage cooperative activities by the States and local governments for the prevention and control of air pollution," 42 U.S.C. § 1857a(a) (1964), to the more detailed provision that currently appears in section 7410(a)(2)(D)(i)(I). EPA Br. 3 5.

The earlier versions of the statute focused on localized interstate impacts. In 1977, for instance, the good-neighbor provision targeted emissions from "any stationary source" in one State that "will . . . prevent" attainment of a NAAQS in another State. 42 U.S.C. § 7410(a)(2)(E) (Supp. II 1977). This 1977 provision was designed to deal with NAAQS, like the one for sulfur dioxide ("SO_2"), that target pollution caused by emissions from a nearby source or a discrete group of nearby sources. *See Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1075 76 (6th Cir. 1984); EPA Br. 4 5; ALA Br. 8 9. It was not helpful in maintaining air-quality standards for ozone and fine particle matter ("$PM_{2.5}$"). Addressing interstate transport of those pollutants requires a regional approach because ozone and $PM_{2.5}$ are formed through atmospheric migration and chemical transformation of "precursor" pollutants, such as nitrogen oxides ("NO_x") and SO_2, that are emitted by numerous mobile and stationary sources scattered over a large area. *See* EPA Br. 5 6 & n.3; NY Br. 9 10; Calpine Br. 48; Atmospheric Scientists' Amicus Br. 14.

The 1990 amendments to the Clean Air Act broadened the good-neighbor provision to better address this type of regional pollution while leaving "the division of responsibilities between EPA and the states in the section [74]10 process" unchanged. *Virginia v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997). The statute now requires SIPs to

> contain adequate provisions
>
> > (i) prohibiting, consistent with the provisions of this subchapter, any source . . . within the State from emitting any air pollutant in amounts which will
> >
> > > (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS].

42 U.S.C. § 7410(a)(2)(D)(i)(I).

The Act does not define "contribute significantly" or "interfere." *See* EPA Br. 42; Calpine Br. 30. And because SO_2 and NO_x emissions can be transported great distances, transforming into ozone and $PM_{2.5}$ concentrations hundreds of miles downwind, determining the "amounts" of those pollutants that will "contribute significantly" to a State's nonattainment of air-quality standards for ozone and $PM_{2.5}$ is no simple task. *See, e.g.*, EPA Br. 6–7, 10–12, 46, 51–52; ALA Br. 15–20, 36; Calpine Br. 21–25, 48; Law Professors' Amicus Br. 25.[1]

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[1] This brief focuses on the "contribute significantly to nonattainment" element of the good-neighbor provision. The court of appeals did not reach the state and local respondents' challenge to the portions of the Transport Rule addressing the statute's "interfere with maintenance" language. *See* State & Local Respondents' Br. in Opp. 36–38 (noting this and other alternative grounds to affirm the court of appeals' judgment even if the Court accepts all of the petitioners' present contentions).

A separate portion of the 1990 amendments to the Act gives EPA a tool to accomplish that task with input from States. Section 7506a authorizes creation of a "transport region" and a "transport commission" comprised of state and federal officials who can work together, through use of section 7410(k)(5)'s SIP-call procedure, to "ensure that the plans for the relevant States meet the requirements of section 7410(a)(2)(D)." 42 U.S.C. § 7506a(a), (b)(1) (2), (c).

But section 7506a is not the exclusive means of addressing interstate transport of air pollution, and it is not the statutory tool that EPA has used. Invoking its general rulemaking power, *id.* § 7601(a)(1), EPA has instead taken upon itself the complex task of assessing SO_2 and NO_x emissions in light of their impact on $PM_{2.5}$ and ozone concentrations in downwind States. That endeavor has produced three distinct rules, each imposing new emissions-reduction requirements on a different subset of upwind States and allowing differing degrees of state involvement.

B. EPA's Three Good-Neighbor-Provision Regional Programs[2]

1. The NO_x SIP Call

The 1998 NO_x SIP Call was EPA's first regional rule to address the States' good-neighbor obligations.

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[2] The appendix to this brief contains a fold-out timeline that illustrates EPA's regional good-neighbor rules and the SIP opportunities provided under each.

The rule proceeded in three steps. First, EPA used air-quality data to identify States with large NO_x emissions. 63 Fed. Reg. 57,356, 57,398 (Oct. 27, 1998). Second, EPA applied cost-effectiveness criteria to determine which States' emissions qualified as "significant[]" contributors to downwind nonattainment. *Id.* at 57,398. Finally, those States were given the opportunity to choose their preferred mix of emissions controls in SIPs. *Id.* at 57,368 70.

Under the regime that EPA initiated in the NO_x SIP Call, EPA determines the *amount* of pollution that upwind States must eliminate, while the States determine *how* to achieve those EPA-mandated reductions. *See id.* at 57,369 ("Once EPA determines the overall level of reductions (by assigning the aggregate amounts of emissions that must be eliminated to meet the requirements of section [74]10(a)(2)(D)), it falls to the State to determine the appropriate mix of controls to achieve those reductions."); *id.* at 57,369 70 (noting that this approach allowed States to "choose from a broad[] menu of cost-effective, reasonable alternatives, including some . . . that may even be more advantageous in light of local concerns").

EPA insisted that it held the prerogative to quantify the States' good-neighbor obligations under 42 U.S.C. § 7410(a)(2)(D)(i)(I). *See id.* at 57,368 69 (rejecting the views of commenters who argued that "EPA's authority is limited to determining that the upwind States' SIPs are inadequate, and generally requiring the upwind States to submit SIP revisions

to correct the inadequacies"). EPA noted that section 7410(a)(2)(D) is "silent" on whether the States or EPA should determine the specific amount of emission reductions needed to avoid a "significant contribution" to interstate air pollution, and declared it "reasonable" to "include this determination among EPA's responsibilities." *Id.* at 57,369 (citing *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 468 U.S. 1227 (1984)).

EPA further recognized that it *needed* to quantify the States' good-neighbor obligations because without this determination from EPA, a State would be left to guess at what it means to "contribute significantly" to interstate air pollution under section 7410(a)(2)(D). *See id.* at 57,370 (noting that an "upwind State would not have guidance as to what is an acceptable submission"). Worse, States would "submit SIPs reflecting their conflicting interests," forcing EPA into issuing "SIP disapproval rulemakings in which EPA would need to define the requirements that each of those States would need to meet in their later, corrective SIPs." *Id.*

For these reasons, EPA sensibly announced the States' good-neighbor obligations up front, before the States would be required to submit their SIPs or SIP revisions for EPA approval. *See id.* at 57,362, 57,367, 57,369 70, 57,451. EPA then issued a SIP call under 42 U.S.C. § 7410(k)(5), giving the covered States 12 months to submit SIPs addressing the

1997 NAAQS for 8-hour ozone and revised SIPs to address the 1979 standard for 1-hour ozone.[3] *Id.*

The D.C. Circuit vacated the NO_x SIP Call in part after concluding that EPA had unlawfully included some States in the rule and had failed to give adequate notice of some elements of its final regulatory approach. *Michigan v. EPA*, 213 F.3d 663, 681 85, 691 93, 695 (D.C. Cir. 2000) (per curiam), *cert. denied*, 532 U.S. 904 (2001). But in the portion of the decision relevant here, the court confirmed that the Clean Air Act gives States "the primary responsibility to attain and maintain NAAQS within their borders" through SIPs. *Id.* at 671. The court deemed the NO_x SIP Call in keeping with EPA's statutory role, as it "merely provide[d] the levels to be achieved by state-determined compliance mechanisms." *Id.* at 687. The court explained that EPA's approach had given States "real choice" regarding how to comply with EPA's requirements, allowing them to "choose from a myriad of reasonably cost-effective options to achieve the assigned reduction levels." *Id.* at 687 88.

2. The Clean Air Interstate Rule ("CAIR")

CAIR was the second EPA regional rule addressing States' good-neighbor obligations. It sought to implement two 1997 NAAQS, one for 8-

[3] "8-hour" and "1-hour" refer to the time over which concentrations of the targeted pollutant are averaged. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 483 (2001).

hour ozone and the other for annual $PM_{2.5}$. 70 Fed. Reg. 25,162, 25,168 69 (May 12, 2005). Like the NO_x SIP Call, CAIR quantified the States' good-neighbor obligations, and then allowed a period of time for States to revise their SIPs to comply with these newly announced requirements. *Id.* at 25,162, 25,263. CAIR ensured that "[e]ach State may independently determine which emissions sources to subject to controls, and which control measures to adopt." *Id.* at 25,165; *see also id.* (noting that this approach ensures "compliance flexibility" for the States); *id.* at 25,167 ("States have the flexibility to choose the measures to adopt to achieve the specified emissions reductions.").

CAIR reiterated that EPA does not expect the States to guess at the scope of their good-neighbor obligations in the absence of an EPA rule quantifying significant contributions under section 7410(a)(2)(D)(i)(I). *See id.* at 25,265 n.116 (noting that EPA "does not expect States to make SIP submissions establishing emission controls for the purpose of addressing interstate transport without having adequate information available to them"); *see also* 77 Fed. Reg. 46,361, 46,363 n.7 (Aug. 3, 2012) (confirming that "section [74]10(a)(2)(D)(i) . . . contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution").

About one month before it issued CAIR, EPA issued a blanket finding that States had failed to submit SIPs to implement the 1997 NAAQS for

ozone and $PM_{2.5}$. *See* CADC Joint Appendix ("CAJA") 3,168 78. These findings triggered EPA's authority to impose FIPs on the States. *See* 42 U.S.C. § 7410(c)(1)(A). But EPA did not impose FIPs to implement the States' good-neighbor obligations at the time it promulgated CAIR. Instead, CAIR gave the States 18 months to submit SIPs to implement the good-neighbor obligations that EPA had just announced, 70 Fed. Reg. at 25,167, 25,176, explaining that the States could not be expected to have implemented the requirements of section 7410(a)(2)(D) before EPA quantified the States' good-neighbor obligations:

> In . . . today's action, we have provided States with a great deal of data and analysis concerning air quality and control costs, as well as policy judgments from EPA concerning the appropriate criteria for determining whether upwind sources contribute significantly to downwind nonattainment under section [74]10(a)(2)(D). We recognize that States would face great difficulties in developing transport SIPs to meet the requirements of today's action without these data and policies.

Id. at 25,268 69.[4]

The D.C. Circuit disapproved CAIR after finding its significant-contribution analysis invalid. *See North Carolina v. EPA*, 531 F.3d 896, 917 21 (D.C. Cir. 2008) (per curiam). The court also found that EPA had misconstrued section 7410(a)(2)(D)(i)(I) by failing to give independent effect to its "interfere with maintenance" language. *Id.* at 909 10, 929.

The court initially vacated CAIR and remanded it for EPA to cure "fundamental flaws" that would require re-evaluation of CAIR "from the ground up." *Id.* at 929, 930. But on rehearing, it granted EPA's request for remand without vacatur, explaining that this approach would "temporarily preserve" the environmental benefits of CAIR while EPA worked to promulgate a replacement rule. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam). EPA therefore left CAIR in place until it issued the Transport Rule in 2011, and the agency continued to approve CAIR-compliant SIPs even after the D.C. Circuit's decisions in *North Carolina*. *See, e.g.*, 74 Fed. Reg. 65,446 (Dec. 10, 2009); 74 Fed. Reg. 62,496 (Nov. 30, 2009); 74 Fed. Reg. 53,167 (Oct. 16, 2009); 74 Fed. Reg. 48,857 (Sept. 25, 2009);

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[4] Although EPA promulgated FIPs before CAIR's 18-month deadline for SIP submissions, it explained that those FIPs served only as a "[f]ederal backstop" and that they would not have effect until "a year after the CAIR SIP submission deadline." 71 Fed. Reg. 25,328, 25,328, 25,330–31 (Apr. 28, 2006).

74 Fed. Reg. 38,536 (Aug. 4, 2009). All of this led to significant and widespread attainment of NAAQS.[5]

3. The Cross-State Air Pollution Rule ("Transport Rule")

The 2011 Transport Rule was EPA's replacement for CAIR. *See* 76 Fed. Reg. at 48,211 (Pet. App. 134a 35a). In addition to implementing the 1997 annual $PM_{2.5}$ and 8-hour ozone NAAQS that CAIR had addressed, the Transport Rule imposed good-neighbor obligations for the 2006 daily $PM_{2.5}$ NAAQS on a new subset of States. *Id.* at 48,209 (Pet. App. 128 29a).

But the Transport Rule did not give the covered States a window in which to implement these newly announced good-neighbor obligations. Instead, it immediately imposed these requirements on the States through FIPs. This represented a sharp break from the approach that EPA had used in the NO_x SIP Call and CAIR. In each of those rules, EPA had quantified the States' good-neighbor obligations, but it refrained from imposing FIPs until the States were given an opportunity to meet their new obligations in SIPs. In the Transport Rule, by contrast, EPA imposed good-neighbor FIPs *immediately* upon informing the States what it

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[5] *See* EPA, Progress Report 2011: Environmental and Health Results Report 12, 14 (2013), *available at* http://www.epa.gov/airmarkets/progress/ARPCAIR11 downloads/ARPCAIR11 environmental health.pdf ("2011 Progress Report"); *see also* Industry & Labor Respondents' Br. Part I.A.3.

means to "contribute significantly" to another State's nonattainment under section 7410(a)(2)(D)(i)(I). *Id.* at 48,209, 48,212, 48,219 20 & n.12 (Pet. App. 128a 29a, 138a 42a, 170a 72a & n.12).

Many upwind States had no idea that they needed to undertake *any* pollution-mitigation efforts under section 7410(a)(2)(D)(i)(I) until EPA finalized the Transport Rule. *Compare id.* at 48,212 14 (Pet. App. 142a 49a), *with* 75 Fed. Reg. 45,210, 45,215 (Aug. 2, 2010) (reflecting that the subset of States covered by the Transport Rule changed between the proposed and final rule), *and* 70 Fed. Reg. at 25,167 (reflecting that the subset of States covered by the final Transport Rule differed from the subset of States covered by CAIR). Yet the Transport Rule imposed 59 FIPs that specified exactly how the 27 covered States must meet the good-neighbor obligations that the Transport Rule had just quantified. *See* 76 Fed. Reg. at 48,213 (tbl. III 1), 48,219 n.12 (Pet. App. 143a 44a, 171a 72a n.12). And although the Transport Rule purported to allow States the opportunity to replace the EPA-imposed FIPs with SIPs, it did not allow a full SIP to replace a Transport Rule FIP until the 2014 control year. *See id.* at 48,326 32 (Pet. App. 669a 689a).

II. THE COURT OF APPEALS' OPINION AND THE PETITIONERS' CLAIMS

A. The D.C. Circuit vacated the Transport Rule for several reasons. First, the court of appeals found that EPA misconstrued section 7410(a)(2)(D)(i)(I) by requiring States to reduce their emissions by more

than their significant contributions to other States' nonattainment. *See* Pet. App. 3a 4a, 21a 41a. Second, the court of appeals found that EPA exceeded its statutory authority by imposing FIPs at the same time it quantified the States' significant contributions under section 7410(a)(2)(D)(i)(I). *See id.* at 4a, 42a 61a.

The court of appeals vacated both the Transport Rule and its FIPs, remanding the rule to EPA. *Id.* at 62a 64a. But as in *North Carolina*, the court of appeals ordered EPA to "continue administering CAIR pending the promulgation of a valid replacement." *Id.* at 63a 64a.

Judge Rogers dissented. She argued that some of the challenges to EPA's significant-contribution analysis had not been preserved before the agency and criticized some of the court of appeals' holdings on the merits. *Id.* at 65a, 67a 70a, 95a 114a. Judge Rogers also claimed that the challenge to the Transport Rule's FIPs was an impermissible collateral attack on prior EPA orders and argued, in the alternative, that the challenge should be rejected on the merits. *See id.* at 65a 67a, 70a 95a.

B. EPA (in No. 12-1182), along with ALA and four other environmental groups that intervened on EPA's behalf (in No. 12-1183), petitioned for certiorari. Briefs in support of certiorari were filed by a group of cities and States (led by New York) and two corporations (Calpine and Exelon), all of whom had supported EPA as intervenors in the court of

appeals. The Court granted the petitions but limited the questions to those presented by EPA.

In their merits-stage briefs, the petitioners and their supporters (both amici and a subset of the intervenors below) attack the court of appeals' jurisdiction as well as its analysis of the merits. The industry and labor respondents' brief addresses the issues surrounding the court of appeals' analysis of section 7410(a)(2)(D)(i)(I)'s substantive limits. This brief addresses the issues surrounding the scope of EPA's FIP authority.

SUMMARY OF THE ARGUMENT

The court of appeals had jurisdiction to decide whether EPA's Transport Rule could lawfully impose good-neighbor FIPs on the States. EPA tries to characterize this challenge to the Transport Rule as a jurisdictionally barred "collateral attack" on earlier agency actions that led EPA to issue the Transport Rule FIPs. But the state and local respondents are not challenging those earlier actions in this case, and their arguments in this case do not imply that those earlier agency decisions were unlawful. They are challenging the Transport Rule's issuance of FIPs to address obligations that did not exist at the time of those earlier actions, and for several of the state respondents, the predicate actions for the Transport Rule FIPs were made in the Transport Rule itself. Accordingly, even assuming this threshold challenge could properly be characterized as jurisdictional, it fails on multiple levels.

On the merits, the court of appeals was correct to vacate the FIPs in EPA's Transport Rule. There are two independent grounds on which this Court should affirm the court of appeals' judgment.

First, EPA's authority to impose FIPs for the 1997 NAAQS for ozone and $PM_{2.5}$ expired once EPA approved good-neighbor SIPs to implement those standards. *See* 42 U.S.C. § 7410(c)(1) (authorizing EPA to impose a FIP "*unless the State corrects the deficiency, and the Administrator approves the plan or plan revision*, before the Administrator promulgates such Federal implementation plan" (emphasis added)). EPA's attempt to retroactively revoke its approvals of those SIPs is not authorized by section 7410(k)(6) or any other provision of the Clean Air Act, and EPA's claim that those previously approved SIPs failed to "correct[] the deficiency" within the meaning of section 7410(c)(1) is not a permissible construction of the statute. EPA had no authority to impose FIPs for the 1997 standards on the States that had EPA-approved good-neighbor SIPs in place, and because the Transport Rule FIPs are non-severable, the court of appeals properly vacated them across the board.

Second, EPA refused to quantify the States' good-neighbor obligations under section 7410(a)(2)(D)(i)(I) until the moment it issued the Transport Rule FIPs. This left the States to guess at how EPA might define the threshold for "significant[]" contributions during the SIP-submission process, and it left many States unaware of whether they needed to undertake

any pollution-abatement efforts as part of their good-neighbor obligations. EPA's actions deprived the Transport Rule States of the opportunity to stave off EPA-imposed FIPs by submitting approvable good-neighbor SIPs.

The FIP authority conferred by section 7410(c)(1) does not permit EPA to act in this manner. Rather, EPA's FIP authority is limited to implementing the SIP obligations in place at the time that EPA disapproves a State's SIP submission or issues a finding of failure to submit, and a FIP cannot be used to announce and impose new requirements that the States had no opportunity to implement during the SIP-submission process.

ARGUMENT

I. THE COURT OF APPEALS HAD JURISDICTION TO CONSIDER THE CHALLENGE TO EPA'S FIP-BEFORE-SIP APPROACH.

EPA contends that the court of appeals lacked jurisdiction to consider whether the Transport Rule could impose FIPs while simultaneously announcing the covered States' obligations under the good-neighbor provision. EPA Br. 15 16, 18 24; *see also* Pet. App. 66a 67a; 70a 82a (Rogers, J., dissenting). EPA insists that this represents a forbidden "collateral attack" on the SIP disapprovals that triggered EPA's FIP authority, rather than a challenge to the Transport Rule itself. EPA Br. 24.

In July 2011, *before* EPA issued its Transport Rule quantifying the States' good-neighbor

obligations regarding ozone and $PM_{2.5}$, EPA issued final rules disapproving SIPs submitted by ten States.[6] In disapproving those submissions, EPA specifically found that they failed to comply with the "good neighbor" requirements of section 7410(a)(2)(D)(i)(I) with regard to the 2006 daily $PM_{2.5}$ standard. *E.g.*, 76 Fed. Reg. at 43,130.

Of course, at that time, EPA had yet to quantify the States' good-neighbor obligations regarding this standard. The final Transport Rule would not be issued for another month, and although the proposed rule had already been published in the Federal Register, the rule's requirements and the States subject to the rule were subject to change (and ultimately did change) before the final rule was adopted. *See* 76 Fed. Reg. at 48,213 14 (Pet. App. 144a 50a) (noting some of the substantial changes between the Transport Rule's proposal and finalization). But EPA nevertheless disapproved the SIPs for non-compliance with the Act's good-neighbor provision, explaining that the rationale for this action could be found in the *proposed* Transport Rule. *See supra* n.6.

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[6] 76 Fed. Reg. 43,128 (July 20, 2011) (Alabama); 76 Fed. Reg. 43,159 (July 20, 2011) (Georgia); 76 Fed. Reg. 43,175 (July 20, 2011) (Indiana); 76 Fed. Reg. 43,143 (July 20, 2011) (Kansas); 76 Fed. Reg. 43,136 (July 20, 2011) (Kentucky); 76 Fed. Reg. 43,156 (July 20, 2011) (Missouri); 76 Fed. Reg. 43,153 (July 20, 2011) (New Jersey and New York); 76 Fed. Reg. 43,167 (July 20, 2011) (North Carolina); 76 Fed. Reg. 43,175 (July 20, 2011) (Ohio).

EPA had also found in June 2010 that 29 States and territories had failed to submit SIPs for enforcing their good-neighbor obligations under the 2006 daily $PM_{2.5}$ standard. 75 Fed. Reg. 32,673 (June 9, 2010). And in July 2011, EPA made a similar finding of failure to submit with regard to Tennessee. 76 Fed. Reg. 43,180 (July 20, 2011).

All of these SIP disapprovals and findings of failure to submit authorized and required EPA to issue FIPs. *See* 42 U.S.C. § 7410(c)(1).[7] But in this case, the States are not attacking *any* of these past SIP disapprovals or findings of failure to submit; they are attacking only the Transport Rule and its imposition of FIPs on the States. EPA tries to maintain that the States' challenge to the Transport Rule FIPs is really a challenge to the earlier agency actions that triggered EPA's FIP authority, but this collateral-attack argument should be rejected for three independent reasons.

First, a ruling from this Court that disapproves the Transport Rule FIPs does not compel the conclusion that EPA's earlier SIP disapprovals and findings of failure to submit were unlawful. The States acknowledge in this case that EPA's earlier

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[7] In separate proceedings, Ohio, Georgia, and Kansas challenged their SIP disapprovals. *Ohio v. EPA*, No. 11-3988 (6th Cir.); *Kansas v. EPA*, No. 12-1019 (D.C. Cir.); *Georgia v. EPA*, No. 11-1427 (D.C. Cir.). If those States can show in those proceedings that EPA's disapprovals of their SIPs were invalid, then those invalid actions would no longer serve as lawful predicates for FIPs.

SIP disapprovals and findings of failure to submit triggered its FIP authority under 42 U.S.C. § 7410(c)(1). The States are contesting only the *type* of FIPs that EPA could issue before the Transport Rule was promulgated. EPA could, for example, issue a FIP that implements EPA's previously announced good-neighbor requirements. What EPA cannot do is hide the ball by refusing to announce its interpretation of "contribute significantly," disapprove SIP submissions from States that have no idea how EPA intends to interpret that phrase, and then hold off on defining the covered States' obligations under section 7410(a)(2)(D)(i)(I) until it has issued FIPs imposing those obligations on the States.

The States' attacks on the Transport Rule FIPs also do not imply that EPA is powerless to enact those FIPs. Rather, those FIPs must issue *after* EPA has quantified the States' good-neighbor obligations and given the States a reasonable opportunity to meet those obligations in SIPs. *See* 42 U.S.C. § 7410(k)(5).

For example, EPA could have disapproved the SIP submissions (or issued findings of failure to submit) at time one, quantified the States' "good neighbor" obligations at time two, and imposed the Transport Rule FIPs at time three on any States that had not yet amended their SIPs to implement these EPA-announced good-neighbor requirements. A ruling from this Court that disapproves EPA's decision to issue the Transport Rule's FIPs

simultaneously with its announcement of the States' good-neighbor obligations does not imply that the SIP disapprovals issued at time one are unlawful. Those SIP disapprovals would still trigger a duty under section 7410(c)(1) to issue FIPs but the *Transport Rule's* FIPs could be issued only *after* EPA defined the States' good-neighbor obligations and allowed the States a reasonable opportunity to implement those requirements through SIPs.

Second, even if EPA were correct to assert that the States' arguments logically imply that EPA's earlier SIP disapprovals were unlawful, that still would not represent a collateral attack on those earlier agency actions. The only remedy that the States are seeking from this Court is a judgment affirming the court of appeals' vacatur of the Transport Rule and its FIPs. They are not asking this Court to invalidate EPA's earlier SIP disapprovals and resurrect the SIPs that EPA had disapproved.[8]

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[8] EPA is also wrong to suggest that the court of appeals "exceeded its jurisdiction" by opining that EPA's prior SIP disapprovals and findings of failure to submit were invalid. EPA Br. 20. The judgment issued by the court of appeals did not vacate those earlier agency actions; it merely vacated the Transport Rule and the Transport Rule FIPs. Pet. App. 64a. A court does not collaterally attack a previous court ruling or agency action whenever its opinion claims that an earlier judicial or agency decision was wrongly decided; if that were true, then this Court could never write an opinion abrogating a court of appeals ruling from which the losing party declined to petition for certiorari or a district court ruling from which the

Third, EPA's collateral-attack argument cannot overcome the fact that EPA *approved* 22 States' SIP submissions for the 1997 ozone and $PM_{2.5}$ standards before EPA issued the Transport Rule. *See* 76 Fed. Reg. at 48,220 21 (Pet. App. 177a 83a) (citing EPA's approval of CAIR SIPs submitted by Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, and West Virginia). EPA approved these submissions after its 2005 blanket finding of failure to submit SIPs for the 1997 standards. *See* 70 Fed. Reg. 21,147 (Apr. 25, 2005). The States contend that those pre-Transport Rule SIP approvals terminated EPA's authority to impose FIPs on those States for the 1997 standards. *See* 42 U.S.C. § 7410(c)(1) (authorizing EPA to impose FIPs after issuing findings of failure to submit "unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan"); Part II.A, *infra*.

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losing party declined to appeal. *But see, e.g.*, *Millbrook v. United States*, 133 S. Ct. 1441 (2013) (abrogating *Orsay v. U.S. DOJ*, 289 F.3d 1125 (9th Cir. 2002)). The time limits in section 7607(b)(1) are transgressed only when a court's *judgment* purports to vacate or alter an agency action outside the scope of a timely filed petition for review.

This particular attack on EPA's FIPs cannot be characterized as a "collateral attack" against the finding of failure to submit that EPA issued in 2005. The FIPs that EPA imposed on this subset of States are unlawful *regardless* of the legality of EPA's 2005 finding of failure because EPA's FIP authority with regard to those States expired when EPA approved their SIP submissions. To be sure, EPA denies that those SIP approvals terminated its FIP authority, *see* 76 Fed. Reg. at 48,219 (Pet. App. 172a 73a), but the courts surely can resolve *that* disagreement without launching a collateral attack on EPA's finding of failure to submit.

Moreover, the Transport Rule's FIPs are non-severable. As the petitioners themselves explain, the States' good-neighbor obligations are intertwined with other States' obligations under the 1997 and 2006 standards. *See* EPA Br. 45 53; ALA Br. 39 41; *see also* Calpine Br. 47 54; 76 Fed. Reg. at 48,252 53 (tbl. VI.B 3 & n.a) (Pet. App. 335a 37a) (reflecting EPA's conclusion that Transport Rule FIPs requiring more stringent emissions reductions in some States than others will cause emissions shifting, resulting in greater emissions in States whose Transport Rule FIPs are more lenient); *cf. North Carolina*, 531 F.3d at 929 (noting that the components of CAIR "must stand or fall together"). This non-severability enables the Court to resolve the legality of the entire Transport Rule even if it concludes that some of the States' challenges were untimely.

Finally, even if EPA were correct to characterize the States' challenge to the Transport Rule FIPs as a collateral attack on earlier agency actions, that characterization would not have jurisdictional implications. The premise of EPA's jurisdictional argument is that any collateral attack on EPA's SIP disapprovals or findings of failure to submit is jurisdictionally out of time because section 7607(b)(1) requires petitions for review of those decisions to be filed within 60 days of the decision. But section 7607(b)(1) is not phrased in jurisdictional terms. *See* 42 U.S.C. § 7607(b)(1) ("Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register . . . ."). And the only authority EPA cites for the idea that section 7607(b)(1) establishes a jurisdictional time limit comes from the D.C. Circuit, not from this Court. *See* EPA Br. 19 (citing *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998)).

Recent decisions of this Court make clear that the filing deadlines in section 7607(b)(1) do not establish jurisdictional limits on the federal courts. *See, e.g.*, *Henderson v. Shinseki,* 131 S. Ct. 1197, 1202 03 (2011) (holding that a 120-day deadline on filing appeals to the Veterans Court is non-jurisdictional); *id.* at 1203 ("Filing deadlines, such as the 120-day filing deadline at issue here, are quintessential claim-processing rules."); *Kontrick v. Ryan,* 540 U.S. 443, 454 55, (2004) (holding that filing deadlines in the Bankruptcy Code are "claim-processing rules"

rather than jurisdictional time limits). The jurisprudence of the D.C. Circuit on this matter is out of step with this Court. And so is EPA's argument that the court of appeals lacked jurisdiction to consider the arguments of the state and local respondents.

II. THE COURT OF APPEALS CORRECTLY HELD THAT EPA LACKED AUTHORITY TO IMPOSE THE TRANSPORT RULE FIPS.

A. EPA Had No Authority To Impose Transport Rule FIPs On The 22 States With EPA-Approved SIPs For The 1997 Ozone And $PM_{2.5}$ NAAQS.

After EPA promulgated CAIR, States submitted SIPs to implement the good-neighbor obligations for the 1997 ozone and $PM_{2.5}$ standards. *See, e.g.*, 72 Fed. Reg. 55,659 (Oct. 1, 2007). By the time EPA issued the Transport Rule, EPA had approved good-neighbor SIPs submitted by 22 States. *See* 76 Fed. Reg. at 48,220 21 (Pet. App. 177a 83a). This revoked EPA's authority to impose FIPs on those States with regard to the 1997 standards. *See* 42 U.S.C. § 7410(c)(1) (authorizing EPA to impose a FIP "*unless the State corrects the deficiency, and the Administrator approves the plan or plan revision*, before the Administrator promulgates such Federal implementation plan" (emphasis added)).

The Transport Rule, however, imposed at least one FIP with regard to the 1997 standards on all but three of those 22 States whose good-neighbor SIPs

for the 1997 standards had previously been approved. *See* 76 Fed. Reg. at 48,213 (tbl. III 1), 48,219 n.12 (Pet. App. 143a 44a, 171a 72a n.12) (reflecting EPA's ultimate conclusion that each of these States except Connecticut, Massachusetts, and Minnesota would be covered by one or more Transport Rule FIPs as to the 1997 NAAQS). In all, 31 of the Transport Rule's 59 FIPs implement good-neighbor obligations under the 1997 standards for States whose CAIR SIPs addressing those standards had previously been approved. *Id.* (further reflecting that 14 of those 31 FIPs were imposed on the eight state respondents whose CAIR SIPs had previously been approved, *see id.* at 48,220 21 (Pet. App. 178a 83a); EPA Br. (II)).

EPA had no authority to impose a FIP that implements the 1997 standards on any of those States because its FIP authority for the 1997 standards expired once EPA approved the good-neighbor SIP submissions from those States.[9] Even

[9] For the reasons discussed in Parts II.B and II.C, *infra*, EPA also lacked authority to impose Transport Rule FIPs implementing the 1997 standards on Michigan, New Jersey, Tennessee, Texas, and Wisconsin, all of which were governed by CAIR FIPs when EPA issued the Transport Rule. *See* CAJA 3,172, 3,174, 3,176–78 (explaining that the abbreviated CAIR SIPs that EPA approved for these States "modified but did not replace the CAIR FIPs"). Because a FIP may not impose obligations that were not disclosed in time to be addressed in a SIP, EPA could not replace the CAIR FIPs for these States with Transport Rule FIPs without providing an opportunity to submit SIPs addressing the new obligations disclosed in the Transport Rule.

if one assumes, for the sake of argument, that EPA could impose FIPs to implement the 2006 $PM_{2.5}$ standard on the States subject to the Transport Rule, EPA had no authority to impose a FIP that implements the 1997 ozone or $PM_{2.5}$ standards on Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, or West Virginia. And because the FIPs imposed by the Transport Rule are non-severable, *see supra* p. 23, this Court should affirm the court of appeals' judgment vacating all of the Transport Rule's FIPs.

EPA was well aware that its prior approval of these good-neighbor SIPs presented a problem under the "unless" clause of 42 U.S.C. § 7410(c)(1). *See* 76 Fed. Reg. at 48,219 (Pet. App. 172a 73) (acknowledging commentators who argued that EPA lacked authority to impose FIPs on States with EPA-approved SIPs for the 1997 ozone and $PM_{2.5}$ standards). The Transport Rule tried to obviate the "unless" clause by deploying two dubious maneuvers. First, EPA attempted to retroactively revoke its approval of the States' SIP submissions under section 7410(k)(6). *See id.* at 48,217, 48,219 (Pet. App. 162a, 173a 74a). Second, EPA argued that the approved SIP submissions failed to "correct[] the deficiency" that had prompted EPA to issue findings of failure to submit. *See id.* at 48,219 (Pet. App.

173a). None of this can salvage the Transport Rule FIPs.

1. EPA Had No Authority To Retroactively Disapprove The SIPs That It Had Previously Approved.

EPA claims that section 7410(k)(6) allowed it to retroactively disapprove the good-neighbor SIPs that it had previously approved. *See* EPA Br. 33. Section 7410(k)(6), entitled "Corrections," provides:

> Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification *was in error*, the Administrator may *in the same manner as the approval, disapproval, or promulgation* revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

42 U.S.C. § 7410(k)(6) (emphases added). EPA thought that it could invoke section 7410(k)(6) because its previous SIP approvals had been issued under CAIR and the D.C. Circuit later disapproved CAIR's interpretation of the States' good-neighbor obligations in *North Carolina*. EPA's use of section

7410(k)(6) was unlawful for two independent reasons.

First, section 7410(k)(6) allows "corrections" only when a past EPA action "*was* in error," meaning that the action was erroneous based on the law in existence *at that time*. Section 7410(k)(6) cannot be used to revoke a SIP approval on account of subsequent developments in judicial doctrine or agency rulemaking. That is the office of section 7410(k)(5), which requires EPA to issue a "SIP call" whenever it determines that a SIP is "substantially inadequate to attain or maintain the relevant [NAAQS] . . . or to otherwise comply with any requirement of this chapter."

EPA now insists that section 7410(k)(6) empowers the agency to revoke an earlier SIP approval as "error" by relying on new developments that post-date the approval. EPA Br. 32 33 & n.11.[10] EPA appears to be saying that it could approve 50 SIP submissions at time one, change its interpretation of the good-neighbor requirements at time two, and then immediately revoke the earlier SIP approvals under section 7410(k)(6) and impose FIPs on all 50

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[10] It is noteworthy, however, that EPA did not stop approving CAIR SIPs when *North Carolina* was decided. Seven of the subsequently "corrected" CAIR SIP approvals post-date the D.C. Circuit's 2008 decisions in that case. *See* 76 Fed. Reg. at 48,221 (Pet. App. 180a–83a) (citing post-*North Carolina* CAIR SIP approvals for Indiana, Maryland, North Carolina, Ohio, Pennsylvania, South Carolina, and West Virginia).

States. This is a manifestly implausible construction of the phrase "was in error."

To begin, EPA's interpretation of section 7410(k)(6) allows the Transport Rule to apply retroactively by "altering the past legal consequences of past actions." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (emphasis omitted). When EPA approved the States' SIP submissions, it terminated its authority to issue FIPs for those States as to the 1997 ozone and $PM_{2.5}$ standards. *See* 42 U.S.C. § 7410(c)(1). The Transport Rule, however, altered the past legal consequences of those agency actions, as those "approvals" are now deemed to have prolonged, rather than terminated, EPA's authority to impose FIPs.

This contradicts *Bowen*, which forbids agencies to engage in retroactive rulemaking absent clear and unambiguous statutory authorization. 488 U.S. at 208. It also contradicts the Administrative Procedure Act, which defines "rule" as "an agency statement of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis added). Nothing in the Clean Air Act authorizes retroactive rulemaking in a manner sufficient to satisfy *Bowen* or the clear-statement requirement of 5 U.S.C. § 559.

EPA's construction of the word "error" also cannot be reconciled with section 7410(k)(5)'s mandatory SIP-call provision. Section 7410(k)(5) provides that EPA "shall" issue a SIP call whenever it finds that a SIP is "substantially inadequate" to maintain a

NAAQS or comply with any requirement of the Clean Air Act. This process requires EPA to "notify the State of the inadequacies" and provide an opportunity for the State to submit a revised SIP; a FIP cannot be imposed until *after* EPA finds that the State has failed to submit the necessary SIP revisions. *See* 42 U.S.C. §§ 7410(c)(1), 7410(k)(5).

EPA's understanding of the word "error" extends section 7410(k)(6)'s correction power to every circumstance described in section 7410(k)(5). Any time the agency discovers that an EPA-approved SIP is "inadequate" to comply with the agency's current understandings of the Clean Air Act, EPA can simply declare its earlier approval to be "in error" and immediately impose a FIP without using any of the procedures required by section 7410(k)(5). This renders the mandatory language of section 7410(k)(5) meaningless, and makes hash of the procedural protections that section 7410(k)(5) confers on the States. There *must* be a distinction between the "inadequac[ies]" described in section 7410(k)(5) and the "error[s]" described in section 7410(k)(6), yet EPA's construction of the statute treats these as fungible commodities.[11]

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[11] As one prominent commenter on the 1990 amendments to the Clean Air Act has explained, section 7410(k)(6) was intended merely to "enable EPA to deal promptly with clerical errors or technical errors. It [wa]s not intended to offer a route for EPA to reevaluate its policy judgements." Henry A. Waxman, et al., *Roadmap to Title I of the Clean Air Act Amendments of 1990:*

Finally, EPA cannot overcome the fact that its SIP approvals were not "in error" at the time that EPA approved the SIPs. Agencies are required to base their decisions on the administrative rules in existence at the time of agency action. *See Bowen*, 488 U.S. at 208 (forbidding retroactive rulemaking absent clear and unambiguous statutory authorization); *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 390 (1932) (forbidding agencies to change rules in an adjudication). It is not "error" for an agency to fail to foresee that a future decision of the D.C. Circuit will disapprove the governing agency rule. Nor is it "error" to fail to foresee that a future administration will adopt a more stringent interpretation of the good-neighbor requirement. The word "error" implies fault, and no human being can know future events. One cannot impose fault on an agency administrator and accuse him of "error" for failing to undertake a task that is beyond human capacity.

Even if this Court were to accept EPA's interpretation of the word "error," the Transport Rule's use of section 7410(k)(6) would remain unlawful for another, independent reason. Any revisions of past agency action must be made "in the same manner as" the putative erroneous action. 42 U.S.C. § 7410(k)(6). And although EPA issued its SIP approvals through notice-and-comment

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Bringing Blue Skies Back to America's Cities, 21 ENVTL. L. 1843, 1924–25 (1991).

rulemaking, its "corrections" did not go through that process. 76 Fed. Reg. at 48,221 (Pet. App. 183a 84a) ("EPA is taking this final action without prior opportunity for notice and comment . . . .").

EPA tries to excuse its failure to follow this statutory command by invoking the "good cause" exception of 5 U.S.C. § 553(b)(B). 76 Fed. Reg. at 48,221 22 (Pet. App. 184a). That is a non sequitur. EPA's obligation to use notice and comment for its "corrections" comes from *two* independent sources: 5 U.S.C. § 553(b), which is subject to a "good cause" exception, and 42 U.S.C. § 7410(k)(6), which is not. The state and local respondents are not accusing EPA of violating the Administrative Procedure Act by failing to use notice and comment; they are accusing EPA of violating the Clean Air Act. Agencies do not have a good-cause license to violate their organic statutes.

New York suggests that this Court should overlook EPA's unlawful use of section 7410(k)(6)'s "corrections" power because "the court of appeals did not address this issue . . . and it is not fairly raised by the questions on which this Court granted certiorari." NY Br. 26 n.17; *see also* ALA Br. 47 n.16. But EPA makes no such claim, and for good reason. This Court may review issues "pressed *or* passed upon" in the courts below, *see Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (citation and internal quotation marks omitted), and while New York correctly observes that the section-7410(k)(6) issues were not fully "passed upon" by the court of

appeals, they were most assuredly "pressed." *See* State & Local Respondents' CADC Br. 24 29; *see also Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) ("As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.").

As for whether section 7410(k)(6) falls within the scope of the questions presented, the issue need only be "fairly included," SUP. CT. R. 14.1(a); *see also Yee v. Escondido,* 503 U.S. 519, 535 (1992), and New York does not explain how the section-7410(k)(6) issues fail to satisfy this standard. The questions presented include "[w]hether States are excused from adopting SIPs prohibiting emissions that 'contribute significantly' to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations." EPA Cert. Pet. (I). EPA contends that the answer is "no," but it cannot show that the States with EPA-approved good-neighbor SIPs for the 1997 standards were required to adopt new good-neighbor SIPs unless it also shows that its invocation of section 7410(k)(6) was lawful.[12]

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[12] Even though the court of appeals declined to resolve whether EPA lawfully used section 7410(k)(6) to revoke its earlier SIP approvals, the court at least resolved whether EPA may invoke those "corrections" powers *on the same day* that it issues FIPs, depriving the States of any opportunity to adopt a SIP that

2. EPA's "Correct the Deficiency" Argument Is Meritless.

EPA believes that it can impose FIPs on States with EPA-approved SIPs even apart from its "corrections" power under section 7410(k)(6). EPA notes that the "unless" clause of section 7410(c)(1) kicks in only when *two* conditions are satisfied: the State must "correct[] the deficiency," *and* EPA must "approve[] the plan or plan revision," before EPA issues the FIP. EPA contends that the SIPs it approved failed to "correct[] the deficiency" within the meaning of section 7410(c)(1) and therefore did not terminate EPA's FIP authority. EPA Br. 32 33; 76 Fed. Reg. at 48,219 (Pet. App. 172a 73a).

EPA relies on the same reasons it gave for invoking its "corrections" power under section 7410(k)(6): namely, that the EPA-approved SIPs became tainted when the D.C. Circuit issued its initial ruling in *North Carolina*. In EPA's view, as soon as the D.C. Circuit disapproved CAIR's interpretation of the good-neighbor requirement, the SIPs that EPA approved in reliance on CAIR were no longer adequate to "correct[] the deficiency" within the meaning of section 7410(c)(1). EPA Br. 32 33; 76 Fed. Reg. at 48,219 (Pet. App. 173a). EPA's interpretation of "correct the deficiency" is not tenable.

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would avoid an EPA-imposed FIP. *See* Pet. App. 45a. The legality of *that* use of section 7410(k)(6) is assuredly before this Court.

The "correct the deficiency" phrase in section 7410(c)(1) uses a definite article: "*the* deficiency." This refers to the deficiency that caused EPA to disapprove the SIP or find that a State had failed to submit a SIP. It cannot refer to a "deficiency" that arises only upon later developments in judicial doctrine or administrative rulemaking. A State "corrects *the* deficiency" by submitting a new SIP that responds to the concerns that prompted EPA to act under subsection (A) or (B) and that complies with every reasonably knowable legal obligation at the time of EPA's disapproval or finding of failure. Every SIP that EPA approved before the ruling in *North Carolina* satisfies the "correct[] the deficiency" clause and terminates EPA's FIP authority.

EPA's construction of section 7410(c)(1) re-writes the "correct the deficiency" clause to require a State to "correct all deficiencies that are known at this time and that may become known in the future." This interpretation not only departs from the natural reading of the text, but it also renders the "unless" clause useless in constraining EPA's power. Anytime EPA approves a SIP under the "unless" clause of section 7410(c)(1), EPA can resurrect its FIP authority simply by changing its interpretation of some provision in section 7410(a)(2) and declaring the previously approved SIP "deficient." No principle of deference to agencies can allow a statute to be interpreted in such an atexutal and self-aggrandizing manner.

EPA's interpretation of "correct the deficiency" also circumvents the SIP-call process of section 7410(k)(5). Later-discovered deficiencies in a SIP are supposed to trigger a finding of "inadequa[cy]" under section 7410(k)(5), which requires EPA to notify the State of the inadequacies and provide an opportunity to submit a revised SIP within a "reasonable deadline." On EPA's view, however, any "inadequacy" in a previously approved SIP can be deemed a "deficiency" in the original submission, which allows EPA to impose a FIP immediately without using the procedural protections required by section 7410(k)(5). That is not a plausible interpretation of the statute.

3. EPA Has Failed To Show That The Transport Rule FIPs Are Severable.

Because EPA's FIP authority for the 1997 standards expired when it approved the good-neighbor SIPs submitted by 22 States, the Transport Rule should be vacated to the extent it imposes FIPs on States with EPA-approved good-neighbor SIPs for the 1997 standards. The Court should go further, however, and vacate the entire rule, because the FIPs it imposes are non-severable. *See supra* p. 23.

EPA suggests in a footnote that this Court can salvage the Transport Rule even if EPA lacks authority to impose FIPs to implement the 1997 standards on the States with EPA-approved SIPs for those standards. *See* EPA Br. 33 n.11. EPA claims that "for all States except South Carolina and Texas, the EPA's authority to promulgate the federal plan

for the annual NO_x and SO_2 requirements flows from the EPA's finding of failure to submit or disapproval of a proposed state plan for the 2006 $PM_{2.5}$ standard, which CAIR did not address." *Id.* This footnote seems to be saying that the Court should vacate only the FIPs that were imposed on South Carolina and Texas, leaving the remaining Transport Rule FIPs in place.

EPA is wrong to claim that it can impose the Transport Rule FIPs on any State for which it previously issued a SIP disapproval or finding of failure to submit regarding the 2006 $PM_{2.5}$ standard. The Transport Rule FIPs implement three different NAAQS: the 1997 standard for 8-hour ozone, the 1997 standard for annual $PM_{2.5}$, and the 2006 standard for daily $PM_{2.5}$. 76 Fed. Reg. at 48,219 n.12 (Pet. App. 171a 72a n.12). EPA appears to believe that if section 7410(c)(1) authorizes it to impose a FIP for a particular NAAQS on a particular State, then EPA may impose one or more additional FIPs on that State to implement any other NAAQS that EPA has ever issued. That is not a defensible construction of section 7410(c)(1), and EPA makes no effort to defend it.

In any event, even assuming EPA is correct to say that this Court need only vacate the Transport Rule FIPs imposed on South Carolina and Texas, EPA never explains how this Court can vacate the FIPs that govern those two States without causing the entire Transport Rule FIP network to come apart. EPA asserts that "the effect on the Transport Rule

would be slight," but it never explains how the remaining Transport Rule FIPs can survive when the good-neighbor obligations imposed on other States can no longer presume compliance on the part of South Carolina and Texas.

B. 42 U.S.C. § 7410(c)(1) Limits The Type Of FIP That EPA May Impose After Disapproving A SIP Submission Or Finding That A State Has Failed To Make A Required SIP Submission.

There is a broader problem with the Transport Rule's good-neighbor FIPs: EPA issued these FIPs without ever telling the States *how much* contribution to another State's air pollution would be deemed "significant" under section 7410(a)(2)(D)(i)(I). Instead, EPA chose to leave the States in the dark about their good-neighbor obligations while demanding that the States submit SIPs to implement section 7410(a)(2)(D)(i)(I) unglossed by any agency interpretation. Not until it announced and imposed the Transport Rule FIPs did EPA deign to inform the States what it means to "contribute significantly" to another State's air pollution. The Clean Air Act does not permit EPA to play hide-the-ball in this manner.

The good-neighbor provision states that a SIP must prohibit emissions that "contribute *significantly*" to another State's nonattainment of any EPA-announced air-quality standard. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). This statute contains a significant gap: Just how much cross-

state pollution is needed to contribute *significantly* to another State's nonattainment of EPA's air-quality standards? *See* EPA Br. 34, 45, 55 (noting the ambiguity in the good-neighbor provision); ALA Br. 12, 25, 28, 35 (same); Calpine Br. 27 31, 33 (same).

Statutes containing gaps of this sort are presumed to delegate gap-filling authority to the agency that administers the statute. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843 44 (1984). But no State can know how to comply with section 7410(a)(2)(D)(i)(I) until EPA fills in the blanks and announces its formula for determining "significan[ce]." Otherwise, the States are left to guess how much pollution will be deemed "significant[]" by EPA or whether they even need to take steps to mitigate their contributions to other States' air pollution. Submitting a good-neighbor SIP under these circumstances is a fool's errand. EPA will judge the SIP submission according to a standard-to-be-announced-later and then impose FIPs on the States for "noncompliance" with this unknown (and unknowable) legal standard.

Delaware's experience illustrates the problems that arise with an undefined and unquantified good-neighbor provision. Delaware submitted a good-neighbor SIP to EPA months before EPA issued the final Transport Rule. EPA responded that Delaware's SIP submission would be approved if Delaware were ultimately excluded from the Transport Rule program, and that the exact same SIP would be disapproved (and a Transport Rule FIP

imposed) if Delaware were ultimately included in the program. 76 Fed. Reg. 2,853, 2,856 58 (Jan. 18, 2011); *see also* 76 Fed. Reg. at 48,212 14 (Pet. App. 142a 44a); 75 Fed. Reg. at 45,215 (reflecting that EPA proposed to include Connecticut, Delaware, Massachusetts, Oklahoma, and the District of Columbia in the final Transport Rule, even though none was ultimately included, and that EPA proposed to exclude Texas from the final rule's annual $PM_{2.5}$ program, even though Texas was ultimately included in that program). Not even *EPA* could determine the States' good-neighbor obligations before the Transport Rule quantified the States' interdependent responsibilities under section 7410(a)(2)(D)(i)(I).

The petitioners say that this regime is exactly what the text of the Clean Air Act allows. *See* EPA Br. 24 33; ALA Br. 53 56, 62 65; *see also* NY Br. 24 27. Once EPA announces a NAAQS, it triggers a three-year deadline for the States to submit SIPs, 42 U.S.C. § 7410(a)(1), and those SIPs must implement all of the requirements of section 7410(a)(2) including the requirements of the good-neighbor provision. In the petitioners' view, EPA can announce a NAAQS, require the States to submit good-neighbor SIPs that can only guess at how EPA will determine their responsibilities under section 7410(a)(2)(D)(i)(I), and then impose FIPs to implement the agency's never-before-announced interpretation of that statutory provision. If the States are unable to divine how EPA will quantify

their good-neighbor obligations when submitting their SIPs, that's their problem.

The petitioners' argument overstates the scope of EPA's FIP authority under section 7410(c)(1). Consider the text of that provision:

> The Administrator shall promulgate *a Federal implementation plan* at any time within 2 years after the Administrator
>
> > **(A)** finds that a State has failed to make a required [SIP] submission . . . , or
> >
> > **(B)** disapproves a [SIP] submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c)(1) (emphasis added). The petitioners seem to think that section 7410(c)(1) authorizes EPA to impose *any* federal implementation plan once it issues findings of failure or disapprovals. *See* EPA Br. 25. That is not a sensible or permissible construction of the statute. When section 7410(c)(1) authorizes EPA to impose "a federal implementation plan," EPA's FIP authority is

limited to implementing the State's SIP obligations at the time of the SIP disapproval or the finding of failure to submit.

Surely there must be *some* limitations on the FIP authority conferred by section 7410(c)(1). *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999). Suppose that EPA disapproved a State's SIP submission regarding the 2006 24-hour $PM_{2.5}$ standard and then decided to impose a FIP that implements not only that standard but also an entirely different NAAQS that EPA had promulgated earlier that day. Could EPA defend the legality of this FIP by simply pointing to its earlier disapproval of the State's SIP submission? Of course not. Although section 7410(c)(1) would both authorize and require EPA to impose "*a* federal implementation plan" in these circumstances, the statute does not open the door for EPA to impose any FIP that suits its fancy. There must be some connection between the contents of the FIP and the State's SIP obligations under 42 U.S.C. § 7410(a)(1)(2).

Once it is acknowledged that EPA's FIP authority under section 7410(c)(1) is limited, it falls to this Court to resolve the extent of those limitations and to decide whether EPA transgressed those boundaries by imposing FIPs to implement a never-before-announced interpretation of the States' good-neighbor obligations. The petitioners do not engage this question in their briefs, dogmatically insisting that the "plain language" of section 7410(c)(1)

authorizes the Transport Rule FIPs simply because those FIPs were preceded by a disapproval of a SIP submission or a finding of failure to submit. EPA Br. 25; ALA Br. 26; *see also* NY Br. 2, 35. But unless the petitioners want to contend that section 7410(c)(1) allows the Transport Rule to impose any FIP that EPA wants, they will need to rely on something more than incantations of "plain language" and *Chevron* deference.

1. EPA's FIP Authority Under 42 U.S.C. § 7410(c)(1) Is Limited.

The petitioners never come out and say that EPA may impose any FIP that it pleases once it disapproves a State's SIP submission or issues a finding of failure to submit. But neither do they acknowledge any judicially enforceable limits on the contents of a FIP once EPA makes disapprovals or findings under section 7410(c)(1)(A) (B). *See* EPA Br. 16, 24 33; *see also* NY Br. 5, 16 17, 21 22. New York suggests that a FIP imposed under section 7410(c)(1) must "timely achieve the NAAQS," but it never says whether the Clean Air Act limits the means by which EPA may achieve that goal. NY Br. 21 22. And although EPA and New York both contend that States can calculate their good-neighbor obligations on their own, they do not concede that EPA's FIP authority is limited to enforcing legal obligations that the States can determine without exposition from EPA. *See* EPA Br. 16, 24 33; NY Br. 5, 16 17, 21 22.

If the petitioners believe that EPA's FIP authority under section 7410(c)(1) is unlimited, they should say so. Otherwise, they should explain what the limits on EPA's FIP authority are and why the Transport Rule FIPs fall on the permissible side of the line. The petitioners' reliance on deference to agencies suggests that they believe that EPA, rather than the courts, should determine the limits of the FIP authority conferred by section 7410(c)(1). *See* EPA Br. 30 32. But it is not clear from their briefs whether the petitioners intend to push the concept of deference this far, and the petitioners do not explain how far this deference (if any) to EPA's invocation of its FIP authority should extend.

In all events, it cannot be the case that an EPA-imposed FIP is *per se* legal regardless of its contents so long as it is preceded by a SIP disapproval or finding of failure to submit. Imagine a FIP that imposes requirements that have nothing to do with the Clean Air Act or the NAAQS that triggered the three-year SIP clock under section 7410(a)(1). That could not possibly be defended as a lawful "federal implementation plan" under section 7410(c)(1). We assume that the petitioners will concede at least this much that there are judicially enforceable limits on the contents of a FIP, even when EPA has issued the disapproval or finding required by section 7410(c)(1)(A) (B). The next step is to determine what those limits are, as well as the statutory sources of those limits.

2. EPA's FIP Authority Under 42 U.S.C. § 7410(c)(1) Cannot Exceed A State's Known SIP Obligations.

Consider again the hypothetical just mentioned. Suppose that the Transport Rule FIPs attempted to implement not only the 1997 and 2006 standards for ozone and $PM_{2.5}$, but also an entirely new NAAQS that EPA had announced for the first time in the Transport Rule itself. One would think that this exceeds the scope of the FIP authority conferred by section 7410(c)(1). But why? What exactly in the statute prohibits EPA from doing that?

All that section 7410(c)(1) says is that EPA "shall promulgate a federal implementation plan" after it issues a disapproval or finding described in section 7410(c)(1)(A) (B) without purporting to define or limit the contents of the "federal implementation plan" that EPA is required to impose. And although the term "federal implementation plan" is defined elsewhere in the Clean Air Act, that definition does not establish an outer boundary on the contents of a FIP, providing only the minimum requirements for what a "federal implementation plan" must contain:

> The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures,

> means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

42 U.S.C. § 7602(y). But this should not lead to the conclusion that the Clean Air Act imposes no boundaries whatsoever on the contents of a FIP.

First, the text of section 7410(c)(1) indicates not only that EPA's FIP authority is limited, but also that it is limited to implementing the States' existing SIP obligations. The "unless" clause provides that EPA's FIP authority expires once the State "corrects the deficiency" that led to the disapproval or finding of failure to submit and EPA approves a SIP reflecting those corrections. If EPA's FIP authority could extend beyond "the deficiency" in the State's SIP, then it would make no sense for section 7410(c)(1) to revoke that authority once "the deficiency" has been corrected. EPA's FIP authority must therefore be limited to correcting "the deficiency" in the State's SIP.

"[T]he deficiency" addressed by an EPA-imposed FIP must also be a "deficiency" that existed and that could have been corrected by the State at the time EPA issued its disapproval or finding under section 7410(c)(1)(A) (B). Otherwise, the State has no opportunity to correct the alleged deficiency, and the "unless" clause becomes a meaningless gesture.

Suppose that EPA were to promulgate a NAAQS at time one, disapprove a State's SIP submission for that NAAQS at time two, and then quantify the State's good-neighbor obligations at time three. If one tried to contend that the SIP's "deficiency" should extend to its failures to comply with EPA's later-announced good-neighbor obligations, that "deficiency" would not be one that the State was capable of correcting at the time it learned of the SIP disapproval. It is not reasonable for EPA to say that it may use its FIP authority to impose requirements that were promulgated or announced *after* it issued findings or disapprovals under section 7410(c)(1)(A) (B).

Nothing in the petitioners' briefs contests the notion that EPA's FIP authority is limited to correcting "the deficiency" that triggered EPA's finding or disapproval, or that the FIP-corrected "deficiency" must be one that the State could have corrected as soon as it learned of the SIP disapproval or finding of failure to submit. *See* Part II.B.1, *supra*. Instead, the petitioners insist that the States *could* have corrected the deficiency in their good-neighbor SIPs even as EPA refused to quantify "significan[ce]" in section 7410(a)(2)(D)(i)(I). It is to that issue that we now turn.

3. EPA Cannot Use Its FIP Authority To Impose Good-Neighbor Obligations That Were Not Announced At The Time Of The SIP Disapproval Or Finding Of Failure To Submit.

The petitioners suggest that the States can figure out their good-neighbor obligations on their own, without any need for EPA to say what counts as a significant contribution to another State's air pollution. *See* EPA Br. 29 30; *see also* NY Br. 24 27; 29 35. If this were true, then there would be no basis for the States to object to the Transport Rule FIPs because the FIPs would be addressing a deficiency that the States could have corrected.

But the petitioners actually advance a more limited claim. They contend only that the States can determine the *empirical* questions surrounding their contributions to interstate air pollution. *See, e.g.*, EPA Br. 29 ("States routinely undertake technically complex air quality determinations. . . . [T]he necessary emissions information from all States is publicly available."); ALA Br. 53 54 (noting that the States can undertake a "technical analysis" of interstate air pollution); *see also* NY Br. 31 ("States will have the capacity to monitor and model emissions and air quality.").

The petitioners do not and cannot possibly claim that the States can predict how EPA will interpret section 7410(a)(2)(D)(i)(I) before EPA announces its authoritative construction of that statute. Section 7410(a)(2)(D)(i)(I) delegates to EPA the prerogative

to decide *how much* pollution will be deemed to "contribute significantly" to another State's nonattainment. Until EPA answers that question, the States are shooting at an invisible target. All the scientific knowledge in the world is useless if the States are left to guess the way in which EPA might ultimately quantify "significan[ce]" for States included in a final regional rule under section 7410(a)(2)(D)(i)(I).

States have no way to ensure that their calculations of required reductions match EPA's because EPA's analysis ultimately turns on subjective policy judgments regarding cost-effectiveness. *See* 76 Fed. Reg. at 48,248 49 (Pet. App. 316a 23a); Pet. App. 15a 18a. In defining the required reductions in the Transport Rule, EPA developed "cost curves," or estimates of the amounts of reductions available at certain cost thresholds. 76 Fed. Reg. at 48,248 (Pet. App. 319a 20a). It then estimated the effect, at different cost-per-ton levels on its cost curves, that the contributing States' "combined reductions" would have on downwind air quality and identified "significant cost thresholds," or "point[s] along the cost curves where a noticeable change occurred in downwind air quality." *Id.* at 48,249 (Pet. App. 322a). So to accurately determine their reduction obligations, the covered States would have had to guess not only what EPA's cost curves would look like, but also what changes on those curves would be most "noticeable" to EPA.

The complexity of the linkages between emissions from an upwind State and nonattainment in downwind States that the petitioners mention only further decreases the likelihood of matching EPA's analysis. *See, e.g.*, EPA Br. 6. And because downwind States are also required to control their own emissions, and may voluntarily choose to impose stricter controls than EPA requires, upwind States would also have to make accurate guesses about what controls those downwind States would implement.[13]

New York's brief eventually gets around to acknowledging this point. NY Br. 33 ("To be sure, in reviewing a SIP submission, EPA may ultimately disagree with a State's determination of its good-neighbor obligations and issue a FIP that provides its own determination of how to address interstate air pollution."); *see also* ALA Br. 53 (recognizing that "a State's assessment of its contribution might diverge from subsequent federal findings"). But given this concession, we are at a loss to understand how New York can simultaneously insist that the States can determine their good-neighbor obligations before EPA completes that work. *See* NY Br. 29 ("States Can And Do Independently Determine Their

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[13] Just as some States may choose to impose emissions-reduction obligations beyond those that EPA requires, others choose to impose no greater burdens on their sources than those EPA deems necessary. States that have made the latter policy decision can control in-state sources in the first instance only after they know the overall reductions EPA will require.

Good-Neighbor Obligations."). As New York recognizes, the formula that the Transport Rule deploys for determining significant contribution under the good-neighbor provision is quite complex. *See id.* at 13; *see also* ALA Br. 18 20. Surely New York does not believe that the States could have figured out this formula through divination. But New York never explains how else the States are supposed to know whether and to what extent they must reduce their contributions to interstate air pollution.

The petitioners also suggest that section 7410(a)(2)(D)(i)(I) delegates interpretive authority to the States at least until EPA acts to quantify the States' good-neighbor obligations. *See* EPA Br. 24 25; *see also* NY Br. 30 ("Section [74]10(a)(2), which includes the good-neighbor provision, charges the *States* with responsibility for implementing SIP requirements in the first instance . . . . The Act thus obligates state authorities to interpret and apply the statute's terms in the first instance not to helplessly await EPA's interpretation.") (emphasis added). This argument runs headlong into *Chevron*, which established that statutory ambiguities are presumed to delegate gap-filling authority to the federal agency that administers the statute. 467 U.S. at 843 44. The States cannot decide the legal meaning of "significant[]" contribution unless EPA chooses to give them that authority. *See* 63 Fed. Reg. at 57,369. And EPA has given the States no such authority here.

The petitioners' argument also contradicts EPA's longstanding interpretation of section 7410(a)(2)(D)(i)(I). In the 1998 NO_x SIP Call, for example, EPA asserted that it held the sole prerogative to resolve the ambiguities in that provision and that the States had no role to play in deciding what the statute means. *See* 63 Fed. Reg. at 57,368 70.

Now EPA seems to be saying that the States are to take the first crack at quantifying significance under section 7410(a)(2)(D)(i)(I). *See* EPA Br. 24 25 ("Nothing in the statute requires the EPA to quantify upwind States' significant contribution obligations at all . . . . To the contrary, the States' obligation to submit timely state plans with all required elements, including good neighbor provisions, is imposed directly by [section 7410(a)(2)(D)(i)(I)] itself."). But EPA cannot abandon its claim to exclusive interpretive authority over section 7410(a)(2)(D)(i)(I) unless it provides a reasoned explanation for the change of heart. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). No such explanation appears in the Transport Rule.

So it is no answer for the petitioners to say that the States can determine their good-neighbor obligations on their own. The States cannot predict how EPA will quantify significance in section 7410(a)(2)(D)(i)(I), and the States lack gap-filling authority over the statute under *Chevron* as well as

under EPA's past interpretation of the statute. The only way that the petitioners can maintain their case is to claim that section 7410 allows EPA to leave the States in the dark: Announce a NAAQS, require the States to submit SIPs that must guess at how EPA will quantify their good-neighbor obligations, and then impose FIPs after the States either guess wrong or decide that this shell game is not worth playing.

But that is not a permissible construction of section 7410. Until EPA exercises its delegated authority to determine *how much* contribution to interstate air pollution is "significant[]" within the meaning of section 7410(a)(2)(D)(i)(I), the States have no obligation to implement EPA's standard-to-be-announced-in-the-future just as the States have no obligation to implement a NAAQS until EPA invokes its delegated authority and announces the standard.

The petitioners note the absence of specific statutory language requiring EPA to announce a formula for determining thresholds for "significan[ce]" and 'interfere[nce]" under section 7410(a)(2)(D)(i)(I). *See* EPA Br. 24 26; NY Br. 24 27. But this observation gets them nowhere. Under *Chevron*, statutes are *presumed* to delegate gap-filling authority to the agency that administers the statute regardless of whether the statute contains explicit language conferring that responsibility on the agency. And until EPA acts to fill the gaps in section 7410(a)(2)(D)(i)(I), the unglossed statute provides no guidance to States attempting to comply

with their good-neighbor obligations. Imposing a FIP to implement a previously unannounced good-neighbor obligation is no different from imposing a FIP to implement a previously unannounced NAAQS. In both situations, the agency that holds delegated gap-filling authority concealed its plans until after it was too late for the States to submit SIPs in the hope of staving off EPA-imposed FIPs.[14]

C. EPA's Understanding Of Its FIP Authority Subverts The Regime Of Cooperative Federalism Established In The Clean Air Act.

EPA's interpretation of its FIP authority is problematic for an additional reason: it empowers

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[14] EPA's brief attacks the court of appeals for analogizing the issuance of a NAAQS with the quantification of the States' good-neighbor obligations. *See* EPA Br. 31 n.10. But the analogy is EPA's own. In the NO_x SIP Call, the agency explained:

> Determining the overall level of air pollutants allowed to be emitted in a State [included in a section-7410(a)(2)(D)(i)(I) regional program] is comparable to determining overall standards of air quality [*i.e.*, NAAQS], which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility.

63 Fed. Reg. at 57,369; *see also id.* at 57,370 (finding it "necessary" for EPA "to establish the [States'] overall emissions levels" under section 7410(a)(2)(D)(i)(I)).

the agency to undermine statutory prerogatives that the Clean Air Act preserves for the States.

The Clean Air Act ensures States an opportunity to avoid an EPA-imposed FIP by submitting a SIP that complies with the requirements of section 7410(a)(2). *See* 42 U.S.C. § 7410(a)(1) (providing that States have three years, "or such shorter period as the Administrator may prescribe," to submit a SIP after EPA issues a NAAQS). The Transport Rule rendered this opportunity meaningless because EPA left the States unaware of how it would interpret the phrase "contribute significantly" until the moment it promulgated the Transport Rule FIPs. If EPA wants to promulgate a good-neighbor FIP based on a novel and previously unannounced construction of section 7410(a)(2)(D)(i)(I), it must first quantify the States' good-neighbor obligations and provide the States a reasonable time period in which to submit SIPs. Anything less would make the States' SIP-submission opportunity a matter of EPA whim rather than statutory entitlement.

EPA nevertheless insists that the Transport Rule FIPs are lawful because they were preceded by a SIP disapproval or finding of failure to submit, and (according to EPA) section 7410(c)(1) requires nothing more. But it is not enough under *Chevron* for an agency to show that its interpretation of a statute is linguistically possible. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994); *see also Whitman*, 531 U.S. at 468 71; *FDA v. Brown & Williamson Tobacco Corp.*, 529

U.S. 120, 132 (2000). It must also be reasonable, and it is not reasonable to interpret the Clean Air Act in a manner that leaves the States' opportunity to avoid a FIP through the SIP-submission process entirely at the mercy of EPA.

Suppose that EPA announced a NAAQS but gave the States only two hours in which to submit SIPs. Section 7410(a)(1) establishes a default rule of three years for the States to submit SIPs after EPA issues a NAAQS, but provides that EPA "may prescribe" a "shorter period." EPA might try to defend this two-hour window as consistent with the literal language of section 7410(a)(1); two hours is indeed a "shorter period" than three years. But it would not be reasonable for EPA to establish a "shorter period" that deprives the States of any meaningful opportunity to stave off FIPs with their SIP submissions.

The same problem plagues the Transport Rule. By imposing FIPs on the same day that EPA quantified the States' good-neighbor obligations, EPA left the States without any genuine opportunity to avoid the Transport Rule FIPs by submitting SIPs. Even though years had elapsed between the time that EPA announced the relevant NAAQS and the time of the Transport Rule, the States could not determine their good-neighbor obligations because no State had any idea how EPA would interpret the phrase "contribute significantly." Indeed, the States did not know whether they would need to undertake any pollution-abatement efforts under EPA's not-

then-announced construction of section 7410(a)(2)(D)(i)(I).

EPA's approach is all the more unreasonable when one considers how state authority is preserved throughout the Clean Air Act. Many more provisions of the Act confirm the States' ability to:

- provide input on the classifications and obligations that EPA defines, *e.g.*, 42 U.S.C. §§ 7407(d)(1)(B)(ii) (area designations), 7411(f)(3) (new emissions sources);
- have a fair chance to satisfy EPA's obligations without federal interference, *e.g.*, *id.* §§ 7412(*l*)(1), (5) (programs addressing hazardous air pollutants); 7511a(g)(2) (3), (5) (milestones for nonattainment areas); 7545(m) (standards for oxygenated fuel); and
- play the lead role in enforcement and implementation, *e.g.*, *id.* §§ 7411(c)(1) (performance standards for new sources), 7511b(e)(7) (controls targeting volatile organic compounds); *see also id.* § 7411(j)(1)(A) (conditioning EPA's power to grant a waiver to a new emissions source on "the consent of the Governor of the State in which the source is to be located").

Again and again, the Act allows EPA to step in only if the States choose not to regulate or their initial regulatory efforts fail. *E.g.*, *id.* §§ 7589(c)(2)(F) (authorizing EPA to establish an adequate clean-fuel program only if California does

not), 7651e(b) (authorizing EPA to allocate certain emissions allowances only if States do not). And when a state plan or program fails to meet the obligations EPA defines, the Act often gives the State a chance to fix the deficiency through revisions that will obviate the need for federal involvement. *E.g.*, *id.* §§ 7412(*l*)(5) (programs addressing hazardous air pollutants), 7424(b) (plans for major fuel-burning sources), 7661a(d)(1) (permit programs).

Outside of this litigation, EPA has repeatedly recognized the need to give States a reasonable opportunity to implement new obligations through SIPs after a final rule establishes a regional program under the good-neighbor provision. EPA explained in CAIR, for instance, that

> [w]here . . . the data and analytical tools to identify a significant contribution from upwind States to nonattainment areas in downwind States . . . . may not be available, . . . [a State's] section [74]10(a)(2)(D) SIP submission should indicate that the necessary information is not available at the time the submission is made or that, based on the information available, the State believes that no significant contribution to downwind nonattainment exists.

70 Fed. Reg. at 25,263; *accord* JA 195 (2006 EPA guidance document); 77 Fed. Reg. at 46,363 & n.7 (EPA's confirmation a year *after* the Transport Rule was promulgated that section 7410(a)(2)(D)(i)

"contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution").

And in CAIR, after acknowledging the limited requirements of SIPs submitted before EPA quantifies good-neighbor obligations for purposes of a new regional rule, EPA identified section 7410(k)(5) as the proper mechanism to address any new obligations: "EPA can always act at a later time after the initial section [74]10(a)(2)(D) submissions to issue a SIP call under section [74]10(k)(5) to States to revise their SIPs to provide for additional emission controls to satisfy the section [74]10(a)(2)(D) obligations if such action were warranted based upon subsequently-available data and analyses." 70 Fed. Reg. at 25,263 64. The idea that EPA could unilaterally impose a FIP without affording the States a reasonable time for SIP submissions was not even considered as an option.

Indeed, EPA recognized in both the NO_x SIP Call and CAIR that States should have the first opportunity to implement EPA-announced good-neighbor obligations. *See id.* at 25,167, 25,176; 63 Fed. Reg. at 57,451. The Transport Rule departed from those precedents without acknowledging them or explaining why it was not following them. *See Fox Television Stations*, 556 U.S. at 515. EPA now tries to suggest that it switched to a FIP-first regime to secure environmental benefits, but that explanation falls flat. EPA had CAIR in place for years before it issued the Transport Rule, and EPA's own data show

that CAIR was achieving widespread downwind attainment. *See* 2011 Progress Report at 12, 14.

D. The Petitioners' Remaining Arguments Are Without Merit.

The petitioners and their supporters express concern that vacating the Transport Rule FIPs will cause EPA to violate the Clean Air Act in at least two respects. First, New York suggests that a ruling to this effect will leave EPA unable to impose FIPs when section 7410(c)(1) requires them. NY Br. 22. Second, the petitioners claim that it will cause EPA to violate the Clean Air Act by tolerating nonattainment in downwind States. *See* EPA Br. 27 28; *see also* NY Br. 27 29. Each of these concerns is chimerical.

The petitioners are correct to note that section 7410(c)(1) requires EPA to issue FIPs within two years after disapproving a State's SIP submission or finding that the State has failed to make a required submission. But the state and local respondents are not disputing EPA's authority (or statutory duty) to impose FIPs; they are challenging only the *contents* of the FIPs imposed by EPA's Transport Rule. EPA could, for example, have imposed good-neighbor FIPs based on CAIR, which the D.C. Circuit allowed to remain in place until EPA issued a valid replacement. *See North Carolina*, 550 F.3d at 1178. This approach would have fulfilled the statutory mandate of section 7410(c)(1), but without using the FIP process to impose good-neighbor obligations that were unknown to the States at the time EPA issued

its predicate findings or disapprovals. Then EPA could have announced its new interpretation of the States' good-neighbor obligations and allowed the States a reasonable time to submit SIPs to implement those requirements, using the CAIR FIPs as an interim measure as the process unfolded.

The petitioners are also wrong to suggest that vacating the Transport Rule FIPs will leave EPA powerless to protect downwind States from interstate air pollution. EPA remains able to impose CAIR FIPs on States that have failed to submit good-neighbor SIPs for the 1997 standards, and the States with EPA-approved CAIR SIPs already have plans in place to mitigate interstate transport of ozone and $PM_{2.5}$. Those SIPs have resulted in widespread attainment of the ozone and $PM_{2.5}$ standards at issue here. *See* Industry & Labor Respondents' Br. Part I.A.3. CAIR FIPs might not provide immediate attainment of every NAAQS in every region of the country, but they would go a long way toward that goal while EPA undertakes the post-*North Carolina* tasks of quantifying new good-neighbor obligations, allowing the States a reasonable window of time to submit SIPs or SIP revisions, and deciding whether to approve the SIP submissions or impose FIPs instead.

Finally, if any downwind States find themselves in noncompliance with the relevant NAAQS, that is the fault of EPA. EPA waited nearly eight years after announcing its 1997 standards for 8-hour ozone and $PM_{2.5}$ before issuing findings of failure to submit

for the States that had failed to implement good-neighbor SIPs with respect to those standards. Then EPA promulgated CAIR, which was rejected as unlawful by the D.C. Circuit, forcing EPA back to the drawing board. EPA's delays and mistakes should not excuse its decision to impose FIPs immediately and deprive upwind States of the opportunity to avoid those FIPs by submitting SIPs. In short, EPA cannot benefit from an exigency of its own creation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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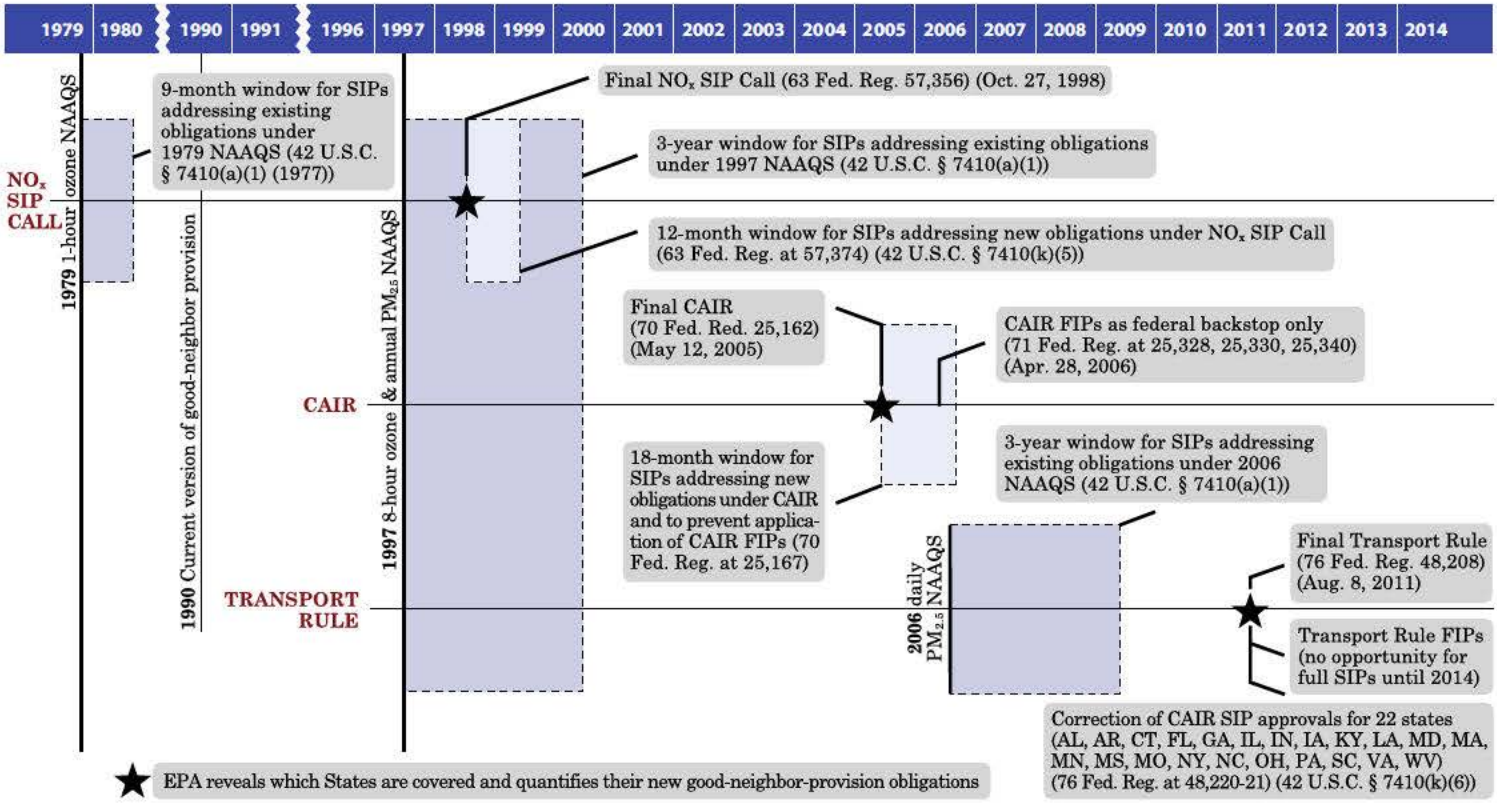
Appendix

SIP Opportunities Under the NO_x SIP Call, CAIR, and the Transport Rule



Oldham; 0323

No. 12-246

In The
Supreme Court of the United States

GENOVEVO SALINAS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

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QUESTION PRESENTED

Does the admission into evidence of a defendant's selective, transitory silence during voluntary, non-custodial police questioning violate the Fifth Amendment privilege against compelled self-incrimination, absent an invocation of the Fifth Amendment privilege and absent a showing that such evidence was compelled, testimonial, and incriminating?

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STATEMENT OF THE CASE

Throughout his Brief on the Merits, Salinas has made repeated references to his first trial, Pet. Br. 3 n.1, 5, 6, 23, at which the evidence showed a materially different set of facts surrounding the interview. The court reporter's record for Salinas's first trial is not part of the appellate record, and there is no evidence that it was a part of the record before the trial judge at the second trial, the Fourteenth Court of Appeals, or the Texas Court of Criminal Appeals. In Texas, appellate courts review trial court rulings in light of what was before the trial court at the time that the ruling was made. *Weatherred v. State,* 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

Nevertheless, during the first trial, the testimony revealed that Salinas had received *Miranda* warnings and waived them before agreeing to answer the officer's questions. The prosecutor also referred to Salinas's silence during closing argument in the first trial in response to defense counsel's closing argument. As Salinas acknowledges, no evidence regarding his receipt of *Miranda* warnings was noted by either party during the second trial, and such evidence is not part of the appellate record. Pet. Br. 3 n.1. This information is offered in candor to the Court so that the Court can make a full and informed disposition of the case, including a determination as to whether the issue is fairly presented to the Court. *Cf. Rogers v. United States,* 522 U.S. 252, 253 (1998) (plurality opinion); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

I. The offense

On December 18, 1992, Houston Police Department (HPD) officers responded to the execution-style murders of brothers Juan "Johnny" Manual Garza, the complainant, and Hector Garza. 4.RR.41-43, 67-69, 258. The brothers died as a result of multiple close-range shotgun wounds. 4.RR.241-254; 5.RR.15. Neither Johnny nor Hector had any defensive wounds. 4.RR.256-257.

Two days after the murders, Genovevo Salinas, the Petitioner, went to John Damien Cuellar's house. 4.RR.177-178. While holding his hand on his .45 caliber handgun, Salinas admitted that he went to Hector's apartment and killed Johnny and Hector. 4.RR.177-185, 189, 224-226. Cuellar told Salinas not to joke around, but Salinas said, "I'm not lying." 4.RR.179-180. Cuellar did not tell the police about Salinas's admissions until February 1, 1993. 5.R.R.57.

II. The non-custodial interview

Officers eventually learned that Salinas had been partying at Hector's apartment on the night before the murders. 5.RR.24. On January 28, 1993, HPD Sergeant C.E. Elliott went to Salinas's residence and met Salinas and his father. J.A. 7; 5.R.R.24-25. He explained that he was investigating a murder and asked if Salinas had a shotgun. J.A. 6-7. Salinas and his father each signed a written voluntary consent to search the residence. J.A. 8-9. Salinas stated that his

father had a shotgun, and his father brought a black Winchester Defender shotgun to Elliott. J.A. 9, 12; 5.RR.49, 149, 250-251. Salinas did not offer any explanation when he turned the shotgun over to the police. J.A. 11-13. His father appeared very surprised, however, when Elliott unloaded the shotgun to reveal shells filled with double-aught buckshot. 5.RR.51-53.

Elliott asked Salinas if he would come downtown to talk to them and provide elimination fingerprints, and Salinas agreed. J.A. 14. He was not handcuffed and was free to leave; he was not under arrest or in custody. J.A. 14. Upon arrival at the station, Elliott asked Salinas some questions about the murders. J.A. 14-15. He asked about Johnny and Hector, about his relationship with them, and about his last time at Hector's apartment. J.A. 15. Salinas answered that he knew them through Mike Provazek, that he had been to the apartment a total of three to four times, and that he had been to the apartment on the night before the killings. J.A. 15-17.

Elliott asked Salinas about the night before the murders, and Salinas responded that he had been to Hector's apartment with Provazek. J.A. 15-16, 19. When questioned about Cuellar, Salinas answered that Cuellar was his and Provazek's friend. J.A. 16-17. When asked about any disagreements or arguments that any of the parties may have had, Salinas responded that there had not been any disagreements or arguments with Johnny and Hector. J.A. 17.

Elliott asked Salinas if he had any weapons other than the shotgun, and Salinas responded that he had no other weapons. J.A. 17. Near the end of the almost hour-long interview, Elliott asked "if the shotgun [officers recovered from Salinas's residence] would match the shells recovered at the scene of the murder?" J.A. 17. The officer testified, "He did not answer," but further stated that Salinas "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." J.A. 17-18.

The officer asked Salinas some additional questions, and Salinas continued to answer. J.A. 18. Elliott asked Salinas where he was at the time of the murders, and Salinas responded that he was at home. J.A. 18. He also asked Salinas why he was not at work that day, and Salinas answered that he did not go to work because he had been hung over, but that he had called in and said he had car trouble. J.A. 18. Finally, Elliott asked Salinas if anybody had seen him at home during the time of the murders, and Salinas responded that no one had seen him or could corroborate what he was saying. J.A. 18-19.

Salinas verbally answered all but one question during the 58-minute non-custodial police interview. J.A. 19. After the interview, officers learned that Salinas had outstanding traffic warrants, and so they arrested him on those warrants. Pet. App. 12a. The next day, January 29, 1993, officers learned that the ballistics analysis was completed; it established that the shotgun shells recovered at the scene of the

murders had been fired from the Winchester Defender shotgun recovered from Salinas. 5.RR.49. Based on this information, the officers obtained an extension to hold Salinas as a suspect in a homicide. 5.RR.49. A search of Salinas's residence pursuant to a warrant revealed double-aught buckshot ammunition. 5.RR.51. The district attorney's office, however, declined charges without additional evidence, and the officers released Salinas when the hold expired on January 30, 1993. 5.RR.54.

On February 1, 1993, Cuellar finally told the police what Salinas had told him on December 20, 1992. 5.RR.57. Elliott filed charges against Salinas and attempted to arrest him, but could not locate him at home or work. 5.RR.58-60, 127-128. Salinas had absconded, and officers spent years searching for him. 5.RR.59-63. Finally, in November 2007, Elliott learned that Salinas was in custody, after Salinas had been arrested under a different name and different date of birth. 5.RR.63-65.

III. The trial court proceedings

Salinas's first trial resulted in an eleven-to-one hung jury. 2.C.R.331, 348. At the second trial, the prosecutor sought to introduce evidence that Salinas had not answered a question during his interview with the police. J.A. 15. Salinas objected to the introduction of that evidence based on the Fifth Amendment. J.A. 15, 17. The trial court overruled the objection, and the evidence was admitted. J.A. 17.

Salinas did not testify. During closing argument, the prosecutor argued that the evidence regarding Salinas's selective, transitory silence demonstrated Salinas's guilt because an innocent person would have responded to the question. 7.RR.171-173. Salinas did not object to this argument based on the Fifth Amendment. 7.RR.171-173. The jury found Salinas guilty of murder and assessed punishment at 20 years' imprisonment and a $5,000 fine. Pet. App. 1a, 7a.

IV. The appeal

On appeal, Salinas contended that the trial court erred in admitting testimony of his pre-arrest, pre-*Miranda* silence. Pet. App. 18a. The court of appeals upheld the admission of the evidence because there was no government compulsion in the pre-arrest, pre-*Miranda* questioning in which Salinas voluntarily participated for almost an hour. Pet. App. 23a. Because the Fifth Amendment privilege against compelled self-incrimination was not triggered absent any governmental compulsion, it did not prevent the State from offering Salinas's failure to answer the question at issue. Pet. App. 23a.

The Texas Court of Criminal Appeals granted discretionary review and affirmed the court of appeals decision. Pet. App. 1a. According to the Court of Criminal Appeals, the plain language of the Fifth Amendment protects a defendant from *compelled* self-incrimination, and a suspect's interaction with police

officers is not compelled in pre-arrest, pre-*Miranda* circumstances. Pet. App. 6a. Because the evidence of Salinas's lack of a verbal response during non-custodial questioning was admissible, prosecutors may comment on such silence regardless of whether a defendant testifies. Pet. App. 6a. The Court of Criminal Appeals denied Salinas's motion for rehearing. Pet. App. 24a.

SUMMARY OF ARGUMENT

Salinas argues that evidence of his silence near the end of voluntary, non-custodial police questioning should have been excluded even though his statements themselves were admissible. He objected at trial only to the admission of the evidence that he "did not answer" one question during police questioning. J.A. 15, 17. He did not argue that he was in custody or that his responses had been coerced. And he did not object to the prosecutor drawing adverse inferences from that properly-admitted evidence during closing argument.

Salinas's arguments rest on a number of assumptions not supported by the record or the Court's precedent. Salinas's reference to his "refusal to answer" was not the invocation of the privilege against compelled self-incrimination that he implies. The Court has recently held that mere silence in the face of questioning does not constitute an invocation of the privilege against compelled self-incrimination. *Berghuis*

v. Thompkins, 130 S.Ct. 2250 (2010). And even if the Court were to subscribe to Salinas's view of the evidence, a defendant cannot anticipatorily invoke the Fifth Amendment privilege apart from police custody or coercion.

Salinas alternatively characterizes his lack of a verbal response to the officer's question as either "silence" or a "refusal to answer." But in the context of the question put to him and his physical cues attendant to his response, Salinas's "silence" was in actuality his non-verbal response, perhaps acknowledging that the shotgun shells found at the scene would match his shotgun because he knew that he had committed the murder, or perhaps realizing that the police had the capability of matching those shotgun shells to his shotgun.

Moreover, even if the Court were to consider Salinas's selective, transitory silence in isolation, that silence would necessarily lack any testimonial character. While Salinas points to a number of possible inferences to be drawn from his non-verbal conduct, silence alone fails to convey any facts or information either explicitly or implicitly. If Salinas's "silence" was neither an invocation of the privilege against compelled self-incrimination nor an implied assertion of fact when considered with his physical conduct, then it was not testimony, and therefore not covered by the Fifth Amendment.

More importantly, Salinas's interaction with police was not compelled within the meaning of the

Fifth Amendment. Historically, the Fifth Amendment was designed to prohibit the use of oaths and torture to gain a confession. It was not designed to exclude from trial the product of unsworn, voluntary, non-custodial questioning. While the Court has held that Fifth Amendment compulsion is inherent during custodial interrogation, the Court has never extended that holding to apply to non-custodial questioning. The Court has also held a number of situations to be inherently coercive under the Fifth Amendment, but none are analogous to the facts of this case. To the contrary, the Court has held that voluntary, non-custodial questioning is not inherently coercive and that the possible use of pre-trial silence at a subsequent trial does not make it so.

Nevertheless, Salinas seeks to extend the Court's holding in *Griffin v. California*, 380 U.S. 609 (1965), to apply to non-custodial questioning under the rationale that the possible use of his non-verbal responses at a later trial was inherently coercive. *Griffin*, however, is a poor analogy to this pre-trial circumstance. The choice at issue in *Griffin* occurred at trial and concerned the decision to testify; in that context, drawing adverse inferences from a clear assertion of the right to refuse to testify placed a legal penalty upon the invocation of the privilege against compelled self-incrimination. But the Court has already held that the possible use of an individual's voluntary, non-custodial communication with police is not compelled merely because of its potential use at trial. *Jenkins v. Anderson*, 447 U.S. 231 (1980).

Moreover, *Griffin*'s underpinnings reveal that the Court's central concern was the impact that a defendant's refusal to testify had upon his presumption of innocence at trial. But the presumption of innocence is solely a trial right that the Court has not extended to pre-trial investigation.

Finally, even assuming evidence of Salinas's selective, transitory silence was improperly admitted, it was harmless beyond a reasonable doubt. The testimony regarding the silence was necessarily brief, while Salinas's physical response was properly admitted without objection, as were the rest of his statements to police. This evidence, considered in conjunction with the evidence of Salinas's efforts to prevent detection by the police and the overwhelming evidence of Salinas's guilt, clearly demonstrates beyond a reasonable doubt that the admission of Salinas's selective, transitory silence did not contribute to his conviction.

ARGUMENT

I. Salinas's selective, transitory silence was either an admission or not testimonial, but it did not constitute an invocation of the Fifth Amendment privilege against compelled self-incrimination.

The admission into evidence of Salinas's selective, transitory silence during a voluntary, non-custodial police interview did not violate the Fifth

Amendment because Salinas did not invoke the privilege against compelled self-incrimination and because he answered the question through his non-verbal conduct. Salinas does not argue that the police questioning amounted to custodial interrogation. Pet. Br. 2-3. Nor does Salinas argue that the police questioning was otherwise coercive. Pet. Br. 3 n.1.

Rather, Salinas participated in a voluntary, non-custodial interview, during which he verbally answered all but one of the officer's questions and non-verbally answered the remaining question. J.A. 14-19. Knowing that the police were investigating the deaths of Johnny and Hector, Salinas went to the police station voluntarily and freely answered police questions. Salinas was not handcuffed and was free to leave; he was not under arrest or in custody. J.A. 14; Pet. Br. 3. Near the end of the almost hour-long interview, Elliott asked "if the shotgun [officers recovered from Salinas's residence] would match the shells recovered at the scene of the murder?" J.A. 17. Elliott testified, "He did not answer," but further stated that Salinas "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." J.A. 17-18. Elliott continued to ask Salinas questions, which Salinas answered. J.A. 18.

The Fifth Amendment concerns itself primarily with the admission of statements, not the exclusion of silence. It provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Or, as

the Court has put it, "The Fifth Amendment prohibits only compelled testimony that is incriminating." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 189-90 (2004) (citing *Brown v. Walker*, 161 U.S. 591 (1896)). Thus, a defendant can rely upon the Fifth Amendment only to preclude the admission of testimonial statements. *Schmerber v. California*, 384 U.S. 757, 763-64 (1966) ("It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications[ ].").

A defendant's testimonial statements can be used against him so long as they are not compelled. *New York v. Quarles*, 467 U.S. 649, 654 (1984) ("The Fifth Amendment itself does not prohibit all incriminating admissions; '[a]bsent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.' ") (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)). As the Court has noted, "[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *Washington*, 431 U.S. at 187.

The Court has also consistently held that a defendant must affirmatively invoke his privilege against compelled self-incrimination in order to rely upon the privilege contained in the Fifth Amendment. *Garner v. United States*, 424 U.S. 648, 654-55 (1976) ("[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming

the privilege, the government has not 'compelled' him to incriminate himself.").

Salinas claims that the State's subsequent use[1] at trial of his silence during non-custodial police questioning penalized his decision to remain silent, insofar as it compelled him to be a witness against himself regardless of whether or not he decided to speak. Pet. Br. 12, 17-18. Yet, Salinas concedes that "[i]n pre-arrest, pre-*Miranda* circumstances, *a suspect's interaction with police officers* is not compelled." Pet. Br. 24 (quoting Pet. App. 6a). Instead, he claims inherent compulsion "if the prosecution may use silence in the face of police questioning as substantive evidence of guilt." Pet. Br. 28. Salinas effectively claims that a defendant's silence during voluntary, non-custodial police questioning has greater protection than a defendant's statements and conduct during that same questioning.

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[1] This case presents the issue of whether the *admission* of, and not *argument* or *comment* concerning, evidence of a defendant's silence during non-custodial police questioning violates the Fifth Amendment privilege against compelled self-incrimination. Pet. App. 18a. Salinas objected only to the admission of the "did not answer" question during the police interview. He did not object to *argument* or *comment* by the prosecutor on Fifth Amendment grounds. 7.RR.173. Nor did he raise an issue on appeal as to the prosecutor's *argument* or *comment*.

A. Salinas's selective, transitory silence did not invoke the Fifth Amendment privilege against compelled self-incrimination.

While Salinas characterizes his lack of a verbal response as "silence" or a "refusal to answer," such conduct did not constitute an invocation of the privilege against compelled self-incrimination. The Court has made clear that such an invocation would be necessary to provide Fifth Amendment protection to someone in Salinas's position. *Garner*, 424 U.S. at 665.

The Court has recently held that a suspect seeking to invoke his privilege against compelled self-incrimination must do so clearly. *Berghuis*, 130 S.Ct. at 2261. In *Berghuis*, the accused was arrested and provided *Miranda* warnings but was "[l]argely" silent during the approximately three-hour custodial interrogation. *Id.,* 130 S.Ct. at 2256. About two hours and forty-five minutes into the interrogation, an officer asked Thompkins, "Do you believe in God?"; Thompkins responded "Yes," as his eyes "well[ed] up with tears." *Id.,* 130 S.Ct. at 2257. When asked, "Do you pray to God?," Thompkins also answered in the affirmative. *Id.,* 130 S.Ct. at 2257. Finally, when he was asked, "Do you pray to God to forgive you for shooting that boy down?," Thompkins again responded in the affirmative. *Id.,* 130 S.Ct. at 2257.

The Court rejected Thompkins's argument that he had invoked his privilege against compelled self-incrimination merely by remaining silent for a sufficient period of time. *Id.,* 130 S.Ct. at 2259-60. The Court explained that there is good reason to require a defendant who wants to invoke the right to remain silent to do so unambiguously. *Id.,* 130 S.Ct. at 2260. The requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Id.,* 130 S.Ct. at 2260 (quoting *Davis v. United States*, 512 U.S. 452, 458-59 (1994)). According to the Court, had Thompkins merely stated that he wished to remain silent or that he did not wish to talk with police, he would have sufficiently invoked his privilege against compelled self-incrimination. *Berghuis*, 130 S.Ct. at 2260. But his selective, transitory silence did not invoke the privilege. *Id.*

Like Thompkins, Salinas never stated during the interview that he wanted to remain silent or that he did not want to talk with the police. J.A. 17-18; *Berghuis*, 130 S.Ct. at 2260. Contrary to Salinas's suggestions, he did not invoke the Fifth Amendment privilege against compelled self-incrimination during the non-custodial police interview. *See United States v. Monia*, 317 U.S. 424, 427 (1943) ("[The Fifth Amendment] does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered

to have been 'compelled' within the meaning of the Amendment.").

Invocation is crucial because it is the infringement of the right to terminate the interview, rather than the possible evidentiary use of a response to an incriminating question, that operates on the individual to overcome the free choice in producing a statement. *See Miranda v. Arizona*, 384 U.S. 426, 473-74 (1966). Because only the witness knows whether the disclosure may incriminate him, the burden appropriately lies with him to assert his privilege at the time he is called to decide whether or not to disclose. *Garner*, 424 U.S. at 655. Garner made incriminating disclosures on his federal income tax returns instead of claiming the Fifth Amendment privilege against compelled self-incrimination. *Garner*, 424 U.S. at 665. The Court held that Garner's disclosures were not compelled incriminations even though he was compelled to file his tax return. *Id.* Therefore, he was foreclosed from later invoking his Fifth Amendment privilege when the incriminating information was introduced as evidence against him in his criminal trial. *Id*. Similarly, Salinas did not invoke the privilege against compelled self-incrimination during the non-custodial police interview and, like Garner, he cannot subsequently invoke the privilege at trial to bar the admission of evidence obtained during the non-custodial police interview.

Furthermore, where there is no official compulsion to speak, the Fifth Amendment cannot be anticipatorily invoked. *Bobby v. Dixon*, 132 S.Ct. 26, 29

(2011). Dixon had spoken with police at the police station during a chance encounter and, after receiving his *Miranda* warnings, declined to answer questions without his lawyer present. *Id.*, 132 S.Ct. at 28. Yet, five days later, police re-approached Dixon and sought to question him regarding the offense. *Id.* According to the Court, Dixon's invocation of his right to counsel was ineffective because it occurred prior to "custodial interrogation." *Id*. As the Court explained, it has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *Id.* at 29. Though *Bobby* dealt with the ability to invoke the Fifth Amendment right to counsel, the Court has made clear that there is no principled reason to treat the invocation of the privilege against compelled self-incrimination differently than the invocation of the right to counsel. *Berghuis*, 130 S.Ct. at 2260 (citing *Solem v. Stumes,* 465 U.S. 638, 648 (1984); *Fare v. Michael C.,* 442 U.S. 707, 719 (1979); *Michigan v. Mosley,* 423 U.S. 96, 103 (1975)). And while the evidentiary use of a suspect's premature invocation of the Fifth Amendment privilege may raise due process concerns, such concerns are not present in this case because Salinas did not invoke the privilege. *See Johnson v. United States*, 318 U.S. 189, 196 (1943) (holding that requirements of a fair trial prevented comment on a defendant's reliance upon the privilege asserted at trial even though it was improperly asserted to prevent cross-examination).

Moreover, the Court has held that silence is inadmissible only after an accused has received his *Miranda* warnings. *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976). In *Doyle*, the Court held that the use of post-*Miranda* silence for impeachment violated due process because "silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights." *Id.* at 617. The Court, however, declined to extend *Doyle* to cover pre-*Miranda* silence. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (holding that it is the use of silence after the assurances embodied in *Miranda* that violates due process). In *Fletcher*, the Court tacitly acknowledged that one may not readily assume that a suspect is exercising the privilege against compelled self-incrimination because the suspect simply remained silent. Thus, under the facts of this case and the Court's clear precedent, Salinas's selective, transitory silence was not an invocation of the Fifth Amendment privilege against compelled self-incrimination. Because he did not invoke the Fifth Amendment privilege during police questioning, Salinas could not later invoke it at trial to preclude admission of the product of that voluntary, non-custodial police questioning. *Garner*, 424 U.S. at 665.

B. While Salinas characterizes his lack of a verbal response as "silence" or a "refusal to answer," Salinas was not "silent" for the purposes of the Court's Fifth Amendment jurisprudence because he answered the officer's question through his non-verbal conduct.

Although Salinas characterizes Elliott's testimony that he "did not answer" a question as "silence," it is clear from the entire interview that his response to the question was not merely sitting in silence. Rather, Salinas physically responded to Elliott's question. His response conveyed, at least to Elliott, his answer to the question in a way that mere silence could not. One plausible inference is that Salinas agreed that the shotgun shells found at the scene would match the shotgun he had produced for the police. And this response was admissible as an assertion.

"Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character." *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923). Indeed, the failure to contest an assertion can be considered evidence of acquiescence to that assertion if it would have been natural under the circumstances to object to the assertion in question. *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976).

In *Baxter*, the Court distinguished the use of Palmigiano's silence from those cases where the total refusal to submit to interrogation was treated as a final admission of guilt rather than merely a piece of

evidence. *Baxter*, 425 U.S. at 318 ("There, failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him . . . his silence was given no more evidentiary value than was warranted by the facts[ ]."); c*f. Lefkowitz v. Turley,* 414 U.S. 70 (1973); *Garrity v. New Jersey,* 385 U.S. 493 (1967). Here, Salinas's selective, transitory silence was simply treated as a piece of evidence and given the weight deemed appropriate by the jury as with any other alleged admission.

Salinas would likely respond that his acquiescence to the officer's assertion under the rationale outlined in *Baxter* is itself compulsion because it would require him to object even though he had no obligation to speak. But this argument assumes that Salinas's selective, transitory silence somehow suggested he was prevented from clearly asserting the privilege against compelled self-incrimination or even terminating the interview. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (holding that interaction with police at police station was voluntary where suspect's freedom to depart was not restricted in any way). It also assumes that his response was an assertion of his privilege against compelled self-incrimination despite his failure to invoke it. *Cf. Berghuis*, 130 S.Ct. at 2260 (holding that mere silence did not invoke the privilege against compelled self-incrimination). And it overlooks that Salinas voluntarily continued to make himself a witness by answering questions even after

Elliott asked him about the shotgun shells. Even Salinas concedes that "[i]n pre-arrest, pre-*Miranda* circumstances, *a suspect's interaction with police officers* is not compelled." Pet. Br. 24 (quoting Pet. App. 6a).

Salinas's response to the question of whether the shotgun shells at the scene would match his shotgun constituted the type of assertion envisioned in *Baxter*, yet made in the context of a non-coercive, voluntary police interview. *Mathiason*, 429 U.S. at 495. Moreover, the possible use at trial of Salinas's selective, transitory silence during a voluntary, non-custodial police interview had no more coercive effect on Salinas's decision-making than the use of verbal responses during non-custodial police questioning. *See Berkemer v. McCarty,* 468 U.S. 420, 441-42 (1984) (upholding the admissibility of responses made during non-custodial roadside questioning). Because Salinas was under no official compulsion at the time of questioning, his physical, non-verbal response to the officer's incriminating question was just as admissible as the statements on the roadside in *Berkemer* or at the stationhouse in *Mathiason*.

C. Salinas's selective, transitory silence was not testimonial and therefore not protected by the Fifth Amendment privilege against compelled self-incrimination.

Salinas will undoubtedly reject characterizing his response to the officer's question as a non-custodial, incriminating admission. And, as discussed above, his selective, transitory silence during police questioning is not an invocation of the privilege against compelled self-incrimination. Therefore, if the issue presented is the admissibility of Salinas's lack of a verbal response, divorced from the circumstances of the questioning and his non-verbal response, as Salinas seems to argue, that lack of a verbal response necessarily failed to disclose any incriminating information or relate any incriminating factual assertions.

As the Court made clear in *Pennsylvania v. Muniz*, the privilege against compelled self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (quoting *Schmerber*, 384 U.S. at 761). "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe v. United States*, 487 U.S. 201, 210 (1988). The privilege does not protect a suspect from being

compelled by the State to produce "real or physical evidence." *Schmerber*, 384 U.S. at 761-62.

In *Muniz*, the Court rejected the argument that Muniz's answer to the question about his sixth birthday was non-testimonial by explaining that the State's characterization of the response addressed the wrong question; the State focused upon the incriminating inferences drawn from the response rather than whether the response itself was a testimonial act or physical evidence. *Muniz*, 496 U.S. at 593. The Court explained that the definition of "testimonial" evidence under the Fifth Amendment "must encompass all *responses* to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the 'cruel trilemma.'"[2] *Id.*, 496 U.S. at 597 (emphasis added). Thus, the vast majority of "*verbal* statements" will be "testimonial" because there are very few instances "in which a *verbal* statement,

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[2] Notably, the Court still contemplated that there must be a response to the incriminating question and did not limit the consideration of whether that response is testimonial to a mere inquiry into whether the question asked was incriminating. The Court went on to explain that a response must explicitly or implicitly convey facts or information in response to an incriminating question in order to be testimonial. *Muniz*, 496 U.S. at 597. Here, Salinas's selective, transitory silence, considered without reference to his physical cues, did not convey any facts or information regardless of whether the question asked was incriminating. And because Salinas's selective, transitory silence by itself did not communicate any explicit or implicit facts, it was necessarily non-testimonial and not covered by the Fifth Amendment.

either oral or written, will not convey information or assert facts." *Id.* (quoting *Doe*, 487 U.S. at 213) (emphasis added).

Similarly, the Court held that a defendant's signed consent directive authorizing the release of foreign bank records did not implicate the privilege against compelled self-incrimination because it did not convey any facts or assertions. *Doe*, 487 U.S. at 204. The consent directive authorized the release of any and all accounts over which Doe had a right of withdrawal, without acknowledging the existence of any such account. *Id*. When Doe refused to sign the consent directive by affirmatively invoking his privilege against compelled self-incrimination, the trial court held him in contempt and confined him until he complied with the order to sign the directive. *Id.*, 487 U.S. at 205. Significantly, the Court acknowledged that the consent directive was obviously compelled and assumed without deciding that it would also be incriminating by providing a link in the chain of evidence leading to Doe's indictment. *Id.*, 487 U.S. at 207.

Yet, on the question of whether the compelled consent directive was testimonial, the Court held that it was not. According to the Court, the privilege against compelled self-incrimination reflected a judgment that the prosecution should not be free to build up a criminal case, in whole or in part, with the assistance of enforced *disclosures* by the accused. *Id.*, 487 U.S. at 212 (emphasis in the original); *see also Ullmann v. United States*, 350 U.S. 422, 427 (1956).

The Court also likened the consent directive to acts by the defendant that did not fall within the privilege even though the acts themselves might have been incriminating. *Doe*, 487 U.S. at 210. Regardless of whatever possible legal effect the defendant's signature had, it did not communicate any implicit or explicit factual assertions. *Id.*, 487 U.S. at 210-11.

The logic of *Doe* and *Muniz* necessitates a holding that Salinas's selective, transitory silence was non-testimonial. While Salinas's conduct may have given rise to incriminating inferences of guilt, his selective, transitory silence, isolated from his non-verbal conduct, was necessarily void of any communicative value. It did not communicate facts or information any more than the defendant who authorized the release of bank records by signing a consent directive in *Doe*. *Doe*, 487 U.S. at 215. As the Court emphasized in *Doe*, the Fifth Amendment is concerned with forced *disclosures* by an accused. For the same reason, Salinas's reliance upon cases such as *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006) is misplaced. Those cases are not examples of compelled testimony, and the witnesses in those cases actually disclosed information. If Salinas seeks to argue that his lack of a verbal response was not, by itself, an implied assertion of fact, then his silence necessarily failed to convey any information, lacked testimonial character, and was not a clear assertion of the privilege against compelled self-incrimination.

Salinas points out the many possible non-incriminating reasons that a suspect might invoke his privilege against compelled self-incrimination. Pet. Br. 22-23. But the inferences from Salinas's conduct would provide no support for his proposition that his selective, transitory silence alone communicated either explicitly or implicitly facts or information. Salinas effectively concedes that his "silence" did not communicate any information to police when he argues that his silence was "insolubly ambiguous" due to the many reasons a suspect may choose to remain silent. Pet. Br. 22-23. And, arguing that his "silence" carried with it an adverse inference of guilt falls into the same problem faced by the State in *Muniz*. Pointing to the possible adverse inferences from his conduct only illustrates the incriminating nature of the evidence, not its testimonial character. *Muniz*, 496 U.S. at 593.[3] Thus, Salinas's selective, transitory silence during a voluntary, non-custodial police interview was not testimonial, and therefore not protected by the Fifth Amendment absent a clear assertion of the privilege against compelled self-incrimination.

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[3] Any "innocent" inferences drawn from his response, even if testimonial, would not be incriminating by definition. *Hiibel*, 542 U.S. at 190-91 (holding that Hiibel's refusal to disclose his name was not incriminating because it was not based upon any articulated real and appreciable fear that his name could be used to incriminate him).

II. Salinas was not compelled to be a witness against himself.

As Justice Kennedy has observed: "The 'Amendment speaks of compulsion,' . . . and the Court has insisted that 'the constitutional guarantee is only that the witness not be *compelled* to give self-incriminating testimony.'" *McKune v. Lile*, 536 U.S. 24, 35-36 (2002) (citations omitted). The sole concern of the Fifth Amendment is governmental coercion. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986). The Fifth Amendment privilege against compelled self-incrimination is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion." *Oregon v. Elstad*, 470 U.S. 298, 305 (1985). The privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. *Miranda*, 384 U.S. at 460.

"Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him." *Doe*, 487 U.S. at 212 (referencing the ecclesiastical courts and the Star Chamber as an "inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source."). At its core, the privilege reflects an unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt that defined the operation of the

Star Chamber, wherein authorities forced suspects to choose between revealing incriminating private thoughts or forsaking their oath by committing perjury. *Muniz*, 496 U.S. at 596. In his dissent to the Court's opinion in *Griffin*, Justice Stewart described the process as being unquestionably brutal:

> When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

Griffin, 380 U.S. at 620 (Stewart, J. dissenting). Indeed, the longstanding common-law principle, *nemo tenetur seipsem prodere* or "no one is bound to betray himself," was thought to ban only testimony forced by compulsory oath or physical torture, not voluntary, unsworn testimony. *See Mitchell v. United States*, 526 U.S. 314, 332-33 (1999) (Scalia, J., dissenting) (citing T. Barlow, The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate 189-190 (1745)). From this history, the privilege was designed to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullmann*, 350 U.S. at 428.

A. The possibility of adverse inferences during trial from the evidentiary use of pre-trial silence does not constitute compulsion under the Fifth Amendment, and neither the history of the Fifth Amendment nor the Court's precedent justifies the exclusion of such voluntarily obtained evidence.

Historically, the possible use at trial of a defendant's pre-trial silence was not equated with the type of coercive governmental conduct prohibited by the Fifth Amendment. Pretrial procedure in colonial America was governed by the Marian Committal Statute, which provided that justices of the peace would examine prisoners prior to trial and secure a statement from the defendant. *Mitchell*, 526 U.S. at 333 (Scalia, J., dissenting). The justice of the peace would later testify at trial regarding the contents of the statement, and if the defendant refused to speak, that would have been reported to the jury as well. *Id.* (citing Langbein, The Privilege and Common Law Criminal Procedure, in The Privilege Against Self-Incrimination 82, 92 (Helmholz et. al. eds. 1997)). And even after the privilege against compelled self-incrimination was ratified in the Fifth Amendment, justices of the peace continued pre-trial questioning of suspects whose silence continued to be introduced against them at trial. *See, e.g.*, *id*. 526 U.S. at 334 (citing Fourth Report of the Commissioners on Practice and Pleadings in New York – Code of Criminal Procedure xxviii (1849)). Consistent with this history, the Court has held that a suspect's non-custodial

statements are admissible because non-custodial questioning is not inherently coercive. *Berkemer*, 468 U.S. at 442 (holding that statements made to police prior to arrest were admissible).

Notably, *Miranda* held only that custodial interrogation is presumptively coercive, and the reading of the *Miranda* warnings removes the possibility of compulsion. While the Court noted John Lilburne's trial as the "critical historical event" shedding light on the origins and evolution of the Fifth Amendment, it nevertheless fashioned its holding to address the potential for compulsion rather than compulsion under traditional terms. *Miranda*, 384 U.S. at 459-61. The Court reasoned that the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. *Id.*, 384 U.S. at 455. However, even in the context of incommunicado, police-dominated, custodial interrogation, the reading of the *Miranda* warnings is sufficient to dispel the compulsion. As the Court noted in *Miranda*, "without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement *after the privilege has been once invoked*." *Id*., 384 U.S. at 474 (emphasis added). It is only when police fail to adequately advise a suspect of his rights, or when they refuse to honor a clear assertion of the privilege against compelled self-incrimination, that custodial interrogation becomes inherently coercive.

Yet, the Court has carefully limited the holding of *Miranda* and its presumption of coercion to custodial

interrogation. For example, the Court long ago upheld the admission of evidence of pre-arrest flight as substantive evidence. *See Alberty v. United States*, 162 U.S. 499, 509-10 (1896). And where a defendant is not deprived of his freedom of action in any significant way, law enforcement questioning is not coercive even when it occurs in a station house. *Mathiason*, 429 U.S. at 495. The Court has held that there is no official compulsion to respond even where a suspect's freedom of action is restricted during a temporary detention. *Berkemer*, 468 U.S. at 439-40.

Additionally, the Court rejected the argument that *Miranda* should be extended to cover interrogation in non-custodial circumstances even after a police investigation has focused on the suspect. *Beckwith v. United States*, 425 U.S. 341, 347 (1976). The Court stated that *Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar "nature and setting of . . . in-custody interrogation." *Id.*, 425 U.S. at 346. "In subsequent decisions, the Court specifically stressed that it was the Custodial nature of the interrogation which triggered the necessity for adherence to the specific requirements of its Miranda holding." *Id.*, 425 U.S. at 346 (citing *Orozco v. Texas*, 394 U.S. 324 (1969); *Mathis v. United States*, 391 U.S. 1 (1968)).

The Court has even held that police questioning in a prison environment is not inherently coercive. *Howes v. Fields*, 132 S.Ct. 1181, 1192 (2012). According to the Court, the prison environment is not inherently coercive because "a prisoner, unlike a person

who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release." *Id.,* 132 S.Ct. at 1191. The same holds true in this case where Salinas was not in custody and free to leave during police questioning. Unlike a person in custody, Salinas was not pressured to speak by the hope that, after doing so, he would be allowed to leave and go home. *Id.*

Most importantly, the Court has already determined that the possibility of adverse inferences from the use of pre-trial silence in a subsequent trial does not amount to a compulsion to speak prior to trial under the Fifth Amendment. *Jenkins*, 447 U.S. at 236. In *Jenkins*, the defendant was charged with murdering a man he claimed had robbed his sister and her boyfriend. *Id.,* 447 U.S. at 232. At trial, Jenkins testified that he acted in self-defense, and the prosecution impeached him with the fact that he had never told that story to police. *Id.*, 447 U.S. at 233. The Court distinguished the situation from that present in *Griffin* by noting that Jenkins had not asserted his right to remain silent, he voluntarily testified. *Id.*, 447 U.S. at 235.

The same is true in this case. Salinas did not assert the privilege against compelled self-incrimination; he voluntarily spoke with police. *See Berghuis*, 130 S.Ct. at 2260. In fact, the situation in *Jenkins* was arguably more coercive than the circumstances of this case because the prosecution drew adverse inferences at trial from Jenkins's total refusal to talk to police. *Jenkins*, 447 U.S. at 234. But in

this case, Salinas voluntarily agreed to go to the police station to answer police questions, and he continued answering questions after Elliott had asked him about the shotgun shells found at the scene of the crime.

Contrary to Salinas's contentions, *Jenkins* rejected the argument that the possibility of drawing adverse inferences during trial from the use of a defendant's pre-trial silence might compel a defendant to talk to police prior to trial. *Id.,* 447 U.S. at 236-38. According to the Court, "It can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him. But the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Id.,* 447 U.S. at 236 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)) (citing *Corbitt v. New Jersey*, 439 U.S. 212, 218 n.8 (1978)). The Court noted in *Jenkins* that "the Fifth Amendment guarantees the accused the right to remain silent during his criminal trial and prevents the prosecution from commenting on the silence of a defendant who asserts the right." *Jenkins*, 447 U.S. at 234 (citing *Griffin,* 380 U.S. at 614). Relying upon *Raffel v. United States*, the Court rejected the idea that the possibility of impeachment by prior silence placed an impermissible burden upon the exercise of Fifth Amendment rights. *Jenkins*, 447 U.S. at 236-37; *see also Raffel v. United States*, 271 U.S. 494, 499 (1926).

Just like a defendant who chooses to testify at trial, Salinas presumably had already weighed the possibility that his responses could be used against him at trial when he voluntarily agreed to the non-custodial interview. The fact that his selective, transitory silence could possibly be brought up later in a trial pursuant to a discussion of his entire interview provided no more coercion to speak with police than the possibility of wide-open cross-examination does to a defendant who voluntarily takes the witness stand. *Raffel*, 271 U.S. at 499 ("We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.") The potential for use at a possible trial subsequent to his voluntary decision to speak with police did nothing to fetter the exercise of Salinas's free will. *See Malloy v. Hogan*, 378 U.S. 1, 8 (1964) ("[T]he Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty[ ].").

What *Jenkins* makes obvious is that the choice at issue in both that case and *Griffin* was the decision to testify at trial, not the decision to speak with police prior to trial. *Griffin* held that a trial court's instruction drawing adverse inferences from a defendant's refusal to testify along with a prosecutor's argument to that effect amounted to a penalty upon the exercise of the right to refuse to testify. *Griffin,* 380 U.S. at

614. But in *Jenkins* the possibility of impeachment with pre-arrest silence at trial did not impose an impermissible burden on the decision to testify. *Jenkins*, 447 U.S. at 236-37. The possible use at trial of pre-arrest silence would not coerce a defendant to speak to police prior to trial. *Jenkins*, 447 U.S. at 236, 238.

Providing greater protection to Salinas's silence than his statements has the same potential to distort the truth-finding function as testifying at trial without impeachment would. It would still, as Justice Kennedy observed, "make the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell." *Mitchell*, 526 U.S. at 322 (quoting *Brown v. United States*, 356 U.S. 148, 156 (1958)). A contrary decision would allow defendants to create exculpatory evidence while immunizing themselves from potentially inculpatory questioning just as if the defendant sought to limit the scope of his cross-examination on the witness stand.

While introduction into evidence of an affirmative assertion of the privilege against self-incrimination may raise due process concerns, the use of a defendant's evasive and non-responsive answers does not. *Cf. Anderson v. Charles*, 447 U.S. 404, 409 (1980) (noting that while inconsistent statements that omit facts can be considered silence, the use of such post-arrest silence did not violate due process). Therefore, the possibility of adverse inferences during

trial from the evidentiary use of his pre-trial silence could not have compelled Salinas to be a witness against himself in violation of the Fifth Amendment.

B. The voluntary, non-custodial questioning environment in this case was not inherently coercive, and therefore did not implicate the Fifth Amendment.

The Court has held that certain situations are so inherently coercive that compulsion under the Fifth Amendment will not merely be presumed but will be conclusively and irrebutably established. Thus, under *Miranda*, if a defendant confesses to a crime as a result of custodial interrogation and without the waiver of *Miranda* rights, his Fifth Amendment privilege against compelled self-incrimination has been violated regardless of whether that particular defendant felt compelled or whether additional facts show that a reasonable person in the suspect's position would not have felt compelled. *See Miranda*, 384 U.S. at 468, 471-72 ("[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. . . . No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead.").

Likewise, if a person is given a choice to either forfeit his job or to incriminate himself, his decision to incriminate himself has been automatically compelled regardless of whether he actually felt compelled to

talk or whether a rational person in his particular situation would have felt so compelled. *See Garrity*, 385 U.S. at 497 ("That practice, like interrogation practices we reviewed in *Miranda*[ ], is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' ").

One justification for the conclusive-rule approach found in *Miranda* is that it avoids burdening police with the task of anticipating each suspect's idiosyncrasies and divining how those particular traits affect that suspect's subjective state of mind. *Berkemer*, 468 U.S. at 430-431. The efficacy of such a conclusive rule, however, must be balanced against the "legitimacy of the challenged governmental practice" as well as against the truth-determining function of the trial. *See Jenkins*, 447 U.S. at 238; *see also Brown v. U.S.*, 356 U.S. at 156 ("The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.").

But the Court has never created a conclusive rule stating that a non-custodial police interview is so inherently coercive that no amount of circumstantial evidence can overcome the presumption of compulsion, and such a situation does not deserve the blanket protection of a conclusive rule such as *Miranda*. Whether or not compulsion under the Self-incrimination Clause can exist prior to custody, it is substantially less likely that a reasonable person

would feel compelled to incriminate himself under such circumstances. *See, e.g., Howes*, 132 S.Ct. at 1189 ("As used in our *Miranda* case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion."); *Miranda*, 384 U.S. at 478 ("Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today"); *Jenkins*, 447 U.S. at 241 (Stevens, J., concurring) ("When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment.").

Salinas relies upon language from inherent coercion cases – which incorporated a clear assertion of the privilege after a defendant had a legal obligation to speak – in order to suggest that the voluntary, non-custodial police questioning environment in this case was equally coercive. Pet. Br. at 15-16, 26-27; *see also Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964); (finding a violation of the Fifth Amendment when witnesses asserted their privilege against compelled self-incrimination and were held in civil and criminal contempt); *Watkins v. United States*, 354 U.S. 178 (1957) (holding it a violation when Watkins was forced through subpoena to appear as a witness before the Subcommittee of the Committee on "Un-American Activities" of the House of Representatives and later indicted for criminal contempt when he refused to answer questions regarding the Communist Party); *Malloy*, 378 U.S.

at 3 (holding that Malloy could invoke the Fifth Amendment privilege when he was ordered to testify before a court-appointed referee conducting an inquiry into alleged gambling, was held in contempt, and sent to prison for refusing to answer questions); *Marchetti v. United States*, 390 U.S. 39 (1968) (finding a violation when a bookie was statutorily required to register with the IRS that he was engaging in the illegal activity of accepting wagers and was criminally prosecuted when he asserted his privilege against compelled self-incrimination); *Garrity*, 385 U.S. at 494 (holding that police officers' statements were "compelled" and, therefore, inadmissible against them because the officers' employment would have been terminated had they remained silent).

While none of these consequences for the assertion of the privilege against compelled self-incrimination were as brutal as being pilloried like John Lilburne for his refusal to swear the Star Chamber oath, the Court regarded them as a modern equivalent because they placed a condition upon the assertion of the privilege. In each of these cases, the individual was forced by law to provide information, and the refusal to do so gave rise to an automatic punishment enshrined in law and independent of the initial inquiry. *See also Spevack v. Klein*, 385 U.S. 511, 516 (1967) (invalidating order disbarring attorney based upon his failure to comply with subpoena *duces tecum* for financial records where attorney's refusal to respond was premised upon his clear assertion of the privilege against compelled self-incrimination); *Boyd v. United States*, 116 U.S. 616

(1886) (holding that court order during trial requiring the production of invoices from the claimants in criminal forfeiture action violated the Fifth Amendment).

Salinas, however, faced no such compulsion. He was not forced by law to provide information to the police. Neither his freedom of movement nor his freedom to terminate the interview were restricted in any way. And there was no automatic, independent penalty placed upon his assertion of the privilege against compelled self-incrimination. The voluntary, non-custodial police questioning in this case was simply not inherently coercive, and therefore Salinas's responses were not compelled under the Fifth Amendment absent an invocation of the privilege against self-incrimination.

C. *Griffin v. California* applies only to a refusal to testify at trial and only to comments by the judge or prosecutor, neither of which is at issue in this case.

The most significant expansion of this line of cases came in *Griffin v. California* where the Court held for the first time that the drawing of an adverse inference from a defendant's reliance upon his right to refuse to testify at his trial also amounted to a penalty upon the clear assertion of the privilege. *Griffin*, 380 U.S. at 609. There, Eddie Griffin dragged Essie Mae Hodson into an alley and brutally raped her, leaving her to die. *People v. Griffin*, 383 P.2d 432,

434-35 (Cal. 1963), *rev'd*, 380 U.S. 609 (1965). Griffin did not testify at the resulting murder trial, but the trial judge instructed the jury according to a California statute that "among the inferences that may be reasonably drawn [from the defendant's refusal to testify] those unfavorable to the defendant are the more probable." *Griffin*, 380 U.S. at 610. Additionally, the prosecutor argued, "These things he had not seen fit to take the stand and deny or explain." *Id.*, 380 U.S. at 611. According to the Court, the trial court's instruction was "a penalty imposed by courts for exercising a constitutional privilege" that "[cut] down on the privilege by making its assertion costly." *Id.*, 380 U.S. at 614.

The Court took no issue with the jury drawing an adverse inference on its own from the defendant's refusal to testify, it only invalidated California's statutory scheme that required the trial court to instruct the jury to draw the adverse inference and allowed the prosecution to argue it. *Id.*, 380 U.S. at 614 ("What the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.") It was not until *Carter v. Kentucky*, that the Court took the extra step of requiring a no-adverse-inference instruction. *Carter v. Kentucky*, 450 U.S. 288, 301 (1981) ("The *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify.").

But putting aside *Griffin's* extension of prior law, the focus of the case was not on Griffin's individual decision to take the witness stand, it addressed an environment that was inherently coercive at the time of Griffin's decision not to testify. As in the other penalty cases, Griffin was legally obligated to participate in the proceeding, or suffer an immediate consequence. The Court apparently equated the statutory authority of a trial court and prosecutor to draw adverse inferences from the refusal to testify with the authority to hold an individual in contempt for refusing to answer questions.

1. *Griffin* was fundamentally based on the presumption of innocence, which is a trial right.

Griffin was designed to be limited to the context of trial. The Court reversed Griffin's conviction based on *Wilson v. United States*, which had enforced a federal statute that prevented "any presumption against [a criminal defendant]" who failed to testify. *Griffin*, 380 U.S. at 613-14 (citing *Wilson v. United States*, 149 U.S. 60, 66 (1893)). The Court did not hold that the trial court in *Griffin* violated the federal statute but rather that the purpose of the federal statute reflected "the spirit of the Self-Incrimination Clause[ ]." *Griffin*, 380 U.S. at 613-14. *Wilson* itself, however, was not based on the Fifth Amendment; it was based on "the presumption of innocence." *See Griffin*, 380 U.S. at 613, quoting *Wilson,* 149 U.S. at 66 ("the act was framed with a due regard also to

those who might prefer to rely upon the presumption of innocence which the law gives to every one."). The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. *See Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

The *Griffin* Court essentially stated that the Self-Incrimination Clause was framed to allow people to rely on the presumption of innocence. *See Griffin*, 380 U.S. at 613. In fact, it concluded that, "If the words 'fifth Amendment' are substituted for 'act' and for 'statute,'" in the *Wilson* opinion, "the spirit of the Self-Incrimination Clause is reflected." *Griffin*, 380 U.S. at 613-614. Literally making that substitution renders: "[the Fifth Amendment] was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses." *See id.*, 380 U.S. at 613 (quoting *Wilson*, 149 U.S. at 66). Such substitution would further provide that "[The Fifth Amendment] declares that the failure of a defendant in a criminal action to request to be a witness shall not create any presumption against him." *See id.*, 380 U.S. at 613 (quoting *Wilson*, 149 U.S. at 66). Thus, for the purposes of *Griffin*, the Fifth Amendment extends only so far as the presumption of innocence announced in *Wilson*.

The presumption of innocence, however, is solely a trial right and has "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Bell v. Wolfish*, 441 U.S. 520, 533 (1979). It is a doctrine that allocates the burden of proof in criminal trials. *Id.* It also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. *Id*. (citing *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *Estelle v. Williams*, 425 U.S. 501 (1976); *In re Winship*, 397 U.S. 358 (1970)). Thus, it simply defies logic to extend *Griffin* beyond the trial context upon which the presumption of innocence was based.

Salinas may argue that the presumption of innocence does not apply to the punishment phase of trial, yet this Court has extended *Griffin* to that phase in *Mitchell. See Mitchell*, 526 U.S. at 325 ("We reject the position that either petitioner's guilty plea or her statements at the plea colloquy functioned as a waiver of her right to remain silent at sentencing."); *Herrera v. Collins*, 506 U.S. 390, 399 (1993) ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."). Of course, many on this Court resisted the move to extend *Griffin* beyond the guilt stage of trial. *See Mitchell*, 526 U.S. at 336 (Scalia, J., dissenting), and 526 U.S. at 342 (Thomas,

J., dissenting). But *Mitchell* need not be overruled in order to hold the *Griffin* line in the present case because the language of *Griffin* was broader than the guilt stage of trial and extended to the entire trial. In the context of *Griffin*, the presumption of innocence must be understood in the language from which it was born. *Wilson* and *Griffin* were not explicitly restricted to the guilt stage of trial, but simply provided "that the failure of a defendant in a *criminal action* to request to be a witness shall not create any presumption against him." *Griffin*, 380 U.S. at 613 (emphasis added). Thus, *Griffin*'s language extended the concept to all stages of trial, but not beyond those stages.

Salinas claims that "the *Griffin* rule applies to a defendant's silence not only at trial . . . but also outside of the courtroom proceedings as well." Pet. Br. 13. Although *Griffin* has been extended by the Court to cover other fact situations, it has been in the context of some stage of a trial. *See Carter*, 450 U.S. at 288 (extending *Griffin* to require that a criminal trial judge give a "no-adverse-inference" jury instruction when requested by a defendant to do so); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (citing *Griffin*'s "assertion costly" language in striking down law requiring defendant to testify first); *Mitchell*, 526 U.S. at 325 (extending *Griffin* to penalty phase of trial).

Furthermore, while there was a substantial amount of dicta in *Griffin* dealing with the penalties and the costs of exercising a constitutional privilege,

the *Griffin* rule itself was that neither the prosecution nor the trial court could comment adversely on the defendant's failure to testify at the criminal proceeding. *Griffin*, 380 U.S. at 611, 615. By its very nature, *Griffin* does not apply outside of courtroom proceedings because it is based on the failure to testify at that proceeding.

As sole support for his proposition that "the *Griffin* rule applies . . . outside of the courtroom proceedings," Salinas quotes footnote 37 of *Miranda*. Pet. Br. 13-14. Footnote 37 states that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police *custodial* interrogation." *Miranda,* 384 U.S. at 468 n.37 (emphasis added). But Salinas has conceded that there was no custodial interrogation in this case. Pet. Br. 2. Thus, even if *Griffin*, for the sake of argument, could be extended to a pre-trial, custodial interrogation, it does not support the proposition that *Griffin* has been extended to voluntary, non-custodial police questioning.

Furthermore, footnote 37 cites *Griffin, Malloy*, *Bram v. United States*, and two law review articles with a "Cf." cite. *Miranda,* 384 U.S. at 468 n.37 (citing *Griffin*, 380 U.S. at 609; *Malloy*, 378 U.S. at 8; *Bram v. United States*, 168 U.S. 532 (1897)). Such a vague citation cannot mean that the Court meant to extend every rule in those authorities to apply outside of the courtroom. *Bram* dealt with a pretrial confession, so perhaps the Court cited *Bram* in support of the "custodial interrogation" portion of the

footnote while it cited *Griffin* for the purposes of the "stood mute" portion of that footnote. *See id.* (citing *Griffin*, 380 U.S. at 609; *Bram*, 168 U.S. at 532). In any event, footnote 37 cannot confidently be labeled an example of the Court extending *Griffin* outside of a courtroom proceeding.

Finally, footnote 37 was predicated on the warning requirements of *Miranda*, so a comment on muteness as mentioned in the footnote would have been a violation of due process rather than an extension of the *Griffin* rule. *See Doyle*, 426 U.S. at 610. Thus, contrary to Salinas's claims, the Court has not previously extended *Griffin* outside of the context of a courtroom. While some broad dicta in *Griffin* might seem to justify such an extension, doing so would be entirely inconsistent with the facts that the holding was based upon, as well as the opinion's rationale.

2. Unlike the instruction and argument in *Griffin*, the mere admission into evidence of Salinas's selective, transitory silence did not mandate an adverse inference by the jury.

Whatever the merits of reframing *Griffin*, this case is not *Griffin*. The Fifth Amendment violation in *Griffin* was based on the joint effect of the trial court's instruction and the comment by the prosecutor, both of which invited the jury to make an adverse inference from Griffin's refusal to testify at trial. *Griffin*, 380 U.S. at 610.

Salinas's trial objection was solely to the evidence that he "did not answer" one question during his interview with Elliott. J.A. 15-18. That was the only issue raised on appeal in the Texas appellate courts, and the Texas Court of Criminal Appeals made no mention of the prosecutor's closing argument to the jury that Salinas "wouldn't answer that question." *Compare* Pet. App. 2a *with* 7.RR.171-73. Indeed, the Texas Court of Criminal Appeals framed the issue as whether "the trial court erred in *admitting evidence* of his pre-arrest, pre-*Miranda* silence." *Id.* (emphasis added).[4] Thus, the issue before the Court is not whether the trial prosecutor violated Salinas's privilege by asking the jury to draw an adverse inference during closing argument but whether the trial prosecutor violated Salinas's privilege by introducing evidence of his selective, transitory silence during his interview with Elliott.

Griffin cannot be extended to apply to the current situation where the evidence of Salinas's selective, transitory silence was not in itself adverse. For example, in *Lakeside v. Oregon*, the Court held that

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[4] The Texas Court of Criminal Appeals also stated that "pre-arrest, pre-Miranda silence is not protected by the Fifth Amendment right against self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies." Pet. App. 6a. But the absence of any discussion in that opinion of the prosecutor's closing argument suggests that the Court of Criminal Appeals treated the introduction of evidence of Salinas's silence as itself a comment on his silence. Pet. App. 6a.

Griffin did not apply because "a judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of his privilege not to testify is 'comment' of an entirely different order." *Lakeside v. Oregon*, 435 U.S. 333, 339 (1978) (emphasis omitted); *see also Carter*, 450 U.S. at 298 (analyzing *Lakeside*).

Unlike the comments in *Griffin*, which explicitly directed the jury to infer guilt as a result of Griffin's refusal to testify, the mere introduction of the selective, transitory silence in the present case did not necessarily call for an adverse inference against Salinas. *See Griffin*, 380 U.S. at 614 ("What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."). The prosecutor in this case suggested that Salinas's lack of a verbal response was due to the fact that back in 1993, "before CSI was on TV," Salinas did not know that ballistics testing could be done and that Salinas was wondering whether such evidence could connect him to the crime. 7.RR.171, 173. But Salinas could also have been wondering whether such scientific methods were reliable and whether it would falsely connect him to the crime. Or he could have been wondering whether someone else with access to the gun could have committed the murder, in which case the shotgun would match the shells. Thus, the evidence itself was open to interpretation, it did not mandate an adverse inference, and *Griffin* does not apply to its mere admission.

3. Salinas's selective, transitory silence during a voluntary, non-custodial interview does not equate to *Griffin's* compulsion to stand trial.

Griffin was born out of a trial, with all the compulsive elements that attend an official proceeding. *See, e.g., Andresen v. Maryland*, 427 U.S. 463, 473 (1976) (recognizing the "inherent psychological pressure to respond at trial to unfavorable evidence."); *United States v. Hvass*, 355 U.S. 570, 575 n.4 (1958) (noting that a witness is required to take an oath in order to testify).

Griffin was required to stand trial, but Salinas voluntarily went to the police station to talk to the police. J.A. 14; 5.RR.54. As the Court stated, "[t]here is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make." *Miranda*, 384 U.S. at 478 (footnote omitted). Furthermore, "[v]olunteered statements of any kind are not barred by the Fifth Amendment[.]" *Id.*; *see also Rhode Island v. Innis*, 446 U.S. 291, 299-300 (1980) (reviewing *Miranda* to address interplay between interrogation and the need for prophylactic warnings). Salinas claims that he "had no option when questioned by the police but to become a witness against himself." Pet. Br. 17. But this claim ignores the crucial step where Salinas voluntarily went to the police station to talk to the police, thereby

voluntarily choosing to make himself a witness. That crucial element distinguishes this case from *Griffin*.

Another element of compulsion present in *Griffin*, yet absent here, is that if Griffin wanted to offer evidence to rebut the prosecution's case, he was required to take an oath and be subjected to cross-examination by the prosecution. *See Hvass*, 355 U.S. at 575 n.4; *Brown v. United States*, 356 U.S. at 155-156 ("He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute."). Salinas, on the other hand, was not required to take an oath and not required to answer questions under cross-examination. Indeed, his failure to answer the question at issue in this appeal proves the distinction: if Griffin had testified at trial, he would have been ordered by the court to answer questions on cross-examination, whereas Salinas was allowed to walk out of the police station without verbally responding to every question. The evidence showed that Salinas voluntarily went downtown to talk with the police officers, that he was not under arrest for murder, and that he was allowed to leave without murder charges being filed against him. J.A. 14; 5.RR.54. Therefore, the compulsory elements of a trial were not present in this case, and *Griffin* should not be stretched to encompass it. *See, e.g., Baxter*, 425 U.S. at 317.

Not only was the compulsory nature absent in the present case, Salinas took no affirmative steps to invoke the privilege against compelled self-incrimination. Unlike Griffin, who necessarily rested

his case at the guilt stage without taking the stand, Salinas made no unequivocal act demonstrating his assertion of his privilege against compelled self-incrimination. *See Griffin*, 380 U.S. at 609. The privilege against compelled self-incrimination may not be relied upon unless it is invoked in a timely fashion. *Garner*, 424 U.S. at 653-55; *see also Berghuis*, 130 S.Ct. at 2260. Thus, the present case lacks both the compulsion and the invocation that were necessarily present in the trial setting of *Griffin*.

4. The Court has already chosen not to extend *Griffin* to the context of evidentiary admissibility.

In dealing with the admissibility of evidence obtained prior to trial, the Court has applied general Fifth Amendment principles rather than the rule announced in *Griffin*. *Schmerber*, 384 U.S. at 765 n.9. While the primary focus of *Schmerber* was the admission of blood test results, Schmerber had also made a Fifth Amendment argument regarding the prosecution's use of his refusal to submit to a "breathalyzer" test. *Schmerber*, 384 U.S. at 765 n.9. The Court rejected Schmerber's invitation to extend *Griffin* to that circumstance, choosing to apply the general Fifth Amendment principles set out in *Miranda* instead. *Id.*

When the Court subsequently considered whether the use of a defendant's pre-trial refusal to submit to a blood-alcohol test at trial violated the Fifth Amendment, it did not apply *Griffin*. *South Dakota v.*

Neville, 459 U.S. 553, 560, 563 (1983). Doubtless, Salinas will argue that *Neville* is distinguishable because in this case the State lacked the ability to compel Salinas's answers in the same way that police could compel the taking of a blood test in *Neville*. But that argument overlooks the Court's holding in *Neville* that the introduction of a defendant's refusal was not compelled merely because it could have been used against him at trial. *Id*., 459 U.S. at 564. Though the Court could have extended *Griffin*'s rationale to prohibit the admission of the evidence, the Court did not do so because it first determined that the refusal was not compelled under the Fifth Amendment. *Id*.

Additionally, while the Court held in *Doyle v. Ohio* that a defendant's refusal to speak with the police after being read his *Miranda* warnings could not be used for impeachment purposes, the Court decided that case without reference to the rationale announced in *Griffin*. *Doyle*, 426 U.S. at 618-19. In *Doyle*, the Court reasoned that the use of a defendant's refusal to speak after he had been advised that he could remain silent was fundamentally unfair under the Due Process Clause of the Fourteenth Amendment. *Id.*, 426 U.S. at 619; *cf. Fletcher*, 455 U.S. at 607 (holding that it is the use of silence after the assurances embodied in *Miranda* that violates due process, not the use of pre-*Miranda* silence at trial).

The Court has never held that a defendant's pre-arrest silence, in the absence of an invocation of the

privilege against compelled self-incrimination, is somehow compelled because it could potentially be used at trial. And rather than extend *Griffin* to cover the admissibility of evidence obtained prior to trial, the Court has applied general Fifth Amendment principles to the admission of such evidence by considering whether the evidence in question was compelled, testimonial, and incriminating. Because Salinas's selective, transitory silence during a voluntary, non-custodial interview was none of these things, the admission of the evidence did not violate the Fifth Amendment.

III. Any error in the admission of Salinas's selective, transitory silence during a voluntary, non-custodial police interview was harmless beyond a reasonable doubt.

Even if the admission into evidence of Salinas's selective, transitory silence violated the Fifth Amendment privilege against compelled self-incrimination, any error in the admission of such evidence was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967).

Testimony that Salinas "did not answer" Elliott's question was quite brief. Elliott testified that he asked Salinas "if the shotgun in question here would match the shells recovered at the scene of the murder?" J.A. 17. When asked, "And what was his answer?" Elliott gave a four word reply, "He did not answer." J.A. 17.

Salinas did, in fact, answer Elliott's question by his non-verbal conduct. Elliott testified, without a Fifth Amendment objection by Salinas, as to Salinas's non-verbal response that he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, clinched his hands in his lap, began to tighten up." J.A. 18.

Moreover, there was overwhelming evidence of Salinas's guilt. Martha Trevino Alexander awoke on the morning of December 18, 1992, to the sound of gunshots, a scream, and more gunshots. 4.RR.73, 138-139. She looked out the window of her downstairs apartment and saw the back of a man in his twenties; he was wearing a white hat, dark pants, and a long tan coat that appeared bulky on the right side. 4.RR.73, 140-146, 157-159. The man came halfway down the stairs, ran toward the street, and entered a nice, dark Z28 Camaro or Trans Am, which fled the scene. 4.RR.73, 140-146, 157-159. The description of the vehicle observed at the scene of the murders matched vehicles owned by Salinas and his family. 4.RR.73, 146-147; 5.RR.19, 22, 29. The description of only one man being observed running from the scene matched Salinas's admission to Cuellar that he, alone, had killed Johnny and Hector. 4.RR.73, 140-144.

Officers recovered six fired 12-gauge No. 6 Remington Peter shotgun shells from the scene. 5.RR.15. Ballistics analysis revealed all six fired shotgun shells had been fired in the Winchester Defender shotgun recovered from Salinas's residence.

4.RR.96, 103-104; 5.RR.49-50, 149, 156, 181-182, 200-204, 219-221.

Salinas's good friend, John Damien Cuellar, testified that Salinas had left Hector's apartment the night before the murders but had stated that he planned to go back to the apartment. 4.RR.168, 174. Salinas, whom he knew to carry a 12-gauge chrome pistol grip shotgun, admitted just two days after the murders that he had returned to Hector's apartment in a Camaro and he, alone, had killed Johnny and Hector. 4.RR.171, 178-185, 189, 191, 224-225. Shortly thereafter, Cuellar told Salinas that he had decided to tell the police what Salinas had told him, and that Salinas has to do what he has to do – whether it be turning himself in or running. 4.RR.190-91.

Knowing that the police had recovered the murder weapon from his residence and that he was a suspect in a double murder, Salinas absconded and was a fugitive for over fourteen years. 5.RR.59-63. Officers finally located Salinas in jail, after he had been arrested under a different name and different date of birth. 5.RR.63-65.

Clearly, the record as whole demonstrates beyond a reasonable doubt that the admission of evidence that Salinas "did not answer" Elliott's question during a voluntary, non-custodial police interview did not contribute to Salinas's conviction.

———♦———

CONCLUSION

For these reasons, the Court should affirm the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted.

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TABLE OF AUTHORITIES – Continued

Nos. 12-1182 & 12-1183

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS
and
AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE STATE AND LOCAL RESPONDENTS IN OPPOSITION

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[The State of Texas, the Public Utility Commission of Texas, the Railroad Commission of Texas, the Texas Commission on Environmental Quality, and the Texas General Land Office are represented by the counsel listed on the cover.]

QUESTIONS PRESENTED

The Clean Air Act ("CAA") effects a system of cooperative federalism under which the Environmental Protection Agency ("EPA") defines the air-quality obligations that the States must meet, and the States then have a chance to meet those obligations in the manner they see fit. *See Train v. NRDC*, 421 U.S. 60, 78-87 (1975). Consistent with that framework, the court of appeals held that EPA could not define the amounts of pollution that "contribute significantly," 42 U.S.C. § 7410(a)(2)(D)(i)(I), to air-quality problems in downwind States and, at the same time, find that upwind States had failed to abate those newly defined contributions. The court of appeals also concluded that the upwind States aggrieved by the rule implementing that unprecedented approach could not have raised their challenge before the rule was promulgated.

The questions addressed in this brief are:

1. Whether the court of appeals lacked jurisdiction over the federalism challenge because it was not presented until after EPA promulgated the rule that simultaneously defined the States' obligations and dictated how they must be met.

2. Whether the court of appeals erred in holding that EPA must give States included in a section-7410(a)(2)(D)(i)(I) regional program a chance to devise their own plans to satisfy EPA's requirements before EPA imposes federal plans of its own design.

The industry and labor respondents' opposition addresses the remaining questions presented.

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INTRODUCTION

The CAA's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), is EPA's primary tool for regulating air pollution that crosses state lines. Although the petitioners assert that the enactment of that provision in 1990 strengthened the agency's ability to ensure compliance with national ambient air quality standards ("NAAQS") in downwind States, *see* EPA Pet. 3-4, they do not claim that any statutory amendment licensed EPA to override the Act's structure of cooperative federalism. That core feature of the Act has remained a constant throughout all of the legislative changes that the petitioners note. *See* Pet. App. 43a n.26. As the court of appeals correctly held, the Act continues to give States the first opportunity to satisfy the emissions-reduction obligations that EPA mandates. *Id.* at 4a, 42a-61a; *see Train*, 421 U.S. at 78-87.

The rule at issue here, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (the "Transport Rule"), is not EPA's first attempt to implement the current version of section 7410(a)(2)(D)(i)(I). EPA previously promulgated two rules under that provision, each of which acknowledged the Act's system of cooperative federalism and appropriately gave upwind States designated for inclusion in a multi-state regional program a reasonable chance to meet the new requirements that EPA announced. *See* Pet. App. 55a-57a. But the Transport Rule departed from that approach. It simultaneously announced new requirements for the upwind States and mandated how those requirements must be met, cutting the

States included in EPA's new Transport Rule region out of the implementation process entirely. *See id.* at 42a-54a.

The States do not question EPA's ultimate goal of improving downwind air quality. But to achieve that goal, EPA must work within the parameters that Congress has set. Although the petitioners claim that the Transport Rule did so, their description of the rule contains several important omissions, their legal argument ignores key statutory language and this Court's confirmation of the Act's core structure, and their claims about the health-related impact of denying the petitions incorrectly assume that the Transport Rule's vacatur left interstate transport of air pollution unregulated. For these and the additional reasons that follow, further review is unwarranted.

STATEMENT

1. a. Under the CAA, the prevention of air pollution has always been "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). As the Court explained in 1975, "[t]he Act gives [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [42 U.S.C. § 7410(a)(2)]." *Train*, 421 U.S. at 79. The same is true today: EPA sets air-quality requirements, but the States are given the first opportunity to determine how best to meet those requirements through state implementation plans ("SIPs"). *See* 42 U.S.C. §§ 7407(a), 7410(a).

The process begins with EPA's promulgation of a NAAQS and its subsequent designation of areas as "nonattainment," "attainment," or "unclassifiable." *Id.* §§ 7407(c) (d), 7409. Those designations inform the types of provisions that SIPs must contain. *See, e.g.*, *id.* § 7502(c) (describing plan provisions required for States with "nonattainment" areas). States then have up to three years to submit SIPs that "provide[] for implementation, maintenance, and enforcement" of the NAAQS on an appropriate compliance schedule. *Id.* § 7410(a)(1), (2)(A). After a SIP is submitted, EPA reviews it for technical completeness and compliance with the Act's requirements. *Id.* § 7410(k)(1)-(4).

If a SIP "as a whole . . . meets all of the applicable requirements of [the CAA]," EPA "shall approve" it. *Id.* § 7410(k)(3). If EPA concludes that a SIP it previously approved is "substantially inadequate to attain or maintain the relevant [NAAQS]" or otherwise fails to "comply with any requirement of [the CAA]," EPA "shall require the State to revise the [SIP] as necessary to correct such inadequacies." *Id.* § 7410(k)(5) (the "SIP call" provision).

EPA may promulgate a federal implementation plan ("FIP") only if a State fails to submit an approvable SIP that is, only if a State "has failed to make a required submission" or EPA disapproves such a submission, and the State fails to correct the deficiency before a FIP issues. *Id.* § 7410(c)(1). By definition, a FIP may not impose requirements that a State has not yet had a chance to meet. *See id.*

§ 7602(y) (defining a FIP as a plan "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [SIP]").

b. The Transport Rule attempted to implement 42 U.S.C. § 7410(a)(2)(D)(i)(I), which requires SIPs to

> contain adequate provisions
>
> > (i) prohibiting, consistent with the provisions of this subchapter, any source . . . within the State from emitting any air pollutant in amounts which will
> >
> > > (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS].

The statute does not define "contribute significantly" or "interfere" either generally or with respect to specific NAAQS. And although relatively simple atmospheric-dispersion modeling can relate local emissions of sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x") to local ground-level concentrations of those pollutants, relating those emissions to the formation of fine particulate matter ("$PM_{2.5}$") and ozone the two pollutants at issue here is much more complex.

As the petitioners note, SO_2 and NO_x emissions can be transported great distances, transforming into particles that contribute to $PM_{2.5}$ concentrations hundreds of miles downwind. Similarly, NO_x emitted in an upwind State can interact with

sunlight and volatile organic compounds to form ozone that is transported to downwind States. *See* EPA Pet. 7-8 n.5 (describing how ozone and $PM_{2.5}$ can result from precursor emissions far upwind).

As explained below, EPA has attempted to develop a framework through legislative rulemaking to address, under the current version of section 7410(a)(2)(D)(i)(I), SO_2 and NO_x emissions in light of their impact on $PM_{2.5}$ and ozone concentrations in downwind States. The outcome of those rulemaking proceedings, which identified the States included in EPA's latest multi-state region and their interdependent emissions-reduction obligations, remained unknown until each final rule was promulgated.

2. a. The first rule that EPA promulgated under the current version of the statute was the 1998 NO_x SIP Call, which applied to a group of 23 States that, according to EPA's analysis, contributed significantly to downwind nonattainment of EPA's one-hour and eight-hour ozone NAAQS. 63 Fed. Reg. 57,356, 57,356, 57,358 (Oct. 27, 1998). As its name suggests, the NO_x SIP Call was not promulgated as a series of FIPs. It was a SIP call that gave the States identified in that rulemaking proceeding 12 months to submit SIPs specifying the particular mix of controls appropriate to abate the significant contributions that EPA had defined. *Id.* at 57,362, 57,367, 57,369-70, 57,451; *see* 42 U.S.C. § 7410(k)(5) (authorizing EPA to establish reasonable deadlines,

not to exceed 18 months after notice is given, for SIP revisions).

Citing *Train*, EPA explained in the NO_x SIP Call that "[d]etermining the overall level of air pollutants allowed to be emitted in a State [under section 7410(a)(2)(D)(i)(I)] is comparable to determining overall standards of air quality [*i.e.*, NAAQS], which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility." 63 Fed. Reg. at 57,369.

On judicial review, the D.C. Circuit vacated the NO_x SIP Call in part based on EPA's failure to give adequate notice of some elements of the rule. *Michigan v. EPA*, 213 F.3d 663, 695 (D.C. Cir. 2000) (per curiam), *cert. denied*, 532 U.S. 903, 904 (2001). But after confirming that the CAA gives States "the primary responsibility to attain and maintain NAAQS within their borders" through SIPs, the court held that the NO_x SIP Call, which "merely provide[d] the levels to be achieved by state-determined compliance mechanisms," was in keeping with EPA's statutory role. *Id.* at 671, 687. The court explained that EPA had given States "real choice" regarding how to comply with EPA's requirements, allowing them to "choose from a myriad of reasonably cost-effective options to achieve the assigned reduction levels." *Id.* at 687-88.

b. EPA's next regional section-7410(a)(2)(D)(i)(I) rule was the 2005 Clean Air Interstate Rule ("CAIR"). 70 Fed. Reg. 25,162 (May 12, 2005). CAIR covered 28 upwind States that EPA identified through its rulemaking process as significantly contributing to downwind nonattainment of the 1997 $PM_{2.5}$ and ozone NAAQS. *Id.* at 25,162. The rule did not impose any independent obligations to satisfy section 7410(a)(2)(D)(i)(I)'s "interfere with maintenance" language. Instead, it provided that the covered States would fully satisfy their section-7410(a)(2)(D)(i)(I) obligations by adopting SIPs that implemented the required reductions, which EPA derived by considering impacts only on downwind areas actually in nonattainment. *Id.* at 25,193 & n.45.

Like the NO_x SIP Call, CAIR required States to revise their SIPs, and it gave them the full 18 months to do so. *Id.* at 25,162, 25,263; 42 U.S.C. § 7410(k)(5). Only if a State failed to submit an approvable SIP could EPA impose a CAIR FIP. And although EPA did propose and ultimately finalize certain FIPs, those FIPs "in no way preclude[d] a State from developing its own SIP . . . ." 71 Fed. Reg. 25,328, 25,339 (Apr. 28, 2006). EPA explained that it had "considered the timing of each element of the FIP process to make sure to preserve each State's freedom to develop and implement SIPs." *Id.* at 25,340.

On judicial review, the D.C. Circuit held that CAIR's significant-contribution analysis was invalid.

North Carolina v. EPA, 531 F.3d 896, 917-21 (D.C. Cir. 2008) (per curiam). The court also found that EPA had impermissibly failed to give independent effect to section 7410(a)(2)(D)(i)(I)'s "interfere with maintenance" language. *Id.* at 909-10, 929. The court initially vacated CAIR and remanded the matter for EPA to cure "fundamental flaws" that would require re-evaluation of CAIR "from the ground up." *Id.* at 929, 930. But on rehearing, it granted EPA's request for remand without vacatur, preserving the environmental benefits of CAIR while EPA worked to promulgate a replacement. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam).

3. The 2011 Transport Rule was EPA's intended replacement for CAIR. 76 Fed. Reg. at 48,211. But rather than issuing a section-7410(k)(5) SIP call, EPA imposed the Transport Rule as a series of FIPs governing 27 upwind States' obligations under the 1997 annual $PM_{2.5}$ NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, and the 1997 ozone NAAQS. *See* Pet. App. 12a; *see also* 76 Fed. Reg. at 48,212; 70 Fed. Reg. at 25,167 (reflecting that the subset of States covered by the Transport Rule differed from the subset of States covered by CAIR). Simultaneously, EPA, rather than the States, decided how to implement the rule's new emissions budgets by allocating "allowances" to individual sources within the covered States. 76 Fed. Reg. at 48,208, 48,212, 48,219-20; *see* Pet. App. 19a-20a & n.11 (explaining the purpose and function of allowances).

Although the Transport Rule provided that "[e]ach state has the option of replacing these [FIPs] with [SIPs] to achieve the required amount of emission reductions from sources selected by the state," 76 Fed. Reg. at 48,209; *see* EPA Pet. 17; American Lung Association, et al. ("ALA") Pet. 13, it explained that States could not do so for the 2012 control year. 76 Fed. Reg. at 48,328. The rule did permit States to make allowance allocations beginning one year into the program (for the 2013 control year), but it restricted those SIP revisions to ones that were "narrower in scope than the other SIP revisions states can use to replace the FIPs." *Id.* at 48,212 n.8. The rule did not allow a full SIP to replace a Transport Rule FIP until the 2014 control year. *Id.* at 48,327.

4. a. On judicial review, the D.C. Circuit concluded that the Transport Rule was fatally flawed for several reasons. First, as explained in the industry and labor respondents' brief in opposition, the court found that EPA exceeded the authority granted by section 7410(a)(2)(D)(i)(I) in multiple independent ways by requiring emissions reductions without regard either to the "insignificance" threshold that EPA drew for a State's inclusion in its new multi-state program or to whether those reductions were more than needed to bring about downwind NAAQS attainment. Pet. App. 3a-4a, 21a-41a. Second, as discussed below, the court of appeals found that EPA exceeded its statutory authority in simultaneously defining the covered States'

significant contributions and imposing FIPs to abate those contributions. *Id.* at 4a, 42a-61a.

Based on those flaws, the court of appeals vacated both the Transport Rule and its FIPs, remanding the matter to EPA. *Id.* at 62a-64a. But consistent with its final decision in *North Carolina*, the court ordered EPA to "continue administering CAIR pending the promulgation of a valid replacement." *Id.* at 63a-64a.

b. Judge Rogers dissented, asserting that the challenges to EPA's significant-contribution analysis had not been preserved at the administrative level and criticizing several other holdings on the merits. *Id.* at 65a, 67a-70a, 95a-114a. Judge Rogers also asserted that the federalism challenge was an impermissible collateral attack on prior EPA orders, adding that, in her view, the challenge failed on the merits under the text of the Act. *Id.* at 65a-67a, 70a-95a.

5. EPA (in No. 12-1182) and ALA and four other environmental groups that intervened on EPA's behalf below (in No. 12-1183) filed petitions for a writ of certiorari. Subsequently, briefs in support of certiorari were filed by a group of States and cities (led by New York) and two corporations (Calpine and Exelon), all of which likewise supported EPA as intervenors in the court of appeals. Together, these parties assert that the court of appeals lacked jurisdiction to rule on some of the grounds it did and that some of the court of appeals' conclusions on each of those grounds were erroneous. The industry and

labor respondents' brief in opposition addresses the issues surrounding the court of appeals' analysis of section 7410(a)(2)(D)(i)(I)'s substantive limits, and this brief addresses the issues surrounding the court of appeals' analysis of EPA's FIP authority.

REASONS TO DENY THE PETITIONS

Unable to identify a circuit split, the petitioners attempt to show that the court of appeals erroneously invalidated an EPA rule of broad importance. That assertion fails for the reasons noted below. But the petitioners' request for review is also marred by threshold questions that, far from providing a basis for granting certiorari, stand as obstacles to review of the primary questions presented. For each of those reasons, and for the additional reasons identified in the industry and labor respondents' brief in opposition, the petitions for a writ of certiorari should be denied.

I. THERE IS NO CIRCUIT SPLIT, AND THE WAIVER AND UNTIMELINESS ARGUMENTS CHALLENGE FACTBOUND APPLICATION OF SETTLED LAW.

1. Where, as here, a lower court's opinion neither creates nor deepens a split of authority on an important point of federal law, a certiorari petition will occasionally succeed by showing that the lower court "decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the

misapplication of a properly stated rule of law." *Id.* R. 10.

The petitioners do not contend that the court of appeals misstated the settled law that governs their threshold issues regarding waiver and untimeliness. Rather, they assert that the court misapplied the properly stated rules of law that govern those issues. EPA Pet. 12-14, 18-21; ALA Pet. 16-20, 30-31. That assertion only undermines their request for certiorari.

2. The petitioners' arguments on the merits fare no better. As the industry and labor respondents explain in their brief in opposition, the petitioners' waiver argument fails for a variety of reasons. And as explained below, the petitioners' untimeliness argument fails not only because it mischaracterizes the relief that the upwind States requested and obtained in the D.C. Circuit, but also because it overlooks key portions of the record.

a. In the court of appeals, the States' first issue asked whether EPA exceeded its authority in the Transport Rule by imposing FIPs to implement section-7410(a)(2)(D)(i)(I) obligations that EPA had not previously defined. State & Local Petitioners' CA Br. 2 (CADC Doc. 1364206). The petitioners' untimeliness argument depends on the notion that the States were actually asking something different: whether, in separate final actions taken before the Transport Rule was promulgated, EPA improperly (1) found that some States had failed to submit SIPs addressing their interstate-transport obligations

under the program in place before the Transport Rule's promulgation and (2) disapproved SIPs that other States had adopted to meet those preexisting obligations. EPA Pet. 12-14; ALA Pet. 30-31; *accord* Pet. App. 70a-82a (Rogers, J., dissenting); *see* 42 U.S.C. § 7410(c)(1)(A) (B).

The petitioners' argument fails because, in this proceeding, the States did not challenge, and the court of appeals did not invalidate, any EPA action that predated the Transport Rule. Rather, the court of appeals invalidated the Transport Rule's simultaneous identification of the States regulated under that rule, definition of those States' section-7410(a)(2)(D)(i)(I) obligations, and imposition of FIPs to implement the new requirements. Pet. App. 42a-61a. The court also specifically addressed and rejected the untimeliness argument that the petitioners now advance. *Id.* at 61a-62a n.34.

The issue here is not, and has never been, whether 42 U.S.C. § 7410(c) authorizes EPA to issue FIPs if States fail to submit approvable section-7410(a)(2)(D)(i)(I) SIPs. Nor is it whether the earlier findings of failure and SIP disapprovals that the petitioners reference were proper under the standards applicable before the Transport Rule's promulgation. Rather, the issue is what type of FIP EPA was authorized to issue, and the answer is a FIP implementing only the requirements of those earlier programs, not a FIP implementing the Transport Rule's new requirements. *See* State & Local Petitioners' CA Br. 2, 20-31 (CADC Doc.

1364206); State & Local Petitioners' CA Reply Br. 2-10 (CADC Doc. 1364210).

The Transport Rule's rulemaking docket was the first and only place to comment on whether EPA could bypass the SIP process and impose FIPs for a wholly new multi-state program at the same time it defined covered States' section-7410(a)(2)(D)(i)(I) obligations under that program. In comments, several parties urged EPA to adhere to the statute and implement the program through SIPs. *See, e.g.*, Ohio EPA, Comments on Proposed Transport Rule 11 (Oct. 1, 2010) (D.C. Circuit Joint Appendix (CADC Doc. 1363545 ("CAJA")) 1241); Utility Air Regulatory Group, Comments on Proposed Transport Rule 23-24 (Oct. 1, 2010) (CAJA 1019-20) ("UARG Cmts."). But EPA rejected those comments and elected to adopt a final rule both creating the new program and simultaneously implementing it through FIPs. 76 Fed. Reg. at 48,208.

Only after EPA rejected, through promulgation of the final Transport Rule itself, the SIP-related comments filed in the underlying rulemaking proceeding could the respondents challenge EPA's decision to promulgate Transport Rule FIPs; the issue could not have been resolved in challenges to EPA's earlier SIP disapprovals and findings of failure under earlier programs. Although the disapprovals referenced the "proposed Transport Rule," *e.g.*, 76 Fed. Reg. 43,143, 43,144 (July 20, 2011), the findings of failure did not, *see, e.g.*, 75 Fed. Reg. 32,673 (June 9, 2010), and none of those earlier

actions discussed the debate about EPA's FIP authority that would remain unresolved until the Transport Rule was finalized.

Judicial review of those earlier actions would have required the court of appeals to assume that EPA, in the final Transport Rule, would impose FIPs for each covered State and, in so doing, reject the numerous comments urging EPA to respect the statutorily mandated SIP process. Because those comments aligned with binding precedent, the D.C. Circuit would also have had to assume that EPA would violate the law. *See, e.g.*, *Virginia v. EPA*, 108 F.3d 1397, 1406-10 (D.C. Cir. 1997); *Michigan*, 213 F.3d at 687-88.

In any event, the court of appeals' precedent on standing and ripeness would not have allowed the respondents to challenge EPA's earlier actions based on speculation about the content of a future rule. *See, e.g.*, *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1205-07 (D.C. Cir. 1998); *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1383-85 (D.C. Cir. 1996). That observation is especially pertinent here because the subset of States subject to the Transport Rule changed between the rule's proposal and finalization. *Compare* 76 Fed. Reg. at 48,212-14 *with* 75 Fed. Reg. 45,210, 45,215 (Aug. 2, 2010).

The industry and labor respondents likewise could not have challenged the Transport Rule's unlawful circumvention of the SIP process until the final rule was promulgated. But those respondents

did suffer harm by being cut out of the process. *See* 42 U.S.C. § 7410(a)(1) (providing for reasonable notice and public hearings before adoption of a SIP); *id.* § 7410(*l*) (same, for SIP revisions). And like the States, the industry and labor respondents properly raised this issue in their challenge to the Transport Rule. *See, e.g.*, Industry & Labor Petitioners' CA Br. 17 n.6 (CADC Doc. 1357526); Petitioner GenOn's Nonbinding Statement of Issues to be Raised in CA 2 (CADC Doc. 1335597); UARG Cmts.

Despite Judge Rogers's suggestions in dissent, Pet. App. 70a-71a, adjudication of the respondents' challenge to the Transport Rule's FIP-before-SIP approach did not ignore or alter the jurisdictional character of 42 U.S.C. § 7607(b)(1) and similar provisions specifying the timing of judicial review. The court of appeals merely applied the law to the particular facts of this case, in which EPA simultaneously determined which States would be subject to a new section-7410(a)(2)(D)(i)(I) rule, quantified their significant contributions, and imposed FIPs to abate those contributions. *Id.* at 4a, 42a-43a, 48a-49a, 55a-57a, 61a n.34.

b. Regardless, even assuming the petitioners and Judge Rogers are correct that some of the States forfeited their challenge to the Transport Rule's FIP-before-SIP approach by failing to challenge EPA's pre-Transport Rule findings of failure and disapprovals with respect to the 2006 24-hour $PM_{2.5}$ NAAQS, *see id.* at 71a-74a (Rogers, J., dissenting), their argument does not reach several other States

covered by the Transport Rule for the 1997 NAAQS. Before the Transport Rule was promulgated, EPA took no final action on Texas's interstate-transport SIP revision as to the 1997 NAAQS, and it *approved* eight other States' submissions. *E.g.*, 72 Fed. Reg. 55,659, 55,659 (Oct. 1, 2007).

For those eight States, the first 1997-NAAQS SIP *disapprovals* came through the Transport Rule itself, in the form of purported "corrections" under 42 U.S.C. § 7410(k)(6) that were not even noticed for public comment. *See* 76 Fed. Reg. at 48,219-20; Pet. App. 48a-49a & n.29; *cf.* EPA Pet. 6 (erroneously stating that all of the SIP disapprovals were made "in separate administrative proceedings"). Although the Transport Rule asserted that *North Carolina*'s invalidation of CAIR automatically nullified EPA's prior approvals of those States' SIPs, 76 Fed. Reg. at 48,219, the agency's own actions belie that assertion. EPA continued to approve CAIR SIPs *after North Carolina* was decided. *E.g.*, 74 Fed. Reg. 53,167, 53,167 (Oct. 16, 2009). That is how EPA found itself in the awkward position that precipitated its unlawful use of section 7410(k)(6).

There could be no question that a petition for review of the Transport Rule was the first vehicle any of the States subject to this treatment had to challenge the rule's simultaneous definition of their significant contributions and its retroactive disapproval of their SIPs with respect to the 1997 NAAQS. Like Judge Rogers below, the petitioners do not argue otherwise. Indeed, they fail even to

mention this conspicuous gap in their untimeliness argument, let alone the D.C. Circuit's skepticism about EPA's use of section 7410(k)(6) to "correct" the earlier SIP approvals. *See* Pet. App. 49a n.29.

And because, under the Transport Rule, States' section-7410(a)(2)(D)(i)(I) obligations are intertwined with, and contingent upon, other States' obligations for both the 1997 and 2006 NAAQS, *see, e.g.*, *id.* at 11a-19a; EPA Pet. 8-9, 22-23, the Transport Rule's FIPs are not severable. *See North Carolina*, 531 F.3d at 929 (noting that the components of CAIR, another regional section-7410(a)(2)(D)(i)(I) program, "must stand or fall together"). For that reason, as long as even one party properly presented a challenge to its Transport Rule FIP and here, several parties did so even under the petitioners' logic the FIP-before-SIP issue was properly before the court of appeals.

3. Finally, it is well settled that "federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them.'" *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). For that reason, if the Court agrees with the petitioners' two threshold assertions, it would be unable to reach the additional issues the petitions present. The Court's work would instead be limited to error correction on factbound issues in a case with a detailed and voluminous record a function well "outside the mainstream of the Court's functions." E. GRESSMAN ET AL., SUPREME COURT PRACTICE

§ 5.12(c)(3), at 351 (9th ed. 2007). Accordingly, the portions of the petitions that question whether the court of appeals correctly applied the CAA's settled rules regarding administrative exhaustion and the timing of judicial review are obstacles to review of the other issues that the petitioners claim warrant a grant of certiorari.

II. ON THE MERITS, THE D.C. CIRCUIT'S ANALYSIS COMPORTS WITH THIS COURT'S PRECEDENT, THE STATUTORY TEXT, AND EPA'S ADMISSIONS.

In rejecting the Transport Rule's imposition of FIPs before allowing for SIPs, the court of appeals accurately observed that States could not know whether they would be included in a newly proposed regional program and, if they were, what their significant contributions to downwind States would be, until EPA revealed the final rule resolving those issues. Pet. App. 8a-9a. The court explained how the CAA's overarching provisions governing the balance of state and federal responsibility, its specific provisions governing SIPs and FIPs, and this Court's precedent construing those provisions precluded the Transport Rule's approach. *Id.* at 42a-61a. For several reasons, the petitioners' challenges to that reasoning fail.

1. This Court has repeatedly confirmed the cooperative federalism at the heart of the CAA. As noted in *Train*,

> [t]he [CAA] gives [EPA] no authority to question the wisdom of a State's choices of

> emission limitations if they are part of a [SIP] which satisfies the standards of [42 U.S.C. § 7410(a)(2)], and [EPA] may devise and promulgate a specific [FIP] of its own only if a State fails to submit [a SIP] which satisfies those standards. [42 U.S.C. § 7410(c)].

421 U.S. at 79; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 470 (2001) ("It is to the States that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources. *See* 42 U.S.C. §§ 7407(a), 7410 (giving States the duty of developing [SIPs])."); *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the [NAAQS] were met, the power to determine which sources would be burdened by regulation and to what extent."); *accord Virginia*, 108 F.3d at 1406-10.

The petitioners do not challenge that precedent. Rather, they claim that the Transport Rule States could have, and should have, predicted the obligations that EPA would define through legislative rulemaking for each of the States ultimately covered by its latest section-7410(a)(2)(D)(i)(I) regional program and that the covered States' failure to do so in SIPs required EPA to promulgate the Transport Rule's FIPs. *E.g.*, EPA Pet. 15-16. But as explained below, both the statutory text and EPA's admissions outside of this litigation defeat that claim.

2. The problems with the petitioners' statutory construction begin with the CAA's definition of a FIP. The statute defines a FIP as a plan to "fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [SIP]." 42 U.S.C. § 7602(y); *see also* H.R. REP. 101-490, pt. 1, at 219 (1990) (reflecting that a FIP focuses exclusively on a "deficiency" in implementing an EPA rule that a State has "fail[ed] to correct"). For that reason, EPA's FIP authority cannot exceed a State's SIP obligation.

That fundamental point resurfaces in the CAA provision governing EPA's FIP power:

> (1) [EPA] shall promulgate a [FIP] at any time within 2 years after [EPA]
>
> > (A) finds that a State has failed to make a required submission . . . or
> >
> > (B) disapproves a [SIP] submission in whole or in part,
>
> unless the State corrects the deficiency, and [EPA] approves the plan or plan revision, before [EPA] promulgates such [FIP].

42 U.S.C. § 7410(c).

As the court of appeals explained, this provision creates a "federal backstop if the States fail to submit adequate SIPs." Pet. App. 47a. Section 7410(c) comes into play only if a State fails to meet its initial obligation to submit an adequate SIP

under section 7410(a), and a State cannot fail to meet an obligation that EPA has not yet defined. *See id.* at 46a-48a, 50a-51a; *see also id.* at 53a-55a (explaining why this reading of section 7410(a) and (c), in contrast to EPA's, comports with both the text and structure of the CAA).

For that reason, and contrary to the petitioners' reasoning, *see, e.g.*, *id.* at 75a-76a, 80a-82a (Rogers, J., dissenting), the only SIP submissions "required" under section 7410(c)(1)(A) are ones for which EPA has disclosed the requirements, and EPA cannot properly "disapprove[]" a SIP under section 7410(c)(1)(B) unless the SIP contains a deficiency that a State could have identified and avoided on its own. The court of appeals accordingly focused on whether the section-7410(a)(2)(D)(i)(I) obligations that the Transport Rule attempted to implement were among those that States were "required" to satisfy in pre-Transport Rule submissions. *Id.* at 47a. And because EPA defined those obligations for the first time in the Transport Rule, in accordance with the D.C. Circuit's earlier order to redo the necessary analysis "from the ground up," *North Carolina*, 531 F.3d at 929, they could not have been "required," 42 U.S.C. § 7410(c)(1)(A), before the Transport Rule was promulgated.

Section 7410(k)(5), the SIP-call provision, allows the process to work as intended in this context. *See* Pet. App. 47a. When EPA concludes through legislative rulemaking that a State's emissions are making a quantified significant contribution to

downwind nonattainment, it is concluding that the State's existing SIP is "substantially inadequate" under the new rule's analysis. 42 U.S.C. § 7410(k)(5); *see, e.g.*, 76 Fed. Reg. at 48,219 (Transport Rule finding that CAIR SIPs "were not adequate to satisfy . . . the statutory mandate of section [74]10(a)(2)(D)(i)(I)"). Section 7410(k)(5) explains that, in this scenario, EPA "shall require the State to revise the [SIP] as necessary" to address its newly defined significant contribution, determine which sources in the State must control emissions and to what extent, and establish a schedule for implementing the new requirements.

Section 7410(k)(5)'s mandate applies to all of the States that were unlawfully subjected to Transport Rule FIPs. With respect to some of those States, EPA attempted to avoid that mandate through use of section 7410(k)(6), which allows EPA to correct "error[s]" in past final actions. 76 Fed. Reg. at 48,219-20. Accordingly, EPA's assertion that, for each of the States covered by the Transport Rule's FIPs, EPA had either made a finding of failure to submit a SIP or disapproved the SIP that the State had submitted, EPA Pet. 15, not only erroneously assumes that those earlier actions cleared the way for some of the Transport Rule's FIPs. It also ignores EPA's unlawful treatment of the States that had submitted SIPs that EPA *approved* and then retroactively *disapproved* through use of section 7410(k)(6) in the Transport Rule itself.

That omission is no mere oversight. Both the States' prior briefing and the court of appeals' opinion questioned the Transport Rule's use of section 7410(k)(6). *See, e.g.*, Pet. App. 49a n.29. EPA simply has no valid response. If EPA could avoid section 7410(k)(5) by deeming its prior approval of a CAIR SIP an "error" capable of correction on the same day a FIP issues, section 7410(k)(5) would be superfluous. EPA could always unlock its FIP power by invalidating any of its own prior SIP approvals, thereby removing any role even for States that had, according to EPA itself, done everything that EPA asked them to do.

The petitioners' failure to mention the Transport Rule's use of section 7410(k)(6) also undermines EPA's central argument about the circumstances under which section 7410(c) requires imposition of a FIP. EPA does not assert that, under the CAA's system of cooperative federalism, it may simultaneously disapprove a SIP that it had previously approved and impose a FIP to correct the newly identified "deficiency" or "inadequacy." 42 U.S.C. §§ 7410(c)(1), 7602(y). Rather, based on its prior findings of failure and disapprovals, EPA attempts to show (albeit erroneously) that it followed the statute's proper order of operations. EPA Pet. 15.

But if EPA were to acknowledge the Transport Rule's use of section 7410(k)(6) to correct "errors" that materialized only upon promulgation of the final Transport Rule, it would either have to (1) concede

that the rule impermissibly imposed FIPs before giving several of the covered States a chance to submit SIPs addressing newly identified deficiencies or (2) make the untenable assertion that the statute authorizes that approach. Either way, its argument could not sustain the integrated, nonseverable Transport Rule.

Finally, to the extent the petitioners fault the court of appeals for construing the statute as a whole, EPA Pet. 16; *see* Pet. App. 54a (noting the "contextual and structural factors" supporting the court of appeals' analysis), they overlook not only the general principle that supports the court of appeals' approach, *see, e.g.*, *Roberts v. Sea Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012), but also this Court's specific application of that principle when construing the CAA. *Train*, 421 U.S. at 78. For all of these reasons, the court of appeals' statutory analysis is correct, and the petitioners' analysis is fatally flawed.

3. a. Outside of this litigation, EPA has reflected its understanding of the constraints on its FIP authority in the context of regional section-7410(a)(2)(D)(i)(I) rulemaking. *See, e.g.*, Pet. App. 51a. Those admissions further undermine the petitioners' present claims.

In support of the dissenting opinion's statutory construction, the petitioners contend that the court of appeals' reasoning is based on a flawed analogy between the act of promulgating a NAAQS and the act of defining a newly selected group of States'

significant contributions. ALA Pet. 31; *accord* NY Br. in Support of Cert. 11. But the analogy is EPA's own. In the NO_x SIP Call, EPA explained that

> [d]etermining the overall level of air pollutants allowed to be emitted in a State [included in a section-7410(a)(2)(D)(i)(I) multi-state program] is comparable to determining overall standards of air quality [*i.e.*, NAAQS], which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility.

63 Fed. Reg. at 57,369; *see id.* at 57,370 (finding it "necessary" for EPA "to establish the [States'] overall emissions levels" under section 7410(a)(2)(D)(i)(I)). As previously noted, the States covered by the NO_x SIP Call were given 12 months to prepare SIPs after EPA placed them in the program and defined their significant contributions, *see id.* at 57,451 a period that gave them "real choice" in deciding how to achieve the required reductions. *Michigan*, 213 F.3d at 688; *see* Pet. App. 56a-57a.

Similarly, CAIR gave the States included in that program 18 months to implement emissions budgets through SIPs, and EPA assured the States that its FIPs would not interfere with the SIP process. *See* 70 Fed. Reg. at 25,263; 71 Fed. Reg. at 25,330-31; Pet. App. 57a. And after EPA had defined the covered

States' obligations under section 7410(a)(2)(D)(i)(I) in the NO_x SIP Call and CAIR, the States performed their function under section 7410, developing SIPs to address those obligations. *See, e.g.*, 74 Fed. Reg. 65,446, 65,446 (Dec. 10, 2009); 66 Fed. Reg. 27,459, 27,459 (May 17, 2001).

It was the Transport Rule, not the court of appeals' opinion, that departed from the core CAA requirements that EPA acknowledged and followed in those two prior rules. In allowing no time between EPA's decision to include States in the Transport Rule and the issuance of FIPs to implement their newly defined obligations, 76 Fed. Reg. at 48,208, 48,219-20, the rule made it impossible for the covered States to formulate and adopt SIPs as contemplated by section 7410. *See* Pet. App. 48a-55a. And contrary to the petitioners' argument, EPA Pet. 15-16; *accord* Pet. App. 88a (Rogers, J., dissenting); NY Br. in Support of Cert. 9, the court of appeals' opinion did not relieve States of their section-7410 duties. As reflected in the EPA guidance documents that the court of appeals cited, Pet. App. 50a n.30, 58a-59a n.33, section 7410(a)(1) did require States to submit SIPs addressing their section-7410(a)(2) obligations independent of the regional-transport obligations that EPA defined for the first time in the Transport Rule. *See* 77 Fed. Reg. 46,361, 46,362-63 & n.7 (Aug. 3, 2012).

Like EPA's guidance documents, the court of appeals recognized that the States could not go further, and specify precise emissions-reduction

requirements for in-state sources, until EPA told them which States were covered by the Transport Rule and what overall reductions were required. As EPA has explained, while a "detailed and substantive" section-7410(a)(2)(D)(i)(I) SIP submission may be possible

> when existing data and analyses already provide the requisite information[, i]n other instances, the submission may be more preliminary and simplified, as when there is currently insufficient information to support a determination that there are interstate transport impacts, *or when other later regulatory actions are prerequisites to making such a determination.*

EPA, Guidance for State Implementation Plan Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards 3 (Aug. 15, 2006) (emphasis added); *accord* Pet. App. 50a-51a.

The petitioners' reference to what States that were not part of a regional program could do, *e.g.*, EPA Pet. 17-18; *see* Pet. App. 89a-90a (Rogers, J., dissenting) (quoting CA Tr. of Oral Arg. 61), is irrelevant to States that were included in such a program. *See infra* pp. 29-33. And any assertion that the court of appeals' opinion *disturbs* the Act's system of cooperative federalism, *see* NY Br. in Support of Cert. 8-9, is not credible. States that have made the policy decision to impose no greater

burdens on in-state sources than those EPA will mandate can control in-state sources in the first instance, *id.* at 13, only after they know the overall reductions EPA will require.

The court of appeals thus confirmed that EPA need do nothing more than perform its initial, and essential, role in the section-7410 process just as EPA did in both the NO_x SIP Call and CAIR. Importantly, EPA has recently and repeatedly acknowledged that quantifying States' significant contributions is something only it can do. *E.g.*, 77 Fed. Reg. at 46,363 & n.7 (EPA's confirmation that section 7410(a)(2)(D)(i) "contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution") (quoted in Pet. App. 51a-52a, notwithstanding EPA's contrary suggestion, *see* EPA Pet. 17); *see also* EPA Pet. 12 (describing "significant contribution" as an "ambiguous term"); Pet. App. 50a (observing that a State's section-7410(a)(2)(D)(i)(I) obligation remains "nebulous and unknown" until EPA defines it). Neither the petitioners nor the dissenting opinion offers any response to this point, which confirms that the court of appeals' understanding of EPA's and the States' respective roles under section 7410(a)(2)(D)(i)(I) matches the view that EPA has consistently taken outside of this litigation.

b. Despite EPA's admissions, the petitioners now assert that States covered by a new regional section-7410(a)(2)(D)(i)(I) program such as the Transport

Rule need not await EPA's identification of the covered States and its definition of their significant contributions because States can perform those tasks themselves. *E.g.*, EPA Pet. 17-18; ALA Pet. 32-33; *accord* 89a-90a (Rogers, J., dissenting). That assertion fails for several reasons.

First of all, and as already noted, *North Carolina* required EPA to revisit the criteria for determining States' significant contributions and other key elements of CAIR and to create an entirely new multi-state program. 531 F.3d at 929. Whether a State's SIP addressing section 7410(a)(2)(D)(i)(I) would require any emissions reductions at all would depend on whether the State would or would not be part of the new Transport Rule region. *See, e.g.*, 76 Fed. Reg. 2,853, 2,856-58 (Jan. 18, 2011) (reflecting that Delaware's SIP would be approved if Delaware was ultimately excluded from the Transport Rule program, *see* ALA Pet. 32; NY Br. in Support of Cert. 14, and that the exact same SIP would be disapproved, and a Transport Rule FIP imposed, if Delaware was ultimately included in the program).

EPA, however, did not determine which States would be part of the Transport Rule region until the final rule was promulgated. The proposed rule reflected that Connecticut, Delaware, Massachusetts, Oklahoma, and the District of Columbia would be covered by the final rule, even though none was, and that Texas would be excluded from the final rule's annual $PM_{2.5}$ program, even though it was ultimately

included in that program. *Compare* 76 Fed. Reg. at 48,212-14 *with* 75 Fed. Reg. at 45,215.

And as to their substantive emissions-reduction obligations, States could do all the measurements, calculations, and predictions they wanted before the Transport Rule was promulgated, but only *EPA's* measurements, calculations, and predictions announced in the final rule informed what reductions, if any, were required in any particular State. Again, if a State was outside of the program, EPA approved its SIP without reductions; if a State was covered by the program, EPA disapproved its SIP and imposed the Transport Rule's reduction obligations. *See, e.g.*, 76 Fed. Reg. 53,638, 53,638 (Aug. 29, 2011) (final Delaware approval); 76 Fed. Reg. at 43,143 (final Kansas disapproval).

For a regional section-7410(a)(2)(D)(i)(I) program, EPA's complex emissions-transport modeling relies on numerous evolving input assumptions, many of which require subjective judgment that can alter the final output. *See* 76 Fed. Reg. at 48,263 (introducing an unproposed "emissions leakage" theory under which EPA's determination of whether some States had significant contributions to ozone nonattainment depended on predictions about how other States would react if they were covered by the final Transport Rule); Calpine Br. in Support of Cert. 26-28; *see also* EPA Primary Response to Comments on the Proposed Transport Rule, EPA-HQ-OAR-2009-0491-4513, at 470 (June 2011) (CAJA 1779) (reflecting that "EPA made numerous updates and

corrections to its significant contribution analysis" between the proposed and final versions of the Transport Rule). Indeed, EPA made additional revisions to the Transport Rule nearly ten months *after* its promulgation. 77 Fed. Reg. 34,830 (June 12, 2012).

Moreover, even assuming States could track the moving target of EPA's emissions modeling, they would still be unable to ensure that their own calculations of required reductions would match EPA's because EPA's analysis ultimately turned on subjective policy judgments regarding cost-effectiveness. *See* 76 Fed. Reg. at 48,248; Pet. App. 15a-18a. In defining the required reductions in the Transport Rule, EPA developed "cost curves," or estimates of the amounts of reductions available at certain cost thresholds. 76 Fed. Reg. at 48,248. It then estimated the effect, at different cost-per-ton levels on its cost curves, that the contributing States' "combined reductions" would have on downwind air quality and identified "significant cost thresholds," or "point[s] along the cost curves where a noticeable change occurred in downwind air quality." *Id.* at 48,249. So to accurately determine their reduction obligations, the covered States would have had to guess not only what EPA's cost curves would look like, but also what changes on those curves would be most "noticeable" to EPA.

The complexity of the linkages between emissions from an upwind State and nonattainment in downwind States that the petitioners mention, EPA

Pet. 8, 22, only further decreases the likelihood of matching EPA's analysis. And because downwind States are also required to control their own emissions, *see* 76 Fed. Reg. at 48,252, and may voluntarily choose to impose stricter controls than EPA requires, upwind States would also have to make accurate guesses about what controls those downwind States would implement.

The combination of all of these variables and the discretionary nature of EPA's consideration of them belie any claim that States could anticipate EPA's final rulemaking judgments. The court of appeals therefore correctly recognized that States could not know whether, or what, section-7410(a)(2)(D)(i)(I) reductions would have to be provided for in SIPs until EPA decided whether they were in or out of its multi-state program and, if they were in, what their specific reduction obligations were. *See* Pet. App. 50a-61a.

III. UNDER THE D.C. CIRCUIT'S OPINION, EPA CAN STILL IMPLEMENT THE STATUTE, AND THE CLAIMS OF HEALTH IMPACT ARE EXAGGERATED.

The petitioners attempt to bolster the importance of this case by arguing that the court of appeals' decision will make EPA's task of developing section-7410(a)(2)(D)(i)(I) regional programs more difficult and that denying the petitions will negatively affect public health. *E.g.*, EPA Pet. 11, 28-32; ALA Pet. 3-4; NY Br. in Support of Cert. 15-19. Each of those arguments is flawed.

1. On the first point, EPA does not assert that following the statute's proper order of operations is impossible in this context. *See* EPA Pet. 28-29; *accord* NY Br. in Support of Cert. 15, 18. After all, both the NO_x SIP Call and CAIR reflect that EPA can honor the CAA's cooperative-federalism structure when promulgating regional rules under section 7410(a)(2)(D)(i)(I).

EPA nonetheless claims that meeting NAAQS attainment deadlines has now become more difficult or even "could[,] in some cases[,] [be] impossible." EPA Pet. 12, 16-17, 29-30. That assertion overlooks a point that the industry and labor respondents' brief in opposition highlights: most downwind areas identified in the Transport Rule as nonattainment areas or areas with maintenance problems are already in attainment under CAIR and other emissions-reduction programs. Moreover, to the extent that inability to meet attainment deadlines as a result of interstate transport remains a problem, it is a problem of EPA's own creation, resulting from the agency's unprecedented embrace of an unlawfully aggressive view of its FIP power. Finally, at this stage, the potential inability to meet NAAQS attainment deadlines would not be resolved even if the Court granted review and reversed the court of appeals' judgment based on the subset of challenges to the Transport Rule at issue here.

All along, EPA has had a duty to perform its task under the CAA's system of cooperative federalism in a timely manner, so that the rest of the process could

unfold on time. And the difficulty of complying with a statute does not license an agency to violate it. If EPA is dissatisfied with the current state of its section-7410(a)(2)(D)(i)(I) program, it can either formulate a new regional program under that provision or seek to advance its regulatory objectives through one of the other tools that the CAA provides. If EPA believes that the Act's cooperative-federalism structure would unduly hinder either of those approaches, its proper audience is Congress, not the Court.

2. The petitioners' health claims are based on a false premise: that the Transport Rule's vacatur left interstate transport of air pollution unregulated. *See, e.g.*, EPA Pet. 31 (citing health data based on that premise); ALA Pet. 11 (same). But as explained in the industry and labor respondents' brief in opposition, the court of appeals' judgment leaves CAIR in effect, *see* Pet. App. 64a, and the combination of CAIR and other measures to improve air quality has resulted in widespread NAAQS attainment. Once again, EPA is the one empowered to build upon the health benefits of CAIR to the extent necessary and appropriate under the CAA by taking swift action to define States' section-7410(a)(2)(D)(i)(I) obligations in a manner consistent with the statutory framework, so that States can meet their obligations to satisfy any requirements EPA lawfully sets.

IV. ALTERNATIVE GROUNDS TO AFFIRM MAKE THIS CASE A POOR CANDIDATE FOR FURTHER REVIEW.

Further review is unwarranted even assuming the petitioners' statutory analysis is correct because the court of appeals' judgment is subject to affirmance on alternative grounds. The most prominent of these is the court's express rejection of EPA's erroneous view of its authority under section 7410(a)(2)(D)(i)(I). Pet. App. 3a-4a, 21a-41a (holding that EPA's implementation of section 7410(a)(2)(D)(i)(I) was flawed in three independent respects). Both the upwind States and the industry and labor respondents asserted that the Transport Rule was invalid for that reason alone, State & Local Petitioners' CA Br. 31-37 (CADC Doc. 1364206); Industry & Labor Petitioners' CA Br. 19-26 (CADC Doc. 1357526), and the upwind States support the industry and labor respondents' brief in opposition addressing that issue here.

But there are several other grounds supporting the court of appeals' judgment that were asserted below but not reached, and a prevailing party is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Two grounds addressed in the upwind States' briefs to the court of appeals fall into that category.

1. First, the Transport Rule attempted to follow *North Carolina*'s mandate to give independent meaning to "interfere with maintenance" in section 7410(a)(2)(D)(i)(I). 531 F.3d at 909-10, 929; 76 Fed. Reg. at 48,227-28; *see* Pet. App. 40a n.25. But the only difference between its significant-contribution and interference methodologies involved the identification of downwind air-quality monitors. *See* 76 Fed. Reg. at 48,211, 48,233-36 (explaining how EPA labeled monitors "nonattainment" or "maintenance" based solely on its emissions projections for each three-year period in 2003-2007).

The Transport Rule's ultimate emissions-reduction methodology was the same for both nonattainment and maintenance monitors. *Id.* at 48,236. For each, EPA used modeling to identify States whose maximum downwind contributions exceeded an "insignificance" threshold of 1% of the relevant NAAQS, then imposed emissions budgets reflecting the amount those States could emit after imposing cost-effective controls. *Id.* at 48,246-64. In failing to draw any true distinction between "contribute significantly to nonattainment" and "interfere with maintenance," 42 U.S.C. § 7410(a)(2)(D)(i)(I), EPA violated both the statutory text and *North Carolina*, and the rule is invalid for that reason alone.

2. EPA also violated the CAA's notice-and-comment requirements, 42 U.S.C. § 7607(d), by promulgating a final Transport Rule that was far from a "logical outgrowth," *Long Island Care at*

Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983), of the version of the rule it proposed. For example, the final rule "linked" States to monitors in different downwind areas, *compare, e.g.*, 76 Fed. Reg. at 48,241-44, 48,246 (Tables V.D 2-3, 5-6, 8-9) *with* 75 Fed. Reg. at 45,257-70 (Tables IV.C 14-21), reduced individual States' proposed emissions budgets by as much as 50%, *compare, e.g.*, 76 Fed. Reg. at 48,269-70 (Tables VI.F 1-3) *with* 75 Fed. Reg. at 45,291 (Tables IV.E. 1-2), and reversed the proposed rule's conclusion that Texas would be excluded from the Transport Rule's annual SO_2 and NO_x programs. *Compare* 76 Fed. Reg. at 48,269 *with* 75 Fed. Reg. at 45,215-16, 45,282-84.

Had EPA provided adequate notice, the States and other interested parties would have submitted comments that would have required alteration of the final rule in several significant respects. For that additional reason, the rule would remain invalid even if the petitioners prevailed on the issues they present here.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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listed on inside cover]

May 2013

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Andy Oldham

From: Andy Oldham
Sent: Friday, July 07, 2017 4:40 PM
To: Berry, Jonathan (OLP)
Subject: Re: Radio interviews

(b) (5)

On Fri, Jul 7, 2017 at 3:30 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

> Roger – thanks.
>
> **From:** Andy Oldham [mailto: (b) (6)
> **Sent:** Friday, July 7, 2017 4:30 PM
> **To:** Berry, Jonathan (OLP) <jberry@jmd.usdoj.gov>
> **Subject:** Re: Radio interviews
>
> (b) (5)
>
> On Fri, Jul 7, 2017 at 3:20 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
>
> > 1) (b) (5)
> >
> > 2) (b) (5)
> >
> > **From:** Andy Oldham [mailto (b) (6)
> > **Sent:** Friday, July 7, 2017 4:18 PM
> > **To:** Berry, Jonathan (OLP) <jberry@jmd.usdoj.gov>
> > **Subject:** Re: Radio interviews
> >
> > On 1, (b) (5)
> >
> > On 2, (b) (5)

[redacted] (b) (5) [redacted]?

On Fri, Jul 7, 2017 at 3:01 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

1) [redacted] (b) (5) [redacted]

2) [redacted] (b) (5) [redacted]

Thanks!

Jonathan Berry

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Andy Oldham

From: Andy Oldham
Sent: Tuesday, July 11, 2017 5:54 PM
To: Berry, Jonathan (OLP)
Subject: Re: Latest draft

That looks great. Thank you again.

On Tue, Jul 11, 2017 at 2:35 PM Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:

> Awesome – thanks, Andy. [redacted (b) (5)]
>
> **From:** Andy Oldham [mailto: [redacted (b) (6)]
> **Sent:** Tuesday, July 11, 2017 5:32 PM
> **To:** Berry, Jonathan (OLP) <jberry@jmd.usdoj.gov>
> **Subject:** Re: Latest draft
>
> Yes of course. I will do that this evening/night. [redacted (b) (5)]
>
> Thanks again Jon.
>
> Andy
>
> On Tue, Jul 11, 2017 at 2:18 PM, Berry, Jonathan (OLP) <Jonathan.Berry@usdoj.gov> wrote:
>
> > Andy, [redacted (b) (5)] ? Thanks! -Jon
> >
> > Jonathan Berry
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