No.

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA; BASIN ELECTRIC POWER COOPERATIVE, INC.; AND WESTERN FUELS ASSOCIATION, INC.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 49 U.S.C. § 11701(c), an investigative proceeding "is dismissed automatically unless it is concluded by the [Surface Transportation] Board" within three years. In this case, shippers challenged BNSF's coal-transport rates. The Board initially found—prior to expiration of § 11701(c)'s three-year deadline—that the shippers had failed to prove BNSF's rates unreasonable. But the Board gave the shippers a second chance to make their case. Over BNSF's objection that the continued proceedings had impermissibly extended beyond § 11701(c)'s three-year deadline, the Board considered the shippers' new case, found the challenged rates unreasonable, and ordered more than $300 million in rate relief—by far the largest award ever entered by the STB. On appeal, BNSF argued (inter alia) that the Board's later order was contrary to law under § 11701(c). The D.C. Circuit refused to address that substantial challenge, even though it had been raised timely under the Board's own rules and the Board had rejected the argument on the merits. The questions presented are:

1. Whether the D.C. Circuit erred by holding that petitioner's argument challenging agency action was forfeited before the agency, when the agency had resolved the argument on its merits without ever suggesting that the argument had not been properly raised. The D.C. Circuit has joined the Fifth and Eighth Circuits by finding an administrative forfeiture in these circumstances, in square conflict with decisions of the Third, Seventh, Ninth, Tenth, and Federal Circuits.

2. Whether the D.C. Circuit erred in imposing, ex post, its own judicially-created rule of administrative forfeiture not grounded in any statute, rule, or agency practice, in conflict with this Court's decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

RULE 29.6 STATEMENT

BNSF Railway Company ("BNSF"), a common carrier by railroad, is a wholly-owned subsidiary of its parent, Burlington Northern Santa Fe, LLC ("BNSF LLC"). BNSF LLC is an indirect, wholly owned subsidiary of Berkshire Hathaway Inc., a publicly-held corporation.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 604 F.3d 602 (App.1a-22a).

JURISDICTION

The D.C. Circuit denied BNSF's motion for rehearing and rehearing en banc on September 2, 2010. App.57a-60a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The text of 49 U.S.C. § 11701 and 49 C.F.R. § 1111.5 are reproduced at App.61a-62a.

STATEMENT OF THE CASE

The D.C. Circuit dismissed BNSF's principal challenge to the largest reparations order ever entered by the Surface Transportation Board ("Board" or "STB") as untimely raised before the Board, even though (i) BNSF had raised the argument well before the Board's final decision, and the only applicable STB rule provides that a motion to dismiss may be made "*anytime* during a proceeding," 49 C.F.R. § 1111.5 (emphasis added); (ii) the Board had rejected the argument on the merits without any suggestion—by the Board or the complainant shippers ("WFA")—that it was untimely, and (iii) neither the Board nor WFA argued that the argument was untimely in their briefs to the court of appeals. That holding is fundamentally misguided in at least two respects, deepens a well-recognized and mature circuit split, and warrants this Court's review.

First, by holding BNSF's challenge forfeited even though the Board addressed the argument on the merits without questioning its timeliness, the D.C. Circuit's decision conflicts squarely with prior decisions of this Court recognizing that a court may not affirm agency action on a basis other than that invoked by the agency itself, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), and the corollary that a court must defer to an agency's waiver of its own rules of procedure, *see, e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975); *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970). Despite this Court's clear admonition, however, the circuits are now deeply divided: three circuits, including the influential D.C. Circuit, will entertain non-statutory administrative forfeiture arguments not relied upon by the agency; at least five other circuits have properly concluded that they may not.

Second, even if it were appropriate for a federal court to *sua sponte* consider a supposed procedural bar to an argument resolved by the agency on its merits, the D.C. Circuit's forfeiture holding would still be fundamentally flawed. By holding BNSF's challenge forfeited based on nothing more than the court's own subjective sense of administrative timeliness—not tied to any statute, rule, or agency practice—the decision assumes for the judiciary the very common-law-making power that this Court flatly repudiated in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978), and reintroduces a harmful uncertainty and confusion about the operation of fundamental principles of administrative law that had been settled for decades. The D.C. Circuit, with its disproportionate jurisdiction over agency action, has adopted an approach to

administrative forfeiture that threatens to fundamentally disrupt the balance Congress has struck between an agency's authority to fashion and implement its own rules of procedure and the limited role of a reviewing court.

This is an appropriate vehicle through which to resolve the questions presented. The court's holding barred petitioner's primary challenge to an unprecedented Board order imposing what the Board itself estimated to be more than $300 million in reparations and future rate relief. And the underlying statutory question that the D.C. Circuit avoided—whether 49 U.S.C. § 11701's three-year automatic dismissal provision applies to complaint proceedings such as these—is an important one in its own right. The Board's interpretation of that statutory command is contrary to both its plain text and the legislative history, and undermines Congress's policy decision to grant carriers repose as to the lawfulness of their rates if a complaint is not resolved within three years. That substantial question was left unresolved by the D.C. Circuit based on a fundamentally misguided forfeiture holding that deepens a mature and apparently intractable circuit split. The petition for certiorari should be granted.

Statutory Background

The Board succeeded the Interstate Commerce Commission ("ICC") as the federal agency charged by Congress with economic regulation of the freight railroad industry. The Board's regulatory jurisdiction over railroad rates, however, is quite limited. It may initiate an administrative proceeding to review rates charged by a railroad *only* if the railroad has "market dominance." *See* 49 U.S.C. §§ 10701(d)(1), 10704(a)-(b),

10707(b). If the Board determines that it has jurisdiction over the challenged rate, it must decide whether the rate is "reasonable." *Id.* § 10701(d)(1). If the Board finds the rate unreasonable, it "may prescribe" the maximum rate the railroad may charge going forward and may order reparations to compensate the complaining shipper for overcharges. *Id.* §§ 10704(a)(1), 11704(b).

Board investigations are subject to a statutory three-year time limit. *Id.* § 11701(c). In particular, § 11701(a) states that, except as otherwise provided, "the Board may begin an investigation under this part only on complaint," and § 11701(c) states that an investigative proceeding brought under subsection (a) "is dismissed automatically unless it is concluded by the Board ... by the end of the third year" after it was begun.

Relevant Facts and Proceedings Below

From 1984 to 2004, BNSF transported WFA's coal from the Powder River Basin ("PRB") in Wyoming to WFA's electric generating facility at Moba Junction, Wyoming, under a long-term contract. Under that contract, the transportation rate gradually decreased from $4 per ton in 1984 to $3 per ton in 2004. *See* App.24a. When the parties' efforts to negotiate a replacement contract were unsuccessful, BNSF established a common carrier rate of $6 per ton, which was "one of the lowest transportation rates any utility pays to acquire PRB coal," and "low on a dollar-per-ton basis" in comparison to rates paid by other utilities in the region. *Id.*

WFA nonetheless filed a complaint with the Board on October 19, 2004, asserting that the rate was unreasonable. *See* App.27a-28a. Even though "railroad

costs increased approximately 60% and demand for PRB coal production increased by 500%" during the life of WFA's contract with BNSF, WFA contended that its rate should be only $3.10—nearly 25% less than the initial contract rate negotiated in 1984. App.24a-25a. WFA sought over $20 million per year in rate relief through 2024. App.25a.

The parties completed their briefing to the Board in December 2005. In October 2006, the Board issued final rules in a separate rulemaking proceeding that modified the guideline that it applies to determine the reasonableness of coal-transport rates and directed that the new rules would be applied to pending cases, including WFA's case. The Board explained that applying the new rules to this case was not unfair because it would not upset "settled expectations." JA251.[1] Though WFA (unsuccessfully) challenged the application of the new rules to its case, *see BNSF Ry. Co. v. STB*, 526 F.3d 770, 784 (D.C. Cir. 2008) ("*Major Issues*"), it never asked the Board for the opportunity to modify its evidence or arguments in light of the new rules.

On September 7, 2007, forty-two days shy of §11701(c)'s three-year deadline, the Board issued a decision finding that WFA had failed to prove that BNSF's rates were unreasonable. *See* App.23a-31a ("*2007 Decision*"). However, despite its prior finding that it could fairly apply its new rules to this proceeding, the Board reversed course and offered WFA the opportunity to reopen the record and present

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[1] "JA---" refers to the Joint Appendix filed with the D.C. Circuit.

a revised case tailored to the new rules. App.25a-27a.[2] WFA accepted that offer on October 22, 2007, a few days after the three-year deadline had passed.[3] On July 14, 2008, in its first substantive brief in response to WFA's revised case, BNSF argued that the proceeding should be dismissed for extending beyond the statutory time limit provided in § 11701(c). JA512, 533-34. In reply, WFA did not suggest that any Board rule or precedent rendered BNSF's argument for dismissal untimely, but argued that it was wrong on the merits and that "equitable considerations" should prevent BNSF from prevailing on it in any event. JA578.

On February 18, 2009, the Board issued a new decision, this time finding BNSF's challenged rates unreasonably high and ordering more than $300 million in estimated rate relief. *See* App.32a-36a ("*2009 Decision*").[4] The Board rejected BNSF's argument for dismissal under § 11701 on the merits, citing Board precedent holding that (notwithstanding its plain text)

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[2] In its petition for reconsideration of the *2007 Decision*, filed October 22, 2007, BNSF pointed out that permitting the proceedings to continue would undermine the statutory scheme that is intended to "give railroads repose if cases are not determined within three years." JA452 (citing § 11701(c)).

[3] The D.C. Circuit's opinion twice states, incorrectly, that the parties agreed to a schedule that "would include time for additional discovery." App.9a, 16a. Although it should not matter either way, the parties actually agreed to a procedural schedule "that would *not* include time for additional discovery." JA478 (emphasis added).

[4] Even so, the Board acknowledged that "the challenged rates are among the lowest transportation rates any utility pays to receive PRB coal," and "appeared on their face to be commercially reasonable." App.33a.

"the 3-year timetable in [§ 11701(c)] does not apply to rate cases begun on complaint" and "applies only in those circumstances where the Board institutes a proceeding on its own initiative." App.36a. The Board did not suggest that BNSF's three-year statutory argument was untimely under Board rules or precedent.

In its petition for review of the Board's order, BNSF once again argued that § 11701(c)'s three-year limit applies to this case. Final Brief of Petitioner ("Pet'r D.C. Cir. Br.") 26-42, ECF No. 1222535. BNSF pointed out that the Board's interpretation of § 11701(c) as excluding all proceedings brought "on complaint" is textually untenable. Pet'r D.C. Cir. Br. 28-29. Subsection (c)'s three-year time limitation applies only to "formal investigative proceeding[s] begun by the Board *under subsection (a)*." 49 U.S.C. § 11701(c) (emphasis added). Subsection (a), in turn, authorizes the Board to initiate only one type of proceeding: those brought "on complaint." *Id.* § 11701(a). The statute, BNSF explained, is not susceptible to the Board's reading—which excludes from subsection (c)'s scope the *only* type of proceeding actually mentioned in subsection (a). And the statutory history confirms this conclusion. Pet'r D.C. Cir. Br. 29-32.

Moreover, BNSF explained that—contrary to the Board's suggestion—enforcement of § 11701(c)'s unambiguous command in this case would not offend due process. Pet'r D.C. Cir. Br. 33-42. The Board was not required to provide WFA a second bite at the apple after the Board found in September 2007 that WFA failed to prove BNSF's rates unreasonable, because the Board had given WFA ample notice and opportunity to

request leave to file evidence bearing on the new standard when the Board informed WFA in February 2006 that the new rules would apply to its case. *See Major Issues*, 526 F.3d at 784.

BNSF argued that the Board's proceedings therefore terminated automatically as of October 19, 2007—three years after WFA filed its complaint—with no finding that BNSF's rates are unreasonable and no order of reparations. At the same time, BNSF acknowledged that, if the Board's September 2007 decision were treated as a final decision, then the later proceedings could be construed as a reopening, restarting the three-year statutory clock and preserving the possibility of *prospective* relief for the shippers. Pet'r D.C. Cir. Br. 43-44.

The Board and WFA's briefs responded to BNSF's dismissal argument at length on the merits, but nowhere suggested that BNSF had forfeited the argument by raising it too late before the Board. *See, e.g.*, Joint Brief of Respondents STB and United States 28-48, ECF No. 1222549; Joint Brief of Intervenors 23-28, ECF No. 1222245. Although the Board had thus never questioned the timeliness of BNSF's statutory three-year argument—during the administrative proceedings, in its final decision, or in its brief in the court of appeals—the court *sua sponte* raised a timeliness concern a few days before the oral argument. The court ordered the parties to address at oral argument whether BNSF forfeited its statutory dismissal argument and whether the Board in turn "forfeited its right to rely on such forfeiture (if any) by failing to argue the issue on appeal." App.55a. At oral argument, BNSF explained that it raised its argument timely before the Board and that, in any event, the

Board twice forfeited any timeliness objection—first through its "consideration of the issue on the merits" and its "failure to raise untimeliness" below, and again by declining to raise it on appeal. App.63a-66a (citing, *e.g.*, *Chenery* and *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001)).

The court ultimately granted BNSF's petition for review in part so that the Board could address on remand one of BNSF's objections to the Board's application of its rate reasonableness guidelines. But it declined to reach BNSF's statutory dismissal argument, holding that BNSF had forfeited that argument by failing to raise it sooner before the Board. The court so held even though BNSF had raised the argument within the time contemplated by the Board's rules, the Board had addressed the argument on its merits, and neither the Board nor WFA had argued—before the Board or in their briefs on appeal—that BNSF's challenge was untimely.

Although the court of appeals recited this Court's instruction in *United States v. L.A. Tucker Truck Lines, Inc.*, 34 U.S. 33, 37 (1952), that reviewing courts should refrain from considering arguments that were not raised before the administrative agency "'at the time appropriate *under [the agency's] practice*,'" App. 15a (emphasis added), it did not even pretend to rely on the Board's "practice" for its forfeiture holding. The court acknowledged that, under Board rules, BNSF was allowed to "fil[e] a motion to dismiss at any point in the WFA proceeding, *see* 49 C.F.R. § 1111.5," App.16a, but nonetheless ruled that BNSF had "stood silent before the Board" for too long, App.16a-17a. The court concluded that "BNSF did not timely present the three-year limit argument to the Board," even though

BNSF had raised the argument in its first substantive filing in response to WFA's revised case, once the three-year limitations period had actually run. App.17a.[5] And the court concluded that it could *sua sponte* reject BNSF's challenge as untimely—*i,e.*, that the Board had not forfeited the forfeiture—because the Board had ruled against BNSF on the merits. *See id.* ("The Board never acquiesced in BNSF's view that section 11701(c)'s three-year limit applied to complaint-initiated investigations and rejected BNSF's argument on the merits when it was first raised in July 2008.").

BNSF filed a petition for panel or en banc rehearing, arguing that the court erred in affirming the Board's action on a ground not relied on by the Board and by imposing its own rule of administrative forfeiture upon the Board's proceedings. The court of appeals denied rehearing on September 2, 2010. App.57a-58a.

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[5] *BNSF Railway Co. v. STB*, 453 F.3d 473, 479 (D.C. Cir. 2006) ("*Xcel*"), cited by the panel, does not address the questions presented here. In *Xcel*, the three-year statutory argument was raised for the first time in a footnote in a petition for reconsideration of a final Board decision, and the Board consequently *did not* address it on the merits. On appeal, the Board argued that it had not been timely raised. The D.C. Circuit agreed, reasoning that the Board was *prohibited by statute* and Board precedent from addressing the argument because it was first raised on reconsideration *after* a final Board decision. *Id.* at 479 (explaining that "the criteria for granting reconsideration are *limited by statute*" and the "*Board* 'generally does not consider new issues raised for the first time on reconsideration'") (emphases added) (citation omitted). Thus, in *Xcel*, unlike here, the court plainly did not impose its *own* preferred timeliness procedures. It simply affirmed the Board's determination that the argument had not been timely raised.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's decision has deepened a recognized and entrenched circuit split concerning an important and recurring question of law: whether a federal court may refuse to consider a party's argument challenging agency action based on an administrative forfeiture, when the agency itself did not find forfeiture and ruled on the merits of the argument. At least five circuits have concluded that they may not, and others have indicated that they share that view. Those courts have sensibly applied this Court's admonition in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), that agency action must be affirmed, if at all, on a basis proffered by the agency. Those circuits also recognize the inherent unfairness of requiring litigants to "suddenly ... defend [in federal court] a claim of untimeliness never before raised." *Ester v. Principi*, 250 F.3d 1068, 1072 (7th Cir. 2001). The D.C. Circuit and two other circuits disagree. In those circuits, an agency may spring an administrative forfeiture argument upon the parties for the first time on appeal or—as in this case—a federal court may avoid a substantial statutory challenge to agency action based on a forfeiture argument not relied upon by the agency.

The D.C. Circuit compounded its error in this case by fashioning and applying its own, apparently subjective, rule of administrative forfeiture, not grounded in statute, rule, or agency practice, in square conflict with this Court's decision in *Vermont Yankee*, thereby creating uncertainty in an area of administrative law that had been settled for decades.

The decision below fundamentally misapprehends the respective roles of courts and administrative

agencies by purporting to affirm the Board's action on a rationale not proffered by the Board and by usurping the agency's prerogative to fashion its own procedures and decide whether and to what extent to waive them. These are issues of national importance, over which the D.C. Circuit wields disproportionate influence. This Court should grant certiorari to resolve the circuit conflict and restore clarity to these once-settled rules of administrative law.

I. THE D.C. CIRCUIT'S AFFIRMANCE OF AGENCY ACTION ON NON-STATUTORY PROCEDURAL GROUNDS NOT RELIED UPON BY THE AGENCY DEEPENS A WELL-RECOGNIZED AND MATURE CIRCUIT SPLIT

Under *Chenery* and its progeny, this Court has long adhered to the "simple but fundamental rule of administrative law" that a court is "*powerless* to affirm ... administrative action by substituting what it considers to be a more adequate or proper basis." 332 U.S. at 196 (emphasis added); *see also ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (courts "*may not* affirm on a basis containing any element of discretion ... that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[W]e *may not* supply a reasoned basis for the agency's action that the agency itself has not given.") (emphasis added). Thus, "an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962)).

For the same reason, the courts "*may not* accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines*, 371 U.S. at 168 (emphasis added).[6]

This Court has recognized that the admonition of *Chenery* applies with equal force whether the alternative rationale is substantive or procedural; it is the province of the administrative agency not only to fashion rules of procedure, but also to decide whether and to what extent to waive them. *See Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975); *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970) (ICC may "relax or modify" its own procedures).

Nevertheless, a pronounced circuit split has developed as to whether a reviewing court may avoid addressing a party's argument on the merits by affirming the agency's decision on (non-statutory) procedural grounds not relied upon by the agency.[7] By

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[6] *See also Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 297 (1945) ("If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it.").

[7] Of course, a court may (indeed, *must*) determine that it has statutory jurisdiction to entertain a challenge to agency action even if the agency overlooks a potential jurisdictional defect. *See, e.g.*, 16 U.S.C. § 825*l*(a)-(b) (requiring litigant to file rehearing petition before challenging FERC decision in federal court); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) ("Neither FERC nor this court has authority to waive these statutory requirements."); *Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007) (party waived argument "by failing to present it to FERC as required by [the FPA]"). There is no such defect here.

answering that question in the affirmative, the D.C. Circuit joins the Fifth and Eighth Circuits in an entrenched conflict with the Third, Seventh, Ninth, Tenth, and Federal Circuits.[8] The lower courts and at least one commentator have acknowledged this conflict. *See, e.g.*, *Ester*, 250 F.3d at 1071 (Flaum, C.J., and Easterbrook and Williams, JJ.) ("[T]he courts of appeals that have considered the issue have not produced uniform results."); *Eneje v. Keisler*, 251 F. App'x 154, 154 n.* (4th Cir. 2007) (recognizing split); *Lewis v. Leavitt*, No. 1:07CV375, 2008 U.S. Dist. LEXIS 61502, at *11 (M.D.N.C. Aug. 8, 2008) (same); *Smith v. Danzig*, Civil No. 00-216-P-H, 2001 U.S. Dist. LEXIS 10262, at *33 (D. Me. July 20, 2001) (same); Kevin J. Dolley, Comment, *Administrative Waiver of the Untimeliness Defense in Title VII Cases Concerning Federal Employees: A Proposed Analysis*, 46 St. Louis U. L.J. 477, 489 (2002) (describing circuit split on whether appellate court may find administrative forfeiture "[w]hen an agency provides a final decision on the merits and there is no mention of untimely exhaustion of administrative remedies") (footnote omitted).

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[8] Prior D.C. Circuit decisions were murky on this question. *See* Kevin J. Dolley, Comment, *Administrative Waiver of the Untimeliness Defense in Title VII Cases Concerning Federal Employees: A Proposed Analysis*, 46 St. Louis U. L.J. 477, 504-05 (2002) (observing that the D.C. Circuit had "developed an unreliable and unnecessarily ad hoc jurisprudence" that "fails to provide a definitive answer to whether the administrative agency waives the untimeliness defense when it is not raised at the administrative level").

A. Two Other Circuits Will Affirm Agency Action Based On An Administrative Forfeiture Not Found By The Agency

Fifth Circuit. The Fifth Circuit will affirm agency action on administrative forfeiture grounds unless the agency made a "specific finding" of timeliness below or rendered a *favorable* decision on the merits of a party's claim. *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992). In *Rowe*, a suspended agency employee filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"). The EEOC rejected the complaint and an untimely request for reconsideration. Later, the Fifth Circuit affirmed a district court's holding that the employee's administrative motion for reconsideration was untimely and therefore did not toll the statutory deadline for filing his Title VII lawsuit—which, consequently, was also untimely. The Fifth Circuit held that the EEOC did not waive any timeliness objection by "docketing and acting on [the employee's] request for reconsideration" because the EEOC made no explicit finding of timeliness. *Id.* Indeed, the court explained that even a statement by the EEOC that the "request for reconsideration is timely" would not have "suffic[ed] 'because agencies may inadvertently overlook timeliness problems and should not thereafter be bound.'" *Id.* (citation omitted). *See also Munoz v. Aldridge*, 894 F.2d 1489, 1495 (5th Cir. 1990) ("If an agency makes a specific finding during the administrative process that the administrative complaint was timely, it cannot later defend against a civil complaint by arguing that the administrative complaint was untimely."); *Oaxaca v. Roscoe*, 641 F.2d

386, 390 (5th Cir. Unit A Apr. 3, 1981) (holding that government waives timeliness when "agency has in fact *made a finding of discrimination*") (emphasis added).

Eighth Circuit. In *Otter Tail Power Co. v. STB*, the court held that a party waived an argument by raising it "fatally late" before the STB, 484 F.3d 959, 963 (8th Cir. 2007), even though the agency had resolved the issue on its merits, *see Otter Tail Power Co. v. BNSF*, STB Docket No. 42071, 2006 WL 275904, at *24 (S.T.B. Jan. 27, 2006). The court reasoned that, because the opposing party "had no opportunity to investigate or respond to the [late] challenge nor did the Board have the opportunity to receive evidence relating to [the] challenge," allowing the challenge "would violate the exhaustion rule's principle of '[s]imple fairness to those who are engaged in the tasks of administration, and to litigants ....'" *Otter Tail Power Co.*, 484 F.3d at 963 (quoting *L.A. Tucker Truck*, 344 U.S. at 37).

B. At Least Five Circuits Properly Refuse To Find An Administrative Forfeiture Where The Agency Reached the Merits Without Finding Forfeiture

The Third, Seventh, Ninth, Tenth, and Federal Circuits have squarely held that a court may not refuse to address an argument challenging agency action based on an administrative forfeiture when the agency itself did not find forfeiture and decided the argument on its merits. Two other courts of appeals have indicated in dicta (and/or holdings in unpublished decisions) that they agree.

Seventh Circuit. In *Ester*, the Veterans Administration ("VA") "ruled on the merits of [the plaintiff's employment discrimination] claims without addressing [his] failure to timely file his formal complaint." 250 F.3d at 1073. In its answer in the plaintiff's subsequent Title VII suit, the VA argued for the first time that the plaintiff's complaint before the agency was untimely. The district court agreed and granted the VA summary judgment on that ground. The Seventh Circuit reversed. Citing this Court's decisions in *L.A. Tucker Truck* and *Chenery*, the Seventh Circuit held that, "when an agency decides the merits of a complaint, without addressing the question of timeliness, it has waived a timeliness defense in a subsequent lawsuit." *Id.* at 1071-72. The court explained that, "[i]f an agency indeed believes that a particular complaint is untimely, then the agency needs to state that reason as the one (or as one of many) for its administrative action." *Id.* at 1072. Further, the court reasoned, "values of judicial economy" and "agency autonomy" are served by "requiring objections—even those objections possessed by the agency itself—to be raised in the agency proceeding." *Id.* And, the court pointed out, that rule avoids significant prejudice to "plaintiffs who suddenly must defend [in federal court] a claim of untimeliness never before raised." *Id.* Finally, the court analogized to the federal/state habeas context in which state procedural bars expire if the last state court "'reaches the merits'" of a given federal claim. *Id.* at 1073 (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991)). *Accord Abdelqadar v. Gonzales*, 413 F.3d 668, 670-71 (7th Cir. 2005) (holding that an agency "excuse[s] an alien's failure to exhaust a particular issue" by addressing it on the merits (applying *Salfi*)).

Federal Circuit. In *Hall v. Department of Treasury*, the Federal Circuit "ch[o]se to follow the guidance of the Seventh Circuit" in *Ester*, and likewise held that "an agency waives its timeliness defense when it decides the merits of a complaint without addressing the question of timeliness." 264 F.3d 1050, 1061 (Fed. Cir. 2001). There, a Treasury Department employee in the mid-1990s asked the agency to retroactively credit his years of service, stretching back to 1979, toward the total needed to qualify for an increased retirement benefit. Although an agency regulation limited such credit to the year preceding any such request, the Treasury Department nonetheless considered the employee's request for the entire time period and rejected it on the merits. The court found that the agency had thereby waived any right to rely on its time limitations on appeal. *Id.* at 1061-62. The Federal Circuit has since reaffirmed that position. *See, e.g., Jorge v. Dep't of Treasury*, 19 F. App'x 892, 899 (Fed. Cir. 2001); *Labrada v. Dep't of Treasury*, 19 F. App'x 883, 891 (Fed. Cir. 2001); *see also Turner v. Merit Sys. Prot. Bd.*, 806 F.2d 241, 246 (Fed. Cir. 1986) ("Waiver of the time limit ... is committed to the Board's discretion and we will not substitute our judgment for that of the Board.").

Ninth Circuit. In *Abebe v. Gonzales*, the Board of Immigration Appeals ("BIA") had adopted the decision of an immigration judge, denying petitioner's application for asylum. 432 F.3d 1037 (9th Cir. 2005) (en banc). On appeal, the government argued that the petitioner had forfeited one of his arguments before the BIA. The Ninth Circuit, sitting en banc, rejected the government's argument. The court held that it may not avoid consideration of an issue on administrative

forfeiture grounds when the agency "has ignored a procedural defect and elected to consider an issue on its substantive merits." *Id.* at 1041 (citing *FPC v. Texaco Inc.*, 417 U.S. at 397 (in turn quoting *Burlington Truck Lines, Inc.*, 371 U.S. at 168-69)).

Tenth Circuit. In *Sidabutar v. Gonzales*, the Tenth Circuit held that an agency waives compliance with its own procedural requirements when it "issue[s] a decision considering the merits of an issue, even *sua sponte*." 503 F.3d 1116, 1121 (10th Cir. 2007). Although the petitioner had failed to challenge the immigration judge's ruling in its appeal to the BIA, the BIA waived its own requirement that an issue be "specifically" raised in the notice of appeal by considering the issue on its merits. *Id.* at 1120. The Tenth Circuit explained that agencies are "'free to fashion their own rules of procedure,'" and that a federal court's "role is not to substitute [its] own preference ... for the agency's determination of its internal rules." *Id.* (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940), and citing *Salfi*). Accordingly, "[w]here the BIA determines an issue administratively-ripe to warrant its appellate review, [the court] will not second-guess that determination." *Id.* "The failure to consider" the petitioner's claims on the merits, the court observed, "'would come at the cost of respect for the agency's own judgment regarding its ground for decision,'" and "would amount to a judicial determination that the Board acted *ultra vires* in following its own rules." *Id.* (citation omitted).

Third Circuit. In *Bin Lin v. Attorney General*, the petitioner failed to specify a particular issue in appealing an immigration judge's decision to the BIA, as required by BIA regulations. 543 F.3d 114 (3d Cir.

2008). Adopting much of the Tenth Circuit's reasoning in *Sidabutar*, the Third Circuit held that an agency "waive[s] compliance with [a procedural] requirement by choosing to address [a] petition on the merits" and that the federal courts, therefore, "may not ... reject the petition for review based on that [procedural] requirement." *Id.* at 125.

Other Circuits. Considered reasoning in decisions of the Second and Sixth Circuits indicates that those courts agree with *Ester* and would refuse to find an administrative forfeiture in circumstances such as those present here. For example, in *Bruce v. United States DOJ*, the Second Circuit explicitly agreed with *Ester*'s conclusion that an agency forfeits any timeliness objection by "issu[ing] a final decision on the merits" without addressing timeliness "until the complainant filed suit in federal court." 314 F.3d 71, 74-75 (2d Cir. 2002). Although the court ultimately relied on the agency's "specific finding of timeliness" in finding agency waiver, it determined *Ester* to be "good law." *Id.* at 75. *See also Horton v. Potter*, 369 F.3d 906, 911 (6th Cir. 2004) (noting that an agency waives its timing rules "when the agency decides the complaint on the merits without addressing the untimeliness defense") (citing *Ester*); *Momah v. Dominguez*, 239 F. App'x 114, 121 (6th Cir. 2007) (holding that "the [agency] waived its untimeliness defense by addressing the merits ... at the administrative level without raising a timeliness objection") (citing *Ester*).

II. THE D.C. CIRCUIT FOUND A FORFEITURE BASED ON ITS OWN SUBJECTIVE NOTION OF ADMINISTRATIVE TIMELINESS, IN SQUARE CONFLICT WITH THIS COURT'S PRECEDENTS

The D.C. Circuit's opinion also conflicts with this Court's precedents by asserting a judicial common-law-making authority to fashion and impose administrative forfeiture rules that are different from, or in addition to, those devised by the agency itself.

It has long been settled that a reviewing court will not consider an argument that was not raised before the agency "at the time appropriate under [the agency's] practice." *L.A. Tucker Truck*, 344 U.S. at 37. That principle reflects the agency's power and responsibility to "fashion [its] own rules of procedure," *Pottsville Broad. Co.*, 309 U.S. at 143, which this Court has held should be "left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments." *Vt. Yankee*, 435 U.S. at 524.

In *Vermont Yankee*, this Court clarified that a court must not "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 549. And, this Court has since reiterated that "*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements" divorced from any statutory or regulatory requirement. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654-55 (1990) (rejecting lower court's reliance on "fundamental fairness" in attempting to craft procedural requirements).

Together, the principles articulated in *L.A. Tucker Truck* and *Vermont Yankee* prohibit a reviewing court from substituting its judgment for the agency's concerning the timeliness of objections raised before the agency.

The D.C. Circuit's decision in this case, however, does just that, hearkening back to the heady days before *Vermont Yankee* when that court felt empowered to prescribe its own notions of proper agency procedures. *See generally* Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 359 (1978) (discussing prior D.C. Circuit case law and noting that it was "in the process of replacing the rudimentary procedural mandates of the [APA]" and crafting an "'ever-growing common law'") (citation omitted). Here, Congress made the judgment—in keeping with its decision to ease the strictures governing railroad carriers—that a Board investigation must be dismissed if it extends beyond three years. And, the agency entrusted by Congress to make vital, multi-million-dollar rate decisions has a rule explicitly permitting a motion to dismiss to be raised at "anytime during a proceeding." 49 C.F.R. § 1111.5. The agency, following that rule, addressed BNSF's argument that the proceeding must be dismissed for extending beyond the statutory three-year period. The agency did not suggest in its decision that BNSF's challenge was untimely. Under *Vermont Yankee* and its progeny, the D.C. Circuit was not empowered to decree otherwise; it must leave it to the agency to "fashion [its] own rules of procedure," *Pottsville Broad. Co.*, 309 U.S. at 143. Other circuits have recently reiterated this bedrock

principle. *See, e.g.*, *Bin Lin*, 543 F.3d at 125; *Sidabutar*, 503 F.3d at 1120.

The D.C. Circuit averred to this Court's admonition in *L.A. Tucker Truck* (App.15a), but, disregarding *Vermont Yankee*, it proceeded to fashion and apply its own, apparently subjective, rule of administrative waiver, not grounded in statute, rule, or agency practice. As the court's opinion acknowledges, BNSF raised its argument for dismissal under § 11701(c) seven months before the Board issued its final decision, and the Board's own regulations provide that a motion to dismiss may be brought before the Board "at anytime" during the proceedings. 49 C.F.R. § 1111.5. The court pointed to no statute, rule, or agency practice that would have required BNSF to raise the argument sooner than it did. Indeed, it is plain that the Board itself believed the argument *was* timely. The Board addressed the argument on the merits without a word about the timing, and it did not suggest any problem with BNSF's timeliness in its brief to the court of appeals. The D.C. Circuit's decision thus presents a direct challenge to one of this Court's most fundamental holdings on the limits of judicial power. Although petitioner believes that the D.C. Circuit's decision merits plenary review, its error is sufficiently egregious to warrant summary reversal.

This error cannot be dismissed as an aberrant decision by a rogue panel. In *J.J. Cassone Bakery, Inc. v. NLRB*, the D.C. Circuit similarly held that a party forfeited an argument because it was "not timely presented to the Board" without basing that decision on any statute, rule, or agency precedent. 554 F.3d 1041, 1046 (D.C. Cir. 2009). The court observed that the party had missed several earlier opportunities to

raise the argument, but cited nothing—apart from the court's own notions of fairness and efficiency—that would have *required* the party to raise the argument at the earliest opportunity. *Id.* at 1043-44. In finding an administrative forfeiture, the court relied on pre-*Vermont Yankee* circuit precedent. *See id.* at 1044 (citing *Marcus v. Director*, 548 F.2d 1044, 1051 (D.C. Cir. 1976)). And, in this case, the D.C. Circuit denied rehearing en banc on this issue. App.59a-60a.

III. THE QUESTIONS PRESENTED ADDRESS FREQUENTLY RECURRING ISSUES OF NATIONAL IMPORTANCE

The first question presented raises an important and frequently recurring issue of administrative law, on which the decision below deepens a recognized and entrenched circuit conflict. The related, second question presented also warrants this Court's plenary review. The D.C. Circuit's ad hoc determination that BNSF should have raised its argument at some earlier time and therefore "forfeited" the argument at the agency level is flatly contrary to fundamental principles of administrative law recognized by this Court and upsets the fundamental balance that Congress struck between agency authority and federal court review. As this Court stressed in *Vermont Yankee*, the specter of the courts "impos[ing] additional procedural requirements on agency action raises questions of such significance in this area of the law as to warrant ... granting certiorari." 435 U.S. at 535 n.14. *See also Pension Benefit Guar. Corp.*, 496 U.S. at 644 (certiorari granted due to the "significant administrative law questions raised by this case").

Moreover, the identity of the court below argues for immediate review. The D.C. Circuit—with its

nearly ubiquitous jurisdiction over administrative agencies—inevitably exerts disproportionate influence on the other courts and the agencies themselves. *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 376-77 (2006) (noting that "[o]ne-third of the D.C. Circuit appeals are from agency decisions" whereas "[t]hat figure is less than twenty percent nationwide"); *see also id.* at 389 ("Whatever combination of letters you can put together [in an agency's name], it is likely that jurisdiction to review that agency's decision is vested in the D.C. Circuit. Even when the jurisdiction is concurrent, as it often is ... lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other circuits."); Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 Geo. L.J. 779, 779 (2002) (noting that "the D.C. Circuit has long dominated and played a major role in shaping" administrative law).

As this Court explained in *Vermont Yankee*, review of an administrative decision of the D.C. Circuit may be especially warranted because "the vast majority of challenges to administrative agency action are brought to the [D.C. Circuit], the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." 435 U.S. at 535 n.14; *see also* John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 Geo. Wash. L. Rev. 553, 562 (2010) (noting that this Court has historically "prioritized review of the D.C. Circuit's administrative law").

The D.C. Circuit has here "unjustifiably intruded into the administrative process," and this Court's guidance is again needed to prevent "'judicial intervention run riot.'" *Vt. Yankee*, 435 U.S. at 556-57 (citation omitted).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted, and the case should be set for briefing and argument or summarily reversed.

Respectfully submitted,

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