No.

In the Supreme Court of the United States

LUMINANT GENERATION CO. LLC,
OAK GROVE MANAGEMENT CO. LLC, BIG BROWN POWER CO. LLC, & SANDOW POWER CO. LLC, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

PETITION FOR A WRIT OF CERTIORARI

STACEY H. DORÉ
DANIEL J. KELLY
ENERGY FUTURE HOLDINGS CORP.
1601 Bryan Street
41st Floor
Dallas, Texas 75201

HARRY M. REASONER
Counsel of Record
VINSON & ELKINS LLP
1001 Fannin Street
Suite 2500
Houston, Texas 77002
(713) 758-2358
hreasoner@velaw.com

STEPHANIE ZAPATA MOORE
LUMINANT GENERATION COMPANY LLC
1601 Bryan Street
22nd Floor
Dallas, Texas 75201

JEREMY C. MARWELL
ERIC A. WHITE
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, NW, Suite 500W
Washington, DC 20037

P. STEPHEN GIDIERE III
THOMAS L. CASEY, III
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, Alabama 35203

QUESTIONS PRESENTED

Under the Clean Air Act ("Act"), states retain "primary responsibility" to control "air pollution * * * at its source." 42 U.S.C. § 7401(a)(3). Although the Act directs the U.S. Environmental Protection Agency ("EPA") to establish national ambient air quality standards, the states retain authority to develop, propose for EPA approval, and administer implementation plans that specify the control measures, means, and techniques of meeting those standards. "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train* v. *Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). EPA must approve a state's revision to a plan unless it "would interfere with any applicable requirement concerning attainment * * * or any other applicable requirement of th[e] [Act]." 42 U.S.C. § 7410(*l*); *Train*, 421 U.S. at 80. The questions presented are:

(1) Whether, contrary to § 7410's express limit on EPA's disapproval authority and decisions of other courts of appeals, the Agency may substitute its own policy preferences for a state's about the appropriate means of controlling air pollution within that state, without identifying any applicable "requirement of th[e] [Act]" with which the state's chosen means would interfere?

(2) Whether the panel erred under *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), by upholding agency action based on, and by purporting to "defer" to, an interpretation of the Act that EPA itself not only never adopted—but in fact expressly rejected?

PARTIES TO THE PROCEEDINGS

Petitioners Luminant Generation Company LLC, Oak Grove Management Company LLC, Big Brown Power Company LLC, and Sandow Power Company LLC, were petitioners below. Respondent is the U.S. Environmental Protection Agency, respondent below. The Environmental Integrity Project, Sierra Club, Environment Texas Citizen Lobby, Inc., Citizens for Environmental Justice, Texas Environmental Justice Advocacy Services, Air Alliance Houston, and Community In-Power and Development Association were petitioners below and are nominally respondents here. The Texas Association of Business, Texas Association of Manufacturers, Texas Chemical Council, and the Texas Oil & Gas Association were intervenors below and are nominally respondents here.

RULE 29.6 STATEMENT

Big Brown Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Generation Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Holding Company LLC is the parent company that wholly owns Luminant Generation Company LLC, Sandow Power Company LLC, Big Brown Power Company LLC, and Oak Grove Management Company LLC. Luminant Holding Company LLC is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC ("TCEH").

TCEH is a wholly owned subsidiary of Energy Future Competitive Holdings Company ("EFCH"). EFCH is a wholly owned subsidiary of Energy Future Holdings Corp. ("EFH Corp."), formerly TXU Corp. Substantially all of the common stock of EFH Corp. is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater ownership interest in EFH Corp.

Oak Grove Management Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

Sandow Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

TABLE OF CONTENTS

Page

Table of Contents—Continued: **Page**

APPENDIX CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Statutes: **Page(s)**

Rules: **Page(s)**

Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

Luminant Generation Company LLC, Oak Grove Management Company LLC, Big Brown Power Company LLC, and Sandow Power Company LLC (collectively "Luminant") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The first opinion of the court of appeals (App., *infra*, 72a-108a), dated July 30, 2012 but subsequently withdrawn, is unreported. The second opinion of the court of appeals (App., *infra*, 35a-71a), dated October 12, 2012 and also subsequently withdrawn, is reported at 699 F.3d 427. The third opinion of the court of appeals (App., *infra*, 1a-34a), dated March 25, 2013, is reported at 714 F.3d 841. The order of the court of appeals denying rehearing en banc, dated April 1, 2013, with Judges Jones, Clement, and Owen dissenting (App., *infra*, 111a-124a), is unpublished. The action of the Environmental Protection Agency (App., *infra*, 125a-180a) can be found at 75 Fed. Reg. 68,989.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2013. App., *infra*, 1a-34a. That court denied a petition for rehearing en banc on April 1, 2013. App., *infra*, 111a-124a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App., *infra*, 181a-193a.

INTRODUCTION

This case presents a critical question about the Clean Air Act's division of authority between the federal government and the states: whether EPA may substitute its judgment for a state's about the proper means of controlling air pollution in that state, without identifying applicable statutory authority in which EPA's action is grounded. The question has generated conflict and confusion in the lower courts, and arises from the Act's requirement that EPA approve revisions to a state's implementation plan "[unless] the revision would interfere with any applicable requirement concerning attainment [of federal ambient air-quality standards] * * * or any other applicable requirement of th[e] [Act]." 42 U.S.C. § 7410(*l*), (k); *Train* v. *Natural Res. Def. Council, Inc.*, 421 U.S. 60, 80 (1975).

Here, EPA rejected a revision to Texas's plan providing a defense for emissions during periods of planned startup, shutdown, and maintenance ("SSM")—emissions that even EPA has acknowledged are often unavoidable. EPA did so without determining that the Texas law would interfere with attainment of ambient air-quality standards or any other provision of the Act. In upholding EPA's action, the panel interpreted the agency's disapproval authority expansively, freeing EPA to disapprove virtually any provision of a state plan. The panel's holding conflicts with decisions of other courts applying § 7410(*l*) and closely related statutory provisions, and adds to

confusion about the scope of EPA's disapproval authority.

The panel's error is no mere technicality. Limits on EPA's authority to disapprove state choices about controlling air pollution are at the heart of the Act's "experiment in cooperative federalism." *Michigan* v. *EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). Granting EPA broad discretion to instruct states about the contents of implementation plans risks rendering states mere functionaries, eliminating the "sovereignty concurrent with that of the Federal Government" (*New York* v. *United States*, 505 U.S. 144, 163 (1992)) that the Act reserves to the states. The issue recurs frequently and is of ongoing nationwide importance: in the past year alone, EPA has reviewed hundreds of revisions to state implementation plans, on a wide range of issues. EPA also recently published a proposed rule ordering 36 other states to amend their implementation plans to remove similar affirmative defenses for startup, shutdown, and malfunction events, and repeatedly invoked the panel's erroneous decision here in support of those actions. See 78 Fed. Reg. 12,460, 12,470 n.24 (Feb. 22, 2013).

The "panel opinion [also] violates a cardinal precept of the rule of law in the administrative state: an agency action may not be ratified in court by means of *post hoc* rationalization." App., *infra*, 113a (Jones, J., dissenting from denial of rehearing en banc) (citing *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)). The panel upheld EPA's action here by purporting to "defer" to an interpretation of the Act that EPA expressly *rejected* in its rulemaking. The panel also relied on, and "deferred" to, an interpretation of that statute that EPA never adopted—and that the gov-

ernment declined to defend even when invited to do so. The error is plain and outcome-determinative, the basis for three judges dissenting sharply from the denial of rehearing en banc.

The need for this Court's intervention is highlighted by the panel's departure from the accepted and usual course of appellate proceedings. The panel issued three different versions of its opinion, withdrawing the first two in response to Luminant's en banc petitions. The substituted opinions relied on a rationale found nowhere in the agency's rulemaking or any party's briefs to that court. The court's final opinion adopted (and "deferred" to) an interpretation of the Act that EPA itself expressly rejected. Before any party could seek rehearing, the court issued an order denying rehearing en banc of that opinion, based on a petition for review that addressed arguments in the (by-then-withdrawn) second version. The court then summarily issued the mandate, insulating the final opinion from rehearing requests.

Plenary review is warranted to address conflict and confusion in the lower courts about the scope of EPA's authority to disapprove state implementation plans—and to protect Congress's choice to reserve primary policymaking authority to the states under the Act. At a minimum, this Court should vacate the judgment below and remand for the Fifth Circuit to correct its substantive and procedural errors.

STATEMENT OF THE CASE

The Clean Air Act ("CAA" or "Act") reserves to each state "primary responsibility for assuring air quality" within its boundaries. 42 U.S.C. § 7407(a). EPA must publish lists of air pollutants that "cause

or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and promulgate primary and secondary national ambient air quality standards ("NAAQS") for such pollutants. 42 U.S.C. §§ 7409, 7410; *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 469 (2004) ("*Alaska DEC*").

The states, in turn, must develop and submit for EPA approval "a plan which provides for implementation, maintenance, and enforcement of [NAAQS]" within their jurisdictions. 42 U.S.C. § 7410(a)(1); *Alaska DEC*, 540 U.S. at 470. This "state implementation plan" ("SIP") must "include enforceable emission limitations and other control measures, means, or techniques * * * as may be necessary or appropriate to meet the applicable [CAA] requirements." 42 U.S.C. § 7410(a)(2)(A). A SIP includes "the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards." *Train*, 421 U.S. at 78.

This Court has emphasized states' "wide discretion" in formulating SIPs, *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 250 (1976), so long as they include measures "to assure that national ambient air quality standards are achieved," 42 U.S.C. § 7410(a)(2)(C). States review their SIPs periodically and, after notice and a hearing, propose revisions to account for changes in the NAAQS or methods of attainment. *Id.* § 7410(a)(2)(H).

When a state revises a previously approved SIP, EPA is required to approve the revision unless "the revision would interfere with any applicable requirement concerning attainment * * * or any other appli-

cable requirement of th[e] [Act]." *Id.* § 7410(*l*) (emphasis added); *id.* § 7410(k); *Train*, 421 U.S. at 80. EPA must act on such a submission "[w]ithin 12 months" of determining that it meets minimum completeness criteria. 42 U.S.C. § 7410(k)(2). Thus, although EPA is responsible for setting ambient standards, Congress "plainly * * * relegated [EPA] * * * to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Train*, 421 U.S. at 79.

In short, "[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. §] [74]10(a)(2)." *Train*, 421 U.S. at 79. "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Ibid.*

1. *EPA's disapproval of Texas's SIP revision*

This case involves an EPA rule disapproving, in pertinent part, a revision to Texas's SIP that provided an affirmative defense for excess emissions during "planned" SSM activities. 75 Fed. Reg. 68,989 (Nov. 10, 2010).

For decades, both EPA and the states had recognized that unavoidable emissions occur during planned and unplanned SSM at industrial plants. EPA itself has explained that many pollution control devices, such as the electrostatic precipitators used to control emissions in coal-fired power plants, will not

work efficiently below minimum threshold temperatures. See 75 Fed. Reg. at 68,996; see also 75 Fed. Reg. 26,892, 26,896 (May 13, 2010). Thus, during shutdown and startup, which involve operation at lower temperatures, increased emissions are inevitable. Maintenance can also necessarily lead to increased emissions, because exhaust fans must generally be kept on for the safety of maintenance crews inside the boilers. As a result, the (EPA-approved) Texas SIP for years included outright exemptions for SSM emissions. See 65 Fed. Reg. 70,792 (Nov. 28, 2000). In 2004, at EPA's request and with its approval, Texas revised its SIP to replace the categorical exemption with an affirmative defense. 29 Tex. Reg. 118 (Jan. 2, 2004); 70 Fed. Reg. 16,129 (Mar. 30, 2005).

In 2005, Texas adopted the rule at issue here, which split the SSM defense into "planned" and "unplanned" provisions. Both required proof that "all" of nine listed criteria are satisfied, including that the emissions "did not cause or contribute to an exceedance of the NAAQS" and "could not have been prevented through planning and design." 30 Tex. Admin. Code § 101.222(c)(1)-(9), (e)(1)-(9) (unplanned SSM); *id.* § 101.222(h) (requirements for planned SSM, incorporating the former). Texas submitted its revision to EPA in January 2006.

Nearly five years later—long after § 7410(k)(2)'s 12-month deadline for acting on Texas' SIP revision had expired—EPA approved the defense for unplanned SSM, but disapproved the planned defense. EPA's basis for disapproval centered on the planned *maintenance* component of SSM. 75 Fed. Reg. at 68,991. Citing a 1999 policy memorandum, the

Agency stated that "to be consistent with the Act, an affirmative defense must be narrowly-tailored in order not to undermine the enforceability of the SIP." *Id.* at 68,992. A qualifying defense would, in EPA's view, apply "only * * * where it is infeasible to meet the applicable limit" and the defense ensures that "the source has made all reasonable efforts to comply." *Id.* at 68,993.

EPA did not identify any particular provision of the Clean Air Act to support this interpretation, or determine that the planned maintenance defense interferes with any such requirement. See generally 75 Fed. Reg. at 68,989-69,002. Instead, EPA asserted as a matter of policy that "maintenance activities can and should be scheduled during process shutdowns," or that a source should "ensure that control equipment can be consistently effective during maintenance activities." *Id.* at 68,992. Because EPA "d[id] not believe it is infeasible for sources to meet applicable limits during planned maintenance," it concluded that the defense for planned maintenance was not narrowly tailored. *Id.* at 68,993.

As to startup and shutdown, EPA reached the opposite conclusion, interpreting the Act (consistent with its longstanding view) to "allow * * * an affirmative defense for [such] excess emissions." 75 Fed. Reg. at 68,991 & n.5; accord *id.* at 68,997 ("we interpret the [Act] to allow EPA to approve a SIP revision * * * that provides an affirmative defense for excess emissions during planned startup or shutdown activities"). Although that concession undermined its legal basis for disapproval, EPA concluded that the planned startup and shutdown defenses "are not severable from the [defense] for maintenance." *Id.* at

68,997. In a footnote, EPA suggested that, as a matter of drafting, the planned-event provision's adoption by reference of the requirements for unplanned events was a "defect" that "could prevent our approval of this provision in the future if submitted in the same form." *Id.* at 68,991 n.5.

2. *Proceedings before the Fifth Circuit*

Luminant petitioned for review of EPA's disapproval. Environmental groups also petitioned, challenging EPA's approval of the unplanned defense, 75 Fed. Reg. at 68,991.

a. The panel issues and withdraws its first opinion

The panel issued its initial opinion on July 30, 2012, denying the petitions for review. Invoking *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), it granted deference to EPA's view that the Act requires SIPs to "deter all avoidable excess emissions" and allows only "narrowly tailored" defenses, and it upheld EPA's disapproval of the defense for planned maintenance. App., *infra*, 98a. The panel did not identify, and did not require EPA to identify, any applicable statutory requirement with which the planned maintenance defense was purportedly inconsistent.

The panel quoted EPA's conclusion that an affirmative defense for planned startup and shutdown events is consistent with the Act. App., *infra*, 96a-97a; see 75 Fed. Reg. at 68,996; 75 Fed. Reg. 26,892, 26,896 (May 13, 2010). But the panel then deferred, without any analysis of Texas law, to EPA's conclusion that the startup/shutdown provisions are not severable from the maintenance defense. And the

panel reasoned that the startup/shutdown defense "was potentially" too broad because of a supposed drafting "defect"—*i.e.*, that the rule for planned activities adopts, by cross-reference, all the requirements of a section for unplanned activities. App., *infra*, 100a-101a.[1]

Luminant sought rehearing en banc, arguing (among other things) that EPA and the panel failed to identify any applicable requirement of the Act with which the planned SSM defense would "interfere," as required by § 7410(*l*). Luminant also argued that the panel erred by ignoring controlling Texas law on severance, and extending *Chevron* deference to EPA's interpretation of state law. In October 2012, while that petition was pending and without calling for a response, the panel withdrew its first opinion and substituted a second version resting on a new rationale.

b. The panel issues and withdraws its second opinion

The second opinion reached the same result based on an entirely new rationale—an interpretation of the Act's penalty enforcement criteria, 42 U.S.C. § 7413—

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[1] In denying the environmental groups' petitions for review, the panel reasoned that the Act "confines" EPA to reviewing SIP revisions for "consistency with the Act's requirements," and prohibits EPA from interfering with Texas's "broad authority to determine the methods and particular control strategies [it] will use to achieve the statutory requirements." App., *infra*, 74a (internal quotation marks omitted). The panel did not attempt to reconcile those principles with its disapproval of the planned SSM defense, or to explain how it could reject the latter defense while approving the former, given that the planned defense adopts all the requirements of the unplanned-SSM defense.

found nowhere in EPA's rulemaking or the parties' briefs. The opinion asserted (erroneously) that EPA had based its disapproval of the planned maintenance defense on an interpretation of § 7413(e)—which provides criteria an adjudicator should consider "[i]n determining the amount of any penalty to be assessed." The panel then purported to "defer" to the agency's (non-existent) "interpretation" of that statute. See App., *infra*, 64a. As before, the panel deferred to EPA's conclusion on severability as the reason for rejecting the defense for planned startup and shutdown. See *id.* at 70a-71a.

Luminant again sought rehearing en banc, arguing that the panel's novel § 7413 rationale improperly "deferred" to an interpretation EPA itself never adopted, and granted EPA impermissibly broad discretion to disapprove SIP revisions without statutory authority. Luminant also argued that the panel erred by failing to defer to Texas's controlling interpretation of state law on severance.

On March 25, 2013, the panel withdrew its second opinion and substituted a third version that—as to the defense for planned startup and shutdown—invoked yet another novel rationale.

c. The panel issues its third and final opinion, and cuts off rehearing

The panel's final opinion debuted a novel statutory interpretation focused on the planned startup/shutdown defense. The panel abandoned its earlier rationales and no longer addressed the actual basis of the EPA's action, *i.e.*, the supposed non-severability of the planned startup/shutdown defense from the planned maintenance defense. The panel

also removed any discussion of the supposed drafting "defect" identified by EPA. Compare App., *infra*, 11a-12a, 27a-28a, 32a (third opinion), with App. 45a-46a, 61a-62a, 70a (second opinion). Instead, the panel stated summarily, and without explanation, that "even if severed, the [startup/shutdown] provisions would not have been consistent with the agency's interpretation of section 7413." App., *infra*, 33a. The panel then upheld EPA's disapproval of the startup/shutdown defense "[f]or the same reasons provided in [its] discussion * * * of the affirmative defense for planned maintenance activity." *Ibid.* The panel presumably was referring to its earlier rejection of the maintenance defense as "not narrowly tailored to address unavoidable, excess emissions because it provided a defense for SSM activities during which excess emissions could be avoided." *Ibid.*

When it issued its third opinion on March 25, 2013, the panel did not immediately act on Luminant's still-pending petition for rehearing en banc of the second opinion. But on April 1, 2013, the Court entered an order and opinion denying the pending "Petition for Rehearing En Banc." Despite the fact that Luminant's en banc petition was dated November 26, 2012, and raised arguments addressing the October 2012 opinion, the Court's order referred to both the October 2012 and March 2013 opinions in denying rehearing.

Judge Jones, joined by Judges Clement and Owen, dissented from the denial of rehearing en banc. In her view, the panel "violate[d] a cardinal precept of the rule of law in the administrative state: an agency action may not be ratified in court by means of *post hoc* rationalization." App., *infra*, 113a. The govern-

ment's briefs to the Fifth Circuit, Judge Jones explained, were "replete with statements" indicating that the agency had not relied on 42 U.S.C. § 7413 "as the basis for its decision." *Id.* at 119a. And the panel's invented rationale on § 7413, Judge Jones feared, "would seem applicable to nearly any disapproval of a SIP that EPA might conjure." *Id.* at 121a-122a. That result, Judge Jones observed, "would be at variance with EPA's statutory *duty* to allow states to fashion their own SIPs." *Id.* at 122a. As to the panel's administrative-law error, "'[g]ood enough for government work' is not an excuse for the agency's—or this court's—breach of *Chenery*." *Id.* at 124a.

The next day, and contrary to a March 25 letter advising the parties that the normal appellate rules would govern rehearing and issuance of the mandate, the court entered a "directive" instructing "the clerk to issue the mandate forthwith." Luminant moved to recall the mandate, seeking an opportunity to petition for rehearing. Luminant explained that the panel's final rationale—that the startup and shutdown defenses "would have been" inconsistent with EPA's interpretation of the Act—was squarely contradicted by the record, in which EPA had concluded those defenses were consistent with the Act. 75 Fed. Reg. at 68,997.

The following day, Chief Judge Stewart (the author of the panel opinion) entered a one-judge order denying the motion. The order stated that the court's action "denying rehearing and rehearing en banc was rendered * * * upon this court's review of the revised opinion issued on March 25, 2013." App., *infra*, 110a. This petition follows.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted because the panel's decision exacerbates conflict and confusion in the lower courts about whether EPA may substitute its judgment for a state's about the proper means of controlling air pollution in that state, without identifying applicable statutory authority supporting that assertion of federal authority. See *Union Pac. R.R. Co.* v. *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009) (grant of certiorari enables Court to "reduce confusion" on a "matter of some importance"); *United States* v. *Behrens*, 375 U.S. 162, 164 (1963) (conflict and confusion).

Even if this Court declines to exercise plenary review, the clarity of the panel's outcome-determinative *Chenery* error, combined with its departure from the accepted and regular course of appellate proceedings, justify granting the writ, vacating the judgment below, and remanding to allow the lower court to correct its procedural and substantive errors. *Youngblood* v. *West Virginia*, 547 U.S. 867 (2006).

I. The Courts Of Appeals Are Divided About Whether EPA's Disapproval Authority Requires The Agency To Identify An Applicable Statutory Requirement With Which A State's Plan Would Interfere

A prominent "experiment in cooperative federalism," *Michigan*, 268 F.3d at 1083, the Clean Air Act defines clear roles for the states and EPA. The Act vests in states and local governments the "primary responsibility" to control "air pollution * * * at its source." 42 U.S.C. § 7401(a)(3); accord *id.* at

§ 7407(a). "Each State is given wide discretion in formulating its plan," *Union Elec.*, 427 U.S. at 250, which EPA "*shall* approve * * * if it meets all of the applicable requirements" of the Act. 42 U.S.C. § 7410(k)(3) (emphasis added); *id.* § 7410(*l*).

As noted above, EPA has historically approved SIP provisions that contained both outright exemptions and affirmative defenses for SSM activity. The narrow SIP revision that Texas proposed here allows an affirmative defense only if emissions "did not cause or contribute to an exceedance of the NAAQS" and "could not have been prevented through planning and design." 30 Tex. Admin. Code §§ 101.222(c)(1)-(9), (e)(1)-(9), (h). EPA disapproved the defense for planned maintenance without determining that it would interfere with attainment or any other applicable provision of the Act, instead invoking vague policy concerns about narrow tailoring. And EPA disapproved defenses for startup and shutdown that it conceded were fully consistent with the Act, on state-law severability grounds.

By allowing EPA to disapprove Texas's defenses for planned SSM without identifying a statutory requirement with which they would "interfere," the panel turns Clean Air Act federalism on its head. This case may now be cited—in a jurisdiction with nearly 300,000 EPA-regulated facilities, see *EnviroFacts*, EPA, http://www.epa.gov/enviro/html/fii/fii_query_java.html ("Geography Search") (last visited June 19, 2013)—for the proposition that EPA can reject states' pollution-control programs based on bare policy preferences. The panel decision also exacerbates a conflict among the courts of appeals,

the majority of which have concluded, contrary to the panel's opinion, that EPA must base any rejection of a state's SIP on an applicable provision of the Act. This Court's guidance is needed to resolve this conflict of authority and broader "confusion among the Courts of Appeals" (*Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001)) about EPA's ability to displace the role Congress reserved to the states.

A. The Panel And The Sixth Circuit Have Authorized EPA To Disapprove A State's SIP Without Identifying An Applicable Statutory Requirement With Which The SIP Interferes

1. The panel in this case upheld an EPA disapproval that lacked any basis in an applicable provision of the Act. Without finding that the proposed defenses "would interfere with any applicable requirement concerning attainment * * * or any other applicable requirement of th[e] [Act]," 42 U.S.C. § 7410(*l*), EPA disapproved the affirmative defense for planned maintenance on the policy ground that it was not "narrowly tailored." 75 Fed. Reg. at 68,992; accord App., *infra*, 25a; compare with 42 U.S.C. § 7410 (containing no mention of a narrow tailoring requirement). The agency also added that it "d[id] not believe it is appropriate to approve an affirmative defense for excess emissions during maintenance into the SIP," 75 Fed. Reg. 68,992, since "sources *might* argue that many of the criteria would not apply and would not need to be proved when asserting an affirmative defense," *id.* at 68,991 n.5 (emphasis added); compare 42 U.S.C. § 7410(*l*) ("[t]he

Administrator shall not approve a revision of a plan if the revision *would* interfere with any applicable requirement concerning attainment and reasonable further progress") (emphasis added).

The agency based its disapproval on its "long-standing national policy," 75 Fed. Reg. at 26,896, as embodied in three internal memos from 1982, 1983, and 1999, 75 Fed. Reg. at 68,992.[2] But none of the memos mentions, much less offers an authoritative interpretation of, § 7410 or § 7413. At most, they state EPA's policy preference that sources "should" avoid "excess emissions during periods of scheduled maintenance" by employing "better scheduling * * * and maintenance practices." 1982 Policy Memo, at 2-3; accord 1983 Policy Memo, at 3 (attachment). The memoranda do not, however, link that preference to any requirement in the Act. See generally 1999 Policy Memo (never mentioning § 7413, and citing § 7410 only once for background proposition of law). To the extent they are relevant at all—as they involve "automatic exemptions," see, *e.g.*, 1999 Policy Memo at 1 (attachment); 75 Fed. Reg. at 26,893; *id.*

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[2] Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air, Noise & Radiation, to Reg'l Adm'rs, Regions I–X, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," Sept. 28, 1982 (1982 Policy Memo); Memorandum from Kathleen M. Bennett to Reg'l Adm'rs, Regions I–X, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," Feb. 15, 1983 (1983 Policy Memo); Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement & Compliance Assurance, and Robert Perciasepe, Assistant Adm'r for Air & Radiation, to Reg'l Adm'rs, Regions I–X, "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," Sept. 20, 1999 (1999 Policy Memo).

at 68,992, not the (non-automatic) affirmative defenses contained in Texas's SIP—they demonstrate that Texas's planned maintenance defense *complies* with the Act; indeed, EPA cited the same memoranda in approving Texas's earlier exemptions for maintenance emissions. 65 Fed. Reg. at 70,792.[3]

EPA's disapproval of the planned startup and shutdown defenses was similarly untethered from any applicable requirement of the Act; EPA stated without explanation that although the Act "allow[s] * * * an affirmative defense for [such] excess emissions," those portions of the rule "are not severable from the provision for maintenance," 75 Fed. Reg. at 68,991 & n.5.

Despite the panel's suggestions to the contrary, App., *infra*, 25a-28a, 33a, EPA's final rule did not find that the Texas SIP violated any applicable statutory requirement of the CAA. The statement in the preamble to EPA's final rule that the Agency is "taking this action under section 110 of the Act," 75 Fed. Reg. at 68,989, merely refers to EPA's basic authorization to review and approve a SIP or SIP revision, see 42 U.S.C. § 7410(k), (*l*). Nor does EPA's citation to § 7413's penalty criteria, 75 Fed. Reg. at 68,992, 68,999 (cited at App., *infra*, 139a-140a, 167a-168a), identify that or any other provision as the basis for disapproval of Texas's affirmative defenses.

2. In upholding EPA's disapproval notwithstanding the agency's failure to identify any

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[3] These internal "guidance" memos are also informal, non-binding documents not incorporated into federal SIP regulations, and thus "lack the force of law." *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000).

way in which the Texas SIP conflicted with an "applicable requirement of th[e] [Act]," 42 U.S.C. § 7410(*l*), the panel aligned with the Sixth Circuit's decision in *Michigan Department of Environmental Quality* v. *Browner*, which upheld a disapproval of automatic SSM exemptions in Michigan's SIP. 230 F.3d 181, 185-186 (2000). There, as here, EPA did not identify an applicable statutory requirement with which the SIP would interfere. Rather, the court relied on a conclusory statement from the same 1982 and 1983 memoranda discussed above that "any emissions above the allowable [standard] may cause or contribute to violations of the national ambient air quality standards." *Id.* at 183. That was enough, the court held, for EPA to "reasonably conclude[] that Michigan's proposed SIP revision did not meet the requirements of the CAA." *Id.* at 186.

B. Contrary To The Approach Of The Panel And The Sixth Circuit, A Majority Of Circuits Require EPA To Identify An Applicable Statutory Requirement With Which A State Provision Would Interfere Before Disapproving The State's Approach

By contrast, the majority of circuits to consider the issue have held, consistent with § 7410, that EPA lacks authority to reject or modify a SIP provision without showing that the state's proposed method would interfere with a "specific provision * * * in the Clean Air Act." *Bethlehem Steel Corp.* v. *EPA*, 651 F.2d 861, 870 (3d Cir. 1981).

For example, the Seventh Circuit has rejected an EPA attempt to substitute its policy judgment for a state's with respect to a compliance order under a

former provision of the Act that required EPA to determine whether a state order delaying the date that a regulated entity must comply with a SIP was "'issued in accordance with the requirements of th[e] [Act].'" 42 U.S.C. § 7413(d) (1976 & Supp. 1977); see *Bethlehem Steel Corp.* v. *EPA*, 638 F.2d 994, 1003 (7th Cir. 1980). There, the Seventh Circuit analogized to § 7410(*l*)'s requirements for EPA review of "revisions to SIP[s]" and *Train*, concluding that EPA action under the two sections "should be subject to the same standard of review." *Id.* at 1003-1004. In disapproving the state compliance order, however, EPA had articulated as its sole reason that "[EPA] is not satisfied that the program to control stack emissions is sufficient to attain compliance." *Id.* at 999. The Seventh Circuit rejected that vague, extra-statutory justification as wholly inadequate to support EPA's disapproval. *Id.* at 1004.

Consistent with that approach, the Seventh Circuit has recognized that EPA lacks authority to reject a SIP absent a violation of an applicable requirement of the Act. In *Bethlehem Steel Corp.* v. *Gorsuch*, that court rejected EPA's partial disapproval of a SIP—a disapproval which had the effect of making the state's plan more stringent—as unauthorized by the relevant provisions of the statute. 742 F.2d 1028, 1035 (7th Cir. 1984). The court explained that "[t]he federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through state implementation plans and timetables for compliance." *Id.* at 1036.

In its own *Bethlehem Steel* decision, the Third Circuit likewise vacated an EPA disapproval order under the same former provision of the Act, 42 U.S.C. § 7413(d), at issue in the Seventh Circuit case discussed above. The Third Circuit held that "EPA cannot impose on the state a requirement that its proposed [compliance order] make a * * * finding which the statute itself does not impose." *Bethlehem Steel*, 651 F.2d at 869. The court rejected EPA's particular basis for disapproval because "[t]here is no specific provision, either in the Clean Air Act or in the state's implementation plan, which [imposes such a] require[ment]." *Id.* at 870; cf. *Concerned Citizens of Bridesburg* v. *EPA*, 836 F.2d 777, 788-789 (3d Cir. 1987) (noting that EPA's departure from the Act's state public-hearing requirement impermissibly altered the federalism balance because it allowed EPA—not the state—to control the substance of the revision).

The D.C. Circuit has also recognized the general principle that EPA cannot substitute its judgment for a state's about the appropriate means of controlling air pollution. In reviewing EPA's issuance of a "SIP call" directing a state to revise its implementation plan, that court held that EPA exceeded its § 7410 authority by seeking to require states to adopt California's vehicle emissions program.[4] *Virginia* v. *EPA*, 108 F.3d 1397, 1414-1415 (D.C. Cir.), modified

[4] Analogous to the Act's limitations on EPA's authority to disapprove a SIP revision, EPA may exercise its "SIP call" authority under § 7410(k)(5) only if it first determines a SIP is "substantially inadequate to attain or maintain the [NAAQS] * * * or to otherwise comply with any requirement of [the Act]." 42 U.S.C. § 7410(k)(5).

on other grounds, 116 F.3d 499 (D.C. Cir. 1997). The court found nothing in § 7410 that "give[s] EPA the authority to condition approval of a state's plan on the state's adoption of control measures EPA has chosen." *Id.* at 1404. Quoting from *Train* that "[t]he Act gives the Agency 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 § 110(a)(2)," *id.* at 1407 (quoting 421 U.S. at 79), the court held that EPA may not use its authority "to order states to adopt a particular approach to achieving the SIP requirements listed in section 110," *Michigan* v. *EPA*, 213 F.3d 663, 686 (D.C. Cir. 2000) (discussing *Virginia*).

Other D.C. Circuit decisions affirm that EPA cannot impose extra-statutory requirements on states. See, *e.g.*, *North Carolina* v. *EPA*, 531 F.3d 896, 922 (D.C. Cir. 2008) (holding that EPA lacks authority to require non-trading states to have SIP provisions to retire excess Title IV allowances, where the SIP satisfies the relevant statutory obligations); *Envtl. Def.* v. *EPA*, 467 F.3d 1329, 1334-1336 (D.C. Cir. 2006) (rejecting EPA's promulgation of "interim tests" to demonstrate conformity with revised NAAQS).

To similar effect, other courts of appeals strictly enforce § 7410's limit on EPA's authority to interfere with a state's choice of air pollution control measures. See *Union Elec. Co.* v. *EPA*, 515 F.2d 206, 212 (8th Cir. 1975) ("In determining whether to approve or disapprove a state implementation plan, the Administrator's discretion is limited by the clear terms of the Act. He *shall* approve any state implementation plan which meets the requirements

of § 110(a)(2).") (emphasis added), *aff'd*, 427 U.S. 246 (1976); *Riverside Cement Co.* v. *Thomas*, 843 F.2d 1246, 1247-1248 (9th Cir. 1988) (rejecting EPA attempt to "approve" a SIP in a manner that would render it more stringent, because nothing in the Act authorizes EPA to "take a portion of what the state proposes and amend the proposal ad libitum"); *Vermont* v. *Thomas*, 850 F.2d 99, 104 (2d Cir. 1988) (upholding EPA's denial of a petition seeking disapproval and revision of SIPs in upwind states based on regional haze concerns, because no "federal regional haze program [wa]s in place" and therefore there was no basis for disapproval).

C. The Panel Is Wrong

1. Although the panel decision pays lip service to the concept of cooperative federalism and EPA's "ministerial function," see App., *infra*, 3a, it effectively frees EPA from the constraint of identifying an applicable statutory requirement that a SIP violates, inviting the agency to substitute its own policy preferences for a state's. That result is inconsistent with the statutory text and this Court's understanding of the roles of states and EPA in fashioning controls for air pollution.

The language in the Act can hardly be clearer. As this Court long ago explained in *Train*, under § 7410(k), EPA "is *required*" to approve a SIP that "provides for the timely attainment and subsequent maintenance of [the NAAQS] and which also satisfies [§ 7410(a)(2)'s] other general requirements." 421 U.S. at 79 (emphasis added). Likewise, EPA must approve a revision to a SIP unless it "*would* interfere" with NAAQS attainment or "other applicable

requirement[s] of [the Act]." 42 U.S.C. § 7410(*l*) (emphasis added).

Nothing in the Act suggests that Congress freed EPA to impose policies of its own choosing when reviewing states' pollution-control measures. To the contrary, Congress established a system that "subject[s] the States to strict minimum compliance requirements," *Union Elec.*, 427 U.S. at 256-257, and gave them free rein to design their own systems so long as they "satisf[y] the standards of § 110(a)(2)," *Train*, 421 U.S. at 79. The Fifth Circuit violated these basic tenets when it allowed EPA to substitute its policy preferences for Texas's—based merely on vague extra-statutory references to "narrow tailoring," and a handful of internal "guidance" memos untethered from the Act that "lack the force of law," *Christensen*, 529 U.S. at 587; *Sierra Club* v. *Ga. Power Co.*, 443 F.3d 1346, 1354 (11th Cir. 2006) ("EPA's 1999 Guidance concerning SSM provisions is not a regulation and is not due the same level of deference as formally adopted rules.").

2. The Fifth Circuit's attempt to bolster EPA's deficient justification by invoking § 7413 (see App., *infra*, 25a) cannot remedy the court's substantive error. For one, and as discussed further below, that approach violated fundamental principles of administrative law, because "before the panel issued its original opinion, EPA never stated that it disapproved [Texas's SSM permits] because the defense did not comport with § 7413." App., *infra*, 119a-120a (Jones, J., dissenting); see pp. 27-34, *infra*.

But even if EPA *had* relied on § 7413 for its disapproval, that provision could not demonstrate that the planned SSM defense would interfere with

attainment of the NAAQS or any other applicable requirement, as required under § 7410(*l*). Indeed, § 7413 is completely unrelated to the approval or disapproval of SIPs. It is an administrative provision dealing with penalty assessment criteria, and lists various factors—such as "the size of the business," "the economic impact of the penalty," the "duration of the violation," and "the violator's full compliance history and good faith efforts to comply"—to consider "[i]n determining the amount of any penalty to be assessed." See 42 U.S.C. § 7413(e); see also App., *infra*, 120a-121a (Jones, J., dissenting) ("Section 7413 simply identifies criteria that are material to an agency or court determination to issue civil penalties for a CAA violation."). The provision thus not only cannot constitute a "requirement" for approval or disapproval of SIPs, but it is wholly irrelevant to the question of liability. See, *e.g.*, *United States* v. *Hoechst Celanese Corp.*, 128 F.3d 216, 229 (4th Cir. 1997) (noting the division between liability and penalty phases in Clean Air Act disputes and holding that the § 7413(e) factors apply only to the latter); accord *United States* v. *B & W Inv. Props.*, 38 F.3d 362, 368 (7th Cir. 1994).

As Judge Jones explained in her dissent from denial of rehearing en banc, allowing EPA to rely on § 7413 as the basis to disapprove a SIP upends the Act's entire federalism balance: if that rationale is "sufficient here, it would seem applicable to nearly any disapproval of a SIP that EPA might conjure." App., *infra*, 121a-122a (Jones, J., dissenting). After all, "SIP violations will always involve potential penalties, and variations in SIPs that EPA doesn't like can always be said to affect the amount of penalties."

Id. at 122a. But that is just what the Fifth Circuit did. This remarkable result endows EPA with virtually unlimited discretionary authority to disapprove SIPs for policy reasons untethered from the Clean Air Act's requirements.

D. The Issue Is Recurring And Of Ongoing National Importance

In the past year alone, EPA has published scores of Federal Register notices reviewing revisions to state implementation plans, on a wide range of issues nationwide. The particular issue presented here—whether EPA may reject a state's chosen means of controlling emissions under 42 U.S.C. § 7410(*l*) without determining that the state plan would interfere with an applicable statutory requirement—is at the heart of an important ongoing nationwide rulemaking. In February 2013, EPA published a proposed rule that seeks to direct some *36 other states* to amend their implementation plans to remove their affirmative defenses for startup, shutdown, and malfunction. See 78 Fed. Reg. 12,460 (Feb. 22, 2013). The notice repeatedly cites (one version of) the panel decision here as legal support for EPA's intended actions. *Id.* at 12,470 n.24; 12,476 n.51; 12,505 n.124. This complex, multi-state rulemaking will take years to complete; indeed, EPA agreed to extend the comment period and ultimately received nearly 50,000 submissions. 78 Fed. Reg. 20,855 (Apr. 8, 2013). This case provides a timely and excellent vehicle to address this crucial and recurring legal issue.

II. The Panel's Fundamental Administrative-Law Errors Warrant Summary Correction

As noted, the panel's judgment ultimately rests on the proposition that EPA disapproved the planned SSM defenses as inconsistent with § 7413, even though the agency never relied on that statute as a basis for its decision. As such, the panel's rationale violates basic administrative-law doctrines prohibiting a court from upholding agency action based on "*post hoc* rationalizations." App., *infra*, 113a (Jones, J., dissenting). Under *Chenery*, a court "must judge the propriety of [agency] action solely by the grounds invoked by the agency" in the order under review. 332 U.S. at 196; accord *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). The panel's failure to follow *Chenery* is both outcome-determinative and plain from the face of its opinion, justifying summary correction.

A. For The Startup/Shutdown Defense, The Panel Violated Fundamental Principles of Administrative Law By "Deferring" To An Interpretation Of The Clean Air Act That EPA Explicitly Rejected

The panel acknowledged that EPA "disapproved of the affirmative defense for planned startup and shutdown activity contained in the SIP revision because it found the provision for such activity to be nonseverable from those for planned maintenance." App., *infra*, 12a. But the final version of the panel's opinion ultimately "decline[d] to address * * * whether EPA was correct in concluding that the provisions relating to

planned startup and shutdown activities are not severable from the planned maintenance provisions." *Id.* at 33a. Instead, it upheld the Agency's action on an alternative ground: that "EPA's [supposed] interpretation of section 7413 is entitled to *Chevron* deference," and that the planned startup/shutdown defense, even if severable, "would not have been consistent with [EPA's] interpretation of section 7413 of the Act." *Id.* at 25a, 33a. The panel's novel holding (found nowhere in its original opinion) is factually and legally wrong, and flatly violates *Chenery*.

The panel's reliance on a statutory interpretation it effectively acknowledges EPA never adopted (see App., *infra*, 33a (stating that the defense for planned startup/shutdown "*would* not have been consistent" with the interpretation) (emphasis added)) violates *Chenery*. The record and the government's own briefs show that EPA not only never adopted the panel's interpretation of § 7413—but that the agency expressly *rejected* it as an incorrect statement of law.

Throughout the administrative proceedings, EPA explicitly stated that a startup/shutdown defense is fully consistent with the Act. See 75 Fed. Reg. at 26,896 (proposed rule) ("The EPA's interpretation of section 110 of the Act and related policies allows an affirmative defense to be asserted * * * during startup or shutdown periods."); 75 Fed. Reg. at 68,991 n.5 (final rule) ("we interpret the Act to allow for an affirmative defense for excess emissions during startup and shutdown"); *id.* at 68,997 ("we interpret the [Act] to allow EPA to approve * * * an affirmative defense for excess emissions during planned startup or shutdown"). In its notice of proposed rulemaking, EPA explained the basis for "[its] interpretation": "the Act

and related policies allo[w] an affirmative defense to be asserted against civil penalties in an enforcement action for excess emissions activities which are sudden, unavoidable or caused by circumstances beyond the control of the owner or operator and where emissions control systems may not be consistently effective, *such as during startup or shutdown periods*." 75 Fed. Reg. at 26,896 (emphasis added). EPA reaffirmed that view in briefing to the Fifth Circuit, explaining that the agency had repeatedly "interpreted the [Act] to allow narrow affirmative defenses for excess emissions during planned startup and shutdown." EPA Response to the Petitions for Rehearing and Rehearing En Banc at 14 (citing 1999 policy memorandum).[5]

Given EPA's actual legal positions, the panel's *ipse dixit* that "the provisions relating to planned startup and shutdown activities * * * would not have been consistent with the agency's interpretation of section 7413 of the Act" (App., *infra*, 33a) is unfathomable. Upholding EPA's action on that basis violates *Chenery*'s fundamental rule that a court must judge the propriety of agency action solely on the grounds invoked by the agency. 332 U.S. at 196.

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[5] As noted above, EPA's actual basis in its final rule for disapproving the startup/shutdown defenses was an asserted lack of severability from the maintenance defense. See 75 Fed. Reg. at 68,991 ("Because the portions of section 101.222(h) that provide an affirmative defense for excess emissions during planned startup and shutdown are not severable from the provision for maintenance, those provisions are also disapproved."). The panel explicitly declined to address that issue. App., *infra*, 12a, 32a-33a.

The panel also invoked *Chevron* deference to support its disapproval of the startup/shutdown provisions. App., *infra*, 25a, 27a. The panel did not cite—and Luminant is unaware of—any authority for the proposition that a court may "defer" to a statutory interpretation that the agency charged with administering a statute squarely rejected. Indeed, other courts have recognized that *Chenery* bars *Chevron* deference even where (unlike here) an agency has embraced the relevant statutory interpretation in litigation. See, *e.g.*, *America's Cmty. Bankers* v. *FDIC*, 200 F.3d 822, 835 (D.C. Cir. 2000) (declining to afford *Chevron* deference to an agency's post-hoc rationale adopted in litigation, because *Chenery* "applies * * * to our review of statutory interpretations under the second prong of *Chevron*"); *Carpenter Family Invs., LLC* v. *Comm'r*, 136 T.C. 373 (2011) (applying *Chenery* as a bar on *Chevron* deference to interpretation of ambiguous statute). *A fortiori*, deference is inappropriate where the agency has explicitly rejected the interpretation advanced by the court.

B. As To Planned Maintenance, The Panel Violated *Chenery* By Upholding Agency Action Based On An Interpretation Of The Statute EPA Never Advanced In Its Rulemaking

As to planned maintenance, the panel deferred to EPA's (supposed) interpretation that the defense "was inconsistent with section 7413 of the Act." App., *infra*, 27a, 31a. But the record and the government's briefs make clear that "before the panel issued its original opinion, EPA never stated that it disapproved the affirmative defense for planned mainte-

nance because the defense did not comport with § 7413. It will not do, then, to uphold the agency's decision on that basis." App., *infra*, 119a-120a (Jones, J., dissenting).

As noted, the panel cited the text of EPA's final rule as providing the statutory basis for EPA's disapproval of the Texas SIP. *See* App. 25a-28a, 30a, 33a. But neither EPA's notice of proposed rulemaking nor its final rule and preamble contain a relevant discussion of § 7413. EPA's Federal Register notice relied principally on the 1999 "Policy" on excess SSM emissions that does not once mention or cite § 7413. Nowhere in the proposed or final rulemaking notices did EPA state that it was disapproving the planned-SSM defense because of § 7413(e), or advance any interpretation of that provision. Rather, EPA's basis of decision was that the planned-SSM defense was not "narrowly tailored." 75 Fed. Reg. at 68,992. EPA asserted that (unspecified) provisions of the Act made it "inappropriate to provide an affirmative defense [for] * * * planned maintenance [emissions]," because such emissions are supposedly avoidable, and because (in EPA's view) there were other "preferable" means to address planned startup/shutdown emissions. *Id.* at 68,990, 68,997. EPA's rulemaking notice did not contend that those requirements were a reasonable interpretation of § 7413(e).

The panel cited an isolated reference in EPA's rulemaking notice to § 7413(e). App., *infra*, 17a-18a. But that reference did not purport to be the agency's considered interpretation of the statute.[6] The rele-

[6] The relevant reference to § 7413 reads, in full: "The criteria a source must prove when asserting an affirmative defense, as provided in the 1999 Policy, are consistent with the criteria

vant passage simply asserts, without explanation, that the 1999 policy statement is "consistent with" § 7413. 75 Fed. Reg. at 68,992.

The panel also invoked EPA's general statements that "to be consistent with the Act, an affirmative defense must be narrowly-tailored," and "an effective enforcement program must be able to collect penalties to deter avoidable violations." App., *infra*, 26a-27a. Neither statement cited § 7413(e) or any other provision of the statutory text.

Underscoring that EPA never relied on § 7413 in its decision, "EPA's original brief to th[e] [Fifth Circuit] cited § 7413 only once, in opposing the *[E]nvironmental* [P]etitioners' challenges to EPA's approval of a different portion of the SIP revision." App., *infra*, 119a (Jones, J., dissenting). And "EPA's response to the petitions for rehearing is replete with statements that show the agency was relying on § 7410, not § 7413, as the basis for its decision." *Ibid.* (Jones, J., dissenting).

Indeed, the government's en banc response acknowledged that the panel "deferred" to an "interpretation" of a statutory provision that EPA did not actually articulate—*i.e.*, that the panel's § 7413 analysis was "on the surface different" from EPA's rule-

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identified in section 113(e) [42 U.S.C. § 7413(e)] of the CAA that the courts and EPA may consider in determining whether to assess a penalty (and, if so, what amount) in the context of an enforcement action." 75 Fed. Reg. at 68,992; see also App., *infra*, 119a (Jones, J., dissenting) ("[EPA] statements that show the agency was relying on § 7410, not § 7413, as the basis for its decision to disapprove the affirmative defense for planned SSM * * * are not surprising given that the agency cited § 7413 only five times in the final rule.").

making, because the agency "did not expressly articulate" § 7413 as the basis for its disapproval. App., *infra*, 119a (Jones, J., dissenting) (quoting EPA Response to Pets. For Reh'g and Reh'g En Banc). The government suggested the panel had merely "restate[d] the essence of EPA's construction," while further conceding that EPA's rulemaking notice "did not expressly articulate [an interpretation of § 7413] as such." *Ibid.* The government then asserted (without citation to authority) that the notice should nonetheless be viewed as "an *implicit interpretation* of the applicability of * * * § 7413." *Ibid.*

But "no authority supports the proposition that a reviewing court can 'defer' to a non-existent 'interpretation' of a statutory provision", or that a court may uphold agency action by "defer[ring] to an agency's 'implicit' interpretation." App., *infra*, 120a (Jones, J., dissenting). To the contrary, this Court has made clear that it is only EPA's stated rationale, in the order under review, that the panel may assess under *Chenery*.[7]

In upholding EPA's disapproval of the planned maintenance defense, the panel departed from the "simple but fundamental rule of administrative law"

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[7] Even accepting EPA's implausible re-imagination of the rulemaking notice, advanced for the first time in a brief opposing en banc review, an agency's post-hoc rationalization, developed for purposes of litigation, is not entitled to *Chevron* deference. *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency litigating positions are not entitled to deference when they are merely appellate counsel's post hoc rationalizations for agency action, advanced for the first time in the reviewing court."); *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (same).

that "a reviewing court * * * must judge the propriety of such action solely by the grounds invoked by the agency." *Chenery*, 332 U.S. at 196. Given the government's *de facto* concession of error below, the clarity of the mistake on the face of the panel's opinion, and the central relevance to the judgment, correction by this Court is appropriate. "This error is no matter of mere semantics," in part because it is "hard to see how [the § 7413 penalty enforcement] factors affect approval or disapproval of a SIP." App., *infra*, 120a-121a (Jones, J., dissenting).

Even if this Court declines to grant certiorari and set the case for briefing and argument, it should grant the petition and vacate the judgment below to allow the Fifth Circuit to address EPA's actual, stated basis for decision. See, *e.g.*, *Youngblood*, 547 U.S. at 867 (summarily vacating judgment and remanding to allow lower court to address issue in first instance); *Lawrence* v. *Chater*, 516 U.S. 163, 165-166 (1996) (concluding that this Court has power to issue GVR order in light of position of Solicitor General). "'Good enough for government work' is not an excuse for the agency's—or [a] court's—breach of *Chenery*." App., *infra*, 124a (Jones, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for briefing and argument. In the alternative, the Court should grant the petition, vacate the judgment, and remand for the lower court to adjudicate Luminant's petition for review in the first instance, in a manner consistent with fundamental administrative-law doctrines.

Respectfully submitted.

STACEY H. DORÉ
DANIEL J. KELLY
ENERGY FUTURE HOLDINGS CORP.
1601 Bryan Street
41st Floor
Dallas, Texas 75201

HARRY M. REASONER
Counsel of Record
VINSON & ELKINS LLP
1001 Fannin Street
Suite 2500
Houston, Texas 77002
(713) 758-2358
hreasoner@velaw.com

STEPHANIE ZAPATA MOORE
LUMINANT GENERATION COMPANY LLC
1601 Bryan Street
22nd Floor
Dallas, Texas 75201

JEREMY C. MARWELL
ERIC A. WHITE
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037

P. STEPHEN GIDIERE III
THOMAS L. CASEY, III
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, Alabama 35203

JUNE 2013