No. 14-748

IN THE

Supreme Court of the United States

VOLVO POWERTRAIN CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
CALIFORNIA AIR RESOURCES BOARD,
Respondents.

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

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE AMERICAN PETROLEUM INSTITUTE, THE AMERICAN COATINGS ASSOCIATION, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, AND METALS SERVICE CENTER INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether EPA exceeds its regulatory authority under the Clean Air Act by imposing more than $62 million in penalties for foreign engine emissions based on a consent decree that limits EPA's enforcement power to the territorial reach of the Act.

2. Whether a court violates its obligation to ensure that a consent decree furthers the objectives of the statute being enforced by construing consent decree provisions contrary to incorporated statutory language.

RULE 29.6 STATEMENT

Amici curiae the National Association of Manufacturers, the American Petroleum Institute, the American Coatings Association, the Organization for International Investment, and Metals Service Center Institute have no parent corporations, and no publicly held company owns more than 10 percent of their stock.

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INTEREST OF *AMICI CURIAE*

Amici curiae the National Association of Manufacturers, the American Petroleum Institute, the American Coatings Association, the Organization for International Investment, and Metals Service Center Institute have an important interest in this case.[1]

This case presents the question whether an administrative agency – here, the U.S. Environmental Protection Agency ("EPA") – may reinterpret a consent decree to expand its authority beyond the statutory limits imposed by Congress. In approving EPA's ability to assess penalties on the basis of foreign emissions from engines that never entered the United States, the D.C. Circuit construed a consent decree whose express terms said nothing about that authority. Instead, the court relied on purportedly ambiguous language in the consent decree in permitting EPA to impose extraterritorial liability otherwise unavailable under the Clean Air Act. The D.C. Circuit's rule would impermissibly allow agencies to circumvent legislative limits on their authority and to subject defendants (including *amici*'s members) to potentially significant penalties not available under the statutory schemes administered by the agencies.

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[1] Pursuant to Rule 37.2(a), *amici* certify that counsel of record for the parties received timely notice of the intent to file this brief and have granted consent, which is on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than *amici* or its counsel made such a monetary contribution.

Amici are leading trade associations and business organizations whose members are sometimes subject to enforcement actions under federal environmental laws and other regulatory statutes and often resolve such actions by entering into consent decrees. Some of *amici*'s members are subject to complex consent decrees with EPA that include substantial stipulated penalty provisions. *Amici* seek to ensure that regulated parties are not subject to liability in excess of statutorily authorized limits, on the basis of ambiguous provisions in consent decrees.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The mission of the National Association of Manufacturers is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The American Petroleum Institute is a nationwide, not-for-profit association representing over 625 member companies engaged in all aspects of the oil and gas industry, including science and research, exploration for and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products. The American Petroleum Institute regularly advocates for its members' interests concerning environmental laws and regulations and other regulatory programs before administrative agencies, Congress, and the courts.

The American Coatings Association is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors.

The Organization for International Investment is a nonprofit business association in Washington, D.C. representing the United States operations of many of the world's leading global companies, which "insource" millions of American jobs. The Organization for International Investment advocates for fair, non-discriminatory treatment of foreign-based companies and works to promote policies that will encourage them to establish United States operations, increase American employment, and boost United States economic growth.

More than 100 years strong, Metals Service Center Institute ("MSCI") is the broadest-based, not-for-profit association serving the industrial metals industry. As the premier metals trade association, MSCI provides vision and voice to the metals industry, along with the tools and perspective necessary for a more successful business. Its 400 member companies have over 1,500 locations throughout North America.

SUMMARY OF ARGUMENT

This case presents the important and recurring question whether an agency may reinterpret a consent decree to expand its authority beyond its statutory limits and thereby circumvent congressionally imposed boundaries on the agency's power. Here, the D.C. Circuit allowed EPA to broaden a consent decree to do exactly that and to impose a penalty of more than $62 million for foreign

engine emissions, even though the Clean Air Act limits EPA's territorial jurisdiction to the United States. Such an approach creates a blueprint for impermissible agency overreaching in violation of the separation of powers.

An administrative agency derives its power solely from delegations enacted by Congress. The decision below flies in the face of this fundamental principle, by permitting the agency to construe a consent decree to extend administrative power beyond the statutory limits imposed by Congress.

That principle is especially salient where, as here, the agency seeks to enlarge its authority extraterritorially. This Court has repeatedly noted the special considerations that militate against construing legislation as having international application, and those concerns are magnified when an agency construes a consent decree to expand its power in a way that circumvents clear congressional limits on that agency's jurisdiction. Such an action by any agency is particularly inappropriate where the agency seeks to play an unauthorized foreign policy role.

This case has broad implications for consent decrees in the environmental field and elsewhere. Federal agencies are parties to thousands of consent decrees, which are an extremely common way for agencies to resolve enforcement actions. Given the practical realities of administrative enforcement, regulated parties often have little choice but to resolve a matter via a consent decree rather than to contest it on the merits. If agencies are able to reinterpret the terms in such decrees to allow them freedom to operate beyond legislative limits, they

will effectively have license to bypass statutory restrictions imposed by Congress. The question presented thus involves an important and recurring issue.

This Court should grant review to make clear that an agency may not reinterpret a consent decree to expand its authority beyond the statutory limits imposed by Congress.

REASONS FOR GRANTING THE WRIT

A. Agencies Should Not Be Permitted To Reinterpret Consent Decrees To Circumvent Congressionally Imposed Limits On Their Authority.

The federal government is one of limited and enumerated powers. "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (Marshall, C.J.). This principle applies with equal force to the so-called modern administrative state.

Administrative agencies are creatures of statute, with no constitutional or common law existence or authority, but only those powers conferred upon them by Congress. This Court has instructed that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Id.* at 374-75.

Thus, this Court has stressed the need to "tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it . . . ." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

Just last Term, this Court voiced strong concerns regarding EPA's attempt to expand its power without clear statutory authorization. *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."). This Court explained that, "[u]nder our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them." *Id.* at 2446. This Court added that, to permit an agency to modify clear statutory limits on its power "would deal a severe blow to the Constitution's separation of powers." *Id.*

The decision below violates this principle and warrants this Court's review, because it creates a blueprint by which agencies may expand their authority to bypass legislative limits imposed by Congress. There is no dispute in this case that the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (the "CAA"), in relevant part limits EPA's enforcement authority over engine emissions to engines introduced into the commerce of the United States. *See id.* § 7522(a)(1). EPA acknowledges that, under the CAA, it may not regulate foreign emissions:

> EPA's regulatory interest and jurisdiction only extend to engines that are or will be introduced in commerce in the U.S., and EPA cannot require an engine manufacturer to comply with the emissions, certification, labeling, and other requirements of 40 C.F.R. Part 89 for engines that are not or will not be introduced into U.S. commerce.

Brief of Respondent U.S. Environmental Protection Agency, *Indep. Equip. Dealers Ass'n v. E.P.A.*, 372 F.3d 420 (D.C. Cir. 2004) (No. 03-1020), 2003 WL 23003369, at *38-39 ("2003 EPA Brief").

EPA has conceded that "nothing in the CAA gives EPA authority to enforce requirements of domestic law against engines produced overseas for sale overseas." 2003 EPA Brief, at *2; *see also id.*, at *40 ("There is nothing in the CAA that suggests that EPA has authority over engines that are not imported into the United States.") (citing *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

Yet EPA has aggressively construed language in the consent decree in this case to provide it with exactly the authority that Congress has expressly denied it. An agency may not use a consent decree in this manner. A court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *Sys. Fed'n No. 91, Ry. Emp. Dep't AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961).

This limitation arises because consent decrees "must further the objectives of the law upon which the complaint was based." *Frew ex. rel. Frew v. Hawkins*, 540 U.S. 431, 436 (2004) (citing *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986)). Indeed,

consent decrees may not be approved if the parties "agree to take action that conflicts with or violates the statute upon which the complaint is based." *Int'l Ass'n of Firefighters*, 478 U.S. at 526; *see also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984) ("a district court cannot enter a disputed modification of a consent decree . . . if the resulting order is inconsistent with [the] statute [being enforced]").

This Court should grant review to vindicate the fundamental separation of powers principles presented by this case. Consent decrees are heavily negotiated by both parties and not entered into lightly. If a court can rewrite the language and intent of the decree, then it removes the defendant's reason for entering into one in the first place. An agency should not be permitted to reinterpret a consent decree to expand its authority beyond the limits established by Congress.

B. The Foreign Policy Implications Of This Case Make This Court's Review Especially Appropriate.

This Court's review is particularly warranted in this case because EPA's power-grab would extend the agency's authority extraterritorially, with foreign policy implications that the agency is not equipped to take into account.

This Court has noted that there is a "presumption against extraterritorial application" of United States laws, which "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (internal quotation marks

and citation omitted). For a court to find that a statute intrudes into the "delicate field of international relations there must be present the affirmative intention of the *Congress* clearly expressed. *It alone* has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Id.* (emphasis added; internal quotation marks and citation omitted). "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.* (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)); *see also Arabian Am. Oil*, 499 U.S. at 248 (citing canon of statutory interpretation that there is a general presumption against extraterritorial application of federal statutes) (citations omitted); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) ("this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations"). The presumption recognizes that "United States law governs domestically but does not rule the world." *Kiobel*, 133 S. Ct. at 1664 (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

Given that Acts of Congress are not accorded extraterritorial application in the absence of a clear legislative statement to the contrary, it is particularly inappropriate for agencies to use consent decrees to extend their authority internationally. Indeed, the Clean Air Act is not merely silent on the subject of its extraterritoriality; rather, the statute specifically restricts EPA's jurisdiction to the domestic United States. *See* 42 U.S.C. § 7522(a)(1). Yet the decision below would

establish a back-door mechanism for EPA to regulate emissions throughout the world, without congressional authorization and in fact contrary to the directives of the Clean Air Act. Such actions would inevitably lead to foreign relations friction and issues beyond Congress' grant of authority to EPA.

This Court has long been sensitive to agency actions that carry international implications without clear congressional authorization. In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976), for example, this Court invalidated a Civil Service Commission regulation denying federal employment to non-citizens because, even though the agency was not found to have acted beyond its statutory mandate, the decision to bar aliens from federal employment was not a decision that administrative officials were competent to make. This Court noted that the Civil Service Commission "performs a limited and specific function" and that its "only concern" was "the promotion of an efficient federal service." *Id.* at 114. The Court held that the Commission could not justify its rule because it "has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies. Indeed, it is not even within the responsibility of the Commission to be concerned with the economic consequences of permitting or prohibiting the participation by aliens in employment opportunities in different parts of the national market." *Id.*; *see also Empagran S.A.*, 542 U.S. at 164 (noting that one goal in statutory construction is to avoid "unreasonable interference" with foreign relations).

The foreign policy concerns raised by EPA's efforts to bypass the congressional limits on its authority under the Clean Air Act underscore the need for this Court's review.

C. The Questions Presented Are Important and Recurring.

The questions presented are of wide significance and will affect many other parties and many other statutes. Since the beginning of 1998, EPA has entered into approximately 450 consent decrees under the environmental statutes it administers,[2] including 175 consent decrees under the Clean Air Act alone.[3] Approximately 70% of environmental enforcement actions are resolved by consent decree.[4]

Consent decrees are also prevalent in antitrust and securities enforcement. "The vast majority of civil antitrust cases brought by the Antitrust Division are resolved by consent decree."[5] And the

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[2] *See* EPA, Civil Cases and Settlements, available at http://cfpub.epa.gov/enforcement/cases/index.cfm?templatePage=1 (last visited February 7, 2015).

[3] EPA, Civil Cases and Settlements by Statute, available at http://cfpub.epa.gov/enforcement/cases/index.cfm?templatePage=12&ID=1&sortby=&stat=Clean%20Air%20Act (last visited February 7, 2015).

[4] Kristi Smith, *Who's Suing Whom: A Comparison of Government and Citizen Suit Environmental Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENVTL. L. 359, 387 (2004).

[5] John M. Nannes, *Termination, Modification, and Enforcement of Antitrust Consent Decrees*, 15 ANTITRUST 55, 55 (2000).

Securities and Exchange Commission resolves over 90% of its cases by consent decrees.[6]

In short, the Government itself has recognized that "[f]ederal government agencies utilize consent judgments extensively."[7] There are currently "thousands of such consent judgments," involving such agencies as the Federal Trade Commission, the Food and Drug Administration, the Department of Justice, and many other agencies.[8]

This Court has endorsed the use of consent judgments in enforcement of federal laws, citing the "time, expense, and inevitable risk of litigation" that parties can avoid through the consent judgment vehicle. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). However, both Congress and this Court have recognized the potential risks of consent decrees – risks that warrant the grant of *certiorari* in this case.

The decision of a regulated party to enter into a consent decree with an administrative agency usually reflects the practical reality that the agency enjoys substantial leverage. Targets of enforcement actions often face massive potential penalties and highly technical liability questions. A regulated party frequently has little choice but to settle and to accept whatever ambiguous language an agency proposes to insert in a consent decree. As one scholar

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[6] *S.E.C. v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983); *see also* Brief of Petitioner Securities and Exchange Commission ("SEC Citigroup Appellate Brief") 23, *Securities and Exchange Commission v. Citigroup Global Markets Inc.*, 2012 WL 1790380 (2d Cir. 2012).

[7] SEC Citigroup Appellate Brief at 23.

[8] *Id.* at 29.

has observed, "[s]uch 'arm-twisting' succeeds, and evades judicial or other scrutiny, in part because companies in pervasively regulated industries believe that they cannot afford to resist agency demands."[9] A party that refuses to enter a consent decree may face retaliation by the agency. "Whether or not such charges are accurate, the perception leads companies to accede to the agency's wishes even though they may lack any basis in law or fact."[10]

Such pressures frequently result in "the strong-arming of regulated parties into 'voluntary compliance.'" *Sackett v. EPA,* 132 S. Ct. 1367, 1374 (2012). Justice Alito has explained the Hobson's choice available to regulated parties under the Clean Water Act:

> The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease

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[9] Lars Noah, *The Little Agency That Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 909-10 (2008); *see also* Lars Noah, *Administrative Arm-Twisting In The Shadow Of Congressional Delegations Of Authority*, 1997 WIS. L. REV. 873.

[10] *See* Noah, *The Little Agency That Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. at 909-10.

> construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the compliance order). . . . [T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.

Id. at 1375 (concurring opinion).

Similarly, under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), EPA is permitted to impose sanctions on potentially responsible parties for hazardous waste sites amounting to treble clean-up costs plus penalties of $37,500 per day for noncompliance, and EPA can defer a judicial enforcement action for years while those potential liabilities mount. *See* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3); 40 C.F.R. § 19.4. If EPA were to wait the full five years permitted under the statutory limitations period before bringing an enforcement action, a party would be liable for nearly $68.5 million in daily penalties, plus three times the clean-up costs incurred by EPA. The creation of such a huge contingent liability would create an immediate financial impact on even the largest regulated parties – even if they were ultimately to prevail in a subsequent judicial action adjudicating their liability.

Hence, a party that declines the offer of a consent decree from EPA and seeks to vindicate its position in a subsequent EPA enforcement action can expect to suffer immediate financial harms, in the form of higher borrowing costs, a lower stock price, and other adverse market impacts. One district court found that EPA has issued over 1,700 administrative orders during the last three decades to more than 5,400 parties compelling response actions costing an aggregate $5.5 billion, all in non-emergency situations. *General Elec. Co. v. Jackson*, 595 F. Supp.2d. 8, 33 (D.D.C. 2009), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010). Yet only a handful of parties have ever sought or received independent judicial review of an EPA administrative order under CERCLA. As the district court noted, "empirical evidence concerning actual instances of UAO [Unilateral Administrative Order] noncompliance is scarce because very few publicly-traded firms have chosen not to comply with UAOs." *Id.* at 23.

When statutes afford agencies overwhelming power to coerce compliance, it is not surprising that many enforcement actions culminate in consent decrees. Nor is it surprising that many of the details governing the conduct of regulated parties are established in the netherworld of consent decree negotiations.

As a result, agencies frequently have the opportunity to include ambiguous terms and conditions in consent decrees that they can later reinterpret to expand their authority beyond the statutory limits imposed by Congress. One scholar has documented numerous instances in which federal agencies have sought "voluntary concessions" beyond what they could seek pursuant to their

congressionally granted authority.[11] The practice "saddles parties with more onerous regulatory burdens than Congress had authorized, accompanied by a diminished opportunity to pursue judicial challenges."[12] Another scholar has warned that such agency conduct runs "counter to democratic legitimacy and transparency values that inhere in official agency action."[13]

If the D.C. Circuit's judgment is permitted to stand unreviewed by this Court, it will provide agencies with a readily available recipe for circumventing legislative restrictions on their authority. Regulated parties will be subject to an impermissible bait-and-switch: they may enter a consent decree (waiving their right to contest whether a violation occurred and agreeing to potentially substantial remedial provisions) in the hopes of achieving finality, but under the D.C. Circuit's decision the agency will subsequently be able to reinterpret the decree and punish the company for conduct that the agency never had the authority to regulate in the first place. Regulated parties are entitled to the certainty that a settlement

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[11] *See* Noah, *Administrative Arm-Twisting In The Shadow Of Congressional Delegations Of Authority*, 1997 WIS. L. REV. at 876-903; Noah, *The Little Agency That Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. at 910 (noting FDA consent decrees with pharmaceutical companies that included provisions beyond FDA's authority).

[12] *See* Noah, *Administrative Arm-Twisting In The Shadow Of Congressional Delegations Of Authority*, 1997 WIS. L. REV. at 875.

[13] Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529, 559 (2009).

is intended to provide, and the decision below allows an agency to repudiate, after the fact, the bargain reflected in the decree in the first place.

Such untrammeled agency power would run contrary to the legislative schemes enacted by Congress under Article I. It would also run contrary to the Tunney Act, the specific statute regulating judicial entry of consent decrees. In the Tunney Act, Congress explicitly created a judicial role for the approval of consent decrees and authorized courts to reject decrees even when agencies insisted they were appropriate. *See*, *e.g.*, 15 U.S.C. § 16(e)(1) (2004) ("Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest.").

The decision below threatens the separation of powers, foreign policy concerns, and the valid interests of private parties in avoiding liability in excess of statutorily authorized limits. The questions presented are of broad importance and will affect many other parties and statutory schemes.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted.

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