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 a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Petitioner Volvo Powertrain requests review of EPA's assertion of authority to regulate nonroad engine emissions outside the United States. Respondents concede that in imposing $62 million in penalties against Petitioner for 7,262 engines that were neither built nor sold in America, EPA exercised extraterritorial enforcement authority not granted to it under the Clean Air Act ("CAA").[1] EPA's misuse of the consent decree process to achieve this outcome marks another "enormous and transformative expansion of EPA's regulatory authority without clear congressional authorization" that demands the Court's attention. *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2432 (2014).

Petitioner did not consent to extraterritorial enforcement in the Consent Decree ("Decree"). Respondents' claim of consent rests solely on the fact that Paragraph 110 of the Decree refers to "all" nonroad engines, which they contend should be read to include nonroad engines produced and sold overseas. U.S. Resp. 12; CARB Resp. 7. But the Court has rejected the argument that such general terms bestow extraterritorial power,[2] and Respondents ignore the many uses of the word "all" elsewhere in the Decree and the CAA without extraterritorial import. By resting its argument on this commonplace word, EPA would establish a rule whereby it could exercise extraterritorial power under any number of the 70

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[1] The engines were built in Sweden for Volvo Penta – a foreign affiliate of Volvo Powertrain that was not a signatory to the Decree – and sold in markets outside the United States.

[2] *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013).

percent of all enforcement actions it resolves by consent decree.

Respondents argue that Petitioner brought itself within EPA's jurisdiction when its affiliate sought certificates of conformity for the foreign engines. U.S. Resp. 19; CARB Resp. 7. But this argument ignores the fact that manufacturers seek certificates of conformity for engine *families*, not individual engines. *See* 40 C.F.R. § 1054.230. As such, Respondents' argument would grant EPA extraterritorial enforcement authority over *all* foreign engine emissions for any manufacturer that wishes to market *some* of its engines in the United States. The CAA is to the contrary. Under the statute, the only power granted to EPA with respect to nonconforming foreign engines is the revocation of the certificate to prevent their importation into the United States. *See* 42 U.S.C. § 7525(b)(2)(A); 40 C.F.R. § 89.126(e).

EPA's misuse of the Decree to extend its enforcement authority also demonstrates the need for the Court to resolve the circuit split that has arisen over the proper rule of construction for consent decrees. Respondents do not deny that the Decree expressly incorporates the CAA-defined term, "prohibited acts," in setting forth the scope of EPA's enforcement authority, and they do not deny that "prohibited acts" with respect to engine emissions is limited to engines sold in the United States. U.S. Resp. 17. But Respondents contend that the Court need not consider this statutory language because the Decree's statement that EPA "may exercise" its territorially-limited statutory authority to "tak[e] enforcement action against prohibited acts" does not preclude EPA from asserting extraterritorial authority not granted in the

CAA. *Id.* This "four corners" view of regulatory consent decrees – while arguably consistent with the rule adopted in the D.C. Circuit – is contrary to a proper reading of *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 240 (1975) and the more reasoned authority of the Second, Third, Sixth, Ninth, and Tenth Circuits. Pet. 28-30.

The Petition should be granted.

I. THE D.C. CIRCUIT OPINION CREATES A BLUEPRINT FOR IMPERMISSIBLE AGENCY OVERREACH IN VIOLATION OF THE SEPARATION OF POWERS.

Federal agencies use consent decrees extensively, with literally thousands of such decrees currently in force. *See* Br. for National Association of Manufacturers, *et al.* as *Amici Curiae* Supporting Pet. 11-12 (Mar. 9, 2015). As Professor Tribe explained for a coalition of *amici* supporting the Petition, if agencies (or courts nudging those agencies along) are able to construe such decrees to give the agencies freedom to operate beyond legislatively-fixed boundaries, those agencies will effectively be given license to bypass statutory restrictions imposed by Congress, creating a blueprint for impermissible agency overreach in violation of the separation of powers. *See id.* at 4-8.

The issue before the Court is whether such agency overreach will be allowed. EPA does not have the statutory authority to impose the $62 million in penalties levied against the Petitioner. EPA's claim that the Decree extends its regulatory power into foreign countries cannot stand. "An agency may not confer power upon itself." *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986). "Where Congress has established a clear line, the agency

cannot go beyond it ….” *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013). That line under the CAA is drawn at the country’s territorial borders.

A. The Consent Decree Does Not Include A Grant of Extraterritorial Enforcement Authority.

Respondents cannot point to any language in the Decree that expressly grants EPA extraterritorial enforcement power. Nor can they point to anything in the history of the underlying enforcement action that even hints at a concern about foreign engine emissions. To the contrary, that enforcement action was initiated because of alleged emissions violations for engines sold *in the United States*, Pet. 6, and EPA defended the resulting Decree in court as “further[ing] the Congressional goals embodied in the Clean Air Act” “to protect and enhance the quality of *the Nation’s air resources* ….” Pet. 18.

1. The Consent Decree’s Use of the Word “All” Does Not Confer Extraterritorial Jurisdiction.

Given the CAA’s territorial focus and the presumption against extraterritorial application of U.S. law, the absence of any clear grant of extraterritorial authority in the Decree should be dispositive. Respondents’ argument to the contrary rests entirely upon a single word in the Decree: the word “all” in Paragraph 110. Respondents argue that by referring to “all” nonroad engines, Paragraph 110 extends EPA’s reach to nonroad engines manufactured and sold overseas. U.S. Resp. 12.

As explained in the Petition, however, Respondents' interpretation of "all" in Paragraph 110 cannot be squared with the use of the same word elsewhere in the Decree and in the CAA and implementing regulations, and their interpretation is directly contrary to the Court's holding that extraterritorial grants of authority are not conferred by such general terminology.

The Decree uses the same phraseology, "all nonroad engines," in both Paragraph 60 and Paragraph 110. Pet. 19-20. Paragraph 60 is the operative paragraph setting forth the nonroad engine pull-ahead requirement. *See* App. 103a ("All Nonroad CI Engines manufactured by [Petitioner] on or after January 1, 2005 … shall meet [emission standards] that would apply as if the engines were Model 2006 engines"). While Respondents seek to soften the blow of EPA's extraterritorial power play by focusing on the language in Paragraph 110 requiring that Petitioner also seek a certificate of conformity, there is no such certification requirement in Paragraph 60. Accordingly, if Respondents' reading of "all" were correct, Paragraph 60 would require Petitioner (and the other engine manufacturers who signed similar decrees) to submit to EPA's pull-ahead requirement for engines manufactured exclusively for foreign markets, without regard to certification.

Likewise, the CAA and its implementing regulations regularly use the word "all" in discussing engines covered by the CAA. Pet. 20. But Respondents concede that these uses of the word "all" carry no extraterritorial significance – as they must, because the Court has rejected such expansive readings of the word, holding that "it is well established that generic terms like 'any' or 'every' do

not rebut the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1665; Pet. 19.

Respondents have no answer to any of these points.

2. The Consent Decree's Enforcement Provision Is Expressly Tied To The CAA's Territorial Limits.

Nor do Respondents explain how EPA obtains extraterritorial power where the specific enforcement provision in the Decree governing nonroad engines makes *no* reference to extraterritorial enforcement. EPA's authority to enforce the nonroad engine pull-ahead provisions is set forth in Paragraph 62. Far from granting EPA extraterritorial power, Paragraph 62 expressly limits EPA's enforcement power to conduct that would constitute a "prohibited act" – a CAA-defined term that applies to the sale of nonconforming engines *in the United States*. *See* 42 U.S.C. § 7522(a)(1).[3]

Respondents argue that because Paragraph 62 uses the words "may exercise," it should not be read as excluding an additional grant of extraterritorial enforcement authority. U.S. Resp. 17. But Respondents do not point to any such grant elsewhere in the Decree, and their assertion of enforcement powers without regard to Paragraph 62 would render that paragraph mere surplusage. Further, Respondents ignore Paragraph 63, which plainly excludes such non-textual assertions of authority, stating that "[e]xcept as specified, this Decree does not modify,

[3] Respondents note that "prohibited acts" also includes violations of CAA testing, reporting, and inspection provisions, U.S. Resp. 21, but they do not contend that Petitioner violated any of those provisions.

change, or limit the rights and obligations of the Parties under the Act and EPA's regulations with respect to the control of emissions from Nonroad CI Engines." App. 104a.

Respondents refer generally to the stipulated penalty provisions in the Decree, *see* App. 130a-143a, but they do not claim that those provisions contain a grant of extraterritorial enforcement authority. U.S. Resp. 17-18. Instead, once again, Respondents argue that the purported absence of an express territorial limitation of EPA's enforcement authority allows EPA to exercise broad power to take whatever enforcement action it deems appropriate. *Id.* But EPA has it backwards, and this assertion of unlimited power beyond EPA's statutory mandate is exactly why the Petition should be granted.

3. EPA's Claimed Difficulty In Tracking Mistakenly Certified Engines Does Not Allow It To Rewrite the Consent Decree Or The CAA.

Respondents' final argument does not rest upon any language in the Decree but on the claim that a grant of extraterritorial enforcement power should be read into the Decree because EPA cannot effectively track foreign, nonconforming nonroad engines after a certificate of conformity has been granted. U.S. Resp. 16-17. The obvious answer to this concern, however, is that EPA should only grant certificates to conforming engines. That is exactly what Paragraph 62 of the Decree envisions in authorizing EPA to exercise its certification authority as if the pull-ahead provisions were emissions standards adopted under the CAA. App. 104a. There is no basis for the Court to conclude that the parties drafted the Decree based upon

an expectation that EPA would mistakenly certify engines that did not meet governing standards.[4]

EPA's purported practical dilemma in tracking nonroad engines is no different than that which would face EPA in the ordinary course if it mistakenly certified foreign engines outside the Decree. But the CAA does not authorize EPA to impose extraterritorial penalties based upon the possibility that EPA will lose track of improperly-certified foreign engines, and such power should not be granted here by agency *fiat*.

B. The Consequences of the D.C. Circuit's Ruling Extend Far Beyond This Case.

Respondents argue that the Court should not grant the Petition because the parties' dispute involves a single consent decree. U.S. Resp. 22; CARB Resp. 7. But Respondents' arguments extend far beyond the present case. First, by placing such import on the commonplace word "all," Respondents would establish a precedent whereby federal agencies could use consent decrees to confer extraterritorial enforcement authority upon themselves without any meaningful judicial or congressional control. Second, by claiming jurisdiction over all engines within an engine family for which a certificate of conformity is sought, EPA would effectively condition a foreign manufacturer's entry into the U.S. market on the acceptance of U.S. emission standards over all of its engines throughout the world.

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[4] EPA knew when it issued certificates covering the nonroad engines at issue that they were manufactured for Penta at the Powertrain facility in Sweden, but it did not suggest until years later that the engines were subject to the Decree. *See* App. 179a.

A rule of construction for consent decrees that would confer extraterritorial authority based upon the use of general terminology raises the same concerns that have caused the Court to reject such a rule for statutory construction. Respondents' suggestion that regulated entities would understand that they are submitting to extraterritorial enforcement whenever a consent decree uses a term like "all," ignores how that term is used in ordinary life. *See Small v. United States*, 544 U.S. 385, 388 (2005) ("The word 'any' considered alone cannot answer this question. In ordinary life, a speaker who says, 'I'll see any film,' may or may not mean to include films shown in another city.").

The Court can take judicial notice that EPA regularly enters into consent decrees that use such general terms. A review of CAA consent decrees posted on EPA's website reveals numerous examples: (1) a 2014 consent decree requiring MotorScience Enterprises and China-based Chi Zheng to follow a testing protocol "for all new vehicles and engines,"[5] (2) a 2011 consent decree imposing penalties on Caterpillar for the "sale of any engine" with a non-conforming emission-control device,[6] (3) a 2007 consent decree requiring Mercedes-Benz and Germany-based DaimlerChrysler to implement an emissions

[5] Consent Decree at § 16.b.ii, *United States v. Motorsciences Enterprises, Inc.*, No. 2:11-cv-08023 (C.D. Cal. Jan. 10, 2014), *available at* http://www2.epa.gov/sites/production/files/2013-08/documents/motoscience-cd.pdf.

[6] Consent Decree at § VI.22, *United States v. Caterpillar Inc.*, No. 1:11-cv-01373 (D.D.C. Sept. 7, 2011), *available at* http://www2.epa.gov/sites/production/files/documents/caterpillar11-cd.pdf.

protocol for "all Mercedes-Benz Vehicles."[7] Under Respondents' rationale, each of these decrees authorizes EPA to exercise enforcement authority in foreign countries, a proposition that would no doubt come as a great surprise to the signatories to the decrees and to the foreign countries in which they operate. Similar examples no doubt exist among the thousands of consent decrees entered into by other federal agencies.

Absent the same presumption against extra-territoriality of consent decrees as is applied to statutes, federal agencies will have broad power through the netherworld of consent decree negotiations to extend their reach into foreign countries. This expansion of regulatory power will be even more dangerous to international relations than the assertion of extraterritorial power under a statute, which at least is subject to political oversight and international diplomacy. It will threaten the legitimate sovereign interests of foreign governments, which are presumptively capable of regulating conduct within their borders. It will place federal agencies in conflict with foreign nations that have different views as to what conduct is or is not permissible. And it will invite similar assertions of power by foreign governments over conduct occurring within the United States. *See* Br. for Atlantic Legal Foundation as *Amicus Curiae* Supporting Pet. (Mar. 9, 2015).

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[7] Consent Decree at § IV.9, *United States v. DaimlerChrysler AG*, No. 1:06-cv-02172 (D.D.C. Apr. 1, 2007), *available at* http://www2.epa.gov/sites/production/files/2014-10/documents/Mercedesincanddaimler chrysler07.pdf.

Respondents' attempt to link EPA's enforcement power to a request for certificates of conformity raises similar concerns. As the Alliance of Automobile Manufacturers explains, "[g]iven the global nature of today's economy, [a manufacturer's] decision to seek a voluntary certificate of compliance from EPA so that it can sell some of its engines in the United States must not be a hook for EPA to exercise carte blanche authority over [the manufacturer's] other engines that were made, sold, and used entirely in other countries." Br. for Alliance of Automobile Manufacturers as *Amicus Curiae* Supporting Pet. 8 (Mar. 9, 2015). Engine manufacturers like Penta routinely sell engines from a single engine family in a number of countries, each of which has its own regulations governing engine emissions. The fact that some of the engines are sold in the United States gives EPA no greater authority over those sold elsewhere than the fact that others of the engines might be sold in China gives the Chinese government a say over the allowable emissions of engines sold in the United States. Respondents' contention to the contrary is akin to the argument that a foreign company that lists its shares on a U.S. stock exchange is subject to U.S. laws for alleged misconduct in securities transactions overseas, an argument rejected by the Court in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 251, 267 (2010). *See also Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 178-79 (2d Cir. 2014) (applying *Morrison*).

II. THE D.C. CIRCUIT'S INTERPRETATION OF THE DECREE WITHOUT REFERENCE TO THE CAA REFLECTS A CIRCUIT SPLIT THAT SHOULD BE RESOLVED BY THE COURT.

Forty years have passed since the Court's conflicting opinions in *United States v. Armour & Co.*, 402 U.S. 673 (1971) and *ITT Continental Baking Co.*, 402 U.S. 223 (1975) on the proper rule of construction for consent decrees.[8] The D.C. Circuit interprets these opinions as requiring consent decrees to "be construed basically as contracts without reference to the legislation the [Agency] originally sought to enforce." *Paralyzed Veterans of Am., Inc. v. Washington Metro. Area Transit Auth.*, 894 F.2d 458, 461 (D.C. Cir. 1990); *see also* App. 14a (interpreting Decree as a contract). This interpretation explains the D.C. Circuit's failure below to consider the statutory definition of "prohibited acts" in construing the territorial limits to EPA's enforcement power under the Decree. The Second, Third, Sixth, Ninth, and Tenth Circuits, however, hold that consent decrees must be construed against the backdrop of the underlying statute. Pet. 29-30. Under these circuits' holdings, the use of the term "prohibited acts" in the Decree is of central importance, and EPA's assertion of extraterritorial enforcement power under the Decree likely would have been rejected.

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[8] While Respondents argue that there is no conflict between these cases, U.S. Resp. 24, the four dissenting justices in *ITT Continental Baking* felt differently. *See ITT Cont'l Baking Co.*, 420 U.S. at 247 (Stewart, J., dissenting) (arguing that majority's "novel approach" in construing consent decrees "is directly contrary to the 'four corners' rule of *Armour*").

The fact that the different circuits each claim adherence to this Court's rulings does not, as Respondents argue, avoid this conflict. To the contrary, it demonstrates why further guidance from this Court is needed.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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