No. 97-1897

In the Supreme Court of the United States

OCTOBER TERM, 1997

VISTA PAINT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant in a civil enforcement action under the Clean Air Act (42 U.S.C. 7401 *et seq.*) is barred from asserting as an affirmative defense that the standards contained in a State Implementation Plan approved by the Environmental Protection Agency are technologically or economically infeasible.

2. Whether the district court acted within its discretion in declining to impose the burden of proof on either party in assessing a civil penalty against petitioner for violations of the Clean Air Act (42 U.S.C. 7401 *et seq.*).

3. Whether the district court acted within its discretion by ordering the parties to submit their trial witnesses' direct testimony by affidavit and to make the witnesses available for cross-examination.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) affirming the judgment of the district court is unpublished, but the decision is noted at 129 F.3d 129 (1997) (Table). The district court's opinion (Pet. App. 4a-33a) setting civil penalties is unreported. An earlier opinion of the court of appeals (Pet. App. 34a-45a) concerning, *inter alia*, the district court's dismissal of petitioner's affirmative defenses is unpublished, but the decision is noted at 976 F.2d 739 (Table). The district court's order (Pet. App. 89a-92a) concerning petitioner's affirmative defenses is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1997. A petition for rehearing was

denied on January 23, 1998. Pet. App. 3a. Justice O'Connor granted petitioner an extension of time to and including May 23, 1998, to file its petition for a writ of certiorari. The petition was filed on May 26, 1998 (a Tuesday after a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this action under the Clean Air Act, 42 U.S.C. 7401 *et seq.*, to enforce provisions of California's State Implementation Plan (SIP) limiting the levels of volatile organic compounds (VOCs) in certain paints. VOCs are a principal source of ozone in the atmosphere. The VOC limits were approved by the federal Environmental Protection Agency (EPA) in 1985 as part of the California SIP. Petitioner Vista Paint Corporation, a paint manufacturer and retailer, was still violating the VOC limits in 1987. This civil enforcement action seeks the imposition of monetary penalties for petitioner's continued violation of the VOC limits and for petitioner's related non-compliance with an EPA information request.

1. The Clean Air Act, as amended, requires the EPA to promulgate National Ambient Air Quality Standards (NAAQS) for various air pollutants. 42 U.S.C. 7409. It also requires each State to submit to the EPA a plan to implement, maintain, and enforce those standards. 42 U.S.C. 7410(a)(1). The EPA is required to approve any such SIP that comports with the Clean Air Act. 42 U.S.C. 7410(k)(3). Once the EPA approves a SIP or SIP revision, the EPA may enforce its provisions as federal law. 42 U.S.C. 7413(a)(1). See *Train* v. *Natural Resources Defense*

Council, 421 U.S. 60, 63-67 (1975); *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 265-266 (1976).[1]

Section 307(b)(1) of the Clean Air Act provides for judicial review of certain actions by the EPA, including its promulgation of any NAAQS and its approval of any SIP or SIP revision. 42 U.S.C. 7607(b)(1). The petition for review must be filed in the court of appeals within 60 days after the date on which notice of the EPA's action appeared in the Federal Register. *Ibid.* The Act further provides that any "[a]ction of the [EPA] Administrator with respect to which review could have been obtained under [Section 307(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. 7607(b)(2).

The EPA has the authority to require any person subject to the Clean Air Act to establish and maintain records and to provide such information as the EPA may reasonably require to determine whether a violation of the Act has occurred. 42 U.S.C. 7414(a)(1)(A), (B) and (G).

A person who violates a SIP or refuses to comply with an information request is liable for a civil penalty of up to $25,000 for each day of violation. 42 U.S.C. 7413(b).

2. The State of California delegates primary responsibility for air pollution control to local and regional authorities. In 1984, two such authorities, the South Coast Air Quality Management District

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[1] Under the Clean Air Act, the States retain the authority to adopt their own air pollution control standards and limitations, as long as those standards and limitations are no less stringent than those imposed by federal law. 42 U.S.C. 7416; see *Union Elec.*, 427 U.S. at 265.

and the San Diego County Air Pollution Control District, adopted rules governing the VOC content of non-flat architectural coatings, which are more commonly known as gloss and semi-gloss paint. The rules specify that each liter of such paint may contain no more than 250 grams of VOC. The EPA approved those rules as part of the California SIP on January 24, 1985. 50 Fed. Reg. 3338 (1995).[2]

3. On June 12, 1987, petitioner admitted to the EPA that it was still selling paint that violated the VOC limits in the California SIP. The EPA, pursuant to Section 113(a)(1) of the Clean Air Act, 42 U.S.C. 7413(a)(1), issued a Notice of Violation to petitioner. The EPA also sent information requests to petitioner, pursuant to Section 114 of the Clean Air Act, 42 U.S.C. 7414, seeking documentation of the quantity, sales volume, and VOC content of all non-compliant paint that petitioner manufactured and sold from July to October 1987. The EPA warned petitioner of the $25,000 per day penalty for not providing the information in a timely manner. Pet. App. 8a-9a.

Petitioner continued to manufacture non-compliant paints until June 1987 and continued to sell non-compliant paints until October 1987. But petitioner did not file the reports required by the EPA that would have reflected those sales. Pet. App. 9a, 15a-16a.

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[2] Both districts later adopted more lenient versions of those rules and submitted them to the EPA for approval. But the EPA did not approve them. The revised rules therefore have no effect on the enforceability of the VOC limits approved by the EPA in 1985 as part of the California SIP. 42 U.S.C. 7416; *General Motors Corp.* v. *United States*, 496 U.S. 530, 540 (1990).

4. In 1990, the United States, at the request of the EPA, brought this enforcement action against petitioner under the Clean Air Act. Pet. App. 73a-79a. The government contended that petitioner had failed to comply with the VOC limits, in violation of 42 U.S.C. 7410, and had failed to comply with an EPA information request, in violation of 42 U.S.C. 7414. *Ibid*.

Petitioner asserted various affirmative defenses and counterclaims alleging that the VOC limits were invalid under federal and state law.[3] The district court dismissed all of petitioner's so-called "invalidity" defenses and counterclaims. Pet. App. 91a-92a.

The district court subsequently granted the government's motion for summary judgment, concluding that petitioner had violated the Clean Air Act by failing to comply with the VOC limits and with the EPA's information request. Pet. App. 69a-72a. The court imposed civil penalties totalling more than $3 million. *Id*. at 19a.

5. The Ninth Circuit affirmed in part and reversed in part. Pet. App. 34a-45a. The court held that the district court had properly dismissed petitioner's affirmative defenses and counterclaims contesting the validity of the VOC limits, explaining that petitioner had "ample opportunity" to "challenge EPA's approval of the inclusion of those rules in the SIP pursuant to section 307(b)(1) of the [Clean Air Act]," 42 U.S.C. 7607(b)(1). Pet. App. 36a. The court also

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[3] Petitioner contended that the VOC limits were void as contrary to the California Health and Safety Code, the California Environmental Quality Act, and the state and federal constitutions. See Vista C.A. Br. 17-18, *United States* v. *Vista Paint Corp.*, No. 92-55160 (9th Cir.).

held that the district court had properly granted summary judgment on petitioner's liability under the Clean Air Act for selling and offering for sale non-compliant paint and for failing to comply with the EPA's information request. *Id.* at 37a-38a.

The court of appeals held that summary judgment should not have been granted, however, with respect to the amount of petitioner's civil penalty. Pet. App. 45a. The court remanded the case for trial on various disputed factual issues relating to the appropriate amount of the penalty. Those issues included the economic impact of the penalty on petitioner's business, whether petitioner had made good faith efforts to comply with the VOC limits, the seriousness of petitioner's violations, and whether the penalty should be reduced as a result of the EPA's inaction on the proposed revisions to the VOC limits sub- mitted by the two regional pollution-control districts (see note 2, *supra*). *Id.* at 39a-43a; see 42 U.S.C. 7413(e)(1) (non-exclusive list of factors to be considered by courts in imposing penalties under Clean Air Act).[4]

This Court denied certiorari. 510 U.S. 826 (1993).

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[4] Section 113(e)(1) of the Clean Air Act, 42 U.S.C. 7413(e)(1), provides, in pertinent part, that

> the court * * * shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence * * * , payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

6. On remand, the district court held that neither party would bear the burden of proof at the bench trial on issues relating to the amount of the penalty. Pet. App. 87a. The court explained that the determination of an appropriate penalty involved the "weighing and balancing [of] the proper statutory factors and common law factors against the facts which [the court] finds from all the evidence admitted at trial." *Ibid.* The court directed the parties to submit the trial testimony of all direct witnesses by affidavit and to make those witnesses available during trial for cross-examination. *Id.* at 80a-81a.

In April 1996, the district court entered findings of fact and conclusions of law, which determined that petitioner should be assessed a civil penalty of $1,111,250—$559,000 for petitioner's continued sale of non-compliant paint, in violation of 42 U.S.C. 7410, and $552,250 for petitioner's failure to respond to the EPA's information request, in violation of 42 U.S.C. 7414. Pet. App. 4a-33a. The district court separately addressed each of the penalty factors on which the court of appeals had ordered a trial. *Id.* at 24a-32a.

First, the district court concluded that petitioner, as "an expanding business with increasing annual gross sales revenues in the range of 45 to 47 million dollars annually," was fully capable of paying the $1,111,250 penalty. Pet. App. 25a. The court concluded that a penalty of that size would neither "undermine [petitioner's] financial structure" nor "place [petitioner] in jeopardy of 'going-out-of-business.'" *Ibid.*

Second, as for whether petitioner had made good faith efforts to comply with the Clean Air Act, the district court concluded that petitioner had "knowingly and intentionally violated federal law from at

least December 3, 1985, to October 12, 1987" by continuing to sell non-compliant paints, "ignoring during that period repeated warnings by EPA and the June 1987 Notice of Violation." Pet. App. 26a. The court also found that petitioner had made "no real good faith effort" to respond to the EPA's information request. *Ibid.* The court observed that petitioner's "corporate state of mind was to engage in a pattern of continued non-cooperation with [EPA's] enforcement efforts by withholding the documentation of its violations or by providing incomplete information regarding such while it continued to sell and offer to sell non-compliant coatings." *Id.* at 27a.

Third, the district court held that petitioner's violations of the VOC limits were sufficiently serious to warrant a "moderate penalty." Pet. App. 28a. The court explained that "a major reduction in atmospheric pollutants" would have occurred in the affected regions if petitioner had promptly complied with the VOC limits. *Id.* at 27a. But the court declined to find that petitioner's failure to do so had a "measurable negative impact on human health and the environment." *Id.* at 28a. The court also concluded that petitioner's failure to comply with EPA's information request warranted a "moderate to substantial penalty," because the effectiveness of the EPA's enforcement of the Clean Air Act depends in large part on the provision of information from regulated industries such as petitioner. *Ibid.*

Fourth, the district court held that EPA had not engaged in unreasonable delay in reviewing the proposed modifications of the VOC limits submitted by the regional pollution-control districts. Pet. App. 28a-29a. "In any event," the court added, "even if there were unreasonable delays in acting on the

proposed rule revisions, Vista was not prejudiced by them because Vista violated federal law before and after the rule revisions were submitted to EPA." *Id.* at 29a. The court did, however, conclude that the government should have filed suit against petitioner more promptly for non-compliance with the EPA's information request. *Id.* at 30a-31a. The court held that "[s]uch delay supports a moderate reduction in penalty for the period June 21, 1989 to January 18, 1991." *Id.* at 31a.

Finally, as for the statutory penalty factors on which the court of appeals had found no dispute of fact, the district court observed that three of those factors supported a "substantial penalty." Pet. App. 31a-32a. The court stated that petitioner had "a history of non-full compliance," as demonstrated by "the extent and degree" of the violations at issue; that petitioner's violations were of an extended duration, "spann[ing] a period of almost six years"; and that petitioner had "obtained significant economic benefit" from its violations. *Ibid.* As for the final factor, whether petitioner had previously paid penalties for the same violations, the court found that petitioner's prior payments totaled only $500. *Ibid.*

7. The Ninth Circuit affirmed in an unpublished order "for the reasons stated in the district court's Findings of Fact and Conclusions of Law." Pet. App. 2a.

ARGUMENT

The court of appeals' unpublished decisions in this case are correct and do not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. Petitioner principally contends (Pet. 8) that the court of appeals erred in its initial decision in this case by holding that a defendant in a civil enforcement proceeding under the Clean Air Act cannot assert as a defense to liability that compliance with a SIP is "economic[ally] or technological[ly] infeasib[le]." But the court of appeals did not so hold. Nor did petitioner ask the court of appeals to rule on whether such a defense is cognizable in a civil enforcement proceeding. This Court does not grant certiorari to "decide questions not raised or resolved in the lower courts." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).

Petitioner, in its answer to the government's complaint, asserted as defenses to liability that the VOC limits in the California SIP were invalid as contrary to federal and state law, including the California Health and Safety Code.[5] Petitioner's invalidity

[5] Petitioner asserted six defenses arguing that the VOC limits were invalid. The first and second invalidity defenses contended that the local pollution-control agencies, in promulgating the VOC limits, "violated the provisions of the California Health and Safety Code relating to rulemaking, the provisions of the California Public Resources Code relating to environmental impact analysis, and the Contract Clauses, the Due Process Clauses, the Takings Clauses, and the Delegation Doctrine under the California and United States Constitutions." Vista Answer ¶¶ 22-25. The third and fourth invalidity defenses contended that the California Air Resources Board, in incorporating the VOC limits into the California SIP, "violated the provisions of the California Health and Safety Code relating to approval or disapproval of local rules as plan portions, the provisions of the California Public Resources Code relating to environmental analysis, and the Contract Clauses, the Due Process Clauses, the Takings Clauses, and the Delegation Doctrine under the California and United States Constitutions." *Id*. ¶¶ 26-29. The fifth and sixth invalidity defenses asserted that the EPA, in approving the VOC limits as part of the

defenses did not, however, refer to infeasibility in any way, much less cite the specific sections of the California Health and Safety Code on which petitioner now relies. The invalidity defenses thus did not fairly raise any issue of technological or economic feasibility. And petitioner did not suggest to the court of appeals in its briefs that the invalidity defenses were predicated on the technological or economic infeasibility of the VOC limits.[6] There is

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California SIP, "violated the provisions of the [Clean Air] Act relating to federal approval or disapproval of state plans, the provisions of the National Environmental Policy Act relating to environmental impact analyses, relevant portions of the Administrative Procedure Act and other applicable laws governing the decision-making of federal administrative agencies, and the Due Process and Takings Clauses of the Fifth Amendment and the Delegation Doctrine under the United States Constitution." *Id.* ¶¶ 30-33.

[6] Petitioner informed the court of appeals that its "affirmative defenses alleged that both 1984 [VOC] rules had 'violated' the [California Health and Safety] Code, the California Environmental Quality Act ('CEQA'), and the state and federal constitutions and were, therefore, 'void *ab initio*.'" Pet. C.A. Br. 17, *United States* v. *Vista Paint Corp.*, No. 92-55160 (9th Cir.). In elaborating on those defenses (*id.* at 28-30), petitioner contended that the local pollution-control agencies (1) did not prepare environmental impact reports with respect to the VOC limits, as required by the CEQA, (2) did not "assess and duly consider the economic impacts [of the VOC limits], as required by law," (3) did not have statutory rulemaking authority over paints sold as consumer products, (4) did not comply with state law requirements that such rules reflect "best available technological and administrative practices," apply "reasonably available" control measures, and be "necessary and proper" (quoting Cal. Health & Safety Code §§ 40440(a), 40462, 40702) (West 1996)); (5) violated the due process clauses of the federal and state constitutions by basing the VOC rules on "crystal-ball gazing" (quoting *International Harvester Co.* v. *Ruckelshaus*,

thus no reason to suppose that the Ninth Circuit's single-sentence holding that "the district court lacked subject matter jurisdiction over * * * the affirmative defenses dealing with invalidity" (Pet. App. 36a) was directed at defenses based on technological or economic infeasibility.

Similarly, in its earlier petition for a writ of certiorari in this case challenging the dismissal of the invalidity defenses, petitioner did not contend that those defenses involved feasibility issues. See Pet. 10-11, 18-20, *Vista Paint Corp.* v. *United States*, No. 92-2026 (9th Cir.) (discussing invalidity defenses). And, in refuting petitioner's assertion of a circuit conflict as to which defenses may be raised in a civil enforcement proceeding under the Clean Air Act, the United States explained that the allegedly conflicting cases involved "claims of economic or technological infeasibility," whereas "the claim in this case is not one of technological or economic infeasibility, but rather of the invalidity of the VOC regulations under state law." U.S. Supp. Br. 13-14, *Vista Paint Corp.* v. *United States*, No. 92-2026. Petitioner did not take issue at that time with the government's characterization of its invalidity defenses as not being based on technological or economic feasibility. The petition for certiorari was denied. 510 U.S. 826 (1993).

b. The only issue fairly raised by petitioner's invalidity defenses, therefore, is whether the VOC limits were promulgated in accordance with the require-

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478 F.2d 615, 623 (D.C. Cir. 1973)); (6) violated the contract clauses of the federal and state constitutions by "severely impair[ing] Vista's contract rights" for no "important public purpose," and (7) did not comply with the state Administrative Procedure Act.

ments of state law (*e.g.*, any requirement that an environmental impact report be prepared, see note 6, *supra*).[7] The court of appeals' decision that such defenses cannot be asserted in a civil enforcement proceeding under the Clean Air Act is correct and consistent with the decisions of other circuits.

Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1), authorizes judicial review in the courts of appeals of certain actions by the EPA, including its approval of a SIP, and requires that any petition for review be filed within 60 days after notice of the EPA's action appears in the Federal Register. Section 307(b)(2), 42 U.S.C. 7607(b)(2), then provides that any "[a]ction of the [EPA] Administrator with respect to which review could have been obtained under [Section 307(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement." This Court has recognized that Section 307(b)(2) bars a defendant in a criminal enforcement proceeding for violation of a regulation promulgated under the Clean Air Act from raising various challenges to the validity of that regulation, including "whether the [EPA] Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the admin-

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[7] Petitioner appears to have abandoned the portions of its invalidity defenses arguing that the EPA's approval of the VOC limits violated various federal constitutional and statutory provisions. See Pet. 6 (describing affirmative defenses as asserting that "the VOC standards contained in the federally approved SIP were invalid because they had been promulgated in violation of California law"); Pet. 9 (noting that "Vista argued below that the VOC standards * * * are invalid on several grounds under California law").

istrative record." *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978). And the courts of appeals have uniformly held that Section 307(b)(2) bars a party from challenging the validity of an EPA action in a civil enforcement proceeding—or any other sort of proceeding—on any ground that could have been considered by the EPA in deciding whether to take the action in the first place and by the court of appeals in reviewing the EPA's action under Section 307(b)(1). See, *e.g.*, *United States* v. *Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir.), cert. denied, 484 U.S. 822 (1987); *United States* v. *Ethyl Corp.*, 761 F.2d 1153, 1155-1157 (5th Cir. 1985), cert. denied, 474 U.S. 1070 (1986); *Action for Rational Transit* v. *West Side Highway Project*, 699 F.2d 614, 616 (2d Cir. 1983); cf. *Lubrizol Corp.* v. *EPA*, 562 F.2d 807, 813-815 (D.C. Cir. 1977).[8]

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[8] Several circuits agree that issues of technological and economic infeasibility may be raised in a civil enforcement action, because those issues are not properly considered by the EPA in evaluating a SIP. See, *e.g.*, *Union Elec. Co.* v. *EPA*, 593 F.2d 299, 307 (8th Cir.), cert. denied, 444 U.S. 839 (1979); *Indiana & Mich. Elec. Co.* v. *EPA*, 509 F.2d 839, 845 (7th Cir. 1975); *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162, 173 (6th Cir. 1973), cert. denied, 409 U.S. 1125 (1973). The Third Circuit, however, has held that a defendant cannot raise "economic hardship" as a defense in an enforcement action because it could have raised the issue "in a section 307 hearing." *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349, 357 (3d Cir. 1972). But this Court has recognized since *Getty Oil* that the EPA cannot consider such issues in Section 307(b)(1) proceedings. See *Union Elec.*, 427 U.S. at 265-266. To the extent that any inconsistency ever existed between *Getty Oil* and the decisions of the Sixth, Seventh, and Eighth Circuits, it was over whether economic hardship could be raised in a Section 307(b)(1) proceeding. There was no disagreement over the basic principle that a party is barred from raising in a civil enforcement action any

The Ninth Circuit's decision that the district court lacked jurisdiction over petitioner's invalidity defenses is consistent with those decisions. In determining whether to approve the California SIP, the EPA could have considered petitioner's arguments that the VOC limits were promulgated in violation of state law, because States must provide the EPA with assurances that they have the authority under state law to carry out a SIP. 42 U.S.C. 7410(a) (2)(E). And the court of appeals could then have considered that issue on a petition for review under Section 307(b)(1) challenging the EPA's approval of the California SIP. Accordingly, because petitioner could have raised its claim that the VOC limits are contrary to state law on a petition for review under Section 307(b)(1), the district court was without jurisdiction to consider such a claim in a civil enforcement proceeding.[9]

c. Petitioner also argues (Pet. 12-14) that defendants in civil enforcement proceedings under the Clean Air Act cannot constitutionally be precluded from challenging the validity of a SIP requirement. But no such constitutional challenge to Section 307(b)(2) was presented to or addressed by the courts

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question that a court of appeals could have considered in a Section 307(b)(1) proceeding. In any event, this case does not implicate any conflict over when issues of economic or technological feasibility may be raised, because, as explained above, petitioner did not argue below that its invalidity defenses were based on such issues.

[9] Petitioner could likewise have raised in a Section 307(b)(1) proceeding its arguments that the EPA, in approving the VOC limits, violated the Clean Air Act, the National Environmental Policy Act, the Administrative Procedure Act, and various provisions of the United States Constitution. See *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 892 (8th Cir. 1977).

below. Nor has petitioner identified *any* decision of *any* court holding Section 307(b)(2) (or any similar statutory provision) to be unconstitutional. See generally *Yakus* v. *United States*, 321 U.S. 414 (1944) (upholding constitutionality of statute precluding challenges to validity of price controls in enforcement proceedings); *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 892-893 (8th Cir. 1977) (rejecting argument that precluding challenges to validity of EPA regulations outside time period allowed by Section 307(b)(1) violates due process).

Moreover, to the extent that petitioner's challenge to the VOC limits was actually based (as petitioner now contends) on issues of technological and economic feasibility, petitioner was free to raise such issues during the penalty phase of the case in an effort to show "good faith efforts to comply" with the VOC limits. See 42 U.S.C. 7413(e)(1) (listing penalty factors); see also *Ford Motor Co.*, 814 F.2d at 1104 ("technical infeasibility coupled with good faith efforts can be considered by the district court as a factor mitigating against the imposition of monetary penalties in the enforcement action"). The Ninth Circuit's initial opinion in this case addressed only the defenses that petitioner could raise to liability. That ruling had no legal or practical effect on petitioner's ability to attempt to persuade the district court on remand that little or no penalty should be imposed because its compliance with the SIP was technologically or economically infeasible. And neither the district court nor the Ninth Circuit subsequently held that feasibility issues could not be considered in mitigation of any penalty.

2. Petitioner next urges (Pet. 17) the Court to resolve a "conflict of authority" as to the allocation of

the burden of proof on the various factors that Section 113(e)(1) of the Clean Air Act, 42 U.S.C. 7413(e)(1), directs the district courts to consider in determining the amount of a penalty. But no such conflict exists.

In this case, the district court held (Pet. App. 87a), and the court of appeals agreed (*id.* at 2a), that neither party bore the burden of proof on the Section 113(e)(1) penalty factors.[10] Instead, the district court concluded (*id.* at 87a) that it should "receive[] admissible evidence from both sides," "weigh[] and balanc[e] the proper statutory and common law factors against the facts which it finds from all the evidence admitted at trial," and then "exercise[] its discretion in determining the amount, if any, of the penalty." Cf. *Tull* v. *United States*, 481 U.S. 412, 427 (1987) (recognizing that district courts must engage in "highly discretionary calculations that take into account multiple factors" in setting civil penalties under the Clean Water Act).

Petitioner has identified no decision that adopts a position contrary to that of the courts below on the allocation of the burden of proof under Section 113(e)(1). None of the appellate decisions cited by petitioner even addresses the burden of proof. Petitioner does cite two district court decisions that declined to require a defendant to bear the burden of proving that its penalty should be less than the statutory maximum.[11] But those decisions are

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[10] Because the district court held that "there is no burden of proof on either party" with respect to the Section 113(e)(1) penalty factors (Pet. App. 87a), petitioner was not, as it contends (Pet. 16), "saddled with the burden of proving facts to *rebut* the maximum penalty requested by the Government."

[11] See *United States* v. *Midwest Suspension & Brake*, 824 F. Supp. 713, 735 n.30 (E.D. Mich. 1993), aff'd, 49 F.3d 1197

entirely consistent with the decision in this case, which likewise held that petitioner did not bear the burden of proof on the amount of its penalty.[12] In short, petitioner has offered no authority under Section 113(e)(1) of the Clean Air Act, or any parallel provision of any other environmental statute, adopting its view that the courts below should have "place[d] squarely on the Government the burden of proving the facts underlying the penalty factors" (Pet. 17).

Petitioner also seizes on the district court's statement that "[t]his Court will first determine the maximum penalty allowable and then consider any mitigating circumstances" (Pet. App. 22a), asserting that the district court thereby "presumptively appl[ied] the maximum penalty and require[d] [petitioner] to prove facts in mitigation" (Pet. 16). But petitioner is reading more into the district court's statement than its words or their context can bear. It is evident from the entirety of the district court's opinion, and from its holding, that no presumption was made that the statutory maximum penalty should apply. The court found that most of the Section 113(e)(1) factors favored a "substantial" penalty. See Pet. App. 25a-

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(6th Cir. 1995); *Student Public Interest Research Group of New Jersey, Inc.* v. *Monsanto Co.*, Civ. A. No. 83-2040, 1988 WL 156691, at *16 (D.N. J. Mar. 24, 1988) (citizen suit not involving Section 113(e)(1) penalty factors).

[12] Indeed, the district court in one of those cases, in words strikingly similar to those of the district court here, explained that "the inquiry mandated under [42 U.S.C.] § 7413(e) is for this Court to evaluate the penalty assessment criteria in light of all of the evidence introduced at trial, not merely the evidence a defendant introduces at trial." *Midwest Suspension*, 824 F. Supp. at 735 n.30.

28a, 31a-32a. Yet, the court imposed penalties ranging from $250 to $2500 per day of violation— *i.e.*, from one percent to ten percent of the statutory maximum of $25,000 per day of violation. *Id.* at 39a; 42 U.S.C. 7413(d)(1).

Nor would the district court's statement, even if read in the manner that petitioner suggests, create a conflict among the circuits. The courts of appeals are in agreement that "[i]n considering fines under the Act, courts generally presume that the maximum penalty should be imposed." *United States* v. *B & W Inv. Properties*, 38 F.3d 362, 368 (7th Cir. 1994), cert. denied, 514 U.S. 1126 (1995); accord *United States* v. *Marine Shale Processors*, 81 F.3d 1329, 1337 (5th Cir. 1996) ("when imposing penalties under the environmental laws, courts often begin by calculating the maximum possible penalty, then reducing the penalty only if mitigating circumstances are found to exist"); *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990). None of the district court decisions that petitioner cites as conflicting holds that such an approach is impermissible.[13] And one of those decisions itself adopts such an

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[13] For example, the court in *United States* v. *Smithfield Foods, Inc.*, 972 F. Supp. 338, 353 (E.D. Va. 1997), noted that some courts, including the Eleventh Circuit in *Tyson Foods*, have used "the 'top down' method of penalty calculation, in which the court begins the penalty calculation at the statutory maximum, and adjusts downward considering the [statutory] factors," whereas some district courts have used "the 'bottom-up' method of penalty calculation, in which the court begins the penalty calculation using defendants' economic benefit of noncompliance, and adjusts upward or downward considering the [statutory] factors." After concluding that "the statute does not require either the 'top-down' or the 'bottom-up'

approach. See *United States* v. *Midwest Suspension & Brake*, 824 F. Supp. 713, 735 (E.D. Mich. 1993) ("in calculating the amount of civil penalties to be imposed on defendant [under the Clean Air Act], this Court must start with the statutory maximum and make any downward adjustments based on the evidence adduced at trial"), aff'd, 49 F.3d 1197 (6th Cir. 1995).

In any event, even if one assumes *arguendo* that the lower courts erred in not requiring the government to bear the burden of proof on all of the Section 113(e)(1) penalty factors, petitioner has not even attempted to demonstrate that any such error was prejudicial in this case. The burden of proof is dispositive in a civil case only in those relatively rare circumstances where the parties' evidence is in equipoise. Cf. *Medina* v. *California*, 505 U.S. 437, 449 (1992). Nothing in the district court's decision suggests that the evidence was in equipoise on any of the Section 113(e)(1) penalty factors. It thus appears that the district court would have reached the same conclusion on the amount of petitioner's penalty regardless of whether the burden of proof was placed on the government, on petitioner, or on neither party.

3. Finally, petitioner complains (Pet. 15-20) that the district court abused its discretion in its conduct of the trial on the Section 113(e)(1) penalty factors, because the court required the parties to submit the testimony of their direct witnesses by affidavit rather than in person. The court also required, however, that those witnesses be made available at trial for cross-examination. See Pet. App. 80a-81a. As the courts of appeals have recognized, "[a] district court's

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method," the court chose, as an exercise of its "discretion," to use the "bottom-up" method. *Id.* at 353-354.

requirement that parties submit direct evidence in written form, while permitting parties to cross-examine adverse witnesses orally," is "an accepted and encouraged technique for shortening bench trials." *Ball* v. *Interoceanica Corp.*, 71 F.3d 73, 77 (2d Cir. 1995) (quoting *Phonetele Inc.* v. *American Tel. & Tel. Co.*, 889 F.2d 224, 232 (9th Cir. 1989), cert. denied, 503 U.S. 914 (1992)); see also *Eirhart* v. *Libbey-Owens-Ford Co.*, 996 F.2d 837, 840 (7th Cir. 1993) (district courts may conduct bench trials on "a written record").

Petitioner nonetheless contends (Pet. 17-20) that such a procedure is inconsistent with Rule 43(a) of the Federal Rules of Civil Procedure, which provides that "[i]n every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise." Rule 43(a), by its terms, thus gives way in the face of inconsistency with, *inter alia*, the Federal Rules of Evidence. The courts have construed Federal Rule of Evidence 611(a), which gives trial courts broad authority over "the mode and order of interrogating witnesses" in order to "avoid needless consumption of time," as permitting the introduction of direct testimony in the form of affidavits at bench trials. See, *e.g.*, *In re Adair*, 965 F.2d 777, 779-780 (9th Cir. 1992); *Saverson* v. *Levitt*, 162 F.R.D. 407, 408-409 (D.D.C. 1995).

Petitioner claims (Pet. 19-20) that several cases are in conflict with *Adair*, *Ball*, and the decision below. But there is no true circuit conflict. None of the appellate cases relied on by petitioner concerned a district court's order that the parties submit their witnesses' direct evidence by affidavit at a bench trial

while making the witnesses available in person for cross-examination. Two of those cases reversed a district court's grant of summary judgment, based on affidavits or other evidence, where various genuine disputes of material fact appeared to exist. See *Ross* v. *Franzen*, 777 F.2d 1216, 1220-1221 (7th Cir. 1985); *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 430-434 (2d Cir. 1974).[14] Those cases are obviously not on point. Both the Second Circuit and the Seventh Circuit have since approved of trial procedures similar to those used in this case. See *Ball*, 71 F.3d at 76; *Eirhart*, 996 F.2d at 840.

A third case held that a district court could not conduct the trial of a prisoner's civil-rights suit "solely on affidavits," especially in circumstances where the prisoner was entitled to a trial by jury. See *Dolence* v. *Flynn*, 628 F.2d 1280, 1281-1282 (10th Cir. 1980). *Dolence* is distinguishable from the present case in at least two respects. The trial of this case was not conducted "solely on affidavits," because the witnesses were subject to live cross-examination. And the issues in this case were triable to the court rather than to a jury. A district court is allowed more latitude over the manner in which evidence will be introduced at a bench trial as opposed to a jury trial. See, *e.g.*, *Southern Pacific Transp. Co.* v. *Chabert*, 973 F.2d 441, 448 (5th Cir. 1992), cert. denied, 507 U.S. 987 (1993). Similar reasons distinguish the present case from *Lebeck* v. *William A. Jarvis, Inc.*, 250 F.2d 285, 294-295 (3d Cir. 1957), which held that a district court should not have read an edited transcript of a witness's testimony to the jury, but in-

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[14] Petitioner relies on a footnote in *J.B. Williams*, 498 F.2d at 430 n.19, that consists essentially of dicta.

stead should have required the witness to testify in person.

The case most analogous to this one is *Walton* v. *United Consumers Club, Inc.*, 786 F.2d 303, 312-313 (7th Cir. 1986), which concluded that a district court should not have admitted the plaintiffs' interrogatory answers at a bench trial in lieu of live testimony, even though the plaintiffs were subject to cross-examination about those answers. But the court of appeals in that case did not consider the relationship between Rule 43(a) of the Federal Rules of Civil Procedure and Rule 611(a) of the Federal Rules of Evidence. And, in any event, the court of appeals ultimately held that the admission of the affidavits was harmless and consequently did not require reversal. 786 F.2d at 313. There is thus no tension in the outcomes of *Walton* and the present case. Petitioner has not even attempted to demonstrate any prejudice resulting from the district court's mode of obtaining witnesses' testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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