No. 20-2215

IN THE
United States Court of Appeals for the Third Circuit

CLEAN AIR COUNCIL,
Plaintiff-Appellant,

v.

UNITED STATES STEEL CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, NO. 2:19-CV-01072 (HORAN, J.)

AMENDED BRIEF FOR APPELLEE UNITED STATES STEEL CORPORATION

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CERTIFICATE OF INTEREST

The undersigned counsel of record certifies that Defendant-Appellee United States Steel Corporation has no parent corporation; no publicly-held company owns 10% or more of United States Steel Corporation's stock; and no publicly held corporation not a party to this case has a financial interest in the outcome of the case.

/s/ James C. Martin
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PRELIMINARY STATEMENT

This appeal raises a straightforward issue of statutory construction that plaintiff Clean Air Council (CAC) does its best to confound: do United States Steel Corporation's (USS) air emissions governed by permits and regulations under the federal Clean Air Act (CAA) fall within the federally permitted release reporting exception in 42 U.S.C. § 9601(10)(H) of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)? The district court answered that question affirmatively. This Court should too.

In December 2018, a fire broke out at a USS plant in Allegheny County that produces coke, which is used in the steelmaking process, and coke oven gas (COG), a fuel used in steelmaking. After the fire, for just over three months, plant equipment used in removing certain chemical constituents from COG was inoperable. During the equipment downtime, USS continued to produce coke and COG. The air emissions generated by COG combustion in that interval are the basis for this lawsuit. CAC specifically claims that hydrogen sulfide, benzene, and coke oven emissions were released in quantities requiring reporting under CERCLA.

USS' three plants are, however, subject to comprehensive CAA permits and regulations that apply to *all* of their emissions, including those from COG use and combustion, under oversight and monitoring by the Allegheny County Health Department (ACHD). As required by its CAA permits and accompanying regulations,

USS promptly reported these COG-related emissions to ACHD and ACHD immediately responded. Later, ACHD intervened in a CAA lawsuit against USS based on the same emissions from the same COG use and combustion—a suit filed by CAC, the same plaintiff in this case.[1]

CAC nevertheless claims that USS also was required to report the very same emissions to the National Response Center (NRC) under CERCLA § 9603(a). But § 9601(10)(H) contains an express exemption for "any emissions" "subject to" the CAA's comprehensive regulatory scheme—as is the case with the challenged USS emissions. Yet, as it did below, CAC argues that "any emissions" really means any "lawful" emissions and "subject to" really means "in compliance with." Since USS' emissions are unlawful and not in compliance with its permits, so CAC's argument goes, the CERCLA reporting exemption does not apply, even though § 9601(10)(H) contains no such phrasing.

The district court properly rejected CAC's redrafting effort and found that the challenged emissions are exempt from CERCLA reporting precisely because they are governed by the CAA's regulatory scheme. Here, USS' COG-related emissions *are governed* by its CAA permits and the accompanying "state implementation plan" and control regulations, bringing them squarely within CERCLA's reporting exemption.

[1] That CAA lawsuit is proceeding in the Western District of Pennsylvania and has yet to be resolved on the merits.

CAC's own CAA lawsuit makes the point, expressly alleging that the same emissions are indeed regulated by that statute.

Faced with the mandated plain-language construction and its own admissions, CAC urges deference to Environmental Protection Agency (EPA) adjudications involving the CERCLA reporting exemption from more than 25 years ago. But that request is as flawed as CAC's attempt at redrafting. There is no textual basis in the CERCLA exemption for deferring to the EPA. Nor is any deference owed, as this Court has made clear, to an unreasonable agency construction that contradicts plain statutory text—and that is all the more true where, as here, the relevant statute contains potential criminal penalties.

While CAC further claims that adopting the district court's and USS' construction leads to absurd results, it is CAC's interpretation that displaces the comprehensive, detailed, and integrated regulatory framework Congress established under the CAA. The statutory scheme makes clear that there is no need for redundant CERCLA reporting where the CAA applies and Congress said so. This Court accordingly should stick to the statutory design and affirm the result it intends and compels.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the district court correctly conclude that "any emissions" "subject to" CAA permits and regulations under CERCLA § 9601(10)(H) includes USS' emissions from the combustion of COG that are governed or affected by its CAA permits and regulations?

STATEMENT OF RELATED CASES

USS adopts CAC's statement of related cases, adding only that CAC's related CAA case encompasses the same emissions alleged in this suit. *See infra* at 10-12.

STATEMENT OF THE CASE

A. Regulatory Background

1. Clean Air Act

"In 1970, Congress enacted the Clean Air Act, 42 U.S.C. §§ 7401-7671q, to address the increasing amount of air pollution created by the industrialization of the United States and the resulting threat to public health and welfare." *Nat'l Parks Conservation Ass'n v. EPA*, 803 F.3d 151, 153 (3d Cir. 2015). "Employing 'cooperative federalism,' the [CAA] gives both the federal government and the states responsibility for maintaining and improving air quality: 'the federal government develops baseline standards that the states individually implement and enforce.'" *Id.* (citation omitted).

In this cooperative framework, "primary responsibility" for preventing and controlling air pollution rests with "individual states and local governments[.]" *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013) (citing CAA § 7401(a)(3)-(4)). Accordingly, "each state is required to create and submit to the EPA a State Implementation Plan ('SIP') which provides for implementation, maintenance, and enforcement of [National Ambient Air Quality Standards] within the state." *Bell*, 734 F.3d at 190 (citing CAA § 7410(a)(1)).

The CAA correspondingly contains detailed requirements governing SIP approval, such as the inclusion of "enforceable emission limitations and other control measures, means, or techniques ... as may be necessary or appropriate to meet the applicable [CAA] requirements." CAA § 7410(a)(2)(A). Moreover, once the SIP receives approval, "'its requirements become federal law and are fully enforceable in federal court.'" *Id.* (citations omitted); CAA § 7604(a)).

Under the CAA, "[s]tates are tasked with enforcing the limitations they adopt in their [approved] SIPs." *Bell*, 734 F.3d at 190.[2] "They must regulate all stationary sources located within the areas covered by the SIPs, 42 U.S.C. § 7410(a)(2)(C), and implement mandatory permit programs that limit the amounts and types of emissions that each stationary source is allowed to discharge, *id.* §§ 7661a(d)(1), 7661c(a)." *Id.* These permits, so-called CAA "Title V" operating permits, are "a source-specific bible for [CAA] compliance containing in a single, comprehensive set of documents, all [CAA] requirements relevant to the particular polluting source.'" *Id.* (citation omitted). Title V "makes it unlawful to operate any 'major source,' wherever located, without a comprehensive operating permit." *Id.* at 309 (citing CAA § 7661a(a)). And

[2] Although "Title V permitting programs are administered and enforced primarily by state and local air permitting authorities, ... EPA oversight continues." *Ocean County Landfill Corp. v. EPA*, 631 F.3d 652, 654 (3d Cir. 2011) (citing CAA § 7661a(d)(1)).

Title V permits may be enforced by the EPA, local agencies, and through citizen lawsuits. CAA § 7604(f)(4).

"In order to obtain an operating permit under title V of the [CAA], major sources must comply with extensive monitoring, reporting and record-keeping requirements." *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 638 (D.C. Cir. 2019) (citation and internal quotation marks omitted). Further, just as with SIPs, Title V permits require EPA approval. "If the application or proposed permit is deficient, the EPA must deny it or require supplemental information during the permitting process." *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 299-300 (3d Cir. 2013) (citing CAA § 7661d(b)(1)). Indeed, the "threat of criminal charges confronts any person who knowingly submits a deficient application." *Id.* at 300 (citing CAA § 7413(c)(2)(A)). Apart from that, if any "deficiencies are overlooked and remain undiscovered until after the permit is issued[,]" the EPA or the states may "reopen the permit to add any 'applicable requirement' that was omitted during the permitting process." *Id.* (citing 40 C.F.R. § 70.7(f); CAA § 7661d(e); 25 Pa. Code §§ 127.542, 127.543).

Finally, Title V permits, again by express statutory design, incorporate all state and local requirements as applicable to the permitted pollution sources. Title V permits "must include all 'emissions limitations and standards' that apply to the source, as well as associated inspection, monitoring, and reporting requirements." *Util. Air Regulatory Grp. v. EPA* (*UARG*), 573 U.S. 302, 309-10 (2014) (citing CAA

§ 7661c(a)-(c)). And "[s]ources subject to Title V may not operate in violation of, or without, a Title V permit containing all applicable requirements." *Sierra Club v. EPA*, 964 F.3d 882, 893 (10th Cir. 2020) (citation omitted). Under the statute, SIP "requirements are, of course, applicable requirements." *Id.*; *see also Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F.3d 507, 512 (5th Cir. 2016) (explaining that Title V permits "incorporate by reference state permits issued pursuant to" SIPs); 57 Fed. Reg. 32250, 32258 (July 21, 1992) ("The [Title V] permit program collects and implements the requirements contained in the SIP as applicable to the particular permittee … [P]ermits must incorporate emission limitations and other requirements of the SIP").

Just as the CAA's integrated statutory scheme envisions, Pennsylvania is a full partner in this cooperative regulatory endeavor. It has its own SIP expressly charging state and local agencies with enforcing the governing permits and accompanying regulations. In Allegheny County specifically, ACHD is authorized to regulate air quality, 40 C.F.R. § 52.2020(c)(2), and it has developed comprehensive and detailed emissions and monitoring standards and reporting requirements, as well as its own permitting programs in Article XXI of its rules and regulations. All of this likewise has been incorporated into Pennsylvania's SIP. 40 C.F.R. § 52.2020(c)(2). Article XXI is "thereby binding federal law under the Clean Air Act[,]" *Grp. Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 120 (3d Cir. 2016), and it applies throughout Allegheny County—including to the three USS plants in this case.

In particular, if any air pollution control equipment, process equipment, or other source of air contaminants breaks down, Article XXI requires an immediate report to ACHD where there is a substantial likelihood that air contaminants violating the Article will be emitted. Article XXI, § 2108.01(c)(1). This reporting is not limited to a particular list of hazardous materials or substances; it expressly applies to any amount of a substance emitted from the processes at the regulated source. *Id.* Article XXI reporting further requires: (1) identification of specific materials which are being, or are likely to be, emitted, together with their toxic qualities; (2) the estimated quantity of each material being, or likely to be, emitted; (3) measures taken to minimize the emissions and ambient effects; and (4) measures taken to shut down or curtail the affected sources of the emissions, or reasons why it is impossible or impractical to do so. *Id.* § 2108.01(c)(2).

2. CERCLA

Ten years after the CAA, "Congress enacted CERCLA 'to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.'" *Pa. Dep't of Envtl. Prot. v. Trainer Custom Chem., LLC*, 906 F.3d 85, 89 (3d Cir. 2018) (citation omitted). CERCLA also includes, in § 9603, a procedure for notifying national emergency response authorities of releases of hazardous substances. Under § 9603(a):

> any person in charge of … an … onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel … facility in quantities equal to or

> greater than those determined pursuant to section [102], immediately notify the National Response Center established under the Clean Water Act of such release.

42 U.S.C. § 9603(a). Section 9603(b) subjects knowing violations to criminal fines and imprisonment.

Section 9603(a)'s reporting requirement is intended "to notify government personnel of releases of hazardous substances so that a timely decision can be made regarding the need for a response action to protect public health or welfare or the environment." 63 Fed. Reg. 13460 (Oct. 27, 1998). Congress recognized, however, that § 9603 was not the only mechanism for reporting releases, especially where such releases already were regulated by other agencies. To that end, § 9603 does not require reporting of "federally permitted releases," and § 9601(10) exempts 11 different categories of "federally permitted releases" from CERCLA's reporting requirement.

Many of these "federally permitted releases" are defined explicitly as "releases," "discharges[,]" or "injections" that are "in compliance with" or "authorized under" statutory permits. But others—such as those in this case—are defined more broadly to include "emissions" or "discharges" "with respect to," "identified in," or "subject to" a permit or regulation. Specifically, § 9601(10)(H), the only subpart addressing air emissions, defines a "federally permitted release" as:

> any emission into the air subject to a permit or control regulation under section 111, section 112, title I part C, title I part D, or State implementation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator of the Environmental

> Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections.

And, as is true for the other 10, releases falling within § 9601(10)(H)'s scope are exempt from CERCLA's reporting requirements.

B. Proceedings Below[3]

1. Emissions From USS' Plants Are Subject To Permitting And Regulation Under The CAA.

This case involves three USS steelmaking facilities—the Clairton, Edgar Thomson, and Irvin Plants (collectively the Plants). The Clairton Plant primarily produces coke, but also produces COG which is transported by pipeline for combustion and use as fuel at all three Plants. JA-033. The Edgar Thomson Plant produces steel slabs, which are finished at the Irvin Plant. JA-022, ¶¶ 40-41.

At each Plant, COG use and combustion is subject to extensive regulation under the CAA, including requirements implemented by "Title V Operating Permits," JA-033-034 (citing permits), as well as Pennsylvania's SIP and ACHD Article XXI. Compl., *PennEnvironment, Inc. and Clean Air Council v. United States Steel Corp.*, No. 2:19-

[3] This background section is drawn from CAC's complaint, documents attached to that complaint, and CAC's parallel CAA complaint arising out of the same events as this case. *See Alpizar-Fallas v. Favero*, 908 F.3d 910, 914 (3d Cir. 2018) (in reviewing 12(b)(6) dismissal, court "'must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents'").

cv-00484-MJH, ECF No. 1 at ¶¶ 132-153 (W.D. Pa.) (filed Apr. 29, 2019) (the CAA Complaint); *supra* at 4-8. Consistent with Article XXI, USS is required to monitor the Plants' processes and in the event any equipment breaks down, to immediately report to ACHD detailed information about *any* emissions of *any* amounts of "materials," including their "toxic qualities," the "estimated quantity of each material" emitted, and "measures" USS was taking "to minimize the emissions and ambient effects" and "to shut down or curtail the affected sources of the emissions[.]" Article XXI, § 2108.01(c)(2); JA-041-042; CAA Compl., ¶¶ 143, 150-158.

2. After A Clairton Plant Fire, As Required By Its Permits And Governing Regulations, USS Reports Possible Releases Of Hydrogen Sulfide, Benzene, And Coke Oven Emissions To The ACHD.

On December 24, 2018, a fire at the Clairton Plant caused the shutdown of two "control rooms" used to remove benzene, sulfur, and other constituents from COG. JA-015, ¶ 4; JA-021-022, ¶¶ 39, 42. From that date until April 4, 2019, USS allegedly used unprocessed COG as fuel at the Plants. JA-015, ¶ 5; JA-022, ¶¶ 43, 44. In this same interval, USS' COG combustion allegedly caused releases containing coke oven emissions, hydrogen sulfide, and benzene in amounts that, according to CAC, required reporting under CERCLA. JA-015, ¶ 6; JA-022, ¶ 44; JA-028, ¶ 87.

The air emissions resulting from COG use and combustion in the Plants' processes are, however, subject to applicable USS Title V operating permits, Pennsylvania's SIP, and the incorporated ACHD regulations, including Article XXI. *Supra* at 10-

11. Indeed, in its Notice of Intent to Sue attached to its complaint, CAC explicitly states that "none of the three [Plants'] [Title V operating] permits authorize emissions of any amount of" hydrogen sulfide or COG (JA-041); "neither [of] the [Title V operating] permits for the Irvin Plant [or] the Edgar Thomson Plan[t] authorize any emissions of benzene" (JA-042); and the "Clairton Plant's [Title V] Operating Permit is the only of the three that authorizes any emission of benzene" (JA-042).

Similar assertions are made in ACHD's February 2019 Enforcement Order, also attached to CAC's complaint. JA-048-056. And CAC's CAA Complaint against USS, which relates to the same air emissions from the same COG combustion, likewise alleges that the "Plants are *subject to*" their Title V permits, Pennsylvania's SIP, and Article XXI, *see* CAA Compl., p. 18 (emphasis added); *id.*, ¶¶ 133, 137, 140, and violated those permits, the SIP, and Article XXI. *Id.* ¶¶ 3, 15, 166-319; *see also id.* Exhibit 1, ECF No. 1-2 (filed Apr. 29, 2019) (pre-CAA Complaint letter to USS detailing alleged emissions and violations of CAA permits).

CAC does not allege that USS failed to make the reports required under Pennsylvania's SIP, USS' Title V operating permits, applicable control regulations, or Article XXI, nor could it. Within minutes, USS reported the fire and the ensuing emissions from COG combustion to ACHD. JA-090-092; *see also* JA-080, ¶ 5. And ACHD immediately responded by releasing a public notification about the fire, JA-093, and by issuing, in late February 2019, an "Enforcement Order" to USS pursuant

to Article XXI, alleging that the COG-related emissions following the fire violated Article XXI and various CAA permits. JA-047-065.

3. CAC Sues USS For Purported CAA Emission Violations And Then Sues USS For Failing To Report The Same Emissions Under CERCLA.

In April 2019, CAC filed a CAA citizen lawsuit against USS based on the COG-related emissions from the Plants. *See* CAA Complaint. Four months later, CAC brought this lawsuit under CERCLA for the same emissions. Here, CAC alleges that USS "released hazardous substances, including hydrogen sulfide, benzene, and coke oven emissions, in quantities exceeding the reportable quantities under 40 C.F.R. § 302.4, Tbl. 302.4." JA-015, ¶ 6. CAC further alleges that the Plants' "releases of [these] hazardous substances were not federally permitted releases, as that term is defined in 42 U.S.C. § 9601(10)(H)." JA-028, ¶ 81. And because USS "did not report any of these releases to the National Response Center" as required by CERCLA § 9603(a), JA-028, ¶ 84, CAC alleges a violation of § 9603(a). JA-028-029, ¶¶ 87-88.

USS moved to dismiss because the emissions were "federally permitted releases" expressly exempted from CERCLA's reporting requirements. JA-086-087. As USS argued, CERCLA § 9601(10)(H) exempts "any emission subject to" various CAA permits, "control regulations," or "State implementation plans[.]" D. Ct. ECF No. 8 at 6. While the phrase "subject to" is not defined, USS cited dictionary definitions showing it means "affected by." *Id.* at 7. This ordinary meaning was further reinforced by the various other definitions of "federally permitted releases" in § 9601(10)(H),

which, by contrast, use narrower phrases, such as "in compliance with" or "authorized under." Thus, as USS argued, interpreting "subject to" to mean "in compliance with" would run counter to the strong interpretive presumption that different terms used in the same statutory subsection mean different things. *Id.* at 8-9.

Turning to the record, USS pointed out that "[t]here is no dispute that the air emissions stemming from [USS'] combustion and use of COG at the Plants following the December Fire are 'subject to' the limitations of the Title V Permits under the SIP." *Id.* at 10. In fact, USS noted, "CAC expressly admit[ted]" as much in its CAA Complaint against USS, which is "based on allegations that [USS] violated the Title V Permits and SIP when it continued to use and combust COG after the December fire." *Id.* (citing CAA Complaint).

In its opposition, CAC claimed that USS' construction should be rejected based on a nearly 30-year-old decision by an EPA administrative law judge—*In re Mobil Oil Corp.*, Nos. EPCRA-91-0120, EPCRA-91-0122, EPCRA-91-0123, 1992 WL 293133 (E.P.A. 1992)—and the EPA Environmental Appeals Board's ruling in the appeal in that case. *See In re Mobil Oil Corp.*, 5 E.A.D. 490, 1994 WL 544260 (E.P.A. 1994). CAC claimed that these decisions, which found that § 9603(a)'s exemption did not apply to emissions in violation of the requirements of a CAA permit or control regulations, should be accorded *Chevron* deference. D. Ct. ECF No. 12 at 9-12. It also relied on a 2002 EPA guidance document, which followed *Mobil Oil*, and argued that the guidance should be given *Skidmore* deference. *Id.* at 8.

Notably, CAC did not contend that the challenged emissions were beyond the reach of the CAA or the SIP, CAA Title V permits, control regulations, or Article XXI. To the contrary, CAC expressly acknowledged that those emissions were "in violation" of USS' CAA permits and regulations, D. Ct. ECF No. 12 at 3, and repeatedly made similar statements throughout its opposition. *See id.* at 19 (stating that USS' emissions were in "violation of its air permits").[4] CAC nevertheless also argued that the applicability of the "federally permitted release" exclusion could not be resolved because: (i) the court "would have to consider the terms of [USS' CAA] permits and the sources and types of emissions"; and (ii) the exclusion is an affirmative defense. *Id.* at 21-24.

In reply, pointing particularly to CAC's own admissions, USS reiterated that the "only facts relevant to" its motion to dismiss "are undisputed: the air emissions at issue are governed by [USS'] Title V Permits under the SIP[,]" D. Ct. ECF No. 13 at 2, as further shown by CAC's allegations and its CAA lawsuit against USS for the same emissions. *Id.* at 5. USS also noted that CAC's call for agency deference was misplaced given the absence of any ambiguity in the relevant statutory provisions. *Id.* at 3-4.

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[4] *See also* D. Ct. ECF No. 12 at 23 (asserting that "the Clairton [CAA] permit does not allow flaring of [COG] when the hydrogen sulfide throughput is above a certain rate"); *id.* at 24 n.5 (describing CAA Complaint as "another litigation regarding permit violations under the Clean Air Act").

4. The District Court Dismisses CAC's CERCLA Action, Finding That By Express Statutory Design, USS' Emissions Are Exempt From CERCLA Reporting.

In its opinion and order granting USS' motion to dismiss, the district court went directly to the critical issue of whether CERCLA's reporting exemption applied. JA-007.

In resolving that issue, the court looked closely at the statutory context, pointing out that Congress chose different verb phrases like "in compliance with" and "authorized under" in other definitions of "federally permitted releases," in contrast with its use of "subject to" in § 9601(10)(H). "If Congress had intended that air emissions must be 'in compliance with' a Clean Air Act permit in order to be exempt," the court observed, it "could have—and would have—said so, just as it did six other times when defining 'federally permitted release.'" JA-010. Thus, the fact "[t]hat Congress chose to use different words in relation to the Clean Air Act in § 9601(10) is strong evidence of Congress's intent that releases regulated by the Clean Air Act should [be] treated differently than releases regulated by other environmental acts." *Id.*

As the court further noted, the contrasting phrases in § 9601(10)(H) also made "sense in light of the greater statutory schemes of CERCLA, the Clean Air Act, and the other environmental statutes listed in § 9601(10)[,]" especially given the CAA's "detailed requirements regarding risk management, emergency response, and accident reporting." JA-011 (citing CAA § 7412(r)). In light of these comprehensive reporting requirements—"similar to, if not duplicative of, CERCLA's requirements"—the court

found it was "understandable that Congress would not require a facility to comply with duplicative reporting requirements under both the Clean Air Act and CERCLA." JA-011-012.

On analysis, therefore, the court found that "subject to" in § 9601(10)(H) "is unambiguous and does not require that the air emissions comply with a Clear Air Act permit in order to be exempt" from CERCLA's reporting requirement in § 9603(a). JA-012. And since USS' Plants "are subject to permits issued under the Clean Air Act," its "emissions at issue here are 'federally permitted releases' and exempt under CERCLA." *Id.*

SUMMARY OF ARGUMENT

This Court should affirm the dismissal of CAC's CERCLA action because the emissions from USS' Plants were "federally permitted releases" under CERCLA § 9601(10)(H) and thereby expressly exempted from § 9603(a)'s reporting requirement.

A. Section 9601(10)(H), properly construed in context, plainly exempts any emissions governed or affected by SIPs, CAA Title V permits and their accompanying control regulations, and ACHD's Article XXI, from § 9603(a)'s reporting requirement. CAC's contrary reading—that "any emissions" must be revised to be any "lawful emissions" and "subject to" must be revised to be "in compliance with"—improperly redrafts the section, violates accepted principles of construction, and creates redundant CERCLA reporting where Congress deemed it unnecessary. CAC

cannot rebut the strong presumption that § 9601(10)(H)'s contrasting uses of "subject to," "in compliance with," and "authorized under" in the same statutory subsection means Congress intended those terms to have different meanings. Nor can CAC overcome the record and its own admissions, which reveal that the challenged emissions are governed by the CAA.

B. CAC's call for *Chevron* or *Skidmore* deference to EPA's administrative decisions or guidance dealing with § 9601(10)(H)'s exemption is equally unavailing. There is no basis to defer to an agency interpretation that contravenes plain statutory text and that is doubly true where the statutory provisions involve criminal penalties. CAC's call for agency deference also ignores that Congress did not explicitly delegate any discretion to EPA to resolve any ambiguity in the statutory provisions at issue. Rather, the only issue raised by the statutory provisions is the meaning to be given to the words Congress actually used —an issue that a court is fully-equipped to decide based on controlling principles of construction.

C. CAC's last-ditch procedural arguments asserting that dismissal is improper also fail. CAC's admissions concerning the CAA's applicability to the emissions at issue is enough to trigger the exemption in § 9601(10)(H). Those admissions support dismissal, whether the applicability of the (10)(H) exemption is an element of CAC's claim or USS' affirmative defense.

STANDARDS OF REVIEW

The statutory interpretation question presented is subject to plenary review. *United States v. Savage*, 970 F.3d 217, 250 n.27 (3d Cir. 2020) (citation omitted). The Rule 12(b)(6) dismissal also is reviewed *de novo*. *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 786 n.2 (3d Cir. 2016) (citation omitted).

In considering the merits of a motion to dismiss, courts look to a complaint's well-pled factual allegations, in addition to "exhibits attached to the complaint, matters of public record, [and] undisputedly authentic documents if the complainant's claims are based upon these documents.'" *Alpizar-Fallas*, 908 F.3d at 914 (citation omitted). Courts likewise are free to rely on party admissions and take judicial notice of pleadings in other lawsuits. *See Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 211 (3d Cir. 2006) (admissions); *Juday v. Merck & Co.*, 799 F. App'x 137, 138 (3d Cir. 2020) (taking judicial "notice [of] a complaint and dispositive opinions in certain other litigation" filed by same plaintiffs).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT USS' EMISSIONS ARE EXEMPT FROM CERCLA § 9603(A)'S REPORTING REQUIREMENT BECAUSE THEY ARE FEDERALLY PERMITTED RELEASES.

The dispositive question here is whether the challenged air emissions by USS are "federally permitted releases" exempted from CERCLA reporting under § 9601(10)(H). The statutory language, principles of construction, and CAC's own admissions all establish that the exemption applies.

A. Governing Principles Of Statutory Construction.

In determining a statute's meaning, courts will not "consider a statute or rule to be 'genuinely ambiguous' unless it remains unclear after we have 'exhaust[ed] all the traditional tools of construction.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (citations omitted). As for those tools, "'statutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011) (citations omitted). "Our Pole Star is the principle that, if a statute or rule is unambiguous, we must give effect to its plain meaning." *Consol Pa. Coal Co., LLC v. MSHA*, 941 F.3d 95, 104 (3d Cir. 2019) (citing *Kisor*, 139 S. Ct. at 2415).

These settled principles apply just as forcefully where a federal agency has offered its own interpretation of a statute. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), courts ask "whether Congress has directly spoken [in the statute] to the precise question at issue." They "answer that question by 'exhaust[ing] all the traditional tools of construction,' including 'text, structure, history, and purpose.'" *Kisor*, 139 S. Ct. at 2415 (citations omitted) (cleaned up). Courts "will not defer to 'an agency interpretation that is inconsistent with the design and structure of the statute as a whole.'" *UARG*, 573 U.S. at 321 (citation omitted) (cleaned up). If this process yields an unambiguous meaning, that is the end

of the inquiry and the court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843.[5]

B. CERCLA § 9601(10)(H) Expressly Excludes USS' Federally Permitted Releases From The Statute's Reporting Requirement.

By express statutory design, the COG-related emissions challenged in CAC's lawsuit are subject to CAA regulation and reporting. The CAA provides that state and local regulators will oversee and administer air-pollution sources subject to Title V operating permits and the control regulations those permits incorporate. Under the CAA, the emissions from USS' Plants' processes are regulated, in detail, pursuant to Pennsylvania's SIP, the Plants' Title V operating permits, and ACHD's Article XXI, and the monitoring, reporting, and enforcement oversight that comes with them. Because the challenged emissions were governed by its federal CAA permits, USS reported them to ACHD. And because of ACHD's regulatory authorization under the CAA, it responded. In these circumstances, the exemption from CERCLA reporting plainly should be applied.

In pertinent part, § 9601(10)(H) defines a "federally permitted release" exempt from § 9603(a)'s reporting requirement as:

> any emission into the air subject to a permit or control regulation under section 111, section 112, title I part C, title I part D, or State implemen-

[5] As discussed below in Section I.D, even if the CERCLA provisions are found to be ambiguous, EPA's interpretation is not entitled to deference under *Chevron*.

> tation plans submitted in accordance with section 110 of the Clean Air Act (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections.

The phrase "any emission into the air," which CERCLA does not define, is all-encompassing and thus properly should be read to include the air emissions regulated under the CAA in this case. There is no basis in the statutory text to conclude otherwise. *See Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011) ("When terms used in a statute are undefined, we give them their ordinary meaning") (citation omitted) (cleaned up). Indeed, the "word 'any' naturally carries 'an expansive meaning[,]' ... ordinarily 'refer[ring] to a member of a particular group or class without distinction or limitation' and in this way 'impl[ies] every member of the class or group.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (citations omitted).

"Subject to" likewise is not defined, but its ordinary meaning is plain enough. Numerous courts have construed the statutory phrase "subject to" to "mean 'governed or affected by.'" *Portland GE Co. v. Bonneville Power*, 501 F.3d 1009, 1028 (9th Cir. 2007) (citation omitted); *see also*, *e.g.*, *U.S. ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 547 (D.C. Cir. 2002) ("[A]n entity is 'subject to' a particular legal regime when it is regulated by, or made answerable under, that regime."); *Texaco Inc. v. Duhe*, 274 F.3d 911, 918-19 (5th Cir. 2001) ("'subject to' an existing contract" means "governed by" the terms of that contract); *Ardestani v. INS*, 502 U.S. 129, 135 (1991) ("under" statute means "subject to" or "governed by" the statute). This interpretation also is con-

sistent with the 1979 edition of Black's Law Dictionary in print at the time CERCLA was enacted. *See "Subject To," Black's Law Dictionary* 1278 (5th ed. 1979) (defining "subject to" as "governed or affected by").[6] *See Downey v. Pa. Dep't of Corr.*, 968 F.3d 299, 306 (3d Cir. 2020) ("We look to dictionary definitions to determine the ordinary meaning of a word.") (citation omitted) (cleaned up). Adopting this accepted ordinary meaning likewise brings the challenged emissions within the exemption.

The emissions indisputably are "governed or affected by" Pennsylvania's SIP, CAA permits and control regulations, and ACHD Article XXI, and there is no basis in the statute to conclude otherwise. To the contrary, construing "subject to" to mean "governed or affected by" is reinforced by § 9601(10)(H)'s use of "subject to," and its distinctively disparate use of phrases such as "in compliance with" and "authorized under" in other neighboring subparts. "Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones v. United States*, 527 U.S. 373, 389 (1999) (citation omitted). Courts "usually 'presume differences in language like this convey differences in meaning.'" *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018) (citation omitted). The distinct word choices in subsection (10)—made by the very same Congress, at the very same time, in the very same

[6] As CAC points out, the 1979 edition of Black's Law Dictionary includes other possible definitions of "subject to," including "obedient to." But "obedient to" is not a path to the result CAC demands. It is just another way of saying "governed by."

enactment—presumptively mean Congress intended the different phrases to have different meanings. Indeed, this "presumption applies with special force in this case given that" the different objects—"emissions" in subsection (10)(H), and "discharges," "releases," "injections" and the like in neighboring subsection (10) subparts—are "qualified differently within the same subsection of Section [9601]." *Stovic v. RRB*, 826 F.3d 500, 503 (D.C. Cir. 2016) (Kavanaugh, J.); *see also Riccio v. Sentry Credit, Inc.*, 954 F.3d 582, 587 (3d Cir. 2020) (en banc) (reasoning that "intra-section" and "inter-section" "variation" of terms within the same statute or statutory subsection "strongly signals" a difference in meaning).

Other disparate uses of terms in § 9601(10) further compel this reading. For instance, subpart (E) uses both "in compliance with" and "subject to." And subparts (B)-(D)—which relate to the same statute regulating water pollution—disparately use the phrases "with respect to," "identified in," and "in compliance with." Thus, it is clear that had Congress meant to exclude from § 9603(a)'s reporting requirement only "emissions" "in compliance with" or "authorized under" CAA permits, SIPs, or control regulations, it knew how to say so. But it didn't. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("A textual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.").

The above contextual construction also aligns fully with the integrated statutory scheme. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)

(explaining that courts must "interpret the statute 'as a symmetrical and coherent regulatory scheme,' [and that] the meaning of one statute may be affected by other Acts") (citations omitted). Here, the CAA comprehensively regulates air emissions, deploying federal, state, and local resources to carry out its mission, including by mandating reporting of unauthorized emissions to local and state authorities. *Supra* at 4-8, 21. And where, as here, a facility's emissions are governed by SIPs, Title V permits and control regulations, and local regulations—which trigger duties to report to local regulatory authorities more extensive than those required under § 9603(a)—CERCLA reporting is unnecessary and thus an exemption logically is provided.

Given this backdrop, requiring CERCLA reporting for CAA-regulated air emissions also is incompatible with the purpose and function of the CAA. As just one example, Title V permits are "intended to be a source-specific bible for [CAA] compliance" containing all regulatory requirements relating to air emissions, *Bell*, 734 F.3d at 190, and they are designed "to add 'clarity and transparency … to the regulatory process to help citizens, regulators, and polluters themselves understand which clean air requirements apply to a particular source of air pollution.'" *Envtl. Integrity Project v. EPA*, 969 F.3d 529, 544 (5th Cir. 2020) (citation omitted). Thus, subjecting sources governed by these all-encompassing, federally-approved air emission permits to an additional set of CERCLA reporting requirements that alternately are: (i) not contained in the Title V permit "bibles"; (ii) based on a list of well over 1,000 specific substances; and (iii) provided for under a different statute *not* aimed specifically at air

emissions, runs contrary to the central aim of Title V. *Id.* (rejecting interpretation of Title V permitting provisions that was "at cross-purposes" with Title V's "goal" of regulatory "clarity and transparency"); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (rejecting "reading of the statute [that] would … run contrary to [its] stated purpose") (citation omitted).

Moreover, had Congress intended for such reporting redundancy, it could, and would, have made that clear and not provided for an express exemption. But it did not do so. In fact, 10 years after it enacted CERCLA, Congress amended the CAA to create extensive new regulatory and reporting requirements targeted at air emissions without reference to CERCLA. *See Envtl. Integrity Project*, 969 F.3d at 534. Congress also amended CAA § 7412, authorizing EPA to establish additional risk management and "release prevention, detection, and correction requirements" and creating the Chemical Safety Board (CSB), which was authorized to establish its own rules for reporting "accidental releases into the ambient air." CAA §§ 7412(r)(7)(A), (r)(6)(C)(iii); JA-011 (describing § 7412).

Congress is presumed to be "aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and had Congress believed in 1990 that CERCLA § 9603(a) already required reporting of hazardous air emissions governed by the CAA to the federal NRC, it would not have created these comprehensive new reporting regimes requiring additional notification to federal, state, and local authorities. *See Prestol Espinal v. AG of the United States*, 653 F.3d 213, 224 (3d Cir.

2011) (noting "that 'the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically on the topic at hand[,]' and concluding that "[w]hen Congress amended" statute to include a new requirement, "it was undoubtedly aware of the whole text of the statute, saw that there was no [such] requirement generally, and decided to include such a requirement") (citation omitted). The far more likely explanation for Congress's 1990 CAA amendments is that, aware of the broad exemption from CERCLA reporting for air emissions in § 9601(10)(H), it perceived a need to require air emission reporting not subject to such an exemption, and created extensive new air emission reporting requirements to account for that. *See* CAA § 7661b(b)(2); *id.* § 7412(r)(6)(C)(iii) (conferring broad authority on CSB to issue regulations requiring reporting of "accidental releases into the ambient air").

Therefore, just as the district court concluded, settled rules of construction compel that § 9601(10)(H) should be read to provide, without exception, that any emissions governed by the CAA's extensive and comprehensive regulatory scheme are exempted from CERCLA § 9603(a)'s reporting requirement.

C. The District Court Properly Rejected CAC's Effort To Redraft § 9601(10)(H).

Faced with this logical, contextually-drive construction, CAC attempts to create ambiguity where none exists. None of its strained efforts withstand reasoned analysis.

CAC's infirm textual arguments. CAC initially claims the district court's interpretation renders meaningless the term "permitted" in § 9603(a)'s reference to "federally permitted releases." To support this contention, CAC cherry-picks dictionary definitions of "permitted" as "allow[ed]" or "authorized," which, it says, support reading "subject to" similarly to mean "in compliance with" or "in conformance with." But as CAC is forced to concede, the phrase "federally permitted releases" does not exist in a vacuum. Rather, it is defined, in 11 particularized ways, by § 9601(10), including subpart (H). If Congress had wished to enshrine CAC's interpretation, it could easily have done so by limiting the exemption to "lawful emissions" or by using the same verb phrase—such as "in compliance with"—in each of the 11 subparts; it did not.

Apart from that, adopting CAC's reading of "permitted" and engrafting it onto § 9601(10) would render superfluous the eight subparts of that statutory subsection that already use terms with the same meaning—such as "in compliance with" and "authorized under"—and which terms play "pivotal" roles in delineating the scope of those subparts. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are especially unwilling" to treat a term as surplusage when it "occupies so pivotal a place in the statutory scheme"); *see also Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("express[ing] a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment").

CAC's proffered interpretation of "permitted" likewise would render meaningless the language in other subsection (10) categories that refers to "discharges" that "result[] from circumstances identified and reviewed and made part of the public record with respect to a permit" (subpart (B)) or that are merely "identified in a permit or permit application" (subpart (C)). These types of "discharges" clearly need not be "allowed" or "authorized" by a permit to meet these definitions—the fact that they are merely "identified" is enough. Yet that is precisely what CAC's proposed reading of "permitted" would compel, another unexplained violation of the "venerable" canon against surplusage. *Riccio*, 954 F.3d at 588.

CAC ironically ignores these surplusage problems even as it makes a surplusage argument of its own—that is, that failing to read "subject to" to mean "in compliance with" purportedly renders meaningless subpart (H)'s exemption of emissions otherwise subject to a "waiver granted, promulgated, or approved" under the CAA. Appellant's Opening Brief (AOB) at 31. That is wrong too. A source can be "subject to" a CAA § 111, 42 U.S.C. § 7411, "new source performance standard" (NSPS) or a CAA § 112, 42 U.S.C. § 7412, "national emissions standard for hazardous air pollutants" (NESHAP) and yet have a waiver from complying with that NSPS or NESHAP. Without subpart (H)'s "waiver" clause, it would be unclear whether a source with such a waiver nonetheless is still "subject to" or governed or affected by the § 111 NSPS or § 112 NESHAP.

In context, therefore, the "waiver" clause clarifies that emissions from a source that is governed by an NSPS or NESHAP waiver (and accordingly that are not "in compliance with" a § 111 NSPS § 112 NESHAP) are within the § 9601(10)(H) exemption, and thus is not meaningless. Indeed, if, as CAC contends, "subject to" means "in compliance with[,]" that would make no sense because sources covered by a § 111 or § 112 waiver by definition are *not* "in compliance with" the applicable NSPS or NESHAP. *See Maracich v. Spears*, 570 U.S. 48, 68 (2013) (""The provisions of a text should be interpreted in a way that renders them compatible, not contradictory"") (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012)).

CAC then incomprehensibly asserts that the district court's interpretation "conflicts … with the other ten subparts" of § 9601(10), which "all construe the exemption narrowly." AOB.32. Of course, statutory provisions do not "construe" other statutory provisions. What CAC appears to be saying is that because certain other § 9601(10) subparts expressly limit the particular exemption to releases "that are in conformance with legal requirements[,]" "subject to" must mean the same thing. Rather than draw the rational conclusion—that a *different* meaning should be given to *different* phrasing—CAC claims those differences compel that each one should be read to mean the *same thing*, citing the rule that a statute's provisions should be read consistently with one another. AOB.33. Yet this perverts the very principle CAC relies on.

To be sure, statutory provisions should be read harmoniously where possible. But that is not the same thing as revising statutory language in order to make the principle apply, which is what CAC advocates for here. No principle countenances redrafting under the guise of construction—indeed, the most fundamental of those principles forecloses it. *See Nat'l Ass'n of Mfrs. v. DOD*, 138 S. Ct. 617, 629 (2018) ("[O]ur constitutional structure does not permit this Court to rewrite the statute that Congress has enacted") (citation omitted) (cleaned up).

CAC's unfair treatment of the district court. CAC's attempt to support its atextual construction takes a decidedly unfair turn when it attacks a straw man—that the district court supposedly *based* its ruling on its "assumptions" that CAA § 7412(r) "applied to the specific emissions alleged by" CAC. AOB.22. But the court made no such "assumption." Instead, it simply observed that the risk management planning, prevention, detection, and reporting requirements set forth in § 7412(r) evidence the CAA's comprehensive regulation of the reporting and responses to emissions, which are "similar" to those in CERCLA. JA-011. That reality, the court continued, made it "understandable that Congress would not require a facility to comply with redundant reporting requirements under both the Clean Air Act and CERCLA." JA-012.[7]

[7] CAC goes so far as to claim that because § 7412(r) says a report to the NRC satisfies any reporting regulations promulgated by the agency created by § 7412(r), the CSB, that "indicates that Congress intended sources like [USS] to continue to disclose (**continued**)

CAC adds another layer of unfairness when it claims that the district court erred in interpreting "subject to" to mean "ought to comply" and omitted the word "emission" from the statute. AOB.29-30. But what the court found is what the statutory language plainly provides—that "subject to" "does not require that the air emissions comply with a Clean Air Act permit in order to be exempt." JA-012. This interpretation accounts for the emissions, but finds them to be within the statute's plain text—just as bedrock principles of construction demand.

CAC further strains credulity when it argues that the district court's interpretation would exempt "*all* emissions of *any* pollutant and at *any* quantity ... as long as the facility has a Clean Air Act permit for *some* emissions[,]" and claims that is an impermissibly "absurd" result. AOB.33. "[T]hat dog won't hunt" either. *Riccio*, 954 F.3d at 588. As for CAC's premise, the district court said no such thing, nor could it have given CAC own admission that USS' emissions violated its CAA permits.

Beyond that, CAC cannot—and makes no attempt to—meet the elevated standard for showing an "absurd" construction. "'An absurd interpretation is one that defies rationality or renders the statute nonsensical and superfluous.'" *Riccio*, 954 F.3d

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their emissions of hazardous substances to the NRC under CERCLA § 9603(a)." AOB.27. But one doesn't follow from the other. And, as discussed above, the fact that Congress saw a need—10 years *after* it passed CERCLA—to create the CSB and provide for new federal reporting requirements specifically targeting air emissions conclusively refutes CAC's logic.

at 588 (citations omitted). "As long as Congress could have any conceivable justification for a result—even if the result carries negative consequences—that result cannot be absurd." *Id.* (citations omitted). For the reasons already explained, there *is* no such irrationality underlying the district court's interpretation and the court's interpretation *is* justified by the statutory scheme. CAC also does not make a sufficiently developed argument to the contrary and that failure forfeits its point. *See In re Wettach*, 811 F.3d 99, 115 (3d Cir. 2016) (forfeiture where "no substantive argument" made in appellant's opening brief). In any event, it is CAC's construction that leads to an absurdity by treating emissions that admittedly fall within controlling permits and regulations as though they do not.

CAC's improper resort to legislative history, purpose, and policy. At various points, CAC invokes legislative history, purpose, and policy to support its redrafting. This effort fails as well.

To start with, CAC quotes from one page of a sprawling CERCLA Senate Committee Report, which notes that the CAA controls hazardous emissions "through a variety of means" and that the § 9601(10)(H) exception extends to CAA permits and regulations that "limit or eliminate emissions" of hazardous substances. AOB.37. But nothing in the quoted text shows that (i) CERCLA reporting is required for CAA-regulated emissions or (ii) the "federally permitted release" exemption should be read narrowly to exclude those emissions. If anything, the excerpt *supports* the district

court's construction—that the CAA does indeed control emissions through a variety of means, thereby justifying application of the exemption.

CAC also points to an isolated statement from Senator Randolph that "exemptions are not to operate to create gaps in actions necessary to protect the public or the environment[,]" and claims USS' "failure to report to the NRC *did* create a gap." AOB.37-38. Putting aside that the single senator's statement is entitled to little weight, *see NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history"), there is no "regulatory gap" here. *Supra* at 4-8, 21, 25-27. CAC goes so far as to claim—without citation—that neither USS' CAA "permits nor applicable regulations required the immediate reporting of emissions of hazardous substances required by CERCLA." AOB.38. But CAC knows that is wrong. *Supra* at 10-13.

CAC does not dispute—indeed, it affirmatively asserts—that the processes at USS' Plants and the resulting emissions are governed by SIP requirements, Title V permits, SIP requirements, and detailed and extensive local regulations, all having the force of federal law. In fact, Article XXI—which CAC never mentions in its brief—*does* require "immediate reporting," and requires it far more broadly, in terms of both the types and quantities of substances released, than does CERCLA. *Supra* at 7-8. These regulatory requirements triggered USS' obligation to report the alleged emissions to ACHD, and it did. ACHD, in turn, had the regulatory prerogative to pursue

investigatory and enforcement measures aimed at preventing any hazardous emissions from the Plants, and it did. *Supra* at 12-13.

At the same time, CAC ignores other legislative history that rebuts its narrative. *See Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293, 302 (3d Cir. 2009) (rejecting reliance on "cherry-picked" legislative history where "'[t]he legislative history is more conflicting than the text [of the statute] is ambiguous'") (citation omitted). In enacting CERCLA, Congress wanted to avoid creating parallel and redundant reporting requirements for releases addressed by other environmental statutes:

> The laws authorizing permits and regulations that control these releases provide for notification and such notification procedures should provide the same public benefits – especially regarding timely response – as would be provided in this substitute bill. Notice is crucial to the timely Government response which is central to the superfund bill. The federally permitted release exceptions are not directed at avoiding notice, but rather to make it clear which provisions of law apply to discharging sources.

S. Rep. No. 848, at 50 (1980). Congress acted on that concern by creating its list of CERCLA reporting exceptions. And that same Committee Report—in a statement CAC also ignores—makes clear that Congress explicitly recognized the *CAA's* comprehensive regulation of emissions as the reason for the exemption:

> In the [CAA], unlike some other Federal regulatory statutes, the control of hazardous air pollutant emissions can be achieved through a variety of means: express emissions limitations… ; technology requirements… ; operational requirements … ; work practices…; or other control practices[.]

Id. at 49.

CAC's two-sentence "purpose" argument is flimsier still. It claims that if "subject to" is not interpreted to mean "in compliance with," that would contravene § 9603(a)'s purpose of ensuring the government's ability to quickly "'check the spread of a hazardous release.'" AOB.38 (citation omitted). But "'it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective'—such as remedying environmental harms—'must be the law.'" *EME Homer City Generation, L.P.*, 727 F.3d at 294 (citation omitted).

In any case, CAC's claim is a *non sequitur*. CAC does not dispute that where emissions do not comply with CAA permits and SIPs, that triggers immediate reporting obligations under those permits and SIPs, consistent with the CAA's mandate. Article XXI, as administered by ACHD, carries this into effect. And there is nothing in the record showing that such reporting does not enable rapid government response or enforcement. On the contrary, the record shows prompt reporting, a prompt response, and follow-on enforcement measures, all taken under the CAA.

Finally, CAC's suggestion that its reading should be adopted because CERCLA reporting imposes only a *de minimis* burden, AOB.27n.4, is meritless. Just as courts are "unwilling[] to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome[,]" *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 134 (2015) (citation omitted), courts will not extend a statute beyond its text to impose an unspecified requirement, no matter what degree of burden it entails. Extending statutes for any reason is the prerogative of Congress, not the courts. *See*

H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249 (1989) ("[R]ewriting" statutes "is a job for Congress, if it is so inclined, and not for this Court"); *Rotkiske*, 140 S. Ct. at 361 ("We simply enforce the value judgments made by Congress.").

D. The District Court Correctly Found That CAC's Atextual Redrafting Cannot Be Adopted By Resort To "Agency Deference."

CAC argues that the district court erred by not deferring to EPA's previous interpretations of CERCLA's reporting exception in the late 1980s and early 1990s under *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). CAC does not cite any court decisions accepting these administrative interpretations, nor is there a basis for this Court to do so. Rather, this call for deference is yet another exercise in misdirection.

The *Mobil Oil* decisions are not entitled to *Chevron* deference. CAC argues that the administrative decisions in *Mobil Oil* (*supra* at 14) are entitled to *Chevron* deference.[8] For a variety of equally dispositive reasons, however, no such deference is owed to either administrative decision.

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[8] CAC did not argue in the district court, and does not argue in its opening brief on appeal, that the *Mobil Oil* decisions are entitled to *Skidmore* deference. That is a forfeiture. *See Harris v. City of Philadelphia*, 35 F.3d 840, 845 (3d Cir. 1994) ("This court has consistently held that it will not consider issues that are raised for the first time on appeal."); *In re Wettach*, 811 F.3d at 115 (finding forfeiture where appellants "fail[ed] to develop … argument in their opening brief"). But even if CAC had made an argument for *Skidmore* deference, it would fail for the same reasons as its *Chevron* deference argument.

As a threshold matter, *Chevron* "deference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (citation omitted). So "[w]here, as here, the canons [of construction] supply an answer, '*Chevron* leaves the stage.'" *Id.* (citation omitted). Nor is deference due "if Congress has [not] delegated authority to definitively interpret a particular ambiguity in a particular manner." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 321 (2013). But neither § 9603 nor § 9601 delegates authority to EPA to resolve any purported ambiguity in the meaning of "federally permitted releases" under §§ 9603(a) and 9601(10)(H). *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-650 (1990) (rejecting deference where, although Congress authorized agency to implement certain statutory provisions, "no such delegation" from Congress "regarding [the enforcement] provisions" at issue "is evident in the statute").

Beyond this, the *Mobil Oil* administrative decisions are not entitled to *Chevron* deference because "pure questions of statutory construction must be resolved by courts[,]" *Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001) (citation omitted), and the interpretive question here does not "'implicate[] agency expertise in a meaningful way.'" *Id.* (citation omitted); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (denying deference on "pure questions of law"); *Drakes v. Zimski*, 240 F.3d 246, 251 (3d Cir. 2001) (suggesting no deference due because "defining" a federal statutory term "is what federal courts do all the time"). Some interpretive issues "fall more naturally into a judge's bailiwick[,]" *Kisor*, 139 S. Ct. at 2417, and "[d]etermining the

meaning of a statute … presents a classic legal question," *id.* at 2432 (Gorsuch, J., concurring in the judgment).

Still further, courts do not accord *Chevron* deference to accomplish what CAC advocates—rewriting a statute's provisions in order to depart from their plain meaning. Specifically, "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference." *UARG*, 573 U.S. at 321 (citation omitted).

And finally, under any circumstances, courts accord *Chevron* deference only to "reasonable interpretation[s]." *Michigan v. EPA*, 576 U.S. 743, 751 (2015) (rejecting EPA's interpretation of ambiguity in CAA § 7412) (citation omitted); *see also Reich v. Local 30, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am., AFL-CIO*, 6 F.3d 978, 988 n.14 (3d Cir. 1993) ("[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ."'). Here, there is nothing reasonable about the reasoning supporting the results reached in the *Mobil Oil* decisions.

First, the decisions run roughshod over subpart (H)'s ordinary meaning and § 9601(10)'s disparate verb use based on a series of premises that ignore what foundational principles of construction require. Both rely on the erroneous notion that "'subject to' is inherently ambiguous" (1992 WL 293133, at *8; 1994 WL 544260, at *9) when it has a plain meaning, and the administrative judge follows that by employing a principle of construction—that "odd results" require a more searching inquiry

into congressional intent (1992 WL 293133, at *8)—when there is nothing odd about the result the required textual construction compels.[9] The Board finds further support for purported ambiguity by observing that the verb phrases in § 9601(10) "are not statutorily-defined terms having particular and differentiated regulatory meaning." 1994 WL 544260, at *10. But that recognition instead should lead naturally to a plain-language construction where disparate terms are given different meanings. If more were needed, both decisions fail to attribute any significance to the "any emissions" language and likewise ignore the plain meaning of "any emissions subject to."

Second, the Board's decision relies heavily on pre-1950 Supreme Court statutory-construction precedents—issued in an era when statutory text did not always hold the central place in interpretation that it does today—in giving paramount weight to what the Board calls legislative history and purpose. 1994 WL 544260, at *11. And it improperly *begins* its analysis with legislative history and later relies on the least reliable form of legislative history—floor statements from individual legislators. *Id.* at *10. Of course, "[t]he law is what Congress enacts, not what its members say on the floor[,]" *Szehinskyj v. Att'y Gen.*, 432 F.3d 253, 256 (3d Cir. 2005); and proper statutory interpre-

[9] On this score, the administrative judge plainly erred by resorting to the narrow absurd-result principle as a "tie-breaker" canon because, as this Court recently made clear, "we first interpret the statute according to its text and only then analyze whether that text leads to an absurd result." *Cabeda v. Att'y Gen.*, 971 F.3d 165, 187 (3d Cir. 2020).

tation never *begins* with legislative history. Nor is there any "need to resort to legislative history unless the statutory language is ambiguous." *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 259 (3d Cir. 2013) (citation omitted) (cleaned up).

Third, both decision-makers also place primary reliance on CERCLA's supposed goal to fill a "regulatory gap" that would result from not reading "subject to" to mean "in compliance with." 1992 WL 293133, at *16; 1994 WL 544260, at *11. Yet as explained above, there is no gap under CAA's regulatory scheme and Congress recognized as much by enacting CERCLA's reporting exemption. In any case, nothing in the generalized purpose of a statute, including CERCLA, "'can overcome the specific manner of [coverage] which the text'" of the statute provides *In re Majestic Star Casino, LLC*, 716 F.3d 736, 763 (3d Cir. 2013) (citation omitted). Indeed, "the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality) (citation omitted).

There is, moreover, a critical distinction between the *Mobil Oil* case and this one—Mobil Oil's CAA "permits [did] *not* contain reporting requirements of *any kind*." *Mobil Oil*, 1992 WL 293133, at *16 (emphasis added). But USS *is* subject to detailed, comprehensive, and immediate reporting obligations under its permits and associated SIP and ACHD requirements—obligations it indisputably met. *Supra* at 10-13.

Fourth, although not acknowledged by CAC, any effort to find ambiguity based on deference to an agency construction would trigger the rule of lenity, which inde-

pendently precludes any deference to the *Mobil Oil* decisions. Here, § 9603 "imposes criminal liability (including prison sentences) for failure to report a 'release' of hazardous substances above a certain threshold." *United States v. CDMG Realty Co.*, 96 F.3d 706, 717 (3d Cir. 1996) (citation omitted); CERCLA § 9603(b)(3) (knowing failure to notify triggers fines and up to 3-5 years in prison). Under the rule of lenity, "[a]ny ambiguity in the language of a criminal statute should be resolved in favor of the defendant."[10] *United States v. Vitillo*, 490 F.3d 314, 321 (3d Cir. 2007); *Burrage v. United States*, 571 U.S. 204, 216 (2014) ("Especially in the interpretation of a criminal statute subject to the rule of lenity, we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.") (citation omitted).

Given the threat of criminal sanction, the rule of lenity should take priority over any call for agency deference.[11] "[C]riminal laws are for courts, not for the

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[10] This principle applies with equal force to statutes—like CERCLA § 9603—that have both civil and criminal applications. *Leocal v. United States*, 543 U.S. 1, 11 n.8 (2004) (emphasizing that courts "must interpret the statute consistently, whether [they] encounter its application in a criminal or noncriminal context"); *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (same); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality) (same).

[11] Although it appears this Court has not specifically addressed the interplay between the rule of lenity and deference, it has rejected *Chevron* deference "to an agency's interpretation of a statute that raise[s] serious constitutional doubts." *Guerrero-Sanchez v. Warden York Cty. Prison*, 905 F.3d 208, 226 (3d Cir. 2018) (citation omitted). And, as the Supreme Court recently observed, the canon of constitutional avoidance and the rule of lenity are "traditionally sympathetic doctrines[.]" *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019).

Government, to construe[,]" *Abramski v. United States*, 573 U.S. 169, 191 (2014), and the Supreme Court has "never held that the Government's reading of a criminal statute is entitled to *any* deference." *United States v. Apel*, 571 U.S. 359, 369 (2014) (emphasis added); *Guedes v. BATFE*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari) (reasoning that *Chevron* "has no role to play when" the law at issue carries "the possibility of criminal sanctions"); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155–57 (10th Cir. 2016) (Gorsuch, J., concurring) (same).

Moreover, a court cannot defer to an agency under *Chevron* until it empties its "legal toolkit" of "all the 'traditional tools' of construction[,]" *Kisor*, 139 S. Ct. at 2415, the rule of lenity included. *Thompson/Ctr. Arms Co.*, 504 U.S. at 518 (cleaned up). Thus, the rule, like other "presumptions, substantive canons and clear-statement rules" of statutory construction, must be applied to "take precedence over conflicting agency views." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring); *see also Arangure v. Whitaker*, 911 F.3d 333, 340-341 (6th Cir. 2018) (same).

EPA's informal guidance is not entitled to deference. CAC's argument for giving *Skidmore* deference to the EPA's informal guidance fails for similar reasons.

First, CAC cites the 2002 EPA guidance's statements that § 9601(10)(H) does not apply to releases resulting from accidents or malfunctions, but CAC does not make an argument along those lines on appeal.

Second, CAC did not even mention the 1988 guidance accompanying EPA's proposed rule in the district court, much less argue that it is entitled to *Skidmore*

deference, and it makes only a perfunctory argument for such deference in its opening brief on appeal. That is a forfeiture. *See Harris*, 35 F.3d at 845 (failure to raise in district court); *In re Wettach*, 811 F.3d at 115 (failure to raise in opening brief on appeal); *Simmons v. UBS Fin. Servs., Inc.*, 972 F.3d 664, 669 n.13 (5th Cir. 2020) (holding that appellant "waive[d] reliance on "*Skidmore* [ ] deference" to agency guidance where not raised below).

Third, the 1988 guidance is not entitled to *Skidmore* deference on its own terms. Whether an agency interpretation is "reasonable given the language and purpose of the" relevant statute is one of the "the most important" considerations in determining *Skidmore* deference. *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 304 (3d Cir. 2012) (citation omitted) (cleaned up). For the reasons discussed above with respect to the *Mobil Oil* decisions, EPA's 1988 guidance fails to properly account for the statutory text or applicable principles of construction. And the guidance is premised on a purported need to construe an "ambiguity" that, on analysis, does not exist. Courts do not resort to *Skidmore* deference in such circumstances. *Id.* at 295 ("we need reach the [*Skidmore*] deference question only if we find the statutory language is ambiguous") (citation omitted); *Kientz v. Comm'r, SSA*, 954 F.3d 1277, 1281 (10th Cir. 2020) ("not even *Skidmore* deference 'is due to agency interpretations at odds with the plain language of the statute itself'") (quoting *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 109 (1993)).

Fourth, the 1988 guidance was not "issued contemporaneously with the statute"—CERCLA was enacted eight years earlier—and its proffered interpretation of the relevant provisions does not fall "within [EPA's] expertise[.]" *DOL v. Am. Future Sys.*, 873 F.3d 420, 427 (3d Cir. 2017). To be sure, EPA is charged with administering CERCLA and the CAA. But the dispositive interpretive issue in this case relates only to what Congress meant by what it said—a "pure question[] of statutory construction [that] must be resolved by courts." *Francis*, 269 F.3d at 168 (citation omitted).

Fifth, just as it precludes *Chevron* deference to the *Mobil Oil* decisions, the rule of lenity blocks any *Skidmore* deference too. *Supra* at 42-44.

To be sure, *Chevron* or *Skidmore* deference to administrative interpretations is appropriate where the requirements for application of the doctrine are met. For the many reasons discussed above, however, those requirements cannot be met here.

II. CAC'S PROCEDURAL ARGUMENTS FOR AVOIDING DISMISSAL ARE MERITLESS.

Even while it advances a broad construction of § 9603(a)'s reporting requirement, CAC tries to avoid any ruling on that construction by arguing that: (i) the district court applied § 9601(10)(H) "without identifying any emission limits or permit conditions that applied to [USS'] accidental releases of benzene, coke oven emissions, or hydrogen sulfide[ ]" (AOB.21); and (ii) the CERCLA exception is an affirmative defense that could not be decided at the Rule 12(b)(6) stage. Both arguments lack merit.

A. The Record Establishes That The Challenged Emissions Are Exempt From CERCLA Reporting.

CAC contends that § 9601(10)(H) does not exempt from § 9603(a)'s reporting requirement air emissions that are not "in compliance with"—*i.e.*, that violate—a CAA permit, SIP, or control regulation. It further argues, however, that dismissal was improper because the record does not enable any such decision. This argument is belied by CAC's own allegations and admissions and its parallel CAA suit against USS.

There is no mystery what CAC's position is—USS' alleged emissions following the December 2018 fire violated its CAA permits, and therefore are not exempt under § 9601(10)(H). *Supra* at 11-12, 15. CAC's Notice of Intent to Sue attached to CAC's complaint asserts that "none of the [Plants'] [CAA] permits authorize the emission of any amount" of hydrogen sulfide or COG, JA-041-042, and that while the Clairton Plant's permit allowed a certain amount of benzene emissions, it did not allow the type and amount of benzene allegedly emitted from the Clairton Plant following the fire. JA-042. The ACHD's Enforcement Order, also attached to CAC's complaint, makes similar claims. JA-052-56. Later, in its brief in opposition to USS's motion to dismiss, CAC unqualifiedly asserted that USS's use of unprocessed COG following the fire was "a violation of [USS's] air permits." *Supra* at 15. CAC went on to quote its own allegation that USS' emissions were not exempt under § 9601(10)(H), and then, citing its Notice of Intent to Sue, described the Notice as "alleging releases in violation of air permit terms[.]" *Id.* at n.4.

Leaving no room for doubt, CAC filed a parallel CAA suit against USS based on the same underlying events. At the heart of that suit are allegations that (i) the USS facilities at issue are subject to a SIP pursuant to § 7410 of the CAA and (ii) USS violated that SIP with the specific emissions of benzene, COG, and hydrogen sulfide. *Supra* at 12. Then, at the hearing on USS' motion to dismiss, CAC's counsel admitted that the emissions in this case are governed by USS' CAA permits and are the same emissions as those in CAC's parallel CAA suit. JA-119-22.

For purposes of USS' motion to dismiss, these allegations and admissions establish what CAC claims cannot be ascertained—that USS's emissions fall under its CAA permits. *See Berckeley Inv. Grp.*, 455 F.3d at 211 n.20 (plaintiff's "concessions in pleadings or briefs" are "judicial admissions" "that bind the party who makes them") (citations omitted). CAC's assertions that the emissions are not in compliance with those permits and the SIP necessarily concede that the emissions are "subject to" those permits and SIP and a "court is 'not obliged to ignore any facts set forth in the complaint that undermine the plaintiff's claim.'" *Am. United Logistics, Inc. v. Catellus Dev. Corp.*, 319 F.3d 921, 928 (7th Cir. 2003) (citation omitted); *see Juday*, 799 F. App'x at 138 n.4 (taking judicial "notice [of] a complaint and dispositive opinions in certain other litigation" filed by the same plaintiff); *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998) (same).

B. CERCLA's Reporting Exemption Was Properly Resolved On USS' Motion To Dismiss.

CAC's argument that § 9603(a)'s exemption is an affirmative defense that is unresolvable on a motion to dismiss also lacks support in the law or the record.

This Court employs a multi-factor analysis when determining whether a statute creates an exemption from a prohibition that the plaintiff must prove, or an affirmative defense falling on the defendant. *See Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 361 (3d Cir. 2015) (listing the factors). One is whether the statute frames "an exception" to its general prohibition or an element of a prima facie case. Section 9603(a) does not clearly do either, but this Court has construed a similar structure to create an element, not a defense. *See United States v. Daniel*, 518 F.3d 205, 208-09 (3d Cir. 2008) (holding that authorization carve-out in statute providing that "[a]ny person, who unless authorized by law, possessed, purchases, manufactures, advertises for sale or uses any firearm ammunition shall be guilty of a felony[,]" established element of offense, not affirmative defense).

A second factor looks at the broader statutory scheme. Two aspects of § 9603 and related CERCLA provisions demonstrate that the federally permitted release exemption is not an affirmative defense. Specifically, § 9603(a) incorporates the exemption into the prohibition-enacting clause itself. That is significant because, as the Supreme Court has held, "[i]t is a general guide to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a statute, the

burden is on the prosecution to plead and prove that the defendant is not within the exception." *United States v. Vuitch*, 402 U.S. 62, 70 (1971) (interpreting statute that, like § 103(a), built an exclusion into the prohibition itself); *compare Evankavitch*, 793 F.3d at 363 (finding that "placement of the exception and the general prohibition in different parts of the statute has been recognized by the Supreme Court as indicative of an affirmative defense").

In that same vein, a separate subsection of § 9603, and a separate CERCLA provision, already set out exemptions and defenses. Section 9603(f) contains several exemptions from § 9603(a)'s reporting requirement. Similarly, § 9607(b) lays out "defenses" for releases in violation of § 9603(a). Thus, had Congress intended to make the federally permitted release exemption an affirmative defense, it presumably would have included it in § 9607—or perhaps § 9603(f)—but it did not. *See Trainer Custom Chem.*, 906 F.3d at 92 (according significance to § 9607's enumeration of defenses to liability and declining to imply additional defenses); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91 (2008) (stating that "it is no surprise" that the provisions at issue were affirmative defenses given that they were "exemptions laid out apart from the prohibitions").

The third and fourth factors—whether requiring CAC to prove the alleged emissions are not "federally permitted" would unfairly surprise CAC, and whether CAC is in control of information necessary to prove as much (*see Evankavitch*, 793 F.3d at 364-65)—also counsel that the exemption is not an affirmative defense. CAC

anticipated the potential applicability of the exemption when it affirmatively pled that it did not apply. CAC thus could not have been surprised when USS raised the exemption. And CAC's pre-complaint Notice of Intent to Sue (JA-032-045)—which includes detailed and extensive allegations of USS's CAA permits, the SIP they encompass, and USS' alleged violations—confirms that CAC had the information necessary to prove or disprove the applicability of the exemption before filing its complaint.

The last factor—which looks at fairness considerations—similarly does not support treating the exemption as an affirmative defense. Given CAC's possession of information on whether the exemption applies, no fairness considerations tip in favor of placing the burden of proving it on USS.

The *Evankavitch* factors go unaddressed by CAC. But those factors nevertheless refute CAC's position that the federally permitted release exemption must be treated as an affirmative defense. Any argument by CAC to the contrary in reply is forfeited. *See In re Wettach*, 811 F.3d at 115.

As for the arguments CAC does make, it cites (but does not discuss) a Ninth Circuit and two district court decisions, which found (or suggested) the exemption was an affirmative defense. AOB.48. Neither district court decision, however, provides any substantive analysis on why. And the Ninth Circuit's decision, which does, *United States v. Freter*, 31 F.3d 783 (9th Cir. 1994), is distinguishable and erroneous.

Freter considered the issue under deferential plain-error review because the defendant had failed to object to the relevant jury instruction. 31 F.3d at 788. Nor did *Freter* purport to follow anything like this Court's later-adopted *Evankavitch* analysis. It also based its affirmative-defense conclusion on the premise that it is easier for a defendant to prove a release is federally permitted than for the government to disprove it under *any* of § 9601(10)'s categories, *id.*, but did not explain its sweeping conclusion, which is contradicted by the record here.

In any case, adopting the view that the exemption is an affirmative defense does not put its application beyond the reach of a motion to dismiss. "A complaint may be dismissed under Rule 12(b)(6) where an unanswered affirmative defense appears on its face[.]" *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (citation omitted); *see also Sweda v. Univ. of Pa.*, 923 F.3d 320, 331 n.6 (3d Cir. 2019) (explaining that complaint can be dismissed on basis of an affirmative defense when it "anticipates" defense by preemptively denying its applicability).

Thus, in *Tower Air*, this Court held that because the complaint "declares that the [affirmative defense] does not vitiate any of his claims," the plaintiff was required to plead facts supporting the claim that the affirmative defense did not apply. 416 F.3d at 238; *see also Hecker v. Deere & Co.*, 556 F.3d 575, 588-89 (7th Cir. 2009) (holding that where plaintiff "chose to discuss [affirmative defense] extensively in the Complaint and to specify the ways in which [the defense did not apply][,]" the

"defendant may use those facts to demonstrate that she is not entitled to relief") (internal quotation marks omitted).

Here, CAC's complaint defines "federally permitted release" (JA-020, ¶ 33), avers that it is an affirmative defense (JA-020, ¶ 34; JA-028, ¶ 82), and asserts that it does not apply to USS' alleged emissions (JA-025, ¶ 57; JA-028, ¶ 81). Moreover, allegations and admissions made in CAC's opposition brief and its judicially noticeable CAA complaint, *supra* at 12, 15, provide a further factual basis to consider the exemption's applicability, even as an affirmative defense. *See also Berckeley Inv. Grp.*, 455 F.3d at 211 (judicial admissions); *Juday*, 799 F. App'x at 138 (judicial notice of complaints in other litigation).

Therefore, either independently or as an affirmative defense, the district court had the authority to resolve the statutory construction issue on USS' dispositive motion.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

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COMBINED CERTIFICATE OF COMPLIANCE

On this 2nd day of November, 2020, the undersigned certifies that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 12,994 words, as determined by the word-count function of Microsoft Word and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f);

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), the undersigned certifies that on this 2nd day of November, 2020, he caused the Amended Brief for Appellee to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished on this 2nd day of November, 2020, by the CM/ECF system via electronic mail.

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