ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5234

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VOLVO POWERTRAIN CORPORATION,
Defendant-Appellant

CALIFORNIA AIR RESOURCES BOARD,
Intervenor-Appellee

ON APPEAL FROM THE DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA, No. 1:98-CV-02547(RCL)

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE AMERICAN PETROLEUM INSTITUTE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, IN SUPPORT OF DEFENDANT-APPELLANT

Russell S. Frye
FryeLaw PLLC
1101 30th Street, N.W., Suite 220
Washington, DC 20007-5108
(202) 572-8267
Counsel for Amici Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, undersigned counsel for *amici curiae* the National Association of Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States of America, and the Organization for International Investment certifies as follows:

1. This proceeding is an appeal from a final judgment by the United States District Court for the District of Columbia (Honorable Royce C. Lamberth) in *United States v. Volvo Powertrain Corporation*, Civil Action Number 98-2547, entered on June 4, 2012, awarding approximately $72 million to the United States and California for alleged violations of a consent decree implementing the federal Clean Air Act and related state law. The judgment is supported by a memorandum opinion that the district court issued on April 13, 2012. *Amici curiae* the National Association of Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States, and the Organization for International Investment ("*Amici*") are interested in this proceeding because it implicates issues of the district court's authority to interpret a consent decree and to expand the scope and penalties stated in the decree.

2. The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial

sector and in all 50 states. The National Association of Manufacturers' mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

3. The American Petroleum Institute is a nationwide, not-for-profit association representing over 500 member companies engaged in all aspects of the oil and gas industry, including: science and research; exploration for and production of oil and natural gas; transportation; refining of crude oil; and marketing of oil and gas products. The American Petroleum Institute regularly advocates for its members' interests concerning environmental laws and regulations and other regulatory programs before administrative agencies, Congress, and the courts.

4. The Chamber of Commerce of the United States of America, a non-profit corporation organized under the laws of the District of Columbia, is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than 3,000,000 businesses and professional organizations of every size and in every economic sector and geographic region of the country. A central function of the Chamber of Commerce of the United States is to advocate for the interests of its members in important matters before courts, Congress, and the Executive Branch.

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

6. *Amici*'s members often enter into consent decrees to resolve disputes about the enforcement of environmental and other regulatory statutes, and they therefore have an interest in the extent to which compliance obligations and penalties under consent decrees are clear and predictable.

7. *Amici* have no parent corporations, and no publicly held company owns more than a 10 percent interest in any of *Amici*. *Amici* are "trade associations" within the meaning of Circuit Rule 26.1(b).

Dated: December 20, 2012

Respectfully submitted,

/s/ Russell S. Frye
FryeLaw PLLC
1101 30th Street, N.W. Suite 220
Washington, DC 20007-3769
(202) 572-8267
Fax (866) 850-5198
rfrye@fryelaw.com

Attorney for Amici Curiae

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INTERESTS OF *AMICI CURIAE*

This proceeding is an appeal from a final judgment by the United States District Court for the District of Columbia, awarding approximately $72 million to the United States and California for alleged violations of a consent decree implementing the federal Clean Air Act and related state law. *Amici curiae* the National Association of Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States, and the Organization for International Investment ("*Amici*") are leading trade associations and business organizations, whose members often are subject to enforcement actions under federal environmental laws and other kinds of regulatory statutes, similar to the enforcement action that resulted in the consent decree whose later enforcement was the subject of the opinion below. Some of *Amici*'s members also are subject to complex consent decrees with EPA that include substantial stipulated penalty provisions. *Amici* want to ensure that these decrees are enforced as written, and not unilaterally revised by EPA or a trial court to impose terms and sanctions to which the parties never agreed.

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

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Amici are interested in this proceeding because it concerns the extent of a district court’s authority to interpret a consent decree issued in an enforcement action and to expand the scope and penalties stated in the decree. The very broad discretion that the District Court asserted in the opinion below to expand the applicability of and potential liability under a consent decree could present a substantial disincentive for *Amici*’s members to finally and predictably resolve enforcement actions by entering into consent decrees. *Amici* are also concerned that, if the District Court’s decision is not corrected, their members could be exposed to this type of unilateral revising of consent decree language – opening them to large potential penalties imposed through the consent decree.

These concerns in turn would undercut a key tool in the application and enforcement of federal environmental laws and other types of regulatory statutes. It also could deter companies from investing in the United States because of the impression that U.S. courts will enforce extensive federal regulatory programs in an unpredictable manner. Accordingly, *Amici* wish to inform the Court about the important role that consent decrees play in resolving actions to enforce regulatory statutes and the harm that could result to businesses, regulators, and the public if businesses believe that the obligations they might agree to under a consent decree are uncertain in scope and cost.

Fed. R. App. P. 29(a) authorizes *Amici* to file this brief because all parties have consented to its filing. No party's counsel authored this brief in whole or in part. No party or party's counsel, nor any other person (other than *Amici*, their members, and their counsel) contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The consent decree whose enforcement is at issue in this case has a number of attributes typical of consent decrees resulting from civil enforcement actions

under federal environmental laws.[2] Indeed, companies often use consent decrees with these attributes to resolve enforcement actions brought under many federal regulatory statutes: This consent decree resolved huge claims for potential penalties, imposing a significant, but far lower, penalty for the alleged violations. It involved the defendant's waiver of its right to contest not only whether the actions alleged to constitute the violations occurred, but also whether those actions would even be prohibited by applicable law and regulations, and what penalty would be appropriate under the law. It also committed defendant to major undertakings considered beneficial by EPA but beyond what the law at the time required.

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[2] The type of consent decrees discussed in this *amicus* brief and the decision below, which resolve an enforcement action brought against a regulated entity, are distinguished from, and raise very different policy considerations from, consent decrees that have been used to resolve litigation against a government agency claiming that the agency failed to perform some required duty to regulate. In the former, a defendant gives up its individual rights to contest an enforcement action, in exchange for an agreement on penalties and future compliance obligations. In the latter, a government agency may commit itself to engage in rulemaking activity that affects the public generally and represents a prioritization of taxpayer-supplied resources. Such consent decrees committing an agency to rulemaking, studies, or other governmental action present very different policy and legal issues than the consent decrees resolving enforcement actions discussed in this brief. *See*, *e.g.*, *National Audubon Society, Inc. v. Watt*, 678 F. 2d 299, 308 (D.C. Cir. 1982) (discussing "the difficult and far-reaching constitutional issues" related to a stipulation between government and interest-group plaintiffs); Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 Stan. L. Rev. 203, 204 (1987); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 Duke L.J. 1015 (2001).

A fundamental consideration for companies deciding whether to resolve regulatory enforcement actions through a consent decree is the certainty that a settlement provides, in terms of the costs the company will incur, the timing of its future payments and compliance obligations, and the precise nature of those obligations. In the instant case, the District Court interpreted its powers to enforce a consent decree very broadly, to authorize it to impose, for actions of a company not mentioned in the consent decree, penalties not listed in the consent decree, based for the most part on actions (sales of engines outside the United States, and sales of engines that were used as stationary engines) that are not even subject to the regulations that the consent degree implements. This Court should reject the District Court's highly discretionary expansion of the obligations and liabilities bargained for in the consent decree. If the District Court' approach were adopted, defendants could no longer achieve the certainty that now motivates companies to make the substantial waiver of their rights involved in these settlements.

ARGUMENT

I. Consent Decrees Are a Common Tool for Resolving Regulatory Enforcement Actions.

Consent decrees, which convert an agreement between the enforcement authority and the regulated defendant into an order of the court, are a common

settlement tool for businesses to achieve a clear and final resolution to enforcement actions. Unfortunately, the approach to enforcing the consent decree set forth in the opinion below would seriously undermine the use of consent decrees to resolve enforcement actions, for the reasons described in Sections II. and III. below.

Of course, settlements are a basic element of litigation, and resolving litigation through settlement is encouraged by the Executive Branch and the judiciary. *See, e.g.*, *Southern Union Gas Co. v. Fed. Energy Regulatory Comm'n*, 840 F.2d 964, 971 (D.C. Cir. 1988) ("broad public interest favoring" settlement); *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010) (the law encourages voluntary settlement of litigation, especially when a government agency with environmental expertise negotiated the agreement); *accord*, *United States v. Cannons Engineering Corp*., 899 F.2d 79, 84 (1st Cir. 1990). The Supreme Court has repeatedly endorsed the use of consent judgments in enforcement of federal laws, citing the "time, expense, and inevitable risk of litigation" that parties can avoid through the consent judgment vehicle. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).[3]

[3] *See also* Memorandum from the Attorney General, Department Policy Concerning Consent Decrees and Settlement Agreements (March 13, 1986), reprinted in Review of Nixon Presidential Material Access Regulations: Hearing Before the Subcomm. on Government Information, Justice and Agriculture of the

An important aspect of environmental litigation that makes settlement and consent decrees particularly useful in that context is that often there are substantial disputes, whose outcome is uncertain, about whether particular actions are subject to and permissible under an environmental regulation. Resolving these applicability issues through settlement avoids lengthy, resource-intensive litigation and an outcome that is uncertain for both the government and the regulated entity.

Consent decrees also sometimes incorporate into a court order requirements that go beyond anything that current law requires and beyond what the court—absent agreement of the parties—could order. *See, e.g.*, *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 525-27 (1986); EPA Press Release: "Essroc Cement Company to Pay $1.7 Million Penalty to Resolve Clean Air Act Violations," Dec. 29, 2011, available at http://www.epa.gov/compliance/resources/cases/civil/caa/essroc.html (defendant alleged to have modified cement plant without permit agrees, in addition to correcting violation, to spend $745,000 to replace old engines in several off-road vehicles at its plant sites).

House Comm. on Government Operations, 99th Cong., 2d Sess. 182 (1986), reprinted in part in 54 U.S.L.W. 2492 (April 1, 1986) at 1 (encouraging use of consent decrees to enforce federal laws, which is desirable "for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgment.").

In fact, that was precisely the case with respect to the "pull-ahead" obligations in the consent decree in the instant case. EPA extracted, through a consent decree resolving an action for civil penalties for past violations, a commitment to reduce future diesel engine emissions on a faster schedule than the applicable regulations required. *See, e.g.*, Jonathan Z. Cannon, *Taking Enforcement on Its Own Terms: EPA's Heavy-duty Diesel Engine Litigation*, 5 Regulation & Governance 262-274 (2011). Consent decrees may thus involve very substantial commitments beyond what is necessary to come into compliance and remedy any effects of noncompliance, *see, e.g., U.S. v. Lexington-Fayette*, 591 F.3d at 486 (consent decree required Lexington to complete two Supplemental Environmental Projects estimated to cost $1.23 million).

For regulated companies, a key benefit of settlement that can justify agreeing to such substantial commitments is bringing certainty and predictability to the cost of penalties and any injunctive relief. Environmental statutes typically authorize the imposition of very large penalties (such as $25,000 per day for each violation, with the possibility of numerous regulatory violations each day arising from a single incident). *See, e.g.*, 40 C.F.R. § 19.4 and Clean Air Act section 113(b), 42 U.S.C. § 7413(b), and Clean Water Act section 309(d), 33 U.S.C. §1319(d) (authorizing civil penalties of up to $37,500 "per day for each violation"); Robert H. Fuhrman, *Will Massey Energy Company Suffer Severe*

Penalties in Clean Water Act Case? 186 BNA Daily Environment Report B1-B6 (Sept. 26, 2007) (EPA alleged violations of water pollution limitations over seven years, while only 0.3 percent of total opportunities for exceedances at company's facilities, produced a theoretical civil penalty of about $2 billion). The chasm between what penalties may be *authorized* by statute, and what penalties might be reasonable, can be bridged through a mutually agreed upon settlement.[4]

A significant problem with environmental regulation is that the massive theoretical potential penalties, coupled with the highly technical and often unclear questions of what requirements even apply, often result in companies feeling compelled to agree in settlement to comply with rules whose application to the company's activities is unclear, or to undertake extensive obligations that all parties agree are beyond those the statute and regulations require.[5] *See, e.g.*

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[4] Settlement also allows defendant companies to remove a cloud over their financial condition resulting from the huge theoretical penalties that environmental and similar statutes authorize, thereby benefiting investors as well. *See* Fuhrman, *supra* (discussing stock market analysts' concerns about what they valued as a $2 billion claim (applying the statutory maximum penalty per day per violation) against Massey Energy Corporation (which EPA later settled for a penalty which, although large, was only 1% of that amount—see EPA Press Release: "Massey Energy to Pay Largest Civil Penalty Ever for Water Permit Violations," Jan. 17, 2008, available at http://www.epa.gov/compliance/resources/cases/civil/cwa/massey.html)).

[5] Obviously, avoiding the cost of litigation also can motivate a defendant to settle an enforcement action even if it believes it has strong defenses. *Cf. In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 749 (E.D.N.Y. 1984) (given

Sackett v. EPA, 566 U.S. ___, 132 S. Ct. 1367, 1375 (2012) (Alito, J, concurring) (EPA guidance on whether Clean Water Act requirements even apply to a property lacks "clarity and predictability.").

Consent decrees entered into in government actions to enforce regulatory statutes especially will frequently involve a major concession by the defendant: waiver of its right to judicial review of a debatable question of its compliance obligations under the applicable statute and regulations. This makes it particularly important that the commitments the government obtained in exchange for that waiver of due process rights are enforced faithfully and predictably…which, as described in Section III. below, did not happen in the instant case. Because "the combination of the uncertain reach" of the regulatory regime "and the draconian penalties imposed… leaves most [regulated entities] with little practical alternative but to dance to the EPA's tune," *id.*, a settlement with the EPA, where companies agree to fixed penalties and to undertake extensive obligations, cannot help companies achieve the predictability that the regulatory regime itself has failed to provide, if courts are left to expand the scope and penalties stated in the decree.

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expenses of trial, settlement was reasonable option for defendants even though possibility of a liability finding was "slight"), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

II. Regulated Entities Must Have a Clear, Reliable Understanding of What Will Be Required If Consent Decrees Are To Remain a Viable Means of Resolving Enforcement Actions.

As explained above, a primary motivation for a company to enter into a consent decree and give up its right to an adjudication of its liability and appropriate sanctions is the certainty that comes from agreeing with the enforcement authority about both appropriate penalties and the requirements the company will have to meet going forward. A rule that allowed a court, in enforcing a consent decree, to impose obligations and penalties not specified in the consent decree, will undermine the utility of consent decrees as a means of resolving compliance disputes. *See*, *e.g.*, *Requests by the Government for Modification of Consent Decrees*, 75 Yale L.J. 657, 659 n.18 (1966) ("The degree to which a private defendant can rely upon the consent decree would seem to be significantly related to the attractiveness of such a decree as an alternative to litigation….But if this reliability is decreased, as by a more lenient test for modification when requested by the Government, it is not unreasonable to assume—as we in fact do—that in future cases defendants will be less willing to join the Government in a consent decree. This of course would reduce the efficacy of the Government's consent decree program.")

Responsible corporate managers will not be comfortable writing in effect a "blank check," the full ramifications of which cannot be described to the

company's Board of Directors or shareholders. Consent decrees that obligate a company to implement measures beyond otherwise applicable legal requirements present a particularly troubling scenario: If the District Court's approach to interpreting and enforcing consent decrees stand, a company considering entering into a consent decree will have to consider that it might not only be agreeing to take steps beyond what applicable regulations require and beyond what the company could have been ordered to do by the court in litigation, but it also might have those additional obligations expanded by the court or subject to sanctions for which the company (and the enforcement authority) had not bargained.

A court must be careful to treat the consent decree as what it is: a negotiated resolution of various disputed matters, in which both sides likely compromised, and where the defendant has surrendered substantial rights in exchange for certainty as to the costs it would incur and the requirements to which it would be subject in the future. *See, e.g.*, *U.S. v. Armour & Co.*, 402 U.S. at 681. The Supreme Court and many other courts have recognized these essential characteristics of consent decrees and accordingly, when enforcing a consent decree, have looked to the "precise terms" that the parties consented to, rather than what might best implement the statute involved or what the court might deem best. *See, e.g.*, *id.* at 677-79, 681-83 ("Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by

the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." *Id*. at 682.); *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. at 521-22 (same); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (declining, for similar reasons, to find a remedy not specifically stated in consent decree).

III. The District Court's Opinion Could Interfere with the Use of Consent Decrees to Resolve Environmental and Other Enforcement Actions.

The District Court's opinion below has the potential, both in its terms and in its outcome, to discourage the use of consent decrees in the implementation and enforcement of the Clean Air Act, other environmental laws, and other types of regulatory statutes.

Appellant's opening brief describes numerous ways in which the District Court departed from the express terms of the consent decree at issue. Those departures inject precisely the kinds of uncertainty into consent decrees that can substantially reduce the desirability of entering into a consent decree, from the defendant's viewpoint. For example, applying the "pull-ahead" requirements, where two Volvo companies agreed to achieve reductions in diesel engine emissions a year ahead of the required schedule, to another Volvo company that

was left out of that commitment in the consent decree makes it less likely that defendants will use consent decrees as a means to resolve other enforcement disputes. Similarly, imposing penalties for actions that the District Court acknowledged were not covered by the negotiated stipulated penalty provisions in the consent decree, *see* 854 F. Supp. 2d at 71-73, creates an uncertainty about the financial consequences of entering into a consent decree that can negate one of the most powerful incentives for regulated entities to negotiate and commit to a consent decree in the first place. These consequences were accompanied in the opinion below by troublingly broad assertions of the freedom district courts have in deciding how to enforce a consent decree, suggesting that a district court might find consent decree compliance obligations and penalty liabilities beyond the agreed-upon terms of the decree in many other cases. *See*, *e.g.*, 854 F. Supp. 2d at 71.

Among the particularly troubling aspects of the District Court's expansion of the consent decree was its decision that it was a violation for Volvo Penta to certify nonroad engines that did not comply with the "pull-ahead" commitment of the parties to the decree, even though Volvo Penta, a foreign corporation, admittedly was not party to the consent decree, and even though most of the engines involved were never intended to be, and were not, imported into the United States. The Clean Air Act provisions concerning mobile source emissions

that the consent decree implemented do not, unsurprisingly, apply to engines manufactured and used outside the United States. 42 U.S.C. § 7522(a)(1); 40 C.F.R. § 89.105, 89.1003; 59 Fed. Reg. 31,306, 31,316 (June 17, 1994). As Appellant has explained, the terms that EPA and Appellant agreed to for the consent decree incorporate that limitation. Appellant's Opening Brief at 40-42. The District Court, however, extended the consent decree's requirements to approximately 7,250 engines not manufactured in the United States nor imported into the United States on the theory that the provisions of the consent decree "d[o] not require actual importation." 854 F. Supp.2d at 71.

This approach to interpreting the consent decree—imposing a sanction unless the conduct was explicitly *excluded* from the decree—ignored public policy and Supreme Court precedent, discussed above, limiting enforcement of the consent decree to actions clearly prohibited by the decree. It also improperly assumed, in the absence of a clear intent to the contrary, that Volvo Powertrain (or really, Volvo Penta) had undertaken a compliance obligation beyond what the law otherwise requires. *Cf.*, *e.g.*, *Firefighters v. Stotts*, 467 U.S. at 575 ("it is reasonable to believe that the 'remedy', which it was the purpose of the decree to provide, would not exceed the bounds of the remedies that are appropriate under Title VII, at least absent some express provision to that effect."). Moreover, the District Court's assumption that, since the consent decree did not specifically

exclude actions outside the United States, it was intended to restrict those activities and apply to engines never imported in the United States runs directly counter to the principle that federal statutes are assumed not to have extraterritorial application unless they clearly indicate that they do. *See*, *e.g.*, *Morrison v. National Australia Bank Ltd.*, 561 U.S. __, 130 S. Ct. 2869, 2877 (2010).

Thus, imposition of penalties for engines that Volvo Penta manufactured and distributed outside the United States was an effect of entering into the consent decree that Volvo Powertrain could not reasonably have anticipated. A defendant in a future enforcement action, looking at the opinion below, would understandably be very concerned that it could, by settling with the federal government, take on—unknowingly—unprecedented obligations with respect to its activities outside of the United States.[6]

[6] *See* Lloyd C. Anderson, *Interpretation of Consent Decrees and Microsoft v. United States I: Making Law in the Shadow of Negotiation*, 1 U. Pitt. J. Tech. L. & Pol'y 1 (2000) ("For a defendant business, it raises the converse specter that a judge will broaden the activities it may not engage in beyond what it thought it had agreed to, simply by broadening the scope of antitrust law and using it to expand the parties' intended meaning of the prohibitions. This interpretive method undermines the certainty and stability that are two of the chief values of settlement. Moreover, it makes the relative certainty of obligation produced by adjudication after trial and appeal much more attractive.")

Similarly, rejecting the statutory and regulatory definitions of "nonroad engine" (which the consent decree incorporated by reference), to find that Volvo engines that did not meet that definition nevertheless were manufactured in violation of the consent decree provisions on nonroad engines, also was an unforeseeable approach to enforcing the agreed obligations of the consent decree, and one likely to discourage defendants in enforcement actions from entering into consent decrees. The District Court imposed penalties under the consent decree for the manufacture and certification of stationary engines, despite the fact that emissions from stationary engines are regulated under a completely different title of the Clean Air Act than the mobile engines that were the subject of the consent decree and the underlying EPA enforcement action. *See* 854 F. Supp. 2d at 70-71; *cf*. 42 U.S.C.A. ch. 85 subch. I pt. A, subch. II pt. A; 71 Fed. Reg. 39,154, 39,155 (July 11, 2006) (explaining different regulatory authority for mobile nonroad engines and stationary engines).[7] The distinction between stationary engines and mobile engines (whether used in highway vehicles or in "nonroad engines") thus is a long-standing and well understood one. Yet the Court ignored the definition

[7] In fact, not only are stationary engines and mobile engines subject to different requirements issued under different provisions of the Clean Air Act, the parties subject to compliance obligations are different. *See* 71 Fed. Reg. at 39,163 col. 3 (explaining that owners and operators of stationary-source engines are subject to certain regulatory requirements, while "EPA's mobile source regulations are directed towards manufacturers, so they will not substantially affect owners and operators.")

of "nonroad engine" in the statute and regulations (and therefore, by reference, in the language of the consent decree that created the "pull-ahead" requirement for nonroad engines), because the definition "problematically" "focuses on the design…and use…of a particular engine." 854 F. Supp. 2d at 70. The District Court thus applied sanctions under the consent decree to stationary engines, because, in the Court's view, that "alone produces a workable regulatory scheme." *Id*.

This kind of wholesale extension of the negotiated bargain that Volvo Powertrain entered into, to apply to engines not only absent from the terms of the consent decree but outside the bounds of the regulatory program the consent decree seeks to enforce, clearly was contrary to the principles of interpretation of consent decrees set forth above. *Cf. U.S. v. Armour & Co*., 420 U.S. at 681-83 (court cannot ignore language chosen for the consent decree just because it results in an ineffective remedy); *Firefighters v. Stotts*, 467 U.S. at 574 (court should look to terms agreed to in the consent decree, not to "what might satisfy the purposes of one of the parties to it"). It also directly undercuts the elements of certainty and predictability that cause defendants to relinquish their rights and enter into consent decrees. If the negotiated terms of a consent decree are subject to being overruled by a court's judgment, in a post-entry action to enforce the consent decree, of what would be more effective than the scheme negotiated and agreed to

in the consent decree, or even than the scheme Congress adopted, then industry's goal of achieving certainty through a consent decree will appear unachievable.[8]

Likewise, the District Court's conclusion that the consent decree is "ambiguous" in several respects, 854 F. Supp. 2d at 72, 75, but that the District Court nevertheless could proceed to interpret those "ambiguous" provisions against the defendant, is not just contrary to the established principle, founded in due process concerns, that ambiguous provisions of a consent decree should not be interpreted to penalize the defendant for past conduct. *See, e.g,, Accusoft Corp. v. Palo*, 237 F.3d 31, 47 (1st Cir. 2001) (remedy of civil contempt only available if alleged violation of consent decree is "clear and unambiguous," and "Courts are to construe ambiguities and omissions in consent decrees as redounding to the benefit of the person charged with contempt" (internal quotation marks and citation omitted)); *see also* cases cited in Appellant's Opening Brief at 46-47. It also creates an impression that regulated entities that choose to enter into a consent decree to resolve an enforcement action are surrendering their rights to an extent that they cannot even predict. The District

[8] *Accord*, Lloyd C. Anderson, *Interpretation of Consent Decrees and Microsoft v. United States I: Making Law in the Shadow of Negotiation*, 1 U. Pitt. J. Tech. L. & Pol'y 1 (2000) ("A major incentive to enter into such an agreement is the parties' confidence that the court will measure their obligations by the words they choose, and if the words are clear, so are their obligations. If the court is free to change those obligations no matter how clearly set forth in the agreement, this incentive to settle will be reduced and much of the value of consent decrees will be lost.").

Court's approach in addition could have the effect of encouraging EPA and other regulatory agencies to favor vagueness and ambiguity in consent decrees, where the law instead should be encouraging and rewarding clarity in such an agreed-upon court order.

These considerations cause *Amici* serious concern that, if this Court upholds the judgment below, and particularly if the Court does so without clarifying the limited scope of the district court's discretion in enforcing a consent decree, this case could serve as a substantial disincentive to the use of consent decrees to finally and clearly result enforcement disputes under the nation's environmental laws and other federal regulatory statutes. Upholding the judgment below could also serve as an invitation to EPA to disregard the terms that the consenting parties agreed upon in fully negotiated consent decrees and to seek penalties under the consent decree that no defendant could have reasonably envisioned.

CONCLUSION

For the reasons discussed above, *Amici* urge the Court to reject an overly broad interpretation of the district courts' authority to expand the applicability, scope, and penalties explicitly set forth in a consent decree entered into to resolve actions to enforce environmental and other types of federal regulatory statutes.

Dated: December 20, 2012

Respectfully submitted,

/s/ Russell S. Frye
Russell S. Frye
FryeLaw PLLC
1101 30th Street, N.W., Suite 220
Washington, DC 20007-3769
(202) 572-8267
Fax: (866) 850-5198
Email: rfrye@fryelaw.com

Counsel for Amici Curiae

Of Counsel:

Quentin Riegel
Vice President, Litigation & Deputy General Counsel
National Association of Manufacturers
733 10th Street, NW, Suite 700
Washington, DC 20001

Harry M. Ng
Erik C. Baptist
American Petroleum Institute
1220 L Street, N.W.
Washington, DC 20005

Robin S. Conrad
Rachel Brand
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
Counsel for the Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief contains complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B), because this brief contains 4957 words..

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word with Times New Roman font and 14-point type.

/s/ Russell S. Frye

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of December 2012, I electronically filed the Brief of *Amici Curiae* the National Association of Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States of America, and the Organization for International Investment, in Support of Defendant-Appellant with the Clerk of the Court using the Court's CM/ECF system. Copies of the brief therefore were served electronically through the Court's CM/ECF system on all registered counsel. The original and eight paper copies of the brief were also filed with the Clerk pursuant to Circuit Rule 31.

/s/ Russell S. Frye