

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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COUNTY OF ROCKLAND, NEW YORK, *et al.*,

*Petitioners,*

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,

*Respondents.*

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*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the  
District of Columbia Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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BARBARA E. LICHMAN, Ph.D.

*Counsel of Record*

BERNE C. HART

STEVEN M. TABER

CHEVALIER, ALLEN & LICHMAN, LLP

695 Town Center Drive

Suite 700

Costa Mesa, CA 92626

(714) 384-6520

*Counsel for Petitioners*

County of Delaware, Pennsylvania;

The Honorable Andrew J. Reilly;

The Honorable Linda A. Cartisano;

The Honorable Mary Alice Brennan;

*(Additional Parties Continued Inside)*

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The Honorable Michael V. Puppio;  
The Honorable John J. Whelan;  
Friends of the Heinz Wildlife Refuge at Tinicum, Inc.;  
Hank Hox; The Honorable Ron Raymond;  
The Honorable Elric C. Gerner;  
The Honorable Geoff Semenuk;  
The Honorable Henry A. Eberle, Jr.; Robert J. Willert;  
Thomas J. Giancristoforo, Jr.; Michael Smith;  
Frank Samsel; John F. Gresch

## QUESTIONS PRESENTED

The Clean Air Act, codified at 42 U.S.C. § 7401, *et seq.*, Conformity Provision provides that “[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title.” 42 U.S.C. § 7506(c)(1). The Court of Appeals for the District of Columbia Circuit found that, although the Federal Aviation Administration (FAA) “did not directly calculate the level of emissions” resulting from a redesign of approach and departure paths at five major airports across five states with five separate State Implementation Plans (SIPs) in the northeastern United States, it “did not need to quantify the reduction [in emissions] in order to conclude the redesign was exempt from a conformity determination.” The Court of Appeals further found that, assuming FAA’s omission was error, Petitioners had failed to prove the error harmful. The questions presented are:

1) Whether FAA’s violation of the substantive command of Congress in the Conformity Provision of the Clean Air Act is the type of error that has the natural effect of prejudicing Petitioners’ substantial rights, and, thus, may “generally” be regarded as likely to prove harmful; and

2) if so, whether the Court of Appeals erred in placing the burden of proving harm from FAA's error on Petitioners.

**PARTIES TO THE PROCEEDING**

Petitioners, who were Petitioners in the Court of Appeals, are County of Delaware, Pennsylvania; The Honorable Andrew J. Reilly; The Honorable Linda A. Cartisano; The Honorable Mary Alice Brennan; The Honorable Michael V. Puppio; The Honorable John J. Whelan; Friends of the Heinz Wildlife Refuge at Tinicum, Inc.; Hank Hox, the Honorable Ron Raymond; The Honorable Elric C. Gerner; The Honorable Geoff Semenuk; The Honorable Henry A. Eberle, Jr.; Robert J. Willert; Thomas J. Giancristoforo, Jr.; Michael Smith; Frank Samsel; and John F. Gresch.

Respondents, who were Respondents in the Court of Appeals, are United States Department of Transportation; Mary E. Peters; Federal Aviation Administration; Bobby Sturgell; and Manny Weiss.

Parties to cases consolidated in the Court of Appeals who are not parties to this petition are City of Elizabeth, N.J.; J. Christian Bollwage; Rockland County, N.Y.; Board of Chosen Freeholders of Bergen County, N.J.; NJ Boroughs; New Jersey Coalition Against Aircraft Noise (NJCAAN); County of Union; Union County Freeholders Air Traffic and Noise Advisory Board; Friends of the Rockefeller State Park Preserve, Inc.; The Timbers Civic Association; The Clair Manor Maintenance Association; Perth Civic Association; Northshire-Maplechase Civic Association; Chalfonte Civic Association; Kennett Pike Association; The Brandywine Civic Association; the North Graylyn Crest Civic Association; The Ramblewood Civic

Association; The Village of Arden; The Village of Ardentown; The Village of Ardencroft; the Honorable Catherine A. Cloutier; Stephen F. Donato; and Amy K. Pollock.

### **CORPORATE DISCLOSURE STATEMENT**

All non-governmental petitioners are either nonprofit organizations or individuals. None of them has a parent corporation, and no publically-held company has a 10% or greater ownership interest in any of those entities.

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## PETITION FOR WRIT OF CERTIORARI

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Petitioners respectfully petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit.

### OPINIONS BELOW

The opinion of the Court of Appeals is not reported. It is available at 2009 WL 1791345 and reproduced in the Appendix to this Petition [App. *infra*, 1a-12a]. The Federal Aviation Administration September 28, 2007 Corrected Record of Decision for the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign is reproduced in the Appendix [App. *infra*, 13a-140a]. The order denying Petitioners' petition for rehearing *en banc* is unreported, and is reproduced in the Appendix [App. *infra*, 141a-142a].

### JURISDICTION

The Judgment of the Court of Appeals was entered on June 10, 2009. A timely petition for rehearing *en banc* was denied on August 19, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTORY AND REGULATORY PROVISIONS

The relevant provisions of the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, are set forth in the Appendix [App. *infra*, 143a-160a]. 49 U.S.C. § 46110 is set forth

in its entirety in the Appendix. [App. *infra*, 161a-162a]. The relevant provisions of the Administrative Procedures Act, 5 U.S.C. § 500, *et seq.*, are set forth in the Appendix [App. *infra*, 163a-164a]. The Federal harmless error statute, 28 U.S.C. § 2111 is set forth in the Appendix [App. *infra*, 165a]. The relevant provisions of the U.S. Environmental Protection Agency's regulations "Determining Conformity of General Federal Actions to State or Federal Implementation Plans", 40 C.F.R. § 93.150 *et seq.*, are set forth in the Appendix [App. *infra*, 166a-173a].

### **STATEMENT**

In December, 2007, FAA began implementing the New York/New Jersey/Philadelphia Metropolitan Airspace Redesign Project (Project), a reorganization of air traffic over five states, involving five major and sixteen satellite airports throughout the Northeastern United States. In preparation for implementation, FAA issued a Draft Environmental Impact Statement (DEIS). The DEIS did not include calculation of emissions or analysis of potential changes in air emissions levels resulting from the Project, as required by the Clean Air Act's Conformity Provision, 42 U.S.C. § 7506. In July, 2007, in response to numerous comments, FAA issued a Final Environmental Impact Statement (FEIS) which included Appendix R, "Effect of New York/New Jersey/Philadelphia Airspace Redesign on Aircraft Fuel Consumption" (Fuel Burn Report). The Fuel Burn Report purported to show that the Project would reduce fuel burn, on average, throughout the entire Northeast Project area, although fuel burn would increase at some individual airports.

The Fuel Burn Report therefore concluded that emissions would decrease, on average, because of the decrease in fuel burned resulting from the Project, and, thus, the Project would be exempt from the conformity requirement as having a *de minimis* impact.

The Fuel Burn Report did not calculate or analyze emissions; did not address the Clean Air Act's express requirement that conformity be determined with respect to each State Implementation Plan (SIP); and did not apply the regulations promulgated by the Environmental Protection Agency (EPA) (to which Congress delegated responsibility for implementing the Clean Air Act), for determining whether a project is subject to a *de minimis* exemption from conformity, 40 C.F.R. § 93.153(c) and (b). Despite the absence of relevant analysis to support FAA's conclusion, the Court of Appeals opined that FAA "did not need to quantify the reduction [in emissions] in order to conclude the redesign was exempt from a conformity determination," [App. *infra*, 12a]. It further opined that, even assuming FAA erred in failing to inventory emissions, Petitioners had "failed to identify any way in which the error was or might have been harmful." [App. *infra*, 11a].

The FAA's omission and the subsequent Court of Appeals ruling give rise to significant issues, both legal and practical. From a legal perspective, the Court of Appeals' ruling fails to take into account the evolution of this Court's jurisprudence concerning: (1) whether violation by a Federal agency of the substantive, rather than technical/procedural,

provisions of a civil statute have the “natural effect” of prejudicing a petitioner’s “substantial rights,” an issue previously addressed by this Court in the context of criminal statutes; and (2) if so, whether the Court of Appeals erred in placing the burden of proving harm from FAA’s lack of compliance with the Conformity Provision on Petitioners, rather than placing the burden on the agency to prove absence of harm.

From a practical perspective, the appellate ruling opens the flood gates to Federal agencies seeking relief from the draconian, yet, as Congress decided, important, substantive requirements of the Conformity Provision, at a time when air quality and its impact on climate change, have taken a prominent place in the national consciousness. It also risks a clash between the intent of Congress as expressly set forth in the Act, and a contrary construction by the Executive and Judicial Branches. For those reasons, and, because these questions will remain unanswered in the absence of any other avenue of review from the Court of Appeals’ original jurisdiction over challenges to FAA actions, this Court’s grant of the Petition for Writ of Certiorari is imperative.

### **The National Airspace Redesign**

In April, 1998, then FAA Administrator, Jane Garvey, announced the “National Airspace Redesign Project.” “The goals of the [airspace] redesign . . . [were] to maintain and improve system safety; improve the efficiency of the air traffic management and reduce delays; increase system flexibility and predictability; and *seek to reduce adverse environmental effects on*

*communities* in and around our Nation's airports." Statement Of Arlene B. Feldman, Regional Administrator, Eastern Region, Federal Aviation Administration, Before the Aviation Subcommittee of The House Transportation and Infrastructure Committee on Air Traffic Departures at Newark International Airport, November 4, 1999 (Feldman Statement) [emphasis added]. [App. *infra*, 207a]. The New York/New Jersey/Philadelphia Metropolitan Airspace Redesign Project that is the subject of this lawsuit, became the flagship of the national effort.

### **The Project**

The Project entails changes in air traffic control procedures and flight paths affecting aircraft operations at airports in a 31,180 square mile, five-state region in the New York/New Jersey/Philadelphia metropolitan area. FEIS, p. ES-8 [App. *infra*, 216a]. There are over 8,000 flights a day into and out of the New York/New Jersey/Philadelphia metropolitan areas, more than any other major metropolitan area in the U.S., accommodating 300,000 passengers and 10,000 tons of cargo. Feldman Statement [App. *infra*, 207a-208a]. The Project focuses on five major airports and 16 satellite airports in the Study Area. The five major airports are:

- John F. Kennedy International (JFK) - New York
- LaGuardia (LGA) - New York
- Newark Liberty International (EWR) - New Jersey
- Teterboro (TEB) - New Jersey

- Philadelphia International (PHL) - Pennsylvania

FEIS, pp. ES-8, 9 [App. *infra*, 217a].

In testimony before Congress, the FAA stated that one of the Project's goals "*is to enhance the environment to the degree consistent with safety and efficiency, both with noise abatement and improvements in air quality.*" Feldman Statement (emphasis added). [App. *infra*, 208a]. In addition to promising Congress that the Project would reduce adverse environmental impacts, the FAA made the same promise to the public. An FAA "Pre-Scoping Summary Report" stated, among other things: "Some of the benefits of a major redesign include: . . . • *Reduced adverse environmental impacts such as noise and air emissions . . .*," Pre-Scoping Summary Report, § 1-1, Purpose and Need for Airspace Redesign Program, pp.1-2 [emphasis added] [App. *infra*, 265a].

The Project was officially initiated on January 22, 2001 when FAA issued a Notice of Intent to prepare an Environmental Impact Statement (EIS). FEIS at 1-1. [App. *infra*, 224a]. After receiving comments and holding several public meetings, the FAA developed a "Scoping Report" in March 2002. In the 2002 Scoping Report, the FAA stated with respect to "air emissions" that:

**Air Emissions** Many of the scoping comments listed air emissions from aircraft as a concern that should be addressed during the Airspace Redesign

Project and EIS development. The majority of the comments concerning air emissions were generated from the following areas: northern New Jersey (including areas west of Newark airport and along the northern New Jersey shoreline), areas surrounding JFK airport in New York and areas surrounding both Wilmington (DE) and Philadelphia airports.

...

**EIS Analysis:** It is neither within the FAA's regulatory authority nor expertise to carry out a health-effects type study of air quality in the study area for this EIS. *However, the required air quality analysis will be done.*

2002 Scoping Report, p. 6 [emphasis added] [App. *infra*, 267a-268a]. Having promised the citizens of the Study Area a second time that the required air quality analysis would be done, the FAA moved on to develop its DEIS.

## **DEIS**

In December, 2005, the FAA issued its DEIS. The Project, as depicted in the DEIS, mirrored the description in the Pre-Scoping Summary Report. Aside from listing counties in the study area as non-attainment and maintenance areas for criteria pollutants, the DEIS did not contain any of the promised air quality analysis. Instead, the DEIS relied on a purported exemption for "Air Traffic

Control Activities and Adopting Approach, Departure and Enroute Procedures for Air Operations” derived from the preamble to the EPA’s General Conformity Rule, 40 C.F.R. § 93.150, *et seq.* See, 58 *Fed.Reg.* 63,214, 229 (1993) [App. *infra*, 242a]. The DEIS states, in pertinent part:

The FAA met with the representatives of EPA Regions 1, 2 and 3 to discuss the Proposed Action alternatives and analysis of air quality impacts. (EPA Regions 1, 2, and 3 have jurisdiction over areas with the Study Area.) *During these meetings the FAA indicated that no air quality analysis would be undertaken.* Several reasons were provided to explain the FAA’s assertion that no detailed air quality analysis was required and that no significant air quality impacts would result from the implementation of the Proposed Action. These reasons were:

- The Proposed Action alternatives examined in this Draft EIS are exempt from analysis under the General Conformity Rule. The final rule for Determining Conformity of General Federal Actions to State and Federal Implementation Plans was published in the Federal Register in 1993. In Section

51.853 (c)(1), the Environmental Protection Agency (EPA) lists actions that are *de minimis* and, thus, do not require an applicable analysis under this rule. EPA states in the preamble to this regulation that it believes, “air traffic control activities and adopting approach, departure, and en route procedures for air operations” are illustrative of *de minimis* actions.

DEIS p. 4-57 [emphasis added]. [App. *infra*, 211a-212a].

### **Presumed To Conform Rule**

After the DEIS was published, the FAA took advantage of a provision in the EPA’s General Conformity Rule<sup>1</sup> and developed a list of FAA actions it “presumed” would conform to the applicable SIPs.<sup>2</sup>

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<sup>1</sup> “Notwithstanding other requirements of this subpart, actions specified by individual Federal agencies that have met the criteria set forth in either paragraph (g)(1) or (g)(2) of this section and the procedures set forth in paragraph (h) of this section are presumed to conform, except as provided in paragraph (j) of this section. 40 C.F.R. § 93.153(f).

<sup>2</sup> Petitioners have twice raised the issue of the Presumed to Conform Rule’s unconstitutional delegation of

On or about February 12, 2007, the FAA published its Draft *Federal Presumed to Conform Actions Under General Conformity* in the Federal Register. [72 *Fed.Reg.* 6641-6656 (2007)] (“Draft Presumed to Conform Rule”).

The Draft Presumed to Conform Rule contained a list of fifteen Airport Project categories which the FAA “presumes” to conform to applicable SIPs, without the need for individual conformity review and analysis prior to the implementation of each project within the specified category. Project Category No. 14, *Air Traffic Control Activities and Adopting Approach Departure Enroute Procedures for Air Operations*, stands out from among all of the others in that it is the only Project Category that: (1) involves aircraft operations and engine emissions; (2) extends off-airport; and (3) had not been subject to analysis in some form to determine the level of emissions. 72 *Fed.Reg.* 6654 (2007 [App. *infra*, 251a-254a]. On July 30, 2007, the FAA published a Final Presumed to Conform Rule in the Federal Register. 72 *Fed.Reg.* 41,565-580 (2007). Although some changes were made to the text discussing Category 14, the substance, *i.e.*, that changes in air traffic control activities would be

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legislative authority from EPA to other federal agencies where Clean Air Act § 7506(c)(4) specifically states that the EPA Administrator exclusively “shall promulgate criteria and procedures for determining conformity” while the EPA’s Presumed to Conform provision allows any Federal agency to develop a list of exempt project categories. In both instances, the Court of Appeals declined to rule on the constitutionality of the EPA’s Presumed to Conform rules.

“presumed to conform,” was not modified in any way. 72 *Fed.Reg.* 41,578 (2007) [App. *infra*, 257a].

## **FEIS**

In July, 2007, the FAA released the FEIS. In the FEIS, FAA addressed numerous comments it received concerning its failure in the DEIS to study air quality impacts. Most notably, the FAA disclosed that “[s]ince issuance of the DEIS, the FAA was advised by the EPA that it should not use the Preamble to the [General Conformity Rule] to determine de minimis actions for ‘air traffic control activities and adopting approach, departure, and en route procedures for air operations.’” [FEIS, p. ES-10] [App. *infra*, 221a]. The FEIS further stated:

Recently, the FAA has determined that it can not rely on the preamble and on February 12, 2007 issued a Draft Federal Notice Federal Presumed to Conform Actions Under General Conformity [Federal Register<sup>6</sup>: February 12, 2007 (Volume 72, Number 28)] which formally defines these types of actions above 1,500 feet above ground level (AGL) as de minimis. . . . To reinforce the FAA presumption that the Proposed Action would be de minimis a fuel burn analysis was completed for the FAA’s Preferred Alternative with and without mitigation, both versions of the Preferred Alternative reduced fuel burn when compared to the Future No Action Alternative.

Additionally, the Airspace Redesign will not increase traffic over the Future No Action. Lastly the project will not cause a new violation, worsen an existing violation, or delay meeting the National Ambient Air Quality Standards.

Notably missing, however, was any calculation of emissions, or analysis of the effect that the emissions from the Project would have on the various SIPs in the study area.

### **Fuel Burn Report**

The FEIS rested its conformity conclusion on the Fuel Burn Report, FEIS, App. R, which was prepared after issuance of the DEIS. The Fuel Burn Report purported to translate operational modeling into units of fuel consumption. *See id.* at 1 [App. *infra*, 181a]. It concluded that the modeled delay reduction at high levels of operational demand for the year 2011 would produce an average reduction in fuel consumption of less than 1%. *Id.* at 7, 9 [App. *infra*, 189a, 192a-193a]. While the Fuel Burn Report did not “directly calculate the level of emissions,” as acknowledged by the Court of Appeals [App. *infra*, 10a], it indicated that at least at two airports (Teterboro, one of the five major airports, and Morristown Municipal, one of 16 satellite airports) there would be an *increase* in *fuel burn*. Fuel Burn Report at pp. 7-8 [App. *infra*, 189a-190a]. The Fuel Burn Report does not analyze the way in which the increase in fuel burn at Teterboro and Morristown translates into an increase in emissions and the effect

that would have on the SIP for the surrounding area, since Bergen and Morris Counties, in which the two airports are located, are maintenance areas for carbon monoxide and non-attainment areas for ozone and PM2.5. FEIS, pp.3-50, 3-52, and 3-55 [App. *infra*, 225a-226a, 231a, 237a-238a].

### **Record of Decision**

On September 5, 2007, FAA issued its Record of Decision (ROD) for the Project. On September 28, 2007, FAA issued a “Corrected” ROD (Corrected ROD) [App. *infra*, 13a-140a], which did not change the conclusions in the ROD, including FAA’s bases for its conformity decision.

The Corrected ROD concluded that the “selected project conforms with the purposes of the SIPs in the six [sic] States within the Study Area,” [Corrected ROD, p. 56 [App. *infra*, 133a]] on the ground that “[b]ased upon the EIS and the clarification in the footnote below regarding regional significance, the proposed airspace redesign alternatives and the selected project are either exempt or presumed to conform under the General Conformity Rule.” Corrected ROD, pp.43-44 [App. *infra*, 105a-106a].

### **National Airspace Redesign**

The Project is the first major, regional airspace redesign in the U.S. Currently, the airspace over Florida, Illinois, the District of Columbia, and the Southwest, including California and Arizona, are in planning for redesign according to FAA’s 2009-2013

Flight Plan. FAA's Flight Plan also indicates that in fiscal year 2009 FAA intends to redesign the airspace of San Francisco, Las Vegas, Charlotte, in addition to New York, Philadelphia, Chicago and Los Angeles. [2009-2013 FAA Flight Plan, p. 21 [App. *infra*, 270a]. Each of these cities over which FAA plans to redesign the airspace contains at least one nonattainment or maintenance area that are part of a State Implementation Plan. Thus, the Conformity Provision will arise as an issue in each of those projects.

### **Litigation History**

On September 14, 2007, Petitioners filed a Petition for Review, pursuant to 49 U.S.C. § 46110, in the United States Court of Appeals for the Third Circuit. The Petition for Review was subsequently consolidated with other petitions for review in the United States Court of Appeals for the District of Columbia Circuit, under the caption *County of Rockland, New York, et al. v. FAA, et al.*, Case No. 07-1363. In their Joint Brief, filed August 29, 2008, Petitioners argued, *inter alia*, that FAA had failed to analyze the emissions created by the Project and thus, failed to analyze the Project's impacts in each of the maintenance and non-attainment areas within each SIP pursuant to the requirements of the Clean Air Act's Conformity Provision, 42 U.S.C. § 7506(c)(1).

On May 11, 2009, the D.C. Circuit held oral argument, and on June 10, 2009, issued its *per curiam* opinion, dismissing all of the Petitions for Review [App. *infra*, 1a-12a]. The Court of Appeals summarily concluded that the Project is "exempt from a

conformity determination under the *de minimis* exemption” because, even though FAA “did not directly calculate the level of emissions resulting from the project,” [App. *infra*, 10a], FAA reasonably “concluded the redesign” will reduce emissions in the study area. [App. *infra*, 10a, 11a]. Moreover, the Court of Appeals concluded that even if FAA erred in failing to comply with the Clean Air Act by inventorying emissions, “the petitioners still have failed to identify any way in which the error was or might have been harmful.” [App. *infra*, 11a].

Petitioners filed a Petition for Rehearing and Rehearing *En Banc* on July 23, 2009. The Court of Appeals denied Petitioners’ Petition for Rehearing on August 19, 2009. [App. *infra*, 141a-142a].

### **REASONS FOR GRANTING PETITION**

In deciding this case, the Court of Appeals encroached on the prerogatives reserved to Congress under the Constitution and delegated to the EPA when Congress enacted the Clean Air Act. The Court of Appeals did so by placing upon Petitioners the burden of proving harm from FAA’s failure to comply with the substantive command of Congress that “[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way, or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title.” 42 U.S.C. § 7506(c)(1). In reaching its decision, the Court of Appeals relied on the scope of review in the

Administrative Procedures Act, 5 U.S.C. § 706 (APA). But it made that decision in a vacuum, without guidance by this Court which has hitherto declined to consider in a civil context the question first raised in *Kotteakos v. United States*, 328 U.S. 750, 760-761 (1946) in a criminal context: whether a governmental action that violates a substantive, rather than technical or procedural command of Congress may generally be regarded as having the “natural effect” of prejudicing “a litigant’s substantial rights,” such that the burden should rest with government to prove the harmlessness of its action.

This Court has been consistent in defining the term “prejudicial error” as used in the APA as: “intended to ‘su[m] up in succinct fashion the ‘harmless error’ rule applied by the courts *in the review of lower court decisions as well as of administrative bodies.*” *Shinseki v. Sanders*, 129 S.Ct. 1696, 1704 (2009), quoting *Department of Justice, Attorney General’s Manual on the Administrative Procedures Act* 110 (1947) [emphasis in original]. This Court has been further guided by the Federal “harmless error” statute, 28 U.S.C. § 2111, which it has found applicable in both civil and administrative contexts. *Shinseki*, 129 S.Ct. at 1704. [“The federal ‘harmless error’ statute, now codified at 28 U.S.C. § 2111, tells courts to review cases for errors of law ‘without regard to errors’ that do not affect the parties’ ‘substantial rights,’” *id.* at 1705, quoting 28 U.S.C. § 2111.]

The assignment of the burden of proving that a prejudicial error has occurred has, however, not

always been consistent. “. . . [C]ourts have correlated review of ordinary administrative proceedings to appellate review of civil cases . . . . Consequently, the burden of showing that an error is harmful normally falls upon the party attacking the agency determination.” *Id.* at 1706. Courts adjudicating criminal cases, however, recognized long ago that a court may not disregard a right Congress gave a defendant. *Bruno v. United States*, 308 U.S. 287, 293 (1939).

In *Kotteakos*, also a criminal case, Justice Rutledge, while holding that the usual incidence of the burden applies where “technical errors” are being challenged, *Kotteakos*, 328 U.S. at 760, went further to hold that “this burden does not extend to all errors,” *Id.* Rather, “[i]f the error is of such a character that its natural effect is to prejudice a litigant’s substantial rights, the burden of sustaining a verdict will . . . rest upon the one who claims under it [the verdict].” *Id.*, quoting *Bruno*, 308 U.S. at 294. The *Kotteakos* court then asserted in dictum that, while the usual incidence of the burden on the one challenging the verdict should apply where an error had a “very slight effect,” *Id.* at 764, an “exception” would lie “perhaps where the departure is from a constitutional norm or a specific command of Congress.” *Id.* at 764-65, quoting *Bruno*, 308 U.S. at 294.

Ultimately, this Court, in deciding *Shinseki*, *supra*, moved further toward qualifying the traditional assignment of the burden of proof under the harmless error rule in two “important” ways. First, it declined to “decide the lawfulness of the use by the Veteran

Court of what it called the ‘natural effects’ of certain kinds of notice errors,” *id.* at 1706-07, and held that “courts may sometimes make empirically based generalizations about what kinds of errors are likely, as a factual matter, to prove harmful.” *Id.* at 1707 *citing Kotteakos*, 328 U.S. 760-761. Second, this Court “recognized” that Congress has expressed “special solicitude” for certain causes, *id.*, (in *Shinseki*, the cause of veterans’ right to disability benefits). *Shinseki* did not, however, clarify whether the violation of a specific Congressional command in the substantive provisions of a civil statute is the type of error that may *generally* be regarded as having the “natural effect” of prejudicing a litigant’s “substantial rights,” as suggested in *Kotteakos*.

In this case, the Court of Appeals placed the burden on Petitioners to establish prejudice from FAA’s failure to comply with the specific, substantive commands of Congress which apply to all Federal agencies - to analyze emissions with the goal of achieving conformity within each nonattainment or maintenance area included in the scope of the Project; to comply with each applicable SIP, 42 U.S.C. § 7506(c)(1); or, in the alternative, to establish exemption from the conformity requirement through compliance with regulations promulgated by the EPA, 40 C.F.R. §§ 93.153(c)(1) and (b).

In misapprehending the import of FAA’s error, the Court of Appeals disregarded this Court’s evolving precedent with respect to proof of harm. Moreover, it placed an unreasonable evidentiary burden on Petitioners, analogous to the one this Court held

impermissible when placed upon the Veterans' Administration in *Shinseki*, 129 S.Ct. at 1705. In that case, the statutory framework utilized by the Veteran's Court required the court to find a notice error harmful unless, among other things, "the VA [Veterans' Administration] demonstrates (1) that the claimant's 'actual knowledge' cured the defect," *id.*. The court held that requiring the Secretary of the Veterans Administration to ascertain a claimant's "state of mind," *id.*, would "often prove difficult, perhaps impossible." *Id.* That burden is even more unreasonable here where the evidence is entirely within the control of FAA and there is a total absence of data in the Administrative Record, the only evidence admissible in a case brought under the APA from which Petitioners might establish harm. 5 U.S.C. § 706(2)(E). The question of the incidence of the burden of proving harm from violation of a substantive, rather than procedural, statute begs for clear and final determination by this Court.

The decision below raises critical practical as well as legal issues. The Court of Appeals' unfiltered application of the traditional harmless error rule, even to violations of unequivocal Congressional direction in circumstances where compliance is a clear Congressional priority, *see Environmental Defense Fund v. EPA*, 167 F.3d 641, 643 (D.C. Cir. 1999), *citing Clean Air Conference Report*, 136 Cong. Rec. 36,103, 36,105-06 (1990), threatens not only the substantial rights of Petitioners to receive the benefits granted by Congress, but also the fundamental integrity of Congress' legislative scheme, enacted with the clear

goal of “healthy and safe air for every American.” 101 *Cong.Rec.S* 16956 (Daily Ed. Oct. 27, 1990).

Moreover, the Court of Appeals’ rationale for its decision, *i.e.*, that another method of analyzing air quality, an unauthorized Fuel Burn Report, was an adequate surrogate for the procedures mandated by Congress and EPA, has serious practical implications for future compliance. This is true for FAA that is even now embarked on planning for airspace redesign projects similar to the one at issue here across the United States, as well as for other Federal agencies that may construe the Court of Appeals’ liberal approach as a “free pass” to rewrite the rules for compliance with Congress’ unequivocal mandate to achieve conformity.

This Court’s review is, therefore, crucial to resolving the issue of the incidence of burden of proof of prejudice in the context of violation of a substantive civil statute, thereby ensuring consistent direction from Congress and the courts for compliance with the Clean Air Act.

**A. The Appellate Court Disregarded This Court’s Evolving Precedent in Finding That the Burden of Proving Harm from FAA’s Violation of a Substantive Provision of the Clean Air Act Should Fall on Petitioners.**

The Clean Air Act’s Conformity Provision admonishes that “[n]o department, agency, or instrumentality of the Federal Government shall

engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title.”<sup>3</sup> 42 U.S.C. § 7506(c). Because the Clean Air Act’s judicial review provisions extend only to violation of a specific emissions standard or limit, 42 U.S.C. § 7604, or a challenge to an action by the EPA Administrator, 42 U.S.C. § 7607, challenges to compliance by FAA are brought under the Administrative Procedures Act, *City of Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002). 49 U.S.C. § 46110 places original jurisdiction over challenges to FAA actions in the Courts of Appeals.

The scope of review properly applied by the Court of Appeals is found in 5 U.S.C. § 706(2). It instructs a reviewing court to, *inter alia*,

hold unlawful and set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

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<sup>3</sup> Section 7410 establishes procedures for implementation of “state implementation plans for national primary and secondary ambient air quality standards.”

*See also, Federal Communications Commission v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1823 (2009), Justice Kennedy, concurring in part and concurring in the judgment[“and, of course, the agency must not be ‘in excess of statutory jurisdiction, authority or limitations, or short of statutory right.’” § 706(2)(C)]. Section 706 further directs a reviewing court that, “[i]n making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”

The APA does not specifically define either the term “due account” or “prejudicial error.” This Court, however, has weighed in on both. In *Shinseki, supra*, 129 S.Ct. at 1704, this Court held that “the APA’s reference to ‘prejudicial error’ is intended ‘to su[m] up in succinct fashion the ‘harmless error’ rule applied by the courts *in the review of lower court decisions as well as of administrative bodies*,” *Id.*, quoting *Department of Justice, Attorney General’s Manual on Administrative Procedures Act 110* (1947) [emphasis in original]. This Court has further taken advantage of a relevant analogy to the more descriptive “federal ‘harmless error’ statute, now codified at 28 U.S.C. 2111,” *Shinseki*, 129 S.Ct. at 1705, which “tells courts to review cases for errors of law, ‘without regard to errors’ that do not affect the parties ‘substantial rights.’” *Id.*, quoting *Kotteakos, supra*, 328 U.S. at 760.

The *Kotteakos* court, referring to 28 U.S.C. § 2111's predecessor's statute, “Section 269 of the Judicial Code, as amended, 28 U.S.C. § 391, 28

U.S.C.A 391,” *Id.* at 756, relied on the legislative intent enunciated in H.R. Rep. No. 913, 65<sup>th</sup> Congress, 3<sup>rd</sup> Session 1 in holding that the fundamental purpose of § 269 was “to cast upon the party seeking a new trial the burden of showing that any technical errors he may complain of have affected his substantial rights, otherwise they are to be disregarded.” *Id.* at 760. “Whether the burden of establishing that the error affected substantial rights, or, conversely, the burden of sustaining the verdict shall be imposed, turns on whether the error is ‘technical’ or is such that ‘its natural effect is to prejudice a litigant’s substantial rights,’” *Id.*

The *Kotteakos* court went further, however, and relied upon additional Congressional intent language for the proposition that “if the error is of such a character that its natural effect is to prejudice a litigant’s substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it [the verdict],” *Id.* at 761-62, *citing, inter alia, Bruno*, 308 U.S. at 294. This Court’s subsequent decision in *Shinseki* referred to the *Kotteakos* standard in opining that “[c]ourts may sometimes make empirically based generalizations about what kinds of errors are likely, as a factual matter, to prove harmful,” *Shinseki*, 129 S.Ct. at 1707, *citing Kotteakos*, 328 U.S. at 760-761.

While this Court specified certain “factors that inform a reviewing court’s ‘harmless error’

determination,” *Shinseki*, 129 S.Ct. at 1707,<sup>4</sup> it also held that it is the court of original jurisdiction (here the Court of Appeals) “that sees sufficient, case-specific raw material . . . to enable it to make empirically-based, nonbinding generalizations about ‘natural effects’ . . .” *Id.*

Ultimately, the *Kotteakos* court both clarified and qualified its holding:

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but a very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress [citation omitted] . . . The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

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<sup>4</sup> These “case specific factors” include “an estimation of the likelihood that the result would have been different, an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result, a consideration of the error’s likely effects on the perceived fairness, integrity or public reputation of judicial proceedings, and a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference.” *Shinseki*, 129 S.Ct. at 1707.

*Id.* at 765 [emphasis added].

The first unanswered question before this Court is, therefore, whether the facial violation of the substantive provision of a civil statute, by a Federal agency, is that sort of error which has the “natural effect” of prejudicing a litigant’s “substantial rights,” and, thus, may “generally” be regarded as “likely to prove harmful.”

**1. Compliance with the Clean Air Act’s Conformity Provision is a Substantive, Not Merely Technical, Statutory Requirement.**

This Court has long recognized that the substantive provisions of a statute do not merely require following a “necessary process” prescribed in the statute, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), but rather the achievement of “result-based standards,” *Id.* at 353. In *Robertson*, petitioners argued that the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, required that each Federal agency include in an EIS, among other things, a fully developed plan to mitigate environmental harm. The Ninth Circuit agreed, but this Court reversed and remanded, holding that while NEPA’s “action forcing” procedures “are almost certain to affect the agency’s substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Id.* at 350. In short, this Court found a “fundamental distinction . . . between a requirement

that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted on the other.” *Id.* at 352.

This Court’s distinction in *Robertson* confirms the Conformity Provision’s substantive nature. The Court of Appeals in *Environmental Defense Fund v. EPA*, 167 F.3d 641, 643 (D.C. Cir. 1999) [“EDF II”] has described the Clean Air Act’s substantive mandate:

The Clean Air Act establishes a joint state and federal program for regulating the nation’s air quality. The Act requires EPA to establish national ambient air quality standards (‘NAAQS’) for various pollutants. *See*, 42 U.S.C. § 7409 (1994). It also requires each state to adopt a State Implementation Plan (known as a ‘SIP’) that ‘provides for implementation, maintenance and enforcement of [NAAQS] in each air quality control region (or portion thereof) within such State.’ *Id.* § 7410(a)(1). SIPs must include ‘enforceable emission limitations and other control measures, means or techniques . . . , as well as schedules and timetables for compliance, as may be necessary or appropriate’ to meet the NAAQS. *Id.* § 7410(a)(2)(A). [Emphasis added.]

*Environmental Defense Fund*, 167 F.3d at 643. The Conformity Provision further “requires each federal agency to determine that a proposed activity in a ‘nonattainment’ or ‘maintenance’ area conforms to an applicable SIP. . .” *Environmental Defense Fund v. EPA*, 82 F.3d 451, 454 (D.C. Cir. 1996) [“EDF I”]. And, EPA’s regulations implementing the Conformity Provision establish “tonnage thresholds of emissions below which the conformity of a federal action is presumed,” *Id.* at 465, thus establishing a result-based standard for determining exemption from the conformity requirement for “*de minimis*” impacts.

The contrast between this Court’s analysis of NEPA in *Robertson* and the analysis of the Court of Appeals in the *EDF* cases, *supra*, clearly demonstrates the Conformity Provision’s “result based,” substantive nature, which requires compliance with the specific “tonnage thresholds” in a SIP to establish conformity, as well as compliance with the specific tonnage thresholds in § 93.153(b) to establish exemption from conformity.<sup>5</sup> Thus, far from constituting a mere procedural template, the Conformity Provision provides that “action be taken . . .,” *Robertson*, 490 U.S. at 347, and prescribe with reference to each state’s air quality standards memorialized in its SIP, “particular results” to be met. *Id.* at 350.

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<sup>5</sup> Section 93.153(c) states in part: “The requirements of this subpart shall not apply to the following Federal Actions: (1) actions where the total of direct and indirect emissions are below the emissions levels specified in paragraph (b) of this section.”

## **2. Compliance is Also a Substantial Right Accorded to Petitioners Specifically and the Public in General.**

This Court has typically addressed the issue of “substantial rights” in the context of criminal cases. *See, e.g., Puckett v. United States*, 129 S.Ct. 1423, 1429 (2009) “[e]rror must have affected the appellant’s substantial rights, which in the ordinary case means he must demonstrate that it ‘affected the outcome of the district court proceedings.’”] This Court’s analysis of the circumstances giving rise to “substantial rights” is not, however, limited to criminal cases. In *Accardi v. Pennsylvania Railroad Company*, 383 U.S. 225 (1966), petitioners, World War II Veterans and former employees of the Pennsylvania Railroad, brought an action under the Selected Training and Service Act of 1940, on the ground that the railroad had denied them seniority rights due to them under the Act. This Court held that where an act of Congress “clearly manifests a purpose and desire on the part of Congress . . .,” *Id.* at 228, the party at whom that purpose is directed possesses “substantial rights guaranteed by the Act.” *Id.* at 229. This was so despite the fact that “[t]he term ‘seniority’ is nowhere defined in the Act, but it derives its content from private employment practices and agreements.” *Id.*

In this case, as in *Accardi*, the Clean Air Act clearly manifests a purpose and desire on the part of Congress “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare . . .” 42 U.S.C. § 7401(b)(1). The

scope of the term “welfare” is explicitly and broadly defined at 42 U.S.C. § 7602(h). [“All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.”]

The specific Congressional purpose underlying the Conformity Provision is no less explicit. The Record of Congressional debate concerning the 1990 Clean Air Act amendments illustrates Congress’ view of the substantiality of the rights conferred by the Conformity Provision. “The experience of the last thirteen years has shown that it is necessary to do more than simply consider applicable control measures; they must be implemented as well,” 101 *Cong.Rec.S* 16956 (Daily Ed. Oct. 27, 1990) in order to achieve the Bill’s goals of “healthy and safe air for every American.” *Id.* But unlike *Accardi*, Congress, in creating the Conformity Provision, did not simply rely on the general term “Conformity.” Instead, it defined “Conformity” specifically to mean:

Conformity to an implementation plan means - (A) conformity to an implementation plan’s purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such

standards; *and* (B) that such activities will not - (i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reduction or other milestones in any area.

42 U.S.C. § 7506(c)(1)(A) and (B) [emphasis added]. That Congress defined subparts (A) and (B) in the conjunctive clearly indicates that conformity must be achieved to *both* the purpose of a SIP *and* to at least one of the explicit listed standards.

Finally, this Court has repeatedly invoked the *Kotteakos* test to define the circumstances under which prejudice to a party's "substantial rights" is implicated. *See, e.g., Shinseki, supra; O'Neal v. McAninch*, 513 U.S. 432, 437 (1995). "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos, supra*, 328 U.S. at 765.

In *United States v. Lane*, 474 U.S. 438 (1986), this Court, relying on *Kotteakos*, defined prejudice in the context of a criminal case involving misjoinder of offenses pursuant to *Federal Rules of Criminal Procedure* 8(b). It held that "an error involving misjoinder 'affects substantial rights' and requires reversal if the misjoinder results in *actual prejudice*

because it ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” *Id.* at 449 [emphasis added.] This Court has since held, citing 28 U.S.C. § 2111, the same statute relied upon in the *Kotteakos* analysis, “[t]hat statute, by its terms, applied to both civil and criminal cases and *Kotteakos* made no distinction. . .” *O’Neal v. McAninch*, 513 U.S. at 441.

FAA’s error in relying on an unauthorized surrogate, the Fuel Burn Report, was determinative of the outcome of FAA’s action in a manner contrary to Congress’ specifically defined purpose, as well as EPA’s implementing procedures. If the Court of Appeals’ decision is allowed to stand, “[t]he statutory prohibition on projects that cause delays in attaining emissions standards would effectively be stripped of almost any impact and be inconsistent with Congress’ intent that pollution production be prevented by forward planning.” *Environmental Defense, Inc. v. Environmental Protection Agency*, 509 F.3d 553, 561 (D.C. Cir. 2007).

### **3. The Court of Appeals Therefore Erred in Placing the Burden of Proving Harm on Petitioners Where Violation by a Federal Agency of a Substantive Command of Congress Is at Issue.**

In its prior decisions, this Court addressed the propriety of “empirically based, non-binding generalizations” about whether the “natural effects” of

an error, *Shinseki*, 129 S.Ct. at 1707, have had “substantial and injurious effect or influence in determining an outcome,” *Lane, supra*, 474 U.S. at 449. While this Court construed the *Kotteakos* holding as confirming a “congressional preference for determining ‘harmless error’ without the use of presumptions, *Shinseki*, 129 S.Ct. at 1705, *citing Kotteakos*, 328 U.S. at 760, those warnings are not contravened by reliance on such “generalizations.” Through such reliance “a court might “properly influence, though not control, future determinations,” *Shinseki*, 129 S.Ct. at 1707, in that the “generalizations” would still require a predicate evaluation of the statutory provisions’ substantive, rather than purely technical, nature, as well as the substantiality of the rights conferred, and the influence of the error on the outcome of the case.

The principal import of applying such “non-binding, case specific generalizations” is on the incidence of the burden of harm. While this Court has opined “[t]o say that the claimant has the ‘burden’ of showing that an error was harmful is not to impose a complex system of ‘burden shifting’ rules or a particularly onerous requirement,” *Shinseki*, 129 S.Ct. at 1706, the Court was referring to “ordinary civil appeals.” *Id.* A challenge to an administrative agency’s violation of a substantive legislative command is not an “ordinary civil appeal” for several reasons.

First, the Court of Appeals in this case was the court of original jurisdiction. 49 U.S.C. § 46110(a). Petitioners have no recourse for appellate vindication

other than that which resides in this Court. Second, like other cases involving challenges to administrative actions, but very unlike an “ordinary civil appeal,” this case was tried entirely on the Administrative Record created by, and completely within the control of, FAA. Petitioners had no access to evidence of air quality analysis other than that adduced by FAA in the Administrative Record before the Court of Appeals. Typically, any attempt by Petitioners to introduce contradictory evidence would have been foreclosed by the substantial deference afforded a government agency in the area of its expertise (in the case of the FAA, aircraft operations which include the amount of “fuel burn”), *Washington Gas Light Co. v. F.E.R.C.*, 523 F.3d 928, 930 (D.C. Cir. 2008) [when considering an agency’s evaluation of data within its technical expertise, courts afford the agency “an extreme degree of deference.”], and by the limitations on introduction of evidence from outside the administrative record created by the agency. *See, e.g., Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) [when substantive soundness of agency decision is under scrutiny, judicial review of agency actions is normally confined to the administrative record . . .].

For those reasons, the circumstances of this case are closely akin to those addressed by this Court in *O’Neal, supra*. In *O’Neal*, this Court held that “[w]hen an error’s natural effect is to prejudice substantial rights and the court is in grave doubt about the harmlessness of that error, the error must be treated as if it had a ‘substantial and injurious effect’ on the verdict.” *Id.* at 444, *citing Kotteakos*, 328 U.S. at 764-

765.<sup>6</sup> *O’Neal*, like this case, did not involve “a judge who shifts a ‘burden’ to help control the presentation of evidence at a trial,” *Id.* at 436, but one who, like the Court of Appeals here, “applies a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect.” *Id.*

This Court pointed out that “the original common-law harmless-error rule put the burden on the beneficiary of the error [here the State] . . . to prove that there was no injury . . .” *Id.* at 437, *citing Chapman v. California*, 386 U.S. 18, 24 (1967). It then proceeded to distinguish its holding to the contrary in *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943) [“He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.”] as “pre-*Kotteakos*,” and confirmed that *Palmer*, like *Kotteakos*, referred to “mere technical errors” for its contrary holding. *O’Neal*, 513 U.S. at 439.

After having analyzed the equivalence of criminal and civil cases in this regard, *id.* at 440, this Court ultimately held that “[W]hen reviewing errors from a criminal proceeding, this Court has consistently held that, if the harmlessness of the error is in grave doubt, relief must be granted.” *Id.* Acknowledging the identity of the harmless error standards in civil and criminal cases, this Court stated conclusively, “[C]ivil and criminal harmless-error standards do not

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<sup>6</sup> Like the case at issue here, *O’Neal* was a “civil case” because habeas corpus petitions are technically “civil” actions. *Id.* at 440.

differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights.” *Id.* at 441.

In summary, this case and *O’Neal* share salient characteristics. Both deal with the government’s violation of a substantive civil statute. Both are cases in which the harmless error standard was applied to a “closed record.” Most important, however, both deal with a situation where grave doubt exists as to the true harmlessness of a governmental error. Not a shred of data or analysis exists in the Record provided by the FAA relating to emissions, let alone their impacts. The Fuel Burn Report relied upon by the Court of Appeals concluded that reduced fuel burn was equivalent to reduced emissions on average across the entire northeast region, without taking into account either the requirements of each state’s SIP, or that at least two airports located within the jurisdiction of the New Jersey SIP would experience an increase in fuel burn as a result of the Project. Nor, as acknowledged by the Court of Appeals, did the Fuel Burn Report contain a direct calculation of emissions [App. *infra*, 10a]; a comparison of emissions to the thresholds permitted for conformity in the applicable SIPs, as required by 42 U.S.C. § 7506(c)(1); or any analysis pursuant to EPA Conformity Rule §§ 93.153(c)(1) and (b) which are required for the establishment of an exemption from the conformity requirement.

Therefore, under this Court’s decision in *O’Neal*, the total absence of evidence in the Record made the Court of Appeals conclusive determination of the harmlessness of FAA’s error impossible. As “the

burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge,” *United States v. Fior D’Italia, Inc.*, 536 U.S. 238, 257, n.4 (2002), under this Court’s established jurisprudence, “the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a ‘substantial and injurious effect or influence in determining the jury’s verdict’),” *O’Neal*, 513 U.S. at 435. As the party with “knowledge” in actions brought under the APA is the Federal agency, the burden should fall on Federal agencies generally, and FAA in this case specifically, to prove that the substantial rights conferred by a statute’s substantive provisions have not been so undermined as to contravene the stated intent and specific result-based mandates of Congress.

**B. The Issues Raised by This Case Merit This Court’s Review Because Congress Showed Special “Solicitude” For Enforcement of the Clean Air Act and its Legislative Scheme.**

This case gives rise to important practical as well as legal justification for this Court’s grant of certiorari. First, in *Shinseki, supra*, this Court not only qualified its “normal” standard for the incidence of the burden of proof to acknowledge the possibility of “empirically based generalizations about what kinds of

errors are likely, as a factual matter, to prove harmful,” *id.* at 1707, but also acknowledged “that Congress has expressed special solicitude” for certain “cause[s].” *Id.* Congress has expressed just such “solicitude” for enforcement of the Clean Air Act.

In the Clean Air Act, Congress expressed its deep concern that

the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting danger to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation.

*Id.* at 7401(a)(2). It established as the primary goal of the Act “to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.” 42 U.S.C. § 7401(c). Congress then articulated the fundamental intent of the Conformity Provision to give life to this goal by giving “clear legislative direction to incorporate air quality criteria into the review and approval of transportation plans as well as projects,” 101 *Cong.Rec.S* 16956 (Daily Ed. Oct. 27, 1990), and in doing so, “protect and

enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;" 42 U.S.C. § 7401(b)(1).

Thus, the face of the Clean Air Act, as well as the stated intent of Congress behind it, demonstrates Congress' deep concern, not merely for the plight of the individual, as in *Shinseki, supra*, but the impact of emissions on the public and the environment. The Court of Appeals' decision in this case strikes at the heart of both the Congressional purpose behind conformity and its goal, in that it excused not merely FAA, but by extension, all Federal agencies from strict compliance with the legislative standards unequivocally mandated by the Conformity Provision. The import of the Court of Appeals' decision is that any report or summary purporting to support a conformity analysis will withstand judicial scrutiny, whether or not it analyzes and documents a project's compliance with an applicable SIP; and whether or not it follows the step-by-step procedures required to establish an exemption from the conformity requirement for a project with *de minimis* impacts, *see*, 40 C.F.R. 93.153(c)(1) and (b). The Court of Appeals thus opens the door to a wholesale abrogation of the conformity requirement, at a time when the issue of emissions impacts has become even more prominent (and more threatening) as a principal contributor to the problem of climate change.

Nor is this scenario as far fetched as it may sound. FAA is intending to implement airspace redesigns similar to the Project throughout the nation. As 49 U.S.C. § 46110 places original jurisdiction over a challenge to an FAA action in the Courts of Appeals, this issue is likely to arise repeatedly, and, if the Court of Appeals' resolution in this case is used by other agencies as a template, with equal indifference to the facial mandates of the Clean Air Act.

In short, the Court of Appeals in this case effectively nullified the specific, affirmatively expressed intent of Congress with respect to conformity. But this Court has already spoken unequivocally in defense of the Congressional prerogative. Where, as here,

“Congress has spoken with great clarity to the precise question raised by this case[,] [i]t is the duty of the courts to enforce the judgment of the legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the legislature.”

*Estate of Floyd Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 483-84 (1992). Absent relief from this Court, Petitioners' only avenue of recourse, the door will have been opened for future agency decisions pitting the Executive and Judicial Branches against

the will of the Congress in addressing one of the most critical environmental issues of our time.

Respectfully submitted,

Barbara E. Lichman, Ph.D.

*Counsel of Record*

Berne C. Hart

Steven M. Taber

CHEVALIER, ALLEN & LICHMAN, LLP

695 Town Center Drive

Suite 700

Costa Mesa, CA 92626

(714)384-6520

*Counsel for Petitioners* County of Delaware, Pennsylvania; The Honorable Andrew J. Reilly; The Honorable Linda A. Cartisano; The Honorable Mary Alice Brennan; The Honorable Michael V. Puppio; The Honorable John J. Whelan; Friends of the Heinz Wildlife Refuge at Tinicum, Inc.; Hank Hox, the Honorable Ron Raymond; The Honorable Elric C. Gerner; The Honorable Geoff Semenuk; The Honorable Henry A. Eberle, Jr.; Robert J. Willert; Thomas J. Giancristoforo, Jr.; Michael Smith; Frank Samsel; John F. Gresch