No. 13-73398

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ASSOCIATION OF IRRITATED RESIDENTS,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents,

and

AIR COALITION TEAM, DAIRY CARES,
FOSTER FARMS, LLC, FOSTER POULTRY FARMS, INC.,
and SAN JOAQUIN AIR POLLUTION CONTROL DISTRICT,
Respondents-Intervenors

On Petition for Review of a Final Rule
of the U.S. Environmental Protection Agency

BRIEF OF RESPONDENTS-INTERVENORS FOSTER FARMS, LLC AND FOSTER POULTRY FARMS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Respondents-Intervenors hereby certifies that Foster Farms, LLC and Foster Poultry Farms, Inc. are both privately held companies with no parent company. No publicly held company owns a 10 percent or greater stake in either.

/s/ *Carmine R. Zarlenga*

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INTRODUCTION

This is a challenge to EPA's final action limiting the applicability of certain local permitting rules under the Clean Air Act to ensure consistency with California state law. But it is a challenge that petitioner, the Association of Irritated Residents (AIR), lacks standing to bring because it has not shown that EPA's final action caused its members any harm.

On the merits, this is a straightforward case about deference: Must the Court defer to EPA's determination that Section 110(k)(6) of the Clean Air Act authorized it, in the circumstances of this case, to limit the range of air-pollution sources to which certain local air pollution control measures apply? And, in the course of making that determination, was EPA correct to defer to the authoritative opinion of the California Attorney General regarding the interpretation of California state law? The answer to both those questions is *yes*. The petition accordingly should be denied.

JURISDICTIONAL STATEMENT

Foster Farms agrees with AIR's jurisdictional statement.

ISSUES PRESENTED FOR REVIEW

1. Do AIR's members lack standing because their injuries are not fairly traceable to EPA's final action, such that vacatur of the final rule would not redress those injuries?

2. Should the Court defer to EPA's interpretation of Section 110(k)(6) of the Clean Air Act, as applied in this case?

3. Should the Court defer to the California Attorney General's interpretation of SB 700?

STATEMENT OF THE CASE

A. The statutory and regulatory framework[1]

The Clean Air Act "sets forth a cooperative state-federal scheme for improving the nation's air quality." *Vigil v. Leavitt*, 381 F.3d 826, 830 (9th Cir. 2004). EPA's primary responsibility under this cooperative framework is to establish national air quality standards for various air pollutants, as required "to protect the public health." 42 U.S.C. § 7409(a)-(b). States, in turn, are charged with developing and enforcing state implementation plans (or SIPs) to achieve and maintain those standards. *Id.* § 7410.

1. State implementation plans

A state implementation plan must "provide[] for implementation, maintenance, and enforcement" of EPA's national air quality standards in each "air quality control region" in the State. 42 U.S.C. § 7410(a)(1). A SIP must specify both "the methods the state will employ to attain the air

[1] EPA refers to "Section 7410" as a section "of the Clean Air Act," "of the CAA," and "of the Act." *E.g.*, EPA Br. 5, 19, 23. We note for clarity's sake that Section 7410 is a section of Title 42 of the U.S. Code, not of the Act. The corresponding section of the Act is Section 110, to which we refer throughout this brief (as does petitioner in its brief and EPA in the Federal Register).

quality standards promulgated by EPA" and "the measures the state will impose to prevent significant deterioration of air quality in those [areas] that are in compliance." *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981). In practice, a SIP is a collection of various state and local rules, regulations, and standards, typically promulgated and revised piecemeal, but together comprising a statewide plan. States often delegate rulemaking authority to local air quality control boards, which typically are supervised by centralized state agencies. A State may adopt, repeal, or amend its constituent SIP rules and regulations "after reasonable notice and public hearings." 42 U.S.C. § 7410(a), (l).

2. EPA's options for approving SIP submissions

After a State adopts a revision to its SIP, it must submit the revision to EPA for approval. 42 U.S.C. § 7410(a)(1), (k). If EPA approves the revision, it becomes a federally enforceable element of the SIP. *See Safe Air For Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) ("[A] SIP, once approved by EPA, has the 'force and effect of federal law.'"). An approved SIP rule remains in force until the State submits, and EPA approves, a superseding revision. *Id.*

EPA assesses SIP submissions for conformity with Section 110(a)(2) of the Act (42 U.S.C. § 7410(a)(2)), which is intended to ensure that implementation of a SIP is both practically feasible and actually capable of

bringing the State into compliance with EPA's national air quality standards. As long as a SIP (or SIP revision) meets those requirements, States have substantial discretion in choosing what regulations to adopt to meet EPA's air quality standards. *See Safe Air*, 488 F.3d at 1092.

Particularly relevant here, Section 110(a)(2) requires that a SIP submission provide "necessary assurances" that the State or responsible local government "will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out" the SIP. 42 U.S.C. § 7410(a)(2)(E). EPA's regulations elaborating the "necessary assurances" requirement explain that a SIP "must show that the State has legal authority to carry out the plan" and—if a local board is delegated the responsibility to carry out a portion of the plan—that the local board similarly has the legal authority to fulfill its obligations. 40 C.F.R. §§ 51.230, 51.232.

EPA approval of a SIP submission requires formal notice-and-comment rulemaking. Section 110(k)(3) of the Act—which sets out the actions EPA may take with respect to a SIP submission—provides that EPA must approve a submission "as a whole" if it meets all of the Act's requirements. 42 U.S.C. § 7410(k)(3). If only a "portion" of the submission meets the requirements of the Act, EPA "may approve the plan revision in part and disapprove the plan revision in part." *Id.* If EPA disapproves a submission

either in whole or in part, the State must correct the deficiency within a prescribed period of time; if the deficiency is not corrected, EPA can impose sanctions (*id.* § 7509(a)(2), (b)) and must promulgate a "Federal implementation plan" (*id.* § 7410(c)(1)).

In addition, EPA has taken the position that Section 301(a) of the Act—which allows EPA to "prescribe such regulations as are necessary" to carry out its functions under the Act (*see* 42 U.S.C. § 7601(a)(1))—gives it the authority, together with Section 110(k)(3), to issue a limited approval and limited disapproval of a submission. *See* 66 Fed. Reg. 37587, 37590 (July 19, 2001) [ER52]. *See also, e.g.*, 65 Fed. Reg. 8083, 8084 (Feb. 17, 2000). This approach is appropriate, according to EPA, when it determines that a SIP submission cannot be approved either in whole or in part because of certain deficiencies, but that approval of the submission nonetheless would strengthen a State's SIP. When EPA takes this form of action, the entire submission is approved, but the State must correct the deficiency in the submission within 18 months or face sanctions.

Finally, EPA can issue a "[c]onditional approval" of a SIP submission under Section 110(k)(4), which allows EPA to "approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain." 42 U.S.C. § 7410(k)(4). Like a limited approval, a conditional approval has the effect of approving the entire submission. If,

however, "the State fails to comply with such commitment" by the determined date, the "conditional approval shall [convert to] a disapproval." *Id.*

Apart from granting EPA the power to approve and disapprove proposed SIP revisions, the Act authorizes EPA to address deficiencies in a State's *existing* SIP rules in two ways.

First, Section 110(k)(5) authorizes EPA to issue an "SIP call" when it determines that a SIP is "substantially inadequate to attain" applicable air quality standards. 42 U.S.C. § 7410(k)(5). When issuing a SIP call, EPA must "notify the State of the inadequacies" in its SIP and establish a deadline for remedying those inadequacies. *Id.* The State must submit to EPA, by the established deadline, a revision "as necessary to correct such inadequacies." *Id.* Like any other SIP submission, any revision that a State submits in response to a SIP call is subject to "an extensive regulatory process that includes the publication of a proposed plan in the Federal Register for notice and comment before final approval by [EPA]." *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1207 (D.C. Cir. 1998).

Second, Section 110(k)(6) authorizes EPA, when it "determines that [its] action approving, disapproving, or promulgating any plan or plan revision (or part thereof) . . . was in error," to "revise such action as appropriate." 42 U.S.C. § 7410(k)(6). EPA must identify the error "to the State and public." *Id.* Once EPA has made the determination that it erred, it

"may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State." *Id.* Thus, "[w]hile Section 110(k)(5) provides an avenue for revising a substantially inadequate SIP, Section 110(k)(6) provides an avenue for correcting a SIP revision approved in error." *Alabama Envt'l Council v. EPA*, 711 F.3d 1277, 1286 (11th Cir. 2013).

B. District Rules 2201 and 2020

The California SIP gives local air pollution control districts the responsibility for developing air quality plans and implementing control measures in their local areas. When districts propose new rules or revise existing ones, they submit them to California's Air Resources Board (CARB) for review and approval, which in turn submits them to EPA for review and approval. *See State Implementation Plan Background*, http://perma.cc/V66N-3QT9.

The San Joaquin Valley Air Pollution Control District is one such air district. The District's stated mission is to provide a regulatory framework that encourages continued local economic growth while minimizing emissions increases due to that growth. The District's rules, like those of its coordinate districts in other areas, are directed primarily at controlling stationary sources of air pollution, such as factories and plants.

At issue in this case are two of the District's new source review (NSR) rules, which are a part of California's SIP. NSR rules generally require permits for the construction of new stationary sources of air pollution and for major modifications to existing stationary sources. These permits establish emissions limitations and often require the use of "best available control technology" (BACT) and the purchase of offsets to keep overall emissions low.

1. EPA's 2001 limited approval of Rules 2201 and 2020

The two local NSR rules at issue here—Rules 2201 and 2020, first proposed and submitted to EPA in 1998—work together. In its original form, Rule 2201 set out standards for reviewing and permitting construction of and modifications to all stationary sources within the District. And Rule 2020 initially exempted all agricultural sources of air pollution from those requirements. Rule 2020's original agricultural carve-out implemented Section 42310(e) of the California Health and Safety Code, which, at that time, categorically prohibited "the District, as well as all other districts in California, from permitting agricultural sources" under the Clean Air Act. 68 Fed. Reg. 7330, 7335 (Feb. 13, 2003) [ER119].

In 2000, EPA concluded that Section 42310(e)'s agricultural exemption violated the Act, which requires regulation of all "major" stationary

sources, whether agricultural or not. *See* 65 Fed. Reg. 58252, 58254 (Sept. 28, 2000) [ER47]; 42 U.S.C. § 7411(e), (f).

EPA thus issued a "limited approval and limited disapproval of District Rules 2020 and 2201" in July 2001. *See* 66 Fed. Reg. at 37589. In issuing its "final limited approval of the submitted rules under section 110(k)(3)," EPA ordered the District to "remove the agricultural exemption from District Rule 2020" and to "revise Rule 2201 to provide a mandatory and enforceable remedy" to ensure compliance with offset requirements. *Id*. at 37590. But EPA was clear that its "final limited disapproval action does not prevent the District or EPA from enforcing the[] rules" as they were then written. *Id*.

2. The 2003 SIP call and SB 700

In response to the deficiency EPA had identified, the District proposed to remove Rule 2020's agricultural exemption. But Section 42310(e) of the of the California Health and Safety Code still contained a blanket exemption preventing districts from requiring permits from agricultural sources. EPA accordingly issued a SIP call in February 2003, recommending that the California legislature amend the statute. 68 Fed. Reg. 7327, 7328 (Feb. 13, 2003) [ER111]. In the SIP call, EPA explained that, in light of Section 42310(e)'s blanket agricultural exemption, California could not provide "necessary assurances" under 42 U.S.C.

§ 7410(a)(2)(E) that the local air pollution control districts had legal authority to implement NSR rules with respect to all major stationary sources, including agricultural sources, as required by the Act. *Id*.

In response to the SIP call, the California legislature enacted Senate Bill 700, which the governor signed into law in September 2003. *See* 75 Fed. Reg. 4745, 4747 (Jan. 29, 2010) [ER308]. SB 700 "removed the wholesale exemption" for agricultural sources, "subject[ing] major agricultural sources to permitting requirements," as required by the Clean Air Act. *Id*. SB 700 "retained exemptions for new source permitting for certain *minor* agricultural sources," however, "and limited the ability [of air pollution control districts] to require [those] minor agricultural sources to obtain Federal offsets." *Id*. (emphasis added).

Specifically, SB 700 exempted minor agricultural sources with actual emissions below fifty percent of the major-source threshold exempt from permitting requirements "unless [a] District makes certain findings" not relevant here. 75 Fed. Reg. at 4747 n.7 [ER308]. SB 700 also provided that offsets may not be required of any minor agricultural source "unless they meet the criteria for real, permanent, quantifiable, and enforceable emission reductions" within the meaning of the Clean Air Act. *Id*.

3. EPA's 2004 approval of the revised rules

Pursuant to EPA's July 2001 directive, the District submitted a revision to Rule 2020 in December 2002, eliminating the exemption for agricultural sources. 68 Fed. Reg. at 7335 [ER119]. At the same time, the District submitted an amendment to Rule 2201, providing that any permit authorizing the construction or modification of a stationary source, no matter its size, would require the applicant (1) to install BACT and (2) to purchase emission offset credits from other pollution sources. *Id.* at 7331 n.3, 7335-7336 [ER115, 119-120].

On the same day it issued the SIP call, EPA proposed to approve the revised versions of Rules 2201 and 2020, reasoning that once "the State has provided the necessary assurances required under section 110(a)(2)(E), the NSR program for the [District] will fully meet the requirements" of the Act. 68 Fed. Reg. at 7336 [ER120]. After the governor of California signed SB 700, EPA, in May 2004, issued a final rule approving the revised versions of Rules 2201 and 2020, noting that the District had "address[ed] the deficiency in Rule 2020" by removing its exemption for agricultural sources and that "the State ha[d] also removed a similar blanket exemption, thereby providing the District with authority to require air permits for agricultural sources, including federally required NSR permits." 69 Fed. Reg. 27837, 27838 (May 17, 2004) [ER149].

But there was a problem that EPA had not noticed: Rule 2020, as approved, did not exempt *any* agricultural sources from permitting requirements, not even minor sources (75 Fed. Reg. at 4747 n.4 [ER308]); and Rule 2201 likewise continued "on [its] face" to require permits for and offsets from *all* sources, including minor agricultural sources (78 Fed. Reg. 46504, 46505 (Aug. 1, 2013) [ER13]). SB 700, however, retained the distinction between major and minor sources, prohibiting districts from requiring permits or offsets from certain minor agricultural sources. Thus although the revised Rules 2201 and 2020 had been approved, they were not enforceable under state law with respect to minor agricultural sources.

C. The district court lawsuits and EPA's response

In 2005 and 2006, the Association of Irritated Residents—petitioner in the present proceedings—filed citizen suits against the District and two dairies operating in the San Joaquin Valley, alleging that the District's failure to require those dairies to apply for permits, implement BACT, and purchase offsets violated the District's NSR rules. *See AIR v. Fred Schakel Dairy*, 460 F. Supp. 2d 1185 (E.D. Cal. 2006); *AIR v. C & R Vanderham Dairy*, 435 F. Supp. 2d 1078 (E.D. Cal. 2006).[2] AIR additionally sued the

[2] This Court denied permission for an interlocutory appeal in the *Fred Schakel Dairy* case (No. 08-80115 (Nov. 5, 2008) (Dkt. 10)), which later terminated with a consent decree. Proceedings in the *Vanderham* case have been stayed but remain pending.

District and intervenor Foster Farms in November 2006, claiming that permits issued under Rule 2201 for two of Foster Farms' ranches (which are minor agricultural sources within the meaning of the Clean Air Act (42 U.S.C. § 7412(a)) failed to comply with Rule 2201 because they did not impose strict enough BACT and did not require Foster Farms to purchase offset credits. *See* Compl. ¶¶ 2, 55-71, *AIR v. San Joaquin Valley Unified Air Pollution Control District et al.*, No. 1:06-cv-01648 (E.D. Cal. Nov. 15, 2006) (Dkt. 1).

When the suits came to EPA's attention, EPA undertook a review of its 2004 approval of Rules 2201 and 2020 and concluded that that approval had been "erroneous." 75 Fed. Reg. at 4747 [ER308]. Thus, in 2008, EPA began a rulemaking "pursuant to CAA section 110(k)(6)" to revise its 2004 action on the NSR rules. 73 Fed. Reg. 9260, 9263 (Feb. 20, 2008). EPA observed in its announcement that "recent enforcement actions have been brought pursuant to the CAA's citizen suit provisions against [concededly] minor agricultural sources in [the District]," including the action against Foster Farms, "for failure to apply for and receive a new or modified source permit." *Id.* In EPA's view, however, the District did "not have the authority under State law to issue such permits." *Id.* "The fact that such cases are being brought," EPA stated, "supports the need to correct our error in approving Rules 2020 and 2201 in 2004." *Id.*

EPA's 2008 announcement explained that Rules 2201 and 2020, as they were approved in 2004, were "at odds with State law." 73 Fed. Reg. at 9263. While the two rules purported to allow the District to apply permitting and offset requirements to *all* agricultural sources, EPA concluded that the District lacked authority under State law to apply either its permitting or offset requirements to minor agricultural sources with emissions below fifty percent of the major-source threshold. 75 Fed. Reg. at 4748 [ER309]. Accordingly, EPA concluded that its full approval of Rules 2201 and 2020 in 2004 had been in "error" because it "should have ensured that the authority in those rules was consistent with the authority granted [to the District] by SB 700" and it had not done so. 73 Fed. Reg. at 9263.

EPA proposed to "correct [its] error by limiting [its] approval of Rules 2020 and 2201 to apply only to the extent the District has authority under state law to require permits and offsets." 73 Fed. Reg. at 9263. Specifically, EPA proposed to approve Rule 2020 "only to the extent it applies to agricultural sources subject to permitting under SB 700"—that is, only to those sources with actual emissions above 50 percent of the major-source threshold. *Id.* EPA similarly proposed to approve Rule 2201 "only to the extent it requires offsets for new major sources and major modifications." *Id.*

D. The current rulemaking

1. EPA's 2010 limited approval of the revised rules

In March 2008, one month after EPA proposed revising the scope of its 2004 approval of the District's NSR rules, CARB submitted to EPA, on behalf of the District, a further revision to Rule 2020 that brought the Rule into compliance with SB 700. The revision fully complied with SB 700: major agricultural sources and minor agricultural sources with emissions above 50 percent of the major-source threshold would be subject to permit requirements, while minor agricultural sources would be exempt. *See* 75 Fed. Reg. at 4749 [ER310]. The following year, CARB also submitted a revised version of Rule 2201 for EPA's review; this revision similarly "conform[ed]" Rule 2201 "to existing state law by exempting new or modified agricultural sources from offset requirements, unless the offsets are required by Federal CAA requirements." *Id.* at 4750 [ER311].

In light of these new submissions, EPA abandoned the rulemaking it had begun in 2008; instead, EPA started a new proceeding in January 2010 in which it both proposed a limited approval and limited disapproval[3] of the newly revised NSR rules *and* reintroduced its proposal to revise its

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[3] EPA's justification for limiting its approval was that the District had incorporated the codified provisions of SB 700 by reference, rather than expressly stating the exemptions in the text of the rules themselves. 75 Fed. Reg. at 4755 [ER316]. The District revised the two rules accordingly, and EPA has proposed to approve them. *See* 76 Fed. Reg. 76112 (Dec. 6, 2011).

2004 approval action. 75 Fed. Reg. at 4746 [ER307]. But during the comment period of this new rulemaking, EPA received comments suggesting that certain "'savings' clauses in state law" obviated the purported conflict between SB 700 and the versions of Rules 2201 and 2020 EPA had approved in 2004. 78 Fed. Reg. at 46506 [ER14]. EPA thus sought a legal opinion from the Attorney General of California clarifying the "extent of District authority with respect to agricultural sources under state law." *Id.* at 46506 & n.7.

In May 2010, while EPA was awaiting the Attorney General's opinion, it finalized its limited approval and limited disapproval of the District's newly-revised NSR rules. *See* 75 Fed. Reg. 26102 (May 11, 2010) [ER358]. EPA's view is that, as of the date of that limited approval, "the [California] SIP and State law [are] aligned with respect to permitting of agricultural sources (and imposition of the emissions offset requirement) in San Joaquin Valley." 78 Fed. Reg. at 46505 n.2 [ER13].

2. The opinion of the California Attorney General

In two separate letters to EPA, California's Attorney General confirmed that EPA's interpretation of SB 700, as it applied to the District's NSR rules in 2004, was consistent with her own. She agreed that SB 700 "did not authorize the District to impose a permit requirement on agricultural sources whose potential and actual emissions were less than one-half

of the major source threshold and where the District had not made the requisite findings." [ER463]. She further confirmed that "emissions reductions from minor agricultural sources do not meet the criteria for real, permanent, quantifiable and enforceable emission reductions," a fact that "suspend[s] the duty of a minor agricultural source to offset emissions." [ER466]. Finally, the Attorney General made clear that the savings clauses identified in the comments did not authorize NSR rules that conflicted with SB 700 and thus did not cure the overbreadth of the 2004 versions of Rules 2201 and 2020. *See* [ER464-465].

3. EPA's final action under Section 110(k)(6)

In August 2013, "[a]fter due consideration of the comments submitted on [the] proposed action, and in light of California's interpretation of SB 700 as it applies to the District's NSR rules," EPA promulgated the final rule at issue here. 78 Fed. Reg. at 46512 [ER20]. The agency invoked its error-correcting authority under Section 110(k)(6) to limit its prior approval of the 2004 rules to the extent that the rules comported with the District's authority under state law:

> (a) Approval of the New Source Review rules for the San Joaquin Valley Unified Air Pollution Control District Rules 2020 and 2201 as approved on May 17, 2004 in § 52.220(c)(311)(i)(B)(1), and in effect for Federal purposes from June 16, 2004 through June 10, 2010, is limited, as it relates to agricultural sources, to the extent that the permit requirements apply:

(1) To agricultural sources with potential emissions at or above a major source applicability threshold; and

(2) To agricultural sources with actual emissions at or above 50 percent of a major source applicability threshold.

(b) Approval of the New Source Review rules for the San Joaquin Valley Unified Air Pollution Control District Rules 2020 and 2201 as approved on May 17, 2004 in § 52.220(c)(311)(i)(B)(1), and in effect for Federal purposes from June 16, 2004 through June 10, 2010, is limited, as it relates to agricultural sources, to the extent that the emission offset requirements apply to major agricultural sources and major modifications of such sources.

40 C.F.R. § 52.245.

EPA explained why it chose not to revise its 2004 action to a partial approval, limited approval and limited disapproval, or full disapproval. A partial approval would have been "problematic," in EPA's view, because the District's "NSR rules are not separable" by application. 78 Fed. Reg. at 46510 [ER18]. A limited approval and limited disapproval would have left the rules in effect during the relevant time, doing nothing to remedy the problem of the "mismatch" between the NSR rules and the District's authority under SB 700 from June 2004 through June 2010. *Id.* at 46510-46511 [ER18-19]. And a full disapproval of the NSR rules "would have the deleterious effect of removing the December 2002 version of the NSR rules from the SIP entirely." *Id.* at 46511 [ER19]. The NSR rules applicable to the District from 2004 to 2010 would then be deemed to have been the

versions approved in 2001, which "included a blanket exemption for agricultural sources." *Id.*

Because EPA already had finalized a limited approval that brought the NSR rules into compliance with state law as of May 2010, the final 2013 rule affects only the NSR rules in effect "after the effective date of [the] May 2004 approval of the 2002-amended District NSR rules" and before "the effective date of [the] May 2010 approval of the subsequently amended NSR rules." 78 Fed. Reg. at 46505 n.2 [ER13].

AIR filed the present petition for review before this Court. It challenges EPA's determination that, under SB 700, the District cannot require minor agricultural sources of air pollution to obtain permits or offsets under Rule 2201.

SUMMARY OF ARGUMENT

AIR lacks standing to bring this rule challenge. Its theory of causation and redressibility speculates that success in this rule challenge will necessarily lead to success in the district court citizen-suit cases, which will necessarily require minor agricultural sources to obtain offsets, which necessarily will reduce emissions enough to make a meaningful difference in the levels of ground-level ozone present in the Valley. None of those speculative propositions is supported by evidence, and thus none is sufficient to satisfy *Lujan*'s causality and redressability prong.

Concerning the merits, principles of deference determine both issues presented for review.

First, EPA reasonably determined that Section 110(k)(6) authorized it to limit the applicability of Rules 2201 and 2020 in the particular circumstances of this case. Reading Section 110(k)(6) as AIR suggests would have left EPA without authority to prevent an unenforceable version of those rules from prevailing between June 2004 and June 2010. In the unusual circumstances presented here, therefore, the *only* "appropriate" solution available to EPA under Section 110(k)(6) was to revise its 2004 full approval of Rules 2201 and 2020 by limiting their applicability to agricultural sources with emissions above fifty percent of the major-source threshold. EPA's decision to that effect was reasonable and therefore is entitled to *Chevron* deference.

Second, EPA correctly deferred to the California Attorney General on the interpretation of SB 700. Both this Court and the California courts routinely defer to authoritative opinions of the California Attorney General on matters of California law. No less is required here, particularly in light of the Clean Air Act's federal-state cooperative framework. None of AIR's arguments for disregarding the Attorney General's opinion is persuasive. EPA's final rule accordingly must be upheld.

ARGUMENT

I. AIR LACKS STANDING BECAUSE ITS MEMBERS' INJURIES ARE NOT FAIRLY TRACEABLE TO EPA'S ACTION

We begin with the question of standing, the requirements of which are familiar: "The plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 2014 WL 1168967, at *6 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). We do not take issue with AIR's claim that its members have suffered injury in fact. *See* AIR Br. 26-30. But there is no plausible basis for concluding that their injuries are "fairly traceable" to EPA's final action here, or, therefore, that vacating its final rule will "redress" their injuries.

AIR's reasoning on each of these points is conspicuously thin. It says, in the most conclusory of terms, that "EPA's action . . . allows new and modified minor agricultural stationary sources to avoid air pollution controls, the excess pollution from which contributes to the Valley's air pollution and thus injures AIR members" and that vacatur therefore "would redress AIR's injuries by requiring minor agricultural stationary sources to obtain NSR permits and offsets." AIR Br. 30-32.

That is insufficient for two related reasons: *First*, neither AIR nor its declarants offers any plausible basis for concluding that emissions from minor agricultural sources contribute meaningfully to their injuries. *Second*, AIR does not (and cannot) show that vacatur of EPA's final action here will lead directly (or at all) to lower emissions.

1. "Under *Lujan*'s causality prong, Plaintiffs must show that a causal connection exists between their asserted injuries and the conduct complained of—*i.e.*, [EPA's final rule exempting certain minor agricultural sources from offset requirements]." *Washington Envt'l Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013). Such a showing requires something more than "conjecture"; it requires a "plausible scientific or other evidentiary basis" for concluding that EPA's final action will lead to greater emissions, and that those emissions "are the source of [AIR's members'] injuries." *Id.* at 1142-43. Mere "vague, conclusory statements" that EPA "ha[s] failed to curb emission[s] . . ., which contribute (in some undefined way and to some undefined degree) to [AIR's members'] injuries" is insufficient. *Id.*

Yet that is all we have here. The only evidence that AIR submits in support of its standing to bring suit are the very brief declarations of two of its members. Each supposes that his injuries are caused by increased ozone levels. *See* Dkt. 37-2, at 3-4, ¶¶ 9-10 (Frantz Decl.); *id.* at 8-9, ¶¶ 7-8

(Wells Decl.). But neither even attempts to explain how EPA's final action will lead to higher ozone levels, much less sufficiently higher levels to contribute meaningfully to their injuries given all the other sources of volatile organic compounds in the Valley (including, for example, *major* agricultural sources).

For its part, AIR asserts that "total ozone formed by VOC" emitted by "confined animal facilities" is substantial. AIR Br. 14. Perhaps. But, like the declarants, it does not explain how substantial that contribution is relative to other sources, or what portion of emissions from such facilities is attributable to the *minor* agricultural sources covered by EPA's final rule. To be sure, AIR asserts (*id.*) that "confined animal facility emissions with controls required by SB 700 still account for emissions of approximately 97 tons per day of VOC in 2012." But the ER page it cites (ER377) does not support that proposition. Even if it did, information concerning emissions from major sources "with controls required by SB 700" says nothing about emissions from minor sources not subject to such controls. And it certainly does not speak to what degree such controls would *reduce* emissions from minor sources. It therefore does nothing to demonstrate that vacating EPA's final rule would make any difference.

2. More fundamentally, AIR cannot say that EPA's final action will lead directly (or even necessarily) to greater emissions from minor

agricultural sources. The most that it can say, instead, is that EPA's final action threatens to frustrate the two citizen-suit actions still pending in district court. Any causal connection between EPA's action and injury to AIR's members is wholly attenuated by the citizen-suit cases.

Take the suit against Foster Farms, for example. In 2006, the District issued permits under Rule 2201 authorizing the modernization and expansion of Foster Farms' El Dorado Ranch and Davis Ranch facilities. Both ranches are minor agricultural sources within the meaning of the Clean Air Act and California law. The permits imposed certain BACT requirements but did not require offsets. AIR filed suit against both Foster Farms and the District, arguing that the permits failed to comply with Rule 2201 because (so far as relevant here) they did not require Foster Farms to purchase offset credits. *See* Compl. ¶¶ 2, 55-71, *AIR v. San Joaquin Valley Unified Air Pollution Control District et al.*, No. 1:06-cv-01648 (E.D. Cal. Nov. 15, 2006) (Dkt. 1). AIR asked for an injunction requiring the purchase of offsets. *Id.* at 13-14.

There is no guarantee, however, that success in this rule challenge necessarily will lead to success in that suit or any other. Foster Farms has denied most of AIR's factual allegations and asserted a range of affirmative defenses, including failure to join a necessary party, mootness, lack of standing, and failure to state a claim. Assuming success in the district

court suit against Foster Farms, or either of AIR's two other citizen suits, is precisely the sort of "hypothetical [and] tenuous" link that makes the "causal chain . . . too weak to support standing." *Washington Envt'l Council*, 732 F.3d at 1142 (quotation marks omitted).

And that is to say nothing of an even bigger problem: Requiring Foster Farms to purchase credits from *other* facilities with excess pollution reductions *would not reduce emissions from its two ranches at all.*

In the end, all we are left with is a "speculative" and "attenuated" theory (*id.*) that requires the Court to assume that success in this rule challenge (1) will lead to success in the district court cases, (2) which will require minor agricultural sources like the El Dorado Ranch and Davis Ranch facilities to obtain offsets, (3) which will reduce emissions substantially enough (if at all) to make a difference in the ozone levels in the Valley. None of those wholly speculative propositions is supported by evidence, and thus none is sufficient to satisfy *Lujan*'s causality and redressability prong. For that reason alone, the petition should be dismissed.[4]

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[4] AIR also says that EPA's action "further injures AIR" because it "caused the district court to stay AIR's two Clean Air Act citizen suits enforcing the District NSR Rules." AIR Br. 31. But the parties *voluntarily* stipulated to a stay of the district court litigation when EPA commenced the rulemaking process, and AIR *itself* requested a continuation of the stay until the conclusion of this Court's review. *See AIR v. San Joaquin Valley Unified Air Pollution Control District et al.*, No. 1:06-cv-01648 (E.D. Cal.) (Dkts. 33, 66). Even if a stay of the citizen suits in district court amounted to an "injury in fact" (it does not), here it would be one of AIR's own making.

II. SECTION 110(k)(6) AUTHORIZED EPA TO LIMIT THE APPLICABILITY OF THE DISTRICT'S NSR RULES IN THE CIRCUMSTANCES OF THIS CASE

Assuming *arguendo* that AIR has standing, EPA's final rule should be upheld on the merits. Statutory interpretation begins with "the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). But the meaning of statutory language is not always plain, sometimes leaving "'a gap for an agency to fill.'" *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). When Congress leaves a gap, the agency with authority to enforce the statute may "'elucidate [the] specific provision of the statute by regulation,'" and "any ensuing regulation is binding in the courts," unless it is "manifestly contrary to the statute." *Id.*

Interpretive gaps typically result from textual ambiguities, which exist "when a statute is capable of being understood by reasonably well-informed persons in two or more different senses." 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 45:2, at 13 (7th ed. 2007). To ascertain whether a statute is "ambiguous with respect to [a] specific issue addressed by [a] regulation," courts "must look" to "the particular statutory language at issue," as well as "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Courts must defer to an agency determination unless the language, "purpose and structure of the statute" are unambiguous, and

“clearly reveal a contrary intent on the part of Congress.” *Chem. Mfrs. Ass’n v. NRDC, Inc.*, 470 U.S. 116, 126 (1985).

The statutory language at issue here provides that, when EPA determines that

> [its] action approving, disapproving, or promulgating any plan or plan revision (or part thereof) . . . was in error, [it] may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State.

42 U.S.C. § 7410(k)(6). In AIR’s view, that language unambiguously “limit[s] allowable” revisions to the kinds of “approvals and disapprovals” authorized by paragraphs 110(k)(3) and (k)(4). AIR Br. 35. That is manifestly wrong. The Act reasonably can be read (as EPA *did* read it) to permit EPA to limit its prior approval of Rules 2201 and 2020 under the circumstances of this case.

Before proceeding further, however, one point warrants clarification: The question presented here concerning EPA’s authority under Section 110(k)(6) is narrower than either AIR or EPA suggests. It is not whether EPA has sweeping authority to correct erroneous SIP approvals in any way it deems “appropriate,” regardless of circumstance. It is, instead, whether “the *specific* issue addressed by” the final rule at issue here, which relates exclusively to District Rules 2201 and 2020, reflects a “permissible construction” of Section 110(k)(6). *K Mart*, 486 U.S. at 291-92

(emphasis added). In evaluating the permissibility of EPA's conclusion that the "discretionary language of CAA [S]ection 110(k)(6)" authorized EPA, in light of the unique facts of this case, to "revise the scope of [its original] approval" of Rules 2201 and 2020 to comply with SB 700 (78 Fed. Reg. at 46511-45612 [ER19-20]), the Court need not and should not address the scope of EPA's Section 110(k)(6) power more generally.

A. EPA's interpretation of the words "as appropriate" is a permissible one in this case

1. We begin with the word *appropriate*, upon which EPA based its interpretation. 78 Fed. Reg. at 46511 [ER19]. As the Supreme Court observed in the context of Section 307(f) of the Act, "[i]t is difficult to draw any meaningful guidance" from the word *appropriate*, "which means only 'specially suitable: fit, proper.'" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983). Thus while the statutory text sets a definitive standard, taken alone, it "does not begin to answer th[e] question" of what actually *is* "appropriate" in any given circumstances. *Id*.

There is therefore no serious question that the word lacks a single plain meaning and that Congress left "a gap" in the statute, intending EPA "to elucidate" (*Mead*, 533 U.S. at 227) the word "appropriate" by determining, in its expert discretion, what particular revision is "suitable" or "fit" or "proper" in a given circumstance (*Ruckelshaus*, 463 U.S. at 683).

In arguing that Section 110(k)(6) leaves no gap to fill, AIR says that "the plain meaning of the phrase 'revise such action as appropriate' in 110(k)(6) authorizes EPA [only] to act within the authority granted elsewhere in [S]ection 110(k) and does not grant EPA additional authority." AIR Br. 36. Even if AIR's interpretation is a permissible interpretation of that language, the "purpose and structure of the statute" do not "clearly reveal" that it is the only one. *Chem. Mfrs.*, 470 U.S. at 126. Congress did not place the kind of express limit on the scope of the actions that EPA can take under paragraph (k)(6) that it did under paragraphs (k)(3) and (k)(4).

2. EPA's discretion to determine what is "appropriate" under Section 110(k)(6) is not boundless, however. AIR is correct that paragraph (k)(6) must be understood as just one element of the broader SIP-approval scheme; it is, after all, a "fundamental principle of statutory construction" that the meaning of statutory language "must be drawn from the context in which it is used." *Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. UAW*, 523 U.S. 653, 657 (1998) (quotation marks omitted). And it would be quite odd to conclude that Congress, in giving EPA authority under paragraph (k)(6) to correct its previous errors, meant to enlarge the scope of EPA's power, in every case, to accomplish ends that it could not accomplish if it were reviewing a SIP submission in the first instance under paragraphs (k)(3) and (k)(4). That might encourage carelessness in

initial approvals, thereafter allowing EPA substantively to revise a State's SIP submission without the hassle of "requiring [a] further submission from the State." 42 U.S.C. § 4710(k)(6). That, in turn, would risk undermining the "cooperative state-federal scheme" on which the statute is based. *Vigil v. Leavitt*, 381 F.3d 826, 830 (9th Cir. 2004).

But whatever these observations may mean in the mine run of cases, they are not a limiting principle in *this* case. That is because, without the power beyond the kind conferred by paragraphs (k)(3) and (k)(4), EPA would not have been able *at all* to correct the error it previously committed. And whatever authority Congress meant to confer with the word "appropriate," it surely included the necessary authority actually to fix a plain error like the flat inconsistency with state law involved here.

That is the reasoning reflected in EPA's final rulemaking. In its initial, erroneous action, EPA gave full approval to Rules 2201 and 2020 under Section 110(k)(3). *See* 69 Fed. Reg. at 27838 [ER149]. If AIR were correct that Section 110(k)(6) never "grant[s] EPA additional authority" beyond the authority conferred by paragraphs (k)(3) and (k)(4) with respect to initial SIP submissions (AIR Br. 36), EPA's options in correcting that erroneous full approval therefore would have included revising it to be (1) an approval "in part" and a disapproval "in part," (2) a limited ap-

proval and limited disapproval, (3) a conditional approval, or (4) a full disapproval. None of those options would have solved the problem.

Take, for starters, a partial approval and partial disapproval under paragraph (k)(3). That approach would have been "problematic in this instance" because the unenforceable elements of the District's "NSR rules [were] not separable" from its enforceable elements. 78 Fed. Reg. at 46510 [ER18]. Thus, EPA could not have used a partial disapproval to sever the offending elements of the rules.

A limited approval and limited disapproval under paragraph (k)(3) also would have been "problematic in that it would [have] incorporate[d] the entire rule into the California SIP, and thus would not [have] remed[ied] the problem of the mismatch between the District NSR rules in the SIP and the District's authority with respect to agricultural sources under SB 700." 78 Fed. Reg. at 46510-46511 [ER18-19].

A "[c]onditional approval" under Section 110(k)(4) would have implicated the same dilemma: It would have operated as an approval, subject to a "commitment of the State to adopt specific enforceable measures by a date certain." 42 U.S.C. § 7410(k)(4). Such a requirement would, of course, have been meaningless, given that Rules 2201 and 2020 *already* had been corrected, as of June 2010, leaving the erroneous conditional approval in effect from June 2004 through that date.

A full disapproval, by contrast, would have reverted the District's NSR rules to the versions of Rules 2201 and 2020 that were approved in 2001—versions that included the unenforceable blanket exemptions for *all* agricultural sources. *See* 66 Fed. Reg. at 37589. It was entirely reasonable for EPA to conclude that trading one unenforceable rule for another was not an "appropriate" revision.[5]

Accordingly, in the peculiar circumstances presented here, the *only* "appropriate" solution available to EPA under Section 110(k)(6) was to do exactly what it did: to revise its 2004 full approval of Rules 2201 and 2020 by limiting their applicability to agricultural sources with emissions above fifty percent of the major-source threshold. Any other action would have guaranteed that the approved version of the District's NSR rules prevailing between June 2004 and June 2010 squarely conflicted with SB 700—an outcome once again at odds with "cooperative state-federal scheme" under the Act. *Vigil*, 381 F.3d at 830.

3. In its briefing before this Court, EPA appears to take a broader view, arguing that Section 110(k)(6) gives it "significant discretion" to revise any previous action it deems to have been erroneous in any way it believes will "further[] the goals of the CAA." EPA Br. 25. But the settled

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[5] A SIP call under paragraph (k)(5) would have been equally ineffectual. SIP calls are necessarily *forward* looking. The only way to correct the erroneous 2004 approval was to *revise* it under Section 110(k)(6).

rule is that "[t]his court is limited to a review of the reasoning the agency [actually] relied upon in making its decision." *Public Citizen v. Nuclear Regulatory Comm'n*, 573 F.3d 916, 923 (9th Cir. 2009) (citing *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007)).

In promulgating the final rule at issue here, EPA did not consider whether it has sprawling authority to revise erroneous actions in any manner it thinks "benefits" the environment or advances the "goals of the Clean Air Act." EPA Br. 26; *see also id.* at 32 (similar). Instead, it made a case-specific determination that it had no choice other than to limit the range of sources to which Rules 2201 and 2020 apply, and that such action therefore was "appropriate." This case presents no occasion to decide the very different question whether EPA enjoys that same authority to limit the scope of a SIP submission's applicability, even in cases where it could correct its error by taking action consistent with its authority under paragraphs (k)(3) and (k)(4). As for EPA's determination that it had that authority under the narrow circumstances presented here, the *Chevron* doctrine leaves little doubt that it did.

B. EPA's interpretation of the phrase "in the same manner" also is permissible and entitled to deference

In insisting that the plain text of Section 110(k)(6) prohibited EPA's action here, AIR points to the language requiring that EPA's error

correction be undertaken "in the same manner as the [original, erroneous] approval, disapproval, or promulgation." *E.g.*, AIR Br. 35. This "in the same manner" language means, in AIR's view, that "Congress specifically limited allowable EPA actions under 110(k) to approvals and disapprovals *only*." *Id.*

That is not a sensible reading of the statute. As an initial matter, Congress cannot have meant to limit EPA to acting in the same *substantive* manner as its initial action because the statute says in the "*same*" manner. If the phrase "in the same manner" meant "in the same substantive manner," Section 110(k)(6) would not authorize EPA to "*revise*" its prior action at all. "To apply the construction contended for on the part of [AIR]" therefore "would be rendering the law in a great measure nugatory," contradicting Congress's manifest intent. *The Emily*, 22 U.S. (9 Wheat.) 381, 389 (1824).

It is no answer—as AIR suggests (Br. 35)—to read Section 110(k)(6) as requiring EPA to revise its previous action in one of the same substantive manners as it could have approved the initial SIP submission. That reading adds a number of significant words to the statute that do not appear there, running afoul of "[t]he preeminent canon of statutory interpretation [that courts must] 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'"

Petroliam Nasional Berhad v. GoDaddy.com, Inc., 737 F.3d 546, 550 (9th Cir. 2013) (quoting *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004)).

The far better reading is that Congress meant to limit EPA to taking revisionary action "in the same manner" *procedurally* as its initial action, meaning only—as EPA explains (Br. 28-32)—through notice-and-comment rulemaking. Not only is that interpretation a permissible one, but it has the benefit of consistency with the Supreme Court's recent conclusion in a different statutory context that the language, "in the same manner," is "best read" as referring to "the same 'methodology and procedures.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583-84 (2012). To the extent there is any room for disagreement on that score, EPA's reading is entitled, again, to *Chevron* deference.

III. THE FINAL RULE AT ISSUE HERE MUST BE UPHELD

AIR dedicates the majority of its analysis to an argument that EPA acted arbitrarily and capriciously with respect to the underlying merits of the final rule at issue here. In AIR's view, and notwithstanding SB 700, the District *did* have authority to require minor agricultural sources to obtain offsets. *See* AIR Br. 39-55.

AIR is wrong, for the many reasons already explained by EPA. *See* EPA Br. 33-45. While we see no need to repeat EPA's well-reasoned argu-

ments supporting the merits of its final action, two points bear emphasis: *First*, this Court, like EPA before it, should defer to the California Attorney General's interpretation of California law, especially given that the state courts themselves would accord such deference. *Second*, there is not the slightest merit to AIR's contention (Br. 55-57) that the District's NSR rules have "trump[ed]" SB 700 simply because they were approved (erroneously) by EPA.

A. It was reasonable for EPA to defer to the California Attorney General's interpretation of state law

In determining whether EPA's action here should be upheld, the question is not whether its action is based on the one and only *correct* reading of SB 700. The question, instead, is whether EPA properly deferred to the California Attorney General's expert judgment on the matter. As we now explain, it did.

1. First, a word on the standard of review. It is true, as we already have said, that an agency's interpretation of ambiguous statutes that it administers "is binding in the courts" unless it is "manifestly contrary to the statute." *Mead*, 533 U.S. at 227. And it also is true that a court may not "substitute its judgment for that of the agency" on matters of fact and policy; a court, instead, must uphold an agency action if the agency's path

to decision is discernible and reasonable. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quotation marks omitted).

That does not mean, however, that every agency determination is entitled to deference. On the contrary, the settled rule is that "an agency's interpretation of a statute *outside* its administration is reviewed de novo." *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (emphasis added). Thus, contrary to EPA's unspoken assumption (EPA Br. 33-37) and ACT's express claim (ACT Br. 40), the question is not whether EPA's reading of SB 700 was *reasonable*, but whether it was *correct*. We therefore agree with AIR (*see* AIR Br. 49) that this Court "owe[s] no deference to [EPA's] interpretation of state law" and must undertake its own, independent interpretation of SB 700. *Renee v. Duncan*, 686 F.3d 1002, 1014 (9th Cir. 2012).

Yet that is not the entire picture, for EPA did not interpret SB 700 on its own. Instead, it deferred to the formal legal interpretation of the California Attorney General, submitted in response to EPA's inquiry concerning the precise issues of state law presented here. The more precise framing of the question, therefore, is whether—for purposes of interpreting SB 700 *de novo*—this Court should defer to the authoritative opinion of the California Attorney General, as did EPA in the rulemaking process. The clear answer to that question is that *it should*.

2. It is well established that an interpretation of California law by the California Attorney General "is entitled to deference." *FTC v. MTK Mktg., Inc.*, 149 F.3d 1036, 1039 (9th Cir. 1998); *accord In re Sluggo's Chicago Style, Inc.*, 912 F.2d 1073, 1075 (9th Cir. 1990) (treating as "significant" to the interpretation of state law a letter from then-California Attorney General Earl Warren). That rule is grounded in federal-state comity and is beyond reasonable dispute; other circuits universally agree that federal courts should "defer to a state agency's interpretation of those statutes it is charged with enforcing" (*City Of Bangor v. Citizens Commc'ns Co.*, 532 F.3d 70, 94 (1st Cir. 2008)), especially including legal opinions issued by a State's attorney general (*see, e.g.*, *Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1188 (11th Cir. 2010); *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 850 F.2d 224, 228 (5th Cir. 1988)).

The ruling calling for deference to state attorneys general rings especially true in cases involving the Clean Air Act. As we have observed, Congress adopted a "cooperative state-federal scheme" under the Act (*Vigil*, 381 F.3d at 830), "mak[ing] 'the States and the Federal Government partners in the struggle against air pollution'" (*Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 938 (9th Cir. 2011) (quoting *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990))). It would disserve the Clean Air Act's cooperative framework for

either a federal agency or a federal court to disregard state officials' authoritative interpretations of their own State's laws.

Even if this Court were not independently inclined to defer to the opinion of the California Attorney General, the state courts are. According to the California Supreme Court, "Attorney General opinions are generally accorded great weight." *Moore v. Panish*, 652 P.2d 32, 37 (Cal. 1982). The California courts give Attorney General opinions such weight because "an Attorney General opinion 'is not a mere advisory opinion, but a statement which, although not binding on the judiciary, must be regarded as having a quasi judicial character and [is] entitled to great respect, and given great weight by the courts.'" *Natkin v. CUIAB*, 162 Cal. Rptr. 3d 367, 375-76 (Ct. App. 2013) (quoting *Planned Parenthood Affiliates v. Van de Kamp*, 226 Cal. Rptr. 361, 368 (Ct. App. 1986)).

Of course, "[i]n a case requiring a federal court to apply California law, the court 'must apply the law as it believes the California Supreme Court would apply it.'" *Kairy v. SuperShuttle Int'l*, 660 F.3d 1146, 1150 (9th Cir. 2011). When interpreting California statutes, this Court accordingly must use the same "interpretive aids" as would the California Supreme Court (*id.*)—including the settled rule that Attorney General opinions are "quasi judicial" and must be "given great weight" (*Natkin*, 162 Cal. Rptr. 3d at 376 (quotation marks omitted)). There is, in short, no

serious dispute that, in interpreting SB 700, this Court must defer to the authoritative interpretation given the California Attorney General.

3. The deference due to the Attorney General's opinion is dispositive in this case. To assist it with resolving the underlying issues here, EPA requested a legal interpretation of SB 700 from CARB. [ER461]. CARB referred the matter to the California Attorney General's Office, which replied with an initial letter on November 14, 2012. In that letter, the Attorney General explained that SB 700 did not authorize the District to apply Rule 2201, concerning permits, to "agricultural sources whose potential and actual emissions were less than one-half of the major source threshold." [ER463]. In reaching that conclusion, she applied California's various "statutory construction rules," consulting the plain text of the statute, its "effect to [other] parts of the statute," and the "the legislative history" and "goals" of SB 700. [ER461-463]. AIR does not challenge either the Attorney General's or EPA's determination on that score.

The 2012 letter also addressed the applicability of Rule 2201's requirement that agricultural sources obtain offset credits. [ER463-464]. But it did so only at a general level, without identifying or answering the more specific question whether Rule 2201 applies to minor agricultural sources. To avoid confusion, the District and CARB accordingly requested that the Attorney General explicitly "address the application of [SB 700] to

minor agricultural sources." [ER466]. The Attorney General responded in March 2013 with her conclusion that, because emission reductions from minor agricultural sources do not "meet the criteria for real, permanent, quantifiable and enforceable emission reductions," SB 700 "*serves to suspend the duty of a minor agricultural source to offset emissions.*" *Id.* (emphasis added). Her interpretation notably was "consistent" with CARB's reading of the law, as expressed in a 2008 letter from the chairman of CARB to its staff. The 2013 letter appended the 2008 CARB letter and referred its readers to it. [ER468-472].

4. AIR insists that EPA should not have, and this Court should not now, defer to the Attorney General's (and CARB's) interpretation of SB 700's offset credit exemption because the 2012 and 2013 letters are "inconsistent" and "difficult to reconcile." AIR Br. 49-50. That is incorrect.

As an initial matter, the Attorney General's position in her two letters is not inconsistent. The 2012 letter explained that SB 700 "disqualifies any offsets that do not meet the offset criteria and forbids the district from requiring these deficient offsets." [ER463]. It therefore concluded that "[t]he District ha[s] legal authority . . . to enforce the offset provisions of Rule 2201," but only with respect to sources that "meet the offset criteria." [ER463-464]. In full conformity with that analysis, the 2013 letter concludes simply that "emissions reductions from minor agricultural

sources do not the meet the criteria for real, permanent, quantifiable and enforceable emission reductions," and therefore that SB 700 "serves to suspend the duty of a *minor* agricultural source to offset emissions." [ER466] (emphasis added). The two letters are entirely consistent.

Bolstering that conclusion is the fact that the Attorney General based her 2013 answer on CARB's long-standing 2008 interpretation of SB 700. [ER466]. So far as we are aware, CARB's interpretation has been consistently applied from its initial drafting. And it is entitled to special weight because CARB "has expertise and technical knowledge" and "the legal text . . . is technical, obscure, complex, open-ended, [and] entwined with issues of fact, policy, and discretion." *Yamaha Corp. v. State Bd. of Equalization*, 960 P.2d 1031, 1037 (Cal. 1998) (quotation marks omitted).

Even if there were tension between the Attorney General's 2012 and 2013 letters, the rule that limits *stare decisis*—that "[q]uestions which merely lurk in the record" but are not expressly "ruled upon" are "not to be considered as having been so decided as to constitute precedents" (*Webster v. Fall*, 266 U.S. 507, 511 (1925))—seems apt here. The question of the minor-agricultural-source limitation to the offset requirement was merely lurking in the background of the 2012 letter. The Attorney General did not expressly address that question, and so the 2012 letter should not be considered as resolving it.

In any event, the universal rule is that "'a 'change in interpretation alone presents no separate ground for disregarding' an agency's present interpretation of a statute." *Am. Meat Inst. v. Leeman*, 102 Cal. Rptr. 3d 759, 776 n.25 (Ct. App. 2009) (quoting *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009)); *cf. Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 898 (9th Cir. 2013) (similar principle under federal law). And that makes sense, because "the whole point of [deference to agency interpretation] is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996).

In short, EPA properly deferred to the California Attorney General's (and CARB's) interpretation of SB 700. This Court must do the same.

5. EPA explains at length why the California Attorney General's and CARB's interpretation of SB 700 is not only a permissible one, but the best one. *See* EPA Br. 33-45. We agree fully with and adopt EPA's reasoning and do not repeat those arguments here. We observe only that the parties' vigorous dispute concerning the applicability of SB 700's offset requirement to minor agricultural sources demonstrates that the provision is ambiguous. In circumstances like these, this Court therefore should defer to the California Attorney General's and CARB's interpretation of the state statute at issue.

If, however, the Court believes that there is "good reason to doubt the [Attorney General's] determination of state law," "principles of federalism and comity" very strongly support "certify[ing] the question to the [California] Supreme Court." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 776-77 (2005) (Stevens, J., dissenting). That is particularly so in this case because it implicates "uniquely local matters" that "might well require the weighing of policy considerations for their correct resolution." *Id*. at 777 (Stevens, J., dissenting).

B. The District's NSR rules do not "trump" SB 700

AIR makes one last Hail Mary argument at the conclusion of its brief (at 55-57), asserting that because the "exemption-free" versions of Rules 2201 and 2020 adopted in 2004 took the status of federal law, they "trump[ed]" (or preempted, one supposes) SB 700 to the extent that it was "inconsistent" with them. AIR Br. 56.

It is not entirely clear what AIR means by this argument. If it means to suggest that, so long as the 2004 versions of the District's NSR rules remained in effect, they overrode SB 700, its argument is entirely academic. Once EPA "revise[d]" its erroneous approval of the exceptionless versions of Rules 2201 and 2020 with the final rule in this case (42 U.S.C. § 7410(k)(6)), those versions were *no longer* inconsistent with SB 700.

If, instead, AIR means to suggest that EPA's approval of the 2004 versions of the District's NSR rules effectively repealed SB 700, so that EPA's Section 110(k)(6) rule revision was mistaken, it is plainly wrong. SB 700 has been neither amended nor repealed, and the law has remained in full effect all along. And, again, in light of the final action at issue here, it is now also fully consistent with the District's NSR rules as written.

CONCLUSION

The petition for review should be denied.

Dated: April 15, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

Foster Farms draws the Court's attention to the related case of *AIR v. San Joaquin Valley Unified Air Pollution Control District et al.*, No. 1:06-cv-01648 (E.D. Cal.), which is a Clean Air Act citizen suit pending against it in the Eastern District of California.

Two other related citizen suits also were commenced by petitioner here: *AIR v. Fred Schakel Dairy*, 460 F. Supp. 2d 1185 (E.D. Cal. 2006), *interlocutory appeal denied*, No. 08-80115 (Dkt. 10) (9th Cir. Nov. 5, 2008) (Dkt. 10); and *AIR v. C & R Vanderham Dairy*, 435 F. Supp. 2d 1078 (E.D. Cal. 2006). The *Fred Schakel Dairy* case ended with a consent decree. The *Vanderham Dairy* case remains pending, although stayed.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for respondents-intervenors Foster Farms, LLC and Foster Poultry Farms, Inc., certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 10,270 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Carmine R. Zarlenga*

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing motion with the Clerk of the Court using the appellate CM/ECF system on April 15, 2014. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ *Carmine R. Zarlenga*