

No. 11-139

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES,
Petitioner,

v.

HOME CONCRETE & SUPPLY, LLC, ET AL.,
Respondents.

*On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Fourth Circuit*

**BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF HOME
BUILDERS IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Whether a final regulation promulgated by the Department of the Treasury, which reflects the IRS's view that an understatement of gross income attributable to an overstatement of basis can trigger the extended six-year assessment period, is entitled to judicial deference.

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders (“NAHB”) has received the parties’ written consent to file this *amicus curiae* brief in support of the Respondent.¹ NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB’s goals is providing and expanding opportunities for all people to safe, decent and affordable housing. As the voice of America’s housing industry, NAHB promotes policies that keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB’s 160,000 members are home builders or remodelers. These members build about 80 percent of the new homes constructed each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

Where appropriate, NAHB is a vigilant advocate in the nation’s courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and, interests of its members. NAHB was a petitioner in *NAHB v. Defenders of*

¹ All letters of consent are on file with the Clerk. Under Rule 37.6 of the Rules of this Courts Amicus states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Wildlife, 551 U.S. 644 (2007). It also has participated before this Court as *amicus curiae* or “of counsel” in a number of cases involving landowners aggrieved by excessive regulation under a wide array of statutes and regulatory programs. *See* Appendix A.

NAHB’s organizational policies have long advocated the importance of the Administrative Procedure Act in the development of regulatory policy. NAHB’s members frequently face potentially costly regulation from a variety of federal agencies. For that reason, it is vital for the industry to maintain its ability to communicate concerns over the impact of proposed regulations before they take effect. In addition, NAHB’s members often confront agencies that attempt to circumvent the APA’s notice-and-comment requirements.

SUMMARY OF ARGUMENT

This controversy implicates fundamental issues involving the interplay between judicial deference and the Administrative Procedure Act (“APA”). The Internal Revenue Service (“IRS”) asks this Court to uphold its use of the regulatory process to bolster its litigating position. The law prior to its action did not support its argument so the IRS issued new regulations which purported to change the law. Neither thoughtful nor principled, this trump-card view of regulatory rulemaking turns precedent on its head.

If the Regulations are upheld, they would also overturn the Court’s decision in *Colony, Inc. v. Comm’r of Internal Revenue*, 357 U.S. 28 (1958), implicating the issue of whether deference is appropriate when an administrative agency promulgates a regulation in conflict with the Court’s own precedent. See *Nat’l Cable and Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967 (2005).

Ultimately, the Regulations are emblematic of the IRS’s lackadaisical attitude toward the notice-and-comment requirements. The manner in which the IRS issued the Temporary Regulation here “follow[ed] a pattern of . . . impos[ing] a legal burden upon taxpayers to conform to regulations before submitting those regulations for public comment.” Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury’s (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 Geo. Wash. L. Rev. 1153, 1160 (August, 2008). This process is further exacerbated in this case by the fact that the IRS imposed that

burden merely to trump opposing parties' arguments in court.

ARGUMENT

I. *Post Hoc* Rationalization of the IRS's Litigating Position Does Not Draw *Chevron* Deference

The IRS issued both Treas. Reg. § 301.6501(e)-1T and Treas. Reg. § 301.6501(e)-1 in the midst of litigating the very same issue the Regulations address—whether an overstated basis is an omission from gross income under 26 U.S.C. § 6501(e)(1)(A). Because the Regulations represent a *post hoc* rationalization for the purpose of strengthening the IRS's litigating position, they should not be afforded deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The Court has explained that it can only uphold the decision of an administrative agency on the basis “upon which the record discloses that its action was based.” *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Under this analysis, courts have established that *Chevron* deference is not applicable where a regulation is adopted solely in response to litigation. “[D]eference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.” *Bowen v. Georgetown Univ. Hosp. et al.*, 488 U.S. 204, 213 (1988). The District of Columbia Circuit has been similarly explicit in this regard, warning against deference where prevailing in litigation is the primary motivation. *See City of Kansas City, Mo. v. Dep’t of Hous. & Urban Dev.*, 923 F.2d 188, 192 (D.C. Cir. 1991) (“In whatever context we defer to agencies, we

do so with the understanding that the object of our deference is the result of agency decisionmaking, and not some *post hoc* rationale developed as part of a litigation strategy.”²

Federal courts have applied this principle in the context of Treasury and IRS rulemakings. The Court of Federal Claims explained that a “regulation is invalid as to the taxpayer if the Treasury has abused its discretion . . . to adopt a regulation with the purpose of aiding pending litigation.” *Caterpillar Tractor Co. v. United States*, 589 F.2d 1040, 1043 (Cl. Ct. 1978) (finding no evidence that the regulation at issue was adopted to aid pending litigation). In the same vein, the Second Circuit explained that the IRS “may not take advantage of [its] power to promulgate retroactive regulations during the course of a litigation for the purpose of providing [itself] with a defense based on the presumption of validity accorded to such regulations.” *Chock Full O’Nuts Corp. v. United States*, 453 F.2d 300, 303 (2d Cir. 1971).

Decisions by courts below in both this case and the related litigation evidence their suspicion and discomfort with the tactic used by the IRS in this case. The Tax Court, in part, refused to grant deference to the government because the Temporary

² See also, *Securities Indus. Assoc. et al. v. Bd. Of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 143 (1984) (finding that *post hoc* rationalizations about regulations during litigation are entitled to little deference); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Am. Bar Ass’n v. Fed. Trade Comm’n*, 430 F.3d 457, 471 (D.C. Cir. 2005) (“[W]e cannot affirm an agency’s actions based on the *post hoc* rationale of its litigating position.”).

Regulation was “irreparably marred by circular, result-driven logic”. *Intermountain Ins. Serv. of Vail, Ltd. Liab. Co. v. C.I.R.*, 134 T.C. 211, 219 (T.C. 2010), *rev’d*, 650 F.3d 691 (D.C. Cir. 2011).

Similarly, the Fifth Circuit noted that this Court has looked unfavorably upon attempts to use the regulatory process as a litigating tool. *See Burks v. United States*, 633 F.3d 347, 360 n. 9 (5th Cir. 2011). In support of its conclusion, the Fifth Circuit relied on the fact that in *Mayo Found. for Med. Research v. United States*, 131 S.Ct. 704 (2011), this Court “was not faced with a situation where, during the pendency of the suit, the treasury promulgated determinative, retroactive regulations following prior adverse judicial decisions on the identical legal issue.” 633 F.3d at 360 n.9.

The manner in which the IRS adopted the Regulations can also be contrasted to this Court’s past explanations regarding the interplay between the regulatory process and pending litigation. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court reiterated *Bowen’s* holding that deference is not due to “wholly unsupported” litigating positions and explained that “[t]he deliberateness of such positions, if not indeed their authoritativeness, is suspect.” *Id.* at 741. Notably, in *Smiley* the Court found the fact that the agency had gone through the full regulatory process, including notice and comment, to be compelling. *Id.* It is also notable that, in *Smiley*, the Office of the Comptroller of the Currency was not a party to the litigation. The court concluded that the agency’s compliance with the APA made it unlikely that the issuance of a regulation would have an unfair result,

even though it occurred during the pendency of litigation.

Indeed, commentators have noted that “[t]he IRS’s manifest purpose in the Intermountain cases is to introduce policy interpretations post hoc into actively litigated issues to upset court decisions.” Andrew Pruitt, *Judicial Deference to Retroactive Interpretative Treasury Regulations*, 79 Geo. Wash. L. Rev. 1558, 1582 (July, 2011). This type of agency “action” is nothing more than a reincorporation of its unsuccessful litigating position into a legislative regulation. “The caselaw on judicial deference does not permit the use of regulatory powers to interfere with ongoing litigation or to upset decided cases.” *Id.*

Attempted use of the regulatory process by agencies as a trump card in litigation is neither new nor limited to the IRS. In fact, the U.S. Army Corps of Engineers (“the Corps”) recently undermined a district court’s decision to uphold standing for certain plaintiffs to seek judicial review under the Clean Water Act. *See NAHB v. U.S. Army Corps of Eng’rs*, 539 F.Supp.2d 331 (D.D.C. 2008). After the court upheld the ability of private parties to challenge the Corps’ Nationwide Permits, it issued a Notice that eliminated standing for the same type of plaintiffs involved in the underlying litigation. *See* 74 Fed Reg. 17,456, 17,457.

The Corps explicitly undermined the plaintiff’s standing to challenge the permit by claiming that applicants who “voluntarily choose to seek” coverage under the permit should fail. *Id.* Thus, the notice was aimed to extra-judicially affect the outcome of ongoing litigation by amending its administrative

record after the fact. Ultimately, the district court ignored the Corps' tactic, upholding its prior decision. *NAHB v. U.S. Army Corps of Eng'rs*, 699 F.Supp.2d 209 (D.D.C. 2010), *vacated*, 2011 WL 6266071 (D.C. Cir. 2011).

The parallels to the IRS's litigation driven regulation in this case are striking. Both agencies sought to permanently alter judicial precedent by removing potential claims and defenses. Taxpayers in the instant case were suddenly faced with the elimination of a defense by regulatory fiat. The Corps similarly used its federal rulemaking authority to strip an entire class of plaintiffs of the constitutional ability to challenge that agency's action in court.

Courts have been justifiably suspicious of attempts by agencies to use regulatory powers to influence the outcome of litigation in this way. Of course, the mere existence of litigation in connection with a rulemaking cannot eliminate *Chevron* deference. See *Long Island Care At Home, Ltd., et al. v. Coke*, 551 U.S. 158, 159-160 (2007) ("where . . . an agency's course of action indicates that its interpretation of its own regulation reflects its considered views on the matter in question . . . there is no reason to suspect that its interpretation is merely a *post hoc* rationalization."). As in *Smiley*, the U.S. Department of Labor was not a party to the litigation in this case.

But where a regulation is brought solely to influence litigation, and is unsupported by existing statute or regulation, applying *Chevron* deference would turn a blind eye to reality. An agency cannot

reformat a brief as a regulation and thereby win a losing case.

II. The Court Should Clarify *Brand X*

In *Brand X*, 545 U.S. 967 (2005), the Court explained the deference to be given agency rulemakings that conflict with lower court decisions. Under *Brand X*, an agency's statutory construction is entitled to *Chevron* deference despite a contrary judicial construction unless the court found the statute unambiguous. *Id.* at 982.

In *Colony*, 357 U.S. 28 (1958), the Court determined that an overstated basis did not constitute an omission from gross income under former § 275(c), the predecessor to § 6501(e)(1)(A). *Id.* at 37. Further, the Court stated that its conclusion was "In harmony with the unambiguous language of § 6501(e)(1)(A)". *Id.* Thus, Treas. Reg. § 301.6501(e)-1 does not appear entitled to *Chevron* deference under the Court's analysis in *Brand X* because its own prior decision found the statute at issue here unambiguous.

In any event, "if the judicial precedent at issue fully addressed the agency's proffered interpretation, an agency cannot use *Brand X* to circumvent the court's prior resolution." Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 Emory L. J. 1, 21 (2011); see also, *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009) (holding *Brand X* did not apply because the court had previously considered agency's position through a *Chevron* analysis).

This case thus presents an opportunity for the Court to address the unresolved issue of whether *Brand X* applies to its own precedent. In the *Brand X* decision, Justice Stevens left the door open to a different standard for the Court's own precedent, stating that the case "would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity." 545 U.S. at 1003.

Because the Court has not spoken directly to this issue, circuit courts have wrestled with regulatory positions that conflict with the Court's precedent. The Tenth Circuit explicitly applied *Brand X* to Supreme Court holdings, explaining that "we see no reason why the holding in *Brand X* would not be equally applicable to agency constructions that displace tentative Supreme Court interpretations." *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1247 (10th Cir. 2008). The court dismissed Justice Stevens' concurrence, and determined that *Brand X* must apply to both lower court and Supreme Court decisions in order to be consistent. *Id.* The court, however, acknowledged that this principle conflicted with decisions from both the Fifth Circuit and Ninth Circuit, which applied Supreme Court precedent as definitive statutory interpretations. *See Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008); *Tuan Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004).

The Court should eliminate the confusion in the lower courts over the application of *Brand X*. A fuller explanation of the interplay between Supreme Court statutory construction and agency rulemaking would benefit both the regulated community and federal agencies.

III. The Regulation Should Be Invalidated Because it Failed to Allow for Proper Notice Under the Administrative Procedure Act

Closely related to the availability of *Chevron* deference is whether the IRS complied with notice and comment requirements under the APA when it issued Treas. Reg. § 301.6501(e)-1T and Treas. Reg. § 301.6501(e)-1. Because the Regulations were made immediately effective and retroactive, it did not allow for meaningful notice and comment under the APA. *See* 5 U.S.C. § 553. Indicative of the adequacy of the notice (or, more accurately, the IRS's receptivity to comment), the final regulation was published without material change. 75 Fed. Reg. 78,897 (Dec. 17, 2010).

Courts have long held that a substantive regulation is subject to the procedural requirements of § 553 when it grants rights, imposes obligations, or substantially effects private parties. *See Perales v. Sullivan*, 948 F.2d 1348 (2d Cir. 1991). Courts have firmly established that when an agency action intends to create new law, rights, or duties, a legislative rule results because it has the force of law. *See, e.g. Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979), *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952) (holding that legislative rules are those which create law); *Gen. Motors Corp. v. Ruckelhaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (a legislative rule exists where “the agency intends to create new law, rights or duties.”)³ In

³ The D.C. Circuit has explained that rules have the force of law when any of the following factors are met: “(1) whether

contrast, interpretive rules are those that assert an agency's construction of a statute and do not carry the force and effect of law. *See Fed. Labor Relations Auth. v. U.S. Dept. of Navy*, 966 F.2d 747 (3d Cir. 1992).

Courts have readily applied this analysis to Treasury Regulations and other IRS guidance. In *Mt. Diablo Hosp. Dist., et al. v. Bowen*, 860 F.2d 951 (9th Cir. 1988), the IRS issued a new policy on Medicare bonuses under the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") without conducting a rulemaking under § 553. The court noted that "[t]he label an agency gives to a particular statement of policy is not dispositive." *Id.* at 956; *see also, CropLife Am. v. E.P.A.*, 329 F.3d 876, 883 (D.C. Cir. 2003) ("[T]he agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law'.") *citing Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 385 (D.C. Cir. 2002).

Continuing, the court held that because the new policy changed how reimbursement was to be determined under TEFRA, it represented "a change in law and policy that must be promulgated

in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

according to the notice and comment rulemaking.” *Id.* at 958.

The need for proper notice in the context of legislative regulations is closely tied to the availability of *Chevron* deference. In fact, the Court has explained that notice-and-comment rulemaking is a strong indication that *Chevron* deference is appropriate. See *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Commenting on this Court’s *Mayo* decision, the Fifth Circuit explained the interplay:

“ . . . *Mayo* emphasized that the regulations at issue had been promulgated following notice and comment procedures . . . Legislative regulations are generally subject to notice and comment procedure pursuant to the Administrative Procedure Act . . . Here, the government issued the Temporary Regulations without subjecting them to notice and comment procedures . . . ”

Burks, 633 F.3d 347, 360 n. 9 (5th Cir. 2011). In other words, for improperly promulgated regulations to lack *Chevron* deference is unsurprising given the purpose behind notice-and-comment rulemaking.

In fact, legislative rules are entitled to a higher degree of deference because it is assumed that the agency has afforded affected parties a meaningful opportunity to weigh-in. The APA’s notice-and-comment requirements are that opportunity. They are meant to “(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop

evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). Because the Regulations at issue here frustrated all of these purposes, they should be invalidated under the APA.

Quite simply, the Regulations are a clear attempt “to make or change binding law, not merely to inform the public of Treasury’s construction of the statute.” Steve R. Johnson, *Intermountain and the Growing Importance of Administrative Law in Tax Law*, 128 Tax Notes 837 (August 23, 2010). While interpretive regulations are meant to clarify the application of existing law, it is only legislative regulations that are meant to create new legal requirements and overrule judicial precedent. For this reason, the Regulations should be considered a legislative rulemaking that does not qualify for the interpretive regulation exception to notice-and-comment under the APA. 5 U.S.C. 553(b)(A). And because the Regulations substantially modify existing law indeed, that was their sole purpose lack of a meaningful notice-and-comment period is fatal. This impact can be measured by “the drastic changes effected in existing law by the rules” and “the degree of retroactivity and its impact.” *Cont’l Oil Co. v. Burns*, 317 F. Supp. 194, 197 (D. Del. 1970).

The remedy for a violation of the §553 of the APA is clear—invalidation of the regulation. There is ample case law to support invalidation in both tax and non-tax contexts. In *Gen. Elec. Co.*, 290 F.3d 377 (D.C. Cir. 2002), the District of Columbia Circuit held that a guidance document had the force of law

and was, therefore, a legislative regulation required to be subjected to notice-and-comment. *Id.* at 385. Because the guidance document did not follow notice-and-comment, the court invalidated it. *Id.*

Similarly, in *Am. Standard, Inc. v. United States*, 602 F.2d 256 (Cl. Ct. 1979), the United States Claims Court invalidated a Treasury Regulation because the regulation was “in violation of the delegation of rulemaking power and of the notice requirement of the Administrative Procedure Act.” *Id.* at 269.

The APA’s notice and comment requirements are meant to eliminate the possibility of unfair surprise and to allow the regulated community the opportunity to weigh-in on the impact of proposed regulations. While Temporary Regulations are a recognized tool for the IRS, the agency must have a justification beyond the fact that the law no longer supports the Agency’s litigating position. For *Chevron* deference to be meaningful, this Court should unequivocally link the APA’s notice-and-comment requirements to the underlying validity of the agency’s actions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or “of counsel” before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P’ship v. U.S. Army Corps of Eng’rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me.*

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Bd. of Env'tl. Prot., 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 551 U.S. 130 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Env'tl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation*, 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted* 130 S. Ct. 2097 (2010) (No. 09-846); *Am Elec. Power Co., Inc. v. Connecticut*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (2010) (No. 10-174); *Sackett v. United States Env'tl. Prot. Agency*, 622 F.3d 1139 (9th Cir. 2010), *cert. granted*, 2011 WL 675769 (June 28, 2011) (No. 10-1062).