No.

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127

LINDA E. KELLY
QUENTIN RIEGEL
LELAND P. FROST
Manufacturers' Center for Legal Action
733 10th Street, NW, Ste 700
Washington, DC 20001
(202) 637-3000

TIMOTHY S. BISHOP
Counsel of Record
CHAD CLAMAGE
JED GLICKSTEIN
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

In June 2015, respondent agencies promulgated a final rule defining the term "the waters of the United States" and hence the scope of Clean Water Act jurisdiction. The National Association of Manufacturers challenged that rule in district court under the Administrative Procedure Act. State, municipal, industry, and environmental challengers likewise filed APA suits, but in addition filed protective petitions for review in the courts of appeals, citing uncertainty about whether the rule challenge falls under the CWA's judicial review provision, 33 U.S.C. § 1369(b)(1).

The petitions for review were consolidated in the Sixth Circuit. The NAM intervened as respondent in the Sixth Circuit and moved to dismiss the petitions for want of jurisdiction. After full briefing and argument, the Sixth Circuit held that it, not the district courts, has jurisdiction to decide challenges to the rule. But only one judge actually believed that to be the correct outcome. Although two panel members concluded that § 1369(b)(1) *precludes* jurisdiction, one of them reasoned that he was bound by "incorrect" circuit precedent to take jurisdiction under § 1369(b)(1)(F), which requires that agency actions "in issuing or denying any permit under" § 1342 be reviewed by the court of appeals.

This recurring jurisdictional issue has divided the circuits, wasted judicial and party resources, and delayed the resolution of important rule challenges.

The question presented is whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even though the rule does not "issu[e] or den[y] any permit" but instead defines the waters that fall within Clean Water Act jurisdiction.

PARTIES TO THE PROCEEDINGS BELOW

After the Judicial Panel on Multidistrict Litigation consolidated the petitions for review in the Sixth Circuit (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)), the Sixth Circuit permitted petitioner here, the National Association of Manufacturers, to intervene as a respondent. Order, No. 15-3751 cons. (Sept. 16, 2015).

Respondents below—the federal agency respondents here—are the U.S. Environmental Protection Agency; Regina McCarthy, in her official capacity as EPA administrator; the U.S. Army Corps of Engineers; Lieutenant General Todd T. Semonite, in his official capacity as the Corps' Chief of Engineers and Commanding General;[1] Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army; and Eric Fanning, in his official capacity as Secretary of the Army.[2]

State intervenor-respondents below and respondents here are the States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia.

Over 100 other parties filed 22 petitions for review below, and intervened in other petitions, and many of those petitioners moved to dismiss their own and other petitions for review for want of jurisdiction. These petitioners below, respondents here, are as follows:

---

[1] Lt. General Semonite succeeded Lt. General Thomas P. Bostick in this capacity on May 19, 2016.

[2] Secretary Fanning succeeded John M. McHugh in this capacity on May 17, 2016.

No. 15-3751: Murray Energy Corporation.

No. 15-3799: States of Ohio, Michigan, and Tennessee.

No. 15-3817: National Wildlife Federation.

No. 15-3820: Natural Resources Defense Council, Inc.

No. 15-3822: State of Oklahoma.

No. 15-3823: Chamber of Commerce of the United States; National Federation of Independent Business; State Chamber of Oklahoma; Tulsa Regional Chamber; and Portland Cement Association.

No. 15-3831: States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, New Mexico State Engineer.

No. 15-3837: Waterkeeper Alliance; Center for Biological Diversity; Center for Food Safety; Humboldt Baykeeper; Russian Riverkeeper; Monterey Coastkeeper; Upper Missouri Waterkeeper, Inc.; Snake River Waterkeeper, Inc.; Turtle Island Restoration Network, Inc.

No. 15-3839: Puget SoundKeeper; Sierra Club.

No. 15-3850: American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association;

Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.

No. 15-3853: States of Texas, Louisiana, and Mississippi; Texas Department of Agriculture; Texas Commission on Environmental Quality; Texas Department of Transportation; Texas General Land Office; Railroad Commission of Texas; Texas Water Development Board.

No. 15-3858: Utility Water Act Group.

No. 15-3885: Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc.

No. 15-3887: States of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas; Commonwealth of Kentucky; North Carolina Department of Environment and Natural Resources; States of South Carolina, Utah, and Wisconsin.

No. 15-3948: One Hundred Miles; South Carolina Coastal Conservation League.

No. 15-4159: Southeast Stormwater Association, Inc.; Florida Stormwater Association, Inc.; Florida Rural Water Association, Inc., and Florida League of Cities, Inc.

No. 15-4162: Michigan Farm Bureau.

No. 15-4188: Washington Cattlemen's Association; California Cattlemen's Association; Oregon Cattlemen's Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; New Mexico Federal Lands Council; Coalition of Arizona/New Mexico Counties for Stable Economic Growth; Duarte Nursery, Inc.; Pierce Investment Company; LPF Properties, LLC; Hawkes Company, Inc.

No. 15-4211: Association of American Railroads; Port Terminal Railroad Association.

No. 15-4234: Texas Alliance for Responsible Growth, Environment and Transportation.

No. 15-4305: American Exploration & Mining Association.

No. 15-4404: Arizona Mining Association; Arizona Farm Bureau; Association of Commerce and Industry; New Mexico Mining Association; Arizona Chamber of Commerce & Industry; Arizona Rock Products Association; and New Mexico Farm & Livestock Bureau.

CORPORATE DISCLOSURE STATEMENT

Petitioner National Association of Manufacturers is a not-for-profit public advocacy group. It has no parent corporation and does not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and regulations

Miscellaneous

PETITION FOR A WRIT OF CERTIORARI

Petitioner National Association of Manufacturers respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-47a) is reported at 817 F.3d 261. The court of appeals' denial of rehearing en banc, which is unreported, is reproduced at App., *infra*, 51a-52a.

JURISDICTION

The separate judgment of the court of appeals denying all motions to dismiss the petitions for review for lack of jurisdiction was entered on February 22, 2016. App., *infra*, 48a-50a. The court of appeals' order denying rehearing en banc was entered on April 21, 2016. On July 1, 2016, Justice Kagan extended the time to file this petition to September 2, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Section 509(b) of the Clean Water Act, 33 U.S.C. § 1369(b), are set forth at App., *infra*, 53a-54a.

STATEMENT

The Clean Water Act ("CWA" or "Act") defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). In June 2015, the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") promulgated a final rule that significantly revised the scope of federal jurisdiction under the Act by redefining the term "waters of the United States." *Clean Water Rule:*

Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (the "WOTUS Rule" or "Rule").

The National Association of Manufacturers ("the NAM") is among scores of public and private plaintiffs—States, municipalities, and industry and environmental groups—that have challenged the WOTUS Rule. In the fifteen months since the new Rule became final no brief on the merits has yet been filed in any of these cases. Briefing on the merits in the Sixth Circuit is not due to be completed until mid-February 2017.

This bottleneck is due to an esoteric and wasteful debate over *where* the challenges to the Rule belong. The crux of the problem is the judicial review provision of the Clean Water Act, 33 U.S.C. § 1369(b). That provision funnels review of certain types of agency action directly to courts of appeals, leaving other challenges to be brought in the district courts under the Administrative Procedure Act. What should be a straightforward gatekeeping provision has in this and other cases generated widespread judicial disagreement, caused needless delay, and wasted valuable resources for no substantive purpose.

In particular, courts have disagreed over the interpretation of two categories of agency action that are specified in Section 1369(b) to trigger original circuit court review: actions "approving or promulgating any effluent limitation or other limitation" under certain provisions of the CWA, and actions "issuing or denying any permit" under the Act's National Pollutant Discharge Elimination System. *Id.* § 1369(b)(1)(E), (F). Virtually all district and circuit courts agree that the WOTUS Rule does not fall into either of those categories if the statutory words are given their plain meaning. However, courts have

divided over whether this Court's decisions in *E.I. du Pont de Nemours Co.* v. *Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980)—and lower courts' conflicting glosses on those decisions—require a looser interpretation.

The decision here, in which the Sixth Circuit split 1-1-1 over Section 1369(b)'s applicability, exemplifies this disarray. The panel produced three separate and incommensurate opinions addressing whether it has jurisdiction to consider the rule challenges. And the judge who cast the deciding vote in favor of court of appeals jurisdiction did so *not* because he thought that result was a *correct* application of the statute, but because he felt himself bound by a circuit precedent that he deemed wrongly decided and that conflicts with decisions in other courts of appeals. No challenge to agency action—let alone agency action as consequential as the WOTUS Rule, which brings vast areas of the Nation under federal jurisdiction as "waters of the United States"—should be left to rest on such a precarious foundation.

The NAM has consistently argued that the WOTUS Rule does not fall under any Section 1369(b)(1) category and that jurisdiction over these cases therefore belongs in the district court. Its still-pending complaint filed in the Southern District of Texas, joined by over a dozen co-plaintiffs, argues that Section 1369(b) does not provide any basis for circuit court jurisdiction. See *Am. Farm Bureau Fed'n, et al.* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.), Dkt. 1 at ¶¶ 6-9. And while the NAM's co-plaintiffs filed "protective" petitions for review in the Sixth Circuit to prevent their challenges from becoming untimely if the jurisdictional question were resolved in favor of circuit court review, the NAM did not do so. Instead, it intervened as a respondent in 11 of the 22 petitions

(which have all been consolidated) and moved to dismiss for lack of jurisdiction—precisely in order to ensure its standing to seek further review of the jurisdictional question before this Court.

The question presented here not only dogs the pending challenges to the WOTUS Rule, but also has confused and delayed prior rule challenges and certainly will disrupt future rule challenges. That is an intolerable situation. "[J]urisdictional rules should be clear." *Lapides* v. *Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002). This Court's review is urgently required to determine where jurisdiction lies for the WOTUS Rule challenges, resolve the circuit split on Section 1369(b)'s meaning, and guide the federal courts in their future application of that provision.

A. The Clean Water Act

The Clean Water Act "prohibits 'the discharge of any pollutant' without a permit into 'navigable waters,' which it defines, in turn, as 'the waters of the United States.'" *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1811 (2016) (citing 33 U.S.C. §§ 1311(a), 1362(7), (12)). Obtaining a permit is costly, and the penalties for discharging without one are substantial. *Id.* at 1812. The scope of "the waters of the United States" is therefore a matter of exceptional importance for landowners, industry and environmental groups, and government officials.

In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985), this Court concluded that the agencies permissibly interpreted "waters of the United States" to encompass wetlands that actually abutted traditional navigable waters. In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), it struck down

the agencies' "Migratory Bird Rule," which purported to extend agency jurisdiction to any waters that are or might be used as habitat for migratory birds, no matter how isolated or remote from navigable waters. And in *Rapanos* v. *United States*, 547 U.S. 715 (2006), the Court reversed the agencies' determination that they had jurisdiction over wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters," which swept in "virtually any parcel of land containing a channel or conduit * * * through which rainwater or drainage may occasionally or intermittently flow." *Id*. at 722, 729 (plurality opinion).

The WOTUS Rule purports to clarify the definition of "waters of the United States" within the meaning of the CWA and *Rapanos*, *SWANCC*, and *Riverside Bayview*. 80 Fed. Reg. at 37,054.

B. The WOTUS Rule

The WOTUS Rule separates waters into three jurisdictional groups: waters that are categorically jurisdictional, waters that require a case-specific significant nexus evaluation to determine if they are jurisdictional, and waters that are categorically excluded from jurisdiction.

In the first group are waters that are categorically jurisdictional: (1) traditional navigable waters, (2) interstate waters, (3) territorial seas, (4) impoundments of any water deemed to be a "water of the United States," (5) certain tributaries, and (6) certain waters that are "adjacent" to the foregoing five categories of waters. 33 C.F.R. § 328.3(a).

In the second group are waters "that require a case-specific significant nexus evaluation" to determine if they are jurisdictional. 80 Fed. Reg. at 37,073. Waters that are subject to jurisdiction based on a case-

specific significant nexus determination include: (A) waters, any part of which are within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea; or (B) waters, any part of which are within 4,000 feet of the ordinary high water mark of any of those jurisdictional waters, any impoundment of those jurisdictional waters, or any covered tributary. 33 C.F.R. § 328.3(a)(8).

In the third group are waters always excluded from jurisdiction. These include: swimming pools, puddles. ornamental waters, prior converted cropland, waste treatment systems, certain kinds of drainage ditches, farm and stock watering ponds, settling basins, water-filled depressions incidental to mining or construction activity, subsurface drainage systems, and certain wastewater recycling structures. 33 C.F.R. § 328.3(b).

The NAM and its co-plaintiffs in the Southern District of Texas will show (once this case reaches the merits stage) that the WOTUS Rule violates this Court's precedents, is deeply flawed both in substance and procedurally, and consequently violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A)-(D). But to this point, uncertainty over the meaning of Section 1369(b) has meant that the NAM has spent the past 15 months since promulgation of the Rule litigating the issue of where jurisdiction over the merits belongs, in multiple forums.

C. The Clean Water Act's Judicial Review Provisions

The CWA grants the courts of appeals original jurisdiction to hear challenges to seven specified categories of final agency actions (App., *infra*, 53a-54a)—among them, insofar as relevant here, actions

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [and]
>
> (F) in issuing or denying any permit under section 1342 of this title * * *.

33 U.S.C. § 1369(b)(1). This jurisdiction is not only original, but exclusive. *Decker* v. *Nw. Envt'l Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013).

Section 1369(b) very clearly "extends only to *certain* suits challenging *some* agency actions." *Decker*, 133 S. Ct. at 1334 (emphasis added). Challenges to agency rules not specified in Section 1369(b) proceed under Sections 702 and 704 of the APA, which provide that "[a] person suffering legal wrong" or "adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. Thus, litigants whose claims do not fall within Section 1369(b)(1) may invoke a cause of action in district court under the APA and 28 U.S.C. § 1331. That Section 1369(b)(1) is not intended to be all-encompassing is confirmed by Section 1365(e), which preserves statutory and common law rights to seek relief against the Administrator (such as those available under the APA).

In promulgating the WOTUS Rule the agencies conceded that while Section 1369(b)(1) "provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator," courts "have reached different conclusions on the types of actions that fall within" that provision. 80 Fed. Reg. at 37,104.

D. Litigation Challenging The New Rule

Scores of state, municipal, industry, and environmental plaintiffs filed suits challenging the WOTUS

Rule in district courts around the country,[1] including the NAM, which filed suit along with other industry groups in the Southern District of Texas.[2]

The Judicial Panel on Multidistrict Litigation denied the federal government's request to consolidate the district court actions and to transfer them to the District Court for the District of Columbia. See *In re: Clean Water Rule*, MDL No. 2663, Dkt. 163 (JPML Oct. 13, 2015). The Judicial Panel held that transfer was inappropriate under 28 U.S.C. § 1407 because the complaints turn on issues of law, and held that "different jurisdictional rulings by the involved courts" also augured against consolidation. *Id.* at 2.

Reflecting uncertainty surrounding the scope of Section 1369(b), many plaintiffs who filed district court actions (but not the NAM) also filed "protective" petitions for review in various courts of appeals.[3] Those petitions for review were consolidated and transferred

---

[1] Those actions are *North Dakota* v. *EPA*, No. 3:15-cv-59 (D.N.D.); *Murray Energy Corp.* v. *EPA*, No. 1:15-cv-110 (N.D. W. Va.); *Ohio* v. *EPA*, 2:15-cv-2467 (S.D. Ohio); *Texas* v. *EPA*, No. 3:15-cv-162 (S.D. Tex.); *Georgia* v. *McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *Oklahoma ex rel. Pruitt* v. *EPA*, No. 4:15-cv-381 (N.D. Okla.); *Chamber of Commerce* v. *EPA*, No. 4:15-cv-386 (N.D. Okla.); *Southeastern Legal Foundation* v. *EPA*, No. 1:15-cv-2488-TCB (N.D. Ga.); *Washington Cattlemen's Association* v. *EPA*, No. 0:15-cv-3058 (D. Minn.); *Puget Soundkeeper Alliance* v. *McCarthy*, No. 2:15-cv-1342 (W.D. Wash.); *Waterkeeper Alliance* v. *EPA*, No. 3:15-cv-3927 (N.D. Cal.); *Natural Resources Defense Council* v. *EPA*, No. 1:15-cv-1324 (D.D.C.); and *Arizona Mining Ass'n* v. *EPA*, No. 2:15-cv-1752 (D. Az.).

[2] *Am. Farm Bureau Fed'n, et al.* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.).

[3] The 22 petitions for review and more than 100 petitioners are identified in the Parties to the Proceeding Below section, *supra*, pp. ii-v.

to the Sixth Circuit pursuant to 28 U.S.C. § 2112(a). Consolidation Order, MCP No. 135 (JPML July 28, 2015).

The agencies moved to stay or dismiss cases in the district courts in favor of the circuit court litigation. All of the cases became ensnarled in the jurisdictional dispute, halting any progress towards the merits.

1. Confusion in the district courts

In August 2015, the U.S. District Court for the Northern District of West Virginia held that the Sixth Circuit had exclusive jurisdiction over Rule challenges. *Murray Energy Corp.* v. *EPA*, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015). The U.S. District Court for the Southern District of Georgia reached the same conclusion. *Georgia* v. *McCarthy*, 2015 WL 5092568, at *3 (S.D. Ga. Aug. 27, 2015).

But the very same day as *McCarthy*, the U.S. District Court for the District of North Dakota affirmed its own jurisdiction, holding that Section 1369(b) does not apply. *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). The court observed that "[i]f the exceptionally expansive view" of that provision "advocated by the government is adopted, it would encompass virtually all EPA actions under the Clean Water Act." *Id.* at 1053. The *North Dakota* court denied the agencies' motion to dismiss and preliminarily enjoined the operation of the Rule.[4]

---

[4] See *North Dakota* v. *EPA*, 3:15-cv-59, Dkt. 79 (D.N.D. Sept. 4, 2015) (limiting the injunction to the States that were party to the challenge). After the Sixth Circuit ruled it had jurisdiction the North Dakota court denied the United States' renewed motion to dismiss and to dissolve the injunction and stayed the case "pending further decision by the Courts of Appeals or Supreme Court." *Id.*, Order, Dkt. 156 (May 24, 2016).

2. The Sixth Circuit refuses to dismiss the petitions for review

The NAM, which had not filed a protective petition for review, successfully moved to intervene as a respondent in the Sixth Circuit. Dkt. 8, No. 15-3751 cons. (6th Cir. Sept. 16, 2015). The NAM then moved to dismiss the petitions for review for want of jurisdiction. Dkt. 39, No. 15-3751 cons. (6th Cir. Oct. 2, 2015), as did many of the parties that had filed protective petitions for review.

The Sixth Circuit ordered full briefing and argument on jurisdiction. On October 9, acknowledging the "still open question whether * * * this litigation is properly pursued in this court or in the district courts," the Sixth Circuit issued a nationwide stay of the Rule to "temporarily silenc[e] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing." *In re EPA*, 803 F.3d 804, 806, 808 (6th Cir. 2015). Judge Keith dissented, arguing that a stay was premature so long as the court's jurisdiction remained "in doubt." *Id.* at 809 (Keith, J., dissenting).

On February 22, 2016, the Sixth Circuit concluded, in an unusually fractured decision, that it and not the district courts had jurisdiction to hear the Rule challenges. The court of appeals' 1-1-1 decision produced its own "whirlwind of confusion." 803 F.3d at 808. Indeed, the only thing the panel could agree on was that subsections (E) and (F) were the "only two provisions of § 1369(b)(1)" that "potentially apply." App., *infra*, 8a. On all other issues the panel splintered.

a. Judge McKeague's opinion. Judge McKeague admitted that the government's textual arguments as to subsection (E) were "not compelling." App., *infra*, 9a.

"[T]he Rule's clarified definition," he wrote, does not "approve or promulgate *any* limitation that imposes *ipso facto* any restriction or requirement on point source operators or permit issuers." *Ibid.* (emphasis added). "Rather," it is "a definitional rule that, operating in conjunction with other regulations, will result in imposition of such limitations." *Ibid.*

Judge McKeague nevertheless concluded that jurisdiction lies in the court of appeals under subsection (E)—not because the statutory text requires it, but because this Court's decision in *E.I. du Pont de Nemours Co.* v. *Train* does so. Judge McKeague conceded that the *du Pont* case "can be read in more ways than one." App., *infra*, 10a. But he believed that *du Pont* "eschewed" a "literal reading" of Section 1369(b)(1) in favor of a "more generou[s]" interpretation than the statutory "language would indicate," and that this interpretation encompasses the WOTUS Rule because the Rule's "practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities." App., *infra*, 10a, 13a, 17a.

Turning to Subsection (F), Judge McKeague recognized that the Rule does not "issue" or "deny" any permits. But he concluded that Subsection (F) ought not be given "a strict literal application" either. App., *infra*, 17a. In support, Judge McKeague cited this Court's opinion in *Crown Simpson Pulp Co.* v. *Costle* and the Sixth Circuit's decision in *National Cotton Council of America* v. *EPA*, 553 F.3d 927 (6th Cir. 2009). He reasoned that those decisions together authorize direct review in the circuit courts of any regulation that merely, in some indirect way, "*affects* permitting requirements." App., *infra*, 19a (emphasis added).

b. Judge Griffin's begrudging concurrence. Judge Griffin concurred in the judgment only. Like Judge McKeague, he concluded that the "plain text" of subsection (E) does not govern the petitions for review because the WOTUS Rule is not an "effluent limitation or other limitation." App., *infra*, 30a-31a. But unlike Judge McKeague, Judge Griffin refused to read *du Pont* as "shoehorning an exercise in jurisdictional line-drawing into subsection (E)'s 'other limitation' provision," and hence found no jurisdiction under Subsection (E). App., *infra*, 35a.

Canvassing the text and Supreme Court precedents, Judge Griffin also thought it plain that Subsection (F) "simply does not apply here." App., *infra*, 40a. He concurred in the judgment only because, in his view, the Sixth Circuit's earlier decision in "*National Cotton* dictates [the] conclusion" that Subsection (F) encompasses the WOTUS Rule—a conclusion he criticized because it means that subsection (F)'s "jurisdictional reach * * * has no end." App., *infra*, 42a. Judge Griffin explained that "while I agree" with Judge McKeague "that *National Cotton* controls this court's conclusion, I disagree that it was correctly decided. But for *National Cotton*, I would find jurisdiction lacking." App., *infra*, 38a-39a.

c. Judge Keith's dissent. Judge Keith dissented. He joined Judge Griffin in holding Subsection (E) inapplicable. App., *infra*, 45a. But he concluded that "*National Cotton*'s holding is not as elastic as the concurrence suggests." App., *infra*, 47a. It does not authorize original subject-matter jurisdiction over "all rules '*relating*' to [permitting] procedures, such as the one at issue here," which "merely defines the scope of the term 'waters of the United States.'" App., *infra*, 46a. Even read most broadly, *National Cotton* interpreted Section 1369(b) to reach only those rules that

"'regulate' or 'govern' [permitting] procedure," which the WOTUS Rule does not. *Ibid.* Observing that the Eleventh Circuit had rejected *National Cotton*'s reasoning in *Friends of the Everglades* v. *EPA*, 699 F.3d 1280 (11th Cir. 2012), Judge Keith saw no need to read *National Cotton* "in a way that expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion." App., *infra*, 46a-47a. He would have granted the motions to dismiss and sent the parties to the district courts for initial review.

The Sixth Circuit issued a separate judgment denying the motions to dismiss. App., *infra*, 48a-50a.

The NAM and others petitioned the Sixth Circuit to rehear its jurisdictional ruling *en banc*. The court denied rehearing over the dissent of Judge Keith. App., *infra*, 51a-52a. Thereafter, the court set a briefing schedule on a motion relating to the content of the administrative record, followed by the merits. Merits briefing will not be completed until mid-February 2017—*twenty months* after the EPA and the Corps first promulgated the Clean Water Rule. Case Management Order No. 2, Dkt. 99 (June 14, 2016).

E. The Aftermath Of The Sixth Circuit's Decision

Following the Sixth Circuit's fractured decision, the U.S. District Court for the Northern District of Oklahoma declined jurisdiction. *Oklahoma ex rel. Pruitt* v. *EPA*, 2016 WL 3189807 (N.D. Okla. Feb. 24, 2016). The government moved to dismiss or stay other cases, including in the Southern District of Texas, where the NAM's case is pending. The NAM opposed the government's motion, which remains pending. *Am. Farm Bureau Fed'n, et al.* v. *EPA*, 3:15-cv-165 (S.D. Tex.), Dkt. 50.

In August, the Eleventh Circuit abstained under *Colorado River* from deciding the appeal of the denial of a preliminary injunction for lack of jurisdiction in *Georgia* v. *McCarthy*, pending the Sixth Circuit's decision on the merits. *Georgia* v. *McCarthy*, 2016 WL 4363130 (11th Cir. Aug. 16, 2016).[5] Pointedly, the Eleventh Circuit did not endorse the Sixth Circuit's jurisdictional analysis. Nor did it order the district court to dismiss the case for lack of jurisdiction. Rather, relying on "[c]onsiderations of wise judicial administration," the court determined to "stay [its] hand" pending "further developments." *Id*. at *2.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Erroneously Took Jurisdiction Under Section 1369(b), In Conflict With Decisions Of Other Circuits.

"Section 1369(b) extends only to certain suits challenging some agency actions." *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). It does not extend to suits challenging the WOTUS Rule. A majority of the panel understood that fact. App., *infra*, 27a (Griffin, J.), 45a (Keith, J.). Judge Griffin nevertheless voted with Judge McKeague to exercise jurisdiction under Section 1369(b)(1)(F), believing that he was bound by the Sixth Circuit's "incorrect" decision in *National Cotton*. App, *infra*, 44a. The panel's decision to exercise jurisdiction was in error and in conflict with decisions of other circuits.

---

[5] The NAM and its co-plaintiffs filed an *amicus* brief in the Eleventh Circuit in *McCarthy* urging reversal of the district court's decision declining jurisdiction. The NAM and its co-plaintiffs likewise filed an *amicus* brief in the Tenth Circuit in the *Pruitt* case urging reversal of the dismissal. The *Pruitt* appeal has not yet been decided.

A. The Sixth Circuit Lacks Jurisdiction Under Section 1369(b).

1. Section 1369(b)(1)(F) does not authorize the Sixth Circuit's review of the Rule. It grants courts of appeals original jurisdiction to "[r]eview * * * the Administrator's action * * * in issuing or denying any permit under section 1342." There are plenty of examples in which the EPA Administrator *actually* issues or denies a Section 1342 permit; those EPA actions are properly challenged in the courts of appeals.[6]

The WOTUS Rule, by contrast, does not issue or deny a permit. EPA Administrator Gina McCarthy admitted as much: "the Clean Water Rule is a jurisdictional rule. It doesn't result in automatic permit decisions." *The Fiscal Year 2016 EPA Budget: Joint Hearing Before the Subcomm. on Energy & Power & the Subcomm. on Environment & Economy of the House Comm. on Energy & Commerce*, 114th Cong. 70 (Feb. 25, 2015). Judge Griffin therefore was correct in concluding that "[o]n its face, subsection (F) clearly does not apply," because the Rule "neither issues nor denies a permit" under Section 1342. App., *infra*, 39a. "[T]his should end the analysis." *Ibid.*

Judge McKeague agreed that this reading is "consonant with the plain language" of the statute.

---

[6] See, *e.g.*, *Nat. Res. Def. Council* v. *EPA*, 808 F.3d 556, 562 & n.4 (2d Cir. 2015) (challenging grant of Section 1342 permit to vessels); *Alaska Eskimo Whaling Comm'n* v. *EPA*, 791 F.3d 1088, 1090-1091 (9th Cir. 2015) (challenging grant of Section 1342 permit to oil and gas exploration facilities); *Upper Blackstone Water Pollution Abatement Dist.* v. *EPA*, 690 F.3d 9, 11, 20 (1st Cir. 2012) (challenging grant of Section 1342 permit to sewage treatment plant); *Alton Box Bd. Co.* v. *EPA*, 592 F.2d 395, 396 (7th Cir. 1979) (challenging denial of Section 1342 permit to mill).

App., *infra*, 23a-24a. But he chose not to apply that plain language on the ground that *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980), "opened the door to constructions other than a strict literal application." App., *infra*, 17a.

To put it plainly, Judge McKeague misread *Crown Simpson*. In that case, EPA vetoed Section 1342 permits that a California agency had issued to pulp mills after EPA had delegated permitting authority to the State. 445 U.S. at 194-195 & n.3. This Court held that the Ninth Circuit had jurisdiction under Section 1369(b)(1)(F) to review EPA's vetoes because "EPA's veto of a state-issued permit is functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program" and had the "precise effect" of denying the permits. *Id.* at 196.

As Judge Griffin explained, *Crown Simpson*'s "'facts * * * make clear that the Court understood functional similarity in a narrow sense.'" App., *infra*, 40a. EPA effectively had denied Crown Simpson's Section 1342 permit applications in the most literal sense. Judge McKeague lost sight of those facts when he read *Crown Simpson* to allow courts of appeals to review any CWA regulation "so long as it affects permitting requirements." App., *infra*, 19a.

Congress could have written paragraph (F) to apply to EPA actions "affecting when permits are or are not required under Section 1342." But Judge McKeague's approach cannot be squared with the statute that Congress *actually* wrote, which applies to agency actions that *themselves* amount to "issuing or denying any permit under section 1342." As Judges Keith and Griffin recognized, it is difficult to imagine any case in which Judge McKeague's expansive re-drafting of paragraph (F) would not confer jurisdiction.

See App., *infra*, 42a (it means subsection (F)'s "jurisdictional reach * * * has no end") (Griffin, J.); App., *infra*, 47a (it "expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion") (Keith, J.).

Judge Keith explained in his dissent why Judge Griffin erred in nevertheless voting to exercise jurisdiction under Section 1369(b)(1)(F) on the ground that *National Cotton* required it. But Judge Griffin's belief that his vote was forced by the incorrect decision in *National Cotton* is of no moment here. Unbound by *National Cotton*, this Court is free to read the statute correctly.

2. A majority of the panel properly concluded that Section 1369(b)(1)(E) does not confer jurisdiction. App., *infra*, 29a-38a (Griffin, J.), 45a (Keith, J.); see also Gov't Opp. to Rh'g Pets. at 22 n.7, Dkt. 89 (Apr. 1, 2016) (conceding that the Sixth Circuit is not exercising jurisdiction under paragraph (E)). The agencies' contention that Section 1369(b)(1)(E) confers jurisdiction is mistaken.

Paragraph (E) grants jurisdiction to courts of appeals to review "the Administrator's action * * * in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." It is undisputed that the Rule is *not* an "effluent limitation," which is a "restriction * * * on quantities, rates, and concentrations of chemical" or other constituents that are discharged into navigable waters. 33 U.S.C. § 1362(11); see App., *infra*, 8a-9a. The Rule also is not an "other limitation under section 1311, 1312, 1316, or 1345," for three independent reasons.

First, the Rule is not a "limitation" in any ordinary sense of that word. It does not directly restrict the use

to which property owners put their land. It purports only to define the phrase "waters of the United States," which describes the waters to which *other* CWA sections may apply. As Judge Griffin put it, the Rule "is not self-executing" but merely "operates in conjunction with other sections scattered throughout the Act to define when [the Act's other] restrictions * * * apply." App., *infra*, 31a; see also *id.* at 9a ("[T]he Rule's clarified definition is not self-executing"; only "operating in conjunction with other regulations [will it] result in imposition of such limitations") (McKeague, J.).

Second, the Rule is not an "other" limitation. The *ejusdem generis* canon requires reading a general term following a specific term as "embrac[ing] only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). Application of the canon thus requires reading "other limitation" as embracing an object similar to an "effluent limitation." Effluent limitations are not just *any* limitation; rather, they "dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst.* v. *EPA*, 890 F.2d 869, 876 (7th Cir. 1989). The Rule, which is a regulatory definition of "waters of the United States," is not even remotely similar in nature to an effluent limitation.

Third, the Rule is not an other limitation "under section 1311, 1312, 1316, or 1345." Each of those sections provides for the issuance of effluent limitations or effluent limitation-like rules. Section 1311 governs "effluent limitations." Section 1312 governs "water quality related effluent limitations," which are additional effluent limitations that may be imposed where other limitations fail to achieve water quality standards. Section 1316 requires establishment of

technology-based effluent controls for new dischargers. And Section 1345 restricts the discharge of sewage sludge. It would be a mistake to think of the agencies' definition of "waters of the United States" as a limitation at all; it would be downright absurd to say that, *as* a limitation, it has a purpose similar in nature to an effluent limitation describing the technical measures of pollutants allowed under a permit—much less that it was promulgated under any of the specifically identified statutory provisions. See App., *infra*, 30a-31a (Griffin, J.) (the Rule "does not emanate from these sections" and is not "related to the statutory boundaries set forth in [them]"); *Friends of the Everglades*, 699 F.3d at 1286 ("[E]ven if the water-transfer rule could be classified as a limitation, it was not promulgated under section 1311, 1312, 1316, or 1345").

3. There is another reason to reject interpreting paragraphs (E) or (F) as limitless grants of original jurisdiction to the courts of appeals over all agency rulemaking that touches on CWA permitting: the *expressio unius est exclusio alterius* canon, which provides that the expression of one thing implies the exclusion of another. Section 1369(b) meticulously catalogues seven categories of agency action subject to original review in the courts of appeals. Congress's careful selection "justif[ies] the inference" that a general grant to courts of appeals of jurisdiction over all CWA rules was "excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). "No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions [in Section 1369(b)], while meaning to imply a more general and broad coverage than the statutes designated." *Long-*

view Fibre Co. v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992).

That conclusion takes on special force when Section 1369(b) is considered alongside the much broader grant of jurisdiction to courts of appeals in the Clean Air Act. That statute provides for original jurisdiction in the courts of appeals over challenges not only to particular agency actions, but also to "any other nationally applicable regulations promulgated, or final action taken, by the Administrator" under the Act. 42 U.S.C. § 7607(b)(1). That language shows that Congress knows how to "ma[ke] express provisions" for expansive original jurisdiction in the courts of appeals when it wants to and that its "omission of the same [language]" from Section 1369(b)(1) "was purposeful." *Zadvydas* v. *Davis*, 533 U.S. 678, 708 (2001). In short, the panel plainly erred in exercising jurisdiction under Section 1369(b).

B. The Panel's Ruling Conflicts With Decisions Of Other Courts Of Appeals.

The panel's erroneous decision deepens a conflict among the circuits. In their preamble to the Rule the agencies acknowledged that "courts have reached different conclusions on the types of actions that fall within section [1369(b)]." 80 Fed. Reg. at 37,104; see also Allison LaPlante *et al.*, *On Judicial Review Under the Clean Water Act in the Wake of* Decker v. Northwest Environmental Defense Center: *What We Know Now and What We Have Yet to Find Out*, 43 ENVTL. L. 767, 767 (2013) (observing that decisions interpreting Section 1369(b) are "confusing and messy" because the "Circuits are split"). The panel's ruling—itself hopelessly fractured—cannot be reconciled with *Friends of the Everglades* v. *EPA*, 699 F.3d 1280 (11th Cir. 2012).

1. In *Friends of the Everglades*, the Eleventh Circuit held that it lacked original jurisdiction to review EPA's water transfer rule. 699 F.3d at 1283. That rule excludes from the CWA's prohibition of "any addition of any pollutant to navigable waters" without a Section 1342 permit an activity that "conveys or connects waters of the United States," provided the activity does not "subjec[t] the transferred water to intervening industrial, municipal, or commercial use." But it includes within the prohibition an activity in which "pollutants [are] introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i); see 33 U.S.C. § 1362(12).

EPA argued in *Friends* that Section 1369(b)(1)(F) provided jurisdiction because paragraph (F) "appl[ies] to any 'regulations relating to permitting itself'" (699 F.3d at 1288)—the very argument that Judge McKeague accepted here. See App., *infra*, 19a. The Eleventh Circuit flatly rejected that contention because it is "contrary to the statutory text." 699 F.3d at 1288.

The Eleventh Circuit also declined to follow the Sixth Circuit's decision in *National Cotton*, explaining that *National Cotton* "provided no analysis" of Section 1369(b)(1)(F) and "cited two decisions of the Ninth Circuit that the Ninth Circuit had distinguished in *Northwest Environmental Advocates*" (a decision we discuss below). 699 F.3d at 1288. Here, Judge Griffin found the Eleventh Circuit's criticisms of *National Cotton* to "have merit," but concluded that he was nevertheless bound by *National Cotton* as prior Sixth Circuit precedent. App., *infra*, 43a. "But for *National Cotton*," he—and thus the panel—would have granted the motions to dismiss. *Id.* at 39a.

The WOTUS Rule purports to clarify the CWA's jurisdictional reach as defined by the statutory phrase

"waters of the United States" in 33 U.S.C. § 1362(7), which, the agencies say, "establishes where the Act's prohibitions and requirements apply." See App., *infra*, 32a. The water transfer rule at issue in *Friends of the Everglades*, in defining when a transfer of water through a point source is or is not an "addition of any pollutant" under Section 1362(12), likewise established circumstances in which "'the Act's prohibitions and requirements apply.'" There is no plausible argument that Section 1369(b) gave the court of appeals jurisdiction here but not in *Friends*.

The agencies mistakenly contend that the cases are distinguishable because the water transfer rule creates an "exemption." *E.g.*, U.S. Response Br., *Chamber of Commerce* v. *EPA*, No. 16-5038, *supra*, at 52 n.8 (asserting that *Friends* is "not on point" because it "considered *exemptions* from [CWA] requirements"). That is mere wordplay. Calling a rule an "exemption" is just another way of saying that a rule defines when the Act's requirements apply and when they do not. That is especially clear in *Friends*, where the rule on its face described water transfers that are included in the Section 1342 prohibition—transfers that involve the intervening use of the water or that themselves introduce pollutants to the water—as well as transfers that are excluded.

Against this backdrop, there is no doubt that if the JPML had consolidated the petitions for review of the WOTUS Rule in the Eleventh Circuit instead of the Sixth Circuit, the challenges would have been dismissed for want of jurisdiction under *Friends*.

2. The panel's ruling also is at odds with the Ninth Circuit's decision in *Northwest Environmental Advocates* v. *EPA*, 537 F.3d 1006 (9th Cir. 2008). The plaintiff in *Northwest Environmental Advocates* filed

an APA action in the district court challenging a regulation that exempted certain vessel discharges from Section 1342 permitting. EPA argued on appeal that the district court lacked jurisdiction because the challenge fell within Section 1369(b)'s grant of exclusive jurisdiction to the courts of appeals. The Ninth Circuit disagreed. *Id.* at 1015-1018.

The Ninth Circuit refused to "lightly hold that we have jurisdiction under section [1369(b)]." 537 F.3d at 1015. It "counseled against * * * expansive application" of that jurisdictional grant because "'no sensible person would speak with'" the degree of "'specificity and precision'" that Congress used in Section 1369(b) if an expansive application is what it intended. *Ibid.* The Ninth Circuit held that original court of appeals jurisdiction is proper under Subsection (E) only if a rule clearly imposes a limitation, or under Subsection (F) only if the "EPA actions [are] 'functionally similar' to the denial of permits." *Id.* at 1016 (quoting *Crown Simpson*, 445 U.S. at 196). And "the facts of [*Crown Simpson*] make clear that th[is] Court understood functional similarity in a narrow sense." *Ibid.* Because the exemption at issue involved neither the issuance or denial of a permit or a functionally similar action, nor the approval or promulgation of any effluent or other limitation, Section 1369(b) did not govern.

3. The panel's decision is also contrary to the North Dakota district court's decision that it—not courts of appeals—has jurisdiction to review the WOTUS Rule. *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047, 1052-1053 (D.N.D. 2015). The district court favorably cited the Eleventh Circuit's decision in *Friends* and correctly held that the agencies' argument "run[s] precisely contrary to Congress' intent in drafting" Section 1369(b) narrowly. *Id.* at 1053. The district court reaffirmed that decision by refusing to dismiss the case

after the Sixth Circuit panel issued its decision. Order, Dkt. 156, No. 3:15-cv-59 (D.N.D. May 24, 2016).

As the agencies argued in opposing the challengers' petitions for en banc rehearing, achieving "uniformity among the circuits" is "the province of the Supreme Court." Gov't Opp. to Rh'g Pets. at 22. So it is. The Court should grant certiorari here to bring that uniformity.

II. The Question Presented Is Of Immense And Immediate Practical Importance.

A. Uncertainty Over The Meaning Of Section 1369(b) Causes Delay And Waste Of Judicial And Party Resources.

1. This Court has recognized that the manner of challenging federal environmental regulations is an issue of exceptional importance. See *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 586 (1980) ("We granted certiorari * * * because of the importance of determining the locus of judicial review of the actions of EPA [under the Clean Air Act]"). The panel here acknowledged "the nationwide importance of the matter." Order at 2, Dkt. 78 (6th Cir. Mar. 16, 2016). So did EPA when it petitioned for certiorari from the Eleventh Circuit's decision in *Friends of the Everglades*. There, EPA urged this Court to grant certiorari on the Section 1369(b) issue because "the proper time and manner of judicial challenges to the Water Transfers Rule and similar NPDES-related regulations" "presents a question of exceptional importance" that "has significant consequences for the applicable statute of limitations and mode of litigation" and that has given rise to circuit "conflicts." U.S. Pet'n for Cert., No. 13-10, at 9 (U.S. 2013). Commentators agree. See LaPlante, *supra*, 43 ENVTL. L. at 772 ("[T]here is no denying that questions regarding

section [1369](b)(1)'s reach are important and need to be resolved by the High Court").

This Court has recognized time and again that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Ibid.* "Judicial resources too are at stake" because "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Ibid.* (citing *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006)). "So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Ibid.*

Nowhere are these truths more apparent than with respect to Section 1369(b). Because of the great uncertainty in the case law, parties cannot know which court (or courts) will rule that it has power to decide a CWA rule challenge. As a result, challenges are routinely filed both in the district courts and in the courts of appeals—a wasteful practice that the agencies concede is appropriate "to preserve a forum for [challengers'] claims" "[g]iven uncertain jurisdiction." U.S. Response Br., *Chamber of Commerce* v. *EPA*, No. 16-5038, *supra*, at 24.[7] This uncertainty produces duplicative litigation, conflicting decisions on

---

[7] The Seventh Circuit in *Roll Coater, Inc.* v. *Reilly*, 932 F.2d 668, 671 (7th Cir. 1991), warned that "careful counsel must respond to" the "uncertain opportunities for review" of CWA regulations by "filing buckshot petitions" both in the district court and court of appeals. That is precisely what challengers do. See, *e.g.*, *Friends of the Everglades*, 699 F.3d at 1283; *National Cotton*, 553 F.3d at 932; *Nw. Envtl. Advocates*, 537 F.3d at 1014.

jurisdiction, significant delay, and tremendous waste of judicial and party resources. It also leaves merits decisions vulnerable to appellate reversal on grounds other than the merits, creating additional uncertainty. And the problem is unavoidable because every federal court has an independent obligation to determine if it has subject-matter jurisdiction.

2. The challenges to this Rule are a case in point. The agencies admit that "there is no denying the importance of the Clean Water Rule." Gov't Opp. to Rh'g Pets. at 12. Because of the Rule's importance, State, municipal, industry, and environmental parties filed complaints in district courts and 22 petitions for review in the courts of appeals to guarantee that they preserved their challenges. See *supra*, p. 8.

Before the Sixth Circuit issued its decision, three district courts had ruled on jurisdiction, reaching conflicting determinations. *Supra*, p. 9. After the panel's ruling, a district court *sua sponte* dismissed an APA challenge for lack of jurisdiction, another denied the agencies' motion to dismiss, another has the agencies' motion under advisement, and still others have stayed the cases. *Supra*, p. 13. On appeal from a district court's denial of a preliminary injunction against the Rule for want of jurisdiction, the Eleventh Circuit abstained, holding the case in abeyance and ordering the district court to stay, not dismiss, APA proceedings. *Georgia* v. *McCarthy*, 2016 WL 4363130, at *3 (11th Cir. Aug. 16, 2016). And the Tenth Circuit is currently considering an appeal from the dismissal of an APA action for lack of jurisdiction. *Supra*, p. 14. This garbled state of affairs is intolerable.

For its part, the NAM has invested substantial time and money in the proceedings on jurisdiction—as have State, municipal, industry, and environmental

parties, the agencies, and the courts. Only now, long after the agencies promulgated the Rule, are the parties even beginning to brief the merits. And they are doing so before a court that they believe lacks jurisdiction—which puts a merits decision by a Sixth Circuit at risk upon further review.

3. Earlier challenges to EPA's water transfer rule provide another example. That rule was issued in 2008. *Friends of the Everglades*, 699 F.3d at 1284. Challenges were brought in the district courts and courts of appeals. The latter were consolidated in the Eleventh Circuit, which held it lacked original jurisdiction over the rule challenges. *Id.* at 1286. After the United States unsuccessfully sought certiorari to review the jurisdiction ruling (No. 13-10), litigation proceeded in the district court, which ruled on the merits in 2014—*six years* after the regulation was issued. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA*, 8 F. Supp. 3d 500, 516 (S.D.N.Y. 2014). The appeal from that decision remains pending today.

EPA stipulated that, in light of the Eleventh Circuit's decision, it is collaterally estopped from challenging the district court's jurisdiction in the Second Circuit. EPA Br. at 3-4 & n.2, Dkt. 210, No. 14-1823(L) (2d Cir. Sept. 11, 2014). That seems unlikely. But even if that proposition were correct, parties in the district court that did not participate in *Friends* may challenge an unfavorable ruling from the Second Circuit by arguing on petition for rehearing or certiorari that the district court lacked subject-matter jurisdiction—a non-waivable issue—and that the Second Circuit's decision therefore must be vacated. Cf. *Ford Motor Co.* v. *United States*, 134 S. Ct. 510, 510 (2013) (per curiam) (granting certiorari, vacating, and remanding after the United States, which "acquiesced in jurisdiction in the lower courts," contended "for the

first time" in its brief in opposition that the lower courts lacked subject-matter jurisdiction). This ace up the sleeve threatens to return the parties and courts to square one, nearly a decade after EPA issued the water transfer rule.

It is for just these reasons that "jurisdictional rules should be clear." *Lapides*, 535 U.S. at 621. The law interpreting Section 1369(b) is anything but—and confusion is only compounded by the extraordinary 1-1-1 decision below. This Court's intervention is urgently needed to bring clarity and certainty to jurisdiction over CWA rule challenges.

B. The Panel's Decision Would Deny Parties, Agencies, And Courts Of The Benefits Of Multilateral Review Of Agency Rulemaking.

1. The agencies have urged that it is good policy to funnel CWA rule challenges into a single court of appeals to provide "efficient, timely, and nationally-binding review of fundamental Clean Water Act regulatory actions." U.S. Response Br., *Chamber of Commerce* v. *EPA*, No. 16-5038, *supra*, at 60. In other words, the "policy" the agencies are concerned about is their own convenience and desire to suppress the full airing of issues that comes with multi-court review.

Those concerns carry no weight in the face of plain statutory language. As this Court has observed, jurisdiction "must of course be governed by the intent of Congress and not by any views [courts] may have about sound policy." *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 746 (1985). Put another way, "[i]t is not [the Court's] task to determine which would be the ideal forum for judicial review of the Administrator's decision in this case." *Harrison*, 446 U.S. at 593. As EPA has been told before, it may not "avoid the Congressional intent clearly expressed in the text

simply by asserting that its preferred approach would be better policy." *Friends of the Earth* v. *EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006).

2. In fact, the panel's ruling, if allowed to stand, would disserve the federal judicial process, which depends on district courts and courts of appeals independently analyzing legal issues. Under the panel's ruling, challenges to important CWA regulations would be funneled to a single court of appeals, without the benefit of initial consideration by the district courts or the opinions of the other federal courts of appeals on the same issues. The quality of legal decision-making—and of this Court's ability to decide which cases to review—would be diminished.

Debate among lower courts "helps to explain and formulate the underlying principles this Court * * * must consider." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2597 (2015). It also "winnows out the unnecessary and discordant elements of doctrine." *California* v. *Carney*, 471 U.S. 386, 400-401 (1985) (Stevens, J., dissenting) (citing Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS 179 (1921)). Accordingly, this Court typically "permit[s] several courts of appeals to explore a difficult question before [it] grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984); see, *e.g.*, *Obergefell*, 135 S. Ct. at 2597.

The benefits of multi-court review accrue as clearly in the review of administrative rules as in other types of cases. See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1155 (1990) (explaining "[w]hy [we] should * * * take uniform administrative decisions and subject them to review in the various regional circuit courts under a system that makes it possible for these courts to disagree with one another"). These benefits include

that "the possibility of intercircuit disagreement provides a simple device for signaling that certain hard cases are worthy of additional judicial resources"; that "the doctrinal dialogue that occurs when a court of appeals addresses the legal reasoning of another and reaches a contrary conclusion * * * improves the quality of legal decisions"; and that exploration of an issue by multiple courts aids this Court "both in its consideration of the legal merits of an issue and in its case selection decisions." *Id.* at 1156-1157.

Thus the circuit splits that the agencies fear may arise from initial consideration in multiple district courts "increase the probability of a correct disposition" (*Atchison, Topeka & Santa Fe Ry. Co.* v. *Pena*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring)), and tee up issues more thoroughly for this Court's consideration. There is nothing about agency regulations that makes this process less appropriate for rule challenges than for other types of cases, like those involving the meaning or constitutionality of federal statutes. All the benefits of multi-court consideration would be lost if Section 1369(b) were stretched beyond the defined categories of agency action that Congress designated for original court of appeals review.

3. Furthermore, Section 1369(b) must be read in light of the default rule that Congress established in the APA, which is that agency action is subject to multilateral judicial review. "[I]n the absence or inadequacy" of a "special statutory review proceeding," any "person suffering legal wrong because of agency action" is "entitled to judicial review" "in a court of competent jurisdiction." 5 U.S.C. §§ 702-703. A plaintiff generally may file suit where it resides. See 28 U.S.C. §§ 1331, 1391(e); see also *Bowen* v. *Massachusetts*, 487 U.S. 879, 904 (1988) (Congress "inten[ded] that [the APA] cover a broad spectrum of administrative actions,

and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation"). In the absence of a clear statement from Congress in Section 1369(b), the Sixth Circuit should not have upended the APA judicial review process. This Court should grant certiorari to restore APA review to CWA rulemaking outside the narrow categories that Congress expressly specified in Section 1369(b).

C. Interlocutory Review Is Warranted

The interlocutory posture of the case counsels here in favor of an immediate grant of review. If, as we have argued—and as two of the panel judges believed—jurisdiction lies in the district courts under the APA, a merits ruling in the Sixth Circuit would serve no purpose. This Court would have no more authority to review a merits decision by the Sixth Circuit than would the Sixth Circuit to issue such a decision in the first place.

It thus makes no sense to delay deciding whether the court now addressing the merits has the statutory authority to do so while the parties file and the Sixth Circuit reads hundreds of pages of briefs, the court of appeals conducts oral argument and prepares an opinion (or opinions) on the merits, and untold party and judicial resources are expended in the process. Given the resources to be devoted to litigating the merits—and the importance of and great uncertainty over the correct resolution of the jurisdictional issue, in this case and more generally—immediate resolution of the question presented is imperative. Otherwise, the shadow of uncertain jurisdiction will hang over the merits stage before the panel, to reappear at the merits rehearing and certiorari stages. And a reversal on jurisdiction would hit the reset button on what by then

will have been years of litigation. Immediate review thus would serve the interests of regulators and regulated alike by ensuring that a merits decision actually resolves the merits and is not upended by a legal error over jurisdiction. It also would ensure that while the jurisdictional dispute plays out in this case, parties challenging new CWA rules do not face the same uncertainty over jurisdiction.

This Court routinely grants review of jurisdictional determinations even when (as here) the court of appeals holds jurisdiction proper and orders further proceedings. *E.g.*, *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014) (reviewing question concerning personal jurisdiction).

This Court's finality jurisprudence under 28 U.S.C. § 1257 also is instructive. The Court in *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 557-558 (1963), reviewed a state court's interlocutory venue decision because it was "a separate and independent matter, anterior to the merits" and it made sense "to determine now" in which court "appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." If those considerations are sufficient to overcome even the barriers to review of non-final state court rulings, they should easily warrant interlocutory review of a federal court decision here.

Regardless of how this Court ultimately interprets Section 1369(b), Clean Water Act litigants deserve an answer to the question presented to bring to an end the current jurisdictional morass.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3127

LINDA E. KELLY
QUENTIN RIEGEL
LELAND P. FROST
Manufacturers' Center
for Legal Action
733 10th Street, NW, Ste 700
Washington, DC 20001
(202) 637-3000

TIMOTHY S. BISHOP
Counsel of Record
CHAD CLAMAGE
JED GLICKSTEIN
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Petitioner

SEPTEMBER 2016