No. 16-299

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.

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

REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

The agencies concede (at 6-8) that the Sixth Circuit held that it does *not* have original jurisdiction over challenges to the WOTUS Rule under Section 1369-(b)(1)(E) because that Rule does not "approv[e] or promulgat[e] any effluent" or "other limitation." Yet they devote much of their brief in opposition to arguing that the Sixth Circuit's holding on this point *was incorrect*. See U.S. Br. 11-14, 16-17.

The agencies concede (at 8) that the *sole* reason that the Sixth Circuit found jurisdiction under Section 1369(b)(1)(F), which grants courts of appeals original jurisdiction in challenges to agency action "issuing or denying any permit under section 1342," is because Judge Griffin—though he concluded that Subsection (F) "on its face" "simply does not apply here"—believed he was bound by prior circuit precedent in *National Cotton* to hold otherwise. Pet. App. 33a, 38a-40a.

The agencies concede that "the Eleventh Circuit's ruling in *Friends of the Everglades* conflicts with the Sixth Circuit's decision in *National Cotton*," which was the outcome-determinative precedent below. U.S. Br. 21. And though they now try to distance this case from *Friends* by arguing that the latter involved a rule defining exclusions from CWA permitting requirements, in *Friends* itself the agencies told this Court that "the Rule [at issue there] also imposes limits on point sources." U.S. Reply Br. 11, No. 13-10.

No wonder that, as the agencies also concede (at 19 n.2), district courts have stayed their rulings pending action by this Court. The jurisdictional question is a swamp that routinely mires challenges to CWA rules in inefficient, multi-court litigation over where the

challenge belongs. Pet. 26-28; AFBF Resps. Br. 7-9. This uncertainty wastes party, agency, and judicial time and resources on an issue that the fractured 1-1-1 decision below does nothing to resolve. "'[J]urisdictional rules should be clear'" (*Direct Marketing Ass'n* v. *Brohl,* 135 S. Ct. 1124, 1133 (2015)); only this Court's intervention can clarify Section 1369(b)(1). See State Resps. Br. 22-26.

The agencies do not dispute the importance of the question presented. Nor could they, having told this Court when urging review in *Friends of the Everglades* that jurisdiction over CWA rule challenges is "an issue of recurring and exceptional importance." U.S. Reply Br. 1, No. 13-10; see also *id.*, U.S. Pet. for Cert. 9 (this Court has previously granted certiorari "'because of the importance of determining the locus of judicial review of the actions of EPA,'" which has "significant consequences"). The importance of resolving the question presented is confirmed by the briefs submitted by respondents supporting the NAM's petition. Those briefs were filed on behalf of no fewer than 31 States, as well as by industry groups and corporations representing a diverse array of American businesses including agriculture, forestry, minerals extraction and processing, energy, and home and infrastructure building.

The question presented satisfies every criterion for Supreme Court review and cries out for immediate resolution. None of the agencies' arguments to the contrary pass muster.

1. The agencies are wrong in arguing (at 10-19) that Section 1369(b)(1) grants the Sixth Circuit jurisdiction.

a. The agencies offer no textual defense of the panel's erroneous exercise of jurisdiction under Section

1369(b)(1)(F), which applies to EPA actions "issuing or denying any permit under section 1342." There is none. Each panel member understood that Subsection (F) by its plain meaning does not apply. See Pet. App. 17a (McKeague, J.) (no jurisdiction under "a strictly literal application"); *id.* 39a (Griffin, J.) ("On its face, subsection (F) clearly does not apply"); *id.* 45a (Keith, J.) (no jurisdiction "under the plain meaning"). That "should end the analysis." *Id.* 39a (Griffin, J.).

The agencies instead seek a "pragmatic construction" of Section 1369(b)(1)(F) under *Crown Simpson Pulp*. U.S. Br. 11. But they mistakenly claim that decision "authorize[s] original jurisdiction in the courts of appeals of EPA actions that *directly affect* CWA permitting decisions." *Ibid.* (emphasis added). *Crown Simpson* did no such thing. It narrowly held that EPA's vetoes of state-proposed Section 1342 permits for a single facility fell within Section 1369(b)(1)(F) because they had "the precise effect" of a denial of permits in states where EPA issues permits. 445 U.S. at 196. Unlike permit vetoes, the WOTUS Rule does not functionally deny permits. The majority below and many other courts have rejected the agencies' misreading of *Crown Simpson*. See Pet. App. 40a (Griffin, J.) (*Crown Simpson* "simply does not apply"); *id.* 45a (Keith, J.) (same); *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1016 (9th Cir. 2008) (*Crown Simpson* "understood functional similarity in a narrow sense"); *Friends of the Everglades* v. *EPA*, 699 F.3d 1280, 1287-1288 (11th Cir. 2012).

b. The agencies incorrectly argue, contrary to the decision below, that jurisdiction lies under Section 1369(b)(1)(E), which covers EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." But the agencies' assertion (at 13) that the WOTUS Rule is an

"other limitation under section 1311" is "not compelling," as even Judge McKeague concluded. Pet. App. 9a.

The Rule is no "limitation" at all. The agencies concede that it is "not self-executing" but merely "helps to delineate the practical scope" of the Act. U.S. Br. 14, 16. As Judge Griffin explained, it is "circular" to claim that a regulation defining the Act's "jurisdictional reach" is a "'limitation[]' under" the Act. Pet. App. 32a. And while the agencies now assert (at 16) that the Rule "triggers the Act's prohibitions and permitting requirements," they said the opposite when they issued the Rule: it "does not establish any regulatory requirements" and "imposes no enforceable duty" on "the private sector." 80 Fed. Reg. at 37,054, 37,102.

Because it is not similar to an "effluent limitation," the Rule also is not an "other limitation." The agencies argue (at 16-17) that *ejusdem generis* does not apply because "'two or more things'" did not precede the term "other limitation." But *ejusdem generis* applies even when one specific term precedes a general term. *E.g.*, *Nowak* v. *United States*, 356 U.S. 660, 664 (1958). Moreover, "[a] general tag-on renders a single specific word superfluous no less than a series of words." Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 206 (2012). Accordingly—and even if *noscitur a sociis* is the better canon—"effluent limitation" still constrains "other limitation." See States Resps. Br. 14. Congress would not have said "any effluent limitation or other limitation" if it meant "any limitation." Its inclusion of the words "effluent limitation" must be given meaning. See *Am. Paper Inst.* v. *EPA*, 890 F.2d 869, 877 (7th Cir. 1989) (interpreting "other limitation" as "restricted to limitations directly related to effluent limitations").

The agencies' claim (at 13) that the WOTUS Rule was issued "under Section 1311" is wrong. See Pet. App. 31a (Judge Griffin explained that the Rule "does not emanate" from Section 1311). The Rule defines a phrase that appears exclusively in Section 1362. To be sure, it *impacts* Section 1311, as it does many other CWA sections; but that does not make it issued "under" Section 1311, which governs technology-based effluent limitations.

This Court's decision in *E.I. du Pont de Nemours* confirms the point. There, this Court held that industry-wide effluent limitations that were *actually* issued under Section 1311 "unambiguously" fell within Subsection (E). 430 U.S. at 136. In so ruling, the Court avoided the "perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits * * * but would have no power of direct review of the basic regulations governing those individual actions." *Ibid.* But as Judge Griffin explained, this Court's "policy reason came *after* a plain textual" analysis of Subsection (E). Pet. App. 35a. The agencies would turn *du Pont* on its head by allowing the agencies' preferred policy to *supplant* plain statutory language. *Ibid.*

c. The agencies have no answer to our argument that Congress would not have enumerated seven narrow categories of agency action as directly reviewable in the courts of appeals if it broadly intended direct review of every regulation affecting permitting. See Pet. 19-20 (citing cases). Nor do they acknowledge that the Clean Air Act expressly authorizes the court of appeals to review *any* "nationally applicable regulations" (42 U.S.C. § 7607(b)(1))—language conspicuously absent from the CWA. Both points confirm the agencies' misreading.

d. The agencies' "limitless" interpretation of Section 1369(b)(1) is evident in their failed attempts to cabin the statute. They cite *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012), and *American Farm Bureau Federation* v. *EPA*, 792 F.3d 281 (3d Cir. 2015), as challenges properly brought in district courts. U.S. Br. 18. But under their reading, both challenges should have been filed in the courts of appeals.

The *Sackett* plaintiffs challenged EPA's determination that property contained "jurisdictional wetlands" and that they had violated Section "1311" by adding fill material without a "permit." 132 S. Ct. at 1370-1371. EPA had "identif[ied] the locations where the CWA's prohibitions apply and where permits are required"—the agencies' test for jurisdiction under Section 1369(b)(1). U.S. Br. 11. Under that analysis, this Court lacked subject-matter jurisdiction in *Sackett*.

Farm Bureau challenged an EPA regulation that imposed "pollution limits to specific point sources" that are "regulated" under Section "1342." 792 F.3d at 302. The regulation thus "impose[d] limitations essential to the proper operation of the [Section 1342] permitting system or directly govern[ed] the issuance of those permits." U.S. Br. 18. Under the agencies' reading, the regulation therefore should have been "reviewable under Section 1369(b)(1)." *Ibid.*

As these examples demonstrate, there is no end to the agencies' atextual logic. "[J]urisdictional rules should be clear." *Lapides*, 535 U.S. at 621. But the agencies' interpretation would inject jurisdictional uncertainty into every CWA suit.

e. The agencies' response (at 18) to our argument that the panel's ruling deprives the parties, agencies, and courts of the benefits of multilateral review of agency rulemaking is simply that "Congress made a

different judgment in enacting Section 1369(b)(1)." But that begs the question whether Congress intended the WOTUS Rule to fall within Section 1369(b)(1). And the agencies' citation (at 19) to a statement in the House report that Section 1369(b) "'establish[es] a clear and orderly process for judicial review'" ignores the fact that the very next paragraph clarifies that "inclusion of section [1369] is not intended to exclude judicial review" that is "otherwise permitted by law," including under the APA. H.R. Rep. No. 92-911, at 136 (1972).

Regardless, "policy arguments cannot supersede the clear statutory text." *Universal Health Servs., Inc.* v. *United States*, 136 S. Ct. 1989, 2002 (2016). Because the WOTUS Rule falls outside Section 1369(b)(1)'s plain language, the Sixth Circuit erred in exercising jurisdiction.

2. The agencies acknowledge (at 21) that a circuit conflict exists: "the Eleventh Circuit's ruling in *Friends of the Everglades* conflicts with the Sixth Circuit's decision in *National Cotton*." Their claim (at 22) that this conflict is "not implicated here" is incorrect. Judge Griffin—the deciding vote below—would have found "jurisdiction lacking" "[b]ut for *National Cotton*." Pet. App. 39a. The conflict was outcome determinative.

The agencies (at 20-22) argue that *Friends* concerned an "'exemption from the permit program'" and that "[u]nlike the regulation" in *Friends*, the WOTUS Rule "restricts pollutant dischargers." Each part of that analysis is incorrect. First, as the government represented to this Court in *Friends*, the regulation there "impose[d] limits on point sources." U.S. Cert. Reply Br. 11, No. 13-10. Second, as the agencies acknowledge (at 4), the WOTUS Rule "maintains" and "adds additional categorical exclusions" under the CWA. Indeed, petitioners in the Sixth

Circuit are challenging those exclusions. See Br. of Nat'l Wildlife Fed'n 5 (6th Cir.). Even if there were a "distinction between limitations and exemptions" (U.S. Br. 22 n.4), the panel's decision to review the WOTUS Rule *still* conflicts with *Friends*.

The agencies fail to distinguish the Ninth Circuit's ruling in *Northwest Environmental Advocates* for the same reason. Indeed, Judge Griffin cited *Northwest Environmental Advocates* in highlighting the "problems with extending jurisdiction to cover the [WOTUS] Rule" since the Rule "identifie[s] situations" where "there would never be permit decisions." Pet. App. 41a-42a. The Ninth Circuit firmly rejected the "'expansive application'" of Section 1369(b)(1) that the agencies advocate here. 537 F.3d at 1015.[1]

In brushing aside *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015), which held that courts of appeals *lack* jurisdiction to review the WOTUS Rule, the agencies (at 19 n.2) fail to note that the district court there *denied* their renewed motion to dismiss *after* the Sixth Circuit panel voted to exercise jurisdiction. The district court stayed the case "pending any further decision" by the "Supreme Court," confirming that this conflict remains live. Order, Dkt. No. 156, No. 3:15-cv-59 (D.N.D. May 24, 2016).

3. The agencies do not deny the immense importance of the question presented. Nor could they. They admit that the government petitioned this Court to interpret Section 1369(b)(1) in *Friends of the*

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[1] The agencies misrepresent (at 20) that Judge Griffin concluded the Sixth Circuit's decision did "not 'diverge[] from the predominant view of the other circuits.'" In fact, Judge Griffin found *National Cotton* in conflict with *Friends of the Everglades* and *Northwest Environmental Advocates* and believed that *Friends*' criticisms of *National Cotton* "have merit." Pet. App. 43a.

Everglades. U.S. Br. 21 n.3. And they recognize (at 3) that the WOTUS Rule would "pla[y] a central role in defining the reach" of the CWA. The briefs of 31 States and numerous industry groups and corporations as respondents in support of the petition confirm the importance of the jurisdictional issue.

The agencies argue (at 19) that the petition "embraces" "extended uncertainty," but overlook that extended uncertainty is the current norm in CWA litigation. Challengers to agency actions under the CWA routinely file duplicative suits in the district courts and courts of appeals because they cannot predict which court will decide that it has exclusive jurisdiction. See Pet. 25. The agencies do not deny that jurisdictional uncertainty *still* pervades the litigation challenging the regulation at issue in *Friends of the Everglades*, which was promulgated by EPA in 2008. See Pet. 26-27. And the agencies do not deny that the same jurisdictional dispute will continue be litigated in case after case until this Court intervenes and provides desperately needed guidance.

4. The agencies appeal (at 24) to the general rule disfavoring interlocutory review, but fail to acknowledge that questions of subject matter jurisdiction are a well-established exception. See Pet. 32. That is for good reason. Review of a jurisdictional holding that, if not corrected, will result in enormous wasted effort and expenditure is an issue "fundamental to the further conduct of the case." *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947). And full-blown review of a major CWA rule by a court of appeals that lacks jurisdiction—and where a majority of the panel concluded that it lacks jurisdiction under a *correct* interpretation of the statute—makes this a "cas[e] of peculiar gravity and general importance" warranting interlocutory review. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251,

258 (1916). See Shapiro *et al.*, SUPREME COURT PRACTICE 283 (10th ed. 2013) (where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status") (citing numerous examples).

The agencies are less than candid with this Court when they assert (at 9, 24) that it should not intervene now because the case is far along in the Sixth Circuit. A certiorari grant by this Court would predictably result in a stay of proceedings in the Sixth Circuit, before the agencies file their 63,000-word brief due January 18, the intervenors file multiple briefs due February 8, the four sets of petitioners file their reply briefs due March 8, the parties prepare the massive deferred appendix, the parties submit final-form briefs, the Sixth Circuit hears argument and renders a decision based on thousands of pages of briefs and tens of thousands of pages of record, and the full court considers the inevitable *en banc* petitions. The parties, the judiciary, and taxpayers should not be required to endure that enormous expenditure of money and effort in a case that is proceeding in the wrong court.

A lack of candor is evident too in the agencies' failure to mention the imminence of a new Administration. A grant of certiorari now would foreclose the need for the otherwise inevitable motion practice over how the case should proceed in light of President-Elect Trump's promise that his Administration "will eliminate the highly invasive 'Waters of the US' rule." President-Elect Donald J. Trump Transition, *Energy Independence*, https://greatagain.gov/energy-independence-69767de8166#.5orwmlrxk. See, *e.g.*, *Mississippi* v. *U.S. EPA*, No. 08-1200 (D.C. Cir. 2009) (motion practice resulting in abeyance of

litigation over Ozone NAAQS while Obama EPA reconsidered the Bush-era rule). Whether merits briefing eventually proceeds as to the propriety of the current WOTUS Rule or instead as a challenge to an EPA revocation of that Rule, the jurisdictional issue under Section 1369(b)(1) remains live, recurring, uncertain, the subject of a circuit conflict, and critically in need of this Court's resolution.[2]

CONCLUSION

The petition for certiorari should be granted.

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[2] The possibility that the Sixth Circuit merits litigation may be held in abeyance at some point after the change in Administration makes this case more rather than less suitable for review. The agencies' review of the WOTUS Rule will take many months even after new agency personnel are in place and will conclude long after this Court has decided where jurisdiction belongs. *E.g.*, *Mississippi*, *supra* (EPA requested abeyance in March 2009 and announced its intent to reconsider the Ozone NAAQS rule in September 2009). When litigation resumes, over either the Rule or its revocation, it can restart in the correct court in accordance with this Court's ruling on Section 1369(b)(1) jurisdiction.

Respectfully submitted.

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