No. 16-299

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL ASSOCIATION OF MANUFACTURERS, PETITIONER

v.

DEPARTMENT OF DEFENSE ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPPOSITION OF RESPONDENT CONSERVATION GROUPS TO MOTION OF THE FEDERAL RESPONDENTS TO HOLD THE BRIEFING SCHEDULE IN ABEYANCE

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CORPORATE DISCLOSURE STATEMENT

Respondents Natural Resources Defense Council, National Wildlife Federation, One Hundred Miles, and South Carolina Coastal Conservation League are non-profit advocacy organizations. They have no parent corporations and do not issue stock.

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INTRODUCTION

Pursuant to Rule 21.4, respondents Natural Resources Defense Council (NRDC), National Wildlife Federation, One Hundred Miles, and South Carolina Coastal Conservation League ("the Conservation Groups") submit this opposition to the federal respondents' motion to hold the briefing schedule in abeyance. That request should be denied, as it causes severe hardship to the Conservation Groups, particularly given the stay that currently applies to the challenged rule.

The basis for the federal respondents' terse motion is the suggestion that—in light of the President's recent executive order directing reconsideration of the rule at issue in this litigation—this case may become moot before the Court can resolve the jurisdictional question presented. But that suggestion is unfounded: It is quite unlikely that the detailed rule and technical record at issue could properly be reconsidered so quickly, and it would be inappropriate to prejudge the outcome of the deliberative process of notice-and-comment rulemaking that would apply to any such action.

In these circumstances—where the present Administration disfavors the existing rule and the rule itself has been stayed by a court—the federal respondents' request for an indefinite abeyance would allow them to make an end-run around the Administrative Procedure Act's requirements for lawfully repealing the rule. It would place a duly promulgated rule on ice, prior to judicial review of its merits and without the process required by the APA, until the agencies take further action—even though they may take no further action at all. The Conservation Groups therefore request that the Court deny the federal respondents' motion, and move this case forward. In the

alternative, the Conservation Groups request that, rather than hold the litigation in abeyance indefinitely, this Court dismiss the writ as improvidently granted and direct the Sixth Circuit to address the merits forthwith, or to lift the stay of the rule.

BACKGROUND

The Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) issued the final Clean Water Rule (the Rule) on June 29, 2015. The Rule clarifies which water bodies are protected by the Clean Water Act (the Act). 80 Fed. Reg. 37,054. Multiple parties filed challenges to the Rule; challenges filed in the courts of appeals were transferred to and consolidated in the Sixth Circuit. The Conservation Groups filed narrow challenges to the Rule, arguing that it is underprotective of the Nation's waters, and also intervened as respondents to defend the Rule against claims that it protects too many waters.

On September 9, 2015, certain petitioners moved the Sixth Circuit for a stay of the Rule pending review. ECF No. 24 (6th Cir. No. 15-3799). The federal respondents opposed the stay. Among other things, they argued that a stay would "disserve[] the public interest" by undoing the "predictability and consistency achieved by the Rule." ECF No. 50-1 at 18-19 (6th Cir. No. 15-3799). They also argued that the Rule "protects the nation's waters," and therefore promotes the interests of many constituents, including the seven States (and the District of Columbia) that intervened to support the Rule. *Id.* at 19. The Conservation Groups also opposed the stay, emphasizing that the Rule restores the Clean Water Act's protections to critical water bodies across the country, including many that supply drinking-water systems, and allowing the Rule to

remain in effect would therefore serve the public interest. ECF No. 49 at 3-6 (6th Cir. No. 15-3799). Ruling on the stay motion, the Sixth Circuit made no finding that the Rule would cause irreparable harm to the movants, but it nonetheless stayed the Rule nationwide on October 9, 2015, pending further order of that court. ECF No. 64-2 at 5, 6 (6th Cir. No. 15-3799).

On February 22, 2016, the Sixth Circuit held that under section 509 of the Act, the courts of appeals—not the district courts—have exclusive jurisdiction to hear challenges to the Rule. ECF No. 72-2 (6th Cir. No. 15-3751). On January 13, 2017, this Court granted certiorari to consider whether the Sixth Circuit erred in making that jurisdictional determination.

On February 28, 2017, President Donald J. Trump signed Executive Order No. 13,778, requiring EPA and the Corps to "publish for notice and comment a proposed rule rescinding or revising the [Rule], as appropriate and consistent with law." 82 Fed. Reg. 12,497, § 2 (Mar. 3, 2017). Also on February 28, the agencies announced their intention to review the Rule and to "provide advanced notice of a forthcoming proposed rulemaking consistent with the Executive Order." 82 Fed. Reg. 12,532 (Mar. 6, 2017). On March 6, the federal respondents asked this Court, in light of the agencies' plan to rescind or revise the Rule, to "hold the briefing schedule in abeyance." Mot. 3. The motion does not specify what event would trigger an end to this abeyance, but the implication is that the abeyance could remain in place until the Rule is rescinded or revised.

ARGUMENT

I. The case is not moot, and is not likely to become moot before the Court resolves the jurisdictional question presented.

This case, including the jurisdictional question presented, is not moot, and no party claims otherwise. Despite the Sixth Circuit's stay of the Rule's effectiveness, the Rule remains good law, and it would apply to regulated entities immediately if that stay were not in place. No court has ruled on the merits of any challenges to the Rule, and the agencies have not even begun the process of rescinding or revising it in accordance with the notice-and-comment requirements of the Administrative Procedure Act. Challenges to the Rule are still live issues on which relief can be granted. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party" (quoting *Knox v. Serv. Emps.*, 567 U.S. 298, 132 S. Ct. 2277, 2287 (2012))).

Even assuming the federal respondents are no longer committed to defending in litigation the Rule or the Sixth Circuit's jurisdictional ruling, "there continues to exist between the parties that concrete adverseness which sharpens the presentation of issues." *Chafin*, 133 S. Ct. at 1024 (quoting *Camreta v. Greene*, 563 U.S. 692, 701 (2011)) (internal quotation marks omitted). NRDC, a full party to the case, is committed both to defending the Sixth Circuit's jurisdictional ruling in this Court, and to defending the Rule's protections on the merits in the court of appeals.[1] The petitioner here, National Association of Manufacturers, also expressly argued in its reply brief at the certiorari

[1] The federal government's responsive merits brief is already on file in the Sixth Circuit. ECF No. 149-1 (6th Cir. No. 15-3751) (filed Jan. 13, 2017).

stage that the new Administration's plans to rescind the Rule did not change the need for this Court to decide the jurisdictional question: "[T]he jurisdictional issue . . . remains live, recurring, uncertain, the subject of a circuit conflict, and critically in need of this Court's resolution[.]" Pet'r's Reply Br. 11. Whatever risk of mootness now exists was present at the time this Court granted certiorari.

Moreover, it is quite unlikely that this case could become moot before the Court resolves the jurisdictional question presented, for two reasons. First, it is still possible that the agencies may not rescind or revise the Rule at all, despite the executive order and the agencies' professed intent. The outcome of the new rulemaking process necessary to revise the present Rule is not—and cannot legally be—a foregone conclusion, as the President's executive order itself recognizes. *See* Exec. Order No. 13,778, 82 Fed. Reg. at 12,497, § 2 (ordering the agencies to review the Rule and publish a proposal rescinding or revising it "as appropriate and consistent with law"); *see also Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (it is unlawful for an agency official to prejudge irrevocably the outcome of a rulemaking). The Rule is supported by an extensive and compelling scientific record, and there are strong legal justifications for its protections; these factors will require the agencies to carefully explain and support any revisions they may propose. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (when an agency changes regulatory policy, it "must show that there are good reasons for the new policy," and when, for example, the new policy "rests upon factual findings that contradict those which underlay [the] prior policy," the agency must "provide a more detailed justification than what would suffice

for a new policy created on a blank slate"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (internal quotation marks omitted)). In the end, the agencies may simply opt *not* to roll back the Rule, or they may make changes that do not obviate the challenges at issue in this litigation.[2]

Second, even assuming the Rule were eventually rescinded or revised, a new round of notice-and-comment rulemaking would likely take far longer to complete than it will take this Court to resolve the jurisdictional question presented. *See* Pet'r's Reply Br. at 11 n.2 ("The agencies' review of the [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."). Briefing on the jurisdictional question presented to this Court is due to be completed by the end of June, with argument scheduled for the October 2017 term. But the rulemaking process for the current Rule took approximately ***four years*** to complete. *See* 80 Fed. Reg. at 37,102-03 (describing consultation with states, local governments, and Indian tribes at the "onset of rule development in 2011"); Definition

[2] If history is a guide, any attempt to weaken or rescind the Rule would face strong opposition from citizen groups, states, members of Congress, and scientists, like the public outcry that helped deter the agencies from weakening the Rule's regulatory predecessors at the beginning of the George W. Bush administration. *See* EPA, Press Release, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003) ("After soliciting public comment to determine if further regulatory clarification was needed, the EPA and the Corps have decided to preserve the federal government's authority to protect our wetlands."), available at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/540f28acf38d7f9b85256dfe00714ab0.html.

of "Waters of the United States" Under the Clean Water Act; Proposed Rule, 79 Fed. Reg. 22,188, 22,196 (Apr. 21, 2014) (stating that a draft of EPA's report on the connectivity of streams, wetlands, and downstream waters, which provides much of the scientific basis for the Rule, was completed in October 2011). The agencies solicited comments on the proposed rule for more than 200 days, and the Rule reflects over one million public comments submitted on the proposal, "as well as input provided through the agencies' extensive public outreach effort, which included over 400 meetings nationwide with states, small businesses, farmers, academics, miners, energy companies, counties, municipalities, environmental organizations, other federal agencies, and many others." 80 Fed. Reg. at 37,057. Any procedurally proper effort to unwind or revise this Rule would need to be at least as thorough, and such a process would almost certainly take years.

II. An abeyance would harm respondent Conservation Groups and allow an evasion of APA requirements.

The Sixth Circuit stayed the Rule nationwide, pending judicial review. As long as the stay remains in place, holding the litigation in abeyance indefinitely would severely harm the beneficiaries of the Rule, including the Conservation Groups and their members. The Conservation Groups seek to defend and uphold the Rule's protections, which benefit critical waters across the country that the Groups' members use and enjoy. The Groups and their members are harmed by any unnecessary delay of the Rule's effectiveness—including delays obtained through the litigation process at the behest of the federal respondents, who now openly oppose the existing Rule.

Put otherwise, in light of the existing stay, an indefinite delay of the litigation would essentially allow the agencies to use the judicial process to evade the requirements of the APA for repealing or revising the Rule. Legally, the agencies can revise or rescind the Rule only after giving the public an opportunity to comment on the proposed revision or rescission, 5 U.S.C. § 553(b), (c); *id.* § 551(5), and only after the agencies have given a reasoned explanation, with record support, for their action, *see Fox*, 556 U.S. at 515; *State Farm*, 463 U.S. at 43. Because the Sixth Circuit has stayed the Rule pending litigation, an indefinite abeyance of the briefing schedule would be the functional equivalent of an unlawful vacatur of the Rule without notice and comment. The agencies might take no action on the Rule and make no revisions to it for years, but because the Rule is stayed, in practice they would have accomplished an immediate rescission of the Rule with no public process.

The agencies cannot "circumvent the rulemaking process through litigation concessions" or other litigation tactics, "thereby denying interested parties the opportunity to oppose or otherwise comment on significant changes in regulatory policy." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) (denying request to stay a portion of a rule, even if EPA had consented to the stay); *see Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (denying federal government's request for voluntary remand and vacatur before judicial review of the merits, because it would "wrongfully permit the Federal defendants to bypass established statutory procedures for repealing an agency rule" and allow them to do through litigation concessions "what they cannot do under the APA"). A grant of the

agencies' motion while leaving the stay of the Rule in place would effectively nullify the Rule *before* notice-and-comment rulemaking even begins, and would "not account for the interests of other stakeholders who supported the rule" and who "stand to suffer harm" from its rescission. *Mexichem Specialty Resins*, 787 F.3d at 557.

III. In the alternative, this Court should dismiss the writ as improvidently granted.

If, given the agencies' stated intent to revise the Rule, this Court is inclined not to hear the question presented, then the Conservation Groups respectfully request that instead of holding the briefing schedule in abeyance indefinitely, the Court dismiss the writ as improvidently granted. That would allow the Sixth Circuit to dissolve its nationwide stay of the Rule while it holds the litigation in abeyance, or leave the stay of the Rule in place and proceed to hear the merits of the challenges to the Rule. Either of those results could be appropriate; the one litigation-management decision that is manifestly *not* appropriate is to punish the Rule's supporters with a stay they opposed, while also holding the case in abeyance at the behest of the federal respondents, who now oppose the Rule, and so now share the petitioner's interest in using the stay secured by opponents of the Rule to hold off its effects as long as possible.

In other words, given that the request for an abeyance rests on the supposition that the current President and federal respondents now disfavor the existing Rule, it would be unjust to the Rule's remaining supporters for this Court to grant a motion that freezes a stay in place at those respondents' request. If petitioner wants to press forward with its jurisdictional argument and the federal respondents do not wish to defend the

judgment below, NRDC will defend it. If (notwithstanding its earlier assurances) the petitioner does not want to press forward in light of the likelihood that the Administration will revise the Rule, then the writ of certiorari it sought should be dismissed, and the Conservation Groups will defend the Rule on its merits below. And if the petitioner stands willing to make its jurisdictional argument and the federal respondents stand willing to oppose it, then this case should move forward without further delay.

CONCLUSION

The motion for an abeyance of briefing should be denied, or in the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted this 15th day of March, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies that he has this day caused a copy of the foregoing Opposition of Respondent Conservation Groups to Motion of the Federal Respondents to Hold the Briefing Schedule in Abeyance to be served upon the below-named counsel by email and by first-class mail postage pre-paid, and further certifies that all persons required to be served have been served:

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