No. 16-299

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

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 U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPPOSITION OF THE STATES OF NEW YORK, CONNECTICUT, HAWAII, MASSACHUSETTS, OREGON, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA TO THE FEDERAL AGENCIES' MOTION TO HOLD THE BRIEFING SCHEDULE IN ABEYANCE

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The seven states and the District of Columbia listed above (States) respectfully submit this opposition to the motion of the United States Environmental Protection Agency and Army Corps of Engineers (Federal Agencies) to hold the briefing schedule in abeyance. The States oppose the motion because it would prejudice them by, in effect, extending indefinitely the stay of the Clean Water Rule (Rule) entered by the U.S. Court of Appeals for the Sixth Circuit even though that court's jurisdiction to issue that stay is in doubt, as this Court's grant of certiorari on the jurisdictional question demonstrates.

1. The matter pending here arose from challenges to the Rule, which defines the waters subject to the Clean Water Act. The States intervened in consolidated proceedings within the Sixth Circuit in support of the Rule, and that court thereafter issued a nationwide preliminary stay of the Rule over the States' opposition. This Court granted certiorari to decide whether challenges to the Rule must be commenced in the courts of appeals pursuant to 33 U.S.C. § 1369(b)(1) or in the district courts. Following this Court's grant of certiorari, the Sixth Circuit issued an order holding in abeyance briefing on the merits of the challenges to the Rule pending this Court's resolution of the jurisdictional question.

2. The Sixth Circuit's stay of the Rule injures the States and their waters by depriving them of the following important benefits. First, the Rule's definition of "waters of the United States" under the Clean Water Act is tailored to protect those wetlands and headwaters that have a significant impact on downstream waters. In this way it protects the States from upstream, out-of-state pollution over which

they lack regulatory authority. Second, the Rule provides greater certainty by reducing the need for case-by-case, potentially inconsistent, jurisdictional determinations by the Federal Agencies. And third, the Rule's clear definition of federally protected waters conserves the financial resources of the States by more efficiently regulating at the federal level waters that the States might otherwise need to regulate themselves.

3. The relief sought in the Federal Agencies' motion—to hold briefing in abeyance in this Court—would effectively extend indefinitely the Sixth Circuit's stay of the Rule to the prejudice of the States because the Sixth Circuit has deferred its consideration of the merits of challenges to the Rule pending a ruling from this Court on the jurisdictional question. An extension of the stay would be particularly problematic because there is a serious question (underscored by the granting of certiorari) as to whether the Sixth Circuit had jurisdiction to issue the stay in the first place.[1] An indefinite extension is of special concern because the Federal Agencies have not stated when the administrative process to rescind/revise the Rule will commence, and it cannot be known when it will be completed. Indefinitely holding briefing in abeyance in this Court as sought by the Federal Agencies would have the effect, if anything, of reducing their incentive for prompt

[1] If this Court reaches the jurisdictional issue and determines that the Sixth Circuit lacked jurisdiction, then the Sixth Circuit's stay of the Rule would have to be vacated. *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1218-19 (8th Cir. 1993), *cert. denied*, 511 U.S. 1017 (1994).

administrative action to rescind or revise the Rule because it would remain inoperative due to the Sixth Circuit's continuing stay.

4. Moreover, the relief sought by the Federal Agencies would have the effect of vacating the Rule. Rules cannot be vacated without completing a notice and comment procedure in accordance with the Administrative Procedure Act. *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C.Cir.1982) ("[T]he APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule."), *aff'd sub. nom*, *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983). And courts cannot vacate rules without consideration of their merits. *See Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) ("Whether agency action should be vacated depends on how serious the agency's errors" among other considerations). A prolonged and open-ended suspension of the Rule, akin to vacatur, would be at odds with the policies of notice and informed decision making that these limitations are designed to serve.

5. The Federal Agencies are wrong to claim that it would be wasteful to brief the jurisdictional issue now. The very same jurisdictional issue will arise if the Federal Agencies complete a rulemaking to rescind or revise the Rule. Contrary to the Federal Agencies' argument about waste, holding resolution of the jurisdictional issue in abeyance would be wasteful because following the Rule's rescission/revision there would be unnecessary litigation in both district and circuit

courts before the same jurisdictional issue inevitably comes back to this Court for its review.[2]

For all of these reasons, the States respectfully request that the Court deny the Federal Agencies' motion to hold briefing in abeyance.

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[2] As noted in the National Association of Manufacturer's reply supporting its certiorari petition, the jurisdictional question "remains live, recurring, uncertain, the subject of a circuit conflict, and critically in need of this Court's resolution." Petitioner's Reply at 11. The case before the Court is not moot and it is highly unlikely that a subsequent rulemaking would become final before a decision by this Court regarding jurisdiction.

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