No. 16-299

# In the Supreme Court of the United States

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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.*

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

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**RESPONSE OF STATE RESPONDENTS OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, THE NEW MEXICO STATE ENGINEER, THE NEW MEXICO ENVIRONMENT DEPARTMENT, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF THE MOTION OF THE FEDERAL RESPONDENTS TO HOLD THE BRIEFING SCHEDULE IN ABEYANCE**

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This case considers the proper jurisdiction for challenging the rule purporting to establish an expansive new definition of "waters of the United States" under the Clean Water Act. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("the Rule"). On March 6, 2017, the Environmental Protection Agency and the Army Corps of Engineers ("Agencies") moved under Rule 21.1 to place the case's briefing schedule in abeyance "[i]n light of" the President's Executive Order regarding the Rule, and the "prospect that the 2015 Clean Water Rule may be rescinded or revised" in short order. *See* Agencies' Mot., at 3. The State Respondents that join this response brought suit seeking just that outcome: rescission of the Rule. They support the Agencies' decision to review the Rule and hold the briefing in abeyance—*as long as* the Sixth Circuit's nationwide stay of the Rule remains in place during the rulemaking.

*First*, the Rule at issue here is unlawful and should be rescinded by the Agencies. The Rule violates the Clean Water Act because it broadly expands the Agencies' jurisdiction over many waters and lands reserved to state regulatory authority, and it violates the Administrative Procedure Act's notice-and-comment requirements because of the manner in which it was issued. Indeed, these arguments have *already* led the Sixth Circuit to issue a nationwide stay of the Rule, *see In re EPA*, 803 F.3d 804, 809 (6th Cir. 2015), and a district court to issue a preliminary injunction against it as well, *see North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015). Both of these decisions demonstrate the Rule's substantive and procedural defects, and provide ample justification (much

more than a "reasoned explanation") for the Agencies now to rescind the Rule in its entirety. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

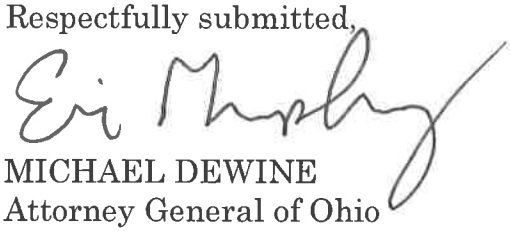
*Second*, efficiency concerns support the Agencies' motion to pause the briefing while they consider rescinding the Rule. If the Agencies ultimately rescind the Rule, there will be no reason for this litigation to continue. And they have already announced an intention to review and rescind the Rule. *See* Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (Mar. 6, 2017). Yet if this Court resolves the jurisdictional issue before that rulemaking ends, its decision could require many State Respondents to seek further protective relief against the Rule from the United States and/or in their respective district courts. The State Respondents fully anticipate that the Court will reverse the Sixth Circuit's jurisdictional ruling below because that ruling misinterpreted 33 U.S.C. § 1369(b)(1). But a decision to reverse the Sixth Circuit's jurisdictional holding could have the eventual effect of dissolving the Sixth Circuit's nationwide stay, perhaps requiring additional litigation. That future litigation would be entirely wasteful if the Agencies subsequently were to rescind the Rule administratively. And litigation over the Rule has already taken up significant time and resources of the parties and of many circuit and district courts across the country.

*Third*, the nationwide stay of the Rule has prevented it from having deleterious effects. The State Respondents support the motion to hold the briefing in abeyance only on the understanding that the stay would remain in place during

any new rulemaking. The Agencies themselves agree that it should remain in place. *See* Agencies' Mot., at 3.

*Fourth*, if this Court ultimately dismisses this case because the Agencies issue a new rule that completely rescinds the Rule challenged here, the State Respondents respectfully ask the Court to vacate the Sixth Circuit's jurisdictional ruling. That ruling wrongly disregarded the controlling text of 33 U.S.C. § 1369 for all of the reasons that the State Respondents detailed in their brief at the certiorari stage. And this Courts' "broad" supervisory power over the decisions of the lower courts is "commonly utilized in precisely this situation to prevent a judgment [or decision], unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950).

Respectfully submitted,



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