No. 07-588

IN THE

Supreme Court of the United States

ENTERGY CORPORATION,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents.

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

PETITIONER'S REPLY BRIEF

CHUCK D. BARLOW
ENTERGY SERVICES, INC.
308 E. Pearl Street
Jackson, MS 39201
(601) 969-2542

ELISE N. ZOLI
Counsel of Record
KEVIN P. MARTIN
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
(617) 570-1000

Counsel for the Petitioner

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Corporate Disclosure Statement

Entergy, a Delaware corporation, is a publicly traded company, and no publicly-held company has a 10% or greater ownership interest in Entergy.

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Certiorari is warranted here to address undisputed splits among the courts of appeals over an issue of unquestioned national importance: the limits of EPA's authority under the Clean Water Act ("CWA") to close or retrofit the nation's existing electric supply to protect early life stages of fish. EPA claims authority to issue new standards for cooling water *intake* structures under section 316(b) of the Act, 33 U.S.C. § 1326(b), and to impose them on existing facilities through so-called NPDES *discharge* permits. Brushing aside the absence of any such authority in the Act as a "textual hiccup," Pet. App. 75a, the Second Circuit deferred to EPA's arrogation of authority.

In its brief in opposition EPA now concedes, as it must, that lower courts are divided on the question whether to defer to agencies on the extent of agency jurisdiction. Respondents are also unable to distinguish the D.C. Circuit holding that NPDES permits may not be used to impose non-discharge requirements. Respondents' arguments that certiorari is not merited at this juncture are individually and collectively unconvincing; their suggestion that EPA's assertion of authority may be reversed or remedied on remand rings particularly hollow.

A. Conflicts Among the Courts of Appeals Over the Existing Facilities Question Merit This Court's Review

1. EPA concedes that, unlike the Second Circuit in this case, see *infra* at 3–5, "the Seventh Circuit has declined to defer to an agency's interpretation of the scope of its regulatory authority." U.S. Br. at 24 (citing *Northern Ill. Steel Supply Co.* v. *Secretary of*

Labor, 294 F.3d 844 (7th Cir. 2002)). Thus, a square conflict on an important issue exists.

The Seventh Circuit, however, is not alone in declining to defer to agencies over jurisdiction, contradicting EPA's position that *Chevron* provides a clear answer. See U.S. Br. at 23. Other courts have acknowledged the existence of a live dispute over the issue. See, *e.g.*, *O'Connell* v. *Shalala*, 79 F.3d 170, 176 n. 6 (1st Cir. 1996) (noting that "[t]he Supreme Court has never taken a clear institutional stand" on the issue); *Newton* v. *FAA*, 457 F.3d 1133, 1137 (10th Cir. 2006) (recognizing that the issue "has been a matter of dispute"). While EPA attempts to distinguish it as an "adjudicatory jurisdiction" case rather than a "regulatory jurisdiction" case, a distinction without a relevant difference, *Holderfield* v. *Merit Sys. Prot. Bd.*, 326 F.3d 1207, 1208 (Fed. Cir. 2003), also held that deference is not owed to agency determinations of their own jurisdiction. And EPA does not contest that the D.C. Circuit, since *Chevron*, has opined that "it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power." *New York Shipping Assoc.* v. *Federal Maritime Comm'n*, 854 F.2d 1338, 1363 n. 9 (D.C. Cir. 1988) (quoting *American Civil Liberties Union* v. *FCC*, 823 F.2d 1554, 1567 n. 32 (D.C. Cir. 1987)).

The scholarly debate around this question underscores the divisions in authority and the need for this Court's direction. As Professor Sunstein has observed, "[t]he Supreme Court has divided on the question of whether *Chevron* applies to jurisdictional questions, an issue that remains unsettled in the lower courts." Cass Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 Yale

L.J. 2580, 2604 (2006). See also Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 1024–25 (1992); Ernest Gellhorn and Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989 (1999); Elizabeth Garrett, *Legislating Chevron*, 101 Mich. L. Rev. 2637, 2673–74 (2003); Thomas Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2173–74 (2004).

To downplay the acknowledged split in authority, EPA argues that the Seventh Circuit decision "did not * * * involve section 316(b) (or the CWA more generally)." U.S. Br. at 24. But deference is a core principle of broad application; the cert-worthiness of the questions whether and when deference should be granted to agency assertions of jurisdiction does not depend on whether cases addressing those issues involve the same provision or statute. Such a hurdle to review would unduly limit this Court's opportunities to redress regulatory over- or under-reach.

Taking a different tack, Respondents assert that the Second Circuit's decision "*does not appear* to rely on deference." U.S. Br. at 22 (emphasis added). The decision below, however, leaves no room for doubt that, but for deference, the Second Circuit could neither have surmounted the plain language of the Act (relegated to a "textual hiccup" under its deferential standard), nor the Act's indisputable limits, particularly what the Second Circuit characterized as the "harder question" of the limited reach of Section 402 solely to the discharge, not the intake of, water.

In particular, the court introduced the existing facilities issue by stating that "EPA permissibly

interpreted the statute to cover existing facilities and that its interpretation is therefore entitled to deference under *Chevron*," App. 72a, then consistently repeated the deference mantra that EPA's reading of the Act was "reasonable." See *id.* at 74a ("EPA's reading is far more reasonable than Entergy's"); *id.* at 75a ("At the very least, the EPA's view that section 316(b) applies to existing facilities is a reasonable interpretation of the statute, and we therefore accord it deference"). Given how the court actually considered the issue, its passing reference to the "plain language" of the Act in a rote summary of its earlier conclusion that deference was warranted amounts to a *non sequitur*.

Moreover, the Second Circuit indisputably deferred to EPA's authority to impose new section 316(b) requirements on existing facilities via the periodic NPDES permitting process. The decision below speaks only in terms of "reasonableness," never mentioning "plain language," and concedes that a "textual basis for the EPA to regulate cooling water intake structures during the periodic permitting process applicable to the discharge of pollutants is not immediately apparent." App. 75a. Only by ignoring the actual language of the Act as a "textual hiccup" was the court able to conclude that "the EPA's decision * * * is not unreasonable." *Id.* at 75a–76a; *id.* at 76a ("it is at least reasonable to conclude" that NPDES permits may impose new section 316(b) requirements); *ibid.* ("It is a fair conclusion that section 402 implicitly requires permitting authorities to ensure compliance with section 316(b) as a [NPDES] permit condition"). The court's stark conclusion that "[s]ection 402 thus does not undermine the deference to which the Agency's

interpretation of section 316(b) is entitled under *Chevron*" eliminates any doubt. *Id.* at 77a.

Respondents implausibly contend that Entergy waived the deference argument. As EPA concedes, however, Entergy argued in its opening brief below that "discretion [is] inappropriate regarding matters of agency authority." U.S. Br. at 22 & n.2 (quoting Entergy C.A. Br. at 33). Moreover, in its reply brief, Entergy specifically directed the Second Circuit to the Seventh Circuit's decision in *Northern Illinois*. See Entergy C.A. R. Br. at 19. The Second Circuit was briefed on this precise discretion issue, yet, as discussed *supra*, expressly deferred to EPA on the existing facilities issue. The waiver argument, accordingly, is meritless.

In short, although unsurprisingly interested in preserving broad deference to its decision-making, EPA's arguments, and those of the other Respondents, cannot hide the fact that since *Chevron* a significant split has developed among the courts of appeals (and in academia) concerning judicial deference to agency assertions of jurisdiction.

2. The Second Circuit also deferred to EPA by concluding that it may impose new section 316(b) requirements on existing facilities through NPDES permits issued under section 402 of the Act. This interpretation of EPA's authority under section 402—the only mechanism any Respondent has put forward by which EPA may impose new section 316(b) requirements on existing facilities—implicates another split in circuit authority requiring resolution by this Court. See Pet. at 17–20.

On its face, section 402 of the CWA only permits EPA to issue "a [NPDES] permit for the discharge of

any pollutant * * * upon condition that *such discharge*" will meet certain requirements, including, for example, the discharge requirements of sections 301 and 306 of the Act. See 33 U.S.C. § 1342(a)(1) (emphasis added). In *Natural Res. Def. Council* v. *EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) ("*NRDC*"), the D.C. Circuit held that EPA "is powerless to impose permit conditions unrelated to the discharge itself." Under the D.C. Circuit's reasoning, conditions relating to the *intake* of water—not being "conditions []related to the discharge itself"—could not be imposed through NPDES permits. Yet the Second Circuit, in deference to EPA, held that the agency could do precisely that.

Respondents argue that *NRDC* is distinguishable because it involved an attempt to use NPDES permits to impose the requirements of a different statute. See U.S. Br. at 21. The D.C. Circuit, however, did not rest its holding on that basis; as quoted above, it rejected EPA's rulemaking because it sought to "to impose permit conditions unrelated to the discharge itself." EPA's suggestion that it may not be "required" to impose non-discharge requirements through NPDES permits but it is has the discretion to do so is also squarely in conflict with *NRDC*. See U.S. Br. at 20.

Alternatively, EPA asserts that "the intake and discharge of water are closely associated with one another." U.S. Br. at 20. Respondents decline to circle the wagons and instead contradict EPA. See, *e.g.*, Riverkeeper Br. at 1 ("Section 316(b) is the only provision in the statute that regulates water *withdrawals*, as opposed to *discharges*") (emphases in original). And even EPA seems of two minds. See U.S. Br. at 2–3 (section 316(b) "is unique among

CWA provisions in that it addresses the *intake* of water, in contrast to other provisions that regulate the *discharge* of pollutants") (emphases in original). In any event, no Respondent distinguishes the Fourth Circuit's conclusion that "it is obvious" that section 316(b) requirements are not discharge limitations. See Pet. at 19 (discussing *Va. Elec. & Power Co.* v. *Costle*, 566 F.2d 446, 449 (4th Cir. 1977).

3. Respondents seek to avoid this Court's review of the splits in circuit court authority discussed above by casting doubt on the ultimate merits question in the case. These various merits arguments are not relevant to the issue of cert-worthiness and are in any event meritless.

Respondents assert that because standards set under section 301 apply to existing facilities, section 316(b)'s cross-reference to section 301 necessarily means that revised section 316(b) standards may be imposed on existing facilities. See U.S. Br. at 18–19. As explained in the petition, however, section 301 applies to "all point sources"—*i.e.*, both existing *and new* facilities—pending EPA's issuance of potentially more stringent standards for new facilities under section 306. See Pet. at 16–17 (quoting 33 U.S.C. § 1311(e) (emphasis added)). Given the phrasing of section 316(b)'s operative provision (referring to the "location, design, construction, and capacity" of intake structures) and the CWA's lack of any means to impose new section 316(b) standards on existing facilities, the limited import of section 316(b)'s cross-reference to section 301 is clear: to the extent a category of facilities is still subject to section 301 rather than section 306 regulations, any *new*

facilities in that category must build their intake structures in compliance with section 316(b).

EPA, in discussing NPDES permits, accurately quotes section 402 as requiring that "such discharge will meet * * * all applicable requirements under sections [301 and 306]." U.S. Br. at 20. The agency, however, then immediately paraphrases this language, removing the key reference to discharges so that it reads "further direct[ing] that NPDES permits contain all applicable section 301 requirements." *Ibid.* That paraphrase is not a fair representation of the statutory text. Even if section 316(b) requirements are incorporated into sections 301 and 306, it is nonsensical to talk of the *intake* requirements of section 316(b) being "applicable requirements" that a "discharge" must "meet." Furthermore, any suggestion that sections 301 and 306 convert section 316(b) requirements into discharge imitations would conflict with the *Va. Elec.* decision, discussed *supra*.

Lastly, Riverkeeper worries aloud that, if NPDES permits cannot be used to impose new section 316(b) requirements on existing facilities, it "would render section 316(b) meaningless by depriving EPA of a mechanism for imposing its requirements." Riverkeeper Br. at 30. But confirming that NPDES permits to not provide "*a* mechanism" for implementing 316(b) does not, of course, render the entire provision "meaningless." Section 316(b) applies to new facilities, where the pre-construction permitting process of section 401 of the CWA provides for the imposition of "effluent limitations *and other limitations*," including, where appropriate, section 316(b) limitations. See Pet. at 18 (quoting 33 U.S.C. § 1341(d) (emphasis added)). Section 401

demonstrates that where Congress wants to provide regulators authority to implement section 316(b) it uses broad language ("other limitations"); section 402, on the other hand, refers only to discharges and "effluent limitations," and never to "other limitations." See 33 U.S.C. § 1342 (referring to a "discharge" 57 times and "effluent limitations" in 13 places, but never to "other limitations").

4. EPA suggests that Entergy's concerns with the Phase II rulemaking may be resolved on remand to the agency, during which it will reconsider its selection of a "best technology available" ("BTA"). See U.S. Br. at 24. Remand, however, will not address the existing facilities issue, because under a proper reading of the CWA the agency may not impose a new BTA standard on existing facilities *at all*. The proceedings ordered by the Second Circuit will do nothing to ameliorate the *ultra vires* nature of the entire exercise.

In the meantime, as EPA concedes, existing facilities up for renewal of their NPDES permits may be required to undergo costly retrofitting. See Pet. at 20–21; see also U.S. Br. at 9 (decision below "may have significant repercussions for facilities that undergo permitting decisions before the remand proceedings are completed"). As explained in the petition and the briefs of *amici*, if regulators require a nuclear facility to retrofit with cooling towers, it could result in its closure and cost hundreds of millions of dollars, in either case disrupting the nation's electric supply. See, *e.g.*, Pet. at 20.

B. The Cost-Benefit Issue Implicates Further Circuit Splits

Entergy agrees with UWAG and PSEG that, for the reasons given in their reply briefs, the Court should grant certiorari on the cost-benefit issue raised by all three petitions. Entergy writes separately to stress two points.

1. Riverkeeper argues that the Court should defer consideration of the issue pending resolution of a Fifth Circuit case also concerning section 316(b), at which point "any party aggrieved by either circuit's decision [could] seek this Court's review." Riverkeeper Br. at 15–16. That is not so. The Fifth Circuit case concerns "Phase III" facilities, including existing facilities under a certain size threshold. Some entities (such as Entergy) with "Phase II" facilities—larger existing facilities—are petitioners in the case at bar, but not in the Fifth Circuit, and hence could not petition for review from that court. In addition, if industry and EPA win on the cost-benefit issue in the Fifth Circuit, the environmental groups might conclude that they are better off living with something better than half a loaf (application of the Second Circuit's "cost effectiveness test" to the larger Phase II facilities) and thus not seek certiorari. Because EPA and industry, as the (hypothetical) prevailing parties in the Fifth Circuit, would not have standing to petition this Court, the circuit split would be unreviewable. Phase II petitioners, such as Entergy, would have no recourse.

Furthermore, if, for the reasons given above, this Court should grant certiorari on either of the questions pertaining to the existing facilities issue,

there would be no reason for the Court not to consider the cost-benefit issue at the same time.

2. Downplaying the practical impact of the decision below, Riverkeeper accuses Entergy of "hyperbole" in suggesting that the Second Circuit would require the expenditure of billions of dollars to save a single fish larvae. See Riverkeeper Br. at 14. Riverkeeper's sanguine view is possible only by ignoring the court's explanation of its "cost effectiveness" test:

> EPA, given a choice between a technology that costs $100 to save 99–101 fish and one that costs $150 to save 100–103 fish (with all other considerations, like energy production or efficiency, being equal), could appropriately choose the cheaper technology on cost-effectiveness grounds.
>
> * * *
>
> [T]he EPA could not choose the cheaper technology on cost considerations under section 316(b) if the EPA had first determined that the power plants could reasonably bear the cost of technology that could save at least 102 fish.

App. 27a–28a.

Thus, the Second Circuit stated that EPA must under some circumstances require the expenditure of potentially billions of dollars on intake structure technology if it will guarantee the survival of an extra fish or larvae (102 fish versus 99–101 fish). The absurdity of a remand proceeding in which EPA narrowly skirts compromising the nation's electric suppliers as a whole to achieve minute resource

protection differences at the margin underscores the importance of the Court granting certiorari now.

Conclusion

The decision below fosters confusion about the proper scope of deference to EPA and authorizes an untenable expansion of the periodic NPDES permitting provision to embrace, not the discharges that are the Act's focus, but intake structures mentioned only in a provision of the Act that the Second Circuit characterized as a Congressional "afterthought." Pet. App. 5a. Absent this Court's granting certiorari, that "afterthought" will be the new focus of the Act and among the costliest rulemakings is its history. Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

CHUCK D. BARLOW
ENTERGY SERVICES, INC.
308 E. Pearl Street
Jackson, MS 39201
(601) 969-2542

ELISE N. ZOLI
Counsel of Record
KEVIN P. MARTIN
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
(617) 570-1000

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