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

BRIEF OF STATE RESPONDENTS OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, THE NEW MEXICO STATE ENGINEER, THE NEW MEXICO ENVIRONMENT DEPARTMENT, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the federal rule redefining the "waters of the United States" that are subject to the Clean Water Act fall within the exclusive, original jurisdiction of the circuit courts of appeals under 33 U.S.C. § 1369(b)(1)?

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INTRODUCTION

The federal government seeks to resuscitate the long-repudiated style of interpretation under which "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). The Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively, "the Agencies") make arguments that are the flipside of *Holy Trinity*. In June 2015, they issued a rule purporting to establish an expansive new definition of "waters of the United States" for 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"). They argue that 33 U.S.C. § 1369(b)(1) grants circuit jurisdiction over challenges to this Rule because—while the Rule does not fall "within the letter" of § 1369(b)(1)—it falls within that provision's efficiency-based animating "spirit." *See Holy Trinity*, 143 U.S. at 459.

The Agencies' purpose-over-text approach to statutory interpretation suffers from two main problems. *First*, "*Holy Trinity* is a decision that the Supreme Court stopped relying on more than two decades ago." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 12 (2012). Nowadays, this Court follows a rule quite different from the one propounded by *Holy Trinity* in 1892 and suggested by the Agencies today—namely, that courts generally "presume Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (citation omitted). The Court's plain-text approach resolves this case.

The Agencies argue that Subsections (E) and (F) of § 1369(b)(1) are broad enough to reach the Rule. Subsection (E) covers EPA action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345"; Subsection (F) covers EPA action "issuing or denying any permit under section 1342." (Unless otherwise indicated, section citations are to Title 33 of the U.S. Code.) The Agencies are wrong. As a matter of pure text, the controlling concurrence below called their interpretation "illogical and unreasonable," Pet. App. 29a (Griffin, J., concurring in judgment), and even the lead opinion described their interpretation as "not compelling," *id.* at 9a (McKeague, J., op.).

Starting with Subsection (E), the Rule does not "promulgat[e]" an "effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." Those four sections direct the EPA to issue distinct types of pollution restrictions: technology-based restrictions (§ 1311), water-quality restrictions (§ 1312), new-source restrictions (§ 1316), or sewage-sludge restrictions (§ 1345). The Rule, by contrast, promulgates a *definition*, not a *limitation*. It even notes that it "does not establish any regulatory requirements." 80 Fed. Reg. at 37,054. Further, the Rule was not issued *under* the four listed sections. It instead defines statutory text ("waters of the United States") found only in a definitional section (§ 1362(7)) under, if anything, the Agencies' general rulemaking authority (*e.g.*, § 1361(a)).

Turning to Subsection (F), the Rule does not issue or deny a pollution-discharging permit under the permitting program established by § 1342. The Agencies instead interpret Subsection (F) far more broadly to cover anything *affecting* § 1342's permitting process. Their interpretation reads the "issuing or denying" verbs right out of the statute. As this Court has already explained to the EPA, "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

Second, even under a purpose-based approach, the Agencies' argument—that circuit jurisdiction here promotes § 1369(b)(1)'s alleged efficiency purpose—overlooks that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). "[A]nd it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 526. This case proves that point. Other important purposes could have motivated Congress to draft the specific language in § 1369(b)(1) that excludes the Rule.

For one thing, the Agencies' reading muddies a relatively straightforward jurisdictional statute, despite Congress's desire for a "clear and orderly process for judicial review." *See* H.R. Rep. No. 92-911, at 136 (1972). This Court has long presumed that Congress intends for jurisdictional statutes to yield "simple" rules. *Hertz Corp. v. Friend*, 559 U.S. 77, 80, 94 (2010). Vague rules ensure that "'an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much

better spent upon elucidating the merits of cases.'" *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment) (citation omitted). This litigation spotlights those hazards. "[C]areful counsel" have had to sue simultaneously at two levels of the judiciary "to protect their rights," *Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977), and many courts have spent significant resources to "assure themselves of their power to hear" these suits, *Hertz*, 559 U.S. at 94. The Agencies' amorphous reading of Subsections (E) and (F) would cement this wasteful double litigation. Parties and courts would routinely find it difficult to determine whether a particular regulation has an "indirect consequence" of initiating limitations found elsewhere in the Act (so as to trigger Subsection (E)), or whether the regulation sufficiently "impact[s] permitting requirements" (so as to trigger Subsection (F)). Pet. App. 10a, 18a (McKeague, J., op.). Far better that courts stick to the comparatively simpler rules flowing out of § 1369(b)(1)'s text.

For another thing, the Agencies' interpretation could restrict the judicial review available in as-applied challenges. This Court has long presumed that Congress intends for final agency action to be judicially reviewable under the Administrative Procedure Act. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016). But § 1369(b)(2) bars judicial review over actions that fall within § 1369(b)(1)'s purview in any later "civil or criminal proceeding for enforcement." Given this restriction, other courts have refused to "read[] § [1369](b)(1) broadly." *Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (Easterbrook, J.). They instead have presumed that Congress did not intend for

§ 1369(b)(2)'s "peculiar sting" to apply to actions not plainly covered by § 1369(b)(1)'s terms. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992).

At day's end, § 1369(b)(1)'s text resolves this case, and the Court should reject the Agencies' policy-driven reasons for departing from that text.

STATEMENT OF THE CASE

A. The Act's Regulatory Scheme

The Clean Water Act prohibits any unauthorized "discharge of any pollutant by any person." 33 U.S.C. § 1311(a). The Act defines "pollutant" to include many ordinary substances, including dirt and fill materials. *Id.* § 1362(6). It defines "discharge of a pollutant" to cover "any addition of any pollutant to navigable waters from any point source," such as a pipe or ditch. *Id.* § 1362(12), (14). And it defines "person" to include individuals, corporations, and States. *Id.* § 1362(5).

As an exception to § 1311(a)'s ban on discharges, the Act establishes two permitting programs that implicate the jurisdictional question before the Court. Under § 1342(a), the EPA administers the "National Pollutant Discharge Elimination System" ("NPDES"), and issues permits allowing persons to discharge pollutants that can wash downstream. Under § 1344, the Corps issues permits allowing persons to discharge "dredged or fill material," "which, unlike traditional water pollutants, are solids that do not readily wash downstream." *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality op.). Both § 1342 and § 1344 authorize States to operate their own permitting programs for waters within their

borders. 33 U.S.C. §§ 1342(b), 1344(g). Most States have done so under the NPDES program in § 1342; two States have done so under the program for dredged or fill material in § 1344.

A permit holder seeking to discharge pollutants must abide by the limitations that are established under other statutory sections. *Id.* § 1342(a). Many of these specific sections (and a few others) also implicate the jurisdictional question presented here.

Technology Limits (§ 1311). "[C]aptioned 'effluent limitations,'" *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112, 118 (1977), § 1311 directs the EPA to establish technology-based "effluent limitations" for *existing* point sources. These limitations were established in "two stages." *Id.* at 121. Early limits were tied to the "best practicable control technology" for point sources or to more stringent state or federal water-quality standards. 33 U.S.C. § 1311(b)(1)(A), (C). Later effluent limitations were tied to the "best available technology economically achievable" (for toxic pollutants) or the "best conventional pollutant control technology" (for conventional pollutants). *Id.* § 1311(b)(2)(A), (E); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 220-21 (2009). These limits are incorporated into specific permits under § 1342(a), which "serve 'to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger(s).'" *E.I. du Pont*, 430 U.S. at 119-20 (citation omitted). For some effluent limitations, however, § 1311(c) allows a point source to seek a variance based on individual need.

Water-Quality Limits (§ 1312). Section 1312 directs the EPA to set more stringent "[w]ater quality related effluent limitations" for specific water bodies.

The EPA may do so if it determines that § 1311(b)(2)'s technology-based limitations would be inadequate to protect public health, water supplies, and certain uses. *See* 33 U.S.C. § 1312(a).

New-Source Limits (§ 1316). Section 1316 directs the EPA to set "[n]ational standards of performance" for "new sources." These new sources must follow a distinct technology-based standard—the "best available demonstrated control technology" at the time that construction begins on the new source. *Id.* § 1316(a)(1)-(2). A State also may enforce new-source standards within its borders if approved to do so by the EPA. *Id.* § 1316(c).

Limits on Toxic Pollutants (§ 1317) & Sewage Sludge (§ 1345). Outside this overarching structure, some pollutants receive specific treatment. Section 1317 directs the EPA to establish a list of, and potentially set more restrictive "effluent standards" for, certain "toxic pollutants." *Id.* § 1317(a). In addition, Section 1345, as amended in 1987, directs the EPA to set either "numerical limitations" on certain toxic pollutants found in "sewage sludge," or "[a]lternative standards" for publicly owned treatment works if those numerical limits are infeasible. *Id.* § 1345(d)(2)-(3); *see* Pub. L. No. 100-4, § 406, 101 Stat. 71-72.

State Water-Quality Standards (§ 1313). Before the Clean Water Act, federal law directed each State to set "water quality standards" for interstate waters "flowing through" the State's borders. *E.g.*, S. Rep. 92-414, at 2 (1971). Section 1313 continues that practice. It directs States to issue and periodically update water-quality standards, and to adopt "total maximum daily loads" for water bodies that cannot

meet those standards through § 1311's technology-based limitations alone. 33 U.S.C. § 1313(a), (c)-(d). "These state water quality standards provide 'a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (citation omitted). As part of these standards, States must adopt "individual control strateg[ies]" for "toxic pollutants." 33 U.S.C. § 1314(l)(1)(D). If the EPA rejects a State's individual control strategy, the EPA may promulgate its own for the relevant waters. *Id.* § 1314(l)(3).

B. The "Waters Of The United States" Rule

The phrase "navigable waters" identifies the waters that are covered by "the entire statute," and so its meaning delineates the reach of the Act's sections. *Rapanos*, 547 U.S. at 742 (plurality op.). The Act's definitional section defines "navigable waters" to "mean[] the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The Corps originally interpreted the phrase "waters of the United States" under the "traditional judicial definition," which covered only "interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (plurality op.). Environmental groups challenged that definition, however, and a district court invalidated it as too narrow. *Nat. Res. Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975). Since then, the Agencies have "adopted a far broader definition." *Rapanos*, 547 U.S. at 724 (plurality op.). This Court has rejected their overly broad definition

as applied to certain wetlands, *see id.* at 786-87 (Kennedy, J., concurring in judgment), and to an "abandoned sand and gravel pit . . . which provide[d] habitat for migratory birds," *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) ("*SWANCC*").

The Rule is another attempt by the Agencies to define "waters of the United States" too broadly; if implemented, it would "invariably result[] in expansion of [their] regulatory authority." Pet. App. 15a (McKeague, J., op.). The Rule is unlawful in many respects, including because it extends the Agencies' regulatory authority to many lands that the Act does not cover under this Court's teachings, and because it adopts specific distance-based standards without any record support or public notice. The States have thus obtained a nationwide stay and a preliminary injunction against its implementation. *See In re EPA*, 803 F.3d 804, 807-09 (6th Cir. 2015); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1056-58, 1060 (D.N.D. 2015).

More important for present purposes, the Rule purports *only* to define the waters that are subject to federal regulation under the Act. "In this joint rulemaking," the Rule indicates, "the agencies establish a definitional rule that clarifies the scope of the Clean Water Act." 80 Fed. Reg. at 37,104. The Rule does not change any of the Act's mechanisms, set any standards or limitations, exempt or include any sources or pollutants, or issue or deny any permits. The Rule notes that it "does not establish any regulatory requirements," *id.* at 37,054, and "imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain

regulatory requirements that might significantly or uniquely affect small governments," *id.* at 37,102.

C. Judicial Review Under The Act

Seeking to "establish a clear and orderly process for judicial review," H.R. Rep. No. 92-911, at 136 (1972), the Clean Water Act divides jurisdiction between the circuit courts and the district courts based on the type of EPA action that is at issue. For most final EPA or Corps actions, challengers may sue in the district court under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 704. In this Court's recent cases, for example, the plaintiffs who asserted that their lands were not "waters of the United States" sued in district court under the APA. *E.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016); *Sackett v. EPA*, 566 U.S. 120, 125 (2012); *Rapanos*, 547 U.S. at 765 (Kennedy, J., concurring in judgment); *SWANCC*, 531 U.S. at 165.

The Act also identifies seven specific actions by the EPA's Administrator that are subject to immediate circuit review. 33 U.S.C. § 1369(b)(1). In particular, it requires circuit review for EPA action:

> (A) in promulgating any standard of performance under section 1316 of this title,
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
> (F) in issuing or denying any permit under section 1342 of this title, and
> (G) in promulgating any individual control strategy under section 1314(l) of this title[.]

Id. These petitions for review must be filed "within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." *Id.* If a party could have sought review under § 1369(b)(1), that party cannot later assert the challenge in enforcement proceedings. *Id.* § 1369(b)(2).

D. State Challenges To The Rule

The State Respondents believe that circuit courts lack jurisdiction over the Rule under § 1369(b)(1) because the Rule does not fall within one of the seven listed actions. So they filed district-court suits challenging the Rule. *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.); *Ohio v. U.S. Army Corps of Eng'rs*, 2:15-cv-2467 (S.D. Ohio); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *Oklahoma ex rel. Pruitt v. EPA*, No. 4:15-cv-381 (N.D. Okla.).

Yet, given the Agencies' suggestion that the Rule fell within § 1369(b)(1)'s *exclusive* jurisdictional grant, *see* 80 Fed. Reg. at 37,104, the State Respondents filed protective petitions for review in the circuit courts. *E.g.*, *Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977); *see Ohio v. U.S. Army Corps of Eng'rs*, No. 15-3799

(6th Cir.); *Oklahoma ex rel. Pruitt v. EPA*, No. 15-9551 (10th Cir.); *North Dakota v. EPA*, No. 15-2552 (8th Cir.); *Texas v. EPA*, No. 15-60492 (5th Cir.); *Georgia v. McCarthy*, No. 15-13252 (11th Cir.). Those petitions were consolidated in the Sixth Circuit with the petitions from many other groups. 28 U.S.C. § 2112(a).

After consolidation, the States filed motions to dismiss the petitions for lack of jurisdiction. The Sixth Circuit denied the motions in a fractured 1-1-1 decision. Pet. App. 4a (McKeague, J., op.); *id.* at 27a (Griffin, J., concurring in judgment).

The lead opinion, written by Judge McKeague, concluded that the circuit courts had jurisdiction under Subsections (E) and (F) of § 1369(b)(1). Pet. App. 3a-26a. Relying primarily on cases interpreting § 1369(b)(1) rather than the statute's text, Judge McKeague noted that the section had been "construed not in a strict literal sense, but in a manner designed to further Congress's evident purposes." Pet. App. 26a. Under this pragmatic approach, the lead opinion agreed with the Agencies that Subsection (E) could extend to regulations, like the Rule, that had an "indirect consequence" of triggering limitations found elsewhere in the Act. *Id.* at 10a. And the lead opinion agreed that Subsection (F) could cover regulations, like the Rule, that "impact permitting requirements." *Id.* at 18a.

Judge Griffin concurred in the judgment. Pet. App. 27a-45a. The concurrence disagreed that the Sixth Circuit had jurisdiction under the text of Subsections (E) and (F), finding the Agencies' reading to be "illogical and unreasonable." *Id.* at 29a. Nevertheless, the concurrence believed that the panel was

compelled to follow "incorrect" circuit precedent applying Subsection (F). *Id.* at 44a (discussing *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009)). "Absent *National Cotton*," the concurrence would have "dismiss[ed] the petitions for lack of jurisdiction." *Id.* at 45a.

Judge Keith dissented. Pet. App. 45a-47a. The dissent agreed with the concurrence's reading of Subsections (E) and (F). *Id.* at 45a. But the dissent did not read *National Cotton* as compelling a finding of jurisdiction under Subsection (F). *Id.* at 45a-47a.

The Sixth Circuit denied en banc review. *Id.* at 52a. It has since stayed briefing on the merits.

SUMMARY OF ARGUMENT

A. The plain text of Subsections (E) and (F) shows that circuit courts lack jurisdiction over the Rule under § 1369(b)(1).

Subsection (E). Subsection (E) covers EPA action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." This text has three elements. Its verb choices extend to EPA actions that "approv[e]" something adopted by another or that "promulgat[e]" something adopted by the EPA itself. In addition, the thing being approved or promulgated must be an "effluent limitation or other limitation." The Act defines "effluent limitation" to cover certain restrictions on discharges into navigable waters. The Act does not define "other limitation." That phrase is best read as covering restrictions that are similar to an effluent limitation, but that fall outside its technical definition. Finally, the EPA must issue the limitation

"under"—i.e., according to the authority of—four specific sections, § 1311, 1312, 1316, or 1345.

For two reasons, this text does not reach the Rule. *First*, the Rule does not "promulgate" an "effluent limitation or other limitation." It does not issue any restrictions on regulated parties, and instead defines the scope of the phrase "waters of the United States." *Second*, the Agencies did not issue the Rule pursuant to congressional instructions found within the four listed sections; instead, they defined a phrase used only in the definitional section (§ 1362) under, if anything, their general rulemaking authority.

In response, the Agencies argue that Subsection (E)'s text is broad enough to cover regulations, like the Rule, that have a "practical effect" of triggering limitations found *elsewhere* in the Act, such as § 1311(a)'s general ban on discharges into navigable waters. Both text and precedent disprove this interpretation.

As for text, Subsection (E)'s *entire* clause shows that the thing that the EPA "promulgates" itself must be the limitation. Other sections confirm this reading because they treat "effluent limitations or other limitations" as things that *themselves* can be *violated*. *E.g.*, 33 U.S.C. § 1341(a)(4). And the Agencies' argument lacks a logical stopping point. For example, *Sackett v. EPA*, 566 U.S. 120 (2012), considered an EPA action finding specific lands to be "waters of the United States." *Sackett* started in the district court under the APA—even though the agency action had a "practical effect" of triggering the Act's limits. Finally, the Agencies mistakenly argue that the Rule issued "under section 1311" within the meaning of Subsection (E) merely because they ref-

erenced that section in the portion of the Rule that identifies the "legal authority" to adopt it. Yet that portion of the Rule identifies the *entire* Act as providing the Agencies with such authority, and they should not be able to manufacture jurisdiction merely by mentioning a section listed in Subsection (E).

As for precedent, the Agencies argue that *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977), supports their "practical" construction of Subsection (E). But *E.I. du Pont* does not, as the lead opinion below asserted, justify "eschew[ing]" a "literal reading" of Subsection (E). *E.I. du Pont*, in fact, *adopted* a literal reading by rejecting an atextually narrow view that would have limited "under section 1311" to EPA variances issued under § 1311(c). While *E.I. du Pont* also relied on practical concerns, it did so only to reinforce the plain text.

Subsection (F). Subsection (F) covers EPA action "issuing or denying any permit under section 1342." This section has two elements. The EPA must "issue" (grant) or "deny" (refuse access to) "any permit." The issuance or denial must also be "under" (i.e., according to the authority of) § 1342. In this way, the Act splits judicial review for permitting decisions: It authorizes circuit review for EPA permits under the NPDES program in § 1342, and district review for Corps permits for dredged or fill material in § 1344.

Here, the Rule neither issues a permit nor denies one under § 1342. That fact ends the analysis under Subsection (F)'s unambiguous text.

In response, the Agencies argue that Subsection (F) covers all EPA actions that "impact" or "affect" permitting. But the Agencies offer *no* textual hook

for this interpretation, which reads "issuing or denying" out of the subsection. And the holding of *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980)—that an EPA veto of a state-issued permit qualifies as a denial of that permit—comports with the plain text. Under the word's ordinary meaning, "deny" means "to refuse the use of or access to." That is precisely what the EPA veto accomplished. And while *Crown Simpson* also referenced practical concerns, the Court again did so merely to reinforce, not repudiate, the text.

B. The plain language of Subsections (E) and (F) alone decides this case. Nonetheless, reading § 1369(b)(1) as a whole confirms that the Rule is not subject to immediate circuit review. Section 1369(b)(1) establishes circuit review for seven *specific* EPA actions, down to the subsection under which some actions are authorized. This precision should make the Court wary of adopting a loose "practical" construction of § 1369(b)(1). A comparison of that provision to its counterpart in the Clean Air Act illustrates why. The Clean Air Act grants circuit jurisdiction over "any" final EPA action, showing that Congress knows how to provide for broad circuit review when it wants to.

Yet the Agencies' broad reading of Subsections (E) and (F) would permit circuit review over actions that Congress excluded from § 1369(b)(1). Take their reading that "under section 1311" in Subsection (E) covers regulations implicating anything mentioned in that section (such as "navigable waters"). Section 1311 cross-references many provisions, including, for example, state water-quality standards in § 1313. But the Agencies agree that this reference does *not*

allow review over those state standards. Similarly, the Agencies' "affect-permitting" test for Subsection (F) could sweep in Corps permitting rules under § 1344 (as it has in this case), even though § 1369(b)(1) references only § 1342 permits.

In addition, the Agencies' broad reading of § 1369(b)(1) creates superfluous text. A broad view of "under section 1311" in Subsection (E) would render that subsection's reference to other sections (such as § 1312) superfluous. After all, § 1311 cross-references § 1312 too. And the Agencies' "affects-permitting" test for Subsection (F) would sweep in regulations issued under §§ 1311, 1312, 1316, 1317, 1318, and 1343 into that subsection—because § 1342(a) requires permits to adhere to those other sections. That result would conflict with Congress's decision to grant jurisdiction over some, but not all, of those sections in § 1369(b)(1).

C. Lastly, a plain-text reading comports with well-established interpretative presumptions.

1. This Court has held that jurisdictional statutes should set clear rules. The plain-text reading advances this goal; the Agencies' pragmatic view does not. Subsection (E)'s text covers specific EPA-sanctioned restrictions referenced in (and issued according to) four sections. But the Agencies' "indirect-effects" test requires an amorphous inquiry into a regulation's impact. Likewise, Subsection (F)'s text establishes a clear rule—the EPA must issue or deny a permit. But the Agencies' "affects-permitting" test creates an unworkable one.

2. This Court interprets statutes against a background presumption favoring judicial review of agen-

cy action. Both *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), and *Sackett* relied on that presumption to reject the Agencies' argument that challenges to particular actions were premature. The presumption applies here, too, because of § 1369(b)(2)'s limits on judicial review. Indeed, other courts have read § 1369(b)(1) narrowly because, where it applies, § 1369(b)(2) restricts subsequent challenges in later enforcement proceedings. Related constitutional concerns with § 1369(b)(2)'s restrictions reinforce this interpretation.

3. The Agencies' competing presumption, by contrast, has little basis in this Court's precedent. They argue that *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), created a broad preference favoring immediate circuit review over agency action. Yet *Florida Power* nowhere suggests it establishes such a universal efficiency-based rule. It simply resolved the ambiguous text of one law. Section 1369(b)(1), by contrast, *unambiguously* bars appellate jurisdiction here. Besides, this Court's presumption in favor of judicial review of agency action "repudiates" such efficiency concerns—as *Sackett* made clear.

ARGUMENT

CIRCUIT COURTS LACK SUBJECT-MATTER JURISDICTION OVER THE RULE UNDER § 1369(b)(1)

The Agencies assert that the Rule falls within Subsections (E) and (F) of § 1369(b)(1). Basic principles of statutory interpretation, however, show that neither subsection covers the Rule. Most notably, the Rule falls outside the text of those subsections. When read as a whole, moreover, § 1369(b)(1) reiterates that Subsections (E) and (F) cannot be given the

breadth needed to cover the Rule. Finally, two of this Court's working presumptions—those presuming that Congress intends for bright-line jurisdictional rules and for judicial review over agency actions—confirm the plain-text reading.

A. The Plain Text Of Subsections (E) And (F) Does Not Reach The Rule

As the Court has said time and again, a statutory-interpretation question "begins 'with the language of the statute itself,' and that 'is also where the inquiry should end'" when that language is unambiguous. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (citation omitted). The Court, in other words, "presume[s] Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016).

This "Supremacy-Of-Text Principle" decides this case. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). Under no reasonable reading could the language in Subsections (E) and (F) extend to the Rule. Indeed, a majority of the Sixth Circuit panel has already concluded that the Agencies' reading of these subsections is both "illogical and unreasonable." Pet. App. 29a (Griffin, J., concurring in judgment); *see id.* at 45a (Keith, J., dissenting).

1. The Rule falls outside Subsection (E) because it is not a "limitation" issued under the identified sections

a. Subsection (E) grants jurisdiction to the circuit courts over EPA action (1) "approving or promulgating" (2) "any effluent limitation or other limitation"

(3) "under section 1311, 1312, 1316, or 1345." 33 U.S.C. § 1369(b)(1)(E). This text has three elements.

First, the verbs cover EPA actions that adopt restrictions developed *by others* ("approving"), and EPA actions that issue restrictions developed *by the agency itself* ("promulgating"). *Cf. Webster's New World Dictionary* 68, 1137 (2d college ed. 1972). The use of both verbs, moreover, shows that the verb "promulgate" has a specific meaning, covering regulations that *directly* impose limitations rather than "everything [the EPA] issues" in the Federal Register. *Roll Coater, Inc. v. Reilly*, 932 F.2d 668, 670-71 (7th Cir. 1991) (Easterbrook, J.). Any broader reading of "promulgating" would render "approving" in the subsection superfluous. *Id.*

Second, the thing that the EPA approves or promulgates must be an "effluent limitation or other limitation." The Act defines "effluent limitation" as "any *restriction* established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other *constituents* which are *discharged from point sources* into navigable waters . . . ." 33 U.S.C. § 1362(11) (emphases added). Thus, an effluent limitation must restrict *discharges* into navigable waters from *point sources*. *See id.* § 1362(14); *Rapanos v. United States*, 547 U.S. 715, 743-44 (2006) (plurality op.). These "effluent limitations" include EPA regulations that establish *general* restrictions on discharges by *categories* of point sources, such as chemical plants. *See E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112, 136 (1977). The EPA regularly adopts or amends those effluent limitations. *See Defenders of Wildlife v. Perciasepe*,

714 F.3d 1317, 1320-21 (D.C. Cir. 2013); 33 U.S.C. § 1311(d).

The Act does not, by contrast, define the phrase "other limitation." The word "limitation" is commonly (if unhelpfully) defined as "something that limits"—that is, something that "restrict[s]" or "curb[s]" action. *See* Webster's, *supra*, at 820 (defining "limitation" and "limit"). Yet Congress's use of the phrase "effluent limitation or other limitation" suggests that an "other limitation" must be similar in kind to an effluent limitation. Under "the doctrine of *noscitur a sociis*," courts "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). A broad view of "other limitation"—as covering anything that restricts anyone—would swallow up the phrase "effluent limitation." If Congress had intended for Subsection (E) to reach any limitation, it would have said "any limitation."

When read in context, therefore, "other limitation" should cover EPA restrictions that are "directly related to effluent limitations" in that they "direct[]" the regulated community "to engage in specific types of activity." *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 877 (7th Cir. 1989) (*"Am. Paper I"*). These types of "other limitations" fall within Subsection (E) even if they do not meet the technical definition of "effluent limitation" because they do not limit *discharges* by *point sources*. The EPA, for example, regulates a point source's *intake* structures by addressing how it *receives* water. These regulations are not "effluent limitations." Yet the phrase "other limitation" allows circuit courts to consider the regulations alongside simultaneously issued effluent limitations. *E.g.*,

ConocoPhillips Co. v. EPA, 612 F.3d 822, 831 (5th Cir. 2010); *cf. PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 713 (1994).

Third, a limitation must be approved or promulgated "under"—i.e., "according to"—"section 1311, 1312, 1316, or 1345." *See Black's Law Dictionary* 1368 (5th ed. 1979). This prepositional phrase clarifies that Subsection (E) "cover[s] a specific set of EPA" restrictions because each of the four sections directs the EPA to issue specific regulations. *Friends of the Earth v. EPA*, 333 F.3d 184, 190 (D.C. Cir. 2003). Section 1311 tells the EPA to establish *technology-based* limitations for *existing* sources. 33 U.S.C. § 1311(b)(1)(A), (2)(A). Section 1312 directs the EPA to establish *water-quality* limitations for more polluted water bodies. *Id.* § 1312(a). Section 1316 directs the EPA to establish limitations on *new* sources. *Id.* § 1316(b)(1)(B). And § 1345 directs it to establish limitations on *sewage sludge*. *Id.* § 1345(d).

Conversely, under basic interpretative principles, a limitation does not fall within Subsection (E) if the EPA's authority to establish it springs from *another* section. "It would be an odd use of language to say 'any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345,'" "if the references to particular sections were not meant to exclude others." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). Circuit courts, for example, have uniformly held that Subsection (E) does not cover the "total maximum daily loads" that States adopt to achieve their water-quality standards because the authority to issue those restrictions arises from § 1313. *Id.* at 1312-13; *Friends of the Earth*,

333 F.3d at 190; *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 516-18 (2d Cir. 1976).

b. The Rule does not meet Subsection (E)'s requirements for two reasons: (1) the EPA did not "promulgate" an "effluent or other limitation," and (2) the EPA did not issue the Rule "under section 1311, 1312, 1316, or 1345."

To begin with, the Rule does not *directly* "promulgate" an "effluent limitation or other limitation." As the Agencies admit, the Rule does not issue an "effluent limitation" because it nowhere announces restrictions on the pollutants that point sources may discharge. 33 U.S.C. § 1362(11); Pet. App. 9a (McKeague, J., op.). Nor can the Rule be considered the "promulgation" of an "other limitation" because it also does not directly issue *any* restriction. To the contrary, the Rule disclaims doing so. It "does not establish any regulatory requirements," 80 Fed. Reg. at 37,054, and "imposes no enforceable duty" on "the private sector," *id*. at 37,102. Instead, the Rule "sets the jurisdictional reach for whether the discharge limitations even apply in the first place." Pet. App. 32a (Griffin, J., concurring in judgment).

In addition, the EPA did not issue the Rule according to the authority of "section 1311, 1312, 1316, or 1345." The Rule does not accomplish the actions that those sections direct EPA to undertake: It sets no technology-based limits under § 1311, water-quality limits under § 1312, new-source limits under § 1316, or sewage-sludge limits under § 1345. The Rule instead interprets language—"waters of the United States"—found *only* in a definitional section. 33 U.S.C. § 1362(7). If Congress gave the EPA the authority to clarify the meaning of § 1362's defini-

tions, that authority would spring from 33 U.S.C. § 1361. Section 1361 allows it "to prescribe such regulations as are necessary to carry out [its] functions under this chapter." *Id.* § 1361(a).

Far from tailored to Subsection (E)'s listed sections, moreover, the Rule's "definition will apply to all provisions of the Act." 80 Fed. Reg. at 37,104. It will govern many sections—such as § 1313 (which addresses state water-quality standards) or § 1344 (which addresses the Corps permitting program)—that are not within § 1369(b)(1)'s reach. Subsection (E)'s citation of § 1311, 1312, 1316, and 1345 should not be read to reach such *general* regulations for the *entire* Act. Indeed, even if those four sections were removed from the Act, that removal would not change whatever authority the Agencies have to clarify the meaning of "waters of the United States" in § 1362. That is also why both Agencies, not just the EPA, issued the Rule. It covers provisions within the *Corps'* domain under § 1344. *See* 80 Fed. Reg. at 37,115-119. That § 1369 grants jurisdiction over EPA actions, not actions of both Agencies, confirms that the multi-agency Rule should not be read as the type of EPA action contemplated by Subsection (E).

c. Only the lead opinion below found Subsection (E)'s text expansive enough to cover the Rule. Pet. App. 8a-17a (McKeague, J., op.). Even that opinion conceded that the Agencies' interpretation was "not compelling." *Id.* at 9a. It nonetheless accepted the argument that the Rule was the "promulgation" of an "other limitation" "under § 1311" based on a "practical construction." *Id.* at 10a. This reading is wrong both as a matter of text and as a matter of precedent.

Text. The Agencies argue that the Rule can be seen as the "promulgation" of an "other limitation" "under § 1311" because its "practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities." Pet. App. 17a (McKeague, J., op.); *see id.* at 9a. By expanding the "waters of the United States" subject to the Act, this argument goes, the Rule triggers limitations found *elsewhere*, including § 1311(a)'s ban on discharges. *Id.* at 15a-17a. Subsection (E)'s text cannot extend this far.

As an initial matter, the Agencies read "limitation" in isolation rather than in the context of the entire phrase "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." A reasonable reader of the phrase "promulgating or approving" a "limitation" would interpret it to mean that the thing being issued or approved *itself* must be the limitation. Yet the Agencies' argument hinges on limitations found in *the Act* rather than *the Rule*. They say that the Rule makes more lands subject to § 1311(a)'s ban on discharges. Br. in Opp. 13. But *Congress* (not *the EPA*) promulgated § 1311(a). Congress would have used a verb like "affecting" rather than "promulgating" if it meant for Subsection (E) to reach regulations that implicate restrictions found elsewhere. When read in its entirety, therefore, Subsection (E) refers to "a specific set of EPA actions"—the restrictions that the specific sections direct the EPA to promulgate. *Friends of the Earth*, 333 F.3d at 190.

In addition, other sections of the Act that use the phrase "effluent limitation or other limitation" all convey that the limitation is something that *itself*

can be *violated*—illustrating that it is the EPA regulation that imposes the restriction. Section 1341, for example, requires certain facilities to allow regulators to review their operations to ensure "that applicable effluent limitations or other limitations . . . will not be violated." *Id.* § 1341(a)(4). Section 1365 authorizes citizens to sue for a violation of an "effluent standard or limitation," defined as, among other things, "an effluent limitation or other limitation under section 1311 or 1312." *Id.* § 1365(a), (f). And the Act's whistleblower protections do not extend to employees who "deliberately violate[] any prohibition of [an] effluent limitation or other limitation under section 1311 or 1312." *Id.* § 1367(d). The Rule, however, defines a phrase; it does not establish "any regulatory requirements" that can be violated. *See* 80 Fed. Reg. at 37,054.

The Agencies' broad interpretation of "limitation" also lacks a stopping point. If they correctly read Subsection (E), this Court likely lacked jurisdiction in *Sackett v. EPA*, 566 U.S. 120 (2012). *Sackett* held that an EPA "compliance order"—an order finding lands to be waters of the United States and asserting penalties for discharges—was reviewable by a district court under the APA. *Id.* at 124, 131. This order did something similar to the Rule, but on a smaller scale. It decided that specific lands were waters of the United States, and so it too had a "practical effect" of "*indirectly* produc[ing] various limitations," including § 1311(a)'s prohibition on discharges. *See* Pet. App. 17a (McKeague, J., op.).

Finally, even if the Rule could qualify as a "limitation," the Agencies have not shown that it was issued "under section 1311." The lead opinion sug-

gested that the Rule should be deemed issued "under section 1311" because the Rule identifies that section as authorizing the EPA to issue it. 80 Fed. Reg. at 37,055; Pet. App. 15a-16a n.4 (McKeague, J., op.). But the Rule identifies the *entire* Act as providing the EPA with the authority to issue it, and it lists several sections (such as §§ 1321 and 1344) that are *not* identified in Subsection (E). 80 Fed. Reg. at 37,055. Nor should courts blindly defer to the Agencies' position that they issued the Rule "under section 1311." The Act does not "empower the [EPA], after the manner of Humpty Dumpty in Through the Looking-Glass, to make a regulation an ["other limitation" "under section 1311"] by [its] mere designation" as such in the regulation. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 (1978).

Precedent. To expand Subsection (E), the lead opinion below rested on *E.I. du Pont*. That case, the lead opinion suggested, adopted a pragmatic approach to Subsection (E), and thus unmoored its scope from "a literal reading of the provision." Pet. App. 10a (McKeague, J., op.). *E.I. du Pont* cannot bear the weight that the Agencies place on it.

While *E.I. du Pont* invoked practical concerns, it did so only to reinforce the text. That case concerned effluent limitations that were issued under § 1311 and so fell within Subsection (E)'s core. The Court "regard[ed] [§ 1369](b)(1)(E) as *unambiguously* authorizing court of appeals review of EPA action promulgating an effluent limitation for existing point sources under [§ 1311]." 430 U.S. at 136 (emphasis added). The challengers, however, argued for an *atextual* view of Subsection (E), one permitting review only "of the grant or denial of an individual var-

iance" from those limits under § 1311(c). *Id.* The Court disagreed. *Id.* Conducting a close textual analysis, it noted that "Congress referred to specific subsections of the Act" elsewhere in § 1369(b)(1), and "presumably would have specifically mentioned [§ 1311](c) if only action pursuant to that subsection were intended to be reviewable in the court of appeals." *Id.*

Only "*after* a plain textual rejection of the industry's position," Pet. App. 35a (Griffin, J., concurring in judgment), did the Court add practical concerns. Interpreting Subsections (E) and (F) together, it noted that a contrary reading "would produce the truly perverse situation in which" circuit courts "review numerous individual actions issuing or denying permits" under Subsection (F), but not "the basic regulations governing those individual actions" under Subsection (E). *E.I. du Pont*, 430 U.S. at 136. *E.I. du Pont* thus relied on practical concerns to reinforce Subsection (E)'s language; it did not grant circuit courts a freewheeling license to depart from the language based on those concerns.

The lead opinion also cited three circuit cases that allegedly justified the abandonment of Subsection (E)'s text. Pet. App. 11a-13a (McKeague, J., op.). The cases do no such thing.

Natural Resources Defense Council, Inc. v. EPA, 673 F.2d 400 (D.C. Cir. 1982) ("*NRDC*") (Ginsburg, J.), addressed "Consolidated Permit Regulations" that made compliance with § 1311's limitations a "permit condition" and defined how to calculate those limitations for permits. *Id.* at 401, 404-05. Because the regulations "restrict[ed] who may take advantage of certain provisions or otherwise *guide[d] the setting*

of numerical limitations in permits," they qualified as § 1311 limitations. *Id.* (emphasis added). *NRDC* thus involved "EPA actions *expressly specified* in" Subsection (E). *Friends of Earth*, 333 F.3d at 184 n.15 (discussing *NRDC*).

Virginia Electric and Power Co. v. Costle, 566 F.2d 446 (4th Cir. 1977), addressed regulations governing "cooling water intake structures." *Id.* at 449-50. These are "other limitations." *See PUD No. 1*, 511 U.S. at 713. As the Fourth Circuit noted, the Act expressly requires limitations that are issued under § 1311 (for existing sources) and § 1316 (for new sources) to include these intake-structure restrictions. *Va. Elec.*, 566 F.2d at 450; *see* 33 U.S.C. § 1326(b). Because the intake-structure restrictions were "closely related" to effluent limitations, it would have been "anomalous" to bifurcate review of them. *Va. Elec.*, 566 F.2d at 450; *cf. Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

Finally, *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), addressed EPA letters concerning practices by "publicly owned treatment works." *Id.* at 854, 856. The court ruled that an EPA action qualifies as an "other limitation" under Subsection (E) if "entities subject to the [Act's] permit requirements face new restrictions on their discretion with respect to discharges *or discharge-related processes*." *Id.* at 866 (emphasis added). Applying that interpretation, it held that an EPA letter restricting the manner in which those treatment works *internally* treated wastewater qualified as an "other limitation" under § 1311(b)(1)(B). *Id.*

2. The Rule falls outside Subsection (F) because it does not "issue or deny" a permit under § 1342

a. Subsection (F) grants jurisdiction over EPA action (1) "issuing or denying" "any permit" (2) "under section 1342." 33 U.S.C. § 1369(b)(1)(F). This language has two elements.

First, "[b]y its plain terms, this provision conditions the availability of judicial review on the issuance or denial of a permit." *Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004). The verb choices make this clear. To "deny" a permit, the EPA must "withhold the possession, use, or enjoyment of" the permit. *The Random House Dictionary of the English Language* 533 (2d ed. 1987) (defining "deny"); *see Webster's*, *supra*, at 378 (defining "deny" as "to refuse the use of or access to"). Thus, this Court has read the word "deny" to cover an EPA action that *vetoes* a state-issued permit, because the EPA's veto had the "precise effect" of a denial. *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980).

To "issue" a permit, the EPA must "give [it] out publicly or officially." *Webster's*, *supra*, at 749. The EPA regularly does so. *E.g.*, *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 562 (2d Cir. 2015) (challenge to "Vessel General Permit"); *City of Pittsfield v. EPA*, 614 F.3d 7, 8 (1st Cir. 2010) (challenge to permit for wastewater treatment plant). Yet, as circuit courts have agreed, under no fair reading of "issue" could the verb cover the EPA's failure to object to, and thus silent approval of, a *state-issued* permit. *E.g.*, *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1221 & nn.7, 12 (6th Cir. 1992).

Second, the permit must issue "under" § 1342. That section identifies the permitting program run by the EPA (or state authorities) for pollutants that "readily wash downstream." *See Rapanos*, 547 U.S. at 723 (plurality op.). The EPA, by contrast, lacks authority to issue permits for dredged or fill material—which fall within the Corps' domain under § 1344. *Coeur Ala., Inc. v. Se. Ala. Conservation Council*, 557 U.S. 261, 273-74 (2009). The Act thus splits judicial review for permit decisions. It requires circuit review of EPA permitting under § 1342, *e.g.*, *City of Pittsfield*, 614 F.3d at 8, but district review of Corps permitting under § 1344, *e.g.*, *Nat'l Ass'n of Home Builders v. Army Corps of Eng'rs*, 417 F.3d 1272, 1277 (D.C. Cir. 2005).

b. The Rule does not fall within Subsection (F). The Agencies have *never* argued that the Rule "issues" or "denies" a permit to discharge pollutants under § 1342. *E.g.*, Pet. App. 18a-19a (McKeague, J., op.). Yet the language is plain. Subsection (F) unambiguously requires the EPA to have issued or denied a permit under § 1342. That ends the matter.

c. Despite the plain text, the Agencies stretch Subsection (F) to encompass *all* EPA regulations that "*impact* permitting requirements" or "*affect[]* the granting and denying of permits." Pet. App. 18a (McKeague, J., op.) (emphasis added). Here again, neither the statute's text nor this Court's cases support the Agencies' reading.

As for text, the Agencies assert that the Rule falls within Subsection (F) because it "delineates where permits are required and so sets the entire NPDES permitting scheme in motion." Br. in Opp. 14. This argument rewrites Subsection (F) from "issuing or

denying any permit" to "affecting or relating to the permitting scheme." The EPA cannot do that. "An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

As for precedent, the Agencies cite *E.I. du Pont* and *Crown Simpson* for their view. Br. in Opp. 14-15. Neither decision helps them. *E.I. du Pont* did not even involve Subsection (F). It interpreted Subsection (E). *See* 430 U.S. at 136.

Crown Simpson, as noted, held that the *veto* of a state-issued permit qualified as the "denial" of a permit under Subsection (F). 445 U.S. at 196-97. To reach that result, the Court started with the text: "When EPA, as here, objects to effluent limitations contained in a state-issued permit, the *precise effect* of its action is to 'den[y]' a permit within the meaning of [Subsection (F)]." *Id*. (emphasis added). Because the EPA veto "refuse[d] the use of or access to" the permit, it could be comfortably read as denying the permit. *Webster's*, *supra*, at 378. Only after concluding that the EPA veto qualified as a denial did the Court add a pragmatic point. The review process for permits should not depend "on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." 445 U.S. at 196-97. This language is best read as using context to confirm what is otherwise a reasonable reading of the text. That is commonplace. "Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text." Scalia, *supra*, at 356.

Thus, even if *Crown Simpson* "opened the door to constructions other than a *strict* literal application," Pet. App. 17a (McKeague, J., op.) (emphasis added), there is a wide gap between that case and this one. Here, the Agencies have not offered *any* reading of the phrase "issuing or denying any permit" that could encompass the Rule. Instead, they *bypass* the text by *jumping* immediately to their pragmatic point about the efficiencies of circuit review. Br. in Opp. 14-15. It is one thing to rely on a pragmatic factor to choose between two plausible interpretations of a text (as *Crown Simpson* did). It is quite another to rely on that factor to *depart* from the only plausible reading of the text (as the Agencies do). Such a contextual consideration can inform an ambiguous text; it cannot rewrite an unambiguous one.

Finally, the concurring opinion below reached its result *only* because it felt bound by *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009), which read Subsection (F) to cover rules *affecting* permits. Pet. App. 42a-44a (Griffin, J., concurring in judgment). This Court, of course, is not so bound. It should reject *National Cotton* for the reasons that the concurrence gave. *National Cotton*'s "incorrect" "jurisdictional reach . . . has no end." *Id.* at 42a, 44a. And that decision "provided no analysis" of Subsection (F)'s text. *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012).

* * *

In sum, this case is straightforward under the only reasonable reading of Subsections (E) and (F). The Rule neither promulgates effluent or other limitations under § 1311, 1312, 1316, or 1345, nor issues or denies permits under § 1342.

B. Section 1369(b)(1), When Read As A Whole, Reinforces That Subsections (E) And (F) Do Not Cover The Rule

Reading § 1369(b)(1) as a whole and against the backdrop of the entire Act confirms that Subsections (E) and (F) cannot have the breadth that the Agencies seek to give them.

1. *Reading § 1369(b)(1) As A Whole.* "'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012)). This canon reinforces the plain language of Subsections (E) and (F).

Section 1369(b)(1) authorizes circuit review over seven specific EPA actions down to the subsections under which some of those actions are authorized. As one example, Subsections (A), (B), and (E) all identify EPA actions under § 1316. (Subsection (B) accidentally refers to a new-source variance provision that was within a draft of § 1316 but did not make it into the final law.) It is noteworthy that Congress acted with this specificity in the context of a complex statute. "No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated." *Longview*, 980 F.2d at 1313. This drafting precision demonstrates that § 1369(b)(1)'s seven subsections should not be read loosely to gobble up provisions that are otherwise absent from that section.

Indeed, a comparison of § 1369(b)(1) to the judicial-review provision in the Clean Air Act confirms that § 1369(b)(1) should be read according to its text. Both Acts have judicial-review provisions cataloging actions that circuits may review, but the Clean Air Act goes further by providing circuit jurisdiction over "*any other* final action of the Administrator." 42 U.S.C. § 7607(b)(1) (emphasis added); *Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980). The Clean Water Act contains no similar catch-all. The conclusion to be drawn could not be clearer: Congress knows how to provide for circuit review of all agency action. It did so under the Clean Air Act, but not under the Clean Water Act. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174-75 (2009). This Court must respect that choice.

The Agencies' reading fails to do so. If this Court adopts their "exceptionally expansive view," § 1369(b)(1) could "encompass virtually all EPA actions under the" Act. *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015). Take the Agencies' broad reading of "other limitation" "under § 1311" within Subsection (E). They say that the Rule qualifies because § 1311(a) (like many sections) places restrictions on discharges into waters of the United States. Br. in Opp. 13-14. Yet § 1311 references *many* things. This Court, for example, has recognized that it "incorporates" "by reference" § 1313 (the section on state water-quality standards). *PUD No. 1*, 511 U.S. at 713; 33 U.S.C. § 1311(b)(1)(C). But the EPA has repeatedly argued *against* a reading of "other limitation" "under § 1311" that would include its approval or promulgation of the "total maximum daily loads" that are authorized by § 1313. *E.g.*, *Friends of Earth*, 333 F.3d at 187-93. The Agencies

cannot reconcile their *traditional* view that a total maximum daily load is not an "other limitation" "under 1311" with their *current* view that a rule defining waters of the United States is.

The Agencies' reading of "issuing or denying any permit" under Subsection (F) suffers from similar problems. If adopted, it could permit review over actions that Congress intentionally excluded. All agree, for example, that Corps permitting decisions under § 1344 do not fall within Subsection (F). But the Agencies' broad reading of that subsection has allowed them to seek review over the amendments to the Corps' permitting regulations that are at issue here. *E.g.*, 80 Fed. Reg. at 37,115-119.

2. *Rule Against Superfluity*. "It is 'a[nother] cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

The circuit courts have applied this principle to § 1369(b)(1). Many courts, for example, have considered whether circuit courts have jurisdiction under Subsection (G)—which covers EPA actions in "promulgating" individual control strategies under § 1314(l)—over an EPA action *approving* a state-promulgated individual control strategy. *E.g.*, *Roll Coater*, 932 F.2d at 670-71. Pointing to Subsection (E), which unlike Subsection (G), *does* use both "approving" and "promulgating," the courts have found jurisdiction lacking based on the rule against superfluity. *Id*. They have refused to write the verb "approving" out of Subsection (E) by reading the verb

"promulgating" in Subsections (E) and (G) broadly to cover both actions. *See id.*

This canon undercuts the Agencies' broad reading of Subsections (E) and (F). As for Subsection (E), a broad reading of "other limitation" "under 1311" would render other language in § 1369(b)(1) superfluous. If, for example, the Rule was issued under § 1311 merely because the phrase "navigable waters" is referenced in that section, Congress had no reason to include "under § 1312" within Subsection (E). That is because the water-quality limitations in § 1312 are likewise referenced in § 1311. 33 U.S.C. § 1311(b)(1)(C). "Thus, if accepted, [the Agencies'] reading would render [Subsection (E)'s] specific reference to section 1312 duplicative and unnecessary." *Friends of the Earth*, 333 F.3d at 190. More generally, a broad reading of "other limitation" "under § 1311" allows that phrase "to swallow up distinctions that Congress made between effluent limitations and other types of EPA regulations" in § 1369(b)(1). *Am. Paper I*, 890 F.2d at 876-77.

As for Subsection (F), the Agencies' argument that issuing or denying a permit under § 1342 extends to regulations that "impact permitting requirements" would render many provisions superfluous. Pet. App. 18a (McKeague, J., op.). Section 1342 mandates that permits "meet . . . all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343." 33 U.S.C. § 1342(a)(1). So nearly every regulation could affect permitting in some way. Section 1369(b)(1)(C), for example, grants jurisdiction over an action "promulgating any effluent standard, prohibition, or pretreatment standard under section 1317" for toxic pollutants. If Subsection

(F) includes all regulations *affecting* permitting, Congress had no reason to adopt this jurisdictional grant for § 1317's toxic-pollutant limitations. Section 1342 *expressly* identifies compliance with § 1317 limitations as a condition for permit issuance, so those § 1317 limitations will, by definition, affect permitting.

C. Background Presumptions For Interpreting Statutes Support The Plain Text

The plain-text reading, lastly, is supported by two background presumptions: (1) that jurisdictional provisions be read to establish clear rules and (2) that statutes be read to permit judicial review over agency action. The Agencies, by contrast, mistakenly invoke a competing presumption in favor of immediate appellate review that does not apply here.

1. This Court's preference for bright-line jurisdictional rules supports a plain-text approach to § 1369(b)(1)

Because § 1369(b)(1) concerns jurisdiction, it should be interpreted as written. The plain text—not the Agencies' "pragmatic" gloss on that text—sets the *clearer* boundary between the jurisdiction of the circuit courts under § 1369(b)(1) and the jurisdiction of the district courts under the APA.

a. "'Jurisdictional rules,'" the Court has noted, "'should be clear.'" *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1133 (2015) (citation omitted). The Court thus has an established "practice of reading jurisdictional laws, so long as consistent with their language, . . . to establish clear and administrable rules." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567-68 (2016).

This practice is a fixture of the Court's precedent. It has, for example, adopted a clear rule to identify a corporation's "principal place of business" under the diversity-jurisdiction statute (28 U.S.C. § 1332) because "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). It has done the same when interpreting "final decision" under the appellate-jurisdiction statute (28 U.S.C. § 1291), recognizing that "[c]ourts and litigants [were] best served by [its] bright-line rule." *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988). Most famously, the Court has for over a century followed the "well-pleaded complaint rule" under the federal-question-jurisdiction statute (28 U.S.C. § 1331), praising the "clarity and simplicity of that rule." *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

Many reasons justify this approach. To begin with, "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz*, 559 U.S. at 94. With vague rules, by contrast, "'an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases.'" *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment) (quoting Zecheriah Chafee, The Thomas M. Cooley Lectures, *Some Problems of Equity* 312 (1950)). These costs "diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz*, 559 U.S. at 94.

Further, "[t]he stakes of the inquiry are high[er]" in the jurisdictional context. *Herr v. U.S. Forest*

Serv., 803 F.3d 809, 813 (6th Cir. 2015) (Sutton, J.). "'[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (citation omitted). Thus, "a defect in subject-matter jurisdiction requires a suit's dismissal, no matter how much the parties have spent and no matter how late in the proceedings the defect comes to light." *RTP LLC v. ORIX Real Estate Capital, Inc.*, 827 F.3d 689, 693 (7th Cir. 2016). Not only that, courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514. And they have "no authority to create equitable exceptions to jurisdictional requirements." *Bowels v. Russell*, 551 U.S. 205, 214 (2007). For these reasons, "in matters of jurisdiction," "clarity" "is especially important." *United States v. Sisson*, 399 U.S. 267, 307 (1970).

b. This presumption supports the plain-text reading. Congress, after all, wrote § 1369(b)(1) to establish a "clear and orderly" review process. H.R. Rep. No. 92-911, at 136. And, unlike the Clean Air Act, 42 U.S.C. § 7607(b)(1), the Clean Water Act unambiguously *divides* jurisdiction between circuit courts and district courts. In the range of cases, it will be far easier to determine on which side of this divide an agency action falls if courts stick to § 1369(b)(1)'s text, not the Agencies' amorphous reading of it.

Start with Subsection (E). In most situations, EPA action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345" will have clear guideposts. 33 U.S.C. § 1369(b)(1)(E). Most notably, that action will

involve the types of specific restrictions that those four sections direct EPA to impose: technology-based restrictions under § 1311, water-quality restrictions under § 1312, new-source restrictions under § 1316, or sewage-sludge restrictions under § 1345. *See, e.g.*, *E.I. du Pont*, 430 U.S. at 136-37.

Under the Agencies' reading, by contrast, it will often be unclear whether an EPA action that is not itself a restriction under the four sections could have an "*indirect* effect" that should qualify as one. Pet. App. 15a (McKeague, J., op.). That reading could regularly require litigants to guess at a rule's "effects," and compel courts to engage in jurisdictional fact-finding over them. Potential regulations defining "waters of the United States" offer a good example. The relative breadth of a definition could determine whether or not it qualifies as a "limitation" under Subsection (E). If a regulation (like the Rule) broadens the definition to *cover* more waters, according to the Agencies, it would fall within Subsection (E). But if a regulation narrows the definition to *exclude* more waters, it would fall outside Subsection (E) because, under the Agencies' own logic, it would have the effect of "creat[ing] *exemptions* from limitations." Pet. App. 14a (McKeague, J., op.). And what happens if a regulation broadens some aspects of the definition but narrows others? Would litigants have to guess at the regulation's *net* effect? *Cf. id.* at 38a (Griffin, J., concurring in judgment). The Agencies' "indirect-effects" test is simply unworkable.

Turn to Subsection (F). Under the plain text, parties will always know whether they are challenging an EPA action "in issuing or denying [a] permit un-

der section 1342." 33 U.S.C. § 1369(b)(1)(F). The EPA will issue or deny a permit under § 1342.

Under the Agencies' reading, by contrast, parties often will not know whether a rule adequately "relates to" or "affects" the permitting process. *See* Pet. App. 18a (McKeague, J., op.). Indeed, this Court has had great difficulty interpreting statutes, like ERISA, that use language similar to what the Agencies seek to incorporate into Subsection (F). "[A]s many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). The Agencies thus advocate for a vague test that has proved "excruciating for courts to police" in other contexts. *Merrill Lynch*, 136 S. Ct. at 1575.

In sum, the Agencies' views on jurisdiction "jettison[] relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). Under their approach, nobody will know where to go with challenges to EPA action. Their reading would regularly force "careful counsel" to sue in both district courts and circuit courts when challenging regulations. *Inv. Co. Inst.*, 551 F.2d at 1280. All of that litigation would "eat[] up time and money" on issues unrelated to the merits, which could represent a costly initial step for those challenging EPA action. *Hertz*, 559 U.S. at 94. Homeowners should not be compelled to "'feel their way'" under the Agencies' ambiguous jurisdictional tests merely to obtain the privilege of "feeling their way" under the Agencies' ambiguous

views on the waters of the United States. *Sackett*, 566 U.S. at 124 (quoting *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring)).

2. The presumption in favor of judicial review of agency action confirms that § 1369(b)(1)'s plain language controls

This Court's presumption that Congress intends to permit judicial review over agency action confirms that courts should stick to § 1369(b)(1)'s text. That is because § 1369(b)(2) *restricts* the judicial review that would be available under the APA for the actions that fall within § 1369(b)(1).

a. "The APA . . . creates a 'presumption favoring judicial review of administrative action.'" *Sackett*, 566 U.S. at 128 (citation omitted). This presumption is a "'strong'" one, and an "agency bears a 'heavy burden'" to overcome it. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citation omitted).

The presumption applies, most obviously, when an agency claims that the relevant action is not judicially reviewable *at all*. *See, e.g.*, *id.* at 1652-53. Yet it extends beyond that domain to apply whenever an agency argues that a particular statute *limits* judicial review. In *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), for example, the Agencies argued that the Clean Water Act did not allow for judicial review over their "jurisdictional determination" that certain lands fell within the waters of the United States until the *end* of the permitting process. *Id.* at 1816. The Court disagreed, invoking the presumption of judicial review. *Id.* It reasoned that "'[t]he mere fact' that permitting decisions are

'reviewable should not suffice to support an implication of exclusion as to other[]' agency actions, such as [the jurisdictional determinations]" that were at issue in *Hawkes*. *Id.*; *see Sackett*, 566 U.S. at 129.

b. This presumption supports the plain-text reading here. Section 1369(b)(1) grants judicial review during a short 120-day window, and § 1369(b)(2) bars judicial review of actions that could have been challenged under § 1369(b)(1) in a later "civil or criminal proceeding for enforcement." "Where . . . review is available" under § 1369(b)(1), therefore, "it is the exclusive means of challenging actions covered by the statute." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013).

Given § 1369(b)(2)'s judicial-review limits, this case is the converse of *Hawkes* and *Sackett*. In those cases, this Court rejected the Agencies' arguments that landowners *prematurely* challenged the Agencies' finding that their lands were waters of the United States. In this case, § 1369(b)(2) could permit the Agencies to argue down the road that landowners *belatedly* challenged the Rule as applied to their lands. If the presumption was broad enough to rebut the Agencies' claim that judicial review was *too early* in *Hawkes* and *Sackett*, it is broad enough to rebut their claim that review is *too late* in a future case.

Some circuit courts have thus recognized that the Court's presumption disfavors a broad reading of § 1369(b)(1). The "review-preclusion proviso in § [1369](b)(2)," these courts reasoned, "dissuade[d]" them "from reading § [1369](b)(1) broadly." *Am. Paper Inst., Inc. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) ("*Am. Paper II*"). Instead, § 1369(b)(2)'s "peculiar sting" has led them to read § 1369(b)(1) narrowly

by finding EPA actions not clearly indicated in § 1369(b)(1) subject to the general APA standards. *Longview*, 980 F.2d at 1313.

Constitutional concerns strengthen this presumption. Justice Powell, for example, suggested that "constitutional difficulties well may counsel a narrow construction of" the Clean Air Act's review-preclusion proviso. *Harrison*, 446 U.S. at 594-95 (Powell, J., concurring). It was "totally unrealistic," he thought, "to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register." *Adamo Wrecking*, 434 U.S. at 290 (Powell, J., concurring).

These concerns take on greater urgency for general regulations like the Rule that reach ordinary "landowners." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring). If it is "totally unrealistic" to think that "small contractors" would review the Federal Register, *Adamo Wrecking*, 434 U.S. at 290 (Powell, J., concurring), it is downright fanciful to think that the average homeowner would, *see Sackett*, 566 U.S. at 122. Yet "the consequences to landowners even for inadvertent violations can be crushing." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring). And when § 1369(b)(2)'s review-preclusion proviso applies, it has real impact. *E.g.*, *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 754 (5th Cir. 2011); *Nat'l Wildlife Fed'n v. EPA*, 949 F. Supp. 2d 251, 252 (D.D.C. 2013). Thus, the Agencies' broad view of § 1369(b)(1) could effectively overrule *Sackett*.

The plain-text approach, by contrast, lessens these constitutional concerns. Affected parties are

much more likely to have notice of the specific actions that are listed within § 1369(b)(1)—such as the issuance of a particular effluent limitation for a particular industry or the denial of a particular permit to a particular landowner.

c. The lead opinion below rejected this presumption of judicial review, finding the notice concerns "speculative and overblown." Pet. App. 25a (McKeague, J., op.). It initially asserted that the present challenges to "the *validity* of the Rule" would not bar a later "challenge to subsequent *application* of the Rule" to a particular property. *Id.* It is, of course, true that homeowners could challenge the Agencies' finding that their specific lands fell within the Rule as a matter of the proper *interpretation* of the Rule (accepting its *validity*). *Decker*, 133 S. Ct. at 1335. But that misses the point. If the lands squarely fell within the Rule and the homeowners sought to show that the Rule was "'invalid,'" under this Court's cases, *as applied* to those lands, there would be a serious question whether they could present that challenge. *See id.* (citation omitted).

Further, the lead opinion suggested that belated challengers could bring as-applied constitutional challenges to § 1369(b)(2)'s limits on judicial review. Pet. App. 25a (McKeague, J., op.). This flips the presumption of agency-action review and the canon of constitutional avoidance on their heads. Those tools instruct that, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). "If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not

those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81. Because the Agencies' broad reading might raise serious problems down the road, the Court should interpret § 1369(b)(1) to avoid those problems *now*.

3. The Agencies mistakenly rely on efficiency concerns and a presumption in favor of immediate appellate review

The Agencies draw support for their "pragmatic" reading from *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), and from concerns with judicial efficiency. *See* Pet. App. 21a-24a (McKeague, J., op.). These arguments, however, cannot support the Agencies' interpretation of Subsections (E) and (F).

To begin with, *Florida Power*, a case about the Atomic Energy Act, does not establish a universal presumption in favor of immediate circuit review similar to this Court's presumptions in favor of bright-line jurisdictional rules and of judicial review over agency actions. This Court has invoked those latter presumptions in many cases over many years. "Nowhere," by comparison, does *Florida Power* even "intimate that it was ruling as a matter of general administrative procedure." *Nader v. EPA*, 859 F.2d 747, 754 (9th Cir. 1988). Instead, *Florida Power* held that jurisdiction "must of course be governed by the intent of Congress and not by any views [courts] may have about sound policy." *Fla. Power*, 470 U.S. at 746. In this case, therefore, given § 1369(b)(1)'s unambiguous language, a majority of the Sixth Circuit panel correctly rejected the lead opinion's "reliance on [this] non-Clean Water Act case to support its policy arguments." Pet. App. 43a (Griffin, J., concurring in judgment).

In addition, the statute at issue in *Florida Power* did *not* contain anything like § 1369(b)(2)'s "review-preclusion proviso." *Am. Paper II*, 882 F.2d at 289. That proviso should lead this Court to read § 1369(b)(1) narrowly even if it were ambiguous. *Florida Power* relied on efficiency concerns, but the "presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 566 U.S. at 130; *cf. Chrysler Corp. v. EPA*, 600 F.2d 904, 912-13 (D.C. Cir. 1979) (rejecting EPA's reliance on similar efficiency arguments because the relevant jurisdictional provision had a similar review-preclusion proviso).

Finally, the conclusion that district courts should initially review challenges to the Rule does not create a "'perverse situation.'" Br. in Opp. 14 (quoting *E.I. du Pont*, 430 U.S. at 136). To the contrary, there is competing "wisdom" in "allowing difficult issues to mature through full consideration" by different courts. *E.I. du Pont*, 430 U.S. at 135 n.26 (noting that the Court had benefitted from competing opinions by the circuit courts). Indeed, most cases that have reached this Court implicating the scope of "waters of the United States" have involved *as-applied* challenges tied to findings for particular lands. *See Hawkes*, 136 S. Ct. at 1812-13; *Sackett*, 566 U.S. at 123-25; *Rapanos*, 547 U.S. at 729 (plurality op.); *SWANCC*, 531 U.S. at 165. Such further as-applied litigation should not be disallowed simply because the Agencies have now adopted a broad regulation on the scope of "waters of the United States."

Regardless, § 1369(b)(1)'s plain language shows the choice that *Congress* made between these competing policy views. It authorized immediate circuit

review only for seven listed EPA actions. But, unlike in the Clean Air Act, Congress required litigants to follow the normal method of judicial review starting in the district courts for everything else—including the Rule. This case should begin—and end—with that plain text.

CONCLUSION

This Court should reverse the Sixth Circuit's holding that it has subject-matter jurisdiction under 33 U.S.C. § 1369(b)(1) over the petitions for review.

Respectfully submitted,

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