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

BRIEF OF 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, THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov
Counsel for Respondent
State of Ohio

QUESTION PRESENTED

Does the federal rule redefining the "waters of the United States" 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)?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

INTRODUCTION

In June 2015, the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively, "the Agencies") issued a final rule purporting to establish an expansive new definition of "waters of the United States" for the entire Clean Water Act. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("the Rule"). With this Rule, the Agencies have attempted to broadly *expand* their power, but narrowly *restrict* the judicial review available for those who would challenge it. In both respects, the Agencies' actions are par for the course.

As for the Agencies' power, this Court has twice rejected their efforts to enlarge their authority beyond what the Clean Water Act allows. *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"). The Rule seeks to do so yet again. In fact, the 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, the North Carolina Department of Environmental Quality, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming—have already obtained a stay of (or a preliminary injunction against) the Rule's expansive reading of the Agencies' authority. *See In re EPA*, 803 F.3d 804, 809 (6th Cir. 2015); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015). But the merits of the Rule are not at issue in the petition for certiorari.

The petition instead concerns judicial review. This Court has also twice rejected the Agencies' efforts to prevent courts from considering claims that they wrongly classified lands as subject to their authority. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, 132 S. Ct. 1367 (2012). The Agencies' views on the proper court to challenge the Rule could do so yet again. They argue that the broad Rule falls within a narrow class of specific EPA actions listed in 33 U.S.C. § 1369(b)(1) that are reviewable exclusively by circuit courts. But a finding of "[r]eviewability under section 1369 carries a peculiar sting" for the regulated community: it bars later challenges in subsequent litigation. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992); *see Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). Thus, the Agencies' reading of § 1369 could insulate the Rule from future as-applied challenges like those that this Court considered in *Hawkes* or *Sackett*.

Given the Agencies' efforts to shoehorn the Rule into § 1369(b)(1), the State Respondents find themselves in the same jurisdictional quagmire as Petitioner, the National Association of Manufacturers. They have been forced to litigate duplicative complaints in the district courts and petitions for review in the circuit courts due to the Agencies' so-called "pragmatic" reading of § 1369. The State Respondents file this brief to detail why the Sixth Circuit's fractured 1-1-1 jurisdictional holding is wrong.

First, § 1369's language shows that the circuit courts lack jurisdiction over the Rule. An analysis of § 1369 must begin "'with the language of the statute itself,'" and it should "'end'" there when "'the stat-

ute's language is plain.'" *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (citation omitted). The Agencies have argued that the Rule can fit within the text of § 1369(b)(1)(E) and (F)—arguments that the lead opinion below found "not compelling," Pet. App. 9a (McKeague, J., op.), and that the controlling concurrence found "illogical and unreasonable," *id.* at 29a (Griffin, J., concurring in judgment). Starting with Subsection (E), the Rule does not promulgate an "effluent limitation or other limitation under section 1311, 1312, 1316, or 1345"—four specific provisions directing the EPA to issue distinct types of pollution restrictions. It is instead a *definitional* rule interpreting text found *elsewhere* (in 33 U.S.C. § 1362(7)) for the *entire* Act. Turning to Subsection (F), the Rule does not "issu[e] or deny[]" a permit "under" 33 U.S.C § 1342. The Agencies' interpretation that Subsection (F) covers anything *affecting* permitting reads those verbs out of the statute. That is why the Sixth Circuit could find jurisdiction only by relying on factors—such as policy concerns or circuit precedent—other than the text.

Second, textual canons of construction confirm the plain-text reading of Subsections (E) and (F). For one thing, statutory language should be read against the backdrop of the statute as a whole. The Clean Water Act specifically identifies seven EPA actions subject to immediate appellate review, in stark contrast to the Clean Air Act's broad grant of appellate jurisdiction over all agency actions. It is unlikely that Congress would have intended for this precise language to be interpreted loosely. For another, a statute should be read in a manner that avoids rendering words or phrases superfluous. But a broad

reading of Subsections (E) and (F) would make other jurisdictional grants in § 1369 redundant.

Third, the decision below complicates a relatively straightforward jurisdictional statute, in violation of the principle that courts should read jurisdictional statutes to yield "simple" rules. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Vague rules require "'an enormous amount of expensive legal ability [to] 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 courts have now spent significant resources to "assure themselves of their power to hear" these issues, *Hertz*, 559 U.S. at 94. Far better for this and all future cases that courts stick to the comparatively simpler rules flowing out of § 1369's text.

Fourth, the Sixth Circuit expands § 1369 in a way that restricts review under the Administrative Procedure Act (APA). The APA establishes a "'presumption of reviewability for all final agency action.'" *Hawkes*, 136 S. Ct. at 1816 (citation omitted). But § 1369(b)(2) bars later "judicial review" of actions that fall within § 1369's purview in a subsequent "civil or criminal proceeding for enforcement." Courts have refused to "read[] § [1369](b)(1) broadly" given these restrictions. *Am. Paper Inst. v. EPA* ("*Am. Paper II*"), 882 F.2d 287, 289 (7th Cir. 1989) (Easterbrook, J.); *Longview*, 980 F.2d at 1313. This

Court, too, should affirm the presumption of reviewability by reading § 1369 narrowly—a reading that Justice Powell proposed in a similar setting. *See Harrison v. PPG Indus.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring).

Fifth, and finally, the lead opinion's analysis rests on a mistaken premise that was rejected by a majority of the judges on the Sixth Circuit panel. It misconstrued language from this Court's decisions in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), as creating a "license to construe Congress's purposes in § 1369(b)(1) more generously than its language would indicate." Pet. App. 13a (McKeague, J., op.); *id.* at 17a. In doing so, the lead opinion "expand[ed]" this Court's dicta in those cases well beyond its intended reach. *Id.* at 35a (Griffin, J., concurring in judgment). While *E.I. du Pont* and *Crown Simpson* invoked practical concerns, they did so only to *reinforce* the text, not to *disavow* it.

At day's end, the Sixth Circuit's jurisdictional holding conflicts with § 1369's text and will have negative effects on the scope of judicial review under the Clean Water Act. This holding was mistaken.

STATEMENT OF THE CASE

A. *Relevant Provisions of the Act.* The Clean Water Act generally prohibits any unauthorized "discharge of any pollutant by any person" into waters within the Agencies' reach. 33 U.S.C. § 1311(a). The Act defines "pollutant" broadly to include many ordinary substances, including dirt and other fill materials. *Id.* § 1362(6). It defines "discharge of a pollutant" broadly 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" broadly to include individuals, corporations, and the States. *Id.* § 1362(5).

The Act establishes two different permitting programs that are relevant to the jurisdictional question at issue here. Under 33 U.S.C. § 1342(a), the EPA issues permits pursuant to the "National Pollutant Discharge Elimination System" ("NPDES"), which allows 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*, 547 U.S. at 723 (plurality op.). Both § 1342 and § 1344 authorize the States to create and 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 and fill material in § 1344.

A permit holder seeking to discharge pollutants generally must abide by several limitations set under other statutory sections of the Act. 33 U.S.C. § 1342(a). Many of these specific sections also implicate the jurisdictional question at issue here. 33 U.S.C. § 1311 directs the EPA to set general "effluent limitations" for pollutant discharges that are tied to the "best available technology" that is "economically achievable" by point sources. In addition, 33 U.S.C. § 1312 directs EPA to set unique limitations that are tied to the chosen water quality standards for specific water bodies. 33 U.S.C. § 1316 directs the EPA to set unique limitations for new sources of pollution.

33 U.S.C. § 1317 directs the EPA to set unique limitations for certain "toxic pollutants." And 33 U.S.C. § 1345 directs the EPA to set unique limitations for "sewage sludge." These limitations are incorporated into specific permits, 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).

Also relevant to the jurisdictional question, on top of source-by-source permitting, 33 U.S.C. § 1313 requires States to set and update "water quality standards" for waters within their borders. "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 Cnty. 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 certain "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).

The phrase "navigable waters" identifies the waters that are covered by "the entire statute," and so it is critical for defining the reach of all of its sections. *Rapanos*, 547 U.S. at 742 (plurality op.). The Act 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 this phrase to incorporate the "traditional judicial definition," covering only "interstate waters that are 'navigable in fact' or readily susceptible of being ren-

dered so." *Rapanos*, 547 U.S. at 723 (plurality op.). Environmental groups challenged that definition, and a district court invalidated it. *Natural 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 725 (plurality op.). This Court has rejected the Agencies' overly broad definition as applied to certain wetlands, *see id.* at 786 (Kennedy, J., concurring in judgment), and to an "abandoned sand and gravel pit . . . which provide[d] habitat for migratory birds," *SWANCC*, 531 U.S. at 162.

B. *The Rule.* The Rule, published in the Federal Register on June 29, 2015, is yet another attempt by the Agencies to define "waters of the United States" far too broadly; if implemented, it would "invariably result[] in expansion of regulatory authority" by the Agencies. Pet. App. 15a (McKeague, J., op.). The Rule is both substantively flawed (because it extends the Agencies' jurisdiction to many lands that should not be covered under this Court's teachings) and procedurally flawed (because it adopted specific distance-based rules in its definition of covered waters that were not in the proposed rule).

More important for present purposes, it is undisputed that the Rule purports *only* to define those waters that are subject to federal regulation under the Clean Water Act. *See* 80 Fed. Reg. at 37,104 ("In this joint rulemaking, the agencies establish a definitional rule that clarifies the scope of the Clean Water Act."). 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. Indeed, the Rule expressly 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*. 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 actions, challengers may sue in the district court under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 704. In most of this Court's recent cases, for example, the plaintiffs who asserted that their lands did not qualify as "waters of the United States" had originally brought suit in district courts under the APA. *E.g.*, *Hawkes*, 136 S. Ct. at 1813; *Sackett*, 132 S. Ct. at 1371; *Rapanos*, 547 U.S. at 765; *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.* And if a party could have sought review under § 1369, that party cannot later assert the challenge in enforcement proceedings. *Id.* § 1369(b)(2).

D. *State Challenges.* The State Respondents believe that the circuit courts lack jurisdiction over the Rule under § 1369(b)(1) because the Rule is not one of the seven listed actions. So they filed district-court suits challenging the Rule in a total of five actions. *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' position on jurisdiction, *see* 80 Fed. Reg. at 37,104, and given that § 1369's grant of jurisdiction to circuit courts is exclusive, the State Respondents filed protective petitions for review in the circuit courts under § 1369(b)(1)—a practice that the circuit courts have recommended. *E.g.*, *Inv. Co. Inst.*, 551 F.2d at 1280 ("If any doubt as to the proper forum exists, careful counsel should file

suit in both the court of appeals and the district court."); *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.). The State Respondents' petitions were consolidated in the Sixth Circuit with the petitions from many other groups. *See* 28 U.S.C. § 2112(a).

After consolidation, many of the State Respondents filed a motion to stay the Rule, and all of them moved to dismiss their petitions for lack of jurisdiction. The Sixth Circuit granted the stay. *In re EPA*, 803 F.3d at 809. It concluded that the State Respondents had "demonstrated a substantial possibility of success on the merits of their claims." *Id.* at 807. "In light of the disparate rulings . . . issued by district courts around the country," the court reasoned, "a stay [would], consistent with Congress's stated purpose of establishing a national policy, . . . restore uniformity of regulation . . . pending judicial review." *Id.* at 808.

Subsequently, the Sixth Circuit denied the motions to dismiss for lack of jurisdiction in a fractured 1-1-1 decision. The lead opinion, written by Judge McKeague, concluded that the circuit courts had jurisdiction under Subsection (E) and Subsection (F) of § 1369(b)(1). Pet. App. 3a-26a. Citing this Court's cases interpreting § 1369, Judge McKeague believed that the section should be "construed not in a strict literal sense, but in a manner designed to further Congress's evident purposes." *Id.* at 26a. Judge Griffin concurred in the judgment. *Id.* at 27a-45a. He disagreed that the Sixth Circuit had jurisdiction

under the plain text of Subsections (E) and (F), finding the Agencies' reading to be "illogical and unreasonable." *Id.* at 29a. Nevertheless, he believed that the panel was compelled to follow "incorrect" yet binding circuit precedent concerning Subsection (F)'s scope. *Id.* at 44a (discussing *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009)). Judge Keith dissented, agreeing with Judge Griffin's textual analysis but disagreeing that circuit precedent required a finding of jurisdiction under Subsection (F). *Id.* at 45a-47a.

The Sixth Circuit denied immediate en banc review of this holding. *Id.* at 52a. Briefing on the merits remains ongoing in the Sixth Circuit.

ARGUMENT

I. THE COURTS OF APPEALS DO NOT HAVE SUBJECT-MATTER JURISDICTION OVER THE RULE UNDER SECTION 1369(b)(1)

A majority of the Sixth Circuit panel correctly recognized that it would be "illogical and unreasonable" to read § 1369 as granting circuit jurisdiction over the Rule. *See* Pet. App. 29a (Griffin, J., concurring in judgment); *id.* at 45a (Keith, J., dissenting). Of the seven actions triggering jurisdiction under § 1369, the Agencies have claimed that the Rule falls within two: Subsection (E) ("approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345") and Subsection (F) ("issuing or denying any permit under section 1342").

The Agencies are wrong for four basic reasons: (1) the Rule falls outside the plain language of Subsections (E) and (F); (2) several textual canons of

construction confirm that those two subsections cannot be read with the breadth necessary to cover the Rule; (3) this Court's strong preference for bright-line jurisdictional rules supports a plain-text approach to § 1369; and (4) the presumption of agency-action review favors that plain-text reading as well.

A. The Rule Falls Outside The Plain Text Of Subsections (E) And (F)

Subsections (E) and (F) have a parallel structure: specific verbs describing a specific EPA action, a direct object of that EPA action, and a prepositional phrase identifying the statutory section under which the EPA must take the action. Each requirement must be satisfied for jurisdiction to exist under those provisions. The Rule does not satisfy these requirements for either subsection.

1. *Subsection (E).* Subsection (E) grants the circuit courts jurisdiction over EPA action (1) "approving or promulgating" (2) "any effluent limitation or other limitation" (3) "under section 1311, 1312, 1316, or 1345." The two verbs cover both actions that consent to limitations developed *by others* ("approving"), and actions that publish limitations directly created *by the EPA* itself ("promulgating"). *Cf. Webster's New World Dictionary* 68, 1137 (2nd coll. ed. 1972). The use of *both* verbs, moreover, illustrates that this subsection intended for the verb "promulgate" to have a narrow domain, covering only those regulations that directly impose EPA limitations, not "everything [the EPA] issues" in the Federal Register. *Roll Coater, Inc. v. Reilly*, 932 F.2d 668, 670 (7th Cir. 1991); *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1222 (6th Cir. 1994). Any broader interpretation would read "approves" out of the subsection.

Next, the action that the EPA approves or promulgates must be an "effluent limitation" or "other limitation." The Clean Water Act defines "effluent limitation" as "any restriction established by a State or the Administrator 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). This Court has found that these "effluent limitations" include regulations establishing *general* limitations on the discharge of pollutants by certain *categories* of point sources, such as chemical plants. *See E.I. du Pont*, 430 U.S. at 136.

While the Act does not define "other limitation," Congress's use of the phrase "effluent limitation or other limitation" suggests that an "other limitation" must be similar 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). Here, a broad view of "other limitation" would swallow up "effluent limitation"; Congress would have said "any limitation" if it intended for a broad reading. Instead, "other limitation" should be read in context as covering restrictions that are "directly related to effluent limitations" in that they "direct[] . . . point sources to engage in specific types of activity," *Am. Paper Inst., Inc. v. EPA* ("*Am. Paper I*"), 890 F.2d 869, 877 (7th Cir. 1989), such as limits on a point source's cooling water *intake* structures, *Va. Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977).

Finally, the limitation must arise from §§ 1311, 1312, 1316, or 1345. Each section directs the EPA to

create distinct limitations through regulation: § 1311 tells the EPA to promulgate technology-based limits for existing sources; § 1312 directs it to promulgate water-quality-based limits for certain water bodies; § 1316 directs it to promulgate standards of performance that will lead to new-source limits; and § 1345 directs it to promulgate sewage-sludge limits. If, by contrast, a limitation primarily arises from *another* section—such as a water quality standard from § 1313—jurisdiction does not exist. *E.g.*, *Friends of the Earth v. EPA*, 333 F.3d 184, 190 (D.C. Cir. 2003); *Longview*, 980 F.2d at 1312-13; *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 516-18 (2d Cir. 1976).

The Rule does not meet Subsection (E)'s requirements both because it is not a "limitation" and because it does not arise under §§ 1311, 1312, 1316, or 1345. To begin with, the Rule does not promulgate an "effluent limitation or other limitation." It cannot be considered an "effluent limitation" because it nowhere sets limitations on the pollutants that can be discharged into navigable waters. 33 U.S.C. § 1362(11); Pet. App. 9a (McKeague, J., op.). Nor can it be considered an "other limitation" because it does not propose limits on point sources that are at all like effluent limitations. *Va. Elec.*, 566 F.2d at 450; *Am. Paper I*, 890 F.2d at 877. Indeed, the Rule affirmatively disclaims doing so: It "does not establish any regulatory requirements," 80 Fed. Reg. at 37,054, and "imposes no enforceable duty" on "governments" or "the private sector," *id.* at 37,102. "[R]ather, it 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, no limitations arise "under" §§ 1311, 1312, 1316, or 1345. The Rule itself "does not emanate from these sections." *Id.* at 31a. It does not set technology-based limits under § 1311, water-quality-based limits under § 1312, new-source limits under § 1316, or sewage-sludge limits under § 1345. Instead, the Rule interprets text—"waters of the United States," 33 U.S.C. § 1362(7)—found in the Act's definitional section. Pet. App. 31a (Griffin, J., concurring in judgment). Far from being tailored to those sections, moreover, the Rule's "definition will apply to all provisions of the Act." 80 Fed. Reg. at 37,104. It applies to many sections—such as § 1313 (which addresses water quality standards) or § 1344 (which addresses the Corps' permitting program for dredged or fill material)—over which jurisdiction does not exist under § 1369. That is why *both* Agencies, not just the EPA, issued the Rule; it covers provisions within the Corps' domain. *Id.* at 37,115-119. That § 1369 grants jurisdiction over *EPA* actions, not actions of *both Agencies*, confirms that the Rule is not an EPA-specific effluent or other limitation.

2. *Subsection (F).* Subsection (F) grants jurisdiction over EPA action (1) "issuing or denying" (2) "any permit" (3) "under section 1342." 33 U.S.C. § 1369(b)(1)(F). "By its plain terms, this provision conditions the availability of judicial review on the issuance or denial of a permit" under the NPDES permitting program in § 1342 (not the Corps' permitting program in § 1344). *Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004). The verb choices are key.

To "deny" a permit, the EPA must "withhold the possession, use, or enjoyment of" it. *The Random House Dictionary of the English Language* 533 (2d

ed. 1987) (defining "deny"); *Webster's*, *supra*, at 378 (defining "deny" as "to refuse the use of or access to"). This Court has thus read the phrase "deny" to encompass an EPA action *vetoing* a state-issued permit under § 1342 because that veto had the "precise effect" of a denial. *Crown Simpson*, 445 U.S. at 196.

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.*, *Natural 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 circuits have agreed, under no fair meaning of "issue" can the verb be read to reach the EPA's failure to object to, and thus silent approval of, a *state-issued* permit. *Lake Cumberland*, 954 F.2d at 1221 & nn.7, 12; *Save the Bay, Inc. v. Adm'r of EPA*, 556 F.2d 1282, 1290-92 (5th Cir. 1977); *Mianus River Pres. Comm. v. Adm'r, EPA*, 541 F.2d 899, 906-10 (2d Cir. 1976).

The Rule does not satisfy Subsection (F). The Agencies do not claim that it actually "issues" or "denies" a permit under § 1342. *E.g.*, Pet. App. 18a-19a (McKeague, J., op.). That should settle the matter. An analysis of § 1369 must begin "'with the language of the statute itself,'" and it must "'*end*'" there when "'the statute's language is plain.'" *Franklin Cal. Tax-Free Trust*, 136 S. Ct. at 1946 (citation omitted). The language is plain—it requires the EPA to have issued or denied a permit. The Rule does not do so.

The Agencies instead argue that Subsection (F) should be interpreted to encompass all EPA regulations that will "impact permitting requirements" and "affect[] the granting and denying of permits." Pet.

App. 18a (McKeague, J., op.). Neither text nor precedent supports this reading. As for text, the Agencies would change the statutory language from "issuing or denying" a permit to "affecting or relating to" one. As for precedent, *Crown Simpson*—the only case from this Court on which the agencies rely for this argument—does not justify the Agencies' atextual view. Under a plain-text reading, the EPA veto of a state-issued permit that was at issue in *Crown Simpson* "refuse[d] the use of or access to" the permit and so could be read as denying it. *See Webster's*, *supra*, at 378; *Crown Simpson*, 445 U.S. at 196. Here, the Agencies can offer no interpretation of "issue" or "deny" that could encompass the Rule.

In sum, this case is straightforward under a plain-text reading of Subsections (E) and (F). The Rule neither promulgates limitations under §§ 1311, 1312, 1316, or 1345, nor issues or denies permits under § 1342. That is why a district court, not a circuit court, considered the Corps' initial regulations narrowly defining the scope of "waters of the United States." *See Callaway*, 392 F. Supp. at 686.

B. Textual Canons Of Construction Reinforce That The Circuit Courts Lack Jurisdiction Over The Rule

That Subsections (E) and (F) cannot be interpreted to extend to the Rule is confirmed by a high-level canon of construction and by an in-the-weeds canon of construction: the rule that statutes should be read as a whole and the rule against superfluity.

1. *Reading Statutes 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)). Reading § 1369 as a whole and against the entire Clean Water Act confirms that Subsections (E) and (F) do not reach the Rule. Section 1369(b)(1) precisely identifies seven specific actions down to the subsections under which those actions are authorized. As one example, Subsections (A), (B), and (E) each cite a different action under § 1316. (Subsection (B) refers to a specific EPA variance provision within § 1316 that did not make it into the final law.) It is noteworthy that Congress acted with such specificity in the context of a comprehensive environmental 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.

If, however, "the exceptionally expansive view advocated by the government is adopted, [§ 1369(b)(1)] would encompass virtually all EPA actions under the" Act. *North Dakota*, 127 F. Supp. 3d at 1053. Take the Agencies' reading of Subsection (F). Nearly every regulation will have some impact on the permitting process because permits must abide by the general limits adopted elsewhere by the EPA. *See* 33 U.S.C. § 1342(a). Similarly, as for the Agencies' view of Subsection (E), most regulations will have some connection to § 1311. The parties who unsuccessfully sought to obtain circuit review of water quality standards issued under § 1313, for example, argued that they were referenced once in § 1311(b)(1)(C). *See Friends of the Earth*, 333 F.3d at 190. Yet it is

unlikely that Congress would have intended these precise provisions to have such general reach.

Comparing § 1369(b)(1) to the jurisdictional grant in the Clean Air Act, the Clean Water Act's sister statute, confirms that § 1369 should not be read in the Agencies' expansive way. 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); *Harrison*, 446 U.S. at 589. 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 as a class. It did so under the Clean Air Act, but opted not to do so under the Clean Water Act. *Cf. Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174-75 (2009).

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 rule to § 1369(b)(1). Several, 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 that *approves* a state-promulgated individual control strategy. *Lake Cumberland*, 954 F.2d at 1221. The courts have universally found jurisdiction lacking based on the rule against superfluity. *Id.* at 1222-24 (discussing cases). They point to Subsection (E),

which unlike Subsection (G), *does* use both "approving" and "promulgating." These courts 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 equally dooms the Agencies' view. To cover the Rule, Subsections (E) and (F) would have to be read in such a broad manner as would make other subsections superfluous. Subsection (A), for example, grants jurisdiction over an action "promulgating any standard of performance under section 1316" for new sources. If Subsection (E)'s "other limitation" covers anything that could limit the private sector, it would make Subsection (A)'s grant over standards of performance superfluous. Those standards are designed "for the control of the discharge of pollutants." 33 U.S.C. § 1316(a)(1). A broad reading of Subsection (E) thus "allow[s] the term 'other limitation' 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; *Friends of the Earth*, 333 F.3d at 190-91 & n.14.

Similarly, Subsection (C) grants jurisdiction over an action "promulgating any effluent standard, prohibition, or pretreatment standard under section 1317" for toxic pollutants. If Subsection (F)'s "issuing or denying any permit" reaches any regulation *affecting* permits, it would make Subsection (C)'s jurisdictional grant over § 1317's toxic-pollutant limits superfluous. After all, § 1342 expressly identifies those toxic-pollutant limitations as a "condition" for a permit's issuance. *Id.* § 1342(a)(1).

C. This Court's Preference For Bright-Line Jurisdictional Rules Supports A Plain-Text Approach To § 1369

That § 1369(b)(1) concerns subject-matter jurisdiction reinforces that it should be interpreted as written. The plain text—not the Agencies' supposedly pragmatic gloss on that text—establishes the *clearer* boundary between the jurisdiction of the circuit courts under § 1369 and the jurisdiction of the district courts under the APA.

1. This Court has a well-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); *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1133 (2015) (invoking the Court's "rule that '[j]urisdictional rules should be clear'" (citation omitted)). The Court has, for example, adopted a clear rule to identify a corporation's "principal place of business" for purposes of the diversity-jurisdiction statute because "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz*, 559 U.S. at 94. It has done the same when interpreting "final decision" for purposes of the appellate-jurisdiction statute, recognizing that "[c]ourts and litigants [were] best served by the bright-line rule" that it adopted. *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988). Perhaps most famously, the Court has for over a century followed the "well-pleaded complaint rule" for purposes of federal-question jurisdiction, *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908), praising the

"clarity and simplicity of that rule," *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009).

Many reasons undergird this general canon of construction for jurisdictional statutes. To begin with, clear rules reduce the time and expense directed away from a case's merits and toward secondary issues. "[C]ourts 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*, 497 U.S. at 375 (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.

In addition, "[t]he stakes of the inquiry are high[er]" in the jurisdictional context than they are in other contexts. *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 813 (6th Cir. 2015) (Sutton, J.). For over two centuries, this Court has held that "'subject-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); *Capron v. Van Noorden*, 6 U.S. 126, 127 (1804). Accordingly, "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. Likewise, courts 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). Parties need to know (clearly) where to sue because these effects leave zero margin for error in choosing the forum.

2. This canon of construction shows that the Court should follow the plain text. Unlike the Clean Air Act, *see* 42 U.S.C. § 7607(b)(1), the Clean Water Act cannot be interpreted to grant jurisdiction to the circuit courts for *all* agency regulations, and instead divides jurisdiction between the circuit courts and the district courts. *Cf.* Pet. App. 33a (Griffin, J., concurring in judgment). "Jurisdictional tests are built for more than a single dispute." *Merrill Lynch*, 136 S. Ct. at 1575. It will be far easier in the run of cases to determine on which side of the jurisdictional divide a particular EPA action falls if courts stick to § 1369's text rather than the Agencies' amorphous view 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 limitations that those four provisions direct EPA to impose: technology-based limits under § 1311, water-quality-based limits under § 1312, new-source limits under § 1316, or

sewer-sludge limits under § 1345. *See, e.g.*, *E.I. du Pont*, 430 U.S. at 136-37; *see also* Pet. App. 30a-33a (Griffin, J., concurring in judgment).

Under the Agencies' reading, by contrast, it will often be unclear whether a particular EPA action that is not itself a limitation under one of the four sections could have an "*indirect* effect" that should qualify as one. Pet. App. 15a (McKeague, J., op.). In many cases, that view could require litigants to guess at a rule's impact, and courts to engage in jurisdictional fact-finding about a rule's "effects." Regulations defining "waters of the United States" offer a case in point. The relative breadth of a challenged regulation—whether it broadens the definition to *cover* more waters or narrows the definition to *exempt* more waters—could determine whether or not the regulation counts as a "limitation" under Subsection (E) subject to circuit review. Indeed, a regulation could broaden some aspects of the definition but narrow other aspects, making it even murkier where challengers should bring suit. *Cf. id.* at 38a (Griffin, J., concurring in judgment).

Turn to Subsection (F). In most situations, it will be obvious whether a party has challenged EPA action "in issuing or denying [a] permit under section 1342." 33 U.S.C. § 1369(b)(1)(F). The EPA will have issued or denied a permit under § 1342. Under the Agencies' reading, by contrast, it will often be unclear whether a rule adequately relates to the permitting process so as to trigger jurisdiction under Subsection (F). *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

§ 1369. "[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 ask this Court to adopt a vague test that has already proved "excruciating for courts to police" in other contexts. *Merrill Lynch*, 136 S. Ct. at 1575.

In sum, the Agencies' view on jurisdiction "jettison[s] 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. This reading would regularly force "careful counsel" to sue in both district courts and circuit courts when challenging regulations under the Clean Water Act. *Inv. Co. Inst.*, 551 F.2d at 1280. All of this litigation would lead to the "eating up [of] time and money" on issues unrelated to the merits (as it has in this case), which would represent a costly initial step for those who seek to challenge EPA action. *Hertz*, 559 U.S. at 94.

D. The Presumption In Favor Of Judicial Review Confirms That § 1369's Plain Text Controls

The presumption of judicial review over agency action confirms that courts should stick with, not depart from, § 1369's text. That is because § 1369(b)(2) restricts the judicial review available for the specific actions that fall within § 1369(b)(1) as compared to the normal judicial review that would otherwise be available under the APA.

"The APA . . . creates a 'presumption favoring judicial review of administrative action.'" *Sackett*, 132 S. Ct. at 1373 (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 a federal agency claims that the relevant action is not reviewable by courts *at all*. *See, e.g.*, *id.* at 1652-53. Yet it extends beyond that narrow domain to apply whenever an agency argues that a particular statute *limits* judicial review to certain methods. In *Hawkes*, for example, the Agencies argued that the Clean Water Act restricted judicial review of their "jurisdictional determinations"—e.g., determinations that certain lands fell within or outside "waters of the United States"—to the *end* of the permitting process. 136 S. Ct. at 1816. This Court disagreed, invoking the APA's presumption of judicial review to do so. *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.*

Under the same logic, circuit courts in this very context have recognized that the APA's presumption *dis*favors a broad reading of § 1369(b)(1). Section 1369(b)(1) provides for judicial review only during a short 120-day window, and, in addition, § 1369(b)(2) bars judicial review of EPA actions that could have been challenged under § 1369 in later "civil or criminal proceeding[s] for enforcement." "Where . . . review is available" under § 1369(b)(1), "it is the exclusive means of challenging actions covered by the

statute." *Decker*, 133 S. Ct. at 1334. Accordingly, as Judge Easterbrook has suggested, the "review-preclusion proviso in § [1369](b)(2) [should] dissuade[]" this Court "from reading § [1369](b)(1) broadly." *Am. Paper II*, 882 F.2d at 289. Its "peculiar sting" should instead lead the Court to interpret § 1369(b)(1) narrowly by finding most EPA actions subject to the general APA standards. *Longview*, 980 F.2d at 1313. Indeed, Justice Powell suggested that "constitutional difficulties well may counsel a narrow construction of" a jurisdictional provision in the Clean Air Act whenever the statutory text would allow such a construction. *Harrison*, 446 U.S. at 594-95 (Powell, J., concurring). The conclusion that the Rule does not fall within Subsections (E) and (F) is, at the least, a plausible construction of those provisions. That suffices to trigger this presumption.

Indeed, this presumption is particularly appropriate for the expansive Rule—which will apply to nearly every section of the Clean Water Act and to the many different ecological environments in the States. Most of the cases to reach this Court implicating the scope of "waters of the United States" have involved *as-applied* challenges that were tied to findings for particular lands. *See Hawkes*, 136 S. Ct. at 1812-13; *Sackett*, 132 S. Ct. at 1370-71; *Rapanos*, 547 U.S. at 729 (plurality op.); *SWANCC*, 531 U.S. at 165. Such as-applied litigation should not be disallowed simply because the Agencies have now adopted a Rule on the scope of "waters of the United States."

II. THE SIXTH CIRCUIT'S CONTRARY ANALYSIS MISREADS THIS COURT'S CASES AND MISTAKENLY INVOKES POLICY ARGUMENTS

The Sixth Circuit wrongly held that it has jurisdiction to review the Rule. *First*, Judge McKeague's lead opinion was alone in finding that jurisdiction existed under Subsection (E). Pet. App. 8a-17a. The lead opinion found the Agencies' argument "not compelling" under Subsection (E)'s text. *Id.* at 9a. But it reasoned that this Court's *E.I. du Pont* decision adopted a pragmatic approach to Subsection (E), and, by doing so, unmoored that subsection's scope from "a literal reading of the provision." *Id.* at 10a.

This overreads one sentence in *E.I. du Pont* at the expense of the rest of the decision. 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. 430 U.S. at 136 ("We regard [§ 1369](b)(1)(E) as unambiguously authorizing court of appeals review of EPA action promulgating an effluent limitation for existing point sources under [§ 1311]."). The industry, however, had argued for an *atextually* narrow reading of Subsection (E), one permitting review only "of the grant or denial of an individual variance" from those limitations under § 1311(c). *Id.* This Court explained that Subsection (E)'s text was not limited to variances under § 1311(c). *Id.* It noted that "Congress referred to specific subsections of the Act" elsewhere in § 1369(b)(1), and thus Congress "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 important 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 the otherwise plain text of Subsection (E); it did not grant circuits a freewheeling license to depart from the text based on policy concerns.

Second, the Sixth Circuit erred in determining that it had jurisdiction under Subsection (F). *See* Pet. App. 17a-24a (McKeague, J., op.); *id.* at 44a (Griffin, J., concurring in judgment). The concurring opinion reached this conclusion only because the panel was required to follow the Sixth Circuit's *National Cotton* decision, which had read Subsection (F) to extend broadly to regulations affecting permits. *See id.* at 42a-44a (Griffin, J., concurring in judgment). *National Cotton* is, of course, no obstacle to this Court adopting the right reading of Subsection (F). And the concurring opinion correctly recognized that *National Cotton*'s "jurisdictional reach . . . has no end" and is "incorrect." *Id.* at 42a, 44a.

The lead opinion also reasoned that this Court's *Crown Simpson* decision "opened the door to constructions other than a strict literal application." Pet. App. 17a (McKeague, J., op.). As noted, however, that case held only that an EPA veto of a state-issued permit qualified as the "denial" of a permit

under Subsection (F). *See Crown Simpson*, 445 U.S. at 196. In that respect, this Court again 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.* Only then did the Court add the pragmatic point that 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." *Id.* at 196-97. This Court again tied its holding to the text; it did not ignore that text.

Third, the lead opinion drew support for its "broader reading" of § 1369(b)(1) from *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985). Pet. App. 21a-24a (McKeague, J., op.). It believed that language in *Florida Power*, a case about the Atomic Energy Act, evinced a general efficiency-based "preference in favor of circuit court review" for all laws. *See id.* at 23a. A majority of the panel correctly rejected the lead opinion's "reliance on a non-Clean Water Act case to support its policy arguments." *Id.* at 43a (Griffin, J., concurring in judgment). "Nowhere" did *Florida Power* "intimate that it was ruling as a matter of general administrative procedure" or sound policy. *Nader v. EPA*, 859 F.2d 747, 754 (9th Cir. 1988). It instead held that jurisdiction "must of course be governed by the intent of Congress and not by any views [courts] may have about sound policy." *Florida Power*, 470 U.S. at 746.

In addition, *Florida Power*'s "lengthy exegesis of th[e] specific statutes" at issue shows it cannot be applied to a "separate, dissimilar statute" like this one. *Nader*, 859 F.2d at 754. The relevant statutes

used broad terms to describe circuit jurisdiction, reflecting "a congressional intent to provide for initial court of appeals review of all final orders." *Florida Power*, 407 U.S. at 739. *That* intent does not transfer to *this* statute. The "considerable specificity in section 1369(b)" shows that "not all EPA actions . . . are directly reviewable in the courts of appeals." *Narragansett Elec. Co. v. EPA*, 470 F.3d 1, 5 (1st Cir. 2005). Additionally, the statute at issue in *Florida Power* did not contain § 1369(b)(2)'s "review-preclusion proviso," which should lead this Court to review § 1369(b)(1) narrowly even if it were ambiguous. *Am. Paper II*, 882 F.2d at 289.

CONCLUSION

The Sixth Circuit lacks subject-matter jurisdiction over the petitions for review.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
eric.murphy@
ohioattorneygeneral.gov

Counsel for Respondent
State of Ohio

OCTOBER 2016

ADDITIONAL COUNSEL

LUTHER STRANGE
Attorney General
State of Alabama

JAHNA LINDEMUTH
Attorney General
State of Alaska

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CYNTHIA H. COFFMAN
Attorney General
State of Colorado

PAMELA JO BONDI
Attorney General
State of Florida

SAMUEL S. OLENS
Attorney General
State of Georgia

LAWRENCE G. WASDEN
Attorney General
State of Idaho

GREGORY F. ZOELLER
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

ANDY BESHEAR
Attorney General
State of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

BILL SCHUETTE
Attorney General
State of Michigan

JIM HOOD
Attorney General
State of Mississippi

CHRIS KOSTER
Attorney General
State of Missouri

TIM FOX
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

ADAM PAUL LAXALT
Attorney General
State of Nevada

LARA KATZ
Assistant General
Counsel
New Mexico Environment Department

GREGORY C. RIDGLEY
General Counsel
MATTHIAS SAYER
Special Counsel
New Mexico State
Engineer

SAM M. HAYES
General Counsel
North Carolina
Department of
Environmental Quality

WAYNE STENEHJEM
Attorney General
State of North Dakota

E. SCOTT PRUITT
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

MARTY J. JACKLEY
Attorney General
State of South Dakota

HERBERT H. SLATERY III
Attorney General and
Reporter
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia

BRAD D. SCHIMEL
Attorney General
State of Wisconsin

PETER K. MICHAEL
Attorney General
State of Wyoming