No. 15-290

IN THE

Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
Petitioner,

v.

HAWKES CO., INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* OHIO CHAMBER OF COMMERCE, COLORADO MINING ASSOCIATION, AND OHIO COAL ASSOCIATION IN SUPPORT OF RESPONDENTS

J. VAN CARSON
Counsel of Record
KAREN A. WINTERS
DOUGLAS A. MCWILLIAMS
ROBERT D. CHEREN
DANELLE M. GAGLIARDI
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8559
van.carson@squirepb.com

March 2016

CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTERESTS OF THE *AMICI CURIAE*

The Ohio Chamber of Commerce, the Colorado Mining Association, and the Ohio Coal Association respectfully submit this *amici curiae* brief in support of respondents.*

Founded in 1893, the Ohio Chamber of Commerce (Ohio Chamber) is Ohio's largest and most diverse business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

The Ohio Coal Association (OCA) is a non-profit trade association dedicated to representing the interests of Ohio's underground and surface coal producers. The OCA represents nearly all of Ohio's coal producers and more than 50 associate members, which include suppliers and consultants to the mining industry, coal sales agents and brokers, and allied industries. The Ohio Coal Association is committed to advancing the development and utilization of Ohio coal as an abundant, affordable, and environmentally sound energy source.

---

* No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation and submission of this brief. The parties have docketed blanket consents to the filing of *amicus* briefs.

The Colorado Mining Association (CMA), founded in 1876, is a trade association formed under section 501(c)(6) of the Internal Revenue Code whose nearly 1,000 members include the producers of coal, metals, agricultural and industrial minerals throughout Colorado and the west; as well as equipment manufacturers, engineering, consulting and other vendors and service providers to the industry. CMA members generate nearly $3 billion in production value alone in Colorado and the mining industry accounts for nearly 75,000 jobs in the state. CMA's mission is to promote the general health and welfare of the industry before legislatures, regulatory agencies, the courts, and other policy forums, while working to educate and raise public awareness of the importance of mining and mineral products.

As respondents have observed, the government's position in this case that "final agency action" must impose "'independent' legal consequences" threatens to "preclude judicial review of most, if not all, interpretive or declaratory decisions and eviscerate the [Administrative Procedure] Act." Res. Br. at 21. In particular, the government's position would bar preenforcement review of statements by agencies that interpret statutes and regulations. Such statements are "interpretative rules" that can be issued without public notice and comment and have powerful effects.

Amici are interested in preserving the rights of their members to preenforcement judicial review of interpretative rules. A decision by the Court that adopts the government's threshold position that immediate "'independent' legal consequences" are required for agency action to be "final" and subject to judicial review would leave *amici*'s members without recourse against agency fiats that threaten large

projects and investments. Accordingly, *amici* submit this brief in support of respondents to demonstrate that the government's threshold position is contrary to the Administrative Procedure Act and the decisions by the Court which establish that interpretative rules are subject to immediate judicial review when they are issued. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478–79 (2001).

In addition, *amici* address the suggestion that the Corps would respond to an adverse decision in this case by ignoring future petitions for jurisdictional determinations. That would violate the requirements of the Administrative Procedure Act that agencies permit and reasonably consider interpretative rule petitions, in disregard of the rights of *amici*'s members.

BROADER QUESTION PRESENTED

Whether interested persons are entitled to obtain preenforcement judicial review of formal and definitive statements by agencies that interpret statutes and regulations.

SUMMARY OF THE ARGUMENT

The approved jurisdictional determination issued by the Army Corps of Engineers in this case is indisputably an interpretative rule. The Court has held that interpretative rules are subject to judicial review if they constitute "final agency action." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478–79 (2001). The government claims that an approved jurisdictional determination is not a "final agency action" because it does not itself "determine legal rights or obligations . . . or impose legal consequences." Pet. Br. at 17. The government misapplies the Court's decision in *Bennett v. Spear* in claiming such a narrow definition of final agency action. In fact, the government's argument would foreclose judicial review of any interpretative rule, which by definition does not determine legal rights or obligations and does not impose legal consequences. This is a critical case because interpretative rules do not require public notice and comment, leaving judicial review as the last check on this class of agency actions.

This is the government's *third* attempt to have the Court establish a total bar against judicial review of interpretative rules. This attempt should fare no better than its predecessors because the Administrative Procedure Act and the decisions of the Court provide for judicial review of agency interpretative rules. The Act defines its terms so that "final agency action" includes agency statements that interpret law. While such statements are exempt from the notice and comment requirement, the Act conspicuously does not exempt interpretative rules from judicial review. The Court decided the question

in *PPG Industries* by holding an interpretative rule qualified as a final agency action subject to judicial review. The government offers no justification for reading a judicial review exemption into the Act and departing from settled precedent.

The government's argument chiefly depends on a misreading of the *Bennett v. Spear* decision as placing severe restrictions on what constitutes a final agency action. The government ignores the Court's subsequent rebuke of this argument in the *American Trucking* decision and further ignores the Court's clarification in the *Sackett* decision that the so-called *Bennett* "prongs" are merely convenient "hallmarks of finality," not requirements.

In short, the government's position is contrary to the Administrative Procedure Act's text, foreclosed by the Court's decision in *PPG Industries*, and has no support in the Court's decision in *Bennett*.

This case has broad and important implications. The government asks the Court to establish in its decision that Congress has foreclosed judicial review completely for an entire class of agency actions for which "there is no other adequate remedy in a court" so long as the agency technically has not "determine[d] legal rights or obligations, or impose[d] legal consequences." Pet. Br. at 17. The Court is asked to deny judicial review no matter how high the stakes are and regardless of whether the agency has committed an egregious and coercive overreach. Immunizing interpretative rules from judicial review would give executive agencies unbridled power to "say what the law is" without judicial review unless and until agencies implement or enforce their legal interpretations in an enforcement action or final permitting decision.

Finally, the government wrongly intimates the Corps will stop issuing jurisdictional determinations if the Court holds they are subject to judicial review. Agencies issue many interpretative rules today undeterred by the availability of judicial review. Further, the Administrative Procedure Act requires agencies to permit and reasonably consider petitions requesting interpretative rules. The Corps cannot categorically refuse petitions from landowners requesting jurisdictional determinations, regardless of whether judicial review is available.

ARGUMENT

I. The government's position jeopardizes judicial review of interpretative rules.

This case concerns a highly important question of administrative law: whether interested persons are entitled to obtain preenforcement judicial review of statements issued by agencies that interpret statutes and regulations.

Interpretative rules "are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. 1199, 1204 (2015). Interpretative rules "do not have the force and effect of law." *Id.* at 1204 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)). While they are statements "of an advisory character indicating merely the agency's present belief," they have "considerable importance" because "customarily they are accepted as determinative by the public at large" and "courts will be influenced . . . by the administrative opinion." *Final Report of the Attorney General's Committee on Administrative Procedure* 27 (1941).

An approved jurisdictional determination is an interpretative rule "stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel." 33 C.F.R. § 331.2.

Interpretative rules come in two contexts. First, they are issued by agencies in response "to inquiries from potentially regulated parties." Pet Br. at 23; *see Final Report of the Attorney General's Committee on*

Administrative Procedure 27 (1941) ("[O]ften they are made as a consequence of individual requests for rulings upon particular questions . . . ."). Second, they are issued on an agency's own accord. While the interpretative rule in this case is of the former kind, the government does not argue that reviewability depends on whether or not the interpretative rule was issued *sua sponte*.

Interpretative rules have an expedited procedural path because the Administrative Procedure Act exempts the formulation, amendment, and repeal of agency interpretative rules from the requirement to give advance notice and take public comments. 5 U.S.C. § 553(b)(3)(A); 5 U.S.C. § 551(5). In addition, the Administrative Procedure Act requires agencies to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule" and that this extends to a rule that is a "statement of . . . particular applicability and future effect designed to . . . interpret . . . law." 5 U.S.C. § 553(e); 5 U.S.C. § 551(4). Through these provisions, Congress fostered the issuance of interpretative rules.

As demonstrated in the briefing before the Court in *Mortgage Bankers* last term, interpretative rules frequently address highly significant legal issues and have enormous ramifications. Brief for the National Mining Association as Amicus Curiae at 18–26, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041); Brief for the National Federation of Independent Businesses, et al. as Amici Curiae at 14–22, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct.

1199 (2015) (No. 13-1041);[1] Brief for American Hospital Association, et al. as Amici Curiae at 16–20, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041);[2] Brief for the Chamber of Commerce of the United States of America, et al. as Amici Curiae at 10–22, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041);[3] Brief for the Cato Institute, et al. as Amici Curiae at 19, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041);[4] Brief for the Center for Constitutional Jurisprudence as Amicus Curiae at 11–15, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041); Brief for the State and Local Government Associations as Amici Curiae, at 13–15, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041);[5] Brief for the Thomas Jefferson Institute

---

1. National Federation of Independent Businesses, American Farm Bureau Federation, American Petroleum Institute, National Association of Home Builders, and Retail Litigation Center.

2. American Hospital Association, Association of American Medical Colleges, and HealthCare Financial Management Association.

3. Chamber of Commerce of the United States of America, American Fuel and Petrochemical Manufacturers, American Health Care Association, Business Roundtable, National Association of Manufacturers, and Securities Industry and Financial Markets Association.

4. Cato Institute, Competitive Enterprise Institute, and Judicial Education Project.

5. National League of Cities, United States Conference of Mayors, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, Government Finance Officers Association, National School Boards Association, National Public Employer Labor Relations Association, and

for Public Policy as Amicus Curiae at 4–5, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (No. 13-1041).

The government down plays the importance of jurisdictional determinations, but does not and could not deny that agencies issue interpretative rules that have significant and immediate effects on heavily regulated industries. For example, the mining industry is regulated by a host of federal agencies under a number of statutory regimes that govern where mining may occur, how mining facilities must be designed, operated and constructed, and how mining facilities must be closed and reclaimed at the end of their operating life. The statutes and regulations are beset with vagueness and ambiguity, and penalties for less-than-perfect compliance are very substantial. Federal agencies frequently send letters to mining companies interpreting statutes and regulations that apply to their operations and address significant investment, business, and engineering decisions, such as whether and how to expand operations.

The government also suggests interpretative rules simply provide "useful" "information" and "incentive," Pet. Br. at 16–17, but in practice interpretative rules in fact deliver commands and coercion. Indeed, a mining company's receipt of such a letter and subsequent refusal to conform to the agency's interpretation will be offered as evidence of a willful violation carrying more severe penalties. *See* Pet. Br. at 32 (noting receipt of jurisdictional determination could be offered as evidence to increase penalties).

International Public Management Association for Human Resources.

In many regulatory contexts, the potential risks of resisting an agency interpretative rule are not limited to just civil penalties, but include potential criminal sanctions as well.[6]

Having last term in *Mortgage Bankers* vindicated the right of agencies to issue, amend, and repeal interpretative rules without notice and comment, now the government seeks to shrug off the vital remaining check on the power of agencies to issue interpretative rules with significant coercive effects: the right of judicial review.

Congress intended "final agency action" to "cover a broad spectrum of administrative actions." *Abbott Laboratories v. Garner*, 387 U.S. 136, 140 (1967); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (the Act's judicial review provision "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action"); *Heckler v. Ringer*, 466 U.S. 602, 645 (1984) ("In our system of government under law, administrative absolutism is not the rule, but only the narrow exception."); Transcript of Oral Argument at 40, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062) ("[F]or 75 years the courts have interpreted statutes with an eye towards permitting judicial review, not the opposite."); *id.* at 50 ("[T]he Government here . . . is fighting 75 years of practice.").

---

6. *E.g.*, 33 U.S.C. § 1319(c)–(d) (Clean Water Act); 42 U.S.C. § 6928(d), (g) (Resource Conservation and Recovery Act); 42 U.S.C. § 7413(b)–(c) (Clean Air Act); 42 U.S.C. §§ 9603(b), 9609(c) (Comprehensive Environmental Response, Compensation, and Liability Act).

Contrary to this congressional intent, the government in this case asks the Court to limit "final agency action" to a narrow set of agency actions that "determine legal rights or obligations, or impose legal consequences," Pet. Br. at 17. If the Court accepts this argument, interpretative rules would be immune from direct judicial review. The government admits in its brief that this is the implication of its position. *Id.* at 33 ("In its lack of legal effect, an affirmative jurisdictional determination is similar to . . . other statements . . . communicating the agency's views about the proper application of relevant statutory provisions to particular factual scenarios."); *Id.* at 34 ("[A] jurisdictional determination is no different from the innumerable opinions that agencies offer to assist regulated entities in understanding the obligations imposed by the governing statute."). Despite the breadth of the claim, the government "relies on no explicit statutory authority for its argument that pre-enforcement review is unavailable" for interpretative rules. *Abbott Laboratories*, 387 U.S. at 141.

II. Formal and definitive interpretative rules are final actions subject to judicial review.

A. The Administrative Procedure Act expressly permits judicial review of interpretative rules.

In this case, just as in *Mortgage Bankers* last term, "[t]he text of the APA answers the question presented." *Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. 1199, 1206 (2015). The Act provides a "final agency action" is "subject to judicial review" whenever "there is no other adequate remedy in a court." 5 U.S.C. § 704. The text of the Act indicates that an "agency action" is "final" if it is not "preliminary, procedural, or intermediate." *Id.* The Act then defines the crucial term "agency action" in relevant part to include "the whole or a part of an agency rule," §§ 551(13), 701(b)(2)[7] and the word "rule" is broadly defined to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to . . . interpret . . . law." §§ 551(4), 701(b)(2).[8]

---

7. In addition, the term "agency action" is defined to include "the whole or part of an agency . . . order, license, sanction, relief, or the equivalent denial thereof, or failure to act." *Id.*

8. In addition, the term "rule" is defined to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement . . . law or policy," "interpret . . . policy," "prescribe law or policy," and statements "describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." *Id.*

The government admits issuance of an approved jurisdictional determination "marks the culmination" of a "distinct process" in which the Corps determines and states its interpretation of the Clean Water Act as it applies to a landowner's property. Pet. Br. at 26. The government does not claim the Corps' action is "preliminary, procedural, or intermediate." 5 U.S.C. § 704. That should be the end of the matter; the jurisdictional determination is a final agency action under the Administrative Procedure Act.

The government's argument is that an approved jurisdictional determination is not "final agency action" because "it does not impose legal consequences or alter the recipient's legal obligations." Pet. Br. at 26. The government would have the Court read an implied exception into the term "agency action" that would only apply when the phrase "agency action" is used in the judicial review provision in order to cabin the availability of judicial review to a more limited set of actions. But limiting the scope of judicial review under the Act and in certain cases is the job of Congress, not the Court, and the limits Congress has imposed already are adequate.

First, "agency" is defined to expressly exclude Congress, courts of the United States, governments of territories, possessions, and the District of Columbia, courts martial, military commissions, military authority exercised in time of war and in occupied territory, and other entities for which judicial review would not be appropriate. 5 U.S.C. § 701(b). Further, the Court has held the President is not an "agency" that is subject to judicial review under the Act. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). Thus, the judicial review provision covers only "action" taken by an "authority of the

Government of the United States" that can properly be subjected to judicial review, such as the Army Corps of Engineers in this case.

Second, judicial review is not available for actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This important exclusion covers a wide range of prosecutorial decisions and similar discretionary judgments for which judicial review would be inappropriate. The approved jurisdictional determinations at issue in this case are not excluded by this provision.

Third, judicial review is not available under the Administrative Procedure Act if "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). Thus, Congress limits review in particular circumstances as needed. The Clean Water Act at issue in this case does not preclude judicial review.

Apart from these three textual limits, however, Section 10(c) expressly extended judicial review to "*every* final agency action for which there is no other adequate remedy in any court." Pub. L. No. 79-404, § 10(c), 60 Stat. 237, 243 (1947) (emphasis added).[9] Had Congress intended that only a narrow subset of "rules" and "agency actions" would be subject to judicial review, Congress could easily have enacted additional limits at the outset of the Act's judicial review provision in Section 10 with the others, but Congress did not do so.[10] In stark contrast, Congress

---

9. The 1966 codification of the Administrative Procedure Act dropped the word "every" but did not change the substantive meaning of the judicial review provision.

10. Notably, the 1966 codification that was prepared by the House Judiciary Committee less than two decades after the

expressly provided interpretative rules *are* exempt from the Act's procedural requirement to provide public notice and take public comments. 5 U.S.C. § 553(b)(3)(A); *Mortgage Bankers*, 135 S. Ct. at 1203. Congress expressly decided that it was inappropriate to mandate public notice-and-comment for issuance of interpretative rules. At the same time, Congress conspicuously chose *not* to exclude interpretative rules from judicial review. This is hardly suprising, for the availability of judicial review of interpretative rules was presumed at the time that the Administrative Procedure Act was drafted. *See Final Report of the Attorney General's Committee on Administrative Procedure* 27 (1941) ("[A]gencies find it useful from time to time to issue interpretations of the statutes under which they operate. These interpretations are ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language. They are not binding upon those affected, for, if there is disagreement with the agency's view, *the question may be presented for determination by a court*." (emphasis added)).

---

passage of the Act expressly incorporates in the judicial review chapter the definition of "agency action" and the definition of "rule." 5 U.S.C. § 701(b)(2) ("'rule' . . . and 'agency action' have the meanings given them by section 551"). This is all the more significant because the House Judiciary Committee only adopted seven definitions in the judicial review chapter, six of which together define the scope of "agency action" subject to judicial review. *Id.* The precise and specific adoption of these definitions in the judicial review chapter reflect a shared understanding that the scope of agency action subject to review is coextensive with the scope of agency action subject to other provisions of the Act except when statutes preclude judicial review and when agency action is committed to agency discretion by law.

The breadth of the availability of judicial review is a direct result of the statutory text. As the Court has explained, "[t]he bite in the phrase" "final agency action" "is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power," *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001), for the word "action" is defined to include any "rule," and the term "rule" in the Act "is defined broadly to include 'statement[s] of general or particular applicability and future effect' that are designed to 'implement, interpret, or prescribe law or policy.'" *Mortgage Bankers*, 135 S. Ct. at 1203 (quoting 5 U.S.C. § 551(4)).

B. The PPG Industries *decision establishes that final interpretative rules are agency actions subject to judicial review.*

The Court in *Harrison v. PPG Industries Inc.* established that the issuance of a final interpretative rule is an agency action subject to judicial review. Adopting the government's position would require the Court to reverse that decision. But even if the Court "would decide [the issue] differently now than [the Court] did then," *stare decisis* dictates that Court must adhere to its earlier decision unless the government demonstrates a "special justification" "over and above" merely claiming that it "was wrongly decided." *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015).

In *PPG Industries*, a chemical manufacturer had "beg[u]n the planning and preliminary construction of a new power generating facility" that included two "waste-heat" boilers. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 582 (1980). A dispute arose over

when the "construction" of the two boilers was "commenced" for purposes of determining if they were subject to a Clean Air Act new source standard that was proposed after planning and preliminary construction of the facility, and this depended on interpeting Section 111(a)(2) of the Clean Air Act as it applied to the particular facts. In addition, a dispute arose over whether the boilers were "fossil fuel-fired steam generators" within the scope of the new source standard promulgated by EPA.

After the agency learned of the project and on the agency's own accord, the EPA Regional Director of Enforcement notified the chemical manufacturer that he concluded "the boilers were subject to the 'new source' standards,' since construction of the boilers themselves had not begun until long after . . . the date on which the standards had been proposed" even though "the boilers were part of an integretated unit, the construction of which had begun . . . before the date of the standards." *Id.* After receiving a response from the chemical manufacterer disputing his conclusion, the Regional Director "reaffirmed his initial decision." *Id.* The chemical manufacturer then petitioned the agency seeking an amended interpretative ruling that "construction" "commenced" prior to proposal of the new source standard, and also an interpretative ruling that the standard at issue covering "fossil fuel-fired steam generators" did "not apply to the type of boilers in question." *Id.* at 583. The EPA Regional Adminstrator answered the petition by letter and concluded that the two waste-heat boilers were subject to the new source standard because the standard applied to boilers of that type and because the "construction" of the two boilers had "commenced" after the proposal of the standard. *Id.*

Thus, the agency issued two interpretative rules that were "statement[s] of . . . particular applicability and future effect designed to . . . interpret . . . law," one interpreting and applying a statutory provision and the other interpreting and applying a regulatory provision. 5 U.S.C. § 551(4). The Court had little trouble holding as a threshold question that the interpretative rules were reviewable "'final action' as that term is understood in the context of the Administrative Procedure Act and other provisions of federal law" because "the Administrator's ruling represented EPA's final determination concerning the applicability of the 'new source' standards to [the chemical manufacturer's] power facility" and "[s]hort of an enforcement action, EPA ha[d] rendered its last word on the matter." *PPG Industries*, 446 U.S. at 586. The Court did not apear in the least bit "reluctant to hold" that EPA's statements interpreting a statute and a regulation were "immediately reviewable." *Cf.* Pet. Br. at 23 (citing lower court decisions evidencing reluctance).

Thus, the Court decided in *PPG Industries* that an interpretative rule is subject to judicial review if it is a "final determination" of the legal question at issue and the agency has "rendered its last word on the matter" "[s]hort of an enforcement action." *Id.* This is consistent with the Act, under which judicial review is accorded an interpretative rule that is not "preliminary, procedural, or intermediate" because it is a "final agency action" for which "there is no other adequate remedy in a court." 5 U.S.C. § 704.

Justice Stevens in his dissent offered a more fulsome discussion of the reviewability of agency interpretative rules. *PPG Industries*, 446 U.S. at 603–04 (Stevens, J. dissenting). As Justice Stevens

noted, the Court of Appeals for the District of Columbia Circuit had already held that formal interpretative rules qualify as reviewable final agency action. *Id.* at 604 n.4 (citing *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971)). In that 1971 case, Judge Leventhal examined the text of the Act and found Section 10 authorizes "judicial review of 'final agency action,'" "the term 'agency action' includes 'rule,' and that in turn is defined . . . as 'an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,'" and "[t]he term 'agency action' thus embraces an agency's interpretation of its law." *Nat'l Automatic Laundry & Cleaning* Council, 443 F.2d at 698.[11] The Court in *PPG Industries* reached the same result nine years later.

The Court's holding in *PPG Industries* is entitled to the utmost respect because nothing suggests that the issue was wrongly decided.

C. Judicial review of interpretative rules is not unduly disruptive.

History does not support the government's claims that judicial review of interpretative rules is unduly disruptive. The Court's 1980 *PPG Industries* decision and the earlier Court of Appeals decision reaching

---

11. Judge Leventhal further observed the Court had ruled the year before that "finality is not negatived because the agency's determination concerning the application of its statute [is] lacking in 'independent coercive effect.'" *Id.* (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

the same result did not produce an unending flood of litigation or otherwise prove disruptive to agency use of interpretative rules. Rather, judicial review of interpretative rules has proved to be a workable method of resolving important legal questions. *See, e.g.*, *Independent Bankers Ass'n v. Smith*, 534 F.2d 921 (D.C. Cir. 1976) (affirming successful challenge to interpretative rule regarding whether ATMs established by national banks are "branches" under Section 36(f) of the National Bank Act); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1564–66 (D.C. Cir. 1984) (en banc) (reviewing interpretative rule).

At a minimum, the government has not identified any "special justification" sufficient to surmount the considerable *stare decisis* barrier to the position that the government now advances. The government's brief neither discusses nor even cites *PPG Industries*.[12] While the government today asserts that a regulated entity's disagreement with an agency is insufficient to "justify judicial review," the government argued to the contrary in *PPG Industries* and the Court agreed. Pet. Br. at 24. The Court should adhere to its prior decision and decline the unsupported invitation to depart in this case from the result in *PPG Industries*.

---

12. The government does cite Judge Leventhal's 1971 decision for the propositions that issuance of interpretative rules is a "salutary administrative practice" and that the availability of judicial review "might well discourage the practice," but the government does not address the court's holding that judicial review of interpretative rules is expressly authorized and cannot be denied even though an agency's interpretation of its law lacks independent coercive effect. Pet. Br. at 23–24 (quoting *Nat'l Automatic Laundry*, 443 F.2d at 699).

III. The *Bennett* decision did not overrule the Court's decision in *PPG Industries* and did not render interpretative rules immune from judicial review.

Given the text of the Act and the Court's decision in *PPG Industries*, the government's case turns on whether the Court in *Bennett v. Spear* reversed its prior decision in *PPG Industries* and erected a nontextual exemption of interpretative rules from judicial review in the Administrative Procedure Act. Pet. Br. at 25 (quoting *Bennett v. Spear*, 520 U.S. 154, 177 (1997)). The government's argument misreads the *Bennett* decision and ignores the Court's subsequent rebuke of the very argument advanced here in the *American Trucking* decision and clarification in the *Sackett* decision that the "prongs" outlined in *Bennett* are merely "hallmarks of finality," not requirements that limit the availability of judicial review.

A. The Bennett *decision merely distinguished* Franklin *and* Dalton *without imposing a universal test for final actions.*

In the portion of the *Bennett* decision that the government relies on to gut the Act's judicial review provision, the Court merely dispensed with the government's "theory" in that case relying on *Franklin* and *Dalton* that a biological opinion issued by the Fish and Wildlife Service to another agency is not "reviewable 'final agency action'" because it is "an agency's recommendation to another governmental decisionmaker.'" Brief for Respondents at 25, *Bennett v. Spear*, 520 U.S. 154 (1997) (No. 95-813) (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462 (1994)). The Court

distinguished these two cases because they involved reports to the President "which were purely advisory and in no way affected the legal rights of the relevant actors," as compared to the eventual action taken by the President that would affect legal rights. *Bennett*, 520 U.S. at 178. In other words, the reports were "preliminary" and "intermediate" rather than "final." 5 U.S.C. § 704.

In the course of rejecting the government's claim that *Franklin* and *Dalton* foreclosed judicial review, the Court observed: "[a]s a general matter, two conditions must be satisfied for agency action to be 'final.'" *Bennett*, 520 U.S. at 177. In describing the latter of the two "general" conditions, the Court stated that an "action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Marine Terminal*, 400 U.S. at 71).

The government argues that this small portion of the Court's *Bennett* decision established (or recited) an absolute and universal requirement for judicial review that would preclude review of all interpretative rules. This mischaracterizes the Court's discussion in *Bennett*.

The *Bennett* discussion merely notes that in many contexts, agency actions are generally "preliminary" and "intermediate" until the point at which "rights or obligations have been determined" or the point at which "legal consequences will flow." 5 U.S.C. § 704; *Bennett*, 520 U.S. at 178 (quotation omitted). This general guidepost was helpful to resolve the issue in *Bennett*, but its application in one relevant context did not silently overturn *PPG Industries* and foreclose direct judicial review of agency interpretative rules, as the government suggests.

The assertion that *Bennett* imposed (or recited) a sweeping limit on the scope of "final agency action" that forecloses review of interpretative rules is belied by the Court's unequivocal recognition in *Bennett* that the Act "by its terms . . . provides a right to judicial review of *all* 'final agency action for which there is no other adequate remedy in a court,' and *applies universally* 'except to the extent that . . . statutes preclude judicial review . . . or . . . agency action is committed to agency discretion by law.'" *Bennett*, 520 U.S. at 175 (citing 5 U.S.C. § 704; 5 U.S.C. § 701(a)) (emphasis added). It would be surprising indeed if a few pages later the Court announced in dicta that the Court would depart from *PPG Industries* and deny judicial review of interpretative rules without even discussing it first. The Court's decision included no such announcement, and even if it had that would not be a reason now to take the dramatic step the government claims the Court said it would.

B. The American Trucking *decision already rejected the government's attempt to rely on* Bennett *to foreclose judicial review of interpretative rules.*

The government's expansive view of *Bennett* has already been rejected by this Court.

In *American Trucking*, the government argued an interpretative rule announced in the explanatory preamble to a final rule "d[id] not satisfy the second *Bennett* requirement that 'the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Brief for Petititioners at 40–41, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) (No. 99-1257) (quoting *Bennett*, 520 U.S. at 178). In an opinion for

the Court by the author of *Bennett*, the Court refused to apply *Bennett* to foreclose judicial review of classes of agency action that by definition do not determine rights or obligations or have direct legal consequences.

At issue was EPA's statement interpreting the provisions of Part D of Title I of the Clean Air Act regarding whether a set of specific restrictions in Subpart 2 would govern the implementation of a new ozone standard. The statement was unquestionably an interpretative rule "issued by [EPA] to advise the public of [EPA's] construction of the [Clean Air Act] which it administers." *Mortgage Bankers,* 135 S. Ct. at 1204.

The Court had "little trouble concluding" that this interpretative rule "constitute[d] final agency action." *Am. Trucking*, 531 U.S. at 478. The Court explained the word "action" in Administrative Procedure Act "is meant to cover comprehensively every manner in which an agency may exercise its power" and so the limit on judicial review is contained "in the word 'final,' which requires that the action under review 'mark the consummation of the agency's decision-making process'" and "[o]nly if the '[agency] has rendered its last word on the matter' in question . . . is its action 'final' and thus reviewable." *Id.* (quoting *Bennett*, 520 U.S. at 177–78; *PPG Industries*, 446 U.S. at 586). The Court found "[t]hat standard" for final agency action was "satisified" by the agency's "adopt[ion] of [an] interpretation" of a statute. *Id.* at 478–79. Thus, the Court held the interpretative rule issued by EPA was final agency action even though the government had shown that "[a]ny obligations . . . ar[o]se . . . regardless of what EPA said, or did not say," "[n]o legal consequences flow[ed] from the . . . statements themselves," and "EPA's views . . .

w[ould] produce tangible legal consequences only when EPA t[ook] actual steps" consistent with EPA's interpretation of the statutue. Brief for Petititioners at 41, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) (No. 99-1257).

And so, the Court in *American Trucking* rebuffed the government's first attempt to argue that the *Bennett* decision imposed a "requirement that 'the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."'" *Id.* at 40–41 (quoting *Bennett*, 520 U.S. at 178). The government notably does not discuss or cite *American Trucking* in its brief raising the same argument.

C. The Sackett *decision clarified that the* Bennett *decision outlines "hallmarks" of finality, not requirements for final actions.*

While the decision in *American Trucking* shows that the government's argument based on *Bennett* is erroneous, the Court's opinion by the same author in *Sackett v. EPA*, 132 S. Ct. 1367 (2012), helpfully clarifies that the "prong" on which the government relies is not a universal requirement.

In *Sackett*, the government argued that an EPA compliance order was not a "final agency action" in part because it did not have a sufficient legal effect. In rejecting that claim, the Court disagreed but first clarified that independent legal effects are merely "hallmarks of APA finality." *Sackett*, 132 S. Ct. at 1371. Thus, the decision in *Sackett* explained that the discussion in *Bennett* was merely a recitation of helpful benchmarks, nothing more.

* * *

In this case, the government's third attempt to use *Bennett* to severely restrict the role of courts in reviewing agency actions, a final and definitive rebuke is warranted.

IV. A decision immunizing interpretative rules from judicial review would permit regulation by administrative fiat.

Judicial review of interpretative rules serves a vital role in administrative law by discouraging agencies "whose zeal might otherwise have carried them to excesses" from leveraging the costs, length, and uncertainty of enforcement actions and the deference that they are afforded by the judiciary to coerce regulated entities into compliance with burdensome agency demands "not contemplated in legislation creating their offices." *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950). The check of direct judicial review is especially necessary for interpretative rules that are exempt from the Act's procedural protections requiring notice and comment rule making.

Accepting the government's position here would fly in the face of the Court's assurance last term in *Mortgage Bankers* that "regulated entities are not without recourse" from unlawful, arbitrary, and capricious interpretative rules. *Mortgage Bankers*, 135 S. Ct. at 1209. Judicial review is the sole recourse available for interpretative rules. Congress could not have intended to leave those aggrieved by agency interpretative rules without any recourse when these final agency actions have significant coercive effects. The public would often have no real choice but to comply with an agency's publicly expressed view of the law no matter how erroneous or unreasonable if interpretative rules are immune from judicial review because the alternative course of acting contrary to the announced agency view risks the considerable weight of agency enforcement.

The government claims that interpretative rules "are not easily used to 'strong-arm[]' regulated parties" because they "do not direct the recipient to take or refrain from taking any action." Pet. Br. at 44 (quoting *Sackett*, 132 S. Ct. at 1374). But as the Court has recognized, "[t]he absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules," *Mortgage Bankers*, 135 S. Ct. at 1204, and there is little if any difference in the coerciveness of an agency statement that certain conduct *is* unlawful and an agency statement demanding that the same conduct must stop *because* it is unlawful.

The government also claims interpretative rules "are not easily used to 'strong-arm[]' regulated parties" because they "they are typically provided only to persons who request them." Pet. Br. at 44 (quoting *Sackett*, 132 S. Ct. at 1374). But agencies can and do issue interpretative rules *sua sponte*, and they should be expected to do so far more often if the Court in this case reverses *PPG Industries* and immunizes interpretative rules from judicial review.

As the *PPG Industries* decision illustrates, there are already circumstances in which agencies issue interpretative rules on their own accord addressing capital projects that are already underway. Without the ability to obtain judicial review, agencies will be empowered to coerce investments in compliance with aggressive and potentially unfounded interpretations of statutes and regulations. For large capital projects the *in terrorum* effect of an interpretative ruling can kill off a project entirely by imposing unacceptable costs or risks, or discouraging key financial backers.

And in other cases, an agency interpretative rule can force acceptance of large changes in overall costs and design to meet the demands of an agency's interpretation that would not survive judicial review.

There is every reason to believe that immunizing interpretative rules from judicial review would lead to "strong-arming of regulated parties." *Sackett*, 132 S. Ct. at 1374. While agencies might voluntarily restrain themselves from using such a power to achieve regulatory ends not intended by Congress without meaningful judicial review, the Act entrusts the judiciary with the role of tempering those who in their zeal would disregard such voluntary restraints. Congress could not have intended to eliminate this vital protection by merely requiring that an agency action must be "final" for judicial review rather than "preliminary, procedural, or intermediate."[13]

---

13. S. REP. NO. 79-752, at 26 (1945) ("Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.").

V. The government's brief wrongly suggests the Corps will stop providing jurisdictional determinations as if the agency can ignore petitions requesting interpretative rules, contrary to the requirements of the Administrative Procedure Act.

The Corps intimates that "because nothing in the [Clean Water] Act or the Corps' regulations requires the Corps to issue jurisdictional determinations, the Corps might reconsider the practice" if the Court were to affirm the right to judicial review. This is an empty threat. The Corps cannot decide to categorically ignore petitions from landowners requesting jurisdictional determinations to avoid the burden of judicial review. Pet. Br. at 24. To the contrary, the consideration and disposition of petitions from landowners requesting jurisdictional determinations are both required and governed by the provisions of the Administrative Procedure Act.

The Clean Water Act does not have to "establish" a "mechanism whereby a property owner, without first seeking a permit or discharging without a permit, may obtain the government's view as to whether the Act applies to particular sites," Pet Br. at 3, because that mechanism is generally provided by Congress in the Administrative Procedure Act. The Act dictates that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule" and that this extends to a rule that is a "statement of . . . particular applicability and future effect designed to . . . interpret . . . law." 5 U.S.C. § 553(e); 5 U.S.C. § 551(4). Thus, the Corps "shall give" a landowner "the right to petition for the

issuance of" a "statement" determining "whether the Act applies to particular sites."

The Corps cannot categorically ignore petitions requesting interpretative rules, for denial of such a petition requires "[p]rompt notice . . . of the denial" and must be "accompanied by a brief statement of the grounds for denial." § 555(e). A blanket prospective denial of petitions would contravene this provision.

The consideration and disposition of a landowner petition requesting a jurisdictional determination is not "committed to agency discretion by law," § 701(a)(2), and so it may not be "unreasonably delayed," § 706(1), and a decision to deny a petition must be vacated by a reviewing court if it is "arbitrary, capricious, [or] an abuse of discretion." § 706(2)(A).

Announcing to the public that all future petitions for jurisdictional determinations will be ignored or denied without reasonable consideration would violate the Administrative Procedure Act. Accordingly, there is no real danger that the Court's decision in this case would cause the Corps to "reconsider the practice" of reasonably considering and disposing of petitions requesting jurisdictional determinations.

Agencies have been making interpretative rules under threat of judicial review for many decades. Undoubtedly agencies prefer to operate without the oversight of the courts and, therefore, it is not surprising that the government is making a third attempt to avoid judicial review. Nor should it be surprising, however, for the Court to reaffirm the essential role of judicial review for final agency actions interpreting how the law applies to those affected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

J. VAN CARSON
Counsel of Record
KAREN A. WINTERS
DOUGLAS A. MCWILLIAMS
ROBERT D. CHEREN
DANELLE M. GAGLIARDI
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8559
van.carson@squirepb.com

March 2016