Nos. 16-5038 & 16-5039

In the

United States Court of Appeals

for the

Tenth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al.,
Plaintiffs-Appellants,

– v. –

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellees.

STATE OF OKLAHOMA *ex rel.* E. SCOTT PRUITT,
Plaintiff-Appellant,

– v. –

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al..
Defendants-Appellees.

Appeals from the U.S. District Court for the Northern District of Oklahoma
Nos. 15-cv-0381 and 15-cv-0386, Chief Judge Claire V. Eagan

BRIEF OF THE AMERICAN FARM BUREAU FEDERATION; AMERICAN FOREST & PAPER ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION; GREATER HOUSTON BUILDERS ASSOCIATION; LEADING BUILDERS OF AMERICA; NATIONAL ALLIANCE OF FOREST OWNERS; NATIONAL ASSOCIATION OF HOME BUILDERS; NATIONAL ASSOCIATION OF MANUFACTURERS; NATIONAL ASSOCIATION OF REALTORS; NATIONAL CATTLEMEN'S BEEF ASSOCIATION; NATIONAL CORN GROWERS ASSOCIATION; NATIONAL MINING ASSOCIATION; NATIONAL PORK PRODUCERS COUNCIL; NATIONAL STONE, SAND, AND GRAVEL ASSOCIATION; PUBLIC LANDS COUNCIL; TEXAS FARM BUREAU; AND U.S. POULTRY & EGG ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

TIMOTHY S. BISHOP
CHAD M. CLAMAGE
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Amici certify that none of them issues stock and none is owned, either in whole or in part, by any publicly held corporation.

TABLE OF CONTENTS

Table of Authorities iii

Interest of the *Amici Curiae* 1

Introduction 4

Argument 6

I. The district court was wrong to defer to the Sixth Circuit's jurisdictional decision 7

A. The Sixth Circuit's judgment is not binding 8

B. The Sixth Circuit's reasoning supports reversal 9

II. The district court had jurisdiction over plaintiffs' complaints 11

A. Paragraphs (E) and (F) are inapplicable here 12

1. The Rule is not an "other limitation" under paragraph (E) 12

2. There is no basis for finding jurisdiction under paragraph (F) 16

3. The government's interpretations of paragraphs (E) and (F) violate the expressio unius canon 18

B. Important practical considerations support reversal 20

Conclusion 23

TABLE OF AUTHORITIES

Cases

1mage Software, Inc. v. Reynolds & Reynolds Co.,
459 F.3d 1044 (10th Cir. 2006) 8

ACF Indus., Inc. v. EEOC,
439 U.S. 1081 (1979) 20

Am. Paper Inst. v. EPA,
890 F.2d 869 (7th Cir. 1989) 14, 19

American Farm Bureau Federation et al. v. EPA et al.,
No. 15-3850 (6th Cir.) 3

American Farm Bureau Federation et al. v. EPA et al.,
No. 3:15-cv-165 (S.D. Tex. July 2, 2015) 3

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 18

Bender v. Williamsport Area Sch. Dist.,
475 U.S. 534 (1986) 9

Bethlehem Steel Corp. v. EPA,
538 F.2d 513 (2d Cir. 1976) 20

California v. Carney,
471 U.S. 386 (1985) 21

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 14

In re Clean Water Rule: Definition of Waters of U.S.,
817 F.3d 261 (6th Cir. 2016) ..... *passim*

Crown Simpson Pulp Co. v. Costle,
445 U.S. 193 (1980) 16, 17

Friends of the Everglades v. EPA,
699 F.3d 1280 (11th Cir. 2012) 5, 10, 16, 18

Georgia et al. v. McCarthy et al.,
No. 2:15-cv-79 (S.D. Ga. July 31, 2015).....12, 17

Grimland v. United States,
206 F.2d 599 (10th Cir. 1953).....8

Hart v. Massanari,
266 F.3d 1155 (9th Cir. 2001).....21

In re Korean Air Lines Disaster of Sept. 1, 1983,
829 F.2d 1171 (D.C. Cir. 1987), *aff'd*, 490 U.S. 122 (1989).....4, 11

McCray v. New York,
461 U.S. 961 (1983).....21

Murray Energy Corp. v. EPA,
No. 1:15-cv-110 (N.D. W. Va. Aug. 20, 2015).....12

Narragansett Elec. Co. v. EPA,
407 F.3d 1 (1st Cir. 2005).....19

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012).....21

National Cotton Council of America v. EPA,
553 F.3d 927 (6th Cir. 2009).....4, 9, 10, 11

North Dakota v. EPA,
127 F. Supp. 3d 1047 (D.N.D. 2015).....5, 7

Obergefell v. Hodges,
135 S. Ct. 2584 (2015).....21

PBW Stock Exch., Inc. v. SEC,
485 F.2d 718 (3d Cir. 1973).....20

United States v. Carson,
793 F.2d 1141 (10th Cir. 1986).....8

United States v. Mackay,
757 F.3d 195 (5th Cir. 2014).....14

United States v. Smith,
454 F. App'x 686 (10th Cir. 2012).....8

Zadvydas v. Davis,
533 U.S. 678 (2001) 19

Statutes

5 U.S.C. § 704 3

28 U.S.C. § 1291 13

28 U.S.C. § 1331 3

33 U.S.C. § 1369(b)(1) .....*passim*

42 U.S.C. § 7607(b)(1) 19

Other Authorities

80 Fed. Reg. 37,054 .....2, 13

INTEREST OF THE *AMICI CURIAE*

Amici curiae are a coalition of trade associations whose members are responsible for a significant proportion of American agricultural, commercial, and industrial production. They are the American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road And Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Manufacturers; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.[1]

The question presented in this appeal—a question that is being litigated not only in this case but also before the Sixth Circuit (on original petitions for review), the Eleventh Circuit (on direct appeal), and in district courts throughout the country—presents a fundamental question concerning the scope of the court of appeals' original jurisdiction under the Clean Water

[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. The parties do not object to the filing of this brief.

Act ("CWA" or "Act"). At issue on the merits of these rule challenges is EPA's and the Army Corps of Engineers' regulation defining the phrase "waters of the United States." *See* 80 Fed. Reg. 37,054 (June 29, 2015) (the "Rule"). The regulation is foundational, purporting to define the agencies' jurisdiction to regulate water throughout the Nation.

Amici's members own and work on property that includes land areas that may constitute "waters of the United States" under the new Rule. Each of their members must comply with the CWA's prohibition against unauthorized "discharges" into any such areas that are ultimately deemed jurisdictional. But because the Rule is vague in describing features that are purportedly "waters of the United States" and often requires unpredictable case-by-case determinations by the agencies, *amici*'s members do not know which features on their lands are jurisdictional and which are not. Continuing uncertainty as to which features are jurisdictional deprives *amici*'s members of notice of what the law requires and makes it impossible for them to make informed decisions concerning the operation, logistics, and finances of their businesses. Moreover, under the CWA, *amici*'s members may be subjected to criminal penalties and civil suits for failure to properly comply with the provisions of the Rule.

Before this or any other court can determine the legality of the Rule, however, the Court must decide which court is the right court to decide. *Amici* are firmly of the view that jurisdiction is proper in the district courts under 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 704. They accordingly filed their own complaint in the U.S. District Court for the Southern District of Texas. *See American Farm Bureau Federation et al. v. EPA et al.*, No. 3:15-cv-165 (S.D. Tex. July 2, 2015). At the same time, *amici* also filed a protective petition for review in the Sixth Circuit under the CWA's judicial review provision. *See* Pet. for Review, *American Farm Bureau Federation et al. v. EPA et al.*, No. 15-3850 (6th Cir.).

As we explain below, jurisdiction to review the validity of the Rule lies exclusively in the district courts under 28 U.S.C. § 1331 and the Administrative Procedure Act. The CWA's judicial review provision cannot be stretched to cover the sort of fundamental, definitional rule that is at stake here. We appreciate that the plaintiffs here—a State and a coalition of business associations—have filed well-reasoned briefs in support of their jurisdictional arguments. Our purpose is not to pile on with duplicative arguments. We address additional and complementary reasons for concluding that jurisdiction lies in the district courts and not before the Sixth Circuit and explain the practical importance of the jurisdictional question.

INTRODUCTION

"If a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job." *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175 (D.C. Cir. 1987) (R.B. Ginsburg, J.), *aff'd*, 490 U.S. 122 (1989). That principle should inform this Court's review of the district court's judgment, which blindly followed the jurisdictional ruling of the fractured Sixth Circuit panel in *In re Clean Water Rule: Definition of Waters of U.S.*, 817 F.3d 261 (6th Cir. 2016) ("*CWR*").

In *CWR*, two of the three judges believed that the Sixth Circuit *lacks* original jurisdiction over challenges to the Rule. *See* 817 F.3d at 275 (Griffin, J., concurring in the judgment); *id.* at 283 (Keith, J., dissenting). Judge Griffin nevertheless voted with Judge McKeague to exercise jurisdiction over those challenges, believing that he was bound by the Sixth Circuit's decision in *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009), even though he wrote that "*National Cotton* is incorrect." 817 F.3d at 275, 282-283. In litigation concerning a different rule under the Clean Water Act, the Eleventh Circuit likewise rejected *National Cotton*'s holding, explaining that it "provided no analysis of the [CWA's jurisdictional review] provision."

Friends of the Everglades v. EPA, 699 F.3d 1280, 1288 (11th Cir. 2012). The Sixth Circuit's judgment thus rests on the shakiest of grounds.

The conflicting readings of the Act's judicial review provision have resulted in what can only be described as a quagmire. The North Dakota district court agreed with the Eleventh Circuit's analysis in *Friends of the Everglades* and held that it had jurisdiction to hear challenges to the Rule brought by twelve States, including Colorado and Wyoming, and two New Mexico state agencies. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015) ("original jurisdiction lies in this court and not the court of appeals"). But the district court here—without the benefit of a single word of briefing from the parties—reached the opposite conclusion.

This Court must independently review the district court's judgment. Few regulations are as consequential as the Rule at issue here, and the outcome of these challenges will not amount to much if the parties cannot be sure that the court rendering judgment has jurisdiction over the dispute. If, as plaintiffs and *amici* contend, the Sixth Circuit lacks original jurisdiction over challenges to the Rule, then a Sixth Circuit decision on the merits may not survive further review by the *en banc* court or the Supreme Court. That would return the parties to square one before the district courts, following years of litigation and nothing to show for it. Such an outcome would be

highly inefficient and deeply problematic. Thus, while the Sixth Circuit is reviewing the merits of challenges originally filed in the courts of appeals, the rule challenges in the district courts also should proceed—because that is where jurisdiction properly lies.

We are mindful of the instinct, born of respect to the Sixth Circuit, to defer to *CWR*. But respect for the views expressed by the majority of the judges in that case calls for reversal, not affirmance—and the acknowledged error reflected in the Sixth Circuit's judgment should be called out sooner rather than later. Beyond that, undue deference to the judgment (as opposed to the reasoning) in *CWR* would stunt development of the law and hand the Sixth Circuit a trump card that Congress never intended it to have on this critical threshold issue.

In short, this Court should reverse the district court's dismissal and remand with instructions for the district court to entertain plaintiffs' complaints on the merits.

ARGUMENT

This case turns on the scope of the Clean Water Act's judicial review provision, 33 U.S.C. § 1369(b)(1). As relevant here, Section 1369(b)(1) confers original jurisdiction on courts of appeals to review challenges to final agency actions "(E) in approving or promulgating any effluent limitation or other

limitation under section 1311, 1312, 1316, or 1345 of this title, [and] (F) in issuing or denying any permit under section 1342 of this title." 33 U.S.C. § 1369(b)(1)(E)-(F). There is no dispute that, if plaintiffs' challenges do not fall within these two provisions, then the district court had jurisdiction over plaintiffs' complaints.

As explained below, plaintiffs' challenges to the Rule do not fall within Section 1369(b)(1). The district court accordingly erred in dismissing plaintiffs' complaints, and that error should be corrected now.

I. THE DISTRICT COURT WAS WRONG TO DEFER TO THE SIXTH CIRCUIT'S JURISDICTIONAL DECISION

As appellants explained in greater detail in their opening briefs, the district court's treatment of the jurisdictional question was problematic, to say the least. The question has been the subject of careful and contentious briefing and argument in courts throughout the country, including the Sixth and Eleventh Circuits—the latter of which has now received two rounds of briefing and heard oral argument the same day as this filing. Yet the district court below dismissed plaintiffs' claims *sua sponte*, without the benefit of a single word of briefing. The court's lack of careful attention to the question presented is evident from the fact that it misread the district court's decision in *North Dakota v. EPA* as having "dismissed challenges to the Clean Water

Rule due to the exclusive jurisdiction of the Sixth Circuit" (App. 76[2]), when in fact that court held the precise opposite, that "original jurisdiction lies in this court and not the court of appeals." 127 F. Supp. 3d at 1053.

Beyond that, the district court was flatly wrong that "the Sixth Circuit's decision speaks for itself that jurisdiction is appropriate only in the appellate courts" and that dismissal was necessary "[i]n light of the Sixth Circuit's ruling." App. 76 & n.1. Although the Sixth Circuit's *judgment* was clear, the judgment is not binding here; as for the Sixth Circuit's *reasoning*, it firmly supports reversal, not affirmance.

A. The Sixth Circuit's judgment is not binding

It is a bedrock principle of the federal judicial system that "the decisions of one circuit court of appeals are not binding upon another circuit." *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir. 1986). Such decisions are at most "persuasive." *Grimland v. United States*, 206 F.2d 599, 601 (10th Cir. 1953); *accord United States v. Smith*, 454 F. App'x 686, 694 (10th Cir. 2012) (finding an "out of circuit decision . . . neither binding nor persuasive"). It is equally foundational that "[f]ederal courts 'have an *independent* obligation to determine whether subject-matter jurisdiction exists.'" *1mage*

[2] "App." cites are to the appendix to appellants' brief in No. 16-5038.

Software, Inc. v. Reynolds & Reynolds Co., 459 F.3d 1044, 1048 (10th Cir. 2006) (emphasis added).

Two conclusions follow. *First*, the district court flouted its independent responsibility to decide its own jurisdiction when it dismissed these cases "[i]n light of the Sixth Circuit's ruling." App. 76. *Second*, it is now this Court's "special obligation" to determine whether the district court had subject matter jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

B. The Sixth Circuit's reasoning supports reversal

To the extent that a 1-1-1 out-of-circuit decision can ever be persuasive, the Sixth Circuit's decision persuasively supports appellants' position, not appellees'.

Judge McKeague was the sole member of the Sixth Circuit panel to conclude that the Sixth Circuit had original jurisdiction to hear challenges to the Rule. And even he admitted that the textual arguments for original jurisdiction were "not compelling." *CWR*, 817 F.3d at 266. No other judge joined any part of Judge McKeague's opinion.

Judge Griffin "concurr[ed] in the judgment, only"—and "only because" he believed that he was "required to follow" the prior Sixth Circuit decision in *National Cotton*. 817 F.3d at 275. But his reluctance to deny the motions to

dismiss could not have been clearer: "[W]hile I agree that *National Cotton* controls this court's conclusion, I disagree that it was correctly decided. But for *National Cotton*, I would find jurisdiction lacking." *Id.* at 280.

Judge Keith dissented. He "agree[d] with Judge Griffin's reasoning and conclusion that, under the plain meaning of the statute, neither subsection (E) nor subsection (F) of 33 U.S.C. § 1369(b)(1) confers original jurisdiction on the appellate courts." 817 F.3d at 283. But unlike Judge Griffin, Judge Keith declined "to read *National Cotton* in a way that expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion." *Id.* at 284. In the belief that "*National Cotton*'s holding is not as elastic as the concurrence suggests" and should not be read to authorize "original subject-matter jurisdiction over all things related to the [CWA]," Judge Keith would have granted the motions to dismiss. *Id.*

Thus, a majority of the panel's judges agreed that the Sixth Circuit *lacks* jurisdiction under the plain language of Section 1369(b)(1). The sole reason that Judge Griffin voted with Judge McKeague to deny the motions to dismiss was his belief that the Sixth Circuit's decision in *National Cotton*—a decision that the Eleventh Circuit has rejected (*Friends of the Everglades*, 699 F.3d at 1288) and that Judge Griffin himself criticized as "incorrect" and "[not] correctly decided" (*CWR*, 817 F.3d at 280, 283)—required him to do so.

Had it not been for *National Cotton*, he would have cast his lot with Judge Keith, who voted to dismiss the petitions for review for lack of jurisdiction. *Id.* at 280. Because this Court (unlike Judge Griffin) is not bound by *National Cotton*, respect for two of the three opinions in *CWR* means reversing the orders dismissing the complaints.

II. THE DISTRICT COURT HAD JURISDICTION OVER PLAINTIFFS' COMPLAINTS

That said, the Court also should analyze the jurisdictional question "independently," without "simply accept[ing] the interpretation of" the Sixth Circuit. *In re Korean Air*, 829 F.2d at 1175.

Congress conferred limited original jurisdiction on the courts of appeals over seven narrow categories of agency actions under the Clean Water Act. None of those categories comes close to covering the agencies' promulgation of the Rule. Determined to pound square pegs into round holes, the government has argued before, and is likely to argue here, that the Rule is an "other limitation" under paragraph (E) or the functional equivalent of "issuing or denying any permit" under paragraph (F). Taking those assertions to their logical conclusions would mean that Section 1369(b)(1) has no limits at all. At bottom, the government's approach is out of step with the statutory text and settled canons of construction and thwarts the Act's purposes. The judgment below should be reversed.

A. Paragraphs (E) and (F) are inapplicable here

1. The Rule is not an "other limitation" under paragraph (E)

The government has asserted that the Rule is an "other limitation" under paragraph (E). *See, e.g.*, Gov't Opp. to Mot. for PI, at 7, *Georgia et al. v. McCarthy et al.*, No. 2:15-cv-79 (S.D. Ga. July 31, 2015). That is so, according to the government, because it "results in restrictions on" *both* "dischargers of pollutants" *and* "permit issuers." Gov't Opp. to Mot. for PI, at 7, *Murray Energy Corp. v. EPA*, No. 1:15-cv-110 (N.D. W. Va. Aug. 20, 2015). That is plainly mistaken; in fact, the Rule is not a "limitation" in any ordinary sense of that word.

To begin with, the Rule does not itself restrict the use to which property owners put their land. The Rule purports only to define the phrase "waters of the United States." That definition is not the promulgation of an independent limitation in its own right; it simply describes the waters to which *other* limitations may apply. As Judge Griffin put it, the Rule "is not self-executing" but merely "operates in conjunction with other sections scattered throughout the Act to define when [the Act's other, independently defined] restrictions . . . apply." *CWR*, 817 F.3d at 276.

Nor does the Rule limit permitting agencies—indeed, it does the opposite. The phrase that the Rule defines, "waters of the United States,"

grants jurisdiction to state and federal agencies over the Nation's waters. It gets matters backwards to call the definition of a phrase that *confers* jurisdiction a "limit" on officials' authority. It would not make sense to think of 28 U.S.C. § 1291—which confers jurisdiction on this Court over "final decisions of the district courts of the United States"—as a "limitation" on the Court's power to hear other kinds of appeals. The Court has no such power unless it is separately granted. Neither does it make sense to think of the Rule as a "limitation" on agencies' power to regulate waters that are not "waters of the United States."

The agencies said so themselves in the preamble: Their definition of "waters of the United States" "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." 80 Fed. Reg. at 37,102. The agencies have since taken an about-face. This litigation-motivated change of position assumes that *any* regulation defining *any* statutory term in *any* way affecting the reach of the CWA qualifies as an "other limitation" under paragraph (E). It is hard to imagine, according to that logic, what would not qualify.

And that is precisely the problem: The government's boundless reading of the words "other limitation" is squarely at odds with the *ejusdem generis*

canon of statutory interpretation, which provides that "the words 'other' or 'any other' following an enumeration of particular classes ought to be read as 'other such like' and to include only those of like kind or character." *United States v. Mackay*, 757 F.3d 195, 197-198 (5th Cir. 2014) (quoting *In re Bush Terminal Co.*, 93 F.2d 659, 660 (2d Cir. 1938)). Put another way, the rule requires reading a general term following a specific term as "embrac[ing] only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001) (internal quotation marks omitted).

Application of that canon here means reading the words "other limitation" as embracing an object similar in nature to an "effluent limitation." *See Circuit City*, 532 U.S. at 114. Effluent limitations are not just *any* limitation; rather, they "dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst. v. EPA*, 890 F.2d 869, 876 (7th Cir. 1989). The Rule, which sets a regulatory definition for "waters of the United States," is very plainly not "of like kind or character" (*Mackay*, 757 F.3d at 197) to an effluent limitation.

If the words "other limitation" were interpreted to cover any limitation of any kind—as defendants have urged—the general term (other limitation) would render the specific term (effluent limitation) "'meaningless.'" *Mackay*,

757 F.3d at 197 (quoting *CSX Transp., Inc. v. Ala. Dep't of Rev.*, 562 U.S. 277, 295 (2011)). That would defeat the animating purpose of the *ejusdem generis* canon, which "'is based on the theory that, if [Congress] had intended the general words to be used in their unrestricted sense, it would have made no mention of the particular classes'" preceding them. *Id.* (quoting *Bush Terminal*, 93 F.2d at 660). Defendants' reading of the term "other limitation" is precisely the kind of "unrestricted" reading that the *ejusdem generis* canon forbids.

The conclusion that paragraph (E) must be read narrowly finds powerful support not only in the words that immediately precede "other limitation," but also in the words that immediately *follow*: "under section 1311, 1312, 1316, or 1345 of [the Act]." 33 U.S.C. § 1369(b)(1)(E). Each of these sections provides for the issuance of effluent limitations or effluent limitation-like rules. Section 1311 governs "effluent limitations," and Section 1312 governs "water quality related effluent limitations," which are additional effluent limitations that may be imposed where ordinary limitations fail to achieve water quality standards. Section 1316 provides for effluent limitation-like reductions on new dischargers. And Section 1345, added in 1987, restricts the discharge of sewage sludge.

As we already have demonstrated, it would be a mistake to think of the agencies' definition of "waters of the United States" as a limitation at all; it would be downright absurd to say that, *as* a limitation, it has a purpose similar in nature to an effluent limitation describing the technical measures of pollutants allowed under a permit—much less that it was promulgated under any of the specifically identified statutory provisions. *See CWR*, 817 F.3d at 276 (Griffin, J., concurring) (the Rule "does not emanate from these sections" and is not "related to the statutory boundaries set forth in [them]"); *cf. Friends of the Everglades*, 699 F.3d at 1286 ("even if [a regulation can] be classified as a limitation," Section 1369(b)(1) is inapplicable if "it was not promulgated under section 1311, 1312, 1316, or 1345").

Any contrary proposal reads "other limitation" as covering every agency rule that might, in any conceivable respect, be understood as a "limitation" on any stakeholder's conduct, without regard for the preceding or following text. That cannot be what Congress had in mind.

2. There is no basis for finding jurisdiction under paragraph (F)

The government fares no better under paragraph (F), which grants the courts of appeals original jurisdiction in cases involving the "issuing or denying [of] any permit under section 1342 of this title." 33 U.S.C. § 1369(b)(1)(F). In *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), the Supreme

Court held that paragraph (F) covers not only technical grants and denials of permits by the agencies, but also other agency actions that have the "precise effect" of accomplishing those ends. *Id.* at 196. At issue in that case was "EPA's veto of a state-issued permit," which the Court held to be "functionally similar" to a permit denial and thus sufficient to support original appellate jurisdiction under paragraph (F). *Id.* None of that is any help to EPA here: The agencies' definition of "waters of the United States" bears no plausible resemblance to a decision to grant or deny a permit to discharge.

The government has asserted that the Rule nevertheless falls within paragraph (F) because "it identifies what water bodies *will* require CWA permits when pollutants are discharged into them." Gov't Opp. 7, *Georgia et al. v. McCarthy et al.*, No. 2:15-cv-79-LGW-RSB (S.D. Ga. July 31, 2015). The government's approach might have some force if Congress had written a different statute—if it had drafted paragraph (F) to apply to EPA actions "impacting a decision to grant or deny a permit" or "affecting when permits are or are not required." But the government's approach cannot be squared with the statute that Congress *actually* wrote, which applies to agency actions that *themselves* amount to "issuing or denying any permit under section 1342 of this title." It is again difficult to imagine any case in which the government's expansive redrafting of paragraph (F) would not confer

jurisdiction. It was for precisely that reason that the Eleventh Circuit rejected the same argument in *Friends of the Everglades*, that paragraph (F) applies "to any 'regulations *relating to* permitting.'" 699 F.3d at 1288 (emphasis added). This, the Eleventh Circuit explained, "is contrary to the statutory text." *Id.*

3. The government's interpretations of paragraphs (E) and (F) violate the expressio unius canon

There is another fundamental reason to reject defendants' (and Judge McKeague's) interpretation of subsections (E) and (F) as effectively limitless grants of original jurisdiction on the courts of appeals over all agency rule-making: the *expressio unius est exclusio alterius* canon, which provides that the expression of one thing implies the exclusion of another.

Section 1369(b)(1) meticulously catalogues seven narrow categories of agency actions subject to original review in the courts of appeals. Under the *expressio unius* maxim, the careful selection of those seven, spare categories "justif[ies] the inference" that a general grant of court-of-appeals jurisdiction over all agency decisionmaking was "excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (citing *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

That conclusion takes on special force when considered alongside other statutes demonstrating that, when Congress wishes to confer broad juris-

diction on the courts of appeals to hear petitions for review challenging general agency rulemaking, it does so expressly. Congress took that approach, for example, when it drafted the CWA's older-cousin statute, the Clean Air Act. There, it provided for original jurisdiction in the courts of appeals over challenges not only to particular agency actions, but to "any other nationally applicable regulations promulgated, or final action taken, by the Administrator" under the act. 42 U.S.C. § 7607(b)(1).

That is compelling evidence that Congress knows how to "ma[ke] express provisions" for expansive original jurisdiction in the courts of appeals when it wants to, and that its "omission of the same [language]" from Section 1369(b)(1) "was purposeful." *Zadvydas v. Davis*, 533 U.S. 678, 708 (2001). "Congress could easily have provided . . . a general jurisdiction provision in the Act" but instead "specified [a limited range of] EPA activities that were directly reviewable by the court of appeals." *Am. Paper Inst.,* 890 F.2d at 877.

For just that reason, other circuits have rejected the government's limitless approach to Section 1369(b)(1): "[S]ince some but not all of the actions that the EPA can take under the CWA are listed with considerable specificity in [S]ection 1369(b)," it follows that "not all EPA actions taken under the CWA are directly reviewable in the courts of appeals." *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005). And "the complexity

and specificity of [33 U.S.C. § 1369(b)(1)] in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable." *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976). Those (unanimous) decisions are entitled to at least equal deference and consideration as the Sixth Circuit's (deeply divided) decision in *CWR*.

B. Important practical considerations support reversal

Finally, the district court's dismissal is inconsistent both with the institutional competencies of the courts of appeals and district courts and with the proper operation of the federal judicial system.

It goes without saying that a district court "is in a far better position than a court of appeals to supervise and control discovery," which is a matter "peculiarly within its discretion and competency." *ACF Indus., Inc. v. EEOC*, 439 U.S. 1081, 1087-1088 (1979) (Powell, J., dissenting from denial of certiorari). In this case, "the superiority of the fact-finding apparatus of a district court" (*PBW Stock Exch., Inc. v. SEC*, 485 F.2d 718, 750 (3d Cir. 1973) (Adams, J., dissenting)) should weigh in favor of jurisdiction in the district courts. Indeed, the parties to the Sixth Circuit litigation are already embroiled in motions practice over the record.

The blindly deferential position taken by the court below would also deprive the courts of appeals and the Supreme Court of the benefit of multilateral consideration of the questions presented on the merits. The federal judicial system depends upon the treatment of complex legal issues by multiple courts to ensure well-informed and efficient development of the law. "To identify rules that will endure, [the appellate courts] must rely on the . . . lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions." *California v. Carney*, 471 U.S. 386, 400 (1985) (Stevens, J., dissenting). As the Ninth Circuit has put it, the "ability to develop different interpretations of the law among the circuits is considered a strength of our system" because "[i]t allows experimentation with different approaches to the same legal problem." *Hart v. Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001). *Accord McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow [lower courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court."). It is thus commonplace for important regulations to receive the attention of several district courts and courts of appeals in parallel law-suits at once. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012).

The government's approach to Section 1369(b)(1) would mean funneling the important legal questions presented here through a single court of appeals, without the benefit of initial consideration by the district courts or the opinions of the other federal courts of appeals on the same issues. If that were what Congress had in mind, it would have said so expressly. Thus, not only is the government's position inconsistent with the statutory language, but it makes no practical sense. Against this backdrop, the district court's jurisdictional ruling should be reversed.

* * * * *

The Sixth Circuit's 1-1-1 ruling should not be the final word on the jurisdictional issue in these rule challenges, especially since it turned on adherence to a prior Sixth Circuit decision that one member of the panel believed was wrongly decided and another believed was inapplicable. Insofar as *CWR* carries any weight here, its reasoning supports reversal of the district court's erroneous dismissal. Any other result creates intolerable uncertainty and the very real risk that a decision by the Sixth Circuit on the merits will be vacated for lack of jurisdiction and the parties will all be sent back to the district courts to start all over again. The Rule is too central to the administration of the CWA, and too critical to the everyday operations of *amici*'s members, to be left in legal limbo for years.

The jurisdictional issue is a pure question of law that is squarely presented to this Court. And the answer to that question is clear: plaintiffs properly filed their challenges to the Rule in the district court. This Court should decide that issue now and hold that the district court erred in dismissing plaintiffs' complaints.

CONCLUSION

The decision of the district court should be reversed.

July 8, 2016

Respectfully submitted,

/s/ *Timothy S. Bishop*

Timothy S. Bishop
Chad M. Clamage
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
tbishop@mayerbrown.com
(312) 782-0600

Michael B. Kimberly
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing brief (1) all required privacy redactions have been made per 10th Cir. R. 25.2; (2) if required to file additional hard copies, that the ECF submission is an exact copy of the documents; and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, Antimalware Client Version 4.9.219.0, and according to the program are free of viruses.

/s/ *Timothy Bishop*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 5,016 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) because it has been prepared using Microsoft Word and set in Century Schoolbook in a typeface size equivalent to 14 points or larger.

/s/ *Timothy Bishop*

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system on July 8, 2016. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ *Timothy Bishop*