No. 15-3751 and related cases

In the

United States Court of Appeals

for the

Sixth Circuit

IN RE: ENVIRONMENTAL PROTECTION AGENCY
AND DEPARTMENT OF DEFENSE,
FINAL RULE: CLEAN WATER RULE:
DEFINITION OF "WATERS OF THE UNITED STATES,"
80 Fed. Reg. 37,054, Published on June 29, 2015 (MCP No. 135)

On Petitions for Review of a Final Rule
of the U.S. Environmental Protection Agency and the
United States Army Corps of Engineers

PETITION FOR REHEARING EN BANC OF INTERVENORS THE NATIONAL ASSOCIATION OF MANUFACTURERS (in Nos. 15-3751, 15-3799, 15-3817, 15-3820, 15-3822, 15-3823, 15-3831, 15-3837, 15-3839, 15-3850, 15-3853) AND AMERICAN FARM BUREAU FEDERATION, ET AL. (in Nos. 15-3817, 15-3820, 15-3837, 15-3839)

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INTRODUCTION AND RULE 35(b)(1) STATEMENT

At issue are eight motions to dismiss, on jurisdictional grounds, twenty-two petitions for review of the "waters of the United States" Rule, one of the most consequential regulations ever promulgated under the Clean Water Act. The motions present a question of exceptional importance, not only to the progression of the petitions for review, but also for sixteen Administrative Procedures Act suits pending in district courts across the Nation. The question is whether 33 U.S.C. § 1369(b) vests exclusive jurisdiction in the courts of appeals to entertain petitioners' challenge to the Rule (as the federal government argues), or whether this challenge must be heard in the district court under Section 704 of the APA (as petitioners argue).[1]

Much hangs in the balance. It would be an enormous waste of party and judicial resources to litigate these petitions to judgment on the merits, if it later turns out that this Court lacked jurisdiction all along. And district courts throughout the country have (for the most part) held the APA cases in abeyance awaiting this Court's decision on jurisdiction. But the panel's

[1] Petitioners here are the American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road & 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.

splintered 1-1-1 jurisdictional decision raises more questions than it answers, casting doubt and uncertainty on the future course of all of those cases.

At the heart of the confusion is *National Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009), where this Court held that Section 1369(b)(1)(F) provides for exclusive original jurisdiction in the courts of appeals to review rules "regulat[ing] . . . permitting procedures" under the Act. *Id.* at 933. The Eleventh Circuit, in *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012), rejected that holding, dismissing *National Cotton* as "an opinion that provided no analysis of the [relevant] provision." *Id.* at 1288.

This split in the circuits is reflected in division among the panel. Judges Griffin and Keith agreed that, insofar as *National Cotton* is interpreted broadly to apply here, the case was wrongly decided. Both judges expressed the view that, as a matter of the CWA's plain text, jurisdiction over these rule challenges lies in the district courts. Yet while Judge Keith read *National Cotton* narrowly (and therefore dissented from the denial of dismissal), Judge Griffin believed that the holding of *National Cotton* is broad and binding here (and therefore concurred in the judgment). Even Judge McKeague, writing the lead opinion, acknowledged that the government's textual arguments are "not compelling" and that petitioners' arguments are "consonant with the plain language of § 1369(b)(1)." Slip op. 7, 16. In voting to deny the motions, Judge McKeague set text aside in favor of a "functional approach rather than a technical approach," which he thought mandated by precedent. *Id.* at 16.

This case thus cries out for en banc review: there is a "circuit split," the question presented is "an important federal question," and a "number of judges on the court have come to doubt the validity of [its] own precedent." *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in denial of rehr'g en banc). Without guidance from the full Court, moreover, district courts across the country will be left uncertain of whether they should proceed to the merits of the APA rule challenges filed before them. The result, unless this Court intervenes, will be a procedural morass that will waste substantial judicial and party resources.

Because the jurisdictional question implicates a wide body of precedent interpreting a complex statutory scheme, petitioners (who anticipate that additional petitions for en banc review will be filed by other movants) request full re-briefing of, and en banc oral argument on, the question presented.

BACKGROUND

Statutory background. The regulation at issue in these cases (the Rule) purports to "clarify" the Agencies' definition of "waters of the United States" within the meaning of the CWA—that is, it purports to clarify the scope of the agencies' regulatory jurisdiction under the Act. The question presented by the motions to dismiss is whether 33 U.S.C. § 1369(b)(1) vests exclusive original jurisdiction in the courts of appeals to entertain petitioners' challenges to the Rule, or if these challenges must instead be heard in district courts under the APA.

Section 1369(b)(1) establishes a scheme of judicial review for certain categories of agency action under the CWA. In particular, Congress conferred original jurisdiction on courts of appeals to review agency action "(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." Congress also provided a mechanism to consolidate petitions challenging the same EPA action in a single circuit (28 U.S.C. § 2112(a)), ensuring an authoritative determination of the validity of EPA action that falls within the defined categories.

Separately, the Administrative Procedure Act provides that a person "adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. Thus, when judicial review of a final agency action under the CWA is not available in the courts of appeals under 33 U.S.C. § 1369(b)(1), the APA provides a cause of action in district court under 5 U.S.C. §§ 702, 704 and 28 U.S.C. § 1331.

Procedural background. Following promulgation of the Rule, public and private parties filed sixteen APA challenges in thirteen federal district courts throughout the country. Petitioners here joined in a single action challenging the Rule in the U.S. District Court for the Southern District of Texas. In that suit, they seek a declaration that (1) the agencies' actions violated the procedural requirements of the APA, (2) the Rule departs from

the plain text and clear structure of the CWA, and (3) the Rule violates the Commerce and Due Process Clauses of the U.S. Constitution.

Motions for preliminary injunctions against enforcement of the Rule were considered by three district courts, in *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.), *Murray Energy Corp v. EPA*, No. 1:15-cv-110 (N.D. W. Va.), and *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga.). The district court in the North Dakota action held that Section 1369(b)(1) is inapplicable and that it therefore has jurisdiction to hear the action, and it entered a preliminary injunction. Order, No. 3:15-cv-59 (D.N.D. Aug. 27, 2015) (Dkt. 70). The district courts in *Georgia* and *Murray Energy*, dismissed the actions for want of jurisdiction, reasoning that jurisdiction lies in the courts of appeals.[2]

2. Meanwhile, various parties—including all petitioners here except the National Association of Manufacturers (NAM)—filed twenty-two protective petitions for review in various courts of appeals under Section 1369(b)(1). Those petitions were later all transferred to this Court.

Petitioners here intervened in the first eleven petitions for review transferred to this Court and moved as respondents to dismiss each for lack of subject matter jurisdiction. We argued, in particular, that the Rule is neither a rule "approving or promulgating any effluent limitation or other

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[2] Plaintiffs in the *Georgia* case noticed an appeal in the Eleventh Circuit, which ordered briefing on the jurisdictional question. *Georgia v. McCarthy*, No. 15-14035 (11th Cir.). That appeal remains pending.

limitation" within the meaning of Section 1369(b)(1)(E) nor a rule "issuing or denying any permit" within the meaning of 1369(b)(1)(F).

3.a. The panel denied the motion to dismiss in a fractured 1-1-1 decision. "[T]he court's authority to conduct direct review of the Agencies' challenged action," Judge McKeague explained in the lead opinion, "must be found, if at all," in 33 U.S.C. § 1369(b)(1)(E) and (F), which "are the only two provisions of § 1369(b)(1) that potentially apply." Slip op. 5-6.

As to subsection (E), Judge McKeague admitted that the government's textual arguments are "not compelling." *Id.* at 7. He ultimately concluded that jurisdiction lies in the court of appeals under subsection (E) not because statutory text requires it, but (in his view) because the Supreme Court's decision in *E.I. du Pont de Nemours Co. v. Train*, 430 U.S. 112 (1977), does. That case, according to Judge McKeague, "eschewed a strict, literal reading" of Section 1369(b)(1) and "license[d]" a "more generou[s]" interpretation "than [the statute's] language would [otherwise] indicate." Slip Op. 7, 9. "Viewing the [Rule] through the lens created in *E.I. du Pont*," Judge McKeague concluded, "reveals a regulation whose practical effect will be to *indirectly* produce various limitations"; thus, "although the Rule does not itself impose any limitation," it is subject to circuit court review under subsection (E) as though it did. *Id.* at 11.

Judge McKeague found jurisdiction under subsection (F) as well, relying on *National Cotton*, which he described as holding that "subsection (F)

authorizes direct circuit court review not only of actions issuing or denying particular permits, but also of regulations governing the issuance of permits" and "'relating to permitting.'" Slip op. 12-13. Because the Rule "expands regulatory authority and impacts the granting and denying of permits," Judge McKeague concluded that it falls within subsection (F). Slip op. 14. No other judge joined Judge McKeague's opinion in either respect.

b. Judge Griffin concurred in judgment only. 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." Slip op. 27.

Beginning with subsection (E), Judge Griffin concluded that the "plain and unambiguous text . . . makes clear that this court does not have jurisdiction under subsection (E) to hear a challenge to a regulation that does not impose any limitation as set forth by the Act." Slip op. 23. Judge Griffin noted that the agencies "have not promulgated an effluent limitation," and he "decline[d] to read *E.I. du Pont*" as "shoehorning an exercise in jurisdictional line-drawing into subsection (E)'s 'other limitation' provision." *Id*. at 24.

Concerning subsection (F), Judge Griffin recounted the statutory text and relevant Supreme Court precedents and concluded that the subsection "simply does not apply here." Slip op. 28. He nevertheless concurred in the judgment because "*National Cotton* dictates [the] conclusion" that subsection (F) encompasses the Rule; indeed, under *National Cotton*, subsection (F)'s

"jurisdictional reach . . . has no end" at all. *Id.* at 29. "Although, in [his] view, the holding in *National Cotton* is incorrect," Judge Griffin concluded that "[the] panel [was] without authority to overrule it." Slip op. 30.

c. 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) . . . confers original jurisdiction on the appellate courts." Slip op. 32. 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." Slip op. 32. 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.

REASONS FOR GRANTING REHEARING

Few cases present such compelling reasons for en banc review. Judges Griffin and Keith both expressed the view that *National Cotton*—given Judge McKeague's and Griffin's broad reading—is inconsistent with the CWA's plain text. Thus both judges believed that the statute calls for dismissal of the petitions. They further acknowledged that the broad reading of *National Cotton* is at odds with the Eleventh Circuit's decision in *Friends of the Everglades*. And there is no denying that the question presented is one of immense practical importance—the future of twenty-two petitions for review and sixteen district-court suits challenging one of the most consequential

regulations ever promulgated under the CWA hangs in the balance.

A. The Court should grant en banc rehearing to overrule *National Cotton*'s jurisdictional holding

En banc rehearing is warranted because *National Cotton*—this Circuit's leading case on Section 1369(b)(1) and the decision that the lead and concurring opinions found dispositive—conflicts with the Eleventh Circuit's decision in *Friends of the Everglades* and was wrongly decided.

1. *National Cotton* conflicts with the Eleventh Circuit's decision in *Friends of the Everglades*

There is little question that if the petitions for review had been consolidated in the Eleventh Circuit, they would have been dismissed for lack of jurisdiction under *Friends of the Everglades*. That case involved a challenge to EPA's Water Transfers Rule, which provides that a transfer of pollutants from one regulated body of water to another does not constitute an "addition" of a pollutant to "the waters of the United States." 699 F.3d at 1284. In its opposition to motions to dismiss for lack of jurisdiction in that case, the government argued (as it has here) that the petitions for review were properly before the court of appeals under Section 1369(b)(1)(E) and (F).

The Eleventh Circuit disagreed. It quickly rejected jurisdiction under subsection (E) because the Water Transfers Rule "is neither an effluent limitation" that "restrict[s] pollutants" nor an "other limitation" on regulators or regulated entities. 699 F.3d at1286. It likewise rejected jurisdiction under subsection (F) because "[t]he water-transfer rule neither issues nor denies a

permit," nor does it have "'the precise effect'" of doing so. *Id.* at 1287. In reaching that conclusion, the Eleventh Circuit rejected the notion that subsection (F) covers all "regulations relating to permitting." *Id.* The court recognized that although this Court, in *National Cotton*, had "adopted the [broad] interpretation advanced by [EPA], it did so in an opinion that provided no analysis of the [the statutory language]." *Id.* at 1288. The Eleventh Circuit thus found *National Cotton* unpersuasive and dismissed the petitions for review for lack of jurisdiction. *Id.* In seeking further review before the Supreme Court, the government acknowledged that *Friends* "conflicts with the Sixth Circuit's decision in *National Cotton Council*." U.S. Pet'n 18, S. Ct. No. 13-10, 2013 WL 3338729 (U.S. June 28, 2013). This Court can and should resolve the conflict by convening en banc.

2. *National Cotton*'s jurisdictional holding should be overruled

We agree with Judge Keith that *National Cotton* is best read narrowly, and that it does not dictate the outcome of this case. But Judges McKeague and Griffin (and the government and Eleventh Circuit) all disagree, reading *National Cotton* broadly to confer exclusive original jurisdiction on the courts of appeals over challenges to any regulations "relating to" the agencies' permitting process under the Clean Water Act. To the extent that *National Cotton* is interpreted that way, it should be overruled.

Subsection (F) 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 v. Costle Co.*, 445 U.S. 193 (1980), the Supreme Court held that paragraph (F) covers not only literal grants and denials of permits by the agencies, but also 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 the functional equivalent of a permit denial and thus reviewable in the court of appeals under paragraph (F). *Id.*

None of that supports jurisdiction here. The agencies' definition of "waters of the United States" does not grant or deny a permit. EPA Administrator Gina McCarthy has admitted as much: "[T]he Clean Water Rule is a jurisdictional rule. It doesn't result in automatic permit decisions." *The Fiscal Year 2016 EPA Budget: Joint Hearing Before the Subcomm. on Energy & Power and the Subcomm. on Env't & Econ. of the H. Comm. on Energy & Commerce*, 114th Cong. 70 (Feb. 25, 2015).

Judges McKeague and Griffin nevertheless found that *National Cotton* interprets subsection (F) to cover challenges not only to the grant or denial of a permit, but also to regulations that indirectly relate to the CWA permitting process by defining those waters for discharges to which permits will be required. That reading of subsection (F) might have some force if Congress had written a different statute—if it had drafted it to apply to, say, EPA actions "affecting when permits are required." But it cannot be squared with

the statute that Congress *actually* wrote, which applies to agency actions that have the *precise effect* of "issuing or denying any permit under section 1342 of this title." 33 U.S.C. § 1369(b)(1)(F). *See Costle*, 445 U.S. at 196. The Rule here has no such effect; it merely defines the agencies' jurisdiction.

The broad reading of *National Cotton* also runs headlong into 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 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 particular force when taken alongside other statutes demonstrating that, when Congress wishes to confer broad jurisdiction on the courts of appeals to hear petitions for review challenging general agency rulemaking, it does so expressly. Congress took that approach in the CWA's cousin statute, the Clean Air Act. There, it provided for original jurisdiction in 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).

In sum, insofar as *National Cotton* is properly read as authorizing jurisdiction over the petitions for review in this case, it is inconsistent with the plain text of Section 1369(b)(1)(F) and should be overruled.[3]

B. Immediate en banc review of the jurisdictional question is imperative and cannot await a decision on the merits

It is sufficient for en banc rehearing that the panel's fractured decision implicates an important question that has divided the circuits, and that two panel judges questioned the correctness of this Court's precedent. But the need for en banc review is all the more pressing in light of the confusion and disruption that will result if the panel decision is allowed to stand.

To begin with, district courts throughout the country have been holding over one dozen of petitioners' APA suits in abeyance while this Court addresses the jurisdictional question. As we have explained, if jurisdiction properly

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[3] It is no answer to say that jurisdiction is proper under subsection (E). Only Judge McKeague believed that to be the case, based on his reading of *E.I. du Pont*. But as Judge Griffin explained, under the *noscitur a sociis* canon, the words "'any effluent limitation or other limitation' must be related to the statutory boundaries set forth in §§ 1311, 1312, 1316, and 1345," and the Rule "does not emanate from these sections." Slip op. 21. As for *E.I. du Pont*, it is "a far stretch to take . . . dicta" from that case to elevate policy arguments over textual ones. *Id.* at 24. Even supposing that the holding in *E.I. du Pont* did permit reasoning from "policy considerations," that would be no justification for employing "a watered down version of textualism in this case," which involves different challenges to a different regulation. *Id.*

lies in this Court under Section 1369(b)(1), then it necessarily does *not* lie in the district courts under the APA. Yet the panel decision has sent the worst kind of mixed message. On the one hand, the panel has denied the motions to dismiss and retained jurisdiction for itself under Section 1369(b)(1). On the other hand, a majority of the panel *disagreed* with that outcome, which was ostensibly dictated by *National Cotton*. In the district courts outside the Sixth Circuit, which are not bound to follow *National Cotton*, there are certain to be disputes about whether the panel decision should be understood as supporting or undercutting jurisdiction of the APA suits in the district courts.

Concern for judicial economy also weighs in favor of immediate reconsideration of the panel's opinion before the Court reaches the merits of the petitions for review. The Court has before it over 60 parties, including 25 States and the District of Columbia, two federal agencies and their heads, scores of industry petitioners, and a multitude of environmental NGOs. Each of these categories of parties have unique interests, and within each group, individual parties are likely to take different perspectives. As the ongoing litigation in the U.S. District Court for the District of North Dakota demonstrates, the disputes among the parties will not be limited to disagreements on broad legal principles. It is nearly certain to involve evidentiary disputes and other hotly-contested motions practice that will consume substantial judicial resources to manage and resolve.

Beyond that, the likelihood that the panel's denial of the motions to dismiss will eventually be overturned is—judging by the panel's splintered decision—quite high. It would not be a wise use of party or judicial resources to litigate the merits in this Court now, given the substantial risk that a judgment on the merits will later be vacated for want of jurisdiction, sending everyone down to start over from scratch before the district courts. In these circumstances, "immediate rather than delayed review" of the jurisdictional question "would be the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Cox Broad. v. Cohn*, 420 U.S. 469, 477-478 (1975).

Finally, it bears mention that the interlocutory posture of the case poses no obstacle. No future developments "would foreclose or make unnecessary decision on the [jurisdictional] question." *Cox Broad.*, 420 U.S. at 480. *See, e.g.*, *Foti v. INS*, 308 F.2d 779 (2d Cir. 1962) (en banc) (reversing on en banc rehearing, and after a merits judgment, a 2-1 panel ruling that the court of appeals had original jurisdiction), rev'd 84 S. Ct. 306 (1963).[4]

CONCLUSION

The petition for rehearing en banc should be granted and full rebriefing and oral argument should be ordered.

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[4] Rule 35(a) provides that any "appeal or other proceeding" may be reheard en banc. IOP 35(g) and (h) specify that petitions for en banc review of non-final orders "will be circulated only to the panel judges" in and "treated in the same manner as a petition for panel rehearing." Any member of the panel may request an en banc poll from the full Court. IOP 35(d)(3), (e). The Court may wish to await other en banc filings before acting on the petition.

Dated: February 29, 2016

Respectfully submitted,

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