No. 16-299

In the
Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

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

RESPONDENTS' BRIEF IN SUPPORT OF PETITIONER ON BEHALF OF AGROWSTAR, LLC; AMERICAN EXPLORATION & MINING ASSOCIATION; CALIFORNIA CATTLEMEN'S ASSOCIATION; COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH; DUARTE NURSERY, INC.; GEORGIA AGRIBUSINESS COUNCIL, INC.; GREATER ATLANTA HOMEBUILDERS ASSOCIATION, INC.; HAWKES COMPANY, INC., LPF PROPERTIES, LLC; NEW MEXICO CATTLE GROWERS ASSOCIATION; NEW MEXICO FEDERAL LANDS COUNCIL; NEW MEXICO WOOL GROWERS, INC.; OREGON CATTLEMEN'S ASSOCIATION; PIERCE INVESTMENT COMPANY; R. W. GRIFFIN FEED, SEED & FERTILIZER, INC.; SOUTHEASTERN LEGAL FOUNDATION, INC., AND WASHINGTON CATTLEMEN'S ASSOCIATION

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QUESTION PRESENTED

Is the federal rule redefining "waters of the United States" under the Clean Water Act subject to exclusive review in the circuit courts of appeals under 33 U.S.C. § 1369(b)(1)?

CORPORATE DISCLOSURE STATEMENT

Respondents are non-profit advocacy groups or privately held companies that have no parent corporations and do not issue stock.

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SUMMARY OF THE ARGUMENT

The government rejects the plain meaning of § 1369(b)(1)(E) and (F) of the Clean Water Act that confer exclusive appellate jurisdiction solely on agency actions "approving or promulgating" any effluent or other limitation or "issuing or denying" any permit. The Rule defining "waters of the United States" expressly declares it has no such effect and only delineates the general scope of the Act. The government asks this Court to ignore its own statements about the Rule and interpret the text of § 1369(b)(1) expansively, relying on "practical considerations," such as judicial efficiency, to bring the Rule under appellate court review. But this approach contravenes Supreme Court precedent and the explicit language of the Act.

When interpreting a statute, this Court relies on the plain meaning of the statutory text, unless that interpretation is absurd. Restricting judicial review of some agency actions to the appellate courts while allowing other agency actions to be heard in the district courts is perfectly reasonable where Congress has expressly allocated federal court jurisdiction. But rewriting the Act, as the government urges, to cover agency actions that are clearly excluded by the plain text, undermines the intent of Congress and the "rule of law," and conflicts with this Court's treatment of § 1369(b)(1) in other cases. In each case where this Court has applied § 1369(b)(1), it relied on the Act's plain meaning. It should do so here and hold the Rule clearly falls outside § 1369(b)(1) and must be challenged in the federal district courts.

ARGUMENT

On June 29, 2015, the Environmental Protection Agency and U.S. Army Corps of Engineers promulgated a revised rule defining "waters of the United States" subject to the Clean Water Act. 80 Fed. Reg. 37054 (WOTUS Rule). The WOTUS Rule covers:

> 1. All waters which are or were or may be used in interstate or foreign commerce;
>
> 2. All interstate waters;
>
> 3. The territorial seas;
>
> 4. All impoundments of any "waters of the United States;"
>
> 5. All tributaries to waters 1-3. A "tributary" means a water that contributes flow directly or through another water (including any impoundment), to waters 1-3, that has physical indicators of a bed and bank and an ordinary high water mark. A tributary may be natural or man-made.
>
> 6. All waters adjacent to waters 1-5. "Adjacent" means bordering, contiguous, or neighboring. "Neighboring" means within 100 feet of the ordinary high water mark of waters 1-5. And, all waters within the 100-year floodplain of waters 1-5 and not more than 1,500 feet from the ordinary high water

> mark. Also, all waters within 1,500 feet of the high tide line of waters 1-3.
>
> 7. All of the following waters that have been determined on a case-by-case basis to have a significant nexus to waters 1-3: prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands. "Significant nexus" means that a water, alone or in combination with similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of waters 1-3. "Significant" means more than speculative or insubstantial and includes effects on any one of nine factors.
>
> 8. And, all waters located within the 100-year floodplain of waters 1-3 and all waters within 4,000 feet of the high tide line or ordinary high water mark of waters 1-5 when they have a significant nexus to waters 1-3.

Some waters are excluded from federal regulation under the Final Rule. *Id.* at 37104-37106

The ultimate question for this Court is whether the WOTUS Rule is tantamount to:

> (E) approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of [the Act], [or]

> (F) issuing or denying any permit under section 1342 of [the Act].

33 U.S.C. § 1369(b)(1)(E) and (F).[1]

That question turns on two other questions: (1) what is the plain meaning of § 1369(b)(1)(E) and (F); and (2) did this Court authorize a departure from the plain meaning of that provision in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980).

I

THE PLAIN LANGUAGE OF § 1369(b)(1) CONTROLS

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States. v. Am. Trucking Ass'ns,* 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). The ordinary meaning of language employed by Congress is assumed accurately to express its legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985). Where the words are clear, they are controlling. *See Lamie v.*

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[1] It is undisputed that this provision only applies to effluent discharges regulated under Section 402 (33 U.S.C. § 1342) of the Act known as the National Pollutant Discharge Elimination System (or NPDES) program administered by the EPA and does not apply to "dredged and fill" discharges regulated under Section 404 (33 U.S.C. § 1344) of the Act and administered by the Army Corps of Engineers.

U.S. Tr., 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."). So it is here.

In support of the petition, the States and Petitioner provided a detailed analysis of § 1369(b)(1) which we join. That analysis demonstrates that, on its face, 33 U.S.C § 1369(b)(1)(E) and (F) do not apply to the WOTUS Rule because the Rule only defines jurisdictional waters under the Act and does not purport to approve or promulgate any limitation or issue or deny any permit. The Rule itself states it "does not establish any regulatory requirements," 80 Fed. Reg. at 37054, and "imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments," *id.* at 37102.

But the same cannot be said for agency actions "approving or promulgating any effluent limitation or other limitation" or "issuing or denying [a] permit." 33 U.S.C. § 1369(b)(1)(E) and (F). Such actions involve particularized enforcement of the Act as applied to specific entities and operations. They are several steps removed and quite different in nature, scope, impact, and time from identifying the reach of the Act under the WOTUS Rule. Therefore, under a plain reading of

the Act, § 1369(b)(1) does not apply to the Rule. This Court relies on the plain meaning of a statute unless it would lead to an absurd result:

> It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989), in turn quoting *Caminetti v. United States,* 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)).

Lamie, 540 U.S. at 534.

Relying on the plain meaning of § 1369(b)(1)(E) and (F) of the Clean Water Act is far from absurd. Rather, it restricts judicial review of certain NPDES (§ 402) effluent or permit actions of the EPA to the exclusive jurisdiction of the courts of appeals while allowing legal challenges to all other actions—such as defining the general scope of the Act—to proceed in the district courts. This is consistent with the general practice of our judicial system to initiate most legal challenges in the district courts.

Section 1369(b)(1) identifies only seven specific agency actions of the EPA Administrator which are subject to immediate review in the appellate courts:

> (1) Review of the Administrator's action
>
> (A) in promulgating any standard of performance under section 1316 of this title,
>
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
>
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
>
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
>
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) in issuing or denying any permit under section 1342 of this title, and
>
> (G) in promulgating any individual control strategy under section 1314(*l*) of this title,

33 U.S.C. § 1369(b)(1).

Unlike the catch-all provision in the Clean Air Act, § 1369(b)(1) is limited to these enumerated actions. *See Harrison v. PPG Indus. Inc.*, 446 U.S. 578, 579 (1980) (citing Section 307(b)(1) of the Clean Air Act that provides for direct review in a court of appeals for any "final action" of EPA under the Act). By singling out these seven actions of EPA for direct review in the courts of appeals, Congress expressed its intent through the clear text to exclude those actions not enumerated. *See Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 168 (2003) (*Expressio unius est exclusio alterius* — listed items exclude non-listed items). For those actions not covered by § 1369(b)(1), the Administrative Procedure Act (APA) authorizes judicial review in the trial courts. Sections 702 and 704 of the APA provide that "[a] person suffering legal wrong" or "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. Among the many actions not restricted to review in a court of appeals under § 1369(b)(1) are all agency actions of the Army Corps of Engineers under § 404 of the Act which must be brought in a district court under the APA. If review of agency actions in the district courts under the APA generally, and under § 404 of the Clean Water Act specifically, is not absurd, neither is limiting EPA review in the courts of appeals to some, but not all, EPA actions. A plain reading of § 1369(b)(1)(E) and (F) is perfectly reasonable and this Court should enforce it according to its terms.

Contrary to the clear text of that provision, the government argues § 1369(b)(1)(F) should be read (or

more accurately, rewritten) to apply to any agency action that "affects" a permit, no matter how indirect or attenuated. *See* Government Opposition to the Petition at 11. This expansive interpretation calls for excising the words "issuing or denying" and inserting the word "affecting," thereby altering the language, intent, and meaning of the Act. But this Court rejected such an approach to statutory interpretation in *Lamie v. U.S. Trustee*, 540 U.S. 526.

In that case, a debtor's attorney sought fees for work provided in a Chapter 7 bankruptcy proceeding. *Id*. at 526. Prior to 1994, the bankruptcy code authorized payment of fees "to a trustee, to an examiner, to a professional person [employed by the trustee and authorized by the court] . . . or to the debtor's attorney." *Id*. Under a plain reading of the code, an attorney who did work on behalf of a debtor could receive an award of fees even if not employed by the trustee and approved by the court. Congress altered the code in 1994 to authorize fees for trustees, examiners, professional persons, and attorneys, employed by the trustee and approved by the court, thus excluding debtor's attorneys from the text. *Id*. Petitioner admitted he was not employed by the trustee nor approved by the court but argued the revised code should be read like the original to authorize an award of fees to a debtor's attorney. *Id*. This Court rejected that argument and held the plain meaning of the revised code was not absurd and was therefore controlling.

The Court reasoned that the petitioner's interpretation would violate a canon of statutory construction—"reading absent word[s] into the

statute." *Lamie*, 540 U.S. at 538. "That is, his argument would result 'not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.'" *Id.* (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)). This Court concluded, "With a plain, *nonabsurd* meaning in view, we need not proceed in this way." *Id.* (emphasis added); s*ee Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

Congress affirmatively and specifically enacted the text of § 1369(b)(1). Its omission of the words "affecting any permit" in subsection (F) is not absurd nor the result of inadvertence or mistake. The text of the Act is clear and intentional. Its plain language applies only to issuing or denying a permit. In deference to congressional intent as expressed in § 1369(b)(1), this Court should not enlarge the scope of the Act by rewriting it.

> Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." *United States v. Locke*, 471 U.S. 84, 95, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) (citing *Richards v.*

United States, 369 U.S. 1, 9, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962)).

Lamie, 540 U.S. at 538.

II

THIS COURT CONSISTENTLY RELIES ON § 1369(b)(1)'S PLAIN LANGUAGE

This Court applied § 1369(b)(1) in two cases: *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. at 136, and *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196-97. In both cases, this Court relied on the provision's plain text. This Court should do so here.

a) E.I. du Pont

Section 1369(b)(1)(E) of the Clean Water Act authorizes exclusive judicial review in a court of appeals of EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345" of the Act. In *E.I. du Pont*, EPA *promulgated* industrywide regulations under the Act setting *effluent limitations* on both new and existing chemical manufacturers. 430 U.S. at 115. The petitioning manufacturers argued review was proper in the court of appeals only when EPA issued individual permits rather than industrywide regulations, but this Court disagreed. By application of the Act's plain meaning, this Court held: "We regard [§ 1369(b)(1)(E)] as unambiguously authorizing court of appeals review of EPA action promulgating an effluent limitation" that applies industrywide. *Id.* at 136. This Court did not engage in a textual analysis of

this provision or call on any interpretative canon to reach this conclusion. This Court found the language clear and the conclusion unavoidable—the promulgation of effluent limitations under the Act is a promulgation of an effluent limitation under § 1369(b)(1)(E). Once the Court determined the regulation was an effluent limitation under Section 301 and not (as the petitioners argued) a guideline under Section 304, the text of the Act resolved the jurisdictional question. The plain meaning of the Act compelled appellate review of such an action.

The government tries to introduce some ambiguity into the decision by citing this Court's statement, relied on by Judge McKeague below, that the manufacturers' "construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to § 402 [NPDES] but would have no power of direct review of the basic regulations governing those individual actions." *E.I. du Pont*, 430 U.S. at 136.

The government argues the WOTUS Rule is a basic regulation governing individual § 402 permits such that it must be covered by § 1369(b)(1)(E), like the industrywide regulations in *E.I. du Pont*. *See* Government Opposition to Petition at 11-12. But the government overlooks the obvious. The regulations in *E.I. du Pont* established actual effluent limitations, as defined in § 1369(b)(1)(E), while the WOTUS Rule does not. *See E.I. du Pont*, 430 U.S. at 115 ("The Environmental Protection Agency has promulgated industrywide regulations imposing three sets of precise limitations on petitioners' discharges.")

(footnote omitted). The WOTUS Rule is solely definitional and sets no effluent limitation whatsoever. EPA did not promulgate the Rule under any of the § 1369(b)(1)(E) sections but under EPA's general Section 501(a) CWA rulemaking authority. *See* 33 U.S.C. § 1361(a). Under a plain meaning of the Act, § 1369(b)(1)(E) does not apply to the WOTUS Rule and *E.I. du Pont* supports that conclusion.

b) Crown Simpson

The government argues *Crown Simpson* endorses a pragmatic approach to statutory interpretation and that the case supports its claim that § 1369(b)(1) places jurisdiction over the WOTUS Rule litigation in the courts of appeals. The government misinterprets this Court's holding. This Court relied on the plain meaning of § 1369(b)(1) which excludes the Rule from direct appellate review.

EPA administers the Clean Water Act's § 402 or NPDES permit program for regulating industrial discharges to covered waters. The Act does allow the States to administer this program, but EPA retains the power to veto any permit the States issue. In *Crown Simpson*, California issued NPDES permits to certain pulp mills that discharge effluent into coastal waters. 445 U.S. at 194. EPA sought stricter effluent controls and "vetoed the permits." *Id.* at 195. On direct petition to the Ninth Circuit, the court held § 1369(b)(1)(E) and (F) do not apply and dismissed the case for lack of subject matter jurisdiction. *Id.*

The Ninth Circuit reasoned it had no jurisdiction to hear the case under subsection (E) because EPA's permit veto did not involve "approving or promulgating any effluent limitation or other limitation." *Crown Simpson*, 445 U.S. at 195. Judge Renfrew wrote a concurring opinion in which he agreed with the majority that § 1369(b)(1)(E) did not apply and the Ninth Circuit had no authority to review the EPA action. *Id.* at 196.

The Ninth Circuit also reasoned it had no jurisdiction to hear the case under subsection (F) because EPA's permit veto was not the same as "issuing or denying a permit." *Id.* In his concurrence, Judge Renfrew opined that the better analysis would find the EPA veto is "functionally similar" to a permit denial and that § 1369(b)(1)(F) does apply. *Id*.

This Court held: "We agree with the concurring opinion and hold the Court of Appeals had jurisdiction of this action under [§ 1369(b)(1)(F)]. When EPA, as here, objects to the effluent limitations contained in a state-issued permit, the precise effect of its action is to 'deny' a permit within the meaning of [§ 1369(b)(1)(F)]." *Id*.

It is instructive that this Court did not overturn the Ninth Circuit under § 1369(b)(1)(E). Although the permit expressly approved specific effluent limitations with which EPA disagreed, this Court did not find this a sufficiently compelling reason to even warrant a discussion of § 1369(b)(1)(E). *See id*. at 196n.7.. If this Court would not find that a permit veto directed at censoring the State's effluent limitations obviously falls within the scope of § 1369(b)(1)(E), it

would be bizarre if this Court were to find the WOTUS Rule, that involves neither a permit nor any effluent limitation, does fall within § 1369(b)(1)(E). *Crown Simpson* provides no support for the government's argument that subsection (E) applies to the Rule and that this case should be litigated in the courts of appeals.

Crown Simpson also provides no support for the government's argument that subsection (F) applies to the WOTUS Rule based on a "pragmatic approach" to interpreting that text. Nowhere in the opinion does this Court state, suggest, or imply that its interpretation of § 1369(b)(1)(F) was anything but a plain reading of the statutory language. This Court was emphatic—"the precise effect" of an EPA veto is a permit denial "within the meaning" of § 1369(b)(1)(F). *Id*. at 196. This Court applied the Act as written.

That this Court cited certain policy concerns to bolster its conclusion does not change the fact that this Court was giving effect to the plain meaning of the Act when it held a permit vetoed is a permit denied. Unlike the permit denial in *Crown Simpson*, the WOTUS Rule does not entail "issuing or denying a permit," either actually or functionally. Under *Crown Simpson* and a plain reading of § 1369(b)(1)(F), the Rule is not subject to exclusive jurisdiction in a court of appeals.

CONCLUSION

The intent of Congress as expressed in the text of § 1369(b)(1) is clear. It does not cover the WOTUS Rule. To effectuate the intent of Congress, this Court should vacate the Sixth Circuit decision and remand for further litigation in the district courts.

DATED: April, 2017

Respectfully submitted,

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