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.

On Appeal from the United States District Court for the
Northern District of Oklahoma, Nos. 4:15-cv-381 & 4:15-cv-386
Judge Claire V. Eagan

BRIEF OF *AMICI CURIAE* OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO STATE ENGINEER, NEW MEXICO ENVIRONMENT DEPARTMENT, NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF APPELLANTS AND REVERSAL

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STATEMENT OF AMICUS INTEREST

Plaintiffs challenge the final rule issued by the Environmental Protection Agency and the U.S. Army Corps of Engineers ("Agencies") that expands the scope of "waters of the United States" under the Clean Water Act. 80 Fed. Reg. 37,054 (June 29, 2015) ("WOTUS Rule"). Ohio, Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, the New Mexico State Engineer, the New Mexico Environment Department, North Carolina Department of Environmental Quality, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming ("State Amici") have an interest in this appeal.

As a specific matter, the State Amici find themselves in the same jurisdictional quagmire as Plaintiffs. They, too, have been forced to file duplicative complaints in the district courts and petitions for review in the circuit courts due to the Agencies' "pragmatic" reading of 33 U.S.C. § 1369. This jurisdictional issue—which cannot be avoided because of the *non-waivable* nature of jurisdictional rules—has taken up substantial time and resources of the States. It also threatens to continue to do so given that the Sixth Circuit's fractured 1-1-1 jurisdictional holding remains open to significant question (as a majority of the

panel recognized). *See In re U.S. Dep't of Defense, U.S. E.P.A. Final Rule* ("*In re WOTUS Rule*"), 817 F.3d 261 (6th Cir. 2016).

As a general matter, the State Amici seek to protect the rights of the States and of property owners within their borders to obtain judicial review of federal agency action. The Agencies have repeatedly sought to prevent judicial review in suits brought by landowners who have disagreed with the Agencies' reading of "waters of the United States" as applied to their particular lands. *See, e.g., U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016); *Sackett v. EPA*, 132 S. Ct. 1367, 1371 (2012). The Agencies' arguments in those cases "would have put the property rights of ordinary Americans entirely at the mercy of [EPA] employees" without recourse to the courts. *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). Here, the Agencies' reading of 33 U.S.C. § 1369 could do the same. When an EPA action falls under § 1369, that section *bars* other challenges to that EPA action in any later "civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). That limitation raises concerns about § 1369's proper domain even outside the context of the WOTUS Rule.

INTRODUCTION

Under the plain text of 33 U.S.C. § 1369, district courts—not circuit courts—have jurisdiction over suits challenging the WOTUS Rule. *See In re*

WOTUS Rule, 817 F.3d at 275 (Griffin, J., concurring in judgment) ("[I]t is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals."); *id.* at 283 (Keith, J., dissenting) (There is no jurisdiction "under the plain meaning of the statute."). The Sixth Circuit reached a different conclusion only because of its reading of circuit precedent—*National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009)—that was binding on that panel. *See In re WOTUS Rule*, 817 F.3d at 280 (Griffin, J., concurring in judgment). Unconstrained by that out-of-circuit precedent, *this Court* should begin "'with the language of the statute itself,' and that 'is also where the inquiry should end,' for 'the statute's language is plain.'" *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (citation omitted); *see* Okla. Br. 16-26; Chambers Br. 20-28.

To reach an opposite result, the Agencies *complicate* a relatively straightforward jurisdictional statute in order to *restrict* judicial review under the Administrative Procedure Act (APA). Both moves contravene established interpretive principles. *First*, courts should read jurisdictional statutes to yield "simpl[e]" and "straightforward" rules. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Vague rules require "'an enormous amount of expensive legal ability [to] be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases.'" *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia,

J., concurring in judgment) (citation omitted). This litigation spotlights those hazards. "[C]areful counsel" have had to sue twice "to protect their rights," *Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977), and many courts have spent significant resources to "assure themselves of their power to" hear these issues, *Hertz*, 559 U.S. at 94. Jurisdiction, not the merits, continues to "eat[] up time and money." *Id*. Far better for this and all future cases, that courts stick to the comparatively simpler rules in § 1369's text.

Second, expanding § 1369(b) restricts APA review. The APA establishes a "'presumption of reviewability for all final agency action.'" *Hawkes*, 136 S. Ct. at 1816 (citation omitted). But § 1369(b)(2) bars "judicial review" of the EPA actions that fall within § 1369's purview after 120 days, even in a later "civil or criminal proceeding for enforcement." This "peculiar sting" limits the APA's presumption of reviewability. *Longview*, 980 F.2d at 1313. Yet APA review must '"not be cut off'" in this way absent '"persuasive reason to believe that such was the purpose of Congress.'" *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (citation omitted). Courts have refused to "read[] § [1369](b)(1) broadly" given these concerns. *Am. Paper Inst. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (noting that "the more [courts] pull within § [1369](b)(1), the more arguments will be knocked out by inadvertence later on"). This Court should do the same.

The Agencies' counterarguments to overcome these canons were rejected by two Sixth Circuit judges in its *In re WOTUS Rule* decision. The Agencies suggested that their position flowed out of a general presumption in favor of circuit-court review. But the "non-Clean Water Act case" used to back this "policy argument[]" does not support the Agencies' view. *In re Final Rule*, 817 F.3d at 282 (Griffin, J., concurring in judgment) (discussing *Florida Power & Light v. Lorion*, 470 U.S. 729 (1985)). *Florida Power* itself disclaims reliance on a court's own "views . . . about sound policy," 470 U.S. at 746, and its careful reading of the specific text at issue easily distinguishes it, *id*. at 735. At best, it applies to statutes enhancing judicial review, not those like § 1369(b) that ultimately restrict it.

In addition, the Agencies take out of context language from *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). In doing so, they substitute the Supreme Court's dicta for its holding and thereby "expand" that dicta beyond its reach. *In re WOTUS Rule*, 817 F.3d at 278 (Griffin, J., concurring in the judgment). While both cases invoked practical concerns, they did so to *reinforce* the text, not to *disavow* it. In short, even while the Sixth Circuit was bound by its own precedent, a panel majority agreed that § 1369's text and more general interpretive principles supported the district court's jurisdiction here. Free from the Sixth Circuit's

precedential constraints, this Court should reject the Agencies' latest attempt to narrow the judicial review available under the Clean Water Act.

STATEMENT OF THE CASE

The Act sets up a "bifurcated jurisdictional scheme" that requires circuit-court review of seven EPA actions and leaves all other actions for district-court review under the APA. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 755 (5th Cir. 2011). As relevant here, the Act requires circuit review for EPA action:

> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, [or]
> (F) in issuing or denying any permit under section 1342 of this title.

33 U.S.C. § 1369(b)(1). If jurisdiction exists under § 1369, a petition for review must be filed within 120 days. *Id.* EPA action that should have been challenged under § 1369 "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Id*. § 1369(b)(2).

Here, because the WOTUS Rule is not one of the actions listed in § 1369(b), the State Amici challenged it in the district courts. Yet they also filed protective petitions in the *circuit* courts, as courts have instructed parties to do, because of the Agencies' suggestion that the WOTUS Rule might fall within § 1369's reach. *See Inv. Co. Inst.*, 551 F.2d at 1280 ("If any doubt as to the proper forum exists, careful counsel should file suit in both the court of appeals and the district court."). Those protective petitions were consolidated in the Sixth Circuit.

Various States have briefed the jurisdictional issue in both district and circuit courts with mixed results. In a case brought by eleven States, the Southern District of Georgia dismissed the suit because it concluded that the Rule qualified as an "other limitation" under § 1369(b)(1)(E). *Georgia v. McCarthy*, No. 2:15-cv-79, 2015 WL 5092568, at *2-3 (S.D. Ga. Aug. 27, 2015), *currently on appeal*, No. 15-14035 (11th Cir.); *see also Murray Energy Corp. v. EPA*, No. 1:15-cv-110, 2015 WL 5062506, at *3-6 (N.D. W. Va. Aug. 26, 2015) (same).

A North Dakota district court, by contrast, rejected the Agencies' § 1369 arguments and held that it had jurisdiction. *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1051-54 (D.N.D. 2015). The Rule is not a "limitation" under § 1369(b)(1)(E), the court said, because one has "exactly the same discretion to dispose of pollutants into the waters of the United States after the Rule as before." *Id*. at 1052. The Rule also does not issue or deny a permit under § 1369(b)(1)(F) as it "has at best an attenuated connection" to permitting. *Id*. at 1053.

The Sixth Circuit disagreed with both courts in a splintered 1-1-1 decision. Two judges ultimately agreed with the District of North Dakota that § 1369(b)(1)(E) did not apply. *See In re WOTUS Rule*, 817 F.3d at 280 (Griffin, J., concurring in judgment), *id.* at 283 (Keith, J., dissenting). But two judges found that the court *did* have jurisdiction under Subsection (F). *Id*. at 274 (McKeague, J., op.); *id*. at 280 (Griffin, J., concurring in judgment). That said, Judge Griffin also

"would [have found] jurisdiction lacking" under Subsection (F) "[b]ut for" the Sixth Circuit's *National Cotton* precedent. *Id.* at 280 (Griffin, J., concurring in judgment). Disagreeing with that decision he noted: "Whether it is desirable for us to possess jurisdiction for purposes of the efficient functioning of the judiciary, or for public policy purposes, is not the issue." *Id.* at 275. Instead, the text should control, and it is "illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals." *Id.* Indeed, he asserted, if Subsection (F) applies here its "jurisdictional reach . . . has no end." *Id.* at 282. Judge Keith dissented, finding that *National Cotton* was ultimately distinguishable from this case. *Id.* at 284.

After the Sixth Circuit's decision, the Northern District of Oklahoma dismissed these cases for lack of jurisdiction on its own initiative. Order, R.49, at 4. It held that it lacked jurisdiction because Plaintiffs' claims were "within the scope of the petitions for review" in the Sixth Circuit. *Id*. Plaintiffs appealed.

ARGUMENT

Section 1369(E) and (F) do not grant subject-matter jurisdiction over the WOTUS Rule to the circuit courts. Plaintiffs and Judge Griffin's opinion in the Sixth Circuit demonstrate in detail why the plain text of those subsections should control. Okla. Br. 16-26; Chambers Br. 20-28; *In re WOTUS Rule*, 817 F.3d at 276-81 (Griffin, J., concurring in judgment). The State Amici will not duplicate

those textual arguments here. Instead, they offer greater elaboration over why traditional rules of statutory interpretation support this plain-text reading of § 1369.

I. THE SUPREME COURT'S GENERAL DIRECTIVE THAT COURTS ESTABLISH BRIGHT-LINE JURISDICTIONAL RULES CONFIRMS THAT § 1369'S PLAIN TEXT GOVERNS IN THIS SPECIFIC CONTEXT

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

A. "The Supreme Court has told [lower courts] to use simple, clear rules for jurisdictional boundaries." *In re Rockford Prods. Corp.*, 741 F.3d 730, 734 (7th Cir. 2013) (Easterbrook, J.) (citing cases); *Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1382 (10th Cir. 2009). The Court, for example, adopted a clear rule to identify a corporation's "principal place of business" for purposes of the diversity-jurisdiction statute because "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz*, 559 U.S. at 94. It did the same thing when interpreting "final decision" for purposes of the appellate-jurisdiction statute, recognizing that "[c]ourts and litigants [were] best served by the bright-line rule" it adopted. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988); *cf. In re Grand Jury Proceedings*, 835 F.2d 237, 239 (10th Cir. 1987) (per curiam) ("[I]n matters relating to appellate jurisdiction, bright line rules are highly desirable.").

Perhaps most famously, the Court has for over a century followed the "well-pleaded complaint rule" for purposes of federal-question jurisdiction, *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908), recognizing the "clarity and simplicity of that rule," *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009).

Many reasons justify this canon of construction for jurisdictional statutes. To begin with, clear rules reduce the amount of time and expense directed away from a case's merits and toward other issues. In that respect, "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz*, 559 U.S. at 94. With vague rules, by contrast, "'an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases.'" *Sisson*, 497 U.S. at 375 (Scalia, J., concurring in judgment) (quoting Zechariah Chafee, The Thomas M. Cooley Lectures, *Some Problems of Equity* 312 (1950)). These costs "diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz*, 559 U.S. at 94.

In addition, "[t]he stakes of the inquiry are high[er]" in the jurisdictional context than they are in other contexts. *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 813 (6th Cir. 2015) (Sutton, J.). For over two centuries, the Supreme Court has made clear that "'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.'" *Arbaugh v. Y&H Corp.*, 546 U.S.

500, 514 (2006) (citation omitted); *Capron v. Van Noorden*, 6 U.S. 126, 127 (1804). Accordingly, "a defect in subject-matter jurisdiction requires a suit's dismissal, no matter how much the parties have spent and no matter how late in the proceedings the defect comes to light." *RTP LLC v. ORIX Real Estate Capital, Inc.*, __ F.3d __, 2016 WL 3568090, at *3 (7th Cir. July 1, 2016). Not only that, courts have an "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514. And courts have 'no authority to create equitable exceptions to jurisdictional requirements,'" *Bowles v. Russell*, 551 U.S. 205, 214 (2007), even when the federal agency itself identifies the wrong deadline for filing petitions for review, *see Utah ex rel. Utah Dep't of Envtl. Quality v. EPA*, 750 F.3d 1182, 1186 (10th Cir. 2014). For these reasons, "the chief and often the only virtue of a jurisdictional rule is clarity." *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987); *McKissick v. Yuen*, 618 F.3d 1177, 1196-97 (10th Cir. 2010). Parties need to know (clearly) where to sue because these various effects leave zero margin for error.

B. This jurisdictional canon of construction supports Plaintiffs (and § 1369's plain text) in this case. The Agencies agree that, unlike the Clean Air Act, the Clean Water Act cannot be interpreted to grant *exclusive* jurisdiction to the circuit courts, and instead divides jurisdiction between the circuit courts and the district courts. *Cf. In re WOTUS Rule*, 817 F.3d at 277 (Griffin, J., concurring in

judgment) (noting that § 1369 "stands in marked contrast to the Clean Air Act's" judicial-review provisions). In the range of cases, it will be much easier for courts to determine on which side of this jurisdictional divide a particular EPA action falls if they stick to § 1369's plain text rather than the Agencies' atextual reading.

Start with Subsection (E). In most situations, EPA action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345" will have clear guideposts. 33 U.S.C. § 1369(b)(1)(F). Most notably, that action will involve the types of limitations that those four provisions direct EPA to impose: technology-based limits under § 1311, water-quality-based limits under § 1312, new-source limits under § 1316, or sewer-sludge limits under § 1345. *In re WOTUS Rule*, 817 F.3d at 276-77 (Griffin, J., concurring in judgment). Under the Agencies' view, by contrast, it will often be unclear whether a particular EPA action that is not itself a limitation under one of those four sections will have an "indirect consequence" that should nevertheless qualify as such a limitation. *Id.* at 267 (McKeague, J., op.). Such a view would, in many cases, require litigants to guess at a rule's impact. Regulations defining "waters of the United States" offer a good example. The relative breadth of the regulatory definition—whether the definition is broadened to include more waters or narrowed to include less—could determine whether or not the regulation counts as a "limitation" under Subsection (E). A regulation also could broaden some aspects

of the definition but narrow other aspects, making it even more difficult to identify jurisdiction.

Turn to Subsection (F). In most situations, it will be obvious whether a party has challenged EPA action "in issuing or denying [a] permit under section 1342." 33 U.S.C. § 1369(b)(1)(F). Most notably, the EPA will have actually issued or denied a permit under § 1342. *E.g.*, *Natural Res. Def. Council v. EPA*, 808 F.3d 556, 562 (2d Cir. 2015) (challenge to "Vessel General Permit"); *City of Pittsfield v. EPA*, 614 F.3d 7, 8 (1st Cir. 2010) (challenge to permit for wastewater treatment plant). Under the Agencies' reading, by contrast, it will often be unclear what adequately relates to or affects the permitting process so as to trigger jurisdiction under Subsection (F). *In re WOTUS Rule*, 817 F.3d at 270 (McKeague, J., op.). Indeed, the Supreme Court has had great difficulty interpreting statutes, like ERISA, that actually use language similar to what the Agencies seek to incorporate into § 1369 because, "as many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

In sum, the Agencies' view on jurisdiction "jettison[s] relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great*

Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995). Going forward, nobody will know where they should go with challenges to EPA action. Aside from the WOTUS Rule, the Agencies' reading would force "careful counsel" to sue in both district courts and circuit courts in many cases under § 1369. *Inv. Co. Inst.*, 551 F.2d at 1280; *Am. Paper Inst.*, 882 F.2d at 288. All of this would lead to the "eating up [of] time and money" on issues unrelated to the merits, which would represent a costly initial step for challenging EPA action. *Hertz*, 559 U.S. at 94.

II. THE PRESUMPTION IN FAVOR OF JUDICIAL REVIEW LIKEWISE CONFIRMS THAT § 1369'S PLAIN TEXT CONTROLS

The APA's presumption of judicial review confirms that courts should stick with, not depart from, § 1369's plain text. Section 1369(b)(2) limits the judicial review available for the specific actions that fall within § 1369 as compared to the judicial review generally available under the APA.

"The APA . . . creates a 'presumption favoring judicial review of administrative action.'" *Sackett*, 132 S. Ct. at 1373 (citation omitted). This presumption is a "strong" one, *Payton v. U.S. Dep't of Agriculture*, 337 F.3d 1163, 1168 (10th Cir. 2003), and a federal agency bears a heavy burden to overcome it. The presumption applies, most obviously, when a federal agency claims that the relevant action is not reviewable by the courts *at all*. *See, e.g.*, *McAlpine v. United States*, 112 F.3d 1429, 1432-35 (10th Cir. 1997). Yet it extends beyond that narrow domain to apply whenever an agency argues that a particular statute *limits*

judicial review to certain methods. In *Hawkes*, for example, the Agencies argued that the Clean Water Act authorized judicial review of their "jurisdictional determinations"—e.g., determinations that certain lands fell within or outside "waters of the United States"—only at the end of the permitting process. 136 S. Ct. at 1816. The Supreme Court disagreed, invoking the APA's presumption of judicial review to do so. *Id.* The Court reasoned that "'[t]he mere fact' that permitting decisions are 'reviewable should not suffice to support an implication of exclusion as to other[]' agency actions, such as [the jurisdictional determinations]" that were at issue in *Hawkes*. *Id.*

Notably, in this very context, courts have recognized that the APA's presumption *dis*favors a broad reading of § 1369. Section 1369(b)(1) provides for judicial review only during a 120-day window, and, in addition, § 1369(b)(2) bars judicial review of EPA actions that could have been challenged under § 1369 in later "civil or criminal proceeding[s] for enforcement." This "review-preclusion proviso in § [1369](b)(2) [has] dissuade[d] [courts] from reading § [1369](b)(1) broadly." *Am. Paper Inst.*, 882 F.2d at 289. Its "peculiar sting" has instead led them to interpret § 1369 narrowly by finding many EPA actions subject to the general standards in the APA. *Longview*, 980 F.2d at 1313.

This presumption is particularly appropriate for the broad WOTUS Rule—which will apply to nearly every section of the Clean Water Act and to the many

different ecological environments in the States. Indeed, nearly every Supreme Court case that has implicated the scope of "waters of the United States" under the Clean Water Act has involved an *as-applied* challenge that was tied to the Agencies' findings for particular lands. *See Hawkes*, 136 S. Ct. at 1812-13; *Sackett*, 132 S. Ct. at 1370-71; *Rapanos v. United States*, 547 U.S. 715, 729 (2006) (plurality op.); *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 165 (2001). Such as-applied litigation should not be disallowed simply because the Agencies have now adopted a rule on the scope of "waters of the United States."

III. THE AGENCIES' CONTRARY ARGUMENTS ARE MISTAKEN

In conflict with these well-established canons of statutory interpretation, the Agencies seek a "practical" construction of § 1369 to find jurisdiction over the WOTUS Rule. They lack the necessary support for this request.

First, relying on *Florida Power*, the Agencies have suggested that there is a "preference in favor of circuit court review" of administrative regulations. *See, e.g.*, *In re WOTUS Rule*, 817 F.3d at 272-73 (McKeague, J., op.). Yet a majority of the Sixth Circuit panel rejected the Agencies' "reliance on a non-Clean Water Act case to support [their] policy arguments." *Id.* at 282 (Griffin, J., concurring in judgment); *id.* at 283 (Keith, J., dissenting) (relying on "plain meaning"). "Nowhere" did *Florida Power* "intimate that it was ruling as a matter of *general* administrative procedure." *Nader v. EPA*, 859 F.2d 747, 754 (9th Cir. 1988)

(emphasis added); *Am. Farm Bureau v. EPA*, 121 F. Supp. 2d 84, 93 (D.D.C. 2000). To the contrary, *Florida Power* explained that jurisdiction "must of course be governed by the intent of Congress and not by any views [courts] may have about sound policy." 470 U.S. at 746.

Indeed, *Florida Power*'s "lengthy exegesis of th[e] specific statutes" at issue shows it cannot be applied to a "separate, dissimilar statute" like this one. *Nader*, 859 F.2d at 754. That statute used broad terms like "all" and "any" to describe circuit-court jurisdiction, *Florida Power*, 470 U.S. at 733, reflecting "a congressional intent to provide for initial court of appeals review of *all final orders*," *id*. at 739 (emphasis added). *That* congressional intent does not transfer to *this* statute. As many circuits have recognized, the "considerable specificity in section 1369(b)" shows that "not all EPA actions . . . are directly reviewable in the courts of appeals." *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005); *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1431 (9th Cir. 1991). Additionally, most courts have not cited *Florida Power* when interpreting § 1369. Instead, they have read the section narrowly because of its "review-preclusion proviso." *Am. Paper Inst.*, 882 F.2d at 289; *Narragansett*, 407 F.3d at 5; *Longview*, 980 F.2d at 1313.

Second, the Agencies have relied on a pair of Supreme Court cases interpreting § 1369—*E.I. du Pont* and *Crown Simpson*. *In re WOTUS Rule*, 817

F.3d at 267, 269-70 (McKeague, J., op.). Yet these cases also do not support the Agencies' "practical" construction of § 1369(b)(1). Again, the majority of the Sixth Circuit panel rejected the Agencies' reading of these cases. While both cases invoked practical concerns, they did so only to *reinforce* the text.

E.I. du Pont concerned effluent limitations that were issued under § 1311 and that fell within Subsection (E)'s core. 430 U.S. at 122 & n.9. The industry, however, argued for an *atextually* narrow reading of Subsection (E), one that permitted review only "of the grant or denial of an individual variance" from the limitations. *Id.* at 136. The Court explained that Subsection (E)'s text referenced all of § 1311, not just § 1311(c). *Id.* Only "*after* a plain textual rejection of the industry's position," *In re WOTUS Rule*, 817 F.3d at 278 (Griffin, J., concurring in judgment), did the Court look at practical concerns. Interpreting Subsections (E) and (F) together, it added that a contrary reading "would produce the truly perverse situation" in which circuits review "numerous individual actions issuing or denying permits" under Subsection (F), but not "the basic regulations governing those individual actions" under Subsection (E). 430 U.S. at 136. *E.I. du Pont* thus reinforced the plain text of Subsection (E); it did not grant circuits a freewheeling license to depart from the text.

The same was true of *Crown Simpson*, which held that an EPA veto of a state-issued permit qualified as the "denial" of a permit under Subsection (F). *See*

445 U.S. at 196. The Court started with the text: "When EPA, as here, objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to 'den[y]' a permit within the meaning of [Subsection (F)]." *Id.* By vetoing the permit, EPA "withh[e]ld the possession, use, or enjoyment of" that permit. Random House Dictionary 533 (2d ed. 1987) (defining "deny"). Only then did the Court add the pragmatic point that the review process for permits should not depend "on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." 445 U.S. at 196-97; *see In re WOTUS Rule*, 817 F.3d at 281 (Griffin, J., concurring in judgment). Again, the Court tied its holding to the text; it did not ignore that text.

At day's end, the Sixth Circuit ruled the way that it did because of its reading of its prior decision in *National Cotton*. But no other court has read § 1369 so broadly. Indeed, the Eleventh Circuit expressly rejected *National Cotton*'s interpretation of Subsection (F). *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012). That court instead limited jurisdiction to actions "issuing or denying" a permit as Plaintiffs urge here. *Id.* at 1287. Other circuits have recognized the same limit. *See, e.g.*, *Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004) ("By its plain terms, this provision conditions the availability of judicial review on the issuance or denial of a permit."); *Appalachian Energy Grp. v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994) (no jurisdiction because "the EPA did not issue or

deny any permits to petitioner or threaten such action"); *see also Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1018 (9th Cir. 2008). This Court should do the same. The Court is neither bound by *National Cotton* nor by the way that the Sixth Circuit has construed that case since.

CONCLUSION

The State Amici respectfully ask the Court to reverse the district court's jurisdictional ruling.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B)(i) and this Court's Order of June 13, 2016 because it contains 4,811 words, including footnotes; and

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I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2016, a true and correct copy of the foregoing Brief of *Amicus Curiae* was filed with the Clerk of the United States Court of Appeals for the Tenth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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