Nos. 13-6, 13-10, 13-23

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

v.

FRIENDS OF THE EVERGLADES, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, MISSOURI, WASHINGTON, AND THE PROVINCE OF MANITOBA, CANADA

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether petitioners lack standing to appeal the court of appeals' judgment in their favor, which dismissed the petitions for review against them.

2. Whether jurisdiction to review the EPA's "Water Transfers Rule," 40 C.F.R. § 122.3(i), lies exclusively in the district court in the first instance, because that regulation—exempting certain transfers of water from the permitting regime of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*—is not one of the specifically delineated agency actions made directly reviewable in the court of appeals by 33 U.S.C. § 1369(b)(1).

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STATEMENT

The Clean Water Act is a broad and wide-ranging federal statute devoted to restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. *See* 33 U.S.C. § 1251(a). To achieve these objectives, the Act prohibits the discharge of pollutants into navigable waters from any point source[1]—except as authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued by EPA or a State. *See id.* §§ 1311(a), 1342. A discharge permit must impose technology-based and water quality standards-based effluent limitations so as to minimize the discharge of pollutants and protect beneficial uses of waters of the United States. *See id.* §§ 1251(a), 1342(a).

1. This case concerns a challenge to EPA's "Water Transfers Rule," codified at 40 C.F.R. § 122.3(i). The Rule provides that "discharges from a water transfer" do not require NPDES permits. 40 C.F.R. § 122.3(i); *see* NPDES Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008). The Rule defines "water transfer" to mean "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). The Rule in essence provides that transfers of water from one water body to another are exempt from NPDES permitting and thus are free from the limitations on discharge of pollutants that NPDES permits would impose. EPA has declared

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[1] A point source is any "discernible, confined and discrete conveyance," including "any pipe, ditch, channel, [or] tunnel." 33 U.S.C. § 1362(14).

water transfers exempt from permitting even though the receiving body of water may differ from the originating body of water in critical ways, such as whether it is used for drinking water or recreational purposes or displays high or low concentrations of particular pollutants. *See* 40 C.F.R. § 122.3(i); *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105-08 (2004) (discussing EPA's "unitary waters" theory).

2. As a general rule, original jurisdiction over a federal-court challenge to final agency action lies in the district court under the Administrative Procedure Act and 28 U.S.C. § 1331.[2] The Clean Water Act delineates exceptions to that general rule in seven subparagraphs setting forth particularized circumstances in which the courts of appeals have original jurisdiction over challenges to specified EPA actions. *See* 33 U.S.C. § 1369(b)(1). The detailed nature of the jurisdictional statute establishes that Congress did not intend to create original jurisdiction in the courts of appeals over all EPA actions or all nationwide rules authorized by the Clean Water Act. Thus, a challenge to a particular EPA action is subject to original jurisdiction in the courts of appeals only if the EPA action is one of those specifically described by Congress in § 1369(b)(1). Otherwise, the ordinary process for judicial review of agency actions, commencing in the federal district court, applies.

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[2] *See, e.g.*, *Bell v. New Jersey*, 461 U.S. 773, 779 n.3 (1983) (noting default rule). Thus, this Court has often exercised jurisdiction over challenges to agency regulations originating in the district courts. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 129-31 (2000); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 692-93 (1995).

In its notice of final rulemaking adopting the Water Transfers Rule, EPA asserted that the rule could be challenged only by petition for review filed directly in the courts of appeals under § 1369(b)(1). *See* 73 Fed. Reg. at 33,697. The agency asserted that such a petition for review was the exclusive vehicle to challenge the Rule because EPA's exemption of water transfers entirely from NPDES permitting was either an EPA action "issuing or denying any [NPDES] permit," *id.* § 1369(b)(1)(F), or an EPA action establishing "any effluent limitation or other limitation" under designated sections of the Act, *id.* § 1369(b)(1)(E).

3. Disagreeing with that legal conclusion, the States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, and Washington, and the Province of Manitoba, Canada (collectively, "the States"), and several environmental organizations, filed actions challenging the Rule in the Southern District of New York, which were subsequently consolidated.[3] Other environmental organizations and the Miccosukee Tribe filed similar actions in the Southern District of Florida,[4] but they later dismissed those actions and intervened as plaintiffs in the consolidated New York actions.

Because EPA had asserted that the Water Transfers Rule could be reviewed only through a

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[3] *See* Complaint, *New York v. EPA*, No. 08-cv-8430 (S.D.N.Y. Oct. 2, 2008) (ECF No. 1); Complaint, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, No. 08-cv-5606 (S.D.N.Y. June 20, 2008) (ECF No. 1); Order (Endorsed Letter), *Catskills Mountains*, No. 08-cv-5606 (Oct. 10, 2008) (ECF No. 18).

[4] *See, e.g.*, Complaint, *Friends of the Everglades v. United States*, No. 08-cv-21785 (S.D. Fla. June 23, 2008) (ECF No. 1).

petition in the courts of appeals, however, the States also filed a protective petition for review in the Second Circuit. Other parties filed petitions for review in other circuits, including the Eleventh Circuit. The Judicial Panel on Multidistrict Litigation consolidated the petitions for review in the Eleventh Circuit. *See* 28 U.S.C. § 2112(a)(3) (providing for consolidation of petitions for review in a randomly selected court of appeals). The South Florida Water Management District and United States Sugar Corporation, which are both petitioners here, intervened as respondents in the Eleventh Circuit. The district courts stayed all actions before them pending resolution of proceedings in the court of appeals.[5]

4. EPA thereafter moved in the court of appeals for summary denial of the consolidated petitions for review on the merits.[6] The States moved in the court of appeals for dismissal of the petitions for review for lack of jurisdiction. On May 6, 2011, the Eleventh

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[5] *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 630 F. Supp. 2d 295, 304-05 (S.D.N.Y. 2009); Order, *Friends of the Everglades*, No. 08-cv-21785 (Nov. 7, 2008) (ECF No. 53); Order, *Friends of the Everglades*, No. 08-cv-21785 (Dec. 20, 2010) (ECF No. 70).

[6] While the petitions for review were pending, the Eleventh Circuit had held, in an appeal in a citizen suit filed in federal district court under 33 U.S.C. § 1365, that the Water Transfers Rule was a permissible interpretation of the Clean Water Act's permitting requirements. *See Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227-28 (11th Cir. 2009). Because the Water Transfers Rule was finalized after the citizen suit appeal was fully briefed, the Eleventh Circuit made that decision based on letters submitted under Rule 28(j) of the Federal Rules of Appellate Procedure and without having the administrative record before it.

Circuit denied both motions and directed full briefing of both the jurisdictional issue and the merits. Following full briefing and oral argument, the Eleventh Circuit held that it lacked original jurisdiction under 33 U.S.C. § 1369(b)(1) and dismissed the petitions for review. EPA Pet. App. 16a.

The court held that the Water Transfers Rule does not constitute one of the specifically delineated types of EPA actions made directly reviewable in the federal courts of appeals by 33 U.S.C. § 1369(b)(1). EPA had invoked two different subsections of that statute, and the court rejected both of them as inapplicable. The court held that the Rule fell outside the plain text of § 1369(b)(1)(E), which applies to an EPA action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316 or 1345." EPA Pet. App. 9a-10a. The court reasoned that a "limitation" is a restriction, and the Rule "imposes no restrictions on entities engaged in water transfers," but rather exempts such water transfers from the NPDES permitting regime altogether. EPA Pet. App. 10a. Moreover, even if the Rule "could be classified as a limitation, it was not promulgated under section 1311, 1312, 1316, or 1345," but instead was promulgated under different sections of the Act. EPA Pet. App. 11a (citing 73 Fed. Reg. at 33,698).

The Eleventh Circuit also held that the Water Transfers Rule was outside the scope of § 1369(b)(1)(F), which applies to an EPA action "in issuing or denying any permit under section 1342." Simply put, the "water-transfer rule neither issues nor denies a permit." EPA Pet. App. 13a. Instead, the Rule "exempts a category of activities from the requirements of a permit and ensures that no permit will ever be issued or denied for discharge from a water

transfer." EPA Pet. App. 13a. Having rejected EPA's and intervenors' jurisdictional arguments, the court also rejected intervenor United States Sugar Corporation's argument that it should exercise "hypothetical jurisdiction" and reach the merits without deciding the jurisdictional question. *See* EPA Pet. App. 14a-16a. The court of appeals denied petitions for rehearing on February 28, 2013. EPA Pet. App. 20a.

5. Consolidated actions challenging the Water Transfers Rule under the Administrative Procedure Act remain pending in New York federal district court. EPA has filed the same administrative record in the district court that it filed in the Eleventh Circuit in connection with the consolidated petitions for review.[7] The parties on each side have filed and fully briefed cross-motions for summary judgment as to the validity of the Water Transfers Rule; those motions are awaiting decision by the district court.

REASONS FOR DENYING THE PETITION

I. As Prevailing Parties Below, Petitioners Lack Standing To Seek Certiorari.

As EPA acknowledges (Pet. at 12),[8] petitioners are the prevailing parties in the judgment of the court below dismissing the consolidated petitions for review. EPA was the named respondent in those

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[7] *See* Letter from Daniel P. Filor, Asst. U.S. Att'y, to Hon. Kenneth Karas, U.S. Dist. Judge, at 1, *Catskill Mountains*, No. 08-cv-5606 (Mar. 15, 2013) (ECF No. 118).

[8] The South Florida Water Management District and United States Sugar Corporation simply ignore the standing question.

petitions for review, and the remaining petitioners intervened as respondents to oppose those petitions. As prevailing parties, petitioners lack standing to appeal the judgment below, and their petitions for certiorari should be denied on this basis alone. Even if there were some ground upon which petitioners might be able to claim standing (and there is none), the presence of a serious threshold issue as to standing would make these petitions exceptionally poor vehicles for raising the questions they seek to present.

This Court only rarely entertains appeals from parties that prevail in the judgment below. *See California v. Rooney*, 483 U.S. 307, 311 (1987); *see also Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682, 684 (2002) (per curiam). In nearly all cases, the prevailing party in a judgment of the lower court can satisfy neither the injury requirement for Article III standing nor the prudential rule limiting appellate standing to parties that are aggrieved by the lower court's judgment. This is true even if the *reasoning* underlying the lower court's judgment may be adverse to the prevailing party's long-term interests. *See Rooney*, 483 U.S. at 311. This Court has identified only a few special circumstances in which a prevailing party may appeal from a judgment in its favor, and none of them is remotely comparable to the circumstances of this case.

EPA cites (Pet. at 11-12) two decisions of this Court as supposedly supporting its standing to appeal here: *Camreta v. Greene*, 131 S. Ct. 2020 (2011), and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). But these cases only illustrate the weaknesses in the argument for standing here. In *Camreta*, the Ninth Circuit held

that government officials had violated a minor child's constitutional rights in questioning her about alleged sexual abuse by her father, but also held that the officials were entitled to qualified immunity against money damages under 42 U.S.C. § 1983. *See* 131 S. Ct. at 2027. This Court ruled that one government official, Camreta, had standing to challenge the Ninth Circuit's adverse constitutional ruling, even though he prevailed in the judgment, because the constitutional ruling compelled him to change the way he performed his official duties or risk a future damages action. *Id.* at 2029. Here, by contrast, the Eleventh Circuit's ruling does not compel EPA or the other petitioners to change anything. Quite the opposite: the court of appeals has ruled the proceedings before it to be a nullity and has left the EPA's rule fully in effect. The status of the Water Transfers Rule is no different now than it would have been if the States and environmental organizations had never filed petitions for review at all.

Even in *Camreta*, two justices would have held that Camreta lacked standing because he was a prevailing party, *id.* at 2037-43 (Kennedy, J., dissenting), and two more justices would have refrained from addressing the merits of the petition in large part because the standing inquiry raised "difficult questions," 131 S. Ct. at 2036-37 (Sotomayor, J., concurring in the judgment). The five justices who found standing in *Camreta* made clear that the ruling arose from special features of the Court's qualified-immunity doctrine under 42 U.S.C. § 1983, which permits a reviewing court to enter two distinct holdings: one to clarify prospectively the requirements that the Constitution imposes on government officials, and another to resolve an official's liability for particular past conduct. *See id.* at 2030-36

(Kagan, J., joined by Roberts, C.J., Scalia, Ginsburg, and Alito, JJ.); *see also id.* at 2036 (Scalia, J., concurring). Nothing similar occurred here: the decision below does not prospectively establish the legal duties of EPA or any other petitioner.

The second case on which EPA relies, *Roper*, also involves distinctive circumstances not presented here—namely, the special procedural setting of class-action litigation. In *Roper*, after the district court denied the named plaintiffs' motion to certify a broad plaintiff class, defendants offered the named plaintiffs a settlement in the full amount of their individual claims. Though the named plaintiffs rejected the settlement, the district court entered judgment in their favor in the amount of the settlement over their objection. This Court held, over two dissenting votes, that the named plaintiffs could appeal the district court's adverse class certification decision as a ruling "collateral" to the merits of the litigation, because the certification ruling deprived the named plaintiffs of their interest in shifting the cost of litigation to the putative class members, and also impaired the interests of putative class members that the named plaintiffs sought to represent. *See Roper*, 445 U.S. at 331-33, 334 n.6, 336-37, 339-40; *see also id.* at 342-43 (Stevens, J., concurring). The judgment of the Eleventh Circuit here, unlike the judgment in *Roper*, does not arise in the class-action context and therefore does not impair any of the distinctive procedural interests protected by the class-action device. Nothing in *Roper* supports EPA's broad argument that free-floating "policy reasons," standing alone, are sufficient to satisfy the jurisdictional requirements of Article III (Pet. at 11-12).

Even if the existing narrow exceptions to the rule against prevailing-party appeals could be expanded

into new areas (and there is neither any basis nor good reason to enlarge the boundaries of Article III jurisdiction or appellate standing), EPA fails to demonstrate that it has suffered any actual or imminent injury caused by the Eleventh Circuit's ruling, or that the ruling will have any "prospective effect" on EPA that is sufficiently "imminent," and "concrete," and "particularized" to permit review here. *Camreta*, 131 S. Ct. at 2028-29; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). EPA asserts, in vague terms, that "the decision below will have a continuing impact on the manner in which the Water Transfers Rule and analogous EPA regulations will be implemented and challenged." EPA Pet. at 12. But EPA does not explain how the ruling will affect the implementation of the Water Transfers Rule in any way. And while the ruling's consequence is that the challenge to the Rule will proceed initially in the district court rather than the court of appeals, EPA does not explain how this is a cognizable injury for standing purposes. EPA's speculative reference to other "analogous EPA regulations" (*id.*) has no bearing on the standing inquiry either, especially given that no other exemption from NPDES permitting has been promulgated since the Water Transfers Rule was issued in 2008. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (allegations that an injury may occur "some day" do not support standing).

EPA's suggestion that "future challenges" to the Water Transfers Rule may emerge in the wake of the Eleventh Circuit's ruling is sharply undermined by the actual history here. Challenges to the Rule were filed in only two district courts after EPA promulgated its Rule in 2008; those suits were stayed during the pendency of the petitions for review in the

court of appeals; and now, following the dismissal of the petitions for review, a challenge to the Rule is pending in only a single district court. If more challenges had been filed, the Judicial Panel on Multidistrict Litigation could have consolidated those actions in a single district court, *see* 28 U.S.C. § 1407, just as it consolidated the multiple petitions for review in the Eleventh Circuit. The possibility that any additional parties will surface and challenge the Water Transfers Rule elsewhere within the short time remaining before the statute of limitations expires is entirely speculative, but if they do, EPA may ask that those actions be transferred and consolidated with the existing district court actions.[9]

No precedent supports EPA's implicit contention that being required to litigate the validity of the Water Transfers Rule initially in federal district court, rather than being permitted to bypass that court, constitutes a cognizable injury for standing purposes. *Cf. Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (change in tribunal "takes away no substantive right"). EPA seems ultimately to argue that its chances of prevailing on the merits of the challenge to the Water Transfers Rule were better in

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[9] A challenge to final agency action under the Administrative Procedure Act must be brought within six years. *See* 28 U.S.C. § 2401. Thus, the time to challenge the Water Transfers Rule expires on June 13, 2014. Petitioners do not and cannot claim that the existing district court actions would subject them to suits that would have been untimely had they been filed in the courts of appeals under § 1369(b)(1). All of the plaintiffs in the pending consolidated district court actions filed their actions within 120 days after EPA published its final rule, the deadline that applies to petitions for review under § 1369(b)(1). See *supra* at 3 nn. 3-4.

the Eleventh Circuit than they are in the pending litigation in New York federal district court, and that its injury consists of the lost opportunity to benefit from favorable Eleventh Circuit precedent. *See* EPA Pet. at 12-14. But an agency does not have a right to defend its rules in a circuit with precedent that it likes or to avoid defending its rules in a circuit with precedent that it does not like. *See* 28 U.S.C. § 1391(e)(1). Under § 1369(b) itself, EPA must be prepared to defend its action in any circuit in which the challenger "resides or transacts business." Where multiple petitions for review are filed, they are generally consolidated in a court of appeals chosen by "random selection." 28 U.S.C. § 2112(a)(3). The petitions for review here thus landed in the Eleventh Circuit by chance; that random outcome did not create a protectable legal interest sufficient to support standing. And no matter which federal court initially addresses the validity of the Water Transfers Rule, ultimate review of that decision will lie in this Court and this Court only.

For all these reasons, petitioners lack standing to seek certiorari from the judgment dismissing the petitions for review against them. Their petitions for certiorari should be denied on this threshold ground alone.

II. The Question Presented Does Not Warrant Review by This Court.

The petitions for certiorari should also be denied because they present no question worthy of this Court's review. The court of appeals correctly applied the plain language of § 1369(b)(1) to conclude that an exemption from NPDES permitting, such as the Water Transfers Rule, does not fall within the specifically delineated class of EPA actions subject to

petitions for review filed originally in the courts of appeals.

Petitioners' arguments to the contrary seriously distort the text of the statute. They argue that the Water Transfers Rule, which exempts water transfers from NPDES permitting altogether, should be held to be an action "issuing or denying any [NPDES] permit," 33 U.S.C. § 1369(b)(1)(F), or that the Rule, which ensures that water transfers will be subject to no limitations whatsoever on discharge of pollutants, should be held to be an action "approving or promulgating any effluent limitation or other limitation," *id.* § 1369(b)(1)(E). Each of these arguments, if accepted, would transform § 1369(b)(1) from a targeted provision enumerating specific types of EPA actions that are subject to initial review in the courts of appeals into a broad and general provision requiring such review for any nationwide EPA rule issued under the Clean Water Act. That position is inconsistent with the statutory text, and so does not warrant the Court's review.

A. The Court of Appeals' Decision Is Not in Tension With Any Decision of This Court.

EPA pointedly does not argue that any decision of this Court is in conflict with the decision of the Eleventh Circuit. There is no merit to its strained effort to suggest that the Eleventh Circuit's decision is in tension with two decisions of this Court. The decisions that it cites, *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) (per curiam), both address EPA actions that are very different from the Water Transfers Rule. In holding the petition-for-review procedure of § 1369(b)(1)

applicable to those EPA actions, both decisions faithfully apply the text of that provision. Neither decision supports petitioners' effort to disregard the highly detailed text of the statute in favor of free-floating policy arguments for original jurisdiction in the courts of appeals.

In *E. I. du Pont*, the critical question was whether the EPA action at issue—adopting regulations imposing industry-wide numerical limits on discharges of various pollutants—constituted promulgation of effluent limitations under 33 U.S.C. § 1311. *See* 430 U.S. at 124-25. If EPA had promulgated effluent limitations, they were plainly reviewable by petition for review in the court of appeals under § 1369(b)(1)(E), which expressly covers actions "approving or promulgating any effluent limitation . . . under section 1311." Once the Court held that the EPA had authority to issue "effluent limitations" by regulation under § 1311, the jurisdictional question was "necessarily" resolved, because § 1369(b)(1))(E) "unambiguously authoriz[es] court of appeals review of EPA action promulgating an effluent limitation . . . under [§ 1311]." *Id.* at 136. The jurisdictional issue did not require any significant interpretation of § 1369(b), and certainly required no interpretation that would bear on the question presented here.

EPA relies for support on a single sentence from *E.I. du Pont*, but the sentence is taken out of context and given more weight than it will bear. EPA quotes (Pet. at 17) the statement that a finding of no jurisdiction in that case "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits . . . but would have no power of direct review of the basic regulations governing those

individual actions," 430 U.S. at 136. But that was merely an observation, not an essential part of the Court's reasoning on jurisdiction, and in any event the logic of that sentence has no application here. No permits will ever be issued or denied under the Water Transfers Rule; the Rule is an exemption from permitting altogether.[10]

In *Crown Simpson*, this Court held that the courts of appeals had original jurisdiction under § 1369(b)(1)(F) to review an EPA action in vetoing a state-issued NPDES permit. Section 1369(b)(1)(F) provides for court of appeals review of EPA actions "in issuing or denying any [NPDES] permit." The Court held that the provision covered EPA's veto of a state-issued permit, rather than covering only EPA actions denying or issuing a NPDES permit in the first instance. The Court reasoned that the veto, in substance, had the "precise effect" of denying a permit, in the straightforward sense that a veto of a permit and a denial of a permit both result in rejection of the permit request.[11] 445 U.S. at 196.

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[10] United States Sugar Corporation strains to "imagine" a scenario in which an entity applies for an unwanted and unnecessary permit to transfer water and the permitting authority in response "denies" a permit by confirming that the Water Transfers Rule makes such permit application unnecessary. U.S. Sugar Pet. at 22. But this hypothetical scenario is nothing like the situation that this Court outlined in *E. I. du Pont*, where parties undisputedly would require permits, and thus would regularly apply for permits and have them either granted or denied on the merits.

[11] The holding of *Crown Simpson* has been superseded by statute. *See Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 874 (7th Cir. 1989) ("[A]n EPA objection to a proposed state permit is no longer 'functionally similar' to denying a permit.").

The reasoning of *Crown Simpson* does not support petitioners here because the Water Transfers Rule has a radically different effect from an EPA action either issuing or denying a discharge permit. If a permit is applied for and denied, the discharge of any pollutants is prohibited. If a permit is applied for and issued, the permit will impose effluent limitations on the permittee. The Water Transfers Rule, by contrast, allows transfers to occur without any such limitation and, indeed, without any permitting process at all. Even EPA (Pet. at 15) ultimately must acknowledge this key "functional difference" between an exemption from permitting, such as the Water Transfers Rule, and denials or issuances of NPDES permits. The decision of the court of appeals in this case is fully consistent with *Crown Simpson*.

B. There Is No Circuit Split Requiring Resolution by This Court.

Petitioners are incorrect in arguing that there is a split in circuit authority requiring immediate intervention by this Court. The courts of appeals have long recognized that the highly detailed nature of the subparagraphs set forth in § 1369(b)(1) reflects congressional intent to *exclude* all EPA actions not specified in the statute from the scope of the court of appeals' original jurisdiction, because "[n]o sensible person . . . would speak with such detail otherwise." *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1015 (9th Cir. 2008) (quotation marks omitted); *see also, e.g.*, *id.* at 1015-18 (holding that the court of appeals lacked original jurisdiction under § 1369(b)); *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005) (same); *Friends of the Earth v. EPA*, 333 F.3d 184, 189-90 (D.C. Cir. 2003) (same); *Baton Rouge v.*

EPA, 620 F.2d 478, 480 (5th Cir. 1980) (same); *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976) (same). Thus, the question presented here is not whether § 1369(b)(1) centralizes review of all EPA actions in the courts of appeals; it plainly does not. Nor is the question whether § 1369(b)(1) "should be read broadly" (EPA Pet. at 14) or given a "cramped construction" (EPA Pet. at 11 (quotation marks omitted)). Rather, the question is whether the *particular* kind of EPA action in question here is covered by a fair reading of the text of § 1369(b)(1).

The Water Transfers Rule is a regulatory exemption from permitting under the Clean Water Act. *See* 40 C.F.R. § 122.3(i). Only three circuits to date have addressed whether a regulatory exemption from NPDES permitting is subject to the standard process for judicial review initiated by filing a complaint in the district court or the special petition for review procedure set forth in § 1369(b)(1). And only two circuits have analyzed the question at any length—the Eleventh Circuit in this case, and the Ninth Circuit, which reached the same result as the Eleventh Circuit did here, and for the same essential reasons. In *Northwest Environmental Advocates*, the Ninth Circuit held that original jurisdiction over a challenge to a regulatory exemption from permitting for certain marine discharges, *see* 40 C.F.R. § 122.3(a), was in the federal district court. The Ninth Circuit said that the regulation could "be characterized as 'approving or promulgating any effluent limitation or other limitation' only if those words are understood in a Pickwickian sense." 537 F.3d at 1016. The court stressed that the exemption from permitting "provide[d] no limitations whatsoever." *Id.* The Ninth Circuit likewise held that the exemption did "not involve the issuance or the denial

of a permit or a functionally similar action, but rather the permanent exemptions of three types of discharges from any permitting requirement." *Id.* at 1018. The Ninth Circuit's decision thus accords fully with the Eleventh Circuit's decision here.

Petitioners contend that older decisions from the Ninth Circuit show confusion within that circuit on the relevant issue, but the court's decision in *Northwest Environmental Advocates* considered and distinguished those earlier cases. In *American Mining Congress v. EPA*, 965 F.2d 759 (9th Cir. 1992), petitioners challenged a portion of a regulation "*requiring* permits," not an exemption to permit requirements. *Nw. Envtl. Advocates*, 537 F.3d at 1017. Similarly, in *Environmental Defense Center, Inc. v. EPA*, petitioners challenged EPA regulations *requiring* a permit to discharge stormwater. *See* 344 F.3d 832, 843-44 (9th Cir. 2003); *see also Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992) (accepting jurisdiction under § 1369(b)(1) where petitioner challenged a rule requiring permits). In *Natural Resources Defense Council, Inc. v. EPA*, 526 F.3d 591 (9th Cir. 2008), the decision contains virtually no jurisdictional analysis, *see* 526 F.3d at 601, perhaps because no party disputed the existence of jurisdiction. None of those decisions does anything to undermine the force of the Ninth Circuit's subsequent decision in *Northwest Environmental Advocates* definitively ruling that a challenge to a regulatory exemption from permitting must be commenced in federal district court.

The third circuit court to address jurisdiction over challenges to an exemption from NPDES permitting is the Sixth Circuit. That court held in *National Cotton Council of America v. EPA* that it

had original jurisdiction under § 1369(b)(1), on its way to invalidating EPA's regulation at issue on the merits.[12] *See* 553 F.3d 927, 933 (6th Cir. 2009), *cert. denied*, 559 U.S. 936 (2010). But that single decision does not open a circuit split of sufficient magnitude or importance to warrant the Court's review at this time. The jurisdictional analysis in *National Cotton Council* is cursory, flawed, and relies almost entirely on a reading of Ninth Circuit precedent that the Ninth Circuit had itself already rejected by the time the Sixth Circuit ruled. *See Nw. Envtl. Advocates*, 537 F.3d at 1015-18. The Sixth Circuit's decision contains no real analysis; it simply recites the language of § 1369(b)(1)(F) and asserts that EPA's exemption for pesticides falls within that provision because it "regulates . . . permitting procedures." *Nat'l Cotton Council*, 553 F.3d at 933. The ruling is thus akin to the "drive-by jurisdictional rulings" that this Court has accorded "no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Petitioners have offered no persuasive reason that the Court's immediate intervention is needed to resolve so shallow a purported split in circuit precedents.

Despite petitioners' claims, there is no deeper conflict in authority. The decisions of the Fourth Circuit and the D.C. Circuit cited by petitioners (EPA Pet. at 20-22; U.S. Sugar Pet. at 10-13) do not conflict with the decision in this case. As the Eleventh

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[12] The Sixth Circuit vacated EPA's pesticides exemption, and EPA has amended its regulations "in accordance with the vacatur . . . by the Court." NPDES Regulation Revision, 78 Fed. Reg. 38,591, 38,593 (June 27, 2013). The pesticides exemption no longer exists.

Circuit observed (EPA Pet. App. 12a), in both of those cases, unlike this one, the challenged regulations imposed limitations on point-source dischargers of pollution.[13] *See Natural Res. Def. Council, Inc. v. EPA*, 673 F.2d 400, 404-05 (D.C. Cir. 1982); *Virginia Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1979). The Water Transfers Rule at issue in this case, by contrast, does not impose any similar limitations on a person responsible for a water transfer. *See* 40 C.F.R. § 122.3(i). The Eleventh Circuit's ruling that the Water Transfers Rule does not promulgate any "effluent limitation or other limitation" within the meaning of § 1369(b)(1)(E) is therefore consistent with the decisions of the Fourth and D.C. Circuits.

C. The Petitions Present No Important Question of Federal Law.

The Eleventh Circuit's decision on purely jurisdictional grounds does not affect any substantive EPA rule or affect any entity's authority to transfer water from one body of water to another without a permit. Nor does it create a chaotic and disorderly process for judicial review, as petitioners suggest. *See, e.g.*, EPA Pet. at 18. To the contrary, as noted above, challenges to the Water Transfers Rule have been consolidated and are pending before a single district judge, with cross-motions for summary

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[13] United States Sugar Corporation, but not EPA nor the South Florida Water Management District, also relies on *Natural Resources Defense Council, Inc. v. EPA*, 656 F.2d 768 (D.C. Cir. 1981). *See* U.S. Sugar Pet. at 11. But the court held that the regulation at issue in that case was an "effluent limitation" and its decision therefore has no bearing on petitioners' "other limitation" argument.

judgment now fully submitted. An appeal from the district court's ruling, and possible further review in this Court, will provide finality and certainty as to the validity of the Rule. Petitioners' assertions that EPA and entities that rely on the Water Transfers Rule will face "extended uncertainty about the legality of their conduct and . . . the risk of inconsistent judicial decisions" (EPA Pet. at 18; *see* U.S. Sugar Pet. at 14) are unfounded, as are their assertions that "several different district courts" will review the Rule if the decision of the Eleventh Circuit is not reviewed and reversed (EPA Pet. at 18 (quotation marks omitted)).

Moreover, petitioners greatly overstate the scope of § 1369(b) and the certainty that it allegedly provides. Section 1369(b) plainly does not cover all the circumstances in which a rule or its meaning may be challenged in the district court, as the courts of appeals have recognized (see *supra* at 16-17), and as this Court recently confirmed in *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2013). In *Decker*, the Court squarely rejected the petitioners' argument that the courts of appeals had exclusive jurisdiction under § 1369(b)(1), even though there—like here—petitioners claimed that original jurisdiction in the district courts would lead to "inconsistent results" and "inconsistent water quality standards." Brief for Petitioners Decker *et al.*, at 43, *Decker*, No. 11-338. As *Decker* reflects, Congress's decision to grant original jurisdiction to district courts to hear challenges to EPA actions falling outside the very specific grant of jurisdiction set forth in § 1369(b)(1) is unremarkable and does not create any difficulties of judicial review, much less difficulties in urgent need of resolution by this Court.

Nor are petitioners correct in suggesting that the Eleventh Circuit's ruling here will dramatically extend the period in which EPA actions under the Clean Water Act can be challenged. Though petitions for review under § 1369(b) must be filed within 120 days of the challenged EPA action, this does not mean that a rule is insulated from challenge after the 120-period has expired. A rule may be challenged long after promulgation by means of a petition to repeal the rule. The agency's denial of such a petition is a final agency action subject to judicial review. *See Nw. Envtl. Advocates*, 537 F.3d at 1013-14 (affirming the vacatur of part of a regulation that had been promulgated more than thirty years before).

This is not to say that vesting original jurisdiction in the courts of appeals over challenges to an agency rule is identical to vesting original jurisdiction in the district courts. The most obvious difference is that when Congress vests original jurisdiction in the district court, the parties have an appeal as of right before seeking this Court's discretionary review. The Eleventh Circuit's decision on jurisdiction means that the losing party in the district court will have a right to appeal to the court of appeals. This is not a catastrophe, as petitioners contend (EPA Pet. at 18; U.S. Sugar Pet. at 16; S. Fla. Water Mgmt. Dist. Pet. at 17), but rather the ordinary course of judicial review in the federal courts. That procedure has the beneficial effect of ensuring that the legal issues are fully developed and thoroughly considered before a final decision is made in the lower courts, or before any discretionary review by this Court. Even if there were any reason to doubt the correctness of the Eleventh Circuit's ruling (and there is none), the ruling would not

present any important question of federal law requiring immediate intervention by this Court.

D. The Decision Below Is Correct.

As we have noted, federal challenges to final agency action lie in the district court unless another statute provides otherwise. *See* 5 U.S.C. § 701 *et seq*.; 28 U.S.C. § 1331. There is no merit to petitioners' arguments that the courts of appeals have original jurisdiction to review challenges to the Water Transfers Rule under subparagraphs (E) and (F) of § 1369(b)(1). The absence of any serious dispute as to the correctness of the Eleventh Circuit's decision is yet another reason to deny the petitions for certiorari.

1. The Water Transfers Rule is not an action "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." 33 U.S.C. § 1369(b)(1)(E). The Rule imposes no limitations on persons that qualify for the exemption from permitting it creates, and indeed, the non-EPA petitioners do not argue that the Rule imposes any limitations on them. Rather, petitioners argue that the term "other limitation" should be read to cover not just limitations imposed on potential dischargers of pollutants, but also to extend to limitations on "a permit issuer's authority." EPA Pet. at 17. But their proposal runs contrary to the plain text of the statute and violates basic canons of statutory construction.

It is well established that "words grouped together in a list should be given a related meaning." *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 7-8 (1985) (quotation marks omitted). Thus, the phrase "other limitation" must be construed in light of the immediately preceding phrase "effluent limitation,"

and in light of the kinds of limitations described in the sections of the Clean Water Act that are enumerated in § 1369(b)(1)(E). The provision references: *(a)* § 1311, which provides for effluent limitations for various point sources; *(b)* § 1312, which provides for water quality-related effluent limitations; *(c)* § 1316, which provides for performance-based limitations on discharges by new sources of pollutants; and *(d)* § 1345, which provides for limitations on disposal of sewage sludge. All of these specified limitations impose restrictions on the pollution of water, and the phrase "other limitation" thus must be understood to refer to restrictions on pollution.

It is also axiomatic that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quotation marks omitted). Petitioners' proposed interpretation would run afoul of this principle by granting original jurisdiction to the courts of appeals to hear challenges to virtually any Clean Water Act regulation, and thereby rendering much of § 1369(b)(1) superfluous. *Most* regulations under the Act can be said to impose limitations on permit issuers, because permitting authorities must follow EPA procedures and cannot issue permits or determinations that conflict with EPA regulations. If the meaning of "other limitation" were expanded so broadly as petitioners propose, the detailed and specific provisions of § 1369(b)(1) would be unnecessary.

Moreover, the claim that Congress chose to create such a broad category of EPA actions over which courts of appeals have original jurisdiction by adding the term "other limitation" is unrealistic. Congress

"does not hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Congress knew how to create original jurisdiction over "any . . . nationally applicable regulations promulgated" by EPA—it did just that in the jurisdictional provisions of the Clean Air Act. 42 U.S.C. § 7607(b)(1). The absence of any similar language in the Clean Water Act shows that Congress did not intend for original jurisdiction to lie in the courts of appeals merely because a case challenges a nationwide regulation promulgated under that Act.

2. The Water Transfers Rule is not an action "issuing or denying any permit under section 1342," 33 U.S.C. § 1369(b)(1)(F), and petitioners do not argue otherwise. Rather, EPA contends that a regulation exempting a type of discharge from permitting altogether "has substantially the same practical effect" as issuing a general permit covering such discharges. EPA Pet. at 15. But this assertion is untrue. A general permit and a regulation eliminating any need to obtain any form of permit are clearly not the same or similar, because the general permit imposes effluent limitations, *see* 33 U.S.C. § 1342(a)(1), while the exemption ensures that no such limitations will ever be imposed, *see* 40 C.F.R. § 122.3. Indeed, the United States Sugar Corporation and South Florida Water Management District intervened in this action precisely because they hope to avoid regulation under the terms of a general permit, and they continue to fight here for that reason.

EPA notes that environmental organizations may challenge general permits on the ground that the permit imposes insufficient effluent limitations (Pet. at 15-16), but this is beside the point. There is a significant difference between a lawsuit challenging

the adequacy of the particular restrictions imposed by a general permit, and a lawsuit challenging a regulation declaring a category of activity exempt from permitting altogether. If there were meaningful similarities between a lawsuit challenging a general permit and a lawsuit challenging a regulatory exemption, it would not matter. Congress did not frame the jurisdictional provisions in § 1369(b)(1) in terms of lawsuits evincing a particular "gravamen" (EPA Pet. at 15); it framed the jurisdictional provisions in terms of the nature of the EPA action under challenge. Petitioners defy both ordinary usage and common sense when they argue that a regulation exempting defined water transfers from NPDES permitting qualifies as an action "in issuing or denying any [NPDES] permit."

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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