No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF STATE RESPONDENTS OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, THE NEW MEXICO STATE ENGINEER, THE NEW MEXICO ENVIRONMENT DEPARTMENT, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

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The State Respondents' opening brief showed that Subsections (E) and (F) of 33 U.S.C. § 1369(b)(1) do not grant circuit jurisdiction over the rule adopting an expansive definition of "waters of the United States" for the Clean Water Act. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) ("the Rule"). *First*, this case should begin and end with the plain text. The Rule does not promulgate an effluent limitation or other limitation under § 1311, 1312, 1316, or 1345, or issue or deny a permit under § 1342. State Resp. Br. 19-33. *Second*, § 1369(b)(1)'s structure confirms this reading. The provision precisely identifies seven actions subject to circuit review, so a broad reading of Subsections (E) and (F) would render other subsections superfluous and cover actions that Congress excluded from its reach. *Id.* at 34-38. *Third*, two interpretive presumptions support this reading. The Court presumes that Congress means for clear jurisdictional rules, and the plain text provides the clearer rule. The Court also presumes that Congress means to authorize judicial review of agency actions, but a broad reading of the subsections would increase restrictions on that review. *Id.* at 38-49.

In response, the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") (collectively, "the Agencies") seek to muddy the clear statutory language by emphasizing policy concerns and legislative history that, in the end, do not even support their reading. The Court should reject their arguments, follow § 1369(b)(1)'s plain text, and hold that district courts have jurisdiction over suits challenging the Rule.

A. The Agencies Cannot Show That The Rule Fits Within Any Reasonable Reading Of Subsection (E) Or (F)

The Agencies begin by mistakenly arguing that Subsections (E) and (F) can be interpreted to cover the Rule. U.S. Br. 17-34.

1. The Agencies read the word "limitation" in isolation, not in the context of the entire Subsection (E)

As the State Respondents showed (at 19-29), the Rule does not fall within Subsection (E) because it does not "promulgat[e]" any "effluent limitation or other limitation" "under section 1311." The Rule does not announce the technology-based restrictions that § 1311 directs the EPA to promulgate. Instead, it defines a phrase that is referenced only in § 1362(7) pursuant to, if anything, the EPA's general rulemaking authority in § 1361(a).

In response, the Agencies argue that Subsection (E) covers EPA actions that "impose limitations of any sort under Section 1311." U.S. Br. 17. The Rule satisfies that test, they continue, because "[a] rule that specifies which sites are 'waters of the United States' imposes on persons who discharge pollutants to those waters the full panoply of effluent and other limitations under Section 1311." *Id.* at 19. This reading suffers from three distinct problems: (a) it asks whether an EPA action has the practical effect of triggering limitations found elsewhere, rather than whether the action itself promulgates a limitation; (b) it reads "any effluent limitation or other limitation" to mean "any limitation"; and (c) it treats all actions that affect § 1311 as issued under § 1311.

a. *Promulgate Limitations v. Affect Limitations*. The Agencies argue that Subsection (E) reaches regulations that have a "practical effect" of "impos[ing]" the limitations found in *other* provisions, such as the pollutant-discharge limitation in § 1311(a). U.S. Br. 19. They are mistaken.

Subsection (E)'s language does not permit this practical-effect test. Even if the Agencies correctly read "any effluent limitation or other limitation" to mean "any limitation," *but see infra* Part A.1.b, the Rule still cannot be said to have *promulgated* the "panoply of effluent and other limitations under Section 1311" on which the Agencies rely. U.S. Br. 19. Congress promulgated § 1311(a), and other rules promulgate the limitations that § 1311 directs the EPA to issue. As the Rule admits, it does not "establish" (i.e., promulgate) "any regulatory requirements" (i.e., any limitations). 80 Fed. Reg. at 37,054.

The Agencies' own statements prove that their test does not fit the text. They studiously avoid the word "promulgate," saying instead that Subsection (E) covers actions that "impose[]" limitations. U.S. Br. 16; *id.* at 17-19. They do so because "impose" has a wider range of meanings than "promulgate." The Agencies' Rule uses the word in a narrower sense, saying that the Rule "*imposes* no enforceable duty." 80 Fed. Reg. at 37,102 (emphasis added). The Agencies' Brief now uses the word in a broader sense, saying that the Rule "*imposes* . . . the full panoply of effluent and other limitations under Section 1311." U.S. Br. 19 (emphasis added). Only the former respects Subsection (E)'s text. Because the rule does not issue "regulatory requirements" or "enforceable

dut[ies]," 80 Fed. Reg. at 37,054, 37,102, it does not promulgate limitations.

The Agencies' practical-effect test also reads out Subsection (E)'s other verb. That subsection covers state-issued limitations that are "approv[ed]" by the EPA, and limitations that are "promulgat[ed]" by the EPA. Thus, promulgate must have a precise meaning reaching actions *directly* issuing limitations; a broader meaning would leave approve without independent force. *Roll Coater, Inc. v. Reilly*, 932 F.2d 668, 670-71 (7th Cir. 1991). The Agencies' reading proves this point: An approval of a state limitation has the "practical effect" of imposing that limitation, so it would qualify as "promulgating" a limitation under the Agencies' boundless reading.

Given that the practical-effect test does not fit Subsection (E), the Agencies cannot justify that test by noting that the adjective "any" precedes "effluent limitation or other limitation." U.S. Br. 18. That adjective cannot change the meaning of the verb "promulgate," the noun "limitation," or the prepositional phrase "under section 1311." In that respect, the Agencies "err[] in placing dispositive weight on the broad statutory reference to 'any' . . . without considering the rest of the statute." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994). While "any" can broaden an object, it cannot "transform[]" the "clear meaning" of the clause *as a whole*. *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). Subsection (E)'s text means something different from the language that the Agencies need for their reading ("affecting any limitation within section 1311").

For the same reason, the Agencies get nowhere by extensively quoting statements by the Rule's chal-

lengers protesting its expansive scope. U.S. Br. 19-22. That the Rule would require landowners to seek more permits (and States to process more) might be relevant under a test tied to a regulation's practical consequences. But Subsection (E) reaches rules that issue restrictions, not rules that affect restrictions. In fact, the Agencies' reliance on these quoted statements shows how unworkable their test would be. Jurisdiction should not turn on whether a rule expands the covered waters (subjecting more lands to § 1311's limits) or contracts the covered waters (exempting more lands from § 1311's limits). *Hertz Corp. v. Friend*, 559 U.S. 77, 94-95 (2010). The Agencies concede this point in a footnote, one that conflicts with their repeated reliance on the Rule's breadth. U.S. Br. 21 n.4. As their footnote explains, an EPA-issued "effluent limitation" falls within Subsection (E) even if it lessens discharge restrictions as compared to earlier restrictions. That is because the subsection does not adopt a practical-effect test; it "turns on the nature of the challenged EPA action." *Id.* The action *itself* must promulgate restrictions.

Comparing statewide and county-wide "blue laws," the Agencies also mistakenly argue that the Rule's "effort to identify" where § 1311's limitations apply qualifies as a limitation under "common usage." U.S. Br. 20-21. But it is not common to say that an action *interpreting* a phrase has *promulgated* a limitation. This Court would not commonly say, for example, that it "promulgated" a "limitation" "under" the Racketeer Influenced and Corrupt Organizations Act when it read that law to apply extraterritorially. *RJR Nabisco Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101-06 (2016). Nor would it say that it promulgated a limitation under § 1311 when it interpret-

ed the Clean Water Act not to reach "an abandoned sand and gravel pit." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) ("*SWANCC*").

The Agencies next wrongly compare the Rule to a general effluent limitation on a point-source *class*, noting that neither action is "self-executing." U.S. Br. 22-24. Whether or not an EPA action must promulgate a "self-executing" limitation, it still must promulgate a limitation. And general effluent limitations issue restrictions because dischargers generally must follow them to obtain permits. 33 U.S.C. § 1342(a). The Rule does not issue restrictions. 80 Fed. Reg. at 37,054. In this respect, the Agencies ignore the State Respondents' argument (at 25-26) that the Act's other uses of "effluent limitation or other limitation" treat the promulgated action as something that itself can be *violated*. *E.g.*, 33 U.S.C. § 1365(a), (f). Effluent limitations satisfy this criterion in a way that the definitional Rule does not.

b. *Effluent or Other Limitation v. Any Limitation.* The Agencies suggest that "any effluent limitation or other limitation" means "any limitation." U.S. Br. 24-28. This debate is an academic one in this case. Even if Subsection (E) reached "any limitation," it would not cover the Rule for the reasons explained above and below. The EPA action must be the restriction, and it must be of a kind that § 1311 directs the EPA to impose. Yet the Agencies rely on restrictions found outside the Rule, and identify nothing in § 1311 giving them the authority to adopt it.

Regardless, as the State Respondents noted (at 21-22), "other limitation" is best read to reach only restrictions that are "directly related to effluent limi-

tations" in that they "direct[]" the *regulated community* "to engage in specific types of activity." *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 877 (7th Cir. 1989). This phrase at least excludes the alleged practical limitations on *permitting authorities* on which the Agencies rely. U.S. Br. 21-22. The Agencies' responses lack merit.

They initially reject both *ejusdem generis* and *noscitur a sociis*, suggesting that neither can apply to a list that includes only two items (like "effluent limitation or other limitation"). U.S. Br. 24-27. They mistake "the fairly technical *ejusdem generis* canon for the somewhat less technical associated-words canon" (*noscitur a sociis*). Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 206 (2012). While "most associated-words cases involve listings," a listing is not a "prerequisite." *Id.* at 197; *Gutierrez v. Ada*, 528 U.S. 250, 254-55 (2000); *MBIA Ins. Corp. v. FDIC*, 708 F.3d 234, 242 (D.C. Cir. 2013). That is because *noscitur a sociis* is not a technical canon; it is a "commonsense canon." *United States v. Williams*, 553 U.S. 285, 294 (2008). It is "an interpretive rule as familiar outside the law as it is within, for words and people are known by their companion." *Gutierrez*, 528 U.S. at 255. Here, commonsense suggests that Congress would not have said "any effluent limitation or other limitation" if it meant "any limitation." *Cf. MBIA*, 708 F.3d at 242.

The Agencies retort that Congress often places a specific phrase before a general one "for emphasis or clarity." U.S. Br. 27. In the cases that they cite, however, the Court recognized a *reason* for Congress to have done so. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008), illustrates this point. That case

considered an exception to the federal government's waiver of sovereign immunity for the detention of property by "'any officer of customs or excise or any other law enforcement officer.'" *Id.* at 216 (citation omitted). The Court read "any other law enforcement officer" broadly to reach law-enforcement officers "of whatever kind." *Id.* at 220. This reading did *not* render the specific phrase ("any officer of customs or excise") superfluous, the Court added, because "Congress may have simply intended to remove any doubt that officers of customs or excise were included in 'law enforcement officers.'" *Id.*

In this case, by contrast, the Agencies offer no explanation why Congress would say "effluent limitation" apart from "other limitation" if it meant "any limitation." Unlike in *Ali*, they cannot argue that "any limitation" could be read to exclude effluent limitations. Section 1311's title is "effluent limitations." There is no reason for Congress to have said "effluent limitation or other limitation" (a phrase suggesting that Congress had specific restrictions in mind) if it intended the breadth that the Agencies seek.

c. *Under § 1311 v. Affecting § 1311.* The Agencies claim that they issued the Rule "under section 1311" because its "effect is to make effluent and other limitations under Section 1311 applicable to" covered waters. U.S. Br. 28. While the meaning of the word "under" depends on context, *Kucana v. Holder*, 558 U.S. 233, 245 (2010), the Agencies do not fit their practical-effect test within any definition of "under section 1311." That phrase naturally reaches limitations issued "according to" the authority of § 1311. *Black's Law Dictionary* 1368 (5th ed. 1979). Section 1311, for example, lists restrictions set "by the Ad-

ministrator." *See* 33 U.S.C. § 1311(b)(1)(A)-(B), (b)(2)(A), (b)(2)(E), (m), (n), (p); *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112, 126-36 (1977). That § 1311 directs the EPA to issue many limitations—but contains no authorization for the EPA to clarify the boundaries of "waters of the United States"—shows that the EPA did not issue the Rule "under section 1311."

The Agencies also do not adequately respond to the Rule's universal scope. If a regulation affects § 1311, they argue, it issues under § 1311 even if it affects *every other section*. U.S. Br. 28-29. This confirms that the Agencies' test lacks a limiting principle. They recognize that nearly the entire Act relates to § 1311, describing that section as "central to the Act" and as its "'first principle.'" U.S. Br. 2 (citation omitted). The Agencies' test thus could sweep in nearly all actions into Subsection (E). Looking only at § 1311's cross-references as a barometer of items that might "affect" the section, the Agencies' reading could apply to rules about §§ 1251, 1281, 1283, 1284, 1312, 1313, 1314, 1316, 1317, 1325, 1328, 1342, 1343, 1344, and 1370. That reading does not comport with Subsection (E)'s demarcation of four specific sections.

Indeed, the Agencies next agree that the Court cannot read Subsection (E) broadly to encompass all EPA actions, identifying some that, they say, do not fall within the subsection. U.S. Br. 29-30. But the Agencies merely list these actions; they do not explain how the actions fall outside their broad reading of Subsection (E). Two of their examples show that the Agencies must switch to an altogether *different* reading of Subsection (E) to exclude these actions.

Example One: The Agencies claim that the Rule qualifies as a limitation "under section 1311" because it "imposes . . . the full panoply of effluent and other limitations under Section 1311." U.S. Br. 19. They later claim that the compliance order in *Sackett v. EPA*, 566 U.S. 120 (2012)—which determined that specific lands were subject to the Act and so imposed § 1311's limits, *id.* at 124-25—does not qualify as a limitation "under section 1311" because the order "does not *itself* approve or promulgate effluent or other limitations under Section 1311." U.S. Br. 30 (emphasis added). Instead of distinguishing the Rule from the order under a *uniform* reading of Subsection (E), the Agencies adopt *different* readings for the two actions. They invoke a broad reading of Subsection (E) to reach the Rule (asking whether the Rule affects § 1311 limits), and a narrower reading of Subsection (E) to exclude the order (asking whether the order itself promulgates § 1311 limits).

Example Two: The Agencies claim—consistent with their traditional view—that Subsection (E) does not "reach EPA's decisions approving state water-quality standards" under § 1313. U.S. Br. 29. Yet their current position contradicts the interpretive principles on which they have relied for their traditional position. Here, the Agencies claim that they issued the Rule "under section 1311" because § 1311 references the phrase "waters of the United States" in a roundabout way: That phrase is the definition of another phrase ("navigable waters") that is in the definition of a third phrase ("discharge of any pollutant") that is used in § 1311(a). 33 U.S.C. §§ 1362(7), (12). There, the EPA argued that water-quality standards are *not* issued "under Section 1311" even though they are referenced in § 1311(b)(1)(C).

Friends of the Earth v. EPA, 333 F.3d 184, 188-89 (D.C. Cir. 2003). To reach that position, it invoked arguments that the Agencies now disregard, such as the requirement to read § 1369(b)(1) as a whole, *id.* at 189, and the rule against superfluity, *id.* at 190.

In sum, the Court should reject the Agencies' "chameleon"-like reading of § 1369(b)(1), whose meaning depends on the action under review. *Cf. Clark v. Martinez*, 543 U.S. 371, 382 (2005).

2. The Agencies make no attempt to fit the Rule within Subsection (F)'s text

As the State Respondents showed (at 30-33), the Rule does not fall within Subsection (F) because it does not issue or deny a permit under § 1342. In response, the Agencies spend no effort on Subsection (F)'s text, identifying no meaning of "issuing" or "denying" a "permit" that covers the Rule. U.S. Br. 30-34. That omission violates basic principles. Interpretation "begin[s], as [it] must, with a careful examination of the statutory text." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017); *Maslenjak v. United States*, 137 S. Ct. 1918, 1924 (2017). The Agencies do not do so here.

Instead, they begin with *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), which held that the EPA veto of a state-issued permit was the denial of a permit. They read that case as adopting a "functional interpretive approach" *unmoored* from the text. U.S. Br. 31. Yet *Crown Simpson* tied its holding to a reasonable reading of Subsection (F) *before* considering the functional concerns that the Agencies advance. It noted: "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). 445 U.S. at 196. The Agencies disregard this portion of the opinion by highlighting only the portion that discusses pragmatic concerns. It is thus the Agencies that depart from *Crown Simpson*'s "'rationale'" and "abrogate" its "framework." U.S. Br. 32-33 (citation omitted). A case's rationale consists of all of its reasoning, not half of it.

The Agencies next portray the circuit courts as "generally" supporting their reading of Subsection (F). U.S. Br. 32. But *NRDC, Inc. v. EPA*, 656 F.2d 768, 776 (D.C. Cir. 1981), did not find jurisdiction under Subsection (F); it relied on Subsection (E). Then, in opinions with little reasoning, *American Mining Congress v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992), and *NRDC, Inc. v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992), misread that opinion as holding that Subsection (F) covers rules affecting permitting. The Ninth Circuit has narrowed those opinions. *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1016-18 (9th Cir. 2008). Yet *National Cotton Council of America v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009), simply cited the Ninth Circuit cases with "no analysis" on Subsection (F)'s text. *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012). That case was then rejected by *Friends of the Everglades*. In short, the Agencies' view of *Crown Simpson* has not "shaped lower-court case law." U.S. Br. 34.

The Agencies lastly claim that their reading of Subsection (F) does not render other subsections in § 1369(b)(1) superfluous. U.S. Br. 33-34. Congress would not have felt the need to adopt a separate subsection for regulations like the Rule, they argue, be-

cause Subsection (F) "naturally" covers a rule defining "waters of the United States." *Id.* at 33. In contrast, they say, Subsection (F) does not "clearly" reach the standards of performance referenced in Subsection (A) or the pretreatment standards referenced in Subsection (C) because those actions "do not dictate whether a permit may be issued at all." *Id.* at 34. This distinction requires the Agencies to characterize as "natural[]" an interpretation that has been described as "illogical and unreasonable." Pet. App. 29a (Griffin, J., concurring in judgment). The distinction also does not work because § 1342(a) makes compliance with the referenced standards a "condition" for the "issu[ance]" of a permit, so these standards do dictate whether a permit may issue. And the distinction's nebulous nature creates an enigmatic jurisdictional test for Subsection (F). *Cf. Hertz*, 559 U.S. at 94-95. There is nothing "natural" about it.

B. The Agencies' Purpose Arguments Do Not Permit Departure From The Text

The Agencies argue that their view comports with three purposes that they glean from § 1369(b)(1): (1) facilitating expedited review; (2) promoting uniformity for national rules; and (3) preventing irrational bifurcation of the review of related actions. U.S. Br. 35-40. These arguments fail.

As a general matter, "[v]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan*, 136 S. Ct. 651, 661 (2016) (citation omitted). In this case, "'even the most formidable argument concerning the statute's purposes could not overcome the clarity'" of

§ 1369(b)(1)'s text. *Nichols v. United States*, 136 S. Ct. 1113, 1119 (2016) (citation omitted).

As a specific matter, the Agencies' purpose arguments are not "formidable." Their first "purpose" undermines their reading of § 1369(b)(1), and the other two do not qualify as "purposes."

1. *Expedited Review*. The Agencies note that § 1369(b)(1) is designed to "facilitate[] quick and orderly resolution of disputes." U.S. Br. 35. True enough. But this purpose cuts *against* them. Their reading "produces a 'vague and obscure'" jurisdictional boundary. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1133 (2015) (citation omitted). The Agencies' failed attempts to distinguish the Rule from actions like the compliance order in *Sackett* show this lack of clarity. If this Court accepts their reading, "careful counsel" would indefinitely have to bring duplicative challenges. *Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977). That would harm the statute's efficiency purpose.

As the State Respondents noted (at 38-43), this purpose instead supports the plain text. It represents one application of the Court's general presumption that Congress means to set "straightforward" jurisdictional rules. *Hertz*, 559 U.S. at 94. It speaks volumes that the Agencies do not cite cases like *Hertz* or discuss the Court's "practice of reading jurisdictional laws, so long as consistent with their language, . . . to establish clear and administrable rules." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567-68 (2016).

2. *National Uniformity*. The Agencies suggest that Congress designed § 1369(b)(1) to send *broad* EPA actions to the circuit courts because of the need for "'national uniformity,'" while relegating *local* EPA actions to the district courts given the lack of such a need. U.S. Br. 35, 38 (citation omitted). This alleged purpose cannot guide the reading of § 1369(b)(1). To identify a "purpose" of a statute, a party must ground that purpose in the statute's text. After all, "the best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98 (1991); Scalia & Garner, *supra*, at 56.

The Agencies do not derive this purpose from § 1369(b)(1). Its text both includes *and* excludes national *and* local actions. On one hand, § 1369(b)(1) sends many *local* actions to circuit courts. Subsection (F) requires an applicant to seek circuit review of an individual permit decision. And Subsection (G) requires circuit review of individual control strategies. On the other hand, § 1369(b)(1) does not cover all national rules. It does not "provide for judicial review of" general guidelines that § 1314 directs the EPA to issue. *E.I. du Pont*, 430 U.S. at 124-25. And it does not provide for review over national rules about the hazardous-substance provisions in § 1321 or vessel-waste provisions in § 1322. U.S. Br. 29. If Congress had intended for circuit review over all national actions, it would have enacted a provision like the Clean Air Act's jurisdictional provision, which directs *national* actions to the D.C. Circuit and *local* actions to regional circuits. 42 U.S.C. § 7607(b)(1). But § 1369(b)(1) does not resemble that provision.

3. *Irrational Bifurcation.* Citing *E.I. du Pont* and *Crown Simpson*, the Agencies argue that § 1369(b)(1) should be read "so that intertwined agency actions are routed through the same channels." U.S. Br. 35. They argue that it would be irrational for district courts to review the Rule because circuit courts review effluent limitations and permits. *Id.* at 38. This argument misreads *E.I. du Pont* and *Crown Simpson* as allowing practical concerns to trump text. As noted, both held that the challenged EPA actions fell within the text before invoking practical concerns. *Crown Simpson*, 445 U.S. at 196; *E.I. du Pont*, 430 U.S. at 136. The Agencies elsewhere concede that the text must control such concerns. They note that the EPA's *approval* of a state-promulgated individual control strategy under § 1314(l) does not fall within Subsection (G), even though the EPA's *promulgation* of an individual control strategy does. U.S. Br. 29. These actions are as "intertwined" as they come, but review takes place across separate courts because the text requires that result. *Cf. Roll Coater*, 932 F.2d at 671.

Regardless, district-court review of the Rule does not create "irrational bifurcation." U.S. Br. 38. The Agencies claim that challenges to their determinations that certain lands are "waters of the United States" invariably originate in *circuit court* after a permit ruling under Subsection (F). *Id.* To the contrary, this Court's recent cases implicating those decisions have all originated in *district courts*. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1812-13 (2016); *Sackett*, 566 U.S. at 123-25; *Rapanos v. United States*, 547 U.S. 715, 729 (2006) (plurality op.); *SWANCC*, 531 U.S. at 165. Thus, even if a challenge to a "categorical" agency resolution should

begin in the same court as a challenge to a landowner-specific agency resolution, challenges to the Rule belong in district court. U.S. Br. 31.

C. The Agencies' Legislative-History Arguments Also Do Not Permit Departure From The Text

The Agencies argue that the legislative history from three different periods supports their argument that Subsections (E) and (F) cover the Rule. U.S. Br. 40-48. This argument fails for the same reasons that their purpose arguments fail.

To begin with, "'reliance on legislative history is unnecessary in light of the statute's unambiguous language.'" *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458 (2012) (citation omitted). "As [the Court has] repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). Because Subsections (E) and (F) are clear, the Court has no need to invoke legislative history.

In all events, the Agencies' legislative history offers no significant insights into the meaning of Subsections (E) and (F).

1. *1971-72 Reports.* The Agencies argue that the Clean Water Act's committee and conference reports "suggested that Section 1369(b)(1) encompasses *every* nationwide regulation that the [EPA] issues under the" Act. U.S. Br. 42. The quoted statements suggest no such thing. The Senate Report indicated that "[o]ne of the uncertainties in the existing [law] is the availability or opportunity for judicial review of administratively developed and promulgated require-

ments, standards and regulations." S. Rep. 92-414, at 84-85 (1971). This passage did not identify the regulations that the new provision would cover, let alone indicate that it would cover them all. In fact, the Senate Report described § 1369(b)(1) as "specif[ying] the courts in which *certain appeals* may be prosecuted." *Id.* at 84 (emphasis added). The House Report was even clearer. It spelled out each action covered by § 1369(b)(1), and added that the section does not "exclude judicial review under other provisions of the legislation that are otherwise permitted by law," such as through the Administrative Procedure Act. H.R. Rep. 92-911, at 136 (1972).

Even if these reports suggested that § 1369(b)(1) covered *all* national rules, they would contain, as the Agencies concede, an "imprecise" summary of the section. U.S. Br. 42-43. It is hard to see why such an inaccuracy should say anything about § 1369(b)(1). Justices "who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text." *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011). They do "not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Id.* That is what the Agencies seek to do here with their reliance on "imprecise" (i.e., ambiguous) history.

2. *1987 Change.* The Agencies next suggest that Congress, in 1987, acquiesced in their broad reading of Subsections (E) and (F) by passing amendments to § 1369(b)(1) "without narrowing its scope." U.S. Br. 44 (citing Water Quality Act of 1987, Pub. Law No. 100-4, 101 Stat. 7). Even if Congress acquiesced in *E.I. du Pont* and *Crown Simpson*, it did not agree to the Agencies' *misreading* of them. If anything, these

amendments show that the Agencies do not read those cases correctly because the amendments would serve no purpose under the Agencies' view. Congress made two changes: It added sewage-sludge limitations under § 1345 to Subsection (E), and it adopted Subsection (G) for the promulgation of individual control strategies. 101 Stat. at 39, 73. If rules affecting the "permitting process" were *already* covered, however, Congress had no reason to add these provisions. After all, the sewage-sludge regulations and individual control strategies establish permit conditions. 33 U.S.C. §§ 1314(l)(1)(D), 1345(a)-(b). So the EPA's reading of Subsections (E) and (F)—which would cover these permit-affecting actions—renders these amendments "a largely meaningless exercise." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58 (2006).

3. *1977 Debate.* The Agencies lastly argue that a floor debate about an unenacted amendment to § 1369(b)(1) during the 95th Congress supports their broad reading of the enacted section passed by the 92nd Congress. U.S. Br. 44-48. The Court should reject their pages of "1977 'history' about a 1972 law." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312 (9th Cir. 1992). The Court has "'observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.'" *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185 (1994) (citation omitted). It has added that "[f]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *United States v. Craft*, 535 U.S. 274, 287 (2002) (citation omitted)); *SWANCC*, 531 U.S. at 169-

70. The Agencies' arguments join both problematic methods. An after-the-fact debate about § 1369(b)(1) *generally* does not help discern the *specific* meaning of the text in Subsections (E) and (F).

D. The Agencies Wrongly Favor A Presumption Of Circuit Review Over Established Interpretive Canons

The Agencies claim that *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), created a presumption favoring circuit review for statutes that divide jurisdiction between circuit and district courts. U.S. Br. 48-49. They overread that case.

To begin with, *Florida Power* confirms that the Agencies' presumption provides no basis to depart from § 1369(b)(1)'s text. While the Court stated that it "will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals," it added that "[w]hether initial subject-matter jurisdiction lies initially in the courts of appeals must of course be governed by the intent of Congress and not by any views we may have about sound policy." 470 U.S. at 745-46. That is, policy rationales cannot override § 1369(b)(1)'s language.

Even if § 1369(b)(1) were ambiguous, the canons that the State Respondents invoked (at 38-49) would prevail over this presumption. *Florida Power* relied on efficiency concerns to describe the "sound policy" of circuit review. 470 U.S. at 745. Yet the statute there contained no provision like § 1369(b)(2), which forecloses later judicial review over actions falling within § 1369(b)(1). And the "presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 566 U.S. at 130.

Indeed, the D.C. Circuit, which the Agencies cite as having adopted their circuit-favoring presumption, U.S. Br. 48, rejected it in a case involving the Noise Control Act precisely because of that law's similar review-preclusion provision. *Chrysler Corp. v. EPA*, 600 F.2d 904, 911-13 (D.C. Cir. 1979).

The Agencies respond that challengers who later confront § 1369(b)(2)'s judicial-review restriction may assert constitutional challenges *at that time*, so the presumption favoring judicial review (and the canon of constitutional avoidance) should not affect the Court's reading *now*. U.S. Br. 49. Not so. If an ambiguous statute could be read to restrict judicial review in a way that raises constitutional concerns, the Court should choose an alternative reading that expands that review and lessens those concerns. "In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark*, 543 U.S. at 380. "If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81. Thus, because § 1369(b)(2) restricts judicial review and raises constitutional concerns, § 1369(b)(1) should be interpreted to lessen those concerns. *Longview*, 980 F.2d at 1313.

The Agencies respond with a footnote from *Harrison v. PPG Industries*, 446 U.S. 578 (1980), which addressed the Clean Air Act's jurisdictional provision. U.S. Br. 49. The challengers there asserted that "a literal construction" of that section—which grants broad review over *all* final action, 42 U.S.C. § 7607(b)(1)—"would violate due process of law" be-

cause of its similar judicial-review restriction. *Harrison*, 446 U.S. at 592 n.9. The footnote stated that the judicial-review restriction was "not at issue here" and that any constitutional challenge would have to "await another day." *Id.* This statement should not be read to reject the canon of constitutional avoidance. Instead, *Harrison* held only that the Clean Air Act's jurisdictional grant *unambiguously* applied to the EPA action at issue, leaving no ambiguity to resolve. *Id.* at 588-89. As Justice Powell noted, "constitutional difficulties well may counsel a narrow construction" of that section, but "no such construction [was] possible in this case." *Id.* at 594-95 (Powell, J., concurring). Section 1369(b)(1), however, is far narrower than the Clean Air Act's similar provision. Whether it reaches the Rule is—at the least—debatable. So the avoidance canon and presumption favoring judicial review counsel a narrow reading.

The Agencies' reliance on *Harrison* is ironic in a final respect. *Harrison* rejected reliance on policy arguments about the best forum for resolving disputes, noting that "this is an argument to be addressed to Congress, not to this Court." 446 U.S. at 593. The same can be said for the Agencies' position. As the State Respondents noted (at 1-2), the Court should reject their efforts to bring back the policy-based interpretive approach from *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

CONCLUSION

This Court should reverse the Sixth Circuit's holding that it has subject-matter jurisdiction under 33 U.S.C. § 1369(b)(1) over the petitions for review.

Respectfully submitted,

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