No. 16-5039

In the United States Court of Appeals for the Tenth Circuit

STATE OF OKLAHOMA EX REL. E. SCOTT PRUITT,
in his official capacity as Attorney General of Oklahoma,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Oklahoma,
No. 4:15-cv-00381 (Eagan, J.)

REPLY BRIEF OF APPELLANT STATE OF OKLAHOMA

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Rules

Regulations

ARGUMENT

The federal government's brief fails to acknowledge one fundamental aspect of federal courts: they are courts of *limited* jurisdiction. Acknowledging that fact, as we must, the Government's argument falls apart.

I. The unique nature of a court's subject matter jurisdiction renders the Agencies' doctrinal theories inappropriate.

The nature of subject matter jurisdiction is unique. Unlike limits on personal jurisdiction or venue, limits on subject matter jurisdiction are "absolute strictures" on a court's authority.[1] The Supreme Court has described it like this:

> [Subject matter jurisdiction] functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. The rule, springing from the nature and limits of the judicial power of the United States is *inflexible and without exception*, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, *that of all other courts of the United States*, in all cases where such jurisdiction does not affirmatively appear in the record.[2]

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[1] *Leroy v. Great W. Utd. Corp.*, 443 U.S. 173, 180 (1979).

[2] *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (internal quotation marks and citations omitted) (emphasis added).

In other words, federal courts are courts of limited jurisdiction. Their authority exists only to the extent authorized by Constitution or statute, and they cannot expand that authority by judicial fiat.[3]

The unique nature of subject matter jurisdiction renders the federal government's preclusion arguments inappropriate in two ways. First, it makes their attempts to analogize preclusion doctrines to the context of subject matter jurisdiction unworkable. And second, it exposes a critical flaw in their arguments regarding consolidated review under the Clean Water Act: those arguments rest on the faulty premise that § 1369 confers jurisdiction in the first instance.

A. The doctrines of issue preclusion and "law of the case" do not apply to the unique context of subject matter jurisdiction.

The federal government puts forth two doctrines to support the district court's denial of jurisdiction: issue preclusion and law-of-the-case. But the federal government fails to demonstrate that either doctrine applies to decisions regarding subject matter jurisdiction.

To begin, the Agencies' brief fails to cite a single example where a court has viewed issue preclusion as a reason for denying subject matter jurisdiction. Instead, they cite two of this Court's cases, *Matosantos*[4] and *Park Lake*,[5] for the proposition that

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[3] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

[4] *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203 (10th Cir. 2001).

[5] *Park Lake Res. Ltd. Liab. v. United States Dept. of Ag.*, 378 F.3d 1132 (10th Cir. 2004).

"a jurisdictional dismissal can have preclusive effect";[6] but neither case involved an issue of subject matter jurisdiction and, indeed, this argument misses the mark.

First, the precluded issue in *Matosantos* was not jurisdictional at all.[7] Rather, it was a merits question about whether one party had assumed the contractual obligations of the other.[8] And in *Park Lake,* the precluded issue was about justiciability, specifically ripeness.[9] But, as the Supreme Court has explained, "there is a significant difference between determining whether a federal court has jurisdiction of the subject matter and determining whether a cause over which a court *has* subject matter jurisdiction is justiciable."[10] Thus, the federal government has provided no support for the idea that issue preclusion, or "collateral estoppel," will prevent a court from addressing issues of subject matter jurisdiction.

Second, and to the extent the Government cites these cases to show that a jurisdictional dismissal can be sufficiently "final" to meet that element of the collateral estoppel analysis, this argument is misplaced. To begin, there has been no jurisdictional dismissal here. Rather, the Sixth Circuit has chosen to retain jurisdiction, meaning the postures in those cases are inapposite. And moreover, it still does not

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[6] Gov'ts Br. at 34.

[7] *See* 245 F.3d at 1206.

[8] *Id.*

[9] 378 F.3d at 1135-36.

[10] *Powell v. McCormack*, 395 U.S. 486, 512 (1969) (emphasis added).

account for the unique nature of subject matter jurisdiction. Unlike the precluded issues in the other cases, the issue of subject matter jurisdiction is never really final until the entire case is final.[11] This is so because federal courts are always under a duty to investigate the basis for subject matter jurisdiction, whether at the parties' request or of its own initiative.[12] Thus the issue cannot be waived and principles of estoppel do not apply.[13] Subject matter jurisdiction is always a live issue and, as such, the federal government should not be allowed to collaterally estop Appellants from raising and litigating it here.

The federal government's support for applying the law-of-the-case doctrine is even thinner. Its brief relies on the characterization of Oklahoma's decision to bring difference cases in different courts under different laws as "splitting hairs,"[14] even though Oklahoma, in fact, brought different cases in different courts under different laws. This cannot be enough to rebut the Supreme Court's rule that the law-of-the-case doctrine applies in "subsequent stages *of the same case.*"[15] Moreover, the prudential or "self-imposed" nature[16] of the law-of-the-case doctrine does not comport with the

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[11] *See Ins. Corp. of Ireland*, 456 U.S. at 702.

[12] *Id.*

[13] *Id.*

[14] Gov't Br. at 37.

[15] *Arizona v. California*, 460 U.S. 605, 618-19 (1983) (emphasis added).

[16] Gov't Br. at 37 (quoting *Fox v. Mazda Corp. of Am.*, 868 F.2d 1190, 1194 (10th Cir. 1989)).

"absolute," legally-imposed nature[17] of subject matter jurisdiction. Only Congress has the authority to "ordain and establish" federal court jurisdiction.[18] And thus neither the Sixth Circuit nor the district court can expand or contract its authority to hear a case by judicial fiat.[19]

B. A court cannot decide APA review is precluded based on the assumption that CWA review is available elsewhere—the court must determine that jurisdictional question for itself.

The rest of the federal government's reasons for denying jurisdiction revolve around the availability of consolidated review under the Clean Water Act (CWA).[20] Indeed, the Agencies' brief makes much ado over how the availability of CWA review should preclude APA review and how, in order to provide efficacy to that process, only the consolidated-review forum should be allowed to hear the case.[21] However, all of these arguments assume that the Sixth Circuit is properly exercising jurisdiction under § 1369, which proves to be a critical error given the nature of subject matter jurisdiction.

In the event the Sixth Circuit is found to lack jurisdiction under § 1369 (which could come sooner than the federal government thinks, considering the recent filing

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[17] *Ins. Corp. of Ireland*, 456 U.S. at 702.

[18] *See Ins. Corp. of Ireland*, 456 U.S. at 701-02 (quoting U.S. CONST. Art. III, § 1).

[19] *Kokkonen*, 511 U.S. at 377.

[20] *See* Gov't Br. at 19-32.

[21] *Id.*

of a petition for certiorari[22]), then review under § 1369 is truly *not* available, because the Sixth Circuit would lack any authority to decide the merits of this case, leaving the parties to start this whole process anew. Therefore, the Agencies' argument for denying jurisdiction here rests not on the premise that review is available, but on the assumption that review *might* be available. Indeed, their argument goes further and asks all other courts to place their bets on this assumption while we wait and see whether the Sixth Circuit is in fact correct.

But this wait-and-see solution does not mesh with the nature of subject matter jurisdiction. Subject matter jurisdiction is a binary concept; a court either has it or it doesn't. The Sixth Circuit cannot purport to have authority over this case for the time being—to all other courts' exclusion—simply because it was the first to decide the jurisdictional question (or at least the first to decide it to the government's liking[23]). Every court has a duty to continually investigate the basis for subject matter jurisdiction,[24] which is all Appellants seek here.

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[22] *See* Petition for a Writ of Certiorari, *Nat'l Ass'n of Mfrs. v. United States Dept. of Def., et al.*, No. 16-299, 2016 WL 4698748 (Sept. 2, 2016).

[23] *See contra. North Dakota v. E.P.A.*, 127 F. Supp. 3d 1047, 1052-53 (D.N.D. 2015) (finding district courts—not circuit courts under § 1369—had jurisdiction over these claims, and announcing its decision almost 6 months before the Sixth Circuit).

[24] *Ins. Corp. of Ireland*, 456 U.S. at 702.

II. The federal government's reading of § 1369 leads to absurd results when applied to analogous provisions of law.

The federal government's argument, less attempts to deduce congressional intent, rests on the idea that an act of defining where a rule applies (*i.e.* passing a definitional or "scope" provision) is itself an act of applying that rule. In other words: if *A* defines the application of *B*, then implementing *A* is an application of *B*; or, in terms of this case, if the WOTUS rule defines when a person needs a permit, then passing the WOTUS rule is "the Administrator's action . . . in issuing or denying" said permit. This equation does not compute at any level of abstraction, which is why the federal government can point to no source endorsing it.

In fact, when applied to other areas of law, it becomes clear just how strange the government's logic is. For instance, Rule 81 of the Federal Rules of Civil Procedure, titled "Applicability of the Rules in General," defines the types of proceedings in which the other rules apply. But no one would ever say that the act of implementing Rule 81 was also an act of "issuing or denying"[25] summary judgement under Rule 56. Nor would anyone ever say that enacting Rule 81 was simultaneously an act of "approving or promulgating"[26] a limit on the number of interrogatories a party could serve under Rule 33. Each of those actions is an independent judicial decision that, while it occurs within the world defined by Rule 81, is entirely separate

[25] *See* 33 U.S.C. § 1369(b)(1)(F).

[26] *See* 33 U.S.C. § 1369(b)(1)(E).

from the *enactment* of Rule 81. To put it another way, if Oklahoma challenged the Rules Committee over its decision to include bankruptcy proceedings in Rule 81, it would certainly appear strange to say that Oklahoma's challenge was the same as if it had appealed, for example, the Committee's issuance of new trial under Rule 59. So too is it strange to characterize Oklahoma's challenge to the WOTUS rule as an appeal from the denial of a permit or as a challenge to an effluent or "other" substantive limitation.

The same could be said of the Federal Rules of Evidence. Those rules have a "scope" provision (Rule 1101 "Applicability of the Rules") that lists the proceedings in which the other rules apply.[27] And, again, no one would ever say that implementing Rule 1101 was an act of admitting a witness or piece of evidence. Nor would anyone say that passing Rule 1101 was an act of limiting a party's ability to use a particular piece of evidence under Rule 105. In other words, if Oklahoma challenged the enactment of Rule 1101, no one would ever say that Oklahoma was appealing a judge's ruling on an individual hearsay objection.

Finally, consider the myriad of statutes that rely upon the "Dictionary Act"[28] to define the word "person."[29] No one would say that by passing the Dictionary Act

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[27] *See also* Fed. R. Evid. 101(a) ("These rules apply to proceedings in the United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.").

[28] 1 U.S.C. § 1.

Congress was permitting or limiting the practice of religion. Yet, because the Religious Freedom Restoration Act (RFRA)[30] relies on 1 U.S.C. § 1 for its definition of the word "person,"[31] the federal government's argument would suggest just that. According to their logic, because one provision informs the other, the act of defining the word "person" would be the same as an act of "burden[ing] a person's exercise of religion"; and thus a challenge to the Dictionary Act would be treated the same as a lawsuit brought under RFRA.[32] This reading is simply untenable.

Indeed, none of the cases the federal government cites as "pragmatically" expanding the reach of §1369(b)(1) purport to go this far. The government primarily relies on this Court's *Maier*[33] decision;[34] but that case did not address a purely definitional or "scope" provision like the WOTUS rule. Instead, the rule at issue in *Maier* was a substantive provision that regulated standards for "secondary treatment" processes at water treatment centers.[35] Moreover, that rule bore a direct relation to

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[29] *See, e.g.*, 7 U.S.C. §§ 241, 242(k) (governing the Secretary of Agriculture's power to issue licenses to warehouse inspectors); 12 U.S.C. §§ 1787(b)(16), (c)(8)(D)(ix) (describing the avoidance powers of liquidating agents in cases where a Credit Union goes bankrupt); 16 U.S.C. §§ 2402(14), 2403, 2404 (prohibiting and permitting certain actions for the purpose of conserving the Antarctic ecosystem); 28 U.S.C. §§ 3701, 3702 (prohibiting sports gambling). And this does not begin to list all the statutes that rely on the Dictionary Act's default definitions, but fail to reference it.

[30] 42 U.S.C. § 2000bb-1.

[31] *See Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2768 (2014).

[32] *See* 42 U.S.C. § 2000bb-1(c) (creating a private cause of action).

[33] *Maier v. E.P.A.*, 114 F.3d 1032 (10th Cir. 1997).

[34] *See* Gov't Br. at 46.

[35] 114 F.3d at 1035-36.

both §§ 1369(b)(1)(E) and (F) because it *actually* established effluent limits and permitting procedures for secondary treatment facilities.[36] And the same is true of the Second Circuit's decision in *Riverkeeper* (evaluating a rule that established water-flow standards for cooling water intake structures),[37] the Fifth Circuit's decision in *ConocoPhillips* (same),[38] the Fourth Circuit's decision in *VEPCO* (evaluating a rule that regulated construction and design standards for cooling water intake structures),[39] and the D.C. Circuit's decision in *NRDC* (evaluating procedures for issuing and denying effluent discharge permits).[40] None of those rules were purely definitional like the WOTUS rule here.

This lack of support makes sense given the inherent nature of a purely definitional provision. Provisions like Federal Rule of Civil Procedure 81, Federal Rule of Evidence 1101, the Dictionary Act, and the WOTUS rule here, are designed to affect every substantive rule to which they relate. With respect to the WOTUS rule in particular, every future attempt to regulate United States waters will inevitably

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[36] *See* Secondary Treatment Regulation, 49 C.F.R. 36986-01 (1984) (establishing "the minimum level of effluent quality attainable by [secondary treatment] facilities" and "amend[ing] the regulation to allow . . . permitting authorities the option of substituting [one effluent quality test for another]" when reviewing permits for treatment facilities).

[37] *Riverkeeper, Inc. v. E.P.A.*, 358 F.3d 174, 181-83 (2d Cir. 2004).

[38] *ConocoPhillips Co. v. E.P.A.*, 612 F.3d 822, 824-27 (5th Cir. 2010).

[39] *Virginia Elec. & Pwr. Co. v. Costle*, 566 F.2d 446, 447-48 (4th Cir. 1977); *see also Natural Res. Def. Council, Inc. v. E.P.A.*, 673 F.2d 400, 403 (D.C. Cir. 1982) (describing the challenge in *VEPCO* as against "standards regulating the construction and design of cooling water intake structures").

[40] 673 F.2d at 402.

implicate the WOTUS rule for its part in determining when water is a water of the United States. And if the provision that defines the scope of all future rules is deemed to be a sufficient jurisdictional anchor for purposes of § 1369, then by extension so too would every *actual* limitation passed pursuant to it. There would be no need to delineate the "bifurcated" system of review because there would be no bifurcation—every rule or action involving waters of the United States would be reviewed at the courts of appeals. This effect could not have been what Congress intended when it took the time to enumerate each specific source for circuit-court review under § 1369.[41] And it certainly does not comport with the idea that federal courts are courts of *limited* jurisdiction.

CONCLUSION

For these reasons, the decision of the district court should be reversed.

DATED: September 12, 2016

Respectfully submitted,

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[41] *See also Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013) ("Section 1369(b) extends only to certain suits challenging some agency actions.").

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. 32 and Tenth Circuit R. 32 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Garamond, 14-point font. I further certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and this Court's briefing order because it contains 2,743 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ P. Clayton Eubanks
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ECF CERTIFICATION

I certify that all required privacy redactions have been made as required by Tenth Circuit Rule 25.5 and the ECF Manual; that, pursuant to Tenth Circuit Rule 31.5, seven exact copies of this ECF filing will be shipped via Federal Express to this Court; and that this filing was scanned with the Sumantec Endpoint Protection Antivirus using the latest version 12.1.6, most recently updated on September 12, 2016.

/s/ P. Clayton Eubanks
P. Clayton Eubanks

CERTIFICATE OF SERVICE

I certify that on September 12, 2016, a true and correct copy of the Reply Brief of Appellant State of Oklahoma was served upon all counsel of record via the Court's CM/ECF system.

/s/ P. Clayton Eubanks
P. Clayton Eubanks