ORAL ARGUMENT REQUESTED
No. 16-5038

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE CHAMBER OF OKLAHOMA, TULSA REGIONAL CHAMBER, and PORTLAND CEMENT ASSOCIATION,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, UNITED STATES ARMY CORPS OF ENGINEERS, and JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works),

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Oklahoma, No. 4:15-cv-386-CVE-PJC
Judge Claire V. Eagan

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INTRODUCTION

The Agencies have done everything they could to prevent this Court from reviewing the validity of the WOTUS Rule. They asked the Judicial Panel on Multidistrict Litigation to transfer and consolidate this case in the District of Columbia with other district court challenges to the WOTUS Rule, they asked the district court below to stay the case until the Sixth Circuit assessed its own jurisdiction, and now they ask this Court to defer to the Sixth Circuit's deeply divided jurisdictional decision or, in the alternative, to adopt a reading of the Clean Water Act's jurisdictional provision that is wholly unsupported by the text. This Court has jurisdiction and it should reject the Agencies' attempts to thwart the ordinary course of review of their actions.

To begin, the Agencies' alternative arguments for affirming the district court are baseless. Whether an "adequate remedy" exists in another forum under the APA is a question of *law*; it does not turn on whether some court is in fact providing a forum for review. Moreover, 28 U.S.C. § 2112 is merely a venue-selection statute; nowhere does it authorize the Sixth Circuit to impose on out-of-circuit district courts a "nationwide" ruling on a jurisdictional issue. Finally, issue preclusion cannot stop this Court from exercising jurisdiction because there has been no "valid and final judgment" from the Sixth Circuit, and the law-of-the-case doctrine is inapplicable because it applies only to decisions within the same case.

Thus, the issue is not *whether* this Court must assess its own jurisdiction; the issue is *when*. None of the Agencies' theories would allow this Court to avoid determining a district court's jurisdiction to review the WOTUS Rule—whether in Appellants' case, in future challenges to the WOTUS Rule, or as a defense in an enforcement action. If the goal is truly to avoid wasting resources, then this Court should review its jurisdiction now, determine that the district court below had jurisdiction, and then leave it to the Supreme Court to resolve the circuit split (if the Government decided to seek further review). The Eleventh Circuit recently stayed litigation pending the Sixth Circuit's resolution of the petitions for review, but that simply postponed that court's review and should not be followed.

Indeed, the Agencies fight so hard to avoid this Court deciding the jurisdictional issue because jurisdiction is proper in the district court, notwithstanding the Sixth Circuit's erroneous decision (which is not binding on this Court). The Agencies claim that subparagraphs (E) and (F) place jurisdiction over the WOTUS Rule in the courts of appeals. But try as they might, they cannot escape the plain language of these provisions. Subparagraph (E) does not apply because the WOTUS Rule is not a "limitation," and even if it were, it is not an "other limitation *under* sections 1311, 1312, 1316, or 1345" of the Clean Water Act. Subparagraph (F) is even more of a stretch because, as the Agencies concede, the WOTUS Rule does not "issu[e] or den[y] a permit." This plain reading of the

statute, in addition to multiple canons of construction, supports only one conclusion: the district court below has jurisdiction over this dispute.

ARGUMENT

I. This Court Must Independently Determine Its Jurisdiction.

As previously explained, the district court erred in *sua sponte* dismissing this case without briefing from the parties based on the Sixth Circuit's jurisdictional determination. Appellants' Brief ("Aplt. Br.") 17-18. "It is well settled that the decisions of one circuit court of appeals are not binding upon another circuit." *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir. 1986). Neither the Sixth Circuit's jurisdictional determination (nor even its eventual final judgment on the merits) will affect this Court's "independent obligation to determine whether subject-matter jurisdiction exists" over this case. *1mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006). Consequently, this Court has an obligation to determine its own jurisdiction and, if jurisdiction exists, to remand the case to the district court for resolution of the merits.

Notably, the Agencies do not defend the district court's decision on its own terms. Agencies Brief ("Agencies Br.") 19-38. The Agencies instead offer their own "doctrinal reasons why the district court was correct to consider itself constrained by the Sixth Circuit's decision," and they contend that these arguments

"are fully adequate to support the district court's dismissal without prejudice." Agencies Br. 19. The Agencies' alternative arguments all fail.

First, the Agencies argue that the district court correctly dismissed the case because the Sixth Circuit's jurisdictional decision "establishes that there is an 'other adequate remedy in a court' for Plaintiffs' claims." Agencies Br. 19 (quoting 5 U.S.C. § 704). According to the Agencies, because the Administrative Procedure Act ("APA") authorizes a district court to review only "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, Appellants lost their right to proceed in the district court once the Sixth Circuit provided "an adequate forum for their claims," Agencies Br. 16. It matters not, the Agencies believe, "whether this Court finds [the Sixth Circuit's] reasoning persuasive—it is the fact of the conclusion itself." Agencies Br. 22.

Not surprisingly, the Agencies provide *no* case to support their circular argument—*i.e.*, that a court can dismiss an APA claim based on an alternative forum providing an "adequate remedy in a court" without first determining which forum has jurisdiction. Whether an "adequate remedy" is available elsewhere does not turn on whether there is active litigation on the same topic in a different court. Rather, this Court must independently determine whether a claim is barred under the APA because "Congress" has elsewhere "provided special and adequate review procedures." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). And whether

Congress has done so depends on whether the district court or the Sixth Circuit has jurisdiction here. That is precisely how the cases upon which the Agencies rely were resolved. *See, e.g.*, *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 664 (D.C. Cir. 1975). In short, the Agencies' argument begs the question this case presents—it is not a ground for resolving it.

Regardless, the Sixth Circuit's fractured jurisdictional determination is "at least doubtful" and thus should not "oust a district court of its normal jurisdiction under the APA." *Bowen*, 487 U.S. at 905-07; *see* Aplt. Br. 18-19. The ruling is doubtful, moreover, because it is not final. The Sixth Circuit panel may reconsider the petitioners' motion to dismiss, the *en banc* court may vacate the ruling at the appropriate juncture, the Supreme Court may grant certiorari and reverse before judgment,[1] or the Supreme Court may grant certiorari and reverse the jurisdictional determination upon final judgment on the merits. Even under the Agencies' theory, then, dismissal under Section 704 is inappropriate.[2]

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[1] On September 2, 2016, a Sixth Circuit intervenor sought certiorari before judgment under the Supreme Court's Rule 11, seeking immediate review of that court's jurisdictional determination. *See Nat'l Ass'n of Mfrs v. U.S. Dep't of Defense, Dep't of the Army Corps of Engineers, et al.*, No. 16-299 (S. Ct.). That petition remains pending.

[2] The Agencies' reliance, *see* Agencies Br. 23-24, on the "general principle [of] avoiding duplicative litigation" among federal courts with "concurrent

Second, the Agencies argue that the district court correctly dismissed the case because the Sixth Circuit is "uniquely authorized to consider and finally decide whether Section 1369(b)(1) provides court-of-appeals jurisdiction over Plaintiffs' claims." Agencies Br. 24-25. The disposition of the petitions for review in the Sixth Circuit "must control related district-court challenges," the Agencies contend, because doing so is the only way to further the congressional goal of "providing a forum for timely, definitive review" through 28 U.S.C. § 2112. Agencies Br. 29.

Here too, the Agencies offer no support for their argument, nor could they. The argument once again begs the question presented. After all, advancing Section 2112's purposes would be a pertinent consideration only if this dispute is subject to Section 2112. This Court's assertion of jurisdiction would undermine Congress's goal of giving "nationwide effect" to the transferee court of appeals' review of an agency action, Agencies Br. 29-32, only if this is among the class of disputes that Congress wanted heard in a single forum. The Agencies' argument thus assumes the correctness of the Sixth Circuit's ruling. If challenges to the WOTUS Rule belong in the district courts—as two of the three Sixth Circuit judges correctly

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jurisdiction," *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800, 817 (1976), misses the mark. There is no possibility of "concurrent jurisdiction" here because it is undisputed that one of the forums (either the district court or the Sixth Circuit) lacks jurisdiction.

concluded, *see* Aplt. Br. 12-14—then this Court's ruling could not undermine any congressional purpose. It would mean Congress had no interest in "expediency and nationwide consistency" in the first place. Agencies Br. 26.

In any event, Section 2112 is merely a venue-selection statute that "provides a mechanical process for consolidating cases in one court where petitions for review of the same order have been filed in two or more courts of appeals." *ACLU v. FCC*, 774 F.2d 24, 27 (1st Cir. 1985). Nothing in Section 2112 suggests any congressional intent to supersede this Court's obligation to determine its own jurisdiction. Rather, Section 2112(d) demands the opposite by expressly providing that it is "not applicable to … proceedings to review or enforce those orders of administrative agencies … which are by law reviewable or enforceable by the district courts." 28 U.S.C. § 2112(d). The Agencies' objection that, if each Court determines its own jurisdiction, "the Sixth Circuit could hypothetically uphold the Rule, while multiple district courts could find the Rule deficient in some respect and set aside various provisions in different parts of the country" is doubly wrong. Agencies Br. 31. If this occurs, then it will be because federal courts—through "thorough, scholarly opinions written by some of our finest judges," *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 (1977)—conclude the Sixth Circuit lacks jurisdiction. The prospect of division among the federal courts on a serious jurisdictional issue is not a basis for deferring to the Sixth Circuit. The solution is

to "permit[] several courts of appeals to explore [the] difficult question," not to "freez[e] the first final decision rendered on [the] issue." *United States v. Mendoza*, 464 U.S. 154, 160 (1984); *see also* Aplt. Br. 38-41.

The Agencies' fears also are overblown. In most cases, the courts will not divide. That is why the Supreme Court has emphasized that jurisdictional statutes should be interpreted in a straightforward fashion—an admonition the Sixth Circuit failed to heed. *See* Aplt. Br. 37-38. It thus is hyperbole to suggest that challenges to agency action will "always necessitate multiple separate decisions on jurisdiction." Agencies Br. 28. In those rare cases when a conflict arises because multiple courts either claim jurisdiction or deny jurisdiction, *see* Agencies' Br. 31-32, the Supreme Court may resolve the issue. *See infra* at 27-28. The Agencies' concerns are not justification for this Court to delegate its duty to determine its own jurisdiction to the Sixth Circuit.

Third, the Agencies argue that "the Sixth Circuit's decision to accept jurisdiction has preclusive effect because it involves the same issue and parties." Agencies Br. 33. Because issue preclusion "bars Plaintiffs here from re-litigating the same question of jurisdiction that they have already lost," the Agencies claim, Appellants are bound by the Sixth Circuit's jurisdictional determination. *Id*. The Agencies ask this Court to reach this conclusion despite the fact that "the district

court here did not actually apply the ruling of another court." *Id*. The argument is misplaced for several reasons.

Issue preclusion is plainly unavailable because the Sixth Circuit case is ongoing and there has been no valid and final judgment. *See* Oklahoma Br. 31-34. "[U]nder [Tenth Circuit] precedents, issue preclusion will not apply in the absence of 'a valid and final judgment' to which resolution of a particular issue was necessary." *In re C&M Properties, L.L.C.*, 563 F.3d 1156, 1166 (10th Cir. 2009) (citing *Arizona v. California*, 530 U.S. 392, 414 (2000)). At this juncture, issue preclusion is inapplicable because the Sixth Circuit has done nothing more than deny petitioners' motion to dismiss.

The Agencies incorrectly respond that issue preclusion is applicable under an exception for adjudications on the merits of "a jurisdictional issue." Agencies Br. 34. This Court applies issue preclusion only when the first court has *dismissed* the case for lack of jurisdiction. As the Agencies' own cases explain, "an important exception to the general rule that a final adjudication on the merits is a prerequisite to issue preclusion" is that "*dismissals* for lack of jurisdiction 'preclude relitigation of the issues determined in ruling on the jurisdiction question.'" *Park Lake Res. Ltd. Liability v. U.S. Dept. of Agr.,* 378 F.3d 1132, 1136 (10th Cir. 2004) (emphasis added; quoting *Matosantos Commercial Corp. v. Applebee's Int'l Inc.*,

245 F.3d 1203, 1209 (10th Cir. 2001)). The Agencies provide no case in which a *denial* of a motion to dismiss was preclusive. *See* Aplt. Br. 33-36.

And for good reason. The Sixth Circuit's decision is not the type of order deserving of preclusive effect because the court is free to change its mind any time before final judgment. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). The *en banc* court, too, could overturn the jurisdictional decision—especially given that Judge Griffin concluded there was jurisdiction solely because he felt bound by circuit precedent.[3] *See* Aplt. Br. 12-13. Just as a district court's denial of a motion to dismiss is not final because it is not subject to immediate appeal, *see Catlin v. United States*, 324 U.S. 229, 236 (1945), the Sixth Circuit's decision is not final because the only avenue for immediate review is a writ of certiorari before judgment—a "deviation from normal appellate practice." Sup. Ct. R. 11. Neither is preclusive.

But even if the Sixth Circuit ultimately enters final judgment on the merits, Appellants still will not be bound by its decision. The Agencies note the general preclusion rule regarding jurisdiction, *see* Agencies Br. 35, but omit the rule's

[3] The Agencies incorrectly contend that the denial of immediate *en banc* review makes the ruling "effectively final barring intervention by the Supreme Court." Agencies Br. 36. Because petitioners sought interlocutory *en banc* review, it is at least equally likely that the *en banc* court wanted to review jurisdiction and the merits together. The *en banc* court will be free to revisit the jurisdiction determination after the panel adjudicates the merits.

exceptions. "When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except" in certain situations, including when "[a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government." Restatement (Second) of Judgments § 12 (2016); *see, e.g.*, *Kalb v. Feuerstein*, 308 U.S. 433, 438-40 (1940) (no preclusion where the decision infringed the exclusive jurisdiction of bankruptcy courts); *Hartwick College v. United States*, 588 F. Supp. 926, 929-30 (N.D.N.Y. 1984) (no preclusion where the decision infringed the "exclusive scheme for judicial review of federal income tax liability," in which Congress "assign[ed] distinct roles in that scheme to the United States District Courts and the United States Tax Courts"). Similarly, preclusion is not appropriate when "the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction." *Durfee v. Duke*, 375 U.S. 106, 115 n.12 (1963).

Deferring to the Sixth Circuit would "substantially infringe the authority of" the federal district courts and improperly encourage federal courts and parties to engage in a race to the merits in multiple forums. Here, it is undisputed that jurisdiction is proper in either the district courts or the courts of appeals—but not both. If claim preclusion applied to these two cases, then it would mean that either

the Sixth Circuit or the district courts would have to defer to the first court to reach the merits. That is untenable. If jurisdiction is indeed disputed, then courts should not give preclusive effect to the first court to reach the finish line.

Indeed, the Agencies are not even willing to abide the terms of their theory. As explained, almost sixth months before the Sixth Circuit's jurisdictional determination, the District Court for the District of North Dakota determined that it—and not the Sixth Circuit—had jurisdiction. *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015). Under the Agencies' theory, that ruling should have precluded the Sixth Circuit from rehearing the issue as to those parties. The Agencies claim that the North Dakota court's ruling does not "bear the same indicia of finality as the Sixth Circuit's decision" because the court stayed the litigation pending appellate review. Agencies Br. 36 n.5. But that does not render the decision any less final, at least under the Agencies' self-serving theory of issue preclusion. The district court did not suggest that it would be revisiting the issue; indeed, the district denied the Agencies' request to dissolve the preliminary injunction. *See North Dakota*, 127 F. Supp. 3d at 1060. Regardless, the counterargument depends on the district court's independent decision to stay the case. Under the Agencies' theory of issue preclusion, the North Dakota district court could have precluded the Sixth Circuit had it moved forward. The Agencies cannot avoid the consequences of their theory.

Recognizing the problem, the Agencies alternatively argue that *they* are not bound by the North Dakota court's decision because "federal agencies may 'nonacquiesce' in the decision of an issue in one court where the same issue is presented in other courts." Agencies Br. 36 n.5. That is nothing more than a creative way of saying that the rule the Agencies seek to establish should apply to everyone except them. But there is no federal-agency exception to issue preclusion. Either the first court to decide the jurisdictional question controls all other courts, or it does not. The Agencies cannot have it both ways.

The Agencies' argument that this Court would be bound by the "law of the case" is similarly meritless. *See* Agencies Br. 37-38. "The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages *in the same case*." *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011) (emphasis added). In other words, "the law of the case doctrine only applies within the same case—an identical issue decided in a separate action does not qualify as law of the case." *Farina v. Nokia, Inc.*, 625 F.3d 97, 117 n. 21 (3d Cir. 2010). Because these cases were brought in different courts under different statutes, the law-of-the-case doctrine is simply inapplicable. *See, e.g.*, *Harbor Ins. Co. v. Essman*, 918 F.2d 734, 738 (8th Cir. 1990).

II. The Court Should Immediately Resolve This Important Jurisdictional Question.

The issue, accordingly, is not *whether* the Court must determine whether the district court has jurisdiction—the issue is *when*. The Agencies note the recent decision from the Eleventh Circuit to stay the litigation pending the Sixth Circuit's resolution of the petitions for review. *See* Agencies Br. 36. Importantly, however, the Agencies do not ask this Court to follow that course. That is because if the Court rejects the Agencies' arguments as to why the district court was "correct to consider itself constrained by the Sixth Circuit's decision," Agencies Br. 19, which it should, then there would be no basis for this Court to defer a decision. The Eleventh Circuit stayed the case because it believed that, by doing so, it might never have to resolve the jurisdictional issue. *Georgia v. McCarthy*, No. 15-14035-EE, 2016 WL 4363130, at *2 (11th Cir. Aug. 16, 2016). But as explained above, that is incorrect.

In fact, even if a stay obviates the need to resolve the jurisdictional issue in this dispute, the Court likely will have to resolve it soon anyway. Given the wide-ranging harms the WOTUS Rule will inflict—as evidenced by the dozens of parties that have filed suit so far—additional plaintiffs (unaffiliated with Appellants) undoubtedly will step forward to challenge the rule. None of the Agencies' arguments would apply to these future plaintiffs. Moreover, the Agencies doubtless will bring an enforcement action against an individual in the

Tenth Circuit that implicates the WOTUS Rule. Contrary to the Agencies' representation, if the Sixth Circuit upholds the WOTUS Rule, the ruling will *not* "preclude a future defendant in an enforcement action from raising the kinds of facial challenges to the Rule that … are being litigated now." Agencies Br. 63. To preclude a defendant from raising such claims, the federal district court in the Tenth Circuit would have to conclude that it lacks jurisdiction—no possible judicial doctrine could allow the district court to defer to the Sixth Circuit under those circumstances.

The Eleventh Circuit's claim that resolving the jurisdictional dispute now would be a "waste of judicial resources" therefore had it backwards. *Georgia*, 2016 WL 4363130, at *2. Staying the case *increases* the chances of wasting resources. The prudent course is for this Court to decide for itself now whether the district court has jurisdiction. If the Court determines that the district court has jurisdiction, as it should, then the resulting circuit split should facilitate eventual Supreme Court review. That is far superior to staying the case in the hope that the Sixth Circuit's ruling (which not even a majority of the panel found persuasive) will be upheld on further appellate review years from now. Appellants are *not* seeking "two bites at the apple." Agencies Br. 31. They are seeking one bite at the apple in a court with subject-matter jurisdiction. The Court should not abdicate its

"virtually unflagging obligation" to exercise jurisdiction, *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015), in the hope this problem might go away.

III. The Agencies' Interpretation of Section 1369(b)(1) Finds No Support in the Statute's Text or in Judicial Decisions.

As explained, the WOTUS Rule does not fall within one of Section 1369(b)'s seven narrow categories of agency action for which a challenge must be initiated in the court of appeals. *See* Aplt. Br. 19-41. In particular, the WOTUS Rule does not fall within subparagraph (E), which grants original jurisdiction to the courts of appeals over an EPA action "in approving or promulgating any effluent limitation or other limitation." *See* Aplt. Br. 21-23. Nor does the rule fall within subparagraph (F), which provides for original appellate jurisdiction when the EPA has "issu[ed]" or "den[ied]" a Section 402 permit. *See* Aplt. Br. 23-24. The text, canons of statutory construction, judicial decisions, and congressional policies all support this interpretation. *See* Aplt. Br. 19-41. None of the Agencies' arguments to the contrary is persuasive.

First, recognizing that their position cannot be reconciled with the statute's text, the Agencies argue that Section 1369(b)(1) must receive a "pragmatic" and "functional" interpretation so that this Court can "effectuate Congress's purposes." Agencies Br. 39-43. This purpose-driven interpretation is required, the Agencies contend, because the Supreme Court "recogniz[ed] that Congress did not anticipate the myriad kinds of regulatory actions that would be necessary to administer the

Act's limitations and permitting programs." Agencies Br. 39. That argument has no support. The Supreme Court has held "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296 (2006). The court's job "is to apply the statute as it is written—even if [it] think[s] some other approach might accor[d] with good policy." *Burrage v. United States*, 124 S. Ct. 881, 892 (2014). Nor has the Supreme Court carved out a special rule for Clean Water Act jurisdiction. *See* Aplt. Br. 29-34.

The various cases the Agencies rely upon are not persuasive. *National Parks & Conservation Association v. FAA*, 998 F.2d 1523 (10th Cir. 1993), concerned a different statute (the Federal Aviation Act) and, in any event, no "ambiguity" exists here. And although *NRDC v. EPA* did say that Section 1369(b)(1) should be given "a practical rather than a cramped construction," 673 F.2d 400, 405 (D.C. Cir. 1982), the D.C. Circuit has since rejected as "misplaced" the argument that Section 1369(b)(1) requires a "broad reading," *Friends of Earth v. EPA*, 333 F.3d 184, 191 n.15 (D.C. Cir. 2003). Indeed, the D.C. Circuit recently made clear its mode of interpretation:

> [S]ound policy may well dictate that judicial review of these agency actions should proceed initially in the court of appeals. But this court simply is not at liberty to displace, or to improve upon, the jurisdictional choices of Congress—no matter how compelling the policy reasons for doing so. By limiting direct review to certain sections of the Exchange Act, Congress knew it would be sending

> some cases to the district court that could be resolved more efficiently at the appellate level. As a court of limited jurisdiction, we must take our cues from Congress, not from considerations of sound policy.

Loan Syndications & Trading Ass'n v. SEC, 818 F.3d 716, 724 (D.C. Cir. 2016) (citations omitted).

Indeed, the narrow scope of Section 1369(b)(1) contrasts with the judicial-review provisions of broadly written federal statutes, such as those concerning the Federal Communications Commission, the Federal Aviation Administration, and the Securities and Exchange Commission. *See* Aplt. Br. 26 n.8. The Clean Air Act, for example, grants the D.C. Circuit jurisdiction over "any … nationally applicable regulations promulgated, or final action taken, by the [EPA] Administrator." 42 U.S.C. § 7607(b)(1). Congress knows how to grant courts of appeals expansive original jurisdiction over challenges to "nationwide rules." It did not do so here. The Agencies never explain why the Clean Water Act's narrow jurisdictional provision should be treated like these statutes.

Second, the Agencies argue that the WOTUS Rule is an "other limitation" under Section 1369(b)(1)(E) because "although it does not specify permissible amounts or concentrations of discharges, it plainly restricts property owners' discretion to discharge pollutants in identifiable areas." Agencies Br. 44. Similarly, the Agencies argue, the WOTUS Rule is an "other limitation" because it "acts as a

limitation on States that administer NPDES permit programs under 33 U.S.C. § 1342." *Id*. at 47.

The Agencies, however, omit half of the provision's requirement; under subparagraph (E), the action must be an "effluent limitation or other limitation *under* section 1311, 1312, 1316, or 1345 of this title." 33 U.S.C. § 1369(b)(1)(E) (emphasis added). As Appellants previously explained, the WOTUS Rule is a "definitional rule" of "navigable waters" that arises *only* in Section 1362. *See* Aplt. Br. 22-23. "[T]he lack of any reference to § 1362 in [subparagraph] (E) counsels heavily against a finding of [original] jurisdiction" in the court of appeals. *In re WOTUS Rule*, 817 F.3d 261, 276 (6th Cir. 2016) (Griffin, J., concurring). The WOTUS Rule thus cannot be an "other limitation" *under* any of the listed statutes in subparagraph (E). The Agencies never respond to this argument.

The Agencies ignore this argument likely because they have successfully made the same argument in the past to avoid original appellate review. In *Friends of the Earth*, the EPA argued that the court of appeals lacked original appellate jurisdiction "to review the approval or establishment of [total maximum daily loads] made pursuant to section 1313(d)" because "actions taken under section 1313 are not included among the listed actions expressly made directly reviewable by the courts of appeals under section 1369(b)(1)." 333 F.3d at 187. And the D.C. Circuit agreed, because it was clear that "'Congress and the President decided to

leave section 1313 out of the list of statutes in section 1369 for direct appeal from EPA to the court of appeals.'" *Id.* at 193 (quoting *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1314 (9th Cir. 1992) (alterations omitted)); *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1286-87 (11th Cir. 2012).

This reasoning likewise distinguishes the Agencies' other cases, including this Court's *Maier* decision, all of which "involved EPA actions expressly specified in section 1369(b)(1)." *Friends of the Earth*, 333 F.3d at 191 n.15; *Maier v. EPA*, 114 F.3d 1032, 1041 (10th Cir. 1997) (challenging "secondary treatment regulations … under sections 1311 and 1314"); *Virginia Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977) ("The challenged regulations in the present case were issued under §§ [1311] and [1316], as well as [1326]."); *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 185 (2d Cir. 2004) (Section 1326 "makes clear that administrative regulations under this section are promulgated 'pursuant to' both sections [1311] and [1316] as well as section [1326(b)]."); *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 825 (5th Cir. 2010) (same).

But even if the WOTUS Rule fell "under" one of the enumerated statutes, the rule still would not be an "other limitation." The term "other limitation" is not as capacious as the Agencies believe. Under the interpretive maxim of *noscitur a sociis*—a word is known by the company it keeps—courts must "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words,

thus giving unintended breadth to the Acts of Congress." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (citation omitted); *see also United States v. Williams*, 553 U.S. 285, 294 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated."). For example, in *Gustafson v. Alloyd Co.*, the Court interpreted the word "communication" in § 2(10) of the Securities Act of 1933 to refer to a public communication, rather than any communication, because the word appeared in a list with other words, notably "notice, circular, [and] advertisement," making it "apparent that the list refer[red] to documents of wide dissemination." 513 U.S. 561, 575-76 (1995). The word "communication" could not be so broad as to mean "any" communication. *See Yates*, 135 S. Ct. at 1085

So too here. That Congress said "effluent limitation or other limitation" suggests that an "other limitation" must be similar to an effluent limitation. Congress would have said "*any* limitation" if it intended the Agencies' broad reading, *viz.*, that "other limitation" means any "restriction on the untrammeled discretion of the industry." Agencies Br. 18. The Agencies' reading of "other limitation" is so broad as to deprive "effluent limitation" of any meaning. The better interpretation, in line with the doctrine of *noscitur a sociis*, is that "other limitation" covers other "limitations directly related to effluent limitations." *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 877 (7th Cir. 1989); *Nw. Envtl. Advocates*

v. EPA, 537 F.3d 1006, 1015 (9th Cir. 2008) (noting that Subsection (E) covers "numerical limitations and similar limits"). Under this interpretation, the WOTUS Rule plainly is not an "other limitation."[4]

Third, the Agencies argue that the WOTUS Rule falls within Section 1369(b)(1)(F) because it is "a regulation that governs the issuance of permits." Agencies Br. 50. Although the Agencies concede that the WOTUS Rule "does not itself 'issu[e] or deny[] any permit under Section 1342,'" they assert that the rule is reviewable under subparagraph (F) because of its "effect on the issuance or denial of permits." Agencies Br. 51. That is incorrect.

The Agencies' argument flatly contradicts the plain text of subparagraph (F), and the Agencies do not claim otherwise. Subparagraph (F) covers EPA actions "issuing or denying a [Section 402] permit." And the Agencies admit that the WOTUS Rule *does not issue or deny a permit*. *See* Agencies Br. 51. That should be the end of the matter.

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[4] The Agencies incorrectly rely on a failed 1977 Clean Air Act amendment to support their interpretation. Agencies Br. 40. "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (citation omitted). "Absent such overwhelming evidence of acquiescence, [courts] are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id*. (citation omitted). One sentence in a 47-page committee report that an amendment is "unnecessary" is not such evidence.

The Agencies rely on out-of-circuit cases, most notably the Sixth Circuit's decision in *National Cotton v. EPA*, to claim that subparagraph (F) applies to "rules that regulate the underlying permit procedures." 553 F.3d 927, 933 (2009). Even Judge Griffin, they claim, recognized that *National Cotton* is "the predominant view of the other circuits." *In re WOTUS Rule*, 817 F.3d at 283 n.2. But *National Cotton* is an outlier,[5] and Judge Griffin never found it to be the "predominant view." In criticizing *National Cotton*, Judge Griffin noted that the Ninth Circuit had "rolled back the two cases relied upon by *National Cotton*," *id.* at 282 (citing *Nw. Envtl. Advocates*, 537 F.3d at 1018), and the Eleventh Circuit had "directly criticized *National Cotton* for expanding subsection (F) to apply to any 'regulations relating to permitting itself,'" *id.* (quoting *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012)). Judge Griffin felt bound by *National Cotton* only because the case did not meet the high standard for ignoring circuit precedent in cases consolidated by the JPML: namely, that it be "unique and diverge[] from the predominant view of the other circuits." *Id.* at 238

[5] *See Friends of the Everglades*, 699 F.3d at 1288; *Nw. Envtl. Advocates*, 537 F.3d at 1016-18; *see also Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004) (finding no jurisdiction because subparagraph (F) "conditions the availability of judicial review on the issuance or denial of a permit"); *Appalachian Energy Grp. v. EPA*, 33 F.3d 319, 321 (4th Cir. 1994) (same); *City of Ames v. Reilly,* 986 F.2d 253, 256 (8th Cir. 1993) (same); *Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 557 (2d Cir. 1978) (same); *Save the Bay, Inc. v. Adm'r of EPA*, 556 F.2d 1282, 1290-92 (5th Cir. 1977) (same).

n.2. Thus, far from being the "predominant view," *National Cotton* has been rightly criticized, *see, e.g.*, *Friends of the Everglades*, 699 F.3d at 1288, and should not be extended to this circuit.

Yet even if *National Cotton* was correctly decided, that case represents the outer limits of subparagraph (F). *National Cotton* and the Ninth Circuit cases upon which the Agencies rely, Agencies Br. 51-52, addressed rules *specifically* about permitting. *See Nat'l Cotton*, 553 F.3d at 931-32 (permitting for pesticides); *NRDC v. EPA*, 526 F.3d 591, 593 (9th Cir. 2008) (permitting for storm-water discharges); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 762 (9th Cir. 1992) (same). To interpret subparagraph (F) as applying to all regulations *relating to* the permitting process would be "contrary to the statutory text." *Friends of the Everglades*, 699 F.3d at 1288. At base, applying subparagraph (F) to the WOTUS Rule would "stretch [the statute's] plain text … to its breaking point." *In re WOTUS Rule*, 817 F.3d at 281 (Griffin, J., concurring). Under no reasonable interpretation of the statute does the WOTUS Rule "issu[e] or den[y] a permit."

Fourth, the Agencies downplay the other canons of statutory construction weighing against their interpretation, arguing that neither the *expressio unius* canon nor the canon against surplusage applies when it does not "'make[] sense as a matter of legislative purpose.'" Agencies Br. 55 (quoting *Longview*, 980 F.2d at

1312-13). But legislative purpose cannot trump interpretative canons, *see supra* at 17, and both support Appellants' interpretation.

To counter the *expressio unius* canon, the Agencies identify certain EPA actions that have been reviewed in district courts and argue that the Agencies' interpretation will not "sweep these sorts of actions into the courts of appeals." Agencies Br. 56-57. That is incorrect. The Agencies' rationale likely would require some of these actions to be brought in the courts of appeals. *See, e.g.*, *Longview*, 980 F.2d at 1308 (refusing to find original appellate jurisdiction over an EPA action that "issued *limits* on dioxins discharged into the Columbia River") (emphasis added). In any event, even if the Agencies could identify certain EPA actions that would still remain in the district court under their interpretation, that would not undermine the force of the *expressio unius* canon. The Agencies would still be sweeping numerous agency actions into the statute "that the legislature had no intent of including." *Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1034 (10th Cir. 2003).

Similarly, the Agencies weakly refute the application of the canon against surplusage by arguing that Congress drafted Section 1369(b)(1) broadly rather than with "foresight and exactitude." Agencies Br. 59. But Congress did not draft Section 1369(b)(1) broadly in an effort to "fill jurisdictional gaps." *Id.* The seven categories of agency actions were chosen with "specificity," *Nw. Envt'l Advocates*,

537 F.3d at 1015; "precision," *Longview*, 980 F.2d at 1313; and "complexity," *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976).[6] Moreover, the Agencies do not dispute that their reading renders subparagraph (C) superfluous. *See* Aplt. Br. 28; Agencies Br. 57-59. Their sole argument, then, is that both parties' interpretation renders superfluous the references to Section 1316 in subparagraph (E). But the multiple references to Section 1316 demonstrate only that Congress made "fine" distinctions by speaking "narrowly and precisely of particular statutory provisions," and thus justify a *narrow* interpretation of the statute. *Longview*, 980 F.2d at 1313.

Finally, the Agencies retreat to the supposed "purposes" of Section 1369, arguing that giving the district court jurisdiction over the WOTUS Rule would not further Congress's goal of providing "timely, centralized review" for important Clean Water Act regulations. Agencies Br. 61. Again, however, a law's "purposes" cannot override the plain meaning of the text, *see supra* at 17, and this argument, like the others, assumes the WOTUS Rule is the type of rule Congress wanted to be reviewed in the courts of appeals, *see supra* at 6-7.

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[6] That Section 1369(b)(1) contains a drafting error, *see* Agencies Br. 56, does not license the Court to ignore basic tools of statutory construction, *see Lamie v. United States Trustee*, 540 U.S. 526, 534, 542 (2004).

Regardless, as explained, to the extent policy concerns are relevant, they *favor* finding jurisdiction in the district courts, not the courts of appeals. *See* Aplt. Br. 34-41. The Agencies disagree that their construction of Section 1369(b)(1) would endanger the ability of litigants to challenge EPA actions outside of the 120-day deadline, arguing that the numerous challenges to the WOTUS Rule show that this is not a concern. *See* Agencies Br. 62. But the Court's interpretation of Section 1369(b)(1) will affect more than just this case, and not all EPA actions are as prominent as the WOTUS Rule. A broad interpretation of Section 1369(b)(1) may cause unsophisticated litigants to miss their day in court to challenge other EPA actions. *See Longview*, 980 F.2d at 1313 (noting the "peculiar sting" of Section 1369). Nor is the ability of a future criminal defendant to (possibly) raise "fact-specific objections," Agencies Br. 64, to the WOTUS Rule (or any other rule) an adequate substitute for the ability to bring an affirmative challenge.

The Agencies also claim—with no case support—that the Supreme Court's preference for rigorous federal review carries less weight when the issue is a "purely legal question." Agencies Br. 64. That is simply false. The Court has explicitly cautioned courts not to take procedural actions that will "substantially thwart the development of important *questions of law* by freezing the first final decision rendered on *a particular legal issue*." *Mendoza*, 464 U.S. at 160 (emphasis added). The possibility of avoiding a circuit conflict is not a justification

for rewriting Section 1369(b)(1). *See In re Clean Water Rule: Definition of "Waters of the United States,"* 140 F. Supp. 3d 1340, 1341 (J.P.M.L. 2015) (finding no statutory justification to transfer and consolidate related district court actions concerning the WOTUS Rule).

Finally, the Agencies claim that their reading of Section 1369(b)(1) is the more "simple, straightforward interpretation." Agencies Br. 64-65. If, as the Agencies request, the Court were to rewrite subparagraph (E) to apply to "*any* limitation," *see supra* at 18-22, and rewrite subparagraph (F) to mean any rules "*relating* to the permitting process," *see supra* at 22-24, the Agencies may be correct: the statute would then encompass virtually all EPA actions. But that is not how the statute is written, and this Court is not free to "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." *Friends of the Earth v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006). Alternatively, if the Court employed a "pragmatic" and "functional" reading of the WOTUS Rule in order to find original appellate jurisdiction here, Section 1369(b)(1) would *not* be more predictable. Indeed, it would not be predictable at all. Countless litigants would be left guessing whether one court's "flexible" interpretation could encompass their EPA action. That is not a recipe for "administrative simplicity." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). It is a recipe for confusion.

CONCLUSION

The Court should reverse the district court's judgment and remand for further proceedings.

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Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Tenth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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