No. 16-5038 & 16-1539

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Oklahoma,
Honorable Claire V. Eagan, District Judge

BRIEF OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, AND SOUTHEASTERN LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae, Pacific Legal Foundation, Cato Institute, and Southeastern Legal Foundation hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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IDENTITY AND INTERESTS OF AMICI

Amici Pacific Legal Foundation (PLF), the Cato Institute, and Southeastern Legal Foundation respectfully submit this brief amicus curiae in support of the Appellants U.S. Chamber of Commerce, *et al*.[1]

PLF was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. It defends limited government, property rights, and a balanced approach to environmental protection in courts nationwide. PLF has extensive experience litigating environmental and constitutional issues. It has represented parties or participated as amicus curiae in numerous cases relevant to the disposition of this case. *See, e.g.*, *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* affirm that no counsel for any party authored this brief in whole or in part. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to Fed. R. App. P. 29(a), *amici curiae* affirm that all parties have consented to the filing of this brief.

that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual Cato Supreme Court Review.

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Utility Air Regulatory Group v. EPA*, *et al.*, 134 S. Ct. 2427 (2014).

Amici are interested in this case because it implicates the right to meaningful judicial review of agencies' power over the fundamental right to own and use property, an essential element of a free society.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs properly filed their challenge to the Water Definition in the federal district court for the Northern District of Oklahoma. Complaint at 7. However, due to the uncertain breadth of the exclusive circuit court jurisdiction granted by 33 U.S.C. § 1369(b)(1), for review of certain acts by the EPA Administrator pursuant to the Clean Water Act (CWA), several parties challenging the Water Definition in district courts also filed concurrent circuit court actions to preserve their claims. Pursuant to 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation transferred these challenges to the randomly designated Sixth Circuit. *State of*

Oklahoma v. EPA, No. 15-cv-0381-CVE-FHM, No. 15-CV-0386-CVE-PJC, 2016 WL 3189807, at *1 (N.D. Okla. Feb. 24, 2016). After issuing its emergency stay of the rule, the Sixth Circuit panel was asked to rule on whether it had jurisdiction to hear the combined challenges under 33 U.S.C. § 1369(b)(1).

By the thinnest thread of concurrence, the Sixth Circuit issued a reluctant, internally conflicting, three-opinion decision upholding its exclusive jurisdiction over challenges to the Water Definition pursuant to section 1369(b)(1)(F). *In re U.S. Dep't Of Defense and U.S. EPA Final Rule: Clean Water Rule: Definition of "Waters of the U.S." v. U.S. Dep't of Defense, Dep't of the Army Corps of Eng'rs, and U.S. EPA, et al.*, 817 F.3d 261 (6th Cir. Feb. 22, 2016) *(In re EPA II)*.

Following the Sixth Circuit's jurisdictional ruling, the Northern District of Oklahoma dismissed plaintiffs' challenge *sua sponte*, citing federal courts' "independent obligation to determine whether subject matter jurisdiction exists." *State of Oklahoma*, 2016 WL 3189807, at *1 (citing *1mage Software, Inc., v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006)). However, in issuing its four page dismissal order, the district court relied almost exclusively on *In re EPA II* as its legal authority on the jurisdiction issue. *Id.* at *2 n.1 (concluding that "the Sixth Circuit's decision speaks for itself that jurisdiction is appropriate only in the appellate courts").

The Tenth Circuit should reverse this error. This Court has an independent obligation to determine whether the District Court for the Northern District of Oklahoma, or the Sixth Circuit, properly has subject matter jurisdiction. To accede, without further analysis, to the Sixth Circuit's tenuous claim of jurisdiction means to adopt the counter-textual reading of 33 U.S. C. § 1369(b)(1)(F) that the Sixth Circuit panel itself could only manage through clenched teeth and only by force of prior Sixth Circuit precedent. This Court is under no such duty. In fact, courts not bound by Sixth Circuit precedent, like this one and the district court below, should more properly read *In re EPA II* as persuasive authority for denying circuit court jurisdiction, not upholding it. But this Court's task goes beyond reading the Sixth Circuit's fractured holding. It must determine for itself how broadly to construe the Supreme Court's "functional" approach to section 1369(b) jurisdiction.

Explained in the Supreme Court case, *Crown Simpson Pulp Co., et al., v. Costle*, the "functional" approach narrowly extends section 1369(b)(1)'s grant of original appellate jurisdiction over challenges of specified EPA actions to also cover non-specified but "functionally similar" actions where stricter textual adherence would cause anomalous results clearly contrary to congressional intent. 445 U.S. 193, 197 (1980) (citing *E.I. Du Pont de Nemours and Co., et al., v. Train, et al.*, 430 U.S. 112, 128 (1977) (adopting a pragmatic reading of 33 U.S.C. § 1369(b)(1)(E) to avoid a "highly anomalous" system of bifurcated judicial review). Adopting the Water

Definition is not functionally similar to any action covered by section 1369(b)(1), and no anomalies result from district court review of the Water Definition. A disciplined construction of *Crown Simpson's* functional approach to section 1369(b)(1)(F), then, does not result in original appellate jurisdiction in this case.

Rather, a proper reading of *Crown Simpson* strongly counsels against straying from the text of section 1369(b)(1), as doing so will gratuitously curtail the right to judicial review far beyond what Congress could have intended—even to the point of barring as-applied review in defense of enforcement. Preclusive review provisions like section 1369(b) are extraordinary tools, and courts should construe them narrowly not only out of respect for Congress, but to avoid their impairment of individual rights when applied out of place.

ARGUMENT

I

THIS COURT HAS A DUTY TO INDEPENDENTLY DETERMINE WHETHER ORIGINAL JURISDICTION IS PROPER IN THE DISTRICT OR CIRCUIT COURT

This Court is free to reject an excessively broad reading of section 1369(b)(1)(F). Because a federal court always has authority to determine whether it has jurisdiction, the Sixth Circuit's jurisdictional ruling has no binding effect here. *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. United Mine*

Workers of Am., 330 U.S. 258, 291 (1947)). Therefore, this Court must decide whether it will adopt the extreme reasoning of the Sixth Circuit panel, or the more persuasive textual reading of the district court in *North Dakota, et al., v. EPA*, No. 3:15-cv059, 2015 WL 5060744, at *2 (D.N.D. Aug. 27, 2015) (rejecting the proposition that section 1369(b)(1)(F) "encompass[es] virtually all EPA actions under the Clean Water Act").

Despite the outcome in the Sixth Circuit, the majority of the *In re EPA II* panel expressed the view that original jurisdiction for these challenges is properly in the various district courts.[2] And for good reason. The text of section 1369(b)(1)(A)-(G) specifies seven particular types of EPA action for which jurisdiction over legal challenges is exclusively in the circuit courts. Subsection (F), held by the Sixth Circuit to encompass the Water Definition, grants jurisdiction for review of EPA actions "in issuing or denying any permit under 33 U.S.C. § 1342 of this title." Section 1342 refers to the CWA's National Pollution Discharge Elimination System (NPDES) permits. But the Water Definition redefines the geographic scope of the CWA. It does not issue or deny an NPDES permit. Under a plain reading of the text,

[2] The concurring and dissenting opinions agree: "In my view, it is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals for these issues." *In re EPA II*, 817 F.3d at 275 (J. Griffin, concurring in the judgment); "I agree . . . that, under the plain meaning of the statute, neither subsection (E) nor subsection (F) of 33 U.S.C § 1369(b)(1) confers original jurisdiction on the appellate courts." *Id*. at 283 (J. Keith, dissenting).

subsection (F) simply does not grant original circuit court jurisdiction over the Water Definition challenges. Therefore, jurisdiction should be proper in the district courts.

Nevertheless, two judges on the Sixth Circuit panel found themselves bound to take an expansive approach to section 1369(b)(1)'s grant of jurisdiction due to the Sixth Circuit's prior decision in *National Cotton Council of Am., et al., v. EPA*, 553 F.3d 927 (6th Cir. 2009) (extending subsection (F) jurisdiction to challenges of regulations "governing the issuance of permits"). Based on its view that *National Cotton* tied its hands, the split panel held that because the Water Definition "governs the issuance of permits," it can only be challenged in circuit court. *In re EPA II*, 817 F.3d at 282.

National Cotton's ultimate authority for its expansive approach is the Supreme Court's reading of 33 U.S.C. § 1369(b)(1)(F) in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193. In that case, the Court narrowly extended 33 U.S.C. § 1369(b)(1)(F) jurisdiction to actions "functionally similar to the denial or issuance of a permit." *Crown Simpson*, 445 U.S. at 196. The Court authorized this departure from the text only to the extent that a stricter reading would cause an irrational situation where "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-97.

The Supreme Court's functional approach to 33 U.S.C. § 1369(b)(1)(F) in *Crown Simpson* thus did not signal an abrupt end to the principle of statutory construction that "[w]hen the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Instead, it carved out a narrow "functional equivalency" exception to the text to avoid an absurd or irrational result. The rule of *Crown Simpson* thus serves Congress's intent in two ways, by curing obviously aberrant quirks of statute, and by doing so in a way—the functional similarity test—that minimizes displacing Congress's considered judgment as to which specifically enumerated actions fall under section 1369(b)(1)'s grant of original appellate jurisdiction.

To find original appellate jurisdiction here stretches the rule of *Crown Simpson* further than it can bear. Even *National Cotton* acknowledged that "Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act." *National Cotton*, 553 F.3d at 933 (citing *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992)); *see also Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated."). Extending the functional approach to sweep the Water Definition suits

into 33 U.S.C. § 1369(b)(1)(F) is precisely what the functional approach is supposed to prevent: an absurdity contrary to the will of Congress.

These points were not lost on Sixth Circuit panel Judges Griffin and Keith.[3] Both ruled that they would conclude, based on standard rules of statutory construction, that the CWA vests jurisdiction in the district courts. Judge Griffin concurred in the judgment only because he considered himself bound by *National Cotton*, as law of the circuit, to do so. *See* note 2, *supra*. In fact, given the manner in which the opinions fractured, courts outside the Sixth Circuit—those unbound by *National Cotton*—should read the combined opinions of Judge Griffin and Keith as persuasive authority for finding jurisdiction proper in the district courts and not the circuit courts.

Other circuits have fared better than the Sixth at grasping the logic of *Crown Simpson*. *See Northwest Environmental Advocates v. EPA*, 537 F.3d 1006, 1018 (9th Cir. 2008) (declining to extend original appellate jurisdiction where exemptions are neither the functional equivalent of a covered action nor a cause of awkwardness); *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012) (a permit exemption fails the functional similarity test because "[t]he exemption is a general rule, as opposed to a decision about the activities of a specific entity"); *cf. Iowa*

[3] Even Judge McKeague admitted that "perhaps" *National Cotton*'s departure from *Crown Simpson*'s functional similarity test results in an "unduly broad" rule. Nevertheless, he found it binding. *In re EPA II*, 817 F.3d at 272.

League of Cities v. EPA, 711 F.3d 844, 862 (8th Cir. 2013) ("[W]e are persuaded that it would be more appropriate to interpret 'promulgating' to include agency actions that are 'functionally similar' to a formal promulgation.").

Amici urge this Court to read *Crown Simpson* as a narrow exception with two necessary conditions for departing from the text of 33 U.S.C. § 1369(b)(1)(F): procedural absurdity and functional similarity. In this case, a plain text reading creates no procedural absurdity and there are no functional similarities between defining the geographic scope of the CWA and the act of issuing or denying a specific permit. This plain text reading ensures that Tenth Circuit case law respects Congress's authority to control federal court jurisdiction and thus avoid the significant due process complications and uncertainty that result from allowing courts free rein to second-guess Congress's carefully drawn jurisdictional statutes.

II

THIS COURT SHOULD NARROWLY CONSTRUE 33 U.S.C. § 1369(b)(1)(F) BECAUSE AN EXPANSIVE READING WILL SIGNIFICANTLY IMPAIR DUE PROCESS RIGHTS AND CREATE UNNECESSARY UNCERTAINTY

The Supreme Court is very concerned with the due process implications of the CWA's reach. During oral argument in *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807, Justice Kennedy voiced his concern that the CWA is simultaneously "arguably unconstitutionally vague" and "certainly harsh in the civil and criminal

sanctions it puts into practice." *U.S. Army Corps of Engineers v. Hawkes Co. Inc., et al.*, No. 15-290, 2016 WL 1243207, at *18 (U.S. Oral Argument Mar. 30, 2016). Justice Kennedy was clearly not alone in his concern. *Hawkes*, 136 S. Ct. at 1816 (2016) (Kennedy, J., concurring) (reiterating that "the reach and systemic consequences of the Clean Water Act remain a cause for concern" in an opinion joined by Justices Thomas and Alito). In *Hawkes*, a unanimous Supreme Court held that the Army Corps' issuance of a jurisdictional determination is final agency action subject to judicial review under the APA. *Hawkes*, 136 S. Ct. 1807 (2016). Reading the *Hawkes* opinion alongside the unanimous ruling in *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (holding that EPA compliance orders are subject to judicial review), it is now quite clear that the Court takes serious issue with assertions of CWA jurisdiction being shielded from judicial review.

Construing section 1369(b)(1)(F) to encompass the Water Definition will threaten precisely what the *Hawkes* and *Sackett* Courts rejected. Narrowing the availability of judicial review over questions of jurisdiction puts "the affected individual just where the Court . . . said he could not be put: 'He must * * * obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order.' " *Yakus v. United States*, 321 U.S. 414, 476-77 (1944) (Rutledge, J., dissenting) (criticizing the due process infirmities of a similar preclusive review provision) (citing *Wadley Southern Ry. Co. v. Georgia*, 235 U.S.

651, 662 (1915)). This is not a necessary result of section 1369(b)'s text. It would only be the result of an overly broad and counter-textual construction in the courts, as exemplified in *In re EPA II*.

A. Congress Does Not Alter Jurisdictional Presumptions Lightly; Nor May the Courts

The Administrative Procedure Act establishes a presumption of reviewability of agency actions in the district courts. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). This "strong" presumption can only be overcome where agency action is committed to agency discretion by law or where precluded by statute. *McAlpine v. United States*, 112 F.3d 1429, 1432 (10th Cir. 1997) (citation omitted). For the presumption of district court judicial review to be precluded by statute, a court must find "clear and convincing evidence that Congress so intended." *Rusk v. Cort*, 369 U.S. 367, 380 (1962), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (upholding the Social Security Act's preclusive review provision but acknowledging the "well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and [the Court] will not read a statutory scheme to take the extraordinary step of foreclosing jurisdiction unless Congress' intent to do so is manifested by clear and convincing evidence.") (internal quotations

omitted). Thus, whenever Congress intends to depart from the baseline due process assumptions of the APA, it must do so explicitly. It follows logically that where Congress goes through the trouble of doing so, it intends that departure to serve a certain purpose. Section 1369(b)(1) was drafted with specificity.[4] Congress designated seven types of agency action, cross-referenced to the sections that authorize and describe them, for which judicial review would proceed in the circuit courts. These actions include the promulgation of performance and effluent standards, issuance and denial of state and NPDES permits, and fixing of effluent limitations and control strategies for toxic pollutants. 33 U.S.C. § 1369(b)(1)(A)–(G). Section 1369(b)(1) establishes a 120-day period for facial invalidation claims to be brought directly in circuit court, beyond which judicial review is barred to the extent it could have been had during the review period. *Id.* at § 1369(b)(2) ("Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement."). *Id.*

[4] *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976) ("[T]he complexity and specificity of section [1369(b)] in identifying what actions of EPA under the FWPCA would be reviewable in the courts of appeals suggests that not all such actions are so reviewable. If Congress had so intended, it could have simply provided that all EPA action under the statute would be subject to review in the courts of appeals, rather than specifying particular actions and leaving out others.").

Thus, Section 1369(b) significantly impacts the "when," "where," and even "if" of challenging agency actions under its jurisdictional sweep. But this significant departure from the APA presumption is not exercised gratuitously or at random. As written, it directly affects only regulated entities that will "of necessity" have notice of section 1369(b)(1) actions due to a pre-existing relationship with the EPA, whether as a permit applicant, permit holder, or other program participant. *See Natural Resources Defense Council, Inc., v. EPA*, 673 F.2d 400, 406-07 (D.C. Cir. 1982) (NRDC) (upholding broad section 1369(b)(1) jurisdiction over due process concerns because of its lack of a "surprise" effect).

Further, this departure from the APA benefits both the agency and permit seekers when applied as intended. Finality in permitting decisions and standards allows both regulators and the regulated community to make investments and rely on the stability that an established permitting regime brings. Because all salient parties to a properly construed section 1369(b)(1) action receive direct notice of discrete agency actions affecting their interests, Congress reasonably decided that the right to sue more than 120 days after such an action was less important than the mutual need for certainty. Along the same lines, several state high courts have recognized that failure to timely object to permit conditions constitutes waiver of a right to bring a later challenge that might unfairly deprive the government of public benefits of the permit. *See County of Imperial v. McDougal*, 19 Cal. 3d 505, 510-11 (1977); *Wilson*

v. Bd. of Cty. Comm'rs of the Cty. Of Teton, 153 P.3d 917, 925 (Wyo. 2007); *Trimen Development Co. v. King County*, 65 Wash. App. 692, 701-02 (1992); *Zweifel Mfg. Corp. v. Peoria*, 11 Ill. 2d 489, 494 (1957). This same logic explains Congress's use of the 120-day limitation.

Therefore, while the post-120-day bar on judicial review is an extraordinary provision, it is not problematic to the extent it is applied to the actions Congress actually circumscribed in the text. There, and only there, can Congress be deemed to have judged the drawbacks of truncated judicial review outweighed by the benefits to regulators and the regulated alike. When judicially construed to apply outside the careful bounds devised by Congress, preclusive review provisions are untethered from Congress's balancing of interests and result in much confusion and unwarranted abridgement of due process.

B. Courts Have Been Uneasy with the Due Process Implications of Preclusive Review Provisions for Over Seventy Years

Section 1369(b) is not a one-of-a-kind statute. Its pedigree reaches as far back as the Emergency Price Control Act of 1942. Since then, quite a few federal statutes have used similar provisions to limit judicial review of specified agency actions, including the Social Security Act (42 U.S.C. § 405(g)–(h)), the Surface Mining Control and Reclamation Act (30 U.S.C. § 1276(a)), and the Clean Air Act (42 U.S.C. § 7607(b)). As with the CWA, these statutes pursue uniformity, stability, or some

other congressional purpose by selectively curtailing access to the courts. The result has been beneficial or at least inoffensive in many cases, but in others due process has been stripped "almost to the bone." *Yakus v. United States*, 321 U.S. at 434 (Rutledge, J., dissenting). Whenever a law restricts court access, concern for due process factors into construing these provisions.

The first time the Supreme Court reviewed a preclusive review statute was when it upheld the constitutionality of the Emergency Price Control Act of 1942 in *Yakus v. United States*, 321 U.S. 414 (1944). In language notably similar to 33 U.S.C. § 1369(b), the Emergency Price Control Act's section 204(d) stated: "[T]he Emergency Court of Appeals shall have exclusive jurisdiction to determine the validity of any regulation or order issued under [specified provisions of the Act]." *Yakus,* 321 U.S. at 429. It also had a parallel to section 1369(b)(2): "Except as provided in this section, no court . . . shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside . . . any provision of this Act . . ." *Yakus,* 321 U.S. at 429.

While the Court upheld the Act, deferring to the special needs of the wartime economy, Justice Rutledge authored a lengthy dissent pointing out the significant due process issues which the Act's novel preclusive review provision raised. *Id.* at 463 (Rutledge, J., dissenting) ("No previous legislation has presented quite this combination of procedural devices."). While Justice Rutledge acknowledged

Congress's "plenary authority to define and control the jurisdiction of the federal courts," he took issue with Congress "confer[ring] jurisdiction upon federal and state courts in the enforcement proceedings, more particularly the criminal suit, and at the same time deny[ing] them 'jurisdiction or power to consider the validity' of the regulations for which enforcement is thus sought." *Id.* at 467. Under his reading, the jurisdictional limitation on invalidation claims operated without "distinction between regulations invalid on constitutional grounds and others merely departing in some respect from statutory limitations," and also regardless of "whether invalidity appears on the face of the regulation or only by proof of facts." *Id.* at 467.

The resulting enforcement proceedings, he claimed, "are cut down so that, in a practical sense, little else than the fact whether a violation of the regulation as written has occurred or is threatened may be inquired into." *Id.* at 464. Justice Rutledge found that this would not only unjustifiably impair the right of a defendant to present a meaningful defense, it would also force the federal judiciary to uphold convictions under even facially unconstitutional regulations so long as they are not invalidated during their brief review period. *Id.* at 470.

The "deeper fault" he found was that a "would-be offender" has no right to question the constitutionality or reach of a regulation at any time after its allotted review period, including during an enforcement proceeding:

> To say that this does not operate unconstitutionally on the accused because he has the choice of refraining from violation or of testing the constitutional questions in a civil proceeding beforehand entirely misses the point. The fact is that if he violates the regulation he must be convicted, in a trial in which either an earlier and summary civil determination or the complete absence of a determination forecloses him on a crucial constitutional question.

Id. at 478.

While the Emergency Price Control Act's preclusive review provision is not a direct analog to the CWA's, many of Justice Rutledge's concerns regarding the effect of barring judicial review of regulations continue to be a concern of the federal courts.

The Supreme Court has, for example, revisited these questions in the context of the Clean Air Act's (CAA) preclusive review provision. *See* 42 U.S.C. § 7607(b) (exclusively limiting judicial review of promulgation of "emission standards" to the D.C. Circuit within 60 days of promulgation). In *Adamo Wrecking Co. v. United States*, the Supreme Court acknowledged the *Yakus* majority's ruling that Congress was within its rights to preclude "any attack on a regulation in a criminal case." 434 U.S. 275, 279 (1978) (emphasis added). But, where the *Yakus* court upheld complete immunity from judicial review, the *Adamo* Court narrowed that effect to allow district courts to consider whether the allegedly violated regulation is an "emission standard."

Id. at 282–85.[5] Thus, *Adamo* clarified that the preclusive review provision of the CAA,[6] which is virtually identical to that of the CWA,[7] bans all judicial review of a covered EPA action during enforcement, other than to determine whether the regulation is indeed covered by the statute and thus unreviewable.

While the *Adamo* majority did not directly address the due process implications of so severely restricting judicial review, Justice Powell separately expressed his doubt as to the constitutionality of the CAA's preclusive review provision. *Id.* at 289 (Powell, J., concurring) ("If the constitutional validity of [the preclusive review provision] of the Clean Air Act had been raised by petitioner, I think it would have merited serious consideration."). His criticism was primarily aimed at the limitation of judicial review solely to a petition process where "[n]o notice is afforded a party who may be subject to criminal prosecution other than publication of the Administrator's action in the Federal Register." *Id.*

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[5] The Sixth Circuit had held below they were unable to extend judicial review even to the question of whether the regulation violated was an "emission standard" in the first place and thus immune from review. *United States v. Adamo Wrecking Co.*, 545 F.2d 1 (6th Cir. 1976) *overruled, Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978).

[6] 42 U.S.C. § 7607(b)(2) ("Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.").

[7] 33 U.S.C. § 1369(b)(2) ("Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.").

Only months later in *Chrysler Corp. v. EPA*, the D.C. Circuit reiterated Justice Powell's concerns, upholding a "narrow interpretation" of the Noise Control Act's identical preclusive review provision in light of the "nagging presence of a substantial due process question." 600 F.2d 904, 913 (D.C. Cir. 1979). In doing so, the court acknowledged that the "express preclusion of review at the enforcement stage creates a highly unusual and unnecessar[il]y harsh restriction on the right to challenge the validity of a regulation to which one is subject." *Id.*

Before long, challengers of a CWA regulation argued that the *Chrysler* court's "narrow interpretation" logic should apply to statutory construction of the CWA's preclusive review provision as well. *NRDC, v. EPA, et al.*, 673 F.2d 400 (D.C. Cir. 1982). Although acknowledging the risks of broad interpretation,[8] the D.C. Circuit declined the invitation to narrowly construe section 1369(b)(1)(E). *NRDC*, 673 F.2d at 406. Yet, it declined on the grounds that parties subject to the EPA action at issue "will of necessity have participated in a permit proceeding before being punished." *Id.* Thus, the court found a narrow interpretation unnecessary to the extent section 1369(b)(1)'s terms already apply to regulatory actions of which notice can reasonably

[8] *NRDC*, 673 F.2d at 407 ("Industry argues that. . . the more broadly the section is construed, the more likely it is that someone will have regulations enforced against him yet be precluded from challenging the validity of those regulations because of a failure to seek immediate judicial review . . . . This argument finds substantial support in decisions of the Supreme Court and this court.").

be presumed and where there is no substantial risk of suddenly exposing unwitting parties to prosecution without a right to review the underlying regulation. *See id.* at 406-07.

Although the challengers argued that a broad reading of section 1369(b)(1)(E) may indeed expose unwitting landowners to unreviewable CWA jurisdiction and enforcement, should changes in definitional scope be construed to fall under the preclusive review provision, the court held that, to the extent any such person were genuinely surprised by their prosecution, they could resort to as-applied due process claims for relief of the preclusive effect of section 1369(b)(2). *Id.* (citing *Harrison v. PPG Indus.*, 446 U.S. 578, 592-93 n.9 (1980). While sufficient to close off the D.C. Circuit's inquiry, this suggested remedy raises more questions than it answers.

First, the D.C. Circuit was concerned only with the due process rights of those subject to "sneak attack" criminal prosecution. *NRDC, v. EPA, et al.*, 673 F.2d at 407. This is vastly under-inclusive of the due process rights affected by CWA jurisdictional assertions being made unreviewable under section 1369(b)(2). As *Sackett* and *Hawkes* confirmed, individuals have judicial review rights well before being subjected to prosecution. If only surprised parties are eligible for individual relief from having their defenses precluded, parties who are aware of the Water Definition have no right to

judicial review of its reach once 120 days have passed—regardless of whether they had notice of the original promulgation period.

Second, to the extent only surprise defendants can claim a due process defense, it is likely impossible any individual would be able to employ one as the D.C. Circuit describes. So long as EPA issues a 33 U.S.C. § 1319(a)(3) compliance order in advance of prosecution, any potential defendant would thereby be put on notice of jurisdiction and then lack the "surprise" element *NRDC* requires for as-applied relief from defense-preclusion. Such orders would be automatic and compelling for property owners receiving them.[9]

Third, to the extent any defendant's due process claim prevails and allows for a challenge to the validity of the Water Definition, the justification for broadly construing section 1369(b)(1) is defeated—uniformity and finality would give way to case by case review.

In any case, the D.C. Circuit was dealing with a regulation where there were "certainly few persons" incidentally exposed to unreviewable jurisdictional assertions, "and perhaps . . . none." *NRDC,* 673 F.2d at 407. With regard to broadly construing

[9] To the extent the Water Definition can be construed to fall under section 1369(b)(1) as an act "governing the issuance of permits," any compliance order must also fit that category and must be challenged facially via a section 1369(b)(1) petition for review. As an agency interpretation of its own regulation, they would receive *Auer/Seminole Rock* deference.

section 1369(b)(1) to encompass the Water Definition, the preclusion of review of jurisdictional assertions is a certainty, leading directly to the due process concern Justice Rutledge first raised 72 years ago.

C. The Sixth Circuit Was Wrong To Dismiss the Due Process Concerns of Expansively Construing Section 1369(b)(1)(F)

The Sixth Circuit's lead opinion in *In re EPA II* dismisses the due process concerns of construing section 1369(b)(1)(F) to encompass the Water Definition. 817 F.3d at 273-74. Petitioners in that case argued that if section 1369(b)(1)(F) applied to the Water Definition, facial and as-applied challenges of CWA jurisdiction would be barred by section 1369(b)(2) and "unwary point-source operators and landowners uncertain about the scope of the Clean Water Act's regulatory reach may be subject to enforcement actions and penalties without fair notice of the conduct prohibited." *In re EPA II*, 817 F.3d at 274. Both concerns were dismissed as "speculative and overblown." *Id.* The court was wrong to characterize them as such.

First, the court found the right to bring a facial invalidation claim against the Water Definition beyond 120 days a fitting sacrifice to "EPA's interests in finality in certain matters." *Id.* (quoting *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005). This assertion is belied by Congress's specific enumeration in section 1369(b)(1) of those "certain matters" where finality trumps the right to review.

Definitions of jurisdictional scope are notably absent. Divining Congress's motivational "interests" is inappropriate where the text is clear and a faithful interpretation does not yield an irrational outcome. The expansion of section 1369(b)(1) exposes innumerable landowners to the loss of facial review rights wholly outside the contexts Congress determined proper.

This abridgement of facial invalidation rights is no small matter. While as-applied challenges may be favored by the courts, facial challenges remain an essential tool for determining basic questions concerning legislative power under the Constitution. *See Sabri v. United States*, 541 U.S. 600, 610 (2004) (Kennedy, J., and Scalia, J., concurring in part). The courts should not deprive litigants of this essential tool where Congress has not so directed.[10]

Second, the lead opinion dismisses the concern that section 1369(b)(2) would preclude as-applied defenses in enforcement actions, apparently, on the grounds that the application of the Water Definition would itself remain reviewable to the extent it can be reinterpreted as opposed to invalidated. *In re EPA II*, 817 F.3d at 274 (citing

[10] *See Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) ("The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction.").

Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013)). This is a misreading of the more limited holding of *Decker*.

Courts have generally read preclusive review provisions to mean what they say: No judicial review of covered administrative actions during enforcement.[11] The Supreme Court has, however, added some ambiguity to that view in its opinions in *Envtl. Def., et al., v. Duke Energy Corp., et al.*, 549 U.S. 561, 573 (2007), and *Decker v. NW Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013).

Duke Energy held that an appeals court violated the CAA's preclusive review provision when, in a citizen suit enforcement proceeding, the appeals court interpreted a regulation in a manner that effectively rewrote it. 549 U.S. at 573. In doing so, the Court noted that "[i]t is true that no precise line runs between a purposeful but permissible reading of the regulation adopted to bring it into harmony with the Court of Appeals' view of the statute, and a determination that the regulation as written is invalid." *Id.* In other words, the Court found no workable standard to differentiate between the use of judicial review to "invalidate" a regulation to the extent it is unlawful and the use of judicial review to merely "interpret" or "apply" it to the same

[11] Except where section 1369(b)(2) itself might be held unconstitutional as-applied, as suggested by the D.C. Circuit in *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982), and the Supreme Court in *Harrison v. PPG Indus.*, 446 U.S. at 592-93 n.9. Notably, these courts seem to assume regulations were otherwise unreviewable facially or as-applied even during enforcement so long as section 1369(b)(2) was in effect.

end. It held that the interpretation at hand was an implicit and therefore disallowed invalidation, but gave no guidance to future courts.

In *Decker*, the Court again was confronted with the issue of whether judicial review was appropriately extended to a citizen suit seeking enforcement more strenuous than a regulation provided for, or whether this review would be barred as an invalidation of the regulation. *Decker*, 133 S. Ct. at 1334. The Court held that section 1369(b)(2) does not bar judicial review of a regulation in an enforcement action "when the suit is against an alleged violator and seeks to enforce an obligation imposed by the Act or its regulations." 133 S. Ct. at 1334. The Court cited *Duke Energy* apparently for the premise that there is no hard distinction between interpretations seeking to correct a discrepancy between a regulation and its statute or the Constitution, and an invalidation seeking the same. *Decker* does not, however, stand for the premise that targets of enforcement will reliably be able to defend themselves on the ground that a jurisdictional assertion like the Water Definition could be "interpreted" not to apply to them. If anything, *Decker* further imperils land owners because they are susceptible not only to enforcement actions brought by EPA, but also any stricter "interpretation" of jurisdiction a citizen suit may convince a court to accept.

A broad construction of section 1369(b)(1) would leave the invalidate/interpret conundrum up to the district courts to puzzle out each time a defendant challenged the Water Definition in an enforcement proceeding. Land owners whose sole defense in an enforcement action is that the regulations improperly define "waters of the U.S." would have to "bet the farm" on the chance that the court hearing an enforcement action would agree that their defensive challenge to the Water Definition requires mere interpretation rather than invalidation. As a result, land owners will be forced to accept the Water Definition as is and forego judicial review, contrary to the rationale underlying the holdings in *Sackett* and *Hawkes*. This Court is not bound by the Sixth Circuit's untenable position and should disregard it.

CONCLUSION

For the foregoing reasons, Amici urge the Court to adopt a narrow reading of section 1369(b)(1) and rule that jurisdiction was proper in the district court.

DATED: July 7, 2016.

Respectfully submitted,

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