No. 13-10

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

FRIENDS OF THE EVERGLADES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Eleventh Circuit held that the Water Transfers Rule promulgated by the Environmental Protection Agency (EPA) is not among the regulatory decisions under the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, that must be challenged through a petition for review filed in a court of appeals. That decision is incorrect, concerns an issue of recurring and exceptional importance, is in sharp tension with decisions of this Court, and conflicts with the decisions of other courts of appeals. If allowed to stand, the Eleventh Circuit's decision will prolong the uncertainty concerning the validity of permitting regulations such as the Water Transfers Rule and will undermine the "clear and orderly process for judicial review" that Congress has established. H.R. Rep. No. 911, 92d Cong., 2d Sess. 136 (1972).

A. The EPA Has Standing To Seek Certiorari

State respondents contend that, "[a]s [a] prevailing part[y]," the EPA "lack[s] standing to appeal the judgment below." States Br. in Opp. 7. As state respondents implicitly acknowledge (*ibid.*), however, this Court has "previously recognized that an appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement," *Camreta* v. *Greene*, 131 S. Ct. 2020, 2028 (2011). The EPA's standing to seek this Court's review thus turns on the circumstances of this case, not on the application of any categorical rule.

State respondents contend that the EPA "fail[ed] to demonstrate that it has suffered any actual or imminent injury caused by the Eleventh Circuit's ruling." States Br. in Opp. 10; see *Camreta*, 131 S. Ct. at 2028 (explaining that a party has standing to "invok[e this] Court's authority" when "three conditions are satisfied: The petitioner must show that he has 'suffered an injury in fact' that is caused by 'the conduct complained of' and that 'will be redressed by a favorable decision.'" (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992))).[1] State respondents acknowledge the EPA's contention that the Eleventh Circuit's decision "will have a continuing impact on the manner in which the Water Transfers Rule and analogous EPA regulations will be implemented and challenged." States Br. in Opp. 10 (quoting Pet. 12). They contend, however, that this harm is too "vague" to constitute an Article III injury in fact. *Ibid.*

[1] State respondents do not dispute that the EPA has satisfied the causation and redressablity prongs of Article III standing. The organizational and tribal respondents do not dispute the EPA's standing to seek certiorari.

The Eleventh Circuit's holding has a concrete and particularized effect on the EPA's cognizable legal interests. A challenge to an EPA action subject to direct review in the courts of appeals generally must be brought within 120 days of the agency's action, 33 U.S.C. 1369(b)(1), and the agency action thereafter is not subject to collateral attack "in any civil or criminal proceeding for enforcement," 33 U.S.C. 1369(b)(2). Under the Eleventh Circuit's judgment, by contrast, parties may challenge the Water Transfers Rule in diverse district courts subject to the six-year statute of limitations applicable to suits brought under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 28 U.S.C. 2401(a) (Supp. V 2011). The Rule may also be subject to challenge in enforcement proceedings depending on, *inter alia*, the statutory provision under which the proceeding is brought and general principles of administrative law. The Eleventh Circuit's holding thus deprives the EPA of the repose that the CWA's direct-review provision was intended to afford. See, *e.g.*, *Krupski* v. *Costa Crociere S.p.A.*, 130 S. Ct. 2485, 2494 (2010) (noting the "strong interest in repose" of "[a] prospective defendant who legitimately believed that the limitations period had passed"); cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994) (explaining that "[t]he Due Process Clause also protects the interest[] in * * * repose" of a private litigant).[2]

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[2] Because the EPA has an interest in the repose provided by the CWA's direct-review provision, the Eleventh Circuit's decision does not amount to the "deprivation of a procedural right without some concrete interest that is affected by the deprivation," which "is insufficient to create Article III standing." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009).

State respondents dispute (States Br. in Opp. 10-11) whether the decision below affects the EPA's cognizable interests. They contend that "a challenge to the Rule is pending in only a single district court," and that there is consequently no discernible difference between judicial review of the Water Transfers Rule in the court of appeals under 33 U.S.C. 1369(b)(1) and review in the district courts under the APA. States Br. in Opp. 11. They argue as well that, if additional district court challenges were filed, those actions could be consolidated into a single suit just as multiple direct-review petitions are consolidated before one court of appeals. *Ibid.* (citing 28 U.S.C. 1407); see 28 U.S.C. 2112(a)(3).

Those contentions understate the practical effect on the EPA's interests of the decision below. The Water Transfers Rule is being challenged not only in a New York district court, see Pet. 14 n.2, but also in a citizen suit brought in Oregon, see *ONRC Action* v. *United States Bureau of Reclamation*, No. 97-3090-CL, 2012 WL 3526833 (D. Or. Jan. 17, 2012), appeal pending, No. 12-35831 (9th Cir.). And while 28 U.S.C. 1407 permits the panel on multidistrict litigation to consolidate certain related civil actions for "pretrial proceedings," it requires those consolidated matters to be "remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred." 28 U.S.C. 1407(a).

If this Court reverses the Eleventh Circuit's judgment and holds that the Water Transfers Rule is subject to direct review in the courts of appeals, the Rule will not be subject to challenge in district court proceedings, including in citizen suits. 33 U.S.C. 1369(b)(2). The only timely petitions for review of the

Water Transfers Rule would be those at issue in this litigation, which would likely be controlled by the Eleventh Circuit's prior decision upholding the Rule. See *Friends of the Everglades* v. *South Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (2009), cert. denied, 131 S. Ct. 643 and 131 S. Ct. 645 (2010). And, quite apart from the existence of Eleventh Circuit precedent favorable to the EPA on the merits of the parties' dispute, treating the pending petitions as the exclusive challenges to the Water Transfers Rule would eliminate the risk of inconsistent outcomes and prevent lingering uncertainty as to the Rule's validity. Because this Court's reversal of the Eleventh Circuit's judgment would vindicate the EPA's "strong interest in repose," *Krupski*, 130 S. Ct. at 2494, the EPA has standing to seek this Court's review of that judgment.

B. The Decision Below Is In Tension With Decisions Of This Court Interpreting The CWA's Direct-Review Provision

Attempting to limit *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) (per curiam), and *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), to their facts, respondents dispute whether the Eleventh Circuit's decision is in tension with this Court's previous interpretations of the CWA's direct-review provision. States Br. in Opp. 13-16; Orgs. Br. in Opp. 12-14; Tribal Br. in Opp. 4-5. Respondents fail to give Section 1369(b)(1) the "practical rather than * * * cramped construction" required by those decisions. *NRDC* v. *EPA*, 673 F.2d 400, 405 (D.C. Cir.) (Ginsburg, J.), cert. denied, 459 U.S. 879 (1982).

Respondents acknowledge that *Crown Simpson* adopted a functional interpretation of Section 1369(b)(1)(F) in holding that the EPA's veto of a

State-issued permit comes within that provision's authorization of court-of-appeals review of EPA actions "issuing or denying any permit" under the National Pollution Discharge Elimination System (NPDES) program. States Br. in Opp. 15; Orgs. Br. in Opp. 12-13. Respondents argue, however, that while the EPA action at issue in *Crown Simpson* "result[ed] in rejection of the permit request," the Water Transfers Rule "is an exemption from permitting altogether" so that "[n]o permits will ever be issued or denied under" the Rule. States Br. in Opp. 15; see Orgs. Br. in Opp. 13.

That distinction provides no basis for treating *Crown Simpson* as inapposite here. The Court in that case found Section 1369(b)(1)(F) applicable to the EPA's veto because that agency action was "functionally similar" to the EPA's denial of a permit in States that do not administer the NPDES program. 445 U.S. at 196; see 33 U.S.C. 1342(b) (authorizing state permitting programs). Here, the Water Transfers Rule is "functionally similar" to a hypothetical general permit (see 40 C.F.R. 122.28; Pet. 15) authorizing the transfers covered by the Rule, since the legal and practical effect of both the Rule and such a permit is to declare the relevant transfers to be compliant with the CWA. Under Section 1369(b)(1)(F), judicial review of such a general permit would be available only in the courts of appeals. Respondents do not explain why Congress would have centralized judicial review of a general permit, while allowing piecemeal district court review of a regulation authorizing the same conduct.

As respondents observe (States Br. in Opp. 16), CWA permits typically impose effluent limitations on permittees, see 40 C.F.R. 122.28(a); Pet. 15-16, while

the Water Transfers Rule imposes no such limits on persons who engage in covered transfers. But from the standpoint of plaintiffs like respondents, who seek to limit the circumstances under which water transfers will take place, that distinction makes this an *a fortiori* case. If the EPA had issued a general permit authorizing such transfers, and if respondents had sought to challenge the permit on the ground that the conditions it imposed were insufficiently protective of water quality, respondents would have been required to bring that challenge directly in the court of appeals. The more categorical nature of the authorization conferred by the the Water Transfers Rule simply reinforces the Rule's suitability for court of appeals review.

As respondents acknowledge, *E.I. du Pont* cautioned against an interpretation of Section 1369(b)(1)(E) that "would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits . . . but would have no power of direct review of the basic regulations governing those individual actions." States Br. in Opp. 14-15 (quoting 430 U.S. at 136); see Orgs. Br. in Opp. 14; Tribal Br. in Opp. 5. Respondents characterize that statement as "merely an observation, not an essential part of the Court's reasoning on jurisdiction." States Br. in Opp. 15. Yet this Court identified that consideration as one of its "two reasons" for concluding that the CWA provides for direct court-of-appeals review of EPA regulations governing the permitting process. *E.I. du Pont*, 430 U.S. at 136.

Respondents further contend that, because "[n]o permits will ever be issued or denied under the Water

Transfers Rule," the "logic" of this Court's rationale in *E.I. du Pont* "has no application here." States Br. in Opp. 15; see Orgs. Br. in Opp. 14; Tribal Br. in Opp. 5. That is incorrect. The Water Transfers Rule defines "[w]ater transfer" restrictively to exclude any "activity that conveys or connects waters of the United States" that also "subject[s] the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. 122.3(i). The Rule thus states that NPDES permitting requirements *do* apply when the transfer water is put to an intervening use. Because the Rule establishes a standard for determining whether particular conveyances of water require NPDES permits, it is a "basic regulation[] governing" "individual actions issuing or denying permits." *E.I. du Pont*, 430 U.S. at 136.

C. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals

State and organizational respondents acknowledge that the decision below conflicts with the Sixth Circuit's holding that Section 1369(b)(1)(F) authorizes court-of-appeals review of "regulations governing the issuance of permits under [33 U.S.C. 1342], as well as issuance or denial of a particular permit." *National Cotton Council of Am.* v. *EPA*, 553 F.3d 927, 933 (2009), cert. denied, 559 U.S. 936 (2010); see States Br. in Opp. 19 (recognizing conflict); Orgs. Br. in Opp. 6, 14 (same); see also Pet. App. 14a (same); but see Tribal Br. in Opp. 9 (suggesting that no conflict exists). They contend, however, that the Sixth Circuit's jurisdictional ruling is "too thinly-based" to create a circuit split warranting this Court's review. Orgs. Br. in Opp. 14; see States Br. in Opp. 19. But the Sixth Circuit's decision is bottomed on the reasoning of the D.C.

Circuit, as incorporated by a line of Ninth Circuit decisions. See *National Cotton Council of Am.*, 553 F.3d at 933 (citing *NRDC* v. *EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992); *American Mining Cong.* V. *EPA*, 965 F.2d 759, 763 (9th Cir. 1992); *NRDC* v. *EPA*, 656 F.2d 768, 775 (D.C. Cir. 1981)).

State respondents contend that the Ninth Circuit in *Northwest Environmental Advocates* v. *EPA*, 537 F.3d 1006 (2008), distinguished its earlier analysis in a manner congruent with the Eleventh Circuit's decision in this case. States Br. in Opp. 17-18. The court in *Northwest Environmental Advocates* held that Section 1369(b)(1)(F) does not authorize direct review of regulatory exemptions from permitting unless the exemption is statutorily based. See 537 F.3d at 1017 ("We have applied Section [1369(b)(1)(F)] in two cases involving challenges to stormwater regulations where those regulations were based in part on exemptions specified in the text of the CWA."). The Water Transfers Rule is statutorily based. The CWA prohibits the unpermitted "discharge of any pollutant," 33 U.S.C. 1311(a), which is the "addition of any pollutant to navigable waters from any point source," 33 U.S.C. 1362(12). The EPA determined that water transfers, as defined by the Rule, do not involve the "addition" of pollutants to navigable waters, and so are not subject to NPDES permitting requirements. 73 Fed. Reg. 33,703 (June 13, 2008). The Water Transfers Rule therefore would be subject to direct court-of-appeals review under the interpretation of Section 1369(b)(1)(F) adopted by the Ninth Circuit.

Respondents further dispute whether the Eleventh Circuit's construction of Section 1369(b)(1)(E) creates a circuit split. States Br. in Opp. 19-20; Orgs. Br. in

Opp. 15-18; Tribal Br. in Opp. 5-8. The Eleventh Circuit held that Section 1369(b)(1)(E), which provides for direct court-of-appeals review of regulations "promulgating any effluent limitation or other limitation," applies only to regulations restricting "the untrammeled discretion of the industry." Pet. App. 12a (quoting *Virginia Elec. & Power Co.* v. *Costle*, 566 F.2d 446, 450 (4th Cir. 1977)). As tribal respondents recognize, the D.C. Circuit has held more broadly that Section 1369(b)(1)(E) authorizes direct review of regulations "restrict[ing] 'who may take advantage of certain provisions.'" Tribal Br. in Opp. 7 (quoting *NRDC*, 673 F.2d at 404). The Water Transfers Rule does not have that effect, tribal respondents claim, because it "allow[s] entities to introduce pollutants into navigable bodies of waters." Tribal Br. in Opp. 7 (quoting Pet. App. 10a). But the Rule does restrict those "who may take advantage" (*NRDC*, 673 F.2d at 404) of the exclusion, since it does not encompass activities "subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. 122.3(i); see 73 Fed. Reg. at 33,699, 33,704-33,705 (explaining the distinction between water conveyances that do and do not come within the Rule).

State and organizational respondents contend that the D.C. and Fourth Circuits have construed Section 1369(b)(1)(E) to authorize direct court-of-appeals review only of regulations "impos[ing] limitations on point-source dischargers of pollution." States Br. in Opp. 20 (discussing *NRDC*, 673 F.2d at 404-405, *Virginia Elec. & Power Co.*, 566 F.2d at 450); see Orgs. Br. in Opp. 15-17. That is an inaccurate description of the precedents within those circuits. Both the D.C. and Fourth Circuits held that restrictions placed on

issuers of permits brought particular EPA regulations within the scope of Section 1369(b)(1)(E). See *NRDC*, 673 F.2d at 404-405 (holding that challenged regulations "restrict[ing] who may take advantage of certain provisions" are "a limitation on point sources *and permit issuers*") (emphasis added; citation and internal quotation marks omitted); *Virginia Elec. & Power Co.*, 566 F.2d at 450 (holding that regulatory requirement that certain information be considered "in itself is a limitation on point sources *and permit issuers*") (emphasis added).

Respondents do not dispute that the Water Transfers Rule limits permit issuers from requiring NPDES permits for water transfers. Cf. 73 Fed. Reg. at 33,699 (noting that Pennsylvania had regularly issued NPDES permits for water transfers). Accordingly, the Rule would be subject to direct review under Section 1369(b)(1)(E) in the D.C. and Fourth Circuits but not in the Eleventh Circuit. In any event, the Rule also imposes limits on point sources insofar as it distinguishes between activities that do and do not subject the transferred water to intervening uses. See *id.* at 33,699, 33,704-33,705. The Eleventh Circuit's parsimonious interpretation of Section 1369(b)(1)(E) conflicts with the D.C. and Fourth Circuits' practical construction of that provision and requires this Court's correction.[3]

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[3] Respondents contend that the Eleventh Circuit's decision does not involve an important question of law because it is "purely jurisdictional" (States Br. in Opp. 20) and has little relevance to other EPA actions (Orgs. Br. in Opp. 18-21). But this Court has recognized "the importance of determining the locus of judicial review of the actions of EPA" under a similar statutory scheme providing for direct review in the courts of appeals. *Harrison* v.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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PPG Indus., Inc., 446 U.S. 578, 586 (1980) (construing analogous judicial-review provision of the Clean Air Act). The D.C. Circuit has likewise observed that "[n]ational uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals." *NRDC*, 673 F.2d at 405 n.15. Within the Eleventh Circuit, however, the decision below will foreclose direct court-of-appeals review of any EPA regulation issued under the CWA "impos[ing] no restrictions" (Pet. App. 10a) on point sources or "relat[ing] to permitting itself" (*id.* at 14a).