No. 00-1628

In the Supreme Court of the United States

STATE OF NEBRASKA, EX REL., DON STENBERG, ATTORNEY GENERAL OF NEBRASKA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Safe Drinking Water Act (SDWA), 42 U.S.C. 300j-7(a) (1994 & Supp. IV 1998), provides that petitions for review of actions of the Environmental Protection Agency "pertaining to the establishment of national primary drinking water regulations * * * may be filed only in the United States Court of Appeals for the District of Columbia circuit," and that petitions for review of "any other action of the Administrator" may be filed "in the circuit in which the petitioner resides or transacts business." The question presented is whether 42 U.S.C. 300j-7 barred petitioner's suit in the United States District Court for the District of Nebraska, challenging the SDWA "as applied" to certain public water systems within Nebraska.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 238 F.3d 946. The opinion of the district court (Pet. App. 8-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2001. The petition for a writ of certiorari was filed on April 24, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Safe Drinking Water Act (SDWA or Act), 42 U.S.C. 300f *et seq.*, establishes a detailed scheme

under which the responsibility for ensuring the safety of the Nation's drinking water is shared between the federal government and the States. The Act is implemented through regulations that are required to be promulgated by the Environmental Protection Agency (EPA) and enforced by EPA or the States. 42 U.S.C. 300g-1 (1994 & Supp. IV 1998); 40 C.F.R. Pt. 141. States may assume the primary responsibility for enforcing the SDWA by adopting drinking water regulations and enforcement controls that "are no less stringent than the national primary drinking water regulations [NPDWRs]," 42 U.S.C. 300g-2, or States may leave the responsibility for enforcing the NPDWRs to EPA, 42 U.S.C. 300g-3(a)(2) (1994 & Supp. IV 1998).

The SDWA does not of its own force regulate providers of drinking water, or establish standards or treatment techniques to assure acceptable drinking water quality. Instead, the Act requires EPA to promulgate primary regulations—NPDWRs—concerning the "contaminants which, in the judgment of the Administrator, may have any adverse effect on the health of persons," 42 U.S.C. 300f(1)(B), as well as certain secondary regulations, 42 U.S.C. 300f(2). NPDWRs must specify either a maximum level of contaminants that could adversely affect human health, or a treatment technique for ensuring acceptable drinking water with respect to a contaminant. 42 U.S.C. 300g-1(b) (1994 & Supp. IV 1998). An NPDWR "is an enforceable standard applicable to all public water systems nationwide." *American Water Works Ass'n* v. *EPA*, 40 F.3d 1266, 1269 (D.C. Cir. 1994); see 42 U.S.C. 300g.[1]

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[1] The Act defines public water systems (PWS) in part as "system[s] for the provision to the public of water for human

Section 300j-7 of the SDWA governs judicial review of the administration of the Act. It provides that petitions for review of "actions pertaining to the establishment of [NPDWRs] * * * may be filed only in the United States Court of Appeals for the District of Columbia circuit" within 45 days of the promulgation of the regulations, and that petitions for review of "any other action of the Administrator" under the SDWA may be filed in a regional court of appeals within 45 days of the action. 42 U.S.C. 300j-7(a). Section 300j-7(a) further provides that "[a]ction of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or in any civil action to enjoin enforcement." 42 U.S.C. 300j-7(a). In addition, Section 300j-7(b) specifies that certain types of actions may be brought in district court, including challenges to the grant or denial of a variance or exemption under 42 U.S.C. 300g-4 and 300g-5 (1994 & Supp. IV 1998).

Section 300j-7 is modeled on the judicial review provision of the Clean Air Act (CAA), 42 U.S.C. 7607(b), which vests the courts of appeals, and not the district courts, with the principal authority to review the implementation of the Act. See *Western Neb. Res. Council* v. *EPA*, 793 F.2d 194, 198 (8th Cir. 1986).

2. In June 1991, EPA promulgated an NPDWR for lead and copper, which became effective on December 7, 1992. 56 Fed. Reg. 26,460 (1991); 40 C.F.R. 141.80-141.91 (Lead and Copper Rule). The Lead and Copper Rule establishes a treatment technique requiring, *inter alia*, that public water systems conduct monitoring to

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consumption through pipes or other constructed conveyances." 42 U.S.C. 300f(4)(A) (1994 & Supp. IV 1998).

determine the levels of lead and copper at consumers' taps and, if the levels of such contaminants exceed "action levels" established by EPA, that systems act to reduce the levels of lead and copper at the tap. 40 C.F.R. 141.81-141.89; see 56 Fed. Reg. at 26,471. The rule was challenged by several industry and environmental organizations on various grounds relating to its coverage of lead, and was upheld in part and vacated in part by the District of Columbia Circuit. See *American Water Works Ass'n*, 40 F.3d at 1275.

3. The State of Nebraska has assumed primary enforcement responsibility under the SDWA. 42 U.S.C. 300g-2 (1994 & Supp. IV 1998). In September 1994, the State adopted EPA's Lead and Copper Rule. See 60 Fed. Reg. 33,803 (1995). In July 1998, however, the State filed suit in the United States District Court for the District of Nebraska against EPA and other federal defendants, seeking a declaration that the SDWA and its implementing regulations violate the Commerce Clause and Tenth Amendment of the United States Constitution. *Nebraska* v. *EPA* (*Nebraska I*), No. 4:98CV3226. In that action, the State specifically challenged the Lead and Copper Rule. See Pet. App. 3. The federal defendants moved to dismiss the action for lack of subject matter jurisdiction pursuant to 42 U.S.C. 300j-7 (1994 & Supp. IV 1998).

In May 1999, the district court granted the motion to dismiss, concluding that, under Section 300j-7, the District of Columbia Circuit "has exclusive jurisdiction over Plaintiff's claims." Order, *Nebraska I*, at 3. The court explained that it "has not located any case which construes § 300j-7 to permit any court other than the Court of Appeals for the District of Columbia [Circuit] to review regulations implementing the Lead and Copper Rule for any purpose." *Id.* at 2. Instead, "the

great weight of authority supports the defendants' position that this court is without jurisdiction to review regulations promulgated under the SDWA either as valid final acts of the EPA or for a determination of their constitutionality." *Ibid.* (citing *Missouri* v. *United States*, 109 F.3d 440 (8th Cir. 1997), and *Virginia* v. *United States*, 74 F.3d 517 (4th Cir. 1996)).[2]

4. Four months after *Nebraska I* was dismissed, the State, joined by the City of Grand Island, Nebraska, filed another action in the same district court. This time, plaintiffs dropped the references to the Lead and Copper Rule and simply alleged that unspecified provisions of the SDWA "as applied in certain circumstances" exceed Congress's powers under the Commerce Clause, and violate the Tenth Amendment and the non-delegation doctrine. C.A. App. 1-2 (Compl. ¶ 1). The complaint characterized the lawsuit as an "as applied" challenge, focusing on the application of the SDWA to two public water facilities in Nebraska, the Lincoln Regional Facility and the water system of the City of Grand Island. See *id.* at 3-4 (Compl. ¶¶ 15, 16, 18). Plaintiffs sought a declaratory judgment invalidat-

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[2] As discussed below, *Missouri* and *Virginia* involved actions brought by States challenging, *inter alia*, the constitutionality of the CAA under the Tenth Amendment. Both actions were filed by States in federal district court; the Eighth Circuit in *Missouri*, 109 F.3d at 441-442, and the Fourth Circuit in *Virginia*, 74 F.3d at 523-525, held that the district courts lacked jurisdiction under the judicial review provision of the CAA, 42 U.S.C. 7607(b)(1), which—like 42 U.S.C. 300j-7 (1994 & Supp. IV 1998)—establishes exclusive jurisdiction for challenging the administration of the Act in the courts of appeals. In so holding, the *Missouri* and *Virginia* courts specifically rejected the argument that constitutional challenges to the statute itself "should be, or even can be, separated from a challenge to final EPA action under the CAA." 109 F.3d at 442; see 74 F.3d at 523.

ing "the provisions of the [SDWA] as applied to regulate the water supply systems at the Lincoln Regional Center and the City of Grand Island." *Id.* at 4. The United States moved to dismiss, arguing that, as in the case of *Nebraska I*, the district court lacked jurisdiction under 42 U.S.C. 300j-7(a) (1994 & Supp. IV 1998).

In April 2000, the district court dismissed the action "on the basis of SDWA § 300j-7." Pet. App. 9. As the court explained, "[s]tripping the complaint of references to the EPA's implementing regulations does not change the result" in *Nebraska I*. *Ibid.*

> A plaintiff bringing an "as-applied" challenge contends that the statute would be unconstitutional under the circumstances in which the plaintiff has acted or proposed to act. Because the SDWA is not self-implementing, Plaintiffs' "as-applied" challenge necessarily implicates the EPA regulations or other final agency action. Plaintiffs cannot challenge only the constitutionality of the statutory scheme. *See Missouri v. United States*, 109 F.3d 440, 441-42 (8th Cir. 1997); *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996).

Id. at 9-10 (citation omitted).

The State appealed and the Eighth Circuit unanimously affirmed (Pet. App. 1-7). The court of appeals rejected the State's argument "that it is only attacking the Act and is not attacking a 'final Agency action' under § 300j-7," *id.* at 5, explaining:

> As in *Virginia* and *Missouri*, Nebraska's suit challenging the constitutionality of the Act is not independent of the EPA's implementing regulations. In *Nebraska I*, Nebraska challenged the Lead and Copper Rule. After the district court dismissed

> *Nebraska I* for lack of jurisdiction, Nebraska filed suit again, only this time omitting references to the EPA's implementing regulations and instead casting its complaint as an "as-applied" challenge to the Act itself. However, the Act is not self-executing; rather, it is applied through EPA regulations. *See* 42 U.S.C. § 300g-1(b)(1)(A) (requiring the EPA to promulgate national public drinking water regulations). Therefore, Nebraska's challenge to the Act as applied to the public water facilities at the Lincoln Regional Center and the City of Grand Island necessarily implicates the EPA's regulations.

Id. at 6-7. Accordingly, the court of appeals held that "§ 300j-7 required Nebraska to bring its suit in the United States Court of Appeals for the D.C. Circuit." *Id.* at 7.

ARGUMENT

The court of appeals' decision that 42 U.S.C. 300j-7 (1994 & Supp. IV 1998) precludes the filing of this "as applied" action in district court is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. As this Court has recognized, "[j]udicial review provisions * * * are jurisdictional in nature and must be construed with strict fidelity to their terms." *Stone* v. *INS*, 514 U.S. 386, 405 (1995). "[T]he 45-day time limit of section 300j-7(a), like those found in similar environmental statutes, defines the duration of this court's jurisdiction." *Western Neb. Res. Council* v. *EPA*, 793 F.2d 194, 198 (8th Cir. 1986). The provision "brings finality to the administrative process and reflects 'a deliberate congressional choice to impose statutory finality on agency [action], a choice we may not second-guess.'" *Ibid.* (quoting *Eagle-Picher Indus.*

v. *EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985) (court's alteration)). Accordingly, courts have consistently rejected litigants' attempts to avoid the forum and timing limitations of Section 300j-7, as well as those established by analogous provisions of other environmental statutes. See, *e.g.*, *Missouri* v. *United States*, 109 F.3d 440 (8th Cir. 1997); *Virginia* v. *United States*, 74 F.3d 517 (4th Cir. 1996); *Halogenated Solvents Indus. Alliance* v. *Thomas*, 783 F.2d 1262 (5th Cir. 1986); see also *Western Neb. Res. Council*, 793 F.2d at 198 (citing cases).

The court of appeals correctly construed Section 300j-7 as requiring that actions challenging the administration of the SDWA must be brought in the appropriate court of appeals, and rejected the State's effort to circumvent that requirement by omitting reference in this "as applied" case to the regulations that the State challenged in *Nebraska I*. As the court explained, because the SDWA is not self-executing, the Act affects particular public water systems only by virtue of EPA's implementing regulations and enforcement actions. Pet App. 7. Thus, the State's "as applied" challenge to the SDWA necessarily implicates EPA's regulations or actions, and therefore is subject to exclusive court of appeals review pursuant to Section 300j-7. *Ibid.*

Contrary to petitioner's suggestion (Pet. 7), the court of appeals did not hold that *any* action brought in district court "to consider the constitutionality" of the SDWA would necessarily be barred by Section 300j-7. Rather, the court held that the "as applied" challenge brought by petitioner in this case is not independent of EPA's implementing regulations and enforcement actions, and therefore is precluded by Section 300j-7. See Pet. App. 7 ("Nebraska's challenge to the Act as applied to the public water facilities at the Lincoln

Regional Center and the City of Grand Island necessarily implicates the EPA's regulations."). That conclusion is bolstered by the procedural history of this case: this action followed shortly on the heels of the dismissal of *Nebraska I*, which focused expressly on EPA's Lead and Copper Rule and raised essentially the same constitutional claims that petitioner seeks to litigate in district court here.[3]

2. Petitioner does not allege any circuit conflict warranting certiorari. Indeed, the court of appeals' decision in this case is in line with the court's prior decision in *Missouri* v. *United States*, *supra*, and with the Fourth Circuit's decision in *Virginia* v. *United States*, *supra*. Those cases dealt with attempts similar to that of Nebraska in this case to circumvent the judicial review provision of Section 307(b)(1) of the CAA, 42 U.S.C. 7607(b)(1), which petitioner acknowledges (Pet. 7) is "substantially similar to 42 U.S.C. § 300j-7."

Section 307(b)(1) of the CAA—the model for Section 300j-7(a) of the SDWA—provides that petitions for review of regulations issued under the CAA must be filed in the District of Columbia Circuit, and that challenges to other final agency action under the CAA must be filed with the regional court of appeals. In both *Missouri* and *Virginia*, States brought suit in district court challenging the administration of the CAA as well as the constitutionality of the statute itself, and argued that the jurisdictional command of Section 307(b)(1) does not extend to the constitutional claims. In both

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[3] The telling procedural history of this case makes it a particularly poor vehicle to consider whether, or in what circumstances, a district court may have jurisdiction to entertain an action brought by a State challenging the constitutionality of the SDWA.

cases, the courts of appeals rejected that contention, explaining that the underlying actions were prompted by agency action, and that "[t]here is simply no reason the constitutional challenges of this lawsuit should be, or even can be, separated from a challenge to final EPA action under the CAA." *Missouri*, 109 F.3d at 442; see *Virginia*, 74 F.3d at 522-523 (State may not "circumvent direct review in the circuit court under CAA § 307(b)(1)" simply "by framing its complaint as a constitutional challenge to the CAA"; "CAA § 307(b)(1) channels review of final EPA action exclusively to the courts of appeals, regardless of how the grounds for review are framed."). As the Eighth Circuit held below, the same conclusion follows under Section 300j-7 of the SDWA with respect to the "as applied" action brought by the State in this case. See Pet. App. 5-6; *id.* at 9-10.

3. The Eighth Circuit's decision in this case also comports with this Court's decision in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), which the courts of appeals relied upon in *Missouri*, 109 F.3d at 441, and *Virginia*, 74 F.3d at 523.

In *Thunder Basin*, this Court rejected the proposition that a litigant may bypass a statutory scheme for judicial review merely by asserting constitutional claims. There, the Court held that the administrative and judicial review provisions of the Federal Mine Safety and Health Act of 1977 (MSHA), 30 U.S.C. 815, 816, 823, precluded a pre-enforcement constitutional challenge in district court to an order of the Mine Safety and Health Administration. Although the statute was "facially silent" with respect to pre-enforcement claims, the Court held that an intent to preclude pre-enforcement review was "fairly discernible" from the "detailed" statutory scheme that provided for

internal administrative review, followed by judicial review of the final agency decision in the court of appeals. 510 U.S. at 207-208. In so holding, the Court noted that two provisions of the MSHA expressly provided for district court review in specified circumstances. *Id.* at 209.

Congress's intent to preclude district court jurisdiction over actions challenging the administration of the SDWA is just as readily, if not more readily, discernible from the text of the SDWA. Section 300j-7 evidences a clear intent to channel actions for judicial review of most EPA actions implementing the Act into the circuit courts, rather than the district courts. Section 300j-7(a) provides that petitions challenging EPA's implementing regulations may be filed "only" in the District of Columbia Circuit, and that petitions challenging "any other action of the Administrator" may be filed in the regional circuit court. The proviso expressly bars adjudication in any other proceeding of claims "with respect to which review could have been obtained under this subsection," *i.e.*, by means of a petition for review in the court of appeals. 42 U.S.C. 300j-7(a) (1994 & Supp. IV 1998). At the same time, Section 300j-7(b) expressly confers district court jurisdiction over a limited class of cases (*e.g.*, challenges to the grant or refusal to grant a variance), which reinforces the conclusion that Congress intended the courts of appeals to have exclusive jurisdiction over claims not specified in Section 300j-7(b). See *Thunder Basin*, 510 U.S. at 209.

4. Contrary to petitioner's suggestion (Pet. 5), this case does not concern "[t]he ability of a state to access the federal courts to resolve a dispute with the government of the United States over an issue of federal constitutional law." Nebraska has not been denied

access to the federal courts to present its constitutional challenges to the SDWA as applied to the public water systems at issue in this case. It is undisputed that petitioner could have obtained review of its constitutional claims by petitioning the District of Columbia Circuit within 45 days of the promulgation of the regulation that it expressly challenged in *Nebraska I*, and whose application it effectively seeks to challenge in this case. See *Western Neb. Res. Council*, 793 F.2d at 198 ("Without question, the 45-day limitation of section 300j-7(a) provided [plaintiff] with a meaningful opportunity to seek review of the agency's action—due process requires no more."); *Virginia*, 74 F.3d at 523, 525. Petitioner's failure to avail itself of that forum for its "as applied" claims does not entitle it to bypass the scheme carefully established by Section 300j-7(a) for judicial review of the administration of the SDWA.[4]

[4] Petitioner states (Pet. 6) that, "[i]f the only way Nebraska can directly challenge the constitutionality of the Safe Drinking Water Act is an original action in the Supreme Court of the United States, then we are prepared to do so." Petitioner does not, however, point to any applicable waiver of the sovereign immunity of the United States from such a suit. In any event, the only question presented here is whether Section 300j-7 of the SDWA precludes the litigation of this action in district court. Pet. i. For the reasons we have explained, that question does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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