No.

In the Supreme Court of the United States

UNITED STATES SUGAR CORPORATION,

Petitioner,

v.

FRIENDS OF THE EVERGLADES, *ET AL.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the courts of appeals have exclusive original jurisdiction under 33 U.S.C. § 1369(b)(1) over suits challenging the validity of EPA's general permit regulations implementing the Clean Water Act, including the Water Transfers Rule, 40 C.F.R. § 122.3(i).

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner here, intervenor-respondent below, is United States Sugar Corporation.

United States Sugar Corporation has no parent company, and no publicly held corporation owns ten percent or more of its stock.

Additional respondents below are the U.S. Environmental Protection Agency and its Administrator, and the South Florida Water Management District and its Executive Director, Melissa L. Meeker.

Respondents here, petitioners below, are Friends of the Everglades; the Miccosukee Tribe of Indians of Florida; the Florida Wildlife Federation, Inc.; the Sierra Club, Inc.; the Environmental Confederation of Southwest Florida; the States of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, and Washington; and the Province of Manitoba, Canada.

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PETITION FOR A WRIT OF CERTIORARI

United States Sugar Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 699 F.3d 1280.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2012. Petitioner filed a timely petition for rehearing en banc, which the court of appeals denied on February 28, 2013. App., *infra*, 17a-20a. On May 21, 2013, Justice Thomas extended the time for filing a petition for certiorari to June 28, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced at App., *infra*, 21a-23a.

STATEMENT

A. The statutory context

1. Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251-1387, to respond to the complex problem of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Clean Water Act (CWA) addresses the problem of water pollution, in part, by prohibiting "the discharge of any pollutant" (*id.* § 1311(a)) without first obtaining a permit under the National Pollution Discharge Elimination Sys-

tem (NPDES) permit program. *Id.* § 1342(a). The Act defines the term "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). "Navigable waters," in turn, are defined to mean "the waters of the United States." *Id.* § 1362(7).

Under the NPDES permit program, EPA "may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants" so long as the discharge satisfies specified requirements. 33 U.S.C. § 1342(a)(1). NPDES permits typically impose "effluent limitations" on point source discharges by establishing permissible rates, concentrations, or quantities of specified constituents at the points where the discharge streams enter the waters of the United States. See *id.* § 1342(a); 40 C.F.R. §§ 122, 125; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000).

The CWA does not impose permit requirements on all discharges of water pollution. For example, permits are not required for discharges from non-point sources such as diffuse rainwater runoff. See generally *Decker* v. *Nw. Envt'l Defense Ctr.*, 133 S. Ct. 1326, 1336-1337 (2013). Congress left the States responsible for establishing water quality standards and developing programs and best management practices to control sources of water pollution that are not subject to NPDES permits. 33 U.S.C. §§ 1288, 1313(a), (d), 1329.

2. Congress created a two-pronged jurisdictional scheme for challenging and enforcing EPA actions under the Clean Water Act. In the first category of cases, Congress conferred original jurisdiction on the *federal courts of appeals* to review challenges to EPA

actions, including actions "in approving or promulgating any effluent limitation or other limitation under section 1311" and actions "in issuing or denying any permit under section 1342." 33 U.S.C. § 1369(b)-(1)(E), (F).

Congress designed Section 1369(b) to "establish a clear and orderly process for judicial review" of EPA's decisions implementing the Clean Water Act. H.R. Rep. No. 92-911, at 136 (1972). Except in circumstances not relevant here, petitions for review in the courts of appeals must be filed against EPA within 120 days. 33 U.S.C. § 1369(b)(1). Congress also provided a mechanism to consolidate all petitions for review challenging the same EPA action in a single circuit (28 U.S.C. § 2112(a)), ensuring that regulators and the regulated alike have the benefit of a single and authoritative determination of the validity of EPA's action. These procedures thus serve "the twin congressional purposes of insuring that the substantive provisions" of EPA's regulations and orders are "uniformly applied and interpreted" and "that the circumstances of [their] adoption [are] quickly reviewed by a single court." *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978).

In the second category of cases, Congress conferred on the *district courts* jurisdiction over citizen suits seeking "to enforce an obligation imposed by the Act or [EPA's implementing] regulations" upon either EPA or a regulated entity. *Decker*, 133 S. Ct. at 1334. See 33 U.S.C. § 1365(a)(1) (district courts have jurisdiction to hear complaints alleging a "violation of an effluent standard or limitation"). Citizen suits are subject to generous six-year time limitations (28 U.S.C. § 2401(a)), may be prosecuted against EPA *or* any private party alleged to violate

the Act or its regulations (33 U.S.C. § 1365(a)), and are not subject to mandatory consolidation when multiple suits challenge the same conduct.

Not all challenges may be brought as citizen enforcement actions. Any EPA rule or regulation "with respect to which review could have been obtained" in a court of appeals under Section 1369(b)(1) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2). Thus when "review is available" in a court of appeals under Section 1369(b)(1), citizen enforcement actions are foreclosed, and "an application for review * * * lodged in the court of appeals within 120 days of the Administrator's action" is "the exclusive means of challenging [EPA] actions covered by the statute." *Decker*, 133 S. Ct. at 1334.

B. The Water Transfers Rule and *Friends I*

1. In June 2008, EPA finalized and promulgated the Water Transfers Rule (App., *infra*, 23a), the subject of the underlying litigation in this case. The Water Transfers Rule provides that "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use," does not require a permit. 40 C.F.R. § 122.3(i); 73 Fed. Reg. 33,697 (2008). The Rule reflects EPA's expert judgment that "transferring pollutants *between* navigable waters is not an '*addition* * * * *to* navigable waters'" within the meaning of 33 U.S.C. § 1362(12)(A). 73 Fed. Reg. 33,699 (emphasis added). Consistent with that rationale, EPA has said that the Rule that no permit is required does not apply to discharges containing "pollutants introduced by the

water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i).[1]

In the preamble to the final Water Transfers Rule, EPA expressed its view that "[u]nder section [1369(b)(1)], judicial review of the Administrator's action" in promulgating the rule "can only be had by filing a petition for review in the United States Court of Appeals within 120 days after the decision is * * * issued." 73 Fed. Reg. at 33,697. Shortly thereafter, ten petitions for review were filed in various courts of appeals throughout the country. Pursuant to 28 U.S.C. § 2112(a)(3), the petitions were transferred to a single, randomly selected court of appeals—here, the Eleventh Circuit. See EPA C.A. Br., Addendum tab C. The Eleventh Circuit consolidated the petitions and stayed further proceedings in this case pending its decision in *Friends of the Everglades* v. *S.*

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[1] EPA has never required NPDES permits for water transfers. In an earlier suit challenging water transfers carried out by the South Florida Water Management District without an NPDES permit, the Eleventh Circuit held—before EPA adopted any rule on the subject—that the CWA requires a permit. *Miccosukee Tribe* v. *S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002). This Court, in vacating and remanding the Eleventh Circuit's decision, declined to address the government's contention that "permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable water body" because all the navigable waters of the United States "should be viewed unitarily for purposes of NPDES permitting requirements." *S. Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe*, 541 U.S. 95, 106 (2004). In sidestepping the United States' "unitary waters" interpretation, the Court noted the lack of "any administrative documents in which EPA has espoused that position," and left that argument "open to the parties on remand." *Id.* at 107, 109. EPA subsequently issued the Water Transfers Rule, confirming its long held position.

Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009) (*Friends I*).[2]

2. *Friends I* was a Section 1365(a) citizen enforcement action—filed in and decided by the district court before EPA's promulgation of the Water Transfers Rule—in which plaintiffs sought to enforce an interpretation of the CWA as requiring permits for water transfers. See *Friends of the Everglades* v. *S. Fla. Water Mgmt. Dist.*, 2006 WL 3635465 (S.D. Fla. 2006). The district court in *Friends I* agreed with the plaintiffs, ruling that the CWA requires NPDES permits for transfers of water from one body of navigable waters to another. *Id.* at *48.

Petitioner here, together with EPA (which intervened in the litigation), appealed to the Eleventh Circuit, which reversed in June 2009. In light of EPA's intervening promulgation of the Water Transfers Rule in June 2008, the Court applied *Chevron* deference, holding that EPA's interpretation of the CWA as *not* requiring permits for most water transfers was rational. *Friends I*, 570 F.3d at 1218-20. The Eleventh Circuit denied rehearing en banc (605 F.3d 962 (2010)), and this Court denied petitions for certiorari. 131 S. Ct. 643, 645 (2010).

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[2] Many of the petitioners also sought judicial review of the Water Transfers Rule in citizen enforcement actions filed in district courts in Florida and New York. Those cases were stayed pending resolution of these petitions for review in the court of appeals. See *Catskill Mountains Ch. of Trout Unlimited, Inc.* v. *EPA*, 630 F. Supp. 2d 295, 304 n.6, 307 n.8, 308 (S.D.N.Y. 2009). That stay has now been lifted, the Florida action has been voluntarily dismissed, and the challenge to the rule is proceeding in the Southern District of New York.

C. The lower court's decision dismissing the petitions for review for lack of jurisdiction

1. After *Friends I* was finally resolved, the stay of proceedings in the present litigation was lifted. Rather than proceeding with their petitions for review (the outcomes of which were now preordained by *Friends I*), respondents here argued that the Eleventh Circuit lacked original jurisdiction under Section 1369(b)(1) to hear their challenge to the Water Transfers Rule—an argument that, if accepted, would permit them to pursue citizen enforcement actions in other jurisdictions not governed by *Friends I*. EPA and petitioner here argued that the Eleventh Circuit had jurisdiction under 33 U.S.C. § 1369(b)(1)-(E) and (F) and that the petitions for review should be denied on the merits.

2. The Eleventh Circuit dismissed the petitions for want of jurisdiction. App., *infra*, 1a-16a. Turning first to Section 1369(b)(1)(E), the court reasoned (*id.* at 10a) that "[b]ecause the water-transfer rule is neither an effluent limitation nor a limitation promulgated under section 1311, 1312, 1316, or 1345, section 1369(b)(1)(E) cannot be the basis for" jurisdiction in the court of appeals. In the Eleventh Circuit's view (*ibid.*), a "limitation" is a "restriction," and the Water Transfers Rule does not impose any restrictions. The court acknowledged that the Fourth and District of Columbia Circuits have held that the courts of appeals have original jurisdiction under Section 1369(b)(1)(E) "to review [certain] consolidated permit regulations" when those regulations function as "a limitation on * * * permit issuers." *Id.* at 11a-12a (quoting *Nat. Res. Defense Council, Inc.* v. *EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982), and citing

Va. Elec. & Power Co. v. *Costle*, 566 F.2d 446, 450 (4th Cir. 1977)). But the court nevertheless found those cases distinguishable. *Id.* at 12a.

Turning next to Section 1369(b)(1)(F), the Eleventh Circuit concluded (App., *infra*, 12a) that the Water Transfers Rule "neither issues nor denies a permit." Although recognizing that this Court has held that clause (F) covers regulations that are "functionally similar to the denial or issuance of a permit" (*id.* at 13a (citing *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196 (1980) (per curiam)), the court of appeals concluded that "a permanent exemption" from the NPDES permit requirement is "meaningfully different" from the grant of a blanket permit. App., *infra*, 13a. The court accordingly dismissed the petitions for review for lack of jurisdiction. *Id.* at 16a.

REASONS FOR GRANTING THE PETITION

This case presents a question of exceptional importance to the orderly and efficient administration of the Clean Water Act and its implementing regulations. Instead of requiring all challenges to EPA regulations concerning the NPDES permit program to be filed in circuit courts within 120 days of the regulations' issuance, as Congress intended, the Eleventh Circuit's decision allows rule challenges to be litigated in any district court at any time over a six year period under the citizen-suit provision. The very troubling consequences of that holding will be far-reaching. If allowed to stand, it would impose enormous new burdens on the courts, foment uncertainty among regulators and the regulated alike, make compliance with EPA's rules more costly and unpredictable, invite forum shopping by plaintiffs, and turn a common-sense judicial review scheme upside down. Further review by this Court is imperative.

A. The decision below creates a conflict of authority over the question presented.

The Eleventh Circuit acknowledged that its holding directly conflicts with a decision of the Sixth Circuit. App., *infra*, 14a. In fact, the division of authority is deeper, because the holding below also conflicts with decisions of the Fourth, D.C., and Ninth Circuits.

1. The Eleventh Circuit's ruling creates a recognized conflict (App., *infra*, 14a) with the Sixth Circuit's holding in *National Cotton Council* v. *EPA*, 553 F.3d 927 (6th Cir. 2009). There, nine parties filed petitions for review in courts of appeals throughout the Nation, all challenging an NPDES permitting regulation providing "that pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act are exempt from the Clean Water Act's permitting requirements." *Id.* at 929 (parenthetical omitted). The petitions were transferred to and consolidated by the Sixth Circuit.

Preferring to challenge EPA's pesticide rule in district court, several of the petitioners "contend[ed] that th[e] dispute should be dismissed for lack of subject matter jurisdiction, arguing that original review of the [pesticide rule] by the courts of appeals is not covered by the grant of original jurisdiction set forth in the Clean Water Act, 33 U.S.C. § 1369(b)(1)." *Nat'l Cotton Council*, 553 F.3d at 932-933. The Sixth Circuit rejected that argument. It concluded that Section 1369(b)(1)(F) confers original jurisdiction on the courts of appeals to review not just "the issuance or denial of a particular permit," but also "'regulations governing the issuance of permits'" and "'rules that regulate the underlying permit procedures.'" *Id.* at 933 (quoting *Am. Mining Cong.* v. *EPA*, 965 F.2d

759, 763 (9th Cir. 1992), and *NRDC* v. *EPA*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992) (hereinafter "*NRDC CA9 1992*")). Because the regulation at issue "regulate[d] [NPDES] permitting procedures," the court "conclude[d] that jurisdiction [was] proper under § 1369(b)(1)(F)." *Ibid.*

The Eleventh Circuit acknowledged the Sixth Circuit's contrary opinion in *National Cotton Council* but dismissed it as "provid[ing] no analysis of the provision" and "cit[ing] two decisions of the Ninth Circuit that the Ninth Circuit ha[s] distinguished" in a more recent case. App., *infra*, 14a. The Eleventh Circuit thus came to the opposite conclusion from the Sixth Circuit: the courts of appeals "lack original jurisdiction to review a permanent exemption from the permit program." *Ibid.*

2. The holding of the court below is also incompatible with holdings of the Fourth, D.C., and Ninth Circuits. In *Virginia Electric & Power* v. *Costle*, 566 F.2d 446 (4th Cir. 1977), the Fourth Circuit held that it had original jurisdiction over a challenge to a general permit regulation requiring permit issuers to consider certain evidence before rendering a decision. *Id.* at 448. In affirming its jurisdiction, the Fourth Circuit explained that an NPDES regulation need not set "specific numerical limitations or standards" in order to qualify as an "other limitation" within the meaning of Section 1369(b)(1)(E). *Id.* at 450. For example, a regulation that "is mandatory in terms that it requires certain information to be considered" by permit issuers is functionally "a limitation on * * * permit issuers." *Ibid.* Indeed, in the Fourth Circuit's view, *any* regulation that is "closely related to" the setting of "effluent limitations" ordinarily will qualify as an "other limitation." *Ibid.* A contrary holding,

that court explained, would be inconsistent with the CWA's general "jurisdictional scheme," which "leaves review of standards of nationwide applicability to the courts of appeals" to ensure "nationally uniform standards." *Id.* at 451.

The D.C. Circuit reached a similar conclusion in *NRDC* v. *EPA*, 656 F.2d 768 (D.C. Cir. 1981) (hereinafter "*NRDC CADC 1981*"). That case involved several petitions for review challenging EPA regulations that set "criteria and standards to be applied" to "requests" for variances from certain sewage treatment requirements. *Id.* at 774. There, as here, petitioners argued that the courts of appeals lacked "jurisdiction to review the challenged regulations because the regulations are not 'effluent limitations or other limitations'" within the meaning of Section 1369(b)(1)(E). *Id.* at 775.

Like the Fourth Circuit, the D.C. Circuit rejected that argument. In the D.C. Circuit's view, the permit standards set by regulation in that case "restrict the discharge of sewage by limiting the availability of a variance to a class of applicants which does not include all coastal municipalities." *NRDC CADC 1981*, 656 F.2d at 775. The court thus concluded that it had exclusive original jurisdiction under Section 1369(b)(1) because "the regulations are 'effluent limitations'" subject to review under clause (E). *Ibid.*

Expounding that holding in a subsequent case, then-Judge Ginsburg explained for the D.C. Circuit that Section 1369(b)(1)(E) confers jurisdiction on the courts of appeals to hear challenges to regulations that "do not set any numerical limitations on pollutant discharge" but merely establish "procedures for issuing or denying NPDES permits." *NRDC* v. *EPA*, 673 F.2d 400, 402 (D.C. Cir. 1982) (hereinafter

"*NRDC CADC 1982*"). Adopting a practical interpretation of Section 1369(b)(1) to cover "broad, policy-oriented rules" that "guide" the permit process, Judge Ginsburg reasoned, "best serve[s]" the "important goal" of ensuring "[n]ational uniformity" with respect to "broad regulations." *Id*. at 405 & n.15 (citing *Costle*, 566 F.2d at 450-451).

The Ninth Circuit reached the same result in *NRDC* v. *EPA*, 526 F.3d 591 (9th Cir. 2008) (hereinafter "*NRDC CA9 2008*"). In that case, environmental advocacy groups petitioned the Ninth Circuit for review of an EPA regulation that "exempt[ed] from the permitting requirements of the CWA" certain gas- and oil-related discharges of sediment. *Id*. at 593-594. Consistent with the holdings of the Fourth and D.C. Circuits, the Ninth Circuit concluded succinctly that it "ha[d] jurisdiction to review th[e] petition pursuant to the CWA, 33 U.S.C. § 1369(b)(1)(F)." *Id*. at 601. In support of that conclusion, the court cited *NRDC CA9 1992*, where it previously had held that "33 U.S.C. § 1369(b)(1)(F) allows the court to review the issuance or denial of a permit" as well as any "rules that regulate the underlying permit procedures." 966 F.2d at 1296-1297.[3]

3. The Eleventh Circuit's decision below cannot be squared with the holdings of the Fourth, Sixth, Ninth, or D.C. Circuits. If the petitions for review underlying this litigation had been consolidated in any one of those circuits, they would have been re-

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[3] The Ninth Circuit arguably reached a contrary conclusion in *Northwest Environmental Advocates* v. *EPA*, 537 F.3d 1006 (9th Cir. 2008), which the Eleventh Circuit found "instructive." App., *infra*, 11a. Evidence of confusion not only among, but within, the courts of appeals demonstrates even more clearly the need for this Court's intervention.

solved on the merits, because the Water Transfers Rule is a "regulatio[n] governing the issuance of permits" (*Nat'l Cotton Council*, 553 F.3d at 933); "requires certain information to be considered" by, and therefore is a "limitation" on, "permit issuers" (*Costle*, 566 F.2d at 450); "establish[es] criteria and standards to be applied by EPA" to permit applications (*NRDC CADC 1982*, 673 F.2d at 403); and is a "permitting requirement exemption for [certain] discharges." *NRDC CA9 2008*, 526 F.3d at 594.[4]

B. The question presented is of great importance.

Although any division of authority among the courts of appeals on a question of federal law is cause for concern, the division here is especially problematic. Congress's express purpose in providing a special procedure for rule challenges in the courts of appeals was to ensure that regulated parties received a *quick* and *singularly authoritative* judicial ruling, rather than remaining subject to uncertainty as long limitations clocks and protracted litigation persist in courts throughout the country. As a result of the conflict in this case, however, there is a risk not only that courts in different circuits will subject the same challenges to the very different procedural standards applicable to Section 1365(a) and 1369(b)(1) suits, but that those courts will reach varying decisions on the merits of the underlying challenges, piling confusion

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[4] The Second and Fifth Circuits also have exercised original jurisdiction over challenges to NPDES permitting regulations—including those that specify which discharges are exempt from permitting—but without analysis of the jurisdiction question. See *Nat'l Pork Producers Council* v. *EPA*, 635 F.3d 738 (5th Cir. 2011); *Waterkeeper Alliance, Inc.* v. *EPA*, 399 F.3d 486, 495-498, 504-506 (2d Cir. 2005).

on top of confusion. As then-Judge Ginsburg observed in *NRDC CADC 1982*, under the approach adopted by the Eleventh Circuit in this case, "there [is] a real possibility" that numerous suits will be filed, and "several different district courts [will] proceed to review the [same regulation], with the attendant risk of inconsistent decisions initially and on appeal." 673 F.2d at 405 n.15.

That possibility is no mere conjecture. The Second and Eleventh Circuits already have reached inconsistent decisions concerning the validity of the theory underlying the Water Transfers Rule. Compare, *e.g.*, *Friends I*, 570 F.3d at 1228 (upholding Water Transfers Rule), with *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) ("the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit"). And the prospect of conflict and uncertainty is all the more likely given that citizen suit plaintiffs often do not name EPA as a party. Thus EPA's ability to defend its rules could be compromised, and the impact of any decision on the agency would be uncertain. In *Friends I*, for example, EPA was not named as a defendant (though it later intervened).

The adverse consequences, if the decision below were allowed to stand, would be serious. Treating rule challenges as Section 1365(a) enforcement actions would impose massive new burdens on the courts, which—rather than being able to dispose of *all* challenges to an EPA regulation in a single proceeding before a single court of appeals—would instead face a multiplicity of suits throughout the Nation, all challenging the same regulation. That bur-

den will be magnified, in turn, by the substantially longer statute of limitations that governs citizen suits, giving plaintiffs an enormously lengthy six year window to bring suit.

The Eleventh Circuit's approach also invites forum shopping. This case demonstrates the point. Petitioners below, dissatisfied with the Eleventh Circuit's decision on the merits in *Friends I*, undoubtedly would prefer to proceed with their enforcement action in the Southern District of New York (see *supra* at 5, n.1), given the Second Circuit's more plaintiff-favorable ruling in *Catskill Mountains*. Yet in many other similar cases environmental groups have argued, successfully, that rule challenges are governed by Section 1369(b)(1). *E.g.*, *NRDC CADC 1982*. The result would be inequitable administration of the Clean Water Act and its implementing regulations.

The Eleventh Circuit's ruling also undercuts Congress's goal of promptly resolving Clean Water Act regulatory challenges. As we have said, under the lower court's holding, parties seeking to contest a general NPDES exemption regulation will have *six years* (28 U.S.C. § 2401(a)) to file citizen enforcement actions in the district court in which they reside (28 U.S.C. § 1391(e)), rather than 120 days. Thus, for every EPA regulation clarifying an exception to the NPDES permit requirement, there will be a *minimum* of six years of uncertainty concerning the regulation's validity. And that is only if no challenge is filed; in those cases where citizen suits are commenced, litigation may drag on for years or decades longer. See *Crown Simpson Pulp*, 445 U.S. at 197 ("the additional level of judicial review" entailed by actions in the district courts "would likely cause delays in resolving disputes under the Act").

The costs associated with such delay and uncertainty are staggering. Compliance with *settled* EPA rules "can entail enormous up-front investments of money, effort, and advance planning." Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2204-2205 (2011). Coping with indefinite *uncertainty* concerning the enforceability of those rules would entail substantially greater cost. It therefore goes without saying that "[b]oth the agency and the private sector have [powerful] interests in getting the legality of these rules settled one way or the other relatively quickly." *Ibid.* The Eleventh Circuit's ruling turns that objective on its head.

Finally, the current disarray among some circuits—and indecision on the issue among others—means that wasteful litigation about where a challenge to CWA rules belongs, before a court even gets to the merits, will continue. The simple question of which court has jurisdiction over EPA rules that say a defined activity does not require an NPDES permit deserves an authoritative, nationwide answer.

In short, the panel's ruling, left undisturbed, will result in decades of uncertainty over the legitimacy of any Clean Water Act regulation defining when NPDES permits are and are not required; will result in wasteful litigation over where jurisdiction for a rule challenge lies; and will lead to inconsistent rulings that will create confusion and encourage forum shopping. The result with be regulatory disarray that will come at enormous cost to both the courts, EPA, and regulated industry. This Court's immediate review is warranted.

C. The decision below is wrong.

The Eleventh Circuit fundamentally misinterpreted the CWA's judicial review provisions. According to the practical approach mandated by this Court's precedents—and consistent with the broader statutory scheme and legislative history—the Eleventh Circuit had exclusive original jurisdiction to consider the petitions for review.

1. "The preeminent canon of statutory interpretation" is that "'the legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd.* v. *United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992)). The Court must therefore "begi[n] with the statutory text." *Ibid.*

a. By its plain terms, Section 1369(b)(1)(F) confers original jurisdiction on the courts of appeals to hear challenges to any EPA action "in issuing or denying any permit" under the NPDES permit program. As then-Judge Ginsburg observed, this Court has admonished the lower courts to give that language "a practical rather than a cramped construction." *NRDC CADC 1982*, 673 F.2d at 405 (citing *Crown Simpson Pulp*, 445 U.S. 193). Consistent with that instruction, this Court itself has read clause (F) to cover not just *literal* permit issuances and denials, but any EPA action that has "the precise effect" of, or is otherwise "functionally similar" to, the issuance or denial of an NPDES permit. *Crown Simpson Pulp*, 445 U.S. at 196. That alone is sufficient to resolve the question presented. There is no disputing that the Water Transfers Rule is the functional equivalent of a blanket permit for discharges resulting from "an activity that conveys or connects waters of the United States without subjecting the transferred wa-

ter to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). For its part, the Eleventh Circuit concluded that "[t]he water-transfer rule neither issues nor denies a permit" and instead simply "exempts a category of activities from the requirements of a permit." App., *infra*, 12a. But that is exactly the kind of cramped and inflexible reading this Court forbade in *Crown Simpson Pulp*. The Eleventh Circuit accordingly erred in dismissing the petitions for review for lack of jurisdiction on that basis.

b. Original jurisdiction in the courts of appeals is also proper under clause (E), which covers EPA actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title." 33 U.S.C. § 1369(b)(1)(E). In distinguishing an "other limitation" from an "effluent limitation," Congress meant to confer jurisdiction on the courts of appeals to hear challenges to any *practical* limitations EPA may impose on, among others, "*permit issuers*." *NRDC CADC 1982*, 673 F.2d at 405 (emphasis added). That describes the Water Transfers Rule precisely: it is a limitation on the discretion of "permit issuers" (*ibid.*), who are prevented by its operation from imposing independent effluent limitations on transfers of water that satisfy the regulation's conditions.

The Eleventh Circuit ignored that rationale. It concluded that the Water Transfers Rule is not an "other limitation" because the Rule "imposes no restrictions on entities engaged in water transfers" but rather "exempts governments and private parties engaged in water transfers from the procedural and substantive requirements of the Administrator's permit program." App., *infra*, 10a.

That reasoning is both irrelevant and wrong. It is irrelevant because, as then-Judge Ginsburg explained, clause (E) applies to limitations that EPA places not just on regulated entities, but also on other entities affected by the CWA, including "permit issuers" (*NRDC CADC 1982*, 673 F.2d at 405)—and as we have just explained, the Rule *is* a limitation on permit issuers.

The Eleventh Circuit's reasoning is wrong because the Water Transfers Rule exempts only *some* water transfers from the permit requirement, while requiring a permit for others. The Rule does not apply when "pollutants [are] introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i). And the Rule requires a permit when the water being transferred is subject "to intervening industrial, municipal, or commercial use" during the course of the transfer and a discharge of pollutants occurs. *Ibid.* Accordingly, the rule very plainly is a *limitation* on what transfers may be made without a permit. The Eleventh Circuit simply ignored that crucial point.[5]

2. If there were any ambiguity concerning the scope of Section 1369(b)(1), it would be resolved by the structure and "design of the [CWA] as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291

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[5] The lower court also reasoned (App., *infra*, 10a-11a) that the Water Transfers Rule "was not promulgated under section 1311, 1312, 1316, or 1345," but instead under Section 1342. But Section 1311 makes "the discharge of any pollutant by any person" illegal "[e]xcept in compliance with," among other provisions, Section 1342. Section 1342, in turn, establishes the NPDES permit program. Any regulation promulgated under Section 1342's permit program is necessarily also promulgated under Section 1311's prohibition of discharges without a permit.

(1988). That is because a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1754 (2011) (quoting *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)).

a. Section 1369(b)(1) is one of two separate judicial review provisions under the CWA. Whereas petitions for review in the courts of appeals cover challenges to EPA's "broad, policy-oriented rules" (*NRDC CADC 1982*, 673 F.2d at 405), citizen enforcement complaints in the district courts cover, among other things, alleged "violation[s] of * * * effluent standard[s] or limitation[s]" and orders issued "with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). Given the different competencies of the courts of appeals and district courts, as well as the different procedural rules applicable to each, the CWA's division of labor between the two courts makes good sense.

As an initial matter, "the great advantage the district courts have over the courts of appeals" in most cases is "their ability to use extensive factfinding mechanisms." *NRDC CADC 1982*, 673 F.2d at 405 n.15. That advantage is put fully to use in citizen enforcement actions, which ordinarily require complex and "technical factfinding" to determine whether the defendants in such actions are (or are not) complying with the relevant effluent limitations, standards, or orders. *Ibid.* But the "extensive factfinding mechanisms" of the district courts are "*not* relevant" to challenges to EPA's "broad, policy-oriented rules." *Id.* at 405 & n.15 (emphasis added). In challenges to rules of national applicability, like the Water Transfers Rule, "the case for first-instance

judicial review in a court of appeals is stronger" because there is no "need to engage in technical factfinding when judicial review is concentrated on an agency record and policy determinations." *Ibid*.

What is more, petitions for review filed in the courts of appeals are subject to procedures designed to ensure prompt and uniform determinations of the legality of EPA's rules. As we have explained, they are governed by a 120-day statute of limitations (33 U.S.C. § 1369(b)(1)) and a compulsory procedure for consolidating all petitions for review challenging the same EPA action in a single circuit. 28 U.S.C. § 2112(a). Petitions for review also must be brought against EPA, ensuring the agency is present to defend its own actions. Litigating general rule challenges in the courts of appeals thus serves "the twin congressional purposes of insuring that the substantive provisions" of EPA's regulations and orders are "uniformly applied and interpreted" and "that the circumstances of [their] adoption [are] quickly reviewed by a single court." *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978). See also *NRDC CADC 1982*, 673 F.2d at 405 n.15 ("National uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals") (citing *Costle*, 566 F.2d at 451).

By contrast, citizen enforcement suits filed in the district courts under 33 U.S.C. § 1365(a) are not subject to any of the same procedural safeguards meant to ensure efficiency, uniformity, and predictability with respect to broad-based regulations. They are subject to a longer statute of limitations (28 U.S.C. § 2401(a)) and need not name EPA as a defendant. 33 U.S.C. § 1365(a)(1). And "[t]here is no analogous transfer provision for district courts." *NRDC CADC*

1982, 673 F.2d at 405 n.15. Of course, when it comes to citizen suits seeking to enforce EPA's case-specific "technical determinations," like the effluent limitations established by a particular permit—and not "broad, policy-oriented rules" with national application—trial-court rules more closely resembling the traditional rules of civil procedure are perfectly appropriate. *Id*. at 405.

b. The decision below makes nonsense of this sensible bifurcated scheme. If the lower court's holding survives, "one or more district courts might proceed to review" the validity of the Water Transfers Rule under Section 1365(a), "yet review of a permit [denied] under the [Rule] would take place directly in a court of appeals under section [1369](b)(1)(F)." *NRDC CADC 1982*, 673 F.2d at 405. 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." *E.I. Du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977).

The concern is very real. It is easy to imagine, for example, the situation in which (1) an entity transfers water in compliance with the Water Transfers Rule and applies for a protective NPDES permit; (2) EPA or a state permitting agency denies the request as unnecessary under the Rule; and (3) an environmental group files a petition for review arguing that the Rule is unlawful. Although original jurisdiction would lie in *that* case in the courts of appeals because it involves a permit denial, a direct challenge to the Rule would (according to the Eleventh Circuit) have to be litigated in a district court. NPDES regu-

lations accordingly "would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of" whether or not the challenge were tied to a particular permit issuance or denial, resulting in a "irrational bifurcated system." *Crown Simpson Pulp*, 445 U.S. at 196-197. The interplay between Sections 1369(b)(1) and 1365(a) thus counsels strongly against the Eleventh Circuit's decision below and in favor of the approach taken by the Fourth, Sixth, Ninth, and D.C. Circuits.

It is fundamental, as Justice Cardozo once put it, that "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting). In holding that it lacked jurisdiction over the petitions for review in this case, the Eleventh Circuit not only ignored the CWA's plain text and this Court's precedents; it also undeniably lost sight of the "all the parts [of the CWA] together and in their relation to the end in view." *Ibid.*

3. The decision below is wrong for one final reason: Congress ratified the Fourth and D.C. Circuits' contrary construction of Section 1369(b)(1)(F) in 1987 and 1988. "The doctrine of ratification states that 'Congress is presumed to be aware of a judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" *Dep't of Transp.* v. *Public Citizen*, 541 U.S. 752, 770 n.4 (2004) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)). As relevant here, Congress in 1987 amended 33 U.S.C. § 1369(b)(1) with several minor changes, including an increase of the initial 90-day clock for filing petitions for review to 120 days. See Pub. L. No. 100-4, § 505(a), 101 Stat. 7 (1987). It

again amended Section 1369(b)(1) in 1988 to alter the procedures used to determine which court of appeals would hear consolidated reviews of multiple petitions filed in multiple circuits. See Pub. L. No. 100-236, § 2, 101 Stat. 1731 (1988).

Prior to the 1987 and 1988 amendments, the Fourth and D.C. Circuits had concluded uniformly that Section 1369(b)(1)(F) conferred original jurisdiction on the courts of appeals over all regulations "closely related to" the setting of "effluent limitations," including all permitting "standards of nationwide applicability" (*Costle*, 566 F.2d at 450-451), and all regulations concerning general "procedures for issuing or denying NPDES permits." *NRDC CADC 1982*, 673 F.2d at 402. "Congress is presumed to [have been] aware" of those circuits' interpretations of the statute. *Lorillard*, 434 U.S. at 580. Congress's enactment of the 1987 and 1988 amendments without changing the language of Section 1369(b)(1)(F) accordingly must be understood as its "adopt[ion of] that interpretation." *Ibid.* For that reason, as well, the decision below is wrong and the petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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