No. _____

In The
Supreme Court of the United States

TIN CUP, LLC, an Alaska limited liability company,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY W. MCCOY*
**Counsel of Record*
JAMES S. BURLING
DAMIEN M. SCHIFF
MOLLIE R. WILLIAMS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: jmccoy@pacificlegal.org

Counsel for Petitioner

QUESTION PRESENTED

The Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for the discharge of certain pollutants into "navigable waters," which include at least some wetlands. In the Energy and Water Development Appropriations Act of 1993, Congress mandated that, when delineating wetlands under the Clean Water Act, the Corps "will continue to use the Corps of Engineers 1987 Manual . . . until a final wetlands delineation manual is adopted." Pub. L. No. 102-377, 106 Stat. 1315, 1324 (1992). For decades, the Corps interpreted this provision as requiring the agency to use the 1987 Manual when delineating wetlands, and one circuit court has agreed. *United States v. Bailey*, 571 F.3d 791, 803 n.7 (8th Cir. 2009); Brief of Appellee the United States at 42, *United States v. Bailey*, 2008 WL 4127307 (8th Cir. Aug. 2008). The Corps has not adopted a new manual, yet below the Ninth Circuit held, in a split opinion on the question presented, that the 1993 Appropriation Act's mandate no longer binds the Corps. To reach that result, the court of appeals panel majority held that the words "will" and "until" in an appropriations act do not bind an agency beyond the applicable fiscal year.

The question presented is:

Whether Congress' use of the words "will" and "until" in a provision of the Energy and Water Development Appropriations Act of 1993 that provides "the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual . . . until a final wetlands delineation manual is adopted," requires the Corps to use the 1987 Manual beyond the pertinent

fiscal year until a final wetlands delineation manual is adopted.

LIST OF ALL PARTIES

Petitioner Tin Cup, LLC, was the Plaintiff in the district court and the Appellant before the Ninth Circuit.

Respondent United States Army Corps of Engineers was the Defendant in the district court and the Appellee before the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Tin Cup, LLC, states that it has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Regulation

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Tin Cup, LLC, respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 904 F.3d 1068 (9th Cir. 2018), and reproduced at Appendix A. The opinion of the district court is unpublished but is available at 2017 WL 6550635 and reproduced at Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION AT ISSUE

The Energy and Water Development Appropriations Act of 1993 provides, in pertinent part:

> None of the funds in this Act shall be used to identify or delineate any land as a "water of the United States" under the Federal Manual for Identifying and Delineating Jurisdictional Wetlands that was adopted in January 1989 or any subsequent manual adopted without notice and public comment.
>
> Furthermore, the Corps of Engineers will continue to use the Corps of Engineers 1987 Manual, as it has since August 17, 1991,

> until a final wetlands delineation manual is adopted.

Pub. L. No. 102-377, 106 Stat. 1315, 1324 (1992).

INTRODUCTION

This case raises important questions, not yet addressed by this Court, about Congress' use of certain words of futurity in appropriations acts. In the Energy and Water Development Appropriations Act of 1993 (1993 Appropriations Act or 1993 Act), Congress mandated that, when deciding what qualifies as a wetland subject to the protections of the Clean Water Act, the U.S. Army Corps of Engineers "will continue to use the Corps of Engineers 1987 Manual . . . until a final wetlands delineation manual is adopted." Pub. L. No. 102-377, 106 Stat. 1315, 1324 (1992).[1] The Ninth Circuit held, in a split opinion, that the words "will" and "until" in an appropriations act do not bind an agency beyond the applicable fiscal year. Appendix A-11. Judge Bea, writing a concurring opinion disagreeing with the majority opinion, concluded that the ordinary meaning of the words "will" and "until" require the Corps to use the 1987 Manual until the agency adopts a new, final wetlands delineation manual. Appendix A-23 (Bea, J., concurring).

This Court has not yet addressed the meaning of "will" and "until" in an appropriations context. *See* Appendix A-11. However, congressional statements, as well as executive and judicial practice, indicate that

---

[1] The 1987 Manual is available on the Corps' website: https://www.lrh.usace.army.mil/Portals/38/docs/USACE%2087%20Wetland%20Delineation%20Manual.pdf.

"will" and "until" in an appropriations act bind an agency beyond the fiscal year. The Ninth Circuit ignored these authorities and practices, and instead concluded that the absence of the word "hereafter" indicated that the pertinent provision of the 1993 Act expired at the end of Fiscal Year 1993. Appendix A-11. The opinion's consequences extend far beyond wetlands regulation, affecting many other instances where Congress has directed agency action in an appropriations law.

Yet the consequences to wetlands regulation are significant enough on their own to warrant review of the panel majority opinion. Determining whether an area is subject to regulation under the Clean Water Act, Federal Water Pollution Control Act Amendments, Pub. L. No. 92-500, 86 Stat. 816 (1972), is controversial and difficult. *See Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear."); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 623 (2018) (describing Clean Water Act regulation as "a complex administrative scheme"). Decades of regulations and resulting litigation have attempted to define who and what are covered by the scope of the Act.

Perhaps the sole soothing source of consistency for the regulated public during this time has been the Corps' approach to determining what constitutes a "wetland" within the scope of Clean Water Act jurisdiction. Since 1993, the Corps has used—and has repeatedly stated that it is required to use—the 1987 Manual when delineating wetlands. *United States v. Bailey*, 571 F.3d 791, 803 n.7 (8th Cir. 2009); Brief of Appellee the United States at 42, *United States v.*

Bailey, 2008 WL 4127307 (8th Cir. Aug. 2008). In this case, however, the Corps suddenly changed its position to argue that the 1993 Act's requirement to use the 1987 Manual expired at the end of Fiscal Year 1993. The Ninth Circuit majority acquiesced in this de facto expansion of the Corps' jurisdiction over wetlands, thereby exacerbating the great uncertainty that already impacts wetland regulation. To ensure that at least one aspect of Clean Water Act practice remains clear and consistent with congressional requirements, this Court should grant the Petition.

STATEMENT OF THE CASE

Tin Cup owns an approximately 455-acre parcel in North Pole, Alaska. Appendix A-7. The company holds the land—which consists largely of uplands with some wetland areas—for Flowline Alaska. *Id.* Founded in 1982, Flowline Alaska is a service firm specializing in heavy construction, in particular the fabrication of large pipe and steel structures needed for the development of the North Slope oil fields. The company desires to relocate from its current leased location which the business has outgrown. *Id*. The chosen relocation site, bordered by a junk car dealer, a scrap metal dealer, and a concrete products supply company, will be used in part for the temporary storage of pipe and other manufactured material. The relocation project will entail the placement of a gravel pad, as well as the construction of several buildings and a railroad spur. *Id.* Thus, the project will require the excavation and laying down of gravel material, a regulated "pollutant" under the Clean Water Act. *See* 33 U.S.C. § 1362(6).

In 2004, Tin Cup obtained a Corps permit for the relocation project. Appendix A-7. *Cf.* 33 U.S.C. § 1344(a) (authorizing the Corps to issue permits for discharge of dredged or fill material). Tin Cup proceeded to clear approximately 130 acres of the site but, by 2008, the company had not yet commenced gravel extraction or fill placement.[2] Appendix A-7. Thinking that the expiration date for its permit was fast approaching, Tin Cup requested a deadline extension from the Corps. The agency responded that the permit actually had expired in 2007, and therefore Tin Cup would be required to reapply for a permit. Tin Cup duly submitted a renewed permit application for essentially the same previously authorized project. *Id.* The Corps then commenced, as a first step in the reinitiated permit process, a review to determine the extent of its jurisdiction over Tin Cup's property. *Id.* In November 2010 the Corps completed this jurisdictional determination process, concluding that approximately 350 acres of Tin Cup's property, including about 200 acres of permafrost, constitute "waters of the United States" subject to Clean Water Act regulation. *Id.*

In December 2010 Tin Cup administratively appealed the Corps' jurisdictional determination. Appendix A-8. Among the grounds for appeal was the contention that the 1993 Appropriations Act required the use of the 1987 Manual and that, under the standards laid out in the Manual, the site's permafrost cannot qualify as a wetland. *Id.* In August 2011 the Corps' review officer determined that Tin

---

[2] The reason for the delay to the relocation project was the decision of several of Flowline Alaska's clients to postpone their own projects.

Cup's objections were partially meritorious, but he rejected Tin Cup's permafrost argument. The review officer explained that, because of an Alaska-specific supplement which purportedly supersedes the 1987 Manual, the 1987 Manual's standards are "essentially irrelevant" to determining wetlands in Alaska. *Id.*

In October 2012 the Corps issued Tin Cup an initial proffered permit. Appendix A-8; *Cf.* 33 C.F.R. § 331.2 (an "initial proffered permit" is the first version of a permit offered to the applicant, which the applicant can object to and thereby demand reconsideration). The permit contained a number of special conditions, among them: (i) Special Condition 3, which requires the construction and maintenance of a "reclaimed pond and riparian fringe" of between 6 and 24 acres total in size; and (ii) Special Condition 4, which requires a 250-foot-wide buffer area totaling at least 23 acres, to border the reclamation pond and riparian fringe. Appendix D-54–D-57. Tin Cup formally objected to the permit's conditions, but in November 2013 the Corps rejected those objections and issued a final permit to Tin Cup. Appendix A-8.

In January 2014 Tin Cup lodged another administrative appeal. Appendix B-13. The company again pressed, among other arguments, its contention that the permit decision should be set aside because it wrongfully asserts federal control over permafrost. *See id.* at C-1. In March 2015 the Corps' appellate officer issued his decision affirming the permit. *See* Appendix C. The appellate officer again rejected Tin Cup's argument that the permit's wetlands delineation was illegal because it was not based on the 1987 Manual. Appendix C-9–C13. The appellate

officer explained that the Alaska Supplement is designed to be used with the 1987 Manual, but that the Alaska Supplement takes precedence if the two conflict. Appendix C-12.[3]

Dissatisfied with the Corps' decision, Tin Cup commenced this Administrative Procedure Act action about a year later to set aside the Corps' permitting decision. Tin Cup alleged that the Corps' assertion of jurisdiction over the permafrost on the property was arbitrary and capricious, and contrary to law because the 1993 Appropriations Act requires the Corps to use the 1987 Manual, and the Corps' permitting decision was not based on the standards for delineating wetlands set forth in the Manual. In response, the Corps argued, for the first time, that it was not required to use the 1987 Manual when delineating wetlands. In the alternative, the Corps argued that the use of the Alaska Supplement was consistent with any requirement to use the 1987 Manual. The district court held that the 1993 Act only applied to Fiscal Year 1993 and, alternatively, that the Alaska Supplement is not contradictory to the 1987 Manual. Appendix B-14 to B-27.

Tin Cup appealed to the Ninth Circuit. In a split decision, the panel held 2 to 1 that the 1993 Act no longer binds the Corps to use the 1987 Manual when delineating wetlands. The majority stated that the words "will" and "until" in an appropriations act do not create obligations that extend beyond the pertinent fiscal year. Appendix A-23. Thus, the

---

[3] Even so, the appellate officer did not rule that the Corps was free to disregard the 1987 Manual, but merely that the Alaska Supplement was an authorized supplement to the Manual. *Id.*

majority concluded, the Corps' use of the Alaska Supplement's standards to regulate permafrost is permissible. Appendix A-15. Dissenting on that point, Judge Bea would have ruled that the 1993 Act does continue to bind the Corps to the 1987 Manual. Appendix A-20 (Bea, J., concurring) ("Congress has explicitly recognized the word 'until' as a word of futurity in the context of appropriations bills.").[4]

REASONS FOR GRANTING THE PETITION

I.

This Court should grant the Petition because the Ninth Circuit's decision will significantly affect the interpretation of appropriations legislation, touching all aspects of the federal government.

This Court should grant the Petition because the Ninth Circuit decided an important question, not yet addressed by this Court, about when provisions in

---

[4] Judge Bea did, however, accept the Corps' alternative argument that use of the Alaska Supplement is permissible under the 1993 Act. Appendix A-23–27. But the panel majority did not address the issue. Thus, should the Court grant this petition to review the question presented, the full Ninth Circuit panel can address on remand any such alternative defenses to Tin Cup's claim. *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 492 (1987) ("We likewise decline to reach [Respondent's] contention that [Petitioners] lack 'standing' to enforce the agreement to arbitrate any of these claims, since the courts below did not address this alternative argument for refusing to compel arbitration. . . . This issue may be resolved on remand . . . ."); *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 462 (1999) ("We do not address alternative grounds, urged by respondent . . . and leave resolution of those grounds to the courts below on remand.").

appropriations acts apply beyond the pertinent fiscal year. Appropriations is one of Congress' central functions, and it pertains to all aspects of the federal government. *See U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (describing the Appropriations Clause as "a bulwark of the Constitution's separation of powers among the three branches of the National Government"). Congress spends a significant amount of time and resources in adopting appropriations legislation. United States Senate Committee on Appropriations, *Committee Jurisdiction*[5] (explaining that the Senate Appropriations Committee is the largest committee in the U.S. Senate, consisting of 30 members in the 114th Congress).

Although this Court has stated that provisions in appropriations acts are presumed to be limited to the applicable fiscal year, ultimately the meaning of an appropriations statute is a "'question … of legislative intent'" resolved like any other question of statutory interpretation. Appendix A-19 (Bea, J., concurring) (quoting *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991)).[6] Congress can overcome the presumption that a provision is limited in time by making a clear statement of futurity to indicate the length of the provision's applicability. *See Natural*

---

[5] *Available at* https://www.appropriations.senate.gov/about/jurisdiction.

[6] Sometimes, however, this Court has simply presumed the permanence of a provision in an appropriations bill without discussion. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570–71 (2017) (citing the Omnibus Consolidated Appropriations Act, 1997, §§ 121(7), 321, 110 Stat. 3009–31, 3009–627).

Resources Defense Council v. U.S. Forest Serv., 421 F.3d 797, 806 n.19 (9th Cir. 2005).

In the decision below, however, the Ninth Circuit broadly applied the presumption that appropriations provisions expire after one year, and issued a virtually unbending rule that only the word "hereafter" can indicate a provision's permanence. *See* Appendix A-20 (Bea, J., concurring) (criticizing the majority for focusing on the lack of the word "hereafter" in the relevant provision). The Ninth Circuit expressly rejected the proposition that the words "will" and "until" indicate futurity, citing the absence of precedent on the issue as well as the absence of "the word 'hereafter'" in the pertinent provision of the 1993 Act. Appendix A-11.

The Ninth Circuit's broad application of the presumption that appropriations acts are limited to one fiscal year, and its rejection of the words "will" and "until" as words of futurity, have impacts beyond the immediate consequences of this case. The terms "will" and "until" are often used in appropriations bills, in many different contexts. Federal agencies and even this Court have acted consistently with the ordinary meaning of these words, but now that practice will be upset by the decision below. If not vacated, the Ninth Circuit's decision will alter many appropriations of funds and congressional limits on agency action found in appropriations statutes.

A. The Ninth Circuit's decision ignores Congress' frequent use of the word "until" in appropriations bills to indicate futurity.

The Ninth Circuit's rejection of "until" as a word of futurity has far-reaching consequences for the federal government. Congress frequently uses the word "until" to indicate that an appropriation or other provision lasts beyond the fiscal year. But, if the decision below stands, the meaning of these provisions will be dramatically altered. The most frequent use of "until" in appropriations acts is when Congress uses "until expended" to indicate that an appropriation is available beyond the applicable fiscal year. Congress used the phrase over 520 times in the most recent omnibus appropriations act. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348 (Mar. 23, 2018). Notably, most of the Corps' own funding is available "until expended." *Id.* at 510.

Congress also uses the word "until" to put a specific date, beyond the end of the fiscal year, when appropriated funds expire. For example, Congress may wish to extend the appropriated funds one additional year. 132 Stat. at 1019 (appropriating funds for homeless assistance grants "to remain available until September 30, 2020").

Sometimes, Congress will use "until" to restrict the use of funds until a specific event occurs. *Id.* at 610 ("That $25,000,000 shall be withheld from obligation for Coast Guard Headquarters Directorates until a future-years capital investment plan for fiscal years 2019 through 2023 is submitted to the Committees on Appropriations of the Senate and the House of Representatives . . . ."); *id.* at 366 ("That rental

assistance provided under agreements entered into prior to fiscal year 2018 for a farm labor multi-family housing project financed under section 514 or 516 of the Act may not be recaptured for use in another project until such assistance has remained unused for a period of 12 consecutive months . . . ."). Other times Congress will appropriate funds "until" some future event occurs. *Id.* at 529 ("Funds . . . for intelligence activities are deemed to be specifically authorized by the Congress for purposes of section 504 of the National Security Act of 1947 . . . during fiscal year 2018 until the enactment of the Intelligence Authorization Act for fiscal year 2018.").

Finally, as with the provision at issue here, Congress will use "until" to restrict agency action until the agency takes some future action. *See id.* at 477 ("That the [Department of Defense] command and control relationships which existed on October 1, 2004, shall remain in force until a written modification has been proposed to the House and Senate Appropriations Committees . . . ."); *id.* at 434 ("[T]he Commission may take no action to implement any workforce repositioning, restructuring, or reorganization until such time as the Committees on Appropriations of the House of Representatives and the Senate have been notified of such proposals . . . .").

In all of these examples, the common theme is that Congress is directing or allowing something "until" another event occurs, without regard to the fiscal year. Consistent with that understanding, the other branches of government frequently act as though a provision containing the word "until" does not expire at the end of the fiscal year. *See, e.g.*, Cong.

Research Serv., *Shutdown of the Federal Government Causes, Process, and Effects* 6 n.33 (updated Dec. 10, 2018).[7]

This Court's practice too has been consistent with the understanding that "until" is a word of futurity. During recent government shutdowns, the federal judiciary has remained open despite the fiscal year ending without a new appropriations bill. Admin. Office of the U.S. Courts, *Memorandum: Status of Judiciary Funding and Guidance for Judiciary Operations During a Lapse in Appropriations*, September 24, 2013, p. 3.[8] That is because many of the relevant funds were appropriated "until expended" and, thus, the judiciary's appropriation did not lapse at the end of the fiscal year. *See Shutdown of the Federal Government*, *supra*, at 20.

Under the precedent set in this case, however, agencies' and the judiciary's practice of using appropriated funds beyond the fiscal year is incorrect because the word "until" does not extend the availability of the appropriation. *Compare* Appendix A-11 ("No authority exists holding that those words in an appropriations bill, absent more, indicate futurity."), *with* Appendix A-20 (Bea, J., concurring) ("Congress has explicitly recognized the word 'until' as a word of futurity in the context of appropriations bills."). The Ninth Circuit majority reached this consequential decision because of the perceived lack of

---

[7] *Available at* https://fas.org/sgp/crs/misc/RL34680.pdf.

[8] *Available* at http://legaltimes.typepad.com/files/shutdown.pdf.

authority from this Court interpreting "until" in an appropriations act. *See* Appendix A-11.

Although there is relatively little case law on what words constitute words of futurity in an appropriations bill, there is precedent from other sources that addresses this issue. One of the leading authorities on the interpretation of appropriations bills is the Government Accountability Office's (GAO) "Redbook." U.S. Gov't Accountability Office, Office of the Gen. Counsel, Principles of Federal Appropriations Law (4th ed. 2016) (Redbook). "In considering the effect of appropriations language both" this Court and lower courts "have recognized that [the Redbook] provides significant guidance." *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349, 1354 (Fed. Cir. 2005); *see also Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 190 (2012) (citing the Redbook).

Contrary to the Ninth Circuit's conclusion, it is not "significant that the provision does not contain the word 'hereafter.'" Appendix A-10–A-11. The Redbook recognizes that "hereafter" is not the only word of futurity Congress uses in appropriations. Redbook at 2-87 ("Words of futurity other than 'hereafter' have also been deemed sufficient" to bind an agency beyond the fiscal year of an appropriations act.).

Indeed, as Judge Bea correctly observed, "the Red Book itself recognizes that . . . consistent with past congressional use, 'until' can also be used to express futurity in certain contexts." Appendix A-21 (citing Redbook at 2-26); *see also* Redbook at 2-9 ("A no-year appropriation is usually identified by appropriation language such as 'to remain available until

expended.'"). That comports with the common meaning of the word "until," which is "up to the time that." The Merriam-Webster Dictionary 570 (Home and Office ed. 1995). Therefore, it is not surprising that Congress itself has explicitly recognized the straightforward meaning of "until" and that it is a clear statement of futurity when used in an appropriations bill. Redbook at 2-67 (quoting H.R. Rep. No. 88–1040, at 55 (1963)) (The "most common technique" to make funds "available for longer than a one-year period" is to add the words "'to remain available until expended.'").

Furthermore, Congress' use of "until" is distinct from its use of "hereafter," although both can indicate futurity. Congress uses "hereafter" to indicate an *indefinite* restriction, requirement, or authorization. 132 Stat. at 977 ("That not later than March 31 of each fiscal year hereafter, the Administrator of the Federal Aviation Administration shall transmit to Congress an annual update to the report submitted to Congress in December 2004 . . . ."). *See* Merriam-Webster Dictionary, *supra*, 242 (defining "hereafter" as "after this in sequence or in time" and "in some future time or state"). If Congress does not intend for a provision to be permanent, it can indicate that the provision is in effect "until" some future event. If "hereafter" were the only word that Congress can use to bind an agency after an appropriations year ends, as the Ninth Circuit's opinion suggests, then it would be exceedingly difficult for Congress to enact appropriations provisions that bind an agency for a set period of time independent of the fiscal year. *Cf.* Redbook, *supra*, at 2-87 ("[A]n appropriations provision requiring an agency action 'not later than

one year' after enactment of the appropriations act, which would occur after the end of the fiscal year, is permanent because that prospective language indicates an intention that the provision survive past the end of the fiscal year."). Thus, contrary to the Ninth Circuit's conclusion, "until" is a clear word of futurity in appropriations bills.

The decision below rejects the understanding of Congress, the GAO, agencies, and this Court itself on the meaning of "until" in an appropriations act. It threatens to upset the function of the federal government. The Ninth Circuit reached its unsettling decision because this Court has not expressly addressed the issue. The lack of judicial precedent on this important issue supports the need for this Court's review.

B. The Ninth Circuit's decision ignores Congress' frequent use of the word "will" in appropriations bills to direct agency action.

The Ninth Circuit majority further upset appropriations law by holding that "will" in an appropriations act does not create a mandatory command. The panel decision fails to recognize that "will," like "until," is a word of futurity. But the opinion goes further to hold that "will" does not create a mandatory requirement. This latter holding has far-reaching consequences, both within and outside the appropriations context.

In the Ninth Circuit's view, Congress' use of the word "will" in the 1993 Act merely reflected Congress' expectation of how the Corps would act. In the court's estimation, Congress would have used the word

"shall" had it intended to require the Corps to use the 1987 Manual. But that wording does not comport with the plain meaning of "will" or with how Congress has used "will" in appropriations acts elsewhere.

The word "will" often reflects a mandatory obligation. *See* Black's Law Dictionary 1771 (rev. 4th ed. 1968) (defining "will" as "[a]n auxiliary verb commonly having the mandatory sense of 'shall' or 'must'"). The word is also a word of futurity, which explains why Congress might want to use "will" rather than "shall" in an appropriations bill. Merriam-Webster Dictionary, *supra*, 603 (defining "will" as "used as an auxiliary verb to express . . . simple futurity").

Yet the panel below ignored this language, based on one case from this Court that purportedly "distinguished descriptive 'will' statements from mandatory 'shall' statements." Appendix A-12 (citing *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004)). But as Judge Bea correctly pointed out, *Norton* is distinguishable for many reasons, not the least of which being that *Norton* did not address an appropriations statute, or any statute for that matter, but instead an agency's own land-use planning document. Appendix A-22 n.1 (Bea, J., concurring).

Further, the panel majority's statement does not even correctly articulate this Court's interpretation of the words "shall" and "will." This Court has never held that "will" statements are incapable of imposing a mandatory duty. Several decisions recognize that "will," "shall," and similar words are often used interchangeably. *See Hewitt v. Helms*, 459 U.S. 460,

471–72 (1983), *abrogated on other grounds*, *Sandin v. Conner*, 515 U.S. 472 (1995) ("Nonetheless, in this case the Commonwealth has gone beyond simple procedural guidelines. It has used language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed . . . ."). *Cf. Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995) (noting that Congress often uses "shall" "should," "will," and "may" in the same way).

The similarity of "will" and "shall" is confirmed by decisions of many lower courts, which have held in a variety of contexts that "will" is mandatory. *See, e.g.*, *Windstream Corp. v. Da Gragnano*, 757 F.3d 798, 804 (8th Cir. 2014), *as corrected* (July 8, 2014) ("When placed in front of a verb like 'pay,' the word 'will' indicates 'simple futurity,' 'likelihood or certainty,' 'requirement or command,' 'intention,' 'customary or habitual action,' 'capacity or ability,' and 'probability or expectation.'" (citing Webster's II New College Dictionary 1293 (3d ed. 2005))); *Summit Packaging Sys., Inc. v. Kenyon & Kenyon*, 273 F.3d 9, 12 (1st Cir. 2001) (noting that "the word 'will' . . . commonly ha[s] the mandatory sense of 'shall' or 'must'" (quotations and citation omitted)).

Because of the similar meaning of the words "shall" and "will," a court needs to read these terms in context. *Evans*, 952 F.2d at 304. Without any controlling authority on the use of the word "will" in the appropriations context, however, the Ninth Circuit majority was able to do as it pleased on the issue. Appendix A-11. The consequences of that approach are to alter the meaning of many appropriations laws.

For Congress often uses "will" in appropriations acts to direct the use of funds or create other obligations. The 2018 Consolidated Appropriations Act, for example, contains numerous instances of Congress directing agency action by using "will." 132 Stat. at 976 ("That [the Department of Transportation's operation] reserve *will not exceed* one month of benefits payable and may be used only for the purpose of providing for the continuation of transit benefits: *Provided further*, That the Working Capital Fund *will* be fully reimbursed by each customer agency from available funds for the actual cost of the transit benefit."); *id.* at 682 (appropriating funds to help relocate eligible individuals and groups including evictees from Hopi-partitioned lands and stating "[t]hat no relocatee *will be* provided with more than one new or replacement home"); *id.* at 422 ("That, if a unit of local government uses any of the funds made available under this heading to increase the number of law enforcement officers, the unit of local government *will achieve* a net gain in the number of law enforcement officers who perform non-administrative public sector safety service."); *id.* at 748 (authorizing loan deferment to Historically Black Colleges and Universities and stating that, "during the period of deferment of such a loan, interest on the loan *will not accrue* or be capitalized, and the period of deferment shall be for at least a period of 3–fiscal years and not more than 6–fiscal years"); *id.* at 1016 ("That the Department *will notify grantees* [of Native American housing assistance grants] of their formula allocation within 60 days of the date of enactment of this Act.") (all emphases added).

Consistent with this practice, Congress used "will" in other parts of the 1993 Act to impose mandates on agencies. For example, Congress required that the Chief of Engineers use appropriated funds toward a feasibility study and that the study "will consider the agricultural benefits of using both traditional and nontraditional methods." 106 Stat. at 1316. In another provision, Congress stated that certain funds "will be administered by" the Department of Energy. 106 Stat. at 1334.

The Ninth Circuit majority, however, considered these uses of "will" to be mere expressions of congressional expectation of how an agency will proceed to use the appropriated funds. Appendix A-12. But if the panel majority were correct, then an agency would be free to ignore these provisions. And if an agency were free to ignore these provisions, then they would have no operative effect and Congress' drafting would be rendered idle. Such a result violates a fundamental rule of statutory interpretation. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons" is that a statute 'should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

But Congress did include mandatory "will" statements in the 1993 Act, and it continues to do so today. Yet the Ninth Circuit's decision calls into question the mandatory effect of these provisions that use "will" instead of "shall." The decision thereby undercuts Congress' ability to direct Executive Branch officials through appropriations bills. This

Court should not allow agencies to ignore the commands of Congress merely because Congress used "will" instead of "shall" in an appropriations act. *Cf. Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990) (The Appropriations Clause assures "that public funds will be spent according to the letter of the difficult judgments reached by Congress . . . not according to the individual favor of Government agents . . . ."). To limit the pernicious consequences of the decision below, this Court should grant the Petition.

II.

This Court should grant the Petition because the Ninth Circuit's decision dramatically upsets regulated parties' expectations, and creates a circuit split, about the regulation of wetlands under the Clean Water Act.

In addition to the impact on appropriations law, the Ninth Circuit's decision overrides the limits on the Corps' regulation of wetlands, in conflict with a decision of the Eighth Circuit and nearly three decades of agency practice. In an action seeking enforcement of a Corps' wetlands restoration order, the federal government argued, and the Eighth Circuit agreed, that through the 1993 Act "Congress has mandated that the 1987 Manual be used until a final wetlands-delineation manual is adopted." *Bailey*, 571 F.3d at 803 n.7. *See* Brief of Appellee the United States at 42, *United States v. Bailey*, 2008 WL 4127307, at *42–*43 (arguing that "the district court correctly concluded [that] Congress has directed the Corps to use the 1987 Manual to delineate wetlands until it issues a final manual" (citing 1993 Act)).

Accord Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 590 (9th Cir. 2008) ("To identify wetlands under this regulation, the Corps uses its 1987 Wetlands Delineation Manual ('Manual')." (citing the 1993 Act)). The Corps' change of position in this case brings great uncertainty to the regulation of wetlands.

As many current and former members of this Court have noted, determining whether an area is subject to Clean Water Act regulation is controversial and difficult. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) ("[B]ased on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern."); *Sackett*, 566 U.S. at 132 (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified . . . as wetlands covered by the Act . . . .").

The Ninth Circuit's opinion increases the controversy and difficulty of delineating wetlands. Although there have been disputes about what the 1987 Manual requires, there has been broad agreement between the Corps and regulated parties that the Corps is required to use the 1987 Manual. *See Rapanos v. United States*, 547 U.S. 715, 761 (2006) (Kennedy, J., concurring in the judgment) ("The Corps' Wetlands Delineation Manual, including over 100 pages of technical guidance for Corps officers, interprets this definition of wetlands . . . ." (citing the 1987 Manual)). Over the past 25 years, the Corps itself has acted consistently with the notion that it is

required to use the 1987 Manual. *Bailey*, 571 F.3d at 803 n.7; *New Hope Power Co. v. U.S. Army Corps of Engineers*, 746 F. Supp. 2d 1272, 1275 (S.D. Fla. 2010) ("According to the updated online edition of the Wetlands Manual, use of the 1987 Manual is mandatory in making wetlands determinations."); Army Corps of Engineers, *Environmental Assessment and Finding of No Significant Impact for the Alaska Regional Supplement to the 1987 Wetland Delineation Manual* 1 ("Use of [the 1987 Manual] for wetland delineation by Corps Districts has been mandatory since 1991.").[9]

Although this understanding about the mandatory use of the 1987 Manual has not resolved all issues about who and what are regulated under the Clean Water Act, it has brought some certainty to the regulation. The Ninth Circuit's opinion in this case puts at risk the little certainty people had about Clean Water Act enforcement. Further, it allows the Corps to further expand its jurisdiction under the Clean Water Act.

That expansion is in fact precisely what Congress aimed to stop in the 1993 Act's manual limitation. Controversy had erupted when, in 1989, the Corps abandoned the 1987 Manual and joined other federal agencies (including EPA) in using a new manual. *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (Jan. 1989). *See* 56 Fed. Reg. 40,446, 40,449 (Aug. 14, 1991). This 1989 Manual employed less stringent wetland delineation methods

---

[9] *Available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p266001coll1/id/7592; Tin Cup's Ninth Circuit Excerpts of Record at 55.

than those used by the 1987 Manual. *See* Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. Rev. 873, 912 n.205 (1993). For that reason, the Corps' use of the 1989 Manual effectively expanded the scope of the agency's wetland jurisdiction. Steven L. Dickerson, *The Evolving Federal Wetland Program*, 44 Sw. L.J. 1473, 1484 (1991).

Members of the public took their concerns to Congress, objecting to the Corps' unannounced abandonment of the 1987 Manual. *See Hearings on H.R. 2427 Before a S. Subcomm. of the Comm. on Appropriations*, 102d Cong., S. Hrg. 102–208, Part 2, at 228 (1991) (statement of the Assoc. Gen. Contractors of Am.) (contending that the Corps' employment of the 1989 Manual has "resulted in significant restrictions on development," and that "[m]any of the definitions in the [1989] manual are very broad, allowing for subjective interpretations"). *See also id.* at 67 (statement of Senator J. Bennett Johnston, subcomm. chairman) (declaring that there is "no policy of the Federal Government that has caused as much consternation, as much difficulty, is as unreasonable as that policy on wetlands," and vowing "to do everything we can to bring reason and balance back into the Corps of Engineers and the EPA's wetlands policy"). *Cf. id.* Part 1, at 234 (statement of Senator Nickles) (observing that the 1989 Manual "is one of the most ludicrous manuals I have ever seen in my life"). In particular, many complained about "the increase in lands identified and delineated as wetlands . . . as a result of the

implementation of the [1989] Manual." S. Rep. No. 102–80, at 54 (1991).

In response, Congress passed several limiting provisions in the Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510 (1991) (1992 Budget Act or 1992 Act). *See* Kalen, *supra*, at 912 n.205. With the 1992 Act, Congress initially took a short-term approach to the issue, prohibiting the use of funds to delineate wetlands under the 1989 Manual or any subsequent manual "not adopted in accordance with the requirements for notice and public comment." Title I, 105 Stat. at 518. The Act also required the Corps to use the 1987 Manual to delineate any wetlands in any ongoing enforcement actions or permit application reviews. *Id.*

After reviewing the impacts of the 1992 Budget Act, the Senate Appropriations Committee was "pleased to note a significant decline in the number of complaints about wetlands delineations since the Corps of Engineers has been using the 1987 guidelines." S. Rep. No. 102–344, at 56 (1992). This satisfaction was shared by the Corps officials, who testified approvingly of Congress' direction to use the 1987 Manual exclusively. For example, Assistant Secretary of the Army Nancy Dorn stated that she was "very confident" that the Corps could "both protect[] wetlands and also allow[] permits to be processed expeditiously using the 1987 manual." *Hearings on H.R. 5373 Before a S. Subcomm. of the Comm. on Appropriations*, 102d Cong., S. Hrg. 102–902, Part 1, at 403 (1992). She also observed that the "public seems to have confidence in the delineations that are

resulting from using the 1987 manual." *Id.* She concluded that, as compared to the agency's use of other manuals, the "confusion and delays seem to have been reduced using the 1987 manual." *Id. See also id.* at 429 ("Based on all indications, the 1987 manual is working very well."). Similarly, Lieutenant General Henry Hatch, then Chief of the Corps, testified that "[g]etting the Corps back to the 1987 manual was sufficient. We intend to remain with the 1987 manual until all involved in this are able to reach some new conclusion." *Id.* at 405.

The positive consequences from the previous year led Congress to use a long-term approach in the 1993 Act. *See* James J.S. Johnson & William Lee Logan, III, *How an Uncodified Federal Appropriations Act Blocks Some Constitutional Challenges to the Regulatory Method Used to Define a Federal Jurisdictional Wetland*, 4 U. Balt. J. Envtl. L. 182, 207 (1994) ("By explicitly directing the Corps, until further notice otherwise, to use the 1987 Manual, Congress has effectively established the 1987 Manual as the statutory standard for defining federal jurisdictional wetlands." (footnote omitted)). That approach is reflected in the provision of the 1993 Act at issue here.

The Ninth Circuit's majority opinion undercuts Congress' remedial efforts and exacerbates the uncertainty and costs for the regulated public—in an area of the law already recognized as being "notoriously unclear." *Sackett*, 566 U.S. at 132 (Alito, J., concurring). Review in this Court is therefore necessary to ensure that at least one aspect of Clean Water Act regulation remains clear and consistent with congressional requirements.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

DATED: December, 2018.

Respectfully submitted,

JEFFREY W. MCCOY*
*Counsel of Record
JAMES S. BURLING
DAMIEN M. SCHIFF
MOLLIE R. WILLIAMS
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: jmccoy@pacificlegal.org

Counsel for Petitioner