No. 18-790

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

REPLY ON PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent Army Corps of Engineers' arguments against granting the Petition are based on a mistaken view of the consequences of the Ninth Circuit majority's opinion. In interpreting the Energy and Water Development Appropriations Act of 1993 (1993 Act), Pub. L. No. 102–377, 106 Stat. 1315 (1992), the Ninth Circuit issued a decision that goes beyond that single piece of legislation. The court laid out broad, general principles about how to interpret appropriations acts, and the decision is now the leading word on that important issue.

But even if the Ninth Circuit's opinion were limited to interpreting the specifics of the 1993 Act, the decision would still greatly affect thousands of regulated parties. For decades, the Corps has adhered to the position that the 1993 Act compels the use of the 1987 Wetlands Delineation Manual. The Ninth Circuit has now eliminated that requirement. Without the need to abide by any aspect of the 1987 Manual, the Corps is free to expand its jurisdiction over wetlands regulation in the very same ways that led Congress to pass the 1993 Act.

Finally, this Court should not credit the Corps' unsubstantiated assertions about the panel majority's motives, or the agency's misstatements about the evidence in the administrative record. The Ninth Circuit affirmed the district court's judgment on one flawed basis: the 1993 Act does not require the Corps to use the 1987 Manual. No one can determine what the outcome would have been had the Ninth Circuit majority reached the opposite conclusion on that issue. And this Court does not need to engage in such

speculation. Instead, it can and should grant the Petition on the only question presented by the decision below.

ARGUMENT

I.

The Ninth Circuit's decision is not merely a case-specific analysis of the 1993 Act, it is now the leading authority on words of futurity and mandate in appropriations legislation.

The Corps argues that the Ninth Circuit's decision is a narrow, context-driven interpretation of the language of the 1993 Act.[1] Opposition Brief at 19. That is incorrect. In the decision, the court made broad pronouncements about what constitute words of futurity and mandate in appropriations bills. Appendix A-9–A-14. In doing so, the Ninth Circuit became the leading word on this important question of federal law. *See* Appendix A-11.

The majority stated that "[n]o authority exists holding that" the words "will" and "until" "indicate futurity." Appendix A-11. That is because this Court has not examined the issue. Yet, those words appear dozens of times in current and past appropriations legislation. Petition at 11–12; 19–20. The meaning of the words "will" and "until" in the appropriations

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[1] The Corps mistakenly states that Tin Cup contends that both the 1992 and 1993 appropriations acts require the Corps to continue to use the 1987 Manual. *See* Opposition Brief at 2. Although comparisons between the 1992 and 1993 Acts shed light on the meaning of the 1993 Act, only the latter binds the Corps beyond the fiscal year.

context is an important question of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(c).

Judge Bea's concurrence further demonstrates the broad impacts of the Ninth Circuit's decision. The debate between Judge Bea and the majority is about how to interpret appropriations acts generally, not just about how to interpret the 1993 Act. *See* Appendix at A-20 (Bea, J., concurring) ("Congress has explicitly recognized the word 'until' as a word of futurity *in the context of appropriations bills*.") (emphasis added). Although both the majority and the concurring opinions look at specifics of the 1993 Act, their analyses start with and apply principles that are applicable to all appropriations bills. Appendix A-10 (majority op.); A-19 (Bea, J., concurring).

The Corps' opposition brief reiterates the broad principles stated in the majority opinion. In arguing that the Ninth Circuit reached the correct decision, the Corps points to the absence of the word "hereafter" in the challenged provision. Opposition Brief at 13. In repeating the language of the Ninth Circuit, the Corps argues for a nearly irrebuttable presumption that an appropriations provision without "hereafter" expires at the end of the fiscal year. *Id.*

That is not a principle that will be constrained to this case. If the Ninth Circuit's decision stands, "hereafter" will become the center of any appropriations bill analysis. Appendix A-10–A-11 ("It is significant that the provision does not contain the word 'hereafter.'"). But "hereafter" has a very specific meaning, and does not indicate when the obligation ends. Merriam-Webster Dictionary 242 (Home and

Office ed., 1995). Exclusive reliance on "hereafter" to determine futurity would hamstring Congress' ability to make appropriations—or regulate conduct through appropriations laws—for a set amount of time beyond a fiscal year.

Equally far-reaching are the Ninth Circuit's rulings that "until" is not a word of futurity and "will" is not a word of mandate. The Ninth Circuit's approach conflicts with all three branches' understanding of words of futurity in appropriations bills. *See* Petition at 8–20.

Indeed, the judiciary's and several agencies' position on this issue was reiterated during the most recent government shutdown. In December and January, the judiciary "continued to operate by using court fee balances and other 'no-year' funds." Admin. Office of the U.S. Courts, *Judiciary Operating on Limited Funds During Shutdown* (Jan. 7, 2019).[2]

Similarly, the Department of Justice continued activities "funded by a source that has not lapsed, such as permanent indefinite appropriations and carryover of no-year funds appropriated in a prior year." U.S. Dep't of Justice, *U.S. Department of Justice FY 2019 Contingency Plan* 1 (Jan. 10, 2019).[3] This is similar to how other agencies responded. *See, e.g.*, U.S. Sec. & Exch. Comm'n, *Operations Plan*

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[2] *Available at* https://bit.ly/2RI0fTe.

[3] *Available at* https://bit.ly/2RM2V37.

under a Lapse in Appropriations and Government Shutdown 12 (Dec. 2018).[4]

The authorizations for these "no-year" funds do not contain the word "hereafter." *See, e.g.*, Cong. Research Serv., *Shutdown of the Federal Government: Causes, Process, and Effects* 6 n.33 (updated Dec. 10, 2018).[5] Instead, they use the word "until" to indicate futurity. *Id.*; Consolidated Appropriations Act, 2018, Pub. Law. No. 115–141, 132 Stat. 348, 411, 553–54, 578 (2018).

According to the decision below, the judiciary's and agencies' actions during the shutdown were illegal. Following the logic of the Ninth Circuit, it is "significant" that these provisions do not contain the word "hereafter." Appendix A-11. It is irrelevant that appropriations were available "until expended" because no authority holds that "until" is a word of futurity. *See id.* Taken to its logical conclusion, the Ninth Circuit's decision will disrupt many aspects of the federal government.

This Court's statements about futurity in appropriations acts have left unanswered questions. *See Minis v. United States*, 40 U.S. (15 Pet.) 423, 445 (1841); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 477–78 (1996) (per curiam); *United States v. Vulte*, 233 U.S. 509, 514–15 (1914). The cited decisions did not address how Congress can and should indicate futurity. The Ninth Circuit has now filled in those gaps, with damaging effects likely to

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[4] *Available at* https://bit.ly/2Ub2O2m.

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

result. This Court should grant the Petition to avoid those consequences.

II.

The Ninth Circuit's decision creates uncertainty among regulated parties because the decision removes limits on the Corps' power to delineate wetlands.

Even if the Ninth Circuit's opinion were a mere interpretation of the 1993 Act, this case would still be worthy of this Court's review. The Ninth Circuit's decision leaves few restrictions on how the Corps delineates wetlands. This increased discretion creates uncertainty for many regulated parties across the country, contrary to Congress' intent.

The decision below creates uncertainty about wetlands regulation because the Corps' position in this case directly contradicts the position it has taken since the early 1990s. *See* Petition at 22–23. Even when the Corps began the process of adopting the regional supplements, it stated that, since 1991, "use of the 1987 Corps manual has been mandatory in the Section 404 permitting program." James S. Wakeley, Eng'r Research & Dev. Ctr., U.S. Army Corps of Eng'rs, *Developing a "Regionalized" Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations* 3 (Aug. 2002).[6]

The Corps' opposition ignores the agency's sudden change of position and instead seeks to downplay the extent of the conflict between this case and *United*

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[6] *Available at* https://bit.ly/2Ufzec8.

States v. Bailey. *See* Opposition Brief at 18. But it was the Corps itself that argued in *Bailey* that the 1993 Act *required* the agency to use the 1987 Manual. Brief of Appellee the United States at 42, *United States v. Bailey*, 2008 WL 4127307 (8th Cir. Aug. 2018). Prior to the current litigation, regulated parties had a fair degree of certainty that the 1987 Manual would provide guiding principles for delineating wetlands. *See Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 590 (9th Cir. 2008) (citing 1993 Act for proposition that the Corps uses the 1987 Manual to delineate wetlands). That certainty has vanished.

Now, because of the Corps' about-face, the Ninth Circuit has held that there is no requirement to use the 1987 Manual. Appendix at A-15. As a result, the agency is free to adopt new standards with little restraint. The Corps can even readopt the 1989 Manual, the controversy over which led to the passage of the pertinent provisions of the 1992 and 1993 Acts. *See* Steven L. Dickerson, *The Evolving Federal Wetland Program*, 44 Sw. L.J. 1473, 1484 (1991); S. Rep. No. 102–80, at 54 (1991); S. Rep. No. 102–344, at 56 (1992). This free-wheeling power creates uncertainty among regulated parties, regardless of the length of time that the Corps has employed regional supplements to the Manual.

Furthermore, the Corps' use of regional supplements has incited controversy and confusion, notwithstanding the agency's contrary suggestions. Opposition Brief at 20. With every new regional supplement—some of which are only a few years

old[7]—regulated parties protested the expansion of covered wetlands. *See, e.g.*, U.S. Army Corps of Eng'rs, *Administrative Record for Interim Alaska Regional Supplement* 11 (2007) ("This Draft does not clarify the delineation of wetlands but rather makes the process even more subjective . . . .");[8] U.S. Army Corps of Eng'rs, *Public Comments and Responses on draft Interim Eastern Mountains and Piedmont Regional Supplement* 5 (2009) (supplement "will significantly expand the geographic reach of the Clean Water Act");[9] U.S. Army Corps of Eng'rs, *Public Comments and Responses on draft Interim Northcentral and Northeast Regional Supplement* 2 (2009) ("the Corps of Engineers is vastly expanding its interpretation of what is a wetland").[10]

And the supplements remain controversial to this day.[11] The previous Congress held oversight hearings

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[7] U.S. Army Corps of Eng'rs, *Schedule of Regional Supplements* (Jan. 13, 2012), *available at* https://bit.ly/2VicFj6. Of course, even if the Corps' practice of subverting the 1993 Act through "supplementation" of the 1987 Manual were longstanding, that would not absolve the agency from wrongdoing. *See Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality opinion) (rejecting a "curious appeal to entrenched executive error" as a defense to agency misinterpretation of the Clean Water Act).

[8] *Available at* https://bit.ly/2YIdKD1.

[9] *Available at* https://bit.ly/2Uqh8Dj.

[10] *Available at* https://bit.ly/2I5B9sq.

[11] Even the issue of whether permafrost should be covered by the Clean Water Act is controversial. Recently, several members of the Alaska State Senate requested that the Corps exclude permafrost from the definition of "Waters of the United States." Letter from Alaska Senate President Cathy Giessel, et al., to EPA and Corps 2 (Mar. 27, 2019), *available at*

about the use and problems with the regional supplements. *See* U.S. Senate Comm. on Env't & Pub. Works Subcomm. on Fisheries, Water, & Wildlife, *Hearing on Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States* (May 24, 2016).[12] Regulated parties testified that the Corps' use of regional supplements greatly expanded the scope of regulable wetlands. *See, e.g.*, Testimony of Valerie Wilkinson, Subcomm. on Fisheries, Water, & Wildlife, *Hearing on "Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of 'Waters of the United States'"* 7 (May 24, 2016).[13]

The Ninth Circuit's decision bypasses Congress' intent on how wetlands should be delineated. Although Congress contemplated that the Corps would adopt a new manual, it required certain procedures for that process. 106 Stat. at 1324. Congress also required that the end result of that process would be a single and uniform national standard for delineating wetlands, *see id.* (requiring "*a* final wetlands delineation manual") (emphasis added), to promote consistency and certainty for the regulated public and to avoid some of the pitfalls of the 1989 Manual's approach. *See* S. Rep. No. 102–80, at 55 (noting approvingly that earlier versions of the 1987 Manual had been "used in various regions throughout the country for almost a decade").

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https://bit.ly/2CQl5ai (citing the decision below as one reason for the request).

[12] *Available at* https://bit.ly/2FOUmNu.

[13] *Available at* https://bit.ly/2HP3805.

Those requirements are now gone. Although the Corps can update standards based on new scientific discoveries, those new standards must be within the limits placed by Congress. After all, the definition of wetlands under the Clean Water Act is not a purely scientific question. *See Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F. Supp. 278, 288 (W.D. La. 1981), *rev'd in part on other grounds sub nom. Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). It is also, and perhaps principally, a matter of policy. *See id.* In short, a "'wetlands' is what Congress (as reflected by the regulations) says it is." *Avoyelles*, 511 F. Supp. at 288; *see also* Wakeley, *supra*, at 5, C.A. E.R. 43. And part of Congress' wetland policy, as reflected by the 1993 Act, is that the Corps should be required to use the 1987 Manual until the agency can produce a new national manual. What is not part of Congress' policy is precisely what the Corps has done: avoid the constraints of national uniformity through the artifice of regional manuals that in part supersede rather than supplement the 1987 Manual.

The Ninth Circuit's decision has upset the balance of power between Congress and the Corps, thereby creating new uncertainty in Clean Water Act regulation. As this Court is aware, regulated parties have struggled with many aspects of the Act for decades. *See* Petition at 22. While this case will not solve all of these uncertainties, it can prevent the arrival of new ones.

III.

The Corps' predictions about what might happen on remand are conjectural and irrelevant.

Finally, this Court should reject the Corps' mistaken presumptions about the ultimate outcome of this case. *See* Opposition Brief at 11, 18. The Corps argues that this Court's review is unwarranted because Judge Bea interpreted the 1987 Manual to allow for use of the Alaska Supplement. *See id.* at 17. But Judge Bea's concurrence is not the decision of the Ninth Circuit.

The panel majority could have provided alternative reasoning for its holding, like the district court, but it chose not to. *See* Appendix B-25 (district court decision). If the two judges in the majority had wished to indicate their thoughts on whether the Alaska Supplement is consistent with the 1987 Manual, they would have only needed to cite the concurring opinion. But without any statement from the panel majority on an alternative rationale, it is impossible to predict how the panel would decide the case on remand. This Court should not let conjecture about the panel majority affect its decision on whether to grant the petition.[14]

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[14] In any event, Judge Bea incorrectly determined that the Alaska Supplement was a true supplement of the 1987 Manual. While the Corps may have anticipated using regional proxies for wetlands standards, *see* Appendix A-26 (Bea, J. concurring), any proxy by definition must bear some reasonable relationship to the thing for which it serves as a proxy. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127 (9th

In particular, this Court should disregard the Corps' contention that Tin Cup never proved that there was permafrost on its property. Opposition Brief at 18. In fact, in April 2012, Marcus Palmer, the chief of the geotechnical and materials section of the Corps' Alaska district, reviewed samples and confirmed the existence of permafrost on the site. *See* C.A. E.R. 296. Following Mr. Palmer's review, the Corps revised its jurisdictional determination to acknowledge the presence of permafrost on Tin Cup's property. *See* C.A. E.R. 291 (confirming that areas on and near Tin Cup's property contain "both seasonal frost and permafrost"). Contrary to the Corps' statements, Tin Cup can prevail on remand if this Court grants the petition.

There is no need, however, to worry about issues not before this Court. *See* Petition at 8 n.4. Instead of looking into speculative predictions about the panel majority, this Court should look at the opinion that the Ninth Circuit actually issued. That decision makes broad pronouncements on an important question of federal law that has not been settled by this Court. Without this Court's review, the Ninth Circuit's erroneous approach will remain the leading authority on words of futurity and mandate in appropriations legislation. If the Court does not vacate the decision, the Corps will continue to broaden its wetlands delineation power, contrary to Congress'

Cir. 2012) (habitat can be used as a proxy for measuring wildlife impacts only if the proxy is linked to and performs the same function as the primary standard). Here, however, the purported proxy for above-freezing soil temperature in Alaska—the number of frost-free days in a year—is unreasonable, precisely because of the existence of permafrost during frost-free days in that state.

intent. Review of the Ninth Circuit's ruling is therefore necessary to ensure clarity and consistency in these areas of the law.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: April, 2019.

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