

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL ASSOCIATION OF )  
MANUFACTURERS, )  
                                ) Petitioner, )  
                                ) v. ) No. 16-299  
DEPARTMENT OF DEFENSE, et al., )  
                                ) Respondents. )  
- - - - -

Pages: 1 through 63  
Place: Washington, D.C.  
Date: October 11, 2017

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5 Petitioner, )

6 v. ) No. 16-299

7 DEPARTMENT OF DEFENSE, et al., )

8 Respondents. )

9 - - - - -

10 Washington, D.C.

11 Wednesday, October 11, 2017

12

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 10:04 a.m.

16

17 APPEARANCES:

18 TIMOTHY S. BISHOP, Chicago, Illinois; on behalf of  
19 the Petitioner.

20 ERIC E. MURPHY, State Solicitor for Ohio, Columbus,  
21 Ohio; on behalf of the Respondents, Ohio, et al.,  
22 in support of the Petitioner.

23 RACHEL P. KOVNER, Assistant to the Solicitor General,  
24 Department of Justice, Washington, D.C.; on behalf  
25 of the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 16-299, the  
5 National Association of Manufacturers versus  
6 the Department of Defense, et al.

7 Mr. Bishop.

8 ORAL ARGUMENT OF TIMOTHY S. BISHOP

9 ON BEHALF OF THE PETITIONER

10 MR. BISHOP: Mr. Chief Justice, and  
11 may it please the Court:

12 The Clean Water Act provides for  
13 judicial review in the courts of appeals of  
14 seven categories of action by the EPA  
15 Administrator, and those are defined narrowly  
16 and precisely in Section 1369(b)(1) of the Act.

17 Had Congress meant for courts of  
18 appeals to review all national or definitional  
19 rules, it would have said so, as it did in the  
20 Clean Air Act, instead of listing a handful of  
21 particular EPA actions down to the statutory  
22 subsection.

23 Our textual approach to subsections  
24 (b)(1) and (E) -- (b)(1)(E) and (F) results in  
25 a comparatively clear jurisdictional rule that

1 would eliminate many duplicative filings and  
2 years of litigation over where to litigate.

3 JUSTICE GINSBURG: What would happen  
4 if two questions were presented? The first  
5 involves whether the water in question fits  
6 within "waters of the United States"; that's a  
7 preliminary question. And then there's a  
8 challenge to a grant -- a grant or denial of a  
9 permit.

10 If you had those two combined, where  
11 do they go?

12 MR. BISHOP: Well, I -- I think,  
13 Justice Ginsburg, that the -- the Court has  
14 never answered that question. In Footnote 14  
15 of the DuPont case, which involved 1304(b)  
16 guidelines, this Court suggested that when you  
17 have a challenge that includes actions covered  
18 by (E) or (F) and that are not covered by (E)  
19 or (F), that it may be possible to exercise  
20 ancillary jurisdiction over the question not --  
21 not covered. Of course, the (b)(2) preclusion  
22 should not apply in that case.

23 But, you know, in any event, the  
24 challenge here is to the waters rule by itself.

25 CHIEF JUSTICE ROBERTS: One of the

1 things, putting -- I mean, obviously, your main  
2 emphasis is, of course, on the statutory  
3 language, but one of the consequences that your  
4 opponent points out is that if you're correct  
5 and these actions are brought in the district  
6 court, each of the district courts will have to  
7 review the entire administrative record, and  
8 presumably, you could have dozens of the  
9 district courts engaged in that same activity,  
10 and then it would have to be done all over  
11 again when you get to the court of appeals.

12 MR. BISHOP: Well, I mean, I think  
13 their argument is that that is inefficient,  
14 right, but their rule --

15 CHIEF JUSTICE ROBERTS: Well, you'll  
16 agree that it's inefficient, won't you?

17 MR. BISHOP: Well, their -- their rule  
18 -- I mean, their rule has its own efficiency  
19 problem, which is that it's not clear. And  
20 what you end up with under a rule that isn't  
21 clear is extremely inefficient.

22 And, you know, here we have -- this  
23 rule was promulgated in June of 2015. We  
24 have --

25 CHIEF JUSTICE ROBERTS: Well what

1 about my efficiency concern?

2 MR. BISHOP: Well, I -- I think -- the  
3 point I'm trying to make there, Chief Justice,  
4 is just that there are inefficiencies on both  
5 sides. This Court said in Sackett that  
6 efficiency does not conquer all. We would like  
7 to litigate these issues in the district court  
8 because we think that going through the  
9 district courts and the courts of appeals will  
10 produce more accurate decision-making and will  
11 tee the case up better for this Court to  
12 review.

13 CHIEF JUSTICE ROBERTS: But they're --  
14 I -- I take it that means they're right, that  
15 that's what -- that's what this would entail.

16 MR BISHOP: Well, I can --

17 CHIEF JUSTICE ROBERTS: And the  
18 district court, to do the correct job, would  
19 have to look at the whole record, and as many  
20 district courts as these actions have been  
21 brought would have to do that. And then the  
22 court of appeals would do it again all over.

23 MR. BISHOP: That's true. And this  
24 has been filed in 11 district courts. I would  
25 say as a practical matter that what happens in

1 these cases, once the initial skirmishing is  
2 over, is that parties on different sides tend  
3 to get together and dismiss certain cases and  
4 then join the others.

5 JUSTICE SOTOMAYOR: I'm sorry, why --  
6 why --

7 MR. BISHOP: In the water transfer  
8 case, that is what happened, for example.

9 JUSTICE SOTOMAYOR: What would be the  
10 inducement for that if we were to say this  
11 needs to go to district court? Why would  
12 parties run to the courthouse? They would  
13 either wait for an enforcement proceeding or  
14 wait for a denial of a permit or just wait, and  
15 the waiting would then result in the  
16 inefficiencies that the Chief Justice just  
17 pointed to. Even worse, because we would have  
18 a rule being constantly challenged and never  
19 truly finalized.

20 MR. BISHOP: Justice Sotomayor,  
21 there's -- there's no chance that anyone will  
22 wait to challenge a rule like this. There were  
23 dozens of suits in the district court and  
24 protective petitions filed within days of this  
25 rule coming out. This is a rule of critical



1 importance to --

2 JUSTICE SOTOMAYOR: Let me ask you  
3 something. Is -- I don't think there's any res  
4 judicata against the government, or is there?  
5 Would a -- would a -- or collateral estoppel,  
6 it wouldn't be res judicata, could there be  
7 collateral estoppel?

8 MR. BISHOP: I don't believe that any  
9 of the conditions for estoppel for either issue  
10 preclusion or -- or claim preclusion would  
11 apply here. If the government lost these  
12 cases, I assume at that point that it could --  
13 it could back away before it litigated the  
14 rest. And --

15 JUSTICE GINSBURG: Can -- can you  
16 explain to me, I know you have a textual  
17 argument, but is there some sense in having  
18 individual permit grant or denial go to the  
19 court of appeals and a question of the  
20 definition here of "waters of the United  
21 States" that goes to the district court? One  
22 would think it would be just the other way  
23 around.

24 MR. BISHOP: Well, can I -- can I say  
25 two things about that, Justice Ginsburg? The

1 first is that Congress itself put the 1342 NPDS  
2 permits into (b)(1), so those are reviewed in  
3 the court of appeals. It do -- did not do that  
4 with 1344 fill permits. So Congress itself had  
5 no problem whatsoever with the idea that permit  
6 -- permits could be challenged in different  
7 courts, even though exactly the same WOTUS  
8 decision would be made in both of those types  
9 of permit.

10 The second -- the second thing is that  
11 this idea that there is bifurcation here is --  
12 is false.

13 In fact, WOTUS decisions are litigated  
14 in the district court. They're litigated in  
15 the district court when the rule is challenged,  
16 under our approach here, but they're also  
17 litigated in the district court when a  
18 particularized decision is made.

19 Riverside Bayview, SWANCC,  
20 Rapanos/Carrabel, Sackett, Hawkes, all of this  
21 Court's cases addressing this question have  
22 come up through the district courts. And these  
23 arise in enforcement proceedings, in -- out of  
24 compliance orders, or out of permits.

25 By the time that a party seeks an NPDS

1 permit, it knows very well whether or not it  
2 has "waters of the United States" on its  
3 property.

4           And if you think about your Miccosukee  
5 case or the LA River case, I think it's clear  
6 why. If you are building a huge pump as in  
7 Miccosukee or if you have a constructed part of  
8 the LA River as in that case, you've already  
9 had to get the fill permit before you ever get  
10 to the NPDS proceeding.

11           As a practical matter, nobody  
12 challenges a WOTUS determination in a 1342  
13 permit proceeding. No one is ever going to go  
14 through the incredible expense of that permit  
15 without first having determined where the  
16 agency is through one of these more formal  
17 proceedings, like a J.D. at issue in Hawkes,  
18 which was reviewed, the J.D., as you said, in  
19 Hawkes is reviewed in the district -- no one is  
20 going to do that unless they know whether they  
21 have WOTUS.

22           JUSTICE KAGAN: Mr. Bishop, could I  
23 step back just for a bit? I mean, I understand  
24 that your basic argument is the list is the  
25 list and what's on the list controls.

1 MR. BISHOP: Right.

2 JUSTICE KAGAN: But if I said to you  
3 what was Congress's theory behind the list, do  
4 you think Congress had one?

5 MR. BISHOP: To be honest, I do not --  
6 I cannot explain that and I have never heard  
7 anyone explain that to me. I mean, if you look  
8 at -- if you look at the list, (b) -- (b)(1)(B)  
9 references a provision that was never enacted,  
10 that doesn't exist. (A) puts into the courts  
11 of appeals promulgation of any standard or  
12 performance under Section 1316, but (E) puts in  
13 any approval or promulgation of a limitation  
14 under 1316.

15 I mean, to me, this, and this was a  
16 great surprise to me, there is an article that  
17 we cite in our brief, Mead and Fromherz, that  
18 just goes through a lot of different  
19 jurisdictional provisions that Congress comes  
20 up with and explains that a lot of them are  
21 just not very carefully thought out. But what  
22 I would say --

23 JUSTICE KAGAN: So your basic view is,  
24 look, you should just resign yourself to  
25 thinking of this as having no particular

1 rationale. Congress said what it said. Nobody  
2 can figure out what the reasons are that  
3 Congress included those things and not other  
4 things. It's all a themeless pudding and  
5 that's just what it is?

6 MR. BISHOP: And I think when you have  
7 that sort of --

8 JUSTICE KAGAN: Is that -- is that the  
9 idea?

10 MR. BISHOP: Yes. I think, you know,  
11 if someone can come up with an explanation of  
12 this that makes sense, I'm very happy to hear  
13 it. I have yet to hear one.

14 JUSTICE SOTOMAYOR: So should we make  
15 --

16 MR. BISHOP: And that's why you stick  
17 to text of it --

18 JUSTICE SOTOMAYOR: Should we make  
19 sense of it? Meaning the government's position  
20 at least with respect to (E) is very simple.  
21 Once you define navigable waters, you say where  
22 an effluent limitation applies or doesn't.

23 And so that's an effluent limitation.  
24 It's attractive, simple. Certainly no more  
25 complex than your position in terms of its

1 consequences. So --

2 MR. BISHOP: Well, I would disagree  
3 with that, Justice Sotomayor. It's -- it --  
4 what it does is it eats up the entire (b)(1)  
5 statute, where there's -- and, Justice Kagan,  
6 these are not -- these are not careful  
7 provisions, I mean, I'll give you that, but  
8 they are precise, okay, they can be applied,  
9 they are precise down to the last subsection in  
10 many cases.

11 And so if you apply the statutory  
12 language, you have a clean jurisdictional rule.

13 JUSTICE SOTOMAYOR: But we have --

14 MR. BISHOP: If you take the  
15 government's --

16 JUSTICE SOTOMAYOR: But it doesn't  
17 swallow up enforcement actions. It doesn't  
18 swallow up the Army Corps permitting. There  
19 are some very big areas that it doesn't swallow  
20 up.

21 MR. BISHOP: It would swallow up -- I  
22 think it would swallow up Sackett. I -- I  
23 disagree there. The compliance order in  
24 Sackett, which went to the district court, told  
25 the Sacketts not to discharge to identified

1 "waters of the United States" and to restore  
2 the property.

3 Now, the government says enforcement  
4 orders don't promulgate limitations within  
5 Subsection (E). But if -- if an order like  
6 that, that says this is a "waters of the United  
7 States," do not discharge to it, please restore  
8 it, if that's not a limitation under (E), how  
9 can a generalized definition of WOTUS possibly  
10 be such a limitation.

11 I think that there are other, you  
12 know, there are other more complex -- I think  
13 that's an easy one -- there are other more  
14 complex ways in which the government -- I mean,  
15 the government's reading essentially is because  
16 of the breadth of 1311(a), the government's  
17 reading is basically that anything that affects  
18 effluent limitations under the statute comes in  
19 under (E). And if you think about --

20 JUSTICE SOTOMAYOR: Could you just  
21 give me one moment, because you just mentioned  
22 the limitations.

23 Give me your interpretation of  
24 effluent limitation or other limitation. What  
25 would other -- give me concrete examples of

1 what would be an other limitation so that the  
2 two terms are not redundant?

3 MR. BISHOP: Other limitations means  
4 the non-effluent limitations in the four listed  
5 provisions. (E) --

6 JUSTICE SOTOMAYOR: Give me an  
7 example, concrete example.

8 MR. BISHOP: Well, let me give you  
9 four examples. So, under 1311(b), and there  
10 are many -- there are many more, this is just a  
11 sampling, so under 1311(b), EPA is directed to  
12 promulgate treatment standards for discharges  
13 to publicly owned treatment works.

14 Under 1312, which is the water quality  
15 standards provision, it is directed to  
16 promulgate alternative effluent control  
17 strategies needed to meet water quality  
18 standards.

19 1316 is all about new source  
20 performance standards, and there, among the  
21 various things that the EPA is told that it  
22 should do, you can come up with operating  
23 methods for the source, operating methods for  
24 the source to meet these standards.

25 And then, under 1345, which is the



1 sewage sludge -- toxic sewage sludge, EPA is  
2 told that it can promulgate management  
3 practices. And the way these fit together, is  
4 there's an effluent limitation, is a specific,  
5 usually numerical, limitation on the  
6 quantities, rates, or concentrations of  
7 pollutants. But you can -- you can just set  
8 those numbers, but something else that you can  
9 do is you can say, well, what comes first?  
10 Before this pollutant comes out of the pipe,  
11 what can we do to reduce the effluent in there?

12 And -- and these four provisions list  
13 very precisely things like operating --

14 JUSTICE SOTOMAYOR: So give meaning to  
15 the word "limitation."

16 MR. BISHOP: A limitation --

17 JUSTICE SOTOMAYOR: Well, because  
18 you're basically buying into the government's  
19 argument that it's anything related to --

20 MR. BISHOP: Not at all.

21 JUSTICE SOTOMAYOR: -- effluent  
22 limitation.

23 MR. BISHOP: Absolutely not. It is  
24 the -- a limitation is an effluent limitation  
25 which is defined -- defined in 36-211, and

1     there are limitations listed in the four  
2     provisions, 1311, 1312, 1316, and 1345. Those  
3     are very precise. That is not anything that  
4     affects a -- the -- the -- an effluent  
5     limitation. It is precise, non-effluent  
6     limitation actions that Congress directed EPA  
7     to take to reduce effluents.

8             And you don't need to go beyond those  
9     four -- those four provisions qualify the  
10    reference to other limitations. And what you  
11    don't do is look at 1311(a), which is the  
12    overarching, foundational provision of the  
13    statute, where if that is what defines what  
14    goes to the court of appeals under (E), you  
15    basically have -- everything -- everything  
16    comes in.

17            Let me just give one more example. I  
18    gave the example of Sackett. But it's -- you  
19    know, 1313 is the water quality provision,  
20    TMDLs. It tells -- it drives effluent  
21    limitations. You set the water quality for a  
22    segment of water, and once you've set that, it  
23    drives the effluent limitations that can be  
24    granted for point sources there.

25            That -- it is inconceivable that that

1 doesn't fall under the government's view of  
2 things that affect effluent limitations. But  
3 the -- the government has twice persuaded  
4 courts of appeals that 1313 lies outside (E)  
5 using textual grounds.

6           What the government's position does is  
7 to make a horrible mess of this statute. And  
8 that mess can only be fixed in one way. And  
9 that's by looking at the precise language that  
10 is set out in (b)(1) and in (E) and (F).

11           And if I can reserve the rest of my  
12 time for rebuttal.

13           JUSTICE GINSBURG: May I just ask you  
14 a question about if -- if, as seems likely, the  
15 rule, the "waters of the United States"  
16 definitional rule is rescinded, is this case  
17 moot?

18           MR. BISHOP: I -- I think it's just  
19 too early to say when or if it will be  
20 rescinded, Justice Ginsburg. The comments came  
21 in on September 27th. There were thousands of  
22 them. We don't know what the timetable is. We  
23 don't know what the government will do.

24           JUSTICE GINSBURG: But they -- the  
25 notice -- as I understand it, notice and

1 comment period has concluded.

2 MR. BISHOP: It has concluded. There  
3 were thousands of comments. At some point, the  
4 government will take action. We don't know if  
5 it will -- the agency will rescind the rule or  
6 not.

7 It is clear that -- the -- the  
8 environmental groups have said in the press  
9 that they will challenge any withdrawal  
10 immediately. And I would suggest that while  
11 that challenge, doubtless with a stay request  
12 attached, is pending, then the fate of the  
13 WOTUS rule is still up in the air.

14 If I can reserve my time.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Mr. Murphy.

18 ORAL ARGUMENT OF ERIC E. MURPHY  
19 ON BEHALF OF RESPONDENTS, OHIO, ET AL.,  
20 IN SUPPORT OF THE PETITIONER

21 MR. MURPHY: Mr. Chief Justice, and  
22 may it please the Court:

23 I'd like to begin with Justice Kagan's  
24 question about the overarching theory. I think  
25 there is a theory that explains both subsection

1 (E) and the entire statute, and that theory is  
2 Congress went through and it looked at the  
3 specific delegations of authority in -- in each  
4 of these statutes. In each of these provisions  
5 that is listed here in the seven sections,  
6 Congress directs EPA to do a specific type of  
7 activity. Subsection (A), standards of  
8 performance, that's one provision in 1316. It  
9 tells EPA promulgate these standards. And  
10 that's true for each one of these, including  
11 subsection (E).

12 And I think that gives meaning to what  
13 effluent limitation or other limitation should  
14 mean because words are known by the company  
15 they keep. Effluent limitation or other  
16 limitation, under the four listed sections, it  
17 seems to me it's talking about the types of  
18 limitations that those four sections  
19 specifically tell EPA: Go engage in  
20 rule-making. Go do these types of activities.  
21 And each one of those is a distinct type of  
22 activity.

23 JUSTICE KAGAN: In the -- in the  
24 government's brief, they ask -- they say, well,  
25 what if we had just done it the following way?

1 We, you know, issued a rule saying don't  
2 discharge -- you can't discharge more than a  
3 certain amount of a certain pollutant in these  
4 following waters.

5 And just list the waters in the rule  
6 that says how much of the pollutant you can't  
7 discharge. And they say, under your rule, that  
8 would come out differently, but it shouldn't  
9 come out differently.

10 MR. MURPHY: I -- I think it would in  
11 this sense: Nothing in subsection or, excuse  
12 me, nothing in Section 1311 directs them to do  
13 that. That would be the agencies acting under  
14 their general rule-making authority, which  
15 would be in Section 1361(a). That's the  
16 catch-all. It says, the agencies, you can  
17 issue rules to implement the Act. That's  
18 exactly what the WOTUS rule is designed to  
19 accomplish. It's under that authority.  
20 Nothing in Section 1311 either tells the EPA to  
21 do that type of action or the WOTUS rule here.

22 JUSTICE KAGAN: So let me make sure I  
23 understand. On -- on -- on that rule, if the  
24 -- if somebody challenged that rule, where  
25 would it go?

1           MR. MURPHY: That would -- so I  
2     assume, the -- the hypothetical was --

3           JUSTICE KAGAN: You -- you can't  
4     discharge more than X amount of Y pollutant in  
5     the following waters.

6           MR. MURPHY: Okay. So I think that  
7     that -- it was just defining waters. That  
8     would -- that would strike me closer to an  
9     effluent limitation because of the actual  
10    limitation, but I still don't think it would be  
11    under 1311. 1311 directs the EPA to set  
12    effluent --

13          JUSTICE KAGAN: Well, it's an effluent  
14    limitation, but you say it's not under 1311.

15          MR. MURPHY: Because it would be under  
16    1361.

17          JUSTICE KAGAN: So then it goes to the  
18    district court?

19          MR. MURPHY: Yes. Yes. It would go  
20    to the district court, I think. In -- but the  
21    common theme of all four of these provisions, I  
22    think, is it tells the EPA to undertake  
23    specific types of actions. 1311, the  
24    technology-based limitations for existing  
25    sources; 1312, switches to water quality-based

1 standards; 1316, new source standards; and then  
2 1345, sewage sludge. So I think that there's  
3 precise language directing EPA to engage in  
4 activity, but there is nothing in the statute  
5 that you can find that -- in any of these four  
6 that says, EPA, please promulgate a definition  
7 of "waters of the United States."

8 JUSTICE ALITO: But do you think that  
9 the EPA has the power to issue the type of rule  
10 that Justice Kagan described?

11 MR. MURPHY: They very may not have  
12 the power. If the -- if the power exists,  
13 however, I do not think it would be a power  
14 under 1311. I think it would -- the power  
15 would flow from 1361, which is the general  
16 authority to implement the Act.

17 I'd also like to turn briefly to the  
18 Chief Justice's concerns with efficiency. We  
19 recognize there are efficiency concerns on the  
20 other side, but -- but as DuPont itself  
21 recognized in Footnote 26, there's a competing  
22 wisdom to having things percolate up with more  
23 review. There's a greater chance of having a  
24 correct result.

25 And I think this -- there's a national



1 rule of -- everybody would agree it's very  
2 important. Everybody would agree that it's  
3 important to get things right. And I also  
4 think that -- that there are both efficiency  
5 concerns and fairness concerns on -- on our  
6 side.

7 Efficiency concerns, this Court has  
8 repeatedly said, repeatedly said, including in  
9 Hertz and many other cases, that we should  
10 establish clear jurisdictional rules. This  
11 case is an example of why that presumption  
12 should exist. We've been litigating this  
13 jurisdictional issue for two years now.

14 This is litigation that, as Hertz  
15 indicates, is better spent on litigating the  
16 merits of the rule versus litigating where to  
17 sue. I think our rule, following the plain  
18 text, adopts the clear rule. So for all sorts  
19 of future cases, it's much more likely  
20 individuals will know where to go. Issuing or  
21 denying a permit, if it actually means issuing  
22 or denying a permit, that's a --

23 JUSTICE GINSBURG: You have -- do you  
24 have any reason -- Mr. Bishop was candid in  
25 telling us there doesn't seem to be any rhyme

1 or reason to this allocation.

2 MR. MURPHY: Well, I do think that --  
3 the rhyme or reason I came up with is, if you  
4 look at the seven actions, each of the sections  
5 that is listed promulgate a standard of  
6 performance. Under Section 306, a toxic  
7 effluent standard; under 1317, make a  
8 determination with respect to a state permit  
9 program -- these are all specific delegations  
10 of authority to the agency to engage in the  
11 specific types of actions that are listed.

12 JUSTICE KAGAN: Do you -- do you think  
13 general -- I mean, does your interpretation  
14 depend very much on a specific understanding of  
15 the word "under"? In other words, you are  
16 reading this to say something like under the  
17 specific authority of Section 1311, 1312. But  
18 "under" is a kind of nebulous word. It doesn't  
19 say under the specific authority here. It just  
20 says "under."

21 You might read "under" a little bit  
22 differently. You might read "under" to say  
23 something like limitations regulating actions  
24 taken under Sections 1311, 1312, et cetera.

25 So why should we read "under" your

1 way, rather than in some other way?

2 MR. MURPHY: Yes, because I think you  
3 -- "under" is absolutely -- the Court has said  
4 it's a chameleon, but I think that when you  
5 look at it in the entire phrase, promulgate or  
6 approve an effluent limitation or under  
7 limitation under these things, I think that our  
8 position relies on the entire phrase.

9 And when you say "promulgate a  
10 limitation under," that means that you're  
11 enacting a regulation that is a restriction and  
12 it's under these provisions. I just --

13 JUSTICE KAGAN: But how about -- I  
14 take the point, but how about promulgating a  
15 limitation, regulating actions taken under  
16 1311, 1312? If you did it that way, it would  
17 come out the government's way.

18 MR. MURPHY: I'm not certain that it  
19 would, because this still would not qualify as  
20 a limitation, it seems to me. I think their  
21 approach would have to be affecting a  
22 limitation that exists within, because that's  
23 essentially what they're arguing, that by  
24 defining the "waters of the United States"  
25 they're triggering -- triggering the ban on

1 discharges in 1311(a) and that's sufficient.

2 But the statute says "promulgate a  
3 limitation." When you hear the phrase  
4 "promulgate a limitation," the thing being  
5 promulgated itself must be the restriction.  
6 But they don't rely --

7 JUSTICE KAGAN: Yes, but, on -- on the  
8 other hand, you yourself treat this rule as  
9 very much limiting your activities. It is a  
10 limitation on activities. It's combined with  
11 another limitation, to -- to say you can't  
12 discharge pollutants where you want to  
13 discharge pollutants, but it's very much part  
14 and parcel of the limitation that you're  
15 objecting to.

16 MR. MURPHY: So I think the limitation  
17 is 1311(a). That's why they have to always  
18 change the verb from promulgate to impose or --  
19 it certainly has a practical effect of  
20 triggering a limitation, but so did the  
21 compliance order in Sackett. And that flowed  
22 out of the district court.

23 I just think the practical effect  
24 test, if you're going to adopt that, it's going  
25 to be unclear in most cases whether something

1 has a practical effect of triggering a  
2 limitation under 1311(a). So I think if you're  
3 -- if we're in the Hertz world where we're  
4 thinking of what's the clearer rule, I think we  
5 provide a clear rule. It's going to be easily  
6 administrable in the range of cases.

7 Under the government's approach,  
8 because it's vague, I think it's going to lead  
9 to a lot additional -- of additional litigation  
10 over where to sue.

11 I guess the final point I would make  
12 is we don't just have efficiency concerns on  
13 our side. We have fairness concerns on our  
14 side as well because of the (b)(2) ban on  
15 raising things that could have been raised  
16 under this jurisdictional provision, and later  
17 civil or criminal enforcement proceedings.

18 Justice Powell when talking about a  
19 very similar review preclusion provision  
20 suggested that he would interpret it narrowly  
21 if he could.

22 In the Clean Air Act, it's quite  
23 broad. It's impossible to interpret it  
24 narrowly. But I think the presumption of  
25 agency action review that was at issue in

1 Sackett would trump the government's position,  
2 given the unfairness that could arise.

3 And the Court should keep in mind that  
4 every one of the Court's cases that it has  
5 considered the "waters of the United States"  
6 rule, those are cases that have arisen in  
7 enforcement proceedings or other type of  
8 district court review.

9 All of those under the government's  
10 approach could now not be allowed if the  
11 government's approach is allowed, because if  
12 circuit review exists, then the (b)(2)  
13 provision kicks in and it says that you cannot  
14 have review and later criminal or civil  
15 enforcement proceedings.

16 And I think that's unfair. I think  
17 that's -- Sackett clearly indicated that the  
18 presumption of agency action review extends to  
19 this Act and it expressly said that that  
20 presumption is a repudiation of the principle  
21 that efficiency of agency action should trump  
22 all. And so I think that fairness concern  
23 equally applies here.

24 I also think that there are due  
25 process concerns as well. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Ms. Kovner.

4 ORAL ARGUMENT OF RACHEL P. KOVNER  
5 ON BEHALF OF RESPONDENTS

6 MS. KOVNER: Mr. Chief Justice, and  
7 may it please the Court:

8 In order for a person to know what  
9 they are prohibited from doing under Section  
10 1311, they need to know both numerical  
11 constraints that apply under that provision and  
12 geographical constraints under that section.

13 A broad definition of "waters of the  
14 United States" imposes broader limitations  
15 under Section 1311. And a narrower definition  
16 imposes narrower limitations under Section  
17 1311.

18 Indeed, the challengers are here today  
19 challenging the rule precisely because they  
20 submit it's going to impose broader  
21 restrictions on their conduct under Section  
22 1311.

23 And any doubt about whether  
24 geographical limitations like this ought to be  
25 treated as limitations under Section 1311 and

1 subject to circuit court review is resolved by  
2 this Court's cases interpreting this very  
3 provision, which indicate that the provision  
4 should be interpreted to avoid the irrational  
5 bifurcation of similar or related decisions.

6 And none of the challengers here have  
7 explained throughout the briefing or here today  
8 why it is that Congress would want to bifurcate  
9 the geographic aspects of limitations under  
10 Section 1311 from the numerical aspects.

11 Indeed, I think as some -- some of the  
12 questioning points out, this is the equivalent  
13 of a rule that does those two things together,  
14 that simply says a person shall not in the  
15 following locations discharge pollutants  
16 without a permit.

17 JUSTICE ALITO: Is there anything in  
18 the definitional section that will not  
19 indirectly affect something that is listed in  
20 1369(b)? And if that's the case, why didn't  
21 Congress just include the definitional section  
22 in the list of covered actions?

23 MS. KOVNER: Well, I think the key  
24 here is that there are -- Section 1311, there  
25 are actually only a handful of critical terms



1 and we're defining one of those critical terms.  
2 So it's not our submission that any term that  
3 was defined throughout the statute is going to  
4 affect limitations under Section 1311.

5 But here where you're defining, in  
6 effect, discharge of a pollutant, which is  
7 defined as discharge into the "waters of the  
8 United States," you are expanding or  
9 contracting the scope of the prohibition under  
10 Section 1311.

11 And that's why it's the equivalent of  
12 a rule that says on the following waters you  
13 shall not discharge pollutants under Section  
14 1311.

15 That would certainly be a limitation  
16 that's promulgated under Section 1311 and it's  
17 exactly what's happened here.

18 JUSTICE KENNEDY: So -- so your  
19 position is that interpreting a definitional  
20 phrase is necessarily a limitation?

21 MS. KOVNER: I think it's --

22 JUSTICE KENNEDY: And is that a  
23 correct way to characterize your argument or  
24 not -- not correct?

25 MS. KOVNER: I think I might

1 characterize it a different way. I think we  
2 have a clear rule that's derived from just what  
3 is a limitation. And we think a limitation,  
4 the dictionary definition is it's a  
5 restriction.

6 So the rule has to impose a  
7 restriction under Section 1311. That -- this  
8 rule does that. It is the equivalent of a rule  
9 saying you shall not discharge pollutants into  
10 the following locations except in compliance  
11 with the terms of Section 1311.

12 So, I mean, there has been a lot of  
13 talk of clear jurisdictional rules on the other  
14 side. I think our rule is very clear. It's  
15 just, does it impose a limitation under Section  
16 1311?

17 I took our friend, you know,  
18 Petitioner to get up and say essentially he  
19 agrees with that. You look to is it a  
20 limitation and then you look to is it a  
21 limitation that arises under one of the  
22 enumerated provisions?

23 CHIEF JUSTICE ROBERTS: It seems -- it  
24 seems more natural to regard the WOTUS rule,  
25 though, as not imposing a limitation but

1 telling you where whatever limitations are  
2 imposed, will apply.

3           It -- it is not a specific limitation.  
4 It kind of sets the -- the -- the canvass and  
5 the rules kind of tell you what -- what that  
6 means.

7           MS. KOVNER: I -- I think they are the  
8 equivalent. They're doing exactly the same  
9 thing here. You could phrase it as it's a  
10 definition that tells you where the limitations  
11 apply or you could phrase it as just part of  
12 the limitation, is it's a limitation that  
13 applies only in certain places.

14           And if you look to this Court's cases  
15 in DuPont and Crown Simpson, I think they tell  
16 you two things: first, you look to whether a  
17 functionally similar rule would have gone to  
18 the courts of appeals.

19           And if it does, and I think, you know,  
20 I think this -- a functionally similar rule  
21 would go to the court of appeals here if it  
22 just included the geographic scope in the rule.

23           CHIEF JUSTICE ROBERTS: Well, Crown  
24 Simpson really was a denial of a permit. I  
25 think you're trying to get too much out of

1 that.

2 In vetoing the state's grant --

3 MS. KOVNER: Right.

4 CHIEF JUSTICE ROBERTS: -- of a permit,  
5 it denied those permits.

6 MS. KOVNER: That's right. And -- but  
7 I think what -- one -- the reasoning that the  
8 Court uses is it says, is this functionally  
9 similar to a rule that would go to the court of  
10 appeals? And here this is functionally similar  
11 to a rule that says the effluent limitations  
12 that we're promulgating apply in the following  
13 places. You shall not discharge in the  
14 following places without a permit.

15 JUSTICE GINSBURG: What goes -- what  
16 goes to the district court under your reading?

17 MS. KOVNER: No, Your Honor. I think  
18 if the EPA promulgated a restriction that said,  
19 for instance, you shall not discharge more than  
20 a thousand parts per million of a certain  
21 pollutant into the following waters, that would  
22 be a classic effluent limitation that would go  
23 to the court of appeals.

24 And I'm not sure --

25 JUSTICE GINSBURG: I'm asking, what

1 goes to the district court?

2 MS. KOVNER: So things that go to the  
3 district court include decisions on one  
4 particular type of permit, fill permits. Your  
5 Honor's opinion in NRDC lists a number of  
6 additional actions that go -- you know, things  
7 that aren't effluent limitations but are other  
8 kinds of rules. For instance, rules for  
9 grant-making, rules for certain kinds of vessel  
10 waste. Those aren't effluent limitations. And  
11 those are the kinds of things that go to the  
12 district court.

13 JUSTICE BREYER: Well, what is the --

14 CHIEF JUSTICE ROBERTS: The most -- it  
15 seems to me the most basic question, are these  
16 "waters of the United States," if you're -- if  
17 you're a farmer somewhere and you don't think  
18 these are "waters of the United States," and  
19 you go to the district court, they're going to  
20 tell you, well, sorry, you're out of luck  
21 because you didn't challenge this in -- within  
22 120 days of the promulgation.

23 MS. KOVNER: Well, I think -- so I  
24 think if you were challenging whether a  
25 particular land was a water of the United

1 States, you could go to the district court and  
2 get a jurisdictional determination applying to  
3 the particular facts of your case.

4 CHIEF JUSTICE ROBERTS: Yeah, yeah,  
5 but if you think that's -- the definition is --  
6 is what you want to challenge, not whether the  
7 definition applies to your land.

8 MS. KOVNER: It's -- it's just like,  
9 Your Honor, if that farmer wanted to challenge  
10 the -- the numerical constraints that applied,  
11 they ought to go to the court of appeals to  
12 challenge the numerical constraints.

13 Now, I do think there's the separate  
14 question that the other side raises of what if  
15 there is a enforcement action and you want to  
16 contest as a defense in an enforcement action  
17 the definition of "waters of the United  
18 States"? And I think what Harrison indicates,  
19 interpreting exactly the same sort of type of  
20 scheme in the Clean Air Act, is there may be --  
21 if there is any due process issue, if that  
22 farmer needs to have a venue to challenge the  
23 rule as a defense, that's -- that's an issue  
24 with enforcement of (b) -- (b)(2). That's an  
25 issue with the enforcement of the bar to raise

1 in that kind of challenge.

2 CHIEF JUSTICE ROBERTS: Well, I don't  
3 know what you mean is an issue. Does that mean  
4 he can challenge it in an enforcement action?

5 MS. KOVNER: It means that if there's  
6 any due process problem, the appropriate way to  
7 address that is by a narrow interpretation of  
8 (b)(2), that permits an enforcement action.

9 CHIEF JUSTICE ROBERTS: Well, what  
10 else do you need to know to tell me whether  
11 there's a due process problem or not? He  
12 thinks the definition is not appropriate --

13 MS. KOVNER: Okay.

14 CHIEF JUSTICE ROBERTS: -- under --  
15 under the statute. That you're enforcing it  
16 against him. Does he get to challenge it or  
17 not?

18 MS. KOVNER: So --

19 CHIEF JUSTICE ROBERTS: He's not a  
20 lobbyist. He's a farmer in Kansas. And all of  
21 a sudden, you come in and you're telling him  
22 that he can't, you know, discharge whatever  
23 into the lake. And -- and he says, well, I  
24 don't think that's the right definition. And  
25 you say, well, you should have come to

1 Washington four years ago.

2 MS. KOVNER: So the Court has reserved  
3 in Harrison, in interpreting essentially the  
4 same provision, whether there is a due process  
5 issue that somebody needs to be able to bring a  
6 challenge when there's an enforcement action.

7 If there is, Your Honor, it's not a --  
8 limiting the definition of effluent limitation  
9 is not going to solve that problem because  
10 there are inevitably some limitations that are  
11 going to be covered by (b)(1). So, if there is  
12 a due process limitation, the way to address  
13 that has to be to say whatever those  
14 limitations are that are covered by (b)(1) --

15 JUSTICE ALITO: Well, if you will not  
16 say whether a person in that situation would be  
17 able to challenge it in a permitting -- in a  
18 permitting proceeding, then I take your answer  
19 to be that the -- the position of the United  
20 States is that the person cannot challenge it.  
21 That's the position you would take in that  
22 situation.

23 MS. KOVNER: I'm -- I'm not sure, Your  
24 Honor. I don't think we have taken a position  
25 on that because the Court has reserved it. I



1 think the cases the Court would look to are  
2 cases like Yakus and Adamo Wrecking, and I  
3 think it might depend on the position of --

4 JUSTICE ALITO: Well, I don't  
5 understand how you can make the argument that  
6 you're making today without knowing what the --  
7 what your answer is to that question.

8 MS. KOVNER: I think --

9 JUSTICE ALITO: But you won't answer  
10 that question.

11 MS. KOVNER: I think the reason, Your  
12 Honor, is that -- I think what the Court has  
13 expressly said about it is that to the extent  
14 there's a due process problem, the appropriate  
15 way to address that, the Court said in Note 9  
16 of Harrison, is by narrowing the definition of  
17 (b)(2), by narrowing the preclusion provision.  
18 And that's what the Court would have to do  
19 because any limitation that's promulgated under  
20 (b)(1) is going to raise --

21 JUSTICE BREYER: So it says here that  
22 there is a definition of effluent limitation.

23 MS. KOVNER: Yes.

24 MS. KAGAN: Ms. --

25 JUSTICE BREYER: The definition of

1 effluent limitation is "a restriction  
2 established by the Administrator on quantities,  
3 rates, and concentrations." Well, once you  
4 have that in mind, it's hard to agree with you,  
5 because it looks as if, given the fact that we  
6 have (A), (C), (D), and then (E), which refer  
7 to those four sections, it would seem to do two  
8 things: (F) says if they issue -- you know,  
9 you don't -- you want them to issue a permit  
10 and they won't, to you, go ahead, you can go to  
11 the court of appeals. A little unusual since  
12 it's fact-based, but nonetheless.

13           And then the other four that I just  
14 mentioned seem to say if there are standards,  
15 which are like rules, and they're related to  
16 the specific definition I told you about or the  
17 equivalent because "standards of performance,"  
18 after all, is a different set of words than  
19 "effluent limitations." But the "other  
20 limitations" means something like that.

21           And if that isn't the correct  
22 interpretation, then what in heaven's name are  
23 (A), (C), (D), and (F) -- or what are (A), (C),  
24 and (D) doing there? Because you don't need  
25 them? Indeed, your view, which makes sense,

1 because maybe all rules should be reviewed in a  
2 court of appeals, but that isn't what it says.

3 And -- and I am rather stuck with  
4 that. And you say, well, why did Congress do  
5 it? The reason they did it is because they  
6 were worried about getting review of effluent  
7 limitations, or the equivalent, as defined up  
8 there in a court of appeals fast. And as to  
9 the rest of it, the rest of what the EPA does,  
10 they didn't care or at least they didn't care  
11 here. Or at least the hearings weren't about  
12 that. Or at least the members of Congress  
13 weren't thinking about that. That's why  
14 they're left out.

15 All right. Now, that's -- that's how  
16 I read it. And -- and what is it that you want  
17 to say that will disabuse me of that reading?

18 MS. KOVNER: Sure. So let me give you  
19 first a textual response and then a response  
20 that goes to, I think, what Congress indicated  
21 it was thinking.

22 JUSTICE BREYER: Yeah.

23 MS. KOVNER: So, with respect to text,  
24 I mean, it says "effluent or other" --

25 JUSTICE BREYER: Oh, I know that.

1 "Other" means the same --

2 MS. KOVNER: Right.

3 JUSTICE BREYER: -- roughly speaking,  
4 as effluent limitations but in respect to those  
5 things that aren't strictly labeled effluent  
6 limitations.

7 MS. KOVNER: So I think -- I guess I  
8 would have two responses to that, Your Honor.  
9 The first is that's not how this Court has  
10 interpreted parallel language in the Clean Air  
11 Act. So, in Harrison, Your Honor, the Court  
12 looks at a statute that's a same -- the same  
13 kind of list, a bunch of other enumerated  
14 actions, and then a "and any other action of  
15 the Administrator" catch-all at the end. And  
16 the Court gives the catch-all its ordinary  
17 meaning. It doesn't apply the canons Your  
18 Honor is talking about, things like ejusdem  
19 generis.

20 And the second thing I would say, Your  
21 Honor, is even if you want to apply sort of an  
22 effluent-related label I think like Your Honor  
23 is suggesting, a closely related, closely  
24 connected limitations label, this is the first  
25 one in line because this is the limitation that

1 tells you exactly where the effluent  
2 limitations apply. It's as closely connected  
3 as you can get --

4 JUSTICE KAGAN: So, Ms. Kovner --

5 JUSTICE BREYER: And so you have --

6 MS. KOVNER: -- and then just to go to  
7 what Congress was -- was -- indicated it was  
8 thinking. I think if you look to the  
9 legislative history, it thought it was sending  
10 most national rules to the courts of appeals,  
11 not the district courts --

12 JUSTICE SOTOMAYOR: Are --

13 JUSTICE BREYER: And if it is that, if  
14 it is that, if the -- Learned Hand once said  
15 you have to read these things like music. And  
16 -- and the word "other limitations" certainly  
17 doesn't sound like a big catch-all; it sounds  
18 like a little catch-all.

19 So, if that's true, your reading,  
20 though, why did they bother writing this other  
21 stuff? Because after all, they would be up  
22 there in the court of appeals anyway under what  
23 you see as a big catch-all.

24 MS. KOVNER: Well, I think, Your  
25 Honor, if you -- if Your Honor is inclined to

1 give it a narrow reading, we would say just  
2 apply the principles that this Court has  
3 applied in other cases to construe how big that  
4 exception is, what its scope is. And what the  
5 Court has said is avoid the bifurcation of  
6 closely related decisions.

7 And something that tells you the  
8 geographic scope of what effluent limitations  
9 are is just as closely related as you can get  
10 to -- to effluent limitations. So --

11 JUSTICE KAGAN: So, Ms. Kovner --

12 JUSTICE GINSBURG: Ms. Kovner, you  
13 mentioned the Clean Air Act. But that does  
14 have a provision that makes rules of national  
15 scope go to the court of appeals. That's  
16 what's missing here.

17 MS. KOVNER: Your Honor, we agree that  
18 this provision is narrower than the Clean Air  
19 Act provision and that there are many rules  
20 that are going to be promulgated that don't go  
21 to the courts of appeals. So we're not reading  
22 this as though it said "and any other action of  
23 the Administrator," like the Clean Air Act.  
24 What we do think it says is effluent or any  
25 other limitations under Section 1311. So, if

1 it's imposing a limitation under Section 1311,  
2 that's all we're saying is what goes to the  
3 courts of appeals.

4 JUSTICE SOTOMAYOR: So, basically, you  
5 agree with your adversary that -- that "other  
6 limitation" means any limitation? Is there any  
7 -- otherwise, what limitations don't exist?

8 MS. KOVNER: We -- we -- we agree that  
9 it means just the ordinary meaning, restricted  
10 --

11 JUSTICE SOTOMAYOR: Of any limitation?

12 MS. KOVNER: Yes. But I think we  
13 would also say, Your Honor, that if you were to  
14 take Justice Breyer's approach and say it has  
15 to be an effluent-related limitation, somehow  
16 connected to effluent limitations, we still win  
17 because this is the kind of limitation you need  
18 to know in order to know where the effluent  
19 limitations apply.

20 It's as closely connected as you can  
21 get --

22 JUSTICE KAGAN: Ms. --

23 CHIEF JUSTICE ROBERTS: Justice Kagan.

24 JUSTICE KAGAN: Let's assume for --  
25 for a moment that your view of any other

1 limitation is right, that it's quite a broad  
2 phrase, but General Murphy, as I understood it  
3 -- him, made -- made a point that said, well,  
4 still, I mean, there's this under these  
5 following sections.

6 And suppose he's right, that in the  
7 context of this whole provision, which starts  
8 out about "promulgating limitations," that  
9 "under" is -- is best taken to mean under the  
10 specific authority of.

11 MS. KOVNER: Yes.

12 JUSTICE KAGAN: So is -- do you have  
13 any argument that this rule was promulgated  
14 under the authority of Section 11, or was it  
15 pretty clearly promulgated under the authority  
16 of Section 1361?

17 MS. KOVNER: We think it's promulgated  
18 under both. Whenever EPA promulgates a rule  
19 interpreting the statute, it's implying -- it's  
20 applying, in part, the general rule-making  
21 authority provision that Mr. Murphy alludes to.

22 But it's also here relying on the  
23 ambiguity that exists. It's just -- you know,  
24 that -- that a statutory term is ambiguous  
25 indicates that Congress was delegating to the



1 agencies some authority to resolve ambiguities  
2 in the statute. Here, it's relying on 1311,  
3 which contains these terms that the EPA has the  
4 authority to define under the statute.

5 JUSTICE KAGAN: Now, in your own brief  
6 in responding to some other argument in a  
7 footnote, you say the CWA authorized the  
8 Administrator to issue the Clean Water Rule,  
9 and then you have a citation, and it gives 1361  
10 as the authority for that.

11 And that seems, you know, pretty right  
12 to me, that you were relying on general  
13 rule-making authority, rather than relying on  
14 the provision that talked about specific  
15 effluent restrictions.

16 MS. KOVNER: Well, just to be clear,  
17 Your Honor, Section -- for everything that we  
18 do under Section 1311, every kind of limitation  
19 we promulgate or approve, we are relying on  
20 that general rule-making authority.

21 I think it's important that Section  
22 1311 itself never says the EPA shall promulgate  
23 effluent limitations. I mean, it's -- it's  
24 simply, you know, we're relying on our Section  
25 1361 rule-making authority to say we're the

1 entity that gets to define what the limitations  
2 are going to be. We're relying on our general  
3 rule-making authority to give content to  
4 definitions that the statute, you know,  
5 indicated are going to be defined terms and are  
6 going to impose limitations.

7 For example, you know, other places in  
8 1361, they talk about best pollution control  
9 technology as defined by the Administrator.  
10 Well, I think if we define best pollution  
11 control technology more stringently, it's  
12 pretty clearly going to be imposing an  
13 additional limitation under Section 1311.

14 JUSTICE BREYER: Why? Why? Because  
15 if you say, if it's like effluent limitation,  
16 how -- you say we need an end because this is  
17 close enough -- but it's defined as -- as I  
18 said, quantities, rates, and concentrations of  
19 constituents which are discharged.

20 Now, how is a geographical regulation,  
21 a geographical limitation or expansion, how is  
22 that related to, why, that doesn't sound like a  
23 restriction on quantities, rates, and  
24 concentrations of discharges.

25 MS. KOVNER: Sure. It's a limitation

1 that's very closely bound up with quantities  
2 and rates because you need to know the scope of  
3 the definition of -- the scope of --

4 JUSTICE BREYER: Of a discharge from a  
5 point.

6 MS. KOVNER: Yes.

7 JUSTICE BREYER: Let's say, a  
8 geographical limitation --

9 MS. KOVNER: Yes.

10 JUSTICE BREYER: -- is -- okay, I get  
11 it.

12 MS. KOVNER: So, in order to know the  
13 scope of that obligation of the limits on rates  
14 or points, you need to know where those  
15 limitations apply. I mean, it's literally  
16 something you need --

17 JUSTICE BREYER: Yeah, I see.

18 MS. KOVNER: -- to know both in order  
19 to know why you're --

20 JUSTICE BREYER: I see the point, I'll  
21 think about it.

22 JUSTICE GINSBURG: May I ask you about  
23 the mootness problem? Isn't it so that and now  
24 the government is poised to moot this case  
25 anytime it wants. It has -- it has announced

1 that it is rescinding this rule and go back to  
2 the old rule, and it has no disincumbent, and  
3 -- and tomorrow it could say no more new  
4 "waters of the United States" rule.

5 MS. KOVNER: I -- I think my friend on  
6 the other side's description of the state of  
7 affairs is correct in that we've completed the  
8 notice and comment receiving phase and the  
9 agency is now evaluating that -- those comments  
10 that it's received.

11 And it is possible that the agency  
12 will, after that, decide, as it's proposed to  
13 do, decide to rescind the existing rule.

14 I do think it points up, Your Honor,  
15 the sort of practical implications here. I  
16 mean, for example, the agency received about  
17 500,000 comments about the new proposed rule.  
18 It received, I think, about twice as many  
19 comments, it assembled a 350,000 page  
20 administrative record about the old rule.

21 JUSTICE SOTOMAYOR: All right. So  
22 just realistically, is it possible this case  
23 would be mooted this term or is this process  
24 one that innately will take longer than this  
25 term?

1           MS. KOVNER: I don't know the answer  
2 to that question. When -- when -- when it  
3 became a possibility that the rule would be  
4 rescinded, we advised the Court and suggested  
5 it might want to consider holding the case in  
6 abeyance to see what happens, but the Court  
7 elected to proceed with the case. And we don't  
8 have any sort of different information now  
9 aside from that the notice and comment has  
10 concluded.

11           CHIEF JUSTICE ROBERTS: Nothing in the  
12 pending proceedings addresses the  
13 jurisdictional issue that's before us right  
14 now, does it?

15           MS. KOVNER: The jurisdictional issue  
16 would arise again, yes, under a new -- so I  
17 think if -- I tend to agree that if the Court  
18 rescinded the rule that is at issue here, this  
19 case would become moot, but the issue would  
20 arise again in the context of the new "waters  
21 of the United States" rule.

22           And, you know, I think what you would  
23 have, to allude to the practical consequences  
24 that Your Honor discussed earlier, as this case  
25 exemplifies, you'd have people go into dozens

1 of district courts. Those courts would be  
2 reviewing hundreds of thousands of pages of  
3 administrative record.

4 It would get to the courts of appeals.  
5 They would do that again with no deference to  
6 the initial district court decision.

7 It's really inimical to what this  
8 Court indicated in *Crown Simpson* and in other  
9 cases was the purpose of this provision, which  
10 is to give clarity.

11 JUSTICE GORSUCH: Well, but, counsel,  
12 under *Hertz*, we -- we prefer a clear rule.

13 MS. KOVNER: Yes.

14 JUSTICE GORSUCH: And if that's the  
15 thumb on the scale, you -- I thought you had a  
16 pretty interesting argument that, you know, it  
17 would go to the courts of appeals and that  
18 would be more efficient, until you -- your  
19 interaction with the Chief Justice and Justice  
20 Alito where you -- you indicated you wouldn't  
21 necessarily foreclose district court actions  
22 either.

23 So where does that leave us in terms  
24 of a clear rule?

25 MS. KOVNER: Yeah, I -- the Court has

1 indicated clear rules are important. We think  
2 we have the clear rule here. You just look to  
3 --

4 JUSTICE GORSUCH: But you wouldn't --  
5 you wouldn't -- you wouldn't stand by that rule  
6 when pressed by -- by my colleagues.

7 MS. KOVNER: Oh, I don't think so. I  
8 think a person who's bringing a civil suit,  
9 absolutely, under (b)(1), has to go to the  
10 court of appeals.

11 The issue that this Court has reserved  
12 is, well, what if you are -- what if you're the  
13 defendant in an enforcement action.

14 JUSTICE GORSUCH: Right.

15 MS. KOVNER: Harrison indicates it's a  
16 separate question and any issue that arises  
17 would be an issue in (b)(2).

18 JUSTICE GORSUCH: So, if we're going  
19 to be in district court anyway, what's --  
20 what's the efficiency gained here by your rule?

21 MS. KOVNER: Well, I think, you know,  
22 this case exemplifies when a major rule like  
23 this is promulgated, you have many, many people  
24 who want to challenge the rule.

25 Here, you had 15 people, you know, 15

1 parties walk in, and the question is are those  
2 challenges going to be routed to a single court  
3 of appeals that can quickly resolve, you know,  
4 these challenges, or are they going to be  
5 considered in 15 different district courts or a  
6 dozen different district courts and then go up  
7 to the courts of appeals and have that 350,000  
8 page record considered anew.

9 We think it's inimical to the  
10 objective of obtaining certainty about what the  
11 scope of people's obligations are under Section  
12 1311.

13 JUSTICE SOTOMAYOR: I -- I'm sorry.  
14 Perhaps you can focus in.

15 MS. KOVNER: Yes.

16 JUSTICE SOTOMAYOR: What would be the  
17 difference? Let's assume we say this goes to  
18 the court of appeals and the court of appeals  
19 says, whatever, the rule is okay.

20 MS. KOVNER: Yes.

21 JUSTICE SOTOMAYOR: Now an enforcement  
22 action comes in and someone, some farmer says I  
23 don't -- I shouldn't fit under this rule  
24 because this really can't be navigable waters.  
25 What happens then?



1           Does the court say, well, that was  
2           litigated or should have been litigated before,  
3           so we're just not going to pay attention to  
4           this challenge?

5           MS. KOVNER: So I think then the  
6           question would be, notwithstanding whatever  
7           this Court has said about (b)(1), is there a  
8           (b)(2) due process exception?

9           That question is going to be a live  
10          question no matter what this Court decides  
11          about the scope of (b)(1), because there are  
12          always going to be challenges that farmer could  
13          bring.

14          JUSTICE GORSUCH: So, in every  
15          enforcement action, we're going to be having  
16          district courts decide this question anyway  
17          eventually.

18          MS. KOVNER: No, no, I think the next  
19          question the Court will need to address, and it  
20          will need to address no matter what it decides  
21          in this case about the scope of effluent  
22          limitations is, is there a due process  
23          requirement that in an enforcement proceeding  
24          somebody be able to challenge something that,  
25          you know, was promulgated through a rule. It's

1 going to arise on either side's -- on either  
2 side's view of what the scope of effluent  
3 limitations are.

4 JUSTICE ALITO: Could I ask you about  
5 clause (F)? What is your textual argument  
6 relating to that?

7 MS. KOVNER: Sure. So I think it -- I  
8 think our argument derives in large part from  
9 what this Court said about (F) in Crown  
10 Simpson, which is this Court indicated the  
11 provision should be construed not simply to  
12 sort of reach decisions that issue or deny a  
13 permit but also decisions that are so closely  
14 related that it would be irrational to divide  
15 them up.

16 And so then I think it goes to the  
17 point that Justice Ginsburg made and what this  
18 Court said in DuPont, which is if the  
19 individual -- if this decision, when in the  
20 context of an individual proceeding would go to  
21 the court of appeals and, you know, here, in  
22 the context of an individual permitting  
23 decision, a "waters of the United States"  
24 decision would go to the court of appeals, then  
25 it doesn't make sense for a categorical rule

1 about that to go to the district court.

2 And courts of appeals sort of starting  
3 from Crown Simpson have adopted that approach.  
4 And so they've said sort of the basic rules  
5 that are sort of thresholds to whether you can  
6 get a permit or not go to the courts of  
7 appeals.

8 JUSTICE ALITO: So the -- so the  
9 argument would be that the definition issues or  
10 denies a permit because it has a -- an  
11 important effect on the issuance and denial of  
12 permits?

13 MS. KOVNER: It's -- it's a threshold  
14 for a permit to be issued that it has to be a  
15 water of the United States. And if that  
16 decision is made in an individual permitting  
17 action, it will go to the court of appeals.

18 But I do think, Your Honor, looking at  
19 that decision, if you look at the sort of  
20 functionally similar or identical language the  
21 Court -- the Court relied on and said if it's  
22 functionally similar then it should go to the  
23 court of appeals, it has a lot of relevance  
24 under (E) because this is the equivalent of a  
25 rule that says, you know, you cannot discharge

1 pollutants on the following locations.

2 If that goes to the court of appeals,  
3 then a rule that just specifies the geographic  
4 piece should also go to the courts of appeals.

5 And, Your Honor, I do think it's worth  
6 highlighting that the approach that we're  
7 proposing of avoiding irrational bifurcation is  
8 an approach this Court set out about 40 years  
9 ago.

10 Since then, the courts of appeals have  
11 been applying it. They have a construction of  
12 limitation they've been looking to, you know,  
13 does this restrain industry?

14 And they've been applying this sort of  
15 does this bifurcate decisions that are closely  
16 related analysis. They have been doing that  
17 for 40 years. In that time, Congress has  
18 amended this provision, but they haven't  
19 expressed any disapproval of that approach.

20 And, in fact, whenever Congress has  
21 spoken about this provision, they've indicated  
22 they understand that national rules are  
23 generally going to go to the courts of appeals.

24 JUSTICE SOTOMAYOR: But we do have  
25 confusion just in this case.

1 MS. KOVNER: I think your --

2 JUSTICE SOTOMAYOR: There was a  
3 circuit and district court split. So something  
4 about our rule is not clear.

5 MS. KOVNER: You're -- I think Your  
6 Honor is correct.

7 JUSTICE SOTOMAYOR: So tell me what we  
8 do to make it clear. How do we --

9 MS. KOVNER: Yes.

10 JUSTICE SOTOMAYOR: -- explain this to  
11 the courts below so that they have a clearer  
12 idea of what it is that's in and what's out?

13 MS. KOVNER: Yes. I think the clear  
14 rule, Your Honor, is to say if a rule imposes  
15 limitations under Section 1311, then it goes to  
16 the courts of appeals.

17 And I think if -- if the Court reaches  
18 --

19 JUSTICE SOTOMAYOR: That has to do  
20 with whether it imposes a limitation on any of  
21 the words of 1311.

22 MS. KOVNER: I -- I think --

23 JUSTICE SOTOMAYOR: Because that's how  
24 you limited it before.

25 MS. KOVNER: Sure. So I think --

1 JUSTICE SOTOMAYOR: Discharge of any  
2 pollutant in navigable waters. What other  
3 words are at issue?

4 MS. KOVNER: So, for instance, courts  
5 of appeals have consistently treated rules that  
6 interpret other provisions -- other words in  
7 1311 like "pollutant" or "point source," those  
8 have also been going to the courts of appeals.

9 JUSTICE KAGAN: And -- and,  
10 Ms. Kovner, suppose that the -- the rule had  
11 restricted the class of "waters of the United  
12 States".

13 MS. KOVNER: Yes.

14 JUSTICE KAGAN: Would that still count  
15 as a limitation under your view?

16 MS. KOVNER: It would, Your Honor,  
17 because we don't think the right baseline is  
18 what was the pre-existing rule. We think you  
19 look at the rule by itself. The easiest way to  
20 see that I think is an analogy to numerical  
21 limits. So, if the rule is, initially, you can  
22 only discharge 16,000 parts per million of a  
23 chemical, and the rule is changed so now it's  
24 you can discharge 18,000, it's a more lenient  
25 limitation, but you would still say that's an

1 effluent limitation that goes to the courts of  
2 appeals.

3 If there are no further questions.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Two minutes, Mr. Bishop.

7 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP  
8 ON BEHALF OF THE PETITIONER

9 MR. BISHOP: So the government's just  
10 conceded that it's been pushing this functional  
11 argument, functional effects argument, for the  
12 last 40 years, which is true, and some courts  
13 have accepted that and not all have by any  
14 means.

15 But the result has been that, for 40  
16 years, people have been filing duplicative  
17 actions and then litigating about where to  
18 litigate. This is the third case I've had like  
19 this. My clients have had dozens of cases  
20 where they've spent millions of dollars  
21 litigating about where to litigate. The answer  
22 to this is to look at the clear language of the  
23 statute, which is the only way to get a -- a  
24 bright-line rule here.

25 And just to -- part of that is the

1 word "under," Justice Kagan. And I -- I think  
2 when you look at the -- although this is a  
3 chameleon, when you look at the cases, two  
4 clear meanings for "under" that come out. One  
5 is authorized by, as you mentioned. And this  
6 is not authorized by. It's a footnote that you  
7 indicated, and the government's brief concedes,  
8 it's authorized by 1361(a), not by 1311.

9 Another meaning is "as specified in."  
10 And that meaning is important here because  
11 where the -- because the second clause in (E)  
12 specifies limitations under these four  
13 provisions. And those four provisions, as  
14 Justice Breyer noted, list both effluent  
15 limitations and other types of limitations that  
16 cut back on what comes out of the pipe but are  
17 not themselves effluent limitations.

18 That is a perfectly clear meaning of  
19 (E) that does not reach a broad geographical  
20 definition of this type. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel. The case is submitted.

23 (Whereupon, at 11:02 a.m., the case  
24 was submitted.)

25



## Official

<b>1</b>	<b>above-entitled</b> <sup>[1]</sup> 1:13 <b>absolutely</b> <sup>[3]</sup> 16:23 26:3 54:9 <b>accepted</b> <sup>[1]</sup> 62:13 <b>accomplish</b> <sup>[1]</sup> 21:19 <b>accurate</b> <sup>[1]</sup> 6:10 <b>act</b> <sup>[12]</sup> 3:12,16,20 21:17 23:16 28:22 29:19 37:20 43:11 45:13,19,23 <b>acting</b> <sup>[1]</sup> 21:13 <b>action</b> <sup>[17]</sup> 3:14 19:4 21:21 28:25 29:18,21 37:15,16 38:4,8 39:6 43:14 45:22 54:13 55:22 56:15 58:17 <b>actions</b> <sup>[16]</sup> 3:21 4:17 5:5 6:20 13:17 17:6 22:23 25:4,11,23 26:15 31:22 36:6 43:14 53:21 62:17 <b>activities</b> <sup>[3]</sup> 20:20 27:9,10 <b>activity</b> <sup>[4]</sup> 5:9 20:7,22 23:4 <b>actual</b> <sup>[1]</sup> 22:9 <b>actually</b> <sup>[2]</sup> 24:21 31:25 <b>adamo</b> <sup>[1]</sup> 40:2 <b>additional</b> <sup>[4]</sup> 28:9,9 36:6 49:13 <b>address</b> <sup>[5]</sup> 38:7 39:12 40:15 56:19,20 <b>addresses</b> <sup>[1]</sup> 52:12 <b>addressing</b> <sup>[1]</sup> 9:21 <b>administrable</b> <sup>[1]</sup> 28:6 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