No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
Petitioner,

v.

HAWKES CO., INC., ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, OHIO, AND 21 OTHER STATES IN SUPPORT OF RESPONDENTS

MIKE DEWINE
Attorney General
ERIC E. MURPHY
State Solicitor
OFFICE OF THE OHIO ATTORNEY GENERAL
30 East Broad St., 17th Floor
Columbus, Ohio 43215

PATRICK MORRISEY
Attorney General
ELBERT LIN*
Solicitor General
ERICA N. PETERSON
J. ZAK RITCHIE
Assistant Attorneys General
OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL
State Capitol, Building 1, Room E-26
Charleston, WV 25305
Elbert.Lin@wvago.gov
(304) 558-2021

**Counsel of Record*

[additional counsel listed at end]

QUESTION PRESENTED

Is a jurisdictional determination that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

In enacting the Clean Water Act ("CWA"), Congress specifically recognized the States' "traditional and primary power over land and water use" in our constitutional system. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). Though Congress granted to the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("the Corps") certain authority over "navigable waters"—defined as "waters of the United States"—it expressly "recognize[d], preserve[d], and protect[ed] the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b); see also *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion); *SWANCC*, 531 U.S. at 174.

This case is significant to *amici curiae*—the States of West Virginia, Ohio, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Wisconsin, and Wyoming—because its outcome is critical to enforcing the limits on federal authority established in the CWA and decisions of this Court. At issue is whether property owners—including States and state agencies—can immediately seek judicial review of a "jurisdictional determination" by the Corps that a property is subject to federal jurisdiction as containing "waters of the United States." Such a jurisdictional determination may unlawfully assert

federal power over territory properly subject only to state regulation. Absent immediate judicial review, however, the pressure on landowners to comply means that most such jurisdictional determinations will go unchallenged, resulting in de facto expansions in federal authority.

As set forth below, immediate judicial review of the Corps' assertions of federal jurisdiction is justified for at least two reasons. *First*, under this Court's precedents, such jurisdictional determinations constitute "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. *Second*, immediate review of such jurisdictional determinations is required by this Court's longstanding rule that it will not upset the balance of federal-state relations without a clear statement from Congress.

SUMMARY OF ARGUMENT

I. Under this Court's decisions in *Bennett v. Spear*, 520 U.S. 154 (1997), and *Sackett v. EPA*, 132 S. Ct. 1367 (2012), a jurisdictional determination asserting federal authority is a "final agency action for which there is no other adequate remedy" and thus eligible for immediate review under 5 U.S.C. § 704 of the Administrative Procedure Act ("APA").

A jurisdictional determination asserting federal authority is "final agency action" under *Bennett* because it represents the consummation of the Corps' decision-making on the issue of jurisdiction, and because it has an immediate and practical impact on landowners, which include States and state agencies.

The Corps' own regulations describe such a jurisdictional determination as "final agency action." 33 C.F.R. § 320.1(a)(6). And once such a jurisdictional determination issues, property owners must refrain from conducting otherwise lawful activities on their land, endure the considerable time and expense of applying for a permit, or continue to use the land and face significant potential civil and criminal penalties.

There is also no adequate alternative remedy to immediate judicial review. Without immediate judicial review, the Corps can effectively compel regulated parties to comply without a court ever assessing the lawfulness of the agency's actions. The vast majority of property owners will comply even if they believe the Corps does not have authority over their property, because the alternatives—challenging the jurisdictional determination through the permitting process or awaiting enforcement—do not provide meaningful relief. Thus, as this Court observed in *Sackett*, preclusion of immediate review will only allow the "strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." 132 S. Ct. at 1374.

II. Review of such jurisdictional determinations under 5 U.S.C. § 704 is also required by principles of federalism. Land and water resource management is a quintessential function of state governments. 33 U.S.C. § 1251(b); *SWANCC*, 531 U.S. at 174. A jurisdictional determination asserting federal authority affects that sovereign function by restricting a State's policy choices over a particular water, including but not limited to the State's

discretion to determine the penalties that should be imposed upon those who violate applicable regulations. The Corps' approach raises federalism concerns because, as explained above, the lack of immediate judicial review means that the legality of many jurisdictional determinations is unlikely to be determined.

These concerns about the balance of federal-state authority provide further reason to read 5 U.S.C. § 704 to permit immediate review. It is a "well-established principle that it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (internal quotations omitted). This Court has applied that principle to protect the States' authority over land and water use from expansive interpretations of the federal government's jurisdiction, see *Rapanos*, 547 U.S. 715 (2006); *SWANCC*, 531 U.S. 159, and it should do so again here. Congress has not clearly indicated any intent to upset the balance of federal-state powers by allowing the Corps to defer judicial review of its assertions of federal authority.

ARGUMENT

I. Jurisdictional Determinations Asserting Federal Authority Are Final Agency Action For Which There Would Be No Other Adequate Remedy In Court.

The APA provides for judicial review of "final agency action for which there is no other adequate

remedy in a court." 5 U.S.C. § 704. Under this Court's decision in *Bennett v. Spear*, agency action is final when it (1) "mark[s] the consummation of the agency's decisionmaking process," and (2) is "one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. 154, 177–78 (1997) (internal quotations omitted). Critically, Congress intended this review to be "widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 430 U.S. 99, 104 (1977). The APA thus provides a "presumption of judicial review" that controls even where "efficiency of regulation" would benefit from denying review. *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

Jurisdictional determinations asserting federal authority readily meet the requirements of 5 U.S.C. § 704. They satisfy both prongs of the *Bennett* test, and there is also "no other adequate remedy in a court." 5 U.S.C. § 704. Indeed, absent immediate review, property owners will be forced into compliance, and the vast majority of such jurisdictional determinations will escape judicial scrutiny.

A. Jurisdictional Determinations Asserting Federal Authority Meet Both Prongs of the *Bennett* Test.

Under the Corps' own regulations and agency guidance, jurisdictional determinations satisfy the first prong of *Bennett* in three ways. *First*, the Corps' regulations expressly state that an approved jurisdictional determination "shall constitute a Corps

final agency action." 33 C.F.R. § 320.1(a)(6). *Second*, the Corps' guidance document on jurisdictional determinations describes them as a "definitive, official determination that there are, or that there are not, jurisdictional 'waters of the United States' on a site." U.S. Army Corps of Eng'rs, Regulatory Guidance Letter, No. 08-02, at 5 (June 26, 2008). *Third*, the regulations also specifically contemplate court challenges to jurisdictional determinations as final agency action. In particular, the regulations provide an administrative appeals process specifically for jurisdictional determinations, which "[a]n affected party must exhaust . . . prior to filing a lawsuit in the Federal courts." 33 C.F.R. § 320.1(a)(2).

It is beyond dispute that the first prong of *Bennett* is fulfilled. Thus, every court to consider this issue has found that jurisdictional determinations represent the Corps' final decision on the question of jurisdiction. See *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 999 (8th Cir. 2015) (citing *Belle Co., LLC v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 389–90 (5th Cir. 2014) and *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591–93 (9th Cir. 2008)). In fact, the Corps appears to concede the point. "An approved jurisdictional determination for which administrative appeals have been completed may represent the consummation of the Corps' decisionmaking with respect to the presence of waters of the United States on particular property. The determination represents the agency's official view, *and it will remain in effect for five years unless*

conditions change or new information comes to light." Pet. Br. at 25 (emphasis added).

The second prong of *Bennett* is satisfied when an agency action determines "rights or obligations," 520 U.S. at 178 (internal quotations omitted), as a practical matter. In *Frozen Food Express v. United States*, 351 U.S. 40, 43–44 (1956), this Court found reviewable an Interstate Commerce Commission order that defined certain agricultural products as non-exempt and thereby required permits for carriers transporting those commodities. The order warned unauthorized carriers that if they transported these commodities, they risked civil and criminal penalties. *Id.* at 44. As a prohibition on carrying certain products without a permit, the order had "an immediate and practical impact" upon carriers, and was not "abstract, theoretical, or academic." *Id.* at 43–44. Because the "consequences" were "not conjectural," this Court directed the district court to "adjudicate the merits." *Id.* at 44–45.

A jurisdictional determination asserting the Corps' authority similarly has "immediate and practical" consequences. *Id.* at 44. Again, the Corps acknowledges that "the determination is the consummation of the Corps' decisionmaking process with respect to CWA coverage of the relevant site." Pet. Br. at 33–34. As such, where the Corps asserts jurisdiction, that determination immediately limits the landowner's rights in his or her land whether or not the property owner decides to apply for a permit.

Property owners subject to such jurisdictional determinations who do not apply for a permit must

restrict the use of their property or face significant penalties for failure to comply. If the landowner proceeds to construct a house, build a fence, or farm the land without applying for a permit, he or she risks criminal liability resulting in fines up to $25,000 per day and imprisonment for up to one year for negligent violations. 33 U.S.C. § 1319(c). In the case of knowing violations, the landowner faces fines up to $50,000 per day and imprisonment for up to 3 years. *Ibid.*

At the same time, a property owner who does apply for a permit also faces restrictions on his or her rights as a result of the jurisdictional determination. In applying for a permit, the landowner faces spending up to two years and over $200,000 on the permit application process. See *Rapanos*, 547 U.S. at 721 (plurality opinion). As this Court has observed, "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process." *Ibid.* And even if the applicant is fortunate enough that his or her proposed discharge is eligible for a nationwide rather than individual permit, the process is quicker and cheaper but still takes on average "313 days and $38,915." *Ibid.*

In both scenarios—where the landowner applies for a permit and where the landowner proceeds without one—the Corps' assertion of federal jurisdiction has an "immediate and practical" effect on the owner's rights and obligations. *Frozen Food Express*, 351 U.S. at 44. The property owner must refrain from conducting otherwise lawful activities on his or her land, endure the expense of applying for a permit, or continue to use his or her land and face

significant potential civil and criminal penalties. These effects are not "conjectural," or "abstract, theoretical, or academic." *Id.* at 44.

Importantly, these landowners are not simply private citizens, but also States and state agencies. Jurisdictional determinations asserting the Corps' authority over land owned by States and state agencies have equally immediate and practical consequences on efforts to build on, improve, or otherwise use state land. In the case of States, the federal permitting requirements that result from the Corps' assertion of federal jurisdiction mean delay in important state projects and the added expense of applying for permits. *Cf. SWANCC*, 531 U.S. at 162–63 (involving "consortium of 23 suburban Chicago cities and villages that united in an effort to locate and develop a disposal site for baled nonhazardous solid waste").

Finally, the Corps' concession that it is bound by its jurisdictional determinations finding *no* federal jurisdiction further highlights that the second *Bennett* prong is met here. The Corps admits that absent a change in conditions or new information, a finding of no jurisdiction "will remain in effect for five years," during which time the Corps cannot change its position on jurisdiction or commence enforcement proceedings. See Pet. Br. at 25, 40–41. In other words, clear legal consequences follow even where the Corps determines that it *lacks* authority to act. It follows that where the Corps does find that federal jurisdiction exists, legal consequences must flow from that decision, as well.

B. Absent Immediate Review Under 5 U.S.C. § 704, There Is No Other Adequate Remedy In Court.

In addition to being "final" under *Bennett*, a jurisdictional determination asserting federal authority also satisfies the requirement under 5 U.S.C. § 704 that there be "no other adequate remedy in a court."

This Court has taken a practical view of such questions. For example, this Court concluded in *Frozen Food* that a restriction on otherwise lawful behavior required immediate judicial review even though the regulation allowed the carrier to apply for a permit, 351 U.S. at 44, the denial of which could presumably be challenged in court. The restriction on otherwise lawful behavior absent a permit was sufficient for review. *Ibid.* And recently in *Sackett v. EPA*, this Court rejected the notion that the ability to challenge a jurisdictional finding by way of a defense in a civil enforcement action provided the landowner with an adequate remedy. 132 S. Ct. at 1372. The Court reasoned that the landowner cannot, as a practical matter, initiate the enforcement process and accrues significant potential liability each day until the proceeding is initiated. *Ibid.*

Under this practical approach, there is no merit to the Corps' argument that property owners have an adequate remedy because they can undertake the lengthy and costly permit process and challenge a jurisdictional determination if the Corps denies their permit applications. Regardless of whether the Corps

grants or denies a permit, the permit process provides no adequate alternative to immediate judicial review.

If the permit is granted, the landowner has not only spent money and time applying for the permit but must also comply with the conditions imposed by the permit. See 33 C.F.R. § 325.4. All of these costs are imposed without allowing the landowner ever being able to challenge the jurisdictional determination and assert that the permit was not legally required in the first place.

If the permit is denied, the landowner has the ability then to challenge the jurisdictional determination, but the relief is still inadequate as compared to immediate judicial review. A landowner in that situation will have spent a significant amount of unrecoverable time and money applying for a permit that would not have been required if a court had immediately judged the jurisdictional determination unlawful.

Similarly erroneous is the Corps' suggestion that an enforcement proceeding provides property owners an adequate alternative to challenge the validity of a jurisdictional determination. As noted above, this Court rejected nearly the same argument by EPA in *Sackett* because the landowner could not initiate the enforcement process and was subject to additional potential liability for each day while waiting for the enforcement process to begin. 132 S. Ct. at 1372. Here, a landowner likewise cannot initiate an enforcement process to challenge a jurisdictional determination. In the meantime, he or she faces fines

up to $50,000 per day and imprisonment for up to three years. 33 U.S.C. § 1319(c). No landowner should have to risk those fines and imprisonment before being able to challenge the Corps' threshold jurisdictional conclusions. *Cf. Ex parte Young*, 209 U.S. 123, 147 (1908) ("[W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.").

The reality is that without immediate judicial review, the Corps can effectively compel regulated parties—including sovereign States and their agencies—to comply with a jurisdictional determination without a court ever assessing the lawfulness of the agency's actions. The vast majority of property owners will comply even if they believe the Corps does not have authority over their property because the alternatives—challenging the jurisdictional determination through the permitting process or awaiting enforcement—do not provide timely or meaningful relief. As this Court observed in *Sackett*, preclusion of immediate review allows the "strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." 132 S. Ct. at 1374. This Court should send a strong message that the Corps and other federal agencies may not extract compliance simply by limiting or delaying judicial review.

II. The Statute Should Be Read To Avoid The Serious Federalism Concerns That Would Result From Precluding Immediate Judicial Review.

If adopted, the Corps' position would raise serious federalism concerns in light of the States' traditional role in land and water use management. The CWA preserved the States' traditional role in managing the use of water resources. And this Court has protected that state power from expansions of federal authority that threaten it. See *Rapanos v. United States*, 547 U.S. 715 (2006); *SWANCC*, 531 U.S. 159. But as explained above, absent immediate judicial review, the Corps' assertions of federal jurisdiction are likely to go unchallenged, resulting in de facto expansions of federal authority.

Those federalism concerns further require reading the APA to permit immediate review of such jurisdictional determinations. This Court has long recognized that courts should avoid reading federal law to alter the traditional balance of federal and state powers absent a clear statement from Congress. See *Bond v. United States*, 134 S. Ct. at 2089 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). That principle has been applied previously to protect the States' authority over land and water use from expansive interpretations of the federal government's jurisdiction, see *Rapanos*, 547 U.S. 715; *SWANCC*, 531 U.S. 159, and should be applied here, as well. Congress has not clearly indicated any intent to upset the balance of federal-state powers by allowing the Corps to defer judicial review of its assertions of federal authority.

A. Preclusion Of Immediate Judicial Review Interferes With The States' Authority Over Land And Water Use.

1. It is well understood that local responsibility for protecting land and water use provides numerous benefits. Federalism "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive to putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. at 458). These advantages of local control are particularly important in the area of land and water use management, as States with very different water resources benefit from having different policies to ensure effective management of the use of these resources.

Thus, Congress specifically preserved the States' regulatory regimes in the CWA. In granting to EPA and the Corps certain regulatory authority under the CWA, Congress expressly "recogniz[ed], preserv[ed], and protect[ed] the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). As this Court has explained, Congress did not in the CWA "readjust the federal-state balance." *SWANCC*, 531 U.S. at 174.

Among those regulatory regimes are state permitting regimes and express duties codified in state law to protect the waters of a State for the

future use and enjoyment of the State's citizens. For example, West Virginia law requires a person to obtain a state permit from the West Virginia Department of Environmental Protection before discharging into waters of the State. W. Va. Code § 22-11-8. Similarly, Utah has a permit program to regulate discharges into waters of the State. Utah Code Ann. §§ 19-5-107–108. See also W. Va. Code § 22-26-3 ("[t]he waters of the State of West Virginia are claimed as valuable public natural resources held by the state for the use and benefit of its citizens" and the State has a duty to "manage and protect its waters effectively for present and future use and enjoyment and for the protection of the environment"); Ala. Code § 22-22-2 (the State shall "provide for the prevention, abatement and control of new or existing water pollution"); Ky. Rev. Stat. Ann § 151.110(1)(a) (the State has a statutory duty to "promote and to regulate the conservation, development, and most beneficial use of the water resources"); Utah Code Ann. § 73-1-1(3) (the "Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private property").

Consistent with the CWA's express instruction and principles of federalism, this Court has repeatedly protected the role of the States in land and water use management. It has twice struck down attempts by federal agencies to stretch the phrase "'waters of the United States' beyond parody," *Rapanos*, 547 U.S. at 734 (plurality opinion), at the expense of the States' authority. See *id.*, 547 U.S. 715; *SWANCC*, 531 U.S. 159. In each instance, this Court found that the agencies had failed to comply

with the CWA and interfered with the States' constitutionally protected role as the traditional regulators of water resources.

In *SWANCC,* this Court rejected as overbroad the Corps' Migratory Bird Rule. 531 U.S. at 174. A group of municipalities challenged the Corps' exercise of jurisdiction over an abandoned sand and gravel pit on which the municipalities planned to develop a solid waste disposal site. *Id.* at 162-63. The Corps claimed that the sand and gravel pit was within its authority under the Migratory Bird Rule, which defined "waters of the United States" in part as waters "[w]hich are or would be used as habitat by . . . migratory birds." *Id.* at 164. This Court rejected the Rule because it "would result in a significant impingement on the States' traditional and primary power over land and water use." *Id.* at 174 (quoting *Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.")).

In *Rapanos*, a plurality of this Court rejected an attempt by the Corps and EPA to assert federal jurisdiction over wetlands near non-navigable tributaries of traditional navigable waters. 547 U.S. 715. Again, this Court recognized that the federal government's expansive interpretation of the CWA would interfere with "the States' traditional and primary power over land and water use." *Id.* at 738 (plurality opinion) (quoting *SWANCC*, 531 U.S. at 174). The "[r]egulation of land use, as through the issuance of development permits," this Court said, "is a quintessential state and local power." *Ibid.* (citing *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30

(1982); *Hess*, 513 U.S. at 44). The federal government's asserted jurisdiction would have "authorize[d] the Corps to function as a *de facto* regulator of immense stretches of intrastate land," displacing the States' role. *Ibid.*

2. When the federal government asserts authority over a parcel by concluding it contains "waters of the United States," it potentially claims jurisdiction at the expense of the States' sovereign authority. Section 404 of the CWA displaces the States' authority by setting a federal floor on discharges of dredged or fill material into the water. While States retain the ability to regulate beyond the federal minimum and to issue state certifications under Section 401 of the CWA, States nevertheless are deprived of a critical aspect of their sovereignty—the ability to make policy decisions in a core area of state concern. See *Mississippi*, 456 U.S. at 761 ("[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature."). States lose the authority to impose regulations that are entirely different than the CWA would apply. This includes not only the State's discretion to determine when and to what extent the waters and lands would be protected, but also its freedom to design the procedures that would be followed to protect those waters and lands, and to determine the penalties that would be imposed upon those who violate those protections. And when States are the owners of the parcel over which the Corps has asserted jurisdiction, the States themselves are additionally subject to the federal permitting requirements.

Timely judicial review is critical to enforcing the limits on federal authority established in the CWA and decisions of this Court. Without immediate judicial review, unlawful claims of jurisdiction by the Corps are likely to go unchallenged by individual property owners. As described above, see pp. 10–12, *supra*, there is no adequate alternative remedy in court; absent an opportunity to seek immediate review, the vast majority of property owners will comply with a Corps jurisdictional determination even if they believe the Corps does not have authority over their property.

As this Court has recognized, whether brought by States in their capacity as landowners or by other property owners, these kinds of lawsuits are an important bulwark against federal encroachment. "Fidelity to principles of federalism is not for the States alone to vindicate." *Bond*, 131 S. Ct. at 2364. "States are not the sole intended beneficiaries of federalism"; rather, "[f]ederalism secures the freedom of the individual." *Id.* at 2364. Indeed, this Court's two principal cases preserving the States' role in land and water use, *SWANCC* and *Rapanos*, both resulted from challenges made by non-State regulated entities—in the former, a group of regulated municipalities, and in the latter, a homeowner. *Cf. Bond*, 134 S. Ct. at 2365 ("In the precedents of this Court, the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances.").

The importance of these lawsuits is amplified by the current litigation over the Waters of the United

States Rule ("WOTUS Rule"), through which EPA and the Corps have sought to expand radically the definition of "Waters of the United States" under the CWA. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015). Thirty-two States and state agencies have challenged the WOTUS Rule, alleging that it violates the CWA, this Court's decisions in *Rapanos* and *SWANCC*, and the Constitution. That litigation is significant not only because it demonstrates the Corps' intent to claim increased federal jurisdiction under the CWA, but also because the Corps has taken the position in that case that the window to challenge the WOTUS Rule has already closed. See Gov't Opp. to Mot. to Dismiss at 19-20, *In re EPA*, No. 15-3751 (6th Cir. Oct. 23, 2015) (arguing for 120-day window for review under 33 U.S.C. § 1369(b) as opposed to six years under the APA). The WOTUS Rule litigation is yet another example of an effort by the Corps, as here, to limit judicial review. And its attempt specifically to insulate the expansive WOTUS Rule from review highlights the need to ensure that, at a minimum, challenges to individual jurisdictional determinations remain an effective case-by-case check on federal overreach under the CWA.

B. There is no clear and manifest statement expressing Congress's intent to upset the federal-state balance by deferring judicial review.

These federalism concerns trigger an important clear-statement rule. As this Court has explained, "Congress legislates against the backdrop" of certain

presumptions, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), including several that stem from the "relationship between the Federal Government and the States under our Constitution," *Bond*, 134 S. Ct. at 2088. For example, this Court has recognized the presumption that federal statutes do not abrogate sovereign immunity, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985); impose obligations on States through section 5 of the Fourteenth Amendment, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16–17 (1981); or preempt state law, *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947).

Relevant here is the principle that it is "incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond*, 134 S. Ct. at 2089 (quoting *Gregory*, 501 U.S. at 460). This Court has recognized and applied this principle in "several areas of traditional state responsibility," *ibid.*, including the qualifications of state judges, *Gregory*, 501 U.S. at 460; real estate titles, *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994); local criminal activity, *Bond*, 134 S. Ct. 2077; and land and water use, *SWANCC*, 531 U.S. at 174.

For example, this Court rejected in *Bond* a reading of the term "chemical weapon" in the Chemical Weapons Convention Implementation Act that would "reach purely local crimes," 134 S. Ct. at 2090. The case presented the question whether a person who used a chemical to cause a minor thumb burn could be prosecuted under the federal Chemical

Weapons Convention Implementation Act, *id.* at 2083, which broadly defined "chemical weapon" as any toxic chemical used for other than peaceful purposes, *id.* at 2084–85. While the plain text of the Act might have included the conduct, the Court rejected such a reading of the statute because it was inconsistent with the backdrop of "principles of federalism inherent in our constitutional structure." *Id.* at 2088. Noting that the federal government's reading would "'dramatically intrude upon traditional state criminal jurisdiction,'" *ibid.* (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)), this Court declined to adopt that reading absent "a clear indication that Congress meant to reach purely local crimes" and "intrude[] on the police power of the States," *id.* at 2090.

This Court has also applied this principle to the precise area of traditional state regulation at issue here—land and water use management. In *SWANCC*, this Court struck down the Corps' Migratory Bird Rule because it found "nothing approaching a clear statement from Congress that it intended . . . . to readjust the federal-state balance." 531 U.S. at 174; see also *id.* at 172–73 (requiring a "clear indication [from] Congress" because "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power"). Similarly, the plurality in *Rapanos* rejected for lack of a clear statement an attempt by the federal government to transform the Corps into "a *de facto* regulator of immense stretches of intrastate land" with "discretion that would befit a local zoning board." 547 U.S. at 738 (plurality opinion). The plurality rejected such an

"unprecedented intrusion into traditional state authority" in the absence of a "'clear and manifest' statement from Congress." *Ibid.* (quoting *BFP*, 511 U.S. at 544).

In this case, there is no clear statement from Congress indicating an intent to upset the balance of federal-state powers by allowing the Corps to defer judicial review of its jurisdictional determinations. Nothing in 5 U.S.C. § 704 or the CWA even "approach[es] a clear statement from Congress that it intended" to allow the Corps' assertions of federal jurisdiction to effectively go unchallenged and result in a de facto expansion of federal authority at the expense of the States. If anything, the CWA contains a clear statement to the contrary. *SWANCC*, 531 U.S. at 174 ("Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources. . . .'" (citing 33 U.S.C. § 1251(b))).

Federalism principles thus bolster the conclusion that the Corps' jurisdictional determinations asserting federal authority are final agency actions reviewable under 5 U.S.C. § 704. For this additional reason, this Court should reject the Corps' attempt to insulate its decisions from review.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

MIKE DEWINE
Attorney General
ERIC E. MURPHY
State Solicitor
OFFICE OF THE OHIO
ATTORNEY GENERAL
30 East Broad St.,
17th Floor
Columbus, Ohio 43215

PATRICK MORRISEY
Attorney General
ELBERT LIN*
Solicitor General
ERICA N. PETERSON
J. ZAK RITCHIE
Assistant Attorneys General
OFFICE OF THE WEST
VIRGINIA ATTORNEY
GENERAL
State Capitol, Building 1,
Room E-26
Charleston, WV 25305
Elbert.Lin@wvago.gov
(304) 558-2021

**Counsel of Record*

LUTHER STRANGE
Attorney General
State of Alabama

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

PAMELA JO BONDI
Attorney General
State of Florida

Samuel S. Olens
Attorney General
State of Georgia

GREGORY F. ZOELLER
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

ANDY BESHEAR
Attorney General
Commonwealth of
Kentucky

BILL SCHUETTE
Attorney General
State of Michigan

JIM HOOD
Attorney General
State of Mississippi

CHRIS KOSTER
Attorney General
State of Missouri

TIMOTHY C. FOX
Attorney General
State of Montana

ADAM PAUL LAXALT
Attorney General
State of Nevada

ROY COOPER
Attorney General
State of North
Carolina

E. SCOTT PRUITT
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South
Carolina

HERBERT H. SLATERY
III
Attorney General and
Reporter
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

BRAD D. SCHIMEL
Attorney General
State of Wisconsin

PETER K. MICHAEL
Attorney General
State of Wyoming