No. 21A539

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF LOUISIANA, ET AL., APPLICANTS

v.

AMERICAN RIVERS, ET AL.

ON APPLICATION FOR A STAY OR, IN THE ALTERNATIVE,
ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

American Rivers v. Wheeler, No. 20-cv-4636 (Dec. 7, 2021)

California v. Wheeler, No. 20-cv-4869 (Dec. 7, 2021)

Suquamish Tribe v. Wheeler, No. 20-cv-6137 (Dec. 7, 2021)

United States Court of Appeals (9th Cir.):

In re: Clean Water Act Rulemaking, Nos. 21-16958, 21-16960, 21-16961 (Feb. 24, 2022)

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The Solicitor General, on behalf of the federal respondents, respectfully files this memorandum in opposition to the application for a stay pending appeal or, in the alternative, petition for a writ of certiorari before judgment to the United States Court of Appeals for the Ninth Circuit.

This case involves a challenge to a rule promulgated by the Environmental Protection Agency (EPA) in 2020 setting forth requirements for water-quality certification under Section 401 of the Clean Water Act (CWA), 33 U.S.C. 1341. See 85 Fed. Reg. 42,210 (July 13, 2020) (2020 Rule). Approximately one year after publishing the 2020 Rule, EPA decided to commence a notice-and-comment

rulemaking with the goal of issuing a revised rule in spring 2023. EPA therefore asked the district court to remand the 2020 Rule to the agency without vacatur. The court instead ordered remand with vacatur. Various States and industry groups that had intervened to defend the Rule (collectively, applicants) appealed that vacatur to the Ninth Circuit, and both the district court and the court of appeals denied applicants' requests for a stay pending appeal.

Applicants now request a stay from this Court. That request should be denied. As the lower courts found, applicants have not demonstrated that they will likely suffer irreparable harm from the vacatur -- the effect of which is merely to reinstate, until the agency issues a new rule in spring 2023, the regulations that had been in place during the 50 years before the 2020 Rule was adopted. Nor have applicants demonstrated a reasonable probability that this Court will grant certiorari if the court of appeals ultimately rules against them. That court may dismiss applicants' appeals for lack of appellate jurisdiction without reaching the merits of the validity of the district court's order. And even if the court of appeals reaches the merits and affirms the district court's judgment, its decision is unlikely to warrant review under this Court's usual certiorari criteria. Moreover, given that applicants have delayed in seeking a stay and that a stay at this juncture would cause substantial disruption, the balance of equities likewise favors denying applicants' requested relief.

Applicants' alternative request for certiorari before judgment should also be denied. Applicants cannot demonstrate that this case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Applicants express concern that EPA's issuance of a new rule will moot this case before the Court has an opportunity to grant review in the ordinary course. But if applicants in fact have a strong practical interest in speedy resolution of this suit, a request that the court of appeals expedite their appeals would have been a more appropriate means of seeking to vindicate that interest. Far from supporting applicants' request for certiorari before judgment, the likelihood that the district court's vacatur order will have only a short-lived practical impact weighs against this Court's review.

STATEMENT

1. In 1970, Congress amended the Federal Water Pollution Control Act (FWPCA), ch. 758, 62 Stat. 1155, by enacting the Water Quality Improvement Act, Pub. L. No. 91-224, 84 Stat. 91. As amended, Section 21(b)(1) of the FWPCA prohibited any federal agency from issuing a license or permit for an activity that "may result in any discharge into the navigable waters of the United States" unless "the State in which the discharge originates or will originate" either (1) certified that "there is reasonable assurance" that "such activity will be conducted in a manner which

will not violate applicable water quality standards," or (2) waived the certification requirement. Sec. 103, § 21(b)(1), 84 Stat. at 108. Section 21(b)(1) specified that, if a State "fail[ed] or refuse[d] to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements * * * shall be waived." Ibid.

In 1971, EPA promulgated regulations to implement the certification requirement. 36 Fed. Reg. 8563 (May 8, 1971) (40 C.F.R. Pt. 121 (2019)). The 1971 regulations require that a certification include, among other things, a "statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards" and a "statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity." 40 C.F.R. 121.2(a)(3) and (4) (2019). The 1971 regulations further provide that the certification requirement "shall be waived" when either (a) the certifying authority provides written notification that it expressly waives its certification authority, or (b) the federal licensing or permitting agency sends written notification to EPA that the certifying authority failed to act on a certification request "within a reasonable period of time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered to be

6 months, but in any event shall not exceed 1 year)." 40 C.F.R. 121.16(a) and (b) (2019).

In 1972, Congress further amended the FWPCA. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816. As amended, the FWPCA became commonly known as the CWA. See 33 U.S.C. 1251 note. Section 401 of the CWA carried forward the certification requirement that had first appeared in Section 21(b)(1) of the FWPCA. Under Section 401 of the CWA, a federal agency may not issue a license or permit for any activity that "may result in any discharge into the navigable waters" unless "the State in which the discharge originates or will originate" either (1) certifies that "any such discharge will comply with applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of [Title 33]," or (2) waives the certification requirement. 33 U.S.C. 1341(a)(1); see 33 U.S.C. 1377(e) (authorizing EPA "to treat an Indian tribe as a State" for purposes of Section 401 in certain circumstances). Like its predecessor provision, Section 401 specifies that, if a State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements * * * shall be waived." 33 U.S.C. 1341(a)(1).

Section 401 of the CWA further provides that "[a]ny certification * * * shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that

any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, * * * and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. 1341(d). The limitations included in the certification "shall become a condition on any Federal license or permit." Ibid.

The 1971 regulations remained in effect after the CWA was enacted. In July 2020, EPA promulgated the 2020 Rule, which revised the 1971 regulations. The 2020 Rule provided, among other things, that the "scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." 40 C.F.R. 121.3 (2021); see 40 C.F.R. 121.1(n) (2021) (defining "water quality requirements"). The 2020 Rule further provided that "the reasonable period of time" within which a certifying authority may act on a certification request "shall not exceed one year from receipt," 40 C.F.R. 121.6(a) (2021), and defined "[r]eceipt" to mean "the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures," 40 C.F.R. 121.1(m) (2021) (emphasis omitted). The 2020 Rule took effect in September 2020. 85 Fed. Reg. at 42,210.

2. After EPA published the 2020 Rule, 20 States, the District of Columbia, several Tribes, and various environmental

groups (collectively, plaintiffs) filed three separate suits against EPA and its Administrator in the United States District Court for the Northern District of California. Appl. App. 116-146, 165-192, 198-223. Plaintiffs alleged that the 2020 Rule was contrary to the CWA and sought an order vacating the Rule under the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq. Appl. App. 139-146, 188-191, 219-222. Applicants moved to intervene to defend the 2020 Rule. Id. at 556. The district court granted their motions to intervene, see id. at 115, 666; 20-cv-4636 D. Ct. Doc. 78, at 1 (Oct. 9, 2020), and consolidated the cases, see 20-cv-4636 D. Ct. Doc. 89, at 1 (Oct. 23, 2020).

In January 2021, the President issued an Executive Order directing federal agencies to review regulations issued during the previous Administration related to the protection of public health and the environment. Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7037 (Jan. 20, 2021). The 2020 Rule was identified as one of the regulations to be reviewed. See The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), http://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review. The district court agreed to hold these cases in abeyance while EPA reviewed the Rule. See, e.g., 20-cv-4636 D. Ct. Doc. 132 (Feb. 22, 2021).

In June 2021, EPA announced that it had completed its initial review of the 2020 Rule and that it had decided to "propose revi-

sions to the rule through a new rulemaking effort." 86 Fed. Reg. 29,541, 29,542 (June 2, 2021). EPA explained that, after considering the "text of CWA Section 401" and other factors, it had "identified substantial concerns with a number of provisions of the [2020] Rule that relate to cooperative federalism principles and CWA Section 401's goal of ensuring that states are empowered to protect their water quality." Ibid.

In July 2021, EPA filed a motion asking the district court to remand the 2020 Rule to the agency without vacating the Rule. Appl. App. 226-243.* In that motion, EPA argued that a remand was appropriate because the agency had "identified 'substantial and legitimate concerns' with the [2020] Rule and ha[d] publicly announced its intention to reconsider and revise the Rule." Id. at 237 (citation omitted). EPA stated that it expected to publish a proposed revised rule in the Federal Register by spring 2022 and to promulgate a final revised rule in spring 2023. Id. at 235-236; see 20-cv-4636 D. Ct. Doc. 143-1, at 7 (July 1, 2021) (declaration of John Goodin). EPA explained that "continuing to litigate this case would interfere with [its] ongoing reconsideration process by forcing the Agency to structure its administrative pro-

* Challenges to the 2020 Rule had also been brought in the United States District Court for the District of South Carolina and the United States District Court for the Eastern District of Pennsylvania. See Appl. App. 463-472. EPA likewise filed motions in those courts to remand the 2020 Rule to the agency without vacating the Rule, and those courts granted EPA's motions and remanded without vacatur. See ibid.

cess around pending litigation, rather than the Agency's priorities and expertise." Appl. App. 239.

Plaintiffs responded that the district court should either deny EPA's motion or remand the 2020 Rule with vacatur. Appl. App. 244-265, 267-293, 424-448. EPA replied that it had "presented a classic case for remand without vacatur," id. at 457, and urged the court to "follow the other two district courts in which challenges to the Rule were filed, both of which ha[d] already remanded the [2020] Rule to EPA without vacatur," id. at 452; see id. at 463-472. Applicants "had no objection to the relief that EPA requested," id. at 474, but opposed plaintiffs' request for vacatur, arguing that if the court was not persuaded by EPA's arguments for remand without vacatur, it should "deny the [agency's] remand motion and proceed to merits briefing," id. at 495.

3. On October 21, 2021, the district court vacated the 2020 Rule and remanded the Rule to the agency. Appl. App. 552-569. The court held that a remand was appropriate because an agency may request a "remand to reconsider a decision without confessing error," id. at 562, and because EPA had "expressed substantial concerns with the current formulation of the certification rule," id. at 563. The court further held that vacatur of the 2020 Rule upon remand was warranted. Id. at 563-568. The court stated that, "when an agency requests voluntary remand, a district court may

vacate an agency's action without first making a determination on the merits." Id. at 559.

Viewing vacatur as "a form of discretionary, equitable relief," Appl. App. 559, the court found that relief warranted for two reasons, id. at 563-568. First, the court expressed "significant doubts that EPA [had] correctly promulgated" the 2020 Rule in light of what the court viewed as a "lack of reasoned decision-making and apparent errors" in the Rule and "indications that the rule contravenes the structure and purpose of the Clean Water Act." Id. at 564-565. In the course of "evaluating the extent of doubt whether the agency correctly promulgated the [2020 Rule]," the court described the Rule as "antithetical" to this Court's interpretation of Section 401(d) of the CWA in PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994), and stated that EPA's "recognition of its inconsistent interpretation * * * compels the conclusion that the [Rule] is unreasonable." Appl. App. 563-564. Second, the district court found that vacatur would "not intrude on any justifiable reliance" interests, given that the Rule had "only been in effect for thirteen months." Id. at 566. The court thus ordered "vacatur of the [2020 Rule] upon remand to EPA," which it explained "will result in a temporary return to the rule previously in force until Spring 2023, when EPA finalizes a new certification rule." Id. at 568. The court then entered "final judgment" "in favor of plaintiffs." Id. at 570.

On November 17, 2021 -- nearly four weeks after the district court's decision -- applicants asked the court to stay its order vacating the 2020 Rule pending appeal. Appl. App. 571-601. Applicants contended that the 2020 Rule had "clarifie[d] basic aspects of the Section 401 process, such as how time limits will be calculated and the scope of permissible State review." Id. at 579. They also asserted that vacatur of the 2020 Rule would create "substantial uncertainty" and cause "substantial delay in completing pending Section 401 reviews." Id. at 596. EPA opposed the motion, arguing that the court's order was not appealable and that applicants had "fail[ed] to establish that they will suffer any irreparable harm or that the public interest favors a stay." 20-cv-4636 D. Ct. Doc. 185, at 1 (Nov. 30, 2021).

On December 7, 2021, the district court denied applicants' motion for a stay. Appl. App. 612-625. The court found that applicants had "not made particularly strong showings of their likelihood of success on the merits." Id. at 621. The court further found that applicants had "not clearly demonstrated serious irreparable harm absent a stay." Id. at 623. The court explained that "[m]any of the economic harms [applicants] assert, such as unspecified delays to projects, remain too speculative to rank as irreparable." Id. at 622. And the court emphasized that a party "can sue in district court if presented with a flawed certification process." Id. at 615; see id. at 623-624 (explaining

that applicants can challenge any application of the 1971 regulations that causes them harm). Finally, the district court determined that, "when it comes to mitigating harm, prudence favors maintaining the course EPA has charted the past fifty years under the 1971 rule." Id. at 615.

4. On December 15, 2021, applicants filed motions in the court of appeals for a stay pending appeal. Appl. App. 667-704. EPA opposed a stay, id. at 757-780, and moved to dismiss applicants' appeals on the ground that the district court's order was not appealable, id. at 783-796.

On February 24, 2022, the court of appeals denied the motions for a stay, finding that applicants had "not demonstrate[d] a sufficient likelihood of irreparable harm to warrant the requested relief." Appl. App. 802. The court also denied the motions to dismiss the appeals "without prejudice to renewing the arguments in the answering brief(s)" before the "merits panel." Ibid. The court of appeals set a briefing schedule under which applicants' opening brief is due on April 6, 2022. Ibid.

5. On March 21, 2022 -- nearly one month after the court of appeals' decision -- applicants filed their application asking this Court to stay the district court's order.

6. EPA has finished drafting a proposed revised rule and supporting documents. On March 25, 2022, EPA sent its proposed revised rule to the Office of Management and Budget for review.

EPA still expects to publish the proposed revised rule later this spring and to promulgate a final revised rule in spring 2023, after receiving and addressing public comments in response to its proposal. See p. 8, supra.

ARGUMENT

I. APPLICANTS HAVE NOT ESTABLISHED THAT A STAY IS WARRANTED

Applicants ask (Appl. 16-29) this Court to stay the district court's order vacating the 2020 Rule. In considering a stay application on a matter pending before a court of appeals, the Court or Circuit Justice must "try to predict whether four Justices would vote to grant certiorari" if the court of appeals ultimately rules against the applicant; "try to predict whether the Court would then set the order aside"; and "balance the so-called 'stay equities.'" San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302-1303 (2006) (Kennedy, J., in chambers) (citation omitted); see Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (traditional stay factors). A stay on a matter currently pending before a court of appeals is an extraordinary remedy that is "rarely granted." Heckler v. Lopez, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers) (citation omitted).

The federal respondents agree with applicants that the district court lacked authority to vacate the 2020 Rule without first determining that the Rule was invalid. For a variety of reasons, however, applicants have not carried their burden of showing that

a stay is warranted here. Applicants have not demonstrated that they will suffer irreparable harm if the 1971 certification rules remain in effect during the relatively brief period while EPA conducts its new rulemaking. This Court would not likely grant certiorari if the court of appeals rules against applicants in their current appeals. And during the five months since the district court issued its vacatur order, EPA, federal permitting agencies, and relevant stakeholders have readjusted their practices to conform to the vacatur order and the renewed applicability of the 1971 regulations. Requiring those practices to be adjusted yet again would cause substantial disruption and disserve the public interest. The application for a stay pending appeal should be denied.

A. Applicants Have Not Demonstrated A Likelihood Of Irreparable Harm If A Stay Is Not Granted

1. Applicants assert (Appl. 25-28) that they will suffer irreparable harm if the district court's order vacating the 2020 Rule remains in effect during the pendency of their appeals. Applicants made the same assertions below, see Appl. App. 596-599, 695-699, and both the district court and the court of appeals found those assertions insufficient to establish the requisite likelihood of irreparable harm, see id. at 621-623, 802. There is no sound reason for this Court to reach a different conclusion.

Applicants do not dispute that the present controversy as to the validity of the district court's order will become moot when

EPA promulgates a final revised rule, which is expected to occur in spring 2023. See Appl. 27; p. 8, supra. To justify a stay, applicants therefore must show that the court's order will likely cause them irreparable harm before then. Applicants have not made that showing. Between 1971 and 2020, the 1971 regulations governed implementation of the certification requirement under Section 21(b)(1) of the FWPCA and then Section 401 of the CWA. See pp. 4-6, supra. As the district court explained, vacatur of the 2020 Rule simply "maintain[s] the course EPA has charted the past fifty years under the 1971 rule" while the agency conducts a new rule-making. Appl. App. 615. In contrast, the 2020 Rule had "only been in effect for thirteen months," a period the court found to be "insufficient time for institutional reliance to build up around the [2020 Rule]." Id. at 566. That finding undermines applicants' assertion that leaving the 1971 regulations in effect until the agency completes its new rulemaking will result in "substantial disruption." Ibid.; see Appl. 26.

Indeed, it has now been more than five months since the district court vacated the 2020 Rule. See Appl. App. 568. Yet applicants have not identified any substantial disruption -- let alone irreparable harm -- caused by vacatur of the Rule during that period. To the contrary, their litigation conduct during the past five months belies any suggestion of irreparable harm. Applicants waited nearly a month after the district court issued its

vacatur order to seek a stay from that court. See id. at 571. After both that court and the court of appeals declined to issue a stay, see id. at 612-625, 799-802, applicants delayed nearly another month before seeking a stay from this Court. At no point, moreover, have they asked the court of appeals to expedite their appeals. See 9th Cir. R. 27-12 (providing that "[m]otions to expedite briefing and hearing may be filed and will be granted upon a showing of good cause," which includes situations in which, "in the absence of expedited treatment, irreparable harm may occur"). Applicants' own lack of urgency undermines their assertion that a stay is necessary to protect them from irreparable harm.

2. Applicants contend (Appl. 3) that they "will suffer irreparable harm from the loss of the [2020] Rule's protections" against certain "abusive practices." That argument lacks merit.

Applicants assert (Appl. 26), for example, that "without the [2020] Rule, previously offending States can now return to their prior practice of delaying their consideration of Section 401 certifications beyond one year, contrary to the Rule's clear limitation." But all of the alleged delays that applicants identify (Appl. 7-9) happened in the past; applicants do not cite a single pending or future project that would be threatened by such a delay during EPA's new rulemaking. Nor do they explain (Appl. 26) why such delays would be permissible "without the [2020] Rule." As applicants observe (Appl. 9), "[a] number of courts have recognized

that allowing States to delay the start of the period of review violates the CWA's plain text." See, e.g., New York State Dep't of Envtl. Conservation v. FERC, 884 F.3d 450, 455 (2d Cir. 2018) (holding that the "plain language of Section 401 outlines a bright-line rule regarding the beginning of review: the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request'") (citation omitted). Those decisions preceded the 2020 Rule and remain controlling precedent in the absence of the Rule. Thus, as the district court found, the "economic harms" that applicants assert from "unspecified delays to projects" "remain too speculative to rank as irreparable." Appl. App. 622.

Applicants also contend that, without the 2020 Rule, "certifying authorities are no longer limited by the Section 401 regulations 'to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements' only, and will likely resume considering non-water-quality-related, project-killing conditions when granting their 'water quality' certifications for disfavored industries or projects." Appl. 26 (citation omitted). But applicants identify (Appl. 6-7, 26-27) only three prior instances in which a State allegedly denied certification or imposed conditions based on non-water-quality-related considerations. They do not identify any pending or future projects that would be threatened by such a practice during EPA's

new rulemaking. See Appl. App. 99 (declaration of Robin Rorick for the American Petroleum Institute) (acknowledging that, in "the significant majority of instances," States "dutifully approach their Section 401 certification obligations with a genuine interest in identifying and addressing discharges with potential adverse impacts on water quality"). And in any event, applicants do not explain how the 1971 regulations could be read to authorize such a practice, given that those regulations require States, in their certification decisions, to focus on "water quality considerations," 40 C.F.R. 121.2(a)(2) (2019), and potential violations of "applicable water quality standards," 40 C.F.R. 121.2(a)(3), 121.24 (2019). Applicants' concerns (Appl. 26) about "non-water-quality-related, project-killing conditions" are thus entirely speculative.

Applicants further contend (Appl. 27) that vacatur of the 2020 Rule "deeply harms State Applicants' constitutional rights and sovereign interests." They suggest that, without the 2020 Rule, some States will use their certification decisions to burden interstate commerce, in violation of the Dormant Commerce Clause. Appl. 28; see U.S. Const. Art. I, § 8, Cl. 3. But applicants cite only one instance of such an alleged constitutional violation, in a case that is now moot. See Appl. App. 51-54, 550-551; U.S. Amicus Br. at 11-13, Montana v. Washington, 141 S. Ct. 2848 (2021) (No. 152, Orig.) (explaining that any constitutional challenge to

the State of Washington's denial of Section 401 certification for the Millennium Bulk Terminal is now moot). And if a State issues a certification decision that is believed to violate the Constitution, that decision can be challenged in court, regardless of which regulations are in place. See Appl. App. 615 (explaining that "a party saddled with unwanted conditions can sue in district court if presented with a flawed certification process"); id. at 623-624 (similar). Applicants' contention (Appl. 27) that a stay is necessary to protect States' "constitutional rights and sovereign interests" thus lacks merit.

Applicants therefore have "not demonstrate[d] a sufficient likelihood of irreparable harm to warrant the requested relief." Appl. App. 802. For that reason alone, their request for a stay should be denied. See Teva Pharm. USA, Inc. v. Sandoz, Inc., 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers); Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers).

B. Applicants Have Not Demonstrated A Reasonable Probability That Certiorari Would Be Granted

For at least three reasons, this Court would not likely grant review if the court of appeals rules against applicants in their pending appeals.

First, the court of appeals may dismiss applicants' appeals for lack of appellate jurisdiction without determining the validity of the district court's order. Section 1291 of Title 28 vests

the courts of appeals with "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. 1291. Under Ninth Circuit precedent, "remand orders" -- including remand orders accompanied by vacatur of the challenged agency action -- "are not 'final decisions' for purposes of section 1291." Alsea Valley Alliance v. Department of Commerce, 358 F.3d 1181, 1184 (2004) (citation omitted); see id. at 1185-1186. Although the Ninth Circuit has recognized an exception to that rule when the agency itself seeks to appeal a remand order, that court has held that non-agency litigants generally lack the ability to appeal such an order. Id. at 1184-1185.

EPA and some plaintiffs moved to dismiss applicants' appeals on that jurisdictional ground, and the court of appeals denied the motions "without prejudice to renewing the arguments in the answering brief(s)" before the "merits panel." Appl. App. 802. If the panel ultimately dismisses the appeals in accordance with circuit precedent, this Court's review would be unlikely. The jurisdictional issue itself is not worthy of this Court's review; indeed, the Court recently denied a petition for a writ of certiorari that raised the issue. See Scott Timber Co. v. Oregon Wild, 138 S. Ct. 1008 (2018) (No. 17-881). And if the panel dismisses the appeals without addressing whether a court may vacate a rule "without first finding that the rule is unlawful," Appl. 1, there

would be no court of appeals decision on that issue for this Court to review.

Second, as applicants acknowledge (Appl. 1), by the time the court of appeals resolves the pending appeals, EPA likely will have completed its new rulemaking, thereby mooting applicants' challenge to the district court's vacatur order. A "decision from the Ninth Circuit may well take a year after" briefing is "scheduled to [be] complete[d]" this May, Appl. 27; see Appl. App. 802, and EPA expects to promulgate a final revised rule in spring of next year, see 20-cv-4636 D. Ct. Doc. 143-1, at 7. Even if the court of appeals issues its decision before then, this Court is unlikely to grant review of an issue that will soon become moot.

Third, even if the court of appeals exercises appellate jurisdiction and affirms the district court's judgment on the merits, this Court would not likely grant review because such a decision would not create a circuit conflict. EPA agrees with the applicants (see Appl. 1) that, when an agency seeks a voluntary remand without confessing error, a district court cannot vacate a challenged agency rule unless it determines that the rule is invalid and carefully considers the appropriate scope of relief. See Appl. App. 452 n.2, 765. To be sure, a court may grant preliminary relief without definitively resolving the merits of such a challenge. See, e.g., Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). But the district court in this case purported

to enter "final judgment" vacating the rule without first finding the rule unlawful. Appl. App. 570.

If the court of appeals endorses that approach, its decision will be incorrect. But applicants do not assert that such a decision would conflict with any decision of another court of appeals. Petitioner therefore cannot demonstrate that this Court would likely grant review even if the court of appeals upholds the district court's flawed approach. See Sup. Ct. R. 10.

C. Applicants Have Not Demonstrated That The Balance Of Equities Favors A Stay

Equitable considerations also weigh against a stay of the district court's vacatur order pending appeal. As explained above, applicants have not exercised reasonable diligence in pursuing a stay. See pp. 15-16, supra. Nor have they shown that they will suffer irreparable harm if the district court's vacatur order remains in effect. See pp. 14-19, supra.

In contrast, a stay at this juncture would be disruptive to EPA, certifying authorities, federal permitting agencies, and project proponents alike. Applicants themselves express concern (Appl. 26) about the "whipsawing effect" of shifting from one regulatory regime to another. But that is precisely the effect that the issuance of a stay now would have. Having shifted from the 1971 regulations to the 2020 Rule and back, EPA and relevant stakeholders would have to shift again to the 2020 Rule, even though the agency expects to promulgate a new rule by spring 2023.

Just as the Army Corps of Engineers paused permitting while it reassessed its certification process in light of the vacatur of the 2020 Rule, see Appl. App. 622-623, the Corps and others might need to pause permitting again if a stay forced a return to that Rule. And in order to avoid regulatory confusion, EPA would likely need to commit resources to clarifying which regulation was in place and how to comply -- just as it did in the aftermath of the vacatur. See EPA, Clean Water Act Section 401 Water Quality Certification: Questions and Answers on the 2020 Rule Vacatur (Dec. 17, 2021), http://www.epa.gov/system/files/documents/2021-12/questions-and-answers-document-on-the-2020-cwa-section-401-certification-rule-vacatur-12-17-21-508.pdf. That effort would divert time and resources away from the agency's rulemaking, which remains ongoing.

II. APPLICANTS HAVE NOT ESTABLISHED THAT CERTIORARI BEFORE JUDGMENT IS WARRANTED

In the alternative, applicants ask (Appl. 29) this Court to treat their stay application "as a petition for a writ of certiorari before judgment and hear the case on the merits, including considering the possibility of summary reversal." This Court typically grants certiorari before judgment, however, "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Applicants have not made that showing.

To begin, this Court may grant certiorari before judgment only if the case is properly "in" the court of appeals. 28 U.S.C. 1254(1); see Stephen M. Shapiro et al., Supreme Court Practice § 2.2, at 2-11 (11th ed. 2019) ("If there were a jurisdictional defect that would preclude the court of appeals from reaching the merits of the appeal, that defect likewise would prevent the Supreme Court from resolving the merits upon the grant of certiorari before judgment."). The Court therefore would need to resolve whether the district court's remand order is a "final decision[]" for purposes of Section 1291 before proceeding to the merits of the issue that applicants have raised. 28 U.S.C. 1291; see pp. 19-21, supra.

Even apart from that potential jurisdictional obstacle, applicants have not shown that this case requires "deviation from normal appellate practice" and "immediate determination in this Court." Sup. Ct. R. 11. If the court of appeals has jurisdiction, it is fully capable of correcting the district court's error in the normal course. Applicants contend (Appl. 30) that "[t]his Court's immediate review is necessary because EPA is likely to finish its new rulemaking before a full appeal can be briefed and decided." But applicants could have acted on that concern by filing a motion to expedite in the Ninth Circuit, see 9th Cir. R. 27-12, rather than delaying for one month after the court of appeals' decision denying a stay and then asking this Court to take

the extraordinary step of granting certiorari before judgment. In any event, the fact that the district court's vacatur order is likely to have a practical impact only for a limited period of time weighs against this Court's review, not in favor of it.

Applicants also have not shown that this case is "of such imperative public importance" as to justify the extraordinary steps of certiorari before judgment and summary reversal. Sup. Ct. R. 11. As explained above, the district court's order merely reinstated the 1971 regulations -- which had been in place for 50 years -- until EPA completes its new rulemaking. See p. 15, supra. And the question that applicants ask this Court to decide -- i.e., whether a court may vacate an agency rule without first finding the rule unlawful -- is not the subject of a circuit conflict or otherwise worthy of this Court's review in this case. See pp. 21-22, supra.

Applicants' request (Appl. 29) for summary reversal is particularly misguided. Summary reversal would create the same substantial disruption as a stay. See pp. 22-23, supra. And summary reversal on the specific ground that applicants urge -- i.e., that the district court was required to determine whether the 2020 Rule was valid before it could lawfully vacate that Rule -- would not terminate the lawsuit. Rather, it would force the parties to return to the district court, thereby requiring EPA to divide its resources between litigating plaintiffs' challenge to the 2020

Rule and crafting a new rule in light of public comments received. It was to avoid that division of resources that the agency requested a remand in the first place. See Appl. App. 239 (arguing that "continuing to litigate this case would interfere with EPA's ongoing reconsideration process by forcing the Agency to structure its administrative process around pending litigation, rather than the Agency's priorities and expertise"); id. at 458 (asking the district court to "grant EPA's motion for voluntary remand without vacatur instead of potentially requiring EPA to litigate the merits of a rule that it has committed to reconsider and revise").

CONCLUSION

The application for a stay pending appeal or, in the alternative, petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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