No. 08-225

IN THE
Supreme Court of the United States

OUR CHILDREN'S EARTH FOUNDATION AND ECOLOGICAL RIGHTS FOUNDATION,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT EFFLUENT GUIDELINES INDUSTRY COALITION

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QUESTION PRESENTED

Whether EPA has a non-discretionary duty to conduct a technology-based approach in reviewing effluent limitation guidelines and effluent limits under sections 301(d), 304(b), and 304(m) of the Clean Water Act. 33 U.S.C. §§ 1311(d), 1314(b) & (m).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Effluent Guidelines Industry Coalition ("EGIC") makes the following disclosure:

EGIC does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of EGIC's stock. EGIC states that its members are made up of numerous industrial entities and trade associations that own and operate (or have members that own and operate) regulated industrial facilities located in the United States. EGIC's members include, but are not limited to, such entities as the American Petroleum Institute and the American Forest and Paper Association.

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The Ninth Circuit decision at issue is reported at 527 F.3d 842 (9th Cir. 2008). That decision resulted from a grant of a petition for panel rehearing, and the Ninth Circuit provided that its earlier decision reported at 506 F.3d 781 (9th Cir. 2007) was withdrawn and replaced. App. at 3a.[1]

STATEMENT OF THE CASE

On October 29, 2007, the Ninth Circuit ruled that EPA has a mandatory duty to use a technology-based approach in reviewing effluent limitation guidelines and effluent limitations ("ELGs") under sections 301(d), 304(b), and 304(m) of the Clean Water Act (the "CWA"). App. at 51a-52a. Because of that mandatory duty, the Ninth Circuit found that Petitioners could bring a citizen suit under CWA § 505(a)(2) to enforce EPA's nondiscretionary duties. *See* 33 U.S.C. § 1365(a)(2). In response to the Ninth Circuit's decision, EPA timely filed a petition for rehearing *en banc* on January 24, 2008.

On May 23, 2008, the Ninth Circuit panel granted rehearing. App. at 3a.[2] The Ninth Circuit panel stated:

> The opinion filed October 29, 2007, slip op. 14215, and appearing at 506 F.3d 781, is withdrawn. It may not be cited as precedent by or to this court or any district court of the

1. Citations to "App. at _a," are to the Appendix attached to the Petition for Writ of Certiorari.

2. The Ninth Circuit panel denied the petition for rehearing *en banc* as moot. App. at 3a.

> Ninth Circuit. It is replaced by the concurrently filed opinion.

Id. The Ninth Circuit held that CWA §§ 301(d), 304(b), and 304(m) do not expressly mandate EPA to use a technology-based approach to review ELGs. App. at 19a ("Nothing in the CWA specifically obligates the EPA to *review* the effluent guidelines and limitations using a technology-based approach.") (emphasis in original). As a result, the Ninth Circuit found that the CWA provisions at issue fall "short of imposing a mandatory duty and thus the review criteria are not properly before the court under § 505(a)(2)" of the CWA. App. at 20a.[3] On August 21, 2008, Petitioners filed a petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

The Ninth Circuit decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners argue that review is appropriate because of an intra-circuit conflict of authority. That argument lacks merit. Petitioners argue the flawed premise that "*OCE II* improperly reversed *OCE I*'s holding . . ." thereby creating a split in the Ninth Circuit because *OCE II* is "contrary to [the Ninth Circuit's] ruling in *OCE I* . . ." Pet. at 2. *OCE II*, however, did not

3. For purposes of clarity, EGIC will refer to the Ninth Circuit's initial withdrawn opinion as *OCE I*, and its subsequent opinion on rehearing as *OCE II*. However, EGIC makes no admission that *OCE I* is a viable opinion, as it has been withdrawn and no longer exists. App. at 3a.

reverse *OCE I*, but rather it withdrew and replaced *OCE I*, rendering the first decision a nullity. As stated in *OCE II*, "[*OCE I*] is withdrawn. It may not be cited as precedent by or to this court of any district court of the Ninth Circuit. It is replaced by the concurrently filed opinion [*i.e.*, *OCE II*]." App. at 3a. Instead of reversing *OCE I*, *OCE II* withdrew its previous decision, rendering *OCE I* a nonexistent opinion that can no longer be cited as precedent. Petitioner's argument of an intra-circuit split is fundamentally faulty as *OCE II* cannot conflict with a nonexistent decision. Thus, Petitioners' assertion of an intra-circuit split fails because *OCE I* is a non-opinion. There is no intra-circuit split in the Ninth Circuit on the issue of whether EPA has a non-discretionary duty to conduct a technology-based approach in reviewing ELGs under CWA §§ 301(d), 304(b), and 304(m). The Ninth Circuit has established *OCE II* as the only controlling authority on that issue.

Moreover, even assuming *arguendo* that there is an intra-circuit conflict as asserted by Petitioners, such a conflict is insufficient to warrant review. Rule 10 of the Court's rules provides the "character of the reasons the Court considers" in determining whether to grant a petition for writ of certiorari as conflicts between 1) two different circuit courts of appeals; 2) a court of appeals and a state court of last resort on an important federal question; 3) two different state courts of last resort on an important federal question; or 4) a state court or court of appeals and this Court on an important federal question. S. Ct. R. 10(a) - (c). An intra-circuit conflict is not listed. Instead, Federal Rule of Appellate Procedure 35(a) provides the mechanism for resolving intra-circuit disputes through *en banc* or panel rehearing, which is

"ordinarily . . . not ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions . . ." Fed. R. App. P. 35(a). The Ninth Circuit was capable of resolving any conflict and maintaining uniformity in its intra-circuit authority that may have occurred from issuing two opinions in this case. Indeed, *OCE II* clarified the Ninth Circuit's exact position on EPA's duties under CWA §§ 301(d), 304(b), and 304(m). App. at 3a. As provided above, the Ninth Circuit resolved any issues that could have resulted in a conflict by withdrawing *OCE I* and replacing it with *OCE II*. Petitioners' assertions about an intra-circuit split fail to support review of this case.

2. Petitioners also claim that review is appropriate to resolve an inter-circuit conflict. That claim is not persuasive. Petitioners do not cite to any case from another circuit court of appeals that involves an interpretation of CWA §§ 301(d), 304(b), and 304(m) related to the issue at bar, so there is no conflict between the Ninth Circuit decision and a decision of another circuit. Petitioners argue that in *OCE II*, the Ninth Circuit failed to employ "traditional principles of statutory construction and/or a *Chevron* second step analysis" in interpreting CWA §§ 301(d), 304(b), and 304(m). Pet. at 20. Petitioners then list numerous cases from other circuits that interpreted different statutory provisions under the CWA and the Clean Air Act to find that EPA had mandatory duties under those provisions. *Id.* at 20-21. Those decisions do not create a conflict with the Ninth Circuit decision that examined the scope of CWA §§ 301(d), 304(b), and 304(m). Instead, Petitioners merely show that there are other circuit courts that

interpreted entirely different statutory language in other environmental provisions than those involved in this case, and found that those provisions imposed mandatory duties on EPA. In *OCE II*, the Ninth Circuit correctly interpreted CWA §§ 301(d), 304(b), and 304(m) based on the plain language of the statutory provisions. Petitioners have shown nothing more than the fact they dislike *OCE II*'s ruling and would have preferred that the Ninth Circuit impose a non-discretionary duty.

The Ninth Circuit ruled on an issue of first impression (thus, it could not create an inter-circuit split): whether EPA is mandated to conduct a technology-based approach in reviewing ELGs under CWA §§ 301(d), 304(b), and 304(m). App. at 19a-20a. The Ninth Circuit found that based on the plain language of the CWA provisions, "[n]othing in the CWA specifically obligates the EPA to *review* the effluent guidelines and limitations using a technology-based approach." *Id.* at 19a (emphasis in original). The Ninth Circuit then found that because of the absence of any express provision compelling EPA to conduct a technology-based approach, Petitioners could not bring a citizen suit to compel mandatory action under CWA § 505(a)(2). *Id.* at 19a-20a. The Ninth Circuit further stated that it was not conducting a full *Chevron* analysis because it was not determining whether to defer to EPA's interpretation of a statute, but only determining whether CWA §§ 301(d), 304(b), and 304(m) create a mandatory duty, such that a citizen suit could be filed under CWA § 505(a)(2). *Id.* at 20a. This analysis was not error, let alone a decision that conflicts with other courts of appeal, as the Ninth Circuit found that the plain

language of CWA §§ 301(d), 304(b), and 304(m) lacked the express and unequivocal language that is necessary to trigger a mandatory duty that could be subject to a CWA § 505(a)(2) suit. This interpretation followed the bedrock construction principle that the courts must follow the plain language of a statute. *See Barnhart v. Sigmon Coal Co. Inc.*, 534 U.S. 438, 461-62 (2002) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Thus, the Ninth Circuit correctly interpreted CWA §§ 301(d), 304(b), and 304(m). Petitioners fail to establish an inter-circuit split that would justify review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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