No. 13-31214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GULF RESTORATION NETWORK; MISSOURI COALITION FOR THE ENVIRONMENT; IOWA ENVIRONMENTAL COUNCIL; TENNESSEE CLEAN WATER NETWORK; MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY; SIERRA CLUB; PRAIRIE RIVERS NETWORK; KENTUCKY WATERWAYS ALLIANCE; ENVIRONMENTAL LAW & POLICY CENTER; NATURAL RESOURCES DEFENSE COUNCIL, INCORPORATED; WATERKEEPER ALLIANCE, INCORPORATED,

Plaintiffs-Appellees,

-v.-

GINA MCCARTHY, Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
Case No. 12-cv-00677 (Hon. Jay C. Zainey)

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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SUMMARY OF ARGUMENT

Our opening brief established that the EPA's decision not to make a Section 1313(c)(4)(B) necessity determination under the Clean Water Act is "committed to agency discretion by law" and therefore not subject to judicial review. 5 U.S.C. § 701(a)(2). We further explained that the EPA may have valid reasons for declining to make necessity determinations in response to a petition, and that the district court erred by refusing to consider the agency's rationale for denying the petition in this case. This Court should reverse the district court's judgment and either direct the district court to dismiss this case for lack of jurisdiction or remand for the district court to review the EPA's reasons for not making necessity determinations in response to Gulf Restoration's petition.

I. Gulf Restoration devotes most of its response brief to the jurisdictional issue, but its arguments for reviewability are unconvincing. It invites this Court to break from the Eleventh Circuit and interpret *Massachusetts v. EPA*, 549 U.S. 497 (2007), to render reviewable an agency's response to *any* petition that might eventually lead to rulemaking. But as our opening brief explained, the abbreviated reviewability discussion in *Massachusetts* did not jettison the Supreme Court's careful, statute-by-statute approach to 5 U.S.C. § 701(a). Nor did *Massachusetts* abrogate *Public Citizen, Inc. v. EPA*, 343 F.3d 449 (5th Cir. 2003), in which this Court held unreviewable the EPA's decision not to investigate whether the

standards established by a State pursuant to a cooperative federalism provision were adequate to meet the requirements of a federal statute. Gulf Restoration offers no meaningful distinction between *Public Citizen* and this case. This Court should follow that precedent and hold that the Clean Water Act commits the decision not to make a necessity determination to the EPA's unreviewable discretion.

II. On the merits, Gulf Restoration obliquely acknowledges that the district court could not overturn the EPA's petition denial without first inquiring whether the agency reasonably explained why it did not make Section 1313(c)(4)(B) necessity determinations. The dispute between the parties on appeal thus turns on whether the district court conducted that inquiry. The plain text of the court's order makes clear that it did not. Consequently, the appropriate course for this Court (assuming that jurisdiction exists) is to remand for the district court to consider in the first instance the EPA's explanation for not making necessity determinations in response to Gulf Restoration's petition.

III. If this Court disagrees with our jurisdictional and merits arguments, a remand is still needed to narrow the scope of the district court's remedy. The court ordered nationwide relief even though the plaintiffs made no attempt to establish a nationwide injury. Gulf Restoration's belated attempts to limit the relief requested in its petition and complaint are unavailing, so this Court should order the district court to tailor its remedy to redress Gulf Restoration's limited Article III injuries.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW THE EPA'S DECISION NOT TO MAKE NECESSITY DETERMINATIONS.

Gulf Restoration's petition asked the EPA to investigate whether certain extant State water quality standards needed to be supplemented in order to meet the requirements of the Clean Water Act. The Act vests the EPA Administrator with discretion to decide whether and when to embark on such an investigation, and neither the statute nor its implementing regulations offer any standard under which courts could review the EPA's decision whether to make a necessity determination under Section 1313(c)(4)(B). That decision is "committed to agency discretion by law" and not subject to judicial review. 5 U.S.C. § 701(a)(2); *see* EPA Br. 17–30.

In contending otherwise, Gulf Restoration relies (Br. 23–25) on the general presumption favoring judicial review of administrative action.[1] In this case, however, that general presumption runs headlong into the more specific presumption *against* judicial review of an agency's choice not to "institute investigative or enforcement proceedings" regarding alleged inadequacies in a

[1] Gulf Restoration asserts (Br. 2, 18, 21–22, 24) that jurisdiction must lie here absent "clear and convincing evidence" of Congressional intent to prohibit review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). Courts use that standard to assess whether "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). But under the separate provision at issue here, 5 U.S.C. § 701(a)(2), reviewability hinges on whether "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (differentiating the standards for the two provisions).

State's implementation of a cooperative federalism statute. *Heckler v. Chaney*, 470 U.S. 821, 838 (1985); *see Public Citizen*, 343 F.3d at 463–465. The *Heckler* presumption applies in this case and required the district court to dismiss Gulf Restoration's lawsuit for lack of jurisdiction.

A. *Public Citizen* controls here.

Our opening brief thoroughly demonstrated (Br. 20–28) why this Court should follow *Public Citizen* and order the district court to dismiss this case on jurisdictional grounds. Like this case, *Public Citizen* involved the EPA's choice (in the face of a request by citizens) not to make a discretionary determination whether particular standards established by a State pursuant to a cooperative federalism program were "adequate[ ]" to meet "the [statute's] requirements." 42 U.S.C. § 7661a(i)(1). And just as in this case, a formal determination by the EPA that existing standards were inadequate, when coupled with the State's inability or refusal to correct the deficiency in a timely fashion, would require the agency to promulgate new standards for the State. *Compare* 33 U.S.C. § 1313(c)(4) *with* 42 U.S.C. § 7661a(i). *Public Citizen* held that Congress committed the decision not to investigate the adequacy of State standards to the EPA's unreviewable discretion. 343 F.3d at 463–465. That precedent governs here.

Gulf Restoration's passing attempt to distinguish *Public Citizen* is unsuccessful. It first asserts (Br. 31) that *Public Citizen* is "squarely on the other

side of the sharp divide … between reviewable petition denials and generally unreviewable enforcement determinations." The divide is not sharp, *see infra* at 6–7, but more to the point, this case falls on the same side of that divide as *Public Citizen* in light of the striking similarities between the relevant statutes.

Gulf Restoration highlights (Br. 31) the non-statutory term "notice of deficiency" to suggest that *Public Citizen* concerned a pure "enforcement" action, as opposed to a rulemaking.[2] Rulemaking, however, played no less of a role in *Public Citizen* than it does here. Parties in both cases challenged the EPA's decision not to make a threshold statutory determination that could trigger a rulemaking obligation. But in each instance, the threshold determination did not itself entail any rulemaking proceedings.

Lastly, Gulf Restoration notes (Br. 31) that if the EPA had determined in *Public Citizen* that existing State standards were inadequate to meet statutory requirements, sanctions could also have been triggered. 42 U.S.C. § 7661a(i)(2). The possibility of sanctions, however, did not drive this Court's jurisdictional analysis. *Public Citizen*, 343 F.3d at 463–465; *see also New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 330 (2d Cir. 2003) ("[T]he key phrase of [the statute] is the opening one, 'Whenever the Administrator makes a

[2] The "enforc[ement]" language in the *Public Citizen* statute speaks to the State's role in enforcing its own pollution standards, rather than the EPA's role in overseeing the State's implementation of those standards. 42 U.S.C. § 7661a(i).

determination.'"). The salient features of *Public Citizen*'s statutory scheme—express discretion lodged with the agency, no condition precedent for making the relevant statutory determination, and cooperative federalism—are all present here, and collectively, they compel dismissal of this case for lack of jurisdiction.[3]

B. *Massachusetts* did not categorically render every denial of a "petition for rulemaking" reviewable under the APA.

Gulf Restoration contends (Br. 28) that three paragraphs in *Massachusetts v. EPA* created a *per se* rule that any federal agency's denial of any petition that can be styled as a request for rulemaking is automatically subject to judicial review. The brief discussion in *Massachusetts*, however, did not discard the Supreme Court's more nuanced approach to judicial review of agency action. EPA Br. 25–27; *cf. United States v. Mead Corp.*, 533 U.S. 218, 236 (2001) (explaining how, given "the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it," "[t]he Court's choice has been to tailor deference to [statutory] variety"). The division between reviewable and unreviewable agency action does not break down neatly along "rulemaking" and "enforcement" lines. EPA Br. 27–28. The presumption

[3] This Court would not be the first to hold that the EPA's decision not to make a Section 1313(c)(4)(B) necessity determination is committed to agency discretion by law and therefore unreviewable. *See Missouri Coal. for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903, 910–912 (W.D. Mo. 2012).

against review of agency non-enforcement decisions, for example, may be overcome if a statute "provide[s] guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 833.

The Eleventh Circuit recently rejected the rigid reading of *Massachusetts* advanced by Gulf Restoration. In *Conservancy of Southwest Florida v. U.S. Fish & Wildlife Service*, 677 F.3d 1073 (11th Cir. 2012), the court held that although "an agency's denial of a petition for rulemaking may often be reviewable," such actions are still committed to agency discretion by law in "the absence of any applicable statutory or regulatory standards" for judicial review. *Id.* at 1085. Invoking *Heckler*, the court declined to review the Fish and Wildlife Service's denial of a petition to designate critical habitat for an endangered species through rulemaking. *Id.* at 1082–1085; *see also Sierra Club v. U.S. Fish & Wildlife Serv.*, 930 F. Supp. 2d 198, 203–210 (D.D.C. 2013). Other courts of appeals have mentioned *Massachusetts* in the course of reviewing denials of rulemaking petitions, *e.g.*, *New York v. U.S. Nuclear Regulatory Comm'n*, 589 F.3d 551, 554 (2d Cir. 2009), but only the Eleventh Circuit has squarely addressed the breadth of the Supreme Court's reviewability holding.

Much of Gulf Restoration's "jurisdictional" discussion of *Massachusetts* (Br. 25–27) actually goes to the merits, which we address in Part II of this brief. As for jurisdiction, several facets of this case distinguish it from *Massachusetts* and

explain why the EPA's decision not to make a Section 1313(c)(4)(B) necessity determination is not subject to judicial review.

Massachusetts had no occasion to address the reviewability of a federal agency's discretionary decision not to interfere with a State's administration of a cooperative federalism provision. The *Massachusetts* petitioners sought rulemaking under a statutory provision that charged the EPA with "protect[ing]" the States by controlling air pollutant emissions that the States lacked authority to regulate. 549 U.S. at 519. Section 1313, on the other hand, relies on the States to develop and implement their own water quality standards within their borders, while the EPA plays a secondary oversight and enforcement role. EPA Br. 23–24; *see generally Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981) (describing "a program of cooperative federalism" as one "that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs"). Section 1313's preference for State action is so strong that, even when the EPA affirmatively determines that revised or new standards are "necessary to meet [statutory] requirements," the agency only promulgates those standards if the State cannot or will not do so. 33 U.S.C. § 1313(c)(4).

Judicial review of every EPA decision not to interfere with duly-adopted State water quality standards could disrupt ongoing efforts by the States and the

EPA to cooperatively administer the Clean Water Act. *See* ROA.1377–1380 (letter denying petition) (describing some of those joint efforts). Courts are generally hesitant to intervene in these sensitive matters of federal-state relations. EPA Br. 28–29; *cf. Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 286 (1973) (explaining that "harmonious federalism" would be "wholly served by allowing the delicate federal-state relationship to be managed through [a federal agency]" without judicial intervention); *Harman v. Forssenius*, 380 U.S. 528, 534 (1965) ("[*Pullman*] abstention may be proper in order to avoid unnecessary friction in federal-state relations ….). Regardless of whether a federal agency's decision not to interfere with a State's implementation of a cooperative federalism provision is "generally committed to an agency's absolute discretion," *Heckler*, 470 U.S. at 831, the significant federalism concerns here distinguish this case from *Massachusetts* and strongly support dismissal for lack of jurisdiction.

Furthermore, the relationship between rulemaking and the predicate action requested by the petitioners is more attenuated here than it was in *Massachusetts*. The *Massachusetts* petitioners asked the EPA to make a threshold determination that would invariably lead to EPA rulemaking. EPA Br. 25–26 (citing 42 U.S.C. § 7521(a)(1)). By contrast, the positive necessity determinations sought by Gulf Restoration would only result in EPA rulemaking if the States failed to develop

adequate water quality standards in a timely fashion. 33 U.S.C. § 1313(c)(4); *see Public Citizen*, 343 F.3d at 454 (describing a similar regime under 42 U.S.C. § 7661a(i)(4)). Thus, contrary to Gulf Restoration's view (Br. 33), a Section 1313(c)(4)(B) necessity determination is not "merely a step in a long rulemaking process." As Gulf Restoration acknowledged before the district court, this lawsuit "seeks an up or down determination on necessity, not a rulemaking." Pls.' Opp'n to Mot. for Stay Pending Appeal, Dkt. No. 181, at 10 (filed Feb. 18, 2014).

The Supreme Court remarked in *Massachusetts* that denials of rulemaking petitions are apt to raise legal rather than factual issues, and that they tend to be less frequent than agency non-enforcement decisions. 549 U.S. at 527 (citing *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987)). Neither of those considerations holds true here. First, the EPA's decision not to make a necessity determination for a particular water quality standard is "typically based mainly on close consideration of the facts at hand, rather than on legal analysis." *Am. Horse*, 812 F.2d at 4; *see* ROA.1377–1382 (letter denying petition). Second, States throughout the country have adopted thousands of water quality standards, and any citizen could petition the EPA to determine whether a revision or addition to any particular standard is "necessary to meet the [Clean Water Act's] requirements." 33 U.S.C. § 1313(c)(4)(B). Allowing judicial review of Section 1313(c)(4)(B)

petition denials would thus implicate the same manageability concerns that disfavor judicial review of agency non-enforcement decisions.[4] EPA Br. 28–29.

Gulf Restoration seeks review of the EPA's petition denial under the APA, whereas in *Massachusetts*, judicial review was deemed proper under a statute-specific provision that "recognized a … procedural right to challenge the rejection of [a] rulemaking petition as arbitrary and capricious." 549 U.S. at 520 (citing 42 U.S.C. § 7607(b)(1)). The Supreme Court reasoned that, "at least in the circumstances [t]here," parties were entitled to petition for rulemaking and then obtain judicial review of the EPA's response. *Id.* at 527–528. The Clean Water Act, however, contains no analogous judicial review provision that is relevant here.

Finally, the Supreme Court referenced 5 U.S.C. § 555(e), which instructs an agency denying a petition to provide "a brief statement of the grounds for denial." *See Massachusetts*, 549 U.S. at 527. Gulf Restoration relies heavily on that provision (Br. 22, 24, 28–29), but its argument proves too much. The APA's brief-statement requirement is not limited to rulemaking petitions; it applies to any "written application, petition, or other request of an interested person made in

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[4] Of course, lawsuits contesting petition denials are subject to ordinary Article III limitations. *See infra*, at 22–23. Limits on judicial power, however, will not mitigate the harm to the EPA from the district court's ruling. Under the district court's reasoning, the agency would need to make necessity determinations with respect to every water quality standard sought by every petition, irrespective of whether the petitioner had a legally-cognizable interest in the subject waters.

connection with any agency proceeding." 5 U.S.C. § 555(e); *see French's Estate v. Fed. Energy Regulatory Comm'n*, 603 F.2d 1158, 1162 (5th Cir. 1979) (applying 5 U.S.C. § 555(e) to the denial of a petition for relief from an enforcement order); *cf. Heckler*, 470 U.S. at 841 (Marshall, J., concurring in the judgment) (opining that the brief-statement rule may apply to the denial of a petition for enforcement). If this Court were to hold that a right to receive a brief explanation for a petition denial entails a right to judicial review of the denial, it could prompt a host of lawsuits asking courts to review discretionary agency decisions based solely on the text of a petition and a simple statement explaining the general basis for its denial.

C. Gulf Restoration's remaining arguments are unpersuasive.

Gulf Restoration raises a variety of other arguments in favor of jurisdiction, none of which are convincing. We address them seriatim.

1. The jurisdictional issue presented here is whether the EPA's *decision not to make a necessity determination* is subject to review, not whether a *necessity determination itself* would be reviewable. EPA Br. 18 n.5; Pls.' Br. 40. Gulf Restoration purports to recognize this distinction, but it repeatedly conflates the two. Pls.' Br. 33, 41–44. Its error is laid bare in the concluding sentence of its argument (Br. 44): "If there is abundant law to apply to a necessity determination itself, it does not stand to reason that there is no law to apply to a refusal to make one at all." Such reasoning would essentially render 5 U.S.C. § 701(a)(2) a nullity,

since an agency's decision not to enforce (or a prosecutor's decision not to indict) could be deemed reviewable on the same basis. See *Heckler*, 470 U.S. at 832 ("[W]hen an agency *does* act to enforce, that action itself provides a focus for judicial review….").

2. This error pervades Gulf Restoration's brief and may also explain its misplaced reliance (Br. 2, 4, 22, 24) on the APA's provisions for reviewing an agency's failure to act. Although a failure to act may constitute an "agency action," 5 U.S.C. § 551(13), an agency's decision not to act may still be "committed to [its] discretion by law." *Id.* § 701(a)(2). Furthermore, a decision not to act is reviewable only "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). As discussed in Part II of this brief, the EPA is not required to make a Section 1313(c)(4)(B) necessity determination merely because a petition is filed; the agency only needs to respond to the petition, which it did here.

3. Citing *Save the Bay, Inc. v. EPA*, 556 F.2d 1282 (5th Cir. 1977), Gulf Restoration argues (Br. 26) that an agency's otherwise unreviewable response to a petition becomes reviewable if the agency relies on "extra-statutory criteria." The Supreme Court has flatly rejected that theory, EPA Br. 30, and *Save the Bay* is inapposite here for other reasons. That case addressed "the situation in which EPA undertakes consideration of the merits of a proposed [Clean Water Act discharge]

permit and decides on the basis of that consideration not to veto it." *Save the Bay*, 556 F.2d at 1293. That decision is closer to a negative necessity determination than it is to the EPA's decision not to make a necessity determination in the first place. *See id.* at 1293 n.14 ("pretermit[ting] the question" whether the EPA's refusal to even consider the merits of a proposed permit would be judicially reviewable).

4. Apart from *Massachusetts v. EPA*, Gulf Restoration principally relies on *Franklin v. Massachusetts*, 505 U.S. 788 (1992). But the passages that it cites (Br. 35, 38, 39) all appear in a concurring opinion. The majority did not address whether the challenged action was committed to agency discretion by law because it determined that the action was unreviewable on other grounds. *Franklin*, 505 U.S. at 796. The concurrence does not help Gulf Restoration anyway. It recites the uncontroversial proposition that 5 U.S.C. § 701(a)(2) ordinarily applies in areas where courts are "hesitant to intrude." *Franklin*, 505 U.S. at 819 (Stevens, J., concurring in part and concurring in the judgment). The EPA's point, however, is that courts *should be* hesitant to second-guess the agency's decision not to investigate a particular citizen's allegation that certain State-adopted water quality standards are not meeting the requirements of the Clean Water Act. EPA Br. 22–30.

5. Gulf Restoration contends that effective implementation of the Clean Water Act depends on judicial oversight of every EPA decision not to make a necessity determination. Pls.' Br. 37 (quoting *Nw. Envtl. Advocates v. EPA*, 268

F. Supp. 2d 1255, 1264 (D. Or. 2003)). That argument "is based ultimately on the assumption that the EPA will not carry out its investigatory duties in good faith," an assumption that this Court has been "unwilling to attribute to Congress" absent "clear statutory language or legislative history." *City of Seabrook v. Costle*, 659 F.2d 1371, 1375 (5th Cir. Unit A 1981); *see also Heckler*, 470 U.S. at 834 ("The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance."). In any event, Gulf Restoration does not allege that the EPA denied its petition "based solely on the belief that it lack[ed] jurisdiction" to make necessity determinations, or that the agency "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U.S. at 833 n.4 (citation omitted). To the contrary, the EPA expressly left open the possibility of making future necessity determinations for the very water quality standards requested by Gulf Restoration. ROA.1382; *contra* Pls.' Br. 41.

6. Gulf Restoration cites (Br. 37–38, 39) *American Canoe Ass'n, Inc. v. EPA*, 30 F. Supp. 2d 908, 919–921 (E.D. Va. 1998), in which a district court reviewed the EPA's failure to establish total maximum daily loads ("TMDLs") in waters where a State had never established them. Once again, the analogy is inapt. If a State had failed to ever submit water quality standards for the EPA's approval, the

agency would have been required to promulgate standards for that State. EPA Br. 23; *see* 33 U.S.C. § 1313(b)(1)(A). In this case, however, Gulf Restoration asks the EPA to amend or supplement a suite of *existing* State water quality standards. The Act does not mandate that the EPA police those existing water quality standards absent a State's submission of a revised or new standard. EPA Br. 23–24.

7. Some provisions of the Clean Water Act employ "mandatory" language, and Gulf Restoration quotes (Br. 39–40) that language to support its argument that Congress intended for courts to review the EPA's decisions not to make necessity determinations. But those provisions actually cut against Gulf Restoration's argument because Congress chose not to use similarly peremptory language in Section 1313(c)(4)(B). *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Section 1313(c)(4) only requires the EPA to act "where the Administrator determines" that revised or new water quality standards are needed to amend or supplement a State's existing standards. 33 U.S.C. § 1313(c)(4)(B). Similarly, the statute in *Public Citizen* only requires EPA action "[w]henever the Administrator makes a determination" that an existing State program is not being implemented in accordance with statutory requirements. 42 U.S.C. § 7661a(i)(1). Both statutes

"fairly exude[ ] deference" to the EPA with respect to the decision whether to make the threshold statutory determination. *Webster v. Doe*, 486 U.S. 592, 600 (1988).

8. Gulf Restoration also highlights (Br. 22, 24) the APA's requirement that federal agencies "give an interested person the right to petition for the issuance … of a rule." 5 U.S.C. § 553(e). But a right to petition does not entail a right to judicial review of an agency's response. Otherwise, an agency could inadvertently render its non-enforcement decisions reviewable simply by agreeing to consider petitions for enforcement. The APA's right to judicial review is conferred by a completely separate provision (5 U.S.C. § 704) that does not apply "to the extent that … agency action is committed to agency discretion by law." *Id.* § 701(a)(2).

If Congress wants an agency to respond to a petition in a particular manner, it specifies the appropriate response in the statute. *E.g.*, 33 U.S.C. § 1329(g)(1) (explaining that a State whose waters are affected by out-of-state pollution "may petition the Administrator to convene, *and the Administrator shall convene*, a management conference of all States which contribute significant pollution resulting from nonpoint sources to such [waters]") (emphasis added). But here, Congress opted not to specify the appropriate EPA response to a petition requesting a Section 1313(c)(4)(B) necessity determination. The agency has unreviewable discretion to decline to make such determinations, and the mere filing of a petition under 5 U.S.C. § 553(e) does not change the nature of the agency's discretion.

In sum, Gulf Restoration fails to rebut the EPA's argument that the decision not to make a Section 1313(c)(4)(B) necessity determination is committed to agency discretion by law. Because that decision is not subject to review, this Court should order the district court to dismiss this case for lack of jurisdiction.

II. THE EPA HAS DISCRETION NOT TO MAKE A NECESSITY DETERMINATION IN RESPONSE TO A PETITION.

On the merits, this appeal presents a very narrow issue: whether the EPA has the option to provide a reasoned justification for declining to make a necessity determination in response to a petition. Gulf Restoration agrees (Br. 17–18) that this Court need not, and should not, address the range of factors that the EPA may consider when making a positive or negative necessity determination. Nor should the Court address the factors that the EPA may consider when deciding whether to make a necessity determination in the first place. The district court did not delimit those factors, nor did it decide whether the EPA's explanation for declining to make a necessity determination was acceptable in this case. The appropriate course (assuming that jurisdiction exists) is to remand for the district court to conduct that record-based inquiry in the first instance. EPA Br. 36.

Gulf Restoration makes this Court's task considerably easier by conceding (Br. 46) that *Massachusetts v. EPA* affords an agency the option of declining to make a discretionary statutory determination in response to a citizen's petition.

Gulf Restoration even quotes (Br. 45) the crucial passage from the Supreme Court's decision recognizing that the EPA may "provide[ ] some reasonable explanation as to why it cannot or will not exercise its discretion" to make a threshold statutory determination. *Massachusetts*, 549 U.S. at 533; *see* EPA Br. 33.

The dispute on appeal is thus not one of legal principle. Rather, it turns on the proper reading of the district court's order. The EPA contends (Br. 13–14) that the district court broadly held that the agency lacks discretion to decline to make a necessity determination in response to a petition. Gulf Restoration maintains (Br. 16) that the court specifically examined the EPA's reasons for declining to make necessity determinations here and found those reasons impermissible. A cursory inspection of the court's order resolves this dispute in the EPA's favor.

Following its (erroneous) resolution of the jurisdictional issue, the district court examined *Massachusetts* and found in the Supreme Court's opinion an "implicit conclusion … that EPA lacks the discretion to simply decline to make the threshold [necessity] determination in response to a rulemaking petition." ROA.19558. In the district court's view, *Massachusetts* held that the EPA "could not simply decline to make a necessity determination in response to Plaintiffs' petition." *Ibid.* As a consequence, the district court held that the EPA's denial of Gulf Restoration's petition "was contrary to law because EPA did not make a necessity determination." ROA.19559.

Consistent with that holding, the district court did not review the EPA's reasons for not making necessity determinations, let alone remand the petition for the EPA to reconsider those reasons. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 905 (5th Cir. 1983) (describing this as the default APA remedy). The court instead ordered the EPA to make necessity determinations for every water quality standard requested by Gulf Restoration. ROA.19561. There is no dispute among the parties about the effect of the district court's order. *See* Pls.' Br. 17 ("[T]he Court ordered EPA to provide Gulf Restoration with a determination of necessity ….").

In light of its holding that Gulf Restoration's petition compelled the EPA to make necessity determinations, the district court had no reason to address the range of permissible considerations that could inform the EPA's decision not to make a necessity determination. The court did go on to state, however, that "[n]othing in the authorizing statutory text of the [Clean Water Act] expressly precludes EPA from considering the very factors that it cited in the Denial" when making a Section 1313(c)(4)(B) necessity determination. ROA.19561. That statement is relevant here for one reason only: it decisively refutes Gulf Restoration's position that the district court invalidated the EPA's decision because the agency's reasons for denying the petition were not sufficiently grounded in the statute. As the order's plain language makes clear, the district court based its decision solely on

the mistaken conclusion that the EPA is categorically foreclosed from declining to make necessity determinations in response to citizen petitions.

Gulf Restoration tries (Br. 44–50) to induce this Court to limit the grounds upon which the EPA may decide not to make a necessity determination. The Court should decline that invitation. The district court categorically ruled that the EPA must make necessity determinations in response to Gulf Restoration's petition, so it never addressed the grounds on which the agency could decline to make a necessity determination. This Court should follow its usual practice and remand for the district court to address that issue in the first instance. EPA Br. 36.

That course is particularly appropriate here because Gulf Restoration's merits argument—that the EPA "relied on reasoning divorced from the statutory text," Br. 46—threatens to entangle this Court in an inquiry regarding which factors the agency can permissibly consider when *making* a necessity determination. The district court did not impose any restriction on the EPA in that regard, ROA.19561, and Gulf Restoration cannot ask this Court to do so now. *See Kelly v. Foti*, 77 F.3d 819, 822 (5th Cir. 1996) (explaining that this Court "lack[s] jurisdiction to alter the district court's judgment in [an appellee's] favor" absent a cross-appeal).

In summary, if this Court concludes that the district court had jurisdiction over this matter, it should hold (consistent with *Massachusetts* and the views of all parties to this appeal) that the district court erred by vacating the EPA's petition

denial without first inquiring whether the agency had provided a reasonable explanation for not making necessity determinations in response to Gulf Restoration's petition. Then this Court should remand for the district court to conduct that inquiry using an "extremely limited and highly deferential" standard of review. *Massachusetts*, 549 U.S. at 527–528 (internal quotation marks and citation omitted). Gulf Restoration can renew its "extra-statutory" arguments on remand, but they are not before the Court at this time.

III. AT A MINIMUM, A REMAND IS REQUIRED TO NARROW THE SCOPE OF THE DISTRICT COURT'S REMEDY.

Even if this Court finds that the EPA's choice not to make a necessity determination is judicially reviewable, and that *Massachusetts* compels the EPA to make necessity determinations with respect to every water quality standard requested by a petition, a remand is still necessary to narrow the district court's remedy. EPA Br. 36–39. Gulf Restoration asserts (Br. 55–58) that it established an Article III injury to its members' interests that could only be redressed by a remedy encompassing the entire Mississippi River Basin. We dispute that assertion (EPA Br. 38), but in any case, a basin-wide remedy is still far narrower than the nationwide remedy ordered by the district court. A remand is therefore needed for

the district court to tailor a remedy limited to the scope of the Article III injuries established by the plaintiffs.[5]

Gulf Restoration suggests (Br. 55) that the district court's order might not require the EPA to make necessity determinations for all fifty States because the petition afforded the agency "leeway" to only address standards in certain States. That stance conflicts with Gulf Restoration's petition, which covered "every 'navigable water'" in the country. ROA.1454; *see also* ROA.1455 ("Petitioners believe firmly that … water quality standards should be established by EPA on a national basis."). The "jointly and in the alternative" language from the petition referred to different classes of water bodies, not variable geographic scope. ROA.1454. Gulf Restoration's current view of its petition is also at odds with the remedy that it pressed before the district court. ROA.17543 (Pls.' Summ. J. Mem.) ("This Court should … remand the petition to EPA with directions to determine specifically whether and where numeric criteria for nutrient pollution in waters in the Mississippi River Basin *and elsewhere in the nation* are 'necessary' to meet the

[5] Gulf Restoration invokes *Massachusetts v. EPA* (Br. 51–52), but that case is inapposite on this question. Under the statutory scheme in *Massachusetts*, the EPA could only promulgate pollution standards nationally. *See* 42 U.S.C. §§ 7521(a)(1), 7522(a)(1), and 7550(6). By contrast, the EPA can make Section 1313(c)(4)(B) necessity determinations at a more granular level (*e.g.*, for an individual State, a particular class of water bodies within a State, or only one water body). That flexibility permits the district court to tailor any remedy to match the specific location(s) of Gulf Restoration's injuries.

Act's requirements.") (emphasis added). If Gulf Restoration now wants to amend its complaint to narrow its claims and requested relief (or narrow the relief that it received), this case must first return to the district court. *See Willard v. Humana Health Plan*, 336 F.3d 375, 387 (5th Cir. 2003).

Gulf Restoration contends (Br. 52–54) that the EPA cannot quarrel with the district court's remedy because it did not object during earlier proceedings. That contention is misplaced for several reasons. First, Gulf Restoration's complaint and summary judgment briefs were not clear regarding the relief that it sought from the district court. *See* ROA.19555 n.8 (district court opinion) (noting the ambiguity). This Court should not fault the EPA for failing to pinpoint and contest the precise relief requested by Gulf Restoration.

Second, the EPA's concern on appeal (Br. 38–39) is that the district court acted outside the scope of its jurisdiction by ordering relief that did not redress any injury alleged by Gulf Restoration. *See, e.g.*, *John Doe #1 v. Veneman*, 380 F.3d 807, 815 (5th Cir. 2004) (invalidating an injunction because "the district court exceeded its jurisdiction" by "act[ing] without an actual controversy"); *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*, 701 F.2d 314, 335 (5th Cir. 1983) (striking a portion of an injunction addressing regulations that the plaintiffs lacked standing to challenge). That concern implicates the district court's Article III power to award relief, and "[w]hen these Article III limitations are at

issue, notions of consent and waiver cannot be dispositive." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

Third, even if the EPA forfeited this issue, the Court should still exercise its discretion to order the district court to reconsider its remedy given the potentially significant consequences for federal-state relations in the substantial portion of the country where Gulf Restoration did not even attempt to assert an injury. *See HECI Exploration Co., Inc. v. Holloway*, 862 F.2d 513, 519 (5th Cir. 1988) (recognizing an appellate court's discretion to consider forfeited arguments).

CONCLUSION

The district court's judgment should be reversed, and this case should be dismissed for lack of jurisdiction. In the alternative, this Court should remand for the district court to review in the first instance the EPA's reasons for declining to make necessity determinations in response to Gulf Restoration's petition. Barring that, this Court should remand for the district court to narrow its remedial order so that it redresses the injuries established by the plaintiffs and goes no further.

Respectfully submitted,

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April 29, 2014
90-5-1-4-19385

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6,120 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point.

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April 29, 2014

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2014, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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