No.

In the Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Water Act creates a federal permitting program for "point source" discharges of pollution and non-regulatory, incentive-based programs to address diffuse "nonpoint sources" like farming. Statutorily defined roles for EPA in each program are designed to preserve the "primary" rights and responsibilities of States to achieve the goal of clean water.

For waters that do not meet water quality standards, the Act requires States to establish "total maximum daily loads" (TMDLs). A TMDL sets a numeric target for pollutants in a water body "at a level necessary to implement" water quality standards. The Act requires the States—and *only* the States—to develop plans to implement TMDLs.

This case concerns EPA's establishment of a TMDL for the Chesapeake Bay—the most far-reaching TMDL ever developed. In addition to fixing total load limits for pollutants in the Bay, this TMDL establishes pollutant limits for individual sources and types of sources across the 64,000-square mile Bay watershed, sets deadlines for States to implement control measures for those sources, and demands "reasonable assurances" from States that the deadlines will be met, backed by federal sanctions. The cost of State compliance is staggering—tens of billions of dollars. In conflict with other courts of appeals' rulings as to the proper scope of TMDLs, the Third Circuit upheld EPA's interpretation of the Act to authorize the Bay TMDL.

The question presented is whether the Third Circuit erred by deferring to EPA's interpretation of the words "total maximum daily load" to permit EPA to impose a complex regulatory scheme that does much more than cap daily levels of total pollutant loading and that displaces powers reserved to the States.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners here, plaintiffs below, are the American Farm Bureau Federation; National Association of Home Builders; National Chicken Council; National Corn Growers Association; National Pork Producers Council; National Turkey Federation; Pennsylvania Farm Bureau; The Fertilizer Institute; and U.S. Poultry and Egg Association.

Intervenor-defendants below and respondents here are Chesapeake Bay Foundation Inc; Citizens for Pennsylvania's Future; Defenders of Wildlife; Jefferson County Public Service District; Midshore Riverkeeper Conservancy; National Wildlife Federation; Virginia Association of Municipal Wastewater Agencies, Inc.; Maryland Association of Municipal Wastewater Agencies; National Association of Clean Water Agencies; Pennsylvania Municipal Authorities Association; and the City of Annapolis, Maryland.

CORPORATE DISCLOSURE STATEMENT

Petitioners American Farm Bureau Federation; National Association of Home Builders; National Chicken Council; National Corn Growers Association; National Pork Producers Council; National Turkey Federation; Pennsylvania Farm Bureau; The Fertilizer Institute; and U.S. Poultry and Egg Association are not-for-profit advocacy groups. None has a parent corporation or issues stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Farm Bureau Federation; National Association of Home Builders; National Chicken Council; National Corn Growers Association; National Pork Producers Council; National Turkey Federation; Pennsylvania Farm Bureau; The Fertilizer Institute; and U.S. Poultry and Egg Association respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-50a) is reported at 792 F.3d 281. The opinion of the district court (App., *infra*, 51a-157a) is reported at 984 F. Supp. 2d 289.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2015. On September 18, 2015, Justice Alito granted an extension of time to file this petition to November 6, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Clean Water Act are set forth at App., *infra*, 158a-175a.

STATEMENT

The Clean Water Act (CWA or Act) aims "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through an elaborate scheme of cooperative federalism. 33 U.S.C. § 1251(a), (g). Although EPA has an important role in achieving that goal, Congress made clear its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate

pollution" and "to plan the development and use" of "land and water resources." *Id.* § 1251(b). Accordingly, the language and structure of the Act carefully constrain EPA's powers, reserving an array of important decisions about how to control pollution to the States, in keeping with their traditional powers under the Constitution.

This case involves "the largest and most complex" plan to reduce water pollution "ever developed by EPA" —a plan covering the 64,000-square mile Chesapeake Bay watershed, which encompasses "large sections" of six States plus the District of Columbia and is home to 17 million people. EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorous and Sediment* ES-1, ES-3 (Dec. 29, 2010) ("TMDL").[1] That TMDL, addressing three pollutants that result largely from land uses, natural sources, and municipal discharges, shows in the starkest possible way how far EPA has strayed from the role Congress defined for it in the CWA and into areas that Congress expressly reserved for the States.

Distorting the statutory words "total maximum daily load" beyond any reasonable interpretation, EPA's Chesapeake Bay TMDL creates a vast regulatory program that

- establishes pollutant limits for individual sources and types of sources, rather than a "total" limit that would leave it to the discretion of State and local governments to allocate that total limit among sources;

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[1] Links to the TMDL are available at http://www2.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document. The TMDL also is reproduced in the appellants' joint appendix before the court of appeals, at JA1106.

- sets deadlines for States to implement control measures and to achieve those limits; and
- demands that States provide "reasonable assurances" that the source limits will be achieved by the target dates.

TMDL ES-8. EPA backs these requirements with "an accountability framework" that threatens "specific federal contingency actions if the jurisdictions do not meet their commitments." *Ibid.* In other words, EPA has promulgated a detailed federally driven scheme that looks nothing like the cooperative federalism specified by Congress in the Act. No wonder 21 States filed an amicus brief below challenging EPA's authority to issue the TMDL. Every State now risks losing authority to EPA TMDLs. See Executive Order 13508, § 301(e), 74 Fed. Reg. 23099, 23101 (May 12, 2009) (calling for Chesapeake Bay strategies that "can be replicated" in "other bodies of water").

The Third Circuit's deference to EPA's rewriting of the Clean Water Act warrants this Court's review. In finding the phrase "total maximum daily load" ambiguous, and thus subject to *Chevron* deference, the Third Circuit focused not on what the statute *says* but on how the court believed the Act's water quality goals may best be achieved. In the Third Circuit's view, the phrase "total maximum daily load" is "broad enough to include" not just a limit on total pollution, but also "allocations" among different sources in different geographic areas, "target dates" for implementing control measures on the ground, and "reasonable assurance[s]" from the States that the allocations will be achieved. App., *infra*, 26a. That conclusion ignores the statutory text, conflicts with the decisions of other courts of appeals, and usurps the role reserved by

Congress for the States under the CWA. It should not stand.

A. The Statutory And Regulatory Framework

The Clean Water Act is "'a program of cooperative federalism'" that "'anticipates a partnership between the States and the Federal Government.'" *New York* v. *United States*, 505 U.S. 144, 168 (1992); see also *Arkansas* v. *Oklahoma,* 503 U.S. 91, 101 (1992). The CWA's "intricate scheme" charges EPA with primary responsibility over a permitting program for point sources of pollution, but "leaves to the states the responsibility of developing plans to achieve water quality standards if the statutorily-mandated point source controls will not alone suffice, while providing federal funding to aid in the implementation of the state plans." *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1128 (9th Cir. 2002).

Water quality standards. States are responsible for establishing water quality standards for waters within their borders. 33 U.S.C. §§ 1313(c)(1), (2)(A). These standards, which "establish the desired condition of a waterway" (*Arkansas*, 503 U.S. at 101), comprise two parts. First, they identify the designated uses for particular water bodies, such as for agriculture, recreation, or public water supply. Second, they identify water quality criteria necessary to serve those uses. *Id.* § 1313(c)(2)(A); see 40 C.F.R. §§ 130.3, 131.10. The "primary role" in "establishing water quality standards" belongs to the States. *City of Albuquerque* v. *Browner*, 97 F.3d 415, 425 (10th Cir. 1996). Only if EPA disapproves a State's standards as being contrary to the Act may EPA promulgate standards for that State. 40 C.F.R. § 131.22.

Point source pollution; NPDES permits. EPA's principal regulatory tool for achieving water quality

standards is Section 402's permit program called the National Pollutant Discharge Elimination System (NPDES), which applies to "point sources" of pollution. Generally speaking, any person who "discharges" a pollutant from a "point source" into "navigable waters" must have an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(f), (k). A "point source" is "a discernible, confined and discrete conveyance" and includes "any pipe, ditch, channel, tunnel, [or] conduit." *Id.* § 1362(14). An NPDES permit imposes technology-based limits on the amount of pollutant in any discharge from the permitted source. *Id.* §§ 1311(b)(1)(A)-(B), 1342(a)(3), (b)(1)(A); see *American Paper Inst.* v. *EPA*, 882 F.2d 287, 288 (7th Cir. 1989). Where technology-based limits are insufficient to achieve water quality standards, permits must impose any more stringent limits necessary to implement those standards. 33 U.S.C. § 1311(b)(1)(C); *Arkansas*, 503 U.S. at 101.

EPA has primary responsibility for administering the NPDES program. 33 U.S.C. § 1342(a)(1). But any State may seek EPA approval "to administer its own permit program for discharges into navigable waters within its jurisdiction." *Id.* § 1342(b). When a State administers its own program, as most do, EPA continues to play a supervisory role: "EPA is notified of the actions taken by state permit-issuing authorities and may veto the issuance of any permit by state authorities by objecting in writing within 90 days." *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 194 (1980) (per curiam).

Nonpoint source pollution. Nonpoint source pollution is all "pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source." *Oregon Natural Desert Ass'n* v. *U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008). For example, unchanneled rainwater runoff from agriculture, forest

operations, construction activities, or urban areas, which may contain pesticide or fertilizer residues or sediment (among other possibilities), is a nonpoint source. See *Cordiano* v. *Metacon Gun Club*, 575 F.3d 199, 221 (2d Cir. 2009).

The CWA does not authorize EPA to regulate nonpoint sources. See *Defenders of Wildlife* v. *EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005); *Sierra Club* v. *Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Instead, State programs required by the CWA address nonpoint source as well as point source pollution in order to achieve water quality standards.

TMDLs, State planning processes, and State management plans. Section 303(d) requires each State to identify those waters for which the technology-based limits in NPDES permits "are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). For each body of water thus identified (called "impaired waters"), the Act establishes a multi-step process by which States work to achieve water quality standards.

First, the State must establish a "total maximum daily load," or TMDL, for those pollutants causing the impairment. 33 U.S.C. § 1313(d)(1)(C). As the word "total" suggests, a TMDL defines the maximum level of pollutant loading "from all combined sources" (*Pronsolino*, 291 F.3d at 1128)—including natural background, point sources, and nonpoint sources—"necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C); see 40 C.F.R. §§ 130.2(g)-(i), 130.7(c). Although responsibility for calculating TMDLs falls to the States, EPA has authority to "approve or disapprove" a State TMDL; if it disapproves, EPA must itself establish the load

necessary to achieve water quality standards. 33 U.S.C. § 1313(d)(2); see 40 C.F.R. § 130.7(d).

Second, each State must establish "a continuing planning process" for the achievement of water quality standards. 33 U.S.C. § 1313(e)(1). This process must "result in [specific] plans for all navigable waters within [the] State," including the incorporation of any applicable TMDL, "adequate authority for intergovernmental cooperation," and "adequate implementation" for water quality standards. *Id.* § 1313(e)(3); see 40 C.F.R. § 130.6. "The theory is that" through the continuing planning process "[NPDES] permits will be adjusted and other measures taken" to address both point and nonpoint sources of a pollutant, "so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL." *Meiburg*, 296 F.3d at 1025.

Although EPA may disapprove a State's planning process (33 U.S.C. § 1313(e)(2)), it has no authority to promulgate a federal planning process or implementation plan.

Third—and an integral part of the scheme for achieving water quality standards—where water quality is impaired in part by nonpoint sources of pollution, a State must address those nonpoint sources. Originally, under Section 208, the States' obligation was to establish a process to "identify, if appropriate, agriculturally and silviculturally related nonpoint sources" and to "set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F). EPA has no authority to review the substance of these plans, only to incentivize them through federal funding. *Id.* § 1288(f).

Section 319, added in 1987, required additional State reports and programs to address waters that need additional nonpoint source controls to meet water quality standards. A State's report must identify nonpoint sources or categories of sources that significantly contribute to failing to meet water quality standards and must describe the State's "process" for "identifying best management practices and measures" to "reduce, to the maximum extent practicable," pollution from those nonpoint sources. 33 U.S.C. § 1329(a)(1)(C). States must then develop programs for implementing best management practices and measures, including a schedule for implementation "at the earliest practicable date." *Id.* § 1329(b)(2)(C).

Congress authorized EPA to approve or disapprove a State's nonpoint source management program and to provide funding for approved State programs. 33 U.S.C. § 1329(h). But Congress did not authorize EPA to dictate the substance of State nonpoint source programs or to establish a federal program in the absence of an approved State program. See *id.* § 1329(e).

The withdrawn 2000 TMDL rule. In July 2000, EPA promulgated a final rule that "redefin[ed] the TMDL" from a simple numerical calculation to "'a written, quantitative plan and analysis'" for "'attaining and maintaining water quality standards.'" Steven Miano & Kelly Gable, *Total Maximum Daily Loads: Section 303(d)*, in THE CLEAN WATER ACT HANDBOOK 207, 218 (Mark Ryan ed., 3d ed. 2011) (quoting 65 Fed. Reg. 43,586 (July 13, 2000)). "One of the more controversial requirements" that EPA attempted to impose under the 2000 TMDL rule was that States' TMDLs include "comprehensive implementation plans providing 'reasonable assurance' that the TMDL would actually be implemented." *Ibid.* It further required that

TMDLs include schedules for implementing nonpoint source control measures for waters that are impaired in part by nonpoint sources. *Ibid.*; see 65 Fed. Reg. 43,668. A "state's failure to adhere to its schedule or meet specific TMDL deadlines" would result in an EPA takeover of the TMDL process. Miano & Gable, *supra*, at 218; see 65 Fed. Reg. 43,669. According to leading commentators, these requirements "created a conflict" with "the CWA's delegation of nonpoint source control to state and local authorities." Miano & Gable, *supra*, at 219.

The 2000 TMDL rule "generated considerable controversy" and never took effect. 68 Fed. Reg. 13,608, 13,609 (Mar. 19, 2003). "Congress prohibited EPA from implementing the final rule through a spending prohibition." *Ibid.* EPA withdrew the rule in 2003, citing "lack of stakeholder consensus on key aspects of the [rule]" and the need for "significant changes" before it "could represent a workable framework for an effective TMDL program." *Id.* at 13,609, 13,612.

B. The Chesapeake Bay TMDL

This case concerns EPA's establishment of a TMDL for the Chesapeake Bay. Through a series of agreements beginning in the 1980s, the Chesapeake Bay States entered into a partnership among themselves and with EPA to form the Chesapeake Bay Program. JA135-137, 249. Congress ratified the partnership in 1987. Pub. L. No. 100-4, § 103, 101 Stat. 10 (codified at 33 U.S.C. § 1267). In 2007, Program members agreed that EPA would establish the Chesapeake Bay TMDL on behalf of the member States. TMDL 1-9.

EPA promulgated the final, 280-page Chesapeake Bay TMDL in December 2010. Although the TMDL sets overall "watershed limits" for the aggregate amount of three pollutants—nitrogen, phosphorus, and

sediment—in the Bay as a whole, it actually comprises 276 TMDLs: one for each of the three pollutants in each of 92 identified water segments that compose the Bay. TMDL 9-2 to 9-16. These limits govern pollutants from a 64,000-square mile watershed that includes large portions of six States and all of the District of Columbia.

Setting total maximum loading levels is not all the TMDL purports to do. It also sets "allocations" of the total loads among sources and categories of sources across the watershed—defining source limits rather than just total pollutant limits in the receiving waters.

Take, for example, the water segment labeled "POTTF-MD." The TMDL defines not just the total maximum load for each pollutant for that segment, but also maximum loads for point sources and nonpoint sources. See TMDL 9-12 to 9-13 Table 9-3.[2] From there, the TMDL breaks down loads geographically, separating point sources and nonpoint sources originating in Pennsylvania, Maryland, the District of Columbia, Virginia, and West Virginia. *Ibid*. Next, the TMDL breaks down maximum loads within each of these geographical subdivisions. For nonpoint sources, that means separate allocations for various "source sectors" within each area, including "agriculture, forest, nontidal atmospheric deposition, onsite septic, and urban" sectors. TMDL Q-1.

Accordingly, the final TMDL document sets not just three *total* maximum daily loads for nitrogen, phosphorus, and sediment in segment POTTF-MD, but 120 constituent maximum daily loads for that segment

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[2] The TMDL distinguishes between "waste load allocations" or WLAs for point sources, and "load allocations" or LAs for nonpoint sources or natural background. See 40 C.F.R. §§ 130.2(g), (h).

alone, for different sources and source types in different States. Overall, the Bay TMDL sets several thousand constituent daily loads or "allocations" in this same manner. See TMDL App. Q, R.

In addition, the TMDL requires the States to provide "reasonable assurance" that these allocations will be achieved on a specified timeline. TMDL ES-8. It backs up that requirement with a "tracking and accountability system" to "monitor" and enforce State compliance. TMDL 7-10. In particular, the TMDL sets several "interim allocation target[s]" to achieve by 2017 (TMDL 8-19, 8-20) and an overall deadline of 2025 for having in place all practices necessary to meet the specified allocations. *E.g.*, TMDL 8-14, 10-2.

Those deadlines are backed up by an enforcement scheme. "EPA may take action if a jurisdiction fails," among other things, to meet "2-year milestones consistent with expectations, load reductions, and schedule" set by EPA or to develop plans "consistent with the expectations and schedule" set by EPA. TMDL 7-11. Those threatened actions include cutting federal funding, imposing additional reductions in load allocations, establishing "finer-scale" and "more specific" allocations of loads among sources, and implementing a federal takeover of local water quality standards. TMDL 7-12.

EPA has not assessed or reported on the overall cost of implementing the TMDL. However, Maryland anticipates $14.4 billion in costs by 2025. *Maryland's Phase II Watershed Implementation Plan for the Chesapeake Bay TMDL* 55 (Oct. 26, 2012), http://perma.cc/P3WK-H5XA. Virginia puts implementation costs in that State at $13.6 to $15.7 billion. Virginia Senate Finance Cmte., *Chesapeake Bay TMDL Watershed Implementation Plan: What Will It Cost To*

Meet Virginia's Goals? 17 (Nov. 18, 2011), http://perma.cc/88EG-EBX4. And the TMDL's effect on regional agricultural production will be dramatic, with nearly 500,000 acres coming out of production in Virginia alone. Commonwealth of Virginia, *Chesapeake Bay TMDL Phase II Watershed Implementation Plan* 43 Table A.1, 45-46 (Mar. 30, 2012).

C. The Proceedings Below

1. Petitioners filed suit in the district court for the Middle District of Pennsylvania challenging the TMDL under the Administrative Procedure Act and CWA. They alleged that EPA's broad interpretation of "total maximum daily load" is inconsistent with the statutory text and usurps States' roles under the CWA. The district court denied petitioners' motion for summary judgment and granted EPA's.

2. The Third Circuit affirmed. The court observed that petitioners' "strongest argument," which has "intuitive appeal," is that a TMDL "is just a number, like the 'total' at the bottom of a restaurant receipt." App., *infra*, 23a. But the court rejected that reading because, in its view, it renders the word "total" redundant: The words "maximum daily load" "would mean the same thing that [petitioners] argu[e] 'total maximum daily load' means." *Ibid.*

Looking to Congress's use of the word "total" in other contexts, the court believed it can "mean something more than a single number." App., *infra*, 24a; see *id.* at 42a (""Total' is susceptible to multiple meanings"). The court observed that EPA must calculate constituent elements of a TMDL to arrive at the total and believed "[i]t would be strange to require the EPA to take into account these specific considerations but at the same time command the agency to excise them from its final product." *Id.* at

25a. Because allocating a TMDL among constituent elements "is a commonsense first step to achieve target water quality," the court found "EPA's construction of the TMDL requirement comports well with the Clean Water Act's structure and purpose." *Id.* at 28a.

"Similarly," the court continued, "it is common sense that a timeline complements the Clean Water Act's requirement that all impaired waters achieve applicable water quality standards." App., *infra*, 29a. Because a TMDL necessarily "requires consideration of a timeline and of changes over time, it is more consistent with the purpose of the Clean Water Act to express the deadline that the EPA relied on in calculating the TMDL than to make states and the public guess what it is." *Id.* at 29a-30a.

With respect to "reasonable assurances," the court stated that "EPA chose to set the TMDL with substantial input from the states but, in order to comply with the Clean Water Act and the APA, the [agency] would not blindly accept states' submissions." App., *infra*, 30a. Its decision "to satisfy itself that the states' proposals would actually 'implement the applicable water quality standards'" further comported with the statute's goals. *Ibid.*

For those reasons, the Third Circuit concluded, "the phrase 'total maximum daily load' has enough play in the joints to allow the EPA to consider and express these factors in its final action." App., *infra*, 30a-31a.

The court rejected petitioners' contention that if Congress had intended to upset the traditional balance of authority between the federal government and States, it would have said so clearly. The court held that "requiring [a] 'clear statement' of congressional intent for every ambiguous term in a highly technical

statute, before accepting an interpretation that could affect our federal structure, would defeat one of the central virtues of the *Chevron* framework: Congress may leave interstitial details to expert agencies and need not think through at the drafting stage every possible permutation of agencies' plausible future interpretations." App., *infra*, 33a. The court further concluded that the Bay TMDL does not make "land-use decisions diminishing state authority in a significant way." *Id.* at 34a. Even if it did, the court went on, the TMDL allows the States to prescribe the "particular *means* of pollution reduction" for "individual point or nonpoint source[s]." *Id.* at 35a. Nowhere did the court mention CWA Sections 208 and 319 and their constraints on EPA's authority to address nonpoint sources.

After discussing the CWA's legislative history (App., *infra*, 44a-47a) and academic scholarship on land use (*id.* at 47a-48a), the court concluded that petitioners' "reading of the Act would stymie the EPA's ability to coordinate among all the competing possible uses of the resources that affect the Bay" and that EPA's interpretation of the Act therefore "reflects a legitimate policy choice by the agency in administering a less-than-clear statute." *Id.* at 48a-49a. Any solution for the Bay will require "winners and losers," the court proclaimed, and here the "losers" are those who "would prefer a lighter touch from the EPA." *Id.* at 49a.

REASONS FOR GRANTING THE PETITION

This case presents a question of fundamental importance to the implementation of the Clean Water Act and in particular Congress's instructions for how to achieve water quality goals: whether the Act authorizes the prescriptive regulatory scheme promulgated by EPA in the Chesapeake TMDL.

The Third Circuit held the phrase "total maximum daily load" ambiguous because the word "total" can be understood in multiple ways. In its view, a "total" load can be expressed not only as "a single number," but also as "constituent elements" of the total. App., *infra*, 23a-24a. The court concluded that the broader statutory scheme also renders the statutory language ambiguous, licensing EPA to set deadlines for imposing control measures and to extract "reasonable assurances" from States that the constituent load limits will be achieved—backed up by a punitive federal enforcement mechanism. Having found the key statutory language to be ambiguous, the court of appeals held that EPA's expansive regulatory program governing the Chesapeake Bay watershed is entitled to *Chevron* deference.

The Third Circuit's erroneous decision cries out for this Court's review. EPA's interpretation of the CWA to authorize a vast federal regulatory scheme micro-managing State water quality programs bears no meaningful resemblance to the words that Congress used. It upsets Congress's carefully crafted balance of power between the States and the federal government, particularly regarding land use and other nonpoint sources. And it adds to confusion among the lower courts over the meaning of the phrase "total maximum daily load" and more generally about how to approach construction of the CWA.

The correct answer to the question presented is a matter of surpassing practical importance. The Chesapeake Bay watershed covers an enormous area that is home to more than 17 million Americans. The Third Circuit's decision affects the "incidents of daily life" within the watershed. App., *infra*, 4a. It sanctions a regulatory program that will cost State and local governments and businesses tens of *billions* of dollars

to implement and that will constrain State and local programs for decades to come. And in endorsing a model that is expressly designed to be used in other watersheds, the Third Circuit's ruling opens the door for a dramatic expansion of federal power over land use and water quality planning nationwide. As States, counties, and Members of Congress explained below, the Chesapeake Bay TMDL guts the scheme of cooperative federalism that Congress established and that this Court has recognized as an important constraint on how the Act may be construed. The time for this Court to act is now, before EPA deploys its expansive new powers across the Nation.

A. The Third Circuit Erred By Deferring To EPA's Expansive Interpretation Of Its Own Powers At The Expense Of The States

Review is warranted, first and foremost, because the Third Circuit's decision misinterprets a statute at the heart of federal environmental regulation. The court took language that hardly could be clearer and twisted it to include powers that it plainly does not: "[the phrase] 'total maximum daily load' is broad enough," according to the Third Circuit, "to include allocations, target dates, and reasonable assurance." App., *infra*, 26a.

In reaching that conclusion, the court held the relevant language ambiguous, not based on an analysis of the text, but based instead on its conclusion that EPA's reading would better protect the environment. That is a deeply misguided approach.

1. The Third Circuit misunderstood the statute's plain text

The *Chevron* framework presents "two questions." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013). "First, applying the ordinary tools of statutory

construction, the court must determine 'whether Congress has directly spoken to the precise question at issue.'" *Ibid.* (quoting *Chevron, U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)). "'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Ibid.* (quoting *Chevron*, 487 U.S. at 842-843).

"But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Ibid.* (quoting *Chevron*, 487 U.S. at 843). Statutory language is ambiguous when it "is capable of being understood by reasonably well-informed persons in two or more different senses." 2A Norman Singer & Shambie Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:2 (7th ed. 2007).

Here, the first step of the *Chevron* analysis dictates the outcome. The Third Circuit held that the CWA's language is hazy and must be read through the lens of deference. In fact, the statute could not be clearer.

a. We begin with the statutory language. When technology-based point source controls "are not stringent enough to implement any water quality standard" with respect to a particular waterbody, a State must calculate "the total maximum daily load" of a pollutant that the waterbody can bear, consistent with the applicable water quality standard. 33 U.S.C. §§ 1313(d)(1)(A), (C).

There is just one way to understand that phrase. The word "total" means "overall" or the "entire number or amount." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2414 (1986). "Maximum" means the "upper limit allowed." *Id.* at 1396. "Daily" means "covering the

period of a day." *Id.* at 570. And "load" means a "quantity" that can be "carried at one time." *Id.* at 1325. Putting those definitions together produces a single, common-sense meaning: the "total maximum daily load" is an overall upper limit of a pollutant that may be carried by a waterbody over a single day.

Not only does that reading follow from the dictionary meaning of the statutory phrase, but it is compelled by the words that immediately follow it. Congress provided that States are responsible for promulgating a TMDL only for pollutants that EPA identifies as "suitable for such *calculation*." 33 U.S.C. § 1313(d)(1)(C) (emphasis added). And, for those pollutants, "[s]uch load shall be established at *a level* necessary to implement the applicable water quality standards." *Ibid.* (emphasis added). That language demonstrates that Congress understood a TMDL to be a single number that must be *calculated* to establish a single *level* of pollution.

Congress's use of the definite article—"the" TMDL—and use of the singular in the terms "load," "calculation," and "level" confirm this plain meaning. See *Rapanos* v. *United States*, 547 U.S. 715, 732 (2006) (plurality opinion).

b. The Third Circuit's contrary conclusion—its view that the phrase "total maximum daily load" calls for "something more than a number" (App., *infra*, 26a), "complete with allocations among different kinds of sources, a timetable, and reasonable assurance that it will actually be implemented" (*id.* at 49a)—cannot be squared with the words Congress used.

Take first the lower court's conclusion that the word "total" is ambiguous. App., *infra*, 23a. In the Third Circuit's view, reading "total" to require a single overall number makes the word "redundant," because

"total maximum daily load" would mean the same thing as "maximum daily load." *Ibid.* It makes better sense, according to the Third Circuit, to read the word "total" as permitting EPA to break down a TMDL into "different relevant allocations." *Ibid.* That is especially so, according to the lower court, because EPA naturally must consider the constituent elements of a total load to arrive at the total itself. *Id.* at 25a.

That reasoning is wrong in every respect. As an initial matter, the court got things backward when it concluded that our reading of the word "total" renders it a nullity. If Congress had wanted EPA to set maximum loads for the constituent parts of a total load, it would have omitted the word "total" and simply required the calculation of "maximum daily loads." That would have given the agency leeway to set maximums for parts of a total load.

But that is not what Congress did; it added the requirement that maximum daily loads be expressed as a *total* load for each pollutant, which plainly requires a single number that is the sum of the constituent sources of pollution. *Cf.* 40 C.F.R. § 130.2(i) (defining a TMDL as "the *sum* of the individual [discharges from] point sources and [from] nonpoint sources and natural background") (emphasis added). It is EPA's and the Third Circuit's contrary conclusion—their view that the word "total" is a license to promulgate thousands of *sub*-totals that micro-manage how States and localities may address pollution—that reads the word out of the statute.

The Third Circuit claimed that other statutory provisions mentioning totals support its holding that "total maximum daily load" is ambiguous. App., *infra*, 24a. That is incorrect. 33 U.S.C. § 1284(b)(1) provides that a "user charge system" exists if EPA determines

that the system "results in the distribution of operation and maintenance costs" in "proportion to the contribution to the *total cost of operation and maintenance* * * * by each user class," taking account of various factors (emphasis added). According to the court, that definition shows that "total" can mean "something more than a single number." App., *infra*, 24a. But the word "total" in Section 1284 indisputably does mean a single number—the cost of operation and maintenance.

The court also pointed to 33 U.S.C. § 2238(d)(1)(C)(i), which requires that the allocation of funds to harbor maintenance take account of "the *total quantity of commerce* supported by" a body of water (emphasis added). The Third Circuit was unsure "how 'commerce' can be expressed as a number" and concluded (without citation) that "total" there allows EPA "to consider and express a complex mix of activities." App., *infra*, 24a. The court pointed to nothing in the statute or elsewhere to indicate that "total quantity of commerce" is other than a single number. To the contrary, in Sections 2238(f)(2), (7), and (9), Congress defined fund-eligible harbors in terms of the number of tons of cargo transited.

There is, in short, no textual basis for concluding that "total" can be read to permit EPA to set not only a *total* maximum daily load, but also daily loads for thousands of constituent sources, broken down by source type and geography. Of course, EPA is not forbidden from considering constituent loading from various sources, if relevant to calculating a TMDL. And EPA would be free to provide that information to the public by way of explanation. But it does not follow that EPA can require implementation of such constituent allocations by including them as part of the TMDL.

c. The Third Circuit's analysis concerning EPA's authority to set deadlines and milestones as part of a TMDL has even less grounding in the statutory text. On that score, the Third Circuit abandoned any pretense of textual analysis and turned instead to what it believed would best serve the statute's "purpose." App., *infra*, 28a. "[I]t is common sense," according to the court, that "[i]ncluding deadlines in a TMDL furthers the Act's goal that the TMDL promptly achieve something beneficial." *Id.* at 29a, 43a.

As for reasonable assurances, the court simply agreed with EPA that it would be better "not [to] blindly accept states' submissions" and instead "to [ensure] that the states' proposals would actually 'implement the applicable water quality standards.'" App., *infra,* 30a; *id.* at 43a ("the reasonable assurance requirement helps guide the EPA's discretion").

For *those* reasons—but not textual ones—the court concluded that "the phrase 'total maximum daily load' has enough play in the joints to allow the EPA to consider and express these factors in its final action." App., *infra*, 30a-31a. The Third Circuit thought that, because petitioners' "reading of the Act would stymie the EPA's ability to coordinate among all the competing possible uses of the resources that affect the Bay," EPA's interpretation of the Act "reflects a legitimate *policy choice*." *Id.* at 49a (emphasis added).

That startling reasoning contradicts this Court's precedents, which establish that a court cannot rewrite a statute because it believes the plain reading will not best achieve the statute's objectives. See, *e.g.*, *Pac. Operators Offshore* v. *Valladolid*, 132 S. Ct. 680, 690 (2012) ("'if Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them'"); *14 Penn Plaza* v. *Pyett*, 556 U.S. 247, 270

(2009) ("it is not for us to substitute our view" of "policy for the legislation which has been passed by Congress"). It is neither EPA's nor the courts' role "to 'correct' the text so that it better serves the statute's purposes, for it is the function of [Congress] not only to define the goals but also to choose the means for reaching them." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). The Third Circuit's contrary view is unsupportable.

2. The Third Circuit's ruling offends the CWA's scheme of cooperative federalism

The Third Circuit's ruling sanctions EPA's encroachment in an area that Congress left the exclusive domain of the States. The CWA creates "'a program of cooperative federalism'" that "'anticipates a partnership between the States and the Federal Government.'" *New York*, 505 U.S. at 167. The CWA's division of authority—which gives EPA a limited role in the continuing planning process and in addressing nonpoint sources—is "an organizational paradigm of the Act." *Oregon Natural Desert*, 550 F.3d at 780.

a. The Act's division of authority between federal and State governments is directly implicated here. By design, a TMDL does not spell out how it will be achieved, and EPA has a carefully circumscribed role in the development of those plans. App., *infra*, 36a-37a. CWA Section 303(e) requires each State to establish "a continuing planning process" for the achievement of its water quality standards. 33 U.S.C. § 1313(e)(1). A State's plans must cover all of its navigable waters and incorporate elements such as TMDLs, "adequate authority for intergovernmental cooperation," and "adequate implementation" for water quality standards. *Id*. § 1313(e)(3). And when upstream pollution prevents a downstream State from achieving

water quality standards, the Act provides that a State may convene an interstate management conference to "develop an agreement among [the] States" and that *State* programs will be revised "to reflect such agreement." *Id.* § 1329(g).

CWA Sections 208 and 319—which the Third Circuit failed to mention—confirm the exclusive authority of the States with regard to nonpoint source programs. It is for State and local governments to identify nonpoint sources responsible for pollution; best management practices and other measures to reduce pollution from those sources to "the maximum extent practicable"; and the "earliest practicable" implementation schedule for those measures. 33 U.S.C. §§ 1288(b), 1329(a)(1), (b)(2). Nothing in Sections 303(e), 208, or 319 authorizes EPA to tell States what timeline is practicable or how to allocate load reductions among various nonpoint sources: Congress left those decisions to the States.

EPA's Chesapeake Bay TMDL nevertheless establishes not only a "total maximum daily load," but also "allocations" of that load among individual sources and types of nonpoint source (*i.e.*, land uses). It sets deadlines for implementing control measures and achieving reductions (*e.g.*, TMDL ES-13, 7-8, 8-19, 8-20) and provides that EPA will monitor and enforce States' compliance. TMDL 7-12. Even absent the explicit threat of enforcement, the States are bound to include EPA's TMDL in their own State plans under Section 303(e)(3).

By federalizing decisions on the allocation of allowable pollutants among sources, and timelines for achieving those limits, EPA's TMDL steps squarely into areas that Congress expressly reserved for the States. Such decisions are at the core of how to achieve

water quality goals. Setting them in a federal TMDL precludes the States' ability to establish and modify them going forward as Congress prescribed.

b. The Ninth Circuit recognized in *Pronsolino* that a TMDL would raise federalism concerns if it "specif[ied] the load of pollutants that may be received from particular parcels of land." 291 F.3d at 1140. That is what the Chesapeake Bay TMDL does—and it specifically threatens "finer scale" allocations in the future. TMDL 7-12. By allocating nutrient and sediment loads among agriculture, forest lands, and urban development within specified geographic areas, the TMDL effectively dictates how the land may be used. As a practical matter, the power to set numeric limits for sediment and nutrients by source type within specified geographic areas equals nothing short of the power to allow farming here, but not there; building here, but not there.

For EPA to seize super-zoning authority in this way raises serious constitutional concerns. Land use decisions are the prerogative of States and their subdivisions. Indeed, regulation of the "development and use" of "land and water resources" is a "quintessential state and local power." *Rapanos*, 547 U.S. at 737-738 (plurality opinion). This Court accordingly defers to "the authority of state and local governments to engage in land use planning." *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994). Prioritizing one land use over another is "a complex and important function of the State" and "may indeed be the most essential function performed by local government." *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). Just as federal courts "do not sit to determine whether a particular housing project is or is not desirable" (*Berman* v. *Parker*, 348 U.S. 26, 33

(1954)), so too should federal agencies forbear from becoming local land use authorities.

The Chesapeake Bay TMDL is no mere abstract offense to States' sovereign interests but a very real threat to the proper functioning of the statutory framework. No matter how laudable EPA's goals, there *is* room for fair-minded debate about how best to ensure the health of the Chesapeake Bay, which is undeniably essential to the cultural and economic well-being of the region. And as technology, science, and on-the-ground circumstances change, there undeniably will be the need for improvement and refinement of the allocations and other decisions wrongly incorporated into the 2010 Bay TMDL.

It is no answer to say that States participated in the TMDL process. EPA's TMDL locks in a position to which the States acquiesced at a particular time, under threat of federal sanctions. Once in place, the TMDL imposes source limits and timing requirements backed by federal sanctions—and it cannot be changed unilaterally by a State. It thus deprives State and local governments of the ability to adapt their plans to take account of changes in societal needs, developing technologies, or new information. It prevents them from exercising their own judgment about the best and most efficient ways to achieve the goals for the Bay—goals that no one here disputes. CWA Sections 208, 303(e), and 319, by contrast, preserve that authority for the States.

c. The Third Circuit's ruling is flatly inconsistent with the federalism underpinnings of the CWA. Courts must construe statutes to "'avoid serious constitutional problems'" and reject "administrative interpretation[s that] alte[r] the federal-state framework by permitting federal encroachment upon a traditional state power."

Solid Waste Agency of N. Cook Cty. v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001) ("*SWANCC*"). Only an unmistakably "clear statement from Congress" is sufficient to alter that framework. *Id.* at 174.

Far from there being any such clear statement here, Congress stated its intent "to preserve a primary role for the states" in "eliminating water pollution." *City of Albuquerque*, 97 F.3d at 424; 33 U.S.C. § 1251(b); see also *id.* at § 1370(2) (the Act is not to "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters * * * of such States"). And Congress reserved authority over nonpoint sources for States in CWA Sections 208, 303, and 319. The Third Circuit created constitutional problems by adopting a reading that "stretched the term[s]" of the CWA "beyond parody." *Rapanos*, 547 U.S. at 734. No federalism concerns would have arisen had it simply followed the plain language that Congress used in the statute.

3. Even if the text were ambiguous, deference would be inappropriate

For all of these reasons, the Third Circuit was wrong to find the words "total maximum daily load" ambiguous. But supposing for the sake of argument that the statute could reasonably be read in more than one way, *Chevron* deference still would be inappropriate.

Deference "'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.'" *King* v. *Burwell*, 135 S. Ct. 2480, 2488 (2015) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Even when statutory language is ambiguous, therefore, "'there may be reason to hesitate before concluding that Congress has

intended such an implicit delegation.'" *Id.* at 2488-2489. There are many such reasons here.

First, Congress's express intent to "protect" the "primary" "rights of States" to "plan the development and use" of "land and water resources" (33 U.S.C. § 1251(b)), as well as the States' traditional authority over land use controls under our Constitution, mean that any statutory ambiguity should be resolved in favor of State rather than EPA authority. See *SWANCC*, 531 U.S. at 173. EPA has no warrant to use statutory ambiguity to make itself "a *de facto* regulator of immense stretches of intrastate land" in the manner of "a local zoning board," which is what the TMDL's allocations to particular land uses most assuredly do. *Rapanos*, 547 U.S. at 738 (plurality).

Second, the "congressional silence" the Third Circuit detected (App., *infra*, 28a-29a) does not authorize an agency to claim power to which a court will then defer. See *Ethyl Corp.* v. *EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *Prestol Espinal* v. *Atty. Gen.*, 653 F.3d 213, 220 (3d Cir. 2011). "[S]tatutory silence" is "best interpreted as limiting agency discretion," not authorizing that which Congress failed expressly to prohibit. *Entergy Corp.* v. *Riverkeeper*, 556 U.S. 208, 223 (2009).

Third, when an issue is one "of deep 'economic and political significance' that is central to [the] statutory scheme,'" it is reasonable to assume that "'had Congress wished to assign [the] question to an agency," it "would have done so expressly.'" *King*, 135 S. Ct. at 2489 (quoting *Utility Air Reg. Group* v. *EPA*, 134 S. Ct. 2427, 2444 (2014)). The deep economic and political significance of the issue presented here cannot be doubted. The power to set *source limits* for nutrients and sediment amounts to nothing short of the power to

prohibit certain land uses in certain places. The power to set deadlines and demand "reasonable assurance" of implementation—without regard to cost or feasibility—means the power to impose devastating social and economic harm. The TMDL exercises these powers over "North America's largest estuary," covering an enormous land area that sustains 17,000,000 people and "a great deal of commerce." App., *infra* 4a, 41a, 49a. The TMDL touches virtually all "incidents of daily life" within this vast watershed, imposing tens of billions of dollars in costs. Nowhere did Congress "expressly" give EPA such expansive power. *King*, 135 S. Ct. at 2489.

Fourth, when EPA promulgated a rule in 2000 that mirrored what it has now done through the Chesapeake Bay TMDL, "*Congress prohibited EPA from implementing the final rule through a spending prohibition*." 68 Fed. Reg. 13,609 (emphasis added); see *supra*, pp. 8-9. EPA then withdrew the rule, acknowledging the need for "significant changes." 68 Fed. Reg. 13,609, 13,612. An appropriations measure may amend a statute (*The Last Best Beef* v. *Dudas*, 506 F.3d 333, 338-339 (4th Cir. 2007) (citing authority)), or confirm the administrative construction of a statute. *Brooks* v. *Dewar*, 313 U.S. 354, 361 (1941). Thus it certainly also may refute an agency interpretation. The Third Circuit should not have endorsed an EPA construction of the CWA that gives EPA powers Congress denied to it when it prevented the TMDL Rule from going into effect.

B. There Is Widespread Confusion Over The Question Presented

Given how far EPA and the Third Circuit have strayed from the statutory text, it should come as no

surprise that the Third Circuit's decision conflicts with holdings of other courts of appeals.

1. The Third Circuit's ruling that the phrase "total maximum daily load" calls for "something more than a number" and is "broad enough to include allocations," "target dates," and "reasonable assurances" (App., *infra*, 26a) is squarely at odds with the Eleventh Circuit's holding in *Meiburg*. *Meiberg* involved a consent decree, which "provided that if Georgia failed to establish TMDLs, EPA was required to do so." 296 F.3d at 1029. The decree defined a TMDL as having the same meaning as in 33 U.S.C. § 1313(d)(1)(C) and 40 C.F.R. § 130.2(i). *Id.* at 1029-1030. The district court held that "implementation plans were required by the consent decree" as part of EPA's commitment to set the TMDLs. *Id.* at 1030. A threshold jurisdictional question was whether that holding amended the decree or interpreted it. *Id.* at 1028.

The Eleventh Circuit held it was an amendment. "Neither the referenced statutory provision nor the referenced regulation includes implementation plans within the meaning of TMDLs." 296 F.3d at 1030. "A TMDL is defined to be a set measure or prescribed maximum quantity of a particular pollutant in a given waterbody," while "an implementation plan is a formal statement of how the level of that pollutant can and will be brought down to or kept under the TMDL." *Ibid.*

Thus, whereas EPA's obligations under the consent decree included a "requirement to establish TMDLs on a basin approach if Georgia fails to do so," it "clearly [did] not require EPA to develop implementation plans for those TMDLs once they are established." *Ibid.* Instead, "[t]he responsibility for implementing the TMDLs once they [are] established [is] left to [to the

State], *as it is in the Clean Water Act itself*." 296 F.3d at 1031 (emphasis added).

The Chesapeake Bay TMDL is just what the Eleventh Circuit held that a TMDL is not: an implementation plan that describes key elements of when and "how the level of [a] pollutant can and will be brought down to or kept under the TMDL." *Meiburg*, 296 F.3d at 1030. The Eleventh Circuit would not have countenanced EPA's sweeping interpretation of the statutory text, as the Third Circuit did here.

Other courts of appeals have issued holdings in substantial tension with the Third Circuit's decision. The Tenth Circuit has emphasized that a "TMDL defines the specified maximum amount of a pollutant which can be discharged into a body of water *from all sources combined*." *Defenders of Wildlife*, 415 F.3d at 1124 (emphasis added); accord *San Francisco BayKeeper* v. *Whitman*, 297 F.3d 877, 880 (9th Cir. 2002) (TMDLs are "calculations" that set "the maximum quantity of a pollutant the water body can receive on a daily basis"). That conclusion is inconsistent with the view that a TMDL is "something more than a number" and may "include allocations" among hundreds of constituent sources broken down by geography and source type—not to mention deadlines and reasonable assurances of compliance by the States. App., *infra*, 26a.

2. More broadly, the Third Circuit's approach adds to a conflict among the lower courts over the proper role of policy considerations in the interpretation of the CWA. The Second Circuit, in *NRDC* v. *Muszynski*, 268 F.3d 91, 98-99 (2d Cir. 2001), addressed whether the word "daily" in "total maximum daily load" is ambiguous and whether EPA's interpretation of that word not to mean "daily" was reasonable. Reasoning

that "the CWA's effective enforcement requires agency analysis and application of information concerning a broad range of pollutants," the Second Circuit was unwilling "to say Congress intended that [EPA's] far-ranging agency expertise be narrowly confined in application to regulation of pollutant loads on a strictly daily basis." *Id.* at 98-99. Motivated by its preference to ensure "effective enforcement," the Second Circuit deferred to EPA's determination that a total maximum *daily* load may be expressed in terms of *any* "measure of mass per time," including total maximum *annual* load. *Id*. at 99.

The D.C. Circuit took the opposite approach in *Friends of Earth* v. *EPA*, 446 F.3d 140 (D.C. Cir. 2006), holding that the word "daily" is *un*ambiguous. According to that court, plain statutory language requires EPA to calculate a maximum load "expressed as a quantity per day." *Id.* at 144. EPA argued that achieving the Act's goals required a "flexible understanding," but the D.C. rejected that policy-based argument. *Id*. at 145. Courts, it held, cannot "set aside a statute's plain language simply because the agency thinks it leads to undesirable consequences in some applications." *Ibid.*

Those decisions, like this case, turned on the question whether EPA's view of the best policy choices to implement the CWA can override plain statutory language. They demonstrate a fundamental disagreement among the lower courts over the proper role of policy considerations in the interpretation of the CWA: the D.C. Circuit's approach in *Friends of the Earth* would have produced a different result here. This conflict raises fundamental and critically important questions of statutory interpretation and deference that this Court should resolve.

* * *

The question presented is important to individuals and businesses throughout the vast, heavily populated region covered by the Chesapeake Bay watershed. As the Third Circuit acknowledged (App., *infra*, 4a), daily lives will be affected by the TMDL, including those of petitioners' members, on whom it will largely fall to satisfy new nonpoint source measures. See, *e.g.*, JA900 (New York explained that the TMDL's "source reductions mea[n] that farms will go out of business in order for NY to meet its proposed allocation"); *supra*, p. 12 (nearly half a million acres will go out of agricultural production under Virginia's implementation plan). The TMDL makes tradeoffs among agriculture, silviculture, construction, and other sectors and sources. It also precludes the government bodies closest to those sources, and best able to judge local needs, from adapting and modifying those tradeoffs over time, absent new federal action. The sweeping scope and impact of the Chesapeake TMDL alone is sufficiently important to warrant this Court's attention.

The question presented is also important to State and local governments that will have to implement this and future TMDLs according to EPA's demands and without consideration of social and economic impact—at great financial cost, and at the expense of their sovereignty and of core powers they have enjoyed since our Nation was founded. The briefs filed below by numerous States and counties attest to the way EPA's power grab has distorted the federal-state balance that Congress sought to preserve in the CWA. As West Virginia—one of the Bay States that EPA insists welcomed this TMDL—and twenty other States explained, the TMDL marks "the beginning of the end of meaningful State participation in water pollution

regulation." EPA intends the Bay TMDL to "serve as a national model." Federal Leadership Committee for Chesapeake Bay, *Strategy for Protecting and Restoring the Chesapeake Bay Watershed* 14 (May 12, 2010); see *supra*, p. 3.

It is important too that this Court correct the Third Circuit's blatant misconstruction of plain language that is central to the entire statutory scheme. And it is important that the Court disapprove the Third Circuit's decision to ignore the principles that should have guided its decision once it incorrectly found that the TMDL provision is ambiguous—such as the requirement that statutes not be read to interfere with the federal/state balance.

The stakes here cannot be overstated. This Court should grant certiorari to restore the scheme that Congress enacted in the CWA.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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