The government has filed a cert. petition in an environmental case (*EPA v. Friends of the Everglades*) with a really interesting procedural wrinkle. There's more background about the case after the jump, but you don't really need the details to understand the main issue. Here's what you do need to know:

1. After EPA issued its regulation, various parties filed petitions for review in the court of appeals asking to have the regulation struck down.

2. The parties who brought the case then asked the court to dismiss their own petitions for lack of jurisdiction. In other words, they were asking to *lose* the case.

3. EPA would normally be happy to have the court dismiss a petition for review, but didn't want to win the case on this particular basis, so EPA opposed the motions.

4. After the court of appeals ruled that it had no jurisdiction, EPA asked the Supreme Court to review the lower court decision which had dismissed the case against it.

So here we have a defendant asking the Court to overturn a lower court ruling in order to have the privilege of continuing to be sued. There actually is some recent precedent for allowing appeals by the parties who won in the lower court, so the government's position isn't crazy. But it's a very odd situation.

If this rings a bit of a bell, it's a little bit like the situation in the *Windsor* case. In *Windsor,* the government had "lost" in the lower court, because the lower court struck down portions of the Defense of Marriage Act. (DOMA). But the government agreed with the lower court that DOMA was unconstitutional. The Supreme Court went on to hear *Windsor* and upheld the lower court decision. That's somewhat similar to this water pollution case.

Despite these recent precedents, I'm inclined to think that the courts should stop allowing winners to appeal from judgments in their favor. It seems too much like a student who got an A+ complaining about not being given enough points. What matters is the grade, not the points. And by the same token, what really matters is winning or losing the lawsuit, not the judicial opinion explaining the reasoning.

Litigation is supposed to be about concrete injuries, not griping because you would have preferred that the court give a different explanation for ruling in your favor. For that reason, I don't think the Court should hear the Everglades appeal. I also

doubt that the Court should have reached the merits in *Windsor*. In *Windsor*, the argument for hearing the appeal was even more tenuous, because the government actually liked the lower court opinion but felt duty-bound to file an appeal as a courtesy to Congress. I don't see why the Court should have jumped in to hear the case though I'm happy with the outcome.

Allowing these appeals by winners is all part of the misconception that opinion-writing for the future is the real function of courts rather than deciding individual cases. This leads judges to reach out for issues they don't need to decide, which often turns out badly.

Keep reading if you're interested in more detail about the Everglades case. The case involves a significant water pollution regulation and a very technical question of jurisdiction. The regulation says that simply transferring water from one body of water to another without adding new pollutants doesn't require a permit. (Of course, the first water body could be highly polluted and the second one clean, so you could potentially cause some real harm. Or you might be introducing an invasive species or pumping salt water into freshwater. But EPA thinks these should all be exempt from regulation.) The technical question is whether this regulation is covered by the phrase "other limitation" under section 301 of the Clean Water Act, which would allow use of section 509 to challenge the regulation directly in the appeals court. The lower court held that the regulation isn't a "limitation" at all because it exempts sources from regulation rather than limiting their activities. The government basically says that this interpretation is too hyper-technical and will cause lots of practical problems.