No. 18-260

In the Supreme Court of the United States

COUNTY OF MAUI, HAWAI'I

PETITIONER,

v.

HAWAI'I WILDLIFE FUND; SIERRA CLUB MAUI GROUP; SURFRIDER FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,

RESPONDENTS.

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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA, 17 OTHER STATES, AND THE GOVERNORS OF KENTUCKY AND MISSISSIPPI IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Clean Water Act's prohibition on the discharge of pollutants and associated permitting regime apply only to discharges conveyed from a point source into "the waters of the United States," or whether they also apply to discharges into groundwater or soil that eventually migrate to jurisdictional waters?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE* [1]

Preserving, regulating, and maintaining the natural bounty within their borders is a primary responsibility of every State. Although true for any natural resource, that duty (and attendant power) is particularly acute with respect to water. This Court has repeatedly held, for instance, that the States' "power to control . . . fishing, and other public uses of water" is "an essential attribute of [their] sovereignty." *United States v. Alaska*, 521 U.S. 1, 5 (1997); *Kansas v. Nebraska*, 135 S. Ct. 1042, 1067 (2015) ("Authority over water is a core attribute of state sovereignty"); see also *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842) (explaining that as successors to the English crown in the wake of the American Revolution, "each state became themselves sovereign; and in that character hold[s] the absolute right to all their navigable waters, and the soils under them, for their own common use").

The Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, was designed to complement—not usurp—the States' role as primary stewards of the environment. While the overall purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), Congress also expressly "recognize[d], preserve[d], and protect[ed]" the "primary responsibilities and

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file an *amicus* brief in support of the Petitioner.

rights *of [the] States*" in this realm, 33 U.S.C. § 1251(b) (emphasis added). Thus, at the same time Congress established the CWA's federal regulatory framework, it made clear that the States retained their traditional authority "to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b). The CWA therefore reflects a "careful balanc[ing] [of] competing policies and interests" specifically designed to protect the "sovereign interests of the States." *Arkansas v. Oklahoma*, 503 U.S. 91, 106-07 (1992).

Left uncorrected, the decision below, *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), together with the Fourth Circuit's similar, recent decision in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), would upend a critical component of this balance. The Ninth Circuit's decision—based on a standard divorced from the CWA's text, structure, and intent—would greatly expand the scope of waters subject to federal jurisdiction and the CWA's regulatory requirements. This decision deepens a growing divide among lower courts, and infringes on the sovereign prerogative of States to manage their water resources—especially those such as groundwater that are often wholly *intrastate*. It also threatens to impose an unnecessary and unworkable bureaucratic burden on state environmental protection agencies at the expense of those entities' important, ongoing conservation efforts.

Amici curiae—the States of West Virginia, Alabama, Arkansas, Colorado, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nebraska, Nevada, Oklahoma, South Carolina, Texas, Utah, and Wyoming, and the Governors of Kentucky and Mississippi—have important interests in both ensuring the safety and quality of their water resources and in preventing unlawful incursions upon their sovereignty. Each *amici* State enforces its own statutory and regulatory regimes designed to protect, conserve, and develop its water resources for the public good. The Ninth Circuit's unjustified expansion of the CWA's jurisdictional breadth will significantly burden—if not effectively displace—those protective measures.

Amici recognize that the CWA is a vital tool for protecting the health and utility of our nation's water resources. But it is far from the *only* regulatory regime that combats water pollution, and it represents an unwieldy and impractical mechanism by which to regulate and protect groundwater and other intrastate water resources. *Amici* urge this Court to grant certiorari, repudiate the flawed and overreaching decision below, and restore the proper balance between state and federal regulation that the CWA—correctly read—demands.

SUMMARY OF ARGUMENT

Certiorari is warranted for at least the following three reasons:

First, the text and structure of the CWA reflect Congress's intent to implement a regulatory framework that respects the primary responsibility of States to manage and preserve their water resources. By limiting the jurisdictional reach of the CWA to pollutants discharged from "point sources" into "the waters of the United States," Congress left largely undisturbed the States' traditional power to regulate and combat pollution of intrastate water resources, such as groundwater. The decision below threatens this textually enshrined balance of state and federal authority, expanding the CWA's jurisdictional reach beyond recognition. And because the vast majority of States have assumed responsibility for implementing the CWA's permitting regime that regulates discharges conveyed by point sources, the burdens imposed by this expansion will fall predominantly on the States and their environmental protection agencies—and in all likelihood, drain resources that would otherwise be available for enforcing other state-level environmental laws.

Second, despite universal agreement that groundwater does not itself fall within the ambit of "the waters of the United States," there is a growing split of authority on whether discharges into non-qualifying waters may nonetheless be swept up by the CWA if they *pass through* groundwater and eventually reach jurisdictional waters. The decision below—like the Fourth Circuit's *Kinder Morgan* decision—flouts the CWA's textual limits by holding that they can. Only this Court can correct this

unwarranted expansion of the CWA and restore uniformity as to its proper scope.

Finally, the flawed approach of the court below is unnecessary to protect our nation's water resources—either surface or ground. There is no denying the connection between groundwater and surface waters. Nevertheless, consistent with the "cooperative federalism" framework baked into the CWA, the States extensively regulate groundwater pollution, thereby helping to protect all the waters into which they flow as well. Additionally, other federal statutes are specifically tailored to combat and regulate potential groundwater contamination. Allowing the decision below to stand undermines these protective measures and adds new, unncessary strain on the limited resources of the States.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Thwarts Congress's Intent In The CWA To Maintain The States' Primary Authority Over Intrastate Water Resources.

A. This Court's review is necessary to restore the CWA's textual and structural limitations.

The Ninth Circuit's decision is both textually and precedentially unmoored. As this Court has explained, "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: [R]estor[ation] and maintain[ence] [of] the chemical,

physical, and biological integrity of the Nation's waters." *Arkansas*, 503 U.S. at 101 (citing 33 U.S.C. § 1251(a)). This partnership makes the CWA one of the paradigmatic examples of "cooperative federalism." See, *e.g.*, *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007). Indeed, this conclusion is unavoidable in light of the statute's plain text, where Congress expressly affirmed the "primary responsibilities and rights of [the] States" to regulate pollution and preserve both "land and water resources." 33 U.S.C § 1251(b).

The language and structure of the CWA illustrate how Congress intended this cooperative, two-tiered regulatory framework to work. As the centerpiece of the *federal* portion of this scheme, the National Pollutant Discharge Elimination System ("NPDES") establishes a general prohibition on the discharge of pollutants into the nation's waters. 33 U.S.C § 1311(a) (providing that "[e]xcept as in compliance [with various other sections of the CWA] . . . the discharge of any pollutant by any person shall be unlawful"). Critically, however, the jurisdictional breadth of this program is limited in at least two ways that flow from the statutory definition of "discharge of a pollutant," which is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

First, a "discharge of a pollutant" occurs only when a qualifying substance is added to "navigable waters," 33 U.S.C. § 1362(12), which, in turn, is defined as "the waters of the United States," 33 U.S.C.

§ 1362(7). The precise breadth of "the waters of the United States" is an open question. See, *e.g.*, *Georgia v. Pruitt*, 2018 WL 2766877 (S.D. Ga. June 8, 2018) (granting preliminary injunction against enforcement of 2015 definition of "the waters of the United States"); 83 Fed. Reg. 32,227 (July 12, 2018) (supplemental notice of proposed rulemaking regarding the definition of "Waters of the United States"). Nevertheless, this Court has been clear that "the waters of the United States" does *not* "refer to water in general," but instead encompasses only "relatively permanent, standing or flowing bodies of water" such as "streams, oceans, rivers, lakes, and bodies of water forming geographical features." *Rapanos v. United States*, 547 U.S. 715, 732-33 (2006) (Scalia, J., plurality op.); *id.* at 778 (Kennedy, J., concurring) (rejecting conception of "navigable waters" that would "permit federal regulation [of water] alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters"); see also *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) ("'Waters of the United States' must be a subset of 'water'; otherwise why insert the qualifying clause in the statute?").

Notably, groundwater—which encompasses as much as 98% of the Earth's "accessible fresh water"[2]—falls outside this definition. See, *e.g.*, *Rice v. Harken*

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[2] Vandas, Winter & Battaglin, *Water and the Environment* 4, American Geological Institute (2002), *available at* http://www.agiweb.org/environment/publications/water.pdf.

Expl. Co., 250 F.3d 264, 269 (5th Cir. 2001) (citing *Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir.1977)); *Oconomowoc Lake*, 24 F.3d at 965; *Ken. Waterways Alliance v. Ken. Utils Co.*, 303 F. Supp.3d 530, 542 (E.D. Ky. 2017) (collecting authority and explaining that "[c]ourts have overwhelmingly found that groundwater, even if hydrologically connected to navigable waters, is not itself a navigable water under the CWA"). Cf. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987) ("the [CWA] applies to virtually all *surface water* in the country") (emphasis added). Not even the court below—nor the Fourth Circuit in *Kinder Morgan*—purports to cross this statutory line. See *Cty. of Maui*, 886 F.3d at 746 n.2 ("We assume without deciding the groundwater here is neither a point source nor a navigable water under the CWA."); *Kinder Morgan*, 887 F.3d at 652 ("We do not hold that the CWA covers discharges to ground water itself.").

Second, a discharge must be conveyed to jurisdictional waters by a "point source," that is, "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). Each of these descriptors matter. Every example in the statute's nonexhaustive list of point sources—"any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," 33 U.S.C § 1362(14)—is a readily identifiable and discrete object or feature capable of channeling and transporting pollutants to navigable waters. Groundwater is none of these things; instead of being "discernible, confined and discrete," by its

very nature it is diffuse and amorphous. *Ky. Waterways Alliance v. Ky. Utils Co.*, --- F.3d. ---, 2018 WL 4559315, at *6 (6th Cir. Sept. 24, 2018) ("By its very nature, groundwater is a 'diffuse medium' that seeps in all directions"); *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017) ("It is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil.") (citation omitted).

As courts routinely recognized before the recent Fourth and Ninth Circuit decisions, in the CWA "Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate *only the former*." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (emphasis added). To be sure, the CWA reaches some *indirect* discharges into navigable waters, such as where a pollutant (whatever its origin) is conveyed by a series of point sources—a pipe, for example, then a drainage ditch, and so on—before eventually reaching "the waters of the United States." Pollution that is conveyed to jurisdictional water by a nonpoint source, however, is outside the scope of the NPDES permitting regime: The CWA "clearly indicates that there is a category of nonpoint source pollution," and leaves its regulation "*to the states*." *Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) (citing 33 U.S.C. § 1251(a)(7)) (emphasis added); see also *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008) ("The CWA's disparate treatment of

discharges from point sources and nonpoint sources is an organizational paradigm of the Act."); *Am. Farm Bureau Fed'n v. E.P.A.*, 792 F.3d 281, 299 (3d Cir. 2015) ("[T]he [CWA] assigns the primary responsibility for regulating point sources to the EPA and nonpoint sources to the states.").

Individually and in concert, these two textual limits cabin the CWA's jurisdiction. By default, discharges *into* groundwater do not require NPDES permits, because groundwater is not part of "the waters of the United States." Neither do discharges that seep into the ground and are eventually conveyed to navigable waters via migration through groundwater—because groundwater is also not a point source.

The standard announced by the Ninth Circuit would replace this text-based reading with an infinitely elastic theory of CWA jurisdiction. As this Court recognized almost half a century ago, it is readily apparent that "[s]urface water and groundwater systems are connected in most landscapes." Vanas et. al., *supra* n.2, at 26; see *Cappaert v. United States*, 426 U.S. 128, 142 (1976); see also *Exxon Corp. v. Train*, 554 F.2d 1310, 1325 (5th Cir. 1977) (discussing material in the CWA's legislative history documenting the "essential link between ground and surfaces waters"). The practical effect of the analysis below—that federal jurisdiction attaches whenever a discharge that migrates through groundwater to "the waters of the United States" is "fairly traceable" to a point source, *Cty. of Maui,* 886

F.3d at 749—is thus to extend the reach of the CWA not only to virtually *all* of the nation's waters, but to any *land* capable of absorbing water as well.

This sprawling jurisdictional creep has no grounding in either the statute or this Court's precedent. In *Rapanos*, for instance, Justice Scalia's plurality opinion rejected the "expansive theory" of federal jurisdiction advanced by the Army Corps of Engineers in part because adopting it would have placed "virtually all" planning as to the "development and use . . . of land and water resources" under federal control. 547 U.S. at 737. As Justice Scalia explained, such a result would be at odds with Congress's express intent to preserve "the primary rights and responsibilities of the States" under the CWA. 33 U.S.C. § 1251(b). The same concern animated this Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, where it rejected another unduly far-reaching formulation of "the waters of the United States" that would have "result[ed] in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. 159, 174 (2001). As it did in both those instances, this Court should intervene here to reverse an unwarranted expansion of the CWA.

B. The decision below will impose significant and unworkable bureaucratic burdens on state environmental protection agencies.

This Court's intervention is also needed because the Ninth Circuit's misreading of the CWA has

significant consequences for the States. Although NPDES permitting is the centerpiece of the CWA's federal regulatory framework, as a practical matter, the States largely implement that program. See 33 U.S.C. § 1342(b); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 650 (2007) (explaining that although the EPA has the initial responsibility for administering the NPDES permitting system, a "State may apply for a transfer of permitting authority to state officials"). Congress expressly designed the CWA to operate this way, explaining its goal that the States should "implement the [NPDES] permit programs." 33 U.S.C. § 1251(b). And that intent has been largely realized: 46 States have sought and received authority to implement the NPDES permitting regime pursuant to Section 1342(b). 81 Fed. Reg. 31,344-01; see also 71 Fed. Reg. 65,509-01 (table outlining when each State obtained EPA approval to issue and oversee NPDES permitting); see also *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315, at *2 n.1.

Because the vast majority of States have assumed primary responsibility over NPDES, the burdens from expanding that regime's scope would fall directly on the States and state environmental protection agencies. This Court has previously acknowledged that the NPDES permitting process is "arduous, expensive, and long." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). As it stands, state environmental protection agencies already spend nearly 1.6 million hours and nearly 70

million dollars each year processing NPDES permits.[3] Those numbers are likely to increase by several orders of magnitude if this Court allows the Ninth Circuit's "fairly traceable" test to stand.

As one example, home septic systems typically discharge pollutants (as the term is broadly defined in the CWA) into groundwater, but homeowners have not historically been required to apply for an NPDES permit. Under the Ninth Circuit's standard, however, a home septic system could qualify as a point source requiring an NPDES permit wherever it can be shown that its discharges migrate through groundwater and eventually reach jurisdictional waters. The potential scope of such liability is vast. Given the EPA's estimate that approximately 25% of American homes rely on septic systems,[4] adoption of the Ninth Circuit's standard could increase the number of NPDES permits by roughly 220,000 in West Virginia alone.[5] This represents an astronomical 35,000% increase over the number of NPDES permits—607—issued by

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[3] See EPA ICR No. 0229.21 Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), EPA ICR at *17, tbl. 12.1 (Dec. 2015), *available at* https://www.reginfo.gov/public/do/DownloadDocument?objectID=60917402.

[4] EPA, *Do your Part—Be SepticSmart!* 2 (Sept. 2012), *available at* https://www.epa.gov/sites/production/files/2015-06/documents/septicsmart_longhomeownerguide_english508_0.pdf.

[5] See United States Census Bureau, *QuickFacts West Virginia*, https://www.census.gov/quickfacts/fact/table/wv/PST045217 (estimating current population of West Virginia to be 1,815,857).

West Virginia in fiscal year 2017,[6] and that accounts for only *one* potential new category of point sources that would, for the first time, be subject to the NPDES permitting regime.

The same result could hold for wastewater treatment plants and other relatively common underground injection wells. Municipalities and other entities use more than 650,000 wells nationwide in the process of purifying and reusing wastewater, and around 180,000 wells to facilitate oil and gas mining. See generally EPA, *Protecting Underground Sources of Drinking Water from Underground Injection (UIC)*, *available at* https://www.epa.gov/uic. Even though both categories of wells are already subject to a variety of state and federal regulations, see *id.*, under the Ninth Circuit's standard they could be (and, as this case itself demonstrates, some have been) required to obtain NPDES permits or face liability. See Pet. 6-7, 10, 13-14. The Ninth Circuit's approach could extend the jurisdictional scope of the CWA to untold other sources as well—irrigation systems, underground storage tanks that spring a leak, mine sites undergoing voluntary state cleanup programs, and others.

What is more, the diffuse nature of groundwater dispersal means that States likely would not be able to complete this torrent of new NPDES permitting

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[6] West Virginia Department of Environmental Protection, *Fiscal Year 2016-17 Annual Report* 2, *available at* https://dep.wv.gov/pio/Documents/2016-17%20Annual%20Report.pdf.

tasks with any clarity, and certainly not without considerable, unjustifiable cost. Groundwater may (or may not) seep through many feet of soil and take multiple directions before ultimately reaching jurisdictional waters, and the direction and speed of flow depend on geography and gravity, not design. Cf. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315, at *6 ("One cannot look at groundwater and discern its precise contours as can be done with traditional point sources like pipes, ditches, or tunnels"). These factors would make it extremely challenging to draft a permit with precise discharge parameters, much less monitor compliance. It is one thing to measure outflow from a pipe into navigable waters to ensure discharge levels are compliant with an NPDES permit; it is quite another to track the volume of pollutants that reach navigable waters after seeping into the ground and joining the subsurface network of groundwater flows. At a minimum, States overseeing an NPDES regime that applies to groundwater would likely need to repeatedly produce or procure, at considerable time and expense, the environmental impact studies necessary to develop the data that might (or might not) enable them to regulate with any kind of precision, coherence, and scientific integrity.

All told, the Ninth Circuit's standard threatens to drown state environmental protection agencies in a myriad of new and technologically challenging NPDES permit requirements from a novel source of federal liability, and leech away scarce resources from other programs better equipped to address groundwater pollution. See Part III, *infra*. Congress

did not intend to foist such burdens on the States, and this Court should not countenance them either.

II. Only This Court Can Resolve Lower Courts' Disagreement Whether The CWA Reaches Discharges That Migrate To Navigable Waters Through Groundwater.

The decision below is the second time this year that a federal appellate court has held that the CWA's regulatory framework applies to discharges that only indirectly reach navigable waters via groundwater migration. *Cty. of Maui*, 886 F.3d at 747, 749; *Kinder Morgan*, 887 F.3d at 650-51. These conclusions conflict with at least two earlier decisions from the Seventh and Fifth Circuits. See *Oconomowoc Lake*, 24 F.3d at 964 (Seventh Circuit); *Rice*, 250 F.3d at 269 (Fifth Circuit). And division among the lower courts has only continued to grow: Since the Petition was filed, the Sixth Circuit issued decisions in a pair of companion cases expressly rejecting the Ninth and Fourth Circuits' analysis. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315; *Tennessee Clean Water Network v. Tennessee Valley Authority*, --- F. 3d. ---, 2018 WL 4559103 (6th Cir. Sept. 24, 2018). The Court should grant the Petition to resolve this disagreement over the meaning of a statute with critical implications for the States and the nation as a whole.

Below, the Ninth Circuit held that the jurisdictional scope of the CWA encompasses "an indirect discharge from a point source to a navigable water" when that discharge is "fairly traceable from the point source to a navigable water." *Cty. of Maui*,

886 F.3d at 747, 749. Similarly, in *Kinder Morgan*, the Fourth Circuit held that the CWA "does not require a discharge [to be] directly to navigable waters"; it is enough if "a point source is *the starting point or cause* of a discharge" and a "direct hydrological connection" exists between the point source and jurisdictional waters. 887 F.3d at 650-51 (emphasis added).

Just last week, the Sixth Circuit unequivocally repudiated both approaches. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315, at *5 ("[W]e disagree with the decisions from our sister circuits in *Kinder Morgan* and *County of Maui*") (citations omitted). Both *Kentucky Waterways* and *Tennessee Clean Water* involved a claim that discharges from power plant coal ash collection ponds traveled through groundwater to jurisdictional waters. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315 at *3-5, *Tennessee Clean Water*, --- F.3d ---, 2018 WL 4559103 at *2-4. The plaintiffs in *Kentucky Waterways* argued that groundwater qualified as a point source and alternatively embraced the "hydrological connection" view to establish CWA jurisdiction over the collection ponds; the *Tennessee Clean Water* plaintiffs relied solely on the "hydrological connection" theory. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315 at *5; *Tennessee Clean Water*, --- F.3d ---, 2018 WL 4559103 at *5 n.5.

The Sixth Circuit flatly rejected these claims. "[T]he text and statutory context of the CWA make [it] clear" that "the CWA does not extend its reach" to

discharges into groundwater. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315 at *5; see also *id.* at *7 ("The CWA's text also forecloses the hydrological connection theory"). The court explained that the power plant at issue was discharging pollutants into groundwater and that the groundwater, in turn, was "adding pollutants to [jurisdictional waters]." *Id.* --- F.3d ---, 2018 WL 4559315 at *7. Nevertheless, the court further explained, "groundwater is not a point source." *Id.* Thus, the court conclued "when the pollutants [enter] the [waters of the United States], they are not coming from a point source; they are coming from groundwater, which is a nonpoint-source conveyance. The CWA has no say over [such] conduct." *Id.*

The Sixth Circuit conclusion follows in the wake of the Seventh and Fifth Circuits' earlier decisions. In *Oconomowoc Lake*, the Seventh Circuit refused to extend CWA jurisdiction to a retention pond collecting "oil, grease, and other pollutants" where the "water seep[ed] into the ground—carrying hydrocarbons and other unwelcome substances." 24 F.3d at 963-64. Although the court's primary holding turned on whether the retention pond was part of "the waters of the United States," *id.* at 964, the court also expressly rejected the "hydrological connection" theory, *id.* at 965. Even granting the premise that "water from the pond will enter the local ground waters, and thence underground aquifers that feed lakes and streams that are part of the 'waters of the United States,'" the court nonetheless held that the CWA does not "assert[] authority over ground waters, *just because*

these may be hydrologically connected with surface waters." *Id.* (emphasis added). The court found instead that Congress's "omission of ground waters" from the CWA was "not an oversight," *id.*, even if these discharges eventually reach "waters of the United States."

The Fifth Circuit has consistently adopted a similar position. For instance, in *Exxon Corp. v. Train*, it identified and discussed a "clear pattern of congressional intent with respect to groundwaters," namely "the encouragement of state efforts to control groundwater pollution [and] not of direct federal control." 554 F.2d at 1322. Engaging in a thorough analysis of the CWA's text and legislative history, it emphasized that Congress had rejected an amendment that would have brought *all* groundwater (hydrologically connected to surface water or not) within the jurisdictional ambit of the CWA. See *id.* at 1328-30.

The holding in *Exxon* was, in turn, a critical component of the Fifth Circuit's later decision in *Rice*. See 250 F.3d at 269. There, the court rejected a claim that a petroleum company illegally discharged oil into "navigable waters"[7] based on a theory that the

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[7] *Rice* involved a claim brought under the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §2701 *et seq.*, rather than the CWA. 250 F.3d at 265. Both statues, however, regulate discharge of pollutants into "navigable waters," defined identically as "the waters of the United States," and the OPA's legislative history "strongly indicate[s] that Congress generally intended the term

"discharges have seeped through the ground into groundwater which has, in turn, contaminated several bodies of surface water" "through subsurface flow from the contaminated groundwater . . . into [a] river." *Id.* at 265, 270-71. The court explained that liability extends only to "discharges . . . into or upon the navigable waters," not indirect discharges through groundwater that reach jurisdictional waters "by gradual, natural seepage." *Id.* at 271. "In light of Congress's decision not to regulate ground waters under the CWA/OPA," the court refused to extend OPA jurisdiction so far, emphasizing instead its duty to "construe the OPA in such a way as to respect Congress's decision to leave the regulation of groundwater *to the States*." *Id.* at 272 (emphasis added).

Only this Court can resolve the fundamental question animating this growing division: Does the CWA apply to discharges that reach "the waters of the United States" only by migration through nonjurisdictional groundwater? Granting the Petition would allow this Court to reject the flawed analysis below, and instead affirm—as the statutory text and principles of cooperative federalism require—that groundwater is neither navigable water nor a point source, and ultimately beyond the CWA's reach.

'navigable waters' to have the same meaning in both the OPA and the CWA." *Id.* at 267-68.

III. Proper Interpretation Of The CWA Will Not Leave Groundwater or Connected Surface Water Unprotected.

This Court should also grant the petition because there is no need for the atextual overreach in the decision below. The CWA was never intended to allow the EPA to regulate every possible aspect of water contamination, and any concern to the contrary about leaving groundwater (and any hydrologically connected surface water) unprotected is unfounded. See, *e.g.*, *Sierra Club v. Virginia Elec. & Power Co.*, --- F.3d. ---, 2018 WL 4343513, at *6 (4th Cir. Sept. 12, 2018) ("[T]he fact that [some groundwater] pollution falls outside the scope of the Clean Water Act's regulation does not mean that it slips through the regulatory cracks."). States take seriously their responsibility to protect the natural resources within their borders, see, *e.g.*, *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 488 S.E.2d 901 (1997), and *other* federal statutes are better-tailored to address the problem of groundwater contamination in certain circumstances.

As an initial matter, while the CWA does not authorize direct federal regulation of groundwater pollution, other federal statutes are better tailored to do so. For example, the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq*., requires States to set minimum standards for the "subsurface emplacement of fluids" that include a prohibition on such discharges without a state permit. See 42 U.S.C. § 300h(b), (d)(1); 40 C.F.R. § 144.12. Further, the Resource Conservation and Recovery Act ("RCRA") and Comprehensive

Environmental Response, Compensation, and Liability Act ("CERCLA") permit enforcement actions against entities responsible for groundwater contamination in appropriate circumstances, as well as authorizing ameilorative and other remedial actions. See, *e.g.*, 42 U.S.C. § 6973(2) (RCRA permits an action against "any person" whose "handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment."); 42 U.S.C. § 9604(a) (EPA may order the removal of pollutants or other corrective action if a "hazardous substance is released" or there is otherwise a "substantial threat of such a release into the environment"). Indeed, although the Sixth Circuit in *Kentucky Waterways* rejected plaintiffs' claim regarding discharges from coal ash ponds under the CWA, it held that such claims are cognizable under RCRA. 2018 WL 4559315, at *9-11.

More importantly, States have long exercised their authority to regulate in this space. The CWA itself expressly provides that States retain power the power to "adopt or enforce" any environmental protection they deem necessary to protect their land and water resources. 33 U.S.C. § 1370. The *amici* States have each enacted statutory protections designed to protect and conserve their groundwater resources, and by extension the surface waters they often feed. Examples of such laws include—but are by no means limited to—the following:

- In West Virginia, "[i]t is unlawful for any person," without a state permit, to "[a]llow

sewage, industrial wastes or other wastes, or the effluent therefrom, produced by or emanating from any point source, to flow into the waters of this state." W. Va. Code § 22-11-8(b); see also W. Va. Code § 22-11-3(23) (defining "water" to include "all water on or beneath the surface of the ground"). Similarly, West Virginia's Department of Environmental Protection "establish[es] maximum contaminant levels permitted for groundwater," which must "recognize the degree to which groundwater is hydrologically connected with surface water and other groundwater" and "provide protection for such surface water and other groundwater." W. Va. Code § 22-12-4(b)-(c).

- The law of Arizona, in light of its arid climate, is especially focused on the protection of its groundwaters through its comprehensive aquifer protection permit and water quality standards programs. Ariz. Rev. Stat. §§ 49-203(A)(4), 223, 224(B).

- In Colorado, it is unlawful to discharge any statutorily defined pollutant into any state waters without first having obtained the necessary permit by state authorities. Colo. Rev. Stat. §25-8-501(1). "State waters" include any and all "subsurface waters which are contained in or flow in or through" the State. Colo. Rev. Stat. § 25-8-103 (19).

- Kentucky directly prohibits the discharge of pollutants into groundwater, providing that "no person shall, directly or indirectly . . . discharge into any of the waters of the Commonwealth . . . any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth" except as authorized by state regulatory authorities. Ky. Rev. Stat. § 224.70-110. "Waters of the Commonwealth" is defined to include "all . . . bodies or accumulations of water, *surface and underground*, natural or artificial, which are situated wholly or partly within, or border upon, this Commonwealth, or are within its jurisdiction, except those private waters which do not combine or effect a junction with natural surface or underground waters." Ky. Rev. Stat. § 224.1-300(6).

- Michigan law provides that a "person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious" to a broad array of interests, including public health, commercial, industrial and agricultural land uses, and the protection of wild flora and fauna. Mich. Comp. Laws § 324.3109(1). The term "waters of the state" is explicitly defined to include "groundwaters . . . within the jurisdiction of this state." Mich. Comp. Laws § 324.3101(aa).

- In South Carolina, it is "unlawful for a person, directly or indirectly, to throw, drain, run,

> *allow to seep*, or otherwise discharge into the environment of the State organic or inorganic matter" without a permit. S.C. Code § 48-1-90(A)(1) (emphasis added).

Where, as here, the States have taken up the mantle of protecting groundwater and nonpoint source pollution within their borders, it would be particularly inappropriate to allow the decision below—and the circuit split it deepens—to stand. The States deeply appreciate the value of their natural resources and the danger posed to *all* waters from groundwater contamination. Reaffirming the CWA's textual limits will not undermine these important state-level protections. To the contrary, curbing the potential tsunami of compliance costs the Ninth Circuit's explansive theory of CWA jurisdiction invites will allow States to focus their efforts and resources on enforcing laws better tailored to ensuring the purity of their waters—both surface *and* ground.

CONCLUSION

The petition for a writ of certiorari should be granted.

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