No. 18-268

In the
Supreme Court of the United States

KINDER MORGAN ENERGY PARTNERS L.P. and PLANTATION PIPE LINE COMPANY, INC.,

Petitioners,

v.

UPSTATE FOREVER and SAVANNAH RIVERKEEPER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The United States' invitation brief gets it roughly half-right. As it explains, there is a clear circuit split on the first question presented here—namely, whether the Clean Water Act ("CWA") applies to discharges of pollutants that eventually find their way into navigable waters via ground or groundwater. U.S.Br.9-12; *see* Pet.16-20; Reply 2-5. That issue is undeniably important and warrants this Court's review. U.S.Br.13-14; *see* Pet.34-37; Reply 12-13. And as the government explains, there is no reason for this Court to await further EPA action before resolving that issue. U.S.Br.14; Reply 9. The government therefore correctly recommends that this Court should grant certiorari to decide the jurisdictional reach of the CWA.

From there, however, the government goes astray. Notwithstanding its recognition that both this petition and *County of Maui v. Hawaii Wildlife Fund*, No. 18-260 (U.S.), present essentially the same cert-worthy question, the government recommends holding this petition and granting certiorari only in *Maui*. That course has nothing to recommend it. This case fundamentally presents a question about federalism—where the authority of federal regulators leaves off and where state authority controls. At the outset, then, this Court should greet the federal regulator's choice of a favored vehicle for resolving the limits of federal regulatory power with considerable skepticism, especially when it recommends that the Court consider only a vehicle involving anomalous facts in a unique hydrological environment. The government may believe that *Maui* is the better case

for asserting federal authority, but that does not make it the better case for this Court's review.

Maui involves an injection well expressly designed to discharge pollutants directly into groundwater. The far more commonly litigated fact pattern, which is featured here and in both of the Sixth Circuit cases that the government acknowledges are part of the circuit split, involves a discharge not designed to reach either groundwater or navigable waters that reaches navigable waters only after traversing ground and groundwater. In considering the important impacts on "federal, state and tribal regulatory efforts in innumerable circumstances nationwide," U.S.Br.13, it makes sense to consider a fact scenario far more likely to recur in innumerable circumstances nationwide than one involving an injection well on an island in the Pacific.

But there is no need to choose. This Court routinely grants multiple petitions presenting the same issue, especially after calling for the views of the Solicitor General on multiple petitions. Moreover, in considering such a critical question of federalism, there are affirmative benefits to having multiple fact patterns before the Court. The Court did just that in granting certiorari in both *Rapanos v. United States*, No. 04-1034 (U.S.), and *Carabell v. United States Army Corps of Engineers*, No. 04-1384 (U.S.), which allowed the Court to consider important questions about the reach of the CWA in multiple factual circumstances. The Court ultimately consolidated the cases for argument and decision, but it benefitted from having separate briefing and fact patterns before it. The Court should follow the same course here.

The government's only other justification for preferring *Maui* as a vehicle is the possibility that the second question presented here is jurisdictional and could prevent the Court from resolving the first question presented. But the government pointedly stops short of endorsing the view that the second question is truly jurisdictional, and with good reason. In all events, even if this were a concern, the government itself provides the solution by recommending a grant on the first question presented in *Maui*. Granting *both* petitions will ensure that the Court can decide the question that has divided the circuits (since there is no even arguably jurisdictional issue in *Maui*). Finally, this Court should not only grant certiorari in this case, but grant certiorari on both questions presented here. The Fourth Circuit's "ongoing violation" theory not only conflicts with precedent from this Court and the Fifth Circuit, but is a direct outgrowth of the Fourth Circuit's erroneous resolution of the first question presented. Only by considering any discharge that finds its way to the navigable waters sufficient for federal jurisdiction could the court below find an ongoing violation years after the discharge from the point source ceased. The Court should grant this petition in full.

REASONS TO GRANT THE PETITION

For the reasons given by the United States (along with those already set forth by petitioners), this Court's review is clearly warranted to decide the first question presented here. U.S.Br.9-14; *see* Pet.16-29, 34-37; Reply 2-9, 12-13. The remaining question is whether the Court should grant certiorari in both *Maui* and this case to review that pressing question,

or instead (as the government suggests) limit its review to the unusual facts and hydrological dynamic presented in *Maui*. The better course is plainly to grant both petitions.

This case, like previous cases about the reach of the CWA, is at bottom about federalism. The question is not whether water resources will be protected by environmental regulators, but which authorities will do the regulating. As this Court has repeatedly recognized, expansive interpretations of the federal government's regulatory authority under the CWA raise serious federalism concerns, as they threaten "significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cty. ("SWANCC") v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *see Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality op.). Those federalism concerns are on full display here, as the ultimate question in this case is whether the federal government has the authority to regulate discharges that ultimately reach the navigable waters even though they more directly impact land and groundwater subject to "the States' traditional and primary power."

For that reason alone, this Court should be skeptical of the federal government's preference for a particular vehicle for testing the limits of federal power. The federal government resisted this Court's review in *SWANCC*, *Rapanos*, and *Carabell*, and it may have institutional reasons to prefer a case that provides what it views as the more attractive scenario for asserting federal authority, as opposed to the most

common fact pattern or the best context for this Court's review.

The government's stated reasons for preferring *Maui* as a vehicle only reinforce the need for skepticism. According to the government, the *Maui* case is a better vehicle because it involves discharges "*solely* via groundwater connected to a point source," whereas this case involves the "seeping" of pollutants "*through soil and ground water*." U.S.Br.16 (quoting Pet.App.9) (emphasis added by government). The government is not explicit about why that distinction makes *Maui* a superior candidate for this Court's review. While the government may have some reason to think that an intentional discharge directly into groundwater is a stronger candidate for an assertion of federal jurisdiction than an unintentional discharge that reaches the navigable waters only after traversing land and groundwater, that hardly makes the former a better candidate for this Court's review—especially when the latter is the far more commonly litigated scenario.

Indeed, to the extent this case is principally about federalism, it would make far more sense to review the more typical case of pollution that implicates both the ground and groundwater, as those are the two media where state and local regulation is preeminent. After all, this Court in *SWANCC* noted that federal regulation infringed upon "the States' traditional and primary power over *land and* water use." 531 U.S. at 174 (emphasis added). And the plurality in *Rapanos* expressed particular concern about an interpretation of the CWA that would render the federal government "a *de facto* regulator of immense stretches of intrastate

land." *Rapanos*, 547 U.S. at 738 (plurality op.). In light of these distinct concerns with extending CWA jurisdiction over land, there is every reason to include among the cases this Court reviews a decision that makes the federal government the *de facto* regulator of not just groundwater, but the ground as well.

That is particularly true because pollution that reaches the navigable waters after seeping through land and groundwater is the far more common scenario than intentional discharges directly into groundwater alone. While both the cases before this Court (and both Sixth Circuit cases) share the common feature that the federal government has exceeded its proper jurisdiction, there is no gainsaying that the facts of *Maui* are relatively unusual. The universe of litigated cases involving injection wells that intentionally discharge directly into groundwater in the unique hydrological environment of an island is essentially a class of one. The far more commonly litigated fact pattern involves point sources (or alleged point sources) that do not intentionally discharge pollutants at all, but unintentionally discharge pollutants that are alleged to have found their way via ground or groundwater to the navigable waters.

That far more common fact pattern is involved not only here but in both of the recent Sixth Circuit cases, which involve the migration of pollutants from ash ponds through groundwater and soil and ultimately to navigable waters. *See* Pet.App.6-7; *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 439-42 (6th Cir. 2018); *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 930-32 (6th Cir. 2018); *see also, e.g.*, *Rice v. Harken Expl. Co.*, 250 F.3d 264, 270 (5th Cir. 2001)

(addressing discharges that "seeped through the ground into groundwater"); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 963 (7th Cir. 1994) (addressing retention pond from which polluted water "seeps into the ground").

That more common pattern also implicates the unique regulatory problems with "permitting" an unintentional discharge. *See, e.g.*, Br. of American Petroleum Institute et al. as *Amici Curiae* 14-20. While it is at least conceivable that one could obtain a CWA permit for discharges from an injection well into groundwater, there is no workable way to permit unintentional discharges into groundwater and soil from an ash pond or a pipeline leak. Thus, it would make particular sense for this Court to have at least one case before it that squarely presents the difficulties inherent in an effort to assert federal jurisdiction and impose federal permitting requirements over inadvertent discharges that reach navigable waters only after seeping through ground and groundwater. For similar reasons, that more common fact pattern is the one that both the pipeline industry and the broader business community believe cries out for this Court's review. *See id.* (urging review only in No. 18-268); Br. of *Amici Curiae* Chamber of Commerce et al. (urging review only in No. 18-268).

In short, to the extent the government believes there is a material difference between cases involving discharges via ground and groundwater as opposed to discharges directly into groundwater, that is a reason to grant this petition, not hold it. If any case is arguably sui generis, it is the *Maui* case involving injection wells specifically designed to discharge

pollutants into groundwater on an island in the Pacific. *Maui* Pet.App.7-9. And if any case is going to give guidance to "federal, state and tribal regulatory efforts in innumerable circumstances nationwide," U.S.Br.13, it is this case involving both groundwater and soil, which is a fact pattern far more likely to recur in innumerable circumstances nationwide.

Fortunately, however, there is no need for this Court to choose between granting the *Maui* petition and this case. To the contrary, when the Court confronts an important federalism issue of the kind implicated here, the Court can affirmatively benefit from having multiple fact patterns that illustrate the potential for federal-state tension. Indeed, when this Court last confronted a critical issue concerning the jurisdictional reach of the CWA it granted plenary review in both *Rapanos* and *Carabell*. Both cases implicated different fact patterns, with *Rapanos* involving wetlands separated from navigable waters by a variety of ditches and culverts, and *Carabell* involving a wetland separated by a berm, *i.e.*, land. Both scenarios illustrated different strengths and weaknesses of the claim to federal regulatory jurisdiction. While the Court ultimately consolidated the two cases for argument and decision, it benefitted from having two sets of briefing and two factual scenarios before it. There is no reason for a different result here.

Indeed, if anything the case for granting two cases is even more compelling here. *Rapanos* itself involved three different building sites with slightly different hydrological characteristics. *See* 547 U.S. at 729. And while both *Rapanos* and *Carabell* originated from the

Sixth Circuit and applied the same basic test, the two cases here come from two different circuits applying materially different tests for federal jurisdiction. In the *Maui* case, the Ninth Circuit adopted a "fairly traceable" test, and specifically rejected the "direct hydrological connection" test that the federal government pressed in its *amicus* brief. *Maui* Pet.App.24 n.3. In this case, by contrast, the Fourth Circuit specifically rejected the Ninth Circuit's "fairly traceable" test in favor of the "direct hydrological connection" test. Pet.App.25-26. The different factual patterns in the cases may have contributed to the different tests. And taking both cases will ensure that the Court can examine the tension between (and independent problems with) those standards.

The government's only other stated reason to favor *Maui* as a vehicle is its suggestion that the second question in this case might implicate a jurisdictional issue that could preclude the Court from reaching the first question. The government stops short of actually embracing the position that the "ongoing violation" issue is truly jurisdictional, and with good reason. That issue is plainly not jurisdictional in the strict sense; it goes to whether a plaintiff has a viable claim, not to whether the court has power to hear the controversy. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006). But in all events, the government has already suggested the complete answer to its purported concern: If the Court grants both cases, then it will be able to reach and resolve the first question regardless.

In fact, there is good reason not only to grant both this case and *Maui*—to ensure that the Court can

address two different factual scenarios, including the more common scenario and the one that implicates the acute federalism concerns of converting the EPA into "a *de facto* regulator of immense stretches of intrastate land," *Rapanos*, 547 U.S. at 738 (plurality op.)—but to grant both of the questions presented here. The government does not and cannot deny that the Fourth Circuit seriously erred by recognizing an "ongoing violation" of the CWA whenever any pollutants from a past discharge continue to be carried by groundwater into navigable waters. That decision cannot be reconciled with this Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), which squarely bars citizen suits based on "wholly past violations of the [CWA]." 484 U.S. at 60-61. Nor can it be reconciled with the Fifth Circuit's decision in *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (1985), which, contrary to the government's suggestion, in no way turned on the lack of an easily-added allegation that the pollutants from the pipeline leak involved there "continue to be added to navigable waters." U.S.Br.19 (quoting Pet.App.18) (emphasis omitted). Indeed, the Fourth Circuit itself rejected the government's suggested distinction when it specifically "decline[d] to adopt the Fifth Circuit's approach." Pet.App.17-18 & n.9.

But even if (contrary to fact) the second question were not *independently* certworthy, there still would be good reasons to grant it along with the first question presented. The Fourth Circuit's mistaken "ongoing violation" holding and the resulting conflict with *Gwaltney* and *Hamker* flow directly from the Fourth Circuit's misguided view of the CWA. It is only because the Fourth Circuit recognizes federal

government authority over any pollution that reaches the navigable waters—even if it must first traverse ground and groundwater (which can take quite some time)—that Fourth Circuit can conceptualize an ongoing violation literally years after the actual discharge from the point source has ceased.

In short, both errors of the Fourth Circuit flow not from a mistaken sense of the Court's own jurisdiction (which, properly understood, is not implicated by either issue), but from a mistaken sense of the federal government's jurisdiction over any pollution that finds its ways to the navigable waters. This case perfectly presents that issue in a context that is common and in which federalism concerns are at their zenith. The federal government's preference for a different vehicle should not prevent this Court from granting both petitions and resolving the question at the heart of the split—namely, whether pollution not intentionally discharged into either groundwater or navigable waters that traverses both ground and groundwater before finding its way to the navigable waterways is subject to CWA jurisdiction.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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