No. 17-418

In the Supreme Court of the United States

STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MICHIGAN, WASHINGTON, AND THE PROVINCE OF MANITOBA, CANADA,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

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

BRIEF FOR THE CITY OF NEW YORK IN OPPOSITION

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INTRODUCTION

Nearly a decade ago, the U.S. Environmental Protection Agency adopted a rule providing that a transfer of water from one body of navigable waters to another, without alteration or intervening use, is not subject to the Clean Water Act's National Pollutant Discharge Elimination System (NPDES). Petitioners, seven states and a Canadian province, now seek certiorari from a ruling of the U.S. Court of Appeals for the Second Circuit holding, consistent with the only other court of appeals to address the question, that the rule is a reasonable interpretation of the Act and entitled to deference.

The petition should be denied. The ruling of the court of appeals is correct and it aligns the circuits. We do not retread that ground here, but instead focus on explaining how the ruling restores, rather than upsets, a state of affairs that has rightly prevailed since the Clean Water Act was enacted four decades ago. This return to the established practice is for the best. Alternatives to the NPDES program empower the states and the federal government to protect water quality and regulate water transfers. Those alternatives not only avoid the harms hypothesized in the petition, they do so without imposing the actual harms that have materialized on the rare occasions when courts have strayed from the prevailing practice.

STATEMENT

1. The Clean Water Act, 33 U.S.C. §§ 1251–1388, is a complex response to a complex problem: the restoration and preservation of "the chemical, physical, and biological integrity of the Nation's waters," *id.* § 1251(a). Congress approached the problem from multiple angles, from permitting and licensing programs, *id.* §§ 1341–46, to enforcement standards, *id.* §§ 1311–30, to funding for public projects, *id.* §§ 1381–88, to research, *id.* §§ 1251–75. A spirit of federal-state cooperation carries through the Act, with some efforts spearheaded by the states and others by the federal government. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

Central to the Act is the distinction between "point" and "nonpoint" sources of water pollution. A point source is "any discernible, confined and discrete conveyance … from which pollutants are or may be discharged," everything from a tunnel to an animal feeding operation, so long as the conveyance itself adds or could add pollutants to the nation's navigable waters. 33 U.S.C. § 1362(14). Nonpoint sources are diffuse sources of pollution, like sediment from farms and toxic chemicals from urban runoff. *See* EPA, *Polluted Runoff: Nonpoint Source Pollution*, https://perma.cc/F52U-VF2W.

The Act's strongest provisions are directed at point sources. Section 301(a) prohibits the addition of any pollutant to the nation's waters from any

point source. 33 U.S.C. §§ 1311(a), 1362(12)(A). But point source discharges are allowed if the EPA, or a state with an EPA-approved permitting program, issues a permit under the National Pollutant Discharge Elimination System (NPDES).[1] *Id.* §§ 1311(a), 1342. Difficult and costly to obtain to begin with, NPDES permits typically carry high compliance costs as well. Most permits impose strict limits on effluents and rigorous monitoring, reporting, and other requirements. *See*, *e.g.*, 40 C.F.R. §§ 122.4, 122.41, 122.42, 125.3; *see generally* EPA, *NPDES Permit Writers' Manual* (Sept. 2010), https://perma.cc/6R5F-CY2J.

Though nonpoint sources are by far the more significant source of water pollution, Congress largely left it to the states to decide how to address them. *See* EPA, *Polluted Runoff: Nonpoint Source Pollution*, *supra*. Here, rather than create a federally defined permitting program, Congress crafted measures to encourage states to regulate nonpoint sources under state law. *See, e.g.*, 33 U.S.C. §§ 1288(f), 1314(f), 1329. Section 319 of the Act, for example, opens up federal funding for state nonpoint source management programs. *Id.* § 1329. Though states can use their funding to enforce state laws regulating nonpoint sources, few have

[1] We use the term "NPDES permit" to refer to permits issued by the EPA and those issued by states under an EPA-approved State Pollutant Discharge Elimination System.

done so. *See* EPA, *A National Evaluation of the Clean Water Act Section 319 Program* (Nov. 2011), https://perma.cc/M3CE-C44M.

2. In 2008, the EPA used its rulemaking power under the Clean Water Act to adopt the Water Transfers Rule. Pet. App. 298a–351a. The Rule makes clear that an NPDES permit is not required for a water transfer—defined as "an activity that conveys or connects waters of the United States without subjecting the … water to intervening industrial, municipal, or commercial use," 40 C.F.R. § 122.3(i)—so long as the water transfer does not itself add new pollutants into the nation's navigable waters, Pet. App. 311a.

The upshot of the Water Transfers Rule is not to inoculate water transfers from regulation. States retain the flexibility to enact and enforce laws addressing water transfers as they see fit. *See* Pet. App. 330a ("[N]othing … precludes a State, under State law, from regulating water transfers.").

3. A teeming metropolis, New York City has looked upstate to meet its drinking water needs since the 1840s. *See* N.Y. City Dep't of Envtl. Prot., *History of New York City's Water Supply System*, https://perma.cc/3J67-EWC3. Today, the City's water supply system delivers 1.1 billion gallons of world-class drinking water daily to around 10 million people, nearly half the state's residents. *See* N.Y. City Dep't of Envtl. Prot., *New York City 2016*

Drinking Water Supply and Quality Report, at 2, 9, https://perma.cc/RV8Z-KP3P. The system works well: the City's drinking water, largely unfiltered and delivered by gravity, is the envy the world.

A water transfer—the Shandaken Tunnel—is a critical part of this system. Opened in 1924, the tunnel has been as integral a feature of New York's landscape as any other waterway for nearly a century, about half before the Clean Water Act and half after. *Shandaken Tube Opened to Water*, N.Y. Times, Feb. 10, 1924, at 21. The tunnel connects two water basins in the Catskill Mountains: water from the Schoharie Reservoir runs 18 miles through the tunnel into the Esopus Creek, flowing into the Ashokan Reservoir. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 79 (2d Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007). The water then passes through an aqueduct and a series of reservoirs and tunnels along the Hudson River until it hits New Yorkers' taps. *Id.* at 79–80.

Nothing is added to the waters flowing from the Schoharie Reservoir into the Shandaken Tunnel. But typical of waters in the Catskill region, water turbidity occurs naturally in the reservoir, due to extensive clay and silt deposits that are prone to cloud its waters during extreme storm events. *See* N.Y. State Dep't of Health, *New York City Filtration Avoidance Determination*, at 73 (Dec. 2017), https://perma.cc/LVY4-YR99. As a result,

reservoir waters diverted through the tunnel can contain elevated levels of suspended solids. *See id.*

The system was designed with this episodic turbidity in mind: allowing waters to sit in the Ashokan Reservoir is usually sufficient for solids to settle. *Id.* And the City's far-reaching watershed protection program includes an array of measures that substantially reduce turbidity throughout the system. *See* N.Y. State Dep't of Health, *Implementation of New York City's Watershed Protection Program and Compliance with the 2007 Filtration Avoidance Determination*, at 1, 25–26 (Sept. 30, 2011), https://perma.cc/AVP6-YXSV.

ARGUMENT

THE COURT OF APPEALS' DECISION HONORS A SOUND PRACTICE AS OLD AS THE CLEAN WATER ACT ITSELF

1. The Water Transfers Rule is now a decade old, and the Rule codified a state of affairs that had itself "prevailed for decades." Pet. App. 49a. Water transfers are a common and enduring feature of the American landscape, and for as long as the NPDES permitting program has existed, the practice has been to treat water transfers as falling outside it. *Id.* at 67a, 306a–07a. In the Act's four-decade-plus history, there are but a few isolated instances where the EPA issued an NPDES permit for a water transfer, all in response to a court order or an activity that itself added pollutants to waters (and therefore would require a permit even under the Rule). Pet. App. 306a–07a. The rare frolic from the governing practice just confirms the norm.

Until the court of appeals corrected course, its own precedent—*Catskill I* and *Catskill II*—was the most significant departure from this practice.[2] In sweeping aside that precedent, which predated the Water Transfers Rule and applied a less deferential

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[2] *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007).

standard of review, the court brought the circuits into alignment, not conflict. The Eleventh Circuit, in *Friends of the Everglades v. South Florida Water Management District*, likewise held that the Rule is a reasonable interpretation of the Act. 570 F.3d 1210, 1228 (11th Cir. 2009), *cert. denied*, 562 U.S. 1082 (2010). These consistent rulings avoid the profound problems that arise when courts stray from the longstanding practice and start subjecting water transfers to the NPDES permitting program.

2. We do not have to guess what those problems would be, because the City experienced them firsthand during the 15-year interregnum between *Catskill I* and the course-correction below. For three decades after the Clean Water Act's passage, federal and state approaches to the Shandaken Tunnel—the water transfer that millions of people depend on for their drinking water—matched the prevailing nationwide practice. Neither the EPA nor the State of New York had ever claimed that the tunnel required an NPDES permit.

That settled practice came under attack in 2000, when a group of plaintiffs sued the City claiming that the tunnel could not be operated without an NPDES permit. What followed was a protracted federal litigation that included two trips to the court of appeals and yielded an order directing the City to seek a permit and imposing more than $5 million in penalties against it. *See Catskill I*, 273 F.3d at 494; *Catskill II*, 451 F.3d at 89.

As the City predicted, the NPDES program proved to be a poor fit for water transfers, and unworkable in practice. A process that the district court expected to be completed within 18 months, by mid-2004, remains unfinished more than a decade later. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 57 (N.D.N.Y. 2003), *aff'd in part and remanded in part*, 451 F.3d 77 (2d Cir. 2006).

After prolonged administrative proceedings, the State of New York issued the City a permit in 2006. *See In re Application for State Pollutant Discharge Elimination System Permit*, 2006 N.Y. Env. LEXIS 44 (N.Y. Dep't of Envtl. Conservation July 27, 2006) (containing both hearing officer's recommendation and commissioner's decision). The State-drafted permit included a series of exemptions to effluent, water quality, and other requirements, recognizing the need to "str[ike] the appropriate balance" between those requirements and the tunnel's vital role as a water resource.[3] *Id.* at *65 (hearing officer's recommendation). But the exemptions sparked a new round of litigation in state court,

[3] As an illustration of the need for flexibility, even though turbidity is a natural and unavoidable phenomenon in the Schoharie Reservoir, *see supra* at 5, any diversion of water from the reservoir through the tunnel could not, without the exemptions, cause any substantial increase in the "visible contrast to natural conditions" in the Esopus Creek. N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2.

ending with a finding that they were incompatible with the NPDES program's "strict guidelines." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, 71 A.D.3d 235, 239 (N.Y. App. Div. 2010).

All this left the City to apply to the State for variances—by definition, time-limited relief. That application, submitted to the State in 2010, has been pending ever since. In the meantime, a court order has allowed the City to operate the Shandaken Tunnel with the benefit of the permit's exemptions. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, No. 06-0361, 2008 N.Y. Misc. LEXIS 5923, at *19 (N.Y. Sup. Ct. Aug. 5, 2008), *aff'd*, 71 A.D.3d 235 (N.Y. App. Div. 2010). That the City's petition has been pending for more than seven years, while water has continued to flow through the tunnel, reflects just how ill-equipped the NPDES program is to handle water transfers.

3. Fortunately, the court of appeals' decision avoids all of these problems by restoring the state of affairs that prevailed for decades. Despite the petitioners' efforts to marshal a parade of horribles in the event certiorari is not granted, this return to the status quo ante is for the best.

Notwithstanding exaggerated rhetoric about the impact of water transfers, out of the thousands of water transfers in the United States, the petition cites but a few offending cases. In reality,

pollutants generally enter the nation's navigable waters through other sources, point and nonpoint, unrelated to water transfer activities. Pet. App. 324a. That makes sense: after all, water transfers merely convey one body of water into another. When that is not the case—as when pollutants are "introduced by the water transfer activity itself"—the EPA's Rule requires an NPDES permit. *Id.* at 311a. So too when water is subject to an "intervening … use," as, for example, when it is withdrawn for irrigation purposes or to cool industrial facilities. 40 C.F.R. § 122.3(i).

To bolster its inflated claims of a dire future, the petition glosses over the positive environmental contributions of some water transfers. Take the City's Shandaken Tunnel, which has been around longer than penicillin and has become an integral part of local ecosystems. The cold waters that flow through the tunnel, for instance, are vital to the trout habitat that makes the Esopus Creek a destination for fly-fishing, especially during the summer, when water levels would drop and temperatures would rise without the tunnel's waters. *See In re Application for State Pollutant Discharge Elimination System Permit*, 2006 N.Y. Env. LEXIS 44 at *45–46. In fact, the waters help improve the creek's water quality, reflected by the State having rated the segment where the waters flow higher than the upstream segment where they do not. N.Y. Comp. Codes R. & Regs. tit. 6, § 862.6,

items 555–56. Indeed, the diversions are so critical that the State began compelling them in 1977—five years after the Clean Water Act—and it continues to compel them today. *Id.* §§ 670.1–670.9.

But even setting all of this to one side, in projecting the real-world impact of the decision below, the petition gives short shrift to other water pollution controls and pretends as if this case is about whether water transfers can be regulated, when it is at most about who can regulate them and how. To intimate that denying review promises to give "industrial and commercial entities free reign to pollute," Pet. 17, the petition must skirt over the "alternative means" that already exist, or could exist, to address water quality in general and water transfers in particular, Pet. App. 16a.

a. Nonpoint source programs. While the NPDES program is a key part of the Clean Water Act, Congress never saw it as the exclusive means for addressing the nation's water pollution problem. It crafted a wide-ranging statute responding to that complex problem on several different fronts—some binding and others not, some led by the federal government and others led by the states.

The Act's nonpoint source programs are an important tool for addressing pollutants at their source. States must, for example, identify impaired and at-risk water bodies, obtain the EPA's approval for their plans to address the problems, and

calculate the pollutant reduction levels needed to meet water quality standards. *See* 33 U.S.C. §§ 1313(d), 1329(a), (b); *see generally* EPA, *EPA Requirements for Quality Management Plans* (Mar. 2001), https://perma.cc/RYJ2-S6AR; EPA, *Nonpoint Source Program and Grants Guidelines for States and Territories* (Apr. 12, 2013), https://perma.cc/T4VN-RN6L. Encouraging states to implement their plans and controls, the Act supplies funding for state projects directed at reducing nonpoint source pollution, 33 U.S.C. § 1329(h), and offers research and other support for efforts to control pollution arising from "changes in the movement, flow, or circulation of any navigable waters," *id.* § 1314(f)(2)(F).

b. Other federal programs. In any case, the Clean Water Act is hardly the only federal regime concerned with water quality: a panoply of federal laws and regulations addresses the subject, and some intersect with water transfers specifically. Two notable examples are the Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-27, and the EPA's Surface Water Treatment Rule, 40 C.F.R. §§ 141.70–141.76, which regulate natural and manmade contaminants in public water systems.

Here too, the City's experience is instructive, illustrating how alternative regimes can effectively respond to water transfers. Because the waters feeding into the City's water system generally need no filtration, since the early 1990s, the City has

periodically sought, and received, approval from the EPA and the State to avoid the filtration requirements imposed by the Safe Drinking Water Act and Surface Water Treatment Rule. The latest approval, a Filtration Avoidance Determination, was issued shortly after the filing of the petition. *See* Winnie Hu, *A Billion-Dollar Investment to Protect the 'Champagne of Drinking Water,'* N.Y. Times, Jan. 19, 2018, at A19.

As part of the approval process, the City has developed a watershed protection plan that, in the State's own words, is both "comprehensive and robust." N.Y. State Dep't of Health, *Implementation of New York City's Watershed Protection Program and Compliance with the 2007 Filtration Avoidance Determination*, *supra*, at 38. A testament to the power of the regulatory regime that birthed it, the plan commits the City to an impressive collection of watershed protection measures, from management of lands conducive to water quality, to stabilization of eroding stream banks, to implementation of agricultural best practices, to mitigation of flooding in watershed communities. *See* N.Y. State Dep't of Health, *New York City Filtration Avoidance Determination*, *supra*, at 35–66. Multiple measures, like turbidity controls and a state-of-the-art forecasting tool optimizing reservoir releases, will apply to the waters flowing through the Shandaken Tunnel. *See id.* at 73.

The EPA- and State-approved plan not only sets ambitious environmental goals, it does so without losing sight of the vital public interests served by the water supply system. It is a case study in how federal regimes outside the Clean Water Act can produce powerful solutions that speak to water transfers, and much more, while achieving the kind of careful regulatory balance that the NPDES permitting program cannot.

c. State laws and regulations. Since the Clean Water Act sets a floor, not a ceiling, *see* 33 U.S.C. §§ 1251(b), 1370, the effect of the Water Transfers Rule is to empower the states to "determine what administrative regime, if any, applies to water transfers," Pet. App. 46a. So when the petition posits a world where water transfers escape regulation, not only does it ignore the alternatives that already exist, it pretends as if states are impotent to do more, when they are anything but.

To be sure, states have long taken a "hands-off" approach to water transfers. *Id.* at 23a; *see also id.* at 305a–07a. But that need not be the case. If the harms theorized in the petition are ever at risk of becoming a reality, states can respond by building

on the federal foundation.[4] Proving the point, a small number of states have already done so. *See, e.g.*, N.C. Gen. Stat. § 143-215.22L(k)(3) (requiring consideration of transfer's effect on source basins).

With the alternatives to address water quality and water transfers, the petition's dire predictions fall flat. In the unlikely event that the alternatives prove unequal to the task, the solution would in any case be legislative, not judicial. As all but two of the petitioners once observed, "the horribles that can be imagined—if they are really so horrible and ever come to pass—can readily be corrected by Congress." Br. of States of New York, *et al.* at 24, *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians.*, No. 02-626 (U.S. Nov. 14, 2003) (quotation marks omitted). But so far, the Water Transfers Rule and the decades-old practice it embodies have existed "without congressional course-correction of any kind." Pet. App. 49a.

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[4] Though water transfers rarely have interstate effects, *see* Pet. App. 79a, states have means to respond to the rare exception. Two petitioners—New York and Delaware—are already part of a compact creating an interstate commission empowered to regulate water pollution. *See* Delaware River Basin Water Comm'n Compact §§ 3.8, 5.2, 5.4 (codified at N.Y. Envtl. Conserv. Law § 21-1701); 18 C.F.R. § 401.35(b)(6).

CONCLUSION

The petition for a writ of certiorari should be denied.

January 19, 2018

Respectfully submitted,

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