No. 18-260

In The
Supreme Court of the United States

COUNTY OF MAUI,
Petitioner,

v.

HAWAIʻI WILDLIFE FUND; SIERRA CLUB – MAUI GROUP; SURFRIDER FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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Question Presented

Whether the Clean Water Act (CWA) requires a permit when pollutants originate from a point source but reach navigable waters by virtue of a nonpoint source, such as groundwater.

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Interest of Amicus Curiae[1]

Founded in 1973, Pacific Legal Foundation (PLF) is the nation's oldest and largest nonprofit legal foundation that seeks to protect the right of private property and related liberties in courts throughout the country. In executing this mission, PLF and its attorneys have been frequent participants in litigation concerning the Clean Water Act (CWA). *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018) (counsel for seventeen respondents); *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1812, 1816 (2016) (counsel for respondents); *Sackett v. E.P.A*, 566 U.S. 120, 132-33 (2012) (counsel for petitioners). PLF supports a balanced approach to environmental law, one that avoids the unreasonable elevation of environmental concerns over other important values.

Directly relevant to the cases at hand, PLF represented the petitioner in *Rapanos v. United States*, 547 U.S. 715 (2006). Below, both the Ninth Circuit and the Fourth Circuit cited *Rapanos* for the proposition that the CWA regulates pollution that reaches navigable waters through groundwater. Petitioner's Appendix (Pet. App.) 21-25; *Upstate*

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received the requisite notice of the intent of Amicus Curiae to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637, 649-51 (4th Cir. 2018). PLF opposes this property-threatening interpretation because it misreads the reasoning of Justice Scalia's plurality opinion in *Rapanos*, contradicting the overarching theme of that decision—namely, to limit not expand the CWA's reach.

Introduction and Summary of Argument[2]

Under the CWA, any person who directly discharges pollutants into a navigable water without a permit violates federal law. Recently, two circuit courts have held parties to be in violation of the CWA for having discharged pollutants into groundwater, because these pollutants eventually reached regulated surface waters. This Court has not addressed whether the CWA regulates such pollution.

The Court of Appeals for the Fourth and Ninth Circuits have ruled that the CWA does, and, in so doing, have greatly expanded the reach of federal water quality regulation beyond what Congress intended through the CWA. *Cf.* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . .").

The substantial expansion of the CWA is particularly problematic because this Court has held that the EPA and Army Corps have already

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[2] This brief has also been submitted in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 18-268, because there are similar questions of law in each case.

interpreted the Act to be broader than what Congress intended and, arguably, what the Constitution allows. *See Rapanos*, 547 U.S. at 739 (plurality op.); *id.* at 780-82 (Kennedy, J., concurring in the judgment). *See also Hawkes Co.*, 136 S. Ct. at 1817 (Kennedy, J., concurring); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001). And this was *before* the Fourth and Ninth Circuits expanded the scope of the CWA to include groundwater pollution that reaches regulated surface waters. Thus, certiorari should be granted to put a stop to the lower courts' improper expansion of an already bloated statute through an unwarranted reading of Justice Scalia's *Rapanos* plurality opinion.

The need for this Court's review is especially acute given that the lower courts' continuing expansion of the CWA augurs intolerable burdens for landowners throughout the country. Under the reasoning of the Fourth and Ninth Circuits, any landowner who owns a septic tank, or who otherwise is responsible for the addition of pollutants to a groundwater basin, is potentially subject to CWA liability. Even without the courts of appeals' interpretive expansion, the burdens of CWA jurisdiction and the risk of CWA liability are tremendous. *See, e.g.*, *Hawkes Co.*, 136 S. Ct. at 1816 (Kennedy, J., concurring) ("[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern."); *Sackett*, 566 U.S. at 132 (Alito, J., concurring) ("[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.").

That the Fourth and Ninth Circuits' decisions threaten to add to those fearsome burdens underscores the need for this Court's review.

Argument

I.

Certiorari Should Be Granted To Check the Lower Courts' Expansion of the Clean Water Act's Already Overbroad Scope, Which Expansion Has Been Effected Through a Misreading of Justice Scalia's Plurality Opinion in *Rapanos v. United States*

In holding that pollution discharges into groundwater can in some instances be directly regulated under the CWA, the Fourth and Ninth Circuits relied on Justice Scalia's plurality opinion in *Rapanos*. Specifically, the lower courts cited the plurality's discussion of how certain waters that may not qualify as "waters of the United States" may nevertheless constitute regulable "point sources" of pollution. *See* Pet. App. 21-25; *Kinder Morgan*, 887 F.3d at 649-51. But far from justifying federal regulation of groundwater pollution, the plurality's discussion was intended simply as a rhetorical response to the charge of the concurring and the dissenting opinions that the plurality's reading of the CWA would necessarily result in a dramatic reduction of regulable surface water pollution. *See Rapanos*, 547 U.S. at 742-44. The plurality opinion nowhere addresses whether groundwater pollution could ever be subject to direct CWA regulation. But what that opinion does certainly address are the problems posed by an over-expansive reading of the CWA, and the

critical need to ensure that the statute not be used as a device to justify federal regulation of all water pollution in this country. *See Rapanos*, 547 U.S. at 757 (plurality op.); *id.* at 780-82 (Kennedy, J., concurring in the judgment).

A. The *Rapanos* Plurality Sought To Narrow the Scope of the Clean Water Act

In *Rapanos*, the Court addressed whether EPA and the Corps had exceeded their jurisdiction under the CWA in attempting to regulate intermittent, ephemeral tributaries and their adjacent wetlands. *See Rapanos*, 547 U.S. at 757 (plurality op.); *id.* at 780-82 (Kennedy, J., concurring in the judgment).

Specifically, the Court in *Rapanos* was tasked with determining whether certain wetlands and their adjacent tributaries were regulable "waters of the United States." *Rapanos*, 547 U.S. 730-31. When drafting the CWA, Congress gave the EPA and Corps jurisdiction over traditional navigable waters. Over time however, the agencies expanded their jurisdiction to include waters that are not traditionally navigable. At the time of *Rapanos*, the agencies had expanded their scope of jurisdiction to include an expansive variety of surface waters and wetlands, including intermittent and ephemeral waters. *Id.* at 733. Therefore, the Court had to decide how far the CWA extended beyond traditionally navigable waters.

Justice Scalia, writing for the plurality, posited that only wetlands that actually abutted traditional navigable waterways could be regulated under the CWA. Additionally, he determined that "'the waters of

the United States' include only relatively permanent, standing or flowing bodies of water." *Id.* at 732. Most importantly, the plurality expressly rejected the notion that navigable waters could include stretches of intrastate land. *Id.* at 733-34 ("The plain language of the statute simply does not authorize this 'Land Is Waters' approach . . . ."). Thus, the *Rapanos* plurality decision ultimately narrowed agency jurisdiction over waters under the Act. *See id.* at 729-32.

B. The Lower Courts' Conclusion That the *Rapanos* Plurality Supports Clean Water Act Regulation of Groundwater Misconstrues That Opinion

The dissenting and concurring opinions in *Rapanos*, challenging the plurality opinion, argued that a narrow interpretation would result in a significant reduction of the Act's control of surface water pollution. *See Rapanos*, 547 U.S. at 769-70 (Kennedy, J., concurring in the judgment); *id.* at 800 (Stevens, J., dissenting). The plurality's opinion addressed these concerns by showing that liability could still attach to a pollutant discharge that had to pass through several point sources. *Id.* at 742-45. The Fourth and Ninth Circuits used the plurality's argument to support the inclusion of groundwater under the CWA. But despite the lower courts' interpretations, at no point did the plurality say that liability could still attach even in the absence of a continuous chain of point sources. *See id.*

In *County of Maui*, the Ninth Circuit decision, the court interpreted the *Rapanos* plurality to allow liability to attach under the CWA when pollution is discharged into groundwater that eventually conveys

the pollution to the ocean. *See* Pet. App. 21-25. The petitioner contended that pollutants must travel via a confined and discrete conveyance to navigable waters for CWA liability to attach. *Id.* at 21. The Ninth Circuit rejected this argument, holding that a person need not directly add a pollutant to a navigable water or point source to be held liable. *Id.* at 24. Instead, the court found that any discharge into groundwater that then conveys the pollution to navigable water is enough. *Id.* The court never determined whether the groundwater through which the pollutants travelled was a point source, only that it had the means to convey pollutants from a point source to a navigable water. *See id.* 21-25.

In *Kinder Morgan*, the Fourth Circuit decision, the court reached a similar conclusion. *See Kinder Morgan*, 887 F.3d at 649-51. The court interpreted the *Rapanos* plurality to allow liability to attach when a person discharges pollutants into the ground, which eventually make their way to a regulated tributary. *Id.* at 649-51. The court found that the CWA only requires that the pollutant just come *from* a point source and that, under the *Rapanos* plurality, it does not need to be directly discharged from a point source into a navigable water. *Id.* at 650. Again, the court did not determine that the groundwater was a point source, but rather that it had the means to transport pollutants from a point source to a navigable water. *See id.* at 649-51.

Both of the lower courts misconstrue the *Rapanos* plurality decision. The *Rapanos* plurality suggested that liability may attach to discharges that "naturally" but not "directly" reach regulated waters.

Rapanos, 547 U.S. at 742-44. This language, used in context, was written to justify the narrowing of the definition of "waters of the United States" by demonstrating that protections for surface waters would remain in place. Because certain no-longer-navigable-waters under the plurality's definition could still qualify as point sources, the Court reasoned that few pollution discharges would escape regulation under its reading. *Id.* But this reading was not an attempt to expand the scope of the Act, which is exactly what the lower courts' use of the argument achieves. *See Kentucky Waterways Alliance v. Kentucky Utils. Co.*, No. 18-5115, 2018 WL 4559315, at *8 (6th Cir. Sept. 24, 2018).

As the plurality explained, prior lower court decisions had affirmed liability for pollutant discharges "even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Rapanos*, 547 U.S. at 743. Indeed, as the plurality's ensuing discussion and citations make clear, the question being entertained was whether liability could still attach to a pollutant discharge that had to pass through several point sources, *not* whether liability could still attach even in the absence of a continuous chain of point sources.

The first case the plurality cited was *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976). *Velsicol* involved a discharge of pollutants into a sewer system that directly connected to the Mississippi River. The defendant argued that, because it did not own the sewer system, it could not be held liable for

discharging pollutants into a navigable water. *Id.* The court found that because the sewer system was a point source that conveyed the pollution to a navigable water, the defendant was liable under the Act. *Id.*

In the second cited case, *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137 (10th Cir. 2005), the court held a gold mine responsible for discharging pollutants into a navigable water. During the springtime, snowmelt washed zinc and manganese down a six-mile tunnel that eventually drained into Cripple Creek and then the Arkansas River. *Id.* The court found that the tunnel was a point source that conveyed the pollution to a navigable water and, thus, that the mine was liable. *Id.*

The *Rapanos* plurality explained that these types of violations were likely point source discharges into other point sources stating, "many courts have held that such upstream, intermittently flowing channels themselves constitute 'point sources' under the Act." *Rapanos*, 547 U.S. at 743. Thus, the plurality was entertaining a point-source-to-point-source-to-regulated-water theory of liability. *See id.* There is a significant difference between this theory and that adopted by the lower courts here.

One problem with the lower courts' use of the *Rapanos* plurality is that groundwater is not a point source. *See* 33 U.S.C. § 1362(14); *Kentucky Waterways*, 2018 WL 4559315, at *6. *See also* Allison L. Kvien, Note, *Is Groundwater That is Hydrologically Connected to Navigable Waters Covered under the CWA?: Three Theories of Coverage & Alternative Remedies for Groundwater Pollution*, 16 Minn. J.L. Sci. & Tech. 957, 986 (2015) ("Contrasting even the

most 'confined and discrete' groundwater with traditional point sources such as pipes makes the contention that groundwater can be a point source look like a rather weak one."). But the bigger problem is that the Fourth and Ninth Circuits' interpretation misses the forest for the trees. The whole point of the *Rapanos* plurality was to prevent the continued and unjustified expansion of the CWA. *See Rapanos*, 547 U.S. at 729-32. Yet that is exactly what the lower courts' employment of the *Rapanos* plurality achieves. Certiorari should be granted to keep the lower courts faithful to the CWA's authentic and relatively modest scope, as outlined in the *Rapanos* plurality.

II.

Certiorari Should Be Granted To Check the Lower Courts' Expansion of the Clean Water Act's Already Overbroad Scope and Thereby Protect the Property and Due Process Rights of Landowners Throughout the Country

The Fourth and Ninth Circuits' expansion of the CWA to reach at least some forms of groundwater pollution substantially worsens, in two key and related ways, the already burdensome regime that the statute imposes on landowners. First, that expansion makes it all the more difficult for landowners to determine whether their normal land-use activities are covered by the Act. Second, it thereby increases substantially the permitting burden, and potential legal liability, for landowners throughout the country, while perversely impeding sound environmental policy.

As to the first point, the significance of the lower courts' enlargement of the CWA is best understood by underscoring just how bad the status quo is without that enlargement. Well before the Fourth and Ninth Circuits' decisions, this Court noted the dramatic administrative expansion of the Act and the commensurate challenge for property owners in ascertaining whether their normal land-use activities are regulated under the Act. *See Rapanos*, 547 U.S. at 722 (plurality op.) ("[An] immense expansion of federal regulation of land use . . . has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations."); *Sackett*, 566 U.S. at 132 (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified . . . as wetlands covered by the Act . . . ."). *Cf. Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 624 (referring to the Clean Water Act's implementing regulations as "a complex administrative scheme"). The Fourth and Ninth Circuits' decisions substantially exacerbate these concerns.

Nearly all groundwater is hydrologically connected to surface water. *See* James W. Hayman, *Regulating Point-Source Discharges to Groundwater Hydrologically Connected to Navigable Waters: An Unresolved Question of Environmental Protection Agency Authority Under the Clean Water Act*, 5 Barry L. Rev. 95, 122-24 (Spring 2005). Whether a pollutant can be tracked back to a discrete source will all depend upon the existence of a hydrological connection, the directness of the connection, the nature of the ground, the distance and flow path, the time spent

underground, and the transformation of the pollutants during this time. *Id.* And some pollutants, particularly those generated by livestock, are not necessarily unique to one definable source. *Id.* As such, any discharge to groundwater could be subject to liability. Perhaps a well-funded government entity or large corporation could "reasonably be expected to hire the army of hydrologists, engineers, and lawyers to determine its liability in this complex situation, but what's an ordinary property owner who lives dozens of miles from the nearest navigable water to do?" Jonathan Wood, PERC, *Environmental Markets Work Better than Indecipherable Regulations*, Apr. 2, 2018, https://www.perc.org/2018/04/02/if-the-goal-is-to-guide-human-action-environmental-markets-work-better-than-indecipherable-regulations/.

Proposed limitations on liability—such as the requirement of more than a *de minimis* discharge, or a "direct" groundwater connection—do little to solve the regulatory problems associated with groundwater conveyance liability. These limitations have no statutory warrant, have never been defined, and cannot be easily administered. And no reported case has ever relied upon a *de minimis* determination to deny liability. *See* Pet. App. 25 ("We leave for another day the task of determining when, *if ever*, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.") (emphasis added). Thus, landowners are still

left with no notice of whether their groundwater discharges[3] are subject to liability.

Second, expanding CWA regulation to any form of groundwater threatens to impose significant new regulatory burdens and liability. Permitting costs under the CWA can be staggering. *Rapanos*, 547 U.S. at 721 (plurality op.); *Hawkes Co.*, 136 S. Ct. at 1812 (majority op.). Equally "crushing" is the liability that the Act imposes for unpermitted discharges. *Hawkes Co.*, 136 S. Ct. at 1816 (Kennedy, J., concurring). *Accord Sackett*, 566 U.S. at 132 (Alito, J., concurring).

Perhaps ironically, the lower courts' unwarranted expansion of CWA liability will likely retard, not accelerate, the cleanup of groundwater pollution. Keeping groundwater regulation out of the CWA could help to incentivize those in the environmental community to fill the groundwater pollution information gap and then encourage, through free-market practices, unwitting polluting property

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[3] Pollution discharges into groundwater can happen in a variety of ways. Chemical storage tanks, septic systems, hazardous waste sites, fertilizing crops or lawns, landfills, road salts, and atmospheric contaminants are all ways in which pollution can enter groundwater. *See* Groundwater Foundation, *Groundwater Contamination*, http://www.groundwater.org/get-informed/groundwater/contamination.html (last visited Sept. 24, 2018). While not the only landowners facing liability, farmers likely face the biggest risk of being prosecuted for groundwater contamination due to regular farming practices, like fertilizing crops, because fertilizers have the ability to soak into the ground and, thus, groundwater. Traditionally the agencies have deemed these types of discharges nonpoint source discharges. *See* EPA, Basic Information about Nonpoint Source Pollution, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (last visited Sept. 24, 2018).

owners to alter their land-use practices. Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 Duke Envtl. L. & Pol'y F. 253, 278-80 (2013) (contending that "environmental protection efforts would benefit from greater decentralization" because (i) "most environmental problems are local or regional in nature," (ii) it "creates the opportunity for greater innovation in environmental policy," and (iii) the federal government could then focus "on those environmental concerns where a federal role is easiest to justify, such as in supporting scientific research and addressing interstate spillovers").

In fact, a significant body of scholarship supports the general policy presumption that the environment would do better by less, not more, federal regulation. *See* Jonathan H. Adler & Andrew P. Morriss, *Symposium: Common Law Environmental Protection—Introduction*, 58 Case W. Res. L. Rev. 575, 576 (2008); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 Geo. Mason L. Rev. 923, 925 (1999) ("[M]ost federal pollution control efforts are fundamentally misguided. The common law, combined with various state-level controls, was doing a better job addressing most environmental problems than the federal monopoly, which directed most environmental policy for the last part of this century. America's move down the track of central environmental planning is incompatible with . . . environmental protection itself."); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1556 (2007) ("The common law system's independence and private incentives to challenge the

status quo are particularly valuable antidotes to complacency and ineffective regulation.").

Additionally, environmental regulation that is designed to avoid environmental harm before it occurs, rather than to mitigate harm after it happens, is easier and cheaper to implement. Wood, *Environmental Markets Work Better*, *supra*. Regulating groundwater under the CWA will inevitably result in more after-the-fact harms—and thus more inefficient enforcement—because most landowners will not be in the position to know whether they are violating the Act with groundwater discharges. Hence, the costs of regulating groundwater under the CWA likely outweigh any benefit to the environment.

* * * * *

Over the last dozen years, this Court has repeatedly agreed to review decisions of the courts of appeals that unjustifiably expand the CWA's reach or otherwise increase the burdens and liabilities on property owners engaged in run-of-the-mill land-use activities. The decisions of the Fourth and Ninth Circuits, stretching the CWA to regulate groundwater pollution, unfortunately reflect a continuing tin ear in the lower courts to this Court's repeated calls for a balanced approach to the CWA's interpretation and administration. Thus, just as with the lower courts' decisions in *Rapanos*, *Sackett*, *Hawkes Co.*, and *National Association of Manufacturers*, the rulings of the Fourth and Ninth Circuits should be reviewed in this Court.

Conclusion

The petition for certiorari should be granted.

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Respectfully submitted,

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