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

REPLY BRIEF FOR PETITIONERS

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November 6, 2018

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REPLY BRIEF

The need for certiorari in this case has only increased since the petition was filed. Weeks after petitioners sought certiorari, the Sixth Circuit confirmed the existence of a clear circuit split on the first question presented and deepened it, expressly and unambiguously "disagree[ing]" with the Fourth and Ninth Circuits on whether the CWA covers discharges into groundwater that eventually percolate into navigable waters. *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 933 (6th Cir. 2018); *see Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 438 (6th Cir. 2018). Respondents thus cannot deny the square conflict in the lower courts on this question. Nor do they identify any valid reason why this case would not be an ideal vehicle for resolving the issue. Instead, they dedicate considerable effort to attempting to defend the decision below on the merits. Those efforts not only are premature, but come up far short, as the Fourth Circuit's decision departs radically from the statutory scheme and from the careful federal-state balance Congress adopted.

The same goes for the second question presented. By redefining an "ongoing violation" of the CWA to include cases (like this one) where the discharge from the point source ended years ago, the decision below directly conflicts with *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), and numerous cases faithfully following that precedent. Once again, respondents identify no reason why this case would not be an ideal vehicle to resolve the lower-court division on this issue, and they utterly fail to justify the Fourth Circuit's mistaken approach.

Both questions presented are exceptionally important. As numerous *amici* describe, the decision below creates widespread regulatory uncertainty, and dramatically increases the already-substantial burdens imposed by the CWA on regulated parties. The Court should grant the petition.

I. This Court Should Resolve The Circuit Split Over Whether The Clean Water Act Applies To Discharges Into Soil Or Groundwater.

Unable to deny the clear conflict between the decision below and the Sixth Circuit's recent decisions, respondents attempt to minimize the scope of the conflict in the lower courts, and assert the decision below is correct. They are wrong on both counts.

A. There Is A Clear Circuit Split.

As respondents concede, the Sixth Circuit has now confirmed and deepened the clear circuit split over whether the CWA applies to a discharge into groundwater that eventually percolates via a "direct hydrological connection" into navigable water. *See* BIO.2-3, 17. In two recent decisions, the Sixth Circuit expressly "disagree[d] with the decisions from [its] sister circuits" in this case and the Ninth Circuit's *Hawai'i Wildlife Fund* case, rejecting "the so-called 'hydrological connection' theory" and holding that "the CWA does not extend its reach to this form of pollution." *Ky. Waterways*, 905 F.3d at 932-33; *see Tenn. Clean Water*, 905 F.3d at 438 (finding "no

support for this theory in either the text or the history of the CWA").[1]

Despite acknowledging this undeniable split, respondents try to minimize its scope. Their efforts are in vain. First, respondents are wrong to suggest the decision below does not apply the CWA to "discharges of pollutants into groundwater." BIO.1-2; *see* BIO.25-26. To be sure, the decision purported to limit its holding to only *some* discharges into groundwater—those that eventually reach navigable waters through a "direct hydrological connection." App.26. But as the Sixth Circuit explained, applying the CWA to *any* discharges into groundwater violates the statutory text and disrupts the federal-state balance. *Ky. Waterways*, 905 F.3d at 934-37. Moreover, the limitation respondents trumpet is no limitation at all. Practically all groundwater has some "hydrological connection" to nearby navigable waters, and it is impossible for anyone to predict whether a court will someday consider that connection "direct" enough to trigger the CWA. *See* Pet.28-29, 34-35. Indeed, respondents do not even attempt to give any content to "direct," instead insisting that all that really matters is whether "the pollutants being added to surface waters are from the defendant's point source." BIO.24.

Respondents are equally wrong to suggest that the Sixth Circuit, rather than the Fourth or Ninth Circuit, is the outlier. When this case began, the circuit courts had uniformly held that a discharge into

[1] Respondents note that "petitions for rehearing are pending in both cases," BIO.2, but fail to mention that only one petition (in *Tennessee Clean Water*) challenges the relevant holding.

soil and groundwater is outside the CWA—whether or not that discharge later percolates into navigable waters. Pet.16-18; App.68; *see Rice v. Harken Expl. Co.*, 250 F.3d 264 (5th Cir. 2001), *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994). Respondents' efforts to deny this consensus are unavailing.

First, respondents are wrong to claim *Rice* and *Oconomowoc Lake* "merely held that groundwater itself is not a water of the United States." BIO.14. On the contrary, both cases addressed discharges that "seeped through the ground into groundwater which has, in turn, contaminated … surface water." *Rice*, 250 F.3d at 270; *see Oconomowoc Lake*, 24 F.3d at 965 (addressing "possibility that [discharges] will enter the local ground waters, and thence … 'waters of the United States'"). And they rejected the precise theory the Fourth Circuit adopted here, holding that the CWA does *not* "assert[] authority over" any groundwater that "may be hydrologically connected with surface waters." *Oconomowoc Lake*, 24 F.3d at 965; *see Rice*, 250 F.3d at 270-72; Pet.16-18.

Nor does the decision below accord with the other federal appellate decisions cited in the petition, which make clear the CWA does not cover any and all discharges (through groundwater or otherwise) that eventually percolate into navigable waters. *See, e.g.*, *Simsbury-Avon Pres. Soc'y v. Metacon Gun Club, Inc.*, 575 F.3d 199, 223-24 (2d Cir. 2009); *Sierra Club v. El*

Paso Gold Mines, Inc., 421 F.3d 1133, 1141 & n.4 (10th Cir. 2005).[2]

Second, and conversely, respondents are wrong to claim a "consensus" of earlier circuit-court decisions supporting the Fourth and Ninth Circuits. Unlike *Rice* and *Oconomowoc Lake*, none of those cases actually decided whether the CWA applies to isolated discharges into groundwater that eventually seep into navigable waters. *See Waterkeeper All. v. EPA*, 399 F.3d 486, 513-15 (2d Cir. 2005) (upholding EPA decision to impose limited groundwater monitoring and discharge-control restrictions against challenge by environmental groups seeking *greater* restrictions); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (upholding limitations on discharges into wells "in conjunction with" limitations on discharges into surface waters); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129-30 (10th Cir. 1985) (pre-*Rapanos* holding that dry arroyos in which "surface flow occasionally occurs, at times of heavy rainfall," were "navigable waters"). At any rate, even if those cases *could* be read to support the decision below, that would only deepen the split and underscore the need for this Court's intervention.[3]

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[2] Respondents concede the district courts are divided on this question, *see* BIO.16-17, but they are wrong to suggest that only four have rejected their theory. *See also*, *e.g.*, *Chesapeake Bay Found. v. Severstal Sparrows Point*, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011); *Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods*, 962 F. Supp. 1312, 1320 (D. Ore. 1997); *Kelley v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985).

[3] So too for respondents' other "indirect discharge" cases. *See* BIO.11-12. Those cases involved pollutants carried to navigable waters by air or surface water, not discharges into groundwater

B. The Decision Below Is Wrong And Completely Unworkable.

Respondents' efforts to defend the decision below on the merits are both premature and unavailing. The CWA's text, structure, and history overwhelmingly establish that the statute does not apply to discharges to soil or groundwater, regardless of any "direct hydrological connection" to nearby navigable waters. Pet.20-29.

Like the Fourth Circuit, respondents primarily argue that the CWA can be stretched to reach discharges into groundwater that then migrate into navigable waters. BIO.18; *see* App.19-20. It cannot. As the Sixth Circuit explained, the statutory text "forecloses the hydrological connection theory." *Ky. Waterways*, 905 F.3d at 934. By its plain terms, the statute "addresses only pollutants that are added '*to* navigable waters *from* any point source.'" *Id.* (quoting 33 U.S.C. §1362(12)). That excludes pollutants "coming from groundwater, which is a nonpoint-source conveyance"—whatever "hydrological connection" it may have to nearby navigable waters. *Id.*; *see* Pet.20-21. The "direct hydrological connection" test, by contrast, has no textual basis whatsoever—as even the Ninth Circuit recognized in rejecting it. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 n.3 (9th Cir. 2018). Nor is there any textual support whatsoever for a test that turns on whether the

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or soil, which are distinctly the subject of state regulation. But to the extent they provide any support for the decision below, they only deepen the conflict.

"distance" between the point source and the navigable waters is sufficiently "short." BIO.9; App.25.

Respondents also have no persuasive answer to the legislative history showing that Congress specifically designed the CWA to "[leave] the regulation of groundwater to the States" and rejected efforts to extend federal regulation to groundwater in order to better regulate navigable waters. *Rice*, 250 F.3d at 271-72. Reading the statute to reach discharges into any groundwater with a direct hydrological connection to navigable waters would eviscerate Congress' judgment and eliminate that federalism-preserving line between federal and state water regulation. Pet.5-6, 22-24.

Respondents' effort to divine support from Justice Scalia's *Rapanos* opinion is unavailing. *See Ky. Waterways*, 905 F.3d at 935-36 (noting that "proponents of the hydrological connection theory" have taken *Rapanos* "out of context in an effort to expand the scope of the CWA well beyond what the *Rapanos* Court envisioned."). Indeed, respondents do not even mention the actual *holding* of *Rapanos*—which *reversed* the Sixth Circuit for extending the CWA to all wetlands with "hydrological connections" to nearby navigable waters. *Rapanos v. United States*, 547 U.S. 715, 730-31, 757 (2006) (plurality opinion); *id.* at 784 (Kennedy, J., concurring in the judgment); Pet.26-28. The *Rapanos* plurality observed that the CWA may reach point-source discharges that "do not emit 'directly into' covered waters, but pass 'through conveyances'"—*i.e.*, one or more point sources before reaching navigable waters. 547 U.S. at 743; *see* 33 U.S.C. §1362(14) ("point source" means a "discernible,

confined and discrete conveyance"). But that is a far cry from expanding the CWA to discharges to groundwater, which is not a point source and which Congress intentionally excluded from the statute. Pet.26-28.

The atextual standard adopted below is also wholly unworkable. Indeed, the Fourth and Ninth Circuits cannot even agree on what atextual standard applies. *See* Pet.19 & n.3; *Hawai'i Wildlife Fund*, 886 F.3d at 749 n.3 (rejecting "direct hydrological connection" in favor of "fairly traceable" standard). And neither standard provides any reliable guidance to regulated parties. *See* Pet.34-35; Br. of Amici Curiae Chamber of Commerce *et al.* ("Chamber Br.") 11-13. To the contrary, "[r]eading the CWA to cover groundwater pollution like that at issue in this case would upend the existing regulatory framework." *Ky. Waterways*, 905 F.3d at 937. The CWA leaves groundwater pollution to the States and other federal environmental laws. *Id.* at 936-37; Pet.28. Stretching the CWA permitting scheme to regulate discharges percolating through groundwater into navigable waters not only interferes with those existing regulatory schemes, but presents severe practical problems, as NPDES effluent-limitation permits do not readily apply to pollutants traveling via diffuse groundwater migration. Pet.28-29. Given that the CWA is ill-equipped to address such discharges, and that other comprehensive state and federal programs already address groundwater pollution, the decision below is an unworkable solution to a nonexistent problem.

Respondents insist that their interpretation is workable because, they claim, several circuits have long applied their view. BIO.28-32. As explained, they misread those decisions. *See supra* p.5. The reality is that interpreting the CWA to require NPDES permits for *all* discharges into groundwater with a "direct hydrological connection" to navigable waters is a brave new world that raises all manner of practical problems and threatens to increase the number of required permits exponentially. *See* Br. of Amici Curiae West Virginia *et al.* ("States' Br.") 11-16; Chamber Br.11-14.

Finally, the current EPA rulemaking does not diminish the need for this Court's review. EPA has taken no public action since the comment period ended in May, and it is unlikely that any action it takes will resolve the issue—especially when the Sixth Circuit on one side, and the Fourth and Ninth Circuits on the other, have each concluded their tests are compelled by the statutory text. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (agency cannot vary from judicial interpretation that "follows from the unambiguous terms of the statute"). Indeed, respondents themselves insist that the statutory text is clear. At best, then, waiting for an EPA rulemaking that may never come would mean more years of circuit conflict, followed by certiorari on the same issue with additional *Chevron*/*Brand X* questions. That course has nothing to recommend it.

II. This Court Should Resolve The Circuit Split Over Whether A Long-Ago-Ceased Discharge Can Constitute An "Ongoing Violation" Of The CWA.

Review is equally warranted on the second question presented. Respondents argue that the decision below implicates no conflict and is correct on the merits. They are wrong on both counts.[4]

First, respondents are mistaken to deny a circuit split. Despite acknowledging the different facts, the Fourth Circuit did not settle for factual distinctions but specifically "decline[d] to adopt the Fifth Circuit's approach." App.17-18 & n.9; *see Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985) (holding that "a past discharge … with continuing negative effects" is not an ongoing violation).

Respondents assert that *Hamker* dealt only with allegations that a past pipeline leak left contamination in the soil and groundwater, without also alleging that pollution was carried via groundwater to the nearby creek. BIO.36. But nothing in *Hamker* suggests that it turned on the absence of an easily-added allegation that polluted groundwater was seeping into the nearby creek; instead, it turned on the fact that there was "only one 'discharge' … from the defendant's pipe," and that

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[4] Respondents suggest in passing that this question is jurisdictional, but it is not jurisdictional in the strict sense of the term, and neither court below treated it as such. In all events, it would hardly make sense to deny certiorari to allow the lower courts to continue to impermissibly adjudicate a dispute over a long-ceased discharge.

discharge ended when the pipe was repaired. 756 F.2d at 397. The decision below cannot be reconciled with that reasoning, or with the numerous other cases holding that a past discharge is not a continuing violation. *See, e.g.*, *Day, LLC v. Plantation Pipe Line Co.*, 315 F. Supp. 3d 1219, 1236-41 (N.D. Ala. 2018) (recognizing division of authority and specifically disagreeing with decision below); Pet.33.

Nor can it be reconciled with *Gwaltney*. As *Gwaltney* explained, the CWA authorizes citizen suits to remedy ongoing CWA violations, not those that are "wholly past." 484 U.S. at 64; *see* Pet.30-32. Faced with that clear limitation, respondents (like the Fourth Circuit) argue that the purported violation here remains "ongoing" because the groundwater continues to carry contamination into nearby navigable waters. BIO.33-35. But that runs head-on into the text of the CWA, which regulates only discharges to navigable waters "*from any point source*." 33 U.S.C. §1362(12) (emphasis added). It is undisputed that groundwater is not a point source—and so by definition, the migration of pollution through groundwater into navigable water cannot be a CWA violation at all, let alone an "ongoing violation." Respondents' insistence otherwise is a product of their profoundly mistaken view that the CWA is concerned only with whether pollutants are finding their way into navigable waters, not with how they get there.

Respondents' interpretation is equally incompatible with the concerns motivating *Gwaltney*. Indeed, this case is a prime example of how allowing citizen suits based on wholly past discharges would

"undermine the supplementary role envisioned for the citizen suit" and "change the nature of the citizens' role from interstitial to potentially intrusive." 484 U.S. at 57, 60-61. The South Carolina Department of Health and Environmental Control is already supervising extensive remediation efforts to address residual contamination from the spill. Pet.9-10. Respondents are clearly dissatisfied with those state-supervised efforts, but the CWA does not authorize them to sue in federal court to seek their own preferred remediation plan when the only point source ceased any discharge years ago.

III. The Questions Presented Are Exceptionally Important.

As explained in the petition, and emphasized by numerous *amici*, the questions presented are exceptionally important. Pet.34-36. Indeed, respondents make no attempt to deny the importance of the first question presented. Left unreviewed, the decision below would expand the NPDES permitting program exponentially, with corresponding burdens on States that operate their own NPDES programs and on regulated businesses and individuals. *See, e.g.*, States' Br.11-16; Chamber Br.11-14; Br. of Amicus Curiae Am. Petroleum Inst. *et al*. 14-20; Br. of Amicus Curiae Pac. Legal Found. 10-13. And it would impose an indefinite standard that would make it nearly impossible to determine in advance whether a given discharge into groundwater has a sufficient "direct hydrological connection" to navigable waters to require a permit. Instead of the "clarity and predictability" that regulators and regulated parties need, *see Sackett v. EPA*, 566 U.S. 120, 133 (2012)

(Alito, J., concurring), the decision below sows only boundless confusion.

The panel majority's second holding compounds the confusion and raises the stakes by opening the door to private citizen suits (with attorney fees) whenever any lingering contamination is still making its way into navigable waters, even if the point source stopped discharging any pollutants years earlier. Nothing about that holding is fact-bound or of limited importance. On the contrary, it presents a pure legal question that has massive importance to anyone who has ever, whether intentionally or inadvertently, discharged pollutants anywhere near a stream.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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