No. 18-593

In the Supreme Court of the United States

STARLINK LOGISTICS, INC.,
Petitioner,

v.

ACC, LLC; TENNESSEE SOLID WASTE DISPOSAL CONTROL BOARD,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Tennessee, Middle Division

BRIEF IN OPPOSITION

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QUESTION PRESENTED BY THE PETITION

Whether a consent order between the State of Tennessee and a private party requiring the private party to remediate pollution that violates Tennessee law is preempted by the Clean Water Act and the Supremacy Clause, U.S. Const. art. VI, cl. 2.

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STATEMENT

This case arises from a 2012 consent order between Respondents, the Tennessee Solid Waste Disposal Control Board (Board) and ACC, LLC, providing for cleanup and environmental remediation at ACC's closed industrial landfill in Maury County, Tennessee. After an administrative hearing in which Petitioner, Starlink Logistics Inc., participated, the Board approved the consent order over Petitioner's objections, and both the state chancery court and the Tennessee Court of Appeals affirmed that decision.

A. Statutory Background[1]

Three Tennessee statutes are relevant to the Board's decision to approve the consent order requiring remediation of ACC's landfill: (1) the Tennessee Water Quality Control Act of 1977, Tenn. Code Ann. §§ 69-3-101 to -148 (WQCA); (2) the post-closure standards of the Solid Waste Disposal Act, Tenn. Code Ann. §§ 68-211-101 to -124 (SWDA); and (3) the Hazardous Waste Management Act of 1983, Tenn. Code Ann. §§ 68-212-201 to -227 (HWMA).

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[1] The following acronyms are used in this brief:
CERCLA – Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675
CWA – Clean Water Act, 33 U.S.C. §§ 1251-1388
HWMA – Hazardous Waste Management Act of 1983, Tenn. Code Ann. §§ 68-212-201 to -227
NPDES – National Pollutant Discharge Elimination System
SWDA – Solid Waste Disposal Act, Tenn. Code Ann. §§ 68-211-101 to -124
WQCA – Water Quality Control Act of 1977, Tenn. Code Ann. §§ 69-3-101 to -148

The WQCA was enacted in part to allow Tennessee to participate in the National Pollutant Discharge Elimination System (NPDES) program established under the federal Clean Water Act (CWA). *See* Tenn. Code Ann. § 69-3-102(c). But the WQCA is also a comprehensive program for the protection, preservation, and regulation of all waters of the State, which are defined broadly to include waters that are not subject to federal jurisdiction. *See* Tenn. Code Ann. § 69-3-103(44).

The U.S. Environmental Protection Agency (EPA) granted Tennessee authority to administer its own NPDES permit program in 1977, after the WQCA was enacted. Pet. 4-5; Pet. App. 124a. EPA authorizes a State to issue such permits in its stead only if the state permitting program is at least equal to that under the federal CWA. *See* 33 U.S.C. § 1342(b). Under Tennessee's WQCA, the Commissioner "may grant permits authorizing the discharges or activities [prohibited by the statute]," such as the discharge of wastes into waters (i.e., issue an NPDES permit), but the statute expressly directs the Commissioner not to "issue a permit for an activity that would cause a condition of pollution either by itself or in combination with others." Tenn. Code Ann. § 69-3-108(g). Under 33 U.S.C. § 1342(c)(3), the EPA may determine that Tennessee is not administering its NPDES program in accordance with the CWA and withdraw federal approval, but it has never done so.

The WQCA prohibits the discharge of substances into waters of the State "unless such action has been properly authorized." Tenn. Code Ann. § 69-3-114(a). The HWMA authorizes the Commissioner of the

Tennessee Department of Environment and Conservation (TDEC) to enter into consent orders for the cleanup of closed landfill sites.[2] Tenn. Code Ann. § 68-212-224(a)(1). It also allows the Commissioner to issue orders to a "potentially liable party requiring such party to contain, clean up, monitor and maintain inactive hazardous substance sites," while taking into consideration the technological feasibility and cost-effectiveness of proposed actions. Tenn. Code Ann. § 68-212-206(a)(3) and (d)(1). Remediation and clean-up activities conducted on-site are exempt from state permit requirements. Tenn. Code Ann. § 68-212-222.[3] Both the HWMA and the WQCA include provisions that allow a party to file a final administrative order in state chancery court seeking entry as a judgment by consent. Tenn. Code Ann. §§ 68-212-114(e), 68-212-215(f), and § 69-3-115(e).

B. Factual and Procedural Background

In 1981, TDEC granted ACC permission to operate a landfill that was used for disposal of aluminum recycling wastes (primarily salt cake slag that contains high concentrations of soluble sodium chloride and potassium chloride). Pet. App. 2a. ACC continued to

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[2] The HWMA is Tennessee's Superfund statute and counterpart to the federal Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA). The federal and state Superfund programs operate separately, as there is no requirement under CERCLA for States to obtain federal authorization.

[3] CERCLA also excepts on-site remediation from federal permitting requirements. 42 U.S.C. § 9621(e).

dispose of wastes there until 1993, when a closure process began. *Id.*

A few years after the landfill began operation, TDEC and ACC observed that unacceptable levels of contaminants were leaching out of the landfill wastes into both groundwater and nearby surface waters, including Sugar Creek and Arrow Lake.[4] Pet. App. 3a. Over the years, as technologies evolved, efforts were made to correct the leachate-migration problem. TDEC and ACC undertook various hydrogeologic investigations and construction efforts, including a wetlands-restoration project to retain and buffer the leachate, and TDEC brought enforcement actions. None of these efforts succeeded. Pet. App. 3a, 5a.

In 2011, ACC filed a Consent Order in state chancery court pursuant to Tenn. Code Ann. §§ 68-212-114(e), 68-212-215(f), and 69-3-115(e) seeking judicial approval of an agreed remediation plan. Petitioner, which had acquired property adjacent to ACC's landfill some ten years earlier, intervened in the chancery-court proceeding and objected to the Consent Order. Pet. App. 6a. When the attempts of the three parties—TDEC, ACC, and Petitioner—to resolve the compliance and leachate-migration issues raised by Petitioner were unsuccessful, the chancery court remanded the matter to the Tennessee Solid Waste Disposal Control Board (Board) for a contested-case hearing in accordance with the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-101 to -325. *Id.*

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[4] Surface and ground waters at the landfill site drain westward into Sugar Creek and its Arrow Lake impoundment, which is located on the property now owned by Petitioner. Pet. App. 3a.

Before the matter was remanded to the Board, Petitioner filed an action against ACC in federal court in 2012 under the citizen suit provisions of the CWA and the federal Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6922, as well as under the cost-recovery provisions of CERCLA. Petitioner is actively pursuing its NPDES permitting claims in that federal forum. *See Starlink Logistics, Inc. v. ACC, LLC, et al.*, No. 1:12-cv-00011 (M.D. Tenn.).

TDEC and ACC presented the Board with an Amended and Restated Consent Order for its approval. This amended order contained new corrective-action items and proposed assessments designed to prevent the continued discharge of leachate contamination from the site. Pet. App. at 6a-7a. The remediation plan incorporated in the Amended Consent Order called for, among other things, the removal and relocation of all the waste from the current landfill to a new, lined landfill cell over a four-year period, and it required ACC to develop a plan to divert surface water away from the landfill area. Pet. App. 8a. It did not require ACC to apply for or obtain an NPDES permit for its leachate discharges, as Petitioner had insisted. Pet. App. 111a-112a.

In 2012, after an administrative hearing, the Board approved the Amended Consent Order, Pet. App. 10a, and Petitioner sought judicial review in the chancery court. Petitioner contended, among other things, that the Board's decision was contrary to law because it did not require ACC to apply for an NPDES permit, in violation of "clear mandates" of the WQCA. Pet. App. 90a.

The chancery court affirmed the Board's approval of the Amended Consent Order. Pet. App. 78a-98a. Finding that the WQCA did not require the TDEC Commissioner to issue permits "when directing a cleanup or removal action pursuant to HWMA," the chancery court rejected Petitioner's argument that "ACC must obtain a permit pursuant to Tenn. Code Ann. § 69-3-108 . . . to legitimize the discharge coming from its property." Pet. App. 90a-91a.

Petitioner appealed to the Tennessee Court of Appeals. That court initially reversed the Board's decision on a basis that had not been raised by the parties—that the Board failed to consider an alternative and potentially viable remedial option. Pet. App. 76a-77a; *see* Pet. App. 59a n.7.

But the Tennessee Supreme Court reversed that judgment. It held that the Court of Appeals had not given the Board's decision adequate deference and had "substituted its judgment for that of the Board." Pet. App. 49a. The Tennessee Supreme Court noted that "the Commissioner of TDEC had the authority to enter into a consent order with ACC to remediate the closed landfill site," Pet. App. 39a (citing provisions of the HWMA), and it held that the Board's decision to approve the 2012 Consent Order "was not arbitrary and capricious" and was "fully supported by substantial and material evidence," Pet. App. 43a. Accordingly, the Tennessee Supreme Court remanded the case to the Court of Appeals for consideration of the issues it had pretermitted. Pet. App. 49a and n.5.

Contrary to Petitioner's assertion, "the parties and the court below" did *not* "agree" that ACC "discharges highly toxic pollutants from point sources on its landfill

into the navigable waters of the United States." Pet. 2. In fact, Petitioner and ACC disputed both whether the leachate discharges at issue were from a "point source," as defined under the CWA, and whether ACC's corrective actions qualified as on-site remediation that CERCLA excepts from permitting requirements.

ACC contended that, under federal law, discharges from "nonpoint sources and certain stormwater discharges do not require NPDES permits" and that the discharges at issue were stormwater and groundwater—"neither of which has been deemed a point source of pollution." Superseding Br. of Appellee ACC, LLC, *Starlink Logistics, Inc. v. ACC, LLC*, 2016 WL 8286202, *20-21 (Tenn. Ct. App. Sept. 30, 2016). ACC further argued that the remediation required by the consent order was on-site remediation that is excepted from NPDES permit requirements under CERCLA, 42 U.S.C. § 9621(e). *Id.* at *22-24. Petitioner disagreed, arguing that the discharges at issue required an NPDES permit because they "exit ACC's property in a stream that runs through a pipe which is by definition a point source" and did not qualify as "on-site" discharges under CERCLA because they flowed offsite to Petitioner's property. Superseding Reply Br. of Appellant Starlink Logistics Inc., *Starlink Logistics, Inc. v. ACC, LLC*, 2016 WL 6610915, *10-11, 15 (Tenn. Ct. App. Oct. 21, 2016).

On remand, the Court of Appeals affirmed the chancery court's approval of the Amended Consent Order. Pet. App. 1a-20a. The Court of Appeals did not make any express findings or conclusions as to whether the discharges at issue were from "point sources" within the meaning of the CWA or whether ACC's

corrective actions constituted "on-site" remediation that CERCLA excepts from permitting requirements.

The Court of Appeals rejected Petitioner's arguments that, because the Amended Consent Order did not require ACC to obtain an NPDES permit, it was contrary to law and exceeded the authority of the TDEC Commissioner. The court noted that both arguments rested on Petitioner's view that TDEC was required to "follow the federal [CWA] and the federal precedent surrounding the statute." Pet. App. 14a. Because federal decisions interpreting a similar federal statute are not binding on state courts, the Court of Appeals found Petitioner's "reliance on the federal law and interpretations of the federal CWA . . . misguided." Pet. App. 15a. It evaluated the Amended Consent Order under state law—namely the WQCA, the HWMA, and the SWDA—and concluded that those statutes gave the TDEC Commissioner discretion in granting permits and prohibited the Commissioner from granting a permit that would cause pollution. Pet. App. 15a-16a, 18a. The Court of Appeals also rejected Petitioner's contention that the Amended Consent Order would allow ACC to discharge pollutants indefinitely, noting that "[t]he Amended Order does address the possibility for the remaining leachate to be treated once the cause of the pollution has been removed from the site, and it is more economically practical." Pet. App. 17a-18a.

In 2016, TDEC and ACC entered into a new consent order following completion of the final phase of waste removal from ACC's landfill under the 2012 Amended Consent Order. Under the 2016 Consent Order, "[t]he corrective action objective for surface water leaving the

ACC site is to meet the Tennessee Water Quality Criteria" promulgated under the WQCA. *See* https://www.tn.gov/environment/program-areas/rem-remediation/rem-ongoing-projects/acc-landfill.html.

REASONS FOR DENYING REVIEW

I. This Case Is a Poor Vehicle for Resolving the Question Presented.

Even if the preemption question presented were otherwise worthy of this Court's review, this Court should deny the petition because this case is an extraordinarily poor vehicle for resolving the issue.

First, the Court of Appeals did not decide the preemption question presented in the petition: whether "the state law that implements the CWA"—the Tennessee Water Quality Control Act (WQCA)—is preempted by the CWA and the Supremacy Clause. Pet. i, 2. Rather, all the Court of Appeals held is that the Board had authority under state law—the WQCA and HWMA—to approve the 2012 Amended Consent Order without requiring issuance of a discharge permit. Pet. App. 1a-20a.

Petitioner's characterization of this decision as an "inverse-preemption ruling," Pet. 23, is therefore inaccurate. The court did *not* hold "that a state law intended to implement the CWA preempts the requirements of the CWA itself," Pet. 13, nor did it hold "that state law governing clean-water standards *trumps* federal law governing the same," Pet. 17 (emphasis in original). The Court of Appeals simply interpreted the relevant state statutes and held that, under those statutes, the consent order was valid. The Court of Appeals' focus on state law is understandable,

given that the EPA granted Tennessee NPDES permitting authority in 1977 based on Tennessee's adoption of the WQCA. And especially given the dispute between Petitioner and ACC as to whether federal law even required ACC to obtain an NPDES permit, the Court of Appeals' opinion cannot be read in the extreme manner Petitioner presses.

Second, even if Petitioner's characterization of the Court of Appeals' opinion were correct, the decision below can and will have none of the dire consequences the petition predicts because the Tennessee Supreme Court designated the Court of Appeals' opinion "Not for Citation" when it denied review. Pet. App. 22a. An opinion so designated "has no precedential value." Tenn. Sup. Ct. R. 4(E)(1). It "shall not be published in any official reporter nor cited by any judge in any trial or appellate court decision, or by any litigant in any brief, or other material presented to any court." Tenn. Sup. Ct. R. 4(E)(2).

Thus, contrary to Petitioner's assertions, this Court's intervention is not needed "to bring Tennessee back into line with federal law," Pet. 21, or "to restore federal supremacy principles to Tennessee's water-quality laws," Pet. 20. If left undisturbed, the Court of Appeals' decision—upholding the adoption of the consent order in this case—will have no impact beyond this case. It will not "seriously undermine Congress' goal of enforcing comprehensive nation-wide water-quality standards," Pet. 21, and it will have no "adverse consequences for businesses [operating in Tennessee]." Pet. 23.

Nor could the decision have such far-reaching consequences, even if it had not been designated as "Not for Citation." As Petitioner's own litigation strategy makes clear, there are other avenues for enforcement of federal law. As explained above, *supra* p. 5, Petitioner also filed a citizen-suit action under the CWA against ACC in federal court and raised its NPDES permitting arguments there. Such actions can only be brought after formal notice is first given to the EPA Administrator, who may intervene as of right. 33 U.S.C. §§ 1365(b) and (c).

Third, because neither the chancery court nor the Court of Appeals expressly resolved the dispute between Petitioner and ACC regarding whether ACC's pollution constituted a point source discharge within the meaning of the CWA or whether ACC's corrective actions qualified as on-site remediation under CERCLA, this Court would need to address those questions in the first instance before reaching the question presented. But doing so would be inconsistent with this Court's role as a "court of final review and not first view." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015). Moreover, if this Court were to resolve those predicate questions adversely to Petitioner and hold that federal law does not require ACC to obtain a permit, then there would be no need to resolve the question presented at all. If this Court wishes to review the question presented, it should await a vehicle in which the court below actually decided that question and in which there are no predicate factual or legal questions that could impede this Court's review.

Fourth, recent developments in the ongoing remediation of the landfill may render this case moot. The remediation plan under the 2012 Amended Consent Order entailed removal of the salt cake slag from the landfill over a designated period, minimizing or diverting the amount of storm water entering the landfill, and "a timeframe for subsequent reassessment of the actions needed once the source of the pollution has been removed." Pet. App. 17a.[5] This last requirement became the basis for TDEC and ACC to enter a new Consent Order in 2016, following completion of the final phase of waste removal from the landfill. Under the 2016 Consent Order, "[t]he corrective action objective for surface water leaving the ACC site is to meet the Tennessee Water Quality Criteria."[6] *See* https://www.tn.gov/environment/program-areas/rem-remediation/rem-ongoing-projects/acc-landfill.html. As part of this 2016 Consent Order, TDEC established a deadline of November 1, 2018, for ACC to meet Tennessee Water Quality Criteria. *Id.*

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[5] Contrary to Petitioner's assertion, the 2012 Amended Order did not authorize "an indefinite discharge of leachate without any oversight." Pet. App. 17a.

[6] The regulations encompassing Tennessee Water Quality Criteria are set out at Tenn. Comp. R. & Reg. 0400-40-03.-03. The 2016 Consent Order states that "[t]he corrective action objective for surface water is for surface water in (1) the unnamed tributary draining the ACC landfill property to Sugar Creek, and (2) Sugar Creek to not be impaired due to pollutants associated with the ACC landfill." https://www.tn.gov/environment/program-areas/rem-remediation/rem-ongoing-projects/acc-landfill.html.

The 2016 Consent Order mandates the very relief that Petitioner has been seeking in this case. It requires ACC to implement actions that prevent surface water and any remaining leachate leaving the ACC site from exceeding Tennessee Water Quality Criteria. This directive will likely require ACC either to treat the surface water (so that it meets state and federal effluent standards) or to pump and haul it all off-site. ACC was not required to take these actions under the 2012 Amended Consent Order. If compliance with the 2016 Consent Order is achieved, this case may become moot before this Court can decide the question presented.

II. There Is No Conflict of Authority on the Question Presented.

Even if the Court of Appeals had decided the question presented—and had done so in an opinion with precedential value that resolved all predicate factual and legal questions—review still would not be warranted because there is no conflict of authority on the question presented.

The federal cases Petitioner cites considered only compliance with federal law and did not address the preemption question presented in the petition. *See Hawai'i Wildlife Fund v. Cty. Of Maui*, 886 F.3d 737, 742 (9th Cir. 2018) (whether county violated CWA by discharging pollutants from wells into Pacific Ocean), *petition for cert. filed* (U.S. Aug. 27, 2018); *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 282 (6th Cir. 2015) (whether holder of general permit under CWA was liable for discharges of pollutant not specified in general permit); *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1294-99 (1st Cir. 1996) (whether Forest

Service violated CWA by failing to obtain permit before approving ski resort's expansion in national forest)[7]; *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 117-23 (2d Cir. 1994) (whether animal feeding lot was point source required to obtain permit under CWA); *United States v. Pozsgai*, 999 F.2d 719, 724-30 (3d Cir. 1993) (whether discharging fill material into wetlands violated CWA); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 369-70 (10th Cir. 1979) (whether mining activities were subject to CWA permitting requirements); *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977) (whether EPA Administrator had authority to make exemptions from CWA's permitting requirements).

The state cases Petitioner cites likewise are distinguishable. Those cases interpreted state law consistently with federal law and therefore had no need to consider whether the state law at issue was preempted. *See Columbus & Franklin Cnty. Metro. Park Dist. v. Shank*, 600 N.E.2d 1042, 1054-57 (Ohio

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[7] The plaintiff in *Dubois* also alleged that the defendant had violated state water quality standards, but the First Circuit did not reach the merits of that issue. 102 F.3d at 1299-1301. To the extent *Dubois* addressed the relationship between the CWA and state law, it held only that "[i]f a state seeks to approve a [water quality] standard that is less stringent than the federal CWA's floor, or seeks to apply a standard in a way that is otherwise invalid under *federal* law, then federal agencies and federal courts are obligated to resolve the application of the federal CWA in any case that properly comes before them." *Id.* at 1300. If anything, that holding counsels against review in this case because it confirms that a party alleging, as Petitioner does here, that a State has acted inconsistently with the CWA may press that argument in federal court.

1992) (interpreting Ohio's antidegradation rule to avoid conflicting with CWA); *Miotke v. City of Spokane*, 678 P.2d 803, 811-14 (Wash. 1984) (en banc) (interpreting Washington's water quality law consistently with CWA and concluding that city had violated state law); *City of Burbank v. State Water Resources Control Bd.*, 108 P.3d 862, 869-70 (Cal. 2005) (interpreting California's water quality law consistently with CWA).[8] And even if the state cases could be viewed as addressing preemption, they do not establish a conflict of authority because they arose under different statutory schemes, and none involved the validity of a consent order aimed at remediating pollution.

Both the federal cases and state cases, moreover, are distinguishable for an additional reason: they involved discharges that were either indisputably "point source" discharges or that the court had expressly determined to be "point source" discharges subject to the CWA. *See Hawai'i Wildlife Fund*, 886 F.3d at 744; *Sierra Club*, 781 F.3d at 290; *Dubois*, 102 F.3d at 1296; *Concerned Area Residents*, 34 F.3d at 118; *Pozsgai*, 999 F.2d at 727 n.6; *Earth Sciences*, 599 F.2d at 374; *Costle*, 568 F.2d at 1377[9]; *Shank*, 600

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[8] The California Supreme Court noted in dicta that it had to interpret state law consistently with the CWA "[t]o comport with principles of federal supremacy." *Burbank*, 108 P.3d at 870.

[9] *Costle* can no longer be relied on for the proposition that the CWA regulates all agricultural and storm-water runoff as point-source discharges. The CWA was amended in 1987, and courts have distinguished *Costle* on this basis. *See, e.g., Conservation Law Foundation v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 334-335 (D. Vt. 2004) (holding CWA, as amended, does not require NPDES permits to regulate certain storm-water discharges).

N.E.2d at 1055; *Miotke*, 678 P.2d at 814; *Burbank*, 108 P.3d at 866. Here, by contrast, there is a dispute concerning whether ACC's closed landfill meets the definition of a "point source" under the CWA.

In sum, even if the vehicle problems discussed above did not independently counsel against granting the petition, review still would not be warranted because there is no conflict of authority on the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

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