No. 18-593

IN THE

Supreme Court of the United States

STARLINK LOGISTICS, INC.,

Petitioner,

v.

ACC, LLC, AND TENNESSEE SOLID WASTE DISPOSAL CONTROL BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE COURT OF APPEALS

BRIEF IN OPPOSITION

PAUL DRUCKER
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
(317) 236-1313

SHARON O. JACOBS
BONE MCALLESTER NORTON PLLC
511 Union Street, Suite 1600
Nashville, Tennessee 37219
(615) 238-6300

BRUCE WHITE
Counsel of Record
LOUISE DYBLE
ASHLEY E. PARR
BARNES & THORNBURG LLP
One North Wacker Drive, Suite 4400
Chicago, Illinois 60606
(312) 357-1313
bruce.white@btlaw.com

JEFFREY LONGSWORTH
BARNES & THORNBURG LLP
1717 Pennsylvania Avenue NW, Suite 500
Washington, DC 20006
(202) 289-1313

Attorneys for Respondent ACC, LLC

286274

QUESTION PRESENTED

Whether this Court should review an unpublished decision by a state appellate court affirming the approval of a consent order issued by the Tennessee Solid Waste Disposal Control Board ordering the Respondent to conduct a complete and expeditious removal of waste from a properly permitted, closed landfill.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29(6), Respondent states that ACC, LLC is a privately-held corporation, with no public company holding 10% or more of its corporate stock.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Statutes and Other Authorities

Cited Authorities

INTRODUCTION

This is a case about Petitioner's belief that it has a better way of remediating pollution than the governing state regulatory experts, despite three state court decisions to the contrary. Petitioner's last-ditch strategy is to recast its failed arguments under the cloak of constitutional supremacy. But, the facts demonstrate that the Tennessee Department of Environment and Conservation ("TDEC"), through its Solid Waste Disposal Control Board ("Board"), made reasoned decisions within its regulatory expertise and federally-delegated authority regarding the best approach to address pollution migrating from a properly permitted, closed landfill owned by Respondent ACC, LLC ("ACC").

Through the Board, TDEC required ACC to physically remove all wastes previously buried in that landfill. TDEC directed ACC to implement this remedy pursuant to the authority delegated to TDEC pursuant to the Tennessee Water Quality Control Act of 1977, Tenn. Code Ann. §§ 69-3-101 to -148 ("WQCA"); post-closure standards of the Solid Waste Disposal Act, Tenn. Code Ann. §§ 68-211-101 to -124 ("SWDA"); and the Hazardous Waste Management Act, Tenn. Code Ann. §§ 68-212-201 to -227 ("HWMA"). For all practical purposes, after having exhausted its challenges in the Tennessee state court system, StarLink Logistics, Inc. ("StarLink") is asking this Court to second guess the State's exercise of its lawful authority and impose a layer of inapplicable federal permit requirements that will have no effect on the remedy. StarLink's collateral attack on the TDEC's federally-delegated authority to administer state environmental programs and discretion to pursue a reasonable and comprehensive remediation plan to

address problems associated with an old, leaking landfill must fail.

In asserting that ACC is "violat[ing] the CWA" ("Clean Water Act"), StarLink is misrepresenting and misapplying the facts of the case, state court holdings, and relevant federal law. In reality, the consent order adopted by the TDEC was properly affirmed by Tennessee courts at all levels, including the state's highest court, and comports with all relevant federal decisions.

Specifically, StarLink's petition for a writ of certiorari ("Petition") claims that ACC illegally "discharges pollutants from point sources" without a CWA-authorized National Pollutant Discharge Elimination System ("NPDES") permit. The landfill remediation effort does not mandate such a permit, however, and StarLink has never demonstrated that there are any unpermitted "point sources" on ACC's property. This is important because, without a point source, StarLink's claims fail no matter what theories it posits; NPDES permits are only ever required for point source discharges. In this case, pollutants migrated underground from the closed landfill through the adjacent aquifer, ultimately emerging downgradient as surface water. StarLink fails to recognize or address Sixth Circuit decisions holding that the diffuse migration of pollutants through groundwater is not subject to NPDES permitting.

StarLink's claims rest on the assertion that state laws adopted to implement federal statutes must be applied and interpreted in the same way that analogous federal laws are (or would be) applied and interpreted. In fact, TDEC is administering the state laws in this case—the WQCA, the SWDA and the HWMA—consistent with

the authority delegated by related federal statutes—namely, the CWA and the Resource Conservation and Recovery Act ("RCRA"). StarLink mischaracterizes the underlying facts and attempts to "federalize" its failed state arguments in the hope that this Court will intervene by granting StarLink's petition.

Further, StarLink improperly asserts federal preemption issues by misrepresenting the facts and judicial history—this case involves the interpretation and application of unquestionably valid state statutes and regulations. This Court has no duty to "police" unpublished lower state court decisions, especially decisions that do not prejudice any federal rights. Accordingly, this Court should decline to hear this appeal just as the Tennessee Supreme Court declined to hear StarLink's most recent appeal.

STATEMENT OF THE CASE

In 1981, ACC received regulatory approval for a 14-acre landfill on a 48 acre parcel of land in Maury County, Tennessee. In the Matter of AAC, LLC, No. 04.27-1167469a, 2012 WL 4135104, at *2 (Tenn. Haz. Waste Mgmt. Bd., Aug. 9, 2012). TDEC (then, the Department of Public Health) issued a Class II permit for non-hazardous industrial waste in accordance with then-applicable regulations. *Id.* at *16, *18.[1] A nearby

1. StarLink's Petition improperly cites to an unpublished federal court decision that is not part of the record of this case to support its fact statement, and also fails to include in its appendix 2012 and 2016 consent orders approved by the Solid Waste Management Control Board. *See* Pet. at 7 (citing *Starlink Logistics Inc. v. ACC*, LCC, No. 1:12-cv-0011, 2012 WL 2395199 (M.D. Tenn. June 25, 2012)).

smelter sent aluminum recycling wastes to ACC's landfill until that landfill was permanently capped and closed, in accordance with all applicable requirements, as certified by TDEC on April 8, 1996. *Id.* at *18.

Within a few years of the landfill's operation, water containing chlorides and ammonia from the aluminum recycling wastes was discovered to be migrating underground from the landfill through the adjacent aquifer and then daylighting downgradient as surface water. *Id.* at *2. On December 30, 2003, ACC submitted its first corrective action plan ("CAP"), and, following a public comment period, TDEC approved the "Wetlands Treatment Alternative" (as described in the CAP) as the preferred approach to remediation and pollution prevention. *Id.* at *19. In compliance with the CAP, ACC undertook various investigative and corrective actions. ACC constructed structures to divert uncontaminated stormwater away from the landfill, built settling ponds and drainage control ditches, attempted to seal springs and other seeps, installed and maintained groundwater monitoring wells, and performed a range of tests to determine the hydrogeological conditions and groundwater flows at the site. *Id.*

In 2008, after tests revealed that the rate of groundwater infiltration and seepage from the landfill was increasing, TDEC determined that the CAP and ACC's related remedial actions were not sufficient to address ongoing contamination. *Id.* at *20. In response, the Board required ACC to submit a modified wetlands treatment plan, which was approved in April 2010. *Id.* at *20. Despite efforts under the modified plan, contaminants from the landfill continued to migrate through groundwater. *Id.* at *21.

In January 2011, the Board and ACC agreed that the only effective solution was to remove all waste material buried in the landfill, thereby eliminating the source of contamination. *Id.* The Board filed a consent order ("Initial Order") to that effect in the Chancery Court of Davidson County on June 9, 2011 for review and formal adoption pursuant to the HWMA and WQCA. *StarLink Logistics, Inc. v. ACC, LCC*, No. 121435, 2014 WL 7001397, at *3 (Tenn. Ch. Ct., Jan. 29, 2014). StarLink objected to the Initial Order, intervening in this matter for the first time. *Id.* at *3–4. In response, the Chancery Court stayed the proceeding and remanded the matter back to the Board. *Id.* at *4. After extensive three-party negotiations (between StarLink, ACC, and TDEC) failed, the Board held a contested hearing featuring testimony from a StarLink employee who advocated for alternative plans. *In the Matter of AAC, LLC*, No. 04.27-1167469a, 2012 WL 4135104, at *1.

On August 9, 2012, following the contested hearing, the Board approved an Amended and Restated Consent Order ("Amended Order"), which was supported both by TDEC and ACC. *StarLink Logistics, Inc. v. ACC, LCC*, No. 121435, 2014 WL 7001397, at *4. The Board specifically recognized that "[o]ver the years as regulations and technologies have evolved, the Respondent [ACC] has worked with TDEC—both voluntarily and in response to TDEC enforcement actions—to identify why this leaching was occurring and [to] try to stop it." *In the Matter of AAC, LLC*, No. 04.27-1167469a, 2012 WL 4135104, at *2 (Tenn. Haz. Waste Mgmt. Bd., Aug. 9, 2012). The Amended Order reflected the Board's finding that "the only way to stop this landfill from continuing to impact groundwater and surface water is to remove all waste that has the potential to be in contact with water. The removed waste

must be placed in a new cell that meets current landfill design requirements." *Id.*

The Amended Order required ACC to "construct a berm upgradient of the site to divert uncontaminated stormwater away from the landfill prior to the commencement of any corrective action activities" and to submit a plan to "eliminate, to the extent practicable, the potential for surface water to migrate from the surface into the landfill and eliminate the potential for surface water to enter the excavated area of the landfill once corrective action begins." *Id.* at *23. ACC also was required to develop and submit a plan to remove all solid waste from the landfill that had the potential for generating contamination through contact with water within four years "or less." *Id.* at *24. Under the Amended Order, all removed waste was to be relocated to a new landfill cell constructed on the site or sent to a permitted off-site landfill. *Id.* at *23. Penalties under the Amended Order included stipulated penalties of $100,000 for failing to meet annual milestones. *Id.* at *24.

On January 29, 2014, the Chancery Court affirmed the Board's approval of the Amended Order after considering and rejecting StarLink's claim that an NPDES permit should be required. *StarLink Logistics, Inc. v. ACC, LCC*, No. 121435, 2014 WL 7001397, at *9. The court affirmed that TDEC is authorized under both the SWDA and the WQCA to enter into a Consent Order to accomplish the clean-up of ACC's landfill. *Id.* (citing Tenn. Code Ann. §§ 68-211-112, 69-3-109a, 68-212-206). The court agreed that removing the waste from the landfill, so that it no longer came in contact with water, was "more reasonable" than issuing an NPDES permit that did not directly address

the contamination of the groundwater in the landfill for any subsequent surface water discharge. *Id.*

StarLink appealed the Chancery Court decision to the Tennessee Court of Appeals, which held that the Board had failed to sufficiently consider all alternative plans, but the Court of Appeals expressly declined to review or discuss issues related to permit requirements. *Starlink Logistics Inc. v. ACC, LLC*, No. M2014-00362-COA-R3CV, 2015 WL 1186311, at *7 n.7 (Tenn. Ct. App. Mar. 11, 2015). TDEC and ACC appealed that finding to the Supreme Court of Tennessee, which found that the Court of Appeals improperly substituted its judgment about other possible alternatives for that of the Board. *StarLink Logistics Inc. v. ACC, LLC*, 494 S.W.3d 659, 672 (Tenn. 2016). Therefore, the Tennessee Supreme Court remanded the case to the Court of Appeals to review its earlier decision with greater deference to the Board's expertise. *Id.*

On remand, the Court of Appeals affirmed the Board's determination that removing the waste buried in the landfill was the only feasible and effective option for ending groundwater contamination and related off-site flows:

> [T]he Board properly focused on minimizing the amount of stormwater entering the landfill and removing the source of the pollution, the salt cake slag, from the landfill. By doing so, the Board attempted to reduce the amount of leachate leaving ACC's property by concentrating on a solution to the pollution rather than simply monitoring it with the permit. This plan of action was more in line with the legislation's purpose and intent in creating the WQCA.

StarLink Logistics, Inc. v. ACC, LLC, No. M2014-00362-COA-R3-CV, 2018 WL 637941, at *6 (Tenn. Ct. App. Jan. 31, 2018), *appeal denied, not for citation* (June 7, 2018). Thus the Tennessee Court of Appeals deferred to a valid order that was reached after years of study, negotiation, hearings, and deliberation. Starlink's Petition challenges the Tennessee Court of Appeals' decision.

In its Petition, StarLink misleadingly states that the Court of Appeals "rejected petitioner's argument that the Amended Order violates the CWA—and the WQCA, which implements the CWA for Tennessee—by authorizing ACC to discharge pollutants from a 'point source' into navigable waters without an NPDES permit." Pet. at 10. In reality, neither the Court of Appeals, nor any of the underlying court or agency decisions, ever discussed the contention that a "point source" exists at the closed landfill. Because StarLink's positions are based wholly on the unfounded presumption that an unpermitted point source exists at the closed landfill, its Petition fails to raise any federal question ripe for review by this Court.

REASONS FOR DENYING THE PETITION

I. THE TENNESSEE COURT OF APPEALS' DECISION DOES NOT RAISE ANY LEGITIMATE PREEMPTION QUESTION.

StarLink's contention that there is a preemption question is easily dispelled by the fact that Tennessee's WQCA was adopted specifically to carry out the NPDES program, as authorized by the CWA. StarLink does not contend that any of the state statutes or related regulations that Tennessee promulgated to implement

related federal law (the WQCA under the CWA, and the SWDA and the HWMA under RCRA) are in any way invalid. Rather, StarLink simply disagrees with TDEC's efforts to implement those laws on a site-specific basis to remediate ACC's closed landfill through the comprehensive 2012 Amended Order approved by the Board and adopted by the Chancery Court. The Amended Order requires ACC to implement all feasible measures to reduce and eventually eliminate pollution leaving the site by removing all waste from the landfill.

StarLink attempts to manufacture a federal question by invoking preemption in its Petition. Assuming, arguendo, that this Court was to accept that this case raises a federal question, this Court still should not grant review for at least three reasons. First, the purported federal question—whether a point source discharge requires an NPDES permit—is irrelevant. Second, the Tennessee Court of Appeal's judgment rests exclusively on adequate state grounds that are consistent with related federal authority delegated to Tennessee. Third, StarLink's attempt to justify its Petition is based on an unfounded assertion that this Court has a duty to "police" unpublished lower state court decisions involving the interpretation of state law. Not only is this incorrect as a matter of law, but should be rejected because StarLink has not alleged that the state court prejudiced any of its federal rights. This case raises no substantial federal question and, consequently, the Court should deny StarLink's Petition.

A. TDEC is properly exercising its federally-delegated authority to address groundwater contamination, which Tennessee state courts have affirmed.

The Tennessee legislature adopted the WQCA in part to enable the TDEC to implement the NPDES program. Tenn. Code Ann. § 69-3-102(c) (stating that one "purpose of this part is to enable the state to qualify for full participation in the national pollutant discharge elimination system established under § 402 of the Federal Water Pollution Control Act, Public Law 92-500"); 33 U.S.C. § 1342(b); 40 C.F.R. Part 123. Similarly, both the SWDA, under which the Department exercises general supervision over the operation and maintenance of solid waste processing facilities and disposal facilities or sites, and the HWMA administer duties delegated under RCRA. *See* 71 Fed. Reg. 27,405 (May 11, 2006). StarLink does not question the validity or constitutionality of any of these state laws.

The TDEC's Amended Order requires measures to prevent surface water from entering the landfill once removal is underway, as part of a larger plan to end contamination as efficiently and expeditiously as possible. TDEC has determined that the terms of the Amended Order represent the best approach to minimizing contamination and, that approach does not include the need for an NPDES permit. The Tennessee state courts agree. The HWMA empowers TDEC to enforce cleanup plans to address contamination, which those state courts held provided TDEC with an efficient means to achieve a "solution to the pollution," without hindering that approach with unnecessary additional permit requirements.

StarLink Logistics, Inc. v. ACC, LLC, No. M2014-00362-COA-R3-CV, 2018 WL 637941, at *6. The HWMA allows this common-sense proviso, providing that "[n]o state or local permits shall be required for clean-up activities which are conducted entirely on site and in accordance with this part; provided, that such clean-up activities meet the standards that would apply if such permits were required." Tenn. Code Ann. § 68-212-222.

The total removal of the landfill material is an extreme and costly remedy designed to completely eliminate, and not simply mitigate, the site's contamination problem. StarLink's relentless attack on TDEC's remedy, however, only serves to thwart implementation of the Amended Order. Indeed, had TDEC proposed to allow the contamination to remain in place and attempted to regulate discharges therefrom pursuant to the CWA, such an approach would have been far less protective than removing the source of contamination as required by the Amended Order. Further, as a matter of law, CWA jurisdiction through the NPDES program does not extend to the diffuse migration of contaminants through groundwater that exists here. As a matter of practicality, the time and cost of implementing water quality control measures sufficient to treat groundwater contamination could far exceed the already costly remedy of removing the source of that contamination.

StarLink believes that the remediation plan should include an NPDES permit, but the CWA and WQCA authorize the TDEC (in its administrative expertise, as approved by the Board) to act as it has and remediate the landfill without requiring such a permit. StarLink's opinions have been duly considered and rejected in a

special administrative hearing and in three Tennessee court proceedings.

B. This Court is not obligated to "police" lower state court decisions or to bring them "into line" with the holdings of other courts.

StarLink's Petition states that "[t]his Court plays a vital role in policing federal preemption principles. . . . The Court should grant the [P]etition in this case as well to bring Tennessee back into line with federal law and with every other major court to consider the question presented (not to mention every other State in the Union)." Pet. at 21. This Court has no duty to police unpublished lower state court decisions that lack precedential effect or significance.

All of the cases StarLink cites as examples of such "policing" efforts are distinguishable because in those cases this Court reviewed published state court decisions that have at least some precedential value. Further, those cases specifically raise substantial preemption questions addressing the validity of the specific state laws being challenged, unlike the decisions interpreting the implementation of indisputably valid state laws at issue here. Whether a lower court has properly interpreted and applied state law, or, for that matter, federal law, is not a preemption question (or, as StarLink describes it, an "inverse-preemption" question). Pet. at 23.

The first case cited by StarLink to support its preemption claim is *Coventry Health Care of Mo., Inc. v. Nevils*, in which this Court held that the Federal Employees Health Benefits Act ("FEHBA") preempted

a contradictory state statute barring contractual subrogation and reimbursement. 137 S. Ct. 1190, 1194 (2017). The FEHBA, however, contains an express-preemption provision. *Id.* Comparison of the facts in this case with those in *Coventry* actually highlights the most important CWA provision here: that the CWA allows for the delegation of implementation of the NPDES permitting program to the states, in contrast with the FEHBA, which expressly preempts related state statutes.

StarLink also cites *DirecTV v. Imburgia*, which also is entirely inapposite to this case. 136 S. Ct. 463 (2015). The *DirectTV* case turned on the meaning of a particular clause in DirecTV's service agreement with its customers, which carved out an exception to mandatory arbitration, providing that "[if] the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration clause] is unenforceable." *Id.* At the time the contract was executed, the California Supreme Court had found arbitration clauses to be unconscionable and, therefore, unenforceable. *Id.* at 467. But this Court held that the Federal Arbitration Act ("FAA") preempted any rule prohibiting class-arbitration waivers. *Id.* at 466-467 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). When DirecTV moved to compel arbitration, lower courts held that its class-arbitration waiver remained unenforceable under state law, reasoning that other state laws established a non-waivable statutory right to pursue consumer protection claims as a class. *Id.* at 468–69. This Court reversed the California's lower courts, holding that its ruling must be applied as "an authoritative interpretation" of the FAA and that DirecTV's arbitration clause must be enforced. *Id.* at 468.

Similarly, StarLink cites *Mut. Pharm. Co. v. Bartlett,* a case involving federal law preemption of state law-related design-defect claims regarding the adequacy of a drug manufacturer's warnings. 570 U.S. 472 (2013). Specifically, this Court found that the specific New Hampshire state law that obligated manufacturers to place a warning on generic drug labels was irreconcilable with federal labeling requirements. *Id.* at 493.

In this case, the Tennessee courts have not ignored any federal statute or case law that would preempt any specific state statutes. Neither the CWA nor any federal case law preempts the WQCA. Exactly the opposite is true; TDEC expressly derives its authority to act or not under to the WQCA pursuant to federal law. All of the major federal cases StarLink cites to support its preemption claim – *Coventry, DirecTV,* and *Bartlett* – are distinguishable because TDEC administers the WQCA by authority delegated under the CWA. *See* 33 U.S.C § 1342(b). The federal and state statutes are not inconsistent with that delegated authority; to the contrary, the CWA expressly authorizes TDEC's exercise of administrative discretion under the WQCA.

StarLink mischaracterizes the Tennessee Court of Appeals' holding. The court is not refusing to enforce or trying to "inverse[ly] preempt" the CWA by ignoring federal common law. Rather, the Tennessee Court of Appeals held that the plain language of the Tennessee state statutes was clear, and, as such, the court did not need to consider the federal common law interpretations of similar federal provisions. *StarLink*, No. M2014-00362-COA-R3-CV, 2018 WL 637941, at *6 ("Therefore, when the language of a Tennessee statute is clear and the statute

can be interpreted and enforced as written, there is little need to consider or follow the federal courts' interpretation of similar federal provisions."). The Tennessee courts, in deferring to the expertise of the Board and affirming the authority of the TDEC, did not disregard any federal case law holding state statutes to be preempted. In reality, StarLink simply disagrees with TDEC's administrative decision-making and the appellate courts' deference thereto. In fact, StarLink has not demonstrated that Tennessee's state statutes and regulations are inconsistent with the structure and intent of the federal statutes and regulations. StarLink should not be allowed to collaterally attack TDEC's authority and administrative discretion by raising inapplicable preemption questions.

In sum, StarLink disagrees with how the State of Tennessee has administered its federally-authorized environmental programs, and after exhausting all of its state court appeals, it is now attempting a "hail Mary" to persuade this Court to reverse a state court's interpretation of otherwise valid state law. This Court has no duty to "police" lower state courts, however, and certainly not to review and "correct" unpublished state court decisions. Even though this Court has chosen to "grant[] petitions for a writ of certiorari when an outlier court erroneously holds that a state law is not preempted by a conflicting federal law," the decision issued by the Tennessee Court of Appeals in this matter does not prejudice any federal rights and does not conflict with any federal law. Pet. at 21.

II. THE TENNESSEE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY RELEVANT DECISION OF THIS COURT OR RAISE ANY UNSETTLED QUESTION OF FEDERAL LAW.

StarLink's Petition for a writ of certiorari should not be granted because the relevant federal law is well-settled and the Tennessee Court of Appeals' decision does not conflict with any decisions of this Court. StarLink's arguments regarding federal law rely on a fact not in existence. None of the decisions underlying the Petition have found that ACC's property contains an unpermitted "point source" discharge to a water of the United States.

While ACC does not dispute the importance of addressing contamination migrating through groundwater from the landfill, such migration does not constitute a "point source" discharge under prevailing law. No NPDES permits are required for nonpoint source pollution, such as the diffuse migration of contaminants into groundwater that has occurred at the closed landfill.

A. StarLink fails to accurately represent the application and limitations of the NPDES program under the Clean Water Act.

StarLink's Petition summarizes many of the key provisions of the CWA and related NPDES permitting obligations, but it fails to address the critical threshold requirements for NPDES permitting authority over "point sources." The CWA defines "point source" to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated

animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Importantly, the definition first provides the general definition of a "point source" (*i.e.*, "any discernable, confined and discrete conveyance"), and then specific examples of those point sources (*e.g.*, pipes, ditches, and channels). *Id.* The definition "connotes the terminal end of an artificial system for moving water, waste, or other materials," and ACC's landfill does not satisfy either component. *See Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000) (internal citations omitted).

StarLink's Petition also fails to acknowledge important limitations on EPA's authority under the CWA. While the NPDES program prohibits unauthorized point source discharges, Congress expressly left the regulation of nonpoint source pollution to the states. *See Simsbury-Avon Preservation Club, Inc. v. Metacon Gun Club, Inc.* 575 F.3d 199, 219 (2d Cir. 2009); *Defenders of Wildlife v. U.S. Envtl. Prot. Agency,* 415 F.3d 1121, 1124 (10th Cir. 2005) ("Unlike point source pollutants, the EPA lacks the authority to control nonpoint source discharges through a permitting process; instead, Congress requires states to develop water quality standards for intrastate waters."); *U.S. v. Plaza Health Labs, Inc.*, 3 F.3d 643, 647 (2d Cir. 1993) ("The control of pollutants from runoff is applied pursuant to section 209 and the authority resides in the State or other local agency.") (quoting S. Rep. No. 92-414, 1972 U.S.C.C.A.N. 3668, 3744); *see also Pronsolino v. Nastri,* 291 F.3d 1123, 1126-27 (9th Cir. 2002) ("[T]he Act provides no direct mechanism to control nonpoint source pollution but rather uses the threat and promise of federal grants to the states to accomplish this task.") (internal quotation marks and citations omitted); *Nat'l Wildlife Fed'n v. Consumers Power Co.,* 862 F.2d 580, 588 (6th

Cir. 1988) ("State water quality standards are the basis of the 'nonpoint source' program. In the "nonpoint source" part of the CWA, Congress specifically refers to pollution resulting from dams, channels, flow diversion facilities, or other 'changes in the movement, flow, or circulation of a navigable water.'") (quoting 33 U.S.C. § 1314(f)(2)(F)).

B. Diffuse discharges to groundwater are not subject to NPDES permitting under prevailing law.

The record shows that the contamination at issue is migrating from the landfill into and through the adjacent aquifer, then emerging downgradient as surface water. [2] Neither TDEC nor ACC dispute the seriousness of the contamination that emanated from the landfill, as reflected by the actions taken to address this pollution under proper remediation programs.[3] The Tennessee Court of Appeals is not endorsing inaction or allowing ACC any permitting exception, it is deferring to state regulators who, in their environmental expertise, have adopted and are currently

2. Contrary to its assertion that a point source exists, StarLink's own account clearly indicates that pollutants move underground through wastes in the former landfill (which has been properly closed and capped) via groundwater, explaining that "[b]ecause chloride salts are extremely soluble, they quickly dissolve and migrate into the environment when chloride-containing slag comes into contact with rain water or groundwater." Pet. at 6-7.

3. The NPDES program is designed to prevent, not remediate pollution. *See Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204 (1976) ("[D]irect restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated.").

enforcing a cleanup plan that includes appropriate and lawful mitigation measures that do not require any NPDES permits.

Significantly, the Sixth Circuit is among the many courts that have held that discharges to groundwater do not fall under CWA authority. *See Tennessee Clean Water Network v. Tennessee Valley Auth.*, 905 F.3d 436, 444–46 (6th Cir. 2018); *Kentucky Waterways All. V. Kentucky Utilities Co.*, 905 F.3d 925, 932–33 (6th Cir. 2018); *see also, e.g., Chesapeake Bay Found., Inc. v. Severstal Sparrows Point*, LLC, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011); *PennEnvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 454-55 (W.D. Pa. 2013). The *Tennessee Clean Water* case involved coal-ash ponds that were leaching contaminants into underlying groundwater. 905 F.3d at 438. The Tennessee Valley Authority ("TVA") was not actively removing or remediating any contamination, unlike ACC has been doing here. *Id.* at 441–42. Despite the groundwater pollution that TVA was not remediating or addressing, the Sixth Circuit held that CWA jurisdiction did not extend to prohibiting pollutants from entering groundwater. *Id.* at 446. Specifically, the Sixth Circuit held: (1) the CWA did not prohibit Tennessee Valley Authority's discharge of pollutants from coal ash ponds through groundwater that was hydrologically connected to a navigable waterway; (2) groundwater was not a "point source;" and (3) the hydrological connection theory directly conflicted with RCRA and EPA's coal combustion residuals rule. *Id.* at 444–46. The Sixth Circuit reasoned that:

> '[A]n unlined [coal] ash waste pond in karst terrain immediately adjacent to a river' that leaks pollutants into the groundwater is a major

> environmental problem that the Permit does not adequately address. *But the CWA is not the proper legal tool of correction*. Fortunately, other environmental laws have been enacted to remedy these concerns.

Id. at 447 (emphasis added). Similarly, in the *Kentucky Waterways* case, the Sixth Circuit held that groundwater, which allegedly carried pollutants from coal ash ponds into a lake, was not a "discernible, confined and discrete conveyance" and, thus, did not qualify as a "point source" subject to CWA regulation. 905 F.3d at 932–33. The court further held that even if groundwater was a "conveyance," it was not "confined" or "discrete," as it was a diffuse medium that seeped in all directions. *Id.* "For that reason, the CWA's text forecloses an argument that groundwater is a point source." *Id.* at 933. Accordingly, StarLink's claims cannot succeed given the precedential Sixth Circuit holding that groundwater is not a "point source" and is, therefore, outside of the scope of the NPDES permit program. StarLink incorrectly assumes CWA jurisdiction over the groundwater contamination, ignoring Sixth Circuit precedent expressly contradicting this assumption.[4]

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4. Notably, EPA has not filed any enforcement action against ACC or asserted any federal authority to require an NPDES permit here. StarLink has even filed a citizen suit pursuant to CWA Section 505(a) against ACC, attempting to invoke federal CWA enforcement authority where EPA has declined to date to do the same. *See* Complaint, *StarLink Logistics, Inc. v. ACC, LCC, et al.*, No 1:18-cv-00029 (M.D. Tenn., April 9, 2018). EPA's inaction lends additional, indirect evidence that TDEC's administration and oversight of remediation is appropriate and in accordance with federal law in this case.

ACC acknowledges that federal circuit courts are divided on the question of whether CWA jurisdiction maybe be extended to certain point source-like discharges to groundwater with hydrologic connections to surface waters. Other petitions for writs of certiorari pending before this Court represent much more appropriate vehicles for deciding questions related to the definition of point source and whether any such point source is hydrologically connected to surface water requiring CWA permitting. *See, e.g., Hawai'i Wildlife Fund v. Cnty. of Maui*, 881 F.3d 754 (9th Cir. 2018) (petition for writ of certiorari pending); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018) (petition for writ of certiorari pending); *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502 (9th Cir. 2013) (petition for writ of certiorari pending). Not only are federal circuit court differences best resolved through review of those federal circuit court decisions, but questions related to the CWA and its scope in this case are undeveloped, both factually and legally, in the unpublished state court decision that is the subject of StarLink's Petition. As such, this case is not appropriate for this Court's review.

C. The Clean Water Act prohibits point source discharges without a permit, but there is no confirmed "point source" discharge in this case.

StarLink alleges that the Tennessee Court of Appeals contravened this Court's rulings by deferring to the TDEC's remediation plan because that plan did not mandate an NPDES permit. But the two Supreme Court cases that StarLink cites to support this assertion

address permitting mandates related to point source discharges, and thus do not apply given the facts in this case. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981); *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987). [5]

As StarLink highlights, in *Milwaukee* this Court explained that the CWA prohibits discharges by point sources unless covered by a permit. Pet. at 13–14. However, in *Milwaukee* there was "no question that all of the discharges involved [] are point source discharges" and therefore subject to permit requirements under the CWA. *Milwaukee,* 451 U.S. at 318 n.11. StarLink also cites *Milwaukee* to support its argument that the Tennessee lower courts improperly ignored federal case law interpreting the CWA. Pet. at 22–23. However, *Milwaukee* addresses the relationship between the CWA and federal common law torts. *See* 451 U.S. at 319. *Milwaukee* did not address the CWA's relationship to state statutes implementing the CWA; indeed, *Milwaukee* does not even involve preemption of state law at all. As such, *Milwaukee* in no way supports the allegation that TDEC acted outside the scope of its delegated authority.

5. ACC notes that these cases also predate amendments to the Clean Water Act in 1987 that added a comprehensive stormwater program to EPA's NPDES permit program. In fact, CWA Section 402(p)(1) is a general exemption from NPDES permitting for stormwater discharges not otherwise enumerated as "industrial," certain "municipal," and other sites with significant pollutants specifically called out by permitting authorities. *See* 33 U.S.C. § 1342(p)(1)-(4); *see also Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013).

For the same reason, StarLink's claim that the Tennessee appellate court's ruling contravened this Court's holding in *Ouellete* is incorrect. Pet. at 13–14. StarLink accurately cites *Ouellette* to support the proposition that the CWA generally prohibits the discharge of pollutants from a "point source" unless the discharger has obtained an NPDES permit. Pet. at 14 (citing 33 U.S.C. § 1311(a)); *see Ouellette,* 479 U.S. at 489. However, *Ouellete* does not support StarLink's assertion that the Tennessee Court of Appeals ignored federal law in deferring to TDEC's decision that its remediation plan does not necessitate an NPDES permit.

In sum, StarLink's position assumes a fact not in in the record of this case: that the landfill constitutes a "point source" under the CWA. None of the Tennessee decisions addressing StarLink's claims considered the question of whether ACC's closed landfill is a "point source," and so, the very foundation of StarLink's argument fails. As such, TDEC was well within its administrative authority to determine that no NPDES permit is required, and the Tennessee Court of Appeals' deference to the Board's decision in no way contravenes federal law.

CONCLUSION

For the reasons set forth above, StarLink's Petition should be denied.

Dated this 6th day of February, 2019.

Respectfully submitted,

PAUL DRUCKER
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
(317) 236-1313

SHARON O. JACOBS
BONE MCALLESTER
NORTON PLLC
511 Union Street, Suite 1600
Nashville, Tennessee 37219
(615) 238-6300

BRUCE WHITE
Counsel of Record
LOUISE DYBLE
ASHLEY E. PARR
BARNES & THORNBURG LLP
One North Wacker Drive,
Suite 4400
Chicago, Illinois 60606
(312) 357-1313
bruce.white@btlaw.com

JEFFREY LONGSWORTH
BARNES & THORNBURG LLP
1717 Pennsylvania Avenue NW,
Suite 500
Washington, DC 20006
(202) 289-1313

Attorneys for Respondent ACC, LLC