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 a Writ of Certiorari
to the Court of Appeals of Tennessee

REPLY BRIEF

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INTRODUCTION

This case is about whether the Supremacy Clause requires States to enforce private-property rights that are protected by federal environmental law. As it has for decades, respondent ACC continues to discharge highly toxic pollutants through point-source surface-water discharges into navigable waters that flow into petitioner's land. As a result, the waters on petitioner's land are polluted and designated as impaired under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq*. Congress has spoken on whether or to what extend landowners may pollute waters of the United States. The CWA unambiguously provides that no entity may discharge pollutants into navigable waters in this way without a permit that complies with the requirements of the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1342. Although States are free to implement the NPDES program with approval from the federal Environmental Protection Agency (EPA), they must at a minimum prohibit pollutant discharges without an NPDES permit and enforce (as a floor) federal discharge limits.

Instead, Tennessee—with approval from its courts—has given itself permission to ignore federal discharge limits and the CWA's permitting requirement, claiming that the state law that is supposed to implement the CWA relieves Tennessee of the burden of complying with the CWA. The state court below expressly held that the State need not comply with the CWA where the State's own law conflicts. In other words, the state court held that state law preempts the federal law it is supposed to implement. Remarkably, respondents agree with the lower court that, to the extent Tennessee's law conflicts with the CWA, state law

must prevail. But that holding is wrong and conflicts with numerous decisions of federal appeals courts and state courts of last resort. Respondents' contentions to the contrary are wishful thinking. This Court should grant this Petition for plenary review or summary reversal.

Respondents urge this Court to deny the Petition because, in their view, one State's outright defiance of the CWA does not merit this Court's attention. But the CWA cannot function if it operates as intended in only 49 States. The waters of the United States flow across state borders—and the CWA was specifically intended to establish comprehensive national standards to protect the Nation's waters from toxic pollution. Tennessee should not be permitted to exempt itself from those standards by hiding behind its own courts.

I. The Decision Below Directly Conflicts With Decisions Of Multiple Federal Courts Of Appeals And State Courts Of Last Resort.

The Tennessee Court of Appeals held that Tennessee's law implementing the CWA displaces the requirements of the CWA when the two conflict. That holding is flat wrong and conflicts with decisions of every federal appeals court and state court of last resort to address the question. Respondents argue that no such conflict exists either because the CWA does not apply to discharges from ACC's toxic landfill or because the decision below has nothing to do with preemption. Those arguments are squarely contradicted by the clear record in this case and must be rejected.

A. Initially, respondents contend (ACC BIO 2, 16-23; State BIO 11, 15-16) that the state court's reverse-preemption holding is immaterial because the CWA's NPDES requirements do not apply to the discharge of pollutants from ACC's landfill. Those assertions are both incorrect and dishonest. ACC asserts (at 16, 23) that no court has found any point-source discharge of pollutants into navigable waters from ACC's landfill, and both respondents argue (ACC BIO 2, 18-21; State BIO 11, 16) that the CWA does not apply to the discharge of toxic pollutants into navigable waters of the United States through groundwater. Those arguments are red herrings, not to mention a distortion of the record below, including respondents' own admissions about the nature of the discharges at issue.

Whether or not contamination through groundwater is covered by the CWA, it is undisputed that pollution through a point-source discharge of surface water is. And that is precisely what we have here. The state courts expressly premised their holding on the parties' admission that ACC is contaminating petitioner's private property through the point-source discharge of pollutants through *surface* water. Pet. App. 7a-8a (quoting consent order); *see id.* at 25a & n.2, 28a (opinion of Tennessee Supreme Court). And the courts below understood petitioner to be insisting that ACC obtain "an NPDES permit for surface water discharge." *Id.* at 98a. Consistent with that view, the consent order at issue by its own terms addresses "contaminants that are *currently discharging* from [ACC's property] *via surface waters*." *Id.* at 7a. That consent order in fact *requires* ACC to "discharge . . . collected ground water directly into Arrow Lake if the water is con-

sistent with" effluent levels approved by the State—levels that in this case exceed those permissible under federal law and are illegal under federal law absent an NPDES permit. *Id.* at 8a.

This is not a case, as ACC contends (at 18), in which pollutants reach navigable waters only by seeping into ground water. This is a case in which polluted surface water is discharged into navigable waters through a point source *and* polluted water is collected in ponds on ACC's land and "directly" "discharge[d]" into such waters. Pet. App. 8a. In reciting the operative factual findings in this case, the chancery court explained that, when rainwater contacts ACC's landfill, it creates surface water contaminated with ammonia. *Id.* at 79a-80a. That surface water is then discharged "into Sugar Creek" "through culverts" (*i.e.*, through steel pipes under an adjacent road). *Ibid.* It is difficult to imagine a more paradigmatic discharge of pollutants from a point source. As ACC acknowledges (at 16), the CWA defines "point source" to include "any pipe, ditch, channel, tunnel, [or] conduit" "from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Indeed, ACC's *own expert* in wastewater engineering testified before the Board that polluted water is discharged from ACC's land through steel culvert pipes—and that those discharges qualify as point-source discharges under the CWA. *See* Pet. C.A. Reply Br. 17. Respondents cannot rewrite the facts on the ground by ignoring their own admissions in this case. ACC is discharging highly toxic pollutants into navigable waters from point sources. Those discharges are plainly covered by the CWA and require an NPDES permit.

B. Respondents also argue (ACC BIO 8; State BIO 9-10, 13-16) that the question presented in the petition is not actually presented in this case because the state court did not hold that state law preempts federal law. That position cannot be reconciled with the decision below.

First, respondents' assertion (State BIO 9) that the Tennessee Court of Appeals "did not decide the preemption question presented in the petition" is pure fantasy. The state court held (1) that the federal CWA prohibits discharges absent an NPDES permit that complies with federal requirements, Pet. App. 14a; (2) that the state law that purports to implement the CWA does *not* prohibit discharges absent an NPDES permit, *id.* at 16a; and (3) that, where the state and federal laws conflict, the State may ignore federal law and follow state law, *id.* at 14a-15a, 19a. Whether or not the decision below included the specific word "preempted," the court plainly held that state law preempts federal law. *E.g.*, *id.* at 15a ("StarLink's reliance on the federal law and interpretations of the federal CWA in this case was misguided."); *id.* at 18a (holding that Tennessee is "not obligated to apply federal law" when it conflicts with state law). Indeed, there is literally no alternative explanation for the state court's following statement:

> While StarLink's argument relying on federal law may have been persuasive, their reliance on such law is misguided. Neither the Board nor this Court are obligated to follow such precedent when the similar state law can be interpreted using plain language and legislative intent.

Id. at 19a. The question presented in the petition is squarely teed up by the lower court's decision.

ACC misunderstands the nature of preemption when it contends (at 9, 12) that petitioner does not challenge the validity of Tennessee's statutory implementation of the CWA. Tennessee's law has been interpreted by state courts to conflict with the CWA. Pet. App. 14a-16a. Petitioner argued below—and argues now—that the state law is preempted to the extent it conflicts with federal law. That *is* an argument that the state law, as construed by the state court, is invalid. The Constitution declares it to be so. U.S. Const. art. VI, cl. 2.

ACC further errs in contending (at 1, 14-15) that, rather than raising a preemption question, this case involves a simple matter of the State's exercising its delegated "discretion" about how to address ongoing toxic pollution of its waterways. But Congress did not delegate to States the authority to exercise unbridled discretion in this area. Congress and EPA have authorized States like Tennessee to implement the federal NPDES program, with federal oversight. It is beyond doubt at this point that that is *not* what Tennessee is doing: Tennessee has authorized ACC to continue to pollute navigable waters in excess of limits established by the CWA and without a required NPDES permit—even after Tennessee has designated the waters on petitioner's property as impaired *by ACC*. *See* 33 U.S.C. § 1313(d). In addition, by ignoring the requirement that a polluter obtain an NPDES permit, the State has evaded the CWA's fail-safe mechanism, which requires States to submit NPDES permits to EPA for possible veto. Rather than risk a federal veto of the State's plainly unlawful discharge approval, the

State simply bypassed the permitting process altogether, opting instead for a private settlement enforced through its own courts.

Second, the State's half-hearted contention (at 13-15) that the decision below does not conflict with any decisions of federal appeals courts or state courts of last resort is mystifying. As set out in detail in the petition (at 13-16), *every* such court to consider the question has held that the CWA requires an NPDES permit for any covered discharge of pollutants—and that state laws implementing the CWA must enforce that permitting requirement and, at a minimum, federal discharge and effluent limits. The State instead seems to argue that no other court has held that state law must yield to conflicting federal law. And ACC joins in (at 12-14) by disputing the relevance of this Court's decisions enforcing federal preemption. The principle of federal preemption is not debatable—it is set out expressly in the U.S. Constitution, not to mention countless decisions of this Court.

Respondents are also wrong on their own terms. As explained in the petition (at 19-20), for example, two state courts of last resort have expressly held that state laws implementing the CWA must yield to the CWA when the two conflict—*i.e.*, the opposite of what the Tennessee Court of Appeals held here. The California Supreme Court held that, "because the supremacy clause of the United States Constitution requires state law to yield to federal law," a state law that would have imposed less stringent discharge limits than the CWA was preempted. *City of Burbank v. State Water Res. Control Bd.*, 108 P.3d 862, 864 (Cal. 2005). That court explained that, "[b]ecause [state law] cannot authorize what federal law forbids, it

cannot authorize" a State's imposition of "pollutant restrictions that do not comply with federal [law]." *Id.* at 869. That holding directly conflicts with the holding below. The Ohio Supreme Court has similarly rejected an interpretation of state law that would permit a state agency to authorize discharges that would violate the CWA. *Columbus & Franklin Cty. Metro. Park Dist. v. Shank*, 600 N.E.2d 1042, 1054-1055 (Ohio 1992).

The conflict between the law in Tennessee (as reflected in the decision below and the State's continued defense of that reverse-preemption holding) and the law in every other jurisdiction seriously undermines "Congress'[s] intent in enacting the" CWA, which "was clearly to establish an all-encompassing program of water pollution regulation," *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981), by "occup[ying] the field" of setting minimum clean-water standards "through the establishment of a comprehensive regulatory program supervised by an expert administrative agency," *id.* at 317. This Court's intervention is warranted to bring Tennessee into compliance with federal law.

II. This Case Is An Ideal Vehicle For Addressing This Important Question.

Respondents further err in contending (ACC BIO 21; State BIO 9) that this case is not a suitable vehicle for addressing the question presented.

The State first urges the Court to deny the petition because the state court's decision was designated as unpublished. This Court routinely reviews unpublished decisions, and it should do so in this case as well. This is not a situation in which we have reason to doubt whether the rule of law announced below will

affect any cases other than this one. The State of Tennessee was the prevailing party, and it is the State of Tennessee that implements the State's CWA compliance. It is clear from Tennessee's litigating position in this case (adhered to in its brief in opposition) that the State agrees with the state court that it need not comply with the CWA when it administers the CWA's NPDES program. As a result of the decision below (and the State's own backwards view of the Supremacy Clause), highly toxic pollutants are being discharged into navigable waters of the United States *every day* in violation of the CWA. Tennessee now implements a clean-water scheme that circumvents the plain requirements of federal law—Tennessee nowhere denies that this is so. The state court approved that practice, the State has endorsed that holding as correct, and we should therefore expect the State to continue to ignore federal law. The State should not be permitted to insulate its decision to flout federal law by relying on the unpublished status of the state court's decision. That decision might not have prospective effect for other landowners if the State were now willing to accept that federal law trumps state law. But it continues to assert the opposite—and with the state court's stamp of approval on that position, there is every reason to expect the State's lawlessness will continue.

This Court's intervention in this case is important not only because we now know that the State will continue to allow polluters to violate federal law—but also because *in this case*, ACC continues to discharge highly toxic pollutants into the water on petitioner's land every day. Those discharges—in clear violation of federal law—are polluting the environment and adversely affecting the value and available uses of

petitioner's land. The State's approval of that unlawful activity does not make it better—it makes it worse.

Moreover, the State's suggestion (at 13) that the 2016 consent order is a substitute for an NPDES permit is laughable. First, it is undisputed that the consent order does not comply with the minimum substantive protections required by the CWA. Second, the 2016 order—unlike an NPDES permit—*neither* "transform[s] generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger" *nor* "provide[s] for direct administrative and judicial enforcement of" its requirements. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). Third, the State and ACC did not submit the 2016 order to the EPA for possible objection or subject the order to public comment, as the CWA requires for NPDES permits. 33 U.S.C. § 1342(d). In other words, that order does not comply with the CWA and is itself preempted.

Respondents also push the bounds of credulity in suggesting (State BIO 11; *see* ACC BIO 20 n.4) that this Court's review is not warranted because petitioner is attempting to pursue a citizen suit in federal court pursuant to the CWA. ACC has used the Board's decision as a sword and a shield, vigorously arguing in that case that the federal court lacks jurisdiction to consider petitioner's CWA claims—regardless of the disposition of this petition—based on the *Rooker-Feldman*

doctrine.[*] Under respondents' view, this Court's intervention now is petitioner's *only* means of obtaining relief.

Finally, respondents' resort to alternative grounds for affirmance is misguided. The State is wrong in asserting (at 11) that this Court would need to address the statutory questions it raises "before reaching the question presented." The lower court held that the CWA does not apply where state law conflicts. If this Court reverses that obviously incorrect holding, the state courts can take the first crack at actually applying the CWA on remand. More to the point, respondents' alternative arguments are meritless. As explained *supra* at pp. 3-4, respondents are wrong that the discharges from ACC's landfill are not covered by the CWA. Respondents' alternative contention (ACC BIO 11; State BIO 3 n.3, 7)—that a provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*, and the state law that implements it do not require NPDES permits for clean-up activities conducted "entirely onsite"—is a non sequitur. It is plain on the face of the order to which both respondents *agreed* that pollutants are *not* being contained "entirely onsite." *See* Pet. App. 7a (addressing the "contaminants that are currently discharging from [ACC's landfill] via surface waters"). The CWA plainly applies to offsite discharges of pollutants from hazardous sites—but not in Tennessee, unless this Court intervenes.

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[*] "The rule that a federal court cannot consider claims actually decided by a state court or claims inextricably intertwined with an earlier state-court judgment." *Black's Law Dictionary* 1527 (10th ed. 2014); *see Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

CONCLUSION

For the foregoing reasons and the reasons set out in the petition for a writ of certiorari, the petition should be granted for plenary review. In the alternative, the Court may wish to consider summarily reversing the decision below.

Respectfully submitted,

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