No. 24-1120

In the Supreme Court of the United States

OHIO, EX REL. DAVE YOST,
ATTORNEY GENERAL OF OHIO,

Petitioner,

v.

ROVER PIPELINE, LLC, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, STARK COUNTY

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Section 401(a) of the Clean Water Act provides that if a State "fails or refuses to act on a request" for a water-quality certification "within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirement[] * * * shall be waived." 33 U.S.C. § 1341(a)(1). The first question presented is whether § 401's one-year deadline for state action begins to run when a State receives a request for a water-quality certification, or only begins to run once the State deems the request "complete."

2. Section 401(d) of the Clean Water Act provides that States "shall" impose any "condition[s]" on a water-quality certification that are "necessary to assure" that the applicant "will comply" with "any * * * appropriate requirement of State law." 33 U.S.C. § 1341(d). For its part, the Natural Gas Act preempts state regulation of interstate natural gas pipeline construction, with a narrow exception that preserves "the rights of States under" the Clean Water Act. 15 U.S.C. § 717b(d). The second question presented is whether Ohio, having waived its ability to issue a water-quality certification for Rover's interstate pipeline project, could nonetheless initiate subsequent litigation to enforce state water-quality laws on which it could have conditioned, but failed to condition, a timely § 401 certification.

RULE 29.6 STATEMENT

Respondent Rover Pipeline, LLC ("Rover") is a Delaware limited liability company that is owned 65% by ET Rover Pipeline LLC, 20% by Traverse Rover LLC, and 15% by Traverse Rover II LLC. ET Rover Pipeline LLC is owned 50.1% by Energy Transfer Interstate Holdings, LLC, a wholly owned subsidiary of Energy Transfer LP, and 49.9% by BCP Renaissance L.L.C. Other than Energy Transfer LP (NYSE: ET) and Blackstone Inc. (NYSE: BX), no publicly held company owns 10% or more of Rover's stock.

Respondent Pretec Directional Drilling, LLC is a Florida limited liability company that is owned 100% by MP Drilling Holdings, LLC, a Florida limited liability company. MP Drilling Holdings, LLC is owned 100% by Precision Pipeline, LLC, a Wisconsin limited liability company. Precision Pipeline, LLC is 100% owned by Precision Acquisition, LLC, a Wisconsin limited liability company. Precision Acquisition, LLC is 100% owned by MasTec, Inc., a Florida corporation which is publicly traded on the New York Stock Exchange (NYSE: MTZ).

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INTRODUCTION

Upon reading Ohio's petition, an uninitiated reader might be surprised to learn that it concerns the regulation of an interstate natural gas pipeline—a unique area subject to comprehensive regulation and oversight by the *Federal* Energy Regulatory Commission ("FERC"), pursuant to a *federal* statute, the Natural Gas Act ("NGA"), that broadly preempts state environmental regulation in this field, subject only to narrow exceptions of Congress's own making. The petition—which is merely the latest chapter in Ohio's stubborn effort to undo the consequences of its own decisions—papers over that reality. So too does it ignore the fact that Ohio easily could have avoided those consequences merely by taking timely action on permit applications.

In early 2015, Rover sought authorization from FERC to build an interstate natural gas pipeline running through Michigan, Ohio, Pennsylvania, and West Virginia. Because of FERC's comprehensive regulatory role under the NGA, any state regulation of this interstate pipeline project would ordinarily be preempted. However, under § 401 of the Clean Water Act ("CWA"), Ohio had a one-year window to impose state water-quality requirements on the project, in advance of construction. Thus, Congress gave Ohio an option—if it wished—to jointly regulate a project that would otherwise be subject solely to federal control.

But the State chose not to exercise that congressionally conferred option. Instead, it allowed its federally imposed one-year deadline to expire, waiving its CWA authority. Then, following an extensive federal environmental review, FERC approved the pipeline

and authorized its construction under the NGA, subject to extensive FERC-imposed environmental conditions.

The State later filed suit against Rover, asserting violations of claimed state-law requirements that Ohio could have, but did not, impose earlier through a timely § 401 certification. After Ohio's claims were dismissed as inconsistent with the CWA and the background rule of preemption the NGA establishes for interstate pipeline construction, the State embarked on a years-long unsuccessful series of state-court appeals. The last of these was so ill-conceived the Ohio Supreme Court refused discretionary review. The State now seeks this Court's review, in a final effort to revive the arguments the Ohio state courts soundly rejected.

This case is profoundly unworthy of this Court's review. There is no split of authority on Ohio's second question presented (regarding the effect of its waiver), and the State never contends otherwise. As for the first question presented—regarding when the one-year waiver clock begins under CWA § 401—the best the State can muster is a supposed conflict with language in a 15-year-old Fourth Circuit decision that was not even interpreting the text of § 401 itself. There is accordingly no split of authority to address.

But even if Ohio's assertion of a thin and stale circuit tension could be credited, the issue would still be unworthy of review for multiple reasons. Most notably, the timing question Ohio's petition presents, which relates to when an application is considered "received" for purposes of beginning the one-year clock, has subsequently been addressed administratively in

Environmental Protection Agency ("EPA") rulemakings postdating the operative facts here. Ohio offers no persuasive reason for this Court to reach ten years back in time, prior to EPA's current (and quite recent) rules addressing this, and adjudicate the timeliness of the State's actions prior to those rules taking effect. Indeed, this case is an almost uniquely bad candidate for review. If this Court's review of the issues Ohio raises were ever warranted (which is doubtful), it would be in a case arising *after* the promulgation of the most recent administrative rules on the subject.

In any event, the questions presented have rarely been litigated and will rarely (if ever) be litigated in the future, because States can easily avoid waiver under § 401 simply by taking timely action on certification requests. In an effort to make up for this lack of practical importance, the State offers rhetoric about purported threats to its sovereignty. But the State's quasi-constitutional puffery cannot withstand scrutiny. When Congress enacted the NGA in 1938, it occupied the field of interstate natural gas pipeline construction, subjecting the approval and construction of such interstate projects to *exclusive* federal regulation. And Congress would have been well within its constitutional authority to leave things there. As it happens, Congress later *chose* to give States a limited role in regulating interstate natural gas pipeline construction via CWA § 401—albeit subject to § 401's limits, including its express waiver provision. Ohio may be dissatisfied with the scope of its federally delegated statutory role in this congressionally crafted cooperative-federalism regime. But the State's constitutional overtures are pure nonsense, intended to obscure the fact

that this case presents only splitless, infrequently arising issues that States can easily avoid by diligently acting on certification requests, and that EPA has issued subsequent rules to clarify. The petition should be denied.

STATEMENT

I. Legal Background

A. The Natural Gas Act

The NGA provides a "comprehensive scheme of federal regulation" for interstate natural gas transportation, including interstate natural gas pipelines. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (citation omitted); see 15 U.S.C. § 717f(e).

Pursuant to its "exclusive jurisdiction" in this field, FERC leads a coordinated effort to review and approve applications for the construction of such interstate pipelines. *Schneidewind*, 485 U.S. at 300-301, 308; see *Islander E. Pipeline Co.* v. *Conn. Dept. of Env't Prot.*, 482 F.3d 79, 84 (2d Cir. 2006); 15 U.S.C. §§ 717f(e), 717n(b)(1). If FERC determines that a proposed pipeline is required by the "public convenience and necessity," then it "shall" issue a certificate authorizing the pipeline. *Id.* § 717f(e); see *Del. Riverkeeper Network* v. *Sec'y Pa. Dept. of Env't Prot.*, 833 F.3d 360, 367 (3d Cir. 2016). The NGA empowers FERC to monitor compliance with any conditions imposed in its certificates, to ensure continued compliance via stop-work orders and penalties, and to impose additional conditions if unforeseen circumstances arise. See 15 U.S.C. §§ 717*o*, 717t-1, 717s(a). Any party "aggrieved" by a FERC order issued under the NGA "may obtain a review of such order" in an appropriate "court of appeals of the

United States." *Id.* § 717r(b). And "[u]pon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." *Ibid.*

A provision of the NGA known as the "savings clause" preserves "the rights of States under" the CWA (as well as the Coastal Zone Management Act and the Clean Air Act). 15 U.S.C. § 717b(d). Outside of the federally delegated "rights" referenced in the savings clause, States have no power to regulate the construction of interstate natural gas pipelines. That is because the NGA "wholly preempt[s] and completely federalize[s] the area of [interstate] natural gas regulation," *Islander E.*, 482 F.3d at 90, including "state environmental regulation of interstate natural gas facilities," *Del. Riverkeeper,* 833 F.3d at 368.

B. The Clean Water Act

1. The CWA establishes a comprehensive framework for regulating discharges of pollutants into waters of the United States. See *S.D. Warren Co.* v. *Me. Bd. of Env't Prot.*, 547 U.S. 370, 385 (2006). When crafting the CWA, Congress balanced the traditional power of States to regulate water resources with the need for comprehensive federal policy governing water quality, as well as long-standing principles of federal supremacy when licensing interstate projects. The result was a scheme of "cooperative federalism" under which States and the federal government each have defined roles. The CWA prohibits all discharges of pollutants into navigable waters without a permit, 33 U.S.C. § 1311, and then divides between federal agen-

cies and the States the authority to permit certain discharges, see *id.* §§ 1311, 1313, 1341(a), 1342(a).

While the CWA contemplates a limited role for States, it does not alter the basic rule that, under long-familiar preemption principles, "[n]o State law can hinder or obstruct the free use of a license granted under an act of Congress." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1851); see *Sperry* v. *State of Fla.* ex rel. *Fla. Bar*, 373 U.S. 379, 385 (1963) (similar). Thus, Congress recognized that, absent federal-law provisions creating a mechanism for States to regulate the water-quality impacts of federally permitted projects, developers could rely on "a Federal license or permit" to "excuse * * * a violation of [state] water quality standard[s]." *S.D. Warren*, 547 U.S. at 386 (citation omitted).

2. Congress enacted CWA § 401 as the sole mechanism for States to participate in regulating federally permitted projects' water-quality impacts. Under § 401, an applicant for a federal permit "to conduct any activity" that "may result in any discharge into the navigable waters" must seek a certification from the "State in which the discharge * * * will originate" that the discharge will comply with state and federal water-quality laws. 33 U.S.C. § 1341(a)(1). Without such a certification, the federal permit cannot be granted. *Ibid.* Crucially, however, Section 401 provides that, if the State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." *Ibid.*

A State has four options when presented with an application for a § 401 certification: (1) grant the certification outright, (2) grant the certification with conditions, (3) deny the certification, or (4) waive its certification authority. See Pet. App. 92a; *Sierra Club* v. *State Water Control Bd.*, 898 F.3d 383, 388 (4th Cir. 2018).

If the State elects the first option (grant outright), then § 401 is satisfied and the federal permit requested by the applicant may be granted. If the State elects the second option (grant with conditions), then § 401(d) specifies that the State "shall" include the conditions "necessary to assure" that the applicant's activities will comply with certain listed provisions of the CWA "and with any other appropriate requirement of State law"; once specified, the State's conditions then become enforceable conditions on the federal permit. 33 U.S.C. § 1341(d). If the State elects the third option (deny), then it can block the federal project, unless its denial is successfully challenged in court. See 33 U.S.C. § 1341(a)(1).

This case is largely about the fourth option available to States presented with a certification request (waiver). Section 401 makes clear that, if a State fails to act on a certification request within "one year * * * after receipt of such request," then the "certification requirements of [§ 401] shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1). The federal permit may then be issued, allowing the project to go forward without further restriction by the State. Section 401 therefore operates to "preserve state authority to address" water pollution, *S.D. Warren*, 547 U.S. at 386, while simultaneously imposing a

one-year deadline to prevent States from engaging in "dalliance or unreasonable delay" when exercising that authority, *Hoopa Valley Tribe* v. *FERC*, 913 F.3d 1099, 1104 (D.C. Cir.) (quotation omitted), cert. denied, 140 S. Ct. 650 (2019); see H.R. Rep. 91-940, at 55 (1970) (Conf.) (waiver provision intended to ensure that "inactivity by the State * * * will not frustrate the Federal application"). In the event of waiver, the State's limited grant of federal authority to impose conditions for the relevant project dissipates and reverts back to the federal licensing agency. See *Del. Riverkeeper*, 833 F.3d at 376; 15 U.S.C. § 717f(e).

3. The EPA oversees implementation of the CWA. See 33 U.S.C. § 1251(d); *Chem. Mfrs. Ass'n* v. *NRDC*, 470 U.S. 116, 125 (1985). EPA has issued several implementing regulations for § 401 in recent years, and is currently contemplating another revision to its rules.

In 2020, EPA issued its first implementing rule for § 401 since 1971. See Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020) ("2020 Rule"). The 2020 Rule expressly confirmed that the one-year clock in § 401 "starts after 'receipt of such request' by the certifying authority" and not "when a State determines that a request for certification is 'complete.'" *Id.* at 42,223-24 (quoting *N.Y. State Dep't of Env't Conservation* v. *FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018) ("*NYSDEC*")); see *id.* at 42,243-48 (similar). A federal district court in California vacated the 2020 Rule, but this Court stayed that vacatur, and the Ninth Circuit later reversed the district court. *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013 (N.D. Cal. 2021), stay granted sub nom. *Louisiana* v.

American Rivers, 142 S. Ct. 1347 (2022), rev'd and remanded, 60 F.4th 583 (9th Cir. 2023).

In 2023, EPA issued a new regulation. Clean Water Act Section 401 Water Quality Certification Improvement Rule, 88 Fed. Reg. 66,558 (Sept. 27, 2023) ("2023 Rule"). Over the objection of various States, the 2023 Rule backtracked in certain respects from the 2020 Rule, including by suggesting that States may establish "requirements for a request for certification that starts the reasonable period of time." *Id.* at 66,577. EPA nonetheless clarified that, even under the new rule, the one-year clock would not be tethered to the time "when a state deems [a request for certification] 'complete.'" *Id.* at 66,576.

A consortium of eleven States and three industry groups brought suit against EPA to challenge the 2023 Rule, and that litigation is currently pending in the U.S. District Court for the Western District of Louisiana. In February 2025, that court placed the litigation into abeyance after EPA represented that "new EPA leadership" was "review[ing] the rule" to confirm that EPA's positions "reflect the views of current Agency leadership." Mot. to Hold Matter in Abeyance at 1-2, *Louisiana* v. *EPA*, No. 23-cv-1714 (W.D. La. Feb. 7, 2025), ECF No. 154. And, in May 2025, EPA published a memorandum announcing that it "will use a forthcoming Federal Register Notice and recommendations docket" to consider changes to the 2023 Rule. Memorandum from Peggy S. Browne at 2, Acting Assistant Administrator, Off. of Water, EPA (May 21, 2025), https://perma.cc/KC9M-WU2F.

II. Factual and Procedural Background

1. In February 2015, Rover applied to FERC for a certificate to construct and operate a 713-mile interstate pipeline through Michigan, Ohio, Pennsylvania, and West Virginia. See Pet. App. 4a. With input from Ohio, FERC developed an environmental impact statement ("EIS") that fully considered the project's potential environmental impacts. *Id.* at 17a. In February 2017, FERC issued a certificate to Rover. No party sought judicial review of FERC's certificate order. Pipeline construction ended in 2020 and the project entered service the same year.

2. In November 2015, Rover submitted a request to Ohio for a § 401 certification. Pet. App. 4a. Ohio did not act on that request within one year. *Ibid.* Instead, Ohio informed Rover of perceived insufficiencies in its request without taking any formal action on the application, and ultimately demanded that Rover "resubmit its request" for a § 401 certification. Pet. App 105a. Rover made its revised request for certification on February 23, 2017. See *ibid.* The next day (some 15 months after Rover had first submitted its application), Ohio "granted the revised request * * * without ever acting on the initial request filed" in November 2015. *Ibid.*; see Pet. App. 89a ("undisputed" that Ohio "failed to act on Rover's original certification request within one year").

In May 2017, Ohio asked FERC to halt construction of the project based on the same concerns that later formed the factual predicates for this case—*i.e.*, alleged "inadvertent returns" during drilling and "failure[s] to adequately control storm water runoff." Pet.

App. 4a.[1] FERC stopped work at some construction sites until Rover implemented various protective measures. See *ibid.* For the next several months, Rover worked with FERC and Ohio to address the State's concerns.

In September 2017, FERC issued a letter order that (1) allowed Rover to resume certain construction activities and (2) rejected Ohio's request that Rover be required to meet Ohio's new permitting demands (the "September 2017 Order").[2] See Pet. App. 4a. Ohio did not seek judicial review of the September 2017 Order.

From the time its FERC certificate became final to the present, Rover has been subject to FERC's expansive enforcement authorities. FERC is currently pursuing an enforcement action against Rover with respect to the same discharges that form this lawsuit's factual predicate. See Pet. App. 4a, 23a.

3. Unable to convince FERC to impose additional conditions on Rover, Ohio attempted to impose them *de facto* in November 2017 by bringing state-court litigation seeking penalties and other relief. Specifically, Ohio's complaint against Rover and its contractor alleged various state-law violations during the project's construction.

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[1] In the pipeline industry, the phrase "inadvertent returns" refers to situations in which the drill used to bore through the ground encounters natural fissures or other features that allow drilling fluid to reach the surface. See Pet. App. 17a, 34a.

[2] Letter from Terry Turpin, Director, Off. of Energy Projects, FERC, to Kelly Allen, Regul. Affairs Dep't Manager, Rover Pipeline, LLC (Sept. 18, 2017), FERC Accession No. 20170918-3075, https://tinyurl.com/ydr2tf6v.

The defendants moved to dismiss on various grounds, including waiver under CWA § 401 and preemption under the NGA. In March 2019, the Ohio Stark County Court of Common Pleas dismissed the State's lawsuit in full, reasoning that the State waived all of the powers it now sought to exercise through litigation. Pet. App. 96a-108a. Ohio appealed to the Ohio Fifth District Court of Appeals, which unanimously affirmed. Pet. App. 79a-95a.

4. The State then appealed to the Ohio Supreme Court. In its memorandum in support of jurisdiction, Ohio argued for the first time that the one-year clock in § 401 does not begin to run until a State deems a certification application to be "complete."[3] The State also argued that even if it did waive its § 401 authority, it retained power to bring claims concerning matters outside "the scope of the certification it declined to act on." State's Ohio S. Ct. Br. 18 (June 19, 2020), 2020 WL 3440352. But it conceded that it could not "use state law to stop or remediate pollution *within* the

[3] Ohio's arguments at earlier stages of the litigation were much different. In opposing the motions to dismiss at the trial court, Ohio suggested that its February 2017 certification was timely under a so-called "revise-and-resubmit" scheme—*i.e.*, that Ohio had supposedly "timely issued the 401 certification, one day after * * * Rover reapplied," with "364 days to spare." Ohio Trial Ct. MTD Opp. 24-25 (Oct. 12, 2018). As the Fifth District explained, Ohio "abandoned" that argument on appeal. Pet. App. 89a. In lieu of arguing that its February 2017 certification was timely, Ohio instead insisted in its Fifth District briefs that, "even if the State waived," its waiver "does not preclude the[] claims" that are supposedly "outside the scope of the Section 401 certification." Ohio 5th Dist. Appellant Br. 1, 16 (June 13, 2019).

scope of the certification it declined to act on." *Ibid.* (emphasis added); accord Pet. App. 67a.

In March 2022, the Ohio Supreme Court issued its decision. Pet. App. 61a-78a. All seven Justices agreed that the one-year clock in § 401 begins when the request for a certification is received, rather than when that certification is deemed "complete" by the State. *Id.* at 66a (majority), 70a (Fischer, J., concurring in part and dissenting in part). Applying that rule to these facts, the Ohio Supreme Court "conclude[d] that the state waived" under § 401 and thus was prohibited from asserting any claims within the "contours of the Section 401 certification." *Id.* at 68a-69a (majority). However, the Court remanded on grounds that, before dismissing the suit on the basis of waiver, the lower court would need to determine whether Ohio's lawsuit (1) "assert[ed] rights related to th[e] certification" (in which case waiver would bar the State's claims), or instead (2) asserted rights "outside the contours of the Section 401 certification" (in which case Ohio's waiver would not, in the Ohio Supreme Court's view, bar Ohio's claims). *Id.* at 69a.[4]

5. On remand, and with Ohio's agreement, the trial court allowed the defendants to file motions to dismiss addressing issues not resolved in the prior appeal to the Ohio Supreme Court, including whether the NGA preempted Ohio's claims. See Pet. App. 6a, 40a. The

[4] In his partial concurrence, Justice Fischer—joined by Justices Kennedy and DeWine—explained that there was "no reason to remand this case" because the record was already clear that Ohio had "waived its ability * * * to enforce any state laws regarding any discharges resulting from the activity of constructing the pipeline." Pet. App. 74a, 77a.

defendants explained that waiver and preemption operated together to eliminate any source of authority the State could rely upon to maintain its lawsuit. The Ohio trial court granted the motions to dismiss. See *id.* at 37a-60a.

6. The Fifth District again unanimously affirmed. Pet. App. 2a-36a. After first expressing frustration with "the fluctuating arguments by [Ohio] at the various stages in these proceedings," *id.* at 13a, the Fifth District explained that, "during the permitting process, states can exercise their CWA permitting authority" through conditions in a § 401 certification, *id.* at 25a. However, "once the state waives this authority, state law is preempted by federal law." *Id.* at 25a-26a. In other words, the "rights of States" protected from preemption under the NGA's savings clause are the same federally delegated rights under the CWA that are waived if the State decides not to act in a timely manner on a § 401 certification request. More particularly, in the specific context of interstate natural gas pipeline construction, the NGA preempts any remaining state powers (*e.g.*, the traditional sovereign authority to regulate waters within the State's jurisdiction). See *id.* at 34a-35a.

7. Ohio sought discretionary review of the Fifth District's 2024 opinion in the Ohio Supreme Court. The Ohio Supreme Court declined to grant review. Pet. App. 1a.

REASONS FOR DENYING THE PETITION

I. There Is No Split of Authority Among Lower Courts.

First, this case does not warrant review because there is no split of authority. Ohio does not contend that there is any division of authority on its second question presented. Rather, the State's only asserted split concerns the first question presented. However, the State's asserted split is illusory.

1. The State argues that the Ohio Supreme Court's unanimous decision on the question of whether Rover's November 2015 application triggered § 401's one-year clock deepened a purported split between the Second and Fourth Circuits. Compare *NYSDEC*, 884 F.3d at 455-456 (2d Cir. 2018), with *AES Sparrows Point LNG, LLC* v. *Wilson*, 589 F.3d 721, 729 (4th Cir. 2009). The State admits that the Second Circuit's decision in *NYSDEC* is consistent with the Ohio Supreme Court's decision here, see Pet. 18, so it is forced to hang its entire argument for certiorari on the Fourth Circuit's 15-year-old decision in *AES Sparrows*. Ohio characterizes the Fourth Circuit's decision in *AES Sparrows* as having held that a "valid request" for certification is necessary to trigger the one-year clock. Pet. 17-18.

But *AES Sparrows* did not supply *any* interpretation of § 401 itself. Instead, as Ohio concedes, the panel found that § 401 was "ambiguous" and granted *Chevron* deference to an interpretation set forth in a regulation of the U.S. Army Corps of Engineers ("Army Corps"). *AES Sparrows*, 589 F.3d at 729. Because the Fourth Circuit did no textual analysis at

Chevron step one and did not deliver any holding about the meaning of § 401, there is no conflict between *AES Sparrows* and *NYSDEC*. Indeed, as Ohio itself conceded below, *AES Sparrows* at most "*suggested*" that Ohio's position in this case might be correct. State's Ohio S. Ct. Juris. Memo 3 (Jan. 17, 2020), 2020 WL 422473 (emphasis added). A "suggestion" does not make a circuit split.

Moreover, *AES Sparrows* turned entirely on the meaning of a regulation that does not even apply in this case. See Pet. App. 65a. The regulation *AES Sparrows* interpreted is an Army Corps implementing rule for CWA § 404, 33 U.S.C. § 1344, under which the Army Corps may grant permits for certain discharges into navigable waters. The Army Corps regulation at issue in *AES Sparrows* provided that no § 404 permit "will be granted" by the Army Corps "until [a § 401] certification has been obtained or has been waived," and that, "[i]n determining whether * * * waiver has occurred, the [Army Corps'] district engineer will verify that the certifying agency has received a valid request for certification." 33 C.F.R. § 325.2(b)(1)(ii).

In *AES Sparrows*, the Army Corps' district engineer issued a public notice on April 25, 2008 stating that Maryland had one year from that date to act on the applicant's request for a water quality certification. 589 F.3d at 729. Applying § 325.2(b), the Fourth Circuit held that the one-year clock began to run on the date of the 2008 notice, rather than in 2007, when Maryland had first received the request. *Ibid.*

Whatever the merits of that holding, it has no application here. Rover sought a § 401 certification in connection with its application *to FERC* for an NGA

§ 7 certificate, not in connection with an application to the Army Corps for a CWA § 404 permit. The Army Corps' implementing regulations are therefore irrelevant.

In addition, the Army Corps regulation at issue in *AES Sparrows* said only that the engineer should verify that "the certifying agency has received a valid request for certification." 33 C.F.R. § 325.2(b)(1)(ii) (2008). The regulation did not say what it meant for a certification to be "valid," or that the certifying State (rather than EPA) was legally empowered to set criteria for "valid[ity]." Ohio apparently interprets *AES Sparrows* to mean that, as a matter of federal law, States must be permitted to decide whether an application for a § 401 certification is "complete." See Pet. 9-10, 18. Ohio neglects to mention that *AES Sparrows* itself rejected this interpretation, reasoning that it would be "inconsistent with the plain language of 33 C.F.R. § 325.2(b)(1)(ii)" to suggest that "the state has the responsibility to determine if it has received a valid request for a § 401(a)(1) water quality certification." *AES Sparrows*, 589 F.3d at 730 n.3 (citation omitted).

In short, Ohio can marshal *no* case from *any* court in *any* jurisdiction that has interpreted the actual text of § 401 as it prefers. There is accordingly no split of authority for this Court to resolve.

3. What's more, the Army Corps itself has declined to defend the interpretation of its regulation offered in *AES Sparrows*. During FERC proceedings concerning the Millenium pipeline in New York State, the parties had the same dispute that now exists here: The pipeline developer argued to FERC that New York had

waived its § 401 authority by taking longer than one year to act on its request for a certification, and New York argued that it had not waived because the clock did not begin running until the application was "complete." The Army Corps wrote a letter (the "Ryba Letter") indicating that it "does not endorse the position taken by either side of this dispute" and that, should a "Federal Court resolve this legal question, the Corps would abide by [that] determination."[5]

FERC ultimately agreed with the developer that New York had waived, reasoning that the "plain meaning" of § 401 is that the one-year clock begins running "the day the agency receives a certification application, rather than when the agency considers the application to be complete." *Millennium Pipeline*, 161 FERC ¶ 61,186, P 38. In so holding, FERC correctly noted that its case was "distinguishable from *AES Sparrow[s]*" because the "Corps' interpretation of the CWA is not at issue in this proceeding." *Id.* P 31.

The Second Circuit then unanimously agreed with FERC's waiver ruling in *Millenium Pipeline*. Reviewing FERC's orders without *Chevron* deference, the Second Circuit rejected New York's argument that the one-year timeline "applies only for 'complete' applications." *NYSDEC*, 884 F.3d at 455-456. As noted, the

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[5] Letter from Stephen A. Ryba, Chief, Regulatory Branch, Army Corps, to Ron Happach, CEO, Millenium Pipeline Company, LLC (Oct. 16, 2017), FERC Accession No. 20171026-5163 attach. 2, https://tinyurl.com/4xuz925j; see *Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,186, P 31 & n.54 (2017) (discussing Ryba Letter).

Army Corps itself has promised to "abide by [that] determination" rather than *AES Sparrows*. Ryba Letter at 1.

4. Perhaps recognizing that it cannot credibly rely on its flimsy alleged circuit split, Ohio asserts that "federal regulations also conflict in reading Section 401." Pet. 19. But this Court does not grant review to resolve "splits" between federal regulations. Nor does Ohio explain why supposedly different interpretations of § 401 offered by FERC and the Army Corps would warrant this Court's review, given that neither of those agencies (as opposed to EPA) has authority to interpret § 401 itself.[6] As Ohio later sheepishly admits, Congress instead delegated that authority solely to EPA, which has issued rulemakings on the subject (postdating the operative facts of this case) and is continuing to examine the question. See Pet. 8; see also pp. 8-9, *supra*.

II. This Case Does Not Present Important or Recurring Questions, and Is a Poor Vehicle.

Regardless, even if the State's assertions regarding a supposed circuit tension could be credited, the questions presented do not warrant review—and this case would also be an extraordinarily bad vehicle for addressing them.

[6] If Ohio believes that there is a tension between EPA's current regulations and those of FERC, the solution is to petition FERC to revise its rule.

A. The First Question Presented Does Not Warrant Review.

1. The question of when a certification request has been received, thereby triggering the one-year waiver clock, is rarely litigated. Although § 401 has existed for more than fifty years, the petition identifies only two other cases that have even arguably addressed the subject. And one of those two cases—*AES Sparrows*—was decided more than 15 years ago, has not been followed by any court since, and has been read narrowly by the Fourth Circuit itself. See *N.C. Dep't of Envt. Quality* v. *FERC*, 3 F.4th 655, 667 n.4 (4th Cir. 2021) ("*Sparrows Point* has no application" in cases that "involve withdrawn and resubmitted applications" for § 401 certifications).

2. There is a reason why the first question presented is so seldom litigated. As the Ohio Supreme Court correctly recognized, if a State believes that an application for a § 401 certification is incomplete, it can simply deny the application within one year of receiving it. See Pet. App. 66a; accord *NYSDEC*, 884 F.3d at 456 ("If a state deems an application incomplete, it can simply deny the application without prejudice—which would constitute 'acting' on the request under the language of Section 401."); 2020 Rule, 85 Fed. Reg. at 42,250, 42,265 (similar). Ohio could have timely denied Rover's November 2015 application due to supposed "incompleteness," as many other States often do. The only reason this case arose is because Ohio elected not to take that simple step. Thus, Ohio's suggestion that the decision below threatens its "sovereignty over [its] own waters" is hyperbolic and inaccurate. Pet. 19. All a State in Ohio's position must do to

fully protect its powers over waters within its borders is to deny an application it believes is incomplete. There is no reason to grant review to address an issue States can avoid ever even arising simply by acting with minimal diligence.

Ohio claims that it would prefer not to deny incomplete applications, supposedly because "that approach would make the certification process far more adversarial" and would "prematurely trigger public notice obligations * * * and hearing obligations." Pet. 27-28. But the procedural obligations Ohio discusses are all creatures of *state* law. See 33 U.S.C. § 1341(a)(1) (the "State * * * shall establish procedures for public notice" and "public hearings"); Pet. 28 (discussing rules for hearings and comment periods under Ohio Rev. Code §§ 6111.30(C)-(D)). If Ohio is truly concerned about the risk of "confusing" or "duplicative" proceedings over applications it regards as incomplete, *ibid.*, then it can change its procedures to address those concerns. Cf. *NYSDEC*, 884 F.3d at 456. Nor does Ohio explain why denying an incomplete application without prejudice would be particularly "adversarial."

3. Equally significant to the unworthiness of this case for review is that EPA has addressed the timing issue in rulemakings that postdate the operative events in this case. See pp. 8-9, *supra*. It would be a profound waste of this Court's resources to ignore a decade of intervening agency rulemaking on § 401 and take up a case whose facts long predate all those rules—especially given that the operative rules may soon change again.

The Ohio Supreme Court issued its ruling on the first question presented while EPA's 2020 Rule was in

effect. That alone is a serious vehicle problem, given that the regulations in place when this case was decided differ from those in place now. To make matters worse, Ohio now seeks to draw support from the 2023 Rule, which postdates the relevant opinion below by more than a year. But the 2023 Rule arguably allows Ohio to implement its preferred rule on a prospective basis—rendering it wholly pointless to grant review here, save as an exercise in fact-specific case review unworthy of this Court's attention. See 2023 Rule, 88 Fed. Reg. at 66,577-78. Moreover, both the 2020 Rule and the 2023 Rule provided that there would be certain minimum requirements for certification requests. Thus, federal agency rulemaking has already foreclosed the State's strained hypotheticals about whether it would be enough to submit a certification request via "handwritten note" or "a shout across the street," answering them in the negative. Cf. Pet. 23.[7]

And even if the first question warranted review, that review would be premature. Litigation concerning the 2023 Rule remains ongoing, and the current Administration has signaled that it may soon revisit

[7] The 2020 Rule defined the term "certification request" and listed certain "documents and information that must be included in a certification request." 85 Fed. Reg. at 42,243; see *id.* at 42,286 (40 C.F.R. §§ 121.5(b), (c) (2020)). Ohio's petition does not claim that Rover's November 2015 certification request would be materially incomplete under the 2020 definition of "certification request," which in any case postdated Rover's November 2015 request by almost five years. Tellingly, the components that Ohio insists were supposedly missing from Rover's 2015 request (*e.g.*, a "jurisdictional determination from the Army Corps," Pet. 12) were *not* required by EPA's 2020 definition of "certification request."

that rule. See p. 9, *supra*. Granting review would short-circuit an ongoing administrative process for no good reason. The better approach is to let EPA's process play out on its own terms. Ohio can participate in that process, as other States are doing and have done. And, should some party ultimately ask this Court to review the validity of the 2023 Rule (or whatever new rule EPA may soon propose), this Court can grant review at that time, if appropriate.

4. Review of the first question presented would also be inequitable and unwarranted because Ohio did not present its current argument concerning "complete" applications to the trial court or the Fifth District. See p. 12 n.3, *supra*. It debuted that argument at the Ohio Supreme Court, apparently because a number of other courts had rejected its prior "revise-and-resubmit" theory during the period after this case was filed but before it reached the Ohio Supreme Court. Even assuming that this Court could properly review the first question despite the fact that it indisputably was not presented at each stage of the state-court proceedings,[8] the record is bereft of information that would be

[8] Rover raised this preservation objection at the Ohio Supreme Court, see Rover Ohio S. Ct. Br. 3, 40-41 (Aug. 7, 2020), 2020 WL 4677970, and that Court ultimately decided the case without explicitly passing judgment on the preservation issue. But "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street* v. *New York*, 394 U.S. 576, 583 (1969).

Moreover, the petition violates this Court's Rule 14.1, which provides that, when "review of a state-court judgment is sought," the petitioner must specify "the stage in the proceedings, *both in*

critical for this Court to properly review the question. Notably, Rover's November 2015 certification application—the critical document on which Ohio's entire case now turns, see Pet. 26—*is not even in the record for this proceeding*.

5. Finally, even if Ohio were correct on its first question presented, it would not change the ultimate result in this case. Although § 401 provides that the *maximum* time to act on an application is one year, it also makes clear that States ultimately must act within a "reasonable period of time," 33 U.S.C. § 1341(a). Many States have implemented laws interpreting the "reasonable period" to be less than one year. See 2020 Rule, 85 Fed. Reg. at 42,235. Ohio is one such State: Its statutes require the Ohio Department of Environmental Protection to "issue or deny" a certification within 180 days after receipt of a "complete application." Ohio Rev. Code § 6111.30(G). Ohio admits that "Rover submitted a completed application" by July 2016, meaning that the deadline for State action was January 2017. State's Ohio S. Ct. Br. 37; cf. Pet. 12. Thus, even if Ohio were correct that the clock does not begin to run until an application is complete, its February 2017 certification was still too late.

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the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised." S. Ct. R. 14.1(g)(1) (emphasis added). The petition makes no such disclosure. Cf. *Adams* v. *Robertson*, 520 U.S. 83, 92 n.5 (1997) (noting non-compliance with Rule 14.1(g) before dismissing writ of certiorari as improvidently granted); *Johnson* v. *California*, 541 U.S. 428, 431 (2004) (similar).

B. The Second Question Presented Does Not Warrant Review.

1. As to the second question presented—concerning the consequences of Ohio's waiver for its claims in this litigation—Ohio concedes that it seeks review of an intermediate state appellate court decision. That decision is binding solely in one of twelve intermediate appellate districts in Ohio. And in the (unlikely) event the issue ever arises in a future case, the Ohio Supreme Court is free to revisit the Fifth District's legal holdings. This Court rarely grants review in such circumstances. Cf. *Huber* v. *N.J. Dep't of Env't Prot.*, 131 S. Ct. 1308, 1308 (2011) (statement of Alito, J., respecting denial of certiorari).[9]

The absence of *any* decisions from other courts addressing the second question presented—much less decisions of federal appellate courts or state courts of last resort—cuts sharply against review. This Court does not customarily grant review of legal issues that have not been addressed by any court except a single intermediate state appellate court. Cf. *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1932 (2017) (Gorsuch, J., concurring in part and concurring in the judgment) ("This Court often speaks most wisely when it speaks last.").

The absence of other decisions addressing the question is, moreover, entirely unsurprising. For

[9] The Ohio Supreme Court's decision not to grant discretionary review does not constitute "a statement of opinion as to the merits of the law stated by" the Fifth District. Ohio Sup. Ct. Rep. Op. R. 4.1; accord *State* v. *Davis*, 894 N.E.2d 1221, 1225 (Ohio 2008).

starters, the second question presented—properly construed—concerns *only* the effect of Ohio's waiver on its *specific* claims in this case. The State conceded in the Ohio Supreme Court that waiver would prevent it from "later us[ing] state law to stop or remediate pollution within the scope of the certification it declined to act on"—in other words, that waiver would extinguish the State's authority to regulate "the activity for which a permit is sought." State's Ohio S. Ct. Br. 18; cf. Pet. 12 (Ohio Supreme Court citing that concession). The Ohio Supreme Court agreed with that framing, see Pet. App. 68a-70a, and the Fifth District simply found that Ohio lost even under that approach. The fact that *that* narrow question presents no split of legal authority (and never will) is hardly surprising. To the extent Ohio seeks to frame its second question presented more broadly—in terms of unspecified "other" rights it might retain despite its waiver, and despite the NGA's preemptive scope, Pet. i—it forfeited any such arguments long ago.

In any event, questions about the effect of a waiver on subsequent efforts to regulate federally permitted projects rarely arise because States seldom waive under § 401 without intending to do so, much less waive and then come back later seeking to use litigation to enforce environmental conditions they could have, but did not, include in a timely § 401 certification.[10] In addition, all States have to do to avoid the situation in which Ohio found itself is either (1) deny

[10] Such waivers are even less common after the D.C. Circuit's *Hoopa Valley* decision and its progeny, which clarified the relationship between waivers under § 401 and revise-and-resubmit schemes. See *Hoopa Valley*, 913 F.3d at 1104.

the application; or (2) grant the application with conditions pursuant to CWA § 401(d)—which can include state-law water-quality-related conditions like the ones at issue here, see *PUD No. 1 of Jefferson Cnty.* v. *Wash. Dept. of Ecology*, 511 U.S. 700, 713 (1994). Ohio took neither step, and now seeks discretionary relief from a problem of its own making. But no State will ever face the same problem if it acts diligently to deny or conditionally grant certification requests.

2. In an effort to paper over the manifest unimportance of the second question, Ohio offers constitutional puffery—going so far as to frame the decision below as a threat to its sovereignty. But the State's constitutional overtures are empty. Ohio complains about being forced to choose between participating in the § 401 process and having its ability to regulate interstate natural gas pipeline construction preempted. See Pet. 31. But Congress occupied the field of interstate natural gas pipeline construction when it enacted the NGA in 1938—something it plainly had constitutional authority to do. Although Congress later gave States a limited role in the process via § 401 and the NGA's savings clause, it was not constitutionally *required* to give States any such role. Questions about the scope of the NGA's savings clause and the consequences of the CWA's waiver provision thus have no constitutional implications whatsoever.

3. Nor does the second question presented implicate any concerns about adequate environmental regulation of FERC-permitted infrastructure projects. The Fifth District's decision simply held that, due to the combined effect of Ohio's waiver against the back-

drop of preemption under the NGA, regulatory authority reverted to exclusive federal oversight. And that federal oversight was fully exercised here. FERC paused construction of the Rover project at Ohio's urging to address the same concerns at issue in this case, and millions of dollars were spent on remediation, satisfying FERC that Ohio's environment would be adequately protected on a prospective basis. As for retrospective sanctions, FERC is pursuing an enforcement action against Rover with respect to the same discharges that form the predicate of this suit. See p. 11, *supra*.

C. This Case Also Presents Threshold Jurisdictional Issues That Further Cut Against Review.

The procedural posture of the case also raises serious questions about statutory jurisdiction that could prevent the Court from reaching the merits of most of Ohio's current claims. That is because, as the defendants argued below, those claims are improper collateral attacks on long-final FERC orders, which were required to be brought (if at all) in challenges to those orders in federal appellate court.

Section 19(b) of the NGA grants the federal courts of appeals "exclusive" jurisdiction "to affirm, modify, or set aside" FERC's orders. 15 U.S.C. § 717r(b). That statute "preclude[s] *de novo* litigation between the parties of all issues inhering in [a] controversy" before FERC. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Thus, Ohio's current claims are precluded to the extent they relate to issues on which the State lost at FERC, or could have raised at FERC and elected not to.

Ohio's claims fit that description to a tee. For example, the claims regarding drilling fluid in Counts 1, 3, and 5 are improper collateral attacks on both FERC's September 2017 Order (which rejected Ohio's arguments concerning fluid releases and allowed construction to resume over the State's objection) and FERC's EIS and certificate order (which approved the construction method Rover used and acknowledged the eventuality of the releases to which Ohio later objected). See Pet. App. 4a, 17a, 92a. And the claims regarding stormwater releases in Counts 2 and 5 are improper collateral attacks on both FERC's certificate order (which anticipated stormwater discharges and included conditions regulating them) and FERC's September 2017 Order (which allowed construction to resume despite Ohio's objection that Rover needed to obtain certain stormwater permits). See *ibid.*

Ohio's sole mechanism for litigating these claims was to raise them at FERC and then seek review of FERC's orders by filing a petition for review in an appropriate federal court of appeals. Cf. Pet. App. 22a. The fact that Ohio never pursued such a petition is irrelevant, because a State cannot "circumvent the scheme of judicial review under § 19 simply by choosing not to file a petition for review." *Williams Nat. Gas Co.* v. *Oklahoma City*, 890 F.2d 255, 262 n.8 (10th Cir. 1989).

This jurisdictional issue was extensively briefed during the state-court litigation. Because the Ohio courts resolved this case on other grounds (which were subject-matter-jurisdictional under Ohio state law, see Pet. App. 8a, 108a), they never reached this question. But if this Court granted review, it would need

to decide whether Ohio was required to litigate its current claims in the federal courts of appeals, or whether the state courts below lacked subject-matter jurisdiction. Cf. *PennEast Pipeline Co., LLC* v. *New Jersey*, 141 S. Ct. 2244, 2254 (2021). Litigation of these threshold jurisdictional issues would crowd out the merits of the questions on which Ohio seeks review. Cf. *Monsalvo* v. *Bondi*, 145 S. Ct. 1232, 1245 (2025) (Thomas, J., dissenting) (expressing frustration that "[t]his Court granted certiorari to decide" underlying merits issues, but "briefing revealed a serious, novel jurisdictional objection" concerning the lower court's statutory jurisdiction "that may bar our review"). If this Court wants to review the questions presented, it can do so in a future case free of lurking jurisdictional problems—*e.g.*, an appeal of challenges to an EPA implementing rule.

III. The Decision Below Is Correct.

A. The Ohio Supreme Court Correctly Resolved the First Question Presented.

1. As to the first question presented, Section 401 provides that the one-year clock starts upon "receipt" of a "request for certification," 33 U.S.C. § 1341(a)(1)—not that it starts when the request for certification is "complete." Dictionaries and ordinary speakers of English understand the word "request" to mean any instance of asking for something. See Black's Law Dictionary 1468 (4th ed. 1968) (noun "request" means "[a]n asking" or "the expression of a desire to some person for something to be granted"); Webster's Third New International Dictionary 1929 (1971) ("request" means "an instance of asking for something").

All agree that the application Ohio received from Rover in November 2015 asked for a § 401 certification to be granted. That application was therefore a "request" within the ordinary meaning of that term. Ohio nonetheless implies that the application was not "formal" enough to qualify under its atextual definition of "request." Pet. 23. But the November 2015 application was presented on a standard form *made available by the Ohio Environmental Protection Agency*, and it was accompanied by detailed tables, schematics, maps, design parameters, economic and environmental analyses, and mitigation plans that together spanned more than 1,700 pages. See Rover Ohio S. Ct. Br. 44 & n.14. Ohio's suggestion that Rover's request was akin to a "quick email" or a "handwritten note" blinks reality. Pet. 23.

2. Ohio now insists that the term "request" actually means "complete request," supposedly because that meaning is evident from the "broader context" of the statute. Pet. 23. Wrong. Congress did not use the word "complete" in § 401, and no court may "add words to [a] law to produce what is thought to be a desirable result." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015); see *Turkiye Halk Bankasi A.S.* v. *United States,* 143 S. Ct. 940, 945 (2023) (court cannot "graft an atextual limitation" into a federal statute).

In any case, statutory context confirms that, when Congress intended to qualify the term "application" with the modifier "complete," it did so. For example, CWA § 404 provides that certain notice requirements for permits under that Section are tethered to the "date an applicant submits all the information required to *complete* an application for a permit." 33

U.S.C. § 1344(a) (emphasis added)).[11] That Congress said "complete" elsewhere in the CWA, but not in § 401, confirms that all "requests" for certification—not just "complete" ones—start the waiver clock under § 401. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

3. Congress's textual decision also dovetails with sound policy. Ohio's rule would defeat the purpose of the statute by allowing States to indefinitely delay much-needed projects via determinations that the application is not "complete" due to their own subjective interpretations of vague and ever-shifting state laws. As thirteen States explained in a recent letter to EPA, crediting Ohio's theory in this case will "enable States to * * * frustrate infrastructure development" and "us[e] bureaucratic games to effectively veto a project that has significant economic effects across an entire region." Comments of Louisiana et al. at 7-8, Docket No. EPA-HQ-OW-2022-0128-0123 (Aug. 8, 2022), https://perma.cc/N33H-S7CW. This risk is particu-

[11] Myriad other statutes confirm that Congress plainly knows how to refer to a "complete" application when it wants to. See, *e.g.*, 42 U.S.C. § 7661b(c) (provision of Clean Air Act requiring action on "a completed application" within "18 months after * * * receipt thereof"); 22 U.S.C. § 8753(d) ("License determinations for complete requests * * * shall be made not later than 90 days after receipt"); 42 U.S.C. § 505(f)(1) ("within 30 days after receipt of a complete application"); 42 U.S.C. § 7651g(c)(2) ("within 6 months after receipt of a complete submission"); 20 U.S.C. § 6364(f)(4) ("90 days after receipt of the complete application").

larly dangerous in the context of interstate gas pipelines, where the applicant often must obtain 401 certifications from multiple States that have multiple standards. Requiring States to act promptly on certification requests—rather than bogging down project development in debates or litigation about whether applications are "complete" enough to satisfy a particular State—is the only way to ensure such projects can move forward.

B. The Fifth District Correctly Resolved the Second Question Presented.

As to the second question presented, the decision below rested on a straightforward application of well-accepted preemption principles against the backdrop of Ohio's waiver. The NGA preempts all state environmental regulation of interstate natural gas pipeline construction except to the extent covered by its savings clause. See pp. 4-5, *supra*. Thus, Ohio had no authority to regulate Rover's construction activities except insofar as it was exercising "rights * * * under" the CWA. 15 U.S.C. § 717b(d). That disposes of any effort by the State to assert its traditional (non-federally-delegated) regulatory powers in this unique context.[12]

And all of Ohio's rights under the CWA were waived. Ohio conceded below that "a State necessarily waives its right to participate in the permitting pro-

[12] Ohio halfheartedly argues otherwise, see Pet. 32-33, but the most natural reading is that the phrase "rights * * * under" the CWA, 15 U.S.C. § 717b(d)(3), means rights that exist "by reason of the authority" of the CWA, *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 583 U.S. 109, 124 (2018).

cess, and thus waives its right to enforce state pollution laws in response to pollution that is within the federal permit's scope, if it fails timely to act on a certification request," State's Ohio S. Ct. Br. 4, and it has now forfeited any broader argument. Moreover, as Rover explained below, all of Ohio's claims fall within the scope of the federal permit, because they all pertain to Rover's pipeline construction, and all of the requirements it sought to assert were requirements it could have placed in § 401(d) conditions.

Thus, all of Ohio's claims, whether nominally granted in federally conferred rights under the CWA or Ohio's traditional regulatory authority, are either waived or preempted. That narrow, case-specific decision of an intermediate state court is plainly unworthy of review. And, once again, the decision below accords not only with the text of the statute and with familiar preemption principles; it accords as well with sound policy. Through the NGA and CWA, Congress balanced the federal interest in a FERC-centered interstate pipeline development process with the States' interest in regulating waters by creating a defined process for States to participate in pipeline regulation: § 401 certification. As participants in that process, States have a time-limited opportunity to impose regulatory requirements. That process gives federal authorities timely notice of the requirements the State seeks to impose on a project, before construction commences. But if a State chooses not to participate, it must stand aside and cede to exclusive federal authority. A State cannot fail to participate according to the process Congress specified, then later change its mind and decide it wishes to impose requirements after all.

A contrary approach would "hamstring new infrastructure and construction projects," *Seven Cnty. Infrastructure Coal.* v. *Eagle Cnty., Colo.*, 145 S. Ct. 1497, 1514 (2025), by rendering the one-year deadline a nullity and preventing both federal authorities and project developers from knowing what regulatory requirements their federally permitted projects will be subject to in a timely manner.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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