No. 24-1120

In the Supreme Court of the United States

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

Petitioner,

v.

ROVER PIPELINE, LLC, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY IN SUPPORT OF CERTIORARI

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QUESTIONS PRESENTED

1. To start the States' waiver timeframe under 33 U.S.C. §1341(a)(1), must an applicant submit a valid certification request that satisfies applicable legal requirements?

2. If a State waives its certification power under 33 U.S.C. §1341(a)(1), does it retain other "rights … under" the Clean Water Act for purposes of 15 U.S.C. §717b(d)(3)?

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REPLY

Section 401 of the Clean Water Act assigns the States a "certification" role in federal licensing. 33 U.S.C. §1341(a)(1). A State waives that role if it "fails or refuses to act on a request for certification" within "a reasonable period of time … after receipt of such request." *Id.*

This case presents two questions about waiver under Section 401. *First*, when does the States' waiver timeframe begin? *Second*, what are the consequences of waiver? These questions warrant this Court's review. The first implicates a significant conflict. The second raises serious constitutional concerns.

Unable to pound the law or the facts, Rover pounds the table against review. But its positions lack merit.

I. The Court should resolve when the States' waiver clock starts under Section 401.

Although Rover says this case is about the Natural Gas Act, BIO.1, its defense is premised on waiver under Section 401 of the Clean Water Act, BIO.7–8. A State's waiver timeframe begins upon a "request" for certification. §1341(a)(1). But Section 401 does not define "request." The term's meaning presents an important issue that has divided circuits and a state high court. Specifically, courts disagree on whether Section 401 requires a *valid* request—satisfying applicable legal requirements—to start the waiver clock.

A. The decision below deepened an existing conflict.

The Fourth Circuit has concluded that Section 401 is "ambiguous" as to whether "an invalid" request triggers the waiver timeframe. *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009).

That court—deferring to a regulation of the Army Corps of Engineers—held that "only a valid request for § 401(a)(1) water quality certification … will trigger the one-year waiver period." *Id.*; *see* 33 C.F.R. §325.2(b)(1)(ii).

The Second Circuit, however, has concluded that Section 401's language is "plain." *N.Y. State Dep't of Env'tl Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018) ("*NYSDEC*"). It read the text as "a bright-line rule" under which any submission begins the waiver timeframe, no matter whether the submission is "complete" under applicable regulations. *Id.* at 455–56. Below, the Supreme Court of Ohio followed the Second Circuit's approach over the Fourth Circuit's. Pet.App.65a–67a.

Rover makes no serious attempt to reconcile these decisions. It instead tries to minimize *AES Sparrows*. Rover says the decision did "not even interpret[] the text of" Section 401 "itself." BIO.2. That is incorrect. In *AES Sparrows*, the Fourth Circuit reviewed the "relevant" statutory language, found it "ambiguous," and determined that requiring a valid request was "permissible in light of the statutory text." 589 F.3d at 728–29. True, the Fourth Circuit interpreted Section 401 using the (now-overruled) *Chevron* framework. But, as Rover does not dispute, past decisions employing *Chevron* "are still subject to statutory *stare decisi*s." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). Thus, Rover cannot discard *AES Sparrows* as a "15-year-old" decision. BIO.2.

Rover's other arguments do not erase the conflict. Rover stresses that *AES Sparrows* involved an Army Corps regulation not directly at issue here. BIO.16. Correct, but unimportant. Because Section 401

applies to all federal permitting, it naturally covers many regulated areas. *See* §1341(a)(1). The key point is that, in the Fourth Circuit, *AES Sparrows* retains "statutory" *stare decisis* for purposes of Section 401. *Loper Bright*, 603 U.S. at 412.

Rover also confuses a footnote within *AES Sparrows*. BIO.17. The footnote observed that it was the federal agency's responsibility (not the State's) to decide a request's validity. 589 F.3d at 730 n.3. The first question, however, does not present a "who decides" debate. It asks the meaning of "request." Even if federal actors ultimately decide whether a request was made, the question remains whether a submission must be valid under applicable regulatory standards. And, during the timeframe relevant to this case, Ohio's regulations set the applicable standards. *See Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (2010), at 11, 16 https://tinyurl.com/6thtbf6j ("2010 Guidance"); Ohio Rev. Code §6111.30(A).

B. The federal landscape and practical considerations show this question's importance.

1. A closer look at the regulatory landscape strengthens the case for review. Federal regulations regarding Section 401 conflict. Pet.19–20. Rover does not say otherwise. It simply insists the disagreement is not worth this Court's attention. BIO.19. Why not? The Court recently clarified that judges—not executive actors—definitively interpret statutory language. *Loper Bright*, 603 U.S. at 403. So, if an "essential" provision of the Clean Water Act is giving federal agencies trouble, this Court should step in. *See S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370,

386 (2006). That is particularly true when more rulemaking might be forthcoming. *See* BIO.9. This Court should reject Rover's call for a "wait for the regulators" approach.

The EPA's regulatory history further supports review. Rover suggests that the first question has been "rarely litigated," BIO.20, but it ignores the underlying reason. For most of the Clean Water Act's history, the EPA left States to define what qualifies as a request. *See* 2010 Guidance at 11, 16; *Wetlands and 401 Certification: Opportunities Guidelines for States and Eligible Indian Tribes* (1989), at 30–31 https://tinyurl.com/4rfyvn4n ("1989 Guidance"). Under that approach, litigation was sparse. Whereas, with increased attention and regulatory changes, litigation over waiver has picked up. *E.g.*, *Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th 920, 935–36 (9th Cir. 2022); *N.C. Dep't of Env'tl Quality v. FERC*, 3 F.4th 655, 669–70 (4th Cir. 2021); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1100–01 (D.C. Cir. 2019). But whatever the frequency of litigation, States must constantly make decisions about their timeline for deciding certification. So, the first question presents a frequently recurring issue.

The first question also transcends recent regulatory changes. *Contra* BIO.21. To be sure, the waiver events relevant here predated the 2020 Rule and the 2023 Rule. *See* 85 Fed. Reg. 42210 (July 13, 2020); 88 Fed. Reg. 66558 (Sept. 27, 2023). But the controlling statutory issue remains: to start the States' waiver clock, does a "request" have to satisfy applicable law? Or is any expression of desire for certification enough? The 2020 Rule and 2023 Rule set different regulatory standards for what counts as a request, but both rules agree that the States' waiver clock does not begin until

an applicant submits a valid request. *See* 85 Fed. Reg. at 42243–45; 88 Fed. Reg. at 66581. The 2023 Rule, for example, provides that the waiver "clock starts" when States receive a submission satisfying the regulatory definition of "request for certification." 88 Fed. Reg. at 66581; *see* 40 C.F.R. §121.6(a). That approach—which remains in effect—conflicts with the Second Circuit's "bright-line rule," under which even incomplete submissions start the waiver clock. *NYSDEC,* 884 F.3d at 455–56; *accord* Pet.App.66a–67a. Given this *enduring* disagreement, the Court's answer to the first question matters going forward.

2. Practical considerations bolster the need for review. Section 401's waiver timeline affects many actors: States, federal agencies, regulated parties, and interested members of the public seeking to comment on proposed projects. Pet.21. Rover does not argue otherwise.

Instead, Rover offers a far-from-ideal suggestion. It says that States—rather than seeking to understand Section 401's true timeline—should simply assume Rover is correct and deny incomplete applications protectively to avoid waiver. BIO.20. But that is no way to run a railroad. That approach would make the certification process less collaborative and more adversarial. Pet.27. Put it this way. Most regulated parties would prefer requests for more information over denials of their applications.

Rover's approach would also lead to duplicative and confusing public notice and hearing proceedings. Pet.27–28. On this front, Rover suggests that any problem is unique to Ohio's certification process. BIO.21. Wrong. Section 401's text is what requires "public notice" for all certification requests and "public

hearings" for some. §1341(a)(1). If invalid requests are enough to trigger the States' waiver timeline, they are presumably enough to trigger these procedural obligations.

C. No serious vehicle concern exists.

Rover attempts several vehicle arguments, but none lands. Take first Rover's argument that Ohio "debuted" its current argument about waiver too late in the state appellate process. BIO.23. The argument misunderstands this Court's "traditional rule" governing review. *United States v. Williams*, 504 U.S. 36, 41 (1992). Namely, this Court will review questions either "pressed or passed upon below." *Id.* (quotation omitted). The Supreme Court of Ohio undeniably passed upon the first question presented. Pet.App.65a–67a. Thus, any preservation concern immediately disappears. Even assuming otherwise, Rover views Ohio's position at the wrong level of abstraction. Parties forfeit legal claims, not in-the-weeds arguments. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Here, Ohio has consistently claimed that it did not waive its certification authority. That Ohio has refined its arguments supporting that "consistent claim" is no barrier to review. *See id.*

Rover's passing argument about Supreme Court Rule 14.1 similarly fails. BIO.23 n.8. That rule requires a party appealing from state-court proceedings to specify when federal questions were first raised and how they were passed upon. Notably, the rule is written in passive voice, given that either side of a dispute might introduce federal issues. Ohio's petition specified that Rover raised the issue of waiver and then detailed how the courts, including the Supreme Court of

Ohio, passed upon the issue. Pet.13–14. Ohio's petition thus satisfied Rule 14.1, notwithstanding Rover's pedantic reading.

Rover's argument about an item omitted from the record fares no better. *See* BIO.24. Rover's point is strange, procedurally speaking. This case was dismissed on the pleadings at Rover's request. At that early stage, Rover (the movant) bore the burden to show there was no debatable question as to Ohio's waiver. *See* Pet.App.64a. Noticeably, Rover does not contend that the omitted document it supposedly desires (its initial certification submission) satisfied Ohio law. There is no reasonable contention to be had. Ohio law requires that parties seeking certification provide Ohio with a jurisdictional determination from the Army Corps. Ohio Rev. Code §6111.30(A)(1). Rover's initial submission did not include one. Letter from Todd Surrena, Application Coordinator, to Buffy Thomason, Rover Pipeline LLC (Dec. 7, 2015), http://edocpub.epa.ohio.gov/publicportal/ViewDocument.aspx?docid=362376. And the Supreme Court of Ohio said nothing suggesting otherwise. Pet.App.64a–65a. In its view, the completeness of Rover's submission was irrelevant. Pet.App.66a–67a. Nonetheless, if Rover wants to prove that its application satisfied Ohio law, it could try to do so after any remand.

Finally, Rover argues that review of the first question might not change this case's outcome. BIO.24. The argument has multiple holes. To begin, Rover's underlying state-law argument is baseless. *See* BIO.24. As Rover observes, an Ohio statute provides that the Ohio EPA shall decide certification within 180 days of a complete application. Ohio Rev. Code §6111.30(G). But, under Ohio law, such directory

provisions do not yield consequences for private parties to rely upon. *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 520–21 (2011). And here, earlier action would have been unreasonable since Rover changed its pipeline's path. *See* Pet.12. Regardless, even if Ohio might not ultimately prevail in this case, that is no reason to avoid an important question about the Clean Water Act.

D. The decision below is wrong.

On the merits, the term "request" in Section 401 is best read to require a valid request satisfying applicable regulatory requirements. Pet.22–23. In arguing otherwise, Rover fails to engage with Section 401's surrounding text. It instead presses an isolated reading under which "request" means "any instance of asking for something." BIO.30. But applying that definition, the hypotheticals in Ohio's petition are far from "strained." *Contra* BIO.22. After all, an informal email, scribbled note, text message, or verbal statement could all "ask for something."

Rover is correct that federal statutes *sometimes* expressly impose completeness requirements for government applications. BIO.32 n.11. But not always. In many instances, federal statutes leave regulators to "fill up the details of a statutory scheme." *Loper Bright*, 603 U.S. at 395 (quotation omitted). Consequently, there are many examples across the Federal Code where *regulations* themselves impose completeness requirements as a trigger for government action. Pet.24–26 (discussing examples, including regulations concerning Section 402 of the Clean Water Act).

As for consequences, Rover's fears are overblown. *See* BIO.32–33. Rover imagines that States will abuse any discretion allowed. Yet, for decades, the EPA

deferred to the States without the sky falling. *See* 2010 Guidance at 11, 16; 1989 Guidance at 30–31. In any event, Ohio's position does not demand that States control the regulatory definition of request. Nor does it allow the States to move the goal posts. Rather, Ohio's position is based on *pre-existing* requirements that were (1) well established at the time of Rover's initial submission and (2) controlling under the EPA guidance then in place. *See* Ohio Rev. Code §6111.30(A); 2010 Guidance at 11, 16.

II. This Court should resolve the effect of waiver.

If Ohio waived its certification authority, then a second question follows: what are the consequences of waiver? Below, the court of appeals held that, because of the "choice" the Clean Water Act offers, waiver results in the States' complete loss of water authority. Pet.App.19a, 31a. That reading of Section 401 renders it unconstitutional. Under our constitutional structure, the federal government cannot force participation in a federal program by threatening States with the loss of their traditional sovereignty. *See NFIB v. Sebelius*, 567 U.S. 519, 582 (2012) (Roberts, C.J., op.). The preemption analysis below is also unsound under the Natural Gas Act. Although that Act sometimes impliedly preempts state laws, it contains a broad saving clause that preserves state rights under the Clean Water Act. 15 U.S.C. §717b(d)(3).

Rover makes light of Ohio's constitutional concern, but it fails to address how coerced state participation in a federal certification program is lawful. *See* BIO.27. Relatedly, Rover suggests that any concern is limited to the natural-gas context. But the decision below is not so narrow. The court of appeals viewed

the Clean Water Act *itself* as offering the States this coercive "choice." Pet.App.19a. The court further reasoned that States lose *all* rights under Clean Water Act if they fail to participate in the certification process. *See* Pet.App.31a. Even setting that logic aside, Rover never explains why the natural-gas context makes federal coercion okay.

Rover's primary objection to the second question is that it seeks review from an intermediate state court's decision. BIO.25. That is true, but it does not prohibit this Court's review. *E.g., Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 273 (2024); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 584 U.S. 617, 630–31 (2018). But even if the Court would not review the second question standing alone, it does not stand alone in this case. It is a natural follow-up to the first question. And Rover identifies no sound reason to refuse the second question if the Court agrees to take the first. Both questions involve statutory interpretation (not fact-intensive analysis), so including the second question does not make this case unwieldy.

On the merits, Rover's analysis provides even more reason for review. Rover's approach to preemption is something from ages past. Rover trumpets the Natural Gas Act's implicit preemptive power, while downplaying the Act's *express* saving clause—a clause that broadly preserves all the States' authority under the Clean Water Act. *Compare* BIO.1, 4–5, 33 *with* §717b(d)(3). And Rover does not even mention this Court's decision in *Oneok, Inc. v. Learjet, Inc.*, which emphasized the Natural Gas Act's "meticulous regard" for continued state authority. 575 U.S. 373, 384–85 (2015) (quotation omitted). If nothing else, therefore, this Court should accept the second question to confirm that statutory text (not judicial

guesswork about statutory implications) remains central to preemption in the natural-gas context.

Finally, Rover oversells the importance of earlier statements within state-court briefing. BIO.26. During earlier proceedings, Ohio acknowledged that a State's waiver of certification would block future claims "within the scope of the certification it declined to act on." *Id.* But here, Ohio's claims feature misconduct—drilling with diesel-laced fuel instead of non-hazardous material—*outside the scope* of the project Rover proposed for certification. Pet.11–12, 35–36.

III. Rover's alternative argument provides no basis for denying or expanding review.

Near the end of its brief, Rover identifies a supposed "threshold" issue that it claims would disrupt review. BIO.30. It argues that some of Ohio's claims collaterally attack FERC orders. As Rover concedes, the lower courts "never reached this" argument. BIO.29. So the argument presents no impediment to review: it is an alternative argument that Rover could press during any further state-court proceedings.

Nonetheless, Rover casts its argument as a "jurisdictional" barrier. BIO.29. That is nonsense. This Court has jurisdiction to review federal questions resolved by state courts. 28 U.S.C. §1257(a). This case presents such questions. In Ohio, moreover, trial courts are courts of general jurisdiction; they possess subject matter jurisdiction unless an Ohio statute specifically "takes that jurisdiction away." *Ohio High Sch. Athletic Ass'n v. Ruehlman*, 157 Ohio St. 3d 296, 298 (2019). Thus, even if Rover's argument provides another ground for dismissal, it does not pose any subject-matter-jurisdiction concern.

Substantively, Rover's argument leads back to the Natural Gas Act's saving clause. Again, that clause expressly preserves state rights under the Clean Water Act. §717b(d)(3). Ohio's claims fall within those confines. Pet.32–34. Because the Natural Gas Act *expressly* preserves this state authority, no other part of the Act *implicitly* removes it.

Finally, Rover can only make this collateral-attack argument through a tortured reading of Ohio's claims. *See* BIO.29. Ohio does not challenge any of FERC's orders. It challenges unlawful pollution that FERC never approved. Most importantly, Rover never previewed to regulators that it would be drilling with diesel-laced fluid. Pet.11–12. It follows that Rover did not have FERC's blessing to dump millions of gallons of diesel-laced pollution into Ohio's waters. *See* Pet.App.132a; Pet.13.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse.

Respectfully submitted,

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