No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Section 401 of the Clean Water Act preserves state sovereignty by giving States a "certification" role in federal licensing for proposed projects that might pollute waterways through "any discharge into the navigable waters." 33 U.S.C. §1341(a)(1). Before an applicant receives a license, a State must certify that the discharge will comply with water-quality laws. *Id.* A State waives this power if it "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." *Id.* But the statute does not define a "request" for purposes of calculating waiver. Here, the Supreme Court of Ohio held that Ohio waived its Section 401 power by failing to act within a year of a company's initial submission for certification, even though that submission was not "complete" under existing law. *See* Ohio Rev. Code §6111.30(A)–(B). As to waiver, this case presents this question:

> 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. This Court has held that the Natural Gas Act sometimes impliedly preempts state laws. But the Natural Gas Act includes a saving clause, which says, "Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under" the Clean Water Act. 15 U.S.C. §717b(d)(3). With respect to preemption, this case presents this question:

> 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)?

LIST OF PARTIES

The petitioner is the State of Ohio, which sued by and through Dave Yost, the Ohio Attorney General.

The respondents are Rover Pipeline, LLC ("Rover") and Pretec Directional Drilling, LLC ("Pretec").

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State of Ohio, ex rel., Michael DeWine, Ohio Attorney General v. Rover Pipeline, LLC, et al.*, Case No. 2017CV02216 (Court of Common Pleas, Stark County, Ohio) (case dismissed on March 12, 2019 and October 20, 2023)
2. *State of Ohio, ex rel., Dave Yost, Ohio Attorney General v. Rover Pipeline, LLC, et al.*, Case No. 2019CA00056 (Ohio Ct. App. 5th Dist.) (decision issued December 9, 2019).
3. *State of Ohio, ex rel., Dave Yost, Ohio Attorney General v. Rover Pipeline, LLC, et al.*, Case No. 2023CA00151 (Ohio Ct. App. 5th Dist.) (decision issued October 1, 2024).
4. *State of Ohio ex rel. Dave Yost, Ohio Attorney General v. Rover Pipeline, LLC, et al.*, Case No. 2020-0091 (Ohio) (decision issued March 17, 2022).
5. *State of Ohio, ex rel. Dave Yost Ohio Attorney General v. Rover Pipeline, LLC, et al.*, Case No. 2024-1603 (Ohio) (discretionary review declined on January 28, 2025).

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INTRODUCTION

Faced with national concern about pollution in America's waters, Congress enacted the Clean Water Act in 1972. The Act "has been a great success." *Sackett v. EPA*, 598 U.S. 651, 658 (2023). Ohio can attest. Before the Act, the Cuyahoga River repeatedly caught fire due to rampant pollution. Fish could not live in the river. But today, after decades of cleanup efforts, Cleveland's big river no longer burns. Many fish now live there. They are even safe to eat. *See* Olivia Amitay, *Five Clean Water Act Success Stories*, PBS (Feb. 24, 2023), https://tinyurl.com/4fc7cmnk.

The Clean Water Act has been a success in another sense: federalism. The Act exemplifies what the States and federal government can accomplish when working together. The Act sets national goals, but the States retain the "primary responsibilit[y]" for combatting water pollution. 33 U.S.C. §1251(b).

Section 401 is one "essential" way by which the Act strikes that balance. *S.D. Warren Co. v. Me. Bd. of Env'tl Prot.*, 547 U.S. 370, 386 (2006). The section assigns the States a "certification" role in federal licensing. 33 U.S.C. §1341(a)(1). In that capacity, the States review projects that contemplate discharges into their waters. But a State waives this certification power 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 concerns waiver under Section 401. In 2015, a company sought to build a natural-gas pipeline running through Ohio. The Buckeye State welcomed that energy development. But, during construction, the company illegally discharged millions of gallons of diesel-laced fluid into Ohio waters. Ohio

sued, alleging unlawful water pollution. State courts held, however, that Ohio waived its claims. Against that backdrop, this petition presents two questions.

The first question asks when Section 401's waiver timeframe begins. The statute says that a "request" triggers the timeframe. §1341(a)(1). But the statute does not define that term. Must an applicant submit a valid request—satisfying legal requirements—to start the clock? Or does any expression of desire for certification (regardless of form or content) count as a request?

The circuits are split on the topic. *Compare AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 728–30 (4th Cir. 2009), *with N.Y. State Dep't of Env'tl Conservation v. FERC*, 884 F.3d 450, 455–56 (2d Cir. 2018) ("*NYSDEC*"). The Supreme Court of Ohio deepened the conflict. It held that an invalid request—which failed to meet pre-existing state-law requirements—started Ohio's waiver clock. That is wrong. Reading the term "request" in context, Section 401 envisions a formal request process, not a standardless regime. *Below* 22–28.

But whatever the answer, this question matters to many entities: States exercising their certifying authority; federal agencies considering permits; regulated parties seeking certification; and any interested citizen who might want to comment on a proposed project. Given these stakes, recent federal rulemakings have also entered this fray. *See* 85 Fed. Reg. 42210 (July 13, 2020); 88 Fed. Reg. 66558 (Sept. 27, 2023).

The second question concerns the consequences of waiver. After the Supreme Court of Ohio's waiver decision, a court of appeals held that Ohio—by failing to participate in the Section 401 process—entirely lost

its ability to protect its waters. The Clean Water Act, the court reasoned, gives the States a "choice" to either participate in the Section 401 process or have their traditional water authority preempted. Pet.App.19a. But that is "no real option." *See NFIB v. Sebelius*, 567 U.S. 519, 582 (2012) (Roberts, C.J., op.). Under our constitutional structure, the federal government cannot "dragoon[]" the States, *id.*, by saying, "Your assistance or your sovereignty."

For the Clean Water Act to remain a success, it must not damage our federalist system. If the States are to lose their traditional authority over their waters because of inaction, the terms of such waiver must be clear. And the federal government cannot use the States' sovereignty as leverage to coerce state participation in a federal certification process. The Court should grant this petition to clarify that the Clean Water Act follows these rules.

OPINIONS BELOW

The Supreme Court of Ohio's decision regarding waiver is published at *State ex rel. Yost v. Rover Pipeline, LLC*, 167 Ohio St. 3d 223 (2022), and reproduced at Pet.App.61a. That court's decision denying review as to preemption is published at *State ex rel. Yost v. Rover Pipeline, LLC*, 2025-Ohio-231, and reproduced at Pet.App.1a.

The decisions of Ohio's Fifth District Court of Appeals are published at *State ex rel. Yost v. Rover Pipeline, LLC*, 2019-Ohio-5179 (5th Dist.) and *State ex rel. Yost v. Rover Pipeline, LLC*, 2024-Ohio-4769 (5th Dist.) and reproduced at Pet.App.2a, 79a.

The dismissal entries of the Court of Common Pleas for Stark County, Ohio are reproduced at Pet.App.37a, 96a.

JURISDICTIONAL STATEMENT

Ohio sued Rover and its contractors in state court, alleging unlawful water pollution. The trial court dismissed Ohio's lawsuit, concluding that Ohio had waived its Section 401 certification power. Pet.App.108a. The court of appeals affirmed. Pet.App.94a. The Supreme Court of Ohio reversed and remanded. It agreed that Ohio had waived its certification power, but it held that waiver did not necessarily defeat Ohio's claims. Pet.App.69a–70a. Because the court remanded, that decision was not final. 28 U.S.C. §1257(a); *see Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476–83 (1975).

On remand, the trial court again dismissed Ohio's lawsuit, holding that the Natural Gas Act preempted Ohio's remaining claims. Pet.App.59a. The court of appeals affirmed. Pet.App.36a. The Supreme Court of Ohio declined review. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The following statutory provisions are included in the appendix filed with this petition:

15 U.S.C. §717b(d);

33 U.S.C. §1341(a)(1);

33 U.S.C. §1342(a)–(d);

Ohio Rev. Code §6111.30(A).

STATEMENT

I. Legal Framework.

A. "For most of this Nation's history, the regulation of water pollution was left almost entirely to the States." *Sackett*, 598 U.S. at 659. That began to change in 1948, when the Federal Water Pollution Control Act slightly adjusted the traditional balance. That legislation gave federal officials some authority to combat water pollution. *Id.* at 660. But it proved ineffective. *City & Cnty. of San Francisco v. EPA*, 145 S.Ct. 704, 711 (2025).

Congress eventually enacted the Water Quality Improvement Act of 1970. That legislation—although mostly short lived—included a provision about federal licensing for activities "that could cause a 'discharge' into navigable waters." *S.D. Warren*, 547 U.S. at 374. Congress conditioned such licenses on "certification from the State" that the discharge would "not violate certain water quality standards." *Id.*

The sea change came next. In 1972, Congress enacted the Federal Water Pollution Control Act Amendments—better known as the "Clean Water Act." The Clean Water Act sets a "national goal" of eliminating

pollution and improving water quality. 33 U.S.C. §1251(a). The Act prohibits "the discharge of any pollutant" into the waters of the United States "[e]xcept" for those discharges that the Act authorizes. 33 U.S.C. §1311(a).

The Clean Water Act depends on cooperative federalism. It "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution … of land and water resources." §1251(b). The States retain "the right … to adopt or enforce" other limits on the "discharges of pollutants" into their waters. §1370. The Act also delegates authority to the States in several ways. Three sections of the Act warrant particular emphasis.

Section 303. Section 303 tasks the State with developing water-quality standards. §1313(a). Those standards set "the designated uses" of covered waters and ensure that water quality is sufficient "to protect the public health or welfare." §1313(c)(2)(A). Acting on that responsibility, the Ohio EPA has crafted water-quality standards for the State. Ohio Rev. Code §6111.041; Ohio Adm. Code §3745-1.

Section 401. The Clean Water Act retained the state-certification process that Congress created in 1970. Under Section 401, that certification process covers applications "for a Federal license or permit to conduct any activity …, which may result in any discharge into the navigable waters." §1341(a)(1). An applicant must obtain "a certification from the State in which the discharge … will originate." *Id.* The State must evaluate whether "any such discharge will comply with the applicable provisions of" the Clean Water Act. *Id.* It must then set any limitations and

requirements "necessary" to ensure compliance with applicable water-quality laws. §1341(d). Those limitations and requirements "become a condition" of the federal license or permit. *Id.*

Section 401 sets the timeframe by which the States must complete this process. It says:

> 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.

§1341(a)(1). Thus, a State waives its certification power if it fails to act within a reasonable time. *Id.* A State's waiver clock begins to run "after receipt" of the relevant "request for certification." *Id.* But the statute does not define "request."

Section 402. Section 402 establishes a separate permit process. That process—often called a "national pollutant discharge elimination system" or "NPDES" program—governs "the discharge of any pollutant" from a point source into navigable waters. §1342(a)(1). The Clean Water Act authorizes such discharges only if a person obtains a Section 402 permit. §§1311(a), 1342.

As a default, the federal EPA runs the Section 402 program. §1342(a). But each State has the option to run "its own permit program." §1342(b). The EPA "shall approve each" state program that meets certain conditions. *Id.* For instance, a state program must contain an enforcement plan, including "civil and criminal penalties," to "abate violations." §1342(b)(7).

The EPA has 90 days to review a State's program submission. §1342(c)(1). That timeframe begins when a State provides a "complete program submission" that covers each required element. 40 C.F.R. §123.61(b); *see* §123.21. If the EPA approves of a State's submission, then the "State permit program" goes forward and the EPA "suspend[s]" its federal program for the relevant jurisdiction. 33 U.S.C. §1342(c)(1).

Most States run their own Section 402 programs. U.S. EPA, *NPDES State Program Authority* (Jan. 31, 2025), https://www.epa.gov/npdes/npdes-state-program-authority. Ohio has done so since 1974. *Id.* It therefore has laws, penalties, and enforcement options that prevent the discharge of pollutants without a valid permit. Ohio Rev. Code §§6111.04(A), 6111.07; Ohio Adm. Code §§3745-33-02(A), 3745-39-04.

B. The Clean Water Act grants the EPA rulemaking authority. §1361(a). Recent administrations have promulgated detailed rules about Section 401. *See* 85 Fed. Reg. 42210 (July 13, 2020); 88 Fed. Reg. 66558 (Sept. 27, 2023). But the EPA was not always so active.

Rewind to 1971, shortly after Congress created the state-certification process. That year, the EPA first promulgated regulations about certification. 36 Fed. Reg. 8563 (May 8, 1971). Those regulations described how the federal EPA would proceed when *it* was the relevant certifying authority. *Id.* at 8564–65. But they did not dictate how the States would proceed with *their* certification processes. Most relevant, the 1971 regulations did not "define what information, if any, was sufficient to start [a State's] review process." 88 Fed. Reg. at 66578.

The EPA eventually issued a guidance handbook. *Wetlands and 401 Certification: Opportunities Guidelines for States and Eligible Indian Tribes* (1989), https://tinyurl.com/4rfyvn4n ("1989 Guidance"). That guidance invited the States to develop a "comprehensive set of 401 certification implementing regulations." *Id.* at 30. The EPA warned States that they should "adopt rules" to "protect against an unintended waiver" of certification power. *Id.* at 31. It further encouraged States to (1) "define the major components of a complete application" and (2) require "the applicant to submit a complete application for certification before the official agency review time begins." *See id.* (emphasis omitted).

The EPA provided updated guidance in 2010. *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* (2010), https://tinyurl.com/6thtbf6j ("2010 Guidance"). That guidance again tasked the States with determining "what constitutes a 'complete application' that starts the timeframe clock." *Id.* at 11. The guidance stressed the "advantage" of States providing "a clear description of components of a complete §401 certification" so that everyone could "understand when the review timeframe has begun." *Id.* at 16.

Thus, for most of the Clean Water Act's history, the EPA allowed the States to establish the details of their certification processes. Many States thus "established their own requirements for what constitutes a request for certification," often by defining the components of a "complete" request. 88 Fed. Reg. at 66578 (quotation omitted). Since 2005, Ohio has defined the contents of a "complete" certification application through statute. Ohio Rev. Code §6111.30. The statute lists ten requirements, some of which apply only in certain

situations. *Id.* at §6111.30(A). A certification request must, for example, include a letter from the U.S. Army Corps of Engineers documenting federal jurisdiction over the waters in question. *Id.* at §6111.30(A)(1); *see* 33 C.F.R. §331.2. The Ohio EPA informs applicants whether their applications are complete within fifteen business days. Ohio Rev. Code §6111.30(B).

C. Things shifted in 2019. That was when the EPA issued revised guidance suggesting that the State's "timeline for review begins" upon "receipt of a written request." *Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes* 3 (2019), https://tinyurl.com/5dzftzws.

The "2020 Rule," however, soon supplanted that guidance. 85 Fed. Reg. 42210. That rule established comprehensive regulations governing the Section 401 certification process. It set a multi-part federal definition for what qualifies as a valid "certification request." 85 Fed. Reg. at 42285. Thus, under the 2020 Rule, the States could no longer craft their own certification-request definitions. Even so, the 2020 Rule clarified that the waiver timeframe would "not begin" until a project proponent submits a valid "certification request" satisfying the new definition. *Id.* at 42273; *see id.* at 42243 ("A certification request must include all components to start the statutory clock.").

The EPA changed course again with the "2023 Rule." 88 Fed. Reg. 66558. The 2023 Rule—which remains in effect—sets a different multi-part definition of "request for certification," which gives the States some discretion to define the contents of a valid request. *Id.* at 66574; 40 C.F.R. §121.5(c). The rule then provides that a State's waiver "clock starts" when the State receives a valid "request for certification" that

satisfies legal requirements. 88 Fed. Reg. at 66581; *see* 40 C.F.R. §121.6(a).

II. Factual Background.

A. In 2015, Rover sought to build a pipeline that would traverse Ohio. Pet.App.4a. Rover applied to the Federal Energy Regulatory Commission ("FERC") for a certificate of public convenience and necessity. *See* 15 U.S.C. §717f(c). As part of that process, FERC needed to prepare an environmental impact statement. *See* 42 U.S.C. §4332(C). And, because the desired project would involve discharges into the nation's waters, Rover needed to obtain a Section 401 certification from Ohio. *See* §1341(a)(1).

These steps forced Rover to describe its project. The environmental impact statement, for instance, said Rover would use only "naturally occurring, nontoxic bentonite clay and water" when drilling under water bodies. *Final Environmental Impact Statement* 2-31 (July 29, 2016), FERC Docket CP15-93, issuance 20160729-4001 ("*EIS*"). Rover's drilling plan similarly said that Rover would be using "drilling mud," consisting "primarily of fresh water," with some "bentonite" clay added. *Horizontal Directional Drill Contignecy Plan* 1 (April 2015), FERC Docket CP15-93, issuance 20160729-4001, App'x G-1 ("*Drilling Plan*"). "Benonite," the plan emphasized, "is not considered a hazardous material." *Id.* These planning documents noted that Rover might inadvertently release drilling fluid into waters. *EIS* at 2-31; *Drilling Plan* at 1. But any release would have little "adverse environmental impact," Rover assured, because of the non-hazardous material it planned to use. *Drilling Plan* at 1. The environmental impact statement noted the chance that "diesel fuel or oil" might spill "during

construction." *EIS* at 4-115. Such a spill might occur, for example, during the "refueling" of "construction equipment." *Id.* But the risks were supposedly "low." *Id.* In short, Rover in no way previewed to regulators that it would be *drilling* with diesel-laced fluid.

Rover first sought Section 401 certification from Ohio in November 2015. Pet.App.4a. But Rover's initial submission was incomplete under Ohio's statutory requirements. For instance, Rover failed to submit a jurisdictional determination from the Army Corps of Engineers. *See* Ohio Rev. Code §6111.30(A)(1). The Ohio EPA soon notified Rover of the missing information. 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. Rover submitted that information by July 2016. Letter from Todd Surrena, Application Coordinator, to Buffy Thomason, Rover Pipeline LLC (Aug. 9, 2016), http://edocpub.epa.ohio.gov/publicportal/ViewDocument.aspx?docid=475383.

While Ohio was processing Rover's completed request, Rover modified its pipeline project. Rover submitted a revised certification request on February 23, 2017. Pet.App.105a. Ohio granted certification the next day. *Id.*

B. FERC approved Rover's construction project. But it required that Rover obtain a hydrostatic permit from Ohio. *See* Pet.App.33a. Hydrostatic test water refers to water placed in tanks or pipelines to test for leaks. Ohio and other States grant hydrostatic permits under Section 402. *EIS* at 1-5. Rover applied for

and received a hydrostatic permit from Ohio. Pet.App.33a.

Rover began construction in 2017, but the project went poorly. As Ohio alleges, Rover and its contractors spilled millions of gallons of diesel-laced drilling fluid into an Ohio wetland. Pet.App.132a. Given this pollution, FERC halted construction so that Rover could implement protective measures. Pet.App.4a. Construction eventually resumed, and Rover completed its pipeline in 2018.

Meanwhile, FERC investigated Rover's pollution. And investigators found that Rover's contractors intentionally added diesel fuel to drilling mud to "keep up with drilling progress demands." *Rover Pipeline, LCC*, 177 FERC ¶61182, at 2 (Dec. 16, 2021). Rover is currently fighting a recommended $40 million penalty in federal administrative proceedings. *Id*. at 4.

III. Proceedings below.

A. Ohio sued Rover and its contractors in state court, bringing claims of unlawful pollution. Rover removed the case, but a federal court remanded back to state court. Pet.App.38a.

Rover and its contractors then moved to dismiss Ohio's claims. They argued that Ohio waived its claims by failing to act within a year of Rover's initial certification submission in November 2015. The trial court agreed and dismissed Ohio's entire case. Pet.App.108a. An Ohio court of appeals affirmed. Pet.App.94a.

The Supreme Court of Ohio agreed in part with the lower state courts. It held that Ohio had waived its Section 401 authority. Pet.App.67a. It did not matter, in the Supreme Court of Ohio's view, whether Rover's

November 2015 submission was complete under existing law at the time of the request. The court instead said that "the one-year period during which the state must act on a request for certification under section 401 begins when the application is submitted, not when it is deemed complete." Pet.App.66a.

Ohio's perceived waiver, however, did not end the case. Rather, the Supreme Court of Ohio held that the State had waived its "authority only with respect to the federal application." Pet.App.67a. The "vast bulk of the state's rights and authority"—outside of the Section 401 process—"remain[ed] intact." *Id.* The court thus remanded for further proceedings. Pet.App.69a–70a.

B. On remand, Ohio filed an amended complaint, its fourth by that point. Pet.App.109a. That complaint brings six claims against Rover and Pretec (a contractor of Rover). Three claims (one, two, and five) allege that Rover and Pretec illegally discharged pollutants. Pet.App.5a–6a. Two other claims (three and four) allege that Rover and Pretec violated Ohio's water-quality standards. *Id.* The final claim (six) alleges that Rover violated its hydrostatic permit. *Id.*

Rover and Pretec moved to dismiss, arguing that the Natural Gas Act preempted these claims. The trial court agreed and dismissed all of Ohio's claims. Pet.App.59a.

The court of appeals affirmed. It held that the Natural Gas Act, by occupying the field of interstate natural-gas transportation, impliedly preempted Ohio's remaining claims. Pet.App.35a–36a. The court emphasized the "comprehensive scheme" of the Natural Gas Act and the "exclusive jurisdiction" the Act confers upon FERC. Pet.App.15a (quotation omitted).

The court further stressed that FERC was already considering federal civil penalties against Rover. Pet.App.23a.

The court of appeals recognized that the Natural Gas Act contains a saving clause. The clause says that, except as the natural-gas chapter of the United States Code "specifically provide[s]," the chapter does "nothing" to "affect[] the rights of States under" the Clean Water Act. 15 U.S.C. §717b(d)(3). The court did not identify any language from the relevant chapter that "specifically provide[d]" for preemption of Ohio's claims. *See id.* But it concluded that the saving clause protects only "those rights delegated to the state from the federal government in the 401 Certification process." Pet.App.21a. The court acknowledged that there are other sections of the Clean Water Act—including Section 402—that also involve state authority. Pet.App.28a. But because those sections are interrelated with Section 401, the court reasoned, they did not confer any independent rights that the saving clause protected. Pet.App.29a.

At bottom, the court of appeals described the Clean Water Act as offering States a "choice." Pet.App.19a. This "choice" is a heavy-handed one: States must either participate in the federal certification process or have all their water-pollution authority "preempted by federal law." *Id.*; *accord* Pet.App.26a. It followed that, since Ohio had "waived its ability to participate in the 401 Certification process," federal law preempted Ohio's remaining claims. Pet.App.35a.

C. Ohio appealed the preemption ruling. Over three dissents, the Supreme Court of Ohio declined review. Pet.App.1a.

REASONS FOR GRANTING THE WRIT

This case presents two important questions about the States' authority under the Clean Water Act. The first involves a topic on which circuits and state high courts are split. The second raises serious concerns about the States' forced participation in a federal program that otherwise preempts their longstanding sovereignty. Both questions warrant this Court's full review.

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

Section 401 of the Clean Water Act establishes a certification process, which reserves a role for the States in federal licensing. A State waives its certification power if it "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." 33 U.S.C. §1341(a)(1). But the Clean Water Act does not define what qualifies as a "request" sufficient to start the waiver timeframe. That issue has divided the Nation's courts.

A. The Supreme Court of Ohio's decision added to an existing conflict between the Second and Fourth Circuits.

1. For decades, parties seldom litigated waiver under Section 401. Discord has since grown. Several recent cases have addressed whether the withdrawal and resubmission of a certification request restarts the waiver timeframe. *See, e.g.*, *Cal. State Water Res. Control Bd. v. FERC*, 43 F.4th 920, 935–36 (9th Cir. 2022); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1100–01 (D.C. Cir. 2019). Other cases have involved

what conduct qualifies as acting on a certification request for waiver purposes. *See N.C. Dep't of Env'tl Quality v. FERC*, 3 F.4th 655, 669–70 (4th Cir. 2021); *Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017).

This case presents a foundational question: Does Section 401 require a *valid* request to start the waiver clock? On that question, the circuits and state high courts are split.

Fourth Circuit. Begin with *AES Sparrows*, 589 F.3d 721. There, a company wanted to build a pipeline running through Maryland. *Id.* at 723. The company initially asked Maryland for Section 401 certification in January 2007. *Id.* at 725. But Maryland concluded that the company's submission was incomplete. *Id.* While the company obtained the missing information, it sought a Section 404 permit from the Army Corps of Engineers. (The Army Corps is responsible for administering that section of the Clean Water Act. 33 U.S.C. §1344.) The Army Corps verified, on April 25, 2008, that the company had submitted a complete certification request to Maryland, and it gave Maryland a year to act. *AES Sparrows*, 589 F.3d at 729. Maryland denied certification on April 24, 2009. *Id.* at 726.

The company nonetheless argued that Maryland waived its Section 401 authority by failing to act sooner. *Id.* at 728. The Fourth Circuit disagreed. Section 401's text was "ambiguous," the circuit reasoned, as to whether a legally "valid request" was necessary to trigger the waiver timeframe. *Id.* at 729. The court thus looked to the Army Corps regulation on the subject, which required a "valid request for certification" to commence the "waiver period." *Id.* (quotation omitted). Because requiring a "valid request" was

reasonable "in light of the statutory text," the Fourth Circuit deferred to that reading under *Chevron USA, Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). *AES Sparrows*, 589 F.3d at 729.

Second Circuit. In *NYSDEC*, 884 F.3d 450, the Second Circuit read Section 401 differently. There, a company sought to build a pipeline in New York. *Id.* at 453. The company first asked New York for certification in November 2015. But New York informed the company that its submission was incomplete under state law. *Id.* at 453; *see* Pet. Br., No. 17-3770, 2017 U.S. 2nd Cir. Briefs LEXIS 1188, at *10–*11 (Dec. 22, 2017). The company submitted additional information in August 2016 and New York denied the certification request in August 2017. *NYSDEC*, 884 F.3d at 453–54.

FERC concluded that New York had waived its certification power by failing to act within a year of the company's initial submission. *Id.* at 454. The Second Circuit agreed. That circuit held that the "plain language of Section 401 outlines a bright-line rule regarding the beginning of review." *Id.* at 455. It rejected a reading under which "state agencies decide" whether a certification request is "complete." *Id.* Thus, in the Second Circuit's view, New York waived its authority regardless of whether the company's initial submission satisfied existing legal requirements. *See id.*

Supreme Court of Ohio. The Supreme Court of Ohio followed the Second Circuit's lead. It concluded "that the one-year period during which the state must act on a request for certification under section 401 begins when the application is submitted, not when it is deemed complete." Pet.App.66a. Given that reading of Section 401, the court did not decide whether

Rover's initial submission satisfied existing law at the time of the request. *See* Pet.App.67a. Notably, the court acknowledged the Fourth Circuit's competing decision in *AES Sparrows*. Pet.App.65a. It made no attempt to reconcile its decision with that one.

As these cases show, the Nation's courts are in conflict as to when the States' certification waiver clock begins. Maryland, and other States in the Fourth Circuit, may await a legally *valid* certification request before starting the certification timeframe. Whereas States like Ohio and New York more easily lose sovereignty over their own waters.

2. Two other points about the existing conflict.

First, while *Chevron* influenced the Fourth Circuit's decision in *AES Sparrows*, the split identified above endures. Like many decisions over the past forty years, *AES Sparrows* applied the *Chevron* framework. This Court recently overruled *Chevron*, but it did "not call into question prior cases that relied on the *Chevron* framework." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). Rather, it stressed that *Chevron*-influenced holdings "are still subject to statutory *stare decisis* despite [the] change in interpretive methodology." *Id.* It follows that *AES Sparrows* remains controlling statutory precedent in the Fourth Circuit. And regardless, the reasoning of *AES Sparrows* and *NYSDEC* conflict. The Fourth Circuit found Section 401's text "ambiguous." *AES Sparrows*, 589 F.3d at 729. The Second Circuit found it "plain." *NYSDEC*, 884 F.3d at 455.

Second, federal regulations also conflict in reading Section 401. The Army Corp's regulation says that in "determining whether or not a waiver period has commenced," the Army Corp's will "verify that the

certifying agency has received a valid request for certification." 33 C.F.R. §325.2(b)(1)(ii). The EPA's current approach is similar. *See* 40 C.F.R. §§121.5(c), 121.6(a). FERC's regulations, on the other hand, start the waiver clock upon any "written request for certification," with no inquiry into the request's legal validity. *E.g.*, 18 C.F.R. §§4.34(b)(5)(iii), 5.23(b)(2), 6.1(b); *accord AES Sparrows*, 589 F.3d at 728. That departs from past practices: FERC used "to deem the one-year waiver period to commence when the certifying agency found the request acceptable for processing." *Cal. ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1552 (9th Cir. 1992).

B. This question is important.

The importance of the waiver question strengthens the case for certiorari. The Clean Water Act is "the principal federal law regulating water pollution." *Sackett*, 598 U.S. at 657–58. Given the Act's overall import, questions about its details are often important too. *See e.g.*, *id.*; *San Francisco*, 145 S.Ct. 704; *Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165 (2020); *Nat'l Ass'n of Mfrs. v. DOD*, 583 U.S. 109 (2018); *Decker v. Northwest Env'tl Def. Ctr.*, 568 U.S. 597 (2013); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009); *S.D. Warren*, 547 U.S. 370; *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994).

Section 401, moreover, is an "essential" part of the Act's "scheme to preserve state authority." *S.D. Warren*, 547 U.S. at 386. For each "Federal license or permit" that involves potential discharges, the States receive a chance to set limitations and requirements "necessary to assure" water quality. §1341(a)(1), (d).

Because every certification request triggers the possibility of waiver due to inaction, the start of the waiver clock is a frequently recurring question. The States must understand the answer to properly structure their certification processes. The stakes are only heightened by the fact that the States lose some of their sovereignty if they do not act timely.

The waiver timeframe affects others, too. Those seeking certification need to know whether they must supply the requisite information upfront or whether they may provide information piecemeal. And the public has its own interests. Section 401 requires "public notice in the case of all applications for certification" and anticipates that States will hold "public hearings" for many certification applications. §1341(a)(1). When the waiver clock starts will necessarily affect the timing of those notice-and-hearing procedures. Relatedly, how much information an applicant must provide to trigger the certification process will affect the quality of information the public receives.

Recent administrations, for their part, have prioritized writing comprehensive rules governing Section 401. During two recent rulemakings, the EPA reviewed over 150,000 total comments from interested parties. 85 Fed. Reg. at 42213; 88 Fed. Reg. at 66566. Both rulemakings focused on the waiver timeframe and the definition of certification request. *E.g.*, 85 Fed. Reg. at 42243–50; 88 Fed. Reg. at 66573–84.

Given all this attention, the Court should not allow existing disagreements to fester. Many States do not yet have firm judicial guidance about when their waiver clock starts. And even setting that uncertainty aside, "equal sovereignty among the States" is a

"fundamental principle" of our federalist structure. *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013) (quotation omitted). Currently, some States are losing sovereignty over their waters more easily than others.

Finally, this case is an ideal vehicle for answering this important question. While the certification timeframe often hides in the background of disputes, here it is front and center.

C. The decision below is wrong.

The Supreme Court of Ohio erred in holding that an invalid request started Ohio's waiver clock. Ohio's clock did not begin until Rover submitted a valid request, which satisfied existing law at the time.

1. Return to the text. The most relevant passage of Section 401 says this:

> 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.

§1341(a)(1). Thus, the State's "receipt" of a "request" starts the waiver timeframe.

The Clean Water Act does not define "request." And request is an elastic word that "draws meaning from its context." *See Dubin v. United States*, 599 U.S. 110, 118 (2023) (quotation omitted). In casual settings, "request" often just means "asking for something." Webster's New International Dictionary 2116 (2d ed. 1948). But in legal settings, formal requirements almost always attach to submitting a "request." *See* Black's Law Dictionary 1563–64 (12th ed. 2024).

For example, as any federal-court practitioner knows, a "request for a court order" is something that is "made by motion," "in writing," and "with particularity." Fed. R. Civ. P. 7(b)(1).

Here, context strongly supports reading "request" in a formal manner. *See San Franciso*, 145 S.Ct. at 715 (declining to read the term "limitation" in a "loose[] sense" for purposes of the Clean Water Act). Recall first that the certification request is part of a broader application process for a "Federal license or permit." §1341(a)(1). That is the type of setting where one expects formal requirements. In another passage, about public notice-and-hearing requirements, Section 401 refers to "applications for certification by" the State. *Id.* That terminology further signals formality. As normally understood, government applications involve "submitting a request through properly defined channels" and complying with a "government-designated format." *See League of Cal. Cities v. FCC*, 118 F.4th 995, 1033–34 (9th Cir. 2024) (Bennett, J., dissenting in part and concurring in part). Remember also that a State's ultimate task during the certification process is to identify the limitations and requirements "necessary" to ensure compliance with applicable water-quality laws. §1341(d). If requesters were not required to supply sufficient information about the contemplated project, a State would be hard pressed to carry out that task.

Considering all this, an ordinary English speaker reading the word "request" in the broader context of Section 401 would expect that making a "request" involves meeting formal requirements. The ordinary reader would not think that a quick email, a handwritten note, or a shout across the street would do.

Once one accepts that a "request" has formal requirements, the question remains what those requirements are. The Clean Water Act leaves the answer to the EPA and the States. *See* 33 U.S.C. §§1251(b), 1361(a). For most of the Clean Water Act's history—including the timeframe relevant to this case—the EPA allowed States to set the definition. *See* 1989 Guidance at 30–31; 2010 Guidance at 11, 15–16. More recently, both the 2020 Rule and the 2023 Rule set multi-part definitions for what qualifies as a "request." 85 Fed. Reg. at 42285; 88 Fed. Reg. at 66662. For all the differences between those two rules, both rules agreed that (1) "request" requires a formal definition and (2) the States' waiver clock does not start until a request meets that formal definition. *See* 85 Fed. Reg. at 42243–45; 88 Fed. Reg. at 66581.

In sum, accounting for both text and context, Section 401 is best read to require a valid "request" to start a State's waiver timeframe. The statute then leaves it to federal or state rulemaking to "fill up the details" of what constitutes a valid request. *See Loper Bright*, 603 U.S.at 395 (quotation omitted).

2. Section 401 is hardly novel in taking this approach. Other sections of the Clean Water Act have also led to "'completeness' standard[s] for applications or similar documents." 88 Fed. Reg. at 66578. Section 402 generally discusses "application[s]" for permits. *E.g.,* 33 U.S.C. §1342(a)(5), (j). But corresponding regulations provide the details for the "completeness" of "applications forms." 40 C.F.R. §122.21(a)(2), (e). And the EPA does not begin "the processing of a [Section 402] permit until the applicant has fully complied with the application requirements for that permit." 40 C.F.R. 124.3(a)(2). Remember also that, under Section 402, the EPA has 90 days to review a State's

submission to run a permit program. §1342(c)(1). The EPA, via regulation, starts that timeframe upon "the receipt of a complete program submission." 40 C.F.R. §123.61(b). Similarly, for Section 404 of the Clean Water Act, the regulatory timeframe for federal engineers to decide applications begins "after receipt of a complete application." 33 C.F.R. §325.2(d)(3); *see* §325.1(d).

Many comparable frameworks exist in other areas of federal law. Indeed, a host of federal regulations use the "receipt" of a "complete" request or application as a triggering phrase for government responsibilities. *E.g.*, 6 C.F.R. §25.9(d)(1); 7 C.F.R. §340.5(h)(5); 7 C.F.R. §4280.110(e); 10 C.F.R. §490.806(a); 12 C.F.R. §251.4(b)(3); 15 C.F.R. §400.38(a); 16 C.F.R. §1500.89(f); 17 C.F.R. §1.9(c)(5); 23 C.F.R. §661.25(d); 24 C.F.R. §242.16(f); 29 C.F.R. §4220.4(a); 32 C.F.R. §725.9(c); 43 C.F.R. §3165.3(d).

Federal telecommunications law offers a final comparison. A federal statute mandates that state and local governments approve certain "request[s]" involving modification to wireless towers. 47 U.S.C. §1455(a)(1). FCC regulations give states and local governments sixty days, after receiving a "request," to decide whether the request satisfies legal requirements. 47 C.F.R. §1.6100(c)(2). But state and local governments may require "documentation or information" within a request to help with that inquiry. §1.6100(c)(1). And the FCC tolls that period for acting if "the reviewing State or local government determines that the application is incomplete." §1.6100(c)(3). Thus, the FCC has read §1455(a)(1) as impliedly requiring that a modification "request" satisfy certain information requirements in order to trigger the relevant statutory duty.

The bottom line is this. Requiring a valid submission to initiate a review process—with rulemaking filling in the requirements—is a common feature of federal administrative law.

3. If Section 401 requires a valid request to initiate the waiver timeframe, then this is an easy case. Rover first sought a Section 401 certification on November 16, 2015. Pet.App.105a. But Rover's initial submission was incomplete, as it did not satisfy Ohio's longstanding statutory requirements establishing the contents of a certification request. *See* Ohio Rev. Code §6111.30(A); *above* 12. So, that initial submission did not start Ohio's waiver clock. Rover eventually submitted a complete submission, which Ohio acted on well within a year. Pet.App.105a. Given these circumstances, Ohio did not waive its Section 401 certification power.

4. The Supreme Court of Ohio's and Second Circuit's contrary decisions are unpersuasive. Both decisions said that a Section 401 "request" includes invalid requests that do not satisfy existing legal requirements. But neither decision seriously engaged with Section 401's surrounding text. And neither decision identified a limiting principle for the outer boundaries of a "request." Does an informal email count? A scribbled note? A text message? The decisions do not say. *See* Pet.App.66a–67a; *NYSDEC*, 884 F.3d at 455–56.

The remaining analysis within these decisions also leaves much to be desired. The Supreme Court of Ohio suggested that the 2020 Rule supported its reading. Pet.App.66a–67a. Not so. The 2020 Rule concluded that the statute's use of "request" was ambiguous. 85 Fed. Reg. at 42246. The Supreme Court of Ohio determined it was clear. Pet.App.66a. The 2020 Rule

set a nationwide definition for request, but the rule recognized that a request still needed to be valid—meeting "all components" of the new legal definition—to "start the statutory clock" for waiver. 85 Fed. Reg. at 42243; *accord id.* at 42273. By contrast, the Supreme Court of Ohio failed to consider whether the request at issue in this case was valid under existing law at the time of the request. *See* Pet.App.67a.

The Second Circuit's discussion of practicalities in *NYSDEC* also misses the mark. The court worried about the "theoretical[]" possibility that States could "request supplemental information indefinitely." 884 F.3d at 456. But Ohio's position is based on objective legal requirements that were in place at the time of Rover's initial submission. Ohio Rev. Code §6111.30. And if Ohio unreasonably delayed a decision on a request, the requester could seek judicial relief. *See Ohio ex rel. Omni Energy Grp., LLC v. Ohio Dep't of Nat. Res.*, 164 Ohio St. 3d 470, 470 (2020). (Requesters can also challenge denials of certifications. Ohio Rev. Code §§3745.04, 3745.06. And Congress has crafted special judicial remedies in the natural-gas context to prevent unjustified denials and delays of permits. *See* 15 U.S.C. §§717r(d)(1)–(3).)

The Second Circuit also gave short shrift to competing concerns. The circuit suggested that no harm would come from starting the States' waiver clock early, because States could simply deny incomplete requests. *NYSDEC*, 884 F.3d at 456. But that approach would make the certification process far more adversarial, by increasing the number of denials and litigation over those denials. Moreover, requiring States to start their waiver clocks early would prematurely trigger public notice obligations (for all

applications) and hearing obligations (for some applications). *See* 33 U.S.C. §1341(a)(1).

Consider Ohio's process. Within twenty-one days of a valid request, Ohio requires that the requester publish notice about the contemplated project "in a newspaper of general circulation." Ohio Rev. Code §6111.30(C). That initiates a thirty-day comment period. *Id.* Ohio then sets hearings for any project for which comments reveal a "significant public interest." *Id.* at §6111.30(D). If incomplete requests are enough to initiate these procedures, that will result in confusing public proceedings with insufficient information. And, if Ohio denies the incomplete request, the next request will trigger duplicative proceedings. Outside of giving requesters an untoward incentive to induce mistaken waivers, this type of stop-and-start process benefits no one.

II. The Court should resolve the effect of waiver under Section 401.

If the Court agrees that Ohio did not waive its certification power, then the analysis stops there. But if the Court disagrees, this case presents an important follow-up question: What are the consequences of waiver?

That question matters for all scenarios in which a certification authority might waive its power. But the possibility of preemption under the Natural Gas Act augments the question's importance. The Natural Gas Act sometimes impliedly preempts state laws relating to natural-gas transportation. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 306–07 (1988); *but see Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015). The Act, however, contains a saving clause

that preserves state rights under the Clean Water Act. 15 U.S.C. §717b(d)(3).

Despite the saving clause, the decision below held that that the Natural Gas Act preempted Ohio's claims. That holding stemmed from an overbroad reading of (1) the consequences of Section 401 waiver and (2) implied preemption under the Natural Gas Act. The lower court erred. And the errors, if left uncorrected, raise a constitutional problem.

A. This question is important, as it implicates the Clean Water Act's constitutionality.

According to the decision below, the Clean Water Act offers the States a "choice" of either participating in a federal program or "having state law preempted by federal law." Pet.App.19a. Under that reading, Ohio lost its traditional water authority because it did not participate in the certification process. But if that reading is right, then Section 401 is unconstitutional.

1. In our federalist system, the States retain considerable powers. *Trump v. Anderson*, 601 U.S. 100, 110 (2024) (per curiam). Those retained powers include the "broad authority to enact legislation for the public good." *Bond v. United States*, 572 U.S. 844, 854 (2014). Exercising that authority, the States have traditionally been responsible for "the regulation of water pollution." *Sackett*, 598 U.S. at 659. If Congress meant for Section 401 waiver to strip that traditional authority, one would expect a "clear statement." *Bond*, 572 U.S. at 857–58.

The States' retained powers include "the power … to order the processes of its own governance." *Anderson*, 601 U.S. at 110 (quotation omitted). The federal

government lacks "the power to issue direct orders to the governments of the states." *Murphy v. NCAA*, 584 U.S. 453, 471 (2018). That means "Congress cannot compel the States to enact or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). Nor can it avoid "that prohibition by conscripting the State's officers directly." *Id.*

True, Congress may "encourage[]" States to participate in cooperative federalism. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987). But States must retain their own sovereignty "not merely in theory but in fact." *Id.* at 211–12. Key here, the federal government cannot threaten the States with "your assistance or your sovereignty." That is a metaphorical "gun to the head" in our system of divided power. *NFIB*, 567 U.S. at 581 (Roberts, C.J., op.); *see id.* at 582 n.12 (discussing a similarly "coercive proposition").

2. These principles make the second question presented incredibly important. The States, in deciding whether to participate in the Section 401 certification process, need clear terms about what happens if they do not participate.

Think, for example, of Section 402. That section allows the States to run their own permit programs governing the "the discharge of pollutants into the navigable waters." 33 U.S.C. §§1342(b), (g). Most States have exercised that option. But the decision below held that participating in the Section 401 certification process is a necessary predicate to exercising Section 402 authority. *See* Pet.App.28a–29a. Even without more, that makes the second question presented significant, as Section 402 is a "critical component" of the Clean Water Act's overall scheme. *San Franciso*, 145 S.Ct. at 712.

A deeper constitutional problem rests below the surface. If States must either participate in the Section 401 process or lose all authority to combat water pollution, then Section 401 no longer presents a constitutionally permissible choice. Under that reading, Section 401 uses state sovereignty as leverage to coerce state participation in a federal process. That type of your-assistance-or-your-sovereignty threat violates the Constitution.

The Court should take this case to make clear that Section 401, when properly read, presents no such dilemma. Given the importance of the Clean Water Act, and the importance of the States retaining a choice about whether to participate in federal programs, the Court should not allow this question to linger.

B. The decision below is wrong.

The decision below erred in holding that the Natural Gas Act impliedly preempts Ohio's claims. Ohio's claims all fall within that Act's express saving clause.

1. Any form of federal preemption—whether express or implied—"must stem from either the Constitution itself or a valid statute." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020). If a statute expressly addresses preemption, the statute's words supply "the best evidence of Congress' preemptive intent." *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 594 (2011) (quotation omitted). Thus, when a statute contains a "saving clause" preserving state authority, the clause provides a "direct route" for resolving preemption. *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 339 (2011) (Thomas, J., concurring in the judgment).

The Natural Gas Act, in its present form, contains a saving clause. The clause says:

> Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—
>
> (1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);
>
> (2) the Clean Air Act (42 U.S.C. 7401 et seq.); or
>
> (3) [the Clean Water Act] (33 U.S.C. 1251 et seq.)

15 U.S.C. §717b(d). Those words allow for the possibility that some natural-gas statutes might "specifically" displace state rights. *Id.* But otherwise, natural-gas statutes do "nothing" to "affect[] the rights of States under" the Clean Water Act. *Id.*

What are the "the rights of States *under*" the Clean Water Act? The word "under" is a "chameleon that must draw its meaning from its context." *Pereira v. Sessions*, 585 U.S. 198, 215 (2018) (quotation omitted). It can mean "according to," "in accordance with," "pursuant to," and "by reason of the authority of." *Id.*; *Nat'l Ass'n of Mfrs.*, 583 U.S. at 124. Context here supports a broad reading. This Court has "repeatedly stressed" that "the Natural Gas Act was drawn with meticulous regard for the continued exercise of state power." *Oneok*, 575 U.S. at 384–85. And the Clean Water Act leaves the States with the "primary responsibilities" for combatting water pollution. §1251(b); *see* §1370. It would thus be strange for Congress to have later signaled a dramatic shift in federal-state authority over this country's waters by saying that it intended to do "nothing." *See* §717b(d).

With that in mind, the best reading is that the States' traditional authority over their waters form part of "the rights of States under" the Clean Water Act. *See* §717b(d)(3). Through the Clean Water Act, Congress entered the field of water pollution. It could have occupied the field to the limits of federal commerce power. Instead, Congress decided "to recognize, preserve, and protect" the "rights of States" to prevent water pollution. §1251(b). Because Congress folded traditional state powers into the recalibrated federal-state balance, the States' traditional powers over their waters make up part of "the rights of States under" the Clean Water Act.

But, at minimum, "the rights of States under" the Clean Water Act must include the authority that the Act specifically delegates. Thus, when a State exercises its authority under Section 303 and Section 402, the State acts "under" (indeed, because of) the Clean Water Act. Put differently, the Natural Gas Act does not preempt state regulation that is "permitted under the Clean Water Act." *Transcont'l Gas Pipe Line Co., LLC v. Pa. Env'tl Hearing Bd.*, 108 F.4th 144, 158 (3d Cir. 2024). Nor does it block States from using "appropriate tools to effectuate" permitted regulation. *Id.*; *cf. Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243–44 (D.C. Cir. 2013).

2. Applying the saving clause, none of Ohio's claims are preempted. No statute within the natural-gas chapter of the United States Code "specifically provide[s]" for the federal preemption of water-pollution claims. *See* §717b(d)(3). The key issue thus becomes whether Ohio's claims involve "the rights of States under" the Clean Water Act. *Id.*

They do. Recall that Ohio's amended complaint brings six claims. *Above* 14. Generally, those claims all involve Ohio's traditional authority to combat water pollution—authority Ohio retained under the Clean Water Act. On a more specific level, Ohio's claims all trace back to authority that the Clean Water Act expressly delegates to the States. Four claims (one, two, five, and six) involve Ohio's Section 402 authority. Those claims allege unpermitted discharges of pollutants and the violation of a Section 402 hydrostatic permit. *See* Pet.App.5a–6a. The final two claims (three and four) allege violations of Ohio's water-quality standards, which Ohio sets under Section 303. *Id.* Thus, because Ohio's claims all arise from authority that the Clean Water Act bestows, the Natural Gas Act does "nothing" to "affect[]" them. *See* §717b(d)(3).

3. The decision below is wrong. Much of its analysis mistakenly focused on implied preemption. For instance, the court of appeals stressed federal law's "comprehensive scheme" of regulating "natural gas in interstate commerce." Pet.App.15a (quoting *Schneidewind*, 485 U.S. at 300). But the comprehensiveness of federal regulations is irrelevant if Ohio's claims fall within the Natural Gas Act's express saving clause.

The court of appeals also suggested that FERC's pending enforcement proceedings against Rover were enough to protect Ohio's interests. *See* Pet.App.22a. Again, that is irrelevant. Through the saving clause, Congress made the decision to preserve the States' enforcement powers under the Clean Water Act. And regardless, any recovery through those proceedings will presumably go to the federal treasury, not Ohio.

See FERC, All Civil Penalty Actions–2024, https://www.ferc.gov/all-civil-penalty-actions-2024.

The lower court's analysis of the saving clause fares no better. The decision below held that the saving clause did not apply because, by waiving its Section 401 certification power, Ohio waived all its rights under the Clean Water Act. Pet.App.35a. The court further reasoned that other sections of the Act—including Section 402—do not give the States "independent rights" that can be exercised outside of "the 401 Certification process." Pet.App.29a. The court of appeals made three critical mistakes.

First, the court of appeals improperly conflated the saving-clause inquiry with waiver under Section 401. They are separate matters. The saving clause simply asks whether Ohio's claims involve "rights of States under" the Clean Water Act. §717b(d)(3). If they do, there is no preemption. The statutory text does not care about which sections of the Clean Water Act "the rights of States" arise from—it protects them all.

Second, the courts of appeals misconstrued the boundaries of Section 401 waiver. When a State waives its certification power, it does so only "with respect to [the] Federal application" that triggered the certification process. §1341(a)(1). Thus, if a State chooses not to participate in the process, it waives its certification power as to the discharges previewed in the "Federal application." That limit makes sense because a State's task during the certification process is to determine the conditions "necessary" to ensure compliance with applicable laws. §1341(d). A State cannot make that determination unless the applicant has fairly described the contemplated discharges. Here, Rover never previewed that it was going to be

discharging diesel-laced fluid into Ohio's waters. *Above* 11–12. So, Ohio could not have waived any rights as to those un-previewed discharges.

Third, the court of appeals misunderstood the relationship between Sections 401 and 402. The "two sections are not interchangeable, as they serve different purposes and use different language to reach them." *S.D. Warren*, 547 U.S. at 380. Certification under Section 401 is a precondition that attaches to any "Federal license or permit" that involves "discharge[s] into the navigable waters." §1341(a)(1). Whereas Section 402 establishes a distinct permit requirement that those seeking to discharge "any pollutant" from a point source must satisfy. §1342(a)(2). To run their own "State permit programs" under Section 402, the States must satisfy certain conditions. §1342(b)–(c). But none of those conditions require the States to pledge their participation in Section 401's certification process. All told, Section 402 grants rights to the States that are independent from participation in the Section 401 process. The decision below wrongly took those rights away from Ohio.

CONCLUSION

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

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