No. 18-260

In The
Supreme Court of the United States

COUNTY OF MAUI,
Petitioner,

v.

HAWAI'I WILDLIFE FUND; SIERRA CLUB – MAUI GROUP; SURFRIDER FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation (PLF) is the nation's oldest and largest nonprofit legal foundation that seeks to protect private property rights and related liberties in courts throughout the country. In pursuing this mission, PLF and its attorneys have frequently represented litigants in Clean Water Act (CWA) cases, including before this Court. *See, e.g.*, *Robertson v. United States*, No. 18-609, 2019 WL 1590229 (U.S. Apr. 15, 2019) (petition granted, judgment vacated, and case remanded); *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617 (2018); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012). PLF supports and advocates for a balanced approach to environmental law, one that avoids the unreasonable elevation of environmental concerns over other important values.

Most relevant to the case at hand, PLF represented the petitioner in *Rapanos v. United States*, 547 U.S. 715 (2006), which the Ninth Circuit below, Pet. App. 21–25, and Respondents, Resp. Br. in Opp. 13–15, 25–26, have cited in support of their argument that the CWA should be read to regulate pollution that reaches navigable waters via groundwater. PLF opposes this misguided and

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

property-threatening interpretation because it misreads Justice Scalia's plurality opinion in *Rapanos*, including by contradicting that opinion's overarching theme, which was to limit—not expand—the CWA's reach. That interpretation also undermines the principle of cooperative federalism that is at the core of the CWA.

PLF frequently represents landowners that are subject to the CWA and who would be substantially harmed if this Court were to adopt the Ninth Circuit's interpretation. CWA compliance costs are already extraordinarily high, and PLF opposes unreasonable interpretations of the CWA that would increase those costs.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has never interpreted the Clean Water Act to regulate groundwater pollution. Yet both the district court and Ninth Circuit below, and the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018),[2] concluded that a party can violate the CWA by discharging pollutants, not into navigable water, but into groundwater. The EPA recently published an Interpretive Statement specifically rejecting these lower court decisions. *Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater*, 84 Fed. Reg. 16,810, 16,812 (Apr. 23, 2019). Instead, the

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[2] *Kinder Morgan* is the subject of a pending petition for certiorari (No. 18-268), which is apparently being held awaiting the Court's decision in this case.

Interpretive Statement concludes, "the [CWA] is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under … the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water." *Id.* at 16,811.

In coming to the opposite conclusion, the aforementioned lower courts applied different and inconsistent tests. The district court below favored a broad "conduit theory," whereby a discharge into groundwater triggers liability if "the groundwater is a conduit through which pollutants are reaching navigable-in-fact water." Pet. App. 59. The Ninth Circuit declined to follow that reasoning and instead applied a "functional equivalence" test, under which CWA liability attaches for a discharge into groundwater if "the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water." Pet. App. 24. The Fourth Circuit has applied yet a third standard, a "direct hydrological connection" test, under which "a plaintiff must allege a direct hydrological connection between ground water and navigable waters in order to state a claim." *Kinder Morgan*, 887 F.3d at 651.[3]

None of these tests are proper. For starters, all three are based on an unwarranted reading of Justice

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[3] In *Kinder Morgan*, the Fourth Circuit concluded that there was "no functional difference" between the Ninth Circuit's test and the direct hydrological connection test—which the Fourth Circuit derived from an earlier EPA position. *See* 887 F.3d at 651 & n.12. Below, the Ninth Circuit criticized the direct hydrological connection test as "read[ing] … words into the CWA … that are not there." Pet. App. 24 n.3.

Scalia's *Rapanos* plurality opinion. Far from supporting these lower courts' rulings, that opinion neither addresses whether groundwater pollution is subject to CWA regulation nor justifies extending the CWA to discharges into groundwater. What that opinion does certainly address are the problems posed by an over-expansive reading of the CWA and the critical need to ensure that the statute not be used as a device to justify federal regulation of all water pollution.

All three lower court tests also undermine Congress' intended federal-state balance by improperly expanding federal CWA jurisdiction. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution …."). Such substantial expansion is particularly problematic because, as this Court has recognized, the EPA and Army Corps (the "Agencies") have a history of interpreting the Act more broadly than Congress intended. *See Rapanos*, 547 U.S. at 739 (plurality op.); *id.* at 780–82 (Kennedy, J., concurring in the judgment); *see also Hawkes Co.*, 136 S. Ct. at 1817 (Kennedy, J., concurring); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 172–74 (2001).

What is more, the lower courts' continuing expansion of the CWA augurs intolerable burdens for landowners throughout the country. Even without this interpretive expansion, the burdens of federal CWA jurisdiction and the risk of CWA liability are tremendous. *See, e.g.*, *Hawkes Co.*, 136 S. Ct. at 1816 (Kennedy, J., concurring) ("[T]he reach and systemic consequences of the Clean Water Act remain a cause

for concern."); *Sackett*, 566 U.S. at 132 (Alito, J., concurring) ("[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune."). The decision below and the Fourth Circuit's ruling in *Kinder Morgan* threaten to add to those burdens by, among other things, saddling any landowner who owns a septic tank, or who otherwise may be responsible for the addition of pollutants to a groundwater basin, with potential CWA liability.

For these reasons, the Court should put a stop to the improper expansion of an already bloated statute by reversing the decision below.

ARGUMENT

I. The Ninth and Fourth Circuits' Decisions Misinterpret the *Rapanos* Plurality Opinion and Undermine Cooperative Federalism.

In holding that discharges into groundwater can in some instances be directly regulated under the CWA, the Ninth and Fourth Circuits went well beyond any prior decision of this Court. Their attempts to greatly expand the reach of federal water quality regulation suffer from two key legal flaws. First, they misread the plurality opinion in *Rapanos* to support an expansion of federal CWA jurisdiction to groundwater. Second, they give insufficient weight to Congress' clear intent to prioritize a federal-state balance in regulating water pollution.

A. The Lower Courts Misread and Misapplied the *Rapanos* Plurality Opinion.

To support their novel application of CWA liability for "indirect discharges" into groundwater, the district court and the Ninth Circuit in this case, and the Fourth Circuit in *Kinder Morgan*, each cited Justice Scalia's plurality opinion in *Rapanos*. *See* Pet. App. 59–60; *id.* at 21–25; *Kinder Morgan*, 887 F.3d at 649–50. Specifically, the lower courts relied on two of the plurality's statements. First, the plurality observed that the CWA's prohibition on pollution uses the term "to" instead of "directly to"; that is, it "does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. at 743 (quoting 33 U.S.C. § 1362(12)(A)). Second, the plurality noted that "lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [the CWA], even if the pollutants discharged from a point source do not emit directly into covered waters, but pass through conveyances in between." *Id.* (emphasis and quotations omitted).

These statements fall far short of justifying federal regulation of groundwater pollution. As the Ninth Circuit recognized, the plurality's statements were not joined by a majority of this Court. *See* Pet. App. 23 (stating that "we … consider Justice Scalia's plurality opinion only for its persuasive value"). But none of the lower courts acknowledged that the quoted statements also did not purport to be "holdings" of the *plurality*. To the contrary, they were plainly dicta: Justice Scalia stated that "we do not decide this

issue"—the "issue" being whether indirect discharge is a proper basis for CWA liability. 547 U.S. at 743.

The lower courts have misconstrued the *Rapanos* plurality even apart from its limited precedential value. Rather than supporting CWA liability for discharges into groundwater, the above-quoted statements were nothing more than a rhetorical response to the charge made by the *Rapanos* concurring and the dissenting opinions that the plurality's reading of the CWA would necessarily result in a dramatic reduction of the ability to regulate surface water pollution. *See id.* at 742–44.[4]

A fuller understanding of the lower courts' error requires a more detailed discussion of *Rapanos*, which follows.

1. The *Rapanos* Plurality Sought to Narrow the Agencies' Overbroad Application of the Clean Water Act.

Rapanos did not address the question presented in this case: whether an unpermitted discharge into groundwater of pollutants that eventually end up in navigable water is a proper basis for CWA liability. Rather, the primary question in *Rapanos* was whether the Agencies had exceeded their jurisdiction in attempting to regulate intermittent or ephemeral

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[4] Additionally, the lower courts' inordinate focus on a single statutory term (CWA's use of "to" instead of "directly to") violates the principle that this Court is "not guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) (quotation marks and citations omitted). Here, the "whole law" does not support the decisions of the Ninth and Fourth Circuits.

tributaries and their adjacent wetlands. *See* 547 U.S. at 757; *id.* at 780–82 (Kennedy, J., concurring in the judgment). Specifically, the issue was whether certain wetlands qualified as "waters of the United States" solely because they had a "hydrologic connection" to navigable waters. *Id.* at 729–30, 740.

In considering that question, the plurality first noted the historical context of the CWA, in which Congress granted the Agencies jurisdiction over traditional navigable waters. *Id.* at 723. Over time, the Agencies expanded their claim of jurisdiction to include waters that are not traditionally navigable, so that, by the time of *Rapanos*, the Agencies purported to exercise CWA jurisdiction over an expansive variety of surface waters and wetlands, including intermittent and ephemeral waters. *Id.* at 724. Faced with this broad assertion of authority, the Court had to decide just how far the CWA extended beyond traditional navigable waters.

The answer, for the plurality, was "not far." It recognized that *United States v. Riverside Bayview Homes, Inc.*, had concluded that wetlands that were not themselves navigable but "'actually abut[ted] on' traditional navigable waters" could be regulated under the CWA. *Id.* at 725 (quoting 474 U.S. 121, 135 (1985)). However, *Riverside Bayview* "nowhere … suggest[ed] that 'the waters of the United States' should be expanded to include … entities other than 'hydrographic features more conventionally identifiable as "waters."'" *Id.* at 735 (quoting 474 U.S. at 131). Thus, in the *Rapanos* plurality's view, the "only plausible interpretation" of the CWA is that the term "'the waters of the United States' include[s] only

relatively permanent, standing or flowing bodies of water." *Id.* at 732, 739.

In sum, the goal of the *Rapanos* plurality and the thrust of its opinion was to narrow and constrain the Agencies' ill-conceived attempt to expand federal jurisdiction under the CWA. *See id.* at 729–32.

2. The *Rapanos* Plurality Opinion Does Not Support Federal Regulation of Groundwater.

The dissenting and concurring opinions in *Rapanos* took issue with the plurality's constraint on CWA jurisdiction, arguing that its more narrow interpretation would result in a significant reduction of federal control of surface water pollution. *See id.* at 769–70 (Kennedy, J., concurring in the judgment); *id.* at 800 (Stevens, J., dissenting). The plurality responded to these concerns by referencing a series of lower court decisions that had imposed CWA liability for pollutant discharges that passed through several point sources and that "naturally" reached regulated waters even if not "directly" discharged into those waters. *Id.* at 742–45. As noted above, the plurality declined to decide whether those lower court opinions were correct. *Id.* at 743.

In context, the plurality was simply seeking to justify its narrower construction of "waters of the United States" by showing that it was unlikely to diminish protections for surface waters. *Id.* The plurality was not trying to expand the scope of the Act, which is exactly what the Ninth and Fourth Circuits now seek to use the plurality opinion to achieve. *See Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 936 (6th Cir. 2018) ("[T]he [*Rapanos* plurality] has been

taken out of context in an effort to expand the scope of the CWA well beyond what the *Rapanos* Court envisioned."). Specifically, in this case the Ninth Circuit held that *Rapanos* supports CWA liability for Maui County's discharge of treated wastewater into groundwater that eventually conveys some pollutants to the Pacific Ocean.[5] Pet. App. 7–8. Likewise, the Fourth Circuit in *Kinder Morgan* held that the *Rapanos* plurality opinion supports CWA liability for gasoline that leaked from a cracked underground pipeline and eventually seeped into nearby creeks. 887 F.3d at 643–44. Both interpretations badly misconstrue the *Rapanos* plurality opinion.

Indeed, as the plurality's full discussion and citations make clear, the only question it considered was whether liability could attach where a pollutant passed into navigable water through a series of point sources, *not* whether liability could attach in the absence of a continuous chain of point sources. Neither of the two cases cited by the plurality indicates otherwise. The first case, *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946–47 (W.D. Tenn. 1976), involved a discharge of pollutants into a sewer system that directly connected to the Mississippi River. The defendant argued that, because it did not own the sewer system, it could not be held liable under the CWA. *Id.* However, the court concluded that a "discharge through conveyances owned by another party does not remove [the]

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[5] A little more than half (64%) of the treated wastewater arrives at the ocean, carried by groundwater that seeps at a snail's pace, averaging about two meters per day. *See* Pet. App. 24; EPA, *Lahaina Groundwater Tracer Study – Lahaina, Maui, Hawaii,* Final Report at ES-28 (June 2013), https://bit.ly/2PNakef.

defendant's actions from the scope of [the CWA]." *Id.* In other words, discharge from one point source into another point source that leads directly into a navigable water is sufficient for liability under the Act, regardless of whether the polluting party owns both point sources. *Id.*; *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) ("[A] point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters' ….").

In the second cited case, *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005), the owner of a gold mine was held liable when snowmelt washed zinc and manganese down a mine shaft and into a miles-long manmade tunnel that eventually drained into the Arkansas River. *Id.* at 1136. The court held that the mine shaft was a point source and that federal CWA jurisdiction was established because pollutants that were discharged into the shaft "flow[ ] through other conveyances [i.e., the manmade tunnel] to navigable waters." *Id.* at 1141. Because a tunnel is itself a point source, *see* 33 U.S.C. § 1362(14), at most the *Rapanos* plurality was entertaining, through its citation to *Sierra Club*, a point-source-to-point-source-to-regulated-water theory of liability. There is a significant difference between that theory and the one adopted by the lower courts here.[6]

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[6] *Sierra Club* in particular does not support Respondents' position in this case, since the Tenth Circuit contrasted the point-source pollution in that case with "[g]roundwater seepage[, which] … would be nonpoint source pollution, [and] which is not subject to NPDES permitting." 421 F.3d at 1140 n.4.

Given its limited reach, one obvious problem with the Ninth and Fourth Circuits' reliance on the *Rapanos* plurality is that groundwater is not a point source. *See* 33 U.S.C. § 1362(14); *Ky. Waterways*, 905 F.3d at 933; *see also* Allison L. Kvien, Note, *Is Groundwater That is Hydrologically Connected to Navigable Waters Covered under the CWA?: Three Theories of Coverage & Alternative Remedies for Groundwater Pollution*, 16 Minn. J.L. Sci. & Tech. 957, 986 (2015) ("Contrasting even the most 'confined and discrete' groundwater with traditional point sources such as pipes makes the contention that groundwater can be a point source look like a rather weak one.").[7]

But as discussed above, the bigger problem is that their interpretation misses the forest for the trees. The whole focus of the *Rapanos* plurality opinion was to prevent the continued and unjustified expansion of the CWA. *See* 547 U.S. at 729–32. Yet such expansion is exactly what the lower courts' employment of the *Rapanos* plurality achieves. This Court should reverse the Ninth and Fourth Circuits to keep the lower courts

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[7] Relatedly, it is factually incorrect to say that *dissolved* pollutants travel or pass "through" groundwater. *See, e.g.*, Pet. App. 17 (stating that discharged effluent "travels through groundwater before entering the Pacific Ocean"); *Kinder Morgan*, 887 F.3d at 641 (stating that pollutants "pass through ground water to reach navigable waters"). Dissolved pollutants are held in solution, and no more "travel through" groundwater than salt "travels through" seawater. This scientific fact only emphasizes the legal reality that groundwater is not itself a "discernable, confined and discrete conveyance … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

faithful to the CWA's authentic and relatively modest scope.

B. Extending the Clean Water Act to Groundwater Undermines the Federal-State Balance Established by Congress.

In addition to misapplying *Rapanos*, the lower court decisions are problematic because they undermine the careful federal-state balance that Congress struck in enacting the CWA. The CWA's legislative declaration emphasizes a policy of cooperative federalism with respect to water pollution regulation:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution[and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ….

33 U.S.C. § 1251(b). In furtherance of that policy, the CWA establishes "a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). As this Court has recognized, that federal-state partnership is undermined by any interpretation of the CWA that would "result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 161; *see also Rapanos*, 547 U.S. at 737.

Instead, Congress' concern for the "responsibilities and rights of States" led it to affirmatively restrict federal regulation under the CWA to point source pollution, thereby excluding nonpoint source pollution. *See Rapanos*, 547 U.S. at

803 (Stevens, J., dissenting) (referring to the States' "nearly exclusive responsibility for containing pollution from nonpoint sources"); *see also* Br. of Pet'r 23–26 (discussing the point/nonpoint source distinction). And Congress made that deliberate choice despite its knowledge of the effect that nonpoint source pollution can have on water quality. *See* Robin Kundis Craig & Anna M. Roberts, *When Will Governments Regulate Nonpoint Source Pollution? A Comparative Perspective*, 42 B.C. Envtl. Aff. L. Rev. 1, 2 (2015) ("[Although] nonpoint source pollution is well-recognized to be one of the last major barriers to achieving state and national water quality goals[,] … Congress made a conscious decision to leave regulation of nonpoint source pollution to the states ...."). Because groundwater is not a point source, Congress intended it to fall outside the ambit of federal regulation under the CWA. *See also* Lawrence Ng, Note, *A DRASTIC Approach to Controlling Groundwater Pollution*, 98 Yale L.J. 773, 784 (1989) (noting "the traditional deference of the federal government to the states in the area of groundwater regulation").

Of course, Congress' choice does not mean that groundwater pollution is unregulated; to the contrary, discharges to and the quality of groundwater are regulated both by other federal laws and by state law. The EPA's recent Interpretive Statement details the federal and state regulations that may apply to groundwater, *see* 84 Fed. Reg. at 16,824–26 (referencing both state regulations and three relevant federal statutes: the Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*; and the Comprehensive Environmental Response,

Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq*.), as well as the many indications of Congressional intent to leave primary regulation of groundwater pollution to the States, *see* 84 Fed. Reg. at 16,812–17 (reviewing legislative history and other evidence).

The Interpretive Statement also makes clear that approaches such as those adopted by the Ninth and Fourth Circuits "upset[ ] the careful balance that Congress struck between the states and the federal government by pushing a category of pollutant discharges from the state-regulated paradigm to the point source, federally controlled, program." *Id.* at 16,819. Upsetting that balance in the context of discharges into groundwater is particularly problematic because "[t]he [CWA] and its legislative history indicate that Congress intended for all discharges to groundwater to be left to state regulation and control." *Id.* at 16,820. In other words, direct federal regulation of pollutant discharges into groundwater would compromise Congress' intended division of labor between state and federal regulators.

Although Congress' overarching "objective" in the CWA was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), it sought to achieve that objective in specific, limited ways that give proper respect to the principle of federalism. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) ("[I]t is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal."). And as this Court has often noted, no law pursues its stated objectives "at all costs"; rather, "the textual limitations upon a law's

scope are no less a part of its 'purpose' than its substantive authorizations." *Rapanos*, 547 U.S. at 752 (plurality op.). Here, both the text and the broader context of the CWA make clear that its purpose was not to subject every type of discharge of a pollutant to federal control; certain discharges—including discharges into groundwater—are primarily left to state regulation. This Court should reverse the decisions of the Ninth and Fourth Circuits to maintain the balance Congress intended.

II. The Ninth and Fourth Circuits' Expansion of the Clean Water Act Undermines the Rights of Landowners.

This Court should also consider the practical realities that would accompany the broad expansion of the CWA envisioned by the Ninth and Fourth Circuits. Complying with CWA requirements can be extraordinarily difficult and expensive for ordinary landowners. That is especially troubling given the steep fines, and even criminal liability, that individuals can incur for CWA violations. *See Hawkes Co.*, 136 S. Ct. at 1816 (Kennedy, J., concurring) ("[T]he consequences to landowners even for inadvertent violations [of the Act] can be crushing."). The proposed expansion of the CWA to include federal regulation of groundwater only adds to property owners' confusion and anxiety. Under the lower courts' novel theories of liability, tens of millions of landowners run the risk of incurring enormous costs for activities as simple as maintaining a home septic tank. This Court should correct this unconstitutional overreach and limit the CWA's scope to protect the constitutional rights of landowners.

A. Regulating Groundwater Under the Act Violates Landowners' Due Process Rights.

Due process requires that landowners have fair notice of whether their ordinary land use activities are subject to CWA regulation. *See Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (Government action violates due process if it "take[s] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."). Experience shows that the CWA and its implementing regulations are plagued with vagueness problems. *See, e.g.*, *Nat'l Ass'n of Mfrs.*, 138 S. Ct. 617; *Hawkes Co.*, 136 S. Ct. 1807; *Sackett*, 566 U.S. 120; *Rapanos*, 547 U.S. 715.

Given this vagueness, even before the lower courts' expansion of the CWA to impose federal control of groundwater, landowners were forced to play a constant high-stakes guessing game in hopes of complying with the CWA. *See, e.g.*, *Sackett*, 566 U.S. at 132 (Alito, J., concurring) ("[T]he uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune."). The "draconian penalties" they face include steep civil fines, up to $37,500 per day for unpermitted pollutant discharges, as well as criminal liability. *See* 40 C.F.R. § 19.4 Table 1 (2011) (maximum fine list); 33 U.S.C. § 1319(c) (criminal provisions). Under the liability expansion accepted by the Ninth and Fourth Circuits, landowners are swept further into confusion and uncertainty as to whether their normal, everyday

activities are subject to these penalties. Due process does not tolerate such lack of notice.

B. The Clean Water Act's Regulation of Groundwater Pollution Places Unacceptable Burdens on Landowners.

Prior to groundwater regulation entering the picture, the CWA already caused significant confusion and risk for landowners seeking to engage in normal activities. Take, for example, the petition for writ of certiorari in *Robertson*, which this Court recently granted to vacate and remand. 2019 WL 1590229. That case involved an elderly veteran who served 18 months in prison and was fined $130,000 for building fire protection ponds on land situated 40-plus miles from the closest navigable water. *See* Pet. for Cert. i, *Robertson v. United States*, No. 18-609, 2018 WL 5978094 (Nov. 7, 2018). Yet the Ninth Circuit upheld Mr. Robertson's conviction because the ponds were dug in and around a narrow channel carrying two or three garden hoses' worth of flow, rendering them (in the Ninth Circuit's view) subject to CWA regulation. *United States v. Robertson*, 875 F.3d 1281, 1286, 1290–92 (9th Cir. 2017).

In another CWA case, the Army Corp of Engineers prohibited a small business owner in North Pole, Alaska, from relocating his business to a plot of land that contained permafrost (frozen ground). *Tin Cup, LLC v. U.S. Army Corps of Eng'rs*, 904 F.3d 1068, 1072 (9th Cir. 2018), *cert. denied*, 2019 WL 1886046 (Apr. 29, 2019). Although the Corps had earlier concluded that permafrost was not subject to the CWA, it subsequently changed its approach to delineating wetlands, subjecting the property owner to significant regulatory burdens. *Id. Tin Cup* and

Robertson are but a few examples of the chaos and confusion under the CWA that existed even before the Ninth and Fourth Circuits decided to add groundwater to its scope.

Expanding the Act to impose federal regulation of groundwater only compounds the CWA headache for landowners. As the lower courts have entertained extending the CWA's reach to groundwater pollution, several proposed tests have emerged regarding how to enforce such regulations, including the tests adopted by the Ninth and Fourth Circuits. *See* Damien Schiff, *Keep the Clean Water Act Cooperatively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 447, 451 (2018) (discussing the potential theories for regulation of groundwater under the CWA). But under any of the proposed theories, expanding the CWA to federally regulate groundwater pollution would substantially increase the already heavy burdens on landowners.

For example, under the Fourth Circuit's "direct hydrological connection" test, landowners would have an incredibly difficult time determining whether their land use activity qualifies. Ascertaining whether a direct hydrological connection exists between a point source and a navigable water "is generally very difficult, very expensive, and potentially impossible." James W. Hayman, Comment, *Regulating Point-Source Discharges to Groundwater Hydrologically Connected to Navigable Waters: An Unresolved Question of Environmental Protection Agency Authority Under the Clean Water Act*, 5 Barry L. Rev. 95, 126 (2005). Factors that must be considered include "the nature of the aquifer, the distance and

flow path the groundwater must travel, the time required for travel, and fate of the pollutants during travel." *Id.* at 124. While wealthy corporations and experienced government agencies can perhaps "reasonably be expected to hire [an] army of hydrologists, engineers, and lawyers to determine [their] liability," it is unthinkable that most landowners would have the resources necessary to make this determination. Jonathan Wood, Property & Environ. Research Center, *Environmental Markets Work Better than Indecipherable Regulations*, Apr. 2, 2018, https://bit.ly/2IXY7CY. And neither the test proposed by the district court in this case (the "conduit theory") nor that proposed by the Ninth Circuit in this case (the "functional equivalent" test) fares any better in terms of moderating unpredictability or compliance costs.

The complexity of determining whether land use activities trigger federal regulation under the CWA is just one of the problems with the Act's expansion to groundwater pollution. The myriad ways that small amounts of groundwater pollution may occur also demonstrate the toll that such an expansion would take on landowners. Any number of run-of-the-mill land use activities—such as maintaining septic tanks, fertilizing crops or lawns, and using road salts—may cause groundwater pollution. *See* Groundwater Foundation, *Groundwater Contamination*, https://bit.ly/2qafuVL (last visited May 9, 2019). In the United States, more than one in five households use a septic tank to dispose of their wastewater. *See* EPA, *Septic Systems Overview*, https://bit.ly/2hg6AUU (last visited May 9, 2019). Each year, local governments and property owners in the United States use about 15 to 20 million tons of salt to de-ice the roads. *See*

Catherine Houska, *Stainless Steel Helps Prevent Deicing Salt Corrosion*, International Molybdenum Association, https://bit.ly/2H2B8Vg (last visited May 9, 2019). And in 2014, commercial fertilizer consumption in the United States reached 23.2 million tons annually.[8] *See* EPA, Report on the Environment: Agricultural Fertilizer, https://bit.ly/2LoV7BA (last visited May 9, 2019). If the CWA now imposes federal regulation on groundwater pollution, tens of millions of people will be obligated to determine whether their ordinary land use activities discharge pollutants into groundwater that is a "conduit," or is "fairly traceable," or has a sufficiently "direct hydrological connection" to surface water, to require a permit under the CWA.

Even then, determining that a federal permit is necessary is just the first step. After all, once property owners determine that their land use activities are subject to the CWA's permitting requirements, they then must expend the time and money necessary to obtain a permit. And those costs can be staggering and time consuming, well beyond the reach of ordinary landowners. *See Rapanos*, 547 U.S. at 721 ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process … not counting costs of mitigation or design changes."); *see also Hawkes Co.*, 136 S. Ct. at 1812 (noting that "'general' permits took applicants, on average, 313 days and $28,915 to complete"). Obtaining a permit under the CWA is no small burden, one which will fall

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[8] Traditionally, these discharges have not been subject to federal regulation under the CWA. *See* EPA, Basic Information about Nonpoint Source Pollution, https://bit.ly/2QsWmOg (last visited May 9, 2019).

hardest on small landowners who cannot write off their time and money as the cost of doing business.

C. Overzealous Enforcement Makes the Statute's Defects Intolerable.

Perhaps the most egregious aspect of this CWA expansion is the overzealous enforcement that landowners face. In addition to the Agencies' enforcement authority, CWA gives private citizens and environmental groups the ability to enforce the Act through its citizen-suit provision. *See* 33 U.S.C. § 1365(a); Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 Syracuse L. Rev. 1, 15 n.91 (2007) ("Two of the most citizen-enforced programs in environmental law are the Clean Air and Clean Water Acts."). Consider California, which leads the country in the number of CWA citizen suits filed. From 2010 to 2016, citizen and environmental groups in California on average filed more CWA enforcement cases than the EPA filed nationwide. *See* California Coastkeeper Alliance, *A Solution to California Water Pollution: The benefits of citizen lawsuits and their value for clean water enforcement in California*, https://bit.ly/2vIrLnw (last visited May 9, 2019). And with the surge of donations certain nonprofit groups received after the 2016 election, they have unprecedented resources to vigorously pursue CWA enforcement actions. *See* Jennifer Bissell, *Donations to charitable groups surge after Trump victory*, Financial Times, Nov. 11, 2016, https://on.ft.com/2gtNztB ("The Sierra Club has nearly quadrupled its monthly donation record in the days following the election, adding 4,000 monthly donors, worth about an estimated $2m over the course of their donations.").

Moreover, under the CWA a prevailing party can obtain an award of litigation costs, including attorney fees. *See* 33 U.S.C. § 1365(d). The prospect of collecting five- or six-figure awards in CWA enforcement suits allows for a business model that invites litigation abuse and turns private actors into ambulance chasers. *See* Marc Robertson, *Environmental Ambulance Chasing: DOJ Urges Court to Scrutinize Clean Water Citizen-Suit Settlements*, Forbes, June 26, 2018, https://bit.ly/2Jepubh. In fact, the Department of Justice objected last year to several settlement agreements that appear to have been "designed to shake down defendants for attorneys fees rather than address environmental concerns." Jonathan Wood, Property & Environ. Research Center, *Environmental Crusaders or Ambulance Chasers?*, May 31, 2018, https://bit.ly/2Y2Gup5. In short, private actors not only have the resources necessary to pursue CWA enforcement actions against landowners, they have a financial incentive under the CWA to do so. Expanding the CWA to groundwater will only magnify these concerns.

When faced with an enforcement action, landowners often find themselves saddled with the burden of trying to show that the pollution in question is *not* connected to their activities. Given that "few groundwater-borne pollutants ... are unique," tracing a specific source of pollutants that appear in surface water is very difficult. Hayman, *supra*, at 124. This is especially true for pollutants discharged by livestock. *Id.* As a result, often the only defense available to landowners such as those who run livestock is to show that someone else's activity likely generated the same non-unique pollutants. Thus, under the CWA,

landowners bear the brunt of enforcement actions at every turn.

CWA regulation "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Hawkes Co.*, 136 S. Ct. at 1817 (Kennedy, J. concurring). This trend persists with the Ninth and Fourth Circuits' decisions to expand federal regulation under the CWA to reach groundwater pollution. Such expansion would undercut the property rights of tens of millions of landowners by subjecting them to significant regulatory burdens and unjustifiable costs.

CONCLUSION

This Court should reverse the Ninth Circuit below and the Fourth Circuit in *Kinder Morgan* and hold that there is no federal CWA jurisdiction over pollutant discharges into groundwater.

DATED: May 2019.

Respectfully submitted,

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