No. 18-555

In the
Supreme Court of the United States

MARQUETTE COUNTY ROAD COMMISSION,
*Petitioner*,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.
*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

# BRIEF OF *AMICI CURIAE* COUNTY ROAD ASSOCIATION OF MICHIGAN AND STAND U.P. IN SUPPORT OF PETITIONER MARQUETTE COUNTY ROAD COMMISSION

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## QUESTION PRESENTED

The Administrative Procedure Act (APA) provides for judicial review of any "final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 704. Moreover, the APA "creates a 'presumption favoring judicial review of administrative action.'" *Sackett v. Envtl. Prot. Agency*, 566 U.S. 120, 128 (2012) (citation omitted); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (same). Here, the Marquette County Road Commission in Michigan intended to build an important road for the upper peninsula of the state. Because the road would impact wetlands, the Road Commission needed a § 404 Clean Water Act (CWA) discharge permit to do so. After a lengthy and expensive application process, the Road Commission had in hand the necessary permit approval from Michigan, which had authority to approve the permit pursuant to § 404(g)-(j) of the CWA. But before the road building could start, the Environmental Protection Agency (EPA) arbitrarily and capriciously vetoed that permit. This veto left the Road Commission with no alternative but to either give up on the road or start over and apply for another § 404 permit from the Army Corps of Engineers, a process that costs the average applicant $271,596 and can take 788 days to complete. *Rapanos v. United States*, 547 U.S. 715, 721 (2006). The question presented by this case is:

Whether an arbitrary and capricious EPA veto of a state-approved CWA § 404 permit, a final agency action that denies the state-approved permit

forevermore, and binds all parties, is subject to judicial review under the APA.

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## IDENTITIES AND INTERESTS OF AMICI CURIAE

County Road Association of Michigan and Stand U.P. (collectively, "Amici") submit this brief *amicus curiae* in support of Petitioner Marquette County Road Commission.[1]

The County Road Association of Michigan ("CRAM") is a 501(c)(3) organization that serves as the statewide association dedicated to serving the needs of Michigan's 83 county road agencies. CRAM provides education, advocacy and communication resources to all 83 road agencies, and assists with issues that impact the ability of road agencies to maintain 90,000 miles of roads, 5,700 bridges and the public road right-of-way across Michigan's Upper and Lower Peninsulas. Michigan has the Nation's fourth-largest local road network, with county road agencies responsible for seventy-five percent of road miles statewide. CRAM's mission is to help its members promote and maintain a safe and efficient county road and bridge system.

Stand U.P. is a 501(c)(4) coalition of residents and conservationists from across Michigan's Upper

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[1] Petitioner has filed a blanket consent to the filing of *amicus curiae* briefs. Respondent's counsel received timely notice of Amici's intent to file this brief and granted consent to do so.

Amici certify 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 Amici, their members, or their counsel made a monetary contribution to this brief's preparation and submission.

Peninsula that was formed to support the construction of County Road 595, which is the project at issue in this case.

Amici are unified in their strong support of County Road 595's construction. By diverting nearly 100 commercial vehicles per day away from schools and communities, and shortening each of their routes by 78 miles round trip per day, Amici believe the 21-mile road will make streets safer, help improve the environment, and strengthen the local economy. But they are deeply troubled by the unchecked power of the federal government—in this case, the Environmental Protection Agency ("EPA")—to arbitrarily veto Michigan's approval of that much-needed infrastructure project. They are equally troubled by the prospect that EPA's veto may escape judicial review, which would only embolden the federal agency to block future projects in Michigan and elsewhere.

Amici have been on-the-ground witnesses to the regulatory challenges the County Road 595 project has faced. And they have seen, first hand, the impacts those challenges have had on their local communities, and residents and businesses throughout the Upper Peninsula. Particularly in light of their local experience with and involvement in the subject of this litigation, Amici believe they can offer a unique and important perspective on the issues that the petition raises.

## SUMMARY OF ARGUMENT

The Court consistently has applied a "strong presumption favoring judicial review of

administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (internal citation and quotation marks omitted). Moreover, the Clean Water Act is premised on "cooperative federalism," which preserves the "primary responsibilities and rights of States" associated with their traditional domain of land-use regulation. *Sierra Club v. United States Army Corps of Engineers*, No. 18-1757, 2018 WL 6175671 (4th Cir. Nov. 27, 2018); 33 U.S.C. § 1251(b). Nevertheless, the United States Court of Appeals for the Sixth Circuit held that EPA's veto of a fully vetted Section 404 permit issued by a Michigan agency, though definitive and final, was not judicially reviewable. Unfortunately, the opinion turns the Court's "strong presumption favoring judicial review" and the Clean Water Act's "cooperative federalism" on their heads.

This Court's review is necessary to determine the scope of those two federal principles, in light of recent decisions of this Court clearly and consistently favoring judicial review of agency actions. Federalism concerns, in particular, militate in favor of the Court's granting of certiorari in this case. If the courts cannot review a federal agency's unbridled power to veto what amounts to a State-approved land-use permit—traditionally a matter of local concern—then the Clean Water Act's "cooperative federalism" is on its way to becoming a dead letter.

Finally, the resolution of the issue presented will have far-reaching impacts beyond the parties to the litigation. For example, at present, two States have the authority to issue Section 404 permits subject to the EPA's veto: Michigan and New Jersey. But,

largely due to the encouragement of the Federal Government and the desire of States to reclaim their land-use authority, more and more States are taking steps to administer the Section 404 permit program.[2] As a consequence, the judicial reviewability of EPA's veto of a State-issued, Section 404 permit is an issue that will affect, not just Michigan and New Jersey, but every State that assumes Section 404 permit authority in the future.

## ARGUMENT

The Court should grant the petition, because it raises an important federal question concerning the reviewability of federal agency actions and the "cooperative federalism" mandated by the Clean Water Act. Specifically, this case presents the opportunity to test the boundaries of those federal principles, where the relevant facts are undisputed, the stakes transcend the specific interests of the parties, and a strong likelihood exists that the question presented will recur.

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[2] For example, both Florida and Arizona have taken concrete steps, just this year, towards the assumption of Section 404 permit authority. *See* https://www.flgov.com/wp-content/uploads/2018/03/3.23.18-House-7043.pdf (Florida Governor Rick Scott's March 23, 2018 letter approving House Bill 7043, which authorizes Florida Department of Environmental Protection to pursue assumption of Section 404 permit authority) (last visited on Nov. 28, 2018); https://azdeq.gov/cwa-404 (Arizona Department of Environmental Quality's August 28, 2018 announcement it is considering state assumption of the dredge and fill program established in CWA § 404 permitting process) (last visited on Nov. 28, 2018).

## I. The Court Should Grant Review To Consider Whether the Strong Presumption Favoring Judicial Review of Agency Action Reaches EPA's Veto of State-Approved Section 404 Permits

The Petitioner discusses at length this Court's jurisprudence favoring review of final agency actions like the EPA veto in this case. Pet. for Writ of Cert., at 13-19. Amici will not belabor that discussion. Suffice it to say that the EPA veto at issue here is substantially the same, in all relevant respects, to the determinations this Court deemed reviewable in *Sackett v. Envtl. Prot. Agency*, 566 U.S. 120 (2012), and *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016). EPA's veto of the State-approved Section 404 permit marked the consummation of EPA's decision-making process for that permit, imposed the legal obligation to obtain a permit from the U.S. Army Corps of Engineers, and denied the Petitioner's legal right to build the road without the Corps' approval. *Bennett v. Spear*, 520 U.S. 154 (1997) (setting forth the standards for judicial review of agency actions).

This Court's recent decision in *Weyerhaeuser Co. v. United States Fish and Wildlife Service*, No. 17-71 (U.S.S.C. Nov. 27, 2018) further underscores the Court's pragmatic approach to the reviewability of agency actions. In that case, the Court considered whether "critical habitat" for the dusky gopher frog (an endangered species) could be designated on land that is not currently habitat for the frog. *Id.* at *1. Assuming it could, the Court considered whether the U.S. Fish and Wildlife Service's decision not to

exclude such land, after weighing a number of factors, was subject to judicial review. *Id.* On the second question, the Court answered affirmatively, holding:

> "The Administrative Procedure Act creates a basic presumption of judicial review [for] one suffering legal wrong because of agency action. As we explained recently, legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action."

*Id.* at *11 (internal citations and quotation marks omitted). Importantly, the Court went on to say that the "presumption may be rebutted only if the relevant statute precludes review, 5 U.S.C. § 701(a)(1), or if the action is 'committed to agency discretion by law,' § 701(a)(2)." *Id.* at **11-12.

The trend in the area of administrative law clearly is in the direction of greater review of agency action, not less. While the EPA's veto in the Section 404 context lies comfortably within the reach of *Sackett*, *Hawkes*, and *Weyerhaeuser*, the Court has not squarely considered whether that precise agency action is subject to judicial review. The Court should accept certiorari in this case to decide the question, and provide guidance to States responsible for administering the Section 404 permit program.

## II. The Court Should Grant Review To Consider Whether Federalism Concerns Require Judicial Review of EPA's Veto of State-Approved Section 404 Permits

In drafting the Clean Water Act, Congress could not have been clearer about its intent: the Federal Government plays only a limited role in the regulation of water pollution, with States and local governments retaining their traditional land-use and water-resource authority. The Act states:

> 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, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b).

Thus, the Act upholds the fundamental principle of "cooperative federalism," whereby state and local governments take on the primary role of deciding how to most efficiently achieve the statute's goals. *Ohio Valley Envtl. Coalition, Inc. v. U.S. Amry Corps of Engineers*, 828 F.3d 316, 319 (2016) ("[T]he Clean Water Act sets up a cooperative-federalism approach."). That principle is best articulated in the Act's mandate that "[f]ederal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and

eliminate pollution in concert with programs for managing water resources." 33 U.S.C. § 1251(g) (emphasis added). It is genuine *cooperation*—not the unilateral say-so of the Federal Government—that should characterize the relationship between the federal government, on the one hand, and State and local governments, on the other.

The "cooperative federalism" required by the Clean Water Act is consistent with this Nation's historical record and constitutional tradition. Land use has always been the primary responsibility of State and local governments. Indeed, this Court has recognized time and again that history and tradition in a number of cases. As the Court plainly stated in *Hess v. Port. Auth. Tran-Hudson Corp.*, 513 U.S. 30, 44 (1994), "regulation of land use [is] a function traditionally performed by local governments." *See also FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity."); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("The power of local governments to zone and control land use is undoubtedly broad . . . . [C]ourts generally have emphasized the breadth of municipal power to control land use[.]").

So sensitive has this Court been to protecting State and local governments' authority over land use that it has struggled even over the outermost limits of their near-plenary power to make permit decisions. In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), the Court considered whether that power is cabined by the *constitutional* obligation to demonstrate an "essential nexus" and

"rough proportionality" between a monetary exaction imposed in a land-use permit and the public harm allegedly caused by the proposed use of land. A majority ruled in the affirmative. *Id.* at 619.

In dissent, Justice Kagan, joined by Justices Breyer, Ginsberg, and Sotomayor, lamented the ruling's "intrusion into *local* affairs" and "*localities'* land-use authority." *Id.* at 628 (emphasis added). In the dissenting Justices' view, the majority decision "deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development," and interferes with "the most everyday local government activity." *Id.* at 635-36. If a purely procedural[3] constraint on State or local land-use authority can cause so much concern, then surely the a federal agency's power to substantively ***veto*** the exercise of that authority—and to escape any judicial review—justifies this Court's review.

The decision of the United States Court of Appeals for the Sixth Circuit disturbs the careful balance that the Clean Water Act strikes between federal and State authority over land-use and water-

[3] *Koontz* does not prohibit local governments from imposing monetary conditions on land-use permits. It merely requires them to show how the conditions they seek to impose are necessary. In this sense, *Koontz* articulates a *procedural* limitation on local land-use decision-making. State and local governments remain free to decide the *substantive* questions of what land uses are allowed, and whether and the extent to which a particular use should be conditioned. This is a far cry from a substantive—and non-reviewable—veto over State and local land-use decisions.

resource management. The decision insulates EPA's veto over a State-approved Section 404 permit from judicial review, on the faulty premise that that the permit applicant has the option to apply anew with the U.S. Army Corps of Engineers. Of course, for the vast majority of applicants, that option is illusory, given the time and cost involved. Most will simply abandon their applications before facing yet another permit process. *Hawkes*, 136 S. Ct. at 1812 (discussing the exorbitant cost—and significant time—it requires to apply for a permit); *see also Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) (The permit process is "arduous, expensive, and long.").

As this Court has recognized, courts must be careful not to interpret federal law in a way that eviscerates the principle of federalism. In *Bond v. United States*, this Court admonished that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the unusual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (internal quotation marks omitted) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Congress has not expressed any intent to disturb the balance of power between Federal and State/local governments by allowing EPA non-reviewable and (therefore) unfettered power to veto their Section 404 permit decisions. The Court's granting of certiorari in this case will help to ensure that the Clean Water Act's much-vaunted "cooperative federalism" is not so easily disturbed.

Further, a ruling that EPA's veto is subject to judicial review could serve as an important prophylactic against federal usurpation of State and local authority. If EPA knows its veto over a State-approved Section 404 permit may be challenged in court, it is more likely to tread carefully and reasonably in reviewing permit applications, so as to not unduly encroach upon the lawful land-use authority of State and local governments. Simply put, "judicial review"—even the mere ***threat*** of judicial review—"helps guard against abuse of power and arbitrariness." Brietta R. Clark, *APA Deference After Independent Living Center: Why Informal Adjudicatory Action Needs a Hard Look*, 102 Ky. L.J. 211, 229 (2014).

## CONCLUSION

For the reasons stated above, and those stated in Petitioner's brief, Amici urge the Court to grant the petition or, in the alternative, summarily reverse the Sixth Circuit's opinion in light of *Sackett* and *Hawkes*.

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Respectfully submitted,

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