No. 18-260

In the Supreme Court of the United States

COUNTY OF MAUI, HAWAI'I

PETITIONER,

v.

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

RESPONDENTS.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA, 19 OTHER STATES, AND THE GOVERNORS OF KENTUCKY AND MISSISSIPPI IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Every State has an abiding interest in the conservation and regulation of its natural resources. See, *e.g.*, *Hudson Cty. Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908) (recognizing that States, acting as "representative[s] of the interests of the public, ha[ve] . . . standing in court to protect the atmosphere, the water, and the forests within [their] territory"). Indeed, this Court has repeatedly affirmed that preserving, maintaining, and encouraging the beneficial use of the natural bounty within a State's borders is an inherent facet of state sovereignty—and this rule holds particular sway for intrastate waters. In 2015 the Court emphasized that "[a]uthority over water is a core attribute of state sovereignty," *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1067 (2015), echoing a refrain common throughout our history that, as co-sovereigns in our federal system, States "hold the absolute right to all their navigable waters, and the soils under them, for their own common use," *Martin* v. *Waddell's Lessee*, 41 U.S. 367, 410 (1842). See also, *e.g.*, *United States* v. *Alaska*, 521 U.S. 1, 5 (1997) ("the [States'] power to control . . . fishing, and other public uses of water" is "an essential attribute of [their] sovereignty"); *Sporhase* v. *Nebraska, ex rel. Douglas*, 458 U.S. 941, 946 (1982) (noting that a "State's

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* contributed monetarily to its preparation or submission.

interest in preserving its waters [is] well within its police power").

The Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, was designed to complement—not usurp—the States' primary role as stewards of their water resources. While the overall purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id.* § 1251(a), Congress also "recognize[d], preserve[d], and protect[ed]" the "primary responsibilities and rights *of [the] States*" in this realm, *id.* § 1251(b) (emphasis added). Thus, at the same time Congress authorized the CWA's regulatory framework, it made clear that the States retain their traditional authority "to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.* The CWA therefore reflects a "careful balanc[ing] [of] competing policies and interests" specifically designed to protect the "sovereign interests of the States." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 106-07 (1992).

The decision below, *Hawai'i Wildlife Fund* v. *County of Maui*, 886 F.3d 737 (9th Cir. 2018), threatens to upend a critical component of this balance Congress struck. By adopting a standard wholly divorced from the CWA's text, structure, and legislative intent, the decision greatly expands the scope of waters subject to federal jurisdiction and the CWA's regulatory requirements. This reworking of the statutory framework infringes upon the sovereign prerogative of the States to manage their water

resources—especially those, like groundwater, that often lie wholly *intrastate*. See *Hudson Cty.*, 209 U.S. at 356 ("few public interests are more obvious [and] indisputable . . . than the interest of . . . a state to maintain the rivers that are wholly within it"). And given that the federal permitting process at the center of this case is implemented by state environmental protection agencies, this expansion will almost certainly impose unnecessary and unworkable bureaucratic burdens on those entities—to the detriment of their other, preexisting conservation efforts.

Amici curiae—the States of West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Utah, Wyoming, and the Governors of Kentucky and Mississippi—have an interest both in preserving the quality of their water resources and in preventing unlawful incursions upon their sovereignty. Each *amici* State enforces its own statutory and regulatory regime designed to conserve and develop its water resources for the benefit of its citizenry—now and into the future. The decision below represents an unjustified expansion of the CWA's jurisdictional breadth that will significantly burden, and even effectively displace, these protective measures. Fidelity to the statutory text, by contrast, properly apportions responsibility for protection of our Nation's water resources between federal and state regulators. In doing so, it better secures those resources, marshalling the power of federal regulation

where appropriate and leaving to the States the task of tailoring individualized solutions to the complex but localized problem of groundwater pollution.

Amici accordingly urge this Court to repudiate the flawed and overreaching decision below, and thereby restore the proper balance between state and federal regulation that the CWA—correctly read—demands.

SUMMARY OF THE ARGUMENT

I. Through its enactment of the CWA and its federal centerpiece—the National Pollutant Discharge Elimination System ("NPDES")—Congress crafted a two-tiered regulatory framework designed to protect our Nation's waters. The text of the CWA reflects the statute's cooperative federalism structure, drawing clear lines between the discharge of a pollutant from a point source into the "waters of the United States"—which falls within the ambit of the federal regime—and contaminants that are not released into the "waters of the United States" or discharged from a point source—which are subject to state regulation. This organizational paradigm leverages the proximity of the States to sources of pollution and the resources they threaten, which in turn encourages a closely tailored, localized approach, and preserves States' sovereign prerogative to regulate and conserve their natural resources—particularly intrastate groundwater.

Congress's intent to adopt this two-tiered framework is readily apparent. The plain language of the CWA places defined, textual limits on the jurisdictional scope of the NPDES through its

definitions of "the discharge of a pollutant," "point source," and "navigable waters." Legislative history confirms that Congress sought to regulate directly only a particular subset of the Nation's water resources, and specifically did not intend to displace the primacy of States when it comes to regulating groundwater. And the vast majority of courts—including this one—have relied on these factors to conclude that Congress did not intend for the CWA to directly regulate groundwater.

Under these textual limitations, only the "discharge of a pollutant" from or conveyed by a point source into "the waters of the United States" falls within the ambit of the NPDES regime. Because groundwater is neither a point source nor part of "the waters of the United States," discharge from a point source into groundwater is not subject to federal regulation even where the released substance migrates through the subterranean medium and eventually reaches jurisdictional waters. Accordingly, no NPDES permit is required.

II. Nevertheless, this textual conclusion does not mean that releases into groundwater are unregulated. Fulfilling their role as primary conservators of intrastate water resources, States have long enforced comprehensive regulatory schemes that cover releases into groundwater and intrastate waters. Thus, while the releases at issue in this case—and those like them—fall outside the ambit of the *federal* statute, they are almost certainly subject to analogous *state*-level permitting requirements and standards that protect groundwater.

III. Further, because almost every State has assumed responsibility for implementation of the federal NPDES program, expansion of its scope will place a significant burden on States' environmental protection agencies. And the expansion wrought by adopting the Ninth Circuit's "fairly traceable" standard would not be marginal. Millions of home septic systems, mine sites, catch-basins, oil and natural gas wells, and water treatment plants nationwide emit releases into groundwater that may eventually migrate to "the waters of the United States." The load of NPDES permits that may need to be issued and enforced by state agencies is likely to increase astronomically if the decision below is left in place. These increased burdens threaten to divert scarce resources away from state-specific programs that already protect the Nation's waters—making it likely that, rather than increase the degree of environmental protection state agencies provide, applying the "fairly traceable" standard nationwide will weaken those agencies' important efforts.

ARGUMENT

I. The Decision Below Cannot Be Squared With The CWA's Text, Structure, and Legislative Intent.

A. Adoption Of The Atextual "Fairly Traceable" Standard Expands The Jurisdictional Scope Of The NPDES Permitting Regime Beyond What Congress Authorized And Undermines The CWA's Cooperative Federalist Structure.

In the CWA's first subsection, Congress announced its fundamental purpose: "to restore and

maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In service of that overarching objective, Congress announced a "national goal" to eliminate "the discharge of pollutants into the navigable waters." *Id.* The NPDES is one of the primary regulatory mechanisms by which this goal is pursued. See *id.* § 1311(a) ("Except as in compliance with this section and [other sections providing for NPDES permits], the discharge of any pollutant by any person shall be unlawful.")

Congress did not, however, authorize pursuit of this goal by any means necessary, nor did it elevate the NPDES—the quintessentially federal portion of the CWA's regulatory framework—above all other programs and initiatives that protect our Nation's waters. Indeed, on the heels of proclaiming the statute's central objective, Congress declared in the CWA's second subsection its intent 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 . . . of land and water resources." 33 U.S.C. § 1251(b) (emphasis added). Clearly then, as this Court has already affirmed, "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective." *Arkansas*, 503 U.S. at 101.

This partnership makes the CWA one of the paradigmatic examples of "cooperative federalism." See, *e.g.*, *Gulf Restoration Network* v. *McCarthy*, 783 F.3d 227, 230, 241 (5th Cir. 2015) ("Both parties

emphasize the fact that the CWA is a cooperative federalism regime."); *United States* v. *Cooper*, 482 F.3d 658, 667 (4th Cir. 2007) ("In the CWA, Congress expressed its respect for states' role through a scheme of cooperative federalism."). As the key committee report on the bill that became the CWA phrased it, it has long been an "important principle of public policy" that "[t]he States shall lead the national effort to prevent, control and abate water pollution." S. Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3669. The CWA did not upend that policy; Congress expressly and unambiguously embraced it. See 33 U.S.C. § 1251(b); S. Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3678 (acknowledging the primary goal of the CWA—elimination of the discharge of pollutants—and stating that "[t]he States are declared to have the primary responsibility and right to implement such a goal"). Moreover, the Senate report explicitly recognized that "[t]he objective of [the CWA] will be met *only if the States have vigorous and adequate pollution control programs*." S. Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3685 (emphasis added). The federal aspects of CWA regulation—such as the NPDES—were thus never intended to represent an all-encompassing framework for protecting every last drop of water from all sources of pollution. Instead, the federal components of the CWA were designed to work in tandem with state programs and regulations to advance the statute's ultimate goal.

The statutory language and, in particular, the textual parameters of the NPDES program, confirms

this point. As noted above, the CWA renders unlawful the "discharge of a pollutant" without an NPDES permit. 33 U.S.C. § 1311. But the statutory definition of "discharge of any pollutant"—"any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12)—cabins the jurisdictional scope of the NPDES in two important ways.

First, a "discharge of a pollutant" occurs only when a qualifying substance is added to "navigable waters," 33 U.S.C. § 1362(12), which, in turn, is defined as "the waters of the United States," *id.* § 1362(7). The precise breadth of "the waters of the United States" is an open question. See, *e.g.*, *Georgia* v. *Pruitt*, 326 F. Supp. 3d 1356, 1364-65 (S.D. Ga. June 8, 2018) (granting preliminary injunction against enforcement of the EPA's 2015 definition of "the waters of the United States"). Notably, the Environmental Protection Agency ("EPA") recently promulgated a proposed rule that would revise its understanding of what waters fall within its ambit, see 84 Fed. Reg. 4154 (Feb. 14, 2019), as well as an interpretive statement addressing the very question before the Court now, see 84 Fed. Reg. 16,810 (Apr. 23, 2019).

But while the exact contours of "the waters of the United States" may be unsettled (for now), this Court has spoken directly to what that term does *not* include. "The waters of the United States" does not "refer to water in general," but instead encompasses only "relatively permanent, standing or flowing bodies of water" such as "streams, oceans, rivers, lakes, and bodies of water forming geographical features."

Rapanos v. *United States*, 547 U.S. 715, 732-33 (2006) (Scalia, J., plurality op.); *id.* at 778 (Kennedy, J., concurring) (rejecting concept of "navigable waters" that would "permit federal regulation [of water] alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters"). In short, there must be some discernable boundary between jurisdictional and nonjurisdictional waters—otherwise "why insert the qualifying clause ["of the United States"] in the statute?" *Vill. of Oconomowoc Lake* v. *Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994).

Critically, groundwater—which encompasses as much as 98% of the Earth's "accessible fresh water"[2]—unquestionably falls outside this statutory paradigm. Even the court below does not suggest otherwise. *Cty. of Maui*, 886 F.3d at 746 n.2 ("We assume without deciding the groundwater here is neither a point source nor a navigable water under the CWA."). And for good reason, as a plethora of authorities confirm that Congress did not intend for releases into or conveyed by groundwater to fall within the ambit of the NPDES permitting regime. Even before announcing *Rapanos*'s more disciplined view, for instance, this Court emphasized that the CWA "applies to virtually all *surface water* in the country." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987) (emphasis added). Similarly, the lower courts have followed this Court's guidance and "overwhelmingly

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[2] Vandas, Winter & Battaglin, *Water and the Environment* 4, American Geological Institute (2002), *available at* http://www.agiweb.org/environment/publications/water.pdf.

found that groundwater, even if hydrologically connected to navigable waters, is not itself a navigable water under the CWA." *Ky. Waterways Alliance* v. *Ky. Utils. Co.*, 303 F. Supp.3d 530, 542 (E.D. Ky. 2017) (collecting authorities); see also, *e.g.*, *Rice* v. *Harken Expl. Co.*, 250 F.3d 264, 269 (5th Cir. 2001) (citing *Exxon Corp.* v. *Train*, 554 F.2d 1310, 1322 (5th Cir. 1977)); *Oconomowoc Lake*, 24 F.3d at 965.

These decisions are buttressed by legislative history illustrating that Congress did not intend for the CWA to expand federal jurisdiction to groundwater. There were "[s]everal bills pending before the Committee" that would have "provided authority to establish Federally approved standards for groundwaters which permeate rock soil, and other subsurface formations." S. Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739. Yet because "the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation." *Id.* And finally, as the EPA declared in the recently released interpretive statement, its regulations "have never defined 'waters of the United States' to include groundwater." 84 Fed. Reg. 16,810, 16,813; see also *id.* at 16,814 ("when analyzing the [CWA] in a holistic fashion, Congress's intent becomes evident: Congress did not intend for the NPDES program to address any pollutant discharges to groundwater, even where groundwater may be hydrologically connected to surface waters").

Second, a discharge must be conveyed to jurisdictional waters by a "point source," which is defined as "any discernible, confined and discrete

conveyance." 33 U.S.C. § 1362(14). Each of these statutory descriptors matters. Every example in the statute's nonexhaustive list of point sources—"any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," *id.* § 1362(14)—is a readily identifiable and discrete object or feature capable of channeling and transporting pollutants to navigable waters.

Groundwater is none of these things. Instead of being "discernible, confined and discrete," by its very nature it is diffuse and amorphous. *Ky. Waterways Alliance* v. *Ky. Utils Co.*, 905 F.3d 925, 933 (6th Cir. 2018). Unlike pollutants released from a point source, "polluted groundwater typically does not flow in discrete channels but instead oozes through the hollow spaces of subterranean material." Damien Schiff, *Keeping 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, 465 (2018). And "[i]t is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil." *26 Crown Assocs., LLC* v. *Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017) (citation omitted).

Further, as courts routinely recognized before the decision below, "Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [CWA] to regulate

only the former." *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (emphasis added); see also, *e.g.*, *Simsbury-Avon Pres. Club, Inc.* v. *Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) (reasoning that the CWA "clearly indicates that there is a category of nonpoint source pollution," and leaves its regulation "to the states"); *Nat. Res. Def. Council* v. *E.P.A.*, 915 F.2d 1314, 1316 (9th Cir. 1990) (explaining that the CWA "ban[s] only discharges from point sources"). To be sure, the CWA reaches some ostensibly "indirect" discharges into navigable waters, such as where a pollutant (whatever its origin) is conveyed by a series of point sources—flowing, for example, from a pipe to a drainage ditch and so on—before eventually reaching "the waters of the United States." Pollution that reaches jurisdictional water via migration through a *nonpoint source*, however, is different in kind.

Individually and in concert, these textual qualifiers set the outer parameters of the NPDES permitting regime. Under the statutory text, a permit is required only for a discharge *from a point source* into *navigable waters*. Thus, discharges into groundwater—even from a point source—do not require a permit, because groundwater is not part of "the waters of the United States." And even if such a discharge eventually reaches jurisdictional waters by migration through underground soil and water, a permit would still not be necessary because groundwater is not a point source. See *Kentucky Waterways*, 905 F.3d at 934 (explaining that when "the groundwater is adding pollutants to [a navigable

water]," the pollutants "are not coming from a point source," and "[t]he CWA has no say over that conduct").

B. The CWA's Structure Confirms That Congress Did Not Intend For The NPDES Program To Encompass Releases Into Groundwater.

The existence of these textual limits is reinforced by the larger structure of the CWA. Congress was well aware that pollution from nonpoint sources—much of which (perhaps even the majority) flows into groundwater—was a serious threat to the overall health and integrity of our Nation's water resources. See S. Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3705 (describing various nonpoint sources as "major contributors to the Nation's water pollution problem" and a "major source of pollution," such that "the waters of the Nation cannot be restored and their quality maintained unless the very complex and difficult problem of nonpoint sources is addressed"); Schiff, 42 Wm. & Mary Envtl. L. & Pol'y Rev. at 459 (reproducing floor comment of Senator Edwin Muskie, chief sponsor of the CWA in the Senate, that "a great quantity of pollutants is discharged by [nonpoint source] runoff").

Congress's response to the pressing problem of nonpoint source pollution was not, however, the NPDES permitting regime. Instead, recognizing that "the control of nonpoint source pollution [i]s so dependent on such site-specific factors as topography, soil structure, rainfall, vegetation, and land use that its uniform federal regulation [i]s virtually

impossible," Congress "shift[ed] primary [responsibility] for the control of nonpoint source pollution to the states." *Shanty Town Assocs. Ltd. P'ship* v. *E.P.A.*, 843 F.2d 782, 791 (4th Cir. 1988).

With that said, Congress did not entirely abdicate the field of nonpoint source regulation. Instead, it imposed a "mandatory planning process" that required States "to identify, in accordance with federal guidelines," areas with "substantial water quality control problems," and to "formulate and operate a comprehensive . . . management plan for each such area"—including "procedures for the identification and control of the area's major sources of nonpoint source pollution." *Shanty Town*, 843 F.2d at 791 (citing 33 U.S.C. § 1288). This separate section of the CWA reflects the reality that "[n]onpoint sources, because of their very nature, are not regulated under the NPDES," and that Congress instead "encourage[d] states to develop areawide waste treatment management plans." *Or. Nat. Res. Council* v. *U.S. Forest Serv.*, 834 F.2d 842, 849 (9th Cir. 1987) (citing 33 U.S.C. § 1288); see also S. Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3706 (explaining that the CWA "provides a mechanism to establish a program to control the principal nonpoint sources of water pollutants" involving state-created plans "for nonpoint source pollution control").

Then, concerned that nonpoint source pollution had not been adequately ameliorated in the original statute, Congress amended the CWA in 1987 to add Section 319. See *Or. Nat. Res. Council*, 834 F.2d at

849 n.12 ("Congress recently amended the Clean Water Act and added a new provision dealing with nonpoint sources of pollution which provides grants and assistance to states who develop programs to deal with nonpoint sources."). This amendment "directs states to adopt 'nonpoint source management programs'"; authorizes "grants for nonpoint source pollution reduction"; and mandates state reports to the EPA identifying "those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this chapter." *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1138 (9th Cir. 2002) (quoting 33 U.S.C. § 1329(a)(1)(A)). In the wake of this amendment, States now have an obligation to "describe [their] programs for reducing nonpoint source pollution and the process[es] [they have implemented] 'to reduce, to the maximum extent practicable, the level of pollution' resulting from particular categories of nonpoint source pollution." *Id.* (quoting 33 U.S.C. § 1329(a)(1)(C)).

It is through this planning and reporting requirement—and the critical incentive of access to federal grant money—that the CWA tackles nonpoint source pollution. See *Or. Nat. Desert Ass'n* v. *Dombeck*, 172 F.3d 1092, 1096-97 (9th Cir. 1998) (explaining that the CWA "uses the 'threat and promise' of federal grants" to address nonpoint source pollution, and that Section 319 "similarly provides for grants to encourage a reduction in nonpoint source

pollution"). Congress adopted a two-tiered regulatory framework in which the NPDES regime encompasses discharges from point sources into "the waters of the United States," and State programs (often facilitated by federal grant money) regulate contaminants attributable to nonpoint sources. Indeed, leaving nonpoint source pollution of local waters to the States reflects fundamental differences between these types of pollution. As the EPA has recognized, "[t]he nature of the connection between groundwater and surface water is highly dependent on local climate, topography, geology and the type of groundwater formation at issue." 84 Fed. Reg. 16,810, 16,812. And these variables call for local—not top-down—solutions. See *Shanty Town*, 843 F.2d at 791 (discussing the "practical difficulties" of regulating nonpoint source pollution); *Nat. Res. Def. Council*, 915 F.2d at 1316 ("The [CWA] focused on point source polluters presumably because they could be identified and regulated more easily than nonpoint source polluters."); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("it is clear from the legislative history Congress would have [directly] regulated so-called nonpoint sources if a workable method could have been derived").

Thus, a holistic examination of the CWA's text and structure shows that the court below's expansion of the CWA's jurisdictional scope is directly at odds with the expressed will of Congress. The Ninth Circuit's atextual standard—requiring an NPDES permit whenever a discharge that migrates through groundwater to "the waters of the United States" is

"fairly traceable" to a point source, *Cty. of Maui,* 886 F.3d at 749—ignores this conscious congressional choice. Further, the consequences of this approach are vast. The EPA has noted "a fundamental principle of hydrology that many groundwaters and surface waters are linked through the hydrologic cycle," 84 Fed. Reg. 16,810, 16812, and this Court recognized almost half a century ago that "groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." *Cappaert* v. *United States*, 426 U.S. 128, 142 (1976) (citation omitted); see also Vandas et. al., *supra* n.2, at 26 ("[s]urface water and groundwater systems are connected in most landscapes"). Thus, the practical effect of adopting the "fairly traceable" standard would be to extend the reach of the NPDES permitting regime to virtually *all* of the nation's waters—and to any *land* capable of absorbing water as well.

This novel and wide-reaching view of the NPDES regime's scope has no grounding in either the statute or this Court's precedents. In *Rapanos*, for instance, Justice Scalia's plurality opinion rejected an "expansive theory" of CWA jurisdiction advanced by the Army Corps of Engineers in part because adopting it would have placed "virtually all" planning for the "development and use . . . of land and water resources" under federal control. 547 U.S. at 737. As Justice Scalia explained, such a result would be at odds with Congress's express intent to preserve "the primary rights and responsibilities of the States" under the CWA. *Id.* (quoting 33 U.S.C. § 1251(b)). The same concern animated this Court's decision in *Solid Waste*

Agency of Northern Cook County v. *U.S. Army Corps of Engineers*, where it rejected another unduly far-reaching formulation of "the waters of the United States" that would have "result[ed] in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. 159, 174 (2001) (citing *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

Had Congress intended the CWA to directly regulate the release of contaminants into groundwater or pollution that entered the "waters of the United States" from nonpoint sources, it would have said so. It would not have placed textual limits on the definition of the "discharge of a pollutant," nor included the statutory provisions addressing ways for *States* to address nonpoint source pollution. After all, those provisions—state planning and reporting, and federal grant money to smooth the way—contain the hallmarks of cooperative federalism. Instead, Congress adopted the CWA's two-tiered regulatory framework, leveraging and relying upon the States' proximity to and familiarity with the sources of nonpoint source pollution within their borders, to achieve the "shared objective" of protecting and conserving our Nation's waters. The decision below is wholly at odds with this structure. Accordingly, this Court should reverse the decision below, and restore the jurisdictional parameters of the NPDES program to what Congress intended.

II. Proper Interpretation Of The CWA Will Not Leave Groundwater or Connected Surface Waters Unprotected.

As the previous section demonstrates, Congress was well aware that the central goal of the CWA could not be achieved without concerted effort to combat groundwater contamination and control nonpoint source pollution. But, as the Fourth Circuit recently recognized, the CWA is not the only regulatory tool for addressing these important issues: "The fact that [some groundwater] pollution falls outside the scope of the Clean Water Act's regulation does not mean that it slips through the regulatory cracks." *Sierra Club* v. *Va. Elec. & Power Co.*, 903 F.3d 403, 411 (4th Cir. 2018). Fidelity to the CWA's cooperative federalist structure demands that the statute's federal regulatory components not be extended beyond what Congress intended. But neither will adherence to the text and structure of the CWA leave our Nation's groundwater—or the connected surface waters it often feeds—unprotected.

States take seriously their responsibility to protect the natural resources within their borders. See, *e.g.*, *State ex rel. Smith* v. *Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 488 S.E.2d 901 (1997) (West Virginia Department of Environmental Quality lawsuit "seeking to compel the appellees to clean up the hazardous waste at their business site" as well as to recover "civil penalties and damages"). Indeed, each of the *amici* States have adopted comprehensive statutory and regulatory schemes designed to protect and conserve their water

resources, including both groundwater and connected surface waters. Examples of such laws include the following:

- In West Virginia, "[i]t is unlawful for any person," without a state permit, to "[a]llow sewage, industrial wastes or other wastes, or the effluent therefrom, produced by or emanating from any point source, to flow into the waters of this state." W. Va. Code § 22-11-8(b); see also *id.* § 22-11-3(23) (defining "water" to include "all water on *or beneath the surface of the ground*" (emphasis added)). Similarly, the Department of Environmental Protection "establish[es] maximum contaminant levels permitted for groundwater," which must "recognize the degree to which groundwater is hydrologically connected with surface water and other groundwater" and "provide protection for such surface water and other groundwater." *Id.* § 22-12-4(b)-(c).
- The law of Arizona, in light of that State's arid climate, is especially focused on protection of its groundwaters through its comprehensive aquifer protection permit and water quality standards programs. Ariz. Rev. Stat. §§ 49-203(A)(4), 223, 224(B).
- In Colorado it is unlawful to discharge any statutorily defined pollutant into any state waters without first having obtained the necessary permit from state authorities. Colo. Rev. Stat. §25-8-501(1). "State waters" include any and all "subsurface waters which are

contained in or flow in or through" the State. *Id.* § 25-8-103(19).

- Florida's regulation of state waters includes "underground waters." Fla. Stat. §§ 403.031(13), 403.062. Florida requires permits for installations expected to be sources of water pollution that discharge to groundwater and has a statewide groundwater quality monitoring and permitting program. *Id.* at §§. 403.087, 403.063; Fla. Admin. Code §§ 62-520, 62-620.300. Discharges to groundwater are not permitted to impair contiguous surface waters. Fla. Admin. Code § 62-520.310. It is unlawful to discharge pollutants to state waters without a permit, with violators subject to civil and administrative enforcement actions or criminal penalties. Fla. Stat. §§ 403.121, 403.161.
- Kansas requires any "person, company, corporation, institution or municipality" to obtain a permit before allowing "sewage" to be discharged into "the waters of the state." Kan. Stat. § 65-164(a). "Sewage" is broadly defined to include "any substance that contains any of the waste products or excrementitious or other discharges from the bodies of human beings or animals, or chemical or other wastes from domestic, manufacturing or other forms of industry." *Id.* § 65-164(b). And "waters of the state" specifically encompasses "subsurface

waters within the boundaries of the state." *Id.* § 65-161.

- Kentucky directly prohibits the discharge of pollutants into groundwater, providing that "no person shall, directly or indirectly . . . discharge into any of the waters of the Commonwealth . . . any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth," except as authorized by state regulatory authorities. Ky. Rev. Stat. § 224.70-110. "Waters of the Commonwealth" is defined to include "all . . . bodies or accumulations of water, *surface and underground*, natural or artificial, which are situated wholly or partly within, or border upon, this Commonwealth, or are within its jurisdiction, except those private waters which do not combine or effect a junction with natural surface or underground waters." *Id.* § 224.1-300(6) (emphasis added).
- Michigan law provides that a "person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious" to a broad array of interests, including public health, commercial, industrial and agricultural land uses, and wild flora and fauna. Mich. Comp. Laws § 324.3109(1). The term "waters of the state" is explicitly defined to include "groundwaters . . . within the jurisdiction of this state." *Id.* § 324.3101(aa).
- In South Carolina, it is "unlawful for a person, directly or indirectly, to throw, drain, run,

> *allow to seep*, or otherwise discharge into the environment of the State organic or inorganic matter" without a permit. S.C. Code § 48-1-90(A)(1) (emphasis added).

These State laws and others like them highlight a crucial point: absence of a requirement to obtain an NPDES permit is not equivalent to an unfettered license to discharge pollutants into groundwater. An entity or individual cannot entirely escape regulation simply by moving a pipe away from water's edge, such that discharges seep into groundwater rather than flow directly into the "waters of the United States." While such a move might relieve the owner of that point source of the NPDES-permitting requirements imposed by *federal* law, in almost every case the purported regulatory void would be filled by a complementary regulatory obligation arising under *state* law. See, *e.g.*, *Tiegs* v. *Watts*, 135 Wash. 2d 1, 12-14, 23-24 (1998); *Prairie Rivers Network* v. *Dynegy Midwest Generation, LLC*, 350 F. Supp. 3d 697, 706 n.2 (C.D. Ill. 2018) (determining that *Oconomowoc Lake* foreclosed CWA suit predicated on hydrological connection between groundwater and jurisdictional waters, but emphasizing that "Plaintiff is not without recourse . . . [and] may pursue this claim in the Illinois state courts with the Illinois EPA").

Reliance on state environmental protections in such a scenario is not only reasonable—it is exactly what Congress intended by the balance it struck in the CWA. It is also not an ephemeral promise: States take seriously their frontline duty to protect groundwater and combat nonpoint source pollution.

"Almost every [S]tate has at some point produced legislation or judicial decisions, or both, proclaiming the importance of groundwater regulation." Dave Owen, *Taking Groundwater*, 91 Wash. U. L. Rev. 253, 257 (2013); see also, *e.g.*, *Branch* v. *W. Petroleum, Inc.*, 657 P.2d 267, 273 (Utah 1982) ("As Utah is one of the most arid states in the union, the protection of the purity of the water is of critical importance, and the Legislature has enacted laws for the protection of both surface and subterranean waters."); *State ex rel. Lassen* v. *Harpham*, 410 P.2d 100, 112 (Ariz. 1966) ("Under-ground waters have received greater attention of . . . state government[s] than surface waters in water-conservation regulation.").

Furthermore, the States' efforts in this arena are reinforced by federal resources that the CWA made available. Since the CWA's 1987 amendment, the EPA has disbursed more than $4 billion in grants to States and local entities to assist their efforts in combatting nonpoint source pollution.[3] The effects of these federal resources are measureable and readily apparent: Since 2005 the EPA has identified 779 bodies of water that were "pollution-impaired"—due primarily to nonpoint source pollution—where restoration efforts facilitated by Section 319 grants

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[3] U.S. Envtl. Prot. Agency, *319 Grant Program for States and Territories* (Oct. 19, 2017), https://www.epa.gov/nps/319-grant-program-states-and-territories (listing total grant expenditures on a yearly basis since 1990).

have "led to documented water quality improvements."[4]

Over $600,000 in Section 319 funding was disbursed over a multi-year period beginning in 2003, for instance, to fund projects that restored the water quality in Morris Creek—a tributary of the Kanawha River southeast of Charleston, West Virginia that had been rendered "devoid of aquatic life" by "acid mine drainage" that "seep[ed] out of . . . hillsides from old [underground] mine voids."[5] In another prominent example, "[m]ore than $1.1 million in section 319 grants" funded a series of projects targeting damage caused by "underground and surface mines" in the Cheat River watershed in north-central West Virginia and southern Pennsylvania, where "many . . . streams h[ad] been so severely degraded by acid mine drainage that they [were] effectively dead."[6] As "a testament to improved water quality" resulting from these Section 319 funded projects, the "once acidic" Cheat Lake—the downstream destination of the Cheat River and its

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[4] U.S. Evntl. Prot. Agency, *Success Stories about Restoring Water Bodies Impaired by Nonpoint Source Pollution* (Apr. 29, 2019), https://www.epa.gov/nps/success-stories-about-restoring-water-bodies-impaired-nonpoint-source-pollution#read.

[5] U.S. Envtl. Prot. Agency, *Section 319 Nonpoint Source Program Success Story: Passive Treatment Systems Restore Water Quality* 1-2 (2008), *available at* https://www.epa.gov/sites/production/files/2015-12/documents/wv_morris.pdf.

[6] U.S. Envtl. Prot. Agency, *Section 319 Nonpoint Source Program Success Story: Success Countering Acid Mine Drainage in Cheat River Watershed* 1-2 (2005), *available at* https://www.epa.gov/sites/production/files/2015-12/documents/wv_cheat.pdf.

tributary streams—"is now home to bass [fishing] tournaments."[7]

In its opinion, the court below lamented that refusing to extend the reach of the NPDES permitting regime to releases into groundwater that migrates to navigable waters would "make a mockery of the CWA's prohibitions." *Cty. of Maui*, 886 F.3d at 752. But the States have long assumed the mantle of protecting groundwater and nonpoint source pollution within their borders, and it is the lower court's refusal to recognize the cooperative balance Congress struck that cannot be squared with the CWA's commands. Congress's decision to confine the scope of the NPDES program to discharges from point sources does not leave groundwater unprotected or ignore the problem of nonpoint source pollution. Extending the program's scope thus subverts Congress' will and invades the sovereign prerogative of the States—all to accomplish a policy objective that is already being worked out through the *combined* efforts of state regulators and federal funding resources.

III. Adopting The "Fairly Traceable" Standard Will Impose Significant Burdens On State Environmental Protection Agencies.

While repudiating the standard the court adopted below will not threaten the integrity of our Nation's water resources, adopting it could in fact undermine existing state environmental protection measures. The NPDES permitting regime is the centerpiece of

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[7] *Id.*

the CWA's federal regulatory framework, but as a practical matter, state environmental protection agencies are largely responsible for implementing it. See 33 U.S.C. § 1342(b); *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 650 (2007) (explaining that although the EPA has default responsibility for administering the NPDES permitting system, a "State may apply for a transfer of permitting authority to state officials"). Indeed, after the EPA approves a State's program, it "no longer has authority to issue NPDES permits under the CWA; at that point the state permitting authority is the only entity authorized to issue NPDES permits within the state's jurisdiction." *Wis. Res. Prot. Council v. Flambeau Min. Co.*, 727 F.3d 700, 703 (7th Cir. 2013) (citation omitted).

The CWA was specifically designed to operate this way: It declares that the States should "implement the [NPDES] permit programs." 33 U.S.C. § 1251(b). And that intent has been largely realized: 47 States have sought and received authority to implement the NPDES permitting regime pursuant to Section 1342(b). See 81 Fed. Reg. 31,344, 34,345 (May 18, 2016) ("To date, 46 states and the Virgin Islands have obtained authorization to administer the NPDES permit program."); 83 Fed. Reg. 27,769 (June 14, 2018) (EPA approval of Idaho—State number 47—to obtain authorization to implement the NPDES).

Because the vast majority of States have assumed primary responsibility over the NPDES permitting process, burdens from any expansion of that regime fall directly on state environmental protection

agencies. This Court has previously acknowledged that the NPDES permitting process is "arduous, expensive, and long." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). As it stands, state environmental protection agencies already spend nearly 1.6 million hours and nearly 70 million dollars each year processing NPDES permits.[8] Viewed in terms of individual States, implementation of the NPDES program in West Virginia cost $2 million in 2014 and was the responsibility of approximately 30 to 35 employees.[9] Ohio spent more than $10 million and employed approximately 100 people the same year, and California racked up a nearly $32 million bill.[10] Those numbers are likely to increase by an order of magnitude—and perhaps

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[8] See EPA ICR No. 0229.21 Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), EPA ICR at *17, tbl. 12.1 (Dec. 2015), *available at* https://www.reginfo.gov/public/do/DownloadDocument?objectID=60917402. The EPA's estimates are also generally consistent with those from a report compiled by the Association of Clean Water Administrators, which provides a State-by-State breakdown of the costs incurred implementing the NPDES program, the number of state employees involved in its implementation in each State, the number of entities that have obtained an NPDES permit, and the average fee assessed on those entities. See Association of Clean Water Administrators, *Report on State NPDES Fee Permitting Program Structures* (June 2014), *available at* https://www.acwa-us.org/wp-content/uploads/2017/05/ACWA-NPDES-Fee-Report-7-31-2014.pdf.

[9] See *Report on State NPDES Fee Permitting Program Structures*, supra n.3 at *49.

[10] *Id.* at *8, *35.

several—if this Court allows the "fairly traceable" standard to stand, thus creating a cascade of new sources that will fall within the ambit of the NPDES permitting regime.

Consider home septic systems. These systems typically discharge pollutants (as the term is broadly defined in the CWA) into groundwater, but homeowners have not historically been required to obtain an NPDES permit for those discharges. See 84 Fed. Reg. 16,810, 16812 ("neither EPA nor states have generally required NPDES permits for [home septic systems and other underground injection wells], except in rare cases involving site-specific factors"). Under the standard adopted below, however, a septic system—a discrete object or feature—would likely qualify as a point source, and discharges that migrate through groundwater to jurisdictional waters would therefore likely fall within the ambit of the NPDES permitting regime.

The potential scope of such liability—and the associated burden that would fall on state regulators—is tremendous. Given the EPA's estimate that approximately 25% of American homes rely on septic systems,[11] adoption of the "fairly traceable" standard could increase the number of NPDES permits by roughly 220,000 in West Virginia alone.[12]

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[11] U.S. Envtl. Prot. Agency, *Do Your Part—Be SepticSmart!* 2 (Sept. 2012), *available at* https://www.epa.gov/sites/production/files/2015-06/documents/septicsmart_longhomeownerguide_english508_0.pdf.

[12] See U.S. Census Bureau, *QuickFacts West Virginia* (July 1, 2018), https://www.census.gov/quickfacts/fact/table/wv/PST0452

This represents an astronomical 35,000% increase over the number of NPDES permits—607—West Virginia issued in fiscal year 2017.[13] And the aggregate numbers nationwide only reinforce the staggering potential in new NPDES obligations if all home septic systems qualify as point sources. The EPA recently reported that "[o]ver 26 million homes in the United States employ septic systems to treat and dispose of household waste," 84 Fed. Reg. 16,810, 16,812, and if even *half* of those systems release pollutants that migrate to navigable water and can be "fairly traced" back to the septic system, that could still result in 13 million new NPDES permits under the Ninth Circuit's reasoning.

And septic systems account for only *one* new category of point sources that could, for the first time, be subject to the NPDES permitting regime. Under the "fairly traceable" standard, NPDES permits would very likely be required for wastewater treatment plants (like the one at the center of this case) and other relatively common underground injection wells, as well. Municipalities and other entities use more than 650,000 of these wells nationwide to process, purify, and reuse wastewater, and around 180,000

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17 (estimating that there are 892,226 housing units in West Virginia).

[13] W. Va. Dept. of Envtl. Prot., *Fiscal Year 2016-17 Annual Report* 2, *available at* https://dep.wv.gov/pio/Documents/2016-17%20Annual%20Report.pdf.

more wells facilitate oil and gas production.[14] Even though both categories of wells are already subject to a variety of state and federal regulations, see *id.*, under the "fairly traceable" standard they would likely be required to obtain NPDES permits or face liability under the CWA. The approach endorsed below could also extend the jurisdictional scope of the CWA to untold other sources—irrigation systems, underground storage tanks or pipelines that spring a leak, current and former mine sites, parking lots, catch-basins, and many others.

What is more, the diffuse nature of groundwater dispersal means that States likely would not be able to complete this torrent of new NPDES permitting with clarity, and certainly not without considerable, unjustifiable cost. The direction and speed of groundwater flow depend on geography and gravity, not design. Groundwater may (or may not) seep through many feet of soil, porous rock, and other subterranean matter—and often takes a circuitous, uncertain path—before ultimately reaching jurisdictional waters. *E.g.*, *Kentucky Waterways*, 905 F.3d at 933 ("One cannot look at groundwater and discern its precise contours as can be done with traditional point sources like pipes, ditches, or tunnels.").

These factors would make it extremely challenging to draft a permit with precise discharge

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[14] See generally U.S. Envtl. Prot. Agency, *Protecting Underground Sources of Drinking Water from Underground Injection (UIC)* (Apr. 15, 2018), https://www.epa.gov/uic.

parameters, and more challenging still to monitor compliance. It is one thing to measure outflow from a pipe into navigable waters to ensure discharge levels are compliant with an NPDES permit; it is quite another to track the volume of pollutants that reach navigable waters after seeping into the ground and joining the complex subsurface network of groundwater flows. Indeed, as the EPA has recognized, "[t]he amount of a pollutant that is released into groundwater that will eventually reach surface water also varies and is dependent on both the characteristics of the pollutant itself as well as site-specific factors." 84 Fed. Reg. 16,810, 16,812; see also *id.* ("The speed and concentration at which pollutants move through groundwater depend on the amount and type of pollutant, its solubility and density, and the speed of the surrounding groundwater.). At a minimum, States overseeing an NPDES regime that encompasses releases traveling through groundwater would likely need to procure expansive and time-consuming environmental impact studies in order to obtain a quantum of data that could (at least conceivably) provide them with the sort of precision, coherence, and scientific integrity necessary avoid arbitrary regulation.

All told, the "fairly traceable" standard threatens to drown state environmental protection agencies under a wave of newfound responsibility, requiring them to process and issue a swell of technologically challenging and complex NPDES permits to sources that have never before been subject to that process. Handling this flood of new permits will leech already

scarce resources from other programs better equipped to address groundwater pollution. See Part II, *supra*. Congress did not intend to foist such a burden on the States, nor did it desire the federal components of the CWA to displace the protections groundwater and other intrastate water resources already receive under state law. This Court should accordingly repudiate the atextual "fairly traceable" standard, and thus ensure that the NPDES permitting regime remains within the boundaries Congress set.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted.

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