No. 18-260

In The Supreme Court of the United States

COUNTY OF MAUI, HAWAII,

Petitioner,

v.

HAWAII WILDLIFE FUND, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, WESTERN STATES TRUCKING ASSOCIATION, INC., AND NUCKLES OIL CO., INC. D/B/A/ MERIT OIL COMPANY 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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INTEREST OF *AMICI CURIAE*[1]

National Federation of Independent Business Small Business Legal Center

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross

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[1] *Amici* National Federation of Independent Business Small Business Legal Center, Western States Trucking Association, Inc., and Nuckles Oil Co., Inc. d/b/a/ Merit Oil Company file this brief with the consent of all parties; by email from Petitioner, and by blanket consent filed by Respondents. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, counsel for *Amici* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no other person or entity other than *Amici*, their members, and their counsel contributed monetarily to the preparation or submission of this brief.

sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amici* briefs in cases that will impact small businesses.

The NFIB Legal Center files this *amici* brief to provide a voice in these proceedings for the rights of small business landowners. Their land is often one of their most valuable assets both in terms of financial investment and for their practical operations. It is highly problematic for ranchers, farmers, and other small business landowners when they are denied their common law right to put their lands to productive uses and profoundly concerning if the reach of the Clean Water Act is expanded to include groundwater.

Western States Trucking Association, Inc.

Western States Trucking Association ("WSTA") is a nonprofit California trade association representing the interests of over 1,000 members involved in a variety of businesses throughout California and other western states whose members own and operate on-road and non-road vehicles, engines, and equipment, and would be adversely affected if the reach of the Clean Water Act is expanded to include groundwater.

Nuckles Oil Co., Inc. D/B/A/ Merit Oil Company

Merit Oil is a California corporation and is a petroleum jobber, wholesaler, and distributor. Merit Oil

stores, transports, and wholesales a variety of petroleum products, including gasoline, diesel fuels, solvents, and kerosene, and operates a number of delivery trucks. Merit Oil would be adversely affected if the reach of the Clean Water Act is expanded to include groundwater.

INTRODUCTION AND SUMMARY OF ARGUMENT

The lower court erred when it held that a discharge of pollutants from a point source to groundwater that ultimately flows into the Pacific Ocean requires a permit under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program.

Congress enacted the Clean Water Act (the "CWA" or the "Act"), 33 U.S.C. §§ 1251 *et seq*., to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), while "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Congress prohibited the discharge of any "pollutant" through a "point source" into "navigable waters" unless authorized by a permit issued pursuant to the NPDES program. *See* 33 U.S.C. § 1311(a); *see also* 33 U.S.C. § 1362(12)(A), 33 U.S.C. § 1342(a), 33 U.S.C. § 1362(14).

The Act defines "navigable waters" as "the waters of the United States, including the territorial seas."

33 U.S.C. § 1362(7). The term "waters of the United States," however, is not explicitly defined by statute. Over the years, agencies have seized upon this opportunity to test the constitutional limits of the CWA, with varying degrees of success. The lower court strayed beyond constitutional limits in holding that the County of Maui's injection of treated wastewater into groundwater without a NPDES permit violated the CWA's permitting requirement for point source discharges into navigable waters where the groundwater ultimately reached the Pacific Ocean. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 745-749 (9th Cir. 2018).

After concluding that each of the County's wells constituted "point sources" under the Act, *Cty. of Maui*, 886 F.3d at 744-745, the lower court analyzed the County's argument that, in order for a CWA "discharge" to occur, "the point source itself must convey the pollutants *directly* into the navigable water," rather than indirectly through groundwater. *Id*. at 745. The court rejected that argument, holding that "an indirect discharge from a point source to a navigable water suffices for CWA liability to attach." *Id*. at 747. In support, the lower court relied in large part on the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), observing that "Justice Scalia recognized the CWA 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.'" *Id*. at 748 (quoting *Rapanos*, 547 U.S. at 743) (internal quotation marks omitted). While recognizing

that the *Rapanos* plurality opinion was not "controlling," the lower court found it persuasive for the point that pollutants need not "be discharged 'directly' to navigable waters from a point source" to fall within the Act's coverage. *Id*. at 744-749. The lower court misreads *Rapanos* and ignores the substantial constitutional issues inherent in extending the CWA's NPDES program to groundwater discharges. For at least five reasons, the judgment of the lower court should be reversed.

First, *Rapanos* did not address groundwater discharges but dealt solely with discharges of dredged and fill material into wetlands, a CWA regulatory program to which the NPDES program does not apply.

Second, the *Rapanos* plurality roundly rejected any notion that the statutory term "waters of the United States" could be interpreted without specific reference to the statutory term "navigable waters." *See Rapanos*, 547 U.S. at 731 ("[T]he qualifier 'navigable' is not devoid of significance."). By its nature, groundwater is not and cannot be readily made to be "navigable." Thus, discharges from a point source to groundwater are not discharges to navigable waters. Moreover, groundwater itself does not and cannot meet the definition of "point source" under the Act.

Third, when agencies try to extend their CWA jurisdiction to waters that are not navigable-in-fact, this Court has cautioned that the CWA "invokes the outer limits of Congress' power" under the Constitution and, accordingly, assertions of jurisdiction should not be sanctioned unless there is a "clear indication that

Congress intended such result." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). The Court in *SWANCC* determined that the broad assertion of CWA jurisdiction over isolated wetlands "alters the federal-state framework by permitting federal encroachment upon a traditional state power[,]" specifically "impingement of the States' traditional and primary power over land and water use." *Id.* at 173-74. Here, the lower court sanctioned an interpretation of the CWA that impermissibly extends federal jurisdiction beyond the constitutional limits established in *SWANCC*.

Fourth, other federal regulatory programs address groundwater pollution, most notably the Safe Drinking Water Act ("SDWA") 42 U.S.C. §§ 300f *et seq.* (1974), which is "the primary law protecting groundwater purity for domestic use." Edward V. A. Kussy, *Wetland and Floodplain Protection and the Federal-Aid Highway Program*, 13 Envtl. L. 161, 213 (1982). Under the SDWA, Congress delegated "primary enforcement responsibility to the individual states." *Spotts v. United States*, 613 F.3d 559, 570 (5th Cir. 2010); *see also* 40 C.F.R. § 142.10. By allowing the regulation of discharges to groundwater to be enforced under the NPDES program of the CWA rather than under the SDWA the lower court misapplied Congress' statutory scheme in enacting the two independent statutes.

Fifth, this Court has opined not only that the CWA pushes the outer boundaries of the Constitution when it veers substantially from regulating "navigable waters" but also that, under the Commerce Clause,

U.S. Const. art. I, § 8, cl. 3, Congress may only regulate outside of the "channels or instrumentalities" of interstate commerce if that which is regulated "substantially affect[s] interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). Navigable waters certainly are within the "channels and instrumentalities" of interstate commerce; groundwaters are not. Accordingly, only if groundwaters "substantially affect" interstate commerce can there be a constitutional basis for regulating them under the CWA. The lower court did not provide any analysis of the extent to which groundwaters could be deemed to "substantially affect" interstate commerce, let alone the extent to which they could be regulated to the same extent as navigable waters under the CWA. Moreover, under the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, a regulation will pass muster under the Commerce Clause only if it is necessary—*i.e.*, "plainly adapted"—to the regulation of commerce, meaning that it is both narrow in scope and incidental to regulating commerce. In ruling that the County needed a NPDES permit to discharge to groundwater, the lower court neglected to address whether such a requirement was "plainly adapted" to the regulation of commerce under the CWA, an oversight that makes the ruling fatally flawed.

ARGUMENT

I.

INTERPRETING THE PERMITTING REQUIREMENTS OF THE CLEAN WATER ACT TO APPLY TO POLLUTANTS CONVEYED TO NAVIGABLE WATERS BY NONPOINT SOURCES, SUCH AS GROUNDWATER, WOULD MAKE THE ACT OF DOUBTFUL CONSTITUTIONAL VALIDITY

This Court's precedents have evidenced serious concerns about the constitutionality of the ever-expanding scope of federal jurisdiction under the Clean Water Act. In *Rapanos*, the Supreme Court reviewed the Corps' regulatory definition of "waters of the United States" as it applied to wetlands adjacent to tributaries of navigable waters. 547 U.S. 715.

The plurality opinion of four justices, authored by Justice Scalia, ridiculed the argument that "waters of the United States" included "virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Rapanos*, 547 U.S. at 722 (plurality opinion). The plurality also rejected the notion that CWA jurisdiction extended to "storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years." *Id*. Instead, the plurality held that, notwithstanding the Corps' regulations, the term "waters of the United States" referred to "relatively permanent, standing or

continuously flowing bodies of water" that are connected to traditional navigable waters. Justice Scalia explained that wetlands fell within the scope of the CWA only when the Corps could show: "first, that the adjacent channel contains a 'water of the United States' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)"; and second, that the wetland has "a continuous *surface* connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id*. at 742 (emphasis added). It is significant that the plurality required a surface water connection between wetlands and adjacent waters and that a groundwater connection was deemed insufficient to establish CWA jurisdiction. Although the lower court purported to rely on *Rapanos*, it chose to ignore this important distinction.

In his concurring opinion in *Rapanos*, Justice Kennedy expressed concern over the scope of jurisdiction asserted under the Act: "[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far." 547 U.S. at 779-780 (Kennedy, J., concurring); *id.* at 776 (citing "constitutional and federalism difficulties" in the jurisdictional reach of the Clean Water Act).

Five years before *Rapanos*, the Supreme Court cautioned that the CWA "invokes the outer limits of Congress' power" under the Constitution and, accordingly,

the Corps' broad assertions of jurisdiction should not be permitted unless there is a "clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. The Court in *SWANCC* determined that a broad assertion of CWA jurisdiction over isolated wetlands could not be sanctioned because, among other things, it "alters the federal-state framework by permitting federal encroachment upon a traditional state power[,]" specifically "impingement of the States' traditional and primary power over land and water use." *Id.* at 173-174. Accordingly, in the instant case, traditional state power over land and the associated use of groundwater cautions against reading the NPDES program broadly to regulate discharges into groundwater.

When considered with other precedents of this Court, the *SWANCC* and *Rapanos* restrictions have significant impacts on the way agencies must view CWA regulation of waters that are not, in fact, "navigable." Under existing Commerce Clause precedent, Congress may only regulate outside of the "channels or instrumentalities" of interstate commerce if that which is regulated "substantially affect[s] interstate commerce." *Lopez*, 514 U.S. at 558-559. The CWA is predicated on the Commerce Clause. *SWANCC*, 531 U.S. at 173-174. Because groundwater has never been considered a "channel or instrumentality" of interstate commerce, it is impermissible to regulate it under the CWA unless a showing is made that it "substantially affects" interstate commerce. The lower court's opinion is silent on this issue.

Furthermore, the authority to regulate interstate commerce is derived from and limited by not only the Commerce Clause but also the Necessary and Proper Clause. *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring). Under the Necessary and Proper Clause, a regulation will pass muster only if it is necessary—*i.e.*, "plainly adapted"—to the regulation of commerce. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012). To be "plainly adapted," a regulation must be (1) "narrow in scope," and (2) "incidental" to the regulation of commerce. *Id*. at 560. The Necessary and Proper Clause adds an additional level of scrutiny, by requiring that regulations must be "proper"—*i.e.*, within the "letter and spirit of the constitution" and in accord with the traditional balance of power between the federal government and the states. *Id*. at 537.

In *Sebelius*, the Court examined whether a federal mandate for individuals to buy insurance was a necessary and proper exercise of the commerce power. 567 U.S. 519. The government had argued that the individual mandate was necessary to maintain and regulate a functional market in health insurance and therefore permissible under the Necessary and Proper Clause. The Court disagreed. As Chief Justice Roberts explained, there was no sufficient evidence that the mandate was necessary, but even if there were, the regulation would not be "proper" because it "would work a substantial expansion of federal authority" into areas traditionally regulated by the states. *Id*. at 560.

This reasoning is relevant to the CWA. To the extent that the government wishes to regulate discharges into waters that are not, in fact, navigable, it must provide some evidence that the regulation of such discharges is "necessary"—*i.e.*, that discharges into the waters have a substantial effect on interstate commerce. *Id*. at 560. Even if that burden were met, the agencies must also show that the regulation is "proper"—*i.e.*, that it would not "work a substantial expansion of federal authority" into areas traditionally regulated by the states. *Id*. Because land and water development and use decisions are traditionally reserved to the states, the second factor provides a significant limiting principle on the scope of the CWA. When it enacted the CWA, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . " and courts must therefore "read the statute as written to avoid the significant constitutional and federalism questions." *SWANNC*, 531 U.S. at 174.

Accordingly, both the Commerce Clause and the Necessary and Proper Clause should be applied as limitations on the scope of constitutionally permissible interpretations of the CWA. The fatal flaw in the lower court's reasoning is that it ignored these considerations.

Moreover, this Court has refused to find implied delegations where discretionary authority would have profound consequences on the economic and societal foundations upon which a statute rests. By forcing

Congress to take explicit statutory responsibility for making the major decisions surrounding a statutory scheme, especially those of major economic or political significance, this Court has policed the regulatory boundaries of agencies to limit their assumption of Congress's role in making major policy decisions. *Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2444 (2014) (describing EPA's interpretation of the Clean Air Act, in part, as "laying claim to extravagant statutory power over the national economy"); *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97, 104 (1983) (refusing to sanction "unauthorized assumption by an agency of major policy decisions") (citation omitted). Subjecting groundwater point source discharges to the NPDES program greatly expands the scope of government power over a wide variety of activities throughout the nation. *See* Pet's Opening Br. at 45-48. In sanctioning such an expansion without explicit congressional approval, the lower court not only ignored the *Rapanos* requirement of a surface water connection as a predicate to CWA jurisdiction but also allowed an administrative agency to circumvent Congress and make a major policy decision affecting the nation, thereby conflicting with the proscriptions of *Util. Air Regulatory Grp.* and *FLRA* limiting implied delegations of authority.

In *King v. Burwell*, 135 S.Ct. 2480 (2015), the Court rejected a broad reading of the Affordable Care Act, 42 U.S.C. §§ 18001 *et seq*. (2010), because the availability of billions of dollars of tax credits on health exchanges established by the federal government was "a

question of 'deep economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id*. at 2488-2489. The *King* decision stands for the proposition that not every ambiguity in an imperfect and complicated statute creates broad interpretive space, which is reserved "only for mundane or confined questions that do not implicate the functionality of the overall statutory structure." Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 Harv. L. Rev. 62, 93-96 (2015).

Just as the Court recognized in *King* that the Affordable Care Act was an "imperfect and complicated statute," the reach of the Clean Water Act is "notoriously unclear." *Sackett v. EPA*, 132 S.Ct. 1367, 1374-1375 (2012) (Alito, J., concurring). The CWA's NPDES program should not be construed to cover point source discharges into groundwater absent a clear statement from Congress. Here, not only has Congress not made a clear statement in favor of such a construction, but the agency in its own regulations has specifically excluded groundwater from the definition of the term "waters of the United States." *See* 40 C.F.R. § 122.2(2)(v) (excluding groundwater from "waters of the United States"). Under these circumstances, it was impermissible for the lower court to rule that a point source discharge to groundwater is jurisdictional under the CWA's NPDES program.

II.

THE CLEAN WATER ACT SHOULD AND READILY CAN BE CONSTRUED TO AVOID THE SERIOUS CONSTITUTIONAL ISSUES RAISED BY THE LOWER COURT'S RULING

The constitutional avoidance canon is triggered not primarily by otherwise irresolvable ambiguity, but rather by situations in which "an otherwise acceptable construction of a statute would raise serious constitutional problems" and courts "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *N.L.R.B. v. Catholic Bishop of Chi.*, 440 U.S. 490, 499-501, 504 (1979)). Moreover, specifically with reference to the CWA, this Court has refused to sanction a broad interpretation of the CWA that raises serious constitutional concerns. *SWANCC*, 531 U.S. at 172-173.

DeBartolo examined the National Labor Relations Board's ("NLRB") interpretation of "coercion" as used in the National Labor Relations Act ("NLRA"). The NLRB decided that a labor union's peaceful handbilling of consumers was prohibited if it encouraged consumers to boycott stores that failed to pay what it deemed to be fair wages. 485 U.S. at 573. The Court held that the NLRB's interpretation posed serious questions of validity under the First Amendment. *Id*. at 574-576. The Court explained that:

> "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

Id. (quoting *Hooper v. People of State of California*, 155 U.S. 648, 657 (1895)). The Court ultimately determined that a less constitutionally suspect interpretation was not foreclosed by the statutory language or legislative history. It therefore rejected NLRB's interpretation because a less problematic construction "makes unnecessary passing on the serious constitutional questions that would be raised by the Board's understanding of the statute." *Id.* at 588; *see also Rust v. Sullivan*, 500 U.S. 173, 181, 190-191 (1991) ("statute must be construed . . . so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score"). *See United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1816 (2016) (Kennedy, J., concurring) ("[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern.").

Here, avoidance of the substantial constitutional issues is a straightforward task because, as explained by the Petitioner, there is a readily available interpretation of the CWA that does not raise constitutional

issues. The Fifth Circuit has observed that "the legislative history demonstrates conclusively that Congress believed it was not granting the Administrator any power to control disposals into groundwater. . . . [Rather the CWA's] pattern is one of federal information gathering and encouragement of state efforts to control groundwater pollution but not of direct federal control over groundwater pollution." *Exxon Corp. v. Train*, 554 F.2d 1310, 1322, 1329 (5th Cir. 1977); *see also Rice v. Harken Expl. Co.*, 250 F.3d 264, 271-272 (5th Cir. 2001) ("Congress was aware that there was a connection between ground and surface waters but nonetheless decided to leave groundwater unregulated by the CWA."); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 963-65 (7th Cir. 1994) (CWA jurisdiction does not extend to pollutants seeping into groundwater regardless of hydrological connection to navigable waters.).

As also pointed out by the Petitioner, the CWA defines "discharge of a pollutant" as "any addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. § 1362(12)(A) (emphasis added). Because groundwater is a nonpoint source, a discharge from groundwater to a navigable water is not a discharge *from* a point source. And this Court has opined that jurisdiction under the NPDES program depends upon whether a point source *itself* actually transports pollution to regulated surface waters. *See South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). Here, groundwater, a nonpoint source, conveyed or transported the

pollution. Thus, the discharge into the regulated water was not *from* a point source. Accordingly, the unambiguous language of the Act itself, as previously interpreted by this Court, provides an ample opportunity to avoid the substantial constitutional concerns raised by the lower court's unwarranted expansion of CWA jurisdiction to the outer boundaries of the Constitution.

The theories proffered in and by the lower court, such as the "conduit" theory, the "direct hydrological connection" theory, the "fairly traceable" theory, and the "de minimis" theory are not based on textual analysis of the CWA. To the contrary, each of those theories impermissibly rewrites the statute by adding words to the statutory text. *See Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) ("We do not—we cannot—add provisions to a federal statute.") (citation omitted).

Of course, the County's discharge into groundwater cannot itself be considered a discharge into navigable waters. For the statutory term "navigable waters" to have a permissible meaning, the "navigable" part of the term cannot be ignored. "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)); *Corley v. United States*, 129 S.Ct. 1558, 1566 (2009) (no statute should be read to render any part "inoperative or superfluous, void or insignificant") (citation omitted); *see also Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction").

This Court has defined the term "navigable waters" as waters that are "navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940)). In his plurality opinion in *Rapanos*, Justice Scalia traced the long history of the term "navigable waters," making clear that, historically, no waters could be defined as "navigable" unless they were either in-fact navigable or could readily be made to be navigable. *Rapanos*, 547 U.S. at 723-24. Accordingly, because groundwater is neither navigable nor could it readily be made to be navigable, the County's discharge at issue here cannot be considered a discharge *into* navigable waters. *See Ken. Waterways Alliance v. Ken. Utils. Co.*, 303 F.Supp.3d 530, 542 (E.D. Ky. 2017) ("Courts have overwhelmingly found that groundwater, even if hydrologically connected to navigable waters, is not itself a navigable water under the CWA.").

A pair of recent Sixth Circuit decisions agree with this analysis. In both cases, the court held that discharges to groundwater eventually seeping into navigable waters are not point source discharges because groundwater, the actual mechanism of transport into the navigable water, is a nonpoint source and itself is not navigable water. *See Ken. Waterways Alliance v. Ken. Utils. Co.*, 905 F.3d 925, 930-33 (6th Cir. 2018); *Ken. Waterways in Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436, 438, 444-45 (2018).

Numerous other federal statues deal with nonpoint source pollution, including the SDWA, the Coastal Zone Act Reauthorization Amendments of 1990 ("Coastal Zone Act"), 16 U.S.C. § 1455b, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq*. Accordingly, interpreting the CWA in the manner suggested herein in order to avoid constitutional issues will not leave any gap in the overall regulatory program governing nonpoint source pollution.

CONCLUSION

For these reasons, as well as those set forth in the Petitioner's brief, the judgment of the lower court should be reversed.

Dated: May 16, 2019

Respectfully submitted,

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