No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAIʻI WILDLIFE FUND; SIERRA CLUB – MAUI GROUP; SURFRIDER FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

REPLY BRIEF FOR PETITIONER

COUNTY OF MAUI
PATRICK K. WONG
RICHELLE M. THOMSON
200 South High Street
Wailuku, Maui, Hawaiʻi 96793
Phone: (808) 270-7740

HUNTON ANDREWS KURTH LLP
MICHAEL R. SHEBELSKIE
Counsel of Record
ELBERT LIN
951 East Byrd Street, East Tower
Richmond, Virginia 23219
mshebelskie@HuntonAK.com
Phone: (804) 788-8200

COLLEEN P. DOYLE
DIANA PFEFFER MARTIN
550 South Hope Street, Suite 2000
Los Angeles, California 90071
Phone: (213) 532-2000

Counsel for Petitioner

November 6, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

REPLY BRIEF FOR PETITIONER

This case calls out for this Court's review. The line in the Clean Water Act (CWA) between point and nonpoint source pollution is of national importance, concerning the "organizational paradigm" of a statutory regime, *Or. Nat. Desert Ass'n* v. *U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008), that several Justices of this Court have recognized needs greater certainty, *e.g.*, *Sackett* v. *EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring). What is more, the courts of appeals and this Court are indisputably divided, and the consequence of the decision below is a staggering expansion of federal permitting to activities long regulated under other state and federal programs.

Respondents assert that review can wait, but their brief in opposition (BIO) only reaffirms the need for certiorari. For example, Respondents' defense of the decision below hinges entirely on whether the Ninth Circuit correctly interpreted dictum from a plurality opinion of this Court. That is something only this Court can answer, and in all events is a dubious foundation for a nationwide regulatory regime. Respondents also urge awaiting the U.S. Environmental Protection Agency (EPA)—though EPA has not promised any action and cannot overrule the Ninth Circuit even if it eventually acts.

I. The Court should grant review to resolve the conflict over the CWA's line between point and nonpoint source pollution.

A. The Ninth Circuit departed from this Court's precedent.

In *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, this Court concluded that the CWA's text "makes plain" an intuitive, core

requirement for point source pollution: it must reach navigable waters by means of one or more point sources. 541 U.S. 95, 105 (2004). Point source pollution turns not on whether a point source "generate[s]" pollution that reaches navigable waters, but whether a point source "transport[s]" (or, in the statute's terms, "convey[s]") that pollution. *Ibid.*

The Ninth Circuit abandoned this bright-line test. It requires a National Pollutant Discharge Elimination System (NPDES) permit whenever pollution traceable to a point source reaches navigable waters in more than *de minimis* amounts, even if conveyed into the navigable waters by a nonpoint source. Contrary to *Miccosukee*, this test focuses on whether a point source *generated* pollution that reaches navigable waters, rather than whether a point source *transported* such pollution.

Respondents make no effort to square the Ninth Circuit's test with *Miccosukee*, turning instead to the plurality opinion in *Rapanos* v. *United States*, 547 U.S. 715 (2006). But as the Petition explained (at 22-23), reliance on *Rapanos* merely underscores the need for review, irrespective of whether *Rapanos* actually supports the Ninth Circuit's departure from *Miccosukee*.

If the County is right, the *Rapanos* dictum is fully consistent with *Miccosukee* and does not support the Ninth Circuit. Pet. 21-22; *see also* Br. Amicus Curiae Pacific Legal Foundation 4-10. In that case, certiorari is warranted because the Ninth Circuit has both departed from *Miccosukee* and grossly misinterpreted *Rapanos*.

But certiorari is still warranted if the Ninth Circuit and Respondents correctly understand *Rapanos*. In that circumstance, dictum in a plurality opinion conflicts with, and is being elevated by lower courts over,

this Court's unanimous opinion in *Miccosukee*. See *Upstate Forever* v. *Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 650 n.11 (4th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268) (suggesting that *Rapanos* "clarified" *Miccosukee*). Only this Court can resolve that tension.

B. The decision below also conflicts with every other appeals court that has decided this issue.

As the County's Supplemental Brief explains, the Ninth Circuit conflicts with two recent Sixth Circuit decisions. Respondents speculate (at 18) that the two courts might reach similar outcomes in certain circumstances. But they cannot, and do not, contest that *this case* would come out differently in the Sixth Circuit. The pollutants here did not "make[] [their] way to a navigable water . . . by virtue of a point-source conveyance" because, as the Sixth Circuit held unconditionally, "groundwater is not a point source." *Ky. Waterways All.* v. *Ky. Utils. Co.*, 905 F.3d 925, 934 (6th Cir. 2018).

Noting two pending rehearing petitions, Respondents downplay the conflict. But only one petition raises this issue, and the Sixth Circuit has not requested a response after two weeks. Pet. for Reh'g En Banc (Oct. 22, 2018), *Tenn. Clean Water Network* v. *Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018) (No. 17-6155). Moreover, even rehearing has not stopped this Court from stepping in. The Court granted certiorari in *King* v. *Burwell*, 135 S. Ct. 2480 (2015), while the D.C. Circuit was actively rehearing *Halbig* v. *Burwell*, 758 F.3d 390 (D.C. Cir. 2014).

Regardless, the Ninth Circuit conflicts with other circuits, including the Second. *See, e.g.*, *Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009).

Respondents assert (at 19) that *Cordiano* merely held that a berm "d[id] not meet the definition of a 'point source.'" Not so. The "holding [wa]s not that a berm can never constitute a point source, but only that there [wa]s insufficient evidence that the migration of lead from [the] berm by virtue of runoff and airborne dust [wa]s a point source discharge." *Cordiano*, 575 F.3d at 224. The lead did not "reach navigable waters by a 'discernible, confined and discrete conveyance.'" *Ibid.*

Concerned Area Residents for the Environment v. *Southview Farm*, 34 F.3d 114 (2d Cir. 1994), and *Peconic Baykeeper, Inc.* v. *Suffolk County*, 600 F.3d 180 (2d Cir. 2010), are consistent. In *Concerned Area Residents*, evidence showed that pollution (liquid manure) reached navigable waters either directly from a point source (manure-spreading vehicles) or through an intermediary point source (a ditch). 34 F.3d at 118-19; *see also Cordiano*, 575 F.3d at 223-24. The question in *Peconic Baykeeper* was merely whether spray applicators meet the definition of "point source." 600 F.3d at 188-89. The court did not discuss whether the pollutants had to, or did, reach navigable waters through a point source.

Contrary to Respondents' assertion (at 20), the Fifth Circuit also conflicts with the Ninth. In *Sierra Club* v. *Abston Construction Co.*, the court stated unequivocally that a point source must be "the means by which pollutants are ultimately deposited into a navigable body of water." 620 F.2d 41, 45 (5th Cir. 1980). And Respondents are simply wrong (at 21) that *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), "held only that 'navigable waters' do not include groundwater."

Respondents try (at 22) to reconcile the Seventh and Ninth Circuits. But *Village of Oconomowoc Lake* v. *Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), did

not concern only a "potential" groundwater connection. The Complaint alleged that pollutants would, in fact, migrate via groundwater to navigable waters. Compl. ¶ 50, *Vill. of Oconomowoc Lake* v. *Dayton-Hudson Corp.*, No. CIV. A. 93-C-0797, 1993 WL 668975 (E.D. Wis. Sept. 24, 1993), *aff'd*, 24 F.3d 962 (7th Cir. 1994).

Finally, the Ninth Circuit differs even from the Fourth Circuit, though both reached similar outcomes. In *Upstate Forever*, the Fourth Circuit adopted EPA's "direct hydrological connection" test, 887 F.3d at 651, which the Ninth Circuit rejected as inconsistent with the statute, App. 24 n.3. The Ninth Circuit certainly did not believe it was simply "us[ing] different words" to articulate the same test. BIO 16 n.6.[1]

C. The conflict should be resolved in this case.

The dispute over the difference between point source and nonpoint source pollution needs immediate resolution. That line is the "organizational paradigm of the [CWA]," *Or. Nat. Desert Ass'n*, 550 F.3d at 780, and is one Congress envisioned would be uniform nationally, 33 U.S.C. § 1251(a)(1) (declaring a "*national* goal that the discharge of pollutants into the navigable waters be eliminated") (emphasis added). Point source pollution for EPA's purposes should not mean one thing in Ohio and another in Oregon while the case law "further develop[s]." BIO 23.

---

[1] The Fourth Circuit is also deeply divided. Contrary to Respondents' claim (at 16-17), the judges in *Upstate Forever* did not all "agree" on the hydrological connection theory. The dissenting judge concluded that "a point source must introduce the pollutant into navigable water from the outside world." 887 F.3d at 656 (Floyd, J., dissenting) (internal quotation marks omitted). Furthermore, a petition for rehearing was closely rejected 7 to 5.

Additional lower court decisions are not needed. The issue is a pure question of statutory interpretation, and the opposing views have been fully developed. Indeed, the dispute largely turns on *Rapanos*, and it is hard to imagine this Court gaining additional insight into that opinion from more back-and-forth among the courts of appeals.[2]

Nor should this Court further await EPA. Though Respondents speculate (at 2) that EPA "may provide additional guidance," nothing supports that bald conjecture. EPA's notice promised no additional steps. And the agency has been silent since the comment period closed in May 2018, despite the appellate decisions and petitions for certiorari in the intervening months.

Indeed, the BIO confirms that waiting for EPA will simply delay this Court's necessary review. As noted in the Petition (at 24), and unrebutted by Respondents, EPA lacks the power to countermand the Ninth Circuit's interpretation of unambiguous statutory text. Moreover, the Ninth Circuit and other courts need not accept EPA's interpretation of *Rapanos*. Thus, even if EPA ultimately promulgates a rule, this conflict will persist until this Court acts. Meanwhile, individuals and entities remain subject to the far-reaching decision below, notwithstanding the concern of several Justices about the CWA's "reach and systemic consequences," *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring).

This case is also an ideal vehicle to resolve the expanding split. The Ninth Circuit's decision both is

---

[2] The Second Circuit case referenced by Respondents is stayed for settlement discussions. Order, *26 Crown St. Assocs., LLC* v. *Greater New Haven Reg'l Water Pollution Control Auth.*, No. 17-2426 (2d Cir. Aug. 13, 2018).

incorrect and squarely presents the question. As Respondents acknowledge (at 8), there is no dispute that pollutants: originate from point sources; travel through groundwater, which is assumed not to be a point source; and ultimately reach navigable water by way of the groundwater.[3]

D. The Ninth Circuit erred below.

Respondents' defense of the merits of the decision below fares no better than their other arguments. As the Petition explained (at 22-31), a bright line between point and nonpoint source pollution is the only line consistent with the CWA's text, structure, and history. Nothing in the BIO demonstrates otherwise.

On the text, Respondents primarily contend that the County reads "directly" into the statute. BIO 25-26 & 26 n.11. But this argument is premised on a misreading of *Rapanos*. Correctly understood, Justice Scalia meant only that the CWA point source program applies to both "direct" point-source-to-navigable-water pollution and "indirect" point-source-to-point-source-to-navigable-

[3] Whether the groundwater might nevertheless be a point source is not a reason to deny certiorari, as Respondents contend (at 15 n.5). It is sheer speculation that the Ninth Circuit could or would, if this Court does not decide the question, determine that the groundwater is a point source. In that event, this Court could decide then whether to review that determination, which would conflict with the Sixth Circuit's categorical conclusion that groundwater is never a point source. This case is no different from other cases this Court has decided knowing they could return on another issue and that, sometimes, did return. *See, e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009), *remanded to*, 613 F.3d 317 (2d Cir. 2010), *vacated & remanded by*, 567 U.S. 239 (2012); *Bond* v. *United States*, 564 U.S. 211 (2011), *remanded to*, 681 F.3d 149 (3d Cir. 2012), *rev'd*, 572 U.S. 844 (2014).

water pollution. That is fully consistent with the County's reading of the text.

It is Respondents and the Ninth Circuit that introduce words into the statute. Using traceability to define point source pollution has no basis in the CWA's text. Like the Ninth Circuit, Respondents draw that concept (at 26) purely from circuit case law purporting to define nonpoint source pollution as untraceable pollution. But that ignores the statutory terms that specifically define point source pollution as a "discrete conveyance." 33 U.S.C. § 1362(14).

As the Petition also explained (at 28-31), non-textual considerations support a bright-line distinction between point and nonpoint source pollution. For example, many other regulatory programs have long addressed nonpoint source pollution. And including nonpoint source pollution in the NPDES program presents practical challenges for permit writers and uncertainty for regulated entities—as confirmed by the state amici, Br. Amici Curiae State of West Virginia et al. ("State Amici Br.") 15, and the very permits Respondents cite.

Respondents counter (at 28) that other regulatory programs cannot provide "the protections an NPDES permit would ensure." This is a policy preference, however. And Congress has already instructed that the NPDES program not apply to all forms of water pollution. Among other things, Congress "assign[ed] the primary responsibility for regulating . . . nonpoint sources to the states," *Am. Farm Bureau Fed'n* v. *EPA*, 792 F.3d 281, 299 (3d Cir. 2015), which is why this case "present[s] concerns of upsetting the federal-state balance," BIO 28 (internal quotation marks omitted).

Respondents also make (at 9) the factually inaccurate and legally irrelevant claim that the groundwater

discharge has "devastated the once-pristine coral reef." The report cited by Respondent does not link coral reef decline to the County's effluent, but rather to "complex" causes. Supplemental Excerpts of Record 273. And some data show an overall increase in coral cover since 2000. Excerpts of Record 607. Perhaps most important, even Respondents do not argue that the groundwater's effect on navigable water has any bearing on the legal distinction between point and nonpoint source pollution.

II. The expansion of federal permitting is akin to that in *UARG*.

The Court also should grant certiorari because, just as in *Utility Air Regulatory Group* v. *EPA* (*UARG*), this case effectuates an "enormous and transformative expansion" of a federal permitting regime "without clear congressional authorization." 134 S. Ct. 2427, 2444 (2014). Respondents answer (at 32) that unlike in *UARG*, EPA has a longstanding and consistent position. This argument fails for several reasons.

First, EPA's position is not at issue. The Ninth Circuit rejected EPA's "direct hydrological connection" test, App. 24 n.3, adopting instead its own novel test that extends point source pollution to any pollution traceable from a point source through *any medium* to navigable waters.

Second, Respondents ignore numerous statements demonstrating inconsistency in EPA's position. For example, in 1973, EPA's Office of General Counsel opined that "the term 'discharge of a pollutant' is defined so as to include only discharges into navigable waters," and that "[d]ischarges into ground waters are not included." *In re E.I. DuPont de Nemours & Co.*, Op. No. 6, 1975 WL 23850, at *3 (E.P.A.G.C. Apr. 8, 1975)

(attaching 1973 opinion). In 1985, the government successfully argued in *Kelley ex rel. People of the State of Michigan* v. *United States* that discharges to groundwater allegedly connected to navigable waters fell outside the point source program. 618 F. Supp. 1103, 1107 (W.D. Mich. 1985). And in 1992, EPA guidance explained that "there is no national requirement" to "incorporate[] ground water discharges into . . . NPDES permits." EPA, EPA 100-R-93-001, Final Comprehensive State Ground Water Protection Program Guidance, at 1-27 (Dec. 1992).[4] The conflict between these statements and those cited by Respondents is precisely why EPA asked this year whether to "clarify its previous statements concerning pollutant discharges to groundwater." 83 Fed. Reg. 7126, 7128 (Feb. 20, 2018).

Third, the few permits identified by Respondents hardly show that NPDES permits have been "routinely issued . . . for indirect discharges via groundwater." BIO 3. Were that true, it would surprise the nineteen states that warn the Ninth Circuit presents "a myriad of new and technologically challenging NPDES permit requirements from a novel source of federal liability." State Amici Br. 15.

Respondents next assert (at 34) that the decision below would not significantly increase NPDES permitting. But the Court need not look far for what looms on the horizon. There are roughly 6,600 UIC wells and 21,000 septic systems in Hawai'i, where all groundwater migrates toward the ocean. None has required NPDES permitting, but all fit the fact pattern here. Moreover, if the Region 5 permit cited by Respondents (at 30, 34) exemplifies what they consider fair game,

---

[4] http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=100048T6.TXT.

even pollutants estimated to take up to 21 years to migrate through groundwater to navigable waters will be targeted for NPDES permitting. EPA Region V, NPDES Permit No. WI-0073059-1, Statement of Basis Briefing Memorandum; Issuance at 2 (Apr. 2011) (on file with author).[5]

III. The fair notice ruling directly contravenes this Court's precedent.

Respondents offer no persuasive response to the Ninth Circuit's failure to cite, much less follow, *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012). Pet. 36-38. Their claim (at 35-36) that the CWA's plain language provided adequate notice merely re-asserts that the Ninth Circuit read the statute correctly. And Respondents' answer to the long history of regulatory inaction is simply to ignore it. Respondents admit (at 11) that no agency "expressly stated the injection wells[] . . . require an NPDES permit" until January 2015. But they nowhere acknowledge that both EPA and the Hawai'i Department of Health knew since at least 1973 that injected effluent would "eventually reach the ocean." App. 159.

Respondents also contend (at 10, 36-37) that "Respondents and other Maui citizens" and the district court's first summary judgment order gave fair notice. Not even the Ninth Circuit adopted these arguments, which are unsupported by any citation. The question is whether the law, on its face or "as interpreted and

[5] Respondents contend (at 34) that general permits could reduce permitting costs. Even assuming the Ninth Circuit's fact-intensive test would be amenable to general permits, that does not rebut the argument that the Ninth Circuit's test vastly increases the facilities subject to NPDES permitting.

enforced by the agency," gave fair notice. *Fox*, 567 U.S. at 254. It did not.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

COUNTY OF MAUI
PATRICK K. WONG
RICHELLE M. THOMSON
200 South High Street
Wailuku, Maui, Hawai'i
96793
Phone: (808) 270-7740

HUNTON ANDREWS KURTH LLP
MICHAEL R. SHEBELSKIE
Counsel of Record
ELBERT LIN
951 East Byrd Street,
East Tower
Richmond, Virginia 23219
mshebelskie@HuntonAK.com
Phone: (804) 788-8200

COLLEEN P. DOYLE
DIANA PFEFFER MARTIN
550 South Hope Street,
Suite 2000
Los Angeles, California 90071
Phone: (213) 532-2000

November 6, 2018

Counsel for Petitioner