No. _____

In The
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the Clean Water Act (CWA), Congress differentiated between point source and nonpoint source pollution in controlling pollution of navigable waters. The CWA regulates point source pollution through permits, while nonpoint source pollution is controlled through federal oversight of state management programs and other non-CWA programs.

This Court and several courts of appeals have read the CWA's line dividing point source and nonpoint source pollution to turn on whether pollutants are delivered to navigable waters by a point source.

Parting with those cases, the Ninth Circuit concluded that point source pollution also includes pollutants that reach navigable waters by nonpoint sources so long as the pollutants can be "traced" in more than "*de minimis*" amounts to a point source. This holding expands CWA permitting to millions of sources previously regulated as nonpoint source pollution.

The questions presented are:

1. Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

2. Whether the County of Maui had fair notice that a CWA permit was required for its underground injection control wells that operated without such a permit for nearly 40 years.

LIST OF PARTIES

The names of all parties appear in the case caption on the cover page.

RULE 29.6 STATEMENT

Petitioner County of Maui is a governmental corporation with no parent corporation or shares held by a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals as amended is reported at 886 F.3d 737 (9th Cir. 2018) and is reproduced in the Appendix starting at App. 1. The three opinions of the United States District Court for the District of Hawai'i granting Respondents summary judgment, and denying the County summary judgment, are reported at 24 F. Supp. 3d 980 (D. Haw. 2014); 2015 WL 328227 (D. Haw. Jan. 23, 2015); and 2015 WL 3903918 (D. Haw. June 25, 2015). They are reproduced in the Appendix starting, respectively, at App. 32, App. 85 and App. 101.

JURISDICTION

The Ninth Circuit's judgment was entered on February 1, 2018. On March 30, 2018, the Ninth Circuit entered an order and amended opinion denying the County's timely petition for en banc rehearing. By order entered June 4, 2018, this Court extended the time for the County's certiorari petition to August 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 1251(a)(1) provides: "it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985[.]"

33 U.S.C. § 1251(a)(7) provides: "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution."

33 U.S.C. § 1311(a) provides: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

33 U.S.C. § 1329 requires federally approved state nonpoint source management programs.

33 U.S.C. § 1342(a)(1) provides, in pertinent part: "Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title. . . ."

33 U.S.C. § 1362(7) defines "'navigable waters'" as "waters of the United States, including the territorial seas."

33 U.S.C. § 1362(12) defines a "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source."

33 U.S.C. § 1362(14) defines a "'point source'" in relevant part as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

INTRODUCTION

Four years ago, this Court reversed an interpretation of the Clean Air Act because it expanded federal jurisdiction to "millions" of sources that previously did not require permits under the Clean Air Act. *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*"). Citing several precedents, this Court explained that it "typically greet[s] . . . with a measure of skepticism" the purported "discover[y] in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Ibid*. (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). This Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'" such as "[t]he power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide." *Ibid*.

This case calls for a similar response to the Ninth Circuit's radical expansion of point source permitting beyond the scope long given by this Court and several courts of appeals. The Clean Water Act (CWA) requires National Pollutant Discharge Elimination System (NPDES) permits for the discharge of pollutants to

navigable waters from point sources (defined as "discernible, confined and discrete conveyance[s,]" 33 U.S.C. § 1362(14)). But the CWA regulates nonpoint source pollution differently. It is controlled through United States Environmental Protection Agency (EPA) oversight of state management programs, as well as by other non-CWA programs.

The Ninth Circuit has swept into the NPDES permitting program millions of sources long regulated as nonpoint sources of pollution. For years, this Court and several appeals courts have read the CWA to distinguish between point source and nonpoint source pollution based on an intuitive, bright-line test: whether pollutants are delivered to navigable waters by means of one or more point sources. Creating its own more expansive test, the Ninth Circuit concluded that point source pollution also includes, on a case-by-case basis, pollutants that reach navigable waters by nonpoint sources like groundwater so long as the pollutants are "traceable" to a point source.

Without this Court's intervention, a wide array of sources previously regulated outside the NPDES point source program, like the underground injection control (UIC) wells at issue here, will be brought suddenly within it. Part of a wastewater treatment facility built nearly 40 years ago with EPA funding and encouragement, the UIC wells in this case are a common method used by municipalities to dispose of treated wastewater (called effluent) generated by homes and businesses. EPA and the Hawai'i Department of Health (HDOH) regulate the County's wells under federal and

state safe drinking water programs. Though these agencies have known since the facility's design in the early 1970s that the effluent would enter groundwater, which in turn would carry it to the ocean, neither required an NPDES permit until this litigation. Now the County and its taxpayers are unexpectedly faced with massive liability in fines and injunctive relief for failing to have such a permit. And the same fate is likely to befall millions of other sources, including the roughly 6,600 UIC wells and 21,000 septic systems in Hawai'i. Indeed, recent notices of intent to file citizen suits for groundwater pollution follow and expand on the Ninth Circuit's rationale.

Certiorari is warranted for three reasons. *First*, intervention is needed to resolve a conflict between this Court's decision in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), several appeals court decisions consistent with *Miccosukee*, and the Ninth Circuit's decision. *Second*, the Ninth Circuit's expansion of NPDES point source permitting is akin to the expansion of Clean Air Act permitting this Court reversed in *UARG*. *Third*, the Ninth Circuit's conclusion that the County had fair notice of an obligation to obtain an NPDES permit for its wells is directly at odds with *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012).

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STATEMENT

This case arises out of a dispute over the type of regulation applicable to four UIC wells at the County's Lahaina Wastewater Reclamation Facility. No party questions that the wells are subject to and permitted under the federal and state safe drinking water programs, and are in compliance with those permits. The parties disagree over whether a CWA NPDES permit is also required, or whether well disposal constitutes nonpoint source pollution that is regulated under the CWA's nonpoint source program and other regulatory programs.

I. Statutory Background

A. Federal and Hawai'i Safe Drinking Water Programs

Enacted in 1974, the federal Safe Drinking Water Act (SDWA) protects the nation's drinking water. 42 U.S.C. §§ 300f *et seq*. Among other things, it charges EPA with developing minimum requirements for UIC programs that prevent injection wells from contaminating underground sources of drinking water. *Id.* § 300h-1. EPA has promulgated regulations doing so. 40 C.F.R. pt. 144. Though States may seek delegated authority to run the UIC program, EPA administers a federal UIC program in Hawai'i.

The wells here are Class V wells under federal law—wells used to inject non-hazardous fluids underground. *Id.* § 144.81. EPA estimates there are more

than 650,000 Class V wells operating nationwide.[1] Such things as agricultural field runoff, sanitary sewage, and water for aquifer storage/recharge are injected into Class V wells. *Ibid.*

Hawai‘i also has a safe drinking water program. Haw. Rev. Stat. § 340E-2. It too regulates UIC wells, with Class V wells managed similarly to Class V wells under federal law. Haw. Code R. §§ 11-23-06, 11-23-07.

B. The CWA

1. Point Source v. Nonpoint Source

The CWA controls pollution of navigable waters through point source permitting and nonpoint source pollution management programs. This point source/nonpoint source distinction is an "organizational paradigm of the Act." *Or. Nat. Desert Ass'n* v. *U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008). *See also Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) ("Congress consciously distinguished between point source and nonpoint source discharges.").

Absent an NPDES permit issued under 33 U.S.C. § 1342, the CWA prohibits the "discharge of any pollutant," *id.* § 1311(a), defined as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). A "point source" is "any discernible,

[1] EPA, Class V Wells for Injection of Non-Hazardous Fluids into or Above Underground Sources of Drinking Water, https://www.epa.gov/uic/class-v-wells-injection-non-hazardous-fluids-or-above-underground-sources-drinking-water (last visited Aug. 17, 2018).

confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14). An NPDES permit can be issued by a State under an EPA-approved state program, or by EPA itself. *Id*. § 1342(b). In Hawai'i, NPDES permits are issued by the state. Haw. Rev. Stat. § 342D-50; 39 Fed. Reg. 43,759 (Dec. 18, 1974).

"All other sources of pollution are characterized as 'nonpoint sources.'" *Or. Nat. Desert Ass'n*, 550 F.3d at 780. Nonpoint source pollution does not require an NPDES permit. Instead, the CWA directs States to adopt nonpoint source management programs, subject to EPA approval, "for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters." 33 U.S.C. § 1329(b)(1). *See also id.* § 1251(a)(7). Nonpoint source pollution is also addressed by other federal statutes, 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*.

2. Navigable Waters v. Groundwater

The CWA distinguishes between groundwater and navigable waters. "Navigable waters" are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). That definition does not

include groundwater, a term used multiple times elsewhere in the statute. See 40 C.F.R. § 122.2 (groundwater excluded from the definition of "Waters of the United States").

This bright-line distinction is reflected directly in the CWA's legislative history. During the CWA's enactment, Congress specifically debated several proposals to extend NPDES permitting to groundwater that may connect to navigable waters. The EPA administrator urged Congress to require NPDES permits for the addition of pollutants to groundwater because those pollutants could reach navigable waters "through the ground water table." See Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation): Hearings Before the H. Comm. on Public Works, 92nd Cong., at 230 (1971) (statement of Hon. William Ruckelshaus, Administrator, EPA). Likewise, then-Representative Les Aspin proposed extending NPDES permitting to pollutants discharged to groundwater because "ground water gets into navigable waters." 118 Cong. Rec. 10,666 (1972).

Congress rejected these pleas. See S. Rep. No. 92-414, at 73 (1971), *reprinted in* S. Comm. on Public Works, 93rd Cong., 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1491 (1973) ("Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters . . . . Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation."). As the Fifth Circuit has said, "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).

II. Factual Background

A. The County's UIC Wells

The County's Lahaina Wastewater Reclamation Facility treats wastewater generated by homes and businesses in the western part of Maui. Constructed with EPA funding, operations commenced by the early 1980s, with treated effluent injected into UIC wells. Before injection, effluent is treated to meet R-1 water standards, Hawai'i's highest standards for recycled water. Haw. Code R. §§ 11-62-03, 11-62-26. As a result, some treated effluent is used for resort and golf course irrigation. Upon injection, effluent immediately mixes with groundwater and disperses both vertically and horizontally as it enters groundwater through approximately 100-foot well openings.

As is true of all groundwater in Hawai'i, the groundwater that receives the effluent migrates toward the ocean. According to an EPA tracer study, more than 90% of the effluent/groundwater mixture enters through diffuse flow, with no identifiable ocean entry point. Less than 10% enters through seeps in the

ocean floor (small fissures typically only a few inches long and wide). The seeps are ephemeral, as they are easily covered by sand and become undetectable. The study showed an average transit time of 15 months for dye to travel approximately a half mile southwest from the wells to the ocean. It also showed that the submarine groundwater discharge has noticeably different nutrient levels than the effluent, due to chemical modifications that naturally occur as groundwater migrates.

Both EPA and HDOH have always known that effluent from the Lahaina wells reaches the ocean via groundwater flow. Both agencies received the 1973 preconstruction environmental impact report explaining that injected effluent would "eventually reach the ocean." App. 159. A 1991 environmental review reaffirmed this, finding the effluent "flows toward the ocean" and "probably enters the ocean with the fresh groundwater." App. 157. And in 1994, both agencies understood that "all experts agree that the wastewater does enter the ocean." App. 153-154. Neither agency suggested this requires NPDES permitting.

B. Regulation of the County's Effluent Injection

The facility's wells are regulated as Class V wells through permits issued by EPA and HDOH under their respective safe drinking water programs. 42 U.S.C. § 300h-1(c); Haw. Rev. Stat. § 340E-2. These permits regulate the volume, rate and constituent

concentrations of injected effluent. EPA's permit imposes a nitrogen limit to address ocean water quality. App. 139-140, ¶ 7. There is no contention the County violated its UIC permits.

Hawai'i's nonpoint source pollution management program, subject to EPA approval under the CWA, is specifically designed to control the migration of effluent from the County's wells to coastal waters. *Hawai'i's Nonpoint Source Management Plan* (2015-2020)[2] implements an integrated plan to comply with nonpoint source statutory programs under both the CWA and the Coastal Zone Act. 33 U.S.C. § 1329, 16 U.S.C. § 1455b. This plan is more stringent than a CWA nonpoint source program alone because the Coastal Zone Act requires a federally approved program that "update[s] and expand[s]" on the CWA's nonpoint source management program to protect coastal waters from nonpoint sources, 16 U.S.C. § 1455b(a)(2), such as the effluent/groundwater mixture at issue here. *Hawai'i's Nonpoint Source Management Plan*, at 10 ("[G]roundwater discharge also impacts near-shore areas."). As the CWA envisions, Hawai'i's plan provides a "coordinated approach among federal, state, and local . . . agencies to implement NPS [nonpoint source] projects and target pollutants and their sources more effectively." *Id*. at 5. Hawai'i's plan focuses on three priority

[2] Hawai'i State Department of Health, *Hawai'i's Nonpoint Source Management Plan* (2015-2020), http://planning.hawaii.gov/czm/initiatives/coastal-nonpoint-pollution-control-program/hawaiis-implementation-plan-for-polluted-runoff-control/.

watersheds, including the one encompassing the County's wells (West Maui). *Ibid*.

C. Agency Evaluation of NPDES Permitting

HDOH never required the County to have an NPDES permit for its well disposal. For example, in 2010 HDOH explained to EPA that the CWA was inapplicable because the wells injected into groundwater, not navigable waters. App. 152 ("Please note CWA content using term "ground water" to separate ground water from Navigable waters when ground water is involved."). In a March 2014 letter sent in response to a County inquiry, HDOH said it had "not made a decision yet" on the need for an NPDES permit for the County's wells. App. 146-147. And in a May 2015 meeting with the County, HDOH maintained that NPDES permitting only applies to discharges to navigable waters and the district court's ruling was "unprecedented." App. 143, ¶ 32.

HDOH's treatment of the County's wells is consistent with its treatment of UIC wells statewide. At the start of this litigation, EPA's FY2011 state survey identified more than 5,600 Class V UIC wells in Hawai'i, none of which were required to have an NPDES permit. App. 151. By EPA's updated FY2016 survey,

there were more than 6,600.[3] None of the additional 1,000 wells have NPDES permits either.

Despite involvement with the Lahaina facility since the planning stages, EPA also never took the position, until this litigation, that the wells required an NPDES permit. App. 138-143. Because it provided CWA grant funding, EPA had to determine at the outset that the facility was CWA compliant. 33 U.S.C. § 1298(b). It required an NPDES permit for certain early facility operations but not for the wells. Over the years, EPA was confronted with several opportunities to take the position that the wells required an NPDES permit, but never did. App. 138-143. For example, in 1999, EPA sued the County for alleged CWA violations but did not identify the wells as requiring an NPDES permit. App. 140, ¶ 8. And in 2008, 2009, and 2011, EPA responded to public comments claiming that the wells required NPDES permits but did not direct the County to obtain such permits. App. 140-142, ¶¶ 11, 13, & 14.

Even after this lawsuit's initial filing, EPA did not immediately change its position. At first, it elected to "steer[] clear" of any NPDES permitting decision, preferring to watch from the "sideline." App. 149, App. 150. Only after the district court's first summary judgment ruling did EPA tell HDOH the wells needed an NPDES permit.

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[3] EPA, FY 2016 Underground Injection Control Inventory – By State, https://www.epa.gov/uic/underground-injection-well-inventory (last visited Aug. 17, 2018).

III. Proceedings Below

A. District Court Proceedings

In 2012, Respondents sued the County, claiming injection of effluent without an NPDES permit violates the CWA. The County responded that the wells do not require an NPDES permit because they inject into groundwater, which is not navigable water and thus outside the CWA's prohibition. The subsequent migration of effluent to the ocean via diffuse subterranean groundwater flow, the County contended, is nonpoint source pollution that likewise falls outside the scope of NPDES permitting.

In three separate orders, the district court granted summary judgment for Respondents. In the first order, the district court found the County liable under the CWA for failure to have an NPDES permit for two of its wells. The court found the wells are point sources that "indirectly discharge[d] a pollutant into the ocean through a groundwater conduit," though it conceded that it could not "point to controlling appellate law or statutory text expressly allowing" the conduit theory. App. 56, App. 63. Alternatively, the court found the County liable because the groundwater is a point source discharging pollutants into the ocean. App. 69-72. In the second order, the district court applied the same reasoning to find the County liable for failure to have an NPDES permit for the two remaining wells. App. 93-99. And in the final order, the district court found that the County had "fair notice" of its liability for failure to have an NPDES permit. App. 113-114.

B. Ninth Circuit Appeal

The County appealed to the Ninth Circuit, which affirmed the district court. The Ninth Circuit premised its liability finding solely on the notion that NPDES permitting includes circumstances where pollutants reach navigable waters by means other than a point source, such as through groundwater.

The Ninth Circuit crafted a new test for NPDES permitting of point source pollution based on the traceability and volume of pollutants reaching navigable waters. It found the County liable because: (1) "the County discharged pollutants from a point source" (*i.e.*, the wells); (2) "pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water"; and (3) pollutants reach navigable water at "more than *de minimis*" levels. App. 24. The Ninth Circuit provided no limit to its new rule, expressly "leav[ing] for another day the task of determining when, *if ever*, the connection between a point source and a navigable water is too tenuous to support liability under the CWA." App. 25 (emphasis added).

In creating its new rule, the Ninth Circuit rejected two other tests for determining whether pollution that reaches navigable waters by means other than a point source nevertheless requires an NPDES point source permit. The Ninth Circuit expressly declined to adopt the district court's "conduit theory" of liability. App. 24. It also rejected the rule proposed by EPA as *amicus curiae*, which argued that disposal of pollutants into

groundwater requires an NPDES permit if the groundwater forms a "direct hydrological connection" between the point source and navigable waters. The Ninth Circuit criticized EPA's proposal as "read[ing] two words into the CWA ('direct' and 'hydrological') that are not there," App. 24 n.3, though it did not explain where the words in its test ("fairly," "traceable," and "*de minimis*") are found in the statute.

Finally, the Ninth Circuit concluded that the County had fair notice of its liability under the NPDES point source program because its actions "fall squarely within the '[p]lain [l]anguage of the [s]tatute.'" App. 29-30 (quoting *United States* v. *Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008)).

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Wrongly Parted With This Court And Several Appellate Courts In Determining Where Congress Drew The Line In The CWA Between Point Source And Nonpoint Source Pollution.

In conflict with this Court and several courts of appeals, the Ninth Circuit incorrectly expanded NPDES point source permitting to cover nonpoint source pollution, which is regulated in other ways. As described below, this Court and several appeals courts have read the CWA to draw a bright line between point and nonpoint source pollution based on a single critical

requirement: whether pollutants are delivered to navigable waters by means of one or more point sources. In contrast, the Ninth Circuit also includes within point source pollution circumstances where pollutants reach navigable waters by means other than a point source, such as groundwater, so long as the pollutants can be "traced" to a point source. Only the former reading is consistent with the text, structure, and history of the CWA.

This Court should grant certiorari to restore nationwide uniformity to NPDES point source permitting and reaffirm its previous case law.

A. The Ninth Circuit has created a growing conflict over the distinction between point source and nonpoint source pollution.

This Court addressed the meaning of the phrase "discharge of any pollutant" in *Miccosukee*, and clearly stated that point source pollution under the CWA requires that a point source "convey" the pollutant to navigable waters. 541 U.S. at 105. After reviewing the statutory definitions of "discharge of a pollutant" and "point source," the unanimous Court highlighted the word "conveyance" in the definition of point source, reasoning that the key characteristic of point sources is not that they may generate pollutants but rather that they "transport" pollutants. *Ibid*. Recognizing that, the Court held the "definition makes plain" that while a point source need not be the "original source"

of the pollutant, "it need[s] [to] . . . ***convey*** the pollutant to 'navigable waters.'" *Ibid.* (emphasis added).

The Second and the Fifth Circuits have read the CWA in the same way. It is not sufficient that pollutants were released into the environment by a point source. Rather, one or more point sources must carry them to navigable waters. *Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199, 224 (2d Cir. 2009) (CWA "requires that pollutants reach navigable waters by a 'discernible, confined and discrete conveyance'"); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 493, 494 (2d Cir. 2001) (CWA's "plain meaning" requires that "point source" refers to "the proximate source from which the pollutant is directly introduced to the destination water body"); *Sierra Club* v. *Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (point sources must "be the means by which pollutants are ultimately deposited into a navigable body of water."). *See also Upstate Forever* v. *Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 659 (4th Cir. 2018) (Floyd, J., dissenting) (observing this Court and several appellate courts have concluded the "discharge of a pollutant," that triggers NPDES permitting occurs only where point sources "convey, transport, or introduce the pollutant to navigable waters.").

In *Cordiano*, the Second Circuit held that a firing range did not require an NPDES permit when lead from shell casings migrated from a range berm to navigable water via airborne dust and uncollected surface water runoff. 575 F.3d at 223-24. Although the berm was "an identifiable *source* from which lead pollution

reaches jurisdictional wetlands," *i.e.*, the pollution in navigable water was fairly traceable to the berm, the court held that fact was "not enough to satisfy the CWA requirement of a *point source discharge*." *Id*. at 224 (emphases added). Imposing CWA liability merely because pollutants in navigable waters are traceable to a point source, the court explained, "would eviscerate the point source requirement and undo Congress's choice." *Ibid.*

In *Abston*, the Fifth Circuit expressly rejected the argument that an NPDES permit is required if the "original source" of pollutants in navigable waters was a point source, "regardless of how the pollutant found its way from that original source to the waterway." 620 F.2d at 44. "Whether or not the law should prohibit such pollution," the CWA "does not." *Ibid.* Because "[t]he focus of this Act is on the 'discernible, confined and discrete' conveyance of the pollutant," an NPDES permit is required only where a point source is "the means by which pollutants are ultimately deposited into a navigable body of water." *Id*. at 44, 45.

Consistent with these cases, the Fifth and Seventh Circuits have considered and rejected that point source pollution includes pollution that travels from a point source through groundwater (a nonpoint source) to navigable waters. *Rice* v. *Harken Expl. Co*., 250 F.3d 264 (5th Cir. 2001); *Vill. of Oconomowoc Lake* v. *Dayton Hudson Corp*., 24 F.3d 962 (7th Cir. 1994). In *Rice*, the court rejected this "unwarranted expansion" of the CWA, supporting its analysis with a close review of the statute's history. 250 F.3d at 271. "Congress was aware

that there was a connection between ground and surface waters," the court wrote, but decided "to leave the regulation of groundwater to the States," and courts must "respect Congress's decision." *Id*. at 271-72. In *Oconomowoc*, the court held that NPDES permitting does not extend to pollutants seeping into groundwater regardless of a hydrological connection to navigable waters. 24 F.3d at 963, 965.[4]

In contrast to these cases, the Ninth Circuit does not require that one or more point sources actually convey pollutants to navigable waters. It imposes NPDES point source permitting merely because pollutants in navigable waters are "fairly traceable" to a point source.

The Ninth Circuit conspicuously fails to discuss this Court's straightforward textual analysis in *Miccosukee*, seeking instead to ground its ruling on dictum regarding "indirect discharges" in Justice Scalia's plurality opinion in *Rapanos* v. *United States*, 547 U.S. 715 (2006). App. 21-23. But Justice Scalia's *Rapanos* opinion is fully consistent with *Miccosukee*, which he quoted without question. *Rapanos*, 547 U.S. at 743. Justice Scalia allowed that discharges into "intermittent watercourses" might need NPDES permits if those

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[4] Numerous district courts concur. *See, e.g., Umatilla Waterquality Protective Ass'n, Inc.* v. *Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1318-20 (D. Or. 1997); *Chesapeake Bay Found., Inc.* v. *Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011); *PennEnvironment* v. *PPG Indus., Inc.*, 964 F. Supp. 2d 429, 454-55 (W.D. Pa. 2013); and *Tri-Realty Co.* v. *Ursinus Coll.*, No. 11-5885, 2013 WL 6164092, at *8 (E.D. Pa. Nov. 21, 2013).

sometimes-dry features act as "intermittent channels" that convey pollutants to navigable waters. *Ibid*. He then made a special point to note that "[i]n fact, many courts have held that such upstream, intermittently flowing channels themselves constitute 'point sources' under the Act." *Ibid*.

It is a stretch to suggest, as the Ninth Circuit did, that Justice Scalia endorsed the notion that a point source discharge under the CWA includes pollution that reaches navigable waters by means other than a point source. Indeed, every case cited by Justice Scalia involved pollution conveyed by one or more point sources to navigable waters. See *Sierra Club* v. *El Paso Gold Mines, Inc*., 421 F.3d 1133, 1141 (10th Cir. 2005) (mineshaft discharge through a tunnel to navigable waters); *United States* v. *Velsicol Chem. Corp*., 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976) (chemical facility discharge through a municipal storm sewer to navigable waters); *Miccosukee*, 541 U.S. at 104 (pump station discharge through a canal to navigable waters); *United States* v. *Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 2005) (industrial facility toilet discharge to a storm drain to navigable waters); *Dague* v. *City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991) (landfill seepage discharge through a culvert to navigable waters), *rev'd on other grounds*, 505 U.S. 557 (1992); *Concerned Area Residents for the Env't* v. *Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) (farm vehicle discharge through a swale, pipe, and ditch to navigable waters).

The Ninth Circuit's confusion about *Rapanos* underscores the need for review here, as it is not alone in

its misapprehension of Justice Scalia's opinion. In a recent ruling, the Fourth Circuit also suggested *Rapanos* had overtaken *Miccosukee*. *Kinder Morgan*, 887 F.3d at 650 n.11. District courts, too, are hopelessly confused and divided about the "indirect discharge" language in *Rapanos*. *Compare* App. 59-60 (*Rapanos* allows for discharges through nonpoint source groundwater) *with 26 Crown Assocs., LLC* v. *Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439 (JAM), 2017 WL 2960506, at *7 (D. Conn. July 11, 2017), *appeal docketed*, *26 Crown St. Assocs., LLC* v. *Greater New Haven Reg'l Water Pollution Control Auth.*, No. 17-2426 (2d Cir. Aug. 4, 2017) (*Rapanos* requires a "*surface* connection"). Review would allow the Court to resolve the confusion.

So, too, do EPA's actions in this area confirm the need for this Court's intervention. Though the agency supported Respondents as *amicus curiae* before the Ninth Circuit, it published a Federal Register notice earlier this year raising questions about the Ninth Circuit's ruling. 83 Fed. Reg. 7126, 7128 (Feb. 20, 2018). EPA documented a lack of clarity in its previous statements on this issue, and noted the substantial and "mixed case law on whether certain releases of pollutants to groundwater are within the jurisdictional reach of the CWA," citing several cases, including *Rice*, *Oconomowoc*, and the Ninth Circuit decision below. *Id.* at 7128. The agency solicited comments by May 21, 2018, on "whether subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA." *Ibid.* In short, even the federal

agency generally responsible for the CWA has acknowledged a real and significant lack of uniformity and certainty over the central legal question in this case.

Only this Court, however, can reconcile the "mixed case law" discussed above and highlighted in EPA's Federal Register notice. Under this Court's precedent, no action by EPA could countermand the Ninth Circuit's flawed interpretation of the CWA. "A court's prior judicial construction of a statute trumps an agency construction . . . if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). That is the case here. The Ninth Circuit purported to follow the unambiguous terms of the CWA, see App. 29-30 (holding that the County's actions "fall squarely within the [p]lain [l]anguage of the [s]tatute"), even criticizing EPA's *amicus* brief for being unfaithful to the text, App. 24 n.3. Now only this Court can reaffirm that *Miccosukee* properly reads the CWA, as discussed more fully below.

B. The Ninth Circuit erroneously expanded NPDES permitting to nonpoint source pollution.

The bright line this Court drew in *Miccosukee* between point and nonpoint source pollution—holding that point source pollution occurs only where pollution

reaches navigable waters by way of a point source—is the only line consistent with the CWA's text, structure, and history.

As this Court explained in *Miccosukee*, its reading of the CWA derives directly from the statutory text—in particular, the statute's definition of a point source as "a discernible, confined, and discrete *conveyance*." 541 U.S. at 105. The use of the word "conveyance" to define "point source" makes clear that the focus of the CWA's prohibition on point source pollution is on the "means of carrying or transporting" pollutants and not their point of origin. See *Conveyance*, Webster's New International Dictionary of the English Language Unabridged (3d ed. 1993). As this Court observed in *Miccosukee*, the examples of point sources listed by the CWA "[t]ellingly" are discernible, confined, and discrete "objects that do not themselves generate pollutants but merely transport them." 541 U.S. at 105. It follows plainly, therefore, that the difference between point source and nonpoint source pollution should turn on whether the pollution is "conveyed" by one or more point sources into navigable waters.

No other line between point source and nonpoint source pollution can claim such a clear basis in the text of the CWA. In this case alone, three tests have been advanced to define the line: the district court's "conduit" theory, EPA's "direct hydrological connection," and the Ninth Circuit's "fairly traceable" and more than "*de minimis*" standard. All are entirely atextual. The district court readily conceded it could not identify "statutory text expressly allowing" its theory. App. 63.

EPA's theory, as the Ninth Circuit recognized, "reads two words into the CWA ('direct' and 'hydrological') that are not there." App. 24 n.3. The Ninth Circuit's own test suffers the same flaw, which it tacitly admits, arguing only that its rule "better aligns with the statutory text," is "consistent with Article III standing principles," and "is firmly grounded in our case law." *Ibid*.

Unsurprisingly, the various district courts expanding point source pollution to include groundwater migration, like the Ninth Circuit, have created a hodgepodge of inconsistent standards relying on various terms not found in the statutory text. *See, e.g., McClellan Ecological Seepage Situation* v. *Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988), *vacated on other grounds*, *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325 (9th Cir. 1995) (NPDES permitting applicable when "the groundwater is *naturally connected* to surface waters") (emphasis added); *Ass'n Concerned Over Res. & Nature, Inc.* v. *Tenn. Aluminum Processors, Inc*., No. 1:10-00084, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011) ("groundwater is subject to the CWA provided an *impact* on federal waters") (emphasis added); *Ohio Valley Envtl. Coal. Inc.* v. *Pocahontas Land Corp*., No. 3:14-11333, 2015 WL 2144905, at *8 (S.D. W.Va. May 7, 2015) (a "[d]efendant may be required to seek a[n] NPDES permit even if groundwater is *somehow hydrologically connected* . . . to surface waters") (emphasis added).

Miccosukee's approach is also supported by other CWA provisions describing point source pollution as

discharges by point sources "into" navigable waters. The provision that allows States to seek primary authority over NPDES permitting speaks to "the Governor of each State desiring to administer its own permit program for discharges *into* navigable waters within its jurisdiction." 33 U.S.C. § 1342(b) (emphasis added). Likewise, permitted point source discharges must meet "effluent limitations," which are defined as restrictions on quantities, rates, or concentrations of pollutants "discharged from point sources *into* navigable waters." *Id.* § 1362(11) (emphasis added). In both cases, "into" contemplates point sources conveying or delivering pollutants to navigable waters.

In addition, the CWA's structure and history are replete with indications that pollutants traveling through groundwater should constitute nonpoint source pollution, as they do under *Miccosukee*'s reading of the CWA. The terms "ground waters" or "underground waters" appear in at least 12 sections of the CWA, such as the provisions concerning identification of nonpoint source pollution, *id.* § 1314(f), and provisions relating to monitoring groundwater and technical assistance and grants to States, *e.g.*, *id.* §§ 1252(a), 1254(a)(5), 1256(e)(1). But those terms do not appear in the provisions concerning NPDES permitting, which refer only to point sources and navigable waters. See *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) ("[W]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning.") (internal quotation

marks and citation omitted). And as noted above (*supra* pp. 9-10), Congress specifically considered and rejected several proposals to extend NPDES permitting to groundwater that carries pollutants to navigable waters.

Consistent with all of this, there are numerous other regulatory programs that address nonpoint source pollution, including groundwater pollution and its effects on navigable waters. For example, the CWA directs States to adopt EPA approved programs "for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters." 33 U.S.C. § 1329(b)(1). Every State has such programs. See EPA, Contacts for Nonpoint Source (NPS) Pollution Programs, State Contacts.[5] In Hawai'i, that program includes plans specifically concerning groundwater quality, monitoring, and protection. *See generally Hawai'i's Nonpoint Source Management Plan*. Furthermore, as in many other states, the pollution and quality of groundwater is within Hawai'i's jurisdiction. Haw. Rev. Stat. §§ 174C-3, 174C-4.

At the federal level, Congress has enacted several laws addressing groundwater pollution. As mentioned, the SDWA controls UIC wells like those at issue here and protects underground drinking water supplies. 42 U.S.C. §§ 300h-300h-8. Similarly, the Coastal Zone Act specifically addresses coastal nonpoint source

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[5] www.epa.gov/nps/state-contacts-nps-programs (last visited Aug. 17, 2018).

pollution, with Hawai'i's plan uniquely focused on West Maui. 16 U.S.C. § 1455b; *Hawai'i's Nonpoint Source Management Plan*. RCRA's control and remediation of groundwater contamination includes coal ash impoundments, 40 C.F.R. §§ 257.90 *et seq*., which are the subject of several cases like this one seeking to expand CWA point source jurisdiction.[6] And CERCLA addresses hazardous substances released into the "environment," a term that expressly includes groundwater. 42 U.S.C. § 9601(8).

Thus, even if the Ninth Circuit's expansion of NPDES permitting was not plainly at odds with the statute's text, structure, and history, it is wrong because it upsets the existing federal-state framework for regulating groundwater. In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001), this Court cautioned against reading the CWA in a way that would "readjust the federal-state balance" absent a "clear statement from Congress." There is nothing in the CWA that comes close to a clear indication that Congress intended the Ninth Circuit's expansive approach to NPDES permitting. Rather, the CWA history and text show the opposite. As explained above (*supra* pp. 7-10), Congress intentionally left groundwater regulation to the states. This is reflected in "the policy of the Congress to recognize, preserve, and protect the primary responsibilities

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[6] See *Ky. Waterways All.* v. *Ky. Utils. Co.,* No. 18-5115 (6th Cir. filed Feb. 1, 2018); *Tenn. Clean Water Network* v. *Tenn. Valley Auth.,* No. 17-6155 (6th Cir. filed Oct. 3, 2017); *Sierra Club* v. *Va. Elec. & Power Co.,* No. 17-1895 (4th Cir. filed Aug. 2, 2017).

and rights of States to prevent, reduce, and eliminate pollution . . . of land and water resources." 33 U.S.C. § 1251(b).

Finally, in contrast to *Miccosukee*, the Ninth Circuit's approach runs headlong into the concerns this Court has expressed about the reach and scope of the CWA. As Justice Kennedy wrote in *U.S. Army Corps of Engineers* v. *Hawkes Co*., "the reach and systemic consequences of the Clean Water Act remain a cause for concern." 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring). In addition to being faithful to the Act's text and history, the *Miccosukee* approach provides a bright-line test that provides much-needed certainty to NPDES permitting. The Ninth Circuit's traceability rule does the opposite, leaving regulated entities and regulators "'to feel their way on a case-by-case basis.'" *Sackett* v. *EPA*, 566 U.S. 120, 124 (2012) (quoting *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring)).

Indeed, it is difficult to picture how permits will be written in many circumstances that fall within the Ninth Circuit's rule, including those in this case. Among many questions, where should the discharge be measured for compliance with effluent limitations? At injection, or where the pollutants eventually enter navigable waters? In this case, the pollutant levels vary significantly after effluent leaves the wells and interacts with the groundwater. If monitoring is to occur where the pollutants eventually enter navigable waters, what is to be done if a consistent and discrete point of discharge is not known? Again, this case is illustrative. With more than 90% of the flow estimated

to enter the ocean as diffuse flow, its point of entry is, practically speaking, unknown.

Nor does adherence to the bright line between point and nonpoint source pollution make a "mockery" of the CWA and allow uncontrolled pollution, as the Ninth Circuit feared. App. 31. Nonpoint source pollution remains fully subject to control under state nonpoint source management programs, and a panoply of other environmental programs, as Congress intended. A polluter therefore cannot, contrary to the Ninth Circuit's fear if the CWA's distinction between point and nonpoint source pollution is followed, simply pull back its pipe from the edge of navigable water and freely release pollutants into the environment.

II. The Ninth Circuit's Vast Expansion Of A Federal Permitting Regime Is Akin To That Reversed By This Court In *UARG*.

The Ninth Circuit's novel reading of the CWA exponentially subjects States, localities, Tribes, and millions of property owners to new liability and the prospect of crippling fines for activities that have long been regulated under other state and federal programs. Consider just the Class V wells at issue in this case. EPA estimates there are 650,000 such wells in the country. *Supra* note 1. Municipalities commonly use these wells to dispose of treated wastewater. Businesses use them too. NPDES permits have not been required for these wells in the nearly half century of the CWA's existence. Now, the public and private owners of

these wells and state regulators face the arduous and expensive prospect of NPDES permitting for them. See *Hawkes*, 136 S. Ct. at 1815 (noting that NPDES permitting process "can be arduous, expensive, and long").

It is not just owners and operators of UIC wells that face new CWA liability. Widespread methods of wastewater disposal add pollutants that are "fairly traceable" through groundwater to navigable waters. Also implicated are groundwater recharge systems and other green infrastructure projects that collect stormwater or recycled water and use it to augment public groundwater supplies. *See, e.g.,* EPA, *Guidelines for Water Reuse,* EPA/600/R-12/618 (Sept. 2012), Chapter 3 (discussing various types of water reuse).[7] Those systems introduce pollutants that also could make their way in a "fairly traceable" manner to navigable waters through groundwater.

These systems are widely used, due in part to EPA's efforts promoting them as environmentally friendly water and waste disposal methods. See EPA, *National Management Measures to Control Nonpoint Source Pollution from Urban Areas*, at Management Measure 5, EPA-841-B-05-004 (Nov. 2005);[8] *EPA Guidelines for Water Reuse*. Entities developed water and wastewater systems employing those systems. Regulatory agencies have not required NPDES permits for

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[7] Hereafter "*EPA Guidelines for Water Reuse*," https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100FS7K.TXT.

[8] https://www.epa.gov/sites/production/files/2015-09/documents/urban_guidance_0.pdf.

these nonpoint sources. *E.g.*, *Hawai'i's Nonpoint Source Management Plan*, at 11-12. But now these entities face crippling costs in penalties and remedies in citizen suits for doing precisely what EPA encouraged.

Homeowners, too, will be impacted. More than 22 million homes in the country use septic tank systems. See U.S. Department of Housing and Urban Development and U.S. Census Bureau, *American Housing Survey for the United States: 2011*, at 14, Table C-04-AO, H150/11 (Sept. 2013).[9] In Hawai'i alone, there are roughly 21,000 septic systems and 88,000 cesspools covered under the State's Nonpoint Source Plan. *Hawai'i's Nonpoint Source Management Plan*, at 12. These systems release pollutants into groundwater that in many cases migrate to navigable waters. The Ninth Circuit's reading of the CWA applies equally to them as to industrial operations.

Finally, it is not just the disposal of pollutants to navigable waters via groundwater that is newly swept into NPDES point source permitting. Under the Ninth Circuit's rule, any activity causing pollutants to reach navigable waters could be subject to NPDES permitting—so long as the pollutants are fairly traceable to a point source and reach navigable waters in more than *de minimis* amounts. The possibilities are limitless when one considers the numerous ways pollutants could end up on or in the ground and then transported

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[9] https://www.census.gov/library/publications/2013/demo/h150-11.html.

to navigable waters by rainfall, snowmelt, or percolation to groundwater (*e.g.*, gas that leaks from nozzles at gas stations; rain that percolates through municipal road salt storage yards; irrigation water on golf courses and farm fields; storm water detention basins; vehicles dripping oil on roads). As one court explained:

> [N]on-point-source pollution . . . could invariably be reformulated as point-source pollution by going up the causal chain to identify the initial point sources of the pollutants that eventually ended up through nonpoint sources to come to rest in navigable waters.

26 Crown Assocs., 2017 WL 2960506, at *8. Pollutants could even be carried by wind through the air from a point source to navigable waters.

These cascading concerns about the Ninth Circuit's decision are not hypothetical. Purporting to follow the Ninth Circuit, the Fourth Circuit recently concluded that an NPDES permit was required for pollutants that seeped into groundwater from a pipeline spill and traveled to navigable waters. *Kinder Morgan*, 887 F.3d at 652-53. Several other appeals courts are currently considering a variety of factual applications to which the Ninth Circuit's test might apply.[10] One citizen suit claimed NPDES permits were required for all septic tanks in Cape Cod. *Conservation Law Found., Inc.* v. *EPA*, 964 F. Supp. 2d 175 (D. Mass. 2013). And

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[10] See *supra* note 6 and *26 Crown Street Assocs., LLC* v. *Greater New Haven Reg'l Water Pollution Control Auth.,* No. 17-2426 (2d Cir. filed Aug. 4, 2017).

recent CWA notices of intent to file citizen suits for groundwater pollution caused by industrial air emissions and resort septic systems seek to follow and expand on the Ninth Circuit's rationale.[11] Excluding facilities operating under general NPDES permits (*e.g.*, industrial stormwater permits) and tribal permits, there are 137,455 facilities operating under NPDES permits nationwide. EPA, NPDES Permit Status Reports, FY 2017 Non-Tribal Backlog Summary Report.[12] The Ninth Circuit's test would increase that number by several orders of magnitude.

This is precisely the problem that led this Court to reverse in *UARG*. There, EPA proposed a Clean Air Act interpretation that would have caused one category of permits to jump from about 800 to nearly 82,000, and another category of permits to jump from fewer than 15,000 to about 6.1 million. This Court found that interpretation unreasonable "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." 134 S. Ct. at 2444. So, too, here. This Court should grant certiorari and similarly reject the purported "discover[y] in a long-extant statute an unheralded power to regulate a significant portion of

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[11] Letter from Heather A. Govern, Esq., Conservation Law Foundation, to James Apteker, CEO, Longwood Venues and Destinations, Inc., et al. (June 21, 2018) (on file with author); Letter from Heather A. Govern, Esq., Conservation Law Foundation, to Mark J. Novota, Managing Partner, Wequassett Inn LLP, et al. (June 21, 2018) (on file with author).

[12] https://www.epa.gov/npdes/npdes-permit-status-reports (last visited Aug. 17, 2018).

the American economy." *Ibid*. (internal quotation marks omitted).

III. The Ninth Circuit's Ruling On Fair Notice Is Directly At Odds With This Court's Ruling In *FCC* v. *Fox Television Stations*.

Independent of whether the Ninth Circuit's rule is a permissible interpretation of NPDES point source permitting, this Court should grant certiorari because the County did not have fair notice an NPDES permit was required under a straightforward application of *FCC* v. *Fox Television Stations, Inc*., 567 U.S. 239 (2012).

In *Fox*, this Court set aside two orders of the Federal Communications Commission because they failed to give "fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent." *Id*. at 258. "A fundamental principle in our legal system," this Court explained, "is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Id*. at 253. That raises two due process concerns: first, "regulated parties should know what is required of them so they may act accordingly"; and second, "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Ibid*. This Court found both concerns implicated because the FCC regulations were unclear on their face and, independently, "the lengthy

procedural history . . . show[ed] that the broadcasters did not have fair notice." *Id*. at 254.

Both elements of *Fox* exist here. *First*, contrary to the Ninth Circuit's assertion, the County's actions do not "fall squarely" within the plain language of the statute. As discussed above, this Court's opinion in *Miccosukee* shows that the statutory language "makes plain" that an NPDES permit is not needed here because a point source did not "*convey* the pollutant to 'navigable waters.'" 541 U.S. at 105 (emphasis added). At the very least, however, the differing interpretations reflected in *Miccosukee* and the Ninth Circuit's decision (as well as the several other interpretations offered in this case, see *supra* pp. 25-26) establish that the County did not "know what is required of them so [it could] act accordingly." *Fox*, 567 U.S. at 253; *see also Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law").

Second, just as in *Fox*, a long regulatory history independently shows that the County did not have fair notice. The County built its facility relying on UIC wells for effluent disposal with HDOH's authorization, as well as EPA funding. For almost 40 years, these agencies maintained UIC permits were the proper mechanism to regulate well disposal. When explicitly asked, HDOH said NPDES permits were inapplicable because effluent was disposed into groundwater, not

discharged into navigable waters, and that the district court's ruling was unprecedented. EPA issued UIC permits for the facility's operation, and brought a county-wide CWA enforcement action without raising NPDES concerns for the wells. After the litigation commenced, EPA refused to answer whether an NPDES permit was required, explicitly stating that it preferred to remain on the "sideline." App. 149. EPA only took a position after the district court ruled.

The Ninth Circuit puts great weight on a statement by HDOH in April 2014 that, in its view, shows HDOH had not "solidified its position" on whether an NPDES permit was required. App. 30. But that statement arose after this litigation began and was further undercut by HDOH's equivocation in May 2015, and therefore cannot possibly have provided the County fair notice. Equally important, this Court in *Fox* rejected the government's reliance on a statement in which the FCC had suggested that "televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464." 567 U.S. at 256 (internal quotation marks and citation omitted). Like in *Fox*, an equivocal, "isolated[,] and ambiguous statement" is not sufficient to provide the fair notice required by due process. *Ibid.*

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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August 27, 2018