No. 18-260

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

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

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

Counsel for Petitioner

January 7, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases:

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, Petitioner respectfully submits this Second Supplemental Brief to respond to the invited brief of the United States.

The United States correctly urges this Court to review the first question presented in the Petition. As the United States well explains, that question regarding the jurisdictional reach of the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program is "important," given the "potential breadth" of its impact on regulators and regulated entities in "innumerable circumstances nationwide." U.S. Br. 13. Moreover, this case is an optimal vehicle to resolve the expanding division of authority over this question. *Id.* at 15-17; see also Pet. Reply 6-7. The only basis for the Ninth Circuit's finding of liability is that pollutants traveled via groundwater, and only groundwater, to navigable waters.

The position of the United States on the Petition's second question regarding fair notice, however, is unpersuasive. The government suggests (at 18) that this Court refuse the second question because it involves a "factbound dispute" over the application of *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012). But the briefing before this Court has shown that there is no material factual dispute, and therefore this Court could resolve the second question summarily as directly contrary to existing precedent. In *Fox*, this Court found a lack of fair notice where

the "regulatory history" included, at best, "[a]n isolated and ambiguous statement" by the regulators. *Id.* at 254, 256. The same is true here. For almost 40 years, federal and state regulators have known that treated effluent reaches navigable waters via groundwater. And neither Respondents nor the United States have pointed to a single statement by any federal or state regulator prior to the commencement of this litigation, see Pet. Reply 11-12, that clearly instructed the County to obtain an NPDES permit. To the extent Respondents contend that the statute unambiguously gave the County fair notice, that is the very question the United States urges this Court to take up, and thus presents no additional burden on this Court's review either.

It also is not necessarily true that the question of fair notice "raises no legal question of continuing importance." U.S. Br. 18. As the United States acknowledges, if this Court grants only the first question and disagrees with the County, that decision only would "provide clear notice *going forward* that future pollutant releases into the County's wells will require a NPDES permit." *Id.* (emphasis added). It would not answer whether the statute provided similarly clear notice for past releases by the County and millions of other entities throughout the nation. The Petition's second question presents the Court an opportunity to provide some guidance on that score, if the decision on the first question requires it.

For similar reasons, the United States's approach unnecessarily creates the possibility of inconsistent rulings in this case. Again, even if this Court reach-

es a decision on the first question that "provide[s] clear notice going forward that future pollutant releases into the County's wells will require a NPDES permit," *id.*, that does not mean the County had such "clear notice" in the past. Yet by suggesting that the Court refuse the second question, the government's approach could result in the Ninth Circuit's finding of liability remaining in place for past releases. If this Court is already reviewing this case, as the United States agrees this Court should, there is no good reason to purposely create the chance of such an incongruous result—especially when the Ninth Circuit's fair notice ruling can be so easily reversed under *Fox*.

CONCLUSION

Both questions presented in 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

Counsel for Petitioner

January 7, 2019