

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-260

COUNTY OF MAUI, PETITIONER

v.

HAWAII WILDLIFE FUND, ET AL.

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

MOTION OF THE UNITED STATES FOR LEAVE TO
PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE
AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves that the United States be granted leave to participate in the oral argument in this case as amicus curiae and that the United States be allowed ten minutes of argument time. The United States has filed a brief as amicus curiae supporting petitioner and seeks an allocation of ten minutes of petitioner's argument time. Petitioner has agreed to cede ten minutes of its argument time to

the United States. Granting this motion therefore would not require the Court to enlarge the overall time for argument.

1. This case concerns interpretation of the Clean Water Act, 33 U.S.C. 1251 et seq. The Act prohibits unpermitted "discharge[s] of any pollutant," 33 U.S.C. 1311(a), a term defined to include "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. 1362(12)(A). The question presented in this case is whether a "discharge of a pollutant," 33 U.S.C. 1362(12), occurs when a pollutant is released from a point source, travels through groundwater, and ultimately migrates to navigable waters.

2. The court of appeals construed the Act's prohibition on the unpermitted "discharge of any pollutant" under Section 1311(a) as applying to pollutant releases into groundwater if the pollutant eventually migrates to navigable waters and is "fairly traceable from the point source to a navigable water" at more than de minimis levels. Pet. App. 24. The United States has filed a brief as amicus curiae supporting petitioner. The brief argues that the Act's text, structure, and history support the conclusion that an unpermitted discharge does not occur when a pollutant is released from a point source to groundwater, even if the pollutant ultimately migrates to navigable waters. Among other things, that conclusion reflects: Congress's deliberate decision to exclude groundwater pollution from the permitting program; the separate

treatment of such pollution under distinct provisions of the Act and other federal statutes; legislative history indicating that Congress rejected proposals to regulate groundwater under the permitting program despite its awareness that pollutants sometimes reach surface waters by migrating through groundwater; and the need to avoid upending the traditional federal-state regulatory balance by substantially enlarging the authority of the U.S. Environmental Protection Agency (EPA) beyond what Congress intended.

3. The United States has a substantial interest in the Court's resolution of this case. Along with the States, see, e.g., 33 U.S.C. 1342(b), the EPA implements the Act, see 33 U.S.C. 1251(d), and the United States both enforces the Act and is a potential defendant in suits alleging unpermitted discharges of pollutants from federal facilities. The United States has a strong interest in ensuring that the respective roles of the federal government and the States in regulating the release of pollutants are appropriately balanced under the Act. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case. We therefore believe that the government's participation in oral argument would materially assist the Court in its consideration of this case.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JUNE 2019