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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and structure of key federal statutes like the Clean Water Act. CAC therefore has a strong interest in ensuring that the Clean Water Act is understood, in accordance with its text and Congress's plan in passing it, to prohibit any addition of any pollutant to navigable waters from any point source without a permit, regardless of whether the point source delivers the pollutant directly.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Water Act (CWA or the Act) provides that, without a permit, "the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. § 1311(a), and it defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). The County of Maui, Hawai'i has discharged a pollutant (treated sewage) to navigable waters (the Pacific Ocean) from point

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

sources (injection wells at a wastewater treatment facility) without obtaining a permit. Resp. Br. 1. According to the County, it did not need a permit for this discharge because it sent the pollutant through groundwater on its way to the ocean. Pet'r Br. 5-6. The plain text of the CWA proscribes this conduct. The County cannot evade liability by doing indirectly what it is prohibited from doing directly. *See* Pet. App. 31.

1. The CWA's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To serve those ends, the CWA prohibits "the discharge of any pollutant by any person," except in compliance with various provisions of the Act, *id.* § 1311(a), including the provision establishing the National Pollutant Discharge Elimination System (NPDES), *id.* § 1342. "[T]he NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). Importantly for purposes of this case, 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). The Act also defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14).

2. The CWA's plain text prohibits any addition of any pollutant to navigable waters from any point source without a permit, and it provides no exception for indirect point-source pollution. That plain language should resolve this case. *Conn. Nat'l Bank v.*

Germain, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Indeed, a plurality of this Court has already recognized that the CWA's text does not include a direct-delivery requirement: 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.'" *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (Scalia, J.) (plurality opinion) (quoting 33 U.S.C. § 1362(12)(A)).

To circumvent this straightforward reading of the statutory text, the County argues that when the statute says "from any point source," it "means *delivered by*" that point source. Pet'r Br. 29. In particular, the County contends that the CWA's definition of "point source" as "any discernible, confined and discrete *conveyance*," 33 U.S.C. § 1362(14) (emphasis added), indicates that point-source pollution is prohibited only if the point source itself delivers pollutants directly to navigable waters. Pet'r Br. 29. But this Court has recognized that—consistent with the plain text of the statute—"[*e*]*very* point source discharge is prohibited unless covered by a permit." *City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 318 (1981); *see* 33 U.S.C. § 1362(12) (prohibiting water pollution without a permit "from *any* point source" (emphasis added)).

3. The structure and purpose of the Act support this reading of the statute's plain language, and the County's arguments to the contrary are unpersuasive. For instance, the County argues that reading the CWA to require a permit for indirect point-source pollution would thwart the federal-state balance that Congress established under the Act. The CWA's regulation of point-source pollution, however, does not preclude a State from imposing more stringent regulation of that

pollution as well. Giving the CWA the meaning that its plain text requires thus does not swallow state regulation or moot the CWA's mandate that States regulate nonpoint-source pollution. Moreover, the plain meaning of the statute's text is consistent with Congress's plan in passing the CWA, as reflected in the CWA's text, to eliminate water pollution and restore the integrity of our nation's waters.

4. Finally, no "clear-statement rule" requires a different result. The County relies on *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), for the proposition that multiple clear-statement rules "confirm the means-of-delivery test" under the CWA. Pet'r Br. 45. That reliance is misplaced. Those cases concerned whether an *agency* exceeded its regulatory authority in interpreting an ambiguous statute. The question here, by contrast, is whether the County's pollution without a permit is unlawful under the CWA's plain text. Accordingly, the clear-statement rules set forth in those cases are inapposite. In any event, Congress could hardly have been clearer that the CWA prohibits "the discharge of any pollutant by any person" without a permit, 33 U.S.C. § 1311(a), including "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12), even if, as here, the pollutant travels through groundwater on its way "from" one point "to" the other.

ARGUMENT

I. THE CLEAN WATER ACT'S PLAIN TEXT PROHIBITS ANY ADDITION OF ANY POLLUTANT TO NAVIGABLE WATERS FROM ANY POINT SOURCE WITHOUT A PERMIT, REGARDLESS OF WHETHER THE POINT SOURCE DELIVERS THE POLLUTANT DIRECTLY.

It is well established that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "And where the statutory language provides a clear answer, [the analysis] ends there as well." *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 254 (2000) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). In this case, this Court's analysis should begin and end with the text of the CWA.

The CWA's plain text prohibits "the discharge of any pollutant by any person" without a permit, 33 U.S.C. § 1311(a), and it defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). No one disputes that treated sewage from the County's injection wells enters the Pacific Ocean. *See* Pet'r Br. 6-7; Resp. Br. 7 & n.2. It is likewise undisputed that this treated sewage is a "pollutant," that the Pacific Ocean constitutes "navigable waters," and that the injection wells are "point sources," all within the meaning of the CWA. *See* Pet'r Br. 55; Resp. Br. 1, 16. That the pollutant ultimately reaches those navigable waters via groundwater instead of arriving *directly* from the point source in no way relieves the County of its obligation under the CWA to obtain a permit.

1. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank*, 503 U.S. at 253-54; *accord Loughrin v. United States*, 573 U.S. 351, 360 (2014). The CWA's text prohibits the discharge of pollutants "to" navigable waters "from" a point source, and it provides no exception for indirect point-source pollution. Carving out such an exception would contravene this Court's longstanding presumption that Congress means what it says and would erroneously "read an absent word into the statute," *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004)—namely, the word "directly."

Indeed, a plurality of this Court has already recognized that 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.'" *Rapanos*, 547 U.S. at 743 (Scalia, J.) (quoting 33 U.S.C. § 1362(12)(A)). Thus, a straightforward reading of the CWA's text prohibiting any unauthorized addition of a pollutant "from" one entity "to" another compels the conclusion that the statute prohibits such an addition regardless of whether it is delivered directly from one to the other. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) ("[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'" (quoting *Dodd v. United States*, 545 U.S. 353, 359 (2005))).

Moreover, the statute's repeated use of the word "any" reinforces the expansive scope of its prohibition of point-source pollution without a permit. Rather than outlawing only the discharge of pollutants directly to navigable waters, the Act broadly proscribes "the discharge of *any* pollutant by *any* person" without a permit, 33 U.S.C. § 1311(a) (emphases added), and it

defines such a discharge "broadly to include '*any* addition of *any* pollutant to navigable waters from *any* point source,'" *Rapanos*, 547 U.S. at 723 (emphases added) (quoting 33 U.S.C. § 1362(12)). This Court has recognized that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Moreover, "Congress did not add any language limiting the breadth of that word" in the CWA. *Id.* The Act's prohibition of point-source pollution, therefore, is "broad and, by repeated use of the word 'any,' [is] obviously meant to be inclusive," *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972).

Accordingly, an interpretation of the statute that excludes from the CWA's coverage the *indirect* addition of a pollutant to navigable waters from a point source is plainly inconsistent with the statute's language, which bans "*any*" such addition absent a permit.[2] By using the word "any" five times in these two short provisions, Congress could hardly have been clearer that the statute bans any and all point-source pollution. Indeed, this Court has recognized that, under the CWA, "[*e*]*very* point source discharge is prohibited unless covered by a permit." *City of Milwaukee*, 451 U.S. at 318; *cf. id.* at 318-19 ("This Court was obviously correct when it described the 1972 [CWA]

[2] The County contends that the phrase "from any point source" in fact *limits* the statute's breadth to cover the addition of pollutants only from a point source in particular or an uninterrupted chain of point sources. *See* Pet'r Br. 32-34. But that argument rests on the assumption that "from any point source" means "*directly* from any point source or point sources." As explained above, such an inference is at odds with the plain meaning of the text Congress passed. *Cf. Rapanos*, 547 U.S. at 743.

Amendments as establishing 'a comprehensive program for controlling and abating water pollution.'" (quoting *Train v. City of New York*, 420 U.S. 35, 37 (1975))).

The Act's use of the passive voice further confirms that a point source need not deliver pollutants directly to navigable waters to fall within the statute's reach. Instead of affirmatively prohibiting a point source from "actually add[ing] the pollutants into the navigable waters," as the County suggests, Pet'r Br. 53, the CWA uses the passive voice, banning "the discharge of any pollutant by any person" without a permit, 33 U.S.C. § 1311(a), including "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). *See Webster's Seventh New Collegiate Dictionary: Based on Webster's Third New International Dictionary* 11 (1971) (defining "addition" as "*the result* of adding" (emphasis added)). As this Court has recognized, when a statute uses the passive voice, "[i]t is whether something happened—not how or why it happened—that matters." *Dean v. United States*, 556 U.S. 568, 572 (2009). Here, there can be no doubt that there was an addition of a pollutant to navigable waters from a point source without a permit. Under the plain text of the CWA, it simply does not matter that the pollutant did not go directly "from" the point source "to" the navigable waters.

Finally, that the statute contains express exceptions that do not apply here—namely, exceptions for permit-holders—further counsels against reading into the statute an exception that Congress did not expressly include. This Court has repeatedly cautioned against finding implied exceptions to statutes, particularly "[w]here Congress explicitly enumerates certain exceptions to a general prohibition." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quoting *Andrus v.*

Glover Constr. Co., 446 U.S. 608, 616-17 (1980)). Here, the CWA provides that, "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title"—which establish effluent limitations and outline permitting procedures—"the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a); *see Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) ("Section 301(a) of the Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency (EPA)."). The County does not argue that one of the enumerated exceptions to this broad prohibition applies here—nor could it, *see* U.S. Br. 2—and this Court should therefore be particularly reluctant to craft an exception that does not appear in the statute's text.[3]

2. In an effort to overcome this straightforward reading of the statutory text, which takes Congress at its word that "from" means "from" and "to" means "to," the County argues instead that "'from' means *delivered by*," Pet'r Br. 29. In particular, the County argues that the CWA's definition of "point source" as "any discernible, confined and discrete *conveyance*," 33 U.S.C. § 1362(14) (emphasis added), connotes a means of transport and indicates that the statute imposes a

[3] Similarly, this Court should reject EPA's newly announced view that "all releases to groundwater are excluded from the scope of the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater," Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,814 (Apr. 23, 2019). This interpretation is entirely untethered from the CWA's text and creates a categorical exception to the law's prohibition out of whole cloth.

"means-of-delivery test." *See, e.g.*, Pet'r Br. 29-31, 53. Under this test, the County argues, a point source is prohibited from polluting without a permit only if the point source itself delivers pollutants directly to navigable waters. *See, e.g.*, *id.* This argument fails for multiple reasons.

First, the County's means-of-delivery test is inconsistent with the ordinary meaning of the statute's terms. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) ("[It is] a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute." (omission in original) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979))). The word "from" is ordinarily used "to indicate a starting point," not a means of delivery. *Webster's Seventh New Collegiate Dictionary* 335. According to *Webster's*, the term is used to refer to "a place where a physical movement begins" or a "source, cause, agent, or basis." *Id.* Thus, a woman may receive a letter "from" her pen pal, even if that letter is delivered by a postal worker. The County's argument that "'from' means *delivered by*," Pet'r Br. 29, is therefore an invitation to impermissibly rewrite the statute. *Cf. Franklin Cal. Tax-Free Trust*, 136 S. Ct. at 1949.

Second, the County's means-of-delivery test contradicts this Court's recognition that "[*e*]*very* point source discharge is prohibited unless covered by a permit." *City of Milwaukee*, 451 U.S. at 318. The County at times attempts to narrow the definition of a "point source"—or at least narrow the definition of a point source that requires a permit to pollute—notwithstanding this Court's broad statement in *City of Milwaukee*. The County characterizes such a point source as "*any pipe, ditch, or similar means of transport*."

E.g., Pet'r Br. 29. Yet the CWA defines "point source" broadly as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, *well*, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). Further, as discussed above, the CWA bans the pollution of navigable waters "from *any* point source" without a permit, *id.* § 1362(12) (emphasis added)—including from "well[s]" and other, more stationary conveyances like "container[s]," *id.* § 1362(14)—and not merely from certain point sources that may readily be associated with delivery. Thus, the injection wells at issue in this case are undisputedly "point sources," *see* Pet'r Br. 55 (conceding that the injection wells "fall within the statutory definition of 'point source'"), and this case involves the "addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12).

And third, while every point source must be a "conveyance," or a "means of carrying or transporting something," Pet'r Br. 29 (quoting *Webster's Third New International Dictionary* 499 (1971)), nothing in that dictionary definition suggests that the CWA's prohibition against unauthorized pollution from any point source requires a point source to be the *final* carrier or means of transport that actually delivers pollutants directly to navigable waters. In other words, the CWA's prohibition of unauthorized pollution "from any point source," 33 U.S.C. § 1362(12), applies just as readily to an original carrier, like a well that releases pollutants that subsequently reach navigable waters, as it does to any other "discernible, confined and discrete" carrier, *id.* § 1362(14).

Indeed, while the County relies heavily on the dictionary definition of "conveyance" to support its means-of-delivery theory, the dictionary defines the words "point" and "source" themselves as referring to an origin or starting place. *See Webster's Seventh New Collegiate Dictionary* 654 (defining "point" as "a narrowly localized place having a precisely indicated position"); *id.* at 835 (defining "source" as "the point of origin of a stream of water: FOUNTAINHEAD," "a point of origin," or "one that initiates"). Thus, the fact that the CWA's definition of "point source" includes the word "conveyance" does not change the fact that the CWA prohibits "any addition of any pollutant to navigable waters from any point source" without a permit, 33 U.S.C. § 1362(12), regardless of whether the pollutant is conveyed *directly* to navigable waters. *Cf. Rapanos*, 547 U.S. at 743.

Significantly, the County concedes that "a point source permit is required not only for point-source-to-navigable-water pollution, but also for point-source-to-point-source-to-navigable-water pollution, and so on." Pet'r Br. 33. The County thus appears to be suggesting that even the *first* point source in such a chain would need a permit, even though that point source would not directly deliver pollutants to navigable waters. This concession is inconsistent with the County's assertion that a point source must itself deliver pollutants to be covered by the CWA's prohibition. Again, despite the County's suggestion otherwise, the statute does not prohibit the discharge of pollutants "delivered by any point source," but rather the discharge of pollutants "*from* any point source."

This conclusion that a point source need not deliver pollutants directly to fall within the CWA's permitting requirement is fully consistent with this Court's decision in *South Florida Water Management District v.*

Miccosukee Tribe of Indians, 541 U.S. 95. In that case, the Court rejected the contention that the CWA's permitting requirement "applies to a point source *only* when a pollutant originates from the point source, and not when pollutants originating elsewhere merely pass through the point source." *Id.* at 104-05 (emphasis added) (citation and internal quotation marks omitted). Instead, the Court recognized that the CWA "makes plain that a point source *need not* be the original source of the pollutant" and that "the definition of 'discharge of a pollutant' contained in § 1362(12) . . . *includes within its reach* point sources that do not themselves generate pollutants." *Id.* at 105 (emphases added).

Notably, the Court in *Miccosukee Tribe* did not suggest that the CWA's prohibition of point-source pollution might exclude the original source of the pollutant. *See id.* That question was not before the Court, and, in any event, such a reading would contradict the statute's plain language. And the Court did not hold that only point sources that deliver pollutants directly to navigable waters must obtain permits. Instead, the Court's recognition that a point source that "convey[s] the pollutant to 'navigable waters'" is subject to the Act's permitting requirements, *id.*, merely tracked the statutory text. Again, as a plurality of this Court recognized two years after *Miccosukee Tribe*, the statute "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." *Rapanos*, 547 U.S. at 743 (quoting 33 U.S.C. § 1362(12)(A)). Thus, *Miccosukee Tribe* did not exclude any point source from the scope of the Act's permitting requirement; it merely clarified that point sources other than those from which pollutants originate are also included, as the statute broadly prohibits "any

addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), without a permit. *See id.* § 1311(a).

Finally, despite the County's argument to the contrary, *see* Pet'r Br. 36-37, Congress's use of the phrase "*into* navigable waters" in other provisions of the statute not at issue here does not change or elucidate the meaning of the phrase "to navigable waters" in § 1362(12) for purposes of § 1311(a). For one thing, there is no reason to conclude that "into" means "directly into" any more than "to" means "directly to." *See Webster's Seventh New Collegiate Dictionary* 444 (defining "into" as "indicat[ing] entry, introduction, insertion, or inclusion"). Thus, even if this Court were to accept that the CWA's use of the word "into" in other provisions sheds light on the meaning of "to" in § 1362(12), that still would not help the County. In any event, §§ 1311(a) and 1362(12) together prohibit the unauthorized addition of pollutants "*to* navigable waters," not "*into* navigable waters." *Cf. Rapanos*, 547 U.S. at 743. Again, the Court must presume that Congress meant what it said and said what it meant. *See Conn. Nat'l Bank*, 503 U.S. at 253-54; *see also Dean*, 556 U.S. at 573 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))). Accordingly, Congress's use of the word "into" in other sections of the CWA not at issue here does not alter the conclusion that the CWA's plain text prohibits both the direct and indirect addition of pollutants from a point source "to navigable waters" without a permit.

II. THE STRUCTURE AND PURPOSE OF THE CLEAN WATER ACT ARE CONSISTENT WITH THE MEANING OF ITS PLAIN TEXT.

This straightforward reading of the statute's text should end the inquiry: this case plainly involves the addition of a pollutant to navigable waters from a point source without a permit. Apparently recognizing that the text does not support its position, the County primarily focuses its brief on the structure and purpose of the CWA. *See, e.g.*, Pet'r Br. 21-27. But these arguments are unavailing because the CWA's structure and purpose are consistent with what its plain text requires.

1. The County argues that reading the CWA to require a permit for indirect point-source pollution would thwart the federal-state balance that Congress sought to establish. *See, e.g.*, Pet'r Br. 35-36, 51-52. In particular, the County argues that, in enacting the CWA, Congress created a "two-track regulatory approach," *id.* at 24, 35, that requires permits for point-source pollution but directs States to regulate the discharge of other pollution to navigable waters (known as nonpoint-source pollution). *See, e.g.*, *id.* at 23-26. Accordingly, the County contends that "[t]here is a clear dichotomy in the statute based on the method of transport 'from' which pollutants are added to navigable waters," *id.* at 25, and that requiring permits for indirect point-source pollution "would greatly enlarge the point source program in contravention of Congress's clear decision" otherwise, *id.* at 35. This argument is incorrect.

To start, as previously discussed, the statutory text plainly prohibits direct and indirect point-source pollution alike. That Congress left to the States the regulation of *nonpoint*-source pollution does not constrain

the broad applicability of its prohibition against any *point*-source pollution without a permit.[4]

Moreover, the CWA's regulation of point-source pollution does not preclude a State from regulating that pollution as well. *See* 33 U.S.C. § 1370; *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 217 n.31 (1976). For instance, under the CWA, a State may issue NPDES permits itself under a state program approved by EPA. 33 U.S.C. § 1342(b); *see Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 208. And "[e]ven if the Federal Government administers the permit program, the source State may require discharge limitations more stringent than those required by the Federal Government." *Ouellette*, 479 U.S. at 489-90; *see City of Milwaukee*, 451 U.S. at 319 n.14 (citing 33 U.S.C. § 1370). Accordingly, "[b]efore the Federal Government may issue an NPDES permit, the Administrator must obtain certification from the source State that the proposed discharge complies with the State's technology-based standards and water-quality-based standards." *Ouellette*, 479 U.S. at 490 (citing 33 U.S.C. § 1341(a)(1)).

Thus, while the CWA makes clear that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. § 1251(b), it does that by "establish[ing] a regulatory 'partnership' between the Federal Government and the source State," *Ouellette*, 479 U.S. at 490, wherein full enforcement of the CWA's terms does not lessen a State's authority to regulate pollution affecting that State. Accordingly, acknowledging that the CWA

[4] Likewise, that other federal and state statutes may help protect against similar pollution does not change the language that Congress used in the CWA or limit its application.

covers indirect point-source pollution does not encroach on a State's authority to regulate water pollution.

Further, this straightforward reading of the CWA's plain text does not swallow the regulation of nonpoint-source pollution or render meaningless the CWA's instruction that States must regulate such pollution, as the County suggests, *see, e.g.*, Pet'r Br. 35-36. As the Ninth Circuit explained below, "'[t]he most common example of nonpoint source pollution is the residue left on roadways by automobiles' which rainwater 'wash[es] off . . . the streets and . . . carrie[s] along by runoff in a polluted soup [to] creeks, rivers, bays, and the ocean.'" Pet. App. 14 (alterations in original) (quoting *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013)). Such quintessential nonpoint-source pollution—which does not involve any point sources along the way—is plainly not included in the CWA's prohibition of pollution "from any point source," 33 U.S.C. § 1362(12), regardless of the prohibition's application to both direct and indirect point-source pollution. In other words, even though the CWA's prohibition includes indirect point-source pollution, there remains plenty of nonpoint-source pollution for the States to regulate separately.

2. Congress's plan in enacting the CWA, as stated in the statutory text, only confirms that the text covers indirect point-source pollution. The CWA states that its "objective . . . is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). It further provides that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* § 1251(a)(1). This Court has recognized that "Congress' intent in enacting the [1972 CWA] Amendments was clearly to establish an all-encompassing program

of water pollution regulation." *City of Milwaukee*, 451 U.S. at 318; *see Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 204 (noting that the CWA is "aimed at achieving maximum effluent limitations on point sources" (internal quotation marks omitted)).

Congress's ambitious and far-reaching goal is all the more reason to give full effect to the Act's prohibition of point-source pollution without a permit. Far from producing an absurd result, a straightforward reading of the CWA to cover indirect point-source pollution directly serves the statute's stated purpose: the elimination of water pollution and restoration of the integrity of our nation's waters. And the possibility that enforcement of the Act as written might require more entities to obtain NPDES permits than would an alternative policy does not justify modifying or disregarding the clear statutory text. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982) ("The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not.").

III. THE PLAIN TEXT COVERS INDIRECT POINT-SOURCE POLLUTION, REGARDLESS OF THE APPLICABILITY OF ANY CLEAR-STATEMENT RULE.

No "clear-statement rule" requires a different result. The County relies on *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (*UARG*), and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (*SWANCC*), for the proposition that multiple clear-statement rules "confirm the means-of-delivery test" under the CWA. Pet'r Br. 45. They do not.

The County argues first that under *UARG*, Congress must "speak clearly if it wishes to assign an

agency decisions of vast economic and political significance," Pet'r Br. 45 (quoting *UARG*, 573 U.S. at 324) (internal quotation marks omitted), and that "'clear congressional authorization' is needed to endorse a 'transformative expansion' of a 'long-extant statute,'" *id.* (quoting *UARG*, 573 U.S. at 324). But recognizing that the CWA prohibits direct and indirect point-source pollution alike does not mark a "transformative expansion of a long-extant statute." *Id.* (citation and internal quotation marks omitted). Rather, as discussed above, the plain text of the statute broadly proscribes "the discharge of any pollutant by any person" without a permit, 33 U.S.C. § 1311(a), and thus applies equally to direct and indirect discharges. *See supra* at 5-9. Indeed, based on a straightforward reading of the statutory text, EPA has (until very recently[5]) long interpreted the CWA to cover such pollution. *See* Resp. Br. 53. Lower courts, too, have long understood the CWA to cover such pollution. *See id.* at 25 & n.12. Indeed, it is the *County's* crabbed reading of the CWA that would substantially transform the statute's coverage, unduly narrowing its scope in a manner at odds with the text Congress passed.

Moreover, *UARG* involved an entirely separate question than the one presented here. That case concerned the outer bounds of an agency's authority to broadly interpret an ambiguous statute. *See* 573 U.S. at 307. After a formal notice and comment period, EPA issued final rules codifying its interpretation of the Clean Air Act, *see id.* at 310-13, and the question

[5] While EPA recently issued an "Interpretive Statement" to provide "guidance" regarding the CWA, 84 Fed. Reg. at 16,811, that statement was not the product of a formal rulemaking process, *see id.* at 16,810, 16,812 n.1, and, indeed, was not even issued until after the Court granted certiorari in this case, *see id.* at 16,826.

in *UARG* was "whether it was permissible for EPA to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the [Clean Air] Act for stationary sources that emit greenhouse gases," *id.* at 307. The Court held that EPA's construction of the law was impermissible because it would have brought "about an enormous and transformative expansion in EPA's regulatory authority," and Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'" *id.* at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

Unlike in *UARG*, this case does not concern whether EPA permissibly interpreted an ambiguous statute under its regulatory authority. Rather, the question before this Court is whether the County's pollution without a permit is unlawful under the CWA's plain text. Accordingly, this Court's rule from *UARG* that it "expect[s] Congress to speak clearly *if it wishes to assign to an agency* decisions of vast 'economic and political significance,'" *see id.* at 324 (emphasis added) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160), is inapposite.

In any event, unlike the Clean Air Act provisions at issue in *UARG*, the relevant text of the CWA is far from ambiguous. Thus, the Court need not be concerned about expanding the CWA's coverage in a manner that Congress did not intend by misconstruing ambiguous text. The plain language of the CWA prohibits point-source pollution, regardless of whether it is direct or indirect. In other words, Congress *did* speak clearly in prohibiting "the discharge of any pollutant by any person," 33 U.S.C. § 1311(a), or "any addition

of any pollutant to navigable waters from any point source," *id.* § 1362(12), without a permit.[6]

The County's reliance on *SWANCC* is similarly misplaced. In *SWANCC*, the Court considered whether the United States Army Corps of Engineers (Corps) correctly interpreted § 404(a) of the CWA—which "grants the Corps authority to issue permits 'for the discharge of dredged or fill material into the navigable waters at specified disposal sites,'" *SWANCC*, 531 U.S. at 163 (quoting 33 U.S.C. § 1344(a))—to give the Corps authority over an abandoned sand and gravel pit. *See id.* at 162. The Corps issued formal regulations interpreting the Act to confer that authority because the pit was used as habitat for migratory birds. *See id.* at 163-64 (citing 33 C.F.R. § 328.3(a)(3)); *id.* at 167. This Court ultimately held that this "'Migratory Bird Rule' [was] not fairly supported by the CWA." *Id.* at 167.

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[6] The United States' argument based on *UARG* is similarly unavailing. The United States suggests that, under *UARG*, a *court's* interpretation of the CWA that would "expand the Act's coverage beyond what Congress envisioned," *see* U.S. Br. 25 (quoting 84 Fed. Reg. at 16,823), requires "clear congressional authorization," *id.* (quoting *UARG*, 573 U.S. at 324). But that makes no sense. Courts must always give effect to the plain meaning of the laws Congress passed, regardless of what Congress may or may not have "envisioned." *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). *UARG* thus does not stand for the odd proposition that the courts should attempt to determine what Congress "envisioned," unless Congress has clearly authorized a broader interpretation (presumably in the text of the law itself). Rather, as explained above, *UARG* concerned whether Congress clearly authorized an *agency* to interpret a statute broadly, which is a separate question from the one at issue here.

The Court reasoned in *SWANCC* that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, [this Court] expect[s] a clear indication that Congress intended that result." *Id.* at 172. In holding that the Corps' regulation, 33 C.F.R. § 328.3(a)(3), "exceed[ed] the authority granted to [the Corps] under § 404(a) of the CWA," the Court noted "significant constitutional and federalism questions" and concluded that there is "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit." *SWANCC*, 531 U.S. at 174.

Because *SWANCC*, like *UARG*, concerned the outer bounds of an *agency's* authority to broadly construe a statute, its clear-statement rule is inapplicable here. Moreover, here, unlike in *SWANCC*, no one has even suggested that the relevant provisions of the CWA raise any constitutional concerns or approach the outer limits of Congress's constitutional authority.

Again, the question in this case is not whether an agency had the authority to interpret the CWA as it did, but whether the County violated the plain terms of the statute. And Congress could hardly have been clearer in the CWA that a permit is required for "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), regardless of whether the point source delivers the pollutant directly from Point A to Point B. *See id.* § 1311(a).

* * *

In sum, the plain text of the CWA broadly proscribes "the discharge of any pollutant by any person" without a permit, 33 U.S.C. § 1311(a)—that is, "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). There can be no doubt that such a discharge occurred here. Under the CWA's

plain text, the County cannot evade liability for its pollution of the Pacific Ocean without a permit simply by sending the pollutant through groundwater on its way "to" navigable waters "from" a point source.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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