No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAI'I WILDLIFE FUND, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONER

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QUESTION PRESENTED

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.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the

[1] Petitioner's counsel of record consented to the filing of this brief. Respondents' counsel of record has filed a blanket consent to all amicus briefs. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases such as this one that raise issues of concern to the Nation's business community.

The Ninth Circuit's breathtaking expansion of the CWA's National Pollutant Discharge Elimination System (NPDES) permitting program to cover groundwater threatens interests of great importance to the Chamber's members. The business community supports safe, effective, and efficient environmental regulation. The decision below imperils these objectives. Indeed, applying the CWA to point sources that convey pollutants to groundwater—an area already extensively regulated by other state and federal programs—will create a morass of duplicative and potentially conflicting regulation. The regulatory uncertainty and vastly increased compliance costs that will follow this sea change in CWA law will impose substantial burdens on the regulated public that Congress never intended.

SUMMARY OF ARGUMENT

Congress drew a clear line limiting the scope of federal permitting and enforcement under the CWA's point source permitting program. The program covers discharges from point sources into navigable waters. Other releases, including those that reach navigable waters through nonpoint sources like groundwater, are already covered by an array of other state and federal laws. The court of appeals' expansion of the CWA disrupts that established framework by adding groundwater regulation into a statutory program that was never designed to regulate groundwater.

Forcing the square peg of groundwater regulation into the round hole of the CWA's point source permitting program promises dire and far-reaching consequences.

It is a recipe for regulatory uncertainty, wasteful overlap, and unpredictable compliance costs. Those effects will be felt by myriad businesses, individuals, and the Nation as a whole.

The Court has consistently rejected similarly transformative regulatory expansions without clear Congressional authorization. It has been rightly skeptical of agencies' efforts to uncover such authorization lying dormant in long-extant statutes. The Ninth Circuit's strained application of the CWA's point source provisions to groundwater—which comes over four decades after the statute's enactment—merits the same treatment. What is more, unlike in some of the Court's previous decisions that refused similar expansions, no agency deference applies to the Ninth Circuit's disruptive interpretation. To the contrary, the Environmental Protection Agency (EPA) has expressly rejected the Ninth Circuit's expansion of the statute.

ARGUMENT

I. THE DECISION BELOW OVERLOOKS CONGRESSIONAL LIMITS ON FEDERAL CWA AUTHORITY AND THE EXISTING STATE AND FEDERAL REGULATORY REGIMES GOVERNING GROUNDWATER

A. Congress purposefully limited the federal government's CWA NPDES authority to discharges to "navigable waters." 33 U.S.C. §§ 1311, 1362(12). Before the law's enactment, EPA asked Congress for authority to regulate discharges to groundwater under the CWA point source program in order to prevent polluted groundwater from harming surface waters. See Pet. Br. 40-41. Congress rejected that request, *id.*, and the CWA plainly differentiates between jurisdictional "navigable waters" and "ground waters." 33 U.S.C. §§ 1252(a), 1254(a)(5).

The opinion below creates a new standard out of whole cloth, applying NPDES point source permitting requirements to releases of pollutants into groundwater if the "pollutants are fairly traceable from the point source to a navigable water" and reach navigable water at "more than *de minimis*" levels. Pet. App. 24. That test finds no footing whatsoever in the statutory text. Indeed, it ignores the CWA's considered statutory distinction by allowing—and indeed requiring—federal regulation of not just "navigable waters," but of groundwater as well.

Nor does the Ninth Circuit's expansion of the CWA plug some inadvertent regulatory gap. The point source permitting program's focus on "navigable waters" instead reflects Congress's recognition that numerous other state and federal regulatory programs have been developed to protect groundwater. Thus, as EPA recently observed, "[t]here is sufficient legal authority to address releases of pollutants to groundwater that subsequently reach jurisdictional surface waters at both the state and federal level without expanding the CWA's regulatory reach beyond what Congress envisioned." 84 Fed. Reg. 16,810, 16,823 (Apr. 23, 2019).

B. All fifty states exercise broad police powers to protect their groundwater from pollution. To take one representative example, Texas has implemented a permitting regime overseen by the Texas Commission on Environmental Quality. Without a permit, it is illegal to "discharge sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state," including "groundwater." Tex. Water Code Ann. §§ 26.001(5), 26.121(a). The Texas Risk Reduction Program further safeguards Texas groundwater. See 30 Tex. Admin. Code §§ 350.1-.135. That comprehensive program provides for investigation and remediation of contaminated sites within the state and includes measures specifically designed for groundwater

contamination. See, *e.g.*, *id.* §§ 350.32-.33 (providing remedial standards for groundwater); *id.* § 350.52 (establishing a "groundwater resource classification system"); *id.* § 350.75(i) (including groundwater-to-surface-water pathway in remediation framework). The other forty-nine states employ similar regulatory regimes to protect their groundwater.[2]

C. While Congress did not apply the CWA's strict liability permitting regime to releases into groundwater, it did address specific groundwater concerns in other parts

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[2] See Ala. Code § 22-22-9(I)(3); Alaska Stat. Ann. § 46.03.710; Ariz. Rev. Stat. Ann. §§ 49-221, 49-241, 49-263; Ark. Code Ann. § 8-4-217; Cal. Water Code §§ 13260(a)(1), 13304(a); 5 Colo. Code Regs. § 1002-61:61.3; Conn. Gen. Stat. Ann. §§ 22a-427, 22a-430; Del. Code Ann. tit. 7, § 6003(a); D.C. Code Ann. § 8-103.02; Fla. Stat. Ann. §§ 403.088(1), 403.161(1); Ga. Code Ann. § 12-5-30; Haw. Rev. Stat. Ann. § 342D-50; Idaho Code Ann. §§ 39-3618, 39-3620; Idaho Admin. Code r. 58.01.11.400; 415 Ill. Comp. Stat. Ann. 5/12; Ind. Code Ann. § 13-18-4-5; Iowa Code Ann. § 455B.186; Kan. Stat. Ann. § 65-164; Ky. Rev. Stat. Ann. §§ 224.70-.110; La. Stat. Ann. §§ 30:2075, 30:2076; Me. Rev. Stat. tit. 38, § 413; Md. Code Ann., Envir. § 9-322; Mass. Gen. Laws Ann. ch. 21, §§ 42-43; Mich. Comp. Laws Ann. § 324.3109(1); Mich. Admin. Code r. 323.2201(i), 323.2204-05; Minn. Stat. Ann. § 115.061; Minn. R. 7050.0210; Miss. Code Ann. § 49-17-29(2)(a); Mo. Ann. Stat. § 644.051; Mont. Code Ann. § 75-5-605; Neb. Rev. Stat. Ann. § 81-1506; Nev. Rev. Stat. Ann. § 445A.570; Nev. Admin. Code 445A.228; N.H. Rev. Stat. Ann. §§ 485-A:12, 485-A:13; N.J. Stat. Ann. § 58:10A-6; N.M. Stat. Ann. § 74-6-4; N.M. Admin. Code 20.6.2.1201, 20.6.2.3104; N.Y. Envtl. Conserv. Law § 17-0501; N.C. Gen. Stat. Ann. § 143-215.1(a)(6); N.D. Cent. Code Ann. § 61-28-06; Ohio Rev. Code Ann. § 6111.04; Okla. Stat. Ann. tit. 27A, § 2-6-105; Or. Rev. Stat. Ann. § 468B.025(1); 35 Pa. Stat. Ann. § 691.401; 25 Pa. Code § 93.8a(a); 46 R.I. Gen. Laws Ann. § 46-12-5; S.C. Code Ann. § 48-1-90(A)(1); S.D. Codified Laws §§ 34A-2-21, 34A-2-22; Tenn. Code Ann. § 69-3-108(b); Utah Code Ann. § 19-5-107(1); Vt. Stat. Ann. tit. 10, § 1259; Va. Code Ann. §§ 62.1-44.5(A), 62.1-194.1; Wash. Rev. Code §§ 90.48.080, 90.48.160; W. Va. Code Ann. § 22-11-8; Wis. Stat. Ann. §§ 281.19(1), 281.20(1)(a); Wyo. Stat. Ann. § 35-11-301.

of the CWA and in other federal statutes. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) empowers EPA to remedy the "release" of any "hazardous substance" and certain other "pollutants" into the "environment," a term that specifically includes "ground water." 42 U.S.C. §§ 9601(8), 9604(a)(1). Indeed, EPA has developed principles to direct its efforts in this area and maintains a vast store of groundwater guidance, reports, and tools for its Superfund Remedial Project Managers. See EPA, Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, OSWER Directive 9283.1-33 (June 26, 2009);[3] EPA, Superfund Groundwater Guidance and Reports.[4] For example, the National Oil and Hazardous Substance Pollution Contingency Plan, which provides the blueprint for CERCLA implementation, states that "EPA expects to return usable ground waters to their beneficial uses wherever practicable." 40 C.F.R. § 300.430(a)(iii)(F).

The Resource Conservation and Recovery Act (RCRA), moreover, provides EPA with specific powers over groundwater contamination that results from solid waste disposal. See 42 U.S.C. §§ 6902, 6911, 6944. RCRA was motivated in part when EPA alerted Congress of the need to fill gaps in the CWA's coverage regarding "pollutant discharges normally associated with improperly managed hazardous waste disposal facilities" and their "migration into groundwater supplies." Legislative History of the Resource Conservation and Recovery Act of 1976 P.L. 94-580, Report to Congress by the EPA Pursuant to Section 212 of the Solid Waste Disposal Act, As Amended 19 (June 1974). Under

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[3] https://semspub.epa.gov/work/HQ/175202.pdf.

[4] https://www.epa.gov/superfund/superfund-groundwater-guidance-and-reports.

RCRA, EPA has promulgated regulations protecting groundwater, including a comprehensive program that provides for monitoring and remediation of groundwater affected by certain waste treatment and storage facilities. See 40 C.F.R. §§ 257.90-.98, 258.50-.58.[5]

The Safe Drinking Water Act (SDWA) also includes extensive provisions to ensure the safety of "underground sources of drinking water." 42 U.S.C. §§ 300h-300h-8. The SDWA specifically focuses on the dangers posed by injection wells. It establishes a regulatory structure to protect groundwater from that type of contamination. *Ibid.*

D. The injection wells at issue in this case fall within the scope of both state and federal regulatory regimes protecting groundwater. On the state side, the wells had to comply with the requirements of Hawai'i's safe drinking water program, see Haw. Rev. Stat. Ann. § 340E-2, which has regulations specifically designed for these types of injection wells, see Haw. Code R. §§ 11-23-06, 11-23-07. Federally, EPA regulates these types of injection wells pursuant to its authority under the SDWA and has promulgated regulations designed to prevent contamination from such wells. See 40 C.F.R. pt. 144. It is undisputed that the County of Maui obtained all necessary permits under both state and federal programs.

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[5] CERCLA and RCRA both exclude certain types of petroleum and drilling materials from their scope. See 42 U.S.C. § 9601(14) (CERCLA excluding "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance"); 40 C.F.R. § 261.4(b)(5) (excluding from RCRA's definition of hazardous waste "[d]rilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy"). But the statutes nonetheless have broad coverage, and other state and federal regulatory programs, such as the one created by the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*, ably fill any gaps.

In short, the states and the federal government are already extensively regulating groundwater—and even the very injection wells at issue in this case. There was no need for the Ninth Circuit to stretch the CWA NPDES permit program to cover this area. And doing so promises duplicative and costly groundwater regulation.

II. The Ninth Circuit's Expansion Of The Clean Water Act Creates Significant Uncertainty

"[C]larity and predictability" are critical in the CWA context because the combination of an "uncertain reach of the Clean Water Act and the draconian penalties imposed for * * * violations" cannot be tolerated. *Sackett* v. *EPA*, 566 U.S. 120, 132-133 (2012) (Alito, J., concurring). The regulatory chaos that would follow if the decision below is upheld would create uncertainty and impose exorbitant costs on the public.

A. Under the court of appeals' decision, regulated individuals and entities will be forced to navigate a labyrinth of rules with pitfalls at every turn. The first question they face is whether a given activity that may affect groundwater now requires a point source permit. The potential reach of the decision below is sweeping. One reason is that the CWA's definition of "pollutant" is extremely broad. That term includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). Thus, any release of "rock," "sand," or even "heat[ed]" water into groundwater could potentially fall within the Ninth Circuit's expanded point source program.

The court of appeals' standard, paired with this broad definition of "pollutant," could encompass a wide swath of

activities. Septic systems—both large commercial ones and the ubiquitous personal ones that dot rural America—could qualify, requiring a federal permit and federal oversight at countless private properties. Municipal storm sewers, brownfield cleanup sites, and other locations already covered by other federal and state regulatory regimes could also enter the point source program's crosshairs. Various kinds of basins and impoundments, like those employed in agricultural operations or for stormwater control, could face CWA regulation under this judicially expanded version of the statute as well, if they employ infrastructure that qualifies as a point source. And that is just the beginning of a much longer list, for it takes little creativity to describe a host of personal and commercial activities as "fairly traceable" to "more than *de minimis*" impacts on groundwater.

Moreover, to avoid the "crushing" penalties levied for even "inadvertent" unpermitted discharges, *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring), every company and individual that is engaged in any of these activities must determine: (1) whether their activities could qualify as a point source; (2) if so, whether any pollutants that migrate through the groundwater to navigable waters are "fairly traceable" to their releases; and (3) whether those pollutants reach navigable waters at "more than *de minimis*" levels. Determining whether a particular release into groundwater meets the latter two of those elements will require hiring experts to conduct a complicated analysis to assess the level of hydrological connectivity between the particular body of groundwater and a specific body of surface water. Both sophisticated commercial enterprises and rural residents alike will have to bear the steep financial cost of such an analysis because it is the only way to determine whether activity that affects groundwater comes within the CWA point source pro-

gram's expanded scope. To make matters worse, because the science is imperfect and the "fairly traceable" and "more than *de minimis*" standards are imprecise, even the most conscientious actor will not obtain anything approaching certainty regarding whether he is subject to a strict liability permitting regime that carries civil and criminal penalties for noncompliance.

The regulated individual or entity's task becomes even more onerous after that initial step. If, for example, a septic-system operator decides that the results of its analysis are concerning enough to justify seeking a CWA permit, it faces a daunting road ahead. Obtaining permits under the CWA is "arduous, expensive, and long" at the best of times. *Id.* at 1815. The challenges confronting a groundwater applicant would be even more severe.

That is because the point source permitting program is designed for discrete discharges into navigable waters. It imposes "effluent limitations" on "discernible, confined and discrete conveyance[s]," 33 U.S.C. §§ 1311, 1362(14), and requires precise effluent measurement and monitoring. See generally EPA, NPDES Permit Writer's Manual, EPA-833-K-10-001 (Sept. 2010) ("NPDES Permit Writer's Manual").[6] The types of measurements and monitoring that the point source permitting program demands are infeasible at best and impossible at worst in the context of effluent that migrates through groundwater. For example, point source permittees are required to measure the "mass * * * for each pollutant limited in the permit" and the "volume of effluent discharged from each outfall." 40 C.F.R. § 122.44(i). Those requirements make sense as applied to point sources that discharge into navigable waters. Sampling and monitoring of the effluent can occur at the pipe or channel that delivers it to the body of surface water. See NPDES Permit Writer's

[6] https://www.epa.gov/npdes/npdes-permit-writers-manual.

Manual § 8.1.2 (providing guidelines for selecting a monitoring location). But that approach does not work for effluent that migrates through groundwater. There is no pipe or channel from which to monitor and measure. There is instead only a diffuse effluent flow from the groundwater into navigable waters at some later point in time. The measurement and monitoring regime that the permitting program appropriately requires for point sources simply does not fit the very different context presented here. Consequently, the point source permitting program is poorly equipped to handle the flood of groundwater permits that may soon inundate it.

Assuming our hypothetical operator somehow gets a permit despite those difficulties, the cost of compliance can also be prohibitive, particularly when viewed in conjunction with the compliance costs for the other federal, state, and local regulatory programs that already protect groundwater. And failure to obtain a permit could preclude land use or business operations and lead to "crushing" financial or even criminal penalties for unpermitted discharges. *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring).

Given the uncertainty inherent in this process and the draconian penalties for releases that are later determined to have required a permit, risk-averse individuals and businesses will often err on the side of caution and seek a permit no matter the cost. The result will be a wasteful allocation of significant resources into obtaining thousands, if not millions, of NPDES permits that may ultimately be unnecessary even under the Ninth Circuit's view.

Thus, at best, the Ninth Circuit's interpretation would force a host of new individuals and businesses to protectively seek burdensome and possibly duplicative CWA permits. At worst, it would discourage and restrict environmentally sound practices.

B. Even before the decision below, the point source permitting program imposed staggering costs in the pursuit of its laudable goals. According to EPA estimates, the public spends over 26 million labor hours and over $1 billion annually in applying for and complying with point source permits. EPA, ICR Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), OMB Control No. 2040-0004, EPA ICR No. 0229.22, at 23, tbl. 12.1 (Sept. 2017).[7] If the Ninth Circuit's dramatically expanded version of the program stands, those costs can be expected to rise exponentially. And that is before factoring in the opportunity costs of businesses rejecting otherwise profitable and economically efficient endeavors because of the newly added compliance costs or the risk of inadvertent violations of the court of appeals' amorphous standard.

It is the province of Congress to weigh these significant costs against any perceived gains from extending the CWA's point source program to groundwater, taking into account existing federal and state protections. Congress has thus far determined that the costs and benefits weigh against extending the point source program in that manner. It is not the role of federal courts to second-guess Congress on that distinctly legislative choice. The Court should restore the longstanding limits on the reach of the CWA and its point source permitting program that the statute's text, intent, and history demand.

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[7] https://www.regulations.gov/document?D=EPA-HQ-OW-2008-0719-0110.

III. THE COURT'S REJECTION OF A SIMILAR NON-LEGISLATIVE EXPANSION OF REGULATORY AUTHORITY IN *UARG* COMPELS THE SAME RESULT HERE

The Ninth Circuit's extravagant extension of the CWA also cannot stand because "it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Util. Air Regulatory Grp.* v. *EPA ("UARG")*, 573 U.S. 302, 324 (2014).

That is precisely the basis on which this Court rejected a similarly disruptive interpretation of the Clean Air Act in *UARG*. At issue was EPA's claim that it possessed the theretofore unrecognized "power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide" because they emitted greenhouse gases. *Ibid.* Despite applying the deferential *Chevron* framework, the Court ultimately rejected EPA's reading of the statute as unreasonable. *Id.* at 321. The Court explained that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." *Id.* at 324 (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Instead, the Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Ibid.* (quoting *Brown & Williamson,* 529 U.S. at 160). Because Congress had not amended the Clean Air Act to provide such a clear regulatory authorization to EPA, the Court rejected EPA's interpretation as unreasonable. See *id.* at 321-324.

That reasoning applies here. Much as in *UARG*, the Ninth Circuit's massive expansion of the CWA would

"radically transform th[e] [NPDES] program[] and render [it] unworkable." *Id.* at 320. And in another parallel to *UARG*, the claimed source for that new power to regulate "'a significant portion of the American economy'" is a "long-extant statute" that no court of appeals had previously read to extend to groundwater. *Id.* at 324 (quoting *Brown & Williamson,* 529 U.S. at 159).

In stark contrast to *UARG*, however, no deference of any kind attends the Ninth Circuit's interpretation of the CWA. Indeed, EPA has explicitly rejected the court of appeals' view of the statute, "conclud[ing] that the Act is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under [the point source provisions] of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water." 84 Fed. Reg. 16810, 16810 (Apr. 23, 2019). Without the counterweight of *Chevron* deference, *UARG*'s reasoning applies with even greater force here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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