Clean Water Act — Review of Administrative Action — Agency Interpretation — County of Maui v. Hawaii Wildlife Fund

In an attempt to resolve a years-long dispute over the scope of the Clean Water Act's[1] (CWA) point source pollution permitting program, the Environmental Protection Agency published an "Interpretive Statement" that spanned seventeen pages of the Federal Register.[2] But when the Supreme Court weighed in exactly one year later, it looked past the Statement, instead turning its focus to a single word in the statute: "from."[3] Last Term, in *County of Maui v. Hawaii Wildlife Fund*,[4] the Supreme Court held that the CWA requires a permit when the addition of pollutants into navigable waters is the functional equivalent of direct discharges from a point source.[5] In doing so, the Court declined to defer to the EPA's interpretation of the Act's relevant provisions,[6] despite indications that it should have given *Chevron*[7] deference closer consideration. The Court placed importance on the parties' failure to invoke *Chevron* but did so in a way that perhaps offers an alternative to the binary, waiver-based conception of such scenarios that has so far prevailed in the academy and the lower federal courts.

The Lahaina Wastewater Reclamation Facility (LWRF), operated by the County of Maui, Hawai'i (the County), filters and disinfects approximately four million gallons of sewage each day.[8] The facility releases treated waste into four injection wells, which terminate in a groundwater aquifer.[9] In 2012, after environmental assessments suggested that pollution from the facility was reaching the nearby Pacific Ocean,[10] a group of nonprofit environmental organizations brought suit against the County.[11] The plaintiffs alleged that, absent a National Pollutant Discharge Elimination System (NPDES) permit, LWRF's pollutant emissions violated the CWA.[12] After the district court denied the

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[1] 33 U.S.C. § 1251–1388.

[2] Interpretive Statement on the Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810. (Apr. 23, 2019) (to be codified at 40 C.F.R. pt. 122) [hereinafter Interpretive Statement].

[3] *See* County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1470 (2020) ("The linguistic question here concerns the statutory word 'from.'").

[4] 140 S. Ct. 1462.

[5] *Id.* at 1468.

[6] *Id.* at 1474.

[7] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[8] Haw. Wildlife Fund v. County of Maui, 24 F. Supp. 3d 980, 983 (D. Haw. 2014).

[9] *Id.* at 983–84. An aquifer is a water-bearing layer of permeable rock. *Aquifer*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/aquifer [https://perma.cc/5VW5-SU8N].

[10] *County of Maui*, 140 S. Ct. at 984. The County had known since the facility was designed in 1973 that the wastewater it generated would reach the ocean. Haw. Wildlife Fund v. County of Maui, 886 F.3d 737, 742 (9th Cir. 2018).

[11] Complaint at 2, *County of Maui*, 24 F. Supp. 3d 980 (D. Haw. 2014) (No. 12-cv-00198).

[12] *Id.*

County's motion to dismiss,[13] researchers released the results of a tracer dye study that "conclusively demonstrate[d]" a hydrological connection between two LWRF injection wells and nearby coastal waters.[14]

In 2014, the district court granted the plaintiffs' motion for partial summary judgment with respect to those two wells,[15] finding that the County's "addition of [a] pollutant to navigable waters from [a] point source"[16] constituted a prohibited "discharge" under the CWA.[17] Then–Chief Judge Mollway rejected the County's contention that liability required finding that the groundwater comprised part of the "navigable waters."[18] Relying on Justice Scalia's plurality opinion in *Rapanos v. United States*,[19] the court also found that the groundwater need not itself be a point source in order to be a regulable conduit of pollution emanating from an initial point source.[20] Given the tracer dye study evidence as well as the County's admission,[21] the court found it "undisputed" that pollutants from the LWRF were reaching the ocean via groundwater.[22] Because the County did not have an NPDES permit, it had violated the CWA.[23]

The Ninth Circuit affirmed.[24] Writing for the panel, Judge Dorothy Nelson[25] echoed the district court's finding that an emission need not be conveyed through a point source to be a regulable "discharge,"[26] but

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[13] Haw. Wildlife Fund v. County of Maui, No. 12-00198, 2012 WL 3263093, at *1 (D. Haw. Aug. 8, 2012).

[14] CRAIG R. GLENN ET AL., LAHAINA GROUNDWATER TRACER STUDY, at ES-3 (2013).

[15] *County of Maui*, 24 F. Supp. at 983.

[16] *Id.* at 986 (quoting 33 U.S.C. § 1362(12)).

[17] *Id.* at 1000.

[18] *Id.* at 993–94. The court did, however, hold in the alternative that the groundwater could be considered navigable waters, as it had a hydrologic connection to the ocean, *id.* at 1001 (citing N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007)), and "significantly affect[ed] the physical, chemical and biological integrity of the receiving waters," *id.* at 1004. *See id.* at 994.

[19] 547 U.S. 715, 743 (2006) (plurality opinion).

[20] *County of Maui*, 24 F. Supp. 3d at 999 (quoting *Rapanos*, 547 U.S. at 744 (plurality opinion)). The court noted that in this case, the groundwater did, in fact, meet the point source criteria. *Id.* ("Any conveyance that transmits such a high proportion of a pollutant from one place to another is consistent with being 'confined and discrete' . . . ." (quoting 33 U.S.C. § 1362(14))).

[21] *Id.* at 998.

[22] *Id.* at 1000.

[23] *Id.* In 2015, the district court granted the plaintiffs' motion for partial summary judgment with respect to the other two wells at the LWRF. Haw. Wildlife Fund v. County of Maui, No. 12-00198, 2015 WL 328227, at *3, *7 (D. Haw. Jan. 23, 2015). The district court also denied the County's motion for summary judgment, finding no due process violation where the CWA itself provided the requisite notice "by listing the elements of a violation" and the plaintiffs had given notice prior to filing suit. Haw. Wildlife Fund v. County of Maui, No. 12-00198, 2015 WL 3903918, at *4–5 (D. Haw. June 25, 2015). The Ninth Circuit affirmed on this issue. Haw. Wildlife Fund v. County of Maui, 886 F.3d 737, 752 (9th Cir. 2018).

[24] Haw. Wildlife Fund v. County of Maui, 881 F.3d 754, 758 (9th Cir.), *amended and superseded on denial of reh'g en banc*, 886 F.3d 737.

[25] Judge Nelson was joined by Judges Schroeder and McKeown.

[26] *See County of Maui*, 886 F.3d at 749.

otherwise set aside its standard, noting that liability should not be triggered by the discharge of pollutants into navigable water "*regardless of how they get there*."[27] Instead, Judge Nelson held liability was proper where pollutants are "fairly traceable from the point source . . . such that the discharge is the functional equivalent of a discharge into the navigable water" and "the pollutant levels reaching navigable water are more than *de minimis*."[28] As a result, the court found it unnecessary to rule on whether groundwater could constitute either a point source or navigable waters.[29] The County's petition for rehearing en banc was denied.[30]

The Supreme Court vacated and remanded.[31] Writing for the Court, Justice Breyer[32] considered — and rejected as "too extreme" — each of the four readings of the CWA suggested by the parties, amici, and lower courts.[33] Justice Breyer found that the Ninth Circuit's "fairly traceable" standard gave the EPA too much authority and could generate liability in "bizarre" and "surprising" circumstances.[34] The Court noted that the CWA's legislative history and the broader statutory scheme reflected Congress's desire to leave the bulk of groundwater regulation to the states, a notion confirmed by the EPA's "longstanding regulatory practice."[35] The Court similarly rejected Hawai'i Wildlife Fund's proposed addition of a proximate cause requirement, which did little to narrow the EPA's authority.[36]

In contrast, Justice Breyer suggested that the County's proposed standard — that a point source must be the "means-of-delivery" of pollution to navigable waters[37] — was too narrow.[38] The Court found that it created a "serious loophole,"[39] allowing regulated parties to avoid

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[27] *Id.* (quoting *County of Maui*, 24 F. Supp. 3d at 1000 (emphasis added)).

[28] *Id.*

[29] *See id.* at 746 n.2, 748.

[30] *Id.* at 741. In denying this petition, the Ninth Circuit amended its original opinion. *See id.*

[31] *County of Maui*, 140 S. Ct. at 1478. Commentators' analyses suggest that despite the vacatur, the Court's newly announced standard should be favorable to respondents on remand. *See, e.g.*, Adam Liptak, *Clean Water Act Covers Groundwater Discharges, Supreme Court Rules*, N.Y. TIMES (Apr. 23, 2020), https://nyti.ms/2KtQO4G [https://perma.cc/T7ZZ-8KZA] (calling the decision "on balance a victory for environmental groups"); Lila Fujimoto, *Supreme Court Decides Against County*, MAUI NEWS (Apr. 24, 2020), https://www.mauinews.com/news/local-news/2020/04/supreme-court-decides-against-county [https://perma.cc/V6HS-WPDH].

[32] Justice Breyer was joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, and Kavanaugh.

[33] *County of Maui*, 140 S. Ct. at 1476. The Court also considered and rejected the standards put forward by the dissenting Justices. *See id.* at 1475–76.

[34] *Id.* at 1471.

[35] *Id.* at 1472; *see id.* at 1471–72.

[36] *Id.* at 1470–71.

[37] *Id.* at 1473.

[38] *See id.*

[39] *Id.* at 1474.

permitting requirements by simply routing pollution through "at least some groundwater" before it reaches navigable waters.[40] The Court likewise dismissed the interpretation put forward by the EPA[41] — and embraced by the United States as amicus curiae[42] — that all releases into groundwater should be exempt from permitting.[43] Justice Breyer noted that no party had requested *Chevron* deference to this interpretation and found that it commanded little respect under *Skidmore*.[44]

The Court held instead that the CWA required a permit for point source pollution when there is a direct discharge or the *functional equivalent* of a direct discharge into navigable waters.[45] According to Justice Breyer, the appropriate liability standard turned on the proper interpretation of the word "from" in the CWA's statutory definition of "discharge of a pollutant"[46]: "[A]ny addition of any pollutant to navigable waters *from* any point source."[47] With Congress's not-too-broad, but not-too-narrow statutory purpose supplying crucial context,[48] the functional equivalency test offered the Goldilocks reading. To determine what constitutes a functional equivalent of a direct discharge, Justice Breyer set forth seven relevant factors, noting that the amount of time and distance over which pollution travels would be "the most important factors in most cases."[49] Justice Breyer suggested that the common law method and additional guidance from the EPA would ultimately "refine[]" the standard, mitigating the administrative difficulties inherent in operationalizing these factors as a balancing test.[50]

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[40] *Id.* at 1473; *see id.* at 1474.

[41] The EPA published a notice initiating this Interpretive Statement shortly after the Ninth Circuit's decision in this case. *See* Interpretive Statement, *supra* note 2.

[42] *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 6–8, 19, 33–35, *County of Maui*, 140 S. Ct. 1462 (2020) (No. 18-260). The United States appeared as amicus curiae for Hawai'i Wildlife Fund in the Ninth Circuit before switching sides. *See* Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees, Haw. Wildlife Fund v. County of Maui, 881 F.3d 754 (9th Cir. 2018) (No. 15-17447).

[43] *County of Maui*, 140 S. Ct. at 1474–75.

[44] Skidmore v. Swift & Co., 323 U.S. 134 (1944); *County of Maui*, 140 S. Ct. at 1474 (citing *Skidmore*, 323 U.S. at 139–40). The Court labeled the interpretation "neither persuasive nor reasonable," *id.*, a phrasing that evokes both the reasonableness standard of *Chevron*, 467 U.S. 837, 844 (1984), and the persuasiveness standard of *Skidmore*, 323 U.S. at 140.

[45] *County of Maui*, 140 S. Ct. at 1468.

[46] *See id.* at 1469–70.

[47] 33 U.S.C. § 1362(12)(A) (emphasis added).

[48] Justice Breyer noted repeatedly that the word "from" — though broad in scope — necessarily takes its meaning from its context. *See County of Maui*, 140 S. Ct. at 1470–71, 1473–75.

[49] *Id.* at 1477; *see id.* at 1476–77. The other five factors were: the material through which the pollution travels; the extent of dilution or change in the pollution as it travels; the proportion of emitted pollution that reaches navigable waters; the manner in which the pollution enters the navigable waters; and the degree to which the pollution maintains its identity. *Id.* (noting these were "just some of the factors that may prove relevant," *id.* at 1476).

[50] *See id.* at 1477.

Justice Kavanaugh, who joined the majority opinion in full, authored a concurrence, in part to emphasize that the *Rapanos* plurality's interpretation of the CWA as covering discharges that passed "through conveyances" directly supported the Court's holding.[51] Justice Kavanaugh also invoked the *Rapanos* plurality's recognition that the CWA itself "does not establish a bright-line test" for what constitutes a discharge, asserting that the statutory language, rather than the Court's opinion, was to blame for any resultant shortcomings of administrability.[52]

Justice Thomas dissented.[53] Finding the majority's fixation on the word "from" to be misplaced, Justice Thomas looked instead to the statutory word "addition."[54] Marshalling dictionary definitions, Justice Thomas suggested that the use of "addition" necessarily "exclude[d] anything other than a direct discharge," as it implied the direct combination of one thing with another.[55] Justice Thomas noted that any reduction in regulatory authority caused by his approach would be "consonant with the scope of Congress's power" by tying that power more closely to the CWA's presumptive Commerce Clause authority.[56]

Justice Alito dissented separately, contending that the Court's functional equivalency reading contravened "clear statement" rules with respect to congressional actions that "impinge[] on the States' traditional authority"[57] or "assign to an agency decisions of vast 'economic and political significance.'"[58] Like Justice Thomas, Justice Alito would have held that a permit is required only for direct discharges,[59] though Justice Alito's definition of "direct discharge" would have included instances where a second point source serves as an intermediary between an initial point source and navigable waters.[60] Justice Alito insisted that his interpretation would not create a loophole, as "point source" should be

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[51] *Id.* at 1478 (Kavanaugh, J., concurring) (quoting Rapanos v. United States, 547 U.S. 715, 743 (2006) (plurality opinion)).

[52] *Id.* Justice Kavanaugh also deflected Justice Thomas's critique that the Court had failed to "commit" to "which factors are the most important," *id.* (quoting *id.* at 1481 (Thomas, J., dissenting)), reiterating the Court's identification of time and distance as "the most important factors in most cases," *id.* (quoting *id.* at 1477 (majority opinion)).

[53] *Id.* at 1479 (Thomas, J., dissenting). Justice Thomas was joined by Justice Gorsuch.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 1481.

[57] *Id.* at 1490 (Alito, J., dissenting).

[58] *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[59] *Id.* at 1486.

[60] *Compare id.* at 1487 ("If [the discharge of a pipe qualifying as a point source] goes directly into another point source and that point source discharges directly into navigable waters, there is a direct discharge . . . and a permit is needed."), *with id.* at 1480 (Thomas, J., dissenting) ("When pollutants are released from a point source to another point source . . .[, o]ne would not naturally say that the pollutants are added to the navigable waters from the original point source.").

read broadly, encompassing many of the conveyances — including surface water — that can carry pollution to navigable waters.[61]

In declining to apply *Chevron*, the Court credited the parties' and amici's failure to explicitly seek such deference, seemingly wading — for the first time — into a debate over whether litigating positions should weigh on a court's application of *Chevron* deference. Justice Breyer appeared to accord this silence dispositive weight, allowing it to overcome what would otherwise have been a strong case to apply *Chevron*. Yet, rather than examining this noninvocation through the lens of waiver — as lower courts and academics have — the *County of Maui* Court appeared to endorse a more freewheeling, standard-like approach. Whether or not he intended his analysis to be read as such, Justice Breyer offered a plausible middle-ground solution[62] to the waiver debate, one faithful to *United States v. Mead Corp.*'s[63] guiding principle of "tailor[ing] deference to variety."[64]

Under the familiar two-step analysis laid out in *Chevron*, courts defer to reasonable agency interpretations of ambiguous statutory provisions.[65] And under *Chevron* "Step Zero" — a threshold inquiry that precludes the application of *Chevron* in certain instances, most notably under the test laid out in *Mead* — courts probe whether Congress authorized an agency to act with the force of law in the relevant instance.[66]

Here, there was little question that the statutory provision at issue was ambiguous,[67] and no question that the EPA had put forth an interpretation of the disputed provision.[68] Yet the Court found *Chevron* inapplicable without so much as a discussion of the familiar Step-Zero factors.[69] Instead, it merely noted that neither the parties nor the United States as amicus curiae had requested deference to the EPA's interpretation.[70] In doing so, the Court appeared to gesture at a concept

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[61] *Id.* at 1487–88 (Alito, J., dissenting). Justice Alito also emphasized that states maintained the authority to regulate discharges from non-point sources. *Id.* at 1488.

[62] Other commentators have theorized a *different kind* of "middle ground" approach to waiver. *See* James Durling & E. Garrett West, Essay, *May* Chevron *Be Waived?*, 71 STAN. L. REV. ONLINE 183, 195–96 (2019) ("Courts should be *less* likely to find arguments waived as cross-system harms increase, but *more* likely to do so as the adjudicative costs for the courts increase." *Id.* at 196.).

[63] 533 U.S. 218 (2001).

[64] *Id.* at 236.

[65] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[66] *Mead*, 533 U.S. at 227. Without such an authorization, agency interpretations should be granted a lesser degree of deference under *Skidmore*. *Id.* at 235.

[67] *See County of Maui*, 140 S. Ct. at 1478 (Kavanaugh, J., concurring) ("The source of vagueness is Congress' statutory text . . . .").

[68] *See id.* at 1474 (majority opinion).

[69] *See id.*

[70] *See id.* Justice Thomas treated this element of the deference analysis similarly in his dissent. *See id.* at 1482 (Thomas, J., dissenting).

that has come to be known as "*Chevron* waiver"[71] — the notion that an agency interpretation is not entitled to *Chevron* deference when the relevant party does not request it.[72]

Chevron waiver seemed to be at issue here especially because if the Court had followed its traditional Step-Zero jurisprudence, it should have found the interpretation to be within *Chevron*'s domain. Although labeled an "Interpretive Statement," the EPA's action was the product of voluntary[73] notice-and-comment procedures.[74] While *Mead* does not categorically require that *Chevron* deference be given to the fruits of these procedures, it comes close enough that scholars have referred to notice-and-comment as a "safe harbor[]" under *Mead*.[75] Indeed, the only other court to consider whether this Interpretive Statement carried the force of law under *Mead* found that it did.[76]

Although there were some non-waiver-related reasons to find *Chevron* inapplicable, the weight of the analysis cut in favor of applying the doctrine. Hawai'i Wildlife Fund and its amici argued that interpretive statements are not entitled to *Chevron* deference under *Mead*.[77] In

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[71] Although the parties' and amici's behavior here — silence with respect to *Chevron* — might logically be considered forfeiture, rather than waiver, the literature has come to refer to both non-invocation and intentional abandonment of *Chevron* as "*Chevron* waiver." *See* Durling & West, *supra* note 62, at 183 n.2 (using "'waiver' as a shorthand for both concepts").

[72] While it is not uncommon for the Court to fail to discuss *Chevron*, it is unheard of for the Court to explicitly cite the parties' silence in doing so. *See* Kristin E. Hickman, *Justice Gorsuch and Waiving* Chevron, YALE J. ON REG.: NOTICE & COMMENT (Mar. 3, 2020), https://www.yalejreg.com/nc/justice-gorsuch-and-waiving-chevron [https://perma.cc/667P-SCHS].

[73] *See* 5 U.S.C. § 553(b)(3)(A) (exempting "interpretative rules" from notice-and-comment requirements).

[74] The EPA provided notice, received comments, responded to those comments at length, and published its Interpretive Statement in the Federal Register. *See* Interpretive Statement, *supra* note 2; *see also* 5 U.S.C. § 553 (listing general procedural requirements for rulemaking).

[75] *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1468 (2005) (quoting United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting)); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 307 n.160 (2010); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 350 (2003). *But see* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (contending that notice-and-comment rulemaking is "neither a necessary nor a sufficient condition for according *Chevron* deference"); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 814 (2002) ("I do not think the [*Mead*] Court was saying . . . that if an *agency* adopts notice-and-comment . . . procedures on its own authority, its interpretation is presumptively entitled to *Chevron* deference.").

[76] *See* Conservation L. Found., Inc. v. Longwood Venues & Destinations, Inc., 422 F. Supp. 3d 435, 453 (D. Mass. 2019), *appeal docketed*, No. 20-1024 (1st Cir. Jan. 7, 2020) (concluding that "the Interpretive Statement passes *Chevron* Step Zero"). The court went on to defer to the EPA's interpretation under *Chevron*. *Id.* at 458.

[77] Brief for Respondents at 42, *County of Maui*, 140 S. Ct. 1462 (2020) (No. 18-260); Brief for Amici Curiae Law Professors in Support of Respondents at 29, *County of Maui*, 140 S. Ct. 1462 (2020) (No. 18-260).

Long Island Care at Home, Ltd. v. Coke,[78] however, the Court rejected a similar argument, ultimately finding *Chevron* applicable because the interpretive rule at issue underwent "full notice-and-comment procedures."[79] Respondents might also have pointed to the Interpretive Statement's failure to directly invoke *Chevron*[80] or to its disclaimer that the Agency would not seek to apply this interpretation in the Fourth and Ninth Circuits.[81] But such arguments overlook the Statement's invocation of *National Cable Telecommunications Ass'n v. Brand X Internet Services*,[82] which held that an agency is bound by a prior judicial interpretation only where a court has deemed its reading to be the only legally permissible interpretation.[83] The EPA invoked *Brand X* to argue that it *could* override prior contrary interpretations by circuit courts,[84] a result only possible if the Agency's interpretation is later awarded *Chevron* deference by another court,[85] thus signaling the Agency's intent to act with the force of law. Perhaps most tellingly, none of these Step-Zero arguments were addressed by the Court; it cited only the parties' and amici's[86] silence in refusing to apply *Chevron*.[87]

As the Court's sole stated rationale, this silence must have played a role in deciding the interpretation fell outside *Chevron*'s domain. At the same time, Justice Breyer's treatment of this silence can hardly be considered a straightforward endorsement of the pro-waiver position.[88]

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[78] 551 U.S. 158 (2007).

[79] *Id.* at 173; *see Longwood Venues*, 422 F. Supp. 3d at 452–53 (relying on this point in finding the Interpretive Statement passed Step Zero).

[80] *Cf.* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 23 (D.C. Cir. 2019) (per curiam) (noting that a rule's "invocation of *Chevron* by name . . . is powerful evidence of its intent to engage in an exercise of interpretive authority warranting *Chevron* treatment"), *cert. denied*, 140 S. Ct. 789 (2020).

[81] Interpretive Statement, *supra* note 2, at 16,812.

[82] 545 U.S. 967 (2005).

[83] *Id.* at 982.

[84] Interpretive Statement, *supra* note 2, at 16,812 n.1.

[85] *See Brand X*, 545 U.S. at 982.

[86] One commentator has argued that the case for waiver is weaker where an agency's non-invocation of *Chevron* comes when it appears as amicus curiae. *See* Jeremy D. Rozansky, Comment, *Waiving* Chevron, 85 U. CHI. L. REV. 1927, 1940 n.79 (2018). This argument is premised on assumptions that "one of the parties asserts that *Chevron* deference is merited" and that "[a]mici generally have a more attenuated stake." *Id.* Here, however, no party sought deference and the Agency seemed to have a clear stake in the outcome, *see* Interpretive Statement, *supra* note 2, at 16,812 (noting that the Interpretive Statement was issued to "provide[] necessary clarity" given the "split in the federal circuit courts"), suggesting that waiver was at play in this instance despite the Agency's status as amicus curiae rather than as a party.

[87] *See County of Maui*, 140 S. Ct. at 1474. Of course, the Court did suggest in its *Skidmore* analysis that the Agency's interpretation was "neither persuasive nor reasonable," *id.*, suggesting that it might have rejected the EPA's interpretation under *Chevron* Step Two.

[88] At least one commentator, however, thought that the Court had straightforwardly invoked *Chevron* waiver. *See* David Zaring (@ZaringDavid), TWITTER (Apr. 23, 2020, 10:10 AM), https://twitter.com/ZaringDavid/status/1253355642938707974 [https://perma.cc/94KL-Y7FD] ("[*County of Maui*] means that Chevron deference - a standard of judicial review - can be waived if the agency

Parties' silence on *Chevron* has become a live and contested issue in the circuits, with the D.C. Circuit flatly dismissing its importance in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*,[89] and the Tenth Circuit embracing it in *Hays Medical Center v. Azar*.[90] In these circuits as well as in some academic discussions, the failure to invoke *Chevron* has been examined exclusively through the lens of waiver.[91] Yet when presented with the opportunity to weigh in directly on this waiver conception, the Supreme Court instead chose to deny certiorari in *Guedes*.[92] And here, though it accorded dispositive weight to the parties' and amici's silence, the Court did not so much as gesture at the ongoing debate in the lower courts and the academy.

The *County of Maui* Court's engagement with the doctrine, then, seems to eschew the binary waiver framework altogether. Its seemingly ad hoc handling of the noninvocation suggests an alternative approach: treating an agency's silence with respect to *Chevron* as another factor to cast into the Step-Zero equation. This standard-oriented conception aligns with Justice Breyer's preferred brand of deference analysis, which combines factors traditionally associated only with *Mead*, *Chevron*, or *Skidmore* together into a single inquiry of "whether Congress would want a reviewing court to defer to the agency interpretation at issue."[93] Justice Breyer significantly expanded the universe of relevant deference factors at Step Zero in *Barnhart v. Walton*[94] and again in *Long Island Care at Home*,[95] "muddying the relative clarity" of the Court's Step-Zero jurisprudence.[96] The idea that the failure to request deference should be relevant, but not necessarily dispositive in all cases, represents another extension of this capacious understanding of Step Zero and of the deference inquiry more broadly.[97]

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fails to ask for it."); *see also* Aaron L. Nielsen, *D.C. Circuit Review — Reviewed: More* Chevron *Waiver*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 24, 2020), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-more-chevron-waiver/ [https://perma.cc/4SUM-8GS8].

89 920 F.3d 1, 23 (D.C. Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 789 (2020).

90 956 F.3d 1247, 1264 n.18 (10th Cir. 2020).

91 *See id.*; *Guedes*, 920 F.3d at 23; Durling & West, *supra* note 62, at 195; *see also* Rozansky, *supra* note 86, at 1959 (arguing for "prohibition" of waiver because it "undercuts the goods provided by rigorous ex ante agency procedures"); Note, *Waiving* Chevron *Deference*, 132 HARV. L. REV. 1520, 1520 (2019) (arguing waiver is "contrary to both law and sensible policy").

92 140 S. Ct. 789, 789 (2020). Justice Gorsuch concurred in the denial of the petition, but disapproved of the D.C. Circuit's *Chevron* waiver analysis. *Id.* at 790 (Gorsuch, J., statement respecting the denial of certiorari) (describing the court's analysis as "plac[ing] an uninvited thumb on the scale in favor of the government").

93 Kristin E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527, 541 (2014); *see id.* at 541–44.

94 *See* 535 U.S. 212, 222 (2002).

95 *See* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173–74 (2007).

96 Hickman, *supra* note 93, at 536.

97 *But see* Kristin E. Hickman, County of Maui *&* Chevron *Waiver — Let's Not Get Carried Away*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 27, 2020), https://www.yalejreg.com/nc/county-of-

While some have suggested that consideration of the government's failure to request deference would fit uncomfortably into Step Zero,[98] this critique seems to stem from an incomplete understanding of the universe of contexts in which a "waiver" might arise. This argument appears to assume that an agency would "waive deference" only when it seeks to reverse existing policy.[99] Here, however, there was no indication the government sought to reverse its policy; the interpretation at issue was promulgated under the current administration, and the government's briefing repeatedly parroted the Interpretive Statement's analysis.[100] This suggests a very different motivation — perhaps a purposeful abdication of *Chevron*'s grant of the power to make "policy choices in the interpretation of Congress's handiwork."[101] While this consideration may not comport precisely with the traditional Step-Zero inquiry, it certainly speaks to one of the underlying justifications of *Chevron* itself — the superior political accountability of the executive branch[102] — and is thus suitable for consideration at this threshold stage.

Although the Court's engagement with the parties' silence with respect to *Chevron* was brief, it may prove consequential. The Court's treatment of non-invocation of *Chevron* outside the waiver context offers a way forward for courts considering the government's failure to seek deference at Step Zero, rather than as a siloed waiver question. The *County of Maui* Court's approach offers a flexible reconceptualization of the doctrine that could prove especially useful if the government continues to decline to seek *Chevron* deference in more varied contexts.

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maui-chevron-waiver-lets-not-get-carried-away [https://perma.cc/VVC2-TVMD] (cautioning against reading too much into the Court's approach, as "the Justices may disagree over how these standards work . . . but still agree to accept or reject an agency's particular statutory interpretation").

98 *See* Rozansky, *supra* note 86, at 1956–57.

99 *See id.* at 1944; *see also* Durling & West, *supra* note 62, at 193.

100 *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 42, at 8, 19, 24, 33. The context of the "waiver" situation in *County of Maui* — an agency or litigant failing to seek deference for a regulation that it promulgated and/or that supports its litigating position — might not be so uncommon. A similar situation played out in the D.C. Circuit in *Guedes*, where the Department of Justice explicitly disclaimed *Chevron* deference for a rule promulgated by the same administration, going so far as to submit at oral argument that it would rather see its rule set aside than upheld under *Chevron*. Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 920 F.3d 1, 21 (D.C. Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 789 (2020). As Professor Gillian Metzger has noted, *Chevron* has become anathema to many conservatives, Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 15 (2017), suggesting that a DOJ policy of blanket *Chevron* waiver might not be unthinkable.

101 *Guedes*, 140 S. Ct. at 790 (Gorsuch, J., statement respecting the denial of certiorari).

102 *See* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1479–81 (2018) (explaining the *Chevron* Court's embrace of this rationale by noting the Court's focus was on *comparative* accountability vis-à-vis the judiciary, while scholarly criticism of it has been focused on absolute measures of accountability).