CA No. 09-30442

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

CORY LEDEAL KING,

Defendant/Appellant.

On Appeal from the United States District Court
for the District of Idaho
(No. 08-cr-00002-BLW, Honorable B. Lynn Winmill)

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Michael Rybak
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

May 13, 2010

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation and the Allied Educational Foundation state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. Neither has a parent corporation or any stock owned by a publicly owned company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

Legislative Materials:

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

INTERESTS OF *AMICI CURIAE*

The interest of *amici curiae* are set forth more fully in the accompanying motion for leave to file this brief. The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. The Allied Educational Foundation is a non-profit charitable foundation based in Englewood, New Jersey.

The Framers of the Constitution sought to maintain a balance of power between federal and state governments as a means of reducing the risks of tyranny and abuse by governments at any level. *Amici* are concerned that the federal government is upsetting that balance by seeking to impose criminal sanctions based on activities far afield from the powers assigned to the federal government under Article I of the Constitution. They are particularly concerned that the federal courts might uphold a felony conviction in a case where federal prosecutors have not been required to demonstrate that the defendant's conduct had any effect on interstate commerce and where no such effect seems plausible.

This brief does not address Mr. King's argument that the district court erred in denying his motions for a mistrial and a new trial. Rather, the brief

focuses on two claims: (1) criminalizing the injection of uncontaminated water into an irrigation well unconnected to sources of drinking water exceeds Congress's power under the Commerce Clause; and (2) the federal government failed to prove that King's statement to an employee of Idaho's Department of Agriculture fell within the jurisdiction of any federal agency.[1]

STATEMENT OF THE CASE

Defendant-Appellant Cory L. King has served since 1986 as manager of Double C Farms, a large farm in a semi-desert area of Idaho. Double C's operations have long been subject to extensive regulation by the State of Idaho. Of direct relevance to this case, a 1971 Idaho statute regulates the construction and use of injection wells within the State. I.C. § 42-3901, *et seq.*

The great majority of Double C's 11,000 acres is devoted to crop farming. Double C makes use of an extensive system of irrigation wells to irrigate its crops. Like many other farms in Idaho, Double C has a long history (a history that precedes 1971) of ensuring an adequate supply of irrigation water by

---

[1] *Amici* agree with King's argument that, in light of the constitutional difficulties raised by this prosecution, the SDWA should be construed narrowly so as to bar the prosecution. But if the Court does not accept that construction of the statute, it should not hesitate to rule that Counts I-IV are impermissible because the prosecution exceeds the federal government's Commerce Clause powers.

injecting surface runoff water into an aquifer that feeds its irrigation wells. The 1971 Idaho statute provided that no injection well should continue to be used after 1973 unless the Director of Idaho's Department of Water Resources had issued a permit for such use. I.C. § 42-3903. It provided further that anyone continuing to use an injection well after 1973 without first obtaining a permit would be guilty of a misdemeanor. I.C. § 42-3911.

Despite the 1971 law, Double C continued to use injection wells – to ensure adequate supplies of irrigation water throughout the growing season – both before and after King began working there in 1986. After Idaho officials became aware in May-June 2005 that Double C was using injection wells, they questioned King about the practice. The record is undisputed that Double C has not injected any runoff water into its irrigation wells since then. The Idaho Department of Water Resources thereafter initiated administrative proceedings against the corporate owner of Double C; the proceedings ended with that owner agreeing to a consent order regarding the injection of runoff water. Idaho did not initiate misdemeanor criminal proceedings under I.C. § 42-3911 against any individuals associated with Double C.

In 2008, nearly three years after Idaho officials became aware of the use of injection wells at Double C, federal prosecutors filed felony charges against

King for his role in the injections. The first four counts of the Superseding Indictment alleged violations of a provision of Part C of the federal Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300h, *et seq.* The provision, § 300h-2(b)(2), makes it a felony punishable by up to three years imprisonment to willfully violate any requirement of a State's underground injection control (UIC) program that has been approved by the federal Environmental Protection Agency (EPA) pursuant to the SDWA. Idaho has an EPA-approved UIC program, and I.C. 42-3903 (which prohibits use of injection wells without a State permit) is a part of that program.[2] Count V of the Superseding Indictment alleged that King violated 18 U.S.C. § 1001(a)(2) by making a false statement of material fact to an employee of Idaho's Department of Agriculture on June 2, 2005; it accused King of falsely denying that a valve and pipe located at "Well No. 5" was being used for underground injections.

Prior to trial, King moved to dismiss the SDWA counts on the ground that

---

[2] Congress did not adopt the SDWA until 1974, several years after Idaho had enacted I.C. § 42-3903's permit requirement. Pursuant to the terms of the SDWA, the State of Idaho (acting through its Department of Water Resources) thereafter chose to seek EPA approval for its UIC program, and EPA granted approval. The federal government has never set up its own UIC program for Idaho; the SWDA provides that EPA should establish such a program only if a State fails to establish or maintain a State-run UIC program that meets SDWA requirements. 42 U.S.C. § 300h-1(c). The indictment did not allege that any *federal* statute or regulation prohibited use of injection wells without a permit.

Congress had exceeded its authority under the Commerce Clause in seeking to regulate the injection of intrastate surface runoff water into intrastate aquifers, where the injections could not reasonably be assumed to have any effect on interstate commerce. He moved to dismiss Count V on the ground that his allegedly false statement did not involve a matter within the jurisdiction of EPA, noting: (1) EPA officials were unaware of King's existence at the time the June 2 statement was made; and (2) the statement was made to an employee of Idaho's Department of Agriculture, which has no jurisdiction over the State's UIC program and does not work with EPA on UIC matters. The trial court denied the motions to dismiss.

Following King's conviction on all five counts, the district court denied his renewed motion for judgment of acquittal. In connection with King's sentencing, the district court determined that the government failed to prove, even by a preponderance of the evidence, that the injected runoff water contained any waste or pollutant. This appeal followed.

SUMMARY OF ARGUMENT

The federal regulatory authority being asserted in this case – imposition of criminal sanctions for the injection of uncontaminated, intrastate water into an irrigation well unconnected to sources of drinking water – exceeds Congress's

power under the Commerce Clause. The trial court refused King's request that prosecutors be required to demonstrate that the injections had at least some effect on interstate commerce. Nor did Congress, in adopting the Safe Drinking Water Act, make any findings that injections of injections of uncontaminated, intrastate water had any such effect. In adopting the SDWA, Congress indicated that it acted for the purpose of maintaining public health with respect to the interstate market for drinking water. But Congress never asserted that drinking water might be endangered if clean water were injected into irrigation wells having no connection to any source of drinking water, and any such assertion is not plausible.

Nor can a federal prohibition against injecting clean water into irrigation wells be salvaged based on a claim that it is part of a larger, comprehensive federal regulatory program. Indeed, the federal government cannot be said to have adopted *any* sort of comprehensive regulation of the use of injection wells. To the extent that Congress has deemed it necessary to regulate injection wells for the purpose of safeguarding drinking water, it has chosen to rely on the States to adopt those regulations. The federal statute under which King was prosecuted did not regulate an entire class of activities; rather, it criminalized only those activities that were prohibited under EPA-approved (but voluntarily adopted)

State UIC programs. Had Idaho chosen not to seek EPA approval for its UIC program, or had it chosen to permit by-rule injection of clean water into irrigation wells, King could not have been prosecuted under 42 U.S.C. § 200h-2(b)(2) unless federal officials in advance had taken the additional step of creating and imposing its own UIC program within Idaho.

Acting within its police powers, Idaho has chosen to prohibit all use of injection wells without a State permit, without regard to whether the injection is for a commercial or a noncommercial purpose. I.C. § 42-3903.[3] But Idaho deems any violations of that prohibition to be no more than a misdemeanor. Moreover, it did not choose to pursue misdemeanor charges in this case, but instead handled the matter civilly and entered into an administrative settlement with the corporate owner of Double C.

Yet despite the absence of evidence that the violation of I.C. § 42-3903 had any effect on interstate commerce, federal prosecutors chose to assert that

---

[3] The relevant commercial or economic activity in this case is the production and distribution of drinking water. Because Double C's injection of runoff water into its irrigation wells was unconnected to that activity, its injection activity is properly classified as noncommercial and noneconomic. Although the classification of Double C's activity as noncommercial in character is irrelevant to whether it was prohibited by I.C. § 42-3903, it is arguably relevant to whether federal government efforts to regulate the activity fall within Congress's Commerce Clause power.

violation as the basis for its federal felony charges against King. In doing so, prosecutors ignored the Founders' understanding that States possess the primary authority for defining and enforcing the criminal law. They "change[d] . . . the sensitive relation between federal and state criminal jurisdiction," *United States v. Enmons,* 410 U.S. 396, 411-12 (1973), by relying on a State statute to charge King with a crime carrying sanctions far more severe than Idaho itself deemed appropriate for violation of its statute. Most importantly, they made no effort to demonstrate that regulation of King's noncommercial activity was necessary to ensure that the federal government could effectively regulate the interstate market for drinking water. Under those circumstances, imposing criminal punishment on King for the injection of uncontaminated, intrastate water into an irrigation well unconnected to sources of drinking water exceeds Congress's power under the Commerce Clause.

The material false statement conviction (Count V) should also be overturned. Prosecutors failed to demonstrate that the false statement involved a "matter within the jurisdiction" of a federal agency. 18 U.S.C. § 1001. The statement at issue was made to an employee of Idaho's Department of Agriculture, which has no regulatory jurisdiction over the State's UIC program. At the time of the statement, EPA had not initiated any sort of investigation of

King or Double C; indeed, EPA officials were not even aware of King's existence. Prosecutors' interpretation of § 1001 would deprive it of all meaningful limitations; under their interpretation, King could have been charged if his allegedly false statement had been uttered to a complete stranger. There is no evidence that Congress intended § 1001 to sweep so broadly, and *amici* are unaware of any instances in which a conviction has been upheld under even remotely similar circumstances.

ARGUMENT

I. THE SDWA EXCEEDS CONGRESS'S COMMERCE CLAUSE POWER TO THE EXTENT THAT IT SEEKS TO REGULATE INJECTION OF CLEAN, INTRASTATE WATER INTO WELLS UNCONNECTED TO SOURCES OF DRINKING WATER

A. The Injection of Clean, Intrastate Water Into Irrigation Wells at Double C Had No Effect on Interstate Commerce

The U.S. Constitution delegates to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." Art. I, § 8, cl. 3. While the powers conferred thereby are undoubtedly quite broad, "even those modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *United States v. Lopez*, 514 U.S. 549, 556-57 (1995). As construed by the district court, the SDWA exceeds those outer limits as applied

to King's activities.

The Supreme Court has identified three broad categories of activity that Congress may regulate or protect under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). Only the third category is at issue here.

Amici recognize that in determining whether activities substantially affect interstate commerce, it is inappropriate to look at the regulated individual's activities in isolation. That the regulated individual's impact on interstate commerce is "trivial by itself" is not sufficient reason for removing him from the scope of federal regulation. *Wickard v. Filburn*, 317 U.S. 111, 127 (1942). Rather, the issue is whether the individual's activities, when combined with the activities of similarly situated individuals, would substantially affect interstate commerce. *Raich*, 545 U.S. at 22. Moreover, the government's evidentiary burden is modest: it need only demonstrate that there exists a "rational basis" for concluding that the individual's activities, "taken in the aggregate, substantially affect interstate commerce." *Id.*

Nonetheless, the evidence is clear in this case that the federal government

cannot meet that undemanding standard. There was no evidence at trial that the water at issue was interstate waters: the runoff water came from intrastate streams, it was injected into an aquifer that does not flow into any other state, and that aquifer has never been used for drinking water – nor was there evidence that it is likely ever to be used for that purpose.[4] The trial court determined that the SDWA did not require prosecutors to introduce such evidence. But the Supreme Court has made clear that the absence of such a "jurisdictional hook" in a federal statute cuts against a finding that a regulated activity substantially affects interstate commerce. *United States v. Morrison*, 529 U.S. 598, 611 (2000) (the absence in a statute of any "express jurisdictional element which might limit its reach to a discrete set" of cases undercuts a claim that Congress was acting pursuant to its power to regulate interstate commerce).

Nor did Congress supply any findings suggesting that it believed that the injection of clean water into irrigation wells has a substantial impact on interstate commerce. The legislative history of the SDWA makes clear that: (1) Congress

---

[4] Prosecutors did not present evidence that water injected into Double C's irrigation wells could have reached a source of drinking water, nor does such evidence exist. The irrigation wells tap into an aquifer that is far deeper than aquifers in the vicinity that are used for drinking water. If injected water were to seep out of the deeper aquifer, it would tend to flow downward, away from the less-deep aquifers.

enacted the statute pursuant to its Commerce Clause powers;[5] (2) its principal purpose was to protect public health with respect to the interstate market for drinking water;[6] and (3) it sought to regulate underground injections of fluids to ensure that the injections did not pollute current or future underground sources of drinking water.[7] The statutory language arguably is broad enough to apply to underground injections of clean water, but nothing in the SDWA suggests that Congress determined that such injections posed a public health hazard or that regulation of such injections was necessary to preserve public health.

The Supreme Court has balked at suggestions that the commerce power encompasses the right to regulate all intrastate waters. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs* ["*SWANCC*"], 531 U.S. 159

---

[5] H.R. REP. NO. 93-1185, 93rd Cong. 2d Sess. (1974) at 8, *reprinted in* 1974 U.S.C.C.A.N. 6454 ("[T]he causes of unhealthy drinking water are national in scope. . . . Underground drinking sources which carry contaminants may cross state boundaries.")

[6] *Id.* at 1 ("The purpose of the legislation is to assure that water supply systems serving the public meet minimum national standards for protection of public health.").

[7] *Id.* at 28 (Section C of the SDWA (covering underground injections) "is intended . . . to assure that drinking water sources, actual and potential, are not rendered unfit by underground injection of contaminants.") *See also id.* at 31 ("The definition of 'underground injection' [42 U.S.C. § 300h(d)(1)] is broad enough to cover any contaminant which may be put below ground level and which flows or moves.").

(2001), EPA sought to exercise jurisdiction under § 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), over intrastate waters: abandoned sand and gravel pits that contained water during a portion of the year. Noting that permitting EPA to regulate those waters "would result in a significant impingement of the States' traditional and primary power over land and water use" and would raise "significant constitutional and federalism questions," the Court invoked the doctrine of constitutional avoidance as its basis for interpreting § 404(a) narrowly and denying EPA its asserted jurisdiction. 531 U.S. at 174. Arguments that King's activities had a substantial impact on interstate commerce are even less plausible here than they were in *SWANCC*, where EPA produced evidence that allowing the sand and gravel pits to be developed would disrupt the habitat of migratory birds.[8]

In arriving at a contrary conclusion, the trial court relied heavily on allegations that the well injections were undertaken in connection with a commercial farming operation. But regardless whether the injections should be deemed commercial or noncommercial in nature, the ultimate question is whether there is a rational basis for concluding that King's activities, in the

[8] *SWANCC* also strongly supports King's argument that the doctrine of constitutional avoidance is applicable here, and should be invoked to interpret the SDWA as inapplicable to his conduct.

aggregate, substantially affected interstate commerce. *Raich*, 545 U.S. at 22.[9] In any event, for purposes of Commerce Clause analysis, King's activities are more appropriately classified as noncommercial in nature. The relevant commercial or economic activity in this case is the production and distribution of drinking water. King and Double C are not engaged in the commercial production or distribution of drinking water. While they may have had an economic motivation for using injection wells (to ensure adequate irrigation water for their crops), that motivation is irrelevant to EPA's assertion of jurisdiction. EPA asserts jurisdiction over *any* underground injection of clean water, even water injected to ensure adequate supplies to irrigate a homeowner's front lawn. It makes little sense to count King's and Double C's operation of a farm as a "plus" factor that supports EPA's assertion of Commerce Clause jurisdiction

[9] Indeed, *Raich* went out of its way to downplay the commercial/ noncommercial distinction. The plaintiffs asserted (and the Ninth Circuit had agreed) that their activity – growing marijuana at home for medicinal purposes – should be deemed noncommercial and thus that the federal government's assertion of regulatory authority should be subject to stricter Commerce Clause scrutiny. The Supreme Court deemed the commercial/noncommercial distinction ultimately irrelevant, rejecting the plaintiff's claim because any exemption for home-grown marijuana would have "a substantial impact on the interstate market for this extraordinarily popular substance. The congressional judgment that an exemption for such a significant segment of the market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity." *Id.* at 28.

when economic activity in which they are engaged (farming) is not the interstate industry that EPA cites as its basis for asserting such jurisdiction. Other courts, for purposes of Commerce Clause analysis, have deemed an individual's activities to be noneconomic under analogous circumstances. *See, e.g., GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 634-35 (5th Cir. 2003) (property owner who sought to develop real estate on which endangered species were present was not engaging in economic activity with respect to EPA's claims that the proposed development would "take" endangered species in violation of the Endangered Species Act, 16 U.S.C. § 1531 *et seq*; the land development is commercial activity, but the "take" is not).

The trial judge explicitly determined that water injected into irrigation wells at Double C did not contain contaminants. ER8. In light of that finding – as well as the absence of evidence that the injected water ever traveled interstate, the absence of evidence that the water was injected into an aquifer that was either an actual or potential source of drinking water, and the absence of any relevant congressional finding – there is no rational basis for concluding that King's activities, even when considered in the aggregate, could have a significant impact on interstate commerce.

B. Federal Regulation of Mr. King's Activities Cannot Be Justified Based on an Assertion That It Is an Integral Part of a Larger, Comprehensive Federal Regulatory Scheme

Even if an activity does not have a substantial effect on interstate commerce, the Supreme Court has permitted the federal government to exercise Commerce Clause jurisdiction over the activity under limited circumstances. Federal regulation of the activity is permissible as an *integral* part of a larger, comprehensive federal regulatory scheme. Thus, *Raich* held that even if it were true that growing one's own marijuana for medicinal use did not substantially affect interstate commerce, it could still be regulated by the federal government because the illicit sale of marijuana could not effectively be controlled without such regulation. *Raich*, 545 U.S. at 28-29; *id.* at 35 (Scalia, J., concurring in the judgment) ("Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.").

But the federal government cannot avail itself of that doctrine in this case. There is no evidence that the SDWA regulation at issue here – imposition of criminal sanctions for the injection of uncontaminated, intrastate water into an irrigation well unconnected to sources of drinking water – is an *integral* part of a larger, comprehensive federal regulatory scheme. Indeed, the federal

government's program for regulating the use of injection wells is far from comprehensive.

The federal government has never adopted a law prohibiting Double C from using injection wells without a permit. Rather, to the extent that Congress has deemed it necessary to regulate injection wells for the purpose of safeguarding drinking water, it has chosen to rely on the States to adopt those regulations. It is only because Idaho has chosen to impose a permit requirement for use of all injection wells (I.C. § 42-3903) that federal officials were in a position to file criminal charges against Mr. King. This somewhat haphazard federal approach to regulation of injection wells hardly seems the type of comprehensive federal scheme that *Raich* had in mind.

There cannot be any serious doubt that Idaho's adoption of an EPA-approved UIC program was wholly voluntary in nature. Although the SDWA contains language that seemingly orders States to adopt such programs, the Supreme Court has made clear that the Tenth Amendment bars the federal government from commandeering either the legislative branch or the executive branch of a state government to do its bidding. *New York v. United States,* 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997). Mr. King was charged with willfully violating a provision of a State's EPA-approved UIC

program, which under 42 U.S.C. § 300h-2(b)(2) is a felony punishable by up to three years imprisonment. But no federal criminal enforcement would have been possible had Idaho, for example, included in its UIC program a by-rule exemption from the permit requirement for injection of clean water into irrigation wells having no connection to sources of drinking water – something Congress authorized Idaho to do under 42 U.S.C. § 300h(b)(1)(A). Moreover, although the Idaho statute (I.C. § 42-3903) requires a permit for *any* use of injection wells, both the federal SDWA and the Idaho statute make clear that the real concern is with injection of pollutants, not clean water. *See, e.g.*, 42 U.S.C. § 300h(d)(2) (underground injections can endanger drinking water sources *only if* they contain "contaminants"); I.C. § 42-3914 ("The provisions of this chapter shall not prevent the present or future use of any existing or proposed injection well which is used exclusively for disposal of irrigation waste water or of surface runoff water where such disposal does not adversely affect drinking water sources.").

Moreover, there is no evidence that sanctioning intrastate activity such as King's is "an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. Indeed, Congress has signaled that

imposing a permit requirement on all underground injections is not "essential" to maintaining drinking water safety, by creating multiple exceptions to that requirement. For example, Congress amended the SDWA in 1980 to provide that injections of natural gas for purposes of storage are not subject to the Act (and thus not subject to federal permitting requirements). 42 U.S.C. § 300h(d)(1)(B)(i). Congress further amended the SDWA in 2005 to provide an exemption for "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." 42 U.S.C. § 300h(d)(1)(B)(ii). The SDWA also provides that EPA may not prescribe requirements that "interfere with" the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations" or "underground injection for the secondary or tertiary recovery of oil or natural gas, unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection." 42 U.S.C. § 300h(b)(2). Given Congress's determination that injection-without-permit of these fluids, which obviously pose a far graver danger of polluting drinking water than does surface runoff water, will not "undercut" the regulatory scheme established by the SDWA, it is impossible to conclude that regulating King's

injection of clean, intrastate water is "essential" to successful implementation of the SDWA's regulatory scheme.

Raich permitted Congress to regulate home-grown, medicinal marijuana, without regard to whether such activity has any effect on interstate commerce, because "it was visible to the naked eye" (given the "extraordinar[y]" popularity of marijuana) that creating a medical marijuana exception "would undermine the orderly enforcement" of federal narcotics controls. *Raich*, 545 U.S. at 28-29. *Raich* involved an exception-free drug enforcement scheme, and thus Congress plausibly could have determined that extending regulation even to those marijuana uses which had no effect on interstate commerce was necessary to make the scheme effective. It is not plausible to conclude that Congress reached a similar determination with respect to the SDWA, given its exceptions-riddled structure.

Recognition of an exemption for King would not, of course, render his conduct unregulated. He would still be subject to Idaho's permit requirement, a requirement that was in place well before the SDWA was adopted. But it would then be left to Idaho to determine appropriate punishment for violating the permit requirement. Idaho has determined that such a violation should be deemed a misdemeanor, not (as mandated by the SDWA) a felony. I.C. § 42-

3911. Moreover, in this case, Idaho officials determined that the infraction should be handled in civil proceedings, which were eventually settled through a consent order. *Amici* deem it appropriate that the punishment for violation of a state law be determined by state officials. Under our federal system, "the States possess primary authority for defining and enforcing criminal law." *Lopez*, 514 U.S. at 561 n.3. "When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Id*. (quoting *Enmons*, 410 U.S. at 411-12). The Commerce Clause was drafted to ensure that Congress could not effect such wholesale changes in federal-state relations in the absence of evidence that such change is necessary to ensure the success of a federal effort to regulate interstate commerce.

C. A Permit Requirement Is No Less Objectionable Under the Commerce Clause Than Is a Prohibition

The Commerce Clause analysis is unchanged by the fact that, as applied to King, the SDWA did not outright prohibit underground injections but rather simply required him to obtain a permit. Under either scenario, the federal government lacks authority to act unless the prerequisites outlined above have been met, even if the government were to provide assurances that anyone

seeking to inject clean water into an irrigation well would routinely be granted a permit. The federal government may not use a permit requirement to expand the reach of its authority.

Lopez and its progeny illustrate the dangers of federal overreaching that could arise if a more relaxed Commerce Clause standard were applied in cases in which the federal government's regulatory regime is limited to a permit requirement. *Lopez* held that the Gun Free School Zones Act of 1990 (which forbade "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone") was invalid as beyond Congress's powers under the Commerce Clause. 514 U.S. at 567. This Court later upheld a follow-on federal statute that prohibits possession of a firearm in a school zone, provided that prosecutors demonstrate at trial on a case-by-case basis that "the firearm possession in question affects interstate commerce." *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005).

Those two decisions make clear that Congress lacks Commerce Clause authority to criminalize possession of a firearm unless prosecutors introduce evidence at trial demonstrating that the firearm possession in question has an effect on interstate commerce. But if a *permit* requirement were made subject to reduced Commerce Clause scrutiny, *Lopez* could easily be evaded. Congress

could simply pass a law prohibiting possession of a firearm in a school zone (or at any location, for that matter) by anyone who lacked a permit demonstrating that his gun had never previously traveled in interstate commerce.

King has been convicted of four federal felonies (Counts I-IV) based on failing to obtain a permit before engaging in intrastate activities that did not affect interstate commerce. Even if that conduct were aggregated with similar conduct throughout the country, there would still be no net effect on interstate commerce. Nor does the enforcement of the permit requirement on King play an essential role in the overall success of the SDWA's effort to protect the safety of drinking water. Under those circumstances, King's convictions on Counts I-IV should be overturned as an unauthorized assertion of federal power.

II. THE MATERIAL FALSE STATEMENT CONVICTION (COUNT V) MUST BE OVERTURNED BECAUSE PROSECUTORS FAILED TO SHOW THAT IT INVOLVED A "MATTER" WITHIN EPA'S JURISDICTION

The material false statement for which King was charged was made on June 2, 2005 to John Klimes, a livestock investigator for Idaho's Department of Agriculture. Klimes had no involvement with Idaho's UIC program, which fell within the jurisdiction of the Department of Water Resources (DWR). Klimes became interested in injection well issues only by happenstance. He came to

Double C to meet with a ranch employee regarding Double C's beef operations. Klimes was driving away when he was approached by Double C employee Shaun Carson. Carson told him that water was being injected into Double C's irrigation wells and specifically described to him a backflow prevention valve that was reversed. Tr329. Carson also apparently described a valve and pipe located at Well No. 5 that was being used to divert water into Well No. 5. When Klimes next spoke with King in the vicinity of Well No. 5, he asked King what the valve and pipe were connected to. King told him that they were connected to a nearby irrigation pivot and did not mention that the pipe led directly to Well No. 5. Tr364.

Following his June 2 conversation with King, Klimes and his supervisor (John Chatburn) reported his observations to DWR's John Sharkey on June 7, 2005. Tr537. On June 9, 2005, Klimes telephoned a local EPA official (Kelly O'Neill) and told O'Neill both about Double C's use of injection wells and about the June 2 statement. Tr156. Based on that telephone call, EPA began an investigation of King. Tr171. Before the call, O'Neill had never heard of Klimes or King or Double C. Tr156.

King's conviction on Count V rests on prosecutors' assertion that his June 2 statement to Klimes was a "materially false" statement in a "matter within the

jurisdiction of the executive, legislative, or judicial branch of the Government of the United States," in violation of 18 U.S.C. § 1001. Efforts to obtain a § 1001 conviction under the facts of this case are unprecedented and, if accepted, would strip the statute of virtually all jurisdictional limitations.

It is uncontested that King's statement was made to an official (Klimes) who had no involvement with or responsibility for Idaho's UIC program; that program was and is operated by DWR. It thus was not part of Klimes's job responsibilities to investigate Double C's use of injection wells. It is also uncontested that neither DWR nor EPA was investigating Double C or King at the time of the June 2 statement; they only learned of allegations of use of injection wells (and of the June 2 statement) the following week. Thus, Klimes cannot be said to have been acting at the behest of either DWR or EPA officials when he spoke with King. Under those circumstances, King's June 2 statement cannot plausibly be deemed to have been spoken in connection with a "matter within the jurisdiction" of EPA. The word "matter" most logically refers to a proceeding in which a federal agency (or its surrogate within a state government agency) is participating.[10] Because no such matter existed on June 2, 2005

[10] In using the word "proceeding," we do not mean to suggest that a "matter" can consist only of a *formal* proceeding for which formal files have been opened. Rather, a "matter" can consist of any government regulator

(indeed, EPA officials had never even heard of Klimes or King on June 2), King's June 2 statement cannot form the basis of a material false statement conviction under § 1001.

Prosecutors argue that the word "matter" refers broadly to the subject matter of a conversation; they contend that a statement is covered by § 1001 so long as the statement covers a topic over which a federal agency possesses enforcement jurisdiction. But if that were Congress's intent, it most likely would have drafted the statute to read, "in connection with any matter that falls within the jurisdiction" of a federal agency. By instead using the words, "in any matter within the jurisdiction" of a federal agency, Congress signified that in order to be actionable a statement must have been uttered "in" a matter – that is, uttered in the course of an existing proceeding that falls within the jurisdiction of the applicable federal body. No such proceeding existed until (at the earliest) June 7, when DWR officials were alerted to the use of injection wells at Double C.

The Supreme Court held in *United States v. Rodgers*, 466 U.S. 475 (1984), that an individual could be prosecuted under § 1001 for lying to FBI agents about an alleged kidnaping plot, a lie that caused the FBI to devote over 100

---

carrying our his appointed tasks, such as checking into whether government regulations are being adhered to.

agent hours investigating the alleged plot. It rejected the Eight Circuit's conclusion that "any matter" referred to proceedings in which a federal body had "power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry," and thus that § 1001 did not cover Rodgers's false statements to the FBI. 466 U.S. at 478 (quoting *Friedman v. United States*, 374 F.2d 363, 368 (8th Cir. 1967)). The Supreme Court concluded that the Eighth Circuit's interpretation of § 1001 was "unduly strained," stating:

> Section 1001 expressly embraces false statements made "in *any* matter within the jurisdiction of *any* department or agency of the United States." (Emphasis supplied.) A criminal investigation surely falls within the meaning of "any matter."

Id. at 479. The quoted language makes plain that the Supreme Court understood § 1001's use of the word "matter" in the same way that we do: it refers to any federal proceeding (such as a criminal investigation), not to the subject matter of the statement (*e.g.,* statements about environmental issues). Under the interpretation of § 1001 espoused by prosecutors, Rodgers could have been charged even if, instead of falsely reporting a kidnaping to the FBI, he had told his tale to a neighbor – since the subject matter of his conversation (kidnaping) falls within the jurisdiction of the FBI. Nothing in *Rogers* supports such a broad

reading of the statute.[11]

Prosecutors reliance on *United States v. Facchini*, 874 F.2d 638 (9th Cir. 1989), is misplaced. *Facchini* involved § 1001 charges filed against individuals who had filed false claims for unemployment benefits with the State of Oregon. In Oregon, the unemployment compensation program was run by the State of Oregon, and most of the funding was provided by the State. Nonetheless, the program was subject to approval by the federal government; once it obtained federal approval, Oregon was eligible for federal grants that covered: (1) part of the cost of administering the program; and (2) funds to pay supplemental benefits to some of its unemployment compensation recipients. 874 F.2d at 640. In return for its financial contributions, the federal government was entitled to monitor the Oregon program (including reviewing the claims forms submitted by recipients), and to cease administrative funding if it determined that Oregon was not administering the program properly. *Id.*

Thus, the § 1001 prosecutions undoubtedly involved a "matter" of the sort

---

[11] The "any matter within the jurisdiction" argument outlined above is substantially similar to the argument made by King at Pages 42-48 of his opening brief: a statement cannot be said to be within EPA's jurisdiction when made to an individual lacking any SDWA responsibilities. *Amici* also agree with King that Count V must be overturned for each of the other reasons set forth in his brief.

contemplated in *Rodgers*: the federal government's monitoring and funding of the Oregon program was an ongoing proceeding involving federal officials. The Court nonetheless overturned the § 1001 convictions of all but four of the defendants, the four who received supplemental benefits directly funded by the federal government. *Facchini*, 874 F.2d at 641-43. The Court explained that the federal government lacked § 1001 jurisdiction over the other defendants (who were paid out of State funds) because "no . . . direct relationship exists between [their] false statements and an authorized function of" the federal government. *Id.* at 641. The Court noted that the purpose of § 1001 was "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described," and that Oregon's receipt of fraudulent claims and payment of those claims out of its own funds could not "pervert" the federal functions at issue. *Id.* at 642.

Prosecutors rely on the following passage in *Facchini* to support their view that "matter" in § 1001 should be understood to mean "subject matter" instead of "proceeding":

> Even though there may be jurisdiction under section 1001 when the false statement is not made directly to a federal agent, . . . and when the federal agency is not affected financially by the false statement, . . . courts have refused to find jurisdiction *unless a direct relationship obtains between the false statement and an authorized function of a federal agency*. . . . To

> establish jurisdiction, the information received must be directly related to an authorized function of the federal agency. Otherwise, the scope of section 1001 jurisdiction would be virtually limitless.

Id. at 641, 642 (emphasis added and citations omitted). Prosecutors rely on the italicized language and argue that in this case there is a "direct relationship . . . between the false statement and an authorized function of a federal agency": EPA is authorized to regulate UIC programs, and King's statement was directly related to an issue involving underground injections.

EPA's argument pulls the *Facchini* quote totally out of context. The Court was merely saying that a "direct relationship . . . between the false statement and an authorized function of a federal department" is a necessary condition for a § 1001 prosecution; it never suggested that such a direct relationship is a *sufficient* condition. The issue that arises here – whether on June 2, 2005 there existed an EPA "matter" to which the jurisdictional requirement might be applied – never arose in *Facchini* because the existence of a relevant proceeding was never in doubt. Federal officials were engaged in an ongoing program that entailed monitoring and funding the Oregon unemployment compensation program; that program fell comfortably within *Rodgers*'s understanding of what constituted "any matter." *Facchini* includes no discussion regarding the meaning of § 1001's "any matter" language.

Prosecutors' interpretation of § 1001 would deprive it of all meaningful limitations; under their interpretation, King could have been charged if his allegedly false statement had been uttered to a random stranger. There is no evidence that Congress intended § 1001 to sweep so broadly, and *amici* are unaware of any instances in which a conviction has been upheld under even remotely similar circumstances.

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court vacate the district court's judgment and remand the case with instructions to dismiss (or enter a judgment of acquittal) on all counts.

Respectfully submitted,

/s/ Richard A. Samp
Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Michael Rybak
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: May 13, 2010

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation, *et al.*. Pursuant to Fed.R.App.P. 29(d) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the brief contains less than 7,000 words (the actual word count is 6,968, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance).

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of May, 2010, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp