No. 11-460

In The Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

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INTRODUCTION

The Ninth Circuit's opinion in this case is so squarely at odds with the decisions of this Court and the provisions of the Clean Water Act ("CWA") that in its brief as amicus curiae the United States can only speculate that the decision must be based on a gross factual error. (Brief for the United States as Amicus Curiae ("BFUS") at 12, 14-15, 17-20.) Thus, somewhat incongruously, the United States urges the Court to deny certiorari based upon something the opinion does not say, while acknowledging that what the opinion *does* say is flatly contrary to governing law.

There are two problems with the Government's position.

First, the notion that the Ninth Circuit simply made an unknowing factual error is belied both by the record in the case – including a petition for rehearing pointing out the uncontested, and indeed incontestable fact that the water bodies containing the monitoring stations were channelized portions of the Los Angeles and San Gabriel Rivers themselves – and the plain language of the opinion stating that an MS4, even an MS4 within a navigable water of the United States, is nonetheless a "point source" for a "discharge" because an MS4 is a "man-made" construction somehow distinct from "naturally occurring" navigable waters.

Second, even assuming the opinion is purportedly based upon a purely speculative, unstated factual

error, this does nothing to ameliorate the uncertainty sown by the plain language in the Ninth Circuit's opinion concerning the interplay between MS4s and navigable waters of the United States. Neither petitioner, nor other public entities throughout the Ninth Circuit and across the nation, has the luxury of ignoring what *is* in the opinion in the faint hope that future courts will speculate as to what is not in the opinion, i.e., an unstated factual error about the location of the monitoring stations.

As the United States tacitly acknowledges, the reality is that liability under the CWA has been imposed on petitioner, even though under the governing law and undisputed evidence no such violation should be found. In an era where local government budgets are stretched to the breaking point, the notion that petitioner, which has as its core function the protection of the life and property of millions of citizens through basic flood control, may nonetheless be required to expend potentially millions of dollars to remedy a nonexistent permit violation, is indefensible. But even putting aside the unconscionable impact on petitioner, as the briefs from amici curiae across the nation make clear, the impact of the Ninth Circuit's opinion is not limited to petitioner or even to public entities within the Circuit. The Ninth Circuit's opinion creates mischief with respect to an ongoing and important issue for flood control agencies throughout the nation, namely, the interplay between MS4s and navigable waters of the United States.

This may indeed be a case where, based upon the governing law and the undisputed record before the Ninth Circuit, summary reversal is appropriate. It certainly would not be the first time in recent memory that the Ninth Circuit's disregard for both the law of this Court and the evidence before it necessitated review by this Court. *See Ryburn v. Huff*, ___ U.S. ___, 132 S. Ct. 987, 990 (2012) (per curiam) (reversing Ninth Circuit because "[n]o decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case" and "[o]n the contrary, some of our opinions may be read as pointing in the opposite direction"); *Felkner v. Jackson*, ___ U.S. ___, 131 S. Ct. 1305, 1307 (2011) (per curiam) (reversing Ninth Circuit where "decision is as inexplicable as it is unexplained"); *Cavazos v. Smith*, ___ U.S. ___, 132 S. Ct. 2, 7 (2011) (per curiam) (reversing and noting that factual assertion in Ninth Circuit opinion "is simply false").

This is indisputably a case that requires intervention by this Court. As even the United States acknowledges, the plain language of the Ninth Circuit's opinion is squarely at odds with the governing authority of this Court and the language of the CWA, and as amici from across the country underscore, entities that must live with the language of that opinion now face uncertainty in performing the day-to-day basic planning of public flood control. Navigable waters are improved for flood control purposes throughout the country. Under the Clean Water Act,

"point sources" are distinct from navigable waters. It is vital that municipalities and flood control districts know whether an improvement to a navigable water for flood control purposes transforms that navigable water into an MS4, and if so, whether that transformation turns the MS4 into a "point source" under the CWA.

I. THE RECORD BEFORE THE NINTH CIRCUIT AND THE PLAIN LANGUAGE OF THE COURT'S OPINION BELIE ANY ASSUMPTION THAT IT IS BASED UPON AN UNSTATED FACTUAL ERROR CONCERNING THE LOCATION OF THE MONITORING STATIONS, NOR WOULD ANY SUCH PURPORTED UNSTATED ERROR ALTER THE DAMAGING IMPACT OF THE OPINION.

The United States acknowledges that, on its face, the Ninth Circuit's holding that there has been a "discharge" under the CWA for purposes of imposing liability on petitioner is flatly contrary to governing authority holding that mere artificial improvement of a navigable water of the United States does not alter its character. (BFUS at 17.) The United States further acknowledges that under *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), there cannot be a "discharge" under the CWA based upon the transfer of water within a single body of water. (BFUS at 19-20.) The United States submits, however, that certiorari is

unwarranted because, despite the plain language of the opinion, it should be inferred that the Ninth Circuit simply made a factual error – that the court somehow believed that the monitoring stations were in portions of petitioner's MS4s that were separate from the navigable waters, i.e., not within the rivers themselves. (BFUS at 12, 14-15, 17-18.)

Yet, the notion that the Ninth Circuit was somehow mistaken about the locations of the monitoring stations is unsupportable, in light of both the record before the Ninth Circuit and the language and reasoning of the opinion. Moreover, any such purported unstated error does nothing to mitigate the damaging impact of the plain language of the opinion.

A. The Record Before The Ninth Circuit Made It Clear That The Monitoring Stations Were In The Los Angeles and San Gabriel Rivers.

There is simply no basis for inferring that the Ninth Circuit was somehow confused about the location of the monitoring stations.

First, as the district court noted in its description of respondents' allegations, the operative complaint specifically alleged that the monitoring stations were within the rivers. (App. 117.)

Second, in describing the location of the monitoring stations, the Ninth Circuit itself cited petitioner's

website, which states that the monitoring stations are within the rivers. (App. 18 n.4.)

Third, plaintiffs readily admitted this fact in opposing summary judgment in the district court. (Petition for Writ of Certiorari at 26 n.4, citing District Court Dkt. 140 at 2.)

Finally, as the United States acknowledges (BFUS at 11), any potential misunderstanding on the part of the Ninth Circuit about the location of the monitoring stations was dispelled by petitioner's petition for rehearing, which specifically noted that the decision was flatly untenable in light of the undisputed fact that the monitoring stations were within the rivers. While the Ninth Circuit amended its opinion in response to other issues raised in the petition for rehearing, it pointedly did not alter the portions holding that discharges under the CWA occurred when water flowed from the "intra-state manmade" constructions of the MS4 at the monitoring stations and into the "naturally occurring Watershed River[s]." (App. 44, 45.) The inescapable conclusion is that the Ninth Circuit was well aware that the record established that the monitoring stations were within the rivers, but that fact was irrelevant to its ultimate, erroneous legal holding concerning a discharge from petitioner's MS4.

Nothing in the record supports the purely speculative proposition that the Ninth Circuit was somehow mistaken about the location of the monitoring stations.

B. The Plain Language And Reasoning Of The Opinion Do Not Support Any Inference That The Court Was Somehow Mistaken As To The Location Of The Monitoring Stations.

Nothing in the opinion suggests that the Ninth Circuit was mistaken about the location of the monitoring stations. The language of the opinion makes it clear that the court based its holding upon its flawed legal analysis of an MS4's status as an "intra-state man-made" construction rendering it distinct from a navigable water for purposes of a discharge under the CWA.

As a threshold matter, nowhere in the opinion does the court suggest that the monitoring stations are anywhere other than within the rivers. This is not surprising since the record – including plaintiffs' admission of facts in response to petitioner's motion for summary judgment – made it clear that the monitoring stations were within the rivers. The opinion does not refer to storm drains or pipes along the banks of the rivers that are inarguably part of an MS4 – it refers only to monitoring stations located in petitioner's "concrete channels" (App. 45, 47), channels which are, based on the record, indisputably within the rivers.

More fundamentally, in holding that there was a discharge under the CWA, the Ninth Circuit expressly found a "discharge" as a matter of fact and law.

(App. 44.) The Ninth Circuit's "fact" is that the monitoring stations were located in portions of the Los Angeles and San Gabriel Rivers maintained by petitioner for flood control purposes. The "law" is that, under the court's view, an MS4 is distinct from a navigable body of water in that "the MS4 is an intra-state man-made construction – not a naturally occurring Watershed River." (App. 44.) If the Ninth Circuit premised its opinion on the mistaken factual assumption that the monitoring stations were in channels not within the rivers, there would be no reason to hold that as a "matter of law," these channels are somehow distinct because as part of an MS4 they are "intra-state" and "man-made construction[s]" distinct from "naturally occurring Watershed River[s]." These terms speak to the legal status of an MS4, not its physical location. There is simply nothing in the opinion to support an inference that the Ninth Circuit was somehow mistaken about the location of the monitoring stations.

C. The Ninth Circuit's Decision Spawns Uncertainty And Inevitable Litigation Based Upon Its Plain Language, Even Assuming Any Rational Inference Could Be Drawn About Some Unstated Factual Error In The Opinion.

Petitioner and its amici are required to plan and fund future projects and evaluate future obligations based upon what cases say, not what they do not say. As noted, nowhere in the opinion does the Ninth

Circuit state that the monitoring stations are anywhere other than in the river channels. In addition, as discussed, the Ninth Circuit made it clear that there is a "discharge under the CWA when waters flow from an MS4 channel that is an "intra-state man-made" structure into "the naturally occurring Watershed River[s]." Neither petitioner nor its amici may be sanguine that administrative agencies and district courts will ignore this plain holding of the Ninth Circuit's opinion. Instead, it is more likely that agencies and district courts, as they are required to do in the Ninth Circuit, will apply the Ninth Circuit's holding as written.

This will cause tremendous confusion. As Justice Scalia noted for the plurality in *Rapanos v. United States,* 547 U.S. 715, 735 (2006), the definitions contained in the Clean Water Act "conceive of 'point sources' and 'navigable waters' as separate and distinct categories." The Ninth Circuit's decision blurs these categories and leaves the regulated community uncertain as to their reach.[1] The reality is that, whatever arguments might be available to public entities in an attempt to forestall reliance on the Ninth Circuit's opinion, the decision spawns needless litigation and unduly complicates planning in light of potential liabilities in the crucial area of municipal flood control. Indeed, the impact on planning is

[1] Justice Kennedy, in his concurrence in *Rapanos,* identified the Los Angeles River as a navigable water "encased in concrete and steel over a length of some 50 miles." 547 U.S. at 769.

particularly pernicious. The paucity of appellate decisions concerning MS4s means that the Ninth Circuit's ill-considered opinion will inevitably have a singular impact on flood control officials who must necessarily plan and commit massive funding for projects years in advance, and cannot do so based on speculation that at some uncertain point in the future another appellate court might eventually repudiate the Ninth Circuit's decision.

In addition, by suggesting that the improved channels of the Los Angeles and San Gabriel Rivers are somehow separate and distinct from such bodies of water, the Ninth Circuit's opinion calls into question the basic jurisdiction of the EPA and the Army Corps of Engineers over these rivers. Public entities such as petitioner will, as a matter of legal obligation, be required to question that jurisdiction over improved portions of these and other water bodies, since they cannot justify spending, and are not legally authorized to expend, public funds for, under the Ninth Circuit's decision, unnecessary permitting requirements. *See* Cal. Civ. Proc. Code § 526a (authorizing action to bar unnecessary and wasteful expenditure of public funds); *City of Ceres v. City of Modesto*, 274 Cal. App. 2d 545, 555, 79 Cal. Rptr. 168, 173 (1969) ("a court must not close its eyes to wasteful, improvident and completely unnecessary public spending, merely because it is done in the exercise of lawful power"); *Sundance v. Municipal Court*, 42 Cal. 3d 1101, 1139, 232 Cal. Rptr. 814, 837 (1986) (same).

As it now stands, the Ninth Circuit's opinion invites ongoing, costly litigation, unnecessarily complicates planning in the important area of flood control, and cannot be left uncorrected.

II. THE NINTH CIRCUIT'S OPINION IS NOT BASED ON ANY UNIQUE ASPECTS OF THE PERMIT ISSUED TO PETITIONER.

The United States also suggests that certiorari is not warranted because the case turns upon unique aspects of the specific permit issued to petitioner. (BFUS at 12-13, 15.) Not so.

The Ninth Circuit's opinion does not turn upon any specific language in the permit issued to petitioner. To the contrary, the Ninth Circuit concluded that in order to find that petitioner violated the permit, it was required to find a "discharge" from a "point source" within the meaning of the CWA. (App. 41-42, 45-46.) In fact, the court properly rejected plaintiffs' attempt to avoid this requirement by simply asserting there had been exceedances under the terms of the permit. (App. 41-42.) As the language of the opinion makes clear, the Ninth Circuit found a "discharge" when "stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways." (App. 45.) This holding has nothing to do with the terms of the permit.

Thus, the United States' suggestion that renewal of petitioner's permit at some future date might

somehow ameliorate the harmful impact of the Ninth Circuit's opinion (BFUS at 15-16) is incorrect. That monitoring stations may be moved or the permit terms otherwise changed does not alter the holding of the Ninth Circuit that improvements to a navigable water body for flood control purposes transforms that water body into an intra-state man-made construction and thus an MS4 "point source."

The fact that the harmful reasoning and impact of the Ninth Circuit's decision is untethered to any particular terms of petitioner's permit is underscored by the concern expressed by amici from across the country, who, although subject to different permitting requirements, must confront, as a matter of both planning and operating flood control conveyances, the legal issue of whether there is a discharge from an MS4 into a navigable water of the United States when the water body has been improved for flood control purposes. As amicus National Association of Flood and Stormwater Management Agencies observed, "[i]f not reversed, the Ninth Circuit's holding that the river itself is both the point source and the outfall . . . would wreak havoc in the administration of the MS4 permit program nationwide." (Brief of the National Association of Flood and Stormwater Management Agencies at 13; *see also* Brief of Amici The League of California Cities and the California State Association of Counties at 10 ["This issue is of critical importance to the *amici* as most cities and counties in California are covered by an MS4 permit issued under California's discharge permitting program"].)

III. THE UNCERTAINTY CREATED BY THE NINTH CIRCUIT'S OPINION CONCERNING IMPROVEMENTS TO NAVIGABLE WATERS OF THE UNITED STATES REQUIRES RESOLUTION BY THIS COURT.

As noted in the petition and as underscored by amici curiae in support of petitioner, public entities across the country must, for basic flood control purposes, channelize and improve portions of navigable waters of the United States. As Justice Alito noted in another context earlier this year, the "reach of the Clean Water Act is notoriously unclear," and the term "waters of the United States" is in many respects "hopelessly indeterminate." *Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). An opinion that manifestly undermines what little clarity there is with respect to that term and does so in the vital and cost intensive area of basic flood control planning should not be left undisturbed. It is essential that this Court grant review to provide clear guidelines on whether improvements to navigable waters for flood control purposes transform those waters into an MS4 under the CWA.

CONCLUSION

For the foregoing reasons, petitioner submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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