No. 13-901

In The Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT and COUNTY OF LOS ANGELES,

Petitioners,

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

BRIEF OF THE NATIONAL LEAGUE OF CITIES, LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS LOS ANGELES COUNTY FLOOD CONTROL DISTRICT AND COUNTY OF LOS ANGELES

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INTERESTS OF THE *AMICI CURIAE*[1]

The National League of Cities, League of California Cities, and California State Association of Counties, as representatives of local government entities and municipalities throughout California and the nation, have a vital interest in ensuring that cities and counties have clear guidance concerning the application of the Clean Water Act ("CWA") to Municipal Separate Storm Sewer Systems ("MS4s"), and a reasonable opportunity to comply with those obligations in the conduct of their duties to control stormwater and related flooding for the benefit of their residents. In the Ninth Circuit Court of Appeal's most recent opinion in *Natural Resources Defense Council v. County of Los Angeles* (the "Opinion"), the court's erroneous interpretation of the CWA and its implementing regulations applied to the Los Angeles

[1] Under Supreme Court Rule 37.2(a), counsel of record received timely notice of the intent of these *amici curiae* to file this brief, the parties have confirmed that they do not oppose the filing of this brief, and letters confirming their non-opposition have been filed with the Clerk. No part of this brief was authored by counsel for a party, and no one, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

County system-wide National Pollutant Discharge Elimination System ("NPDES") permit ("Permit") created an unworkable regulatory scheme for MS4s that does nothing to protect or measurably improve water quality. Moreover, the Opinion directly conflicts with this Court's established precedent regarding the constitutional standing limitation on federal court jurisdiction, thus creating confusion and ambiguity on this important issue.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for more than 19,000 cities, villages, and towns. Founded in 1924, NLC strengthens local government through advocacy, research, and information sharing on behalf of hometown America.

The League of California Cities ("League") is an association of 470 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies cases that have statewide or nationwide significance. The

Committee identified this case as having such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation with a membership consisting of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California, overseen by the Association's Litigation Overview Committee, and comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case represents a matter affecting all counties.

The Opinion in this case exposes local governments and their employees to significant civil and criminal liability. The Court should grant certiorari to address the issues set forth above, and rectify the confusion wrought by the Opinion.

SUMMARY OF THE ARGUMENTS

Several of the Justices that heard arguments the last time this case came up on certiorari were prescient in their suspicion that this case, if remanded, would once again be back on this Court's docket. (*See* Transcript of Oral Argument, No. 11-460 ("Transcript") at 26:18-25, 28:25-29:5, 30:10-14.) This case now returns for the critical determination of whether an entity can be held strictly liable under the CWA simply because it possesses a permit to

discharge to a waterway that is exceeding water quality standards, whether or not that entity is actually discharging the pollutant that caused the exceedance.

In this CWA citizen suit, the Ninth Circuit concluded that the long-standing premise of jurisprudence and previously established precedent from this Court, which holds that one may not be held liable for an act for which he is not responsible, may not apply to municipalities carrying out their obligation to control flooding and facilitate drainage of stormwater within their jurisdictions. Instead, under the Ninth Circuit's Opinion, this basic principle, rooted in fundamental notions of fairness and basic standing requirements under Article III of the Constitution, and supported by the plain language of the CWA and its implementing regulations, can be eviscerated through poorly drafted Receiving Water Limitation requirements in a system-wide NPDES permit, leaving cities and counties exposed to significant financial liability for harms outside their control. (*Natural Resources Defense Council, Inc.* ("*NRDC*") *v. County of L.A.*, 725 F.3d 1194, 1206 (9th Cir. 2013) ("*NRDC III*"); Transcript at 28:21-23 (Justice Scalia: ". . . what follows from that; that the district is liable because it's a lousy permit?")

In the two Southern California rivers at issue (the Los Angeles and San Gabriel Rivers), water flows from the headwaters to the ocean through channelized and unchannelized segments. In a previous decision, the Ninth Circuit held the District liable for

pollutants flowing from the upstream portions of the rivers to the downstream portions of the same rivers (despite Respondents' failure to introduce any evidence of an actual discharge of pollutants from any of Petitioners' MS4 outfalls). (*NRDC v. County of L.A.,* 673 F.3d 880, 885, 889-90, 891-92 (9th Cir. 2011) ("*NRDC I*"); 40 C.F.R. §122.26(b)(9) (definition of "outfall").) This Court previously and rightfully reversed the Ninth Circuit holding that no point source discharge of pollutants to waters of the United States occurred when water merely flowed to the downstream segments of the same rivers below the mass-emissions monitoring stations. (*L.A. County Flood Control Dist. v. NRDC*, ___ U.S. ___, 133 S.Ct. 710, 713 (2013) ("*NRDC II*").)

Faced with this reversal of its prior holding imposing liability on the District and taking an unauthorized second bite at the apple through the remanded case, the Ninth Circuit adopted yet another strained and unsupported interpretation of the CWA to again justify imposing liability for the quality of water in the Los Angeles and San Gabriel Rivers, by holding that the Permit *presumes* a co-permittee has discharged stormwater that caused or contributed to an exceedance of a water quality standard whenever such an exceedance is observed at the downstream mass-emissions station. (*NRDC III*, *supra*, 725 F.3d at 1206-07.) In order to make this unsupportable ruling, the Ninth Circuit took the unusual step of reversing itself, *sua sponte*, created a split of authority with a closed and unappealed part of the

very same case, and created new liability for a party, Los Angeles County, that the Ninth Circuit had affirmatively found *not liable* before. (*See id.*, at 1198 n.5, 1203-04; *see also NRDC I*, *supra*, 673 F.3d at 901 (rejecting identical arguments with respect to Malibu Creek and Santa Clara River, and with respect to Los Angeles County).) The Ninth Circuit's convoluted interpretation of the CWA has been challenged and explained in great detail by Petitioners in their Petition for Writ of Certiorari and will not be repeated here. Instead, the *amici curiae* wish to focus the Court's attention on the impact the Ninth Circuit's new interpretation of the CWA will have on cities and counties nationwide.

The Opinion ensures that many cities and counties participating in system-wide NPDES permits could be deemed in perpetual violation of their permits due to no fault of their own and will have no clear pathway to compliance. The Opinion ignores the fact that a co-permittee has no jurisdiction to control the quality of the water in the river or pollutants from other permitted and unpermitted discharges to the river (*e.g.*, aerial deposition, natural background, up-welling groundwater), all of which are monitored by the same downstream monitoring stations. Finally and most egregiously, the Opinion eliminates a plaintiff's burden to demonstrate causation, no longer requiring proof that a particular permittee's discharges caused or contributed to the exceedance of a water quality standard in the receiving water, and instead establishes a permittee's liability as a matter

of law for activities and conduct over which the municipality has no reasonable control. The permittee would automatically be deemed in violation of the permit with no reasonable way to comply, whether or not its own MS4 discharges contained the pollutant at issue.

Contrary to the Ninth Circuit's conclusion, this illogical result is not dictated by the plain language of the CWA, its implementing regulations, or the Permit. The Opinion, if left undisturbed, will inevitably be relied on by district courts in the Ninth and other appellate circuits. Allowing this decision to stand as precedent creates a significant risk to municipalities nationwide because very little appellate case law addresses the liability of MS4 permittees, and many system-wide MS4 permits allow for similar mass-emissions or other commingled monitoring. The Ninth Circuit's incorrect interpretation of the CWA must be remedied in order to ensure that cities and counties have clear guidance regarding their MS4 compliance obligations and, importantly, have the realistic ability to meet their obligations and avoid liability. If not reversed, the unavoidable violations created by the Opinion will make cities and counties easy targets for citizen enforcement actions, and will cost the public millions in penalties and attorneys' fees, but will do nothing to measurably improve water quality.

The Opinion also directly conflicts with Article III standing requirements, established Supreme Court precedent interpreting these requirements, and prior

Ninth Circuit precedent. Article III standing requires plaintiffs to prove their injuries are "fairly traceable" to the conduct of the specific defendant that plaintiffs sued, and that plaintiffs' harm could be remedied by a favorable decision. The Opinion conflicts with these requirements by creating circumstances wherein citizen plaintiffs can sue an MS4 permittee in federal court without showing that the defendant actually caused or contributed to the plaintiffs' alleged harm, or that the defendant is capable of remedying the harm. Article III, established Supreme Court precedent including *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917 (1976) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992), and prior Ninth Circuit precedent, all dictate the opposite result – if the defendant is not responsible for the harm complained of (in this case, a receiving water quality exceedance caused by a discharge in violation of a permit provision), the plaintiff does not have standing to sue the defendant for that injury and the federal court lacks jurisdiction to decide the dispute. (*See Pritkin v. Dept. of Energy*, 254 F.3d 791 (9th Cir. 2001); *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000) (if the plaintiff does not show that the defendant's discharge to the waterway at issue contained the standards-exceeding pollutants, then a federal court lacks jurisdiction to determine the defendant's liability).) The Opinion, holding that a defendant who is not responsible for a discharge can nevertheless be liable for the receiving water exceedance, cannot be

squared with this Court's Article III jurisprudence and must be overturned.

The *Amici* respectfully request that this Court grant the Petition for writ of certiorari and review the Opinion for the following reasons:

- The Petition should be granted to resolve an important question of federal law. The Opinion interpreted the CWA and its implementing regulations in a manner that conflicts with the law's plain language and with Congressional intent regarding the regulation of municipal stormwater, by holding that Petitioners could be and were liable for violations of the CWA in the absence of proof that Petitioners discharged pollutants from a point source (an MS4 outfall) operated by Petitioners into waters of the United States without or in violation of a permit.
- The Petition should be granted to resolve the conflict the Opinion created with established precedent of this Court, and prior Ninth Circuit rulings, regarding standing. The Opinion, holding that a Federal court can impose liability under the CWA against a party that is not responsible for a discharge of pollutants and cannot remedy the harm to water quality, directly conflicts with this Court's Article III jurisprudence.

The ability of government entities to control flooding and facilitate drainage of the stormwater within their jurisdictions is essential. (*See New Orleans Gaslight Co. v. Drainage Comm'n*, 197 U.S. 453, 460, 25 S.Ct. 471 (1905).) In order to end the legal inconsistencies and confusion created by the Opinion, and to provide a clear set of legal guidelines for local governments to follow related to compliance for MS4 discharges, the *amici curiae* respectfully request this Court grant the Petition and reverse the Opinion.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE PETITION SHOULD BE GRANTED TO RESOLVE AND CLARIFY THE CWA'S UNIQUE REGULATION OF MS4 DISCHARGES.

A. CWA Municipal Stormwater Regulation.

The CWA generally prohibits the "discharge of any pollutant" from a "point source" into navigable waters of the United States without an NPDES permit. (*See* 33 U.S.C. §§1344(a), 1342(a)(1), 1362(12)(A).) Ordinarily, NPDES permits impose effluent limitations on such discharges. (*See* 33 U.S.C. §§1311(b)(1)(A), (C), 1342(a)(1); 40 C.F.R. §122.44(a), (d)(1)(iii).)

Municipal stormwater, however, is fundamentally different from other types of discharges regulated by the NPDES program. Unlike other types of dischargers with a treatment facility and a single point of discharge that is monitored frequently, cities and counties deal with enormous quantities of diffuse stormwater runoff, complex flood control management infrastructure, and difficulties in controlling the addition of pollutants to stormwater both inside and outside their jurisdictional boundaries. Local governments have little jurisdiction or control over the drainage received from private residential and commercial properties within their jurisdictional boundaries, or from other permitted entities that discharge stormwater or wastewater into the local storm drains and waterways. Further, local governments have no jurisdiction over or ability to control upstream entities discharging outside their boundaries, including other cities and counties, industrial sites, and wastewater treatment plants. Cities and counties must manage stormwater for the benefit of the public they serve, but, unlike businesses and industrial dischargers, cannot simply go out of business to avoid regulation and the associated criminal and civil penalties.

In recognition of these fundamental differences, Congress established a distinctly different approach for the regulation of municipal stormwater discharges within the NPDES permit program. (*See* 33 U.S.C. §1342(p)(3)(B).) This approach provided cities and counties with a feasible way to improve the quality of

stormwater discharges in their jurisdictions over time, taking into account the unique character and intermittent nature of municipal stormwater.

Municipal stormwater discharges from MS4s are to be regulated by NPDES permits that:

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants.

(33 U.S.C. §1342(p)(3)(B)(i)-(iii).)

In contrast, Congress imposed a completely different regulatory scheme for industrial wastewater and stormwater permits, requiring strict compliance with water quality-based standards. (33 U.S.C. §§1311(b)(1)(C), 1342(p)(3)(A).) Importantly, the CWA does *not* prescribe water quality-based requirements for municipal stormwater and does *not* require strict compliance with water quality standards in MS4

permits.[2] (*See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999).)

Recognizing that it would not be feasible for local governments to strictly control the quality of stormwater in their jurisdictions or to collect, store, and treat the often massive quantities of stormwater that flow through MS4s, Congress created a process designed to improve the quality of stormwater discharged from MS4s to the maximum extent it is practicable to do so. Instead of receiving strict end-of-pipe effluent limitations, MS4s must implement Best Management Practices ("BMPs") through an iterative approach, requiring more BMPs to be implemented when pollutants are not meeting water quality goals. (40 C.F.R. §122.44(k)(2)-(4).) NPDES permits issued to cities and counties require sound pollutant control techniques that are economically and technically feasible to reduce the amount of pollutants that enter stormwater in their jurisdictions to the Maximum Extent Practicable. (*See* 33 U.S.C. §1342(p)(3)(B) (iii); *see also* 40 C.F.R. §122.26(d)(1)(v) and §122.34 (describing minimum control measures).)

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[2] This different treatment is not unusual. The CWA *totally exempts* some types of discharges from the permitting requirements of the Act. (*See* 33 U.S.C. §1342(*l*)(1)-(2) (CWA §402(*l*)(1)-(2)) (exempting agricultural return flows and certain discharges of stormwater from mining operations or oil and gas production from NPDES permitting requirements); 40 C.F.R. §122.26(a)(2)(i)-(ii); 40 C.F.R. §122.32(c)-(e) (allowing waivers of permit coverage requirements for some small MS4s.)

In this system, not all outfalls are monitored because it is a BMP-based, not an outfall-based, program. (40 C.F.R. §122.45(a).) Instead, water quality in waters of the United States that receive discharges from the MS4s ("Receiving Waters") is monitored to evaluate the efficacy of the pollution control techniques and determine whether pollutant reductions are occurring over time. If water quality standards are exceeded as a result of discharges from the MS4, then pollution control techniques must be adjusted to focus on and specifically address the particular pollutant(s) at issue. (*See, e.g.,* 40 C.F.R. §§122.34, 122.37.)

A municipality can fully comply with these BMP-based requirements, and water quality standards may still be exceeded in the Receiving Waters.[3] (*See Defenders of Wildlife, supra,* 191 F.3d at 1165 (strict compliance with water quality standards is not required).) It is therefore not surprising that Congress did not require MS4 permits to include water quality monitoring sufficient to establish each permittee's compliance with the permit conditions; the

[3] For example, stringent copper water quality standards applied to urban stormwater runoff cannot be consistently achieved until the products used in the manufacturing of automobile brake pad linings are modified no later than 2025. (*See* California S.B. 346 (2010).) It is unclear whether any BMPs will consistently reduce copper levels below the extremely low standards referenced in the Permit. (*See* Permit at 1-2, Provision B.2.) The same problem exists for zinc from tire wear, and for naturally-occurring pollutants, like bacteria.

water quality monitoring by itself was not intended to show a permit violation, just to show reasonable further progress toward decreasing pollutant loads in stormwater discharges. In contrast, water quality compliance monitoring is expressly required by the CWA in NPDES permits for other categories of discharges which *are* required to strictly comply with water quality standards, including industrial stormwater discharges.[4] (*See* 33 U.S.C. §§1311(b)(1)(C), 1342(p)(3)(A).)

Congress provided a separate legal process for addressing consistent exceedances of water quality standards in Receiving Waters that receive discharges from multiple sources. (33 U.S.C. §1313(d); 40 C.F.R. §130.7.) Where a particular pollutant originates from multiple sources outside any one party's control, the problem must be addressed comprehensively at a regional level through the adoption of a Total Maximum Daily Load ("TMDL") for that pollutant. (33 U.S.C. §1313(d); 40 C.F.R. §§130.2(i), 130.7; *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-29 (9th Cir. 2002); *Communities for a Better Environment v. SWRCB*, 132 Cal.App.4th 1313, 1332 (2005).)

TMDLs determine the maximum amount of a pollutant that can be discharged and still maintain standards, and then allocate responsibility for reductions

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[4] Moreover, the type of compliance monitoring required in industrial NPDES permits would often not be possible in the municipal stormwater context. (40 C.F.R. §122.45(a).)

to all pollutant sources through the assignment of load allocations for non-point sources and wasteload allocations for point sources. (40 C.F.R. §§130.2(g), (h), (i), 130.7(a).) TMDLs also generally allow time for those sources to come into compliance. (*See Communities for a Better Environment*, *supra* ("[A] TMDL assesses responsibilities, identifies specific actions to be taken by identified parties, and results in an allocation of the total allowable pollutant burden.").) Through this process, responsibility, *not liability*, is apportioned with the goal of cleaner water that meets the standards.

B. The Opinion Conflicts With Congressional Intent to Provide Local Governments a Feasible Way to Comply with MS4 Permits.

In conflict with Congressional intent expressed in the CWA to provide cities and counties with a feasible way to improve the quality of their stormwater discharges without placing cities and counties in perpetual violation of the CWA based on factors outside their control, the Opinion interprets the CWA to impose *more* stringent requirements on cities and counties than are imposed on other types of NPDES permittees. Because MS4 permits, unlike other types of NPDES permits, are often issued on a system-wide basis, the Ninth Circuit's holding that liability can be imposed on all co-permittees based on system-wide Receiving Water monitoring alone will place many cities and counties in perpetual violation of the CWA.

1. The Opinion Eliminates the Ability of a Permittee to Control Its Compliance Under a System-Wide MS4 Permit.

By essentially reading the requirement of a "discharge" out of the CWA, the Ninth Circuit has unreasonably eliminated a co-permittee's ability to control its own permit compliance. The CWA does not prohibit exceedances of water quality standards; it prohibits unpermitted discharges of pollutants to waters of the United States.[5] (33 U.S.C. §§1311(a), 1362(12)(A).)

The purpose of an NPDES permit is to authorize certain "discharges," (*see* 33 U.S.C. §1342(a)(1)), and the requirements of an NPDES permit regulate those discharges from the permitted entity. The Ninth Circuit, however, disregards the plain language of the Permit, and the CWA on which the Permit is based, by imposing liability based solely on downstream mass-emissions monitoring data without evidence of

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[5] In fact, the Ninth Circuit previously noted this fact when rejecting Respondents' *ipso facto* liability argument in *NRDC I*:

> The Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act. . . . While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant.

(673 F.3d at 898 (holding that Respondents must submit at least some proof that Petitioners *individual* discharges caused or contributed to the observed water quality exceedances).)

corresponding and contemporaneous "[*d*]*ischarges from the MS4 that caused or contributed to*" a Receiving Water exceedance. (*See* Permit at 2, Part 2.1 (emphasis added); *NRDC III, supra*, 725 F.3d at 1206.) The Ninth Circuit's holding ignores the fact that permittees cannot control the actions of the numerous independent third parties that also discharge to the Receiving Waters upstream of the mass-emissions stations. Without mandating a causal connection between the exceeding pollutants and a contributory discharge, the Ninth Circuit has made it impossible for a permittee to ensure compliance with the Permit. The law does not compel impossibilities. (*See Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996) (citing Black's Law Dictionary 912 (6th ed. 1990) (defining "*lex non cogit ad impossibilia*")).) The Ninth Circuit's interpretation of the CWA and the Permit is unreasonable and must be reversed.

2. The Opinion Imposes an Impracticable Monitoring Burden on Municipal Co-Permittees.

The Ninth Circuit's holding in *NRDC I*, which requires Los Angeles County MS4 discharges to strictly comply with water quality standards referenced in the Permit's Receiving Water Limitations, has already imposed a significant burden on cities and counties with this or similar permit language by ignoring the fact that the Permit does *not* include numeric effluent limitations based on water quality

standards for the Receiving Waters, such as those required for industrial NPDES discharges.[6]

The *ipso facto* liability interpretation now adopted by the Ninth Circuit (which could be applied to any NPDES permit using mass-emissions or other comingled water monitoring) compounds this burden by presuming that Receiving Water Limitations equate to end-of-pipe effluent limitations and holding that plaintiffs can rely solely on Receiving Water data to establish a permittee's liability without having to prove the defendant-permittee discharged any pollutants at all.

Plaintiffs properly have the burden of proving an unlawful "addition of any pollutant" that violates a permit or the CWA. (33 U.S.C. §§1365(a)(1), (f); 1311(a), 1362(11) (defining "discharge of a pollutant").) As the Ninth Circuit previously and correctly observed, a plaintiff can easily sample at least one of the permittee's outfalls or conduct more probing discovery, and prove that the MS4 discharged the same pollutant(s) in such an amount as to cause or contribute to a contemporaneous Receiving Water exceedance. (*NRDC I, supra*, 673 F.3d at 901.) Such evidence would be the minimum needed to demonstrate liability. Conversely, the Opinion now effectively imposes a requirement on

[6] Federal regulations provide a different regulatory construct because it is infeasible for MS4s to strictly comply with strict water quality standards due to the variable and intermittent nature of municipal stormwater. (*Accord* 40 C.F.R. §122.44(k)(2)-(3).)

MS4 owners and operators to constantly sample all of their outfalls in order to have the data necessary to prove a negative, namely that no discharges from their individual MS4s ever "caused or contributed" to any possible downstream Receiving Water exceedances that may intermittently occur.

This sampling burden for MS4s was never intended by Congress and is often infeasible. For example, in this case "a comprehensive map of the County Defendants' storm sewer system does not exist, no one knows the exact size of the LA MS4 or the locations of all its storm drain connections and outfalls" are "too numerous to catalog," (*NRDC III, supra*, 725 F.3d at 1198). Other MS4s have similar challenges with locating and safely accessing outfalls built decades or a century ago with no thought to a future need to provide easy access for water quality sampling. It would be impracticable to continuously monitor every outfall in order to prove that none caused or contributed to a contemporaneous exceedance observed at a downstream mass-emissions station.[7]

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[7] The Opinion also leads to an inconsistent result where exceedances in the Receiving Water were caused by separate permitted discharges, exempt non-stormwater discharges, or a third-party's spill or upset. Permittees are not required to prohibit non-stormwater discharges covered by a separate permit or that fall within certain enumerated categories, such as natural flow, emergency firefighting flows, and flows incidental to urban activities. (*See* Permit, Part 1.A., 18-19; 40 C.F.R. §122.26(d)(2)(iv)(B).) Permittees may also have an affirmative

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The Ninth Circuit has placed cities and counties in an untenable position by imposing the impossible burden to disprove a presumptive finding of liability. The Opinion makes cities, counties, and their employees each strictly liable for costly civil penalties and attorneys' fees recoverable in citizen suits, which most municipalities can scarcely afford, all without any evidence of an unlawful act or discharge.[8] (33 U.S.C. §1319(a)-(b), (d), (g).) With few, if any, defenses, innocent municipal stormwater managers could also be criminally penalized or jailed just because mass-emissions data exceeds applicable standards. (*See United States v. Weitzenhoff*, 35 F.3d 1275, 1293-99 (9th Cir. 1993) (dissenting opinion); 33 U.S.C. §1319(c).) These unreasonably harsh results are not warranted under the Permit, the CWA, or sound public policy.

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defense where discharges are caused by an upset. (*See* Permit, Part 6.N., 72; 40 C.F.R. §122.41(n)(2).) In those circumstances, the discharger would not be liable for the Receiving Water exceedance, but another co-permittee under the Permit could be. The Opinion leads to this illogical result by holding a permittee liable for another's *legal* activities.

[8] Recent cost estimates show the billions needed for stormwater control may dwarf municipal pension liabilities. (*See accord* http://www.utsandiego.com/news/2014/feb/17/san-diego-billion-stormwater-cost-shocker/, last accessed 2/24/14.)

C. The Opinion Encourages Opportunistic Litigation Without Water Quality Improvement.

Litigation against co-permittees that did not cause an unlawful discharge only serves to divert public money, which municipalities could be using for other vital services (including police, fire, and improved stormwater management programs), to pay civil penalties and attorneys' fees. By imposing liability without proof of unlawful discharges, the Opinion provides substantial incentive for opportunistic attorneys to file similar CWA lawsuits, confident that they will receive an attorneys' fee award. (*Cf. Gunther v. Lin*, 144 Cal.App.4th 223, 251 (2006) (noting, in an Americans with Disabilities Act lawsuit, that a proposed statutory interpretation to lessen the plaintiff's burden of proof would "open[ ] the door for abusive litigation. . . . We cannot believe that the Legislature ever intended to create an incentive for that.").) *Amici curiae* submit that the Opinion will encourage such predatory litigation even in cases where the state and federal governments are working on constructive watershed-based programs, such as implementing TMDLs, to resolve Receiving Water exceedances. (*See* 40 C.F.R. §122.30(d) (encouraging partnerships and a watershed approach as a management framework.)

The Opinion also conflicts with public policy and the purposes of the CWA by interfering with the ability of municipalities to carry out their responsibilities to the public they serve (*see New Orleans*

Gaslight Co., *supra* ("The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised.")), and because litigation against parties that are not responsible for discharging pollutants does not improve the nation's water quality (*see Menzel v. County Utilities Corp.*, 712 F.2d 91, 95 (4th Cir. 1983) (refusing to impose CWA liability for discharges where subjecting discharger to liability would serve no statutory purpose)). The Opinion, which encourages expensive and unnecessary litigation and conflicts with the purposes of the CWA and sound public policy, must be reconsidered and reversed.

For these and the other reasons set forth herein, the Supreme Court must hear this matter of vital importance to cities and municipal entities nationwide. The magnitude of the problems created by the Opinion for counties and other municipalities around California cannot be overstated. The nation's cities and counties are already experiencing severe financial crises, including many municipal bankruptcies. By imposing liability without requiring proof of responsibility for a discharge in violation of the CWA, the Opinion will cost these entities millions of dollars in penalties and attorneys' fees. Thus, the *Amici* strongly urge this Court to consider the broader consequences of the Opinion to MS4s around the country.

II. THE PETITION SHOULD BE GRANTED TO REMEDY THE INCONSISTENCY AND CONFUSION CAUSED BY THE OPINION'S DEPARTURE FROM SUPREME COURT PRECEDENT REGARDING ARTICLE III STANDING.

To have standing, a plaintiff must, *inter alia*, show injury, causation, and redressability. In other words, a plaintiff must demonstrate that their alleged harm "is fairly traceable to the challenged action of the defendant; and . . . it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." (*Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180-81, 120 S.Ct. 693 (2000); *Lujan*, *supra,* 504 U.S. at 560-61.)

To satisfy the "fairly traceable" requirement, the plaintiff must prove the conduct stems from "the challenged action of the defendant, and not . . . the result of independent action of some third party not before the court." (*Lujan*, *supra,* 504 U.S. at 560; *Southwest Marine, supra*, 236 F.3d at 995.) Here, the Court held defendants liable based not on fairly traceable conduct, but rather on commingled Receiving Water monitoring results reflecting not only stormwater discharges, but also naturally-occurring levels of background pollutants in the river water,

and permitted discharges of multiple third parties not before the Court.[9]

Before this Opinion, the established rule in the Ninth Circuit was that, in order for plaintiffs to establish the "fairly traceable" requirement of Article III standing (*i.e.*, causation) in a CWA case, plaintiffs had to prove "that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." (*Southwest Marine, supra*, 236 F.3d at 995 (quotes and citations omitted).) However, in direct conflict with this established authority, the Opinion now allows plaintiffs to maintain a suit against an MS4 permittee *without any evidence* that the permittee actually discharged anything in violation of the permit. The Ninth Circuit has weakened the standing

[9] The Ninth Circuit expressly recognized thousands of permitted entities discharge pollutants to the San Gabriel and Los Angeles Rivers, including at least 276 industrial and 232 construction stormwater dischargers, 20 industrial wastewater dischargers permitted to discharge pollutants *in excess of* the applicable water quality standards, 2 water reclamation plants, and 21 separate incorporated cities upstream of the mass-emissions station in the San Gabriel River watershed. (*NRDC I*, *supra,* 673 F.3d at 889-90.) The Los Angeles River watershed contains at least 1,344 NPDES-permitted industrial and 488 construction stormwater dischargers, 3 water reclamation plants, and 42 separate incorporated cities upstream of the mass-emissions station. (*Id.* at 889.) These permit holders are legally authorized to discharge stormwater or non-stormwater that is also measured by the downstream mass emission stations.

requirement to such a degree that it no longer passes constitutional muster.

To satisfy the minimum Article III standing requirements, plaintiffs cannot rely on speculative inferences to connect their alleged injury to the challenged action. (*Simon, supra*, 426 U.S. at 44-45 & n.25 ("[U]nadorned speculation will not suffice to invoke the federal judicial power.").) The Ninth Circuit previously, and more logically, concluded that plaintiffs cannot satisfy Article III standing requirements when suing a party that did not cause, and has no power to remedy, the alleged harm. (*Pritkin, supra*, 254 F.3d at 798 (citing *Simon, supra*.) A plaintiff's failure to sue the party with the ability and duty to correct the alleged harm requires speculation as to the causal link between defendant's actions and the plaintiff's alleged injury and, therefore, is insufficient to establish Article III's causation requirement. (*Id.*) For the same reasons, plaintiffs must sue the correct party so that alleged injuries can be redressed by a favorable decision. (*See Laidlaw Environmental Servs., supra*, 528 U.S. at 169 (redress is provided by "a sanction that effectively abates the conduct and prevents its recurrence"); *Pritkin*, 254 F.3d at 800-801.)

By effectively decoupling liability from a permittee's actions, the Opinion allows plaintiffs to maintain suit and obtain a judgment of liability without any demonstrated causal link between the defendant-permittee's actions and a discharge adversely affecting the quality of the Receiving Water at the downstream

mass-emissions stations. The decision also allows lawsuits to proceed against defendants that have no power to remedy the alleged harm. An MS4 permittee only has the authority to address inputs that may affect water quality within its own portion of the MS4. (*See* Permit at 6, Provision D.1. ("The requirements in this Order cover all areas within the boundaries of the Permittee municipalities . . . over which they have regulatory jurisdiction"); 40 C.F.R. §122.36 (Phase II MS4s only subject to non-compliance "in your jurisdiction"); 40 C.F.R. §122.26(b)(1) ("co-permittee" means "a permittee to a NPDES permit that is only responsible for the permit conditions relating to the discharge for which it is operator").)

Thus, a plaintiff must be required to establish the particular permittee-defendant has the clear power and duty to remedy the observed Receiving Water exceedances so that a court may adequately redress the plaintiff's alleged harm. No plaintiff can establish the causation or redressability elements of Article III standing based *solely* on exceedances measured at the mass-emissions stations or by in-stream water quality.

This issue is of critical importance to the *amici,* as nearly all cities and counties in the United States are covered by an MS4 permit issued by the U.S. Environmental Protection Agency or by a State's in lieu permitting program as authorized by the CWA. (33 U.S.C. §1342(b).) MS4 owners and operators must be given clear guidance on how to comply and, more importantly, must be able to comply with an MS4

permit. *Amici curiae* request that the Court grant certiorari to conform the Opinion to the established Article III standing requirements.

CONCLUSION

For the foregoing reasons, *amici curiae*, the League of California Cities, California State Association of Counties, and National League of Cities support the Petition for a Writ of Certiorari of Los Angeles County and the Los Angeles County Flood Control District and urge reversal of the Ninth Circuit's Opinion.

Respectfully submitted,

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