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

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. THE ABSENCE OF ANY AUTHORITY SUPPORTING THE NINTH CIRCUIT'S RECONSIDERATION OF AN ISSUE FINAL AS TO THIS COURT ESTABLISHES THAT THE CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, REQUIRING EXERCISE OF THIS COURT'S SUPERVISORY POWER TO VINDICATE THE PRINCIPLES OF FINALITY ESTABLISHED IN *CALDERON v. THOMPSON*.

A. Respondents Cite No Case Supporting The Ninth Circuit's *Sua Sponte* Reconsideration Of The Monitoring Argument.

So extraordinary is the Ninth Circuit's action here – granting *sua sponte* reconsideration on an issue that this Court expressly declined to decide because respondents had lost the issue in the circuit court and not sought either rehearing in that court or cross-petitioned for certiorari in this Court – that respondents cite no case involving even remotely analogous circumstances.

Respondents assert that on remand, a lower court may consider any matter not decided by the higher court, and that so long as the mandate of this Court does not specifically direct the lower court not to consider particular issues, it is free to do so, citing *Quern v. Jordan*, 440 U.S. 332 (1979), *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), *In re Sanford*

Fork & Tool Co., 160 U.S. 247 (1895), and *Ex Parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900). (Brief in Opposition ("BIO") 9, 11.) But in those cases this Court found the issues in question not foreclosed by prior opinions, because they were not raised in the circuit courts or this Court in those prior proceedings. *Quern*, 440 U.S. at 333-34, 347 n.18; *Edelman v. Jordan*, 415 U.S. 651 (1974); *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973); *Sprague*, 307 U.S. at 168; *In re Sanford Fork & Tool Co,* 160 U.S. at 256; *Ex Parte Union Steamboat Co.*, 178 U.S. at 320. In contrast, respondents' monitoring argument, as this Court expressly found, previously "failed" in the Ninth Circuit, and without a cross-petition or some relationship to the question on which certiorari was granted, was not properly before the Court. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, 568 U.S. ___, 133 S. Ct. 710, 714 (2013).

Respondents contend that "[l]ower courts routinely address a question on remand that this Court declined to decide, either because it was outside the question presented or for some other reason." (BIO 10.) But in none of the cited cases had the circuit court actually addressed the issue in question, as the Ninth Circuit did here. In *Glover v. United States*, 531 U.S. 198, 205 (2001), this Court reversed and remanded without deciding alternative grounds for affirmance precisely because the points "were neither raised in nor passed upon by the Court of Appeals." In *Owen v. Owen*, 500 U.S. 305, 314 (1991), the Court noted an issue remained open because "[t]he Court of

Appeals did not pass on this issue, nor on the subsidiary question of whether the Florida statute extending the homestead exemption was a taking. . . ." *Field v. Mans*, 157 F.3d 35 (1st Cir. 1998) does not approve "reconsideration on remand of an issue the Supreme Court expressly declined to reach." (BIO 11.) In *Field*, the First Circuit held it was free to address a question that this Court had declined to consider not simply because it was outside the question on which the Court had granted certiorari, but because it had not even previously been presented to the Court of Appeals. 157 F.3d at 42; *Field v. Mans*, 516 U.S. 59, 63 n.2 (1995).

Respondents assert that there is nothing "inherently improper about a lower court *reconsidering* a question after this Court reverses on another issue" and that this "Court has acknowledged that lower Courts may reconsider on remand questions that the Court declines to address." (BIO 11 (emphasis original).) Again, their cited cases are inapposite. In *Moore v. Illinois*, 434 U.S. 220, 232 (1977), this Court reversed and remanded for the circuit court to consider issues that remained open after a party had filed a proper petition for certiorari but where the Court had not found it necessary to address the issues given its disposition of the case. Here, no cross-petition raised respondents' monitoring argument.

Nor is this case like *In re Zurko*, 258 F.3d 1379, 1381 (Fed. Cir. 2001) where, on remand from this Court's decision holding that the circuit court applied an improper standard of review, the circuit court

reaffirmed its previous judgment, finding that the lower court decision did not withstand review under the new standard. The Ninth Circuit did not purport to apply new law or facts announced in this Court's decision; indeed this Court declined to decide the monitoring argument because it in no way was "touched by" the issue on which review had been granted. *Los Angeles County Flood Control Dist.*, 133 S. Ct. at 714.

The absence of any authority supporting the Ninth Circuit's extraordinary action underscores the gross impropriety of its decision.

B. Respondents Ignore The Principles Established In *Calderon* Concerning Finality And Due Regard For The Jurisdiction Of This Court.

This case is the civil counterpart to *Calderon v. Thompson*, 523 U.S. 538 (1998), where this Court reversed and rebuked the Ninth Circuit for recalling its mandate solely for purposes of granting rehearing *en banc* and altering a decision that has been final for purposes of review by this Court and where the Court relied on that finality in exercising its jurisdiction. Although the Court noted that reversal was warranted given concerns of finality inherent in the habeas corpus statute, *id*. at 553-58, the Court separately premised its decision on "grave doubts about the actions taken by the Court of Appeals" based on "ordinary concerns of finality," *id*. at 552-53. The

finality concerns identified by the Court encompassed not simply the parties but the Court itself, which found that the Ninth Circuit improperly re-heard a judgment "on which the State, *not to mention this Court*, had placed heavy reliance." *Id*. at 552 (emphasis added).

Respondents ignore the finality concerns identified in *Calderon*, instead arguing that it is distinguishable because there, the mandate had issued. (BIO 15.) In *Calderon*, this Court's finality concerns did not stem from issuance of the mandate; the mandate had not issued at the time the Court considered the case. The Ninth Circuit's error was not simply in recalling its mandate, but in changing the underlying judgment on which this Court relied in deciding to exercise its jurisdiction.

Respondents assert that *Calderon* is distinguishable because Thompson had sought certiorari and therefore this Court had relied on the finality of the Ninth Circuit's decision in determining whether to grant the petition, whereas here, respondents never attempted to invoke this Court's certiorari jurisdiction with respect to the monitoring issue. (BIO 15.) But respondents are procedurally in a worse position than Thompson because they made a calculated decision not to seek further review of the monitoring issue in a cross-petition, perhaps for fear it would bolster the chances of review with respect to the District's petition for certiorari. Respondents instead gambled that the Court would allow them to raise the issue through the backdoor in merits briefing, and if

unsuccessful, they could urge the Ninth Circuit to reconsider its prior ruling, notwithstanding reliance by this Court, the County, and the District on the finality of the Ninth Circuit's judgment. It is nonsensical that parties who made a tactical decision to engage in piecemeal litigation – respondents – should be in a better position than a party that pursued review through proper procedural channels, as did the respondent in *Calderon*.

Respondents contend that this Court did not rely on the Ninth Circuit's previous disposition of the monitoring argument in exercising its jurisdiction. (BIO 16.) Nonsense. This Court granted review premised on the fact that the case raised only a single theory of liability, the only remaining theory having been decided adversely to respondents and not the subject of a cross-petition. This Court expressly declined to exercise jurisdiction with respect to the monitoring argument for the very reason that it "failed below," was not related to the question on which certiorari had been granted, and was not properly before the Court. 133 S. Ct. at 714.

Respondents and the Ninth Circuit casually disregard the time and effort expended by this Court. If there are no prudential limitations on an appellate court's ability to alter its decision before a mandate issues, even after this Court relied upon the finality of the court's previous judgment in exercising its jurisdiction, the Court can never be confident that it is expending its resources in resolving a meaningful issue in an action.

Nor do respondents address the interest that the District and County had with respect to finality of the Ninth Circuit's previous decision. The District wasted time and resources in appealing an issue that ultimately ended up being entirely beside the point. The County finds itself dragged back into the litigation even though respondents made no effort to revive their claims against it.

Respondents assert that the County could have made "its case" on remand to the Ninth Circuit (BIO 17), ignoring the fact that the County had no reason to do so since respondents only urged reconsideration as to the District. (Petition for Writ of Certiorari ("Pet.") 19.) Respondents then make the extraordinary statement that the County and the District are essentially a single entity. (BIO 18.) Even putting aside overwhelming statutory authority making it clear that the District and the County are independent entities,[1] respondents recognized that the District and the County are separate entities by suing them separately and the Ninth Circuit treated them as separate parties.

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[1] The County is a political subdivision of the state. Cal. Gov't Code §§460, 23002. The District is a separate entity created by the State. *See* Cal. Water Code, App. §28-1. The District has the power to sue and be sued, to grant, purchase, lease, and hold real or personal property, borrow money, issue bonds, and raise funds through taxation. *See generally* Cal. Water Code, App. §28-2. The Permit recognizes the County and the District as separate permittees with separate obligations. (ER 204-05, 257.)

The Ninth Circuit's decision violates the basic principles of finality and prudential concerns assuring due regard for the jurisdiction of this Court recognized in *Calderon*, and must be reversed.

C. This Case Is Appropriate For *Per Curiam* Reversal; At The Very Least, Review Is Warranted To Address Application Of *Calderon* To Civil Cases.

There are no open issues on the merits of the summary judgment motions as between the parties – the only argument respondents ever made in the Ninth Circuit with respect to the district court's grant of summary judgment to petitioners was their monitoring argument. The Ninth Circuit rejected the argument, respondents did not seek review in this Court, and the issue was fully adjudicated. The only other ground adopted by the Ninth Circuit as supporting judgment against the District was unanimously rejected by this Court. Nothing remains other than to reverse the Ninth Circuit, with directions to enter judgment for petitioners.

Such a *per curiam* reversal would establish a narrow but vital rule, essential to preserve respect for this Court's exercise of jurisdiction and basic principles of finality: A Court of Appeals may not reconsider an issue that was final for purposes of review by this Court where the Court relied on the finality of that judgment in exercising its jurisdiction, absent extraordinary circumstances, such as a change in the

operative law or facts. No such circumstances are present here.

Alternatively, the Court should grant review in order to clarify application of the principles of finality identified in *Calderon* with respect to civil cases and set down clear guidelines for the appellate courts concerning their authority to alter a decision following remand from this Court, where this Court relied on the finality of the previous judgment in exercising its jurisdiction.

II. THE NINTH CIRCUIT'S IMPOSITION OF LIABILITY ON A CO-PERMITTEE IN A MULTI-JURISDICTIONAL MUNICIPAL STORMWATER PERMIT WITHOUT PROOF THAT THE CO-PERMITTEE DISCHARGED POLLUTANTS IN VIOLATION OF THE PERMIT IS CONTRARY TO THE CLEAN WATER ACT AND ITS REGULATIONS.

A. The Ninth Circuit's Decision Concerns Provisions Of The CWA And Regulations That Are Not Unique To A Single Permit And Discourages Participation In Multi-Jurisdictional Stormwater Permit Programs.

Respondents assert that the Ninth Circuit's decision does not warrant review because it concerns

interpretation of a single permit that has been superseded. (BIO 19.)[2] Not so.

The Ninth Circuit's opinion is premised on the conclusion that municipal stormwater permits require compliance monitoring identical to that applicable to industrial dischargers, despite the fact that the CWA treats the two categories of permittees differently and imposes monitoring requirements on industrial discharges not required of municipal discharges. (Pet. 36-37.) The Ninth Circuit's erroneous holding that municipal stormwater permits must require compliance monitoring directly impacts existing and future municipal stormwater permits across the country.

Similarly, the Ninth Circuit's holding that liability can be imposed on a co-permittee in a multi-jurisdictional municipal stormwater permit without proof that an individual co-permittee actually discharged in violation of the permit addresses a basic standard of liability applicable to all municipal stormwater permits.

Most alarming is the Ninth Circuit's erroneous construction of the Permit provision making it clear that each co-permittee is only responsible for its own discharge. That Permit language is taken directly

[2] Respondents emphasize that the case is not moot, since they no doubt intend to pursue penalties and a fee award premised on the Ninth Circuit's erroneous decision. (BIO 20 n.7.)

from 40 C.F.R. §122.26(b)(1), which defines "Co-Permittee" as "a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator." *See also* 40 C.F.R. §122.26(a)(3)(vi). The Ninth Circuit's untenable construction of this regulatory language as meaning that a co-permittee can be held "liable" for the discharge of another co-permittee but not "responsible," injects uncertainty into a key regulatory provision concerning multi-jurisdictional stormwater permits and discourages participation in such programs. As noted by amici, no rational municipality would agree to be liable for discharges not within its control, nor even risk the possibility that its permit would be interpreted in that manner. (*See* Brief of Amicus Curiae National Association of Flood and Stormwater Management Agencies 13-15; Brief of Amici Curiae Florida Stormwater Association and Southeast Stormwater Association 10-11, 16-18.)

The Ninth Circuit's erroneous interpretation of the CWA and applicable regulations creates uncertainty with respect to the interpretation and negotiation of municipal stormwater permits throughout the nation.

B. Respondents Cannot Reconcile The Ninth Circuit's Decision With The CWA And Applicable Regulations.

The CWA only imposes liability where there is proof of a discharge by a permittee in violation of a

permit's terms, a principle recognized by this Court in its prior decision. (Pet. 33-35.) Respondents contend they need only show that petitioners discharged into the rivers, and, bootstrapping industrial stormwater regulations, assert that municipal stormwater permits require compliance monitoring, which can be done in-stream. (BIO 22-24.) Respondents ignore that Congress treated municipal stormwater discharges differently from industrial stormwater discharges, and, more specifically, that monitoring requirements applicable to industrial dischargers were not imposed on municipal stormwater dischargers. (Pet. 35-37.) Respondents do not address petitioners' statutory analysis, but simply assert that the California State Regional Board has rejected it (BIO 24-25 n.8) – a statement that is flatly incorrect (Pet. 40 n.2).

The Permit reflects the unique nature of municipal stormwater discharges, and multi-jurisdictional permits, by tethering monitoring requirements to assessment of the water body *as a whole*, in an evolutionary process where permit conditions may subsequently be refined. (Pet. 39-40.) This also is dictated by logic – that monitoring stations within a river could assess the liability of any individual co-permittee is nonsensical, given the literally thousands of upstream dischargers, permitted and non-permitted, including some expressly allowed to discharge in excess of Permit standards. (Pet. 38-39.)

Respondents provide no support for the Ninth Circuit's bizarre construction of 40 C.F.R. §122.26(b)(1), as incorporated in the Permit terms. (ER 199, Permit

¶G.4.) The notion that "liability" is something different than "responsibility" is supported by neither law nor logic. As noted in the petition – and ignored by respondents – courts addressing this issue have found a discharger liable only for its own discharges or those over which it has control. (Pet. 43.)

Respondents ultimately appeal for "rough justice," suggesting that courts need not bother with the niceties of liability standards by falsely asserting that petitioners are "by far the biggest source of water pollution in the rivers at issue." (BIO 26, citing ER 10, 302, 307 and FER 17.) The record citations say nothing of the sort. ER 10 is from a district court order reproduced at App. 148-49, stating that the District has the most infrastructure in the MS4. ER 302 and 307 do not mention pollution by petitioners. (Reply Appendix hereto, 1-5.) FER 17 is a page from an amicus brief in another action, reproduced in the prior merits Joint Appendix at 432-34, which does not reference petitioners' discharges, let alone suggest they are the chief sources of Permit-exceeding pollutants.

Finding no support in the CWA, respondents contend that petitioners could and did agree to Permit conditions more rigorous than required under the CWA. (BIO 25.) Petitioners did not. As noted, the Permit is consistent with, and requires nothing more than that required by the CWA itself. With respect to the liability of permittees for discharges by co-permittees, the Permit lifts language from the applicable CWA regulation. Neither petitioners, nor any

other municipal stormwater discharger participating in a multi-jurisdiction permit, would have reason to construe such provisions in contravention of the CWA.

The Ninth Circuit's previous decision was, as even respondents ultimately conceded, indefensible. Its latest decision is even worse, creating uncertainty about basic provisions of the CWA and accompanying regulations. This Court should again grant review.

CONCLUSION

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

Respectfully submitted,

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NINTH CIRCUIT DKT. ENTRY 15, ER 302

* * *

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2003-0013

AUTHORIZATION FOR THE EXECUTIVE DIRECTOR OR DESIGNEE TO ACCEPT, NEGOTIATE AMEND, EXECUTE, OR TERMINATE A CONTRACT OF $5 MILLION OR LESS WITH "TEAM ROGERS AND ASSOCIATES" USING MONEY FROM THE CLEANUP AND ABATEMENT ACCOUNT TO FUND A TWO-YEAR STORM WATER MEDIA AND EDUCATION CAMPAIGN IN LOS ANGELES COUNTY.

WHEREAS:

1. Polluted runoff is one of the nation's most prominent environmental protection issues, and is the chief source of coastal and surface water pollution in California.

2. The Los Angeles area faces the largest concentration of such pollution, which has led to significant bacterial contamination in nearby streams and coastal waters in Southern California and closures of nearby beaches.

3. The State Water Resources Control Board (SWRCB) believes a key element in combating the problem is to involve and educate every Los Angeles area resident in the fight to keep trash, pesticides, fertilizers and other pollutants out of the storm drains, including outreach to diverse populations.

4. The SWRCB in August 2002 authorized the expenditure of $5 million from the Cleanup and Abatement Account to fund a storm water outreach campaign.

5. The SWRCB wishes to delegate authority to the Executive Director or designee to accept, negotiate, amend, execute, or terminate a contract of up to $5 million with "Team Rogers and Associates" using money from the cleanup and abatement account to fund a two-year storm water media and education campaign in Los Angeles County.

THEREFORE BE IT RESOLVED:

1. That the SWRCB authorizes the Executive Director or designee to accept, negotiate, amend, execute, or terminate this contract on behalf of the State Board or any of its Regional Boards, and to perform all acts and do all things necessary, convenient, and legal to implement this contract.

2. That the Executive Director or designee is directed in exercising the authority vested in them by this resolution, without restricting the authority specified, to bring to the attention of the Board Members at workshop or by other appropriate communication any matters that are of a unique, controversial, or unusual nature or that appear to depart from the policies of the SWRCB.

* * *

NINTH CIRCUIT DKT. ENTRY 15, ER 307

Fact Sheet/Staff Report NPDES CAS004001,
Los Angeles County MS4 Permit Order No. 01-182

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The 1992, 1994, and 1996 National Water Quality Inventory Reports to Congress prepared by USEPA showed a trend of impairment in the Nation's waters from contaminated storm water and urban runoff. The recent 1998 National Water Quality Inventory (305(b) Report)[1] showed that urban runoff/storm water discharges affect 11% of rivers, 12% of lakes, and 28% of estuaries. The report states that ocean shoreline impairment due to urban runoff/storm sewers increased from 55% in 1996 to 63% in 1998. The report notes that urban runoff and storm water discharges are the leading source of pollution and the main factor in the degradation of surface water quality[2] in California's coastal waters, rivers and streams.

The Natural Resources Defense Council (NRDC) 1999 Report, "**Stormwater Strategies,**

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[1] *Quality of Our Nation's Waters: Summary of the National Water Quality Inventory 1998 Report to Congress* – USEPA 841-S-00-001 – June 2000; *Water Quality Conditions in the United States: Profile from the 1998 National Water Quality Inventory Report to Congress* – USEPA 841-F-00-006 – June 2000

[2] *Quality of Our Nation's Waters: Summary of the National Water Quality Inventory 1998 Report to Congress*, Chapter 12 State and Territory Summaries, California, pp. 282-83: 1998.

Community Responses to Runoff Pollution"[3] identifies two main causes of the storm water pollution problem in urban areas. Both causes are directly related to development in urban and urbanizing areas:

1. Increased volume and velocity of surface runoff. There are three types of human-made impervious covers that increase the volume and velocity of runoff: (i) rooftop, (ii) transportation imperviousness, and (iii) non-porous (impervious) surfaces. As these impervious surfaces increase, infiltration will decrease, forcing more water to run off the surface, picking up speed and pollutants.

2. The concentration of pollutants in the runoff. Certain activities, such as those from industrial sites, are large contributors of pollutant concentrations to the storm water system.

The report also identified several activities causing storm water pollution from urban areas, practices of homeowners, businesses, and government agencies.

More recent studies conducted by **United States Geological Survey** (USGS)[4] confirms the link

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[3] *Clean Water & Oceans: Water Pollution: In Depth Report Stormwater Strategies, Community Responses to Runoff Pollution.* Natural Resources Defense Council (NRDC), 1999.

[4] *Water Quality in the Puget Sound Basin, Washington and British Columbia, 1996-98*, Circular 1216 – USGS 2000; *Water*

(Continued on following page)

between urbanization and water quality impairments in urban watersheds due to contaminated storm water runoff.

Furthermore, the water quality impacts of urbanization and urban storm water discharges have been summarized by several other recent USEPA reports.[5] Urbanization causes changes in hydrology and increases pollutant loads which adversely impact water quality and impairs the beneficial uses of receiving waters. Increases in population density and imperviousness result in changes to stream hydrology including:

a) increased peak discharges compared to predevelopment levels;

* * *

Quality in the Long Island-New Jersey Coastal Drainages, New Jersey and New York, 1996-98, Circular 1201 – USGS 2000

[5] *Storm Water Phase II Report to Congress* (USEPA 1995): Report to Congress on the Phase II Storm Water Regulations (USEPA 1999); Coastal Zone Management Measures Guidance (USEPA 1992)