No. 13-901

In The Supreme Court of the United States

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

Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL AND SANTA MONICA BAYKEEPER,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether *Calderon v. Thompson*, 523 U.S. 538 (1998), involving a court of appeals that belatedly recalled its mandate in order to reverse a denial of habeas corpus relief, has any bearing on this case, where the court of appeals decided on remand a matter left open by this Court's mandate.

2. Whether the court of appeals properly interpreted the Clean Water Act permit at issue in this case to hold petitioners liable for permit violations based on the permit's compliance monitoring scheme, and to hold petitioners responsible for remedying only their individual share of the pollution.

RULE 29.6 STATEMENT

Respondents Natural Resources Defense Council and Santa Monica Baykeeper represent that each organization is a non-profit corporation with no shares or debt securities in the hands of the public and that no parent, subsidiary, or affiliate of either organization has issued any shares or debt securities to the public.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

STATEMENT OF THE CASE

I. Petitioners' Permit

Petitioners Los Angeles County and the Los Angeles County Flood Control District operate a municipal separate storm sewer system (MS4). An MS4 collects stormwater runoff from city streets and other surfaces, transports it through an urban drainage infrastructure, and discharges it to navigable waters without treatment. 40 C.F.R. 122.26(b)(8). Stormwater runoff is a major cause of water quality impairment nationwide and the principal source of water pollution in southern California's rivers and beaches. Pet. App. 6; C.A. E.R. 302, 307; C.A. F.E.R. 17.

Petitioners operate their MS4 subject to a Clean Water Act permit. The permit governs petitioners as well as other cities that operate municipal storm drains connected to petitioners' MS4. Pet. App. 7-8, 10. The permit was issued by the Los Angeles Regional Water Quality Control Board (Regional Board), under delegated authority from the Environmental Protection Agency. Cal. Water Code §§ 13225, 13263. A violation of the permit is a violation of the Clean Water Act, and is grounds for a citizen or government enforcement suit. 33 U.S.C. 1319, 1365; 40 C.F.R. 122.41(a).

Petitioners' permit prohibits any discharge from the MS4 that contributes to the violation of pollution limits referred to as "water quality standards." Pet. App. 11; C.A. E.R. 202. The permit directs petitioner

Flood Control District, as the Principal Permittee, to monitor "mass emissions" from the MS4 to determine "if the MS4 is contributing to exceedances of Water Quality Standards." C.A. E.R. 263. This monitoring is used for "[a]ssessing compliance" with the permit. *Id.* The monitoring is not conducted at individual outfalls, where polluted water first enters the rivers. There are thousands of such outfalls, and petitioners do not know where they all are. Pet. App. 8 & n.4; C.A. E.R. 155-56. Instead, the monitoring is conducted at specific locations within the Los Angeles River and San Gabriel River, among others. Pet. App. 12-14; C.A. E.R. 263. Petitioners chose the location of these monitoring stations, which are downstream from a large number of their outfalls, and certified that the samples collected there were representative of their stormwater discharges. Pet. App. 36 & n.22; C.A. E.R. 353; C.A. F.E.R. 31-32.

Petitioners must report the results of this monitoring and highlight any permit violations. C.A. E.R. 204, 260-61. The reports are publicly available.

The permit recognizes that many sources contribute pollution to each river, as is expected in a major urban area. *Id.* at 184-86. It includes provisions to ensure that when pollution limit exceedances are detected at the instream monitoring stations, petitioners and other permittees will be responsible for cleaning up only their individual share of that pollution. *Id.* at 199, 202, 260. Specifically, when permit violations are detected and reported, each permittee must propose enhanced monitoring to

identify the source of the violation, adopt improved pollution control measures, and develop a plan to meet standards. *Id.* at 202, 260. Each permittee must apply these steps only to "discharges within its boundaries." *Id.* at 205. The permit does not require petitioners to abate any other discharger's pollution.

The Regional Board successfully defended this permit in state court against petitioners' challenge that the permit was inconsistent with the Clean Water Act and California law. *County of Los Angeles v. Cal. State Water Res. Control Bd.*, 50 Cal. Rptr. 3d 619, 622 (Ct. App. 2006); *In re L.A. Cnty. Mun. Storm Water Permit Litig.*, No. BS 080548 (L.A. Super. Ct. Mar. 24, 2005) (filed at Dist. Ct. Docket entry No. 101-5).

II. Procedural History

Respondents filed this case to require petitioners to address repeated permit violations documented in their self-monitoring reports. Respondents' complaint alleged that petitioners' discharges violated permit limits in the Los Angeles and San Gabriel Rivers. C.A. E.R. 454-56.[1] Petitioners' monitoring reports showed more than a hundred violations of permit limits for a number of pollutants – including aluminum, cyanide, fecal bacteria, and zinc – during the time period covered by the complaint. *Id.* at 355-64.

[1] Respondents also alleged violations in two additional rivers but are no longer pursuing those claims. Pet. App. 9 n.5.

These violations are undisputed and include measurements of aluminum twenty times the legal limit, cyanide fifty times the limit, and fecal bacteria 60,000 times the limit. *Id.* at 358-63.

In response, petitioners argued that their compliance monitoring results could not establish liability, because the monitoring was conducted instream (within the rivers) and not at the precise point of discharge from an MS4 outfall into a river. *Id.* at 15-16. The district court agreed that the permit's instream monitoring could not by itself establish liability. *Id.* at 5-6.

On appeal, the court of appeals reversed in part. It found that the permit's compliance monitoring did not establish petitioners' liability as a matter of law. *See* Pet. App. 89-90. Nonetheless, the court held the Flood Control District liable for violations in the Los Angeles and San Gabriel Rivers on the basis that the monitoring stations were "located in a section of the MS4 owned and operated by the District." *Id.* at 86. Therefore, the court found that violations were detected *prior* to discharge from the District's MS4 into the rivers. *Id.* (In its most recent opinion, the court clarified that it previously misunderstood the physical location of the monitoring stations in relation to the rivers. *Id.* at 14 n.12.)

The Supreme Court granted review to consider a narrow question: whether the flow of water through an engineered improvement within a single river is a "discharge of a pollutant" under the Clean Water Act.

L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, 568 U.S. ___, 133 S. Ct. 710, 711 (2013). The parties and the United States as amicus all agreed that the answer is no. *Id*. Respondents further argued that the District was nonetheless liable for permit violations on alternative grounds: namely, on the basis of the compliance monitoring results. *Id*. at 713-14. Respondents asked the Court to affirm on this alternative ground, *id*. at 713, or remand to allow the court of appeals to reconsider liability in light of a corrected understanding of the facts and law. 11-460 Tr. of Oral Arg. 50:21-51:8 (Tr.).

The United States as amicus agreed that, "[a]lthough the court of appeals' analysis was faulty, the court's ultimate finding of liability is not necessarily incorrect." 11-460 U.S. Amicus Br. 18. Liability depends on "the proper construction of petitioner's MS4 permit," and that question was outside the scope of the question on which the Court had granted certiorari. *Id*. The United States therefore asked the Court to remand, which would allow reconsideration of petitioner's liability in the court of appeals. *Id*. at 19; Tr. 27:8-11, 28:14-20. The Flood Control District opposed a remand and asked this Court to direct entry of judgment in its favor. 11-460 Pet. Reply Br. 1, 6-8; Tr. 62:8-21.

This Court resolved only the legal issue on which all parties agreed, holding that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants"

under the Clean Water Act. 133 S. Ct. at 713. The Court expressly declined to address respondents' alternative grounds for liability based on the compliance monitoring results. *Id*. at 714. It reversed the judgment of the court of appeals, and remanded the case without directing entry of judgment.

On remand, the court of appeals received supplemental briefing from the parties. The court rejected petitioners' argument that the court's initial determination regarding compliance monitoring was "final" and had become "law of the case." Pet. App. 21-22. The court noted that its prior opinion on the compliance monitoring question was not final because the mandate never issued, and that this Court "explicitly declined to address it." *Id.* at 21-22 & n.14. Thus, on remand, the court held it was free to reconsider the argument. *Id.* at 22.

Turning to the merits, the court of appeals concluded that "as a matter of permit construction," the mass emissions monitoring data conclusively demonstrate petitioners' liability for pollution limit exceedances. *Id.* at 29. The court made clear that its holding turned on the language of the permit, not the Clean Water Act: "Our sole task at this point of the case is to determine what Plaintiffs are required to show in order to establish *liability* under the terms of *this particular* NPDES permit." *Id.* at 25; *see also id.* at 25 n.16 ("The question before us is not whether the Clean Water Act mandates any particular result.").

The court rejected petitioners' argument that holding them liable would make them responsible for the pollution of other dischargers. *Id.* at 28-29. The court noted that "the remedial scheme of the Permit itself" protects against that concern, because if the MS4 "is found to be contributing to water quality violations, each Permittee must take appropriate remedial measures with respect to its *own* discharges" only. *Id.* at 29. Thus, the court concluded, "a finding of *liability* against the County Defendants would not, as defendants argue, hold any County Defendant responsible for discharges" that are not its own. *Id.*

The court of appeals remanded to the district court to determine an appropriate remedy. It denied petitioners' motion for rehearing or rehearing en banc, with no judge dissenting or calling for a vote. C.A. Docket entry No. 90. This petition for certiorari followed.

III. Permit Amendment

The permit language in dispute in this case has been rewritten. The Regional Board amended petitioners' permit in 2012 to include a revised monitoring program to assess permit compliance.[2] The new

[2] L.A. Reg'l Water Quality Control Bd., Order No. R4-2012-0175, NPDES Permit No. CAS004001, Att. E, E-4 (Nov. 8, 2012), *available at* http://www.swrcb.ca.gov/losangeles/water_issues/programs/stormwater/municipal/la_ms4/Dec5/Order%20R4-2012-0175%20-%20Final%20Attachment%20E.pdf.

compliance monitoring applies to all future MS4 discharges and any future enforcement actions. The amended permit became effective on December 28, 2012 (after the argument in this Court), and as of that date superseded the monitoring provisions that are in dispute in this litigation.[3]

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied because this case does not meet the Court's criteria for certiorari review.

First, the court of appeals was free to reevaluate petitioners' liability, and its decision to do so was fully consistent with *Calderon v. Thompson*. On remand, lower courts may consider any question not foreclosed by this Court's mandate. Because this Court's prior opinion did not address respondents' monitoring argument, or any basis for petitioners' liability beyond the narrow question on which it granted certiorari, the court of appeals could consider the monitoring argument on remand. There is no conflict with *Calderon v. Thompson*, which did not address the proper scope of lower court proceedings on remand from this Court.

[3] L.A. Reg'l Water Quality Control Bd., Transmittal of Final Order No. R4-2012-0175 (Dec. 5, 2012), *available at* http://www.swrcb.ca.gov/losangeles/water_issues/programs/stormwater/municipal/la_ms4/Dec5/Transmittal%20memo.pdf.

Second, the court of appeals' permit interpretation does not warrant this Court's review. The holding is limited to the meaning of a single permit, the provisions of which are not replicated elsewhere and have now been superseded. The decision has no national significance, does not conflict with any other circuit court opinion or any opinion of this Court, and is consistent with the Clean Water Act.

I. The Court Of Appeals Could Reconsider Issues Left Open By This Court's Mandate, And There Is No Conflict With *Calderon v. Thompson*

On remand, a lower court may consider any matter not decided on appeal by the higher court. *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (on remand, lower courts are bound "only with respect to issues previously determined" by the Supreme Court). "While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939). Under this rule, "the circuit court may consider and decide any matters left open by the mandate of this court." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). The mandate forecloses further review only of matters "heard and decided." *Id*.

In its prior opinion, this Court expressly declined to decide respondents' theory of liability based on the permit's compliance monitoring:

> [The monitoring argument] is not embraced within, or even touched by, the narrow question on which we granted certiorari. We therefore do not address, and indicate no opinion on, the issue . . . .

133 S. Ct. at 714. The Court instead reversed on other grounds and remanded the case. *Id*. The Court's mandate therefore does not foreclose consideration of the monitoring argument on remand. *See Biggins v. Hazen Paper Co.*, 111 F.3d 205, 209 (1st Cir. 1997) ("[M]andates require respect for what the higher court decided, not for what it did not decide.").

Lower 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. *See Glover v. United States*, 531 U.S. 198, 205 (2001) (reversing and remanding without deciding alternative grounds for affirmance that were outside the questions presented, and observing that the lower courts may determine whether those arguments remained open and had merit); *Owen v. Owen*, 500 U.S. 305, 314 (1991) (reversing and remanding while noting that the Court's decision "does not necessarily resolve this case" because other outcome-determinative issues could be considered by the court of appeals on remand); *Field v. Mans*, 157 F.3d 35, 42 (1st Cir. 1998) (addressing a question on remand that the Supreme Court had declined to consider because it was outside the question on which the Court had granted certiorari).

Nor is there anything inherently improper about a lower court *reconsidering* a question after this Court reverses on another issue. This Court has acknowledged that lower courts may reconsider on remand questions that the Court declines to address. *See Moore v. Illinois*, 434 U.S. 220, 232 (1977) (reversing and remanding with specific instructions, and noting that the court of appeals would also be "free on remand to re-examine the other issues presented by the petition, upon which we do not pass"). Lower courts have revisited on remand issues that this Court did not resolve. *Compare In re Zurko*, 142 F.3d 1447, 1449 (Fed. Cir. 1998) (concluding that "the outcome of this appeal turns on the standard of review used by this court"), *with In re Zurko*, 258 F.3d 1379, 1381 (Fed. Cir. 2001) (concluding, after reversal and remand by the Supreme Court for application of a new standard of review, that "the outcome of this case does *not* change with the application of this new standard of review" (emphasis added)); *see also, e.g.*, *Field*, 157 F.3d at 41-42 (approving reconsideration on remand of an issue the Supreme Court expressly declined to reach). This is consistent with the rule that "[t]he inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court." *Ex Parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900).

The circumstances of this case confirm that the court of appeals was free to reconsider respondents' monitoring argument. This Court remanded the case, and the only proffered purpose for a remand was to

allow the court of appeals to reconsider the monitoring argument. 11-460 U.S. Amicus Br. 24 (arguing that it was appropriate to remand the case "to allow the court of appeals to reconsider its liability determination"); Tr. 27:3-11, 28:14-20, 50:16-51:8. Even petitioner recognized that this would be the effect of a remand; that is why petitioner opposed a remand and urged this Court to enter judgment in its favor. 11-460 Pet. Reply Br. 8; Tr. 62:8-23. But this Court remanded without directing entry of judgment. *L.A. Cnty. Flood Control Dist.*, 133 S. Ct. at 714; *see Rogers v. Hill*, 289 U.S. 582, 587 (1933) ("[I]f the court intended to direct dismissal, it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree, and mandate generally employed for that purpose."); *cf., e.g.*, *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 23 (2006) ("The judgment of the Court of Appeals is reversed, and the cases are remanded for entry of judgment for petitioners.").[4]

Petitioners cite *Kotler v. American Tobacco Company*, 981 F.2d 7 (1st Cir. 1992), in which the First Circuit declined to reopen an issue that was outside the scope of a specific remand order. But in

[4] This petition for certiorari thus amounts to a complaint about the Court's prior decision not to direct entry of final judgment, and in fact repeats the same arguments regarding entry of final judgment that were unsuccessfully made to this Court on its prior review. *Compare* Pet. 31, *with* 11-460 Pet. Reply Br. 8.

Kotler, unlike here, the Court's remand order was limited: it remanded for further consideration "in light of" an intervening case. *Id*. at 10 (quoting *Kotler v. Am. Tobacco Co.*, 505 U.S. 1215, 1215 (1992)). Such circumstances may counsel a court of appeals, absent compelling circumstances, to "confine its ensuing inquiry to matters coming within the specified scope of the remand." *Id.* at 13. Here, the remand had no "specified scope" that could narrow subsequent proceedings to particular, itemized issues. *See Field*, 157 F.3d at 42 (distinguishing *Kotler* because "the Supreme Court's mandate here did not contain any express or implied limitation," and instead was "a general remand order").

Petitioners also cite *Christianson v. Colt Industries Operating Corporation*, 486 U.S. 800 (1988), but that case is off point. *Christianson* does not involve a remand from this Court, but instead discusses whether a lower court has authority to revisit decisions of a coordinate court that are law of the case. Here, the appeals court's prior opinion was not law of the case. Among other things, law of the case does not attach where, as here, the appeals court's mandate has never issued and the opinion was never final. *Carver v. Lehman*, 558 F.3d 869, 878 n.16 (9th Cir. 2009) ("[U]ntil the mandate issues, an opinion is not fixed as settled Ninth Circuit law, and reliance on the opinion is a gamble." (internal quotation marks omitted)); *United States v. Simmons*, 923 F.2d 934, 956 (2d Cir. 1991) (holding that an earlier appeals court decision never became "effective" or "law of the

case" where the mandate was stayed and the Supreme Court granted review and reversed).[5]

Petitioners suggest that the appeals court could not reconsider the compliance monitoring argument because, although respondents made the argument in the Supreme Court in defense of the judgment below, it was not the subject of a cross-petition for certiorari. Pet. 23, 27, 29, 31. But this Court did not hold that respondents were required to cross-petition to preserve their monitoring argument, 133 S. Ct. at 713-14, and petitioners cite no other authority for this proposition. The fact that respondents did not petition for rehearing of the original decision does not affect its finality either. Unlike trial court decisions, "[t]he legitimacy of an expectation of finality of an appellate order depends on the issuance or not of the mandate," not the expiration of the time to petition for reconsideration. *United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990).

Petitioners premise their petition for certiorari on an asserted conflict with *Calderon v. Thompson*, 523 U.S. 538 (1998). That case is inapt. In *Calderon*,

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[5] Petitioners claim that as a result of the opinion below, "there will be chaos," with parties "battling over whether the mandate should be stayed pending review in this Court." Pet. 31. But the fact that one party may want a mandate to issue (for reasons of "law of the case" or any other reason) does not lead to "chaos." Appeals courts are fully capable of managing disagreements over whether a mandate should issue pending review in this Court, as they currently do under Fed. R. App. P. 41(d).

the court of appeals denied federal habeas corpus relief in a state death penalty case, and this Court subsequently denied certiorari. The court of appeals then issued its mandate, leading the State of California to set an execution date. *Id*. at 546. Almost two months later, and two days before the scheduled execution, an en banc panel of the court of appeals recalled the mandate *sua sponte* and granted habeas relief. *Id*. at 548-49. The Supreme Court reversed, holding that the court of appeals had abused its discretion by recalling the mandate. *Id.* at 542.

The Court's holding in *Calderon* was explicitly tied to the circumstances presented by that case, which are entirely absent here. *Calderon* considered the question of when a court of appeals can *recall* its mandate after a *denial* of certiorari, in the specific context of federal habeas corpus proceedings. *Id*. at 557. The Court emphasized that it "should be clear about the circumstances we address in this case. . . . [W]e are concerned with cases where, as here, a court of appeals recalls its mandate to revisit the merits of its earlier decision denying habeas relief. In these cases, the State's interests in finality are all but paramount." *Id*.

In this case, unlike in *Calderon*, an appellate mandate has never issued. The principles espoused in *Calderon* in fact support respondents' position that the appeals court's initial judgment here was not final. *Calderon* makes clear that finality attaches to an appellate court's decision when its mandate issues, not before. *See id.* at 550 (describing "the profound

interests in repose attaching to the mandate of a court of appeals" (internal quotation marks omitted)); *id.* at 556 ("A State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief."). In other words, issuance of the mandate is a highly consequential act, which generates repose and an expectation of finality. *Foumai*, 910 F.2d at 620 ("[F]inality of an appellate order hinges on the mandate, as does a defendant's expectation of finality.").

Petitioners ignore *Calderon*'s holding and context, and instead focus on a single sentence in the case noting that "the State, not to mention this Court, had placed heavy reliance" on the court of appeals' first judgment. 523 U.S. at 552; Pet. 26. But nothing in this Court's decision here suggests that it "relied" on the court of appeals' initial opinion regarding the compliance monitoring argument when it granted review to consider an independent question: whether the flow of water through an engineered improvement within a river is a "discharge" under the Clean Water Act. Instead, this Court acknowledged but declined to express any view on the former argument when ruling on the latter.

Finally, petitioners assert that it was error for the court of appeals on remand to impose liability on Los Angeles County in addition to the County's Flood Control District, because the initial decision held only the District liable. Pet. 29-30; *see* Pet. App. 91-92. On remand from this Court, respondents did not explicitly request reconsideration of liability against the

County, but they did not waive their claims against the County either.[6] This Court's mandate did not address the County's liability, and the prior decision of the court of appeals in favor of the County was never final. The court of appeals was therefore entitled to reconsider the County's liability for the same reasons it was entitled to reconsider the monitoring argument. Any interim reliance by the County on the nonfinal opinion was a "gamble." *Carver*, 558 F.3d at 878 n.16; *see also Foumai*, 910 F.2d at 620.

In addition, under the circumstances of this case, holding the County liable results in no unfairness or surprise. The County and its Flood Control District have been represented jointly by the same counsel throughout the litigation. The County participated in the remand briefing in the court of appeals. *See, e.g.*, C.A. Resp. to Supp. Br. on Remand (C.A. Docket entry No. 71) (filed by "Defendants-Appellees" and signed by the Los Angeles County Counsel). The notion that the County was "dragged back" into the case (Pet. 29) is false; the County was never dismissed. The petition is devoid of any suggestion that the County did not have every opportunity to make its case.

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[6] By contrast, respondents did waive their right to pursue remedies for petitioners' discharges into Malibu Creek and the Santa Clara River. C.A. Supp. Reply Br. on Remand 10 (C.A. Docket entry No. 74) ("[T]here would be no available remedy for the District's past violations in other rivers (*Malibu Creek and the Santa Clara River*), or for Los Angeles County's separate violations *in those rivers*, because appellants waived their right to pursue further remedies." (emphasis added)).

In any event, technical distinctions between the County and the Flood Control District are irrelevant here. The County, through its Department of Public Works, performs all of the duties and functions of the Flood Control District. L.A. County Code § 2.18.020. The governing body of both the County and the Flood Control District is the same: the Los Angeles County Board of Supervisors. Cal. Water Code app. § 28-3. California law mandates that the claims against the District here be directed to the County. *Id*. § 28-14 1/2. In the state court litigation related to this permit, the County and the District referred to themselves as a single entity, "the County." *E.g.*, C.A. F.E.R. 2-8; Dist. Ct. Docket entry No. 101-44. And the County and District designated a single individual to testify on behalf of both entities at deposition. C.A. E.R. 161-71. In short, there has been no daylight between the two petitioners at any point in this litigation. Nor does the question have any practical relevance, given that the District is part of the County, and the County carries out all functions of the District. Any remedy awarded against the District alone would require the County's full involvement.

The court of appeals' actions on remand were clearly permitted, and do not conflict with *Calderon*.

II. The Court Of Appeals' Permit Interpretation Does Not Warrant This Court's Review

The court below interpreted petitioners' discharge permit to hold them liable for violations of water quality standards. The holding is limited to the meaning of a few provisions of that permit – provisions that are not replicated in other permits, and that have now been superseded. The decision has no national significance, creates no conflict with other authority, and is correct. It does not warrant this Court's review.

A. The Court Of Appeals' Holding Addresses Specific Provisions Of A Single Permit That Are Not Replicated Elsewhere And Have Been Superseded

The court of appeals interpreted petitioners' discharge permit as a contract, Pet. App. 24, and found that the permit's plain language imposed liability based on the results of the permit's required compliance monitoring, which showed exceedances of permit limits. *Id.* at 26-29. The court made clear that it was announcing no new rule of law under the Clean Water Act: "The question before us is not whether the Clean Water Act mandates any particular result." *Id.* at 25 n.16. The court viewed its task as determining what proof was required to demonstrate liability "under the terms of *this particular* NPDES permit." *Id.* at 25. The court held, "as a matter of permit construction," that petitioners' monitoring data

"conclusively demonstrate" that they are not in compliance with permit conditions. *Id.* at 29.

This holding will have no meaningful impact beyond the parties to this dispute. It will not govern the interpretation of permits with different monitoring provisions, and respondents are not aware of any permit with the same relevant provisions. Petitioners and their amici have pointed to none.

The holding also has limited significance even to the parties to this case, because the permit under review was superseded in December 2012. 133 S. Ct. at 714 n.2; *see supra* at 7-8. The old permit, at issue here, measures compliance solely at instream locations within the rivers. The new permit adds end-of-pipe outfall monitoring. That change eliminates the source of the dispute in this case: whether petitioners can be held liable under their permit based solely on monitoring conducted instream instead of at an outfall. The new monitoring requirements apply to current discharges and future enforcement actions. The permit language construed by the court below thus has no future effect.[7]

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[7] The case is not moot, because effective relief is still available against petitioners for their violations of the prior permit. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192-93 (2000). A case is moot only "if an event occurs . . . that makes it impossible for the court to grant any effectual relief whatever." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (internal quotation marks omitted).

B. The Court Of Appeals' Decision Creates No Uncertainty And Does Not Discourage Jurisdiction-Wide Permits

Petitioners and their amici suggest that the court of appeals' decision is broadly significant because it will "spawn[ ] uncertainty" with respect to storm-water regulation. Pet. 22, 45. Just the opposite is true. The decision below applies a clear, simple, and well-established rule: the terms of a discharger's permit govern the assignment of liability in permit enforcement proceedings. This provides certainty to regulators and regulated parties, who routinely negotiate over the terms of a permit – including the compliance monitoring provisions – before it is issued.

Petitioners and their amici also argue that the court's decision will discourage jurisdiction-wide MS4 permitting, and that this presents an issue of national concern. *E.g.*, Pet. 45. But municipalities still have every incentive to enter jurisdiction-wide permits, which confer the benefit of shared administrative responsibilities and expenses. *See, e.g.*, 53 Fed. Reg. 49,451 (Dec. 7, 1988); NPDES Permit No. CAS004001, *supra* n.2, at Att. E, E-7 (discussing cost efficiencies achieved from coordinated monitoring). The only consequence of the court's ruling is that *if* a future permit contains the same monitoring provisions as those at issue here (including the provision that instream monitoring will be used to "[a]ssess[ ] compliance" with the permit, C.A. E.R. 263), then the monitoring data will be used to assess a permittee's

liability. But dischargers and regulatory agencies are free to choose a different compliance monitoring scheme, as petitioners and the Regional Board have already done for petitioners' new, jurisdiction-wide permit that went into effect in 2012.

C. The Court Of Appeals' Decision Does Not Conflict With Decisions From Other Courts Of Appeals Or This Court

Petitioners do not claim any circuit conflict with respect to the court of appeals' permit interpretation (or with respect to any other aspect of the decision). Petitioners acknowledge the lack of circuit conflict by arguing that certiorari review is warranted because "relatively few" appellate decisions address liability in this area. Pet. 33. But the *lack* of conflicting appellate decisions is not a reason to grant review, especially where, as here, the case is tied to a single permit and has no national significance.

Petitioners assert, almost in passing, that the decision below conflicts with decisions of this Court requiring proof of a "discharge" in order to find violations of the Clean Water Act. *Id.* at 34-35. But the suggestion that petitioners were held liable without proof of a "discharge" is baseless; petitioners *admit* that they discharge polluted stormwater into the rivers. Pet. App. 23 ("County Defendants do not dispute that they are discharging pollutants from the LA MS4 into these rivers."); 11-460 Pet. Reply Br. 2 (petitioner "acknowledges that it discharges stormwater from its MS4 through outfalls into the rivers").

Petitioners' MS4, by definition, is designed to make such discharges. 40 C.F.R. 122.26(b)(8) (defining an MS4 as a conveyance that "discharges to waters of the United States"). Cases from this Court holding that a permit is unnecessary when a party does not discharge into waters of the United States, *see* Pet. 34, therefore have no bearing on the court's decision below or on petitioners' liability for violations of their admittedly lawful permit.

D. The Court Of Appeals' Reading Of The Permit Is Consistent With The Clean Water Act And Is Correct

Petitioners argue that the court of appeals' permit interpretation is incorrect on the merits, primarily by arguing that it is inconsistent with Clean Water Act regulations. Petitioners are wrong.

First, petitioners suggest that the permit's use of instream monitoring to measure a permittee's compliance is inconsistent with the Clean Water Act. Pet. 34-35. But federal regulations provide that monitoring to determine compliance may be conducted at "instream stations," like those at issue here, and shall be "representative" of a permittee's discharge. 40 C.F.R. 122.26(d)(2)(iii)(D) (permit applications must contain proposed monitoring, which may be conducted at "instream stations," for "representative" data collection); *see also* 11-460 U.S. Amicus Br. 9 ("[S]ubject to the permitting authority's approval, a permit applicant may choose between a monitoring scheme

that samples at outfalls, one that samples from instream locations, or some combination of the two.").

Second, petitioners argue that, under minimum federal requirements, MS4 permits need not contain compliance monitoring provisions at all. Pet. 36-38. This argument is incorrect; the Clean Water Act requires every discharge permit to include monitoring and reporting provisions sufficient to assess permit compliance. 33 U.S.C. 1342(a)(2), 1318(a)(A); 40 C.F.R. 122.41(*l*)(4)-(7) (listing conditions "applicable to all permits" and directing dischargers to "report all instances of noncompliance"); Pet. App. 30. In order to obtain a permit, municipal dischargers must propose a monitoring program for inclusion in their permit that is sufficient "to determine compliance and non-compliance with permit conditions." 40 C.F.R. 122.26(d)(2)(i)(F).[8]

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[8] Petitioners' argument that MS4 permits need not contain compliance monitoring has never been accepted by any court and is inconsistent with the purpose and goals of the Clean Water Act. Compliance monitoring enables straightforward enforcement of a permit's pollution limits based on self-reporting, as Congress intended. *See* 44 Fed. Reg. 32,863 (June 7, 1979) ("Congress intended that prosecution for permit violation be swift and simple."); S. Rep. No. 92-414, at 64 (1971) ("One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement."). The Regional Board has stated that "[t]his system of self-reporting is critical" to the permitting program, and "[t]he data provided through accurate and complete monitoring reports serve as *conclusive evidence* as to

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The Court need not entertain this dispute about minimum federal permit conditions, however. Petitioners' permit plainly does contain compliance monitoring provisions, whether or not such provisions are mandated by federal law. Pet. App. 30 (finding that the "plain language" of the permit establishes that the monitoring data determine compliance); C.A. E.R. 263. Petitioners concede that a state-issued permit, like theirs, can go beyond minimum federal requirements. Tr. 24:7-12; *see also* 33 U.S.C. 1370; 40 C.F.R. 122.1(a)(5); *cf. Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999) (holding that EPA may impose permit conditions not required by the Clean Water Act). The pertinent document is the permit, which is controlling. Pet. App. 22-23; *see Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 269 (4th Cir. 2001).

Finally, petitioners argue that the court of appeals' permit interpretation is inconsistent with a federal regulation – the language of which is paraphrased in the permit – providing that each permittee is "responsible only for a discharge for which it is the operator." C.A. E.R. 199; *see* 40 C.F.R. 122.26(b)(1); Pet. 42-44. This provision does not shield petitioners from liability. Liability is established based on the instream compliance monitoring. The permit provision cited by petitioners governs the appropriate *remedy* for permit violations – not liability. Pet. App.

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whether permit violations exist." C.A. F.E.R. 26 (emphasis added).

28-29. The permit itself outlines this remedial program, which apportions cleanup responsibility according to each permittee's own contribution. C.A. E.R. 202, 205, 260. In other words, as the appeals court correctly held, petitioners are liable based on the instream monitoring and responsible for remedying only their individual share of the pollution. Pet. App. 28-29. This reading harmonizes the permit's remedial scheme with its compliance monitoring framework, and effectuates the rule that courts should read a permit, like any other contract, to give full effect to all its terms, not just "a few isolated provisions" read out of context. *Id.* at 27-28. And as a practical matter, holding petitioners responsible for their own discharges will go a long way toward solving the pollution problem, because it is undisputed that petitioners are by far the biggest source of water pollution in the rivers at issue. *See* C.A. E.R. 10, 302, 307; C.A. F.E.R. 17. The court's permit interpretation is sensible, fair, and correct.

In any event, the specific remedy for petitioners' violations has not yet been determined, and petitioners' suggestion that the remedy will be unfair is premature. The district court on remand will have discretion to design appropriate injunctive relief, if any, taking into account relative responsibility. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12, 317-18 (1982). The amount of civil penalties is within the district court's discretion, and may be nominal. 33 U.S.C. 1319(d); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir. 1995). Attorney's fees are

only available if the court determines that such an award is appropriate. 33 U.S.C. 1365(d). If on remand the district court orders relief that petitioners think is improper, petitioners will have every opportunity to challenge that remedy in the court of appeals and this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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