NO. 21-_____

In the Supreme Court of the United States

CORONA CLAY COMPANY,

Petitioner,

v.

INLAND EMPIRE WATERKEEPER, A PROJECT OF ORANGE COUNTY COASTKEEPER; AND ORANGE COUNTY COASTKEEPER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a private citizen suit brought under 33 U.S.C. § 1365(a) of the Clean Water Act (the "CWA"), a plaintiff can establish Article III standing without proving that there is any actual or threatened harm to any jurisdictional water of the United States.

2. Whether Article III standing in a private citizen suit under 33 U.S.C. § 1365(a) may be premised solely on the reporting and monitoring provisions in the CWA stemming from "informational injury."

3. Whether Federal Rule of Civil Procedure 36(a) removes a trial court's discretion, after the evidence phase of trial, to allow or disallow the presentation of new evidence to the jury.

RULE 29.6 STATEMENT

Petitioner Corona Clay Company has no parent corporation, is not publicly traded, and no publicly-traded corporation owns more than 10% of Corona Clay Company's stock.

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 20-55420, 20-55678

Inland Empire Waterkeeper, a Project of Orange County Coastkeeper; Orange County Coastkeeper, a California Non-profit Corporation, *Plaintiffs* v. Corona Clay Co., a California Corporation, *Defendant*

Date of Final Opinion: November 5, 2021

Date of Rehearing Denial: November 5, 2021

United States District Court Central District of California Southern Division

No. 8:18-cv-00333-DOC-DFM

Inland Empire Waterkeeper Et Al., *Plaintiffs*, v. Corona Clay Company, *Defendant*.

Date of Final Judgment: April 6, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals, as amended, is reported at 17 F.4th 825 (9th Cir. 2021), and is reprinted in the Appendix to the Petition ("App.") at App.3a-App.21a. The dissenting opinion of Judge Daniel P. Collins is reprinted at App.22a-App.45a. The district court's order on Respondents' motion for partial summary judgment is available at 2019 WL 4233584 and is reprinted at App.69a. The District Court's orders on Petitioner's and Respondents' post-trial motions are reprinted at App.46a and App.52a, respectively.

JURISDICTION

The Ninth Circuit entered its judgment on September 20, 2021. On November 5, 2021, the Ninth Circuit entered an amended opinion and an order denying Petitioner's timely petition for *en banc* rehearing. App.2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. III, § 2, cl. 1 provides:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

33 U.S.C. § 1311(a)

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1362(12) (Definitions)

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or

the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1365(a)

Authorization; jurisdiction—Except as provided in subsection (b) of this section and section 1319 (g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(f)

Effluent standard or limitation—For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July

1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) a standard of performance or requirement under section 1322(p) of this title; (6) a certification under section 1341 of this title; (7) a permit or condition of a permit issued under section 1342 of this title that is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (8) a regulation under section 1345(d) of this title.

33 U.S.C. § 1365(g)

"Citizen" defined—For the purposes of this section the term 'citizen' means a person or persons having an interest which is or may be adversely affected.

INTRODUCTION

This case involves exceptionally important issues of federal law regarding private-citizen lawsuits brought under 33 U.S.C. § 1365 of the CWA. Relying on dicta from cases involving undisputed discharges of pollutants into waters of the United States, the Ninth Circuit held—over a strong dissent from Judge Daniel P. Collins—that the Supreme Court's decision *in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), "permits a citizen suit based [on] ongoing or imminent procedural violations,"

despite a jury verdict in the District Court finding that Respondents failed to prove that Petitioner "discharged pollutants from a point source into" waters of the United States "and that such discharge was either (1) on or after February 27, 2018 [the date of the filing of the action], or (2) at any time, with a reasonable likelihood that such violations will recur in intermittent or sporadic violations." App.60a. The entire premise of a citizen's suit under the CWA is the "abatement" of pollution. *Gwaltney*, 484 U.S. at 61 (citing authorities). Yet, the Ninth Circuit's decision opens up the possibility of citizen suits based on nothing more than reporting violations, so long as some discharge occurred at some undefined point in time.

For the reasons stated in Judge Collins's dissent, the Ninth Circuit's opinion is contrary to well-settled law. The majority upheld the District Court's grant of summary judgment in favor of Respondents on the issue of Article III standing, notwithstanding the existence of genuine issues of fact regarding whether any harm claimed by Respondents was "fairly traceable" to any conduct of Petitioner. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 578 (1992). This, despite *Lujan*'s clear holding that the elements of Article III standing are "an indispensable part of the plaintiff's case" and that, as a result, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof*, i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. at 561 (emphasis added). As the jury's verdict would later make clear, this fact issue was ultimately resolved in Petitioner's favor after a full trial and should have resulted in a judgment in Petitioner's favor.

This Court's consideration on this point is warranted here because the Ninth Circuit's opinion is contrary to the holding in *Lujan*, as Judge Collins indicated in his dissent. In addition, the Ninth Circuit's opinion conflicts with decisions from other Courts of Appeal on the same issue, notably the Third and Fifth Circuits, as discussed further below. *See Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996); *Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997).

The Ninth Circuit also went against well-established authority on another point. Specifically, Respondents appealed the District Court's decision to decline to present to the jury a response to a request for admission that requested an admission that "discharges of storm water from the FACILITY flow indirectly to Temescal Creek." In response to the request, Petitioner admitted that "storm water from the industrial area on the property . . . indirectly flows to Temescal wash." However, Respondents did not even raise the discovery response until after evidence had closed. Moreover, Respondents did not ask for a jury instruction on the issue in compliance with the Central District's Local Rules. However, the Ninth Circuit found that it was error for the District Court to deny the post-evidence phase request.

Again, as Judge Collins concluded, this was not an abuse of discretion by the District Court. In fact, the Ninth Circuit's opinion conflicts with established Supreme Court, Ninth Circuit, and other Court of Appeal decisions giving district courts significant discretion in the presentation of evidence, particularly where evidence has closed and where the request was

not timely under local rules. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 331 (1971); *U.S. v. Federbush*, 625 F.2d 246, 253 (9th Cir. 1980); *U.S. v. Lustig*, 555 F.2d 737, 751 (9th Cir. 1977); *U.S. v. Upton* 559 F.3d 3, 9 (1st Cir. 2009); *Ardrey v. United Parcel Serv.*, 798 F.2d 679, 682 (4th Cir. 1986).

Because the Ninth Circuit's opinion conflicts with this Court's precedent and decisions from other Courts of Appeals, this Court should grant this Petition and review the judgment.

STATEMENT OF THE CASE

A. Petitioner and the Permit

Petitioner is in the business of acquiring discarded brick materials and then grinding those materials down into a finer clay product. App.72a-73a. The finished product is then sold for use in the installation of baseball infields and running tracks. *Id*

In or about 2014, Petitioner became a permittee under the National Pollutant Discharge Elimination System General Permit (the "Permit"). App.73a. The closest body of water to Petitioner's facility is Temescal Creek, which is about one-quarter of a mile away. *Id.* In June 2017, Petitioner undertook to extensively expand a "silt basin" to capture stormwater runoff. App.86a.

B. Respondents' Initiation of Lawsuit and First Amended Complaint

Respondents initiated this private citizen lawsuit on February 27, 2018, alleging violations by Petitioner of several provisions of the CWA. App.74a. On April 20, 2018, Respondents filed their First Amended Complaint ("FAC"), seeking relief on seven causes of action. *Id.*

The first cause of action was labeled "Violation of Section 301(a) of the Clean Water Act by Discharging Contaminated Stormwater in Violation of the Storm Water Permit's Effluent Limitations." *Id.* It alleged that Petitioner "failed and continues to fail to reduce or prevent pollutants associated with industrial activities at the Facility from discharging from the Facility through implementation of BMPs that achieve BAT/BCT."[1]

Respondents labeled the second cause of action as "Violation of the Clean Water Act by Discharging Polluted Storm Water in Violation of the Storm Water Permit's Discharge Prohibitions." *Id.* The second cause of action alleged that "the Facility has discharged, and continues to discharge, prohibited storm water discharges that result in coloration of the receiving waters; contain floating materials, including soils and liquids; suspended or settleable solids; and increase turbidity which causes a nuisance or adversely affect

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[1] "BMPs" are defined in the Permit as "Best Management Practices." "BAT/BCT" are defined, respectively, as "Best Available Technology Economically Achievable" and "Best Conventional Pollutant Control Technology."

beneficial uses in violation of discharge prohibitions contained in the Basin Plan."

The third and fourth causes of action in Respondents' FAC were dismissed voluntarily and are not a subject of this Petition. App.5a. Their fifth, sixth and seventh causes of action were essentially based on alleged "reporting violations," alleging, respectively, that Petitioner failed to update its Stormwater Pollution Prevention Plan ("SWPPP"), failed to institute a monitoring and reporting program, and failed to file annual reports in compliance with the Permit. *Id.*

C. The District Court's Summary Judgment Ruling

Respondents filed a motion for partial summary judgment, seeking a finding of liability on five of their causes of action and findings regarding the number of days of penalties that could apply. App.75a. Petitioner opposed, arguing—among other things—that Respondents lacked Article III standing because there was a genuine factual dispute regarding whether Petitioner's stormwater runoff ever reached any water of the United States. App.82a-83a.

Although the District Court denied the motion as to the second, sixth, and seventh causes of action, it granted the motion in part on the first and fifth causes of action. App.98a. Notably, in finding Petitioner liable on the first cause of action, the District Court found that Petitioner "failed to meet BMPs, thus violating the General Permit, on numerous occasions in the past several years." App.88a-89a. In support of its conclusion, the District Court cited to notices of violation issued by the Santa Ana Regional Water Quality Control Board (the "Water Board") in 2015, 2016, and

on May 3, 2017. *Id.* All of these notices were issued well before Respondents filed their February 27, 2018 complaint in this action.

Further, and in response to Petitioner's argument that its stormwater runoff never reached waters of the United States, the District Court stated:

> To the contrary, Plaintiffs need not show that discharges have reached the body of water in question; under the CWA, a discharging facility's violation of BMPs can be determinative of whether that facility has violated its state permit and the CWA. 40 C.F.R. § 122.44(k)(4)(BMPs controls the discharge of pollutants when authorized under the CWA). As California's current General Permit utilizes BMPs, these practices are determinative of whether Defendant's Facility has committed violations of the CWA's effluent limitations.

App.89a-90a.

D. Trial and Jury Verdict

The case proceeded to trial on Respondents' second, sixth and seventh causes of action on October 21, 2019. For the second, the final jury instructions read by the District Court required that Respondents prove by a preponderance of the evidence that Petitioner's "facility discharged prohibited storm water discharges, in violation of the Regional Water Quality Control Plan, on or after February 27, 2018; or that there is a continuing likelihood of a recurrence in intermittent or sporadic violations; . . . ." App.5a-6a. For the sixth and seventh, the District Court's final jury instructions included an element that Respondents needed to

prove Petitioner "discharged pollutants into waters of the United States." *Id.*

The jury delivered its verdict on October 25, 2019. In completing the special verdict form, the jury answered "No" to the question of whether Respondents proved, by a preponderance of the evidence, that Petitioner:

> [D]ischarged pollutants from a point source into streams or waters that qualify as jurisdictional 'waters of the United States'; and that such discharge was either (1) on or after February 27, 2018, or (2) at any time, with a reasonable likelihood that such violations will recur in intermittent or sporadic violations?"

App.60a.

As the jury's response to the initial question was "No," there was no need for the jury to complete the remainder of the special verdict form. *Id.*

E. The District Court's Final Judgment

After the parties submitted competing proposed judgments, the District Court entered its Final Judgment on April 6, 2020. App.48a. The Final Judgment stated that judgment was entered in favor of Respondents on the first and fifth causes of action. The Final Judgment further stated that:

> (1) Corona is "liable for 664 daily violations (September 4, 2017 through June 30, 2019) of the Storm Water Pollution Prevention Plan . . . ""

(2) Corona is liable for "1688 daily violations (March 2, 2015 through October 15, 2019) of the Permit's Section V limitations on technology-based effluents;

(3) Corona is to "implement structural storm water Best Management Practices sufficient to retain the 85th percentile, 24-hour storm event, including a factor of safety, from areas subject to the Storm Water Permit no later than December 1, 2020. . . . ;"

(4) Corona is to "update and amend its Storm Water Pollution Prevention Plan to comply with section X.C.1, subsections b and c, of the Permit, no later than July 1, 2020;" and

(5) Corona "shall pay civil penalties for violations of the Clean Water Act in the sum of $3,700,000 by July 1, 2020."

App.49a-50a.

The Final Judgment further stated that, because Respondents prevailed on the first and fifth causes of action, and Petitioner prevailed on the second, sixth and seventh causes of action, that the "parties shall bear their own fees and costs in this matter." App.50a

F. Respondents' Post-Trial Motion

On November 1, 2019, Respondents filed a Motion to Alter or Amend the Judgment or, in the Alternative, for a New Trial. App.54a. As the District Court pointed out in its order denying them, the motions were premised on the argument that the District Court improperly instructed the jury by requiring proof of discharge to waters of the United States in connection with the sixth and seventh causes of action.

App.57a. The District Court also rejected the Respondents' argument that the jury should have been presented with the RFA response. App.58a-59a. The District Court made clear that Respondents were required to prove a discharge to a water of the United States in connection with their second cause of action. App.59a. However, the District Court noted that the evidence "was not introduced at trial" and stated that it "declines at this juncture to admit this evidence post hoc and overrule the jury's verdict on the sixth and seventh causes of action." *Id.*

G. Petitioner's Post-Trial Motion

On May 4, 2020, Petitioner timely filed a Motion under Federal Rule of Civil Procedure 60(b) and Federal Rule of Civil Procedure 59(e). In that motion, Petitioner argued that, based on the jury's verdict, the Final Judgment was void under Federal Rule of Civil Procedure 60(a)(4) because the District Court lacked subject matter jurisdiction to enter it due to Respondents' lack of standing. App.36a.

In the alternative, Petitioner argued that the Final Judgment should be altered or amended under Federal Rule of Civil Procedure 59(e) because (1) there was a lack of standing; (2) the facts adduced more fully at trial and the jury's verdict established that Respondents' first and fifth causes of action failed on the merits; (3) the $3,700,000 penalty imposed by the District Court was unconstitutional and failed to take into account the factors set forth in 33 U.S.C. § 1319(d); (4) if any penalty was assessed, it should be nominal; and (5) the injunctive relief was improper in the absence of irreparable harm. App.21a; *id.* 37a. In a brief June 22, 2020 minute order, the District Court

denied Petitioner's motion concluding that, given Respondents had already filed a notice of appeal, it would decline to rule and would instead defer to the Ninth Circuit. App.46a. The District Court did order, however, that enforcement of the judgment be stayed. App.47a.

H. Panel Majority Opinion and Dissent

On appeal, the Ninth Circuit vacated the judgment below in a 2-1 opinion issued on September 20, 2021. 13 F.4th 917 (9th Cir. 2021), *order amended and superseded by* 17 F.4th 825 (9th Cir. 2021). The panel majority looked to *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020), in which this Court rejected the Ninth Circuit's prior interpretation of the CWA's discharge jurisdictional requirement, and held that an offending discharge must reach the "waters of the United States," either through a direct discharge or a "functional equivalent." App.17a. Because *County of Maui* was decided after the District Court entered its final judgment, the jury instructions in this case corresponded to prior Ninth Circuit law.

The panel majority disagreed with the District Court's interpretation of *Gwaltney* and held that if a jurisdictional discharge into waters of the United States has occurred at any undefined point in time, a CWA citizen suit can be premised on ongoing or reasonably expected monitoring or reporting violations. App.17a. The panel majority wrote that the change in law in *County of Maui* affected not only the jury instructions, but also the partial summary judgment ruling, and the parties deserved the ability to address whether any indirect discharge by Petitioner was the "functional equivalent" of a direct discharge into the waters of the

United States. App.18a. The panel majority also concluded that the District Court erred in not presenting to the jury Petitioner's response to the request for admission. App.19a-20a.

Judge Collins dissented, concluding that the District Court erred by holding, at summary judgment, that Respondents had constitutional standing because there was a triable issue of fact as to whether Petitioner's alleged discharges reached or imminently threatened to reach Temescal Creek. App.26a-27a. Judge Collins wrote that he would not overturn the verdict based on jury instruction error, and he therefore would remand for the District Court to address whether the verdict was dispositive of standing, and, if not, to proceed with a trial on the then-remaining claims. App. 36a-37a. Further, Judge Collins disagreed with the majority regarding the discovery response, concluding that it was not an abuse of discretion by the District Court given the late stage at which Respondents sought to introduce the response. App.44a-45a.

I. Petition for Rehearing *En Banc* and Amended Opinion

Petitioner timely filed a petition for rehearing *en banc* on October 4, 2021. App.2a. On November 5, 2021, the Ninth Circuit issued its order denying the petition for rehearing. *Id.* Also on November 5, 2021, the Ninth Circuit issued an amended opinion, which replaced the word "into" at slip opinion page 20, line 16, with the word "to," and removed the word "admitted" at slip opinion page 20, line 27. App.3a-21a. The dissenting opinion of Judge Collins was unchanged. App.2a; *id.* 22a-45a.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT WRONGLY PARTED WITH THIS COURT AND OTHER COURTS OF APPEALS IN DETERMINING THAT RESPONDENTS HAD ESTABLISHED STANDING

In conflict with this Court and other Courts of Appeals, the Ninth Circuit incorrectly expanded standing in private-citizen suits under the CWA. The Ninth Circuit also departed from this Court's precedent regarding the level of proof a private citizen must meet to establish standing at each stage of the litigation.

This Court should grant the Petition to bring uniformity among the Courts of Appeal on these important issues that will impact numerous businesses, big and small.

A. The Ninth Circuit's Opinion Conflicts with This Court's Precedent and Improperly Provides a Broad, Newfound Basis for Standing in CWA Private-Citizen Suits.

The U.S. EPA and states were meant to be the primary enforcers of the CWA: "The [Senate] Committee [on Public Works] intends the great volume of enforcement actions [to] be brought by the State." *Gwaltney*, 484 U.S. at 60 (quoting S.Rep. No. 92-414, p. 64 (1971)). The citizen suit serves only as a backup, "permitting citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney*, 484 U.S. at 62 (emphasis added) (citing legislative history).

As this Court further discussed in *Gwaltney*, "Members of Congress frequently characterized the citizen suit provisions as 'abatement' provisions or as injunctive measures." *Id.* at 61. The Court then pointed to multiple statements in the legislative history indicating that citizen's suits were meant to be limited to addressing abatement of pollution. *See id.* (citing Water Pollution Control Legislation, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 1st Sess., pt. 1, p. 114 (1971) (staff analysis of S. 523) ("Any person may sue a polluter to abate a violation . . . "); *id.*, pt. 2, at 707 (Sen. Eagleton) ("Citizen suits . . . are brought for the purpose of abating pollution"); H.R.Rep. No. 92–911, p. 407 (1972) H.R.Rep. No. 92-911, p. 407 (1972), Leg.Hist. 876 (additional views of Reps. Abzug and Rangel) ("[C]itizens may institute suits against polluters for the purpose of halting that pollution").

Respondents relied on the doctrine of associational standing recognized in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Under that doctrine, an association may establish standing "'solely as the representative of its members,'" by showing that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 342–43 (citation omitted). At issue in this case is the first prong.

The elements of Article III standing are that "(1) [the plaintiff] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly

traceable to the challenged action of the defendant; and (3) 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 Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citation omitted). in arguing that these elements were satisfied by their members, Respondents relied on the declarations of three individuals. Each declaration expressed concerns that Petitioner's discharges harmed their "use and enjoyment" of Temescal Creek by degrading, or threatening to degrade, the quality of its water. As Judge Collins pointed out in his dissent, none of the declarants expressed concerns about Petitioner's reporting or violations of other procedural aspects of the Permit. App.34a.

This Court has made clear that the "fairly traceable" requirement is separate from the "injury in fact" analysis, stating in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), that "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).[2]

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[2] In CWA cases, both the Third and Fifth Circuits have applied a three-part test regarding the "fairly traceable" requirement, which requires that the plaintiff demonstrate that: "'a defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.'" *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.* 95 F.3d 358, 360–361 (5th

In concluding that standing existed here at the summary judgment stage, both the District Court and the Ninth Circuit ignored the pronouncement by this Court in *Lujan* that the requirements of Article III standing are "an indispensable part of the plaintiff's case," and that "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Indeed, the panel majority's opinion does not even reference the "fairly traceable" requirement, which was a central issue in the summary judgment briefing before the District Court.

Rather, the panel majority came up with a new-found theory of standing based on "informational injury," unannounced in any previous decision addressing private-citizen suits under the CWA. App. 12a-13a. To get there, the panel majority reached to a reference by one of the standing declarants regarding a book she was planning to write about the Santa Ana River. *Id.* Yet, as Judge Collins notes in his dissent, Respondents' "declarations and summary judgment motion never mentioned or relied upon the pure information-deprivation theory of standing that the majority concocts here." App.34a. While the panel majority referred to the need for information for this book as "obvious," the "obvious" need was never raised

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Cir. 1996) (quoting *Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990)). Had this test been applied by the District Court or the Ninth Circuit, there is no doubt that questions of fact remained regarding the second and third parts, at least.

by Respondents in any briefing on the matter. App.12a; *id.* 34a

The importance of the Ninth Circuit's decision cannot be understated. As the opinion indicates, the CWA vests district courts with jurisdiction over a citizen suit only upon proof of discharge into the navigable waters of the United States, "but, nothing in the statute requires the jurisdictional discharge be current or likely to occur." App.17a. Thus, as the Ninth Circuit now holds, a private-citizen suit can be premised solely upon a procedural violation, so long as a discharge into waters of the United States occurred at some, undefined point in time in the past. This is in stark contrast to the purpose of the private-citizen suit as announced by this Court in *Gwaltney*.

B. The Ninth circuit's Opinion Conflicts with Other Courts of Appeals That Addressed Standing for Private-Citizen Suits Under the CWA.

Further supporting the granting of this Petition is the fact that the Ninth Circuit's opinion conflicts with opinions of other Courts of Appeals that have addressed the matters at issue here.

Notably, the Fifth Circuit addressed the standing issue presented in this case, but with an opposite conclusion. In *Crown Cent. Petroleum Corp.*, the court affirmed the lower court's dismissal of discharge claims because the plaintiff in that case failed to establish that its members' alleged injuries were "fairly traceable" to the defendant's discharges. 95 F.3d at 362. In addressing the monitoring and reporting claims, the Fifth Circuit squarely held that "[b]ecause [plaintiff's] members do not have standing to sue for

[defendant's] discharge violations, they do not have standing to sue for the reporting violations." *Id.*

In *Magnesium Elektron, Inc.*, the Third Circuit declined to adopt the Fifth Circuit's "bright-line" rule. 123 F.3d at 124. the Third Circuit did, however, express serious doubts that a plaintiff in a private citizen's suit under the CWA could meet the "redressability" requirement for standing in the absence of discharge violations. Specifically, the *Magnesium Elektron* court stated, "[i]n sum, [plaintiff's] members have shown that they are concerned about their surroundings. They have not shown, however, that [defendant] could reduce that concern by faithfully monitoring and reporting its discharges according to the terms of its permit." *Id.* at 125. The Third Circuit's holding is especially pertinent here, where there was no evidence submitted by Respondents indicating that its members had ever read or reviewed the reports submitted by Petitioner under the Permit requirements.

II. THE NINTH CIRCUIT'S OPINION REGARDING THE RFA RESPONSE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

Also warranting this Court's review is the Ninth Circuit's holding that the District Court was required to instruct the jury on Petitioner's response to the request for admission. Departing from this Court's precedent and in conflict with other Courts of Appeals, the Ninth Circuit essentially erased the trial court's discretion regarding the presentation of evidence to the jury based on the conclusion that Federal Rule of Civil Procedure 36 provides no room for such discretion.

There is no question that the request to present the admission was made after evidence had closed.

App.58a-59a. As this Court has held, a request to reopen for additional proof is addressed to the sound discretion of the trial judge. *Hazeltine Research, Inc.*, 401 U.S. at 331-32. Following *Hazeltine Research*, the Ninth Circuit has likewise held that the district court is vested with significant discretion in determining whether or not to reopen evidence. *Thomas v. SS Santa Mercedes*, 572 F.2d 1331, 1336 (9th Cir. 1978); *Berns v. Pan American World Airways, Inc.*, 667 F.2d 826, 829 (9th Cir. 1982). Yet, nothing in the Ninth Circuit's opinion even discusses the discretion of the District Court in making its ruling on the issue.

In reaching its conclusion, the panel majority's opinion also conflicts with decisions from other Courts of Appeals that recognize a district court's discretion regarding the presentation of evidence to the jury. The Eighth Circuit, for example, has recognized a district court's discretion regarding the effect of an RFA because "[i]ssues change as a case develops, and the relevance of discovery responses is related to their context in the litigation." *Rolscreen Co. v. Pella Prods. of St. Louis*, Inc., 64 F.3d 1202, 1210 (8th Cir. 1995). Thus, according conclusive effect to an admission "may not be appropriate where requests for admissions or the responses to them are subject to more than one interpretation." Likewise, the Eleventh Circuit has recognized that district courts are generally afforded discretion as to what scope and effect is to be accorded party admissions under Rule 36. *See Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335, 1341 (11th Cir. 2000).

Without any reference to the District Court's discretion, the panel majority likened the request by Respondents to a request for a jury instruction,

stating that the "request that the jury be instructed in the final instructions sufficed." App.20a. However, the Local Rules for the Central District of California are clear in requiring that "Proposed instructions [] be in writing and shall be filed and served at least seven (7) days before trial is scheduled to begin unless a different filing date is ordered by the Court." Central Dist. Local Rule 51-1. Thus, even assuming Respondents' request was considered to be a request for a jury instruction, it was untimely under the rules.

In such circumstances, the Ninth Circuit has made it clear that a district court properly exercises its discretion when rejecting an untimely jury instruction. *See U.S. v. Federbush*, 625 F.2d 246, 253 (9th Cir. 1980) (trial court did not abuse discretion in declining to give untimely-requested jury instruction); *Lustig*, 555 F.2d at 751 (even if it were error to decline instruction based on other grounds, the error was excused due to the request being untimely). The panel majority's conclusion was not just contrary to Ninth Circuit precedent. Other Courts of Appeal have also recognized that a district court may appropriately decline to include an instruction that was submitted in untimely fashion. *See Upton*, 559 F.3d at 9; *Ardrey*, 798 F.2d at 682.

The panel majority ignored these cases, instead relying upon an isolated reading of Federal Rule of Civil Procedure 36. This Court's consideration is warranted on this point as the RFA device is commonly used in litigation and the Courts of Appeals should be uniform on the interplay between Rule 36 and the discretion of the district courts in overseeing jury trials.

CONCLUSION

For all of the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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