No. 21-1040

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

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CORRECTED BRIEF FOR THE RESPONDENTS IN OPPOSITION

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**Supreme Court Bar Application Pending*

QUESTIONS PRESENTED

1. Whether the Ninth Circuit's determination that respondents have demonstrated standing under the Court's *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* decision to assert Clean Water Act discharge violation claims comported with well-established principles.

2. Whether the Ninth Circuit's determination that, consistent with this Court's decisions in *Fed. Election Comm'n v. Akins* and other cases, respondents have demonstrated standing due to informational injury to assert Clean Water Act procedural violation claims comported with well-established principles.

3. Whether Supreme Court review is appropriate when key facts are yet to be adjudicated pursuant to the Ninth Circuit's remand order.

4. Whether the Ninth Circuit's holding concerning the proper application under Federal Rule of Civil Procedure 36 of a request for admission should be reviewed when that holding played no part in the Ninth Circuit's resolution of the case.

5. Whether the Ninth Circuit's holding that an admission under Federal Rule of Civil Procedure 36 conclusively establishes the matter admitted unless the admission is allowed to be withdrawn comported with well-established principles.

PARTIES TO THE PROCEEDING

In accord with Rule 29.6, Respondents Inland Empire Waterkeeper and Orange County Coastkeeper (collectively, "Coastkeeper") state that Orange County Coastkeeper is a non-profit public benefit corporation with offices in Costa Mesa, California and members throughout Orange County, California and other areas of Southern California. As such, Coastkeeper has no parent corporation nor does any publicly held company owns 10% or more of the corporation's stock.

The petitioner is Corona Clay Co., a California corporation located in Corona, California.

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STATEMENT OF THE CASE

In this Clean Water Act ("CWA") citizen suit, Inland Empire Waterkeeper and Orange County Coastkeeper (collectively "Coastkeeper") seek to redress Corona Clay Co. ("Corona")'s violations of its CWA permit. Corona's CWA permit imposes various conditions on Corona Clay's operation of a clay recycling facility in Corona, California ("the Facility") designed to prevent the Facility from polluting Temescal Creek, a tributary to the Santa Ana River and eventually to the Pacific Ocean, with contaminated stormwater runoff. Corona Clay has repeatedly violated various requirements of its CWA permit. In committing these violations, Corona Clay has effectively thwarted its CWA permit's purpose and discharged pollutant-laden stormwater to Temescal Creek. These discharges have degraded aquatic resources used by Coastkeeper's members and the general public. Corona Clay has further failed to comply with its CWA permit conditions that are meant to provide regulators and the public with information to oversee the Facility and prevent harmful pollutant discharges.

A. Statutory Background

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To advance this goal, the CWA prohibits the "discharge" of any "pollutant" into "navigable waters" (which the CWA defines as the "waters of the United States") from any "point source" unless the discharge complies with a National Pollutant

Discharge Elimination System ("NPDES") permit issued pursuant to the CWA. 33 U.S.C. §§ 1342(a); 1362(7); *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020); *Nat. Res. Def. Council, Inc. v. County of L.A.,* 725 F.3rd 1194, 1198 (9th Cir. 2013). These terms are defined broadly. *County of Maui*, 140 S. Ct. at 1469.

The NPDES program is the CWA's "cornerstone" for protecting the quality of the nation's waters. *Nat. Res. Def. Council, Inc. v. U.S. EPA,* 822 F.2d 104, 108, 110-11 (D.C. Cir. 1987) (*citing EPA v. Cal. ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 205 (1976)). The U.S. Environmental Protection Agency ("EPA") or EPA-authorized state agencies have primary authority for issuing and overseeing NPDES permits. EPA has approved California's State Water Resources Control Board ("State Board") and Regional Water Quality Control Boards to issue NPDES permits in California. *Nat. Res. Def. Council,* 725 F.3rd at 1198. In the Santa Ana River watershed, the California Regional Water Quality Control Board, Santa Ana Region ("Regional Board") overseas NPDES permit implementation. Cal. Wat. Code, §§ 13001, 13050(a)-(b), 13200, & 13200(f).

The State Board has issued its General Permit for Storm Water Discharges Associated With Industrial Activities, Order NPDES No. CAS000001 (the "IGP"), which is an NPDES permit regulating the stormwater discharges associated with industrial activities to waters statewide. App.71a.[1] In California, a facility that discharges industrial

[1] References to Petitioner's Appendix are to "App.xx." References to Respondent's Supplemental Appendix are to "S.App.xx."

stormwater must obtain CWA authorization under the IGP.[2] *Id.*

The IGP contains various provisions designed to prevent the discharge of polluted stormwater runoff from industrial facilities from harming state water quality. *See Baykeeper v. Int'l Metals Ekco, Ltd.*, 619 F. Supp. 2d 936, 940-42 (C.D. Cal. 2009)("*Baykeeper*"). These include the requirement to implement stormwater BMPs commensurate with "Best Available Technology Economically Achievable" ("BAT") for toxic or non-conventional pollutants,[3] and "Best Conventional Pollutant Control Technology" ("BCT") for conventional pollutants,[4] prohibitions on stormwater discharges that degrade receiving water quality. App.71a; *see also Baykeeper,* 619 F. Supp.2d at 940-42.

With the IGP's guidance, permittees are responsible for adopting appropriate BMPs for their facilities and for monitoring their BMPs' effectiveness and refining them as needed. App.71-2a. Additionally, permittees must develop and implement a Stormwater Pollution Prevention Plan ("SWPPP") which maps their facilities, depicts the facility's stormwater flow pathways, identifies potential pollutant sources on-site, and provides for appropriate site-specific BMPs. App.92-3a. Finally, the IGP requires permittees to develop and implement a Monitoring Implementation Plan ("MIP") that includes making and recording visual

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[2] *See* 40 C.F.R. §§ 122.26(a)(1)(ii), 122.26(c)(1).

[3] Toxic pollutants include various metals and organic compounds. 40 C.F.R. § 401.15.

[4] Conventional pollutants include biochemical oxygen demand, total suspended solids, oil and grease, and pH. 40 C.F.R. § 401.16.

observations of facility conditions in dry weather, making and recording visual observations of stormwater discharges, collection of stormwater runoff samples, and analysis of these samples for specific pollutants. App.96a.

Permittees must evaluate their stormwater monitoring data to determine whether their BMPs are effective for meeting the IGP's pollutant discharge restrictions. App.88a. If a permittee's stormwater sampling demonstrates that its discharges exceed the IGP's target pollutant levels, known as Numeric Action Levels ("NALs"), then the permittee is required to draft and submit Exceedance Response Action ("ERA") reports outlining what additional actions the permittee will take.

The CWA authorizes citizen enforcement actions against defendants violating any "effluent limitations." 33 U.S.C. §§ 1365(a)(1), 1362(5); 40 C.F.R. § 122.41(a). The CWA defines an "effluent limitation," *inter alia*, as "a permit or condition of a permit issued under section 1342 of this title," *i.e.*, as including any condition in any NPDES permit. 33 U.S.C. § 1365(f). The CWA "imposes strict liability for NPDES violations." *Baykeeper,* 619 F. Supp.2d at 919. The CWA authorizes citizens to seek injunctive relief, civil penalties, and recovery of their attorneys' fees and costs. 33 U.S.C. § 1365(a)(2), (d).

B. Factual Background

Coastkeeper, a nonprofit organization, aims to protect the waters of California's Riverside and Orange Counties. App.72a, 80a. In this case, Coastkeeper seeks to protect Temescal Creek and the Santa Ana River, into which Temescal Creek

flows. App.4a. Temescal Creek and the Santa Ana River are environmentally significant waterways in arid Riverside County. Coastkeeper has many members who live and/or recreate in and around the Santa Ana River watershed. App.5a.

Corona Clay processes clay products in Corona, California at an industrial facility overlooking Temescal Creek ("the Facility"). App.4a. When it rains, stormwater polluted with sediment runs from the Facility into a storm drain inlet on the Facility and then into a pipe which discharges stormwater onto a floodplain that is located adjacent to and slightly above Temescal Creek. S.App.26-9. Stormwater flows a short distance from the end of this pipe across the floodplain and into Temescal Creek. S.App.28-39. Corona Clay's clay-stained stormwater discharges contain elevated levels of various pollutants. App.89a. Indeed, Corona Clay's own monitoring of its stormwater discharges, required by the IGP, and its corresponding reports to the State Board have repeatedly documented elevated pollutant levels in Corona Clay's stormwater runoff. App.89a. Corona Clay's stormwater discharges negatively impact Temescal Creek's water quality and risk degrading the Santa Ana River as well, thus harming Coastkeeper's members by diminishing their enjoyment of Temescal Creek and the Santa Ana River watershed. App.9a.

Corona Clay is a permittee subject to the IGP. App.4a, 73a. Since becoming a permittee, Corona Clay has been a repeat problematic actor targeted for enforcement not just by Coastkeeper, but by the Regional Board as well. The Regional Board issued Corona Notices of Violation in February 2015, September 2016, and May 2017 identifying

numerous IGP violations. App.53a, 73a. These Notices of Violation repeatedly warned Corona Clay that its BMPs were either missing, ineffective, or inadequate. App.73a, 93-4a. The Regional Board found that some of the BMPs that Corona Clay claimed in its SWPPPs to have implemented did not actually exist. App.93-4a. The Regional Board further tried to educate Corona Clay that Corona Clay's few minimal BMPs, even if properly installed and used, were insufficient for controlling clay particle discharges from the Facility. App.93a. As a result, the Regional Board demanded Corona Clay immediately implement more robust BMPs at the Facility. App.94a.

Corona Clay also failed to comply with the IGP's requirement to amend its SWPPPs to specify new BMPs after learning that its existing BMPs are insufficient to adequately control pollutant levels. App.94-5a. This failure has been further compounded by Corona Clay's failure, as discussed by the District Court and the Ninth Circuit, to implement an adequate MIP that meets the IGP's procedural requirements designed to ensure that a facility's operations are carefully monitored for stormwater pollution runoff problems with follow-up reporting that informs regulatory agencies and the public about any such problems. App.58a (District Court noting "if the [Ninth] Circuit were to adopt Plaintiffs' interpretation of "ongoing violations [of CWA procedural requirements sufficing for CWA statutory jurisdiction]," the Court has sufficient evidence on the record to simply enter judgment on the sixth and seventh causes of action [which allege Corona Clay's failure to comply with IGP monitoring and reporting requirements] in Plaintiffs' favor on remand."); App.5a, 8a, 10a-13a (Ninth Circuit

discussion of Corona Clay's monitoring and reporting violations).

C. Case Proceedings

Coastkeeper brought this CWA citizen suit on February 27, 2018. App.5a. On June 10, 2019, the District Court partly granted and partly denied Coastkeeper's Motion for Partial Summary Judgment. App.69-89a. Specifically, the District Court granted Coastkeeper partial summary judgment under Coastkeeper's Claim One that Corona had violated the IGP's requirement to develop and/or implement BMPs that achieve reductions in pollutant discharge which are attainable via BAT and BCT, finding that Corona had failed to implement adequate BMPs. App.90a. The District Court further granted Coastkeeper summary judgment under Coastkeeper's Claim Five that Corona violated the IGP's requirement to develop, implement, and revise adequate SWPPPs. App.95a. The court noted that the Regional Board had expressly found that the BMPs set forth in Corona's SWPPPs had been demonstrated to be ineffective and that Corona's stormwater discharges contained levels of pollutants exceeding NALs, an indication that its SWPPPs lacked effective BMPs, but Corona had not revised its SWPPP to propose new BMPs. App.94-5a.

The District Court denied Coastkeeper summary judgment under Claim Six, which alleged that Corona Clay violated the IGP's requirement to take and analyze stormwater samples, analyze samples for all required pollutant parameters, and perform visual inspections of the Facility, in accord with a suitable MIP. App.97a. The District Court

further denied Coastkeeper summary judgment under Claim Seven, which alleged that Corona Clay violated the IGP's reporting obligations by failing to report stormwater sample results, submit required ERA Reports, and report non-compliance with the IGP in its Annual Reports. App.98a.

Corona Clay argued that Coastkeeper should be denied summary judgment because Coastkeeper had not and could not prove that Corona Clay's facility discharged stormwater into Temescal Creek and that without such proof Coastkeeper lacked standing to bring any of its claims. App.86a. The District Court's summary judgment ruling rejected these arguments, holding that Coastkeeper had standing and could prevail without demonstrating that stormwater from the Facility had reached Temescal Creek:

> Defendant argues that Plaintiffs cannot conclusively demonstrate a violation of the General Permit and the CWA because Plaintiffs have not shown that discharges from Defendant's Facility have actually reached Temescal Creek. Opp'n at 12. *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).

App.83-4a., 89-90a (emphasis added).

During the District Court's June 28, 2019

pretrial conference, the District Court emphatically clarified that the issue of Coastkeeper's standing had been resolved by the court's summary judgment ruling and would not be an issue for trial. S.App.3-9.

Coastkeeper subsequently dismissed its Claims Three and Four, leaving Claims Two, Six, and Seven for trial. App. 5a.

During trial, the Court worked with the parties outside of the jury's presence to finalize jury instructions. When Corona Clay proposed instructions that required Coastkeeper to prove that Corona Clay discharged or would likely discharge stormwater from the Facility into Temescal Creek, even to prevail on violations of the IGP's monitoring and reporting requirements, Coastkeeper objected. S.App.12-16. At the District Court's request, Coastkeeper submitted alternative jury instructions which omitted the requirement to prove that Corona Clay's stormwater discharges reach or likely will reach Temescal Creek as a condition of prevailing on Claims Six and Seven. S.App.12-16; 72-6. The Court overruled Coastkeeper's objection and provided the jury with instructions and a Special Verdict Form that required Coastkeeper to prove that Corona Clay had committed post-complaint stormwater discharge violations for Coastkeeper to prevail on its Claims Six and Seven allegations of Corona Clay's failure to comply with the IGP's monitoring and reporting requirements. App.5a-7a., 57a-59a.

The District Court's Special Verdict Form asked the jury to answer the following:

> 1. Did Plaintiffs prove, by a preponderance of the evidence, that Defendant Corona Clay Company discharged pollutants from a point source into streams or

> waters that quality 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?
>
> Yes _____ No _____

The court instructed the jury if it answered no to this question, its verdict was complete. App.6a, 60-1a.

In the sidebar discussion of the jury instructions, Coastkeeper urged the District Court that Corona Clay's response to Coastkeeper's Request for Admission admitting that stormwater from the portion of the Facility where industrial activity occurs "indirectly flows to Temescal wash" had to be treated as a binding judicial admission. App.57a-59a; S.App.14-6. The District Court, however, declined to instruct the jury that as a matter of law it had been established that Corona is discharging stormwater "indirectly" to Temescal Creek, leaving it entirely to the jury to determine whether stormwater from the Facility flows into Temescal Creek either directly or indirectly. App.5a-7a, 19a-20a, 57a-59a.

On October 25, 2019, the jury issued its verdict, answering no to the first question posed by the Special Verdict Form and, as instructed, declining to answer any of the Verdict Form's further questions. The jury thus, as instructed, entered a defense verdict on Claims Six and Seven. App.60a.

On April 6, 2020, the District Court issued its Final Judgment. App.48-51a. Noting that it had granted Coastkeeper partial summary judgment on

Coastkeeper's First and Fifth Claims, the District Court entered judgment that: (1) Corona Clay is liable for 664 daily violations of the IGP's condition requiring adoption and maintenance of an adequate SWPPP; (2) Corona Clay is liable for 1688 daily violations of the IGP's conditions requiring attainment of BAT and BCT; (3) Corona Clay is enjoined to implement structural stormwater BMPs sufficient to retain the 85th percentile, 24-hour storm event, including a factor of safety, from areas subject to the IGP no later than December 1, 2020, with all retention basins designed to IGP standards and certified by a California licensed professional engineer; (4) Corona is enjoined to update and amend its SWPPP to comply with IGP requirements no later than July 1, 2020; and (5) Corona Clay shall pay $3,700,000 in CWA civil penalties by July 1, 2020. App.48-51a.[5] However, on June 22, 2020, the District Court issued an additional order staying its Judgment pending Ninth Circuit review. App.46-7a. Accordingly, so far as Coastkeeper is aware, Corona has not paid the civil penalty nor implemented the injunctive relief required by the Judgment.

Noting that the jury had issued a verdict for Corona Clay on Coastkeeper's Claims Two, Six, and Seven, the District Court further entered judgment in Corona Clay's favor on these claims. App.49a. Also noting that the parties had stipulated to dismissal of Coastkeeper's Claims Three and Four, the court dismissed these claims. App.49a. Finally, the Judgment rejected Coastkeeper's request for attorneys' fees and costs pursuant to 33 U.S.C. §

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[5] Though the Judgment did not so specify, the civil penalties would be payable to the U.S. Treasury. *See Sierra Club v. Electronic Control Design*, 909 F.2d 1350, 1354-55 (9th Cir. 1990).

1365(d), providing instead that the parties would each bear their own fees and costs. App.50a.

On November 1, 2019, Coastkeeper filed a Motion to Alter or Amend the Judgment or, in the Alternative, for a New Trial ("Coastkeeper's Motion To Amend"). App.54a. Coastkeeper's Motion To Amend pointed out the inconsistency between the District Court's summary judgment ruling that Coastkeeper need not prove discharges to Temescal Creek to prevail on Corona Clay's procedural CWA violations and its jury instruction determination that Coastkeeper had to do so. Coastkeeper's motion further pointed out the prejudicial error in failing to instruct the jury concerning Corona Clay's admission that stormwater indirectly flows from the Facility into Temescal Creek. The District Court denied Coastkeeper's Motion To Amend. App.57-59.a.

On May 4, 2020, Corona Clay brought a Motion for Relief from Judgment under Federal Rules of Civil Procedure 59(e) and 60(b) ("Corona Clay's Rule 60 Motion"). App.46a. Corona Clay's Rule 60 Motion sought to introduce new, post-trial evidence that it argued indicated it had eliminated stormwater discharges to Temescal Creek, making injunctive relief unwarranted. S.App.20-1. In its opposition to this motion, Coastkeeper presented new rebuttal evidence of its own unequivocally establishing that the Facility does indeed continue to discharge to Temescal Creek. Specifically, Coastkeeper took video footage and photographs of an April 2020 storm and offered testimony which confirmed that Corona continues to channel industrial stormwater into its collection pipe and under a road into Temescal Creek's floodplain, where it then flows into the creek. S.App.25-62. On June 22, 2020, the District Court denied Corona Clay's

Rule 60 Motion. App.46-7a.

Corona Clay and Coastkeeper both appealed the District Court's judgment. On September 20, 2021, in a 2-1 decision, the Ninth Circuit vacated the District Court's judgment. *Inland Empire Waterkeeper v. Corona Clay Co.*, 13 F.4th 917 (9th Cir. 2021), *order amended and superseded* 2021 U.S. App. LEXIS 33007-08 (9th Cir. Cal., Nov. 5, 2021). The Ninth Circuit remanded the matter for determination of whether the Facility has discharged pollutants to waters of the United States in accord with this Court's newly issued *County of Maui* case. App.3-22a.

Corona Clay filed a petition for Ninth Circuit rehearing *en banc* on October 4, 2021. App.2a. On November 5, 2021, the Ninth Circuit denied the petition for rehearing, noting that only Judge Collins, who had dissented from the majority ruling, had voted to grant the petition. The court added, citing Federal Rule of Appellate Procedure 35, that "The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc." App.2a.

SUMMARY OF THE ARGUMENT

There is no basis to grant certiorari to review the Ninth Circuit's standing determinations in this case. The Ninth Circuit adhered to Supreme Court doctrine that "'[S]tanding is not dispensed in gross,'" and separately analyzed Coastkeeper's standing for its claims that Corona Clay unlawfully discharged pollutants to Temescal Creek and Coastkeeper's claims for Corona Clay's CWA procedural violations. App.8a. With respect to the former, the Ninth Circuit faithfully recited and applied the "familiar"

rule from *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) that "[i]n an environmental case, the 'relevant showing . . . is not injury to the environment but injury to the plaintiff." The court noted the factual record included sworn testimony from several Coastkeeper members who use Temescal Creek that pollution from Corona Clay's discharges "impacted their present and anticipated enjoyment of the waterway." App.8a-9a. Noting that under controlling precedent, including *Laidlaw*, such evidence of "a credible threat of harm is sufficient" for standing, the Ninth Circuit correctly upheld the District Court's finding that Coastkeeper has standing to pursue its CWA discharge violation claims. App.9a.

The Ninth Circuit's findings concerning Coastkeeper's standing to sue for Corona Clay's procedural CWA violations was equally well grounded in Supreme Court precedent establishing that citizens have standing to sue when deprivation of statutorily required information harms their interests. App.10a-11a (*citing Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20-25 (1998) and *Pub. Citizen v. Dep't of Just.*, 491 U.S. 440, 449 (1989).

Corona Clay's contentions that the Ninth Circuit's decision splits from decisions from the Third and Fifth Circuit lack merit. The Circuits are united in following *Laidlaw*'s holding that citizens have standing to bring suit when they have well-founded apprehensions that a defendant is polluting waters they use, and need not prove what is a merits question, whether the defendant is in fact polluting waters they use, to have standing. In addition, the Circuits are united in respecting Supreme Court doctrine from cases such as *Akins* that deprivation of statutorily required information confers standing

when such information deprivation injures a citizen's interests.

There is no basis to grant certiorari to review the Ninth Circuit's *dicta* finding concerning the District Court's treatment of Corona Clay's admission under Federal Rule of Civil Procedure 36 that it "indirectly" discharges to Temescal Creek. Supreme Court review is not warranted to address conclusions reached by lower courts that have no effect on a case's outcome. Additionally, the Ninth Circuit's finding concerning Corona Clay's admission was correct and in accord with the universal rule followed by the Circuits; under Rule 36's plain and unambiguous dictates, admissions made under Rule 36 conclusively establish the matter admitted unless a court gives permission to withdraw the admission.

ARGUMENT

I. Review of the Ninth Circuit's Standing Ruling is Unwarranted as It Accords with this Court's Decisions and those of Other Circuits.

Corona Clay's contentions that this Court should grant review of the Ninth Circuit's *Waterkeeper* decision because it erroneously found Coastkeeper to have standing lack merit. Corona Clay merely offers a broadbrush attack on the Ninth Circuit's standing holding, ignoring what the Ninth Circuit did not. As the Ninth Circuit correctly pointed out, "'[S]tanding is not dispensed in gross.'" Unlike Corona Clay, the Ninth Circuit thus correctly separately analyzed Coastkeeper's standing for its claims that Corona Clay unlawfully discharged pollutants to Temescal Creek from its standing to assert claims for Corona Clay's CWA procedural

violations. 13 F.4th at 923 (*citing Lewis v. Casey*, 518 U.S. 343, 358 n.6, (1996); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). As discussed below, the Ninth Circuit respected Supreme Court and multi-circuit precedent in its separate analysis of these two standing questions, leaving no basis for granting certiorari.

A. The Ninth Circuit Adhered to Supreme Court Precedent in Finding Coastkeeper Had Standing to Assert CWA Discharge Violation Claims.

With respect to Coastkeeper's standing to pursue claims that Corona Clay has unlawfully discharged polluted stormwater to Temescal Creek, the Ninth Circuit faithfully recited and applied the "familiar" rule from *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) that "[i]n an environmental case, the 'relevant showing . . . is not injury to the environment but injury to the plaintiff. To insist on the former rather than the latter as a part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits.'" 13 F.4th at 923 (quoting *Laidlaw*, 528 U.S. at 181). The court noted the factual record included sworn testimony from several Coastkeeper members who use Temescal Creek that pollution from Corona Clay's discharges "impacted their present and anticipated enjoyment of the waterway." *Id.* Noting that under controlling precedent, including *Laidlaw*, such evidence of "a credible threat of harm is sufficient" for standing, the Ninth Circuit upheld the District Court's finding that Coastkeeper has standing to pursue its CWA discharge violation

claims. *Id.* at 923-24.

Corona Clay asserts that the Ninth Circuit ignored that standing requires that the plaintiff's injury be "fairly traceable" to the defendant's conduct. Once more, this is wrong. The Ninth Circuit correctly recited the controlling Supreme Court *Laidlaw* decision and Ninth Circuit precedent in *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3rd 1141 (9th Cir. 2000) establishing that to have Article III standing in a CWA citizen suit (or any action) a plaintiff must "have a concrete and particularized injury *fairly traceable* to the challenged conduct that likely can be redressed by a favorable judicial decision." 13 F.4th at 923-24 (emphasis added). As noted, the Ninth Circuit proceeded to recite the evidence, multiple declarations from Coastkeeper members, that it reasonably concluded met this test. *Id.*

B. The Ninth Circuit Adhered to Supreme Court Precedent in Finding Coastkeeper Had Standing to Assert CWA Procedural Violation Claims.

Corona Clay erroneously argues that Supreme Court precedent and other precedent prior to the Ninth Circuit's *Waterkeeper* decision did not recognize informational injury standing to sue for CWA procedural violations. Cert. Pet. at 19. To the contrary, Supreme Court and Circuit authority for decades has recognized that Congress has authorized citizens to file suit for violation of any NPDES permit condition, *including those which are purely procedural. Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 53 (1987) ("In the absence of federal or state enforcement, private

citizens may commence [CWA] civil actions against any person 'alleged to be in violation of' *the conditions of either a federal or state NPDES permit*. § 1365(a)(1).") (emphasis added); *Natural Resources Defense Council v. Cty. of L.A.*, 725 F.3d 1194, 1204 (9th Cir. 2013) ("A permittee violates the CWA when it discharges pollutants in excess of the levels specified in the [NPDES] permit, or where the permittee otherwise violates the permit's terms…. '[t]he plain language of [the CWA citizen suit provision] authorizes citizens to enforce *all* permit conditions.'") (internal citations omitted) (emphasis original); *Citizens for a Better Environment v. California v. Union Oil Co. of California,* 861 F. Supp. 889, 898 (N.D. Cal. 1994) ("…violations of terms contained in NPDES permits are generally enforceable of their own accord in citizen suits. *See* 33 U.S.C. § 1365(f)(6)."). And no court has suggested that in so doing, Congress has unconstitutionally given citizens the right to sue for claims barred by Article III. Any such suggestion would conflict with decades-old Supreme Court and Circuit precedent that Congress can create standing to pursue claims for failure to provide statutorily mandated information, when deprivation of this information injures a plaintiff. Accordingly, the Ninth Circuit was on solid ground in holding that Coastkeeper had standing to pursue its CWA procedural injury claims. 13 F.4th at 924 (citing *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20-25 (1998) and *Pub. Citizen v. Dep't of Just.*, 491 U.S. 440, 449 (1989) for proposition that informational injuries create standing and further noting that *Lujan v. Def. of Wildlife*, 504 U.S. 555, 578 (1992) established that "Congress plainly has the power to 'elevat[e] to the status of legally cognizable injuries concrete, *de*

facto injuries that were previously inadequate in law.'"); *see also Citizens for Better Forestry v. United States Dep't of Agriculture*, 341 F.3d 961, 969 (9th Cir. 2003) (Citizens have standing to pursue claims for failure to follow legally required procedures that "are designed to protect some threatened concrete interest of [theirs] that is the ultimate basis of [their] standing."); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n.8 (1992) (same); *Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 807 F.3d 1031, 1043-44 (9th Cir. 2015) (same).

C. Additional Aspects of the Record Besides those Cited by the Ninth Circuit Support Plaintiff's Standing.

As noted, the District Court granted Coastkeeper summary judgment that it had standing. This ruling foreclosed Coastkeeper from presenting any further evidence at trial of its standing. Indeed, during the pretrial conference, the District Court emphatically clarified that the issue of Coastkeeper's standing had been resolved by the court's summary judgment ruling and would not be an issue for trial. S.App.3-8. Thus, at a minimum, it would be prejudicially erroneous to find that Coastkeeper failed to present evidence sufficient to establish its standing at trial when the District Court had closed the door to such further presentation. In any case, however, Coastkeeper did have occasion to present more evidence to the District Court supporting that its members' testimony concerning well-founded apprehensions that Corona Clay's discharges to Temescal Creek are degrading the creek in response to Corona Clay's post-trial Rule 60 Motion. As noted, Coastkeeper

presented photographic proof and testimony corroborating that polluted stormwater from the Corona Clay facility streamed into Temescal Creek in an April 2020 storm. Even if Coastkeeper were somehow required to provide more evidence to support that their members reasonably feared that Corona Clay was discharging pollutants to Temescal Creek than that which they provided in support of their summary judgment motion, this evidence in response to Corona Clay's post-trial Rule 60 Motion should be deemed sufficient. While the Ninth Circuit did not recite this evidence as a basis for its decision, this Court could rely on this important additional evidence in the record in affirming the lower court decisions. *Bennett v. Spear*, 520 U.S. 154, 166 (1997) ("A respondent is entitled, however, to defend the judgment on any ground supported by the record."). The existence of this additional evidence and basis for finding the Ninth Circuit decision correct is another reason why granting certiorari would not be appropriate.

II. The Jury Verdict Did Not Defeat Coastkeeper's Standing.

The jury verdict for the defense on some of Coastkeeper's claims provides no basis for this Court to grant certiorari and review the Ninth Circuit's standing holding. The Ninth Circuit properly found that the jury verdict did not create a basis for reversing the District Court's summary judgment grant of standing to Coastkeeper. The court aptly found that the jury verdict did not negate Coastkeeper's members' testimony that they were concerned about Corona Clay's discharges to the creek impairing their use. 13 F.4th at 926. The court

reasonably concluded that the jury verdict form's single, multi-point, dispositive question left the court "unable to conclude exactly which of the several issues posed by the question were decided [by the jury]." *Id.* at 926. The court correctly vacated the jury verdict as predicated on erroneous instructions and thus necessarily inconclusive as to the case's key facts—and the court remanded the case for finding these facts. *Id.*

The Ninth Circuit dissenting judge disagreed with the majority's decision to vacate the jury verdict. But even if the dissenter were correct on this point, the dissenter's analysis would not, contrary to Corona Clay's contentions, make the jury verdict a basis for defeating Coastkeeper's standing. Notably, even the dissenter's approach would only remand the case for further factual findings relevant to deciding this point. The dissent agreed that the jury verdict did not definitively establish whether Corona Clay is discharging polluted stormwater to Temescal Creek. *Id.* at 937. Specifically, the dissent agreed with Coastkeeper that the jury instruction's simultaneous use of the word "discharge" and "violations" created a factual ambiguity that would require further District Court proceedings to resolve. *Id.* The dissent agreed that given the wording of the instructions, "the jury could theoretically have found that Corona's discharges did reach the creek, that those discharges did contain pollutants, but that the level of pollutants did not amount to a 'violation.'" *Id.* The dissent acknowledged that this left open the possibility of Coastkeeper having standing, even under the dissent's overly narrow standard, given that proof of a discharge equating to a CWA violation is unnecessary for standing. Even the dissenter would remand this factual question to the

District Court "for it to address in the first instance." *Id.* As discussed in section III below, at a minimum, this would weigh in favor of this Court declining certiorari at this stage pending further development of the factual record by the lower courts.

III. Review Should Not Be Granted When Key Facts Are Yet to Be Adjudicated Pursuant to the Ninth Circuit's Remand.

Even if there were issues in this case warranting further appellate consideration, they would not be appropriate for Supreme Court review until further development of the record and legal analysis by the lower courts on remand. The Supreme Court is "a court of review, not of first review." *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (remanding case to lower courts to address unresolved factual and legal issues concerning plaintiffs' standing); s*ee also, e.g.*, *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 802 (9th Cir. 1987) (remanding to the district court rather than deciding previously unresolved issues, noting "the decision-making process will benefit from having the District Court 'make these determinations in the first instance.'") (quoting *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2555 (1986)). Notably, as discussed in the preceding section, both the majority and the dissenter in this case agreed that material facts necessary to resolve the case have not been determined as the jury verdict failed to establish whether Corona Clay has discharged pollutants to Temescal Creek. Accordingly, consistent with Supreme Court Rule 10, this matter should be remanded to the District Court for further factual findings at this stage, rather than being heard on

certiorari. It may be that the District Court's resolution of the unresolved factual issues will render further appeal unnecessary. Notably, the factual muddle left by the jury's verdict and split District Court judgment that followed motivated both parties to appeal. Further fact finding from the District Court could well clarify matters in a manner that leads the parties to forego further appeal. Thus, judicial economy favors declining certiorari at this stage of the proceedings, with a less than adequate record. The Ninth Circuit has tasked the District Court with making a factual finding as to whether Corona Clay's discharges reach Temescal Creek, and any further appellate review should be held in abeyance while the District Court fulfills that duty upon remand.

IV. The Ninth Circuit's Standing Decision Does Not Split from Other Circuits' Decisions.

Corona Clay is wrong that the Ninth Circuit's decision conflicts with the Third and Fifth Circuit decisions in *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997) and *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, 95 F.3d 358 (5th Cir. 1996). The Ninth Circuit's *Waterkeeper* decision, *Crown Central*, and *Magnesium Electron* all respect Supreme Court doctrine that to have standing to sue in a CWA case, citizens must use the water in issue and must face harm to their interests if the water is polluted—regardless of whether the claim is for actual polluted discharges or for failure to follow CWA procedures meant to guard against undisclosed pollution discharges. All three decisions also respect Supreme Court precedent (such as that from *Fed.*

Election Comm'n v. Akins) holding that citizens can have standing to challenge failures to follow CWA procedures when such failures create informational injuries.

Rather than following different legal rules, the differing outcomes in *Crown Central* and *Magnesium Elektron* turned on differing facts that are not analogous to the facts at issue here. In *Crown Central* and *Magnesium Elektron*, the courts held that the plaintiffs did not establish that failure to follow the procedures in issue risked harm to them. *Crown Central*, 95 F.3d at 361-62 (plaintiff had no evidence facility's discharges risked degrading waters they use); *Magnesium Elektron*, 123 F.3d at 121-25 (plaintiff failed to show violations caused harm or threatened injury to the relevant waterway). By contrast, all three Ninth Circuit judges below acknowledged that the jury verdict failed to establish that Corona Clay does not discharge, and has not discharged, pollutants to Temescal Creek. Even more to the point, the judges agreed that the jury verdict did not rule out Coastkeeper having standing based on its members reasonable belief that Corona Clay's activity has been and is threatening to degrade Temescal Creek. The majority found the evidence sufficient to support that Coastkeeper had proven this reasonable apprehension and thus to have standing under *Laidlaw*, making the case distinguishable from *Crown Central* and *Magnesium Elektron.* But even under the dissent's view, Coastkeeper should be allowed the opportunity to further prove on remand that its members had the required reasonable belief of actual or threatened harm. Notably, under the Ninth Circuit's ruling, Coastkeeper will have to prove that Corona Clay discharges polluted

stormwater directly into Temescal Creek or in a functionally equivalent manner.

V. There is No Basis to Grant Certiorari to Review the Ninth Circuit's Ruling Concerning the District Court's Misapplication of a Request for Admission Response.

A. Review of the Ninth Circuit's Ruling Concerning Corona Clay's Request for Admission Response is Unwarranted Because the Ruling Did Not Affect the Case's Outcome.

Corona Clay urges the Court to grant certiorari, *inter alia*, simply to reverse the Ninth Circuit's finding that the District Court erred in not instructing the jury concerning a Corona Clay Request for Admission ("RFA") response. In response to Coastkeeper's RFAs, Corona Clay admitted stormwater from the portion of the Facility where industrial activity occurs "indirectly flows to Temescal wash." S.App.14-6. Supreme Court review of this Ninth Circuit finding would be a waste of this Court's limited resources given that neither the Ninth Circuit nor the District Court relied on this RFA for their decisions on the merits of Coastkeeper's standing or Corona Clay's CWA liability. *See* 13 F.4th at 928 (noting that RFA response did not establish point source discharge into waters of United States given new Supreme Court *County of Maui* standard). The Ninth Circuit finding concerning this RFA response is thus essentially *dicta* that does not merit Supreme Court review. *See, e.g.*, Supreme Court Rule 10 ("A petition for a writ of certiorari will be granted only for

compelling reasons.").

B. Review of the Ninth Circuit's Request for Admission Ruling is Unwarranted Because the Ninth Circuit's Ruling Was Neither Erroneous Nor in Conflict with Other Precedent.

Even if the Ninth Circuit's finding concerning the Corona Clay RFA response in issue were not essentially *dicta*, there is no basis for granting certiorari because the Ninth Circuit's finding comports with well-settled law. Corona argues that its RFA response was "evidence," and the Ninth Circuit thus erred in not finding that the District Court had discretion not to present to the jury what Corona Clay contends was late presented evidence. Pet. for Cert. at 21-23. This is plainly wrong. Request for admission responses under Federal Rule of Civil Procedure 36(a) *are not evidence*, but instead conclusively establish matters admitted. *E.g.*, *Conlon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007). RFA responses are conclusive unless a district court grants permission to withdraw them. There is no split in Circuit authority on this point. *Id.*; *Stine Seed Co. v. A & W Agribusiness, LLC*, 862 F.3d 1094, 1102-03 (8th Cir. 2017) (citing decisions from the Third, Fifth, and Eleventh for support that "several circuits have held that when a party has made no filing that could be construed as a motion to withdraw or amend an admission, the court is required to give the admission conclusive effect" and noting agreement with these other Circuits.).[6] While

[6] Specifically, the *Stine Seed* decision cited *Am. Auto. Ass'n v.*

the District Court may have had discretion to allow Corona Clay to withdraw its RFA response, Corona Clay did not make such a request, as the Ninth Circuit noted, much less provide the District Court grounds for granting such a request as provided for by Federal Rule of Civil Procedure 36(b). 13 F.4th at 929. Without deeming the RFA withdrawn, the District Court lacked discretion to do anything but to deem it a binding judicial admission. *Id.*; *see also Tillamook Country Smoker, Inc. v. Tillamook Cnty. Creamery Ass'n*, 465 F.3d 1102, 1111-12 (9th Cir. 2006); *Stine Seed*, 862 F.3d at 1102-03.

Corona Clay's contention that there is a split in authority between the Ninth Circuit *Waterkeeper* decision and the Eighth and the Eleventh Circuit decisions *Rolscreen Co. v. Pella Prods. of St. Louis*, Inc., 64 F.3d 1202, 1210 (8th Cir. 1995) and *Johnson v. DeSoto Cty. Bd. of Comm'rs*, 204 F.3d 1335 (11th Cir. 2000) is meritless. Both the Eighth and Eleventh Circuits have unequivocally ruled that the plain language of Rule 36(a) means what it says: a matter admitted in response to an RFA is conclusively established unless the RFA admission is, with a court's permission, withdrawn. *Stine Seed*, 862 F.3d at 1102-03; *United States Dep't of Labor v. Lovett*, No. 20-13276, 2021 U.S. App. LEXIS 33883, at *4-5 (11th Cir. Nov. 16, 2021). *Rolscreen* and *Johnson* certainly did not contradict these rulings, the Ninth Circuit *Waterkeeper* holding, or Rule 36(a)'s plain and unambiguous language that "A matter admitted under this rule is conclusively

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AAA Legal Clinic of Jefferson Crooke, P.C., 930 F.2d 1117, 1120 (5th Cir. 1991); *Airco Indus. Gases, Inc. v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028, 1036-37 (3d Cir. 1988); and *Williams v. City of Dothan*, 818 F.2d 755, 762 (11th Cir. 1987).

established unless the court, on motion, permits the admission to be withdrawn or amended." Instead, *Rolscreen* and *Johnson* merely held the obvious, that when an admission is open to interpretation, a court can interpret the admission in a reasonable fashion. 64 F.3d at 1210; 204 F.3d at 1340, 1346 n.7. In *Rolscreen*, the district court provided the admissions to the jury. 64 F.3d at 1210. In *Johnson*, the court analyzed and relied on the admissions extensively for its decision. 204 F.3d at 1340-41. Indeed, the Eleventh Circuit noted in *Johnson*, in full accord with *Waterkeeper*, that it would be reversible error if a "court simply disregarded an admission." 204 F.3d at 1346 n.7. This is precisely what the District Court did, simply disregarding an unambiguous admission. As the above cited rulings from the Ninth, Third, Fifth, Eighth, and Eleventh Circuits underscore, the Circuits unanimously agree that this is not permissible.

Relatedly, Corona Clay contends that Coastkeeper's request that the jury be instructed concerning Corona Clay's RFA response was untimely. Pet. for Cert. at 23. This is false. Coastkeeper timely submitted proposed jury instructions that did not require Coastkeeper to prove that Corona Clay had discharged stormwater to Temescal Creek to prevail on its claims presented for trial that Corona Clay had violated CWA monitoring and reporting requirements. S.App.72-6. During the post-trial caucus on the jury instructions convened by the District Court, the court overruled Coastkeeper's proposed instructions and, instead, instructed the jury that Coastkeeper had to prove such discharges as an element of its on its monitoring and reporting claims. Coastkeeper timely objected. Throughout the jury instruction

discussions, Coastkeeper requested that the District Court treat Corona's RFA response admitting that stormwater from the portion of the Facility where industrial activity occurs "indirectly flows to Temescal wash" as a binding judicial admission. S.App.14-6. As noted, the District Court rejected this contention and declined to instruct the jury concerning Corona Clay's RFA response. App.5a-7a, 19a-20a, 57a-59a, 60-1a. In sum, the District Court rejected Coastkeeper's request to instruct the jury concerning the legal significance of Corona Clay's RFA response not because Coastkeeper failed to make the request in time, before the jury instructions were given, but due to error in not treating an RFA response as conclusive with respect to the matter omitted.

VI. Conclusion

For the foregoing reasons, the Court should deny Corona Clay's Petition for Certiorari.

Respectfully submitted,

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