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

REPLY BRIEF OF PETITIONER

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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.

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REPLY BRIEF OF PETITIONER

Petitioner Corona Clay Company respectfully submits the following reply to the Corrected Brief of Respondents filed on March 2, 2022.

INTRODUCTION

Respondents' primary points in opposing Corona Clay's Petition suggest that it is based upon factual issues that are not appropriate for this Court's review. Nothing could be further from the truth. The panel majority's granting of "informational" standing based on violations of "reporting and monitoring" aspects of the Permit is a sweeping holding that extends standing to citizens far beyond those this Court indicated would be appropriate in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 62 (1987). And—while Respondents point to this Court's holdings regarding so-called "informational" injury in the context of different statutory schemes—the panel majority's holding is contrary to more recent authority from this Court addressing issues of Article III standing, including *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342–343 (2016).

Respondents also attempt to brush off the conflict between the panel majority's decision in this case and the contrary decisions of the Third and Fifth Circuits based on purported "factual" differences. Any distinguishing facts in the cases do not matter, as the holdings are clearly contrary to the panel majority's conclusion in this case regarding "infor-

mational injury," which is a conclusion that Judge Collins described in dissent as "concoct[ed]." App.34a. There simply is no way to reconcile the opinion of the panel majority in this case with the Fifth Circuit's clear pronouncement that citizens who "do not have standing to sue for [] discharge violations . . . do not have standing to sue for [] reporting violations." *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, 95 F.3d 358, 362 (5th Cir. 1996). Nor can the panel majority's holding in this case be squared with the Third Circuit's conclusion that a private citizen "must therefore show some threatened injury that can be traced to [a] failure to monitor and report [] effluent emissions accurately." *Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 124 (3d Cir. 1997).

Respondents also argue that the panel majority's opinion is consistent with this Court's holding in *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). In *Laidlaw*, to the extent this Court addressed Article III standing, it focused on the "injury in fact" prong of the analysis. *Id.* at 181-185. Here, the issue is the "fairly traceable" prong, which is referenced only once in the entire *Laidlaw* opinion. Thus, consistency with *Laidlaw* is hardly a basis for concluding the panel majority was correct.

Finally, Respondents argue that this Court should not review the panel majority's holding that reversed the District Court's exercise of discretion to not present a response to a request for admission, or "RFA," after the close of evidence. Respondents, like the panel majority, assert that there is no discretion for a district court to decline to present an "unambig-

uous" RFA response. Yet, the declaration that Respondents submitted in their supplemental appendix indicates "ambiguity" in the terms "Temescal Wash" and "Temescal Creek." S.App.28. This is where the panel majority departed from decisions in this Court and in other Courts of Appeals recognizing the trial court's discretion in determining what is or is not appropriate to present to a jury after the close of evidence. As these other cases recognize, the trial court is in the best position to make such decisions and should only be reversed where there is abuse of discretion. The panel majority did not even discuss the issue of discretion, which is precisely why Judge Collins dissented on this point. App.44a-45a.

The Petition should be granted and this Court should review the important questions presented in it.

ARGUMENT

I. THE PANEL MAJORITY'S HOLDING REGARDING ARTICLE III STANDING WITH RESPECT TO DISCHARGE CLAIMS REQUIRES REVIEW

The panel majority found that Respondents had Article III standing with respect to discharge claims because Respondents "presented sworn testimony from several of its members that they lived near the Creek, used it for recreation, and that pollution from the discharged storm water impacted their present and anticipated enjoyment of the waterway." App.8a. Based on this, Respondents argue that the opinion below was consistent with this Court's decision in *Laidlaw*. Resps.' Br. at 16-17. The argument fails for several reasons, as pointed out by Judge Collins in dissent. App.28a-33a.

Respondents' citation to *Laidlaw* as support for the panel majority's conclusion regarding standing for the discharge claims is inapposite, as that case did not address the "fairly traceable" element of standing in any meaningful way. In fact, the term "fairly traceable" is mentioned only once in the entire *Laidlaw* opinion and only for the purpose of summarizing the basic prongs for Article III standing analysis. 528 U.S. at 180. Thus, the assertion that the panel majority's opinion is consistent with *Laidlaw* sidesteps the issue.

The pertinent issue in this case—at least with respect to the discharge claims—is the "fairly traceable" prong of the Article III analysis, which the panel majority barely discussed. In contrast, Judge Collins

aptly pointed out in dissent that "Plaintiffs' theory that their declarants suffered an injury-in-fact that is fairly traceable to Corona's conduct thus rested dispositively on the assertion that Corona's pollution reached Temescal Creek or threatened to do so." App.27a. Judge Collins continued, stating that "Plaintiffs' claim of standing could be resolved in their favor as a matter of law only if, *inter alia*, they presented sufficient evidence to show that there was no genuine issue of material fact as to whether Corona's alleged polluted discharges reached the creek or threatened to do so." *Id.*

Perhaps recognizing the error in the panel majority's analysis, Respondents argue that review should not be granted because it is somehow a fact issue inappropriate for this Court's review.[1] Resps.' Br. at 22. This is incorrect, as the issue is one of law. As Judge Collins noted, the "requirements of Article III standing are 'an indispensable part of the plaintiff's case'" and 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.'" App.26a (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The District Court and the panel majority both found that Article III standing existed, even without Respondents proving the "fairly traceable" prong. This was an error of law that is ripe for this Court's review.

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[1] Respondents attempt to inject fact issues with purported "evidence" not submitted at the summary judgment or trial stages. Resps.' Br. at 19-20. There is no basis for consideration of this "evidence." In any event, the grainy pictures do not show what Respondents would have this Court believe they do.

Finally, Respondents try to minimize the jury's verdict by claiming it does not contradict the conclusion that fact questions existed with respect to the "fairly traceable" element. Resps.' Br. at 20-22. Yet, and again as pointed out by Judge Collins in dissent, "[b]y its terms, th[e] verdict establishes either that (1) Corona never discharged pollutants into Temescal Creek; or (2) Corona ceased all such discharges before February 27, 2018, with no reasonable likelihood of a recurrence of 'such violations.'" App.38a. The contradiction between the jury verdict and the finding of Article III standing by the District Court and the panel majority is stark. Moreover, it raises yet another conflict with other Courts of Appeals, as the Third and Fifth Circuits have applied a specific three-part test regarding the "fairly traceable" requirement. *Crown Cent. Petroleum Corp.*, 95 F.3d at 360–361; *Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990).

Based on the above, this Court should review the first question presented in the Petition.

II. THE PANEL MAJORITY'S "INFORMATIONAL INJURY" HOLDING IS BROAD, INCORRECT, IN CONFLICT WITH OTHER COURTS OF APPEALS, AND REQUIRES REVIEW

The Panel Majority found that Article III standing exists in this case with respect to reporting and monitoring provisions of the Permit because "'when a statute provides a right to information, the deprivation of which 'result[s] in an informational harm,' violation of the statute gives rise to a cognizable 'informational' injury." App.11a. The practical effect of this holding is that anyone with access to the internet can bring a private-citizen suit under the CWA based

on "reporting" violations, so long as some jurisdictional discharge occurred at some undefined point in time. The holding is sweeping and contrary to this Court's precedent, decisions from other Courts of Appeals, and statutory authority.

A. The Panel Majority's "Informational Injury" Holding is Contrary to this Court's Precedent.

Respondents argue that the panel majority was correct because its holding was consistent with this Court's decisions in *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998) and *Pub. Citizen v. Dep't of Just.*, 491 U.S. 440 (1989). Resps.' Br. at 18. Both cases, however, addressed statutory schemes quite different from the CWA.

Further, more recent decisions from this Court make clear that the panel majority's "informational injury" holding is not supportable. In *Spokeo*, this Court addressed a case involving a consumer suit under the Fair Credit Reporting Act. In concluding that Article III standing could not exist based on a "bare procedural violation," this Court noted that "[a] violation of one of the FCRA's procedural requirements may result in no harm." 578 U.S. at 342-43. Here, where there was a lack of evidence that Temescal Creek was harmed in any way, *Spokeo* results in a conclusion that standing is lacking.

In addition, this Court has already held that the purpose of citizen suits under the CWA is to "abate pollution." *Gwaltney*, 484 U.S. at 62. Thus, the panel majority's "informational injury" holding is in direct contrast to the analysis in *Gwaltney*.

B. The Panel Majority's "Informational Injury" Holding Conflicts with Opinions from the Third and Fifth Circuits.

Respondents argue that the panel majority's holding does not conflict with the Fifth Circuit's decision in *Crown Cent. Petroleum Corp.* and the Third Circuit's decision in *Magnesium Elektron, Inc.* Resps.' Br. at 23-24. In making this argument, Respondents assert that the cases involved different factual issues, rather than legal "rules." *Id.* at 24.

However, the Fifth Circuit was quite clear in holding that, where plaintiffs do "not have standing to sue for [] discharge violations, they do not have standing to sue for the reporting violations." *Crown Central Petroleum Corp.*, 95 F.3d at 362. This is in direct contrast to the panel majority's conclusion that "failure to provide statutorily required information can give rise to Article III injury on the part of private plaintiffs." App.11a. The holding is also contrary to the Third Circuit's conclusion that a private citizen suing under the CWA "must therefore show some threatened injury that can be traced to [a] failure to monitor and report [] effluent emissions accurately." *Magnesium Elektron, Inc.*, 123 F.3d at 124.

In another attempt to distinguish *Crown Central* and *Magnesium Elektron*, Respondents argue that the cases are different because the panel majority concluded that Article III standing existed because Respondents' members "had a reasonable belief that Corona Clay's activity has been and is threatening to degrade Temescal Creek." Resps.' Br. at 24. This reasoning is circular and assumes away the "fairly traceable" requirement that was at issue in this case and in the decisions of the Third and Fifth Circuits.

In any event, the panel majority's holding was not so limited, as it broadly held that the "monitoring and reporting requirements" in the Permit are "far from 'bare' procedure." App.11a (quoting *Spokeo*, 136 S. Ct. at 1549). In other words, the panel majority held that all of the "monitoring and reporting" requirements rise above "bare procedure" and provide standing in a private citizen's suit under the CWA.

There is a clear conflict between the panel majority's holding regarding "informational injury" and the holdings of the Third and Fifth Circuits. Review by this Court is entirely warranted and necessary.

C. The Panel Majority's "Informational Injury" Holding Conflicts with the Statutory Scheme Under the CWA.

Respondents assert that the CWA authorizes citzen enforcement actions involving any "effluent limitation," which they contend includes reporting and monitoring violations. Resps.' Br. at 4. the statutory text indicates otherwise.

Reporting and monitoring obligations are covered under 33 U.S.C. § 1318. And, while 33 U.S.C. § 1319 provides authority for a government agency to bring suit for violations of 33 U.S.C. § 1318, that section is specifically excluded in the provisions that allow for private citizens' suits. *See* 33 U.S.C. § 1365(f). Thus, the intent of Congress is that private citizens cannot maintain actions based purely on procedural violations of the Clean Water Act. *See Askins v. Ohio Dep't of Agric.*, 809 F.3d 868, 875 (6th Cir. 2016) (discussing 33 U.S.C. §§ 1318 and 1365 and noting that "the Clean Water Act does not require compliance with § 1318, or other procedural provisions, to avoid a citizen suit.").

The exclusion of § 1318 from § 1365 cannot be construed as a mere accident. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013) (internal citations and quotations omitted). And most pertinent here, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (citations omitted).

III. THE THIRD QUESTION PRESENTED FOR REVIEW INVOLVES AN IMPORTANT ISSUE REGARDING BALANCING TRIAL COURT DISCRETION WITH FEDERAL RULE OF CIVIL PROCEDURE 36(A).

Respondents argue that this Court should ignore the third question presented for review because the RFA response was not factored into the decisions of the District Court or the panel majority. Resps.' Br. at 25. This is a puzzling argument, as both the panel majority and the dissent discussed the issue to a considerable degree. App.19a-20a; 44a-45a.

In any event, the issue is an important one and merits review. The panel majority essentially held that the District Court had no discretion to decline to present the RFA to the jury after the close of evidence. Indeed, the panel majority did not discuss the issue of discretion at all. Yet, this Court has held squarely that a request to reopen for additional proof is addressed to the sound discretion of the trial judge. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 331 (1971).

The RFA request asked for an admission regarding discharges to "Temescal Creek." The response admitted to indirect discharges to "Temescal Wash." The terms "Creek" and "Wash" are not interchangeable, at least in the context of this case. In fact, Respondents submitted with their supplemental appendix the declaration of Raymond Hiemstra, an employee of Respondents. In his declaration, Mr. Hiemstra discusses how he had a drone camera travel across "Temescal Wash." S.App.28. Mr. Hiemstra then proceeds to discuss how he took his car to "Temescal Creek." *Id.* S.App.29.

In citing this evidence, Petitioner is not trying to have this Court resolve the issue of the difference between "Creek" and "Wash." Rather, Mr. Hiemstra's declaration is discussed because it shows that there is ambiguity in the two terms. It is well-recognized that trial courts are in the best position to make determinations regarding what evidence may be presented to the jury, especially after the close of evidence. Thus, the Eighth Circuit 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). 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). The panel majority ignored the principles expounded in these cases and entirely removed the District Court's discretion.

As a final point, Respondents argue that they did not have the opportunity to present the RFA response

before evidence closed because they were unaware that the District Court would require them to prove discharges in connection with their Sixth and Seventh causes of action, which concerned reporting and monitoring violations. Resps.' Br. at 28-29. This is simply untrue. Respondents' Second cause of action for harm to "receiving waters" required a showing of discharges into Temescal Creek, as Judge Collins noted in dissent. App.29a. The District Court also made the same point in denying Respondents' post-trial motions, stating that "'Plaintiffs were well aware that they needed to prove such discharge to support their Second Cause of Action.'" App.59a (quoting Opp'n at 8-9).

Because RFAs are a regularly-used discovery tool and the issue presented will likely occur again, this Court should review the third question presented.

CONCLUSION

For all of the foregoing reasons and for those presented in Corona Clay's Petition, this Court should grant the Petition.

Respectfully submitted,

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