No. 23-753

IN THE

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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May 8, 2024

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PETITIONER'S SUPPLEMENTAL BRIEF

The day after the City filed its Reply Brief, the Environmental Protection Agency (EPA) sued San Francisco under the Clean Water Act (CWA or the Act), demonstrating the urgency of the City's request for the Court's intervention. *See* Complaint, *United States v. City & Cnty. of San Francisco*, No. 3:24-cv-02594 (N.D. Cal. May 1, 2024) (hereafter EPA Complaint), *available at* https://perma.cc/HT8M-SS35.[1] EPA's lawsuit potentially seeks hundreds of millions of dollars in civil penalties, as well as billions more in injunctive relief. If the Court denies certiorari, there is also a real risk that EPA will amend its complaint to allege that the City is violating the Generic Prohibitions that are the subject of this case.

EPA's lawsuit alleges that the City is violating a permit condition that conflates effluent limitations and water quality standards in the precise unlawful manner identified in the Petition. *See* Petition 28-29; Reply Br. 5-6. San Francisco's wastewater discharges are regulated by two National Pollutant Discharge Elimination System (NPDES) permits issued under the CWA: one covering the City's Bayside and the other—the permit that is the subject of the Petition—regulating its Oceanside. In addition to accusing San Francisco of violating portions of the Oceanside NPDES permit, EPA's complaint alleges that the City has been and is violating a condition in its Bayside permit that—like the two Generic Prohibitions challenged in this case—defines San Francisco's compliance based "*solely* on whether the receiving waters are

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[1] This lawsuit is separate from the citizen suit threatened by San Francisco Baykeeper. *See* Reply Br. 11-12. As of the date of this filing, Baykeeper has not filed a complaint.

meeting applicable water quality standards." App. 61 (Collins, J., dissenting) (emphasis in original); EPA Complaint, First Cause of Action ¶¶ 99-120 (entitled "Bayside Permit – [Combined Sewer Overflows] Causing Exceedances of Water Quality Standards and Violations of Permit Limits").

EPA's newly-filed litigation illustrates that the concerns San Francisco raised in its Petition are not mere risks—they are reality. The complaint alleges that discharges from the eastern portion of San Francisco's combined sewer system violate a condition in the City's Bayside permit prohibiting the City from "causing a violation of any applicable water quality standard for receiving waters." EPA Complaint ¶ 100 (citing NPDES No. CA0037664 § V.C. (Aug. 14, 2013)).

Because of EPA's lawsuit, San Francisco now stands accused of violating a water quality prohibition that suffers from the same flaw as the Generic Prohibitions in the Oceanside permit at issue here. The City faces a lawsuit that exposes San Francisco to civil penalties exceeding $200 million (and counting) and billions of dollars in injunctive relief, and yet it provides the City no notice of how it could reasonably control its discharges to stop the alleged violations. *See* EPA Complaint ¶ 120; *id.*, Prayer for Relief ¶¶ a-c; Petition 13 & n.8.

Critically, San Francisco's predicament may get worse if the Court were to deny review. Although the agency's complaint does not *now* allege violations of the Oceanside permit's Generic Prohibitions at issue in the Petition, EPA nonetheless brings claims for violations of "uncontested conditions" of that permit that became effective in 2020. *See* EPA Complaint ¶¶ 76-88. Moreover, the complaint centrally alleges that San Francisco has "discharged an average of 1.8

billion gallons of combined sewage, which includes untreated sewage, each year from its combined sewer systems *into the Pacific Ocean* and San Francisco Bay"—without once disaggregating discharges from the Bayside and Oceanside. *See id.* ¶ 53 (emphasis added); *see also id.* ¶ 2. Thus, EPA has drafted a complaint that could be easily amended to bring claims that the City is violating the Oceanside permit's contested Generic Prohibitions if the Court denies certiorari.

Congress designed the Act so that no permitholder would endure what San Francisco now faces: "arbitrary enforcement actions from regulators and citizen plaintiffs for 'violating' unspecified, unknown, and unknowable requirements." Br. of *Amici Curiae* Public Wastewater & Stormwater Agencies & Municipalities 6. The Ninth Circuit's decision, however, allows EPA to disregard a key component of the CWA's text that Congress crafted to protect permitholders from this predicament: its instruction to EPA "'to translate … water quality standards' into effluent limitations that notify permitholders how much they need to control their discharges." Reply Br. 2 (quoting App. 53 (Collins, J., dissenting)); *see* Petition 28-29. EPA's lawsuit makes tangible the "crushing consequences" awaiting San Francisco and countless other permitholders if EPA is allowed to continue disregarding Congress's instructions. *Sackett v. EPA*, 598 U.S. 651, 660 (2023) (quotation and citation omitted). This Court should intervene to correct the agency's course.

CONCLUSION

The Court should grant the Petition.

May 8, 2024

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