

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CITY AND COUNTY OF SAN FRANCISCO,)
CALIFORNIA,)
Petitioner,)
v.) No. 23-753
ENVIRONMENTAL PROTECTION AGENCY,)
Respondent.)
- - - - -

Pages: 1 through 105
Place: Washington, D.C.
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3 CITY AND COUNTY OF SAN FRANCISCO,)
4 CALIFORNIA,)
5 Petitioner,)
6 v.) No. 23-753
7 ENVIRONMENTAL PROTECTION AGENCY,)
8 Respondent.)
9 - - - - -
10
11 Washington, D.C.
12 Wednesday, October 16, 2024
13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 11:20 a.m.
17
18 APPEARANCES:
19 TARA M. STEELEY, Deputy City Attorney, San Francisco,
20 California; on behalf of the Petitioner.
21 FREDERICK LIU, Assistant to the Solicitor General,
22 Department of Justice, Washington, D.C.; on behalf
23 of the Respondent.
24
25

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1 P R O C E E D I N G S

2 (11:20 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument now in Case 23-753, the City and County
5 of San Francisco versus the Environmental
6 Protection Agency.

7 Ms. Steeley.

8 ORAL ARGUMENT OF TARA M. STEELEY

9 ON BEHALF OF THE PETITIONER

10 MS. STEELEY: Mr. Chief Justice, and
11 may it please the Court:

12 Section 301(b)(1)(C) of the Clean
13 Water Act assigns EPA the job of setting the
14 effluent limitations necessary to meet and
15 implement water quality standards. The water
16 quality standards are not the limitations
17 themselves. Instead, they set the goals for the
18 water body. EPA must translate those goals into
19 discharge limitations.

20 The Generic Prohibitions fail this
21 task. As Judge Collins explained below, the
22 Generic Prohibitions erase the distinction
23 between water quality standards and discharge
24 limitations, making them one and the same.

25 The Generic Prohibitions revive the

1 very "cause or contribute" standard Congress
2 repealed. And they do not function as discharge
3 limitations. As the Second Circuit recognized,
4 they add nothing that tells a permitholder how
5 to control its discharges.

6 EPA claims it uses the Generic
7 Prohibitions as a backstop, an insurance policy
8 against changing circumstances. But the Clean
9 Water Act already gives EPA all the tools it
10 needs to address uncertainty. EPA can reopen,
11 modify, or terminate a permit when conditions
12 change, and it can exercise its statutory
13 authority to protect public welfare in
14 emergencies. What EPA cannot do is expose
15 permitholders to liability based on receiving
16 water conditions it cannot control.

17 The Generic Prohibitions are also
18 inconsistent with the Act's permit shield. The
19 shield protects permitholders from liability as
20 long as they comply with their permit terms.
21 But, by imposing indeterminate requirements, the
22 Generic Prohibitions prevent permitholders from
23 relying on the shield's protections.

24 San Francisco is therefore exposed to
25 crushing criminal and civil penalties even when

1 it otherwise complies with its 300-page permit.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: In Phase -- in --
4 in -- in your permit, Phase I, doesn't that
5 contain a narrative limitation?

6 MS. STEELEY: So San Francisco's
7 permit is a Phase II permit, so we're not
8 subject to the CSO policy for Phase I.

9 But Phase I describes a narrative
10 condition.

11 JUSTICE THOMAS: Yeah.

12 MS. STEELEY: The Generic
13 Prohibition -- our -- our concern about the
14 Generic Prohibitions is not that they are
15 narrative. It's perfectly fine for EPA to use
16 conditions that are narrative, narrative water
17 quality-based effluent limitations.

18 And that's exactly what the CSO --
19 sorry, the CSO control policy requires. It --
20 even in EPA's own guidance, it describes what's
21 required under -- Phase I, and it describes that
22 as a narrative water quality-based --

23 JUSTICE THOMAS: So what is --

24 MS. STEELEY: -- effluent limitation.

25 JUSTICE THOMAS: -- with this --

1 permit, what is at bottom the problem?

2 MS. STEELEY: What at bottom is the
3 problem is that permitholders don't know what
4 they need to do to comply. We know how to
5 comply with the 300 pages of our permit, which
6 tells us our discharge limitations that we need
7 to achieve.

8 The problem with the Generic
9 Prohibitions is that they don't tell us what in
10 addition that we need to do. And if I could
11 provide an example of that. One of California's
12 water quality standards is no objectionable
13 algae bloom should form in the water body. San
14 Francisco doesn't know how it must control its
15 discharges to prevent that condition from
16 forming in the water body.

17 And we can't know because whether a
18 condition will form in the water body will
19 necessarily depend on what other permitholders
20 or other non-point sources are adding to the
21 water body and the flow of the water itself.

22 What San Francisco can control is our
23 own discharges. We cannot control the receiving
24 water conditions.

25 JUSTICE JACKSON: Are the water

1 quality standards -- in state law? I -- I
2 thought that the EPA permits were just
3 incorporating obligations that already existed
4 in state law.

5 JUSTICE THOMAS: Yeah.

6 JUSTICE JACKSON: Am I wrong about
7 that?

8 MS. STEELEY: I -- I think that's not
9 quite correct, Your Honor. The water quality
10 standards set the goal for the water body, but
11 they aren't self-executing. They have to be put
12 into a permit. And what's -- what 301(b)(1)(C)
13 requires is that EPA meet and implement the
14 water quality standards, which means translating
15 them into a -- a permit limitation --

16 JUSTICE JACKSON: I know, but I --
17 I -- I --

18 MS. STEELEY: -- that permitholders
19 can follow.

20 JUSTICE JACKSON: -- isn't EPA -- I --
21 I thought the statute allowed for "any more
22 stringent limitation, including those necessary
23 to meet water quality standards, treatment
24 standards, or schedules of compliance
25 established pursuant to any state law."

1 MS. STEELEY: So --

2 JUSTICE JACKSON: So California has
3 established certain water quality standards.
4 Are those independently binding on the cities
5 and municipalities in California?

6 MS. STEELEY: They are not binding.
7 They are only binding as a permit limitation.
8 And that's the problem here, is that we don't --
9 they're only binding --

10 JUSTICE JACKSON: Do they -- do you
11 have to have permits under state law so that
12 they get bound -- you get bound through the
13 state permitting process then?

14 MS. STEELEY: The permit at issue here
15 is issued by --

16 JUSTICE JACKSON: No, I understand.
17 But I'm just --

18 MS. STEELEY: Yeah. The --

19 JUSTICE JACKSON: -- I guess my -- my
20 big problem is that I'm trying to understand why
21 you find these permit provisions so onerous or
22 problematic when they seem to just incorporate
23 standards that already exist under state law
24 that you would have to follow anyway.

25 MS. STEELEY: The standards are not

1 self-executing, so we don't have to follow them
2 anyway. They set the goals for the water body,
3 but they're not limitations on us themselves.

4 JUSTICE KAGAN: So --

5 MS. STEELEY: So they aren't -- they
6 are not binding on us.

7 JUSTICE KAGAN: -- Ms. -- Ms. Steeley,
8 I mean, there are lots of different kinds of
9 regulations in the world. Some people like some
10 kinds; some people like other kinds. Some
11 regulations are really prescriptive, do this,
12 this, this, and this. And then, you know, some
13 people hate those kinds of regulations. They'd
14 rather have regulations that are less
15 prescriptive, that say here's the goal, you
16 decide how to meet it. That gives a party more
17 flexibility and so forth.

18 So, you know, some people, you know,
19 it's -- there's got to be something in this
20 statute that tells you --

21 JUSTICE THOMAS: Yeah.

22 JUSTICE KAGAN: -- that the agency
23 can't decide to go the less prescriptive, more
24 flexible "you decide how to meet it; this is the
25 goal" route, and I don't see anything in this

1 statute that does that.

2 MS. STEELEY: So I disagree, Your
3 Honor, that this provides a flexible standard.
4 What --

5 JUSTICE KAGAN: I -- I -- let's talk
6 about the statute. Like, what in the statute
7 prevents the agency from saying, in addition to
8 or instead of the highly prescriptive, you know,
9 you can only discharge X amount, we want to set
10 a goal, and we want to tell you that you're
11 obligated to not contribute to violating that
12 goal?

13 MS. STEELEY: So what the statute
14 provides is that EPA must meet and implement the
15 water quality standards. And those are
16 transitive verbs. They necessarily, in our
17 view, require taking concrete steps to meet --
18 to achieve the goal, right?

19 JUSTICE KAGAN: See, to me, this
20 regulation -- what does this regulation do? It
21 says go meet and implement the water quality
22 standards, because you were exactly right in
23 what you said to Justice Jackson, as without
24 this regulation, or not this regulation but this
25 condition in the permit, you're not

1 independently obligated to -- they're not
2 enforced -- those standards are not enforceable
3 against you.

4 It's the permit condition that makes
5 those standards enforceable against you by the
6 EPA. So that's what this condition does. It --
7 it -- it -- it's -- it's prescribing that you
8 have to meet water quality standards. Like, how
9 more clearly could you meet this statutory
10 language than that?

11 MS. STEELEY: So the problem is, is
12 that it -- it can be used as grounds for
13 enforcement afterwards, but it doesn't tell
14 permitholders in advance what we must do to
15 control our discharges. So, in that sense --

16 JUSTICE SOTOMAYOR: The problem is
17 that there are discharges -- and we get a huge
18 amount of them in the amici briefs -- of
19 discharges that weren't anticipated. You were
20 fine at the time of the permit, and then, all of
21 a sudden, you've got chlorinated or potable
22 water into the waters.

23 So, if the water standards are not --
24 self-executing, which you admit, if they're not
25 in the permit because they haven't been put into

1 the permit, then what you're saying is: Well,
2 you can't do anything immediately, EPA. You
3 have to start a review process that takes months
4 and sometimes years to amend the permit and do
5 something about it.

6 This, instead, says to San Francisco:
7 You should be monitoring the water. Don't let
8 it exceed the water quality standards that we
9 met and set together. Now you implement the
10 changes that you think are appropriate to stop
11 this unexpected discharge.

12 MS. STEELEY: So I'm not --

13 JUSTICE SOTOMAYOR: I don't know why
14 that's the wrong way to look at this.

15 MS. STEELEY: I think it's the wrong
16 way to look at it, Your Honor, because, first of
17 all, we are not saying EPA cannot take immediate
18 action. The statutory scheme already provides
19 EPA with emergency powers. They can act
20 immediately to protect public welfare under
21 Section -- sorry -- 1364.

22 JUSTICE SOTOMAYOR: How can they do
23 that? They can't go to court unless there's a
24 permit violation.

25 MS. STEELEY: They can go into court

1 under their emergency powers. They --

2 JUSTICE SOTOMAYOR: Under their
3 emergency.

4 MS. STEELEY: They can go into
5 court --

6 JUSTICE SOTOMAYOR: But we have to go
7 to that extreme. So how do we get San Francisco
8 to do something about its implementing -- its
9 monitoring obligations? It's supposed to
10 monitor and look at things and, if things are
11 getting out of control, figure out how to put
12 them back into control.

13 MS. STEELEY: So San Francisco's
14 permit requires monitoring of receiving water
15 conditions, as you've noted. You'll see that in
16 the Petition Appendix starting at page --

17 JUSTICE SOTOMAYOR: So --

18 MS. STEELEY: -- 226.

19 JUSTICE SOTOMAYOR: -- in this permit,
20 this is not a permit involving entities --
21 multiple entities that are discharging into most
22 of these waters. So most of these water, it's
23 one permitholder, the City of San Francisco.
24 It's combining sewage and rainwater runoff,
25 correct, so it knows all of the point sources

1 that contribute to that water quality have
2 effluent limitations because you can test those
3 and see whether they're meeting standards.

4 So, if something unexpected happens,
5 it's because one of those water sources has gone
6 awry, correct?

7 MS. STEELEY: That is not correct,
8 Your Honor, and I have two responses to that.

9 First of all, San Francisco is not the
10 only discharger or contributor to the water
11 body. There are eight discharge points at issue
12 in this permit.

13 JUSTICE SOTOMAYOR: Those are the
14 point sources that it's supposed to be --

15 MS. STEELEY: Sorry, no. So --
16 San Francisco has its own discharge points, and
17 there are eight of them.

18 JUSTICE SOTOMAYOR: Mm-hmm.

19 MS. STEELEY: One of them is -- I will
20 concede is fairly far out into the ocean. We
21 are the only source for that one. But the other
22 seven have many other contributors to the water
23 body very close nearby.

24 And if I can give you an example, just
25 a couple weeks ago, there was a bacteria spike

1 near one of those discharge points. It's a
2 point that we are not currently using, so we
3 know we did not cause that spike, but someone
4 else did.

5 Had we been contributing to the water,
6 had we been discharging at the time, we would
7 necessarily have been contributing to that
8 condition and we would be subject to liability.

9 JUSTICE SOTOMAYOR: But how about --
10 but my -- that's my point, which is it -- you
11 can't get past the obligation to meet the water
12 standards unless you put them into the permit.

13 MS. STEELEY: So the way that EPA can
14 achieve its goals here is to set a discharge
15 limitation in the permit. And if I can correct
16 perhaps a misunder- --

17 JUSTICE SOTOMAYOR: Oh -- what, so
18 they should take each -- I see in the water
19 standards they're very detailed on any number
20 of -- of discharges. You can only have X amount
21 of feces in the water, X amount -- or Y amount
22 of bacteria. Pages and pages of measurements.

23 You want them to write all of those --
24 take the water standards, and instead of
25 cross-referencing them and telling you to meet

1 those standards, you want them to write each
2 amount?

3 MS. STEELEY: So, Your Honor, EPA's
4 own regulations require it to set an effluent
5 limitation whenever there is a reasonable
6 potential that a discharge will cause or
7 contribute to a water -- water body --

8 JUSTICE SOTOMAYOR: Well -- well,
9 that -- that's the point I'm making. It does
10 that. Where there's -- where they're exceeding
11 the limitation, it tells it what technology to
12 put into place to reduce it.

13 But, if they're not exceeding it right
14 now, how do they take care of the -- the
15 unexpected situations?

16 MS. STEELEY: The -- the permit
17 limitations are set in advance, so they're
18 anticipating what the discharge will do to the
19 water body.

20 But, if I can correct, I think, what
21 maybe -- what maybe is a misunderstanding. We
22 don't have real-time monitoring of receiving
23 water conditions. Under our permit, we monitor
24 bacteria on a once-a-week basis, and other
25 things, including effects on animals, sediment,

1 we monitor on a yearly basis, and it takes about
2 nine months for the results to come back.

3 So San Francisco cannot shift on a
4 dime. We don't have the information necessary
5 to know --

6 JUSTICE SOTOMAYOR: I'm sorry, no
7 one's asking you to shift on a dime. What
8 they're asking you to do is to become
9 responsible for doing what's necessary, not on a
10 dime, but -- nothing in the EPA works on a
11 dime -- but to take the steps necessary to
12 control situations that develop.

13 MS. STEELEY: So, if I can provide
14 another example of how this runs amuck, the --

15 JUSTICE SOTOMAYOR: By the way, I do
16 accept that there are some provisions of the
17 water standards that are, charitably, a little
18 amorphous. You know, control for the color of
19 the water. But I think that's an as-applied
20 challenge. And --

21 JUSTICE KAGAN: Yeah, can I just
22 piggyback on that if you'll -- if you'll let me,
23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: Yeah -- yeah,
25 sure.

1 JUSTICE KAGAN: Is -- is, when I hear
2 you speaking, I hear one of two things.

3 One is that to the extent that you
4 have objections to particular ones of these
5 water quality standards -- they're too
6 confusing, they're too vague, we can't figure it
7 out, how can you tell between us and other
8 dischargers -- I mean, that does seem like a
9 classic arbitrary-and-capricious question. So
10 you would go and make an arbitrary-and-
11 capricious standard as to those particular
12 standards that are in the permit.

13 I mean, the second way I hear you,
14 honestly, is -- is you're making a policy
15 argument to either the agency or to Congress.
16 You're making a policy argument to the agency,
17 essentially: Don't take advantage of your
18 statutory authority in this way because it's
19 very confusing to us, the regulated party. Or
20 you're making a policy argument to Congress: Go
21 fix this statute so that the EPA can't do this.

22 But what I don't hear you telling me
23 is, like, what in the statute prevents the EPA
24 from doing this. And, you know, as I said in
25 the -- in my -- in my first intervention here,

1 the policy arguments, they cut both ways. Some
2 people like these kinds of standards. These
3 kinds of standards -- if the EPA couldn't do
4 these standards, presumably, they would do
5 something else, which might be more
6 prescriptive, which some parties might really
7 hate.

8 So -- so that's such a policy argument
9 that we can't figure out what in the statute
10 prevents the EPA from doing this.

11 MS. STEELEY: So, again, I would
12 point -- I would point you to the requirement to
13 meet and implement the water quality standards.

14 As you noted, Justice Sotomayor, some
15 of the standards are not -- they don't translate
16 easily into a discharge limitation for
17 San Francisco.

18 And I don't agree that it's a policy
19 argument. We simply want to know what we have
20 to do --

21 CHIEF JUSTICE ROBERTS: I --

22 JUSTICE KAGAN: I -- I feel as though
23 it's -- when you say "meet and implement," I
24 feel that those statutory words, they're
25 practically a description of these permit

1 conditions.

2 You know, they -- they basically say:
3 If -- if -- you -- you don't have to do the --
4 just the standard effluent limitations if you
5 think that a regulation is -- you know, further
6 conditions are necessary to achieve the water
7 quality standards.

8 And the EPA is saying at the very
9 least this: We have to obligate you and other
10 entities with permits to comply with those water
11 quality standards. And that's -- that's
12 actually exactly what this statute allows the
13 EPA to do.

14 MS. STEELEY: So I don't agree that
15 you can meet and implement the water quality
16 standards by simply sticking a term in the
17 permit that says: Do not cause or contribute to
18 the violation of water quality standards.

19 They might as well have said: Do not
20 violate the Clean Water Act. It doesn't tell us
21 anything --

22 JUSTICE KAVANAUGH: I thought -- I
23 thought --

24 MS. STEELEY: -- about how to
25 control --

1 CHIEF JUSTICE ROBERTS: I thought
2 the -- I thought the whole reason we have the
3 water permit system is because the water quality
4 system was a failure --

5 MS. STEELEY: That's exactly --

6 CHIEF JUSTICE ROBERTS: -- because it
7 didn't tell people in any predictable way what
8 they can and cannot do.

9 MS. STEELEY: That's exactly right.
10 And Congress repealed that system. It replaced
11 that system.

12 JUSTICE KAVANAUGH: And -- and the --
13 and -- I'm sorry, keep going.

14 MS. STEELEY: Oh, no. It replaced
15 that with a system where EPA is supposed to tell
16 us our discharge obligations in advance. That
17 was the entire basis for the Clean Water Act.

18 JUSTICE KAVANAUGH: And I thought the
19 statutory hook that you were relying on in
20 (b)(1)(C), 301(b)(1)(C), was the phrase "any
21 more stringent limitation necessary to meet
22 water quality standards." And you read "any
23 more stringent limitation" to refer back and
24 mean effluent limitation.

25 Is that your statutory hook?

1 MS. STEELEY: That's true, Your Honor.
2 I would also point you to -- Section 301(a) sets
3 the table for what the rest of Section 301(b) is
4 going to accomplish.

5 JUSTICE KAVANAUGH: Absolutely.
6 301(a) sets effluent limitations, and then, when
7 it says "any more stringent limitation," you say
8 the fact that the word "effluent" is not there
9 is -- in context, it's obviously referring to
10 "effluent limitations" and then "meet water
11 quality standards," right?

12 MS. STEELEY: That's correct, Your
13 Honor. What --

14 JUSTICE SOTOMAYOR: I'm sorry. But
15 you -- you say narrative is okay. And that's
16 not an effluent limitation. We also have our
17 own case that says it doesn't have to be an
18 effluent limitation. And I still don't
19 understand how you didn't forfeit this argument.

20 MS. STEELEY: So --

21 JUSTICE SOTOMAYOR: First of all, it
22 wasn't raised before the Ninth Circuit. It was
23 mentioned in the dissent, but, when you filed
24 for certiorari, you didn't make this argument.

25 And you now raise it -- I was quite

1 surprised when I read the question presented and
2 started your brief and thought to myself this is
3 a new theory.

4 How is that argument not forfeited?

5 MS. STEELEY: So, Your Honor, we do
6 not object to narrative water quality-based
7 effluent limitations, and an effluent limitation
8 can be narrative. What an effluent limitation
9 is is a --

10 JUSTICE SOTOMAYOR: Just answer my
11 question. Why didn't you forfeit this argument?

12 MS. STEELEY: Okay. We did not
13 forfeit this argument because we've argued
14 throughout this case, including, you'll see, at
15 pages 24 to 34 of our opening brief, that our
16 theory --

17 JUSTICE SOTOMAYOR: I'm asking about
18 how you didn't forfeit it in your cert petition.

19 MS. STEELEY: So what we are
20 challenging here is the Generic Prohibitions.

21 JUSTICE SOTOMAYOR: And how did you
22 not forfeit it in the court below by not raising
23 it?

24 MS. STEELEY: We did --

25 JUSTICE SOTOMAYOR: We're not a court

1 of first impression.

2 MS. STEELEY: We did raise it in the
3 court below, Your Honor. You'll see that at
4 pages --

5 JUSTICE SOTOMAYOR: The Ninth Circuit
6 didn't -- didn't think so. I looked at your
7 briefs from there. I don't think so either.

8 MS. STEELEY: The Ninth Circuit held
9 that 301(b)(1)(C) is not limited to effluent
10 limitations, which are restrictions on
11 discharges. It did reach that holding. You'll
12 see that at pages 32 to 33 of the Ninth
13 Circuit's decision. And we argued this to the
14 Ninth Circuit.

15 JUSTICE SOTOMAYOR: All right.

16 MS. STEELEY: So I -- I don't --

17 JUSTICE SOTOMAYOR: On the "more
18 stringent" area -- question, if it's a different
19 limitation, it's more stringent, isn't it?
20 Meaning you're defining "more stringent" as
21 being more hardship on me than the effluent
22 limitation. But doesn't that answer Justice
23 Kagan's point, which is anytime you have another
24 obligation, it's more stringent?

25 MS. STEELEY: We don't agree that

1 "more stringent" just means additional. I
2 think, if Congress had meant that, it would have
3 said so. And I think that's actually an
4 important part of the statutory --

5 JUSTICE SOTOMAYOR: I --

6 JUSTICE KAGAN: I'm not sure I
7 understand that. I mean, these do impose
8 obligations on you above and beyond what the
9 technology-based limits do, isn't that right?
10 You have to do more?

11 MS. STEELEY: I don't agree, Your
12 Honor, and that's because we cannot tell. It
13 does not tell us in advance how to control our
14 discharges. It --

15 JUSTICE KAGAN: Well, either you have
16 to do only what the technology-based limits tell
17 you to do or you have to do more.

18 MS. STEELEY: But this does not tell
19 us what more we would have to do. But --

20 JUSTICE KAGAN: Well, for example,
21 suppose a technology-based condition says, you
22 know, don't discharge more than 75 gallons of
23 sewage. And now, in addition to that, a water
24 quality-based condition says don't cause or
25 contribute to meaningful discoloration.

1 Isn't it more stringent than the first
2 condition standing alone because, on a
3 particular day, you might have to cut your
4 discharges more to 60 gallons of -- per day?

5 MS. STEELEY: So we --

6 JUSTICE KAGAN: That is more
7 stringent. Now it's 60 gallons per day because
8 that's what's necessary to prevent
9 discoloration.

10 MS. STEELEY: So I have two arguments
11 to that, Your Honor.

12 One is this doesn't tell us how to
13 control our discharges, so, in our view, it's
14 not more stringent.

15 And the second is, is that we judge
16 permit terms at the time that they are set.
17 When they are set, we cannot tell if it's a more
18 stringent requirement or not because, depending
19 on conditions in the water body, it can be
20 either more or less stringent at that moment in
21 time, and so, therefore, it's not a more
22 stringent restriction.

23 JUSTICE JACKSON: But isn't that the
24 point? I mean, do -- do you dispute that
25 Congress was attempting to have a backstop with

1 respect to requiring or allowing for any more
2 stringent limitation?

3 I mean, the word "any" in here also,
4 it seems to me, does work to suggest that we
5 don't have to stay within the world of effluent
6 limitations. So how do you account for that?
7 And isn't the point of having this that Congress
8 understood that the (1)(A) effluent limitations
9 might not be sufficient, so the authority was
10 given to prescribe any more stringent
11 limitation?

12 MS. STEELEY: So I think you have to
13 read "any" in context. I think my friends on
14 the other side read 301(b)(1)(C) as meaning any
15 limitation. That cannot be right. They've rest
16 out -- they've read out the rest of the words of
17 that section. But I think I -- I want to -- I
18 don't believe that 301(b)(1)(C) is meant to be,
19 you know, a all-encompassing backstop. I don't
20 agree with that. In fact --

21 JUSTICE JACKSON: Well, what is it
22 doing?

23 MS. STEELEY: Yeah.

24 JUSTICE JACKSON: I mean, we already
25 have a provision that allows for or authorizes

1 effluent limitations. And then we get to this
2 one that says you can put in a permit any more
3 stringent limitation. And -- and -- and
4 speaking of reading out the words, it says
5 "including those necessary."

6 So it's not even clear that "those
7 necessary" is the sum total of the limitations.
8 It says "any more stringent limitations." So
9 isn't -- doesn't that just on its textual
10 reading suggest we're beyond the effluent
11 limitations that were previously authorized?

12 MS. STEELEY: So a couple responses
13 that I -- I'd like to give you if I may.

14 JUSTICE JACKSON: Yes, please.

15 MS. STEELEY: The first is that what
16 an effluent limitation is, is a restriction on
17 discharges of pollutants. We know from Section
18 301 that the entire section is about a
19 restriction on the discharges of pollutants. So
20 we believe 301(b)(1)(C) is also about an
21 effluent limitation, but it's necessarily narrow
22 in scope, and if I can explain why.

23 So technology-based effluent
24 limitations, which are set under Section
25 301(b)(1)(A) and (B), are effluent limitations

1 that require controls using the best practicable
2 technology that's economically feasible.

3 What Section 301(b)(1)(C) -- sorry --
4 Section 301(b)(1)(C) allows is additional
5 controls regardless of their economic
6 feasibility, regardless of cost. So those are
7 necessarily a limited thing. They are used only
8 when more stringent, only when necessary to meet
9 and implement. They're not a catch-all.

10 JUSTICE JACKSON: Right. I understand
11 that point.

12 MS. STEELEY: They're not used all the
13 time.

14 JUSTICE JACKSON: I understand that
15 point, but what -- what do we do with the fact
16 that Congress chose, I think, to codify the
17 EPA's interpretation of this -- of this -- the
18 CSO control policy, and that policy, it's my
19 understanding, explicitly endorsed the kind of
20 permit provisions at issue here, those that
21 regulate sewage treatment that incorporate water
22 quality standards beyond effluent limitations?

23 Is -- do you -- do you dispute that
24 Congress endorsed the kinds of permit --
25 provisions that exist here?

1 MS. STEELEY: Absolutely. We
2 absolutely --

3 JUSTICE JACKSON: Okay.

4 MS. STEELEY: -- dispute that. So my
5 friends on the other side are not relying on the
6 CSO policy as their source of authority and
7 wisely so because the CSO policy does not give
8 them the permission to put in conditions like
9 the Generic Prohibitions.

10 We are a Phase II permit, which
11 expressly requires water quality-based effluent
12 limitations. Even under Phase I, Phase I allows
13 narrative water quality-based effluent
14 limitations. There's nothing in the CSO policy
15 that suggests that Congress -- that EPA could
16 simply impose something like the Generic
17 Prohibitions, leave San Francisco to figure out
18 its discharge obligations on its own.

19 Congress -- there's nothing suggesting
20 that Congress had that in mind or blessed that
21 system. In fact, when Congress was asked, you
22 know, do we want to leave permitholders to
23 figure it out for themselves or assign EPA as
24 the agency to set limitations, it chose the
25 latter approach.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas, anything further?

4 JUSTICE THOMAS: Are -- are there --
5 not in your case, but are there any
6 provisions -- is there any prohibition in 1311
7 against E -- EPA having the generic limitations
8 in a -- in a plan for someone else? Just
9 generically, not you.

10 MS. STEELEY: Is there a prohibition?

11 JUSTICE THOMAS: Yeah. Are they
12 precluded from having generic limitations?

13 MS. STEELEY: I don't think there's
14 anything expressly precluding them, but --
15 except that they are not authorized to do so,
16 right? EPA only has authority when authorized.
17 And so I think Section 301 is silent about
18 Generic Prohibitions. It doesn't authorize
19 them.

20 JUSTICE THOMAS: Well, let me ask:
21 Can EPA impose generic limitations on anyone?

22 MS. STEELEY: No.

23 JUSTICE THOMAS: Why?

24 MS. STEELEY: Because they point to
25 Section 301(b)(1)(C) as their only source of

1 authority to impose Generic Prohibitions.

2 JUSTICE THOMAS: Mm-hmm. Yeah.

3 MS. STEELEY: And that provision does
4 not allow it.

5 JUSTICE THOMAS: And why is that?

6 MS. STEELEY: Because what can be
7 imposed under Section 301(b)(1)(C) is
8 limitations on discharges. Those are effluent
9 limitations. They need to tell permitholders
10 their obligations. That's the entire point of
11 that section and its requirements.

12 So, by imposing a Generic Prohibition,
13 they're simply telling us to figure it out for
14 ourselves, which we think is contrary to the
15 statutory scheme.

16 JUSTICE THOMAS: So would you have
17 a -- an arbitrary-and-capricious claim if you
18 did not bring this as a statutory claim?

19 MS. STEELEY: Yes.

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 JUSTICE ALITO: The government says
22 that there are no other significant point or
23 non-point sources of pollution around the
24 Southwest Ocean Outfall.

25 Assuming for the sake of argument that

1 that is true -- I heard you to dispute it
2 earlier in your argument -- but assuming for the
3 sake of argument that it is true, why couldn't
4 you then figure out what is necessary for you to
5 do to comply with the water quality standards?

6 MS. STEELEY: So, if I can just
7 clarify first, there are eight outfalls at
8 issue. So they're saying at one of them that is
9 true. They don't contest that the other seven,
10 that is not true.

11 But the reason is, first of all,
12 Congress assigned EPA this task, not us. But
13 the practical answer is, is that we can't know
14 what we can discharge without knowing in real
15 time, minute by minute, what the conditions are
16 in the receiving waters. That will include the
17 water flow, its currents, and also what others
18 have added to the water body.

19 For instance, if we're trying to meet
20 a -- a --

21 JUSTICE ALITO: Well, it sounds like
22 what you're saying there is not that you object
23 to the fact that EPA hasn't told you what you
24 need to do but that there is really no
25 practicable way of specifying in advance what

1 you are required to do, and, therefore, you can
2 continue to have these combined sewer overflow
3 events where you're discharging raw sewage into
4 the Pacific Ocean.

5 MS. STEELEY: There is a way to tell
6 us in advance, and EPA has done so. It has set
7 effluent limitations in our permit.

8 What EPA hasn't told us is what
9 additional we need to do under the Generic
10 Prohibitions.

11 JUSTICE ALITO: All right. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor?

14 JUSTICE SOTOMAYOR: And you haven't
15 told me what you do with unanticipated
16 discharges. You ignore them until the permit is
17 amended? Is that your answer?

18 MS. STEELEY: So, if a discharge is
19 not anticipated, if it wasn't disclosed to the
20 agency, then it's an unauthorized discharge.
21 It's simply prohibited under Section 301 --

22 JUSTICE SOTOMAYOR: No, it's not,
23 because the permit tells you what you can or
24 cannot discharge. That's based on what -- and
25 how much. And that's based on what we know

1 you're doing.

2 If you're okay on day one in
3 discharges, we're not going to tell you not to
4 do more. We're giving you permission --

5 MS. STEELEY: So what I'm --

6 JUSTICE SOTOMAYOR: -- to discharge.

7 MS. STEELEY: Right. So, if -- if --
8 if something is not grant -- if you have not
9 been given the authority to discharge a certain,
10 you know, something --

11 JUSTICE SOTOMAYOR: The way the
12 permit --

13 MS. STEELEY: -- a certain
14 constituent --

15 JUSTICE SOTOMAYOR: -- the permit --
16 the way the permit operates is, with the permit,
17 you can discharge anything that the permit tells
18 you you can't. It works in reverse. It tells
19 you you can't do this thing more than that
20 amount. If it doesn't tell you you can't do
21 this thing, you can continue doing this thing
22 until the permit tells you you can't.

23 MS. STEELEY: So the -- the way it
24 works is that the permitholder goes to EPA and
25 says: This is what we plan to discharge. And

1 then, if you have disclosed that to EPA, then
2 they set the limitations, and that's the scope
3 of your ability.

4 JUSTICE SOTOMAYOR: So what they
5 should do is --

6 MS. STEELEY: That doesn't allow you
7 to then --

8 JUSTICE SOTOMAYOR: -- what you told
9 me earlier not to do: come in and tell you,
10 using the technology you're using now, ensure
11 yourself that you're not doing more than X
12 amount of feces in the water? Would that be an
13 okay limitation?

14 MS. STEELEY: Certainly. EPA can say
15 this is the limit --

16 JUSTICE SOTOMAYOR: So rewrite the --

17 MS. STEELEY: -- that you can
18 discharge.

19 JUSTICE SOTOMAYOR: -- water quality
20 standards. Just bring them all into the permit
21 instead of cross-referencing them and say: You
22 can't have at this point source more than X
23 amount of feces discharge.

24 I suspect that Justice Kagan is right
25 that if they start doing something -- because

1 computers now can make that a very easy task --
2 then you'll come in and say the permit is not
3 comprehensible because it's so long and
4 convoluted.

5 MS. STEELEY: So our -- our permit is
6 already quite extensive, and I -- I don't --

7 JUSTICE SOTOMAYOR: Well -- well,
8 you're just ask -- asking to add more.

9 MS. STEELEY: I'm not asking -- I'm --
10 I'm not asking for EPA to add more. What I'm
11 asking is for clear guidance to permitholders
12 about what we have to do to comply with our
13 permit.

14 And I will say that I'm not sure that
15 it is true that others like this. The
16 regulatory community has lined up in the amicus
17 supporting San Francisco.

18 But, in terms of what EPA can do, EPA
19 can reopen the permit. It can modify a permit.
20 But --

21 JUSTICE SOTOMAYOR: Months and years.

22 MS. STEELEY: If it -- if it has -- if
23 it has any reasonable basis for concern, even
24 anticipatory, right, if it anticipates that
25 there may be a problem causing or

1 contributing --

2 JUSTICE SOTOMAYOR: Months and years.

3 MS. STEELEY: I'm sorry?

4 JUSTICE SOTOMAYOR: Months and years.

5 MS. STEELEY: I mean, it can take as

6 little as six weeks to three months --

7 JUSTICE SOTOMAYOR: Only if you're

8 cooperating. All right.

9 MS. STEELEY: I'm not sure --

10 JUSTICE SOTOMAYOR: Thank you. That's

11 fine, counsel.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: If I understood your

14 response to Justice Thomas, Justice Thomas said:

15 What prevents the EPA from doing this? You

16 said: 1311(b)(1)(C) doesn't authorize it

17 because this is not an effluent limitation.

18 But, of course, (1)(C) does not talk

19 about effluent limitations. (1)(C) just talks

20 about limitations. (1)(A) talks about effluent

21 limitations. (1)(B) talks about effluent

22 limitations. You were adding a word to (1)(C)

23 to get effluent limitations there, weren't you?

24 MS. STEELEY: No. I disagree that

25 we're adding a word. So Section --

1 JUSTICE KAGAN: Well, you're
2 definitely adding a word because there's only
3 "limitation" there.

4 MS. STEELEY: So Congress used
5 "limitation" as a shorthand for effluent
6 limitations throughout this section.

7 And if I can explain. So Section
8 301(a), not 301(b)(1)(A) but 301(a), tells us
9 that the universe of Section 301 is about
10 restrictions on discharge of a pollutant.

11 That's the very definition of an
12 effluent limitation. So we believe that the
13 limitations throughout -- and the title also
14 suggests that the limitations throughout Section
15 301 are limitations on discharge.

16 JUSTICE KAGAN: I mean, throughout
17 this statute, it says effluent and other
18 limitations. And then, in this particular
19 section, it says effluent limitations, effluent
20 limitations. And then, when it gets to this
21 kind of backstop provision of something else is
22 necessary, it just says limitations.

23 Okay. I have another question for
24 you, which is, you know, you spend a lot of your
25 brief talking about this legislative history of

1 the statute and suggesting that what the statute
2 was designed to do was to go from a
3 water-quality-based system to an effluent -- to
4 a technology-based effluent limitation system.

5 And that's -- you know, I suppose, if
6 you really wanted to write the picture broadly,
7 you might say that. But there are plenty of
8 places in this statute where water quality makes
9 an appearance.

10 And, indeed, it makes an appearance in
11 this very provision, which is the source of
12 authority for what the EPA -- did here. You
13 know, it says, well, if the effluent limitations
14 aren't doing enough, EPA can do other
15 limitations that are necessary to meet water
16 quality standards.

17 That's what the text says. We usually
18 don't look at, like, the broadest possible
19 reading of legislative history to do something
20 that's exactly counter to what the relevant
21 textual provision says.

22 MS. STEELEY: It's absolutely true
23 that Congress preserved water quality standards,
24 but they preserved them as a basis for setting
25 discharge limitations.

1 So it's -- it's -- there's no conflict
2 between preserving water quality standards and
3 setting discharge limitations. In fact, that's
4 the way that you preserve the environment.
5 That's the way you protect water quality
6 standards, is you tell permitholders in advance
7 what we must do to control our discharges.

8 But the question presented here is
9 about the --

10 JUSTICE KAGAN: Thank you,
11 Ms. Steeley.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 JUSTICE GORSUCH: Ms. Steeley, as I
15 understand your argument -- I just want to make
16 sure I understand it -- there -- there are two
17 arguments. One is that (b)(1)(C) should be read
18 to regard effluent limitations. That's your
19 primary argument.

20 I had thought in the briefs that there
21 was a backup argument that, it -- nonetheless,
22 whatever it has to be, it has to be a limitation
23 on your discharges given that that's what
24 1311(a) is all about, the discharge of any
25 pollutant by a person, except -- except as

1 specified here, is unlawful and that whatever
2 the limitation is, it can't be the applicable
3 water quality standard itself because that --
4 that is used in contradistinction with
5 limitations throughout this statute.

6 Is that -- is that correct?

7 MS. STEELEY: That is correct. I
8 would only quibble with the idea that if there's
9 a primary and secondary argument, what a
10 restrictional discharges are is an effluent
11 limitation. So I think those arguments are one
12 and the same.

13 JUSTICE GORSUCH: But --

14 MS. STEELEY: But, yes, our --

15 JUSTICE GORSUCH: -- but, if -- if we
16 disagree on that and -- or at least don't want
17 to reach it --

18 MS. STEELEY: Mm-hmm.

19 JUSTICE GORSUCH: -- the -- the
20 point -- the secondary point remains --

21 MS. STEELEY: Absolutely.

22 JUSTICE GORSUCH: -- we have to deal
23 with?

24 MS. STEELEY: Absolutely, that's
25 correct. I mean, the question presented here is

1 about the -- is whether the Generic Prohibitions
2 are authorized by law. And those Generic
3 Prohibitions re-create the -- test -- the
4 statutory scheme Congress rejected, so we think
5 they are not.

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: A few questions.
10 Just to pick up on Justice Thomas's question
11 when he asked if anything prohibits, your
12 response -- and I just want to make sure I have
13 this clear -- was nothing in the statute
14 authorizes something like the generic
15 limitations, correct?

16 MS. STEELEY: That's correct.

17 JUSTICE KAVANAUGH: And that -- and
18 your point about water quality standards, I want
19 to make sure, I think with Justice Gorsuch, the
20 water quality standards are the goal or the end,
21 that the statutory means to that end that are
22 authorized by the statute are the effluent
23 limitations?

24 MS. STEELEY: That's exactly correct.

25 JUSTICE KAVANAUGH: And when you say

1 narrative effluent limitations, I think Footnote
2 22 of your brief talks about that and you've
3 mentioned it at oral argument.

4 Can you -- and Justice Sotomayor
5 picked up on that. Can you just describe
6 briefly what you mean there?

7 MS. STEELEY: Sure, and maybe an
8 example would be helpful.

9 JUSTICE KAVANAUGH: Yes.

10 MS. STEELEY: In San Francisco's
11 permit, for instance, we have a narrative water
12 quality-based effluent limitation that requires
13 San Francisco to increase its rate of pumping
14 when wet weather is expected. So, if there's a
15 30 percent chance of rain, we have to clear
16 capacity in the facility so that we are able to
17 absorb the capacity of stormwater.

18 That's a narrative water quality-based
19 effluent limitation. It tells us about the rate
20 of our discharge, so it's squarely within the
21 definition of effluent limitation, but it's
22 simply a narrative form. And we don't object to
23 that. It's -- it's perfectly fine to use words
24 or numbers. We just want to know how to control
25 our discharges and not have our compliance

1 determined based on conditions in the receiving
2 water.

3 JUSTICE KAVANAUGH: And then the
4 practical way this works, to pick up on Justice
5 Alito and Justice Sotomayor's questions, let's
6 say there are 10 different entities discharging
7 at a particular source. If the water quality is
8 not good in that area, EPA can go back to one or
9 more of the 10 and -- and tighten up the
10 effluent limitations in the permits, which may
11 take some time, as Justice Sotomayor points out,
12 and you quibble with that, but, in any event,
13 that's the means for EPA to do this, right?

14 MS. STEELEY: That's exactly correct.
15 I mean, that tells permitholders their -- the
16 obligations they need to meet, so it -- it --
17 yes, that's exactly how the statute is stated.

18 JUSTICE KAVANAUGH: Okay. And the
19 overarching problem, I think, but you haven't
20 gotten to this, so I'm going to give you -- you
21 know, in terms of how this all works is you
22 don't know what your obligations are ahead of
23 time and yet you're on the hook for millions of
24 dollars and potential prison time even though
25 you didn't know what your obligations were ahead

1 of time, which strikes at least me, I mean, as
2 more -- as definitely a policy problem but one
3 that's rooted in the statute. You don't know
4 what your obligations are and you can go to
5 prison.

6 MS. STEELEY: Exactly. Right. I
7 mean, it's hard to imagine --

8 JUSTICE KAVANAUGH: What are -- what
9 are you on the hook for? There's an EPA suit
10 against you. What is the amount San Francisco
11 is on the hook for for something they didn't
12 know they needed to do? At least that's your
13 claim. What's the amount?

14 MS. STEELEY: What's the amount? So
15 the statutory penalties are 66,000 per day --

16 JUSTICE KAVANAUGH: Per --

17 MS. STEELEY: -- per violation. So
18 that can add up quite fast. In the --

19 JUSTICE KAVANAUGH: They're seeking
20 how much from you?

21 MS. STEELEY: I think it's in the --
22 it's in the millions. It's over 10 years of --
23 of penalties that can add up quite quickly.

24 JUSTICE KAVANAUGH: Yeah. Okay.
25 Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?
3 JUSTICE BARRETT: No.
4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?
6 JUSTICE JACKSON: So I understand that
7 you say that the issue here is whether the
8 Generic Prohibitions are authorized by law. Is
9 that right?
10 MS. STEELEY: That's correct.
11 JUSTICE JACKSON: And that's your --
12 the core of your argument, and that you say that
13 Congress did not contemplate this, having this
14 general prohibition -- Generic Prohibition. But
15 I guess I can't square that with 33-1342(q)(1),
16 which is the 2000 amendment in which Congress
17 appears to be saying that each permit for a
18 discharge "shall conform to the Combined Sewer
19 Overflow Control Policy" signed by the agency.
20 And then, when you look at the control sewer
21 overflow control policy -- or the Combined Sewer
22 Overflow Control Policy, that policy, I think,
23 the longstanding policy of the agency, was to
24 include these generic kinds of -- what you call
25 generic kinds of limitations.

1 I mean, it's very explicit in the
2 policy. It says the authority should at least
3 require permittees to comply with the applicable
4 water quality standards. And, apparently, EPA
5 had guidance that said it didn't matter whether
6 this was Phase I or Phase II; these kinds of
7 permitting conditions we're going to put in our
8 permits.

9 So how can it be, given the amendment
10 here, that Congress did not intend for these
11 kinds of provisions to exist in permits?

12 MS. STEELEY: So there's nothing in
13 the policy that authorizes the Generic
14 Prohibitions. What Congress was authorizing is
15 that EPA set limitations in a permit that
16 require our compliance with water quality
17 standards. They can do that through effluent
18 limitations. Our -- you know --

19 JUSTICE JACKSON: No, no, Congress was
20 very specific. It said we are requiring the
21 permits to "conform to the," capital, "Combined
22 Sewer Overflow Control Policy." It was
23 referencing a particular policy that had been
24 established by the administration that included
25 the Generic Prohibitions that you say Congress

1 did not consider, endorse, or whatnot.

2 MS. STEELEY: Right.

3 JUSTICE JACKSON: And I don't
4 understand how that's possible.

5 MS. STEELEY: So there's nothing in
6 the policy itself that says, EPA, impose
7 restrictions on causing or contributing to a
8 violation of water quality standards alone.
9 That's what -- that's not what the policy says.

10 For -- as we've discussed, for Phase
11 II permits, the policy expressly requires --

12 JUSTICE JACKSON: Was it EPA's --

13 MS. STEELEY: -- water quality-based
14 effluent --

15 JUSTICE JACKSON: -- was it EPA's
16 guidance and what -- weren't they saying this is
17 what you have to do pursuant to our policy? It
18 would --

19 MS. STEELEY: E --

20 JUSTICE JACKSON: -- EPA has never
21 taken the position, I think, that their own
22 policy did not require these.

23 MS. STEELEY: EPA's policy, not -- so
24 EPA's guidance --

25 JUSTICE JACKSON: Yes.

1 MS. STEELEY: -- not the policy
2 itself, but EPA's guidance says conflicting
3 things. It sometimes says, for both Phase I and
4 for Phase II permits, that both require effluent
5 limitations. Other times, it gives something
6 that looks like the Generic Prohibitions as an
7 example of what to do. I think that just simply
8 reflects the confusion.

9 But what Congress actually blessed or
10 required is compliance with the policy. And the
11 policy does not require or authorize anything
12 that looks like the Generic --

13 JUSTICE JACKSON: One final thing.
14 Did you -- did you waive an arbitrary-and-
15 capricious claim? I know Justice Thomas was
16 talking about -- with you about having an
17 arbitrary-and-capricious claim. But I thought
18 you had waived that.

19 MS. STEELEY: Our argument before this
20 Court is that the condition -- the Generic
21 Prohibitions are not authorized by law.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Liu.

1 ORAL ARGUMENT OF FREDERICK LIU
2 ON BEHALF OF THE RESPONDENT

3 MR. LIU: Mr. Chief Justice, and may
4 it please the Court:

5 San Francisco's opening brief makes
6 one and only one argument, that Section
7 1311(b)(1)(C) authorizes only effluent
8 limitations. This Court, however, already
9 rejected that argument in National Association
10 of Manufacturers. And, in any event, the
11 statutory text and history make clear that
12 Section 1311(b)(1)(C) also authorizes other
13 limitations. San -- San Francisco is therefore
14 wrong to argue that limitations like the ones
15 challenged here are never okay.

16 But that does not mean that they are
17 always okay. Under the statute, EPA may rely on
18 limitations like the ones here only when EPA
19 lacks assurance that the permit's effluent
20 limitations alone are insufficient to protect
21 water quality. Even then, EPA may rely on
22 limitations like the ones here only when EPA
23 lacks the information necessary to develop more
24 tailored limitations. And, finally, EPA may not
25 impose limitations of any kind that are

1 unconstitutionally vague.

2 San Francisco pressed each of those
3 limiting principles below. But the court of
4 appeals rejected each of San Francisco's
5 case-specific challenges. The court held at
6 Petition Appendix 40 that the permit's effluent
7 limitations alone would be insufficient to
8 protect water quality. The court held at
9 Petition Appendix 46 to 47 that San Francisco
10 had failed to update its long-term control plan,
11 thus depriving EPA of the information necessary
12 to develop more tailored limitations.

13 And the court at Petition Appendix 32
14 rejected San Francisco's vagueness challenge.
15 San Francisco did not seek this Court's review
16 of any of those parts of the decision below.
17 Rather than pursue an individualized challenge
18 to the limitations in this case, San Francisco
19 has put before this Court only a facial
20 challenge: That all limitations that prohibit
21 discharges based on their effects on water
22 quality are invalid on their face because they
23 don't fit the statutory definition of effluent
24 limitation.

25 Because that argument can't be squared

1 with this Court's precedents or the statute
2 itself, this Court should affirm.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Mr. Liu, do -- do you
5 agree that 1311 seems to focus primarily on
6 effluents and discharge?

7 MR. LIU: I think most -- basically,
8 all of the provisions of 1311, except for
9 1311(b)(1)(C), focus on effluent limitations.

10 JUSTICE THOMAS: Okay. Now that
11 provision, (C), talks about limitations,
12 including those necessary to meet water quality
13 standards, and it also talks -- mentions "or
14 required to implement any applicable water
15 quality standard."

16 How exactly does the generic
17 limitation do that?

18 MR. LIU: It does in two senses. We
19 think that phrase, "necessary to meet or
20 implement water quality standards," imposes two
21 limitations on our authority.

22 One, we can invoke (b)(1)(C) only when
23 we lack assurance that the other limitations in
24 the permit are insufficient to protect water
25 quality. We think we've satisfied that

1 condition here. The court of appeals so found,
2 and San Francisco hasn't sought review of that.

3 We think that language imposes a
4 second limit, which is that for a limitation
5 like this to be necessary, it needs to be
6 necessary in the sense that EPA lacked the
7 information necessary to develop a more -- more
8 tailored information. And, here, that's
9 satisfied too.

10 I want to be clear about the sort of
11 information that we're missing that made it
12 impossible for us to impose anything other than
13 these generic limitations. It's not information
14 about the water. It's information about San
15 Francisco's own sewer system.

16 We're talking about, where do the
17 flows go? What's the conditions of the pipes
18 and the pumping stations? How does the system
19 respond to wet weather events? That's the
20 information that we've been lacking for the past
21 10 years and that we asked San Francisco to
22 provide as part of the long-term control update.

23 Without that information, we're
24 basically flying blind as to how we're going to
25 tell exactly what -- what San Francisco should

1 do to protect water quality.

2 JUSTICE THOMAS: Well --

3 CHIEF JUSTICE ROBERTS: Counsel -- I'm
4 sorry.

5 JUSTICE THOMAS: Oh, I'm sorry. Go
6 ahead.

7 CHIEF JUSTICE ROBERTS: The -- I don't
8 understand -- you know, the bad old days is when
9 we had water quality standards, right, people
10 didn't know what they were supposed to do, how
11 it was going to be allocated, sort of a problem
12 with the -- the comments, and they put in the
13 permit system.

14 And I think the danger here is that
15 you're going back to the other system because
16 it, one, gives more power to you because you
17 don't have to tell the people who are
18 discharging what they have to do or not, you can
19 sit back, and then -- and also you don't even
20 have to allocate among many different polluters
21 who's responsible for -- for what.

22 So what prevents you -- I know you
23 touched on a couple of things in response to
24 Justice Thomas, but I'm not sure that was
25 significant limitations from saying, as you're

1 doing here, we're going to go with water quality
2 standards because that's maybe harder for the
3 people with effluent, but it's a lot easier for
4 us?

5 MR. LIU: No, it's not easier for us.
6 In our ideal world, we would have perfect
7 information about how San Francisco's system
8 works, and based on that information, we would
9 be telling San Francisco things like: Reroute
10 flows from X to Y. Upgrade your pumping station
11 at Sea Cliff. Increase the storage capacity of
12 your Westside storage facility.

13 We were unable to include limitations
14 of that tailoring in this permit because San
15 Francisco deprived us of the very information we
16 would need to do that. So we don't --

17 CHIEF JUSTICE ROBERTS: How do you --

18 MR. LIU: We have no interest in
19 putting in generic provisions like this when we
20 have the information available to supply more
21 tailored information -- more tailored
22 limitations. And that's why -- it's precisely
23 because it's so much easier to enforce a more
24 tailored limitation. These limitations --

25 CHIEF JUSTICE ROBERTS: What do you do

1 with multiple people discharging effluent and
2 you have a water quality standard? There are
3 eight different industries, 10 different water
4 districts, whatever. They're all doing it. And
5 you look at the water quality and you say
6 there's too much of this.

7 MR. LIU: Yeah.

8 CHIEF JUSTICE ROBERTS: What do you do
9 then?

10 MR. LIU: Well, if --

11 CHIEF JUSTICE ROBERTS: How do you
12 allocate who's -- this was the problem that led
13 to the permit system. I mean, how do you
14 allocate responsibility for that?

15 MR. LIU: There are provisions in this
16 statute that authorize states in their
17 development of water quality standards to
18 apportion pollutant loads to different
19 polluters. 1313(d) is an example of this.

20 But I don't think that concern about
21 multiple dischargers is any reason to throw out
22 all of the receiving water limitations in this
23 case. That sort of situation might be the basis
24 for an individualized sort of as-applied type of
25 challenge to a provision like --

1 JUSTICE KAVANAUGH: No, no, it's --

2 CHIEF JUSTICE ROBERTS: Well, how
3 would an as-applied challenge work in that case?
4 Somebody's supposed to come and say: Well, you
5 put this much on me. I think you should put
6 different amounts on those other three because I
7 think they're doing more or they can afford more
8 or they are -- they have more modern plants.
9 And you're just going to go back and say: Well,
10 this is how we -- we want to allocate?

11 MR. LIU: Oh, no, the statute supplies
12 plenty of tools to address the problem of an
13 overpolluted water body. The state can -- can
14 grant a variance or an exception from its
15 standards, as we've actually granted San
16 Francisco --

17 CHIEF JUSTICE ROBERTS: I'm talking
18 about the specific question of allocating
19 responsibility for the water quality to
20 different point sources.

21 MR. LIU: Oh, well, one way to do it
22 is for the state to say: Look, we recognize
23 this water body is overpolluted. Let's grant a
24 variance to certain of the dischargers so that
25 they can continue doing their business.

1 JUSTICE KAVANAUGH: But do --

2 MR. LIU: But -- but I --

3 JUSTICE KAVANAUGH: Keep -- keep
4 going.

5 MR. LIU: -- I just want to make this
6 point. Their rule isn't going to fix the
7 problem of the overpolluted water body -- body.
8 If a -- if a water body is, in fact,
9 overpolluted, thus leaving no room for anyone
10 else to pollute, the appropriate effluent
11 limitation in that case is going to be zero.

12 It's not as if Petitioner's rule is
13 going to magically allow dischargers and
14 petitioners --

15 CHIEF JUSTICE ROBERTS: Well, I don't
16 understand that answer, it could be zero, but it
17 doesn't -- it may not have to be zero across the
18 board. It may be 20 percent in each of the
19 point sources. It may be 10 percent in the
20 antiquated system that can't do any better but
21 30 percent in someone else.

22 And I'm saying what the permit system
23 was designed to do was give some notice to the
24 different dischargers about what was going to be
25 required of them. Your water quality system

1 gives you complete discretion in which -- who's
2 going to bear the burden and who's not.

3 MR. LIU: I don't think that's right.
4 Like -- like I said, there are multiple tools in
5 the statute that address that problem.

6 There are variances that the states
7 can -- can provide. There are schedules of
8 compliance that EPA can provide in issuing
9 the -- the -- the standards. The CSO control
10 policy discusses apportioning pollutant loads so
11 as -- so each discharger can stay within the
12 loads.

13 JUSTICE KAVANAUGH: But the -- the
14 problem is you can go after an individual entity
15 like the City of San Francisco based on the
16 past, when they didn't know what the relevant
17 limitation on them was, and seek retroactively,
18 without fair notice, huge penalties, including
19 criminal punishment, based on something that
20 was -- they didn't know what they could
21 discharge or not discharge, correct?

22 JUSTICE KAGAN: Well --

23 MR. LIU: I don't --

24 JUSTICE KAVANAUGH: I mean, a lot of
25 what you're talking about in response to the

1 Chief Justice is here's things that could help
2 going forward.

3 MR. LIU: Right.

4 JUSTICE KAVANAUGH: You're suing San
5 Francisco separately for a lot of money based on
6 a standard that they had no idea -- you know, at
7 least that's the theory.

8 MR. LIU: No. I mean --

9 JUSTICE KAVANAUGH: That's the theory.
10 And your position -- your position would allow
11 that.

12 MR. LIU: I don't -- I don't think so.

13 JUSTICE KAVANAUGH: Yes, it would.

14 MR. LIU: I mean -- I mean, the
15 Bayside complaint is Exhibit A for why what you
16 said is not going to be true. The standards
17 that are violated in those cases are numeric
18 water quality criteria.

19 JUSTICE KAVANAUGH: The standards --
20 the generic limitations contain water quality
21 standards that you don't know as an individual
22 entity what you need to do to comply with that.

23 MR. LIU: You know, San Francisco has
24 not pointed to any instance of that. The best
25 shot they gave at pointing to a limitation that

1 they said they didn't know what the meaning was
2 was a standard that said marine communities
3 can't be degraded. Well, if you look at
4 Petition Appendix 143, there's a definition of
5 degrade in Attachment A to the permit. That
6 definition spells out exactly how one goes about
7 figuring out how marine communities --

8 JUSTICE KAVANAUGH: They talked about
9 the algae just now. They talked about the
10 natural taste, odor, and color of fish.

11 MR. LIU: Yeah. And, you know, you
12 can look at Footnote 2 of their cert reply
13 brief, and it says, "San Francisco did not
14 challenge the clarity of any water quality
15 standard below."

16 And, you know, we're talking about
17 quality for the first --

18 JUSTICE KAVANAUGH: But the -- that's
19 because they say, as an antecedent matter, you
20 don't have the authority under the statute to do
21 so. They would have, if they did -- you did
22 have the authority, separate
23 arbitrary-and-capricious challenges.

24 MR. LIU: And my point -- my point is
25 there's no reason to invalidate all of these on

1 their face. San Francisco --

2 JUSTICE KAVANAUGH: Yeah. No, that --
3 the facial challenge thing's a total
4 distraction. The question is whether the
5 statute authorizes these kinds of generic
6 limitations. It really comes down to what
7 Justice Kagan was talking about, how you read
8 that precise sentence in 301.

9 MR. LIU: And if -- and if -- and if
10 Congress had wanted to do away with these
11 standards as limits entirely, it would have
12 simply adopted the Senate version of the bill
13 that was before it. The Senate version
14 accomplished exactly what San Francisco is
15 urging here. It very meticulously put the word
16 "effluent" into 1311(b)(1)(C) and then
17 meticulously, in all the other provisions that
18 cross-reference 1311, deleted "or other."

19 JUSTICE GORSUCH: Mister --

20 JUSTICE KAGAN: May I ask, Mr. Liu, is
21 this a multiple discharge situation? There
22 seems to be some conflict between the
23 government's position and San Francisco's
24 position on that. As I understood Ms. Steeley,
25 she said that's true of one, what you say, but

1 it's not true of all eight.

2 What's the situation there?

3 MR. LIU: It's -- so there's no
4 dispute it's true of the one, and the one is the
5 only outfall at issue here because the one is
6 the only federal outfall. There's a division of
7 jurisdiction here between the federal government
8 and the states. The states are the permitting
9 authority for all the near-shore outfalls.
10 That's the seven outfalls that my friend
11 mentioned.

12 But the only Respondent here is the
13 federal government. We are responsible for
14 permitting the -- the Southwest Ocean Outfall,
15 which is 3.3 miles into the Pacific Ocean.

16 JUSTICE KAGAN: I see. And if -- if
17 this issue of, like, we don't know what we're
18 supposed to do, it's horribly unfair, and -- and
19 you think, well, they've really not come up with
20 any particular way in which that's true, I mean,
21 I thought that most of these were something like
22 this: There's a California water quality
23 standard that says waters shall not contain
24 floating material in concentrations that
25 adversely affect fishing and swimming.

1 And it turns out EPA says that,
2 notwithstanding that standard, San Francisco has
3 left lots of toilet paper floating in Mission
4 Creek. I mean, that's not a "we don't know what
5 to do" issue. Like, we know you're not supposed
6 to leave toilet paper floating in Mission Creek,
7 don't we?

8 MR. LIU: That's right. And -- and --

9 JUSTICE KAVANAUGH: And that's one
10 example. There are plenty of others.

11 JUSTICE KAGAN: Well, but this --
12 there -- I mean, there might be examples where
13 they don't know something, although they haven't
14 come up with any --

15 MR. LIU: They haven't.

16 JUSTICE KAGAN: -- but there are
17 plenty of examples. I could go on and on.
18 There are plenty of examples where it's obvious.
19 You know, don't, like -- like, spew the kind of
20 chemicals that discolor the water.

21 MR. LIU: It would -- it would be --

22 JUSTICE KAGAN: When you have brown
23 water --

24 MR. LIU: -- it would be strange if
25 concerns that are individualized to other types

1 of limitations that may or may not be vague
2 cause the court to throw out the whole set of
3 these types of limitations.

4 CHIEF JUSTICE ROBERTS: So --

5 JUSTICE BARRETT: Mr. Liu --

6 CHIEF JUSTICE ROBERTS: -- we
7 should -- so we could limit the decision to
8 items like that, but in terms of particular
9 concentrations of chemicals that you cannot see
10 floating in the water, we would have -- we could
11 reserve that decision because that interferes
12 with the permit system in a way that the others
13 may not?

14 MR. LIU: We would certainly
15 appreciate a decision from this Court that was
16 tailored to the particular concerns that may be
17 motivating Petitioner's position.

18 But, to be clear, we understand
19 Petitioner's legal argument in this Court, the
20 textual hook on which they've hung their entire
21 presentation, to be a facial challenge to these
22 limitations --

23 JUSTICE BARRETT: And you agree --

24 JUSTICE KAVANAUGH: It's just a --
25 it's just an argument that the statute doesn't

1 authorize these kinds of -- of conditions.

2 MR. LIU: And that --

3 JUSTICE KAVANAUGH: And the answer is
4 just yes or no for us.

5 MR. LIU: And I don't think there's
6 anything in 1311(b)(1)(C) that says --

7 JUSTICE KAVANAUGH: I -- I get that.

8 MR. LIU: -- San Francisco can -- EPA
9 can include a standard that says don't cause
10 floatable materials to be in the water.

11 JUSTICE BARRETT: And you agree that
12 all of these concerns would make you vulnerable
13 to an arbitrary-and-capricious challenge. Let's
14 just assume they're all right. I know you're
15 disputing that they're vague --

16 MR. LIU: Yeah. Absolutely.

17 JUSTICE BARRETT: -- or that they're
18 not on notice, but if they were, you would be
19 vulnerable to an arbitrary-and-capricious
20 challenge?

21 MR. LIU: Yes. I mean, in this very
22 case, San Francisco brought three variations of
23 that type of challenge. They said the existing
24 limitations in the permit are already
25 sufficient. You don't need to resort to

1 (b)(1)(C). They said these limitations are
2 vague. They said we gave you the information in
3 the -- we don't need to provide you more
4 information via the updated long-term control
5 plan to -- to -- to create more tailored
6 limitations.

7 JUSTICE BARRETT: How common are these
8 permits? These ones that are more generic,
9 narrative form, and they're getting at
10 non-effluent limitations.

11 MR. LIU: So I would separate the
12 universe into -- into two buckets. There are
13 individual permits like these, where we're
14 talking about an individual discharger. And
15 then there are general permits that we issue
16 that cover a whole swath of -- of discharges
17 within a particular geographic area, like all
18 construction sites, for example.

19 These types of limitations are pretty
20 common in the general permits, and the reason
21 why is precisely because of this information
22 problem. The more information we have, the more
23 tailoring we can do. The less information we
24 have, the less tailoring we can do.

25 And the general permit context is one

1 where we and I think all the dischargers value
2 efficiency and very little administrative
3 burden. So we don't ask for a lot of
4 information, and they don't give it. In
5 exchange, we do include these type of "Generic
6 Prohibitions."

7 In the individual permit context,
8 it's -- it's -- it's as applied to the
9 circumstances. It really depends on where we
10 are in the development of a permit. The --

11 JUSTICE BARRETT: How often do you
12 seek criminal penalties?

13 MR. LIU: We have never sought -- I --
14 I am not aware of any instance, and I have been
15 told we're not aware of any instance, in which
16 we have pursued criminal prosecution of a
17 municipality that violated a condition like
18 this.

19 JUSTICE ALITO: Mr. --

20 JUSTICE JACKSON: And if we --

21 JUSTICE ALITO: -- Mr. Liu, you said
22 at one point that you lacked the information
23 necessary to provide a more specific provision
24 than the provisions that are in question here.
25 But is there anything that prevented you from

1 obtaining whatever information you thought you
2 needed?

3 MR. LIU: Yes, San Francisco. Under
4 this statute, San Francisco --

5 (Laughter.)

6 JUSTICE ALITO: You have no -- you
7 have no ability and the state has no ability to
8 require them to produce any information that --

9 MR. LIU: We did require them. We
10 issued information requests under 33 U.S.C.
11 1318(a). All of that resulted in San Francisco
12 coming up in 2018 with what it called a
13 long-term control plan synthesis. That
14 synthesis did not reflect current conditions.
15 Why? Because the most recent document in that
16 plan was dated in the 1990s.

17 JUSTICE ALITO: And do you have --
18 do -- when a regulated party doesn't provide the
19 information that you think you need, do you lack
20 tools to require that to be done?

21 MR. LIU: We -- no. We -- what we did
22 here, because it had been five years since their
23 last -- last permit has -- had expired, the only
24 way we thought, the best way left to get the
25 information was to put the requirement in the

1 next permit. And so, in the instant permit, we
2 said, as a condition of this very permit -- this
3 is Petition Appendix 131 to 138 -- please
4 provide us with the information we need to
5 develop more tailored limitations.

6 And in that request, Pet. App. 135, we
7 said, while you're at it, why don't you tell us
8 what additional control alternatives you think
9 make sense given your existing infrastructure --

10 JUSTICE ALITO: All right. So --
11 so --

12 MR. LIU: -- and the cost.

13 JUSTICE ALITO: -- do you want us to
14 hold -- and maybe this would be an appropriate
15 disposition of this case -- that permit
16 requirements like these are required -- are
17 permitted in the specific situation in which EPA
18 or the state has made every reasonable effort to
19 get the necessary information from the regulated
20 party and the regulated party has refused to
21 provide the information?

22 MR. LIU: We think that is --

23 JUSTICE ALITO: In that limited
24 situation, you can resort to this sort of permit
25 condition?

1 MR. LIU: We think we -- our reading
2 of the -- yes. Our reading of this statute is
3 these -- to -- to satisfy the requirement that
4 these be necessary to implement, they need to be
5 necessary in the sense that we lack the
6 information necessary to develop more tailored
7 information.

8 JUSTICE JACKSON: But --

9 JUSTICE ALITO: Well, in -- in that
10 response -- and some of the other arguments that
11 you've made suggests that perhaps what you're
12 saying is that we never should have granted
13 review in this case to review the broad question
14 that was presented in the cert petition.

15 MR. LIU: I am saying that. I mean,
16 just track the shifting positions that we've
17 seen thus far. The -- the -- the cert
18 petition -- the certiorari petition focused on
19 whether these provisions were too vague or not
20 specific enough. We responded that -- to that
21 in our opposition. And the response we got on
22 the cert -- in the cert reply was we're
23 disclaiming any argument that any standard or
24 any limitation was too vague. We're shifting to
25 an argument based on the meaning of "effluent

1 limitation" and the definition of it.

2 We get their opening brief. It's
3 consistent with the cert reply. But then page 3
4 of their merits reply starts out by saying, even
5 if this provision does authorize things other
6 than effluent limitations, they're still
7 invalid.

8 JUSTICE ALITO: All right. Thank you.

9 JUSTICE JACKSON: Mr. Liu, can I
10 invite you to go back to the text and comment on
11 the statutory interpretation question, which is
12 what I understood counsel on the other side to
13 say this all reduces to whether or not the
14 statute authorizes these kinds of generic
15 limitations?

16 Her argument -- I mean, the -- the way
17 I'm looking at the statute, we have (A) talking
18 about the discharge being unlawful and (B)
19 talking about the objectives. (b)(1)(A) is
20 specific to effluent limitations, and then there
21 are some subsections about those. And then (C)
22 says "any more stringent limitation, including
23 those necessary," et cetera.

24 So, on its face, it looks like "any
25 more stringent limitations" is taking us outside

1 of effluent limitations because the "more" is
2 relevant to something or relative to something.

3 But she suggests that (a)(1) is
4 setting effluent limitations with the best
5 practicable control technology requirement, and
6 the "any more stringent limitations" is limited
7 to allow -- or is allowing for effluent
8 limitations that go beyond best control.

9 Do you understand what I'm saying?
10 She suggests that it's still cabined by
11 "effluent limitations."

12 MR. LIU: She's -- effluent
13 limitations.

14 JUSTICE JACKSON: And I guess I'm
15 wondering what we do with "any more stringent
16 limitation." Doesn't that defeat her argument?
17 Or how does the government respond to that
18 point?

19 MR. LIU: Yeah, I -- I -- I think
20 the -- the short answer is, if Congress wanted
21 to limit (b)(1)(C) to "any more stringent
22 effluent limitation," Congress would have put in
23 the word "effluent" there. After all, "effluent
24 limitation" is a statutorily defined term.

25 JUSTICE GORSUCH: Mr. Liu, I'm -- I --

1 I -- I think that addresses the primary
2 argument. I haven't heard -- and I -- I'd
3 appreciate some response. I just want to hear
4 what you have to say about the second -- what I
5 understood at least to be the secondary
6 argument, is, even if (b)(1)(C) allows other
7 limitations, it is at necessary to meet a water
8 quality standard, which means they can't mean
9 the same thing that you -- you -- in other
10 words, a limitation can't be the water quality
11 standard. It has to be some restriction on
12 discharge. That's what 1311's all about, you
13 said. I -- (A) says that. The title says that.
14 Some limitation on what they do rather than just
15 saying -- creating a circle that the limitation
16 is a water quality standard, that there --
17 Congress meant those two terms to do different
18 work.

19 MR. LIU: Well, there, this -- under
20 the statute, there is always a distinction
21 between the limitations and the water quality
22 standards.

23 JUSTICE GORSUCH: Yes. And I'm
24 wondering what remains of that when you say,
25 hypothetically, in a limitation: Do not violate

1 the water quality standards. Do not cause or
2 contribute to the violation of water quality
3 standards.

4 MR. LIU: Well, as my friend
5 acknowledged --

6 JUSTICE GORSUCH: Is -- is that -- is
7 that circular or is there --

8 MR. LIU: I --

9 JUSTICE GORSUCH: -- some way to break
10 the circle?

11 MR. LIU: -- I don't think it's
12 circular. As my friend acknowledged, the water
13 quality themselves are not self-executing. And
14 so it's natural to describe --

15 JUSTICE GORSUCH: For sure. For sure.
16 I get that. But -- but, when you just say go
17 forth and do good, okay, right, and -- and --
18 and -- or, you know, do not create a nuisance,
19 or, you know, don't -- what -- what is it? One
20 of them is -- do not cause aesthetically
21 undesirable dislocation -- discoloration of the
22 ocean, that's our water quality standard. And
23 you put that -- is -- is that a limitation on
24 what they do, on what they discharge, in any
25 meaningful sense, or is that the water quality

1 standard itself?

2 MR. LIU: I -- I -- I think it is a
3 limitation on the discharge. It's -- it's
4 prohibiting an entire category of discharges,
5 i.e., those that fit that description.

6 And if you look at the text of the
7 limitations themselves, they're written in terms
8 of what the discharges can or cannot do.

9 JUSTICE JACKSON: And is that
10 because --

11 JUSTICE GORSUCH: If that's the case,
12 then I -- I guess I -- I'm kind of circling back
13 to the Chief Justice's question and, really,
14 maybe administrative agencies generally. The
15 point was to -- to -- to -- to give people
16 notice ex ante of their legal obligations rather
17 than rely on tort ex post, nuisance law.

18 What -- what -- what value added is
19 there to just an ex post tort nuisance law
20 regime when you say: Don't -- don't create a
21 nuisance?

22 MR. LIU: Well, as -- as I think the
23 prior discussion also revealed, a lot of these
24 water quality standards are not self-executing.
25 They are not independently enforceable. And so

1 the only way these standards are applied to a
2 discharger like San Francisco is if we
3 incorporate those standards in a limitation.

4 That's where the -- we -- we need
5 these limitations to bridge the gap between the
6 existence of the standards, which merely specify
7 a desired condition of the -- of the waterway,
8 and the permittee's own responsibilities.

9 JUSTICE GORSUCH: No, I understand
10 that. But -- but -- but does it add anything to
11 an ex post tort nuisance regime?

12 MR. LIU: I think it does. I mean --
13 I mean, to be honest, these -- these standards
14 are much more specific than just a general tort
15 regime.

16 JUSTICE GORSUCH: Sure. I could call
17 an expert witness up, though, and say: Here is
18 what constitutes a -- a nuisance. Or I can
19 point to --

20 MR. LIU: Yeah.

21 JUSTICE GORSUCH: -- what EPA's water
22 quality standards are. And I'm not sure what
23 difference --

24 MR. LIU: I --

25 JUSTICE GORSUCH: -- as a practical

1 matter it would make.

2 MR. LIU: -- I -- I just think
3 Congress -- I think Congress would -- the
4 Congress of 1972 would vociferously disagree. I
5 mean, they thought water quality standards were
6 the linchpin on which the water of the United
7 States would be made clean.

8 JUSTICE GORSUCH: I -- I agree with
9 that. Yeah.

10 MR. LIU: And they didn't think
11 relying --

12 JUSTICE GORSUCH: No, I'm just asking
13 as a practical matter, if -- if -- if -- if
14 we're essentially saying don't create a nuisance
15 and EPA sets the standard as opposed to an
16 expert witness, what -- what value has been
17 added?

18 MR. LIU: To be clear, it's the states
19 that are set -- setting the standards. EPA is
20 merely issuing permits so that the state's own
21 view of clean water --

22 JUSTICE GORSUCH: So then --

23 MR. LIU: -- is achieved.

24 JUSTICE GORSUCH: -- that even begs
25 the question further, right? If -- if this is

1 just a circle, the state standard is the state
2 standard. That would be set in nuisance law
3 too. And so what -- what -- what --

4 MR. LIU: And -- and this was
5 basically the arguments that the proponents of
6 the House bill made. They said: Why do we even
7 need state water quality standards anymore?
8 Let's take out of the statute 33 U.S.C. 1313.

9 But the House bill retained the water
10 quality standard --

11 JUSTICE GORSUCH: Sure.

12 MR. LIU: -- provision.

13 JUSTICE GORSUCH: Because then you're
14 going to have an administrative agency ex ante
15 create limitations on what you can do as a
16 permittee in order to make -- make sure that
17 those water quality standards were met.

18 But, if you take that away and there's
19 no ex ante limitation anymore on what you can
20 do, aren't we just sort of back to a state law
21 nuisance regime in which the state's setting the
22 standard of care?

23 MR. LIU: I -- I don't think so. I
24 mean, these limitations incorporate much more
25 specific standards than just general state tort

1 law. They say things like: Don't cause
2 floatable materials to be in the water. Don't
3 cause the water to have --

4 JUSTICE GORSUCH: That would be --
5 that would be pretty good evidence of the duty
6 in a nuisance suit, wouldn't it, the duty of
7 care?

8 MR. LIU: It may -- it may well be; it
9 may not be. I think Congress want -- one of the
10 problems with the prior regime wasn't that
11 enforcement of these standards was unfair but
12 that it was nonexistent. And so Congress
13 actually wanted to up the ante --

14 JUSTICE GORSUCH: You don't think
15 Congress wanted to -- to ensure advance notice
16 to permittees of their obligations under the
17 law?

18 MR. LIU: I --

19 JUSTICE GORSUCH: That wasn't part of
20 the purposes? You -- you just --

21 MR. LIU: I think, if permittees think
22 they lack -- they lack fair notice, they can
23 bring that sort of challenge. Again --

24 JUSTICE GORSUCH: No, that's not my --
25 Mr. Liu, my question was: Was part of what

1 Congress was trying to do is, as the Chief
2 Justice indicated, try to provide some certainty
3 on the ex ante rather than just adjudicating all
4 this ex post in nuisance cases?

5 MR. LIU: Yeah, I -- I think San
6 Francisco actually knows well what it can do to
7 improve its own sewer system. I mean, San
8 Francisco is an outlier here. If you look --

9 JUSTICE GORSUCH: Okay. Thank you. I
10 got it.

11 JUSTICE KAVANAUGH: Why -- you know,
12 some of these standards are not as specific:
13 Marine communities shall not be degraded. The
14 odor of fish shall not be altered. It's hard to
15 know --

16 MR. LIU: I mean, to take the first
17 example, Justice Kavanaugh --

18 JUSTICE KAVANAUGH: It's just hard --
19 I'm not looking for comment on the specific
20 example. It's just hard to know in advance,
21 when multiple other people are also discharging
22 into the same waters, when you're going to have
23 crossed the line, and --

24 MR. LIU: I don't think --

25 JUSTICE KAVANAUGH: -- and I --

1 MR. LIU: -- I don't think that
2 concern can justify throwing all of these out
3 across the board because --

4 JUSTICE KAVANAUGH: And -- well,
5 Justice Gorsuch's question was, I think, and the
6 Chief Justice's, combining the water quality
7 standards and the effluent limitations. And
8 part of what we have to do is figure out how
9 they fit together in 30 -- 301 there, (b)(1)(C).

10 And it strikes me that the way
11 Congress ensured both more effectiveness and
12 fair notice was to say that the end is water
13 quality standards -- things like this,
14 discoloration of fish, marine communities,
15 et cetera -- but the means to the end were
16 effluent limitations, which would both be, as
17 the Chief Justice said, more effective, and, as
18 Justice Gorsuch said, fair notice. And if
19 they're not tight enough, EPA has mechanisms to
20 tighten them up.

21 What's wrong with that reading of the
22 two things together?

23 MR. LIU: I think it would read the
24 statute --

25 JUSTICE KAVANAUGH: How does that hurt

1 EPA, if you want to say that -- if you want to
2 respond to that? How does that harm EPA's
3 ability to regulate if they have to do it that
4 way?

5 MR. LIU: Oh, it's going to lead to
6 more permit denials, more permit delays as we
7 wait for the information to come in. It's going
8 to lead to less flexibility and more burdens for
9 the dischargers.

10 Again, look at my -- look at the
11 context of general permits. These cover the
12 vast majority of NPDES dischargers. Or they're
13 covered by general permits. And the whole point
14 of the general permit is that the dischargers
15 can get away with not providing us a lot of
16 information. That's how you get a construction
17 site approved in 14 days.

18 You take away our ability to rely on
19 these sorts of prohibitions and we're going to
20 need to ask for more information because it's
21 only with that information that we're going to
22 be -- be able to develop more tailored
23 limitations that assure us that water quality
24 standards are going to be achieved.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas, anything further?

4 Justice Alito?

5 JUSTICE ALITO: To what -- do we know
6 to what degree the problem with the water
7 quality in the affected body of water is the
8 result of water that the City is intentionally
9 discharging and to what degree it is the result
10 of these sewer overflows?

11 MR. LIU: Well, to be -- I mean, I
12 don't -- I don't think San Francisco is
13 intentionally discharging anything or --

14 JUSTICE ALITO: Well, the water that
15 it treats.

16 MR. LIU: Oh.

17 JUSTICE ALITO: It treats water, and
18 some water --

19 MR. LIU: Yes.

20 JUSTICE ALITO: -- is -- some water
21 flows out --

22 MR. LIU: Right.

23 JUSTICE ALITO: -- when there's an
24 overflow.

25 MR. LIU: Yeah. So the permit in

1 Attachment E contains a long list of monitoring
2 locations, and those locations help us
3 disaggregate what's causing what.

4 So there are monitoring locations
5 that -- that sample the flow out of the
6 treatment facility, and that tells us the
7 quality of the discharge there. And then there
8 are monitoring locations that sample the
9 effluent coming out of the outflow at issue
10 here, as well as along the shore and in the
11 ocean.

12 JUSTICE ALITO: All right. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: Mr. Liu, maybe I
16 need to start from the beginning. When you're
17 obligated to give effluent limitations, could
18 you give a permit that says just meet water
19 quality controls?

20 MR. LIU: No.

21 JUSTICE SOTOMAYOR: Why not?

22 MR. LIU: Because the statute says
23 exhaust the technology-based effluent
24 limitations first. And we read "more stringent"
25 to mean resort to the (b)(1)(C) authority only

1 when those technology-based effluent limitations
2 aren't going to be enough.

3 JUSTICE SOTOMAYOR: You called this an
4 individual permit versus a general permit.

5 MR. LIU: Right.

6 JUSTICE SOTOMAYOR: I'm not sure I
7 understand what each is. I know that this is a
8 permit that's issued to San Francisco --

9 MR. LIU: Right.

10 JUSTICE SOTOMAYOR: -- for its
11 combined rainwater and -- or stormwater and
12 sewerage systems. So it's individual in that
13 sense. What does that mean as opposed to a
14 general permit?

15 MR. LIU: So you've exactly accurately
16 described the individual permit here. A general
17 permit, you know, the -- the prototypical one is
18 a construction general permit, and what it says
19 is all the people who want to engage in
20 construction in a particular geographic area, it
21 can be a whole state or a set of states, if you
22 want to engage in construction, file with us a
23 notice of intent to do that, and within 14 days,
24 you'll have authorization to do it.

25 And part of that authorization -- it's

1 basically an agreement that once you get that
2 authorization, you're going to abide by the
3 terms of that general permit. And the general
4 permit has a long list of conditions but
5 typically includes a provision like this.

6 And the reason why we don't -- we are
7 unable to provide a more tailored limitation in
8 the general permitting context is that everyone
9 in that context agrees that the lack of
10 information is a good thing. No constructor
11 want -- no -- no -- no one engaged in
12 construction wants to take the six months to a
13 year to apply for an individual permit. They
14 want to be able to get that authorization
15 quickly and efficiently.

16 But -- but the tradeoff between not
17 having that information about how their
18 individual site operates is that we have to rely
19 on a more general prohibition like this.

20 JUSTICE SOTOMAYOR: So that -- this
21 presumes a general permit, it presumes when it's
22 talking about a general category of industry,
23 that --

24 MR. LIU: Yes.

25 JUSTICE SOTOMAYOR: -- certain

1 protocols are being followed.

2 MR. LIU: Right. There are some
3 protocols in the --

4 JUSTICE SOTOMAYOR: Those protocols
5 generally produce X amount or Y amount of
6 pollutant or effluents, and we're saying you can
7 do that, but only if you're going to go over
8 those set limits are we going to require you to
9 step in and do something else, correct?

10 MR. LIU: Yeah. Exactly. Those --

11 JUSTICE SOTOMAYOR: That's what --
12 that's what happens with a general permit.

13 Now this individual permit, there was
14 a -- there was a concern by Justice -- the Chief
15 Justice that this individual permit, they have
16 many point sources of the sewerage coming in. I
17 mean, everybody's bathroom is a point source.
18 And they have -- yeah, that's what sewerage is,
19 isn't it? It's what goes into the sewer waters,
20 okay? And that unless they know -- unless they
21 have effluent limitations, they won't know how
22 to control those individual point sources or
23 figure out how to control who's the bad actor
24 here, what neighborhood's the bad actor.

25 Does that matter in a situation like

1 this?

2 MR. LIU: No, it doesn't matter in a
3 situation --

4 JUSTICE SOTOMAYOR: Explain why.

5 MR. LIU: Well, because the one point
6 source that's at issue here, the one that's
7 within the federal government's jurisdiction, is
8 the Southwest Ocean Outfall, and that outfall
9 discharges into the Pacific Ocean 3.3 miles away
10 from the coast. And there are no other
11 dischargers -- I think my friend acknowledged
12 this morning there are no other dischargers in
13 the vicinity. So there's no possibility of
14 confusing San Francisco's contribution to water
15 quality versus anyone else's.

16 JUSTICE SOTOMAYOR: So your effluent
17 limitations are already telling it control all
18 these things that we know you can control and
19 control them in this ways because there's better
20 technology you could put in?

21 MR. LIU: Yes. This permit exhausts
22 as far as we can exhaust the technology-based
23 effluent limitations.

24 JUSTICE SOTOMAYOR: Now what you're
25 saying with respect to the other water standards

1 that you're incorporating by reference is we
2 can't tell that because -- whatever reasons?

3 MR. LIU: Yeah. What -- what --
4 here's what we do know.

5 JUSTICE SOTOMAYOR: Mm-hmm.

6 MR. LIU: We do know that San
7 Francisco's system is resulting in 196 million
8 gallons of sewage poured onto San Francisco's
9 beaches. We know that it's leading to sewer
10 backups into homes and businesses. We know that
11 their infrastructure is aging and failing. We
12 know that the discharges are leading to
13 excessive concentrations of bacteria, copper,
14 and other metals.

15 So we know that the limitations that
16 already exist in the permit are not enough to
17 protect water quality. Then the question is,
18 how do we fill that gap? And we would like to
19 fill that gap with additional effluent
20 limitations. After all, they're more -- they're
21 easier for us to enforce.

22 But I think the last thing San
23 Francisco wants us to do is to start telling
24 them what to do without the information of how
25 their system works. We could write into the

1 permit reroute flows from X to Y --

2 JUSTICE SOTOMAYOR: That goes back to
3 Justice Alito's point, which is you don't mind
4 an opinion that says you can only do this if you
5 don't have enough information to issue.

6 MR. LIU: We don't mind an opinion
7 that says that.

8 JUSTICE SOTOMAYOR: Okay.

9 CHIEF JUSTICE ROBERTS: Justice Kagan,
10 anything further?

11 JUSTICE KAGAN: Yeah. So that's true
12 for the individualized permitholders. And then
13 you said for the general permits that you issue,
14 if we took up this invitation to say that this
15 mechanism is just not authorized and you could
16 not write the general permits that you write in
17 the way that you do --

18 MR. LIU: Right.

19 JUSTICE KAGAN: -- what would you do
20 instead and who would suffer from that?

21 MR. LIU: All the small businesses,
22 small farmers that rely on the general permits.
23 These are permittees who don't have the huge
24 companies that are able to navigate what
25 admittedly can be a complicated individualized

1 permit system. They rely on the simple thing of
2 filing a form with us and being able to engage
3 in construction 14 days later.

4 And so saying we cannot across the
5 board rely on these provisions is going to
6 undermine the whole point of the general permit
7 system and, you know, affect the economy of --
8 of small business owners.

9 JUSTICE KAGAN: And one last question
10 is: How long have you been doing this for, in
11 either the individualized context or the general
12 context? You know, when did this start? Is
13 this a consistent practice that EPA has
14 developed?

15 MR. LIU: So we -- in the CS -- CSO
16 context, we -- it certainly has existed since
17 the CSO policy itself in 1994, which we
18 understand as blessing this sort of condition.

19 JUSTICE KAGAN: So, in this particular
20 context --

21 MR. LIU: That -- that --

22 JUSTICE KAGAN: -- almost 30 years?

23 MR. LIU: That -- that -- that's
24 right. And -- and I guess what I would say is,
25 again, it's our view of the statute that when we

1 are able to avoid relying on these, we should
2 avoid relying on these. It's -- dischargers
3 raise concerns, but we have concerns too.

4 I mean, the Second Circuit case that
5 was alleged to be in conflict with the decision
6 below was a case brought by NRDC, and they said,
7 well, it's -- these are hard to enforce. And so
8 stepping into those shoes, they are, indeed,
9 harder to enforce.

10 In an ideal world, we would be able to
11 get perfect information and then use that
12 information to craft very tailored limitations
13 that are specific to a particular site and
14 particular discharges. It -- it's just, in the
15 real world, we lack that information.

16 JUSTICE KAGAN: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch?

19 Justice Kavanaugh?

20 JUSTICE KAVANAUGH: I have a few
21 questions.

22 You just referenced farmers would be
23 helped by -- the Farm Bureau Federation's in
24 here representing 6 more million farm families,
25 along with an amicus brief that represents, as

1 they say, nearly every business sector across
2 the U.S. economy. They're not happy with just
3 leaving it up to you to represent their
4 interests, frankly, and they say that your
5 position will make it impossible for many
6 permittees to protect themselves from
7 unanticipated liability. They say that their
8 members, including the Farm Bureau Federation,
9 those farmers, and other permittees are left
10 exposed to the potentially devastating and
11 unnecessarily costly consequences of a
12 government enforcement action or citizen suit.

13 So they're not -- they're not happy
14 with "trust us." Do you want to respond to the
15 Farm Bureau Federation argument?

16 MR. LIU: Sure. I think all regulated
17 parties would prefer to essentially have their
18 cake and eat it too, to not have to give us the
19 information but also not have to face these
20 Generic Prohibitions.

21 JUSTICE KAVANAUGH: Mm-hmm.

22 MR. LIU: So I think what that -- the
23 message of that brief is that in their ideal
24 world, not only would they not have to give us
25 the information, but they wouldn't have to meet

1 the more generalized prohibitions. The statute
2 takes that option off.

3 JUSTICE KAVANAUGH: Presumably,
4 they're aware of that and filed the amicus brief
5 with that in mind, but, in any event, on to the
6 next one.

7 On the -- what you said to Justice
8 Alito about what the opinion could say, and you
9 said when we should avoid relying on these, when
10 we can avoid relying on these. Would you be
11 okay with an opinion that said we must avoid
12 relying on these when we can avoid relying on
13 them?

14 MR. LIU: Yeah, I want to be careful
15 here because of the general --

16 JUSTICE KAVANAUGH: Yeah, I thought
17 you would.

18 MR. LIU: -- because of the general
19 permitting context.

20 JUSTICE KAVANAUGH: Yeah.

21 MR. LIU: I -- I -- I think this is
22 a -- a balance of priorities. And in some
23 contexts, like the general permitting context,
24 the lack of information is an affirmative good.

25 It is something we want -- we don't

1 want to demand more information. And I don't
2 think any of the dischargers actually want to
3 have to go through the rigamarole of actually
4 providing it. And so, when there is good reason
5 that we are not relying -- we don't -- we don't
6 have the information necessary, whether it's
7 because of resistance by a party like San
8 Francisco or because it just doesn't make sense
9 to demand more information, then I -- then I
10 don't think these -- these limitations should be
11 invalidated.

12 JUSTICE KAVANAUGH: On the criminal
13 penalties point that Justice Barrett raised and
14 you said that hadn't been pursued, but,
15 obviously, civil and citizen suits are pursued.
16 And how much are you seeking from San Francisco?
17 Did --

18 MR. LIU: So we're -- we have not
19 calculated the damages, but --

20 JUSTICE KAVANAUGH: Do you know
21 roughly?

22 MR. LIU: I mean, it's -- it is -- I
23 don't have a rough even back-of-the-napkin
24 estimate. It is --

25 JUSTICE KAVANAUGH: Tens of millions?

1 Hundreds of millions?

2 MR. LIU: It may well be tens of
3 millions of dollars. I think what that reflects
4 is the over decades long failure of San
5 Francisco to update a system that it itself in
6 its own planning documents on CAER 947 admits
7 are aging and deteriorating.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: Just a quick
12 follow-up to that.

13 I think, when I asked you that
14 question about criminal penalties, you cabined
15 your answer to municipalities. Have you pursued
16 them in the context, in this general permitting
17 context, you know, on farmers or small
18 businesses?

19 MR. LIU: So I don't think so. I -- I
20 don't know for sure, but --

21 JUSTICE BARRETT: Is that why you
22 cabined your answer to municipalities?

23 MR. LIU: No. I think it is -- it is
24 only because I had an -- an answer for
25 municipalities.

1 (Laughter.)

2 MR. LIU: My answer for -- my answer
3 in the other context is I don't know. But
4 here's -- here's what I can tell you. We view
5 it as exceedingly difficult to obtain a criminal
6 conviction for violating a provision like this.
7 That's because of the mens rea requirements in
8 this statute, as well as the
9 beyond-a-reasonable-doubt burden of proof.

10 And the -- the other thing I would say
11 is we have no interest in pursuing criminal
12 penalties because, when we have a situation -- a
13 situation like this, where the welfare of a
14 whole city is at stake, our main concern is
15 prospective injunctive relief.

16 We're not look -- our main focus is
17 not to see who we can penalize and put in jail.
18 Our main focus is how can we make this situation
19 better going forward. So our -- our main tool
20 for rectifying a situation like this is to seek
21 civil prospective injunctive relief.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So I'm a little

1 surprised by the suggestion that the goal of the
2 statutory permitting process here was fair
3 notice. I thought the goal was to ensure that
4 there were clean waters in the United States and
5 that that was not actually happening under the
6 previous regime, and so Congress was giving the
7 EPA additional tools to effectuate that result.

8 MR. LIU: That -- that's correct. And
9 the problem with the pre-1972 regime was not
10 that it was unfair. It wasn't that enforcement
11 under the pre -- pre-1972 regime was -- was
12 unfair. It was that it was nonexistent.

13 JUSTICE JACKSON: Right. So we don't
14 have congressional findings, for example, that
15 the statute needs to be interpreted consistent
16 with an understanding of what would be most fair
17 to the polluters who are putting the sewage into
18 the water, is that correct?

19 MR. LIU: I -- I don't think -- well,
20 I -- I'll say this. I think Congress struck a
21 balance in the statute between pursuing clean
22 water and protecting the prerogatives of -- of
23 polluters.

24 JUSTICE JACKSON: How so?

25 MR. LIU: If you look at 1319(d),

1 there is a statutory penalty provision that
2 says, when courts are crafting the correct
3 amount of statutory penalties, courts should
4 take into account things like the seriousness of
5 the violation, the economic impact of the
6 penalty on the violator.

7 JUSTICE JACKSON: I thought you were
8 going to say in terms of the -- the direct
9 statutory interpretation that you're putting
10 forward here. I hear the balance in your
11 statement that effluent limitations, it's clear
12 from the statute, are the first go-to --

13 MR. LIU: Yeah.

14 JUSTICE JACKSON: -- in trying to
15 ensure that the waters are clean but that what
16 (C) is doing is also allowing for other kinds of
17 limitations, to potentially include generic
18 limitations when the effluent limitations don't
19 suffice.

20 MR. LIU: Right.

21 JUSTICE JACKSON: That's what I
22 thought your argument was.

23 MR. LIU: Exactly. Congress didn't --

24 JUSTICE JACKSON: And that's why I
25 think it's not circular in any sort of real

1 sense because these other limitations are being
2 adjudged relative to the effectiveness --

3 MR. LIU: Yes.

4 JUSTICE JACKSON: -- of the effluent
5 limitations, so they only come in as necessary
6 to make sure that we reach the clean water
7 standards when the effluent limitations aren't
8 working.

9 MR. LIU: Exactly. And San Francisco
10 below made the argument that, well, these --
11 these limitations are not necessary because, in
12 their view, the other limitations in the permit
13 were already sufficient to protect water
14 quality, and the Ninth Circuit rejected that
15 argument, and there was no cert petition on that
16 issue.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Rebuttal, Ms. Steeley?

21 REBUTTAL ARGUMENT OF TARA M. STEELEY
22 ON BEHALF OF THE PETITIONER

23 MS. STEELEY: San Francisco's ask in
24 this case is simple. We simply want to
25 understand our permit limitations so that we can

1 comply with them.

2 My friends on the other side say they
3 use the Generic Prohibitions when they lack
4 information. That's simply inconsistent with
5 the way this has actually played out.

6 As we've noted in our reply brief,
7 certain divisions of EPA have put this in every
8 permit they issue. They've been very common in
9 San Francisco. But EPA already has tools that
10 address lack of information. They have an
11 entire regulatory guidance document for their
12 permit writers that tells them exactly how to do
13 it, and it tells them to set water quality-based
14 effluent limitations with a reopener clause in
15 the permit that allows them to reopen the permit
16 and impose additional limitations when they need
17 to.

18 And in San Francisco's particular
19 circumstance, we've been sending monitoring
20 information to EPA for decades about this
21 facility. It's a well-known facility to EPA.

22 I'd like to correct a couple -- a
23 couple things. For -- Justice Kavanaugh, I --
24 my friends on the -- my colleagues here have
25 calculated the numbers for the amount sought in

1 the litigation for the Bayside permit, and it
2 comes to \$10 billion. That's the statutory
3 penalties for the days at issue.

4 And in terms of, like, what's covered
5 under our permit, all of the outfalls are
6 covered. You'll see that at Petition Appendix
7 page 428. There's one permit that governs the
8 entirety of the facility and all of its
9 outfalls. That's joint by the state regional
10 board and EPA, but it's -- it's one system of
11 obligations that covers all the outfalls.

12 And then, finally, I'd like to explain
13 as another example of why this is such a
14 hardship for San Francisco, and I'll use our
15 friends in L.A. as an example.

16 Los Angeles versus NRDC on remand from
17 this Court, the Ninth Circuit considered a
18 cause-and-contribute requirement that's I --
19 nearly identical to the one before this Court.

20 In that case, NRDC argued that
21 monitoring data alone, monitoring data showing
22 an exceedance of water quality standards, was
23 enough by itself to impose liability on Los
24 Angeles. Los Angeles said: No, look, there's
25 80 other dischargers into this water. It's not

1 just us. You need to show something about our
2 own discharges in order to find liability.

3 The Ninth Circuit said no. The Ninth
4 Circuit said the monitoring of data alone
5 exclusively per se established a violation of
6 law with no need to show anything about Los
7 Angeles's own discharges.

8 This is the problem here. With such a
9 broad standard, with such a broad basis for
10 liability, cities like Los Angeles and like San
11 Francisco can be subject to liability without
12 any advance notice that anything about our
13 discharges is going to cause a problem and --
14 and without the ability to prevent that
15 liability.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon at 12:58 p.m., the case was
19 submitted.)

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Official

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