

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.)
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CITY AND COUNTY OF SAN FRANCISCO,)

CALIFORNIA,)

Petitioner,)

v.) No. 23-753

ENVIRONMENTAL PROTECTION AGENCY,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, October 16, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:20 a.m.

APPEARANCES:

TARA M. STEELEY, Deputy City Attorney, San Francisco, California; on behalf of the Petitioner.

FREDERICK LIU, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:20 a.m.)

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

Ms. Steeley.

ORAL ARGUMENT OF TARA M. STEELEY

ON BEHALF OF THE PETITIONER

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

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

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

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2 repealed.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 permit holder 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 permit holders 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 permit holders from liability as
20 long as they comply with their permit terms.
21 But, by imposing indeterminate requirements, the
22 Generic Prohibitions prevent permit holders 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 -- in
4 -- in your permit, Phase I, doesn't that contain
5 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. The Generic Prohibition -- our --
11 our concern about the Generic Prohibitions is
12 not that they are narrative. It's perfectly
13 fine for EPA to use conditions that are
14 narrative, narrative water quality-based
15 effluent limitations.

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

21 JUSTICE THOMAS: So what is --

22 MS. STEELEY: -- effluent limitation.

23 JUSTICE THOMAS: -- with this permit,
24 what is at bottom the problem?

25 MS. STEELEY: What at bottom is the

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

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

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

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

23 JUSTICE JACKSON: Are the water
24 quality standards in state law? I -- I thought
25 that the EPA permits were just incorporating

1 obligations that already existed in state law.

2 Am I wrong about that?

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

11 JUSTICE JACKSON: I know, but I --

12 MS. STEELEY: -- that permitholders
13 can follow.

14 JUSTICE JACKSON: -- isn't EPA -- I
15 thought the statute allowed for "any more
16 stringent limitation, including those necessary
17 to meet water quality standards, treatment
18 standards, or schedules of compliance
19 established pursuant to any state law."

20 MS. STEELEY: So --

21 JUSTICE JACKSON: So California has
22 established certain water quality standards.
23 Are those independently binding on the cities
24 and municipalities in California?

25 MS. STEELEY: They are not binding.

1 They are only binding as a permit limitation.
2 And that's the problem here, is that we don't --
3 they're only binding --

4 JUSTICE JACKSON: Do they -- do you
5 have to have permits under state law so that
6 they get bound -- you get bound through the
7 state permitting process then?

8 MS. STEELEY: The permit at issue here
9 is issued by --

10 JUSTICE JACKSON: No, I understand.
11 But I'm just --

12 MS. STEELEY: Yeah.

13 JUSTICE JACKSON: -- I guess my -- my
14 big problem is that I'm trying to understand why
15 you find these permit provisions so onerous or
16 problematic when they seem to just incorporate
17 standards that already exist under state law
18 that you would have to follow anyway.

19 MS. STEELEY: The standards are not
20 self-executing, so we don't have to follow them
21 anyway. They set the goals for the water body,
22 but they're not limitations on us themselves.

23 JUSTICE KAGAN: So --

24 MS. STEELEY: So they aren't -- they
25 are not binding on us.

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

12 So, you know, some people, you know,
13 it's -- there's got to be something in this
14 statute that tells you that the agency can't
15 decide to go the less prescriptive, more
16 flexible "you decide how to meet it; this is the
17 goal" route, and I don't see anything in this
18 statute that does that.

19 MS. STEELEY: So I disagree, Your
20 Honor, that this provides a flexible standard.
21 What --

22 JUSTICE KAGAN: Let's talk about the
23 statute. Like, what in the statute prevents the
24 agency from saying, in addition to or instead of
25 the highly prescriptive, you know, you can only

1 discharge X amount, we want to set a goal, and
2 we want to tell you that you're obligated to not
3 contribute to violating that goal?

4 MS. STEELEY: So what the statute
5 provides is that EPA must meet and implement the
6 water quality standards. And those are
7 transitive verbs. They necessarily, in our
8 view, require taking concrete steps to meet --
9 to achieve the goal, right?

10 JUSTICE KAGAN: See, to me, this
11 regulation -- what does this regulation do? It
12 says go meet and implement the water quality
13 standards, because you were exactly right in
14 what you said to Justice Jackson, as without
15 this regulation, or not this regulation but this
16 condition in the permit, you're not
17 independently obligated to -- they're not
18 enforced -- those standards are not enforceable
19 against you.

20 It's the permit condition that makes
21 those standards enforceable against you by the
22 EPA. So that's what this condition does. It --
23 it -- it -- it's -- it's prescribing that you
24 have to meet water quality standards. Like, how
25 more clearly could you meet this statutory

1 language than that?

2 MS. STEELEY: So the problem is, is
3 that it -- it can be used as grounds for
4 enforcement afterwards, but it doesn't tell
5 permit holders in advance what we must do to
6 control our discharges. So, in that sense --

7 JUSTICE SOTOMAYOR: The problem is
8 that there are discharges -- and we get a huge
9 amount of them in the amici briefs -- of
10 discharges that weren't anticipated. You were
11 fine at the time of the permit, and then, all of
12 a sudden, you've got chlorinated or potable
13 water into the waters.

14 So, if the water standards are not
15 self-executing, which you admit, if they're not
16 in the permit because they haven't been put into
17 the permit, then what you're saying is: Well,
18 you can't do anything immediately, EPA. You
19 have to start a review process that takes months
20 and sometimes years to amend the permit and do
21 something about it.

22 This, instead, says to San Francisco:
23 You should be monitoring the water. Don't let
24 it exceed the water quality standards that we
25 met and set together. Now you implement the

1 changes that you think are appropriate to stop
2 this unexpected discharge.

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

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

6 MS. STEELEY: I think it's the wrong
7 way to look at it, Your Honor, because, first of
8 all, we are not saying EPA cannot take immediate
9 action. The statutory scheme already provides
10 EPA with emergency powers. They can act
11 immediately to protect public welfare under
12 Section -- sorry -- 1364.

13 JUSTICE SOTOMAYOR: How can they do
14 that? They can't go to court unless there's a
15 permit violation.

16 MS. STEELEY: They can go into court
17 under their emergency powers.

18 JUSTICE SOTOMAYOR: Under their
19 emergency.

20 MS. STEELEY: They can go into
21 court --

22 JUSTICE SOTOMAYOR: But we have to go
23 to that extreme. So how do we get San Francisco
24 to do something about its implementing -- its
25 monitoring obligations? It's supposed to

1 monitor and look at things and, if things are
2 getting out of control, figure out how to put
3 them back into control.

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

8 JUSTICE SOTOMAYOR: So --

9 MS. STEELEY: -- 226.

10 JUSTICE SOTOMAYOR: -- in this permit,
11 this is not a permit involving entities --
12 multiple entities that are discharging into most
13 of these waters. So most of these water, it's
14 one permitholder, the City of San Francisco.
15 It's combining sewage and rainwater runoff,
16 correct, so it knows all of the point sources
17 that contribute to that water quality have
18 effluent limitations because you can test those
19 and see whether they're meeting standards.

20 So, if something unexpected happens,
21 it's because one of those water sources has gone
22 awry, correct?

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

25 First of all, San Francisco is not the

1 only discharger or contributor to the water
2 body. There are eight discharge points at issue
3 in this permit.

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

6 MS. STEELEY: Sorry, no. So
7 San Francisco has its own discharge points, and
8 there are eight of them. One of them is -- I
9 will concede is fairly far out into the ocean.
10 We are the only source for that one. But the
11 other seven have many other contributors to the
12 water body very close nearby.

13 And if I can give you an example, just
14 a couple weeks ago, there was a bacteria spike
15 near one of those discharge points. It's a
16 point that we are not currently using, so we
17 know we did not cause that spike, but someone
18 else did.

19 Had we been contributing to the water,
20 had we been discharging at the time, we would
21 necessarily have been contributing to that
22 condition and we would be subject to liability.

23 JUSTICE SOTOMAYOR: But how about --
24 but my -- that's my point, which is it -- you
25 can't get past the obligation to meet the water

1 standards unless you put them into the permit.

2 MS. STEELEY: So the way that EPA can
3 achieve its goals here is to set a discharge
4 limitation in the permit. And if I can correct
5 perhaps a misunder- --

6 JUSTICE SOTOMAYOR: Oh, so they should
7 take each -- I see in the water standards
8 they're very detailed on any number of -- of
9 discharges. You can only have X amount of feces
10 in the water, X amount -- or Y amount of
11 bacteria. Pages and pages of measurements.

12 You want them to write all of those --
13 take the water standards, and instead of
14 cross-referencing them and telling you to meet
15 those standards, you want them to write each
16 amount?

17 MS. STEELEY: So, Your Honor, EPA's
18 own regulations require it to set an effluent
19 limitation whenever there is a reasonable
20 potential that a discharge will cause or
21 contribute to a water -- water body --

22 JUSTICE SOTOMAYOR: Well, that --
23 that's the point I'm making. It does that.
24 Where there's -- where they're exceeding the
25 limitation, it tells it what technology to put

1 into place to reduce it.

2 But, if they're not exceeding it right
3 now, how do they take care of the -- the
4 unexpected situations?

5 MS. STEELEY: The permit limitations
6 are set in advance, so they're anticipating what
7 the discharge will do to the water body.

8 But, if I can correct, I think, what
9 maybe -- what maybe is a misunderstanding. We
10 don't have real-time monitoring of receiving
11 water conditions. Under our permit, we monitor
12 bacteria on a once-a-week basis, and other
13 things, including effects on animals, sediment,
14 we monitor on a yearly basis, and it takes about
15 nine months for the results to come back.

16 So San Francisco cannot shift on a
17 dime. We don't have the information necessary
18 to know --

19 JUSTICE SOTOMAYOR: I'm sorry, no
20 one's asking you to shift on a dime. What
21 they're asking you to do is to become
22 responsible for doing what's necessary, not on a
23 dime, but -- nothing in the EPA works on a dime
24 -- but to take the steps necessary to control
25 situations that develop.

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

3 JUSTICE SOTOMAYOR: By the way, I do
4 accept that there are some provisions of the
5 water standards that are, charitably, a little
6 amorphous. You know, control for the color of
7 the water. But I think that's an as-applied
8 challenge.

9 JUSTICE KAGAN: Yeah, can I just
10 piggyback on that if you'll -- if you'll let me,
11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Yeah, sure.

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

15 One is that to the extent that you
16 have objections to particular ones of these
17 water quality standards -- they're too
18 confusing, they're too vague, we can't figure it
19 out, how can you tell between us and other
20 dischargers -- I mean, that does seem like a
21 classic arbitrary-and-capricious question. So
22 you would go and make an arbitrary-and-
23 capricious standard as to those particular
24 standards that are in the permit.

25 I mean, the second way I hear you,

1 honestly, is -- is you're making a policy
2 argument to either the agency or to Congress.
3 You're making a policy argument to the agency,
4 essentially: Don't take advantage of your
5 statutory authority in this way because it's
6 very confusing to us, the regulated party. Or
7 you're making a policy argument to Congress: Go
8 fix this statute so that the EPA can't do this.

9 But what I don't hear you telling me
10 is, like, what in the statute prevents the EPA
11 from doing this. And, you know, as I said in
12 the -- in my -- in my first intervention here,
13 the policy arguments, they cut both ways. Some
14 people like these kinds of standards. These
15 kinds of standards -- if the EPA couldn't do
16 these standards, presumably, they would do
17 something else, which might be more
18 prescriptive, which some parties might really
19 hate.

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

23 MS. STEELEY: So, again, I would
24 point -- I would point you to the requirement to
25 meet and implement the water quality standards.

1 As you noted, Justice Sotomayor, some
2 of the standards are not -- they don't translate
3 easily into a discharge limitation for
4 San Francisco.

5 And I don't agree that it's a policy
6 argument. We simply want to know what we have
7 to do --

8 CHIEF JUSTICE ROBERTS: I --

9 JUSTICE KAGAN: I feel as though
10 it's -- when you say "meet and implement," I
11 feel that those statutory words, they're
12 practically a description of these permit
13 conditions.

14 You know, they -- they basically say:
15 If -- if -- you -- you don't have to do the --
16 just the standard effluent limitations if you
17 think that a regulation is -- you know, further
18 conditions are necessary to achieve the water
19 quality standards.

20 And the EPA is saying at the very
21 least this: We have to obligate you and other
22 entities with permits to comply with those water
23 quality standards. And that's -- that's
24 actually exactly what this statute allows the
25 EPA to do.

1 MS. STEELEY: So I don't agree that
2 you can meet and implement the water quality
3 standards by simply sticking a term in the
4 permit that says: Do not cause or contribute to
5 the violation of water quality standards.

6 They might as well have said: Do not
7 violate the Clean Water Act. It doesn't tell us
8 anything --

9 JUSTICE KAVANAUGH: I thought -- I
10 thought --

11 MS. STEELEY: -- about how to
12 control --

13 CHIEF JUSTICE ROBERTS: I thought
14 the -- I thought the whole reason we have the
15 water permit system is because the water quality
16 system was a failure --

17 MS. STEELEY: That's exactly --

18 CHIEF JUSTICE ROBERTS: -- because it
19 didn't tell people in any predictable way what
20 they can and cannot do.

21 MS. STEELEY: That's exactly right.
22 And Congress repealed that system. It replaced
23 that system.

24 JUSTICE KAVANAUGH: And -- and the --
25 and -- I'm sorry, keep going.

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

5 JUSTICE KAVANAUGH: And I thought the
6 statutory hook that you were relying on in
7 (b)(1)(C), 301(b)(1)(C), was the phrase "any
8 more stringent limitation necessary to meet
9 water quality standards." And you read "any
10 more stringent limitation" to refer back and
11 mean effluent limitation.

12 Is that your statutory hook?

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

17 JUSTICE KAVANAUGH: Absolutely.
18 301(a) sets effluent limitations, and then, when
19 it says "any more stringent limitation," you say
20 the fact that the word "effluent" is not there
21 is -- in context, it's obviously referring to
22 "effluent limitations" and then "meet water
23 quality standards," right?

24 MS. STEELEY: That's correct, Your
25 Honor. What --

1 JUSTICE SOTOMAYOR: I'm sorry. But
2 you -- you say narrative is okay. And that's
3 not an effluent limitation. We also have our
4 own case that says it doesn't have to be an
5 effluent limitation. And I still don't
6 understand how you didn't forfeit this argument.

7 MS. STEELEY: So --

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

12 And you now raise it -- I was quite
13 surprised when I read the question presented and
14 started your brief and thought to myself this is
15 a new theory.

16 How is that argument not forfeited?

17 MS. STEELEY: So, Your Honor, we do
18 not object to narrative water quality-based
19 effluent limitations, and an effluent limitation
20 can be narrative. What an effluent limitation
21 is is a --

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

24 MS. STEELEY: Okay. We did not
25 forfeit this argument because we've argued

1 throughout this case, including, you'll see, at
2 pages 24 to 34 of our opening brief, that our
3 theory --

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

6 MS. STEELEY: So what we are
7 challenging here is the Generic Prohibitions.

8 JUSTICE SOTOMAYOR: And how did you
9 not forfeit it in the court below by not raising
10 it?

11 MS. STEELEY: We did raise --

12 JUSTICE SOTOMAYOR: We're not a court
13 of first impression.

14 MS. STEELEY: We did raise it in the
15 court below, Your Honor. You'll see that at
16 pages --

17 JUSTICE SOTOMAYOR: The Ninth Circuit
18 didn't -- didn't think so. I looked at your
19 briefs from there. I don't think so either.

20 MS. STEELEY: The Ninth Circuit held
21 that 301(b)(1)(C) is not limited to effluent
22 limitations, which are restrictions on
23 discharges. It did reach that holding. You'll
24 see that at pages 32 to 33 of the Ninth
25 Circuit's decision. And we argued this to the

1 Ninth Circuit.

2 JUSTICE SOTOMAYOR: All right.

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

4 JUSTICE SOTOMAYOR: On the "more
5 stringent" area -- question, if it's a different
6 limitation, it's more stringent, isn't it?
7 Meaning you're defining "more stringent" as
8 being more hardship on me than the effluent
9 limitation. But doesn't that answer Justice
10 Kagan's point, which is anytime you have another
11 obligation, it's more stringent?

12 MS. STEELEY: We don't agree that
13 "more stringent" just means additional. I
14 think, if Congress had meant that, it would have
15 said so. And I think that's actually an
16 important part of the statutory --

17 JUSTICE KAGAN: I'm not sure I
18 understand that. I mean, these do impose
19 obligations on you above and beyond what the
20 technology-based limits do, isn't that right?
21 You have to do more?

22 MS. STEELEY: I don't agree, Your
23 Honor, and that's because we cannot tell. It
24 does not tell us in advance how to control our
25 discharges. But --

1 JUSTICE KAGAN: Well, either you have
2 to do only what the technology-based limits tell
3 you to do or you have to do more.

4 MS. STEELEY: But this does not tell
5 us what more we would have to do.

6 JUSTICE KAGAN: Well, for example,
7 suppose a technology-based condition says, you
8 know, don't discharge more than 75 gallons of
9 sewage. And now, in addition to that, a water
10 quality-based condition says don't cause or
11 contribute to meaningful discoloration.

12 Isn't it more stringent than the first
13 condition standing alone because, on a
14 particular day, you might have to cut your
15 discharges more to 60 gallons of -- per day?

16 MS. STEELEY: So we --

17 JUSTICE KAGAN: That is more
18 stringent. Now it's 60 gallons per day because
19 that's what's necessary to prevent
20 discoloration.

21 MS. STEELEY: So I have two arguments
22 to that, Your Honor.

23 One is this doesn't tell us how to
24 control our discharges, so, in our view, it's
25 not more stringent.

1 And the second is, is that we judge
2 permit terms at the time that they are set.
3 When they are set, we cannot tell if it's a more
4 stringent requirement or not because, depending
5 on conditions in the water body, it can be
6 either more or less stringent at that moment in
7 time, and so, therefore, it's not a more
8 stringent restriction.

9 JUSTICE JACKSON: But isn't that the
10 point? I mean, do -- do you dispute that
11 Congress was attempting to have a backstop with
12 respect to requiring or allowing for any more
13 stringent limitation?

14 I mean, the word "any" in here also,
15 it seems to me, does work to suggest that we
16 don't have to stay within the world of effluent
17 limitations. So how do you account for that?
18 And isn't the point of having this that Congress
19 understood that the (1)(A) effluent limitations
20 might not be sufficient, so the authority was
21 given to prescribe any more stringent
22 limitation?

23 MS. STEELEY: So I think you have to
24 read "any" in context. I think my friends on
25 the other side read 301(b)(1)(C) as meaning any

1 limitation. That cannot be right. They've rest
2 out -- they've read out the rest of the words of
3 that section. But I think I -- I want to -- I
4 don't believe that 301(b)(1)(C) is meant to be,
5 you know, a all-encompassing backstop. I don't
6 agree with that. In fact --

7 JUSTICE JACKSON: Well, what is it
8 doing? I mean, we already have a provision that
9 allows for or authorizes effluent limitations.
10 And then we get to this one that says you can
11 put in a permit any more stringent limitation.
12 And -- and speaking of reading out the words, it
13 says "including those necessary."

14 So it's not even clear that "those
15 necessary" is the sum total of the limitations.
16 It says "any more stringent limitations." So
17 isn't -- doesn't that just on its textual
18 reading suggest we're beyond the effluent
19 limitations that were previously authorized?

20 MS. STEELEY: So a couple responses
21 that I'd like to give you if I may.

22 JUSTICE JACKSON: Yes, please.

23 MS. STEELEY: The first is that what
24 an effluent limitation is, is a restriction on
25 discharges of pollutants. We know from Section

1 301 that the entire section is about a
2 restriction on the discharges of pollutants. So
3 we believe 301(b)(1)(C) is also about an
4 effluent limitation, but it's necessarily narrow
5 in scope, and if I can explain why.

6 So technology-based effluent
7 limitations, which are set under Section
8 301(b)(1)(A) and (B), are effluent limitations
9 that require controls using the best practicable
10 technology that's economically feasible.

11 What Section 301(b)(1)(C) -- sorry --
12 Section 301(b)(1)(C) allows is additional
13 controls regardless of their economic
14 feasibility, regardless of cost. So those are
15 necessarily a limited thing. They are used only
16 when more stringent, only when necessary to meet
17 and implement. They're not a catch-all.

18 JUSTICE JACKSON: Right. I understand
19 that point.

20 MS. STEELEY: They're not used all the
21 time.

22 JUSTICE JACKSON: I understand that
23 point, but what -- what do we do with the fact
24 that Congress chose, I think, to codify the
25 EPA's interpretation of this -- of this -- the

1 CSO control policy, and that policy, it's my
2 understanding, explicitly endorsed the kind of
3 permit provisions at issue here, those that
4 regulate sewage treatment that incorporate water
5 quality standards beyond effluent limitations?

6 Is -- do you -- do you dispute that
7 Congress endorsed the kinds of permit provisions
8 that exist here?

9 MS. STEELEY: Absolutely. We
10 absolutely --

11 JUSTICE JACKSON: Okay.

12 MS. STEELEY: -- dispute that. So my
13 friends on the other side are not relying on the
14 CSO policy as their source of authority and
15 wisely so because the CSO policy does not give
16 them the permission to put in conditions like
17 the Generic Prohibitions.

18 We are a Phase II permit, which
19 expressly requires water quality-based effluent
20 limitations. Even under Phase I, Phase I allows
21 narrative water quality-based effluent
22 limitations. There's nothing in the CSO policy
23 that suggests that Congress -- that EPA could
24 simply impose something like the Generic
25 Prohibitions, leave San Francisco to figure out

1 its discharge obligations on its own.

2 Congress -- there's nothing suggesting
3 that Congress had that in mind or blessed that
4 system. In fact, when Congress was asked, you
5 know, do we want to leave permitholders to
6 figure it out for themselves or assign EPA as
7 the agency to set limitations, it chose the
8 latter approach.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas, anything further?

12 JUSTICE THOMAS: Are there -- not in
13 your case, but are there any provisions -- is
14 there any prohibition in 1311 against E -- EPA
15 having the generic limitations in a -- in a plan
16 for someone else? Just generically, not you.

17 MS. STEELEY: Is there a prohibition?

18 JUSTICE THOMAS: Yeah. Are they
19 precluded from having generic limitations?

20 MS. STEELEY: I don't think there's
21 anything expressly precluding them, but --
22 except that they are not authorized to do so,
23 right? EPA only has authority when authorized.
24 And so I think Section 301 is silent about
25 Generic Prohibitions. It doesn't authorize

1 them.

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

4 MS. STEELEY: No.

5 JUSTICE THOMAS: Why?

6 MS. STEELEY: Because they point to
7 Section 301(b)(1)(C) as their only source of
8 authority to impose Generic Prohibitions.

9 JUSTICE THOMAS: Yeah.

10 MS. STEELEY: And that provision does
11 not allow it.

12 JUSTICE THOMAS: And why is that?

13 MS. STEELEY: Because what can be
14 imposed under Section 301(b)(1)(C) is
15 limitations on discharges. Those are effluent
16 limitations. They need to tell permitholders
17 their obligations. That's the entire point of
18 that section and its requirements.

19 So, by imposing a Generic Prohibition,
20 they're simply telling us to figure it out for
21 ourselves, which we think is contrary to the
22 statutory scheme.

23 JUSTICE THOMAS: So would you have a
24 -- an arbitrary-and-capricious claim if you did
25 not bring this as a statutory claim?

1 MS. STEELEY: Yes.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: The government says
4 that there are no other significant point or
5 non-point sources of pollution around the
6 Southwest Ocean Outfall.

7 Assuming for the sake of argument that
8 that is true -- I heard you to dispute it
9 earlier in your argument -- but assuming for the
10 sake of argument that it is true, why couldn't
11 you then figure out what is necessary for you to
12 do to comply with the water quality standards?

13 MS. STEELEY: So, if I can just
14 clarify first, there are eight outfalls at
15 issue. So they're saying at one of them that is
16 true. They don't contest that the other seven,
17 that is not true.

18 But the reason is, first of all,
19 Congress assigned EPA this task, not us. But
20 the practical answer is, is that we can't know
21 what we can discharge without knowing in real
22 time, minute by minute, what the conditions are
23 in the receiving waters. That will include the
24 water flow, its currents, and also what others
25 have added to the water body.

1 For instance, if we're trying to meet
2 a --

3 JUSTICE ALITO: Well, it sounds like
4 what you're saying there is not that you object
5 to the fact that EPA hasn't told you what you
6 need to do but that there is really no
7 practicable way of specifying in advance what
8 you are required to do, and, therefore, you can
9 continue to have these combined sewer overflow
10 events where you're discharging raw sewage into
11 the Pacific Ocean.

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

15 What EPA hasn't told us is what
16 additional we need to do under the Generic
17 Prohibitions.

18 JUSTICE ALITO: All right. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: And you haven't
22 told me what you do with unanticipated
23 discharges. You ignore them until the permit is
24 amended? Is that your answer?

25 MS. STEELEY: So, if a discharge is

1 not anticipated, if it wasn't disclosed to the
2 agency, then it's an unauthorized discharge.

3 It's simply prohibited under Section 301 --

4 JUSTICE SOTOMAYOR: No, it's not,
5 because the permit tells you what you can or
6 cannot discharge. That's based on what -- and
7 how much. And that's based on what we know
8 you're doing.

9 If you're okay on day one in
10 discharges, we're not going to tell you not to
11 do more. We're giving you permission --

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

13 JUSTICE SOTOMAYOR: -- to discharge.

14 MS. STEELEY: Right. So, if -- if --
15 if something is not grant -- if you have not
16 been given the authority to discharge a certain,
17 you know, something --

18 JUSTICE SOTOMAYOR: The way the permit
19 --

20 MS. STEELEY: -- a certain
21 constituent --

22 JUSTICE SOTOMAYOR: -- the permit --
23 the way the permit operates is, with the permit,
24 you can discharge anything that the permit tells
25 you you can't. It works in reverse. It tells

1 you you can't do this thing more than that
2 amount. If it doesn't tell you you can't do
3 this thing, you can continue doing this thing
4 until the permit tells you you can't.

5 MS. STEELEY: So the -- the way it
6 works is that the permitholder goes to EPA and
7 says: This is what we plan to discharge. And
8 then, if you have disclosed that to EPA, then
9 they set the limitations, and that's the scope
10 of your ability.

11 JUSTICE SOTOMAYOR: So what they
12 should do is --

13 MS. STEELEY: That doesn't allow you
14 to then --

15 JUSTICE SOTOMAYOR: -- what you told
16 me earlier not to do: come in and tell you,
17 using the technology you're using now, ensure
18 yourself that you're not doing more than X
19 amount of feces in the water? Would that be an
20 okay limitation?

21 MS. STEELEY: Certainly. EPA can say
22 this is the limit --

23 JUSTICE SOTOMAYOR: So rewrite the --

24 MS. STEELEY: -- that you can
25 discharge.

1 JUSTICE SOTOMAYOR: -- water quality
2 standards. Just bring them all into the permit
3 instead of cross-referencing them and say: You
4 can't have at this point source more than X
5 amount of feces discharge.

6 I suspect that Justice Kagan is right
7 that if they start doing something -- because
8 computers now can make that a very easy task --
9 then you'll come in and say the permit is not
10 comprehensible because it's so long and
11 convoluted.

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

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

16 MS. STEELEY: I'm not asking -- I'm --
17 I'm not asking for EPA to add more. What I'm
18 asking is for clear guidance to permit holders
19 about what we have to do to comply with our
20 permit.

21 And I will say that I'm not sure that
22 it is true that others like this. The
23 regulatory community has lined up in the amicus
24 supporting San Francisco.

25 But, in terms of what EPA can do, EPA

1 can reopen the permit. It can modify a permit.

2 But --

3 JUSTICE SOTOMAYOR: Months and years.

4 MS. STEELEY: If it -- if it has -- if
5 it has any reasonable basis for concern, even
6 anticipatory, right, if it anticipates that
7 there may be a problem causing or contributing
8 --

9 JUSTICE SOTOMAYOR: Months and years.

10 MS. STEELEY: I'm sorry?

11 JUSTICE SOTOMAYOR: Months and years.

12 MS. STEELEY: I mean, it can take as
13 little as six weeks to three months --

14 JUSTICE SOTOMAYOR: Only if you're
15 cooperating. All right.

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

17 JUSTICE SOTOMAYOR: Thank you. That's
18 fine, counsel.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: If I understood your
21 response to Justice Thomas, Justice Thomas said:
22 What prevents the EPA from doing this? You
23 said: 1311(b)(1)(C) doesn't authorize it
24 because this is not an effluent limitation.

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

1 about effluent limitations. (1)(C) just talks
2 about limitations. (1)(A) talks about effluent
3 limitations. (1)(B) talks about effluent
4 limitations. You were adding a word to (1)(C)
5 to get effluent limitations there, weren't you?

6 MS. STEELEY: No. I disagree that
7 we're adding a word. So Section --

8 JUSTICE KAGAN: Well, you're
9 definitely adding a word because there's only
10 "limitation" there.

11 MS. STEELEY: So Congress used
12 "limitation" as a shorthand for effluent
13 limitations throughout this section.

14 And if I can explain. So Section
15 301(a), not 301(b)(1)(A) but 301(a), tells us
16 that the universe of Section 301 is about
17 restrictions on discharge of a pollutant.

18 That's the very definition of an
19 effluent limitation. So we believe that the
20 limitations throughout -- and the title also
21 suggests that the limitations throughout Section
22 301 are limitations on discharge.

23 JUSTICE KAGAN: I mean, throughout
24 this statute, it says effluent and other
25 limitations. And then, in this particular

1 section, it says effluent limitations, effluent
2 limitations. And then, when it gets to this
3 kind of backstop provision of something else is
4 necessary, it just says limitations.

5 Okay. I have another question for
6 you, which is, you know, you spend a lot of your
7 brief talking about this legislative history of
8 the statute and suggesting that what the statute
9 was designed to do was to go from a
10 water-quality-based system to an effluent -- to
11 a technology-based effluent limitation system.

12 And that's -- you know, I suppose, if
13 you really wanted to write the picture broadly,
14 you might say that. But there are plenty of
15 places in this statute where water quality makes
16 an appearance.

17 And, indeed, it makes an appearance in
18 this very provision, which is the source of
19 authority for what the EPA did here. You know,
20 it says, well, if the effluent limitations
21 aren't doing enough, EPA can do other
22 limitations that are necessary to meet water
23 quality standards.

24 That's what the text says. We usually
25 don't look at, like, the broadest possible

1 reading of legislative history to do something
2 that's exactly counter to what the relevant
3 textual provision says.

4 MS. STEELEY: It's absolutely true
5 that Congress preserved water quality standards,
6 but they preserved them as a basis for setting
7 discharge limitations.

8 So it's -- it's -- there's no conflict
9 between preserving water quality standards and
10 setting discharge limitations. In fact, that's
11 the way that you preserve the environment.
12 That's the way you protect water quality
13 standards, is you tell permit holders in advance
14 what we must do to control our discharges.

15 But the question presented here is
16 about the --

17 JUSTICE KAGAN: Thank you,
18 Ms. Steeley.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 JUSTICE GORSUCH: Ms. Steeley, as I
22 understand your argument -- I just want to make
23 sure I understand it -- there are -- there are
24 two arguments. One is that (b)(1)(C) should be
25 read to regard effluent limitations. That's

1 your primary argument.

2 I had thought in the briefs that there
3 was a backup argument that, nonetheless,
4 whatever it has to be, it has to be a limitation
5 on your discharges given that that's what
6 1311(a) is all about, the discharge of any
7 pollutant by a person, except -- except as
8 specified here, is unlawful and that whatever
9 the limitation is, it can't be the applicable
10 water quality standard itself because that --
11 that is used in contradistinction with
12 limitations throughout this statute.

13 Is that -- is that correct?

14 MS. STEELEY: That is correct. I
15 would only quibble with the idea that if there's
16 a primary and secondary argument, what a
17 restrictional discharges are is an effluent
18 limitation. So I think those arguments are one
19 and the same.

20 JUSTICE GORSUCH: But --

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

22 JUSTICE GORSUCH: -- but, if -- if we
23 disagree on that and -- or at least don't want
24 to reach it --

25 MS. STEELEY: Mm-hmm.

1 JUSTICE GORSUCH: -- the point -- the
2 secondary point remains --

3 MS. STEELEY: Absolutely.

4 JUSTICE GORSUCH: -- we have to deal
5 with?

6 MS. STEELEY: Absolutely, that's
7 correct. I mean, the question presented here is
8 about the -- is whether the Generic Prohibitions
9 are authorized by law. And those Generic
10 Prohibitions re-create the test -- the statutory
11 scheme Congress rejected, so we think they are
12 not.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: A few questions.
17 Just to pick up on Justice Thomas's question
18 when he asked if anything prohibits, your
19 response -- and I just want to make sure I have
20 this clear -- was nothing in the statute
21 authorizes something like the generic
22 limitations, correct?

23 MS. STEELEY: That's correct.

24 JUSTICE KAVANAUGH: And that -- and
25 your point about water quality standards, I want

1 to make sure, I think with Justice Gorsuch, the
2 water quality standards are the goal or the end,
3 that the statutory means to that end that are
4 authorized by the statute are the effluent
5 limitations?

6 MS. STEELEY: That's exactly correct.

7 JUSTICE KAVANAUGH: And when you say
8 narrative effluent limitations, I think Footnote
9 22 of your brief talks about that and you've
10 mentioned it at oral argument.

11 Can you -- and Justice Sotomayor
12 picked up on that. Can you just describe
13 briefly what you mean there?

14 MS. STEELEY: Sure, and maybe an
15 example would be helpful.

16 JUSTICE KAVANAUGH: Yes.

17 MS. STEELEY: In San Francisco's
18 permit, for instance, we have a narrative water
19 quality-based effluent limitation that requires
20 San Francisco to increase its rate of pumping
21 when wet weather is expected. So, if there's a
22 30 percent chance of rain, we have to clear
23 capacity in the facility so that we are able to
24 absorb the capacity of stormwater.

25 That's a narrative water quality-based

1 effluent limitation. It tells us about the rate
2 of our discharge, so it's squarely within the
3 definition of effluent limitation, but it's
4 simply a narrative form. And we don't object to
5 that. It's -- it's perfectly fine to use words
6 or numbers. We just want to know how to control
7 our discharges and not have our compliance
8 determined based on conditions in the receiving
9 water.

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

21 MS. STEELEY: That's exactly correct.
22 I mean, that tells permitholders their -- the
23 obligations they need to meet, so it -- it --
24 yes, that's exactly how the statute is stated.

25 JUSTICE KAVANAUGH: Okay. And the

1 overarching problem, I think, but you haven't
2 gotten to this, so I'm going to give you -- you
3 know, in terms of how this all works is you
4 don't know what your obligations are ahead of
5 time and yet you're on the hook for millions of
6 dollars and potential prison time even though
7 you didn't know what your obligations were ahead
8 of time, which strikes at least me, I mean, as
9 more -- as definitely a policy problem but one
10 that's rooted in the statute. You don't know
11 what your obligations are and you can go to
12 prison.

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

15 JUSTICE KAVANAUGH: What are -- what
16 are you on the hook for? There's an EPA suit
17 against you. What is the amount San Francisco
18 is on the hook for for something they didn't
19 know they needed to do? At least that's your
20 claim. What's the amount?

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

23 JUSTICE KAVANAUGH: Per --

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

1 JUSTICE KAVANAUGH: They're seeking
2 how much from you?

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

6 JUSTICE KAVANAUGH: Yeah. Okay.
7 Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: No.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: So I understand that
14 you say that the issue here is whether the
15 Generic Prohibitions are authorized by law. Is
16 that right?

17 MS. STEELEY: That's correct.

18 JUSTICE JACKSON: And that's the core
19 of your argument, and that you say that Congress
20 did not contemplate this, having this general
21 prohibition -- Generic Prohibition. But I guess
22 I can't square that with 33-1342(q)(1), which is
23 the 2000 amendment in which Congress appears to
24 be saying that each permit for a discharge
25 "shall conform to the Combined Sewer Overflow

1 Control Policy" signed by the agency. And then,
2 when you look at the control sewer overflow
3 control policy -- or the Combined Sewer Overflow
4 Control Policy, that policy, I think, the
5 longstanding policy of the agency, was to
6 include these generic kinds of -- what you call
7 generic kinds of limitations.

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

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

19 MS. STEELEY: So there's nothing in
20 the policy that authorizes the Generic
21 Prohibitions. What Congress was authorizing is
22 that EPA set limitations in a permit that
23 require our compliance with water quality
24 standards. They can do that through effluent
25 limitations. Our -- you know --

1 JUSTICE JACKSON: No, no, Congress was
2 very specific. It said we are requiring the
3 permits to "conform to the," capital, "Combined
4 Sewer Overflow Control Policy." It was
5 referencing a particular policy that had been
6 established by the administration that included
7 the Generic Prohibitions that you say Congress
8 did not consider, endorse, or whatnot.

9 MS. STEELEY: Right.

10 JUSTICE JACKSON: And I don't
11 understand how that's possible.

12 MS. STEELEY: So there's nothing in
13 the policy itself that says, EPA, impose
14 restrictions on causing or contributing to a
15 violation of water quality standards alone.
16 That's what -- that's not what the policy says.

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

19 JUSTICE JACKSON: Was it EPA's --

20 MS. STEELEY: -- water quality-based
21 effluent --

22 JUSTICE JACKSON: -- was it EPA's
23 guidance and weren't they saying this is what
24 you have to do pursuant to our policy? It would
25 -- EPA has never taken the position, I think,

1 that their own policy did not require these.

2 MS. STEELEY: EPA's policy, not -- so
3 EPA's guidance --

4 JUSTICE JACKSON: Yes.

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

13 But what Congress actually blessed or
14 required is compliance with the policy. And the
15 policy does not require or authorize anything
16 that looks like the Generic --

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

23 MS. STEELEY: Our argument before this
24 Court is that the condition -- the Generic
25 Prohibitions are not authorized by law.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Liu.

5 ORAL ARGUMENT OF FREDERICK LIU

6 ON BEHALF OF THE RESPONDENT

7 MR. LIU: Mr. Chief Justice, and may
8 it please the Court:

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

20 But that does not mean that they are
21 always okay. Under the statute, EPA may rely on
22 limitations like the ones here only when EPA
23 lacks assurance that the permit's effluent
24 limitations alone are insufficient to protect
25 water quality. Even then, EPA may rely on

1 limitations like the ones here only when EPA
2 lacks the information necessary to develop more
3 tailored limitations. And, finally, EPA may not
4 impose limitations of any kind that are
5 unconstitutionally vague.

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

17 And the court at Petition Appendix 32
18 rejected San Francisco's vagueness challenge.
19 San Francisco did not seek this Court's review
20 of any of those parts of the decision below.
21 Rather than pursue an individualized challenge
22 to the limitations in this case, San Francisco
23 has put before this Court only a facial
24 challenge: That all limitations that prohibit
25 discharges based on their effects on water

1 quality are invalid on their face because they
2 don't fit the statutory definition of effluent
3 limitation.

4 Because that argument can't be squared
5 with this Court's precedents or the statute
6 itself, this Court should affirm.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Liu, do -- do you
9 agree that 1311 seems to focus primarily on
10 effluents and discharge?

11 MR. LIU: I think most -- basically,
12 all of the provisions of 1311, except for
13 1311(b)(1)(C), focus on effluent limitations.

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

20 How exactly does the generic
21 limitation do that?

22 MR. LIU: It does in two senses. We
23 think that phrase, "necessary to meet or
24 implement water quality standards," imposes two
25 limitations on our authority.

1 One, we can invoke (b)(1)(C) only when
2 we lack assurance that the other limitations in
3 the permit are insufficient to protect water
4 quality. We think we've satisfied that
5 condition here. The court of appeals so found,
6 and San Francisco hasn't sought review of that.

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

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

20 We're talking about, where do the
21 flows go? What's the conditions of the pipes
22 and the pumping stations? How does the system
23 respond to wet weather events? That's the
24 information that we've been lacking for the past
25 10 years and that we asked San Francisco to

1 provide as part of the long-term control update.

2 Without that information, we're
3 basically flying blind as to how we're going to
4 tell exactly what San Francisco should do to
5 protect water quality.

6 JUSTICE THOMAS: Well --

7 CHIEF JUSTICE ROBERTS: Counsel -- I'm
8 sorry.

9 JUSTICE THOMAS: Oh, I'm sorry. Go
10 ahead.

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

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

1 So what prevents you -- I know you
2 touched on a couple of things in response to
3 Justice Thomas, but I'm not sure that was
4 significant limitations from saying, as you're
5 doing here, we're going to go with water quality
6 standards because that's maybe harder for the
7 people with effluent, but it's a lot easier for
8 us?

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

17 We were unable to include limitations
18 of that tailoring in this permit because San
19 Francisco deprived us of the very information we
20 would need to do that. So we don't --

21 CHIEF JUSTICE ROBERTS: How do you --

22 MR. LIU: We have no interest in
23 putting in generic provisions like this when we
24 have the information available to supply more
25 tailored information -- more tailored

1 limitations. And that's why -- it's precisely
2 because it's so much easier to enforce a more
3 tailored limitation. These limitations --

4 CHIEF JUSTICE ROBERTS: What do you do
5 with multiple people discharging effluent and
6 you have a water quality standard? There are
7 eight different industries, 10 different water
8 districts, whatever. They're all doing it. And
9 you look at the water quality and you say
10 there's too much of this.

11 MR. LIU: Yeah.

12 CHIEF JUSTICE ROBERTS: What do you do
13 then?

14 MR. LIU: Well --

15 CHIEF JUSTICE ROBERTS: How do you
16 allocate who's -- this was the problem that led
17 to the permit system. I mean, how do you
18 allocate responsibility for that?

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

24 But I don't think that concern about
25 multiple dischargers is any reason to throw out

1 all of the receiving water limitations in this
2 case. That sort of situation might be the basis
3 for an individualized sort of as-applied type of
4 challenge to a provision like --

5 JUSTICE KAVANAUGH: No, no --

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

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

21 CHIEF JUSTICE ROBERTS: I'm talking
22 about the specific question of allocating
23 responsibility for the water quality to
24 different point sources.

25 MR. LIU: Oh, well, one way to do it

1 is for the state to say: Look, we recognize
2 this water body is overpolluted. Let's grant a
3 variance to certain of the dischargers so that
4 they can continue doing their business.

5 JUSTICE KAVANAUGH: But do --

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

7 JUSTICE KAVANAUGH: Keep -- keep
8 going.

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

16 It's not as if Petitioner's rule is
17 going to magically allow dischargers and
18 petitioners --

19 CHIEF JUSTICE ROBERTS: I don't
20 understand that answer, it could be zero, but it
21 doesn't -- it may not have to be zero across the
22 board. It may be 20 percent in each of the
23 point sources. It may be 10 percent in the
24 antiquated system that can't do any better but
25 30 percent in someone else.

1 And I'm saying what the permit system
2 was designed to do was give some notice to the
3 different dischargers about what was going to be
4 required of them. Your water quality system
5 gives you complete discretion in which -- who's
6 going to bear the burden and who's not.

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

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

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

25 MR. LIU: I don't --

1 JUSTICE KAVANAUGH: I mean, a lot of
2 what you're talking about in response to the
3 Chief Justice is here's things that could help
4 going forward.

5 MR. LIU: Right.

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

10 MR. LIU: No. I mean --

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

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

15 JUSTICE KAVANAUGH: Yes, it would.

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

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

25 MR. LIU: You know, San Francisco has

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

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

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

18 And, you know, we're talking about
19 quality for the first --

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

1 MR. LIU: And my point -- my point is
2 there's no reason to invalidate all of these on
3 their face. San Francisco --

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

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

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

1 she said that's true of one, what you say, but
2 it's not true of all eight.

3 What's the situation there?

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

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

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

1 adversely affect fishing and swimming.

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

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

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

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

16 MR. LIU: They haven't.

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

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

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

25 MR. LIU: -- it would be strange if

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

5 CHIEF JUSTICE ROBERTS: So --

6 JUSTICE BARRETT: Mr. Liu --

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

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

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

13 MR. LIU: We have never sought -- I am
14 not aware of any instance, and I have been told
15 we're not aware of any instance, in which we
16 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 -- do
18 -- 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 had -- 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 -- so
11 --

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

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

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

7 JUSTICE ALITO: All right. Thank you.

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

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

23 So, on its face, it looks like "any
24 more stringent limitations" is taking us outside
25 of effluent limitations because the "more" is

1 relevant to something or relative to something.

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

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

11 MR. LIU: She's --

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

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

23 JUSTICE GORSUCH: Mr. Liu, I -- I -- I
24 think that addresses the primary argument. I
25 haven't heard -- and I'd appreciate some

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

16 MR. LIU: Well, there, the -- under
17 the statute, there is always a distinction
18 between the limitations and the water quality
19 standards.

20 JUSTICE GORSUCH: Yes. And I'm
21 wondering what remains of that when you say,
22 hypothetically, in a limitation: Do not violate
23 the water quality standards. Do not cause or
24 contribute to the violation of water quality
25 standards.

1 MR. LIU: Well, as my friend
2 acknowledged --

3 JUSTICE GORSUCH: Is -- is that -- is
4 that circular or is there --

5 MR. LIU: I --

6 JUSTICE GORSUCH: -- some way to break
7 the circle?

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

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

23 MR. LIU: I -- I -- I think it is a
24 limitation on the discharge. It's -- it's
25 prohibiting an entire category of discharges,

1 i.e., those that fit that description.

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

5 JUSTICE JACKSON: And is that because
6 --

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

14 What -- what -- what value added is
15 there to just an ex post tort nuisance law
16 regime when you say: Don't -- don't create a
17 nuisance?

18 MR. LIU: Well, as -- as I think the
19 prior discussion also revealed, a lot of these
20 water quality standards are not self-executing.
21 They are not independently enforceable. And so
22 the only way these standards are applied to a
23 discharger like San Francisco is if we
24 incorporate those standards in a limitation.

25 That's where the -- we -- we need

1 these limitations to bridge the gap between the
2 existence of the standards, which merely specify
3 a desired condition of the -- of the waterway,
4 and the permittee's own responsibilities.

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

8 MR. LIU: I think it does. I mean --
9 I mean, to be honest, these -- these standards
10 are much more specific than just a general tort
11 regime.

12 JUSTICE GORSUCH: Sure. I could call
13 an expert witness up, though, and say: Here is
14 what constitutes a -- a nuisance. Or I can
15 point to --

16 MR. LIU: Yeah.

17 JUSTICE GORSUCH: -- what EPA's water
18 quality standards are. And I'm not sure what
19 difference --

20 MR. LIU: I --

21 JUSTICE GORSUCH: -- as a practical
22 matter it would make.

23 MR. LIU: -- I -- I just think
24 Congress -- I think Congress would -- the
25 Congress of 1972 would vociferously disagree. I

1 mean, they thought water quality standards were
2 the linchpin on which the water of the United
3 States would be made clean.

4 JUSTICE GORSUCH: I -- I agree with
5 that. Yeah.

6 MR. LIU: And they didn't think
7 relying --

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

14 MR. LIU: To be clear, it's the states
15 that are set -- setting the standards. EPA is
16 merely issuing permits so that the state's own
17 view of clean water --

18 JUSTICE GORSUCH: So then --

19 MR. LIU: -- is achieved.

20 JUSTICE GORSUCH: -- that even begs
21 the question further, right? If -- if this is
22 just a circle, the state standard is the state
23 standard. That would be set in nuisance law
24 too. And so what -- what -- what --

25 MR. LIU: And -- and this was

1 basically the arguments that the proponents of
2 the House bill made. They said: Why do we even
3 need state water quality standards anymore?
4 Let's take out of the statute 33 U.S.C. 1313.

5 But the House bill retained the water
6 quality standard --

7 JUSTICE GORSUCH: Sure.

8 MR. LIU: -- provision.

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

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

19 MR. LIU: I -- I don't think so. I
20 mean, these limitations incorporate much more
21 specific standards than just general state tort
22 law. They say things like: Don't cause
23 floatable materials to be in the water. Don't
24 cause the water to have --

25 JUSTICE GORSUCH: That would be --

1 that would be pretty good evidence of the duty
2 in a nuisance suit, wouldn't it, the duty of
3 care?

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

10 JUSTICE GORSUCH: You don't think
11 Congress wanted to -- to ensure advance notice
12 to permittees of their obligations under the
13 law?

14 MR. LIU: I --

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

17 MR. LIU: I think, if permittees think
18 they lack -- they lack fair notice, they can
19 bring that sort of challenge. Again --

20 JUSTICE GORSUCH: No, that's not my --
21 Mr. Liu, my question was: Was part of what
22 Congress was trying to do is, as the Chief
23 Justice indicated, try to provide some certainty
24 on ex ante rather than just adjudicating all
25 this ex post in nuisance cases?

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

5 JUSTICE GORSUCH: Okay. Thank you. I
6 got it.

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

12 MR. LIU: I mean, to take the first
13 example, Justice Kavanaugh --

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

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

21 JUSTICE KAVANAUGH: -- and I --

22 MR. LIU: -- I don't think that
23 concern can justify throwing all of these out
24 across the board because --

25 JUSTICE KAVANAUGH: Well, Justice

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

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

17 What's wrong with that reading of the
18 two things together?

19 MR. LIU: I think it would read the
20 statute --

21 JUSTICE KAVANAUGH: How does that hurt
22 EPA, if you want to say that -- if you want to
23 respond to that? How does that harm EPA's
24 ability to regulate if they have to do it that
25 way?

1 MR. LIU: Oh, it's going to lead to
2 more permit denials, more permit delays as we
3 wait for the information to come in. It's going
4 to lead to less flexibility and more burdens for
5 the dischargers.

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

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

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas, anything further?

25 Justice Alito?

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

7 MR. LIU: Well, to be -- I mean, I
8 don't -- I don't think San Francisco is
9 intentionally discharging anything or --

10 JUSTICE ALITO: Well, the water that
11 it treats.

12 MR. LIU: Oh.

13 JUSTICE ALITO: It treats water, and
14 some water --

15 MR. LIU: Yes.

16 JUSTICE ALITO: -- is -- some water
17 flows out --

18 MR. LIU: Right.

19 JUSTICE ALITO: -- when there's an
20 overflow.

21 MR. LIU: Yeah. So the permit in
22 Attachment E contains a long list of monitoring
23 locations, and those locations help us
24 disaggregate what's causing what.

25 So there are monitoring locations that

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

7 JUSTICE ALITO: All right. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor?

10 JUSTICE SOTOMAYOR: Mr. Liu, maybe I
11 need to start from the beginning. When you're
12 obligated to give effluent limitations, could
13 you give a permit that says just meet water
14 quality controls?

15 MR. LIU: No.

16 JUSTICE SOTOMAYOR: Why not?

17 MR. LIU: Because the statute says
18 exhaust the technology-based effluent
19 limitations first. And we read "more stringent"
20 to mean resort to the (b)(1)(C) authority only
21 when those technology-based effluent limitations
22 aren't going to be enough.

23 JUSTICE SOTOMAYOR: You called this an
24 individual permit versus a general permit.

25 MR. LIU: Right.

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

4 MR. LIU: Right.

5 JUSTICE SOTOMAYOR: -- for its
6 combined rainwater and -- or stormwater and
7 sewerage systems. So it's individual in that
8 sense. What does that mean as opposed to a
9 general permit?

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

20 And part of that authorization -- it's
21 basically an agreement that once you get that
22 authorization, you're going to abide by the
23 terms of that general permit. And the general
24 permit has a long list of conditions but
25 typically includes a provision like this.

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

11 But -- but the tradeoff between not
12 having that information about how their
13 individual site operates is that we have to rely
14 on a more general prohibition like this.

15 JUSTICE SOTOMAYOR: So that -- this
16 presumes a general permit, it presumes when it's
17 talking about a general category of industry,
18 that --

19 MR. LIU: Yes.

20 JUSTICE SOTOMAYOR: -- certain
21 protocols are being followed.

22 MR. LIU: Right. There are some
23 protocols in the --

24 JUSTICE SOTOMAYOR: Those protocols
25 generally produce X amount or Y amount of

1 pollutant or effluents, and we're saying you can
2 do that, but only if you're going to go over
3 those set limits are we going to require you to
4 step in and do something else, correct?

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

6 JUSTICE SOTOMAYOR: That's what --
7 that's what happens with a general permit.

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

20 Does that matter in a situation like
21 this?

22 MR. LIU: No, it doesn't matter in a
23 situation --

24 JUSTICE SOTOMAYOR: Explain why.

25 MR. LIU: Well, because the one point

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

11 JUSTICE SOTOMAYOR: So your effluent
12 limitations are already telling it control all
13 these things that we know you can control and
14 control them in this way because there's better
15 technology you could put in?

16 MR. LIU: Yes. This permit exhausts
17 as far as we can exhaust the technology-based
18 effluent limitations.

19 JUSTICE SOTOMAYOR: Now what you're
20 saying with respect to the other water standards
21 that you're incorporating by reference is we
22 can't tell that because -- whatever reasons?

23 MR. LIU: Yeah. What -- here's what
24 we do know.

25 JUSTICE SOTOMAYOR: Mm-hmm.

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

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

17 But I think the last thing San
18 Francisco wants us to do is to start telling
19 them what to do without the information of how
20 their system works. We could write into the
21 permit reroute flows from X to Y --

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

1 MR. LIU: We don't mind an opinion
2 that says that.

3 JUSTICE SOTOMAYOR: Okay.

4 CHIEF JUSTICE ROBERTS: Justice Kagan,
5 anything further?

6 JUSTICE KAGAN: Yeah. So that's true
7 for the individualized permit holders. And then
8 you said for the general permits that you issue,
9 if we took up this invitation to say that this
10 mechanism is just not authorized and you could
11 not write the general permits that you write in
12 the way that you do --

13 MR. LIU: Right.

14 JUSTICE KAGAN: -- what would you do
15 instead and who would suffer from that?

16 MR. LIU: All the small businesses,
17 small farmers that rely on the general permits.
18 These are permittees who don't have the huge
19 companies that are able to navigate what
20 admittedly can be a complicated individualized
21 permit system. They rely on the simple thing of
22 filing a form with us and being able to engage
23 in construction 14 days later.

24 And so saying we cannot across the
25 board rely on these provisions is going to

1 undermine the whole point of the general permit
2 system and, you know, affect the economy of --
3 of small business owners.

4 JUSTICE KAGAN: And one last question
5 is: How long have you been doing this for, in
6 either the individualized context or the general
7 context? You know, when did this start? Is
8 this a consistent practice that EPA has
9 developed?

10 MR. LIU: So we -- in the CS -- CSO
11 context, it certainly has existed since the CSO
12 policy itself in 1994, which we understand as
13 blessing this sort of condition.

14 JUSTICE KAGAN: So, in this particular
15 context, almost 30 years?

16 MR. LIU: That -- that -- that's
17 right. And -- and I guess what I would say is,
18 again, it's our view of the statute that when we
19 are able to avoid relying on these, we should
20 avoid relying on these. Dischargers raise
21 concerns, but we have concerns too.

22 I mean, the Second Circuit case that
23 was alleged to be in conflict with the decision
24 below was a case brought by NRDC, and they said,
25 well, these are hard to enforce. And so

1 stepping into those shoes, they are, indeed,
2 harder to enforce.

3 In an ideal world, we would be able to
4 get perfect information and then use that
5 information to craft very tailored limitations
6 that are specific to a particular site and
7 particular discharges. It -- it's just, in the
8 real world, we lack that information.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: I have a few
14 questions.

15 You just referenced farmers would be
16 helped by -- the Farm Bureau Federation's in
17 here representing 6 million farm families, along
18 with an amicus brief that represents, as they
19 say, nearly ever business sector across the U.S.
20 economy. They're not happy with just leaving it
21 up to you to represent their interests, frankly,
22 and they say that your position will make it
23 impossible for many permittees to protect
24 themselves from unanticipated liability. They
25 say that their members, including the Farm

1 Bureau Federation, those farmers, and other
2 permittees are left exposed to the potentially
3 devastating and unnecessarily costly
4 consequences of a government enforcement action
5 or citizen suit.

6 So they're not -- they're not happy
7 with "trust us." Do you want to respond to the
8 Farm Bureau Federation argument?

9 MR. LIU: Sure. I think all regulated
10 parties would prefer to essentially have their
11 cake and eat it too, to not have to give us the
12 information but also not have to face these
13 Generic Prohibitions.

14 So I think what that -- the message of
15 that brief is that in their ideal world, not
16 only would they not have to give us the
17 information, but they wouldn't have to meet the
18 more generalized prohibitions. The statute
19 takes that option off.

20 JUSTICE KAVANAUGH: Presumably,
21 they're aware of that and filed the amicus brief
22 with that in mind, but, in any event, on to the
23 next one.

24 On the -- what you said to Justice
25 Alito about what the opinion could say, and you

1 said when we should avoid relying on these, when
2 we can avoid relying on these. Would you be
3 okay with an opinion that said we must avoid
4 relying on these when we can avoid relying on
5 them?

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

8 JUSTICE KAVANAUGH: Yeah, I thought
9 you would.

10 MR. LIU: -- because of the general
11 permitting context.

12 JUSTICE KAVANAUGH: Yeah.

13 MR. LIU: I -- I -- I think this is a
14 -- a balance of priorities. And in some
15 contexts, like the general permitting context,
16 the lack of information is an affirmative good.

17 It is something we want -- we don't
18 want to demand more information. And I don't
19 think any of the dischargers actually want to
20 have to go through the rigamarole of actually
21 providing it. And so, when there is good reason
22 that we are not relying -- that we don't have
23 the information necessary, whether it's because
24 of resistance by a party like San Francisco or
25 because it just doesn't make sense to demand

1 more information, then I -- then I don't think
2 these -- these limitations should be
3 invalidated.

4 JUSTICE KAVANAUGH: On the criminal
5 penalties point that Justice Barrett raised and
6 you said that hadn't been pursued, but,
7 obviously, civil and citizen suits are pursued.
8 And how much are you seeking from San Francisco?

9 MR. LIU: So we have not calculated
10 the damages, but --

11 JUSTICE KAVANAUGH: Do you know
12 roughly?

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

16 JUSTICE KAVANAUGH: Tens of millions?
17 Hundreds of millions?

18 MR. LIU: It may well be tens of
19 millions of dollars. I think what that reflects
20 is the over decades long failure of San
21 Francisco to update a system that it itself in
22 its own planning documents on CAER 947 admits
23 are aging and deteriorating.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: Just a quick
3 follow-up to that.

4 I think, when I asked you that
5 question about criminal penalties, you cabined
6 your answer to municipalities. Have you pursued
7 them in the context, in this general permitting
8 context, you know, on farmers or small
9 businesses?

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

12 JUSTICE BARRETT: Is that why you
13 cabined your answer to municipalities?

14 MR. LIU: No. I think it is -- it is
15 only because I had an answer for municipalities.

16 (Laughter.)

17 MR. LIU: My answer for -- my answer
18 in the other context is I don't know. But
19 here's -- here's what I can tell you. We view
20 it as exceedingly difficult to obtain a criminal
21 conviction for violating a provision like this.
22 That's because of the mens rea requirements in
23 this statute, as well as the
24 beyond-a-reasonable-doubt burden of proof.

25 And the -- the other thing I would say

1 is we have no interest in pursuing criminal
2 penalties because, when we have a situation -- a
3 situation like this, where the welfare of a
4 whole city is at stake, our main concern is
5 prospective injunctive relief.

6 We're not look -- our main focus is
7 not to see who we can penalize and put in jail.
8 Our main focus is how can we make this situation
9 better going forward. So our -- our main tool
10 for rectifying a situation like this is to seek
11 civil prospective injunctive relief.

12 JUSTICE BARRETT: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

15 JUSTICE JACKSON: I'm a little
16 surprised by the suggestion that the goal of the
17 statutory permitting process here was fair
18 notice. I thought the goal was to ensure that
19 there were clean waters in the United States and
20 that that was not actually happening under the
21 previous regime, and so Congress was giving the
22 EPA additional tools to effectuate that result.

23 MR. LIU: That -- that's correct. And
24 the problem with the pre-1972 regime was not
25 that it was unfair. It wasn't that enforcement

1 under the pre -- pre-1972 regime was -- was
2 unfair. It was that it was nonexistent.

3 JUSTICE JACKSON: Right. So we don't
4 have congressional findings, for example, that
5 the statute needs to be interpreted consistent
6 with an understanding of what would be most fair
7 to the polluters who are putting the sewage into
8 the water, is that correct?

9 MR. LIU: I don't think -- well, I'll
10 say this. I think Congress struck a balance in
11 the statute between pursuing clean water and
12 protecting the prerogatives of -- of polluters.

13 JUSTICE JACKSON: How so?

14 MR. LIU: If you look at 1319(d),
15 there is a statutory penalty provision that
16 says, when courts are crafting the correct
17 amount of statutory penalties, courts should
18 take into account things like the seriousness of
19 the violation, the economic impact of the
20 penalty on the violator.

21 JUSTICE JACKSON: I thought you were
22 going to say in terms of the -- the direct
23 statutory interpretation that you're putting
24 forward here. I hear the balance in your
25 statement that effluent limitations, it's clear

1 from the statute, are the first go-to --

2 MR. LIU: Yeah.

3 JUSTICE JACKSON: -- in trying to
4 ensure that the waters are clean but that what
5 (C) is doing is also allowing for other kinds of
6 limitations, to potentially include generic
7 limitations when the effluent limitations don't
8 suffice.

9 MR. LIU: Right.

10 JUSTICE JACKSON: That's what I
11 thought your argument was.

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

13 JUSTICE JACKSON: And that's why I
14 think it's not circular in any sort of real
15 sense because these other limitations are being
16 adjudged relative to the effectiveness of the
17 effluent limitations, so they only come in as
18 necessary to make sure that we reach the clean
19 water standards when the effluent limitations
20 aren't working.

21 MR. LIU: Exactly. And San Francisco
22 below made the argument that, well, these --
23 these limitations are not necessary because, in
24 their view, the other limitations in the permit
25 were already sufficient to protect water

1 quality, and the Ninth Circuit rejected that
2 argument, and there was no cert petition on that
3 issue.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Rebuttal, Ms. Steeley?

8 REBUTTAL ARGUMENT OF TARA M. STEELEY
9 ON BEHALF OF THE PETITIONER

10 MS. STEELEY: San Francisco's ask in
11 this case is simple. We simply want to
12 understand our permit limitations so that we can
13 comply with them.

14 My friends on the other side say they
15 use the Generic Prohibitions when they lack
16 information. That's simply inconsistent with
17 the way this has actually played out.

18 As we've noted in our reply brief,
19 certain divisions of EPA have put this in every
20 permit they issue. They've been very common in
21 San Francisco. But EPA already has tools that
22 address lack of information. They have an
23 entire regulatory guidance document for their
24 permit writers that tells them exactly how to do
25 it, and it tells them to set water quality-based

1 effluent limitations with a reopener clause in
2 the permit that allows them to reopen the permit
3 and impose additional limitations when they need
4 to.

5 And in San Francisco's particular
6 circumstance, we've been sending monitoring
7 information to EPA for decades about this
8 facility. It's a well-known facility to EPA.

9 I'd like to correct a couple -- a
10 couple things. Justice Kavanaugh, I -- my
11 friends on the -- my colleagues here have
12 calculated the numbers for the amount sought in
13 the litigation for the Bayside permit, and it
14 comes to \$10 billion. That's the statutory
15 penalties for the days at issue.

16 And in terms of, like, what's covered
17 under our permit, all of the outfalls are
18 covered. You'll see that at Petition Appendix
19 page 428. There's one permit that governs the
20 entirety of the facility and all of its
21 outfalls. That's joint by the state regional
22 board and EPA, but it's -- it's one system of
23 obligations that covers all the outfalls.

24 And then, finally, I'd like to explain
25 as another example of why this is such a

1 hardship for San Francisco, and I'll use our
2 friends in L.A. as an example.

3 Los Angeles versus NRDC on remand from
4 this Court, the Ninth Circuit considered a
5 cause-and-contribute requirement that's nearly
6 identical to the one before this Court.

7 In that case, NRDC argued that
8 monitoring data alone, monitoring data showing
9 an exceedance of water quality standards, was
10 enough by itself to impose liability on Los
11 Angeles. Los Angeles said: No, look, there's
12 80 other dischargers into this water. It's not
13 just us. You need to show something about our
14 own discharges in order to find liability.

15 The Ninth Circuit said no. The Ninth
16 Circuit said the monitoring data alone
17 exclusively per se established a violation of
18 law with no need to show anything about Los
19 Angeles's own discharges.

20 This is the problem here. With such a
21 broad standard, with such a broad basis for
22 liability, cities like Los Angeles and like San
23 Francisco can be subject to liability without
24 any advance notice that anything about our
25 discharges is going to cause a problem and --

1 and without the ability to prevent that
2 liability.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. The case is submitted.

5 (Whereupon at 12:58 p.m., the case was
6 submitted.)

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