No. 20-16605

United States Court of Appeals for the Ninth Circuit

CALIFORNIA RIVER WATCH,
Plaintiff – Appellant

v.

CITY OF VACAVILLE,
Defendant – Appellee

On Appeal from the United States District Court
for the Eastern District of California,
No. 2:17-cv-00524-KJM-KJN,
Hon. Kimberly J. Mueller

BRIEF FOR NATIONAL LEAGUE OF CITIES AND LEAGUE OF CALIFORNIA CITIES AS *AMICI CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING EN BANC

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Under Federal Rule of Appellate Procedure 26.1, the National League of Cities and the League of California Cities ("Amici"), by and through their undersigned attorney, hereby certify that they each have no parent organization and that no publicly held corporation owns ten percent or more of their stock.

Dated: November 15, 2021

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 state municipal leagues including the League of California Cities, NLC serves as a national advocate for more than 19,000 cities and towns representing more than 218 million Americans.

The League of California Cities ("Cal Cities") is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities and has identified this case as having statewide or nationwide significance.

Thousands of Amici's members operate their own municipal drinking water systems or work closely with other entities like water districts that supply drinking water. Amici respectfully submit this brief because the panel decision creates chaos

[1] Under Ninth Circuit Rule 29-2(a), Amici state that both parties have consented to this brief's filing.

for public drinking water suppliers in the Ninth Circuit serving tens of millions of customers.

FED. R. APP. P. 29(A)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting this brief. No person—other than the Amici, their members, or their counsel—contributed money intended to fund preparing or submitting this brief.

Dated: November 15, 2021

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SUMMARY OF ARGUMENT

Federal and state regulators limit drinking water contaminants under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f–300j-27, by adopting and enforcing maximum contaminant levels ("MCLs"), the "maximum permissible level of a contaminant." 42 U.S.C. § 300f(3); Cal. Health & Safety Code § 116275(f).[2] MCLs are designed to protect public health while balancing economic and technological feasibility. *See* 42 U.S.C. § 300g-1(b)(4)–(7); Cal. Health & Safety Code § 116365(a)–(d). It is undisputed that the City of Vacaville ("City") supplies drinking water that complies with MCLs for total chromium adopted by the U.S. Environmental Protection Agency ("EPA") and by California under its laws implementing the SDWA. *See California River Watch v. City of Vacaville* (*Panel Decision*), 14 F.4th 1076, 1083–84 (9th Cir. 2021) (Tashima, J., dissenting).

California River Watch ("CRW") nevertheless brought a single claim against the City under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901–6992k, for injunctive and other relief because the City provides drinking water with detectible concentrations of hexavalent chromium, E.R. 210–20

[2] The SDWA expressly authorizes states to adopt their own MCLs, provided they are "no less stringent" than federal ones. 42 U.S.C. § 300g-2(a)(1).

(complaint), a type of chromium, S.E.R. 71–75 (report of City's expert Dr. Margaret H. Whittaker).

This Court should grant rehearing en banc, vacate the panel decision, and affirm the district court on alternative grounds: RCRA does not provide for citizen suits against public water suppliers for the presence of contaminants in drinking water at concentrations below applicable MCLs adopted under the SDWA and state laws implementing the SDWA.

Specifically, CRW's claim is barred by RCRA's anti-duplication provision, which prohibits applying the statute in ways inconsistent with the SDWA. *See* 42 U.S.C. § 6905(a)–(b). As California courts have recognized, plaintiffs cannot sue public water suppliers for delivering water that complies with applicable MCLs. This safe harbor ensures that MCLs set by expert regulators structure the relationship between public water suppliers and federal and state governments, instead of "an arbitrary patchwork" of injunctions obtained by private litigants from nonexpert judges. *See Panel Decision*, 14 F.4th at 1087 (Tashima, J., dissenting).

The district court held otherwise because although there are federal and California total chromium MCLs, there is no MCL specifically limiting hexavalent chromium. E.R. 7, 189–91. This was error because CRW's claim is inconsistent with federal and California total chromium MCLs, which encompass hexavalent chromium.

The panel majority and the dissent did not consider whether to reverse the district court's anti-duplication holding and affirm on these alternative grounds. *Panel Decision*, 14 F.4th at 1083 n.7; *id.* at 1084 n.1 (Tashima, J., dissenting). This Court should grant rehearing and do so because: (1) the overbroad panel decision creates chaos for public water suppliers by treating them as RCRA "transporters" merely because contaminants appear in trace amounts in their drinking water, thus exposing them to novel litigation risks; (2) the alternative grounds are ready for resolution; and (3) affirming would promote finality and efficiency.

Although Amici support affirming on alternative grounds, they take no position on the other issues addressed by the district court, the panel decision, and the dissent: what is "solid waste" and "discarded material" under RCRA; whether a transporter must be involved in discarding waste to be held liable under RCRA; how to interpret this Court's decision in *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846 (9th Cir. 2011); and whether certain arguments were forfeited or waived.

ARGUMENT

I. RCRA's anti-duplication provision bars CRW's claim.

A. Legal Standards

The relevant part of RCRA's anti-duplication provision states:

> Nothing in this chapter shall be construed to apply to . . . any activity or substance which is subject to the [Clean Water Act], the Safe Drinking Water Act, [and other statutes] except to the extent that such application . . . is *not inconsistent* with the requirements of such Acts.

42 U.S.C. § 6905(a) (emphasis added).

CRW brings its claim under RCRA's citizen-suit provision, which is codified in the same chapter as the anti-duplication provision. *Id.* § 6972(a)(1)(B); E.R. 217–18 (complaint). It is undisputed that the City's "activity" of providing drinking water is subject to the SDWA. S.E.R. 176. Therefore, whether the anti-duplication provision bars CRW's claim turns on whether it is "not inconsistent with the requirements of" the SDWA. *See* 42 U.S.C. § 6905(a).

This Court recently interpreted the term "inconsistent" in *Ecological Rights Foundation v. Pacific Gas and Electric Co.*, where a plaintiff brought a RCRA citizen's suit to limit certain stormwater discharges. 874 F.3d 1083, 1087 (9th Cir. 2017). The EPA was authorized by the Clean Water Act ("CWA") to require permits for the discharges but had elected not to. *Id.* This Court held that the RCRA citizen's suit was not "inconsistent" with the EPA's permitting authority because applying

RCRA would not "contradict[] a *specific mandate* imposed under the CWA." *Id.* at 1095 (emphasis added). "[T]he potential for inconsistent overlap" between RCRA and the CWA was "insufficient; only an actual, and actually inconsistent, requirement triggers the RCRA anti-duplication provision." *Id.* at 1097. "Inconsistent" means "fundamentally at odds," or "[m]utually repugnant or contradictory, such that the application of one [requirement] implies the abrogation or abandonment of the other." *See id.* at 1095 (quotations omitted) (first alteration in original).[3]

B. CRW's claim is inconsistent with the SDWA.

The district court reasoned that because there is no MCL specifically limiting hexavalent chromium, there is no inconsistency between CRW's RCRA claim and the SDWA. E.R. 189–91 (order on City's motion to dismiss); *id.* at 7 (order on City's summary judgment motion).[4] This reasoning was flawed because the absence of a

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[3] This Court in *Ecological Rights Foundation* did not expressly decide whether the burden is on the plaintiff to show an absence of inconsistency, or the burden is on the defendant to show inconsistency. *See* 874 F.3d at 1094–100; *cf.* E.R. 190 (district court's analysis, which imposed the burden on the City). This Court need not address this issue because the City has amply demonstrated an inconsistency.

[4] The district court's analysis, E.R. 190 & n.1, relied on the following EPA webpage. U.S. Envtl. Prot. Agency, *Third Unregulated Contaminant Monitoring Rule*, https://perma.cc/58A7-2J38 (archived on Nov. 3, 2021).

hexavalent chromium MCL does not resolve whether CRW's claim is inconsistent with federal and California total chromium MCLs.

The City has demonstrated an inconsistency.[5] The EPA and California[6] have imposed "specific mandate[s]," *see Ecological Rights Found.*, 874 F.3d at 1095, under the SDWA by adopting MCLs for total chromium, which is comprised mostly of hexavalent and trivalent chromium.[7] An MCL is the "maximum permissible level of a contaminant" in drinking water. 42 U.S.C. § 300f(3); Cal. Health & Safety Code § 116275(f). Thus, public water suppliers are allowed to distribute drinking water that contains chromium at concentrations at or below the MCL. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 458 F. Supp. 2d 149, 153 (S.D.N.Y. 2006) (MCLs "establish the highest amount of any contaminant that may be present in drinking water."). The federal MCL for total chromium is 100 parts per billion, 40 C.F.R. § 141.62(b)(5), and California's more stringent standard is 50 parts

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[5] *See* E.R. 49–52, 206–08 (anti-duplication arguments in district court); Appellee Br. 60–68 (anti-duplication arguments on appeal).

[6] As noted, the SDWA expressly authorizes states to adopt MCLs that are "no less stringent" than federal ones. 42 U.S.C. § 300g-2(a)(1).

[7] Before the district court, but not on appeal, CRW argued that "[t]otal chromium and hexavalent chromium are separate and distinct chemicals." S.E.R. 369 n.5. This was a misunderstanding, misstatement, or misrepresentation. As the unchallenged evidence in the record demonstrates, chromium occurs mostly in two states—trivalent and hexavalent—and hexavalent chromium is a type of chromium. *See, e.g.*, S.E.R. 71–75 (report of City's expert Dr. Whittaker).

per billion, Cal. Code Regs. tit. 22, § 64431, tbl. A.[8] It is undisputed that total chromium concentrations in the City's water have consistently been below these MCLs.[9]

CRW nonetheless seeks injunctive and other relief that would necessarily impose more stringent requirements on the City. E.R. 219–20. This case is unlike *Ecological Rights Foundation*, where the EPA had not exercised its authority under the CWA to require a permit. *See* 874 F.3d at 1087. Here, the EPA and California have "imposed" "specific mandate[s]" under the SDWA, and CRW's claim "contradicts" that mandate. *See id.* at 1095.

The depth of the "[m]utual[] repugnan[cy]" between CRW's claim and the SDWA, *see id.* at 1095 (quotation omitted), is underscored by how expert regulators set MCLs. Federal and state regulators set MCLs as close as economically and technologically "feasible" to the level that would avoid any "known or anticipated adverse effects on" health with "an adequate margin of safety." *See* 42 U.S.C. § 300g-1(b)(4)(A)–(E); Cal. Health & Safety Code § 116365(a)(1)–(2), (b)(1)–(3).

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[8] A part per billion is a microgram per liter (µg/l).

[9] *Panel Decision*, 14 F.4th at 1083–84 (Tashima, J., dissenting); *see* E.R. 120 (CRW's motion for summary judgment, arguing that hexavalent chromium concentrations are as high as 30 parts per billion); *id.* at 163 (report of CRW's expert Dr. Larry L. Russell); S.E.R. 177 ¶ 6 (CRW's response to the City's statement of undisputed facts); *id.* at 223-24 (report of City's expert Adam H. Love).

These decisions require familiarity with water contamination and treatment. For example, regulators must consider whether reducing levels of one contaminant would "increase[] the concentration of other contaminants in drinking water" or otherwise "interfer[e] with the efficacy of drinking water treatment techniques or processes." 42 U.S.C. § 300g-1(b)(5)(A)(i)–(ii).

Federal and California total chromium MCLs account for the particular risks of hexavalent chromium. As the City has undisputedly demonstrated,[10] the EPA "developed" the current federal MCL for total chromium "from health effects data for [hexavalent chromium], the more toxic chromium species." 56 Fed. Reg. 3526, 3537 (Jan. 30, 1991).[11] The EPA had "conclude[d] that the presence of [hexavalent chromium] in drinking water should be minimized." *Id.* The EPA's MCL targeted total chromium instead of hexavalent chromium because trivalent chromium could oxidize into hexavalent chromium in water treatment systems, and hexavalent

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[10] E.R. 50–52 (City's motion for summary judgment); S.E.R. 75–76 (report of City's expert Dr. Whittaker); *id.* at 222 (report of City's expert Dr. Love); *see id.* at 183–85 ¶¶ 28–35 (CRW's responses to the City's statement of undisputed facts, which fail to show a genuine issue of material fact); Appellee Br. 60-68 (making this argument on appeal).

[11] This Court can take judicial notice of the agency materials Amici cite. 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed . . . ."); *see, e.g.*, *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 702 n.5 (9th Cir. 2004) (judicially noticing a proposed rule in the *Federal Register*).

chromium could reduce into trivalent chromium in the acidic digestive systems of mammals. *Id.* Put succinctly, the EPA could not rely on "a clear separation of [trivalent chromium] and [hexavalent chromium]" because their chemistry was "intertwined." *Id.* Since 1991, the EPA has twice reviewed its total chromium MCL and twice recognized that its total chromium MCL is based on, and accounts for, the adverse health effects of hexavalent chromium. 75 Fed. Reg. 15,500, 15,530 (Mar. 29, 2010); 67 Fed. Reg. 19,030, 19,057–58 (Apr. 17, 2002).

Meanwhile, California adopted its 50-parts-per-billion total chromium MCL in 1977. S.E.R. 222 (report of City's expert Dr. Love). This MCL was based on the EPA's "National Interim Drinking Water Standard" for chromium. *Id.* This interim standard was based on the EPA's understanding that "[c]hromium, *particularly in the hexavalent state*, is toxic to man."[12]

If this Court remands, the district court would interfere with federal and state regulators' decisions without the benefits of agency expertise and administrative procedures. The court would first address whether the hexavalent chromium in the City's drinking water poses an "imminent and substantial endangerment to health." *See* 42 U.S.C. § 6972(a)(1)(B). If it finds such an endangerment, the court would

[12] U.S. Envtl. Prot. Agency, *National Interim Primary Drinking Water Regulations*, at 63 (1976), https://perma.cc/R2JM-AMAW (emphasis added).

then decide what relief to issue. However, the SDWA and California's implementing statutes already require regulators to determine the levels of hexavalent chromium that water utilities may deliver to the public. The district court's remand proceedings necessarily would second-guess these determinations and risk imposing an infeasible drinking water standard, or—even worse—requiring a response that "increase[es] the concentration of other contaminants in drinking water" or otherwise "interfer[es] with the efficacy of drinking water treatment techniques or processes." 42 U.S.C. § 300g-1(b)(5)(A)(i)–(ii).

This is untenable. Condoning lawsuits like CRW's that seek to regulate drinking water through litigation would risk creating a patchwork of inconsistent injunctions that supplant the MCLs set by expert regulators. *See Panel Decision*, 14 F.4th at 1087 (Tashima, J., dissenting) ("The majority creates an arbitrary patchwork of RCRA drinking water regulation, as an overlay to the EPA's Safe Drinking Water regulations.").

The California Supreme Court's decision in *Hartwell Corp. v. Superior Court*, 27 Cal. 4th 256 (2002), is instructive. At the time, the state Public Utilities Commission ("PUC") and Department of Health Services ("DHS") had "concurrent

jurisdiction . . . over water quality safety [sic]." *Id.* at 273.[13] In *Hartwell*, the court considered whether claims for damages and injunctive relief against public water suppliers were consistent with Section 1759 of the California Public Utilities Code, which strips from state courts jurisdiction over actions that "interfere with the PUC in the performance of its official duties." *Id.* at 260. The court held that "[a]n award of damages on the theory that the public utilities provided unhealthy water, even if that water actually met DHS and PUC standards, would interfere with a broad and continuing supervisory or regulatory program of the PUC." *Id.* at 276 (quotation omitted). Injunctive relief also was unavailable because a "court injunction . . . would clearly conflict with the PUC's decision" that "the regulated utility defendants in this case were in compliance with DHS regulations and that 'no further inquiry or evidentiary hearings' were required regarding compliance." *Id.* at 278.

Like RCRA's anti-duplication provision, *Hartwell* reflects that complying with applicable MCLs gives public water suppliers a safe harbor from lawsuits over the quality of their water. Put another way, "we cannot permit courts . . . to reweigh the various factual and policy considerations that went into the regulatory agencies'

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[13] *Hartwell* was decided in 2002. California has since transferred DHS's powers over drinking water quality to the State Water Resources Control Board. *See* Cal. Health & Safety Code § 116365(a) ("The state board shall adopt primary drinking water standards for contaminants in drinking water . . . ."); *id.* § 116275(ab) (defining "state board").

determination on water quality standards." *In re Groundwater Cases*, 154 Cal. App. 4th 659, 681 (2007) (quotation and brackets omitted) (reaching this conclusion after considering *Hartwell*).

This limited safe harbor ensures that MCLs set by expert regulators—not injunctions obtained by private litigants from nonexpert judges—structure the relationship between public water suppliers and federal and state governments. This protects suppliers from the chaos that would result if claims like CRW's were allowed to proceed.

Significantly, this safe harbor for *public water suppliers* that provide a vital public service does not immunize *polluters* from liability under RCRA, other statutes, or common law. *See Hartwell*, 27 Cal. 4th at 279–82 (allowing citizens' claims against industrial polluters responsible for contaminating groundwater to proceed). It is well-established that MCLs do not "convey" to *polluters* "a license to pollute up to [the MCL] threshold." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 109 (2d Cir. 2013). So, a public water supplier "may be injured by contamination at levels below the applicable MCL" if "a reasonable water provider in [its] position would treat the water." *See id.* at 107–08 (quotations omitted) (applying New York law). In practical terms, polluters, not public water suppliers, are the proper defendants when drinking water complies with applicable MCLs. And a citizen plaintiff who believes an MCL inadequately protects human

health has a remedy against the regulator that sets the MCL—not against the public water supplier charged with complying with the MCL.

For these reasons, CRW's attempt to use RCRA's citizen-suit provision to impose more stringent drinking water standards on the City is barred by the statute's anti-duplication provision.

C. California's recent efforts to adopt a hexavalent chromium MCL show why the anti-duplication provision applies.

The fact that a previous California MCL limited hexavalent chromium concentrations in drinking water to 10 parts per billion, and the City's drinking water has sometimes exceeded that level, *see* E.R. 116 (CRW's motion for summary judgment in district court); *id.* at 213 (CRW's complaint), changes nothing. In fact, California's experience with its hexavalent chromium-specific MCL demonstrates precisely why the anti-duplication provision bars CRW's claim.

As CRW acknowledges, a California superior court vacated this hexavalent chromium-specific MCL (originally adopted in 2014) because of regulators' "failure to consider and determine economic feasibility." E.R. 116.[14] Instead of considering economic feasibility itself and setting a revised MCL, the court vacated it and

[14] *See* Judgment at 2, *Cal. Mfrs. & Tech. Ass'n v. State Water Res. Control Bd.*, No. 34-2014-80001850 (Cal. Super. Ct. May 31, 2017), https://perma.cc/5F8J-TQGL.

ordered regulators to develop a new one, a process that is still underway.[15] This history coheres with the limited judicial role in drinking water safety: courts may review MCLs but may not set them.

II. This Court should grant rehearing and affirm on these alternative grounds.

This Court's power to grant rehearing and affirm on alternative grounds is discretionary. *See Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 910 (9th Cir. 1993) ("Although we may affirm the grant of summary judgment on any basis presented in the record, we are not obliged to do so."); Fed. R. App. P. 35(a)(1)–(2) (standards for en banc rehearing). This Court should exercise its discretion for three reasons.

A. The overbroad panel decision creates chaos for public water suppliers.

Every day, thousands of public water suppliers in the Ninth Circuit deliver water to tens of millions of people.[16] This complicated system operates quietly and attracts little public attention because of a finely calibrated regulatory framework.

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[15] *See id.* at 3.

[16] The precise number is difficult to determine because there are so many. *See* Kristin Dobbin & Amanda Fencl, *Who Governs California's Drinking Water Systems?*, Cal. Water Blog (Sept. 1, 2019), https://perma.cc/328G-TDWX (providing figures for California).

Under federal law, these suppliers must comply with over eighty requirements for organic contaminants, inorganic contaminants, microbial contaminants, disinfection byproducts, and nucleotides. *See* 40 C.F.R. §§ 141.61–141.66. They must monitor their drinking water for thirty unregulated contaminants, *id.* § 141.40, comply with fifteen "secondary maximum contaminant levels" to provide aesthetically pleasing water, *id.* § 143.3, and comply with myriad monitoring, public notification, and reporting requirements, *id.* pt. 141, subpt. C–D, O, Q. They also are subject to numerous additional requirements under state and local law. To meet these requirements using limited funding, public water suppliers anticipate regulatory changes and plan far ahead for capital, operating, and maintenance costs.

The panel decision upsets this balance by creating novel, costly, and unpredictable litigation risks for public water suppliers. The panel held that a public water supplier can be considered a transporter of solid or hazardous waste under RCRA if drinking water contains detectible concentrations of a manmade contaminant, even if the supplier had no role in disposing of the contaminant. *See Panel Decision*, 14 F.4th at 1084–87 (Tashima, J., dissenting). Because of the ubiquity of manmade contaminants in the environment, most water suppliers at least occasionally detect them in their drinking water and therefore can be considered RCRA transporters under the panel decision's reasoning. Simultaneously, the panel did not recognize that RCRA's anti-duplication provision provides a safe harbor for

drinking water suppliers that comply with applicable MCLs and left untouched a district court decision that failed to apply that safe harbor. The panel decision therefore dramatically increases the scope of RCRA liability for public water suppliers and leaves them vulnerable to costly litigation.

This Court can avoid these risks, protect public water suppliers, and recognize the proper relationship between RCRA and the SDWA by affirming on these alternative grounds. These grounds are narrow and are the most straightforward way to dispose of this appeal. *Cf. United States v. Lee*, 821 F.3d 1124, 1127 n.2 (9th Cir. 2016) ("[T]he 'cardinal principle of judicial restraint' [is] that 'if it is not necessary to decide more, it is necessary not to decide more." (quoting *PDK Lab'ys v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment))).

B. The alternative grounds are ready for resolution.

The parties twice briefed the anti-duplication provision in district court. E.R. 206–08 (City's motion to dismiss); S.E.R. 368–70 (CRW's opposition to City's motion to dismiss); E.R. 49–52 (City's summary judgment motion); S.E.R. 167–71 (CRW's opposition to City's summary judgment motion). The court twice decided the issue incorrectly. E.R. 189–91 (order on motion to dismiss); E.R. 7 (order on summary judgment motion). The parties have briefed the issue on appeal. Appellee Br. 60–68; Appellant Reply Br. 18–22. The anti-duplication issue requires no further

factual development because it is undisputed that the City's water complies with all applicable MCLs. *Cf. Portman*, 995 F.2d at 910 ("We decline to resolve this conflict today because the parties have not briefed the issue, nor has the district court ruled on it.").

By contrast, one of the major areas of disagreement between the panel majority and the dissent—how to interpret this Court's decision in *Hinds Investments*, 654 F.3d 846—was never briefed by the parties. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (describing the party presentation principle).

C. Affirming would promote finality and efficiency.

The district court entered a final decision. Affirming on alternative grounds would preserve that final decision.

A remand also would be inefficient because the City may be unable to avoid a costly and time-consuming trial. Although the panel decision implied that the district court could reconsider the anti-duplication issue on remand, *see Panel Decision*, 14 F.4th at 1083 n.7, the district court has twice rejected the City's argument and would likely be reluctant to reconsider it, *see* E.R. 7, 189–91. Efficiency is especially important in the Eastern District of California, whose judges are among the most overburdened in the United States. *In re Approval of Judicial Emergency Declared in E. Dist. of Cal.*, 956 F.3d 1175, 1180 (9th Cir. 2020) ("It

has come to a time where the delivery of justice in the Eastern District of California is seriously imperiled.").

* * * *

For these reasons, Amici respectfully urge this Court to grant rehearing en banc and affirm on the alternative grounds that RCRA's anti-duplication provision bars CRW's citizen's suit.

Dated: November 15, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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