No. 04-889

In the
Supreme Court of the United States

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

PETITIONER,

v.

FRIENDS OF MILWAUKEE'S RIVERS AND
LAKE MICHIGAN FEDERATION,

RESPONDENTS.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case actually raises the following questions.

1. Whether the court of appeals properly applied Wisconsin's state law doctrine of res judicata.

2. Whether the court of appeals properly remanded this case to the district court for consideration of whether Wisconsin's "fairness" exception to its res judicata doctrine should apply here, given the unique facts of this case, *i.e.*, a municipal sewerage district, which consistently has failed for decades to comply with its permit obligations and the Clean Water Act, entered into a quick settlement of state enforcement litigation filed (after Respondents had filed their citizen suit) by state officials who had tolerated the district's years of noncompliance.

RULE 29.6 STATEMENT

Respondent Friends of Milwaukee's Rivers is a not-for-profit corporation organized under the laws of the State of Wisconsin. It does not have a parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Lake Michigan Federation is a not-for-profit corporation organized under the laws of the State of Illinois. It does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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RESPONDENTS' BRIEF IN OPPOSITION

This case does not present the issues asserted by Petitioners. Rather, the decision of the court of appeals below turns upon applying Wisconsin state law on res judicata to a unique set of facts: a municipal sewerage district that has not met its permit obligations for decades confronted with a citizen suit under the Clean Water Act quickly settles

a subsequently-filed state enforcement action filed by officials who steadfastly had refused to enforce its permit obligations before the citizen suit. Perhaps most significant, the court of appeals merely has remanded the case below to the district court for a more detailed analysis of how Wisconsin res judicata law applies to these facts. Consequently, the preclusive effect of the state court judgment has not even been resolved as yet. There is, therefore, no reason for this Court to issue a writ of certiorari in this case at this time.

STATEMENT OF THE CASE

Invoking their right to sue under the Clean Water Act ("the Act"), Respondents filed their citizen enforcement action in federal district court against the Milwaukee Metropolitan Sewerage District ("the District") in the morning of March 15, 2002, a date more than sixty days after notifying the District of their intent to sue, as allowed by the Act. 33 U.S.C. § 1365(b)(1)(A). Respondents' complaint alleged, in pertinent part, that the District had discharged untreated sewage (also referred to as sanitary sewer overflows ("SSOs")) from at least 165 locations, in fundamental and continuing violation of the Act and the District's discharge permit.

Later in the day of March 15, 2002, the State also filed a complaint against the District but did so in Wisconsin state court. The State's lawsuit alleged a total of only eight violations.

On May 29, 2002, in the State's lawsuit, the Milwaukee County Circuit Court approved a stipulation agreed to by the State and the District, which purported to resolve all claims the State raised in its lawsuit. Respondents were not parties to and did not participate in the formulation

of the stipulation. Two days later, on May 31, 2002, the District filed a motion in federal court to dismiss the Respondents' complaint, arguing (1) that the district court lacked subject matter jurisdiction and, in the alternative, (2) that in light of the resolution of the state lawsuit, the Respondents' claims were barred by the doctrines of mootness and res judicata. The district court granted the motion to dismiss on September 29, 2003, holding that Respondents' citizen suit was barred because the State had diligently prosecuted the District for its violations of the Act. In addition, the Court found that the doctrine of res judicata barred litigation of the issues raised in the Respondents' complaint.

BACKGROUND FACTS

For more than thirty years, the District has violated the terms of its Wisconsin Pollution Discharge Elimination System ("WPDES") permit and the Act repeatedly, discharging over 13 billion gallons of untreated wastewater into Lake Michigan and the rivers in and around of the City of Milwaukee. (S. App. at 00095.) The District is the municipal corporation that provides sewer services to the City of Milwaukee and twenty-seven other surrounding municipalities. (*Id*. at 00217.)[1]

The District has been, and currently is, subject to a WPDES permit, issued by the State under the Act, that specifically prohibits SSOs: "No bypass or overflow of wastewater from the permittee's sanitary sewage system is

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[1] Citations to the Record on Appeal are "R-__ at __." Citations to the Appellants' Attached Required Short Appendix below are "App. at __." Citations to the Appellants' Separate Appendix below are "S. App. at __."

authorized by this permit." (S. App. at 00128.)[2] Despite this clear prohibition against SSOs, SSOs have occurred from at least 165 separate locations between 1995 and 2002. (*Id*. at 00102.)[3]

The Wisconsin Department of Natural Resources (the "State") — the state agency entrusted with protecting Wisconsin's valued natural resources and environment — for thirty years has failed to discharge its responsibilities to stop these illegal SSOs. (S. App. at 00219, 00231.) When it became clear that the State had failed to perform the duty the federal government delegated to it and prosecute an enforcement action (through its attorneys, the Wisconsin Department of Justice) against the District, the Respondents filed this citizen suit in an effort to protect the citizens who reside, work, and recreate in the Milwaukee area and who use, enjoy, or rely on the waters of Lake Michigan and its surrounding waterways. (*Id*. at 00095 - 00114.)

Sewer Overflows Into Lake Michigan and Connecting Rivers.

Separated sanitary sewers are used to carry sewage, often untreated, from residences, commercial buildings, industries, and other institutions to interceptor sewers, which feed into wastewater treatment facilities. (S. App. at 00056-00057.) Separated sanitary sewers protect the public health and the environment by transporting this waste safely to

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2 The WPDES permit enumerates three exceptions to the prohibition of SSOs. At no time during this litigation has the District invoked one of these exceptions in its defense.

3 The District also oversees an older system of combined sewers, which carry both untreated sewage and storm water. Its WPDES permit allows a maximum of six combined sewers overflows ("CSOs") a year, provided that Lake Michigan's water quality does not suffer. (S. App. at 00231, 00269, 00278.)

wastewater treatment facilities for treatment before being discharged to local waterways. (*Id.* at 00057.) When a separated sanitary system has inadequate capacity or is improperly managed, however, the untreated sewage is discharged directly into local waterways. (*Id*.) Usually these discharges, or overflows, occur during heavy rain events. The District, however, also has caused a number of dry weather sewer overflows, which result from either operational errors or equipment failures. (*Id*.) These unpermitted discharges, whether during dry spells or heavy rain events, are referred to as sanitary sewer overflows, or SSOs, and they violate the Act. (*Id.*)

SSOs pose significant public health problems. (S. App. at 00263.) Untreated sewage can be extremely dangerous to the health of area residents, aquatic plants, and wildlife. (*Id.)* Chronic overflows, like those caused by the District, deprive fish and other aquatic life of oxygen. (*Id*. at 00263-00264.) Untreated sewage degrades the water quality of lakes and rivers. (*Id.)* One million gallons of SSO waste water can contain 833 pounds of biological oxygen demand, 16.7 pounds of phosphorous, 1,000 pounds of suspended solids, and 19 million pounds of fecal coliform.[4] (S. App. at 00264.) The District has discharged over one billion gallons of SSOs since 1995. (*Id*. at 00233.)

Untreated SSO waste water can taint community water supplies. (S. App. at 00265.) Raw sewage can force communities to close beaches and curtail recreational activities because of the health risks posed by the sewage, thus depriving citizens of their ability to enjoy its natural resources. (*Id*. at 00265-00266.) In recent years, Milwaukee area beach closures have increased due, in part, to significant

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[4] Biological oxygen demand is oxygen-demanding pollutants that deplete the volume of oxygen in the water. (R-23 at 97.)

repeated SSOs. (*Id.*) Residents who swim, boat, or fish in lakes and rivers that have been contaminated with sewage can be exposed to disease-causing bacteria, viruses, and other pathogens, including cryptosporidium, which can cause gastrointestinal illnesses and, in extreme cases, even death. (*Id*. at 00263.)

The District has violated its WPDES permit continuously at least since 1976. (S. App. at 00219, 00231.) From 1995 to 2002 alone, the District's sanitary sewer system discharged over 13 billion gallons of untreated sewage and storm water into Lake Michigan and the Milwaukee, Kinnickinnic, and Menomonee Rivers. (*Id*. at 00233.)

The State's Abdication of Enforcement Responsibility.

Since at least 1976, the State has abdicated its responsibility to hold the District accountable for the District's failure to comply with the Act and its WPDES permit. (S. App. at 00219, 00231.) In 1976, the District's predecessor sued the State seeking a declaratory judgment that the District need not comply with the Wisconsin regulations that implemented the Act's secondary pretreatment standards for wastewater. (*Id.* at 00001-00002.) The litigation was resolved by a stipulation (the "1977 Stipulation") that contained few enforceable standards and did not contain any provision requiring the District to cease SSOs or comply with the Act. (*Id*. at 00003.)

The District's key capital project to eliminate SSOs under the 1977 Stipulation was its planned "Deep Tunnel" project. (*See* S. App. at 00211.) The Deep Tunnel finally started operating seventeen years later, in 1994. (*Id*.) The District claimed that the Deep Tunnel would eliminate SSOs

by providing sufficient capacity for storing untreated waste and storm water until the untreated waste water could be sent to the treatment facilities. (*Id*. at 00222.) Soon after Deep Tunnel became operational, however, it became evident that this was not the answer to the District's capacity problem. (*Id.* at 00231.) The quality of the surface waters in the area the District serves did not improve (*id.* at 00268-00274), and the District continued to experience numerous significant SSOs that violated its WPDES permit and the Act. (*Id.* at 00211-00212, 00231, 00237-00239.) Nevertheless, the State did not initiate any enforcement action against, or otherwise diligently prosecute, the District to require further specific actions to comply with the law, or to recover penalties. (*Id.* at 00231, 00247.)

Respondents' Citizen Suit.

In light of this history of noncompliance and the State's lack of diligent enforcement, Respondents sent their statutory Notice Letter to the District on July 11, 2001, copying the State and other necessary parties. (S. App. at 00105-00111.) The Notice Letter identified "at least thirteen (13) occasions during which at least 165 SSO discharge locations within [the District's] jurisdiction discharged sanitary sewage" from the District's sewerage collection system since January 1, 1994, including dry weather SSOs. (*Id*. at 00106.)

Five days after receiving Respondents' Notice Letter, the State finally sent a letter to the District informing it that several SSO discharges identified in the Respondents' Notice Letter were violations of the District's WPDES Permit and the Act. (R-19 at 86-89.) Before this letter, the State had not notified the District of *any* SSO violations, even though the

District's quarterly reports revealed repeated violations of the District's WPDES permit and the Act. (S. App. at 00215.)

Respondents heard nothing from the District or the State in response to the Notice Letter until late in the afternoon of Friday, September 7, 2001, just one day before the expiration of the sixty-day waiting period required by the Act. (R-19 at 90-116.) On that date, Respondents received a facsimile copy of a "new" stipulation (the "2001 Stipulation") that the State had executed with the District, and which the State apparently already had filed that same day in the *1977* case before the Dane County Circuit Court. (*Id*.) The State and District provided no opportunity whatsoever for Respondents or the public to comment on the "new" stipulation. (R-18 at 7.)

The Dane County Circuit Court, however, subsequently refused to enter the proffered stipulation on the docket of its 1977 case, stating: "It does seem to me that at some point a court's involvement in a case must end. It also seems to me that this case has gone well beyond that point." (R-19 at 117.)

Only after the Dane County Circuit Court rejected the new stipulation did the District finally agree to discuss with Respondents their concerns over the terms of the proposed 2001 Stipulation and to meet with representatives of both organizations. (R-19 at 119.) Three months later, after settlement negotiations failed, Respondents filed this lawsuit on March 15, 2002 in the United States District Court for the Eastern District of Wisconsin. (R-1 at 1-10.)

Several hours after Respondents filed their citizen suit, the State filed a new lawsuit against the District. (R-18 at 9-10.) This time, however, the State filed its lawsuit in the

Milwaukee County Circuit Court, instead of the Dane County Circuit Court. (*Id*.) In contrast to the 165 locations where violations occurred, as alleged in Respondents' complaint, the State's complaint alleged that the District violated its WPDES Permit on only eight occasions and did not allege any dry weather SSOs. (R-18 at 10.)

The 2002 Milwaukee County Lawsuit and Stipulation.

On May 29, 2002, while the Respondents' citizen suit was pending, the Milwaukee County Circuit Court, at the request of the State and the District, entered a stipulation (the "2002 Stipulation") that settled the State's lawsuit. (S. App. at 00178-00204.) The 2002 Stipulation, which basically mirrored the 2001 Stipulation that the Dane County Circuit Court rejected, allowed the District to follow a "program" rather than requiring the District to stop violating the law and harming the environment. (*Id*. at 00179.) Just like the 1977 Stipulation, the 2002 Stipulation contained lengthy and generous schedules to implement vague and ambiguous corrective measures with few enforceable guidelines. (*Id*. at 00178-00204.) It also failed to provide any consequences in the event of the District's non-compliance with the 2002 Stipulation's provisions. (*Id*.) In addition, the 2002 Stipulation did not require the District to pay any civil penalties for any of the District's past SSOs and did not prohibit future SSO discharges from the District's sewerage system. (*Id*.)

Notably, the 2002 Stipulation also failed to incorporate many of the lengthy and detailed recommendations made by the State to the Natural Resources Board in a March 15, 2001 report entitled "Sewer Overflows in Wisconsin." (S. App. at 00089-00092.) Although the State made these same recommendations in its July 16, 2001 letter

to the District (R-19 at 86-88), the State stipulated to far less rigorous, and less protective, measures. (S. App. at 00178-00204.)

The Wisconsin Legislative Audit Bureau Report.

Only two months after the Milwaukee County Circuit Court approved the stipulation, the Wisconsin Legislative Audit Bureau released its audit evaluating the District (the "Audit Report"). (S. App. at 00205-00301.) This report came on the heels of the earlier report produced by the State to the Natural Resources Board in response to the escalating number of SSOs that occurred in 1999 and 2000. (*Id*. at 00050.) The Audit Report, titled "An Evaluation: Milwaukee Metropolitan Sewerage District," highlighted the State's continuing failure to act in an effective and diligent manner to address the District's continued violations of the Act, and graphically detailed how the District had failed to eliminate the discharge of sewage into area waterways. (*Id*. at 00211-00213.) The Audit Report noted that the Deep Tunnel had not functioned in the manner in which the District had promised. (*Id*. at 00211-00212.) Although the Deep Tunnel was designed to "virtually eliminate" SSOs and significantly reduce combined sewer overflows, both types of overflows repeatedly have occurred in each year since the Deep Tunnel became operational. (*Id*. at 00231.)

The Audit Report also found that the District has had serious and continual operational and management problems. (S. App. at 00240-00244.) For years, the District has failed to address inflow and infiltration problems caused by groundwater leaking into the sewerage system, despite being aware of the problem. (*Id*. at 00239-00240.) Because it has not controlled the inflow and infiltration of groundwater, the District frequently directs its contractor, United Water

Services, to discharge untreated sewage into Lake Michigan and the surrounding waterways even when the Deep Tunnel is at significantly less than capacity. (*Id*. at 00240, 00243, 00259-00260.) This action allowed an additional 107 million gallons of untreated wastewater to be discharged into area waterways during six overflow events from June 1999 to December 2001. (*Id*. at 00243.) These unlawful overflows also occurred because the District allowed United Water Services to shut off Deep Tunnel pumps during periods of peak electricity rates to save money. (*Id*.) During the summer of 2002, the District's contractor also failed to repair a broken sluice gate, which, on several occasions, also allowed significant overflows. (S. App. at 00280.) The Audit Report further noted that, instead of allocating its resources to ensure compliance with its WPDES permit and the Act, the District often makes decisions concerning resource allocation based on faulty economic and political considerations. (*Id*. at 00254-00258.)

The District's Performance Since The 2002 Stipulation.

The 2002 Stipulation has failed to stop significant SSOs from occurring. (S. App. at 00305-00308.) During one week in August 2002, the District dumped 412 million gallons of sewage into Lake Michigan and rivers surrounding Milwaukee – the largest such overflow in nearly two years. (*Id*.) Boaters on Lake Michigan at the time noted that "debris including condoms and other trash generally flushed from toilets ended up in Lake Michigan." (*Id*. at 00307.) Observers of the Milwaukee and Kinnickinnic Rivers noted that the sewage discharged into those waterways contained a wide assortment of debris, including bottles, condoms, bags, and tampons. (*Id*.)

Indeed, even after argument before the court of appeals in this case, which occurred on March 29, 2004, the District's poor performance continued. As the court of appeals noted in its opinion, heavy rainfalls in May 2004 led the District to dump "'an unprecedented 4.6 *billion* gallons of raw sewage' directly into Lake Michigan and Milwaukee area streams and rivers." (Pet. App. A, at 3a n.1, quoting Rohde and Schultze, *Sewage Dumped in May: 4.6 Billion Gallons*, Milwaukee Sentinel, May 29, 2004, at IA (Court's emphasis)). Half a billion gallons of that total came from SSOs; the remainder came from CSOs.

The Court of Appeals Opinion.

The court of appeals issued a carefully-crafted 35-page opinion that demonstrates a complete understanding of the highly-detailed record on appeal and a thoughtful analysis of the law. After an accurate and unchallenged outline of the Clean Water Act's conditions for filing and maintaining a citizen suit (Pet. App. A at 8a-9a), the Court addressed whether any of the State's actions had barred Respondents' suit *ab initio*, and concluded that none had. (*Id*. at 9a-18a.) The District's Petition leaves this conclusion unchallenged. In other words, the District has abandoned its contentions that the Clean Water Act barred Respondents from filing their citizen suit in the first place in light of any actions the District or the State had taken in court or administratively.

The court of appeals then turned its attention to the district court's ruling on res judicata. The Clean Water Act does not specify what effect to give the settlement of a State enforcement action filed after the commencement of a citizen suit. (*Id*. at 18a.) The court of appeals rejected Respondents' argument that judgment in an after-filed state enforcement action cannot have a res judicata effect upon a prior-filed,

ongoing citizen suit. (*Id*. at 22a & n.9.) Instead, the court of appeals ruled, as the District had argued, that Wisconsin's doctrine of res judicata governs whether the settlement of the state enforcement action between the State and the District precluded Respondents' citizen suit. (*Id*. at 18a-19a.) Assessing Wisconsin res judicata law, the court of appeals rejected Respondents' argument that res judicata did not apply to their citizen suit because that citizen suit is broader than, and different in scope from, the State enforcement action. The court of appeals further rejected Respondents' argument that there could be no privity between the State and Respondents. (*Id*. at 19a-22a & n. 9.)

The court, however, also rejected the District's position that Respondents were bound by res judicata even if the State had not diligently prosecuted its enforcement action. (*Id*. at 22a.) Ultimately, after examining the record facts concerning the State's prosecution of its after-filed enforcement action, the court of appeals concluded that questions remained for the district court to address concerning the diligence, or lack thereof, of the State's prosecution. (*Id*. at 31a-33a.) Consequently, the court remanded the matter and, in doing so, specifically directed the district court to address the question of the State's diligence, and also to "determine whether Wisconsin's fairness exception to the res judicata doctrine should be applied here." (*Id*. at 32a-33a & nn. 16-17.)

In so concluding, the court of appeals made the following observation concerning the conduct of the State and the District, up to and including the 2002 Stipulation: "The record to date does not inspire confidence that effective and timely action will be taken to address problems of long standing. While the 2002 Stipulation will hopefully result in fewer and smaller violations after the mandated projects are

completed, it is still, when all is said and done, a stalling tactic rather than a compliance strategy." (*Id.*)

Although the District did not ask the court of appeals for a stay pending this Petition under 28 U.S.C. § 2101(f), it did ask the district court to stay the proceedings until this Court ruled on this Petition. Upon Respondents' objection that such a stay was merely another "stalling tactic" to delay compliance, the district court denied that stay motion. The case is now proceeding to a resolution of the res judicata issue in the district court.

REASONS FOR DENYING THE PETITION

As a review of the opinion of the court of appeals reveals, the court agreed with the District that Wisconsin state res judicata law applies to determine whether Respondents' Clean Water Act citizen suit may proceed in light of the District's prompt settlement of the State's after-filed enforcement suit. (Pet. App. A at 18a-19a.) The District's disagreement with the court of appeals concerns how the court applied Wisconsin state law. Consequently, the decision below presents only the questions of whether the court of appeals has correctly interpreted Wisconsin's doctrine of res judicata and whether that court has concluded correctly, based on the factual record before it, that a remand was required to assess whether the District's hasty settlement with the State should bar this suit under Wisconsin state law of res judicata. Should the district court decide that this case falls within Wisconsin's fairness exception to its res judicata doctrine, proceedings before this Court will be moot, because no ruling by this court on the issues the District has raised could then bar this citizen case from going forward.

I. This Court Should Not Issue The Writ Of Certiorari To Review The Decision Below, Which Applies Wisconsin State Law And Holds Merely That A Remand Is Necessary To Determine Whether Wisconsin's Doctrine Of Res Judicata Applies To Bar This Suit.

Although the District seeks to cloak the decision below in federal garb, its complaint is with the court's application of state law. In its Petition, the District states: "The res judicata effect of final state court orders depends instead on the preclusion law of that State." (Pet. at 14.) The court of appeals so held. (Pet. App. A at 18a-19a.) Consequently, there is no issue here concerning the standard to be applied under 28 U.S.C. § 1738.

Rather, the District's complaint with the decision below is that "the Seventh Circuit ignored Wisconsin law under which persons with the same legal interests are held, as a matter of law, to be in privity. . . . Moreover, the Wisconsin Supreme Court has never applied or adopted § 42(1)(e) of the RESTATEMENT (SECOND) OF JUDGMENTS (1982), on which the Seventh Circuit relied for its authorization to graft a federal diligent prosecution analysis onto Wisconsin preclusion law." (Pet. at 15.)[5]

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[5] Nor has the Wisconsin Supreme Court ever *rejected* section 42(1)(e), though the Wisconsin courts have adopted other sections of the RESTATEMENT (SECOND) OF JUDGMENTS many times. *See*, *e.g.*, *Universal Die and Stampings, Inc. v. Justus*, 174 Wis. 2d 556, 567, 497 N.W.2d 797, 802 (1993) (discussing Res. (2d) Judgments sec. 44); *Michelle T. v. Crozier*, 173 Wis. 2d 681 688-89, 495 N.W.2d 327, 330 (1993) (discussing Res. (2d) Judgments secs. 77 & 85); *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 311, 334 N.W.2d 883, 886 (1983) (discussing Res. (2d) Judgments sec. 24 & 25). As the following text illustrates, however, this is not the kind of issue worthy of a grant of certiorari.

This Court does not review questions of state law and therefore should have no interest in assessing the validity of the ruling on Wisconsin res judicata law by the court of appeals. "The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar. . . ." *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). But even if this Court were interested in Wisconsin's doctrine of res judicata, the District would be in no position to ask this Court to look over the shoulder of the court of appeals. In its brief to that court, the District cited only one Wisconsin state court case on res judicata, *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 525 N.W.2d 723 (1995) — which the court of appeals used as its primary guidepost on this issue. (*Compare* Brief of Appellee at 44-48, *with* Pet. App. A at 19a.) Of the ten other cases the District cited on res judicata, nine come from federal courts and one from Indiana state court. (Brief of Appellee at 44-48.) The District did *not* cite the court of appeals to *Gerhardt v. Estate of Moore*, 139 Wis. 2d 833, 407 N.W.2d 895 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988), *rev'd on other grounds*, 150 Wis. 2d 563, 441 N.W.2d 734 (1989), the *only* case it cites to this Court for the proposition that Wisconsin's doctrine of res judicata applies even though the State had failed to prosecute its enforcement action diligently.[6]

Ironically, the court of appeals discussed more cases from the Wisconsin Supreme Court in its opinion than the

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[6] Moreover, *Gerhardt* is inapposite. *Gerhardt* was a paternity case instituted by the State, in which the Wisconsin Supreme Court concluded that the *mother's* interests and the *child's* interests were in many respects identical. As between the *State* and the child's interests, the Wisconsin Supreme Court said that "the district attorney, *in deciding whether to initiate* a paternity action, did not represent the interests of the illegitimate child." 139 Wis. 2d at 840 (1987) (Court's emphasis).

District did in its brief, as well as many of the federal decisions the District had cited. (*See* Pet. App. A at 18a-33a & nn. 16-17.) Included among these cases are several discussing Wisconsin's fairness exception to its res judicata doctrine, *see Sopha v. Owens-Corning Fiberglass Corp.*, 230 Wis. 2d 212, 236, 601 N.W.2d 627, 638 (1999); *McCourt v. Algiers*, 4 Wis. 2d 607, 91 N.W.2d 194 (1958); *Froebel v. Meyer*, 217 F.3d 928, 935 (7th Cir. 2000) (Pet. App. A at 32a-33a & nn. 16-17). Because the court of appeals singled out Wisconsin's fairness exception to its res judicata doctrine for consideration on remand, this state law exception to a state law doctrine provides an independent state law basis for the decision of the court of appeals to remand. (*Id.*)

Furthermore, the District's supposed conflict between the decision below and *U.S. Envtl. Prot. Agency v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990), is illusory. Indeed, the court of appeals below cited *City of Green Forest* with approval in connection with its privity analysis. (Pet. App. A at 22a.) As did the court of appeals below, the court in *City of Green Forest* stated: "We recognize that there may be some cases in which it would be appropriate to let a citizens' action go forward in the wake of a subsequently-filed government enforcement action." 921 F.2d at 1404. In *City of Green Forest*, the court deemed the consent decree negotiated by the U.S. E.P.A. sufficient to avoid that eventuality: "In view of the consent decree in the instant case negotiated by the EPA and Green Forest, however, this is not such a case." *Id.* After a review of the state's history of non-enforcement and the failure of the hastily-assembled settlement even to chart a course towards compliance by the District with its permit obligations (after more than thirty years of noncompliance), however, the court of appeals below remanded this case to the district court with directions to determine whether this *is* "such a case."

Indeed, the District itself reveals the lack of a conflict between the decision below and *City of Green Forest*. In straining to make two cases applying the same law to very different facts appear to conflict, the District accuses the court of appeals below of "paying lip service" to the appropriate standard. (Pet. at 19.) In other words, the District acknowledges that the court of appeals identified the standard correctly, but argues that the court applied it incorrectly. Even if it were true that the court of appeals misapplied the correct standard below — and it is not — that would not justify a grant of certiorari: "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." S. CT. R. 10.

Were these reasons not enough to deny this Petition, there is yet another: this case is currently ongoing before the district court, which is addressing state law issues that may well moot this appeal or, at the very least, render any opinion of this Court advisory. For example, even in the unlikely event that this Court were to conclude that Wisconsin law would bind Respondents to the settlement between the State and the District although the State's prosecution fell far short of diligent, the district court could conclude, based on the full record compiled during its ongoing proceedings, that this case falls within Wisconsin's fairness exception to its res judicata doctrine. This Court's ruling would not even control the outcome of this case in that instance — and of course its holding would be subject to a subsequent contrary decision by the Wisconsin Supreme Court, which is the ultimate arbiter of the scope of Wisconsin's res judicata doctrine. Yet "if the same judgment would be rendered by the state [here lower] court after we corrected its views of federal laws, our review could amount to nothing more than an advisory

opinion." *Michigan v. Long*, 463 U.S. at 1041-42 (*quoting Herb v. Pitcairn*, 324 U.S. 117, 124-25 (1945)).

Furthermore, if the lower courts were to conclude on remand that the State's conduct constituted diligent prosecution sufficient to invoke the bar of Wisconsin's res judicata doctrine — though Respondents acknowledge that this is an unlikely outcome — then this Court's proceeding would prove moot as well. *Id.*; *see generally Benton v. Maryland*, 395 U.S. 784, 788 (1969) ("It is well settled that federal courts may act only in the context of a justiciable case or controversy."); *cf. Mills v. Green*, 159 U.S. 651, 653 (1895) (noting that an appellate court that had jurisdiction over an appeal when it was filed nevertheless must dismiss the appeal when subsequent events moot the appeal).

II. The Judgment Below Does Not Conflict With Precedent From Other Circuits And Is Consistent With *Gwaltney.*

The court of appeals did *not* "adopt[] an interpretation of § 1365(b)(1)(B)'s diligent prosecution provision that requires the district court to second-guess the State's choice of remedy" (Pet. at 20) and consequently did *not* create any split among the circuits. To the contrary, the court of appeals expressly "recognize[d] that diligence on the part of the State is presumed." (Pet. App. at 23a.) Not a single court of appeals, however, has ever held that the presumption of diligence accorded the State is irrebuttable; such a holding would render the Clean Water Act's diligent prosecution requirement a nullity.

What the court of appeals actually did, therefore, was apply the proper legal standard for diligent prosecution to the unique factual record presented by this case. That record revealed a history of State enforcement so inept that the

District has not had to comply with its permit or the Act for more than two decades. (Pet. App. at 31a.) The factual record also revealed that the State, having failed to commence any enforcement proceeding against the District until after Respondents filed their citizen suit, hastily agreed to a settlement that effectively provided the District with another decade of relief from having to comply with its permit. (*Id.*) Specifically, the record below contained, among other proofs, the District's "own admission that the 2002 Stipulation is aimed at reducing, not eliminating, violations. . . ." (*Id.*) Even so, the court of appeals did not conclude as a matter of law that there was no diligent prosecution and therefore no res judicata; rather, it remanded to the district court for a more careful analysis of the diligence issue. (*Id.* at 32a-33a.)

The contention that, by citing to *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991), the court of appeals added to a circuit split and abandoned *Gwaltney of Southfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), is just plain wrong. The court of appeals cited *Atlantic States* twice. First, it did so as authority for rejecting *Respondents'* argument that privity can never be established between a suing citizen and the State when the citizen suit precedes State enforcement. (Pet. App. at 22a n. 9.) Second, the court of appeals cited *Atlantic States* for the unremarkable proposition that courts may consider as one factor in assessing the diligence of a State prosecution "whether violations will continue notwithstanding the polluter's settlement with the government." (*Id.* at 31a.) The District surely does not complain of the former, and cannot locate a single case holding that the latter is not a proper factor to consider in assessing diligence.

As for *Gwaltney*, the District's repeated suggestion that the court of appeals has abandoned that decision is incorrect. (*See* Pet. at 12, 16, 20.) In fact, the court of appeals cites *Gwaltney* in support of its discussion of the reasons that the State is presumed to have acted diligently. (Pet. App. at 22a-23a.) But *Gwaltney* does not create an irrebuttable presumption that the State is diligently prosecuting a suit filed after commencement of a citizen suit that challenges ongoing violations; to the contrary, its hypothetical discussion focuses on whether citizens may file suit addressing past violations "months or years" after the Government concluded its enforcement as to those violations. 484 U.S. at 61. Hence, *Gwaltney* is quite different from this case. Indeed, here the court of appeals simply remanded to the district court with directions to determine whether the facts rebut the presumption of diligent prosecution. (Pet. App. A at 32a-33a.)

Similarly, the District's effort to portray a conflict among the circuits based on the decision below, on the one hand, and *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994) (*see* Pet. at 20-25) or *North & South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552 (1st Cir. 1992) (*see* Pet. at 22-25), on the other, is equally incorrect. The court of appeals commenced its privity discussion with a quote from *Comfort Lake Ass'n v. Dresel Contracting*, 138 F.3d 351 (8th Cir. 1998), a case decided by the Eighth Circuit four years after its *Arkansas Wildlife* decision. (*See* Pet. App. at 21a.) *Arkansas Wildlife* is perfectly consistent with *Comfort Lakes* — indeed, both opinions were authored by Judge McMillian — and thus with the decision below as well. The court of appeals also cites *Scituate* with approval in its discussion of the presumption it was according the State in this case. (*See id.* at 24a.) In

other words, even though their outcomes may differ, all of these cases apply the same legal principles.

The District also tries unsuccessfully to demonstrate a circuit split using *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004). But *Ellis* cites with approval to *Atlantic States*, *see* 390 F.3d at 475 — the very decision that, the District claims, lured the court of appeals below into a circuit split with *Ellis*. Obviously, if both *Ellis* and the decision below rely on *Atlantic States*, they do not stand on opposite sides of a circuit split over whether *Atlantic States* misstates the law.

The court of appeals below reached an outcome different from that in these cases not because it was applying a different standard — and not even because it was applying the same standard differently — but rather because the underlying facts of this case are different from the facts in those cases in many outcome-determinative ways. The *Arkansas Wildlife* decision is a perfect illustration. That case differs from this in no fewer than four key particulars, each of which would justify a different outcome under the same law. First, Arkansas law allowed the *Arkansas Wildlife* plaintiff to intervene as of right in the State's action, which is consistent with the federal scheme. 29 F.3d at 381. Plaintiffs in this case, however, had no such comparable right under Wisconsin law. Second, the administrative order at issue in *Arkansas Wildlife* actually required compliance with the law, whereas here the State has not required the District to comply with its permit or the law. *Id.* at 378. Third, in *Arkansas Wildlife* the plaintiff was allowed limited jurisdictional discovery — a necessary benefit the district court denied Plaintiffs. *Id.* Fourth, the Arkansas state agency actually imposed civil monetary penalties against the violating entity; here the State has never penalized the

District for its repeated SSOs. *Id.* There is, therefore, no conflict of law for this Court to address.

Ultimately, the court of appeals was not even directly addressing federal law here. (Pet. App. A at 22a.) Rather, it was seeking guidance from federal law on the state law issue of privity under Wisconsin's doctrine of res judicata. Consequently, the decision below does not have a direct impact on the development of what constitutes diligent prosecution under federal law. Moreover, because it addresses state law, this decision remains subject to rejection by the Wisconsin Supreme Court. Review by this Court would be pointless.

Perhaps most important, the decision below was forged in the furnace of the factual record before the lower courts. The State's lax conduct here overcame the presumption favoring the State, at least at the dismissal stage, thus requiring a remand to develop a fuller factual record. The facts — at least as known at this preliminary stage — do not make this case an appropriate vehicle for making legal decisions of broad and general import. *See Taggart v. Weinacker's Inc.*, 397 U.S. 223, 225 (1970) (dismissing certiorari as improvidently granted where the legal question was "overshadowed by special facts of the case").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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