No. 24-350

In the
Supreme Court of the United States

PORT OF TACOMA, ET AL.,
Petitioners,

v.

PUGET SOUNDKEEPER ALLIANCE,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FARM BUREAU FEDERATION, AMERICAN FOREST & PAPER ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Farm Bureau Federation ("AFBF") was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. AFBF's mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts.

The American Forest & Paper Association ("AF&PA") serves to advance U.S. paper and wood

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

products manufacturers through fact-based public policy and marketplace advocacy. The forest products industry is circular by nature. AF&PA member companies make essential products from renewable and recyclable resources, generate renewable bioenergy, and are committed to continuous improvement through the industry's sustainability initiative—Better Practices, Better Planet 2030: Sustainable Products for a Sustainable Future. The forest products industry accounts for approximately five percent of the total U.S. manufacturing GDP, manufactures about $350 billion in products annually, and employs about 925,000 people. The industry meets a payroll of about $65 billion annually and is among the top 10 manufacturing sector employers in 43 States.

The Associated General Contractors of America, Inc. ("AGC of America") is the nation's largest and most diverse trade association in the commercial construction industry, representing more than 28,000 companies through a nationwide network of chapters in all 50 states, the District of Columbia, and Puerto Rico. AGC of America's member firms are engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers. These construction activities on land and water often require Clean Water Act permits before proceeding. AGC of America works to ensure the continued success of the commercial construction industry by advocating for federal, state, and local measures that support the industry; providing education and training for member firms; and connecting member firms with resources needed to be successful businesses and responsible corporate

citizens. AGC of America's goal is to serve its members by advancing the profession of construction and improving the delivery of the industry's services consistent with the public's interest.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 States and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.91 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of private sector research and development in the nation. The NAM is the voice for the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Mining Association ("NMA") is a national trade association whose 250-plus members include most of the producers of the nation's coal, metals, agricultural, and industrial minerals; the manufacturers of mining equipment; and other firms serving the mining industry. NMA's members produce a range of commodities, all of which are essential to U.S. economic and national security, supply chain, and energy and infrastructure priorities. The NMA is the only national trade association that serves as the voice of the entire U.S. mining industry and the thousands of American workers it employs before Congress, the federal agencies, and the judiciary.

The Ninth Circuit has upset the delicate balance that Congress struck for enforcing the Clean Water

Act ("CWA"). And, as Judge O'Scannlain recognized, this mistaken approach "promises to invite excessive, costly, and counterproductive citizen suits" that Congress never authorized. Pet.App.20 (citation omitted). *Amici* have a significant interest in preventing that result. Their members are frequent targets of meritless citizen suits driven by the prospect of exorbitant attorney's fees. *See* 33 U.S.C. § 1365(d). And nowhere is that more true than in the Ninth Circuit, where plaintiffs "disproportionately" file suit because the court "is perceived to be favorable for environmental litigants." David Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 Colo. L. Rev. 377, 427 (2021). *Amici* thus submit this brief to emphasize the importance of the question presented and to urge this Court to reject the Ninth Circuit's distortion of the CWA and affirm that citizen suits under the Act can be used to enforce only federal law, not state law.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is a prime candidate for this Court's review. There can be no doubt that the Petition tees up a clean circuit split on an issue of nationwide importance. Indeed, in the decision below, the Ninth Circuit acknowledged that its position "directly conflicts with" that of the Second Circuit. Pet.App.13 (citation omitted).

The Ninth Circuit also falls squarely on the wrong side of the split. The court's reading of the CWA permits private plaintiffs to bring an action in federal court against a state governmental entity for alleged violations of state law. That remarkable

interpretation raises substantial separation of powers and federalism concerns, which would present serious constitutional questions if Congress had in fact authorized private plaintiffs to enforce any and all state-law permit conditions.

But Congress did not do so. In the CWA, Congress authorized citizen suits for alleged violations of "a permit or condition of a permit issued under section 1342." 33 U.S.C. § 1365(f)(7). That section establishes the federal permitting regime. *See id.* § 1342(a). And it makes clear that state-permit programs are "establish[ed] and administer[ed] *under State law*," meaning States can impose additional requirements under their own state-law authority. *Id.* § 1342(b) (emphasis added). Such a state-permit condition is thus not issued "under" section 1342. And the CWA does not authorize citizen suits in federal court to enforce state-issued permit conditions that sweep beyond the scope of the Act's coverage.

The Ninth Circuit failed to account for this unambiguous text. And its mistaken interpretation would raise serious constitutional questions in at least three ways. First, it would exacerbate concerns that citizen-suit provisions violate Article II's vesting of the "executive Power" in the President, U.S. Const. art. II, § 1, cl. 1, who "shall take Care that the Laws be faithfully executed," *id.* art. II, § 3. Second, it would effectively strip the States of their sovereign discretion over whether and how to enforce their own laws. And third, it would raise the question whether Congress has expanded federal jurisdiction for citizen suits beyond Article III's limits. The constitutional avoidance canon, as well as the CWA's statutory

structure, counsels strongly against adopting the Ninth Circuit's untenable view.

The question presented is also critically important. Effluent limitations derived from water quality standards are primarily set by the States. Indeed, States issue hundreds of thousands of National Pollutant Discharge Elimination System ("NPDES") permits to businesses and municipalities. And many of these permits contain requirements derived from state law. The Ninth Circuit's misreading of the citizen-suit provision has thus dramatically expanded the CWA's reach, and it exposes permittees to additional meritless, attorney-fee-driven citizen suits that have long been fraught with abuse. The Court should not allow that regime to persist. It should instead grant review to resolve this exceptionally important question as to the scope of the CWA's citizen-suit provision and reverse the decision below.

ARGUMENT

I. The Ninth Circuit's Reading of the Clean Water Act's Citizen-Suit Provision Is Wrong.

The Ninth Circuit's interpretation of the CWA's citizen-suit provision blows through the textual limitations that Congress imposed for citizen suits. Multiple constitutional concerns further counsel against the Ninth Circuit's reading. And that reading contradicts the CWA's broader scheme by emboldening private plaintiffs—and their attorneys—to supplant the States on discretionary matters of state law. The Second Circuit has rightly limited CWA citizen suits to the enforcement of federal law. This Court should grant review to ensure that the Second Circuit's position prevails nationwide.

A. The Ninth Circuit Has Misconstrued the Plain Language of the Citizen-Suit Provision.

When Congress enacted the CWA, it authorized citizen suits only in specific, "limited circumstances." *South Side Quarry v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684, 690 (6th Cir. 2022). The statute allows private persons to sue for alleged violations of "an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1). And Congress defined "effluent standard or limitation under this chapter," in turn, to include "a permit or condition of a permit issued under [33 U.S.C. § 1342] that is in effect under [the Act]." *Id.* § 1365(f)(7).

The key interpretive issue here, then, is whether a state-permitting condition that extends beyond the CWA's requirements is issued "under" section 1342. It is not. The word "under" means "subject to the authority, control, guidance, or instruction of." Under, *Merriam Webster's Collegiate Dictionary* 1363 (11th ed. 2020); *see also* Under, *Webster's New Twentieth Century Dictionary of the English Language Unabridged* 1992 (2d ed. 1970) ("with the sanction, authorization, permission, or protection of"). That is especially true where an action is performed "'under' a provision of law or document having legal effect." *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 252 (3d Cir. 2003) (Alito, J.). The law then "must provide the authority for" that action. *Id.*

That is the best reading of the CWA's citizen-suit provision. The prepositional phrase "under [section 1342]" is "most naturally read"—consistent with how this Court has read the phrase elsewhere in the

CWA—to mean that the permit or permitting condition must be "promulgated 'pursuant to' or 'by reason of the authority of' [section 1342]." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 124 (2018) (quoting *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989) (R.B. Ginsburg, J.)).

That is not the case with state-permit conditions that go beyond the CWA. Such conditions are not issued "under" section 1342, because that section does not provide the authority for them. In fact, section 1342 itself recognizes that state-permit programs are "establish[ed] and administer[ed] *under State law*." 33 U.S.C. § 1342(b) (emphasis added). In other words, when a State chooses to extend its program to activities beyond the scope of the federal program, the authority for doing so is exclusively state, not federal. The CWA's text thus expressly refutes the Ninth Circuit's stretched interpretation.

Consistent with that statutory text, EPA's regulations make clear that "[i]f an approved State program has greater scope of coverage than required by Federal law," then "the additional coverage is not part of the Federally approved program." 40 C.F.R. § 123.1(i)(2). This regulation was issued just a decade after the CWA's passage and has "remained consistent over time." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2258 (2024) (noting that the government's "longstanding practice . . . can inform a court's determination of what the law is" (brackets and quotation marks omitted)); *see Environmental Permit Regulations*, 48 Fed. Reg. 14,146, 14,179 (Apr. 1, 1983) (codified at 40 C.F.R. § 123.1(i)(2)). That only confirms

Petitioners' reading here—that a state-permitting condition is not issued "under" section 1342.

Thus, as the Second Circuit has correctly held, "state regulations, including the provisions of [state-issued] permits, which mandate a greater scope of coverage than that required by the federal CWA and its implementing regulations are not enforceable through a citizen suit." *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 359 (2d Cir. 1993) (quotation marks omitted).

The Ninth Circuit had no answer to any of this. Rather, it held that the CWA "authorizes citizens to enforce *all* permit conditions" only by ignoring the citizen-suit provision's limiting prepositional phrase. *See Nw. Env't Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) (omitting the "issued under section 1342" language). That is not how statutory interpretation works: "[O]ur constitutional structure does not permit" courts "to 'rewrite the statute that Congress has enacted.'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 130 (2016) (citation omitted). Courts must instead "respect[] the qualifications" contained in the statute and "the limits up to which Congress was prepared to go." *New Prime Inc. v. Oliveira*, 586 U.S. 105, 121 (2019) (quotation marks omitted). The Ninth Circuit did not respect those limits here. Instead, it bulldozed straight through them.

The Ninth Circuit's reading makes even less sense in the context of this case, where the challenged activity is specifically exempted from the CWA's scope. *See* Pet.5–6, 13. There is no reason to think that Congress would "give with one hand what it takes

away with the other," authorizing certain activity but then enlisting private citizens to prosecute that same activity in federal court if state law forbids the activity. *Greenlaw v. United States*, 554 U.S. 237, 251 (2008). The Court should "resist attributing to Congress an intention to render [the] statute so internally inconsistent." *Id.* The text does not support that absurd result.

B. The Ninth Circuit's Reading Raises Serious Constitutional Concerns.

Accepting the Ninth Circuit's expansion of the citizen-suit provision's language would also risk a constitutional collision on multiple fronts. That further supports Petitioners' reading of the statute in this case. For even if it "were not the best one, the interpretation is at least 'fairly possible'—so the canon of constitutional avoidance would still counsel [this Court] to adopt it." *United States v. Hansen*, 599 U.S. 762, 781 (2023) (citation omitted).

First, and most notably, "it raises 'difficult and fundamental questions' about 'the delegation of Executive power' when Congress authorizes citizen suits" in any case. *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) (alteration adopted) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring)). "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020) (quoting U.S. Const. art. II, § 1, cl. 1; U.S. Const. art. II, § 3). The Framers adopted that unitary structure to promote

accountability and ensure that "a President chosen by the entire Nation" would "oversee the execution of the laws." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). Yet the President can ensure that the laws are faithfully executed only when he "oversee[s] the faithfulness of the officers who execute them." *Id.* at 484. Citizen-suit provisions sit uneasily within that constitutional framework because they redelegate core executive Power vested exclusively in the President to unaccountable private attorneys general. *See* Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 Va. L. Rev. 1957, 1964 (1995). For that reason, such provisions must be construed narrowly if they are to have a chance of surviving constitutional scrutiny. *Cf. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987) (construing citizen-suit provision narrowly, to avoid the possibility that private plaintiffs could curtail the Executive's "discretion to enforce the [CWA] in the public interest").[2]

This case places those Article II concerns in stark relief. The Executive Branch has long respected the CWA's text, maintaining the position that "State-law [permit] requirements" are not "federally enforceable." *Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines*, 73 Fed. Reg. 70,418, 70,458 (Nov. 20, 2008) (citing 40 C.F.R. § 123.1(i)(2)). The EPA thus does not

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[2] To be clear, the constitutionality of the CWA's citizen-suit provisions is an open question even on the Second Circuit's interpretation. But that question is not presented here.

seek to prosecute perceived violations of state-permitting conditions. But the Ninth Circuit's interpretation allows private citizens to second-guess that judgment and take matters into their own hands.

That is a serious cause for constitutional alarm. Under Article II, "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021). There are good reasons for that feature of the constitutional design. "Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law." *Id.* In turn, the constitutional avoidance canon "militates against" construing the CWA's citizen-suit provision broadly—as the Ninth Circuit did. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247–48 (2012). The Ninth Circuit's construction places the law squarely on a collision course with Article II.

Second, if allowed to stand, the Ninth Circuit's expansive view of the citizen-suit provision will equally interfere with "the discretion of *state* enforcement authorities" over matters of state law. *Gwaltney*, 484 U.S. at 61 (emphasis added). That includes, as in this case, suits invoking the laws of States that have chosen *not* to allow citizen suits to enforce state-permitting conditions. Pet.35. And it includes, as in this case, suits against public entities. Pet.9–10.

It is doubtful that Congress could constitutionally permit such a severe intrusion on state sovereignty. "Regulation of land and water use lies at the core of traditional state authority." *Sackett v. EPA*, 598 U.S. 651, 679 (2023). And the "exercise of state officials' prosecutorial discretion [is] a valuable feature of our constitutional system." *Bond v. United States*, 572 U.S. 844, 865 (2014). The Ninth Circuit's interpretation would effectively gut that state discretion over a core sovereign prerogative. At a minimum, one would expect Congress to speak clearly before concluding that it intended to so "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001). That is "[p]articularly" true for the CWA, which Congress adopted with the "express policy [of] 'preserv[ing]' the States' 'primary' authority over land and water use." *Sackett*, 598 U.S. at 680 (quoting 33 U.S.C. § 1251(b)). Such federalism concerns provide yet another "serious reason to doubt the [Ninth Circuit's] expansive reading" of the CWA's citizen-suit provision. *Bond*, 572 U.S. at 866.

Third, the limits of Article III provide an additional reason for doubting the Ninth Circuit's interpretation. The CWA's citizen-suit provision is a "jurisdictional grant." *Gwaltney*, 484 U.S. at 60. It constitutionally supplies jurisdiction for suits seeking to enforce federal permit conditions, which "aris[e] under" federal law. U.S. Const. art. III, § 2, cl. 1. But the same cannot be said when a suit—like this one—seeks to enforce state-permit conditions that arise under state law. In that case, federal law does not "form[] an

ingredient" of the cause of action. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824). Nor can Congress supply that missing ingredient to "confer jurisdiction on [the] federal courts simply by enacting [a] jurisdictional statute[]." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 496 (1983). Accepting the Ninth Circuit's interpretation of the CWA would suggest that Congress defied that principle. It would "present grave constitutional problems" that Congress tried to "'expand[] the jurisdiction of the federal courts beyond the bounds established by the Constitution'" to bootstrap state-law claims between non-diverse parties into federal court. *Mesa v. California*, 489 U.S. 121, 136–37 (1989) (citation omitted).

Of course, Congress did no such thing. It carefully defined the CWA's citizen-suit provision to exclude actions to enforce state-permit conditions that extend beyond the CWA's reach. *See supra* Section I.A. But even if any doubt remained, the constitutional avoidance canon would resolve it against the Ninth Circuit's mistaken reading thrice over. This Court should grant review to decisively reject that reading and restore uniformity in the law.

II. The Question Presented Is Exceptionally Important.

Review is also warranted because the Ninth Circuit's contortion of the CWA has significant real-world consequences. As Judge O'Scannlain warned, allowing citizen suits to enforce all state-permit conditions "promises to invite excessive, costly, and counterproductive citizen suits, funded by the taxpayers, for the enforcement of standards that are

imprecise and astronomically costly to the municipalities affected." Pet.App.20 (citation omitted). And as *Amici* can attest, municipalities are not the only ones affected. The Ninth Circuit's rule exposes a large number of governmental and non-governmental organizations, municipalities, and private companies—across virtually every industry—to costly citizen-suit litigation in federal court based on state regulatory regimes. These suits are detrimental to permittees and threaten to undermine state regulatory objectives. Given the expansive impact of the Ninth Circuit's mistaken reading of the statute, this Court must clarify the citizen-suit provision's scope and restore the limits that Congress placed on its reach.

A. Many States Include State-Law Effluent Requirements in State-Issued NPDES Permits.

There is no question that the Ninth Circuit's expansion of the citizen-suit provision dramatically "change[s] the nature of the citizens' role" from "interstitial" to "intrusive." *Gwaltney*, 484 U.S. at 61. Through the CWA, Congress authorized the States to create their own EPA-approved permit programs. *See* 33 U.S.C. § 1342(b). And almost every State—including every State in the Ninth Circuit—has answered the congressional call, with 47 States in total administering NPDES programs to some degree. *See NPDES Permit Basics*, EPA (Dec. 11, 2023), https://bit.ly/4eNhUjM. NPDES permits are therefore usually issued, not by the federal government, but by individual state programs. *See* Claudia Copeland, Cong. Rsch. Serv., RL30030, *Clean Water Act: A*

Summary of the Law 7 (2016). Indeed, the States issue the vast majority of NPDES permits nationwide. *See id.*; *NPDES Permit Basics*, *supra*; *NPDES State Program Authority*, EPA (Apr. 22, 2024), https://bit.ly/3UfLAOd.

As Petitioners correctly explain, "NPDES permits are ubiquitous" under these state regimes. Pet.33. The federal government estimated that "there were about 335,000 . . . facilities with active NPDES permits in fiscal year 2020." Gov't Accountability Office, *Clean Water Act: EPA Needs to Better Assess and Disclose Quality of Compliance and Enforcement Data* 7 (July 2021), https://bit.ly/4dQI8Av (hereafter, "GAO Report"). And within each State, this translates to an astronomical number of active permits. In a state as large as California, for example, there have been over 45,000 active permit enrollees in the last three years. *See California Integrated Water Quality System Project (CIWQS)*, State Water Resources Control Board, https://bit.ly/4890X0J (last visited Oct. 28, 2024) (NPDES Permits Excel spreadsheet). By contrast, there are only thirteen final, active NPDES permits issued by EPA in California, with most for tribal lands. *See NPDES Permits in California (Excluding Tribal Permits)*, EPA (June 26, 2024), https://bit.ly/3UdiRtu; *California Tribal Lands NPDES Permits*, EPA (Mar. 29, 2024), https://bit.ly/3ULLb6D. Even a state the size of New Jersey has over 15,000 active NPDES permits, but none currently identified as issued by EPA. *See DEP Data Miner*, State of New Jersey Department of Environmental Protection, https://bit.ly/3Y9lWvM (last visited Oct. 28, 2024) (report category NJPDES Permitting Program, NJPDES Active Permit List);

New Jersey NPDES Permits, EPA (Nov. 21, 2023), https://bit.ly/3A3tk3G.

These statistics confirm that NPDES permits are primarily issued by the States. In turn, many States issue so-called combined permits that include both federal requirements and additional effluent requirements derived from state water quality standards and state water laws. *See* GAO Report, *supra*, at 6 ("The permit incorporates any relevant pollutant limits from EPA's effluent guidelines or may include more stringent limits if a state deems it necessary."). The Ninth Circuit's rewriting of the statute thus places large numbers of permittees in the crosshairs of private plaintiffs who are "motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). That sweeping dispersal of executive enforcement power inevitably threatens individual liberty. And it simultaneously undermines the "overall policies" of the States themselves by permitting private bounty hunters to override their enforcement prerogatives. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

B. Citizen Suits Are Costly and Damaging.

Citizen suits are notoriously expensive for both defendants and the public alike. Expenses arise through the standard cost of litigation, the potential for significant penalties, and resulting attorney's fees. And the Ninth Circuit's rule compounds those costs by inviting expansive litigation concerning state-issued NPDES permit conditions defined by state law.

First, environmental citizen suits are particularly expensive to litigate. That is because many

environmental lawsuits like this one have an "inherent" "scientific and legal complexity . . . that drives up cost in this type of litigation." James T. Lang, *Citizens' Environmental Lawsuits*, 47 Tex. Env't L.J. 17, 22 (2017). Parties often must obtain specialized attorneys with experience in environmental litigation, "plus a team of PhD consulting and testifying experts, and a budget for laboratory testing of environmental samples." *Id.* Those costs quickly add up, and they naturally enable plaintiffs to extract settlements from defendants for even meritless claims.

Second, the CWA imposes severe penalties, which similarly drive up the pressure to settle. Indeed, this Court has described the CWA as "a potent weapon" due to the severe consequences it imposes "'even for inadvertent violations.'" *Sackett*, 598 U.S. at 660 (citation omitted). "On the civil side, the CWA imposes over $60,000 in fines per day for each violation." *Id.*; *see* 33 U.S.C. § 1319(b), (d); 40 C.F.R. § 19.4. "And due to the Act's 5-year statute of limitations, and expansive interpretations of the term 'violation,' these civil penalties can be nearly as crushing as their criminal counterparts." *Sackett*, 598 U.S. at 660 (internal citation omitted). When coupled with these civil penalties, "the availability of citizen suits only exacerbates the danger to ordinary landowners." *County of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 206–07 (2020) (Alito, J., dissenting). For even where the "relevant state agency conclude[s] that a permit is not needed, there is always the possibility that a citizen suit will result in a very costly judgment." *Id.*

Third, the CWA authorizes private plaintiffs to recover attorney's fees. Specifically, a court may "award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party." 33 U.S.C. § 1365(d). And there is a very real concern "that a combination of economic incentives like attorney's fees, coupled with self-interest, has led to an 'environmental enforcement cartel.'" Anna A. Mance, *How Private Enforcement Exacerbates Climate Change*, 44 Cardozo L. Rev. 1493, 1508 (2023) (citation omitted).

Each of these factors, independently, can make defending a citizen suit a prohibitively costly endeavor for a municipality or company. But together, they create overwhelming financial exposure. At the same time, many of these citizen suits are brought by well-funded environmental organizations. *See* Anthony M. Leo, *Litigation Conservation: Positively Impeding Animal and Natural Resource Conversation in County Courtrooms*, 19 Animal & Nat. Res. L. Rev. 155, 166 (2023).

Studies have indicated that these sorts of well-resourced organizations often target the "least significant sources" of pollution when exercising their discretion as to whom they should sue. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Env't L. & Pol'y F. 39, 51 (2001). And some environmental groups "have frequently been willing to settle their case" out of court "in exchan[ge] for a 'contribution' to various environmental causes." Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 Temp. Env't L. & Tech. J. 55, 70 (1989).

Such costs and misaligned incentives help explain why Congress "intend[ed] the great volume of enforcement actions to be brought by the State" rather than private parties—and why Congress restricted the citizen-suit provision in the ways that it did. *Gwaltney*, 484 U.S. at 60 (alteration adopted; citation omitted). As the statutory text makes clear, Congress provided that States administering their own permit programs would be able to decide whether to authorize private enforcement actions for alleged violations of state-law permit conditions. The Ninth Circuit's reading deprives the States of that choice, while severely increasing the costs and harms inherent in citizen suits.

C. Expanding Federal Citizen Suits to Enforce State Law Can Undercut Environmental Progress.

The Ninth Circuit's rule ultimately detracts from environmental compliance under state law. The NPDES permit conditions at issue here are imposed under state regulations and are used to promote state enforcement priorities with respect to water pollution. Allowing private plaintiffs—who lack the political accountability of state regulators—to sue based on such state-law conditions threatens to upend the priorities that the States have set for themselves.

The absence of accountability guardrails in private enforcement actions present well-recognized dangers. "Virtually none of the checks on executive enforcement discretion apply to private parties." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 818 (2009). And with citizen suits, there is a complete "lack of political

accountability for important policy decisions" as to whether, where, how, when, and whom to sue. Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 Admin. L. Rev. 1, 12 (1996). As Justice Breyer observed about such private attorneys general in another context:

> The delegation of state authority to private individuals authorizes a purely ideological plaintiff . . . to bring into the courtroom the kind of political battle better waged in other forums. Where that political battle is hard fought, such plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm.

Nike, Inc. v. Kasky, 539 U.S. 654, 679–80 (2003) (Breyer, J., joined by O'Connor, J., dissenting).

These risks are only amplified in environmental litigation. There is substantial concern that "powerful environmental organizations with their own idiosyncratic priorities will hijack enforcement from federal [and state] agencies." Adelman & Diakun, *supra*, at 396. And "[w]here, as is often the case, the plaintiff is a national association, it has significant discretion in choosing enforcement targets" and conducting its lawsuits "without meaningful public

control." *Friends of the Earth*, 528 U.S. at 209 (Scalia, J., joined by Thomas, J., dissenting).

Even where citizens "sue to enforce legitimate violations of the law," the relief they obtain often "does not align with legislative and broader public policy goals." Mance, *supra*, at 1507. Moreover, these suits can "have the perverse 'effect of misdirecting [the agency's] own enforcement efforts,' as [state] regulators may be compelled to closely track or intervene in actions initiated by citizen groups to prevent or mitigate negative repercussions." Adelman & Reilly, *supra*, at 396 (citation omitted). This "further burden[s] scarce government resources rather than freeing them up," thereby frustrating state officials' enforcement priorities. Mance, *supra*, at 1507.

In *Comfort Lake Association, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351 (8th Cir. 1998), for example, the court explained how private plaintiff litigation can detract from state enforcement and compliance. The Minnesota Pollution Control Agency undertook an informal action for violations of an NPDES permit, enforced compliance, and ultimately negotiated stipulated penalties for the violations. *See id.* at 353–54. During that State's enforcement effort, a private plaintiff organization sued under the CWA citizen-suit provision. *See id.* But the court did not allow the plaintiff to pursue additional remedies against the permittee. *See id.* at 357. It warned that permittees "will be disinclined to resolve disputes by such relatively informal agreements if additional civil penalties may then be imposed in pending citizen

suits, thereby depriving [the state regulator] of this resource-conserving enforcement tool." *Id.*

So too here. If the Ninth Circuit's rule remains in place, citizen suits in federal court for alleged state-law violations will disrupt state enforcement priorities and ultimately undermine water quality compliance. State regulators will lose their ability to oversee state-permit programs in a way that is consistent with their enforcement objectives. And the fear of future private plaintiff suits will ultimately deter regulatory compliance and cooperation. *See* Cross, *supra*, at 67 (observing that, "by their very nature," citizen suits can "threaten any cooperative compliance" efforts made by the government). This Court should not allow that problematic regime to stand.

CONCLUSION

The petition for writ of certiorari should be granted.

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