No. 24-350

In the Supreme Court of the United States

PORT OF TACOMA; SSA TERMINALS, LLC; AND SSA TERMINALS (TACOMA), LLC,

Petitioners,

v.

PUGET SOUNDKEEPER ALLIANCE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF IOWA AND 24 OTHER STATES AS AMICI CURIAE IN SUPPORT OF GRANTING THE PETITION

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QUESTION PRESENTED

Whether Section 505 of the Clean Water Act ("CWA") authorizes citizens to invoke the federal courts to enforce conditions of State-issued pollutant-discharge permits adopted under State law that mandate a greater scope of coverage than required by the CWA?

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INTEREST OF AMICUS CURIAE[1]

Amici curiae States of Iowa, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming ("amici States") submit this brief in support of Petitioners, Port of Tacoma, *et al.*, urging this Court to reverse the Ninth Circuit's decision. That decision authorized an environmental activist organization to pursue a federal lawsuit to enforce State-law water-pollution requirements that "mandate 'a greater scope of coverage than that required' by" the Clean Water Act. Pet.App.12a–13a.

Amici States have a strong interest in this case's outcome. The Ninth Circuit's decision to allows private citizens to enforce state-issued pollutant discharge permits conditions in federal court that exceed those required under the Clean Water Act. This expansion of the Clean Water Act's citizen-suit provision disregards the States' longstanding historical role in water regulation. Congress has long recognized that historical role and wove it directly into the cooperative federalist framework of the Clean Water Act.

The Ninth Circuit's interpretation interferes with State authority over water resources and severely constrains congressionally approved State discretion over Clean Water Act enforcement. Beyond the constitutional indignity, the decision undermines

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[1] Pursuant to Rule 37.2, amici provided timely notice of their intent to file this brief to all parties.

State environmental innovation with little environmental benefit.

SUMMARY OF ARGUMENT

"[I]n the Clean Water Act Congress struck a careful balance among competing policies and interests." *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992). When it enacted the 1972 law, Congress did not intend to readjust the longstanding federal-state balance in water regulation. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 174 (2001). "Rather . . . Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources." *Id.* (quoting 33 U.S.C. § 1251(b)). Under the Clean Water Act, "the [Environmental Protection Agency] and the states participate in a 'cooperative federalism' framework working together to clean the Nation's waters." *Am Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 288 (3d Cir. 2015).

Under the cooperative federalism model, "states are partners, if not leaders, when it comes to environmental statutes." Sen. Kevin Cramer, *Restoring States' Rights and Adhering to Cooperative Federalism in Environmental Policy*, 45 Harv. J.L. & Pub. Pol'y 481, 500 (2022). Citizen-suit provisions under these laws are merely meant "to spur and supplement government enforcement." Courtney M. Price, *Private Enforcement of the Clean Water Act*, Nat. Resources & Env't, Winter 1986, at 31, 32. Citizen suits thus exist to ensure "compliance *with* the [Clean Water Act]." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (emphasis added). They are not meant to enforce State

water-pollution laws independent of the Clean Water Act.

By ruling for the Plaintiffs here, the Ninth Circuit drastically expanded Clean Water Act citizen suits—and did so based on a flawed textual interpretation. When faced with the same question, the Second Circuit correctly concluded that state regulations that "mandate 'a greater scope of coverage than that required' by the federal [Clean Water Act] and its implementing regulations are not enforceable through citizen suit." *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 354 (2d Cir. 1993), *as amended* (Feb. 3, 1994) (citing 33 U.S.C. § 1365; 40 C.F.R. § 123.1(i)(2); *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 624 (1992)).

States may enact stricter standards than those contained in the Clean Water Act and federal regulations. *See id.* (citing 33 U.S.C. § 1342(b)). The States or the Environmental Protection Agency may then enforce these States' standards under the Clean Water Act, "but private citizens have no standing to do so." *Id.* (33 U.S.C. § 1342(h)). In other words, [t]he Clean Water Act allows citizens to enforce effluent limitations contained in federal permits, but the Act does not permit citizens to enforce general water quality provisions." *Nw. Env't Advocs. v. City of Portland*, 74 F.3d 945, 946 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of rehearing).

The Ninth Circuit's approach here "would significantly upset Congress's carefully prescribed allocation of authority." *See Sierra Club v. U.S. Army Corp. of Eng'rs*, 909 F.3d 635, 647 (4th Cir. 2018). The Clean Water Act explicitly recognizes that "[i]t is the policy of the Congress to recognize, preserve, and

protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b).

Indeed, the Act declares that, unless expressly provided, "nothing . . . shall preclude or deny" the rights of States to "control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State." 33 U.S.C. § 1344(t). Accordingly, "[w]hile state water quality standards may serve as an important source of authority for a state to impose additional pollution control requirements," these standards "should not be used as a vehicle for flooding the federal courts with citizen suits against permittees who are meeting the specific requirements (*i.e.*, effluent limitations) outlined in those permits." *Nw. Env't Advocs.*, 74 F.3d at 946. "[A]llowing citizens to enforce standards that Congress specifically allocated to" government entities, "upset[s] the delicate balance envisioned by Congress in its promulgation of the current enforcement regime for environmental law." *Id.*

This Court can restore that balance. Here, the Court can ensure that the Clean Water Act's citizen-suit provisions are read through the proper cooperative federalist lens as provided in the Act's text.

ARGUMENT

I. COOPERATIVE FEDERALISM PRINCIPLES MUST DRIVE ANY INTERPRETATION OF THE CLEAN WATER ACT

The Clean Water Act "establishes a distinctive variety of cooperative federalism." *Ohio*, 503 U.S. at 633 (White, J., concurring in part and dissenting in part). "Under [the CWA], the EPA and the states participate in a 'cooperative federalism' framework working together to clean the Nation's waters." *Am. Farm Bureau Fed'n*, 792 F.3d at 288. The cooperative federalism approach allows States to tailor federal regulatory programs to local conditions, promote competition within the federal regulatory framework, and allow experimentation with different approaches that might help find an optimal regulatory strategy. Phillip J. Weiser, *Federal Common Law, Cooperative Federalism, and Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1695–98 (2001). Indeed, the cooperative federalism approach is baked into the text of the Clean Water Act, and any interpretation which ignores cooperative federalism principles ignores critical historical and contextual context.

1. States possess a vital historical role in water regulation.

Regulating "land and water use lies at the core of traditional state authority." *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 679 (2023); *see also SWANCC*, 531 U.S. at 173 (recognizing "the State's traditional and primary power over land and water use."); *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) ("We have long understood that as

sovereign entities in our federal system, the States possess an 'absolute right to all their navigable waters and the soils under them for their own common use.'" (quoting *Martin v. Lessee of Waddell*, 16 Pet. 367, 140 (1842))).

Indeed, "few public interests are more obvious, indisputable, and independent of particular theory." *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908). As such, "[f]or most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their political subdivisions." *Sackett*, 598 U.S. at 659; *see also Atl. Richfield Co. v. Christian*, 590 U.S. 1, 36 (2020) (Gorsuch, J., concurring in part and dissenting in part) ("[T]he protection of natural resources is a traditional and central responsibility of state governments.").

The States have long held this vital role because "[t]he very vastness of our territory as a Nation" has "all but necessitated" different approaches to water management and resource conversation. *California v. United States*, 438 U.S. 645, 684 (1978). "Those who first set foot in North America from ships sailing the tidal estuaries of Virginia did not confront the same problems as those who sailed flat boats down the Ohio River in search of new sites to farm." *Id.* So too "[t]hose who cleared the forests in the old Northwest Territory faced totally different physiological problems from those who built sold huts on the Great Plains." *Id.*

This "strong tradition of decentralized management" allows for "significant customization of standards" and allows States to tailor their standards based on the individual needs in their communities. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. Env't L.J. 179,

192–93 (2005). Thanks to this flexibility, States can experiment with different pollution-regulation methods and can quickly and efficiently respond to changes while quickly reversing or amending ineffective policies. *See* Henry N. Butler & Nathaniel J. Harris, *Sue Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 Harv. J.L. & Pub. Pol'y 579, 610 (2014).

States have embraced their environmental stewardship role with many State constitutions enshrining natural resource protections. *See, e.g.*, Iowa Const. Art. VII, § 10 (creating a natural resources trust fund); Cal. Const. art. XIII, § 8 (protecting the "use or conservation of natural resources"); La. Const. art. IX, § 1 (requiring that natural resources be "protected" and "conserved" for the "health, safety, and welfare of the people").

For clean water specifically, North Carolina "conserve[s] and protect[s]" its "waters" and "control[s] and limit[s] the[ir] pollution." N.C. Const. art. XIV, § 5.

New Mexico and Michigan require their legislatures to "provide for control of pollution and control of despoilment" of state waters. N.M. CONST. art. XX, § 21; *see also* Mich. Const. art. IV, § 52 (similar).

Massachusetts and Pennsylvania go even further, enshrining the right to "clean" and "pure" water. Mass. Const. art. XCVII; Pa. Const. art. I, § 27.

And several States' constitutions put these commitments into action by establishing commissions or setting up funds to keep water and other natural resources clean. *See, e.g.*, Ala. Const. art. IV, §§ 93.14-

16 (creating soil and water conservation coalition and water management districts); Fla. Const. art. VII, § 14 (authorizing state bonds without elections for "water pollution control and abatement" measures); Mo. Const. art. III, § 37(b)-(c), (e) (setting up a "water pollution control fund" that allows state financing to protect "the environment through the control of water pollution"

Both before and after the Clean Water Act's enactment, State laws and regulations thus have been "the prime bulwark in the effort to abate water pollution." *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *accord Sierra Club*, 909 F.3d at 648; *United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983). And States are "[i]ncreasingly" enacting the "most stringent protections against water pollution." Linda Malone, *State and Local Land Use Regulation to Prevent Groundwater Contamination*, 1 Env't Reg. of Land Use § 9:16 (Feb. 2024 Update).

For example, West Virginia's Water Pollution Control Act declares that water purity and quality are "the public policy" of the State. W. Va. Code § 22-11-2(a). To further that policy, the Act creates water quality standards that limit the number of pollutants that may flow into State waters. *Id.* § 22-11-8(b)(4). And West Virginia is not alone in codifying its water protections. *See, e.g.*, Iowa Code § 455B.173 (tasking State Environmental Protection Commission with developing comprehensive water pollution plans and programs); Ark. Code § 15-22-906 (directing the State's Natural Resources Commission to develop a comprehensive groundwater program); Neb. Rev. Stat. § 81-1506(2)(f) (prohibiting the discharge of dredged material without a permit); Wyo. Stat. § 35-

11-301 (barring any person from causing, threatening, or allowing the discharge of pollution wastes into State waters without a permit).

2. The Clean Water Act recognizes the States' water protection role, creating a cooperative federalism regime.

Congressional respect for State water-related jurisdiction is well-established. *See United States v. New Mexico*, 438 U.S. 696, 702 n.5 (1978) (Congress had identified 37 statutes "in which Congress has expressly recognized the importance of deferring to state water law") (citations omitted); *accord Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 958 (1982); *cf California*, 438 U.S. at 653 ("the consistent thread of purposeful and continued deference to state water law by Congress" runs through the history of water reclamation laws). Indeed, at least as early as 1879, "Congress deferred to growing local laws." *Id.* at 654.

Consistent with Congress's historical deference to the States' water protection role, the Clean Water Act "provides for an intricate system of federal-state interaction in the administration and enforcement of the Act, with emphasis on state responsibility." Charles W. Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 Dick. L. Rev. 459, 460 (1973). The Clean Water Act regime thus provides more than simple federal approval of State action. Instead, it "anticipates a partnership between the States and the Federal Government animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas*, 503 U.S. at 101 (quoting 33 U.S.C. § 1251(a)). "In doing so, Congress chose to "recognize, preserve, and protect the primary

responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *SWANCC*, 531 U.S. at 166–67 (quoting 33 U.S.C. § 1251(b)).

Under this State-federal partnership, the Clean Water Act authorizes EPA to issue pollution discharge permits. 33 U.S.C. § 1342. But the law also provides a State may "administer" its own permit system so long as that system complies with detailed federal statutory and regulatory requirements. *Id.* § 1342(b); 40 C.F.R. §§ 123.1–123.64. Though even under an approved State permitting system, EPA reviews water quality standards, 33 U.S.C. § 1313(c), and retains authority to object to the issuance of particular permits and to monitor State programs for continuing compliance with federal requirements. *Id.* §§ 1342(c), (d)(2). The federal government also has the power to enforce the CWA terms of State permits when the State has not instituted its own enforcement proceedings but cannot enforce terms in State permits that come from State law. *Id.* § 1319(a). "Under this unusual statutory structure, compliance with a state-administered permit is deemed compliance with the CWA." *Ohio*, 503 U.S. at 634 (White, J., concurring in part and dissenting in part) (citing 33 U.S.C. § 1342(k)).

Accordingly, "States play the primary role in administering the Act." *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 184 (D.C. Cir. 1988). The States retain the power "to administer [their] own permit program for discharges into navigable waters within [their] jurisdiction." 33 U.S.C. § 1342(b). And although

the Congress gave EPA the authority to issue permits in the first instance, "Congress clearly intended that the states would eventually assume the major role in the operation" of that process. *Shell Oil Co. v. Train*, 585 F.2d 408, 410 (9th Cir. 1978). The States have accepted that role, and 47 States now process National Pollutant Discharge Elimination Permits. *See* NPDES State Program Authority, EPA, https://perma.cc/EEU4-EKF9.

Congress also intended that the States would take a key role in Clean Water Act enforcement. When a person violates the Clean Water Act by failing to meet permit standards—or by failing to get a permit altogether—"the EPA and the states form the first line of defense." *S. Side Quarry, LLC v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 285 F.4th 684, 690 (6th Cir. 2022). But, in limited circumstances, the Clean Water Act also permits citizen suits. *See* 33 U.S.C. § 1365.

Federalism concerns shape the scope of these citizen-suit provisions. The Clean Water Act thus contains several limitations on citizen suits. *First*, the Clean Water Act requires a would-be litigant to send notice of his intent to sue to the EPA Administrator, the State in which the violation allegedly occurred, and the alleged violator. 33 U.S.C. § 1365(b)(1)(A). The law then precludes the citizen from suing for sixty days, during which, EPA or State may decide to file suit on its own. *Id. Second*, the Act bars citizen suits when government enforcement is underway. *Id.* § 1365(b)(1)(B).

The Clean Water Act's statutory history reinforces this limited view of citizen suits. *Gwaltney*, 484 U.S. at 60. In particular, "[t]he Senate Report

noted that '[t]he Committee intends the great volume of enforcement actions [to] be brought by the State,' and that citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'" *Id.* (quoting S. Rep. No. 92-414, p. 64 (1971)). Congress thus intended Clean Water Act citizen suits to play an "interstitial," rather than a "potentially intrusive role." *Gwaltney*, 484 U.S. at 61; *see also Askins v. Ohio Dep't of Agric.*, 809 F.3d 868, 875 (6th Cir. 2016) (Clean Water Act citizen suits "serve[] only as backup, 'permitting citizens to abate pollution when the government cannot or will not command compliance.'" (quoting *Gwaltney*, 484 U.S. at 62).

Overly expansive interpretation of the Clean Water Act's provisions would "result in a significant impingement of the State's traditional and primary power over land and water use." *Rapanos v. United States*, 547 U.S. 715, 737–38 (2006) (quoting *SWANCC*, 531 U.S. at 174).

II. FEDERALISM PRINCIPLES UNDERLIE ANY CLEAN WATER ACT INTERPRETATION.

Even if Congress had not written cooperative federalism into the Clean Water Act, the principles of statutory construction also favor reading the Act through a State-protective lens. Under the nation's federalist system, "States are not mere political subdivisions of the United States," and "State governments are neither regional offices, nor administrative agencies of the federal government." *New York v. United States*, 505 U.S. 144, 188 (1992).

The Constitution instead "leaves to the several States a residuary and inviolable sovereignty." The Federalist No. 39, at 245 (C. Rossiter ed. 1961). "The Framers concluded that allocation of powers between the National Government and the States enhances Freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). This allocation of powers "preserves the integrity, dignity, and residual sovereignty of the States." *Id.* Federalism also secures to citizens the liberties that derive from the diffusion of federal power." *New York*, 505 U.S. at 181 (citation and internal quotation marks omitted).

The cooperative federalism framework in particular "necessarily implies that states may reach differing conclusions on specific issues relating to the implementation of the Act. *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010) (citing *Global Naps, Inc. v. Mass. Dep't of Telecomms. & Energy*, 427 F.3d 34, 46 (1st Cir. 2005)). "Far from being a bug, a patchwork of state-by-state implementation rules is a feature of this system of cooperative federalism." *Id.*

This Court has consistently understood that "[t]he States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred them to the Federal Government." *New York*, 505 U.S. at 156 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)). Courts thus "begin with the axiom that, under our federal system, the States possess

sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

For example, in *McDonnell v. United States*, this Court declined to construe a criminal statute "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of good government for local and state officials." 579 U.S. 550, 576–77 (2016) (citation and internal quotation marks omitted). This Court instead chose a "more limited interpretation" that was both textually supported and free of "federalism concerns." *Id.*

And when interpreting statutes designed to advance cooperative federalism in particular, this Court "ha[s] not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims." *Wisconsin Dep't of Health & Fam. Servs. v. Blumer*, 534 U.S. 473, 495 (2002).

If Congress "wishes to significantly alter the balance between federal and state power," the Court "require[s] Congress to enact exceedingly clear language." *Sackett*, 598 U.S. at 679 (quoting *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 621–22 (2020)) (internal quotation marks omitted). This clear-statement rule recognizes that Congress's ability to "legislate in areas traditionally regulated by the States" is an "extraordinary power in the federalist system," so courts "must assume Congress does not exercise [that power] lightly." *Gregory*, 501 U.S. at 460. As such,

Congress must use "unmistakably" clear language that places its intent beyond dispute. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). Without such language, statutes "will not be deemed to have significantly changed" the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 n.16 (1971). The requirement holds additional force under the Clean Water Act given the Act's "express policy to 'preserve' the States' 'primary' authority over land and water use." *Sackett*, 598 U.S. at 680 (quoting 33 U.S.C. § 1251(b)).

Layering these federalism principles over the text of the Clean Water Act and the States' historical role in water regulation establish why courts should "avoid the significant constitutional and federalism question" that overbroad interpretations create. *SWANCC*, 531 U.S. at 174.

III. THE NINTH CIRCUIT'S RULING DISRUPTS THE COOPERATIVE FEDERALISM BALANCE OF THE CLEAN WATER ACT.

The Ninth Circuit stripped federalism principles and historical context from its purported textual interpretation. Its expanded view of the Clean Water Act's citizen-suit provision frustrates core federalism principles by replacing State primacy in Clean Water Act enforcement with unelected and unchecked citizen plaintiffs.

Too-broad citizen-suit regimes, like those here, undermine federalism and frustrate the States' and Congress's priorities. Cooperative federalism gives States discretion and creative latitude. *Budget Prepay*, 605 F.3d at 281. But the fear of overzealous

citizen suits prevents States from experimenting with regulatory approaches. *Gwaltney*, 484 U.S. at 60. Indeed, "citizen enforcement may not be an effective means of ensuring the most efficient implementation of environmental laws," and "[i]n some cases, environmental suits may even frustrate the objective of environmental protection." Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 Temp. Envt'l L. & Tech. 55, 64 (1989).

1. The Ninth Circuit's interpretation undermines federalist principles.

Federalism is not just an end in itself: Rather, the federalist structure "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society[,] increases opportunity for citizen involvement in the democratic processes[,] allows for more innovation and experimentation in government[, and] makes government more responsive by putting States in competition for a mobile citizenry." *Gregory*, 501 U.S. at 458 (citations omitted).

Under the cooperative federalism system, "[i]f state residents would prefer their government devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program." *New York*, 505 U.S. at 168. States also have the option to supplement the federal program to the extent State law is not preempted. *Id.*

Either way, "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local

electorate's preferences[, and] state officials remain accountable to the people." *Id.* "For example, the state may be more concerned with preserving places for fish to spawn than preventing erosion and sedimentation." *Sierra Club*, 909 F.3d at 648. In other words, "the state may prefer protecting the environment one way to protecting it another way." *Id.* Cooperative federalism allows States to take different approaches provided they still satisfy the baseline federal standards.

But expanded citizen suits interfere with those State decisions. These suits thus take the federalism concerns already present in administrative law, Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. Cal. L. Rev. 45, 94 (2008), and multiply them hundredfold. Where, as here, a court grants citizen plaintiffs broad enforcement authority, it creates an army of "private attorneys general," who lack the institutional concerns and built in checks that could temper even a federal agency. *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). Unlike government enforcers, "[c]itizen-suit plaintiffs . . . face no significant political repercussions for setting unwise enforcement priorities," allowing them to pursue even "technical" violations of state-law conditions that go beyond the EPA. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Env't L. & Pol'y F. 39, 43, 49–50, 56–57, 62 (2001).

These concerns help explain why Congress's approach to this "private [environmental] law

enforcement" shows "a vague sense of suspicion and discomfort" with the citizen suit mechanism. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339, 342 (1990). Statutory limitations to citizen suits, such as the sixty-day notice requirement and government enforcement bar to suit, suggest "the citizen suit is meant to supplement rather than supplant government action." *Gwaltney*, 484 U.S. at 60; *see also* Abell, *supra*, at 1961–62 ("limitations on citizen involvement" under the Clean Water Act "were designed to ensure that citizen suits play a supplementary, and not a superseding, role in the enforcement" of the Act). In addition, all civil fines that a citizen suit obtains are payable to the United States Treasury. 33 U.S.C. § 1365(a); 42 U.S.C. § 6972(a)(2). This prohibition on profitable citizen enforcement "would be inexplicable if Congress considered private enforcement wholly unproblematic." Greve, *supra*, at 342.

Congressional limits thus ensure that citizen suits "are only proper when the federal state, or local agencies fail to exercise their enforcement responsibility, and that such suits should not considerably curtail the governing agency's discretion to act in the public interest." *Arkansas v. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994). Indeed, the Clean Water Act's overarching cooperative-federalism regime means little without clear citizen suit limitations. Yet the Ninth Circuit undermines these principles by removing a key jurisdictional limitation, upending this delicate balance.

2. The Ninth Circuit's interpretation stifles State environmental protection efforts.

An overly broad citizen-suit provision further frustrates core federalism tenets by hampering regulatory innovation. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Federalism recognizes "the political reality that a smaller unit of government is more likely to have a population with preferences that depart from the majority's. So it is more likely to try an approach that could not command a national majority." Michael W. McConnell, *Federalism: Evaluating the Founders' Design for Federalism*, 54 U. Chi. L. Rev. 1484, 1498 (1987). Put simply: "Lower levels of government are more likely to depart from established consensus simply because they are smaller and more numerous." *Id*. This means that "[i]f innovation is desirable, it follows that decentralization is desirable." *Id.* As such, "local laws can be adapted to local conditions and local tastes, while a national government must take a uniform–and hence less desirable approach." *Id.* at 1493. This flexibility also gives local governments "greater opportunity and incentive to pioneer useful changes." *Id.*

That is one reason why "[t]he EPA's regulations are drafted to be applied with discretion." Cross, *supra*, at 66. For example, a proposed effluent control system might "greatly reduce average contaminant levels, but . . . cause[] a periodic 'spike.'" *See* Adler,

supra, at 69 n.140. "Such a system may significantly reduce a facility's environmental impact and yet would be vulnerable to a citizen suit because its operation produced an occasional permit violation." *Id.* But an overbroad citizen-suit provision interferes with this discretion and discourages just such an innovation.

Expanded citizen suits also "run the risk of inconsistent and unfair enforcement, as citizens may pursue even small and unavoidable violations of the Clean Water Act." Cross, *supra*, at 66. "To dedicated environmentalists, such 'over-enforcement' may seem unimportant, or even beneficial, [but] the Supreme Court has emphasized that the Act is not simply 'to eliminate water pollution,' [rather] Congress created a 'balance of public and private interests." *Id.* (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). These suits also come at considerable taxpayer expense as litigation expenses can divert funds from essential government services. *See* Pet.32–35; *see also* Susan A. Macmanus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 840–41 (1993).

Perhaps the policy could be justified if citizen suits somehow enhanced water resource protection, but increased citizen suits do not have that effect. "While some citizen suits are no doubt motivated by pure intentions, and some certainly produce tangible environmental gains, it is not clear how much environmental benefit citizen-suit provisions actually provide." Adler, *supra*, at 51.

It might seem natural to assume that more citizen suits mean more environmental protection,

"[u]nfortunately, citizen enforcement may not be an effective means of ensuring the most efficient implementation of environmental laws[, and] . . . may even frustrate the objective of environmental protection." Cross, *supra*, 64. That is because citizen plaintiffs do not face the same political and economic constraints that might limit government enforcement. Adler, *supra*, at 51. Instead, "citizen-suit provisions encourage the filing of suits against vulnerable plaintiffs irrespective of the environmental benefit." *Id.* at 51. And "[e]nvironmental citizen suits facilitate and encourage litigation over paperwork violations and permit exceedences, which may or may not impact environmental quality. *Id.* at 58.

Indeed, "[t]here is a growing consensus in environmental law that environmental regulations can better achieve their goals if they are more flexible." Adler, *supra*, at 66 (citing Karl Hausker, *Reinventing Environmental Regulation: The Only Path to a Sustainable Future*, 29 Envtl. L. Rep. 10, 148 (March 1999)). The Ninth Circuit's result removes that flexibility and instead "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." *Nw. Env't Advocs.*, 74 F.3d at 946 (O'Scannlain, J., dissenting from denial of rehearing). The cooperative federalism woven into the Clean Water Act is meant to avoid just such a result.

CONCLUSION

This Court should grant *certiorari* to reverse the Ninth Circuit Court's judgment.

Respectfully submitted,

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APPENDIX

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