No. _____

In The
Supreme Court of the United States

DAKOTA FINANCE LLC, d/b/a Arabella Farm;
KEN SMITH; SHARON SMITH;
WILLARD R. LAMNECK, JR.,
Petitioners,

v.

NATURALAND TRUST; SOUTH CAROLINA
TROUT UNLIMITED; UPSTATE FOREVER,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Water Act allows citizens to sue any person alleged to be in violation of an "effluent standard or limitation" under the Act. 33 U.S.C. § 1365(a). Because these "citizen suits" are meant to "supplement" not "supplant" the States' primary role in regulating water quality, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), Congress has barred them when a State has "commenced" and is "diligently prosecuting" an administrative penalty action "under a State law comparable to" the Clean Water Act's administrative penalty provisions. 33 U.S.C. § 1319(g)(6)(A)(ii) ("diligent prosecution bar"). Over the last several decades, the Courts of Appeals have issued conflicting rules on how "comparable" a State's law must be to trigger the bar. For example, the First and Eighth Circuits apply a deferential "overall comparability" test, while the Tenth and Eleventh Circuits employ a stricter "rough comparability" test, with still other Circuits applying variants of the two.

Here, a divided panel of the Fourth Circuit adopted a third and even more demanding standard, according to which the diligent prosecution bar does not preclude citizen suits unless a State's enforcement regime *exactly* follows the Clean Water Act's administrative penalty provisions and implementing regulations.

The question presented is:

What is the proper test for determining whether the "diligent prosecution bar" under 33 U.S.C. § 1319(g)(6)(A)(ii) precludes citizen suits brought under 33 U.S.C. § 1365(a)?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Dakota Finance, LLC d/b/a Arabella Farm, Ken Smith, Sharon Smith, and Willard R. Lamneck, Jr. Respondents are Naturaland Trust, South Carolina Trout Unlimited, and Upstate Forever.

Petitioner Dakota Finance, LLC, has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The proceedings identified below are directly related to the above-captioned case in this Court.

Naturaland Trust, et al. v. Dakota Fin., LLC, et al., No. 6:20-cv-01299-JD, 531 F. Supp. 3d 953 (D.S.C. Mar. 31, 2021). Judgment entered March 31, 2021.

Naturaland Trust, et al. v. Dakota Fin., LLC, et al., No. 21-1517, 41 F.4th 342 (4th Cir. July 20, 2022). Judgment entered July 20, 2022 (rehearing en banc denied September 2, 2022).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners Dakota Finance, LLC d/b/a Arabella Farm, Ken Smith, Sharon Smith, and Willard R. Lamneck, Jr., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's panel opinion is reported at 41 F.4th 342 (4th Cir. 2022) and is reproduced in the Appendix beginning at A-1. The opinion of the United States District Court for the District of South Carolina is reported at 531 F. Supp. 3d 953 (D.S.C. 2021) and is reproduced in the Appendix beginning at B-1. The Fourth Circuit's denial of rehearing en banc is unreported but is reproduced in the Appendix beginning at C-1.

JURISDICTION

The date of the decision sought to be reviewed is July 20, 2022. The Fourth Circuit denied rehearing en banc on September 2, 2022. On October 18, 2022, the Chief Justice granted Petitioners' request for an extension of time to petition for a writ of certiorari, through January 30, 2023. Dkt. No. 22A325. Jurisdiction is conferred under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

- 33 U.S.C. § 1365 – Citizen suits

  (a) Authorization; Jurisdiction

  Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

- 33 U.S.C. § 1319 – Enforcement

* * * * *

(g) Administrative penalties

* * * * *

(6) Effect of order

(A) Limitation on actions under other sections

> Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—
>
> * * * * *
>
> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection . . .
>
> * * * * *
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

INTRODUCTION

This case presents the Court with the opportunity to resolve a conflict among the Courts of Appeals about the scope of the Clean Water Act's authorization for citizen suits, 33 U.S.C. § 1365(a), and to clarify the meaning of a critical limitation that Congress has placed on these suits. The Fourth Circuit's divided decision below deepens a conflict among the Circuits while also flouting the Clean Water Act's text and structure, as well as this Court's precedent. The decision also threatens the States' ability to implement their environmental laws, exposes small businesses and property owners to duplicative penalties and regulatory burdens, and impedes the Act's goal to protect the Nation's waters.

Congress designed the Clean Water Act based on a "cooperative federalism" framework in which the Federal and State Governments share enforcement authority to protect the Nation's waters. *See New York v. United States*, 505 U.S. 144, 167 (1992). But Congress did not envision an equal balance of enforcement authority under the statute. Rather, the Act makes it the policy of Congress to "recognize, preserve, and protect the *primary* responsibilities and rights of States to prevent, reduce, and eliminate [water] pollution." 33 U.S.C. § 1251(b) (emphasis added).

Congress has sought to preserve the States' primary role by, among other things, limiting citizen suits. These suits are an exception to the Clean Water Act's framework and are intended to "supplement," not "supplant," governmental enforcement. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). One limitation on these suits

is 33 U.S.C. § 1319(g)(6)(A)(ii), which Congress added as part of its 1987 amendments to the Act. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 314(a), 101 Stat. 7, 46–49 (1987). This provision of the statute precludes citizen suits when a State has "commenced" and is "diligently prosecuting" an administrative penalty action "under a State law comparable to" the Clean Water Act's administrative penalty provisions, 33 U.S.C. § 1319(g).

The Act does not separately define the elements that comprise this diligent prosecution bar. Thus, a proper analysis of whether the bar is triggered should begin by identifying the ordinary meaning of "commenced," "diligently prosecuting," and "comparable." Yet, since Congress added the bar, the lower courts have struggled to articulate its meaning, applying conflicting tests to determine when the bar applies. And each new test has become less and less deferential to the States' primary role in regulating water resources under the Act.

This conflict is most marked in how the lower courts have determined whether a "State law" is "comparable to" § 1319(g)'s enforcement scheme. At least two Circuits—the First and Eighth—apply an "overall comparability" test. *See N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991); *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994). Broadly deferring to the States' primary enforcement authority under the Clean Water Act, this standard requires only that a State's overall regulatory scheme have comparable civil penalties, comparable enforcement goals, and comparable opportunities for

citizens to participate at significant stages of the decision-making process.

Other Circuits, however, have developed stricter, less deferential tests. For example, the Tenth and Eleventh Circuits apply the "rough comparability" test. *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1249, 1256 (11th Cir. 2003); *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1293–94 (10th Cir. 2005). Under this standard, a court compares a State's enforcement scheme against each category of § 1319(g)'s pertinent provisions—civil penalties, public participation, and judicial review. To trigger the diligent prosecution bar under this standard, a State's law must be roughly comparable to each corresponding class of federal provisions; a State could not, for example, make up for a deficiency in public participation by authorizing a superabundance of judicial review.

The Fourth Circuit's decision below did not adopt either of these tests. Rather, it applied a new heightened standard—even more demanding than the rough comparability test—that is best characterized as the "exactly comparable test." In doing so, the panel majority managed not only to deepen the longstanding conflict over comparability, but also to depart even further from Congress's cooperative federalism design for the Clean Water Act.

Petitioners Dakota Finance LLC, d/b/a Arabella Farm, *et al.* (Arabella), bought land in South Carolina and started a small working farm that would include a vineyard, orchard, and event barn for weddings and other gatherings. In clearing land for the farm, Arabella believed that its project fell under the Act's agricultural stormwater exemption. App.A-3–4. *See*

33 U.S.C. § 1362(14). The State of South Carolina disagreed and commenced, through its Department of Health and Environmental Control, an enforcement action under South Carolina's water pollution law. That action resulted in a Consent Order requiring that Arabella, among other things, obtain a Clean Water Act stormwater permit, remediate any damage its prior discharges might have caused, and pay a civil penalty to the State. App.B-4.

During these state proceedings, Respondents Naturaland Trust, *et al*. (Naturaland), sued Arabella in federal court under the Act's citizen suit provision. *See* 33 U.S.C. § 1365(a). Naturaland alleged, among other things, that Arabella had violated the Act by discharging pollutants into federally regulated waters—the same discharges for which South Carolina was already seeking relief in its administrative enforcement action. App.A-6, B-6. Naturaland's complaint sought an injunction, civil penalties that could result in up to tens of thousands of dollars a day, and attorneys' fees. App.A-6, B-12–13.

The District Court applied the diligent prosecution bar to dismiss, App.B-1–21, but a divided panel of the Fourth Circuit reversed. The panel majority did not separately address whether South Carolina had "commenced" an action and was "diligently prosecuting" that action under a "State law comparable to" the Clean Water Act's administrative penalty provisions. Nor did the panel majority apply either the "overall comparability" test or the "rough comparability" test. Instead, relying on dicta from an outlier Seventh Circuit decision, the panel majority concluded that the Notice of Violation was inadequate

to trigger the diligent prosecution bar because South Carolina law does not afford entities like Naturaland the same rights in the same manner and at the same time as under § 1319(g). App. A-11–16. In so holding, the panel majority employed a doubly flawed and conflicting method. Not only did it apply a standard for comparability that no other Circuit has endorsed, it allowed that same flawed standard to deform the otherwise plain meaning of what should suffice to "commence" a citizen-suit-barring state proceeding—and this also contrary to the approach of other Circuits. App.A-13–14, 21–22.

The Court should grant certiorari and reverse the Fourth Circuit's decision, for three reasons.

First, the Fourth Circuit's exactly comparable standard expands the conflict among the Courts of Appeals over how to apply the diligent prosecution bar. This Court can resolve that conflict by providing a uniform, textually based analysis for the lower courts to apply. *See infra* Part A.

Second, the Fourth Circuit's heightened standard limiting when the diligent prosecution bar applies inverts the Clean Water Act's structure and defies this Court's precedent by "elevat[ing] citizen suits above their supplemental role" under the Act. App.A-18 (Quattlebaum, J., dissenting). In the process, the decision substantially limits the ability of States like South Carolina to develop their own schemes for protecting the Nation's waters as Congress intended. Congress's cooperative federalism framework allows these States to experiment with different enforcement procedures tailored to protect water quality, while also providing for fair and administrable enforcement proceedings for their citizens. But the Fourth Circuit's

exactly comparable standard paradoxically compels States to adopt a one-size-fits-all standard to preserve their ability to control water quality enforcement within their jurisdictions. *See infra* Part B.1.

The decision also contributes to the ever-growing uncertainty for small businesses and property owners over the Clean Water Act's impact. Without the diligent prosecution bar, these small business and property owners might face not only state enforcement proceedings but also duplicative federal lawsuits through sometimes abusive citizen suits—exposing them to excessive penalties and attorneys' fees—even after they have already complied with the statute and paid civil penalties to a State. Indeed, individuals and small businesses like Arabella who, because of a good-faith mistake, illegally discharge pollutants without a permit cannot know under the currently fractured state of the law whether they will be able definitively to settle their disputes on reasonable terms. *See infra* Part B.2.

Moreover, the Fourth Circuit's decision limiting the diligent prosecution bar's scope will undermine Congress' goal to protect the Nation's waters. A broad diligent prosecution bar prevents property owners from being regulated on the front end by the States and then being sued on the back end by private enforcers. Duplicative enforcement actions dissuade these citizens from working with their state and local governments to remediate environmental harm because they know that they may be subject to secondary liability even after they have paid fines and are working to comply with the law. *See infra* Part B.3.

Finally, this case is a good vehicle to resolve the conflict among the Circuits, to clarify the diligent prosecution bar's meaning, and to ensure that lower courts, as well as citizen suit plaintiffs, adhere to Congress's cooperative federalism framework. *See infra* Part C.

STATEMENT OF THE CASE

A. The Clean Water Act

1. Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In doing so, Congress designed a regulatory scheme respecting our federal structure by dividing the authority to regulate water pollution between the Federal Government and the States. The Act thus "protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources," *id.* § 1251(b), while also providing for direct federal regulation when necessary.

That regulation is found principally in the Act's prohibition of most discharges of "pollutants" from "point sources" to "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(12). Nonexempt discharges to regulated waters therefore require a permit from either the Environmental Protection Agency (called a National Pollutant Discharge Elimination Program, or NPDES, permit) or, if the discharge involves "dredged or fill material," from the Army Corps of Engineers (commonly called a Section 404 permit). *See id.* §§ 1342(a), 1344(a). Discharging pollutants without a required permit, or violating permit conditions, risks significant civil and even criminal

liability. *See* 33 U.S.C. § 1319(c), (d). *See also* 40 C.F.R. § 19.4 tbl. 1 (authorizing a civil penalty of over $60,000 per day per violation).

Consistent with the Act's cooperative federalism framework, each State may establish and administer its own permitting program, including for NPDES permits, if the program conforms with certain guidelines and is approved by EPA. *See* 33 U.S.C. § 1342(b); 40 C.F.R. § 123.27.

2. The principal authority to enforce the Clean Water Act rests first with EPA, which can seek administrative, civil, and criminal sanctions for past or ongoing discharges covered by the statute. *See* 33 U.S.C. § 1319(a)–(d), (g). But States that have been delegated permitting authority can also seek such penalties for past or ongoing violations. *Id.* § 1342(b)(7).

In addition, the Act delegates some enforcement authority to private parties: "any citizen" may bring a civil action against any person who is alleged "to be in violation" of specified provisions of the Act, including its NPDES permitting requirement. *See id.* § 1365(a). Private enforcers can seek injunctive relief, as well as civil penalties payable to the United States Treasury. *Id.* They can also recover attorney fees, expert witness fees, and other litigation costs for successful suits. *Id.* § 1365(d). But as this Court has recognized, these suits are meant to play a limited role in enforcing the Act's requirements. In this way, citizen suits "supplement" and do not "supplant" the States' primary role in regulating water quality. *Gwaltney*, 484 U.S. at 60.

3. To ensure that citizen suits remain limited to a supplementary role under the Act, Congress bars such suits when governments are enforcing the Act's requirements. First, citizen suits are precluded if the Federal Government or a State sues or prosecutes an alleged violator in federal or state court. *See* 33 U.S.C. § 1365(b) ("No [citizen suit] may be commenced . . . (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State . . . ."). Second, citizen suits are barred if a State has brought an administrative action under a State law that is comparable to the Clean Water Act's administrative penalty provisions. Specifically, "any violation . . . with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to [§1319(g)] . . . shall not be the subject of a civil penalty action under . . . [the citizen suit provisions]." *Id.* § 1319(g)(6)(A)(ii).

B. Facts and procedural history

1. Arabella is a small, family-owned business that owns land in Pickens County, South Carolina. Arabella's property is bordered by three bodies of water—Clearwater Branch, Peach Orchard Branch, and an unnamed tributary of the Eastatoe River. App.A-3.

In 2017, Arabella began converting its land into a working farm that would include an orchard, vineyard, and event barn for weddings and other festivities. *Id.* Arabella did not seek a permit for stormwater runoff before starting work on its property because it believed that its construction fell within the Clean Water Act's exemption for "agricultural stormwater discharges and return flows from

irrigated agriculture," 33 U.S.C. § 1362(14). *See* App.A-3–4. But Pickens County and the South Carolina Department of Health and Environmental Control thought otherwise, and in 2018 began an investigation of Arabella's construction activities for illegal stormwater discharges into the neighboring waters, including the Eastatoe River. App.A-4.[1] Over the next year, Arabella, the County, and the Department engaged in several informal interactions. *Id.*

2. These interactions resulted in the Department issuing Arabella, in September 2019, a "Notice of Alleged Violation/Notice of Enforcement Conference" under South Carolina's Pollution Control Act, S.C. Code Ann. § 48-1-90(A). *See* App.B-4. This type of document is the first step in the Department's administrative enforcement procedure for all of the state environmental programs that it administers. App.B-4; App.A-21–22. The Notice of Violation alleged, as relevant, that Arabella had discharged pollutants into waters regulated by the Clean Water Act without the required permit. App.A-25. It warned that if Arabella failed to attend the enforcement conference, Arabella would face an assessment of monetary penalties and other sanctions. *Id.*

In November 2019—after the Department had sent the Notice of Violation—Naturaland sent Arabella a notice of intent to sue, alleging violations of the Clean Water Act. *See* App.A-5. *Cf.* 33 U.S.C.

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[1] South Carolina has administered its own NPDES permitting program under 33 U.S.C. § 1342(b) since 1975. *See* 40 Fed. Reg. 28,130 (July 3, 1975). The State delegates enforcement authority to the Department. S.C. Code Ann. § 48-1-10, *et seq.*

§ 1365(b)(1)(A) (requiring such notice before the filing of a citizen suit). In April 2020—six months after the Department had sent its Notice of Violation—Naturaland sued Arabella in the United States District Court for the District of South Carolina. App.A-5–6. The complaint alleged, among other claims, that Arabella was in violation of the Clean Water Act, and sought relief in the form of an injunction along with civil penalties payable to the United States Treasury.[2] *See* App.A-6.

Shortly after Naturaland filed the complaint, Arabella and the Department agreed to a Consent Order. Among other things, the Consent Order required Arabella to: (1) obtain coverage under a NPDES stormwater discharge permit (which permit Arabella obtained on May 22, 2020); (2) pay the State a civil penalty; (3) submit a stormwater management plan and site stabilization plan; and (4) conduct a stream assessment with recommended remediation efforts. App.A-6, A-32; B-4. The Consent Order also contemplated further Department involvement to review and approve plans for the stabilization of Arabella's property, for an assessment of adjacent streams, and potentially for any further remediation that such assessment might find necessary. *Id.* Finally, the Consent Order preserved the Department's authority to take further enforcement action if Arabella violated the order. *Id.*

3. Arabella then moved to dismiss the suit based on § 1319(g)'s diligent prosecution bar. App.B-5. It argued that, at the time Naturaland initiated the

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[2] The complaint also alleged claims under South Carolina common law. App.A-5–6.

action, the Department's notice had already commenced an administrative enforcement action, the Department was diligently prosecuting that action, and South Carolina law is comparable to § 1319(g). App.B-8

In deciding the motion to dismiss, the District Court applied a straightforward three-step statutory analysis to determine whether South Carolina's enforcement proceeding triggered the diligent prosecution bar under § 1319(g). To begin, it determined that South Carolina had "commenced" an administrative action through the Department's issuance of the Notice of Violation—which occurred months before Naturaland filed suit. App.B-10. Then it determined that the Department was "diligently prosecuting" that enforcement action. *Id.* Finally, with respect to comparability, the District Court began its analysis with the premise that the "text of the [Act] and Supreme Court precedent suggest a broad interpretation of the phrase comparable State Law." *Id.* (citing *McAbee*, 318 F.3d at 1252). Accordingly, "the term comparable means that the state law need only be sufficiently similar to the federal law, *not identical*." App.B-11 (emphasis in original). Noting the split among the Circuits as to how to assess comparability, the District Court settled upon the rough comparability test which, as noted above, compares each part of the federal administrative enforcement scheme in § 1319(g)—civil penalties, public participation, and judicial review—to the corresponding provisions of state law. App.B-12. Applying this test, the court held that South Carolina's law is roughly comparable to § 1319(g). App.B-12–17. First, it determined that

South Carolina's law has civil penalty provisions roughly comparable to § 1319(g)(1)–(3) App.B.12–13. Second, it determined that South Carolina law provides public participation rights that are roughly comparable to those found in § 1319(g)(4). App.B.13–16. And last, it determined that South Carolina law provides rights of judicial review roughly comparable to those made available in § 1319(g)(8).[3] App.B-16.

4. A divided panel of the Fourth Circuit reversed. App.A-1–17. Unlike the District Court and the panel dissent, the panel majority did not apply a three-step framework separately analyzing commencement, diligent prosecution, and comparability. Nor did it apply the overall or rough comparability tests adopted by other Circuits. Instead, the panel lumped the inquiries together, looking to whether the Notice of Violation commenced an "action" that, in terms of substance, procedure, and timing, was exactly like an EPA proceeding under § 1319(g). *See* App.A-11–15.

To be sure, the panel majority seemingly started off on the right foot in recognizing that, to understand what "commenced" means, one should understand what "action" means, and that the "essential character of an 'action'" is "an adversarial proceeding initiated by a formal, public document[.]" App.A-12.

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[3] The District Court dismissed the barred Clean Water Act claim for lack of subject matter jurisdiction, which the Fourth Circuit *sua sponte* held to be error. App.A-7–11. *See* App.A-20 n.1 (Quattlebaum, J., dissenting). Naturaland's complaint also had alleged violations of the Act's dredged-and-fill permitting requirements, but the District Court held that the Act's citizen suit provision did not extend to such claims, App. B-18–19, and Naturaland did not press them in its appeal, *see* Appellants' Opening Brief 20 n.2, Dkt. 21.

But then the panel majority's analysis went quickly awry. In the majority's estimation, because South Carolina's Notice of Violation did not initiate an enforcement proceeding just like the one outlined in EPA regulations—*i.e.*, an administrative complaint in EPA format that triggers a proceeding for which public participation and judicial review are made available before EPA may settle or assess civil penalties—the notice could not "commence" a qualifying "action" under § 1319(g)(6)(A)(ii). App.A-11–15. *See* App.A-13 ("[A]lthough . . . public participation and judicial review of the Department's consent orders [are authorized] under South Carolina law . . ., neither of these features is available until *after* the issuance of a departmental consent order."). (emphasis in original).[4]

5. Judge Quattlebaum dissented. App.A-17–49. Unlike the panel majority, he began his analysis by emphasizing that, under the Clean Water Act, States hold the primary responsibility to manage the Nation's water resources; thus, citizen suits serve only to supplement, not supplant, government enforcement. App.A-17 (citing *Gwaltney*, 484 U.S. at 60). And unlike the majority's "questionable" analysis combining the commencement and comparability prongs, Judge Quattlebaum properly broke up his analysis into three separate inquiries. App.A-27.

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[4] Because the panel majority determined that the diligent prosecution bar had not been triggered, it did not address whether the bar would preclude only a claim for civil penalties, or instead would also preclude a request for injunctive relief. The panel did, however, reject Arabella's objection to the sufficiency of Naturaland's notice letter. App.A-16–17. Arabella does not press that objection here.

First, he addressed whether the Department's Notice of Violation "commenced" an enforcement action. A.20–31. To resolve that issue, he looked to the ordinary meaning of "commenced," which is to "begin or start" or, in the legal context, to "initiate formally by performing the first act of a legal proceeding." App.A-21 (citing *Commence*, Webster's Third New International Dictionary (1986)). Because the Notice of Violation under South Carolina law is the Department's first step in enforcing its environmental laws and is more than just an "informal" inquiry, he determined that it would meet either definition. App.A-21–22.

Second, he inquired whether the Department was diligently prosecuting the administrative action, and readily determined that it was. App.A-31–32.

Third, he addressed whether the Department's administrative proceeding was "an action under a state law comparable to [CWA § 1319(g)]." App.A-32–43. Although acknowledging the conflict among the Circuits between the overall and rough comparability tests, App.A-34–35, he avoided choosing between them because he concluded, like the District Court, that South Carolina's enforcement regime is roughly comparable to § 1319(g) and thus necessarily would satisfy the overall comparability standard. In determining that South Carolina law is comparable, he emphasized that "comparable cannot mean identical." App.A-36 (citing *McAbee*, 318 F.3d at 1252). He then explained how South Carolina law provides rights for interested parties and public participation that, although not mirror images of EPA's regulations, are nevertheless comparable. App.A37–38. Similarly, he concluded that South Carolina law provides for

comparable civil penalties and judicial review. A.38–39. He thus would have affirmed the application of the diligent prosecution bar. The majority's contrary conclusion, he warned, promised to "elevate[] citizen suits above their supplemental role," App.A-18, thereby "overriding the delicate balance that Congress established under the Act," App.A-49.[5]

Arabella then petitioned for rehearing en banc, which the Fourth Circuit denied without opinion. App.C-1–2.

REASONS FOR GRANTING CERTIORARI

For several reasons, this Court should grant certiorari to review the Fourth Circuit's flawed decision.

First, the panel majority opinion contributes to a conflict among the lower courts over the meaning of § 1319(g)'s diligent prosecution bar. In the 35 years since Congress amended the Clean Water Act to expand the diligent prosecution bar to include state administrative penalty actions, the Courts of Appeals have developed different tests and standards. With each new ruling, culminating in the Fourth Circuit's exactly comparable standard, these decisions have become less deferential to the States and have moved farther away from Congress's explicit policy that the

[5] Judge Quattlebaum went on to conclude, contrary to the District Court, that the diligent prosecution bar did not preclude Naturaland's request for injunctive relief, but he also thought it unlikely that the request was still live, given that Arabella has already obtained the needed NPDES permit. *See* App.A-43–49. *See also infra* Part C.

States should retain primary responsibility to regulate water pollution.

Second, the question presented is significant for the States, their citizens, and the environment. The Fourth Circuit's analytically flawed analysis applying an exactly comparable standard undermines Congress's cooperative federalism framework and defies this Court's precedent by allowing citizen suits to trump a State's preferred enforcement approach. These errors will undermine the States' ability to develop their own regulatory frameworks and to work cooperatively with their citizens to resolve disputes. The Fourth Circuit's decision also expands the ability of private enforcers to sue for financially crushing penalties and to collect gargantuan attorneys' fees, even after property owners have begun working with their state and local governments to remediate any environmental harm that they may have caused.

But it is not just small businesses and property owners who are threatened by the Fourth Circuit's wrongheaded narrowing of the diligent prosecution bar. The environment itself will be harmed. By making it easier for private parties to bring lawsuits that seek duplicative penalties and remediation, property owners will have less incentive to work with their States to repair environmental harm. There is simply no incentive to settle a dispute on the front end when alleged violators know that they will face subsequent draconian penalties and staggering attorneys' fees on the back end.

Finally, this case presents a good vehicle for the Court to resolve the conflict among the Circuits and to bring uniformity and clarity to the law. The conflict over the diligent prosecution bar's meaning is clearly

presented, and by resolving that conflict, the Court would provide substantial relief to Arabella. Moreover, now is the right time for the Court to weigh in. Nearly every Court of Appeals has addressed to some extent the scope of the diligent prosecution bar, and the full range of potential standards—overall to rough to exact comparability—has been tried. There is thus little reason to delay review for further percolation.

A. The Court should grant certiorari because the Circuit Courts are at odds over the meaning of the Clean Water Act's diligent prosecution bar

At least nine Courts of Appeals have weighed in on § 1319(g)'s diligent prosecution bar since Congress added the provision in 1987. But those courts have not reached a consensus over the bar's scope. Far from it. Two courts have expressly adopted the "overall comparability" test, two have expressly adopted a stricter "rough comparability" test, three are a "mixed bag," App.A-35 n.8, employing variations or combinations of those tests, and two others—including the Fourth Circuit—have adopted a uniquely confused approach which in practice converts "comparable" into "carbon copy" and "commenced . . . an action under a State law" into "commenced an EPA-style suit."

1. *The "overall comparability test."* The First Circuit was the first Court of Appeals to address § 1319(g)'s diligent prosecution bar. In *Scituate*, the court had to decide whether the Massachusetts Clean Waters Act was comparable. 949 F.2d at 553. In setting up its comparability analysis, the court recognized that Congress expressly preserved the

States' primary authority to regulate water pollution. *See id.* at 555 (citing 33 U.S.C. § 1251(b)). It also emphasized that a Clean Water Act "citizen suit is meant to supplement rather than to supplant governmental [enforcement] action." *Id.* (citing *Gwaltney*, 484 U.S. at 60).

Scituate then held that, to establish comparability, "it is enough" that a State's law, "under which the State is diligently proceeding, contains penalty assessment provisions comparable to" the Clean Water Act, the "State is authorized to assess those penalties," and the "overall scheme of the [State law and the Clean Water Act] is aimed at correcting the same violations, thereby achieving the same goals." *Id.* at 556. Such an "overall" standard, the court observed, was necessary to avoid undercutting Congress's intent to protect the Nation's waters by enabling "[d]uplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway." *Id.* Indeed, such duplicative actions would not only undermine Congress's goal but would be "impediments to environmental remedy efforts." *Id.*

A few years later, the Eighth Circuit followed the First Circuit in *Arkansas Wildlife Federation*, 29 F.3d at 376, 379. The court analyzed whether the diligent prosecution bar applied by dividing its analysis into three parts.

First, the court held that Arkansas had "commenced" an action by issuing a "Consent Administrative Order." *Id.* at 379–80. It found that the order commenced an administrative action even though, under Arkansas law, such an order does not follow the "usual notice and hearing procedures

designed to protect and give access to the public and interested parties." *Id.* In reaching that conclusion, the court recognized that "states are afforded some latitude in selecting the specific mechanisms of their enforcement program," and that Arkansas law classifies a consent administrative order as commencing an administrative action. *Id.* at 380.

Second, the court held that Arkansas was "diligently prosecuting" its enforcement action. *Id.* (observing that citizen suits "should not considerably curtail the governing agency's discretion to act in the public interest") (citing *Gwaltney*).

Third, the court held that Arkansas's law was "comparable to" § 1319(g). The citizen suit plaintiffs had argued, as Naturaland did below, that Arkansas law was not comparable because the "public notice and comment provisions of § 1319(g)(4)(A)" come *before* an order issuing civil penalties is final, but in Arkansas, they are provided only afterward. *Id.* at 381. In rejecting that distinction, the Eight Circuit emphasized that "comparable" means "similar," not "identical." *Id.* It adopted the *Scituate* standard, according to which courts should look to whether the "overall regulatory scheme affords significant citizen participation, even if the state law does not contain precisely the same public notice and comment provisions as those found in the federal [Clean Water Act]." *Id.* Thus, comparability is satisfied so long as the state law (i) "contains comparable penalty provisions which the state is authorized to enforce," (ii) "has the same overall enforcement goals as the federal [Clean Water Act]," (iii) "provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process," and

(iv) "adequately safeguards their legitimate substantive interests." *Id.* at 381–82 (citing *Scituate* 949 F.2d at 556 & n.7).

2. *The "rough comparability standard."* Around a decade after the Eight Circuit decided *Arkansas Wildlife Federation,* the Eleventh Circuit adopted a different test that, while more rigorous than the overall comparability standard, still respects the States' primary regulatory authority over water resources. In *McAbee*, the Eleventh Circuit addressed whether the Alabama Water Pollution Control Act was sufficiently comparable. 318 F.3d at 1249. Following the Eighth Circuit's ruling in *Arkansas Wildlife Federation*, the Eleventh Circuit embarked upon its § 1319(g)(6)(A)(ii) analysis as a three-part framework: whether a State has (i) "commenced" and (ii) is "diligently prosecuting" an administrative enforcement action under a State law (iii) "comparable to" § 1319(g).[6]

McAbee began its comparability analysis by acknowledging, along with the First and Eighth Circuits, that (i) States have the primary responsibility to prevent, reduce, and eliminate water pollution, *id.* at 1252 (citing 33 U.S.C. § 1251(b)), (ii) "comparable" as used in § 1319(g)(6)(A)(ii) "means that the state law need only be sufficiently similar to the federal law, not identical," *id.* (quoting *Arkansas Wildlife Federation*, 29 F.3d at 381), and (iii) citizen suits play only a "supplemental role" and thus are not

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[6] Although the court adopted a tripartite approach, it did not analyze the first two parts. *See id.* at 1251 n.6 ("The requirements of 'commencement' and 'diligent prosecution' are not at issue in this appeal.").

meant to "change[] the nature of the citizen's role from interstitial to potentially intrusive," *id.* (quoting *Gwaltney*, 484 U.S. at 61).

Nevertheless, the court rejected the overall comparability test adopted by the First and Eighth Circuits. In the Eleventh Circuit's view, a comparison based on each class of federal provision—penalty amounts, rights of interested parties, and availability of judicial review—would be more consistent with the Clean Water Act's text, which separately details these categories. *Id. See* 33 U.S.C. § 1319(g)(2), (4), (8). This category-by-category approach would also, the court concluded, be more administrable because courts would not need to weigh the incommensurables of, for example, more public participation versus less judicial review. *See id.* Similarly, the court noted that a rough comparability standard would reduce uncertainty for litigants and state actors. *See McAbee*, 318 F.3d at 1255.[7]

The Tenth Circuit followed the Eleventh Circuit's lead in *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union*, 428 F.3d 1285. Like *McAbee*, the Tenth Circuit upfront acknowledged Congress's intent that the States retain primary responsibility to control water quality and that citizen suits are meant only to supplement the States' enforcement role. *Id.* at 1288–89. The court also recognized that the plain meaning of "comparable" does not suggest an exacting standard. *Id.* at 1293 (citing Webster's Third New

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[7] The Eleventh Circuit then went on to hold that Alabama's law was not comparable, principally because it did not afford the general public any right to participate. *See id.* at 1257; App.A-40 n.9.

International Dictionary 461 (1986) (defining "comparable" as "capable of being compared; . . . having enough like characteristics or qualities to make comparison appropriate"). It nevertheless concluded, like the Eleventh Circuit, that the "rough comparability test" is more faithful to the Clean Water Act's text. Thus, for a "state law to be 'comparable,' under 33 U.S.C. § 1319(g)(6)(A)(ii), each category of state-law provisions—penalty assessment, public participation, and judicial review—must be roughly comparable to the corresponding class of federal provisions." *Id.* at 1294.[8]

3. *The other Circuits' "mixed bag."* Several other Circuits have weighed in on the diligent prosecution bar's meaning with varying results. The Ninth Circuit "implicitly" adopted the "rough comparability" test in *Citizens for a Better Env't-California v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1117–18 (9th Cir. 1996). *See McAbee*, 318 F.3d at 1253 (observing that the Ninth Circuit "used a test for comparability that is arguably more demanding than the standards adopted by the First and Eighth Circuits" and that the Ninth Circuit rejected the "overall comparability test"). The Sixth Circuit, without specifically adopting either overall or rough comparability, has declared that "if the overall State regulatory scheme affords interested and/or adversely affected citizens the safeguard of a

[8] But unlike *McAbee*, the Tenth Circuit held that the state law at issue—Oklahoma's—was comparable. The court reached that conclusion despite the fact that, unlike the Clean Water Act, Oklahoma's administrative penalty law did not "require notice of an assessment to anyone other than the violator;" what mattered was that the State's "open meetings Act" required public notice of all regular and special meetings. *Id.* at 1295.

meaningful opportunity to participate in the administrative enforcement process," then the State law is comparable. *Jones v. City of Lakeland*, 224 F.3d 518, 523 (6th Cir. 2000). Similarly, the Fifth Circuit has not expressly adopted either overall or rough comparability but has cited in full the overall comparability test adopted by *Arkansas Wildlife Federation*. *Lockett v. EPA*, 319 F.3d 678, 683–85 (5th Cir. 2003).

4. *The exactly comparable test.* The Seventh Circuit construed the diligent prosecution bar but did not affirmatively adopt a test in *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743 (7th Cir. 2004). Initially, the court appeared to embrace *McAbee*'s rough comparability standard, *see id.* at 755, but then it made the analytical mistake that *McAbee* specifically warned against. Rather than construe the three textual components of the diligent prosecution bar independently, the court "discerned" from previous cases and "the contours of the law" that, with "respect to administrative enforcement actions, the 'commencement' of the action is tied in with the 'comparability' of the state statute to the federal provisions." *Id.* at 756. The court then concluded that the bar had not been triggered because none of Wisconsin's administrative actions allowed for public notice or participation, and thus none could have "commenced" a qualifying "action" under § 1319(g). *See id.* at 757. In employing this analytically flawed approach, the Seventh Circuit suggested that what matters is not just comparability solely in terms of substance—*e.g.*, does State law provide for public participation and judicial review?—but also

comparability in terms of timing and procedure. *Id*. at 756 ("[F]or the purposes of § 1319(g), an administrative action 'commences' at the point when notice and public participation protections become available to the public and interested parties.").

The Fourth Circuit's decision below latched on to the Seventh Circuit's embryonic analytical mistake to give birth to its new exactly comparable standard. Like the Seventh Circuit, the panel majority declined to employ a textually informed, tripartite analysis for applying the diligent prosecution bar's requirements, and instead crudely collapsed them. *See, e.g.*, App.A-13 (discounting "the availability of public participation and judicial review of the Department's consent orders under South Carolina law as support for application of the diligent prosecution bar here" because "neither of these features is available until *after* the issuance of a departmental consent order," and thus "no comparable action had yet commenced"). And just as the Seventh Circuit's analysis intimated, the panel majority below required both substantive and procedural parity to establish comparability.

As for substance, it did not matter to the panel majority that the Department's Notice of Violation commenced "adversarial" enforcement proceedings which, if ignored by Arabella, "would have risked an assessment of monetary penalties and other sanctions," or that the contents of the Notice of Violation would satisfy federal pleading standards for complaints, or that the Notice of Violation is a public document subject to public disclosure. *See* App.A-25 (Quattlebaum, J., dissenting). Rather, per the panel majority, the Notice of Violation was irremediably inadequate because it was not the equivalent of what

EPA would produce to commence a Clean Water Act administrative penalty proceeding. *See* App.A-12 (observing that the notice was the equivalent of neither a "complaint" nor a "consent agreement and final order" under EPA's regulations).

And as for timing, it did not matter to the panel majority that the Notice of Violation "may have been an important and even necessary step in the Department's process," App.A-15, because "comparable" rights of public participation and judicial review do not become available under South Carolina law "until *after* the issuance of a departmental consent order." App.A-13 (emphasis in original). Thus, under the panel majority's reasoning, unless a State gives the *same* opportunities for public participation and judicial review and at *precisely* the same time as EPA does, then a State has no ability to control the who, when, or how of enforcement of water quality regulation in its jurisdiction. And that is true even if, as the dissent observed, the State substantively affords *greater* protections under its law. App.A-42 (Quattlebaum, J., dissenting) (noting that "South Carolina's right to judicial review is broader than the Clean Water Act's corollary").

It should therefore come as no surprise that such an anti-federalism ruling makes no effort to reconcile its exactly comparable standard with Congress's desire to preserve the States' traditional authority over water resources, 33 U.S.C. § 1251(b), or to limit citizen suits to an "interstitial" role in Clean Water Act enforcement, *Gwaltney*, 484 U.S. at 61; App.A-49 (Quattlebaum, J., dissenting).

* * *

In sum, the Circuit Courts are in entrenched conflict over the diligent prosecution bar's scope. Nine have construed the bar, but the result has been a mishmash of conflicting standards and analytical approaches, with the Fourth Circuit's the most recent—yet also the least faithful to the Clean Water Act's text and structure, and this Court's precedent.

B. Resolving the conflict over the diligent prosecution bar's scope is exceptionally important

The question presented has grave implications far beyond this case, for the States, their citizens, and the Nation's waters. It is thus critical that the Court step in and bring clarity to the Clean Water Act and uphold the cooperative federalism framework that Congress designed.

1. A fundamental principle of our constitutional structure is that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *New York*, 505 U.S. at 181). Indeed, the "federal structure allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes[.]" *Id.* (quotation marks & citation omitted).

Following this fundamental principle, Congress structured the Clean Water Act to ensure that the Nation's waters are protected by allowing the States, with federal oversight, to retain the primary responsibility and right to regulate water pollution. 33 U.S.C. § 1251(b). In turn, States can develop different approaches to guard the Nation's waters. *See* App.A-

23 (Quattlebaum, J., dissenting) ("[T]he Clean Water Act's cooperative federalism framework encourages states to experiment with different regulatory approaches.")). But they can also protect their citizens from onerous procedures by having administrative processes to resolve conflicts without formal lawsuits and burdensome, uniform remedial measures. *See* Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 Duke Envtl. L. & Pol'y F. 253, 278–80 (2013). Indeed, state administrative schemes are often used to deal with lower-priority violations committed by property owners such as Arabella, which did not know that its event barn project violated the law but wanted to make things right as soon as it learned of the violation. *See* App.A-3–4.

Almost every State has implemented these administrative enforcement programs. Forty-seven—including South Carolina—have assumed NPDES permitting responsibilities.[9] These States have developed programs to issue permits and have enacted administrative enforcement regimes—all of which EPA has approved.[10] And many of these States, including States within the Fourth Circuit, have enforcement schemes like South Carolina's that

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[9] *See* https://www.epa.gov/npdes/about-npdes ("Currently 47 states and one territory are authorized to implement the NPDES program.").

[10] *Id.*

commence through a Notice of Violation or similar document.[11]

To be sure, Congress authorized a role for citizen suits when federal or state agencies fail to guard adequately against water pollution. But contrary to the thrust of the panel majority opinion below, citizen suits were never meant to play an equal—much less elevated—role under the Act's enforcement structure. *See Arkansas Wildlife Federation*, 29 F.3d at 380.

The diligent prosecution bar plays an important role under this framework. It allows States to enforce their administrative schemes without interference from private parties and to encourage alleged violators to work expeditiously with state and local governments to correct environmental harms.[12] Yet

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[11] *See* Alaska Stat. Ann. § 46.03.761; Ark. Code Ann. § 014.08.1-8.402(B), *et seq.*; Cal. Code Regs. tit. 27, § 25903; Colo. Rev. Stat. Ann. § 25-8-602, *et seq.*; Del. Code Ann. tit. 7, § 6005(b)(3); Fla. Stat. Ann. § 376.16; Fla. Dep't of Envtl. Prot., "Enforcement Manual," Office of General Counsel, Chapter 5: The Administrative Process and Remedies, pg. 61 (Sept. 15, 2022), https://floridadep.gov/sites/default/files/chapter_5_Sept2022.pdf; Haw. Rev. Stat. Ann. § 342D-9; Idaho Code Ann. § 39-108(3)(a)(i); 415 Ill. Comp. Stat. Ann. 5/31; Ind. Code Ann. § 13-30-3-3, *et seq.*; Iowa Admin. Code r. 567-17.2(455B); Ky. Rev. Stat. Ann. § 151.182(1); Mass. Regs. Code tit. 310, § 5.12; Me. Rev. Stat. Ann. tit. 38, § 347-A(1)(B); Minn. Stat. Ann. § 116.072; N.C. Gen. Stat. Ann. § 143-215.6A(d); Or. Rev. Stat. Ann. § 468.126(1); 25 Pa. Code § 92a.103; R.I. Gen. Laws Ann. § 46-12-9; R.I. Gen. Laws Ann. § 42-17.6-3(a); Vt. Stat. Ann. tit. 10, § 8006(b); W. Va. Code St. R. § 47-1-4; Wyo. Stat. Ann. § 35-11-701(c)(i).

[12] *See* Amicus Curiae Brief of South Carolina Department of Health and Environmental Control in Support of Appellees' Petition for Rehearing En Banc at 5, *Naturaland Trust v. Dakota Finance*, Dkt. 66-1 (4th Cir. Aug. 10, 2022).

the Fourth Circuit's decision did not show any deference to South Carolina's enforcement scheme. It did not examine the Clean Water Act's cooperative federalism framework. It didn't even cite *Gwaltney*. It is no wonder then that its decision subverts Congress's purposes and this Court's precedent by elevating "citizen suits above their supplemental role," App.A-18, and forcing States to mimic EPA's regulatory requirements as the price for retaining some measure of water quality control within their jurisdictions. *See* App.A-11–15.

2. The Fourth Circuit's flawed decision narrowing the diligent prosecution bar not only undermines the Clean Water Act's structure but also threatens great harm to small businesses and property owners like Arabella. Because the Act's reach is "notoriously unclear," *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring), it is unfortunately all too easy even for property owners acting in good faith to run afoul of the Act's "regime of strict liability," *Cnty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1489 (2020) (Alito, J., dissenting). And once a property owner is found to be in violation of the Act, the penalties can be "crushing." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring).

By narrowing the diligent prosecution bar, the Fourth Circuit expands the ability of groups to sue in federal court for often innocent violations, collect money for the United States Treasury, and obtain attorneys' fees for doing so. Arabella's plight is a fitting example. As noted above, Arabella did not seek a permit for stormwater runoff because it believed that its construction fell within the Act's agricultural

exemption. App.A-3–4. Arabella did not learn of any wrongdoing until the government, one might say, came knocking on the barn door. And at that point, Arabella cooperatively worked with the Department—and continues to do so to this day—agreeing to obtain an NPDES permit, to pay a fine, and to remediate any harm that it may have caused. Yet despite these good efforts, Arabella still must defend against a federal lawsuit in which it faces financially ruinous civil penalties and attorneys' fees.

Lamentably, this quandary is not unique to Arabella. Citizen suits, with their threat of life-changing liabilities, are common. And these suits are often leveraged by private enforcers to strong-arm property owners into settlements. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 209–10 (2000) (Scalia, J., dissenting) (observing how citizen plaintiffs' "massive bargaining power . . . is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing"). *See also* Marc Robertson, *Environmental Ambulance Chasing: DOJ Urges Court To Scrutinize Clean Water Citizen-Suit Settlements*, Forbes (June 26, 2018) (describing a Department of Justice court filing raising concerns about a law firm's abusive use of Clean Water Act citizen suits).[13]

Simply put, small businesses and property owners should not face ruinous federal lawsuits after they have already been subject to state enforcement actions and are working with the authorities to comply with the law. But the Fourth Circuit's decision

[13] *Available at* https://bit.ly/3R0xFIW.

restricting the diligent prosecution bar makes that situation much more likely.

3. By limiting the diligent prosecution bar, the Fourth Circuit's decision also undermines environmental protection. Indeed, the over-enforcement of environmental laws through duplicative actions like unbarred citizen suits can "discourage voluntary environmental improvements, such as those which can result from cooperative compliance efforts." Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Envtl. L. & Pol'y F. 39, 69 (2001). In this way, the "adversarial approach" to environmental protection "precludes opportunities for creative solutions that a more collaborative system might encourage." *Id.* (citation omitted). The Fourth Circuit's decision will make this problem worse. Narrowing the diligent prosecution bar—thus increasing the prospect of citizen suits after State administrative proceedings have commenced—will discourage small businesses and property owners from working with their States to remediate environmental harm. *See* Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 Temp. Envtl. L. & Tech. J. 55, 67–68 (1989).

There is little incentive for States, small businesses, and property owners to cooperate and settle disputes when they know that a duplicative federal lawsuit is just around the corner. This will invariably lead to delays in environmental remediation and undermine environmental protection. *Cf. Scituate*, 949 F.2d at 556 (noting duplicative actions would be "impediments to environmental remedy efforts").

C. The Petition presents a good vehicle for this Court to provide a uniform, clear, and administrable test for determining when the diligent prosecution bar applies

The question presented—what is the proper test for when the Clean Water Act's diligent prosecution bar applies?—has befuddled the lower courts, resulting in entrenched conflict. Resolution of this conflict is important, given how common administrative penalty procedures like South Carolina's are, as well as the great threats to federalism and to property owners that are posed by citizen suits that cease being "interstitial" and instead become "intrusive." In short, the question presented merits review. For several reasons, this Petition provides the Court with a good vehicle for that review.

First, the pertinent conflicts are squarely presented. The Fourth Circuit issued a published decision expressly holding that Naturaland's citizen suit can continue because the Department's Notice of Violation against Arabella did not meet the diligent prosecution bar's requirements under 33 U.S.C. § 1319(g)(6)(A)(ii). App.A-11–15. As Judge Quattlebaum's dissent explains, critical to that holding was the panel majority's conclusion that the Notice of Violation could not trigger the diligent prosecution bar because "a proceeding commenced by a Notice of Violation is not comparable to the federal proceedings." App.A-27. *See also* App.A-21–22 (explaining that South Carolina's Notice of Violation would qualify under any plausible interpretation of "commence" that is not infected by the majority's erroneous analysis). Yet, as the dissent also explains, the panel's collapsing of commencement with

comparability—and its employment of a hyper-exacting standard for the latter—cannot be reconciled with either the "overall" or the "rough" comparability case law. App.A-27–30.

Second, a ruling reversing the Fourth Circuit's decision and adopting a version of either the overall or roughly comparable standard would provide Arabella with substantial relief. As Judge Quattlebaum's dissent cogently explains, employment of either of those comparability standards, coupled with a normal, uncondensed textual analysis of the remaining elements of the diligent prosecution bar, would mean that Naturaland's civil penalty action against Arabella would be barred. It is also likely that on remand Naturaland's request for injunctive relief would come to naught. *See* App.A-46–49. ("[S]atisfying 33 U.S.C. § 1319(g)(6)(A)(ii) necessarily implies the state's prosecution was 'diligent' and 'comparable' to the federal standard. If that is the case, I do not see how an injunction—which by its nature is telling the agency it was not doing enough—would be justified."). And with the dismissal of all of Naturaland's federal claims, it is likely that the District Court would again decline to exercise supplemental jurisdiction over Naturaland's state-law claims. App.B-21.

Third, now is the right time for the Court to resolve the conflict. Over the last thirty-plus years, almost every Court of Appeals has weighed in on the diligent prosecution bar's meaning, yet the result has been nothing but growing conflict among the Circuits, increased threats to Congress's design for cooperative federalism, and sharply decreasing solace for hapless property owners like Arabella. Moreover, with the Fourth Circuit's adoption of an exactly comparable

standard, the gamut of interpretive choices has been run, thus undercutting any argument for awaiting further percolation.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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