No. 22-720

IN THE

Supreme Court of the United States

DAKOTA FINANCE LLC, D/B/A ARABELLA FARM; KEN SMITH; SHARON SMITH; WILLARED R. LAMNECK, JR.,
Petitioners,

v.

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

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

BRIEF OF *AMICI CURIAE* TRADE ORGANIZATIONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, the National Association of Home Builders, American Farm Bureau Federation, National Federation of Independent Business Small Business Legal Center, Inc., National Apartment Association, and Associated General Contractors of America, are trade associations and affiliated public interest organizations whose members engage in a broad range of economic activities that support the American economy. Their members develop housing; build schools, laboratories, and roads; and produce agricultural goods. Foundationally, *amici* and their members develop American land for productive use and for the public good.

Amici's members' economic endeavors invariably, and in various ways, interact with the land, air, and waters of the United States. As such, they are obliged routinely to assess and apply the myriad technical requirements of a wide variety of federal, state, and local environmental laws and regulations, including the Clean Water Act ("CWA"). *Amici* devote significant time and resources to tracking environmental laws, analyzing their procedural and substantive requirements, assessing their impacts, and developing strategies for compliance. This alone is no simple or straightforward task. But the burdens imposed by legal uncertainty in complex regulatory

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[1] Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae's* intention to file this brief.

environments fall most heavily on *Amicis'* members, including many small businesses that lack the sophisticated resources necessary to navigate these typical labyrinthian obligations, or to defend robustly against lawsuits that may be brought in the face of even good-faith violations.

Amici therefore maintain an interest in advocating for clarity and efficiency in the enforcement of federal environmental statutes on behalf of their members' enterprise.

1. **The National Association of Home Builders ("NAHB")** is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 120,000 members are home builders or remodelers and are responsible for the construction of 80% of all new homes in the United States. The remaining members are associates working in closely related fields within the housing industry, such as environmental consulting, mortgage finance and building products and services. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the rights and economic interests of its members and those similarly situated.

A large part of building and selling homes consists of obtaining and preparing land for construction.[2] That land often contains CWA "waters of the United

[2] Carmel Ford, NAHB Econs. & Hous. Pol'y Grp., *Cost of Constructing a Home* (Jan 2. 2020) https://www.nahb.org/-/media/8F04D7F6EAA34DBF8867D7C3385D2977.ashx.

States," as the federal government has defined and interpreted that term. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. Often land developers must alter those "waters" to ensure that their community makes the best use of the land in accordance with local and state zoning and land use requirements. Moreover, the CWA requires a stormwater permit for any land disturbance that impacts more than one acre.

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

3. **The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center")** is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

4. **The National Apartment Association ("NAA")** is a trade association for owners and

managers of rental housing. NAA is a federation comprised of 141 state and local affiliated apartment associations. NAA encompasses over 95,000 members representing more than 11.6 million apartment homes globally. NAA, which is the leading national advocate for quality rental housing, is also the largest trade organization dedicated solely to rental housing. NAA provides its members with the most comprehensive range of strategic, educational, operational, networking, and advocacy resources they need to learn, to lead and to succeed. As part of its business, NAA advocates for fair treatment of rental housing businesses nationwide, including advocating the interests of the rental housing business community at large in legal cases of national concern. There is a national rental housing shortage. The provision allowing citizen suits under the Clean Water Act has created unintended consequences that are harmful to developers of rental housing. Citizen suits can be extremely costly for businesses to defend against, even if they are in full compliance with the law. These barriers create higher construction costs making it extremely difficult to build affordable housing. Barriers that exist to delay the much-needed development of rental housing should be discouraged, not encouraged.

5. **Associated General Contractors of America, Inc. ("AGC")** is the nation's leading construction trade association. AGC provides a full range of services satisfying the needs and concerns of its members, thereby improving the quality of construction and protecting the public interest. More than 27,000 firms, including 7,000 of America's leading general contractors, nearly 9,000 specialty contracting firms, and more than 11,000 service providers and suppliers belong to the association

through its nationwide network of chapters. AGC members are engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers.

AGC members conduct construction activities at project sites nationwide and are required to obtain and comply with the National Pollutant Discharge Elimination System (NPDES) permit program, created by the CWA, on nearly all projects disturbing one or more acres of land (and smaller sites part of a larger common plan of development or sale). These permits address "stormwater associated with construction activity," as defined by the relevant federal regulations. The manner in which the federal and delegated state NPDES permitting authorities craft and enforce permits directly affects AGC members. The regulated community is also impacted by citizen suits that may seek injunctive relief, civil penalties, and reimbursement of legal costs and attorneys' fees.

Amici write to underscore the serious legal and practical implications of the decision below and the disharmony among the Courts of Appeals, and to urge the Court to grant the petition. The "diligent prosecution bar" serves an important function in the CWA's scheme of cooperative federalism: it facilitates local enforcement and relieves regulated entities of the additional burdens of defending against duplicative legal actions. Construction of the bar has, however, become unsettled, with some courts construing it to afford little to no deference to state enforcement. *Amici* respectfully urge the Court to grant the petition, reverse the decision below, and clarify the proper application of the diligent prosecution bar.

SUMMARY OF ARGUMENT

The CWA vests a set of overlapping private and public enforcers with the authority to prosecute damages suits: the Environmental Protection Agency ("EPA"), the primary federal regulator; the several states; and private citizens may bring actions and collect significant damages awards for CWA violations. As with other cooperative federalism schemes, by diffusing enforcement authority widely, Congress sought to ensure robust enforcement of the underlying statute, which incorporates local and national interests—commensurate with the environmental harms the CWA seeks to deter and redress.

The CWA's multi-tiered enforcement scheme was crafted to ensure *some* enforcement; it was also tempered, however, to ward against *too much* or *over*-enforcement. Whereas appropriate enforcement protects the environment, over-enforcement threatens productive industry. Recognizing these risks, both the statutory text and its accompanying legislative history delineate a clear prioritization of enforcers: government first, with private enforcement only where government fails. To implement this approach, Congress specifically constrained its grant of a private action right: CWA citizen suits are preempted whenever a State has "commenced" and is "diligently prosecuting" an "action under a State law comparable to" the enforcement subsection of the CWA. 33 U.S.C. § 1319(g)(6)(A)(ii).

The diligent prosecution bar evidences a solicitousness for state enforcement. Yet the Fourth Circuit's cramped and atextual reading risks upsetting Congress's carefully crafted balance. In reading "comparable to" to require near-congruity between federal and state enforcement mechanisms, the

Fourth Circuit ignored both the plain meaning of the text and clear indicia of Congressional intent. Rather than the largely toothless barrier to redundant suits the Fourth Circuit found, Congress intended to—and clearly did—enact more sweeping guardrails against citizen suits duplicating already extant State enforcement proceedings.

Amici and their members are concerned that this erroneous reading risks costly and abusive duplicative private litigation by rent-seeking plaintiffs, with no added environmental benefit. If the citizen suit provision is rarely preempted by State enforcement actions—because the plaintiffs will rely upon the Fourth Circuit's exceedingly narrow definition of "comparable" to cherry pick minor differences in state schemes—plaintiffs will be incentivized to piggyback on most State enforcement action, seeking lucrative damages awards in the wake of the State's work. In turn, CWA defendants will be subject to private claims in addition to any state enforcement action, which will disincentivize cooperation with the State in the first place. The Fourth Circuit's approach threatens to unnecessarily undermine the principle role of the States in CWA enforcement and should be rejected.

ARGUMENT

I. THE TEXT AND STRUCTURE OF THE CLEAN WATER ACT SUPPORT BROAD DEFERENCE TO STATE LAW.

The CWA pursues a broad objective: to "restore" and "maintain" the "integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the Act's overall structure imbues federal, state, and citizen actors with the authority to enforce violations. *Id.* § 1319; *id.* § 1365(a).

Congress has made it clear that this system of cooperative federalism, supplemented by citizen participation, is an essential element of the Act. *Id.* § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States" to, *inter alia* "prevent, reduce, and eliminate pollution."); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) ("[t]he bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action"); S. Rep. No. 92-414, at 64 (1971) (the right to citizen suits triggers only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility.").

But this wide-ranging effort, enforceable by a variety of actors with diverse interests, naturally comes with certain risks: inefficiencies and overenforcement, duplicative penalties, slower regulatory approvals, and delayed remediation and development. The risks associated with overenforcement naturally impact most those small businesses that are least able to bear the costs of lengthy regulatory disputes.

Appreciating these risks, Congress designed some aspects of the CWA to alleviate redundant and unnecessary enforcement. For example, under the National Pollutant Discharge Elimination System ("NPDES") program at issue in this case, *see* 33 U.S.C. § 1342; 40 C.F.R. § 123.1, the EPA cedes primary regulatory authority when it authorizes states to administer their own programs. *See, e.g.,* EPA, *NPDES State Program Authorization Information*, https://www.epa.gov/npdes/npdes-state-program-authorization-information (last visited Mar. 2, 2023) ("if EPA approves the [state NPDES] program, the state assumes permitting authority."). This

bifurcation helps reduce regulatory overlap and conflict—though State NPDES enforcement may still be supplemented by citizen suits. *See* 33 U.S.C. § 1365(a).

The CWA's drafters anticipated that citizen suits might lead to "frivolous" and "harassing" actions. S. Rep. No. 92-414, at 81. Therefore, the CWA preempts citizen suits when a State has already "commenced" and is "diligently prosecuting" an "action under a State law comparable to" the CWA's enforcement subsection. 33 U.S.C. § 1319(g)(6)(A)(ii). Congress recognized that no proper public or environmental purpose was served by private litigants simply piggybacking off state proceedings.

Lower courts are now split over how to enforce the diligent prosecution bar, with some courts ignoring Congress's intent in adopting the bar. The majority decision below, requiring exact "comparability" between state programs and § 1319(g) in both features and timing, *see Naturaland Tr. v. Dakota Fin. LLC,* 41 F.4th 342, 349–50 (4th Cir. 2022), *petition for cert. filed*, No. 22-720 (U.S. Feb. 1, 2023), is particularly out of step. *See* Pet. App. 11–15 (reciting relevant facts).

The Court should grant the petition to clarify that the text and structure of the CWA is better served by a more deferential approach, such as adopted by the First Circuit, *see N. & S. Rivers Watershed Ass'n v. Town of Scituate,* 949 F.2d 552 (1st Cir. 1991), *overruled by Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc.*, 32 F.4th 99 (1st Cir. 2022) and the Eighth Circuit, *see Ark. Wildlife Fed'n v. ICI Ams., Inc.,* 29 F.3d 376, 381 (8th Cir. 1994).

A. The plain meaning of the Clean Water Act does not require rigid congruity between a state enforcement scheme and its federal counterpart.

As in all matters of statutory interpretation, the Court begins with the text. *Ross v. Blake*, 578 U.S. 632, 638 (2016); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning," *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (cleaned up) (citation omitted), and court-supplied meanings that defy the best reading of Congressional instructions cannot be justified. *See e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 329 (2015).

The CWA on its face precludes citizen suits when "a State has commenced and is diligently prosecuting an action under a State law *comparable to* this subsection." 33 U.S.C. § 1319(g)(6)(A)(ii) (emphasis added). The threshold question is therefore whether the Fourth Circuit's test—which required exact comparability in both features and timing, and proceeds without regard for whether the State enforcement regime as a whole effectuates the goals of its federal counterpart—can be squared with the express language of the CWA. It cannot.

By its plain meaning, the phrase "comparable to" does not demand precise substantive and procedural congruity between § 1319(g) and State analogues. *See Naturaland Trust,* 41 F.4th at 359 (Quattlebaum, J., dissenting) ("[C]omparable cannot mean identical." (cited sources omitted)).

Rather, "comparable" simply means "capable of being compared." *Comparable*, Webster's Third New International Dictionary 461 (1986).

This definition captures a wide range of possibilities. *Accord Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.,* 428 F.3d 1285, 1293 (10th Cir. 2005) ("the plain meaning of the word 'comparable' in the statute does not suggest a rigid standard.").[3] The key to the analysis is *which* parameters are most relevant for the comparison. And, as the rest of the CWA makes clear, that focus should be on outcomes—not process.

This Court has long encouraged harmonization between related statutory provisions, *see e.g., FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000), and harmonization is a tool frequently employed by courts when interpreting the CWA. *See U.S. Dep't of Energy v. Ohio,* 503 U.S. 607, 630 (1992) (White, J., concurring) ("It is axiomatic that [the CWA] should be read as a whole."); *see also* Shambie Singer, 3C *Sutherland Statutory Construction*, § 77:4 (8th ed. 2022) (collecting lower court cases that give effect to the language of the CWA as a "harmonious whole.").

The CWA's tiered enforcement scheme is clear: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "In order to achieve this objective it is hereby declared that," *id.*,

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[3] Indeed, there are many different parameters along which one might find that one thing is comparable to another. For example, one might find that a red apple is comparable to a green apple on the basis that they are both the same species of fruit. Additionally, one might find that a red apple is comparable to an orange on the basis of their relative sugar content, or the fact that they are both grown above ground on trees. Finally, one might find that a red apple is comparable to a red snapper because they are both red. The parameters one could use to unlock the ability for comparison are broad—as is the meaning of the unmodified statutory phrase, "comparable to."

inter alia, Congress will "recognize, preserve, and protect the primary responsibility and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use … of land and water resources." *Id.* § 1251(b); *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) ("The [CWA] amendments also recognize that the States should have a significant role in protecting their own natural resources.").

Therefore, as the First Circuit held, "[i]t is enough … that the overall scheme of the two acts is aimed at *correcting the same violations,* thereby achieving the *same goals*." *Scituate,* 949 F.2d at 556 (emphasis added). The CWA intends to restore the Nation's waters—not to enforce the stringent punishment of violators by exposing them to swift and harsh adversarial processes at the expense of cooperation with State agencies and long-term remediation.

If Congress had wanted to impose greater uniformity in the enforcement of water pollution violations, it had ample tools at its disposal to do so. The CWA does not require commencement of an action under State law that is "*substantially* comparable to" the enforcement mechanism of the Act—but merely "comparable." This stands in contrast to other statutes, such as the Congressional Review Act, which bar the issuance of rules that are "*substantially* the same" as disapproved rules. 5 U.S.C § 801(b)(2) (emphasis added). The Fourth Circuit's exact comparability test therefore defies the purpose so plainly reflected in the text of § 1319(g).

B. At its core, the Clean Water Act sets forth a strategy of cooperative federalism that risks being upended by rigid comparability standards.

This Court has also recognized that the CWA facilitates a system of cooperative federalism. *New York v. United States*, 505 U.S. 144, 167 (1992). That foundational structure, like the plain meaning of the phrase "comparable to," is distorted by the Fourth Circuit's narrow reading of the diligent prosecution bar.

Cooperative federalism encourages state-driven innovation towards common goals. *Arkansas v. Oklahoma,* 503 U.S. 91, 101 (1992) (the CWA "anticipates a partnership between the States and the Federal Government, animated by a shared objective."). Statutes that adhere to a program of cooperative federalism "allow[] the States … to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). When "interpreting other statutes so structured," this Court "has left a range of permissible choices to the States." *Wis. Dep't of Health & Fam. Servs. v. Blumer*, 534 U.S. 473, 476 (2002).

A narrow reading of the diligent prosecution bar that limits the ability of states to make choices about their own enforcement programs cannot be justified by the structure of the CWA—particularly in cases, like this one, where those choices have no discernable impact on whether the state is able to effectively protect the Nation's waters.

The Senate Report on the CWA illustrates that the Committee fundamentally "intend[ed] the great volume of enforcement actions to be brought by the

State." S. Rep. No. 92-414, at 64. Furthermore, the citizen suit provisions of the Act are "modeled on the provision enacted in the Clean Air Amendments of 1970," *id.* at 79, which this Court has recognized as containing an "explicit indication[]" that citizen suits are to be "rare" and "limited." *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S., 1, 17 n. 27 (1981). The CWA's cooperative federalism approach cuts against the Fourth Circuit's rigid comparability analysis.

The NPDES permitting program exemplifies cooperative federalism under the CWA. *See EPA v. Cal. ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 206–08 (1976). ("Consonant with its policy 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,' Congress also provided that a State may issue NPDES permits for discharges into navigable waters within its jurisdiction"). This Court has recognized that "[i]f authority is transferred, then state officials—not the federal EPA—have the primary responsibility for reviewing and approving NPDES discharge permits, albeit with continuing EPA oversight." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 650 (2007).

The EPA authorization process is no mere rubber stamp—it is robust. A State may obtain permitting authority only by submitting "a full and complete description of the program it proposes to establish and administer under State law." 33 U.S.C. § 1342(b). The EPA authorization process includes a public review period, a comment period, and a public hearing, and the EPA retains the right to withdraw its approval at any time. *See generally EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 205–08 (discussing the NPDES system).

Because State NPDES permitting authority, including associated enforcement mechanisms, are authorized and monitored by the EPA, it makes little sense to minimize the deference they receive under the diligent prosecution bar. As Judge Quattlebaum's dissent pointed out below, the Fourth Circuit's standard erroneously overlooks the fact that South Carolina's enforcement program has been upheld by the EPA for the past thirty years. *Naturaland Trust* 41 F.4th at 361 (Quattlebaum, J., dissenting). Thus, the EPA has already confirmed that programs like South Carolina's contain sufficient procedures to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1342(b)(7).

The majority ruled that the State's Notice of Violation in this case did not preempt citizen action because it did not coincide with any "public notice." *Naturaland Trust*, 41 F.4th at 349. But the EPA, under its own NPDES regulations, already vets state programs for public participation. *See* 40 C.F.R. § 123.27(d) ("Any State administering a program shall provide for public participation in the State enforcement process by providing:" public intervention authority, a commitment to investigate and provide written responses to citizen complaints, and a commitment to publish a notice and comment period on any proposed settlement.). Thus, the EPA has already determined that the state procedures are sufficient to implement the purposes of the CWA, making the Fourth Circuit's rigid inquiry redundant.

South Carolina, like forty-six other States, has completed the authorization process and received NPDES permitting authority from the EPA. EPA, *NPDES State Program Authority*, https://www.epa.gov/npdes/npdes-state-program-

authority (last visited Mar. 2, 2023). The Fourth Circuit's restrictive standard disrespects this review and approval process and reduces many State enforcement schemes to irrelevance with respect to duplicative citizen suits. The Fourth Circuit's test, therefore, risks upending the system of cooperative federalism that sits at the very core of the CWA and should be rejected.

II. A NARROW READING OF THE DILIGENT PROSECUTION BAR RISKS GREAT HARM TO SMALL BUSINESSES.

As reflected in the CWA, the benefits of any enforcement regime must be weighed against the risks of overenforcement. Indeed, this Court has recognized that the interests of regulated entities should be considered in CWA cases: the Act "carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA." *Int'l Paper Co.,* 479 U.S. at 497.

Redundant suits, encouraged by the Fourth Circuit's test, will disproportionality impact small businesses that lack robust resources. And overzealous advocates will not only delay or halt critical infrastructure and development projects, but also delay implementation of remedial measures, all of which is to the public's loss. Allowing plaintiffs to piggyback on existing State enforcement, and citizen suits to proceed even when those actions have been settled has plenty of drawbacks and little value.

The Fourth Circuit's test threatens to expose businesses to increased costs and burdens in a variety of ways:

First, as discussed, for a State action to preempt a citizen suit, the Fourth Circuit's opinion requires a

significant degree of public participation at the earliest stages of enforcement proceedings, regardless of whether the overall degree of public participation in the State enforcement scheme was sufficient to earn approval from the EPA. *See Naturaland Trust*, 41 F.4th at 348–49 ("the diligent prosecution bar would not be triggered until a state agency has begun a comparable formal process that entails public notice."). This outsized public participation requirement will increase the time it takes to resolve violations and result in project delays. These types of delays increase costs, impact the ability to secure the necessary environmental approvals for projects, and impede critical improvements to our nation's infrastructure and productive land development.

Second, a broad reading of the diligent prosecution bar increases the opportunity for regulatory conflicts and overlap. Regulated entities benefit from the diligent prosecution bar because they are not required to negotiate simultaneously with multiple parties. Nonetheless, as Judge Quattlebaum noted in dissent, the Notice of Violation here was publicly available. *Id.* at 354–55. The Fourth Circuit's approach will strongly incentivize diligent plaintiffs to file parallel CWA citizen suits at the first whiff of any State inquiry. The less deference given to State enforcement actions, the more exposed regulated entities will be to duplicative litigation costs and burdensome project delays.

To illustrate the impact of these costs, it is worth noting that many businesses, like construction, invest millions of dollars *upfront* on property, technology, personnel, and machinery. Opponents of these projects may seek preliminary injunctions against continued construction while the project is being assessed, and even short delays can impose significant consequences, like the loss of an entire construction

season in areas where weather conditions or other regulatory restrictions limit the time that contractors can work. During any delay, overhead costs continue to accumulate; workers are idled; economic benefits are postponed. And project contractors can face liquidated or other penalties for the consequential damages that result from not completing a project on time. The negative consequences of introducing redundancies in environmental enforcement have wide-ranging consequences.

The costs associated with overenforcement are compounded by the fact the CWA awards attorneys' fees. 33 U.S.C. § 1365(d). Under the CWA, such fees may be rewarded "to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." *Id.* These fees can be significant, ranging from the tens to hundreds of thousands of dollars on average. *See* David Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 U. Colo. L. Rev. 377, 424 (2021).

Attorneys' fees are meant to encourage citizens to participate in remediation efforts and support public interests. S. Rep. No. 92-414, at 81 (fee shifting is designed to incentivize citizens to "perform[] a public service" by "bringing legitimate actions"); *see also Iowa League of Cities v. EPA*, 711 F.3d 844, 878 n.20 (8th Cir. 2013) (declining to award fees because plaintiff "was largely vindicating its own rights, rather than the purposes of the CWA."). But the public does not benefit from citizen suits when the State is already engaging in enforcement. The Fourth Circuit's decision incentivizes lawsuits that piggyback off of low-hanging fruit to the detriment of important economic activity and the public good.

Third, the adversarial nature of citizen suits renders them particularly ill-suited to address instances where the State is already taking action. Government actors retain and routinely exercise some measure of enforcement discretion under the CWA. *See e.g., Gwaltney*, 484 U.S. at 61 (noting the importance of upholding the discretionary ability of State enforcement authorities to the CWA's statutory scheme). This discretion is particularly significant because, under the CWA, even innocent violations are subject to liability. *See e.g., State of N.Y. v. Shore Realty Corp.,* 759 F.2d 1032, 1042 (2d Cir. 1985) (recognizing that liability under the CWA is "strict liability."). As such, federal and state agencies have adopted policies to ease these rigid costs. *See e.g.,* EPA, *Small Business Compliance Policy*, 65 Fed. Reg. 19,630, 19,630 (Apr. 11, 2000) (recognizing that "good-faith" efforts towards compliance may reduce penalties).

Citizen suits bring entirely different economic incentives. Private plaintiffs seeking fees and damages may not engage in the same equitable or wholistic balancing analysis that government enforcers will undertake. Indeed, commentators have observed that citizen suit damage figures may run ten to one hundred times higher than the typical amounts received by the agencies like the EPA. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 Buffalo L. Rev. 833, 924 (1985).

Fourth, the threat of intervening citizen suits undermines productive settlements between States and regulated bodies. State enforcement schemes are often more efficient and foster the development of long-term solutions. For example, the government

often requires opposing parties to construct water treatment plants upon settlement. In this case, in addition to imposing a penalty, the Consent Order between Arabella Farm and the Department required the farm to submit a stormwater plan and site stabilization plan, and conduct a stream assessment and any recommended remediation. *Naturaland Trust*, 41 F.4th at 345–46. On the other hand, settlements between regulated bodies and environmental groups often result in direct payments to the environmental groups themselves. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339, 356 (1990). Checks issued to environmental organizations have far less tangible benefit to local communities than State settlements centered around direct remediation. State settlements that require water plans are therefore better suited to furthering the Congressional purpose and ultimate goals of the CWA.

Furthermore, businesses will be less likely to settle with State agencies if they fear that private actions are lurking just around the corner. In some cases, citizen suits may even undermine environmental protection by interfering with more effective State and local environmental actions, or at the very least by complicating proceedings and delaying any effective relief. Lawsuits can bring an active construction project to a stop, which may result in open Stormwater Pollution Prevention Plans with only temporary stabilization measures in place. Given the burdens of litigation, project owners are not likely to authorize additional payment for additional stormwater controls and ongoing maintenance due to the fact the outcome of the project remains uncertain.

Fifth, the Fourth Circuit approach hampers judicial efficiency and will further load court dockets. A

narrow reading of the diligent prosecution bar encourages citizen plaintiffs to litigate disputes that would otherwise be enforced through more efficient State administrative proceedings. And, due to the availability of attorney's fees, citizen groups are more likely to draw out litigation in court at the expense of productive settlements. The Fourth Circuit's approach will therefore burden busy court dockets, and increase the period of time from the discovery of an alleged violation to a dispute's ultimate resolution, to the detriment of small business and the public alike.

The Fourth Circuit's diligent prosecution bar standard, which allows citizen suits to proceed even after the State has issued an adversarial, publicly available notice, and even after the State and a small business have entered into an agreement, spells dire consequences for regulated entities. It guarantees duplicative enforcement, increases uncertainty in wastewater permitting, and will drive up costs through project delays and lost investments—all without furthering the Congressional aim of the CWA.

Because the lower courts are split over the proper application of the diligent prosecution bar, the Court's guidance is necessary and appropriate.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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