No. 22-720

IN THE

Supreme Court of the United States

DAKOTA FINANCE LLC, DBA ARABELLA FARM, ET AL.,
Petitioners,

v.

NATURALAND TRUST, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates to protect individual rights and the framework set forth to protect such rights in the Constitution. This aspect of its advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of the constitutional framework. *See, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of the intent to file this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Environmental law "uniquely showcases the need for … federalism." Erin Ryan, *Negotiating Environmental Federalism: Dynamic Federalism as a Strategy for Good Governance*, 2017 Wis. L. Rev. Forward 17, 20 (2017). Our sprawling nation is comprised of vastly different lands and ecosystems, and solutions to environmental problems are often completely dependent on the landscape of specific areas. Because local and tailored policymaking often generates better environmental outcomes, states and local communities must play an important role in making certain land and water decisions.

Congress recognized this in enacting the Clean Water Act (CWA). It embraced "a scheme of cooperative federalism," *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007), a partnership that honors the states' "traditional and primary" role over land and water use, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). Indeed, Congress explicitly acknowledged that states have "primary responsibilit[y]" over land and water resources. 33 U.S.C. §1251(b).

In addition to making states the "primary enforcer[s]" of the Clean Water Act, *Piney Run Pres. Ass'n v. Cnty. Comm'rs*, 523 F.3d 453, 459 (4th Cir. 2008), Congress also provided for citizen suits as an important backup role when the government "cannot or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987). But a private party may not

commence a citizen suit if a state is already "diligently prosecuting" an enforcement action. *See* 33 U.S.C. §1365(b). This diligent prosecution bar allows states to enforce their own tailored administrative schemes without interference and to encourage alleged violators to cooperate with state officials to correct environmental harms. The "diligent prosecution bar" is triggered by the state's "commence[ment]" of "an action under a State law" that is "comparable to" the federal statute addressing "administrative penalties" that the government may assess for violations of the Clean Water Act. 33 U.S.C. §1319(g)(6)(A)(ii).

Today, significant confusion exists as to when a state has "commenced" an action that triggers the diligent prosecution bar. And the decision below only adds to that confusion. In refusing to "respect[]" South Carolina's "view of what commences" a state enforcement action, Pet. App. 23 (Quattlebaum, J., dissenting), the Fourth Circuit turned its back on the "strong current of federalism" running through the CWA, *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980). The court held that the diligent prosecution bar did not apply and allowed a burdensome and duplicative citizen suit to proceed.

That decision "threatens the States' ability to implement their environmental laws, exposes … property owners to duplicative penalties and regulatory burdens, and impedes the Act's goal to protect the Nation's waters." Pet. 4. "The Framers envisioned that the vast majority of governance would be at the state and local levels and that federal actions would be relatively rare and limited." Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L.

Rev. 499, 525 (1995). But the Fourth Circuit's decision undermines that scheme. Reading the Clean Water Act to permit the citizen suit here "to proceed despite the measures South Carolina had already taken … elevates citizen suits above their supplemental role," Pet. App. 18 (Quattlebaum, J., dissenting), and upends the cooperative federalism scheme Congress enacted in the CWA.

The Court should grant the petition and reverse the decision below.

ARGUMENT

I. The Clean Water Act advances environmental protection by prioritizing state and local action.

A. Environmental federalism is important in an ecological diverse nation.

In designing the Constitution, the Framers recognized the dangers of "consolidat[ed] … power[]." The Federalist No. 47 (J. Madison). "Their solution to governmental power and its perils was simple: divide it." *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2202 (2020). Thus they "split[] the atom of sovereignty," and "established two orders of government." *Alden v. Maine*, 527 U.S. 706, 751 (1999) (cleaned up). While the powers of the new federal government would be "few and defined," those retained by the states would be "numerous and indefinite … extend[ing] to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45 (J. Madison).

This structure was not an aesthetic choice. Instead, the "federal balance" was "an end in itself," meant "to ensure that States function as political entities in their own right." *Bond v. United States*, 564 U.S. 211, 221 (2011). For good reason. Leaving policy choices to more responsive state and local governments would allow for more effective, tailored solutions, and more efficient action. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493-94 (1987). Indeed, this scheme would ensure states were "free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979); *see also Bond*, 564 U.S. at 221 ("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, and makes government more responsive" to its citizenry. (cleaned up)). After all, that is the very "essence of federalism." *Addington*, 441 U.S. at 431.

Environmental law "uniquely showcases the need for … federalism." Ryan, *supra*, 20. Solutions to environmental problems are often "completely contingent on the landscape" and unique conditions of specific areas. *Id.* at 23. And in an "extended republic" like ours, The Federalist No. 51 (J. Madison), lands and ecosystems across the nation vary greatly, *see* Ryan, *supra,* at 23. The United States is home to twelve broadly defined ecological regions, including deserts, tropical wet forests, tundra, great plains, and forested mountains. *See* EPA, Ecoregions of North

America, perma.cc/RL9R-H97T. And some states contain numerous ecological regions within them. *Id.* Texas, for example, is comprised of North American desert, great plains, and eastern temperate forests. *Id.* Naturally, then, what makes for good environmental policy in Alaska is unlikely to work in Florida or Arizona, *see generally* Ryan, *supra*, at 23-24, which in turn makes uniform national environmental regulation unworkable.

Congress designed the Clean Water Act to respect the fact that environmental issues are first and foremost a matter of state policy. Recognizing that the vast differences between states and even local communities must play an important role in making certain land and water decisions, the CWA embodies a system of cooperative federalism. *See Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 230, 241 (5th Cir. 2015) ("[T]he CWA is a cooperative federalism regime."); *Cooper*, 482 F.3d at 667 ("In the CWA, Congress expressed its respect for states' role through a scheme of cooperative federalism."); *United States v. Homestake Min. Co.*, 595 F.2d 421 (8th Cir. 1979) (noting the "vigorous federalism" underlying the CWA).

While the Clean Water Act "anticipates a partnership between the States and the Federal Government," *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992), it allows states to retain their "traditional and primary" power over environmental and resource matters, *Solid Waste Agency of N. Cook Cnty.*, 531 U.S. at 174; *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 514 (2d Cir. 2017) ("[T]he Act largely preserves states'

traditional authority over water allocation and use."). Congress explicitly recognized that it is the "*primary responsibilit[y] and right[] of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. §1251(b) (emphasis added). And "numerous courts have recognized 'the primacy of state and local enforcement of water pollution controls [as] a theme that resounds throughout the history' of the [CWA]." *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 873 (7th Cir. 1989) (quoting *Save the Bay, Inc. v. EPA,* 556 F.2d 1282, 1294 (5th Cir. 1977)); *see Hudson Cnty. Water Co. v. McCarter,* 209 U.S. 349, 356 (1908) (explaining that the public interest in state power over water usage and management is "obvious, indisputable," and "omnipresent"). Indeed, "[s]tate power has historically been at its strongest when talking about local control over land use and property rights." Sarah Fox, *Localizing Environmental Federalism*, 54 U.C. Davis L. Rev. 133, 157 (2020).

B. States are best suited to advance environmental protection.

Issues of environmental protection and conservation are intrinsically bound up in specific waters and lands within the states. *See supra*, §I.A; *see also* Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 Duke Env't L. & Pol'y F. 253, 278-80 (2013). Vastly different areas of land require "wholly different" sets of "expertise and management strategies." *See generally*, Ryan, *supra*, at 24. Managing water pollution in a certain area requires decisionmakers to know, among other things,

"the contours of the land, the elevation, the precipitation, seasonal weather patterns, prevailing winds, watershed, soil quality, habitat, population density, zoning laws, cultural uses, local economies, where the local industry is operating at any given time, [and] what the major stressors are in that particular area." *Id.*; *see also County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1488-89 (2020) (Alito, J., dissenting) ("Non-point source pollution … often presents more complicated issues that are better suited to individualized local solutions."); *Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988) ("[T]he control of nonpoint source pollution was so dependent on such site-specific factors as topography, soil structure, rainfall, vegetation, and land use that its uniform federal regulation was virtually impossible."). And states are most likely to have the requisite knowledge.

Moreover, states and localities care greatly about maintaining clean air and water. Forty-six states have specific environmental provisions in their state constitutions. *See* Jeffrey S. Sutton et al., State Constitutional Law 689-95 (3d ed. 2020). Florida dedicates an entire section of its Constitution to conserving its unique ecology from the Everglades to the Emerald Cost beaches, leading with the sweeping declaration that it is "the policy of the state to conserve and protect its natural resources and scenic beauty." Fla. Const. art. II, §7. Colorado pledges the same for its Rocky Mountains and Great Plains. *See* Colo. Const. art. XXVII, §1 (creating the Great Outdoors Colorado Program "to preserve, protect, enhance, and manage the state's wildlife, park, river,

trail, and open space heritage"). Similarly, Pennsylvania's Environmental Rights Amendment secures to its citizens the "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Pa. Const. art. I, §27. And as far back as 1842, the Rhode Island Constitution extended protections to "all the rights of fishery, and the privileges of the shore." R.I. Const. art. I, §17.

States are also best positioned to prioritize local needs. Environmental policy makers must make choices that "necessarily implicate normative concerns that are beyond any scientific or technical analysis." Jonathan H. Adler, *Uncooperative Environmental Federalism 2.0*, 71 Hastings L.J. 1101, 1108 (2020). Those choices often involve "subjective value preferences about how to prioritize competing goods when resources are scarce." *Id.* And individuals on the ground in specific areas are best suited to tailor those decisions to state or community needs. "Localized knowledge is difficult to accumulate and deploy from a centralized administrative agency." *Id.* at 1107. And "[r]egional differences mean that federal policies will often fail to account for local particulars." *Id.* As a result "uniform policies are likely to be over-protective in some areas, and under-protective in others." *Id.* In practice, that means that "one size fits all" policies become "one size fits nobody" policies. *Id.* And the environment will be worse because of it.

Local and tailored policymaking often generates better outcomes. Scholars have observed that "[t]he common law, combined with various state-level controls, was doing a better job addressing most

environmental problems" than the federal government, "which directed most environmental policy for the last part of this century." Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 Geo. Mason L. Rev. 923, 925 (1999); *see also* Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 Wm. & Mary Env't L. & Pol'y Rev. 447, 448 n.6 (2018) (collecting examples). "[C]entral environmental planning" is simply "incompatible with … environmental protection itself." Meiners & Yandle, *supra*, at 925. At bottom, states are the nation's frontline environmental protectors. Uniform policies often fail to account for the specifics needs of different regions or states. And states and localities are better suited to advance environmental protection.

II. The decision below undermines the cooperative federalism scheme Congress enacted in the Clean Water Act.

"[T]he Clean Water Act's cooperative federalism framework encourages states to experiment with different regulatory approaches." Pet. App. 23 (Quattlebaum, J., dissenting). Relevant here, the CWA prohibits individuals from discharging pollutants without a permit, including a National Pollutant Discharge Elimination System (NPDES) permit. *See* 33 U.S.C. §1311(a). While the EPA Administrator has the authority to issue NPDES permits, *see* 33 U.S.C. §§1311(a), 1342(a), "states may apply to the EPA for authority to issue such permits to the dischargers within their borders," Robin Kundis

Craig, Environmental Law in Context 948 (4th ed. 2016) (citing 33 U.S.C. §1342(b)). Not only does the CWA express "a clear preference that states take over the NPDES permit program," *id.* at 949, but the EPA has "applauded the states' role in the permitting process," *id.* at 1115. In its 2001 strategic plan for the CWA, the EPA stated: "[a] state's authorization to implement this program allows state managers to set priorities and tailor the program to meet the challenges facing the waters in that state and to satisfy the desires of its citizens. … As 'co-regulators,' the authorized states play a unique role by helping to shape and develop the national program." *Id.*

By adopting this approach, Congress properly rejected a one-size-fits-all scheme by empowering states to develop water management and pollution mitigation strategies best suited to their individual needs and priorities. *See supra* Section I.B. Congress also made states the "primary enforcer[s]" of the Act. *Piney Run*, 523 F.3d at 459. And it "afforded" states "latitude in selecting the specific mechanisms of their enforcement program[s]." *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994). Indeed, the authors of the CWA anticipated that "the great volume of enforcement actions [should] be brought by the State." S. Rep. No. 92-414, at 64 (1971).

Recognizing that public scrutiny and citizen participation may also help to ensure government accountability in enforcing the CWA, Congress also provided that "any citizen" may bring a civil action against any person alleged "to be in violation" of certain provisions of the act, including the NPDES permitting requirement. 33 U.S.C. §1365(a); *see* S.

Rep. No. 414, at 72; *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) ("Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.").

Citizen suits can serve an important role in helping to preserve the nation's shared water resources. But, as this Court has recognized, citizen suits are intended to "supplement rather than to *supplant* governmental action" and are subject to procedures and limitations deferential to government action. *Gwaltney*, 484 U.S. at 60 (emphasis added); *see* 33 U.S.C. §1319(g)(6)(A). Just as "Congress did not intend to allow federal agencies to override" state policy determinations that reflect the legitimate reasons and concerns of the state, *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 648 (4th Cir. 2018), neither did it allow citizen suits to trump a state's preferred enforcement approach.

Importantly, the CWA prohibits citizen suits when government is already taking enforcement action. *See* 33 U.S.C. §1365(b). Only when federal, state, and local agencies "cannot or will not command compliance," does the CWA permit citizen suits seeking injunctive relief or damages. *Gwaltney*, 484 U.S. at 62; *see* 33 U.S.C. §1365(a). The Act bars 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)(6)(A)(ii).

The diligent prosecution bar plays an important role in the environmental federalism scheme. It allows states to enforce their tailored administrative schemes without interference and to encourage alleged violators to cooperate with state officials to correct environmental harms. But determining when a state law is "comparable" to one of the CWA's administrative penalties has produced conflicting and unworkable tests in the lower courts that have become less deferential to state enforcement decisions.

The Fourth Circuit's newly concocted test is least deferential of all. Here, the state of South Carolina issued Petitioners a "Notice of Violation" for failing to obtain a permit for a project they believed fell under an exemption and eventually entered into a Consent Order, requiring Petitioners to obtain a permit, remediate any damages, and pay a penalty. *See* Pet. 6-7. Rather than look to the comparability of the overall regulatory scheme or to each category of state-law provisions, the court below held that the state's "Notice of Violation" to Petitioners did not commence an action *exactly comparable* to an EPA proceeding under §1319(g). *See* Pet. 11. Having failed to meet the court's "exactly comparable test," Pet. 6, the majority held that the diligent prosecution bar did not apply, and a citizen suit against Petitioners could proceed.

That decision ignores the text of the CWA, undermines Congress's envisioned cooperative federalism framework, and interferes with states' ability to effectively manage environmental impact. First, the Fourth Circuit's test undermines cooperative federalism by requiring all state regulations to precisely mirror federal regulatory

procedures. Prior to the EPA authorizing a State to administer the NPDES program, the State must submit a detailed program description outlining how the State intends to carry out its responsibilities, and must provide the EPA with copies of "all applicable State statutes and regulations, including those governing *State administrative procedures*." 40 C.F.R. §123.21(a)(5) (emphasis added); *see* 40 C.F.R. §123.22(c) (requiring program descriptions to include "[a] description of applicable State procedures, including … any State administrative or judicial review procedures"). By authorizing a state program, the EPA Administrator affirms that the State's enforcement mechanism—including its administrative procedures—are sufficient to enforce violations of the CWA. *See* 33 U.S.C. §1342(b); 40 C.F.R. §123.27.

That means that when a state initiates an action against an alleged violator of the CWA, it does so through the state laws and "State administrative procedures" that were approved prior to the EPA conferring NPDES permitting authority. *See* 40 C.F.R. §123.21(a)(5); 40 C.F.R. §123.22(c). It would thus be illogical to disregard the state's approved enforcement scheme and insist upon a federal analogue. On top of that, almost every state has implemented administrative enforcement programs under NPDES. *See* EPA, *About NPDES*, perma.cc/6BRR-GZK8 ("Currently 47 states and one territory are authorized to implement the NPDES program."). This system allows states to create permitting and enforcement mechanisms particular to their unique needs. But despite receiving EPA-

approval, minor differences between state and federal administrative procedure could result in a barrage of citizen suits burdening landowners, small business owners, and the state regulators tasked with enforcing water regulations. Simply put, "the state's view of what commences its proceeding should be respected." Pet. App. 23 (Quattlebaum, J., dissenting).

Moreover, allowing citizen suits where states are already acting results in duplicative enforcement actions that, paradoxically, can harm the environment. The decision below makes it easier for private parties to bring duplicative lawsuits that seek duplicative remedies. Under that scheme, property owners may have less incentive to work with state officials to remedy 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." Pet. 20. "If citizen suits are permitted when the government cannot or does not act, they should not be allowed when the government is enforcing the Clean Water Act through a lawsuit or administrative proceedings." Pet. App. 20 (Quattlebaum, J., dissenting); *see McAbee v. City of Fort Payne*, 318 F.3d 1248, 1249 (11th Cir. 2003).

At bottom, the CWA strikes a "delicate balance between various competing interests." Pet. App. 49 (Quattlebaum, J., dissenting). But the decision below "overrid[es] th[at] delicate balance." *Id.* By concluding that South Carolina had not commenced an administrative action against Petitioner, the court below "broaden[ed] the scope of when citizen suits are

permissible," *id.*, and undermined the state's ability to consider its own priorities and to provide effective, tailored, and efficient action to protect its waters.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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