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 IN OPPOSITION

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QUESTION PRESENTED

Petitioners err in claiming that this case presents the question of how "comparable" a State's law must be to the Clean Water Act's administrative-penalty provisions in order to trigger the "diligent prosecution" bar for citizen suits under 33 U.S.C. § 1319(g)(6)(A)(ii). The court of appeals did not reach that question, ruling only that, on the facts of this case, the South Carolina Department of Health and Environmental Control had not "commenced . . . an action" within the meaning of that provision. If this Court were to grant certiorari, therefore, the only question properly presented would be:

Whether, at the time this citizen suit was filed, the Department had commenced an action within the meaning of 33 U.S.C. § 1319(g)(6)(A)(ii).

RULE 29.6 STATEMENTS

Respondents Naturaland Trust, South Carolina Trout Unlimited, and Upstate Forever state the following:

Naturaland Trust is not a publicly held entity, has no parent corporation, and has not issued any stock.

South Carolina Trout Unlimited is not a publicly held entity, has no parent corporation, and has not issued any stock.

Upstate Forever is not a publicly held entity, has no parent corporation, and has not issued any stock.

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INTRODUCTION

Petitioners are Dakota Finance LLC, a South Carolina event business, and its owners. While constructing their event venue, petitioners undertook a mass grading and stripping of land in South Carolina's environmentally sensitive Jocassee Gorges area, discharging tons of sediment into nearby rivers and streams. The Clean Water Act ("CWA" or "Act") requires a permit for discharging pollutants into navigable waters, including discharges from clearing and grading land. Petitioners proceeded without one. To redress petitioners' violations of the Act, respondents – environmental non-profits focused on conserving the upstate South Carolina waters that petitioners fouled – noticed and then filed an action under the Act's citizen-suit provision, 33 U.S.C. § 1365(a).

The CWA provides that a violation shall not be the subject of a citizen suit under § 1365 if "a State has commenced and is diligently prosecuting an action" with respect to the same violation "under a State law comparable" to the federal scheme for assessing administrative penalties. *Id.* § 1319(g)(6)(A)(ii). At the time respondents noticed and filed their suit, the South Carolina Department of Health and Environmental Control ("Department") had not commenced any action. It had issued only a Notice of Alleged Violation/Notice of Enforcement Conference, "invit[ing]" petitioners to a "voluntary, informal meeting" that would be "closed to the public." C.A. App. 54, 59. The Department privately negotiated a consent penalty order with petitioners, which it issued only after respondents filed their citizen suit. Because the Department had commenced no action when the suit was filed, the Fourth Circuit declined to apply the Act's diligent-prosecution bar. That fact-bound application of the bar does not merit review.

Petitioners erroneously assert (at i) that the Fourth Circuit's decision contributed to a circuit split on the "proper test" for determining whether a state law is "comparable" to federal law for purposes of the diligent-prosecution bar. But the court did not reach comparability. It decided only that, by inviting petitioners to a voluntary, private, informal conference, the Department had not "commenced . . . an action." Few other circuits have analyzed the issue of commencement, and their decisions are consistent with one another and with the decision below.

In any event, the Fourth Circuit's statutory analysis showing the Department had not "commenced . . . an action" was sound. It focused on the plain, contemporaneous meaning of the term "action" as well as the CWA's context, which uses "action" consistently to describe a formal, adversarial, and public process of the kind that the Department had yet to commence when respondents filed this suit. Petitioners scarcely engage with the careful statutory interpretation that the Fourth Circuit actually conducted.

Granting review thus would not set up the wholesale re-evaluation of the diligent-prosecution bar that petitioners seek. It would entail review only of the narrow commencement issue that the Fourth Circuit actually decided, on which the few circuits to consider the issue are all agreed.

Even if this case did implicate the test for comparing a State's law to federal law, the split that petitioners assert is largely illusory. The circuits have reached consistent results despite the alleged divergence in tests that petitioners claim. Varying facts – not varying tests – explain why some decisions hold state laws are comparable and others do not.

For all these reasons, review is not warranted.

STATEMENT

1. Congress passed 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). To achieve those ends, the Act prohibits "the discharge of any pollutant by any person" except in compliance with the Act. *Id.* § 1311(a). The Act also establishes the National Pollutant Discharge Elimination System ("NPDES"). *Id.* § 1342. "Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).

The NPDES is "administered through a scheme of cooperative federalism." App. A-4. States can establish and administer their own permitting programs in lieu of the federal government's, subject to the approval of the Environmental Protection Agency ("EPA"). *See* 33 U.S.C. § 1342(b). South Carolina received the EPA's approval for its NPDES permitting program in 1975. *See* Notice, Approval of the State Program for Control of Discharges of Pollutants to Navigable Waters, 40 Fed. Reg. 28,130 (July 3, 1975). It administers that program through its Department of Health and Environmental Control. *See* S.C. Code Ann. § 48-1-10 *et seq*.

NPDES permits are required for the "discharge of a pollutant," defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1342(a), 1362(12). Pollutants include "dredged spoil," "rock, sand, [and] cellar dirt." *Id.* § 1362(6). NPDES permits also are required for discharges of stormwater associated with industrial or construction activity, such as "clearing, grading, and excavating"

land. *See* 40 C.F.R. §§ 122.26(b)(14)-(15), 122.26(c)(1), 123.25(a)(9).

2. The CWA provides for federal, state, and citizen enforcement of its requirements. Any citizen can "commence a civil action . . . against any person . . . alleged to be in violation of . . . an effluent standard or limitation," including by engaging in unpermitted discharges or violations of NPDES permits. 33 U.S.C. §§ 1365(a)(1), 1365(f)(1), (7). Congress crafted the scheme of overlapping federal, state, and citizen enforcement after earlier legislation that "emphasized state enforcement of water quality standards . . . proved ineffective." *Middlesex Cnty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981).

The Act provides rules to coordinate multiple potential enforcement actions. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 174-75 (2000). Before filing suit, a citizen plaintiff must give 60 days' notice to the EPA Administrator, the State where the violation occurred, and the alleged violator. *See* 33 U.S.C. § 1365(b)(1)(A). If the Administrator or State already "has commenced and is diligently prosecuting a civil or criminal action" in federal or state court, the citizen suit cannot proceed separately, but the citizen can intervene as of right. *Id.* § 1365(b)(1)(B).

Citizen suits are also barred if the Administrator or State already "has commenced and is diligently prosecuting" an administrative-penalty action. *Id.* § 1319(g)(6)(A)(i)-(ii). In the case of a state penalty action, the bar applies only if the State is diligently prosecuting "an action under a State law comparable to" the federal administrative-penalty scheme. *Id.* § 1319(g)(6)(A)(ii). And a citizen suit may proceed despite a federal or state administrative action if the

citizen suit is filed or noticed "prior to commencement of [the] action." *Id.* § 1316(g)(6)(B).

3. Respondents are three non-profit organizations committed to conserving South Carolina's natural areas. Naturaland Trust is dedicated to the protection of South Carolina's Blue Ridge Mountains. C.A. App. 22. It conserves more than 100,000 acres in their natural state, keeping them open for public use. *Id.* Upstate Forever focuses on protecting the lands, water, and character of the Upstate of South Carolina, including in the Blue Ridge escarpment. C.A. App. 23. South Carolina Trout Unlimited works on behalf of anglers to conserve South Carolina's cold-water fisheries and their watersheds in order to protect and restore trout habitat. C.A. App. 24-25.

Petitioners, Dakota Finance LLC (d/b/a Arabella Farm) and its owners, began clearing a property in South Carolina's Jocassee Gorges area in 2017, intending to use it as a working farm and event venue. App. A-3-4. The site is bounded on three sides by water, including a tributary of the Eastatoe River, a popular trout-fishing destination. C.A. App. 30-31. The Jocassee Gorges area is known for its pristine rivers and streams. C.A. App. 62-64. For that reason, respondents are deeply involved in the area. Naturaland Trust holds two properties bordering petitioners' construction site, and Upstate Forever holds a conservation easement on those properties to ensure their natural qualities are preserved. C.A. App. 23-24.

Petitioners' construction work involved grading and stripping a 20-acre area. C.A. App. 31, 65-66. They "dramatically altered the steep, mountainous landscape and exposed the underlying granular soil." App. A-3. Unilaterally claiming an agricultural exemption from the CWA's permitting requirements, petitioners took

no measures to control sediment or stormwater. C.A. App. 31-33, 65-66. Consequently, they discharged massive amounts of sediment into the adjacent streams and rivers, devastating their natural condition and causing significant erosion. App. A-4; C.A. App. 34, 67-68.[1]

The Department inspected petitioners' NPDES compliance in April and July 2019. App. A-4; C.A. App. 56-57.[2] In September 2019, the Department sent petitioners a "Notice of Alleged Violation/Notice of Enforcement Conference," inviting them to a "voluntary, informal" meeting with the staff of the Office of Environmental Quality Control scheduled for later that month. App. A-4-5; C.A. App. 54, 59. The conference was "'closed to the public and media,'" so respondents could not attend. App. A-5 (quoting C.A. App. 59).

In November 2019, respondents sent petitioners a letter giving notice of their intent to sue, detailing petitioners' discharges that violated the Act. App. A-5. In April 2020, well after the required 60-day notice period, respondents filed suit in district court, alleging that petitioners' land-clearing activities violated the Act and seeking injunctive relief and civil penalties. App. A-5-6; C.A. App. 21-48.

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[1] Petitioners invoked the CWA's exemption for "agricultural stormwater discharges and return flows from irrigated agriculture," 33 U.S.C. § 1362(14), representing that the "barn" at the site was purely for agricultural use and that it would not have a septic system or other commercial features. C.A. App. 31-32. But there is no exemption for clearing land for farms, much less for event venues.

[2] Petitioners' site was also inspected by Pickens County, South Carolina, but they have disclaimed reliance on Pickens County's enforcement efforts. App. A-15 n.5.

In May 2020, a month after respondents filed their suit, the Department and petitioners entered into a consent order that imposed a $6,000 penalty and required them to obtain an NPDES permit, conduct assessments, and perform remediation. App. A-6.

4. Petitioners moved to dismiss, arguing that the district court lacked subject-matter jurisdiction because the Department had commenced and was diligently prosecuting an administrative-penalty action against them. C.A. App. 49-50.

The district court concluded that the Department commenced its action in September 2019 when it issued the notice. App. B-10. Finding that the State had commenced an action and was diligently prosecuting it, the court explained that "the only remaining consideration is the comparability analysis." *Id.* The court then compared the penalty provisions, public-participation provisions, and judicial-review provisions of South Carolina's regulatory scheme to the federal equivalents. App. B-12-16. Ultimately, the court concluded that South Carolina's scheme was comparable under 33 U.S.C. § 1319(g)(6)(A)(ii), and so dismissed respondents' complaint for lack of subject-matter jurisdiction. App. B-16-17.

5. The Fourth Circuit reversed. In an opinion by Judge Heytens, joined by Judge Motz, the court of appeals explained first that the diligent-prosecution bar in 33 U.S.C. § 1319(g)(6) does not implicate an Article III court's subject-matter jurisdiction. App. A-8-11. It followed recent decisions of this Court that had "'tried . . . to bring some discipline'" to the label "'jurisdictional,'" ruling that the bar is a limit on a plaintiff's ability to bring a suit, not the court's ability to adjudicate it. App. A-8-9 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

Applying the diligent-prosecution bar, the court of appeals decided this case on the threshold issue of commencement. Just as the district court had, the court of appeals focused on the Department's September 2019 Notice of Alleged Violation. App. A-11. Drawing on the use of "action" in the Federal Rules of Civil Procedure and dictionary definitions, the court determined that "the essential character" of an "action" is "an adversarial proceeding initiated by a formal, public document." App. A-11-12.

The court also drew insight from the federal administrative process set forth in § 1319(g), to which a state action must be "comparable" in order for the diligent-prosecution bar to apply. App. A-12. That process provides public-notice rights and judicial review. *Id.* It is commenced either by filing a complaint or by "the simultaneous issuance of a consent agreement and final order." *Id.*; *see* 40 C.F.R. §§ 22.13, 22.38. Public notice must precede the assessment of any penalty. App. A-12; *see* 40 C.F.R. § 22.45.

To further develop its "understanding of what it means to commence the relevant sort of action," the court looked to other circuit courts' analysis of state schemes' comparability to the federal process. App. A-13. These courts have found public participation and judicial review important. *Id.* (citing *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251-56 (11th Cir. 2003)). Here, South Carolina does not make public participation or judicial review available "until *after* the issuance of a departmental consent order," and the Department did not issue a consent order to petitioners until after respondents filed suit. *Id.*

The court also followed rulings on commencement by the Seventh and Eighth Circuits. The Seventh Circuit has ruled that an action commences "'when notice

and public participation protections become available to the public and interested parties.'" App. A-13-14 (quoting *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 756 (7th Cir. 2004)). Similarly, the Eighth Circuit has ruled that an action commences when the State issues "a consent administrative order," giving interested parties rights to notice, hearing, and intervention. App. A-14 (citing *Arkansas Wildlife Fed'n v. ICI Ams., Inc.*, 29 F.3d 376, 380 (8th Cir. 1994)).

The court reasoned that the Department's notice of violation did not commence an action for purposes of the diligent-prosecution bar. The notice was an invitation "to an informal, voluntary, private conference," with no penalty for failing to attend. App. A-15. "Although the notice may have been an important and even necessary step in the Department's process—like a demand letter before civil litigation—it did not commence an action within the common understanding of those terms." *Id.* Thus, the notice of violation did not bar respondents' suit. *Id.* Because the court ruled that the State had not commenced an action, it did not decide whether the State was prosecuting an action diligently or proceeding under a state law comparable to the federal administrative process.

Judge Quattlebaum dissented. He too "start[ed] with whether South Carolina had 'commenced' an action at the time of Plaintiffs' suit." App. A-20. He would have ruled that the Department's September 2019 notice commenced an action for purposes of 33 U.S.C. § 1319(g)(6). He then "turn[ed] to the issue of diligent prosecution" and concluded that the Department had diligently prosecuted the action. App. A-31-32. Lastly, he determined that the Department's administrative proceeding is comparable to the federal process in § 1319(g)(6). App. A-36.

The Fourth Circuit remanded the case to the district court, which set a scheduling order and permitted discovery to commence. The present petition followed.

REASONS FOR DENYING THE PETITION

THIS CASE DOES NOT PRESENT ANY QUESTION ON WHICH THE CIRCUITS ARE SPLIT

Review is not warranted because this case does not present any question on which circuit courts are split. The Fourth Circuit decided only whether the Department had commenced an action within the meaning of 33 U.S.C. § 1319(g)(6)(A)(ii). Petitioners assert no split on that issue. The petition claims that a circuit split exists on the proper test of a state law's comparability to federal law, but the court of appeals' ruling that South Carolina had not commenced an action meant that it did not need to decide whether South Carolina's law is comparable to federal law. Moreover, even the asserted split is dubious, because the circuits reach consistent results despite petitioners' claim that their comparability tests diverge.

A. This Case Does Not Implicate the Asserted Split

1. The diligent-prosecution bar in § 1319(g)(6)(A)(ii) blocks citizen suits "when three requirements are satisfied." *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003). "First, the state must have 'commenced' an enforcement procedure against the polluter." *Id.* (quoting *Arkansas Wildlife Fed'n v. ICI Ams., Inc.*, 29 F.3d 376, 379 (8th Cir. 1994)). "Second, the state must be 'diligently prosecuting' the enforcement proceedings." *Id.* (quoting *Arkansas Wildlife Fed'n*, 29 F.3d at 380). "Finally, the state's statutory enforcement scheme must be 'comparable' to the federal scheme promulgated in 33 U.S.C. § 1319(g)." *Id.*

Courts share this three-part understanding of the diligent-prosecution bar. *See*, *e.g.*, *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 755 (7th Cir. 2004) ("*Milwaukee's Rivers*") (following *McAbee*'s delineation of "three requirements"); *Lockett v. EPA*, 319 F.3d 678, 683-84 (5th Cir. 2003) ("Appellants d[id] not challenge" district court's commencement and diligence rulings, so "the only issue before us is whether the action was brought under a 'comparable' state law"); *Arkansas Wildlife Fed'n*, 29 F.3d at 379-82 (dealing "first" with commencement, then with diligence, and "[t]hird" with comparability).

The dissent below likewise acknowledged "that 'commencement,' 'diligent prosecution' and 'comparability' are three separate elements." App. A-29 (quoting *McAbee*, 318 F.3d at 1251). Petitioners appear to agree. *See* Pet. 17 (diligent-prosecution bar "properly" involves "three separate inquiries"), 28 (diligent-prosecution bar requires "tripartite analysis").

The court of appeals' application of the diligent-prosecution bar began and ended with commencement. The CWA does not define "commence" or "action." *See* 33 U.S.C. § 1362. And few circuit decisions have analyzed commencement in any depth. *See infra* Part B. The court therefore undertook a careful analysis of what it means to "commence[] . . . an action" under § 1319(g)(6)(A)(ii), considering text, context, and precedent.

The court of appeals then reached a fact-specific conclusion: "On the facts of this case, we do not think the Department's notice of alleged violation was enough to commence an action that was comparable to one brought under federal law." App. A-14-15. It ended its analysis there: "[B]ecause the Department had not yet commenced an action when the conservationists

filed their citizen suit, the diligent prosecution bar does not preclude them from pursuing a civil penalty action." App. A-15.

2. Rather than address commencement, petitioners assert (at 21-30) that the circuits have taken differing approaches to the third part of the analysis: comparability. Comparability generally involves assessing the similarity of the state scheme at issue to the federal process in § 1319(g)(6) in terms of their respective "penalty provisions," "enforcement goals," "opportunity to participate" for interested citizens, and safeguards for citizens' "legitimate substantive interests." *Stringer v. Town of Jonesboro*, 986 F.3d 502, 507 (5th Cir. 2021) (quoting *Arkansas Wildlife Fed'n*, 29 F.3d at 381, and collecting cases).

Tracking the dissent below, petitioners claim that the First and Eighth Circuits employ an "overall comparability test," while the Tenth and Eleventh use a "rough comparability standard." Pet. 21-26 (for the former, citing *North & South Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 553-56 (1st Cir. 1991), *overruled on other grounds by Blackstone Headwaters Coal., Inc. v. Gallo Builders, Inc.*, 32 F.4th 99 (1st Cir. 2022), and *Arkansas Wildlife Federation*, 29 F.3d at 380-82; for the latter, citing *Paper, Allied-Industrial, Chemical & Energy Workers International Union v. Continental Carbon Co.*, 428 F.3d 1285, 1288-94 (10th Cir. 2005) ("*Paper Workers*"), and *McAbee*, 318 F.3d at 1249-55); *see* App. A-34-35 (Quattlebaum, J., dissenting).

Petitioners go beyond the dissent in an effort to broaden the purported split. They call the Fifth, Sixth, and Ninth Circuits' approaches a "mixed bag." Pet. 26-27 (citing *Lockett*, 319 F.3d at 683-85; *Jones v. City of Lakeland*, 224 F.3d 518, 523 (6th Cir. 2000)

(en banc); and *Citizens for a Better Env't.-California v. Union Oil Co. of California*, 83 F.3d 1111, 1117-18 (9th Cir. 1996) ("*UNOCAL*")). And they claim that the court below and the Seventh Circuit imposed an "exactly comparable test." Pet. 27-29 (citing *Milwaukee's Rivers*, 382 F.3d at 755-57).

None of that matters to this case because the court of appeals did not reach comparability. Despite petitioners' use of quotation marks, the words "exactly comparable" are nowhere to be found in the court's decision.[3] The court did not say whether South Carolina's scheme is comparable to the federal equivalent and did not adopt any "test" for making that determination. Its ruling on commencement rendered that inquiry unnecessary. The dissent's lengthier analysis of the diligent-prosecution bar makes this clear. Unlike the panel majority, the dissent would have found commencement, so it did go on to "compar[e] South Carolina's penalty assessment, public participation and judicial review provisions with the corresponding class of federal provisions." App. A-36. No such analysis appears in the majority opinion.

3. Petitioners make two unpersuasive efforts to bridge the gap between the court's limited decision on commencement and the supposed circuit conflict on comparability.

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[3] Petitioners' *amici* make the same mistake of attributing to the court below holdings that are nowhere to be found in the court's opinion. *See*, *e.g.*, Southeastern Legal Found. Br. 13 ("exactly comparable test"); Trade Orgs. Br. 9 ("exact 'comparability' . . . in both features and timing"); Buckeye Inst./Cato Inst. Br. 4 (States must "mimic the federal program"); States Br. 1 (States must "mirror every procedure and process prescribed for federal enforcement actions").

First, petitioners suggest (at 5) that there is a broad "struggle[]" among lower courts "to determine when the [diligent-prosecution] bar applies," of which divergent comparability analyses are the most "marked" part. But, as the circuits agree and petitioners concede, commencement, diligent prosecution, and comparability are different issues based on different statutory language. The Fourth Circuit's ruling on one was not a ruling on the others. Nor can a split on one issue be broadened into a split on three. Petitioners do not even argue that the circuits are split on defining commencement or diligent prosecution.

Second, petitioners attempt (at 27-29) to link the court's decision on commencement to the alleged split by characterizing the court's analysis of "commencement" as if it were a determination of "comparability." That mischaracterizes the court's opinion. The court engaged in a close analysis of the text and context to form a judgment about what it means to commence an "action." *See infra* pp. 17-21.

The court then looked to other circuits' comparability analyses to confirm its insight as to what it means to "commence[] . . . an action" under § 1319(g)(6)(A)(ii). App. A-13-14. The court considered the role of public participation and judicial review in other circuits' comparability rulings as one of several points indicating that the Department's September 2019 notice, to which no rights of public participation or judicial review attached, did not commence an "action." App. A-13. But the court did not say – and certainly did not hold – that South Carolina's scheme as a whole was not comparable to federal law. That question may be presented in some future case when a citizen suit is filed *after* an administrative order like the May 2020 order here. The Fourth Circuit may decide that future

case either way, because its ruling in this case leaves the question open.

Petitioners mischaracterize (at 27-28) the Seventh Circuit's *Milwaukee's Rivers* decision in the same way. As here, the Seventh Circuit ruled only that the State had not commenced an action. *See* 382 F.3d at 755-57. Far from requiring "exact" comparability as petitioners claim, the Seventh Circuit observed that Wisconsin law did not provide for administrative enforcement proceedings at all. *Id.* at 756-57. The Wisconsin Department of Natural Resources could meet with defendants, investigate discharges, and issue "informal notice[s] of non-compliance," but it had to refer matters to the Wisconsin Department of Justice for enforcement action, which it pursued only in court. *Id.* at 755-57. Contrary to petitioners' claims, the Seventh Circuit held appropriately, and only, that the Department's informal pre-referral steps did not commence an action for purposes of the diligent-prosecution bar. *Id.* at 757.

B. No Circuit Disagrees with the Court of Appeals on the Issue It Decided

The commencement issue that the Fourth Circuit actually decided seldom arises. Few circuit courts have issued decisions on it, and all align with the Fourth Circuit's ruling. The rarity of the issue and the uniformity of circuit authority counsel against review.

In six of the eight cases comprising petitioners' alleged split, besides the decision below, commencement was undisputed. *See Paper Workers*, 428 F.3d at 1292 (no "dispute" that Oklahoma "ha[d] commenced and [wa]s diligently prosecuting an administrative action under state law"); *Lockett*, 319 F.3d at 683-84 (no "challenge" to district court's holding that Louisiana "commenced an administrative penalty action");

McAbee, 318 F.3d at 1251 n.6 ("'[C]ommencement' and 'diligent prosecution' are not at issue in this appeal."); *see also Jones*, 224 F.3d at 523-24 (deciding only comparability); *UNOCAL*, 83 F.3d at 1118 (deciding only comparability and diligent prosecution); *Scituate*, 949 F.2d at 555-57 (same). The two other decisions in the purported split – *Milwaukee's Rivers* by the Seventh Circuit and *Arkansas Wildlife Federation* by the Eighth Circuit – are in line with the decision below on the commencement of an "action." The Fourth Circuit expressly followed them. *See* App. A-13-14.

Like the court below, the Seventh Circuit understood an "action" to commence based in part on when rights of public notice and participation would attach. *Milwaukee's Rivers*, 382 F.3d at 755-57. Its conclusion that informal meetings and notices did not commence an action, *id.*, is in accord with the decision below that a notice and invitation to an informal private conference did not either. No circuit has disagreed with the Seventh Circuit that commencement of an action depends in part on the availability of public notice and participation.

For its part, the Eighth Circuit held that the State commenced an action when it issued a "Consent Administrative Order" that imposed a penalty, "initiate[d] formal adjudicatory proceedings," and triggered public notice, hearing, and intervention procedures. *Arkansas Wildlife Fed'n*, 29 F.3d at 378-80. The Eighth Circuit pegged commencement to that order, not to notices and meetings that preceded it. *Id.* at 377-78. Here, the Department did not enter into an equivalent consent order with petitioners until after respondents filed suit. The court's conclusion that the Department's earlier notice of violation did not commence an action draws the same line that *Arkansas Wildlife Federation* did.

C. The Decision of the Court of Appeals Was Correct

1. The court of appeals' statutory interpretation properly began "'where all such inquiries must begin: with the language of the statute itself.'" *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1055-56 (2019) (quoting *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 412 (2012)). App. A-11 ("We start, as always, with the text.").

The court appropriately recognized that the term "action" has a particular legal meaning, noting its use in the Federal Rules of Civil Procedure. App. A-11; *see* Fed. R. Civ. P. 2 ("There is one form of action—the civil action."); 1 *Oxford English Dictionary* 128 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (defining "action" as "[t]he taking of legal steps to establish a claim or obtain judicial remedy"). As *Black's Law Dictionary* put it in 1979, between the CWA's passage and the adoption of § 1319(g), the term "action" in "its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law." *Action*, *Black's Law Dictionary* 26 (5th ed. 1979). That supports the court's reasoning that "the essential character" of an "action" is "an adversarial proceeding initiated by a formal, public document." App. A-12. Applying this interpretation, the court correctly concluded that South Carolina's invitation to a voluntary, private, informal meeting failed to constitute the "commencement" of an "action." App. A-15.

The use of "action" throughout the Act confirms this understanding. *See Law v. Siegel*, 571 U.S. 415, 422 (2014) ("[W]ords repeated in different parts of the same statute generally have the same meaning.") (citing *Department of Revenue v. ACF Indus., Inc.*, 510

U.S. 332, 342 (1994)). The 1972 Act's authorization of the citizen suit – a lawsuit filed in federal court – refers to it interchangeably as "a civil action" or an "action." *See* Pub. L. No. 92-500, § 2, 86 Stat. 816, 888-89 (1972) (adding Section 505, codified in part, as amended, at 33 U.S.C. § 1365(a)-(d), (h)). Similarly, the 1972 Act refers interchangeably to the federal government's suits to enforce the Act as "civil action[s]" and "action[s]." *See id.*, 86 Stat. 859-60 (adding Section 309, codified in part, as amended, at 33 U.S.C. § 1319(a)-(b)). And the original diligent-prosecution bar in the 1972 Act blocks citizen suits when the EPA or a State commenced and is prosecuting "a civil or criminal action in a court of the United States, or a State." *Id.*, 86 Stat. 888-89 (adding Section 505, codified in part at 33 U.S.C. § 1365(b)).

The addition of the federal administrative-penalty process in 1987 preserved the Act's understanding of "action" as a formal, adversarial, public proceeding. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 314(a), 101 Stat. 7, 46-49 (adding Section 309(g), codified at 33 U.S.C. § 1319(g) (1988)). That administrative process requires the EPA to give alleged violators written notice of a proposed penalty and a hearing at which they can present evidence. *See* 33 U.S.C. § 1319(g)(2). The process also requires the EPA to give interested persons notice and an opportunity to comment on proposed penalty orders, including the right to request a hearing and present their own evidence before the penalty is made final. *See id.* § 1319(g)(4).

The statute calls this formal, adversarial, public process an "action," and it triggers the diligent-prosecution bar at issue here. *See id.* § 1319(g)(6)(A)(i). Indeed, § 1319(g)(6) has parallel

provisions for federal and state enforcement that trigger the bar. *See id.* § 1319(g)(6)(A)(i)-(ii). The statute uses the same language in these parallel provisions to describe the requirement that the government, whether state or federal, "has commenced and is diligently prosecuting an *action*." *Id.* (emphasis added). Thus, the "normal rule of statutory construction" that the same word in different parts of a statute means the same thing, *Law*, 571 U.S. at 422, corroborates the court of appeals' interpretation.

"Moreover, to consider the statutory phrase as a whole strengthens these linguistic points considerably." *Lagos v. United States*, 138 S. Ct. 1684, 1688 (2018). Though the court below did not reach whether the Department was "diligently prosecuting," that text further indicates that commencing an action means starting an enforcement process that is formal, adversarial, and public. "Prosecution" is the archetypal term for such an enforcement process. *See Prosecution*, *Black's Law Dictionary* 1099 ("A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime."); *Prosecute*, *id.* ("to carry on an action or other judicial proceeding" or "to proceed against a person criminally").

The diligent-prosecution bar's text conjoins prosecution with commencement. A State must have "commenced and [be] diligently prosecuting" the action for the citizen's suit to be blocked. 33 U.S.C. § 1319(g)(6)(A)(ii). The court of appeals' interpretation gives full effect to this language. If petitioners had persuaded the Department at an informal, private conference that they were in compliance with the statute and the Department had stopped there

without going further, no one would say that it had "prosecuted" an "action" against them.

2. Petitioners do not engage with the statute's text. They omit that the court below focused on determining the meaning of "action," and they make little effort to advance an alternative interpretation of that term as used in the diligent-prosecution bar.

Petitioners' view (at 28-29) that a mere notice and invitation to an informal private conference suffice to commence an action defies the natural meaning of "action" in the CWA. It likewise strips meaning from the Act's "diligently prosecuting" language. Petitioners' position would be more sound if the Act spoke in terms of investigating violations. For instance, Title 33 deals elsewhere with discharges of pollution from ships. "Upon receipt of evidence that a violation has occurred," the Secretary of Defense must "cause the matter to be investigated." 33 U.S.C. § 1907(b). But "Congress did not adopt that ready alternative" language here. *Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017).

Moreover, petitioners lack circuit authority for loosening what it means to commence an action. *See supra* Part B. As noted, the Seventh Circuit rejected the argument that meetings, notices, and informal inquiries commenced an "action" under the diligent-prosecution bar. *See Milwaukee's Rivers*, 382 F.3d at 755-57. And the Eighth Circuit determined that an action was commenced not by meetings and letters but by a consent order of the kind that the Department here did not issue until after respondents filed their citizen suit. *See Arkansas Wildlife Fed'n*, 29 F.3d at 378-80.

These cases also illustrate the "practical fact" that petitioners' "broad reading would create significant

administrative burdens." *Lagos*, 138 S. Ct. at 1689. Petitioners' view would "invite disputes" across the range of preliminary investigative steps a State might take. *Id.* Rejecting a similar interpretation of the equivalent diligent-prosecution bar in the Resource Conservation and Recovery Act of 1976, the Seventh Circuit emphasized "the interminable character of much administrative process and the difficulty of deciding on a threshold below which the process is too tentative to justify barring a citizen's suit." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998); *see id.* ("Suppose Illinois' environmental protection agency sent a letter of inquiry . . . with no follow-up. Would that administrative 'action' bar PMC from suing? If not, what would? How 'diligent' would the agency have to be in pursuing the matter? We'd rather not get into those questions, and we don't think that Congress intended us to.").

The broad appeals by petitioners and their *amici* to federalism and States' primacy in enforcement of the CWA do not overcome the statute's text. "[A] broad general purpose of this kind does not always require" a particular statutory interpretation. *Lagos*, 138 S. Ct. at 1689. Congress chose language with clear meaning. Citizen suits are barred only when governmental administrative enforcement satisfies each element of the diligent-prosecution bar. The Fourth Circuit's decision finding that South Carolina never commenced an action properly enforced the text chosen by Congress. The court's correct interpretation of the statute and application of the law to the record do not warrant review.

D. Even the Asserted Split Is Dubious

Even as to comparability, the circuit split petitioners assert (at 21-30) is dubious and unworthy of

review. Petitioners do not identify any cases that arrive at different results on equivalent records. Instead, ostensibly different tests produce comparable results; differing results derive more from variations in facts than tests. *See Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

To start, the tests are more similar than petitioners would have it. The "rough" and "overall" comparability tests they describe consider the same points of comparison. *McAbee*, a "rough" comparability case, called for comparing the "penalty-assessment," "public-participation," and "judicial-review" provisions of state law to federal law. 318 F.3d at 1254. *Arkansas Wildlife Federation*, an "overall" comparability case, identified the same emphases: "comparable penalty provisions" and "a meaningful opportunity [for the public] to participate at significant stages of the decision-making process." 29 F.3d at 381.

The tests also tend to produce similar results. For instance, in *Paper Workers*, a "rough" comparability case, the Tenth Circuit reviewed Oklahoma's provisions for public notice and participation and held that the Oklahoma scheme was comparable to federal law. *See* 428 F.3d at 1294-97. That is little different from the "overall" comparability cases petitioners cite (at 21-24). Those decisions likewise reviewed state laws' notice and participation provisions in the course of determining that those laws were comparable to the CWA. *See Arkansas Wildlife Fed'n*, 29 F.3d at 381-82; *Scituate*, 949 F.2d at 556 n.7.

When results have diverged, different facts explain them. *McAbee* – as noted, a "rough" comparability case – deemed Alabama law not comparable because of its unusually weak provisions for public notice and

participation. *See* 318 F.3d at 1256-57. The public could participate only after the State issued a penalty order. Notice to the public was a one-day newspaper bulletin containing little detail that ran in a general-circulation newspaper in the county where the violation occurred. *Id.* at 1250, 1257. "[A]ggrieved" persons had 15 days from the newspaper bulletin to request a hearing to contest the penalty. *Id.* at 1257. Proper requests for a hearing were thus "nearly impracticable." *Id.*

The Sixth Circuit's decision in *Jones*, which petitioners label (at 26-27) a "mixed bag" case, is similar. As in *McAbee*, deficient notice and participation provisions drove the court's conclusion that state law was not comparable. *See Jones*, 224 F.3d at 523-24. The Tennessee agency at issue there had "unilateral discretionary authority" to exclude interested citizens from the administrative process. *Id.*

By contrast, the Arkansas and Massachusetts laws at issue in *Arkansas Wildlife Federation* and *Scituate* provided far more robust notice and participation rights to the public. In *Arkansas Wildlife Federation*, the citizen plaintiff was allowed to inspect the state agency's files, had actual notice of administrative proceedings, and could have intervened in them. *See* 29 F.3d at 382. In *Scituate*, the state law made administrative orders public documents and permitted any interested person – not just those "aggrieved" as in *McAbee* – to intervene in administrative proceedings or request a hearing. *See* 949 F.2d at 556 n.7.

Accordingly, it cannot be said that these decisions are in conflict with *McAbee* or *Jones*. Nor can it be assumed – given the attention that the First and Eighth Circuits devoted to public notice and participation rights – that either court would have decided

McAbee differently than the Eleventh Circuit or *Jones* differently than the Sixth.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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