No. 22-720

In The
Supreme Court of the United States

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

v.

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

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Clean Water Act bars citizen suits brought under 33 U.S.C. § 1365(a) when "a State has commenced and is diligently prosecuting an action under a State law comparable to" the Act's administrative penalty provisions. *Id.* § 1319(g)(6)(A)(ii). The question presented by Petitioners Dakota Finance LLC, d/b/a Arabella Farm, et al., (Arabella), is: What is the proper test for determining when this diligent prosecution bar applies?

That question warrants this Court's granting of the petition because the Fourth Circuit's divided decision below deepens a decades-long conflict among the lower courts over the diligent prosecution bar's scope. Review is warranted as well because the Fourth Circuit's ruling (i) inverts the Clean Water Act's "cooperative federalism" framework by elevating private enforcement over the primary role of the States to regulate the waters within their jurisdictions, *see* Amicus Br. of West Virginia, South Carolina, and 18 Other States 6, 12–13, (ii) threatens small businesses and property owners with duplicative and burdensome legal actions and penalties, *see* Amicus Brief of Trade Orgs. 16–21, and (iii) undermines environmental protection, *see* Amicus Br. of Se. Legal Found. 15; Amicus Br. of Buckeye and Cato Insts. 15. *See also* App.A-23–24, A-49 (Quattlebaum, J., dissenting).

Yet, in their opposition brief, Respondents Naturaland, et al., do not confront the question's importance or the baleful consequences that the Fourth Circuit's decision promises for the States, their citizens, and the environment. Rather, Naturaland

misconstrues the decision below to argue that this case does not implicate the conflicts among the Courts of Appeals over how to apply the diligent prosecution bar. But in fact, the decision below deepens two Circuit splits encompassed within the question presented—both of which merit this Court's review.

First, unlike most other Courts of Appeals, *see infra* Part A.1, the decision below did not engage in a three-step analysis of commencement, diligent prosecution, and comparability, to determine whether South Carolina's enforcement action against Arabella met the diligent prosecution bar's requirements. Instead, the panel majority collapsed the issue of whether South Carolina's law is "comparable to" the Act's administrative penalty provisions into the issue of whether South Carolina's Notice of Violation had "commenced . . . an action" against Arabella. *See* App.A-27 (Quattlebaum, J., dissenting) ("Analytically speaking, the majority's approach here seems questionable. The comparability requirement . . . is not part of the commencement inquiry."). This conflict over the proper way to determine when the diligent prosecution bar applies—specifically, whether an action can be "commenced" only if that action is also "comparable to" an EPA administrative penalty proceeding—is an important statutory question of federal law that requires uniformity in the lower courts and that this Court should resolve.

Second, the Fourth Circuit's analytical mistake in condensing the otherwise distinct elements of the diligent prosecution bar then led the panel majority right into another conflict over the proper test for determining when a State's law is sufficiently comparable. Naturaland does not deny that there is a

conflict among the lower courts over the proper test for determining comparability. Yet it tries to dismiss the split as "dubious" and "unworthy of review," because the different tests adopted by the lower courts are supposedly "similar" and "tend to produce similar results." Resp.21–24. But that argument is belied by the outcomes here and in several other cases decided under the varying tests employed by the Courts of Appeals to determine comparability. *See infra* Part A.2.

The Fourth Circuit's ruling worsens these conflicts, thereby exacerbating the harm to federalism, the regulated public, and the environment caused by an undisciplined diligent-prosecution-bar jurisprudence. *See infra* Part B. This Court's review is merited.

ARGUMENT

A. The Fourth Circuit's decision deepens conflicts among the Courts of Appeals over the proper test for determining when the diligent prosecution bar applies

Naturaland broadly argues that the Fourth Circuit's decision presents no question on which the Circuits are split. Resp.10. That is incorrect. The panel majority not only broke with many Circuits over the proper mode of analysis for construing the diligent prosecution bar, but it deepened a split among the Circuits over how to determine comparability. Therefore, the question presented by Arabella's petition allows this Court to correct both of the Fourth Circuit's analytical mistakes, provide much-needed guidance to the lower courts, and adopt a textually

sound, clear, and administrable test for applying the bar.

1. Conflict #1: Should the elements of the diligent prosecution bar be analyzed separately or lumped together?

Several Circuits have recognized that the diligent prosecution bar precludes a citizen suit "when three requirements are satisfied." *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003). This textually-based analysis looks separately to whether a State has (i) "commenced" and (ii) is "diligently prosecuting" an administrative enforcement action (iii) under a State law that is "comparable to" § 1319(g). *See id.* (citing *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 379–80 (8th Cir. 1994)); *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005). *See also* App.A-29 (Quattlebaum, J. dissenting) ("'[C]ommencement,' 'diligent prosecution,' and 'comparability' are three separate elements . . . .") (quoting *McAbee*, 318 F.3d at 1251). Contrary to Naturaland's view, the Fourth Circuit panel majority did not follow these Circuits and engage in a three-step analysis to determine whether South Carolina's enforcement action against Arabella met the diligent prosecution bar's requirements. Rather, it broke with these Circuits and instead sided with the Seventh Circuit by combining commencement and comparability. *See* App.A-12–15. *Cf. Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 756 (7th Cir. 2004).

To be sure, Naturaland is correct that, broadly speaking, most lower "[c]ourts share this three-part understanding of the diligent-prosecution bar."

Resp.11. But Naturaland's contention that the Fourth Circuit's analysis "began and ended with commencement," *id.*, is simply incorrect. *See* Pet.16–17. Indeed, as Naturaland itself admits, the panel majority "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)." Resp.14 (citing App.A-13–14) (emphasis added). Similarly, Naturaland concedes that the panel majority "considered the role of public participation and judicial review *in other circuits' comparability rulings*" to determine whether South Carolina had "commence[d] an 'action.'" *Id.* (citing App.A-13.) (emphasis added).

Thus, although superficially limited to commencement, the Fourth Circuit's decision turns in substance upon its assessment of comparability—a point that the panel majority opinion confirms by its conclusion that South Carolina had not "commenced" an "action" through the Notice of Violation issued to Arabella because, in the majority's view, South Carolina's enforcement procedures are not "comparable to" the enforcement provisions found in § 1319(g).[1] *See* App.A-14–15 ("[W]e do not think the Department's notice of violation was enough to commence an action that was comparable to one brought under federal law."). Not only did that

[1] Under a normal textual analysis uninfected by the panel majority's conflated methodology, South Carolina's issuance of the Notice of Violation undoubtedly "commenced," *see* App.A-21–22 (Quattlebaum, J., dissenting) (the Notice is consistent with the ordinary- and legal-dictionary meaning of "commence"), an "action," *see* App.A-24–26 (the Notice was a publicly available document that satisfied federal pleading standards and initiated an adversarial proceeding).

analytical move result in the Fourth Circuit's rejection of the tripartite approach followed by other Circuits. *See* App.A-29 (Quattlebaum, J., dissenting) ("In fact, *McAbee* warns against the majority's conflation of the commencement and comparability elements."). It led the panel majority straight into the Circuits' comparability dispute.

2. Conflict #2: When is a State's law sufficiently "comparable" to trigger the diligent prosecution bar?

In departing from other Circuits' three-step approach by its conflation of commencement and comparability, the Fourth Circuit deepened a second conflict among the Courts of Appeals. For the panel majority, it is not enough for a State's law to be generally or roughly comparable to the Clean Water Act's administrative penalty provisions to trigger the diligent prosecution bar; the State's law must be exactly comparable. *See* App.A-12–15. This conflict over comparability is real, deep, and lingering. *See* Pet.21–30 (describing the "overall comparability test," the "rough comparability test," and, as Judge Quattlebaum's dissent termed it, App.A-35 n.8—other Circuits' "mixed bag").

Naturaland does not dispute that the Circuits are in conflict over the proper test for determining comparability. Instead, it contends that the split is largely academic because the "ostensibly different tests produce comparable results." Resp.22. For several reasons, this argument lacks merit.

First, as both the District Court and Judge Quattlebaum's panel dissent concluded, South Carolina's law is "comparable to" the Clean Water

Act's administrative penalty provisions under both the overall and rough comparability standards. *See* App.B-12–17; App.A-32–43. Only because the Fourth Circuit panel majority required South Carolina's law effectively to parrot § 1319(g) could it then determine that the diligent prosecution bar did not apply. *See* Pet.28–29. Thus, the choice of which comparability test to use made a difference in this very case.

Second, the varying tests adopted by the Circuits are meaningfully distinct in another respect: they differ in the level of deference afforded a State's law when determining comparability. Indeed, the tests range from broad deference to a State's law, under the overall comparability test, *see N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991); *Ark. Wildlife Fed'n*, 29 F.3d at 380, to less but still substantial deference, under the rough comparability test, *see McAbee*, 318 F.3d at 1249, 1256; *Cont'l Carbon Co.*, 428 F.3d at 1293–94, to essentially no deference, a result suggested by the Ninth Circuit's ruling in *Citizens for a Better Environment-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1117–18 (9th Cir. 1996),[2] and now adopted by the Fourth Circuit's decision, *see* App.A-24, A-28, A-47 (Quattlebaum, J., dissenting).

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[2] *See* Patrick S. Cawley, Note, *The Diminished Need for Citizen Suits to Enforce the Clean Water Act*, 25 J. Legis. 181, 191 (1999) (observing that the "Clean Water Act, by deferring to the local insights of State legislatures and environmental agencies, provides a guideline for enforcement, not a template to be duplicated in every State regardless of their unique circumstances," a principle that the Ninth Circuit's ruling in *Citizens for a Better Environment* contravenes by requiring that the State law "be virtually identical").

Third, a fair examination of the cases adopting the different tests for comparability shows that the choice of which test to apply does often determine the outcome. For example, under the Fourth Circuit's exactly comparable standard, the State law at issue in *Scituate* would not have been found to be "comparable to" the Clean Water Act's administrative penalty provisions because it did not provide for the same rights of notice and comment, public participation, and rights of appeal as under § 1319(g), *Scituate*, 949 F.2d at 556 n.7. *See* App.A-12–13. Similarly, the Eighth Circuit's holding that the diligent prosecution bar applies even though a State's law does not provide for public participation and similar rights until after a consent order assessing administrative penalties becomes final, *Arkansas Wildlife*, 29 F.3d at 381–82, directly conflicts with the Fourth Circuit's ruling that South Carolina's law is not comparable to the Clean Water Act because it does not provide for public participation until after a consent order is entered into, *see* App.A-13.

Even setting aside the Fourth Circuit's decision, other Circuits' varying interpretations of comparability produce different results. For example, for the First Circuit, it is enough that a State's water quality law authorizes administrative penalties, even if the administrative proceeding cited as bar-triggering does not actually seek such penalties. *See Scituate*, 949 F.2d at 555–56. In contrast, for the Ninth Circuit, it is necessary but not sufficient that the purported bar-triggering proceeding itself be one seeking an administrative penalty; the pertinent provisions of public notice and participation must also come from *the same* penalty-authorizing provision.

See Citizens for a Better Environment-Cal., 83 F.3d at 1117–18. *See also* Barry S. Neuman & Jeffrey A. Knight, *When Are Clean Water Act Citizen Suits Precluded by Government Enforcement Actions?*, 30 Envtl. L. Rep. News & Analysis 10111, 10114–15 (2000). Employment of such a strict rough-comparability standard would have produced a different result not only in a case like *Scituate*, decided in an "overall comparability" jurisdiction, but also in a case like *Continental Carbon Co.*, decided in a jurisdiction using a less demanding version of rough comparability. *See* 428 F.3d at 1295 (relying on a State's general open-meetings law to satisfy the public-notice component of rough comparability).

Finally, Naturaland attempts to side-step the conflicts among the lower courts by characterizing the Notice of Violation issued to Arabella as "a mere notice and invitation to an informal private conference," which, in its view, no Circuit would consider worthy enough to trigger the diligent prosecution bar. Resp.20. But what the Department had in mind was no afternoon social tea party. *See* Amicus Curiae Br. of S.C. Dep't of Health & Env'tl Control, *Naturaland Trust v. Dakota Fin.*, Dkt. 66-1, at 8 (4th Cir. Aug. 10, 2022) (A notice of violation "is a formal, public document that initiates a formal adversarial proceeding," and ignoring such a notice puts recipients "at risk of losing their opportunity to reach a consent resolution of the alleged violations."). Indeed, given "the statutory authority under which [the Department] issued the Notice, as well as the document's adversarial nature and substantive content," "[n]o reasonable inquiry would view the

Notice as a casual offer to engage in a voluntary discussion." App.A-31 (Quattlebaum, J., dissenting).

* * *

In sum, Naturaland's argument that the "different tests produce comparable results" is wrong. Off the mark as well is its contention that there is no meaningful conflict among the Circuit Courts over the diligent prosecution bar. Indeed, more than a half-dozen Circuits are in conflict over the diligent prosecution bar's scope, and those conflicts arise from disputes about the Clean Water Act's legal meaning, not from factual differences in the cases. *See* Pet.21–29. The Fourth Circuit's decision deepens these splits and merits this Court's review.

B. The conflicts contained within the question presented are exceptionally important

Naturaland's opposition almost entirely ignores the other traditional certiorari factors presented by Arabella in its petition. For example, unaddressed is that the Fourth Circuit's decision will threaten small businesses and property owners—who like Arabella may accidentally violate the Act's strict liability provisions—with duplicative federal lawsuits as well as ruinous fines and attorney fee awards. *See* Amicus Br. of Trade Orgs. 21 (The Fourth Circuit's decision "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 [Clean Water Act]."). *Cf.* Patrick Kurtas, Casenote, *Lowering the Bar: The Sixth Circuit Embraces the Ninth Circuit's Narrow*

Interpretation of Section 1319(g)(6) of the Clean Water Act, 12 Vill. Envtl. L.J. 235, 267 (2001) (A robust diligent prosecution bar "prevents excessive and duplicative punishment of polluters and remains faithful to [the Clean Water Act's] main goal of restoring and maintaining clean water."). Similarly ignored by Naturaland is that piggy-back citizen suits undermine environmental protection. *See* States Amicus Br. 13 (Under the Fourth Circuit's decision, "private plaintiffs are allowed to insert themselves into ongoing state proceedings in ways that may prove destructive."). *Cf.* Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. New Eng. L. Rev. 311, 312 (1998) ("[C]itizen suits, as they are currently employed, discourage the business community from cooperating with government agencies in correcting known environmental problems.").

The only time that Naturaland's opposition even tacitly acknowledges these important issues is when it is diving headlong into the merits. *See* Resp.17–21. But by insisting that the "broad appeals by petitioners and their *amici* to federalism and States' primacy in enforcement of the [Clean Water Act] do not overcome the statute's text," *id.* at 21, Naturaland impliedly concedes that its interpretation would in fact lead to the cited federalism harms. In any event, Naturaland's reliance on the statutory text to dismiss those harms is unfounded, because it overlooks how "federalism and States' primacy in enforcement" is in fact a product of the Act's text. After all, the Act's "Congressional declaration of goals and policy" instructs that it is "the policy of the Congress to recognize, preserve, and protect the primary

responsibilities and rights of States" to regulate water pollution, 33 U.S.C. § 1251(b), a policy furthered by the Act's limits on the citizen suit provision, *see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (citizen suits are intended to "supplement," not "supplant," governmental enforcement). *Cf. County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020) (citing § 1251(b) as "perhaps most important" to the Court's conclusion that "Congress intended to leave substantial responsibility and autonomy to the States" with respect to the water pollution at issue).

Indeed, as this Court made clear in *Gwaltney* (a decision noticeably absent from the panel majority opinion and Naturaland's opposition), Congress's desire to preserve the States' traditional role in regulating their waters is a foundational part of the Act's cooperative federalism framework. 484 U.S. at 60. Yet the Fourth Circuit's decision, besides deepening the conflicts among the Courts of Appeals over the diligent prosecution bar's scope, directly threatens that framework. App.A-18 (Quattlebaum, J., dissenting). *See* States Amicus Br. 6 (Under the Fourth Circuit's ruling, "Federal courts will come to superintend state investigations, and federal administrative processes will become the *de facto* norm."). Thus, by granting review, the Court can shore up Congress's intended cooperative federalism structure while also bringing consistency and textual fidelity to the application of the Act's diligent prosecution bar.

* * *

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: April 2023.

Respectfully submitted,

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