No. 24-350

IN THE

Supreme Court of the United States

PORT OF TACOMA; SSA TERMINALS, LLC; AND SSA TERMINALS (TACOMA), LLC,

Petitioners,

v.

PUGET SOUNDKEEPER ALLIANCE,

Respondent.

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

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners ask this Court to resolve a purported conflict over whether the Clean Water Act (CWA) allows citizen suits to enforce state-issued pollution-discharge permits that provide what they describe as "a greater scope of coverage" than required by federal law. Pet. i. However, there is no genuine conflict over this issue—certainly none implicated by this case.

As every court to consider the question in the past three decades has recognized, the plain text of the CWA forecloses petitioners' argument. Neither the phrase "greater in scope" nor anything similar appears in the CWA. To the contrary, the Act allows private enforcement of all conditions of a state-issued CWA permit, without exception. 33 U.S.C. §§ 1365(a), (f)(7). This Court too has explained that private parties may sue to enforce permit conditions "imposed in accordance with more stringent standards and limitations established by a State." *EPA v. California*, 426 U.S. 200, 223-24 (1976). The only court decision expressing petitioners' rule is a thirty-year-old case from the Second Circuit that ignored statutory text. Instead, it relied on a stray EPA regulation dealing with another aspect of the Act. If the Second Circuit confronted the issue today, there is good reason to think it would agree with the decision below.

Moreover, even if there were a genuine conflict, this case is not a vehicle to address it. Petitioners concede that citizens may enforce state permits that exceed federal regulations if the state determines that a discharge is a "significant contributor of pollutants." Pet. App. 13a. That is exactly what the State of Washington determined here. Petitioners dispute only whether the State's permitting decision was

procedurally valid. The court below held that such arguments can only be brought in state fora. Petitioners do not seek review of that holding.

Finally, the question presented is hardly important enough to warrant review. Even petitioners have previously admitted citizen suits can be brought to enforce conditions in state-issued permits that are "more stringent" than federal law requires. And they have not shown that any distinction between the "stringency" and "scope" of permit conditions matters on the ground or in court.

STATEMENT OF THE CASE

1. The West Sitcum Terminal is a 137-acre marine container terminal in Tacoma, Washington. Much of the activity at the Terminal occurs on a 12.6-acre sliver called the Wharf, where five large cranes load and unload container ships. Pet. App. 3a. When it rains, water from the Terminal, including the Wharf, runs directly into Puget Sound. This stormwater discharge contains copper and zinc, toxic pollutants that can be lethal to fish, including salmon. Resp. C.A. Br. 7.

2. The Clean Water Act prohibits "the discharge of any pollutant by any person" into navigable waterways without a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1311(a). EPA can delegate overall NPDES permitting authority to the states, subject to ongoing EPA oversight. *Id.* § 1342(b)-(c). EPA has delegated its permitting authority to almost every state, including Washington. Pet. App. 4a.

States administering their own programs must ensure that they comply with "any applicable

requirements" of the CWA. 33 U.S.C. § 1342(b)(1)(A). In addition, whenever necessary to ensure compliance with *state* water quality laws, the CWA requires states exercising the CWA's delegated authority to incorporate limitations into NPDES permits that are "more stringent" than what federal law requires. *Id.* § 1311(b)(1)(C).

Petitioners concede that stormwater discharges from the entire Terminal are subject to the NPDES system insofar as they are classified as "municipal" discharges. CA9 SER 12, 415; *see also* 33 U.S.C. §§ 1342(p)(2)(C)-(D), (p)(3). Indeed, petitioner Port of Tacoma holds a Municipal Separate Storm Sewer System (MS4) NPDES permit that covers the Terminal, including the Wharf. MS4 Permit, Dkt. No. 17-05016, ECF No. 215-2, 215-4 at 10-14..

3. The CWA also requires more stringent NPDES permits for certain other categories of stormwater discharges. Two such categories are stormwater discharges "associated with industrial activity," 33 U.S.C. § 1342(p)(2)(B), and any stormwater discharge that a state has determined "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," 33 U.S.C. § 1342(p)(2)(E).

Since 2009, Washington has found that "industrial stormwater from water transportation facilities, like the West Sitcum Terminal, is a significant source of pollution that contributes to violations of Washington's water quality standards." CA9 ER 414-15. Accordingly, in "general" permits issued in 2010, 2015, and 2020, Washington elected to regulate the entire footprint of such facilities. *Id.* at 479. The State has explained that its decision to do so—and not just

regulate the portions of the facilities where equipment cleaning, vehicle maintenance, and airport deicing occur—was an exercise of "its residual Clean Water Act authority under 33 U.S.C. § 1342(p)(2)(E)." *Id.*

Although permittees may challenge conditions imposed in NPDES permits, petitioners never challenged the scope of the 2010 or 2015 permits. They challenged the 2020 permit in state proceedings, arguing that it does not regulate the Wharf, and if it does, then that decision was procedurally flawed. Pet. App. 16a-18a. The Washington courts have held thus far that the permit does regulate the Wharf. *Id.* Litigation over the procedural question is ongoing.

4. Since 2010, stormwater discharges from the Terminal have routinely exceeded the industrial permits' pollution benchmarks. CA9 ER 242-47. Pollution from the Wharf has been equally if not more significant than from other parts of the Terminal. *Id.* at 716. But petitioners have failed to monitor or control pollution from the Wharf. *Id.* at 789-90.

In light of these unlawful discharges, respondent Puget Soundkeeper Alliance gave petitioners notice of permit violations in 2017 and an opportunity to bring themselves into compliance. CA9 ER 75. When petitioners failed to do so, respondent sued in federal district court under the Act's citizen-suit provision to remedy the permit violations. Pet. App. 5a. That provision allows "any citizen" to bring suit in federal court against anyone alleged to be in violation of "an effluent standard or limitation under this chapter"—a phrase the Act defines to include "a permit or condition of a permit issued under section 1342." 33 U.S.C. §§ 1365(a)(1), (f)(7). Section 1342 is the NPDES permit program. 33 U.S.C. § 1342.

Petitioners did not dispute that portions of the Terminal other than the Wharf are "associated with industrial activity" under 33 U.S.C. § 1342(p)(2)(B). However, petitioners contended that discharges from the Wharf itself were subject to nothing more than federal requirements for "municipal" stormwater because no "industrial activities" occurred on the Wharf and the general permits did not legitimately rest on the State's residual Subsection (E) authority either. Petr. CA9 Br. 29, 48-49.

The district court granted summary judgment to petitioners. It did not dispute respondent's statutory right to bring suit for violations of these state-issued permits. But it concluded, despite the unqualified language in the industrial permits, that they did not regulate the Wharf. Pet. App. 43a-45a.

5. The Ninth Circuit reversed. It first held that Washington's 2010 and 2015 industrial NPDES permits did in fact regulate the Wharf's stormwater discharges because the permits covered "the entirety of facilities conducting industrial activity." Pet. App. 10a. Given the ongoing proceedings in state court involving the 2020 permit, the court of appeals did not address that permit. *Id.* 16a-18a.

The court of appeals then turned to petitioners' argument that the Act's citizen-suit provision does not give respondents the right to enforce the permits at issue. Petitioners did not dispute that Washington could regulate Wharf discharges pursuant to Section 1342(p)(2)(E). Petr. CA9 Br. 47-49. And petitioners did not dispute that had the State done so, Wharf discharges could be the subject of citizen suits. *Id.* But petitioners argued that the State did not properly invoke Subsection (E) because it did not expressly cite

that statutory provision at the time it issued the permit. *Id.*; Petr. CA9 Supp. Br. 3. Petitioners thus maintained that the permit's regulation of the Wharf was not a "condition of a permit issued under" the NPDES program, 33 U.S.C. § 1365, and instead "exceed[ed] the requirements of the federal regulations." Pet. App. 11a.

Respondent countered that the permits here did, in fact, rest on Subsection (E) as the State itself explained in a brief filed in the trial court. Resp. CA9 Br. 6, 33-34. As to petitioners' argument that the State failed to explicitly cite Subsection (E) in the permit or obtain EPA's express approval, respondent pointed out that nothing in the Act requires that and EPA did approve the permits. Resp. CA9 Reply Br. 35 n.22, 41. Respondent also argued that, under this Court's precedent, the Act allows citizen suits to redress violations of any condition in a state-issued NPDES permit. *Id.* at 39-42.

The Ninth Circuit sided with respondent. Writing for the panel, Judge Miller concluded "that the plain text of the [2010 and 2015] permits extends coverage to the entire facility and that the validity of the permits," i.e., formalities for invoking Subsection (E), "is not subject to collateral attack in federal court." Pet. App. 2a, 13a. The court of appeals likewise rejected petitioners' argument that 2010 and 2015 permit conditions that regulate the Wharf are not valid NPDES permit conditions, based on alleged procedural deficiencies at the time of permit issuance. *Id.* 13a. The court of appeals explained that such challenges may be brought in state tribunals, but because petitioners brought no such challenge to the 2010 and 2015 permits, all conditions of those permits

are necessarily valid and enforceable in a citizen suit. *Id.* 13a-16a.

Thus, the court of appeals turned aside petitioners' claim that the permit conditions regulating the Wharf are not enforceable through a citizen suit because they purportedly mandate "a greater scope of coverage" than required by the CWA. "Whether or not the [permits here] prescribe 'a greater scope of coverage' than the federal regulations," the Ninth Circuit explained that "the plain language of the Clean Water Act's citizen suit provision" authorizes citizens to enforce all permit conditions, regardless their scope. Pet. App. 11a-13a.

The panel then remanded for further proceedings, which will determine, among other things, whether petitioners violated the 2015 permit and the effect of the ongoing state court review of the 2020 permit. Pet. App. 18a. (Respondent has no continuing claims under the 2010 permit.)

Judge O'Scannlain specially concurred. He did not address the majority's plain-text analysis of the CWA's citizen-suit provision or its conclusion that parties may not attack the validity of state-issued NPDES permits within a federal enforcement proceeding. And he agreed that the panel's rejection of petitioners' "greater in scope" argument comported with the court's previous decision in *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) ("*NWEA II*"), *cert. denied*, 518 U.S. 1018 (1996). Pet. App. 18a-19a. But he noted that if he were writing on a clean slate, he would hold that *NWEA II* "goes beyond what Congress intended." *Id.* 20a.

6. Petitioners now seek review in this Court, arguing that the CWA does not allow a citizen suit under the circumstances here.

REASONS FOR DENYING THE WRIT

When the Ninth Circuit first held that the Clean Water Act allows citizen suits regardless of whether permit conditions are "greater in scope" than federal law requires, this Court denied review. *See Nw. Env't Advocs. v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) ("*NWEA II*"), *cert. denied*, 518 U.S. 1018 (1996). There are no intervening developments warranting a different outcome now. To the contrary, there is even less reason to consider the question presented now, much less in this case.

I. There is no true conflict in the circuits.

Petitioners' lead argument for review is a purported conflict of authority among the federal courts of appeals. *See* Pet. 16-23. But there's no reason to believe this case would come out differently in any other circuit.

1. The Ninth, Fourth and Eleventh Circuits, as well as at least four district courts within other circuits, have held that the Clean Water Act allows citizen suits to enforce any provision in a state-issued NPDES permit, regardless of whether that provision might be characterized as "greater in scope" than federal law requires.

Writing for the Ninth Circuit below, Judge Miller found the "plain language of the Clean Water Act's citizen-suit provision" to be dispositive. Pet. App. 11a. That provision states that "any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of . . . an *effluent standard or limitation under this chapter*." 33 U.S.C. § 1365(a) (emphasis added). The court of appeals explained, in turn, that an "'effluent standard or limitation under

this chapter' is defined to include '*a permit or condition of a permit issued under section 1342* of this title that is in effect under this chapter.'" Pet. App. 12a (emphasis added). Because a state-issued NPDES permit is "a permit issued under section 1342," the court concluded that any condition in such a permit is enforceable by citizen suit. *Id.*

This textual analysis tracks the Ninth Circuit's earlier holding in *NWEA II*. There, the court held that "[t]he plain language of [Section 1365] authorizes citizens to enforce *all* permit conditions." 56 F.3d at 986.

The Fourth Circuit agrees with the Ninth Circuit's plain-text reading. In *West Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159 (4th Cir. 2010), Judge Wilkinson explained for the court that when states issue their own NPDES permits, they "are free to treat the EPA's pollution limits as a floor" and go above them. *Id.* at 162. "Once an NPDES permit has been issued" by a state, "the state, the EPA, *and citizens alike* can sue to enforce it." *Id.* (citing 33 U.S.C. §§ 1319(a)(3), 1365(a)) (emphasis added); *see also Ohio Valley Env't Coal. v. Fola Coal Co.*, 845 F.3d 133, 143 (4th Cir. 2017) (reaffirming that states can incorporate their own standards into their NPDES permits and that "a permit holder must comply with *all* the terms of its permit to be shielded from liability," including liability for citizen suits).

The Eleventh Circuit has also held that a "plain reading" of the CWA allows private parties to sue to enforce *all* state-issued permit conditions, including those that are based "entirely" on state water quality standards. *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1005-06 (11th Cir. 2004).

At least four district courts in other circuits have agreed with this straightforward analysis. *See, e.g.*, *Harpeth River Watershed Ass'n v. City of Franklin*, 2016 WL 827584, at *3 (M.D. Tenn. Mar. 3, 2016); *Stephens v. Koch Foods, LLC*, 667 F. Supp. 2d 768, 783 (E.D. Tenn. 2009); *Am. Canoe Ass'n, Inc. v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 37-38 (D.D.C. 2004); *Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton*, 506 F. Supp. 902, 908 (W.D. Pa. 1980).

2. Petitioners point to a lone thirty-year-old decision from the Second Circuit as the source of a purported circuit split: *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 513 U.S. 811 (1994). In that case, the Second Circuit rejected citizen enforcement of a New York State wastewater regulation that the court assumed (without deciding) mandated "a greater scope of coverage than required" by the CWA. *Id.* at 358-59. But it is unclear whether the Second Circuit would still reach the same conclusion today because the legal landscape has changed significantly since *Atlantic States*.

a. For one thing, the Second Circuit decided *Atlantic States* in the heyday of the *Chevron* era, in which courts deferred to reasonable agency interpretations of statutes they deemed ambiguous. Indeed, the Second Circuit recited this doctrine in an earlier part of the opinion. *Id.* at 358. And when it turned to the question presented here, the *Atlantic States* panel never analyzed the text of the CWA

provisions governing citizen suits, instead relying primarily on an EPA regulation.[1]

Even if that regulation actually spoke to the question presented (and as explained below, it does not), a court today could not approach the question presented as the *Atlantic States* panel did. In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), this Court overturned *Chevron* and held that federal courts must conduct their own statutory analysis rather than deferring to agency interpretations. *Id.* at 2273. Even if a statute appears at first blush to be less than clear, courts must "apply their 'judgment' independent of the political branches when interpreting the laws those branches enact." *Id.*

The Second Circuit's decision in *Atlantic States* runs afoul of this rubric. Not only that, the decision exhibits one of the maladies that caused this Court to overturn *Chevron*: The tendency of courts in that era was to engage in "cursory analysis" of legal questions even where, "applying the ordinary tools of statutory construction, Congress's intent could be discerned." *Pereira v. Sessions*, 585 U.S. 198, 220 (2018) (Kennedy, J., concurring). Such "reflexive deference" "abdicat[ed] the Judiciary's proper role in interpreting

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[1] Aside from that regulation, the Second Circuit asserted that "private citizens have no standing to" enforce state-issued permits under "33 U.S.C. § 1342(h)." *Atlantic States*, 12 F.3d at 358. But that provision does not govern citizen suits at all. The Second Circuit also included a *cf.* cite to *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992). *Id.* at 359. But that case addressed waivers of sovereign immunity, not citizen suits. Presumably recognizing that neither of these citations in *Atlantic States* is even arguably pertinent, petitioners do not rely on either one.

federal statutes." *Id.* at 221. The Second Circuit addressed the question presented here in a single paragraph—citing a regulation without any analysis of the statutory text or other traditional indicia of statutory meaning. Indeed, petitioners themselves do not defend the Second Circuit's analytic approach in *Atlantic States*. Instead, they advance a slew of new arguments no lower court has ever considered, much less accepted.

b. Even apart from the abrogation of *Chevron* deference, the Second Circuit would have good reason to revise its position in a future case. The Second Circuit was the first to consider this question presented, and it has had no opportunity since to reconsider its stance on it.[2]

Given an opportunity to revisit the issue, the Second Circuit may well conclude that its sister circuits are correct and abrogate the *Atlantic States* holding on which petitioners rely. A Second Circuit panel determining whether a previous precedent should continue as the law must "employ[] normal

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[2] The Second Circuit has never received a petition to consider this issue *en banc*. The Second Circuit has cited *Atlantic States* just four times—and never for the proposition at issue here. *See Bray v. Dowling*, 25 F.3d 135, 143 (2d Cir. 1994) (citing *Atlantic States* for the since-overruled principle of judicial deference to agency interpretation); *Coon ex rel. Coon v. Willet Dairy, LP*, 536 F.3d 171, 173 (2d Cir. 2008) (citing *Atlantic States* for the "permit shield" concept that permitholders fully complying with their NPDES permit cannot be sued for violating the CWA); *Santana v. Take-Two Interactive Software, Inc.*, 717 Fed. Appx. 12, 17 (2d Cir. 2017) (citing *Atlantic States* for its discussion of the relationship of the merits of a case to statutory standing); *All. For Env't Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 87 (2d Cir. 2006) (same).

interpretive methods" and examine things like "the conclusions of other Circuits." *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016), *abrogated on other grounds by Badgerow v. Walters*, 596 U.S. 1 (2022) (citations omitted). In deciding *Atlantic States*, the Second Circuit did not employ normal interpretive methods and had no other circuits to look to for guidance. Since then, every circuit to have addressed the question has relied on the statute's plain text to reach a different conclusion.

II. Even if there were a genuine split, this would be the wrong case to resolve it.

This case is a poor vehicle for addressing the question petitioners pose because federal law in fact requires coverage of the Wharf and because the case comes to the Court with numerous procedural complications.

1. This case does not tee up the question petitioners present because the NPDES permit at issue did not, as they claim, have a "greater scope of coverage" than required by federal law. Pet. i. In other words, petitioners would not prevail even if this Court were to adopt the rule the Second Circuit expressed in *Atlantic States*.

Petitioners argue in this Court that Washington's permit coverage is "greater in scope" than the Clean Water Act requires because 33 U.S.C. § 1342(p)(2)(B) mandates permit coverage for stormwater discharges only when "associated with industrial activity"—a phrase that EPA has interpreted to include transportation facilities like the Terminal but with a carve-out for areas like the Wharf. Pet. 5, 12. But petitioners ignore a different subsection of Section 1342(p)(2)—Subsection (E)—that requires permit

coverage for stormwater discharges whenever a state determines that stormwater "contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the United States." 33 U.S.C. § 1342(p)(2)(E). And in the proceedings below, petitioners did not dispute that if Washington properly invoked Subsection (E), then federal law requires coverage of the Wharf. Port Dist. Ct. Supp. Br. Dkt. No. 17-05016, ECF No. 258 at 3; Port Dist. Ct. Supp. Br. Dkt. No. 17-05016 ECF No. 257 at 3.

Here, the State has made the requisite determination under Subsection (E). In 2009, Washington found—in language tracking that statutory provision practically verbatim—that "industrial stormwater from water transportation facilities, like the West Sitcum Terminal, is a significant source of pollution that contributes to violations of Washington's water quality standards." CA9 ER 414-15. Accordingly, as the State later explained, it "exercised its residual Clean Water Act authority under 33 U.S.C. § 1342(p)(2)(E)" to extend permit coverage at transportation facilities. CA ER 479. The 2010 and 2015 permits' coverage of the Wharf here was therefore required by *federal* law, not state law as petitioners claim.

To be sure, the Ninth Circuit declined to decide whether the NPDES permits here went beyond federal minimums "in the sense contemplated by the Second Circuit." Pet. App. 13a. But this Court should not decide whether the Act's citizen-suit provision applies to permits with "a greater scope of coverage" than federal regulation requires in a case where both sides agree that, so long as the State properly invoked

Subsection (E), the permit here was *not* "greater in scope" than federal law requires.

Put another way, this is not a case about whether the CWA allows a citizen suit to enforce unduly "far-reaching" permit conditions. Pet. 8. In *Atlantic States*, the defendants could advance such a claim because that case dealt with *wastewater*, not stormwater, 12 F.3d. at 354, and there is nothing in the CWA's wastewater provisions analogous to Subsection (E). Here, by contrast, everyone agrees that a CWA citizen suit could reach the precise discharges at issue so long as the State cited Subsection (E) at the proper junction. This is, at most, a dispute about whether the State followed proper procedure for implementing Subsection (E).

Furthermore, on a remand, petitioners could not even argue that Washington did not properly invoke Subsection (E). The Ninth Circuit held below that a defendant in a citizen suit "cannot avoid liability" by arguing that a state agency was "required" to invoke Subsection (E) more explicitly than Washington did when it issued the 2010 and 2015 permits. Pet. App. 13a-15a. Any such "collateral attack" on the propriety of a state-issued permit must be brought in a separate proceeding in state court. *Id.* 13a-16a. Petitioners do not ask this Court to review that holding.

Accordingly, the die is already cast: Regardless of whether this Court were to adopt petitioners' "greater in scope" argument, they cannot defeat *this* citizen suit on the ground that the CWA does not allow the suit. Even under a "greater in scope" approach, permit conditions issued under Subsection (E) can supply the basis for citizen suits. And the State's procedures for invoking Subsection (E) when it developed the now-

expired 2015 permit (the only one at issue in this petition) cannot be challenged here or now.

2. This case comes to the Court with yet more procedural complications.

To start, the case is currently in an interlocutory posture. That fact "itself alone furnishe[s] sufficient ground for the denial of" this petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (Kavanaugh, J., respecting the denial of certiorari) (Interlocutory posture "counsel[s] against this Court's review at this time." (citing *Abbott v. Veasey*, 580 U.S. 1104 (2017) (Roberts, C.J., respecting the denial of certiorari))).

All the more so under the particular circumstances here. There are ongoing proceedings that may affect the import of the question presented not only in federal but also state adjudications. In particular, petitioners are currently arguing in the Washington appeal that the 2020 permit (which is identical in relevant part to the permit at issue here) does not properly rest on Subsection (E). Port's Appeal Brief, Dkt. No. 17-05016, ECF No. 324-3 at 29-33; *Puget Soundkeeper All. v. Pollution Control Hearings Bd.*, 30 Wash. App. 2d 360, 374 (2024). If the state courts reject that argument, it will be even clearer that this citizen suit is legitimate regardless of whether the Act somehow contains petitioners' "greater in scope" exception. (And as just noted, even if the Washington courts accept petitioners' argument regarding Subsection (E), the CWA's collateral attack bar still precludes petitioners from contending in future proceedings in this litigation that the 2015 permit did not properly rest on Subsection (E). To do that, they

would have to go to the state appeals board, and that suit would be time-barred. Wash. Admin. Code 173-226-190(1).

Moreover, part of what petitioners complain about in this Court is private parties' ability to seek injunctive relief based on supposedly "complex" and "infeasible" permit conditions. Pet. 7, 33. But again, the 2020 NPDES permit—the one that currently governs and the only one that supplies any potential for injunctive relief—is subject to ongoing state proceedings concerning whether the State followed proper procedures to regulate the Wharf. Out of respect for those proceedings, the Ninth Circuit did not address the scope of the 2020 permit. Pet. App. 18a. Accordingly, only in a future appeal could petitioners properly make the arguments about the ability of citizen suits to affect their primary conduct through judicial decrees.

III. The question presented is not sufficiently important to warrant the Court's review.

The question presented seldom arises, and it is not especially consequential in any event.

1. To begin, the question presented rarely arises. Petitioners conceded below that citizen suits may be brought to enforce CWA permit requirements that are "more stringent" than federal minimums. CA9 ER 711. That concession was wise. As this Court explained in *EPA v. California*, 426 U.S. 200 (1976), private parties may sue to enforce "both [] conditions imposed in accordance with EPA-promulgated effluent limitations and standards and for those imposed in accordance with *more stringent standards* and limitations established by a State." *Id.* at 223-24 (discussing 33 U.S.C. § 1365(f)(6)) (emphasis added).

Accordingly, petitioners' entire argument hinges on some elusive difference between "more stringent" permit conditions and conditions that are "greater in scope." It is unclear what daylight may exist between those two concepts. Petitioners offer no explanation for how a court might distinguish between the two in general, much less in the context of this case where it is undisputed that the very discharges at issue here are subject to the NPDES permitting program insofar as they are "municipal" in nature. *See supra* at 5. But whatever daylight may theoretically exist, it is not worth this Court's attention.

Indeed, there is little evidence that states incorporate conditions "greater in scope" than required by federal law into NPDES permits with any regularity anyway. Petitioners observe that states issue "hundreds of thousands of permits under the NPDES program." Pet. 3, 33. But that is not the pertinent inquiry. What matters is how many of those permits are "greater in scope" than federally required. As to *that* question, petitioners point to only two permits, from Maryland and Minnesota, that purportedly adopted "greater in scope" conditions because they regulate groundwater pollution. *See* Pet. 34 n.10. But the Maryland permit that regulates groundwater is a wholly separate state-only permit, not an NPDES permit. *Dep't of the Env't v. Assateague Coastal Tr.*, 299 A.3d 619, 638, 641 (Md. 2023). And in the appeal involving the Minnesota permit, all parties agreed the lower court was wrong to assume that the permit rested solely on state law. *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 574 n.1 (Minn. 2021). That is because the CWA does not categorically exempt discharges to groundwater; rather, it can apply to groundwater that

is hydrologically connected to surface water. *County of Maui v. Haw. Wildlife Fund*, 590 U.S. 165 (2020).

Much less do petitioners demonstrate that citizen suits are brought with any frequency to enforce state-issued permits that are "greater in scope" than federal law requires. Petitioners suggest that three citizen suits seeking to enforce permits regulating groundwater discharges fit the bill. Pet. 34 n.11. But here again, it is not clear these conditions were actually "greater in scope" than the CWA required; all of the regulated discharges were discharges to surface water or hydrologically connected groundwater. *See id.*[3] And none of those cases found that the permit conditions were "greater in scope" than federal law requires, as opposed to simply more stringent or even directly required by the Act. At any rate, three cases over several decades would hardly show that private plaintiffs often sue to enforce conditions greater than the scope of federal law.

2. Petitioners are wrong to suggest that the Ninth Circuit's plain reading of the CWA "harms the States" by undermining states' "authority over land and water use." Pet. 35. To the contrary: The Clean Water Act

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[3] *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 446-48 (M.D.N.C. 2015) (allowing citizens to enforce permit requirement for discharges to surface water via hydrologically connected groundwater and permit conditions that protect a river); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 802 (E.D.N.C. 2014), *as amended* 2014 WL 10991530, at *1 (E.D.N.C. Aug. 1, 2014) (allowing citizen enforcement of permit conditions regulating groundwater directly connected to surface water); *Okanogan Highlands All. v. Crown Res. Corp.*, 544 F. Supp. 3d 1092, 1094 (E.D. Wash. 2021) (noting that permit-holder averred that its mine "discharges to waters of the United States").

protects state authority through a program of cooperative federalism that "anticipates a partnership between the States and the Federal Government, animated by a shared objective" of restoring and maintaining the "integrity of the Nation's waters." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)).

Furthermore, the delegation of NPDES permit authority allows states to determine for themselves which state water pollution rules can be enforced by private parties under the Act. If a state does not want its water pollution rules to be enforced in suits under Section 1365, it simply needs to impose those rules through a mechanism other than NPDES permits—for example, through ordinary state regulations or through a separate, non-NPDES permit.

This case provides an example. In the very permit at issue, Washington expressly stated that noncompliance with any of the permit conditions here "*constitutes a violation of the Clean Water Act* and is grounds for enforcement action." CA9 ER 1018 (emphasis added). At the same time, Washington regularly issues other permits under its separate "state permit program," which explicitly does not overlap with the NPDES program. *See, e.g.*, Wash. Admin. Code § 173-216-010. Such permits are not enforceable in federal court.

3. Petitioners finally complain that Washington's stormwater permit is "staggering," "far-reaching," and "extreme." Pet. 8-9. But this case has nothing to do with the regulation of primary conduct. There is no dispute that EPA and the states can enforce permit conditions that are "greater in scope" than federal law requires. *See, e.g.*, *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 162 (4th Cir. 2010).

Even the Second Circuit has recognized as much. *See Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 358 (2d Cir. 1993), *cert. denied*, 513 U.S. 811 (1994).

Consequently, the only issue here is whether private plaintiffs can bring such suits, just as states and EPA can. And even as to that question, petitioners admit that permits regulating stormwater like the ones here can be enforced by citizens, as long as Subsection (E) is properly invoked. *See supra* at 14.

Besides, the CWA contains other processes allowing the EPA and permitholders to address any concern regarding overregulation. To begin, every proposed state NPDES permit must be submitted to the EPA for review. *See* 40 C.F.R. § 123.44. The agency then has 90 days in which it may object to the permit, including on the grounds that "[i]ssuance of the proposed permit" would "be outside the requirements of CWA, or regulations issued under CWA." *Id.* §§ 123.44(a)(1), (c)(7).

EPA had that opportunity here and declined to object to the 2015 permit. In 2019, petitioners argued to EPA that the 2020 permit should not apply to the Wharf—at least not as a matter of federal law. After reviewing the draft permit, EPA "did not have any objections" to it and wrote that "it appears that Ecology is using its 'residual designation' authority" under Subsection (E). EPA 2019 Ltr. to NWSA, Dkt. No. 17-05016, ECF No. 429-3.

Moreover, federal law requires states issuing NPDES permits to "provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process." 40 C.F.R. § 123.30. Washington

provides ample opportunities for dischargers to challenge a permit. The State has a Pollution Control Hearings Board "to provide for a more expeditious and efficient disposition of designated environmental appeals," including the "issuance, modification, or termination of any permit" issued by Ecology. Wash. Rev. Code §§ 43.21B.010, 43.21B.110(1)(c). Permittees may challenge a permit on the ground that it is arbitrary or capricious and may seek an immediate stay of offending permits or permit conditions. *Id.* §§ 34.05.570(2)(c), 34.05.550. Washington then allows for judicial review of NPDES permits in state court. *See* Wash. Admin. Code § 173-226-190(2).[4]

In short, inasmuch as petitioners' true complaint is that the permits here are overly burdensome, they have (and have had) every opportunity to press that complaint through this state system. This setting is not the place for those arguments.

IV. The court of appeals' decision is correct.

There is a reason that every court to apply the customary method of statutory interpretation to the question presented has rejected petitioners' argument: The CWA plainly forecloses the atextual carve-out petitioners propose.

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[4] Petitioners insinuate that Ecology told permittees in 2010 that the industrial stormwater permit would apply "only to the portions of transportation facilities 'where vehicle and equipment maintenance or equipment cleaning occurs.'" Pet. 8-9. But public comments showed that industry permittees were aware of the change in language and updated coverage. *See* Pl. Resp. to Appellants' Joint Mot. for Summ. J., Dkt. No. 17-05016, ECF No. 324-5 at 9. Multiple parties even appealed the scope of coverage at transportation facilities. *Id.* And they had renewed opportunities to appeal the 2015, 2020, and soon 2025 permits.

1. Courts and judges across the country—from Judge Miller below to Judge Wilkinson years ago—have recognized that the "plain language" of the CWA allows suits like this one. Pet. App. 11a-12a; *see also W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 161-62 (4th Cir. 2010). The Act's citizen-suit provision allows any private party to commence a civil action against any person "who is alleged to be in violation of . . . an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a). The CWA specifically defines the term "effluent standard or limitation" to include "a permit or condition of a permit issued under section 1342 of this title that is in effect under this chapter." *Id.* § 1365(f)(7). Section 1342, in turn, establishes the NPDES permit system and authorizes states to issue NPDES permits after receiving EPA approval. *See id.* § 1342(a)-(b). The result, as the court of appeals explained below, is that the plain text of Section 1365 "authorizes citizens to enforce *all* permit conditions" in state-issued NPDES permits." Pet. App. 12a (citation omitted).

Making an argument no court has ever considered, much less accepted, petitioners respond by isolating one word—"under"—in Section 1365(f)(7)'s phrase "a permit or condition of a permit issued under section 1342 of this title." Petitioners argue that "under" requires courts to scrutinize each separate permit *condition* and ask whether it is meant to effectuate the state's federally approved NPDES program or "state-only" requirements. Pet. 24. This argument fails for several reasons.

As a textual matter, in the case of both a "permit" or "condition of a permit," the phrase "issued under" modifies only the word "permit." In ordinary use, a

permit condition is not "issued"—only the whole permit is "issued." And that is the only sensible construction here: An NPDES "permit" provides authorization to discharge pollutants, while a "permit condition" places limits on that authorization (and thus has no freestanding force absent the permit). A state could never "issue" a "permit condition"; it could only issue a permit that contains conditions. Therefore, when Section 1365 refers to "a permit or condition of a permit issued under section 1342," the operative inquiry is whether the permit was issued as part of an EPA-approved NPDES permit program. All agree that here, it was. Pet. App. 27a.

If there was any doubt, federal law effectuating the NPDES program requires every state-issued NPDES permit to make clear that contravening any permit condition violates the CWA. 40 C.F.R. § 122.41(a). And the permits here expressly confirm that "[a]ny permit noncompliance constitutes a violation of the Clean Water Act." Pet. App. 16a.

2. The CWA's structure reinforces what the text of the Act plainly says. The Act interweaves federal and state law throughout, making it difficult—if not outright meaningless—to try to distinguish what the CWA "requires" in state-issued permits from what state law alone demands. In particular, the Act contains multiple mechanisms that make compliance with all state standards or conditions a federal requirement. Examples include:

- The issuer of an NPDES permit "is required to make a State's 'more stringent limitation[s], including those necessary to meet water quality standards, treatment standards, or schedules of compliance' part of the conditions of the permits it must issue." *EPA v.*

California, 426 U.S. 200, 220 (1976) (quoting 33 U.S.C. § 1311(b)(1)(C)). That requirement encompasses limitations "established pursuant to any State law or regulations." 33 U.S.C. § 1311(b)(1)(C). And the CWA contains no suggestion that there is some separate category of state standards that are "greater in scope" than federal law requires, or that the citizen-suit provision would apply any differently in that theoretical context.

- Where EPA administers permitting programs, the state where the discharges will occur must certify to EPA that the permit complies with *state* effluent limitations, water quality standards, and "any other appropriate requirements." 33 U.S.C. § 1341(d). Further, the conditions set forth in such a certification "become a condition on any Federal license or permit subject to the provisions of this section." *Id.*

- A different sub-part of the citizen suit provision itself, not directly at issue in this case, provides for citizen suits against any person alleged to be in violation of "an order issued by . . . a State with respect to . . . a standard or limitation" issued under the CWA. 33 U.S.C. § 1365(a)(1). There is no reason why the Act would allow citizens to enforce any such state-issued "order" but also limit citizen suits to enforce conditions in state-issued NPDES permits.

3. Petitioners' argument also contravenes this Court's precedent. *See Nw. Env't Advocs. v. City of Portland*, 56 F.3d 979, 988 (9th Cir. 1995), *cert. denied*, 518 U.S. 1018 (1996) (relying on precedent); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1006-07 (11th Cir. 2004) (same). This Court has recognized that the CWA "expressly identifies the achievement of state water quality standards as one of

the Act's central objectives." *Arkansas v. Oklahoma*, 503 U.S. 91, 105-06 (1992). And with respect to Section 1365, the Court has explained, without qualification, that private parties can sue "to enforce permit conditions, whether those conditions arise from standards and limitations promulgated by the Administrator or from stricter standards established by the State." *EPA v. California*, 426 U.S. at 224.

4. Petitioners' remaining arguments are unconvincing.

a. Echoing the Second Circuit in *Atlantic States*, petitioners point to an EPA regulation promulgated years after the statute was enacted. Pet. 25-26 (citing 40 C.F.R. § 123.1(i)(2)). In that regulation, EPA said that "[i]f an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program." 40 C.F.R. § 123.1(i)(2).[5]

But EPA has never indicated that this provision applies to state-issued NPDES permits. As its only example of how the regulation operates, EPA wrote "if a State requires permits for discharges into publicly owned treatment works, these permits *are not NPDES permits*." *Id.* (emphasis added). This suggests EPA envisioned the phrase "program with a greater scope of coverage" as addressing circumstances where states create new permit regimes outside the NPDES program—not requiring courts to parse each condition of validly issued NPDES permits.

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[5] Contrary to petitioners' claim, EPA's original NPDES regulations did not contain this language. *See* 44 Fed. Reg. 32,854 (June 7, 1979) (to be codified at 40 C.F.R. § 123.1(g)).

b. Next, petitioners look to other subparts of the citizen-suit provision for support. The provision sets out eight categories of "effluent standard[s] or limitation[s]" enforceable by citizen suit. 33 U.S.C. § 1365(f). Petitioners argue that, putting aside the category at issue here, the other seven "all address federal obligations" and do not "include[] state law matters." Pet. 25. So petitioners claim that NPDES permits, the seventh category, must be similarly limited to federal obligations. *Id.*

Wrong twice over. As an initial matter, one of the other categories *does* require the enforcement of state water-quality standards. *See* 33 U.S.C. § 1365(f)(6). The category at issue here—any "permit or condition of a permit"—addresses federal obligations; it makes compliance with state requirements a condition of the federal program. 33 U.S.C. § 1365(f)(7). But even if the category at issue here differed from the others, the plain text of the Act unambiguously provides for private enforcement of all eight categories *and* any order issued by a state "with respect to" those eight categories. *See supra* at 25.

c. Petitioners also suggest 73 Fed. Reg. 70,418, 70,458 (Nov. 20, 2008) supports their position. Pet. 26. It does not. That regulation is about agricultural stormwater discharges, a class of discharges Congress exempted from the CWA's definition of point-source discharges that trigger the NPDES permit requirement. 33 U.S.C. § 1362(14). By contrast, Congress explicitly requires NPDES permits for industrial stormwater, municipal stormwater, and stormwater that a state deems to be a significant pollution problem. 33 U.S.C. § 1342(p)(2)(B)-(E).

d. Petitioners' attempt to draw from case law interpreting a different statute, RCRA, is also ineffectual. *See* Pet. 26-27. Petitioners incorrectly argue that *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004), supports their rule. But that case, like *Ashoff v. City of Ukiah*, 130 F.3d 409 (9th Cir. 1997), is peculiar to Subtitle D of RCRA which is unlike the NPDES program. As EPA explained, "[b]ecause of the unique structure and language of RCRA Subtitle D, [such decision] does not have any bearing on issues related to citizen suit enforcement of state programs under other environmental statutes, such as the Clean Water Act." 63 Fed. Reg. 57,026, 57,033 n.2 (Oct. 23, 1998).

And petitioners omit the single appellate RCRA case concerning their "scope" argument. *United States v. S. Union Co.*, 630 F.3d 17, 29-30 (1st Cir. 2010), *rev'd on other grounds*, 567 U.S. 343 (2012). In *Southern Union*, the First Circuit held that a state regulation was "more stringent," not "broader in scope," because it merely imposed additional requirements on those who already were subject to regulation under the federal program. *Id.* So too here: The Terminal is indisputably subject to the federal NPDES permit requirement; petitioners dispute only whether more exacting industrial NPDES permit requirements ought to apply to the Wharf area (as opposed to municipal NPDES permit requirements). *See supra* at 3.

e. Petitioners next argue that allowing private enforcement of all permit conditions yields "illogical" and "untenable" results. Pet. 27, 29 (citation omitted). But the two examples they advance are neither.

Petitioners first claim the CWA's civil penalties provision is incompatible with private enforcement of state-issued permit conditions because all permit-violation fines must be paid to the United States. *Id.* at 27. But as noted above, and as petitioners conceded below, EPA can also enforce state-issued permit conditions. *See supra* at 20; CA9 ER 711. And in such cases, fines "for violations of state law" are also "payable to the United States Treasury." Pet. 27. In reality, the Act's penalty structure underscores Congress's commitment to cooperative federalism: Polluters who violate their NPDES permits pay the federal government because they have violated *federal* law. That remains true regardless of who brings the suit, whether it be EPA, states, or private parties.

Petitioners also suggest that construing the CWA according to its plain terms might give citizens more enforcement power than EPA. *Id.* at 27-28. But that claim's premise—that EPA cannot sue to enforce state-issued permit conditions—is wrong. As just explained, EPA has the power to sue to enforce any permit condition.

f. Petitioners lastly raise various constitutional arguments. But to no avail.

This is not the right case to consider petitioners' constitutional contentions. No doubt mindful that they advanced no such contentions below, petitioners ask the Court only to invoke the canon of constitutional avoidance. Pet. 31. But the canon of constitutional avoidance "'has no application' absent 'ambiguity.'" *Nielsen v. Preap*, 586 U.S. 392, 419 (2019) (quoting *Warger v. Shauers*, 574 U.S. 40, 50 (2014)). And here, the CWA's text is unambiguous, "making constitutional avoidance irrelevant." *Id.*

If petitioners or other future litigants truly believe the citizen-suit provision is unconstitutional where a state-issued permit imposes conditions "greater in scope" than federal law requires, they should raise those constitutional challenges in a procedurally proper manner as stand-alone defenses. Then the courts could consider whether enforcing the plain terms of the CWA violates some constitutional tenet. But any such argument has no place in this case.

At any rate, petitioners' constitutional arguments lack merit. Petitioner contends that the CWA contravenes Article III because it "shoehorns *state-law* claims into *federal* court." Pet. 29-30. But when a state issues NPDES permits under an EPA-approved program, claims to enforce those permits do "arise under" federal law and therefore are properly brought in federal court. *See, e.g.*, *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 110 (1992).[6]

Next, petitioners intimate that Article II might restrict private-enforcement provisions like the CWA's citizen suit provision. Pet. 30-31. But Article II provides no basis for narrowly construing such provisions. Much less has this Court ever held that private enforcement in a setting like this violates Article II.

Finally, contrary to petitioners' claims, enforcing the CWA as plainly written raises no federalism

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[6] Petitioners also argue that the CWA's private-enforcement provision is a "jurisdictional statute" and should therefore be "strictly" construed. Pet. 30. But this is not even a constitutional argument. More fundamentally, statutes that create a cause of action, like the CWA's citizen-suit provision, are not automatically "jurisdictional." *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014).

concerns. Its citizen-suit provision, like the statute more generally, respects, rather than undermines, state sovereignty. Most notably, if a state does not want a water-quality rule that is "greater in scope" than federal law requires to be enforceable in a citizen suit, it can simply leave the rule out of any NPDES permit it issues. *See supra* at 20.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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