No. 23-1028

In the Supreme Court of the United States

SHANNON POE,

Petitioner,

v.

IDAHO CONSERVATION LEAGUE,

Respondent.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL RESPONSIBILITY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Center for Constitutional Responsibility.[1] The Center is a nonprofit organization that is dedicated to preserving the separation of powers and the accountability of the political branches at all levels of government in the United States. In particular, the Center is concerned with the increasingly common delegation to unaccountable private parties of the Executive's exclusive power to enforce public laws. This delegation—which deputizes the plaintiffs' bar and private citizens to act as roving, unaccountable "private attorneys general"—is a threat to democratic accountability and the cohesiveness of our union. Laws, especially on contentious topics, should be enforced by government officials that answer to the Constitution and the people. The Center aims to prevent the unwise and unconstitutional delegation of sovereign enforcement authority.

SUMMARY OF ARGUMENT

The decision below reads the Clean Water Act ("CWA") in a way that expands its substantive reach, and thus expands the ability for policy-motived entities like Respondent to enforce the law under the CWA's citizen-suit provision—a provision that poses significant Article II problems because it delegates executive enforcement authority to private individuals. That deserves this Court's review.

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[1] Pursuant to this Court's Rule 37.2, *amicus curiae* provided timely notice of intent to file this brief to counsel of record for the parties. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, and its counsel made such a monetary contribution.

Article II of the Constitution vests "the executive Power" in the "President of the United States," U.S. CONST. art. II, § 1, and charges the President to "take Care that the Laws be faithfully executed," *id.* art. II, § 3. These provisions ensure that the President—who is accountable to the American people—and his subordinates—who are accountable to the President—*exclusively* wield the executive power to enforce federal law. To be sure, private plaintiffs may sue to vindicate their own private rights, even when doing so may have the indirect effect of enforcing federal law. But a private citizen has no ability to act as a private attorney general. When private plaintiffs do so, they violate Article II because law enforcement is a power reserved exclusively for the Executive Branch.

The CWA nevertheless through its citizen-suit provision grants law enforcement power to any individual with Article III standing. A CWA plaintiff suing under that provision is not limited to private remedies, such as an injunction to stop a defendant's activities that are harming it. Instead, a CWA plaintiff is authorized to seek substantial civil monetary penalties payable to the United States Treasury—a quintessential *public* remedy that Article II demands reside within the Executive Branch. And there are virtually no guardrails to this authority. So long as the Executive is not already taking enforcement action, a private party may at its own discretion seek to enforce a perceived violation of the CWA, threatening the allegedly offending entity with ruinous fines and litigation costs.

The CWA's delegation of executive authority to self-appointed private attorneys general produces the practical problems that Article II was designed to prevent. Article II vests the executive power in the President because the President is accountable to the people and thus can be expected to exercise prudent judgment when exercising

his discretion to take enforcement action. Private parties—especially advocacy organizations—do not have this constraint and thus act very differently. They can—and do—pursue claims to advance ideological or policy agendas specific to them and their members. And they do so (by definition) only when the Executive has decided that an enforcement action is *not* appropriate.

That is what happened in this case. Respondent is an environmental advocacy organization that filed suit to enforce the CWA and obtained a $150,000 civil penalty judgment even though the Environmental Protection Agency ("EPA") *chose not* to do so. Put bluntly, because Respondent believed that the elected President was not exercising his enforcement discretion appropriately, Respondent stepped in and exercised the President's discretion differently. That is what Article II is meant to prevent.

Against this backdrop, it is important for this Court to review the lower court's broad reading of a substantive provision of the CWA regarding what constitutes the "discharge of a pollutant." When courts broadly read substantive provisions of the CWA, they expand the ability for self-appointed individuals and organizations to enforce more violations of the CWA contrary to Article II. Moreover, the lower court's deference to the EPA's interpretation of the CWA is problematic because it allows an agency to erode the President's power to control enforcement actions as Article II mandates.

ARGUMENT

I. THE CLEAN WATER ACT'S PRIVATE RIGHT OF ACTION PRESENTS SERIOUS ARTICLE II PROBLEMS.

A. Article II bars private citizens from exercising executive power.

Only the President has the power and responsibility to direct the actions of individuals who exercise executive

power. This principle of the separation of powers is so fundamental to our Constitution that no fewer than three constitutional provisions work together to ensure that the executive authority is not outside the President's control.

Most directly, the Vesting Clause ensures Presidential control over executive actions. That clause provides: "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. This Clause prohibits the vesting of the executive power in anyone else or any other branch of government, because "all of it" resides with the President. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). The proposition that the Congress could "vest [the executive power] in any other person" has long been "utterly inadmissible." *Martin v. Hunter's Lessee*, 14 U.S. 304, 329-30 (1816) (Story, J.).

The Take Care Clause—which states that the President "shall take Care that the Laws be faithfully executed"—serves a similar function. U.S. CONST. art. II, § 3. That Clause necessarily gives the President, as "the chief constitutional officer of the Executive Branch," "supervisory . . . responsibilit[y]" over those who execute the law. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). If the President were deprived of the "general administrative control of those executing the laws," it would be "impossible" for him "to take care that the laws be faithfully executed." *Myers v. United States*, 272 U.S. 52, 117, 163-64 (1926); *see also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 63 (2d ed. 1871) ("[W]here a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred.").

Finally, the Appointments Clause states that the President "shall nominate, and by and with the Advice and

Consent of the Senate, shall appoint . . . Officers of the United States . . . which shall be established by Law." U.S. CONST. art. II, § 2. The Clause also states that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* A person is an officer under the Appointments Clause if he holds a "continuing" office established by law and wields "significant authority." *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1879); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

Together, these clauses ensure that the power to enforce federal law—and accountability for enforcement decisions—rests solely with the Executive Branch. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (The Executive Branch's obligation to "take Care that the Laws be faithfully executed" is its "most important constitutional duty." (citation omitted)). That power includes, at its core, the "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (explaining decision to "refus[e] to institute proceedings" is part of the Executive Branch's Article II powers).

"[C]ivil enforcement decisions"—that is, decisions to bring suit in federal court for civil violations of federal law—likewise fall within the Executive Branch's exclusive power. *In re Aiken Cnty.*, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013) (Kavanaugh, J.). When the United States decides whether to bring a civil suit to enforce "general compliance" with federal law, it exercises a quintessential Executive Branch function. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021). That is why the Federal Election Commission cannot be part of the legislative branch—it

wields "enforcement power, exemplified by its discretionary power to seek judicial relief." *Buckley*, 424 U.S. at 138.

None of this, of course, prohibits private citizens with a private cause of action from suing to redress concrete and solely personalized injuries caused by violations of federal law. But it does limit them to redressing only "[i]ndividual rights," not "public rights." *Lujan*, 504 U.S. at 578. A private individual who has personally been injured (say, because she was fired due to a disability) may file suit to redress that injury (seeking, for example, reinstatement and backpay) provided she has a cause of action. *See id.* at 577-78. That kind of suit incidentally advances the public interest in rooting out disability discrimination, but the primary result is the redress of the plaintiff's personal, specific injuries. *See Laufer v. Arpan LLC*, 29 F.4th 1268, 1291 (11th Cir. 2022), *vacated as moot*, 77 F.4th 1366 (11th Cir. 2023) (Newsom, J., concurring).

Suits that advance "the *public* interest," by contrast, are "the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576. If private citizens share the power to advance "the undifferentiated public interest in . . . compliance with the law," they usurp "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

B. The CWA authorizes private citizens to exercise unsupervised executive power contrary to Article II.

The CWA raises serious Article II concerns because it delegates unsupervised executive authority to private citizens. Like nearly every federal environmental statute, the CWA includes a citizen-suit provision that authorizes members of the public to initiate lawsuits against private entities that allegedly violate its substantive provisions. The citizen-suit provision states that "any citizen may

commence a civil action" against "any person" for a violation of the Act. 33 U.S.C. § 1365(a)(1). It then defines "citizen" very broadly—virtually to the far reaches of Article III standing requirements—to mean any "person or persons having an interest which is or may be adversely affected" by the alleged violation. *Id.* § 1365(g).

These citizens have a panoply of remedies available to them under the CWA. "Most environmental citizen-suit provisions only provide for injunctive relief and legal costs, (including attorneys' fees) for successful plaintiffs" because "the relief is aimed at remedying the permit violation or other illegal action." Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Env't L. & Pol'y F. 39, 47 (2001). The CWA is different. It authorizes private plaintiffs to impose on private defendants civil fines that are payable to the federal treasury. 33 U.S.C. § 1365(a) (providing that private plaintiffs may seek "to apply any appropriate civil penalties under 1319(d) of this title"). And these civil fines are significant, reaching as high as "$25,000 per day for each violation." *Id.* § 1319(d).

This ability for a self-appointed plaintiff to enforce the CWA against a private defendant through a lawsuit seeking (often ruinous) civil penalties payable to the United States treasury is in severe tension with our constitutional design vesting all executive power in the President. A "lawsuit," after all, "is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts [that] responsibility.'" *Buckley*, 424 U.S. at 138. And "the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court" is "a quintessentially executive power." *Seila Law*, 140 S. Ct. at 2200.

Justice Kennedy explicitly recognized this tension between the CWA's private right of action and Article II in

his concurrence in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). He wrote that "[d]ifficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II." 528 U.S. at 197 (2000) (Kennedy, J., concurring).[2] Justice Scalia, joined by Justice Thomas in dissent, went further. He explained that the CWA is not merely providing private individuals with a remedy for individual harm; it is instead "giving an individual plaintiff the power to invoke a public remedy." *Id.* at 204-05 (Scalia, J., dissenting). Thus, "[b]y permitting citizens to pursue civil penalties payable to the Federal Treasury, the [CWA] does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law." *Id.* at 209.

Still, there are some indications in this Court's caselaw that individuals exercising such executive power need not be fully accountable to the president so long as they are meaningfully supervised or constrained. In *Morrison v. Olson*, 487 U.S. 654 (1988), for example, this Court held that an independent counsel provision did not "impermissibly undermine" the powers of the Executive Branch because there were "several means of supervising or controlling" the independent counsel. *Id.* at 693-96 (internal quotation marks omitted). *But see id.* at 705-06 (Scalia, J.,

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[2] *Cf. DOT v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) ("Private entities are not vested with legislative Powers. Nor are they vested with the executive Power, which belongs to the President. Indeed, it raises difficult and fundamental questions about the delegation of Executive power when Congress authorizes citizen suits." (cleaned up) (citing *Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring))).

dissenting) (explaining that the President is vested not with "*some* of the executive power, but *all of* the executive power").

But the CWA does not have any meaningful guardrails to constrain self-appointed private attorneys' general and save its constitutionality. A provision prohibiting private parties from filing a citizen suit "if the [EPA] or State has commenced and is diligently prosecuting a civil . . . action . . . to require compliance with the standard, limitation, or order" does not meaningfully constrain private litigates. 33 U.S.C. § 1365(b)(1)(B). Rather, it serves as a one-way ratchet. If the government is not enforcing against a violation—including when it chooses not to enforce as an exercise in prosecutorial discretion—then the private citizen is still empowered to prosecute in its sole discretion. The requirement that a private plaintiff provide 60-days' notice of the alleged violation to the EPA and to the proposed defendant is similarly unconstraining. *Id.* § 1365(b)(1)(A). It adds a procedural hurdle, but does not prohibit a private plaintiff from enforcing the CWA. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (noting this requirement is intended to provide the proposed defendant "an opportunity to bring itself into complete compliance . . . and thus . . . render unnecessary a citizen suit"). Finally, the government's ability to "submit its comments" with respect to any consent decree under the act (42 U.S.C. § 7604(c)(3)), does not relieve the tension with Article II. Nothing prohibits the parties from entering into a settlement agreement—as compared to a consent decree—to resolve the private enforcement without the government's involvement, *see United States v. DTE Energy Co.*, No. 10-CV-13101, 2020 WL 10730046, at *1 (E.D. Mich. Dec. 3, 2020), and, in any event, the district court is free to enter a consent decree to which the Executive objects.

In short, the CWA's citizen-suit provision is in substantial tension with Article II as it authorizes private entities to take law enforcement into their own hands and without any meaningful supervision or control by the President or his lawful appointees.

II. The Decision Below Accentuates the Article II and Practical Problems with Citizen-Suit Provisions.

A. This case exemplifies the Article II problems with the CWA's citizen-suit provision.

Article II protects individual liberty by leaving to the elected Executive the discretion *not* to enforce violations of law when enforcement would be unjust or unwise. As then-Judge Kavanaugh explained in *In re Aiken*:

> One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior. . . . After enacting a statute, Congress may not mandate the prosecution of violators of that statute. Instead, the President's prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed.

725 F.3d at 264.

The CWA's citizen-suit provision robs the Executive of this discretion. Indeed, commentators routinely recognize that a fundamental characteristic of citizen-suit provisions is their circumvention of executive discretion. *E.g.*, David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 U. Colo. L. Rev. 377, 380 (2021) ("[C]itizen suits are lauded

for augmenting government enforcement and compelling ideologically antagonistic administrations to take legally required action." (collecting authorities)); Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. Rev. 321, 345 (2010) (noting that "citizen suit provisions could help to ensure that agencies were not fully 'captured' by regulated entities").

The Executive—who is accountable to the American people—can be expected to strive to exercise prudent judgment and only take enforcement action when doing so is reasonable and in the public interest. The environmental organizations that routinely enforce the CWA pursuant to its citizen-suit provision, however, cannot. These organizations do not need to take a broader view of enforcement because they "face no significant political repercussions for setting unwise enforcement priorities." Adler, 12 Duke Env't L. & Pol'y F. at 49. *See also* Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 Admin. L. Rev. 1, 12 (1996) (noting that a critical shortcoming of citizen suits is the "lack of political accountability for important policy decisions"). To the contrary, they often enforce the law in service of their own ideological or policy goals. As Justice Breyer explained outside of the CWA context: "The delegation of state authority to private individuals authorizes a purely ideological plaintiff . . . to bring into the courtroom the kind of political battle better waged in other forums." *Nike, Inc. v. Kasky*, 539 U.S. 654, 679 (2003) (Breyer, J., dissenting).

Worse, private enforcers can mix ideology and policy with plainly improper motivations for enforcement because they are "unencumbered by the legal and practical checks that constrain public enforcement agencies." *Arpan*, 29 F.4th at 1295 (Newsom, J., concurring) (quoting

Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781, 837 (2008)). There is nothing stopping private enforcers of public statutes from selecting their targets for improper reasons, like the resources the defendant has available to fight the allegation, whether the defendant is a competitor to a friend's or family member's business, or even the defendant's political stances.

This unconstrained discretion is particularly problematic with respect to the CWA because that law imposes "crushing" consequences "even for inadvertent violations." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring). "The availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power—which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing." *Laidlaw*, 528 U.S. at 209-10 (Scalia, J., dissenting) (describing the result as "a public fine diverted to a private interest").

This case is an example of a private entity exercising that unconstrained discretion under the CWA to act where the Executive has not. The Executive *chose* not to prosecute Petitioner for his dredge mining. In 2014, the EPA sent Petitioner a notice of violation. App. 52a-53a. Petitioner responded to the notice by disputing that the CWA required him to obtain a permit. *Id.* And the EPA never followed-up. That is unsurprising. Petitioner's conduct is precisely the type that the Executive reasonably does not prosecute because the violation is predominantly on paper and does not cause meaningful environmental harm. The district court made this clear, explaining that "it is important to keep in mind that suction dredge mining *is* allowed on the [river]. In other words, this is not a case of [Petitioner] suction dredge mining at a time and

place where it was not lawfully permitted." *Idaho Conservation League v. Poe*, No. 1:18-CV-353-REP, 2022 WL 4536465, at *12 (D. Idaho Sept. 28, 2022). Rather, this is merely a case of an individual engaging in activity without completing the proper federal paperwork (on his attorney's advice), even as he obtained a state permit for that same activity. *Id.* The EPA could have decided to prosecute this supposed offense. It did not. And the only reason Petitioner has had to defend himself for years in court, and is now subject to a judgment requiring him to pay $150,000 to the United States Treasury (App. 60a) is because a policy-oriented private entity decided that he should.[3]

B. This Court should grant the petition to constrain private attorneys general under the CWA.

The question presented in this petition for certiorari—whether resuspending material in a riverbed that was already there constitutes the "discharge of a pollutant" under the CWA—is an issue of statutory interpretation important not only for the substance of the CWA, but for its citizen-suit provision. That is because, when private entities with ideological or policy agendas and no political accountability enforce laws like the CWA, they have every incentive to push expansive views of the statute's substantive provisions, as Respondent did here. This Court's review is needed to ensure that the broadest possible constructions of a substantive law favored by the most aggressive private enforcers of that law do not supersede Congress's intent, especially where that construction will open the door to more private actions that are inconsistent with Article II.

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[3] Respondent is also seeking over $250,000 in attorneys' fees. *See* ECF Dkt. Entry 81.

Moreover, this Court's review is necessary because of the way in which the lower court here resolved this statutory interpretation question. The decision below relied on *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990), which deferred under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the EPA's interpretation that resuspending existing material constitutes an "addition" of a pollutant under the CWA. App. 8a. Although this Court has instructed courts to give deference to reasonable federal agency interpretations in certain circumstances, doing so in the face of a broad citizen-suit provision intensifies the Article II problems discussed above. When the EPA broadly reads the CWA, or any other act with a citizen-suit provision, it inevitably invites additional private suits attempting to enforce that broad interpretation of the law in circumstances where the EPA is unwilling to enforce itself. Such an interpretation, therefore, delegates even further enforcement authority to politically unaccountable organizations, in tension with Article II vesting the executive power solely with the President.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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