No. 23-1028

In the Supreme Court of the United States

SHANNON POE,
Petitioner,

v.

IDAHO CONSERVATION LEAGUE,
Respondent.

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

BRIEF OF *AMICI CURIAE* OF STATE OF WEST VIRGINIA AND 20 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether there is a "discharge of a pollutant" under the Clean Water Act when material already within a regulated waterbody is merely moved or resuspended within that waterbody?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

You might think that figuring out the meaning of "addition" wouldn't be that hard. You would be on strong ground concluding that it gets at putting something new into the mix instead of moving around what was already there. And you might even be surprised by the question itself: The Court has already answered—twice—what "addition[s]" count as "discharge of a pollutant" into waters of the United States. 33 U.S.C. § 1362(12). Twenty years ago, the Court said that pumping water from one part of a "not meaningfully distinct water bod[y]" to another would not be an "addition" of a pollutant in Clean Water Act terms because nothing new went in. *S. Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004). Ten years later, it confirmed it meant just that. *L.A. Cnty. Flood Control Dist.* v. *Nat. Res. Def. Council, Inc.*, 568 U.S. 78, 83 (2013) (holding that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants").

Given that, "why are we here?" becomes a fair question. If what counts as an "addition" for Section 1362(12) purposes is not a taxing legal question, or if the Court could fairly say job already done, the case for review might be weak indeed. But the facts on the ground another ten years on from *L.A. County* say otherwise. Below, the Ninth Circuit reaffirmed an earlier holding that taking up water and materials from a streambed, *removing* some of those materials, and then letting the rest fall back into that same waterbody can "constitute[] the 'addition' of a pollutant under the CWA." Pet.App.8a. That outcome is at odds with

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[*] Under Supreme Court Rule 37.2, *amici* timely notified counsel of record of their intent to file this brief.

this Court's precedent, and so was the lower court's choice to ground its decision in "great deference," Pet.App.9a, instead of "the CWA's text" and "common understanding[s]," *L.A. Cnty.*, 568 U.S. at 82. The decision also deepens a longstanding circuit split. Pet.21-25.

The consequences? Confusion that is getting worse despite the Court's earlier intervention, not better, and in an area with high stakes for landowners and the States. "For most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions." *Sackett* v. *EPA*, 598 U.S. 651, 659 (2023). And Congress honored this sovereign prerogative when it passed the CWA by ensuring that the States retained wide latitude to regulate and protect their valuable waters. 33 U.S.C. § 1251(b). So against the proper constitutional and statutory frame, the CWA cannot be expanded against the States through mere statutory doubt. Deferring to an agency interpretation that leads to surprising and expansive results was thus the wrong choice.

The *amici* States believe that correcting the Ninth Circuit's wayward approach—and not letting it proliferate as other circuits follow—is reason enough to grant the Petition. But the Court should also take on the issue because minimizing the States' role in the statutory scheme is not some theoretical tug-of-war between state and federal control. Federalism protects real-life interests. It is the States, after all, that implement the CWA's permitting programs, often with limited resources. Reading "addition" properly would allow the States to implement responsibly the significant aspects of the CWA they oversee, while also enforcing their own environmental laws that cover the remainder of the nation's waters. And it would cut back the uncertain and potentially ruinous liability from citizen-suit enforcement

actions that often lead to only minimal environmental gains anyway.

The Court should grant review.

SUMMARY OF ARGUMENT

I. The CWA requires clear language before expanding its jurisdiction at the States' expense. States are the primary players in protecting our nation's waters, which this Court recognized over a century ago when it declared that States' rights over rivers and other intrastate waters are "obvious, indisputable," and "omnipresent." *Hudson Cnty. Water Co.* v. *McCarter*, 209 U.S. 349, 356 (1908). The CWA recognizes that, too, constructing a cooperative-federalism structure that ensures all sovereigns have a voice. Add to all that, federalism matters to statutory interpretation, which means that Congress must speak clearly if it wants to alter the "usual constitutional balance of federal and state powers." *Bond* v. *United States*, 572 U.S. 844, 858 (2014) (cleaned up).

But the Ninth Circuit ignored all this—not even referencing the CWA's "cooperative federalism" constraints. Nor did it apply the traditional tools of statutory construction to determine what "addition" means. Instead, the Ninth Circuit saw that the CWA left "addition" undefined and deemed it ambiguous. It then relied on old circuit precedent to defer under *Chevron* to EPA's interpretation. That reasoning is wrong and goes beyond even what *Chevron* allows. This Court should step in.

II. The Ninth Circuit's wayward approach warrants this Court's intervention. It is not just wrong, but wrong in a way that hurts the States and our residents. In the CWA context, deferring to EPA's interpretation usurps state authority in water management matters and places it in the hands of less accountable agencies and private citizen

enforcers. Expanding the CWA's jurisdiction also imposes substantial costs on the States in managing and preserving our nation's waters. Every dollar the States devote to complying with the Act is a dollar not spent on intrastate waters. Finally, regulated parties face substantial costs as they comply with new regulations. The Court should grant the Petition to protect the CWA's cooperative-federalism framework.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant The Petition To Restore The States' Role In Water Regulation.

A. The CWA Does Not Grow Through Ambiguity.

Reading the Clean Water Act right takes some background.

1. Traditionally, protecting America's "natural resources" has been a "central responsibility of state governments." *Atl. Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1362 (2020). It includes the States' "power to control navigation, fishing, and other public uses of water," which "is an essential attribute of [their] sovereignty." *Tarrant Reg'l Water Dist.* v. *Herrmann*, 569 U.S. 614, 631 (2013) (cleaned up); see also *Kansas* v. *Nebraska*, 574 U.S. 445, 480 (2015) (Thomas, J., concurring in part) ("Authority over water is a core attribute of state sovereignty."). Those rights are "obvious, indisputable," and "omnipresent." *Hudson Cnty.*, 209 U.S. at 356. And for decades, the Court has recognized that States historically control "the conservation of natural resources." *Nw. Cent. Pipeline Corp.* v. *State Corp. Comm'n of Kan.*, 489 U.S. 493, 512 (1989); see also *Sackett*, 598 U.S. at 659 ("For most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions.").

States take the lead in protecting our vital water resources for a good reason—local officials understand better local environments' hydrological challenges because they are literally "on the ground." After all, the Louisiana bayous present different water-management concerns than the mountain rivers of West Virginia. This understanding also means that States can often respond faster to changing conditions than the federal government. And drawing on this "strong tradition of decentralized management," Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179, 193 (2005), States step up to the plate.

For one thing, many state constitutions enshrine natural-resource protections. See, *e.g.*, CAL. CONST. art. XIII, § 8 (protecting the "use or conservation of natural resources"); LA. CONST. art. IX, § 1 (requiring that natural resources be "protected" and "conserved" for the "health, safety, and welfare of the people"). For clean water specifically, North Carolina "conserve[s] and protect[s]" its "waters" and "control[s] and limit[s] the[ir] pollution." N.C. CONST. art. XIV, § 5. New Mexico and Michigan require their legislatures to "provide for control of pollution and control of despoilment" of state waters. N.M. CONST. art. XX, § 21; see also MICH. CONST. art. IV, § 52 (similar). Massachusetts and Pennsylvania go even further, enshrining the right to "clean" and "pure" water. MASS. CONST. art. XCVII; PA. CONST. art. I, § 27. And several States' constitutions put these commitments into action by establishing commissions or setting up funds to keep water and other natural resources clean. See, *e.g.*, ALA. CONST. art. IV, §§ 93.14-16 (creating soil and water conservation coalition and water management districts); FLA. CONST. art. VII, § 14 (authorizing state bonds without elections for "water pollution control and abatement" measures); MO. CONST. art. III, § 37(b)-(c), (e) (setting up a "water pollution control fund" that allows

state financing to protect "the environment through the control of water pollution").

State laws and rules dominate environmental regulation, too: States are "[i]ncreasingly" flexing their authority with the "most stringent" protections against water pollution. Linda Malone, *State and Local Land Use Regulation to Prevent Groundwater Contamination*, 1 ENV'T REG. OF LAND USE § 9:16 (Feb. 2024 update). West Virginia's Water Pollution Control Act, for example, makes it "public policy" to keep water pure. W. VA. CODE § 22-11-2(a). It creates effluent limitations and water quality standards that limit the number of pollutants that may flow into the State's waters, *id.* § 22-11-8(b)(4), and gives its environmental agency power over the State's CWA permitting program and its own permitting regime, *id.* §§ 22-11-4(a)(1), 8(a), as well as broad enforcement authority more generally, *id.* §§ 22-11-19, 22 to 25. Indeed, water-purity and pollution standards abound across the States' codebooks. See, *e.g.*, IOWA CODE § 455B.173 (statute tasking state commission to develop comprehensive plans and programs to address water pollution); NEB. REV. STAT. § 81-1506(2)(f) (making it unlawful for a person to discharge dredged material without obtaining a permit); see also ARK. CODE § 15-22-906; WYO. STAT. § 35-11-301.

2. Congress knows all this. It has long respected States' interests, seeking "to avoid [an] unconstitutional invasion" of their water-related "jurisdiction." *First Iowa Hydro-Elec. Co-op.* v. *Fed. Power Comm'n,* 328 U.S. 152, 171 (1946). For decades, it has given "purposeful and continued deference to state water law," and repeatedly "recognized and encouraged and … protect[ed]" the States' rights over their own waters. *California* v. *United States,* 438 U.S. 645, 653-54 (1978); see also *Sporhase* v. *Nebraska ex rel. Douglas,* 458 U.S. 941, 959 (1982) (describing "37 statutes and the interstate compacts [that] demonstrate Congress'

deference to state water law"); *United States* v. *New Mexico,* 438 U.S. 696, 702 (1978) (saying Congress has "almost invariably deferred to the state law" when addressing "whether federal entities must abide by state water law").

No surprise, then, that the CWA also defers to the States. When Congress enacted it to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), Congress simultaneously "recognize[d], preserve[d], and protect[ed] the primary responsibilities and rights *of States* to prevent, reduce, and eliminate pollution" and protect their "water resources," *id.* § 1251(b) (emphasis added). So the CWA "anticipates a partnership between the States and the Federal Government." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). And it has become a model example of "cooperative federalism"—an "enduring, organizing concept in environmental law"—where it plays a more "central" role than in "any other field." Fischman, *supra*, at 187; accord *Am. Farm Bureau Fed'n* v. *EPA*, 792 F.3d 281, 288 (3d Cir. 2015).

How this all plays out in practice is that the "States play the primary role in administering the Act." *Nat. Res. Def. Council, Inc.* v. *EPA*, 859 F.2d 156, 184 (D.C. Cir. 1988). Congress reserved the States' power "to administer [their] own permit program for discharges into navigable waters within [their] jurisdiction." 33 U.S.C. § 1342(b). Although it gave EPA authority to issue federal permits in the first instance, it also "clearly intended that the states would eventually assume the major role in the operation" of that process. *Shell Oil Co.* v. *Train*, 585 F.2d 408, 410 (9th Cir. 1978). And with 47 States now processing National Pollutant Discharge Elimination System permits, that reality is here. See NPDES State Program Authority, EPA, https://tinyurl.com/bden9kef (last visited Apr. 13, 2024).

Particularly relevant to this case, Congress also had federalism concerns in mind when it fashioned the CWA's citizen-suit provisions. The whole enterprise reflects some skepticism—perhaps echoing ideas from this Court's "federalism cases" that have sought to "curb … congressional attempts to mobilize private litigants for federal purposes." Michael S. Greve, *Friends of the Earth, Foes of Federalism*, 12 DUKE ENV'T. L. & POL'Y F. 167, 175 (2001). Regardless, Congress's approach to "private (environmental) law enforcement" shows "a vague sense of suspicion and discomfort" with the very mechanism itself. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 342 (1990). The prohibition on profitable citizen enforcement, for instance, "would be inexplicable if Congress considered private enforcement wholly unproblematic." *Id.*

The result is that Congress made citizen suits decidedly supplemental to state enforcement. Confirming the States' text-based primacy, legislative history shows that Congress wanted States to bring "the great volume of enforcement actions" under the Act. *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (cleaned up); see also *Sierra Club* v. *U.S. Army Corps of Eng'rs*, 909 F.3d 635, 647 (4th Cir. 2018) ("Legislative history further emphasizes the central role Congress intended for the States to play."). The private-suit option, by contrast, is available *only* when state agencies "fail to exercise their enforcement responsibility." *Gwaltney*, 484 U.S. at 60 (cleaned up). So citizen suits are just a "backup." *S. Side Quarry, LLC* v. *Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684, 690 (6th Cir. 2022) (cleaned up). The States keep the lead.

Indeed, the CWA's overarching cooperative-federalism regime would mean little if this weren't the case. Remember that "where the EPA has certified a NPDES

permitting program," courts "construe the Act to place maximum responsibility for permitting decisions on the states." *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 874 (7th Cir. 1989); accord *Am. Forest & Paper Ass'n* v. *EPA*, 137 F.3d 291, 294 (5th Cir. 1998). And too-broad citizen-suit regimes can frustrate the States' *and* Congress's priorities. For instance, States should receive creative latitude under cooperative federalism. *Budget Prepay, Inc.* v. *AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010). Yet they find themselves leashed when it comes to experimenting with regulatory approaches to induce greater compliance for fear that citizen groups will step in. *Gwaltney*, 484 U.S. at 60. Allowing private plaintiffs to jump too quickly into ongoing state proceedings can also "frustrate" the very "objectives of environmental protection." Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENV'T L. & TECH. J. 55, 64 (1989).

So because larger CWA jurisdiction also means greater reach for a method of enforcement to which Congress (and federalism principles) give a wary eye, this feature of the Act is another reason for pause before reading the statute broadly. And all told, "given the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use," statutory interpretations shrinking that power face a high bar. *Sackett*, 598 U.S. at 680 (quoting 33 U.S.C. § 1251(b)).

3. Add to all *that* the principles of statutory construction that would favor reading the CWA through a State-protective lens even if Congress had not taken pains to write cooperative federalism throughout it.

Federalism matters when it comes to statutory interpretation. After all, the "proper division of authority between the Federal Government and the States" is "our oldest question of constitutional law." *New York* v. *United States*, 505 U.S. 144, 149 (1992). Just as old is the States'

broad "residuary and inviolable sovereignty," *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (quoting THE FEDERALIST No. 39 (J. Madison)), which allows the States to "pursu[e] [their] legislative objectives," *Shelby Cnty., Ala.* v. *Holder*, 570 U.S. 529, 543 (2013). Preserving the balance of power between the States and the federal government "is not just an end in itself," *id.* (cleaned up), but assures more "sensitiv[ity] to the diverse needs of a heterogeneous society," "allows for more innovation and experimentation," and "makes government more responsive," *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). In short, "[i]n the tension between federal and state power lies the promise of liberty." *Id.*

Courts thus read statutes (where fairly possible) in a way that strengthens areas of traditional state responsibility. Indeed, "apply[ing] the background assumption that Congress normally preserves the constitutional balance between the National Government and the States" is "fully appropriate" judicial work. *Bond*, 572 U.S. at 862 (cleaned up). *McDonnell* v. *United States*, for example, favored a "more limited interpretation" of a criminal law that was both textually supported *and* free of "federalism concerns." 579 U.S. 550, 576-77 (2016). A construction that would have left the statute's "outer boundaries ambiguous and involve[d] the Federal Government in setting standards of good government for local and state officials," however, ended on the cutting-room floor. *Id.* (cleaned up); see also, *e.g.*, *Jones* v. *United States*, 529 U.S. 848, 858 (2000) (refusing to upset the "federal-state balance in the prosecution of crimes" when construing federal arson statute (cleaned up)). And perhaps especially when a statute is "designed to advance cooperative federalism," the Court has "not been reluctant to leave a range of permissible choices to the States." *Wis. Dep't of Health & Fam. Servs.* v. *Blumer*, 534 U.S. 473, 495 (2002).

The Court puts these federalism principles to even sharper effect before finding that federal law overrides the "usual constitutional balance of federal and state powers"—that result requires Congress to clearly declare its intent. *Bond*, 572 U.S. at 858 (cleaned up). This clear-statement rule recognizes that Congress's ability to "legislate in areas traditionally regulated by the States" is an "extraordinary power in a federalist system," so courts "must assume Congress does not exercise [that power] lightly." *Gregory*, 501 U.S. at 460. Clarity is no low bar, either: Congress must employ "unmistakably," *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989), or "exceedingly" clear language "to place that intent beyond dispute," *U.S. Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 590 U.S. 604, 621-22 (2020). Short of that, statutes "will not be deemed to have significantly changed" the federal-state "balance." *United States* v. *Bass*, 404 U.S. 336, 349 n.16 (1971) (collecting cases).

So layering federalism-laced canons onto the CWA's text and context completes the story of why courts should "avoid the significant constitutional and federalism questions" overbroad CWA interpretations raise. *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). Courts must instead look for express textual proof before adopting readings that "would result in a significant impingement of the States' traditional and primary power over land and water use," *id.*, or otherwise invade "traditional state authority," *Sackett*, 598 U.S. at 679. In short, the CWA is a statute that requires clear language—not ambiguity—before expanding its jurisdiction at the States' expense.

B. The Ninth Circuit Bowled Cooperative Federalism Over.

The court below missed all of that. And the CWA-specific federalism principles missing from its analysis

make its reflexive deference to not-actually-ambiguous text particularly worthy of review. So even if the Court leaves *Chevron* intact, see Pet.26 n.17 (noting that "[t]he Court may wish to hold this Petition until *Loper Bright* is resolved"), the Ninth Circuit's decision is so far afield even *Chevron* cannot salvage it. This Court should step in.

Here is what the Ninth Circuit did. Focusing on the term "addition of any pollutant" in the CWA's definition of covered "discharge[s]," 33 U.S.C. §§ 1362(12), 1311(a), it deemed "addition" ambiguous. In doing so, it deferred to old circuit precedent with a curious lack of textual analysis, Pet.13, then used that precedent to defer under *Chevron* to an EPA idea that "addition" can include materials already in the waterbody's streambed, Pet.App.17a.

That reasoning is wrong. The Ninth Circuit should have never reached *Chevron* because this Court has already indicated that EPA's conception is incompatible with the CWA. On two separate occasions, the Court used traditional methods of statutory construction to find that "addition" is, in fact, quite clear. It explained that the term applies only when pollutants are added to a water body. See *L.A. Cnty.*, 568 U.S. 78; *Miccosukee Tribe*, 541 U.S. 95. Specifically, it considered the "common understanding of the meaning of the word 'add'"—which means "to bring about an increase"—to find that transferring polluted water within the same water body is not a discharge of pollutants under the CWA. *L.A. Cnty.*, 568 U.S. at 82-84.

So the lower court flubbed what should have been an easy task. It found that this Court's decisions were inapplicable because the activity here involves picking up streambed materials and releasing most of them back into the same water in temporarily suspended form. Pet.App.11a. No matter that the streambed is part-and-parcel of a "distinct water bod[y]," *Miccosukee Tribe*, 541 U.S. at 112, with the water flowing through it. The panel

rushed to "great deference" to EPA's approach because it did not find "irreconcilable" conflict between its previous precedent and both of this Court's decisions since. Pet.App.9a, 12a. It should have reckoned harder with the Court's straightforward analysis of the word "addition" before doubling down on its now-outdated ambiguity finding.

And even if the Ninth Circuit had been right to find *Miccosukee Tribe* and *L.A. County* distinguishable on their facts, at a minimum it should have recognized that the Court's approach in putting the ordinary tools of statutory construction to real use called for more rigor. Applying those tools cuts hard against the "resuspension can equal addition" read.

Even *Chevron*, of course, directs courts to deploy the "traditional tools of statutory instruction" at step one. *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council. Inc.*, 467 U.S. 837, 843 n.9 (1984). The Ninth Circuit quoted that language to start its analysis, Pet.App.8a, it just never got around to applying those tools. It mentions that the CWA does not define "addition," Pet.App.7a, then concludes that the term's meaning "remains sufficiently ambiguous that deference … is appropriate." Pet.App.17a. Making matters worse, the old circuit decision it relies on does not explain why "addition" is ambiguous, either. *Rybachek* v. *EPA*, 904 F.2d 1276, 1285-86 (9th Cir. 1990).

Doing the work to determine if "addition" is truly ambiguous would have required grappling with this Court's holdings that "addition" contemplates something new entering the waterbody. And (as explained above), the tools of statutory construction should have also included the federalism clear-statement canon and the federalism-favoring flavors Congress baked into the CWA. Starting with the idea that water regulation is a traditional state function means that reading the Act to reach activities

that disturb waters but do not add new pollutants to them takes the Act further into the States' traditional zone. And once in that clear-statement territory, any lack of clarity the Ninth Circuit found in the CWA *would itself have been clarity*. That is, the lack of a clear statement expanding EPA's reach under the CWA is proof that the statute cannot sweep as far as the Ninth Circuit thought it could.

Just last year, after all, this Court rejected an "overly broad interpretation of the CWA's reach [that] would impinge on [the States'] authority" where Congress failed to "enact exceedingly clear language" expressing its desire to "significantly alter the balance between federal and state power." *Sackett*, 598 U.S. at 679-80. In giving the tools of statutory construction short shrift—including the ones favoring the States—the lower court thus did not apply *Chevron* as much as "abdicate [its] duty … to say what the law is." *Arangure* v. *Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) (cleaned up).

II. The Court Should Grant The Petition To Stem The Consequences Of The Lower Court's Decision.

The Ninth Circuit's choice to reject the Court's common-sense interpretation of "addition" warrants review not just because it is wrong, but because the court got things wrong in a way that harms the States and our residents. So regardless of whether "addition" is secretly a thorny issue of statutory interpretation or a simple one the Ninth Circuit and others are inexplicably getting wrong, the real-world consequences mean the Court should intervene to set the confusion right.

First, start broadly. Reflexive deference to agency interpretations hurts the States because it shunts federalism values aside. Sometimes agencies miss these values inadvertently because "they are unlikely to confront

[them] routinely." Kent Barnett, *Improving Agencies' Preemption Expertise with* Chevmore *Codification*, 83 FORDHAM L. REV. 587, 594 (2014). Other times, however, federal agencies lean on *Chevron* to deliberately ignore state interests and preempt state law. See, *e.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996) (applying *Chevron* to find a regulation preempted state law despite an argument that the presumption against preemption should have controlled).

Moving regulatory power from the States to less connected and representative agencies also means that rules are less able "to respond to the divisive needs of a diverse citizenry." Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 94 (2008). At the same time, the States lose out on their right to have the people they send to Congress make those calls. At least in Congress, members have front of mind that voters can fire them for snubbing concerns contrary to the "will of the people." *United States* v. *Lee Yen Tai*, 185 U.S. 213, 222 (1902). Agencies are inherently "less accountable." Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1438 (2001). And though the Administrative Procedure Act is meant to counteract that reality by making agencies more "accountable to the public," *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (cleaned up), the sort of deference the Ninth Circuit employed here "is in serious tension with" that goal, *Baldwin* v. *United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari).

And all of that is worse where, as here, a court uses broad deference at the behest of private citizen enforcers—who lack the institutional concerns and other built in "checks" that could temper even a federal

regulator's hand. In the citizen-suit context, a private plaintiff is "basically unchecked to exercise executive, prosecutorial authority as a private attorney general." Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957, 1964 (1995) (cleaned up). As explained above, that method of squeezing enforcement power from the States has federalism question marks of its own. Add to that state of affairs a court's willingness to defer to a broad view of "ambiguous" text, and the threat to state enforcement prerogatives only grows.

Second, States suffer financially from CWA jurisdictional bloat. Recall that currently 47 States administer the NPDES permitting regime for the waters in their borders. This Court has lamented that process as "arduous, expensive, and long." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 578 U.S. 590, 601 (2016). Quite right. Back in 2015, state environmental protection agencies spent nearly 1.6 million hours and $70 million each year processing NPDES permits. See OFF. OF MGMT. & BUDGET, EPA ICR NO. 0229.21, ICR SUPPORTING STATEMENT, INFORMATION COLLECTION REQUEST FOR NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM (RENEWAL), at 17, tbl. 12.1 (Dec. 2015), https://tinyurl.com/mryp6e8c. As courts have blessed regulators' gambits to expand the CWA through aggressive understandings of its reach, these numbers have grown. States, tribes, territories, and the District of Columbia now spend just short of 2.5 million hours and $130 million annually on these permits. See OFF. OF MGMT. & BUDGET, EPA ICR NO. 0229.25, ICR SUPPORTING STATEMENT: INFORMATION COLLECTION REQUEST FOR NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM (RENEWAL), at 20, tbl. 12-1 (July 2021), https://bit.ly/3JI8Lst.

Many States can't keep up with the rising costs. As it is, too few people and dollars are available to implement too broad of a program. See, *e.g.*, Hunter S. Higgins, *Deference, Due Process, and the Definition of Water: Dredging the Clean Water Act*, 20 U. DENV. WATER L. REV. 305, 322-23 (2017). One survey of state water regulators, for example, "suggested a national gap of approximately $280 million between federal spending and [a]ctual spending"; the States "were hundreds of millions of dollars short of what they needed to meet their minimum obligations under the CWA." CHERYL BARNES, ET AL., CLEAN WATER ACT IMPLEMENTATION: REVISITING STATE RESOURCE NEEDS 26 (2019), https://bit.ly/3M5uBYt; see also Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of* Rapanos *v.* United States, 30 U. ARK. LITTLE ROCK L. REV. 413, 444 (2008) (finding that as early as 2008, "[a]necdotal evidence abound[ed] that the significant nexus test has markedly strained the wetlands jurisdictional determination process"). In short, States already struggle to bear the costs associated with the CWA's expansion. Diluting "addition" of real meaning makes an already untenable situation worse.

More concerning still, this resource mismatch matters because the CWA doesn't even address most water pollution. Most comes from nonpoint sources, which fall outside the CWA—so the States' role dealing with the remainder has only grown more important. Douglas R. Williams, *Toward Regional Governance in Environmental Law*, 46 AKRON L. REV. 1047, 1052 (2013) (explaining how the States' "dominant role in ensuring ... water quality" has become "central to the overall success of the CWA[]"). But every dollar one of the *amici* States spends implementing an ever-expanding federal permitting regime is one less dollar for other locally needed environmental protection efforts. A narrower, text-focused reading of the CWA would lighten these impossible burdens and allow the

States to better direct efforts when their local water resources need them most.

Third, and finally, the landowners and businesses in our States suffer from the need to comply with costly regulations in newly expanded zones. The end result of how the Ninth Circuit interpreted "addition" is that Shannon Poe, an Idaho instream suction dredge miner, must obtain an Idaho state permit *and* an NPDES permit to move forward. Pet.11, 13-14. But the costs of obtaining an NPDES permit are "significant," and "the permitting process can be arduous, expensive, and long." *Sackett*, 598 U.S. at 661 (quoting *Hawkes Co.*, 578 U.S. at 594-95). And these costs cannot be avoided because the CWA "impose[s] criminal liability," as well as civil fines, on "a broad range of ordinary industrial and commercial activities." *Hanousek* v. *United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari). The consequences for noncompliance are "crushing." *Hawkes Co.*, 578 U.S. at 602, (Kennedy, J., concurring).

Here, the trial court imposed a $150,000 civil penalty covering 42 days during the 2014, 2015, and 2018 dredge seasons. *Idaho Conservation League* v. *Poe*, No. 1:18-CV-353, 2022 WL 4536465, at *1 (D. Idaho Sept. 28, 2022). True, the trial court did not adopt the Idaho Conservation League's requested civil penalty of at least $564,924. *Id.* at *10. But the significant amount it did impose—combined with the threat the bill could have run much higher—underscores the costs to businesses or landowners when courts impermissibly expand the CWA's scope.

These sometimes ruinous costs show their weight even more when lined up against the costs our residents already bear complying with federal regulatory programs. Small businesses in our States shell out an annual average of $11,700 per employee in federal regulatory costs, with the smallest among them paying almost 20% more "than the

average for all firms." U.S. CHAMBER OF COM. FOUND., THE REGULATORY IMPACT ON SMALL BUSINESS: COMPLEX. CUMBERSOME. COSTLY. 4, 6 (2017), *available at* https://bit.ly/3xsiaUr. This amounts to "over $40 billion per year" in direct spending on "federal economically significant rules." Sean Hackbarth, *How Regulations at Every Level Hold Back Small Business*, U.S. CHAMBER OF COMMERCE (March 28, 2017), https://bit.ly/3U5Hojo. "[T]hat's billion with a b." *White Stallion Energy Ctr., LLC* v. *EPA*, 748 F.3d 1222, 1259 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd sub nom.*, *Michigan* v. *EPA*, 576 U.S. 743 (2015). Adding in "lost productivity" and "higher prices," the total charge federal regulators foist on the American economy is more like $1.9 trillion a year. U.S. CHAMBER OF COM. FOUND., *supra*, at 4, 8. And on average, our consumers face nearly 1% price increases for every 10% increase in overall federal regulation. Dustin Chambers, et al., *How Do Federal Regulations Affect Consumer Prices? Analysis of the Regressive Effects of Regulation*, 180 PUB. CHOICE 57, 59 (2019), https://bit.ly/3rxlHOQ.

In short, reflexively deferring to statutory readings that the text cannot bear comes with real costs. So it's no accident CWA litigation keeps coming before the Court—all of these factors show that this area of the law matters in concrete ways for the States and our residents, and for federalism and the values it protects. By not even acknowledging the States' interests here, the Ninth Circuit's decision undermines the Clean Water Act's cooperative-federalism framework in another way that calls for the Court's attention. The Court should step in and restore this important statute's importantly cabined role.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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