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 IN OPPOSITION

Bryan Hurlbutt
Laurence J. Lucas
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701

Kirti Datla
Counsel of Record
EARTHJUSTICE
1001 G St. NW, Ste. 1000
Washington, DC 20001
202.797.5241
kdatla@earthjustice.org

Counsel for Idaho Conservation League

QUESTION PRESENTED

Petitioner traveled to the South Fork Clearwater River in Idaho seeking to mine placers—mineral deposits containing gold—that can be found deep within a riverbed. He suction dredge mined along the river, gouging holes in the riverbed several feet deep, dredging those holes along the riverbed, and suctioning up thousands of cubic feet of material. He pumped the excavated material up to a barge, processed it to remove the gold he sought, and discarded the waste—water, sediment, and other material—in the river.

The question presented is whether the panel below correctly applied longstanding circuit precedent holding that this type of mining adds pollutants to the water to find that petitioner violated Section 402 of the Clean Water Act when he chose not to obtain a permit under the Act before mining.

RELATED PROCEEDINGS

To counsel's knowledge, there are no related proceedings beyond those included in petitioner's Rule 14.1(b)(iii) statement.

CORPORATE DISCLOSURE STATEMENT

Under Supreme Court Rule 29.6, Idaho Conservation League, a nonprofit organization, states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States, and that no publicly held corporation owns 10% or more of its stocks because it has never issued any stock or other security.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 23-1028

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 IN OPPOSITION

INTRODUCTION

Petitioner Shannon Poe suction dredge mines along rivers for gold. To do so, he excavates holes in a riverbed (20 feet wide and 6 feet deep, in one case) to reach potential gold deposits. He dredges those holes along the riverbed (upwards of 45 feet, in that case). He then pumps the excavated material (enough to fill the Court's courtroom more than a foot deep) up to a floating barge, processes it to remove whatever gold it may contain, and releases wastewater into the river. All of this leaves cloudy plumes of sediment in the river and tailing piles strewn across the riverbed.

The Clean Water Act requires Poe to secure a permit before engaging in this hobby. The Act prohibits an unpermitted "discharge" of a pollutant, which includes "any addition of any pollutant." 33 U.S.C. § 1362(12)(A). Suction dredge mining adds pollutants to the water, not just suspended materials that increase turbidity, but also harmful heavy metals like mercury that often lie alongside the gold that miners seek. So for decades, would-be miners have been required to seek a permit. This does not bar mining. It does facilitate the use of best practices that reduce the harm that this kind of mining causes.

Poe would prefer not to obtain a Clean Water Act permit, and his repeated treks to a river in Idaho to mine without one led the courts below to find that he violated the Act. In affirming Poe's liability, the panel below applied three-decade-old circuit precedent holding that placer mining—a category of mining that includes suction dredge mining—discharges pollutants within the meaning of the Act. Poe disagrees. In his view, his mining did not add pollutants to the river because the pollutants existed somewhere within the riverbed before he excavated them, processed them, and discarded them in the water.

This issue does not warrant review. The only other court to consider whether suction dredge mining discharges pollutants agrees that it does, and this Court denied certiorari in that case just four years ago. Nothing has changed since then: There is no split, the decision below aligns with this Court's precedents, and this issue rarely arises and remains unimportant.

The petition should be denied.

STATEMENT

A. Statutory and Regulatory Background

"The objective" of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To meet that objective, the Act makes "the discharge of any pollutant by any person" unlawful unless a permit issued under the Act authorizes the discharge, subject to certain exceptions. *Id.* § 1311(a). A "discharge of a pollutant" is, as relevant, "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). A pollutant, in turn, is "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6).

Two of the Act's permit programs are relevant here. The first is the Section 402 program, also called the National Pollutant Discharge Elimination System. This program authorizes permits for the discharge of pollutants, other than dredged or fill material. *See id.* § 1342(a). The Environmental Protection Agency administers this program, unless a state seeks authorization to administer the program within its jurisdiction. *See id.* § 1342(b). The second is the Section 404 program, also called the dredge-and-fill program. It authorizes permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.* § 1344(a). The Army Corps of Engineers administers this program, again unless a state seeks authorization to administer the program itself. *See id.* § 1344(d), (g); *see also Coeur Alaska, Inc. v.*

Southeast Alaska Conservation Council, 557 U.S. 261, 273–275 (2009) (discussing the statutory division of labor between EPA and the Corps).

Pollution discharges from placer mining are subject to the Clean Water Act. This form of mining aims to extract gold from "placers," which are "alluvial or glacial deposit[s] containing particles of gold" that can be found, among other locations, beneath some creeks, streams, and rivers. *Trustees for Alaska v. EPA*, 749 F.2d 549, 552 (9th Cir. 1984). For placers in those areas, mining is carried out through different methods and at different scales, but generally follows the same basic process. A miner (1) breaks and digs through the clay, sand, rock, vegetation, and other material that lies beneath the water in the riverbed to reach a placer, (2) extracts the placer material, (3) runs it through "a gravity separation process known as sluicing," in which heavier particles like gold settle out and "[l]ighter materials, including sands, silts, and clays remain suspended in the" wastewater, and then (4) discharges the wastewater, along with everything suspended within it, into the water. *Id.*

Pollution from placer mining can have significant, harmful effects. Toxic substances, including arsenic, copper, and mercury, often lie contained and inaccessible deep beneath the water within a placer. *See id.*; *see also* 1-SER-181.[1] After digging through the material above a placer, miners excavate and process the placer and those toxins. These harmful substances can then enter the waterbody as part of the discarded wastewater. The wastewater also contains the clay,

[1] References to "SER" are to the Supplemental Excerpts of Record, *Idaho Conservation League v. Poe*, No. 22-35978 (9th Cir. May 30, 2023), ECF No. 20.

rock, sediment, and vegetation that was broken up, removed, processed, and then released. *See Trustees*, 749 F.2d at 552. Adding this wastewater increases turbidity, a measure of the suspended solids in a waterbody. Higher turbidity "can adversely impact water quality and can have direct and indirect effects on fish and other aquatic life." 1-SER-43; *see also Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1029 (9th Cir. 2012) (en banc) (discussing the harmful effects of this mining—"disturbance, turbidity, pollution, decrease in food base, and loss of cover"—on salmon and other fish that live and spawn in rivers).

EPA has consistently—for nearly fifty years—addressed placer mining and the pollution that it generates under Section 402 of the Clean Water Act.[2] In the 1970s, EPA issued nearly 200 Section 402 permits for placer mining in Alaska. *See Trustees*, 749 F.2d at 553–554 (also noting additional permits issued in later years). In the 1980s, EPA (along with the Corps) reiterated that Section 402 covers "a discharge in . . . suspended form or . . . of solid material of a homogeneous nature normally associated with single industry wastes, and from a fixed conveyance," a description that "include[s] placer mining wastes."[3] Today, EPA continues to address placer mining under Section 402. *See, e.g.*, 40 C.F.R. §§ 440.140–440.148.

---

[2] *See also* 40 C.F.R. pt. 440 (regulating wastewater discharges from ore mines and processing operations under Section 402).

[3] Dep't of Defense & EPA, *Memorandum of Agreement on Solid Waste*, 51 Fed. Reg. 8871, 8872 (Mar. 14, 1986); *see also* Pet. App. 18a (reproducing Corps' Regulatory Guidance Letter 88-10, *Regulation of Waste Disposal from In-Stream Placer Mining* (July 28, 1990) (stating that when excavated material is "subsequently processed to remove desired elements, its nature has changed," and the residue "should be considered waste")).

B. Procedural History

1. The South Fork Clearwater River lies in northwestern Idaho and partially within the Nez Perce Reservation. The river is designated as a protected river under Idaho state law and offers "a vital fishery" that is home to many threatened species such as steelhead trout, fall Chinook salmon, and bull trout. Pet. App. 28a–29a. Because its waters do not meet standards for, among other things, turbidity, it has been designated as an impaired river. *See id.* at 29a.

As with some other Western rivers, its riverbed attracts recreational and professional small-scale suction dredge miners. This method of placer mining involves "dismantling the riverbed by dislodging and moving rocks and boulders, and breaking up tightly bound sediments using the miner's hands, the dredge nozzle, and other tools, like crowbars." *Id.* at 6a. This dismantling creates large holes that can extend "several feet deep" into the riverbed. *Id.* "[W]ater, riverbed sands, and minerals" are then sucked through a nozzle and pumped using gasoline-powered engines up to "a floating watercraft device," where the materials are run "through a 'sluice box'" to separate gold and other heavy metals and then discharged into the river as waste, leaving a plume of turbid water in the craft's wake and piles of tailings on the riverbed. *Id.* at 5a. The piles "can rise to the surface level of the river and can span most of the river's width." *Id.*

EPA addresses pollution from suction dredge placer mining the same way it addresses placer mining generally—under Section 402 of the Clean Water Act. EPA and Idaho have worked together to make securing a Section 402 permit simple. As of 2013, suction dredge mining in Idaho has been covered by a general

permit. *See* 1-SER-34; *see also County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 186 (2020) (discussing "general permits for recurring situations"). In areas open to suction dredge mining, securing a general permit involves filling out a few lines on a one-page form and emailing, faxing, or mailing it in.[4]

Shannon Poe is a "self-employed gold miner" from California who went to Idaho to suction dredge mine along the South Fork Clearwater River. 1-SER-157.

Idaho Department of Water Resources Photo of 2018 Trip[5]

In 2014, 2015, and 2018, he spent 42 days mining gold placer from the riverbed. Pet. App. 22a. This mining was no minor matter. On one trip, he described how

---

[4] *See* NPDES General Permit IDG370000: Small Suction-Dredge, bit.ly/3Uo9xmX. In 2019, after the events relevant to this case, authority to administer these permits transferred from EPA to Idaho. 1-SER-211; *see also supra* at 3 (discussing state administration of Section 402).

[5] Ex. N to 2d Hurlbutt Decl., *Idaho Conservation League v. Poe,* No. 1:18-cv-353 (D. Idaho May 18, 2020), ECF. Nos. 38-3, 41.

he "punched a hole" in the riverbed "20' wide, all the way across the river" and going "straight to bedrock, about 6-8' deep." 2-SER-326. He dredged the holes along the riverbed for "about 45 to 50 linear feet." 2-SER-327. Along the way, he processed the excavated materials onboard a floating barge and released the waste into the water, leaving cloudy plumes of suspended materials and large tailing piles behind. Based on his statements, an expert conservatively calculated the volume of the material excavated on two of his trips as 11,550 cubic feet. *See id.*; 2-SER-337.

Poe "openly suction dredge mined" the river without seeking a Section 402 permit on these trips, despite knowing that one was required. Pet. App. 51a. Poe did obtain an Idaho state-law permit for his trips, and that permit states—in bold text—that a Section 402 permit is required too.[6] And EPA told Poe in 2014 that his mining without a Section 402 permit violated the Act. *Id.* at 52a; *see also id.* at 53a (noting 2016, 2017, and 2018 letters to Poe from the Idaho Conservation League). Yet Poe returned to the South Fork Clearwater River to mine again in 2015 and 2018. Poe described his 2018 trip as part of an "Occupy the Waters" event "to dredge openly in opposition to the EPA" and express the view that the Section 402 permit requirement "is not a law." 1-SER-85; *see also* 1-SER-86 ("We placed our [American Mining Rights Association] banner . . . to announce to the EPA we were here, we were dredging and they could come and fine us.").

[6] Ex. 1 to Poe Mot. for Summary Judgment at 21, *Idaho Conservation League v. Poe*, No. 1:18-cv-353 (D. Idaho May 18, 2020), ECF No. 39-4 (Idaho Dep't of Water Resources, Letter Permit at 1 (June 27, 2014)).

2. When it became clear that Poe would continue to mine without seeking the required permit, the Idaho Conservation League sued. The League is a small nonprofit organization that supports Idahoans' efforts to protect their state's environment. The Clean Water Act allows citizens who, like League members here, are harmed by certain violations to sue to stop those violations. *See* 33 U.S.C. § 1365(a)(1). It imposes procedural requirements that preserve the government's primary role under the Act. *See id.* § 1365(b)(1)(A) (requiring pre-suit notice to the government); *id.* § 1365(b)(1)(B) (creating a diligent-prosecution bar); *id.* § 1365(c)(3) (requiring service of complaints and proposed consent decrees on the United States).

In concluding that Poe had violated the Act, the district court first addressed whether Section 402 covered Poe's suction dredge mining of the South Fork Clearwater River.[7] Section 402 requires a permit if a person (1) discharges, (2) a pollutant, (3) into navigable waters, (4) from a point source. There was "no dispute" that Poe's mining releases pollutants, that the river is a navigable water, or that his floating barge is a point source. Pet. App. 66a. Poe argued only that he does not "discharge" pollutants because he does not introduce new substances "to the dredged streambed material" that he processes on the barge and then disposes of as wastewater. *Id.*

The district court followed a three-decade-old Ninth Circuit precedent that foreclosed Poe's view. The district court explained that the Act prohibits "any addition of any pollutant," 33 U.S.C. § 1362(12)(A), but does not define addition, *see* Pet. App. 66a–67a. In

[7] A magistrate judge heard the case. The decision below and petition refer to the district court. This brief does too.

Rybachek v. EPA, the Ninth Circuit addressed this term when reviewing Section 402 regulations that governed gold placer mining. To uphold those regulations, Judge O'Scannlain's opinion for the court explained that even if material discharged by placer mining "originally comes from the streambed itself," resuspension of the waste material "may be interpreted to be an addition of a pollutant." *Rybachek v. EPA*, 904 F.2d 1276, 1285–286 (9th Cir. 1990). *Rybachek* noted that this reading aligned with the Fifth and Eleventh Circuits' views. *See id.* (citing *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983) and *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501 (11th Cir. 1985) (subsequent history omitted)). It then deferred to EPA's interpretation of addition. *See id.* at 1286.

The district court rejected Poe's claim that two Supreme Court cases had undermined *Rybachek*. The first—*South Florida Water Management District v. Miccosukee Tribe*—stated that if two areas "are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants." 541 U.S. 95, 109 (2004). The second—*Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*—similarly held that "no discharge of pollutants occurs when water . . . simply flows from one portion of the water body to another." 568 U.S. 78, 83 (2013). "Suction dredge mining," the district court explained, "does not simply transfer water (what the above cases address)." Pet. App. 74a. It instead extracts materials from the riverbed, processes them, and disposes of wastewater that contains newly suspended solids. *See id.* "[T]he

very nature of Mr. Poe's suction dredge mining" therefore "added pollutants to the" river. *Id.* at 76a.[8]

As for remedies, the district court enjoined Poe "from suction dredge mining on the [South Fork Clearwater River] unless he obtains and complies in good faith with a" Section 402 permit. *Id.* at 46a. It also set a $150,000 civil penalty for the 42 days on which Poe mined the river without obtaining a permit. *See id.* at 59a. To set this penalty, the district court considered the value of the gold he mined and the penalties in similar cases. *See id.* at 49a, 59a. It also considered Poe's choice to "ignore[] violation notices" and "repeatedly suction dredge mine . . . without a permit" based on his subjective view of the law, rather than to "administratively engage" or "seek relief from the courts." *Id.* at 53a. The district court noted that the penalty was "less than 8% of the maximum possible" and that Poe had "fail[ed] to explain the basis" for an even lower amount. *Id.* at 57a & n.13, 59a.

3. A unanimous Ninth Circuit panel affirmed, with Judge Milan D. Smith, Jr., writing for the court.

The panel held that Poe's unpermitted "mining activities fall squarely within the scope of *Rybachek*." *Id.* at 9a. "Undisputed evidence" showed that he used a "high-pressure blaster nozzle" to excavate the riverbed, extracted gold and other heavy metals, and discharged the waste materials into the water. *Id.* He "therefore 'added' materials to the South Fork" Clearwater River. *Id.*

---

[8] The district court also rejected Poe's second argument: that authority to address these discharges lies with the Corps under Section 404, not EPA under Section 402. Pet. App. 77a–95a.

The panel explained that its holding is consistent with *Miccosukee Tribe* and *Los Angeles County*. Both addressed "polluted water" that "was transferred from one location to another within the same waterbody." *Id.* at 11a. "Here, by contrast," Poe "added a plume of turbid wastewater to the" river containing materials that "were not already suspended in the water." *Id.* *Miccosukee Tribe* and *Los Angeles County* were thus "both distinguishable . . . and inapposite." *Id.* at 10a.

Poe urged the panel to overrule *Rybachek*, criticizing its use of the deference framework in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Pet. App. 10a. The panel declined to depart from controlling circuit precedent. *See id.* at 12a.[9]

4. Poe sought rehearing en banc. No judge requested a vote on the petition, and it was denied. *Id.* at 97a.

This petition followed.

REASONS TO DENY THE PETITION

I. The Question Presented Does Not Warrant Certiorari.

There is nothing certworthy about this case or this issue, as evidenced by this Court's recent denial of the same question presented in the same factual context. The panel below applied settled circuit precedent that is perfectly consistent with *Miccosukee Tribe* and *Los Angeles County*. There is no split. Instead, the one other court to address this exact issue agrees with the decision below, and none of the factually distinct cases

[9] Poe did not ask the Ninth Circuit to review the district court's remedy decisions. He did seek review of its decision that the Corps, not EPA, had authority over any of his discharges. The panel affirmed, *see* Pet. App. 13a–17a, and Poe does not seek further review on that question here, Pet. 11 n.7.

petitioner points to conflict with the decision below. And the issue is unimportant. It comes up only rarely, concerns the hobby of only a few people, and poses no real burden to them. Finally, this petition would not be a good vehicle to address the question presented, even if it otherwise warranted review.

A. There is no conflict with this Court's precedents, nor any split.

1. The panel decision is consistent with this Court's decisions in *Miccosukee Tribe* and *Los Angeles County*. As the panel below explained, neither speaks to suction dredge mining, which extracts materials from the riverbed, processes them, and discards wastewater in the river containing pollutants that were not previously in the water. Pet. App. 11a. Instead, both cases addressed whether the mere movement of water within a waterbody adds pollutants to that waterbody.

Miccosukee Tribe addressed the flow of water in a flood control project in which canals collected water that was then pumped to an impoundment area. *See* 541 U.S. at 100. Without the project, the areas would have been "an undifferentiated body of surface and ground water." *Id.* at 101. The issue was whether the pump needed a permit under Section 402 of the Clean Water Act. *See id.* at 104. This Court stated that if the two areas were "simply two parts of the same water body," then "pumping water from one into the other cannot constitute an 'addition' of pollutants." *Id.* at 109. It then remanded for a decision on whether the areas were part of the same waterbody or were "meaningfully distinct." *Id.* at 112.

Los Angeles County addressed the flow of water out of concrete channels placed in a river for flood control purposes. *See* 568 U.S. at 81–82. Many sources

discharged into the rivers, and monitoring stations in the channels showed elevated pollution. The issue was whether a discharge of pollutants occurred when polluted water "flowed out of the concrete channels and entered downstream portions of the waterways lacking concrete linings." *Id.* at 82 (quotation marks omitted). This Court held "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." *Id.* at 83.

Suction dredge mining does not resemble the mere flows of water in *Miccosukee Tribe* and *Los Angeles County*. Here, Poe dug deep holes in the riverbed and dredged them for long distances, processed the excavated material on a barge, and disposed of waste in the river. This added materials to the water that were "previously deposited in the riverbed." Pet. App. 11a.

As a result, the decision below "can be squared with this Court's rulings" easily. Pet. 15. If this case had involved a mere flow of water, *Miccosukee Tribe* and *Los Angeles County* would be relevant. But it does not, so they are "inapposite." Pet. App. 10a. Indeed *Los Angeles County* itself contrasted the mere movement of water—"when water . . . simply flows from one portion of the water body to another"—with actions that involve water "*being removed and then returned to a water body*." 568 U.S. at 83 (emphasis added). It thus recognized that an action that involves more than the mere flow of water, like suction dredge mining, can add pollutants within the meaning of the Act.

All of this belies petitioner's charge (at 4, 5) that the panel "did not apply" *Miccosukee Tribe* and *Los Angeles County*. Were there any doubt, a decision issued the very next day after the decision below would dispel

it. That decision was authored by the same judge who authored the decision below, for a panel that included a second member of the panel below. In that decision, the panel applied *Miccosukee Tribe* and *Los Angeles County* to affirm the dismissal of a Clean Water Act claim. *See Cottonwood Env't L. Ctr. v. Edwards*, 86 F.4th 1255, 1262–263 (9th Cir. 2023) ("[T]he transfer caused by the underdrain pipe alone cannot constitute the discharge of a pollutant . . . ."). Both panels applied this Court's precedents to the facts in the case before them, and any suggestion that the panel below did otherwise lacks merit.

2. The decision below did not "deepen[]" an "entrenched split" over the meaning of "addition" under the Act. Pet. 21. It applied 33-year-old circuit precedent and could not have deepened (placed a new circuit on one side of) a split. Also, there is no split.[10]

The two courts that have addressed the exact facts here both held that suction dredge mining "adds" pollutants. The Oregon Supreme Court addressed suction dredge mining, just like the panel below. And it followed *Rybachek* in finding that this mining is subject to Section 402, just like the panel below. *See E. Oregon Mining Assn. v. Dep't of Env't Quality*, 445 P.3d 251, 254–245 (Or. 2019), *cert. denied*, 141 S. Ct. 111 (2020) (agreeing that EPA reasonably concluded "that the suspension of solids" and "remobilization of heavy metals" is an "'addition' of a pollutant").

As for *Rybachek*, it followed other circuits' lead, and the circuits remain in agreement today. *See supra* at

[10] Any split, if one existed, would be stale. The decisions petitioner cites (at 22–24) are, on average, 30 years old. That petitioner relies on a dated set of cases makes clear that there is no contested question in need of review.

10. *Rybachek* followed two decisions that addressed discharges subject to Section 404 of the Act. *See Avoyelles Sportsmen's League*, 715 F.2d at 921, 923 (holding that, where "large chunks of" a wetland were "torn up, holes dug, and sloughs filled in," addition "may reasonably be understood to include 'redeposit'"); *M.C.C. of Florida*, 772 F.2d at 1503, 1506 (holding, in a case involving "extensive damage" to acres of seabed and sediment "redeposited on the adjacent sea grass bed," that addition of dredged spoil includes redeposits).[11] Since then, another circuit has also agreed with these decisions. *See United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000) (stating that reading addition to cover dredging "dirt and vegetation in an undisturbed state" and redepositing that spoil into a wetland was "entirely unremarkable").

That leaves the six cases that petitioner claims conflict with the panel decision, which do no such thing. Four are mere flow of water cases, and, as just discussed, the panel decision is perfectly consistent with those cases. One expressly stated that it does *not* conflict with the interpretation in the panel decision. And one addressed an entirely distinct set of facts.

Petitioner begins by citing (at 22–23) four cases that all agreed that a mere flow of water does not add pollutants, well before this Court reached that same conclusion in *Miccosukee Tribe* and *Los Angeles County*. Two cases accepted the rule but found that it did not apply to the facts before it. *See United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) (finding a jury instruction's misstatement of the rule harmless because the rule did not apply to the "waste treatment

[11] Though petitioner describes (at 13 n.10) this case as applying "broad deference," the decision does not mention deference.

systems" at issue); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (subsequent history omitted) (concluding that the rule did not apply where water moved to an "utterly unrelated" body of water). Two other cases applied the rule to water flowing through a dam. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) (deferring to EPA's view that "polluted water" passing "through the dam from one body of navigable water (the reservoir) to another (the downstream river)" does not result in a discharge of pollutants);[12] *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 589 (6th Cir. 1988) (agreeing with *Gorsuch* where a hydroelectric dam "merely change[d] the movement, flow, or circulation of" water).

For the reasons already given, there is no conflict or tension between these flow-of-water cases and the panel decision. Indeed, one drew the same distinction that this Court did in *Los Angeles County*. *Consumers Power* distinguished a dam that kills some fish as water flows through its turbines from a processor who removes fish, processes them, and discards processed fish parts in the water as waste. It explained that the processor of course discharges pollutants; it is irrelevant that the discharged fish parts were once in the same waters that they were later discharged into. *See Consumers Power*, 862 F.2d at 585. These decisions, like this Court's later cases, thus recognize that something *more* than the mere flow of water can result in the addition of pollutants.

---

[12] This is dicta, not a holding, because the court began its discussion by deferring to EPA's view that the pollutants at issue were not pollutants under the Act at all. *Gorsuch*, 693 F.2d at 174.

As for *National Mining Association* (at 22), the D.C. Circuit itself explained why its holding is consistent with *Rybachek* (which the panel below applied). There, the Corps had stated that the Act did not cover "incidental fallback" of dredged materials into water, but it later removed that exception from its Section 404 regulations. *Nat'l Min. Assn. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1402 (D.C. Cir. 1998). The D.C. Circuit held that Section 404's reference to discharges of dredged or fill material did not cover a situation in which material is dredged and "a small portion of it happens to fall back" and that the Corps should not have removed the exception. *Id.* at 1404. But the court made clear that its decision was narrow, emphasizing that it did "*not* hold that the Corps may not legally regulate some forms of redeposit under [Section] 404." *Id.* at 1405 (citing *Avoyelles*, 715 F.2d at 924 n.43) (emphasis added). And it made equally clear that its decision was consistent with *Rybachek*, which did not involve any "incidental fallback" or "imperfect extraction" and instead addressed "the discrete act of dumping leftover material into the stream after it had been processed." *Id.* at 1406.

Capt. Gaston (at 24–25) is consistent with the decision below for the same reason: It did not address any act of extracting material, processing it, and dumping it into the water. There, fishing trawl nets "stir[red] up sediment" on the ocean floor. *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 294 (4th Cir. 2023). The Fourth Circuit held that this did not discharge pollutants under Section 402. *See id.* at 303–304. Though its analysis was brief (three sentences of a ten-page opinion), the court apparently viewed the rock and sand on the ocean floor that the nets stirred up as "already present *in the body*

of water." *Id.* at 304 (emphasis added). Elsewhere, it distinguished the nets' effects from those of "activities that alter the water's floor through excavation." *Id.* at 303. Accordingly, there is no sound reason to believe that the Fourth Circuit would reach a different conclusion than the panel below did on the facts here: mining that "*excavat[ed]* through layers of riverbed down to the bedrock," processed those materials, and then "added a plume of turbid wastewater" containing materials that "*were not already suspended in the water*" to the river. Pet. App. 11a (emphasis added).

3. Petitioner's remaining quibbles with the decision below lack merit and do not support review. To the extent petitioner sees error in the panel's application of settled circuit precedent (*Rybachek*) that itself applied settled Supreme Court precedent (*Chevron*), that is wrong. Stare decisis principles require panels to follow circuit precedent. And this Court has repeatedly told lower courts to leave any decision on whether to overrule Supreme Court precedents to, well, the Supreme Court. *See, e.g.*, *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016).

For similar reasons, Poe's accusations that the panel "ignored" (at 19) his arguments about *Sackett v. EPA*, 598 U.S. 651 (2023), provide no basis for review. Poe invoked *Sackett* as part and parcel of his argument against relying on *Rybachek* due to its application of *Chevron*.[13] The panel's explanation of why basic stare

[13] *See* Reply Br. at 15, *Idaho Conservation League v. Poe*, No. 22-35978 (9th. Cir. July 20, 2023), ECF No. 27.

decisis principles foreclosed that argument thus also fully addressed his references to *Sackett*.[14]

This Court should not accept petitioner's footnoted suggestion (at 26 n.17) to hold these petitions pending *Loper Bright Enterprises v. Raimondo*, No. 22-451 (granted May 1, 2023). The petitions that appear to be being held for that case and *Relentless, Inc. v. Department of Commerce*, No. 22-1219 (granted Oct. 13, 2023), either raise the same question presented as those cases (whether to overrule or limit *Chevron*)[15] or seek review of a panel decision that applied the *Chevron* framework, or a variant thereof, in the first instance.[16] Respondent is not aware of a petition being held that involves the one-step-removed posture of this case, in which the panel applied decades-old, on-point circuit precedent that, in turn, applied this Court's *Chevron* framework. That makes sense, as even the *Loper Bright* and *Relentless* petitioners both agreed at argument that long-decided precedents like

---

[14] Poe now also refers to *Sackett*'s discussion of interpretations that "significantly alter the balance between federal and state power." Pet. 20 (quoting *Sackett*, 598 U.S. at 679). He did not raise this principle below, either before the panel or on rehearing. Even now, he does not explain how the interpretive question here might alter, much less significantly alter, that balance.

[15] *See Edison Electric Institute v. FERC*, No. 22-1246 (filed June 14, 2023); *Foster v. Dep't of Agriculture*, No. 23-133 (filed Aug. 10, 2023).

[16] *See KC Transport, Inc. v. Su*, No. 23-876 (filed Feb. 12, 2024); *Diaz-Rodriguez v. Garland*, No. 22-863 (filed Mar. 08, 2023); *Cruz v. Garland*, No. 23-538 (filed Nov. 16, 2023); *United Natural Foods, Inc. v. NLRB*, No. 23-558 (filed Nov. 20, 2023).

Rybachek would retain their precedential effect even if *Chevron*'s framework were limited or overruled.[17]

B. The petition does not present an important issue, nor is this case an ideal vehicle.

1. This question presented was not important when this Court decided against reviewing it a few years ago, and it is not important now.

This Court recently decided not to review this issue. In that case, suction dredge miners challenged the Section 402 general permit for suction dredge mining that covers Oregon. The Oregon Supreme Court rejected the challenge. It adopted "EPA's considered conclusion that suction dredge mining can result in the addition of pollutants . . . in the form of suspended solids and remobilized heavy metals." *E. Oregon Mining Assn.*, 445 P.3d at 254 (quotation marks omitted). The Oregon miners—who were represented by some of petitioner's counsel here—then asked this Court to resolve the same question presented here. Pet. i, No. 19-839 (filed Dec. 20, 2019). This Court denied the petition. 141 S. Ct. 111 (cert. denied June 15, 2020). It should do the same here.

Petitioner does not mention *Eastern Oregon Mining Association* or address this recent denial of certiorari; instead, he reaches back 22 years (at 27) to claim that a prior grant of certiorari shows that this issue is an important one. There, a lower court held that Section 404 of the Clean Water Act applies to "deep ripping," in which a tractor drags long metal prongs to dislodge

---

[17] *See Loper Bright* Tr. at 21–22 ("And if the court has already held yes, it is lawful, I would think that would settle the matter."); *Relentless* Tr. at 61–62 ("litigants . . . would have to overcome the normal stare decisis test" and courts will find that threshold met "very rarely, maybe almost never").

a restrictive soil layer. *Borden Ranch P'ship v. U.S. Army Corps of Eng's*, 261 F.3d 810, 812 (9th Cir. 2001), *aff'd by an equally divided ct.*, 537 U.S. 99 (2002). For several reasons, the decision to grant review there lends no support to the petition here.

Petitioner's view (at 27) that *Borden Ranch* shows that this Court once viewed the question presented here as important is misguided. The "addition" issue in *Borden Ranch* was part of a first, three-part question presented, and there were two more, which makes divining the motivation for the grant a tall order. *See* Petr. Br. at i, *Borden Ranch*, No. 01-1243 (filed Aug. 26, 2002). And the "addition" issue was different. The petitioner there argued that it did not *extract* any material at all, much less add material to water. *See id.* at 21. The only conclusion one can reasonably draw from *Borden Ranch* is that this Court did not think about the question presented here at all.

That petitioner must reach so far back to paint the question presented as important is good evidence that it is not. If the questions in *Borden Ranch* were recurring ones, surely someone would have brought them to this Court again over the past two decades. Yet to the best of respondent's knowledge, no one has.[18]

In truth, few cases even implicate the issue on which petitioner seeks review. Petitioner does not show that cases often discuss whether a pollutant was at some

---

[18] In the same vein, petitioner's claim that commenters "continuously underscored" a need for review rests on pieces from 2003, 2004, and 2014—hardly continuous, much less continuing. Pet. 27. And one of those pieces rejects petitioner's interpretation as "ambiguous, unhelpful, [and] inconsistent with §404." Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Addition" Element of the Clean Water Act Offense*, 44 Envtl. L. Rep. News & Analysis 10770, 10779 (2014).

point within the waters that it was discharged into, much less turn on that question. That is because no such slew of cases exists.[19]

Finally, this issue is even less likely to arise after this Court's recent decision in *Sackett*, as the few cases cited in the petition show. Most of those cases involved discharges into wetlands permitted through the Section 404 program. *See supra* at 15–16. *Sackett* substantially reduced the wetlands that are subject to the Act. *See* 598 U.S. at 678–679. So even fewer cases implicating this issue will arise in the future.

2. As to the specific activities in this case, a decision from this Court would not make much of a difference.

Suction dredge mining occurs primarily in only a few Western states. Many, like Idaho, restrict suction dredge mining as a matter of state law, both in waters that the Clean Water Act does not reach and as a complement to the Act. *See, e.g.*, Cal. Fish & Game Code § 5653.1 (prohibiting suction dredge mining within the state until an environmental review and regulations are completed); Wash. Dep't of Fish & Wildlife, *News Release* (June 3, 2019) (stating that suction dredge mining will require a state-law permit in part because of "out-of-state dredgers"), bit.ly/wdfw19.

A decision from the Court would not affect those state-law restrictions. It is thus hard to see how resolving this question would affect "thousands" of would-be miners. Pet. 29. And even accepting that number, it only further shows that this issue—

[19] A place to look might have been the hundred-plus cases that cite *Rybachek*. Reviewing them reveals that *Rybachek*'s discussion of generic arbitrary-and-capricious review principles has proven far more influential than its Clean Water Act holding.

implicating an activity that so few engage in—lacks importance.

Finally, the decision below does not mean that these would-be miners cannot suction dredge mine. It means only that a permit is needed beforehand. And EPA and the relevant state agencies have used general permits to make obtaining a Clean Water Act permit a simple task.[20]

3. This petition would not be the ideal vehicle to address the question presented, even if it otherwise warranted review.

The petition does not even implicate the question on which it seeks review. It refers (at i) to "material" that is "merely moved or resuspended within th[e] waterbody." But the courts below found that Poe "excavat[ed]" material and added turbid wastewater to the river that contained materials that "were not already suspended in the water." Pet. App. 11a; *id.* at 74a.

And petitioner's position rests (at 17–18) on a contested premise. He views the thousands of cubic feet of riverbed material that he excavated and mined for gold as "waters of the United States," such that he added nothing to the water when he processed those materials and discharged the processed materials into the river as waste. Respondent challenged this

---

[20] *See supra* at 6–7 (discussing Idaho's general permit); Alaska Dep't of Fish & Game, *Mining: Apply for a Permit*, bit.ly/3UkjzUV; Mont. Dep't of Envt'l Quality, *Notice of Intent (NOI): General Permit for Suction Dredging Operations* (Mar. 2019), bit.ly/49U5Zxf; Oregon Dep't of Envt'l Quality, *New Application: 700PM General Permit*, bit.ly/odeq700pm; *see also* Cal. State Water Res. Control Bd., *National Pollutant Discharge Elimination System (NPDES) - Suction Dredge Mining* (updated May 2023) (discussing a general permit to take effect on lifting of the state moratorium), bit.ly/3QnE8yN.

premise below, noting that a riverbed, like other channels, defines the waters but does not itself consist of water, and it would be free to raise the same point in this Court as well.[21] *See* Sup. Ct. R. 15.2. Because the panel below did not reach that issue, granting review of this petition risks requiring this Court to pass on an antecedent question without guidance.

II. The Decision Below Is Correct.

Excavating materials from deep within a riverbed, bringing them to the surface, processing them, and releasing wastewater full of pollutants into a river is a "discharge of pollutants" under the Clean Water Act.

This conclusion flows from the text. The Act prohibits the unpermitted "discharge of any pollutant by any person," 33 U.S.C. § 1311(a), and defines a "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12)(A). The word "addition" has a common meaning. *See, e.g.*, Addition, American Heritage Dictionary of the English Language at 15 (1969) ("[t]he act or process of adding"; "[t]he result of adding; something added"). Suction dredge mining breaks up the riverbed to suction water, dirt, rocks, heavy metals, and more up to a barge, processes these materials, and then *adds* the waste to the river.

This reading aligns with common sense. The measurement of pollution in a waterbody is the concentration of the pollutant *in the water*. *See, e.g.*, 40 C.F.R. § 131.3(b), (i) (defining "water quality standards" as "expressed as constituent concentrations, levels, or narrative statements, representing a quality of water

[21] *See* Answering Br. at 36–38, *Idaho Conservation League v. Poe*, No. 22-35978 (9th Cir. May 30, 2023), ECF. 19.

that supports a particular use"). Suction dredge mining adds pollutants to the water that were "previously deposited in the riverbed," inert and isolated from water. Pet. App. 11a. Along with plumes of sediment, these pollutants can include dangerous heavy metals like arsenic and mercury. *See supra* at 4. This mining thus raises the concentration of these pollutants in the water. Of course it adds pollution to that water.

Petitioner's reading, by contrast, is shot through with flaws.

First, it requires revising the statutory text. The Act asks if "any pollutant" has been added to water. Petitioner instead would ask if the net mass of material in the riverbed and the water column has increased. That is not what the Act says. "[T]he statute does not prohibit the addition of material; it prohibits 'the addition of any pollutant.'" *Deaton*, 209 F.3d at 335.

It would also disrupt other parts of the Act. The Act creates the Section 404 permit program to address "the discharge of dredged or fill material." 33 U.S.C. § 1344(a). One typical discharge of dredged material involves excavating material from one waterbody, usually a wetland, and moving it elsewhere within that wetland. *See supra* at 15–16 (discussing Section 404 cases). For that reason, if a pollutant is not "discharged" under the Act unless it "come[s] from outside sources," that "would effectively remove the dredge-and-fill provision from the statute." *Avoyelles Sportsmen's League*, 715 F.2d at 924 n.43. This likely explains why *none* of the cases that petitioner cites adopted his interpretation. *See American Hospital Assn. v. Becerra*, 596 U.S. 724, 737 (2022) ("We must hesitate to adopt an interpretation that would eviscerate such significant aspects of the statutory text.").

As for petitioner's reliance on a soup-ladle analogy (at 3, 18–19), it cannot make up for his interpretation's lack of textual support. This Court has previously offered that analogy to help explain why the flow of water within a waterway does not add pollutants within the meaning of the Clean Water Act. *See Los Angeles County*, 568 U.S. at 82–83; *Miccosukee Tribe*, 541 U.S. at 109–110. It did not use the analogy to define "addition," nor did it address materials extracted from a riverbed, processed, and then discarded.

A different analogy shows why petitioner's interpretation of "addition" cannot be right. Many homes and offices in this country were built with materials that contain asbestos. This cancer-causing material was embedded—inert—within ceilings and floors. If a contractor scrapes off a popcorn ceiling that contains asbestos in an office without taking measures to contain it, then anyone entering the office would breathe it in. Every reasonable person would be upset with the contractor for "adding" asbestos pollution to the office, even though the asbestos was in the ceiling all along.

Finally, petitioner's interpretation also flouts the stated purpose of the Act. As discussed, the excavated material often includes harmful heavy metals like mercury. Petitioner touts (at 10) the possibility that miners may safely dispose of that mercury. But on his reading, a miner could extract a large amount of mercury from a riverbed, toss it in the water, greatly raise the concentration of mercury in the water, and not have "discharged" a pollutant at all, because the mercury was once in the riverbed. This is no way to read a statute that Congress enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Bryan Hurlbutt
Laurence J. Lucas
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701

Kirti Datla
Counsel of Record
EARTHJUSTICE
1001 G St. NW, Ste. 1000
Washington, DC 20001
202.797.5241
kdatla@earthjustice.org

Counsel for Idaho Conservation League

May 20, 2024