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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Other Authorities

INTRODUCTION

The statutory provision at issue is unambiguous: The Clean Water Act requires a person to obtain a permit from the Environmental Protection Agency only if an activity results in the "addition"—*i.e.*, increases the amount—of pollutants to "navigable waters." 33 U.S.C. § 1362(12). The Court has—twice—confirmed this commonsense, ordinary meaning of "addition." *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109–12 (2004); *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 568 U.S. 78, 82–84 (2013). Under this precedent, the mere movement of pollutants within regulated waters cannot trigger liability.

The Ninth Circuit nevertheless concluded that it was compelled by its own precedent—predating *Miccosukee Tribe* and *L.A. County*—to hold the term "addition" to be ambiguous. Yet unlike *Miccosukee Tribe* and *L.A. County*, that Ninth Circuit precedent did not apply the traditional tools of statutory construction to determine the Act's meaning. It instead reflexively deferred under *Chevron*, holding that EPA could reasonably conclude that merely resuspending pollutants within a single waterbody can result in the "addition" of a pollutant. The conflict between this Court and the Ninth Circuit could not be clearer.

Yet Respondent insists that review is unwarranted because the Ninth Circuit's judgment is "consistent with" the Court's rulings in *Miccosukee Tribe* and *L.A. County*. Like the Ninth Circuit's decision, Respondent characterizes these cases as concerning the "mere movement of water" within the same regulated waterbody, while this case concerns

suction dredge mining, which "excavates" materials from a riverbed and temporarily suspends those materials in the water column. But besides ignoring the conflict over the statutory meaning of "addition," Respondent's effort to reconcile the Ninth Circuit's ruling with this Court's decisions has no support in case law. Respondent cites no case holding that a streambed is excluded from regulated "navigable waters." And Respondent's argument runs headlong into this Court's precedent, holding streambeds to be part of otherwise regulable "waters." *See* Pet.18.

The Ninth Circuit's decision also directly conflicts with the Fourth Circuit's decision in *North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*, 76 F.4th 291, 303–04 (4th Cir. 2023)—not only over the meaning of "addition" (*Gaston* did not find "addition" ambiguous and instead followed this Court's precedent in *L.A. County*)—but also over whether resuspending pollutants from the streambed into a water column results in the "addition" of a pollutant. Respondent attempts to distinguish *Gaston* by taking a quote from the decision about "excavation" out of context, but there is no difference between the issue in *Gaston* and the issue here.

The Petition presents a good vehicle for the Court to resolve the conflicts over how to interpret "addition." The Ninth Circuit's decision not only implicates jurisprudential conflicts over the Clean Water Act's meaning, it also has real-world consequences for citizens subject to the "potent weapon," *Sackett v. EPA*, 598 U.S. 651, 660 (2023), that is the Clean Water Act. Respondent tries to downplay the importance of the question presented, noting that this Court has denied certiorari in another

case raising a similar question. But as this Court has "often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (cleaned up). Respondent's assertion that this Court should not view the question presented as important, despite having granted certiorari on the issue in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 812 (9th Cir. 2001*), aff'd by an equally divided ct.*, 537 U.S. 99 (2002), also misses the mark. In Respondent's view, by "reach[ing] so far back" to *Borden Ranch*, BIO.22, the issue is unimportant. But this Court waited nearly two decades to finally clarify a different provision of the Act. *See Sackett*, 598 U.S. at 678 (adopting the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006)). As with *Sackett*, now is the right time to clarify another contested part of the statute's reach.

Since *Borden Ranch*, the Court has stressed that ordinary citizens must be able to rely on the law written by Congress. Indeed, due process demands that "ordinary people . . . understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement." *Sackett*, 598 U.S. at 680 (cleaned up). Yet several lower courts have applied broad deference when construing "addition," expanding the federal government's jurisdictional scope over everyday activities with little notice to the regulated public and little care for the impingement on traditional state prerogatives. States AC Br. 3–4. Without this Court's intervention, citizens will continue to be stuck in an ad hoc, strict liability legal regime—subjecting them to life-altering federal lawsuits, crushing civil penalties, and even criminal prosecution. The Petition should be granted.

ARGUMENT

I. Certiorari is needed to give lower courts guidance over the meaning of "addition."

A. The Ninth Circuit's decision conflicts with this Court's Clean Water Act precedent.

Respondent insists that the Ninth Circuit's decision "is consistent with this Court's decisions in *Miccosukee Tribe* and *L.A. County*," and that the panel below merely applied these precedents to the "facts." BIO.13–14. Not so.

1. Noticeably absent from Respondent's brief—and the Ninth Circuit's decision—is any discussion of the Court's construction of the ordinary meaning of "addition" in the Clean Water Act. Yet that is the heart of the conflict between this Court's decisions and the Ninth Circuit's judgment. Indeed, the primary conflict is over the legal rule the Court established in *Miccosukee Tribe* and *L.A. County* when it construed the ordinary meaning of "addition," and the Ninth Circuit's holding that the term is ambiguous and thus eligible for *Chevron* deference.

Just compare. **This Court**: "We held in *Miccosukee* that the transfer of polluted water between two parts of the same water body does not constitute a discharge of pollutants under the CWA." *L.A. County*, 568 U.S. at 82–83 (cleaned up). The Court "derived that determination from the CWA's text, which defines the term "discharge of a pollutant" to mean "any *addition* of any pollutant to navigable waters from any point source." *Id.* (citation omitted). And "*[u]nder a common understanding of the meaning of the word 'add,'* no pollutants are 'added' to a water

body when water is merely transferred between different portions of that water body." *Id.* (citing Webster's Third New International Dictionary 24 (2002) ("add" means "to join, annex, or unite (as one thing to another) *so as to bring about an increase* (as in number, size, or importance) or so as to form one aggregate")) (emphasis added).

The Ninth Circuit: "[In *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990)] [w]e noted that 'resuspension' of streambed materials 'may be interpreted to be an addition of a pollutant under the Act,' and we deferred to the EPA's reasonable interpretation that such activity constitutes the 'addition' of a pollutant under the CWA." App.8a. The Ninth Circuit only came to that conclusion because its precedent in *Rybachek*—which predates *Miccosukee Tribe* and *L.A. County*—found "addition" ambiguous and thus *Chevron*-eligible. *See* Pet.13.

Nor does Respondent acknowledge that, under *Chevron*, courts must apply the traditional tools of statutory construction to determine whether a statute is ambiguous before deferring to an agency, a task which the Ninth Circuit did not undertake.

The Ninth Circuit continues to find ambiguity where this Court found no ambiguity. Thus, the Ninth Circuit "did not apply," BIO.14, *Miccosukee Tribe* and *L.A. County*. It applied *Chevron* despite those precedents.

2. Rather than confront this Court's construction of "addition," Respondent—like the Ninth Circuit—seeks to distinguish the mere "movement of water" within the same waterbody from suction dredge mining, which "extracts materials from the riverbed"

and temporarily places those materials within the water column. BIO.13.

Respondent's attempted distinction is unpersuasive, because it proceeds upon a false premise—that a riverbed can be decoupled from regulated "waters." This Court's precedents affirm that a riverbed—and the materials or "pollutants" within it—are part of regulable waters. *See* Pet.18. More still, *Miccosukee Tribe* and *L.A. County* did not hold that merely transferring water between two parts of the same waterbody is not an "addition" of a pollutant. Rather, those cases held that transferring (redepositing) water—*containing suspended pollutants*—between parts of the same waterbody is not an addition of pollutants. Pet.3. Despite those "pollutants" having been "discharged" and suspended within the water column, the Court determined that, under the ordinary meaning of "addition," nothing was added. Thus, the Ninth Circuit's decision conflicts with this Court's precedent even on Respondent's reading.

B. The Circuits are split over the meaning of "addition."

The Ninth Circuit's decision, reaffirming the view that "addition" is ambiguous and applying *Chevron* deference to hold that the mere resuspension of pollutants from the streambed results in the "addition" of pollutants, conflicts with other circuits' decisions. *See* Pet.21–24. But rather than address the conflict over the statute's meaning, Respondent spends several pages (BIO.15–19) just reciting the factual differences among the circuit courts' applications. Nor does Respondent acknowledge that some circuits have held that resuspension may qualify

as an "addition," while others have held that it does not. *Cf.* Pet.22–23.

In any event, there is now a clear conflict between the Ninth Circuit's decision and the Fourth Circuit's decision in *Gaston*, 76 F.4th 291—as to both the statutory meaning of "addition" and its application to facts like those here. **Conflict # 1**: Unlike the panel decision below, *Gaston* did not find "addition" ambiguous. It cited *L.A. County*'s holding that, under the ordinary meaning of "addition," there must be an increase in pollutants to a "body of water." *Id.* at 304. *See also id.* at 302 (citing the ordinary meaning of "addition" to address whether throwing "bycatch" overboard could be understood as a "discharge of a pollutant"). Respondent leaves this conflict unaddressed. **Conflict # 2**: Contrary to the panel decision here, *Gaston* applied the ordinary meaning of "addition" to hold that materials from the ocean floor were part of the "body of water" and thus that the sediment (rocks and sand) suspended in the water column did not meet the definition of "addition." *Id.* at 303. Respondent resists this conclusion, citing a separate part of *Gaston* discussing "excavation." BIO.19. But that discussion addresses an entirely separate legal issue—whether material from the seabed stirred up by shrimp trawlers could be considered "dredged spoil" and thus a regulable "pollutant." *Gaston*, 76 F.4th at 303.

At bottom, the Ninth and Fourth Circuit—like several other circuits—disagree over the Act's legal meaning, as well as over whether the "resuspension" of materials from a body of water's bed is the "addition" of a pollutant. These conflicts are real and warrant review.

C. The Court should grant certiorari to once again enforce the limits of *Chevron* deference in the Clean Water Act context.

Respondent asserts that this Court's decision in *Sackett* is irrelevant here because the panel below was (implicitly) applying "stare decisis principles" by ignoring that decision (BIO.19–20), and it is up to this Court to overrule its precedents (*Chevron*). *Id*. at 20. But *Sackett* held that deference is precluded by "background principles of construction" requiring EPA to "provide clear evidence that it is authorized to regulate in the manner it proposes." 598 U.S. at 679. In contrast, the Ninth Circuit's decision did not cite *Sackett*. It relied instead on its past precedent which applied no traditional tools of statutory construction and reflexively deferred under *Chevron*. *See* Pet. 15–16.

More still, the Ninth Circuit's use of *Chevron* here is the exact reflexive deference that led this Court to grant certiorari in *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (No. 22-451), *cert. granted in part* May 1, 2023, and decide whether *Chevron* should be altered or overruled. If the Court does so, then the Ninth Circuit's decision, which ultimately is founded upon a heavily *Chevron*-inflicted statutory analysis, should at least be vacated with instructions to construe the statute afresh considering the Court's decision in *Loper Bright*. *See Encino Motorcars v. Navarro*, 579 U.S. 211, 224 (2016) (vacating and remanding a Ninth Circuit decision wrongly applying *Chevron* deference to interpret the Fair Labor Standards Act).

Respondent objects because Petitioner does not explicitly seek to "overrule *Chevron*," nor did the Ninth Circuit explicitly apply *Chevron* "in the first instance." BIO.20. But Petitioner knows of no Supreme Court precedent allowing lower courts to ignore its precedent or the application of its decisions to open cases like Petitioner's. Indeed, "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law *and must be given full retroactive effect in all cases still open on direct review*." *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 97 (1993) (emphasis added).

To be sure, this Court may rely on stare decisis to decline to overturn its precedents, but lower courts cannot rely on stare decisis to insulate their own rulings from this Court's later contrary decisions. Thus, if *Chevron* were overruled or modified, the Ninth Circuit's use of *Chevron* would not retain its "precedential effect." BIO.20–21. Rather, the Ninth Circuit's judgment here relying on it would conflict with this Court's superseding precedent. So, depending on *Loper Bright*'s outcome, the Court should at least grant the Petition, vacate the Ninth Circuit's judgment, and remand with instructions to apply the new standard it adopts.

II. This case is a good vehicle for the Court to clarify an exceptionally important issue of statutory interpretation.

1. This Court should provide clarity (again) over the meaning of "addition" under the Clean Water Act. Liability under the Act depends in part on whether someone added pollutants to a regulated water. Under the Ninth Circuit's view that "addition" is ambiguous, citizens can never be sure if they have violated the

statute—leaving them subject to constitutionally questionable enforcement actions—through which private attorneys general have an incentive to "push expansive views of the statute's substantive provisions." Center for Constitutional Responsibility AC Br. at 13. If allowed to stand, this regime will continue not only in the Ninth Circuit, but in every circuit that has found "addition" ambiguous—in cases decided before this Court issued *Miccosukee Tribe*, *L.A. County*, and *Sackett*. Pet.22 n.15.

2. Leaving the Ninth and other circuits' antitextual decisions in place also undermines the federalism principles this Court has mandated courts must consider when construing the Act. *Sackett*, 598 U.S. at 680. And it undermines Congress's codified purpose that States retain a primary role in regulating water quality. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). Indeed, when lower courts ignore these principles and instead apply reflexive deference, as happened here, "regulatory power [moves] from the States to less connected and representative agencies," meaning that States are "less able to respond to the divisive needs of a diverse citizenry." States AC Br. at 15 (cleaned up). Thus, contra Respondent, BIO.27, granting the Petition would not "flout[] the stated purpose of the Act," but would reinforce one of its primary goals.

3. Respondent does not dispute these arguments. Instead, it highlights how this Court denied certiorari over a similar issue in *E. Oregon Mining Association v. Department of Env't Quality*, 445 P.3d 251 (Or.

2019), *cert. denied*, 141 S.Ct. 111 (2020).[1] BIO.21. But this Court does not express views on judgments or arguments by merely denying certiorari. *See Teague*, 489 U.S. at 296. Nor does a denial suggest the Court will not address an issue in a future case. *Compare Buffington v. McDonough*, 143 S.Ct. 14 (2022) (denying a petition for certiorari asking the Court to overrule *Chevron*), *with Loper Bright*, 143 S.Ct. 2429 (granting certiorari to consider whether to overrule *Chevron*). Also misplaced is Respondent's assertion that this Court's grant of certiorari in *Borden Ranch* on the "addition" issue is unimportant. BIO.22–23. First, the "addition" issue was heavily addressed by the government in *Borden Ranch*. *See Borden Ranch*, No. 01-1243, 2002 WL 31427903, at *25 (U.S. Resp. Br. 2002). Second, it is not unusual for this Court to "reach back" and revisit an important issue as occurred last Term in *Sackett*. 598 U.S. at 678 (adopting the plurality opinion in *Rapanos* after 17 years).

4. Finally, this case is a good vehicle to resolve the conflicts over the statutory meaning of "addition." Respondent again tries to muddy the water by injecting a factual distinction—that Petitioner "excavates" material from the riverbed—as a legal distinction. BIO.24–25. But neither *Rybachek* nor *Borden Ranch*, on which the panel below relied, Pet.12–14, turned as a legal matter on where any material came from. Indeed, the depth or breadth of a person's streambed work was irrelevant to those decisions, which held that "resuspension" within a

[1] In that case, Respondents' lead argument in opposition to certiorari was that the case was moot, No. 19-839, a vehicle problem not present here.

waterbody could be considered an "addition." *See* Pet.13 (explaining that *Borden Ranch* "relied on *Rybachek* to hold that deep plowing in regulated wetlands results in the 'addition' of pollutants even though it does not 'involve the introduction of material brought in from somewhere else' and even though 'no new material has been "added"'"). In any event, even if Respondent's "excavation" theory holds water, that issue is subsumed within the question presented. The Ninth Circuit held that (1) "addition" is ambiguous and merits *Chevron* deference, and (2) the mere movement or resuspension of materials or pollutants within a waterbody can be considered the "discharge of a pollutant" under the Act, 33 U.S.C. § 1362(12). Pet.12–14. The question presented encompasses both issues and both warrant this Court's review. *Id.* at i.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: May 2024.

Respectfully submitted,

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