No. 24-350

IN THE

Supreme Court of the United States

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

Petitioners,

v.

PUGET SOUNDKEEPER ALLIANCE,

Respondent.

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

BRIEF OF WASHINGTON TRUCKING ASSOCIATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JEFF B. KRAY
Counsel of Record
JAMES A. TUPPER, JR.
EMMA L. LAUTANEN
MARTEN LAW, LLP
1191 Second Avenue,
Suite 2200
Seattle, WA 98101
(206) 292-2600
jkray@martenlaw.com

STEPHEN J. ODELL
MARTEN LAW, LLP
1050 SW Sixth Avenue,
Suite 2150
Portland, OR 97204
(206) 292-2600
sodell@martenlaw.com

Counsel for Amicus Curiae

120058

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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The Washington Trucking Associations ("WTA") respectfully submits this brief as an amicus curiae supporting petition for writ of certiorari ("Petition") that the Port of Tacoma ("Port"), SSA Terminals, LLC, and SSA Terminals (Tacoma), LLC, have filed in this Court.[1] The Petition seeks review of the Ninth Circuit opinion in *Puget Soundkeeper Alliance v. Port of Tacoma*, 104 F.4th 95 (9th Cir. 2024), on whether the citizen-suit provision of the Clean Water Act ("CWA") confers jurisdiction for alleged violations of conditions in state-water-quality permits that are based entirely on state law outside the CWA's scope.

INTERESTS OF AMICUS CURIAE

WTA is a non-profit corporation that serves as the unified voice for the trucking industry in Washington State. It was established in 1922 by a group of truck owners for the purpose of protecting and promoting the interests of the trucking industry for its members, all of whom operate in the state of Washington and many of whom operate in many other states across the country as well. Its more than 600 members include common carriers, private carriers, dump truckers, log truckers, movers, and suppliers,

1. In accordance with this Court's Rule 37.6, counsel for amicus curiae represents that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Moreover, no person or entity other than amicus curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.2, counsel for amicus curiae further certifies that it provided timely notice of the intent to file this brief with counsel of record for both Petitioners and Respondent.

and range from Fortune 100 companies who operate in all fifty states to privately owned trucking companies that operate locally. Among other of its purposes, WTA serves its members by promoting safe, efficient, and cost-effective business practices, encouraging pro-competitive legislation, improving highway safety through education and legislation, and supporting technologies and innovations that enhance operations, safety, and the environment. Member-supported, WTA is dedicated to advocating sound public policies; providing excellence in education, training, and information; and promoting a safe, dependable, and cost-efficient trucking industry in Washington State.

Consistent with these overarching interests, WTA regularly advocates on behalf of the trucking industry in this and other courts. It and its members have a strong interest in and deep familiarity with the critical CWA issues at the heart of the Petition. Given that many WTA members are permittees under the State of Washington's Industrial Stormwater General Permit ("ISGP") the enforceability by private citizens in federal court of the purely state-law provisions of which that not even the state itself can enforce are at stake. The Washington ISGP is a combined permit that the Washington Department of Ecology ("Ecology") issues every five years pursuant to both the federal CWA as a National Pollutant Discharge Elimination System ("NPDES") permit, and the Washington State Water Pollution Control Act ("WPCA") as a State Waste Discharge General Permit. The ISGP's hybrid nature salient because the CWA expressly excludes stormwater from its regulatory reach unless it fits within one of several statutory exceptions, while the Washington WPCA encompasses all waters within state boundaries

such as that which forms the basis of Respondent's citizen-suit claim at issue.

The explicit exceptions to the general rule that stormwater discharges do not require a permit under the CWA emerged after two decades of debate over how to tackle pollution issues posed by stormwater, given its ubiquitous nature, without overwhelming the agencies administering the statute. As its name implies, stormwater materializes upon any incidence of precipitation and thus presents a particularly unique challenge in the regulatory sphere, for both regulators and regulated communities. A seminal judicial decision ruled that, as originally enacted, the CWA encompassed all point-source discharges, including those composed purely of stormwater. This led Congress to amend the CWA in 1987 to prescribe that stormwater discharges do not require an NPDES permit unless they fall into one of five statutory categories, one of which as relevant here is "a discharge associated with industrial activity." Rather than define that term by statute Congress directed the Environmental Protection Agency ("EPA") to develop regulations defining permit application requirements for stormwater discharges falling within this categorical exception.

Pursuant to this direction, in 1990 EPA issued regulations setting forth NPDES permit application requirements for, among other things, stormwater discharges associated with industrial activity. In defining this operative term, EPA specified twelve categories of facilities that it would consider to be engaging in industrial activity requiring NPDES permit coverage. One such category constitutes transportation facilities that engage in vehicle maintenance, equipment cleaning, or airport deicing

operations. In delineating such activities that fall within the definition of industrial activity, the EPA regulation explicitly states that only those portions of a qualifying transportation facility involved in conducting these activities are considered to be "associated with industrial activity" for purposes of the NPDES program. These regulations have remained unchanged since EPA initially issued them pursuant to congressional direction in 1990.

The CWA is imbued with the concept of shared federalism. Thus, the statute expressly provides for states to apply for EPA-delegated authority to administer the federal NPDES program. Forty-seven states, including Washington, have accepted that delegated authority. In addition, the CWA includes an "anti-preemption" provision, Section 510, that expressly provides that its federal requirements serve as a floor, not a ceiling, such that states are not precluded from adopting more stringent measures designed to protect water quality within their boundaries than those prescribed by or within the jurisdictional reach of the CWA. Thus, Washington has both assumed responsibility for administering the State's NPDES program under the CWA and adopted its own WPCA to define the water-quality protections applicable more broadly to all waters—beyond those that meet the definition of "waters of the United States"—within its state borders. In enacting the WPCA, Washington also departed from the CWA by explicitly opting not to include a "citizen suit" provision under which parties could bring actions in state court to enforce alleged violations of its state Act but reserved judicial enforcement of its terms to Ecology. It is in this federalism context that Washington issued the ISGP.

As an initial matter then, WTA members' interests are most directly implicated by the Petition by virtue of the fact that they engage in industrial activity that can lead to stormwater discharges that go beyond the limited reach of the NPDES program under the CWA, which for their transportation facilities is limited to those portions devoted to vehicle maintenance and equipment cleaning operations. For example, some WTA member facilities involve other activities such as truck parking, freight storage, driver amenities, and administrative buildings. Under the rule the Ninth Circuit enunciated of which the Petition seeks review, WTA members face the prospect of being the subject of a federal citizen-suit for these extra-NPDES activities, notwithstanding their express exclusion from the NPDES program by statutory direction and longstanding regulations issued thereunder.

WTA's interests are further implicated by the Petition due to the Ninth Circuit ruling creating a cascading series of inconsistencies in enforcement of the CWA its members will face as they operate across different states.

The first such inconsistency arises simply from the fact that the Ninth Circuit ruling effectively cedes exclusive control over state WPCA enforcement from the state agency with legislatively delegated authority for that responsibility to single-interest organizations operating without any political accountability or governmental checks and balances. Thus, environmental organizations such as Respondent can pick and choose among specific ISGP permittees against whom to bring federal citizen-suit lawsuits for alleged violations of state water-quality measures, wholly irrespective of considerations regarding equity, fairness, or uniform application of the law that

otherwise operate to inform and influence the discretion of the permitting agency, Ecology. This inconsistency is particularly untenable given that the Washington Legislature has not authorized citizen suits to be brought in state court for such alleged violations; hence, under the Ninth Circuit's ruling, the only forum in which such citizen-suit actions can be brought for purely *state* WPCA permit violations is *federal* court.

The second inconsistency derives from the circuit split itself, which even the Ninth Circuit overtly conceded in its opinion exists between it and the Second Circuit and has existed for two decades now. The split creates uneven terrain in terms of potential liability for WTA members who also operate facilities in states encompassed by the Second Circuit. And from an interstate commerce perspective, it puts WTA members who operate facilities within the Ninth Circuit at an unfair disadvantage vis-à-vis competitors who operate only within the Second Circuit; this inconsistency and disadvantage, by all reliable indicia, flies in the face of initial congressional intent in enacting the CWA.

Thirdly, even WTA members with transportation facilities solely within the Ninth Circuit (or other circuits who have issued similar rulings on the question at issue in the Petition), face undue and disparate risks of potential litigation. This follows because, under the federalism principles underlying the CWA, each state that has assumed responsibility for administering the federal NPDES program has at least a different statutory and regulatory state law regime for managing stormwater with varying requirements and conditions. Thus, in such states that have, like Washington, issued a single,

combined industrial stormwater permit that qualifies as an NPDES permit under the CWA, and also incorporates supplemental requirements under their own state law, the Ninth Circuit ruling subjects WTA members with facilities in such states to significantly different risks of potential liability. That is, they face the prospect of enforcement actions in federal court by private groups based on alleged violations of highly variable state water-quality standards that can go beyond the established federal CWA parameters for stormwater discharges associated with transportation-related industrial activity.

In light of the foregoing, WTA and its members have significant interests in the Petition and reversal of the Ninth Circuit ruling of which review is sought.

SUMMARY OF ARGUMENT

The Petition bears the hallmarks that warrant review by the Court. First, the Ninth Circuit ruling of which the Petition seeks review maintains a pre-existing circuit split and expands the reasoning of its 1995 decision that originally created the split. The extension of its reasoning has led to further variation between itself and two other circuits—the Fourth and Eleventh—which had relied on its 1995 opinion. Second, the Ninth Circuit ruling involves an important question of federal law that implicates compelling issues regarding the scope of federal court jurisdiction and the respective powers of the federal and state governments, and the role of private citizens, in the administration and enforcement of the CWA. Third, the Ninth Circuit made rulings regarding this question that are inconsistent with the precedents of this Court.

ARGUMENT

I. The Circuit Split on the Vital Question of the Scope of Federal Jurisdiction over Citizen Suits to Enforce Water Quality Standards Emanating from State Law and Indisputably Exceeding the CWA's Ambit Warrants Granting the Petition.

As noted above, the Ninth Circuit openly acknowledged in its opinion that a circuit split has existed for nearly thirty years now regarding the question the Petition presents as to the enforceability in a federal citizen suit under the CWA of purely state-based water quality conditions. *PSA*, 104 F.4th at 104 (noting that the holding in its earlier opinion in *Northwest Env't Advocs. v. City of Portland*, 56 F.3d 979 (9th Cir. 1995) ("*NWEA II*"), "directly conflicts with the Second Circuit's ruling" in *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), but that it was bound to follow its own precedent on the issue); *see also id.* at 107 (O'Scannlain, J., specially concurring to expound on the history of the split and register his ongoing disagreement with the Ninth Circuit position).

In his special concurrence, Judge O'Scannlain explained that he and several of his colleagues who dissented from the denial of a petition seeking rehearing en banc of the *NWEA II* opinion recognized even then that it would give rise to a direct conflict with the Second Circuit ruling in *Atlantic States* and unsuccessfully urged his Ninth Circuit colleagues to follow their sister circuit. *Id.* at 107 citing his en banc dissent in *Northwest Env't Advocs. v. City of Portland*, 74 F.3d 945, 946 (9th Cir. 1996) ("*NWEA III*").

Moreover, as Petitioners elaborate in the Petition, the split has only deepened or grown more convoluted since its emergence in the mid-1990s. Since that time, as the Petition summarizes, the Fourth and Eleventh Circuits have had occasion to explicitly address issues similar to the one presented by the Petition that cite the Ninth Circuit opinion in *NWEA II* in determining whether federal jurisdiction over a CWA citizen suit existed. *See* Petition at 21-23 (citing *Ohio Valley Env't Coal. v. Fola Coal Co.*, 845 F.3d 133 (4th Cir. 2017); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004)).

In *Parker*, the salient issue varied somewhat from the specific question in the Petition, as defendants there argued that the Georgia assumption of the NPDES program "transform[ed] the plaintiffs' CWA claims into state law claims" such that they did not "arise under federal law" so as to fall within the constitutional limits of federal-court jurisdiction under Article III. 386 F.3d at 1005. The Eleventh Circuit rejected this contention and ruled that the mere fact Georgia was administering the NPDES program did not render private citizens' claims to enforce its state-issued permit under that program outside the realm of the CWA citizen-suit provision. *Id.* at 1008. Thus, although when viewed through the prisms of their actual holdings, *Parker* and *Atlantic* States may not directly conflict, in reaching its ruling in *Parker* the Eleventh Circuit went out of its way to note its disagreement with the Second Circuit in *Atlantic States*. *Id.* at 1006 n.15. *Parker* can therefore only be viewed as expanding the breadth of the split among the circuits or, at a minimum, adding to confusion surrounding the question presented by the Petition.

In *Ohio Valley*, the Fourth Circuit grappled with the scope of permit conditions the permittee had to comply with to qualify for the permit shield defense in Section 402(k) of the CWA. 845 F.3d at 141-43. In ruling that the NPDES permittee had to comply with "generic" narrative-oriented regulations directing it "not to cause violation" of state water quality standards in addition to specific effluent limitations in the permit to qualify for the shield, the Fourth Circuit ended up addressing issues extremely similar to the ones the Ninth Circuit resolved in *NWEA II* and, more recently, in the case on which this Court heard oral argument just last week, *City & Cnty. of San Francisco v. EPA*, 75 F.4th 1074, 1089-91 (9th Cir. 2023), *cert. granted*, 144 S. Ct. 2578 (2024).[2]. *See Ohio Valley*, 845 F.3d at 136 & 141-42 n.5 (citing *NWEA II* for the proposition that "courts have enforced water quality standards provisions when, as here, the NPDES permit incorporates these standards"); In reaching this ruling, however, the Fourth Circuit was careful to note that the state water-quality standards plaintiffs were seeking to enforce under the CWA citizen-suit provision had been adopted by West Virginia as "necessary to comply with" its assumption and ongoing administration of the NPDES program under Section 402. *Id.* at 136-37. As such, *Ohio*

2. The main difference between *San Francisco* and this case is that the present one goes two steps further by specifically addressing whether purely state law requirements indisputably beyond the ambit of the federal NPDES program as confirmed by EPA regulation can be enforced against a permittee in federal court, and by whom. Thus, the Court also needs to grant the current Petition as a necessary corollary and complement to its ruling in *San Francisco* and give it the opportunity to ensure that lower federal courts gain clarity in a more comprehensive and useful manner in the demonstrably choppy waters in which they are presently sailing.

Valley can be seen as relatively consistent with the Ninth Circuit opinion in *NWEA II* insofar as it confirms that state narrative water-quality standards, at least insofar as they are part of required program elements EPA has indicated are necessary for a state to take on the NPDES program, are enforceable elements of an NPDES permit in a CWA citizen suit. But by carefully hewing its holding to state water-quality standards that EPA had approved as part of the state assumption of the delegated NPDES program, even the Fourth Circuit has not gone as far as the Ninth Circuit did in *PSA*.

Moreover, resolving the circuit split on the jurisdictional question the Petition presents is even more justified given the number of citizen-suit provisions in other federal environmental statutes that largely track or are modeled after that in the CWA (which in turn was patterned after the first citizen-suit provision in a federal environmental statute, Section 304 of the Clean Air Act ("CAA"), 42 U.S.C. § 7604). *See Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 23 n.1 (1989) (citing sixteen citizen-suit provisions, including Section 505 of the CWA, which borrow from Section 304 of the CAA). Indeed, the Ninth Circuit has expressly pointed out its practice, as well as that of other courts, in mixing and matching cases interpreting citizen-suit provisions under the CWA, CAA, and the Resource Conservation and Recovery Act ("RCRA"), especially when construing such a provision under any one statute. *See Ashoff v. City of Ukiah*, 130 F.3d 409, 413 (9th Cir. 1997). The circuit split in construing the citizen-suit provision of the CWA is only exacerbated in this vein, however, given that the cases the Ninth Circuit cites reveal inconsistencies in how courts compare its "sister" citizen-suit provisions in determining which ones should be interpreted similarly or at variance with the others.

In sum, the foregoing tangled web of circuit case law in this area reveals an unequivocal, long-standing, and irreconcilable circuit split between the Ninth and Second on the question presented by the Petition, as well as a jumbled mess among at least four circuits overall, all of which have struggled with issues integrally related to that same question. The Petition also presents a question that dovetails quite seamlessly with the CWA issue the Court has before it presently in *San Francisco* and would enable it to enhance the value of its ruling in that case. Such a scenario cries out for reconciliation and clarification from this Court and this criterion alone therefore heavily in favors of granting the Petition.

II. The Ninth Circuit's Ruling is Contrary to the Plain Text of the CWA Citizen-Suit Provision and Ignores Essential Statutory Context.

The Ninth Circuit ruling is erroneous and ill-advised on a host of different fronts, and thus, is sorely in need of correction, particularly when considered in conjunction with the conflict and confusion presently manifest among the circuits. The ruling is contrary to the plain meaning of the statutory provisions it construes, fails to account for the relevant statutory context in rendering its construction or otherwise abide by key tenets of statutory interpretation, and also goes wholly against the grain of the federalism principles woven throughout the CWA that are essential to a proper understanding of its interpretation and enforcement.

1. The Ninth Circuit ruling misapprehends and misconstrues the fundamental text at the heart of its ruling in Section 505 of the CWA, its citizen-suit

provision. In relevant part, Subsection 505(a) authorizes any citizen to bring a civil action in federal district court against any person who is alleged to be in violation of "an effluent standard or limitation under" the CWA. 33 U.S.C. § 1365(a)(1)(A). Subsection 505(f) goes on to define the term, "effluent standard or limitation" for purposes of the citizen-suit provision as "a permit *or condition of a permit issued under* [Section 402 of the CWA] that *is in effect under* [the CWA]." 33 U.S.C. § 1365(f)(7) (emphases supplied).

2. In reviewing this text in *PSA*, the Ninth Circuit gave short shrift to the full complement of text at issue and instead simply declared that "there is no dispute that the ISGP is 'a permit issued under [Section 402 of the CWA],' nor that it was 'in effect.' It follows that [Respondent] may bring a citizen suit to challenge an alleged violation of the ISGP." 104 F.4th at 104. This construction runs afoul of the wisdom imparted by the adage attributed to Albert Einstein that everything should be made as simple as possible, but not any simpler. Turning the core judicial function of interpreting statutes, *see Loper-Bright Enterprises v. Raimundo*, 144 S. Ct. 2244, 2257, 2273 (2024), into what amounts to little more than a syllogistic exercise risks, as with the Ninth Circuit ruling here, seriously undermining that essential task.

As a fundamental matter, the Ninth Circuit wholly overlooked the fact that the relevant text in Section 505(f)(6) defines an "effluent standard or limitation" not as any condition incorporated into a "permit . . . issued under [Section 402 of the CWA]," but rather as cabined to a permit or condition of a permit issued under that

section. This framing of the text makes it clear that, to be enforceable under Section 505, not just a permit, but each condition in a permit that a citizen seeks to enforce, must be issued under Section 402 of the CWA that creates and prescribes the parameters of its NPDES program. Under the Ninth Circuit reading, "or condition of a permit" in Section 505(f)(6) would have to be construed as mere surplusage, which is ordinarily to be avoided, *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 698 (1995), or wholly rearranged to follow "a permit issued under [Section 402 of the CWA]." Such rewriting of statutory text is especially unmerited under the circumstances because Congress specifically tightened up the language in Section 505(f)(7) in its most recent amendments to the CWA, but in so doing did not modify the essential framing of the language, indicating that both permits and permit conditions need to be issued under the NPDES program established in Section 402. *See* Pub. L. 115–282, title IX, § 903(c)(3), Dec. 4, 2018, 132 Stat. 4356. And, more generally of course, rewriting statutory text is never a permissible judicial function, but rather lies exclusively within the constitutional purview of the Congress.

In the context of a hybrid permit such as the Washington ISGP issued under *both* Section 402 and the state WPCA, it is critical to ascertain the legal source of the condition a private plaintiff seeks to enforce pursuant to the CWA citizen-suit provision. As a result of its erroneous conclusion that all permit conditions in the Washington ISGPs are enforceable under the CWA citizen-suit provision simply because such permits were issued *in part* under the authority of the state-administered NPDES program that Ecology implements, the Ninth Circuit

also failed to take account that for a NPDES permit to be enforceable in a citizen suit under the CWA, a permit condition not only has to be issued "under" Section 402 of the CWA, but also has to be in effect "under" the Act itself. 33 U.S.C. § 1365(f)(7).

3. Moreover, the Ninth Circuit's failure in this regard is fatal to its analysis and ultimate ruling because it also led it to overlook construing the relevant text of the citizen-suit provision in the context of other key elements of the CWA, most importantly Section 402(p). As this Court recently reaffirmed, statutes can be sensibly interpreted only by reviewing the text at issue in its proper context of the statute as a whole. *Pulsifier v. United States*, 601 U.S. 124, 133 (2024).

Subsection 402(p) and the regulations that provision directs EPA to promulgate expressly exclude from the ambit of the NPDES program the very stormwater discharges that Respondent seeks to enforce in the case at hand. As referenced above, in 1987 Congress expressly amended the CWA to add that subsection 402(p) for the purpose of excluding all stormwater discharges from the statute's NPDES program unless they fall into one of five categories of exceptions, one of which is for such discharges "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). It then expressly directed and authorized EPA to issue regulations that flesh out the relevant NPDES permit application requirements for stormwater discharges falling within this categorical exception. 33 U.S.C. § 1342(p)(4)(A). Because the statute expressly and specifically directed EPA to utilize its expertise to determine how the broad statutory term should be applied in administering the NPDES program, its regulations

in this regard are due particular respect in the Court's construction of the CWA. *See Loper-Bright*, 144 S. Ct. at 2259, 2263.

In those regulations, EPA directly addressed the scope of the NPDES program with respect to distinct types of stormwater discharges associated with industrial activity, including, as relevant here, such discharges occurring at certain transportation facilities. 40 C.F.R. § 122.26(b)(14)(viii). In defining the scope of what is considered to be engaging in industrial activity for purposes of the NPDES program's regulation of stormwater discharges, EPA expressly delineated that it included in relevant part "[o]nly those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication) [or] equipment cleaning operations." *Id.* To make its intent unmistakably clear in this regard and emphasize that this delineation is meant to be exclusive, EPA further provides more generally in its regulation that the term stormwater discharge associated with industrial activity "does not include discharges from facilities or activities *excluded from the NPDES program* under this part." 40 C.F.R. § 122.26(b)(14) (emphasis supplied).

It is therefore indisputable that the stormwater discharge conditions the Ninth Circuit ruled are actionable under the citizen-suit provision in *PSA* are excluded from the NPDES program. *See PSA*, 104 F.4th at 100. It necessarily cannot be said then that any such conditions were "issued under" Section 402 or are in effect pursuant to the CWA, as Section 505(f)(7) requires for claims brought pursuant to its terms. 33 U.S.C. § 1365(f)(7). Such a construction is particularly warranted given

that the regulations expressly provide a mechanism for a state administering the NPDES program to add protections beyond EPA's carefully delineated regulatory boundaries. 40 C.F.R. § 122.26(a)(9)(i)(D) (state can go beyond the bounds of the federal NPDES program only if it determines that a stormwater discharge is contributing to violation of a water quality standard or is a significant contributor of pollutants to U.S. waters).

The Ninth Circuit also failed to adequately consider how its construction of the CWA citizen-suit provision interrelates with or could undermine other important elements of the CWA. For example, although it acknowledged the importance of the permit shield defense in Section 402(k) of the CWA to the statute's overall design, *PSA*, 104 F.4th at 105, it failed to address how its ruling might serve to largely limit if not eviscerate that shield.

Section 402(k) provides that compliance with an NPDES permit issued under Section 402 shall be construed as compliance with virtually all regulatory requirements of the CWA (except any standard imposed under Section 307 of the Act to regulate toxic pollutants injurious to human health). 33 U.S.C. § 1342(k). If a private citizen can bring a lawsuit to challenge state permit conditions outside the explicit and well-delineated bounds of the NPDES program, however, as happened here, the permit shield is effectively eviscerated. This appears to be why the Fourth Circuit took pains in *Ohio Valley* to discern whether the standards sought to be enforced in the citizen suit before it were properly within the scope of the NPDES program. 845 F.3d at 142-43. This judicial methodology is in stark contrast to the approach the Ninth Circuit employed, which was to conclude that it does not matter whether

the condition sought to be enforced via citizen-suit in a regulated entity's permit is part of that program, thereby severely diminishing its protection from such suits and threatening to render the permit shield essentially a dead letter in the Ninth Circuit going forward.

4. The Ninth Circuit also failed to utilize appropriate interpretive tools and principles in construing the scope of the CWA citizen-suit provision in *PSA*. Most tellingly, it failed to acknowledge or contend with the fact that, in defining that scope, it necessarily also engaged in defining the reach of federal jurisdiction for claims falling within its berth. *See* 33 U.S.C. § 1365(a) (providing in relevant part that federal district courts shall have jurisdiction to enforce "such an effluent standard or limitation" under the CWA as defined in Section 505(f)). This is relevant, of course, because federal courts possess limited jurisdiction that only goes so far as the Congress demarcates within constitutional bounds. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). As such, federal courts are to construe statutory grants as granting them jurisdiction narrowly and no more expansively "than their language, most fairly read, requires." *Merrill Lynch, Pierce, Fenner & Smith v. Manning*, 578 U.S. 374, 389 (2016). This is particularly true when such a construction implicates the prerogatives of state courts and their much more expansive jurisdictional authority. *Id.* at 390.

Rather than invoking or following this well-established principle, however, the Ninth Circuit's ruling takes it to its polar extreme. This follows because, under its ruling, it will be states through their independent water pollution control statutes, and enterprising environmental advocacy groups who seek to enforce such state measures as broadly

as possible in the process of bringing citizen suits, who will be elastically defining and expanding the jurisdiction of federal courts in a case-by-case process under the CWA, not the Congress by statute.

A narrow reading of federal-court jurisdiction under the citizen-suit provision is particularly warranted in this case given the rigid refusal of the Ninth Circuit to allow Petitioners to bring what it characterized as a "collateral attack" on the Washington ISGPs. *PSA*, 104 F.4th at 104-06. More specifically, the Ninth Circuit declined to allow Petitioners to challenge the scope of the ISGPs based on their argument that Ecology failed to avail itself of the procedures EPA has prescribed to explicitly allow a state to adopt measures that exceed the stringency of the NPDES stormwater program as defined in the CWA and its implementing regulations. *Id.* The court did so based on its view that Petitioners needed to bring any such challenge upon issuance of the permit pursuant to the available state procedures for that purpose. It did so even after devoting a healthy chunk of its opinion to interpreting just what the conditions in the ISGPs entail (in a manner contrary to the way the district court had construed them), thereby displaying that the meaning and full reach of such conditions may not be readily apparent to a permittee upon issuance of the permit. For present purposes, the salient point is that the federal courthouse door should not be construed to swing widely open in favor of one set of stakeholders (environmental advocacy organizations), but stringently kept only narrowly ajar for another (regulated entities).

Nor did the Ninth Circuit follow its own interpretive practice of looking to cases involving the citizen-suit provision in the CAA arena to assist it in construing the citizen-suit provision of the CWA. *See Ashoff*, 130 F.3d at 413. If it had, it would have run across its numerous opinions that have taken a decidedly narrow view of the scope of federal jurisdiction for citizen suits under the CAA, in particular where the measures sought to be enforced exceed the bounds of that act or have not been formally incorporated into a state-approved plan, including the requisite approval by EPA. *See*, *e.g.*, *Romoland School Dist. v. Inland Empire Energy Center, LLC*, 548 F.3d 738, 741 (9th Cir. 2008) (only after a local rule becomes part of an EPA-approved State Implementation Plan following a public notice and comment period, does it become federally enforceable in district court through the CAA's citizen suit provision); *see also Committee for a Better Arvin v. EPA*, 786 F.3d 1169, 1182 (9th Cir. 2015).

III. The Ninth Circuit Ruling is Important to the Proper Functioning of the CWA in accordance with the Act's Congressional Purposes and Overall Design.

Finally, granting the Petition in this case is warranted because the Ninth Circuit ruling threatens to upset and undermine the carefully crafted statutory balance and array of incentives and consequences Congress has assiduously constructed in enacting the CWA and a series of amendments to achieve the Act's purposes and improve its efficacy.

This risk is most apparent when it comes to the principles of federalism that run throughout the CWA (and much of

the rest of the federal environmental statutory rubric), given the historical primacy of states regarding the use and protection of water resources. See 33 U.S.C. § 1251(b) (recognizing same). In this regard, the Ninth Circuit ruling leads to the anomalous result that the purely state law requirements of the Washington WPCA can be enforced in a citizen suit in federal court but are not enforceable in Washington state courts. *See Miotke v. City of Spokane*, 101 Wash.2d 307, 330 (Wash. 1984) (en banc) (confirming that the WPCA authorizes the state to recover damages and civil penalties for violations of waste discharge permit requirements but does not authorize citizen suits to enforce such violations). Thus, even though the Ninth Circuit strains to show that it is seeking to defer to the role of states in enacting and enforcing the CWA, *PSA*, 104 F.4th at 104-05, on the central issues before it of where and by whom purely state water-quality requirements should be enforced, its ruling does the exact opposite. Its ruling may therefore have the unintended consequence of causing states to scale back state-based water quality protections for fear of losing control over how and when to enforce them and how they should be interpreted and applied.

Moreover, the Ninth Circuit ruling has taken a veritable sledgehammer to the limits of federal regulatory jurisdiction and oversight over the navigable waters of the United States that the Congress prescribed in enacting the CWA. When a state assumes responsibility to administer the NPDES program within its boundaries, it is simply stepping into the shoes of administering the federal CWA program, nothing less, but also nothing more. *See* 33 U.S.C. § 1342(c)(2) (any State NPDES

program "shall at all times be in accordance with" Section 402). And while the "regulatory creep" reflected in permitting a citizen suit to enforce a purely state-based water quality condition that expands regulation over stormwater discharges beyond the confines of the federal NPDES program may not seem all that worrisome in isolation, the effect of the Ninth Circuit ruling stands to open a Pandora's box that could lead to far more extreme measures being enforced that are wholly antithetical to the CWA. As just one example in this regard, it is instructive to note that in the next iteration of the ISGP due to go into effect in 2025, Washington seeks to extend its coverage to discharges to groundwater under its state law authority, which is expressly excluded from the ambit of the federal CWA. WA Draft Industrial Stormwater General Permit (available at https://fortress.wa.gov/ecy/ezshare/wq/permits/ISGP_2024_DraftPermit.pdf).

CONCLUSION

The Petition before the Court is a clear basis for intervention by the Court to resolve an important jurisdictional issue for citizen suits under the CWA and to resolve a conflict in appellate court rulings in this area. WTA respectfully submits that the Court should grant the Petition.

Respectfully submitted,

JEFF B. KRAY
Counsel of Record
JAMES A. TUPPER, JR.
EMMA L. LAUTANEN
MARTEN LAW, LLP
1191 Second Avenue,
Suite 2200
Seattle, WA 98101
(206) 292-2600
jkray@martenlaw.com

STEPHEN J. ODELL
MARTEN LAW, LLP
1050 SW Sixth Avenue,
Suite 2150
Portland, OR 97204
(206) 292-2600
sodell@martenlaw.com

Counsel for Amicus Curiae