No. 24-350

In the Supreme Court of the United States

PORT OF TACOMA, *ET AL.*,
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 FOR THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, PACIFIC MARITIME ASSOCIATION, AND PACIFIC MERCHANT SHIPPING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

West Coast ports support more than 12 million jobs nationwide, nearly two trillion in total economic value, and almost nine percent of U.S. gross domestic product. Ensuring the vitality of the global supply chain is critically important to obtaining basic necessities for average American life. The National Association of Waterfront Employers (NAWE), Pacific Maritime Association (PMA), and Pacific Merchant Shipping Association (PMSA) each play a role in ensuring the integrity and vitality of this economy. Each are deeply concerned with the implications of the Ninth and Second Circuit split on a fundamental, jurisdictional issue with the potential to impact the shipping industry nationwide. Collectively, *amici curiae* have an interest in ensuring even-handed, uniform administration of justice in the enforcement of their members' environmental permits.

NAWE is a trade association whose members include privately owned stevedores, marine terminal operators, and other waterfront-related employers that do business on the Atlantic and Pacific Coasts, the Gulf of Mexico, the Great Lakes, Canada, and Puerto Rico. As a result of the circuit split before the Court, NAWE members on the West Coast, Gulf Coast, and Southern East Coast will be subject to

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[1] Counsel for the parties received timely notice of *amici curiae's* intent to file this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part. No entity or person, aside from *amici curiae*, its non-party members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

litigation in state and federal courts for pure, state law environmental regimes, while NAWE members on the Northern East Coast are subject to litigation in state courts alone. NAWE has an interest in ensuring regulatory uniformity for its members nationwide.

PMA members include domestic carriers, international carriers, marine terminal operators, and stevedores on the West Coast. PMA is responsible for negotiating and administering maritime labor agreements with the International Longshore and Warehouse Union (ILWU) and is committed to the economic vitality of West Coast ports, which in turn results in benefits to ILWU. The economic vitality of West Coast ports and the attendant benefits that flow to its workers[2] depend on the ability to compete with counterparts operating on the East and Gulf Coasts and Canada. On the West Coast, if regulated entities cannot uniformly navigate the regulatory regime, in many cases they can easily turn north to Canadian ports to obtain regulatory certainty. PMA has an interest in ensuring the U.S. regulatory regime does not incentivize loss of cargo, work, and investment to other shores.

PMSA is an independent, not-for-profit trade association whose members include ocean carriers, marine terminal operators, and other maritime and supply chain stakeholders that conduct business at West Coast ports. The principal purposes of PMSA include representation and promotion of its members'

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[2] Full-time ILWU workers make on average $233,000 per year across 16,402 ILWU registered workers, for a total of 2.2 billion in wages paid.

interests in legislative, legal, and administrative matters affecting the West Coast shipping industry, maritime commerce, and trade. Like PMA, PMSA has an interest in ensuring the shipping economy for its members is as vibrant and competitive in Washington state as it is in New York or Canada.

INTRODUCTION AND SUMMARY OF ARGUMENT

In enacting and amending the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, Congress did not delegate to the states the ability to make federal, environmental law beyond the bounds of the CWA itself, nor did Congress grant federal jurisdiction based on state law claims. CWA "federal law" regulates "point sources" of pollution into the Nation's waters through the National Pollutant Discharge Elimination System (NPDES) permit program under Section 402. 33 U.S.C. §§ 1342–43, 1345. It regulates the dredging and filling of the Nation's waters through permits issued under Section 404. 33 U.S.C. § 1344. States regulate remaining, nonpoint sources under Section 208 (water quality management plans) and Section 319 (water quality standards), with no enforcement mechanism granted to the U.S. Environmental Protection Agency (EPA) against private persons. *See* 33 U.S.C. §§ 1288, 1319, 1329. Any law within the confines of these latter provisions is plainly "state law" subject to state policy choices. To ensure state efforts are not undermined, under Section 401, certification from the state is a condition precedent to any federal license (assurance that the state's water quality standards are being met). 33 U.S.C. § 1342.

This delicate federal and state law balance is cooperative. But it does not vest EPA with greater enforcement rights than the CWA dictates, vest states with the ability to confer jurisdiction in federal courts pursuant to their own state law, or vest private citizens with jurisdiction based on state law claims.

The decision in *Puget Soundkeeper Alliance v. Port of Tacoma*, 104 F.4th 95 (9th Cir. 2024) is plainly wrong in deciding otherwise and interpreting the CWA's Section 505 citizen-suit provision to expand the statute's carefully drawn boundaries.

The circuit split between the Ninth Circuit and the Second Circuit in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 513 U.S. 811 (1994) has also created an inequitable, jurisdictional loophole. As a result, NPDES permit holders are subject to greater, and more costly, litigation in Washington (Ninth Circuit) than permit holders in New York (Second Circuit) *and* permit holders in New Hampshire or Puerto Rico where EPA administers the program and Section 401 state water quality certifications are required (First Circuit). Amici curiae's members do business in all of these circuits and application of CWA jurisdictional law now depends solely on their location. Remedying this unequal treatment under the law is important.

The jurisdictional question before the Court also raises important issues of court and statutory enforcement administration. District Courts, EPA, state environmental agencies, potential citizen-suit plaintiffs, and private parties like amici curiae's members need jurisdictional clarity and uniformity in the enforcement of environmental permits. The first question any court asks when a case is before it, whether the plaintiff should be here, should not take years and vast resources to answer.

The Ninth Circuit decision and the jurisdictional loophole it has created seriously undermines the

expectations of amici curiae's members. They presume the federal legislature makes "federal law" with federal remedies and state legislatures make "state law" with state remedies. The remedies under CWA federal law are vast. The remedies for private citizens under Washington state law are nonexistent here. Ultimately, this policy question is for a state legislature, not the judiciary.

ARGUMENT

I. The Ninth Circuit Decision Delegates Federal Lawmaking to States Where Congress Never Intended Such Result.

The suggestion that state agencies could expand federal CWA legislation or "federal law" through their run-of-the-mill, delegated general NPDES permitting authority is a dangerous one. It is also plainly unsound under the delicate balance of powers embedded in our Constitution and the CWA. There is no such authority.

It is hornbook administrative law that Congress must lay down intelligible principles when delegating decision making to agencies. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429–430 (1935); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also Gundy v. United States*, 588 U.S. 128, 156 (2019) (Gorsuch, J., joined by Roberts, C.J. and Thomas, J. concurring) (explaining the vesting clauses are "designed to protect [] liberties, minority rights, fair notice, and the rule of law."). Congress may also delegate lawmaking authority to independent authorities with preexisting authority over the subject matter. *United States v. Mazurie*, 419 U.S. 544, 557 (1975). But before finding delegation of that authority, it necessarily follows that the delegating entity must have power to regulate that area. *West Virginia v. EPA*, 597 U.S. 697, 744 (2022) (Gorsuch, J., joined by Alito, J. concurring) (to ensure the "federalism canon . . . courts must be certain of Congress's intent before finding that it legislate[d] in areas traditionally

regulated by the States." (internal citations omitted, alteration in original)).

In the case of "subdelegation" to a state agency, there must be clear Congressional intent to do so.

> [W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.

United States Telecom Ass'n v. FCC, 359 F.3d 554, 566 (D.C. Cir. 2004). The District of Columbia Circuit has articulated three things federal agencies may do in coordination with state agencies, short of delegation. They may (1) "condition [] grant of permission on the decision of another entity, such as a state, local, or tribal government, so long as there is a reasonable connection between the outside entity's decision and the federal agency's determination"; (2) "use an outside entity, such as a state agency or a private contractor, to provide the agency with factual information"; and (3) "turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself." *Id.* at 567–68. Instead of "coordination," however, the Ninth Circuit decision implies Congress delegated to EPA, to delegate to states, the ability to bypass the CWA rulemaking process and to make "federal law" which can only be reviewed at the federal level when the

permit holder is sued by a private party in an enforcement matter. That is untenable.

The original Ninth Circuit decision underlying the case at issue here relied upon *EPA v. California*, 426 U.S. 200 (1976) for the proposition that this Court "has acknowledged citizen standing under CWA § 505(a)(1) and (f)(6), to enforce permit conditions based on both EPA-promulgated effluent limitations and state-established standards." *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 988 (9th Cir. 1995). Yet, the Ninth Circuit case ignored the important context that Congress was so disenchanted by the federal courts' interpretations of the CWA that it amended the entire statute just a year after *EPA v. California* was decided, in 1977. *See* Pub. L. No. 95-217, 91 Stat. 1566 (1977); S. Rep. No. 95-370, at 1 (1977), *reprinted in* U.S.C.C.A.N. 4326, 4327 ("The 1972 Amendments . . . were initiated by the Congress and enacted over the President's veto. Their implementation has been uneven, often contrary to congressional intent, and, frequently more the result of judicial order than administrative initiative."). In doing this, Congress loudly reiterated what was "federal law" and what was not.

> In 1972, the Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through the section 208 process.

S. Rep. No. 95-370, at 8. Where Congress wanted a state provision to be "federal law," they amended the act with language to make that clear. *Id*. at 4384 ("Section 402(b)(8) is amended to . . . make the requirements of local pretreatment programs enforceable under sections 309 and 505 of this act."). Where they sought to make permitting under the federal regime "condition[ed]" on state requirements, *United States Telecom Ass'n*, 359 F.3d at 567, they also made that clear. 33 U.S.C. § 1341(a)(1) ("No license or permit shall be granted if certification has been denied by the State[.]"). Congress envisioned a federal and state regime that would "coordinate and integrate" permits, not subdelegate federal, lawmaking power. S. Rep. No. 95-370, at 78.

> Although discretion is granted to establish separate administration for a State permit program, the authority of the Administrator to assure compliance with guidelines in the issuance and enforcement of permits and in the specification of disposal sites which is provided in sections 402(c) through (k) and 404(c) is in no way diminished.

Id. And Congress did not fundamentally alter this regime in 1987 when it decided the states' handling of nonpoint sources required more support and the state-driven water quality standard requirements in Section 319 were enacted. *See* Pub. L. No. 100-4, 101 Stat. 7 (1987) (not including Section 319 to EPA's permit enforcement authority under Section 309 *or* to Section 505).

The CWA includes no language that indicates EPA can delegate its regulatory authority to sharpen the contours of "federal law" to states. Instead, the legislative history plainly indicates Congress' decision to segregate the two functions—making the federal regime focus around "point sources" and leaving nonpoint sources within the prerogative of states and their laws. What is and is not subject to the point source regime is carefully prescribed by federal law. *See* 33 U.S.C. § 1362(12) (limiting the phrase "discharge of a pollutant" as one from any "point source"); § 1362(14) (excluding "agricultural stormwater discharges" from the definition of "point source"); § 1342(p) (excluding stormwater from NPDES permitting entirely, with only enumerated exceptions remaining, including "[a] discharge associated with industrial activity"); 40 C.F.R. § 122.26(b)(14)(viii) (regulating stormwater on "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations" for "[t]ransportation facilities"). States may coordinate their own requirements, they may provide factual information, they may make policy recommendations when EPA enacts CWA regulations, *United States Telecom Ass'n*, 359 F.3d at 567–68, but they cannot transform their state's nonpoint source law into federal law.

The result reached by the Ninth Circuit in this case ignores this explicit balance in the CWA, and turns form into substance by creating "federal law" based on the sole act of placing a state's law into a NPDES permit. This is directly contrary to the plain language of the statutory text and Congressional

intent,[3] and by extension nondelegation principles and our federal Constitution.

II. The Ninth Circuit Decision Has Created A Jurisdictional Loophole in the CWA Permitting Regime.

The Ninth Circuit does in fact place the CWA at war with itself by granting private citizens greater rights than EPA. But the conflict stems beyond just this result and beyond the Ninth and Second Circuit split. The decision also creates a clear inequity between NPDES permit holders located in states where the state issues the permit and NPDES permit holders in states where EPA issues the permit.[4] In addition, private citizens now have greater federal, jurisdictional rights when seeking to enforce state standards than permit holders have to challenge the lawfulness of those same state standards when

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[3] Considering legislative history and construing the statutory text as a hypothetical legislator would is most faithful to our system of government in the form of a republic. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. Chi. L. Rev. 2193, 2209 (2017) ("In reading a statute as a lawyer would, a court is not betraying the ordinary people to whom it owes fidelity, but rather employing the perspective of the intermediaries on whom ordinary people [or voters] rely.").

[4] Currently, the District of Columbia, Massachusetts, New Hampshire, New Mexico, and the territories of American Samoa, Puerto Rico, Guam, Johnston Atoll, Northern Mariana Islands, Midway Island, and Wake Island have no authority to administer the individual or general NPDES permitting regime under the CWA. NPDES State Program Authority, https://www.epa.gov/npdes/npdes-state-program-authority (last updated Apr. 22, 2024) (last visited Oct. 25, 2024).

embedded in a water quality certification. This is clearly inequitable.

A. Private citizens have no greater rights than EPA.

Private citizens have no greater enforcement rights than EPA. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (citizen suits "supplement rather than [] supplant" agency enforcement). As a result, private citizens can have no additional forum for relief when compared to instances where EPA administers the NPDES program. EPA has long held the view that it cannot enforce broader state standards in CWA permits. 40 C.F.R. § 123.1(i)(2) ("If an approved State program has greater scope of coverage than required by Federal law[,] the additional coverage is not part of the Federally approved program."). That interpretation is firmly rooted in the CWA text.

EPA can only enforce permit limitations involving effluent limitations from point sources (33 U.S.C. §§ 1311–12); national standards of performance (33 U.S.C. § 1316); toxic and pretreatment effluent standards (33 U.S.C. § 1317); records and reporting provisions (33 U.S.C. § 1318); aquaculture projects (33 U.S.C. § 1328); and sewage sludge (33 U.S.C. § 1345) when these requirements are embedded in a state-issued NPDES permit. 33 U.S.C. § 1319(a). Notably absent from the plain text are the ability to enforce water quality standards (33 U.S.C. § 1329) and nonpoint sources regulated under state law (*i.e.*, stormwater from non-industrial areas). *See id.* This glaring, statutory omission should not be ignored as

Congress did not intend to give private citizens primacy over EPA in the enforcement context.

B. The Ninth Circuit decision creates an inequitable, jurisdictional distinction between state- versus EPA-issued NPDES permits which depends solely on a permit holder's location.

The statutory provision at issue in this case, Section 505 of the CWA, grants private citizens power to enforce both Section 402 NPDES permits (whether state- or EPA-issued) and Section 401 water quality certifications. 33 U.S.C. § 1365(f). A definitive body of jurisdictional case law in the state water quality certification context is drastically at odds with the decision in the Ninth Circuit (and the Eleventh Circuit and Fourth Circuit that followed suit). Looking at the statutory text in Section 505, Congress made no distinction between Section 401 private enforcement and Section 402 private enforcement. The two regimes must be aligned to avoid the jurisdictional loophole that now exists in legal interpretations of the same statute.

1. Section 505 should be applied equally to alleged Section 402 violations and alleged violations of state water quality certifications under Section 401.

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To do this, Congress created a variety of requirements in the management of water. These requirements were meant to be a floor, with states free to create more

standards with a greater scope of coverage as states had the "primary responsibilities and rights" to preserve their water resources. *See* 33 U.S.C. § 1251(b). Before the Court now is a permit requirement under Section 402 for discharges of pollutants from any "point source" as defined by Congress, which may include a broader (not less so) state standard based on delegation of permitting authority to a state. 33 U.S.C. §§ 1362(12), 1342, 1370. Another integral part of the CWA regime requires applicants of federal permits to obtain a water quality certification from the applicable state where there is a potential for discharge into the Nation's waters—a requirement that the state can waive. *See generally* 22 U.S.C. § 1341. As a result, in states where EPA administers NPDES permits, an applicant will need to obtain *both* the federal Section 402 permit from EPA and a state-issued water quality certification under Section 401, unless waived (*i.e.*, in New Hampshire or Puerto Rico).[5]

At the heart of the parties' dispute here is the definition of "effluent standard or limitation under this chapter" in Section 505, which is a statutory limitation around what private citizens can (or cannot) enforce. 33 U.S.C. § 1365(a)(1). That definition includes "a certification under [Section 401]" and "a permit or a condition of a permit issued under [Section 402]"—the latter being the primary language in dispute here. 33 U.S.C. § 1365(f).

Quite obviously, whether there is federal jurisdiction to hear a citizen suit challenge to state-

[5] *See supra*, n.4.

only requirements should not drastically differ depending on what discreet part of a subsection is at issue unless there is language to indicate Congress intended a distinction to be made. There is no language in Section 505 that indicates that is true. *See id*. As a result, any jurisdictional rules that apply to Section 401 enforcement by private citizens should also apply to Section 402 enforcement by private citizens. But, that is not how the law is currently or will be applied.

2. Section 402 jurisdictional law is now at odds with Section 401 jurisdictional law.

Section 402 jurisdictional law (at issue here) is now drastically at odds with Section 401 jurisdictional law depending on location. When examining Section 401 of the CWA, federal courts uniformly agree that state certification is the "exclusive prerogative of the state" and "federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification." *Lake Erie All. for Prot. of Coastal Corridor v. U.S. Army Corps of Engineers*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981), *aff'd*, 707 F.2d 1392 (3d Cir. 1983) (addressing the issuance of a CWA Section 404 permit by the Army Corps of Engineers and the authority to review the attendant state-issued water quality certification); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (addressing the issuance of a NPDES permit from EPA and the courts' and EPA's limited authority to review the attendant state-issued water quality certification); *see also City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006) ("In most cases, if a party

seeks to challenge a state certification issued pursuant to section 401, it must do so through the state courts.") (declining to hear a challenge to a state-issued water quality certification in the context of a license for a hydroelectric project issued by the Federal Energy Regulatory Commission (FERC)); *N.C. Dep't of Envtl. Quality v. FERC*, 3 F.4th 655, 666 (4th Cir. 2021) (declining to hear a challenge to a state-issued water quality certification in the context of FERC's issuance of a license for a hydroelectric project); *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 10 (D.C. Cir. 2011) (*per curiam*) (advising Section 402 permit applicants to file in state court to challenge the District of Columbia's water quality certification, citing *Roosevelt, supra* and *City of Tacoma*, *supra*); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234–235 (S.D. Ala. 1976) ("Since EPA was not intended to exercise any review over State action on certification and since no other federal agency may exercise such review under the National Environmental Policy Act, it follows that the proper forum for judicial review of state certification is in state court.") (addressing the issuance of a drilling permit from the Army Corps of Engineers and the authority to review the attendant state-issued water quality certification). EPA also has no authority to challenge or change that certification. *Lake Carriers' Ass'n*, 652 F.3d at 10 ("given the case law and the arguments that EPA had before it, the agency correctly concluded that it did not have the ability to amend or reject conditions in a [state's] CWA 401 certification" (internal quotations omitted, alteration in original)).

The First Circuit decision in *Roosevelt Campobello* involved a private challenge to EPA's issuance of a NPDES permit before the state of Maine was delegated authority to issue NPDES permits. *See supra*, n.4. There, a private citizen could not challenge the issuance of the water quality certification in federal court. *Roosevelt Campobello Int'l Park Comm'n*, 684 F.2d at 1056. It necessarily follows that they would not have been able to enforce that same certification in federal court. The remaining case law involves a permit applicant's challenges to a federal permit and the state water quality certification that goes with it. In that context, the permit applicant is consistently sent to state court to challenge "state law" (*i.e.*, state standards with broader scope of coverage) pursuant to and subject to state law alone.

The exception to the above, general rule for state law in state water quality certifications that federal courts have carved out is simple enough: "If the question regarding the state's section 401 certification is not the application of state water quality standards but compliance with the terms of section 401[,]" then a federal agency (including EPA) may address it. *Port of Tacoma*, 460 F.3d at 68. The reviewable "federal law" is whether or not the state issuance complied with Section 401 procedural requirements. *Id*. This carefully crafted exception avoids inquiry "into every nuance of state law." *Id*. Yet another obvious exception is where there is a claim that the "state's law imposes an unconstitutional burden on interstate commerce[,]" which can also be challenged in federal court. *Lake Carriers' Ass'n*, 652 F.3d at 10. Put together, the "federal law" only requires compliance

with the procedural mechanisms in the CWA and, of course, the U.S. Constitution, but does not extend to the broader state requirements, including water quality standards—which are matters of state law, state policy preferences, and state prerogatives.

Limits on federal review of state water quality certifications based on Constitutional principles should be a guidepost. As a result of the Section 402 circuit split here, however, if a state issues a Section 402 NPDES permit in the Ninth or Eleventh or Fourth Circuits and that permit includes a state law requirement that is broader in scope as a purely state matter, a private citizen can enforce that state provision in a federal District Court, regardless of whether that state allows citizen suits. *See Puget Soundkeeper Alliance*, 104 F.4th at 103–04 (relying on *Northwest Envtl. Advocates,* 56 F.3d at 979); *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133 (4th Cir. 2017); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004). If a state issues a Section 402 NPDES permit in the Second Circuit and that permit includes a state law requirement that is broader in scope, a private citizen cannot enforce that provision in a federal District Court and must go to state court. *Atlantic States Legal Foundation*, 12 F.3d 353. If EPA (and not the state) issues the Section 402 NPDES permit and the broader state requirements are part of the Section 401 water quality certification (*e.g.*, New Hampshire and Puerto Rico in the First Circuit, or the District of Columbia),[6] a private citizen can only enforce those state requirements in state court. *See, e.g., Lake Carriers'*

[6] *See supra*, n.4.

Ass'n, supra. These vastly different results depending on where the permit holder is and who is issuing the permit are cause for serious concern.

The outcome in the Fourth Circuit is particularly inequitable. There, a permit holder that seeks to challenge state water quality standards embedded in a state certification has no access to a federal District Court. *See N.C. Dep't of Envtl. Quality.*, 3 F.4th at 666 (declining to hear a challenge to a state-issued water quality certification in the context of FERC's issuance of a license for a hydroelectric project, citing *Roosevelt, supra* and *City of Tacoma*, *supra*). But if that exact same standard gets embedded in a state-issued NPDES permit, a private citizen can seek to enforce it in federal District Court. *See generally Ohio Valley Envtl. Coal.*, 845 F.3d 133. Both of these outcomes cannot be logically or statutorily correct.

Ultimately, whether a District Court has jurisdiction under the CWA's permitting regime is pure geographical happenstance. It depends on the location of the permit holder and whether or not EPA has granted (or revoked) state authority over the NPDES permitting program. And, at least in the Fourth Circuit, it depends on whether the case is brought by the permit holder versus a private citizen. Amici curiae's members do business in the Ninth Circuit, in the Second Circuit, in the Eleventh Circuit, and in the Fourth Circuit. The enforcement of their environmental permits should not depend upon where their ships are located on any particular day or which circuit their terminals are located in. Not only is this illogical, it is inequitable.

III. Stakeholders Affected By Environmental Law Depend Upon Jurisdictional Certainty.

Not long ago, this Court reiterated that jurisdictional statutes must have some level of "jurisdictional simplicity" to avoid confusion, which in turn would avoid the exact situation created here—a split of authority as between two coasts of the same nation and private citizens seeking to enforce permit conditions in a judicial forum that an agency itself believes it cannot. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 399 (2016) (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)); 40 C.F.R. § 123.1(i)(2).

The jurisdictional phrase at issue here requires interpretation of CWA's "issued under [Section 402]" language for purposes of Section 505 citizen suit enforcement. 33 U.S.C. § 1365(f).[7] District Courts, EPA, state environmental agencies, potential citizen-suit plaintiffs, and private parties need clarity around the "convoluted arising-under standard" in the Constitutional sense as it relates to the CWA Section 505 "issued under" standard in the citizen suit enforcement context. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 578 U.S. at 399 (Thomas, J., joined by Sotomayor, J. concurring); *id*. Hornbook "arising under" case law does not provide a ready answer. Not long ago, this Court found no distinction between the

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[7] For purposes of comparison, Section 505 uses the phrase "certification under" as it relates of Section 401 enforcement. 33 U.S.C. § 1365(f). It is reasonable to assume the same word, in the same provision, of the same statute—"under" —will have the same meaning to the drafter. *See supra*, n.3.

statutory phrase "brought to enforce" and the phrase "arising under" for jurisdictional purposes. *Id*. at 387. That law indicates federal jurisdiction lies "if 'it appears from the face of the complaint that determination of the suit depends upon a question of federal law.'" *Id*. (quoting *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663 (1961)). "Th[e] inquiry focuses on . . . whether the plaintiff seeks relief under state or federal law." *Id*. But none of this case law addresses Section 505's "issued under" language or a dual, federal and state regime, common in environmental law addressing water (33 U.S.C. § 1251 *et seq*.), waste (42 U.S.C. § 6901 *et seq*.), and air pollution (42 U.S.C. § 7401 *et seq*.).

As a result of the confusion, the parties now tussle with a seemingly simple jurisdictional phrase—"issued under." 33 U.S.C. § 1365(a)(1), (f). Does "issued under" take on a traditional "arising under" analysis? Does it mean "brought to enforce"? Does it mean "pursuant to" or "by reason of authority of"? Does it mean something else unique to the legislative context of the CWA? A ready and uniform answer is required, particularly in the context of general permits, which are intended to be the simplest form of the CWA permitting regime.

The state of Washington currently has twenty water quality general permits,[8] at least five of which

[8] *See* Water quality general permits, https://ecology.wa.gov/Water-Shorelines/Water-quality/Water-quality-permits/Water-Quality-general-permits (last visited Oct. 25, 2024).

are stormwater discharge related.[9] They affect many activities across many sectors—for example, including any construction activities involving just one acre or more. 40 C.F.R. § 122.26(b)(15). As this case aptly demonstrates, a federal limitation is not always a limitation under state law. *Compare* Wash. Rev. Code § 90-48-020 (defining "pollution" to include any "alteration of the physical, chemical or biological properties, of any waters of the state"); Wash. Rev. Code § 90-48-080 (prohibiting anyone from "permit[ting]" pollution into the waters of the state); Wash. Admin. Code § 173-226-050 (providing no limitation on the authority of the Washington Department of Ecology for general permits of "[s]tormwater sources"); *with* 33 U.S.C. § 1362(19) (defining "pollution" as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water"); § 1362(12) (limiting the phrase "discharge of pollutant" as one from any "point source"); § 1362(14) (excluding "agricultural stormwater discharges" from the definition of "point source"); § 1342(p) (excluding stormwater from NPDES permitting entirely, with only enumerated exceptions remaining).

As they are issued routinely, general permits from state agencies with delegated permitting authority often contain many provisions of federal and state law. Knowing what is "state law" for jurisdictional purposes and "federal law" for jurisdictional purposes should not lead to endless litigation and depend on which state and circuit a purported violation occurred.

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[9] *See supra*, n.8 (follow "All stormwater permits" hyperlink).

This result is not only inequitable, it frustrates the goals of the CWA and private industry's attempts to adhere to environmental law more generally.

Moreover, if an allegation is made that a party is violating state law, that party should have an opportunity to take that issue to the state's highest court sooner rather than later. Doing so will not only answer the state law question for that party, but everyone else as well. Where the state law question is the *only* issue, the state court should as a federal, Constitutional matter decide the issue. *See* U.S. Const. art. III, § 2, cl. 1. Where the state law issue is a pendant issue, the District Court may decline to hear the issue under a traditional, pendant jurisdiction analysis or the doctrine of abstention. *See* 28 U.S.C. § 1367; *Colorado River Water Cons. Dist. v. United States*, 96 S. Ct. 1236 (1976). These traditional analyses promote the efficiency of the court system, provide final answers to state legal questions faster, and recognize the Constitutional principle that federal courts are courts of limited jurisdiction. *See Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 807 (1986). Congress did not (nor could it) throw all of this away in enacting the CWA.

IV. If The Law Does Not Provide A Remedy, Neither Should Any Court.

The Ninth Circuit decision seriously undermines the regulatory expectations of amici curiae's members. Their members presume that legislatures (federal or state), not courts, provide statutory remedies granted in environmental statutes—remedies that may call for fines, penalties, and

payment of attorney fees. *See., e.g.*, 33 U.S.C. § 1365(d). The Ninth Circuit decision here is particularly suspect because the "traditional" way of engaging in a jurisdictional analysis of a state law claim, discussed *supra*, would leave Washington state, and not private citizens, to enforce its own environmental laws. The plaintiff here would have no relief under state law if not for Ninth Circuit common law.

Historically, the "weighty policies of judicial economy and fairness to parties" allowed District Courts to entertain pendant jurisdiction over state law claims. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 724 (1966). That exercise of jurisdiction is wholly discretionary. *Id*. at 726. These principles of fairness and of providing whole relief, now codified at 28 U.S.C. § 1367, assume that the plaintiffs would have access to the state court in the first instance. Here, the plaintiff would have no court access because Washington itself does not have a citizen suit provision. The plaintiff would have no right, and by extension no state claim, to enforce the environmental laws of Washington.

The jurisdictional policy of providing whole relief has been turned on its head to create relief where none would otherwise exist. Whether or not a state implements a citizen suit provision to enforce its own state laws is a major policy decision currently subject to "novel social and economic experiment" at the state level. *West Virginia*, 597 U.S. at 739 (Gorsuch, J., joined by Alito, J. concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). The policy decision of any particular

state, including Washington, is not to be intruded upon lightly. Even if that state enforcement choice is contrary to the policy choice made in the CWA, that is not reason enough to override it. Here, however, in order to conclude the Ninth Circuit was correct, one would also have to conclude that Congress delegated to EPA, to delegate to states, to delegate to private citizens the enforcement of state law even though the state legislature itself did not grant that ability. That cannot possibly be true.

Whatever good intentions may underly the Ninth Circuit's decision, it creates a jurisdictional morass in environmental law that undermines the expectations of amici curiae's members. It is plainly wrong. It also raises important issues implicating federalism principles, proper court administration, and uniform application of the law affecting amici curiae's members nationwide.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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