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

AMICUS CURIAE WASHINGTON PUBLIC PORTS ASSOCIATION ET AL. BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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I. IDENTITY AND INTERESTS OF AMICI

Petitioners Port of Tacoma, SSA Terminals, LLC, and SSA Terminals (Tacoma), LLC's ("Petitioners") Petition for a Writ of Certiorari (the "Petition") is one of vital interest to *amici curiae* the Washington Public Ports Association ("WPPA"), the American Association of Port Authorities ("APPA"), the Pacific Northwest Waterways Association ("PNWA"), the International Longshore and Warehouse Union Coast Longshore Division ("ILWU"), the California Association of Port Authorities ("CAPA"), and each of their respective members.[1] If upheld, the Ninth Circuit Court of Appeals' ruling, will have a detrimental effect on not only Washington ports, but port districts throughout the United States, the tens of thousands of industries utilizing port facilities to conduct their business and the various local governments, private industrial facility operators, municipalities, animal feeding operations, construction facilities, boatyards, shipping terminals, and transportation and rail operators that may be required to hold a National Pollutant Discharge Elimination System ("NPDES") permit administered by the states.

The WPPA was created in 1961 and represents the collective interests of the 75 municipal, taxpayer-funded port districts within the State of Washington. Of those 75 ports, 69 are WPPA members who pay annual dues to provide the bulk of the WPPA budget.

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[1] No counsel for any party authored this brief in whole or in part, and no party, counsel for a party, or person or entity other than *amicus curiae*, its members, and its counsel made a monetary contribution intended to fund the brief's preparation for submission. Counsel of record for the parties received timely notice of *amicus*'s intent to file this brief.

Washington has the largest locally controlled public port system in the world and collectively handles 7% of exports from the United States and 6% of all imports to the United States. The Port of Seattle and Port of Tacoma, both members of the WPPA, combined constitute the fourth largest container complex in North America. It is important to note, however, that the Ports of Tacoma and Seattle are in the minority of port districts in Washington in terms of size and revenue. In actuality, the majority of Washington's ports have a much smaller tax base.

WPPA's members own, lease, and license numerous docks and wharfs that sit adjacent to and above the navigable waters in Washington State and are used for cargo transport. Rain falls on these docks and wharfs and drains into the water below. These discharges of stormwater have been exempted from regulation under the federal Clean Water Act ("CWA") since 1987, when Congress exempted most "'discharges composed entirely of stormwater.'" *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 603 (2013) (quoting 33 U.S.C. § 1342(p)(1)). Instead, Congress limited stormwater regulation to those discharges "associated with industrial activity," and entrusted the Environmental Protection Agency ("EPA") to define what constitutes industrial activity. 33 U.S.C. § 1342(p)(2)(B).

The AAPA is the unified voice of the seaport industry in the Americas, representing more than 130 public port authorities in the U.S., Canada, the Caribbean and Latin America. For more than 100 years, AAPA has promoted the efforts of the Port industry by educating stakeholders and advocating for policies that strengthen the ability of member seaports to serve their global customers and create

economic and social value for their communities. The efficient functioning of seaports is critical to the nation's ability to maximize economic and social value and compete with neighboring ports. AAPA advocates for U.S. seaports, focusing on the most urgent policy issues and common interests of trade and infrastructure, striving to provide industry leadership on environmental concerns, security, trade, transportation, infrastructure, funding, and other issues related to port development and operations.

PNWA, established as the Inland Empire Waterways Association in 1934, is a non-profit, non-partisan trade association with over 150 members that advocates for federal policies and funding in support of regional economic development to efficiently move goods, like grain, forest products, and liquid fuels, on waterways and through Northwest ports. PNWA exists as a collaboration of ports, businesses, and public agencies who combine their economic strength and channel their advocacy in support of safe and efficient navigation, energy, trade, economic development, and environmentally sustainable waterways throughout the Pacific Northwest. The scope of PNWA's members includes public ports, tug and barge companies, steamship operators, grain elevator operators, agricultural producers, forest products manufacturers, electric utilities, irrigation districts, other businesses, public agencies, and individuals throughout Washington, Oregon, and Idaho.

The ILWU International was founded in 1934 to represent longshore and maritime workers on docks, with stevedores, at waterfront terminals, and in warehouses. It is comprised of approximately 40,000 members in over 50 local unions in the states

of California, Washington, Oregon, Alaska, and Hawaii. The ILWU International longshore division is the exclusive bargaining representative on the West Coast for these workers and represents approximately 22,000 workers at 29 ports from San Diego, California to Bellingham, Washington.

Longshore workers load, unload, and manage cargo from vessels, trucks, and rail. They also load and unload cargo to and from ships, barges, trains, and trucks. Marine clerks within the ILWU perform the associated record-keeping and tracking to ensure proper positioning of cargo at the terminals for loading and unloading. Much of this work involves physically demanding and often dangerous tasks performed in a hazardous environment. Although this work is highly sought after for providing a livable family wage, many longshore workers do not have steady jobs and are dispatched daily depending on work availability.

The availability of work is wholly dependent on cargo ships calling on the west coast's port terminals. If there are no ships or terminals, there is no work.

CAPA is made up of 11 major deepwater port authorities across the State of California. It is committed to advocating and advancing the public policy objectives of the California ports at all levels of government. CAPA educates state and federal policy makers on port operations and advances the best interests of the maritime community. CAPA also maintains formal agreements on behalf of the association and its member ports with the Federal Maritime Commission ("FMC") and communicates regularly with the FMC and other national interests. CAPA's members are dedicated to environmental stewardship and sustainable operations and have

invested significantly in new technologies, creating some of the world's most environmentally friendly and innovative port facilities and operations.

II. SUMMARY OF ARGUMENT

Under the authority of the CWA, EPA issued regulations defining industrial activity to include, as relevant here, marine transportation facilities that have "vehicle maintenance shops, equipment cleaning operations, or airport deicing operations." 40 C.F.R. § 122.26(b)(14)(viii). EPA is clear that the regulation of stormwater under the CWA is limited to "[o]nly those portions of the facility that are either involved in vehicle maintenance (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, [or] airport deicing operations . . ." *Id.* Stormwater discharges from areas where ports do not conduct such activities, such as on docks and wharfs, are distinctly and purposefully exempted from CWA regulation.

The CWA is implemented through a cooperative federalism paradigm. Congress authorized EPA to delegate regulatory authority to states that have EPA-approved water quality enforcement programs. EPA delegated authority to the Washington State Department of Ecology ("Ecology") to issue and enforce CWA NPDES permits.

The Washington Legislature adopted the State Water Pollution Control Act ("WPCA") in 1945. Wash. Rev. Code § 90.48 *et seq.*, which is also enforced by Ecology. Ecology utilizes its delegated federal authority, combined with its authority under the WPCA, to issue a general permit that covers certain enumerated categories of industrial stormwater

discharges[2] under the Industrial Stormwater General Permit ("ISGP") at issue here. Essentially every Washington port deals with ISGP coverage either by itself or through one or more of its tenants. CAPA members are subject to a similar state permitting scheme, under the delegated authority of EPA to the California State Water Resources Control Board (the "State Water Board."). State Water Resources Control Board, *National Pollutant Discharge Elimination System ("NPDES") – Stormwater: Do I Need an NPDES Permit?*, (https://www.waterboards.ca.gov/water_issues/programs/npdes/) (last visited Oct. 27, 2024).

As the Petition explains, beginning in 2010 Ecology began instructing ports—somewhat vaguely—that once a facility has permit coverage, the ISGP's requirements apply to all areas of "industrial activity." This resulted in Washington public ports investing significant resources to expand the scope of their stormwater collection, treatment, and monitoring operations. Ecology recognized that its position changed created significant economic consequences and used its enforcement discretion to give ports additional time to make improvements needed to satisfy these additional requirements.

This was important, as even if this requirement was found in the ISGP, most port docks and wharfs presently have no means to collect or treat stormwater, let alone in a safe manner. The technology to do so simply does not exist, so any requirement to install such systems creates significant regulatory uncertainty and imposes

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[2] Ecology also issues other general NPDES permits pursuant to both federal and state authority, all of which are also affected by the Ninth Circuit decision at issue in this Petition.

millions of dollars in capital costs on individual ports and port tenants, assuming that compliance was even possible.

In the present case, Puget Soundkeeper Alliance ("PSA") has attempted to invoke the CWA citizen suit provision found at 33 U.S.C. § 1365 to enforce ISGP requirements articulated by Ecology that are broader than—and explicitly exempted from coverage under—the CWA. *See* 33 U.S.C. § 1342(p)(1). PSA filed similar allegations against the Port of Seattle and its tenant in *Puget Soundkeeper Alliance v. Total Terminals International*, No. 2:18-cv-00540-RSL (W.D. Wash), and PSA has sent other ports threatening messages through public records requests concerning discharges from wharfs and docks, suggesting that PSA is likely to continue filing similar suits throughout Washington.

The Ninth Circuit's ruling below contradicts Congress's intent in drafting the CWA, exacerbates an already existing Circuit split, and completely ignores the widespread negative impact its holding will have on U.S. ports generally. The flow-through effect of these impacts will be detrimental to local economies; international trade; U.S.-based manufacturing and shipping operations; and industries and trades that heavily rely upon the effectiveness of those water dependent industries to promote an efficient and productive economy.

PSA's attempt to use federal CWA citizen suit authority to enforce requirements that Congress exempted from the CWA should be rejected for several reasons.

First, the CWA citizen suit provision is clear on its face that its jurisdiction extends only to the enforcement of effluent standards or limitations

issued "under" the CWA. 33 U.S.C. § 1365(a)(1). To the extent that the ISGP can be read to regulate stormwater discharges to include non-industrial areas at ports like docks and wharfs, Ecology has broadened the ISGP's scope solely as a matter of state law, not "under" the CWA. Because there is no cause of action (state or federal) to enforce *state* permit requirements imposed exclusively under the WPCA, PSA's arguments fail as a matter of law.

Second, PSA's position would upset the CWA's delicate balance between state and federal responsibilities. The CWA empowers EPA to expand the scope of stormwater discharges covered by the CWA, and generally affords states a limited role in that process. 33 U.S.C. § 1342(p)(4)-(5); 40 C.F.R. § 122.26. Hence, if a state water quality program has a greater scope than federal law, that additional coverage is not part of the federal program, absent compliance with this process. 40 C.F.R. § 123.1(i)(2). While Congress allows for individual states to enforce stricter and broader regulations pursuant to their delegated authority, under the CWA, those are outside of the CWA and, accordingly, are for the *state* to interpret and adjudicate, not the federal courts. The Ninth Circuit's ruling effectively bypasses the purposeful structure of the CWA while also taking away an individual states' ability to enforce its own laws. Simply put, the ruling is nothing short of dangerous.

Third, the ramifications of the Ninth Circuit's ruling on entities most often targeted by citizen groups like PSA, will have immediate and longstanding detrimental effects on ports, their tenants, and the public at large. Ports use the tax revenues of their constituents to invest in

infrastructure designed to grow the economy. As a result of the Ninth Circuit's ruling, citizen suit litigation against entities like port districts will result in hundreds of thousands of taxpayer dollars going directly into the pockets of the attorneys for private organizations rather than towards projects that improve the environment and promote economic development.

For these reasons, and those more fully presented below, the Court's review is warranted in order to review and settle the current circuit split that the Ninth Circuit's recent ruling exacerbates and to make clear the proper role of the CWA's citizen suit provision in the federal courts.

III. ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A. Ports and Economic Development.

Public ports are vital to economic development across the nation. In Washington, the legislature has deemed that "[i]t shall be in the public purpose for all port districts to engage in economic development programs." RCW 53.08.245. Washington public ports fulfill this mandate by using various—but limited—financing opportunities including taxes, service fees, bonds, and grants or gifts.

Additionally, 90% of Washington ports promote economic development for their community and region through brick-and-mortar investment in facilities and programmatic engagement in job growth or general economic resiliency. Port infrastructure and the efficient movement of cargo is imperative since 75-80% of Washington's trade is discretionary cargo, meaning that it could move through other gateways. WPPA, *Commissioner Resource Guide*, at 7,

(https://static1.squarespace.com/static.pdf) (March 2010).

The ports on the Columbia and Snake Rivers, which run through Idaho, Oregon, and Washington, export 60% of U.S. wheat exports annually. These ports connect inland farmers to global markets. In 2022, this river system imported and exported over $31 billion in trade.

Citizen suit enforcement of the state law provisions of the ISGP, which are much broader in scope than the CWA's requirements, increases the costs of moving cargo through Washington ports, making them less competitive for discretionary cargo that can move through other gateways like ports in the Second Circuit. The acknowledged circuit split has real life implications for *amici* and the communities they serve. For example, the Port of Grays Harbor ("POGH"), is the only deep-draft port directly on the Pacific Ocean in Washington capable of handling ocean-going vessels, and one of Washington's most export-oriented ports, with more than 95% of shipping activity based on exports. One of POGH's largest customers can alternatively send its cargo through east coast ports (where *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993) applies), or POGH, where this case now controls.

California's ports similarly play a pivotal role in connecting California's farmers, autoworkers, refineries, and laboratories to customers around the world. CAPA's membership includes three of the largest ports in the nation which serve a vital and unique role for the state and the nation. Almost 40% of the total containerized cargo entering the U.S.— and almost 30% of the nation's exports— flow through

California's ports making them a critical link in the international supply chain and a vital component of California's local, regional, state, and national economic well-being. In 2020, trade from California ports generated an estimated $38.1 billion in tax revenue, supporting an estimated 3.1 million jobs across the nation. CAPA, *New Study Shows CA Ports Drive $416 Billion in Trade Value, $38.1 Billion in Tax Revenue, 3.1 Million Jobs Nationally*, https://californiaports.org/portsday23/ (last visited Oct. 28, 2024).

B. Economic Development is Dependent Upon Job Stability and Job Availability.

Promoting economic development is crucially dependent upon the efficiency of the individual laborers utilized at the ports and those who employ them. Most notably, and perhaps most visibly to those on the outside looking in, are the longshoremen and warehouse workers who are on the ground ensuring that those goods coming in and out of coastal ports, as well as ports located along major waterways, are safely handled, stored, and transported according to state and federal standards.

Organizations and labor unions like the ILWU serve to protect their members by fighting for fair wages, safe working conditions, and the preservation of marine ports in the U.S. and internationally. In 2019, the Washington International Trade Association ("WITA") found that "[a]pproximately 40% of all jobs in Washington are tied to trade, making [it] the most trade dependent state in the nation." *The Export-Import Bank: Impact on Washington State Trade*, WASHINGTON INTERNATIONAL TRADE ASS'N,

https://www.wita.org/atp-research/the-export-import-bank-impact-on-washington-state-trade (last visited October 20, 2024). The import and export of goods at coastal ports occurs at marine terminals, each of which contains a wharf. These wharfs are designed and sized to support the movement of goods for domestic and international trade. For example, the wharf at Terminal 18 in Seattle is 14.55 acres, the wharf at Terminal 5 in Seattle is 17.3 acres, and the wharf at the Sitcum Waterway in Tacoma is 12.6 acres.

In the Washington State Court litigation involving challenges to Ecology's *post hoc* interpretation as to the scope of coverage of the ISGP, Petitioners explained at length why the expansion of ISGP coverage requirements at marine terminals in Washington would have a devastating effect on Washington's economy. Most existing wharfs at the affected marine terminals—built decades ago at a cost of millions of dollars—are not designed to allow for stormwater sampling or treatment in a reasonable or safe manner. While citizen-suit plaintiffs like PSA argue that this is a simple fix requiring those ports with marine terminal wharfs to either retrofit or replace their existing wharfs to allow for stormwater sampling and treatment, if necessary, this argument does not consider the financial toll such financial projects would have on a port or the related impacts to the local, state, and national economy.

The cost of retrofitting or, more likely, replacing the wharfs at marine terminals so that stormwater sampling and, if necessary, treatment could occur, will cost tens to hundreds of millions of dollars. It would also require extensive shutdowns of

entire wharfs, or portions thereof, causing commerce to grind to a halt.

In 2020, the Northwest Seaport Alliance ("NWSA"), a marine cargo operation partnership between the Ports of Seattle and Tacoma, estimated that the cost to install catchment and treatment systems at NWSA's piers to align with Ecology's interpretation of the ISGP—applying to the entirety of NWSA container facilities—would be $1.1 million per acre, amounting to approximately $100 million. These numbers are four years old, do not consider the current cost of construction or inflation in the intervening years, and do not account for permitting expenses and the years-long delays associated with permitting such projects.

The effect of wharf closures on the public would be devastating. The timeframe of any project that involves the permitting, closure, removal, and/or reconstruction of a marine terminal wharf along the Washington coast alone would take years. During these years of closure—or reduction in capacity for imports and exports—the ports themselves will suffer immense revenue loss. Market demands will also drive cargo to other modes of transportation or to other markets, and once the infrastructure investments are made, the supply chain will have fundamentally shifted away from these ports.

What is also often forgotten in these scenarios is the loss to laborers and their families who depend upon the certainty that marine terminals provide. Rural coast ports in particular serve as important assets to their local communities and typically represent a large share of local employment as thousands of local jobs are linked to port operations,

ranging from dock workers and shipping agents to truck drivers and logistics coordinators.

A loss in certainty of the future availability of a family-wage job has historically been the impetus for the mass migration of people in search of a new source of income for themselves and their families. Whether temporary or permanent, the impact upon the economy because of the loss of jobs to the tens of thousands of workers dependent upon global trade through marine terminals would be nothing short of disastrous.

C. Ports Are Bound by a Strict Statutory Budgeting Scheme.

As the economic engines for their communities, ports use the tax revenues of their constituents to invest in infrastructure designed to grow the economy. Ports are municipal governments. Ports do not have unlimited funds at their disposal, nor do they possess an unlimited or guaranteed source of revenue that can be allocated to hundreds of millions of dollar projects every year.

The Washington Legislature limits the rate at which a port district may levy taxes to finance its general purposes, including capital improvements, to 45 cents per $1,000 of assessed value on taxable property. RCW 53.36.020. Furthermore, on or before September 15th of each year, every port in Washington must submit a preliminary budget for the following fiscal year "showing the estimated expenditures and the anticipated available funds from which all expenditures are to be paid." RCW 53.35.010. This preliminary budget must be made available to the district's taxpayers for their review and a date set for a public hearing "for the purpose of fixing and

adopting the final budget." RCW 53.35.020. At the hearing, "[a]ny person may present objections to the preliminary budget following which the commission shall, by resolution adopt a final budget." RCW 53.35.030. Washington Port districts must also observe strict timelines for this process. Wash. Rev. Code § 53.35 *et seq.*.

In California, ports have historically been self-supported through funds that come "directly through fees and other revenue the ports generate from their users or tenants, in addition to occasional state and federal grants." Cal. Harb. & Nav. Code § 1690(c). In 2023 the California Legislative Analyst's Office ("LAO") explained that "Ports [in California] are primarily funded by lease and fee revenues from shipping businesses and freight operators." *Overview of California Ports*, Assembly Select Committee on Ports and Goods Movement, Hon. Mike A. Gipson, Chair, at 4 (https://lao.ca.gov/handouts/resources/2023/Ports-Overview-081723.pdf) (Aug. 17, 2023). The LAO's report further stated that although they exist, "[n]o ongoing federal or state funding is dedicated to California's port operations or infrastructure projects." *Id.*

The infrastructure required for compliance under an NPDES permit is expensive and can take years to fully install. Ports are, therefore, acutely aware that necessary stormwater system infrastructure must be included in their yearly budgets along with every other project to be tackled that year. Unfortunately, the effect of the Ninth Circuit's ruling shifts a port's ability to allocate funds from environmental stewardship, such as replacing

aging infrastructure with more species friendly designs, towards the costs of excessive litigation.

D. Attorneys' Fees and Costs are Almost Always Awarded to Citizen Suit Plaintiffs.

Although up to the discretion of the Court, the ability to seek an award of attorneys' fees and costs is an attractive factor in the decision to bring a CWA citizen suit:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party, whenever the court determines such award is appropriate.

33 U.S.C. § 1365(d).

As most often occurs in civil litigation, citizen suits rarely go to trial and tend to settle by way of a Consent Decree filed with the court. The Consent Decree will, in part, mandate the fees and costs paid by the defendant(s) to the plaintiff(s). Even for the largest of ports, these fee awards are often monumental.

As was noted in briefing at the Ninth Circuit, the law firm of Smith & Lowney, representing PSA here, advertises itself as an expert in CWA citizen-suit actions. During the fourteen-year period from 1996 to 2020, Smith & Lowney brought over two hundred CWA citizen-suit actions on behalf of plaintiffs such as PSA. *See* Decl. of Dianne K. Conway in Support of Defs.' SSA Terminals (Tacoma), LLC and SSA

Terminals, LLC's Mtn. for an Award of Att'y Fees and Costs, at ¶ 4 (Sept. 29, 2021), Case No. 3:17-cv-05016-BHS.

Between 2014 and 2024, consent decrees entered in CWA citizen suits brought in the United States District Court for the Western District of Washington have cost ports, port tenants, and businesses a staggering $17,855,250 in payments in lieu of penalty and $12,203,126.34 in plaintiff's attorneys' fee payments. These numbers do not include the costs associated with satisfying the injunctive relief portion of the consent decree—which are often substantial—or defense costs. Of those cases, those lodged against Washington public ports cost taxpayers $3,379,000 in payments in lieu of penalty and $2,131,450 in plaintiff's attorneys' fees, in addition to costs of injunctive relief and defense costs. These examples also do not account for the same attorneys' fees threat to private third-party terminal operators and to business moving through the ports.

If upheld, the Ninth Circuit's ruling will cause port districts across the nation to re-evaluate how they formulate their yearly budgets to account for the hundreds of thousands, if not millions, of dollars they may be forced to pay for CWA citizen-suit actions. As noted by the Petitioners, it is nonsensical for penalties resulting from violations to *state law* be paid to the U.S. Treasury, as is required under the CWA, let alone to private organizations, as occurs in settlements with citizen suit plaintiffs.

Not to be forgotten, the money set aside for potential litigation costs in a port's annual budget comes directly from the taxes and revenue collected from port tenants and other constituents. So, rather than being able to use those funds for infrastructure

and programming aimed towards economic development—as is the statutory purpose of a port district—the public's dollars will instead go directly into the pockets of private organizations and/or the U.S. Treasury. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987).

Judge Kleinfeld noted in his dissent in *Northwest Envtl. Advocs. v. City of Portland*, that "citizens' suits may produce too much of a good thing with regard to enforcement," and that the "burdens" on courts and regulated parties often outweigh the "benefits" to water quality. 11 F.3d 900, 992-93 (9th Cir. 1993). The Ninth Circuit's decision below invites even more excessive and costly litigation, with unchecked demands for excessive attorneys' fees by the small group of plaintiffs' attorneys who do this work.

This is particularly troubling given that the majority of port districts, especially in Washington State, have a much smaller tax base than, say, the Port of Tacoma or Port of Seattle. This logically translates to a smaller budget, a smaller staff, and now, lesser opportunity to invest in infrastructure needed to promote economic development—and far more effective environmental protections—in their jurisdiction.

E. Ports are Environmental Stewards.

Along with promoting economic development, port districts proudly remediate contaminated property within their districts and implement environmental protection measures to ensure preparation for future development.

The Port of Tacoma, for example, has invested $12.8 million in a dual stage stormwater treatment

system for its West Sitcum terminal, and many other ports are making similar investments. Notably, many of these Ecology-approved projects were completed before Ecology's shift in its reading of Washington law and were instead a result of the WPPA and individual ports working directly with Ecology on CWA issues.

But not all Washington ports have the resources that larger ports, like the Port of Tacoma, have at their disposal. The majority of ports are significantly more limited as far as their available funding for infrastructure projects, including stormwater systems.

California ports are similarly dedicated to environmental stewardship by working to improve air quality, protect water quality, and enhance wildlife protection throughout their state. The Port of Los Angeles and the Port of Long Beach have expanded their water quality programs with the development of a coordinated Water Resources Action Plan ("WRAP"). The WRAP is a comprehensive effort to target remaining water and sediment pollution sources in the San Pedro Bay and has greatly improved water and sediment quality in San Pedro Bay over the last 40 years. The WRAP's success stems from the ports working closely with federal and state officials and other stakeholders to develop measures that will further minimize landside and waterside sources of pollutants.

Expanding CWA citizen suits to encompass state standards is unnecessary and a waste of the Court's, and the public's, resources.

F. Ecology's Prosecutorial Discretion Should be Respected.

The Washington Legislature has the power to include a citizen suit provision within the WPCA for the enforcement of state water quality laws and regulations.

But rather than allowing for a flood of citizen suits under the broader WPCA in the state courts, the Legislature instead chose to leave such crucial enforcement solely to the discretion of Ecology:

> The department [of Ecology], with the assistance of the attorney general, is authorized to bring any appropriate action at law or in equity, including action for injunctive relief, in the name of the people of the state of Washington as may be necessary to carry out the provisions of this chapter or chapter 90.56 RCW.

RCW 90.48.037. This decision should be respected.

G. Undermining the Diligent Prosecution Bar.

The CWA includes statutory bars that prohibit a citizen suit in cases where the state or federal government pursues enforcement actions with respect to the same alleged violations. 33 U.S.C. §§ 1319(g)(6)(A)(i)–(iii), 1365(b)(1)(B); *California Sportsfishing Protection Alliance v. Chico Scrap Metal, Inc.*, 728 F. 3d 868 (9th Cir. 2013).

The CWA declares that no citizen suit action may be commenced if the "State has *commenced* and *is diligently prosecuting* a civil or criminal action *in a court* of the United States, or a State to require compliance with the standard, limitation, or order..."

33 U.S.C § 1365(b)(1)(B) (emphasis added). The diligent prosecution bar under 33 U.S.C. § 1319(g)(6) prohibits citizen suits when the "*State has commenced* and is *diligently prosecuting* an action under a State law *comparable* to this subsection." (emphasis added). For Section 1319 to apply, the comparable state law must contain penalty provisions, and a penalty must actually have been assessed under state law. *Knee Deep Cattle Co., Inc. v. Bindana Inv. Co. Ltd.*, 94 F.3d 514 (9th Cir. 1996); *Wash. PIRG v. Pendleton Woolen Mills*, 11 F. 3d 883 (9th Cir. 1993)). Under relevant case law, a proceeding is "commenced" by filing a complaint or issuance of a consent decree and final order. *Natureland Trust v. Dakota Finance, LLC*, 41 F. 4th 342 (4th Cir. 2022) (cert denied May 15, 2023).

Under the Ninth Circuit's ruling, Ecology could issue a notice of violation to a port for allegedly violating portions of the NPDES permit based on the WPCA and, at the same time, a citizen could sue the port in federal court under the CWA. This is because Ecology's enforcement actions are not "under a comparable statute" since the WPCA does not contain public participation and notice for enforcement actions like Section 1319 of the CWA. *See* RCW 90.48.037; WAC 173-201A-530.

Facing this reality, what incentive will ports have to resolve issues with Ecology if they will still be subject to CWA citizen suits? Particularly given that such CWA citizen suits were not authorized by the WPCA. Nor were they authorized by the CWA because the laws at issue are *state* laws. If the Washington legislature wanted to allow for such citizen suits, Ecology's administrative enforcement

statutory scheme would have to change to mirror that of the EPA's. This has not occurred.

H. Expanding the CWA Citizen Suit Provision Goes Against Congress's Intent.

We can further deduce that Congress specifically intended for it to be left up to the states whether to allow for citizen suits over state law provisions by looking to language of other similarly situated federal statutes. The Clean Air Act ("CAA") (42 U.S.C. § 7401 *et seq*.) being a perfect example.

Under the CAA, EPA has developed National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7409. Each state is also responsible for developing its own State Implementation Plan ("SIP"), approved by EPA, for achieving and maintaining compliance with NAAQS. 42 U.S.C. § 7410.

Like the CWA, the CAA includes a citizen suit provision:

> …any person may commence a civil action on his own behalf…(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I (relating to significant deterioration of air quality) or part D of subchapter I (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

42 U.S.C. § 7604(a)(3).

Noteworthy in its deviation from the CWA, the CAA explicitly allows citizen suits that target state SIPs. 42 U.S.C. § 7604(f)(1); 42 U.S.C. 7602(k); *Conservation Law Foundation Inc. v. Busey*, 79 F. 3d 1250 (1st Cir. 1996):

> For purposes of this section, the term "emission standard or limitation under this chapter" means—
>
> …
>
> (4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V *or under any applicable State implementation plan approved by the Administrator*, any permit term or condition, and any requirement to obtain a permit as a condition of operations.

42 U.S.C. § 7604(f)(4) (emphasis added). This is different than the CWA citizen suit provision's definition of "effluent standards or limitations" which does not include state standards. 33 U.S.C. § 1365(f).

The CAA was designed as a floor upon which states could build, and not a ceiling. *Board of Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 25 F 4th 1238 (10th Cir. 2022). The CAA also contains a similar diligent prosecution bar as the CWA. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 894 F. 3d 1030 (9th Cir. 2018); 42 U.S.C. § 7604(a)(1).

In other words, the CAA specifically allows citizen suits to be brought to enforce state standards. This is plainly distinguishable from what Congress intended for enforcement of the CWA, as recognized by EPA's own regulations:

> (i) Nothing in this part precludes a State from:
>
> …
>
> (2) Operating a program with a greater scope of coverage than that required under this part. *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.*

40 C.F.R. § 123.1(i)(2); *See also Glazer v. Am. Ecology Env't Servs. Corp.*, 894 F. Supp. 1029, 1041 (E.D. Tex. 1995). *Glazer*, although not a CWA lawsuit, includes a reiteration of the Second Circuit's findings in *Atlantic States Legal Foundation v. Eastman Kodak Co.*, (12 F.3d 353, 358-59) regarding the scope of a CAA citizen suit versus that of a CWA citizen suit.

> Specifically, *Atlantic States* did not involve a CAA claim; rather, it concerned a CWA claim. This is significant, because the court's conclusion rested on 40 C.F.R. § 123.1(i)(2), which states that state programs broader in scope than the federal requirement are not a part of the federal program. *Id.* No equivalent

> regulation has been promulgated concerning the CAA. *Cf.* 40 C.F.R. § 271.1(h)(i)(2).

Glazer, 894 F. Supp. at 1041.

In sum, had Congress wanted the citizen suit provision under the CWA to extend to state law standards that differed from federal ones, it certainly knew how to say so. To declare otherwise, as the Ninth Circuit has done below, effectively strips the states of their authority to enforce their own laws and undermines the careful balance between federal and state enforcement authority.

IV. CONCLUSION

For the reasons set forth herein, it is of paramount interest to *amici curiae* that the Petitioners' Petition for Writ of Certiorari should be granted by this Court.

RESPECTFULLY SUBMITTED this 28th day of October, 2024

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