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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

This is a textbook case for certiorari. Soundkeeper concedes that there is a longstanding circuit split over whether the Clean Water Act ("CWA") creates federal jurisdiction over citizen suits enforcing permit conditions adopted under state-law authority that mandate a greater scope of coverage than the CWA, just as the Ninth Circuit itself did (Pet.App.13a). Soundkeeper does not dispute that the Ninth Circuit's resolution of that question against petitioners was the sole reason Soundkeeper's suit against the Port proceeded. And Soundkeeper's attempts to downplay the significance of the question presented crumble under the weight of a broad coalition of States, trade associations, ports, and labor unions all underscoring that the issue is "critically important." Chamber Amicus Br. 6, 14-23; States Amicus Br. 15-21; Washington Public Ports Association ("WPPA") Amicus Br. 8-18. This is precisely the type of case warranting this Court's intervention.

Unable to contest the split or its importance, Soundkeeper tries to manufacture a vehicle problem. It asserts (at 13) that Washington used its purported "residual authority" under the CWA—not state law—to expand the 2015 Industrial Stormwater General Permit ("ISGP") beyond the scope of the CWA, even though the permit itself says no such thing. That argument is meritless. But more important for present purposes, it is, at most, an issue for remand—not a barrier to resolving the question presented. Indeed, Soundkeeper repeatedly urged the courts below to *avoid* this argument, pushing instead for a sweeping ruling that all permit conditions are enforceable—*regardless* of whether they stem from

state or federal law. The Ninth Circuit's decision adopting that sweeping rule is an ideal vehicle for resolving the acknowledged conflict.

ARGUMENT

I. Soundkeeper Concedes The Circuit Split

Soundkeeper concedes that the circuits are split 3-1 on the question presented. BIO 1, 8-13. The Fourth, Ninth, and Eleventh Circuits permit citizens to enforce *any* condition of a state-issued pollutant-discharge permit in federal court, while the Second Circuit limits such actions to conditions within the CWA's scope. Pet.16-23. This "[c]lean circuit split," Chamber Amicus Br. 4—which was expressly acknowledged by the Ninth Circuit, Pet.App.13a, 18a-19a—warrants this Court's review. Indeed, particularly for entities operating on both coasts, it is both "illogical" and "inequitable" to face different liability risks "depend[ing] upon where their ships are located on any particular day or which circuit their terminals are located in." Nat'l Ass'n of Waterfront Employers ("NAWE") Amicus Br. 1-2, 20.

Soundkeeper complains (at 10) that this circuit split is longstanding. But that *favors* certiorari. This Court routinely grants certiorari on "longstanding" conflicts. *See, e.g.*, *Salinas v. United States R.R. Ret. Bd.*, 592 U.S. 188, 193 (2021). Particularly given the "important federal policy of uniformly … enforcing the [CWA]" from "state to state," *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521-22 (9th Cir. 1987), resolving circuit conflicts—especially persistent ones—over the meaning of the CWA's core provisions is of paramount importance. Pet.31-32. The key point is that the split has not resolved itself. And the decision below—by a circuit that is already a

magnet for aggressive environmental litigation—only invigorates the split. *Id.* at 36.

Soundkeeper notes (at 8) that this Court declined to review the Ninth Circuit's decision in *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995) ("*NWEA II*"), *cert. denied*, 518 U.S. 1018 (1996). But since that denial, the circuit split has deepened, as the Fourth and Eleventh Circuits, and district courts across the country, have weighed in too. Pet.21-23. Meantime, leading treatises and practice guides have acknowledged the conflict. *Id.* at 20-21 & n.5. Whatever was true in *NWEA II,* the need for this Court's intervention to resolve an acknowledged and now entrenched conflict is clear.[1]

Soundkeeper speculates (at 10-13) that "it is unclear whether the Second Circuit would still reach the same conclusion today." But the Second Circuit got it right in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993). This explains why "[the] circuit split remains." Pet.App.19a (O'Scannlain, J.). And, in any event, Second Circuit panels (and district courts within the Second Circuit) are bound by *Atlantic States*, and the Second Circuit is notoriously reluctant to convene en banc*, see United States v. Taylor*, 752 F.3d 254, 255-57 & n.1 (2d Cir. 2014) (Cabranes, J., dissenting).

Soundkeeper's principal response to the conflict (at 10-13) is just a critique of *Atlantic States*'

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[1] The respondent in *NWEA II* argued there was no conflict with *Atlantic States* because the permit condition did not go "beyond the scope of the CWA." BIO 9, *NWEA II* (No. 95-1732), 1996 WL 33467602. But here, the Ninth Circuit decided this case on the premise that the permit conditions exceed the scope of the CWA and acknowledged the conflict with *Atlantic States.*

reasoning—on the merits. But Soundkeeper's premature merits arguments provide no basis to leave an acknowledged circuit split in place. At this stage, what matters is that the circuits *are* split on the question presented, so CWA citizen standing means something different in circuits across the country.

Regardless, the CWA's "unambiguous text" refutes the Ninth Circuit's expansive conception of citizen-suit standing. Chamber Amicus Br. 5-10; *see* Pet.25-31.[2] The Ninth Circuit's rule that the "[CWA] allows private enforcement of *all* conditions of a state-issued CWA permit, *without exception*," BIO 1 (emphasis added), turns a "carefully drawn" statute with prescribed limits into a self-defeating mess. Pet.24. And adopting that position would raise significant Article II, Article III, and federalism concerns. Pet.29-31; *see* Chamber Amicus Br. 5, 10-14; States Amicus Br. 16-18. Despite Soundkeeper's attempt (at 30) to dodge those concerns, this Court has repeatedly

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[2] Soundkeeper dismissively refers (at 1) to 40 C.F.R. § 123.1(i)(2)—which explicitly states that conditions with a "greater scope of coverage than required by federal law" are not part of the federal program—as a "stray EPA regulation." But there is nothing "stray" about that regulation, and it enjoys the same force of law as any other. And while Soundkeeper questions (at 18) whether there is any "daylight" between conditions that are "'greater in scope'" of coverage and merely "'more stringent,'" there is an obvious—and significant—difference between imposing more stringent effluent limitations on regulated discharges above the federal minimums, as allowed by the CWA and EPA's regulations (*see, e.g.*, 33 U.S.C. § 1311(b)(1)(C)), and expanding the geographic scope of federal coverage, including the industrial-stormwater program to, for example, include discharges EPA explicitly *exempted from* that program. Pet.5-6. Here, there is zero ambiguity that the conditions fall in the latter category; the Ninth Circuit decided the case on that premise. Pet.App.11a-13a.

stressed that they play a significant role in the interpretation of federal regulatory statutes—including the CWA. *See, e.g.*, *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 174-76 (2020). The Ninth Circuit ignored these concerns entirely.

Soundkeeper's position also would mean that Congress gave unaccountable citizen plaintiffs greater authority to enforce permit conditions than EPA itself. That is absurd—and further underscores that Soundkeeper's argument is wrong. Pet.27-29; NAWE Amicus Br. 13; *see* 33 U.S.C. § 1319(a)(1) (confining EPA's enforcement to conditions "implement[ing]" specific CWA provisions).[3]

II. The Question Presented Is Important

When it comes to importance, Soundkeeper sticks its head in the sand—completely ignoring the wide array of amici that have filed briefs emphasizing the importance of the question presented from multiple different perspectives, ranging from States, a diverse coalition of business interests, ports, and labor interests as well. *See* States Amicus Br. 1-2; Chamber Amicus Br. 14-23; WPPA Amicus Br. 1-5.

Amazingly, Soundkeeper just brushes aside the serious federalism concerns raised by the decision below. As twenty-five States explain, the Ninth Circuit's rule "interferes with State authority over water resources," "severely constrains congressionally approved State discretion over [CWA] enforcement," and "undermines State environmental innovation with little environmental benefit." States

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[3] The lone Fourth Circuit case Soundkeeper cites (at 20) is not to the contrary; it did not address the question presented, let alone EPA's ability to enforce conditions broader in scope than federal requirements.

Amicus Br. 1-2. Soundkeeper claims (at 19-20, 30-31) *petitioners* overstate the federalism concerns. Yet the amici States—which are best situated to evaluate those concerns—have explained they have a "strong interest in this case's outcome" precisely *because* it implicates "the [CWA's] overarching cooperative-federalism regime." States Amicus Br. 1, 18.

Soundkeeper also ignores the real-world assessment offered by the ports, companies, and labor unions directly impacted by the decision below:

- The Ninth Circuit's rule harms companies across "virtually every industry" by subjecting them to "costly citizen-suit litigation in federal court," where plaintiffs may "extract settlements … for even meritless claims." Chamber Amicus Br. 15, 17-20; *see* Washington Trucking Association Amicus Br. 5-7, 12.
- The Ninth Circuit's rule harms ports and local economies by "increas[ing] the costs of moving cargo" due to added burdens of costly citizen-suit litigation, "making [ports in the Ninth Circuits] less competitive for discretionary cargo that can move through other gateways like ports in the Second Circuit." WPPA Amicus Br. 10; *see* NAWE Amicus Br. 1.
- And the Ninth Circuit's rule harms unions and workers, since the availability of longshore and maritime work "is wholly dependent on cargo ships calling the west coast's port terminals." WPPA Amicus Br. 3-4, 13-15.

Soundkeeper's own citations contradict its claim (at 18) that States do not regularly incorporate "greater in scope" conditions into their permits. For example, Maryland issues one "general discharge

permit"—"a joint federal NPDES permit and a [state] permit," covering discharges to groundwater under the latter program. *Maryland Dep't of the Env't v. Assateague Coastal*, 299 A.3d 619, 634, 641 n.33 (Md. 2023). Minnesota does the same thing. *In re Denial of Contested Case Hearing Requests*, 993 N.W.2d 627, 637, 661 (Minn. 2023). And at least three States issue permits making clear that particular conditions "constitute greater scope of coverage than required by Federal law" and are "enforceable under state law only." Ohio Rev. Code Ann. § 903.08(H); Ala. Admin. Code r 335-6-7-.06(5); La. Admin. Code tit. 33, pt. IX § 2301(B). Allowing citizens to enforce such conditions in federal court would "frustrate[] core federalism principles by replacing State primacy in [CWA] enforcement with unelected and unchecked citizen plaintiffs." States Amicus Br. 15.

Soundkeeper also does not deny that, in numerous cases cited by petitioners and amici—including the scores of lawsuits brought by Soundkeeper itself—citizens have attempted to enforce state-law-derived permit conditions with a greater scope of coverage than the federal program. Pet.21-23, 33 & n.8; *see* WPPA Amicus Br. 7 (discussing recent Soundkeeper threats to sue over state-law provisions). Instead, Soundkeeper makes an unsuccessful attempt (at 17-19) to distinguish just three cases cited in the petition. But each of these cases also involved citizen enforcement of state-law-derived conditions that plainly fell outside the scope of the CWA. *See Okanogan Highlands All. v. Crown Res. Corp.*, 544 F. Supp. 3d 1092, 1096 (E.D. Wash. 2021) (discharges never reached navigable waters); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 448 (M.D.N.C. 2015) (dam-safety requirements);

Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc., No. 13-cv-200, 2014 WL 10991530 (E.D.N.C. Aug. 1, 2014) (discharges district court concluded could not be regulated under the CWA).[4]

In short, this case has enormous practical importance, which, again, is underscored by the amicus briefs Soundkeeper tellingly ignores.

III. This Case Is An Optimal Vehicle

Unable to contest the traditional certiorari criteria, Soundkeeper tries to scare away the Court with baseless vehicle arguments.

1. Soundkeeper attempts to muddy the waters by claiming (at 13-16) that the permit conditions it seeks to enforce do not actually mandate a greater scope of coverage than the CWA because Washington exercised authority under 33 U.S.C. § 1342(p)(2)(E), rather than state law, to regulate docks and wharfs in the 2015 ISGP. This rarely-used CWA provision—dubbed "residual designation authority"—supposedly empowers States and EPA to earmark discharges for federal regulation on a case-by-case basis once they make certain findings. 33 U.S.C. § 1342(p)(2)(E).

This argument is particularly disingenuous because Soundkeeper itself implored the lower courts to sidestep this "residual designation" issue, pushing for a sweeping ruling that all permit conditions are enforceable. *See, e.g.*, 1-PortSER-116 ("Whether Ecology's basis for [regulating the Wharf] was based on its state authority or its residual CWA authority … is irrelevant to whether Soundkeeper can enforce this condition of the ISGP in this citizen suit.");

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[4] Soundkeeper does not deny that it alone has filed more than *170* citizen-suit actions since 1992. Pet.32-33.

1-PortSER-17–18 ("[T]he basis for Ecology's decision to [regulate the Wharf] is irrelevant, because Soundkeeper can enforce all the terms of the Permit, regardless of whether they are based on state or federal authority."). The Ninth Circuit complied—it avoided the "residual designation" question, *see* Pet.App.11a-13a, and instead adopted the sweeping rule proposed by Soundkeeper, *id.* at 12a.

It is *that* categorical holding that warrants this Court's review. If the Court agrees with petitioners that this broad holding is wrong, then Soundkeeper can try to argue on remand that the ISGP does not have a greater scope of coverage than the federal program. But that alternative ground does not impede this Court's ability to decide the question presented any more than it did the Ninth Circuit—which *decided* it. And this Court regularly remands to lower courts to consider such alternative arguments. *See, e.g.*, *Groff v. DeJoy*, 600 U.S. 447, 473 (2023); *County of Maui,* 590 U.S. at 186.

In any event, as petitioners explained below, Soundkeeper's argument is baseless. *See* Response to Amicus Br., D. Ct. Dkt. 279; Pet.App.42a. The ISGP does not cite, let alone purport to invoke, this supposed authority. *See* 5-ER-965–1033. That alone is fatal. And Ecology itself admitted to the district court that, before this litigation, it never previously stated that it had exercised "residual [designation] authority." 3-ER-414; 1-PortSER-27. Moreover, the Ecology employee who drafted the permit explicitly stated that the expanded scope was "*based on state authority"* alone. Pet.App.33a.

In fact, Soundkeeper's argument is purely post hoc. It rests entirely on an amicus brief Ecology submitted in this litigation nearly five years *after* the

2015 ISGP was issued—the epitome of a post-hoc litigating position. BIO 14. Ecology cannot conveniently claim *years after the fact* that it expanded the federal NPDES program to include non-industrial discharges from each of the State's *hundreds* of transportation facilities—irrespective of the receiving waters—all without citing the applicable statute and federal regulation. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). And here, the post-hoc claim is that the State somehow (silently) invoked "residual" authority to regulate discharges EPA itself explicitly *exempted* from the federal industrial-stormwater program. Pet.5-6.[5]

If anything, Soundkeeper's reliance on the so-called "residual designation authority" only amplifies the *need* for certiorari. To date, this authority has been invoked a mere handful of times, ever—and never on the sweeping scale proposed here as to *hundreds* of disparate transportation facilities across an entire State. Significant questions also exist about whether a State can even wield this authority, and to what extent, especially since 33 U.S.C. § 1342(p)(1), (2)(E) expired by its terms on "October 1, 1994," and

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[5] Soundkeeper's claim (at 15) that these arguments constitute a "collateral attack" on the *propriety of* the 2015 ISGP is wrong. Petitioners do not challenge in these proceedings Ecology's ability to regulate transportation facilities under state law. The issue is Soundkeeper's post-hoc claim that these conditions stem from a federal "residual designation," not from state-law authority—again, an argument the Ninth Circuit did not reach. That is an argument *Soundkeeper* presses, not Petitioners. The Ninth Circuit may consider that authority argument on remand if this Court reverses the Ninth Circuit's categorical rule that citizen-suit standing exists *regardless* of whether the expanded scope is a product of federal "residual" or state-law authority.

33 U.S.C. § 1342(p)(6) mandates that "the Administrator"—i.e., EPA, not States—designate sources for inclusion in the federal program. *See* Pet.App.25a-26a.

Left unchecked, this "residual" authority would create an obvious potential for abuse. Indeed, Soundkeeper argues that "residual" authority may be invoked to override the express *exemption* in the CWA and EPA's regulations for non-industrial stormwater runoff from particular areas including wharfs. Pet.5-6. So if, and when, a State actually attempts to invoke this novel authority, its assertion of power demands careful review in any citizen-suit litigation. Yet, if citizen plaintiffs can enforce *all* conditions in a pollution-discharge permit, no matter whether they stem from state or federal law, States have no incentive to transparently engage in that process. Denying certiorari would thus leave States free to covertly expand permits beyond the CWA while empowering unaccountable citizens to enlist the federal courts to enforce such conditions.

2. Soundkeeper's attempt (at 16) to manufacture a vehicle problem out of the case's interlocutory posture fares no better. Soundkeeper refers (at 16-17) to state administrative board proceedings regarding the *2020* ISGP. But the case before this Court is solely about alleged violations of the 2015 ISGP, *see* BIO 16, whose scope and validity are now final, *see* Pet.12-13; Pet.App.16a.[6] The remaining 2020 ISGP proceedings are limited to whether the State adhered

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[6] Soundkeeper has apparently abandoned its claims under the 2010 ISGP. *See* BIO 7. Yet, the 2015 ISGP remains critical to this case because Soundkeeper seeks penalties for violation of that permit, which could total millions of dollars.

to proper procedures in expanding *that* permit's scope, with no potential to change the validity of the 2015 ISGP or Soundkeeper's ability to enforce it.

In any event, this Court routinely grants certiorari when the case is interlocutory. *See, e.g.*, *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 144 S. Ct. 479 (2023) (No. 22-1165). And Soundkeeper's objection is especially baseless here, given that the Ninth Circuit has finally resolved the threshold question presented; the district court has stayed proceedings pending this Court's review, D. Ct. Dkt. 432; and any ongoing proceedings as to the 2020 ISGP have zero bearing on the question presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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December 11, 2024