No. 22-720

In the Supreme Court of the United States

DAKOTA FINANCE LLC, D/B/A/ ARABELLA FARM, ET AL.,
Petitioners,

v.

NATURALAND TRUST, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE BUCKEYE INSTITUTE AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

What is the proper test for determining whether the "diligent prosecution bar" under 33 U.S.C. § 1319(g)(6)(A)(ii) precludes citizen suits brought under 33 U.S.C. § 1365(a)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and education institution—a "think tank"—to formulate and promote free-market public policy in the States. The staff at The Buckeye Institute accomplish the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those policy solutions for implementation in Ohio and replication across the country. Through its Legal Center, The Buckeye Institute works to restrain governmental overreach and engages in litigation in support of the rights and principles enshrined in the United States Constitution.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies,

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[1] *Amici curiae* state that pursuant to Sup. Ct. R. 37.2, counsel of record for the parties received timely notice of *amici curiae*'s intent to file this brief. Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici*, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

conducts conferences, and produces the annual Cato Supreme Court Review.

Amici curiae support the principles of limited government and individual liberty. They have a strong interest in preserving the principles embodied in the United States Constitution, including federalism. This case raises important questions about the principles of federalism and the role that each level of government plays in protecting our Nation's water resources. *Amici* support a regulatory environment which is not overly burdensome, and which respects each State's ability to regulate activity within its own jurisdiction.

SUMMARY OF ARGUMENT

Amici curiae The Buckeye Institute and the Cato Institute agree with Petitioners that this case presents an opportunity for this Court to resolve a conflict among the Courts of Appeals about the scope of the Clean Water Act's authorization for citizen suits. *See* Pet. at 4. This Court should grant review in order to resolve this conflict by clarifying the limitations that Congress has placed on such private enforcement actions.

Amici curiae write separately to highlight the significant problems that the decision below poses to the principles of federalism embodied in the Clean Water Act (the "Act"). The Fourth Circuit's decision upsets a careful balance between the respective roles of the States and the federal government. It does this

by interpreting the Act in a way that is inconsistent with the ordinary plain meaning of the statutory text.

Congress designed the Clean Water Act as a partnership between the States and the federal government. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Under this "cooperative federalism" framework, the States and federal government share authority to protect the Nation's waters. States retain the primary responsibility for such enforcement. Indeed, the Clean Water Act plainly states that it is the "policy of Congress" to preserve the "primary responsibilities and rights of States to prevent, reduce, and eliminate" water pollution. 33 U.S.C. § 1251(b).

Consistent with the Clean Water Act's cooperative federalism framework, individual States may establish and administer their own permitting programs. Such is the case here. South Carolina administers and enforces its own permitting program—a program that has long been approved by the United States Environmental Protection Agency ("EPA").

The Clean Water Act provides for citizen suits for certain violations of the Act. *See* 33 U.S.C. § 1365(a). However, the States remain primarily responsible for enforcement. Indeed, the Act specifically bars private enforcement actions when a State has commenced and is "diligently prosecuting" an administrative action "under a State law comparable" to the Clean

Water Act's administrative penalty provisions. 33 U.S.C. § 1319(g)(6)(A)(ii).

Here, the Fourth Circuit determined that South Carolina's enforcement procedures are not comparable to § 1319(g)'s enforcement scheme. As a practical matter, the court's holding offers States a choice: either mimic the federal program, or citizen suits will trump the State's preferred enforcement program.

That is not the system envisioned and enacted by Congress. A one-size-fits-all approach runs counter to the Clean Water Act's cooperative federalism framework. It fails to show proper deference to the States' "primary" role in regulating water resources under the Act. *See* 33 U.S.C. § 1251(b). It is also inconsistent with the Act's plain language, which gives some latitude to the States to adopt their own policies.

This Court should grant review to clarify the proper interpretation of § 1319(g), apply the plain meaning of the statutory text, and enforce the cooperative federalism approach embodied in the Clean Water Act.

ARGUMENT

I. This Court Should Grant Review Because the Court of Appeals' Decision is Inconsistent with the "Cooperative Federalism" Approach of the Clean Water Act.

The Clean Water Act adopts a cooperative federalism approach to protecting and preserving our Nation's waters—a partnership between the States and federal government. *See New York v. United States*, 505 U.S. 144, 167 (1992); *Arkansas*, 503 U.S. at 101. The statutory scheme carefully balances the roles of each level of government, and makes clear that States retain the primary responsibility for preventing and reducing water pollution. *See* 33 U.S.C. § 1251(b). The Court of Appeals' decision here upsets that balance. The decision below effectively requires a one-size-fits-all approach, rather than preserving the States' flexibility to enact and enforce their own standards and procedures.

Amici curiae respectfully submit that the Fourth Circuit's interpretation of the diligent prosecution bar is inconsistent with the statutory text. The decision below also exacerbates a circuit split over the scope of the Clean Water Act's authorization for citizen suits. Importantly, the court's errors could actually undermine efforts to protect the Nation's waters.

This Court should grant review to correct these errors and resolve the inter-circuit conflict over the proper interpretation of 33 U.S.C. § 1319(g).

A. The Clean Water Act Preserves the States' Primary Role in Preventing and Eliminating Water Pollution.

Congress designed the Clean Water Act as "a partnership between the States and the Federal Government, animated by a shared objective" of restoring and maintaining the "integrity of the Nation's waters." *Arkansas*, 503 U.S. at 101 (quoting 33 U.S.C. § 1251(a)); *see also U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 633 (1992) (White, J., concurring in part and dissenting in part). Under this cooperative federalism framework, the States and federal government share authority to protect the Nation's waters. *See generally New York*, 505 U.S. at 167 (describing such federal-state partnerships as "program[s] of cooperative federalism").

The States retain the primary responsibility for enforcing permitting rules and penalizing violations. Indeed, the Clean Water Act expressly states that it is the "policy of Congress" to preserve the "primary responsibilities and rights of States to prevent, reduce, and eliminate" water pollution. 33 U.S.C. § 1251(b); *see also Rapanos v. United States*, 547 U.S. 715, 722–23 (2006) (quoting § 1251(b)); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166–67 (2001); *Cnty. of*

Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 1480 (2020).

This Court is familiar with the contours of the Clean Water Act's cooperative federalism framework. *See, e.g.*, *U.S. Dep't of Energy*, 503 U.S. at 633 (White, J., concurring in part and dissenting in part). The Act authorizes the EPA to issue discharge permits. *Id.* (citing 33 U.S.C. § 1342). Yet it also "provides that a State may 'administer' its own permit system if it complies with detailed statutory and regulatory requirements." *Id.* (citing 33 U.S.C. § 1342(b); 40 C.F.R. §§ 123.1–123.64 (1991)).

Nonexempt discharges to regulated waters generally require a permit from the EPA, known as a National Pollutant Discharge Elimination Program (NPDES) permit. *See* 33 U.S.C. § 1342(a). Alternatively, if the discharge involves "dredged or fill material," property owners must obtain a permit from the Army Corps of Engineers. *See id.* § 1344(a). Property owners can face significant civil and criminal liability for discharging pollutants without a required permit or violating permit conditions. *See* 33 U.S.C. § 1319(c), (d); *see also* 40 C.F.R. § 19.4.

Individual States may establish and administer their own permitting programs, including for NPDES permits, if the program meets certain requirements and is approved by the EPA. For example, a State that seeks to administer a permitting program must adopt a system of civil penalties. *See U.S. Dep't of Energy*, 503 U.S. at 633 (White, J., concurring in part and

dissenting in part) (citing 33 U.S.C. § 1342(b)(7)). Federal regulations establish the minimum size of the penalties and mandate how they must be imposed. *Id.* (citing 40 C.F.R. §§ 123.27(a)(3)(i), 123.27(b)(1), 123.27(c) (1991)).

Similarly, the States still must meet certain federal requirements for water quality standards. *See* 33 U.S.C. § 1313(a)(1)–(2). If a State does not implement its own standards that satisfy the federal requirements, the EPA will inform the State of the changes it needs to make. *Id.* But even here, cooperative federalism is at play. If any States had implemented their own standards prior to the enactment of the Clean Water Act, those standards remained in effect so long as they were not inconsistent with the Act. *See id*.

Significantly, States retain latitude to shape their own policies and procedures. *See, e.g.*, *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994) (finding that because a state regulatory scheme "must be 'comparable' to the federal scheme … the states are afforded some latitude in selecting the specific mechanisms of their enforcement program"). Indeed, as Judge Quattlebaum emphasized in his dissent from the panel's decision below, "the Clean Water Act's cooperative federalism framework *encourages states to experiment with different regulatory approaches*." Pet. App. A-23 (Quattlebaum, J., dissenting) (emphasis added). This experimentation includes, *inter alia*, adopting different procedures or

administrative processes for resolving potential violations.

Nearly every State has implemented administrative enforcement programs under the Clean Water Act. "Currently 47 states and one territory are authorized to implement the NPDES program."[2] As Petitioners explain, these States "have developed programs to issue permits and have enacted administrative enforcement regimes" that have been approved by the EPA. Pet. at 31.

Like the vast majority of States, South Carolina administers and enforces its own permitting program. That program was approved by the EPA thirty years ago and is periodically reviewed. *See* Pet. App. B-7 ("The EPA has delegated CWA enforcement to South Carolina.") (citing 40 Fed. Reg. 28,130 (July 3, 1975) (NPDES program); 57 Fed. Reg. 43,733 (Sept. 22, 1992) (general permits program)). In fact, in the proceedings below, South Carolina argued (as *amicus curiae*) that the EPA's approval of its program "supports a finding that the program is sufficiently comparable to the EPA's program, both substantively and procedurally."[3] *Cf. Paper, Allied Indus., Chem. &*

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[2] U.S. EPA, About NPDES: Overview, *available at* https://www.epa.gov/npdes/about-npdes (visited Feb. 12, 2023); *see also* U.S. EPA, NPDES State Enforcement Authority, *available at* https://www.epa.gov/npdes/npdes-state-program-authority (visited Feb. 12, 2023) (table showing the status of state authorizations to date).

[3] *Amicus Curiae* Brief for the South Carolina Department of Health and Environmental Control in Support of Appellees' Petition for Rehearing En Banc at 6 n.1, *Naturaland Trust v.*

Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285, 1296–97 (10th Cir. 2005) ("Oklahoma's public-participation provisions are *comparable enough* to permit a delegation of CWA enforcement authority ….") (emphasis added).

This combination of factors is crucial here. The Clean Water Act preserves the States' primary responsibility to protect its water resources. Pursuant to the Act's cooperative federalism framework, South Carolina adopted a series of policies and procedures comparable to the federal enforcement mechanisms. The EPA approved that enforcement program, and the State has used it for decades.

Furthermore, in the instant matter, South Carolina's enforcement program did precisely what it was designed to do. The State's administrative action resulted in a consent order requiring Petitioners to obtain a Clean Water Act stormwater permit and remediate any damage that prior discharges might have caused. *See* Pet. at 7 (citing Pet. App. B-4). The order also required Petitioners to pay a civil penalty to the State. *Id.* In short, the system worked without the need for private civil litigation.

Dakota Finance, LLC, No. 21-1517 (4th Cir.) (filed Aug. 10, 2022).

B. The Decision Below Does Not Show Proper Deference to the States' Role in Protecting Water Resources Under the Clean Water Act.

The decision below would effectively require States, for the purposes of the diligent prosecution bar, to adopt enforcement processes identical or nearly identical to their federal counterparts. That rigid interpretation frustrates the cooperative federalism approach of the Clean Water Act.

To be sure, the Clean Water Act provides for citizen suits for certain violations of the Act. *See* 33 U.S.C. § 1365(a). Private enforcers may seek injunctive relief, civil penalties payable to the United States Treasury, and certain fees and litigation costs. *See id.* § 1365(a), (d).

Importantly, though, this Court has recognized that citizen suits are "meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). They are proper only where the government has failed to exercise its enforcement responsibilities. *See id.* (citing S. Rep. No. 92-414, at 64 (1971)). Thus, such suits are barred where a State agency "has commenced and is diligently prosecuting an action" under a State law that is "comparable" to its federal analogues. 33 U.S.C. § 1319(g)(6)(A)(ii).

Here, the state agency issued Arabella Farm a "Notice of Alleged Violation/Notice of Enforcement

Conference" in September 2019. *See* Pet. at 13 (citing S.C. Code Ann. § 48-1-90(A)). Respondents sued Arabella Farm six months later. *Id.* at 14. Yet the Fourth Circuit panel held that Respondents' private suit was not precluded by the diligent prosecution bar.

Among other reasons for its decision, the court determined that South Carolina had not commenced an action "comparable" to the one set forth in 33 U.S.C. § 1319(g). *See* Pet. App. A-12–13. The District Court had found that the relevant state and federal laws do have comparable penalty provisions, provisions providing for public participation, and provisions providing for judicial review. *See* Pet. App. B-12–16. The appellate court, however, focused not only on the substance of those provisions, but also their *timing* in the enforcement process.

The Fourth Circuit panel recognized that the applicable state and federal laws each have provisions protecting public participation and judicial review. Pet. App. A-13. Yet the panel majority emphasized that under the state law, "neither of these features is available until *after* the issuance of a departmental consent order." *Id.* (emphasis in original). In other words, although the features of the state law *are* comparable, "the comparable features were not yet available at the time this suit was filed …." *Id.*

Petitioners correctly observe that the Fourth Circuit's decision effectively "converts 'comparable' into 'carbon copy'" and requires "an EPA-style suit" in

order for the diligent prosecution bar to apply. *See* Pet. at 21. *Amici curiae* respectfully submit that this is inconsistent with both the statutory text and the cooperative federalism that it embodies. The Clean Water Act does not require that state statutes be identical to their federal counterpart. Nor does it require that they follow the same procedures at precisely the same time the EPA does.

Unsurprisingly, other courts have concluded that use of the word "comparable" in § 1319(g) "does not suggest a rigid standard." *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union*, 428 F.3d at 1293. Rather, "comparable" means that a state law must be "sufficiently similar to the federal law, *not identical*." *McAbee v. City of Fort Payne*, 318 F.3d 1248, 1252 (11th Cir. 2003) (quoting *Arkansas Wildlife Fed'n*, 29 F.3d at 381) (emphasis in original); *see Paper, Allied-Indus., Chem. & Energy Workers Int'l Union*, 428 F.3d at 1293 (citing Webster's Third New International Dictionary 461 (1986) (defining "comparable" as "capable of being compared; having enough like characteristics or qualities to make comparison appropriate")).

By using the word "comparable," Congress reserved the States' flexibility to innovate with different regulatory approaches. *See* Pet. App. A-23 (Quattlebaum, J., dissenting); A*rkansas Wildlife Fed'n*, 29 F.3d at 380. The statutory text allows the States to function as laboratories for different (albeit similar) public policy solutions. *See Oregon v. Ice*, 555 U.S. 160, 171 (2009) ("We have long recognized the

role of the States as laboratories for devising solutions ….”); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). South Carolina served as one such “laboratory” for decades—with the EPA’s stamp of approval.

The flexibility envisioned by Congress works well. In fact, in some ways the States may arguably provide even stronger procedures than federal law. For example, the dissent below pointed out that “South Carolina’s right to judicial review is *broader* than the Clean Water Act’s corollary.” Pet. App. A-42 (Quattlebaum, J., dissenting) (emphasis added); *see id.* (comparing judicial review provisions in 33 U.S.C. § 1319(g)(8) with provisions in S.C. Code Ann. § 48-1-200 and S.C. Code Ann. § 1-23-380).

Nor should courts have the impression that States are not proactive or otherwise engaged in preserving their water resources. In *amicus curiae* The Buckeye Institute’s home State of Ohio, for example, state officials have adopted numerous policies in recent years to protect and preserve Lake Erie and the State’s waterways. These include, among others, limiting the application of fertilizer or manure in Lake Erie’s western basin, in order to minimize runoff. *See* Ohio Rev. Code §§ 905.326(A), (E) and (F); Ohio Rev. Code § 1511.10(A)). Ohio recently updated its laws to require certain water treatment facilities to undertake monthly monitoring of total and dissolved reactive phosphorous pursuant to a NPDES permit. *See* Ohio Rev. Code § 6111.03(V). It has likewise restricted the use and placement of dredged

material. *See* Ohio Rev. Code § 6111.33. In short, the federalism approach has worked not only in the instant case, but in other States as well.

Rather than showing deference to the State's primary role under the Clean Water Act, the decision below effectively requires a State to mimic the federal program. Otherwise, citizen suits will trump the State's preferred enforcement program. States should not be confronted with this false choice. It is inconsistent with both the text of the Act and with decades of practice by the States and the EPA. This Court should grant review to clarify the proper interpretation of 33 U.S.C. § 1319(g).

Finally, it is worth noting that the errors below could actually undermine the Clean Water Act's goal of protecting the Nation's waters. The diligent prosecution bar incentivizes property owners to work with state and local governments to remediate environmental harm and avoid the threat of private litigation. Conversely, property owners may be dissuaded from working with regulators if they know that they may nonetheless be subject to private enforcement actions. Congress balanced these issues in § 1319(g). The courts should not disturb that balance. The statutory text should be applied as written.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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