No. 22-720

In the Supreme Court of the United States

DAKOTA FINANCE LLC DBA ARABELLA FARM, ET AL.,
Petitioners,
v.
NATURALAND TRUST, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, SOUTH CAROLINA, AND 18 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION 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)?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

In the Clean Water Act, Congress worked to ensure that States retained wide latitude to regulate and protect their valuable waters as they see fit. See 33 U.S.C. § 1251(b). Sometimes, Congress wrote in protections against overreach by federal actors. But this case is about a different guardrail against a different kind of potential interference: lawsuits launched by private plaintiffs. Although so-called "citizen suits" against CWA violators play an important role under the statute, Congress wanted those private lawsuits to "supplement rather than to supplant governmental action." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). So Congress specified that an alleged CWA violation "shall not be the subject of a civil penalty action" when "a State has commenced and is diligently prosecuting an action under a State law comparable to" an EPA enforcement action. 33 U.S.C. § 1319(g)(6)(A)(ii).

Decisions like the one below undercut this congressionally secured state discretion. Rather than presuming that States have things in hand when their enforcement efforts are underway, a divided panel of the Fourth Circuit decided that state efforts were not enough to preclude private ones when they did not mirror every procedure and process prescribed for federal enforcement actions. See Pet.App.A-14-15. South Carolina was aware of the CWA violation that spurred Respondents' private lawsuit. And it was taking action in response. But the Fourth Circuit dismissed all that. The court wouldn't budge even after the relevant South Carolina

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[*] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

environmental enforcement agency explained at it had timely initiated and diligently pursued an enforcement action. See generally Amicus Br. of S.C. Dep't of Health & Env't Control, *Naturaland Tr.* v. *Dakota Fin. LLC*, 41 F.4th 342 (4th Cir. 2022) (No. 21-1517), 2020 WL 13527624.

The *Amici* States of West Virginia, South Carolina, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming believe that the Fourth Circuit's blow to the state interests preserved in the CWA would be reason enough to grant the Petition. But the majority's cramped view of state power and confused perspective on citizen suits is not relevant to just that Act. Plenty of other laws—including the Clean Air Act, Toxic Substances Control Act, Safe Drinking Water Act, Endangered Species Act, Surface Mining Control and Reclamation Act, and Resource Conservation and Recovery Act—have similar citizen-suit provisions. And in narrowing the bar against citizen suits, the Fourth Circuit disregarded both the deference States are owed generally and the discretion they are owed specifically on water and land management issues like these. See, *e.g.*, *Cebollero-Bertran* v. *P.R. Aqueduct & Sewer Auth.*, 4 F.4th 63, 74 (1st Cir. 2021) (explaining that courts grant "considerable … deference to the [state] agency's plan of attack" (cleaned up)). As Petitioners have explained (Pet.21-30), all these problems come paired with an entrenched circuit split, too. See also, *e.g.,* Jeannette L. Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 222 (1987) ("[T]he judicial treatment of citizen suits has verged on the chaotic."). So this scheme is calling out for the Court's help.

The Court should grant the Petition. In a few short pages of the *Federal Reporter*, the Fourth Circuit majority impaired the CWA's carefully calibrated balance of responsibilities among States, the federal government, and citizens. The Court should restore that balance.

SUMMARY OF ARGUMENT

The Clean Water Act "contain[s] unusually elaborate enforcement provisions, conferring authority to sue … both on government officials and private citizens." *Middlesex Cnty. Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). If left undisturbed, the decision below threatens to topple that enforcement scheme.

I. States are not secondary players in protecting our nation's waters. States have long controlled the management and protection of the environment—land, air, *and* water. The CWA recognizes exactly that, constructing a cooperative federalism structure that ensures all sovereigns have a voice. State interests cannot be shunted aside because private-interest groups might take up a particular environmental matter. Citizens are permitted to "abate pollution" only when "the government cannot or will not command compliance." *Gwaltney*, 484 U.S. at 62. Restoring clarity on these key points is a matter of national importance that justifies the Court's attention.

II. Recognizing that States play this essential role, courts can and should defer to States' decisions when they commence comparable enforcement actions under the CWA. Several courts have afforded deference before. Deference reflects the state agencies' expertise on matters bound up with state law. Deference also makes more room for settlements—which in turn facilitates

faster remediation of environmental harms. And federal courts should not upset state enforcement efforts just because they do not perfectly mirror the EPA's approach, especially when EPA approves state-enforcement plans.

III. Some might insist that courts should make more room for citizen suits because state and federal actors are not doing enough. But even if those policy arguments could help decide a question of statutory interpretation, the premise is wrong. States aggressively act to protect the environment. So our nation's waters would be well protected even if the Court restores the balance away from favoring private professional plaintiffs and the civil penalties they seek.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant The Petition To Reaffirm States' Primacy In Water Protection.

Our Constitution, and the Clean Water Act itself, expect that States will have broad room to regulate their own waters. But by tying state enforcement procedures to federal ones and allowing private plaintiffs to thrust themselves into ongoing enforcement efforts, the decision below pushes States aside. The Court should grant review to set matters right.

A. States Traditionally Control Water Regulation.

Controlling the environment, water, and soil is an exercise of "police power," *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 442 (1960), that closely affects public health and welfare, *Maine* v. *Taylor*, 477 U.S. 131, 151 (1986). So "traditional[ly]," regulating and protecting America's environment and "natural resources" has been a "central responsibility of state governments." *Atl.*

Richfield Co. v. *Christian*, 140 S. Ct. 1335, 1362 (2020). Indeed, for decades this Court has recognized that States historically control "the conservation of natural resources." *Nw. Cent. Pipeline Corp.* v. *State Corp. Comm'n of Kan.*, 489 U.S. 493, 512 (1989); see also, *e.g.*, *Merrick* v. *Diageo Ams. Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015) ("Environmental regulation is a field that the states have traditionally occupied.").

Drawing from this "strong tradition of decentralized management," Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179, 193 (2005), state laws and rules dominate environmental regulations. From specific fields like gas production, *Nw. Cent. Pipeline*, 489 U.S. at 512, or mining, *Penn. Fed'n of Sportsmen's Clubs, Inc.* v. *Hess*, 297 F.3d 310, 327 (3d Cir. 2002), to broader fields like "land use," *FERC* v. *Mississippi*, 456 U.S. 742, 767 n.30 (1982), water use, *California* v. *United States*, 438 U.S. 645, 662 (1978), and water quality, *Chesapeake Bay Found., Inc.* v. *Va. State Water Control Bd.*, 495 F. Supp. 1229, 1238 (E.D. Va. 1980), States' interests have prevailed for a very long while.

Given the States' primacy here, it's no surprise that environmental—and specifically water-related—cases raise "significant constitutional and federalism questions." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). Federal courts must remain "sensitive" to these "delicate" federalism issues. *W. Va. Highlands Conservancy, Inc.* v. *Huffman*, 651 F. Supp. 2d 512, 529 n.11 (S.D. W. Va. 2009); see also, *e.g.*, *SWANCC*, 531 U.S. at 174 (rejecting an interpretation of the CWA because it "would result in a significant impingement of the States' traditional and primary power over land and water use").

This respect for state authority is not perfunctory. When a federal statute "touche[s] on … areas of traditional state responsibility," a "background principle" applies: Congress must clearly declare its intent to upset the usual balance. *Bond* v. *United States*, 572 U.S. 844, 858 (2014). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). Yet the Fourth Circuit ignored this common-sense idea. In fact, save one fleeting reference to the CWA's "cooperative federalism" (Pet.App.A-4), the majority never mentioned federalism at all. It stayed quiet on the subject even though its decision deals a striking blow against federalism: Federal courts will come to superintend state investigations, and federal administrative processes will become the *de facto* norm.

The Fourth Circuit's silence on federalism has other real consequences, too. Respecting States' authority isn't just an exercise in political theory—it can provide the best outcome for our country's environment. The Court has recognized before that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Shelby Cnty.* v. *Holder*, 570 U.S. 529, 543 (2013). In this context, "diffusion" and state deference is the best way to ensure that the many considerations that arise from environmental regulation can be properly accounted for. America hosts a breathtaking variety of topographies, climates, and ecosystems, and intensely diverse flora and fauna. That diversity in nature requires parallel diversity in administration and regulation. See *Penn. Fed'n of Sportsmens' Clubs, Inc.*, 297 F.3d at 327 (state primacy in environmental space is necessary because "the terrains and environments of the various

states differ"); Marc R. Poirier, *Non-point Source Pollution*, in ENV'T L. PRACTICE GUIDE § 18.13 (2008) (regulatory diversity is crucial because of broad "[d]ifferences in climate and geography"). And beyond ecological impacts, a particular environmental action in one State might have far different economic, sociological, and political consequences in another. So even though addressing a "given environmental concern" may be "difficult," "empirical research has shown that [S]tates seek to address those environmental concerns important to their citizens when they can and are quick to learn about and replicate the successful policy experiments of their neighbors." Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 DUKE ENV'T L. & POL'Y F. 253, 279 (2013). Federal action, on the other hand, whether administrative or through federal-court-empowered citizen suits, is most often one-size-fits-all.

In short, differences among States make environmental regulation "complicated." Richard J. Pierce, Jr., *Issues Raised by* Friends of the Earth v. Laidlaw Environmental Services*: Access to the Courts for Environmental Plaintiffs*, 11 DUKE ENV'T L. & POL'Y F. 207, 234 (2001). That label is probably an understatement judging from the number of laws, regulations, regulators, and the like that occupy the field of environmental law. Yet despite that complexity, States have a "rich history" of "solving resource and environmental problems." TERRY ANDERSON & P.J. HILL, PROP. & ENV'T RSCH. CTR., ENVIRONMENTAL FEDERALISM: THINKING SMALLER 10 (1996), https://bit.ly/3IM6DT9. This customization is possible because this Court has insisted on a strong environmental federalism that is "sensitive to the diverse needs of a heterogeneous society." *Gregory*, 501 U.S. at 458. The Fourth Circuit majority seemingly forgot all that.

B. Congress Meant For The States To Retain Power Under The CWA.

The Fourth Circuit's approach does not just conflict with the structure of our constitutional system. It also conflicts with the interests that animate the CWA itself.

Congress has always been "very wary of any regulation" usurping States' primary role in protecting the environment. Linda A. Malone, *Introduction*, 1 ENV'T REG. OF LAND USE § 8:1 (2022). So historically, it stayed away from water-quality standards and goals, which the States set and enforced. FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03(1)(a), at 3-71 to -72 (1993). Even Congress's 1970s forays into the environmental space "clearly" maintained a rock-ribbed commitment to "federalism and comity." Pierce, *supra*, at 234. The Executive Branch has followed suit—for example, by never "support[ing] the adoption of uniform national groundwater standards." U.S. GEN. ACCT. OFF., GROUNDWATER PROTECTION: THE USE OF DRINKING WATER STANDARDS BY THE STATES 3 (1988); accord *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1126-27 (9th Cir. 2002).

The CWA further testifies to Congress's commitment to maintaining the States' historical role. Congress intended the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use … [of] water resources." 33 U.S.C. § 1251(b). The CWA "anticipates a partnership between the States and the Federal Government." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). Thus, the CWA is a model example of "cooperative federalism," an "enduring, organizing concept in environmental law," where it plays a more "central" role than in "any other field." Fischman,

supra, at 187; accord *Am. Farm Bureau Fed'n* v. *EPA*, 792 F.3d 281, 288 (3d Cir. 2015). More than that, it is "widely considered a leading example of cooperative federalism." Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N.C. L. REV. 1283, 1294-95 (2013).

So Congress structured the CWA to maintain "state responsibility." Charles W. Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 DICK. L. REV. 459, 460 (1973); *Nat. Res. Def. Council, Inc.* v. *EPA*, 859 F.2d 156, 184 (D.C. Cir. 1988) (saying "there can be no reasonable doubt" "States play the *primary role* in administering the Act" (emphasis added)). Two relevant aspects of that structure are especially important here: recognition of state regulatory power and limitations on citizen suits.

First, one of the CWA's central prohibitions is the requirement that a person can't "discharge" a "pollutant" into "navigable waters from any point source." 33 U.S.C. §§ 1311(a), 1362(12). CWA legislative history, case law, and scholarly analyses agree that Congress defined "navigable waters" and "point source" to leave States in charge of the overwhelming majority of American water pollution policy. See Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal–Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 WM. & MARY ENV'T L. & POL'Y REV. 447, 454-60 (2018) (summarizing sources). During committee debates, for example, the CWA's chief sponsor noted that the CWA left nonpoint source pollution to the States because it was mainly an issue of land use—traditionally a state responsibility. H. COMM. ON PUB. WORKS, 93D CONG., LEGISLATIVE HISTORY OF THE WATERS POLLUTION CONTROL ACT AMENDMENTS OF 1972, at

1314-15 (Comm. Print 1973). This delineation was a "conscious" and intentional decision to *partner* with the States, Robin Kundis Craig & Anna M. Roberts, *When Will Governments Regulate Nonpoint Source Pollution? A Comparative Perspective*, 42 B.C. ENV'T AFF. L. REV. 1, 2 (2015), even though the federal government believed it could have assumed full control, Fischman, *supra*, at 184. It reflects an unwavering sensitivity to regulatory issues "traditionally state or local in nature." *Or. Nat. Desert Ass'n* v. *U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (cleaned up).

Federal courts—including this Court—echo this reasoning. In *County of Maui* v. *Hawaii Wildlife Fund*, for example, the Court said that perhaps the "most important" principle of CWA interpretation is that "Congress intended to leave substantial responsibility and autonomy to the States." 140 S. Ct. 1462, 1471 (2020); see also *id.* at 1476 (noting the CWA cannot be read to "undermin[e] the States' longstanding regulatory authority over land and groundwater"). By deliberately omitting groundwater from the general EPA permitting provision, Congress intentionally "left [that] regulatory authority to the States" and "encourage[d]" them to play their traditional regulatory role. *Id.* at 1472, 1474. Similarly, the district court in *Chesapeake Bay Foundation* said the CWA doesn't "detract from" States' "historical role" of "[w]ater pollution" control because its "statutory scheme" "expressly recognizes" this responsibility. 495 F. Supp. at 1237-38. The "spirit of federalism" that "pervades the Act" protects "area[s] of traditional state concern." *Id.* In contrast, "assum[ing] a general review position over the state agency" would be a significant "intrusion" and not "easily countenanced." *Id.* Published 40 years apart, these cases' central message is the same: the CWA's touchstone is *federalism*.

How this plays out day-to-day is straightforward. States retain power "to administer [their] own permit program for discharges into navigable waters within [their] jurisdiction." 33 U.S.C. § 1342(b). As part of this authority, the States may seek to enforce permit requirements, including through civil and criminal penalties. *Id.* § 1342(b)(7). Although the Act also gives EPA the authority to issue permits in the first instance, "Congress clearly intended that the states would eventually assume the major role in the operation of the [National Pollutant Discharge Elimination System ("NPDES")] program." *Shell Oil Co.* v. *Train*, 585 F.2d 408, 410 (9th Cir. 1978); see also *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 874 (7th Cir. 1989) ("Therefore, it seems beyond argument that we should construe the Act to place maximum responsibility for permitting decisions on the states where the EPA has certified a NPDES permitting program."). And "EPA does *not* enjoy wide latitude in deciding whether to approve or reject a state's proposed permit program." *Am. Forest & Paper Ass'n* v. *EPA*, 137 F.3d 291, 294 (5th Cir. 1998) (emphasis added); accord *Save the Bay, Inc.* v. *Admin. of EPA.*, 556 F.2d 1282, 1285 (5th Cir. 1977) ("Unless the Administrator of EPA determines that the proposed state program does not meet those requirements, he must approve the proposal."). So States control permits and, by extension, compliance with them. Congress left substantial regulatory powers in the States' capable hands.

Second, Congress was motivated by respect for federalism in fashioning the CWA's citizen-suit provisions, perhaps echoing this Court's "federalism cases" that have sought to "curb … congressional attempts to mobilize private litigants for federal purposes." Michael S. Greve, *Friends of the Earth, Foes of Federalism*, 12 DUKE ENVTL. L. & POL'Y F. 167, 175 (2001). Indeed, one author

reads Congress's approach to "private (environmental) law enforcement" as reflecting "a vague sense of suspicion and discomfort" of that enforcement method in the first place. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 342 (1990).

Congress therefore made citizen suits subservient to state enforcement actions—legislative history shows that Congress wanted States to bring "the great volume of enforcement actions" under the Act. *Gwaltney*, 484 U.S. at 60; see also *Sierra Club* v. *U.S. Army Corps of Eng'rs*, 909 F.3d 635, 647 (4th Cir. 2018) ("Legislative history further emphasizes the central role Congress intended for the States to play under the regulatory scheme laid out in the Act."); Peter A. Appel, *The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation*, 10 WIDENER L. REV. 91 (2003). Citizen suits are a "backup" for "when the government cannot or will not command compliance." *S. Side Quarry, LLC* v. *Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684, 690 (6th Cir. 2022). The private-suit option is available only when state agencies "fail to exercise their enforcement responsibility." *Gwaltney*, 484 U.S. at 60. This core limitation on citizen suits thus confirms and compliments the CWA's default structure: The States take the lead.

* * * *

The Fourth Circuit majority—which looked to federal processes to determine whether state processes have commenced—offends all these cooperative federalism principles and protections. The lower court effectively imposed an "exact comparability" requirement on States, requiring the administrative actions of state agencies to have a "comparable formal process that entails public notice." Pet.App.A-13. But that view requires any state administrative action to move in lockstep with an

administrative-penalty proceeding brought by EPA. Pet.App.A-13. Ignore, for a moment, that this requirement conflicts with the CWA's text. Pet.App.A-36 (Quattlebaum, J., dissenting) ("[C]omparable cannot mean identical."). It also defeats one of Congress's essential objectives in putting cooperative federalism at the forefront of the CWA: allowing and encouraging States to experiment with various regulatory approaches. See *Sierra Club*, 909 F.3d at 647; see also *Budget Prepay, Inc.* v. *AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010) (noting States are given wide latitude in systems of cooperative federalism). And in a second bit of interference, private plaintiffs are allowed to insert themselves into ongoing state proceedings in ways that may prove destructive. See, *e.g.*, Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENV'T L. & TECH. J. 55, 64 (1989) (explaining how "citizen enforcement" can "frustrate the objective of environmental protection").

The Court should thus grant the Petition to remind courts that the CWA's cooperative federalism is as important in the citizen-suit provisions as it is elsewhere in the Act.

II. The Court Should Grant the Petition to Restore Deference To States.

The Court should also grant the Petition to put deference to States and their agencies appropriately back into the analysis.

A. Federal Courts Defer To State Agencies On State-Law Issues.

As even the Fourth Circuit has recognized before, federal courts generally defer to state agencies on issues

of state law. See *Vann* v. *Angelone*, 73 F.3d 519, 521 (4th Cir. 1996); see also, *e.g.*, *Morgan* v. *ATF*, 509 F.3d 273, 276 (6th Cir. 2007) (rejecting the argument that federal courts are "obligated independently to construe and interpret the meaning of local law, without regard to the locality's interpretation of its own law," even when that determination is bound up with a decision under federal law); cf. *Bldg. Trades Emps. Educ. Ass'n* v. *McGowan*, 311 F.3d 501, 507 (2d Cir. 2002) ("We defer to a state agency's interpretation of its own regulations, unless the interpretation is arbitrary or capricious."). This treatment also jibes with how state courts treat their own agencies. In South Carolina, for example, courts defer to an "administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ." *S.C. Coastal Conservation League* v. *S.C. Dep't of Health & Env't Control*, 610 S.E.2d 482, 486 (S.C. 2005).

Especially when a state administrative decision involves a complex policy judgment, this deference grows from more than just comity. It also stems from a recognition that, even when a case implicates federal statutes, federal courts "must be careful to avoid imposing their view of preferable ... methods upon the States"—at least where (as here) Congress has left States room to decide on their own. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty.* v. *Rowley*, 458 U.S. 176, 207 (1982) (applying Education of the Handicapped Act). Put another way, courts often recognize that state-agency determinations may "merit some deference where the agency is administering federal statutes and regulations upon an express delegation from Congress as long as the agency's interpretation or application is otherwise consistent with federal law." *Grand Canyon Tr.* v. *Energy Fuels Res. (U.S.A.) Inc.*, 269 F. Supp. 3d 1173, 1195 (D. Utah 2017) (collecting authorities).

These principles apply with equal force to the CWA. Consider the Eighth Circuit's decision in *Arkansas Wildlife Federation* v. *ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994). There, the court agreed that the relevant state agency had commenced an administrative-penalty action, stressing that States "are afforded some latitude in selecting the specific mechanisms of their enforcement program." *Id.* at 380. Consistent with this approach, courts around the country routinely afford deference to state agencies under the CWA. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 890 F. Supp. 470, 487 (D.S.C. 1995) (observing how "several courts" have recognized similar "deference").

So federal courts often afford "substantial deference" to a state agency's determination that it is diligently prosecuting a civil or criminal action. *Cmty. of Cambridge Env't Health & Cmty. Dev. Grp.* v. *City of Cambridge*, 115 F. Supp. 2d 550, 554 (D. Md. 2000). Other times, courts defer in everything but name by adopting a presumption of diligence. See *Piney Run Pres. Ass'n* v. *Cnty. Comm'rs of Carroll Cnty.*, 523 F.3d 453, 459 (4th Cir. 2008) ("[D]iligence is presumed."); see also, *e.g.*, *Conn. Fund for Env't* v. *Cont. Plating Co., Inc.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986) (presuming diligence "absent persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith").

B. Deference Is Especially Appropriate In the CWA Enforcement Context.

Many good reasons justify deferring to a state agency's view that it has commenced a prosecution sufficient to trigger the citizen-suit bar.

First, as should be clear by this point, the CWA itself requires deference. Again, the CWA's system of cooperative federalism assigns to the States the role of primary CWA enforcer. See *Gwaltney,* 484 U.S. at 60. "Cooperative federalism" means very little if States are not even empowered to say how and when their enforcement actions begin and end. Otherwise, because "[m]ost traditional agency enforcement does not meet [a] high[er] standard[]" for the diligent-prosecution bar, "citizen plaintiffs [could then] assume the role of primary regulators." Ross Macfarlane & Lori Terry, *Citizen Suits: Impacts on Permitting and Agency Enforcement,* 11 NAT. RES. & ENV'T 20, 23 (Spring 1997).

Second, state agencies are experts on both technical matters and state law. Unsurprisingly, then, courts often cite technical agency expertise as a primary reason for deferring to state CWA-related decisions. See *Piney Run Pres. Ass'n*, 523 F.3d at 459 (describing deference to agency expertise); see also *Friends of Milwaukee's Rivers* v. *Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004) (presuming diligence in part because "courts are not in the business of designing, constructing or maintaining sewage treatment systems"). And because they interpret state law every day, state regulators are better equipped to make calls under that body of law.

Third, deference encourages settlements between state agencies and alleged violators. As this Court has recognized, by deferring to a state agency's determination that it commenced an administrative action—and that a citizen suit is necessarily barred—courts foster stability and predictability in resolving agency actions. See *Gwaltney*, 484 U.S. at 60-61 ("If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo [in exchange for

other concessions], then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities."). If an alleged violator cannot trust that an agreement with a state regulator will resolve a violation *in toto*, then violators "will be disinclined to resolve disputes by such relatively informal agreements" at all. *Comfort Lake Ass'n, Inc.* v. *Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998).

And *fourth*, deference in this context often comes with a federal-agency endorsement to boot. Here, EPA approved South Carolina's enforcement plan. EPA first approved South Carolina's permitting program almost a half-century ago. See 40 Fed. Reg. 28,130 (July 3, 1975) (NPDES program); 57 Fed. Reg. 43,733 (Sept. 22, 1992) (general permits). Since then, EPA has periodically reviewed that approval. See EPA REGION 4, STATE REVIEW FRAMEWORK: SOUTH CAROLINA (2019), *available at* https://bit.ly/3kf7IJX. This continuing approval strongly suggests that EPA has sanctioned the state agency's related enforcement procedures. And if EPA has determined the enforcement procedures are "comparable enough to permit a delegation of CWA enforcement authority," then it is hard to see why they would not likewise "be deemed comparable for the purposes of imposing the jurisdictional bar under 33 U.S.C. § 1319(g)(6)(a)(ii)." *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union* v. *Cont'l Carbon Co.*, 428 F.3d 1285, 1297 (10th Cir. 2005).

C. The Fourth Circuit Forgot Deference.

Despite these compelling reasons to defer, the decision below affords *no* deference to South Carolina's determination that it had commenced an administrative

action. The South Carolina Department of Health and Environmental Control had issued Petitioners a Notice of Alleged Violation/Notice of Enforcement Conference before Respondents ever filed their citizen suit. See Pet.App.A4-5. In the Department's view, that notice commenced an administrative proceeding under its own Uniform Enforcement Policy for the Office of Environmental Quality Control. See Amicus Br. of S.C. Dep't of Health & Env't Control, *supra*, at 7-10.

Yet the Fourth Circuit decided to go its own way. By not deferring—or even acknowledging—the state agency's own determination that it had commenced a proceeding, the court erred. As Judge Quattlebaum wrote in dissent, "the Clean Water Act's cooperative federalism framework encourages states to experiment with different regulatory approaches. Under that framework, the state's view of what commences its proceeding should be respected." Pet.App.A-23 (internal citation omitted).

The Petition thus presents an excellent opportunity to reaffirm deference to States. The Court should take it.

III. States Wield Their Traditional Authority to Regulate the Environment Often and Broadly.

Some might advocate for more citizen suits because they perceive States do too little for the environment. But that's no reason to withhold review. Pure policy notions like this are a problematic lens through which to view a statute. "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004). And the notion that citizen suits are always good for the environment is dubious, anyway. See, *e.g.*, Patrick S. Cawley, *The Diminished Need for Citizen Suits to Enforce the Clean*

Water Act, 25 J. LEGIS. 181, 191 (1999) ("[A] narrow approach [to the diligent-prosecution bar] seems unsatisfied with the CWA's chief objective to uphold clean water standards, and treats as equally important the stringent punishment of violators, even if immediate penalties fail to affect the discharge of effluents by often wealthy corporate offenders."). But the fundamental premise—that the States are not acting aggressively enough to protect our waters—is perhaps the most wrongheaded part of this rationale.

States take environmental protection seriously. "Increasingly," state environmental regulations are among the "most stringent" protections against water pollution. Linda Malone, *State and Local Land Use Regulation to Prevent Groundwater Contamination*, 1 ENV'T REG. OF LAND USE § 9:16 (2022). And because most water pollution continues to come from nonpoint sources—thus falling outside the CWA—the States' role has grown more important. Douglas R. Williams, *Toward Regional Governance in Environmental Law*, 46 AKRON L. REV. 1047, 1052 (2013) (noting that the States' "dominant role in ensuring … water quality" has become "central to the overall success of the CWA[]").

Perhaps more remarkable is the States' strong *constitutional* commitment to environmental protection and water quality. Most state constitutions enshrine a concern for natural resources. See, *e.g.*, ALASKA CONST. art. VIII (including 18 sections spanning land and water development, rights, and access); CAL. CONST. art. XIII, § 8 (protecting the "use or conservation of natural resources"); LA. CONST. art. IX, § 1 (saying natural resources, including water, must be "protected" and "conserved" for the "health, safety, and welfare of the

people"); accord FLA. CONST. art. II, § 7(a); MASS. CONST. art. XCVII; NEB. CONST. art. XV-5.

And these constitutions do more than just praise the environment—many detail commitments to clean water. For example, North Carolina "conserve[s] and protect[s]" its "waters" and "control[s] and limit[s] the pollution of [its] … water." N.C. CONST. art. XIV, § 5; accord FLA. CONST. art. II, § 7(a). Decades ago, California amended its constitution to guarantee "water quality," CAL. CONST. art. XA, and allow financing for certain "environmental pollution control facilities," *id.* art. XVI, § 14; see also FLA. CONST. art. VII, § 14 (creating similar funding). And New Mexico's constitution requires the legislature to "provide for control of pollution and control of despoilment of the air, water and other natural resources." N.M. CONST. art. XX, § 21; see also MICH. CONST. art. IV, § 52 (requiring the legislature to "protect[] … the air, water and other natural resources of the state from pollution, impairment and destruction"). Massachusetts's and Pennsylvania's constitutions go even further, enshrining "the right to clean air and water," MASS. CONST. art. XCVII, and the "right" to "pure water," PA. CONST. art. I, § 27.

Further, States seek to address these issues practically, so they have set up funds and revenue allocations to keep water clean. For example, Michigan's constitution diverts specific tax revenues to remediate "pollution, impairment, or destruction of air, water, or other natural resources." MICH. CONST. art. IX, § 40. Minnesota set aside a third of the revenue from a sales tax hike to the "clean water fund," which can be "spent only to protect, enhance, and restore water quality … and to protect groundwater." MINN. CONST. art. 11, § 15. Missouri set up a "water pollution control fund" and allows state financing to protect "the environment through the

control of water pollution." MO. CONST. art. III, § 37(b)-(c), (e). And New Jersey dedicates a set percentage of a certain fund to finance "the cost of water quality point and nonpoint source pollution monitoring … and nonpoint source pollution prevention projects." N.J. CONST. art. VIII, § 2; see also N.M. CONST. art. XVI, § 6 (establishing a protected state fund "to secure a supply of clean and safe water for New Mexico's residents"); PA. CONST. art. VIII, § 16 (creating a fund to conserve "water resources," including "the elimination of … pollution"). In the same vein, some States established permanent councils or commissions to monitor water quality. See, *e.g.*, ALA. CONST. art. IV, § 93.14-16 (creating soil and water conservation coalition and water management districts). In sum, the number, specificity, and diversity in these state constitutional provisions reflect the States' commitment to water quality.

State statutory and common law is committed to water quality, too. Rather than surveying the realm, consider just one of many state laws dedicated to water quality: West Virginia's Water Pollution Control Act ("WPCA"). The WPCA says West Virginia's "public policy" is to keep water pure and consistent with the "[p]ublic health and enjoyment" of the people, "propagation and protection of" nature, and economic development. W. VA. CODE § 22-11-2(a). Under the WPCA, the Secretary of the Department of Environmental Protection has broad powers. He runs the State's NPDES permitting program, *id.* §§ 22-11-4(a)(1), (16), 22-11-8 to -12. He disseminates water pollution information and develops programs to reduce pollution. *Id.* § 22-11-4(a)(5)-(9). He can require detailed recordkeeping by anyone who owns a "point source" and may enter any premise that has an effluent source to inspect all records. *Id.* § 22-11-4(b)-(c). He may also enter any property at any reasonable time to inspect or

investigate issues "concerning" West Virginia's "water resources"—and the public must comply. *Id.* § 22-11-4(e).

The WPCA also creates specific effluent limitations and water quality standards, including emergency rules, and the Department coordinates this and other environmental work with federal agencies. See W. VA. CODE §§ 22-11-6, 22-11-7, 22-11-7b. The Department provides detailed certification-agreement standards for permits issued under 33 U.S.C. § 1344. See *id.* § 22-11-7a. It has "[a]ll authority" to draft and implement "water quality standards" for both public health and environmental purposes. *Id.* § 22-11-7b. To monitor water quality, the director appoints and supervises "voluntary water quality monitors." *Id.* § 22-11-13. The WPCA demands prompt compliance and provides an appeals process. *Id.* §§ 22-11-14 to -16, 22-11-18, 22-11-21. The Secretary has broad enforcement authority, too. He may take extraordinary measures in emergencies to abate pollution. *Id.* § 22-11-19. Violators pay up to $25,000 and face criminal penalties, among other punishments, and their cases are prioritized in court. *Id.* §§ 22-11-22 to -25.

The WPCA is a tremendous grant of power. And seeing this amount of government control accepted in a State with a passionate "love of political liberty," *State ex rel. Dillon* v. *Braxton Cnty. Ct.*, 55 S.E. 382, 384 (W. Va. 1906), is telling. It helps make the bigger point that the WPCA is hardly alone. Indeed, the WPCA and state constitutional provisions quoted above highlight water quality's first-order importance to all States and their people. They also show that States can handle the regulatory load. The Fourth Circuit should have let them.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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