No. 25-2397

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON,

Plaintiff-Appellant,

and

OKANOGAN HIGHLANDS ALLIANCE,

Plaintiff,

v.

CROWN RESOURCES CORPORATION and KINROSS GOLD USA, INC.,

Defendants-Appellees,

On Appeal from the U.S. District Court for the Eastern District of Washington
Case No. 2:20-cv-00147-MKD
Hon. Mary K. Dimke, United States District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Many of the Chamber's members engage in activities that are subject to regulation under the Clean Water Act (CWA, or Act), such as by discharging water pursuant to CWA permits. Many of the Chamber's members also engage in activities that are subject to other federal laws, such as the Clean Air Act, that contain citizen suit provisions that are comparable to the citizen-suit provision in the Clean Water Act. The scale and scope of activities affected by these laws is massive and touches nearly every corner of the U.S. economy. Chamber members are frequently defendants in citizen suits under these laws. The Chamber submits this brief to

[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae,* its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

further explain and underscore the exceptional importance of the panel's decision regarding the interpretation of the citizen suit provision of the Clean Water Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Water Act is a sweeping statute that, as currently implemented, affects essentially any activity that touches navigable waters. Enforcement of the Clean Water Act is the responsibility of the Environmental Protection Agency, the U.S. Army Corps of Engineers, and responsible state agencies. But the Clean Water Act also allows a citizen to file suit to enforce the statute, on the basis of any alleged observation of a violation of the statute.

In this case, the defendant was subject to two separate citizen suits contesting the same alleged violations of the same permit. The defendant settled one of those suits with a consent decree that a district court approved as favoring the public interest.

And now, remarkably, the second citizen suit will continue. In the decision at issue, the panel rejected the assertion that the Clean Water Act citizen-suit provision makes a first citizen suit preclusive of a second citizen suit based on the same alleged violations. In the panel's view, the second plaintiff, the State of Washington, can maintain its suit in part because it articulates further remedies it seeks beyond those in the consent decree.

The panel's decision has startling implications. It undermines the utility of the citizen suit as an enforcement mechanism while increasing the burden on courts by sharply reducing the value of settling such suits. Under the panel's decision, such a settlement does not provide a definitive resolution. A defendant, who may well have serious defenses and grounds for objecting to liability, might compromise by undertaking costly changes to its operations or paying penalties. Then, under the panel's decision, the defendant can be forced to litigate the merits of its defense anyway, with all the attendant cost and risk, against a second citizen-suit plaintiff. This prospect is a significant disincentive for a defendant to settle a Clean Water Act citizen suit; and the exposure to multiple, successive citizen suits is a serious additional risk for all kinds of businesses.

Even worse, the logic of the panel's decision raises doubt as to an array of similar provisions in statutes like the Clean Air Act, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and more. No other circuit, so far as the Chamber is aware, freely allows successive citizen suits under such statutes, as the panel's decision now does for the Clean Water Act. Yet the panel scarcely engaged with the weight of considered authority inconsistent with its approach.

The issue is exceptionally important. Citizen suits under environmental laws are common against businesses throughout this circuit and around the country. The

panel's decision substantially alters the way in which this enforcement mechanism works, and exposes businesses to significantly greater risk and cost even when they voluntarily compromise such cases. The *en banc* Court should hear this case before the panel's decision rewrites the nature of citizen suits.

ARGUMENT

I. This case presents an issue of exceptional importance warranting *en banc* review.

A. The Clean Water Act affects a vast amount of economic activity, and citizen suits magnify the risk to businesses.

The Clean Water Act regulates the "discharge" of any "pollutant" into waters of the United States. 33 U.S.C.§ 1311(a). Waters of the United States, even after the seminal *Sackett v. EPA* decision, 598 U.S. 651 (2023), encompass waters with a continuous surface connection back to traditionally navigable rivers, and thus a vast network of streams, and continuously connected wetlands, throughout the country. "Pollutant" means "dredged spoil, solid waste," "biological materials," "heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). "The CWA can sweep broadly enough to criminalize mundane activities like moving dirt." *Sackett*, 598 U.S. at 669.

Corresponding to that broad scope, state and federal agencies have issued over 40,000 effluent permits governing nearly 200,000 facilities. *NPDES Permit Status Reports*, https://www.epa.gov/npdes /npdes-permit-status-reports (last accessed

Oct. 27, 2026). And the U.S. Army Corps of Engineers issues tens of thousands of permits and approvals for discharges of rock and soil every year. Sara Gonzalez-Rothi, *The Muddy Waters of BAAJA*, YALE J. REG. (Oct. 26, 2026), https://www.yalejreg.com/nc/the-muddy-waters-of-baaja/. In short, the Clean Water Act affects a significant portion of the nation's economy.

Besides potential criminal liability for certain categories of violation, the Clean Water Act broadly establishes civil penalties. 33 U.S.C. § 1319(d). Reaching up to $65,000 per day, these penalties "can be nearly as crushing as their criminal counterparts." *Sackett*, 598 U.S. at 660. The Act is a potent tool, "the reach and systemic consequences of" which have long given courts "cause for concern." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring). An allegation of violating the Act is a significant threat commanding substantial attention from any business that it concerns.

Such allegations come not only from the EPA, the Army Corps, or state regulators acting in their enforcement capacity. Under the Clean Water Act, "any citizen" can sue "any person" "who is alleged to be in violation." 33 U.S.C. § 1365(a). In such a lawsuit, the district court can "enforce" the pertinent CWA requirement or restriction, and "apply any appropriate civil penalties under section 1319(d)." *Id.*

Citizen suits are different from governmental enforcement. First, a citizen plaintiff need not pay any regard to the enforcement priorities and policies of the EPA, the Army Corps, and the states. Enforcement decisions by a government agency reflect not only the availability of resources, but also decisions about which kinds of violations should be attacked vigorously and which are more debatable. *See Sierra Club v. Whitman*, 268 F.3d 898, 902-03 (9th Cir. 2001) (recognizing that EPA's discretion about enforcing the Clean Water Act involves deciding "the most effective way to accomplish the objectives of the Act as a whole"). A decision to file a citizen suit does not need to be constrained by those policy choices. And, unlike a government enforcement agency, a citizen plaintiff can receive an award of attorney fees, 33 U.S.C. § 1365(d)—a feature that changes the calculus for a potential citizen plaintiff. Citizen suits are unusual in that they permit private entities to enforce federal law, which raises serious questions about their compatibility with the Constitution's Vesting and Take Care clauses. And they are a prominent risk for businesses across the United States. In a 15-year period, there were more than 150 consent decrees under CWA citizen suits—and untold numbers of pre-suit settlements driven by potential defendants' cost, risk, and fear of the potent litigation remedies. Garrett Jansma, *"A Cottage Industry": The Economics of CWA Citizen Suit Enforcement*, ALLEN MATKINS (July 20, 2026),

https://www.allenmatkins.com/real-ideas/a-cottage-industry-the-economics-of-cwa-citizen-suit-enforcement.html.

B. The panel's decision exposes a business to multiple citizen suits for the same violation.

In this case, two litigants had presented parallel citizen suits challenging the same conduct which allegedly violated the Clean Water Act. When the defendants settled with the first plaintiff through a court-approved consent decree, they then sought to dismiss the second suit. The district court agreed with the defendants that the second suit could not proceed, dismissing the action. On appeal, the panel reversed. But rather than inquire into the nature of the claims asserted and conduct at issue, the panel relied on the second plaintiff's characterization of the differing relief it would seek, such as additional penalties beyond what the court had already approved. Op.13. The panel further emphasized that the consent decree provided for an award of attorney's fees to the settling plaintiff but not to the non-settling plaintiff. *Id.* at 14. On that basis, the panel decided that the state could maintain its second suit notwithstanding the fact that it alleged the same violations as the first.

This interpretation of the Clean Water Act is deeply misguided. Congress defined the elements of the citizen-suit cause of action to be that the defendant violated an applicable requirement or order under the statute. 33 U.S.C. § 1365(a). Those elements would be the same for a second citizen-suit plaintiff as for the first. Thus the cause of action for one such plaintiff, arising from a given alleged violation,

is literally the same as for any other citizen-suit plaintiff alleging the same violation.[2] *See Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 13 (1951) ("A cause of action. . . consist[s] . . . of the unlawful violation of a right which the facts show.") (citation omitted). A second plaintiff's preference for additional penalties or its desire to incur and be reimbursed for its attorney fees does not make the claim, as established by statute, a different claim.

Meanwhile, when a court enters a consent decree to resolve a Clean Water Act suit, its analysis focuses on furthering the remedial and protective goals of the statute and protecting the public interest. *E.g.*, *Hawaii's Thousand Friends, Life of Land, Inc. v. City & Cnty. of Honolulu*, 149 F.R.D. 614, 616 (D. Haw. 1993) (applying *Sierra Club*). A consent decree "that affects the public interest or third parties imposes a heightened responsibility on the court to protect those interests." *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). That this is the mode in which district courts evaluate proposed consent decrees in Clean Water Act citizen suits confirms that those claims do, indeed, belong to the public in an important way.

[2] Of course, not every person who might object to a given defendant's activities will have standing under Article III to contest them; and when a person alleges an injury cognizable for Article III purposes, the person's favorite judicial outcomes might not legitimately be within the scope of Article III redress. These constitutional limitations on judicial authority do not alter the interpretation of the cause of action that Congress established in the Clean Water Act; "federal standing often turns on the nature and source of the claim asserted" but "in no way depends on the merits of the [claim]." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (citation omitted; alteration in original).

The panel's decision is not just incorrect as an interpretation of the Clean Water Act. It is also profoundly damaging for the implementation and operation of one of the country's most far-reaching environmental regulatory programs.

First, consent decrees typically represent a careful bargain, approved by the court, striking a balance between competing goals and interests while ensuring a workable way of carrying on ongoing activities—usually running a business, construction operations, and the like. Compliance and implementation is often measured in years. *Upper Chattahoochee Riverkeeper Fund v. City of Atlanta*, 98 F. Supp. 2d 1380, 1384 (N.D. Ga. 2000) (problem "decades in the making" could not be "remed[ied] overnight"). Indeed, the consent decree in this specific case carried a six-year term. Making long-term operational commitments requires exactly the kind of certainty the panel's decision undermines by permitting a second citizen suit.

Second, successive citizen suits could be in conflict with each other to the extent they seek differing remedies. Remedial measures secured through citizen suit litigation are often complex and the subject of multiple competing expert opinions. *See, e.g.*, *United States v. NCR Corp.*, 911 F. Supp. 2d 767, 770-71, 779 (E.D. Wis. 2012) (decision on remedy in CERCLA action, exhaustively covering the consideration of different remedial measures). In this case, Washington and the panel mused that the state might "require[] additional remedial measures, such as

capturing and treating contaminated discharges at two locations already identified by Washington's experts." Op.13. Often, courts struggle to balance competing remedies in environmental remediation cases, and the speculation that other remedies are feasible (to say nothing of better) allows a second suit to undermine the finality of the prior suit with no reason to believe that better environmental outcomes will follow.

C. The panel's decision substantially frustrates settlement of Clean Water Act cases.

The panel's decision undermines the careful work that district courts and litigants have previously carried out in the resolution of Clean Water Act cases through settlement. If a defendant may be subject to successive citizen suits, that prospect not only reduces the incentive to settle the first case, but actually makes that first settlement dangerous. Under the panel's decision, a second plaintiff can file a successive action so long as it can articulate any dissatisfaction with the remedy negotiated by the parties and entered by the court in the first litigation. As courts have recognized, permitting a second action concerning the same underlying conduct "discourage[s] defendants in a citizen from entering a consent decree … because defendants would remain exposed to duplicative penalties." *Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 (5th Cir. 2008) (*ECO*).

Across many contexts, this Court has repeatedly recognized that the finality of judgment is an important component of the incentives for settlement. In *Franklin*

v. Kaypro Corp., this Court expounded the role of bar orders (an order which "constitutes a final discharge of all obligations of the settling defendants") in securities litigation and noted that unless bar orders actually resolved the litigation, a partial settlement would be "preclude[d]." 884 F.2d 1222, 1225, 1229 (9th Cir. 1989). The court recognized the "overriding public interest in settling and quieting litigation," *id.*, which the panel's decision here substantially undermines. Settlement without finality is "courting disaster." *Id.*

Similarly, in CERCLA suits, the Court has noted that the statute incentivizes settlement by capping the settling defendant's liability and shifting it to non-settling potentially responsible parties ("PRPs"); limiting the settling defendant's liability; and "leaving non-settling PRPs liable for all of the response costs not paid by the settling PRPs." *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1145 (9th Cir. 2010). And in the qui tam context, this Court recognized that settlements are "infeasible" without a "release[] that will protect [defendant] from more litigation." *United States* ex rel. *Barajas v. Northrop Corp.*, 147 F.3d 905, 910 (9th Cir. 1998).

The panel's invitation to serial citizen suits undermines the incentive structure that is essential for settlement of citizen suits under the Clean Water Act and similar statutes. Under the panel's interpretation, a court-ordered settlement cannot provide the sort of certainty or finality that promotes settlement and avoids unnecessary litigation. Indeed, the panel's decision expressly turned on Washington's desire to

get more—more civil penalties, more remedial obligations, include more defendants, more attorney fees—than what the first citizen suit negotiated for its consent decree. Op.13. As this Court recognized, the "ability to settle cases depends on [the] power to give defendants releases that will protect them from more litigation." *Barajas*, 147 F.3d at 910.[3]

Third, the panel's decision further undermines the existing structure by reducing the incentive for third-party participation in the initial litigation or its settlement. If the resolution of the first case is not definitive, then amici, intervenors, and interested parties have much less reason to offer their expertise in the process or comment on a proposed settlement that no longer presents their only opportunity to shape the relief provided and the measures taken to protect the environment. A non-party who objects that a proposed settlement would not be sufficiently protective might gather evidence, perhaps even retain counsel, and present a substantive comment to the court. District courts rely on these comments. As one court observed, "I cannot overemphasize the role that the public plays in this process."

[3] The perverse outcome of the panel's decision is to privilege plaintiffs over defendants. The citizen-suit plaintiff has the burden to prove the defendant did anything wrong at all. If the plaintiff compromises with the defendant, that settlement might not achieve all the relief that the first (or any other) plaintiff might want—with, in many cases, the gap arising precisely because the claims are debatable. But under the panel's decision, the defendant must keep defending until a second (or third, or fourth) plaintiff has had a shot at getting the full scope of theoretically possible relief.

United States v. Telluride Co., 849 F. Supp. 1400, 1405 (D. Colo. 1994) (relying on public comments in denying government's motion to enter CWA consent decree).

Under the panel's interpretation, non-parties may still offer comment and participate but a strongly objecting non-party, the sort most likely to have the motive and means to present the clearest and most sophisticated case, may well consider their chances for securing that relief are better in a second litigation. Being the second citizen-suit plaintiff places one in a commanding position in a way that submitting the twenty-seventh comment does not. That is a significant hindrance to a settlement process which imposes a heightened responsibility on the court to protect the public's interest.

Meanwhile, a defendant that settles a Clean Water Act case with a first plaintiff has made a public announcement of its willingness to reach certain terms regarding a particular set of alleged violations. The consent decree might require a range of changes to a business's operations, as well as remedial activities and payments that are not recoverable. Then, under the panel's decision, a second plaintiff attacks the same alleged violations as the first, with the benefit of all the knowledge gained from seeing the outcome of the defendant's negotiation in the first suit, and on top of that the defendant's case assessment presented in filings seeking approval of the consent decree. *Id.* (rigorously analyzing the parties' submissions). And that second plaintiff can press for remedies that are inconsistent with those of

the first lawsuit, or that are made more damaging precisely because of the first lawsuit. The disincentives for settlement are potent.

D. The panel decision expands an already-questionable practice.

"[P]rimary enforcement authority" under the Clean Water Act rests with the government. *Inland Empire Waterkeeper v. Corona Clay Co.*, 189 F.4th 804, 811 (9th Cir. 2026). Courts have cautioned that expanding the availability of citizen suits could "effectively cede primary enforcement authority under the CWA to citizens acting in the role of private attorneys general." *ECO*, 529 F.3d at 528. Citizen suits are interstitial, "intended to supplement, rather than supplant, enforcement actions by the government." *Sierra Club*, 268 F.3d at 905.

This Court, like others, has interpreted the citizen-suit provision in a manner designed to protect this structure and the government's enforcement discretion. *Id.* at 903 (noting "EPA's decision not to take enforcement measures, like a prosecutor's decision not to indict, is one that is typically committed to the agency's absolute discretion"). "[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021). An interpretation of the Clean Water Act that allows serial private litigation over the precise remedy chosen for the violation of federal law is not one that merely "supplement[s]" government

enforcement. The panel thought that out-of-circuit precedents could be distinguished on the basis of "the particular relationship between government enforcement actions and citizen suits," Op.15, but failed to appreciate that its interpretation undermines that particular relationship and the constitutional considerations that must constrain citizen suits.

II. The panel's decision puts this circuit at variance with the U.S. Supreme Court and other circuits.

The panel's decision is in significant tension with the U.S. Supreme Court's decision in *United States v. Tohono O'odham Nation*. 563 U.S. 307 (2011). That case recognized that the "now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual overlap," and "not also on the relief requested." *Id.* at 316; *see also Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 234 (1998) ("no reason" preclusion should "differ depending solely upon the type of relief sought"). The panel here refused to apply res judicata based on the second plaintiff's assertion that it seeks remedies different from what the first plaintiff achieved in its consent decree. Op.14. That approach is inconsistent with *Tohono*.

The panel further refused to follow a large body of careful and well-reasoned out-of-circuit caselaw regarding successive citizen-suit litigation, Op.15-16, giving

scant attention to these cases, Op.14. There is now a fundamental disharmony between this circuit and other circuits.

Among other differences, the panel suggested a given suit is different from the prior suit if the two suits seek different remedies. Other circuits, by contrast, focus on the underlying violation. That split demands review by the full court.

These out-of-circuit authorities are carefully reasoned, persuasive, and merit serious engagement. *EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990), affirmed the dismissal of a second citizen suit following the entry of a consent decree in earlier Clean Water Act litigation involving "the same" alleged violations. *Id.* at 1403. The court reasoned that the Clean Water Act was designed to protect the public's interest, and analogized to *parens patriae* suits which traditionally involved "a government suing to enjoin alleged nuisances caused by water or air pollution." *Id.* at 1404 (quoting *United States v. Olin Corp.*, 606 F. Supp. 1301 (N.D.Ala.1985)). Since "citizens suing under the CWA are cast in the role of private attorneys general," once the first suit had concluded through a consent decree and vindicated the interest protected by the cause of action provided under the Clean Water Act, "as a practical matter there was little left to be done" even if "the citizens might have preferred more stringent terms" than those in the first consent decree. *Id.*

The Eighth Circuit's approach is in accord with the weight of authority from other circuits.

The **Second Circuit** has held that "a citizen suit cannot proceed solely for the purpose of challenging the terms of a settlement reached by state officials." *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 125 (2d Cir. 1991). *Atlantic States*, like *Green Forest*, recognized that a prior settlement "eliminated the basis for the citizen suit" because the "purpose of the citizen suit is to stop violations of the Clean Water Act." *Id.* at 127. The Second Circuit's focus on the cessation of the underlying violation is inconsistent with the panel's approach here.

The **Fifth Circuit** has held that a consent decree issued in a Clean Water Act enforcement action moots a pending citizen suit. *ECO*, 529 F.3d at 523. Under *ECO*, the second-in-time plaintiff must show a realistic prospect of future violations notwithstanding the earlier consent decree to avoid mootness. *Id.* A litigant who simply articulated their interest in a different remedy they intend to seek would not meet this test.

Furthermore, as consequential as the Clean Water Act by itself is, the panel's analysis may well affect other statutes. A host of other major environmental laws contain similar citizen-suit provisions. *E.g.*, 42 U.S.C. § 6972 (Resource Conservation and Recovery Act); 42 U.S.C. § 7604 (Clean Air Act); 42 U.S.C. § 9659 (CERCLA). Other circuits, considering citizen suits under those provisions, impose res judicata, consistent with *Green Forest* and other CWA decisions. The Sixth Circuit has held that a second citizen-suit must be dismissed to the extent it

covered matters governed by a prior consent decree, even though the plaintiff felt personally aggrieved by fugitive dust emissions and the consent decree did not seem to effectively prevent that second plaintiff's injury. *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 473-75 (6th Cir. 2004). That is contrary to the panel's decision and its emphasis on the variable remedies a second plaintiff might seek.

CONCLUSION

The Court should grant the Petition.

November 5, 2026

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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