No. 15-599

In the
Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, *et al.*,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, NATIONAL ALLIANCE OF FOREST OWNERS, SOUTHEASTERN LUMBER MANUFACTURERS, TEXAS FORESTRY ASSOCIATION, NORTH CAROLINA FORESTRY ASSOCIATION, LOUISIANA FORESTRY ASSOCIATION, AND EMPIRE STATE FOREST PRODUCTS ASSOCIATION IN SUPPORT OF PETITIONERS

DAMIEN M. SCHIFF
Counsel of Record
JULIO N. COLOMBA
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dms@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, National Association of Forest Owners, Southeastern Lumber Manufacturers Association, Texas Forestry Association, North Carolina Forestry Association, Louisiana Forestry Association, and Empire State Forest Products Association

QUESTION PRESENTED

Whether the Third Circuit erred by deferring to EPA's interpretation of the word "total maximum daily load" (TMDL) to permit EPA to impose a complex regulatory scheme that does much more than cap daily levels of total pollutant loading and that displaces powers reserved to the States.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

Federal Statutes

TABLE OF AUTHORITIES—Continued

Page

Federal Regulations

Rules of Court

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), National Alliance of Forest Owners, Southeastern Lumber Manufacturers Association, Texas Forestry Association, North Carolina Forestry Association, Louisiana Forestry Association, and Empire State Forest Products Association respectfully submit this brief amicus curiae in support of the Petitioners American Farm Bureau Federation, *et al.*[1]

PLF was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. It defends limited government, property rights, and a balanced approach to environmental protection in courts nationwide. PLF has extensive experience litigating environmental and constitutional issues. It has represented parties or participated as amicus curiae in numerous cases relevant to the disposition of this case. *See*, *e.g.*, *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Ag. of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the brief's filing of the intention of Amici to file the brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

The National Alliance of Forest Owners is a trade association representing owners and managers of over 79 million acres of private forests in 47 states. Its mission is to protect and enhance the economic and environmental values of privately-owned forests through targeted national policy advocacy. The Alliance is concerned that its work toward a balance of economically and environmentally sound forest usage will be incompatible with the mandates of an EPA wielding authority to regulate land use solely to improve environmental quality.

The Southeastern Lumber Manufacturers Association is a trade organization established in 1962 to promote family-owned lumber businesses. The Association represents lumber manufacturers in 17 states, primarily in the South. With emphasis on government affairs, marketing and management, and operational issues, the Association offers programs to support lumber manufacturers. The Association's members are concerned that if the decision below stands, federal micromanaging will threaten their family businesses, and the state and local representatives with whom they have worked over the past decades will be unable to help.

The Texas Forestry Association is a private non-profit association representing 3,000 forest landowners, logging contractors, professional foresters, and processing mills in East Texas. The Association's members support the implementation of Best Management Practices in forestry operations and its members work closely with the state agencies that oversee the TMDL program in Texas. TFA members will be negatively affected if EPA is allowed the

authority to direct the TMDL process at a national or regional level.

The North Carolina Forestry Association was organized in 1911. The Association actively promotes healthy, productive forests by supporting the efforts of forest land owners and forestry-related businesses that responsibly manage or use forests and produce wood and paper products. The Association is primarily engaged in legislative and regulatory advocacy, environmental education, logger training, and public outreach. The Association has approximately 4,000 members, including forest land owners, forest managers, wood suppliers and loggers, and producers of wood and paper products. Forest products is North Carolina's largest manufacturing industry, providing over 68,000 jobs with an annual economic impact of $23 billion affecting more than 180,000 jobs. Forest lands in North Carolina cover more than 18 million acres (59% of the state). The Association believes North Carolina is the proper party to regulate the use of its forest lands, not the EPA.

The Louisiana Forestry Association goes to great financial and human capital expense in training and overseeing the Best Management Practices for water quality associated with forestry operations in Louisiana. Best Management Practices compliance in Louisiana is consistently in the high 96% range. This voluntary effort has been well received and effective. The LFA is concerned that EPA's efforts to direct TMDLs in Louisiana will interfere with the cooperation enjoyed by state agencies and the private sector. LFA believes, "if it isn't broke, don't try and fix it."

Since 1906 the Empire State Forest Products Association has been the forest products industry's source for information and public affairs in New York State. ESFPA is a nonprofit organization for businesses, land owners, and individuals dedicated to improving the business climate for the forest products industry while promoting management of New York's forests to meet the needs of today and future generations. ESFPA has over 700 members representing all aspects of the forest industry, land owners and interested affiliate organizations. ESFPA believes a larger regulatory footprint for the EPA in regulating forest land use will be counterproductive and will impair the development of innovative, dynamic policies and solutions for managing New York's forests.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

The Federal Water Pollution Control Act Amendments of 1972—commonly known as the Clean Water Act (Act)—create a cooperative federalism framework through which the federal and state governments work together to "restore the chemical, physical, and biological integrity of the nation's waters." *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)). The decision below derails this system by allowing EPA to arrogate to itself authority that the Act reserved for the states. EPA's and the Third Circuit's approach creates irreconcilable conflicts in the Act's implementation and cannot be reconciled with federalism.

This case turns on the construction of the statutory term, "total maximum daily load" (TMDL).

See 33 U.S.C. § 1313(d)(1)(C). A TMDL is a "total" number that represents the "maximum" amount of a pollutant "load" that a body of water can receive "daily" before it will fail to meet its water quality standards. *See* 40 C.F.R. § 130.2(g)-(i). In other words, a TMDL states the maximum acceptable amount of pollution a body of water can safely handle, and in that sense gives states a numerical water quality goal to reach. State officials then incorporate those TMDLs into plans developed pursuant to "continuing planning processes" designed to achieve the Act's goals while taking into account the unique characteristics and needs of their state. 33 U.S.C. § 1313(e). TMDLs are "informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans." *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). The Act ensures those tools are used by compelling the states to incorporate TMDLs into their implementation plans. 33 U.S.C. § 1313(d)(2). States have the primary duty to establish TMDLs, subject to EPA approval. *Id.* If EPA disapproves of a state TMDL, the agency may establish its own. *Id.* That is what EPA did when it published its comprehensive, watershed-wide Chesapeake Bay TMDL. EPA, Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorus and Sediment (Chesapeake Bay TMDL) (Dec. 29, 2010).[2]

Yet, EPA's Chesapeake Bay TMDL goes far beyond merely providing the states with numerical water quality goals to reach. It tells them *how* to reach those goals by establishing a comprehensive pollution allocation plan that makes thousands of decisions on how to allocate the burdens of water pollution

[2] Http://www2.epa.gov/chesapeake-bay-tmdl-document.

reduction among different source types, geographic locations, and types of land use. *See* TMDL 9, 8-1. Because the states are compelled to incorporate TMDLs into the plans they develop pursuant to their Section 303(e) continuing planning processes, EPA's allocation decisions automatically become part of the state plans. This greatly restricts the states' ability to allocate those burdens as they see fit, as Congress intended.

The Chesapeake Bay TMDL also tells the states *when* they must act by setting deadlines for putting control measures in place that are necessary to meet the TMDL's detailed allocations and by demanding that the states give "reasonable assurances" that they will achieve federal goals by these federal deadlines. TMDL ES-8 ("The Chesapeake Bay TMDL is unique because of the extensive measures EPA and the jurisdictions have adopted to ensure accountability for reducing pollution and meeting deadlines for progress"). Congress did not give EPA authority to regulate nonpoint sources of pollution, much less to establish deadlines for reducing nonpoint source pollution. Nevertheless, the agency demands obedience to the TMDL's nonpoint source regulatory provisions. *See id.* (Listing economically ruinous "contingency actions" EPA is prepared to unleash on states that do not meet EPA goals and deadlines).

Below, the Third Circuit deferred broadly to EPA's interpretation of what a TMDL can contain, finding enough "play in the joints" in the statute to permit EPA to pursue what the Court of Appeals believed would be a reasonable, more effective strategy for improving water quality in the Bay. App. 31a.

The Court should grant certiorari because the decision below raises a question of fundamental importance to the administration of the Clean Water Act. Allowing EPA to seize nonpoint source regulatory authority from the states by inserting mandates into "comprehensive" TMDLs conflicts with the plain wording of the Clean Water Act. Moreover, the agency's arrogation conflicts with the Act's cooperative federalism framework. Rejecting that framework will have disastrous political and economic consequences for the communities forced to bear the costs of EPA's increasingly large regulatory footprint. The Act's costs, previously moderated by its reliance on state nonpoint source regulation, will soar. Further, blame for unpopular land-use decisions may be mistakenly assigned to local governments, rather than to the unelected EPA officials responsible for the TMDL. Thus, political accountability could be obscured.

ARGUMENT

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW UNDERMINES THE CLEAN WATER ACT'S COOPERATIVE FEDERALISM STRUCTURE, THEREBY PRESENTING AN ISSUE OF GREAT NATIONAL IMPORTANCE

The Clean Water Act reflects Congress's desire to regulate water quality through cooperative federalism. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). A chief characteristic of cooperative federalism is the use of the distinct regulatory advantages of the state and federal governments under a single regulatory

framework to solve a complex regulatory problem. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and Dual Federalism Doesn't*, 96 Mich. L. Rev. 813, 815 (1996). Crafting an effective cooperative federalism framework requires a careful balancing of interests and a thorough understanding of the institutional strengths and weaknesses of the respective levels of government. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 Mich. L. Rev. 570, 618 (1996). The decision below ignored these considerations. It thereby seriously undermined Congress's carefully designed regulatory framework and injected federal environmental policy into quintessentially local decision making.

A. Congress Committed a Significant Portion of the Clean Water Act's Implementation to the States

Congress explicitly defined the states' significant role under the Clean Water Act: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," while also allowing the states "to plan the development and use (including restoration, preservation and enhancement) of land and water resources." 33 U.S.C. § 1251(b).

This statutory preference for state-based action can be found throughout the Act's provisions, as Congress gave the states primary responsibility for most of the Act's programs. *See, e.g.*, 33 U.S.C. § 1313(a) (water quality standards); 33 U.S.C. § 1313(d) (identification of impaired waters); 33 U.S.C. § 1313(e) (continuing planning processes); 33 U.S.C. § 1288 (areawide management plans); 33 U.S.C. § 1329

(nonpoint source management programs). The TMDL process is no different: "Each State shall establish . . . the total maximum daily load." 33 U.S.C. § 1313(d)(1)(C). Although the Act gives EPA backstop authority to establish TMDLs when a state fails to do so, 33 U.S.C. § 1313(d)(2), the Act provides EPA only limited authority over states' decisions on how to achieve a TMDL's goals. *See* 33 U.S.C. § 1313(e) (granting EPA limited supervisory authority to approve or deny a plan, but not to establish one); 33 U.S.C. § 1342(a)(1) (requiring permits to be consistent with water quality-related effluent limitations); 40 C.F.R. § 122.44(d)(1)(vii)(B) (requiring permits to be consistent with applicable TMDL wasteload allocation effluent limitations). This distinction between setting a TMDL and directing its implementation is key to understanding the Act's structural design and why EPA's approach impermissibly expands the agency's authority.

The Clean Water Act Provisions where EPA is granted significant non-delegable authority[3] often

[3] Congress selected EPA as the initial issuer of National Pollutant Discharge Elimination System Permits. *See* 33 U.S.C. § 1342(a). That designation does not conflict with Congress' desire to preserve a healthy state-federal balance in the Act. For it makes sense that a federal agency would be better positioned *in the early years* of a brand-new federal permitting scheme to implement that scheme. Over time, however, the federal agency's comparative advantage should disappear. Thus, Congress provided for states to petition EPA to become the principal permit issuers, *see* 33 U.S.C. § 1342(b), and to *require* EPA to transfer permitting authority once certain basic criteria had been met. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 671-72 (2007). The vast majority of states have obtained such permitting authority. *See* EPA, *NPDES State Program Information*, (continued...)

share common themes: information and money. This phenomenon comports with the conventional wisdom—dating back to the Constitutional Convention—that economies of scale give the federal government an advantage in the provision of public goods benefitting the general populace. This insight holds true for the federal role in cooperative federalism schemes generally. Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle*, 14 Yale L. & Pol'y Rev. 23, 49 (1996).

For example, one might argue that the federal government enjoys a regulatory advantage over the states to the extent that economies of scale allow it to more easily and cheaply produce centralized research "on technical, scientific issues that recur through a number of states."[4] *Id.* Likewise, one might plausibly conclude that the federal government has an advantage where "centralization of data collection and dissemination" provide more "cost-effective technique[s] of identifying trends across states and setting policy priorities" than are available to state governments. *Id.* But these advantages, however, "can be realized by the federal government even when most policymaking and implementation functions are handled by the states." *Id.*

---

[3] (...continued)
ww2.epa.gov/national-pollution-discharge-elimination-system-npdes/npdes-state-program-information.

[4] Nevertheless, one can compellingly argue that states are still in a better position to provide the best watershed-specific data to inform a TMDL, given that, generally speaking, the states will be the ones to have taken the lead in developing the TMDL as well as the relevant water quality standards.

An examination of the Clean Water Act's delegation of authority to EPA reveals Congress' wise reliance on the benefits of economies of scale. For example, EPA has primary authority for establishing technology-based point source controls. 33 U.S.C. § 1311(b)(1)(A). And its backstop authority to approve or deny multi-jurisdictional TMDLs[5] is attributable to its relative advantage over the states in hydrology and data collection. In addition, the Act provides for a variety of federally-administered scientific studies, *see e.g.*, 33 U.S.C. § 1271, grant programs, *see e.g.*, 33 U.S.C. § 1255, and other means of providing federal technical assistance to the states. *See* 33 U.S.C. § 1329(f). Yet, EPA's environmental expertise and access to scientific resources lend it no advantage whatsoever for determining, for example, which local industries—much less which individual dischargers—should bear the burden of improving water quality.

Instead, these decisions are made by the states in their continuing planning processes, over which EPA tellingly is given no authority so long as the plans cover all navigable waters in the state. 33 U.S.C. § 1313(e) ("The Administrator *shall* approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such state . . .") (emphasis added). They

[5] Even in those area where EPA is granted primary authority, there is room for debate as to how much relative advantage EPA actually holds over the states (*e.g.*, crafting NPDES permit limits for a specific facility or approving/denying water quality standards and TMDLs for river segments within a particular state). Those provisions must be interpreted with the recognition that Congress reserved regulatory authority over nonpoint sources to the states, which necessarily involves land-use decisions.

are also routinely addressed through EPA's approval of states' nonpoint source management programs. *See* 33 U.S.C. § 1329. This process entails, among other things, the identification of the "best management practices and measures to control . . . nonpoint source [pollution]," the means to "reduce, to the maximum extent practicable," such pollution, and the state programs designed to "improv[e] the quality of" impaired waters. *See* 33 U.S.C. § 1329(a)(1)(C)–(D).

Thus, if Congress wanted EPA to have a more prominent role in the regulation of nonpoint source pollution, it had many opportunities to carve out such a role. Yet notwithstanding those many opportunities, it has declined in favor of preserving the states' traditional and effective role in nonpoint source pollution control.

B. The Decision Below Lets EPA Make Implementation Policy and Regulate Nonpoint Source Pollution, Contrary to the Clean Water Act

The Clean Water Act's cooperative federalism framework is perhaps clearest in the statute's division of authority over pollution from point and nonpoint sources. A point source is a "discernible, confined and discrete conveyance,"such as a pipe, ditch, or conduit. 33 U.S.C. § 1362(14). Nonpoint sources are diffuse, non-discrete sources of pollution such as runoff from farms, forests, and parking lots. *See Pronsolino*, 291 F.3d at 1126. Because of the fundamental differences between the two categories of pollution, the Act treats them differently.

Point source pollution is addressed primarily though technology standards, water quality-based

limits to meet state standards, and a federally supervised permitting system. *See* 33 U.S.C. §§ 1342, 1344. As for non-point source pollution, Congress recognized that its diffuse nature means it can only be effectively addressed through regulating land use. *See* 117 Cong. Rec. 38825 (1971) (the only "effective way"to intercept and control runoff is through "land use control") (Sen. Muskie).

Land-use regulation is the responsibility of state and local governments. *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006) (plurality op.) (citing *F.E.R.C. v. Mississippi*, 456 U.S. 742, 767-768 n.30 (1982)); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)). Consistent with the Clean Water Act's commitment to preserving the primary rights of the states to regulate water quality, the Act does not give EPA any direct land-use regulatory role.

Instead, the Act gives EPA limited authority to indirectly address nonpoint source pollution. Specifically, the Act gives EPA the authority only to grant or withhold federal water quality funds based on states' compliance with EPA's nonpoint source directives. *See Or. Nat. Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998) ("[T]he Act provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task."). EPA's contrary interpretation of its TMDL power, endorsed by the Court of Appeals, undermines Congress's decision to give general authority to regulate nonpoint source pollution to the states, not EPA.

As petitioners point out, the TMDL goes far beyond its namesake task of setting a maximum total daily pollutant load for a body of water. Pet. at 10. It

allocates pollution quantities between point sources and nonpoint sources, allocates pollution subtotals among the Bay watershed states, and allocates pollution subtotals further among various geographical subdivisisions within those states. *See generally* TMDL 9 (setting out detailed allocations and sub-allocations in a series of charts). Nonpoint source allocations are then subdivided for allocation among various "source sectors" including "agriculture, forest, nontidal atmospheric deposition, onsite septic, and urban" uses of land. *See* TMDL Q-1. Any amendments to these allocations would, of course, require EPA approval. *See* TMDL at 10-4 to 10-5.

As noted above, TMDLs are intended to establish the maximum acceptable amount of a pollutant that a water body can safely accept per day. 33 U.S.C. § 1313(d)(1)(C). States take those amounts and incorporate them into their Section 303(e) plans wherein they make the hard implementation choices of prioritizing and cutting certain uses of land and water resources to ensure that daily pollutant flows do not exceed the applicable TMDLs. 33 U.S.C. § 1313(e).

In contrast, EPA's Chesapeake Bay TMDL sets not only the maximum acceptable amounts of nutrients and sediment for the Bay, but also *decides* how much to allocate to each state, *decides* how much to allocate between point source pollution and nonpoint source pollution, *decides* how to allocate the point source pollution among permittees, and lastly, *decides* how to allocate nonpoint source load among competing "source sectors." *See* TMDL 9. States are statutorily compelled to include TMDLs in their Section 303(e)

plans.[6] So if the decision below stands, states will be forced to accept and publish *as part of their own implementation plan* the TMDL's myriad implementation allocation decisions and its federal land-use plan for the Bay watershed "source sectors."

Consistent with the Clean Water Act's cooperative federalism framework and the underlying federalism logic, the Act reserves substantial pollution-control authority to state and local governments. The decision undermines state and local land-use authority and unravels this federalism framework.

II

THE DECISION BELOW PRESENTS AN ISSUE OF NATIONAL IMPORTANCE BECAUSE IT WILL RENDER THE ACT LESS SENSITIVE TO DIVERSITY AND CHANGE, LESS ACCOUNTABLE TO THE PEOPLE, AND LESS INNOVATIVE

> [I]t is not by the consolidation, or concentration of powers, but by their distribution, that good government is effected. Were not this great country already divided into states, that division must be made, that each might do for itself what concerns itself directly, and what it can so much better do than a distant authority. Every state again is divided into counties, each to take care of what lies within it's local bounds; each county again into townships or wards, to manage minuter details; and every

[6] *See* 33 U.S.C. § 1313(d)(2).

> ward into farms, to be governed each by it's individual proprietor. Were we directed from Washington when to sow, and when to reap, we should soon want bread. It is by this partition of cares, descending in gradation from general to particular, that the mass of human affairs may be best managed for the good and prosperity of all.

Thomas Jefferson, 1 *The Works of Thomas Jefferson* 113 (Paul Ford ed. 1904).

Similar to the constitutional system of dual federalism, the Clean Water Act commits certain decisions to the states and others to the federal government, in accordance with the inherent institutional advantages of each.[7] *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Energy,* 511 U.S. 700, 704 (1994). The Clean Water Act is also similar to constitutional federalism in that its continued vitality and effectiveness depend on the active participation of an engaged judiciary to police the boundary between the states and the federal government. Such judicial supervision is necessary, lest one government seize

[7] To be sure, one can argue about the efficacy of a particular division of authority that Congress made, or whether a division is inflexible. For example, EPA's backstop authority for TMDL setting is arguably unnecessary because states are better positioned than EPA to develop and interpret data necessary to create water quality standards and TMDLs. Similarly, although Congress gave EPA initial permitting authority, it established a nondiscretionary process whereby the states could obtain that authority. Nevertheless, these debates over how best to implement a cooperative federalism framework do not change the fact that Congress *did* intend to implement the Clean Water Act through such a framework, which the Chesapeake Bay TMDL's arrogation of nonpoint source regulatory authority undoubtedly undercuts.

authority not entrusted to it—authority to which it may be unsuited, if not incompetent, to wield.

The Third Circuit's decision represents an utter failure to engage with and uphold the structural framework of the Clean Water Act. By deferring to EPA's seizure of the states' primary authority to regulate nonpoint source pollution, the Third Circuit dismissed Congress's carefully designed framework for addressing water quality in the nation's navigable waters. As justification for doing so, the court stated that it cannot "conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted." App. 49a (citing *E.I. du Pont de Nemours v. Train*, 430 U.S. 112, 132 (1997)). Had Congress enacted the Clean Water Act for the sole purpose of improving water quality without regard to states' traditional authority over the development and use of land and water resources, perhaps the Third Circuit would be right to authorize EPA's arrogation. But that is not the approach that Congress adopted. *See Rapanos v. United States*, 547 U.S. 715, 755-56 (2006) (plurality op.) ("[C]lean water is not the only purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions.").

Rather, the statute that Congress did in fact enact reserves to the states "the primary responsibilities and rights to prevent, reduce, and eliminate pollution," as well as "to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). And it does so for good reason. As the Framers understood, and as this Court has recognized, decentralized government enjoys several significant advantages over centralized decision making. *Gregory v. Ashcroft*, 501 U.S. 452,

458 (1991). It is "more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* (quoting Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988)).

A. State Implementation Keeps the Clean Water Act Sensitive to the Diverse Needs of a Heterogeneous Society

The Court of Appeals observed that "water pollution in the Chesapeake Bay is a complex problem currently affecting at least 17,000,000 people (with more to come). Any solution to it will result in winners and losers." App. 49a. The Third Circuit apparently believes it obvious that unelected EPA officials should be the ones to determine who those winners and losers will be, as opposed to the locally elected and accountable representatives of those 17,000,000 people. This conclusion is wrong.

The United States is filled with people of varying, diverse preferences, and those differences are often highly pronounced from one geographic region to the next. *See* Michael W. McConnell, *Federalism: Evaluating the Founder's Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987). For a nation as diverse in geography, ideology, and interests as ours, the ability to express and find satisfaction of diverse preferences through state and local government is essential. *See*

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century,* 88 Colum. L. Rev. 1, 9 (1988). A federal government, even one replete with branch offices designated to accommodate local preferences, would be no substitute.[8] Hence, a major purpose of the federalist system's use of decentralized government was to preserve, cater to, and satisfy those diverse tastes to the greatest extent practicable. Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 14 Yale J. on Reg. 1, 13 (1996). Indeed, federalism's ability to achieve that purpose is one of its greatest advantages, making the Clean Water Act's adoption of its principles particularly apt.[9]

---

[8] Merritt, *supra*, at 9 n.44 ("It is unlikely, however, that a unitary government acting through branch offices would ever create as much diversity as a federal system of independent state and local governments. In any unitary organization, the incentives for uniformity are powerful and may overwhelm the desire for diversity. Branch officers chosen by a central government, moreover, are less likely to reflect local preferences than elected officials chosen locally.").

[9] *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1210-11 (1977) ("As a nation we have traditionally favored non-centralized decisions regarding the use and development of the physical environment. This presumption serves utilitarian values because decision making by state and local governments can better reflect geographical variations in preferences for collective goods like environmental quality and similar variations in the costs of providing such goods. Non-centralized decisions also facilitate experimentation with differing governmental policies, and enhance individuals' capacities to satisfy their different tastes in conditions or work and residence by fostering environmental diversity.") (citations omitted).

In contrast, centralized government is not well-suited to the challenges of governing a wide diversity of people and places. Butler & Macey, *supra*, at 50 ("Federal regulators have not been, and never will be, able to acquire and assimilate the enormous amount of information necessary to make optimal regulatory judgments that reflect the technical requirements of particular locations and pollution sources."); *see* Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. Envtl. L. J. 130, 136-37 (2005). For example, the Act's nationally-uniform, technology-based point source controls produce burdens that can be wildly disproportionate to the environmental benefit received, depending on local conditions. Bruce Ackerman et al., *The Uncertain Search for Environmental Quality* 320-27 (1974). It may be that Congress believed the price was worth the environmental benefit. But such significant costs should make one even more reluctant to interpret other provisions of the Act to give less authority to the states and more authority to EPA to issue such costly regulations. This is particularly so where certain provisions of the Act (33 U.S.C. §§ 1329, 1288, 1313(e)) reserve for the states authority that EPA is trying to assert through an expansive reading of a different provision (33 U.S.C. § 1313).

Further, federal regulators have no incentive to craft policies that reflect local preferences, as opposed to the state and local government officials whose continuance in office depends on them. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.9 (1985) (Powell, J., dissenting) (noting the increasing tendency of Congress to be indifferent and even hostile to local preferences). Thus, a TMDL that sets in stone the how, when, and where of a state's

implementation plan hamstrings the ability of state and local governments to cater to their constituents' preferences, industries, and changing geographical and economic conditions. Because EPA is not well-positioned to understand, much less satisfy, local concerns, it is not surprising that the agency would regulate land use indifferent to them.

B. State Implementation Keeps the Clean Water Act Accountable to Democratic Processes

The Third Circuit's approval of EPA's federalization of land use displaces state and local government. One sad outcome of that displacement is the obscuring of political accountability.[10] Political accountability is the 'answerability' of representatives to the represented. D. Bruce La Pierre, *Political Accountability in the National Political Process: The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. Rev. 577, 640 (1985). If an implementation policy bars a particular land use, neither the federal nor state or local government will be wholly to blame. State and local officials will tell their constituents that their hands are tied by federal mandates. For their part, federal officials will counter that a land-use

---

[10] *See New York v. U.S.*, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished . . . . But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decisions. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal legislation.")

permit was denied by a local process in accordance with a state plan. This political hot potato gives politicians precisely what they desire most: freedom from the political consequences of hard political decisions. As such, most of the Bay states spoke out in favor of the Chesapeake Bay TMDL in the Third Circuit. *See* App. 40a n.7 (pointing out that Virginia, Delaware, Maryland, and the District of Columbia all appeared as amici curiae supporting the TMDL). The Chesapeake Bay TMDL relieves them of their duty to make hard, politically costly implementation and land-use decisions in response to the wishes of their constituents. Of course, states are not free to shirk these decisions: "The Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States . . . . Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. U.S.*, 505 U.S. 144, 182 (1992).

C. State Implementation Protects Innovative Competition

Justice Brandeis's conception of the states as little "laboratories," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), may now be a cliché, but the beneficial effect of interstate competition remains as compelling a reason as ever to preserve decentralized policymaking. *See* Henry J. Friendly, *Federalism: A Foreward*, 86 Yale L.J. 1019, 1034 (1977). This Court has often upheld the value of interstate competition as a catalyst for the development of new social, economic, and political

ideas. *F.E.R.C. v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."). Residents dissatisfied with their state's policies can move to another state capable of better providing for their desires and needs. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416, 418 (1956). To increase their tax base, states compete for a share of this mobile citizenry by providing attractive policies, the result being that competition among the states leads to an optimal mix of policies. *See id.*

Federal implementation mandates and land-use planning severely handicap state and local ability to creatively adapt state and local land-use policies for the purpose of attracting and accommodating new citizens and industries. By largely standardizing state implementation and land-use policy across the watershed, the Chesapeake Bay TMDL prevents meaningful intergovernmental competition among those states. This of course does not deny that the affected states retain some measure of discretion in how to achieve the TMDL's goals. But of course, the rub is those goals themselves, which effectively federalize many local land-use decisions. The TMDL therefore unavoidably imposes policies that are relatively more static, inefficient, and unresponsive than they would be in the TMDL's absence.

CONCLUSION

The petition should be granted.

DATED: December, 2015.

Respectfully submitted,

DAMIEN M. SCHIFF
Counsel of Record
JULIO N. COLOMBA
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dms@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation, National Association of Forest Owners, Southeastern Lumber Manufacturers Association, Texas Forestry Association, North Carolina Forestry Association, Louisiana Forestry Association, and Empire State Forest Products Association