No. 15-599

In the Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

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

BRIEF OF THE STATES OF KANSAS, INDIANA, MISSOURI, AND 19 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Clean Water Act is based on a framework of cooperative federalism. It clearly delineates and distinguishes EPA's role in achieving the water quality standards set under the Act from the States' role. EPA has ultimate regulatory authority over discrete "point sources" of pollution, while States retain exclusive authority to regulate "nonpoint sources," such as farmland, construction sites, and urban areas. If point source regulations alone are insufficient to meet water quality standards, "*the total* maximum daily *load*" (TMDL)—which links point- and nonpoint-source limits—must be set at a "*level* necessary to implement the applicable water quality standards." 33 U.S.C. § 1313(d)(1)(C). States have exclusive authority to implement TMDLs.

This case challenges EPA's authority to establish the Chesapeake Bay TMDL. At a cost of tens of billions of dollars to States, the Chesapeake Bay TMDL creates a massive regulatory program that micromanages state and local land-use decisions by setting thousands of sub-total source- and sector-specific pollutant limits. The Third Circuit upheld this unprecedented TMDL based on perceived ambiguity in the statute.

The question presented is whether the Third Circuit erred by deferring to EPA's interpretation of the words "the total maximum daily load," thus permitting EPA to impose complex regulatory requirements that do much more than cap daily levels of total pollutant loading and that displace powers reserved to the States.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The Third Circuit's decision approving the Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorous, and Sediment threatens to substantially diminish States' traditional role in making the land-use decisions necessary to comply with the Clean Water Act's water quality standards. EPA did not simply set "the total maximum daily load" for designated pollutants, it imposed caps on thousands of sources and sectors, including specific limits for nonpoint sources that by tradition—and by statute—have been beyond EPA's reach. If this TMDL is left to stand, other watersheds, including the Mississippi River Basin (which spans 31 States from Canada to the Gulf Coast) could be next.

The *amici curiae* are a geographically diverse group of 22 States—Kansas, Indiana, Missouri, Alabama, Arizona, Arkansas, Colorado, Georgia, Kentucky, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin, and Wyoming—with a common interest in protecting their right to manage their natural resources, including and particularly the lands within their borders. *Amici* States agree that the TMDL must be invalidated because it exceeds EPA's authority, disregards the CWA's framework of cooperative federalism, and raises serious Tenth

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[1] *Amici* States gave timely notice of their intent to file this brief to counsel for the parties. *See* Supreme Court Rule 37.2(a). *Amici* States do not need consent of the parties to file this brief. *See* Supreme Court Rule 37.4.

Amendment concerns by invading States' traditional right to control the land within their borders and relegating States to the role of EPA's agents for implementing EPA's preferred approach to satisfying water quality standards.

SUMMARY OF THE ARGUMENT

The Chesapeake Bay TMDL is the culmination of EPA's decade-long attempt to control exactly how States achieve federal water quality standards under the Clean Water Act (CWA). EPA first sought this expanded TMDL authority through a rule it promulgated in 2000. When Congress prohibited EPA from using its funds to implement the rule, EPA withdrew the rule, acknowledging it needed "significant changes." 68 Fed. Reg. 13,608, 13,612 (Mar. 19, 2003). Undeterred, EPA used the Chesapeake Bay TMDL to implement its expansive view of its TMDL authority.

The Third Circuit upheld the Chesapeake Bay TMDL by deferring to EPA's claim that its authority to set "the total maximum daily load" for certain pollutants included authority to create a sweeping regulatory regime that sets thousands of load limits targeted at specific sources and sectors. That was wrong for two reasons.

First, the decision is contrary to the CWA's plain language and destroys the Act's cooperative federalism framework. Under the Third Circuit's decision EPA is free to micromanage state and local governments' decisions regarding land use and development—quintessential State and local powers Congress expressly reserved for the States.

Second, even if the CWA's TMDL provision could be considered ambiguous, the Third Circuit was wrong to defer to EPA's expansive interpretation of its authority because it raises serious Tenth Amendment concerns. By embracing EPA's expansive interpretation of its authority the Third Circuit allowed EPA to replace States as the ultimate land-use regulators, upending the balance between federal and state authority without any clear congressional authorization, as this Court requires. The economic and political fallout from the Third Circuit's decision will affect state and local governments from coast to coast. The Chesapeake Bay TMDL alone will cost state and local governments, taxpayers, and businesses tens of billions of dollars. The Third Circuit's decision is contrary to our nation's federalist structure and damaging to the economies of States that must now answer to EPA regarding sensitive local land-use decisions.

It is critical that this Court bring EPA back into line with the CWA and avoid the Tenth Amendment issues the Third Circuit's decision creates before EPA locks other States into similar TMDL regimes.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Decision Allows EPA To Trample The Very State Rights Congress Expressly Protected.

The Third Circuit held that EPA's authority to set "the total maximum daily load" allows it to set thousands of sub-total load limits that are allocated to specific sectors and areas. This disregards the plain language of the CWA and the CWA's framework of cooperative federalism, both of which limit EPA's

authority. By deferring to EPA's expansive interpretation of its authority, the decision below allows EPA to dictate specific state and local governments' land-use decisions, upending the traditional federal-state balance Congress sought to preserve. The far-reaching implications of the Third Circuit's decision warrant this Court's review.

A. The Third Circuit's Decision Disregards The Act's Plain Language.

The Third Circuit acknowledged the "intuitive appeal" of reading "total" in "the total maximum daily load" actually to mean "total"—"like the 'total' at the bottom of a restaurant receipt." Pet. App. 23a. But it rejected this commonsense approach. Instead, the court found ambiguity where none existed, based on specious reliance on the Administrative Procedure Act (APA), 5 U.S.C. § 500, *et seq.*, admittedly distinguishable case law, and a fundamental misunderstanding of how the CWA works. Pet. App. 23a–26a.

Nothing in the CWA authorizes EPA to micromanage States' regulation of nonpoint sources the way EPA has done in the Chesapeake Bay TMDL. The context of § 303(d) of the CWA confirms that Congress withheld from EPA the authority EPA asserted in this TMDL. Thus, EPA's request for deference must be rejected at *Chevron* step one. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

1. Under § 303(d), if point-source regulations alone are insufficient to achieve water quality standards, States must set a limit—"the total maximum daily load"—on the amount of certain pollutants that contribute to the water not meeting water quality standards. *See* 33 U.S.C. § 1313(d)(1)(A), (C); *see also* 33 U.S.C. §§ 1311(b)(1)(A), 1314(a)(2). EPA must "either approve or disapprove" a State's identification of "such . . . load." *Id.* § 1313(d)(2). If EPA disapproves any load, EPA must establish the total maximum daily load necessary to achieve water quality standards. *Id.* The conclusion that EPA's authority extends no further is shown by two sets of words in § 303(d).

First, the plain meaning of the five words at the center of this case—"the total maximum daily load"—is that EPA can do nothing more than set an aggregate upper-limit-amount of certain pollutants that a water is allowed to receive each day. The dictionary definition of the terms confirms this; the words "total" "maximum" and "load" mean the "overall" "upper limit" "quantity . . . carried at one time." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1396, 2414, 1325 (1986).

Second, § 303(d) confirms this plain meaning by requiring that "[s]uch *load*" must be "established at a *level* necessary to implement . . . water quality standards." 33 U.S.C. § 1313(d)(1)(C). EPA's own regulations define "load" as an "amount of matter . . . introduced into a receiving water." 40 C.F.R. § 130.2(e). So EPA is limited to setting at a certain "*level*" "*the total*" "*load*," *i.e.*, the total *amount*, of certain pollutants an impaired water may receive. Congress's use of the definite article "the" combined with the use of only

singular nouns reinforces the plain meaning of the statute. *See Rapanos v. United States*, 547 U.S. 715, 732 (2006).

The Third Circuit's rejection of the plain meaning of § 303(d) creates tension with other courts' decisions that have adhered to the statute's plain meaning. The Ninth Circuit has described a TMDL as defining "'*the specified maximum amount* of a pollutant which can be discharged or "loaded" into the waters at issue *from all combined sources*.'" *Pronsolino v. Nastri*, 291 F.3d 1123, 1128 (9th Cir. 2002) (quoting *Dioxin / Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995)) (emphasis added). The Eleventh Circuit has called TMDLs a "*set measure* or *prescribed maximum quantity* of a particular pollutant in a given waterbody." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1030 (11th Cir. 2002) (emphasis added). *See also Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 213 (D.D.C. 2011) ("TMDLs . . . specify the *absolute amount* of particular pollutants the entire water body can take on while still satisfying all water quality standards." (emphasis added)).

The Third Circuit's tortured reasoning that the terms "total," "load," and "level"—all in the singular form—mean something other than a single aggregate limit on particular pollutants for impaired waters fundamentally alters the statute Congress enacted. *See Friends of the Earth, Inc. v. Envtl. Protection Agency*, 446 F.3d 140, 146 (D.C. Cir. 2006) (rejecting EPA's argument that the term "'daily' means something other than daily"). Section 303(d)'s plain language cannot possibly support EPA's breathtaking assertion of

authority to set thousands of *sub*-total loads that target nonpoint sources.

2. But EPA did not stop there; it used the Chesapeake Bay TMDL to extend its authority not just beyond "total load," but beyond the geographic limits permitted in the statute. EPA purports to regulate "upstream" States even though no part of the Chesapeake Bay is located within those States. But the Act provides that "[e]ach State shall establish . . . the total maximum daily load," 33 U.S.C. § 1313(d)(1)(C), for impaired "waters *within its boundaries*," *id.* § 1313(d)(1)(A) (emphasis added). If EPA disapproves a State's identification of impaired waters and establishment of a TMDL, it may step in and "identify *such waters in such State* and establish *such loads for such waters*" at a level necessary to achieve water quality standards. *Id.* § 1313(d)(2). EPA has no authority to impose a TMDL on a State for waters not within that State's boundaries. *See id.* §§ 1313(d)(1), (A), (C), 1329(g). Yet EPA did exactly that to New York, Pennsylvania, and West Virginia. Section 303(d) precludes EPA's expansive interpretation of its authority.

3. The Third Circuit's decision, which allows EPA to ride roughshod over the States and has no support in the statute's text, reveals a fundamental misunderstanding of how § 303(d) operates. For example, the court concluded that interpreting "total" actually to mean "total" would make the word "redundant" because if the term's plain meaning were applied, "maximum daily load" would mean the same thing as "total maximum daily load." Pet. App. 23a. Similarly, the Third Circuit observed that because the

Act requires EPA to consider "'seasonal variations and a margin of safety'" it would be "strange" to "command the agency to excise them from its final product." Pet. App. 25a (quoting 33 U.S.C. § 1313(d)(1)(C)). Not so. The Act recognizes that a TMDL is a number that must be "calculat[ed]" based on numerous constituent parts. *See* 33 U.S.C. § 1313(d)(1)(C); *see also* 40 C.F.R. § 130.2(i). By using "total" Congress made clear that although EPA could calculate the "total" by adding up the constituent parts of the TMDL, it could only set the aggregate load limit and could not micromanage how States achieved that goal.

Contrary to the Third Circuit's conclusion, the word "total" is *not* "susceptible to multiple interpretations." Pet. App. 26a. The examples the Third Circuit gives to support its conclusion are inapt. *See* Pet. App. 23a–24a. And while the APA requires agencies to explain the rules they make, *see* 5 U.S.C. § 553, it by no means expands an agency's regulatory authority, as the Third Circuit implied. *See* Pet. App. 25a.

B. The Third Circuit's Decision Guts The CWA's Cooperative Federalism Framework.

By rejecting § 303(d)'s plain meaning, the Third Circuit upends the CWA's cooperative federalism structure. Conscious of the delicate balance between state and federal interests involved in regulating water pollution, Congress structured the CWA on a framework of cooperative federalism. TMDLs are "central" to the CWA's cooperative federalism framework because they "tie together" point source pollution, over which EPA has ultimate authority, and nonpoint source pollution, over which the States have exclusive authority. *See Meiberg*, 296 F.3d at 1025–26

(internal quotation marks omitted). The Third Circuit's decision eviscerates this essential division of authority in the CWA. There is "nothing 'cooperative'" about the TMDL program as the Third Circuit has construed it. *See FERC v. Mississippi*, 456 U.S. 742, 783 (1982) (O'Connor, J., concurring in the judgment and dissenting in part).

1. "Even under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation," which "must account for both the specific context in which language is used and the broader context of the statute as a whole." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (internal quotation marks and ellipsis omitted). An "agency interpretation that is inconsistent with the design and structure of the statute as a whole"—like EPA's interpretation here—"does not merit deference." *Id.* (internal quotation marks, citation, and alteration omitted).

The CWA leaves States in charge of setting water quality standards, listing impaired waters, and establishing TMDLs in the first instance. *See generally* 33 U.S.C. § 1313(d). If EPA determines a State's action (or inaction) is inconsistent with the Act, EPA can step in and set its own standards, including establishing "the total maximum daily load" for certain pollutants in impaired waters. *See generally id.* But that is where EPA's involvement ends; only States have authority to decide how to achieve the TMDL. *See Meiburg*, 296 F.3d at 1031; *Pronsolino*, 291 F.3d at 1128; *see also Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005).

Throughout the Act, Congress carefully limited EPA's authority in this way to preserve and protect States' traditional regulatory authority. Congress started by breaking down sources of pollution into two groups: point sources and nonpoint sources. Point sources are "any discernible, confined and discrete conveyance[s] . . . from which pollutants are or may be discharged," such as a pipe or tunnel. 33 U.S.C. § 1362(14). Nonpoint sources are "non-discrete sources" such as "sediment run-off" from agriculture, timber harvesting, construction, and erosion. *Defenders of Wildlife*, 415 F.3d at 1124; *Pronsolino*, 291 F.3d at 1126; *see also* 33 U.S.C. § 1329(h).

EPA has ultimate authority for regulating pollution from point sources through the National Pollutant Discharge Elimination System (NPDES). *See* 33 U.S.C. §§ 1311(a), 1342; *Arkansas v. Oklahoma*, 503 U.S. 91, 101–02 (1992). But the CWA reserves to States exclusive authority to regulate nonpoint sources. *See* 33 U.S.C. §§ 1313(d), (e), 1329; *Defenders of Wildlife*, 415 F.3d at 1124; *Meiburg*, 296 F.3d at 1026. EPA may attempt to influence States' implementation plans through incentive-based programs, but that is all. *See* 33 U.S.C. §§ 1288(f), 1313(e)(2), 1329(e), (g). This division of authority implements Congress's "policy . . . to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

2. The Third Circuit's decision dismantles Congress's carefully-drawn balance between state and federal authority to regulate water pollution. And the

court appears to have done so based on its own policy preferences, reasoning that allowing EPA to micromanage States' regulation of nonpoint sources is a "commonsense first step to achieve the target water quality." Pet. App. 28a. There is no doubt that it would be easier for EPA to implement its preferred policies if it had plenary power to limit water pollution from all sources. But Congress rejected that approach by leaving to the States sole authority to regulate nonpoint sources.

Indeed, § 319 of the CWA specifically leaves to the States the very authority EPA seeks in the Chesapeake Bay TMDL. 33 U.S.C. § 1329. Section 319 charges state and local governments with regulating nonpoint sources, and specifically the nonpoint sources that would be subject to a TMDL—those that must be controlled in order to meet water quality standards. *See* 33 U.S.C. § 1329(a)(1), (b)(2); *see also id.* § 1288(b). Unlike in other areas, EPA has no "backstop" authority to establish its own nonpoint source management plan. *See id.* §§ 1288(b), 1313(e), 1329(d). The Third Circuit's decision gives EPA the precise authority Congress withheld from EPA, thus fundamentally undermining critical aspects of Congress's cooperative federalism design. That the States in the Chesapeake Bay watershed have agreed to EPA's overreach does not cure EPA's unlawful action. It "makes no difference to the *statute's* stated purpose of preserving States' 'responsibilities and rights, § 1251(b), that some States wish to unburden themselves of them." *Rapanos*, 547 U.S. at 737 n.8 (plurality opinion); *accord New York v. United States*, 505 U.S. 144, 182 (1992).

The importance of confining EPA to the role Congress intended for it, and the tension the Third Circuit's decision creates with other courts' decisions, warrant this Court's immediate review.

II. The Third Circuit's Decision Raises Serious Tenth Amendment Concerns And Allows EPA To Alter The Federal-State Balance Of Authority Without A Clear Statement From Congress.

The Third Circuit's decision ignores the Ninth Circuit's caution that a TMDL "specif[ying] the load of pollutants that may be received from particular parcels of land or describ[ing] what measures the state should take to implement the TMDL" would raise serious federalism concerns. *Pronsolino*, 291 F.3d at 1140. The Chesapeake Bay TMDL does both. And it reinforces EPA's pollution-control preferences by threatening even more coercive allocations and backstop measures. *See, e.g.*, TMDL 7-11 to 7-12; 8-30 to 8-31.[2]

Although the Third Circuit acknowledged that the Chesapeake Bay TMDL will require "some land . . . to be used differently from the way it is now," it disregarded the serious federalism concerns this observation raises—that EPA could usurp States' traditional authority to make their own land-use decisions, and without any clear congressional authorization to do so. *See* Pet. App. 38a.

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[2] The TMDL and its appendices are available at http://www2.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document, and reproduced at JA1106 of the appellants' joint appendix in the court of appeals.

A. The Third Circuit's Decision Opens The Door For EPA To Dictate State And Local Governments' Land-Use Decisions From Coast To Coast.

The Chesapeake Bay TMDL includes nearly 700 allocations for agricultural, forestry, urban, and other *nonpoint* sources. *See* TMDL App. R, R-1 (Land Based LAs). These allocations dictate the amount of pollution that each of the Chesapeake Bay's 92 impaired segments can receive from each of the nonpoint sources. *See id.* This vast regulatory regime will cost States tens of billions of dollars to implement. *See* Chesapeake Bay Watershed Blue Ribbon Finance Panel, Saving a National Treasure: Financing the Cleanup of the Chesapeake Bay, at 8 (Oct. 2004), *available at* http://www.chesapeakebay.net/content/publications/cbp_12881.pdf (last visited Dec. 8, 2015).

The Third Circuit's approval of the Chesapeake Bay TMDL has implications far beyond the Chesapeake Bay watershed because it opens the door for EPA to dictate land-use management decisions across the country. Of particular concern to *amici* States is the Mississippi River Basin, which spans 31 States from Canada to the Gulf of Mexico and covers more than 1,245,000 square miles—41% of the contiguous United States. Mississippi-Atchafalaya River Basin (MARB), Mississippi River Gulf of Mexico Watershed Nutrient Task Force, http://www.epa.gov/ms-htf/mississippiatchafalaya-river-basin-marb. Roughly 60% of that land is used for agriculture, a use which EPA has targeted for micromanagement in the Chesapeake Bay TMDL. *See* National Research Council, *Mississippi River Water Quality and the Clean Water Act: Progress, Challenges,*

& Opportunities 22, 26 (2008), *available at* http://www.nap.edu/catalog/12051.html (last visited Dec. 8, 2015). If applied to the Mississippi River Basin, the authority EPA claims in this case would allow it to make land-use decisions for cropland and pasture that "produces 92% of the nation's agricultural exports, 78% of the world's exports in feed grains and soybeans, and most of the livestock and hogs produced nationally." Jerry M. Hay, *Mississippi River: Historic Sites and Interesting Places* 119 (2013). The similarities between the Chesapeake Bay and the Mississippi River Basin are striking.

The Chesapeake Bay is "an interrelated and interstate water system . . . that is impaired by pollutant loadings from sources in seven different jurisdictions." TMDL 1-17. The primary source of the "pollutants of concern for [the Chesapeake Bay] TMDL are . . . nitrogen[,] phosphorous[,] and sediment." TMDL 2-7. The largest single source of these pollutants is agriculture, TMDL 4-29, which EPA has little authority to regulate directly absent its expansive interpretation of its TMDL authority.

EPA used each of these characteristics to justify its authority to establish the Chesapeake Bay TMDL and it could employ the same reasoning with respect to the Mississippi River Basin. The Basin covers a considerably larger geographic area than the Bay, and is polluted mainly by nutrients and sediment from agricultural land, which comprises a greater percentage of the Basin's watershed than the Bay's (60% percent versus 22%). *See* National Research Council, *Mississippi River Water Quality and the Clean Water Act* 23; TMDL 4-29.

EPA has acknowledged that States are actively working to address water pollution issues in the Mississippi River. *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 231 (5th Cir. 2015). But some interests are pressuring EPA to take more aggressive action in the Basin. *See id.* Although EPA has resisted the pressure thus far, *see id.*, if the Chesapeake Bay TMDL is approved it likely is only a matter of time before EPA targets the Mississippi River Basin.

The Chesapeake Bay TMDL has laid the groundwork for EPA to create a nationwide Mississippi River Basin TMDL that could micromanage how 41% of the land in the United States is used. EPA could set not only an aggregate cap for pollutants the Mississippi River receives, it also could divide the limit among individual point sources and, perhaps more importantly, specific nonpoint source sectors.

The negative consequences of EPA acting as a national zoning board with control over such a substantial and important part of the U.S. economy cannot be overstated. Agricultural products from the Mississippi River Basin are estimated to be worth $54 billion dollars annually. Joe S. Whitworth, *Quantified: Redefining Conservation for the Next Economy* 158 (2015). Because farmland makes up the majority of the Basin, the billions of dollars in implementation costs due to source- and sector-specific EPA-mandated load reductions would virtually guarantee that significant tracts of agricultural land would be taken out of production. *See* TMDL ES-2.

EPA could control—and potentially debilitate—an area where more than half the goods and services consumed by United States citizens are produced, all

under the guise of setting "the total maximum daily load" for pollutants entering the Mississippi River. America's Watershed Initiative, *Mississippi River Watershed Report Card* 2 (2015), *available at* http://americaswater.wpengine.com/wp-content/uploads/2015/10/FINAL-Report-Card-2015_print-ltr-size.pdf. This would turn the traditional federal-state relationship on its head. The CWA explicitly sought to protect States from this kind of federal overreach, an overreach which, if allowed, would raise serious Tenth Amendment concerns, emboldening EPA to pick the economic winners and losers in an area that Congress explicitly made off limits to EPA.

B. The Third Circuit's Decision Raises Serious Tenth Amendment Concerns.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. The Tenth Amendment reflects the system of "'dual sovereignty'" the Constitution established, *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)), and the CWA intended to preserve through cooperative federalism, *see* 33 U.S.C. § 1251(b). Thus, States have independence and autonomy "within their proper sphere of authority," *id.* at 928, and the federal government is prohibited from "compelling the States to implement, by legislation or executive action, federal regulatory programs," *id.* at 925.

The Chesapeake Bay TMDL encroaches on States' traditional authority to regulate land use within their borders, conscripts States to be EPA's agents for implementing EPA's preferred approach to nonpoint

source pollution control, and allows EPA to evade political and financial accountability for its policy choices by shifting those burdens to state and local officials. That some or even all Chesapeake Bay watershed States may have acquiesced in EPA's extreme overreach does not validate EPA's actions. *See New York*, 505 U.S. at 182 ("Where Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

The Third Circuit should have "read the statute as written to avoid the significant constitutional and federalism questions raised by [EPA's] interpretation," and should have "reject[ed its] request for administrative deference." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). Instead, it allowed EPA to rewrite a crucial provision of the CWA in a way that substantially affects States' rights.

1. Contrary to the Third Circuit's attempt to downplay the effect of EPA's stunning overreach, the Chesapeake Bay TMDL will not just "obliquely" affect land use regulations. Pet. App. 37a. Rather it allows EPA to appropriate "quintessential state and local power" to determine how best to manage the lands within their borders to comply with federal water quality regulations. *Rapanos*, 547 U.S. at 738 (plurality opinion); *see also FERC*, 456 U.S. at 767 n.30 ("[R]egulation of land use is perhaps the quintessential state activity.").

For example, EPA could require state and local governments to limit or prohibit the use of fertilizer on agricultural lands, stop production on lands used for

agriculture or forestry, halt construction or development, or rezone certain lands altogether. As the Third Circuit acknowledged, there are "winners and losers" under the Chesapeake Bay TMDL. Pet. App. 49a. That is a given under any regulatory regime, but traditionally it has been the States' job to balance local costs and benefits and select the most appropriate course of action—not EPA and certainly not federal courts. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 744 (1995) (noting that "land use . . . is an area traditionally regulated by the States rather than by Congress, and that land use regulation is one of the historic powers of the States") (Thomas, J., dissenting) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).

2. The manner in which EPA invades States' traditional authority—by turning States into federal agents for implementing EPA's preferred strategy for reducing water pollution—is particularly offensive to the Tenth Amendment. Specifically, EPA claims the power to assign daily pollution limitations on specific point and nonpoint sources, including land used for agriculture, forestry, and urban centers. *See* TMDL App. R, R-1. The CWA gives EPA's TMDLs "operational force," *Pronsolino*, 291 F.3d at 1128, by requiring States to incorporate the TMDLs into their continuing planning processes, 33 U.S.C. § 1313(e). And if that were not enough, to make sure States do exactly as EPA says, the Chesapeake Bay TMDL requires States to give "reasonable assurances" that they will implement EPA's TMDL allocations, sets deadlines for States to comply, and enforces these requirements with threats of tighter and more targeted allocations, even on nonpoint sources. *See* TMDL 7-1 to 7-3; TMDL 8-30

to 8-31. But Congress cannot "require the States to govern according to [its] instructions." *New York*, 505 U.S. at 163; *see also id.* at 166. Nor may Congress "'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). Yet the Third Circuit's decision allows EPA to do exactly that—require States to zone specific parcels of land to permit or prohibit certain uses.

3. As a result, it will be the state and local officials who "bear the brunt of public disapproval" of EPA's decisions "while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision[s]." *See New York*, 505 U.S. at 168–69. EPA's claim to coercive administrative power without political accountability is anathema to our federalist system of government, eliminates "one of the Constitution's structural protections of liberty," and certainly is not entitled to *Chevron* deference. *See Printz*, 521 U.S. at 920–21; *accord Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)*; U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838–43 (1995) (Kennedy, J., concurring).

4. These structural federalism costs bring with them financial burdens on state and local governments that come with losing the flexibility to decide how to make the best economic use of their resources. Inherent in any allocation of pollution limits is a delicate balance of local priorities, local benefits, and local burdens. The CWA, general federalism principles, and the dynamics of local economies demand that pollution control implementation plans be placed in the hands of State

authorities that are familiar with and sensitive to local needs, and have a direct interest in responding appropriately.

The Third Circuit could have avoided creating all of these issues by taking the statute's plain language at face value and rejecting EPA's plea for deference. Indeed, this Court's precedents demand as much and call for this Court's review. *See, e.g.*, *Rapanos*, 547 U.S. at 738 (plurality opinion); *SWANCC*, 531 U.S. at 174.

C. The Third Circuit's Decision Upends The Traditional Federal-State Balance Without A Clear Statement From Congress, As This Court's Precedents Require.

Because EPA's "administrative interpretation" of the CWA's TMDL provision "alters the federal-state framework by permitting federal encroachment on state power," this Court requires a "clear indication that Congress intended that result" in order to avoid "needlessly reach[ing] constitutional issues." *See SWANCC*, 531 U.S. at 172. Even if the TMDL provision were ambiguous, as the Third Circuit incorrectly held, it could not support the Chesapeake Bay TMDL's "enormous and transformative expansion in EPA's regulatory authority" at the States' expense. *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444. The Third Circuit was wrong to defer to EPA's interpretation of its authority under the CWA's TMDL provision, which is critical to the Act's implementation. *See id.*

This Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120,

160 (2000)); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). And if Congress intends to "alter the 'usual constitutional balance of federal and state powers,'" as the Chesapeake Bay TMDL does, Congress "must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory*, 501 U.S. at 460–61 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

Far from clearly authorizing EPA to invade States' traditional authority to regulate land use within their borders, Congress intended to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). Yet the Chesapeake Bay TMDL "'result[s] in a significant impingement of the States' traditional and primary power over land and water use.'" *Rapanos*, 547 U.S. at 738 (plurality opinion) (quoting *SWANCC*, 531 U.S. at 174). The broad authority EPA has asserted, particularly over nonpoint sources of pollution, empowers it to "function as a *de facto* regulator of immense stretches of intrastate land." *Id.* EPA's substantial "'intrusion into traditional state authority'" requires a "clear and manifest statement from Congress," *id.*, but any such indication of congressional intent is utterly absent here.

If anything, as discussed above, Congress has clearly rejected EPA's attempt to redefine its TMDL authority—both in the text and structure of the CWA, as well as when it prohibited EPA from using its funds to implement its proposed TMDL overhaul in July 2000. *See* 65 Fed. Reg. 43,591 (July 13, 2000) (proposed

rule); Pub. L. 106-246, 114 Stat. 511, 567 (funding restriction). It is important that this Court grant review to avoid the serious federalism concerns the Third Circuit's decision creates.

* * *

The Third Circuit's decision allows EPA to seize expansive authority at the expense of States' traditional control over land management decisions, without a clear statement from Congress approving or authorizing such a disruption of the federal-state balance. Limiting EPA's authority to setting "the total maximum daily load" would have given effect to the plain language and structure of the statute and would have avoided the difficult constitutional questions the Chesapeake Bay TMDL raises. *See SWANCC*, 531 U.S. at 174. Instead, by improperly deferring to EPA's expansive interpretation of its authority, the Third Circuit created serious *Chevron* and federalism issues that warrant this Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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