No. 18-609

In the

Supreme Court of the United States

JOSEPH DAVID ROBERTSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Does the Army Corps of Engineers' interpretation of the Clean Water Act as extending to ponds more than forty miles away from navigable waterways exceed the bounds of Congress's Commerce Clause powers?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental Commerce Clause and federalism principles implicated by this case. The Center has previously appeared before this Court as *amicus curiae* in such related cases as *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"); and *United States v. Morrison*, 529 U.S. 598 (2000).

SUMMARY OF ARGUMENT

On three occasions, this Court has suggested that broad interpretations of the Clean Water Act implicate constitutional concerns over the outer limits of Congress's Commerce Clause powers. Importantly, in *SWANCC*, this Court noted that the U.S. Army Corps of Engineers' interpretation of the Clean Water Act as extending to non-navigable puddles visited by migratory birds raised serious concerns about "whether Congress could exercise such authority consistent with the Commerce Clause…." 531 U.S. at 163. This Court held that the Army Corps of Engineers had in-

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

correctly interpreted the powers Congress had delegated to it, however, and therefore never reached the constitutional question. *Id.* But the cautionary red flag raised by this Court appears to have had no effect on either the EPA or the Army Corps of Engineers, which have both continued to interpret their powers under the Clean Water Air more broadly than Congress's power under the Commerce Clause permits. This case presents the opportunity for this Court to definitively reject the notion that the Commerce Clause can be read so broadly has to reach wholly intrastate conduct involving non-navigable waters.

REASONS FOR GRANTING THE WRIT

I. The Army Corps of Engineers' Interpretation of the Clean Water Act's Jurisdictional Reach Far Exceeds Congress's Power to Regulate Commerce Among the States, As Originally Conceived.

As originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade. *See, e.g., Corfield v. Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach this Court, it was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice

Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); *see also Corfield*, 6 F. CAS., at 550 ("Commerce ... among the several states … must include all the means by which it can be carried on, [including] … passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S., at 194 (quoted in *Morrison*, 529 U.S. at 616 n.7). In other words, for Chief Justice Marshall and his colleagues, the Commerce Clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce among the states included the power to regulate wholly intrastate water ponds more than forty miles from any navigable waterway, therefore, would have been completely foreign to them.

This originally narrow understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *United States v. E.C. Knight*, 156 U.S. 1, 12 (1895), because "Commerce succeeds to manufacture, and is not a part of it." "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce ...." *Id.* at 13; *see also Kidd v. Pearson*, 128

U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail of liquor, as not subject to Congress's power to regulate interstate commerce); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture (as well as local land use), was part the police powers reserved to the States, not part of the power over interstate commerce delegated to Congress. *See, e.g., E.C. Knight*, 156 U.S., at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons*, 22 U.S. (9 Wheat.) at 210; *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.) at 599; *Mobile Co. v. Kimball*, 102 U.S. 691 (1880); *Bowman v. Railway Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891); *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the states and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government ....

156 U.S. at 13; *see also Carter v. Carter Coal Co.,* 298 U.S. 238, 301 (1936) (quoting *E.C. Knight); Garcia v. San Antonio Metro. Trans. Auth.,* 469 U.S., 528, 572 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S. at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*); *id.* at 586 (Thomas, J., concurring) ("the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture"). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "considerable influence" on commerce:

> The object of [state] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation [reserved to the States] .... No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Gibbons, 22 U.S. at 203; *see also id.* at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one .... The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted in Lopez, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical purposes we would have a completely centralized government.'" 514 U.S. at 555 (quoting *Schechter Poultry*, 295 U.S. at 548).

As should be obvious, the interpretation of the Clean Water Act at issue here is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution.

II. Even Under the Expansive View of the Commerce Power That This Court Has Previously Approved, The Corps' Interpretation Is Excessive.

To be sure, this Court upheld a vastly expanded exercise of power under the Commerce Clause three-quarters of a century ago in *Wickard v. Filburn*, 317 U.S. 111 (1942). In that case, this Court allowed federal power to reach well beyond the regulation of interstate commerce, to encompass as well the power to legislate on *intra*state matters so long as there was a "substantial economic effect on interstate commerce." *Id.* at 125. But even under that broad reading, which already presses (indeed, exceeds) constitutional limits, the Corps' claim here is extremely problematic. As noted in the petition, the ponds at issue here are more than forty miles from any navigable water, and hence more than forty miles from any plausible connection to interstate commerce.

Instead, as the Clean Water Act itself makes clear, Congress's purpose was only tangentially related to interstate commerce. It was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Federal Water Pollution Control Act Amendments of 1972, Pub. L. No 92-500 § 101(a), 86 Stat. 816, 816 (1972). That is a police power purpose that, only in extreme contexts, might qualify as a "necessary and proper" means of aiding the navigability of the nation's interstate waterways, and hence of furthering Congress's enumerated power to regulate commerce among the states. But when the purpose is applied in contexts far removed from navigable waters, as the Corps has done here, the police power goal can no longer even plausibly be viewed as a means to

a Commerce Clause end. Instead, it serves as a police power end in and of itself. Because Congress itself could not use its discretionary power over means in furtherance of ends not granted, then *a fortiorari* a regulatory agency cannot do so by its own expansive regulations. As Chief Justice Marshall noted in *M'Culloch v. Maryland*: "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the [national] government; it would become the painful duty of this tribunal … to say, that such an act was not the law of the land." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819); *see also Carter Coal*, 298 U.S. at 317 (Hughes, C.J., separate opinion) ("Congress may not use this protective [commerce] authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly").

This Court has never directly addressed the constitutionality of the Clean Water Act as it has been extended by regulation to reach minor waters far removed from navigable interstate waterways. But it has raised concerns on multiple occasions about whether Congress could authorize such regulations without exceeding its Commerce power.

First, in *Solid Waste Agency v. Army Corps of Engineers* (*SWANCC*), 531 U.S. 159 (2001), this Court invalidated the Corps' claim to jurisdiction over sand and gravel pits that were used as a habitat by migratory birds. *Id.* at 167. This Court noted in the case that the Corps' interpretation raised the constitutional question of "whether Congress could exercise such authority consistent with the Commerce Clause." *Id.* at

162. It also found that the Corps' claim raised "significant constitutional questions" because it "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174. But it nevertheless invalidated the Corps' migratory bird rule on statutory grounds.

Second, the plurality opinion by Justice Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006), joined by Chief Justice Roberts and Justices Thomas, concluded that the Act did not extend to "wetlands with only an intermittant, physically remote hydrologic connection," but rather extended to "*only* those wetlands with a continuous connection" to bodies that are 'waters of the United States' in their own right." *Rapanos*, at 742 (Scalia, J., plurality) (emphasis in original). Justice Scalia reached that conclusion in part because, as in *SWANCC*, "the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power." *Id.* at 738. Justice Kennedy likewise acknowledged in his opinion concurring in the judgment that "a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 121 S. Ct., at 675). In contrast, he noted, "the Corps has construed the term 'waters of the United States' to include not only waters *susceptible to use in interstate commerce*—the traditional understanding of the term 'navigable waters of the United States,' but also tributaries of those waters and, of particular relevance here, wetlands adjacent to those waters or their tributaries." *Id.* at 760 (emphasis added).

Most recently, in *Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016), Justice Kennedy, joined by Justices Thomas and Alito, wrote a separate concurrence to observe that "the reach and systemic consequences of the Clean Water Act remain a cause for concern." *Id*. at 1816. Justice Kennedy further warned that the Act "raises troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Id.*

Given the criminal sentence imposed on Mr. Robertson by the courts below, this case presents a particularly salient opportunity for this Court to resolve definitely whether the Corps' expansive interpretation of the Clean Water Act exceeds Congress's power to regulate commerce among the states.

CONCLUSION

The federal government undoubtedly has broad authority under the Commerce Clause, yet that authority has limits. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2587 (2012); *Morrison*, 529 U.S. at 625-26; *Lopez*, 514 U.S. at 560. Indeed, the Court in *Gibbons* explained, "[T]he enlightened patriots who framed our constitution and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." 22 U.S. (9 Wheat.) at 188. So the power delegated to Congress to regulate commerce among the states must involve activity that is both interstate and commerce. As James Madison warned, and as this Court recognized in *NFIB*, expansive interpretations of the Commerce power would "permit[] Congress to reach beyond the natural extent of its authority, 'everywhere extending the sphere of its activity and drawing all

power into its impetuous vortex.'" *NFIB*, 132 S. Ct. at 2589 (citing The Federalist No. 48, at 309 (J. Madison, Rossiter ed.)). At a minimum, the navigable waters of the United States should have a clear connection to interstate commerce.

Because the Corps' interpretation of the Clean Water Act, upheld by the court below, extends well beyond the power actually delegated to Congress to regulate commerce among the states, the petition for writ of certiorari should be granted, and the decision of the Ninth Circuit below should be reversed.

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