No. _____

In The
Supreme Court of the United States

WHITE OAK REALTY, LLC, AND CITRUS REALTY, LLC,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL THOMAS P. BOSTICK, UNITED STATES ARMY CHIEF OF ENGINEERS, IN HIS OFFICIAL CAPACITY; MAJOR GENERAL JOHN W. PEABODY, COMMANDER, MISSISSIPPI VALLEY DIVISION, UNITED STATES ARMY CORPS OF ENGINEERS, IN HIS OFFICIAL CAPACITY; AND COLONEL RICHARD L. HANSEN, COMMANDER, NEW ORLEANS DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, IN HIS OFFICIAL CAPACITY,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a statute directs an agency to carry out and pay for a federal project for public benefit without granting express authority to regulate private parties, may agency action shifting project costs onto private parties be upheld by application of *Chevron* deference?

2. Does the unconstitutional conditions doctrine to protect private property rights apply in the context of federal government contracts and subcontracts?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners White Oak Realty, LLC, and Citrus Realty LLC are the plaintiffs in this case and were the appellants in the Fifth Circuit. Neither plaintiff has any parent corporation or any publicly held company that owns 10% or more of its stock.

Defendants United States Army Corps of Engineers; Thomas P. Bostick, Lieutenant General, United States Army Chief of Engineers, in his official capacity; John Peabody, Major General, Commander, Mississippi Valley Division, United States Army Corps of Engineers, in his official capacity; and Richard L. Hansen, Colonel, Commander, New Orleans District, United States Army Corps of Engineers, in his official capacity, were the appellees in the Fifth Circuit.

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CONCISE STATEMENT OF JURISDICTION

On September 14, 2016, and March 28, 2017, the District Court granted summary judgment to Defendants. Those decisions were appealed to the Fifth Circuit Court of Appeals, which affirmed the District Court by order dated July 11, 2018. On September 11, 2018, the Court of Appeals denied Petitioners' petition for rehearing. Judgment was entered by the Court of Appeals on September 19, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS

This case implicates the following statutory provisions, which have been set forth in full in the Appendix hereto: certain provisions of the Water Resources Development Act including 33 U.S.C. §§ 2283 (effective November 8, 2007 to June 9, 2014), 2283 (effective December 6, 2016 to present), 2213, 2219, and 2241; and 42 U.S.C. § 1962d-5b.

This case also implicates the Fifth Amendment to the U.S. Constitution, which provides, in pertinent

part, that "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case arises out of a dispute between the U.S. Army Corps of Engineers (the "Corps") and Petitioners over responsibility for mitigating for the removal of certain habitat from Petitioners' property, which removal the Corps contends may be an impact of a water resources development project governed by the Water Resources Development Act ("WRDA"), codified at 33 U.S.C. § 2201, *et seq*. Petitioners filed claims described below under the Administrative Procedure Act and pursuant to the Fifth Amendment of the United States Constitution in the U.S. District Court for the Eastern District of Louisiana.

In the aftermath of Hurricanes Katrina and Rita, Congress authorized and directed the Corps to repair and improve the levee system in and around New Orleans, pursuant to WRDA. 2a. To effectuate this directive, the Corps needed to acquire large amounts of clay material ("borrow") that could be used to construct and enhance levees. 2a. The Corps sought to make available borrow from private landowners in the region, including Petitioners, for purchase by Corps contractors. 3a. WRDA is detailed in its planning and funding mandates, but does not create or authorize a regulatory scheme directing how landowners in Louisiana were to participate in the levee construction.

Petitioners' property is "Idlewild," which is a single tract of land, but for purposes of providing borrow to the Corps was notionally (though not

legally) divided into several tracts. Map 161A. Idlewild Stage 1 did not contain bottomland hardwood forests and Petitioners mined Idlewild Stage 1 for borrow material and sold it to Corps contractors. 19a. Idlewild Stage 2 consisted of wetland[1] areas surrounded by large portions of what the Corps identified as "upland bottomland hardwood forest," also referred to by the Corps as "upland BLH" or "non-jurisdictional BLH" in recognition of the fact that the Corps lacked Clean Water Act Section 404 jurisdiction over such upland areas. 19a. Idlewild Stage 3—divided from the rest of the property by a non-federal levee—consisted of marsh habitat and mature bottomland hardwood forest habitat which Petitioners offered to the Corps to satisfy the mitigation obligations. 4a.

Idlewild Stages 1 and 2 were seen as advantageous sources of borrow given their proximity to Corps levee projects:[2] the non-federal levee crossing the Idlewild property was to be raised as part of the Corps's levee improvement projects, and a federal levee scheduled for improvements was less than a mile away. 161a. Both projects would require borrow material.

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[1] This case does not involve any impacts to wetlands.

[2] Transportation cost, which is based on distance, is a significant portion of the cost of borrow. The Corps originally sought to acquire Idlewild in order to mine the borrow itself. To prevent acquisition, Petitioners abandoned their development plans for Idlewild—which also would have necessitated clearing the upland BLH from Idlewild Stage 2—and sought to qualify it as a private ("contractor-furnished") source of borrow. 3a. The Corps repeatedly told Petitioners that they were "free to utilize their property in any manner they choose." 16a, 166a.

The Corps approved Idlewild Stage 2 as a contractor-furnished borrow source on October 29, 2010, and notified Petitioners that they were required to mitigate for impacts to non-jurisdictional BLH located on the site before Petitioners could excavate borrow for sale to Corps contractors. 4a. This approval was supported by Individual Environmental Report ("IER") #31.[3] (Excerpts provided at 179a-195a). In pre-approving Idlewild Stage 2, the Corps stated: that credits for BLH impacts may be purchased from "an appropriate mitigation bank within the watershed as [sic] the impacts,"), 187a; that mitigation for "unavoidable impacts to non-jurisdictional BLH" would be discussed "under a separate IER," *id.*; and that the Corps is engaged "in an effort to complete mitigation work and construct mitigation projects expeditiously." 191a-194a. However, there were no mitigation banks offering credits for non-jurisdictional BLH; only wetland BLH credits —an out-of-kind and much more expensive habitat type—were available. 4a.

In September 2012, Petitioners removed the upland BLH habitat from Idlewild Stage 2. 37a. Since WRDA requires mitigation to be "in-kind" if possible, 33 U.S.C. § 2283(d), White Oak offered to preserve an extensive tract of BLH on Idlewild Stage 3. The Corps rejected that offer. 4a.

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[3] Because of the scope of the Corps's post-Katrina flood control projects, the Corps received authorization to proceed with the projects under emergency alternative arrangements whereby National Environmental Policy Act requirements would be satisfied through the publication of several IERs throughout the construction process and an analysis of the cumulative impacts and mitigation would be provided in a later Comprehensive Environmental Document.

Instead of the mitigation alternatives quoted above, the Corps required that to satisfy the mitigation obligation, Petitioners must purchase wetland BLH mitigation bank credits as the exclusive mitigation alternative. 4a. Internal memoranda show that the Corps imposed the requirement to purchase mitigation bank credits in part out of concern that some mitigation costs could otherwise revert to the Corps. Corps Internal Memorandum, 195a-199a.

Petitioners protested the Corps's requirement that they pay for mitigation, and do so by the purchase of mitigation credits, and corresponded for several years in an attempt to resolve the dispute. 4a-5a. On February 20, 2013, in response to Petitioners' counsel's request for a definitive decision regarding mitigation at Idlewild Stage 2, Corps District Commander Colonel Fleming issued a letter stating that "if borrow excavated at the Idlewild Stage 2 site is not used in the construction of a [Corps] water resources project, there is no [Corps] requirement that impacts to non-wetland bottomland hardwoods be mitigated. However, impacts . . . associated with borrow that will be used in construction of a [Corps] water resource project must be mitigated through the purchase of mitigation bank credits." Final Decision Letter, 154a-155a. In other words, if Petitioners sold borrow to a Corps contractor at any point in the future, they would be required to pay $2.5 million for wetland mitigation credits before such sale would be allowed; no payment would be required if Petitioners never sold the borrow material to the Corps; and the Corps would not be responsible for mitigating any habitat removed from Idlewild under any circumstance. A memorandum attached to the letter

reasons that a "key component" of the contractor-furnished borrow program "was to ensure that contractors and landowners understood that they would be required to fulfill any mitigation requirements associated with the excavation of borrow to be used in" Corps projects. 157a. The Corps did not explain its rationale for shifting the mitigation obligation onto the private borrow suppliers. *Id*.

Proceedings Below

District Court decisions

Seeing no support in WRDA for the imposition of mitigation requirements on private parties, Petitioners filed suit, asserting claims pursuant to the Administrative Procedure Act ("APA") alleging that the Corps's dual mitigation requirements—that Petitioners provide mitigation and do so only through the purchase of wetland mitigation bank credits—were: arbitrary and capricious and contrary to law; an unconstitutional condition under the Fifth Amendment and this Court's reasoning in *Koontz v. St John's Water Management District*; a *Penn Central* taking; and a deprivation of substantive due process. Petitioners sought declaratory and injunctive relief on these claims. The District Court had jurisdiction to review the Corps's actions pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346, and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*.

Defendants challenged Petitioners' Article III standing and moved to dismiss Petitioners' substantive due process claim. The District Court held that Petitioners had standing, but dismissed the substantive due process claim. 54a-81a. The parties

filed cross-motions for summary judgment on Petitioners' APA and *Koontz* claims. The District Court granted summary judgment to Defendants on those claims. 18a-38a. Defendants then moved for summary judgment on Petitioners' *Penn Central* claim. The District Court granted summary judgment and entered judgment for Defendants on all of Petitioners' claims. 39a-51a.

Fifth Circuit's decision

In an unpublished per curiam decision, the Fifth Circuit affirmed Petitioners' Article III standing and affirmed entry of judgment for Defendants on the merits. 1a-17a.

As to Petitioners' APA claims, the Fifth Circuit held that Defendants' interpretation of WRDA's mitigation requirements was entitled to *Chevron* deference. 7a. The court reasoned that Congress had delegated to the Corps authority to make mitigation plans and—citing 33 U.S.C. § 2283(h), a provision that was enacted in 2014, after this litigation commenced, and that does not apply to mitigation plans under section 2283(d)—that such plans were subject to notice and comment procedures. *Id.* The court stated that the Corps's interpretation of section 2283 is that "all 'habitat losses caused by water resources projects'" require mitigation. 11a. The Fifth Circuit concluded that it was reasonable for the Corps to find that mitigation was required for impacts at Idlewild Stage 2. 12a. As to Petitioners' claim that WRDA does not allow Defendants to pass mitigation costs to private parties, the court, without citation or analysis of WRDA's cost-sharing provisions,

concluded that section 2283 was ambiguous as to whether the Corps could require a private party who is not a "non-federal interest" (a term defined by statute and discussed below) to share in the funding of Corps project costs. 12a-13a. Specifically, the Fifth Circuit found that WRDA was ambiguous as to the meaning of "third-party mitigation arrangement" and the "extent" of permissible "cost sharing" and "reimbursement." 13a. After identifying these terms as ambiguous, the Fifth Circuit moved into *Chevron* Step 2 and found that "third-party mitigation arrangements" could reasonably include requiring Petitioners to pay for mitigation. *Id.*

Finally, the Fifth Circuit upheld the requirement that Petitioners purchase wetland mitigation bank credits, despite the statutory requirement for in-kind mitigation, on the grounds that Petitioners did not offer a sufficient in-kind mitigation option, without considering whether in-kind mitigation was nevertheless possible. 14A. The Corps determined that in-kind mitigation was possible and considered it as an option for mitigating the Corps's own impacts. USACE005553.[4]

The Fifth Circuit analyzed Petitioners' Fifth Amendment claim as a pure takings claim rather than addressing Petitioners' unconstitutional conditions argument. 15a-16a. Finding that Petitioners had "no property interest in selling borrow material to the Corps's contracting program," the court held that no taking had occurred. 15a.

[4] The Corps documents compiled by Defendants and submitted to the District Court in lieu of an administrative record were Bates stamped in the format USACE [page number] and were made part of the Record on Appeal before the Fifth Circuit.

Furthermore, the court held that even if such an interest existed, nothing had been taken because Petitioners' interest had been merely "frustrated." 16a. In an extended footnote, the Fifth Circuit also reasoned that Petitioners' legal theory was not viable because it "would allow parties to avoid the WRDA's mitigation requirement," ignoring the fact that it is the Corps, not "parties," who are subject to WRDA and its mitigation requirements. 15a n.6. The Fifth Circuit also declined to consider evidence showing that the Corps excludes other private party impacts from WRDA's mitigation requirements. 17a.

REASONS FOR GRANTING THE PETITION

The first question presented by this case is: where a statute directs an agency to carry out and pay for a federal project for public benefit without granting express authority to regulate private parties, may agency action shifting project costs onto private parties be upheld by application of *Chevron* deference? The Court should take up this question for two reasons: first, to clarify that the *Chevron* doctrine is not meant to undermine the separation of powers principle that only Congress can place affirmative financial obligations on private parties, and second, to explain that when Congress directs agency action without establishing a regulatory scheme, agencies cannot shift their own requirements onto private citizens. Finally, this Court should address the second question presented here – whether the *Koontz* doctrine applies in the context of government contracts.

I. This case presents an opportunity to clarify the *Chevron* doctrine to maintain Congress's exclusive legislative authority to balance the burdens and benefits of public projects.

This case illustrates the danger of focusing on the reasonableness of an agency's actions under *Chevron* rather than examining every agency exercise of executive power through the lens of the constitutional separation of powers. Before the existence of the two-step framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court analyzed the authority of a federal agency to impose financial obligations on private entities by reviewing the statute and legislative history in the context of separation of powers concerns.

For example, in *National Cable Television Association, Inc. v. United States*, 415 U.S. 336 (1974), the Court considered the authority of federal agencies to impose fees pursuant to the Independent Offices Appropriation Act ("IOAA"), which provided that for things of benefit provided to private persons by government agencies, "the head of each Federal agency is authorized by regulation . . . to prescribe therefor . . . such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." *Id.* at 337 (quoting 31 U.S.C. § 483a (1976) (recodified at 31 U.S.C. § 9701)). In that case, the Federal Communications Commission had imposed, for the first time, a regulatory charge on cable TV providers to recover the administrative costs of the agency. *Id.*

at 340. The Court found that allowing the FCC to base fees on the "public policy or interest served" would implicate a delegation of Congress's taxing power without any apparent "intelligible principle" to guide the agency. 415 U.S. at 340–43. To avoid this constitutional question, the Court limited the fee chargeable under the IOAA to one based on the "value to the recipient." *Id* at 342-43. Although the cable TV providers received some benefit from regulation, the costs on which the FCC had based the fee "inured to the benefit of the public" rather than only to the regulated entities. *Id.* at 343. Accordingly, the Court struck down the fee as outside the scope of the agency's statutory authority. *Id.* The Court thus recognized that agency power to adjust the allocation of public benefits and burdens is constrained by both statutory language and background separation of powers limitations imposed by the Constitution.

After *Chevron*, the question of agency authority was distilled into the familiar two-step inquiry asking first if Congress has "directly spoken to the precise question at issue" and, if not, according deference to any agency interpretation that is reasonable. *Chevron*, 467 U.S. at 842-43. But in adopting *Chevron*, this Court did not obviate the need for a separation of powers analysis and has never abandoned its requirement that Congress explicitly authorize a "tax" or impositions of financial obligations on private parties that are not regulatory "fees." *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 214 (1989) ("*National Cable* . . . stand[s] . . . for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated

parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties."). However, what is "reasonable" under *Chevron* Step 2 has become so wide-reaching in scope that, as this case demonstrates, *Chevron* condones an agency's imposition of financial obligations on private parties, without express congressional authorization, to satisfy purely public policy interests.

Here, the Corps imposed on Petitioners the cost of the perceived environmental benefit of mitigation for Corps project impacts. The cost imposed on Petitioners is therefore a cost entirely based on the public interest, and not any benefit to Petitioners, and is, following *National Cable*, a tax. *See, e.g., United States v. River Coal Co.*, 748 F.2d 1103, 1106 (6th Cir. 1984) (holding that a reclamation fee imposed on coal mines was a tax because it did not confer a benefit on the operator "different from that enjoyed by the general public"). The Fifth Circuit cited no clear expression from Congress that the mitigation costs could be shifted to Petitioners as *National Cable* would require; indeed, the *Chevron* framework compelled the Fifth Circuit to identify ambiguities and defer to the agency's interpretations of them.

Unlike *National Cable*, here, there is no statute explicitly authorizing the agency to regulate or to impose costs on private parties, and no principle, intelligible or otherwise, guiding the agency's imposition of costs on private parties. On the contrary, there is clear statutory language dictating a different allocation of costs. *See infra* Section II.A.i. The Fifth Circuit's *Chevron* analysis depended on supposed ambiguity in the phrases "cost sharing" and "reimbursement" in 33 U.S.C. § 2283(c), which WRDA

defines elsewhere. *E.g.*, 33 U.S.C. § 2213; 13a. The Fifth Circuit also found ambiguity in the phrase "third-party mitigation arrangements" in 33 U.S.C. § 2283(i), a provision enacted after Petitioners filed suit. Water Resources Reform and Development Act of 2014, Pub. L. 113-121, § 1040, 128 Stat. 1193, 1240-42 (June 10, 2014); 130a-146a; 13a. By looking only to potential statutory ambiguity in applying *Chevron*, the Fifth Circuit did not consider the separation of powers implication of allowing the agency to shift the cost of mitigation to Petitioners.

This Court should grant certiorari to clarify that *Chevron* Step 2 does not allow agencies to circumvent the general proposition that Congress, not unelected agency personnel, must decide when individuals must undertake affirmative financial obligations to benefit the public.

II. Application of the *Chevron* doctrine to an agency-directing statute presents an important question demanding resolution by the Supreme Court.

This Court has clarified *Chevron* analysis for lower courts in several areas, including (1) by requiring that the agency action in question earn deference through congressional delegation and procedural trustworthiness, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); (2) by requiring that the review include the broader context of the statute as a whole, *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988); *Util. Air Regulatory Grp. v. EPA*, 134

S. Ct. 2427, 2442 (2014); and (3) by strengthening *Chevron* Step 1 by declining to grant deference when agencies attempt to regulate in areas plainly outside of their authority, *FDA v. Brown & Williamson*, 529 U.S. 120, 156 (2005); *MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 225-26 (1994). Yet this Court has not defined what is "reasonable" in the context of statutes that do not delegate or contemplate delegating regulatory authority to a federal agency and which do not expressly authorize the imposition of financial obligations on private landowners. If no regulatory authority exists, can an agency nonetheless require that private citizens pay for the agency's statutory obligations?

This Court has not addressed the issue presented here. Fish and wildlife mitigation is within the statutory scheme of WRDA which Congress intended the Corps to administer. This case thus differs from *Brown & Williamson* and *MCI Telecommunications*, cases in which the statute excluded the topic which the agency sought to regulate. While the Corps plainly is required and has authority to mitigate for fish and wildlife losses, the question is whether the Corps can make a private party undertake and pay for the agency's mitigation requirement. This case demonstrates what an agency-directing statute is, how *Chevron* Step 2 was used to shift agency obligations onto private parties, and how *Chevron*'s deferential framework ultimately has left courts without the tools to draw this important distinction in agency authority.

A. WRDA is a statute directing agency action, not the establishment of a regulatory program.

WRDA governs Corps conduct in undertaking flood control and other water resource projects. It speaks directly to the agency—it regulates the agency itself—and directs it in carrying out the Corps's congressional mandate. In contrast, other statutes speak to the public—they regulate private parties—and direct individuals in the conduct of their affairs. Such regulatory-focused statutes often utilize a designated agency to implement Congress's regulatory purpose. The role of the agency is vastly different under each of these statute types, and the application of *Chevron* should likewise be differentiated.

As discussed below, WRDA is an agency-directing statute that expresses several clear congressional mandates relevant to the present case.

i. Congress was explicit about who bears project costs.

To pay for the obligations associated with the construction of water resources development projects, Congress mandated that project costs be shared between federal and "non-federal interests," and proscribed how this "cost-sharing" between federal and "non-federal interests" would be undertaken and managed. Cost-sharing is determined by project type, s*ee generally* 33 U.S.C. Subchapter I ("Cost Sharing"), with specific provisions governing cost-sharing for flood control projects like those projects undertaken in and around New Orleans after Hurricane Katrina,

33 U.S.C. § 2213. A "non-federal interest" is defined as "(1) a legally constituted public body . . . ; or (2) a nonprofit entity with the consent of the affected local government," 42 U.S.C. § 1962d-5b(b), *see* 33 U.S.C. §§ 2219, 2241(7). A "non-federal interest" therefore does not include a private[5] entity like the Petitioners. There are no provisions providing for regulation of private parties or authorizing project costs or other obligations to be imposed on private parties.

ii. Congress was explicit about mitigation responsibility.

As part of the mandate to construct various projects, Congress also imposed certain obligations on the Corps when carrying out their mandate, including but not limited to conducting a wide range of studies, 33 U.S.C. §§ 2261-69; conducting safety reviews, 33 U.S.C. § 2344; and, at issue in this litigation, mitigating for fish and wildlife losses caused by Corps projects, 33 U.S.C. § 2283. Specifically, WRDA requires that the Corps mitigate for fish and wildlife

[5] Under WRDA, Congress has allowed contributions from private parties only under very specific statutory authorities and only for limited purposes which do not apply here and which were not relied on by Defendants or the courts below. *E.g.*, 33 U.S.C. § 2286 (allowing the Secretary to accept funds for mitigation "in accordance with the Pacific Northwest Electric Power Planning and Conservation Act"); 33 U.S.C. § 2325 (authorizing the Secretary to accept "cash" or "funds" "[i]n connection with" water resources projects not relevant to this case, and requiring such funds to be deposited in a specific account in the Treasury of the United States); *id.* § 2325a (enacted in 2014 and amended in 2016 to allow contribution of funds by private entities in circumstances not presented here).

losses resulting from Corps projects. 33 U.S.C. § 2283 (2013).[6] The Secretary is also "authorized to mitigate damages to fish and wildlife resulting from any water resources project under his jurisdiction, whether completed, under construction, or to be constructed." 33 U.S.C. § 2283(b)(1).

Mitigation is plainly a Corps obligation. Costs incurred

> to mitigate damages to fish and wildlife shall be allocated among authorized project purposes in accordance with applicable cost allocation procedures, and shall be subject to cost sharing or reimbursement to the same extent as such other project costs are shared or reimbursed.

Id. § 2283(c). That is, mitigation costs are subject to the same cost-sharing between the federal government and non-federal interests as all other project costs. Section 2283(d) required the Secretary to submit "a recommendation with a specific plan to mitigate fish and wildlife losses created by [a water resources development] project" with any request for congressional authorization of such project.

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[6] After this lawsuit was filed, section 2283 was amended in 2014, Water Resources Reform and Development Act of 2014, Pub. L. 113-121, § 1040, 128 Stat. 1193, 1240-42 (June 10, 2014), and again in 2016, Water Infrastructure Improvements for the Nation Act, Pub. L. 114–322, title I, § 1162, 130 Stat. 1668-69, (Dec. 16, 2016).

iii. Congress has been explicit about regulation of wetlands, but not uplands.

In contrast to the WRDA, which is agency-directing, the Clean Water Act imposes on all parties (including private landowners) duties and restrictions with respect to waters of the United States and authorizes the Corps to promulgate regulations generally (33 U.S.C. § 1) and also grants a specific mandate to "issue regulations . . . [regarding] mitigation . . . as compensation for lost wetlands functions in permits issued by the [Corps]." Defense Authorization Act of 2004, Pub. L. 108-136, Div A, Title III, Subtitle B, § 314(b), 117 Stat. 1431. No similar directive or delegation of authority exists to issue regulations under WRDA to require mitigation by private citizens for upland impacts.

This specific absence of regulatory authorization is significant: in other contexts, the Corps has recognized that its lack of control over private parties means it is not responsible for the environmental impacts caused by those private parties. *See Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 707–08 (6th Cir. 2014) (holding that NEPA did not require the Corps to consider upland impacts of coal mining because the Corps did not have sufficient responsibility or control over surface mining); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196–97 (4th Cir. 2009) (holding that upland impacts of coal mining were not under the "control and responsibility" of the Corps even if a Corps permit was a "but for" cause of these impacts). This conclusion comports with *Department of Transportation v. Public Citizen*, where this Court rejected the argument that

"an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect," holding that "a 'but for' causal relationship is insufficient to make the agency responsible for the particular effect under NEPA." 541 U.S. 752, 767 (2004). If the Corps has no authority to prevent an activity, it has no obligation to mitigate and no authority to impose a cost on that activity.[7]

In short, WRDA contemplates that the Corps will meet the statutory obligation to mitigate for losses to fish and wildlife habitat on their projects, just as it contemplates that the Corps will fulfill the many other obligations described in the statute, including bearing, along with its non-federal partners, the cost of that mitigation. It does not speak to the public or attempt to regulate the conduct of private parties. As the Corps has repeatedly conceded, WRDA places no constraints on private parties in the use of their property, and Petitioners were free to impact any non-wetland habitat type on

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[7] The Corps itself agrees with this reasoning. The Corps has interpreted WRDA as not requiring the Corps to mitigate for private party impacts resulting from water resources development projects where those private parties are outside Corps jurisdiction. Fifth Circuit Record on Appeal at ROA.2618 ("USACE does not mitigate for indirect impacts such as induced development, where local and state entities regulate zoning and land use and are able to assign mitigation requirements directly to the developer." (citing ROA.4053-55: "Corps . . . policy is that we will mitigate . . . for the adverse direct environmental impacts of our projects. Indirect impacts . . . are subject to compliance with local and state . . . requirements, and, therefore, local and state interests are responsible for defining the appropriate mitigation . . . .")).

their property without providing mitigation.[8] WRDA speaks to the Corps and how the impacts of public works will be mitigated for the public benefit, and places responsibility for mitigation on the federal government and the relevant non-federal interests. WRDA does not give the Corps discretion to reallocate the cost of public projects to private landowners.

Therefore, this case presents an agency-directing statute in WRDA. Helpful to the analysis is the fact that WRDA contrasts starkly with the Clean Water Act, a regulatory statute that grants the Corps authority to impose mitigation requirements on private parties for impacts to wetlands. Therefore, this case creates an opportunity for the Court to delineate clearly between the two statute types and clarify the applicability of *Chevron* Step 2 to an agency-directing statute.

B. The lower courts used *Chevron* to allow the Corps to transform WRDA into a regulatory scheme that shifts public costs onto private parties.

The present case demonstrates that incautious application of *Chevron* can convert a statute meant to regulate the agency into a scheme for the agency to regulate private parties. The purpose of *Chevron* analysis is to determine whether the agency acted within its authority. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013); *Chevron*, 467 U.S. at

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[8] It is the subsequent attempt to sell the underlying borrow to a Corps contractor that, in the Corps's analysis, creates a project impact to the prior habitat that must be mitigated. The Corps's analysis thus reverses the commonsense notion that cause must precede effect.

841, 844. Yet if the statute is an agency-directing statute setting forth agency obligations, can the agency "interpret" the statute to require others to perform those obligations? This case presents clear circumstances under which the Court can answer this question, and the answer should be "no."

The crux of the Fifth Circuit's decision lies in perceived ambiguity in the phrase "cost sharing" and the fact that WRDA now authorizes the Corps to make "third-party mitigation arrangements." 33 U.S.C. § 2283(i).[9] The Fifth Circuit apparently reasoned that because Congress failed to prohibit the Corps from shifting mitigation requirements onto private persons, and because Congress did not specifically define "third-party mitigation arrangements" to exclude imposition of mitigation requirements on private persons, the Corps's decision to do so was "reasonable" under *Chevron* Step 2.[10] 13a. However "reasonable" this result may seem as a policy matter, it is wholly inconsistent with WRDA's purpose in regulating the Corps—not private parties—and Congress's allocation of the costs of Corps projects.

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[9] This provision was enacted after Petitioners filed suit, *see supra* p. 13, and was not relied on by the Defendants in their decision documents, pleadings, or briefs.

[10] The Corps has not interpreted section 2283(i) to allow anything other than the Corps itself paying for mitigation bank credits or in-lieu fee credits. *See* Implementation Guidance for Section 1162 of the Water Resources Development act of 2016 (WRDA 2016), Fish and Wildlife Mitigation, at 7 ("The purchase of mitigation credits . . . , in-lieu-fee or other third-party arrangement must comply with any applicable Federal procurement laws . . . ."), available at http://cdm16021.contentdm.oclc.org/utils/getfile/collection/p16021coll5/id/1257.

As demonstrated above, WRDA sets out explicit cost and mitigation responsibilities. This statutory context as a whole and the congressional intent to control the Corps was lost when the courts below applied a simplistic review of the statute for any "ambiguity" that could justify the Corps's reallocation of those responsibilities. Lacking statutory language guiding their determinations, the lower courts effectively condoned an agency's attempt to revise the statute governing its behavior. Because this Court has not addressed how *Chevron* Step 2 works in the context of an agency-directing statute, the lack of express authority to impose the mitigation obligation on Petitioners was unimportant to the courts below: they could simply imply the authority from congressional silence. If the Fifth Circuit's opinion is allowed to stand, then the Corps and other federal agencies will be permitted to use agency-directing statutes like WRDA to justify requiring private parties to perform the agencies' statutory obligations wherever Congress has not explicitly prohibited it.

While such cost-shifting may be acceptable in some circumstances if Congress authorizes it, there is nothing to suggest that Congress intended to authorize such a regulatory scheme when it enacted WRDA. Coupling *Chevron* and congressional silence to allow agencies to turn their own statutory obligations into burdens on private persons, as the courts here have done, will require Congress to anticipate the agencies' creativity and enact a list of prohibitions to ensure the congressional purpose will not be frustrated.

Furthermore, allowing agencies to unilaterally convert their statutory obligations into prescriptions for private persons, without any meaningful review by the judiciary, is "precisely the accumulation of governmental powers that the framers warned against." *See Garco Const., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (Thomas, J., dissenting). The Fifth Circuit's decision delegates too much legislative power to the Corps. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring); *Michigan v. EPA*, 135 S. Ct. 2699, 2712–2714 (2015) (Thomas, J., concurring); *Gutierrez–Brizuela v. Lynch*, 834 F.3d 1142, 1149–1158 (10th Cir. 2016) (Gorsuch, J., concurring).

The Supreme Court should take up this question to determine whether and to what extent an agency-directing statute can be extrapolated pursuant to *Chevron* Step 2 to impose obligations on private citizens, and to set limits on accumulation of power by the executive branch.

C. This Court should clarify that *Chevron* does not obviate a court's duty, and power, to interpret agency authority.

Deference to agency action is the most insidious when cloaked in an unpublished, per curiam decision, because such deference becomes almost immune to critical review. The Fifth Circuit's opinion—which relied on statutory provisions not enacted at the time of the agency decision and reasoning not offered by the agency—illustrates the sort of impulsive deference that *Chevron* Step 2 leads courts to grant. The result is courts in search of reasoning to uphold agency action rather than taking

a hard look at whether any statute actually allows what the agency has done. This is precisely why *Chevron* Step 2 should be narrowed to exclude agency action burdening private parties pursuant to an agency-directing statute.

Arguably, the process undertaken by the Fifth Circuit is a logical outcome of the *Chevron* doctrine. *Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). As Justice Scalia noted in *Perez v. Mortgage Bankers Ass'n*, "So long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to 'decide' that the text means what the agency says." 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment). The less a statute says on a subject, the more ambiguous the statute apparently becomes. The more ambiguity in the statute, the larger the range of "reasonable" interpretations. Here, where the statute is silent on the question—Can the Corps require private parties to pay for water resources development project mitigation?—the end result is an agency careening wildly outside the bounds of the authority granted by Congress, with no judicial oversight to be had.

Called to make a decision divorced from any statutory text, the lower courts seemed to be addressing whether the agency's preferred outcome was "reasonable" as a policy matter, rather than whether Congress intended—and wrote statutes so authorizing—the agency to take such action. Such a

result inverts the expected operation of our federal government, where the courts interpret the law and the elected branches make policy.

In this light, the Fifth Circuit's analysis—and the application of *Chevron* Step 2 analysis itself in this context—is an abdication of judicial duty. The judiciary, not the executive or legislative branches, has the power to say what the law is. This Court instructs: "To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629–30 (2018). Yet this exercise of judicial power cannot occur when the courts must defer to "reasonable" agency interpretations. The Court should take up this question in order to expound upon this premise, curtail the scope of *Chevron* Step 2, and return the power to say what the law is to where it ought to be: in the courts.

III. Whether the unconstitutional conditions doctrine protects against uncompensated takings in the federal contracting context is an important question necessitating resolution by the Supreme Court.

This case poses the question whether the Fifth Amendment's essential nexus and rough proportionality requirements as set forth in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), protect private property rights in the government contracting context. The District Court concluded they do not, and determined that even if they did, Petitioners' could not succeed because that would lead to "absurd results, in which parties subject

to mitigation requirements could simply destroy the valued resources to avoid mitigating their loss." 37a. The Fifth Circuit failed to address the question and ignored this Court's precedents by rejecting Petitioners' claim based on Petitioners' lack of property interest in selling borrow to the Corps.[11]

There is no doubt that the unconstitutional conditions doctrine prohibits the government from conditioning the grant of government benefits on a person's forfeiture of constitutional rights. *Koontz*, 570 U.S. at 604 (citing cases). As this Court made clear in *Koontz* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this prohibition protects the Fifth Amendment right against the taking of private property without just compensation by preventing the imposition of conditions that lack an essential nexus to a legitimate government interest or that lack rough proportionality to the impacts allowed by grant of the benefit. *Koontz*, 570 U.S. at 605-06; *Dolan*, 512 U.S. at 386–91. This prohibition applies even when the would-be recipient lacks a property interest in the benefit and the government would be allowed to deny the benefit altogether. *Koontz*, 570 U.S. at 607–08 (citing cases).

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[11] The Fifth Circuit's erroneous holding that Petitioners were required to have a property interest in selling borrow to the government is directly contrary to *Koontz* and is easily disposed of. *Koontz*, 570 U.S. at 607–08 ("Virtually all of our unconstitutional conditions cases involve a gratuitous governmental benefit of some kind."). The Fifth Circuit's conclusion that Petitioners have "done no more than [complain] that a prospective business opportunity was lost" is likewise plainly erroneous. *Lefkowitz*, 414 U.S. at 76, 82-83 (holding that "future contracting privileges" could not be conditioned on forfeiture of constitutional rights).

There is also no doubt that among the government benefits that may not be conditioned on forfeiture of constitutional rights are government contracts. *Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 681-86 (1996) (contract to haul trash may not be conditioned on forfeiture of First Amendment rights); *Lefkowitz v. Turley*, 414 U.S. 70, 83-84 (1973) (eligibility for government contract cannot be conditioned on forfeiture of Fifth Amendment right against self-incrimination); *Perry v. Sindermann*, 408 U.S. 593, 604 (1972) (employment contract may not be denied for exercise of First and Fourteenth Amendment rights); *Shelton v. Tucker*, 364 U.S. 479, 498 (1960) (employment may not be conditioned on forfeiture of the right of free association).

The question of whether the unconstitutional conditions doctrine prohibits the government from conditioning the grant of a procurement contract on a person's forfeiture of the right to just compensation under the Takings Clause is squarely presented here. Petitioners desired to sell a commodity—clay—whose fair market value was determined through competitive bidding. 3a. Prior to allowing Petitioners to even contract to sell their non-wetland clay to Corps contractors, Defendants required Petitioners to buy millions of dollars of wetland mitigation bank credits for offsite mitigation. 4a. Others in the borrow market did not have such costs imposed. The price paid for borrow sold by Petitioners at competitive pricing could reflect only the value of the clay itself, and would not compensate Petitioners for the mitigation expense. As discussed, the agency's purpose of requiring Petitioners to pay for mitigation was to ensure that the Corps would not bear those

costs. Finally, it is undisputed that the sale of clay from Idlewild Stage 2 would not impact any non-jurisdictional BLH because Petitioners had already lawfully removed the trees. By burdening a specific parcel of Petitioners' property with the requirement to purchase wetland mitigation bank credits, Defendants sought to obtain for free, for the public's benefit, environmental benefits that bear a tenuous relationship to the government's interests and that, by definition, lack proportionality because no habitat would be impacted.

The requirement to purchase mitigation bank credits bears all the hallmarks of an unconstitutional condition. Defendants had no authority to prevent Petitioners from removing non-jurisdictional BLH from Idlewild and Petitioners removed that habitat prior to participating in any Corps project. But Defendants sought to use the lure of participation in federal contracts to extract free, disproportionate after-the-fact mitigation from Petitioners that Defendants could not otherwise have obtained. Application of the *Koontz* framework in this context would allow federal agencies to seek good deals from private contractors for the benefit of the public while ensuring that contractual conditions remain tied to congressionally authorized purposes and are proportional to the actual impacts sought to be addressed. At the same time, the federal government would be restrained from abusing its purchasing power to exact concessions from private parties that the Constitution does not allow. This Court should take up the question in order to address the proper application of the *Koontz* framework in this context.

CONCLUSION

This case presents the Court with an opportunity to examine further the limitations of deference accorded to federal agencies under *Chevron* Step 2, especially in the context of an agency carrying out a congressional mandate and shifting the burden of that mandate onto private parties without clear congressional authorization to do so. Should the Court conclude that the Corps's statutory interpretations have been properly upheld by the lower courts, the case requires further examination of the application of the unconstitutional conditions doctrine. Accordingly, Petitioners respectfully request the Court take up this case to examine both questions presented.

Respectfully submitted,

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