No. 22-

IN THE
Supreme Court of the United States

BG GULF COAST LNG, L.L.C. and PHILLIPS 66 COMPANY,

Petitioners,

v.

SABINE-NECHES NAVIGATION DISTRICT OF JEFFERSON COUNTY, TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Tonnage Clause states that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. art. I, § 10, cl. 3. The Water Resources Development Act of 1986 provides limited congressional consent for local authorities to impose "tonnage duties or fees" on vessels using the Nation's ports and harbors to finance harbor navigation projects, but "only" if those fees are "levied * * * in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project)." 33 U.S.C. § 2236(a)(1).

The question presented is whether the Act permits localities to charge fees for incomplete and unusable increments of a harbor navigation project.

PARTIES TO THE PROCEEDING

BG Gulf Coast LNG, L.L.C. and Phillips 66 Company, petitioners on review, were the plaintiffs-appellants below.

Sabine-Neches Navigation District of Jefferson County, Texas, respondent on review, was the defendant-appellee below.

RULE 29.6 STATEMENT

BG Gulf Coast LNG, L.L.C. is 100% ultimately owned by Shell plc. BG Gulf Coast LNG, L.L.C. is 100% directly owned by BG LNG Services, L.L.C., who is 100% ultimately owned by Shell plc. BG Gulf Coast LNG, L.L.C. and BG LNG Services, L.L.C. are both Delaware limited liability companies and are both indirectly owned subsidiaries of Shell USA, Inc.

Phillips 66 Company is wholly owned by Phillips 66.

RELATED PROCEEDINGS

Counsel is not aware of any related proceedings within the meaning of Supreme Court Rule 14.1(b)(iii).

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BG Gulf Coast LNG, L.L.C. and Phillips 66 Company respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

INTRODUCTION

"The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government * * * ." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824). Most famously, the Constitution grants Congress the power to regulate interstate and foreign commerce. *See* U.S. Const. art. I, § 8, cl. 3. But the Founders were particularly wary of the potential for coastal States to inhibit national and international trade through their

control over the Nation's ports. *Id.* art. I, § 10, cl. 3. The Tonnage Clause thus bars States "without the Consent of Congress" from "lay[ing] any Duty of Tonnage," *id.*—that is, "to impose a charge for the privilege of entering, trading in, or lying in a port." *Polar Tankers, Inc.* v. *City of Valdez*, 557 U.S. 1, 8 (2009) (quotation marks omitted). By placing control of tonnage duties in Congress, the Founders ensured that decisions about such fees would be made in the national interest.

In the Water Resources Development Act of 1986 ("WRDA"), Congress granted limited consent to local authorities imposing "tonnage duties or fees" on vessels using our Nation's ports and harbors, provided that those fees satisfy a series of "conditions." 33 U.S.C. § 2236(a). The Act's detailed conditions carefully cabin the consent granted by, among other things, limiting *why* and *when* fees can be charged. Fees can be charged only for a "harbor navigation project" that improves a port, and only when "construction is complete." *Id.* § 2236(a)(1). Fees that do not meet these strict requirements are unconstitutional.

Congress tied the fees to project completion because Congress enacted WRDA to benefit the economy, not burden it. Congress understood the user fees WRDA authorizes to act as payment for "services rendered to vessels," in the form of improved ports and harbors. S. Rep. No. 99-126, at 7 (1985); *see also Keokuk N. Line Packet Co.* v. *City of Keokuk*, 95 U.S. 80, 84 (1877) ("[A] charge for services rendered or for conveniences provided" is "not a hindrance or impediment to free navigation."). The fees were "not for the purpose of raising revenue." S. Rep. No. 99-126, at 7.

Despite this history, in the decision below, the Fifth Circuit greenlit a user fee that is transparently aimed at raising revenue by charging fees for an incomplete project. The Sabine-Neches Navigation District of Jefferson County, Texas ("Sabine-Neches") is in the very early stages of improving the Sabine-Neches Waterway so that it can one day be used by vessels with deeper drafts. It's so early, in fact, that construction for 98% of the Project *has not yet started*. Yet, with the Fifth Circuit's blessing, Sabine-Neches is now charging fees based on the *estimated cost of the completed project* as a whole, not based on the *actual cost of the completed portion* of the project. The actual cost to Sabine Neches of the completed portion is actually $0 because the federal government gifted Sabine-Neches the starting funds. Sabine-Neches therefore levies a $488-million user fee that is based, not on what Sabine-Neches has already spent, but on a guess of what the project might ultimately cost upon completion, if it is ever is. *See* Pet. App. 5a-6a.

It is rare to have a Court of Appeals decision that is so fundamentally at odds with our constitutional and Congress's statutory structure. But the Fifth Circuit's decision here does that, and in the course of doing so threatens the Nation's essential coastal commerce. Sabine-Neches's user fee falls outside of the narrow consent to fees granted by Congress in WRDA, and unconstitutionally burdens commerce in violation of the Tonnage Clause. The significant limits Congress placed on its consent in WRDA likely explains why there have been only two other instances in the 36 years since WRDA's enactment where a non-federal entity has adopted a user fee under the statute—and neither similar to Sabine-Neches.

And although Sabine-Neches is the first locality to charge fees for incomplete and unusable projects, it is unlikely to be the last. The Fifth Circuit's decision disturbs the long-settled understanding that localities may finance port and harbor improvements only by levying fees on vessels that directly benefit from those improvements. *See New Orleans S.S. Ass'n* v. *Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1025-26 (5th Cir. 1989). The Fifth Circuit's decision thus writes a blank check for States and localities to burden interstate and foreign commerce.

The Court should grant certiorari. In the alternative, the Court should invite the Solicitor General to file a brief expressing the views of the United States.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-17a) is reported at 49 F.4th 420. The Fifth Circuit's order denying rehearing (Pet. App. 55a-56a) is not reported. The District Court's opinion (Pet. App. 18a-54a) is reported at 587 F. Supp. 3d 508.

JURISDICTION

The Fifth Circuit entered judgment on September 14, 2022. *See* Pet. App. 1a-17a. Petitioners timely sought rehearing, which was denied on October 25, 2022. Pet. App. 55a-56a. On January 19, 2023, Justice Sotomayor entered an order extending the deadline to petition for certiorari to and including February 22, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. Pet. App. 57a-68a.

STATEMENT

1. In the Water Resources Development Act of 1986, 33 U.S.C. § 2201, *et seq.*, Congress crafted a process for financing waterway construction and improvement projects, using a new cooperative scheme that divides the costs between the federal government and state and local entities. *See* Pet. App. 2a-4a. Under WRDA's cost-sharing scheme, the federal government foots the bill for the first phase of the project using "new start" funds. *Id.* at 3a. Local entities must then reach an agreement with the Secretary of the Army that requires localities to "provide to the Federal Government the non-Federal share of all other costs of construction of [the] project." 33 U.S.C. § 2211(e)(3). The statute specifies the required non-federal share of construction costs, which vary by project type. *Id.* § 2211(a). Congress expressly provided that WRDA constituted its limited consent under the Tonnage, Import-Export, and Commerce Clauses to fees that would otherwise violate those constitutional provisions. *See* 33 U.S.C. § 2236(a) (citing U.S. Const. art. I, § 10, cls. 2, 3; *id*. § 8, cl. 3).

So that localities can recoup their share of construction costs, Congress granted them limited permission to impose "tonnage duties or fees" on vessels if those fees satisfy a series of "conditions." *Id*. Congress's conditions include (1) that fees must be levied "on a fair and equitable basis"; (2) that fees must be levied "only

in conjunction with" a completed project or completed project increment; (3) that the fee complies with a cap as to its overall amount; and (4) that the fee exempt certain vessels. *Id.* § 2236(a)(1)-(4).

By "forbid[ding] fees to finance harbor improvements until after the project is complete," Congress sought to "prevent[] nonfederal ports from fraudulently charging for projects that are mere speculation or that suffer from undue delays while under construction." *Plaquemines*, 874 F.2d at 1026. Congress's conditions thereby ensure that fees are paid only by those who "benefit directly from [the] improvements" for which the fees are assessed. *Id.*; *see also* 132 Cong. 33,068 (1986) (statement of Rep. Robert A. Roe on the conference report) ("A non-Federal interest may levy * * * tonnage duties but may only do so with regard to a vessel if that vessel is a beneficiary of the project."). Fees that fail to meet Congress's strict conditions lack congressional consent and are unconstitutional.

2. The Sabine-Neches Navigation District of Jefferson County, Texas is a state political subdivision that is responsible for ports and harbors in southeast Texas. Sabine-Neches is also the non-federal sponsor of a $1.2 billion infrastructure project to modernize the Sabine-Neches Waterway, which links Texas ports to the Gulf of Mexico. Pet. App. 19a-20a.

After an initial feasibility study, Congress approved the modernization project in 2014. *Id.* at 21a. Congress then allocated $20 million in "new start" funding in 2019 to finance the first increment of the project, which deepened Anchorage Basin No. 1—an upland portion of the Waterway—from 20 to 40 feet. *Id.* at 22a-23a. In July 2019, Sabine-Neches entered into a cooperative agreement with the United States Army

Corps of Engineers to share the projected $1.2 billion construction cost for the rest of the project: $732 million would come from the federal government, while Sabine-Neches pledged $488 million. *Id*.

In April 2021, Sabine-Neches passed a User Fee Ordinance in order to fund its share of the project. The fee collects $0.20 per short ton of hydrocarbon cargo and $0.02 per short ton of non-hydrocarbon cargo. *Id.* at 23a; *see id*. at 6a. Sabine-Neches has the discretion to adjust the fee to as high as $0.35 per short ton of hydrocarbon cargo and $0.035 per short ton of non-hydrocarbon cargo, as well as to lower the fee to zero. *Id*. at 23a; *see id*. at 6a. Sabine-Neches began levying the entire fee in May 2021 after Anchorage Basin No. 1's completion, even though the basin is just 1.6% of the overall project by cost. *Id*. at 24a. The user fee will remain in place until January 1, 2049, "or upon final payment of all construction and construction financing costs associated with the Project, whichever occurs first." Sabine Neches Navigation District User Fee Notice, 86 Fed. Reg. 7369, 7370-71 (Jan. 28, 2021). The user fee has cost vessels carrying hydrocarbon cargo between $15,462 and $16,357 per voyage. Pet. App. 69a-71a.

Petitioners BG Gulf Coast LNG, L.L.C. ("BG Gulf Coast") and Phillips 66 Company ("Phillips") are energy companies that currently make extensive use of the Waterway to transport cargo. Pet. App. 24a & n.3. They sued Sabine-Neches in September 2021 alleging that the user fee did not comply with WRDA, rendering it unconstitutional. The companies explained, as relevant here, that the fee flunked WRDA because it permitted Sabine-Neches to prospectively collect fees for incomplete, unusable increments of the project. *Id*.

at 25a-26a. The companies sought to recoup the fees they had already paid, as well as injunctive and declaratory relief. *Id*. at 27a.

3. The district court granted Sabine-Neches' motion to dismiss. The court held that the Act permits the collection of fees for the whole project once any single usable increment is complete, rather than the collection of fees only for a completed project or completed usable increment. *Id*. at 27a-54a.

The Fifth Circuit affirmed. Agreeing with the district court's interpretation of the statute, the panel held that the Act permits Sabine-Neches to charge a user fee for the entire project once one usable increment is completed. *Id*. at 8a-12a. For the panel, the key provisions for interpreting what Congress meant were 33 U.S.C. § 2236(a)(1) and § 2236(a)(1)(A)(i): "Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to * * * finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 2211 of this title." 33 U.S.C. §§ 2236(a)(1), (a)(1)(A)(i); *see* Pet. App. 8a-12a. The panel read Sections 2236(a)(1) and 2236(a)(1)(A)(i) together to permit Sabine-Neches to "finance" its "share of construction and operation and maintenance costs" of the project once one "usable increment of the project" was complete. Pet. App. 8a-12a (quotation marks omitted).

The panel rejected Petitioners' interpretation that the words "in conjunction with" meant that Congress only intended to allow fees for costs incurred for

completed projects or completed project increments, not speculative future costs that may never benefit the present-day users who are paying the fees. Pet. App. 10a-11a. The panel also turned aside the companies' argument that fees should be tied to specific usable increments. As the companies explained, Section 2236(a)(1)(A)(i) requires fees to finance the costs of "a navigation project for a harbor," which, in the companies' interpretation, meant the costs of "a harbor navigation project whose construction is complete" or "a usable increment of the project." *Id.* at 8a, 11a (quotation marks omitted). The panel disagreed. It instead held that "it makes far more sense that this language means that once a usable increment of the project is complete, a fee may be levied, not that a fee may only be levied to finance a usable increment of the project." *Id.* at 11a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT ALLOWED STATES TO VIOLATE THE CONSTITUTION BY NULLIFYING WRDA'S NARROW AUTHORIZATION ALLOWING LOCALITIES TO CHARGE PARTIAL FEES FOR PARTIALLY COMPLETED PROJECTS.

A. WRDA's plain text prohibits localities from levying user fees to fund incomplete and unusable increments of a harbor navigation project.

1. In WRDA, Congress permitted port or harbor dues to be "levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project)." 33 U.S.C. § 2236(a)(1). The ordinary meaning of these words is

that a locality can impose a user fee measured by the entire cost of the project only when the entire project is complete. After all, a fee cannot be levied "*in conjunction with*" a completed project if the fee is assessed *before* the project is complete. When two actions are taken "in conjunction with" one another they "occur[] together in time or space." *See Conjunction*, Webster's Ninth New Collegiate Dictionary 277 (1986).

Other provisions of Section 2236 confirm that user fees satisfy Congress's conditions only when they are based on demonstrated, past costs. For example, in setting out the permissible criteria for user fees, Congress used the past tense to refer to the improvement project. Section 2236(a)(3)(B) explains that "[i]n developing port or harbor dues that may be charged under this section on vessels *for project features constructed* under this subchapter, the non-Federal interest may consider such criteria as * * * vessel draft, vessel squat, vessel speed, sinkage, and trim." 33 U.S.C. § 2236(a)(3)(B) (emphasis added). Congress's use of the past tense in this provision indicates that Congress expected "project features" would already be "constructed"—that is, complete—at the time that localities charged "port or harbor dues * * * under this section." *Id.* And this Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr* v. *United States*, 560 U.S. 438, 448 (2010).

Still other provisions reveal that Congress intended to refer to completed projects. Congress told localities setting user fees to consider "the direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services under

paragraph (1) of this subsection." 33 U.S.C. § 2236(a)(4)(A). Congress used the present progressive in referring to the facilities and service costs, and a locality can only be "provid*ing* the facilities and services" once construction is complete. *Id*. (emphasis added); *see United States* v. *Balint*, 201 F.3d 928, 935 (7th Cir. 2000) ("[T]he common understanding of the present progressive tense used by Congress [is] to indicate continuing—*i.e.* present and future—activities."). Moreover, most of the items on the list—operations costs, maintenance costs, facilities costs, and services costs—are incurred only after construction is complete. The provision thus underscores Congress's intent that user fees should be tied to a completed project.

2. The Fifth Circuit had to re-write the statute in order to reach the opposite conclusion. In the Fifth Circuit's view, WRDA permits a locality to finance a whole project with user fees as soon as one increment of the project is completed. *See* Pet. App. 10a-12a. The statute's plain text indicates that the Fifth Circuit's reading is the wrong one.

First, the Fifth Circuit's interpretation renders the phrase "harbor navigation project whose construction is complete" surplusage. If the Fifth Circuit's reading were what Congress intended, Congress could have written a different, more straightforward statute stating that "[p]ort or harbor dues may be levied only in conjunction with a harbor navigation project ~~whose construction is complete (including~~ **when** a usable increment of the project~~)~~ **is complete.**" But that's not the statute that Congress wrote. "As this Court has noted time and time again, the Court is 'obliged to give effect, if possible, to every word Congress used.' "

National Ass'n of Mfrs. v. *Department of Def.*, 138 S. Ct. 617, 632 (2018) (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)). The only way to give effect to every word that Congress wrote is to acknowledge that a locality can impose a user fee that is tied to the *entire cost* of the project only once the *entire project* is complete.

Properly construed, the "usable increment" parenthetical in § 2236(a)(1) merely means that, in addition to permitting a locality to impose a user fee upon completion of a full project, Congress also permitted a locality to impose a user fee that is tied to an increment of the project that is complete and has come to benefit navigation. Congress therefore authorized Sabine-Neches to levy user fees in two situations only: either (1) in the amount of Sabine-Neches's full cost when the entire Project is complete; or (2) in the amount of Sabine-Neches's cost for each usable increment of the Project as each increment is completed. But there is no reading of the text that permits a locality to levy a user fee tied to the entire cost of the completed project, when only a portion of the project is complete.

Other WRDA provisions governing the other reimbursement schemes confirm this result. A separate provision, codified at 33 U.S.C. § 2232, governs reimbursement for localities that undertake construction themselves instead of leaving the job to the Army Corps of Engineers. In that instance, localities are "eligible for credit or reimbursement" from the federal government "for the Federal share of work carried out on a project or separable element of a project." 33 U.S.C. § 2232(d)(1). But, the statute notes, "[c]redit or *reimbursement may not be made* available to a non-Federal interest pursuant to this paragraph *until* the

Secretary determines that * * * the construction *of the discrete segment for which credit or reimbursement is requested is complete*." *Id.* § 2232(d)(5)(B) (emphases added). Congress slightly varied the language in this portion of the statute, but the result is the same: In setting up both the federal reimbursement scheme and the commercial reimbursement scheme, Congress intended WRDA to limit payments to completed projects or completed segments of projects. Congress did not intend localities to collect—either from the federal government or commercial users—the entire cost of a project when only a portion is complete.

Second, the Fifth Circuit's interpretation gives "harbor navigation project" and "navigation project for a harbor" two different meanings in the same sentence. After stating that "[p]ort or harbor dues may be levied only in conjunction with *a harbor navigation project* whose construction is complete (including a usable increment of the project)," 33 U.S.C. § 2236(a)(1) (emphasis added), Congress went on to explain that such dues could be levied "to finance the non-Federal share of construction and operation and maintenance costs of *a navigation project for a harbor*," *id.* § 2236(a)(1)(A)(i) (emphasis added). If the Fifth Circuit were correct that WRDA permits a locality to finance the whole project with user fees as soon as one increment of the project is complete, then the phrase "harbor navigation project" when used in Section 2236(a)(1) refers to the entire project and any usable increments thereof, while a functionally identical phrase "navigation project for a harbor" when used in Section 2236(a)(1)(A)(i) refers to just the entire project.

The "normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning,'" *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986)), should have prevented the court from holding that a "harbor navigation project" has two meanings in the same statute. That rule is "at its most vigorous when"—as here—"a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); *see id*. (given the "presumption that a given term is used to mean the same thing throughout a statute," it would be "virtually impossible" to read a statute in a way that would give a word two different meanings in the same sentence). The best reading of Section 2236(a)(1) is that the phrase "harbor navigation project" means the same thing each time that it is used: User fees are authorized only when they are based on costs that have already been incurred.

The Fifth Circuit attempted to explain away the one-phrase-two-meanings problem through the nearest-reasonable-referent canon. *See* Pet. App. 11a (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 152-153 (2012)). In the Fifth Circuit's view, the parenthetical "(including a usable increment of the project)" doesn't refer back to the referenced "harbor navigation project" and instead modifies the word "complete." *See* Pet. App. 11a. But the phrase "(including a usable increment of the project)" is set off by parentheses. As the Fifth Circuit's preferred treatise explains, "parentheses * * * isolate the material they contain" from "grammatical implications that would otherwise be created by the words that precede or follow them." Scalia & Garner, *supra*, at 162 (punctuation canon). Without the parentheses,

the words "including a usable increment of the project" could be read to modify "complete." But the parentheses around "(including a usable increment of the project)" signal to the reader that the bracketed words offer a gloss on everything in § 2236(a)(1) that precedes the brackets, not just the word "complete." Because of the parentheses, the clear import of the text is that localities can impose both a user fee for a whole project at the project's completion and a partial fee when the project is partially complete.

The Fifth Circuit's reading does not make sense in context. *See Lockhart* v. *United States*, 577 U.S. 347, 352 (2016) ("[T]he rule of the last antecedent is not an absolute and can assuredly be overcome by other indicia of meaning." (internal quotation marks omitted)). The text of the parenthetical "(including a usable increment of the project)" itself calls back to the phrase "harbor navigation project": the "project" referenced in both the parenthetical and the phrase are the same. Moreover, the question of which items in a definition are modified by a particular clause is properly informed by context and other indicia of meaning. *See id.* at 355-356 (considering "fundamentally contextual questions," and rejecting an interpretation that "would risk running headlong into the rule against superfluity"); *United States* v. *Hayes*, 555 U.S. 415, 425-426 (2009) (declining to apply modifier to the immediately preceding phrase where doing so would have required accepting "unlikely premises" and would have rendered a term "superfluous"). And, as explained above, other provisions of Section 2236 confirm that user fees satisfy Congress's conditions only when they are based on demonstrated, past costs. *See supra* pp. 10-11. The Fifth Circuit's reading of the statute does not withstand scrutiny.

B. The broader statutory context shows that Congress intended WRDA to permit fees for services rendered and forbid revenue raising activities.

WRDA's legislative history shows that Congress carefully crafted the statute to support the original purposes of the Tonnage Clause, not to undermine it. *See Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1072 (2020) (using legislative history to confirm a statute's plain meaning). Drawing on this Court's precedents interpreting the Tonnage Clause, which prohibit tonnage duties aimed at raising revenue for the port rather than exacting payment for services rendered to ships, Congress explained that user fees imposed under WRDA should "reflect a reasonable relationship between the cost of providing services and the benefits conferred upon vessels and cargo interests from channel usage." H.R. Rep. No. 99-251, pt. 4, at 21 (1985); *see also* S. Rep. No. 99-126, at 7 (similar). Congress attempted to ensure that outcome by permitting localities to "recover" costs already incurred, rather than raising revenue for future projects. S. Rep. No. 99-126, at 55.

1. In drafting WRDA, Congress recalled that "[u]nder the Constitution, cargo fees in the form of duties on imports and exports (under Article 1, section 10, clause 2) and tonnage duties on vessels (under article 1, section 10, clause 3) require[] the express consent of Congress to be levied by a non-Federal interest." H.R. Rep. No. 99-251, pt. 4, at 21. Indeed, the collective purpose of these constitutional provisions is to " 'restrai[n] the states themselves from the exercise' of the taxing power 'injuriously to the interests of each other.'" *Polar Tankers*, 557 U.S. at 6-7 (quoting

J. Story, Commentaries on the Constitution of the United States, § 497, p. 354 (1833)). The Constitution "thereby seeks to prevent states with convenient ports from placing other States at an economic disadvantage by laying levies that would tax the consumption of their neighbours. The coastal States were not to take advantage of their favorable geographical position in order to exact a price for the use of their ports from the consumers dwelling in less advantageously situated parts of the country." *Id.* at 7 (cleaned up) (quoting, among others, 3 Records of the Federal Convention of 1787, pp. 542, 519 (M. Farrand rev. 1966)).

To effectuate these purposes, this Court has interpreted the Tonnage Clause to prohibit more than only classic tonnage duties—that is, taxes on a ship based on the ship's capacity; the Court has also said that a State cannot "do that indirectly which she is forbidden * * * to do directly." *Id.* at 8 (quoting *Passenger Cases*, 48 U.S. (7 How.) 283, 458 (1849)). The Tonnage Clause therefore prohibits taxes that vary according to factors other than a ship's capacity, like the number of masts, mariners, or passengers. *Id*. It likewise prohibits taxes that are imposed not just on the vessel itself but also on the ship captain, owner, supercargo (the shipowner's representative in charge of the ship's cargo), and passengers. *Id.*; *Passenger Cases*, 48 U.S. (7 How.) at 458-459. The Clause even prohibits flat taxes on a ship—those that do not vary according to tonnage—if they are for the privilege of entering a port. *Southern S.S. Co.* v. *Portwardens*, 73 U.S. (6 Wall.) 31, 34-35 (1867). The Tonnage Clause therefore prohibits an extremely broad range of taxes and duties: it "embrace[s] all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a

charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-266 (1935).

The Tonnage Clause does not, however, extend to fees " 'for services rendered to and enjoyed by' " vessels, which "are constitutional because they facilitate, rather than impede, commerce" and represent "demands for reasonable compensation." *Maher Terminals, LLC* v. *Port Auth. of N.Y. & N.J.*, 805 F.3d 98, 107 (3d Cir. 2015) (quoting *Clyde Mallory Lines*, 296 U.S. at 265-66; and citing *Keokuk*, 95 U.S. at 84); *accord Plaquemines*, 874 F.2d at 1027 ("If ships receive a service they pay for, fees charged by a nonfederal port authority are constitutional.").

This Court has carefully policed this exception to prohibit taxes and duties—like the user fee charged by Sabine Neches—that are designed to raise revenue, not fund the provision of services. Thus, for example, in *Polar Tankers*, the Court invalidated a "personal property tax" on "vessels of at least 95 feet in length," and that declined "insofar as the tankers spend time in other ports." 557 U.S. at 5 (quotation marks omitted). Rather than providing services to the vessels, the tax was "designed to raise revenue used for general municipal services" in the city of Valdez, Alaska. *Id*. at 10. As the Court held, such a "general, revenue-raising" tax "lies at the heart of what the Tonnage Clause forbids." *Id*. "The ordinance applies almost exclusively to oil tankers. And a tax on the value of such vessels is closely correlated with cargo capacity. Because the imposition of the tax depends on a factor related to tonnage" and "is not for services provided to the vessel, it is unconstitutional." *Id*.

As Congress put it, this Court had outlined a "limitation on the authority of local ports to levey fees" so that fees may be charged only for "direct services" like "wharfage, dockage, pilotage, stevedoring, and demurrage." H.R. Rep. No. 99-251, pt. 4, at 21 (citing *Clyde Mallory Lines*, 296 U.S. at 265-266).

2. Congress therefore intended that WRDA "confer[] the express consent of Congress to a non-Federal interest to levy port or harbor dues in the form of tonnage duties or fees." *Id*. But in permitting "[l]ocal ports * * * to levy fees" under WRDA, Congress sought to "tailor[] the delegation of that authority" to match the original purposes of the Tonnage Clause. *Id.*

Congress explained that "[t]he exercise of this authority" to impose tonnage duties "is intended to reflect *a reasonable relationship between the cost of providing services and the benefits conferred* upon vessels and cargo interests from channel usage." *Id.* (emphasis added). "The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce." S. Rep. No. 99-126, at 7. Although the original House and Senate versions of the legislation differed in the precise contours of the permissible duties, *see* 132 Cong. Rec. 33,322 (1986) (statement of Sen. Lloyd M. Bentsen on the conference report), both chambers understood the law to require a "reasonable" link or relationship between the fees imposed and the benefits conferred on vessels. *See* H.R. Rep. No. 99-251, pt. 4 at 21; S. Rep. No. 99-228, at 16 (1985); S. Rep. No. 99-126, at 56 ("[A] link should exist between the imposition of a local user fee on vessels and cargoes and the benefits to those specific vessels and

cargoes resulting from the improvement or maintenance of a project.").

Congress ensured that this reasonable relationship would exist by authorizing localities to levy tonnage duties on a vessel "only * * * if that vessel is a direct beneficiary of the project." 132 Cong. Rec. 33,068 (1986) (statement of Rep. Robert A. Roe). WRDA's post-conference legislative history makes this point abundantly clear. In a colloquy after the conference report on the final bill was introduced, one of WRDA's co-sponsors agreed that it was "the intent of the conferees that port user fees be imposed on only the direct beneficiaries of project features": "It is [Congress's] intent that the direct beneficiaries pay port or harbor duties." 132 Cong Rec. 33,086 (1986) (statement of Rep. Robert A. Roe). WRDA's provisions "are intended to assure that these duties are levied on vessels that demonstrably benefit from the project features that are constructed." *Id.; see also Plaquemines*, 874 F.2d at 1025-26 (explaining that Congress structured WRDA to "ensure[] that the fees will be paid by ships that benefit directly from improvements"); Brief for the United States at 23, *United States* v. *U.S. Shoe Corp.*, 523 U.S. 360 (1998) (No. 97-372) (discussing the legislative history of WRDA and emphasizing Congress's preference that direct beneficiaries shoulder the costs of port improvements). In other words, Congress wanted the user fees imposed under WRDA to be consistent with the original purposes of the Tonnage Clause and this Court's precedent interpreting that provision.

Congress also ensured that this reasonable relationship would exist by tying user fees to project completion. As both the Senate and House Reports explain,

Congress intended WRDA to permit localities to "recover" costs already incurred from the "direct beneficiaries" of the project. That is, Congress "recognize[d] the need of ports to *recoup* reasonable costs from *beneficiaries* for navigation improvements and *services rendered*, 132 Cong. Rec. 33,071 (1986) (statement of Rep. Gene Snyder) (emphases added), and so the consent to port or harbor dues codified at 33 U.S.C. § 2236 "provides non-Federal sponsors with a means to *recover* its obligations for construction work, including associated administrative expenses, through the imposition and collection of fees for the use of such projects by vessels in commercial waterway transportation." *See* S. Rep. No. 99-126, at 55 (emphasis added). Congress thus contemplated that construction would be complete before localities began charging user fees. After all, construction costs can be recovered from beneficiaries of the project only after construction is done.

The theme of "recoup[ing]" costs for "services rendered" is echoed throughout the legislative history. 132 Cong. Rec. 33,071 (1986) (statement of Rep. Gene Snyder). The House Report, for example, notes that "[t]hese fees are to *recover* the required local share of the cost of project construction for all new projects subject to local cost sharing under section 105 of the Act." H.R. Rep. No. 99-251, pt. 4, at 32 (emphasis added). "The permissible purposes in levying fees" are therefore limited to "*recover[ing]* a portion of the costs applicable to completed projects (including usable increments), for operations and maintenance, where local cost sharing is required for deep draft improvements, and for other necessary port services provided in gross to vessels at large and not subject to specific

existing fees for wharfage, dockage, and demurrage." *Id.* at 32-33.

3. Because the Fifth Circuit's reading of the statute severs the link between the user fee and the benefit to the user, it is "implausible in context." *Yellen* v. *Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2448 (2021).

The Fifth Circuit thought that Congress could have intended "the process under the Act to work like this: (1) Congress funds the first phase of the project; (2) the non-federal interest, after going through notice and comment, imposes a fee to build revenue to cover its share; (3) the fee raises funds to pay for the next increment of the project; and (4) so on until the project is complete." Pet. App. 9a-10a. "Because Anchorage Basin No. 1 has been completed," the Fifth Circuit reasoned, "subsection (a)(1) permitted the District to pass the Ordinance containing the User Fee." *Id*. at 12a. And on that reasoning, the Fifth Circuit permitted Sabine-Neches to charge a user fee based on an estimate of 100% of the local share of the completed project's cost, even though the project is only 2% finished. *See id*. at 5a-6a, 12a. That is, the Fifth Circuit authorized Sabine-Neches to levy over $488.1 million in fees *today*, even though 98.4% of the Project remains unbuilt.

But only a user fee that is proportionate to the project's completion would effectuate Congress's stated "inten[tion]" that user fees "reflect a reasonable relationship between the cost of providing services and the benefits conferred upon vessels and cargo interests from channel usage." H.R. Rep. No. 99-251, pt. 4, at 21. A ship cannot benefit from an improvement that does not yet exist. Nor is there any guarantee that the

ships being charged today would ever use the waterway after the Project is complete. Vessels currently using the waterway are paying for a benefit that they do not receive, contrary to Congress's intent. *Cf.*, *e.g.*, 132 Cong. Rec. 33,086 (1986) (statement of Rep. Robert A. Roe) ("It is our intent that the *direct beneficiaries* pay port or harbor dues.") (emphasis added). And there is no guarantee that the Project whose entire costs are being foisted on current users will ever be fully built, or built as currently planned. Thus, under the Fifth Circuit's rule, if a State's share of a navigation project is estimated to cost $1 billion over 30 years, it could define a usable increment to be the installation of a single navigational buoy for $2,000, install that buoy, and then immediately charge vessels the entire billion dollars, regardless of whether the project is ever completed or the vessels charged ever benefit.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW NOW.

The Fifth Circuit's erroneous interpretation of WRDA warrants review now. Although WRDA may not be a household name, the Fifth Circuit's opinion will be felt at Americans' kitchen tables. The decision below threatens to inflict significant economic burdens on both shippers and on everyday consumers and businesses that rely on the goods that transit our Nation's ports and waterways. If allowed to stand, the Fifth Circuit's opinion will permit localities to charge billions of dollars in new fees for vessels to use a small increment of a larger project that will not be completed for years, if ever. At a minimum, given the danger posed by the Fifth Circuit's novel decision, the Court should seek the views of the Solicitor General.

See Petition for Writ of Certiorari, *U.S. Shoe Corp.*, 523 U.S. 360 (No. 97-372) (United States seeking certiorari after the last major court of appeals decision regarding WRDA).

1. The Fifth Circuit appeared to believe that deference to Sabine-Neches was necessary to promote infrastructure development and maritime commerce. In the Fifth Circuit's account, the user fee is essential to fund Sabine-Neches's share of the modernization project. Pet. App. 2a.

But that gets the economic analysis backwards. Sabine-Neches's user fee is completely novel, and so striking it down would not cut off a funding stream currently relied upon by States and localities. In the 36 years since WRDA's passage, a harbor-improvement project has never been funded by a fee like Sabine-Neches'. *See* Humboldt Bay Harbor, Recreation and Conservation District's Proposed Ordinance No. 15 Establishing General Tariff No. 1 for the Humboldt Harbor and Bay Deepening, California Project, 62 Fed. Reg. 34,697 (June 27, 1997) ("Humboldt Bay Harbor"); Humboldt Bay Harbor, Recreation and Conservation District's Ordinance No. 15 Establishing General Tariff No. 1 for the Humboldt Harbor and Bay Deepening, California Project, 62 Fed. Reg. 44,110 (Aug. 19, 1997); Lake Charles Harbor and Terminal District Resolution 2002-089A Proposed Channel Users' Fee for Calcasieu River Waterway, Louisiana Project, 67 Fed. Reg. 64,636 (Oct. 21, 2002) ("Lake Charles Harbor").

Other navigation districts have understood WRDA to permit fees only to offset expenses for completed projects or completed project increments. In 1997, a harbor district in California proposed a user fee on

vessels and cargo in order to "provid[e] 32 percent of the required local contribution to the cost of construction" of a harbor improvement project financed by a WRDA cost-sharing plan. Humboldt Bay Harbor, 62 Fed. Reg. at 34,698. The California harbor district levied the fee on any vessel transiting any portion of a "usable increment[]" of the newly improved harbor "[u]pon completion of construction" of that usable increment. General Tariff No. 1, Humboldt Bay Harbor Improvement Surcharge Ordinance, Humboldt Bay Harbor, Recreation, and Conservation District (Aug. 28, 1997), https://humboldtbay.org/general-tariff-no-1. In 2002, a harbor district in Louisiana proposed a user fee to fund its non-Federal share of a navigation project. Lake Charles Harbor, 67 Fed. Reg. 64,636. The Louisiana harbor district's fee likewise would "offset the District's incurred expenses associated with completed navigation projects not to exceed actual accrued District expenditures." *Id*.

If this Court does not intervene, many other localities in need of money for infrastructure will inevitably follow Sabine-Neches's example. The recently passed Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) ("Bipartisan Infrastructure Law"), made "a once-in-a-generation investment in our nation's infrastructure." *See* Press Release, The White House, Fact Sheet: One Year into Implementation of Bipartisan Infrastructure Law, Biden-Harris Administration Celebrates Major Progress in Building a Better America (Nov. 15, 2022).[1] Included in the

[1] *Available at* https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/15/fact-sheet-one-year-into-implementation-of-bipartisan-infrastructure-law-biden-

legislation was $1.5 billion in emergency appropriations specifically designated for the U.S. Army Corps of Engineers to spend on construction for harbor and navigation projects. Pub. L. No. 117-58, Div. J, tit. III, 135 Stat. 429, 1359. These are the kinds of navigation projects eligible for WRDA's cost-sharing program and the levying of tonnage fees by local authorities.

The Bipartisan Infrastructure Law's construction funds will "help address the huge backlog of authorized projects that have yet to receive funding." Office of Senator Ben Cardin, Bipartisan *Infrastructure Investment and Jobs Act* Summary: A Road to Stronger Economic Growth, at 108.[2] As this backlog of authorized projects is cleared, more and more localities will have to scrounge for funds to pay for their pledged shares. The Fifth Circuit decision will allow these localities to externalize the costs of improvements rather than relying on traditional funding streams, such as "general revenues, bonds, dedicated tax revenues, or other sources." H.R. Rep. No. 99-251, pt. 1, at 70 (1985).

Even worse, the Fifth Circuit decision could allow localities to double dip and utilize fees and other dedicated funds together to raise more money than is required to fund projects. In May 2022, voters in Jefferson County, Texas, approved a proposition authorizing Sabine-Neches to dedicate a portion of its existing tax revenues to secure financing to fund up to $250 million of its share of the costs of the Waterway

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%E2%81%A0harris-administration-celebrates-major-progress-in-building-a-better-america.

[2] *Available at* https://www.cardin.senate.gov/wp-content/uploads/2022/09/Infrastructure-Investment-and-Jobs-Act-Section-by-Section-Summary.pdf.

project. *See* Jefferson County Clerk, Elections Department, Sabine Neches Waterway – Election Results (May 2022);[3] Sabine-Neches Navigation District, Notice of Special Election (Apr. 12, 2022).[4] The approval of this proposition demonstrates that Sabine-Neches's user fee is not required to cover the entire $488 million local share of the Waterway project: Voters approved a dedicated stream of $250 million in existing tax revenue. The proposition also shows how localities can use the Fifth Circuit decision to circumvent Congress's intent that fees be "not for the purpose of raising revenue," S. Rep. No. 99-126, at 7, and use WRDA to generate a surplus beyond what is required to pay for their share.

2. The Fifth Circuit's decision to permit Sabine-Neches's massive user fee on shippers instead of requiring Sabine-Neches to rely on traditional funding streams will have devastating effects. The Sabine-Neches Waterway is the nation's leading liquid energy cargo waterway and an integral component of the nation's energy and military infrastructure, handling over 194 million tons of cargo annually. *See Sabine-Neches Waterway: Improvement Project of National Significance*, Sabine-Neches Navigation District, tinyurl.com/24c8ycb5 (last visited Feb. 22, 2023). The user fee threatens to inflict serious economic harm on an industry that supports 11.3 million American jobs and contributes an estimated $1.7 trillion to the U.S. economy annually. *See* PricewaterhouseCoopers LLP,

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[3] *Available at* https://www.jeffersonelections.com/wp-content/uploads/2022/05/SabineNechesWaterwayResults.pdf.

[4] *Available at* https://www.navigationdistrict.org/wp-content/uploads/2022/04/NOTICE-OF-SPECIAL-ELECTION-English-Final-041222.pdf.

Impacts of the Oil and Natural Gas Industry on the US Economy in 2019 (July 2021), *available at* https://tinyurl.com/2p99th5a.

3. If other States and localities follow suit, the prospect of billions of dollars in new levies on shipping would realize the Framers' fears when they drafted the Tonnage Clause: that coastal states could exploit "their favorable geographical position in order to exact a price for the use of their ports from the consumers dwelling in less advantageously situated parts of the country." *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534, 556-557 (1959) (Frankfurter, J., dissenting). New user fees on vessel and cargo owners would inevitably be passed onto consumers and businesses, effectively functioning as a tax on consumption throughout the country and driving up prices on ordinary Americans during a time when they can least afford them.

This is not just speculation. Copycat user fees is the most likely scenario. The Nation's aging infrastructure means that local authorities are often desperate to scrounge up money to meet their needs. Ships are getting larger and larger, which means that ports need deeper and deeper waterways to remain competitive. *See* Pet. App. 19a. In the Fifth Circuit proceedings, multiple port associations and individual ports filed *amicus* briefs supporting the district court's interpretation of the Act. The Texas Ports Association argued that it was "critical to afford non-Federal interests with the power to levy flexible harbor dues, because those harbor dues would in turn serve as a new and innovative source of revenue to fund much-needed and long-delayed improvements to the nation's ports and harbors." C.A. Brief of Amicus Curiae

Texas Ports Association at 1 (internal quotation marks omitted); *see also* C.A. Brief of Amicus Curiae Port of Houston Authority at 1 ("The Port of Houston * * * has a strong interest in a * * * flexible interpretation of this key statute."); C.A. Brief of Amici Curiae American Association of Port Authorities et al. at 11 ("Flexibility in fees and cost sharing is also critical * * * ."). But denying ports "flexibility" to leverage duties on shipping without careful congressional oversight was what the Tonnage Clause and WRDA were meant to do. Without this Court's intervention, we can expect that these ports will soon copy the Sabine-Neches model.

Since 2014, Congress has authorized 29 new navigation projects under the Water Resources Development Act's cost-sharing scheme, with a cumulative non-federal funding share of over $6.3 billion. *See* Water Resources Development Act of 2022, Pub. L. No. 117-263, § 8401; Water Resources Development Act of 2020, Pub. L. No. 116-260, § 401, 134 Stat. 1182, 2733-34; America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 1401, 132 Stat. 3765, 3835-36; Water Infrastructure Improvements for the Nation (WIIN) Act, Pub. L. No. 114-322, § 1401, 130 Stat. 1628, 1708-09 (2016); Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, § 7002, 128 Stat. 1193, 1364-65. Under the Fifth Circuit's reasoning, localities could start charging current port users for the entire $6.3 billion non-federal share as soon as they complete a single usable increment of their respective projects. And with the unprecedented levels of Federal funding flowing in through the Bipartisan Infrastructure Law, the day when these new fees can start to be levied—and the devasting effects of those fees can

felt—will be fast approaching. This Court should grant review now.

CONCLUSION

For the foregoing reasons, the petition should be granted. In the alternative, the Court should invite the Solicitor General to file a brief expressing the views of the United States.

Respectfully submitted,

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