No. 22-805

In the Supreme Court of the United States

BG GULF COAST LNG, L.L.C., ET AL., PETITIONERS,

v.

SABINE-NECHES NAVIGATION DISTRICT OF JEFFERSON COUNTY, TEXAS.

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

BRIEF OF AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

American Petroleum Institute ("API") is a national trade association representing all segments of America's oil and natural gas industry. API's nearly 600 members support more than 11.3 million jobs and produce, process, and distribute most of our Nation's energy.[1] API was formed in 1919 as a standards-setting organization. In its more than 100 years of operation, API has developed more than 800 natural gas and oil industry standards to enhance environmental safety, efficiency, and sustainability. API also conducts or sponsors research ranging from economic analyses to toxicological testing. And it collects, maintains, and publishes statistics and data on all aspects of U.S. industry operations, including supply and demand for various products, imports and exports, drilling activities and costs, and well completions.

API works to support a strong, viable American oil and natural gas industry. API therefore has a keen interest in the rigorous and consistent application of statutes that directly affect its members' abilities to contribute to the national economy through the import and export of oil and natural gas. The Fifth Circuit's unprecedented interpretation of the Water Resources Development Act of 1986 permits the Sabine-Neches Navigation District to levy taxes in excess of $1 billion on API's

[1] In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity other than amicus curiae, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for all parties were notified of API's intent to file this brief in accordance with Rule 37.2.

members over the life of the project and opens the door for numerous other ports and waterways to do the same.

SUMMARY OF ARGUMENT

I. The Fifth Circuit's decision disturbs the long-settled precedent that nonfederal interests may finance port and harbor improvements, such as "new, deeper channels," only by levying fees on vessels that *directly* benefit from those improvements. *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1026 (5th Cir. 1989). This understanding is grounded in centuries-old prohibitions not waivable "without the [c]onsent of Congress." U.S. Const. art. I, § 10, cl. 2; *id.* cl. 3. These include bans on import-export taxes under the Import-Export Clause, *see id.* cl. 2, and on "all taxes and duties . . . which operate to impose a charge for the privilege of entering, trading in, or lying in a port" under its neighbor, the Tonnage Clause. *Clyde Mallory Lines v. Ala. ex rel. State Docks Comm'n*, 296 U.S. 261, 265-66 (1935) (discussing U.S. Const. art. I, § 10, cl. 3).

These clauses do not, however, preclude fees "for services rendered to and enjoyed by vessels." *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 805 F.3d 98, 107 (3d Cir. 2015) (discussing *Keokuk N. Line Packet Co. v. City of Keokuk*, 95 U.S. 80, 85 (1877) and *Clyde Mallory Lines*, 296 U.S. at 265-66). Fees for service rendered "are constitutional because they facilitate, rather than impede, commerce" and represent "demands for reasonable compensation." *Id.; see also Plaquemines*, 874 F.2d at 1027 ("If ships receive a service they pay for, fees charged by a nonfederal port authority are constitutional."); *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 10 (2009) (local ordinance unconstitutional where it "applie[d] almost

exclusively to oil tankers" and imposed tax based "on a factor related to tonnage" and not "for services provided to the vessel").

Here, however, the Fifth Circuit approved the Sabine-Neches Navigation District's assertion of sweeping powers to impose on energy shippers the enormous cost of improving its Waterway *absent* any direct benefit from the planned improvements to those shippers. The District has levied fees for oil and natural gas cargo on vessel and cargo owners able to use the Waterway in its current, unimproved form. In so doing, the District disregards longstanding recognition that the Water Resources Development Act of 1986 ("WRDA") "forbids fees to finance harbor improvements until after the project is complete" to "ensure[] that the fees [are] paid by ships that benefit directly from improvements[.]" *Plaquemines*, 874 F.2d at 1026. Because the District's user fees—based on the number of short tons a vessel carries—fall outside of the limited consent provided by Congress in WRDA, they violate the Tonnage Clause.

II. The Fifth Circuit's opinion approving these fees piles costs onto the natural gas and oil industry at a time of global uncertainty and instability. API estimates that the District's fee structure could result in nearly $50 million in fees for oil and gas shippers over a single year, and as much as $1.3 billion over the 27-year timeframe set by the District's ordinance. Perhaps even more concerning, however, the panel decision opens the door to billions of dollars in user fees for any *future* navigation improvement project undertaken by a nonfederal district.

Given the exceptional importance of nonfederal ports and waterways to national and global energy markets,

and the direct effects of the Fifth Circuit's decision on four of our Nation's top-five busiest ports by tonnage, this case merits this Court's immediate review. The Court should grant the Petition.

ARGUMENT

I. The Fifth Circuit's decision disrupts longstanding reliance on constitutional protections afforded free trade.

"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). Indeed, "[t]he free flow of maritime commerce was so important to the Framers that they grouped the prohibition on tonnage duties with bans on keeping troops or ships of war, entering into compacts with other States or foreign powers, and engaging in war." *Polar Tankers*, 557 U.S. at 17 (Roberts, C.J., concurring). Absent "Consent of Congress," states and political subdivisions are strictly prohibited from levying fees on vessels engaged in commerce. *See* U.S. Const. art. 1, § 10, cl. 3. Only fees comprising "just compensation" for services rendered are permissible. *Cannon v. City of New Orleans,* 87 U.S. (20 Wall.) 577, 582 (1874).

The decision below implicates these important principles, blowing wide open the narrow congressional consent for harbor fees provided by the Water Resources Development Act, 33 U.S.C. § 2201, *et seq.* But fees that fail to meet Congress' strict conditions—like the user fees in this case—lack congressional consent and violate the Tonnage Clause.

A. The Tonnage Clause provides that "No State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. art. 1, § 10, cl. 3. A "duty of tonnage," as the Framers understood it, referred to taxes based on a ship's carrying capacity. *In re State Tonnage Tax Cases*, 79 U.S. 205, 206 (1870) ("duties on vessels in proportion to their capacity").

The constitutional prohibition on duties of tonnage "was designed to guard against local hindrances to trade and carriage by vessels," *Keokuk*, 95 U.S. at 84–85, and "to enable the government to give uniformity to the commerce of the States with foreign countries, and with each other," W. H. BURROUGHS, A TREATISE ON THE LAW OF TAXATION § 63, at 89 (New York, Baker, Voorhis & Co. 1877).

The Tonnage Clause serves as a complement to, and a surety for, the Commerce Clause and the Import-Export Clause. True, the Commerce Clause standing alone imbues Congress with the "power to regulate commerce," U.S. Const. art. I, § 8, cl. 3, and the Import–Export Clause bars states from taxing merchandise travelling in commerce at the expense of consumers in other states, *id.*, § 10, cl. 2. But certain of the Framers feared that states could effectively "nullif[y]" these clauses by simply "taxing the vessels transporting the merchandise" instead of the merchandise itself. *Clyde Mallory Lines*, 296 U.S. at 265. "[T]he Tonnage Clause was adopted to 'prevent that nullification' and to further restrain states from obtaining 'geographical vessel-related tax advantages[.]'" *Maher Terminals*, 805 F.3d at 106 (quoting *Polar Tankers*, 557 U.S. at 7). *See also* James Madison, Notes on the Constitutional Convention (Sept. 15, 1787), in 3 THE RECORDS

OF THE FEDERAL CONVENTION OF 1787, at 622-625 (Max Farrand ed., rev. ed. 1966) (1911) (recording discussion preceding proposal of Tonnage Clause).

In the 1800s, this Court recognized that states could also circumvent the Tonnage Clause by affixing fees to features *other* than a vessel's carrying capacity—such as the number of masts or the number of passengers. To prevent a state from "do[ing] indirectly [that] which she is forbidden . . . to do directly," *Passenger Cases*, 48 U.S. (7 How.) 283, 458 (1849), this Court confirmed that the Clause extended to "all taxes and duties regardless of their name" if they "impose a charge for the privilege of entering, trading in, or lying in a port," *Clyde Mallory Lines,* 296 U.S. at 265–66 (collecting cases). This prohibition bars fixed fees that are independent of any features of a vessel. *See Steamship Co. v. Portwardens*, 73 U.S. (6 Wall.) 31 (1867). It also bars "general[] revenue-raising" taxes and fees "for general municipal services." *Polar Tankers*, 557 U.S. at 10; s*ee also State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 220 (striking down a tax as "an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed").

Reimbursement, however, is distinct from revenue. Nothing in the Tonnage Clause prevents a state or political subdivision from charging for serviced rendered: "a charge for services rendered or for conveniences provided is in no sense a tax or a duty" because it is "not a hindrance or impediment to free navigation." *Keokuk*, 95 U.S. at 84. Rather, such charges represent "just compensation" for services that enable rather than impede commerce. *Cannon,* 87 U.S. (20 Wall.) at 582; *see also Packet Co. v. St. Louis*, 100 U.S. (10 Otto) 423, 427 (1879) (municipal

corporation could "charg[e] and collect[] from those using its wharves and facilities, such reasonable fees as will fairly remunerate it for the use of its property"); *Plaquemines*, 874 F.2d at 1027 ("If ships receive a service they pay for, fees charged by a nonfederal port authority are constitutional.").

Substance trumps form when it comes to distinguishing between tax and recompense. "Vessels that pay a purported services charge must actually receive a proportionate benefit in return." *Maher Terminals*, 805 F.3d at 107. "[A] state may not escape the Tonnage Clause's reach merely by labelling a tax as a charge for services." *Id.*; *Cannon*, 87 U.S. (20 Wall.) at 580 ("A tax which is . . . due from all vessels arriving and stopping in a port, without regard to the place where they may stop . . . cannot be treated as a compensation[.]").

B. This important distinction between taxes (which burden commerce) and fees for services rendered (which facilitate it) is evident in the text of the Water Resources Development Act ("WRDA"). WRDA provides nonfederal ports with limited, narrowly crafted authority to levy fees in connection with completed harbor improvements. *See* 33 U.S.C. § 2236(a) ("Consent of Congress" expressly authorizing "port or harbor dues"—"[s]ubject to" specified "conditions" —"under clauses 2 and 3 of section 10, and under clause 3 of section 8, of Article 1 of the Constitution").

Consistent with the notion that harbor dues must constitute fair renumeration rather than general revenue, WRDA authorizes fees "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). Indeed, the Fifth Circuit previously (and properly) acknowledged Congress's "belief," manifest in the text of the WRDA, that the Act "forbids fees to finance harbor improvements until after the project is complete." *Plaquemines*, 874 F.2d at 1026. That is because fees levied under that Act were "not for the purpose of raising revenue." *Id.* Rather, such fees were intended solely to "repay costs related directly to the servicing of commerce" and "offset services rendered to vessels." *Id.*

For this reason, WRDA authorizes fees "only [for] ships that benefitted directly from" harbor improvement projects. *Plaquemines*, 874 F.2d at 1025 (discussing 33 U.S.C. § 2236(a)). *See also, e.g.*, 132 Cong. Rec. 33,086 (daily ed. Oct. 17, 1986) ("It is our intent that the *direct beneficiaries* pay port or harbor duties.") (emphasis added); *id.* at 33,071 (recognizing "the need of ports to recoup reasonable costs from beneficiaries for navigation improvements and services rendered, but at the same time establish[ing] an important *direct beneficiary principle*") (emphasis added). This direct-nexus requirement "prevents nonfederal ports from fraudulently charging for projects that are mere speculation or that suffer from undue delays while under construction" and thus prevents ports and waterways from running afoul of constitutional prohibitions on general revenues. *Plaquemines*, 874 F.2d at 1026.

In reaching the opposite conclusion, the Fifth Circuit disregarded these critical constitutional limits, WRDA's plain language, and its own prior opinion in *Plaquemines*. The court instead approved user fees for a project that is far from complete, on vessels that have

not benefited—and may never benefit—therefrom.[2] The court did so by interpreting WRDA to permit a port to finance an *entire* planned harbor project, once a "usable increment" of that project, no matter how small, is complete. Pet.App.12a.

Not only is this reading incorrect as a matter of statutory construction, *see* Petition for Writ, at 11-15, it contravenes the broad, longstanding prohibition on duties of tonnage. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (presuming that Congress "legislates in the light of constitutional limitations"). Under the Fifth Circuit's re-read of WRDA, nonfederal interests may impose fees on vessels for large swaths of improvements yet to occur—essentially raising revenue on a prospective basis and regardless of whether such projects ever come to fruition. *But see Plaquemines*, 874 F.2d at 1026-27 (cautioning against this very possibility); *Polar Tankers*, 557 U.S. at 10 (same).

"If States wish to use their geographical position to tax national maritime commerce, they must get Congress's consent—just as they must to engage in the other activities prohibited by Clause 3." *Polar Tankers*, 557 U.S. at 17 (Roberts, C.J., concurring). WRDA does not provide the consent the court below claimed. That is because WRDA permits harbor fees to be levied only in conjunction with a harbor project whose construction is complete, or a usable increment of a project whose construction is complete. *Supra*, at 8. "Because the imposition of the [District's user fees] depends on a factor

[2] The user fees apply to vessels with a design draft of less than 40 feet, which are able to use the Waterway as currently constructed. C.A. Brief of Appellant, at 8.

related to tonnage and that tonnage-based tax is not for services provided to the vessel" taxed—and is instead for planned services that *could* benefit *some* vessels in the future—"this case lies at the heart of what the Tonnage Clause forbids." *Polar Tankers*, 557 U.S. at 10.

II. Interpreting WRDA to permit fees for the entirety of planned harbor improvements inflicts unforeseen costs on the economically important energy industry at a critical time.

The upshot of the Fifth Circuit's decision is precisely what the Tonnage Clause and its neighboring provisions sought to prevent: a burden on free trade. Under the Navigation District's user-fee structure, the burden falls most heavily on the natural gas and oil industry. And these fees are only the tip of the iceberg. The Fifth Circuit's ruling paves the way for dozens of political subdivisions and states to tax the industry in the same way, imposing hefty fees in an era of global energy instability.

A. The natural gas and oil industry is a pillar of our national economy. In 2019, the natural gas and oil industry contributed an estimated $1.7 trillion to, and accounted for nearly 8% of, the national GDP. *See* PricewaterhouseCoopers, *Impacts of the Oil and Natural Gas Industry on the US Economy in 2019*, prepared for API (July 2021), tinyurl.com/yc897skw. As of 2019, the 11.3 million jobs supported by the natural gas and oil industry represented 5.6% of total employment. *See* PricewaterhouseCoopers, *Oil and Natural Gas: Essential Contributors to American Recovery* (July 2021), tinyurl.com/58m8te59. API further estimates that recent upticks in liquified natural gas exports alone could support between 220,000 and 452,000 additional American

jobs and add up to $73 billion to the national economy by 2040. API, *Impact of LNG Exports on the U.S. Economy: A Brief Update*, tinyurl.com/2p8c9s6z.

It goes almost without saying that the oil and natural gas industry is a critical player in our Nation's continued post-pandemic economic recovery. Higher costs for oil and natural gas can echo throughout the economy in countless ways. Agricultural and food supply chains, for one, rely on energy products for planting, fertilizing, and harvesting, as well as for shipping and delivery. *See, e.g.*, U.S. Dep't of Agriculture, Economic Research Service, *Impacts and Repercussions of Price Increases on the Global Fertilizer Market* (June 30, 2022), tinyurl.com/zv5ckhj8; U.S. Bureau of Labor Statistics, *The relationship between crude oil prices and export prices of major agricultural commodities* (April 2019), tinyurl.com/yc7jdsw6. Likewise, electricity markets and the price of manufactured goods are influenced by the costs of energy. *See, e.g.*, U.S. Energy Information Administration, *Factors affecting electricity prices*, (April 20, 2022), tinyurl.com/4aa5v3y9; U.S. Energy Information Administration, *Energy use in industry* (June 13, 2022), tinyurl.com/2zbfxhr9.

The natural gas and oil industry also plays a leading role in current events unfolding in the global markets. The industry relies heavily on our Nation's ports and waterways, exporting roughly 8.5 million barrels per day of petroleum, and importing nearly as much. U.S. Energy Information Administration, *Oil imports and exports* (Nov. 2, 2022), tinyurl.com/y98v5mdc. And recent sanctions on Russia and the corresponding energy crisis in Europe have placed these exports front and center,

making efficient, cost-effective shipments more important than ever. *See, e.g.*, Charles Riley, *US becomes world's top exporter of liquefied natural gas*, CNNBusiness (Jan. 5, 2022), tinyurl.com/4htvv3x3.

The Fifth Circuit's reinterpretation of WRDA piles unnecessary and unforeseen costs on the natural gas and oil industry at this critical economic juncture. The Sabine-Neches Navigation District is a major channel for exports and is of particular importance to energy shippers. Its Waterway serves the first- and eighth-largest refineries in the Nation (Motiva Port Arthur and ExxonMobil Beaumont). U.S. Energy Information Administration, *Refining crude oil*, tinyurl.com/4592n87d. And it has now imposed unprecedented user fees for oil and natural gas shippers, at a rate *ten times* that of other freight. *See* Pet.App.6a (setting fees for cargo at .02/short ton, but for oil and gas cargo at .20/short ton, and approving ranges of up to .035 and .35, respectively). API estimates that in light of the nearly 140 million tons of oil and gas products loaded and unloaded in the Waterway in 2019, this fee structure could result in nearly $50 million in fees for oil and gas shippers over a single year, and as much as *$1.3 billion* over the 27-year timeframe set by the District's ordinance. *See* U.S. Army Corp. of Engineers, Waterborne Commerce Statistics Center, *2019 Sabine-Neches Waterway*, tinyurl.com/bdc7xusd (cataloguing commodities shipped to and received at the Waterway in CY2019).

B. More worrisome still, these fees represent only the tip of the iceberg. The decision below also opens the door to nonfederal interests to levy user fees on vessel and cargo owners for any future navigation improvement

project, regardless of whether those owners have derived any direct benefit from the project.

As the Petition notes, the nonfederal funding portion of the 29 navigation projects Congress recently approved under WRDA exceeds $6.3 billion. *See* Petition for Writ, at 29. "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." *Id.*

This assertion is far from mere conjecture. Numerous Port Authorities filed amicus briefs in the Fifth Circuit, urging the court to adopt a reading of WRDA that would allow them, too, to impose fees for the entirety of future planned improvements on a prospective basis. The Port of Houston—the "nation's busiest waterway by tonnage," *see* C.A. Brief of Amicus Curiae, Port of Houston Authority, at 1 —urged the Fifth Circuit that its decision would "significantly impact [the Port's] ability to use [WRDA] to finance the non-federal cost share of [its current] . . . billion-dollar" project, *id.* at 2. A copycat funding structure from this project alone would impose significant costs: the Port of Houston saw nearly 200 million tons of oil and gas products alone loaded and unloaded in 2019. *See* U.S. Army Corp. of Engineers, Waterborne Commerce Statistics Center, *2019 Port of Houston*, tinyurl.com/bdc7xusd (cataloguing commodities shipped to and received at the Port in CY2019). Under a fee structure identical to the one approved below, this would result in nearly $70 million in fees for oil and gas shippers over a single year, and more than $1.8 billion over a similar 27-year timeframe. *See id.*

Likewise, the Port of Corpus Christi, which bills itself

as the "nation's largest energy export gateway," Port of Corpus Christi, *About Us,* tinyurl.com/5n6mxtpd, is currently undergoing a project to widen and deepen its 36-mile channel, C.A. Brief of Amicus Curiae, American Association of Port Authorities, at 5. Total federal allocations for this project top $403 million thus far, with the nonfederal portion estimated at approximately $273 million. AAPA, Corpus Christi Ship Channel Improvement Project, tinyurl.com/khh2mf6e. Under the opinion below, this Port, too, may now seek to impose the entirety of this cost onto energy shippers once a miniscule portion of the project is complete and before any benefit to them is certain.

That the erroneous interpretation of WRDA is limited thus far to the Fifth Circuit counsels in favor of rather than against immediate review. As the American Association of Port Authorities aptly pointed out below, "This case is not only about two oil companies asked to pay dues and one navigational district attempting to fund its waterway development. This case will have far-reaching impacts[.]" C.A. Brief of Amicus Curiae, American Association of Port Authorities, at 4. "[M]ost of the major U.S. commodity ports are . . . found along the Gulf coast in Louisiana and Texas. Petroleum imports in particular dominate shipping at Gulf ports." U.S. Army Corps. Of Engineers, Institute for Water Resources, *Harbors and Ports*, tinyurl.com/mu57ur6z. In fact, Texas and Louisiana together boasted four of the top five ports in total tonnage in the States in 2020. *See* Bureau of Transportation Statistics, *Tonnage of Top 50 U.S. Water Ports, Ranked by Total Tons*, tinyurl.com/49zj2r4a. Regardless of when other courts decide to follow suit, the bulk of the

cost impact on the natural gas and oil industry is likely to flow directly from the decision below.

This Court should grant the Petition to closely examine the Fifth Circuit's interpretation of WRDA to permit harbor fees in advance of completed improvements or any resulting benefits in light of its plain text and constitutional underpinnings, and in light of the heavy impacts this decision heralds.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted.

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