No. 22-805

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 STATEMENT

The disclosure statement in the petition for writ of certiorari remains accurate.

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INTRODUCTION

The Sabine-Neches Navigation District of Jefferson County, Texas insists that the Water Resources Development Act of 1986 ("WRDA") permits localities to charge fees for incomplete and unusable increments of a harbor navigation project. But the law Congress enacted could not be clearer: Local authorities may impose "tonnage duties or fees" on vessels using the Nation's ports and harbors "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). Fees that fall outside of this narrow statutory provision are prohibited by the Tonnage Clause of the Constitution. U.S. Const. art. I, § 10, cl. 3.

That pure question of law warrants review. Sabine-Neches argues that this Court should deny the petition because the Fifth Circuit is the only court of appeals to have ruled on its novel funding scheme. Ordinarily, that point would have merit. But this case is different. The Fifth Circuit is home to some of the Nation's largest and most important ports for the natural gas and oil industry. Multiple WRDA projects are underway at ports within the Fifth Circuit, and several ports have indicated an interest in levying new fees based on the outcome of this case. Absent review, the decision below will subject countless energy companies to an unconstitutional fee that will have severe downstream effects for the nationwide economy. Brief of Amicus Curiae American Petroleum Institute 10-15 ("API Amicus Br."). This result is precisely what Congress sought to avoid in enacting WRDA, which was designed to marry harbor improvements to direct benefits for harbor users. At a

minimum, this Court should call for the Solicitor General's views on the meaning of this important statute.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED.

The Fifth Circuit's erroneous opinion will inflict significant economic burdens on our Nation's shippers and cargo owners, as well as everyday consumers and businesses. Sabine-Neches does not dispute that the opinion below permits it to levy over $488.1 million in fees *today*, even though 98.4% of the Project remains unbuilt. Pet. 22. Moreover, that $488.1 million figure is based on an *estimate* of future construction costs, and Sabine-Neches has made multiple statements to industry that the actual project cost will likely be substantially lower. Appellants' C.A. Opening Brief 9-10. Thus, left standing, the decision below will allow local ports throughout the country to levy harbor dues *today* for project increments that may never be built or that may cost far less than initial estimates. Sabine-Neches nevertheless contends that the Court should deny this petition, indefinitely delaying review of the permissibility of Sabine-Neches's scheme. According to Sabine-Neches, the decision below is correct, the question is not important, and this case would be a poor vehicle to address the question presented. Sabine-Neches is wrong on each point.

A. The Decision Below Is Incorrect.

As explained in the petition (at 9-16), the Fifth Circuit's decision was wrong on the merits. The Court of Appeals failed to recognize that WRDA ties Congress's consent to user fees to project completion. *See* 33 U.S.C. § 2236(a)(1). After all, a fee cannot be levied "*in conjunction with*" a "complete[d]" project if the fee

is assessed *before* the project is complete. *Id*. (emphasis added).

1. Sabine-Neches's response (at 11-16, 19-23) hinges on one word in the statute: "finance." To hear Sabine-Neches tell it, Congress's use of the word "finance" in WRDA indicates that Congress invited localities to use harbor dues to raise the money to fund future construction, instead of reimbursing localities for completed, usable portions of the project. But that word cannot bear the weight that Sabine-Neches would place on it.

As an initial matter, the word "finance" does not inform the meaning of "complete" because it pertains to a separate statutory requirement. In outlining the terms under which "[p]ort or harbor dues may be levied," Congress set two, separate limits. 33 U.S.C. § 2236(a)(1). First, Congress stated *when* dues can be levied: "only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project)." *Id*. And second, Congress stated *why* dues can be levied: either "(A)(i) 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," or "(ii) to finance the cost of construction and operation and maintenance of a navigation project for a harbor under section 2232 or 2233 of this title," and "(B) [to] provide emergency response services in the harbor." *Id*. § 2236(a)(1)(A)-(B). Thus, "finance" does not help explain *when* a project is "complete." Instead, "finance" refers to a separate requirement regarding the *purposes* for which fees may be imposed.

Even if the statute could be re-written so that "finance" bears on the question of when a project is complete, WRDA's text indicates that Congress understood "finance" to mean repayment. Congress used the word "finance" to describe the reimbursement scheme outlined in Section 2232. *See* 33 U.S.C. § 2236(a)(1)(A)(ii) (providing that "[p]ort or harbor dues may be levied," "to *finance* the cost * * * of a navigation project for a harbor *under section 2232* or 2233 of this title") (emphases added). As explained in the petition (at 12-13), Section 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. 33 U.S.C. § 2232(d)(1). But "[c]redit or *reimbursement may not be made* * * * *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). Thus, Congress does not subscribe to Sabine-Neches's view that "financing" a project means funding future construction. Congress instead equated "financing" a project with reimbursement for past construction of completed segments.

Sabine-Neches argues (at 15-16) that Congress's statement in Section 2232 that reimbursement is linked to project completion indicates that Congress did not require the same in Section 2236. But Congress used virtually identical language in Section 2236 to describe the reimbursement schemes at Sections 2211 and 2232. *Compare* 33 U.S.C. § 2236(a)(1)(A)(i), *with id.* § 2236(a)(1)(A)(ii). Thus, the language and operation of the federal reimbursement scheme at Section 2232 is important textual

evidence of Congress's intentions for the commercial reimbursement scheme at Section 2211. In setting up both schemes, Congress intended WRDA to limit payments to completed projects or completed segments of projects.

2. Sabine-Neches also resists (at 18-19) the case's constitutional import. But contrary to Sabine-Neches's claims, there *is* a "thumb on the scale favoring Petitioners." Br. in Opp. 19.

The Constitution permits localities to burden interstate commerce only when authorized "by an expression of the 'unambiguous intent' of Congress." *New York* v. *United States*, 505 U.S. 144, 171 (1992) (quoting *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992)). This clear statement rule acknowledges "that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid" while also respecting "the important role the Commerce Clause plays in protecting the free flow of interstate trade." *Maine* v. *Taylor*, 477 U.S. 131, 138-139 (1986).

That same clear-statement rule applies here because the Tonnage Clause is closely tied to the history and purposes of the Commerce Clause. *See* Pet. 1-2. Tonnage duties "tend[] immediately to interfere with and to obstruct the commerce between the States." *Morgan* v. *Parham*, 83 U.S. (16 Wall.) 471, 475 (1872); *see also, e.g.*, *Polar Tankers, Inc.* v. *City of Valdez*, 557 U.S. 1, 7 (2009) (explaining that there was disagreement among the Founders about whether the Commerce Clause prohibited tonnage duties, and the Tonnage Clause was adopted to "prevent that nullification" and to further restrain states from obtaining "geographical vessel-related tax advantages"). Any

ambiguity in the statute must therefore be construed against Sabine-Neches. *See Wyoming*, 502 U.S. at 458.

The Commerce Clause cases provide a better analogy than the Compact Clause cases Sabine-Neches collects. *See* Br. in Opp. 19. After all, the clear-statement rule applied in Commerce Clause cases derives from the provision's purpose. *See Maine*, 477 U.S. at 138-139. And the Compact Clause's purpose is entirely different from the shared purpose of the Commerce and Tonnage Clauses. The Compact Clause, unlike the Commerce and Tonnage Clauses, is concerned with ensuring that agreements among States do not increase States' political power in such a way as to encroach upon the just supremacy of the federal government. *See U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 470-472 (1978). Because of their different purposes, the Compact Clause precedents are not instructive here. Moreover, Sabine-Neches's analogy to the Compact Clause relies only on the fact that the Compact Clause uses the same "consent of Congress" language as the Tonnage Clause. Br. in Opp. 19. But that language is not unique to the Tonnage and Compact Clauses. It also appears in the Import-Export Clause and the Foreign Emoluments Clause. *See* U.S. Const. art. I, § 10, cl. 2; *id*. art. I, § 9, cl. 8. Sabine-Neches therefore overreaches with its argument that the shared phrase requires a shared analytical framework.

3. Finally, Sabine-Neches argues (at 16-18, 23-25) that its reading of WRDA aligns with the statute's history and purpose. But Sabine-Neches offers only the thinnest of reasons as support.

For example, Sabine-Neches contends (at 16-17) that WRDA should be read to permit localities to charge fees for incomplete and unusable increments of a project because that would expedite project completion. All Sabine-Neches's cited documents show is that Congress hoped WRDA *as a whole* would expedite project construction. *See* H.R. Rep. No. 99-251, pt. 4, at 18 (1985); H.R. Rep. No. 99-251, pt. 1, at 526 (1985). "But no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). The legislative history focused on the question presented demonstrates that Congress intended that vessels would only have to pay for an improvement if they are a direct beneficiary of it. *See* Pet. 20. That more-specific history confirms Petitioners', not Sabine-Neches's, reading of WRDA.

Sabine-Neches similarly misses the mark with its contention (at 25) that the Senate Report's reference to "flexibility" for localities in crafting harbor dues indicates that Congress would have approved of the novel fee charged here. WRDA places careful constraints on localities' flexibility, limiting the "purposes" for which localities may charge dues, *see* 33 U.S.C. § 2236(a)(1); setting "[g]eneral limitations" on which vessels can be charged dues at all, *see id.* § 2236(a)(3); and describing how localities must "formulat[e]" the fees that they charge, *see id.* § 2236(a)(4). This isn't a statute that simply grants localities discretion to do what they will.

Sabine-Neches also suggests (at 17) that WRDA should be read to permit localities to charge fees for incomplete and unusable increments of a project because that will somehow "reduce burdens on the federal fisc." But under WRDA's funding scheme, the

federal government's payments are not reduced by user fees. The statute obligates the federal government to foot the bill for the *first phase* of the project using "new start" funds. Pet. App. 3a. After that initial cash infusion, local entities must "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 federal government therefore pays the same amount regardless of how much localities charge vessels.

B. The Question Presented Is Important And Warrants Review Now.

1. Although Sabine-Neches devotes the lion's share of its brief to shoring up the Fifth Circuit's analysis, Sabine-Neches also asks this Court to ignore the Fifth Circuit's error. For example, Sabine-Neches insists—early and often—that the absence of a circuit split supports denying the petition. Br. in Opp. 2, 10, 27. But, this Court's review is warranted precisely because the one circuit confronting the question presented has conclusively—and wrongly—decided it.

Where one court of appeal has an outsized influence on a particular area of law, this Court grants review in the absence of a split. For example, this Court routinely reviews decisions from the Federal Circuit, where "conflict among and with other federal courts * * * has been substantially eliminated," and the Court instead grants certiorari based "largely on the importance of the questions presented." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.21 (11th ed. 2019); *see also, e.g.*, *United States* v. *U.S. Shoe Corp.*, 522 U.S. 944 (1997) (granting certiorari in the absence of a split in a case involving WRDA). The same is true in this case, where numerous Port Authorities—the

vast majority of which were located in the Fifth Circuit—filed amicus briefs in the Fifth Circuit in support of Sabine-Neches's position. *See* C.A. Brief of Amicus Curiae Texas Ports Association 1; C.A. Brief of Amicus Curiae Port of Houston Authority 1; C.A. Brief of Amici Curiae American Association of Port Authorities et al. 1-3.

The Fifth Circuit's flawed interpretation creates a rule with nationwide effects. *See* API Amicus Br. 10-15. Absent review and correction here, the decision below will continue to subject the natural gas and oil industry—including the numerous producers who pass through Sabine-Neches's port each year—to fees that Congress not only never intended but also affirmatively sought to prevent.

2. Sabine-Neches attempts to obscure the economic fallout by arguing that its user fee is a "modest" levy that amounts to "a tiny fraction of a penny per MMBTU (a measure of energy content)." Br. in Opp. 27. That is a misleading metric, as a single tanker can carry *millions* of MMBtu's of liquified natural gas. *See* FTI Consulting, LNG Freight Rate Estimates—Results, at 22 (Aug. 29, 2022), *available at* https://tinyurl.com/m6rs5f8w. What Sabine-Neches tries to disguise, but cannot deny, is that the decision below opens the door to user fees under WRDA with a potential *multi-billion* dollar aggregate impact on the Nation's economy. Pet. 28-30.

Having failed to minimize the economic burden imposed by the decision below, Sabine-Neches falls back on the unsupported statement that the user fee is justified because Petitioners must "pay[] their fair share for waterway improvements designed to benefit them and other hydrocarbon shippers." Br. in Opp. 28. But

that statement highlights how upside-down Sabine-Neches's (and the Fifth Circuit's) reasoning is. The Project was conceived to permit the Waterway to accommodate larger vessels with drafts up to 48 feet, but Sabine-Neches requires every vessel entering the Waterway with a draft greater than 20 feet to pay the user fee, *even if* they can use the Waterway as currently constructed. Pet. App. 23a. And vessels with drafts greater than 40 feet, for which the Project was designed, cannot currently use the Waterway and are therefore paying *none* of the fee. Appellants' C.A. Opening Brief 8-9, 12.

Finally, Sabine-Neches's argument (at 29-30) that a reversal of the decision below would make it more difficult to finance and complete waterway-improvement projects is belied by the admitted novelty of Sabine-Neches's user fee, Br. in Opp. 33, and by the Navigation District's own use of traditional revenue streams to finance part of the Project's costs, Pet. 26-27. Following WRDA's text does not threaten this Project or future infrastructure proposals. Alternative—and lawful—funding mechanisms exist, like the $250 million in bond financing Sabine-Neches has obtained, *id*., and WRDA-compliant user fees, *id*. at 24-25.

C. This Case Is An Excellent Vehicle To Decide The Question Presented.

Sabine-Neches argues that this case is an inappropriate vehicle to decide the question presented because it arises from "a unique factual context" that is unlikely to be repeated. Br. in Opp. 33-35. Sabine-Neches's *own amici* in the Fifth Circuit said the opposite. The Texas Ports Association expressly asked for "the power to levy flexible harbor dues, because those harbor dues would in turn serve as a *new and*

innovative source of revenue." C.A. Brief of Amicus Curiae Texas Ports Association 1 (emphasis added) (internal quotation marks omitted). This amicus brief was "paid for" by the Port of Corpus Christi Authority of Nueces County, Texas, which is "the non-Federal sponsor of the Corpus Christi Ship Channel Improvement Project" under WRDA. *Id*. at 1-2.

Moreover, nothing in the Fifth Circuit's opinion would limit the imposition of similarly-structured fees to only those localities lacking "a large asset base or other sources of revenue." Br. in Opp. 33. The decision below sets no such limit. Pet. App. 8a-12a. The fact that Sabine-Neches's user fee is currently unique does not mean that it will remain so if this Court declines review. A port that may have previously assessed that a Sabine-Neches-style user fee could violate WRDA and the Tonnage Clause, can now decide to follow Sabine-Neches's example, with the Fifth Circuit's blessing. This Court should step in now before copycat user fees have the chance to inflict even greater burdens on the Nation's economy.

II. IN THE ALTERNATIVE, THE COURT SHOULD CALL FOR THE VIEWS OF THE SOLICITOR GENERAL.

If the Court does not grant certiorari outright, it should invite the Solicitor General to express the United States' views. Pet. 23-24. Sabine-Neches suggests (at 32) that, because the Corps has approved of Sabine-Neches's improvement project and Congress has appropriated start-up funding, the Solicitor General must necessarily agree with Sabine-Neches's position. That is wrong. Piecemeal congressional appropriations and agency support for the overall project do not constitute a legal judgment about the legality of the user fee. This case, at its heart, is about an

unauthorized and unconstitutional levy on shipping with a potential multi-billion dollar impact on the Nation's economy. Given the high-stakes involved in the interpretation of this important federal statute, the Solicitor General should be invited to weigh in.

CONCLUSION

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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