No. 21-454

In the

Supreme Court of the United States

MICHAEL SACKETT, ET UX.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the core principles of Separation of Powers and that our federal government is one of limited, enumerated power. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *West Virginia v. EPA*, No. 20-1530 (2021); *Baldwin v. United States*, 140 S.Ct. 690 (2020); *Kisor v. Wilke*, 139 S.Ct. 2400 (2019); *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); *Rapanos v. United States*, 547 U.S. 715 (2006); and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), to name a few.

SUMMARY OF ARGUMENT

One might be tempted to claim that arguments about whether so-called "wetlands" fall within the Clean Water Act's regulation of navigable waters is just so much "water under the bridge." The problem with such a claim is that the respondents have built their bridge in a place where there is no water, navigable or otherwise. This case demonstrates that the Environmental Protection Agency and the Army

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

Corps of Engineers have pulled off a naked power grab. Not only have they usurped the power of Congress to make the laws and the power of the courts to interpret those laws, but they have also usurped state and local governments' police power authority to regulate local land use. This was accomplished because, decades ago, this Court "deferred" to the agencies' interpretation of the Clean Water Act pursuant to the Court's troubled *Chevron* deference doctrine.

The Court should reexamine its decision to defer to the agencies' rewriting of the statutory text and rule that the Act only extends to the limits of Congress's power under the Commerce Clause – regulation of the navigable waters as a channel of interstate commerce.

ARGUMENT

I. The Court Should Reexamine its Decision to Defer to the Agencies' Interpretation of the Clean Water Act.

In *United States v. Riverside Bayview Homes, Inc.*, this Court deferred to the Army Corps of Engineers "interpretation" of the Clean Water Act to allow the Corps to include "wetlands" adjacent to a navigable water as part of the navigable water of the United States. 474 U.S. 121, 131 (1985). That decision to defer to the Executive on an issue of statutory interpretation was based on the doctrine of *Chevron* deference. Members of this Court have identified the constitutionally dubious nature of this doctrine. *Michigan v. EPA*, 576 U.S. 743, 761-62 (2015) (Thomas, J., concurring); *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). Deference to the

Executive on matters of statutory interpretation violates the separation of powers, one of the core features of our constitutional structure.

A. The Constitution requires separation of powers to protect individual liberty.

Essential for the preservation of individual liberty, the Constitution's separation of powers is "a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (emphasis in original). It is "a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Id.*

Several members of this Court have recognized that various doctrines of deference to the unelected, unaccountable, and largely-unknown federal bureaucracy might be difficult to reconcile with the separation of powers' "high walls." *Id.*

There is good reason to question the constitutionality of *Chevron* deference. Deferring to the Executive on the meaning of statutory texts contravenes the separation of powers—a structural feature of the federal constitution considered vital by the Framers and Ratifiers—because it gives to the agencies the judiciary's power "to say what the law is." *See Marbury v. Madison*, 1 Cranch 137, 177 (1803). *Chevron* deference's denigration of the separation of powers attacks the constitution's primary means of protecting individual liberty. *Baldwin v. U.S.*, 140 S.Ct. at 691 (Thomas, J., dissenting from denial of certiorari).

Separation of the powers of government is foundational to our constitutional system precisely because the Framers and Ratifiers of the Constitution understood well that this principle was necessary to protect individual liberty. Accordingly, the founding generation relied on the works of Baron de Montesquieu, William Blackstone, and John Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, The Spirit of the Laws 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, Commentaries on the Laws of England 58 (William S. Hein & Co. ed., 1992); John Locke, The Second Treatise on Government 82 (Thomas P. Peardon, ed.,1997).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government itself. Federalist No. 51, The Federalist Papers, Clinton Rossiter, ed. at 318 (Madison); Federalist No. 47 at 298-99 (Madison); Federalist No. 9 at 67 (Hamilton); *see also* Thomas Jefferson, Jefferson to Adams, The Adams-Jefferson Letters 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, by vesting the legislative authority in Congress, the executive power in the President, and the ultimate judicial responsibilities in this Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. Accepting as a given that power needed to be separated, the ratifying generation debated whether the proposed constitutional text separated power *enough*. Federalist No. 48, at 305 (Madison). This

was a rare issue on which the federalists and the anti-federalists agreed. Even the anti-federalist Brutus noted that "[when] power is lodged in the hands of men independent of the people, and of their representatives . . . no way is left to controul them." Brutus, Essay XV (1788), *reprinted in* 2 The Complete Anti-Federalist 437, 442 (Herbert J. Storing ed. 1981). In short, the ratifying generation suffered from no agnosticism or crisis of confidence about the urgent imperative to diffuse power both horizontally (among the coordinate federal branches) and vertically (between the United States and the sovereign States).

Alarmed that just stopping one branch from exercising the powers of another would prove insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachments by another. Federalist No. 48, at 305 (Madison). Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id.*; Federalist No. 51, at 317-19 (Madison); *see Mistretta v. United States*, 488 U.S. 361, 380 (1989).

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. So much so that any attempt by any branch of government to encroach on another branch's powers, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The duty falls on the judicial branch, in particular, to enforce this essential protection of liberty.

Chadha, 462 U.S. at 944-46. To be sure, the Constitution was designed to pit ambition against ambition and power against power. Federalist No. 51, at 319 (Madison); *see also* John Adams, Letter XLIX, 1 A Defense of the Constitutions of Government of the United States of America 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). But when this structural competition of interests does not stop an encroachment, this Court is obligated to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S. at 199. Judicial engagement at such critical moments is an imperative and a virtue, not a vice. It is a principal reason that the judiciary was created.

B. *Chevron* deference violates constitutionally mandated separation of powers.

i. Deference to agency interpretation of statutory texts allows the Executive to exercise legislative power.

Chevron deference involves an explicit recognition that administrative agencies make "law"—that is to say, agencies promulgate substantive legal obligations (or prohibitions) that bind individuals. Pursuant to the doctrine, courts may not interfere with agency lawmaking so long as the congressional enactment is ambiguous, the agency has both expertise and rulemaking authority, and the agency's interpretation is at least a possible interpretation of the law. The courts have recognized that agencies are clearly involved in lawmaking when they enact substantive rules that are subject to *Chevron* deference. *See Mead*, 533 U.S. at 233. There are two problems with deference in this regard. First, the Constitution assigns lawmaking exclusively to Congress. U.S. Const.

art. I, § 1. Second, reflecting the Founders' fears over the power of legislative branch, the Constitution specifies a particular procedure through which laws are to be made. U.S. Const. art. I, § 7, cl. 2. Agencies do not follow that procedure when promulgating regulations. *See* 5 U.S.C. § 553

Article I, section 1 of the Constitution provides: "All legislative Powers herein granted shall be vested *in a Congress* of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1, cl. 1 (emphasis added). This is the first of the three "vesting clauses" that set out the basic plan of government under the Constitution and that provide the framework for the scheme of separated powers. Powers vested in one branch under a vesting clause cannot be ceded to or usurped by another. *Baldwin v. U.S.*, 140 S.Ct. at 691 (Thomas, J., dissenting from denial of certiorari); *Association of American Railroads*, 575 U.S. at 67-68 (Thomas, J., concurring).

The legislative power is the power to alter "the legal rights, duties and relations of persons." *See Chadha*, 462 U.S. at 952. This is the same definition given to "substantive rules" adopted by administrative agencies. Section 551 of the Administrative Procedure Act defines the term "rule" as an agency statement that prescribes "law or policy." These are "laws" that impose "legally binding obligations or prohibitions" on individuals. *Perez*, 575 U.S. at 123 n.4 (Thomas, J., concurring). It is difficult to see much space between agency "rules" and the "legislation" that Article I of the Constitution reserved exclusively to Congress. Deference under *Chevron* and related deference doctrines makes any such space evaporate

and results in the Executive exercising Congress's power to make law. *See Michigan*, 576 U.S. at 762 (Thomas, J., concurring).

ii. Deference to agency interpretation of statutory texts allows the Executive to exercise judicial power.

Article III, § 1 of the Constitution vests the "judicial power" in the "Supreme Court and in such inferior Courts as the Congress may … establish." In a scheme of separated powers, the key to judicial power is the "interpretation of the law." Federalist No. 78 at 404 (Alexander Hamilton); *Perez*, 575 U.S. at 119-20 (Thomas, J., concurring). This is a power that must be separated from both execution and legislation. Quoting Montesquieu, Justice Story noted that "there is no liberty, if the judiciary power be not separated from the legislative and executive powers." Joseph Story, 3 Commentaries on the Constitution, § 1568 (1833), reprinted in 4 The Founders' Constitution 200. The purpose of the judiciary is to stand as a neutral arbiter between the legislative and executive branches—a necessary check on the political branches of government. Federalist No. 78, *supra* at 405 (Alexander Hamilton). The separate judicial power allows the courts to serve as "bulwarks" for liberty. *Id*. This requires that judges have the power to "declare the sense of the law." *Id*.; *see Chadha*, 462 U.S. at 944.

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. Federalist No. 51 at 269 (Madison). Each branch of government must support and defend the Constitution and thus must interpret the Constitution in is own arena. *United States v. Nixon*, 418 U.S. 683, 704 (1974). But in order

to keep the political branches in check, the courts may not surrender their power to interpret the law to either of the political branches. The judicial branch accomplishes its role by ruling on the legality of the actions of the executive and giving "binding and conclusive" interpretations to acts of Congress. William Rawle, A View of the Constitution of the United States, reprinted in 4 The Founders' Constitution 195. Had the Constitution not assigned such a role to the judiciary as a separate branch, the plan of government "could not be successfully carried into effect." *Id*.

Chevron deference alters this framework, however, in a way that the separation of judicial from executive power is no longer complied with. It is no longer the exclusive province of the courts to interpret congressional enactments. Instead, the court now treats the existence of an "ambiguity" as meaning that Congress intended the agency, and only the agency, to interpret the statute. So long as the agency interpretation is "reasonable," *Chevron* requires the courts to cede their judicial power to the executive and approve the agency interpretation.

Any deference to the agency on issues of statutory construction ignores the constitutional role of the courts to interpret legal texts. It also ignores the provisions of the Administrative Procedure Act that assign interpretation of the statute to the courts, not the agencies. *Baldwin v. U.S.*, 140 S.Ct. at 692 (Thomas, J., dissenting from denial of certiorari). This Court should reexamine its decision in *Riverside Bayview Homes* because that decision was based on the constitutionally dubious doctrine of *Chevron* deference.

II. The Clean Water Act Only Applies to Navigable Waters.

A. Proper interpretation of the Clean Water Act requires adherence to the principle of enumerated powers.

When the framers of our Constitution met in Philadelphia in 1787, it was widely acknowledged that a stronger national government than existed under the Articles of Confederation was necessary if the new government of the United States was going to survive. The Continental Congress could not honor its commitments under the Treaty of Paris; it could not meet its financial obligations; it could not counteract the crippling trade barriers that were being enacted by the several states against each other; and it could not even ensure that its citizens, especially those living on the western frontier, were secure in their lives and property. *See, e.g.*, Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), reprinted in 3 The Founders' Constitution 473-74 (P. Kurland & R. Lerner eds., 1987) (noting that duties imposed by the states upon each other were "as great in many instances as those imposed on foreign Articles"); Federalist No. 22, at 144-45 (Hamilton) (referring to "[t]he interfering and unneighborly regulations in some States," which were "serious sources of animosity and discord" between the States); *New York v. United States*, 505 U.S. 144, 158 (1992) ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience") (quoting Federalist No. 42 at 267 (Madison)).

But the framers were equally cognizant of the fact that the deficiencies of the Articles of Confederation existed by design, due to a genuine and almost universal fear of a strong, centralized government. *See, e.g.*, *Bartkus v. People of State of Illinois*, 359 U.S. 121, 137 (1959) ("the men who wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power"); *Garcia v. San Antonia Metropolitan Transportation Authority*, 469 U.S. 528, 568-69 (1985) (Powell, J., dissenting). Our forebears had not successfully prosecuted the war against the King's tyranny merely to erect in its place another form of tyranny.

The central problem faced by the convention delegates, therefore, was to create a government strong enough to meet the threats to the safety and happiness of the people, yet not so strong as to itself become a threat to the people's liberty. *See* Federalist No. 51, at 322 (Madison). The framers drew on the best political theorists of human history to craft a government that was most conducive to that end. The idea of separation of powers, for example, evident in the very structure of the Constitution, was drawn from Montesquieu, out of recognition that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny." Federalist No. 47, at 301 (Madison).

But the framers added their own contribution to the science of politics, as well. In what can only be described as a radical break with past practice, the Founders rejected the idea that the government was

sovereign and indivisible. Instead, the Founders contended that the people themselves were the ultimate sovereign, *see, e.g.*, James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), reprinted in 2 J. Wilson, The Works of James Wilson 770 (R. McCloskey ed., 1967), and could delegate all or part of their sovereign powers, to a single government or to multiple governments, as, in their view, was "most likely to effect their Safety and Happiness." Declaration of Independence, ¶ 2. The importance of the division of sovereign powers was highlighted by James Wilson in the Pennsylvania ratifying convention:

> I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.
>
> Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made for the people as well as by them, and not the people as made for the States. The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means

> preserve them all. This, I say, is the inherent and unalienable right of the people.

James Wilson, Pennsylvania Ratifying Convention, (Dec. 4, 1787), reprinted in 1 The Founders' Constitution 62.

As a result, it became and remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the residuum of power to be exercised by the state governments or by the people themselves. *See, e.g.*, Federalist No. 39, at 256 (Madison) (noting that the jurisdiction of the federal government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); Federalist No. 45, at 292-93 (Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite"); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended"); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("The Constitution created a Federal Government of limited powers").

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on, by way of the Tenth Amendment. *See* U.S. Const. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Rather, it is inherent in the doctrine of enumerated powers embodied in the

main body of the Constitution itself. *See* U.S. Const. Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States" (emphasis added)); U.S. Const. Art. I, § 8 (enumerating powers so granted); see also *M'Culloch*, 17 U.S. (4 Wheat.) at 405 ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, … is now universally admitted"); *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers").

The constitutionally-mandated division of the people's sovereign powers between federal and state governments was not designed to protect state governments as an end in itself, but rather "was adopted by the Framers to ensure protection of our fundamental liberties." *Lopez*, 514 U.S. at 552 (quoting *Gregory*, 501 U.S. at 458); *see also United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) ("As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power" (citing *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting); *Gregory*, 501 U.S., at 458-59; *Atascadero State Hospital v. Scanlin*, 473 U.S. 234, 242 (1985) (quoting *Garcia*, 469 U.S. at 572 (Powell, J., dissenting))); *Garcia*, 469 U.S. at 582 (O'Connor, J., dissenting) ("This division of authority, according to Madison, would produce efficient government and protect the rights of the people") (citing Federalist No. 51, at 350-351 (Madison). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States

and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 582 (quoting *Gregory*, 501 U.S., at 458); *Gregory*, 501 U.S. at 459 (quoting Federalist No. 28, at 180-81 (Hamilton)); *id*. (quoting Federalist No. 51, at 323 (Madison)); *see also Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting) ("[The Framers] envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States" (citing *FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting)); *id*. at 571 (Powell, J., dissenting) ("The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government").

When Congress (or a federal agency, in supposed reliance on an act of Congress) acts beyond the scope of its enumerated powers, therefore, it does more than simply intrude upon the sovereign powers of the states; it acts without constitutional authority, that is, tyrannically, and places our liberties at risk. *See, e.g.*, Federalist No. 33, at 204 (Hamilton) (noting that laws enacted by the Federal Government "which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies … will be merely acts of usurpation, and will deserve to be treated as such").

Foremost among the powers not delegated to the federal government was the power to regulate the health, safety, and morals of the people – the so-called police power. *See, e.g.*, Federalist No. 45, at 292-93 (Madison) ("The powers reserved to the several States

will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation"); *United States v. E. C. Knight Co.*, 156 U.S. 1, 11 (1895) ("It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belong to the states, not surrendered by them to the general government"). The powers at issue in this case – the granting of land use permits and the regulation of wholly intrastate "wetlands" – are within the core of the police powers reserved to the states or to the people.

Congress does retain some measure of discretion to choose the means necessary for giving effect to its enumerated powers, of course, but it cannot use its discretionary power over means in furtherance of ends not granted to it. As Chief Justice Marshall noted in *M'Culloch v. Maryland*: "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the [national] government; it would become the painful duty of this tribunal … to say, that such an act was not the law of the land." 17 U.S. (4 Wheat.) at 423. Because, as described below, Congress's attempts, as interpreted by EPA and the Corps of Engineers, to link the vintage exercise of the state police powers at issue here to its power to regulate interstate commerce is pretext of

the highest order, Chief Justice Marshall's admonition is directly on point: It is the duty of this Court to say that the interpretation of the Clean Water Act propounded by respondents is not the law of the land.

B. Regulation of "wetlands" is outside the scope of Congress's powers to regulate the channels of interstate commerce.

As originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade. *See, e.g.*, *Corfield v. Coryell*, 6 F. Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"); *Lopez*, 514 U.S. at 585 (Thomas, J., concurring) ("At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes"). Indeed, in the first major case arising under the clause to reach this Court, it was contested whether the Commerce Clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons*, 22 U.S. (9 Wheat.), at 190; *see also Corfield*, 6 F. CAS., at 550 ("Commerce … among the several states … must include all the means by which it can be carried on, [including] … passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

This originally narrow understanding of the Commerce Clause continued for nearly a century and

a half. Manufacturing was not included in the definition of commerce, held the Court in *E.C. Knight*, 156 U.S. at 12, because "Commerce succeeds to manufacture, and is not a part of it." "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce …." *Id*. at 13; *see also Kidd v. Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding state ban on retail sales of liquor, as not subject to Congress's power to regulate interstate commerce); *see also A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture (as well as local land use), was part of the police powers reserved to the States, not part of the power over commerce delegated to Congress. *See, e.g.*, *E.C. Knight*, 156 U.S. at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons*, 22 U.S. (9 Wheat.) at 210; *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.) at 599; *Mobile Co. v. Kimball*, 102 U.S. 691 (1880); *Bowman v. Railway Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140

U.S. 545, 555 (1891)); *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the states and therefore to liberty that the line between the two powers be retained:

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

156 U.S., at 13; *see also Carter v. Carter Coal*, 298 U.S. 238, 301 (1936) (quoting *E.C. Knight*); *Garcia*, 469 U.S., at 572 (Powell, J., dissenting) ("federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

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

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

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

As should be obvious, the interpretation of the Clean Water Act to include so-called "wetlands" that are not channels of interstate commerce is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution. The Sacketts seek to make improvements on their own land, not engage in interstate commerce. Land, of course, is the quintessential thing that does not move in interstate commerce. *See*

Camps Newfound/Owatonna v. Town of Harrison, Maine, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting).

As the record in this case demonstrates, respondents are seeking to regulate the Sacketts' land. There is no showing that this land, which is separated from the nearest navigable water by a paved road, is in any way related to a navigable water way that can be used as a channel of interstate commerce.

Nor does the Necessary and Proper Clause provide a valid ground for EPA and the Corps of Engineers expansive assertion of power here. As has long been recognized, that clause gives Congress power over the means it will use to give effect to its enumerated powers; it does not serve as an end power unto itself. *See, e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 187 (describing the phrase "necessary and proper" as a " limitation on the means which may be used"); *M'Culloch*, 17 U.S. (4 Wheat.) at 324 (describing the Necessary and Proper Clause as merely a means clause). There must be a regulation of commerce to which Congress hopes to give effect when it acts pursuant to the Necessary and Proper Clause, and there is no such regulation here. Congress sought to limit the scope of its regulation to "navigable waters" – at least giving a nod to the constitutional limitation that it could only regulate waters as channels of interstate commerce. *See*, *e.g.*, *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 334 (1893); *Cardwell v. Am. River Bridge Co.*, 113 U.S. 205, 205-08 (1885); *Miller v. City of New York*, 109 U.S. 385, 395-96 (1883); *Escanaba & Lake Michigan Transp. Co. v. City of Chicago*, 107 U.S. 678, 682 (1883). It is doubtful that the Clean Water Act involves regulation of interstate commerce at all. But it

is beyond dispute that the Executive's interpretation of "navigable water" to include land puts the Act, as interpreted, far outside of the commerce power.

Under the original view of the Commerce Clause, therefore, this is an extremely easy case. Indeed, it is hard to imagine regulations more removed from the Commerce Clause power, as originally understood, than the interpretations of the Clean Water Act put forward by the Corps of Engineers here and its analogous "migratory bird" rule already invalidated by this Court in *SWANCC*").

Even when this Court expanded the original understanding of the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the States be completely subsumed by Congress. Thus, in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, this Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937) (quoted in *Lopez*, 514 U.S. at 557; *Morrison*, 529 U.S. at 608). Similarly, Justice Cardozo noted in *Schechter Poultry* that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." 294 U.S. at 554 (1935) (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 616 n.6).

These reservations were key to this Court's decisions in *Lopez* and *Morrison*, and played a prominent role in *SWANCC* as well. *See Lopez*, 514 U.S. at 566; *Morrison*, 529 U.S. at 608; *SWANCC*, 531 U.S. at 173-74. As in those cases, the interpretation of the Clean Water Act at issue here does not regulate the channels or the instrumentalities of interstate commerce. A boat will not float on the Sackett's property. There is surely no way to use the so-called "wetlands" on the property as a channel of interstate commerce.

In short, even under the expanded view of the Commerce Clause that has been in place since the New Deal, the interpretation of the Clean Water Act proffered by respondents remains what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people.

The statute enacted by Congress does not actually pretend otherwise. Its express purpose is not to ensure the navigability of the nation's waterways - a proper commerce clause purpose – but is rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" – a clear police power purpose. *See* 33 U.S.C. § 1251(a).

If the statute merely prohibited the discharge into navigable waters of dredged or filled material, or other pollutants that could reasonably threaten navigability, the law would arguably be both a necessary and a proper means to further Congress's powers under the Commerce Clause, because such discharges could at some point threaten navigation. But the statute prohibits the discharge of "any pollutant," not just dredged or filled material or other pollutants that

would threaten navigability. 33 U.S.C. § 1311. There is therefore no jurisdictional element that this Court described as important in *Lopez*, 514 U.S. at 560. Moreover, under respondents' interpretation, the statute prohibits the discharge of fill even in wetlands, which have no connection whatsoever with navigability of interstate waters. The agency here seeks to regulate land use, not navigability. There is not a Commerce Clause purpose to the federal regulation of the Sacketts' property.

Traditional tort and nuisance law remains available to address actions that have detrimental effects in other states. *See, e.g.*, *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 840 (4th Cir. 1999), aff'd sub nom, *United States v. Morrison*, 529 U.S. 598 (2000); *Missouri v. Illinois*, 180 U.S. 208 (1901). Even for waters that touch upon two or more States, the States remain free to enter into agreements to regulate the waters to their mutual benefit. *See, e.g.*, *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893) (describing an agreement to drain a malarial district on the border between two States as an example of an interstate agreement that could "in no respect concern the United States"). And on the chance that such an agreement might be made to the detriment of other states, the Congressional consent requirement of the Compacts Clause of Article I, Section 10 provides a sufficient check. U.S. Const., Art. I, § 10, cl. 3 ("No State shall, without the consent of Congress, … enter into any agreement or compact with another State, or with a foreign power*"); see also West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951) ("A compact is more than a supple device for dealing with interests confined within a region.… [I]t is also a means of safeguarding the national interest").

But there is no basis for federal regulation of local land use under the Clean Water Act for actions that do not affect the navigability of a water way used to transport goods in interstate commerce.

In short, there is as little need for federal regulation here as there is constitutional authority. That federal officials in Washington, D.C., might weigh the various police power concerns differently than the people of Idaho provides no constitutional title for them to do so, especially where, as here, the benefits and costs on both sides of the health, safety and welfare equation are exclusively borne by the people of Idaho. Our Constitution leaves such decisions to the States for good reason. The inference-upon-inference reasoning of the Corps and EPA should not be allowed to alter that fundamental constitutional structure

CONCLUSION

The text of the Clean Water Act purports to regulate "navigable waters." This was the understanding of the agency at the time the statute was enacted. Why then is the EPA insisting on regulating "wetlands" separated by a paved road from any surface water? What changed was not the text of the statute but rather the agency's interpretation. *See SWANCC*, 531 U.S. at 167-68. This Court's deference to that interpretation violates separation of powers and allows EPA to regulate beyond the enumerated powers of Congress.

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