No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT & CHANTELL SACKETT,

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 CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
MIRIAM BECKER-COHEN
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

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Other Authorities

Akhil Reed Amar, *America's Constitution: A Biography* (2005) 12

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2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed. 1836) 10, 11

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Samuel Johnson, *A Dictionary of the English Language* (9th ed. 1790)..... 12

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2 *The Records of the Federal Convention of 1787* (Max Farrand ed., rev. ed. 1967) 8, 9, 21

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1 Joseph Story, *Commentaries on the Constitution of the United States* (1833)..... 7

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution is interpreted in a manner consistent with its text and history and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Two centuries ago, Chief Justice John Marshall cautioned that a "narrow construction" of Congress's authority to regulate interstate commerce would "cripple the government, and render it unequal to the object for which it is declared to be instituted." *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824). Yet with no meaningful discussion of the text and history of the Commerce Clause—not even a citation to the language of the Clause itself—Petitioners assert that the test applied by the court below to ascertain the meaning of the term "navigable waters" in the Clean Water Act (CWA) raises "Commerce Clause issues" that merit invocation of the constitutional avoidance canon. Pet'rs Br. 47. Their *amici* go even further, urging that Congress is

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or their counsel made a monetary contribution to its preparation or submission.

powerless to regulate the destruction of wetlands like those on Petitioners' property, even though those wetlands have a significant nexus to traditional navigable waters and thus fall within the heartland of Congress's Commerce Clause authority. This Court should reject these arguments as unmoored from the text and history of the Commerce Clause and affirm the decision of the court below.

At issue in this case is the proper test for determining whether the wetlands on Petitioners' property constitute "navigable waters" under the CWA, which in turn, are defined as "waters of the United States," 33 U.S.C. § 1362(7). If Petitioners' wetlands constitute "waters of the United States," then without an appropriate permit, they may not "discharge . . . any pollutant," *id.* § 1311(a), including "dredged spoil," "rock," or "sand," *id.* § 1362(6), onto their property to fill the wetlands and render them capable of being built upon.

The court below applied the test set forth by Justice Kennedy in his concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), to hold that Petitioners' property constitutes "waters of the United States." Pet. App'x 32-36. Specifically, the court concluded that Petitioners' wetlands "have a significant nexus to Priest Lake, a traditional navigable water," and thus fall within the federal government's jurisdiction. *Id.* at 33; *see Rapanos*, 547 U.S. at 759-760 (Kennedy, J., concurring in the judgment) (wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made" constitute "waters of the United States").

There is no reason for this Court to question the constitutionality of the CWA as interpreted in this way. As the text and history of the Commerce Clause make clear, regulation of wetlands with a "significant nexus" to traditional navigable waters fall squarely

within Congress's power to regulate the "channels of interstate commerce," as well as its power to regulate "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

When the Framers gathered in Philadelphia to draft the Constitution, they were living under a central government that had proved incapable of addressing issues of national concern. With this experience fresh in their minds, delegates to the Constitutional Convention voted overwhelmingly in favor of the Virginia Plan as a blueprint for our nation's charter, creating a robust and empowered federal government. 1 *The Records of the Federal Convention of 1787* at 313 (Max Farrand ed., rev. ed. 1966) [hereinafter *Federal Convention Records*]. The centerpiece of the Virginia Plan was Resolution VI which, as tweaked by Gunning Bedford, declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation." 2 *id.* at 131-32.

Tasked with translating the principle of this Resolution into specific but non-exhaustive provisions, the Committee of Detail wrote Article I to grant Congress the sweeping power to, among other things, "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. As used in this Clause, the word "commerce" meant more than economic activity or trade—it carried a broader meaning encompassing "interactions, exchanges, interrelated activities, and movements back and forth, including, for example, travel, social connection, or conversation." Jack M. Balkin, *Commerce*, 109 Mich. L. Rev. 1, 15-16 (2010); *see*

Gibbons, 22 U.S. at 189 ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."). And when the Framers invoked the phrase "among the several states," they meant "intermingled with"—that is, "commerce which concerns more States than one." *Id.* at 194. In this manner, the Commerce Clause targets for federal regulation those activities, including ones occurring within a single state, that have an impact on multiple states or the nation as a whole, such as those producing spillover effects or collective action problems. The destruction of "waters of the United States," including wetlands with a "significant nexus" to traditional navigable waters, is the quintessential example of such a problem.

Drawing on this text and history, this Court has held that Congress may regulate, among other things, "the use of the channels of interstate commerce" and "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. Regulation of the destruction of wetlands with a significant nexus to traditional navigable waters falls squarely within both categories. *Id.* at 559.

To start, as this Court has recognized, Congress has "extensive authority over this Nation's waters" as channels of interstate commerce. *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979). Indeed, Petitioners concede that since at least the late nineteenth century, this Court has held that Congress has the authority to regulate non-navigable waters when doing so is necessary to achieve meaningful oversight of the channels of interstate commerce. Pet'rs Br. 35; *see United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940) ("it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation").

Such is the case for regulation of those wetlands with a significant nexus to traditional navigable waters. Justice Kennedy's test itself, by instructing that the significant-nexus requirement is met only "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment), necessarily ensures that the CWA only permits regulations of those wetlands that fit within Congress's traditional channels-of-commerce authority. This Court could end its analysis there.

But this Court could also conclude that the CWA, as construed by Justice Kennedy's *Rapanos* opinion, targets the regulation of activities that substantially affect interstate commerce because the destruction of wetlands with a significant nexus to the *channels* of interstate commerce can impair the ability of those channels to support interstate commerce by rendering them unfishable, unable to support commercial recreation, or otherwise unfit for meaningful commercial activity. Here, for instance, if Petitioners were to dredge and fill the wetlands on their property, those wetlands would no longer provide important filtering functions that help preserve the integrity of Priest Lake as a channel of interstate commerce that supports "substantial commerce including boat rentals, fishing guides, public campgrounds and boat ramps, and private marinas." J.A. 34-35 (EPA ecologist's site inspection report). Thus, by permitting federal regulation of the destruction of wetlands with a significant nexus to the channels of interstate commerce, Justice Kennedy's test targets "activities that substantially

affect interstate commerce," *Lopez*, 514 U.S. at 559, as well.

Petitioners and their *amici* raise a slew of other arguments in support of their position that this Court should choose their atextual multistep test over the straightforward significant-nexus test. But all are without merit. To accept those arguments would not just require this Court to overrule its longstanding CWA precedents and rewrite the well-established significant-nexus test from *Rapanos*; it would also require this Court to ignore the text and history of the Commerce Clause and adopt an artificially narrow and ahistorical construction of Congress's power to regulate in the national interest.

Put simply, under the text and history of the Commerce Clause, as well as modern precedent, there is no question that Congress has the authority to regulate wetlands with a significant nexus to traditional navigable waters. Thus, this Court should reject Petitioners' invocation of the constitutional avoidance canon and affirm the decision of the court below.

ARGUMENT

I. The Framers Designed the Constitution to Grant the Federal Government Broad Power to Address Issues of National Concern.

The Framers drafted the Constitution "in Order to form a more perfect Union," U.S. Const. pmbl.—more perfect, that is, than the flawed Articles of Confederation that deprived the central government of sufficient power to do its job. The result was a federalist system that gives Congress the power to act in circumstances in which a national approach is necessary or preferable, while reserving a primary role for the states in matters of purely intrastate concern.

By the time the Framers began drafting the Constitution in 1787, they had spent years under the defective Articles of Confederation. Those Articles, adopted by the Second Continental Congress in 1777 and ratified in 1781, established a confederacy built upon a mere "firm league of friendship" between thirteen independent states, Arts. of Confed. of 1781, art. III, with Congress as the single branch of national government, *id.* art. V. Although the Articles of Confederation delegated certain discrete powers to Congress, they gave the national government no means to execute its powers. *See* 1 Joseph Story, *Commentaries on the Constitution of the United States* § 246 (1833) (Congress could "declare everything, but do nothing"). For example, Congress could not directly tax individuals or legislate upon them; it had no express power to make laws that would be binding in state courts and no general power to establish national courts; and it could raise money only by "requisitioning" contributions from the states. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1447 (1987).

This scheme created such an ineffective central government that it nearly cost Americans victory in the Revolutionary War. In the midst of several American setbacks during the war, George Washington lamented that "unless Congress speaks in a more decisive tone; unless they are vested with powers by the several States competent to the great purposes of War . . . our Cause is lost." 18 *The Writings of George Washington* 453 (John C. Fitzpatrick ed., 1937) (Letter to Joseph Jones, May 31, 1780). Thus, as the war approached its end, he announced in a circular sent to state governments that it was "indispensible to [their] happiness" that "there should be lodged somewhere, a supreme power to regulate and govern the general concerns of the confederated Republic, without which the

Union cannot be of long duration." Letter from George Washington to the States (June 1783), https://founders.archives.gov/documents/Washington/99-01-02-11404.

The delegates to the Constitutional Convention shared Washington's conviction that the Constitution must establish a federal government with sufficient powers to enable it to function effectively. *See, e.g.*, James Madison, *Vices of the Political System of the United States* (Apr. 1787), https://founders.archives.gov/documents/Madison/01-09-02-0187 (identifying a key shortcoming under the Articles as "want of concert in matters where common interest requires it," a "defect" that was "strongly illustrated in the state of our commercial affairs"). In considering how to grant such power to the national government, the delegates crafted an instructional resolution directed to the Convention's drafting committee, the Committee of Detail, on how to articulate the powers of Congress. They based these instructions on Resolution VI of the Virginia Plan, which declared "that the National Legislature ought to be [e]mpowered to enjoy the Legislative Rights vested in the Congress by the Confederation & moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." 2 *Federal Convention Records*, *supra*, at 131-32. The delegates overwhelmingly approved the Virginia Plan and rejected the alternative New Jersey Plan, which proposed a much weaker national government. Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335, 1339 (1934).

The most likely author of Resolution VI was James Wilson, widely regarded as one of the most skilled and accomplished lawyers at the Convention. John

Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1071-72 (2014). The concept of a "national power for national purposes," *id.* at 1074, embodied in Resolution VI, closely aligns with Wilson's 1785 essay, *Considerations on the Bank of North America*, in which he presented arguments in favor of a national bank and "offered a vision of the powers of the national government that foreshadowed the new Constitution drafted two years later," 1 *Collected Works of James Wilson* xix (Kermit L. Hall & Mark David Hall eds., 2007). In that essay, Wilson explained that "[t]he United States have general rights, general powers, and general obligations, not derived from any particular states, nor from all the particular states, taken separately; but resulting from the union of the whole." James Wilson, *Considerations on the Bank of North America* (1785), *reprinted in id.* at 66. Because some "powers" and "obligations" "result[ed] from the union of the whole," it followed that "[w]henever an object occurs to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled." *Id.*

Before the delegates passed their resolution along to the drafting committee, Gunning Bedford of Delaware made an important tweak to Wilson's original Resolution VI, which further emphasized Congress's power to legislate in the natural interest. David S. Schwartz, *A Question Perpetually Arising*, 59 Ariz. L. Rev. 583, 603-605 (2017). Bedford added the language emphasized below:

> [T]hat the National Legislature ought to be [e]mpowered to enjoy the Legislative Rights vested in Congress by the Confederation, and moreover to legislate in all cases *for the general interests of the Union, and also in those* to

> which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.

2 *Federal Convention Records*, *supra*, at 21 (emphasis added); *see* Schwartz, *supra*, at 603-04. The Framers approved the Bedford Resolution by a vote of eight to two, Stern, *supra*, at 1339, adopting it as a guiding constitutional principle.

Once the Bedford Resolution's language was finalized, the delegates passed it along to the Committee of Detail, led by Wilson, to transform this general principle into an enumerated list of powers in Article I of the Constitution. The process of translating the Resolution into enumerated powers was "an effort to identify particular areas of governance where there were 'general Interests of the Union,' where the states were 'separately incompetent,' or where state legislation could disrupt the national 'Harmony.'" Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 178 (1996). The enumerated powers, in other words, were intended to capture the idea that "whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 424 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *Elliot's Debates*] (statement of James Wilson).

Critically, the enumeration of powers was not intended to *displace* the fundamental principle of the Bedford Resolution that Congress should have the ability to legislate in matters of national concern; rather, it was meant to *implement* that principle. Schwartz, *supra*, at 604; *see* Balkin, *supra*, at 11 (although the Resolution does not appear in the final text

of the Constitution, it "was the *animating purpose* of the list of enumerated powers that appeared in the final draft, and it was the key explanation that Framer James Wilson offered to the public when he defended the proposed Constitution at the Pennsylvania Ratifying Convention"). As Wilson put it, "though th[e] principle [of the Bedford Resolution] be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle." 2 *Elliot's Debates*, *supra*, at 424.

Thus, the Framers attempted "with much industry and care" an "enumeration of particular instances, in which the application of the principle ought to take place." *Id.* at 424-25. That enumeration was not intended by the Committee of Detail to be exhaustive, Mikhail, *supra*, at 1055-56, nor did the larger Convention perceive it that way, Stern, *supra*, at 1340 (the Convention "accepted *without discussion* the enumeration of powers made by a committee which had been directed to prepare a constitution based upon the general propositions that the Federal Government was 'to legislate in all cases for the general interest of the Union . . . and in those to which the states are separately incompetent'"). And "no matter what the Convention delegates may have thought, the broader public decisively rejected the idea that the enumeration would limit Congress" to exercising those powers discretely defined in Article I, Section 8, as was made clear by the ongoing public cry for a Bill of Rights even after the enumerated powers were drafted. Richard Primus, *The Limits of Enumeration*, 124 Yale L.J. 576, 617 (2014).

In sum, the powers listed in Article I must be interpreted in light of the general principle underlying

them—that Congress has the power to regulate matters of national concern. As Chief Justice Marshall later put it, "the powers expressly granted to the government of the Union" must not be "contracted by construction, into the narrowest possible compass," as doing so would "explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use." *Gibbons*, 22 U.S. at 222.

II. Focused on More than Just Trade or Economics, the Commerce Clause Empowers Congress to Address Problems that Require a Federal Response, Including Pollution of the Nation's Waters.

With the Bedford Resolution as a guiding structural principle, the Framers wrote the Commerce Clause to empower Congress to legislate on issues requiring a federal response. The Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

The original meaning of "commerce" in the Constitution was not limited to economic activity or trade—it carried "a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets." Akhil Reed Amar, *America's Constitution: A Biography* 107 (2005). At the Founding, "commerce" meant "'intercourse'—that is, interactions, exchanges, interrelated activities, and movements back and forth, including, for example, travel, social connection, or conversation." Balkin, *supra*, at 15-16; *see also* Samuel Johnson, *A Dictionary of the English Language* (9th ed. 1790) (defining "commerce" as "Intercourse: exchange of one thing for another, interchange of

anything; trade; traffick," or "common or familiar intercourse").

Navigation was a key component of "commerce," as the Framers understood it. Indeed, the power over navigation, as an incident of Congress's power over "commerce," "was one of the primary objects for which the people of America adopted their government." *Gibbons*, 22 U.S. at 190.

But the text of the Commerce Clause stretches beyond navigation. It "yokes together" foreign, Indian, and interstate commerce in a single clause because all of these "sets of concerns might require the United States to speak with a single voice." Balkin, *supra*, at 13; *see Gibbons*, 22 U.S. at 194 (the word "commerce" "must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it"). Therefore, "Congress's power to regulate commerce 'among the several states' is closely linked to the general structural purpose of Congress's enumerated powers as articulated by the Framers: to give Congress power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action." Balkin, *supra*, at 6 (quoting U.S. Const. art. I, § 8, cl. 3). As this Court has put it, "prevention of . . . destructive interstate competition is a traditional role for congressional action under the Commerce Clause." *Hodel v. Va. Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. 264, 282 (1981); *see also* Robert Cooter & Neil Siegel, *Collective Action Federalism*, 63 Stan. L. Rev. 115, 119-20 & n.8 (2010) ("collective action problems are the key to understanding the scope of the commerce power").

Again, this Court's landmark decision in *Gibbons v. Ogden* reflects this principle. In his opinion for the Court, Chief Justice Marshall explained that "among

the several states" means more than just commerce "between states"; rather, "among" means "intermingled with" and "commerce among the several states" means "commerce which concerns more States than one." 22 U.S. at 194-95. Under this construction, "even commerce that occurs within a single state might be within Congress's regulatory power if it has external effects on other states or on the nation as a whole." Balkin, *supra*, at 29-30. Indeed, this was the chief holding of *Gibbons*: the Court concluded that Congress had the authority to license steamboat operations in New York waters because that licensing constituted an intrastate activity with a substantial effect on the channels of interstate commerce. *Gibbons*, 22 U.S. at 186-98.

Consistent with *Gibbons*, this Court has long held that the "Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State," *Hodel*, 452 U.S. at 282, regardless of whether the activities are themselves interstate, *see infra* at 22-23. This is because the flow of water—including pollutants and fill materials in that water—does not respect state boundaries, meaning downstream states are at direct risk of injury from insufficient regulation of pollution in upstream states. *See, e.g.*, *Missouri v. Illinois*, 200 U.S. 496 (1906) (Missouri suing to restrain discharge of Chicago sewage through artificial drainage canal into Mississippi River); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (Vermont landowners suing New York paper mill to restrain discharge of effluents into Lake Champlain). Thus, as described further below, pollution of the nation's waterways presents a collective action problem squarely within the scope of Congress's

authority to regulate under the original meaning of the Commerce Clause.

III. The Significant-Nexus Test Does Not Raise Commerce Clause Concerns, as It Ensures Any Regulation of Wetlands Fits Within Congress's Traditional Authority to Regulate Problems with Genuine Spillover Effects.

Drawing on the text and history described above, this Court has recognized three categories of regulations permissible under the Commerce Clause: "Congress may regulate the use of the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59; *United States v. Morrison*, 529 U.S. 598, 609 (2000). Justice Kennedy's significant-nexus test from *Rapanos* permits federal regulation of wetlands that fit squarely within the first category, "the channels of interstate commerce," *Lopez*, 514 U.S. at 558. And federal regulation of those wetlands is justified under the third *Lopez* category as well.

In *Rapanos*, this Court considered whether wetlands near "ditches or man-made drains that eventually empty into traditional navigable waters" constitute "waters of the United States" subject to regulation under the CWA. 547 U.S. at 729 (plurality opinion). Justice Kennedy joined four other justices in the plurality in rejecting aspects of the analysis applied by the court below, but he proposed a different test for determining whether a wetland constitutes a "water[] of the United States."

Under Justice Kennedy's analysis, the CWA covers wetlands that, either alone or in combination with other similarly situated wetlands in the region,

"significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in the judgment). This test, he explained, aligns with the CWA's textual objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). Moreover, the test derives directly from this Court's precedents interpreting the CWA and accounts for the well-established fact that "[w]here wetlands perform . . . filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would," *Rapanos*, 547 U.S. at 775 (Kennedy, J., concurring in the judgment).

A. The Significant-Nexus Test Implements Congress's Authority to Regulate the Channels of Interstate Commerce.

"It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause" as "channels of interstate commerce." *Kaiser Aetna*, 444 U.S. at 173. And that power is not simply justified under a theory of navigability, as "it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation." *Appalachian Electric*, 311 U.S. at 426-27. Indeed, since at least the late nineteenth century, this Court has held that Congress has the authority to regulate non-navigable waters when doing so is necessary to achieve meaningful regulation of the channels of interstate commerce. *See, e.g.*, *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703, 708 (1899) (upholding Congress's authority over non-navigable portions of the Rio Grande River).

For instance, in *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941), this Court unanimously held that Congress could authorize flood

control projects on intrastate non-navigable tributaries because doing so would prevent flooding in traditional navigable rivers. *Id.* at 525-26. This Court emphasized Congress's authority over "the entire basin," *id.* at 525, even where flood control improvements were "somewhat conjectural," *id.* at 526, recognizing that Congress's broad Commerce Clause power extends not just to navigability but other values and interests of national proportion, such as flood control.

Similarly, in *United States v. Riverside Bayview Homes, Inc.*, this Court again unanimously held that as an incident of Congress's power over the channels of interstate commerce, the federal government could exercise jurisdiction over non-navigable "wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features" typically characterized as "navigable waters," 474 U.S. 121, 131 (1985). These cases demonstrate this Court's longstanding acknowledgment that regulation of the pollution of traditional navigable waters is meaningless without the coordinate power to regulate the destruction of wetlands and pollution of other bodies of water with a significant nexus to those channels of interstate commerce.

Justice Kennedy's significant-nexus test follows naturally from these precedents. In his words, Congress's power to regulate channels of interstate commerce also includes the power to adopt "appropriate and needful control of activities and agencies which, though intrastate, affect that commerce." *Rapanos,* 547 U.S. at 782-83 (quoting *Phillips,* 313 U.S. at 526); *see Pierce County v. Guillen*, 537 U.S. 129, 147 (2003).

The significant-nexus test itself, by instructing that the significant-nexus requirement is met only "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect

the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" *id.* at 780, ensures that the CWA permits regulation of only those wetlands that fit within Congress's traditional channels-of-commerce authority. In other words, those wetlands that have no nexus—or a less than "significant" one—to traditional navigable waters and thus might also have a more tenuous relationship to interstate commerce, are excluded from the scope of federal regulation under Kennedy's construction of the CWA.

Unlike some of their *amici* who bafflingly assert that Congress's power to regulate the channels of interstate commerce permits only regulation of waters that can be used to transport goods and people, *see, e.g.*, Br. of Americans for Prosperity 16, Petitioners do not dispute Congress's authority to regulate certain waters that are not "navigable" in the traditional sense, *see* Pet'rs Br. 35 (stating "Congress's power over the channels of interstate commerce authorizes federal regulation of . . . activities not in the [traditional navigable waters], but nonetheless affecting them"). Indeed, the multistep test that Petitioners propose in lieu of the significant-nexus test *also* covers certain non-navigable wetlands that are "inseparably bound up with a 'water' by virtue of a continuous surface-water connection." Pet'rs Br. 49-50. Yet Petitioners still assert without explanation that the significant-nexus test would subject certain wetlands to federal regulation in excess of Congress's authority to regulate the channels of interstate commerce. *See id.* at 47.

This Court should reject that argument. As this Court has repeatedly recognized, *e.g.*, *Rapanos*, 547 U.S. at 775 (Kennedy, J., concurring in the judgment) (noting the important filtering function performed by upstream wetlands); *Riverside Bayview*, 474 U.S. at

134 (same), and the record in this case makes clear, *e.g.*, J.A. 42-43 (EPA ecologist's site inspection report), destruction of any wetland with a significant nexus to a channel of interstate commerce can directly harm that channel by increasing pollution and runoff into it. And as described further below, pollution of a channel of interstate commerce impedes the ability of that channel to support such commerce by rendering it unfishable, unfit for commercial recreation, or even unnavigable. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 174 (2001) (Stevens, J., dissenting) (describing the pollution of the Cuyahoga River that caused it literally to catch fire in 1969, spurring enactment of the CWA). Thus, regulation of wetlands with a significant nexus to a channel of interstate commerce amounts to regulation of the channels of interstate commerce.

Moreover, Petitioners' unsubstantiated constitutional concerns are unmoored from the text and history of the Commerce Clause, as well as this Court's precedents demonstrating "[t]he pervasive nature of Congress' regulatory authority over national waters" pursuant to the Commerce Clause, *Kaiser Aetna*, 444 U.S. at 173. Put simply, the significant-nexus test falls within Congress's authority to regulate the channels of interstate commerce, as that power extends to all wetlands and other waters with a significant nexus to traditional navigable waters, thus giving meaning to Congress's power over those channels of interstate commerce themselves.

B. The Significant-Nexus Test Is Also Justified Under Congress's Authority to Regulate Activities with a Substantial Effect on Interstate Commerce.

The significant-nexus test also falls within Congress's power to regulate activities with a substantial effect on interstate commerce, including the pollution, dredging, and filling of certain wetlands. The facts of this case demonstrate why: Petitioners' "wetlands provide important benefits to Priest Lake including water quality improvement through sediment reduction and nutrient retention and uptake, fish and wildlife benefits through habitat and food base support, and hydrologic benefits through flow attenuation and base flow augmentation." J.A. 42-43 (EPA ecologist's site inspection report). If Petitioners were to dredge and fill the wetlands on their property, those wetlands would no longer provide these critical benefits that help preserve the integrity of Priest Lake as a channel of interstate commerce supporting "boat rentals, fishing guides, public campgrounds and boat ramps, and private marinas." J.A. 34-35. Activities like the dredging and filling of wetlands that lead to pollution of the channels of interstate commerce and impair the ability of those channels to support commerce, like fishing and boating, plainly have a substantial effect on interstate commerce. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (racial discrimination in channels of interstate commerce constitutes activity with a substantial and disruptive effect on "commercial intercourse" under the Commerce Clause). Thus, because Justice Kennedy's test permits federal regulation of the pollution of wetlands with a significant nexus to the *channels* of interstate commerce, it regulates "those activities that substantially

affect interstate commerce" itself, *Lopez*, 514 U.S. at 558-59.

It does not matter for purposes of a Commerce Clause analysis whether pollution amounts to a "commercial" activity, as some of Petitioners' *amici* urge, *see, e.g.*, Br. of Se. Legal Found. (SLF) 32-33; Br. of West Virgina 19-20. It is well settled that "Congress may regulate noneconomic intrastate activities . . . where the failure to do so 'could . . . undercut' its regulation of interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 38 (2005) (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 561). And as described in Section II, the pollution of wetlands with a significant nexus to navigable waters is a prototypical example of an activity with spillover effects for "which the States are separately incompetent," 2 *Federal Convention Records* at 131, setting this case apart from *Lopez* and *Morrison*, the only recent cases to strike down federal laws on the ground that they exceeded Congress's commerce authority. *See* Cooter & Siegel, *supra*, at 163 ("the absence of regulation of guns near schools in one state" in *Lopez*, or of gender-based violence in *Morrison*, "would not undercut the effectiveness of prohibiting them in other states").

In any event, filling or polluting wetlands *is* an "economic" or "commercial" activity. *See SWANCC*, 531 U.S. at 193-94 (Stevens, J., dissenting) ("There can be no doubt that, unlike the class of activities Congress was attempting to regulate in [*Morrison* and *Lopez*], . . . the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons."). Major sources of such pollution overwhelmingly stem from business or commercial land development endeavors. *See* Env't Prot. Agency, Pub. No. EPA-843-F-01-002d, *Threats to Wetlands* 1-2 (2001), www.epa.gov/sites/default/files/2021-

01/documents/threats_to_wetlands.pdf (describing some of the most common types of wetland pollution in the United States, including agriculture, urbanization, mining, marinas, and landfills). Moreover, the sheer number of *amicus* briefs filed in this case by trade associations and business entities, *e.g.*, Br. of Chamber of Com.; Br. of Nat'l Assoc. of Home Builders; Br. of Fourteen Nat'l Agric. Orgs.; Br. of Forestry Orgs.; Br. of Am. Expl. and Mining Assoc. et al.; Br. of Am. Petroleum Inst. et al., belies any claim that this case does not directly—and significantly—involve economic activities.

This is true even when the "significant nexus" itself is of a biological or ecological character. "[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *see, e.g.*, *Pierce County*, 537 U.S. at 147; *Perez v. United States*, 402 U.S. 146, 150 (1971); *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903). Moreover, under this Court's precedents, *see, e.g.*, *Lopez*, 514 U.S. at 561, the *character* of the pollution itself is irrelevant if its *effect* is to hamper, impede, or otherwise alter interstate commerce. *Cf. Heart of Atlanta Motel*, 379 U.S. at 256 ("Nor does it make any difference whether the transportation is commercial in character."). Indeed, this Court has long accepted that the CWA—which was enacted to control pollution of the nation's waters—is a permissible exercise of Congress's Commerce Clause power because of the direct impact that biological and ecological changes brought about by such pollution may have on navigable waters that carry, once carried, or could potentially carry, interstate commerce. *See Riverside Bayview*, 474 U.S. at

133; *Rapanos*, 547 U.S. at 776-77 (Kennedy, J., concurring in the judgment).

For similar reasons, it is irrelevant that Petitioners seek to dredge and fill the wetlands on their property in order to build a family home as opposed to a commercial building. Again, what matters is that the *pollution* or other harm brought about by such dredging and filling would constitute an activity with a substantial effect on interstate commerce by wreaking havoc on downstream navigable waters that support, or could support, such commerce. Indeed, since *Wickard v. Filburn*, this Court has recognized that Congress may regulate intrastate activities of a private nature if those activities, when viewed in the aggregate, would have a substantial effect on interstate commerce. 317 U.S. 111, 124-29 (1942) (upholding Agricultural Adjustment Act of 1938, even as applied to farmer growing wheat for his own consumption). This case is no different.

Finally, this Court should reject out of hand the argument that the CWA "regulate[s] water bodies rather than activities," and that therefore "the [channels of interstate commerce] category of Commerce Clause regulation is the only available avenue for federal jurisdiction." Br. of SLF 10; *see, e.g.*, Br. of Am. Expl. & Mining Assoc. et al. 23. The plain text of the Act refutes that point: after declaring its sole objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), the Act states seven goals and policies, all targeted at altering the *activities* of regulated parties in order to achieve that objective, *see, e.g.*, *id.* § 1251(a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985"). And the particular provision of the CWA that Petitioners violated here explicitly makes

"unlawful" an activity—that is, the non-permitted "discharge of any pollutant by any person [into a water of the United States]." 33 U.S.C. § 1311(a). It thus defies logic to suggest that a law enacted to protect the waters of the United States, with express provisions limiting *activities* that harm those waters, does not regulate "activities" itself.

C. This Case Presents No Close Constitutional Question.

Petitioners and their *amici* present various theories in support of their argument that this Court should reject the significant-nexus test under the canon of constitutional avoidance, but none survives scrutiny. This Court has made clear that the constitutional avoidance canon should not be used to create "statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate." *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998); *see Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2207 (2020) ("Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation."). In this case, Congress "intend[ed] that the term 'navigable waters' [in the CWA] be given the broadest possible constitutional interpretation." S. Rep. No. 92-1236, at 144 (1972) (Conf. Rep.); *see* S. Rep. No. 95-370, at 75 (1977) (the CWA "exercise[s] comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent"). And, as illustrated above, using the significant-nexus test to determine the scope of that language raises no constitutional concerns. To the contrary, it merely implements Congress's well-established authority over the channels of interstate commerce, as well as its authority over those activities with a substantial effect on interstate commerce.

1. Petitioners and their *amici* repeatedly cite this Court's decision in *SWANCC*, arguing that the constitutional concerns that this Court identified there are equally applicable here. But *SWANCC* actually underscores that there are no constitutional concerns here.

SWANCC involved a challenge to the application of an interpretation of a U.S. Army Corps of Engineers regulation promulgated pursuant to the CWA that authorized the federal government to regulate isolated, non-navigable intrastate ponds because those ponds supplied a habitat for migratory birds. 531 U.S. at 166-74. This Court held that the so-called "Migratory Bird Rule," "as clarified and applied to petitioner's balefill site, . . . exceed[ed] the authority granted to the [federal government] under § 404(a) of the CWA." *Id.* at 174. In so doing, the Court explained that its reading "avoid[ed] the significant constitutional and federalism questions raised by [the Corps'] interpretation," which would "result in significant impingement of the States' traditional . . . power over land and water use." *Id.*

However, this Court in *SWANCC* expressly distinguished its earlier decision in *Riverside Bayview*, where the Court had upheld the Corps' interpretation and application of a different regulation promulgated pursuant to the CWA, on the basis that there had been a "*significant nexus* between the wetlands and 'navigable waters' that informed [its] reading of the CWA in *Riverside Bayview*," and that nexus was lacking or at least not readily apparent in the isolated, seasonal ponds covered by the Migratory Bird Rule. *SWANCC*, 531 U.S. at 167 (emphasis added). Thus, *SWANCC* actually supports the proposition that the significant-nexus test—by ensuring a significant nexus exists between the regulated wetland and a traditional

navigable water—*necessarily* eliminates the constitutional concerns that this Court identified in *SWANCC*.

2. Petitioners also argue that this Court should reject the significant-nexus test because it does not closely track Congress's channels of commerce power, "which is narrower and more readily defensible than Congress's 'substantially affects' power." Pet'rs Br. 47. But there are two fatal flaws with this argument.

First, it is wrong on its face: as described above, the significant-nexus test *does* directly implement Congress's channels-of-commerce authority by reaching only those wetlands with a significant nexus to traditional navigable waters. The fact that the test could also be construed as falling within Congress's power to regulate activities that substantially affect interstate commerce does not alter that conclusion.

Second, just because regulation of activities that substantially affect interstate commerce may reach further than other sorts of regulations authorized by the Commerce Clause does not mean that the "substantially affects" power itself raises any constitutional questions. It is well established that regulations of activities with a substantial effect on interstate commerce fit squarely within Congress's Commerce Clause authority, under the original understanding of the scope of that authority and under modern precedents. *See, e.g.*, *Raich*, 545 U.S. at 17 (upholding federal statute implementing Congress's "power to regulate activities that substantially affect interstate commerce"); *Hodel*, 452 U.S. at 280-81 (same); *Perez*, 402 U.S. at 150 (same); *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (same); *Heart of Atlanta Motel*, 379 U.S. at 261 (same); *Wickard*, 317 U.S. at 125 (same).

3. Next, Petitioners and their *amici* suggest that the significant-nexus test raises constitutional

concerns because it would subject to federal jurisdiction even an "occasional trickle, typically invisible to the eye," leaving "very little, if any, water for state regulation," and disrupting the CWA's "policy of cooperative federalism." *E.g.*, Br. of SLF 8, 17. That argument is plainly incorrect.

While it is true that the CWA creates "a program of cooperative federalism," *Hodel*, 452 U.S. at 289, "anticipat[ing] a partnership between the States and the Federal Government, animated by a shared objective," *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992), the principle of cooperative federalism is honored rather than undermined by permitting Congress to regulate wetlands with a significant nexus to traditional navigable waters. As discussed earlier, the power of individual states to mitigate the effects of out-of-state upstream pollution, including dredging and filling, is limited, so those states rely upon the federal government to assist them through federal legislation like the CWA. *See Rapanos*, 547 U.S. at 777 (Kennedy, J., concurring in the judgment) ("the Act protects downstream States from out-of-state pollution that they cannot themselves regulate"). That assistance in no way undermines or detracts from the important role that states play in protecting waters within their borders and enforcing environmental laws—indeed, it *facilitates* their ability to do so.

Moreover, these slippery-slope arguments highlighting tiny "trickles" read the "significant" requirement out of the "significant-nexus" test. Only those wetlands that, "either alone or in combination with similarly situated lands in the region, *significantly* affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" are subject to federal regulation under Justice Kennedy's test. *Rapanos*, 547 U.S. at 780 (Kennedy,

J., concurring in the judgment) (emphasis added). In the court below, Petitioners effectively conceded that the wetlands on their property meet this test, Pet. App'x 32 (Petitioners' "only challenge" to the application of regulations implementing the significant-nexus test to their property "is premised on the Scalia plurality being the controlling opinion"), and they do not argue otherwise to this Court.

4. Finally, several of Petitioner's *amici* urge this Court to apply the constitutional avoidance canon based on an interpretation of the Commerce Clause that is at odds with the text and history of the Constitution itself. For instance, one *amicus*, citing a series of cases that have since been overruled or abrogated, *e.g.*, *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895), *abrogated by Wickard*, 317 U.S. at 121-22, references "the originally narrow understanding of the Commerce Clause" and asserts that "[a]s originally conceived, Congress's power under the Commerce Clause was limited to the regulation of interstate trade." Br. of Claremont Inst. Ctr. for Const. Juris. 17. Not only is that argument at odds with constitutional text and history, *see supra*, Sections I & II, but this Court has explicitly and repeatedly recognized as much—even in more recent opinions typically cited for the *limits* on Congress's Commerce Clause power, *e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 536 (2012) (calling Congress's Commerce Clause power "expansive").

* * *

In sum, under the text and history of the Commerce Clause, as well as modern precedent, there is no question that Congress has the authority to regulate wetlands with a significant nexus to traditional navigable waters. Accordingly, the constitutional avoidance canon has no application to this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

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* Counsel of Record