NO. 25-700

In the

Supreme Court of the United States

Joan V. Bayley, et al.,
Petitioners,
v.
United States of America,
Respondent.

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

Brief of *Amicus Curiae*
David Erlanson Sr. in Support of Petitioners

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IDENTITY & INTEREST OF *AMICUS CURIAE* [1]

Mr. Erlanson's interest in the case is twofold, both equally important for the court to consider. First, this petitioner had in hand a state authorized permit allowing a specific action to occur and that action was compliant to all aspects of the permit. Such was the case David Erlanson Sr. v. USEPA Docket #23-1372 Oct. 2024. Secondly, the courts of the United States, both inferior and supreme have unnecessarily litigated the jurisdictional boundaries of the Clean Water Act. Mr. Erlanson's qualifications are brief, but substantial. He received a Master of Education with Thesis and Doctoral Work at Indiana University of Pennsylvania through 1977. He has written articles concerning WOTUS and its present application within Idaho in the Kootenai Journal. He is directly responsible for the organization of two mining districts within the State of Idaho and served as the liaison between the US Forest Service and the Mining Community for over thirty years.

SUMMARY OF ARGUMENT

This *Amicus* deals with the issue of delegated authority by Congress to the United States Environmental Protection Agency (EPA) and the Army Corps of Engineers (USACE) concerning the Clean Water Act of 1972 (CWA) and its lack of Constitutionality.

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[1] Under Supreme Court 37.6, no counsel for any party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

A brief historical accounting is necessary to begin this discussion. In *McCulloch v. Maryland*, 17 U.S. 316 (1819), the Court altered the Constitution from one of enumerated powers (Federalist #45, James Madison) to adding implied powers. Next, under *J. W. Hampton Jr. v. United States*, 276 U.S. 394 (1928), the implied power concept came to the forefront again which greatly expanded the role of Congress and the growth of the administrative state. Here the Taft court authorized the delegation of authority using what is known as the "Intelligible Principle Doctrine." In 1946, *American Power & Light Company v. S.E.C.* 329 U.S. 90 (1946), provided the precise requirements that **must** be met for Congress to Constitutionally delegate authority to an agency. Known as the three (3) part test, it then becomes constitutionally sufficient (1) if Congress clearly delineates the general policy, (2) the public agency which is to apply it (3) and the boundaries of this delegated authority (see pp. 329 U.S. 106). These three requirements demand that the following questions be answered:

1. Did Congress clearly delineate the general policy? Yes, the CWA.

2. Did Congress select a Public Agency to administer the program? Yes, the EPA and USACE.

3. Did Congress set the boundaries of this delegated authority? **No,** Congress left the Agencies to determine the boundaries of jurisdiction of the CWA, as well as the developing definitions, which changed the jurisdictional boundaries, rules and regulations.

The Court wrote in *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 143 S.Ct. 1322, 215 L.Ed.2d 579 (2023) *(Sackett),* "[G]iven the CWA's

express policy to preserve the State's primary authority over land and water use §1251(B) the Court has required **a clear statement <u>from</u> Congress** when determining the scope of the "waters of the United States" ("WOTUS) and by extension the jurisdictional limits of the CWA (Petition at 5). Congress has yet to provide a clear national policy as required.

The Agencies and the Courts, both Circuit and Supreme have continually litigated the boundaries and reach of the CWA, ad nauseum. The Courts have been forced to interpret Congressional intent, to the best of their ability and expertise, as to the boundaries of jurisdiction to protect private rights. There are at least thirty-six instances in which the Courts and the Agencies of the Executive Branch have changed the jurisdictional limits of the CWA, lastly in *Sackett*. This leads to a void for vagueness situation. Even now, the Trump Administration is redefining the reach of the Clean Water Act once again. Under Supreme Court precedent, as mentioned above, only Congress has the delegated authority to determine the boundaries of jurisdiction related to the CWA, not the Agencies nor the Courts (Art. I, cl. 1).

The Agencies have always relied upon the Commerce Clause of the Constitution to enforce the CWA on all waters of the United States through their inclusion of navigable waters into all waters of the United States to gain Commerce Clause authority. It is the responsibility of Congress, not the Agencies to determine what constitutes the waters of the United States. This amounts to a usurpation of States' Tenth Amendment powers, especially on or westward of the 98th Meridian concerning the control and use of those States' water resources, namely ground and surface

waters not susceptible to navigation (See Submerged Lands Act 1953, 43 U.S.C. §1301 et. seq.).

Gibbons v. Ogden, 22 U.S. 1 (1824) *(Gibbons)* explicitly deals with the jurisdictional aspect of the Commerce Clause. The Commerce Clause of the Constitution (Art. 1, §8, cl. 3), to regulate commerce with foreign nations and among the several States and Indian Tribes. In *Gibbons*, actions dealing with commerce that remains within a State, or are confined to one's own property, and are not under the authority of the Commerce Clause of the Constitution. Therefore, State sanctioned intra-State activities, be it by Petitioner or by others, are exempt from enforcement procedures using the Commerce Clause as an Agency's Constitutional authority.

What are navigable waters? For over two-hundred years, the navigable waters were capable of carrying on commerce, "navigational servitude". This Court's cases, such as *Pollards Lessee v. Hagan*, 44 U.S. 212 (1845), *The Propeller Genesee Chief,* 53 U.S. 443 (1857), *Gillman v. Philadelphia,* 70 U.S. 713 (1865), *The Daniel Ball,* 77 U.S. 557 (1870), *The Montello,* 87 U.S. 430 (1874) all deal with: "What constitutes navigable water?" In the CWA, the definition of navigable water was altered. It was to be included into all waters of the United States (See CWA Section 502(7)). This change was made not by Congress, but by the Agencies themselves to gain Commerce Clause authority, changing the jurisdictional boundaries.

According to the third part of the three parts "Intelligible Principle Doctrine" test, the failure of Congress to determine the boundaries of jurisdiction clearly, as they failed to do for over fifty years, should make the CWA an unconstitutional delegation of

authority by Congress to the Agencies tasked to administer and enforce the CWA (See *American Power & Light Company v. S.E.C.* 329 U.S. 90 (1946). A national policy/rule must provide a clear statement, in all its aspects, so that the citizen understands his obligations to comply (5 U.S.C. §522(a)(1)).

CONCLUSION

If stare decisis is still applicable in American jurisprudence and if the Submerged Lands Act of 1953 and the Surface Resources Act of 1955 are valid, then any enforcement action by the Executive and/or Independent Agencies, known as the United States Environmental Protection Agency and the United States Army Corps of Engineers regarding the Clean Water Act, should be void according to *Marbury v. Madison,* 5 U.S. 137 (1803). The creation of the Clean Water Act resulted in an unconstitutional delegation of authority by Congress to the above Agencies. Water is not an expressed or enumerated power within the Constitution. In *Kansas v. Colorado*, 206 U.S. 46 (1907), it declares that the government of the United States is one of enumerated powers. That those powers are found in the Constitution and Congress has no power to control water within a state except to insure navigability.

Respectively submitted,

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