No. 04-1034

IN THE

Supreme Court of the United States

JOHN RAPANOS, *ET UX.*, *ET AL.*,
Petitioners,

v.

UNITED STATES,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress's constitutional power to regulate commerce among the states?

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including, notably, publication of the *Cato Supreme Court Review*. The instant case raises squarely the question of the limits of the federal government's commerce power and is thus of central interest to the Cato Institute and its Center for Constitutional Studies.

SUMMARY OF ARGUMENT

The Clean Water Act expressly authorizes federal control over "navigable" water. 33 U.S.C. § 1344(a). But the United States contends that it does more: that the Act's reference to "navigable waters" authorizes federal control of waters and land that are neither navigable nor wet. So long as land has a "hydrological" connection to water that is navigable, however remote the connection may be, says the government, the Clean Water Act reaches it.

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[1] In conformity with Supreme Court Rule 37, amicus has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. Amicus also states that counsel for a party did not author this brief in whole or in part, and no person or entities other than the amicus, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

The risibility of this fiction is evident on the facts of this case: John Rapanos dumped sand into a man-made ditch filled with rainwater. As a result, the federal government brought criminal charges against Mr. Rapanos under the Clean Water Act based on the risk that some grains of that sand may, in an epic journey across drains, ditches, and creeks, "hydrologically" wend their way to the Kawkawlin River, twenty miles distant. *See United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002).

Nevermind that Mr. Rapanos' land is not remotely traversable by boat. Nevermind that Mr. Rapanos' land (now designated as a "wetland" by the Corps) has been drained of standing water *since the early 1900s*, when a county commission installed drains to reclaim the land for farming, rendering it as dry as a bone. *See, e.g.*, *Wetlands Desperado*, Wall St. J., Aug. 29, 2004, *available at* http://www.opinionjournal.com/editorial/feature.html?id=110005541. While it is not "navigable" and it is not "water," says respondent, the government can still treat it as such as a matter of law.

Respondent's novel and expansive interpretation of the Clean Water Act is at odds with the Court's most recent analysis of the federal commerce power in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). In *Raich*, the Court presumed that federal regulations located at the periphery of the federal commerce power must be grounded in positive "assertions of authority" (*id*. at 2205) clearly contained in the *text* of a governing federal statute. *Raich*'s analysis is consistent with a key goal articulated by the Court in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000): promoting accountable *legislative* deliberation about the scope of the commerce power. *See*, *e.g.*, Thomas W. Merrill, *Rescuing Federalism After* Raich*: The Case for Clear Statement Rule*s, 9 Lewis & Clark L.

Rev. 823, 834 (2005) (forthcoming), *available at* www.lclark.edu/org/lclr/objects/LCB94_Merrill.pdf.

Raich dooms respondent's textually-unmoored "hydrological connection" test for agency jurisdiction under the Clean Water Act.

ARGUMENT

RESPONDENT'S INTERPRETATION OF THE CLEAN WATER ACT IS INCONSISTENT WITH *GONZALES V. RAICH*

A. *Gonzales v. Raich* Underscores That Positive "Assertions Of Authority" Clearly Contained In The Text Of A Federal Statute Are A Prerequisite For Agency Action Within The Periphery Of The Federal Commerce Power.

Gonzales v. Raich, *supra*, belies respondent's novel interpretation of the Clean Water Act. *Raich* is a case not only about the *meaning* of the Commerce Clause, but about where the *burden* of articulating a theory of the Commerce Clause in hard cases is properly assigned. In *Raich*, this Court assigned that burden to Congress in the first instance, underscoring that regulatory action within the periphery of the commerce power requires a clear textual warrant contained in an agency's authorizing statute.

1. Respondent's theory of the statute is this: "Navigable waters," as used in the Clean Water Act, encompass water possessing a "hydrological" nexus to an "aquatic system" within the recognized jurisdiction of the EPA, whether or not that water is "navigable." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001); Resp. Cert. Opp. 10 (quoting 42 Fed. Reg. 37,128 (1977)); Resp. Cert. Opp. 16.

That rule is nothing if not expansive. As Judge Easterbrook has noted, it could plausibly embrace even isolated puddles of rainwater contaminated with exhaust fumes, lacking any surface connection—man-made or otherwise—to open water. *See, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962, 965 (7th Cir. 1994) (Easterbrook, J.) (municipality filed suit suggesting that trucks parked near a Target warehouse "drip oil, which collects in the runoff from a storm" and thence "into the ground—carrying hydrocarbons and other unwelcome substances" into the groundwater and through the groundwater into "streams, lakes, and oceans"; while skeptical that the statute authorized liability based on such a theory, Judge Easterbrook noted that "the possibility of hydrological connection cannot be denied"). The "hydrological connection" rule, in short, has no logical or principled stopping point.[2]

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[2] The EPA suggests that everyday homeowner nuisances—from "clogged" or "frozen" pipes to "basement backups"—may exert "hydraulic" system stress on municipal pipes, which in turn may cumulatively impact water far removed from individual parcels of property. *See*, *e.g.*, EPA, *SSO Fact Sheet* 2-4 (Nov. 25, 2005), *available at* www.epa.gov/npdes/sso/control/indext.htm ("freeze/thaw cycles" and "clogged and collapsed lines due to root growth and accumulation of debris, sediment, oil and grease" can cumulatively result in "hydraulic stress" on "other parts" of the system, which may eventually impact "rivers, streams, and estuaries"); *id*. at 5 ("An untold number of private basement backups occur each year . . . [not only] caus[ing] structural damage to building frames" and "electrical and gas appliances," but "frequently spill[ing] into homeowner yards"); *id*. at 4 (suggesting that while it is "hard to gauge" the degree of environment impact of such localized plumbing problems on the degradation of waterways, they are "suspected as a contributing factor"). If the "hydrological connection" rule is taken seriously, and the EPA's evidence is credited, there is no

The rule also has no basis in the text of the Clean Water Act. Three textual hooks for the rule present themselves, but not one is a remotely plausible basis for recognizing the "hydrological connection" test. First, Section 404(a) of the Act authorizes federal control over "navigable waters." 33 U.S.C. § 1344(a); 33 U.S.C. § 1362(7). The term "navigable waters" is not, however, ambiguous: as this Court has long held, "navigable waters" are those that are "used or are susceptible of being used . . . as highways for commerce, over which trade and travel are or may be conducted." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). The term's plain meaning cannot support jurisdiction over water that is not so described.

Nor can respondent find recourse in 33 U.S.C. § 1362(7), which defines "navigable waters" under the Clean Water Act as the "waters of the United States." As *Ex parte Boyer*, 109 U.S. 629 (1884), held long ago, the "water of the United States" is that which encompasses "navigable water" used "for commerce between ports and places of different States." *Id*. at 632.

To be sure, "waters of the United States" is a term of art, derived from admiralty law. *See id*. Might it therefore encompass administrative glosses on the Act, including the hydrological connection test? No again: This Court has consistently held that terms of art, when

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logical basis for denying federal "police power" over the dirt that flows from garden tools and soiled hands into the kitchen sink and bathroom shower drain. Yet, to date, even the EPA has not suggested it possesses the kind of general permit power over private homeowners claimed by counties and municipalities.

susceptible of multiple interpretations, must be construed according to the meaning that best accords with, and does not render superfluous, the plain text of the Act itself. *See*, *e.g.*, *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 741 (1989) (where the term "employee" is a term of art susceptible of several interpretations under the law of agency, the Court will choose the meaning most "consistent with the text of the Act."). Here, that rule dictates that the term "waters of the United States" must be assumed to qualify and narrow, not supplant and expand, the textual term "navigable."[3]

The remaining possible textual basis for the "hydrological connection" test is Section 404(g) of the Act. Section 404(g) mandates reporting requirements for *state* programs that issue permits for the dredging or infill of "navigable waters," but contains a murky parenthetical that refers to "navigable waters (*other than* those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. . .)." 33 U.S.C. § 1344(g) (emphasis added). The words "other than," respondent has argued, may suggest Congress understands the term "navigable" to extend beyond waters actually "navigable." *See*, *e.g.*, *SWANCC*, 531 U.S. at 171 (providing overview of government argument premised on Section 404(g)).

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[3] *See also Village of Oconomowoc Lake*, 24 F.3d at 965 ("'Waters *of the United States*' must be a subset of 'water'; otherwise why insert the qualifying phrase in the statute? (No one suggests that the function of this phrase is to distinguish domestic waters from those of Canada or Mexico.)") (emphasis in original).

Even if such an inference were possible, it does not follow that Congress intended to grant respondent authority over all waters "hydrologically connected" to navigable water. The hydrological connection rule has no discernable stopping point. It would render the terms "navigable" and "waters of the United States" ineffective as meaningful limits on federal regulatory jurisdiction. Put another way, the hydrological principle would support jurisdiction in nearly all cases, leaving the terms "navigable" and waters "of the United States" with little to do. Whatever Section 404(g) may mean, it cannot be attributed a meaning that either reads the plain text *out* of the statute or that renders that text insignificant as a practical matter. As this Court held in *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001), a statutory construction that "result[s] [in] a rule nowhere contained in the text . . . [that] would do the bulk of that provision's work, while a proviso accounting for more than half of that text would lie dormant in all but the most unlikely situations," is categorically disfavored. *Id*. at 31.

In sum, the plain text of the Clean Water Act cannot support the claim that non-navigable water with a "hydrological connection" to navigable water is within federal regulatory jurisdiction.

2. The government has suggested its capacious reading of the Clean Water Act accords with the Commerce Clause. Resp. Cert. Opp. 25 ("The power to protect navigable waters is part of the commerce power given to Congress."). That argument echoes past rulings of this Court that suggest that "navigable waters" include all waters within the scope of the federal commerce power. *SWANCC*, 531 U.S. at 168 n.3 (statement in Conference Report that "the term 'navigable waters' be given the broadest possible constitutional interpretation" signifies "that Congress intended to exert . . . its commerce power over navigation"); *see also id*. at 181,

182 (Stevens, J., dissenting) (noting that the Corps argues that the statute requires it "to protect water quality to full extent of the Commerce Clause," and that is not confined only to the "very heartland of its commerce power").

Yet, in the wake of *Gonzales v. Raich* the Commerce Clause is not available to respondent as a tool for circumventing textual problems with the "hydrological connection" test: This Court's decision in *Raich* underscores that the *plain text* of statutes enacted by Congress is the sole guide for agencies acting, as the Corps and EPA do here, within the periphery of the commerce power.

a. *Raich*'s implicit "clear statement" rule—its preference for agency action grounded in the clear text of a governing statute—is evident when the legislative record before the Court in *Raich* is compared with the evidence upon which the majority actually relied in that case.

Respondents in *Raich* challenged the application of schedule I of the Controlled Substances Act to wholly intrastate, medicinal use of cannabis under the Commerce Clause. *Raich*, 125 S. Ct. at 2200. Both parties in the case agreed that application of the CSA to medicinal cannabis, if it was to be upheld, must rest on Congress's residual power over commerce under the Necessary and Proper Clause. As the Attorney General explained, under the government's theory, the Necessary and Proper Clause allowed Congress to reach intrastate use of medical marijuana because regulation of such use is "an essential part of a larger regulation of economic activity." *See, e.g.*, *Raich* Pet. Br. 12, *Gonzales v. Raich* (No. 03-1454) (quoting *Lopez*, 514 U.S. at 561) (hereinafter "*Raich* Pet. Br.").

Accordingly, the Attorney General's briefs in *Raich* strove toward one end: creating a legislative record that might support a deferential judicial finding of "necessity."

See, *e.g.*, id. at 16-20 (compiling "legislative judgments regarding whether the intrastate activity at issue substantially affects interstate commerce").

In an effort to compile that record, the Attorney General highlighted three different categories of legislative findings:

First, he quoted extensively from findings found in the legislative history of the Controlled Substances Act. *See id*. at 17-18 (quoting H.R. Rep. No. 1444, 91st Cong., 1st Sess., pt. 1, at 1, 3. 6 (the Act establishes a "comprehensive" and "'closed' system of drug distribution")); *id*. at 18-19 (quoting S. Rep. No. 613, 91st Cong., 1st Sess., at 3-4) (the drug trade constitutes "commercial activity" that "takes place in interstate and foreign commerce")); *see id*. at 17-18 (quoting S. Rep. No. 613, *supra*, at 3 (Congress was concerned with preventing diversion of controlled substances from legal to illicit channels)); *id*. at 19 (quoting S. Rep. No. 613, *supra*, at 3-4 (noting scope of "nonmedical" and "nonprescription" cross-border drug smuggling)); *id*. (quoting S. Rep. No. 613, *supra*, at 2, 3 (at time of passage, marijuana offenses accounted for "the bulk of drug arrests")); *id*. at 22-23 (quoting H.R. Rep. No. 1444, *supra*, pt. 1, at 29 (Congress deemed it "necessary to make the controls . . . applicable to all controlled substances regardless of whether they or their components have ever been outside the State in which they are found")); *id*. at 23 (citing H.R. Rep. No. 1444, *supra*, pt. 1, at 29 (controlled substances commonly flow through interstate commerce "immediately prior to . . . possession")).

Second, the Attorney General relied on factual findings of executive branch agencies entrusted with enforcement of the Controlled Substances Act. *See id*. at 18-19 (quoting DEA, *Drug Trafficking in the United States* 1 (Sept. 2001) (the drug trade generally constitutes

"commercial activity" that "takes place in interstate and foreign commerce")); *id*. at 19 (quoting Drug Availability Steering Committee, *Drug Availability in the United States* 103 (Dec. 2002) (documenting the current economic value of the trade in recreational marijuana)).

Third, the Attorney General relied on additional statutory findings, contained within the enacted text of the Controlled Substance Act, *see* 21 U.S.C. §§ 801(1)-(6) (expressing Congress's judgment that a "major portion of the traffic in controlled substances flows through interstate and foreign commerce"; and "[i]ncidents of the traffic which are not an integral part of the interstate or foreign flow . . . nonetheless have a substantial and direct effect upon interstate commerce"). *See Raich* Pet. Br. at 4-5, 23, 31, 39 (quoting 21 U.S.C. § 801).

The Attorney General argued that, together, those sources demonstrated Congress had made an intelligible, deference-worthy judgment that regulating local possession of marijuana is "necessary" to effective federal control of interstate trafficking. *Id*. at 16, 20-21, 23-24, 28-29, 43.

b. The *Raich* Court held that Congress's legislative findings deserved substantial deference. In so holding, however, the Court marginalized supporting evidence *extraneous* to the text and structure of the CSA.

Indeed, legislative judgments contained in the legislative history—which had figured so prominently in the Attorney General's briefs—were almost entirely excluded from the majority's analysis.[4] The Court turned

[4] The Court's sole use of legislative history to support the existence of a material "legislative judgment" is found in footnote 21, where the Court refers to legislative history that evidences Congress's "particular" concern with the "need to prevent the diversion of drugs from legitimate to illicit

a blind eye to that history even though it (1) contained the record's *only* direct and unqualified statement of "legislative judgment" that categorical control of "all" intrastate use of marijuana is "necessary" to the suppression of marijuana in the interstate marketplace and also (2) contained the only evidence, however indirect, that Congress was aware marijuana may have medicinal, or some other social, value. *See*, *e.g.*, *id*. at 23 (quoting H.R. Rep. No. 1444, *supra*, pt. 1, at 29 (Congress deemed it "*necessary* to make the controls of [the CSA] applicable to *all* controlled substances regardless of whether they or their components have ever been outside the State in which they are found") (emphasis added)); *Raich* Pet. Reply at 9 (quoting H.R. Rep. No. 1444, *supra*, pt. 1, at 12 (noting that "there are some who would not only advocate [marijuana's] legalization but encourage its use")).[5]

Instead, the Court focused on the CSA's express textual findings: that a "major portion of the traffic in

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channels." *Raich*, 125 S. Ct. at 2203 n. 21 (citing *United States v. Moore*, 423 U.S. 122, 135 (1975) and H.R. Rep. No. 1444, pt. 2, at 22 (1970)). However, this evidence did not add to the textual evidence, but rather concerned the intensity of legislative concerns that the Court noted were independently apparent in the text and structure of the CSA. *See Raich*, 125 S. Ct. at 2203-04 (noting that the structure of the CSA evidences a desire to devise "a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substances except in a manner authorized by the CSA") (citing 21 U.S.C. §§ 811, 812, 821-30, 841(a)(1), 844(a)).

[5] By contrast, the legislative findings contained in 21 U.S.C. § 801(6) stated only that control of intrastate "incidents of traffic"—not "all" simple noncommercial intrastate use, unconnected with traffic—is "essential" to the integrity of the ban on interstate trafficking in controlled substances. *See*, *e.g.*, 21 U.S.C. § 801(6).

controlled substances flows through interstate commerce," that local "distribution and possession" contribute to "swelling the interstate traffic in such substances," and that enforcement difficulties "attend distinguishing between marijuana cultivated locally" and marijuana grown in and transported from another state. *See Raich*, 125 S. Ct. at 2203 (noting that Congress's "main objectives" were to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances") (quoting 21 U.S.C. §§ 801(1)-(6)); *id*. (stating that "Congress devised a closed regulatory system") (citing 21 U.S.C. § 841(a)(1)); *id*. at 2208 (noting that "[f]indings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA") (citing 21 U.S.C. §§ 801(1)-(6)); *id*. at 2208 (noting Congress's judgment about the "enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere") (citing 21 U.S.C. § 801(5)).

Raich's selective treatment of the record evidence highlights the decision's import for this case: When federal agencies seeks deference for actions within the periphery of the federal commerce power, *Raich* suggests judgments evident in, and supported by, the clear *text* of a federal statute—not those contained in extraneous sources—deserve judicial deference.[6]

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[6] The Court also relied, in a footnote, on the fact that the CSA's textual scope has been replicated by *other* statutes that similarly aim to effect a comprehensive ban on interstate traffic in a proscribed article of commerce, *see*, *e.g.*, *Raich*, 125 S. Ct. at 2211 n.36 (treating parallel statutory structure as evidence that the enforcement choices reflected in the CSA are rational). That evidence remains squarely focused on text—*i.e.*, on

To be sure, the Court rejected the argument that legislation, to qualify for deference, must "contain detailed findings proving that each activity regulated within a comprehensive scheme is essential to the statutory scheme." *Id*. at 2208 n.32. That objection, however, does not gainsay the fact that the CSA's text monopolized the *Raich* majority's analysis: it merely denies that the text must identify with specificity each possible challenged application of the statute in advance. For the *Raich* Court, it was enough that the statute, through its text and structure, reflected a coherent theory of "necessity"—namely, that local transactions have a direct economic (a "swelling") effect on supply in the interstate market. *Id*. at 2207. Any further requirement—*i.e.*, that Congress must anticipate a challenge premised on state authorization of medicinal cannabis use—would be "impractical." *Id*. at 2208 n.32 ("[s]uch an exacting requirement [of precise specificity] is not only unprecedented, it is also impractical"). *See also* Merrill, *Rescuing Federalism After* Raich, 9 Lewis & Clark L. Rev. at 850 (endorsing clear statement rule, but noting that it would be "unusual, not to say unworkable," to make the test turn on Congress's ability to identify in advance each specific factual application authorized).

c. By anchoring record analysis of regulatory "necessity" on the clear textual choices contained in the four corners of the Controlled Substance Act, *Raich* retains some consistency with the Court's prior Commerce Clause analysis in *United States v. Lopez* and *United States v. Morrison*. In *Lopez*, the Fifth Circuit struck down the Gun Free School Zones Act based on the absence of pertinent legislative findings (*United States v.*

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inferences that may be drawn from the *replication* of enacted text and statutory structure in other, parallel statutory schemes.

Lopez, 2 F.3d 1342, 1367 (5th Cir. 1993)); the Supreme Court, in turn, cited the absence of legislative findings as one of the factors that disabled a determination "that the activity . . . substantially affected interstate commerce." *Lopez*, 514 U.S. at 563. *See also* Merrill, *Rescuing Federalism After* Raich, 9 Lewis & Clark L. Rev. at 836-37. And the text of the Violence Against Women's Act, struck down in *Morrison*, included a similarly "bare assertion of power to legislate; there [was] no explication in the text of the constitutional theory that would support legislation under the Commerce Clause, nor any enumeration of findings in the text." *See* Merrill, *Rescuing Federalism After* Raich, 9 Lewis & Clark L. Rev. at 848.[7] *See* 42 U.S.C. § 13981(a) (2000).

The clear statement rule also respects the overarching liberty principles that *Lopez* and *Morrison* sought to secure. "We start with first principles," Chief Justice Rehnquist famously wrote in *Lopez*. "[T]he powers delegated by the . . . Constitution to the federal government are few and defined"—an enumeration that in turn "[e]nsur[es] protection of our fundamental liberties." *Lopez,* 514 U.S. at 552. Clear statement rules, like the kind practiced in *Raich*, offer additional protection for liberty interests that the enumeration of powers in Article I and the separation of powers more generally are designed to safeguard. As Judge (then-Professor) Frank Easterbrook notes:

> Those who wrote and approved the Constitution thought that most social relations should be

[7] While Congress did make legislative findings when it passed the Violence Against Women Act, those findings were contained in the Act's legislative history. *See* Merrill, *Rescuing Federalism After* Raich, 9 Lewis & Clark L. Rev. at 848.

> governed by private agreements . . . . A rule declaring statutes inapplicable unless they plainly resolve or delegate the solution of the matter respects this position. It either preserves the private decisions or remits the questions to other statutes through which the legislature may have addressed the problem . . . . [But] [u]ntil the legislature supplies a fix or authorizes someone else to do so, . . . judges [have no reason] to rush in.

Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 549-50 (1983).

d. The clear statement rule also mitigates the risk that agencies will interpret *Raich* as an invitation to executive aggrandizement. The risk is palpable: If, after *Raich*, agencies can use legislative history, statutory purpose, or context to manufacture ambiguity nowhere apparent from the text of a statute, and if, in turn, agencies interpreting their power under "ambiguous" statutes are granted both the full quantum of deference owed to Congress under *Raich* ***and*** under *Chevron*, the potential for agency aggrandizement is immense, indeed. *See* Merrill, *Rescuing Federalism After* Raich, 9 Lewis & Clark L. Rev. at 834 (clear statement rule protects against threat that executive actors will "leverage" grants of power "into regulations that expand federal authority in new ways," thereby "unilaterally changing the scope of federal authority").

The clear statement test reduces that risk by ensuring that agency action at the outer limits of federal power (where the risk of agency aggrandizement is greatest, *see*, *e.g.*, Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 Cardozo L. Rev. 989, 991-92 (1999) ("concern about agency aggrandizement is at its highest" . . . "[w]here agency self-interest is directly

implicated")), is cabined by an objective limiting standard grounded in the text of the statute.[8]

3. Applied to the "hydrological connection" test, the *Raich* "clear statement" rule dooms respondent's bid to criminalize petitioner's conduct in this case. As even the respondent must concede, neither the text nor the structure of the Clean Water Act provides any warrant for the "hydrological connection" test. *See also* Merrill, *Rescuing Federalism After* Raich, 9 Lewis & Clark L. Rev. at 849 (noting that the Court would be correct to invalidate "any . . . construction of the Clean Water Act grounded in a

[8] Concern about executive aggrandizement is not new to the Court: it is echoed in the Court's evolving approach to *Chevron* deference, which has suggested (1) that the "reasonableness" prong in step two of the *Chevro*n test should be applied to prohibit open-ended assertions of federal regulatory authority under an ambiguous organic statute (*see*, *e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999) (agency interpretation fails *Chevron* step two because agency failed to supply a "limiting standard, rationally related to the goals of the Act"); *see also* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L. J. 1399 (2000)); and (2) that deference is particularly inappropriate where the interpretation implicates the agency's self-interest in perpetuating its own power. *See FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159 (2000) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."). *See also* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203, 262 (2004) (noting, after careful analysis, that *Brown & Williamson* "would appear to provide a rationale for questioning any interpretation that serves to expand the reach of an administrative agency's regulatory authority").

substantial effect analysis, since Congress never articulated an intention to permit regulation on that theory"). At best, the "hydrological connection" test finds support in indirect legislative history (*i.e.*, Congressional acquiescence to executive interpretations and speculative inferences derived from unenacted legislative proposals). *See*, *e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-39 (1985); *SWANCC*, 531 U.S. at 180-81, 183-87 (Stevens, J., dissenting).

Because the hydrological connection rule has no basis in statutory text and would extend agency power at the periphery of the federal commerce power (Resp. Cert. Opp. at 22 (suggesting power over non-navigable waters is rooted in peripheral power over channels of commerce granted by the Necessary and Proper Clause) (quoting *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003)), it must be rejected.

B. The "Hydrological Connection" Test Fails Traditional Commerce Clause Analysis

While this case is resolvable on the basis of clear-statement principles, it is also capable of resolution—and *should* be resolved—based on an independent, *non*-deferential judicial analysis of the Clean Water Act under the Commerce Clause.

The wetlands regulation at issue here does not purport to directly regulate "channels" or "instrumentalities of commerce," but rather to regulate activity that may indirectly affect channels or instrumentalities. As such, the regulation is justifiable solely under the third prong of commerce clause regulation identified in *United States v. Lopez*: as regulation of activity that "substantially affects" interstate commerce. *Lopez*, 514 U.S. at 559-60. Yet, as *United States v. Morrison* made clear, isolated local activity cannot be aggregated under the substantial effects test unless the activity is itself "economic" in nature.

Morrison, 529 U.S. at 610. *Raich* did not dispute this holding: To the contrary, the Court expressly reiterated *Morrison*'s statement that, under the "substantial effects" test, "economic activity" forms the proper basis for aggregation, *see Raich*, 125 S. Ct. at 2211.

Indeed, the *Raich* Court upheld the Controlled Substances Act not only because the CSA "directly regulates economic, commercial activity," including the "production, distribution, and consumption of commodities" (*id*.), but because the CSA does so with the *intent* to affect prices and distribution within a larger market. *Id*. at 2207 n.29 (noting that in *Wickard*, Congress sought to "protect and stabilize" the "wheat market," while Congress sought, under the Controlled Substances Act, to eradicate the marijuana market); *id*. at 2208 ("as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce'").

Here, it is impossible to discern any "commercial" or "economic" nexus in the sense articulated by *Morrison* and *Raich*. *Lopez* directs our attention to "the *activity* being regulated"—here, literally, the filling of a ditch in a cornfield with sand. *See*, *e.g.*, *Rancho Viejo LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of reh'g en banc). Even if it might be argued that the dumping of sand is the "distribution" or "consumption" of a commodity (since sand can be bought and sold), and that the use of sand will—multiplied across thousands of cornfields, bogs, sand boxes, and drainage ditches—"affect" the going price for sand bags nationally, no one can plausibly argue that the Clean Water Act is designed to regulate the price of sand trafficked on the interstate market. *Compare Raich*, 125 S. Ct. at 2207 n.29 (noting that Congress

sought, under the Controlled Substances Act, to eradicate the marijuana "market").

Indeed, any such suggestion would raise serious concerns that the Clean Water Act is premised on exactly the sort of pretextual Commerce Clause justifications that both the majority and dissent in *Raich* suggested are impermissible. *See Raich*, 125 S. Ct. at 2210 n.34 (recognizing possibility of "'evasive' legislation" written "for the purpose of targeting purely local activity" but denying the CSA was such a statue); *id*. at 2223 (O'Connor, J., dissenting) (warning of "evasive" legislative strategies in which Congress regulates "comprehensively," in order to receive deference under *Raich*, but does so "exclusively for the sake of reaching intrastate activity").[9]

[9] Nor, for that matter, is the *class* of activity defined *in* the Clean Water Act inherently commercial, as the Court has required in *Raich* and other cases: "The Corps has asserted that it could regulate 'walking, bicyclying or driving a vehicle through a wetland,' if it so chose, because such activities could result in the 'discharge of dredged material.' Clearly, regulatory authority of this scope extends far beyond the regulation of purely commercial activity." Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 35 (1999).

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the Sixth Circuit should be overruled.

Respectfully submitted,

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