No.

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Solid Waste Agency of Northern Cook County, which comprises 23 Cook County, Illinois municipalities, acquired a 500-acre-plus site to construct an urgently needed balefill facility to dispose of its communities' non-hazardous solid waste. Petitioner's plans called for filling some 17 acres of permanently or seasonally wet depressions left by earlier strip mining operations. The U.S. Army Corps of Engineers twice informed petitioner that it had no jurisdiction over the site, then abruptly changed its mind on the sole basis that the isolated waters on the site were used by migratory birds. The Corps relied on its so-called "migratory bird rule," which interprets the Clean Water Act to reach isolated intrastate waters that do or potentially could serve as habitat for migratory birds. Because the Corps asserted jurisdiction, petitioner was required to apply for a permit to fill the waters on the site pursuant to Section 404 of the Clean Water Act. The Corps denied petitioner's permit application, thereby destroying a significant municipal public works project important to some 700,000 local residents.

The question presented in this case, as to which the courts of appeals are in conflict, is as follows:

Whether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds.

RULES 29.6 AND 14.1 STATEMENT

Petitioner is the Solid Waste Agency of Northern Cook County, a municipal corporation created by intergovernmental agreement under the laws of Illinois. Its member communities are the cities and villages of Arlington Heights, Barrington, Buffalo Grove, Elk Grove Village, Evanston, Glencoe, Glenview, Hoffman Estates, Inverness, Kenilworth, Lincolnwood, Morton Grove, Mt. Prospect, Niles, Palatine, Park Ridge, Prospect Heights, Rolling Meadows, Skokie, South Barrington, Wheeling, Wilmette, and Winnetka. SWANCC has no parent corporations and no subsidiaries, wholly-owned or otherwise.

Respondents are the U.S. Army Corps of Engineers; the U.S. Environmental Protection Agency; Arthur Williams, Lieutenant General, Chief of Engineers, U.S. Army Corps of Engineers; Robert E. Slockbower, Lieutenant Colonel, Chicago District Engineer, U.S. Army Corps of Engineers; Togo D. West, Jr., Secretary of the Army; Carol M. Browner, Administrator, U.S. Environmental Protection Agency; and intervenors below, the Village of Bartlett and Citizens Against the Balefill.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Solid Waste Agency of Northern Cook County respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 191 F.3d 845. The opinion of the district court (App., *infra*, 14a-36a) is reported at 998 F. Supp. 946. The U.S. Army Corps of Engineers' decision denying petitioner's revised Section 404 permit application is set out at Pet. C.A. App. 85-171 (decision) and U.S. C.A. App. 29-189 (appendices).

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1999. On December 16, 1999, Justice Stevens extended the time for filing the petition for certiorari to and including January 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution provides in relevant part that "Congress shall have Power * * * To regulate Commerce * * * among the several States." U.S. CONST. art. I, § 8.

The relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1344(a) and 1362(7), are reproduced at App., *infra*, 37a-38a. The pertinent regulation, 33 CFR § 328.3(a)(3) (the "other waters rule"), and preamble to 51 Fed. Reg. 41,206 (1986) (the "migratory bird rule"), are reproduced at App., *infra*, 39a-40a.

STATEMENT

The issue in this case is whether, pursuant to the Clean Water Act ("CWA" or "Act"), the U.S. Army Corps of Engineers ("Corps") properly has jurisdiction over isolated waters that are not navigable and not connected or adjacent to navigable waters, but that do or could provide habitat for migratory birds. The Corps has asserted such jurisdiction in this case and others through its "migratory bird rule" (App., *infra*, 40a), which interprets the navigable "waters of the United States" subject to the CWA to include all waters that are an actual or potential habitat for migratory birds.

The Corps' unprecedentedly broad claim of jurisdiction has caused sharp disagreement among the courts of appeals. The Fourth Circuit has rejected the Corps' jurisdictional grab as contrary to the text of the CWA and constitutionally impermissible. *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997). The Seventh and Ninth Circuits, in contrast, have upheld the Corps' authority. App., *infra*, 1a-13a; *Leslie Salt Co.* v. *United States*, 55 F.3d 1388 (9th Cir. 1995) (*Leslie Salt II*). Even the Ninth Circuit, however, recognized that "[t]he migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason." *Id.* at 1396. Mirroring this circuit split, Justice Thomas and a number of appellate judges have criticized the Corps' position in individual concurrences and dissents. *Cargill, Inc.* v. *United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari); see *infra*, pp. 12-13.

The Seventh Circuit's ruling in this case is legally erroneous. The notion that the Corps has jurisdiction over isolated intrastate waters based merely on the actual or potential presence of migratory birds is inconsistent with the plain language and legislative history of the CWA. The migratory bird rule also raises substantial constitutional concerns under the Commerce Clause, which mandate a narrower reading of the Act to avoid the constitutional difficulty. In those

circumstances, the Corps' migratory bird rule is entitled to no deference under *Chevron*, and it should be set aside.

Given the split among the circuits and the statutorily and constitutionally untenable basis of the Corps' assertion of jurisdiction, it is time for this Court to address the question presented. Review of the Corps' migratory bird rule in *this* case is *especially* appropriate and necessary. The Corps' unfounded claim of jurisdiction has brought to an abrupt halt the coordinated efforts of 23 municipalities to address the important local problem of the disposal of solid waste generated by their 700,000 citizens, derailing a vital, $20-million-plus public project. Cooperative, multi-municipality efforts to address common local issues are not properly matters for federal control. Yet so expansive is the migratory bird rule that it is difficult to imagine any significant state or municipal project (or private development) that would not require the Corps' approval.

Beyond that, the ubiquitous presence of migratory birds, which number in the billions, means that land-use matters traditionally subject to local control are now dependent upon federal approval by the Corps sitting as a sort of super zoning body determining the "public interest." That federalization of local land-use matters is not what Congress had in mind when it adopted the CWA, and the Commerce Clause does not permit it.

A. The Statutory And Regulatory Scheme

The CWA prohibits the discharge of "pollutants," including dredged and fill materials, into "navigable waters" without a permit from the Corps. 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). "Navigable waters" are defined in the CWA only as "the waters of the United States." § 1362(7).

The Corps has defined the "waters of the United States" in regulations to include not only navigable waters, tidal waters, and waters adjacent to such waters, but also [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce * * *.

33 CFR § 328.3(a)(3) (1998), App., *infra*, 39a.[1]

In the preamble to regulations promulgated in 1986, the Corps further defined these "other" waters:

> EPA has clarified that waters of the United States at [33] CFR 328.3(a)(3) also include the following waters:
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines * * *.

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986), App., *infra*, 40a. It is the Corps' reliance on this "migratory bird rule" —which the Corps never promulgated in accordance with Section 553 of the Administrative Procedure Act and which therefore has never been subject to notice and comment[2]—that petitioner challenges as a legally improper basis for federal jurisdiction over petitioner's proposed balefill site.

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[1] The Environmental Protection Agency has issued an identical definition, 40 CFR § 230.3(s), which is not directly at issue here.

[2] See *Tabb Lakes Ltd.* v. *United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988) (the migratory bird rule is invalid as a substantive rule promulgated without notice and comment), aff'd, 885 F.2d 866 (4th Cir. 1989).

B. SWANCC's Balefill Project And The Corps' Exercise Of Jurisdiction

The Solid Waste Agency of Northern Cook County ("SWANCC") is a municipal corporation comprised of 23 municipalities located in northern and northwestern Cook County, Illinois. SWANCC was formed to develop a system for the safe and efficient disposal of non-hazardous municipal waste for the approximately 700,000 people who live in its member communities. As part of its mission, SWANCC proposed to locate and develop a site for disposal of that waste. App., *infra*, 2a.

SWANCC purchased a 533-acre parcel of land to create a balefill—a landfill where baled, rather than loose, waste is dumped—on 410 acres of the site located exclusively in Cook County. Part of the balefill site was agricultural land and part, 298 acres, an "early successional stage forest" that had grown up on land previously used as a strip mine for gravel. The forested portion of the site contained "a labyrinth of trenches and other depressions" left by the strip mining. These trenches and depressions collect rainwater during some or all of the year, forming "permanent or seasonal ponds" ranging from one-tenth of an acre to several acres in size, and from a few inches to several feet in depth. App., *infra*, 2a.

In 1987, after ten public hearings and 2,500 pages of testimony, the local zoning board and the Cook County Board of Commissioners approved SWANCC's balefill project. Pet. C.A. App. 54. In 1989, SWANCC further obtained a permit for the project from the Illinois Environmental Protection Agency, which had reviewed SWANCC's 1,700 page appli-cation and conducted four days of hearings. *Id.* at 50-51, 55-56. Because SWANCC planned to fill 17.6 acres of trenches and depressions within the forested area to construct the balefill, it also requested rulings from the Corps of Engineers as to whether it required a permit under Section 404 of the CWA, 33 U.S.C. § 1344(a). After conducting an on-site inspection, the Corps informed SWANCC in 1986 and again in

1987 that those 17.6 acres were not subject to the Corps' regulatory authority over "navigable waters" and that a Section 404 permit was not required. App., *infra*, 3a-4a, 16a.

The Corps changed its position after the Illinois Nature Preserves Commission informed the Corps in July 1987 that its staff had observed migratory bird species on the property during a brief site visit. App., *infra*, 4a. Based on that assessment, and invoking its "migratory bird rule," the Corps concluded that the isolated, intrastate strip-mining depressions on the balefill site were "navigable" "waters of the United States" within its jurisdiction under the CWA because they "are used or would be used as habitat by other migratory birds which cross state lines." *Ibid.*

In response to the Corps' assertion of jurisdiction, SWANCC submitted an application for a Section 404 permit, which the Corps denied in 1991. The Corps also denied SWANCC's revised application in 1994. App., *infra*, 4a.[3]

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[3] The court of appeals incorrectly assumed the Corps had determined that migratory birds actually used waters on the balefill site as habitat. App., *infra*, 10a. To be sure, the Corps stated, in denying SWANCC's permit application, that "the water areas are used as habitat by migratory bird[s] which cross state lines." But it did so based not on any recorded observation of birds using the water areas as habitat, but based solely on the fact that thirteen species of migratory birds observed at least once on the 533-acre site "are known to depend on aquatic environments for a significant portion of their life requirements." Pet. C.A. App. 78; see also *id.* at 94, 780-781. Nothing in this case turns, however, on whether the balefill site was actually or only potentially habitat for migratory birds. Though the extension of federal jurisdiction to wet areas that *might* be used by migratory birds may be even more statutorily and constitutionally problematic, there is no basis for jurisdiction over actual habitat either.

C. SWANCC's Challenge To The Migratory Bird Rule And The District Court's Ruling

In December 1994, SWANCC brought suit against the Corps in the District Court for the Northern District of Illinois. SWANCC challenged both the merits of the Corps' decision and the theory under which it asserted jurisdiction. Both sides moved for summary judgment on the issue of jurisdiction, and, on March 25, 1998, the district court granted summary judgment for the Corps on that question. App., *infra*, 14a.

The district court rejected SWANCC's contention that the migratory bird rule exceeds the bounds of the Corps' authority to define "navigable waters" and "waters of the United States." The court recognized that "the Fourth Circuit reached the opposite conclusion in *United States* v. *Wilson*." App., *infra*, 30a. But it "decline[d] to follow" *Wilson*, holding that the migratory bird rule is justifiable because one purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at 29a, quoting 33 U.S.C. § 1251(a).

The district court also rejected SWANCC's argument that the Commerce Clause and *United States* v. *Lopez*, 514 U.S. 549 (1995), bar the migratory bird rule and require the statute to be read more narrowly. App., *infra*, 30a-31a. Distinguishing *Wilson* and *Lopez*, the court relied on prior circuit precedent and *Leslie Salt II* to conclude that the "commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Ibid.*; see also *id.* at 17a-24a. Subsequently, SWANCC dismissed the remainder of its claims and the district court entered final judgment for the Corps. *Id.* at 2a.

D. The Seventh Circuit's Decision

The Seventh Circuit affirmed. It first rejected SWANCC's argument that the migratory bird rule violates the Commerce Clause, or at least raises enough constitutional problems to mandate a narrow interpretation of "navigable" "waters of the United States." App., *infra*, 5a-9a. The court acknowledged that the migratory bird rule can be justified, if at all, only under the third prong of federal regulatory power set forth in *Lopez*: "regulation of activities that 'substantially affect' interstate commerce." *Id.* at 5a, quoting 514 U.S. at 558-559. It then held that although the Corps had made no showing that the use of SWANCC's balefill site by migratory birds had any effect on interstate commerce, "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." App., *infra*, 6a. Finally, the court held that "destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce" because "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds," including by "trave[l] across state lines." *Id.* at 7a.

Turning to SWANCC's argument that the migratory bird rule is not a permissible interpretation of the CWA, the court of appeals held that the "scope of the Act reaches as many waters as the Commerce Clause allows." Accordingly, it concluded, "because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the * * * Corps to interpret the Act in such a manner." App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the circuits are split as to the jurisdictional reach of the CWA, and because the Seventh Circuit reached a decision in this case that is erroneous as a matter

of statutory interpretation and constitutional law and seriously infringes on prerogatives reserved to States and municipalities in our system of federalism.

I. THE CIRCUITS ARE SPLIT OVER THE CORPS' AUTHORITY TO REGULATE ISOLATED INTRA-STATE WATERS BASED ON THEIR ACTUAL OR POTENTIAL USE BY MIGRATORY BIRDS

In *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 129 (1985), this Court upheld the Corps' construction of the Clean Water Act to cover not only "navigable or interstate waters and their tributaries" but also wetlands *"adjacent"* to such waters. (Emphasis added). This Court reserved and did "not express any opinion" regarding the Corps' much more ambitious claim of authority "to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water"—referencing specifically the Corps' claim in 33 CFR § 328.3(a)(3) to have jurisdiction over "other waters * * * the use, degradation or destruction of which could affect interstate commerce." 474 U.S. at 131 n.8. The courts of appeals have disagreed about the question reserved in *Riverside Bayview Homes*, including about the very furthest reach of the Corps' assertion of jurisdiction over "other waters," the migratory bird rule.

1. The Fourth Circuit in *Wilson* held "invalid" the Corps' "other waters" regulation, 33 CFR § 328(a)(3)—the regulation that the migratory bird rule expressly purports to "clarif[y]" (App., *infra*, 39a)—on the ground that it "exceeded [the Corps' regulatory power] under the Clean Water Act." 133 F.3d at 257. Had Congress enacted § 328(a)(3) as a statute, the court pointed out, "it would present serious constitutional difficulties * * * under the Commerce Clause," because it "requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate waters." *Ibid.* But, the court held, because the other waters regulation "is not a statute," "[a]bsent a clear indication to the

contrary, we should not lightly presume that merely by defining 'navigable waters' as 'the waters of the United States,' * * * Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner." *Ibid.*

In addition to identifying constitutional difficulties with the Corps' claim to jurisdiction over "other waters," the Fourth Circuit held that § 328(a)(3) "expands the statutory phrase 'waters of the United States' beyond its definitional limit." 133 F.3d at 257. "[A]s a matter of statutory construction," the Fourth Circuit held, "one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to interstate or navigable waters." *Ibid.*

The Seventh Circuit thought *Wilson* irrelevant for two reasons, both mistaken. First, *Wilson* "involved a challenge to 33 C.F.R. § 328(a)(3)," while SWANCC "limited its objections to the propriety of the migratory bird rule as an interpretation of" § 328(a)(3). App., *infra*, 10a. Obviously, however, the Fourth Circuit would not, under its reasoning, uphold an *interpretation* or *clarification* of the very regulation it held invalid: *Wilson* effectively struck down not just § 328(a)(3), but also the migratory bird rule. That is especially clear because the migratory bird rule even more broadly interprets "waters of the United States" than the underlying regulation. Instead of requiring a connection or potential connection with *interstate commerce*, like the regula-tion, the rule only requires a connection or potential connection with *migratory birds* that are "protected by Migratory Bird Treaties" or "cross state lines." App., *infra*, 40a.

Second, the Seventh Circuit pretended that the *Wilson* ruling was limited to the question whether "Congress may regulate waters based on their *potential* to affect interstate commerce." App., *infra*, at 10a. As the quotations from *Wilson* set out above show, *Wilson*

cannot be so narrowly cabined. The Fourth Circuit struck down the "other waters" rule because it does not require a showing of a "substantial effect on interstate commerce" or a "nexus" with navigable or interstate waters. 133 F.3d at 257. Unsurprisingly, since it is solely an interpretation of § 328(a)(3), the migratory bird rule does not require a showing of a substantial effect on interstate commerce or any nexus with navigable or interstate waters either. The Fourth Circuit's Commerce Clause analysis thus applies equally to the migratory bird rule. The Seventh Circuit also simply ignored the alternative *statutory* basis for the *Wilson* decision. *Ibid.* Without doubt, the Fourth Circuit holds the migratory bird rule, as well as the regulation it interprets, beyond the Corps' statutory authority because it requires no connection to navigable or interstate waters or waters closely related thereto.

Wilson cannot be distinguished, and it is flatly at odds with the Seventh Circuit's decision in this case that the migratory bird rule is constitutionally unproblematic and statutorily authorized, as well as with the similar decisions of other circuits. See *Leslie Salt Co.* v. *United States* (*Leslie Salt I*), 896 F.2d 354, 360 (9th Cir. 1990) ("The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species"); *Utah* v. *Marsh*, 740 F.2d 799, 803-804 (10th Cir. 1984) (upholding Corps jurisdiction over intrastate lake because its waters were used for fisheries and to irrigate crops which were subsequently marketed interstate, it was visited by out-of-state tourists, and it was on migratory bird flyways).

Had SWANCC's balefill been located in the Fourth Circuit, the result in this case would certainly have been different. This Court should not tolerate a circuit split on an issue as important as the scope of federal jurisdiction under national legislation like the Clean Water Act. Municipalities and other landowners are entitled to consistent treatment under the CWA throughout the country; the fate

of their projects should not turn on the happenstance of where their land is located. And the need for national uniformity is especially great because anyone planning to dredge or fill waters within the Corps' jurisdiction must obtain a permit or risk facing *criminal sanctions*. See, *e.g.*, *Wilson*, 133 F.3d 251 (criminal convictions at issue). Whether an act is a federal crime or not should not depend on where in the country the act takes place.

2. Justice Thomas questioned the validity of the Corps' migratory bird rule in his dissent from the denial of certiorari to review the *Leslie Salt II* decision. He stated that the issue presented in that case—as here—"raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the Clean Water Act." *Cargill, Inc.* v. *United States*, 516 U.S. 955, 959 (Thomas, J., dissenting from denial of certiorari).

Justice Thomas observed that "[t]he basis asserted to create federal jurisdiction over petitioner's land"—"the actual or potential presence of migratory birds on petitioner's land" —is "even more far-fetched than that offered, and rejected, in *Lopez*." 516 U.S. at 957-958. Justice Thomas described as "improper" the Corps' "assumption * * * that the self-propelled flight of birds across state lines creates a sufficient interstate nexus to justify the Corps' assertion of jurisdiction." *Id.* at 958. He observed that in *Leslie Salt*, as here, the Corps made "no showing that humans ever went to petitioner's property to hunt, trap, or observe migratory birds," or "that the cumulative effect of land use involving * * * wholly isolated [waters] would have a substantial effect on interstate commerce." *Id.* at 959. There was, in short, absolutely no explanation how "the activity on the land to be regulated * * * substantially affect[ed] interstate commerce." *Ibid.*

Justice Thomas concluded that the migratory bird rule "likely stretches Congress' Commerce Clause powers beyond breaking point" and expressed, "[i]n light of *Lopez*, * * * serious doubts about the propriety of the Corps' assertion of jurisdiction over petitioner's land." 516 U.S. at 958.

Although Justice Thomas' position did not garner four votes to review the *Leslie Salt II* decision, review of the migratory bird rule has since become more urgent with the Fourth Circuit's 1997 rejection of the Corps' jurisdiction over "other waters" in *Wilson*.

3. Circuit judges have been equally critical of the "other waters" and migratory bird rules in individual opinions. In his concurrence in *Hoffman Homes, Inc.* v. *United States Envtl Protection Agency*, 999 F.2d 256, 262-263 (7th Cir. 1993), for example, Judge Manion concluded both that the CWA gives no federal jurisdiction over "isolated wetlands" that "have no effect on the waters of the United States," and that even if it did, "the Commerce Clause does not empower Congress to regulate isolated wetlands * * *. To hold other-wise would be, in effect, to hold that Congress' power under the Commerce Clause is virtually limitless." *Id.* at 263; see also *ibid.* ("The commerce power as construed by the courts is indeed expansive, but not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink").[4] Judge Rymer, in her separate opinion in *Leslie Salt I*, was likewise unimpressed with the legal basis for the Corps' migratory bird rule. *Leslie Salt I*, 896 F.2d at 361 n.1 (Rymer, J., concurring in part and dissenting in part); see also *United States* v. *Larkins*, 852 F.2d 189, 193-194 (6th Cir. 1988) (Merritt, J., concurring);

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[4] Judge Manion's analysis is more fully set forth in his subsequently vacated opinion for the Seventh Circuit in *Hoffman Homes, Inc.* v. *United States Envtl Protection Agency*, 961 F.2d 1310 (7th Cir. 1992).

Leslie Salt II, 55 F.3d at 1396 ("The migratory bird rule certainly tests the limits of Congress' commerce powers and, some would argue, the bounds of reason").

It is no surprise, given these disagreements, that the Corps' jurisdictional grab has also drawn considerable scholarly attention. By and large, commentators recognize that the Corps' exercise of jurisdiction over "isolated waters" and migratory bird habitat pushes the edges (at the very least) of federal Commerce Clause power. *E.g.*, Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 185 n.49 (1998) ("Why the fact that a bird or animal crosses state lines of its own volition and without being itself an object of interstate commerce is sufficient for Commerce Clause purposes remains unexplained").[5]

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[5] See also, *e.g.*, Gilbert, *The Migratory Bird Rule After* Lopez: *Questioning the Value of State Sovereignty in the Context of Wetland Regulation*, 39 WM. & MARY L. REV. 1695, 1696 (1998) (noting "concerns" regarding the validity of the migratory bird rule "in view of the *Lopez* decision"); Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 414 (1998) (isolated wetland regulations "will be susceptible to Commerce Clause attack because they are indefensible as proper regulations of 'commerce' under any untortured definition of the word"); Bueschen, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U.L. REV. 931, 950 (1997) (explaining that in light of *Lopez*, the migratory bird rule "could be in jeopardy"); Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVT'L L. & POLICY FORUM 321, 351 (1997) ("A rule permitting jurisdiction to be determined solely by potential use of a wetland by migratory birds is arguably too tenuously connected to interstate commerce to trigger the commerce power in light of *Lopez*'s substantiality requirement");

Beyond the clear circuit split with *Wilson*, the separate opinions by Justice Thomas and others and the wealth of critical academic commentary demonstrate the diversity of views on the propriety of the migratory bird rule and show that confusion in this area will continue and likely escalate absent this Court's immediate intervention.

II. THE MIGRATORY BIRD RULE IS AN IMPERMISSIBLE INTERPRETATION OF THE CWA

The Seventh Circuit's decision to defer to the Corps' interpretation of the Clean Water Act is incorrect. Courts properly defer to an agency's interpretation of a statute "only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508 (1992). A court "ascertains [whether] Congress had an intention on the precise question at issue" by "employing traditional tools of statutory construction," including analysis of the text, structure, "history and policy of the Act." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*,

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Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. DAVIS L. REV. 1237, 1267 (1995) ("It is unreasonable to argue that the potential use of an isolated wetland by any species of migratory bird substantially affects interstate commerce"); Bablo, Leslie Salt Co. v. United States: *Does the Recent Supreme Court Decision in* United States v. Lopez *Dictate the Abrogation of the "Migratory Bird Rule"?*, 14 TEMP. ENVT'L L. & TECH. J. 277, 278 (1995) ("the very tenuous tie between migratory birds and interstate commerce does not satisfy the tests of the Commerce Clause enunciated in *Lopez*"); Lessner, Leslie Salt Co. v. United States: *Keep the Birds Out of Your Birdbath: It May Be Considered The Jurisdiction of the Army Corps of Engineers as a "Water of the United States,"* 2 VILL. ENVT'L L.J. 463, 500 (1991) (expressing doubt that a migratory bird habitat "can be declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction").

467 U.S. 837, 843 n.9, 862 (1984). Applying that familiar standard, the migratory bird rule is invalid. It is inconsistent with the language and history of the CWA, and it fails to pass muster under established canons of interpretation requiring that a statute be construed to avoid raising serious constitutional questions and to avoid impinging on areas traditionally regulated by the states.

A. The Plain Language of the Act Requires Jurisdictional Waters To Be Related To Navigable Waters

The plain language of the CWA prohibits discharges into "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1344(a), 1362(7). The Corps and the court below played favorites with these terms, ignoring the phrase "navigable waters" and focusing exclusively on the phrase "waters of the United States." App., *infra*, 9a. But "'[j]udges should hesitate * * * to treat [as surplusage] statutory terms in any setting.'" *Bailey* v. *United States*, 516 U.S. 137, 145 (1995). The statutory phrases "navigable waters" and "waters of the United States" are *both* essential to divining congressional intent. The former concept, properly understood, forecloses the Corps' migratory bird rule.

1. "Navigable waters" is a term of art that traditionally meant "waters navigable in fact" (*The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)), but that was refined over time to include those waters capable of navigation through reasonable improvements. *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 298-299 (1940); see BLACK'S LAW DICTIONARY 1179 (4th ed. 1968); *Gilbert* v. *United States*, 370 U.S. 650, 655 (1962) (statutory terms are generally to be given their established common law meaning). No one asserts that the gravel-mining depressions on SWANCC's property are navigable in either sense.

2. The Seventh Circuit ignored this settled common-law meaning of "navigable waters" and treated that statutory phrase as surplusage. It justified that approach by pointing to the CWA's definition of "navigable waters" as the "waters of the United States,"

then treating *that* phrase as the sole source of limits on the Corps' jurisdiction. App., *infra*, 9a.

It was error for the court of appeals to write the phrase "navigable waters" out of the CWA. In fact, the meaning of the phrase "waters of the United States," while somewhat broader than "navigable waters," is informed by and *incorporates the idea of navigability*. As this Court has held, the phrase means those waters which "form in their ordinary condition by themselves, or by uniting with other waters, *a continued highway over which commerce is or may be carried on* with other States or foreign countries *in the customary modes in which such commerce is conducted by water*." *The Daniel Ball*, 77 U.S. at 563 (emphasis added); see also *The Montello*, 87 U.S. (20 Wall.) 430, 443 (1874).

Thus, as the Fourth Circuit explained in *Wilson*, "the phrase 'waters of the United States' when used to define the phrase 'navigable waters'" naturally "refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." 133 F.3d at 257. The migratory bird rule, like the regulation it purports to interpret, "defines 'waters of the United States' to include waters that need have nothing to do with navigable or interstate waters," and deserves no deference because it "expands the statutory phrase 'waters of the United States' beyond its definitional limit." *Ibid.*

3. The Seventh Circuit's reliance on this Court's decision in *Riverside Bayview Homes* as support for its interpretation of the CWA is misplaced. This Court explained in *Riverside Bayview* that Congress' use of the phrase "waters of the United States" in the CWA evidences an intent to "regulate at least *some* waters that would not be deemed 'navigable' under the classical understanding," and in that sense (only), the concept of navigability "is of limited import" in the CWA. *Riverside Bayview Homes*, 474 U.S. at 133 (emphasis added). Nowhere, however, has this Court suggested that

the Corps can ignore altogether the concept of navigability, as it does in its "other waters" and migratory bird rules.

To the contrary, in stark contrast to Corps' sweeping definition of "waters of the United States," the definition this Court found reasonable in *Riverside Bayview*—navigable waters and their "adjacent wetlands"—does accord with the traditional interpretation of "waters of the United States" as a "continued highway for commerce." "Adjacent wetlands" abut navigable waters, thus forming a "continued highway" and becoming "waters of the United States." *The Daniel Ball*, 77 U.S. at 563; *The Montello*, 87 U.S. at 443; see also *DeLovio* v. *Boit*, 7 F.Cas. 418, 423 (Cir. Ct., D.Mass. 1815) (Storey, J.) ("marsh land, bordering on the sea" may be within the admiralty jurisdiction). Isolated, man-made depressions that fill with rainwater are not remotely similar. Thus, *Riverside Bayview* provides no support for the extraordinary extension of federal jurisdiction over local land use approved by the Seventh Circuit.

4. The only statutory analysis engaged in by the court below was its iteration of the purpose of the Act, which includes the phrase "biological integrity" and the goal of ensuring "water quality which provides for the protection and propagation of * * * wildlife." App., *infra*, 10a. But "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action * * * and, in the end, prevents the effectuation of congressional intent." *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986).

In contrast to the highly generalized purposes of the Act relied on by the Seventh Circuit, the CWA's text is specific and transparently clear. When it enacted the CWA, Congress was no stranger to the terms "navigable waters" and "waters of the United States," including their common law meanings and alternatives. It had

previously used both concepts "to determine the extent of the authority of the [Corps] under the Rivers and Harbors Appropriation Act of 1899," 33 U.S.C. § 403. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979). Congress' choice to use those well-understood terms to define the scope of the CWA should not be treated lightly, and it supports the Fourth Circuit's view of the Corps' jurisdiction, not the Seventh Circuit's interpretation.

Equally telling, in the Federal Power Act Congress gave an agency authority over activities not only on "navigable waters," but also on streams "*other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States.*" 16 U.S.C. § 817 (emphasis added).[6] It follows that "Congress knew how to draft a statute to reach" all nonnavigable waters over which Congress has Commerce Clause jurisdiction. *Bailey,* 516 U.S. at 150. That Congress used no similar language in the CWA indicates that, contrary to the ruling below, it did not intend the CWA to apply so broadly.

B. Legislative History Confirms That Congress Did Not Intend The Corps To Base Jurisdiction Merely On The Presence Of Migratory Birds

This Court will not defer to an agency construction where "the legislative history of the enactment shows with sufficient clarity that [it] is contrary to the will of Congress." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 233 (1986). Such is the case here.

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[6] It is noteworthy that even under the broadly worded Federal Power Act, this Court has refused to extend congressional authority to "intrastate nonnavigable waters which do not flow into any navigable streams." *Federal Power Comm'n* v. *Union Elec. Co.*, 381 U.S. 90, 97 & n.9 (1965).

1. Section 404(a) and the definition of "navigable waters" as "waters of the United States" originated in the Federal Water Pollution Control Act Amendments of 1972. In the thousands of pages of legislative history of those amendments, isolated waters are mentioned not once. Neither the government nor the court below has produced a single such reference. Yet the extension of federal jurisdiction to isolated waters implicates many millions of acres. Given the important policy and political interests at stake in drawing the boundary line between federal and local control of development, such a vast expansion of federal authority over heretofore local concerns would hardly have passed in silence.

Congressional statements about the language that was used in the statute—"navigable waters" and "waters of the United States"—reflect established common law definitions. See 118 CONG. REC. H33,756 (1972) (statement of Rep. Dingell, House floor manager); *id.* at H33,699 (statement of Sen. Muskie, Senate floor manager). By defining "navigable waters" as "waters of the United States," the legislative history shows, Congress merely sought to avoid giving "navigable waters" its most "limited" or "technical" meaning—navigable in fact—"derived from the *Daniel Ball* case." *Id.* at H33,756 (Rep. Dingell). Congress wanted a definition "in line with more recent judicial opinions" that "expanded that limited view of navigability * * * to include waterways which would be 'susceptible of being used * * * with reasonable improvement,' as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera." *Ibid.*, quoting *United States* v. *Utah*, 283 U.S. 64, 72 (1931). See also *ibid.* (Rep. Dingell quotes cases, which all involve waters previously or currently obstructed to navigation). In other words, the text was designed to reference the broader definitions of "navigable waters" and "waters of the United States" established by this Court. See also 118 CONG. REC. H33,699 (statement of Sen. Muskie).

In light of these explanations, the statement in the House and Senate conference reports that "[t]he conferees fully intend that *the term 'navigable waters'* be given the broadest possible constitutional interpretation" is clear. S. REP. No. 92-1236, 92d Cong., 2d Sess. 144 (1972) (emphasis added); see also H.R. REP. No. 92-911, 92d Cong., 2d Sess. 131 (1972). Congress simply meant that the CWA should reach waters capable of *navigation* by reasonable improvement, consistent with this Court's decisions in cases such as *Appalachian Electric* and *United States* v. *Utah*. It does *not* mean, as the Seventh and Ninth Circuits have held, that the CWA "reaches as many *waters* as the Commerce Clause allows." App., *infra*, 9a (emphasis added); *Leslie Salt I*, 896 F.2d at 360. Had that been Congress' intent, it would have said so expressly, as it did in the Federal Power Act.

2. No different message was sent by Congress when, in 1977, it rejected amendments that would have limited the Corps' authority to waters navigable in fact and their adjacent wetlands. This Court concluded in *Riverside Bayview Homes* that Congress' inaction showed that "the scope of the Corps' asserted jurisdiction *over wetlands* was specifically brought to Congress' attention," and that "even those who thought that the Corps' existing authority under § 404 was too broad" recognized that existing legislation should be read to cover *adjacent* wetlands. 474 U.S. at 137-138 (emphasis added). Neither conclusion supports the migratory bird rule.

First, the migratory bird rule was not officially promulgated by the Corps until 1986. 51 Fed. Reg. 41206, 41217 (1986); App., *infra*, 39a. Absent clairvoyance, Congress could not have "acquiesced in the Corps' definition of waters" (474 U.S. at 138) in the migratory bird rule by its failure to act in 1977. See *Leslie Salt I*, 896 F.2d at 361 n.1 (Rymer, J., dissenting) (rejecting argument that Congress acquiesced in the migratory bird rule because "[t]his 1986 addition to, or clarification of, the Corps' regulations was not considered during congressional debates on the [CWA] of 1977").

Second, even the government has not ventured to suggest that "even those who thought that the Corps' existing authority under § 404 was too broad" would comfortably read the existing legislation to cover isolated intrastate depressions visited by migratory birds. Nor could it: the migratory bird rule marks the very furthest extent of asserted federal jurisdiction and is a giant leap beyond the normal bases upon which the federal government inserts itself into local affairs. In sum, the legislative history of Section 404 provides no support for, but contradicts, the migratory bird rule.

C. No Deference Is Owed To The Migratory Bird Rule Because It Raises Serious Constitutional Concerns

1. The migratory bird rule is also entitled to no deference because it raises "serious constitutional concerns" and "there is another interpretation that may fairly be ascribed" to the Act. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988); see also *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (when an agency's "exercise of its jurisdiction * * * would give rise to serious constitutional questions" no deference is owed unless the regulation denotes "the affirmative intention of the Congress clearly expressed"). The Commerce Clause "is subject to outer limits." *Lopez*, 514 U.S. at 557. The migratory bird rule hovers around or exceeds those limits, at minimum raising "serious constitutional questions." Even *defenders* of the migratory bird rule acknowledge that it "tests the limits of Congress' commerce powers, and, some would argue, the bounds of reason." *Leslie Salt II*, 55 F.3d at 1396.

2. The Seventh Circuit recognized that the migratory bird rule can be justified, if at all, only as regulation of an activity that "substantially affect[s]" interstate commerce. App., *infra*, 6a-7a; *Lopez*, 514 U.S. at 558-559. But the court did not rest its decision that the rule is constitutionally unproblematic on a showing by the Corps that filling gravel-mining depressions on SWANCC's

property would "substantially" affect interstate commerce. The terms of the migratory bird rule require nothing more than the particular waters in question "are or would be used" as a habitat by migratory birds that are protected by international treaty or that "cross state lines" (App., *infra*, 40a), and the Corps made no showing beyond that requirement when it determined that SWANCC's balefill property is within its jurisdiction. See App., *infra*, at 6a (acknowledging that any impact on birds on SWANCC's property "has no discernible effect on interstate commerce"). The migratory bird rule's lack of any connection to commerce, reflected in the Corps jurisdictional determination in this case, renders the basis for federal jurisdiction "even more farfetched than that offered, and rejected in *Lopez*" and raises "serious doubts" about the "propriety of the Corps' assertion of jurisdiction." *Cargill*, 516 U.S. at 958 (Thomas, J., dissenting from denial of certiorari).

3. The Seventh Circuit avoided the difficulty that migratory bird use of SWANCC's property has "no discernable effect on interstate commerce" by theorizing that the "cumulative impact" of "the destruction of migratory bird habitat" "substantially affects" interstate commerce in hunting and birdwatching. App, *infra*, 6a-7a.[7] The commerce power may not be extended by that kind of bootstrapping.

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[7] The Seventh Circuit disregarded the fact that there has never been a "showing that the cumulative effect of land use involving * * * *water that is wholly isolated from any water used, or usable, in interstate commerce*" would have a substantial effect on migratory birds, much less "a substantial effect on interstate commerce." *Cargill*, 516 U.S. at 959 (Thomas, J.) (emphasis added). There is no evidence that the numbers of any commercially relevant bird species would diminish as a result of the Corps not regulating isolated waters. The speculative assumption that filling a particular intrastate pond or trench will have a noticeable effect on migratory birds, which in turn will have a substantial effect on commerce, depends on "pil[ing] inference upon inference," an approach rejected in *Lopez*. 514 U.S. at 567.

To be sure, "[w]here the class of activities is regulated and that class is within the reach of federal power" because of its aggregated effect on commerce, "the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971), quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968). But "the *de minimis* character of individual instances * * * is of no consequence" *only* when those instances are "essential part[s]" of "a general regulatory statute" that "bears a substantial relation to commerce." *Lopez*, 514 U.S. at 558. Here, isolated, purely intrastate wet areas are *not* within the class obviously regulated by Congress in the CWA, nor did Congress show any concern in the CWA with migratory birds as a class. And the Corps has never explained how preventing the filling of isolated, intrastate, man-made depressions is "essential" to any goal identified by Congress in the CWA.

The "regulated class" approach to Commerce Clause analysis, which recognizes federal jurisdiction despite the lack of any significant effect on commerce of particular regulated circumstances, should have no application in cases such as this where there is a glaring disconnect between the class covered by the statute ("navigable" "waters of the United States") and the asserted basis of an agency's jurisdiction (migratory birds), and where the agency has failed to show that extending its jurisdiction is essential to the achievement of any statutory goal. See, *e.g.*, *United States* v. *Bird*, 124 F.3d 667, 676 (5th Cir. 1997) (rejecting the government's claim that "Congress need only identify a broad 'class of activities' and determine that, viewed in the aggregate, the class 'substantially affects' interstate commerce," requiring instead the separate incidents be connected to interstate commerce).[8]

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[8] Professor Nagle points out that this Court "has said little about how

4. The migratory bird rule contains no "jurisdictional element which would ensure, through case-by-case enquiry" that particular isolated waters "affec[t] interstate commerce." *Lopez*, 514 U.S. at 561. Under the rule, it is enough that the waters "are or would be used as habitat" by any migratory bird. App., *infra*, 40a. Accordingly, the Corps conducted no analysis of the impact on commerce of filling the gravel-mining depressions on SWANCC's balefill site.

5. The basis of the Corps rule and assertion of jurisdiction here appears to be that the self-propelled flight of birds across state or national boundaries alone is enough to implicate the Commerce Clause, allowing regulation of every place where the birds might naturally stop. The ramifications of this assertion are astonishing. Approximately five billion land birds migrate across North America every year, with flyways covering the entire continental United States. THE ATLAS OF BIRD MIGRATION 54-83 (ed. J. Elphick 1995); R. PETERSON, A FIELD GUIDE TO BIRDS 305-370 (4th ed. 1980). By the Corps' rationale, the Commerce Clause would stretch

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far Congress can reach in aggregating activities or how one decides what aggregations are permissible." But he notes that the "available clues counsel against overly broad aggregations" like that relied on below: "*Lopez* rejects any Commerce Clause test that every conceivable federal statute could satisfy. The Court's frequently stated concern about federalism pushes toward less sweeping aggregations. And lower courts have rejected the contention that Congress can satisfy the Commerce Clause simply by choosing a broad category of activities whose aggregate effect on interstate commerce is substantial." 97 MICH. L. REV. at 197-198 (footnotes omitted). See also 1 L. TRIBE, CONSTITUTIONAL LAW 825 n.68 (3d ed. 2000) ("*Lopez* leaves unanswered many questions regarding focus and levels of generality [in aggregation] that were raised by *Wickard* and its progeny"). Review in this case would give this Court an opportunity to guide the lower courts in their application of the aggregation principle, which has taken on greater practical significance after *Lopez*.

to cover virtually every piece of property in the country, regardless of its commercial or noncommercial use.[9] As in *Lopez*, "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. at 564.

At the very least, the migratory bird rule raises "serious constitutional concerns." *Edward J. DeBartolo Corp.*, 485 U.S. at 577; see *Cargill*, 516 U.S. at 959 ("This case raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the [CWA] that provide a compelling reason to grant certiorari") (Thomas, J.). Because the Corps' dubious approach lacks support in the text or legislative history, much less the requisite "clearest indication" of congressional support, the Seventh Circuit's deference to the rule cannot be sustained.

D. No Deference Is Owed To The Migratory Bird Rule Because It Impinges On Traditional State Powers

The migratory bird rule also runs afoul the interpretative principle that a court will not assume that Congress intended to substantially "alter sensitive federal-state relationships" by regulating conduct "traditionally subject to state regulation" unless Congress said so clearly. *Rewis* v. *United States*, 401 U.S. 808, 811-812 (1971); see *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (if a federal law is to be read to "radically readjus[t] the balance of

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[9] The government conceded as much at oral argument in *Hoffman Homes*. See 961 F.2d at 1321 n.9 (government conceded that its interpretation would allow it to regulate a puddle visited by migratory birds). See also Holman, *After* United States v. Lopez: *Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVT'L L.J. 139, 197 (1995) ("migratory flyways cover the entire United States and, as birdwatchers will attest, migratory birds will alight almost anywhere. Thus the migratory bird rule * * * operates as a limiter-manque—a limiting rule with no limits").

state and national authority," "those charged with the duty of legislating [must be] reasonably explicit").

By vastly expanding federal jurisdiction to include tens of millions of acres of isolated intrastate waters and wetlands —traditionally the exclusive province of the States and their subdivisions—the migratory bird rule drastically alters "sensitive federal-state relationships," making the Corps a sort of super zoning board for all permanently or seasonally wet areas of the United States. Under the migratory bird rule, it is the Corps that ultimately decides whether a project is in the "public interest" (33 CFR § 320.4(a)), supplanting the considered judgments of state and local authorities, as it did in this case. Such a rule was not anticipated by Congress, much less clearly intended, and therefore cannot be sustained.

In light not only of *Lopez*, but also this Court's federalism jurisprudence in recent cases such as last Term's sovereign immunity decisions, *Printz* v. *United States*, 521 U.S. 898 (1997), *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *New York* v. *United States*, 505 U.S. 144 (1992), this Court should demand much clearer authority from Congress before permitting an agency to deprive states and municipalities of their traditional police powers over the use of land so ephemerally connected to interstate commerce. "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden* v. *Maine*, 119 S. Ct. 2240, 2263 (1999). The Founders likewise understood that the States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere." THE FEDERALIST NO. 39, at 245 (C. Rossiter ed. 1961) (J. Madison).

BFP is instructive. There, this Court rejected an interpretation of the Bankruptcy Code that would have preempted state foreclosure law. The Court explained that the power to ensure the security of titles to real estate "inheres in the very nature of [state] government" and that the construction urged by the government would intrude on "the essential [state] sovereign interest in the security and stability of title to the land." 511 U.S. at 544 & n.8. This Court would not permit an interpretation of the Code that "displace[d] traditional state regulation in such a manner" absent a "'clear and manifest'" statement of congressional intent. *Id.* at 544; see also *Lopez*, 514 U.S. at 567-568 (emphasizing the need to maintain "a distinction between what is truly national and what is truly local").

The same principle governs here. The migratory bird rule allows for intrusive federal land-use regulation that impinges on "the authority of state and local governments to engage in land use planning," which this Court has recognized "as long ago as our decision in *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)." *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994). Because land-use decisions are the prerogative of States and their subdivisions, this Court has repeatedly deferred to these interests. See *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 4 (1974); *Village of Euclid*, 272 U.S. at 388; see also *Village of Belle Terre*, 416 U.S. at 13 (Marshall, J., dissenting on other grounds) ("zoning is a complex and important function of the State" which "may indeed be the most essential function performed by local government"). Just as federal courts "do not sit to determine whether a particular housing project is or is not desirable" (*Berman* v. *Parker*, 348 U.S. 26, 32 (1954)), so too should federal agencies forbear from becoming local land-use authorities.

Thus, the text and history of the CWA, together with important principles of statutory interpretation that serve to protect state and local powers from unintended federal interference, all indicate that the Corps' migratory bird rule is an impermissible construction of the

Act that is owed no deference. The Seventh Circuit's contrary decision is erroneous and should be reversed.

III. THE PETITION SHOULD BE GRANTED, NOT HELD FOR *JONES* v. *UNITED STATES*

This Court has granted certiorari in *Jones* v. *United States*, No. 99-5739 (cert. granted Nov. 15, 1999), to decide whether interpreting the federal arson statute to reach intra-state arson of residential property is permissible in light of Commerce Clause constraints on federal power. See Order List, Nov. 15, 1999 (reformulating the question for review as "[w]hether, in light of *United States* v. *Lopez*, * * * and the interpretative rule that constitutionally doubtful constructions should be avoided, * * * [18 U.S.C.] Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is unconstitutional").

It appears likely that in *Jones* this Court will provide guidance as to the effect Commerce Clause concerns should have on the proper interpretation of jurisdictional grants in federal statutes. Stated in the abstract, that issue is of obvious relevance to this case: we contend that Commerce Clause problems raised by the migratory bird rule mean that it is an impermissible construction of the CWA under the established "interpretative rule that constitutionally doubtful constructions should be avoided." Nevertheless, holding this petition for *Jones* would not be useful or appropriate.

To begin with, this case and *Jones* involve very different statutes and entirely different factual bases that are alleged by the United States to provide a sufficient nexus to interstate commerce. There is no reason to believe that this Court's ruling whether a federal arson conviction may be based on the burned residence's receipt of out-of-state gas (and the like) will illuminate whether the presence of migratory birds is a proper basis for CWA jurisdiction. The different language of the statutes involved, their different regulatory histories,

and the vastly different questions whether the supply of natural gas to a residence or use of wet areas by migratory birds are "interstate commerce," suggest that however this Court decides *Jones*, the issue in this petition will remain alive and in urgent need of this Court's review.

The two cases also involve completely different Commerce Clause issues. *Jones* concerns a "case-by-case inquiry" into evidentiary sufficiency under a statutory jurisdictional element. This case raises the wholly different question of when deference is owed to agencies that seek to stretch their own jurisdiction to (or beyond) constitutional limits.

Moreover, the Seventh Circuit made abundantly clear that it regards protecting migratory bird habitat as implicating interstate commerce and sees no constitutionally doubtful interpretation at all in this case. A ruling in *Jones* that Commerce Clause problems are to be avoided by narrowing interpretations of jurisdictional grants would have no impact whatsoever on the Seventh Circuit on remand following a GVR, for the Seventh Circuit sees no conceivable Commerce Clause problem to begin with.

In light of these differences, and because the courts of appeals are in disarray as to an important issue concerning the scope of the Clean Water Act that will not be settled in *Jones*, we urge this Court to grant independent review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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