No. 01-1243

In the
Supreme Court of the United States

Borden Ranch Partnership,
Angelo K. Tsakopoulos,

Petitioners,

v.

United States Army Corps of Engineers,
United States Environmental Protection Agency,

Respondents.

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

BRIEF OF THE STATES OF ALABAMA, ALASKA, ILLINOIS, KANSAS, LOUISIANA, NEBRASKA, OHIO, PENNSYLVANIA, TEXAS, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae States of Alabama, Alaska, Illinois, Louisiana, Nebraska, Ohio, Pennsylvania, and Virginia submit this brief, pursuant to Sup. Ct. R. 37.4, in support of the petitioners, Borden Ranch Partnership and Angelo K. Tsakopoulos, urging this Court to reverse the judgment of the Ninth Circuit Court of Appeals. Amici have an interest in preserving the framework of cooperative federalism established by Congress in the Clean Water Act, and in maintaining the authority to regulate "normal farming activity" that Congress reserved for the States in the Act. The State of Alabama is a home to many farmers, and the interpretation of the Clean Water Act given by the Ninth Circuit is inimical to the interests of farmers. The petitioners' deep plowing of farmland is an activity that Congress left to state regulation and that Congress purposefully exempted from federal government regulation. Amici submit this brief to urge a return to the plain language of the Act, to defend the demarcations set forth in the Act between federal and state authority, and to protect the rights of States to regulate their own land and water to the extent provided by Congress.

SUMMARY OF ARGUMENT

The question before this Court is whether the federal government has authority to regulate the deep plowing of land, which does nothing but move soil around and adds nothing to the soil. The Clean Water Act did not give this authority to federal government agencies; instead, it reserved it to the States. The plain language of the Act and its legislative history show that

States have jurisdiction over nonpoint source pollution and farming activities. The Ninth Circuit's opinion places at risk the balance of powers between federal and state governments established by the Act.

Among the express purposes of the Act was to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . ." 33 U.S.C. 1251(b). Congress was careful to preserve the States' rights to regulate their own land and water and to leave the States authority over land and water uses not under federal jurisdiction. This Court recently addressed the federal government's impermissible expansion of its jurisdiction and recognized that Congress did indeed create a balance of power between federal and state governments in the Act. *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). This Court is again called upon to preserve the framework of cooperative federalism created by the Act and to check the runaway federal agencies that seek to expand their own jurisdiction at the expense of the States.

To have jurisdiction over Mr. Tsakopoulos's deep plowing, the respondent federal agencies had to concoct a uniquely creative interpretation of the Act. The Act required Mr. Tsakopoulos to obtain a federal permit only if the deep plowing were deemed to discharge a pollutant into navigable waters. 33 U.S.C. 1311(a); 1344(a). Because "discharge" is defined to be the "addition" of a pollutant from any point source, the agencies had to argue — and the Ninth Circuit had to accept — that deep plowing is an "addition," even

though it just moves the soil around and adds nothing to the soil. *Borden Ranch Partnership* v. *United States Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001). This interpretation of the word "addition" flies in the face of common sense. As the D.C. Circuit has held in an analogous context, "we fail to see how there can be an addition of *dredged material*, when there is no addition of *material*." *National Mining Association* v. *U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (emphasis in original).

To twist the Act to their purposes, the respondent agencies and the Ninth Circuit further had to treat the tractors and bulldozers pulling the plows as "point sources." The Act defines a point source as a "discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. 1362(14). Although bulldozers may in some instances be point sources, depending on the attachments used and activities performed, the bulldozers and tractors that pulled plows in this case were not point sources because they did not discharge any material.

Even if Mr. Tsakopoulos's deep plowing did somehow meet these conditions, it should still qualify for the Act's permitting exemption for normal farming activities, of which plowing is specifically named as one. 33 U.S.C. 1344(f)(1)(A). The Ninth Circuit, however, held that the plowing was not exempt because it fell under the exemptions' "recapture provision." This provision states that the discharge of dredged or fill material is not exempt if it is incidental to bringing an area "into a use to which it was not

previously subject." 33 U.S.C. 1344(f)(2). Although Borden Ranch consisted of ranch and crop land, and Mr. Tsakopoulos sought to convert it to land suitable for growing orchards and vineyards, all of which are exempt uses, the Ninth Circuit nevertheless held this to be a new use of the land. This expansive reading of the recapture provision impermissibly expands the authority of the federal government by shrinking the farming exemption. The balance of powers in the Act was established by Congress, and so it is for Congress, not the courts and certainly not the agencies, to alter it.

ARGUMENT

Angelo K. Tsakopoulos deeply plowed his land to convert it from ranchland and cropland to vineyards and orchards (Pet. at 9). Plowing is not an activity requiring a federal permit under the Clean Water Act. Even if it were, it is a normal farming activity exempt from federal permitting requirements under the Act. In spite of these legal constraints, the U.S. Army Corps of Engineers, Environmental Protection Agency, and Ninth Circuit have seen fit to extend the authority of the federal government's jurisdiction to this plowing activity, to the detriment of the authority of the States.

I. The Clean Water Act Preserved The Primary Responsibility Of The States To Prevent, Reduce, And Eliminate Water Pollution.

In the Clean Water Act, Congress declared: "It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration,

preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. 1251(b) (emphasis added).

Throughout the Act, Congress recognized State authority to regulate pollution and to control the waters within their boundaries. See, e.g., 33 U.S.C. 1251(g) (States' authority to allocate water supply not abrogated by Act); 33 U.S.C. 1288 (States' authority and role in waste treatment management); 33 U.S.C. 1342(b) (States' authority to administer their own programs for discharges into navigable waters); 33 U.S.C. 1344(g)-(j) (States' authority to administer their own programs for discharge of dredged and fill material); 33 U.S.C. 1370 (States' authority to control pollution, unless a State's standard is less stringent than that of the Act).

The Act's legislative history further emphasizes the distribution of authority between the federal and state governments. For example, the report from the Senate Committee amending the bill in 1977 noted that, in 1972, "Congress made a clear and precise distinction" between point sources, under federal regulation, and nonpoint sources, under state regulation. S. Rep. 95-370 at 8, 1977 U.S.C.C.A.N. 4326, 4334. The Act's history also indicates that jurisdictional questions should focus on kinds of "discharge," whether or not it is "point source or nonpoint, whether or not it is major or minor, whether or not it is a conventional activity or a major change in the use of an area." S. Rep. 97-370 at 10, 1977 U.S.C.C.A.N. 4326, 4336.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159

(2001) ("*SWANCC*"), this Court preserved the framework of cooperative federalism recognized by the Act. In *SWANCC*, the Corps had asserted jurisdiction over an abandoned sand and gravel pit under its "Migratory Bird Rule," on the ground that many species of migratory birds had been observed on the site. In rejecting the Corps' jurisdiction, this Court stated: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. at 174. This Court further noted that in the Act, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" rather than to readjust "the federal-state balance." *Id.* (citations omitted).

As Congress saw fit to limit the jurisdiction of the federal government, reserving primary responsibility for the States, it is not for the courts, and certainly not for the federal agencies themselves, to enlarge that jurisdiction. As Judge Gould stated in his dissent from the Ninth Circuit's majority opinion in the instant case, "the judicial determination that a deep plowing technique constitutes a pollution of navigable waters, with no prior adequate guidance from Congress, goes beyond mere statutory interpretation." *Borden Ranch Partnership* v. *United States Army Corps of Engineers*, 261 F.3d 810, 821 (9th Cir. 2001) (Gould, J., dissenting). "The alternatives are an agency power too unbounded or judicial law-making, which is worse." *Id.*

II. Deep Plowing Of Soil Does Not "Add" A "Pollutant."

Mr. Tsakopoulos's deep plowing did not add a pollutant to his soil, so as to require a federal permit under the Act. The Act allows the U.S. Army Corps of Engineers ("Corps") to issue federal permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). The Act makes it unlawful for any person to "discharge" a "pollutant" without complying with its permitting requirements. 33 U.S.C. 1311(a). A "discharge" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(16), (12).

Thus, to require a federal permit, Mr. Tsakopoulos's deep plowing must have constituted the discharge of a pollutant, which is actually the addition of a pollutant into navigable waters from a point source. Although the deep plowing merely churned up the same soil and left it in approximately the same place, the Ninth Circuit nevertheless found this activity to be the addition of a pollutant. *Borden Ranch*, 261 F. 3d at 814-15.

In an uncommon assault on common sense, the Ninth Circuit and several other courts have held that a pollutant is "added" even if no new material or substance is actually added to the soil or water. This confusion appears to have begun inadvertently in *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983). In *Avoyelles*, the defendants conducted wide-scale deforestation of an area known as the "Lake Long Tract." 715 F.2d at 901. This process involved

bulldozers fitted with shearing blades that cut timber and vegetation at ground level, which was then raked into windrows and burned, with the ashes spread back onto the ground. *Id.* The clearing and moving of land had the effect of leveling the land in some places. *Id.* at 923. The material removed was not placed in the same form in substantially the same place. It was moved into piles, burned, and spread about the land. *Id.* at 921. Backhoes were used to dig pits to bury debris. *Id.* Unfortunately, the Fifth Circuit used some broad language in holding this activity to be the addition of a pollutant, stating that an addition "may reasonably be understood to include a 'redeposit.' " *Id.* at 923.

Using the broad language of *Avoyelles* as a foundation, other courts have held that re-deposited materials constitute the addition of a pollutant. See *United States* v. *Deaton*, 209 F.3d 331, 333, 337 (4th Cir. 2000) (finding that digging a ditch and piling the excavated land on the sides of the ditch, a process known as "sidecasting," constituted the addition of a pollutant); *Rybachek* v. *United States Environmental Protection Agency*, 904 F.2d 1276, 1285 (9th Cir. 1990) (holding that the return of materials into a streambed in the process of placer mining constituted the addition of a pollutant); *United States* v. *M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (finding that the dredged spoil churned by tugboat propellers — which had dredged a channel, removed vegetation, and deposited the vegetation on sea grass beds — constituted the addition of a pollutant).

Several of these courts support their determinations by pointing to the definition of a "pollutant." The logic

appears to be that, if a pollutant includes substances such as dredged spoil, sand, rock, etc., then the redeposit of it, even if placed back it in approximately the same form in the same place, must constitute an "addition." See, e.g., *Deaton*, 209 F. 3d at 335-36; *Rybachek*, 904 F.2d at 1285; *M.C.C.*, 772 F. 2d 1505-06. While Congress did include substances such as rock, sand, and dredged spoil in the definition of a "pollutant," 33 U.S.C. 1362(6), it does not necessarily or logically follow that their redeposit in the same place in the same form constitutes the "addition" of a pollutant. Rock, sand, dredged spoil, and other similar substances would without question be additions of pollutants if placed in new locations, even if within the same general area. For example, dumping truckloads of dirt and soil from excavated land into navigable waters would obviously constitute the addition of a pollutant. It defies all reason to label a redeposit of the same substance in the same place an "addition" just because the substance can in some instances also be a pollutant.

The D.C. Circuit has not followed the *Avoyelles* line of cases, holding instead with refreshing common sense that "we fail to see how there can be an addition of dredged material when there is no addition of material." *National Mining Association* v. *U.S. Army Corps of Engineers*, 145 F. 3d 1399, 1404 (D.C. Cir. 1998) (quoted in *Borden Ranch*, 261 F. 3d at 819 (Gould, J., dissenting)). The D.C. Circuit further explained that, while the Corps may have jurisdiction to regulate some redeposit of materials, the agency's rule that effectively enlarged its jurisdiction to cover any incidental fallback of dredged materials exceeded the Corps' statutory authority under the Act. *National Mining*, 145 F.3d at

1405. As the Court stated, the "straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id.* at 1404 (D.C. Cir. 1998). In *Borden Ranch*, Judge Gould would have followed *National Mining*, noting that the petitioners' deep plowing may "transform" the land, changing its "hydrological nature," but that "Congress spoke in terms of discharge or addition of pollutants, not in terms of change of hydrological nature of the soil." *Borden Ranch*, 261 F.3d at 820 (Gould, J., dissenting).

The voices of reason sound from the D.C. Circuit and Judge Gould. Mr. Tsakopoulos did not add a pollutant to his soil merely by plowing it. He did not need to obtain a federal permit.

III. Plows Pulled By Tractors And Bulldozers Are Not Point Sources.

To fall within federal permitting authority, soil that is returned to its original place must not only be considered a pollutant, but it must also be added to navigable waters by a "point source." This is because, as noted above, a "discharge" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(16), (12). Congress defined a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. 1362(14).

The Ninth Circuit summarily dismissed the argument that a plow should not be considered a point source. Rather than focusing on the plow, the object that actually turned the soil, the court instead looked to the farm equipment that pulled the plows — tractors and bulldozers. The court's cursory analysis was that "courts have found that 'bulldozers and backhoes' can constitute 'point sources,' *Avoyelles*, 715 F.2d at 922." *Borden Ranch,* 261 F.3d at 815. Since "bulldozers and tractors were used to pull large metal prongs [plows] through the soil" the Ninth Circuit could "think of no reason why this combination would not satisfy the definition of a 'point source.' " *Id*.

The Ninth Circuit should have thought a little harder. A point source is a "discernable, confined, and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. 1362(14). The bulldozers and backhoes in the *Avoyelles* case did not pull plows; instead, the bulldozers first were outfitted with shearing blade attachments to remove all trees and vegetation and then were outfitted with rake blades to rake the trees into windrows. *Avoyelles*, 715 F.2d at 920-21. The backhoes were used to dig pits approximately 50 feet long and 6 feet deep. *Id.* at 921. Thus, in *Avoyelles*, the bulldozers and backhoes were used as point sources, i.e., conveyances from which pollutants were discharged.

In this case, however, tractors and bulldozers were not used as point sources. They pulled plows, from which pollutants could not be discharged, i.e., added, because the plows simply churned the land. The plows did not dig, cut, or move the land. The plows added no

substance and moved no substance from one place to another. Thus, the plows, bulldozers, and tractors cannot be point sources under the definition of point source in 33 U.S.C. 1362 (14) or under the holding of *Avoyelles*.

IV. Deep Plowing Is A Normal Farming Activity Exempt From Federal Authority Under The Clean Water Act.

Even if this Court were to conclude that deep plowing constitutes the discharge of a pollutant, the plowing would still be exempted from federal jurisdiction. The Clean Water Act exempts normal farming activity from federal permitting authority. The Act provides that "the discharge of dredged or fill material . . . from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating . . . is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title. . . ." 33 U.S.C. 1344(f)(1)(A).

The Ninth Circuit nevertheless held that deep plowing did not qualify for this exemption because it fell within an exception to the normal farming activity exemption called the "recapture provision":

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose *bringing an area of the navigable waters into a use to which it was not previously subject*, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. 1344(f)(2) (emphasis added). The Ninth Circuit held that, by converting his ranchland and cropland into orchards and vineyards, Mr. Tsakopoulos was "bringing the land 'into a use to which it was not previously subject.' " *Borden Ranch*, 261 F.3d at 815.

The effect of the Ninth Circuit's holding is to narrow the farming exception by broadening its recapture provision and thereby to expand the jurisdiction of the federal agencies. This is contrary to not only to the plain language of the Act but also to its purposes. "The upland farming, forestry and normal development activity carried out primarily by individuals and as a part of family business or family farming activity need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters. . . . *Without question, they should not and cannot be regulated by the Federal Government*." S. Rep. 95-370 at 10, 1977 U.S.C.C.A.N. at 4336 (emphasis added).

In determining that the farming exemption did not apply, the Ninth Circuit followed *United States* v. *Akers*, 785 F.2d 814 (9th Cir. 1986), another case holding the farming exception not applicable based on the recapture provision. Yet, in *Akers*, the farmer was not converting his land from one exempt use to another. The farmer was converting swampland to farmland, unquestionably bringing the land into a use to which it was not previously subject. In *Akers* the farmer had planned "extensive grading, leveling, drainage and water diversion" to convert the area known as "Big

Swamp" from wetlands into croplands. *Akers*, 785 F.2d at 816. The land in question had never been used for any traditional farmland operation. *Id*. at 819. In upholding the injunction prohibiting the farmer's planned conversion, the *Akers* court was careful to limit its holding to the facts before it and to reject the government's position that a change in cropland use required a federal permit. The court stated: "We do not believe that Congress intended to place the burden of Corps permit regulation on farmers who desire merely to change from one wetland crop to another." *Id*. at 820.

In this case, the land in question was ranchland and cropland before its conversion to orchards and vineyards. All of these are normal farming activities, exempted from federal permitting requirements by 33 U.S.C. 1344(f)(1)(A). Mr. Tsakopoulos's decision to change from one crop to another, or from ranchland and cropland to another exempted farming activity, does not bring the land "into a use to which it was not previously subject" for purposes of the Section 1344(f)(2) recapture provision. The land was used for normal farming and ranching activities and continues to be used as such after its crop rotation to orchards and vineyards. As Judge Gould opined, "[f]armers have been altering and transforming their crop land from the beginning of our nation, and indeed in colonial times. Although I have no doubt that Congress could have reached and regulated the farming activity challenged, that does not in itself show that Congress so exercised its power." *Borden Ranch*, 261 F.3d at 819 (Gould, J., dissenting).

The petitioners' activities are normal farming activities. The conversion from ranchland and cropland to another form of cropland, when all uses are exempt, does not constitute the transformation of land to a use to which it was not previously subject. Thus, the activities are exempt and do not fall within the recapture provision.

CONCLUSION

The ruling of the Ninth Circuit Court of Appeals should be reversed.

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