No. 04-1034*

In the

Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; and PINE RIVER BLUFF ESTATES, INC.,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONERS' REPLY BRIEF

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* This case is consolidated with No. 04-1384

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INTRODUCTION

In support of its extraordinarily broad claim of authority over all wetlands adjacent to any "tributary," under the Clean Water Act and the federal commerce power, the government argues: First, that the agencies' interpretation of "waters of the United States" is reasonable and, therefore, requires judicial deference. And second, that Congress was exercising its full Commerce Clause authority and intended to regulate virtually all waters in the United States.

But the government fails to reconcile this position with this Court's precedents in *United States v. Riverside Bayview Homes, Inc.*, (*Riverside*) 474 U.S. 121 (1985), and *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). Those cases indicate that Congress used the jurisdictional term "waters of the United States" to mean traditional navigable waters and those wetlands abutting and inseparably bound up with traditional navigable waters.

ARGUMENT

When the Sixth Circuit held that CWA jurisdiction over "adjacent waters," including wetlands, requires a "significant nexus" with a traditional navigable water that "can be satisfied *by the presence of a hydrological connection*," the court put no limits on that "connection" indicating that *any* connection will do however tenuous or insubstantial. Petitioner's Appendix (PA) at A16 (emphasis added). That rationale effectively authorized the Corps and EPA to regulate any wetland in the country that comes into contact with surface or ground water flowing downhill to a traditional navigable waterway, *as if* the wetland itself were a traditional navigable waterway. *See United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 807 (7th Cir. 2005) ("Whether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into a navigable waterway, the wetlands are

"waters of the United States" within the meaning of the Act.") (Citing *United States v. Rapanos*, 339 F.3d 447, 450-53 (6th Cir. 2003), and *United States v. Deaton*, 332 F.3d 698, 704-12 (4th Cir. 2003)).

But instead of relying on this rationale, the government seeks to move the debate in a different direction arguing: "The question in this case is whether the Corps and EPA have reasonably defined the CWA term 'the waters of the United States' to include wetlands adjacent to tributaries of traditional navigable waters." Brief for the United States in Opposition (Opp.) at 19. The "reasonable" definition the government offers is a new definition, never adopted in formal rule making, that "waters of the United States" include *all* "tributaries" to traditional navigable waters (33 C.F.R. § 328.3(a)(5)), and any wetlands adjacent to any "tributary" (33 C.F.R. § 328.3(a)(7)).[1] *See* Opp. at 7. Under the federal regulations, "adjacent" wetlands need not have a hydrological connection to a "tributary." Proximity is enough. The term "adjacent" means "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c). Thus, the government's new regulatory definition of "waters of the United States" exceeds even the geographic scope of the Sixth Circuit's "any hydrological connection" rationale.

But this approach is deficient in a number of respects. First, the government's interpretation of "waters of the United States" warrants no deference whatsoever because this Court has found Congress' intent in "§ 404(a) to be clear." *SWANCC*, 531 U.S. at 172. Second, this Court has determined that federal jurisdiction over nonnavigable wetlands requires more than a

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[1] In formal rule making the government has consistently maintained that its § 404(a) jurisdiction does not extend to all "tributaries." *See* 48 Fed. Reg. 21,466, 21,474 (May 12, 1983) ("Waters of the United States do not include . . . nonnavigable drainage and irrigation ditches excavated on dry land"). For similar *see* 40 Fed. Reg. 31,320, 31,321 (July 25, 1975); 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986); and, 67 Fed. Reg. 2,020, 2,087 (Jan. 15, 2002).

hydrological connection. Third, § 404(a) is limited by its text to the commerce power over navigation. And, fourth, the government's virtually limitless claim of authority raises significant federalism and constitutional questions requiring a narrow reading of the Act.

1. The Government's New Regulatory Interpretation Is Due No Deference

The government's all but limitless claim of authority is ultimately based on what it calls the "practical, common-sense" notion that effective regulation of traditional navigable waters necessarily requires *federal* regulation of all "tributaries" and their adjacent wetlands. *See* Opp. at 19 and 28. But if that was Congress' intent, it did not say so in the Act. To the contrary, in the Act Congress expressed its intent to defer to the States to exercise *their* "primary responsibilities and rights . . . to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Rather than explicit language in the CWA that Congress intended to regulate wetlands adjacent to any "tributary," § 404(a) is limited by its terms to "navigable waters."

In *SWANCC*, this Court determined that the term "waters of the United States" is descriptive of, but does not modify, the term "navigable waters." This Court found the correct interpretation of "navigable waters" means "*those waters of the United States* which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." *SWANCC*, 531 U.S. at 168 (emphasis added). In other words, the term "navigable waters" under § 404(a) means traditional navigable waters:

> We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the Statute. . . . The term "navigable" has at least the import of showing us what Congress

> had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Id. at 172.

As a matter of law and logic the term "navigable waters" cannot mean downstream traditional navigable waters and still encompass all upstream nonnavigable waters. Therefore, in *SWANCC* this Court concluded: "[R]espondents face a difficult task in overcoming the plain text and import of § 404(a)." *Id*. at 170. This Court stated unequivocally: "We find § 404(a) to be clear. . . .," and refused to extend *Chevron* deference to the government's "reasonable" regulatory interpretation. *Id*. at 172. But there was another reason this Court gave in *SWANCC*, equally applicable here, for not deferring to the government's overly broad regulations: "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id*.

There can be no doubt that the government invokes the outer limits of congressional power in this case. The Corps and EPA unabashedly claim § 404(a) jurisdiction over *all* "tributaries" of traditional navigable waters, and any wetland adjacent to each. Opp. at 28. The government studiously avoids defining "tributaries" so as not to limit its authority, but the government's meaning of the term is now clear.

Although this Court narrowly defined "navigable waters" and "waters of the United States" in *SWANCC* to mean traditional navigable waters, and included certain abutting wetlands, the government doggedly argues here that those terms provide *no "textual basis for distinguishing among different nonnavigable tributaries.*" *Id*. (emphasis added). In the government's lexicon, therefore, "tributaries" are not limited to rivers and streams but include *any* hydrological connection

where even a trickle or drop of water may flow. According to the government, "*neither the directness nor the substantiality of a tributary's connection to traditional navigable waters is relevant to the jurisdictional inquiry.*" *Id.* at 31. (emphasis added). If that were not enough, the government cites to the Fourth Circuit for the amazing and decidedly dangerous proposition that "[t]he statutory term 'waters of the United States' is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine which waters are to be covered. . . ." Opp. at 29 (citing *Deaton*, 332 F.3d at 709-10). In other words, the agencies argue they can and should define their own jurisdiction, which they attempt to do here by laying claim to the entire tributary system of a traditional navigable waterway, whatever its form.

This Court's requirement that Congress give a clear indication it intended such a result is, therefore, based on the "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-73. But this Court found such a clear indication of congressional intent was missing from the CWA as evidenced by the plain text and import of § 404(a). *Id.* at 171-74. The government's extreme interpretation of that provision is "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173.

Nevertheless, the government assures us that the Corps and EPA's exercise of jurisdiction over nonnavigable waters and wetlands is a "flexible" process that does not result in *automatic* prohibition of regulated discharges. Opp. at 22. "It simply means that the responsible agency will scrutinize and attempt to mitigate the likely impacts of a proposed discharge . . . before deciding whether the project may go forward." *Id.*

But putting aside the fact that this "simple scrutiny" has been documented to take an average of 313 days for a nationwide permit at an average cost of $28,915, and an individual § 404(a) permit takes an average of 788 days at an average cost of $271,596 (not including mitigation)[2], the government misses the point that no matter how accommodating the agencies may be, they simply have no authority to require a permit in the first place. The authority of the federal government must turn on something more substantial than administrative good will. Otherwise there would be no limit to federal power.

2. Wetland Jurisdiction Requires More than a Hydrological Connection

Although the argument was unavailing in *SWANCC*, the government argues here that § 404(g) validates its jurisdictional claim because that provision defines "navigable waters" more broadly than traditional navigable waters and their adjacent wetlands. Opp. at 23-25. But § 404(g) is also unavailing in this case because this Court already determined in *SWANCC* that § 404(g) does not demonstrate Congress' acceptance of the Corps' expansive regulatory definition of "navigable waters." *SWANCC*, 531 U.S. at 170-71. In *SWANCC*, the government argued that this Court should accept its broad interpretation of its CWA jurisdiction because a 1977 House bill failed to pass that would have narrowly defined "navigable waters." *Id.* at 170. But this Court found that event showed nothing "[b]eyond Congress' desire *to regulate wetlands adjacent to 'navigable waters*.' " *Id.* at 170-71 (emphasis added). This Court added that "[s]ection 404(g) is equally unenlightening" as to the

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[2] *See* David L. Sunding, & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,* 42 Nat. Resources J. 59, 74-76 (Winter 2002)

definition of "navigable waters" under § 404(a). *Id.* at 171 (emphasis added).

Although this Court recognized that "Congress intended the phrase 'navigable waters' to include at least some waters that would not be deemed 'navigable' under the classical understanding of that term," such as the abutting and inseparably bound up wetlands in *Riverside*, this Court also recognized that § 404(g) does not define those "other waters" and rejected the government's argument that they "must incorporate the Corps' 1977 regulations"—the same regulations at issue here. *See SWANCC*, 531 U.S. at 171.

To establish federal jurisdiction under § 404(a), this Court has required something more than the mere presence of any sort of hydrological (i.e., "tributary") connection between a wetland and a traditional navigable water. In *SWANCC*, this Court concluded jurisdictional wetlands must have a "significant nexus" with traditional navigable waters. And, by reference to *Riverside*, this Court in *SWANCC* ostensibly defined that nexus: "[W]e held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway." *Id.* at 167.

In further explanation, this Court stated that its holding in *Riverside* was based on Congress' willingness "to cover wetlands adjacent to navigable waters" and that Congress had indicated its intent to "regulate wetlands 'inseparably bound up with the 'waters of the United States.'" *Id.* However, *Riverside* left open the very question raised in this case; that is, whether the Corps had authority "to regulate discharges of fill material into wetlands that are *not* adjacent to bodies of open water. *Id.* And that was the precise question this Court answered in *SWANCC*.

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to

> ponds that are *not* adjacent to open water.[3] But we conclude that the text of the statute will not allow this.

Id. at 168.

This Court need go no further. Indeed, by so defining jurisdictional wetlands, this Court signaled it *would not* go any further.

Unlike the jurisdictional wetlands in *Riverside*, the wetlands in this case lack a legally "significant nexus" characterized by wetlands abutting and inseparably bound up with a traditional navigable water. Therefore, this Court should make express in this case what it implied in *SWANCC*; that the text of the Act does not allow federal regulation of wetlands that are *not* adjacent to (i.e., abutting) and inseparably bound up with open bodies of traditional navigable water.[4]

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[3] The government argues the term "open water" as used in *SWANCC* does not mean traditional navigable water, as the context would suggest. *See* Opp., at 35. But that does not help the government. The government claims jurisdiction over any wetlands adjacent to any "tributary." Therefore, unless the term "open water" means any "tributary," this Court's determination that the Act does not reach "ponds that are *not* adjacent to open water" would conclusively defeat the government's claim of jurisdiction.

[4] In *Riverside,* the Court remarked on the unique character of "wetlands" suggesting that "[o]n a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters."" *Riverside*, 474 U.S. at 132. But the Court acknowledged a difficulty in that case to "choose some point at which water ends and land begins," because the wetlands were inseparably bound up with the abutting traditional navigable water. *Id. See also*, *SWANCC*, 531 U.S. at 167. This was an important factor in the Court's determination, therefore, that the term "navigable waters" should extend to the abutting wetlands. *See Riverside*, 474 U.S. at 132-34.

3. Section 404(a) Is Limited to the Commerce Power over Navigation

In *SWANCC* this Court considered the legislative history of the CWA, although it did not need to do so after having found the text of the statute clear, and determined nothing therein "signifies that Congress intended to exert *anything more than its commerce power over navigation*." *SWANCC*, 531 U.S. at 168 n.3 (emphasis added). This Court endorsed the Corps' original interpretation of "navigable waters" emphasizing "'it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor.'" *Id.* at 168. Nevertheless, the government invites this Court to reconsider the history of the Act in defense of its broad claim of authority over any and all "tributaries" and adjacent wetlands. But, ironically, that reconsideration undermines rather than supports the government's position.

The government asserts that even before the 1972 Federal Water Pollution Control Act (FWPCA) Amendments, the precursor to the Clean Water Act, Congress had recognized "the danger that pollution of tributaries may impair the quality of traditional navigable waters downstream." Opp. at 25. But the means Congress chose to address that pollution is in accord with the approach it took later in § 404(a) of the CWA. Prior to 1972, the government reports: "[T]he FWPCA established procedures for abatement of '[t]he pollution of interstate or navigable waters in or adjacent to any State or States (*whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters*." *Id.* (citing 33 U.S.C. § 1160(a) (1970)) (emphasis added). Apparently, the government's purpose in citing this language is to show that before the CWA was promulgated, Congress had already extended its authority beyond traditional navigable waters to include the direct regulation of tributaries for pollution control.

Opp. at 25-26. But a close reading of the citation shows no such thing.

On its face, this provision only authorized the abatement of discharges that actually "enter[ed] into" or "reach[ed]" the traditional navigable water. It did not authorize the direct regulation of all tributaries, and certainly not any wetlands adjacent to such. Similarly: "§ 404(a) only regulates dredged or fill material that is discharged '*into* navigable waters.' " *SWANCC*, 531 U.S. at 171 n.7 (emphasis added). Accordingly, the CWA authorizes the Corps or EPA to require a permit for the discharge from a point source[5] of dredged or fill material flowing *into* a traditional navigable water. And, to bring an enforcement action for any unpermitted discharge of dredged or fill material from a point source that *actually reaches* a traditional navigable water. Section 301 of the Act makes it unlawful for any person to discharge a pollutant into a "navigable water" except as in compliance with § 404(a), among others. *See* 33 U.S.C. § 1311(a). And, § 309 authorizes criminal and civil sanctions as well as abatement for an illegal discharge in violation of § 404(a). *See* 33 U.S.C. § 1319. This reading of the statute places § 404(a) comfortably within the commerce power over navigation.

The Rivers and Harbors Act (RHA) of 1899 has long been recognized as a statute based on the commerce power over navigation. As the dissent in *SWANCC* notes, in the RHA

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[5] Under § 404(a), the Corps and EPA regulate discharges of dredged or fill material from a "point source" into "navigable waters." A "point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, conduit, well," etc. 33 U.S.C. § 1362 (14). This identification of point sources from which a pollutant may be discharged *into* "navigable waters" suggests that Congress did not intend to include such conveyances, like the ditches in this case, *as* "navigable waters."

Congress assigned the Corps "the mission of regulating discharges into certain waters in order to protect their use as highways for the transportation of interstate and foreign commerce; the scope of the Corps' jurisdiction under the RHA accordingly extended only to waters that were 'navigable.'" *SWANCC*, 531 U.S. at 175 (dissent by Justice Stevens). The government cites § 13 of the RHA as prohibiting the discharge of refuse matter "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed *into* such navigable water." Opp. at 25 n.12 (citing 33 U.S.C. § 407) (emphasis added). In other words, the commerce power over navigation, which acts as a limit on the CWA, covers discharges *directly into* traditional navigable waters and discharges into a tributary that *actually reach* traditional navigable waters.

This Court's conclusion in *SWANCC* that Congress' use of the term "navigable waters" invokes the commerce power over navigation precludes, therefore, the government's argument that the CWA authorizes the Corps and EPA to directly regulate any "tributary" and adjacent wetland as if they were a traditional navigable waterway. Of course in this case, the regulated nonnavigable wetlands are miles removed from any traditional navigable water and the government did not even allege, let alone prove, that the fill material (rocks, sand, and other solid debris) ever reached a traditional navigable water.

But this is irrelevant, the government argues, because "neither the directness nor the substantiality of a tributary's connection to traditional navigable waters is relevant to the *jurisdictional* inquiry." Opp. at 31. As far as the government is concerned, "the use of the word navigable in the statute . . . does not have any independent significance." *SWANCC*, 531 U.S. at 172. A contention this Court was unwilling to accept: "We cannot agree that Congress" intended to read "the term 'navigable waters' out of the Statute." *Id.*

4. The Government's Extravagant Interpretation Raises Significant Federalism and Constitutional Issues.

4.a. In *SWANCC* this Court stated that its concern for a clear indication from Congress that it intended to push the limits of its authority "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173. This Court found such an encroachment in the government's claim of federal jurisdiction "over ponds and mudflats." *Id*. at 174 (emphasis added). And rather than a clear indication from Congress that it intended that result, this Court found the Act expressed Congress' intention to preserve the federal-state balance by expressly choosing to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." *Id*. (citing the CWA at 33 U.S.C. § 1251(b)).

Here, the claim of federal jurisdiction over every drop of water hydrologically connected to traditional navigable waters, and beyond, undoubtedly results in an even greater encroachment on State powers. The government makes a point of underscoring the reach of federal authority over nonnavigable waters under its new regulatory interpretation citing; for example, "fewer than 1% of the stream miles within the Missouri River watershed are traditional navigable waters." Opp. at 21. Likewise, many amici in this case document the ubiquitous nature of nonnavigable "tributaries" and adjacent wetlands. *See* for example the Brief Amicus Curiae of the States of New York, et al., at 9 ("Non-navigable tributaries comprise at least 75% of the nation's streams and river miles."); *see also* the Brief Amicus Curiae of Western Coalition of Arid States at 11 (noting that the Mississippi drainage basin extends from the Rockies in the west to the Appalachains in the east covering more than a million square miles and drains 41% of the 48 contiguous states).

There is universal agreement that nonnavigable waters reach extensively into each of the States. But this fact simply makes Petitioners' case—federal regulation of such waters necessarily intrudes on traditional state powers over land and water use and alters the federal-state framework. The federal government cannot assume jurisdictional control of the entire tributary system and regulate land and water use all the way up the hydrological chain, to its very source, *and* "recognize, preserve, and protect the *primary* responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." *See SWANCC*, 531 U.S. at 174. And, Congress never expressed an intent to do so. Thus, in *SWANCC*, this Court "read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore, reject[ed] the request for administrative deference," *id*., just as it should here.

The government's rejoinder that its virtually limitless claim of authority does not unduly impinge on the States, because the States may assume responsibility for the *federal* § 404(a) permitting program, under the auspices of the EPA, does not help the government's case. Opp. at 49. In effect, the government argues there is no federalism problem here because the federal government is willing *to give back* to the States the traditional and primary state authority it has taken, albeit only with federal approval, under federal supervision, and subject to a federal veto over state permit decisions. *See* Opp. at 40 n.21 and 33 U.S.C. §§ 1344(g)-(i). The consolidated case of *Carabell v. United States Army Corps of Engineers* (04-1384) is a case in point. After the Michigan Department of Environmental Quality issued the Carabells a § 404(a) permit under its EPA authorized state program, albeit under an order from an administrative law judge, the EPA asserted jurisdiction over the site and required the Carabells to seek a § 404(a) permit from the Corps, which was denied. *Carabell* PA at 3a-5a. A greater intrusion into state affairs than the government's

expansive jurisdictional interpretation would be hard to conceive.

4.b. The result of this Court's heightened concern when federal regulations permit "federal encroachment upon a traditional state power" is that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *SWANCC*, 531 U.S. at 173.

In this case, the government argues that the underlying project—the Rapanos' potential commercial developments—are economic and such activities can be aggregated to show a "substantial effect" on interstate commerce. *See* Opp. at 45 n.23. But it is the text of the Act that determines the regulated activity for aggregation purposes and not the underlying project. By its terms, § 404(a) only covers "the discharge of dredged or fill materials into the navigable waters at specified disposal sites" and, like the prohibition on the possession of guns in *United States v. Lopez*, 514 U.S. 549 (1995), and the cause of action for domestic violence in *United States v. Morrison*, 529 U.S. 598 (2000), on its face, § 404(a) has nothing to do with economic activity. Nor is that provision part of a larger *economic* scheme that would be undermined by limiting the regulatory reach of § 404(a). Therefore, such discharges cannot be aggregated to satisfy this Court's test for "substantial effects." *See Lopez*, 514 U.S. at 561 and *Morrison*, 529 U.S. at 610-11.

The government also argues that Petitioners' constitutional challenge is an as-applied challenge and cannot be sustained under this Court's recent decision in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). The government is mistaken.

This is the language on which the government relies:

> Here, respondents ask us to excise individual applications of a concededly valid statutory scheme.

> In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that 'where the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances of the class.'"

Id. at 2209 (citations omitted).

Contrary to the situation in *Raich*, the Petitioners in this case *do* assert that § 404(a) does fall outside Congress' commerce power in its entirety *if* it is interpreted as the government argues to cover any wetlands adjacent to any "tributaries" to traditional navigable waters. This *is* a facial challenge to a particular provision of the CWA to which *Lopez* and *Morrison* apply. Moreover, *Raich* is inapposite for another reason; the CWA does not address a market scheme that clearly falls "within the reach of the federal power" like the Controlled Substances Act in *Raich*, or even the Agricultural Adjustment Act in *Wickard*. The former regulated the entire market in drugs while the later regulated the entire market in wheat. The CWA, in contrast, does not purport to regulate any market or commodity at all.

Additionally, the government argues that its prohibition on the filling of wetlands adjacent to any "tributary" constitutes the regulation of the "use of channels of interstate commerce" and is per se valid. Opp. at 39-44. But again, the government is mistaken. The problem with this argument is that the government is not regulating the channels themselves, the movement of goods or people in navigable waters, but only activities that arguably may affect the channels of commerce, the discharge of dredged or fill materials into wetlands adjacent to any "tributary." This is the classic "substantial effects" category of Commerce Clause regulation.

> Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. *Compare Presault v. ICC*, 494 U.S. 1, 110 S. Ct. 914, 924-25, 108 L. Ed. 2d 1 (1990), *with* [*Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968)] at 196, n.27, 88 S. Ct., at 2024, n.27 (the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

Lopez, 514 U.S. at 559.

The government cites no Supreme Court authority that a federal agency may regulate any activity that *may affect* a channel of interstate commerce under the "channels" category of Commerce Clause enactments. In fact, such a test would not be "consistent with the great weight of [this Court's] case law." *Id*. Even those cases upholding federal regulation of activities to keep channels from immoral and injurious uses, on which the government relies, are not availing because they involve the regulation of things actually moving in interstate commerce. For example, in *Caminetti v. United States*, 242 U.S. 470 (1917), the Court upheld a law prohibiting the transportation of women across state lines for purposes of prostitution or debauchery. Likewise, in *Champion v. Ames* (The Lottery Case), 188 U.S. 321 (1903), this Court upheld a federal law prohibiting the transportation of foreign lottery tickets from one state to another. In both cases, Congress was directly regulating things in and the "use of channels" of interstate commerce. But that is certainly not the case here.

The CWA does not purport to regulate any economic activity whatsoever let alone an item moving in interstate commerce. And, of course, the discharge of dredged or fill material into nonnavigable wetlands wholly within one state and over twenty miles from the nearest traditional navigable waterway cannot remotely be said to constitute commerce let alone interstate commerce. That fact is significant because as this Court noted in *Champion* the Act for the Suppression of Lottery Traffic through National and Interstate Commerce, and the Postal Service, Subject to the Jurisdiction and Laws of the United States, could be sustained precisely because it did "not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but has in view only commerce of that kind among the several states." *Champion*, 188 U.S. at 357.

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941), which the government cites in passing, also does not stand for the general proposition that Congress can regulate any activity in the hydrological chain that may affect a traditional navigable water under the "channels" category. That case was quite different from this case. In *Oklahoma*, the Secretary of War was authorized to exercise federal eminent domain to construct a reservoir and a dam for flood control and commercial power generation in the Red River in two states. *Id*. at 510. Based on documented evidence that the project was necessary to protect against substantial economic loss from flooding in the Mississippi, the Court upheld the authorizing legislation against a Commerce Clause challenge. *Id*. at 521-30. But the regulation of discharges of dredged or fill material into nonnavigable intrastate wetlands adjacent to any "tributary" with any sort of hydrological connection to a traditional navigable water is a far cry from the commercial interstate eminent domain project in *Oklahoma*.

Even the more recent case of *Pierce County, Wash. v. Guillen*, 537 U.S. 129 (2003), on which the government more

heavily relies, simply does not support the government's sweeping claim of authority under the "channels" category of Commerce Clause regulation. *Pierce County* involved the federal Hazard Elimination Program which provided federal funds to state and local governments to improve dangerous roads. *Id*. at 133. To qualify for these funds, state and local governments had to conduct a thorough study of their roads and document hazardous conditions. *Id*. But shortly after this program became available, state and local governments were being sued by motorists for negligent maintenance of the roads relying on the information the state and local governments had gathered for the federal funding program. *Id*. at 133-34. Therefore, Congress passed new legislation prohibiting the use of this information in court. *Id*. at 134. In evaluating the constitutionality of the program and the new legislation, this Court reiterated that Congress has power under the Commerce Clause "to regulate the use of the channels of interstate commerce" and "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id*. at 146-47. Because the program and the new legislation were specifically aimed at "improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce," this Court found they fell within the federal commerce power. *Id*. at 147.

But this Court did not address, let alone hold, that the power to regulate "the use of the channels of interstate commerce" reaches to every activity that may affect a "channel," as the government contends. Unlike the § 404(a) permitting program, which usurps the power of the States to control local land and water use by regulatory fiat,[6] the Hazard Elimination

[6] "The Corps subjects each dredge-and-fill permit application to a plenary 'public interest review,' in which the Corps considers such general police power concerns as: conservation, economics, aesthetics, (continued...)

Program was a voluntary federal funding program that did not impinge on the rights of the States in any way. Moreover, the express purpose of the Hazard Elimination Program was to improve the highways and protect vehicles and people in transport while the statutory provision in this case reveals no congressional intent to regulate intrastate nonnavigable wetlands at all. The government's regulatory interpretation is contrary to the very text of § 404(a) which only covers discharges *into* "navigable waters."

By definition, traditional navigable waters can be used as channels of interstate commerce. But the wetlands here are not navigable. Therefore, regulation of the Rapanos' wetlands is not regulation of the use of channels of interstate commerce. It is, instead, the quintessential regulation of activities that must be sustained, if at all, as activities that "substantially affect" interstate commerce under *Lopez* and *Morrison*.

This Court has never held or endorsed the principle that Congress can regulate under the "channels" category of Commerce Clause enactments any noneconomic, intrastate activity that may affect a channel of commerce. If this Court were to adopt such a rule, it would make the "substantial affects" category redundant. In effect, the government is asking this Court to make new law.

But the government takes its "channels" argument to an impossible extreme. While claiming that dredge and fill activities fall under "channels" regulation, because these

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[6] (...continued)
general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people." Amicus Brief of Pult Homes, Inc., et. al., at 14 (citing 33 C.F.R. § 320.4(a)(1)).

discharges *have an affect* on a traditional navigable waterway, the government simultaneously argues it can regulate such activities even when they have *no effect* on a traditional navigable waterway. According to the government, "the Act appears to contemplate a permitting regime under which the purity of nonnavigable tributaries (once they are found to be covered) will be treated as an end in itself, rather than simply as a means of protecting the traditional navigable waters downstream." Opp. at 41 n.21. To state this proposition is to refute it.

CONCLUSION

For these reasons, the decision below should be reversed.

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Respectfully submitted,

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