No. 15-290

In The
Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES COMPANY, INC., *et al*.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Is a Jurisdictional Determination, that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties, subject to judicial review under the Administrative Procedure Act?

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court, including such cases as *Utility Air Regulation Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

This case is of particular interest to SLF because the Army Corps of Engineers' (Army Corps) assertion that courts are precluded from reviewing its final Jurisdictional Determinations is a prime example of the Executive Branch's unconstitutional usurpation of power through creation of an expansive administrative state. Over the last decade, the administrative state has grown in two primary ways – through the launching of new agencies and through the expansion of existing agencies' jurisdiction. While both means of growth offend the founding principles of limited government and enumerated powers, the latter is of

[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

prime concern because expansion of administrative jurisdiction raises serious constitutional concerns.

The Army Corps issues nearly 10,000 Jurisdictional Determinations a year and in doing so, unilaterally declares that innumerable acres of private property fall within its jurisdiction. Ignoring the presumption of reviewability and basic separation of powers principles, the Army Corps claims that the judiciary has no power to review its Jurisdictional Determinations. *Amicus* writes separately to stress that the Army Corps' disregard for the Constitution and the intent of Congress must be stopped.

SUMMARY OF ARGUMENT

"The availability of judicial review, is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally void." Louis L. Jaffe, *Judicial Control of Administrative Action* 320 (Little, Brown, 1965). The common law presumption of reviewability grew out of the constitutionally protected right to claim protection of the laws. *See Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (citing *United States v. Nourse*, 9 Pet. 8, 28-29 (1835)). Congress codified the presumption of reviewability when it enacted the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq*. In designing the APA, Congress expressly provided judicial review of final agency action, 5 U.S.C. § 704, which is exactly

what the Jurisdictional Determination in this case is. *Alaska Dept. of Env. Conservation v. EPA*, 540 U.S. 461 (2004).

"The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012). Unless an administrative agency can establish that Congress intended to preclude judicial review, courts have the power to review challenges like the one presented in this case. The Army Corps issues nearly 10,000 Jurisdictional Determinations a year, unilaterally declaring that nearly any piece of property that is wet at least part of the year falls within its regulatory jurisdiction. Through Jurisdictional Determinations the Army Corps, and invariably the Environmental Protection Agency (EPA), expands its reach far beyond what Congress ever intended when it enacted the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*.

Even more egregious than its unilateral assertion of jurisdiction though, is the Army Corps claim that courts lack the power to review Jurisdictional Determinations. The Framers of the Constitution sought to create a government structure limited in nature. "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1988). "In a government, where liberties of the people are to be preserved . . . , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check

upon each other." Charles Pinckney, Observations of the Plan of Government Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787, p.108 (rev. ed. 1966).

The strong presumption of reviewability supports judicial review of Jurisdictional Determinations, as does basic separation of powers principles.

ARGUMENT

I. A strong presumption of reviewability supports judicial review of Jurisdictional Determinations.

A. Judicial review of Jurisdictional Determinations is presumed.

1. This Court's precedent antedating the APA supports judicial review of executive action. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall declared: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Id*. at 163. Inherent in the constitutionally protected right to claim protection of the laws is a strong presumption of judicial review. *See Bowen*, 476 U.S. at 670 (citing *Nourse*, 9 Pet. at 28-29).

Throughout history, the Court has emphasized the need for the judiciary to review executive actions. And, despite a period of judicial restraint that resulted

only out of deference to Congress, by the early 20th century, any perceived barriers to judicial review faded away. *See Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) (explaining that the acts of all administrative agency "officers must be justified by some law, and in the case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief"). The increased level of executive actions and the already growing administrative state underscored the need for judicial review. In 1915, the Court reaffirmed the common law presumption of reviewability when it reviewed the Acting Commissioner of Immigration's detention of a group of aliens for the purpose of deportation even though the statute at issue did not provide for judicial review. *Geigow v. Uhl*, 239 U.S. 3, 8 (1915). Writing for the Court, Justice Oliver Wendall Holmes explained that judicial review was appropriate because the statute did not forbid courts from considering whether the Commissioner's act violated the statute. *Id*. at 9. In doing so, Justice Holmes made clear that under the common law, unless a statute forbids judicial review, the courts have both the power *and* duty to review challenged executive actions.

Over the next few decades, the Court continued to stress the need for judicial review of administrative actions. By way of example, in *Lane v. Hoglund*, 244 U.S. 174 (1917), the Court reviewed the actions of the Secretary of Interior taken under a homestead law. In doing so, the Court found judicial review of administrative acts both appropriate and necessary,

explaining that to find otherwise would "limit[ ] the powers of the court" and "be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties." *Id*. at 182. And, in *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932), the Court reviewed the Secretary of Labor's imposition of fines against steamship companies for bringing aliens with illnesses into the United States. The Court explained that it had the power to review the administrative action because even though "Congress confer[red] on the Secretary great power, . . . it is not wholly uncontrolled." *Id*. at 339.

In 1944, the "powers of the court" to review executive actions that the Court so often spoke about received their greatest affirmation and explanation. In *Stark v. Wickard*, 321 U.S. 288 (1944), the Court explained that the presumption of reviewability arises from Article III of the United States Constitution because "[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Id*. at 310. The Court continued: "Under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Id*. Starting with the presumption of reviewability inherent in the Constitution, the Court reviewed the statute governing the

Secretary of Agriculture's actions and, finding it silent as to judicial review, explained that "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Id*. at 309.

2. In 1946, Congress enacted the Administrative Procedure Act and codified "the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702). When determining whether administrative action like the Jurisdictional Determination is subject to judicial review, the Court demands that the APA's "generous review provisions . . . be given a hospitable interpretation." *Id*. at 141 (internal quotations omitted). Both the Court and Congress have emphasized that "'very rarely do statutes withhold judicial review[ ]'" because to do so would convert statutes into "blank checks drawn to the credit of some administrative officer or board." *Bowen*, 476 U.S. at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

B. Congress did not preclude judicial review of Jurisdictional Determinations.

This Court's precedent establishes "that judicial review of a final agency action by an aggrieved person

will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen*, 476 U.S. at 670 (quoting *Abbott Labs*, 387 U.S. at 140). "Statutory preclusion of judicial review must be demonstrated clearly and convincingly." *Nat'l Labor Relations Bd. v. Union Food & Commercial Workers Union*, 484 U.S. 112, 131 (1987). Although this Court does not apply the "clear and convincing standard" in a strictly evidentiary sense, "the standard serves as 'a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.'" *Bowen*, 476 U.S. at 672 n.3 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350-51 (1984)).

Various considerations inform the Court's analysis of whether Congress intended to foreclose a given avenue of judicial review, including the nature of the administrative action, and the statute's language, structure, objectives and legislative history. *See Block*, 467 U.S. at 349; *see also Bowen*, 476 U.S. at 673. The leading consideration in determining whether Congress precluded judicial review is whether a party can obtain meaningful judicial review of the agency action at issue if review under the APA is precluded. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000).

1. Congress did not intend to preclude judicial review of Jurisdictional Determinations.

The text of the Clean Water Act contains no provision that explicitly prohibits judicial review of Jurisdictional Determinations. Indeed, the statute says nothing at all about judicial review of Jurisdictional Determinations. "[S]ilence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in federal courts." *Stark*, 321 U.S. at 309; *see also Dunlop v. Bachowski*, 421 U.S. 560, 566-67 (1975); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970).

Here, the statutory silence is striking because Congress expressly foreclosed judicial review of similar pre-enforcement non-permit decisions. If Congress had intended to preclude review of Jurisdictional Determinations, it knew how do to it. For example, in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq*., Congress expressly foreclosed courts from reviewing orders issued pursuant to Section 9606(a) except in specifically enumerated proceedings. *See* 42 U.S.C. § 9613(h). Congress did not include any similar limitation in the Clean Water Act.

Because the plain words of the Clean Water Act lack an express prohibition against judicial review, the Army Corps "bears the heavy burden of overcoming

the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision." *Dunlop*, 421 U.S. at 567. The presumption of reviewability demands that "[t]he question is phrased in terms of 'prohibition' rather than 'authorization[.]'" *Id*. (quoting *Abbott Labs*, 387 U.S. at 140). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id*. (quoting *Abbott Labs*, 387 U.S. at 141).

Turning to the remaining factors the Court considers, the Army Corps has offered no evidence that the legislative history of the Clean Water Act supports preclusion. *See Bowen*, 476 U.S. at 673 (noting that the court will consider "specific legislative history that is a reliable indicator of congressional intent"). That is because the Clean Water Act's legislative history contains no specific statement that would support preclusion of judicial review of Jurisdictional Determinations under the APA.

Finally, judicial review of Jurisdictional Determinations is consistent with the objective of the Clean Water Act. The Clean Water Act's "stated objective was 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1251). Judicial review of the Army Corps' assertion of jurisdiction based on a factually intensive analysis does not in any way defeat the purpose of the Clean Water Act. Rather, it is wholly consistent with

the statutory objectives because the Clean Water Act allows the Army Corps to exercise jurisdiction only over certain specified lands. The Army Corps should not be permitted to skirt judicial review of its exercise of extraterritorial jurisdiction over private property that does not fall within its reach.

2. Denying judicial review of Jurisdictional Determinations leaves landowners with no means of obtaining meaningful judicial review.

The leading consideration in determining whether the Clean Water Act precludes judicial review, is whether Respondents can otherwise obtain meaningful judicial review. *Thunder Basin*, 510 U.S. at 207. This consideration is based on the presumption that Congress does not intend to foreclose meaningful judicial review which would deny due process. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97 (1991); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150-51 (2010).

The Clean Water Act offers no "meaningful" review of Jurisdictional Determinations. Thus, without review under the APA, the only options available to Respondents, and the 10,000 property owners that receive Jurisdictional Determinations annually, are to abandon the project or to proceed and risk significant fines. The Army Corps argues that subsequent judicial review of any enforcement proceeding or permit

denial constitutes meaningful judicial review of its claim to jurisdiction. This Court has already found that it does not. Just four years ago in *Sackett*, this Court rejected a nearly identical argument made by the EPA. In doing so, the Court explained that enforcement proceedings did not constitute a means of obtaining meaningful review because each day that the landowner was denied an answer to its question, it accrued an additional $75,000 in potential liability, and potential criminal sanctions. *Sackett*, 132 S. Ct. at 1372.

Here, Respondents are faced with the same situation. They can either spend hundreds of thousands of dollars on pursuing a permit that they may or may not need (because the Army Corps may have erred in its unilateral determination that it has jurisdiction over the property), and that will likely be denied, or they can proceed with the peat harvesting project and risk substantial fines and criminal sanction. "When the remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given." *Ex Parte Young*, 209 U.S. 123, 147 (1908). *See Free Enter. Fund*, 130 S. Ct. at 3143 (rejecting the government's argument that meaningful judicial review was available to petitioners because they could obtain adequate review by violating the law). Absent clear and convincing evidence of Congressional intent, the Court has never required a party to risk such immense liability to obtain judicial review and it should not do so now.

II. Denying judicial review of Jurisdictional Determinations violates separation of powers principles.

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund*, 130 S. Ct. at 3156). "[T]he authority administrative agencies now hold over our economic, social, and political activities" *id*. at 1878, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure limited in nature – as James Madison explained in an effort to ease concerns that the proposed national government would usurp the People's power to govern themselves: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as ware, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45 (James Madison), at 292 (Clinton Rossiter ed., 1961).

Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id*. at 1879 (citation and quotation omitted).

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Members of the Court warned that the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id*. at 594 (Frankfurter, J., concurring). The purpose of the separation of powers is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id*. at 629. As Justice Jackson stressed, any presidential claim to power "at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitution." *Id*. at 638 (Jackson, J., concurring).

Under these principles, any action by which one branch of the federal government presumes to encroach upon the constitutionally assigned functions of another branch presents a fundamental threat to liberty. "In a government, where the liberties of the people are to be preserved . . . , the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787, p.108 (rev. ed. 1966). *See* The Federalist Nos. 47-51 (James Madison) (Clinton Rossiter ed., 1961) (explaining and defending the Constitution's structural design of separated powers). "Liberty is always at

stake when one or more of the branches seek to transgress the separation of powers." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring). *See id*. at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

There are few administrative agencies whose actions exhibit the tyranny that our Founding Fathers feared more than the Army Corps and the EPA. Congress could have never predicted the vast expansion of jurisdiction that EPA and the Army Corps has pursued since the Clean Water Act was enacted in 1972. The Clean Water Act provides that it covers "the waters of the United States," 33 U.S.C. § 1362(7), but Congress did not define what it meant by "the waters of the United States." Since 1972, "the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority." *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). Time and again, this Court has rejected the Army Corps and EPA's expansive interpretation of its jurisdiction. *See Rapanos v. United States*, 547 U.S. 715, 732-39 (2006) (plurality opinion); *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159, 167-74 (2001).

The executive branch's latest attempt to expand its jurisdiction underscores the need for judicial review of Jurisdictional Determinations. In June 2015, the Army Corps and EPA published its final rule which expands the definition of "the waters of

the United States" to nearly every inch of the United States and for sure any piece of land that is wet at least part of the year. Clean Water Rule: Definition of "Waters of the United States," 80 Fed Reg. 37,053-37,127 (Jun. 29, 2015). Through legislation that would overturn the new expansive definition of "the waters of the United States," Congress recently attempted to reinstate the responsibilities and rights of property owners and the States that Congress intended to leave untouched by the Clean Water Act but that the Army Corps and EPA has tried to eviscerate. S.J. Res. 22, 114th Cong. (2015-2016). Despite the resolution passing, the President later vetoed it. Dozens of parties, including SLF, have also challenged the rule in district and circuit courts around the country.

The current administration and the present leadership of the Army Corps and the EPA believe that the need to restore and maintain the Nation's waters justifies the unilateral and unreviewable expansion of their jurisdiction. The Army Corps' insistence that the judiciary lacks any power to review Jurisdictional Determinations shows as much. Here, preclusion not only conflicts with the presumption of reviewability founded in common law and codified in the APA, but it runs afoul of the Constitution. As this Court has explained, "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse" than a judiciary that reviewed agency

action. *Free Enter. Fund*, 130 S. Ct. at 3157 (internal quotation marks, alterations, and citations omitted).

"The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 132 S. Ct. at 1374 (majority opinion). The lack of Congressional intent to preclude judicial review and lack of meaningful judicial review combined with the clear violation of separation of powers principles that preclusion would cause, supports affirmance of the Eighth Circuit's ruling and judicial review of Jurisdictional Determinations.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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