No. 15-599

IN THE

Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

BRIEF OF *AMICI CURIAE* NINETY-TWO MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

RICHARD E. SCHWARTZ
Counsel of Record
CLIFTON S. ELGARTEN
THOMAS A. LORENZEN
THOMAS C. MEANS
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500
rschwartz@crowell.com

Counsel for Amici Curiae Ninety-Two Members of Congress

December 9, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—continued

Page(s)

REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

INTEREST OF AMICI CURIAE

Amici curiae are ninety-two members of Congress (hereinafter "congressional *amici*")[1] elected by the people to exercise the legislative powers vested in that body by the Constitution.[2] The extraordinary deference afforded by the court below to an executive branch agency substantially impairs Congress's ability to fulfill its legislative duties, by requiring Congress, when it legislates, to write laws that not only authorize agency actions to effectuate Congress's intent, but that also specifically delineate the actions an agency may *not* take under that statutory authorization.

As the present case demonstrates, federal executive branch agencies often refuse to confine their actions to stay within the bounds defined by Congress. Instead, they treat federal statutes as grants of omnibus authority—effectively finding the power to legislate by straining to find ambiguity in even the plainest statutory words, and then claiming their strained interpretation is entitled to deference

---

[1] The list of congressional *amici* is attached as an Addendum hereto. No part of this brief was authored, in whole or in part, by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than congressional *amici* and their counsel. The law firm representing congressional *amici* on this brief represented Petitioner in the court below. Pursuant to Rule 37, counsel of record received timely notice of *amici curiae's* intent to file this brief in support of the Petitioner and granted their consent.

[2] U.S. CONST. art I.

under Step Two of the *Chevron* doctrine.[3] *Chevron*, however, makes clear that the matter is at an end when Congress has spoken plainly, using commonly-understood words. The integrity of this *Chevron* Step One must be vigorously protected as it seeks to ensure that executive branch agencies follow the express will of Congress and do not arrogate legislative authority to themselves. Where the statutory words used to grant the agency authority are common and have plain meaning, there is no room for agency interpretation and no occasion for the agency to expand the authority granted to it by Congress by purporting to find ambiguity in those words. "Total" is such a word.

Thus, Congress's ability to authorize executive branch agencies to take specific actions, and only those actions, depends on the courts applying *Chevron*'s Step One rigorously and as it was intended: the clear words of a statutory provision must be given their plain and ordinary meaning. Failure to follow that rule, as here, results in an expansion of agency authority far beyond what Congress authorized. In this case, that expansion not only usurps Congress's legislative functions, in violation of the Constitution's separation of powers, but comes at the expense of the States, to which Congress specifically reserved the authority that the Environmental Protection Agency ("EPA" or "the Agency") has now taken for itself.

---

[3] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

Congress cannot feasibly solve this problem through legislative drafting. It cannot identify all possible actions an agency might take and then specifically foreclose all the possible alternatives that Congress does not intend to authorize. It cannot define every word in every statute to foreclose the possibility of expansive interpretations of even the most common words. Requiring Congress to legislate in such a cumbersome manner would be impractical—and quite likely impossible. Indeed, there would be no library large enough to store the Statutes at Large if Congress were forced to legislate this way. Instead, the courts have recognized that when a law grants certain authorities to an agency, authorities not mentioned are necessarily excluded.

It therefore falls to the third branch—the federal judiciary—to ensure in such circumstances that executive branch agencies stay within the bounds Congress sets. Where (as here) a court defers to an implausible agency interpretation of plain statutory language, it is not merely allowing the executive branch to increase federal authority unilaterally, but is upsetting the balance—the separation of powers—so carefully struck in the Constitution, rendering it nearly impossible for Congress to constrain effectively grants of authority to executive agencies.

Congressional *amici* therefore urge the Court to grant the petition for *certiorari* ("the Petition").

STATEMENT OF THE CASE

Like many statutes, the Clean Water Act ("CWA" or "the Act") has broad policy goals, but grants the federal executive branch only specific and

limited authorities to advance them. For example, the broad objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The Act does not, however, give EPA plenary authority to regulate water pollution. Instead, the Act prohibits the discharge of pollutants from "point sources" (sources that discharge from a pipe) to navigable waters without a CWA permit. *See* 33 U.S.C. § 1311. The CWA gives EPA no authority to regulate a source of pollution itself, only the discharge. The CWA gives EPA no authority to regulate diffuse runoff from land ("nonpoint sources").

Instead, the Act is based on the concept of "cooperative federalism": Congress carefully divided between the federal government and the States the responsibility to protect our nation's waters. *New York v. United States*, 505 U.S. 144, 167 (1992). Specifically, under the CWA, the goal of water quality protection is advanced through a series of federal or State actions. Each State sets water quality standards for every water body within its borders. These standards are implemented in point source permits that may be issued by EPA or authorized States. 33 U.S.C. § 1342. Nonpoint sources are addressed through management plans that are implemented only by States or local governments. 33 U.S.C. § 1329. If, despite technology-based limits on point sources, a body of water within a State does not achieve State water quality standards, the State must identify it and include it on a list of such water bodies that it submits to EPA. For those water bodies, the State must determine the "total maximum daily load"

("TMDL") for that water body—that is, the maximum amount of the pollutant the water body can receive and still meet water quality standards.

EPA has backup authority, to be exercised only if a State fails to do the job assigned to it by Congress, for setting water quality standards, listing impaired waters, and establishing the level of pollutants a water body can receive and still meet standards. Relevant here, if a State fails to act for a particular water body, EPA "shall" establish the TMDL for that water body as it determines "necessary to implement the water quality standards applicable to such waters . . . ." 33 U.S.C. § 1313(d)(2). The Act provides no additional authority to EPA when EPA acts as the State's backstop in establishing the total load for a water body.

Once this total load is determined—whether by the State or by EPA in its stead—the Act authorizes the State, and only the State, to decide how to achieve that total maximum daily load. That authority includes deciding which sources to regulate or address in management plans, when to do so, and how to apportion the total load among those sources—all delicate questions requiring diverse local interests to be balanced. Specifically, the Act authorizes the States to address areas (including interstate areas) with "substantial water quality control problems," 33 U.S.C. § 1288, and to develop nonpoint source management programs. Those programs must include control practices and implementation schedules for water bodies that cannot reasonably be expected to achieve water quality standards without additional control of nonpoint sources, 33 U.S.C. § 1329. No federal

power to make or override these decisions is conferred in either of these sections. EPA can define the total load, but States determine how to meet it by making policy choices that affect local interests.

The court below turned all of this upside down, taking the words "total maximum daily load" and turning them into a broad grant of federal authority to create and implement watershed-wide plans to control both point source discharges and diffuse runoff from land.

It held that the word "total," as used in the statute to define and circumscribe EPA's authority, does not necessarily mean the "the whole" or "the sum"—the definition of "total" in every English language dictionary we could find. Rather, in true Alice-in-Wonderland fashion, the court determined that "total" could mean not only the "whole" or the "sum," but could also include each of the constituent parts of that whole. This is like determining that in the equation 4+2+1+1=8, the "total" is not 8, but rather each of the particular constituent numbers that goes into that sum. Indeed, it ignores that that the same whole can be derived by adding together an entirely different set of constituent parts—such as 5+3. When the court held that "total" can refer to the components of a sum, it profoundly altered the Congress's carefully-considered allocation of authority between the federal government and the States.

The result is that EPA is no longer limited to setting the "total," as Congress had specified, but can also dictate its components throughout a State, even though that is a power the CWA purposely reserved to the States. This is a breathtaking expansion of

EPA's authority at the expense of the States. Through its interpretation of the word "total," EPA arrogated to itself the States' powers under the Act to—among other things—regulate nonpoint sources of water pollution and to determine the best ways to achieve State water quality standards. According to the court below, this interpretation "comports well with the Clean Water Act's structure and purpose" and "is a commonsense first step to achieve the target water quality."[4] This justification fails to recognize that the CWA is not a grant of omnibus authority to EPA to achieve water quality standards.

EPA did not stop with arrogating to itself the authority to allocate the allowable pollutant loads among sources. It also claimed authority to control how various sources reduce discharges (in the case of point sources) or runoff from land (in the case of nonpoint sources) by requiring States to provide assurances to EPA regarding how pollutant reductions will be made. EPA in fact changed pollutant load allocations made by Pennsylvania and West Virginia where it disagreed with the pollution control approaches taken in those States. EPA even set time frames for when States must implement those pollution controls. In upholding EPA's broad interpretation of its own authority, the court below held that the grant of authority to EPA to set a total maximum daily load at a *level* necessary to implement applicable water quality standards encompasses the authority to regulate how a State implements those standards and the timetable for

---

[4] *Am. Farm Bureau Fed'n v. EPA* ("*Am. Farm Bureau II*"), 792 F.3d 281, 299 (3d Cir. 2015).

that implementation. The court below relied on the goals of the Act to reach these conclusions. According to the Third Circuit: "Including deadlines in a TMDL furthers the Act's goal that the TMDL promptly achieve something beneficial (recall that the enacting Congress's goal was to have the Nation's waters clean by 1985) . . . ."[5] Once more, the court below is confusing legislative goals with legislative grants of authority.

The Third Circuit even refused to consider the fact that in 2000 Congress took action to block EPA from issuing a regulation that would have changed the definition of a TMDL to incorporate a reasonable assurance requirement. The court claimed that there was no evidence that Congress blocked the rule because of the reasonable assurance requirement. In fact, Congressional objection to the reasonable assurance requirement and how it could be used to bootstrap regulation of nonpoint sources was clearly expressed during many Congressional hearings on this rule.[6] Thus, the Third Circuit

---

[5] *Id.* at 307.

[6] *See, e.g., Proposed Rule Changes to the TMDL and NPDES Permit Programs, Hearing Before the S. Subcomm. on Fisheries, Wildlife and Water of the S. Comm. on Env't and Pub. Works*, 106th Cong. 971 (2000); *Environmental Protection Agency's Proposed Regulation Regarding Total Maximum Daily Loads, the National Pollutant Discharge Elimination System, and the Federal Antidegradation Policy*: *Hearing Before the H. Subcomm. on Water Res. and Env't of the H. Comm. on Transp. and Infrastructure*, 106th Cong. 66 (2000); *Impact of the Proposed Total Maximum Daily Load Regulations on Agriculture and Silviculture*: *Hearing Before the H. Subcomm.*

(continued...)

opinion even undercuts the efficacy of Congressional oversight as a means of reining in executive branch agency overreach.

Finally, and perhaps most remarkably, in the Chesapeake Bay TMDL, EPA set allocations not only for sources in States that discharge into the Chesapeake Bay, but also for municipalities, factories, and farms in distant upstream States. EPA claims to find this authority in the use of the word "its" in an EPA regulation.

EPA points to regulatory language at 40 C.F.R. §§ 130.2 (g) & (h) stating that allocations must reflect the "portion of a receiving water's loading capacity that is allocated to one of *its* existing or future . . . sources." (emphasis added). EPA interprets its regulation to mean that "its" (the water body's) existing sources include not only those that discharge into an impaired waterbody itself, but also to all other sources in the watershed, even sources hundreds of miles away over which the State has no authority. EPA's strained interpretation of regulatory language transforms the statutory authority to establish a total maximum daily pollutant load for a water body into authority to establish a comprehensive watershed plan that can control economic development and land use in

---

(continued...)
on Dep't Operations, Oversight, Nutrition, and Forestry of the H. Comm. on Agric., 106th Cong. 53 (2000).

multiple states, all without the benefit of any statutory language supporting this broad authority.[7]

Despite the absence of any clear statement by Congress, the court below upheld this claim of authority. According to the Middle District of Pennsylvania, EPA's interpretation of its own regulation is entitled to deference, unless "plainly erroneous or inconsistent with the regulation" under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and EPA's interpretation "not only meets this deferential standard, but is otherwise entirely reasonable, considering that upstream sources unquestionably contribute pollutants to the Bay."[8] Once again, the courts below are allowing EPA to claim that the Clean Water Act gives it authority to regulate any sources of water pollution, anywhere.

---

[7] EPA also claims that section 117(g) of the Clean Water Act, 33 U.S.C. § 1267(g), gives it authority to establish a watershed plan for the entire Chesapeake Bay watershed. This claim ignores the fact that the language in section 117(g) does not refer to total maximum daily loads and the legislative history specifies that: "Nothing in the Chesapeake Bay Restoration Act provides EPA with any additional regulatory authorities." H.R. REP. NO. 106-550, at 3 (2000).

[8] *Am. Farm Bureau Fed'n v. EPA* ("*Am. Farm Bureau I*"), 984 F. Supp. 2d 289, 330 (M.D.Pa. 2013), *aff'd*, 792 F.3d 281. The court further said: "Although nothing in the CWA specifically authorizes EPA to take this holistic, or watershed approach, it is equally true that nothing in the CWA prohibits such an approach." *Id.*

REASONS WHY THE WRIT SHOULD BE GRANTED

As the Petition demonstrates, the Third Circuit's decision upholding EPA's wildly expansive interpretation of "total maximum daily load" is a CWA game-changer: it essentially gives EPA the authority to micromanage every watershed in every State in the nation, even though Congress expressly reserved that authority to the States. The holding of the court below, in its application to the Chesapeake Bay watershed, and in its application to watersheds across the Nation, thus warrants this Court's review.

Moreover, if allowed to stand, the Third Circuit's decision will severely undermine Congress's ability to write laws that grant only *limited* authority to federal agencies. Put another way, Congress cannot be expected to write laws that specify everything that an agency *cannot* do under a congressional grant of authority, as well as what it can—yet that is what the lower court's decision effectively requires. Close adherence to the words and will of Congress is especially important where, as here, the issue presented involves an encroachment on the power of the States, because the federal executive branch is not designed to be sensitive to the rights of the States, but Congress was specifically designed for that purpose. Congressional *amici* focus here on these additional grounds for granting *certiorari*.

I. *Certiorari* Is Necessary To Protect Congress's Constitutional Prerogative To Write the Law.

Congress has a formidable job. Crafting statutes is always difficult given the nature of our

government. Crafting statutes that delegate authority—*limited* authority—to federal executive agencies to implement those statutes is even more challenging. Not surprisingly, the executive branch, feeling constrained by the limits Congress places on its authority, often seeks to push that boundary. Agencies frequently do what they regard as expedient and desirable, backing down only when the courts rule they have overreached. Moreover, when agencies promulgate regulations, they often presume that Congress expects them to interpret the statute; they then attempt to give every term the current administration's desired meaning.

Chevron recognizes that the executive branch can formulate "policy and [make] rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron,* 467 U.S. at 843 (citation and internal quotations omitted). When Congress does so expressly, or when a reviewing court finds statutory language to be ambiguous, the courts generally defer to an agency's reasonable interpretation of that language. *Id.* In contrast, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43; *see Oneale v. Thornton,* 10 U.S. 53, 68 (1810) (Marshall, C.J.) (ruling if Congress speaks plainly and leaves no room for executive policy-making, then the executive branch must accept that Congress "use[d] a language calculated to express the idea [it] mean[t] to convey").

Thus, the most powerful constraint on executive power available to Congress is the plain language of its statutes. Ordinary words are to be given their plain meaning. *Roberts v. Sea-Land Servs., Inc.*, 132

S. Ct. 1350, 1364 (2012) ("[i]n determining the meaning of a statutory phrase . . . [the Court] . . . 'giv[es] the words used their ordinary meaning'" (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[A] court should always turn first to one, cardinal canon before all others . . . [it] must presume that a legislature says in a statute what it means and means in a statute what it says there."). This principle has guided both the courts in interpreting statutes and Congress in drafting them. *See McNary v. Hatian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("Congress legislates with knowledge of [these] basic rules.").

If Congress intends to grant broad policy-making power, it knows how to "express[] it in straightforward English," *FMC Corp. v. Holliday*, 498 U.S. 52, 66 (1990) (Stevens, J., dissenting). Congress knows that courts may often defer to executive branch interpretations of technical and complex terms. *See Chevron*, 467 U.S. at 865. But such deference should not apply where Congress uses plain and commonly understood words—like "total" or "level."

Certainly, this Court has emphasized the point before: at most, "only the most extraordinary showing of contrary intentions . . . would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984); *see United States v. Am. Trucking Assn's., Inc.*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."); *United States v. Locke*, 471 U.S. 84, 95–96 (1985) ("deference

to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that the legislative purpose is expressed by the ordinary meaning of the words used") (citation and internal quotations omitted).

The courts stand as a bulwark against tendencies of agencies to expand their authorities to address perceived problems. As Justice Breyer has observed, "the public now relies more heavily on courts to ensure the fairness and rationality of agency decisions." Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2195 (2011). No meaningful system of checks and balances can exist where the executive branch can vest itself with legislative powers beyond what Congress has provided to it.

Certiorari is necessary here to reaffirm these foundational principles. By disregarding Congress's clear intent—manifest in its use of a common word with plain meaning—the Third Circuit effectively imbued the executive branch with Congress's legislative power, diminishing Congress's own place in the constitutional framework. As the executive branch's instincts to overstep its authority grow, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000), it is particularly important in cases like this one—addressing a matter of great public interest in a manner that smacks of expediency—that the courts remain vigilant against executive overreach.

The Court has noted that: "Deciding what competing values will or will not be sacrificed to the

achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original). Yet, that is what the court below has done.

As a result, the decision below has profoundly disturbing implications for Congress's primary function—its ability to draft laws that confer authority, but not *unbridled* authority, on federal agencies. Congress must be able to legislate secure in the knowledge that the words it uses in statutes will be given their ordinary meanings, and that the executive branch, abetted by the reviewing courts' misapplication of *Chevron* deference, will not twist these words in an effort to craft from "a long-extant statute an unheralded power to regulate 'a significant portion of the American economy[.]'" *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).

The Court should, therefore, grant *certiorari* to reaffirm a vital principle: that when Congress describes the scope of agency authority with plain language, the statute's words, and those words' ordinary meanings, will be respected.

II. *Certiorari* Is Necessary Because Under the Third Circuit's Twist on *Chevron*, Administrative Agencies Would Receive Deference Any Time Congress Did Not Explicitly Deny Them Administrative Power.

The Third Circuit found its ultimate conclusion bolstered by its view that EPA's interpretation was not directly *prohibited* by any specific provision of the Act.[9] *Certiorari* is necessary because the court's decision—which fails to appreciate the nature of the legislative process and what can reasonably be expected of the Congress in its efforts to control the authority of executive branch agencies—should not be allowed to stand.

Congress legislated here by stating in plain language the power that it intended to confer on EPA as a backstop to a State's failure to submit an approvable total maximum daily load. As explained above, it granted EPA the power to exercise its judgment to establish the "total" amount of a pollutant in a water body as the objective to be attained when State has not done so. 33 U.S.C. § 1313(d)(1)(C) and (d)(2). It left to the States the means of reaching that total.

---

[9] In affirming the opinion of the court below, the Third Circuit found it to be "careful and thorough," *Am. Farm Bureau II*, 792 F.3d at 310, thus adopting the position of the Middle District of Pennsylvania that: "in the face of no countervailing provisions explicitly or implicitly requiring or prohibiting a certain action, any action that is consistent with policy declarations and otherwise lawful should be upheld." *Am. Farm Bureau I*, 984 F. Supp. 2d at 327 n.22.

The notion that it was somehow incumbent upon Congress not only to state clearly and affirmatively the power it intended to grant EPA, but to go further and specify what powers it did *not* intend to grant EPA, is impractical. Congress specified that EPA shall determine the "total" amount of a pollutant that a water body may accept. It is simply unrealistic to force Congress to try to clarify that directive by stating that it is *not* thereby granting EPA the power to also issue directions to States, localities, and innumerable local entities concerning everything that *contributes* to the total. Congress cannot possibly anticipate, and then negate with statutory language, every conceivable, far-fetched interpretation of its statutory directives that an agency might someday think of.

As Judge Harry Edwards of the United States Court of Appeals for the District of Columbia Circuit explained nearly two decades ago:

> To suggest . . . that *Chevron* step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power (i.e. when the statute is not written in "thou shalt not" terms), is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent. Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well. *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (citations omitted); *see also Am. Petroleum Inst.*

> *v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("[W]e will not presume a delegation of power based solely on the fact that there is not an express withholding of such power.").

Nat'l Mining Ass'n v. Dep't of Interior, 105 F.3d 691, 695 (D.C. Cir. 1997). Concluding otherwise would make the task of writing federal statutes that effectively constrain executive branch power exceedingly more onerous than it is now, perhaps even impossible.

In sum, congressional *silence* does not and cannot confer on the executive branch any plenary authority. *See Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) ("The idea that Congress gave the [Agency] such broad and unusual authority through an implicit delegation . . . is not sustainable."). Thus, the courts should focus on the affirmative question—whether the statute *grants* the agency the authority it claims. They should not be distracted or misled by the negative question—whether there is anything in the statute that bars the assertion of that claimed authority. "[N]o matter how important, conspicuous, and controversial the issue . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 161. No grant of authority can reasonably be inferred from the absence of express prohibitions against a particular agency interpretation.

The Court has long expressed a profound skepticism toward agencies claiming to find broad grants of authority in obscure or minimally-worded statutory provisions. *See Util. Air Regulatory Group,*

134 S. Ct. at 2444 ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.") (internal citations omitted); *Gonzales*, 546 U.S. at 267 (Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," especially when, as is the case here, the decision involves matters of "economic and political significance."); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (finding it "implausible that Congress would give to the EPA through . . . modest words the power to determine whether implementation costs should moderate national air quality standards"); *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 (2000) (holding that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"). Congressional silence—the failure to expressly prohibit something—is an even less likely basis upon which to premise a grant of agency authority. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) *("American Trucking* . . . stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion.").

The decision below disregards these basic principles, and in so doing, makes it extremely difficult for Congress to write legislation that can effectively constrain executive agency power and discretion.

III. *Certiorari* Is Necessary Because the Third Circuit's Opinion Undermines the Clean Water Act's Cooperative-Federalism Framework and Upsets a Deliberate Balancing of State and Federal Interests.

Adherence to the plain language of a statute is especially important when that statute apportions authority between the States and federal agencies. The Framers intended Congress to serve as a bulwark against federal encroachment into traditional areas of state regulation.

The Constitution's structure assigns Congress primary responsibility for protecting our system of federalism. As James Madison explained, "the residuary sovereignty of the States is implied *and secured* by that principle of representation in one branch of the federal legislature." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985) (citation, alterations, and internal quotations omitted). The very structure of Congress makes this apparent: the House of Representatives comprises members from districts within each State, while the States were, at least initially, "given . . . direct influence in the Senate," *id.* at 551; even today Senators stand as representatives of a state-wide constituency. The Founders "provide[d] for the security of the States against federal encroachment" by making Congress the intermediary between States and the executive branch. *Id.* (quoting 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 438–39 (J. Elliot 2d ed. 1876)).

The same cannot be said for the executive branch itself. The executive branch's constituency is

a national one. Because the executive branch and its agencies are not directly accountable at a state or local level, they may be less sensitive to potential encroachments on state and local authority. The Congress, then, is the principal protector of the States' constitutional rights under our system of cooperative federalism.

Therefore, on matters that affect the allocation of authority as between States and federal agencies, Congress's directives should control. The Third Circuit disregarded this principle and in the process raised serious doubts about the durability of the cooperative-federalism framework.

The CWA unambiguously seeks to preserve state authority. It provides that: "[i]t 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 . . . ." 33 U.S.C. § 1251(b).

This policy, explicit in the CWA, is swept aside by the Third Circuit's decision. Yet much of the Court's own case law reaffirms the need to preserve the carefully crafted balance of federal and state interests under that Act. *See e.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (discerning whether the executive branch's interpretation of the Clean Water Act "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power"); *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("We ordinarily expect a 'clear and manifest' statement from

Congress to authorize an unprecedented intrusion into traditional state authority . . . . The phrase 'the waters of the United States' hardly qualifies.").

The Court has long held that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Congress's purpose here could not have been clearer: to protect States' regulation "of land use [which is] a function traditionally performed by local governments." *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). Absent a plain statement by Congress to the contrary, Congress would expect the courts to interpret the Act in a manner that avoids "intrusion into traditional state authority" and reinforces Congress' role as the federal representative of States' interests. *Rapanos*, 547 U.S. at 738.

Therefore, in this important respect as well, the Third Circuit's decision not only conflicts with the language and the purposes of the Act, but also with the understandings that have long guided Congress in writing and enacting statutes to constrain the exercise of federal agency authority—particularly when the concern is that the exercise of agency authority would improperly invade the legislative domain of the States.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

RICHARD E. SCHWARTZ
Counsel of Record
CLIFTON S. ELGARTEN
THOMAS A. LORENZEN
THOMAS C. MEANS
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500
rschwartz@crowell.com

Counsel for Amici Curiae
Ninety-Two Members of Congress

Addendum

List of *Amici Curiae*

1. Senator John Barrasso of Wyoming
2. Senator Roy Blunt of Missouri
3. Senator John Boozman of Arkansas
4. Senator Mike Crapo of Idaho
5. Senator Charles E. Grassley of Iowa
6. Senator James M. Inhofe of Oklahoma
7. Senator Jim Risch of Idaho
8. Senator Pat Roberts of Kansas
9. Senator Dan Sullivan of Alaska
10. Senator Thom Tillis of North Carolina
11. Senator Pat Toomey of Pennsylvania
12. Representative Lou Barletta of Pennsylvania, 11th Congressional District
13. Representative Joe Barton of Texas, 6th Congressional District
14. Representative Mike Bishop of Michigan, 8th Congressional District
15. Representative Marsha Blackburn of Tennessee, 7th Congressional District
16. Representative Rod Blum of Iowa, 1st Congressional District
17. Representative Mike Bost of Illinois, 12th Congressional District
18. Representative Mo Brooks of Alabama, 5th Congressional District
19. Representative Ken Buck of Colorado, 4th Congressional District
20. Representative Buddy Carter of Georgia, 1st Congressional District
21. Representative Steve Chabot of Ohio, 1st Congressional District
22. Representative Mike Coffman of Colorado, 6th Congressional District

23. Representative Tom Cole of Oklahoma, 4th Congressional District
24. Representative Doug Collins of Georgia, 9th Congressional District
25. Representative Mike Conaway of Texas, 11th Congressional District
26. Representative Kevin Cramer of North Dakota, At-Large Congressional District
27. Representative Rodney Davis of Illinois, 13th Congressional District
28. Representative Scott DesJarlais of Tennessee, 4th Congressional District
29. Representative Tom Emmer of Minnesota, 6th Congressional District
30. Representative John Fleming of Louisiana, 4th Congressional District
31. Representative J. Randy Forbes of Virginia, 4th Congressional District
32. Representative Trent Franks of Arizona, 8th Congressional District
33. Representative Bob Gibbs of Ohio, 7th Congressional District
34. Representative Bob Goodlatte of Virginia, 6th Congressional District
35. Representative Paul Gosar of Arizona, Arizona 4th Congressional District
36. Representative Sam Graves of Missouri, 6th Congressional District
37. Representative Morgan Griffith of Virginia, 9th Congressional District
38. Representative Brett Guthrie of Kentucky, 2nd Congressional District
39. Representative Gregg Harper of Mississippi, 3rd Congressional District

40. Representative Andy Harris of Maryland, 1st Congressional District
41. Representative Vicky Hartzler of Missouri, 4th Congressional District
42. Representative Jeb Hensarling of Texas, 5th Congressional District
43. Representative Richard Hudson of North Carolina, 8th Congressional District
44. Representative Tim Huelskamp of Kansas, 1st Congressional District
45. Representative Bill Huizenga of Michigan, 2nd Congressional District
46. Representative Robert Hurt of Virginia, 5th Congressional District
47. Representative Darrel Issa of California, 49th Congressional District
48. Representative Lynn Jenkins of Kansas, 2nd Congressional District
49. Representative Bill Johnson of Ohio, 6th Congressional District
50. Representative Walter B. Jones of North Carolina, 3rd Congressional District
51. Representative Jim Jordan of Ohio, 4th Congressional District
52. Representative Mike Kelly of Pennsylvania, 3rd Congressional District
53. Representative Trent Kelly of Mississippi, 1st Congressional District
54. Representative Steve King of Iowa, 4th Congressional District
55. Representative Adam Kinzinger of Illinois, 16th Congressional District
56. Representative Raúl Labrador of Idaho, 1st Congressional District

57. Representative Darin LaHood of Illinois, 18th Congressional District
58. Representative Doug Lamborn of Colorado, 5th Congressional District
59. Representative Billy Long of Missouri, 7th Congressional District
60. Representative Frank Lucas of Oklahoma, 3rd Congressional District
61. Representative Blaine Luetkemeyer of Missouri, 3rd Congressional District
62. Representative Thomas Marino of Pennsylvania, 10th Congressional District
63. Representative Thomas Massie of Kentucky, 4th Congressional District
64. Representative David McKinley of West Virginia, 1st Congressional District
65. Representative Alex Mooney of West Virginia, 2nd Congressional District
66. Representative Randy Neugebauer of Texas, 19th Congressional District
67. Representative Dan Newhouse of Washington, 4th Congressional District
68. Representative Kristi Noem of South Dakota, At-Large Congressional District
69. Representative Steve Pearce of New Mexico, 2nd Congressional District
70. Representative Scott Perry of Pennsylvania, 4th Congressional District
71. Representative Collin C. Peterson of Minnesota, 7th Congressional District
72. Representative Robert Pittenger of North Carolina, 9th Congressional District
73. Representative Ted Poe of Texas, 2nd Congressional District

74. Representative Mike Pompeo of Kansas, 4th Congressional District
75. Representative John Ratcliffe of Texas, 4th Congressional District
76. Representative Jim Renacci of Ohio, 16th Congressional District
77. Representative Reid Ribble of Wisconsin, 8th Congressional District
78. Representative Mike D. Rogers of Alabama, 3rd Congressional District
79. Representative Todd Rokita of Indiana, 4th Congressional District
80. Representative Keith Rothfus of Pennsylvania, 12th Congressional District
81. Representative David Rouzer of North Carolina, 7th Congressional District
82. Representative John Shimkus of Illinois, 15th Congressional District
83. Representative Bill Shuster of Pennsylvania, 9th Congressional District
84. Representative Mike Simpson of Idaho, 2nd Congressional District
85. Representative Adrian Smith of Nebraska, 3rd Congressional District
86. Representative Marlin Stutzman of Indiana, 3rd Congressional District
87. Representative GT Thompson of Pennsylvania, 5th Congressional District
88. Representative Scott Tipton of Colorado, 3rd Congressional District
89. Representative Brad Wenstrup of Ohio, 2nd Congressional District
90. Representative Bruce Westerman of Arkansas, 4th Congressional District

91. Representative Joe Wilson of South Carolina, 2nd Congressional District
92. Representative David Young of Iowa, 3rd Congressional District