No. 18-555

In The Supreme Court of the United States

MARQUETTE COUNTY ROAD COMMISSION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an arbitrary and capricious EPA veto of a state-approved CWA § 404 permit, a final agency action that denies the state-approved permit forevermore, and binds all parties, is subject to judicial review under the APA.

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, 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) and *National Ass'n of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018).

The Mackinac Center for Public Policy (the Center) is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

This case is of particular interest to *amici* because the EPA's assertion that courts are precluded from reviewing its veto of state-approved plans 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

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[1] *Amici curiae* notified the parties 10 days before of their intent and request to file this brief. All parties consented to the filing of this brief in letters. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

administrative state has grown in two primary ways – through the launching of new agencies and through the expansion of existing agencies' reach. While both means of growth offend the founding principles of limited government and enumerated powers, the latter is of prime concern because expansion of administrative power raises serious constitutional concerns.

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 (1965). The common law presumption of reviewability grew out of the constitutionally protected right to claim protection of the laws. *See Bowen v. Mich. Acad. 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 EPA veto here is.

"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 here. It is true that Congress gave the EPA the authority to veto a state-approved permit, but it did not make such decisions which effectively remove state input and control of the permitting process, unreviewable. That the EPA argues such, runs roughshod over the Clean Water Act and the APA.

In addition, the EPA's insistence that its veto is unreviewable violates separation of powers principles. 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 the EPA's veto of the state-approved permit, as do basic separation of powers principles. While it is regrettable that the Court needs to do so, this case provides the Court with an opportunity to make clear that it meant what it said in *Sackett*, 132 S. Ct. 1367, and *U.S. Army Corps of Engineers v.*

Hawkes Co., 136 S. Ct. 1807 (2016) – the EPA's final agency actions are judicially reviewable.

ARGUMENT

I. A strong presumption of reviewability supports judicial review of all EPA final agency decisions.

A. Judicial review of the EPA's veto of the state-approved permit 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. 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. Sch. 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. For 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). As the Court explained again this term, "legal lapses and violations occur, and especially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, No. 17-71, slip op. at 11 (Nov. 27, 2018) (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. ___, ___-___ (2015) (slip op., at 7-8)). When determining whether administrative action like the EPA veto 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 the EPA veto.

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).

The text of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, contains no provision that explicitly prohibits judicial review when the EPA vetoes a permit approved under a state § 404 program. Indeed, the statute says nothing at all about judicial review of such vetoes. "[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).

Because the plain words of the Clean Water Act lack an express prohibition against judicial review, the EPA "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 EPA 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 the EPA's veto of a state-approved permit.

Finally, judicial review of the EPA's final agency decision to veto the state-approved permit 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 EPA's final agency action vetoing a state-approved permit in no way defeats the purpose of the Clean Water Act. Instead, it is consistent with Congress' recognition that the states should have the primary right and responsibility over the development and use of land and water resources. 33 U.S.C. § 1251(c) (added by Pub. L. No. 95-217 § 5(a), 91 Stat. 1566 (Dec. 27, 1977)). This statutory objective is carried out by the state § 404 programs and statutory procedures regarding how the state and EPA work together on § 404 permit applications. Under those procedures, the EPA may veto a state-approved permit. Judicial review of this veto is imperative to ensuring that the state's original reasons for granting the permit are not wholly dismissed by the federal agency and that the EPA does not override Congress' intent to leave primary responsibility for land and water resources to the states. The EPA should not be permitted to skirt judicial review and run roughshod over the states.

Finally, 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 assumes 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 the EPA's veto of a state-approved permit. In fact, the CWA offers no review whatsoever. As Petitioner explains, a landowner's only option in this situation is to give up on the project or to start the permit process over with the Army Corps of Engineers.

II. Denying judicial review of the EPA's final agency decisions 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 war, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45 (James Madison), at 289 (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 EPA. For example, Congress could have never predicted the vast expansion of jurisdiction that EPA 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 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 Cty. v. Army*

Corps of Eng'rs, 531 U.S. 159, 167-74 (2001); Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053-37,127 (Jun. 29, 2015).

The executive branch's latest attempt to expand its own powers underscores the need for judicial review when it vetoes a state-approved permit. The EPA's insistence that the judiciary lacks any power to review its final agency decisions 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 extra-constitutional 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 granting the Petition to reverse the decision below.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and this *amici curiae* brief, this Court should grant the Petition and reverse the judgment of the Sixth Circuit.

Respectfully submitted,

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Respondents.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF OF AMICI CURIAE SOUTHEASTERN LEGAL FOUNDATION AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONER in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 3500 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 28th day of November, 2018.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

PATRICIA BILLOTTE
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AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 28th day of November, 2018, send out from Omaha, NE 2 package(s) containing 3 copies of the BRIEF OF AMICI CURIAE SOUTHEASTERN LEGAL FOUNDATION AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONER in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

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My Commission Expires Nov 24, 2020

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