No. 13-599

IN THE
Supreme Court of the United States

MINGO LOGAN COAL COMPANY,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FARM BUREAU FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber advocates for its members' interests before Congress, the Executive Branch, and the courts, and regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community.

The American Farm Bureau Federation ("Farm Bureau") is the Nation's largest general farm organization, representing over 6 million member families in all 50 states and Puerto Rico. The Farm Bureau was established in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. The Farm Bureau is an advocacy organization that regularly represents its members'

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief. Petitioner has filed a letter granting blanket consent to the filing of *amici* briefs; written consent of respondent to the filing of this *amici* brief is being submitted contemporaneously with this brief.

interests before Congress, federal regulatory agencies, and the courts.

This case presents a question of vital importance to the Chamber and the Farm Bureau (collectively "*amici*") and their members: whether, under Section 404(c) of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(c), the Environmental Protection Agency ("EPA") has the uncabined authority to withdraw disposal site specifications years after the Army Corps of Engineers ("Corps") has issued a permit, thereby effectively nullifying a permit properly issued by the Corps.

The answer to this question has tremendous consequences for *amici*'s members—including companies engaged in residential and commercial construction, farming and ranching, power generation and transmission, manufacturing, among many others—and to the national economy. To put the question's importance in perspective, the Corps issues approximately 60,000 Section 404 permits a year. C.A.App.216. As the Court noted in 2006, "[t]he average applicant for an individual [Section 404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality). Many of *amici*'s members currently possess CWA permits, and they are directly affected by the uncertainty caused by the EPA's actions in this case, and by the EPA's broader assertion that Section 404(c) grants it plenary authority to modify a previously issued Section 404 permit.

Moreover, as Professor David Sunding opined in a report the Chamber submitted in the courts below, "over $220 billion of investment annually is

conditioned on the issuance of these discharge permits," and every $1 spent on these projects generates roughly $3 of downstream economic activity. C.A.App.216–218. If, as the D.C. Circuit held, the EPA were to have unrestrained power to invalidate an existing, Corps-issued permit by claiming to "withdraw" the site specifications years after the permit had issued, the potential economic consequences of such uncertainty would be staggering.

Amici have participated in many cases addressing the scope of EPA's statutory authority. *See, e.g., Gen. Motors Corp. v. United States*, 496 U.S. 530 (1990); *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), cert. denied, 559 U.S. 991 (2010); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), cert. granted, 133 S. Ct. 2857 (2013). *Amici* have both a unique perspective on the question presented and a substantial interest in ensuring that the CWA is interpreted consistent with Congress' design.

INTRODUCTION AND SUMMARY

Congress has vested the Corps with exclusive authority to exercise permitting authority under Section 404 of the CWA. Indeed, as the Court has explained, "Section 402 . . . forbids the EPA from exercising permitting authority that is 'provided [to the Corps] in" Section 404. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 273 (2009). The EPA's role under Section 404 is limited to "two tasks": (1) "the EPA must write guidelines for the Corps to follow in determining whether to permit a discharge of fill material"; and (2) the EPA has the "power to veto a permit" by " 'prohibit[ing]' any decision by the Corps to issue a permit for a particular disposal site." *Id*. at 274 (quoting 33 U.S.C. § 1344(c)).

Critically, once the EPA has considered the Corps' findings and declined to veto the Corps' issuance of a permit, the EPA no longer has any role under the statutory framework. Or, as Justice Kennedy explained in writing for the Court in *Coeur Alaska*, "[b]y declining to exercise its veto, the EPA in effect [has] deferred to the judgment of the Corps on this point." *Id*. at 270. Much like the Constitution provides the President with no power to veto legislation that has already been enacted through bicameralism and presentment, the CWA provides no mechanism for the EPA to unilaterally reconsider its decision to defer to the Corps after the Section 404 permit has issued.

In this case, the EPA attempted—for the first time ever—to expand its Section 404 authority to include the ability to revisit its decision not to exercise its veto power *years after* the Corps had properly issued a Section 404 permit. The District Court concluded that the EPA has no such power; to allow the EPA to effectively invalidate a Corps-issued permit is inconsistent with the CWA's text, structure, and legislative history. App.32. By focusing myopically on Section 404(c)'s language that the EPA may withdraw a specification "whenever" it finds an "unacceptable adverse effect," the D.C. Circuit reversed. App.10.

This Court should grant the petition and reverse the decision below. *Amici* focus on two of the many reasons for reversal.

First, the D.C. Circuit's reading of Section 404(c)—fixating on a broad reading of "whenever"—violates the whole-text canon, which commands that general terms in a statute be construed against the text, structure, and design of the statute as a whole. Proper application of the whole-text canon is of utmost importance when reviewing an agency's interpretation

of a statute it administers to confine agency action within the limits set forth by Congress.

Second, the whole-text canon takes on added importance in the context of regulatory schemes, such as the CWA, that involve multi-agency coordination. Respect for Congress' decisions about which agency is the final decision-maker is imperative to promote regulatory certainty, finality, and predictability via a functioning unitary executive.

The D.C. Circuit's decision below provides a classic example of the dangers created by reading words in a vacuum and not in light of the entire statutory text, structure, and design. The sweeping economic repercussions of the D.C. Circuit's failure to apply the whole-text canon make the Petition particularly worthy of this Court's attention.

ARGUMENT

I. The Whole-Text Canon, Which the D.C. Circuit Failed To Apply Here, Is Chiefly Important When Construing an Agency's Statutory Authority at *Chevron* Step One

It is a bedrock principle of statutory interpretation that "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Notwithstanding, "[p]erhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012).

The whole-text canon is particularly important when reviewing an agency's interpretation of a statute it administers. Under the now-familiar *Chevron* two-step approach, a reviewing court must defer to an agency's interpretation of a statute it administers if, at step one, the court finds "the statute is silent or ambiguous" and then, at step two, determines that the agency's reading is a "permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). At *Chevron* step one, the reviewing court must "employ[] traditional tools of statutory construction" to determine whether "Congress had an intention on the precise question at issue." *Id.* at 843 n.9. The whole-text canon is among those traditional tools courts employ at step one. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–49 (1987); *accord id.* at 452 (Scalia, J., concurring in judgment).

If the reviewing court finds a statute ambiguous at step one, the court at step two "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. That is because the Court has held that, when Congress intends for the agency to resolve an ambiguity in statutes it administers, the agency—not the reviewing court—is "the authoritative interpreter (within the limits of reason) of such statutes." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

Brand X magnifies the need to apply the traditional tools of interpretation at *Chevron* step one. In *Brand X*, the Court held that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the

agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id*. at 982–83. *But see United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1842–44 (2012) (rejecting argument that a 1958 opinion stating that a statute is "not unambiguous" creates *Chevron* space for subsequent agency interpretation where the 1958 Court had in fact found the statute unambiguous by applying traditional tools).

In other words, if the reviewing court fails to apply faithfully the traditional tools of statutory interpretation to resolve a textual ambiguity at step one, it cedes primary authority to the agency to interpret the statute, thus frustrating the proper separation of powers between the three branches and bestowing more power on the agency (at the expense of the judiciary) than Congress had intended. Moreover, even if the court strikes down the agency's interpretation as unreasonable or impermissible at *Chevron* step two, *Brand X* allows the agency to go back to the drawing board and advance another interpretation. *See* Christopher J. Walker, *How To Win the Deference Lottery*, 91 Tex. L. Rev. See Also 73, 81–83 (2013). The agency's *Brand X* ability to play the deference lottery again (and again), in turn, creates greater uncertainty for the regulated parties.

Accordingly, it is imperative that reviewing courts utilize the traditional tools of statutory interpretation—including the whole-text canon—at *Chevron* step one to determine whether "Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9.

II. The CWA's Text, Structure, and Design Leave No Room for the EPA To Invalidate a Corps-Issued Section 404 Permit

The D.C. Circuit's decision below epitomizes the hazards of failing to apply the whole-text and related canons at *Chevron* step one.[2]

In determining that the EPA has "a broad veto power extending beyond the permit issuance," App.10, the D.C. Circuit committed perhaps the most common interpretative error by focusing in isolation on a few words in the statute without considering the meaning of the statute "in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner, *supra*, at 167. In particular, the D.C. Circuit held that the EPA may invalidate an existing permit "at *any* time" because Section 404(c) authorizes the EPA to withdraw a site specification "whenever" it finds an "unacceptable adverse effect." App.10.[3] To

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[2] As Justice Scalia and Professor Garner explain, "[m]any of the other principles of interpretation are derived from the whole-text canon," including the associated-words canon, harmonious-reading canon, irreconcilability canon, presumption against ineffectiveness, presumption of consistent usage, and surplusage canon. Scalia & Garner, *supra*, at 168.

[3] Section 404(c) of the CWA, 33 U.S.C. § 1344(c), provides as relevant:

> The [EPA] Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any de-fined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water sup-plies, shellfish beds and fishery areas . . . , wildlife, or recreational areas. Before making such

reach this conclusion, the D.C. Circuit resorted first and foremost to a dictionary and not to the text, structure, and design of the statute as a whole: "Using the expansive conjunction 'whenever,' the Congress made plain its intent to grant the [EPA] Administrator authority to prohibit/deny/restrict/withdraw a specification at *any* time. *See* 20 Oxford English Dictionary 210 (2d ed. 1989) (defining 'whenever,' used in 'a qualifying (conditional) clause,' as: 'At whatever time, no matter when.')." App.10.[4]

Had the D.C. Circuit applied properly the whole-text canon as the District Court did, it would have concluded that the CWA unambiguously foreclosed the EPA from invalidating a Section 404 permit after it had been properly issued by the Corps. The Petition (at 10–20) and the District Court's decision (App.31–45) ably set forth the statutory structure and design features that confirm this conclusion. The following are thus merely illustrative:

1. To read the EPA's Section 404(c) specification prohibition authority as applying post-permit issuance would usurp the Corps' exclusive statutory authority

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determination, the Administrator shall consult with the Secretary [of the Army]. . . .

[4] Contrary to the District Court's conclusion that the statutory text of Section 404(c) alone—without considering the statutory design and structure as a whole—is at best (for the EPA) ambiguous for *Chevron* step one purposes, *see* App.38, the D.C. Circuit's acontextual approach ultimately led it to conclude erroneously that Congress intended to "confer on EPA a broad veto power extending beyond the permit issuance." App.10. So the failure to apply the traditional tools of statutory interpretation at *Chevron* step one may lead a court to conclude that a statute is ambiguous or alternatively, as here, that a statute unambiguously allows the agency action. In both instances, congressional intent is undermined. *See* Part I *supra*.

to grant—and enforce compliance with—Section 404 permits. Section 404 of the CWA gives the Corps exclusive authority to issue Section 404 permits; indeed, Section 402(a)(1) expressly excludes the EPA from doing so. 33 U.S.C. § 1342(a)(1); *accord Coeur Alaska*, 557 U.S. at 273. Congress gives the Corps statutory authority to grant permits, 33 U.S.C. § 1344(a); to specify the disposal sites, based on criteria developed by the EPA, for each permit, *id*. § 1344(b); and to ensure compliance with those permits, *id*. § 1344(s).

By contrast, aside from developing guidelines for site specification, the EPA's only "task[]" under Section 404 is the "power to veto a permit," *Coeur Alaska*, 557 U.S. at 274, by "prohibit[ing] the specification . . . of any defined area as a disposal site." 33 U.S.C. § 1344(c). As the District Court concluded, "the clear import of the provision . . . is that Congress gave EPA the right to step in and veto the use of certain disposal sites at the start, thereby blocking the issuance of permits for those sites." App.34. As this Court has explained, "[b]y declining to exercise its veto, the EPA in effect [has] deferred to the judgment of the Corps on this point." *Coeur Alaska*, 557 U.S. at 270. To allow the EPA to reverse field after the permit has issued and exercise its veto would usurp the Corps' exclusive permitting authority. As the District Court concluded, "[t]his is a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute. It is not conferred by section 404(c), and it [is] contrary to the language, structure, and legislative history of section 404 as a whole." App.32.[5]

[5] Whereas this brief focuses on the D.C. Circuit's failure to apply the whole-text and related canons, it merits mention that the legislative history confirms that the EPA is limited to acting

2. Moreover, if Congress had intended to grant the EPA the extraordinary authority to revoke a Section 404 permit that had been properly issued by the Corps, it certainly would have said so expressly. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Critically, as the Petition notes (at 12), Section 404 uses the word "permit" 87 times, yet the word "permit" is nowhere to be found in Section 404(c), which refers only to the EPA's authority to prohibit a "specification." 33 U.S.C. § 1344(c). This Court "normally presume[s] that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (internal quotation marks omitted). Reading the statute as a whole, the EPA prohibiting specifications "whenever" cannot apply after the Corps issues the permit so as to invalidate a properly issued permit.

3. Similarly, if Congress had intended to grant the EPA authority to terminate an existing Section 404 permit—or to otherwise play a role with the Corps in the permit's termination or modification post-

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before a permit issues. As the Petition details (at 20–22), the competing House and Senate bills vested Section 404 permitting authority in the Corps and EPA, respectively. The Conference Committee, however, adopted the House's approach. *See* 118 Cong. Rec. 33692, 33699 (1972) (statement of Sen. Muskie). Moreover, Senator Muskie, the CWA's chief proponent, explained that the EPA would conduct its environmental impact analysis "prior to the issuance of any permit to dispose of spoil." 118 Cong. Rec. at 33699; *see also* 43 Op. Att'y Gen. 197, 199–200 (1979) ("EPA responsibilities [under Section 404] were perhaps best summarized by Senator Muskie.").

issuance—Congress knows how to indicate textually such intent for multi-agency coordination. *See, e.g.*, *Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1155–81 (2012) (explaining that Congress includes, inter alia, "shall jointly" and "in consultation with" in multiagency statutes to indicate its intent for inter-agency cooperation); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 1007–08 (2013) (finding that many congressional drafters surveyed noted that "in consultation with" means one agency has the lead, whereas "jointly" or "in collaboration with" signals joint authority).

Indeed, such evidence of inter-agency cooperation is manifest elsewhere in Section 404. For instance, the EPA must develop the disposal site specification guidelines "in conjunction with the" Corps. 33 U.S.C. § 1344(b). And, before prohibiting a disposal site specification, the EPA "shall consult with the" Corps. *Id*. § 1344(c). Yet, nowhere in Section 404 does Congress direct the EPA to play any role in permitting or post-permit issuance activities. To the contrary, the Corps has sole authority to issue the Section 404 permit, *see id*. § 1344(a), and sole authority to enforce compliance. *See id*. § 1344(s). The structure and design of Section 404 simply do not provide for a post-issuance permit veto by the EPA.

4. Finally, when the statutory text is placed in its proper context in light of the CWA's entire text, structure, and design, the fundamental flaws in the D.C. Circuit's interpretation are exposed. The D.C. Circuit concluded that, because Section 404(c) allows the EPA to withdraw a disposal site specification

"whenever [the EPA] determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect," *id*. § 1344(c), the EPA must have "authority to prohibit/deny/restrict/withdraw a specification at *any* time," even long after the Corps has issued the Section 404 permit. App.10.

This "statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). As discussed above, Congress designed the Section 404 permitting process such that the Corps specifies the site(s) for the permit at issue, and then the EPA has an opportunity to determine whether the site(s) should be prohibited. Only after the EPA declines to veto the site(s) does the Corps issue the permit. And, Congress instructed that "to the maximum extent practicable," the entire Section 404 permitting process should take no longer than 90 days. 33 U.S.C. § 1344(q).

If Congress had intended "whenever" to mean even after the EPA had initially determined the specification's propriety and after the Corps had issued the permit, it would have said "whenever the EPA determines or *re*-determines" or "whenever, including even after a permit issued." Or Congress would have said that the 90-day statutory deadline for the permitting process did not apply to the EPA's authority to invalidate a permit by withdrawing the site specification after the permit's issuance.

Just as the President cannot veto legislation that has already been enacted through bicameralism and presentment, the EPA has no power under the CWA to unilaterally reconsider or re-determine its decision

not to exercise its veto after the Section 404 permit has issued. This is essentially what the *Coeur Alaska* Court observed: "By declining to exercise its veto, the EPA in effect [has] deferred to the judgment of the Corps on this point." 557 U.S. at 270.

III. The D.C. Circuit's Decision Undermines Congressional Efforts To Promote Regulatory Certainty and Predictability

Applying the whole-text canon—and not just construing the words of a statute in isolation—is particularly important in the context of regulatory schemes that involve multi-agency coordination. Taking into account the entire statutory text, structure, and design helps ensure finality, certainty, and predictability in regulatory decision-making by uniting executive authority in a final decisionmaker.

As noted in Part II, Congress knows how to signal when agencies should collaborate, consult, and share regulatory responsibilities. Congress' deliberate efforts to structure multi-agency responsibilities should be respected, as they contribute to a fully functioning and predicable administrative state where finality, certainty, and predictability are paramount. For instance, the CWA's permitting regime "serves the purpose of giving permits finality"—i.e., "to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).

Coeur Alaska is instructive. There, the Court rejected the argument that a Section 402 permit from the EPA is necessary to discharge a slurry of crushed

rock and water; instead, a Section 404 permit from the Corps is sufficient. 557 U.S. at 266. The Court refused to require permits from both the Corps and the EPA because "[t]he statute gives no indication that Congress intended to burden industry with that confusing division of permit authority." *Id*. at 277. To the contrary, "[t]he regulatory scheme discloses a defined, and workable, line for determining whether the Corps or the EPA has the permit authority." *Id.*

These concerns for regulatory clarity and predictability apply with equal if not greater force here. The statute gives no indication that Congress intended for the EPA to be able to invalidate a properly issued permit at any time after a company has spent months if not years and tens of thousands if not hundreds thousands of dollars to obtain the permit from the Corps (with the EPA's implicit or explicit approval). *See Rapanos*, 547 U.S. at 721.

Nor is there any indication that Congress intended to allow the EPA to upset settled, investment-backed expectations concerning the finality of a Section 404 permit—especially when over $200 billion is invested annually on the condition of these discharge permits. C.A.App.216. The Petition (at 26-35) aptly details how such a threat to regulatory certainty would frustrate Congress' concern for finality; chill private investment throughout the national economy; raise serious constitutional retroactivity and Takings Clause concerns; and usurp states' authority to regulate water quality within their borders. As the District Court observed, if the EPA's "exercise of that power essentially undermined the finality of the Corps' exercise of their [permitting] power in 404(a), wouldn't it have been essential for Congress to say that?" App.43.

Without support in the statutory structure or design, the D.C. Circuit has put untenable weight on one word—"whenever"—to conclude that Congress unambiguously intended "to confer on EPA a broad veto power extending beyond the permit issuance," App.10, even though the Corps has exclusive permitting authority and the EPA declined to exercise its veto power at the outset. As the District Court noted, "[t]his reading does not exactly leap off the page." App.33. Nor does it find support in the text, structure, or design of the CWA as a whole.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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