No. 11-347

In The
Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., *et al.*,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

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QUESTION PRESENTED

Whether the Ninth Circuit should have deferred to the Environmental Protection Agency's longstanding position that channeled runoff from forest roads is exempt from the Clean Water Act's National Pollutant Discharge Elimination System permitting regime?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) submits this brief amicus curiae in support of Petitioners Georgia-Pacific West, Inc., *et al.*

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs

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[1] Counsels of record have consented to the filing of this brief. Petitioners and Respondents have filed blanket consents to all amicus filings with the Clerk of Court, and amicus NFIB Legal Center has given the parties timely notice of our intention to file in this matter. In accordance with Rule 37.6, the NFIB Legal Center states that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The Legal Center files in this case because the scope of federal authority under the Clean Water Act concerns small business owners. Moreover, small business owners are concerned about the possibility that litigants might bring future challenges along these lines against federal regulations which currently allow business practices. Accordingly, we seek to file in this case to offer a constitutional rule of statutory construction, which should help this Court determine when it is appropriate to defer to an agency's interpretation.

SUMMARY OF ARGUMENT

This case concerns the scope and proper application of the Clean Water Act (CWA), and subsequent amendments to the CWA. According to Respondents, the Petitioners violated the CWA by constructing, maintaining and using forest roads for timber-harvesting operations. Respondents argue that Petitioners must obtain National Pollutant Discharge Elimination System (NPDES) permits from the Environmental Protection Agency (EPA) to continue to use and maintain these roads because they were constructed with a corresponding drainage system, which channels rainfall into streams and rivers. The EPA disagrees with Respondent's interpretation of the CWA. The agency promulgated

the Silvicultural Rule, 40 C.F.R. § 122.27, to exempt construction, maintenance and use of forest roads from the NPDES regime.

Since the text of the CWA is ambiguous, *Chevron USA v. Natural Resource Defense Council*, 467 U.S. 837 (1984), provides that courts should defer to reasonable interpretations from the EPA. This does not vest the EPA with unbridled discretion to resolve ambiguities in any conceivable manner. The agency's interpretation must be *reasonable*, and must comport with the background principles of our constitutional system.

In this case, the EPA's Silviculture Rule deserves *Chevron* deference because the agency provided a reasoned explanation for exempting timber harvesting operations from NPDES permitting requirements consistent with the principles of federalism entailed in the Ninth and Tenth Amendments. These amendments safeguard the prerogative of the states to establish policies allowing economic activities and the rights of citizens to exercise their liberties unrestrained in the absence of legitimately enacted federal or state law. States are presumed to retain autonomy to address local concerns, and citizens are presumed to be at liberty to act as they so choose, in the absence of an *unambiguous* federal abridgement of state powers and individual rights. In sum, it would be unreasonable to resolve an ambiguity in the manner that Respondents advocate. Such an interpretation would contravene the principles ensconced in the Ninth and Tenth Amendments.

ARGUMENT

I. CHEVRON DEFERENCE IS CONSTRAINED BY THE BACKGROUND PRINCIPLES OF CONSTITUTIONAL LAW

This case concerns ambiguity in the Clean Water Act. Federal Water Pollution Control Act, 33 U.S.C. § 1362 (2008) (CWA). Respondents' proffered interpretation would extend the CWA to restrict economic activities currently allowed under local and state law. *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063, 1066-1067 (9th Cir. 2011). Amicus NFIB Legal Center cautions against this interpretation because it improperly presumes both federal preemption and abrogation of economic liberties. Instead, we maintain that the Court should endorse the Environmental Protection Agency's (EPA) interpretation, as codified in the Silviculture Rule because it appropriately conforms to the principles of federalism, and the concept of retained rights ensconced in the Ninth and Tenth Amendments.

This Court has repeatedly emphasized the importance of grounding judicial review on the "first principles" of constitutional law when addressing a questionable assertion of federal authority. *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles."); *Medellin v. Texas*, 552 U.S. 491, 494 (2008) (noting that the court cannot "set aside first principles."). Accordingly, this Court should consider whether the background principles of our constitutional system constrain the scope of

permissible constructions of the ambiguous provisions at issue in this case. Specifically, the Court should consider whether the Ninth and Tenth Amendments set forth an overarching rule of construction.

a. *Chevron* Recognized that Agency Interpretations are Constrained by the Background Principles of Law and Reason

Chevron USA v. Natural Resource Council, 467 U.S. 837 (1984) (*Chevron*), held that courts should defer to an agency's reasonable interpretation of an ambiguous federal statute. *Christensen v. Harris County*, 529 U.S. 576, 586-587 (2000). But, this does not give an agency free-rein to adopt any interpretation it prefers. *Chevron*, 467 U.S. at 843-844 (The agency cannot adopt an interpretation that is "arbitrary, capricious, or manifestly contrary to statute."). *Chevron* deference is not paramount to rational basis review or judicial abdication. *See Pelofsky v. Wallace*, 102 F.3d 350, 355 (8th Cir. 1996); *see also* Peter J. Smith, *Pennhurst*, *Chevron, and the Spending Power*, 110 Yale L.J. 1187, 1195 (2001); David B. Edwards, *Out of the Mouth of States: Deference to State Action Finding Effect in Federal Law*, 63 N.Y.U. Ann. Surv. Am. L. 429, 449 (2008).

Chevron and its progeny recognize that judicial deference is inappropriate where the agency's interpretation is based on an unreasonable construction of the statute. *Chevron*, 467 U.S. at 843 ("[T]he question for the court is whether the agency's

[interpretation] is based on a permissible construction of the statute.") (emphasis added). The agency's construction must address an ambiguity and must represent a non-arbitrary or capricious interpretation based on an acceptable statutory construction. *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 411 (2008) (citing *Chevron* for the proposition that the "EEOC may include additional elements in its definition [of the term 'charge'], as long as they are reasonable constructions of the statutory term…"); *see also Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1307 (11th Cir. 2011) ("As a general rule, an agency's interpretation of a statute which it administers is entitled to deference if the statute is silent or ambiguous and the interpretation is based on a reasonable construction of the statute.").

The *Chevron* doctrine is grounded in respect for the separation of powers, but it must also conform with other fundamental tenants of our constitutional system. While *Chevron* emphasized that "[t]he Court need not conclude that the agency construction was the only one it permissibly could have adopted[,]" this does not preclude a reviewing court from rejecting interpretations which contravene other constitutional principles. *See Edward DeBartolo Corp. v. Florida Gulf Coast Bldg. and Trade Council*, 485 U.S. 568, 575 (1988) (invoking cannon of constitutional avoidance in *Chevron* analysis); *see also United States v. Mead Corp.*, 533 U.S. 218, 228 FN 6 (2001) (observing that the reasonableness of an agency's interpretation rests in part on constitutional principles). Indeed, the rules of reason and our fundamental

constitutional precepts necessarily cabin the scope of permissible agency constructions. *See U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224, 1231 (10th Cir. 1999) (a construction raising constitutional problems is not reasonable); *see also How Chevron Step One Limits Permissible Agency Interpretations: Brand X and the FCC's Broadband Reclassification*, 124 Harv. L. Rev. 1016, 1027-1028 (2011) (*Chevron* step two considers whether the permissible scope of acceptable interpretations has been "cabined").

b. Any Reasonable Statutory Interpretation Must Conform to the Background Principles Established in the Ninth and Tenth Amendments

The Ninth and Tenth Amendments establish an overarching rule of construction which must inform any reasonable construction of an ambiguous federal statute. Specifically, federal law does not preempt state policies except if it is manifestly clear that Congress intended to effect preemption. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) ("In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'") (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). An intrinsically intertwined corollary principle holds that individuals are at liberty to act in accordance with local and state law, unless federal law holds otherwise. *New York v. United States,* 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the

liberties that derive from the diffusion of sovereign power.") (internal quotation marks omitted). These presumptions of state autonomy and individual liberty are properly understood as constitutional rules of construction. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597, 714 (2005).

i. The Ninth Amendment Established a Rule of Construction

In the ongoing endeavor to ascertain the objective meaning of the Ninth and Tenth Amendments, it is necessary to consider recently discovered historical evidence.[2] This is particularly true with regard to the Ninth Amendment, which was largely dismissed as a "constitutional irrelevance" in the early-mid twentieth century. Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 Tex. L. Rev. 1, 2 (2006). "[T]his enigmatic provision has received an outpouring of serious scholarly attention over the past twenty years." *Id*. at 3. In all propriety, newly discovered lost historical evidence, as to the meaning of this text, should be considered in assessing whether the Ninth Amendment should have application in a case of this nature. *See* Seth Rokosky, *Denied and*

[2] Historical evidence may be particularly helpful in elucidating the commonly understood meaning of the constitutional text at the time of ratification. *See e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 579-610 (2008) (discussing historical evidence to shed light on the original meaning of the Second Amendment). Therefore, it is only appropriate to reassess our understanding of the Constitution as legal scholars and historians uncover previously lost or forgotten documents.

Disparaged: Applying the 'Federalist' Ninth Amendment, 159 U. Pa. L. Rev. 275, 334 (2010) (synthesizing recent originalist scholarship and suggesting the Court should rehabilitate the Ninth Amendment in order to "strengthen protections of state sovereignty and bolster them with text.").

Originally understood, the Ninth and Tenth Amendments were meant to operate together. Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 Iowa L. Rev. 801, 854 (2008) (noting that James Madison and early commentators referred to the Ninth and Tenth Amendments as the "twin guardians of federalism"). They were intended to preserve the liberties of the people and the political autonomy of the states. Barnett, *The Ninth Amendment: It Means What it Says, supra* at 4. Rokosky *supra* at 285. That intent is reflected in the plain language of the amendments.

The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const., Amend IX. By its plain language, the Ninth Amendment requires that the Constitution should "not be construed" as abrogating those inherent "rights" which the founding generation believed to be natural to all men. Randy E. Barnett, Restoring the Lost Constitution, 54-55 (Princeton University Press, 2004). Indeed the framers intended just what the text suggests.

The historical record is clear. The Ninth amendment was "solely concerned with

constitutional interpretation." Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 340-341 (2004). As James Madison explained in a 1789 speech opposing the creation of a national bank, "the purpose of the Ninth [Amendment] was to 'guard[] against a latitude of interpretation.'" Lash, *Lost Jurisprudence of the Ninth Amendment*, supra at 601 (citing James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), James Madison, Writings 437, 489 (Jack N. Rakove ed. 1999) ("Rakove"). Specifically, the drafting committee and proponents intended to placate both federalist and antifederalist concerns by constitutionalizing a rule of construction in the Ninth Amendment to preserve state autonomy and individual rights.[3]

The very structure of the Ninth Amendment presupposes that individuals retain their natural liberties in the absence of a validly enacted state or

[3] "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive, that it may be guarded against." James Madison, Speech in Congress Proposing Constitutional Amendments, (June 8, 1789), *in* Rakove *supra* at 448.

federal law.[4] Barnett, Restoring the Lost Constitution, *supra* at 60. This reflects the revolutionary generation's predominant conviction that individuals are naturally at liberty, and that they only give up those liberties necessary to attain the security and benefits of a governed society. *See e.g.*, Letter to Congress (Sept. 17, 1787), in 2 The Records of the Federal Convention of 1787, at 666 (Max Farrand ed., 1911).[5] There is abundant documentation in the historical record evincing the fact that the "retained" rights [mentioned in the Ninth Amendment] referred to natural rights…"[6] Barnett, Restoring the Lost Constitution, *supra* at 54-55. Yet the Ninth Amendment did not set out to

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[4] In providing that the people "retain" rights against the federal government, the Ninth Amendment constitutionalized the Lockean concept that individuals are naturally free and that their rights precede the formation of the Constitution. Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2010 Cato Sup. Ct. Rev. 13, 15 (2009-2010).

[5] ("Individuals entering into society must give up a share of liberty to preserve the rest… [But] [i]t is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be preserved.").

[6] For example, one of the early drafts of the bill of rights explicitly stated that "[t]he people have certain natural rights which are *retained* by them when they enter into Society…" Roger Sherman's Draft of the Bill of Rights, reprinted in The Rights Retained by the People: The History and Meaning of the Ninth Amendment, 351 (Randy E. Barnett ed., 1989). This concept of "retained" natural rights was eventually incorporated into the final text of the Ninth amendment. *See* Madison's Notes for Amendment Speech, 1789, *in* 1 Rights Retained, supra at 64 (Madison's notes for an early speech on the Bill of Rights used the phrase "natural rights retained"); *see also* 2 Annals of Cong. 1944 (1791) (Statement of Rep. Madison, Feb. 2, 1791) ("Bank Speech").

specifically define our rights. Instead, in saying that our rights were "retained", the amendment offers a simple rule of construction—a presumption of liberty. Barnett, Restoring the Lost Constitution, *supra* at 259-300.

ii. The Presumptions of Liberty and State Autonomy Must Inform any Reasonable Construction an Ambiguous Statute

In compliment to the Ninth Amendment's explicit rule of construction, the Tenth Amendment was to preserve the retained powers of the states and the people. Barnett, *The Ninth Amendment: It Means What it Says*, *supra* at 4 ("[T]he cumulative effect of the available historical evidence suggests strong support for the individual rights and federalism models."). Together these two amendments were intended to make explicit the understanding that federal powers are limited, along with the corollary constitutional presumptions that individuals retain their natural rights, and that states maintain their traditional sovereign powers, unless and until the federal government legitimately enacts positive law to curtail the exercise of those rights or powers. *See* James Madison, Bank Speech *supra* at 1949, 1951. This original understanding was lost in the early twentieth century. Lash, *Lost Jurisprudence of the Ninth Amendment*, *supra*

at 714.[7] Nonetheless, our Tenth Amendment jurisprudence now incorporates the Ninth Amendment's rule of construction. *Id*. at 714 ("Even if their source has been forgotten, the principles enshrined in the Ninth Amendment continue to inform the Supreme Court's construction of the Constitution.").

The Tenth Amendment proclaimed that states kept their traditional sovereign powers. This is the fundamental tenant of our federalist system. Absent an unambiguous assertion of preemptive federal authority, states retain the prerogative to regulate, *or to allow*, conduct in whatever manner best suits local priorities, concerns and sensibilities. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (there must be a demonstrably clear and manifest intent to preempt). It is therefore unreasonable to resolve ambiguous language in a federal statute as obviating the state's autonomy to address local issues in accordance with the best judgment of state policymakers. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985) (preemption can only be inferred where it is clear "that Congress 'left no room' for supplementary state regulation'" or where "'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'") (internal citations

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[7] ("The Madisonian reading of the Ninth Amendment was echoed by Justice Story in Houston v. Moore, [18 U.S. (5 Wheat.) 1, 49 (1820),] the first Supreme Court discussion of the Ninth Amendment. Story's reading of the Ninth Amendment as a rule of construction preserving the retained rights of the states initiated a jurisprudence that would last more than a century.").

omitted). Simply put, the default presumption favors the state's local prerogative. *Rice*, 331 U.S. at 230.

Likewise, individuals are presumed to be at liberty. The principles of federalism protect *both* state autonomy and individual rights. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Indeed, the Tenth Amendment reserves non-delegated powers "to the states respectively, or to the people." *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2576 (U.S. 2012); *see also United States v. Comstock*, 130 S. Ct. 1949, 1971 (2010) (Thomas, J., dissenting). Accordingly, our Tenth Amendment jurisprudence recognizes that individuals retain ultimate sovereignty.[8] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people by whom and for whom all government exists and acts."); *Chisolm v. Georgia*, 2 U.S. 419 (2 Dall.), 468 (1793) ("The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government."). As such, an ambiguous federal statute cannot reasonably be interpreted as impeding a citizen from freely exercising her liberties any more than it can be presumed as

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[8] Randy E. Barnett, *Commandeering the People: Why the Individual Mandate is Unconstitutional*, 5 NYU J. L. & Liberty 581, 627-628 (2010) ("'[T]he sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State… [A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country…'") (quoting Chief Justice John Jay).

obviating state autonomy. *See Bond*, 131 U.S. at 2364. This background principle of residual autonomy is textually grounded in the Ninth and Tenth Amendments. *See* James Madison, Bank Speech *supra* at 1949, 1951.

II. THE SILVICULTURE RULE CONSTITUTES A REASONABLE CONSTRUCTION AND SHOULD BE AFFORDED DEFERENCE BECAUSE IT PRESERVES ECONOMIC LIBERTIES AND STATE AUTONOMY

a. The CWA is Ambiguous, and Respondents Cannot Overcome the Presumptions of Liberty and Autonomy

The first step in considering whether EPA's Silviculture Rule should be entitled to *Chevron* deference is to look to the CWA's text—applying the traditional rules of statutory construction—to see if Congress has definitively spoken to the issue. *Duncan v. Walker*, 533 U.S. 167, 172 (2001) ("We begin, as always, with the language of the statute"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foun., Inc.*, 484 U.S. 49, 56 (1987). But, we must begin this analysis with the presumptions of liberty and reserved autonomy in mind. Since the Ninth and Tenth Amendments confirm that individuals retain their natural liberties and residual sovereignty on entering society, the party asserting an abridgement bears the burden of demonstrating that Congress legitimately and unambiguously enacted supreme

law to curtail individual rights. *See Rice*, 331 U.S. at 230; *Bond*, 131 S. Ct. at 2364.

In this case, Respondents assert that Petitioners violated the CWA in failing to obtain an NPDES permit when constructing, maintaining and using forest roads. While there is no question—under modern Commerce Clause jurisprudence—that Congress could regulate these activities if it choose to, it is unclear whether Congress intended to do so here. The CWA's text provides no definitive answer. The plain language could potentially be understood as either requiring Petitioners to obtain an NPDES permit, or exempting them from that requirement. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 989 (2005) (Recognizing ambiguity in the term "offering" because the statute did "not unambiguously require" Respondent's preferred interpretation, but could instead be understood in different ways).

Specifically, ambiguity stems from the definition of the term "point source." 33 U.S.C. § 1362(14). The CWA requires individuals to obtain an NPDES permit for any discharge from a *point source* into the waters of the United States. *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003); 33 U.S.C. § 1342. The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit… from which pollutants are or may be discharged." 33 U.S.C.A. § 1362(14). But, it also expressly states that the term "does not include

agricultural stormwater discharges and return flows from irrigated agriculture." *Id*. As such, it is ambiguous whether the drainage ditches in this case should be understood as point sources. Since Petitioners constructed the ditches for timber-harvesting, the ditches may be subject to the agricultural stormwater discharge exception. The American Heritage dictionary defines "agriculture," as entailing the growing of crops, but does not clarify whether this should specifically include the harvest of timber. *See* American Heritage dictionary (defining "agriculture" as "[t]he science, art, and business of cultivating soil, producing crops, and raising livestock; farming");[9] *but see* John Gifford, Practical Forestry 12 (1907) ("silviculture is a branch of agriculture").

Likewise, there is ambiguity as to the meaning of the phrase "associated with industrial activity." 33 U.S.C. § 1342(p)(1)-(3). The 1987 CWA amendments specify that NPDES permits are not required for stormwater discharges, except for those *associated with industrial activity*. *Id.* It is unclear whether this includes the construction, maintenance and use of forest roads. Indeed, the term "industrial" might be understood as pertaining only to manufacturing facilities, or might be interpreted much more broadly to entail any and all business ventures. *See* American Heritage Dictionary (While offering multiple definitions of "industry," the American Heritage Dictionary defines the term as pertaining to manufacturing precisely in the context

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[9] *Available online* at http://ahdictionary.com/word/search.html?q=agriculture (last visited Aug. 27, 2012).

of a regulatory scheme; specifically the definition provides that "industry" is "[t]he sector of an economy made of manufacturing enterprises: government regulation of industry.").[10]

Since the dictionary definitions of the key terms in these sections are ambiguous, it is necessary to resort to other cannons of statutory construction and extrinsic indicia of congressional intent to determine whether discharges associated with timber harvesting activities clearly require NPDES permits. *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012) ("In order to determine whether a statute clearly shows the intent of Congress in a *Chevron* step-one analysis, we employ traditional tools of statutory construction and examine 'the statute's text, structure, and legislative history, and apply the relevant canons of interpretation.') (*citing Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000). The Ninth Circuit recounted a long and muddled legislative history, from which it concluded that Congressional intent requires NPDES permits for discharges associated with the construction, maintenance and use of forest roads. *Brown*, 640 F.3d at 1070-1085. Yet an objective assessment must conclude that Congress failed to make its intent clear.

"Legislative history can never produce a 'pellucidly clear' picture… of what a law was 'intended' to mean, for the simple reason that it is

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[10] *Available online* at http://ahdictionary.com/word/search.html?q=industry (last visited Aug. 27, 2012).

never voted upon…" *Zuni Public School Dist. No. 89 v. Dept. of Educ.*, 550 U.S. 81, 117 (2007) (Scalia dissenting). Indeed the only thing that we can be sure of is what the CWA actually says, and we cannot read anything more or less into the text than what "we know for certain both Houses of Congress (and the President if he signed the legislation) agreed upon..." *Id*. Since extrinsic aids of this sort are inherently unreliable and particularly susceptible to the subjective predilections of reviewing judges, it is only proper, in cases like this where divining congressional intent amounts to conjecture and extrapolation, to conclude that Congress simply failed to make clear any intent to regulate Petitioner's conduct. *Id*. ("[W]hat judges believe Congress 'meant' (apart from the text) has a disturbing but entirely predictable tendency to be whatever judges think Congress must have meant, *i.e.*, should have meant."); *see also Chevron*, 467 U.S. at 862 (Finding the "legislative history as a whole silent on the precise issue…" and concluding "[w]e are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress."). In short, Respondents have failed to meet their burden of offering compelling and incontrovertible evidence of congressional intent, and have therefore failed to overcome the presumptions of liberty and reserved autonomy.

Since the proper scope and application of the CWA remain ambiguous, it is necessary to move to the second step of the *Chevron* test to determine whether EPA's interpretation is reasonable. *Brand X*, 545 U.S. at 997 ("[S]ilence suggests… that the Commission has [reasonable] discretion to fill the

consequent statutory gap."). Congress charged EPA with responsibility for enforcement and has delegated authority to make reasonable interpretive decisions under the Act. *See Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 202 (D.C. Cir. 1988). Accordingly, EPA's Silviculture Rule deserves deference if it represents a reasonable construction of the statute. *See Mayo Foundation for Medical Educ. and Research v. U.S.*, 131 S. Ct. 704, 716 (2011) (Deferring to an agency's interpretation when Congress had not directly spoken to the issue because the agency's "rule [was] a reasonable construction of what Congress ha[d] said…").

b. EPA's Interpretation is Reasonable and Entitled to Deference Because it Comports with the Presumptions of Liberty and Autonomy

In this case, the State of Oregon established Best Management Practices (BMPs) to govern timber harvesting activities. OR. Rev. Stat. §§ 527.765(1), (2). Oregon's BMPs allow for the construction, maintenance and use of forest roads with corresponding drainage systems. In the judgment of the state's policymakers, these practices best manage stormwater runoff from forest roads. Or. Admin. R. § 629-625-0000(3). This approach protects the environment and appropriately encourages timber harvesting—a staple of the regional economy. *Id*. Oregon chose not to adopt a permitting regime like EPA's NPDES program. But, Respondents take issue with the balance the state had adopted between environmental stewardship and economic liberty. They argue that ambiguity in

the CWA should be resolved—in contravention of the best judgment of Oregon's policymakers—to require individuals to obtain federal NPDES permits in order to continue constructing, maintaining and using forest roads. *Brown*, 640 F.3d at 1067.

EPA disagrees with Respondent's interpretation of the CWA. 40 C.F.R. § 122.27. For over 35 years, EPA has consistently construed the CWA as allowing states to address stormwater runoff through the adoption of BMPs. The agency interprets the CWA to exempt discharges associated with timber harvesting activities from the NPDES permit regime. *Brown*, 640 F.3d at 1073-1085. EPA and Petitioners advance several reasons for EPA's interpretation, including EPA's conclusion that forest road runoff is "better controlled through the utilization of best management practices" at the state level. *Id*. at 1075. EPA's Silviculture Rule is also justified on the fact that associated discharges are "induced by natural processes, including precipitation" and are "not traceable to any discrete and identifiable facility." 41 Fed. Reg. 24710 (June 18, 1976). To be clear, we do not take issue with any of these justifications; however, we submit that the constitutional rule of construction and the principles of federalism, ensconced in the Ninth and Tenth Amendments, are of paramount importance in any reasonable construction of the Act because they concern the fundamental tenants of our constitutional system.

EPA's proffered interpretation constitutes a reasonable construction of the ambiguous provisions because it preserves Oregon's autonomy to allow

timber harvesting activities under the specific conditions that it has imposed. It also allows the unrestrained exercise of economic liberties in the absence of a clear and unambiguous assertion of preemptive federal authority. *See Rice*, 331 U.S. at 230; *see also* James Madison, Bank Speech *supra* at 1949, 1951 (arguing that the Ninth Amendment entailed a rule of construction). First, any reasonable construction of the CWA must take into account the Act's structure, which necessarily leaves room for the states to play a coordinate role with the federal government in managing water and environmental issues. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 493 (9th Cir. 1984) ("The general regulatory picture… is one of congressionally intended cooperation and collaboration between… the combined federal/state regulatory authorities under the CWA."); *see also Barnum Timber Co. v. U.S. E.P.A.*, 633 F.3d 894, 903 (9th Cir. 2011) ("In amending the CWA… Congress recognized that states, not the federal government, would regulate nonpoint sources of pollution."). Second and more fundamentally, the Tenth Amendment preserves Oregon's power to establish regulatory policies in accordance with local concerns and to allow economic practices subject to those policies, except to the extent those policies may be preempted by federal law. *Bond*, 131 S. Ct. at 2364 ("The federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society…'").

Since preemption is not presumed, ambiguity in the CWA cannot reasonably be construed as extending federal authority in a manner that obviates Oregon's policy choices. *See Hammond*, 726

F.2d at 493 (recognizing that the CWA preempts state policies only to the extent they are in clear conflict). Finally, the Ninth Amendment's rule of construction provides that citizens are presumed to retain economic liberties in the absence of legitimately enacted law curbing their exercise. Lash, *The Lost Jurisprudence of the Ninth Amendment*, *supra* at 714 (The Ninth Amendment has been incorporated into the idea of federalism); *Bond*, 131 S. Ct. at 2364 ("Federalism secures the freedom of the individual."). Accordingly, it would be unreasonable to construe ambiguous language in the CWA as abrogating Petitioner's right to conduct business in accordance with local and state law. That right is presumed to be "retained," absent an unambiguous exercise of contrary federal authority under the Supremacy Clause. *See* Barnett, Restoring the Lost Constitution, *supra* at 259-300. Therefore, the ambiguity must be resolved—as Petitioners and the EPA interpret the CWA—so as to preserve Oregon's prerogative to manage stormwater runoff under the state's BMPs, and to allow Petitioners to continue constructing, maintaining and using forest roads without further regulatory requirements.

CONCLUSION

This Court should reverse the Ninth Circuit and hold that Petitioners are not required to obtain NPDES permits for channeled forest road run off.

Respectfully submitted,

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