No. 21-454

In The
Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, Administrator,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

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Introduction

When are wetlands among "the waters of the United States," 33 U.S.C. § 1362(7)? To answer that question, Petitioners Michael and Chantell Sackett have proposed a two-step analytical framework, derived from the Clean Water Act's definitional text:

- Step one: is the wetland "inseparably bound up," *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985), with a "water"—*i.e.*, a hydrogeographic feature that in ordinary parlance would be referred to as a stream, river, lake, or the like—such that it is difficult to say where the wetland ends and the water begins, *see Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality opinion)?

- Step two: is that water "of the United States," *i.e.*, subject to Congress's "commerce power over navigation," *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 n.3 (2001)?

Only if the answer at both steps is affirmative may a wetland be regulated under the Act.

Respondent Environmental Protection Agency advances a variety of objections to the Sacketts' proposed framework, but they all lead back to the same dubious theory of statutory interpretation and tendentious reading of the Clean Water Act's purposes. Specifically, EPA asks the Court to reject the two-step framework—and in its place to adopt the atextual significant nexus test—because only thereby can Congress's supposed overriding purpose to restore

and maintain the Nation's water quality be vindicated.

EPA's arguments reflect "the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose." *Rapanos*, 547 U.S. at 755. This approach to interpreting the Act is unjustified, partly because "clean water is not the *only* purpose of the statute." *Id*. at 755-56. Another important purpose "is the preservation of primary state responsibility for ordinary land-use decisions," *id*. at 756, which the significant nexus test fails to respect, *see id*. at 738 n.9 ("[Justice Kennedy] admits that 'the significant-nexus requirement may not align perfectly with the traditional extent of federal authority' over navigable waters—an admission that tests the limits of understatement.") (cleaned up). Yet the graver fault of the significant nexus test is that it meanders freely "in utter isolation from the text of the Act." *Id*. at 754-55. It assumes that whatever achieves the supposed "purpose" of the Act ought to be regulated; but in relying upon that "last resort of extravagant interpretation," the significant nexus test contravenes the key interpretive principle that "no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Id*. at 752.

As applied to the Clean Water Act, those "textual limitations" are partly geographic: Congress chose to regulate not water quality per se, but rather just certain discharges of pollutants to (i) "waters" that are (ii) "of the United States." Only by ignoring these limitations and instead resorting to a skewed

understanding of Congressional purpose can EPA argue that the Sacketts' "soggy residential lot," Cert. App. A-4, which is separated from a non-navigable manmade ditch by a thirty-foot-wide paved road, and which contributes no water to that ditch, is nevertheless among "the waters of the United States." Perhaps the Sacketts' land would fall under a "Comprehensive National Wetlands Protection Act," but "[w]hat is clear . . . is that Congress did not enact one when it granted [EPA] jurisdiction over only 'the *waters* of the United States.'" 547 U.S. at 745-46.

Argument

I. Step One, Prong One: When May a Wetland Be Treated as a "Water"?

Much of EPA's attack on step one of the Sacketts' proposed framework rests on a misreading of the *Rapanos* plurality's surface-connection test. Under that test, deeming a wetland to be a "water" requires more than an aquatic connection between the two features. *Cf.* Resp. 28-31. What is needed as well is the boundary-drawing problem presented by *Riverside Bayview*. *See Rapanos*, 547 U.S. at 742. That is, the connection between the wetland and the water must be such that the two features are "*indistinguishable*." *Id.* at 755. To be sure, such a standard will rarely be satisfied in the absence of a regular and substantial aquatic interchange between wetland and water. *See id.* Ultimately, however, what is decisive is not the mere existence of such an exchange, but rather whether, in light of whatever surface-water connection that may exist, "there is no clear

demarcation between 'waters' and wetlands."[1] *Id*. at 742.

EPA's misreading of the plurality's boundary-drawing rule in turn infects its arguments against that rule's provenance. The agency dismissively suggests that the rule came from nowhere, Resp. 28-29 (a surprising critique given EPA's view that the rule represents "a *permissible* basis for CWA coverage of wetlands," Resp. 18), but its origins are obvious and authoritative: the Clean Water Act's definitional text, which speaks of "waters" and not "wetlands." *See Rapanos*, 547 U.S. at 742, 752, 755. EPA questions whether it is normal linguistic practice to deem wetlands something apart from "waters." Resp. 25-26. Yet such a differentiating usage has been recognized by this Court, *see Riverside Bayview*, 474 U.S. at 132, and regularly employed by Congress, *see, e.g.*, Outdoor Recreation Resources Review Act, Pub. L. No. 85-470, § 7, 72 Stat. 238, 241 (1958) (listing "waters" separately from "wetlands"), Water Bank Act of 1970, 16 U.S.C. § 1301 (stating a congressional purpose "to preserve, restore, and improve the wetlands of the Nation" so as "to conserve surface waters"); National Environmental Policy Act of 1969, 42 U.S.C. § 4341 (1970) (directing preparation of annual reports detailing, inter alia, the status of the aquatic environment, "including marine, estuarine, and fresh

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[1] EPA suggests that the Sacketts' proposed framework modifies the plurality's surface-connection test. Resp. 29. But the plurality's standard turns upon the line-drawing problem between two *aquatic* features, and thus necessarily envisions a "physical connection" of water. *See Rapanos*, 547 U.S. at 755.

water," and "the terrestrial environment, including . . . wetland").

Citing the Act's legislative history, EPA contends that restricting wetlands jurisdiction because of limitations in the pertinent definitional text would be inconsistent with Congress's intent to regulate broadly. Pointing to the original House bill, EPA observes that it used the traditional phrase "navigable waters of the United States" and concludes that the phrase's deletion in conference reveals Congress's aim to regulate well beyond navigable-in-fact waters. Resp. 19. Although the Conference Committee did delete the phrase "navigable waters of the United States" from the House bill, it deleted the same phrase from the Senate bill; and not just that phrase, but also the Senate bill's "the tributaries thereof." *See* Albrecht & Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 Envtl. L. Rep. News & Analysis 11042, 11047 (2002) (discussing S.2770, 92d Cong. § 502(h) (1971)). Yet EPA does not contend that this last deletion indicates a Congressional desire not to regulate tributaries—and for good reason, given that unenacted bill language is a very weak indicator of Congressional intent. *See SWANCC*, 531 U.S at 170 ("A bill can be proposed for any number of reasons, and it can be rejected for just as many others."). EPA also cites the Conference Report for the proposition that Congress intended to regulate to the full extent of its constitutional authority. Resp. 19. But properly interpreted, that document merely confirms Congress's purpose to regulate to the full extent only

of its *channels-of-commerce* power,[2] *see SWANCC*, 531 U.S. at 168 n.3, a purpose that the Sacketts' two-step framework comfortably accommodates.

Likely sensing the weakness of its arguments based on the original 1972 Act, EPA pivots to the 1977 amendments. The agency contends that those amendments' newly added Section 404(g), 33 U.S.C. § 1344(g)—which, among other things, reserves permitting authority to the Corps for "wetlands adjacent" to certain classes of traditional navigable waters[3]—represents a codification of the Corps' broad

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[2] Statements from the Act's floor managers bear out this appropriately contextualized understanding of EPA's cited legislative history. *See* 1 Congressional Research Service, Legislative History of the Water Pollution Control Act Amendments of 1972, at 250 (1973) (statement of Rep. Dingell) ("it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation"); *id*. at 178 (statement of Sen. Muskie) (the term "navigable waters" should be "construed broadly" to include all waters that are "navigable in fact," *i.e.*, those waters that "form . . . a continuing highway over which commerce is or may be carried on").

[3] The Sacketts use the phrase "traditional navigable waters" to denote those waters that are, or have been, or with reasonable improvement would become navigable-in-fact, *see SWANCC*, 531 U.S. at 172, and that either by themselves or by linking to other waters could serve as channels of interstate commerce, *see In re Boyer*, 109 U.S. 629, 631-32 (1884). The difference between such waters and "the waters of the United States" is that the latter, although including all traditional navigable waters, also comprise those waters that can serve as channels of interstate commerce only through links with non-aquatic modes of transport. *See* Pet. Br. 42-43.

regulatory definition of adjacent wetlands.[4] Resp. 21-22. The principal difficulty with EPA's argument is that Section 404(g) bears no direct relationship to Section 502(7)'s "the waters of the United States," which the 1977 amendments left unchanged. For that reason, Section 404(g) is not determinative of the meaning of "the waters of the United States," and instead simply indicates that "the term 'waters' as used in the Act does not necessarily exclude 'wetlands.'" *Riverside Bayview*, 474 U.S. at 138 n.11. *Accord SWANCC*, 531 U.S. at 171. A further reason not to read too much into Section 404(g)'s "wetlands adjacent" reference is its placement in a parenthetical, "which is typically used to convey an aside or afterthought," *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1498 (2022) (cleaned up), not, as EPA would have it, a statute's significant expansion. *See West Virginia v. EPA*, No. 20-1530, slip op. 18 (U.S. June 30, 2022) ("Nor does Congress typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme.") (cleaned up). And as for the legislative history, although wetlands jurisdiction was debated in the lead-up to the 1977 amendments, *see* Resp. 20-21, the records of that legislative process fail to prove that Congress intended to ratify a broad administrative construction of "what constitutes an

[4] EPA also argues that *Riverside Bayview* itself approved the agency's inclusion of all neighboring wetlands as regulable "waters," Resp. 22-23, but such a reading cannot be squared with the decision's emphasis on the line-drawing rationale (which is not implicated by merely close-by wetlands), the decision's acknowledgement that wetlands by themselves are not typically denominated as waters, or the case's facts, namely, that the wetlands at issue directly abutted a navigable water. *See Rapanos*, 547 U.S. at 741 n.10.

'adjacent' wetland covered by the Act." *Rapanos*, 547 U.S. at 750. *Accord SWANCC*, 531 U.S. at 170.

EPA also questions the plurality's standard by invoking a rather imaginative recharacterization of the case law. As to *Riverside Bayview*, EPA contends that the decision was really about "determining how wet is wet enough," not about the difficulty in distinguishing wetland-like features from abutting waters. Resp. 26-27. EPA's interpretation is implausible. It bears no relationship to the "shallows, marshes, mudflats, swamps, [and] bogs" recounted in the Court's opinion, which the Court cited as examples of features that "may lie" "between open waters and dry land," *Riverside Bayview*, 474 U.S. at 132, not as types of quasi-waters occupying a logical middle-ground between "waters" and "land." EPA's interpretation also renders inexplicable the Court's repeated reference to the problem of drawing physical boundaries between waters and land. *See id.* at 132 ("[T]he transition from water to solid ground is not necessarily or even typically an abrupt one."); *id.* at 134 (citing "the inherent difficulties of defining precise bounds to regulable waters"). Similarly, EPA's interpretation ill fits the regulatory phrase at issue in the case—"adjacent wetland," *id.* at 124—which naturally suggests spatial relationships between wetlands and waters, not distinctions based on the amount of water each feature contains. And EPA's amount-of-water recasting does not accord with the case's facts, *see id.* at 135 (highlighting that "respondent's property is part of a wetland that actually abuts on a navigable waterway"), or with how the government presented those facts to this Court, *see* Tr. at 16, *Riverside Bayview*, No. 84-701 (U.S.

Oct. 16, 1985) ("This is in fact an adjacent wetland, adjacent—by adjacent, I mean it is immediately next to, abuts, adjoins, borders, whatever other adjective you might want to use, navigable waters of the United States.").

Equally unpersuasive is the agency's recharacterization of *SWANCC*. According to EPA, that decision merely disavowed one type of ecological connection theory—the Migratory Bird Rule—as a basis for statutory jurisdiction, and did so solely because of the rule's purported lack of concern for traditional navigable waters. Resp. 27-28. But nothing in the Court's opinion suggests that non-avian ecological considerations could have justified federal jurisdiction over the isolated ponds at issue. *See SWANCC*, 531 U.S. at 168 ("In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this."). Moreover, the government in *SWANCC* did try to tie the Migratory Bird Rule to the Clean Water Act's core purposes. *See* Fed. Resp. Br. at 31 n.22, *SWANCC*, No. 99-1178 (U.S. Sept. 20, 2000) ("[D]egradation of 'isolated' waters may also impair the quality of traditional navigable waters."). Although *SWANCC* acknowledged "Congress' concern for the protection of water quality and aquatic ecosystems," such ecological considerations were merely evidence to support the Corps' categorical regulation of wetlands "inseparably bound up" with adjoining bodies of "open water." 531 U.S. at 167-68. Thus, contrary to EPA's attempted re-invention, what the Court in *SWANCC* found determinative was the absence of the intense physical

connection present in *Riverside Bayview*, one that resulted from "wetlands that actually abutted on a navigable waterway." *Id.* at 167.

EPA also advances a number of administrability and results-based objections to the *Rapanos* plurality's standard for wetlands jurisdiction. Resp. 29-31. But the force of EPA's policy critiques is easily deflected once the plurality's standard is correctly understood to turn upon the line-drawing and indistinguishability factors articulated in *Riverside Bayview*, 474 U.S. at 132, 134, rather than the mere presence *vel non* of an aquatic connection. *See Rapanos*, 547 U.S. at 742, 755. For example, EPA contends that employment of the plurality's standard would mean that many wetlands that are seasonally or less frequently connected aquatically to regulated waters would be removed from federal regulation. Resp. 29-30. But it does not follow that the sometime absence of a surface-water connection would render wetlands readily distinguishable from their otherwise abutting waters and thus non-jurisdictional under the plurality's standard. Whether the requisite line-drawing problem is raised must be determined against the normal climatic and topographic circumstances in the area. *Cf.* 40 C.F.R. § 230.3(t) (2008) (defining wetlands with reference to "normal circumstances"). If a wetland is indistinguishable from its abutting water under normal circumstances, then the wetland is jurisdictional, despite the possibility that in a severe drought the line-drawing difficulty would vanish. Conversely, the mere happenstance that occasional flooding might temporarily bridge an otherwise clear boundary

between wetlands and regulated waters does not convert such wetlands into jurisdictional features.

Likewise misplaced is EPA's concern that the plurality's standard will encourage the construction of berms or other barriers to destroy federal jurisdiction. Resp. 30-31. The plurality's test would create no such loophole. If the wetlands that would be de-federalized in this manner satisfy the plurality's standard, then the construction of such barriers in these regulated areas would itself be regulated by EPA and the Corps, *cf.* 33 U.S.C. § 1344(f)(2) (permit exemption inapplicable if "the reach of [regulated] waters [would] be reduced"), who presumably would have no interest in encouraging such jurisdictional reduction.

But even if EPA were correct that adoption of the plurality's test for wetlands jurisdiction would result in the exclusion of many wetlands from Clean Water Act regulation, the policy worthiness of the plurality's test would in no way be reduced. For one, EPA's water-quality concerns are overblown: even ungenerously interpreted, the plurality's test would still cover over 50 million acres of wetlands. *See* Amicus Brief of Outdoor Recreation & Conservation Organizations 7. Further, discharges of pollutants into wetlands that are nearby other regulated waters but which are not covered by the plurality's test will likely still be regulated if, pursuant to the indirect discharge theory, *see County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476-77 (2020); *Rapanos*, 547 U.S. at 743-44, those pollutants find their way to regulated waters. But most significantly, EPA's critique rests on the highly contested proposition that broad federal regulation necessarily

results in a better environment, *see* Amicus Brief of Property & Environment Research Center (PERC) 10-20; Amicus Brief of West Virginia 26, a proposition that even the agency's own amici reject, *see* Amicus Brief of National Association of Clean Water Agencies 18 ("Exclusions for [green infrastructure] from the WOTUS definition support critical public policy aims acknowledged by Congress and both state and federal agencies."). Indeed, as the regulatory history confirms, the states are fully competent to protect their waters and wetlands in the absence of federal regulation. *See* Amicus Brief of State Farm Bureaus 17-27 (discussing several states' water-quality programs, including enhanced protections enacted following *SWANCC*'s excision of isolated waters from federal control); Amicus Brief of American Sustainable Business Network 29 (noting that, "if petitioners succeed," then "some states will heavily regulate").

Boiled down, EPA's beef with the plurality's boundary-drawing standard is that its adoption will mean that some wetlands, somewhere, may be impaired. *See, e.g.*, Resp. 14, 24, 28-29. But as the plurality correctly determined, the Clean Water Act is not a comprehensive wetlands preservation code. *See Rapanos*, 547 U.S. at 745. That this conclusion is "inconsistent" with Congress's purposes is a canard, because it is founded on the false premise that the Clean Water Act has one overriding purpose or that any purpose can justify a departure from the Act's text. *See id*. at 752, 755-56. *Cf.* Resp. 33-35. Obviously the Act is a water-quality statute; but the means that Congress selected to protect water quality—directly regulating only "waters" and leaving other water-

quality regulation to the states—must also be respected. *See Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995) ("Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means . . . .").

For clear evidence that Congress has not chosen every "means" possible to remedy water pollution, one need look no further than how the Act treats nonpoint sources. Although pollution from such sources "constitutes a substantial portion of all water pollution,"[5] Congress chose to leave its regulation to the states. *See County of Maui*, 140 S. Ct. at 1471. That decision would be inexplicable if EPA were right that Congress's trumping purpose in the Clean Water Act was to craft a federal response to all water-quality problems, of every kind, everywhere. But the decision would make perfect sense if Congress also intended, as it did, to "preserve" traditional state authority "to plan the development and use" of "land and water resources," 33 U.S.C. § 1251(b), including wetlands, *see* Amicus Brief of PERC 6 (three quarters of the Nation's wetland acreage is privately owned). EPA's approach fails to honor that legislative aim. *See* Amicus Brief of West Virginia 13. The *Rapanos* plurality's does. *See Rapanos*, 547 U.S. at 752-53.

II. Step One, Prong Two: What Is a "Water"?

In addition to challenging the boundary-drawing rule for wetlands jurisdiction, EPA contests the *Rapanos* plurality's ordinary parlance standard for

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[5] Zaring, Note, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 Harv. Envtl. L. Rev. 515, 517 (1996).

determining when a non-wetland aquatic feature may be considered a "water," taking particular aim at that standard's application to ditches and other manmade features. Resp. 42-44. The agency largely attacks a straw man: the mere fact that a ditch is manmade does not mean that it cannot be a "water." *See Rapanos*, 547 U.S. at 736 n.7 (observing that "a permanently flooded man-made ditch used for navigation is normally described, not as a 'ditch,' but as a 'canal,'" and that "an open channel through which water permanently flows is ordinarily described as a 'stream,' not as a 'channel'"). The relevant inquiry is not whether a feature is constructed but whether, despite its artificial origin, the feature would still in ordinary conversation be referred to as a type of "water," such as a stream, river, lake, or even a canal. *See, e.g.*, *In re Boyer*, 109 U.S. at 632 (the Illinois & Michigan Canal is a "public water of the United States . . . even though the canal is wholly artificial"). EPA also asserts that this standard conflicts with the Act's permitting exemption for the maintenance of drainage ditches, 33 U.S.C. § 1344(f)(1)(C), but the conflict is more imagined than real. *See SWANCC*, 531 U.S. at 171 n.7 ("Congress' decision to exempt certain types of these discharges does not affect, much less address, the definition of 'navigable waters.'").

III. Step Two: When Is a Water "of the United States"?

EPA contends that the second step of the Sacketts' proposed jurisdictional framework is not properly before the Court because the Sacketts previously disclaimed the issue of so-called tributary jurisdiction. Resp. 41-42. It is true that the Sacketts' question

presented focused on the *Rapanos* plurality's surface-connection test, and that their briefing highlighted that the Court need not address tributary jurisdiction to reverse the judgment below. *See* Cert. Pet. i; Cert. Reply 8-10.[6] But in granting certiorari, the Court rephrased the question presented to focus the parties' attention on the proper test for determining when a wetland is among the "waters of the United States." Because the *Rapanos* plurality opinion provides a comprehensive construction only for the term "waters," *see Rapanos*, 547 U.S. at 731-32, 742, a complete response to the Court's rephrased QP necessarily entails, as the Sacketts have provided, an analysis of how the clause "of the United States" restricts the set of potentially regulable "waters."

Moving to the merits, EPA contends that the phrase "the waters of the United States" did not have an established meaning in 1972, and thus that the Sacketts' construction of that phrase as a shorthand for Congress's channels-of-commerce jurisdiction—based principally on the use of the phrase "the waters of the United States" in Section 10 of the 1899 Rivers and Harbors Act—is unjustified. Resp. 46. But there exists no other similarly prominent and longstanding statute that uses any like term.[7] Presumably, then,

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[6] The Sacketts also noted, however, that their petition did raise the basic two-step jurisdictional inquiry, *see* Cert. Reply 9-10, a developed version of which the Sacketts urge in their merits briefing.

[7] Although more recent and less prominent than the Rivers and Harbors Act, the Federal Boat Safety Act of 1971, Pub. L. No. 92-75, 85 Stat. 213, provides some further usage evidence. As originally enacted, the Boat Safety Act's policy was "to improve

Congress's adoption in the Clean Water Act of such a rare grouping of words is at least some evidence that Congress meant largely to carry forward the meaning long associated with those words. *See* Pet. Br. 36-37.

EPA adds that the Sacketts have identified no other pertinent authority to support their interpretation of "the waters of the United States." Resp. 47. That is incorrect. Long before the enactment of the Clean Water Act, this Court construed Section 10 of the Rivers and Harbors Act to be an exercise of Congress's power to regulate navigable waters as channels of interstate commerce. *See Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 425, 428-29

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boating safety and to foster greater development, use, and enjoyment of all the waters of the United States," § 2, 85 Stat. at 214, 46 U.S.C. § 1451 (1982), *repealed as part of non-substantive recodification*, Pub. L. No. 98-89, § 4(b), 97 Stat. 500, 605 (1983). *See* H. Rep. No. 98-338, at 120, 158, 226 (1983). This policy the Act sought to further by establishing construction and safety standards, *see* §§ 5-8, 85 Stat. at 215-16, for "vessels . . . on waters subject to the jurisdiction of the United States," § 4(a), 85 Stat. at 215. Presumably boat construction and safety are only relevant for actually navigable waters; Congress's desire to promote those goals for "all the waters of the United States" therefore suggests that Congress did not believe that such waters included non-navigable bodies. *See* S. Rep. No. 92-248, 1971 USCCAN 1333, 1338 ("General jurisdictional applicability is to vessels within the historic federal maritime jurisdiction . . . ."). That conclusion is strengthened by a 1976 amendment, which declared that certain intrastate waters in New Hampshire would not be regulable under the 1971 Act until a judicial determination that they were "navigable waters of the United States." Pub. L. No. 94-531, § 1, 90 Stat. 2489, 2489 (1976). Congress thus explicitly tied the coverage of the 1971 Act—which, again, was intended to protect "all the waters of the United States"—to those waters regulated under the Rivers and Harbors Act.

(1925). Similarly, the Corps had, for decades prior to the Clean Water Act's passage, operated under regulations that construed the statutes it then administered—including the Rivers and Harbors Act—to be limited to traditional navigable waters. *See* 33 C.F.R. § 209.260(a)-(d) (Suppl. 1946). Given this case law and regulatory backdrop, it is reasonable to read the phrase "the waters of the United States" in the Clean Water Act as generally consistent with how the Rivers and Harbors Act had been interpreted.

Finally, EPA argues that the Sacketts' interpretation of the qualifying clause "of the United States" would contravene Congress's purpose of reworking federal water quality law; indeed, per EPA, it would make the Clean Water Act even less protective than the body of federal law that preceded it. Resp. 47-48. EPA's characterization is flawed because it is based on the incorrect premise that Congress intended to dramatically rework *every* aspect of federal water quality law, even its geographic scope. *See* Pet. Br. 37-38. Had Congress so intended, presumably it would not have used a phrase long associated with traditional navigable waters, but instead would have selected broader wording—for example, the capacious language that Congress employed in the 1935 amendments to the Federal Power Act. *See id.* at 37 & n.18. EPA's roll-back critique is similarly off-base. Neither the Rivers and Harbors Act nor the Federal Water Pollution Control Act ever regulated non-navigable tributaries as such; rather, these laws regulated activities in and around tributaries only to the extent that they caused harm to navigable waters. *See* 33 U.S.C. §§ 407, 1160(a), 1160(c)(5) (1970). In any event, adoption of the

Sacketts' proposed framework would not mean that navigable-in-fact waters like Priest Lake could be destroyed with impunity by damming their tributaries. *Cf.* Resp. 42. Many such waters would still enjoy the protections of the Rivers and Harbors Act, *see* 33 U.S.C. § 403 (2018) (prohibiting obstructions to navigable capacity); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 707-09 (1899) (damming the non-navigable portion of a traditional navigable water creates a prohibited navigational obstruction), not to mention those of state law, *see, e.g.*, Idaho Code § 42-201(2) ("No person shall divert any water from a natural watercourse . . . without having obtained a valid water right to do so . . . .").

IV. The Significant Nexus Test Should Be Rejected

EPA offers a number of arguments for why the significant nexus test ought to be adopted in lieu of the *Rapanos* plurality's standard. Yet EPA's presentation leaves unaddressed the significant nexus test's greatest failing: its deracination from the statutory text. *Cf. Rapanos*, 547 U.S. at 754-55 ("One would think, after reading Justice Kennedy's exegesis, that the crucial provision of the text of the CWA was a juIisdictional requirement of 'significant nexus' between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the Act . . . ."). Such extratextual interpretation naturally leads, as EPA's argument in this case proves, to the "extravagant" practice of citing the "purpose" of the Act, rather than its words, as the pre-eminent consideration. *See id.* at 752. The *Rapanos* plurality presciently summarized EPA's approach here: the

statute's "purpose is to clean up the waters of the United States, and therefore anything that might 'significantly affect' the purity of those waters bears a 'significant nexus' to those waters, and thus . . . *is* those waters." *Id*. at 755. This spirit-of-the-law hermeneutic effectively "rewrites the statute, using for that purpose the gimmick of 'significant nexus.'" *Id*. at 756. The lamentable consequences of employing such a gimmick to construe the Act's scope may be seen in the many photographic examples adduced by amici of purportedly regulable "ephemeral washes" and "desert erosional features." *See, e.g.*, Amicus Brief of Freeport-McMoRan Inc., 11, 13; Amicus Brief of Western Urban Water Coalition 17-18.

EPA contends that it and the Corps have plenty of experience using the significant nexus test and that the test is not hard for them or the regulated public to apply. Resp. 35-36. EPA's view is, however, difficult to square with the experience of that regulated public across a number of industries. *See, e.g.*, Amicus Brief of U.S. Chamber 11-16; Amicus Brief of Fourteen National Agricultural Organizations 4; Amicus Brief of State Farm Bureaus 3-12; Amicus Brief of National Stone, Sand & Gravel Association 6-14; Amicus Brief of Association of American Railroads 5-7. EPA's view is also hard to reconcile with the agencies' prominent failure to operationalize the significant nexus test,[8] as

[8] *See In re EPA*, 803 F.3d 804, 807 (6th Cir. 2015) (vacating the Clean Water Rule) ("[A]ssuming . . . that Justice Kennedy's opinion . . . represents the best instruction . . . , it is far from clear that the new Rule's distance limitations are harmonious with the instruction.") (footnoted omitted), *vacated on other grounds*, *sub nom*. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617 (2018).

well as the lower courts' struggles to adjudicate cases thereunder.[9]

EPA dismisses the costs of Clean Water Act compliance, Resp. 37, but the agency's downplaying characterization is not credible in light of the contrary experience of regulated parties. *See, e.g.*, Amicus Brief of Savannah Economic Development Authority 27-31 (detailing permitting costs for a variety of projects ranging from $2 million to over $45 million); Amicus Brief of Alaska 8-9 (explaining how permitting requirements made construction of a proposed wastewater treatment plant for a remote village cost-prohibitive). Likewise unconvincing is EPA's reliance on nationwide permits to defend its overbroad administration of the Clean Water Act. Resp. 36-37. Nationwide permits are not always available, even for modest activities like single-family home construction. *See* Administrative Record 00184 (nationwide permit for residential construction unavailable because the Sacketts' lot allegedly contains a "forested" wetland). And even when available, nationwide permits are often far more expensive than EPA claims; the low figures the agency cites come from a study that did not quantify the costs of compensatory mitigation. *See* Army Corps of Engineers, Regulatory Impact Analysis for 2021 Reissuance and Modification of Nationwide Permits 25 (analyzing only "direct compliance costs"). The

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[9] *See Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs*, 893 F.3d 1017, 1025 (7th Cir. 2018) ("Justice Kennedy did not define 'similarly situated'—a broad and ambiguous term . . . ."); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) ("This test leaves no guidance on how to implement its vague, subjective centerpiece.").

overall price for that mitigation is staggering. *See* Amicus Brief of Savannah Economic Development Authority 21 (estimating annual yearly costs of compensatory mitigation for the Section 404 program to be $4 *billion*).

EPA claims that its proposed regulatory adoption of the significant nexus test merits deference from this Court. Resp. 38-40. But no deference is owed an agency interpretation when "the intent of Congress is clear," or when that interpretation does not embody "a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The significant nexus test "is far from" the most reasonable interpretation of the Act, *Rapanos*, 547 U.S. at 756-57; that honor goes to the *Rapanos* plurality's test, which embodies the "only plausible construction" of the statutory term "waters," *see id*. at 738, 748. Arguing to the contrary, EPA cites the Chief Justice's *Rapanos* concurrence. But that opinion does not suggest that codification of the significant nexus test would have resulted in a different outcome. Rather, the Chief Justice cautioned that EPA's rulemaking discretion would be cabined by the "clearly limiting terms Congress employed in the Clean Water Act." *Id*. at 758. Those terms surely include "the waters," the plurality's explication of which the Chief Justice fully joined. EPA also cites its decades-long practice of regulating non-abutting wetlands, Resp. 39-40, but deference on that basis would amount to "a sort of 30-year adverse possession that insulates disregard of statutory text from judicial review," a proposition that "deservedly has no precedent in [the Court's] jurisprudence." *Rapanos*, 547 U.S. at 752.

EPA also assures that the significant nexus test imposes real limits on its authority. *See* Resp. 35. EPA's characterization is contradicted by the agency's own pre-*Rapanos* administrators, who believe that their old, very broad approach to wetlands jurisdiction comprised "fact-based assessments applying, in essence, what has become known in shorthand as the 'significant nexus' analysis." Amicus Brief of Former EPA Administrators 3. EPA's characterization is also belied by this very case. As the agency itself acknowledges, there is no surface-water connection between the Sacketts' lot and the wetlands complex on the other side of Kalispell Bay Road. *See* Resp. 41. Moreover, the alleged subsurface connection is *from* those wetlands *to* the Sacketts' lot. *See* JA 30-32. Thus, the Sacketts' property does not in any way affect the wetlands across that elevated road. Yet EPA and the Ninth Circuit nevertheless concluded that the Sacketts' lot was similarly situated to those across-the-street wetlands, and it is only because the Sacketts' lot was aggregated with those wetlands that EPA and the Ninth Circuit could satisfy the significant nexus test. *See* Cert. App. A-34, A-35, C-18. If the Sacketts' land is regulable under the significant nexus test, despite the absence of a surface-water connection to any water, it is hard to imagine any property in this country that would be exempt from EPA's reach. A test of this sort, which comes with no meaningful limit on federal authority, is an irremediably defective test. *See County of Maui*, 140 S. Ct. at 1471-73.

Conclusion

By rejecting the significant nexus test and adopting the Sacketts' proposed two-step framework, the Court can render the otherwise "contentious and difficult task" of construing "the waters of the United States," *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 623 (2018), substantially less so. Such a decision would provide "a reasonably clear rule regarding the reach of the Clean Water Act," which in turn would give landowners like the Sacketts "[r]eal relief," *Sackett v. EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring), while also appropriately balancing the environmental and federalism purposes that Congress sought to further in the Act, *see Rapanos*, 547 U.S. at 738 n.9.

The judgment of the Ninth Circuit should be reversed.

DATED: July 2022.

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No. 21-454

In the
Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,

Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, Administrator,

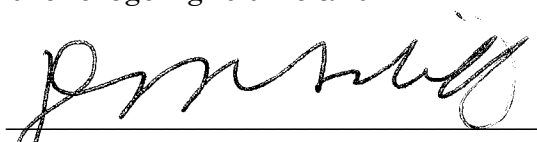
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that PETITIONERS' REPLY BRIEF ON THE MERITS contains 5,995 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 7, 2022.



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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 8th day of July, 2022, send out from Omaha, NE 1 package(s) containing 3 copies of the REPLY BRIEF 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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Subscribed and sworn to before me this 8th day of July, 2022.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

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