No. 24-1635

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT D. WHITE,

Plaintiff – Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency; UNITED STATES ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL SCOTT A. SPELLMON, in his official capacity as Chief of Engineers and Commanding General, United States Army Corps of Engineers; MICHAEL L. CONNOR, in his official capacity as Assistant Secretary of the Army (Civil Works); UNITED STATES OF AMERICA,

Defendants – Appellees,

and

NATIONAL WILDLIFE FEDERATION;
NORTH CAROLINA WILDLIFE FEDERATION,

Intervenors/Defendants – Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina

REPLY BRIEF OF APPELLANT ROBERT D. WHITE

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INTRODUCTION

In their response briefs, Defendants-Appellees the United States Environmental Protection Agency, et al. (together, the "Agencies") and Intervenors/Defendants-Appellees National Wildlife Federation and North Carolina Wildlife Federation (together "Intervenors"), advocate for the continued application of the unlawful Amended Rule[1] to Plaintiff-Appellant Robert D. White's properties—a situation that is imposing enormous economic and personal costs upon Mr. White. The continued imposition of these costs upon Mr. White notwithstanding the Amended Rule's facial illegality is fundamentally inequitable. Mr. White has established his entitlement to a preliminary injunction.

First, Mr. White is likely to succeed on the merits of his claims against the Amended Rule. Because the Amended Rule does not require wetlands to be "indistinguishable," *Sackett v. EPA*, 598 U.S. 651, 684 (2023), from covered waters, and because it asserts authority over wetlands lacking even a continuous water connection to covered waters, it violates *Sackett*'s test for wetlands authority. As a result, the Amended Rule is contrary to, and exceeds, the CWA's limited grant of

[1] In this reply brief "Amended Rule" refers to the challenged "adjacent wetlands" provisions of the final rule issued by Defendants-Appellees United States Environmental Protection Agency (EPA) and United States Army Corps of Engineers (Corps), purporting to interpret the term "navigable waters," for purposes of the Clean Water Act (CWA). *See* 88 Fed. Reg. 3004 (Jan. 18, 2023), *as amended*, 88 Fed. Reg. 61,964 (Sept. 8, 2023), *codified at* 33 C.F.R. § 328.3(a)(4), (c)(2); 40 C.F.R. § 120.2(a)(4), (c)(2).

authority to the Agencies to regulate "navigable waters," rendering it *facially invalid*. *See* 5 U.S.C. § 706(2)(A), (C).

Second, Mr. White has concrete plans that involve the dredging and filling of relatively low-lying lands bordering covered waters. *See* Opening Brief of Appellant Robert D. White (Opening Brief) 59-61. In pursuing these plans, Mr. White must unquestionably abide by the Amended Rule's delineation of what is or is not lawful, and Mr. White has already taken steps to comply with the Amended Rule—incurring significant costs. *See id*. Numerous courts addressing prior definitions of "navigable waters" have routinely treated such costs as irreparable harm. *See id.* at 62.

Third, there is no public interest in continued application of an unlawful regulation to Mr. White's properties, and the balance of the equities demands that the Amended Rule be enjoined. *See id.* at 64-65. This Court should reverse the district court's denial of Mr. White's motion for preliminary injunction.

ARGUMENT

I. Mr. White is likely to succeed on the merits

A. "Indistinguishability" is central to *Sackett*'s test for wetlands authority; thus, the Amended Rule's omission of this requirement is unlawful

Sackett is clear. To establish regulatory authority over a wetland, the Agencies must prove that the wetland is "indistinguishable" from a covered "water." *See* Opening Brief 32-37. The Agencies and Intervenors argue that the Amended Rule's

failure to include *Sackett*'s indistinguishability requirement is permissible, because indistinguishability is merely "the result of meeting the continuous-surface-connection standard." Response Brief of Federal Appellees (Agencies' Brief) 23. *See also* Wildlife Federations' Response Brief (Intervenors' Brief) 20-23. To treat indistinguishability in this manner undermines *Sackett*'s central holding: the CWA only regulates "waters," *Sackett*, 598 U.S. at 671, so that features like wetlands that are typically regarded as non-waters, *see id*. at 674, can be regulated only in those perhaps rare instances when they "qualify as 'waters of the United States' in their own right," *id.* at 676.

The Agencies and Intervenors do not meaningfully respond to Mr. White's argument that the phrases "indistinguishable," "no clear demarcation," and "difficult to determine" are not synonymous with "continuous surface connection." *See* Opening Brief 36-37. Instead, the Agencies argue that *Sackett*'s requirement that it must be "difficult to determine where the 'water' ends and the 'wetland' begins," *Sackett*, 598 U.S. at 678-79 (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality opinion)), is "nonessential information," merely restating the "continuous surface connection" requirement, Agencies' Brief 23-24. But as Mr. White has explained, it is possible for two features to have a "continuous surface connection," while still being distinguishable. *See* Opening Brief 36-37. For this reason, the purported "participial phrase set-off with a comma," Agencies' Brief 23-

24—"making it difficult to determine"—cannot be merely "nonessential information," *id.*, about the "continuous surface connection" concept. It must be a specification of a particular type of "continuous surface connection"—namely, one where it is "difficult to determine where the 'water' ends and the 'wetland' begins." *Sackett*, 598 U.S. at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)). The Amended Rule's failure to qualify the "continuous surface connection" concept, as *Sackett* expressly qualified it, *see id.*, is unlawful.

The Agencies stand by their statements in the 2023 Rule's preamble that daisy-chained connections through culverts and ditches can qualify as a continuous surface connection, regardless of distance. *See* Agencies' Brief 33-34 (citing 88 Fed. Reg. at 3096). This further proves Mr. White's point. It is true that a wetland connected to a water via a series of culverts and ditches might in some sense have a "continuous surface connection." But no person would have any difficulty "demarcat[ing]," *Sackett*, 598 U.S. at 678, or distinguishing such features. *Sackett*'s indistinguishability requirement thus provides an essential qualification to the "continuous surface connection" concept.[2]

[2] Some commentators have opined that the Agencies' failure to properly qualify the surface connection concept with *Sackett*'s indistinguishability requirement, constitutes a reversion to a pre-*Rapanos* approach. *See* Tony François, *"Same As It Ever Was"—An Application of a 1980s Classic to EPA and Army Regulations "Conforming" to* Sackett v. EPA, CF004 ALI-CLE 627 (Feb. 1, 2024) ("Perversely, it reverts their approach to adjacent wetlands all the way back to before *Rapanos*,

In any event, the Agencies' grammatical arguments ignore more obvious indications of the Supreme Court's intent: that the word "indistinguishable" is used more often than the phrase "continuous surface connection," *see generally Sackett*, 598 U.S. 651, and that the Supreme Court's conclusion that the Sacketts' property was not subject to Clean Water Act regulation hinged on indistinguishability, *see id.* at 684.[3] Underscoring the Agencies' error is that numerous commentators agree with Mr. White's commonsense understanding of *Sackett*'s indistinguishability requirement. *See*, *e.g.*, Royal C. Gardner, *Waters of the United States: POTUS, SCOTUS, WOTUS, and the Politics of a National Resource* 207 (2024) ("Wetlands with a continuous surface connection are protected by the Clean Water Act *only if they are* 'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the "water" ends and the "wetland" begins.'" (quoting *Sackett*, 598 U.S. at 678-79) (emphasis added)); *id.* at 213 ("Most of the post-*Sackett* analysis of its impact on wetland jurisdiction focused solely on the continuous surface requirement and neglected to consider the 'indistinguishable'

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when [the Agencies] took the view that there was no practical distance limit over which a hydrologic connection could be established between a wetland and a navigable jurisdictional water feature." (citing *Rapanos*, 547 U.S. at 722, 726-29 (plurality opinion)).

[3] The Agencies appear to forget the commonsense rule that "the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute." *Brown v. Davenport*, 596 U.S. 118, 141 (2022) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)).

requirement: Wetlands are covered only if they are 'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the "water" ends and the "wetland" begins.'" (quoting *Sackett*, 598 U.S. at 678-79, 684)); François, *supra* note 2 ("substantially broader than the indistinguishability test adopted in the decision"); Rebecca L. Kihslinger, et al., *Unpacking the Revised WOTUS Rule*, *Panel Before the Environmental Law Institute*, 53 Env't L. Rep. 10887, 10892 (2023) (emphasizing that the word "indistinguishable" in *Sackett* is "not a mere rhetorical flourish").

B. *Sackett* requires an *aquatic* surface connection between covered waters and wetlands

The Agencies' position that the connection between water and wetland need not be aquatic, Agencies Brief 30-32, plainly conflicts with *Sackett*, which expressly contemplates a continuous surface water connection, *see* Opening Brief 45-47. *See also Sackett*, 598 U.S. at 678 (contemplating that surface water must be continuously present, absent "*temporary* interruptions . . . because of phenomena like low tides or dry spells" (emphasis added)). The Agencies' position that the surface connection between water and wetland need not be aquatic also further demonstrates the logical flaw in their argument that indistinguishability is merely nonessential window-dressing for the continuous surface connection concept. *See supra* 2-4. Even granting the Agencies' idiosyncratic position that a "continuous surface connection" is equivalent to "indistinguishability," Agencies' Brief 22-25, the plain meaning of

"continuous" remains "marked by uninterrupted extension in space, time, or sequence," *Continuous*, Merriam-Webster Dictionary (online ed.). If a continuous surface connection can be established *without* a water connection, there must still be *some* "uninterrupted" surface connection. And if that uninterrupted surface connection is not aquatic, that only leaves "land." If a continuous terrestrial surface connection is all that is required to meet *Sackett*'s test, then that test does not impose any meaningful limitation on the Agencies' authority. All wetlands bear a terrestrial connection to neighboring waters.

The Agencies simply ignore, *see* Agencies' Brief 30-32, the separate opinions in *Rapanos*—which each read the *Rapanos* plurality as requiring a surface water connection. *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring); *id.* at 805 (Stevens, J., dissenting).[4] Instead, the Agencies cite *Riverside Bayview Homes* for the proposition that mere physical "abut[ment]" suffices. Agencies Brief 31-32 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985)). But this position is inconsistent with the manner in which the government presented the facts in *Riverside Bayview Homes*—*see* Reply Brief for the United States,

[4] Intervenors, for their part, acknowledge these portions of the separate opinions in *Rapanos*—but dismiss them as mere "characterizations of the plurality opinion." Intervenors' Brief 28-29. Surely an associate justice's contemporaneous "characterization" of an opinion with which he concurred, or from which he dissented, is persuasive as to the proper reading of that opinion.

Riverside Bayview Homes, 474 U.S. 121 (1985) (No. 84-701), 1985 WL 669804, at *2 ("[I]t would not be an exaggeration to state that one could, after wading through a cattail marsh, swim directly from Riverside's property to the Great Lakes.")—and, more importantly, how the *Rapanos* plurality (and thus the *Sackett* majority) understood those facts, *see Rapanos*, 547 U.S. at 740-42 (plurality opinion).

The requirement that jurisdictional wetlands possess a continuous surface water connection likewise does not render the CWA "illogical" because many *scientifically defined* wetlands lack such a connection. *See* Agencies' Brief 30. This simply confirms *Sackett*'s central holding: that the CWA exists to protect "waters," so that features like wetlands that are typically regarded as non-waters, *see* 598 U.S. at 674, are presumptively outside the CWA's scope, and can be regulated only in those instances when they "qualify as 'waters of the United States' in their own right," *id.* at 676. It is therefore quite unremarkable that many scientifically defined wetlands are *not* federally regulated. *See id*. at 683 ("[T]he CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority."); *Rapanos*, 547 U.S. at 745-46 (plurality opinion) ("[A] Comprehensive National Wetlands Protection Act is not before us . . . [w]hat is clear, however, is that Congress did not enact one when it granted the Corps jurisdiction over only 'the waters of the United States.'"). *See also* Gardner, *supra* at 95 ("But

wetlands fell outside Justice Scalia's constricted view of 'the waters': Wetlands generally were not 'waters of the United States.'").

Finally, just like *Sackett*'s indistinguishability requirement, *Sackett*'s requirement of a surface *water* connection is widely understood among commentators across the ideological spectrum. *See*, *e.g.*, *Frequently Asked Questions regarding the U.S. Supreme Court's ruling in Sackett v. EPA*, California State Water Resources Control Board 3 (Oct. 23, 2023)[5] ("Vernal pools are shallow, seasonal wetlands that are found in California that generally would not be 'adjacent wetlands' as defined by the *Sackett* decision because vernal pools do not typically have a continuous surface water connection with a water of the United States."); Richard J. Lazarus, *Judicial Destruction of the Clean Water Act*: Sackett v. EPA, U. Chi. L. Rev. Online, at *5 (Aug. 11, 2023)[6] (referencing "the Court's adoption of the *Rapanos* plurality's 'continuous flow' requirement for adjacency"); William S. Buddy Cox III, *WOTUS at SCOTUS: Supreme Court Shrinks Clean Water Act Jurisdiction Over Wetlands*, Nat'l L. Rev. (June 9, 2023)[7] (predicting "attempts by agencies to creatively read 'continuous surface water connection'").

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[5] *Available at* https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/sackett-faq-external.pdf.

[6] *Available at* https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa.

[7] *Available at* https://natlawreview.com/article/wotus-scotus-supreme-court-shrinks-clean-water-act-jurisdiction-over-wetlands.

C. Lower court decisions confirm Mr. White's arguments

As discussed in Mr. White's opening brief, numerous lower courts have confirmed his reading of the CWA—both as to *Sackett*'s indistinguishability requirement, and as to its requirement for a surface *water* connection. *See* Opening Brief 37-42, 46-47. The Agencies and Intervenors' various attempts to explain away these cases are unavailing.

For example, the Agencies and Intervenors do not meaningfully respond to *Sharfi*—admitting that it "adopt[s] an interpretation of *Sackett* that resembles White's," Intervenors' Brief 26-27, but dismissing it as a "non-final report and recommendation, to which the United States has filed extensive objections," Agencies' Brief 29. *See also* Intervenors' Brief 27. On December 30, 2024, however, the Southern District of Florida entered final judgment against the United States and issued an order "agree[ing] with the legal conclusions of the Magistrate Judge." *United States v. Sharfi*, No. 2:21-cv-14205, 2024 WL 5244351, at *1 (S.D. Fla. Dec. 30, 2024). In addition to affirming the legal conclusions of the magistrate judge in their entirety, the Southern District of Florida stated in relevant part:

> "[C]ontinuous surface connection" means a surface water connection. Otherwise the Supreme Court's statement in *Sackett* that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells;" and the statement in *Rapanos* that "[w]etlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable* from

> waters of the United States," would have no practical meaning.

Id. (quoting *Sackett*, 598 U.S. at 678, and *Rapanos*, 547 U.S. at 755). Thus, just like the magistrate judge, the Southern District of Florida confirmed *Sackett*'s surface *water* connection requirement and emphasized the error in interpreting *Sackett* in such a manner as to render "indistinguishability" merely nonessential information about a continuous surface connection. *See id. See also United States v. Sharfi*, No. 2:21-cv-14205, 2024 WL 4483354, at *13 (S.D. Fla. Sept. 21, 2024) (emphasizing the significance of "the latter half of the second part of the *Sackett* test, which requires that the continuous surface connection be one which *makes it difficult to determine where the 'water' ends and the 'wetland' begins*" (quoting *Sackett*, 598 U.S. at 678-79) (emphasis in original)).

Likewise, far from a "narrow dispute over pleading standards," Agencies' Brief 28, *Ace Black Ranches* clearly emphasized the independent significance of *Sackett*'s "indistinguishability" requirement. *See United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113, 2024 WL 4008545, at *3 (D. Idaho Aug. 29, 2024) (dismissing United States' complaint for failing to "successfully allege[] that Ace Black Ranches discharged pollutants into wetlands that are indistinguishable from, *and* have a continuous connection with, the River, satisfying the adjacency test" (emphasis added)). *Ace Black Ranches* also unambiguously states that *Sackett* requires a surface *water* connection. *Id.* at *4 n.2. *See also Sharfi*, 2024 WL

5244351, at *2 ("[T]he court in *United States v. Ace Black Ranches* . . . expressly stated in granting a motion to dismiss the government's complaint 'The Government still needs to connect any wetlands it believes Ace Black Ranches' has polluted with the River via a *sufficient surface-water connection*.'" (quoting *Ace Black Ranches*, 2024 WL 4008545, at *4 n.2)).

Sweeney does not undermine Mr. White's arguments. *See United States v. Sweeney*, No. 2:17-cv-00112, 2024 WL 4527260 (E.D. Cal. Oct. 18, 2024). While it is true that the Eastern District of California declined to modify its previous judgment in light of *Sackett*, the evidence before the court demonstrated a continuous surface flow of water between the wetlands and adjacent bodies of water. *See id.* at *4 ("Specifically, the government demonstrated the wetlands of Point Buckler Island were connected to the approximately two miles of tidal channels, which carried water into, throughout and out of the tidal marsh."). Consistent with Mr. White's position, the court also emphasized, in its ultimate conclusion, that "the wetlands and the tidal waters" were "indistinguishable as a practical matter, as it was difficult to determine where the water ended and the wetlands began." *Id.*

With respect to *Lewis*, *Chameleon*, and *Glynn*, the Agencies and Intervenors miss the larger point. In each of these three cases, the Agencies (or in *Glynn*, the environmental plaintiffs), sought a broad application of the CWA to a particular wetland area, only to be told that their assertions of CWA authority were faulty in

light of *Sackett*. *See Lewis v. United States*, 88 F.4th 1073, 1079 (5th Cir. 2023) ("[R]emand is not appropriate to allow USACE another attempt to assert federal authority over the Lewis property."); *United States v. Chameleon, LLC*, No. 3:23-cv-00763, 2024 WL 3835077, at *5 (E.D. Va. Aug. 15, 2024) ("[T]he United States ultimately fails to adequately plead its CWA claim."); *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, No. 2:19-cv-00050, 2024 WL 1088585, at *5 (S.D. Ga. Mar. 1, 2024) ("Plaintiffs failed to allege facts indicating the Subject Property is adjacent to Dunbar Creek and has such a continuous surface connection to it that it is 'indistinguishable' from it[.]"). It beggars belief to suggest—as Intervenors do, *see* Intervenors' Brief 23-25—that these defeats are somehow an endorsement of the Agencies' post-*Sackett* approach to regulating wetlands.

Finally, as for pre-*Sackett* lower court decisions applying or interpreting the *Rapanos* plurality's test, Intervenors concede that *Cundiff* determined that the *Rapanos* plurality "clearly requires surface flow," but note *Cundiff*'s qualification that this "does not mean that only perpetually flowing creeks satisfy the plurality's test." Intervenors Brief 29 n.3 (quoting *United States v. Cundiff*, 555 F.3d 200, 212 (6th Cir. 2009)). But nothing in this qualifying language is inconsistent with *Sackett*'s view that surface water must be continuously present, absent "temporary interruptions . . . because of phenomena like low tides or dry spells." *Sackett*, 598 U.S. at 678. The bottom line is that, in applying the *Rapanos* plurality's test, *Cundiff*

stated that "the plurality's test requires a *topical flow* of water between a navigable-in-fact waterway or its tributary with a wetland[.]" *Cundiff*, 555 F.3d at 212 (emphasis added). And while it is true that the characterization of *Rapanos* in *Simsbury-Avon Preservation Society* was "the 'defendant's reading,' undisputed by plaintiffs," Intervenors' Brief 29 n.3 (quoting *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 224 (D. Conn. 2007)), the fact that the adversarial parties in that case agreed that the *Rapanos* plurality requires a surface water connection—and that the district court did not second guess this understanding—is further evidence that such a requirement is the best and most natural reading of *Rapanos*.

D. Background principles of construction counsel against the Agencies' interpretation of "navigable waters"

The Agencies' interpretation of the CWA as authorizing the regulation of wetlands where the Agencies cannot independently prove "indistinguishability," and where such wetlands lack a continuous *water* connection to covered waters, raises serious constitutional questions relating to federalism, nondelegation, and due process. *See* Opening Brief 49-55. These questions counsel rejection of the Agencies' interpretation of the scope of their own authority, pursuant to the federalism clear statement canon and the canon of constitutional avoidance. *See id.* Like the district court below, *see* JA144-145, the Agencies and Intervenors' position is that, because the Supreme Court employed these canons in *Sackett*, and because

(in their view) the Amended Rule is faithful to *Sackett*, there is no further work for these canons to do here. *See* Agencies' Brief 35-40; Intervenors' Brief 30-31, 33. This non-response sidesteps the question.

To the extent that the Agencies and Intervenors offer any further response, their arguments are unavailing. For example, the Agencies and Intervenors' argument that the CWA's broad, aspirational goals to "'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' while balancing 'the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,'" Agencies' Brief 37 (quoting 33 U.S.C. § 1251(a)-(b)); Intervenors' Brief 32, provides an intelligible principle justifying the Amended Rule's broad definition of "adjacent wetlands" is essentially refuted by the Supreme Court's unanimous rejection of the significant nexus test in *Sackett*. The significant nexus test was itself modeled after the CWA's same statement of purpose. *See Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) ("[W]etlands possess the requisite nexus . . . if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"). But this did not prevent the Supreme Court from unanimously determining that the significant nexus test went beyond the CWA's delegation of authority to the Agencies to regulate only "navigable waters." *See Sackett*, 598 U.S. at 680 ("EPA has no statutory basis to

impose [the significant nexus test].”); *id.* at 715-16 (Kavanaugh, J., concurring) (“I agree with the Court’s decision not to adopt the ‘significant nexus’ test for determining whether a wetland is covered under the Act.”).

With respect to due process, the Agencies appeal to their self-created “approved jurisdictional determination” (AJD) process to cure the vagueness concerns identified by Mr. White. *See* Agencies’ Brief 41. But to gain notice of the law, landowners like Mr. White must resort to hiring “expensive expert consultant[s],” *Sackett*, 598 U.S. at 670-71, to seek a determination that the Agencies contend they are not even obligated to provide, *see id.* This costly yet uncertain procedure only serves to underscore the due process problems with the Agencies’ interpretation. *See id.* at 680-82 (“Due process requires Congress to define penal statutes ‘with sufficient definiteness that ordinary people can understand what conduct is prohibited’ and ‘in a manner that does not encourage arbitrary and discriminatory enforcement.’” (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016))).

E. These defects render the Amended Rule facially invalid

The fundamental, substantive defects in the Amended Rule render it unlawful and ultra vires, and thus facially invalid. *See Fed. Election Comm’n v. Cruz*, 596 U.S. 289, 301 (2022) (“An agency . . . ‘literally has no power to act’ . . . unless and until Congress authorizes it to do so by statute.” (quoting *La. Pub. Serv. Comm’n v.*

Fed. Commc'ns Comm'n, 476 U.S. 355, 374 (1986))). The Agencies argue, however, that Mr. White's APA challenge must fail because, even under Mr. White's reading of the CWA, there could exist individual circumstances whereby the Amended Rule's unlawfully overbroad view of the CWA would nevertheless encompass regulation of some wetlands that are lawfully subject to regulation. *See* Agencies' Brief 24. The Agencies argue, therefore, that Mr. White has failed to "meet his burden to show that the Amended Regulations are unlawful in all circumstances." *Id.* at 25 (citing *Reno v. Flores*, 507 U.S. 292, 301 (1993)). This argument ignores what is at issue: an unlawful and ultra vires regulation that is predicated upon an erroneous reading of the CWA. In every application of this unlawful regulation, the Agencies necessarily act unlawfully—even if, incidentally, they are regulating an area that might otherwise be regulated under some hypothetical lawful regulation. In this sense, the Agencies appear to collapse *unlawfulness* with *injury*. True, a landowner with properly regulable wetlands on his property will not ultimately be *injured* by application of the Amended Rule to his property—because a lawful interpretation of the CWA would hypothetically lead to the same outcome. But this does not change the fact that the rule that *is being applied* constitutes an unlawful and ultra vires application of the CWA. The question to be resolved on the merits of Mr. White's facial APA claim is whether *the Agencies* have acted unlawfully by omitting *Sackett*'s central indistinguishability and water-connection requirements

from their definition of "navigable waters." *Cf. Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 818 n.5 (2024) (emphasizing "the defendant-focused *substance* of an APA claim").

Indeed, if the unlawful Amended Rule's incidental regulation of some wetlands that would nevertheless be regulated under a hypothetical lawful construction of the CWA were reason to deny Mr. White relief, it would be impossible to explain the numerous cases entering preliminary injunctions and final judgments in facial challenges to prior definitions of "navigable waters." *See In re EPA & Dep't of Defense Final Rule*, 803 F.3d 804 (6th Cir. 2015), *vacated on other grounds*, *In re U.S. Dep't of Defense*, 713 Fed. App'x 489 (6th Cir. 2018) (preliminarily enjoining 2015 definition of "navigable waters"); *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015) (same); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018) (same); *Texas v. EPA*, No. 3:15-CV-00162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018) (same); Order, *Or. Cattlemen's Ass'n v. EPA*, No. 3:19-cv-00564 (D. Or. July 26, 2019), ECF No. 58 (same); *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019) (holding 2015 definition of "navigable waters" unlawful on the merits); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019) (same); *Texas v. EPA*, 662 F. Supp. 3d 739 (S.D. Tex. 2023) (preliminarily enjoining 2023 definition of "navigable waters"); *West Virginia v. EPA*, 669 F. Supp. 3d 781 (D.N.D. 2023) (same); Order, *Kentucky v. EPA*, Nos. 23-5343 and 23-5345 (6th Cir.

May 10, 2023), ECF No. 24 (enjoining 2023 definition of "navigable waters" pending appeal). Each rule at issue in these cases—while unlawful—would likewise have covered *some* lawfully regulated wetlands in individual circumstances. But this was no impediment to relief on the plaintiffs' APA claims.

On this point, it must also be emphasized that the Amended Rule *has* been applied to Mr. White's properties, *see* E.D.N.C. ECF No. 62 at 17 (arguing that "the wetlands on Mr. White's property that the United States contends are jurisdictional in the Enforcement case are jurisdictional under the Amended Regulations"); that the alleged wetlands on Mr. White's properties are not properly regulable under Mr. White's reading of *Sackett*, *see* JA52 (explaining that the alleged wetlands on Mr. White's properties are distinguishable from, and contain no surface water connections to, any covered waters); and that Mr. White does not request that the Amended Rule be preliminarily enjoined *in all circumstances*, instead limiting his request to an injunction against its *unlawful application* to his lands, *see* JA47-48.

II. Mr. White is suffering irreparable harm

Mr. White has concrete plans that involve the dredging and filling of relatively low-lying lands bordering covered waters. *See* Opening Brief 59-61. In pursuing these plans, Mr. White must unquestionably abide by the Amended Rule's delineation of what is or is not lawful. As a result, Mr. White has already taken steps to comply with the Amended Rule—incurring significant costs. *See id*. Courts

addressing prior definitions of "navigable waters" have routinely treated such costs as irreparable harm. *See id.* at 62. The Agencies and Intervenors attempt to evade this straightforward case law by: (A) arguing that Mr. White's harms are unduly "speculative," non-imminent, or "generalized," *see* Agencies' Brief 42-45; Intervenors' Brief 34-38; and (B) offering the approved jurisdictional determination process as an alternative remedy, *see* Agencies' Brief 42-43; Intervenors' Brief 38-39. Intervenors further argue that (C) Mr. White's injuries are not irreparable because they are economic. *See id.* at 39-41. None of these arguments has merit.

A. Mr. White's injuries are concrete and immediate

The Agencies and Intervenors argue that the costs for Mr. White to conform his conduct to the Amended Rule are "generalized," "speculative," or insufficiently imminent. *See* Agencies' Brief 42-45; Intervenors' Brief 34-38. But Mr. White has presented evidence of concrete plans which the Amended Rule has directly and immediately disrupted.

First, Mr. White invested significant resources to secure a state sand mining permit. JA50-51. Yet the Agencies have prohibited Mr. White from developing this mine, under threat of *additional enforcement*—that is, enforcement in addition to the ongoing enforcement case. *See* JA53, JA117-118. This has been financially devastating. *See* JA50-51, JA53. That "the United States did not bring an enforcement action on the sand-mining portion of Plaintiff's property," Agencies'

Brief 45, merely reflects that Mr. White abided by the Agencies' threats—stalling development of his mine at great economic cost, JA50-51, JA53. It does not follow that Mr. White has nothing to fear should he decide to proceed. Instead, Mr. White has every reason to believe that, should he resume development of the mine, he will face additional enforcement. *Cf. Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018) ("The most obvious way to demonstrate a credible threat of enforcement in the future, of course, is an enforcement action in the past.").

Second, due to the authority claimed in the Amended Rule, Mr. White is unable to engage in erosion control to prevent the ongoing loss of his farmlands. JA54. The Agencies have—since finalizing the Amended Rule—maintained an unmodified enforcement action against Mr. White for similar erosion control projects previously undertaken, JA51-52—this fact underscores the causal link between the additional compliance costs Mr. White has incurred and the Amended Rule. The Agencies also argue that Mr. White "fails to explain why any harm caused by erosion cannot be remedied at a later date." Agencies' Brief 44. But Mr. White has explained that his properties are washing into various bodies of water—and how as a result he is every day *irreversibly* losing arable farmlands. JA54.

Third, the Agencies and Intervenors' contention that Mr. White has not alleged facts demonstrating irreparable harm to occur during the period while he is waiting for a decision on the merits in this case, or alternatively the enforcement

case, *see* Agencies. Brief 42, 46; Intervenors' Brief 37, is inaccurate. Mr. White explains that he would pursue his planned activities immediately, should the Amended Rule be enjoined, JA56-57, and he explains that, with every day that he cannot pursue his projects, he is losing money (and land), JA54-55, JA57.[8]

More fundamentally, the Agencies and Intervenors ignore what is at issue: a rule that defines the scope of a statutory prohibition backed by extraordinary penalties. Mr. White's planned activities are more than plausibly regulated under the CWA, and he must unquestionably abide by the Amended Rule's delineation of what is or is not lawful—or face "'crushing' consequences" for even an inadvertent violation. *Sackett*, 598 U.S. at 660 (quoting *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)). For this reason, courts have repeatedly emphasized the need for landowners to navigate the scope of the Agencies' authority (by applying their definition of "navigable waters") as the most troubling aspect of the regulated public's *compliance* with the CWA. *See Hawkes Co.*, 578 U.S. at 594 ("It is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does."); *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("Any

[8] Intervenors also argue that Mr. White has failed to specifically identify his properties. Intervenors' Brief 36. This is contradicted by the apparent ease with which Intervenors' own members have identified Mr. White's properties. *See* JA80 ("[N]ear the plaintiff's property.").

piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the Agency thinks possesses the requisite wetness, the property owners are at the Agency's mercy."). Thus, regardless of the Agencies' resolve to act against Mr. White, the costs he has incurred are necessary to ensure *compliance* with the Amended Rule.

B. The AJD process underscores Mr. White's injuries

The AJD process itself underscores the harms Mr. White is suffering.

First, the availability of "free," Intervenors' Brief 38; Agencies Brief 42-43, AJDs does not eliminate the compliance costs associated with the Amended Rule. Seeking an AJD takes time, often a great deal of time, even if the applicant is able to pay environmental consultants to speed things up. Indeed, the Corps itself "recommends that [a landowner] contract with an environmental consultant" in order "[t]o expedite" any AJD request. Obtaining a Jurisdictional Determination, U.S. Army Corps of Engineers 3 (July 2017).[9] And the Supreme Court recognized that costly consultants are an *inevitable* part of the AJD process. *See Sackett*, 598 U.S. at 670-71. *See also Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring). In short, the AJD process presents Mr. White with an untenable dilemma. He can either suffer the consequences of delaying his projects

[9] *Available at* E.D.N.C. ECF No. 36-2.

until the Corps does all the work, JA55-57 (describing consequences of delay), or he can pay consultants to try to hurry that process along, JA53 (describing costs of hiring consultants). No matter which option Mr. White chooses, the Amended Rule's breadth imposes substantial compliance costs. For this reason, in a challenge to the 2023 Rule, the Sixth Circuit determined that the "need to hire consultants to determine what project changes, permitting, or mitigation may be required under the rule" itself was irreparable harm. Order, *Kentucky*, No. 23-5343, ECF No. 24 at 5-6.

Second, even were Mr. White to apply for an AJD, the outcome of that process would provide no guaranteed remedy. The AJD process would at most resolve uncertainty in the CWA's application to Mr. White's properties. But Mr. White's harm is not simply *abstract* uncertainty. It is uncertainty *coupled with direct regulation and the threat of liability*. JA53-55. A positive AJD—a very plausible outcome under the unlawfully broad Amended Rule—would, far from *resolving* Mr. White's harms, only *exacerbate* them by confirming the Agencies' claims over his property. *See Sackett*, 598 U.S. at 660. And even should Mr. White find himself among the lucky few to receive a *negative* AJD, that AJD would bind only the government, and would not prevent a citizen suit. *See Hawkes*, 578 U.S. at 598-99 ("the property owner may still face a citizen suit").

This lack of guaranteed relief distinguishes Mr. White's case from *Di Biase v. SPX Corporation*, 872 F.3d 224 (4th Cir. 2017). There, plaintiffs alleged irreparable harm from a lapse in medical insurance. *Id.* at 235. Defendants, however, had provided an avenue—albeit potentially time-consuming—for plaintiffs to secure guaranteed coverage at no additional cost. *Id.* In contrast, should Mr. White seek an AJD, he is *at best* guaranteed further costs and uncertainty. At worst, he is guaranteed the CWA's permitting process and the threat of liability. Further distinguishing *Di Biase*, even were Mr. White to seek an AJD, the Corps maintains that it is not obligated to issue one, *see Sackett*, 598 U.S. at 670-71, and Mr. White possesses no avenue to compel the issuance of one, *see Mashni v. U.S. Army Corps of Eng'rs*, 535 F. Supp. 3d 475, 485 (D.S.C. 2021).

C. Compliance harms are irreparable

Intervenors' argument that Mr. White's injuries are not irreparable because they are economic, Intervenors' Brief 39-41, is simply wrong. Compliance costs generally constitute irreparable harm because the government's sovereign immunity from damages renders them nonrecoverable. *See Odebrecht Constr., Inc. v. Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." (collecting cases)). Courts routinely hold that federal regulation creates

irreparable harm when it "places an immediate and irreversible imprint" on the regulated community through compliance costs. *BST Holdings, LLC v. Occupational Safety & Health Admin.*, 17 F.4th 604, 618 (5th Cir. 2021). *See also Ala. Ass'n of Realtors v. U.S. Dep't of Health & Human Servs.*, 594 U.S. 758, 765 (2021) ("The moratorium has put the applicants . . . at risk of irreparable harm[.]"). Courts addressing prior definitions of "navigable waters" have reached the same conclusion. *See* Order, *Kentucky*, No. 23-5343, at 5-6; *West Virginia*, 669 F. Supp. 3d at 809; *Texas*, 2018 WL 4518230, at *1.

III. The equities and public interest favor enjoining the Amended Rule

The Agencies invoke a "strong public interest" in the Amended Rule. Agencies' Brief 46. To the contrary, numerous courts in this precise context have determined that "[i]t benefits the public to 'ensure that federal agencies do not extend their power beyond the express delegation from Congress.'" *West Virginia*, 669 F. Supp. 3d at 818 (quoting *North Dakota*, 127 F. Supp. 3d at 1060). *See also Texas*, 662 F. Supp. 3d at 757 (same); *Texas*, 2018 WL 4518230, at *1 ("overwhelming" public interest). Intervenors argue that because the Amended Rule might provide some abstract environmental benefit, the equities favor maintaining it. Intervenors' Brief 42-46. But "even the most admirable aspirations 'do[] not permit agencies to act unlawfully.'" *Texas*, 662 F. Supp. 3d at 758 (quoting *Ala. Ass'n of Realtors*, 594 U.S. at 766).

CONCLUSION

This Court should reverse the district court's denial of Mr. White's motion for preliminary injunction. And it should remand with instructions for the district court to preliminarily enjoin all Defendants-Appellees from giving effect to, implementing, or enforcing the "adjacent wetlands" provisions of the Amended Rule, as to Mr. White and his properties.

DATED: January 17, 2025.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 24-1635 **Caption:** White v. U.S. Environmental Protection Agency

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