Nos. 23-15089, 25-2498

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA.

Plaintiff - Appellee,

v.

JOHN DONNELLY SWEENEY; POINT BUCKLER CLUB, LLC,

Defendants - Appellants.

On Appeal from the United States District Court
for the Eastern District of California
Hon. Kimberly J. Mueller, District Judge
No. 2:17-cv-00112-KJM-JDP

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE ISSUES

1. Whether the U.S. District Court for the Eastern District of California (the "District Court") erred by failing to analyze whether Point Buckler Island's tidal channels constitute "relatively permanent waters" under the Clean Water Act ("CWA").
2. Whether the District Court erred by finding Point Buckler Island's wetlands are part of "the waters of the United States" under the CWA merely because they abut its tidal channels.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a) and with the parties' consent, Pacific Legal Foundation ("PLF")[1] submits this amicus brief in support of Defendants-Appellants John Donnelly Sweeney and Point Buckler Club, LLC ("Appellants") urging this Court to vacate the District Court's October 18, 2024 Order denying Appellants' Motion to Amend Findings and for New Trial, or to Alter or Amend Judgment or for Relief from Judgment (the "New Trial Order"), *United States v. Sweeney*, No. 2:17-cv-00112, 2024 WL 4527260 (E.D. Cal. Oct. 18, 2024), and remand to reconsider the motion under the correct legal standards governed by

[1] PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

Sackett v. EPA, 598 U.S. 651 (2023). Founded in 1973, PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF is the most experienced public-interest legal organization advocating for private property rights and defending the constitutional principle of separation of powers. Most relevant to this case, PLF attorneys served as counsel of record for the petitioners in *Sackett v. EPA*, 598 U.S. 651 (2023), where the Supreme Court set forth the controlling interpretation for what wetlands and other features qualify as "waters of the United States" under the CWA.

PLF attorneys also have served as counsel of record for some of the Supreme Court's other recent CWA cases. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016) (Army Corps' CWA-approved jurisdictional determination is final agency action under Administrative Procedure Act ("APA")); *Sackett v. EPA*, 566 U.S. 120 (2012) (plaintiffs may sue under APA to challenge EPA's CWA administrative compliance order); *Rapanos v. United States*, 547 U.S. 715 (2006) (application of CWA's "waters of the United States" provision to wetlands). PLF also participated as amicus curiae in *Glynn Environmental Coalition, Inc. v. Sea Island Acquisition, LLC*, 146 F.4th 1080 (11th Cir. 2025), which contains the most extensive circuit court analysis of *Sackett* to date.

PLF's broad CWA litigation experience offers the Court an important perspective that will assist it in deciding whether the District Court misapplied *Sackett* when it failed to analyze whether Point Buckler Island's (1) tidal channels constitute "relatively permanent waters"; and (2) wetlands are indistinguishable from the tidal channels. This brief also provides important legal background on the Supreme Court's interpretation of the statutory term "waters of the United States."

SUMMARY OF THE ARGUMENT

In *Sackett v. EPA*, the Supreme Court provided clear guidance regarding which wetlands constitute "waters of the United States," holding that for wetlands to be regulated, "they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." 598 U.S. 651, 676 (2023) (citation omitted). The wetland must have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 678-79 (citation omitted). It also held that "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.'" *Id.* at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality)) (cleaned up). In so holding, the Court resolved decades of dispute regarding the CWA's scope and significantly narrowed the universe of covered wetlands and other

waters. Despite the Supreme Court's clarity, the District Court made two errors when applying *Sackett*.

First, the District Court erred by failing to consider whether Point Buckler Island's tidal channels meet *Sackett*'s "relatively permanent waters" test. Instead of applying the controlling statutory definition, the District Court focused exclusively on the U.S. Army Corps of Engineers/U.S. Environmental Protection Agency's 1986 Regulations,[2] *United States v. Sweeney*, 483 F. Supp. 3d 871, 918-19 (E.D. Cal. 2020), which set forth the agencies' interpretation of the types of water bodies that fall under the CWA's definition "the waters of the United States." 33 C.F.R. § 328.3 (2014). This was error because the District Court ignored that *Sackett* established a universal standard for what qualifies as "waters" under the CWA. It was required to, but failed to, apply *Sackett*'s interpretation of "the waters of the United States." Further, the District Court failed to grasp that the regulations cannot alter or expand the CWA's definition of "the waters of the United States," as interpreted by the Supreme Court. The Supreme Court's statutory interpretation controls this case, regardless of the fact that *Sackett* did not involve tidal channels. And because it was a controlling change in law, as confirmed by the Eleventh Circuit, the District Court should have applied the relatively permanent test to the tidal channels.

[2] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206 (Nov. 13, 1986) (the "1986 Regulations").

Second, the District Court misapplied *Sackett*'s wetlands test. Instead of determining whether the island's wetlands are indistinguishable from, and have a continuous surface connection to, the tidal channels that run through the island, the District Court affirmed statutory authority solely on the basis that the wetlands "abut" the tidal channels. *Sweeney*, 483 F. Supp. 3d at 919, 925-27. In so holding, the District Court misinterpreted *Sackett*'s continuous surface connection requirement to allow for regulation even in the absence of a surface water connection. Thus, it parted from numerous courts that have held that the continuous surface connection must be one of surface water. The District Court's position also is inconsistent with the Corps/EPA's newly released proposed rule interpreting "waters of the United States," which requires a continuous surface water connection.

Further, this Court should vacate and remand to ensure that the government does not undermine *Sackett*. Following each of the Supreme Court's previous CWA cases interpreting the "waters of the United States" provision, the Corps and EPA attempted to water down the Court's holdings through rulemakings and guidance. Unfortunately, before the District Court, the United States picked up where the pre-*Sackett* agencies left off. This Court should apply *Sackett* as the Supreme Court intended it to be applied, vacate the District Court's Order, and remand this case for the District Court to apply the correct legal standards.

ARGUMENT

I. This Court Should Vacate and Remand Because the District Court Applied the Wrong Standards for Analyzing Whether Point Buckler Island's Tidal Channels and Wetlands Are Among "the Waters of the United States" Under the Clean Water Act and *Sackett*

A. Legal Background Regarding the Jurisdictional Scope of the CWA

Prior to May 2023, there was confusion regarding the scope of the CWA, which regulates discharges of "pollutant[s]" from "point source[s]" to "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(12). Although the CWA defines "navigable waters" as "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7), and defines "territorial seas," *id.* § 1362(8), it does not define "waters of the United States." Thus, courts have struggled to clarify this phrase. The Supreme Court attempted to bring clarity in *Rapanos v. United States*, where it considered "whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States.'" 547 U.S. at 729 (plurality). However, no opinion garnered a majority. Instead, the Court ruled for the petitioners through a four-Justice plurality, with Justice Kennedy providing the fifth vote through a concurrence in the judgment.

The plurality interpreted "waters of the United States" to "include[] only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Id.* at 739 (plurality) (quoting Webster's Second International

Dictionary 2882 (2d ed. 1954)) (cleaned up). This interpretation excluded "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* As to wetlands, the plurality held that the CWA provides authority over "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands . . . ." *Id.* at 742 (stating that "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States'" are not covered).

Although Justice Kennedy provided the fifth vote, he did not agree with the plurality's reasoning. Instead, he would have found jurisdiction under the CWA where "a water or wetland . . . possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in judgment) (citation omitted). His "significant nexus" test was to be considered by examining multiple factors. *Id.* Following *Rapanos*, there was uncertainty regarding whether the plurality's or Justice Kennedy's opinion controlled, with the government maintaining that the significant nexus test was "sufficient to establish jurisdiction over 'adjacent' wetlands." *Sackett*, 598 U.S. at 669. And the circuits split, with some holding that regulatory authority could be shown through only the significant nexus test, and others holding that authority could be established through either the plurality or significant nexus test. *See United*

States v. Robison, 505 F.3d 1208, 1219 (11th Cir. 2007) (citations omitted) (discussing split among First, Seventh, and Ninth Circuits). In *Northern California River Watch v. City of Healdsburg*, this Court held that "Justice Kennedy's concurrence provides the controlling rule of law." 496 F.3d 993, 999-1000 (9th Cir. 2007).[3] In *Sackett*, however, all nine Justices rejected Justice Kennedy's significant nexus test; the Court also produced a majority opinion that now controls and clarifies the CWA's jurisdictional scope.

The *Sackett* majority "conclude[d] that the *Rapanos* plurality was correct," and thus held that "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.'" 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality)) (cleaned up). Regarding wetlands, *Sackett* held that "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 755 (plurality)). *Sackett*'s test:

> requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent body of water constitutes 'waters of the United States,' (*i.e.*, a relatively permanent body of water connected

[3] Although this Court later clarified that *Healdburg* "did not, however, foreclose the argument that Clean Water Act jurisdiction may also be established under the [*Rapanos*] plurality's standard," *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011), it continued to apply the significant nexus standard up to, and including in, *Sackett v. EPA*, 8 F.4th 1075, 1092-93 (9th Cir. 2021), *rev'd and remanded*, 598 U.S. 651 (2023).

> to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

Id. at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality)) (cleaned up). This "continuous surface connection" exists when "'there is no clear demarcation between waters and wetlands.'" *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742 (plurality)).

Following *Sackett*, the Fifth Circuit confirmed that, "[f]rom a legal standpoint, this test significantly tightens the definition of federally regulable wetlands, as compared with the 'significant nexus' test and interim administrative regulations." *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023). And the Eleventh Circuit recently clarified that, for a "continuous surface connection" to be present, the party asserting statutory authority must establish that "there is a continuous flow" of water connecting the relatively permanent water with the putative jurisdictional wetland. *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, 146 F.4th 1080, 1090 (11th Cir. 2025) (affirming grant of motion to dismiss).

B. The District Court's Failure to Consider Whether Point Buckler Island's Tidal Channels Are "Relatively Permanent Waters"

The District Court erred by failing to consider whether Point Buckler Island's tidal channels meet *Sackett*'s "relatively permanent waters" test. As noted, *Sackett*'s test:

> requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent body of water constitutes 'waters of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it 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)) (cleaned up). Simplified, this test requires three types of "waters": (1) a traditional navigable water; (2) a relatively permanent water; and (3) jurisdictional wetlands. The District Court's analysis got off to a good start, but it quickly diverged from *Sackett*'s requirements.

The District Court correctly began by identifying the traditional navigable water in this case. "Traditional navigable waters" are "interstate waters that were either navigable in fact and used in commerce or readily susceptible of being used in this way." *Id.* at 659. The District Court made this required finding by identifying Grizzly Bay, Suisun Cutoff, and Andy Mason Slough as "water bodies" surrounding Point Buckler Island "that are navigable in the traditional sense and subject to the ebb and flow of the tide." *Sweeney*, 483 F. Supp. 3d at 885 (Factual Findings ¶¶ 5-6).

However, the District Court then diverged from *Sackett* by failing to analyze whether the island's tidal channels are "relatively permanent waters." "[T]he CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are

described in ordinary parlance as streams, oceans, rivers, and lakes.'" 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality)) (cleaned up). These relatively permanent waters are contrasted with unregulated "intermittent" waters, which are those "whose flow is '[c]oming and going at intervals.'" *Rapanos*, 547 U.S. at 732 n.5 (plurality) (alteration in original; citation omitted); *see id.* at 739 ("[T]he phrase 'the waters of the United States' . . . does not include channels through which water flows intermittently or ephemerally . . . ."). Instead of applying the controlling statutory definition, the District Court focused exclusively on the Corps/EPA's 1986 Regulations, *Sweeney*, 483 F. Supp. 3d at 918-19, which set forth the agencies' interpretation of the types of water bodies that fall under the CWA's definition "the waters of the United States." 33 C.F.R. § 328.3 (2014). This was error for two reasons.

First, the District Court ignored that *Sackett* established a universal standard for what qualifies as "waters" under the CWA. *Sackett*, 598 U.S. at 671. Contrary to the District Court, *see Sweeney*, 2024 WL 4527260, at *4, it does not matter that *Sackett* was not a case concerning tidal channels. Rather, *Sackett* set forth the "relatively permanent" test, and to be regulable, *any* putative "waters"—including tidal channels—must meet this test. In this way, the District Court ignored that:

> when the Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law *and must be given full retroactive effect in all cases still open on direct*

> *review and as to all events, regardless of whether such events predate or postdate the Supreme Court's announcement of the rule*.

Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC, No. 2:19-cv-050, 2024 WL 1088585, at *4 (S.D. Ga. Mar. 1, 2024) (cleaned up; emphasis added) (quoting *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993)), *aff'd*, 146 F.4th 1080 (11th Cir. 2025). This case was "still open" at the time of the New Trial Order, and thus *Sackett*'s "relatively permanent waters" test governed, even though this case's "events predate" *Sackett* and regardless of the 1986 Regulations still being in place for California. Rather than applying this test, the District Court made only a passing reference to "relatively permanent." *Sweeney*, 2024 WL 4527260, at *4.

Second, the District Court's application of the 1986 Regulations instead of the statutory text misunderstands how the regulations operate. These regulations primarily provide guidance to the Corps and EPA when they exercise their separate functions under the CWA. So, when the Corps receives a request for jurisdictional determination, it applies these regulations to determine if a specific body of water is jurisdictional. But, a petitioning party may then challenge in federal court the Corps' application of the regulations to the allegedly jurisdictional water. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016); *Lewis*, 88 F.4th at 1076-78. Likewise, EPA looks to these regulations when determining whether to issue an administrative compliance order. But, a party receiving such an order may then

challenge it in federal court, contesting EPA's application of the regulations to the allegedly jurisdictional water. *See Sackett*, 598 U.S. 651.

The regulations, however, cannot alter or expand the CWA's definition of "the waters of the United States" when the United States brings an enforcement action in district court. A court still must apply *Sackett*—without reflexively deferring to the regulations—to determine if the case's specific water bodies are regulated. Thus, in its New Trial Order, it was error and a *non sequitur* for the District Court to conclude that *Sackett* was not an intervening change in law because the Supreme "Court did not revisit the definition or import of the term 'tidal waters.'" *Sweeney*, 2024 WL 4527260, at *4 (citation omitted). *Sackett*, decided in May 2023, does represent a "change" because the "Supreme Court altered the jurisdictional test." *Glynn Env't*, 146 F.4th at 1087-88. At the time of the September 2020 Liability Order, the 1986 Regulations did not identify "relatively permanent waters" as regulated, and no controlling precedent required the District Court to analyze nontraditional navigable waters to determine if they were "relatively permanent waters" (as *Rapanos* was only a plurality opinion that had yet to be adopted by *Sackett*).

These were errors warranting the vacatur of the New Trial Order and remand to determine if the tidal channels constitute "relatively permanent waters."

C. The District Court's Failure to Analyze Whether Point Buckler Island's Wetlands Are "Indistinguishable" from Its Tidal Channels

Even if this Court holds that the District Court was not required to apply the relatively permanent test to the tidal channels (or determines in the first instance that the channels are relatively permanent), vacatur and remand are still warranted because the District Court misapplied *Sackett*'s wetlands test. *Sackett*'s test:

> requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent body of water constitutes 'waters of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it 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)) (cleaned up). This "continuous surface connection" exists when "'there is no clear demarcation between waters and wetlands.'" *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742 (plurality)).

Instead of applying this test, the Liability Order affirmed the government's regulatory authority solely on the basis that the wetlands "abut" the tidal channels. *Sweeney*, 483 F. Supp. 3d at 919, 925-27. This abutment theory cannot be squared with *Sackett*'s requirement that any surface connection between water and wetland must be aquatic, *i.e.*, surface water. *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"); *id.* (referencing a wetland that

has an "'unimpaired connection with the open sea up to the head of tidal influence'" as an example of a covered wetland (quoting 33 U.S.C. § 2802(5))). The Eleventh Circuit confirmed this recently by affirming the grant of a motion to dismiss because the plaintiffs "provide[d] no information about whether there is a continuous flow." *Glynn Env't*, 146 F.4th at 1090. The requirement of a "continuous flow" clearly contemplates a flow *of water*. Multiple district courts have reached the same conclusion. *See United States v. Sharfi*, No. 2:21-cv-14205, 2024 WL 5244351, at *1 (S.D. Fla. Dec. 30, 2024) ("'[C]ontinuous surface connection' means a surface *water* connection." (emphasis added)); *United States v. Sharfi*, No. 2:21-cv-14205, 2024 WL 4483354, at *13 (S.D. Fla. Sept. 21, 2024) ("I disagree with Plaintiff's argument that that [*sic*] the 'continuous surface connection' required by *Sackett* does not require a continuous *water* surface connection and instead requires only that the adjacent regulated body of water 'abut' the wetlands."), *report and recommendation adopted*, 2024 WL 5244351 (S.D. Fla. Dec. 30, 2024); *United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113, 2024 WL 4008545, at *4 n.2 (D. Idaho Aug. 29, 2024) ("The Government still needs to connect any wetlands it believes Ace Black Ranches' [*sic*] has polluted with the River via a sufficient surface-*water* connection." (emphasis added)). And the District Court's position is inconsistent with how Justice Kennedy in *Rapanos* understood the plurality's test to operate. *See* 547 U.S. at 776 (Kennedy, J., concurring in judgment) ("when a *surface-water connection* is lacking,

the plurality forecloses jurisdiction over wetlands *that abut navigable-in-fact waters*" (emphasis added)).

Given *Sackett*'s "hold[ing] that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States,'" *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 755 (plurality)), reading *Sackett* to require a continuous surface-water connection is the only interpretation that makes sense. Wetlands cannot be "indistinguishable" from "waters" unless the surface water in the wetlands is continuously connected to the surface water in the "waters." After all, "wetlands must qualify as 'waters of the United States' in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." *Id.* at 676 (citation omitted).

The District Court had a chance to correct its misapplication of the law in its New Trial Order, but it instead doubled down on its abutment theory. It compounded its error by quoting *United States v. Andrews* for the proposition that wetlands are jurisdictional when they "'have a continuous physical connection to covered waters.'" *Sweeney*, 2024 WL 4527260, at *4 (quoting *United States v. Andrews*, 677 F. Supp. 3d 74, 88 (D. Conn. 2023)). But, as just discussed, *Sackett* requires a surface-water connection, not just any "physical" connection. *See supra* pp. 14-16. And instead of discussing the *Sackett* majority opinion to determine how to apply *Sackett*'s "indistinguishability" requirement, the District Court relied on Justice

Kavanaugh's concurrence in the judgment. *Sweeney*, 2024 WL 4527260, at *4 (quoting *Sackett*, 598 U.S. at 716 (Kavanaugh, J., concurring in judgment)). The District Court should know better, as a concurring or "dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 230 (2023).

Getting the wetlands test right is not a mere academic exercise. Rather, parts of the Liability Order indicate that, once the proper test is applied on remand, at least some wetlands will be found to be unregulated. For example, the District Court noted that some of Point Buckler Island could be considered wetlands so long as water was found in the upper twelve inches of soil. *See Sweeney*, 483 F. Supp. 3d at 924-25, 927. But if one must dig twelve inches to locate water, this necessarily means the wetland lacks surface water and, thus, cannot possibly have a continuous surface water connection to a relatively permanent water. *See supra* pp. 14-16. This shows that at least some of the island's wetlands are unregulated, indicating that this Court should vacate and remand for the proper application of *Sackett*.

II. Vacating and Remanding Will Ensure That the Government Does Not Undermine *Sackett*, Which Is What Occurred Following Previous Supreme Court CWA Decisions

The United States' litigation positions taken before the District Court represent a frustrating but (unfortunately) unsurprising development regarding

application of the CWA's jurisdictional scope. In *Sackett*, the Court recounted how, following each CWA Supreme Court opinion, the Corps and EPA attempted to flout the Court's limiting construction of the term "the waters of the United States." *See Sackett*, 598 U.S. at 665-69. This first occurred following *United States v. Riverside Bayview Homes, Inc.*, where the Court deferred to the Corps and affirmed regulatory authority over wetlands that were "inseparably bound up with the 'waters' of the United States." 474 U.S. 121, 134 (1985). The next year, "[t]he agencies responded to *Riverside Bayview* by expanding their interpretations" and "issued the 'migratory bird rule,'" *Sackett*, 598 U.S. at 665, which "interpret[ed] the CWA to cover nonnavigable, isolated, intrastate waters." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 165-66 (2001) ("*SWANCC*"). In *SWANCC*, the Court invalidated this rule because Congress's use of the term "navigable" in "navigable waters" indicated Congress intended the CWA to cover Congress's "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172 (citation omitted).

"Days after [this] decision, the agencies issued guidance that sought to minimize *SWANCC*'s impact," leading to "a system of 'vague' rules that depended on 'locally developed practices.'" *Sackett*, 598 U.S. at 666 (citation omitted). "[A]gainst this backdrop" the Court "granted review in *Rapanos v. United States*," *id.*, where the plurality first held that wetlands are regulable only where they are "as

a practical matter *indistinguishable* from waters of the United States." *Rapanos*, 547 U.S. at 755. Not taking the hint, "the agencies . . . engaged in a flurry of rulemaking," and "offered a muscular approach that would subject 'the vast majority of the nation's water features' to a case-by-case jurisdictional analysis." *Sackett*, 598 U.S. at 668 (citation omitted). Although *Sackett* rejected this approach, *id.* at 679-83, the agencies responded with another rule, which is currently enjoined in twenty-six States. *See Definition of "Waters of the United States": Rule Status and Litigation Update*, United States Environmental Protection Agency, https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update (last visited Nov. 24, 2025).

Continuing this trend, before the District Court, the United States argued that "the thrust of defendants' motion is their incorrect assertion that 'after *Sackett*, only wetlands that are indistinguishable from waters are regulated.'" *See* Dist. Ct. Dkt. 267 at 11 (cleaned up; citations omitted). Further, it claimed "*Sackett* did not" require "that there be a 'continuous surface *water* connection.'" *Id.* at 17. These positions are contrary to *Sackett*.

However, in a turn of events, on November 20, 2025, the Corps/EPA published a new proposed rule agreeing that continuous surface connection means continuous surface *water* connection. *See* Updated Definition of "Waters of the United States," 90 Fed. Reg. 52498, 52545 (Nov. 20, 2025). It is encouraging to see

that the agencies have made progress towards correctly implementing *Sackett*. In this appeal, the United States should admit the error of its prior litigation positions and advocate for vacatur and remand so that the District Court can correctly apply *Sackett*. If the United States does not, this Court should not let the government continue its overreach. It is time for the government and lower courts to respect *Sackett*, and this Court can encourage that outcome by vacating the New Trial Order and remanding.

CONCLUSION

For these reasons, this Court should vacate the District Court's October 18, 2024 New Trial Order and remand for the proper application of *Sackett*.

DATED: December 1, 2025.

Respectfully submitted,

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/s/ Sean J. Radomski_____
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CERTIFICATE OF COMPLIANCE

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DATED: December 1, 2025.

By /s/ Sean J. Radomski
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