

SUPREME COURT OF THE UNITED STATES

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MICHAEL SACKETT, ET UX.,)
Petitioners,)
v.) No. 21-454
ENVIRONMENTAL PROTECTION AGENCY,)
ET AL.,)
Respondents.)
- - - - -

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Washington, D.C.

Monday, October 3, 2022

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:03 a.m.

APPEARANCES:

DAMIEN M. SCHIFF, ESQUIRE, Sacramento, California; on
behalf of the Petitioners.

BRIAN H. FLETCHER, Principal Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-454, Sackett versus EPA.

Mr. Schiff, you're up first this year.

ORAL ARGUMENT OF DAMIEN M. SCHIFF

ON BEHALF OF THE PETITIONERS

MR. SCHIFF: Thank you, Mr. Chief Justice, and may it please the Court:

It's now going on 16 years since Petitioners Mike and Chantell Sackett began construction of a house on a vacant lot in a largely built-out subdivision. Yet, their home-building plans remain on hold to this day because EPA remains steadfast in its view that their property contains navigable waters, subject to regulation under the Clean Water Act. But under no plausible interpretation of that term does the agency have such authority.

Now the statute defines "navigable waters" as the waters of the United States and so explicitly requires that EPA establish two things before it may regulate.

First, there must be a water, that is,

1 a --a hydro-geographic feature that in ordinary
2 parlance would be referred to as a type of
3 stream, creek, river, lake, or the like. A
4 wetland, however, is none of those things, and
5 so it can be regulated as a water only to the
6 extent that it blends into and thus becomes
7 indistinguishable from an abutting water.

8 Second, the water has to be of the
9 United States, that is, for all practical
10 purposes, a navigable in fact water.

11 Now this test is vastly superior to
12 the significant nexus test for a number of
13 reasons. First and most importantly, the
14 two-step framework closely adheres to the
15 textual limits that Congress itself imposed on
16 the agency.

17 Second, by faithfully adhering to
18 those limits, the test faithfully vindicates all
19 of Congress's purposes, not just its
20 water-quality purposes, but also its desire to
21 preserve the state's traditional preeminence
22 over land and water resources.

23 And, thirdly, it's an
24 easy-to-administer test. Ordinary citizens can
25 use their own eyes to reliably determine whether

1 or not their land is regulated.

2 And under this two-step framework,
3 it's clear that the Sacketts' property contains
4 no waters, much less waters of the United
5 States, and so they should be entitled to a
6 declaration that their property is not subject
7 to EPA's authority.

8 JUSTICE THOMAS: Mr. Schiff, can --
9 can intrastate, purely intrastate, navigable
10 bodies of water be waters of the United States?

11 MR. SCHIFF: Yes, Justice Thomas.

12 JUSTICE THOMAS: And how is that, if
13 it's purely intrastate?

14 MR. SCHIFF: If -- as a statutory
15 matter, if that intrastate navigable water
16 connects with some form of interstate
17 transportation such that there could be a
18 continuous channel of interstate commerce, then
19 that water could be regulated.

20 JUSTICE THOMAS: So what does that
21 mean?

22 MR. SCHIFF: I'll give you an example,
23 Your Honor, the -- the Great Salt Lake. The
24 Great Salt Lake is not a traditional navigable
25 water, even though it's navigable in fact,

1 precisely because it doesn't hook up to any
2 other waters to flow interstate. But,
3 obviously, there are a lot of forms of
4 nonaquatic transportation that can get you there
5 and that can sustain an interstate channel of
6 commerce.

7 So that's an example of a water body
8 that, though wholly intrastate, would qualify as
9 a statutory matter as a water of the United
10 States.

11 JUSTICE THOMAS: So why isn't that met
12 here?

13 MR. SCHIFF: Well, Your Honor, there
14 is no allegation whatsoever that the -- the
15 Sacketts discharge any pollutants --

16 JUSTICE THOMAS: No, I'm --

17 MR. SCHIFF: -- into Priest Lake.

18 JUSTICE THOMAS: -- well, if the -- I
19 think the -- the question -- the issue would be,
20 if there is nearby a body of water that could be
21 considered navigable, that possibly the wetland
22 could be associated or connected with that in
23 some way.

24 MR. SCHIFF: Your Honor, the --

25 JUSTICE THOMAS: I mean, don't you

1 have a ditch, you have a body of water, and you
2 have sort of a nexus with it with the land?

3 MR. SCHIFF: Justice Thomas, mere
4 adjacency itself cannot justify the agency's
5 statutory jurisdiction for a -- a number of
6 reasons.

7 The text of the statute says --
8 setting aside even "of the United States," the
9 text says that if it's not even a water, it
10 can't even be regulated.

11 And the plain meaning of "water," as
12 elucidated by dictionary definitions and what
13 have you, is not -- is streams, creeks, rivers,
14 what have you, not wetlands.

15 JUSTICE KAGAN: But doesn't that,
16 Mr. Schiff, ignore the import of 1344(g)(1),
17 which really specifically says that when we're
18 talking about waters, we're talking about --
19 including their wetlands, 1344(g)(1) says.

20 So, if we're going to be fair to the
21 text of the statute, isn't there a pretty
22 powerful indication that wetlands are included,
23 adjacent wetlands are included? And then we can
24 talk about what the word "adjacent" means, but
25 adjacent wetlands are included.

1 MR. SCHIFF: Absolutely, Justice
2 Kagan, there's no doubt that some wetlands are,
3 in fact, regulated. And the question is, what
4 kind of wetlands?

5 Now adjacency in the context of 404(g)
6 clearly means physically touching. For example,
7 if I were to say I own two adjacent parcels of
8 land --

9 JUSTICE KAGAN: Well, you say that's
10 clearly true, but, in fact, when you look to our
11 normal indicators of statutory meaning, first,
12 we look to dictionaries, and if you look to
13 dictionaries, both legal and non-legal, what
14 they show is that adjacency actually is not the
15 same as touching or contiguity, that adjacency
16 has something to do with proximity, of course.

17 But the -- the -- the definitions are
18 actually remarkably explicit about the fact that
19 two things can be adjacent to each other without
20 touching each other.

21 MR. SCHIFF: Justice Kagan, if I could
22 respectfully disagree, certainly, adjacency in
23 the abstract can have more than one meaning, but
24 in the particular context of comparing
25 relationships between topographic features, as

1 that word is obviously employed in 404(g)(1), I
2 think the only plausible understanding of that
3 term is physically touching.

4 JUSTICE KAVANAUGH: Well, why --

5 CHIEF JUSTICE ROBERTS: I'm not sure
6 --

7 JUSTICE KAVANAUGH: -- did E- --

8 CHIEF JUSTICE ROBERTS: -- I'm not
9 sure that's right. I -- I don't know whether
10 they're topographical features or not, but you
11 would readily say that a train station is
12 adjacent to the tracks even though it's not
13 touching the tracks?

14 MR. SCHIFF: That is right. Mr. Chief
15 Justice, that is correct. However, the example
16 that I was going to give is, if I were to say
17 that I own two adjacent parcels of land, I don't
18 think anyone would just think -- simply think
19 that I meant I own two parcels of land in the
20 neighborhood, that that necessarily implies that
21 they're physically touching, and it's that
22 particular kind of --

23 JUSTICE KAGAN: Well, let me give you
24 another example. I grew up in an apartment
25 building in New York City. If I say there are

1 two adjacent apartment buildings, do they have
2 to be touching each other, or could be, you
3 know, one is across a side street, you know?

4 MR. SCHIFF: Again, Justice Kagan --

5 JUSTICE KAGAN: I mean, I would say
6 that those -- you know, those two apartment
7 buildings are adjacent to each other because
8 there's no other apartment building in between
9 them, even if they're not touching each other.

10 MR. SCHIFF: Again, Justice Kagan, I
11 would say that when we're speaking specifically
12 about physical topographic features, natural
13 features like wetlands and other water bodies, I
14 think that physically touching requirement is
15 essential and is the -- the meaning of adjacency
16 as used in 404(g). That is, in fact, actually
17 --

18 JUSTICE JACKSON: But, Mr. Schiff,
19 isn't the issue what Congress would have
20 intended with respect to adjacency and there was
21 a regulation that defined "adjacency" to include
22 neighboring? And as far as I know, Congress
23 used the term "adjacency" and didn't adjust it
24 to try to make clear the touching requirement
25 that you say was intended by the term.

1 MR. SCHIFF: Yes, Justice Jackson.
2 Every single time that argument has been
3 advanced by the government, it has been rejected
4 by this Court. In Rapanos, the plurality opinion
5 rejected out of hand the idea that 404(g)
6 represents a ratification of the Corps's broad
7 understanding of adjacency. Justice Kennedy's
8 opinion doesn't even -- even give it
9 consideration.

10 SWANCC, for its part, said 404(g) is
11 unenlightening as to the meaning of "waters of
12 the United States."

13 JUSTICE JACKSON: All right. Well,
14 let me -- let me -- let me try to bring some
15 enlightenment to it by asking it this way.

16 You say the question is which wetlands
17 are covered, which I agree with, but I guess my
18 question is, why would Congress draw the
19 coverage line between abutting wetlands and
20 neighboring wetlands when the objective of the
21 statute is to ensure the chemical, physical, and
22 biological integrity of -- of the nation's
23 waters?

24 So are you saying that neighboring
25 wetlands can't impact the quality of navigable

1 waters?

2 MR. SCHIFF: Justice Jackson, not at
3 all. However, it's also important to -- to
4 acknowledge that Congress was balancing concerns
5 here. On the one hand, there is a water quality
6 issue.

7 But, on the other hand, there's a very
8 important federalism issue, so important that
9 actually Congress put in the text of the Act
10 that one of the purposes of the Act is to
11 preserve traditional state authority over land
12 and water resources.

13 JUSTICE JACKSON: I didn't read that
14 as a purpose, I mean, that Congress said our
15 objective is to address or make sure that we
16 maintain the integrity of the waters.

17 It was one of the policies in
18 achieving that objective that we care about
19 states' rights, but -- or federalism concerns,
20 but I didn't see that as Congress's primary
21 objective or even, you know, a main objective
22 with respect to the Clean Water Act.

23 MR. SCHIFF: That is true, Justice
24 Jackson, although this Court in SWANCC very much
25 relied upon, however you would like to call it,

1 this principle of federalism to adopt a narrow
2 construction.

3 JUSTICE SOTOMAYOR: But, counsel --

4 JUSTICE KAVANAUGH: Well --

5 JUSTICE SOTOMAYOR: -- how can you say
6 they wanted a narrow construction when they were
7 very, very clear in the statute in 1341(g) that
8 the Corps couldn't give states jurisdiction over
9 adjacent wetlands to that navigable water?

10 You are not disputing that Priest Lake
11 is a navigable water, correct?

12 MR. SCHIFF: That is correct, Your --
13 Your Honor.

14 JUSTICE SOTOMAYOR: It's 62 miles
15 long. It carries people. It's an instrument in
16 transport. That's the definition of traditional
17 navigable waters.

18 So as I see the question here is what
19 did Congress mean by "adjacent"? And now we're
20 going -- you are saying it requires a continuous
21 water surface. But how about a natural being?
22 Even the Trump Administration in -- who came
23 close to adopting your meaning, exempted beams.
24 It exempted beaver dams. It exempted those two
25 items and they would stop continuous surface

1 flow.

2 So how does your -- where does your
3 definition come from?

4 MR. SCHIFF: Justice Sotomayor, if I
5 could go back first to the first point about
6 404(g) and also in partial response to Justice
7 Jackson's question, even in Riverside Bayview,
8 which is the only time that this Court has
9 actually upheld the Agency's assertion of
10 jurisdiction, even there, at most, the Court was
11 willing to say is that 404(g) simply means that
12 wetlands are not necessarily excluded from the
13 definition of waters, but it wasn't even
14 prepared to adopt a general affirmation of -- of
15 adjacency.

16 In part, that's because none of the
17 1977 amendments had anything to do with the
18 definitional text. And I think this is in
19 response to your second question, Justice
20 Sotomayor, where does the test come from?

21 Well, it comes from that unchanged
22 definitional text. Congress did not change the
23 term "the waters of the United States." And a
24 water is, again, in ordinary parlance, we would
25 submit, something that is other than a wetland.

1 And the only way that one can plausibly regulate
2 it is if one has what was at issue in Riverside
3 Bayview --

4 JUSTICE KAVANAUGH: But -- but --

5 MR. SCHIFF: -- where you act --

6 JUSTICE KAVANAUGH: -- I'm sorry. EPA
7 had by that time, as Justice Jackson said,
8 indicated that the term "adjacent wetland" would
9 include wetlands separated by berms or dunes or
10 man-made dikes or levees from the navigable
11 water. Okay. So EPA as of '77 had made that
12 clear in the term "adjacent wetland," explicitly
13 made that clear.

14 And then Congress uses the term
15 "adjacent wetland." And my understanding is
16 every administration since 1977, but correct me
17 if I'm wrong, has stuck with adjacent wetland
18 includes those wetlands separated by berms,
19 dunes, dikes, or levees from the navigable
20 water.

21 So why shouldn't we read "adjacent
22 wetland" in the statute to mean what EPA has
23 said, as Justice Jackson asked, and what
24 significance should it have that every
25 administration since then has included those

1 wetlands as covered by this statute?

2 MR. SCHIFF: Justice Kavanaugh, in --
3 in answer to your -- to your first question, I
4 think, again, it goes back to the text, that if
5 one accepts the proposition that waters -- their
6 ordinary meaning as employed by Congress does
7 not normally include wetlands, then that raises
8 a textual difficulty, how can wetlands --

9 JUSTICE KAVANAUGH: But -- but
10 Riverside Bayview said the contrary to that,
11 obviously. It said wetlands are included. The
12 statute refers to adjacent wetlands. EPA has
13 said since '77 that "adjacent" means those
14 wetlands even if separated by berms, dunes,
15 levees, or dikes.

16 MR. SCHIFF: Well, Justice Kavanaugh,
17 I -- I don't want to necessarily die on this
18 hill because, obviously, the facts in this
19 record are such that --

20 JUSTICE KAVANAUGH: Let's put aside
21 the facts of this case --

22 MR. SCHIFF: All right.

23 JUSTICE KAVANAUGH: -- cause this case
24 is going to be important for wetlands throughout
25 the country and we have to get it right.

1 So why wouldn't a wetland separated by
2 a berm, dune, levee, or dike be covered,
3 contrary to what the last 45 years have
4 suggested?

5 MR. SCHIFF: In response to the second
6 part of your question, Justice Kavanaugh, about
7 the fact that the agencies have consistently
8 interpreted this over a long period of time, I
9 think Justice Scalia appropriately responded to
10 that argument in the Rapanos plurality where he
11 says it's a sort of now 40-year adverse
12 possession of statutory authority.

13 So I would say the mere fact that it's
14 been interpreted that way can't convert the fact
15 that if one accepts that waters as ordinarily
16 understood and not just in the dictionary but in
17 our yellow brief --

18 JUSTICE KAVANAUGH: Well, I would
19 agree with that but for the initial history of
20 when Congress put that term "adjacent wetland"
21 in, or I would think that has some force at
22 least but for that.

23 JUSTICE BARRETT: And can I ask just a
24 clarifying question to Justice Kavanaugh's? If
25 you could help me with the timing, cause, as

1 Justice Kavanaugh says, you know, one argument
2 that the government makes and that would have
3 some force is that the regulation defined
4 "adjacent" in the way Justice Kavanaugh's
5 pointing out.

6 What is the timing? Cause I
7 understand that that regulation was adopted in
8 1977 and 1344(g) was passed in 1977.

9 MR. SCHIFF: Yes, Justice Barrett. My
10 understanding -- and it was actually a
11 regulation from the Army Corps, not from the
12 EPA. But the Army Corps had a series of
13 regulations, and the final version was issued in
14 1977, I think shortly before -- I think maybe --

15 JUSTICE BARRETT: So it wasn't like an
16 old soil. It was pretty proximate in time to
17 the enactment of 1344(g)?

18 MR. SCHIFF: I believe, Justice
19 Barrett, it was about one or two months prior to
20 the enactment of -- of the 1977 amendment.

21 JUSTICE KAVANAUGH: Well, the Act was
22 December, and this was, I think, in the summer.
23 But wasn't this discussed? The whole question
24 of wetlands was a big part of the discussion in
25 the '77 amendments, or am I wrong about that?

1 MR. SCHIFF: No, you're absolutely
2 right, Justice Kavanaugh. And, again, the
3 Sacketts certainly don't dispute that -- that
4 wetlands are, in fact, regulated.

5 But, again, I would go back to Justice
6 Scalia's analysis in the plurality opinion. One
7 cannot read the legislative history of the '77
8 amendments to then conclude that every jot and
9 tittle of the Corps's regulations were then
10 affirmed. And, in fact, again, I would go back
11 to Riverside Bayview --

12 JUSTICE KAGAN: But there was an --
13 there's an even lengthier history. I mean,
14 before the regulations become the regulations,
15 there's a whole controversy about it because the
16 first Corps regulation was much more along the
17 lines of what you are proposing.

18 And then there was a big brouhaha and
19 the Corps was interpreting it too narrowly, and
20 the Corps essentially changed its mind, and
21 everybody was aware that this had happened, that
22 the Corps first came out of the blocks with a
23 narrow interpretation and, you know, was
24 essentially convinced to reverse itself on the
25 theory that it was not reflective of what

1 Congress had wanted.

2 MR. SCHIFF: Justice Kagan, I would
3 say one answer is that if -- if -- if Your Honor
4 is referring to, say, a failed legislative
5 proposal, I mean, I don't think one can really
6 put much --

7 JUSTICE KAGAN: I -- I'm not really
8 referring to that. I'm sort of referring to a
9 story that I don't think anybody disputes about
10 the history here, which is that the first
11 regulation, the first interpretation is quite
12 narrow, and there was a blow-back, and the Court
13 changes its mind.

14 And so everybody's aware on a sort of
15 continuing basis of this issue. It's not as
16 though the -- you know, the regulation came out
17 and -- and then the statute was amended, all
18 within a month, and nobody had time to -- to
19 think about this question. I mean, people had
20 been thinking about this question almost the
21 entire time in the interim between the initial
22 statute and the amendment.

23 MR. SCHIFF: That -- that is true,
24 Justice Kagan, but I think there's a lack of
25 commensurability here in that the relevant Corps

1 regulation during this period that -- that you
2 note was a regulation purporting to interpret
3 the "waters of the United States."

4 Now it would seem passing strange in
5 -- in my view for Congress to say: We're going
6 to resolve this lengthy administrative dispute
7 by entirely ignoring the statutory text that the
8 regulation that has caused the dispute is
9 related to, and, instead, we're going to affect
10 what amounts to a significant expansion of
11 federal authority over land use by including in
12 a parenthetical in a provision that deals with
13 permit transfer a reference to adjacent
14 wetlands.

15 That that seems to me just to -- to be
16 an unlikely way for Congress to affect what
17 would be a significant unbalancing --

18 JUSTICE SOTOMAYOR: Counsel --

19 MR. SCHIFF: -- of traditional --

20 JUSTICE KAVANAUGH: Let's --

21 JUSTICE SOTOMAYOR: -- counsel, in
22 SWANCC, we said directly the 1977 amendment
23 showed "Congress's unequivocal acquiescence to
24 and approval of the Corps's regulations
25 interpreting the Act to cover wetlands adjacent

1 to navigable waters." There, we faced the
2 question and said, at least as to that
3 definition, Congress was clear.

4 So my problem with your point is even
5 Rapanos, Justice Scalia, recognized, whether
6 it's scientifically accurate or not, that what
7 navigable waters can be is anything that's
8 adjacent to what we think of as traditional
9 navigable waters.

10 No one's suggesting you can put a boat
11 on a wetland. It would sink. You can't put a
12 boat of certain sizes or many near the shore
13 line because they would sink. There's not
14 enough water there to hold them up.

15 So I don't understand how the wetland
16 has to be navigable. It does have to be
17 adjacent because it's part of that river. And
18 Rapanos suggested it's hard to tell where the
19 beginning of the wetland is and where the
20 beginning of the -- of the water is. Whether
21 that's true or not is irrelevant.

22 Congress defined the term as navigable
23 waters and adjacent wetlands. So, if I take
24 that as their definition, why don't we say that
25 something that is near qualifies? And so the

1 question becomes what's near enough, isn't it?

2 MR. SCHIFF: Justice Sotomayor, I
3 would respectfully disagree. I-- I think this
4 would be a totally different case if Congress,
5 in fact, had defined "navigable waters" as the
6 waters of the United States plus adjacent
7 wetlands, which is precisely what the Corps
8 regulation was trying to do in the '70s. But
9 Congress hasn't done that. In fact, it
10 studiously avoided touching that central
11 definitional provision for the last 50 years.

12 With respect, though, Justice
13 Sotomayor, to your point about how -- why do
14 wetlands have to be navigable, they don't have
15 to be navigable. Certainly, in the normal
16 delimitation of any water, you're always going
17 to have a point at which navigability, in fact,
18 towards the banks of a river, for example, is
19 going to disappear. But that doesn't change the
20 fact that one can plausibly define a river, say,
21 up to its ordinary high water mark and
22 understand that water-ward of that mark one
23 might not have navigability at all points.

24 And I think the same thing is true
25 when it comes to defining the outer scope of

1 waters with respect to abutting wetlands, that
2 as one approaches the shore, it may not become
3 physically possible to navigate, but one can
4 still reasonably say that one hasn't yet
5 completely departed the water.

6 JUSTICE JACKSON: But -- but counsel,
7 why -- why is it that your conception of this
8 does not relate in any way to Congress's primary
9 objective? Do you dispute that the primary
10 objective as stated in the statute, I guess it's
11 at 1251, is that Congress cared about making
12 sure that the chemical, physical, and biological
13 integrity of the nation's waters was protected?

14 MR. SCHIFF: Justice Jackson, we don't
15 dispute that. However, no statute pursues its
16 purpose or object -- or its objective at all
17 costs, that -- that the limitations in the
18 statute are as much a part of its purpose as its
19 affirmative authorization.

20 JUSTICE JACKSON: So why didn't
21 Congress say "immediately adjacent"? If they
22 were trying to achieve something different than
23 what the regulations had said about adjacency,
24 if they were balancing their concerns about
25 protecting the integrity of the navigable waters

1 with the property interests and the states'
2 rights to control it, why didn't they say
3 "immediately adjacent" in terms of the -- of the
4 wetlands coverage?

5 MR. SCHIFF: Justice Jackson --

6 JUSTICE SOTOMAYOR: A footnote, why
7 didn't they use the word they used elsewhere,
8 "abutting"?

9 JUSTICE JACKSON: "Abutting."

10 MR. SCHIFF: Well, Justice Jackson, I
11 -- I don't believe the term "abutting" appears
12 in the statute, but one reason why Congress --

13 JUSTICE SOTOMAYOR: Oh, it actually
14 does. Assume it does. There are other sections
15 that use the word "abutting."

16 MR. SCHIFF: Well, Justice Sotomayor
17 and Justice Jackson, I would say with respect to
18 the question of immediate adjacency, I think one
19 reason why Congress didn't bother is because I
20 don't believe Congress was at all thinking that
21 404(g) would have any impact upon the scope of
22 the Act.

23 Again, if Congress intended to want to
24 definitively change the scope of the Act, one
25 would think that the most natural move would

1 have been to amend the definition of "navigable
2 waters."

3 JUSTICE JACKSON: But can I -- can I
4 -- can I just -- I'm sorry. You suggest that
5 the balancing, that the limitation is about the
6 concerns with respect to the state's
7 administration, and 1344(g) is precisely where
8 they're talking about what is left to the state
9 versus the federal government, and in that
10 statute, it just uses "adjacent."

11 So I -- with respect, that seems to me
12 to be exactly where they would have made clear
13 that the federal government's scope of authority
14 was abutting or immediately adjacent, and we're
15 leaving the rest to the states, under your own
16 theory of what they were trying to do.

17 MR. SCHIFF: Justice Jackson, my -- my
18 disagreement there is that that presupposes that
19 Section 404 already regulates the universe of
20 all wetlands and that it's essentially a -- a --
21 a federal privilege whether or not any of that
22 regulatory authority will be given back to the
23 states.

24 But I -- I don't believe that that's
25 at all what Congress intended. I think Congress

1 recognized that, setting aside the Clean Water
2 Act, there would be a significant swath of land
3 use and water regulation that would remain to
4 the states.

5 And I think one good example to prove
6 that point is, as we discuss in the briefs,
7 non-point source pollution. Everyone recognizes
8 that non-point source pollution is a serious
9 water quality issue, but it's never been
10 disputed that the Clean Water Act doesn't reach
11 that, which I think emphasizes that the purpose
12 of Congress in enacting the Clean Water Act was
13 not at all costs let's clean up water quality as
14 much as we can. It was a balancing to recognize
15 that some water quality measures, like wetlands
16 regulation, inevitably, as the Sacketts' cases
17 demonstrates, inevitably converts EPA and the
18 Corps into land use administrators.

19 JUSTICE JACKSON: So can I just ask
20 you, so the reason why in your view Congress
21 includes wetlands or -- or thinks some wetlands
22 should be in there is what? Is it because they
23 can't be distinguished or because those wetlands
24 affect the water quality of navigable waters?

25 MR. SCHIFF: Justice Jackson, I think

1 the main answer is that precisely the rationale
2 that Riverside Bayview gave, that inevitably, in
3 delimiting any true waters, one will have to
4 pick a point at which land ends and water
5 begins, and in that intermediate zone, there
6 will be things like wetlands.

7 JUSTICE JACKSON: But, if you read
8 Riverside Bayview carefully, it looks to me as
9 though we were talking about the Corps's
10 rationale, not Congress's, that we were saying
11 the difficulty of being able to tell land from
12 water is the reason that the Corps thought it
13 should -- should or could include the abutting
14 wetlands, but it doesn't suggest that that was
15 Congress's reason, that Congress said something
16 about wetlands because it would be too difficult
17 to distinguish.

18 So is there something in the text or
19 the history of the statute that points to that
20 concern as being one of Congress's?

21 MR. SCHIFF: Yes, Justice Jackson. I
22 would go back again to -- to the definitional
23 text, that Congress used the term "waters."
24 Congress knew about wetlands. Congress knew
25 about how wetlands affect water quality even in

1 1972.

2 In our yellow brief at pages 4 and 5,
3 we cite a number of examples in the years
4 leading up to 1972 where Congress in a variety
5 of acts explicitly distinguished between
6 wetlands and other types of waters.

7 So Riverside Bayview certainly adopts,
8 in our view, the idea that -- that waters are
9 ambiguous when applied to the facts on the
10 ground, and that ambiguity necessarily means
11 that some wetlands will be regulated. And to
12 justify that perhaps mild excursion from the
13 text, Riverside Bayview noted the Corps's
14 ecological judgments, that those judgments
15 supported the categorical rule that where the
16 line-drawing problem arises, that is when
17 Congress can regulate these wetlands as waters.

18 JUSTICE BARRETT: Mr. Schiff, let me
19 follow up on Justice Jackson's question.
20 1344(g) is the biggest problem for you, clearly.

21 Is your answer to Justice Jackson --
22 she's pointing out that in the parenthetical in
23 1344(g), where it gives the state -- well,
24 1344(g) gives the state permitting authority but
25 excepts navigable waters, essentially, including

1 wetlands adjacent thereto. If we read "waters
2 of the United States" as you propose, does that
3 mean that wetlands fall in another world where
4 neither states nor federal -- nor the federal
5 government can regulate them?

6 MR. SCHIFF: No, not at all, Justice
7 Barrett. I mean, certainly, there will be many
8 wetlands that will still be regulated, even if
9 the Court adopts the -- the -- the -- the test
10 the Sacketts have offered precisely because of
11 this line-drawing problem, that -- that there
12 will be wetlands that cannot be readily
13 distinguished from adjoining waters.

14 JUSTICE BARRETT: But you're --

15 CHIEF JUSTICE ROBERTS: Thank --

16 JUSTICE BARRETT: -- you're assuming
17 your -- oh, sorry.

18 CHIEF JUSTICE ROBERTS: Go ahead.

19 JUSTICE BARRETT: You're assuming the
20 adjacent -- you're -- you're assuming that we
21 adopt your -- I -- I'll save it for my -- my
22 round, that's fine.

23 CHIEF JUSTICE ROBERTS: Counsel, thank
24 you. We've been talking a lot about adjacency,
25 but your test also addresses the question of

1 continuity. Are you saying in your brief that
2 there is no wetland if, for example, in a few
3 weeks in July, you know, the ground dries up and
4 there isn't a immediate connection between wet
5 area and the navigable water?

6 MR. SCHIFF: No, Mr. Chief Justice. I
7 mean, we make allowance for this normal
8 circumstances understanding that what should
9 guide the line-drawing standard application is
10 what would in normal circumstances be the case.

11 So, if we're --

12 CHIEF JUSTICE ROBERTS: Well, is it
13 normal circumstances if it's from the fall to
14 the spring, but June, July, and August, it's --
15 you don't have that kind of connection?

16 MR. SCHIFF: If on a normal yearly
17 basis there would not be a continuous
18 connection, then I think it would be very hard
19 to fit the wetland into the rationale of the
20 line-drawing problem standard precisely.

21 CHIEF JUSTICE ROBERTS: With -- and
22 not simply in the area that's dried up, but you
23 would say the entire area that is normally
24 connected but isn't for three months in the
25 summer, that whole area is not a wetland?

1 MR. SCHIFF: No, Mr. Chief Justice.
2 If I understand the hypothetical correctly, it's
3 not that it -- it suddenly defederalizes
4 everything. But, certainly, it's difficult to
5 understand textually how one can regulate an
6 area as a water if on a regular basis there is
7 no water there, much that --

8 CHIEF JUSTICE ROBERTS: Does the
9 summer count as a regular basis? It just dries
10 up in the summer. It's pretty common, I think,
11 for wetlands or at least adjacent waters in many
12 situations.

13 MR. SCHIFF: Mr. Chief Justice, it's
14 certainly a -- a regular occurrence. And,
15 admittedly, this is one of the cases at the
16 margin where I would say with respect to any
17 legal rule there's going to be difficult cases.
18 And perhaps that could be reduced through
19 further agency rulemaking.

20 But I think what's important and what
21 we haven't really discussed, which the Court
22 hasn't noted much yet, is comparing whatever
23 shortcomings there may be in the line-drawing
24 problems test to the shortcomings that are
25 orders of magnitude greater from the only other

1 game in town, the significant nexus test, both
2 in terms of its lack of fidelity to the text, in
3 terms of its subversion of -- of the federal
4 structure, in terms of its much greater
5 difficulty in application.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 JUSTICE THOMAS: Counsel, I'd like
10 just give you a minute to at least comment on
11 what we have said about 1344(g) in SWANCC and
12 what the Court has said about it in Riverside,
13 because, as I recall, we suggested that it did
14 not control the definition of "waters" or
15 certainly did not have an overwhelming impact on
16 the definition of "waters."

17 MR. SCHIFF: Thank you, Justice
18 Thomas. Yes. In terms of the case law, no
19 decision of this Court has ever relied upon
20 404(g) to affirm the version of adjacency that
21 the EPA and the Corps advance. The most was
22 Riverside Bayview, which said that 404(g) simply
23 means that some wetlands will be regulated. But
24 the Court was not willing to go much beyond
25 that.

1 And with respect to how "adjacent"
2 actually appears in 404(g), given the context of
3 physical topographic features, I think the most
4 plausible understanding of that term is that
5 Congress simply meant that those wetlands that
6 are physically touching, the very facts that
7 were at issue in Riverside Bayview, the fact
8 that Riverside Bayview's property was
9 essentially a cattail marsh that blended into
10 Lake St. Clair. And I think that is the most
11 that 404(g) says.

12 And, again, that's a -- a -- a
13 proposition that the Sacketts' test is fully
14 consistent with. The Sacketts acknowledge that
15 some wetlands can be regulated under the
16 line-drawing problem standard. It's just that
17 nothing in 404(g) can reasonably be interpreted
18 to represent some general congressional
19 ratification of the Corps's adjacency regulation
20 from 1977.

21 JUSTICE THOMAS: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE ALITO: Well, this case will
24 have -- may have a -- an important nationwide
25 effect, but we do decide concrete cases in

1 controversy, so I would like you to address the
2 -- the theory that the government uses to
3 determine that the Sacketts' property
4 constitutes wetlands that can be regulated.

5 The property, as I understand it, is
6 separated from wetlands by a road, isn't that
7 right?

8 MR. SCHIFF: Yes, Justice Alito, by --
9 by a road and then a -- a roadside ditch on the
10 other side of the road. That ditch then spills
11 about a half mile downstream into Kalispell
12 Creek, which then itself spills another thousand
13 feet from that point into Priest Lake.

14 JUSTICE ALITO: And how does the water
15 from the Sacketts' property get to the ditch?

16 MR. SCHIFF: The short answer, Justice
17 Alito, is that the water doesn't get to the
18 ditch. It doesn't get to the wetlands. It
19 doesn't get to Priest Lake. There is no surface
20 connection from the Sacketts' property to any
21 plausible water.

22 JUSTICE ALITO: What is the
23 government's theory of how the water from the
24 Sacketts' property gets to the wetlands?

25 MR. SCHIFF: The government doesn't

1 have a theory for that, which I think
2 underscores how broad the significant nexus test
3 is.

4 The government's theory is that the
5 wetlands on the other side of the road, which
6 are not connected to the Sacketts' property,
7 that those can be combined with the Sacketts'
8 property on some theory that they're similarly
9 situated and only because the government then
10 combined this 36 acres of wetlands that it could
11 then conclude that there was a significant
12 relationship to Priest Lake.

13 JUSTICE ALITO: So it's only by
14 combining the water from the Sacketts' property
15 with this large wetlands that it comes to the
16 conclusion that there's a significant ecological
17 effect on Priest Lake?

18 MR. SCHIFF: Yes, Justice Alito.

19 JUSTICE ALITO: Priest Lake is
20 navigable?

21 MR. SCHIFF: Yes.

22 JUSTICE ALITO: Does it cross a state
23 line?

24 MR. SCHIFF: No, it does not cross a
25 state line.

1 JUSTICE ALITO: If I -- someone puts a
2 boat in Priest Lake, is it possible to get to
3 another state from Priest Lake?

4 MR. SCHIFF: One would probably have
5 to negotiate some rapids through Priest River,
6 but I think it's fair to say that Priest Lake
7 would certainly qualify as a water of the United
8 States according to the interpretation that the
9 Sacketts have offered.

10 JUSTICE ALITO: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

13 JUSTICE SOTOMAYOR: Yes.

14 Counsel, I -- I think that there has
15 been a misreading, and I obviously could be
16 doing it, but I have read Justice Kennedy's
17 significant nexus test, and as I read his
18 decision, he was of the view that "adjacency"
19 defined wetlands that were adjacent to navigable
20 waters and that he was applying the significant
21 nexus test to deal with non-navigable waters
22 that might be waters of the United States.

23 And so I think that there are two
24 issues in this case. Justice Alito referenced
25 only one of them, which is whether or not the

1 tributary that runs from the bay fen to the
2 Sacketts' site, whether that is a marshland that
3 -- that constitutes a water of the United
4 States. That's what the Ninth Circuit saw.

5 But there is also the Sackett site
6 running directly to Priest Lake, and that
7 Sackett site does run across -- below a road and
8 below some houses. I believe the government's
9 position -- and it could speak for itself when
10 its gets up -- is that that connection is very
11 direct, that there is a subsurface flow, not a
12 groundwater flow, but a subsurface flow of
13 water.

14 Isn't that -- am I correct about the
15 factual nature of this case?

16 MR. SCHIFF: Justice Sotomayor, you're
17 correct that -- that the record contains some
18 evidence to the effect that there is a
19 subsurface flow from the fen wetlands that are
20 north of the site, south underneath the
21 Sacketts' property at Priest Lake.

22 JUSTICE SOTOMAYOR: I'm not going that
23 far. I'm going from the Sackett site to Priest
24 Lake. There -- there's some evidence there's a
25 subsurface flow there.

1 MR. SCHIFF: That is correct.

2 JUSTICE SOTOMAYOR: Now, as I
3 understand it, there's a difference between
4 groundwater and subsurface flows. Am I correct
5 about that too?

6 MR. SCHIFF: I don't believe, Justice
7 Sotomayor, that EPA has ever made such a -- such
8 a distinction. And, certainly, in the position
9 of someone like the Sacketts, there practically
10 is no distinction. Whether it's subsurface or
11 really subsurface --

12 JUSTICE SOTOMAYOR: Well, I think --

13 MR. SCHIFF: -- one can't see it.

14 JUSTICE SOTOMAYOR: -- no, it's not
15 that hard. I mean, if -- if -- yes, you can see
16 it, and you can see subsurface water when you
17 put your foot in the sand and you can feel it
18 underneath the top of the sand. You can feel it
19 in how watery your soil is. I mean, it's not
20 impossible to know that there's a subsurface.
21 You could put a -- a stake or a plot or
22 something into it and -- and feel it immediately
23 or have it spring up immediately.

24 So there is a difference between
25 groundwater and subsurface water, isn't there?

1 MR. SCHIFF: Justice Sotomayor, I
2 don't believe legally there really is any
3 distinction. Again, if -- if the relevant point
4 is can one distinguish anything on the Sacketts'
5 property from Priest Lake, whether it's
6 subsurface or substantial --

7 JUSTICE SOTOMAYOR: But you don't
8 think there's a -- there's a difference?

9 MR. SCHIFF: Well, one thing, Justice
10 Sotomayor, that I think is problematic with
11 relying upon any sort of subsurface connection
12 is that it essentially renders the test
13 limitless. I mean, it's hard to imagine --

14 JUSTICE SOTOMAYOR: Why?

15 MR. SCHIFF: -- it's hard to imagine
16 any property in this country that does not have
17 some degree of subsurface flow at whatever depth
18 that will ultimately -- I mean, the hydrological
19 cycle is unified. Ultimately, that water is
20 going to flow to some surface water.

21 It's hard to imagine that Congress
22 could have intended, especially in a statute
23 that imposes such significant penalties for
24 someone who guesses wrong as to whether or not
25 his or her property is regulated --

1 JUSTICE SOTOMAYOR: Well, that goes
2 back to Justice Jackson's point, that what
3 Congress was concerned about was ensuring the --
4 the sanctity of our waters and that those things
5 that directly discharged into it would be safe,
6 to keep our waters safe.

7 MR. SCHIFF: Well, Justice Sotomayor,
8 I also think Congress was concerned about --
9 about the sanctity of -- of -- of freedom and
10 private property rights and ensuring that people
11 at least have fair notice as to whether their
12 property is going to be regulated. If the test
13 --

14 JUSTICE SOTOMAYOR: Well, I mean --

15 MR. SCHIFF: -- is surface to
16 subsurface --

17 JUSTICE SOTOMAYOR: -- why is it their
18 -- whatever test, even yours right now, as you,
19 in your answers to the Chief Justice, said that
20 we'll have to define what a normal season is,
21 we're going to have to define how many days are
22 continuous. So it's not a question that any
23 test that's being proposed won't have some lack
24 of security for homeowners. But one thing about
25 the EPA process is you can always get -- you

1 could always ask the EPA for an opinion as to
2 whether or not you fall within the definition.

3 MR. SCHIFF: Yes, Justice --

4 JUSTICE SOTOMAYOR: And you then have
5 a opportunity to fight that definition, correct?

6 MR. SCHIFF: That is correct, Justice
7 Sotomayor, but I think that actually indicates
8 why something like the significant nexus test is
9 so problematic. It's hard to imagine any other
10 statutory system in -- in the federal code that
11 requires a potentially regulated party to
12 initiate a rather expensive and time-consuming
13 process just to find out whether, in fact, one
14 is regulated.

15 And that's precisely why the
16 jurisdictional determination process has been
17 developed in the -- the age of the significant
18 nexus, because it is a test that's very
19 difficult to know whether, in fact, one is
20 regulated.

21 JUSTICE SOTOMAYOR: Well, that test
22 applies, as I mentioned, only to connections
23 that are not directly with waters. That's a
24 different issue. But that's not how we've been
25 -- that's not how you briefed this case or what

1 we're looking for. We're looking for a
2 definition that has to do with a -- a connection
3 that exists with traditional navigable waters.

4 We may have to develop, as was the
5 insight of Justice Kennedy in Rapanos, a
6 different test like the significant nexus test
7 for those connections, like here, where there
8 might be a tributary somewhere else.

9 MR. SCHIFF: Justice Sotomayor, I
10 would say that if the test is subsurface
11 connections to a traditional navigable water, I
12 guarantee you that this case or something like
13 it will be back here in another 16 years and we
14 will be back in the same place that we have been
15 with property owners not knowing whether they're
16 regulated, with the states not knowing what test
17 to apply --

18 JUSTICE SOTOMAYOR: That's assuming
19 it's sub -- sub -- subsurface water is not
20 differentiated between groundwater.

21 MR. SCHIFF: Justice Sotomayor, again,
22 I don't think that there is certainly a legal
23 distinction that EPA has ever articulated
24 between the two. And, moreover, I think, as a
25 practical matter to the property owner, if it's

1 subsurface, it doesn't necessarily follow that
2 one standing in a marsh -- the Sacketts'
3 property certainly wasn't a marsh, and there's
4 no reason that --

5 JUSTICE SOTOMAYOR: Only because they
6 put gravel in it.

7 MR. SCHIFF: I -- I'm sorry, Your
8 Honor?

9 JUSTICE SOTOMAYOR: Only because they
10 put gravel in it.

11 MR. SCHIFF: Well, the original state
12 of the property was, before the -- the -- the --
13 the top soil was taken out and the gravel was
14 put on it, it looked like a -- a buildable lot.
15 In fact, it was zoned as a buildable lot. It
16 has a sewer hookup. It has an address.
17 Neighbors around that property have built.

18 There was -- there's no sense that
19 this property is something that one might think,
20 ah, there's water somehow flowing underneath,
21 that that connects it to Priest Lake. That's
22 not the type of topography.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Kagan?

1 JUSTICE KAGAN: Mr. Schiff, do you
2 think there's any third position? I mean, I --
3 I understand that you don't like the significant
4 nexus test, but I'm going back really to Justice
5 Kavanaugh's point about, you know, take
6 something like you just create a dam so that --
7 and the dam breaks up any idea that there is a
8 continuous surface connection.

9 So, if I think, well, in that kind of
10 situation, it just -- it just can't -- you --
11 you can't be right, but I also understand some
12 of your points about the significant nexus test,
13 is there anything in the middle?

14 MR. SCHIFF: To some extent, Justice
15 Kagan. I -- I -- I think a middle position is
16 the idea of the nature of -- of the barrier. I
17 think this came up a little bit, whether it's a
18 natural barrier or whether it's a -- a permanent
19 legal barrier, like the roads that bound the
20 Sacketts' property.

21 But, in a sense, it's not a
22 particularly satisfactory middle position
23 because it still doesn't really afford
24 appropriate fidelity to the text. Again, if
25 Congress -- Congress could tomorrow enact a

1 statute saying --

2 JUSTICE KAGAN: Well, I think I'm
3 asking you to assume that 1344 means more than
4 you think it means and suggests that there is
5 something in the text that says we're supposed
6 to figure out what it means for an adjacent
7 wetland, for a wetland to be adjacent.

8 So, if -- if I'm thinking of Justice
9 Kavanaugh's example and thinking that looks
10 pretty adjacent to me, but, on the other hand,
11 I'm thinking of some of the objections that you
12 have as to the Kennedy test, you know, what do I
13 do from there? You know, call it a backup
14 position, call it a compromise position, call it
15 whatever you want, is there a third option?

16 MR. SCHIFF: In that sense, Justice
17 Kagan, I think there is. I mean, it's
18 exemplified by the facts of the Sacketts' case
19 in that there's not even a -- a -- there's no
20 surface connection, much less any -- there's no
21 surface connection from the Sacketts' property
22 to any plausible water.

23 I mean, I think certainly --

24 JUSTICE KAGAN: That's just -- that's
25 just repeating your test. I'm -- I'm asking you

1 for a test that's different from your test.

2 MR. SCHIFF: Well, I -- I would -- I
3 would hesitate a little bit to say it's the same
4 thing because our test is -- is the line-drawing
5 problem test. But one could say that whether
6 there might be marginal challenges about
7 defining boundaries in other cases, certainly,
8 where there's no surface connection, there
9 cannot be any plausible argument that the
10 wetland itself is -- is inseparably bound up
11 with an abutting water.

12 JUSTICE KAGAN: So your answer is no.
13 Okay. Thank you.

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 JUSTICE GORSUCH: I'd like to return
18 to where Justice Sotomayor left off, and that is
19 adjacency. If we're going to have something
20 more than a continuous water surface test like
21 we did in Riverside Bayview, if we're going to,
22 excuse me, expand beyond that, why not just look
23 at the geographic proximity between this
24 property and -- and the lake?

25 The lake is the -- the waters of the

1 United States that -- that -- that -- that EPA
2 wishes to protect, understandably. They --
3 they've got a circuitous route across a road
4 down a drainage ditch to an unnamed tributary to
5 a named tributary to the lake. That's their
6 adjacency theory. It's kind of a -- a daisy
7 wheel spin -- spun out from -- from the lake.

8 But that -- that's rather complicated
9 when one looks at the map, I mean, and it's the
10 back of the petition appendix, the picture.
11 You're -- you're blocked from -- from -- from --
12 from the lake. Why isn't that just adjacent
13 enough?

14 Now there's a subdivision between you
15 and the lake, I understand, but pretty close. A
16 lot -- lot closer route that way than this --
17 this rather convoluted path around.

18 MR. SCHIFF: Justice Gorsuch, I -- I
19 think the reason why that's not satisfactory,
20 and I recognize that I've given this answer in
21 more than one form several times already this
22 morning, but I would still go back again to the
23 text. It was -- obviously, Congress knows about
24 wetlands. It included a reference to wetlands
25 in 404(g) among other places. It chose not to

1 include that in the definitional section.

2 That has to mean something, and what
3 that means is that the relevant jurisdictional
4 entity is water. If something cannot be
5 reasonably classified as a water, taking into
6 account the line-drawing problem standard, then
7 the -- the answer is simply Congress hasn't
8 authorized it. Maybe it is a good idea in terms
9 of water quality, but that's for Congress to
10 decide, obviously, not for the Court.

11 And that really has to be why mere
12 geographic closeness can't justify the
13 contratextual conclusion that a two-third-of- --
14 of-an-acre residential lot with a sewer hookup
15 with an address and a mailbox is somehow
16 considered a water of the United States.

17 JUSTICE GORSUCH: And -- and -- and --
18 and that is what's being asked, is -- is a
19 person who purchased a property with -- with a
20 sewer hookup a block from the lake with a
21 subdivision between you and the lake and a road
22 on the other side is supposed to know that
23 that's a water of the United States, that piece
24 of property, or else what?

25 What -- what are the -- what are the

1 penalties associated with this? What -- what
2 was threatened to your clients and what -- what
3 does one face in these circumstances?

4 MR. SCHIFF: Well, certainly, for the
5 Sacketts in particular, they were threatened
6 with significant civil and administrative
7 penalties and, of course, also the continuing
8 liability of having to restore the property to
9 the way it was before they began any work.

10 But, also, there is lingering over all
11 of this discussion the threat of criminal
12 penalties, and I think this is particularly
13 important because the waters of the United
14 States is as much relevant to the criminal
15 portions of the Clean Water Act as the civil
16 portions. It's the same text. And I think that
17 should give the Court particular concern in
18 indulging any sort of malleable or somewhat
19 unclear or flexible test exemplified by the
20 significant nexus test.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: You keep
25 emphasizing the text, but you agree that some

1 wetlands are covered as waters of the United
2 States, correct?

3 MR. SCHIFF: That is correct, Justice
4 Kavanaugh.

5 JUSTICE KAVANAUGH: And so the
6 question then becomes, as I see it, does the
7 statute, does the text, cover only bordering or
8 contiguous wetlands, or does it also cover what
9 we might call neighboring wetlands?

10 Is that an appropriate way to phrase
11 what you think the precise dispute is?

12 MR. SCHIFF: Yes, that -- that is
13 correct, Your Honor.

14 JUSTICE KAVANAUGH: Okay. And on
15 404(g), which, as Justice Barrett says, is -- is
16 critical here to the case, is your argument that
17 404(g) does not control or even illustrate what
18 qualifies as waters of the United States, or is
19 your argument that "adjacent," the word in
20 404(g), does not mean neighboring or nearby but
21 requires actual touching?

22 MR. SCHIFF: Justice Kavanaugh, I --

23 JUSTICE KAVANAUGH: Or both?

24 MR. SCHIFF: Justice Kavanaugh, I -- I
25 -- I would say it's both. I would say, again,

1 falling precisely like Riverside Bay, which is
2 essentially the -- the zenith of -- of this
3 Court's indulgence of -- of EPA and the Corps's
4 interpretation of the Act.

5 At most, Riverside Bayview was willing
6 to say that 404(g) simply means that while we
7 can't interpret waters to categorically exclude
8 wetlands. And that's all that the Court was
9 willing to say. But the --

10 JUSTICE KAVANAUGH: Once you get
11 there, aren't you a little bit separated from
12 the text as you see the text? In other words, I
13 don't know that you really agree with Riverside
14 Bayview when it comes down to it. You're not
15 asking for it to be overruled.

16 MR. SCHIFF: Well, Justice Kavanaugh,
17 to be frank, we weren't all textualists then,
18 but today --

19 JUSTICE KAVANAUGH: So -- but then --
20 then you're asking us to put what you're calling
21 a textual limit on something that's divorced
22 from the text to begin with, it sounds to me
23 like, rather than going with neighboring, which
24 is the ordinary dictionary definition of
25 "adjacent" and also would -- would -- well keep,

1 I'll leave it there.

2 MR. SCHIFF: Well, Justice Kavanaugh,
3 with respect to -- to -- to the ordinary
4 understanding of "adjacency," I certainly agree
5 that in the abstract "adjacent" has more than
6 one meaning. But I do believe that in the
7 context of 404(g), where it's trying to describe
8 relationships between topographic features, that
9 the most reasonable understanding, really, the
10 only plausible understanding, is that it means
11 physically touching.

12 Again, when you combine it with the
13 fact that the central definitional section --

14 JUSTICE KAVANAUGH: Last question, why
15 did seven straight administrations not agree
16 with you?

17 MR. SCHIFF: Well, I wouldn't quite
18 say it's seven straight. At least the -- under
19 the Trump Administration, their proposal was
20 certainly closer to -- to what the text --

21 JUSTICE KAVANAUGH: Wait. No, no,
22 let's be clear. They said that it would still
23 be covered even if it was separated by a berm or
24 dune, for example.

25 MR. SCHIFF: No, that is correct, and

1 --

2 JUSTICE KAVANAUGH: And under your
3 test, that would not be covered?

4 MR. SCHIFF: That is correct, Justice
5 Kavanaugh. And I don't presume to -- to -- to
6 know more than -- than those -- those seven
7 prior administrations, but what I do know is
8 what is the text that Congress has used, and
9 nothing can supersede that.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: Mr. Schiff, can you
14 explain to me why you wouldn't lose? Because I
15 take it to -- you're saying that you wouldn't
16 lose if we adopt a broader definition of
17 "adjacent," akin to the one that Justice Kagan
18 is proposing.

19 MR. SCHIFF: Justice Barrett, I may
20 have misspoken. If "adjacent" means that
21 something is not adjacent if there is a -- a --
22 a -- a man-made barrier as opposed to a natural
23 barrier, then, obviously, here, the Sacketts'
24 property is bounded by man-made barriers.

25 And so what I meant to say is that --

1 is that whether or not if the Court thought that
2 natural barriers might not defeat jurisdiction,
3 the Court could also say that at least here,
4 with man-made barriers, there is no
5 jurisdiction.

6 JUSTICE BARRETT: Okay. I think -- I
7 think I didn't articulate my question clearly
8 enough.

9 MR. SCHIFF: Sorry.

10 JUSTICE BARRETT: So part of what
11 you've said is that 1344(g), Congress was doing
12 something different and that it didn't modify
13 the definition of "waters of the United States"
14 that was existing.

15 Okay. So here's my question. It
16 seems to me -- and this was kind of what Justice
17 Jackson was getting at -- that that might be
18 true, that 1344(g) was doing something
19 different, but what it was doing was carving out
20 what the states could and could not regulate.

21 And if "adjacent" means something
22 broader -- and this is what I was starting to
23 ask you when time expired -- if "adjacent" means
24 something broader, then it seems to me that
25 there is a category of wetlands that nobody

1 could regulate.

2 So it seems to me that even though
3 1344(g) was doing something different and even
4 though Congress didn't modify the definition of
5 "waters of the United States," that adjacent
6 matters to this case, and if we adopt the -- the
7 definition Justice Kagan is proposing, that you
8 would lose. Am I right?

9 MR. SCHIFF: Justice Barrett, if I
10 understand what -- what Justice Kagan is
11 proposing, that -- that neighboringness or mere
12 closeness is sufficient, then, necessarily then,
13 the Sacketts' property and a lot of other
14 property in this country is going to be
15 regulated.

16 JUSTICE BARRETT: So, in that respect,
17 1344(g) does qualify or cast light on the
18 definition in 1362(7) of waters of the United
19 States?

20 MR. SCHIFF: It certainly does.
21 And -- and as I responded to Justice Kavanaugh,
22 the way it casts light is to indicate that to
23 some extent wetlands are going to be regulated.
24 The extent to which they're regulated, I think
25 that has to be -- it's a -- in a sense a --

1 a-tail-wagging-the-dog problem.

2 JUSTICE BARRETT: But that -- but that
3 depends on our accepting the narrower definition
4 of "adjacent," correct? I mean, I see why your
5 whole theory hangs together if "adjacent" means
6 abutting.

7 MR. SCHIFF: Right, Your Honor.
8 And -- and what I mean by "tail wagging the dog"
9 is that I don't think it's really appropriate to
10 -- to look at how "adjacent" is used in 404(g)
11 and then use that to sort of reinvent what the
12 central definitional section from Section 502
13 is.

14 Rather, it's the other way around.
15 It's precisely because Section 502 was not
16 changed that the criterion remains waters, that
17 that must then inform what "adjacent" means in
18 Section 404.

19 JUSTICE BARRETT: And is the idea
20 partly that because 1344(g) was enacted in 1977
21 and 1367 -- or 1362(7), was that 1972?

22 MR. SCHIFF: Yes, that's correct.

23 JUSTICE BARRETT: But, in any event,
24 it was preceding, that the later legislation
25 doesn't cast light on what the original meaning

1 of "waters of the United States" was?

2 MR. SCHIFF: Well, it's certainly not
3 definitive. It's not a ratification. And I
4 don't want to go too far, Justice Barrett, in
5 saying that it means nothing, because, again,
6 Riverside Bayview says it -- it does mean
7 something.

8 But, again, it would be strange, it
9 would be a -- a -- sort of an inversion of
10 statutory interpretation to say that this
11 parenthetical reference in a provision dealing
12 principally with permit transfer authority
13 suddenly backfills and dramatically changes the
14 scope of the central definitional portion of the
15 Act, again, a portion that is as -- as much at
16 issue in criminal prosecution as it is in civil
17 matters.

18 JUSTICE BARRETT: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: Sorry. So you've
22 said several times that Riverside Bayview said,
23 at most, that some wetlands could be regulated.
24 But, under your test, it appears that you're
25 requiring visual indistinguishability. And I'm

1 trying to assess whether or not Riverside base
2 -- Bayview actually gets you there.

3 In that case, was it clear that the
4 marsh area was visually indistinguishable from
5 the abutting creek?

6 MR. SCHIFF: Yes, Justice Jackson,
7 that is precisely how the government argued it
8 in its briefing and at oral argument. We quote
9 that portion in our reply brief where the
10 emphasis is on how -- I believe these are the
11 words that were used -- that from Riverside
12 Bayview, it would not be an exaggeration to say
13 that one, after wading through a cattail marsh,
14 could then swim into Lake St. Clair, that it was
15 a -- a continuous body of water that at some
16 point ended. And the Court, in looking at those
17 facts, said that it's appropriate to defer to
18 the Corps and the EPA in saying that the water
19 ends at this point because we can't otherwise
20 say whether it's reasonable to have it end at an
21 earlier point.

22 JUSTICE JACKSON: But do you think
23 that that's -- that -- is that going to be the
24 case in every situation, that it's
25 indistinguishable as to when the marsh ends or

1 the wetlands end and the creek begins? I'm just
2 trying to imagine whether people were really
3 confused in Riverside Bayside as to which part
4 was wetland and which part was water, and is
5 that your test, we have to have a visual
6 indistinguishability?

7 MR. SCHIFF: Justice Jackson, there
8 may have -- there was certainly a dispute among
9 the parties as to the proper characterization of
10 the facts, but I think what matters is -- are
11 two things.

12 One is how the government presented
13 those facts to the Court and how the Court
14 ultimately crafted a decision based upon those
15 facts, meaning that the Court concluded that, as
16 it said, between dry land and open water, the
17 transition is not necessarily or even typically
18 an abrupt one and that you have all sorts of
19 features in between those two points.

20 And the Court said that it's not our
21 place to second-guess the agency determination
22 that in drawing the boundaries of waters, which
23 is the -- the central jurisdictional term, in
24 drawing the boundaries of waters, it's not
25 unreasonable that there may be some semi-aquatic

1 features that are brought into that boundary.

2 JUSTICE JACKSON: So, under your test,
3 in future cases, are we going to be debating in
4 every case the extent to which there really is
5 visual indistinguishability?

6 MR. SCHIFF: Absolutely not, Your
7 Honor. And I think that if there were disputes,
8 those disputes would be -- would pale in
9 comparison to the number of disputes that have
10 percolated throughout the lower courts over the
11 last 16 years with respect to the significant
12 nexus test.

13 This test, the line-drawing problem
14 test, is much simpler to apply.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Fletcher.

19 ORAL ARGUMENT OF BRIAN H. FLETCHER

20 ON BEHALF OF THE RESPONDENTS

21 MR. FLETCHER: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 As the discussion so far illustrates,
24 everyone agrees that the waters protected by the
25 Clean Water Act include some adjacent wetlands.

1 The narrow but important question presented in
2 this case is whether wetlands lose protection if
3 they're separated from other waters by a barrier
4 like a berm or a road.

5 Overwhelming scientific evidence and
6 essentially undisputed scientific evidence shows
7 that those sorts of barriers do not diminish
8 wetlands' essential role in protecting the
9 integrity of other waters. And as Justice
10 Kavanaugh emphasized, for 45 years, the EPA and
11 the Army Corps have recognized that the presence
12 of such a barrier does not categorically strip a
13 wetland of the Act's protections.

14 This Court should uphold that
15 longstanding interpretation for three reasons.
16 First, in 1977, Congress was presented with
17 proposals to limit the Act's coverage that
18 sounded very much like the proposal that you
19 just heard, and it rejected them. Instead, it
20 adopted Section 1344(g), which includes express
21 textual recognition that the waters covered by
22 the Act include adjacent wetlands.

23 The Court recognized in SWANCC, in the
24 language that Justice Sotomayor quoted, that
25 that was an unequivocal approval of the Corps's

1 regulation on adjacent wetlands.

2 Second, this Court unanimously upheld
3 those regulations in Riverside Bayview. Now
4 it's true that the marsh at issue in that case
5 happened to directly abut a creek such that one
6 could wade from one and then swim in the other.
7 But the Court did not rely on any difficulty in
8 identifying the boundary between the creek and
9 the lake, and there wasn't one.

10 Instead, the Court relied on what it
11 called the agency's ecological judgment that
12 wetlands significantly affect neighboring
13 waters. And the presence of a berm or other
14 barrier does not sever that connection. In
15 fact, as the 2020 Navigable Waters Protection
16 Act emphasized, the presence of a river berm can
17 itself be evidence of the close connection
18 between the river and the neighboring wetlands.

19 Third and finally, the agencies are
20 now doing what members of this Court have
21 repeatedly urged them to do by promulgating
22 regulations that recognize and appropriately
23 limit the coverage of the Act. Those
24 regulations incorporate the significant nexus
25 test, which is a limiting construction that

1 ensures that the Act reaches only those wetlands
2 that must be covered to reach the traditional
3 navigable waters in which the federal interest
4 is indisputable.

5 CHIEF JUSTICE ROBERTS: Counsel --

6 MR. FLETCHER: I welcome the Court's
7 questions.

8 CHIEF JUSTICE ROBERTS: -- is -- under
9 the position of the federal government, is a
10 ecological and biological connection between
11 wetlands and navigable waters enough to bring
12 the wetlands into coverage? In other words, dry
13 land between it, but underneath -- you know, we
14 had that case in Hawaii that indicated how far
15 --

16 MR. FLETCHER: Yeah.

17 CHIEF JUSTICE ROBERTS: -- underneath
18 it could go -- there is a biological connection.
19 You know, you put some tracing materials in the
20 wetlands, and they do find their way to the
21 lake. Is that enough under your view?

22 MR. FLETCHER: Not any connection.
23 We're not talking about the possibility that
24 some molecules of water eventually make their
25 way from the wetlands into the -- the lake, but,

1 instead, what we take to be the significant
2 nexus standard from Justice Kennedy's opinion in
3 Rapanos, which traces back to SWANCC and
4 Riverside Bayview, that demands a significant
5 effect.

6 CHIEF JUSTICE ROBERTS: So how --
7 well, what does that mean? I mean, how much of
8 a biological connection does there have to be?

9 MR. FLETCHER: So the agencies now
10 have, you know, more than a decade of experience
11 applying this in practice, and they explained in
12 the guidance that they issued after Rapanos and
13 have sort of reiterated and refined in the NPRM
14 that they just issued in December of 2021 the
15 factors that they consider in assessing
16 significant nexus, and it includes things like
17 distance to the tributary, distance to the
18 downstream traditional navigable water, the
19 volume of the flow, the hydrology of the area,
20 the presence of other wetlands.

21 I acknowledge it --

22 CHIEF JUSTICE ROBERTS: So -- so, if
23 the Sacketts or anybody else are walking around
24 the area, they could look at something and see
25 how long -- what -- what's the -- the distance

1 factor?

2 MR. FLETCHER: So the distance factor
3 isn't a bright-line rule. You know, here, the
4 fact --

5 CHIEF JUSTICE ROBERTS: Okay. So they
6 know it's not a bright-line rule, but they have
7 to figure out -- if a certain amount of whatever
8 kind of tracing thing you use is deposited in
9 the wetlands, they then have to figure out if
10 that makes it all the way to the -- to the lake,
11 no matter how far away it is.

12 And I think, as your -- your friend
13 pointed out, I forget what the phrasing was,
14 but, you know, water goes everywhere eventually,
15 right, and so there's probably going to be a
16 biological or ecological connection of some
17 sort.

18 MR. FLETCHER: So I'd say a couple
19 things.

20 First of all, this case is focused on
21 provisions addressing adjacent wetlands. There
22 are other provisions of the regulation dealing
23 with isolated waters that aren't at issue here.
24 But, for purposes of this case, there has to be
25 a showing of adjacency.

1 And, right now, the Corps and the EPA
2 have not tried to reduce that to a bright-line
3 rule. They tried that approach in the 2015
4 rule, and that was criticized by many as being
5 arbitrary.

6 CHIEF JUSTICE ROBERTS: Have they
7 tried to reduce it to a vague rule?

8 MR. FLETCHER: Yeah, I -- I -- I think
9 -- I think they've said reasonable proximity,
10 and they've said that reasonable proximity
11 depends on the hydrology of the area. If you
12 have a flat floodplain where often floods from
13 the river reach waters or wetlands that are at
14 some distance from the river --

15 CHIEF JUSTICE ROBERTS: So somebody
16 looking around the lot would have to look at the
17 wetlands, if they can see them, and the lake and
18 say is that reasonable proximity or not?

19 MR. FLETCHER: That's right. Yes,
20 that is the standard. And I -- I --

21 CHIEF JUSTICE ROBERTS: That's the --
22 that's the standard that is used in criminal
23 prosecutions as well?

24 MR. FLETCHER: That's correct, Mr.
25 Chief Justice, but I -- I don't think that's an

1 unusual standard in regulatory or criminal
2 statutes. And as the most recent example, I'd
3 point to the Court's last Clean Water Act case,
4 County of Maui, where the Court adopted a
5 standard for indirect discharges into the
6 navigable waters, and the dissents criticized
7 that standard because it was a multifactor test
8 that was not capable of being reduced to precise
9 rules.

10 CHIEF JUSTICE ROBERTS: Yeah, but the
11 sewage plant was pretty proximate to the ocean,
12 right? How far apart -- away was it?

13 MR. FLETCHER: I don't remember
14 exactly how far apart, but it was pretty
15 proximate. But, on the other hand, the
16 Sacketts' wetland is pretty proximate to the
17 tributary and the lake. We're talking about 30
18 feet to the tributary and just 300 feet to the
19 lake itself.

20 CHIEF JUSTICE ROBERTS: Well, yeah, in
21 the Hawaii case, though, we were talking about a
22 big sewage plant.

23 MR. FLETCHER: So that -- that's
24 right, Mr. Chief Justice, and I guess -- I think
25 this -- this gets to another issue in the case,

1 which is that what we're talking about now is
2 whether wetlands are brought within the Act's
3 coverage at all.

4 The fact that they're covered by the
5 Act does not mean that development is
6 prohibited. It just means that development has
7 to be permitted. And if the Sacketts' wetlands
8 would not significantly affect or degrade Priest
9 Lake because of their location or their size or
10 anything else, that's something that's
11 appropriately taken into account in the
12 permitting process. This is just about which
13 wetlands are going to have some examination to
14 make sure that that degradation does not occur.

15 JUSTICE KAGAN: Can I ask you to
16 clarify some of the answers that you just gave
17 to the Chief Justice? I mean, the statutory
18 language is of adjacency, and at certain points
19 in your answer, you suggested that the
20 significant effects test is really just the test
21 that you use to evaluate whether there's
22 sufficient adjacency.

23 At another point when you talked to
24 the Chief Justice, you said that the test was
25 reasonable proximity. Is reasonable proximity

1 the same as significant nexus? Is -- is -- is
2 what you're doing trying to figure out how,
3 other than by demanding strict contiguity, one
4 defines adjacency, and then, you know, dealing
5 with the hard issue of it just doesn't seem as
6 though it should be 50 but not 51, but I think
7 what the Chief Justice is asking you is, well,
8 what do you look to then, you know, name the
9 three things that matter when you're saying is
10 something adjacent enough?

11 MR. FLETCHER: Right. So "significant
12 nexus" and "adjacency" are separate concepts.
13 Adjacency traces back to the original
14 regulations from 1975 and 1977 picked up in
15 Section 1344(g). The agencies have long said
16 that adjacent wetlands are covered.

17 In Rapanos, Justice Kennedy's
18 concurrence said that for traditional navigable
19 waters, he accepted that adjacency alone was
20 sufficient to justify inclusion. But, for
21 wetlands that were adjacent to tributaries
22 further upstream, Justice Kennedy thought that
23 some additional showing had to be made.

24 JUSTICE KAGAN: Okay. Then, if you're
25 going to separate them, which I had thought that

1 you hadn't done, so my mistake, but if you're
2 going to separate them, where does the
3 significant nexus test come from?

4 MR. FLETCHER: So I think it's a --
5 it's a limiting construction that limits the
6 sort of -- the broad language of the statute is
7 "waters of the United States," and as I think
8 the Court has recognized, that could conceivably
9 cover literally every body of water in the
10 country.

11 We know it doesn't mean that. We also
12 know it means something more than just navigable
13 waters, and so we need a test to figure out
14 which additional waters are covered. And what
15 the significant nexus test does is it says it's
16 permissible to sweep in additional waters if
17 they significantly affect the traditional
18 navigable waters that were the sort of core
19 focus of the Act.

20 JUSTICE KAGAN: Well, you haven't told
21 me where that comes from. I mean, it might --
22 it sounds like a very good idea to have such a
23 test, but where does it come from?

24 MR. FLETCHER: From this Court's cases
25 which say you have to give effect to two things.

1 The term being defined is "navigable waters,"
2 but the definition is broad and doesn't include
3 any requirement of navigability.

4 And the way we read Riverside Bayview
5 and SWANCC is to say you can include other
6 waters that are not themselves navigable, but
7 the justification for including them has to be
8 their effects on the traditional navigable
9 waters that are the core of this statute.
10 Things like migratory birds -- that was the
11 issue in SWANCC -- aren't good enough.

12 JUSTICE BARRETT: And they need not be
13 adjacent. So what Justice Kagan's question is
14 getting to -- and I want to make certain I
15 understand it because it's important to me --
16 the significant nexus test is separate and
17 apart, so it can be not adjacent, but so long as
18 there's a significant nexus, it's still covered,
19 it's untethered from 1344(g) in that respect?

20 MR. FLETCHER: I want to be very clear
21 to distinguish between what we think is -- you
22 have to decide in this case and then also, in
23 candor, tell you what the agency's view is about
24 other circumstances.

25 So this case is about the regulations

1 dealing with adjacent wetlands, and as to those
2 wetlands, the agencies think they're covered if
3 they're adjacent to traditional navigable waters
4 or if they're adjacent to upstream tributaries
5 and they satisfy the significant nexus test.

6 It's an additional limiting
7 construction that --

8 JUSTICE BARRETT: Okay.

9 MR. FLETCHER: -- that narrows the
10 scope of the Act. The agency --

11 JUSTICE ALITO: What is your -- I'm
12 sorry.

13 MR. FLETCHER: I was just going to say
14 the agencies have also said -- and this is
15 reflected in the Notice of Proposed Rulemaking
16 -- they would cover other waters if -- even if
17 they weren't adjacent to navigable waters if
18 they could satisfy the significant nexus test,
19 but that's not really before you here because
20 everyone agrees that if you accept our view that
21 "adjacent" means neighboring, then the Sacketts'
22 wetlands are covered.

23 I'm sorry, Justice Alito.

24 CHIEF JUSTICE ROBERTS: Justice Alito?

25 JUSTICE ALITO: What is your

1 understanding of the term "waters"?

2 MR. FLETCHER: We think it -- so our
3 understanding of it is reflected in the agency's
4 regulations, which have for 45 years spelled out
5 the different sorts of waters that are covered.
6 I think, if I were try -- going to reduce it to
7 a phrase, it would be geographic features that
8 are characterized by the presence of waters.

9 And I think where I'd part ways with
10 my friend is that I'd say that's not just lakes,
11 streams, and rivers. It's also marshes and
12 swamps.

13 JUSTICE ALITO: Any geographic feature
14 that has water in it at least at some period
15 during the course of the year, that -- that
16 falls within the term "waters"?

17 MR. FLETCHER: So, again, I -- as I
18 said, this is something that the agencies have
19 fleshed out over many decades, and one of the
20 things that they've done is exclude both because
21 of particular statutory provisions excluding
22 particular types of waters and also because the
23 agencies as a matter of regulation have excluded
24 things like irrigation ditches, waste treatment
25 systems, small erosional features, those sorts

1 of things. So I don't --

2 JUSTICE ALITO: They can be man- --

3 MR. FLETCHER: -- want to say --

4 JUSTICE ALITO: -- they can be
5 man-made features, right?

6 MR. FLETCHER: That's correct, yes.

7 JUSTICE ALITO: Why aren't irrigation
8 ditches included?

9 MR. FLETCHER: I think irrigation
10 ditches aren't included both because the -- the
11 agencies have made the determination that it
12 doesn't make sense to include them and also
13 because, typically, irrigation ditches bring
14 water from the waters of the navigable waters,
15 canals, rivers, things like that, and distribute
16 it out into rivers. They're not bringing water
17 back into the navigable waters.

18 JUSTICE ALITO: Well, if we forget
19 about everything the agencies have done and
20 everything this Court has said about the
21 question of what constitutes waters, what would
22 you say is the definition of "waters"? Is it --
23 a -- a definition was provided by the plurality
24 opinion in Rapanos. You disagree with that.
25 Does it include any place in the United States

1 that has water in it?

2 MR. FLETCHER: No, I don't think it
3 does. I accept the -- the Rapanos plurality's
4 idea that it is a geographic features
5 characterized by the presence of water. I'd go
6 further than that and say that wetlands can
7 easily fit that description.

8 And I acknowledge that there are some
9 difficult cases about how do you distinguish
10 between a wash and an intermittent or a seasonal
11 stream or a river. Those cases really aren't
12 before you here. This is a case about whether
13 adjacent wetlands are waters, and I think, on
14 that point, the sort of clearest place to look
15 is Section 1344(g).

16 JUSTICE ALITO: No, but we need to
17 know what "waters of the United States" means.
18 That's what we're interpreting. We're really
19 not interpreting 1344(g).

20 1344(g) may shed some light on what is
21 meant by "waters of the United States," but
22 we're interpreting what is meant by that phrase,
23 that cryptic phrase, a strange phrase, "waters
24 of the United States."

25 MR. FLETCHER: So I agree exactly with

1 the description of what the Court ought to do.
2 And my point was just that it's a difficult
3 problem of how to interpret it and apply it to
4 all of the different water features in the
5 country.

6 And I was trying to emphasize the --
7 the specific question before you is what to do
8 about wetlands adjacent to other waters. And on
9 that point, 1344(g)'s text and history I think
10 speak very clearly and provide in our view
11 dispositive guidance about how to interpret and
12 apply that general statutory language to this
13 particular category.

14 JUSTICE KAVANAUGH: But the text
15 doesn't say in referring to adjacent in 1344(g)
16 whether that means bordering or contiguous and
17 stop there or also include neighboring, as the
18 regulation does.

19 And as I understand, the case really,
20 as your brief set it out, comes down to, okay,
21 what about a wetlands separated by a berm or
22 dune or by a dike or levee?

23 And on that question, I -- I suppose,
24 since Congress hasn't specified that it goes
25 that extra step, why not let Congress figure out

1 where the line is?

2 I mean, I think that's the toughest
3 hurdle you face, is that Congress -- we've
4 gotten, as Justice Alito, says from waters to
5 adjacent and now from contiguous or neighboring
6 to -- contiguous or bordering to also
7 neighboring, and shouldn't that be Congress's
8 job? So what's your general response to that?

9 MR. FLETCHER: So I think, if you look
10 at 1344(g) in context, Congress has answered
11 this question. We think you'd get there past
12 just directly abutting and to neighboring on the
13 dictionary definitions alone, the definitions we
14 cite at page 22 of our brief, but I don't think
15 you need those here because of the history
16 against which Congress acted.

17 And, Justice Barrett, this goes to
18 your question about the chronology. The Corps
19 of Engineers first defined "the waters of the
20 United States" to include adjacent wetlands in
21 1975. An interim regulation issued in 1975, and
22 those regulations said adjacent or contiguous to
23 and so I think already made clear that we're not
24 just limiting to contiguous right here.

25 JUSTICE KAVANAUGH: Then it spelled it

1 out only in '77.

2 MR. FLETCHER: Then, in July of 1977,
3 it spelled it out. It said we're deleting
4 contiguous because that's a subset of adjacency
5 and we're making explicit that the presence of a
6 barrier like a berm or a dune is not enough to
7 defeat adjacency.

8 And then Congress comes along in
9 December of 1977 and in this carveout in 1344(g)
10 which is dividing up which waters are going to
11 be covered by the states, which are going to be
12 reserved to the federal governments.

13 And in doing that, Congress drew a
14 line that was reflected in the Corps's
15 regulations. The Corps had, when it expanded
16 jurisdiction out, it said we're going to phase
17 in this expansion of our jurisdiction. We're
18 going to start with traditional navigable waters
19 and their adjacent wetlands and then we're going
20 to move to other things later.

21 And what Congress did in 1344(g) was
22 say the federal government is going to keep
23 permitting authority over phase one and the
24 states can take permitting authority over
25 everything else.

1 And I think that context makes it
2 especially clear that Congress was picking up
3 the concept of adjacency that was reflected in
4 the Corps's regulations.

5 JUSTICE KAVANAUGH: And it's kind of a
6 bank shot way to do it, you would acknowledge
7 that?

8 MR. FLETCHER: So I -- I guess,
9 Justice Kavanaugh, I think --

10 JUSTICE KAVANAUGH: And -- and you
11 used the phrase "shed light on." What does --
12 what does that mean?

13 MR. FLETCHER: Well, I -- I think
14 confirmed that the agency's understanding was
15 correct. So, you know, this is the term,
16 "waters of the United States." The Corps, the
17 EPA, the Department of Justice, the courts all
18 interpreted that to reach adjacent wetlands.

19 And Congress was then presented with a
20 lot of the same objections you're hearing now
21 with people saying this is too much of an
22 intrusion on the states, this is messing with
23 farming and ranching and other activities. And
24 there was a serious proposal to curtail the
25 jurisdiction in the way that they suggest. But

1 --

2 JUSTICE JACKSON: Can I --

3 JUSTICE KAVANAUGH: And Congress
4 carved out --

5 JUSTICE ALITO: If -- if 13- --

6 JUSTICE KAVANAUGH: -- farming and
7 agricultural activities?

8 MR. FLETCHER: Exactly right. It did
9 something different. It said we're not going to
10 accept a proposal to carve out wetlands from the
11 Act's coverage entirely.

12 Instead, we're going to do two
13 things -- three things actually. We're going to
14 carve out certain activities like farming and
15 ranching. We're going to transfer permitting
16 authority over some wetlands to the states to
17 give the states a greater role in things. And
18 then we're going to ratify this concept of
19 general permits to streamline the permitting
20 process.

21 So it was sensitive to these concerns,
22 but it rejected the idea of carving off wetland
23 coverage in the way that Petitioners are now --

24 JUSTICE ALITO: If 1344 -- I'm sorry.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch.

2 JUSTICE GORSUCH: Thank you.

3 Mr. Fletcher, I just want to
4 understand your concept of "adjacency" and --
5 and how it differentiates from substantial
6 nexus.

7 So your -- your first point was that
8 if it's adjacent to a water of the United
9 States, we're done.

10 MR. FLETCHER: Right.

11 JUSTICE GORSUCH: We don't do the
12 substantial nexus test. And I want to
13 understand how much adjacency is adjacent.

14 And I think you indicated that you --
15 you thought that this property -- and I just
16 want to make sure I heard you right -- that this
17 property is adjacent indeed to a water of the
18 United States because it's close enough to
19 Priest Lake itself.

20 MR. FLETCHER: So I -- I -- that is my
21 view.

22 JUSTICE GORSUCH: Okay.

23 MR. FLETCHER: I want to be clear
24 about how the case has developed, though.

25 JUSTICE GORSUCH: I -- I -- I -- I

1 just want to make sure --

2 MR. FLETCHER: Okay.

3 JUSTICE GORSUCH: -- I just want to
4 understand that's the view of the government.
5 Despite the fact that there's a subdivision
6 between this property and the lake, it's still
7 adjacent to the lake?

8 MR. FLETCHER: That's the government's
9 view. That --

10 JUSTICE GORSUCH: And it's adjacent
11 why? What's the definition of "adjacency"
12 that's independent from substantial nexus? And
13 then I have a couple follow-ups to that.

14 MR. FLETCHER: Sure. So it's -- the
15 agency's understanding of "adjacency" is, you
16 know, neighboring, and we have -- they have
17 cached that out by saying it's a reasonable
18 proximity to a covered water.

19 JUSTICE GORSUCH: Is there a -- a
20 mileage limit to that?

21 MR. FLETCHER: So they haven't tried
22 to do that. They did try that in the 2015 rule.
23 They said there anything within a hundred feet
24 or anything within the hundred-year floodplain
25 and 1500 feet. And they were --

1 JUSTICE GORSUCH: But those have been
2 rejected.

3 MR. FLETCHER: Those have been
4 rejected.

5 JUSTICE GORSUCH: So does a reasonable
6 landowner have any idea? So, for example, in
7 Priest Lake, I imagine that most of the water
8 flow and rainfall and snowfall in quite a large
9 geographic area drains into the lake eventually
10 or wishes to, unless diverted.

11 It -- would that whole watershed be
12 adjacent to?

13 MR. FLETCHER: So I don't think so,
14 Justice Gorsuch. And, also, as -- I am
15 sympathetic to the idea of how does a landowner
16 know under the standard whether their land is
17 covered. It's important to recognize that there
18 are other limits too. They have to actually be
19 wetlands. So --

20 JUSTICE GORSUCH: No, I understand
21 that. I'm just asking about adjacency.

22 MR. FLETCHER: Understood.

23 JUSTICE GORSUCH: How does anyone
24 know, any reasonable person know, within maybe
25 several hundred square miles in -- in a

1 watershed that drains into a body of water that
2 is a water of the United States, know whether or
3 not their -- their land is adjacent to?

4 MR. FLETCHER: So I -- I think we are
5 talking about adjacency, and that may not be
6 something that gives you bright-line rules, but
7 it rules out things that are many miles away.

8 JUSTICE GORSUCH: Does it?

9 MR. FLETCHER: In -- in my --

10 JUSTICE GORSUCH: Are you sure the EPA
11 would take that view?

12 MR. FLETCHER: I -- in -- I -- I've
13 asked this question. The agencies have told me
14 they do not draw bright-line rules. They do not
15 think 300 feet is unreasonable for adjacency.

16 JUSTICE GORSUCH: So how about 3,000
17 feet? Could be?

18 MR. FLETCHER: I -- I don't -- I don't
19 know the answer to that, Justice Gorsuch.

20 JUSTICE GORSUCH: Could it be three
21 miles?

22 MR. FLETCHER: I -- I don't think it
23 could be three miles.

24 JUSTICE JACKSON: Is there a process
25 for --

1 JUSTICE GORSUCH: Hold -- one -- I'm
2 -- I'm sorry. I'm just -- I'm just -- so -- so
3 it couldn't be three miles?

4 MR. FLETCHER: I don't think it could,
5 Justice Gorsuch.

6 JUSTICE GORSUCH: Could it be two
7 miles?

8 MR. FLETCHER: That, a -- again, when
9 we start to talk about miles, that sounds too
10 far to be adjacent -- to reasonably be proximate
11 to me.

12 JUSTICE GORSUCH: One mile?

13 MR. FLETCHER: Again, I see where this
14 is headed.

15 (Laughter.)

16 MR. FLETCHER: But -- but, again, I
17 think --

18 JUSTICE GORSUCH: So, if the federal
19 government doesn't know, how is a person subject
20 to criminal time in federal prison supposed to
21 know?

22 MR. FLETCHER: So the agencies, in
23 recognition of this problem, make available free
24 of charge jurisdictional determinations as to
25 any property. They also publicize their manuals

1 and make available on websites every
2 jurisdictional --

3 JUSTICE GORSUCH: Their manuals that
4 don't tell us the answer.

5 MR. FLETCHER: So I -- I understand,
6 Justice Gorsuch, and I -- I think you could make
7 similar criticisms and -- and the dissenting
8 Justices did make similar criticisms of the
9 functional equivalent to an indirect discharge
10 standard in County of Maui. And the Court
11 recognized that sometimes Congress gives us laws
12 where the text isn't susceptible to bright-line
13 rules. I think adjacency is one of those that
14 cannot be --

15 JUSTICE GORSUCH: I'm done on
16 adjacency. I've got some substantial nexus
17 questions, but I've got a colleague who wants to
18 ask a question first.

19 JUSTICE JACKSON: Yes, I just -- I
20 just wanted to follow up on Justice Gorsuch's
21 very fair points, which were my points. How do
22 -- how do people know? Is there a process by
23 which a homeowner can ask?

24 MR. FLETCHER: Yes. Any homeowner can
25 ask the Corps for a jurisdictional

1 determination. The Corps makes those available
2 free of charge.

3 JUSTICE JACKSON: And so you're not
4 really facing criminal liability without the
5 opportunity to get an assessment from the
6 government regarding your particular
7 circumstances?

8 MR. FLETCHER: That's correct.

9 JUSTICE JACKSON: All right. And --

10 JUSTICE ALITO: And what happens if
11 this -- if the -- the government's determination
12 based on this multifactor test is that you can't
13 develop your property? Then what recourse does
14 the homeowner have?

15 MR. FLETCHER: The homeowner can
16 challenge that determination. If we're talking
17 about a determination that you can't develop,
18 that wouldn't just be a jurisdictional
19 determination. That would have to also be a
20 permitting decision --

21 JUSTICE ALITO: Yeah. Okay. But --

22 MR. FLETCHER: -- because just being
23 covered doesn't mean you can't develop.

24 JUSTICE ALITO: -- what if the
25 homeowner doesn't agree with the jurisdictional

1 decision?

2 MR. FLETCHER: This Court's decision
3 in Hawkes makes clear that the homeowner can
4 seek judicial review of that at that point,
5 without potentially incurring any -- any
6 penalties, can challenge the jurisdictional
7 determination there and can also seek a permit,
8 you know, and that is -- I think it's important
9 to emphasize just again that being covered by
10 the Clean Water Act doesn't mean no development.
11 It means review.

12 And the Corps have -- have taken a lot
13 of steps at Congress's behest to streamline the
14 process through the availability of nationwide
15 permits for things like road construction, for
16 the development of dams, for single-family home
17 construction, in order to --

18 JUSTICE BARRETT: But the
19 site-specific which is applicable to the
20 Sacketts, you don't dispute in your brief that
21 that can cost hundreds of thousand dollars and
22 be years and years? It's just the general
23 permitting that gets you out of that and gets
24 you in the \$14,000 range in the shorter time
25 period?

1 MR. FLETCHER: So we think the several
2 hundred thousand dollars is exaggerated for the
3 site-specific permits as well. The same source
4 that we cite on page 37 of our brief for the 4
5 to 14,000 dollars for nationwide permits gives
6 numbers of 17,000 to 35,000 dollars as the
7 usual cost --

8 JUSTICE BARRETT: Site-specific?

9 MR. FLETCHER: -- for site-specific,
10 that's right. And it's -- it's also important
11 to recognize that those site-specific permits
12 often involve much bigger projects that could be
13 major developments spanning many, many acres.
14 So that's the agency's best estimate of the cost
15 of a simple --

16 JUSTICE BARRETT: So Rapanos was just
17 wrong in citing that statistic?

18 MR. FLETCHER: In our view, that --
19 that statistic is not consistent with the best
20 information we have now. And that's from the
21 2021 regulatory impact analysis of the
22 re-issuance of the nationwide permits.

23 JUSTICE SOTOMAYOR: Your -- your
24 adversary, the other side -- I shouldn't call
25 them adversary -- your -- the other side argued

1 that Mr. Sackett could not tell this was a
2 marshland. Is that true? Because you said the
3 first thing is it has to be a wetland.

4 MR. FLETCHER: So I don't know what
5 Mr. Sackett could tell, and I don't want to
6 speak to that. What I can speak to is what's in
7 the record, which is communications from the
8 Army Corps to the prior owner in 1996 saying
9 this is a jurisdictional wetland, you would need
10 a permit to build, here's information about how
11 to seek nationwide permits.

12 And we also have the pictures of the
13 property that are at Petition Appendix 37 to 39
14 and also in the Joint Appendix. Now we don't
15 have pictures before it was filled in with
16 gravel, but the pictures after it was filled in
17 with gravel show that the parts that are not
18 filled with gravel have standing water in them.

19 And, also, the Sacketts' own
20 environmental consultant who came and looked at
21 the property confirmed the Corps's judgment that
22 these are wetlands.

23 I think it's also worth emphasizing
24 that although they're now separated by the
25 larger fen across the street by Kalispell Bay

1 Road, historically, before the road was built,
2 that wasn't true. It was all part of one
3 wetlands complex, and the whole fen drained down
4 through the Sacketts' property and into -- to
5 Priest Lake.

6 JUSTICE KAVANAUGH: Is it possible --

7 JUSTICE SOTOMAYOR: Counsel --

8 JUSTICE KAVANAUGH: Go ahead.

9 JUSTICE SOTOMAYOR: Just one last
10 question, and borrowing from Justice -- what
11 Justice Kagan did before, as you can probably
12 tell, some of my colleagues are dubious that
13 this is precise enough definition, adjacency, to
14 survive.

15 So is there another test? Not the
16 Rapanos test, not the adjacency test, not the
17 significant nexus test. But is there another
18 test that could be more precise and less
19 open-ended than the adjacency test or the
20 significant nexus test that you use? Is there
21 some sort of connection that could be
22 articulated?

23 MR. FLETCHER: So I'd say a couple
24 things about that.

25 I'd say, first of all, that if you're

1 in that world, you're past the sort of
2 line-drawing problem or the notion that wetlands
3 aren't really waters and so are only covered if
4 they're indistinguishable, and, instead, we're
5 making a judgment about which wetlands are
6 appropriate to cover because of their effect.

7 JUSTICE SOTOMAYOR: Exactly.

8 MR. FLETCHER: Now there are different
9 ways to draw that line. Justice Kennedy
10 articulated the significant nexus test. The --

11 JUSTICE SOTOMAYOR: But that's -- but
12 that's when it's not adjacent, correct?

13 MR. FLETCHER: That's when it's not
14 adjacent to a traditional navigable water.

15 JUSTICE SOTOMAYOR: Right. I want to
16 go --

17 MR. FLETCHER: That does apply to
18 adjacent to a tributary.

19 JUSTICE SOTOMAYOR: -- because we seem
20 to be searching for wetlands adjacent --

21 MR. FLETCHER: Right.

22 JUSTICE SOTOMAYOR: -- so let's stick
23 to that.

24 MR. FLETCHER: Right. So, for
25 wetlands adjacent, if you wanted a -- a sort of

1 crisper, clearer definition of "adjacent," I --
2 as I think my colloquy with Justice Gorsuch
3 illustrates, I think it's difficult to say that
4 there's one single bright-line answer. The
5 agencies are taking comment on this and are
6 considering whether there are things that they
7 could do to provide greater clarity to the
8 regulated public on all parts of the test,
9 including adjacency and significant nexus.

10 The 2015 rule, as we discussed, tried
11 to draw some bright-line rules. Those were
12 criticized as arbitrary and overinclusive, which
13 is the problem with bright-line rules. They'll
14 be overinclusive or underinclusive. But I -- I
15 certainly think there is a range of reasonable
16 understandings of what "adjacency" means, and
17 also I know you're focused on that, but
18 significant nexus too.

19 JUSTICE KAGAN: Did -- did I just
20 understand you to say that the rule that you're
21 issuing may, in fact, have more guidance than we
22 currently have as to what "adjacency" means?

23 MR. FLETCHER: I -- I don't want to
24 represent what's coming in the forthcoming rule
25 because it's not issued yet. By definition, the

1 agencies haven't finished their deliberation. I
2 -- I will say they've sought comment on how to
3 cache out, how to crystallize the significant
4 nexus test and the adjacency framework that it
5 is a part of. And they've also said that even
6 after this rulemaking, they are interested in --

7 JUSTICE KAGAN: When is the rulemaking
8 coming down?

9 MR. FLETCHER: So it's with OMB now.
10 It's public that in September it went over to
11 the Office of Management and Budget for
12 interagency review. The agencies have told me
13 that they still expect to issue it by the end of
14 the year.

15 JUSTICE KAVANAUGH: Is it possible for
16 you to be correct about the adjacent test as
17 articulated so far, but the Sacketts win?

18 MR. FLETCHER: I don't think so,
19 Justice Kavanaugh. I don't --

20 JUSTICE KAVANAUGH: And why is that?

21 MR. FLETCHER: So I don't take them to
22 be disputing that if "adjacency" means something
23 more than just directly abutting or contiguous
24 with, then their property satisfies that
25 standard because it's just 30 feet away from the

1 tributary across the street.

2 JUSTICE GORSUCH: -- across the street
3 because that's -- that's where we need the
4 substantial nexus test, right?

5 MR. FLETCHER: No, the substantial
6 nexus has to go to the navigable water, sort of
7 downstream navigable water.

8 JUSTICE GORSUCH: Oh, I thought -- I
9 thought, if you're adjacent to a water of the
10 United States, you're good to go.

11 MR. FLETCHER: I'm sorry. Yes, yes,
12 yes.

13 JUSTICE GORSUCH: Okay, but -- so you
14 need substantial nexus if you're working through
15 the tributary, which is, if you look at the
16 appendix, that great picture at the end is
17 across the street, through a ditch, and then
18 down through a creek, and then it eventually
19 gets to the water of the United States. And so,
20 for that, you need the substantial nexus between
21 the Sacketts' property across the road and into
22 the ditch at least, right?

23 MR. FLETCHER: So, yes, but with a
24 couple caveats if I -- if I could.

25 JUSTICE GORSUCH: Okay.

1 MR. FLETCHER: You're right that you
2 do need to satisfy the significant nexus test if
3 you're relying --

4 JUSTICE GORSUCH: Yeah. Right.
5 Significant nexus.

6 MR. FLETCHER: -- on adjacency to a
7 tributary.

8 JUSTICE GORSUCH: Yeah. Yeah. Okay.
9 So we're going that way. Does it -- first of
10 all, does the significant nexus have to be to
11 the ditch across the road or all the way down to
12 the -- the lake?

13 MR. FLETCHER: All the way down to the
14 lake.

15 JUSTICE GORSUCH: Okay.

16 MR. FLETCHER: That's the limiting
17 work that it does. It says --

18 JUSTICE GORSUCH: Okay. Great.
19 That's helpful. How much? It's the same
20 question, different test.

21 MR. FLETCHER: Yeah.

22 (Laughter.)

23 JUSTICE GORSUCH: And -- and the Chief
24 kind of alluded to this already. How many parts
25 per million of what kind of stuff has to get

1 from the Sacketts' property across the road into
2 a ditch, I don't know how far -- how many
3 thousands of feet over to a -- a -- a creek, and
4 then from the creek down into the lake?

5 MR. FLETCHER: So I'm going to give
6 you a similar answer, which is to say I can give
7 you qualitative --

8 JUSTICE GORSUCH: But you don't know?

9 MR. FLETCHER: No, no. Respectfully,
10 Justice Gorsuch, in law, I think there's a
11 qualitative standard with guideposts that isn't
12 determinative.

13 JUSTICE GORSUCH: You can call out
14 your local friendly agent and he'll tell you,
15 yes or no?

16 MR. FLETCHER: Will tell you here are
17 the guidelines that the agencies use. They'll
18 tell you free of charge what they think. And if
19 you don't like what they think, you're free to
20 challenge that in court, yes.

21 JUSTICE GORSUCH: Okay. So that's --
22 so we don't know until he comes out and tells
23 you? I mean, is there -- what -- what is the
24 standard? I mean, give me your best shot.

25 MR. FLETCHER: So it's do the wetlands

1 with other similarly situated wetlands
2 significantly affect the chemical, biological,
3 or physical integrity of downstream waters.

4 JUSTICE GORSUCH: And what does that
5 mean?

6 MR. FLETCHER: The agencies look at
7 the functions that are typically performed by
8 wetlands, like retention of flood waters,
9 filtering of pollutants, provision of flow
10 during dry periods, and they look at the
11 distance, they look at the amount of flow from
12 the wetland and other wetlands down to the
13 downstream navigable water, and they look at the
14 climate.

15 JUSTICE GORSUCH: How is that
16 different than adjacent?

17 MR. FLETCHER: So I think adjacent is
18 focused on reasonable proximity.

19 JUSTICE GORSUCH: I thought that was
20 part of the test you just gave me too.

21 MR. FLETCHER: Distance -- distance is
22 one factor, but what the significant nexus test
23 says is that if you're going to be relying on
24 adjacency to some upstream tributary, that's not
25 good enough to justify coverage. You have to

1 show that that has a significant effect on the
2 downstream navigable waters. It makes it harder
3 to include wetlands that are adjacent only to
4 tributaries and not to navigable waters.

5 JUSTICE GORSUCH: Thank you.

6 JUSTICE BARRETT: Mr. Fletcher, is the
7 government estopped -- is the -- is the Corps or
8 the EPA estopped from going after you? If you
9 get a jurisdictional determination and they say,
10 yeah, not within our jurisdiction, not a
11 wetland, then are you protected?

12 MR. FLETCHER: That's my
13 understanding, at least for five years.
14 Jurisdictional determinations are good for five
15 years, and I think one of the reasons that this
16 Court gave in Hawkes for why those are
17 judicially reviewable final agency action is
18 because they're binding on the Corps and the EPA
19 for that five-year period.

20 JUSTICE BARRETT: One other question.
21 So the significant nexus test -- do you want me
22 to stop?

23 CHIEF JUSTICE ROBERTS: Go ahead.
24 Yeah.

25 JUSTICE BARRETT: The significant

1 nexus test, you said, is separate and apart and
2 the subject of a different rulemaking and that
3 the agency has a broader view than adjacency,
4 than adjacency would be here.

5 So the significant nexus test, I take
6 it, would be grounded in waters of the United
7 States and not 1344(g)?

8 MR. FLETCHER: That's right, yes.

9 JUSTICE BARRETT: And if -- if we
10 accepted the significant nexus test, we wouldn't
11 even really need 1344(g) because it would be
12 broader than adjacency?

13 MR. FLETCHER: I think potentially
14 that's right. But I think that's what makes --
15 1344(g) makes this case about adjacent wetlands
16 an even easier case and doesn't require you to
17 pass on the validity of that broader theory.

18 JUSTICE BARRETT: But, if waters of
19 the United States already included everything
20 with a significant nexus, then why does
21 adjacency even matter in 1344(g)?

22 MR. FLETCHER: Well, I think adjacency
23 still matters in 1344(g) because that's express
24 textual confirmation that Congress understood
25 that adjacent wetlands are coverage. The

1 agencies, as reflected in the rulemaking, think
2 that the Act's coverage goes beyond that in ways
3 that might subsume the adjacent wetlands theory,
4 but I think, for purposes of this case, 1344(g)
5 would be -- still be very, very instructive.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas?

9 JUSTICE THOMAS: Mr. Fletcher, it --
10 it seems as though when there's a body of water
11 and a nearby wetland, there's a presumption that
12 it's covered by the Clean Water Act. The -- and
13 then the -- the homeowner or whomever owns it or
14 attempts to develop it has to opt out in some
15 way.

16 Can you give me an example of a body
17 of water and nearby land that is automatically
18 or presumptively excluded from coverage?

19 MR. FLETCHER: Sure. So I think, if I
20 understand the question, the agencies have
21 defined some automatic exclusions. You know, in
22 addition to just anything that doesn't satisfy
23 the significant nexus test, they've ruled out
24 things like certain ditches that are excavated
25 in uplands, small erosional features, things

1 that are isolated and --

2 JUSTICE THOMAS: No, I mean, you know,
3 I grew up in -- in low country Georgia and you
4 had standing water. That was normal.

5 And I'm thinking of something that's
6 natural like that that is presumptively not
7 covered and is not near -- not bordering on -- I
8 don't want to use the term "adjacent." I'm done
9 with that word.

10 (Laughter.)

11 JUSTICE THOMAS: Bordering on a -- a
12 body of water.

13 MR. FLETCHER: Sure. So I -- I don't
14 know that the agencies have talked in terms of
15 presumptively not covered. I think the best
16 thing that I can point you towards is in the
17 2021 NPRM, and this is at page 69432.

18 The agencies, in explaining that the
19 significant nexus test really has teeth,
20 explained that they routinely conclude that
21 waters aren't covered, and they give half a
22 dozen or so specific examples of the types of
23 isolated things that are definitely waters but
24 still aren't covered because they don't have
25 enough of a connection to the downstream now.

1 JUSTICE THOMAS: So, in other words,
2 if I were still living there, I wouldn't know
3 until you told me?

4 MR. FLETCHER: No, Justice Thomas,
5 respectfully, I -- I disagree with that. I
6 think that if you have an isolated body of
7 water, an isolated, you know, farm pond or
8 something like that, there are some things that
9 are categorically excluded.

10 If you're not in one of those
11 categories, the question that you'd have to ask
12 is, is there a -- is this adjacent to or is
13 there a significant nexus with the navigable
14 waters? And I think, for an isolated body of
15 water, the answer to that would be no.

16 JUSTICE THOMAS: And could you --
17 if -- if I were concerned about the authority of
18 EPA to regulate a purely intrastate body of
19 water or associated wetland, where would I find
20 the authority for that, or would you give me
21 your best argument for the authority of the --
22 of the government to regulate that?

23 MR. FLETCHER: Sure. I think it's
24 authority that's common ground between us and
25 Petitioners --

1 JUSTICE THOMAS: Yeah.

2 MR. FLETCHER: -- that the Commerce
3 Clause gives the federal government the
4 authority to regulate the channels of interstate
5 commerce, including navigable waters, whether
6 they're interstate or intrastate, if they can be
7 used in -- to transport commerce, that's within
8 the commerce power. That's common ground
9 between the parties.

10 And then also, and this is the next
11 step, that authority extends beyond just things
12 that happen in the channels but also things that
13 happen outside the channels but could damage
14 them. That's something that's been
15 uncontroversial since the 1899 Rivers and
16 Harbors Act, which extended up to tributaries
17 and the banks of tributaries of navigable
18 waters, and it's really necessary for Congress
19 to be able to protect the channels of commerce
20 to also to be able to protect activities that
21 affect those channels.

22 JUSTICE THOMAS: What is a channel of
23 commerce? I am talking about a purely
24 intrastate, for example, a lake, purely
25 intrastate. How does that get to be a channel

1 of commerce?

2 MR. FLETCHER: So I'd -- I'd point to
3 the same case that my friend did, the Great Salt
4 Lake was at issue in some litigation between
5 Utah and the United States.

6 And what the Court said is, even
7 though it's intrastate and there's no water
8 connection to some out-of-state body, you could
9 still move commerce across it and that commerce
10 could be moving in intrastate if you married up
11 the transport over water with transport over
12 land.

13 JUSTICE THOMAS: Is there a lot of
14 transportation over the Great Salt Lake?

15 MR. FLETCHER: Apparently not. That's
16 why it was in litigation. But the Court held
17 that a little bit from the 1880s was enough.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: I guess
20 there's less and less.

21 Justice Alito?

22 JUSTICE ALITO: Does your
23 understanding of "waters of the United States"
24 take into account any of the clear statement
25 rules that have been invoked on the other side,

1 for example, the effect on federalism, the fact
2 that you're reading an awful lot into a
3 parenthetical in 1344(g).

4 Your -- your -- your argument is that
5 with this parenthetical, Congress did something
6 that has major importance.

7 And also the fact that there may be a
8 vagueness problem. Do you take any of that into
9 account?

10 MR. FLETCHER: I think -- yes. I
11 think those considerations are all reflected in
12 this Court's prior decisions. And we take the
13 significant nexus test to be consistent with
14 those decisions and to be a limiting
15 construction, a narrowing construction on the
16 covered waters that make sure that the covered
17 waters include all the waters that are necessary
18 to achieve the goal that I talked about with
19 Justice Thomas and that leave waters that aren't
20 essential to that goal to the states to
21 regulate.

22 JUSTICE ALITO: Okay. So it sounds
23 like your understanding of "waters of the United
24 States" is any -- I come back to my earlier
25 question -- anything in the United States that

1 has water in it if it has an ecological effect
2 on -- on -- on waters of -- on navigable waters,
3 is that right? And then these clear statement
4 rules narrow that? That's your interpretation
5 of the phrase "waters" -- "waters"?

6 MR. FLETCHER: I -- I wouldn't say any
7 effect is good enough. I think the concept is
8 --

9 JUSTICE ALITO: Significant.

10 MR. FLETCHER: -- significant nexus
11 from this Court's cases, but, yes.

12 JUSTICE ALITO: Could -- would you win
13 if 1344(g) had not been enacted?

14 MR. FLETCHER: I think we would. I
15 think the Corps of Engineers and the EPA got it
16 right the first time when they said adjacent
17 wetlands are regulated under the plain text of
18 the statute. What 1344 does you is that it
19 tells you that Congress looked at this problem,
20 considered proposals to cut back the Act, and
21 then essentially approved the Corps's
22 interpretation in express statutory text while
23 adopting other changes to the Act to deal with
24 some of the concerns that were raised.

25 JUSTICE ALITO: Just out of curiosity,

1 what is your understanding of "of the United
2 States"? Does that mean in the United States,
3 or does it mean something else?

4 MR. FLETCHER: I think it means more
5 than just "in the United States." We take it to
6 mean waters in which there's a federal interest,
7 waters that affect the navigable waters that are
8 -- where the federal interest is indisputable.
9 We take it to be sort of reiterating that point.

10 JUSTICE ALITO: That would extend
11 very, very far, would it not?

12 MR. FLETCHER: It's true that the
13 Act's coverage is broad. It's been understood
14 as broad from the beginning. And that was
15 Congress's intent, you know, was to
16 comprehensively regulate the waters of the
17 United States because the prior system that
18 relied primarily on states had proved
19 insufficient, in part because this isn't a
20 problem that the states can solve by themselves
21 because pollution that happens in one state or
22 the destruction of wetlands in one state have
23 consequences that may be felt in many states
24 downstream that can't themselves regulate to
25 address it.

1 JUSTICE ALITO: Do you doubt that
2 Congress could regulate dry land on the theory
3 that it has a significant -- together with other
4 similar pieces of dry land, it has a significant
5 effect on interstate commerce?

6 MR. FLETCHER: I think I would
7 probably defend such a law. And I think the
8 Rivers and Harbors Act was a version of that
9 which said you can't place refuse on the banks
10 of tributaries to navigable waters because it
11 could wash downstream into the navigable waters.
12 But I think that's, you know, stretching out
13 further certainly than Congress did here.

14 JUSTICE ALITO: So, if that's the
15 limitation on "of the United States," it's not
16 much of a limitation?

17 MR. FLETCHER: So, Justice Alito, I
18 disagree, and I think the -- the -- the proof is
19 sort of in the pudding. The agencies have told
20 us, in proposing to recodify the significant
21 nexus test that we're defending here today, that
22 it has real teeth, that they routinely conclude
23 that it's not satisfied, and that something like
24 25 percent of jurisdictional determinations made
25 under the post-Rapanos guidance conclude that

1 there is no jurisdiction under the Act.

2 So I think that that's real concrete
3 evidence that this is broad because Congress's
4 purpose was broad, but it's not unlimited.

5 JUSTICE ALITO: What the agencies have
6 done, I would imagine, is to take a very broad
7 provision that can be re- -- can be read to give
8 them almost plenary authority and made some
9 pragmatic judgments about how far they want to
10 go based on all sorts of factors. Is that
11 unfair?

12 MR. FLETCHER: I -- I don't think it's
13 unfair in the sense that I think pragmatism,
14 administrability, considerations of policy have
15 factored into this rulemaking, I'm sure. But I
16 think I -- the thing I'd add to what you said is
17 that the agencies have also been mindful,
18 especially in the ongoing rulemaking, of the
19 guidance provided by this Court's decisions,
20 which have significantly narrowed the agencies'
21 interpretation from where it was in the '80s.

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: I just want to be

1 clear, you're defending the significant nexus
2 test with respect to use when it's not adjacent
3 to navigable waters, correct?

4 MR. FLETCHER: That's correct.

5 JUSTICE SOTOMAYOR: But -- so are you
6 giving up the argument that the Sackett
7 property -- that the Sackett wetland is covered
8 by the Act simply because it is adjacent to
9 Priest Lake? I thought --

10 MR. FLETCHER: So this is -- I didn't
11 get a chance to get this out in response to
12 Justice Gorsuch. What I wanted to say is the
13 agencies do think and argued previously that the
14 wetland is adjacent to the lake itself. The
15 district court upheld that determination. We
16 didn't renew that argument in the Ninth Circuit
17 or in our briefs in this Court. We relied on
18 adjacency to the tributary and the additional
19 showing of a significant nexus to Priest Lake.
20 So that's how the case has been briefed and
21 argued as it comes to this Court. But if you're
22 asking about the agencies' view --

23 JUSTICE SOTOMAYOR: Why did you give
24 it up?

25 MR. FLETCHER: I -- I don't know why

1 that decision was made. I would guess that it's
2 because adjacency to the tributary is in some
3 ways a simpler test. It's only 30 feet from the
4 tributary, and because we felt confident that we
5 could make this showing of significant nexus
6 down to Priest Lake, it was the sort of simpler
7 way to justify the conclusion that the property
8 is covered.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Gorsuch?

11 JUSTICE KAVANAUGH: I just want to
12 follow up on Justice Gorsuch's earlier questions
13 because I think he identified something that
14 this Court's overwhelmingly been concerned about
15 for decades, mens rea and not punishing innocent
16 people who -- who make a mistake, or -- an
17 innocent mistake.

18 So what assurance can you provide on
19 that front that some of the hypotheticals about
20 someone being penalized for making a mistaken
21 but reasonable judgment about the status of
22 their land will -- will not, in fact, be
23 punished?

24 MR. FLETCHER: So I'd say a couple
25 things.

1 The first one is this Court made the
2 point in Maui that the civil penalties
3 provisions direct courts to consider things like
4 essentially mens rea or culpability in deciding
5 the amount of civil penalties, and as the Court
6 said there, it was confident that district
7 courts would take that into account. In the
8 agencies' experience, they do.

9 On the criminal side of the house,
10 it's true that the -- 1319(d) of the Act does
11 provide for criminal -- potential criminal
12 liability for negligent or knowing violations.
13 As a matter of practice, the agencies tell me
14 that it's very unusual to bring criminal
15 prosecutions absent sort of willful conduct.

16 JUSTICE KAVANAUGH: And then, I mean,
17 to state the obvious, that negligent provision
18 is a -- a red flag, so what -- what do you have
19 to say about that?

20 MR. FLETCHER: Yeah, understood. So I
21 -- I'd say two things.

22 You know, first, as a matter of
23 practice, I think it's -- it's rare for a
24 simple -- in fact, very unusual for simple
25 negligence to give rise to criminal liability,

1 that criminal prosecutions are brought only when
2 there's some sort of serious aggravating
3 conduct.

4 And the other thing that I'd say is,
5 you know, we think that standards like this, you
6 know, as reflected in County of Maui, where
7 there was a similar multifactor standard that
8 also potentially gave rise to criminal
9 liability, that didn't stop the Court from a --
10 adopting that standard, we think the same should
11 be true here.

12 And we think, if you really had a case
13 where there was someone who was being criminally
14 prosecuted and had a claim that the statute was
15 vague as applied to them, that they didn't have
16 fair notice, they could always bring an
17 as-applied vagueness challenge in the criminal
18 prosecution.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: I want to return to
23 Justice Sotomayor's point because I want to make
24 sure that I understand exactly what the scope of
25 your argument is.

1 As you're arguing the case in this
2 Court, to win, we have to find that you're right
3 about significant nexus, Justice Kennedy's
4 position in Rapanos, because you're not really
5 relying for purposes of this case on the 1344(g)
6 adjacency language, is that correct?

7 MR. FLETCHER: We're relying on
8 adjacency to the tributary, which requires us to
9 make a showing of significant nexus. So we do
10 have to have both --

11 JUSTICE BARRETT: Both?

12 MR. FLETCHER: -- as we briefed the
13 case. But I think also it's worth emphasizing
14 that Petitioners aren't challenging the
15 significant nexus finding, and also I think
16 they've conceded essentially that if you get
17 past their idea that adjacent includes only
18 things that directly touch, then their property
19 is adjacent because it's only 30 feet away
20 across the road.

21 JUSTICE BARRETT: Okay. And then, to
22 follow up on Justice Alito's points about waters
23 of the United States, if we put aside 1344(g)
24 for a moment, and we're thinking about
25 significant nexus, you know, Justice Thomas says

1 he grew up in the low country of Georgia, and I
2 grew up in New Orleans. The whole thing's below
3 sea level. So, you know, there are aquifers
4 that run right underneath it. You -- we have no
5 basements because, you dig far enough in
6 anybody's yard, you hit water, and all of that
7 runs into Lake Pontchartrain and the Mississippi
8 River, navigable waters.

9 So would that view of the Clean Water
10 Act and the definitions of "waters of the United
11 States" mean that anybody who constructed on a
12 lot or built a backyard pool has to get a
13 jurisdictional determination from the Corps
14 before proceeding?

15 MR. FLETCHER: No, I don't think so,
16 Justice Barrett.

17 JUSTICE BARRETT: Why not?

18 MR. FLETCHER: Because the -- these
19 requirements all apply only if you're talking
20 about wetlands, which has a particular
21 scientific definition reflected in the
22 regulations. It requires --

23 JUSTICE BARRETT: But -- but -- but --
24 but your view of the statute wouldn't be so
25 limited, would it?

1 MR. FLETCHER: The statute, we think,
2 does -- is limited to wetlands. We don't argue
3 that things that don't qualify as wetlands can
4 be waters of the United States. So --

5 JUSTICE BARRETT: Okay. And why --
6 why would that be? Because of 1344(g)? Because
7 nothing in the statutory definition of waters of
8 the United States -- I mean, if you're talking
9 about something that has a significant nexus,
10 presumably, subsurface water would.

11 MR. FLETCHER: So -- but we don't
12 think you could call groundwater a water of the
13 United States. We don't argue that water --
14 groundwater is covered.

15 JUSTICE BARRETT: Mm-hmm.

16 MR. FLETCHER: And to Justice
17 Sotomayor's point, we think that subsurface flow
18 can be evidence of a connection between two
19 bodies of water, but you have to be talking
20 about waters. We think wetlands, like swamps
21 and marshes and fens like the one at issue here,
22 are waters of the United States or can be if
23 they satisfy the test, and someone's backyard in
24 New Orleans, if it doesn't meet the definition
25 of a wetland, is not a -- even potentially a

1 water of the United States.

2 JUSTICE BARRETT: But what about
3 debris on the bank of the river, the example
4 that you gave? So it's not on the river
5 itself --

6 MR. FLETCHER: Yep.

7 JUSTICE BARRETT: -- but it's on dry
8 land.

9 MR. FLETCHER: I took that to be a
10 question about the scope of Congress's
11 constitutional authority --

12 JUSTICE BARRETT: Okay.

13 MR. FLETCHER: -- and I was giving
14 that as an example of the Rivers and Harbors Act
15 in order to protect the channels of interstate
16 commerce, the aquatic channels of interstate
17 commerce, extending its authority up onto land.
18 We don't argue that Congress has done that here.
19 Here, it's about waters of the United States --

20 JUSTICE BARRETT: So it --

21 MR. FLETCHER: -- specifically
22 wetlands.

23 JUSTICE BARRETT: -- hasn't used its
24 full Commerce Clause authority, in your view, in
25 the Clean Water Act?

1 MR. FLETCHER: That's correct.

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 Thank you, counsel.

5 Mr. Schiff.

6 REBUTTAL ARGUMENT OF DAMIEN M. SCHIFF

7 ON BEHALF OF THE PETITIONERS

8 MR. SCHIFF: Whatever the deficiencies
9 in the line-drawing problem test, they pale in
10 comparison to the significant nexus test. In
11 response to Justice Thomas -- Thomas's question
12 about the channels of commerce, the significant
13 nexus test is far, far broader than a
14 traditional understanding of the channels of
15 commerce, as shown by this very case.

16 The Sacketts -- there's no evidence
17 that anything the Sacketts did affected any
18 channel of commerce. It's the mere fact that
19 they put gravel on their lot that now they're
20 fully regulated under the Clean Water Act. And
21 that raises Justice Alito's point about canons
22 of construction and federalism.

23 Building a single-family home in a
24 residential subdivision is the quintessence of
25 local government authority, and yet the

1 significant nexus test inevitably causes that to
2 be regulated.

3 JDs are expensive. There is an entire
4 industry of environmental consultants whom one
5 has to hire to fill out an adequate application
6 to the Corps.

7 Sure, the Corps doesn't charge you,
8 but your consultant will definitely charge you
9 an arm and a leg just to have a chance to find
10 out whether one is, in fact, regulated.

11 JUSTICE JACKSON: Counsel, can I --
12 can you just speak to the representation that
13 was made about the Sacketts' property in
14 particular and the fact that prior to their
15 purchasing it there was some concern about the
16 property being a wetland?

17 MR. SCHIFF: Justice --

18 JUSTICE JACKSON: Did I misunderstand
19 that? I -- I thought --

20 MR. SCHIFF: No --

21 JUSTICE JACKSON: -- I thought they
22 went into it knowing that this might be a
23 wetland.

24 MR. SCHIFF: No, no. There was a
25 jurisdictional determination done in 1996 by a

1 prior owner. The Sacketts were not aware of
2 that. Even if --

3 JUSTICE JACKSON: Would they have been
4 as a part of the purchase agreement? Shouldn't
5 they --

6 MR. SCHIFF: The Sacketts --

7 JUSTICE JACKSON: -- have gathered
8 information about the property prior to
9 purchasing it?

10 MR. SCHIFF: Justice Jackson, in -- in
11 the record, the Sacketts' testimony is that
12 there was no indication either from the county,
13 building department, in their deed of title,
14 anywhere that this was a wetland.

15 Moreover, even if they had been aware,
16 that jurisdictional determination would have
17 given them no comfort because it --

18 JUSTICE JACKSON: But did -- did they
19 see the property? I understood in the pictures
20 that you could tell that at least part of it was
21 a wetland by looking at it. So --

22 MR. SCHIFF: I believe Mr. Fletcher
23 was referring to after the initial work had been
24 done, and the pictures show that there is water
25 on the property, but that doesn't show how it

1 was before.

2 But if -- if I could go back, though,
3 to the question of the jurisdictional --

4 JUSTICE JACKSON: But you keep talking
5 about notice and fair notice and property owners
6 not being able to tell or know about this issue,
7 and I'm just trying to clarify with respect to
8 the Sacketts, there seem to have been a prior
9 determination that the land was wetland before
10 they bought it, and whether or not they knew,
11 they could have known, I presume.

12 So why is this unfair in this
13 situation with respect to the government now
14 asserting that authority?

15 MR. SCHIFF: Justice Jackson, that
16 determination had expired several years before
17 the -- the -- the Sacketts even purchased the
18 property. As Mr. Fletcher explained, typically,
19 jurisdictional determinations are only valid for
20 five years.

21 Moreover, that determination was done
22 even before this decision -- this Court's
23 decision in Rapanos. So, even if the Sacketts
24 had been aware of it, it would have given them
25 no -- no -- no notice whatsoever.

1 CHIEF JUSTICE ROBERTS: We'll give you
2 an extra minute for your rebuttal.

3 MR. SCHIFF: Thank you, Mr. Chief
4 Justice.

5 The last point I'd like to make is
6 with respect to compensatory mitigation, simply
7 that obtaining a permit is a very expensive
8 process. It's true that the Corps does not
9 charge for permits, but the Corps will never
10 give a permit unless one provides compensatory
11 mitigation.

12 And we cite studies from the amicus
13 briefs at pages 20 and 21 of the yellow brief
14 where the annual cost of compensatory mitigation
15 under the Corps's program is in the billions of
16 dollars.

17 This is not an easy process. It's not
18 a cheap process. And in terms of notice, it's
19 not a fair process for property owners who have
20 to deal with the significant nexus test, which
21 is why this Court should definitively jettison
22 that test.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

1 (Whereupon, at 11:52 a.m., the case
2 was submitted.)
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