No. 18-609

In the Supreme Court of the United States

JOSEPH DAVID ROBERTSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

AMICI CURIAE BRIEF OF DUARTE NURSERY, INC., JOHN DUARTE, CHANTELL AND MICHAEL SACKETT, HAWKES COMPANY, INC., & CALIFORNIA VALLEY LAND COMPANY, INC.

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December 2018

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INTEREST OF THE AMICI[1]

Duarte Nursery, Inc., and its President, John Duarte (together "Duarte"), have several interests in this case. They are interested first and foremost in the law being applied as it is written, which the Clean Water Act is not. Applying the law as written makes for better government that earns the respect of the people it represents and governs. When it was passed in 1972, and amended in 1977, the Clean Water Act represented a constructive bargain amongst clean-water advocates, farmers, municipalities, and the rest of the public to protect the nation's navigable waters. But the agencies and the lower courts in the years since have abrogated that bargain, reading the Act to regulate—and even to criminalize—everyday activities, like plowing a field to plant food.

More directly, Duarte was prosecuted by the Corps for plowing a field a few inches deep in California's Central Valley, some 8 miles from the nearest navigable water (the Sacramento River), to plant winter wheat. The field was dry at the time of the plowing, and no streams or running water were plowed. For this, the Corps prosecuted Duarte for tens of millions of dollars. Going to trial on that kind of charge would have devastated the Duarte family

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[1] No counsel for any party authored this brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of this brief. No person (other than the *amici curiae*, their members, or their counsel) made any such monetary contribution. Petitioner filed a blanket consent to the filing of briefs amicus curiae. Respondent's letter of consent to this filing is being submitted with this brief.

and company, as well as the families of its 600-some employees. Duarte had no choice but to settle the case through a consent decree for $1.1 million, plus certain injunctive relief.

Duarte was prosecuted under the "guidance" issued by the Corps and EPA in 2008 about the *Rapanos* case. The consent decree specifies that much of the injunctive relief may be reduced if the law on what is navigable waters changes, which this case has the potential to achieve.

Chantell and Michael Sackett are interested in this case because, five years after unanimously winning the right from this Court to even *go* to court to challenge the EPA's assertion of jurisdiction over an alleged wetland on their property (*Sackett* v. *EPA*, 566 U.S. 120 (2012)), they still have not gotten an answer from the lower courts, on remand, about whether their property is jurisdictional. It is undisputed that the alleged wetlands on their property are physically separated from any navigable-in-fact water. If the rule from *SWANCC* advocated in this brief were to be adopted, the district court ought to be able to quickly and finally dispose of this case in the Sacketts' favor.

The Hawkes Company, Inc., is interested in this case because, having also had to go through the burden of winning the right from this Court simply to challenge the Corps' jurisdiction in court (*U.S. Army Corps of Engineers* v. *Hawkes Co.*, 136 S. Ct. 1807 (2016)), a more straightforward rule of jurisdiction under the Act should simplify permitting for future projects that the company is planning.

The California Valley Land Company, Inc. (d/b/a Woolf Enterprises) is heavily engaged in the farming and agricultural industries in the great Central Valley of California, employing over a hundred

people responsible for stewarding the Central Valley's tremendous land and water resources. Woolf Enterprises produces fruit, vegetables, grains, fiber, and nuts that feed not only California, but the entire nation and world. As farmers, Woolf Enterprises is intimately familiar with the interaction between soil, water, and care that puts the food we often take for granted on our tables. There are no greater stewards of the land than those who must coax life out of it for sustenance for the rest of us. As farmers, Woolf Enterprises labors in the medium of soil and water – that medium is to it what canvas is to the painter.

Woolf Enterprises therefore has an acute interest in the clear and durable articulation of where the jurisdiction of the United States is when it comes to navigable waters under the Clean Water Act. Without that clarity, it is forced to assume a disproportionate risk in its operations. Without that clarity, it is forced to spend tens of thousands of dollars for expert consultants to tell it whether and where there might be "navigable waters" on its lands. Those expert opinions may yet be subject to second-guessing by the agencies and the courts years later and after substantial investments have been made in the meantime. Without that clarity, and even after it has done its due diligence to avoid what it has been told are navigable waters, it is forced into the untenable position of hoping the currents of the next political and regulatory regime will not render that work void. Such a muddy regime is not the work of good government.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court's fractured decision in *Rapanos* has created a mess in the lower courts, within the regulatory agencies, and for ordinary Americans, which can all be resolved by this case.

This case is clearly cert-worthy. As the petition notes, just last term the Court granted certiorari in *Hughes* to resolve the question of how this Court's fractured decisions should be interpreted, though the Court did not end up needing to reach that question because it was able to come to a majority opinion on the underlying issue that had fractured the Court. Now, the circuit courts are split on which of the opinions in the fractured *Rapanos* case controls the geographic scope of the Clean Water Act. The question of how to interpret fractured decisions of this Court, which merited certiorari in *Hughes*, can be resolved by this case.

But the Court should really take this case to do what it did in *Hughes*: reach a majority opinion. That ought not to be difficult to achieve here because the Court, prior to *Rapanos*, had already reached a sensible majority opinion, grounded in the statutory text, on the geographic scope of the Clean Water Act.

The Clean Water Act regulates discharges of pollutants to "navigable waters". (33 U.S.C. 1311(a), 1362(12).) In *Riverside Bayview Homes*, the Court accepted that navigable waters could include wetlands actually abutting a navigable-in-fact lake because such wetlands are part of "the transition from water to solid ground". (474 U.S. at 132.) In *SWANCC*, the Court stopped there, holding that the Act does not allow regulation of "ponds that are *not* adjacent to open water". (531 U.S. at 168.)

Following *SWANCC*, the agencies and lower courts did not get the message that the reach of the Act stops where navigable-in-fact waters have transitioned to solid ground, continuing to regulate far afield, like an "arid development site" in the "middle of the desert". (547 U.S. at 727.) The disposition of *Rapanos* was a vacatur of the lower courts' expansive views of the Act, but without a majority opinion as to why.

Chief Justice Roberts, in his concurrence in *Rapanos*, expressed hope that agency rulemaking might one day resolve the issue. Unfortunately, the twelve years of rulemaking that have followed have only made the matter worse, spawning different regulations applying in different parts of the country, countless lawsuits, relentless game-playing by the agencies, and no end in sight. This confusion has led three Justices to question whether the Act might even be void for vagueness. (*Hawkes* at 1817 (Kennedy, J., concurring, joined by Thomas and Alito, JJ.).)

This whole mess can be put behind us now if the Court would just state that it meant what the majority said in *SWANCC*: that "navigable waters" means navigable-in-fact waters and any actually abutting wetlands, but not beyond. This is a reasonable reading of the statutory text that ordinary people can understand. The petition should be granted.

ARGUMENT

1. *SWANCC* Provided A Good Majority Rule

"Regulation of land use is a function traditionally performed by local governments". (*Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ["*SWANCC*"], cleaned up.) Emboldened by being upheld in regulating wetlands actually abutting navigable-in-fact waters, in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the federal agencies tried to regulate far afield, claiming jurisdiction over any waters that "are or would be used" by migratory birds,[2] regardless of any connection to waters that are actually navigable. (*Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed.Reg. 41206, 41217 (1986).)

A majority in *SWANCC* rejected that claim, ruling that the Act does not allow regulation of "ponds that are *not* adjacent to open water". (531 U.S. at 168.) To rule otherwise "would result in a significant impingement of the States' traditional and primary power over land and water use" and create "significant constitutional and federalism questions" best avoided by "read[ing] the statute as written". (*Id.* at 174.) The statute as written applies to "navigable waters", which is Congress' "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made" (such as abutting wetlands that could be

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[2] Many practitioners referred to this as the "Reasonable Bird Rule" owing to the fact that it applied to features birds hypothetically "would" use, not just to those that actually "are" used.

dredged out to enlarge a navigable-in-fact waterway). (*Id.* at 172.)

2. With *Rapanos*, *SWANCC* Went Sideways

The federal agencies and lower courts (with the exception of the Fifth Circuit[3]) effectively disregarded what this Court said in *SWANCC* and continued to try to regulate features far afield from any real navigable water. Justice Scalia's concurrence in *Rapanos* gave some examples:

> [C]ourts have held that jurisdictional "tributaries" include the "intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I–64)" [cite]; a "roadside ditch" whose water took "a winding, thirty-two-mile path to the Chesapeake Bay" [cite]; irrigation ditches and drains that intermittently connect to covered waters [cites]; and (most implausibly of all) the "washes and arroyos" of an "arid development site," located in the middle of the desert, through which "water courses ... during periods of heavy rain" [cite].

Rapanos v. *United States*, 547 U.S. 715, 726–27 (2006).

In the cases under review in *Rapanos*, *United States* v. *Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004)

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[3] *E.g.*, *Rice* v. *Harken Exploration Company*, 250 F.3d 264, 270-271 (5th Cir. 2001) (dry land and intermittent creeks not navigable waters); *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) ("puddles, sewers, roadside ditches and the like" not jurisdictional).

and *Carabell* v. *U.S. Army Corps of Engineers*, 391 F.3d 704, 710 (6th Cir. 2004), the Sixth Circuit had gone so far as to hold that "navigable waters" existed wherever there was a mere "hydrological connection" to navigable-in-fact waters—a test that might have made even the roof of the Supreme Court a navigable water because the rain that falls on it eventually flows to the Potomac.

Rapanos vacated those decisions, but could not reach a majority opinion as to why they were wrong.

After *Rapanos*, there of course developed the circuit split over which of the opinions in that fractured decision controls (if any). (Petition at 28-29.) Meanwhile, the federal agencies, who had just lost two Supreme Court cases on the Clean Water Act in a row, played like they had really just won all along, asserting jurisdiction as far afield as they had since before *SWANCC*.

In 2008, the Corps and EPA issued "guidance" on *Rapanos*.[4] That guidance is what the agencies are

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[4] Memorandum from Benjamin H. Grumbles, Assistant Admin. for Water, U.S. Envtl. Protection Agency and John Paul Woodley, Jr., Assistant Sec'y of the Army (Civil Works), Dep't of the Army (Dec. 2, 2008), https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf ["*Rapanos* guidance"]. The *Rapanos* guidance is itself illegal under the Congressional Review Act (5 U.S.C. 800 *et seq.*), which prohibits any "rule" from "tak[ing] effect" until after a "report" on that rule is submitted to Congress and the Controller General. (5 U.S.C. 801(a)(1)(A).) A "rule" generally has the same meaning as in the Administrative Procedures Act, 5 U.S.C. 804(3), as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or

continuing to rely on in those 28 states where the 2015 Rule is not in force (Petition at 25).

This guidance is a remarkable document. It defines wetlands as "adjacent", and thus jurisdictional, even when "physically separated" from navigable waters.[5] Agency staff in the field using this guidance assert that any water that has even "a potential connection to interstate commerce" is under their control.[6] The *Rapanos* guidance provides no real limits to federal jurisdiction under the Act.

In the remaining 22 states, where the 2015 Rule is now in effect (Petition at 25), the agencies' assertions of jurisdiction remain just as aggressive. The American Farm Bureau Federation commissioned state-by-state studies of waters that might be jurisdictional under the 2015 Rule. In Florida, for example, anything that might be considered a water within 79% of the state's land area might be

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prescribe law or policy", 5 U.S.C. 551(4). The *Rapanos* guidance is a rule, because it is designed as a general interpretation of law, but the guidance has never been submitted to Congress for review.

[5] *Rapanos* guidance at 5.

[6] *Duarte Nursery Inc.* v. *U.S. Army Corps of Engineers*, No. 2:13-cv-02095-KJM-DB, E.D. Cal., ECF 115, at page 38, lines 2-25. This quote is taken from deposition testimony of Matthew Kelley, the sole Corps staff person for five large California counties (Tehama, Plumas, Lassen, Shasta, and Modoc counties).

regulated under the 2015 Rule.[7] In Pennsylvania, the number is 99%.[8]

The current administration aims to replace all this with new regulations based on Justice Scalia's opinion in *Rapanos*. (Petition at 25.) Justice Scalia understood "navigable waters" to mean "relatively permanent", or "continuously present, fixed bodies of water", not "ordinarily dry channels". (547 U.S. at 732–33.) But the agencies are already playing games with Justice Scalia's opinion, stretching it to cover ordinarily dry land far from any real navigable water.

Where there are continuously flowing streams, the agencies interpret the stream as extending well beyond where the water ordinarily flows to where the water might get up to during an extraordinary 5- or 10-year flood event.[9] Where there is no visible water on the surface of the ground, the agencies might still see a stream wherever groundwater gets to within 12 inches of the surface.[10]

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[7] *"Waters of the U.S." In Florida Farmland*, https://www.floridafarmbureau.org/wp-content/uploads/2015/10/WOTUS-Florida-Maps.pdf.

[8] *"Waters of the U.S." In Pennsylvania Farmland*, https://www.pfb.com/images/stories/news-docs/WOTUS/WOTUS_Pennsylvania_MAP-How-Final-Rule-Impacts-PA.pptx.

[9] U.S. Army Corps of Engineers, "A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual", at 31 (2008), https://apps.dtic.mil/dtic/tr/fulltext/u2/a486603.pdf.

[10] *See* U.S. Army Corps of Engineers, "Regional Supplement to the Corps of Engineers Wetland

By playing games with where dry land is really water, the agencies, even when saying they are applying Justice Scalia's test, still assert jurisdiction over low spots in dry fields many miles from the nearest real river:

One of dozens of alleged "tributaries that flow directly to the traditional navigable waters of the Sacramento River" some 8 miles away, meeting Justice Scalia's test, according to DoJ experts in Duarte *case.*[11]

Delineation Manual: Arid West Region (Version 2.0)", at 59 (2008) (water where "14 or more consecutive days of flooding or ponding, or a water table 12 in. (30 cm) or less below the soil surface, during the growing season at a minimum frequency of 5 years in 10"), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1046489.pdf.

[11] *Duarte Nursery Inc.* v. *U.S. Army Corps of Engineers*, No. 2:13-cv-02095-KJM-DB, E.D. Cal., ECF 87-3, at page 17 of 84.

3. A Sensible Way Forward

The 12 years since Chief Justice Roberts expressed hope that new rules might help people no longer have to "feel their way on a case-by-case basis" (*Rapanos* at 758) have yielded only endless rulemaking, confusing guidance, agency game-playing, and countless lawsuits. So confused has the situation become that three Justices of this Court have questioned whether the Act—which carries potentially massive administrative, civil, and criminal penalties for violations (33 U.S.C. 1319)—might even be void for vagueness. (*Hawkes*, 136 S.Ct. at 1817 (Kennedy, J., concurring, joined by Thomas and Alito, JJ.).)

A new rulemaking based on Justice Scalia's plurality opinion in *Rapanos*, even if completed before the next administration might change course again, is not likely to bring additional clarity any time soon. The agencies, as discussed above, have interpreted Justice Scalia's opinion as giving them authority to regulate features that, to the ordinary person, look nothing like a "relatively permanent", "continuous[]", or "fixed" body of water (*Rapanos* at 732). The petition makes a strong argument that the rule articulated by the plurality might well be void for vagueness. (Petition at 21-23.) One thing is for certain: whatever rule the agencies might end up adopting will be subject to years of litigation from across the country.

All this can be avoided by the Court taking this case to rule that "navigable waters" means just what a majority of this Court said in *SWANCC*: navigable-in-fact water and immediately abutting wetlands, but no more. This is a rule that comports with an ordinary meaning of the statutory text. Because that rule is clear and easy to understand, it ought not to

require further rulemaking to implement, or invite more game-playing by the agencies. It is a rule that ordinary people can understand with their own eyes, and without expensive experts. The petition should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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