No. _____

In The
Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners Michael and Chantell Sackett own a vacant lot in a mostly built-out residential subdivision near Priest Lake, Idaho. The lot has no surface water connection to any body of water. In April, 2007, with local permits in hand, the Sacketts began building a family home. But later that year, Respondent Environmental Protection Agency sent them an administrative compliance order determining that their home construction violated the Clean Water Act because their lot contains wetlands that qualify as regulated "navigable waters."

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Court held that the Clean Water Act does not regulate all wetlands, but no opinion explaining why that is so garnered a majority of the Court. A plurality opinion authored by Justice Scalia and joined by three other Justices argued that only those wetlands that have a continuous surface water connection to regulated waters may themselves be regulated. A concurring opinion by Justice Kennedy advanced a different and much broader test, allowing for regulation of wetlands regardless of any surface connection, so long as the wetlands bear an (undefined) "significant nexus" with traditional navigable waters. Below, the Ninth Circuit employed Justice Kennedy's "significant nexus" test to uphold EPA's authority over the Sacketts' homesite.

The question presented is:

Should *Rapanos* be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act?

LIST OF ALL PARTIES

The Petitioners are Michael and Chantell Sackett. The Respondents are the Environmental Protection Agency and its Administrator, Michael S. Regan.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Sackett v. EPA, No. 08-cv-185-N-EJL, 2008 WL 3286801 (D. Idaho Aug. 7, 2008).

Sackett v. EPA, No. 08-35854, 622 F.3d 1139 (9th Cir. Sept. 17, 2010).

Sackett v. EPA, 566 U.S. 120 (March 21, 2012).

Sackett v. EPA, No. 2:08-cv-00185-EJL, 2019 WL 13026870 (D. Idaho Mar. 31, 2019).

Sackett v. EPA, No. 19-35469, 8 F.4th 1075 (9th Cir. Aug. 16, 2021).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners Michael and Chantell Sackett respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the Ninth Circuit is reported at 8 F.4th 1075, and is reproduced in the Appendix beginning at A-1. The opinion of the United States District Court for the District of Idaho is not reported but is available at 2019 WL 13026870, and is reproduced in the Appendix beginning at B-1.

JURISDICTION

The date of the decision sought to be reviewed is August 16, 2021. Jurisdiction is conferred under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

- 33 U.S.C. § 1362(7): "The term 'navigable waters' means the waters of the United States, including the territorial seas."

- 33 C.F.R. § 328.3(a), (c) (2008):

> (a) The term *waters of the United States* means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign

commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.
>
> (8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
>
> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.
>
> ****
>
> (c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

INTRODUCTION

Nearly 15 years ago, the efforts of Petitioners Michael and Chantell Sackett to build their family home in a residential neighborhood of Priest Lake, Idaho, were put on indefinite hold. That is because

Respondents EPA, *et al.*, demanded, on pain of immense monetary penalties, that the Sacketts first obtain a time-consuming and costly Clean Water Act permit from the Army Corps of Engineers before they could proceed with building their home. *See Sackett v. EPA*, 566 U.S. 120, 123–25 (2012). EPA has remained steadfast in that position to this day, despite the fact that the Sacketts' home lot contains no "streams, oceans, rivers, [or] lakes," and despite its lacking "a continuous surface connection" to any such water body. *Rapanos v. United States*, 547 U.S. 715, 739, 742 (2006) (plurality opinion) (cleaned up). The Sacketts' ordeal is emblematic of all that has gone wrong with the implementation of the Clean Water Act since this Court attempted in *Rapanos* to rein in the agencies' extravagant interpretation of the Act's scope.

That EPA and the Corps are still emboldened, notwithstanding *Rapanos*, to operate as federal zoning administrators—dictating how residential subdivisions should be built out—is just half of the problem of the post-*Rapanos* world. The other is that neither the lower courts, nor the agencies, nor the regulated public can agree on what the rule of *Rapanos* is, much less agree on how to apply any such rule efficiently and consistently.

For nearly as long as *Rapanos* has been in the United States Reports, the lower courts have been divided over whether the decision requires landowners like the Sacketts to disprove jurisdiction under just the significant nexus test set forth in Justice Kennedy's concurring *Rapanos* opinion, or also under the test set forth in Justice Scalia's plurality opinion, or under both of the foregoing as

well as the test from Justice Stevens' dissenting opinion. *See infra* Argument Part I.A.

The agencies have had no better success figuring out what *Rapanos* means. They have tried both informal guidance documents and formal notice-and-comment rulemakings. They have tried an amalgam test, combining parts of the significant nexus standard with parts of the *Rapanos* plurality test. They have tried elaborating on just significant nexus. And most recently, they have looked primarily to the *Rapanos* plurality opinion. Yet each effort has failed to produce a workable rule that would satisfy the lower courts' conflicting views of what *Rapanos* allows. *See infra* Argument Part I.B.

And finally, there is the plight of hapless landowners who, like the Sacketts, own "soggy" property, App. A-4. Such property owners rarely if ever can afford the hundreds of thousands of dollars for consultants and attorneys necessary to have a fighting chance at disproving jurisdiction under *Rapanos* and getting that determination to hold up in court. *See U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.,* 136 S. Ct. 1807, 1812 (2016). Yet even if they do have the resources to defend their position, they are very reluctant to proceed without permits given the "crushing" consequences, *id.* at 1816 (Kennedy, J., concurring), if their assessment of jurisdiction proves to be wrong and EPA "drop[s] the hammer," *Sackett*, 566 U.S. at 127. Ordinary citizens seeking to make reasonable use of their property are therefore left "with little practical alternative but to dance to the EPA's tune." *Id.* at 132 (Alito, J., concurring).

Fifteen years of fruitless confusion, conflict, and litigation is enough. This Court can and should chart a better course for the Clean Water Act by articulating a clear, easily administered, constitutionally sound rule for wetlands jurisdiction, using the surface-water-connection test set forth in the *Rapanos* plurality opinion. The Sacketts' case is an excellent vehicle for that task. For the Sacketts still want the right to build a home without seeking federal approval. EPA still denies them that right while also reserving the power to assess "steep civil fines." *Rapanos*, 547 U.S. at 721 (plurality opinion). The record of the case is clear that the Sacketts' lot contains no surface water connection to any water body. *See* App. A-34 to A-35 nn.13–14; (subsurface connection only); App. B-23 to B-24 (same). *See also* App. C-12 (jurisdictional determination explaining that the site is separated from the nearest water by a county road); App. E-1 (aerial photo showing same). EPA and the Corps need guidance too. They have announced an intent to commence another rulemaking, the first step of which is to officially return to the same regulations under which *Rapanos* and the Sacketts' case were decided. *See* EPA, *Intention to Revise the Definition of "Waters of the United States"* (June 9, 2021).[1] And there is no reason

[1] *Available* at https://www.epa.gov/wotus/intention-revise-definition-waters-united-states. The agencies have already returned de facto to those regulations, in response to a recent district court ruling vacating their most recent rulemaking. EPA, *Current Implementation of Waters of the United State*s, *at* https://www.epa.gov/wotus/current-implementation-waters-united-states (last visited Sept. 18, 2021) ("In light of this order, the agencies have halted implementation of the Navigable Waters Protection Rule and are interpreting 'waters of the

to wait to allow Congress to bring clarity. Despite the passage of decades, "Congress has [still] done nothing to resolve this critical ambiguity" of "the precise reach of the Act." *Sackett*, 566 U.S. at 133 (Alito, J., concurring).

The time has come for this Court to act.

STATEMENT OF THE CASE

A. The Sacketts' home-building project runs into the Clean Water Act

In 2004, the Sacketts purchased a 0.63-acre vacant lot in a residential subdivision near Priest Lake, Idaho. App. A-8; App. B-2. On the north end, the lot is bounded by a county-owned road, on the other side of which runs a drainage ditch. App. A-8; App. B-21; App. E-1. To the south of the lot, across another road, is a row of houses that fronts Priest Lake. App A-8; App. B-24; App. E-1. No surface water connection exists between the Sacketts' lot and the roadside ditch, or between their lot and Priest Lake. App. A-34 to A-35 nn.13–14; App. B-23 to B-24; App. C-12; App. E-1.

In April, 2007, having obtained all necessary local permits from Bonner County, Idaho, the Sacketts began construction of their family home. App. A-8; App. B-2. On May 3, 2007, shortly after preliminary earthmoving activities had commenced, officials from EPA and the Corps entered the lot and suggested to the Sacketts' construction workers that the homesite

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United States' consistent with the pre-2015 regulatory regime until further notice.").

contained "wetlands" subject to federal regulation as "navigable waters" under the Clean Water Act. App. A-8 to A-9; App B-2. These officials directed that all work should cease until the Sacketts obtained a permit from the Corps. App. A-9; App B-2.

The Clean Water Act, 33 U.S.C. §§ 1251–1388, regulates discharges of "pollutants" from "point sources" to "navigable waters." *Id.* §§ 1311(a), 1362(12). The Act defines "navigable waters" as "waters of the United States, including the territorial seas." *Id.* § 1362(7). Although the Act defines "territorial seas," it does not define "waters of the United States." *Id.* § 1362(8).

Nonexempt discharges to "navigable waters" require a permit from either EPA (called a National Pollutant Discharge Elimination System, or NPDES, permit) or, if the discharge involves "dredged or fill material," from the Corps (commonly called a Section 404 permit).[2] *See* App. App. A-9; App B-2; 33 U.S.C. §§ 1342(a), 1344(a). In practice, the Clean Water Act's permitting regime is time-consuming and expensive. *See Hawkes*, 136 S. Ct. at 1812 (to obtain a Section 404 permit from the Corps takes an average of more than two years and $250,000 in consulting costs). Even when obtained, a permit can result in significant changes to the applicant's intended operations and may substantially limit the use of the property. *See* Daniel R. Mandelker, *Practicable Alternatives for Wetlands Development Under the Clean Water Act*, 48 Envtl. L. Rep. News & Analysis 10894, 10913 (2018)

[2] The Clean Water Act authorizes EPA and the Corps to delegate their permitting authorities to the states. *See* 33 U.S.C. §§ 1342(b), 1344(g).

("The [Clean Water Act's] practicable alternatives requirement functions . . . as a conditioned permit that requires project modifications to reduce a development's effect on wetlands resources."). *Cf. Rapanos*, 547 U.S. at 721 (plurality opinion) ("In deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot . . . ."). And a person who discharges pollutants without a required permit, or who violates permit conditions, risks administrative compliance orders, administrative penalties, civil penalties and injunctions, and even criminal prosecution. *See id.* at 721. *See also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52–53 (1987).

The significant costs and liability that the Clean Water Act can impose underscore the importance of clearly demarcating where the Act's reach begins and where it ends. Unfortunately, construing the meaning of "navigable waters" has proved to be an overwhelmingly difficult task for the courts, the agencies, and the regulated public. This is especially true with respect to non-navigable wetlands such as those alleged to exist on the Sacketts' lot.

Shortly after the Clean Water Act was enacted, EPA and the Corps adopted regulations defining "navigable waters." 38 Fed. Reg. 13,528, 13,529 (May 22, 1973); 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974). Although EPA's initial interpretation was quite broad,[3] the Corps' was more limited. Guided by this

[3] For example, EPA claimed NPDES permitting authority over all "[t]ributaries" of navigable waters, as well as all "lakes, rivers, and streams" used by "interstate travelers" or used in interstate

Court's longstanding definition of the term "navigable waters of the United States," as that phrase was employed in predecessor statutes, the Corps construed the Act to reach interstate waters that are navigable in fact or readily susceptible of being rendered so. *See Rapanos*, 547 U.S. at 723 (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), and 39 Fed. Reg. at 12,119). In 1975, a federal district court rejected this interpretation as too narrow. *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975). Rather than appeal the ruling, the Corps followed EPA's example and promulgated much broader regulations. *See Rapanos*, 547 U.S. at 724.

These revised regulations purported to extend the scope of "navigable waters" to the outer limits of Congress' power to regulate interstate commerce.[4] *Id.* (citing 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977)).

"industrial" commerce. *See* 40 C.F.R. § 125.1(*o*)(2), (4), (6) (1974). But EPA also followed the Corps' narrower interpretation for Section 404 permits. *See* 40 Fed. Reg. 41,292, 41,293 (Sept. 5, 1975) (EPA final interim guidelines for the Section 404 program incorporating the Corps' definition, 33 C.F.R. § 209.120(d)(1) (1975)).

[4] Commentators at the time recognized that these regulations bore little relationship to Congressional intent. *See, e.g.*, Daniel E. Boxer, *Every Pond and Puddle—or, How Far Can the Army Corps Stretch the Intent of Congress*, 9 Nat. Resources Law. 467, 470 (1976) ("Congress . . . did not intend . . . that the scope of regulatory activity by the Army Corps . . . take the direction of the [revised] regulations."); Gary E. Parish & J. Michael Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 Land & Water L. Rev. 43, 84 (1982) ("The existing [regulation] looks and has an effect similar to a program of federal land use control. There should be little doubt that Congress did not intend such a result.").

Thus, federal permitting authority was asserted not just over interstate waters, but also intrastate waters with various relationships to interstate or foreign commerce, all tributaries of such waters, and all wetlands "adjacent" to, *i.e.*, bordering, contiguous, or neighboring, any regulated water. *Rapanos*, 547 U.S. at 724 (citing 33 C.F.R. § 328.3(a)(1), (a)(3), (a)(5), (a)(7), and § 328.3(c) (2004)). Over the ensuing years the agencies also claimed authority over isolated waters used by migratory birds, pursuant to the so-called "Migratory Bird Rule," *id.* at 725 (citing 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986)), as well as "ephemeral streams" and "drainage ditches" with an ordinary high water mark. *Id.* (citing 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000)).

The Court has to date addressed the legality of the agencies' interpretation of "waters of the United States" three times.

First, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court upheld the agencies' regulation of wetlands that "actually abut[] on" traditional navigable waters. *Id*. at 135.

Second, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANNC*), 531 U.S. 159 (2001), the Court struck down the Migratory Bird Rule, thereby rejecting the agencies' attempted regulation of "nonnavigable, isolated, intrastate waters." *Id*. at 171.

Finally, in *Rapanos*, a majority of the Court held the agencies' broad interpretation of "navigable waters" to be invalid insofar as it would reach all tributaries of traditionally navigable waters and all

wetlands adjacent to such tributaries. *Rapanos*, 547 U.S. at 728 (plurality opinion); *id.* at 759 (Kennedy, J., concurring in the judgment). But no opinion explaining why the Act cannot be so construed garnered a majority of the Justices' votes.

Writing for three other members of the Court, Justice Scalia argued that the Clean Water Act reaches only those wetlands that, as in *Riverside Bayview*, actually abut other regulated waters, such that it would be difficult to tell where the wetland ends and the abutting water begins. *Id.* at 742 (plurality opinion). Put another way, the surface water connection must be so substantial that the wetland and abutting water are rendered "*indistinguishable*." *Id.* at 755 (emphasis in original).

Although Justice Kennedy provided the fifth vote to support the Court's judgment rejecting the agencies' attempt to regulate all tributaries and wetlands adjacent thereto, he disagreed with the plurality's rationale for that rejection. *Id.* at 759 (Kennedy, J., concurring in the judgment). Instead of a surface-connection test for wetlands jurisdiction, Justice Kennedy proposed a "significant nexus" standard. *Id.* According to this standard, a wetland may be regulated if it, either alone or in combination with other "similarly situated" wetlands in the "region," significantly affects the physical, chemical, and biological integrity of a traditional navigable water. *Id.* at 779–80. As Justice Kennedy recognized, the significant nexus test requires a case-by-case assessment for determining federal authority over any given wetland. *See id.* at 773–75.

The Chief Justice joined the plurality but concurred separately to lament the agencies' failure to issue new regulations after *SWANCC* had invalidated the Migratory Bird Rule. *Id.* at 757–58 (Roberts, C.J., concurring). He also expressed concern that, due to the lack of a majority opinion, "[l]ower courts and regulated entities" would lack guidance "on precisely how to read Congress' limits on the reach of the Clean Water Act" and would be left "to feel their way on a case-by-case basis." *Id.* (citing *Marks v. United States*, 430 U.S. 188 (1977)).

Less than a year after *Rapanos*, the Sacketts—"feel[ing] their way" with all local permits in hand—began construction of their family home, only to be surprised one spring morning by EPA and Corps officials who informed the Sacketts' construction crew that a federal permit was likely required and thus that construction should cease. App. A-8 to A-9; App. B-2. Following the agencies' initial site visit, the Sacketts attempted without success to obtain from EPA an explanation for why the agency claimed authority over their lot. Ultimately, an answer of sorts was delivered in November, 2007, in the form of an administrative compliance order. This EPA directive asserted that the Sacketts' home lot contains "navigable waters" subject to the Clean Water Act and that the Sacketts had violated the Act by trying to build a home thereon without first obtaining federal permission. App. A-9; App. B-2 to B-3. The Sacketts were ordered to "immediately undertake activities to restore the Site" and refrain from further construction. App. A-9. They were given five months to complete that remediation. *Id.* And they were threatened with administrative and civil penalties of

tens of thousands of dollars per day should they fail immediately to comply. *Id.*; App. B-2 to B-3.

B. The Sacketts' challenge to EPA and the Corps' purported authority over their home-building project is rebuffed by the lower courts

1. The lower courts reject, but this Court affirms, the Sacketts' right to seek judicial review of whether their home-building project requires a Clean Water Act permit

Believing that their lot does not contain "navigable waters" subject to federal authority, the Sacketts requested from EPA an administrative hearing on the agency's order, to no avail. *See Sackett*, 566 U.S. at 125. The Sacketts therefore proceeded, in April, 2008, to file an action under the Administrative Procedure Act to challenge EPA's assertion of authority over their property.[5] App. A-9. In their lawsuit, the Sacketts contended that EPA's compliance order was arbitrary and capricious because the Clean Water Act does not grant EPA authority to regulate their homesite. App. A-9. EPA moved to dismiss the suit, arguing that the

[5] Prior to the filing of the action, EPA had made several amendments to the compliance order, each postponing the deadline to complete "remediation" of the site. App. A-10; App. D-1 to D-2. Shortly after the lawsuit had commenced, EPA amended the order again to eliminate or to extend some of the deadlines and remedial requirements, *see* App. D-2, but the amended order still asserted jurisdiction over the Sacketts' property and still concluded that the Sacketts had violated the Act, App. D-5 to D-7.

compliance order was not "final agency action . . . subject to judicial review." App. A-10 to A-11. The district court granted EPA's motion and the Ninth Circuit affirmed. *See Sackett v. U.S. EPA*, 622 F.3d 1139, 1147 (9th Cir. 2010). This Court granted certiorari and reversed, holding that the order constituted "final agency action" subject to judicial review. *Sackett*, 566 U.S. at 131.

2. On remand, the district court rules for EPA on the merits, and the Ninth Circuit affirms, relying upon the "significant nexus" test from Justice Kennedy's *Rapanos* concurrence

On remand to the district court, the parties cross-moved for summary judgment. App. B-1, B-3 to B-4. On March 31, 2019, the district court entered summary judgment in EPA's favor. App. B-31 to B-32. Applying Justice Kennedy's "significant nexus" test, the district court upheld EPA's claim of authority to regulate the Sacketts' lot. App. B-27 to B-30. The Sacketts then appealed.

In the Ninth Circuit, the Sacketts renewed their argument from the district court that the *Rapanos* plurality contains the controlling rule of law and thus that the district court had erred by applying Justice Kennedy's concurrence to determine the scope of EPA's regulatory authority over their lot. A-22 to A-25. The Sacketts argued that their homesite—which is bounded by permanent roads on both ends and has no surface water connection to any water body—cannot fall within the Act's ambit because the *Rapanos* plurality limits federal authority to wetlands

that have a continuous surface water connection to regulated waters. App. A-25.

Before reaching the merits, the Ninth Circuit panel addressed EPA's contention that the agency's voluntary actions taken after entry of the district court's judgment had mooted the appeal. App. A-12 to A-20. On March 13, 2020, after the Sacketts had filed their opening brief, EPA withdrew the amended compliance order and made a non-binding commitment to refrain from issuing another order. App. A-11 to A-12. But EPA continued to assert authority to regulate the Sacketts' lot and refused to withdraw the jurisdictional determination underlying the order. App. A-14 to A-15. *Cf.* App. C-1 to C-22 (jurisdictional determination). The Ninth Circuit rejected EPA's mootness arguments. App. A-20. Given EPA's steadfast position that the agency has authority to regulate the Sacketts' lot, the Ninth Circuit concluded that the Sacketts' "central legal challenge" remains "unresolved" and thus that the controversy remains very much alive. App. A-14 to A-15, A-17.

Moving to the merits, the Ninth Circuit affirmed the district court's conclusion that EPA has authority over the Sacketts' homesite. The court began its analysis with a review of circuit case law applying the *Marks* framework for interpreting fractured decisions like *Rapanos*. App. A-25 to A-31. Rejecting the Sacketts' argument that the *Rapanos* plurality governs, the court held that the significant nexus test set forth in Justice Kennedy's concurrence is the controlling rule of law. App. A-25 to A-31. The court then affirmed EPA's determination that the Sacketts' lot contains "adjacent wetlands" within the meaning

of the agencies' regulations,[6] and that those wetlands, in combination with wetlands in the "region," bear a significant nexus to Priest Lake.[7] App. A-32 to A-36.

REASONS FOR GRANTING CERTIORARI

I. The lower courts, the agencies, and the regulated public are at sea as to the scope of the Clean Water Act

Over the last 15 years, the Court's splintered decision in *Rapanos* has created significant confusion for the lower courts, the agencies, and especially the regulated public. This Court's review is needed to dispel that confusion and to provide a clear majority rule to govern the Act's regulation of wetlands.

A. For almost as long as *Rapanos* has been the law, the lower courts have been in conflict over the rule (or rules) that the decision establishes for determining whether land is subject to Clean Water Act regulation

Within a year of *Rapanos*, the lower courts were already split as to the fundamental question of what test *Rapanos* establishes. *Compare United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (to disprove

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[6] The Ninth Circuit cited the Corps' regulatory definition of "waters of the United States," App. A-6, but EPA's is substantively identical, *see* 40 C.F.R. §§ 122.2, 230.3(s) (2008).

[7] The Ninth Circuit also affirmed the district court's rejection of the Sacketts' challenge to EPA's wetlands delineation of the Sacketts' homesite. *See* App. A-23 n.7. The Sacketts do not seek this Court's review as to that issue.

jurisdiction, one must defeat the *Rapanos* plurality as well as the Kennedy significant nexus tests), *with United States v. Robison*, 505 F.3d 1208, 1211 (11th Cir. 2007) (to disprove jurisdiction, one need only show the absence of a significant nexus). In the ensuing years, that split has worsened, with the Third and Eighth Circuits following the First Circuit, *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009), and the Seventh and Ninth Circuits following the Eleventh Circuit, *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006); App. A-31. Meanwhile, the Fourth, Fifth, and Sixth Circuits have taken a somewhat different approach, declining to decide whether a controlling *Rapanos* opinion exists and thus effectively compelling landowners to disprove jurisdiction under the *Rapanos* plurality and significant nexus tests, as well as (in the Fifth Circuit) the test advanced by the *Rapanos* dissent. *See Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011); *United States v. Lucas*, 516 F.3d 316, 325–27 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009).

The splits among the circuits have occasionally even run within them. For example, the Ninth Circuit held in *Northern California River Watch v. City of Healdsburg* that the significant nexus test controls. 496 F.3d 993, 999–1000 (9th Cir. 2007) ("Justice Kennedy's concurrence provides the controlling rule of law for our case."). Yet the court in a later decision hedged, declaring that jurisdiction might also be proved under the *Rapanos* plurality. *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011) ("In

City of Healdsburg, the court found that Justice Kennedy's concurrence in *Rapanos* 'provides the controlling rule of law for our case.' We did not, however, foreclose the argument that Clean Water Act jurisdiction may also be established under the plurality's standard.") (citation omitted). But then in *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017), *vacated*, 139 S. Ct. 1543 (2019), and again below, the Ninth Circuit appeared to veer back to exclusive reliance on the significant nexus test. *See Robertson*, 875 F.3d at 1289 ("Specifically, in *Northern California River Watch v. City of Healdsburg*, a precedent that is critical to our decision today, we held that Justice Kennedy's opinion was the controlling opinion from *Rapanos*."); App. A-25 to A-26 ("In *Northern California River Watch v. City of Healdsburg*, we concluded that 'Justice Kennedy's concurrence provides the controlling rule of law' from *Rapanos*.") (citation omitted). A similar flip-flop arguably has occurred in the Seventh Circuit. *Compare Gerke*, 464 F.3d at 725 ("Justice Kennedy's proposed standard . . . must govern the further stages of this litigation . . . ."), *with Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014) (observing that "Justice Kennedy's standard for testing the scope of federal authority over wetlands under the Clean Water Act [is] narrower than the plurality's . . . *in most cases*") (emphasis added).

The confusion has not been limited to circuit courts; district courts as well have struggled mightily to figure out what *Rapanos* means. *See, e.g.*, *United States v. Robison*, 521 F. Supp. 2d 1247, 1248, 1249 n.5 (N.D. Ala. 2007) (reassigning case because the court was "so perplexed by the way the law . . . has

developed" and declining to compare *Rapanos* "to making sausages because it would excessively demean sausage makers"); *Colorado v. U.S. EPA*, 445 F. Supp. 3d 1295, 1312 & n.11 (D. Colo. 2020) ("Again, it is difficult to discern what *Rapanos* was *for*—no judicial construction of the [Clean Water Act] offered in that case had the support of five justices. . . . The problem . . . is that *Rapanos* arguably forecloses *every* formulation of 'waters of the United States' proposed in *Rapanos* . . . ."), *rev'd and vacated on other grounds*, 989 F.3d 874 (10th Cir. 2021). *Cf. United States v. Robertson*, No. CR 15-07-H-DWM, 2015 WL 7720480, at *2 (D. Mont. Nov. 30, 2015) (observing with understatement that the defendant's "criticism of the confusion surrounding the definition of 'waters of the United States' may have a ring of truth," citing *United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007) ("Those facially simple provisions [of the Clean Water Act] have generated a good deal of regulatory and judicial attention. Suffice it to say that while they are designed to bring clarity to the Nation's waters, they, themselves, are not hyaline.")), *vacated on other grounds*, 773 Fed. Appx. 391 (9th Cir. 2019).[8]

[8] In *Robertson*, the Court granted certiorari and vacated the judgment of the Ninth Circuit affirming the defendant's conviction. 139 S. Ct. 1543. In contrast to the Sacketts' case, the dispute in *Robertson* primarily concerned the extent to which the Act regulates non-navigable tributaries of traditionally navigable waters. *See Robertson*, Pet'n for Writ of Cert., No. 18–609, 2018 WL 5978094, at 8–9, 22–23.

B. Despite several years of operating under guidance documents, and then two immense notice-and-comment rulemakings, the agencies have failed to articulate a workable and legally sound interpretation of *Rapanos*

Shortly after *Rapanos*, EPA and the Corps issued a guidance document, *see* App. A-45 to A-70, which the agencies later amended, *see* EPA & Army Corps, Memorandum re: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2008), A-45 to A-70.[9] This *Rapanos* guidance articulated a hodge-podge test, taking some aspects from the *Rapanos* plurality and some from Justice Kennedy's concurrence. *See id*. at A-45 to A-47. But by EPA's own admission, the guidance guided nobody. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) ("[The] guidance documents did not provide the public or agency staff with the kind of information needed to ensure timely, consistent and predictable jurisdictional determinations."). *See also* Jamison E. Colburn, *Don't Go in the Water: On Pathological Jurisdiction Splitting*, 39 Stan. Envtl. L.J. 3, 56 (2019) (noting how the guidance contributed to "gradient indeterminacy," thereby exacerbating "the vagaries of evidence gathering and other variabilities in the field," and resulting in "polarizing jurisdictional battles").

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[9] *Available at* https://perma.cc/JNN9-HKEG.

Recognizing that failure, and taking a cue from this Court, *see Rapanos*, 547 U.S. at 757–58 (Roberts, C.J., concurring), the agencies then embarked upon notice-and-comment rulemaking. *See* Jamison E. Colburn, *Governing the Gradient: Clarity and Discretion at the Water's Edge*, 62 Villanova L. Rev. 81, 133 (2017) ("The [rulemaking] was the Obama Administration's response to the legal mess that [Clean Water Act] jurisdiction has become."). Issued in 2015, the "Clean Water Rule," 80 Fed. Reg. 37,054, was the result of several years of intense scientific and economic analysis from agency staff, hundreds of meetings with state and local governments, regulated parties, and others, as well as a six-month public comment period that produced over a million comments. Stephen M. Johnson, *Killing WOTUS 2015: Why Three Rulemakings May Not Be Enough*, 64 St. Louis Univ. L.J. 373, 386 (2020). Yet despite these mighty efforts to craft a rule consistent with *Rapanos*, it was preliminarily enjoined within just a few months of its adoption for being inconsistent with various aspects of *Rapanos*. *In re EPA & Dep't of Defense Final Rule*, 803 F.3d 804 (6th Cir. 2015), *vacated on other grounds, In re U.S. Dep't of Defense*, 713 Fed. Appx. 489 (6th Cir. 2018); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). Ultimately, two other courts held on the merits that the rule was unlawful, *Texas v. U.S. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019), and shortly thereafter the agencies repealed it and reinstated the prior regulations, at issue in *Rapanos*, defining "navigable waters," *see* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

EPA and the Corps then tried again in 2020, issuing a "Navigable Waters Protection Rule." 85 Fed. Reg. 22,250 (Apr. 21, 2020). Like the Clean Water Rule, the Navigable Waters Protection Rule was the result of intense agency work, as well as significant engagement with regulated parties and review of hundreds of thousands of public comments. *See id.* at 22,260–62. In the new rule's preamble, the agencies observed that "litigation has continued to confuse the regulatory landscape," which fact underlined "the importance of providing clear guidance to the regulated community." *Id.* at 22,256–57. The agencies therefore sought through the new rule to "adher[e] to Constitutional and statutory limitations, the policies and objective of the [Clean Water Act], and case law," so as to enable "the regulatory agencies and the regulated community to protect navigable waters from pollution while providing an implementable approach to determining regulatory jurisdiction under the [Clean Water Act]." *Id.* at 22,262. But this third agency effort at construing *Rapanos* failed as well, with one district court preliminarily enjoining it shortly after its issuance, *Colorado*, 445 F. Supp. 3d at 1299, and another vacating it because of the rule's "fundamental, substantive flaws," *Pascua Yaqui Tribe v. U.S. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at *5 (D. Ariz. Aug. 30, 2021).

C. The confusion as to which jurisdictional test or tests *Rapanos* establishes, coupled with the great indeterminacy of the significant nexus test, imposes extraordinary costs and potentially crushing penalties on ordinary Americans engaged in everyday land-use

As this Court has recognized, for property owners who after *Rapanos* must "feel their way on a case-by-case basis," *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring), identifying whether one's "soggy" land, App. A-4, is regulated by the Clean Water Act is "often difficult," *Hawkes*, 136 S. Ct. at 1812. *Accord Sackett*, 566 U.S. at 132 (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear."); *Hawkes*, 136 S. Ct. at 1816 (Kennedy, Thomas, Alito, JJ., concurring) ("[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern.").[10]

To begin with, in some jurisdictions property owners cannot even identify the pertinent legal standard. Will they have to disprove jurisdiction under just the significant nexus standard, or under the *Rapanos* plurality too, or perhaps also under the standard of the *Rapanos* dissent? *See supra* Part I.A.

Things are not much better even in those jurisdictions, like the Ninth Circuit, where the

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[10] Indeed, as Justice Kennedy himself acknowledged, sogginess alone does not tell landowners whether their property is regulated. *Rapanos*, 547 U.S. at 761 (Kennedy, J., concurring in the judgment) (emphasizing that "wetlands are not simply moist patches of earth").

significant nexus test is exclusively controlling, for it is incredibly challenging to figure out what the significant nexus test actually requires. *See Orchard Hill Building Company v. U.S. Army Corps of Eng'rs*, 893 F.3d 1017, 1025 (7th Cir. 2018) ("Justice Kennedy did not define 'similarly situated'—a broad and ambiguous term . . . ."); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) ("This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?"); Lawrence R. Liebesman, *et al.*, Rapanos v. United States*: Searching for a Significant Nexus Using Proximate Causation and Foreseeability Principles*, 40 Envtl. L. Rep. News & Analysis 11242, 11253 (2010) ("The significant nexus concept is fraught with unknowns.").

Because of its opacity, landowners uncertain about their rights must hire expert consultants and resort to litigation—always burdensome and expensive undertakings—to operationalize the significant nexus test. *See* J.B. Ruhl, *Proving the* Rapanos *Significant Nexus*, 33 Nat. Res. & Env't 51, 52–53 (2018) ("The harder proposition has been proving or disproving a significant nexus. [¶] As a matter of practice, however, if . . . a landowner . . . hopes to satisfy the significant nexus standard, it is advisable to bring along experts. [¶] [I]t is a fool's errand for landowners to dispute assertions of jurisdiction without rigorous expert-based evidence."); Dialogue, *The Impact of Justice Kennedy and the Effect of His Retirement*, 48 Envtl. L. Rep. News & Analysis 10863, 10864 (2018) (remarks of John C. Cruden) ("I can't imagine any more significant

concurring opinion in the history of the Court than his concurring opinion in *Rapanos*, which we're still trying to figure out and has spawned numerous litigation."). *Cf. Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) ("[J]ust how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within [Clean Water Act] jurisdiction . . . is a unique aspect of the [Clean Water Act]; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property.").

As one might expect, confusion over how to apply the significant nexus test means that more, not less, land is regulated. Indeed, virtually any wet area is at least presumptively covered. *See* Samuel P. Bickett, *The Illusion of Substance: Why* Rapanos v. United States *and Its Resulting Regulatory Guidance Do Not Significantly Limit Federal Regulation of Wetlands*, 86 N.C. L. Rev. 1032, 1041 (2008) ("In practice, post-*Rapanos* litigation has shown that it is quite easy to prove the existence of a significant nexus between navigable-in-fact waters and wetlands."). That in turn raises significant federalism concerns. *See* Thomas J. Philbrick, *From* Asahi *to WOTUS: Why "Significant Nexus" Falls Short*, 9 LSU J. Energy L. & Resources 165, 196 (2021) ("[T]here is a presumption against federal preemption of states' ability to regulate their own affairs. The 'significant nexus' test would allow agencies (and, to a lesser degree, courts) to override this presumption and violate the foundational principles of federalism.") (footnote omitted).

Converting the Clean Water Act into a federal zoning code is not, of course, what Justice Kennedy wanted, for he intended his test to be a *limitation* on federal authority. *See Rapanos*, 547 U.S. at 776–77 (Kennedy, J., concurring in the judgment) (criticizing the plurality opinion for allegedly leading to "constitutional difficulties and federalism concerns" as well as "applications of the statute as far from traditional federal authority as are the waters [the plurality] deems beyond the statute's reach"). *See* Bradford C. Mank, *Implementing* Rapanos*—Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 Ind. L. Rev. 291, 294 (2007) ("Justice Kennedy had to remain true to *SWANCC*'s underlying principle that the Act is limited to waters that have some meaningful connection to navigable waters.").

But as Justice Kennedy belatedly recognized, the confusion surrounding his significant nexus test, and Clean Water Act jurisdiction generally, leads to more than just inter-governmental disputes and run-of-the-mill regulatory headaches. Given that "the consequences to landowners even for inadvertent violations can be crushing," *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring), such confusion raises constitutional concerns of fair notice and due process. During the *Hawkes* oral argument, Justice Kennedy observed that "the Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice." He struggled to identify any "analogous statute that gives the affected party so little guidance at the front end." Transcript of Oral Argument at 18:11-19, *Hawkes*, 136

S. Ct. 1807. For those reasons, he concluded in his concurring opinion that the Clean Water Act "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring).

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The lower courts are in entrenched conflict as to how to interpret *Rapanos*. The agencies have repeatedly tried to provide help through guidance and rulemaking, to no avail. *See Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 624 (2018) ("What are the 'waters of the United States'? As it turns out, defining that statutory phrase . . . is a contentious and difficult task."). Meanwhile, average citizens seeking to do normal, everyday activities—like building a family home—are left adrift, uncertain if their sometimes "soggy" property may be regulated. They are immobilized by the understandable fear of the "crushing" consequences should they guess wrong as to jurisdiction, even if they are among the very few who can afford the six-figure costs of the permitting process, *Hawkes*, 136 S. Ct. at 1812, or the squad of wetland consultants and lawyers needed to disprove jurisdiction and to defend that conclusion in court.

This deep confusion, especially with respect to how to apply the significant nexus test, indicates that the stare decisis value of Justice Kennedy's *Rapanos* concurrence—assuming that it has any such value under *Marks*—is at best minimal. *See generally Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019) (poorly reasoned decisions establishing unworkable rules merit little stare decisis weight). This Court can

therefore provide desperately needed clarity by granting the petition to revisit *Rapanos* and to adopt its plurality wetland test as the controlling rule.

II. The Sacketts' case provides an excellent vehicle for this Court to end the *Rapanos* confusion and to articulate a clear and easily administered rule for determining the Clean Water Act's wetlands jurisdiction

This Court can readily end the years of confusion and conflict over the scope of the Clean Water Act by adopting the *Rapanos* plurality rule of continuous surface water connection. The Sacketts' petition provides the Court with the right vehicle for making that happen.

First, the Sacketts' case presents a sharply live controversy. Although the compliance order has been rescinded, EPA could reissue it at any moment. App. A-16. Moreover, regardless of the fate of the compliance order, the Sacketts still remain liable, in response to an enforcement action brought by EPA or a citizen-suit plaintiff, *see* 33 U.S.C. § 1365, for gargantuan civil penalties for violation of the Act itself. *See Sackett*, 566 U.S. at 126. And even were there no liability for past action, the core of the parties' dispute—may the Sacketts build a home without having to obtain a Clean Water Act permit?—remains at issue. App. A-16, A-20. Indeed, over the course of this nearly decade-and-a-half litigation, EPA has studiously avoided declaring that it lacks authority over the Sacketts' property or their home-

building project. App. A-14 to A-15.[11] The fair inference is that the agency does believe that it retains authority. And if that was true when future activity on the Sacketts' property would have been subject to the narrower Navigable Waters Protection Rule, it is all the more so now that EPA is already re-applying throughout the nation the broader regulations at issue in *Rapanos*. *See supra* note 1.

Second, now is the right time for the Court to weigh in on the scope of the Clean Water Act. Several months ago, EPA and the Corps announced their intention to formally repeal the Navigable Waters Protection Rule and then to replace it with a new rule. *See supra* note 1. Given the agencies' horrible track-record at construing *Rapanos* in a manner that provides real guidance to the regulated public and that satisfies the demands of the lower courts, *see supra* Part I.B., intervention by this Court to provide a clear jurisdictional rule would be invaluable to the agencies in their long-term regulatory efforts.

Third, the facts of the Sacketts' case are perfectly fitted for highlighting the difference in practice between the significant nexus test and the *Rapanos* plurality's surface connection rule. The Ninth Circuit concluded below that, under the former, the Sacketts' property is covered. App. A-32 to A-36. But the record is clear that, under the latter, it is not. *See* App. A-33 to A-34 ("EPA therefore properly concluded that the

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[11] Below, the Sacketts requested that EPA expressly declare that it does not have authority over their home-building project, but the agency failed to do so. *See* Plts.–Apps.' Opp'n to Mot. to Dismiss the Appeal as Moot at 5, Doc. No. 23–1, Case No. 19–35469 (filed Apr. 9, 2020).

wetlands on the Sacketts' lot were adjacent to the unnamed tributary to Kalispell Creek thirty feet away, notwithstanding that Kalispell Bay Road lies in between the property and the tributary."); App. A-35 n.14 ("[T]he Sacketts' wetlands and the Fen [wetlands] remain interconnected via a *subsurface* flow, and historical aerial photographs establish that they *used* to be a single wetland complex . . . .") (emphasis added); App. C-12 (jurisdictional determination stating that the Sacketts' site's connection is "subsurface" and that the lot is separated from the nearest regulated water by a road). *See also* E-1 (aerial photo of site showing the same).

Finally, this Court should act now because waiting for Congress has not resulted in any legislative fix in the 15 years since *Rapanos* was decided. To be sure, Congress could have given "[r]eal relief" by providing "a reasonably clear rule regarding the reach of the Clean Water Act." *Sackett*, 566 U.S. at 133 (Alito, J., concurring). And it is only by such "clarification of the reach" of the Act that the "underlying problem" besetting "aggrieved property owners" like the Sacketts can be resolved. *Id.* But despite ample time, Congress has not acted. It thus falls to this Court to do so.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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