No. 21-454

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

BRIEF OF THE CATO INSTITUTE AND NFIB SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Should *Rapanos v. United States*, 547 U.S. 715 (2006) be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts.

This case interests *amici* because the decision below encourages government agencies to resolve major questions of economic and social significance without clear instructions from Congress, the result of which are ever-changing jurisdictional determinations and property owners' inability to rely on official guidance.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and *amicus* alone funded its preparation and submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Fixing the scope of federal authority over national "waters" is a matter of great economic and political significance. *See Rapanos v. United States*, 547 U.S. 715, 722 (2006) (observing that agencies interpret federal jurisdiction to "cover 270-to-300 million acres of swampy lands"); *see also Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1489 (2020) (Alito, J., dissenting) ("The Clean Water Act imposes a regime of strict liability, backed by criminal penalties and steep civil fines.") (citations omitted). For regulatory agencies to exercise authority over these sorts of "major" questions, "Congress *must* either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce." *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari) (citations omitted) (emphasis added). On both counts, Congress failed here.

Of course, Congress did not itself "expressly and specifically" define the boundaries of the Clean Water Act. Lawmakers instead extended federal authority to the "waters of the United States," 33 U.S.C. § 1362(7), which "is not a term of art with a known meaning [and] the words themselves are hopelessly indeterminate." *Sackett v. EPA*, 566 U.S. 120, 133 (2012) (Alito,

J., concurring). As a result, the Clean Water Act's scope "is notoriously unclear." *Id.* at 132.

Nor did Congress "expressly and specifically delegate" authority to decide this "major policy question" to any agency. In past rulemakings to define the "waters of the United States," the relevant agencies couldn't identify any specific delegation for their action, but instead grounded their interpretive authority in the statute as a whole. *See, e.g.*, 85 Fed. Reg. 22,250, 22,251 (Apr. 21, 2020) ("The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., including sections 301, 304, 311, 401, 402, 404, and 501.").

For 50 years, this "critical ambiguity" has persisted, confounding agencies, courts, and—most importantly—landowners, far too many of whom have been denied regulatory certainty with respect to the enjoyment of their property. *Sackett*, 566 U.S. at 133 (Alito, J., concurring). Enough is enough. Unless and until Congress "do[es] what it should have done in the first place [and] provide a reasonably clear rule regarding the reach of the Clean Water Act," *id.*, it is the duty of this Court to "say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Instead of performing this constitutional role and providing much needed clarity, the Court 15 years ago further muddied the waters. The Clean Water Act's jurisdictional scope was squarely at issue in *Rapanos*, but no opinion commanded a majority and the holding sent mixed messages. A plurality opinion adopted clear limits on federal jurisdiction, while Justice Kennedy's concurring opinion advanced a much broader

test. *See* Pet. at 11–13. As the Petitioners explain, the splintered decision in *Rapanos* has left lower courts confused. *See id.* at 17–20.

The Court would be mistaken to rely on agencies to formulate a durable interpretation—and not only because they long have failed to produce a workable rule. *See id.* at 21–23. Here, Congress has not "expressly and specifically delegated" authority to any agency to define the "waters of the United States," despite the policy's significant social and economic effects. In this context, courts must exercise interpretive primacy to police delegations of legislative power.

As a practical matter, our political order makes it impossible for administrative agencies to resolve the major question at issue here without engendering a severe disruption of property owners' reliance interests. Today, American government is characterized by "presidential administration," such that administrative policymaking reflects the incumbent president's policy preferences. The limits of federal jurisdiction over national "waters" thus undergo a president-led transformation every time there's a political changeover in the White House. In this environment, landowners rely on the government at their peril.

The scope of the Clean Water Act is a major question that Congress *won't* answer and one that agencies *can't* answer. The Court should grant certiorari and provide long overdue regulatory certainty.

ARGUMENT: THIS COURT MUST ACT TO PREVENT A CRISIS OF RELIANCE INTERESTS

"We live today in an era of presidential administration." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2246 (2001). In modern American government, it is the presidency, rather than Congress, that leads "in setting the direction and influencing the outcome of" administrative policymaking. *Id.* Because "regulatory activity . . . [is] more and more an extension of the President's own policy and political agenda," *id.* at 2248, there occurs a wholesale shift in administrative policymaking whenever the presidency switches hands—especially when there's a party changeover.

Defining the "waters of the United States" provides a quintessential example of our modern era of presidential administration. To herald the first post-*Rapanos* rulemaking, President Obama held a press conference. Coral Davenport, "Obama Announces New Rule Limiting Water Pollution," *N.Y. Times*, May 27, 2015, https://nyti.ms/3BUjI7d. In accordance with the administration's political values, that rule adopted an expansive interpretation of government authority to regulate under the Clean Water Act. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053 (June 29, 2015).

President Obama's successor, of course, represented the other party. Within weeks of taking office, President Trump ordered his administration to initiate a rulemaking "rescinding or revising" the capa-

cious jurisdictional definition developed by his predecessor. *See* Exec. Order 13,778, 82 Fed. Reg. 12,497, 12,497 (Mar. 3, 2017). Ultimately, the Trump administration adopted a narrow interpretation of government authority to regulate. *See* 85 Fed. Reg. 22,250.

Now the policy pendulum is swinging back. On his first day in office, President Biden ordered an "immediate[] review" of his predecessor's jurisdictional rule to determine whether it comports with the new administration's agenda. *See* Exec. Order 13,990, 86 Fed. Reg. 7,037, 7,037 (Jan. 25, 2021); *see also* White House Briefing Room, "Fact Sheet: List of Agency Actions for Review" (Jan. 20, 2021), https://bit.ly/3AM85ha (identifying rules subject to review under Executive Order 13,990). Soon thereafter, the operative agencies announced that they would undertake a rulemaking to again expand federal jurisdiction. *See* Press Release, U.S. Environmental Protection Agency, EPA, Army Announce Intent to Revise Definition of WOTUS (June 9, 2021), https://bit.ly/3lS27XT (announcing intent "to better protect our nation's vital water resources") (hereinafter "EPA Press Release").

To be sure, voters *should* guide administrative policy, and "presidential leadership establishes an electoral link between the public and the bureaucracy." Kagan, *supra*, at 2332; *see also Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of

its programs and regulations."). Political responsiveness is a virtue for most regulatory affairs.

But not always. For obvious "major" policy questions—such as the Clean Water Act's jurisdictional extent—the ping-pong policymaking inherent to presidential administration is too unsettling to pass constitutional muster.

Again, only Congress can furnish "real relief" by "provid[ing] a reasonably clear rule regarding the reach of the Clean Water Act. *Sackett*, 566 U.S. at 133 (Alito, J., concurring). For 50 years, however, "Congress has done nothing to resolve this critical ambiguity." *Id.* Assuming for the sake of argument that Congress remains inert, then only this Court can avert a crisis of reliance interests that will inevitably flow from the vicissitudes of policymaking inherent to our present "era of presidential administration."

The likelihood of unprecedented regulatory uncertainty is demonstrated by recent trends in the issuance of "jurisdictional determinations" (JDs) under the Clean Water Act. Because "it is often difficult to determine whether a particular piece of property contains waters of the United States," *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016), the relevant agencies (the Army Corps of Engineers and the EPA) have developed a discretionary policy of issuing JDs to afford a measure of regulatory stability to landowners, *see* 33 C.F.R. § 331; U.S. EPA and U.S. Army Corps of Engineers, Memorandum of Agreement: Determination of Geographic Jurisdiction of the Section 404 Program and Application of Exemptions Under CWA Section 404(f) (Jan. 19, 1989),

https://bit.ly/3B3LPzs (establishing program). Much like they sound, JDs are official determinations that a wetland and/or waterbody is (or isn't) subject to federal jurisdiction. As this Court has explained, "approved" JDs "definitively stat[e] the presence or absence" of jurisdictional waters on a property owner's land." *See Hawkes Co.*, 136 S. Ct. at 1812 (citing 33 C.F.R. § 331.2).

Recipients use approved JDs to plan the use of their property. These determinations are also relied upon to establish value for tax and lending purposes in real estate transactions. In addition, states count on approved JDs to determine compliance with their own regulatory programs. *See* Br. of Foundation for Economic Progress and Utility Water Act Group as *Amici Curiae* at 23–29, *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016) (No. 15–290) (listing reliance uses).

In sum, the entire point of approved JDs is to incur reliance interests by property owners. But in an era of presidential administration, when the scope of federal jurisdiction grows or shrinks whenever the White House changes political affiliation, property owners rely on government at their peril. An approved JDs can become meaningless—or even a liability—depending on the outcome of the next election.

The problem is that approved JDs are temporary. If a property is found to be free of federal jurisdiction, then that negative determination lasts for five years, after which the landowner must seek a new JD. *See* U.S. Army Corps of Engineers, Regulatory Guidance

Letter 05-02, Extirpation of Geographic Jurisdictional Determinations (June 14, 2005). Obviously, the Clean Water Act's geographical extent is paramount here, and the agencies' decisions are governed by the definition of the "waters of the United States" that is in effect when at the time of the final determination. In our age of presidential administration, the scope of federal jurisdiction is apt to oscillate sharply every 4 years, which is about as often as approved JDs require renewal. That's a recipe for disaster.

For example, the government recently estimated that the Army Corps of Engineers issued 968 "no permit required" findings associated with approved JDs in the year after the Trump administration promulgated its narrow definition of the "waters of the United States." This includes at least 333 projects that previously had required permitting. These "no permit required" findings represented a 338% increase over the last annual total under the previous regulatory regime. *See* U.S. EPA and U.S. Army Corps of Engineers, Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule, 3 (June 8, 2021). According to the government, this data "likely capture[s] only a small portion" of these trends. *Id.* Notably, the Biden administration presented these trends as a justification to (again) expand federal jurisdiction under the Clean Water Act. *See* EPA Press Release. This is a strong indication that recipients of these "no permit required" findings will be on the front line of regulatory

enforcement when their approved JDs come up for renewal under the forthcoming incarnation of the "waters of the United States" rule.

Of course, when the White House next changes party, this cycle of jurisdictional flip-flopping will begin anew. Until Congress acts, only this Court can stabilize federal authority under the Clean Water Act.

CONCLUSION

For the reasons stated above, the Court should grant the petition and clarify the scope of federal jurisdiction under the Clean Water Act.

Respectfully submitted,

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