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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Introduction

Petitioners Michael and Chantell Sackett ask the Court to take their case a second time to adopt the standard for Clean Water Act wetlands jurisdiction articulated in Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006)—a statutorily compelled, straightforward, and easily implementable rule. By so doing, the Court will render the "notoriously unclear" issue of the Clean Water Act's reach, *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring), substantially less "difficult to determine," *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 594 (2016).

Respondents EPA and Administrator Regan oppose review, contending that: (i) lower courts are only confused about some but not all aspects of this Court's fractured decision in *Rapanos*; (ii) the agency should be given yet another opportunity to attempt to do what, since *Rapanos*, it has repeatedly proved incapable of doing, *viz.*, adopting a clear and legally defensible construction of the scope of its authority under the Clean Water Act; and (iii) the Sacketts' case is a poor vehicle because it will not resolve every question about the Act's reach, and because the agency, having withdrawn its compliance order (while expressly reserving its authority to regulate), may choose not to drop its enforcement "hammer" again, *Sackett*, 566 U.S. at 127 (majority opinion). As set forth below, these arguments against the Court's review are unconvincing.

Argument

I. The conflicts among the lower courts about how to apply *Rapanos* support this Court's review of the Sacketts' case

EPA argues that the lower court conflicts over how to apply the Court's split decision in *Rapanos* are neither here nor there because no court of appeals has held the *Rapanos* plurality test to be controlling. *See* Resp. 13-14, 16-17. That point is unavailing, for three related reasons.

First, the lower courts *are* in conflict about how to apply *Rapanos*. *See* Pet. 17-20, Amicus Br. of U.S. Chamber 4-7, Amicus Br. of West Virginia & 20 Other States 15-16, Amicus Br. of Se. Legal Found. 20-23. In fact, EPA itself once believed that this Court's review was merited to resolve these lower-court conflicts, *see* Pet. for Writ of Cert., *United States v. McWane, Inc.*, No. 08-223, conflicts that the agency is now on the precipice of worsening through its proposed rulemaking, Resp. Br. 10-11. *Compare* proposed 40 C.F.R. § 120.2(a)(5)(i)-(ii), (7)(ii)-(iii) (allowing jurisdiction to be proved under either the test from the *Rapanos* plurality or Justice Kennedy's concurring opinion) *with United States v. Robison*, 505 F.3d 1208, 1211 (11th Cir. 2007), & Pet. App. A-25 to A-26 (jurisdiction may be proved only under the test from Justice Kennedy's *Rapanos* concurrence). EPA counters that the Court has repeatedly denied petitions that have raised these conflicts. Resp. 14. But the most recent of such denials was 2012. *See id.* Whatever might have motivated the Court to decline review in the handful of years immediately after *Rapanos*, the ensuing decade has shown that the

confusion surrounding *Rapanos* is entrenched and intractable, absent intervention by this Court.[1] *See* Pet. 17-28.

Second, the Sacketts' petition offers the Court the opportunity to greatly reduce this confusion by adopting as controlling the *Rapanos* plurality's rule for wetlands jurisdiction: a wetland may be reckoned among the "waters of the United States" if, but only if, it maintains a surface-water connection with a regulated water such that it is difficult to say where the wetland ends and the water begins. *Rapanos*, 547 U.S. at 742, 755.

Third, adoption of the *Rapanos* plurality test to govern wetlands jurisdiction would provide full relief to the Sacketts as well as similarly situated landowners throughout the country. There is no surface-water connection from the Sacketts' property to any alleged jurisdictional water: between the site and the roadside ditch "tributary" are 30 feet of paved Kalispell Bay Road; and between the site and Priest Lake 300 feet away is another road as well as a row of houses.[2] Pet. App. A-8, A-33 to A-34, E-1. A better example of the absence of any "boundary-drawing

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[1] Review would not, however, require the Court to employ the split-decision framework from *Marks v. United States*, 430 U.S. 188 (1977); the dispute among the lower courts about how to apply *Marks* to *Rapanos* is reason enough to consider afresh the Clean Water Act's reach. *See Nichols v. United States*, 511 U.S. 738, 745-46 (1994) ("This degree of confusion following a splintered decision . . . is itself reason for reexamining that decision."), *quoted in* Amicus Br. of New England Legal Found. 6.

[2] EPA does not appear to contest the absence of any surface-water connection. *See* Resp. 15-16. *Cf.* S. Ct. R. 15.2.

problem," *Rapanos*, 547 U.S. at 742, would be hard to find.

II. EPA's proposed rulemaking in no way undercuts the need for this Court's review

EPA argues that, in light of its recently proposed rulemaking, judicial review of the scope of the Clean Water Act's wetlands jurisdiction would be premature. Resp. 17-20. The argument is unconvincing, for three reasons.

First, even if finalized as proposed, EPA's new rule would not resolve the dispute presented by the Sacketts' petition over the reach of the Clean Water Act. The proposed rule would formally reinstate "the pre-2015 regulatory regime." Corps & EPA, Pre-Publication Notice, Proposed Rule, Revised Definition of "Waters of the United States," at 7 (Nov. 18, 2021) (2021 Notice). That is the very same framework according to which EPA issued the compliance order challenged in this case. *See* Pet. 6 & n.1. Hence, holding off review to allow EPA's rulemaking to play out would do nothing to sharpen the issues or avoid the dispute raised by the Sacketts' petition.

Second, the mere possibility of future Clean Water Act rulemaking does not make this Court's review unwarranted or improper. *See Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 627 n.5 (2018). EPA protests that judicial review of the scope of the Clean Water Act should not happen until the agency "has completed its work."[3] Resp. 24. But given the

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[3] The government opposed certiorari in *Robertson v. United States*, *cf.* Pet. 20 n.8, in part on this very ground. *See* Br. for the

contentious history of rulemaking construing "waters of the United States," *see* Pet. 11-13, 21-23, it is likely that EPA will never, absent intervention by this Court, finish "its work."[4] *Cf.* Amicus Br. of U.S. Chamber 16 (characterizing the rulemaking history as the "water regulatory version of *Groundhog Day*—fated to repeat the same series of events over and over again" (footnote omitted)). The Court recently rejected a similar contra-review argument in granting certiorari in a case challenging EPA's authority under the Clean Air Act. *See West Virginia v. EPA*, No. 20-1530 (cert. granted Oct. 29, 2021). *Cf.* Br. for the Fed. Defs. in Opp'n, *West Virginia v. EPA*, No. 20-1530, at 16 ("Any further judicial clarification of the scope of EPA's authority under Section 7411(d) would more appropriately occur at the conclusion of the upcoming rulemaking . . . ."). The Court should do so here as well. *Cf.* Amicus Br. of Cato Found. 7 ("[T]he ping-pong [of Clean Water Act] policymaking . . . is too unsettling to pass constitutional muster.").

Finally, a resumption of the "pre-2015 regulatory regime," 2021 Notice 7, will simply subject the nation yet again to an intolerably burdensome and confusing regulatory system, Amicus Br. of the Nat'l Ass'n of Home Builders 11-20; Amicus Br. of U.S. Chamber 16-20, one that also threatens to upset the Clean Water Act's delicate federal-state balance, Amicus Br. of West Virginia & 20 Other States 13 ("This situation is

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U.S. in Opp'n, *Robertson v. United States*, No. 18-609, at 21. Yet in the two years since that denial, the regulatory regime has become *more* confused and contentious, not less. *See* Pet. 22-23.

[4] Help from Congress is unlikely, given that body's inaction over the last several decades of wetlands controversy. *See Sackett*, 566 U.S. at 133 (Alito, J., concurring).

untenable. . . . The Court should act to heal the wound to state sovereignty that too-broad interpretations of the [Act] have opened these many years."). EPA downplays the costs associated with a return to the status quo ante. Resp. 20-21. But its description should not be credited, given the agency's contrary characterizations elsewhere. *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."); 2021 Notice 123 ("The agencies acknowledge that a return to the pre-2015 regime would . . . potentially rais[e] some timeliness and consistency issues that the agencies' rules in 2015 and 2020 were designed, in part, to reduce.").

III. EPA's attack on the *Rapanos* plurality's wetland test is no reason to deny review

Whether the *Rapanos* plurality's surface-connection rule or, as EPA argues, Justice Kennedy's significant nexus test, Resp. 14-15, is the correct one for construing the extent of the Clean Water Act's wetlands jurisdiction is of course the heart of the issue presented for review. That such competing candidate rules exist does not weaken the many reasons for why this Court should grant certiorari and decide which rule should prevail.

In any event, the plurality's test is the correct one. EPA argues to the contrary in part by invoking the Act's "animating purposes." Resp. 14. This Court, however, has "often criticized that last resort of extravagant interpretation, noting that no law

pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Rapanos*, 547 U.S. at 752. Thus properly framed, the interpretive question raised by the Sacketts' case is not, "What is the best way to end water pollution?", but rather, "What is the best way to end water pollution *given the statutory means that Congress has provided*?" For the Clean Water Act, those statutory means do not include the power to regulate all pollution, or all activities affecting water pollution, but rather only discharges of pollutants to "navigable waters," in turn defined as "waters of the United States." *See Rapanos*, 547 U.S. at 756 ("It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that 'significantly affect the chemical, physical, and biological integrity of' waters of the United States. It did not do that . . . ." (quoting Kennedy, J., concurring)). Necessarily, then, the agency has no authority to regulate discharges to non-waters, *e.g.*, land.

To be sure, determining where land ends and water begins can be challenging. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132, 134 (1985) (observing that "the transition from water to solid ground is not necessarily or even typically an abrupt one," and that "the Corps must necessarily choose some point at which water ends and land begins," given the "inherent difficulties of defining precise bounds to regulable waters"). But that difficulty does not mean that EPA can regulate any and all moist land or, as the Ninth Circuit concluded below, a "soggy residential lot," Pet. App. A-4. Rather,

as the *Rapanos* plurality opinion explains, "the inherent ambiguity in defining where water ends and abutting ('adjacent') wetlands begin" allows EPA "*only to resolve that ambiguity* in favor of treating all abutting wetlands as waters." *Rapanos*, 547 U.S. at 742. There is, however, no ambiguity in distinguishing between such "'physically abutting'" wetlands and wetlands that are "merely 'nearby'" another water, *id.* at 748, such as those alleged to exist on the Sacketts' lot, *see* Pet. App. A-8, A-33 to A-34, E-1. With respect to these "nearby" wetlands, there can be no "boundary-drawing problem," *Rapanos*, 547 U.S. at 742—simply put, where the water stops, the unregulated non-water necessarily must begin.[5]

IV. The Sacketts' petition is the right vehicle

EPA argues that, because the Sacketts here do not contest jurisdiction over the roadside ditch 30 paved feet from their home lot, their case is a poor vehicle. Resp. 21-22. But the fact that the Sacketts do not seek review of every aspect of Clean Water Act jurisdiction, such as the extent to which the Clean Water Act regulates tributaries of traditional navigable waters, should be a knock in favor of, not against, review.

[5] That conclusion follows even if one were to credit EPA's invocation of its "experience and expertise after more than 30 years of implementing prior regulations" construing the scope of the Clean Water Act, Resp. 19. Although there certainly is some ambiguity as to the precise scope of EPA's authority under the Act, the statutory text makes clear that only waters—not wet or soggy lands—may be regulated. No amount of deference can fudge that hard statutory distinction. *See Rapanos*, 547 U.S. at 752. Notably, in *Rapanos* neither the plurality nor Justice Kennedy deferred to the government's regulatory interpretation. *See id.* at 799, 807 (Stevens, J., dissenting).

After all, this Court typically prefers to work incrementally, especially in contentious areas such as environmental regulation. *See, e.g.*, *Rapanos*, 547 U.S. at 731 ("We need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act."); *Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 & n.10 (2019) ("leav[ing] for another day" whether the Park Service may regulate activities on wild and scenic rivers within Alaskan national parks). Moreover, the Clean Water Act jurisdictional disputes that have merited this Court's review all have focused principally on the extent to which EPA may regulate activities in *non-tributary* features. *See Riverside Bayview*, 474 U.S. at 123 (discharge of fill material into wetlands); *Solid Waste Ag. of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 163 (2001) (discharge of solid waste into abandoned mining pits); *Rapanos*, 547 U.S. 719-20 (backfilling of wetlands); *Sackett*, 566 U.S. at 124 (discharge of "dirt and rock" into alleged wetlands); *Hawkes Co.*, 578 U.S. at 595-96 (mining of peat from bogs and wetlands).

In any event, the jurisdictional issue presented by the Sacketts' petition is not as narrow as EPA would have it. The agency contends that the Sacketts' case does not implicate instances where wetlands are "adjacent" to intermittent or ephemeral channels. Resp. 22. That is not so. The *Rapanos* plurality's test for wetlands jurisdiction, which the Sacketts' petition asks the Court to adopt, employs a two-step inquiry. First, is there a nearby channel that qualifies as a water of the United States? Second, does the wetland maintain a continuous surface-water connection to that water? *See* 547 U.S. at 742. Only if both questions

are answered affirmatively may EPA regulate. Hence, regardless of the degree of flow in any channel, "nearby" wetlands cannot be regulated under the plurality's test if they, as is the case with those alleged to exist on the Sacketts' home site, *see* Pet. 6, 30-31, lack a surface water connection to that channel. Granting the Sacketts' petition would thus allow the Court to establish a single rule governing jurisdiction for all wetlands alleged to be adjacent to regulated waters.

Finally, EPA attempts to downplay the Sacketts' predicament, contending that renewed enforcement action against the Sacketts for their aborted homebuilding is "improbab[le]," even while conceding that "it is possible that a future dispute . . . may arise concerning the status of the wetlands on [their] property."[6] Resp. 23-24. As the Ninth Circuit correctly noted, despite EPA's withdrawal of the compliance order, the "central dispute in this case remains unresolved"—namely, "whether EPA can prevent them from developing their property." Pet. App. A-20. If that was true below, when future activity on the site would have been governed by the jurisdiction-

[6] EPA suggests that the predicament was of the Sacketts' own making, citing the conclusion of a wetlands expert whom the Sacketts had consulted. Resp. 4. But this consultation happened *after* the allegedly illegal discharge had already occurred. *See* Appellants' ER 134-35, 9th Cir. Doc. No. 15-2 (May 23, 2007, letter from Chantell Sackett to Army Corps). EPA also refers to a pre-*Rapanos* jurisdictional determination for the site done nearly a decade prior to the Sacketts' purchase. Resp. 4. But the Sacketts were not aware of the determination and, even if they had been, it would have been of no moment given that such a determination expires after five years. *See Hawkes Co.*, 578 U.S. at 595.

narrowing Navigable Waters Protection Rule, *see* Pet. App. A-20, it is all the truer now given EPA's abandonment of that rule and reimposition (currently de facto and perhaps soon de jure) of the very same "pre-2015 regulatory regime," 2021 Notice 7, that underpinned the compliance order's issuance against the Sacketts, *see* Pet. 6 n.1. EPA's argument against review would therefore return the Sacketts to "the same regulatory quagmire they have been in for the past thirteen years," Pet. App. A-16, inviting them blindly to hope that the agency (or a third-party citizen plaintiff) will never "drop the hammer." *Sackett*, 566 U.S. at 127. In contrast, a ruling on the merits in the Sacketts' favor would directly help the Sacketts, for then "they would finally be on solid ground when resuming construction." Pet. App. A-16. Such a ruling would also help the thousands of landowners throughout the country who, for the last 15 years, have had "to feel their way," *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring), amid the vicissitudes of continually changing guidance documents and regulations—property owners who, without this Court's review, will be left "with little practical alternative but to dance to the EPA's tune," *Sackett*, 566 U.S. at 127, 132, lest they suffer the "crushing" consequences, *Hawkes*, 578 U.S. at 602 (Kennedy, J., concurring), of getting crossways with EPA's latest articulation of its own authority.

Conclusion

The petition for writ of certiorari should be granted.

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