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

PETITIONERS' BRIEF ON THE MERITS

ANTHONY L. FRANÇOIS
Briscoe, Ivester &
Bazel LLP
235 Montgomery Street,
Suite 935
San Francisco, CA 94104
Telephone: (415) 402-2707
tfrancois@briscoelaw.net

PAIGE E. GILLIARD
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 610
Arlington, VA 22201
PGilliard@pacificlegal.org

DAMIEN M. SCHIFF*
**Counsel of Record*
CHARLES T. YATES
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
DSchiff@pacificlegal.org
CYates@pacificlegal.org

Counsel for Petitioners

Question Presented

Did the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7)?

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Jurisdiction

The judgment of the court of appeals was entered on August 16, 2021. The petition for a writ of certiorari was filed on September 22, 2021, and the petition was granted on January 24, 2022. Jurisdiction is conferred by 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), (b), (c) (2008):

  > For the purpose of this regulation these terms are defined as follows:
  >
  > (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 purposes 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.

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(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

In 2007, Petitioners Michael and Chantell Sackett set out to build a modest family home on a two-thirds-of-an-acre lot in an established residential neighborhood near Priest Lake, Idaho. Fifteen years later, those plans remain on indefinite hold. Not long after the Sacketts started construction, Respondent United States Environmental Protection Agency ordered all work to stop, on pain of crushing fines, because it asserted that the Sacketts' land contains "navigable waters," 33 U.S.C. § 1362(7), regulated under the Clean Water Act, *id.* §§ 1251-1388.

The Sacketts' property contains no stream, river, lake, or similar waterbody. Yet EPA persists in its view that the Sacketts must obtain federal approval to build on their lot. It contends, and the Ninth Circuit agreed, that the Sacketts' proposed house requires a Clean Water Act permit because: Priest Lake is a navigable water → A non-navigable creek connects to Priest Lake → The non-navigable creek is connected to a non-navigable, man-made ditch → The non-navigable, man-made ditch is connected to wetlands → These wetlands, though separated from the Sacketts' lot by a thirty-foot-wide paved road, are nevertheless "similarly situated" to wetlands alleged to exist on the Sacketts' lot → These alleged wetlands on the Sacketts' property, aggregated with the wetlands across the street, bear a "significant nexus" to Priest Lake. *See* Cert. App. A-33 to A-36; C-3, C-8, C-13. As circuitous and strained as this theory is, it gets even worse. For, as EPA itself recognizes, *no*

water at all—surface or subsurface—flows from the Sacketts' lot to the wetlands or to the ditch across the street. *See* Joint Appendix (JA) 28-29, 32.

The Sacketts' ordeal is emblematic of all that has gone wrong with implementation of the Clean Water Act following this Court's attempt in *Rapanos v. United States*, 547 U.S. 715 (2006), to adopt a workable standard for delimiting the Act's reach. The years of confusion since *Rapanos* have shown that regulated citizens, the lower courts, and EPA need at long last a clear and definitive articulation of the Act's scope. But that articulation cannot be the significant nexus test from Justice Kennedy's concurring *Rapanos* opinion, which the Ninth Circuit applied to affirm EPA's jurisdiction, Cert. App. A-32, and which EPA is now proposing to codify, *see* 86 Fed. Reg. 69,372, 69,373 (Dec. 7, 2021). As Justice Scalia observed in his *Rapanos* plurality opinion, even on paper, the "significant nexus" test amounts to a "flouting of statutory command." *Rapanos*, 547 U.S. at 756. And as he accurately foresaw, because that test is "perfectly opaque," it "is not likely to constrain an agency whose disregard for the statutory language has been so long manifested." *Id.* at 756 n.15. *See infra* Argument II.

The Court can chart a better course for the Clean Water Act by adopting the following two-step framework for determining when a wetland is among "the waters of the United States" subject to the Act's regulation of "navigable waters," 33 U.S.C. § 1362(7).

- Step one: is the wetland inseparably bound up with a "water"—*i.e.*, a stream, ocean, river, lake, or similar hydrogeographic feature that in

ordinary parlance would be called a "water"—by means of a continuous surface-water connection, such that it is difficult to tell where the wetland ends and the "water" begins?

- Step two: is the "water" among "the waters of the United States," *i.e.*, those waterbodies subject to Congress's authority over the channels of interstate commerce?

The framework's first step proceeds on the premise, long acknowledged by this Court, that wetlands are not "waters" in their own right. *See Rapanos*, 547 U.S. at 741 n.10 ("[O]ur opinion [in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985),] recognized that unconnected wetlands could not naturally be characterized as 'waters' at all . . . ."). Rather, a wetland can be considered a "water" only where it is "inseparably bound up" with a "water," *see Riverside Bayview*, 474 U.S. at 134—namely, a hydrogeographic feature described in ordinary parlance as a "stream," "ocean," "river," "lake," or the like, *see Rapanos*, 547 U.S. at 739 (quoting Webster's Second New International Dictionary 2882 (2d ed. 1954)). And a wetland is inseparably bound up with a "water" only where the wetland has such a significant *physical* nexus to the "water" that it is difficult to say where the wetland ends and the authentic "water" begins—in other words, a shoreline wetland. *See Rapanos*, 547 U.S. at 742-43; *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167, 171 (2001). *See infra* Argument I.A.

Determining that a wetland can be deemed a "water" does not, however, establish EPA's

jurisdiction. *See Rapanos*, 547 U.S. at 731. A finding must also be made that the "water" is "of the United States"—thus, the second step of the Sacketts' proposed framework. In extending federal jurisdiction to "the waters of the United States," Congress was exercising "its commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3. More than a century of statutory precedents, judicial decisions, and agency administration leading up to the Clean Water Act's passage demonstrates that, by 1972, such power undoubtedly extended to (i) waters that do, or once did, or could with reasonable improvement, serve as channels of interstate commerce, as well as (ii) those activities, wherever located, that harm such aquatic interstate highways. *See infra* Argument I.B.1. It is also true, however, that Congress in 1972 wished to go beyond prior statutes and enforcement practice that embodied this more traditional understanding of federal authority over aquatic channels of interstate commerce. *See Rapanos*, 547 U.S. at 731. Indeed, the debates surrounding federal water quality law in the years leading up to the Clean Water Act's passage show that Congress wished to regulate to the full limit of its channels of commerce power. But that does not mean that Congress intended to regulate all waters in the country. Rather, to respect the states' historical role in regulating land-use and water resources, Congress chose to extend the new statute's assertion of federal jurisdiction no farther upstream from traditional navigable waters than those wholly intrastate waters that, when combined with non-aquatic means of transportation, form a continuous channel of interstate commerce. *See infra* Argument I.B.2-3.

In contrast to the significant nexus standard, the two-step framework respects Congressional intent by adhering closely to the statutory text while, at the same time, giving due regard to the states' traditional pre-eminence (recognized by the Tenth Amendment) in regulating land and water resources. And unlike the significant nexus standard, the two-step framework respects the property and due process rights of landowners like the Sacketts, providing them a rule that requires only ordinary visual observation and thus one that any layman can readily and accurately employ.

Applying the two-step framework to this case's record compels a finding that the Sacketts' property contains no "waters of the United States." The lot has no surface-water connection to any "water," JA 19, 28-29, and thus no wetland that may be present on it can be inseparably bound up with any "water." Moreover, the nearest "water of the United States" is Priest Lake, which is separated from the lot by a gravel road and a row of lakefront homes. JA 19, 29, 50. *See infra* Argument III. Therefore, as elaborated below, EPA lacks authority over the Sacketts' property, and the Ninth Circuit's judgment affirming that authority should be reversed.

Statement of the Case

A. The Sacketts' Thwarted Home-Building Project

In 2004, the Sacketts purchased a vacant lot in a residential subdivision near Priest Lake, Idaho. *See* JA 15. At its north end, the lot is bounded by the paved Kalispell Bay Road, on the other side of which runs a

manmade ditch that drains about 35 acres of wetlands. JA 32-33; Cert. App. C-13. To the south of the lot, across the graveled Old Schneider Road, is a row of houses that fronts Priest Lake. JA 19, 29, 50; App. E-1. No surface-water connection exists between the Sacketts' lot and the roadside ditch, or between the lot and Priest Lake. JA 19, 28-29. Although a subsurface connection is thought to be present, the alleged flow is *from* the ditch and wetlands north of Kalispell Bay Road south *to* the Sacketts' lot. *See* JA 30-31.

In late April, 2007, the Sacketts began construction of their family home. JA 13. On May 3, after preliminary earthmoving activities had commenced, *see* JA 23-24, officials from EPA and the United States Army Corps of Engineers entered the property and informed the Sacketts' construction workers that the lot likely contains wetlands subject to regulation under the Clean Water Act. *See* JA 18-19. These officials therefore recommended that all work cease until the Sacketts' compliance with the Act could be established. *See id*.

B. The Clean Water Act's Regulation of Pollutant Discharges

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

Nonexempt discharges to "navigable waters" require a permit from either EPA (called a National Pollutant Discharge Elimination Program, or NPDES, permit) or, if the discharge involves "dredged or fill material," from the Corps (commonly called a Section 404 permit).[1] *See id.* §§ 1342(a), 1344(a). In practice, the Clean Water Act's permitting regime is time-consuming and expensive. *See U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 594-95 (2016) (observing that a Section 404 permit typically takes more than two years and $250,000 in consulting costs to secure). Even when obtained, a permit can result in significant changes to the applicant's intended operations and substantially limit the use of the property. *See* Mandelker, *Practicable Alternatives for Wetlands Development Under the Clean Water Act*, 48 Envtl. L. Rep. News & Analysis 10894, 10913 (2018) ("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."). Discharging pollutants without a required permit, or violating permit conditions, risks cease-and-desist orders, compliance orders, administrative penalties, civil penalties and injunctions, and even criminal prosecution. *See generally Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52-53 (1987).

The significant costs and liabilities that the Clean Water Act can impose underscore the importance of clearly demarcating the Act's reach. Unfortunately,

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[1] The Act authorizes EPA to transfer NPDES and Section 404 permitting authority to the states and territories. *See* 33 U.S.C. §§ 1342(b), 1344(g)-(h).

construing the meaning of "navigable waters" has proved to be a vexing 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 passed, 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). EPA's interpretation was quite broad, *see* 40 C.F.R. § 125.1(p)(2), (4), (6) (1974) (claiming authority over all "[t]ributaries" of navigable waters, as well as all "lakes, rivers, and streams" used by "interstate travelers" or used in interstate "industrial" commerce), whereas the Corps' was notably more limited. Guided by this Court's longstanding construction of the phrase "navigable waters of the United States," as it was employed in predecessor statutes, the Corps construed the Act principally to reach interstate waters that are navigable in fact or readily susceptible of being rendered so.[2] *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 Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975). The Corps did not appeal the ruling. Instead, following EPA's example, the Corps promulgated much broader regulations. *See Rapanos*, 547 U.S. at 724.

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[2] The Corps' regulations did, however, go somewhat beyond a strictly traditional understanding of the commerce power over interstate aquatic channels. *See infra* at 41.

These revised regulations were meant to extend the scope of "navigable waters" to the outer limits of Congress's power to regulate interstate commerce. *Rapanos*, 547 U.S. at 724 (citing 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977)). Thus, federal permitting authority was asserted not just over interstate waters, but also intrastate waters with various relationships to interstate or foreign commerce, as well as all tributaries of such waters, and all "wetlands"[3] that are "adjacent" to, *i.e.*, bordering, contiguous, or neighboring, any regulated water. 33 C.F.R. § 323.2(a)(2)-(5), (d) (1978).[4] *See Rapanos*, 547 U.S. at 724. In the ensuing years, EPA and the Corps 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)).

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[3] These were defined as "those areas that are inundated or saturated [so as to support] a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 323.2(c) (1978).

[4] These are essentially the same provisions that, in subsequently recodified form, the Ninth Circuit applied below, *see* Cert. App. A-6; 33 C.F.R. § 328.3(a), (b) (2008); 40 C.F.R. §§ 122.2, 230.3(s), (t) (2008), and that the agencies are now applying throughout the country, *see* 86 Fed. Reg. at 69,373.

C. The Court's Precedents Interpreting "the waters of the United States"

The Court has addressed the geographic scope of the Clean Water Act three times.

First, in *Riverside Bayview*, the Court considered whether EPA and the Corps had reasonably interpreted the Act to regulate wetlands that were immediately adjacent to a navigable-in-fact water.[5] *See* 474 U.S. at 124. The Court began its statutory analysis by citing its then recent decision in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), for the proposition that the Court must defer to an agency's reasonable interpretation of ambiguous text within a statute that the agency is charged with administering. *Riverside Bayview*, 474 U.S. at 131. Looking to the text of the Clean Water Act, the Court conceded that, on "a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" *Id*. at 132. But weighing in favor of EPA and the Corps' view was Congress's aim, as the Court understood it, to regulate at least some waters beyond those traditionally subject to Congress's channels of commerce power, *see id*. at 133, 138-39, as well as the agencies' scientific judgment that wetlands play an important role in maintaining such waters, *id*. at 133-34. In light of this legislative intent and administrative expertise, the Court concluded that the agencies had reasonably resolved

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[5] As the government described the site at issue in its briefing before the Court, "it would not be an exaggeration to state that one could, after wading through a cattail marsh, swim directly from Riverside's property to the Great Lakes." Reply Brief for the United States at 2, No. 84-701, 1985 WL 669804 (1985).

the line-drawing ambiguity raised by the Act's regulation of "waters" by including within such aquatic features those wetlands that are "inseparably bound up with the 'waters' of the United States." *Id.* at 134. At the same time, the Court cautioned that its affirmance of the agencies' authority was limited to the regulation of such inseparably bound-up wetlands. *See id.* at 131 & n.8.

Second, in *SWANCC*, the Court considered whether EPA and the Corps may regulate "nonnavigable, isolated, intrastate waters," based on how the use of such waters could affect interstate commerce, pursuant to the Migratory Bird Rule. *See* 531 U.S. at 162. The Court began its analysis by repeating that *Riverside Bayview* had upheld the agencies' extension of the Act only to "wetlands that actually abutted on a navigable waterway." *Id.* at 167. According to *SWANCC*, it was the "significant nexus" of geographic propinquity between wetlands and the adjacent waters with which they were "inseparably bound up" that led the Court in *Riverside Bayview* to affirm the agencies' authority over such wetlands. *Id.* (quoting *Riverside Bayview*, 474 U.S. at 134). This kind of shoreline connection is, in contrast, necessarily absent with respect to features like the ponds at issue in *SWANCC*, which were "*not* adjacent to open water." *Id.* at 168.

In light of that important distinction, the Court in *SWANCC* concluded that the Act cannot be stretched to reach such isolated waters. Besides the Act's text, support for the Court's conclusion was to be found in the Corps' initial 1974 regulations, which focused on those waters traditionally subject to Congress's power

over the channels of commerce. *See id*. As the Court underscored, the agencies "put forward no persuasive evidence that the Corps mistook Congress' intent in 1974," *id*.—namely, that the Act was merely an exercise of Congress's commerce power over navigation, *id*. at 168 n.3. *Accord id*. at 172 ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."). The Court found unpersuasive as well the agencies' reliance on Congress's 1977 amendments to the Act, concluding that their oblique references to "wetlands" were "unenlightening" as to the scope of the term "waters." *Id*. at 171. Finally, the Court observed that accepting the agencies' reading of the Act to reach isolated waters would, by trenching upon "the States' traditional and primary power over land and water use," raise "significant constitutional and federalism questions." *Id*. at 174. Yet, far from wanting to implicate such issues, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'" *Id*. (quoting 33 U.S.C. § 1251(b)). The Court therefore invalidated the agencies' assertion of authority over the isolated ponds at issue.

Lastly, in *Rapanos,* the Court was presented with the middle question between *Riverside Bayview* and *SWANCC*—namely, whether the Act allows for the regulation of wetlands adjacent to non-navigable ditches and other waters that ultimately flow into traditional navigable waters. *See Rapanos*, 547 U.S.

at 729-30. Five members of the Court held the agencies' regulations asserting control over such waters to be invalid insofar as they purport to regulate all tributaries of traditionally navigable waters and all wetlands adjacent to such tributaries. *Id.* 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 Court.

Writing for himself and three other members of the Court, Justice Scalia began his analysis by noting that, however the qualifiers "navigable" and "of the United States" may limit the Act's scope, that scope surely can extend no farther than "waters." *Id.* at 731. Justice Scalia then proceeded to explain, based on (i) an ordinary meaning analysis of the statutory text, (ii) the Court's rulings in *Riverside Bayview* and *SWANCC*, and (iii) Congress's desire to preserve traditional state authority over land and water, *see id.* at 732-38, that "waters" include "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *id.* at 739 (quoting Webster's Second at 2882).

"Wetlands" would not normally fall under such a definition. *See Riverside Bayview*, 474 U.S. at 132. But as Justice Scalia pointed out, there is a difference between considering a wetland on its own to be a "water," and concluding that inevitably some wetlands may be regulated as "waters," given the "inherent ambiguity in drawing the boundaries of any 'waters.'" *Rapanos*, 547 U.S. at 740. It was, the

plurality concluded, only the latter concession to agency interpretation that *Riverside Bayview* had made, one that *SWANCC* had confirmed by characterizing *Riverside Bayview* as a case about "the close connection between waters and the wetlands that they gradually blend into." *Id.* at 741. As Justice Scalia underscored, the "significant nexus" that, in *SWANCC*'s recounting, *Riverside Bayview* had upheld, was a *physical* shoreline-connection arising from "the inherent ambiguity in defining where water ends and abutting ('adjacent') wetlands begin." *Id.* at 742. And it was that line-drawing ambiguity which permitted "the Corps' reliance on ecological considerations" to regulate "all abutting wetlands as waters." *Id.* Thus, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* 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' expansive regulation, he disagreed with the plurality's rationale for that rejection. *Id.* at 759 (Kennedy, J., concurring in the judgment). Instead of a boundary-drawing-problem test for determining when a wetland may be deemed a "water," Justice Kennedy proposed a "significant nexus" standard. *Id.* According to this rule, 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 "waters more readily understood as 'navigable.'" *Id.* at 780. Thus, unlike the plurality's test, the significant nexus test requires no hydrological connection of any quantity, nor does it limit jurisdiction to those wetlands that are inseparably bound up with adjacent waters. *See id*. at 768-73.

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)).

D. EPA's Assertion of Jurisdiction Over the Sacketts' Lot, and the Sacketts' Lawsuit

Less than a year after *Rapanos*, the Sacketts—"feel[ing] their way"—began construction of their family home, only to be stopped days later by EPA and Corps officials who, as noted above, informed the Sacketts' crew that construction should cease because a federal permit was likely required. *See* JA 18-19. Following the agencies' initial site visit, EPA sent the Sacketts a "Request for Information" concerning their building project. *See* Administrative Record (AR) 00203-00212. *Cf.* 33 U.S.C. § 1318 (authorizing EPA to demand from any owner or operator of a "point source" "such . . . information as [EPA] may reasonably require"). In their written response, the

Sacketts explained that they had all local building permits in hand, that their site was bordered by developed properties and roads, and that nothing in their deed of title or other paperwork suggested that their lot contains wetlands. JA 24-25. A couple of months later, EPA followed up with a voicemail, informing the Sacketts that the agency needed to do "additional research" and inquiring as to whether the Sacketts would comply with its "request" that they remove the fill from their property.[6] *See* AR00236. Answering by letter, the Sacketts requested "a response from the EPA in writing as to a rational reason why the property . . . needs to be reclaimed," while noting that the agency had still not provided "any official notification in writing of any violation." *Id*.

That notification was delivered in November, 2007, in the form of an administrative compliance order. *See* AR00237-00248. *Cf.* 33 U.S.C. § 1319(a)(3) (authorizing EPA to issue such orders, "on the basis of any information available," for a variety of alleged violations). This EPA directive asserted that the Sacketts' lot contains "navigable waters" subject to the Clean Water Act. Specifically, EPA found that the property contains "wetlands" as defined by regulation, and that these alleged wetlands are among "the waters of the United States" because of their alleged relationship to Priest Lake. *See* AR00239. *Accord* Cert. App. D-5 to D-6 (amended compliance order); C-

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[6] In a prior telephone message, EPA personnel had informed Chantell Sackett that the Sacketts "would not have gotten a permit to build there" and thus that the agencies would "ask [them] to restore [the] site [and] build elsewhere." AR00182 (notes from EPA official Carla Fromm).

1, C-3, C-8 (jurisdictional determination asserting that the alleged wetlands are regulable because of their "adjacen[cy]" to the roadside ditch, a "tributary" of Priest Lake). Thus, EPA's order determined that the Sacketts had violated the Act by trying to build their home without first having obtained a Clean Water Act permit. App. A-9. The Sacketts were therefore ordered to refrain from further construction and to immediately begin to "restore" their property. *Id.* Failure to comply would subject them to tens of thousands of dollars per day in administrative and civil penalties. *Id.*

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 v. EPA*, 566 U.S. 120, 125 (2012). The Sacketts therefore proceeded, in April, 2008, to file an action under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to challenge EPA's assertion of authority over their lot.[7] Cert. App. A-9. They contended that EPA's compliance order was arbitrary and capricious because the Clean Water Act does not grant EPA authority to regulate their property. App. A-9. EPA moved to dismiss the suit, arguing that the compliance order was not judicially reviewable. *See* App. A-10 to A-11. The district court granted EPA's

[7] Prior to the action's filing, EPA had made several amendments to the compliance order, each postponing the deadline to complete "remediation" of the site. *See* Cert. App. A-10, D-1 to D-2. Shortly after filing, 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.

motion and the Ninth Circuit affirmed. *See Sackett v. 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 under the APA. *Sackett*, 566 U.S. at 131.

On remand to the district court, the parties cross-moved for summary judgment. Cert. App. B-1, B-3 to B-4. The district court granted summary judgment to EPA, B-32, ruling among other things that EPA had authority to regulate the wetlands alleged to exist on the Sacketts' lot pursuant to the significant nexus test, App. B-27 to B-30. The Sacketts appealed again.

In the Ninth Circuit, the Sacketts renewed their challenge to EPA's jurisdiction, principally on the ground 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. *See* Cert. App. A-22 to A-25. The Sacketts contended, among other points, that any wetlands on their property are beyond the Act's ambit because the *Rapanos* plurality limits federal authority to wetlands that have a continuous surface-water connection to regulated waters, and their lot has no such connection. *See* App. A-25.

The Ninth Circuit affirmed the district court's judgment that EPA has authority over the wetlands alleged to exist on the Sacketts' property.[8] The court

[8] Before reaching the merits, the Ninth Circuit confirmed that the Sacketts' appeal remains live despite EPA's voluntary, non-

began its merits analysis with a review of circuit case law applying the *Marks* framework for interpreting fractured decisions like *Rapanos*. Cert. 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 should control. App. A-25 to A-31. The court then affirmed EPA's determination that the agency has jurisdiction over the Sacketts' lot because (i) the property contains, within the meaning of the agencies' regulations, "wetlands" that are "adjacent" to a "tributary" of Priest Lake (namely, the roadside ditch), and (ii) the site's purported two-thirds-of-an-acre wetland, in combination with the few dozen acres of wetlands on the other side of Kalispell Bay Road, bears a significant nexus to Priest Lake. App. A-32 to A-36.[9]

Summary of Argument

The test for determining whether a wetland is among "the waters of the United States" subject to regulation under the Clean Water Act requires a two-step analysis. The initial step asks whether a wetland may be considered a "water." This step has two prongs. The first prong requires a finding that the wetland has a continuous surface-water connection with a "water," such that the resulting physical nexus

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binding withdrawal of the compliance order during the appeal, because the Sacketts' "central legal challenge" to EPA's jurisdiction remains "unresolved." Cert. App. A-14 to A-15, A-17.

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

makes the wetland and "water" "inseparably bound up," *Riverside Bayview*, 474 U.S. at 134, to the extent that it is difficult to say where the wetland ends and the "water" begins, *see Rapanos*, 547 U.S. at 742. The second prong requires a finding that the "water" to which the wetland is thus connected is a hydrogeographic feature ordinarily referred to as a "water," such as a stream, ocean, river, or lake. *See id.* at 739.

The two prongs of the first step are compelled by the statute's text, which regulates "waters," not land (wet or otherwise) or other features (such as sewer systems or some manmade ditches) that are not commonly denominated as "waters." *See id.* at 733-34 & 736 n.7. Although the Court in *Riverside Bayview* upheld the regulation of wetlands immediately adjacent to a navigable-in-fact river as "waters," it did so only because of the inherent ambiguity in defining the border between true waters and wetlands immediately adjacent to and abutting those waters. *See* 474 U.S. at 134. Hence, where such a physical nexus is absent—that is, where there is no line-drawing problem—wetlands and other non-waters that are merely nearby true "waters" cannot themselves be deemed to be "waters." *Rapanos*, 547 U.S. at 742, 755.

The framework's second step requires a finding that the "water" is "of the United States"—in other words, that it is subject to Congress's authority over the channels of interstate commerce. This step follows from the Court's conclusion in *SWANCC* that the Act is an exercise of Congress's commerce power over navigation. 531 U.S. at 168 n.3. Such power

traditionally encompassed various types of interstate waters, as well as some activities outside those waters that nevertheless harmed them. But given its dissatisfaction with the regulatory status quo that was limited to such waters, Congress had by 1972 determined to go beyond prior statutes and to exercise the full extent of its channels of commerce power. The result is a Clean Water Act that regulates not just traditional navigable waters, but also intrastate waters that serve as a link in a channel of interstate commerce. Yet, as *SWANCC* underscored, there is no evidence that Congress wished to regulate further, beyond its channels of commerce power, and thereby raise serious Tenth Amendment issues. *See id*. at 168 n.3, 172-74. *SWANCC*'s assessment of the Congressional purpose behind the phrase "the waters of the United States" is confirmed by the nature of the criticism of the pre-1972 federal regulatory regime, which ultimately spurred Congress to legislate. The main trouble as Congress understood it was not that the pre-1972 system was geographically too narrow, but rather that it imposed little regulation at the source of pollution, and that which it did impose was underenforced.

The two-step framework that the Sacketts propose is vastly superior to the significant nexus test employed by the Ninth Circuit. Unlike the two-step framework, the significant nexus test conflicts with the statutory text and the Court's precedents, while raising troubling federalism concerns and threatening the right of landowners to fair notice of what the law demands.

Applying the two-step framework to the record of this case compels a finding that the Sacketts' lot contains no "waters of the United States." Hence, the Sacketts are entitled to a declaration that EPA lacks jurisdiction over their property.

Argument

I.

A Two-Step Framework for Wetlands Jurisdiction Under the Clean Water Act

A. Step 1: Is There a Continuous Surface-Water Connection to a "Water" Such That It Is Difficult to Say Where the "Water" Ends and the Wetland Begins?

All questions of statutory interpretation begin with the text. *E.g.*, *Ross v. Blake*, 578 U.S. 632, 638 (2016). The Clean Water Act regulates the discharge of pollutants to "navigable waters," *see* 33 U.S.C. §§ 1311(a), 1362(12), which are defined as "the waters of the United States, including the territorial seas," *id.* § 1362(7). Thus, the extent to which the Act regulates wetlands depends in part on, and logically begins with, whether such features may plausibly be considered "waters."

As the *Rapanos* plurality recognized, deeming wetlands to be "waters" raises a "textual difficulty" because a wetland, on its own, is not in ordinary language a "water." *Rapanos*, 547 U.S. at 740 (citing *Riverside Bayview*, 474 U.S. at 132). Wetlands, of course, are lands with some amount of water on them. *See* 33 C.F.R. § 328.3(b) (2008). But the Clean Water

Act regulates "the waters," not "water"—the significance of the definite article and the plural being that the statute does not aim to regulate "water in general." *Rapanos*, 547 U.S. at 732. Rather, "the waters" to be regulated are "'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" *Id.* at 732-33 (quoting Webster's Second at 2882). *Cf. S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370, 376 (2006) (relying on Webster's Second to construe the term "discharge" as used in the Act). To include among "waters" such features as "wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert" would not only conflict with the "commonsense understanding" of "waters," it would "stretch[] the term . . . beyond parody." *Rapanos*, 547 U.S. at 734. Accordingly, the "plain language of the statute simply does not authorize [a] 'Land Is Waters' approach to federal jurisdiction." *Id.*[10]

That the Clean Water Act does not protect wetlands per se should cause no surprise. After all, Congress traditionally viewed such features as nuisances to be eliminated, not "waters" to be

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[10] Although the *Rapanos* plurality was chiefly concerned with rate of flow or amount of water as the measure to distinguish waters from non-waters, it acknowledged that such measure is not a sufficient condition for "water" status. *Rapanos*, 547 U.S. at 736 n.7 (observing that "relatively continuous flow is a *necessary* condition for qualification as a 'water', not an *adequate* condition"). Another necessary condition is, as explained in the text, a determination that the feature is akin to "streams," "oceans," "rivers," "lakes," or other hydrogeographic objects normally considered "waters." *See id.*

preserved. *See, e.g.*, 43 U.S.C. § 982 (codification of the Swamp Land Acts of 1849, 1850, and 1860) (authorizing transfer of swamp lands to the states in exchange for draining and rendering them fit for cultivation). *Cf.* Mitsch & Gosselink, *Wetlands* 7 (5th ed. 2015) ("Wetlands have been depicted as sinister and forbidding and as having little economic value throughout most of Western literature and history."). And despite Congress's gradual change in attitude toward wetlands in the decades leading up to the Clean Water Act's passage,[11] the 1972 statutory text is devoid of any mention of them. *See* Pub. L. No. 92-500, 86 Stat. 816, 816-903 (1972).

To be sure, Congress's 1977 amendments to the Act added passing references to "wetlands," among them in provisions giving EPA the authority to transfer the Act's dredge-and-fill permitting to the states. *See* Clean Water Act of 1977, Pub. L. No. 95-217, § 67(b), 91 Stat. 1566, 1601 (1977), *codified at* 33 U.S.C. § 1344(g)(1) (authorizing transfer of permitting authority except for discharges to certain classes of waters and "wetlands adjacent thereto").[12] Adverting

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[11] *See, e.g.*, Outdoor Recreation Resources Review Act, Pub. L. No. 85-470, § 7, 72 Stat. 238, 241 (1958) (recognizing that "lands, waters, forest, rangelands, wetlands, [and] wildlife . . . serve to varying degrees and for varying uses outdoor recreation purposes"); Wetland Loan Act, Pub. L. No. 87-383, § 1, 75 Stat. 813, 813 (1961) (recognizing "the serious loss of important wetlands and other waterfowl habitat essential to the preservation of such waterfowl").

[12] The other references to "wetlands" pertained to the funding and completion of the National Wetlands Inventory spearheaded by the Department of the Interior. *See* 91 Stat. at 1578. As *Riverside Bayview* acknowledged, these amendments merely

to those amendments, *Riverside Bayview* upheld the regulation of wetlands immediately abutting a navigable-in-fact water. 474 U.S. at 139. In doing so, the Court frankly admitted that, on "a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" *Id*. at 132. But recognizing the "inherent difficulties of defining precise bounds to regulable waters," *id*. at 134, the Court concluded that the Corps' determination that the boundaries of regulated waters should include their immediately abutting wetlands was a reasonable interpretation of the Act to which the Court must defer, *see id*. at 131, 134. And in *SWANCC*, the Court confirmed that *Riverside Bayview* holds only that the Act authorizes EPA and the Corps to regulate "wetlands that actually abutted on a navigable waterway"—that is, "to regulate wetlands 'inseparably bound up with the "waters" of the United States,'" owing to a "significant nexus" of direct and immediate physical connection. *SWANCC*, 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 134).

Thus, per the plain meaning of the text, the Clean Water Act does not regulate wetlands standing alone. Rather, the Act reaches such non-waters only to the extent that a significant physical nexus (like a shoreline connection) between wetlands and an authentic "water"—such as a stream, river, ocean, or lake—is present, a nexus that raises *Riverside Bayview*'s "boundary-drawing problem." *Rapanos*, 547 U.S. at 742. In other words, "*only* those wetlands with

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reflected that, to some degree, "wetlands are a concern of the Clean Water Act." *Riverside Bayview*, 474 U.S. at 139.

a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id*.

B. Step 2: Is the Wetland Among "the waters of the United States", *i.e.*, subject to Congress's authority over the channels of commerce?

1. "[T]he waters of the United States": a traditional statutory shorthand for those waterbodies subject to Congress's power to regulate the aquatic channels of interstate commerce

Pursuant to its power to regulate interstate and foreign commerce, U.S. Const. art. I, § 8, cl. 3, Congress may regulate the use and channels of interstate commerce, the instrumentalities of or persons or things in interstate commerce, and activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Since *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Court has recognized that Congress can regulate navigable waters as an incident of its power to regulate the channels of interstate commerce. *See id*. at 190 ("The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government . . . ."). It was not, however, until the end of the nineteenth century that Congress exercised its aquatic channels of commerce power on a national basis. *See United States v. Standard Oil Co*., 384 U.S. 224, 226-28 & n.4 (1966).

Congress was prompted to action by the Court's ruling in *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1 (1888), which held that federal common law does not prohibit obstructions and nuisances in navigable waters. *See United States v. Republic Steel Corp.*, 362 U.S. 482, 485-86 (1960). In response, Congress passed the 1890 Rivers and Harbors Act, Ch. 907, 26 Stat. 426, which among other things prohibited "the creation of any obstruction . . . to the navigable capacity of any waters, in respect of which the United States has jurisdiction," *id.* § 10, 26 Stat. at 454. This prohibition was repeated in slightly different form in the 1899 Rivers and Harbors Act, Ch. 425, 30 Stat. 1121, as a limitation on "any obstruction . . . to the navigable capacity of any of the waters of the United States," *id.* § 10, 30 Stat. at 1151, *codified as amended*, 33 U.S.C. § 403. The 1899 Act was, however, "no more than an attempt to consolidate . . . prior [Rivers and Harbors] Acts into one," reflecting Congress's intent merely "to codify without substantive change the earlier Acts," including the 1890 Act. *Standard Oil*, 384 U.S. at 227-28. Thus, by replacing the 1890 Act's "waters, in respect of which the United States has jurisdiction," with the 1899 Act's "the waters of the United States," Congress was treating the two phrases as equivalent, thereby indicating that "the waters of the United States" is a shorthand for Congress's channels of commerce jurisdiction.

This conclusion is supported by related language from the 1899 Act's Section 10. Among other things, that provision requires a permit from the Corps to construct "any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable

river, or other water of the United States." 33 U.S.C. § 403. Each of the specified aquatic features is necessarily navigable, except "river"; the addition of the qualifier "navigable" thus suggests a legislative purpose to regulate according to navigability. Given that Congress did not repeat the navigability qualifier for the catch-all phrase "other water of the United States," it is therefore reasonable to conclude that the phrase denotes waters that are navigable. *See* Ablard & O'Neill, *Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 Vt. L. Rev. 51, 57-58, 66 n.77 (1976) ("Section 10 of the 1899 Rivers and Harbors Act uses the term 'waters of the United States' apparently interchangeably with 'navigable waters of the United States.'"). This reading is confirmed by the ejusdem generis canon, according to which "other water of the United States," as a catch-all phrase, should be read consistent with the qualities of the preceding items, including their navigability. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018).

Other provisions of the 1899 Act also support the conclusion that the phrase "the waters of the United States" denotes navigable waters. For example, Section 9 makes it unlawful, without Congressional approval, "to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States." § 9, 30 Stat. at 1151, *codified as amended*, 33 U.S.C. § 401. In contrast, Section 10, as discussed in the preceding paragraph, requires a Corps permit for wharfs, piers, and like structures "in any port, roadstead, haven,

harbor, canal, navigable river, or other water of the United States." 33 U.S.C. § 403. Despite this separate treatment, the structures in Section 10 can impede navigation just as the structures in Section 9. Thus, given this substantial overlap, and given the absence of any good reason why Congress would want the geographic scope of these two provisions to vary, the two catch-all phrases are best understood as equivalent. *See United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608-09 (3d Cir. 1974) (in protecting the "waters of the United States," Congress in the 1899 Act meant traditional navigable waters).

2. Statutes and judicial precedent prior to the Clean Water Act concerning the aquatic channels of interstate commerce and activities affecting those waters

The foregoing statutory history supports the conclusion that the phrase "the waters of the United States" is a legislative shorthand for all waters subject to Congress's power to regulate the aquatic channels of interstate commerce. This understanding of the phrase undergirds the Court's conclusion in *SWANCC* that "what Congress had in mind as its authority for enacting the [Clean Water Act was] its traditional jurisdiction over waters that were" navigable in fact,[13] "or had been navigable in fact,"[14] "or which could

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[13] *The Daniel Ball*, 77 U.S. at 563 (interpreting a statute, 5 Stat. 304 (1838), regulating steam vessel transportation on the "navigable waters of the United States").

[14] *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921) (interpreting section 9 of the 1899 Rivers and Harbors Act).

reasonably be so made."[15] 531 U.S. at 172. The Court in *SWANCC* did not, however, explain the precise scope of Congress's exercise of the channels of commerce power as embodied in the Clean Water Act. Besides the just cited pre-1972 precedents from this Court, such an explanation is informed by an analysis of the main federal water quality laws that came before the Clean Water Act. *See generally Holmes v. Secs. Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992) (relying upon predecessor enactments to elucidate the meaning of later statutory text).

As discussed in the preceding section, the 1890 and 1899 Rivers and Harbors Acts were channels-of-commerce enactments directed toward traditional navigable waters. But to adequately protect such waters from navigational and other harms,[16] Congress chose in those Acts to regulate at least some upstream activities. For example, in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), the Court upheld federal regulation of water diversions in a non-navigable segment of the otherwise navigable Rio Grande, reasoning that the 1890 Act's prohibition of "any obstruction . . . to the navigable capacity of any of the waters of the United States" (which prohibition was preserved in the 1899

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[15] *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-09 (1940) (interpreting, inter alia, section 9 of the 1899 Rivers and Harbors Act).

[16] Prior to the Clean Water Act, decisions from this Court and lower courts had upheld application of the 1899 Rivers and Harbors Act to regulate pollution and other non-navigational harms to traditional navigable waters. *See, e.g.*, *Standard Oil Co.*, 384 U.S. at 226; *Zabel v. Tabb*, 430 F.2d 199, 207 (5th Cir. 1970); *United States v. U.S. Steel Corp.*, 328 F. Supp. 354, 356-57 (N.D. Ind. 1970).

Act) is not geographically limited. *Id*. at 707-08. Following this principle, Section 13 of the 1899 Act (often referred to as the Refuse Act) not only prohibits the placement of "any refuse matter" directly into any "navigable water of the United States" or on its banks, but also into any "tributary of any navigable water" thereof, or along its banks, if liable to be washed downstream to the navigable water. *See* 33 U.S.C. § 407.

Similarly, in the Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948), Congress authorized the abatement of certain pollution nuisances in "interstate waters" caused not just by discharges directly into those waters, but also by discharges into "a tributary of such waters." 33 U.S.C. § 466a(d)(1) (1952). In 1961, Congress expanded this abatement power to remedy pollution nuisances in "interstate or navigable waters" caused by direct discharges as well as discharges into "a tributary of such waters." *See* Federal Water Pollution Control Act Amendments of 1961, § 7, Pub. L. No. 87-88, 75 Stat. 204, 207-08, *codified at* 33 U.S.C. § 466g(a) (Suppl. III 1962). In 1965, Congress added a further basis for abatement—when pollutant discharges would result in water-quality-standard violations of "interstate waters or portions thereof," regardless of whether the violations were the result of direct discharges or instead discharges that reached such waters from their "tributaries." *See* Water Quality Act of 1965, § 5(a), Pub. L. No. 89-234, 79 Stat. 903, 909, *codified at* 33 U.S.C. § 466g(c)(5) (Suppl. I 1966). *See generally* Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the*

Difficulty in Developing Effective Legislation, 68 Mich. L. Rev. 1103, 1104-17 (1970).[17]

Thus, by the early 1970s, statutory precedent and case law had established that Congress's power over the channels of interstate commerce authorizes federal regulation of:

(i) activities in "traditional 'navigable waters,'" *SWANCC*, 531 U.S. at 169, namely (I) interstate navigable-in-fact waters, *The Daniel Ball*, 77 U.S. at 563, (II) interstate waters that were once navigable in fact, *Economy Light & Power Co.*, 256 U.S. at 123, and (III) interstate waters that could with reasonable improvement become navigable in fact, *Appalachian Elec. Power Co.*, 311 U.S. at 407-09, as well as

(ii) activities not in the waters of (I) through (III) but nonetheless affecting them, *see, e.g.*, *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525-27 (1941) (damming a tributary of a traditional navigable water); *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 428-29 (1925)

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[17] Other early Congressional attempts at water pollution regulation were the Oil Pollution Control Act of 1924, Ch. 316, §§ 2(c), 3, 43 Stat. 604, 604-05 (prohibiting the discharge of oil into "coastal navigable waters of the United States," defined as "all portions of the sea within the territorial jurisdiction of the United States, and all inland waters navigable in fact in which the tide ebbs and flows"), and the Public Health Service Act of 1912, Ch. 288, § 1, 37 Stat. 309, 309 (authorizing research into the health effects of water pollution in the "navigable streams and lakes of the United States").

(diverting water from a traditional navigable water); *United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621, 622-23 (3d Cir. 1967) (discharging pollution within the confines of an industrial facility and allowing it to spill into a nearby traditional navigable water); *United States v. Hercules, Inc., Sunflower Army Ammunition Plant, Lawrence, Kan.*, 335 F. Supp. 102, 106 (D. Kan. 1971) (discharging pollution that, through a series of tributaries, flowed into a traditional navigable water).

3. The Clean Water Act's "the waters of the United States": traditional navigable waters as well as intrastate navigable waters that serve as links in an interstate channel of commerce

That Congress in 1972 adopted "the waters of the United States" as the jurisdictional reach of the Clean Water Act—a phrase prominently employed in the Rivers and Harbors Act, which itself had been construed for decades as reaching only those waters subject to Congress's authority over the channels of interstate commerce, *see, e.g.*, 33 C.F.R. § 209.260(a)-(d) (Suppl. 1946) (Corps regulation adopting the standards for traditional navigable waters)—strongly suggests that Congress largely intended to maintain the scope of what it had already legislated. *See generally* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("if a word is obviously transplanted from another legal source, whether the common law or other

legislation, it brings the old soil with it"), *quoted in Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018). After all, when Congress wishes to exercise its full commerce power over the Nation's waters, it uses different language to effect that result. *See, e.g.*, Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, § 202, 49 Stat. 803, 841-42, *codified as amended*, 16 U.S.C. § 797(e) (amending Section 4 of the Federal Power Act to authorize the Federal Power Commission to issue permits for the construction of hydroelectric dams and other structures on "any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States").[18]

It is no doubt true that Congress was dissatisfied with the regulatory status quo in 1972. But the source of that dissatisfaction was not primarily the geographic reach of existing federal water quality law. Rather, Congressional concern lay principally with the prior *mode* of regulation and enforcement. In particular, Congress wished to move from a system whereby pollutant discharges were in practice only prohibited when they led to nuisances or water quality standard violations, to a system that also regulated

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[18] Under prior law, the Commission had been authorized to issue Section 4 permits only for structures in "the navigable waters of the United States." Federal Water Power Act, Ch. 285, § 4(d), 41 Stat. 1063, 1065 (1920). *See Cooley v. FERC*, 843 F.2d 1464, 1469 (D.C. Cir. 1988) ("[Section] 4(e) itself was amended in 1935 to broaden its application; Congress removed the apparent limitation on the Commission's power to license projects on 'navigable waters,' replacing it with language granting authority over any waters subject to Congress' Commerce Clause jurisdiction.").

(and sometimes prohibited) certain discharges at their source, regardless of any resulting nuisance or standard exceedance. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-05 (1976). *See also City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 320 (1981) ("There is thus no question that the problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress, as contemplated by Congress.").

This is not to say that Congress intended *no* geographic expansion beyond what had been commonly regulated prior to the Clean Water Act's passage. But there is no evidence that Congress sought a radical enlargement. *See SWANCC*, 531 U.S. at 168 n.3, 172-74. That conclusion is confirmed by the nature of the criticism leveled at the Corps and EPA with respect to their administration of the pre-1972 body of law. The oft-repeated objection was not that the geographic scope of the agencies' authority was too circumscribed, but rather that the agencies had construed too narrowly what they could regulate under their existing authorities and enforcement power. *See, e.g.*, H.R. Rep. No. 92-1323, at 5 (1972) ("The [C]orps has thus far taken too narrow a view of its jurisdiction and responsibilities over navigable waterways . . . ."); Rogers, *Environmental Quality Control*, 3 Nat. Res. Law. 716, 723 (1970) (noting that "there was little enforcement activity under [the Refuse Act] for many years"); Barry, *supra*, at 1119 (noting that only one abatement action had been brought under the Federal Water Pollution Control Act in 22 years).

These critiques principally concerned the failure of the Corps and EPA to use existing law to regulate navigable-in-fact waters found entirely within a state. *See* Albrecht & Nicklesburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 Envtl. L. Rep. News & Analysis 11042, 11045-46 (2002). For example, the above-quoted 1972 House committee report criticized the Corps for its then-recent determination that Washington State's Lake Chelan, "a body of water 55 miles long and almost 2 miles wide . . . and clearly navigable," was not regulable under the Rivers and Harbors Act because the lake "cannot form a part of either the interstate or international system."[19] H.R. Rep. No. 92-1323, at 30. In contrast, in the committee's view, any body of water ought to be regulated as a channel of interstate commerce so long as the "waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation (highways, railroads, air traffic, radio and postal communications, waterways, etc.)." *Id*. Such was, after all, the foundation for the Federal Water Pollution Control Act's pollution abatement action on "navigable" but not "interstate" waters. *See* Edelman, *Federal Air and Water Control:*

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[19] EPA had taken a similarly narrow view in its administration of the Federal Water Pollution Control Act. *See* Bodine, *Examining the Term "Waters Of The United States" in Its Historical Context*, Ctr. for the Study of the Admin. State, Policy Br. No. 4, at 7 (Jan. 2022), https://bit.ly/3rURu9L (noting a December 1971 EPA General Counsel opinion that "refused to include inland lakes within the scope of [the Federal Water Pollution Control Act's regulation of] 'navigable waters' even if they linked to rail or automotive transportation systems, determining that there must be a water connection between states").

The Application of the Commerce Power to Abate Interstate and Intrastate Pollution, 33 Geo. Wash. L. Rev. 1067, 1073 (1965) (pollution abatement power extended to navigable waters whether inter- or intrastate).

Thus, Congress wanted to regulate to the full extent of its channels of commerce power, beyond what prior statutes or administrative interpretation had captured, to reach even wholly intrastate navigable waters—yet, as the Court in *SWANCC* cautioned, *see* 531 U.S. at 168 n.3, no further. For had Congress really intended to regulate what EPA and the Corps now seek to control—virtually all tributaries (including roadside drainage ditches) of traditional navigable waters as well as nearby wetlands—one would expect Congress to have spoken much more clearly that it wished to bring about such a significant expansion of federal authority. *See id*. at 173 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance[.]")). But again, there is "no persuasive evidence that the Corps mistook Congress' intent in 1974" with the agency's initial regulations construing the Clean Water Act consistent with, though not exceeding, the full extent of Congress's channels of commerce power. *SWANCC*, 531 U.S. at 168 (citing, inter alia, 33 C.F.R. § 209.260(e)(1) (1975) ("It is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor.")). *See* 33 C.F.R. § 209.260(f) (1975) (acknowledging that wholly intrastate waters may be regulated if they are "capable of carrying interstate commerce" by "physically connect[ing] with

a generally acknowledged avenue of interstate commerce"). *See also* Ablard & O'Neill, *supra*, at 61-62 (the Corps' initial regulations deliberately went beyond what the agency had traditionally regulated under the 1899 Rivers and Harbors Act).

SWANCC's conclusion about Congress's purpose is supported not just by the Corps' initial regulations, but by other contemporary evidence as well. For example, in 1973 the Congressionally chartered National Water Commission[20] issued a report to Congress and the President on water quality. *See* Nat'l Water Comm'n, *Water Policies For The Future* (1973). Despite being aware of the 1972 Act and its changes to federal water quality law,[21] the Commission nevertheless identified intrastate, non-navigable waters as a gap in federal regulation. *See id*. at 203 (recommending increased state regulatory efforts for "nonnavigable inland waters, where many activities such as dredging and channel alteration are beyond the scope of Federal law"). Such an assessment would make sense only if the Commission understood, as it evidently did, that the Clean Water Act does not reach such features. *See id*. at 201 (Corps permits for "dredging and channel alteration" are required only

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[20] *See* National Water Commission Act, Pub. L. No. 90-515, § 3(a)-(b), 82 Stat. 868, 868-69 (1968).

[21] *See, e.g.*, Water Policies For The Future at 207 ("Consideration of Water Quality: The Federal Water Pollution Control Act Amendments of 1972 require State or Federal discharge permits, limiting the composition of the effluent which an entity may discharge, if any."); *id*. at 510 ("The Federal Water Pollution Control Act Amendments of 1972 impose considerably higher treatment requirements and extend Federal control to all discharges of waste material into the Nation's waters.").

for waters that are "navigable in interstate or foreign commerce" and not for "other inland waters").

This reading of "the waters of the United States"—limited to traditional navigable waters and intrastate navigable waters that link with other modes of transport to form interstate channels of commerce—is fully consistent with Congress's desire to reform federal water quality law by regulating "at the source" of pollution. *Cf.* S. Rep. No. 92-414, at 77 (1971), *reprinted in* 2 Cong. Research Serv., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1495 (1973). Congress reasonably concluded that such end-of-pipe regulation was necessary with respect to that class of pollutant discharges that would end up in those waters subject to its channels of commerce power. *Cf. Rapanos*, 547 U.S. at 743-44 (the Act reaches direct discharges as well as indirect discharges to regulated waters); *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020) (the Act reaches not just direct and indirect discharges to regulated waters but also the functional equivalent of such discharges). But, at the same time, Congress recognized that regulating upstream discharges that likely would never reach navigable waters (as is often the case with "fill" deposits, *Rapanos*, 547 U.S. at 744), would do little to ameliorate downstream water quality, but would raise serious federalism concerns and therefore such regulation should be avoided. *Cf. SWANCC*, 531 U.S. at 171-72.

C. The Two-Step Framework's Consistency With the Court's Precedents

As the *Rapanos* plurality noted, the Court has twice stated that, through the Clean Water Act, Congress intended to regulate at least some waters besides traditional navigable waters. *See Rapanos*, 547 U.S. at 730-31 (citing *SWANCC*, 531 U.S. at 167; *Riverside Bayview*, 474 U.S. at 133). That correct statement does not, however, mean that Congress intended to regulate all waters. Rather, as the preceding sections have detailed, Congress in 1972 wished to regulate traditional navigable waters, as well as intrastate navigable waters over which interstate commerce could pass, plus the non-navigable wetlands inseparably bound up with such waters—but no more. And Congress's determination that new legislation would be required to effect that result was not just a reasonable response to perceived administrative underenforcement of existing laws; it was also remarkably clairvoyant as to how the courts would interpret at least some of those older laws. *See Hardy Salt Co. v. So. Pac. Transp. Co.*, 501 F.2d 1156, 1168-69 (10th Cir. 1974) (overland links do not establish an interstate connection allowing regulation of intrastate navigable waters under the Rivers and Harbors Act); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 623-24 (8th Cir. 1979) (same).

To be sure, the *Rapanos* plurality concluded that Congress intended "the waters of the United States" to extend beyond even intrastate navigable waters. *Rapanos*, 547 U.S. at 731 n.3. To hold otherwise, it reasoned, would deprive "of the United States" of any independent meaning, given that *The Daniel Ball* had

held intrastate waters (whether navigable or not) to be excluded from the "navigable waters of the United States." *Id*. (citing *The Daniel Ball*, 77 U.S. at 563). But as the statutory and legislative history reveal, by 1972, Congress had moved well beyond the meaning of *The Daniel Ball* and was using "the waters of the United States" to denote what it *then* viewed as the fullest extent of its channels of commerce power. *See supra* Argument Part I.B.2-3.

Given this updated understanding of "the waters of the United States," the framework for assessing wetlands jurisdiction that the Sacketts propose faithfully assigns independent meaning to both parts of the Clean Water Act's geographic jurisdiction: the term "navigable waters" indicates a desire to capture traditional navigable waters, and the term "the waters of the United States" indicates a desire to go the full extent of the channels of commerce power, to include even intrastate navigable waters forming segments of an interstate channel of commerce. This interpretation therefore correctly assigns to "navigable" as well as "of the United States" some of those modifiers' "traditional import" and "traditional meaning," just as the *Rapanos* plurality wanted.[22] *See Rapanos*, 547 U.S. at 731 n.3. In contrast, as the

[22] The Sacketts' interpretation of the clause "of the United States" also explains why "territorial seas" are called out for inclusion among "the waters of the United States" as part of the definition of "navigable waters," 33 U.S.C. § 1362(7). According to the traditional understanding of "navigable waters," the territorial seas would not necessarily be included to their full extent (up to, for example, their marshy edges) because jurisdiction-by-navigability in this country is not a function of the ebb and flow of the tide. *See The Daniel Ball*, 77 U.S. at 563.

following section demonstrates, the significant nexus test does not.

II.

The Significant Nexus Test Should Be Abandoned

Below, the Ninth Circuit upheld EPA's jurisdiction over the Sacketts' lot using the significant nexus test. Cert. App. A-34 to A-36. According to that test, wetlands qualify as among "the waters of the United States" if they, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment). For many reasons, the significant nexus test should be rejected.

First and foremost, it is divorced from the statutory text, which mentions no "nexus," significant or otherwise. *See* 33 U.S.C. §§ 1251-1388. *See also Rapanos*, 547 U.S. at 756 (plurality opinion) ("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 . . . ."). In contrast, the two-step framework that the Sacketts advance closely hews to the statutory text (step one derives from "the waters," step two from "of the United States") and interprets that text according to its ordinary and established meaning.

Second, the significant nexus test is illogical, as it makes "whatever affects waters" to be "waters," *Rapanos*, 547 U.S. at 756-57, thereby inevitably erasing the distinction between water and land. For example, making surfaces impermeable significantly affects flood control, water filtering, and runoff storage, *see* EPA, Urbanization – Stormwater Runoff,[23] considerations that would support federal jurisdiction under the significant nexus test. *Rapanos*, 547 U.S. at 775. But no one would describe upland dirt as a "water" simply because paving it would reduce its ability to absorb precipitation and to slow runoff. The Sacketts' two-step framework avoids this bizarre collapsing of land and waters by acknowledging that a non-water such as a wetland can be treated as a "water" if, but only if, the boundary between the water and the wetland is indiscernible. *See id.*

Third, the significant nexus test improperly makes one statutory purpose—improving water quality—paramount, while ignoring other important Congressional aims, such as preserving traditional state authority over the use and development of land and aquatic resources. *Rapanos*, 547 U.S. at 755-56 (citing 33 U.S.C. § 1251(b)). *Cf. County of Maui*, 140 S. Ct. at 1471 ("We must doubt that Congress intended to give EPA the authority to . . . interfere as seriously with States' traditional regulatory authority—authority the Act preserves and promotes—as the Ninth Circuit's [indirect discharge] test would."). In contrast, the two-step framework recognizes the importance of water quality while also preserving state authority, especially by recognizing that

[23] *Available at* https://bit.ly/3CS1eWi (last visited Apr. 5, 2022).

Congress did not intend to regulate beyond its channels of commerce power.

Fourth, the significant nexus test is "a perfectly opaque" standard, "not likely to constrain an agency whose disregard for the statutory language has been so long manifested." *Rapanos*, 547 U.S. at 756 n.15. *See* 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."); 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, 1043 (2008) ("[T]he only fundamental change . . . after *Rapanos* is that the [agencies] must accommodate the need for case-by-case proof of a significant nexus, and the practical consequences of *Rapanos* are minimal."). In contrast, the two-step framework is clear, easy to apply, and, as noted above, faithful to the limits that the Act places on EPA's jurisdiction.

Fifth, by hardly limiting the federal government's power to regulate any and all waters and wetlands, the significant nexus test raises the same Tenth Amendment concerns that led the Court in *SWANCC* to reject the Migratory Bird Rule. *See SWANCC*, 531 U.S. at 172-74. In contrast, the two-step framework raises no Commerce Clause issues because it closely tracks Congress's channels of commerce power, which is narrower and more readily defensible than Congress's "substantially affects" power. *Cf. id.* at 173.

Finally, the opacity of the significant nexus test raises, as Justice Kennedy himself belatedly recognized, vagueness and due process concerns which are amplified by the "crushing" civil and criminal penalties that the Act imposes. *Hawkes Co.*, 578 U.S. at 602-03 (Kennedy, J., concurring). *See* Larkin, *The Clean Water Act and the Void-for-Vagueness Doctrine*, 20 Geo. J.L. & Pub. Pol'y (forthcoming 2022) (manuscript at 16-22), https://bit.ly/3Dbi3M0 (the significant nexus test, coupled with the Clean Water Act's criminal penalties, renders the statute unconstitutionally vague). In contrast, the two-step framework raises no such troubles because it relies upon ordinary meaning and requires only normal visual observation to apply.

No principle of stare decisis precludes the Court's jettisoning of the significant nexus test. Because *Rapanos* was a split decision, any broadly precedential holding from it depends on *Marks*. *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring). But in order for *Marks*' narrowest-grounds framework to be workable, one opinion of the split decision must be a "logical subset" of another; yet neither Justice Kennedy's concurrence nor Justice Scalia's plurality readily fits that description.[24] *United States v. Johnson*, 467 F.3d 56, 63-64 (1st Cir. 2006). *See* Cert Pet. 17-20. *Cf. Nichols v. United States*, 511 U.S. 738, 746 (1994) (significant confusion in trying to apply *Marks* to a split decision "is itself a reason for reexamining that decision"). In such circumstances, "the only binding aspect of [a split decision] is its

[24] To the extent that *Marks* must be applied, it counsels adoption of the *Rapanos* plurality. *See* Apps.' Opening Br. at 20-33, Doc. 14, Case No. 19-35469 (Dec. 11, 2019).

specific result." *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998). Accordingly, the precedential holding of *Rapanos* is simply that Clean Water Act jurisdiction cannot be based solely on the presence of a hydrological connection or geographic closeness, *see Rapanos*, 547 U.S. at 784-86 (Kennedy, J., concurring in the judgment); *id.* at 757 (plurality opinion)—a prohibition perfectly consistent with the Sacketts' proposed two-step framework. And even if Justice Kennedy's lone opinion were to some degree precedential under *Marks*, the many legal and practical defects of the significant nexus test, noted above, would strongly counsel against affording that opinion any stare decisis weight. *See generally Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019) (poorly reasoned decisions establishing unworkable rules have little stare decisis effect).

III.

The Sacketts' Lot Contains None of "the waters of the United States," and thus the Sacketts Are Entitled to a Declaration That EPA Lacks Authority Over Their Homebuilding Project

Application of the two-step framework to the record supporting EPA's jurisdictional determination and compliance order shows that the agency lacks authority over the Sacketts' property.

First, the record is clear that the Sacketts' lot contains no hydrogeographic features ordinarily referred to as "waters," such as streams, rivers, lakes, or the like. EPA asserts that the property contains wetlands. But, for the agency to have authority over

wetlands, they must be inseparably bound up with a "water" by virtue of a continuous surface-water connection. Yet the Sacketts' lot lacks a surface-water connection to any plausible "water," and thus any wetlands thereon necessarily lack the physical nexus needed for them to be considered "waters." *See* JA 28-29.

Second, assuming arguendo that any wetlands on the Sacketts' lot were inseparably bound up with the ditch on the other side of Kalispell Bay Road—which is the "tributary" upon which EPA bases its authority,[25] Cert. App. C-3—EPA would still lack jurisdiction. That is because the "tributary" ditch is not a "water" but rather a "constructed channel," JA 30, *i.e.*, a type of non-water. Although the *Rapanos* plurality anticipated that some ditches may qualify as "waters," *see Rapanos*, 547 U.S. at 757, it was careful to note that such manmade structures are regulable only to the extent that they are reasonably classifiable as geographic features more readily recognizable as "waters," *see id.* at 736 n.7. For example, "an open channel through which water permanently flows is ordinarily described as a 'stream,' not as a 'channel,' because of the continuous presence of water." *Id.* Yet, in describing the roadside ditch here, EPA used

[25] The district court affirmed EPA's jurisdiction on the alternative ground that the Sacketts' lot is directly adjacent to Priest Lake. Cert. App. B-21 to B-25. On appeal, EPA did not defend on that basis, *see* Ans. Br. for Defs./Appellees at 35-37, 43, Doc. 28 (June 22, 2020), and the Ninth Circuit did not address the point, *see* App. A-32 to A-36. In any event, EPA's renewed reliance thereon would be unavailing under the two-step framework, because there is no line-drawing problem between Priest Lake and any wetlands on the Sacketts' property. *See* JA 19, 29, 50.

"ditch," "stream," and "channel" interchangeably, JA 20, 30, 49, suggesting that the ditch is not a geographic feature fairly described as a "water."[26] The ditch does have a continuous (though small) year-round flow.[27] *See* JA 30. But the *Rapanos* plurality also recognized that, even with continuous flow, certain types of "elaborate, man-made, enclosed systems" should not be put "on a par" with an authentic "water" like a stream or river. *See Rapanos*, 547 U.S. at 736 n.7. The importance of this distinction is underscored by how the Act treats the two sets of features differently, expressly defining a "ditch" and many other manmade conveyances as "point sources," not waters. 33 U.S.C. § 1362(14). Thus, because the manmade drainage ditch alongside Kalispell Bay Road cannot fairly be characterized as a geographic feature readily classifiable as a "water," it cannot

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[26] Justice Kennedy's *Rapanos* concurrence provides an apt counter-example. Although "it has been encased in concrete and steel over a length of some 50 miles," "ordinarily carries only a trickle of water," and "often looks more like a dry roadway than a river," *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment), in common usage it is still called the Los Angeles *River*, not the Los Angeles Big Storm Drain.

[27] EPA estimated the ditch's mean annual flow to be 1.81 cubic feet per second. JA 30. To put that in perspective, for many years the Corps, through the Act's nationwide permit process (a streamlined general permitting system for those discharges having only minimal adverse environmental impacts, *see* 33 U.S.C. § 1344(e)), exempted various discharges of dredged or fill material into "headwaters." *See* 61 Fed. Reg. 65,874, 65,890-91, 65,916-17 (Dec. 13, 1996). These were defined as having flow "less than five cubic feet per second," 33 C.F.R. § 330.2(d) (1996), such as the ditch here at issue.

support EPA's jurisdiction over any wetlands that may exist on the Sacketts' lot.

Third, even if the ditch were a "water" with which any wetlands on the Sacketts' lot were inseparably bound up, EPA would still lack jurisdiction over such wetlands because the ditch is not a traditional navigable water or an intrastate navigable water, and thus is not "of the United States." *Cf.* Cert. App. C-3. Indeed, the nearest such water is Priest Lake, *see* JA 34, which is separated from the Sacketts' lot by a waterless 300-foot band of gravel road and lakefront homes, *see* JA 19, 29, 50. Thus, EPA has no basis to regulate the Sacketts' property.

Conclusion

For decades, lower courts and regulators have struggled to formulate a clear and defensible test for when a wetland qualifies as among "the waters of the United States" subject to the Clean Water Act. By adopting the Sacketts' proposed two-step framework, the Court can put a definitive end to this struggle while faithfully executing Congressional intent to protect the Nation's water quality and, at the same time, respecting the states' traditional role in regulating land and water. In so doing, the Court can also provide meaningful relief to property owners like the Sacketts who have suffered from "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five [now eight] Presidential administrations." *Rapanos*, 547 U.S. at 722.

The judgment of the Ninth Circuit should be reversed.

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ANTHONY L. FRANÇOIS
Briscoe, Ivester & Bazel LLP
235 Montgomery Street, Suite 935
San Francisco, CA 94104
Telephone: (415) 402-2707
tfrancois@briscoelaw.net

PAIGE E. GILLIARD
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
PGilliard@pacificlegal.org

DAMIEN M. SCHIFF*
**Counsel of Record*
CHARLES T. YATES
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
DSchiff@pacificlegal.org
CYates@pacificlegal.org

Counsel for Petitioners