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

BRIEF OF *AMICI CURIAE* CONGRESSIONAL WESTERN CAUCUS MEMBERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Dan Newhouse (WA-04), Mariannette Miller-Meeks (IA-02), and Rodney Davis (IL-13)—Members of the House of Representatives and the Congressional Western Caucus who are committed to conservation, protecting private property, and land-use rights guaranteed by the Constitution. If allowed to stand, the Ninth Circuit's decision will harm each of those interests. It will allow a federal agency to make every puddle, ditch, and creek in the United States subject to overbearing regulation. This Court should reject that outcome as inconsistent with the relevant statutory text and reverse the decision below.

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[1] Under this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici* curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to its filing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"Water is one of our most precious natural resources. Whether for drinking, farming, or fishing, clean water is a national priority, and future generations depend on us doing our part to preserve and protect bodies of water throughout the United States." Mariannette Miller-Meeks & Dan Newhouse, *Opinion: Rural America Is Dedicated to Clean Water*, Des Moines Reg. (Apr. 14, 2021), bit.ly/36Xk1nA. *Amici* stand committed to its protection.

Even so, "[c]onfusion, unpredictability, and litigation have surrounded the scope of federal authority of our nation's navigable waterways for decades." Letter from Members of Congress to Michael Regan, EPA Administrator (Mar. 8, 2022). This case proves the point. The Sacketts' Idaho property has "no surface water connection to any body of water," Pet. i, yet for more than a decade, the EPA has prevented the Sacketts from building on it because the agency has deemed it a "navigable water" subject to the Clean Water Act's permitting process.

Amici highlight two of the countless reasons that's wrong. First, an expansive reading of the Clean Water Act (CWA) hinders environmental protection by interfering with state, local, and private action. The CWA makes environmental federalism a key aspect of protecting our sprawling nation's waters, but the EPA's expansive reading of the CWA undermines the role of states and localities in localized conservation efforts. *Amici* "understand that just because a body of water isn't under federal jurisdiction doesn't mean

there isn't effective, active water management and protection happening at the state, local, and individual levels," and *amici* believe that "[w]e cannot and should not discount these efforts; instead, we should empower our local conservation efforts to continue promoting clean water for future generations." Press Release, Newhouse, Miller-Meeks Respond to SCOTUS Announcement on "Waters of the United States" (Jan. 25, 2022), bit.ly/3LQN7ns.

Indeed, *amici* know that "local communities are capable of making land use and water decisions far better than a bureaucrat thousands of miles away." Press Release, What They Are Saying: We Must Maintain the Navigable Waters Protection Rule (Apr. 15, 2021), bit.ly/3xc8knI (statement of Western Caucus Chairman Dan Newhouse (WA-04)). And allowing EPA to employ its expansive definition of "waters of the United States" allows the federal government to "turn[] [its] back on farmers and rural America." Press Release, Davis Critical of Biden Decision to Restore Obama-Era WOTUS Regulation (Nov. 24, 2021), bit.ly/3v5redj.

Second, the Clean Water Act's history confirms what its text makes clear: Congress did not give the EPA power to regulate land like the Sacketts' under the Act's permit provisions. The enacting Congress understood the phrase "waters of the United States" to refer to bodies of water used in a commercial context, principally connected with interstate commerce. Such waters do not include bodies incapable of commercial utility, such those near the Sacketts' property. "Waters of the United States"

simply cannot bear EPA's preferred expansive interpretation.

The Court should reverse the decision below.

ARGUMENT

I. An expansive reading of the Clean Water Act hinders environmental protection by interfering with state, local, and private action.

A. Environmental federalism is important in our sprawling nation.

In fashioning the Constitution, the Founders "split the atom of sovereignty." *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019) (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)). While the powers of the new federal government would be "few and defined," those retained by the states would be "numerous and indefinite … extend[ing] to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." Federalist No. 45 (Madison).

This structure was not an aesthetic choice. Deliberately diffusing power to the lowest practical level would allow the multifarious interests spanning our "extended republic" to thrive without devolving into tyrannical factions. *See* Federalist No. 51 (Madison). As James Madison put it: "society itself w[ould] be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested

combinations of the majority." *Id.* On top of that, states and localities would serve as "laboratories for devising solutions to difficult [] problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). In this federal scheme, leaving policy choices to more responsive state and local governments would allow for more effective, tailored solutions, and more efficient action. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493-94 (1987).

Environmental law "uniquely showcases the need for … federalism." Erin Ryan, *Negotiating Environmental Federalism: Dynamic Federalism as a Strategy for Good Governance*, 2017 Wis. L. Rev. Forward 17, 20 (2017). Solutions to environmental problems are "completely contingent on the landscape" of specific areas. *Id.* at 23. And lands and ecosystems across the nation vary greatly. *See id.* at 23. The U.S. is comprised of twelve different, broad (level I) ecological regions, including temperate forests, deserts, tropical wet forests, tundra, great plains, sierras, semi-arid highlands, and forested mountains. EPA, *Ecoregions of North America*, bit.ly/3KzP336 (last visited Apr. 7, 2022); EPA, *Ecoregions*, bit.ly/38vl91X (last visited Apr. 7, 2022). Given those vastly different ecosystems, what makes good policy for an environmental issue in Alaska is unlikely to work for issues in Florida or Arizona. *See generally* Ryan, *supra*, at 23-24. And some states contain numerous ecological regions within them. *See Ecoregions of North America*, *supra*. Texas, for example, is comprised of North American desert, great plains, and eastern temperate forests. *Id.* Simply put,

the incredible ecological variety throughout the nation makes one-size-fits-all national environmental regulation unworkable.

The Clean Water Act is no exception. A uniform approach to water management simply "doesn't work." Press Release, Western Caucus Members Speak Out Against Biden's Return to Obama-Era WOTUS Definition (Nov. 19, 2021), bit.ly/3KjBQM3. As one Member of Congress explained, "[h]ow Arizona handles rainfall or water is different than Louisiana as we also take on water from 31 states and two Canadian provinces." *Id.* Recognizing that the vast differences between states and even local communities must play an important role in making certain land and water decisions, the Clean Water Act includes federalism provisions. *See, e.g.*, 33 U.S.C. §1251(b). In the CWA, Congress explicitly recognized that it is the "primary responsibilit[y] and right[] of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.*

Other sections of the CWA promote federalism too. For example, §1311(a) prohibits individuals from discharging pollutants without a permit, including a National Pollutant Discharge Elimination System (NPDES) permit. While the EPA Administrator has the authority to issue NPDES permits, *see* 33 U.S.C. §1342(a), "states may apply to the EPA for authority to issue such permits to the dischargers within their borders," Robin Kundis Craig, Environmental Law in Context 948 (4th. ed. 2016) (citing 33 U.S.C. §1342(b)).

Not only does the CWA express "a clear preference that states take over the NPDES permit program," Craig, *supra*, at 949, but the EPA has "applauded the states' role in the permitting process," *id.* at 1115. In its 2001 strategic plan for the CWA, the EPA stated: "[a] state's authorization to implement this program allows state managers to set priorities and tailor the program to meet the challenges facing the waters in that state and to satisfy the desires of its citizens. … As 'co-regulators,' the authorized states play a unique role by helping to shape and develop the national program." *Id.*

But while "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government," *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992), that partnership is heavily weighted toward federal power. *See, e.g.*, Oliver A. Houck, *Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited*, 44 Envtl. L. Rep. News & Analysis 10426, 10428-29 (2014). Like other environmental statutes and their implementing regulations, the CWA "centralize[s] much environmental policy decision-making, including decision-making concerning distinctly local matters." Jonathan H. Adler, *Uncooperative Environmental Federalism 2.0*, 71 Hastings L.J. 1101, 1107 (2020). As demonstrated by the EPA's Waters of the United States (WOTUS) Rule at issue here, the "federal government does too much, and crowds out the opportunity for state governments and local communities to pursue their own environmental priorities." *Id.* "Distinctly local priorities, such as the management of local resources or land use, get

subsumed by federal regulatory edicts." *Id.* As a result, regulations like WOTUS end up "giv[ing] the federal government jurisdiction over people's yards and businesses." Press Release, Western Caucus Members Speak Out Against Biden's Return to Obama-Era WOTUS Definition (Nov. 19, 2021), bit.ly/3KjBQM3.

B. States and localities are best suited to advance environmental protection.

Environmental protection and conservation remain core, traditional areas of state and local regulation. Indeed, "[s]tate power has historically been at its strongest when talking about local control over land use and property rights." Sarah Fox, *Localizing Environmental Federalism*, 54 U.C. Davis L. Rev. 133, 157 (2020). That makes sense since problems of environmental protection and concentration are intrinsically bound up in specific waters and lands within the states. *See supra*, §I.A; *see also* Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 Duke Envtl. L. & Pol'y F. 253, 278-80 (2013). For the Americans who live on those lands, and who rely on those waters, conservation is a way of life. "Those who are closest to the land—whose quality and way of life depend upon healthy ecosystems—care most about the land and know best how to maintain its legacy, conservation, and uses for years to come." Senate and Congressional Western Caucuses, *Western Conservation Principles: An Alternative Proposal to Conserve and Restore America's Landscapes*, (Oct. 5, 2021), bit.ly/3ukBzTb.

Maintaining clean air and water matters to states and localities. Forty-six states have specific environmental provisions in their state constitutions, ranging from general resource conservation goals to individual rights to a healthy environment. *See* Jeffrey S. Sutton, et al., State Constitutional Law 689-95 (3rd ed. 2020). Pennsylvania's Environmental Rights Amendment, for example, secures to its citizens the "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Pa. Const. art. I, §27. Florida dedicates an entire section of its Constitution to conservation, leading with the sweeping declaration that it is "the policy of the state to conserve and protect its natural resources and scenic beauty." Fla. Const. art. II, §7. And as far back as 1842, the Rhode Island Constitution extended protections to "all the rights of fishery, and the privileges of the shore." R.I. Const. of 1842, art. I, §17. *Amici* and the citizens they represent work closely with their communities and local representatives to care for the lands in their communities. Indeed, all "Americans share a hallowed understanding that regulating land use is among the most sacred of local prerogatives—part of the very backbone of the police power to protect public health and safety." Ryan, *supra*, at 22.

Despite all those state efforts, "local policy choices" are often "made in Washington D.C." Adler, *Uncooperative Environmental Federalism 2.0*, *supra*, at 1107-08. "Federal environmental statutes and regulations govern many matters for which the costs and consequences of environmental policy

decisions are localized." *Id.* Such "federal primacy," however, is unsupported. *Id.* Indeed, because the costs and benefits of most environmental policy choices are "known and confined to a given political jurisdiction, there is little reason to believe that transferring responsibility for making such choices to Washington, D.C. will produce systematically better results." *Id.* In fact, "federal policy decisions concerning localized problems" might "be worse than those made by state and local officials." *Id.* As one scholar explained:

> Localized knowledge is difficult to accumulate and deploy from a centralized administrative agency. Regional differences mean that federal policies will often fail to account for local particulars. As a consequence, uniform policies are likely to be over-protective in some areas, and under-protective in others. A policy that effectively reduces air pollution in one part of the country, such as New York City or Atlanta, may not work as well in parts of the country with different mixes of pollution sources, different topography, and a different climate. Further, the likelihood that "one size fits all" federal policies operate as "one size fits nobody" will only increase over time, as environmental measures experience diminishing marginal returns and regional variation becomes more important on the margin.

Id.

Vastly different areas of land require "wholly different" sets of "expertise and management strategies." *See generally*, Ryan, *supra*, at 24. Managing water pollution in a certain area requires decisionmakers to know, among other things, "the contours of the land, the elevation, the precipitation, seasonal weather patterns, prevailing winds, watershed, soil quality, habitat, population density, zoning laws, cultural uses, local economies, where the local industry is operating at any given time, [and] what the major stressors are in that particular area." *See id.* And decision makers must make choices that "necessarily implicate normative concerns that are beyond any scientific or technical analysis." Adler, *Uncooperative Environmental Federalism 2.0*, *supra*, at 1108. Those choices often involve "subjective value preferences about how to prioritize competing goods when resources are scarce." *Id.* Individuals on the ground in specific areas are best suited to tailor those decisions to state or community needs.

Such local and tailored policymaking often generates better outcomes. Scholars have observed that "[t]he common law, combined with various state-level controls, was doing a better job addressing most environmental problems" than the federal government, "which directed most environmental policy for the last part of this century." Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 Geo. Mason L. Rev. 923, 925 (1999); *see also* Damien Schiff, *Keeping the Clean Water Act Cooperatertively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 Wm. & Mary Envtl. L. &

Pol'y Rev. 447, 448 n.6 (2018) (collecting examples). In short, America's race down the "track of central environmental planning is incompatible with … environmental protection itself." Meiners & Yandle, *supra*, at 925.

It is little wonder, then, that modern attempts at nationwide environmental regulation have proven ineffective. Years-long reviews, mountains of paperwork, and unstable rules have raised administrative costs and interfered with private property rights in the pursuit of positive environmental outcomes. Worse yet, these impositions often result in "detrimental impacts on the surrounding ecosystem." Senate and Congressional Western Caucuses, *Western Conservation Principles*. Shifting agency interpretations are "devastating to farmers, ranchers, builders, and the other industries in America that depend on a stable WOTUS rule structure." Press Release, Western Caucus Members Speak Out Against Biden's Return to Obama-Era WOTUS Definition (Nov. 19, 2021), bit.ly/3KjBQM3. Continued federal expansion into environmental protection and conservation will box out and preempt more effective, responsive state and local efforts.

At bottom, states "remain our nation's frontline environmental implementers and enforcers." Hearing on Nomination of Attorney General Pruitt to Be Administrator of the Environmental Protection Agency Before the S. Comm. on Env't & Pub. Works, 115th Cong. 20 (2017) (opening statement of Scott Pruitt). But the decision below "greatly limits [states and local landowners'] ability to support existing,

sustainable efforts to protect the nation's waterways." Press Release, Newhouse Blasts District Court Ruling on Navigable Waters Protection Rule (Aug. 31, 2021), bit.ly/3jcXjds. "If we truly want to advance and achieve cleaner air and water the States must be partners and not mere passive instruments of federal will." Hearing, *supra.*

II. The Clean Water Act's legislative history provides more evidence of original public meaning confirming that occasionally soggy inland properties do not constitute "waters of the United States."

From enacting the Clean Water Act's precursor in 1948 to the debates surrounding the 1972 amendments that gave us today's operative CWA text, every relevant congressional action confirms what the Clean Water Act's text makes clear: the original public meaning of "waters of the United States" cannot bear EPA's preferred expansive interpretation, and the Sacketts' soggy inland property is not a "water[] of the United States."

* * *

Congress enacted the Federal Water Pollution Control Act of 1948 (WPCA) to empower and support States "in the formulation and execution of their stream pollution abatement programs." Pub. L. 80-845, 62 Stat. 1155 §2 (1948). Although the Act was the first major federal statute to regulate pollution in American waterways, it was not primarily a regulatory enforcement regime. Rather, it "did little more than provide technical assistance and financial

aid to help the states deal with their growing water pollution problem." William W. Sapp, et. al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term "Navigable Waters"*, 36 Envtl. L. Rep. 10190, 10197 (2006). And the WPCA's scope was limited: federal abatement efforts were circumscribed to "interstate waters" and "tributar[ies] of such waters." Pub. L. 80-845 §2(d)(1).

In time, Congress decided that the WPCA failed to address the nation's pervasive water pollution problem. Even until the early 1970s, rivers like the Potomac still teemed with raw sewage, and coastal wildlife and resources still sustained heavy losses from pollution discharges and spills. *See* 117 Cong. Rec. 38,797-98 (1971) (statement of Sen. Muskie).

Without an adequate remedial regime in the WPCA, federal agencies fashioned a pollution permit program under the Refuse Act of 1899. The Refuse Act prohibited discharging "any refuse matter of any kind ... into any navigable water of the United States, or into any tributary of any navigable water" without a permit. Refuse Act of 1899 §13, 33 U.S.C. §407 (1899). In December 1970, President Richard Nixon charged the Secretary of the Army and the Administrator of the EPA with "implement[ing] a permit program under the [Refuse Act] to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States and their tributaries." Exec. Order No. 11,574, 3 C.F.R., 1971 Comp., 556-58 (1970). About a month before Congress passed the 1972 CWA amendments, the Army Corps of Engineers

issued its final version of the Refuse Act regulations, updating the agency's jurisdictional reach to the "navigable waters of the United States," Sapp, *supra*, at 10200, which the Corps defined as "waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. §209.260(c) (1973).

Combining the WPCA's remedial aim and the efficacy of the Refuse Act's permitting regulations, Congress proposed the 1972 CWA amendments. Among other things, the amendments implemented the modern pollution and fill permit program under section 404 of the Act, grafting the Refuse Act permit program into the WPCA's framework of cooperative federalism. *See* 117 Cong. Rec. 38,836 (statement of Sen. Muskie) ("In the bill, we codified [direct enforcement] authority in order to reestablish a balance between State and Federal authority."). The CWA was Congress's attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act of 1972 §101, 33 U.S.C. §1251; *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). To effectuate that purpose, Congress altered the jurisdictional scope of the WPCA, replacing "interstate waters and tributaries thereof" with "navigable waters," which Congress defined as "waters of the United States, including the territorial seas."

Just as it borrowed the Refuse Act regulations' terminology, Congress sought to give the CWA a similar scope. The term "navigable water" and its definition, "waters of the United States," was inserted

into the CWA in the conference committee. 118 Cong. Rec. 32,809 (1972). The conferees agreed that "the term navigable waters be given the broadest possible constitutional interpretation." *Id.* at 33,757. Both Senator Muskie, the CWA's Senate manager, and Representative Dingell, the CWA's House manager, introduced the conference report to their respective chambers and reiterated that intended construction. Senator Muskie characterized the conference committee's intent that the CWA would reach not only waters that are navigable in fact but also those that "form … with other waters or other systems of transportation … a continuing highway over which commerce is or may be carried on with other states." *Id.* at 33,699 (statement of Sen. Muskie). Representative Dingell similarly stated, "[T]here is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States." *Id.* at. 33,757 (statement of Rep. Dingell).

Even when showing Congress's intent to exercise the fullest extent of its commerce power over intrastate waters, Congress's discussion of the kinds of waters was notably constrained to *actual bodies of water*. Senator Muskie referred to "lakes, streams, rivers, and oceans," *Id.* at 33,692, and Representative Dingell referred to "all water bodies, including main streams and their tributaries," *Id.* at 33,757. Other supporters of the amendments used similar terms. Senator Mondale decried the neglect of the "rivers and lakes of America." 117 Cong. Rec. 38,834. Discussing

the ill of pollution in "navigable waters," Senator Humphrey referred to "rivers," "coastal water," and "lakes, small and large." *Id.* at 38,835. And Senator Moss stated that the CWA "set[] a goal of eliminating all discharges into our Nation's waterways" with an interim goal of "making our streams and lakes 'swimmable.'" *Id.* at 38,837.

In short, during the debates on the 1972 CWA amendments, Congress overwhelmingly referred to *distinct* bodies of water—seas, oceans, lakes, and waterways. *Those* are the kinds of bodies of water that Congress intended to make the remedial subject of the CWA.

This Court agreed with that assessment when it concluded that, despite the conference report's "broadest possible constitutional interpretation," 118 Cong. Rec. 33,757, "neither this, nor anything else in the legislative history … signifies that Congress intended to exert anything more than its commerce power over navigation." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. 159, 168 n.3 (2001). *See also* Isaiah McKinney, Note, *"Navigable Waters" Does Not Include Mud Puddles: The Clean Water Act's Legislative History Supports a Narrow, Commercial-Focused Interpretation*, 12 Wake Forest J.L. & Pol'y, at 2 (forthcoming 2022).

So it is that by broadening the WPCA's limited application from "interstate waters" to "the waters of the United States," Congress intended only to extend the Act's reach to intrastate bodies of water and their

tributaries. Congress's heavy emphasis on rivers, lakes, and oceans further confirms that Congress did not intend to depart from the geographic character of bodies of water covered by previous remedial enactments. Congress's expansive interpretation may have pushed the bounds of the Commerce Clause to include intrastate waters, but it did not turn the historical conception of "waters" into "mud pits."

* * *

The Clean Water Act's history confirms what its text makes clear: Congress did not give the EPA power to regulate land like the Sacketts' under the Act's permit provisions. Instead, the enacting Congress understood that term to refer to bodies of water used in a commercial context, principally connected with interstate commerce. *See SWANCC,* 531 U.S. at 168 n.3. Such waters do not include bodies incapable of commercial utility.

Affirming the Ninth Circuit's decision would eviscerate any limit on the meaning of "navigable waters." Indeed, adopting the EPA's argument would render the word "navigable" a nullity. If allowed to stand, the decision below will "empower[] federal bureaucrats to place every single body of water—every ditch, puddle, and stream—under federal regulation." Press Release, Newhouse Leads 201 Members in Calling on the Biden Administration to Drop WOTUS Expansion (Mar. 14, 2022) bit.ly/3KwUMXA. This Court should decline its invitation to do so.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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