No. 21-454

IN THE
Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

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

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE ASSOCIATION OF OIL PIPE LINES, AND THE AMERICAN GAS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The American Petroleum Institute (API), the Association of Oil Pipe Lines (AOPL), and the American Gas Association (AGA) submit this brief as *amici curiae* in support of Petitioners.[1]

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioners have consented to the filing of this brief, and Respondents have filed a blanket consent with the Clerk.

API is a national trade association that represents nearly 600 members involved in the oil and natural gas industry. API's members include corporations that produce, process, store, transport, and market oil and natural gas products, as well as companies that support the oil and natural gas sector. With over 30 active chapters in 12 states, API harnesses its members' expertise to research and advocate for economically-efficient and environmentally-sound approaches to the production and supply of energy resources.

AOPL is a nonprofit national trade association that represents the interests of liquid pipeline owners and operators. Together, AOPL's members operate pipelines carrying nearly 97 percent of the crude oil and petroleum products moved by pipeline throughout the United States, extending over 225,000 miles in total length. AOPL frequently engages with federal regulators and legislators to facilitate environmentally-responsible, safe, and cost-effective pipeline policies.

AGA is a national trade association that represents over 200 energy companies involved in the natural gas industry. AGA's members advocate for the safe, reliable, and environmentally-responsible delivery of natural gas across the country. AGA works closely with federal agencies to craft policies and regulations that protect the environment and account for the special needs of the natural gas industry.

Amici's members have a deep interest in the outcome of this case. As entities that conduct operations on property potentially subject to the Clean Water Act's requirements, *amici*'s members understand the complexities of determining whether federal jurisdiction attaches to a particular piece of property and the profound consequences that follow. *Amici* are also

intimately familiar with the regulatory and legal issues at the heart of this case. For years, *amici* have worked with federal regulators to develop administrable standards under the Clean Water Act, submitting comments in response to proposed definitions of "waters of the United States" by the Environmental Protection Agency and the U.S. Army Corps of Engineers. In addition, *amici* have filed briefs in prior court cases involving the Clean Water Act, shedding light on the proper scope of federal jurisdiction under the statute and detailing the real-world impacts of jurisdictional determinations. *Amici* write to offer that same insight here.

SUMMARY OF ARGUMENT

This case concerns a question that has vexed federal agencies and courts for decades: When does a patch of wet ground constitute "waters of the United States" and what legal standard should be used to decide?

The Clean Water Act grants the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") limited regulatory authority over "navigable waters," which Congress defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Congress did not further delineate the meaning of "waters of the United States," but rather left it to EPA and the Corps to define.

In the early 1980s, EPA and the Corps converged on a common definition. Under it, "waters of the United States" included, but were not limited to, traditional navigable waters and their tributaries, interstate waters and wetlands, and wetlands adjacent to such waters and their tributaries. *See* Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,424 (May 19,

1980) (EPA's definition); Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,810-11 (July 22, 1982) (the Corps' definition). Although that core definition has remained largely consistent over the years, the agencies have repeatedly struggled to clarify its scope. The agencies have defined—and in some cases redefined—the meaning of "wetlands," "tributaries," and "adjacent." They have also attempted to create workable standards to help guide their assertion of federal jurisdiction in individual cases. But at every step of the way, the agencies, courts, and regulated parties have become embroiled in disputes over the Clean Water Act's limits. And despite decades of litigation and rulemaking, the extent of federal authority under the Act is anything but clear.

That lack of clarity is particularly apparent in the case of wetlands. As the law currently stands, there is no one rule for determining whether a wetland falls within the Clean Water Act's reach. Some courts apply the significant-nexus test from Justice Kennedy's concurrence in *Rapanos* v. *United States*, 547 U.S. 715 (2006), while others apply the significant-nexus test and the bright-line rule set out by the *Rapanos* plurality. EPA and the Corps, for their part, have incorporated one or both of these tests in four different ways over the past 14 years. But neither the courts nor the agencies have sufficiently clarified what a significant nexus means.

The absence of a clear rule as to what lands are in and what lands are out is not just a good-governance problem. It is detrimental to the Clean Water Act's success. In order to protect "waters of the United States," the statute requires regulated parties to

obtain a permit before engaging in certain activities on covered property—and imposes severe civil and criminal penalties for a party's failure to do so. If regulated parties lack adequate notice that their property is subject to the Act, they run the risk of damaging protected waters and exposing themselves to crippling liability in the process.

The Clean Water Act also depends on a clear division of regulatory authority between the federal government and the States. Under the Clean Water Act, the States retain primary responsibility over land and water resources, and EPA and the Corps' jurisdiction is limited to waters that come within the meaning of "waters of the United States." But the more ambiguous that definition is, the less of a limitation it becomes.

The uncertainty over the Clean Water Act's reach has persisted for far too long. And the consequences of perpetuating that uncertainty are far too serious. The plurality's test in *Rapanos* provides the clarity that EPA, the Corps, courts, and regulated entities need. The Court should adopt that test once and for all.

ARGUMENT

I. CLEAR JURISDICTIONAL RULES ARE NECESSARY TO ACHIEVE THE CLEAN WATER ACT'S CORE OBJECTIVES.

In enacting the Clean Water Act, Congress sought to achieve two primary goals: restore and protect the country's waters, and preserve States' traditional power to regulate water and land use within their borders. *See* 33 U.S.C. § 1251(a)-(b); *Rapanos*, 547 U.S. at 722-723 (plurality opinion). To protect the

country's water, Congress prohibited the discharge of pollutants into "navigable waters" without a permit from EPA or the Corps. *See* 33 U.S.C. § 1342(a) (authorizing EPA to issue permits for the discharge of pollutants as a general matter); *id.* § 1344(a), (d) (requiring a permit from the Corps to discharge dredged or fill material). To preserve the States' traditional powers, Congress left any water outside the Clean Water Act's purview to the States' regulatory control and provided financial and technical support to the States to assist their own regulatory efforts. *See, e.g.*, *id.* §§ 1251(b), 1255; *County of Maui* v. *Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471-72 (2020) (explaining that waters not covered by EPA and the Corps' permitting authority were generally left to the States to protect).

Taken together, these twin purposes form the backbone of the Clean Water Act's statutory scheme. Clear jurisdictional rules are necessary to give them both their full effect.

1. When Congress enacted the Clean Water Act in 1972, it put in motion an ambitious strategy for curbing pollution of our nation's waters. Among the principal mechanisms for pollution control was a complex permitting system, in which the Corps and EPA would closely regulate the discharge of pollutants on property containing "waters of the United States." These permits are no small matter. They can be difficult to obtain and the consequences of failing to acquire them can be ruinous.

Applying for a permit is an onerous process: It can take years to complete and it comes with a hefty price. The average applicant for coverage under a general permit spends "313 days and $28,915" completing the

process. *See U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 578 U.S. 590, 595 (2016). And the average applicant for an individual permit "spends 788 days and $271,596" obtaining a permit. *Id.* at 594 (internal quotation marks omitted).

These costs are further compounded by the agencies' avoidance and mitigation requirements, which can require applicants to forgo development of a specific area of property or redesign their entire project to minimize potential adverse effects. *See* 40 C.F.R. § 230.10(a), (d). If the project requires National Environmental Policy Act or the Endangered Species Act review, applicants must also engage in lengthy environmental review and consultation procedures. *See, e.g.*, 42 U.S.C. § 4332; 16 U.S.C. § 1536. Given the difficulty of complying with this panoply of requirements, developers often end up abandoning their plans in whole or in part, and the value of their regulated land may end up dropping. *See* Jason Scott Johnston, *Environmental Permits: Public Property Rights in Private Lands and the Extraction and Redistribution of Private Wealth*, 96 Notre Dame L. Rev. 1559, 1560-62 (2021).

If a regulated entity fails to comply with a permit's conditions—or fails to obtain one in the first place—the Clean Water Act imposes substantial civil and criminal penalties. Those penalties apply to both negligent and willful violations of the statute or conditions of a permit, and a party found liable can face thousands of dollars in fines or even be jailed. *See, e.g.*, 33 U.S.C. § 1319; *Sackett* v. *EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) (highlighting the "draconian penalties" that the Clean Water Act imposes).

These harsh features of the permitting system are what make permits an effective regulatory tool: They deter activities that can potentially lead to pollution and ensure that regulated entities minimize environmental impacts. But in order for permits to accomplish these purposes, it is essential to have clear rules for determining when permitting requirements apply. Without a clear jurisdictional rule, regulated entities may lack fair notice that their property is subject to the Clean Water Act's requirements. That lack of notice raises serious due-process questions because the lack of predictable rules "invite[s] arbitrary enforcement." *See, e.g.*, *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1223 (2018). It also makes it more difficult to prevent pollution of navigable waters, which is the point of the permitting process. If regulated parties do not know their property is protected under the Clean Water Act, they may start a project that is unknowingly subject to EPA and the Corps' oversight. But if the Clean Water Act's scope is easily discernable, regulated parties can apply for a permit and minimize adverse effects from the outset.

2. Clear jurisdictional rules are also necessary to respect the Clean Water Act's careful balance between federal and state authority. As this Court has reiterated, "navigable waters" are the dividing line between federal and state jurisdiction over water and land use. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-174 (2001) ("*SWANCC*"). "Navigable waters"—that is, "waters of the United States"—are subject to the agencies' permitting requirements, while all other land and water are left to the States to regulate. *See Rapanos*, 547 U.S. at 737 (plurality opinion) (emphasizing that Congress intended to "preserv[e] the primary rights and

responsibilities of the States" over water and land use, not bring "virtually all planning of the development and use of land and water resources by the States under federal control") (cleaned up).

Accordingly, whenever EPA and the Corps define "waters of the United States," significant federalism concerns are implicated. An overly broad interpretation of the term may expand federal jurisdiction beyond the Clean Water Act's intended limits, encroaching upon the power that Congress expressly reserved for the States. *See SWANCC*, 531 U.S. at 172-174 (rejecting the Corps' application of permitting requirements to "nonnavigable, isolated, intrastate waters" because asserting federal authority over such waters "would result in a significant impingement of the States' traditional and primary power over land and water use").

In the absence of any clear demarcation between federal and state authority, infringements upon States' traditional regulatory powers are all the more likely to occur. When they do, States may have to wait years for their authority to be restored while challenges to the agencies' jurisdiction work their way through the courts. *See, e.g.*, *Rapanos*, 547 U.S. at 719-721 (plurality opinion) (describing a twelve-year litigation process over the Corps' assertion of federal jurisdiction under the Clean Water Act). And given the uncertainty over the extent of EPA and the Corps' reach, States may have little incentive to develop and implement regulatory programs to protect waters that may—or may not—fall within the agencies' purview.

A clear jurisdictional rule avoids these concerns and preserves Congress's carefully calibrated scheme. When regulators can readily identify the scope of their

own authority, they can devote more time and energy to environmental protection and less time litigating what they are allowed to protect. Similarly, when clear, predictable rules set the outer bounds of EPA and the Corps' power under the Clean Water Act, States can confidently invest resources in protecting their lands and waters, armed with the knowledge that certain waterbodies will not become subject to the agencies' control.

In short, the Clean Water Act reflects a balance. Federal authorities are charged with regulating the discharge of pollutants into navigable waters through stringent permitting requirements; state authorities retain their traditional power over land and water use. Certainty over the scope of federal jurisdiction does more than make the Clean Water Act administrable; it makes the system work.

II. THE SCOPE OF FEDERAL JURISDICTION OVER WETLANDS REMAINS UNSETTLED.

For more than a decade, courts, agencies, and regulated parties have tried to clarify the Clean Water Act's reach. But in spite of those efforts, the boundaries of federal jurisdiction have become more blurred than clear. That is especially true for wetlands, which have bedeviled courts and regulators for years.

This Court last addressed the scope of federal jurisdiction over wetlands in *Rapanos* v. *United States*. *See* 547 U.S. at 729-730 (plurality opinion). *Rapanos* concerned the Corps' assertion of authority over wetlands located "near ditches or man-made drains that eventually empty into traditional navigable waters." *Id.* at 729 (plurality opinion). The Court vacated the lower court's decision upholding the Corps' jurisdictional determination. But a majority of the Court

could not agree on a framework to govern EPA and the Corps' jurisdiction.

A plurality of the Court turned to the dictionary definition of "waters" to conclude that federal permitting jurisdiction extends only to "continuously present, fixed bodies of water." *Id.* at 733 (plurality opinion). Against that backdrop, a wetland adjacent to a tributary leading to navigable water would be subject to federal permitting jurisdiction if (1) "the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters);" and (2) "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742 (plurality opinion).

Justice Kennedy proposed a different analytical approach. Under Justice Kennedy's test, federal jurisdiction attaches so long as the waterbody in question has a " 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment). To properly assert jurisdiction, EPA and the Corps would need to "establish a significant nexus on a case-by-case basis." *Id.* at 782 (Kennedy, J., concurring in the judgment). And in the wetlands context, the "requisite nexus" would exist "if the wetlands, 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' " under the Clean Water Act. *Id*. at 780 (Kennedy, J., concurring in the judgment).

These tests are not just analytically different. They can lead to results that are diametrically opposed. *See id.* at 810 n.14 (Stevens, J., dissenting) (noting the possibility for outcome-determinative differences between the two approaches). For that reason, courts and regulators have struggled to determine what rule, if any, *Rapanos* endorses. Those attempts have only made the uncertainty over the scope of the Clean Water Act worse.

1. In the lower courts, the rule turns on where a suit is brought. In the Seventh, Ninth, or Eleventh Circuits, Justice Kennedy's significant-nexus test determines EPA and the Corps' permitting jurisdiction. *See, e.g.*, *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam); *Northern Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States* v. *Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007). In the First, Third, or Eighth Circuits, a court will uphold the agencies' assertion of federal jurisdiction over wetlands so long as their determination passes muster under *either* the plurality or Justice Kennedy's tests. *United States* v. *Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *United States* v. *Donovan*, 661 F.3d 174, 184 (3d Cir. 2011); *United States* v. *Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). And some circuits will apply the test the parties agree on, *see, e.g.*, *Precon Dev. Corp.* v. *U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011), while others will apply both tests just to be safe, *see, e.g.*, *United States* v. *Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009); *United States* v. *Lucas*, 516 F.3d 316, 325-327 (5th Cir. 2008).

The pronounced uncertainty in the courts over the scope of EPA and the Corps' jurisdiction does not stop

there. For courts analyzing the agencies' assertion of authority under Justice Kennedy's test, questions remain over how to best interpret the test and how to apply it in a given case. Some courts have called attention to the test's "broad" instructions that are "open for considerable interpretation." *See Precon Dev. Corp.*, 633 F.3d at 292. Others have lamented the difficulty of discerning "exactly what is 'significant' " and how "a 'nexus' [is] determined" under Justice Kennedy's test. *United States* v. *Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006); *see also Johnson*, 467 F.3d at 66 (Torruella, J., concurring in part and dissenting in part) (expressing doubt that "Justice Kennedy's seemingly opaque 'significant nexus' test is a constitutional measure of federal regulatory jurisdiction"); *see also Rapanos*, 547 U.S. at 756 n.15 (plurality opinion) (describing Justice Kennedy's test as "perfectly opaque").

None of this is to relitigate the case for certiorari that this Court has already granted. Rather, it shows that if this Court kicks the can on giving the lower courts a clear, administrable standard, then the circuits will fall into disarray once more, to the detriment of all involved.

2. The agencies' attempts to clarify the scope of federal jurisdiction over wetlands have only exacerbated the problem. Over the last 14 years, EPA and the Corps have proposed four different approaches to define "waters of the United States." Yet at every turn, the agencies have floundered in determining how to account for Justice Kennedy's significant-nexus test.

In a 2008 guidance document issued in *Rapanos*'s wake, EPA and the Corps endorsed a jurisdictional approach that explicitly incorporated aspects of both

the plurality's and Justice Kennedy's tests. *See* Revised Memorandum from Benjamin H. Grumbles, Assistant Administrator for Water, Env't Prot. Agency, & John Paul Woodley, Jr., Assistant Sec'y of the Army (Civil Works), Dep't of the Army, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States* & *Carabell* v. *United States* (Dec. 2, 2008). In the guidance, the agencies divided "waters" into three different groups: those that were categorically within EPA and the Corps' jurisdiction under the Clean Water Act, those that could fall within their jurisdiction on a case-by-case basis, and those that were categorically excluded from their jurisdiction. *See id.* at 1.

The first and third categories included phrases pulled directly from the plurality's approach: "[N]onnavigable tributaries of traditional navigable waters that are relatively permanent" and "adjacent wetlands that have a continuous surface connection to such tributaries" were included among the waters categorically within the agencies' reach. *Id*. at 6. Ditches that lacked a "relatively permanent flow of water" were excluded. *Id.* at 1. The second category, meanwhile, expressly borrowed from Justice Kennedy's test. Waters in this category would be subject to federal jurisdiction if, "based on a fact-specific analysis," the agencies found "a significant nexus with a traditional navigable water." *Id.*

This second category proved unruly at best. In EPA and the Corps' own words, the case-by-case "significant nexus" inquiry involved a "time and resource intensive process" that could "result in inconsistent interpretation[s] of [Clean Water Act] jurisdiction and perpetuate ambiguity over where the [statute]

applies." Clean Water Rule, 80 Fed. Reg. 37,054, 37,056 (June 29, 2015).

In a quest for a clearer rule, the agencies reformulated their jurisdictional approach in the Clean Water Rule of 2015. The Clean Water Rule purported to again incorporate both the plurality's and Justice Kennedy's tests. *See id.* Yet in reality, the rule included little from the plurality's approach—eschewing the specific language it had previously adopted from the plurality opinion—and asserted jurisdiction over waters that would plainly be excluded under the plurality's test. *Compare, e.g.*, *id.* at 37,079 (extending jurisdiction to ditches with intermittent flow), *with Rapanos*, 547 U.S. at 739 (plurality opinion) ("The phrase ['waters of the United States'] does not include channels through which water flows intermittently or ephemerally.").

At the same time, the Clean Water Rule applied Justice Kennedy's opinion in a way that limited case-by-case determinations and provided a more administrable framework than the agencies' 2008 Guidance. Even then, EPA and the Corps' interpretation of Justice Kennedy's approach caused trouble. Lawsuits across the country challenged the Clean Water Rule for not aligning with Justice Kennedy's opinion and for misconstruing the significant-nexus test. *See, e.g.*, *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 807 (6th Cir. 2015); *Georgia* v. *Wheeler*, 418 F. Supp. 3d 1336, 1381-82 (S.D. Ga. 2019).

Returning to the drawing board, EPA and the Corps repealed the Clean Water Rule and issued the Navigable Waters Protection Rule in 2020. *See* 85 Fed. Reg. 22,250 (Apr. 21, 2020). This rule retreated from Justice Kennedy's significant-nexus test and largely

codified the plurality's rule instead. *Id.* at 22,273. This rule, too, was quickly challenged in court, on the ground that the agencies had, among other things, improperly jettisoned the significant-nexus test and failed to adequately account for their changed position. *See, e.g.*, Complaint ¶¶ 68-69, *Pascua Yaqui Tribe* v. *U.S. EPA*, No. 4:20-cv-00266-RM (D. Ariz. June 22, 2020).

EPA and the Corps have now come full circle. In December 2021, the agencies published a new proposed rule, incorporating principles from both *Rapanos* tests once again. *See* Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372, 69,373 (Dec. 7, 2021). In this most recent iteration, the agencies have interpreted their jurisdiction under the Clean Water Act to include wetlands adjacent to tributaries that satisfy *either* the "relatively permanent standard" *or* the significant-nexus test. *Id.*

Like the other tests that have come before, the agencies' new interpretation will pose legal and practical challenges. For one, the Proposed Revision applies the significant-nexus test to waters other than wetlands—a step beyond what Justice Kennedy's opinion contemplated and what EPA and the Corps have done in the past. *See id.* at 69,440. For another, the agencies appear to have construed the significant-nexus test in a way that allows for virtually limitless assertions of jurisdiction. For instance, the agencies envision analyzing the cumulative effects of a wide variety of waterbodies within a broad geographic region. *Id.* at 69,439-40. But the agencies' determination of the general number, type, and location of waterbodies to include in that analysis relies on their subjective views of what counts as significant—meaning that a

finding of significance is already baked into the analytical framework ostensibly used to determine whether a significant nexus exists.

From the circuit split and regulatory whiplash, this much is clear: the scope of federal jurisdiction over wetlands is a moving target, and the significant-nexus test creates more problems than it solves. The resulting uncertainty does a disservice to all parties involved. And it prevents the Clean Water Act from achieving its laudable goals.

III. THE *RAPANOS* PLURALITY PROVIDES A CLEAR, ADMINISTRABLE RULE.

To best carry out the Clean Water Act, regulated parties, courts, and the federal government need clarity over what EPA and the Corps can and cannot regulate. The plurality opinion—standing alone—provides exactly that.

1. The plurality's approach is at once easy to understand and easy to apply. It defines "waters of the United States" based on the dictionary definition of "waters." *See Rapanos*, 547 U.S. at 732-733 (plurality opinion). In so doing, the plurality aligns with "the commonsense understanding of the term." *Id.* at 734 (plurality opinion). Accordingly, under the plurality's approach, "waters of the United States"—and therefore federal jurisdiction under the Clean Water Act—has the meaning that one would expect: "[R]elatively 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 (plurality opinion) (quoting *Waters*, Webster's New International Dictionary 2882 (2d ed. 1954)).

The plurality's approach not only establishes the outer limits of federal jurisdiction under the Clean Water Act, but also provides a bright-line test for determining whether a particular wetland comes within EPA and the Corps' reach. As a general matter, a wetland will be subject to federal jurisdiction if it has "a continuous surface connection to bodies that are 'waters of the United States' in their own right." *Id.* at 742 (plurality opinion). A wetland adjacent to a tributary that empties into a traditional navigable water will meet that definition if two requirements are met. First, the "adjacent channel [must] contain[] a 'wate[r] of the United States.' " *Id.* Second, the wetland must share "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*

By drawing a clear line between jurisdictional and non-jurisdictional waters, the plurality's approach facilitates EPA and the Corps' permitting process and furthers environmental protection. With the plurality's test as the governing law, landowners and developers can readily predict whether or not their wetland is subject to federal permitting requirements: "Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' " are outside EPA and the Corps' jurisdiction. *Id*. Wetlands that "possess[] a continuous surface connection" to waters "containing a relatively permanent flow" are within the agencies' jurisdiction. *Id.* at 757 (plurality opinion). This ability to anticipate the assertion of jurisdiction enables landowners and developers to take the necessary precautions from the start and seek a permit before any adverse environmental effects can begin. *See supra* at 8. Moreover, by affording landowners and developers proper notice of their

obligations, the plurality's approach reduces the amount of agency resources spent defending jurisdictional determinations in court, allowing them to focus their resources on crafting and enforcing permitting conditions instead.

The plurality's bright-line rule preserves the balance between federal and state jurisdiction as well. By clearly delineating the difference between jurisdictional "waters," land, and property where the boundary between the two is too difficult to discern, the plurality's approach ensures federalism is a fundamental feature of the test—not merely an aspirational goal or theoretical concern. That close attention to federalism is by design. In rejecting the Corps' assertion of jurisdiction over wetlands adjacent to channels with intermittent or ephemeral flow, the plurality highlighted the need for a clear division between regulation of "waters" and land. As the plurality saw it, the more the property in question resembled land, the greater the encroachment on States' "quintessential" authority to regulate land use. *Rapanos*, 547 U.S. at 738 (plurality opinion). And the more the agencies became "*de facto* regulator[s] of immense stretches of intrastate land," the farther away the agencies strayed from Congress's stated intent. *Id*. The plurality therefore adopted a jurisdictional test that would guard against such concerns, defining "waters" and wetlands inextricably bound up with "waters" in unambiguous terms.

Those definitions provide the necessary clarity to enable federal and state authorities to understand and police the boundaries of their respective powers. Indeed, as four members of this Court previously recognized, they are the "*only*" definitions "consistent with"

the Clean Water Act's "stated policy" of respecting and protecting States' traditional power over land and water resources. *Id.* at 737 (plurality opinion) (emphasis added) (internal quotation marks omitted).

In sum, the plurality's test provides precisely what the Clean Water Act requires: a clear, administrable framework that fosters environmental protection and honors established parameters of federal and state authority.

2. To bring the necessary clarity to the current morass, this Court should adopt the plurality's test as the governing jurisdictional rule and reject the significant-nexus standard. Two major reasons counsel in favor.

First, far from promoting the Clean Water Act's objectives, the significant-nexus test has hindered them. The test's case-by-case determinations have deprived regulated parties of the notice they are due, thereby limiting the extent to which they can proactively comply with the Act. *See, e.g.*, Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, Cato Sup. Ct. Rev. 139, 161 (2012); *Sackett*, 566 U.S. at 132 (Alito, J., concurring) (emphasizing due-process concerns arising from case-by-case determinations). Its ambiguous terms have proven difficult to interpret and apply, by lower courts and EPA and the Corps alike. *See, e.g.*, *Chevron Pipe Line*, 437 F. Supp. 2d at 613; Clean Water Rule, 80 Fed. Reg. at 37,056. And it lacks the requisite safeguards to preserve the federal-state balance that Congress so carefully struck. *See Rapanos*, 547 U.S. at 756 (plurality opinion) (noting that the significant-nexus test "takes no account" of the Clean Water Act's preservation of States' traditional authority); *id*. at

782 (Kennedy, J., concurring in the judgment) (appearing to acknowledge that in at least some cases involving the regulation of wetlands adjacent to tributaries, the significant-nexus test could create federalism concerns).

Second, even if the significant-nexus test offered a clear, administrable rule, this Court should not endorse the "either-or" approach that lower courts and the agencies have proposed. In crafting their respective tests, the plurality and Justice Kennedy intended to impose a constraint on EPA and the Corps' reach—preventing the limitless interpretations of federal jurisdiction that the agencies had promoted in the past. *See, e.g.*, *id*. at 731-734 (plurality opinion); *id.* at 779-781 (Kennedy, J., concurring in the judgment). Allowing EPA and the Corps to assert jurisdiction under one or both tests would undo the very limitation that each opinion intended to set. Wetlands that one test sought to exclude from the Clean Water Act's reach could fall under federal jurisdiction under the other. That outcome makes little sense as a legal or practical matter.

* * *

As this Court has long acknowledged, the Clean Water Act's scope is maddeningly unclear. *See, e.g.*, *Hawkes*, 578 U.S. at 594; *Sackett*, 566 U.S. at 132 (Alito, J., concurring). Over 15 years ago, a plurality of this Court provided a clear and administrable rule to resolve that jurisdictional ambiguity. That rule should now command a majority.

CONCLUSION

For the foregoing reasons and those in Petitioners' brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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