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 FARM BUREAUS OF ARKANSAS, ARIZONA, CALIFORNIA, COLORADO, ILLINOIS, INDIANA, IOWA, KANSAS, MINNESOTA, MISSOURI, NEBRASKA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTRODUCTION AND INTERESTS OF THE *AMICI CURIAE* [1]

Amici curiae are twenty state farm bureaus with an interest in effective, efficient, and commonsense rules for the protection and management of the nation's water and land resources.[2] Agriculture is inherently and inextricably tied to the earth. All farmers and ranchers—including *amici*'s members—have a strong interest in clear and sensible regulation of water resources. That is why they historically have been at the forefront of balanced and responsible efforts to protect such resources. Many of these efforts are conducted in conjunction with state and local governments, who have long had primary responsibility for regulating land and water use. Indeed, when Congress enacted the Clean Water Act (CWA) in 1972, it expressly intended to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b).

In the decades since the CWA's enactment, however, the federal government has attempted to increase its authority by regulating features that are wholly intrastate and that often are not recognizable as water bodies at all, deeming them against both plain text and commonsense to constitute "waters of the United States." Even after the Court admonished the federal government for its overly expansive interpretation of "waters of the United States" in *Rapanos* v. *United States*, 547 U.S. 715 (2006), the federal government has continued to extend its

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[1] No party or counsel for a party authored this brief in whole or in part, and no one other than *amici*, their members, or their counsel funded the preparation or submission of this brief. Blanket consents to the filing of *amicus* briefs are on file with the Clerk.

[2] A list of *amici* is set forth in Appendix A.

regulatory reach over entirely local land and water features. Seizing upon the ambiguous "significant nexus" test from Justice Kennedy's concurring opinion in *Rapanos*, federal agencies have asserted jurisdiction over isolated wetlands (like those at issue in this case), to say nothing of dry ditches and even tire ruts—features that no reasonable person would consider a water of any kind, let alone one "of the United States."

The result is a federalized regulatory system that bears no resemblance to the model of cooperative federalism that Congress contemplated and preserved in 1972. This intrusion by the federal government into vast swaths of state lands and waters has led to adverse impacts and hardships on *amici's* members. Many, if not most, routine farm operations now require farmers and ranchers first to seek the permission of federal bureaucrats, at a substantial cost of time and money.

Congress had good reason to limit federal jurisdiction under the CWA and to preserve the authority of States and localities over land and water resources. State and local governments are better suited to assess, regulate, monitor, and make decisions about land and water use given their relatively smaller geographical scope and their closer relationship and access to the land, water, and communities being regulated.

Moreover, States have shown that they are capable and willing to take on these responsibilities. As the experiences of *amici* in their respective States show, States have enacted their own environmental regulations and programs that often provide broader protections than the CWA for the water resources within their borders and that address the particular geographical, climatic, economic, and social characteristics of their states.

Congress intended these state laws to be the primary mode for regulating water resources and to be supplemen-

ted—not supplanted—by federal jurisdiction over "waters of the United States." This Court should adopt a reasonable definition of "waters of the United States" that restores the balance intended by Congress in the CWA.

ARGUMENT

A. Over-federalization of water-resources regulation has led to absurd and unsustainable results

Since the Nation's founding, regulation of land and water use has been "a quintessential state and local power." *Rapanos*, 547 U.S. at 738. See also *Solid Waste Agency of New Cook County* v. *Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (recognizing "the State's traditional and primary power over land and water use"). As the Court elsewhere has put it, "regulation of land use [is] a function traditionally performed by local governments." *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). Thus, in enacting the CWA, Congress expressed an intent not to overturn but rather to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b).

In the ensuing decades, however, the federal government has displaced States from their traditional role as exclusive land-use regulators by asserting statutory jurisdiction under the CWA over ever-increasing expanses of land and intrastate water. In the absence of a clear and definitive test for determining whether a land feature constitutes a "water of the United States" (WOTUS) subject to federal jurisdiction under the CWA, the Environmental Protection Agency and U.S. Army Corps of Engineers have relied on the nebulous "substantial nexus" test from Justice Kennedy's concurrence in *Rapanos*. Under that test, the EPA and Corps have essentially limitless regulatory authority.

The one-size-fits-all "substantial nexus" test has prompted federal regulators often to make jurisdictional determinations based on factors that are meaningless because of the particular area's geography and climate. For example, federal agencies have oftentimes relied on the presence of a bed, banks, and an ordinary high-water mark to characterize a "tributary" of a navigable water. See 80 Fed. Reg. 37053, 37076-78, 37105-06 (June 29, 2015). While the presence of these features may typically indicate regular flow in humid climates, that is not the case in arid lands in the West. Due to the highly erodible nature of the soil in the West, lack of vegetation, and enormously variable precipitation, these physical characteristics may form in the landscape after a single rain event and may persist despite never carrying water again. But federal regulators, applying their categorical rules, have not hesitated to deem such features to be WOTUS.

The experience in Arizona bears this out. Irrigation ditches are used intermittently to channel water from larger sources of water, such as irrigation canals or truly navigable waters, to agricultural fields or storage. But sometimes during large rain events, they may produce return flows that send water back to those sources. Congress could not have contemplated that usually dry, intermittently-used irrigation ditches would be considered "waters of the United States." But under rules prevailing for most of the past 50 years, the great majority of ephemeral drainage features and ditches on farmland and pastures have been regulated as jurisdictional tributaries.

For example, the Redfield Canyon Wash in southeastern Arizona (Figure 1, next page) has a high-water mark and ultimately runs into the San Pedro River (Figure 2). But it runs only during flood events. Minor or normal rainfall events are not enough to sustain water flow in the wash. A vast majority of the time, the wash looks as it is pictured below: dry land with desert vegetation and no

surface water connection to any body of water. Under the agencies' standards that have historically prevailed, it nonetheless is a "water of the United States."

Figure 1. Redfield Canyon Wash

Figure 2. The San Pedro River

Making matters worse, EPA's and the Corps' overbroad definitions and criteria often have been applied by federal bureaucrats sitting in remote offices, looking at mere computer screens. These distant analysts rely on dubious interpretations of satellite images and other non-public surveillance data, often without ever setting foot in the field or putting eyes on the "water" features over which they purport to assert jurisdiction. See, *e.g.*, Jody Gallaway, Testimony Submitted for the Record on "Erosion of Exemptions and Expansion of Federal Control—Implementation of the Definition of Waters of the United States" before the S. Comm. on Env. and Public Works Subcommittee on Fisheries, Water and Wildlife 114th Cong. (May 24, 2016) at 4, perma.cc/HCQ4-6AGF (*Gallaway Testimony*). In one instance, a Corps analyst reviewing an aerial photo insisted that exposed lava rock be mapped as a wetland because, based on her interpretation of the photo, it looked like a wetland. *Id.* at 5.

More examples abound, illustrating just how far the federal government has strayed from the textual limitation of its jurisdiction to "waters of the United States." In recent years, the Corps has asserted jurisdiction over:

Figure 3: A small depression on a dirt road

Figure 4. Human created tire ruts

Figure 5. More human created tire ruts

Figure 6. Pits dug to test soil percolation

Figure 7. A ditch exhibiting an ordinary high water mark

The practical costs of the federal government's over-reaching cannot be overstated. Once a feature has been deemed a "water of the United States" subject to federal

jurisdiction, regulated entities must obtain a permit from the Corps to discharge dredged or fill material or any other pollutant—which includes *dirt and rocks*. In other words, once a feature is declared a WOTUS, landowners must secure a federal permit to undertake essentially any activity in or around the feature, including not only land clearing and construction, but also basic agricultural activities like driving a tractor over the feature or applying fertilizer to and around it. 33 U.S.C. § 1342(a).[3]

Even absent a definitive determination of CWA jurisdiction, the prevailing regime has had a tremendously costly chilling effect on land use in light of the vagueness of the applicable standards. Consider this photo:

Figure 8. Small "depressional wetland" or puddle?

The costs of dealing with such uncertainty are very real. If landowners choose to play it safe and seek a

[3] Although 33 U.S.C. § 1344(f)(1) exempts normal farming practices from the permitting requirement for dredge and fill materials under Section 404 of the CWA, the Corps has issued landowners Letters of Inquiry and cease and desist orders for farming their property. See *Gallaway Testimony* at 7-10.

federal permit to undertake basic farming activities, they face enormous, sometimes crushing, expenses. As the plurality in *Rapanos* recognized almost two decades ago, "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 719 (plurality). Costs in terms of both time and money are far greater today. See *Gallaway Testimony* at 14.

The burdens are even greater if the landowner chooses to take the risk of foregoing a permit and the Corps later determines that the subject land contains a "water of the United States." The agencies and private citizens may enforce the CWA through civil and administrative actions for penalties of nearly $60,000 per violation per day and for injunctive relief. 33 U.S.C. §§ 1319(b), (d), (g), 1365; 87 Fed. Reg. 1676, 1678 (January 12, 2022). The Act also provides for criminal penalties against violators: negligent violations bring penalties of up to an additional $25,000 per day and one year of imprisonment, while knowing violations can trigger penalties up to $50,000 per day and three years' imprisonment. 33 U.S.C. § 1319(c)(1)-(2).

And because there is at least a possibility that the federal government will characterize (and often has characterized) just about any puddle or rut as a "water of the United States," these dynamics prevail across "immense stretches of interstate land." *Rapanos*, 437 U.S. at 738. Indeed, a map of Arizona's intermittent streams (shown in yellow on the next page) shows the potential for EPA and the Corps to assert jurisdiction over virtually the entire State. That is in itself remarkable, given that most of Arizona is *a desiccated desert*.

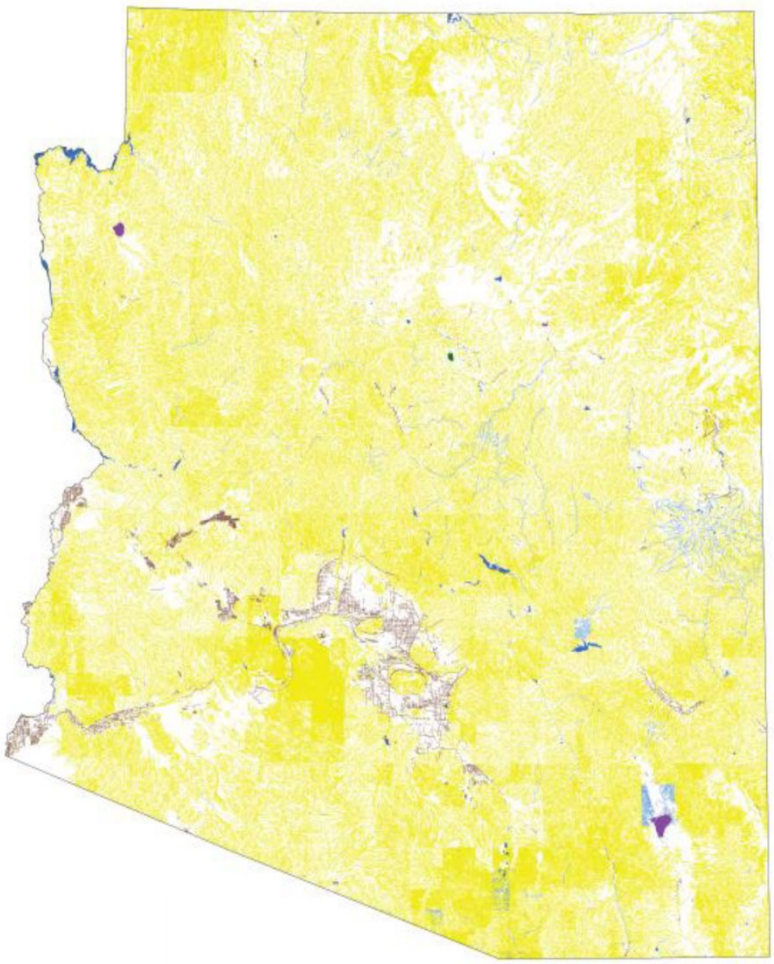

Figure 8. Intermittent washes and streams in Arizona (depicted in yellow)

Accordingly, under the significant nexus test, nearly all land use and development throughout the Nation may be subject to costly and onerous federal requirements and permit processes under the CWA. *Amici*'s members must seek constant input and approval from the federal government to engage in the most basic agricultural activities. That means that federal regulators often can effectively

dictate to farmers and ranchers which crops can be grown, what animals can be raised, and in what location and in what quantity. *Gallaway Testimony* at 10. It means that farmers cannot plow or change to certain crops in response to droughts or other climate changes without first asking the Corps and EPA for permission. *Id.* at 9-10. And it means that the numerous soil conservation, stormwater management, wildlife habitat, flood control, and nutrient management activities in which farmers often engage may be foregone because of the expense of applying for a federal permit. That is not the "cooperative federalism" arrangement that Congress envisioned. See *Rapanos*, 547 U.S. at 755-56.

B. State and local governments are well-suited to regulate land- and water-use

All that we have said so far underscores the importance and wisdom of leaving land- and water-use regulation principally to the States. This division of power between the federal and state governments at the Founding, and its reaffirmation in the preamble to the CWA, was no historical accident, but rather reflects the relative institutional competence of each level of government.

1. The relatively smaller geographical scale of States and localities enables them to make regulations and land-use decisions that are tailored to their regional geographies, climates, and economies. Decisions about how land and water should be used and regulated necessarily require consideration of a wide range of factors—including "the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people." *Hairston* v. *Danville & W.R. Co.*, 208 U.S. 598, 606 (1908). Accord Marci A. Hamilton, *The Constitutional Limitations on Congress's Power Over Local Land Use: Why the Religious Land Use and Institutionalized Persons*

Act Is Unconstitutional, 2 Alb. Gov't L. Rev. 366, 387-88 (2009) (land use planning "necessarily requires the consideration of a diverse set of factors tied to local geography, community needs, and the area's history and vision"). The United States encompasses 2.43 billion acres—from the redwood forest to the Gulf Stream waters, and all of the other diverse landscapes in between. Put simply, the factors and considerations on which land and water use decisions should be based "vary so much." *Hairston*, 208 U.S. at 606.

For example, dry western states—like the home State of the Arizona Farm Bureau Federation—face very different issues regulating and allocating water than wetter eastern states—like the home State of the North Carolina Farm Bureau. Densely populated, urban areas face different land- and water-use problems than do sparsely populated, rural areas. And land-use planning for communities in and near mountains must account for different hazards and challenges than those on flat plains.

Similarly, States in which agricultural production is the primary economic activity must account for different needs and uses as compared with States where (say) manufacturing is the primary industry. And some States value open space preservation more than others.

A federal, one-size-fits-all regulatory regime cannot address the heterogeneous needs, goals, and issues of the different regions of the country. State and local governments, on the other hand, are able to design approaches that are suitable and responsive to the specific characteristics and needs of their land and communities.

2. State and local governments have the knowledge and expertise to undertake these tasks in a sensible and effective way. They have greater familiarity and information about the unique characteristics of the land, the relevant weather and climate patterns, and their intera-

ction with the land. See Craig Anthony (Tony) Arnold, *Clean-Water Land Use: Connecting Scale and Function*, 23 Pace Envtl. L. Rev. 291, 337 (2006); Michael C. Pollack, *Land Use Federalism's False Choice*, 68 Ala. L. Rev. 707, 718-19 & n.54 (2017). Thus, for example, western States and localities would not mistake dry erosional features for tributaries. See Ltr. from Lee A. Norman, M.D., Secretary of Kansas Dep't of Health & Environment, to Radhika Fox and Jaime A Pinkham, Re: Docket EPA-HQ-OW-2021-0328-001 at 6-7 (Oct. 4, 2021) ("Norman Letter") (explaining characteristics of Kansas streams, tributaries, and ditches). And where more information may be needed, local government officials can put their feet on the ground and their eyes on the land with considerably greater ease—something that makes them more in-touch and effective than distant federal bureaucrats. There's no mistaking a lava rock for water when you're looking at it with your own eyes.

States and localities also have expertise and data about the land use patterns, practices, and development in surrounding parcels. Arnold, *supra*, at 337; Pollack, *supra*, at 718-719. Perhaps unlike many other regulators, state and local government officials in predominantly agricultural States have experience "in evaluating farm practices, activities, and crop rotation decisions based on market conditions." *Gallaway Testimony* at 7. Accordingly, they can more accurately determine whether certain practices—such as fallowing fields or planting different crops—are a change in land use, and they can more consistently apply standards across parcels.

Finally, States and localities possess knowledge about the historical, cultural, social, and economic contexts in which a particular project is situated. Arnold, *supra*, at 337; Pollack, *supra*, at 718-19.

3. Because local governments have a more limited geographical scope and more specific and relevant expertise,

they can also process land use decisions more efficiently than federal officials. See Arnold, *supra*, at 337; Pollack, *supra*, at 718-19. Federalizing land and water use decisions results in a massive volume of applications that becomes bottlenecked at the federal agencies. The Corps issues an average of over 50,000 general CWA Section 404 permits and over 2,500 individual permits each year, to say nothing of the additional number that are either rejected or abandoned due to the time and cost to pursue them. U.S. E.P.A., Economic Analysis for the Clean Water Act Section 401 Certification Rule at 9 (May 28, 2020), perma.cc/9LBT-ZMRM. It is of little surprise then that, as noted above, applicants often wait years to receive decisions from the Corps—all the while incurring the significant costs of idle delay. Those costs are also imposed on the broader economy and society, which are deprived of the benefits of productive use of the land, such as the production of crops.

Related, the institutional competencies and capacities of local governments enable them to respond quicker to changing conditions and to innovate solutions to land- and water-use problems. These factors have become all the more important in recent years as climate and population changes are expected to continue to affect land and water use needs with increasing intensity, and vice versa. For example, changes in climate and water use have resulted in once-flowing streams becoming ephemeral. See Norman Letter, *supra*, at 5-6. State and local officials, who are closer to the ground, are in a better position than federal officials in ascertaining these changes and making appropriate regulatory adjustments.

Climate and population changes have a particularly strong impact on agriculture. Changes in temperatures and extreme weather events affect land productivity and crop sustainability. For example, a five-year drought has required farmers in the West to change the crops they

grow on their land, but those farmers have faced pushback and delays from the Corps. Requiring farmers to spend years and tens of thousands of dollars trying to reach federal regulators who are unfamiliar with farming practices or regional issues jeopardizes individual livelihoods and our food supply. State and local governments, by contrast, have the expertise and capacity to respond quicker to changes and to experiment and develop solutions to emerging problems. Arnold, *supra*, at 337.

4. Finally, placing primary responsibility for land and water use management on the States promotes participatory democracy and gives a voice to those who are most directly impacted by land use decisions. Arnold, *supra*, at 328. A home—and particularly a family farm—is one of the largest and emotional investments someone makes and, along with the community in which it is situated, contributes to one's personal, social, and economic identity. Land and water use regulations and policies affect people's homes and communities; they shape "the character, economic health, and success or failures of towns, cities, and counties." Hamilton, *supra*, at 387; see also Jerrold A. Long, *Sustainability Starts Locally: Untying the Hands of Local Governments to Create Sustainable Communities*, 10 Wyo. L. Rev. 1, 20-21 (2010).

Local decisionmaking ensures that local residents' voices and concerns are heard and taken meaningfully into account. Local governments are more accessible to and accountable to their residents, and residents have more opportunities to participate in local policymaking. See Arnold, *supra*, at 328-29; Richard Briffault, *Smart Growth and American Land Use Law*, 21 St. Louis. U. Pub. L. Rev. 253, 268 (2002); Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, Minn. L. Rev. 231, 239 (2008). Accordingly, individuals are more likely to participate in the

democratic processes, and government officials are more likely to be responsive to that participation.

C. State and local regulations provide robust protections for water resources

These observations are not academic—history has shown that State and local governments take seriously their obligations to regulate land and water use to ensure responsible stewardship of their natural resources. It is often assumed that invalidating or curtailing overbroad federal regulations will allow landowners to do as they like, free from all constraints. That is simply wrong.

State and local governments have not hesitated to assert their regulatory powers to protect water resources within their borders, sometimes in ways even more expansive than the federal government. In candor, *amici* do not always agree with the wisdom of all those efforts, some of which suffer from similar infirmities as the federal CWA. But the point for present purposes is a simpler one—that even if Congress repealed the Clean Water Act tomorrow, America's water resources would remain subject to extensive regulatory protections. Following are a selection of relevant state and local regulations, illustrative of the kinds of measures that apply all across the country.

1. Arizona's jurisdiction over the waters within its borders extends wider than the federal government's under the CWA. Arizona has defined "waters of the state" to include "all waters within the jurisdiction of this state including all perennial or intermittent streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, aquifers, springs, irrigation systems, drainage systems and other bodies or accumulations of surface, underground, natural, artificial, public or private water situated wholly or partly in or bordering on the state." Ariz. Rev. Stat. Ann. § 49-201(50).

Arizona has taken steps to ensure that its waters receive strong protection, regardless of which way the political pendulum swings at the federal level. For example, following promulgation of the 2020 Navigable Water Protection Rule, which narrowed the waters subject to federal jurisdiction under the federal CWA, Arizona tasked the State's Department of Environmental Quality (ADEQ) with implementing a state-level Surface Waters Protection Program. *Id.* § 49-221(G). Using its expertise and familiarity with the state's unique hydrology, ADEQ created a Protected Surface Waters List (PSWL). *Id.* § 49-221(A). If a water meets the definition of "waters of the United States," it is automatically included on the PSWL and subject to the federal regulatory regime. *Id.* § 49-221(G). A water that is not considered a "water of the United States" under the applicable federal definition may be included if it meets the definition of a state protected surface water, and if it is, will be subject to ADEQ water quality and permitting requirements. See *id.* Through this program, Arizona ensures that Arizona's actual waters are protected, while also providing much needed clarity to landowners.

2. Since 1969, California has regulated the quality of the waters within its borders under the Porter-Cologne Water Quality Control Act. See Cal. Water Code § 13000 *et seq.* The Act provides that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made [to] those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." *Id.* § 13000.

The waters subject to Porter-Cologne are broad. The State defines "waters of the state" broadly to include "any surface water or groundwater, including saline waters, within the boundaries of the state." Cal. Water Code

§ 13050(e). In response to court decisions and policy changes that have recently pared back on federal jurisdiction under the CWA, California has worked to ensure that no gaps in protection arise. For example, in response to the holding in *Solid Waste Agency of New Cook County* that federal jurisdiction did not extend to isolated wetlands and isolated surface waters, California adopted a state plan for wetlands that were no longer protected under the Clean Water Act. See California Water Boards, Wetland Riparian Area Protection Policy, perma.cc/-ER5C-3B84. It also developed a new definition of "wetland" that "encompasses the full range of wetland types commonly recognized in California, including some features not protected under federal law." California Water Boards, State Policy for Water Quality Control: State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State at 1 (rev. Apr. 6, 2021), perma.cc/BT8Y-6FKD. In doing so, California took into account its specific variable climate, landscapes, and ecology. See San Francisco Estuary Institute & Aquatic Science Ctr., Technical Memorandum No. 2: Wetland Definition at 4 (rev. Sept. 1, 2012), perma.cc/-8ZBZ-TJRY ("California wetland definition should reflect the natural spatial and temporal variability in wetland extent and condition.").

California utilizes a network of entities to regulate extensively the discharge of waste into waters of the State. The State Water Resources Control Board sets statewide water quality control policy. Cal. Water Code §§ 13140-13147. It also oversees the activities of nine Regional Water Quality Control Boards, which are responsible for water quality protection, permitting, inspection, enforcement, and formulating and adopting water quality control plans ("basin plans") within their respective regions. *Id.* §§ 13225, 13240.

Any "person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system," must file a report of waste discharge and obtain the necessary permits from the Regional Water Board. *Id.* §§ 13260(a)(1), 13263, 13269.

In fulfilling their responsibilities, the Water Boards have leveraged their proximity to and relationships with local stakeholders—including them in planning to set priorities and allocate funds, monitoring projects, developing local goals and performance standards, and reviewing permit applications. See California Water Boards, Watershed Management, at perma.cc/TN78-SKN5; Mem. of Understanding Between the Cal. Envt'l Protection Agency and the Cal. Resources Agency for the Implementation of the Framework for Protecting California's Watersheds at 4 (rev. Nov. 30, 2004), perma.cc/33RS-2RVC. These partnerships have enabled the Water Boards to develop more geographically sensitive standards and process permits more quickly.

3. Iowa similarly has both broad water quality protections, as well as measures specific to Iowa's land, economy, and communities.

Like the other States just discussed, Iowa defines "waters of the state" expansively to include "any stream, lake, pond, marsh, watercourse, waterway, well, spring, reservoir, aquifer, irrigation system, drainage system, and *any other body or accumulation of water*, surface or underground, natural or artificial, public or private." Iowa Code § 455B.171(41) (emphasis added). And it subjects all of the waters of the state to regulation.

Iowa imposes numeric water quality standards on all lakes and wetlands and designated stream segments. *Id.* § 455B.176A(5); Iowa Admin. Code r. 567-61.3(1), (3). And it subjects all other waters of the state to narrative

water quality standards. Iowa Code § 455B.176A(c); Iowa Admin. Code r. 567-61.3(2). Additionally, all wastes discharged to any waters of the state "must be of such quality that the discharge will not cause the narrative or numeric criteria limitations to be exceeded." Iowa Admin. Code r. 567-61.2(3). In addition, Iowa protects certain wetlands. Iowa Code §§ 456B.12, 456B.13. It also prohibits discharges from a point source to a water of the state without a permit, and effluent limits must allow the stream to meet or exceed water quality standards. *Id.* § 455B.183(1)(b)-(c).

In addition to implementing numerous laws and regulations dealing specifically with agriculture-related water management issues,[4] Iowa has also innovated to address the specific issues and needs it faces relating to water quality given its position as one of the leading agricultural producers in the nation. One major development is the Iowa Nutrient Reduction Strategy, and the Iowa Water Quality Initiative, which are implemented by the State in collaboration with local governments, federal government agencies, and private parties and organizations. Iowa Dept of Agriculture & Land Stewardship, Iowa Water Quality Initiative 2020 Annual Report at 6. The Strategy assesses the specific factors contributing to Iowa's water quality and offers tailored solutions and practices

[4] For example, Iowa has issued hundreds of pages of regulations relating to environmental protection requirements for animal feeding operations. Iowa Admin. Code r. 567-ch. 65. Additionally, Iowa has a number of agricultural drainage wells—wells that discharge cropland tile drainage water to underground aquifers—that were constructed a century ago. Iowa has been working with landowners to close them and been protecting the areas around them to address contamination. See Iowa Code § 460.203: Iowa Dep't of Agriculture & Land Stewardship, Ag Drainage Well Closure Assistance Program, perma.cc/E8BV-BQRE.

for Iowa's farms, businesses, and communities to protect and improve water quality. As part of the Strategy, the Iowa Department of Agriculture and Land Stewardship and its partners work with farmers to educate them about and help fund land use and water quality practices—such as cover crops, tillage practices, bioreactors, buffer strips, saturated buffers, and restored wetlands. *Id.* at 5.

As a result of Iowa's efforts, cover crops planted in Iowa increased from 379,000 acres in 2011 to over 3.1 million acres in 2020. Iowa Nutrient Research and Education Council, Crop Survey Results for 2020 (2021), perma.cc/D6M7-PMW9; Iowa Dep't of Agriculture & Land Stewardship et al., Iowa Nutrient Reduction Strategy 2018-19 Annual Progress Report at 4 (June 2020). Iowa leads the nation in "reduced tillage" acres—more than 10.1 million acres—and is third in no-till acres—more than 8.2 million acres. National Agricultural Statistics Services, USDA, Land Use Practices, Results from the 2017 Census of Agriculture at 1, perma.cc/3JMY-KDC4. Iowa has also increased the number of bioreactors and saturated buffers in the state. Iowa Department of Agriculture & Land Stewardship, Iowa Water Quality Initiative 2021 Annual Report at 1. And the State is currently constructing 40 new conservation wetlands. *Id.* According to a 2018 statewide LiDAR mapping of just six types of conservation practices, the value of the long-term investment by farmers and the public has been estimated at $6.2 billion. Iowa State University, Iowa Department of Nature Resources, Iowa BMP Mapping Project.

4. North Carolina has recognized that the "prudent utilization of" its water and air resources is "essential to the general welfare" of its people and, as such, has declared that it is the "State's ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens." N.C. Gen. Stat. § 143-211(a). Accordingly, North Carolina has codified its

commitment to "maintain, protect, and enhance water quality in North Carolina." *Id.* § 143-211(a).

In carrying out this commitment and responsibility, North Carolina generally prohibits any person from discharging waste into the waters of the State, unless he or she has obtained a permit. N.C. Gen. Stat. § 143-215.1. And that protection applies broadly: "Waters" of the State is defined to include "*any* stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, *or other body or accumulation of water, whether surface or underground*, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction." *Id.* § 143-212(6) (emphasis added). "Waters" includes "wetlands" that are "inundated or saturated by an accumulation of 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," with the exception of prior converted cropland. 15A N.C. Admin. Code § 02B.0202(61).

Furthermore, North Carolina, like California, has responded to limitations on federal jurisdiction by expanding its jurisdiction and consequent protections. In response to *Solid Waste Agency of New Cook County*, North Carolina's Department of Environmental Quality (NCDEQ) asserted regulatory authority over isolated wetlands. See 15A N.C. Admin. Code § 02H.1301. NCDEQ subjected discharges "resulting from activities that require State review after October 22, 2001 and that require a Division determination concerning effects on isolated wetlands and isolated classified surface waters" to its permitting requirements. *Id.* § .1301(b). And it expressly provided that the requirements applied to waters that the Corps determined are "not regulated under

Section 404 of the Clean Water Act" if the waters meet the definition of isolated waters. *Id.*

In 2021, NCDEQ again clarified its jurisdiction in response to the 2020 Navigable Water Protection Rule. NCDEQ adopted a temporary rule that broadened the definition of "isolated waters," *id.* § .1301(f)(7), and also broadened the agency's authority to include "federally non-jurisdictional wetlands and federally non-jurisdictional classified isolated wetlands." *Id.* § .1401(a)-(b). In short, the State's authority extends to all state wetlands and surface waters that were not jurisdictional under the federal CWA.

5. Kansas's regulatory regime also covers a broad range of water features. Kansas asserts jurisdiction over "waters of the state," which includes "all streams and springs, and all bodies of surface and subsurface waters within the boundaries of the state"—in short, all waters, including wetlands. See Kan. Stat. § 65-161(a); Kan. Admin. Reg. § 28-16-28b(sss).

Kansas prohibits the discharge of sewage into all of these waters and applies general narrative criteria to them as well. See Kan. Stat. § 65-164; Kan. Admin. Reg. § 28-16-28e(b). Kansas also applies numeric criteria to designated uses of surface waters and to "classified" stream segments, surface waters, lakes, wetlands, and ponds. Kan. Admin. Reg. § 28-16-28e(d).

Kansas also continues to develop and implement a state Water Plan, which sets forth policies and programs for the comprehensive management, conservation, and development of water resources—including water quality and water quantity issues. See Kan. Stat. § 82a-907. The development and implementation of the Plan is done in collaboration with state, local, and federal agencies, regional advisory committees, organizations, and the general public. Kan. Dep't of Health & Envt., Kansas

Nonpoint Source Pollution Management Plan 2019 Update at 22, perma.cc/6KKN-HWNQ (*NPS 2019 Update*).

Pursuant to the Water Plan, Kansas has developed a number of strategies for managing nonpoint sources. For example, it provides information, technical assistance, and financial assistance to landowners and citizens to implement best management practices—including terraces, filter strips, and pasture and rangeland planting. *Id.* at 30, 33; see also Kansas Water Office, Kansas Water Authority 2022 Annual Report to the Governor and Legislature at 16, 18, perma.cc/2VJ3-ANRE. And, recognizing that management of nonpoint source pollution is a shared responsibility between local, state, and federal bodies, the State works with local conservation districts to develop Local NPS Management Plans, local environmental protection plans, and local water quality protection plans. *NPS 2019 Update* at 41.

6. Ohio similarly asserts authority over "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters." Ohio Rev. Code Ann. § 6111.01(H).

All of the waters of the state are subject to a prohibition on pollution without a permit and subject to water quality standards, plans, and programs developed and adopted by Ohio's Environmental Protection Agency. *Id.* §§ 6111.03(A) ("develop plans and programs for the prevention, control, and abatement of new or existing pollution of the waters of the state"), 6111.04(A) (prohibition on pollution), 6111.037 (funding for control of non-point

sources of pollution), 6111.041 (adopt standards of water quality); Ohio Admin. Code §§ 3745 (implementing regulations), 901:13-1-01 *et seq.* (agricultural pollution abatement rules), 1501:3-12-01 *et seq.* (silvicultural pollution abatement rules).

All surface waters are subject to narrative water quality criteria, and additional numeric criteria apply to designated uses and specific waters within Ohio. Ohio Admin. Code § 3745-1-04 *et seq*. Wetlands—which are defined at least as broadly as the federal definition, see Ohio Rev. Code Ann. § 6111.02(P)—are similarly subject to narrative and numeric criteria. Ohio Admin. Code §§ 3745-1-50 to -54.

Furthermore, Ohio expressly protects "isolated wetlands." An "isolated wetland" is defined as "a wetland that is not subject to regulation under the Federal Water Pollution Control Act." Ohio Rev. Code Ann. § 6111.02-(F). Any person that seeks to engage in an activity that involves the filling of an isolated wetland or that discharges dredged material[5] into isolated wetlands must first apply for and obtain a permit from Ohio's Environmental Protection Agency. *Id*. §§ 6111.021(B), 6111.028-(A). Accordingly, Ohio law occupies any space that federal law does not cover.

7. South Dakota also has robust protections for the waters of its state, which include "all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems and all other bodies or accumulations of water, surface and underground, natural or artificial, public or

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[5] As under the CWA, "normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for production of food, fiber, and forest products" are exempt. Ohio Rev. Code Ann. § 6111.028(B)(2).

private, situated wholly or partly within or bordering upon the state." S.D. Codified Law § 34-A-2-2(12). Wetlands are considered "waters of the state" and afforded accordant protection. S.D. Admin. R. 74:51:01:11.

Since 1972, the State has maintained a State Water Plan, which seeks to conserve, develop, and manage use of the State's water resources for the optimum benefit of current and future generations. Additionally, South Dakota applies strict water quality standards that provide criteria for the State's bodies of water, as well as designating their beneficial uses. *Id.* § 74:51:01 *et seq.*

The efforts of these seven States are just a few examples of state engagement across the country. Against this background, the Court (and public) should have comfort knowing that, although the federal CWA no doubt will continue to play an important role in the protection of the Nation's water resources, it does not operate in a regulatory void. The States take seriously their role in land- and water-use regulation. This Court should adopt a standard to determine what constitutes "waters of the United States" that recognizes this role, as Congress intended.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

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APPENDIX

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Arizona Farm Bureau Federation
California Farm Bureau Federation
Colorado Farm Bureau
Illinois Farm Bureau
Indiana Agricultural Law Foundation
Iowa Farm Bureau Federation
Kansas Farm Bureau Legal Foundation
Minnesota Farm Bureau Federation
Missouri Farm Bureau Federation
Nebraska Farm Bureau Federation
New Mexico Farm & Livestock Bureau
North Carolina Farm Bureau Federation
North Dakota Farm Bureau
Ohio Farm Bureau Federation
Oklahoma Farm Bureau Legal Foundation
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Tennessee Farm Bureau Federation
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