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
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF COLORADO IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

At the Colorado Capitol, it is inscribed on the walls: "Here is a land where life is written in water." Written by one-time Colorado State Poet Laureate Thomas Hornsby Ferril, this poem exemplifies what all Coloradoans know: water is intricately connected to our way of life. Colorado has within its boundaries the headwaters of five major multistate river systems: the Platte, the Arkansas, the Republican, the Rio Grande, and the Colorado. Colorado's rivers supply millions of people in nineteen states and Mexico with water needed for drinking, agriculture, industries, and recreation. Water from these Colorado headwaters is also critical to the survival of aquatic life and healthy aquatic ecosystems, including federally endangered species and other species of conservation concern. As a headwaters state, Colorado brings an important perspective to the debate over how to define waters of the United States.

Colorado has a strong interest in the jurisdiction and application of the Clean Water Act for many reasons. These include protecting water quality, upon which so much of our economy and quality of life rely; providing healthy aquatic and wetland habitats for preserving Colorado's native species and protecting recreational and fishing opportunities and industries; maintaining state control over water rights administration and ensuring our continued ability to allocate and beneficially use our land and water resources in

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[1] Rule 37 statement: Petitioners have consented to Colorado filing an amicus brief in this matter and Respondents have provided blanket consent. *See* Sup. Ct. R. 37.3(a).

accordance with state law; and promoting agricultural activities with the regulatory certainty and flexibility necessary to feed people in Colorado and beyond. These cornerstone interests have been successfully accommodated by application of the significant nexus test for determining federal jurisdiction under several different presidential administrations, which is why Colorado has consistently advocated for a common sense reading of the Clean Water Act that includes federal protections for headwaters streams and wetlands under the significant nexus framework.[2]

Colorado also recognizes that managing the use of land and water resources is a traditional state power. Indeed, Colorado's prior appropriation system for water rights is enshrined in the State's constitution. Colo. Const. art. XVI, § 5 & 6. At the same time, because Colorado places such great value on our carefully managed water and aquatic resources, we also appreciate the important role that the federal government has played for decades under the Clean Water Act in protecting the quality of our wetlands and streams, particularly under the Army Corps of Engineers' dredge-and-fill permitting program.

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[2] *See, e.g.*, *State of Colorado Comments on Proposed Revisions to Definition of Waters of the United States*, Docket ID No. EPA-HQ-OW-2011-0880 (Nov. 13, 2014); *Colorado Comments on Revisions to Definition of Waters of the United States* (July 19, 2017); *State of Colorado Comments on Revised Definition of "Waters of the United States,"* Docket ID No. EPA-HQ-OW-2018-0149 (Apr. 15, 2019); *State of Colorado Comments on Proposed Rule Defining "Waters of the United States,"* Docket ID Nos. EPA–HQ–OW–2021–0602 and FRL-6027.4-03-OW (Feb. 7, 2022).

Many of Colorado's headwaters are small tributaries that run seasonally or only flow in response to storm events. The United States Geological Survey's National Hydrography Dataset estimates that 24 percent of Colorado's streams are ephemeral, and 45 percent are intermittent, meaning over two-thirds of Colorado's waters are temporary in nature and lack year-round flow.[3] *See* Fig. 1.

[3] United States Geological Survey's *National Hydrography Dataset*. Although this data provides the best available estimate of ephemeral and intermittent stream mileage statewide, it likely underestimates the true extent of these waters.

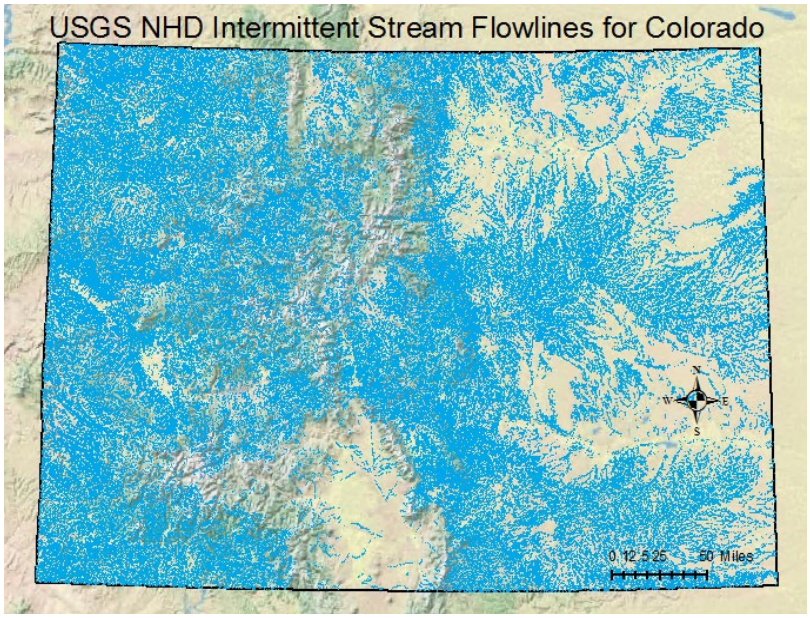

Fig. 1: Intermittent streams in Colorado based on USGS National Hydrography Dataset, 2019. This map does not include ephemeral drainages.

Similarly, a large percentage of Colorado's wetlands are not connected to perennial streams by surface flow,[4] but have long been recognized as tributaries to downstream waters because of their inextricable connection to Colorado's valuable water resources. Cumulatively, these waters can have significant effects

[4] A modeling study of the South Platte headwaters, one of Colorado's seven major watersheds, determined that between 15 and 54 percent of wetlands lacked the types of continuous surface connections to traditionally navigable waters required by Justice Scalia's plurality opinion in *Rapanos*. Meyer, R., and A. Robertson, Saint Mary's University of Minnesota, Winona, Minnesota, *Clean Water Rule Spatial Analysis: A GIS-based scenario model for comparative analysis of the potential spatial extent of jurisdictional and non-jurisdictional wetlands* (Jan. 16, 2019).

on waters at lower elevation that are ultimately used by the public for domestic water supply, recreation, and agricultural use. These types of resources could lose federal protection under a substantially narrowed test for jurisdiction such as that advocated by the Sacketts, because they lack continuous surface flows to more traditionally navigable waters downstream.

Colorado is particularly interested in protection of our high-quality water resources that support a variety of industries important to our state's economy. For example, tourism is the largest employer in the headwaters region for the Colorado, Gunnison, Yampa and South Platte river basins.[5] Clean water is the lifeblood of this industry, which includes fishing, hunting, kayaking, recreation on lakes and reservoirs, wildlife watching, hiking, and snowmaking for ski resorts. Other industries that make Colorado a uniquely great place to live and work also depend on clean water. Beermaking—from Coors' iconic brewery in Golden to hundreds of craft brewers—is part of Colorado's identity, and craft brewing has an economic impact of $3.4 billion in the state.[6] Brewers need reliable sources of clean water, and support protections for the water resources that are the key to their success.[7]

Nearly half of Colorado's acreage is dedicated to farming, ranching, and other agricultural activities

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[5] *Comments of the Northwest Colorado Council of Governments on Potential Rewrite of the Definition of "Waters of the United States"* (June 19, 2017).

[6] Brewer's Association, *Colorado's Craft Beer Sales & Production Statistics, 2021* (last visited Jun. 13, 2022).

[7] *Comments of Allagash Brewing Company, et al., on Revised Definition of "Waters of the United States,"* (March 7, 2019).

that contribute tens of billions of dollars a year to the State's economy. Agriculture provides an example of an industry that stewards the environment but needs certainty over what regulations apply to agricultural lands to allow for efficient operations.[8] Recognizing these important interests, Colorado has consistently supported and continues to support practical and necessary exemptions to Clean Water Act permitting for agricultural activities and exclusion (and further clarification) of prior converted cropland from the Act's jurisdiction. These limitations reflect a framework that protects headwater streams and wetlands with a significant nexus to downstream waters.

In short, Colorado's position as a headwaters state with strong interests in protecting water quality and aquatic resources and supporting the needs of agriculture and industry gives it a unique perspective on how to define the limits of federal Clean Water Act jurisdiction in a way that honors the Act's text and purpose while protecting state sovereignty over land use, water rights allocation, and the state's rights and obligations under interstate compacts and decrees of this Court equitably apportioning the flows of an interstate stream.

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[8] *See, e.g.*, *2018 Comments from Colorado Farm Bureau* (noting clean water is important to all farm families in Colorado and supporting proposal to revert back to the WOTUS rules in place prior to 2015).

SUMMARY OF ARGUMENT

A robust floor of federal water quality protection is central to the cooperative federalism structure put in place in the Clean Water Act. This structure recognized the failures of water pollution control legislation in place prior to 1972, when the modern statute was enacted, and replaced the previous ineffective patchwork of state laws and federal common law. The Act's careful balance of state and federal interests incorporates and depends on a strong federal role in setting and enforcing minimum standards for water quality protection.

Exercise of federal jurisdiction over tributaries and adjacent wetlands, as implemented through the significant nexus test articulated by Justice Kennedy in *Rapanos*, accommodates these carefully balanced interests and best reflects the text, purpose, and structure of the Clean Water Act. This test is particularly important in preserving a federal baseline in arid states like Colorado, where an obvious continuous surface connection to navigable waters may not be present for a large portion of our waters. Replacing that test with a substantially narrowed test for the scope of federal jurisdiction would upend settled expectations and harm states that have relied on the current scope of the Corps' dredge and fill program in fashioning their own water quality protection regimes.

The Court need not articulate a wide-ranging new test applicable to all surface waters to resolve this case, which involves a limited question of appropriate federal jurisdiction over wetlands. EPA and the Corps are currently engaged in an effort to revise the regulatory definition of "waters of the United States" that

will consider a broad range of stakeholder input and address important legal and scientific nuances among different categories of water resources. Thus, there is no need to reach beyond the issue here to announce a broadly applicable definition for all of the nation's surface waters.

ARGUMENT

I. The Clean Water Act created a framework of cooperative federalism with a robust federal floor of water quality protection.

The Sacketts urge adoption of a categorical rule that would shift to the states the regulatory burden to protect many waters—like tributary streams and wetlands—that may not have continuous surface connections to traditional navigable waters yet have undeniable effects on the quality of such waters. This proposed rule conflicts with Congress' creation of a "regulatory partnership" where both the federal agencies and states would work together to protect the "waters of the United States." *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489-490 (1987).

The Sacketts and several amici mischaracterize the nature of the question before the Court. It is not a choice between either federal jurisdiction or state sovereignty. To the contrary, the Clean Water Act supports overlapping state and federal jurisdiction over the nation's waters. The Act is one of the core examples of cooperative federalism, a regulatory structure where federal and state regulatory regimes complement each other, requiring a baseline of protection but giving states flexibility on how to meet that baseline. *See* Philip J. Weiser, *Towards A Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 665 (2001).

Section 101(b) of the Act recognizes the important role that states play in this cooperative regulatory scheme and makes clear that Congress did not intend to preempt the entire field. *See* 33 U.S.C.

§ 1251(b). But the Act's statement that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation and enhancement) of land and water resources" does not support the narrow definition of "waters of the United States" advocated by the Sacketts. Instead, Section 101(b) serves to highlight that it is the States' primary responsibility to *implement* the baseline protections established under the Act in concert with their own resource management frameworks. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (the Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective [in Section 101(b)]); *City of Arcadia v. EPA*, 411 F.3d. 1103, 1106 (9th Cir. 2005) (states' Section 101(b) role "in combating pollution" is consistent with CWA's "goals and policies").

While Section 101(b) correctly acknowledges state sovereignty over the development and use of land and water within each state, this Court has long recognized that federal standards control pollution of navigable waters. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 102 n.3 (1972). Such protection is undermined when the baseline of federal water quality standards is not applied to all water bodies that have significant impacts on the quality of traditional navigable waters. Our nation's waters do not recognize the invisible boundaries between states. Many of our waters are connected by gravity flow – starting from tributaries and associated wetlands and eventually flowing to our nation's largest rivers and lakes.

Thus, this Court has long recognized a federal role in controlling water pollution, distinct from water allocation or other resource management decisions that are more properly left to the states. Before the Clean Water Act, abatement of interstate water pollution was addressed by states bringing suits under the federal common law of nuisance. *See Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906); *New York v. New Jersey*, 256 U.S. 296, 313 (1921); *New Jersey v. New York City*, 283 U.S. 473, 481-82 (1931); *Illinois v. City of Milwaukee*, 406 U.S. 91, 106 (1972). As this Court recognized, the 1972 Clean Water Act amendments that created the current regulatory system displaced that common law. *See City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981). In doing so, the Court noted that "Congress' intent in enacting the [1972] Amendments was clearly to establish an all-encompassing program of water pollution regulation." *Id.*

With this history as a backdrop, the Clean Water Act, like other federal environmental laws, calls for a model of cooperative federalism where the federal agencies help maintain a level regulatory playing field among the states in helping to define common national goals while providing support to further those goals. The Act provides a framework for the federal government to develop policy while relying on states to "maintain[] the authority to control their own resources in partnership with enforcement and financial support from the federal government."[9] The Clean

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[9] B. Zollitsch, *Cooperative Federalism: Finding the Right Balance between Federal and State Roles in Implementing the Clean Water Act*, Wetland News, Vol. 29 No. 3, May/June 2019, at 3.

Water Act intentionally creates a uniform "national floor" of pollution protections by establishing minimum pollution controls for "waters of the United States," replacing an ineffective patchwork of state laws. *See* 33 U.S.C. § 1370 (requiring states to impose permit standards no less stringent than EPA's standards); *Arkansas v. Oklahoma*, 503 U.S. at 110 (the Act authorizes EPA "to create and manage a uniform system of interstate water pollution regulation"); S. Rep. No. 92-414, 92d Cong. 1st Sess. 7 (1972) (prior mechanisms for abating water pollution "ha[d] been inadequate in every vital respect.").

Thus, the 1972 Act was intended to expand, not narrow, federal baseline protection of water quality because prior mechanisms for addressing water pollution at the state level had not solved the nation's pervasive water pollution problem. But this expansion does not tread on the states' ability to administer their own land and water rights within their borders or impair any state's rights, duties, or obligations under interstate water compacts and Supreme Court decrees. States like Colorado successfully work with the federal agencies to administer the Clean Water Act permit programs side by side with their state-specific laws governing land and water rights. As an example, Colorado has a well-established water allocation system, enshrined in the state constitution and governed by a complex statutory process that has successfully protected water rights holders' ability to use their vested water rights alongside robust water quality protections provided by expansive Clean Water Act jurisdiction.

The Sacketts and their supporting amici seek to redefine the Act's cooperative federalism framework

in a way that draws an arbitrary line between state and federal jurisdiction, inevitably resulting in a return to an unworkable patchwork of water quality protection that serves neither federal nor state interests. Adopting this contorted interpretation of cooperative federalism would severely undermine the state/federal partnership for water quality protection that Congress envisioned and would lead to diminished water quality for the nation as a whole.

II. The significant nexus test best serves the text, purpose, and structure of the Clean Water Act, particularly in the arid west.

The Clean Water Act's text, legislative purpose, statutory structure, legislative history, and longstanding regulatory practice are all important considerations when determining its meaning. *See County of Maui v. Hawaii Wildlife Fund,* 140 S. Ct. 1462, 1470-73 (2020). The significant nexus test long used by EPA and the Army Corps of Engineers to determine the meaning of "waters of the United States"—and thus the limits of federal regulatory authority—is the framework most consistent with the language and structure of the Clean Water Act. And it represents the best method of protecting the nation's waters in states, like Colorado, where traditionally navigable waters are often connected to wetlands and tributaries in ways not obvious on the surface.

The Clean Water Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Reaching this goal is dependent on the protection of all waters with a significant nexus to navigable waterways. An interpretation that would strip federal protections from waters that lack a continuous surface connection to navigable waters, but which nevertheless have significant impacts on the quality of those downstream waters, would fundamentally undermine the basic goal of the Clean Water Act and turn the statute's carefully crafted cooperative federalism on its head. To serve the legislative purpose, the Clean Water Act must protect *all* "the Nation's waters."

Relying on the Act's text and purpose, between the late 1970s and the early 2000s, courts and the Agencies applied the Act broadly to protect many kinds of water bodies, including streams and wetlands. *See, e.g., U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24, 131-39 (1985).[10] In 1985, this

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[10] Regulations issued in 1977 and the 1980s defined the "waters of the United States" to cover: (1) waters used or susceptible of use in interstate and foreign commerce, commonly referred to as navigable-in-fact or "traditionally navigable" waters; (2) interstate waters; (3) the territorial seas; and (4) other waters having a nexus with interstate commerce. *See Permits for Discharges of Dredged or Fill Material into Waters of the United States*, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977); *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 45 Fed. Reg. 85,336, 85,346 (Dec. 24, 1980); *Interim Final Rule for Regulatory Programs of the Corps of Engineers*, 47 Fed. Reg. 31,794, 31,897 (July 22, 1982); *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,206, 41,251-54 (Nov. 13, 1986); *Clean Water Act Section 404 Program Definitions and Permit*

Court recognized that the Clean Water Act extends federal regulatory jurisdiction over waters and wetlands that "have significant effects on water quality and the aquatic ecosystem." *Id.* at 135 n.9. But this jurisdiction is not unlimited, and in 2001 this Court rejected the Corps' attempt to assert jurisdiction over an isolated abandoned gravel pit solely because the pit served as a habitat for migratory birds. In doing so, the Court recognized that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed [its] reading of the [Clean Water Act] in *Riverside Bayview Homes*." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001) ("*SWANCC*").

Asserting federal jurisdiction over those waters and wetlands that meet the significant nexus test as it has developed over the last few decades recognizes that pollution upstream impacts water downstream when there is a substantial chemical, physical, or biological connection between those waters, even if that connection is not continuous or is found in shallow subsurface flows.[11] Limiting the protections afforded by the Clean Water Act to situations where the waters in question are connected by continuous visible

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Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764, 20,765 (June 6, 1988).

[11] This does not include true groundwater, as opposed to shallow subsurface connections between surface waters. The term "waters of the United States" does not include groundwater. *See, e.g., County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1472 (2020) (noting that in the Clean Water Act "Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.").

surface flow, as the Sacketts suggest, would effectively read out federal protections for arid parts of the country, like Colorado, despite the presence of clear, objective markers of a significant nexus between headwater streams and wetlands and downstream navigable waters. Ephemeral and intermittent waters play a large collective role in maintaining and defining the physical, chemical, and biological integrity of perennial waters.[12] Impairment or loss of these systems through unregulated fill or pollution would have considerable and long-lived negative consequences for fisheries, ecosystem services, and economies dependent on them.[13]

There is unlikely to always be a bright line between ephemeral and intermittent waters in states like Colorado. In one year, a stream may appear ephemeral, and in others it may appear intermittent. Some streams may appear perennial (flowing for years at a time) but may lose surface flow during periods of drought. Particularly in the west and other arid climates, streams and stream reaches may have no surface flow, with a channel morphology indicative of ephemeral flow, but may flow for years at a time after large precipitation events fill perched aquifers (which occur where impermeable layers of rock or sediment

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[12] *See generally* EPA, *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid American Southwest* (Nov. 2008).

[13] *See More Information Regarding the Science of Tributaries*, Appendix 2 to State of Colorado Comments on Revised Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2018-0149 (Apr. 15, 2019), at 4.

hold water above the main water table) that sustain baseflow in streams thought to be ephemeral.[14]

When these streams are flowing, they are easily identifiable as "waters" that connect downstream. *See* Fig. 2. And when they lose flow, these features still have objective markers of other rivers and streams, and still play important roles supporting the chemical, physical, and biological integrity of connected waters. *See* Fig. 3. These tributary streams, wetlands, and open waters in floodplains and riparian areas are connected to and strongly affect the water quality of downstream traditional navigable waters. For example, these waters provide seasonal runoff which provide critical base flows to downstream waters, and regulate the supply of nutrients and sediments, improving water quality and aquatic ecosystem health in downstream waters.[15]

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[14] *Id.* at 1.

[15] *Id.* at 4.

Fig. 2: East Fork of McKenzie Creek, near Ridgway Colorado, May 2015.

Fig. 3: East Fork of McKenzie Creek, near Ridgway Colorado, December 2015.

Similarly, Colorado boasts a plethora of species of aquatic organisms, including sensitive macroinvertebrates and endangered species of fish and amphibians, that inhabit ephemeral and intermittently flowing streams or wetlands.[16] Streams that flow only seasonally can provide important habitat for aquatic life, even though they are dry for a significant portion of the year. Cottonwood Creek in the Gunnison River basin is an example of a snowmelt driven stream that typically only flows during April through June in years with near average or above average snowpack. Despite flowing only seasonally, the creek is used annually by over 10,000 individual at-risk native Bluehead Sucker, Flannelmouth Sucker, and Roundtail Chub for spawning and larval rearing. Spawning habitats provided by tributaries like Cottonwood Creek are necessary for the persistence of many western native fishes, especially as water use and biological invasions alter and threaten other habitats that those fishes use.[17] *See* Figs. 4 & 5.

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[16] *Biological Importance of Ephemeral and Intermittent Streams and Non-Adjacent Wetlands in Colorado*, Appendix 1 to State of Colorado Comments on Revised Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2018-0149 (Apr. 15, 2019).

[17] *See* Hooley-Underwood et al., *Razorback Sucker Spawning in an Intermittent Colorado Tributary* (2021).

Fig. 4: Cottonwood Creek, Gunnison River Basin, April 2016.

Fig. 5: Cottonwood Creek, Gunnison River Basin, June 2016.

Leaving protection of these waters entirely to the individual states does not serve the Act's text, structure, or purpose. Indeed, upending settled expectations over Clean Water Act jurisdiction with a dramatic change in the operable test would harm Colorado, including serious negative effects on its own efforts to protect the waters within its borders, which rely on the balanced federal-state partnership created by the Act.

The federal Act provides that states can administer either the Section 402 NPDES permit program or the Section 404 dredge and fill permit program if they meet certain federal requirements under the Act and receive approval from EPA. 33 U.S.C. §§ 1342(b); 1344(g), (h); *see also* 40 C.F.R. § 233 (setting forth requirements to assume Section 404 permitting authority). Nearly all states, including Colorado, administer the Section 402 permit program for point source discharges. *See* 40 Fed. Reg. 16,713 (April 14, 1975) (granting Colorado's request for approval of its program for controlling discharges of pollutants to navigable waters under Section 402(b) of the Act).

By contrast, nearly all states, also including Colorado, rely on the Army Corps of Engineers to administer the Section 404 program and have not created a comprehensive state program or sought EPA approval of such a program. In many cases, the cost and administrative burden of assuming the Section 404 program are prohibitive barriers.[18] Assumption

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[18] *See, e.g.*, Oliver A. Houck and Michael Rolland, *Federalism in Wetlands Regulation: A consideration of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242,

requires a complex application process in which a state must demonstrate regulatory authority equivalent to the federal program, including authority to issue permits, make jurisdictional determinations, process permitting exemptions, enforce the program, and manage mitigation requirements. Yet the Clean Water Act does not provide any dedicated federal funding for administration of the Section 404 program.[19] Having the Corps administer a comprehensive program with a federal floor provides economies of scale in implementation that do not exist at the state level.[20] Finally, the Act requires the Corps to retain exclusive

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1280-81 (1995) (describing funding challenges related to Section 404 program assumption efforts by Maryland and North Dakota); *see also* Alex Brown, *More States Want Power to Approve Wetlands Development* (May 11, 2022) (noting that Michigan spends more than $12 million a year and has more than 80 staffers who work on Section 404 applications).

[19] Minnesota Department of Natural Resources, *Briefing Paper on Clean Water Act Section 404 Assumption in Minnesota* (Dec. 2014) at 3.

[20] For example, most permits issued by the Corps, including Letters of Permission, Nationwide and General Permits, do not have a permit fee. Individual Permits have fees of $10 for individuals and $100 for businesses. *See* U.S. Army Corps of Engineers, *Regulatory Program Frequently Asked Questions*, (last visited Jun. 13, 2022).

By contrast, Colorado estimated that it would require annual fees of $750 for general permits and $10,000 for individual permits to fund the costs of administering a state-level dredge and fill permitting program to address projects no longer subject to federal jurisdiction under the narrow definition of "waters of the United States" put forth in the 2020 Navigable Waters Protection Rule. *See* Colorado Department of Public Health and Environment, *Potential for a state regulatory program*, (last visited Jun. 13, 2022).

regulatory oversight for certain "non-assumable" waters, meaning that even successful state assumption of the federal program does not result in sole state administration. *See* 33 U.S.C. § 1344(g)(1).

Under the current framework, project sponsors in the vast majority of states where the Corps administers the Section 404 program know to get their projects permitted through the federal process. For Colorado to establish its own permitting program for fill activities would require amendment of the Colorado Water Quality Control Act, promulgation of new regulations, and appropriation of significant funding for new permitting and mitigation programs.[21] Thus, the suggestion by some amici that use of the significant nexus test creates more burdens on states misunderstands the federal-state partnership.

The federal Section 404 permitting program administered by the Corps in Colorado allows for the discharge of dredged or fill material into waters of the United States under a longstanding federal regulatory scheme. Permit applicants must describe the likely pollutants; show that they have worked to avoid impacts to aquatic ecosystems and minimized potential impacts; and demonstrate that they have provided for compensatory mitigation for all remaining unavoidable impacts. *See* 40 C.F.R. §§ 230.10(a) and (d), 230.70-77, 230.91-98. In the arid west, this regulatory scheme effectively steers many project proponents away from project alternatives that can impact rivers and

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[21] *See* Colorado Department of Public Health and Environment, *Dredge and Fill White Paper No. 1: Colorado Dredge and Fill Permitting Considerations in Response to the 2020 Navigable Waters Protection Rule* (Jan. 29, 2021).

perennial streams and toward alternatives that involve dry drainages that are isolated from or lack a significant nexus to traditionally navigable waters.[22] Thus, project sponsors have incentives to avoid impacts to waters and wetlands that connect with downstream resources, and have the ability to get projects permitted more quickly and with fewer mitigation requirements by avoiding these waters.[23] Under the test advocated by the Sacketts, Colorado would suddenly find itself with about 54 percent of its watershed area unprotected by the federal Section 404 permit program, without an existing state dredge and fill permit program to replace it.[24]

The significant nexus test, as it has long been applied by the federal agencies, is the most efficient mechanism for both protecting the nation's waters and providing certainty to both states and potential permittees.

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[22] *Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule Defining Waters of the United States*, Prepared for Western Urban Water Coalition by ERO Resources Corporation (Nov. 2014), at 4.

[23] *Id.*

[24] Colorado Department of Public Health and Environment, *Dredge and Fill White Paper No. 1: Colorado Dredge and Fill Permitting Considerations in Response to the 2020 Navigable Waters Protection Rule* (Jan. 29, 2021), at 6, 9-10.

III. The question before this Court is limited and should not be used to announce a broad change in how the agencies regulate under the Clean Water Act.

The Sacketts have asked this Court to use their individual challenge to federal jurisdiction over a wetland on their property to announce an entirely new framework for determining the extent of "waters of the United States." But this case is not the appropriate vehicle for upending years of settled regulatory practice with a new bright line test that could extend to both wetlands and tributaries. *See, e.g., U.S. v. Hubenka*, 438 F.3d 1026, 1032 (10th Cir. 2006) (recognizing the distinction between the isolated gravel pits at issue in SWANCC and tributaries).

The jurisdictional status of the unnamed tributary to Kalispell Creek adjacent to the Sackett's property, as a "relatively permanent" water feature, was apparently not in dispute in the proceedings below. *See Sackett v. EPA*, No. 19-35469, 8 F.4th 1075, 1092 (9th Cir. 2021). Thus, to determine the jurisdictional status of the wetlands that are the subject of EPA's order, this Court need only answer the narrow question of how to define the appropriate connection between the wetlands and the tributary to Kalispell Creek; there is no question that the tributary itself is properly within the jurisdiction of the Clean Water Act. The Court need not and should not craft a new jurisdictional test applicable to features beyond the wetlands at issue. Restraint is particularly appropriate where the federal agencies are currently engaged in a rulemaking process that will provide an opportunity to craft a workable rule for all types of

waterbodies with the benefit of a full administrative record. 86 Fed. Reg. 69,372 (Dec. 7, 2021).

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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