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 AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Much of Public Citizen's research and policy work focuses on regulatory matters, and Public Citizen is often involved in litigation either challenging or defending agency action. Significant questions of administrative law, and of statutory construction bearing on the scope of agency authority, are thus central concerns of Public Citizen. Public Citizen has often filed briefs in cases raising such issues. *See*, *e.g.*, *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778 & 20-1780 (brief filed Jan. 25, 2022); *Biden v. Texas*, No. 21-954 (briefs filed March 18 and May 9, 2022).

SUMMARY OF ARGUMENT

Petitioners advance a novel construction of the term "waters of the United States" in the Clean Water Act, 33 U.S.C. § 1362(7), as the basis for the second step of a proposed "two-step framework" that would limit federal regulatory authority under the Act to "those waterbodies subject to Congress's authority over the channels of interstate commerce." Pet. Br. 5–6. That limitation, in petitioners' view, extends "no farther upstream from traditional navigable waters than those wholly intrastate waters that, when combined with non-aquatic means of transportation, form a continuous channel of interstate commerce." *Id*. at 7.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties have consented in writing to its filing.

Petitioners' argument rests in large part on the assertion that Congress's use of the term "waters of the United States" to define the scope of the Clean Water Act carried with it narrow limits on that term that derive from the use of the same phrase in a statutory provision enacted decades earlier: section 10 of the Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121, 1151, *codified at* 33 U.S.C. § 403. Petitioners invoke the interpretive principle that when statutory language is "obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947), *quoted in Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018).

Petitioners, however, ignore key limitations on this principle, which does not apply when the transplanted term had no well-settled meaning in the earlier source or when the language, structure, and context of the later statute using the term reveal a different meaning. Here, these considerations require rejection of petitioners' application of the "old soil" maxim and the construction of "waters of the United States" they derive from it, for two independent reasons: First, when the Clean Water Act was enacted, the phrase "waters of the United States" did not have a well-settled meaning that limited its scope to navigable waters that form parts of interstate transportation networks. Second, explicit statutory text in the Clean Water Act, and the distinct, congressionally enacted purposes of that Act, foreclose the inference that the meaning of the term "waters of the United States" in the Clean Water Act is limited by whatever scope that term had in section 10 of the Rivers and Harbors Act.

ARGUMENT

The Clean Water Act generally prohibits unpermitted discharges of pollutants, including fill materials, to "navigable waters" from point sources. *See* 33 U.S.C. §§ 1311, 1362(12). The Act defines the "navigable waters" to which this prohibition applies with a broad phrase that, tellingly, omits any reference to navigation or navigability: "The term 'navigable waters,' " the Act states, "means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). This Court has thus repeatedly recognized that "the term 'navigable' as used in the Act is of limited import" and that the Act's prohibition of unpermitted discharges extends to "waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *see also Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167–72 (2001); *Rapanos v. United States*, 547 U.S. 715, 730–31 (2006) (plurality); *id.* at 767–68 (Kennedy, J., concurring in the judgment).

Petitioners, however, advance the view, long rejected by the Court, that regulatory authority under the Act is limited to waters that are navigable in fact. Through the second step of their proposed "two-step test," petitioners would restrict the Act's application to navigable waters that are part of a transportation network that "form[s] a continuous channel of interstate commerce." Pet. Br. 7. Central to petitioners' position is the argument that, in using the apparently expansive phrase "waters of the United States" to define the "navigable waters" subject to the Act, Congress was incorporating language previously used in section 10 of the Rivers and Harbors Act of 1899 and,

hence, adopting the meaning of the phrase as used in that statute. Petitioners contend that, in the Rivers and Harbors Act, the phrase "waters of the United States" was "legislative shorthand for all waters subject to Congress's power to regulate the aquatic channels of interstate commerce." *Id.* at 32. Those waters, in petitioners' view, are limited to those that are (or have been) "navigable in fact" or "could reasonably be so made." *Id.* at 32–33. Invoking this Court's endorsement of Justice Frankfurter's view that statutory language derived from prior statutes "brings the old soil with it," *Hall v. Hall*, 138 S. Ct. at 1128, petitioners conclude that the Clean Water Act's scope is limited to navigable waters that are part of an interstate transportation network.

Petitioners' reliance on this Court's quotation of Justice Frankfurter's observation about statutory "old soil" is fundamentally misplaced. The phrase "waters of the United States" was never the "legislative shorthand" that petitioners claim. Moreover, regardless of the meaning of the phrase in the earlier statute, the text, structure, context, and explicitly stated statutory purposes of the Clean Water Act preclude giving the phrase petitioners' proposed construction.

I. The interpretive principle that petitioners invoke applies only when context indicates that Congress adopted the well-settled meaning of a term of art.

As Justice Scalia explained, Justice Frankfurter's "old soil" comment "colorfully" expresses the familiar canon of statutory construction that when Congress employs "terms of art" with "well-settled meaning," it "intends to incorporate" that meaning. *Sekhar v. United States*, 570 U.S. 729, 732–33 (2013). That

principle applies both to terms that have an established common-law meaning and to statutory terms that have acquired a settled meaning through judicial construction or, in some cases, administrative use. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Judicial Texts* 320–33 (2012) (describing "canon of imputed common-law meaning" and "prior-construction canon"). Construing a statute based on the established meaning of terms borrowed from prior statutes that address related subjects is a specific application of the more general principle that, where context indicates that a legislature has employed a word with a technical legal meaning (or some other term of art), its technical sense may prevail over its ordinary, everyday meaning. *See id.* at 73, 324. In other words, a statutory term that has been authoritatively construed "has acquired … a technical legal sense … that should be given effect in the construction of later-enacted statutes." *Id.* at 324.

This interpretive principle has inherent limits. To begin with, as this Court has emphasized in its most recent decisions discussing the subject, "[a]lthough statutory language 'obviously transplanted from another legal source' will often 'bring the old soil with it,' that principle applies only when a term's meaning was 'well-settled' before the transplantation." *Kemp v. United States*, 596 U.S. __, __ (2022) (slip op. at 9–10) (citations omitted). Prior construction is controlling only to the extent there is a " 'prevailing understanding' of [a] term of art 'under the law that Congress looked to when codifying' it." *George v. McDonough*, 596 U.S. __, __ (2022) (slip op. at 11–12). Only in such circumstances does the "old soil" provide a reliable indication of "the term's meaning at the time of the [later] Act's adoption"—that is, the way "most people

then would have understood" it. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); *see also Yellen v. Confed. Tribes of Chehalis Reservation*, 141 S. Ct. 2434, 2445 (2021) ("Ordinarily … this Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption.").

Moreover, even when a statutory word or phrase had a settled meaning at common law or in a prior statute, the language, structure, or context of a newer statute using the same word or phrase may reveal a different meaning. The principle calling for giving a statutory word or phrase an established legal meaning gives way "when the application of other sound rules of interpretation overcomes this canon." Scalia & Garner, *Reading Law*, at 324. Thus, if express language in a more recent statute is incompatible with giving a statutory term an established meaning from a prior statute, the basic principle that the plain meaning of a statute's text is controlling, *see Yellen*, 141 S. Ct. at 2441, will foreclose importation of the interpretation given to the prior statute.

Statutory context and structure may also weigh decisively against treating a statutory phrase as a term of art incorporating the meaning given to other statutes using the same phrase. *See Yellen*, 141 S. Ct. at 2443–44; *Johnson v. United States*, 559 U.S. 133, 139, (2010); *see also Gonzales v. Oregon*, 546 U.S. 243, 282 (2006) (Scalia, J., dissenting) ("We do not force term-of-art definitions into contexts where they plainly do not fit[.]"); Scalia & Garner, *Reading Law* at 73, 321 (context determines whether a statute uses a term of art).

The relevant context includes statutory purposes expressly stated in or inferable from the text, as "[t]he evident purpose of what a text seeks to achieve is an essential element of context that gives meaning to words." Scalia & Garner, *Reading Law* at 20. And where it is evident that statutes use the same language to address different subjects or achieve different ends, the construction given them in the earlier statute is not dispositive. *See*, *e.g.*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522 (1994); *see also United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("[T]he meaning of the same words well may vary to meet the purposes of the law."). The inference that Congress intended to adopt the settled meaning of language used in an earlier statute is more likely to be appropriate "when Congress uses the same language in two statutes having similar purposes." *Smith v. City of Jackson*, 544 U.S. 228 , 233 (2005) (plurality opinion); *see United States v. Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J. concurring in part and in the judgment) (same); *see also Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmties. Proj., Inc.*, 576 U.S. 519, 580 (2015) (Alito, J. dissenting) ("[I]dentical language in two statutes having similar purposes should generally be presumed to have the same meaning."); *e.g.*, *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (reading language in two statutes to have the same meaning where "the two provisions share a common raison d'etre").

II. The meaning of "waters of the United States" in the Clean Water Act is not controlled by the Rivers and Harbors Act.

A. The phrase had no well-settled meaning under the earlier statute.

Petitioners argue that "waters of the United States" in the Clean Water Act must be given the narrow meaning that they advocate because it was "transplanted" from the Rivers and Harbors Act. That argument, however, fails the most basic requirement of the interpretative principle on which it rests because the phrase's meaning was not " 'well-settled' before the transplantation." *Kemp*, slip op. at 10.

The phrase "waters of the United States," unlike the narrower and much more widely used term "navigable waters of the United States," was seldom used in legal sources before it appeared in the Clean Water Act.[2] In the Rivers and Harbors Act, the sole statute petitioners identify that uses the phrase without the adjective "navigable" modifying "waters," it appears only in two clauses in section 10—neither of which supports petitioners' claim that the term was "shorthand" for navigable waters forming part of interstate channels of commerce.

The first clause to use the term appears in section 10's prohibition of "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States."

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[2] For examples of the narrower phrase, see *The Daniel Ball*, 77 U.S. 557, 563 (1870) (interpreting "navigable waters of the United States" in 5 Stat. 304 (1838)); *United States v. Standard Oil Co.*, 384 U.S. 224, 227 (1966) (construing Section 13 of the Rivers and Harbors Act, 33 U.S.C. § 407, which applies to "navigable waters of the United States" and their tributaries).

That provision does not imply that navigability is a *defining* feature of all "waters of the United States." The provision's *substantive* prohibition applies only to the extent that a particular body of water has some "navigable capacity" that has been obstructed. The sentence does not, however, suggest that all "waters of the United States" are navigable or have the capacity to be so.

The second use of the term "waters of the United States"—without the adjective "navigable"—occurs in section 10's prohibition of the unauthorized building of structures "in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established." In this provision, "other water of the United States" appears following a list of specific types of waters that all share the feature of navigability. As the United States explains, U.S. Br. 46, that particular use of the phrase, in context, was likely limited to navigable waters under the principle of ejusdem generis, as a catch-all phrase following a list of specific items that all share a particular characteristic. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163–64 (2012). But that context-specific use of "other water of the United States" to refer to other navigable waters does not suggest that the phrase "waters of the United States" standing alone was a legal term of art referring only to navigable channels of commerce.

Because the language of section 10 does not on its face establish that "waters of the United States" was a legal term of art with the meaning petitioners ascribe to it, their argument requires a showing that authoritative decisions of this Court, or a body of consistent decisions of lower tribunals, had given a

settled meaning to those words by the time Congress used the phrase in the Clean Water Act. But petitioners point to no such construction. Although this Court had issued a number of decisions addressing the Rivers and Harbors Act's use of the term "navigable waters of the United States," petitioners cite no decisions in which the Court addressed the meaning of "waters of the United States" in section 10. In *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925), this Court considered section 10's prohibition on obstruction of the navigable capacity of "waters of the United States," but that decision did not construe the term "waters of the United States"—likely because no one would have suggested that the waters whose navigable capacity was allegedly impaired (Lake Michigan and the entire system of lakes, rivers, and harbors downstream from it) failed to qualify under any possible meaning of the words.

Likewise, petitioners point to no lower-court decisions predating the Clean Water Act that *considered*, let alone *settled*, the meaning of "waters of the United States" in section 10. Indeed, they cite only one decision that supposedly construed the relevant phrase in section 10, *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608–09 (3d Cir. 1974), and that decision does not in fact address the term "waters of the United States." Rather, *Stoeco Homes* concerned the clause in section 10 prohibiting excavation in "any navigable water of the United States"—not the meaning of the phrase "waters of the United States" elsewhere in section 10.[3] Further, the decision came *after* the Clean

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[3] The case also concerned an alleged violation of section 13 of the Rivers and Harbors Act, 33 U.S.C. § 407, which likewise uses

(*Footnote continued*)

Water Act's enactment—too late to have informed Congress's choice of words or to have supplied a "settled meaning" that Congress could have adopted. Neither *Stoeco Homes* nor any other precedent suggests that the "term's meaning was 'well-settled' *before* the transplantation." *Kemp*, slip op. at 10 (emphasis added); *see*, *e.g.*, *Yellen*, 141 S. Ct. at 245; *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019) (rejecting a term-of-art reading absent evidence of a term's meaning "at the time of its adoption").

B. Statutory language and context confirm that the Clean Water Act does not mirror section 10 of the Rivers and Harbors Act.

Whatever meaning "waters of the United States" had in section 10 of the Rivers and Harbors Act, the context of the phrase's use in the Clean Water Act does not support the inference that Congress intended it as a term of art incorporating its meaning in the earlier statute. In particular, the express language of the two statutes refutes any suggestion that its use in each was aimed at "similar purposes." *Castleman*, 572 U.S. at 174 (Scalia, J., concurring).

The language of section 10 of the Rivers and Harbors Act reflects a singular focus on regulating structures and activities that could threaten to impede navigation. Each of its three parts serves that purpose in a different manner: The first comprehensively prohibits the creation of any obstruction to the navigable capacity of a body of water; the second prohibits erection of structures in navigable waterways without authorization from the Secretary of the Army; and the third

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the phrase "*navigable* waters of the United States" (emphasis added).

prohibits excavation, fill, or other physical alteration of navigable waters. *See* 33 U.S.C. § 403. To be sure, the scope of the statute includes activities outside the navigable portion of a waterway if they could obstruct its navigable capacity, as *Sanitary District of Chicago* illustrates. *See* 266 U.S. 405. But its language centers on protecting navigation. The caption of the section, as codified, reflects that purpose: "Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in." 33 U.S.C. § 403.

The Clean Water Act, by contrast, uses the term "waters of the United States" to define the scope of regulatory provisions with a much broader purpose that is expressly stated in the statutory text: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The objective of restoration and maintenance of "the chemical, physical, and biological integrity of the Nation's waters" has no necessary relationship to whether a discharge of pollutants into a system of waterbodies occurs in a part of the system that is a component in an interstate commercial transportation network. Congress's stated objective, therefore, belies any inference that, in defining the scope of the prohibitions on discharges aimed at achieving that objective, Congress would have chosen to employ a "term of art" that would limit regulation of discharges using a criterion wholly unrelated to advancing the law's stated purpose—and, indeed, one likely to thwart that purpose. In Justice Scalia's words, "[w]e do not force term-of-art definitions into contexts where they plainly do not fit." *Gonzales*, 546 U.S. at 282 (Scalia, J., dissenting).

The Clean Water Act's text also directly forecloses petitioners' argument that, in defining the "navigable

waters" subject to regulation under the Act as all "waters of the United States," Congress adopted a term that excludes all waters that are not components of interstate commercial transportation networks. As this Court has recognized, section 404(g) of the Act, 33 U.S.C. § 1344(g), explicitly states that the waters covered by the Act include waters "other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce." *See Rapanos*, 547 U.S. at 731 (plurality). The Clean Water Act fulfills its stated objective of "preserving traditional state authority," Pet. Br. 46, not by excluding all such other waters from regulation altogether, but, in part, by allowing states, with approval of the EPA Administrator, to assume administration of the fill-permitting program for waters that cannot be used for transportation. *See* 33 U.S.C. § 1344(g).

Finally, the error of petitioners' "old soil" argument is underscored by their own failure to apply the interpretive principle they advocate in a coherent way. Even petitioners recognize that limiting the Clean Water Act to what they claim "waters of the United States" meant in section 10 of the Rivers and Harbors Act (i.e., "interstate" navigable waters) would be untenable. They therefore propose broadening their own invented term of art to include intrastate navigable waters that are connected to non-aquatic interstate transport networks. Pet. Br. 39–40. That definition of "waters of the United States," however, neither corresponds to any well-settled meaning that Congress could possibly have adopted when it enacted the Clean Water Act, nor bears any relationship to the language or stated objectives of the Act itself. Moreover, that

definition was expressly rejected by the plurality opinion in *Rapanos*. *See* 547 U.S. at 731 n.3. And it would have the anomalous effect of making the Clean Water Act's prohibition of discharges of pollutants to "waters of the United States" drastically narrower than the prohibition of depositing "refuse" into waters (or onto their banks) in section 13 of the Rivers and Harbors Act, 33 U.S.C. § 407, which applies both to navigable waters and their non-navigable tributaries. Adopting such a construction would overturn the statutory text and design while (petitioners hope) bolstering petitioners effort to prevail in this case despite the connection between the wetlands on their property and a tributary of a concededly navigable lake, as well as a connection to the lake itself.

This Court has recognized repeatedly that the Clean Water Act's definition of "navigable waters" as "the waters of the United States" extends regulation beyond traditionally navigable waters while retaining the requirement of some connection to traditional navigable waters. Petitioners' proposed "two-step framework" would overturn the Court's repeated holdings. Because the textual argument that petitioners advance for their "second step" rests solely on a mistaken invocation of the "old soil" interpretive principle, this Court should reject petitioners' misguided "framework."

CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

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