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 FOR AMERICAN SUSTAINABLE BUSINESS NETWORK, NATIONAL LATINO FARMERS AND RANCHERS TRADE ASSOCIATION, ECOLOGICAL RESTORATION BUSINESS ASSOCIATION, AND CRAFT BREWERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MAX E. RODRIGUEZ
ALISON BOROCHOFF-PORTE
POLLOCK COHEN LLP
60 Broad Street, 24th Floor
New York, NY 10004
(212) 337-5361

BENJAMIN D. BATTLES
Counsel of Record
POLLOCK COHEN LLP
50 Lakeside Avenue
Burlington, VT 05401
(802) 793-5512
ben@pollockcohen.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*

The American Sustainable Business Network (ASBN), the National Latino Farmers and Ranchers Trade Association (NLFR), the Ecological Restoration Business Association (ERBA), and the Craft Brewers submit this brief as *amici curiae* in support of respondents.[1]

Amici and their members collectively represent hundreds of thousands of American businesses that depend on consistent sources of clean water for their economic success and the health of their communities. *Amici*'s members also routinely conduct activities subject to federal regulation under the Clean Water Act. *Amici* and their members thus keenly appreciate the need for both robust protection and jurisdictional clarity under the Act.

ASBN originated in 2022 as a merger of two longstanding business organizations committed to sustainable and equitable corporate practices—the Social Venture Network and the American Sustainable Business Council. ASBN develops and advocates solutions for policymakers, business leaders, and investors that support an equitable, regenerative, and just economy that benefits all—people and planet. As a multi-issue membership organization advocating on behalf of

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

every business sector, size, and geography, ASBN and its association members collectively represent over 250,000 businesses.

NLFR provides policy advocacy, farm management and sustainability training, conservation best practices, and technical assistance that enables Latinos and multiethnic farmworkers, farmers, and ranchers who have been historically discriminated against to transition and thrive in indigenous, regenerative, and sustainable farming and ranching operations, while strengthening and safeguarding our national food supply system.

ERBA's mission is to support private investment in durable environmental results that enable responsible economic growth. First established in 1998 as the National Mitigation Banking Association, ERBA promotes federal legislation and smart regulatory policies that encourage and advance compensatory mitigation and private investment in ecological restoration as the preferred means to offset adverse impacts to our nation's natural resources and coastal communities.

The Craft Brewers participate in a coalition of craft breweries from across the United States. The Craft Brewers operate businesses dependent on consistent sources of clean water and rely upon the Clean Water Act to protect their water supply and their business operations.[2]

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[2] The individual breweries that form the coalition are listed in the Appendix.

Amici, their members, and their communities stand to be affected by any decision that undermines the Clean Water Act.

SUMMARY OF ARGUMENT

Businesses throughout the United States and across a wide variety of industries—from brewing to agriculture to real estate—depend on the Clean Water Act's protection of wetlands for their economic success and the health of their communities.

Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As relevant here, the Act prohibits the unpermitted discharge of any pollutant—including "dredged spoil," "rock," and "sand"—into the "waters of the United States." 33 U.S.C. §§ 1311(a), 1362(6), (7), (12).

The Act's text, structure, and history make clear that any judicial definition of "waters of the United States" must encompass wetlands that are chemically, physically, and biologically linked with traditionally navigable waters.

Petitioners' position that the definition of "the waters of the United States" necessarily excludes most of the country's wetlands, if adopted by the Court, would significantly undermine the Act's protections and threaten significant economic harm to business *amici* and their members. Petitioners' position would

significantly lower the federal floor of protection, threatening downstream water quality from upstream filling and polluting. Furthermore, a collapse of federal uniformity would steeply increase uncertainty and force businesses to rely on an inconsistent patchwork of state and local regulations when conducting or expanding their operations.

Wetlands provide crucial benefits for the American economy. Wetlands protect farming operations from flooding, ensure pure water quality for breweries, and support outdoor tourism. Reducing protections for wetlands stands in direct opposition to the needs of the business community that *amici* represent. Indeed, the vast majority of small business owners favor federal regulations that protect wetlands.

Amici are themselves frequently subject to regulation under the Clean Water Act and thus recognize the importance of clearly defining the Act's reach. But *amici* disagree that clarifying the scope of federal jurisdiction requires rolling back the Act's protections. To the contrary, *amici* believe the benefits of robust and durable regulation under the Clean Water Act far outweigh the costs. In *amici*'s view, clarity is better achieved through the clear adoption of a science-based standard for identifying federally protected waters that is consistent with the Act's text, structure, and history.

Establishing such a standard is critical for enabling the federal agencies to implement the Act based on their expertise, for ensuring that American businesses

have regulatory certainty as they plan their business activities, and for guaranteeing that they and their customers can access, utilize, and enjoy clean water for decades to come.

The economic value of clean, healthy water to the U.S. business community is immense, as is the harm that will result from petitioners' proposed rollback of federal protections.

ARGUMENT

I. A strong economy depends on plentiful clean water and a robust and durable Clean Water Act.

Water is one of our nation's priceless resources, essential to life itself. Healthy ecosystems and a strong economy depend on plentiful, clean water; plentiful, clean water depends on functioning wetlands. And unlike almost all other resources, water has no substitute. It's why businesses in all sectors support protecting clean water and wetlands—whether as a direct component of their operations or simply to keep their communities and employees healthy.

The *amici* supporting petitioners have presented themselves to the Court as embodying the uniform perspective of American business. Certainly, petitioners' *amici* are welcome to their views. In supporting a substantial narrowing of federal wetlands protections, however, they do not speak for all businesses in the United States, or even a majority of them. *Amici* here

represent a diverse set of businesses that support and indeed rely upon robust federal wetlands protections. *Amici*, their members, and their fellow businesses depend upon clean water and strong, durable regulations to operate and grow their businesses, which support and serve millions of Americans and are integral to the country's economy.

Businesses, their needs from regulators, and their philosophies concerning protecting and investing in the environment—including in water quality—are as diverse as the United States itself. But the numbers show that significant sectors of the economy depend on robust but clear regulation to protect and maintain our nation's water sources.

Indeed, small business owners overwhelmingly support robust federal water regulation. According to polling:

- 67% of small business owners "are concerned that water pollution could hurt their business";
- "80% of small business owners favor federal rules to protect upstream headwaters and wetlands"; and
- over 70% of small business owners "believe clean water protections help spur economic growth, compared to only six percent who believe they are too burdensome."[3]

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[3] *See* Am. Sustainable Bus. Council, *Small Business Owners Favor Regulations to Protect Clean Water*, 1 (July 2014), https://

As discussed below, industries throughout the country and across the economic spectrum will be harmed by petitioners' proposed rollback of the Clean Water Act's protections.

A. Drinking water

Most fundamentally, business owners, their employees, and their customers depend on clean drinking water to live healthy and productive lives. About 117 million Americans—more than one in three—get their drinking water from sources that would risk losing federal protection under petitioner's proposed jurisdictional limits. *See* EPA, Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S. (last updated May 28, 2020).[4]

Impaired access to clean drinking water has significant negative economic effects. "Economic growth and water pollution are intrinsically linked." Richard Damania et al., World Bank, *Quality Unknown: The Invisible Water Crisis* (2019). A recent study by the World Bank concluded that, globally, "[t]he release of pollution upstream acts as a headwind that lowers economic growth in downstream areas, reducing GDP

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studylib.net/doc/8215811/small-business-owners-favor-regulations-to-protect-clean-.

[4] *Available at* https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent (last visited June 2, 2022).

growth in downstream regions by up to a third." *Id.* at xv.

The problem is by no means confined to low- and middle-income countries. *Id.* at xii ("Not only does pollution not decline with economic growth, but the range of pollutants tends to expand with prosperity."). Millions of Americans already lack consistent access to safe drinking water. J. Mueller & S. Gasteyer, *The Widespread and Unjust Drinking Water and Clean Water Crisis in the United States* 3, 12 Nature Commc'ns, Art. 3544 (2021). Lower-income and minority communities are disproportionately affected, and barriers to access exacerbate longstanding problems of poverty and barriers to economic growth. *Id.* at 2-4; *see also* Justin Worland, *America's Clean Water Crisis Goes Far Beyond Flint*, TIME (Feb. 20, 2020).[5]

Adopting petitioners' continuous-surface-connection test would add to these concerns.

B. Food and beverage

Companies in the food and beverage industry play vital roles in local economies and rely on a steady supply of clean water to create their products. They are increasingly concerned over risks to clean water.

"As of 2021, 71% of [the largest food and beverage companies] consider water risks as part of their major business planning activities and investment decisions,

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[5] *Available at* https://time.com/longform/clean-water-access-united-states/.

up from 58% in 2019." Ceres, *Feeding Ourselves Thirsty: Tracking Food Company Progress Toward a Water-Smart Future*, *Executive Summary* at 3 (2021).[6]

1. Beer

Quality beer requires clean water. Brewers rely upon the Clean Water Act to protect their water supply and their business operations and on uniform federal protections to ensure predictability over toxins and pollutants. In order to safeguard the upstream sources that provide their most critical ingredient, craft brewers seek robust federal protections.[7]

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[6] *Available at* https://www.ceres.org/resources/reports/feeding-ourselves-thirsty#:~:text=Tracking%20Food%20Company%20Progress%20Toward%20a%20Water%2DSmart%20Future&text=Feeding%20Ourselves%20Thirsty%20provides%20investors,largest%20food%20and%20beverage%20companies.

[7] *See* Jason Perkins, Brewmaster, Allagash Brewing Company, et al., Comment Letter on Revised Definition of "Waters of the United States" 84 Fed. Reg. 4154 (Feb. 14, 2019) at 2, https://www.nrdc.org/sites/default/files/media-uploads/brewers_letter_opposing_dirty_water_rule_-_march_2019.pdf; Matt Gallagher, Half Acre Beer Company, Comment Letter on EPA Evaluation of Existing Regulations Pursuant to Executive Order 13777 (June 2, 2017), https://www.regulations.gov/document/EPA-HQ-OA-2017-0190-38415 ("As brewers we operate in a heavily regulated industry, and it is heavily regulated for a reason. Federal environmental regulations are in place to ensure the safety of all citizens, and any regulatory burden that arises from this on any industry is a necessary part of doing business."); Tim Patton, Saint Benjamin Brewing Company, Comment Letter on EPA Evaluation of Existing Regulations Pursuant to Executive Order 13777 (June 2, 2017), https://www.regulations.gov/document/EPA-HQ-OA-2017-0190-40255 ("Please consider the fate of the nation's thousands of breweries

The craft brewing industry largely grew up with the Clean Water Act. In 1972, the craft brewing business was in its infancy. It has since grown at an extraordinary rate—in part because American craft brewers can rely upon a clean water supply.

There are more breweries today than at any other point in American history. Brewers Ass'n, *National Beer Sales & Production Data*.[8] In 2020 alone, the craft brewing industry contributed over $60 billion to the U.S. economy, and over 400,000 jobs. Brewers Ass'n, *Economic Impact*.[9] Florida, Texas, Pennsylvania, and California—all downstream states—comprise 4 out of the top 5 states in terms of dollar value for the industry. *Id*. The industry cannot exist without a reliable clean water supply—for which wetlands are crucial.

Water is the most fundamental ingredient in all craft beer and accounts for about 90% of the finished product. Thus, the quality of source water significantly affects the finished product, and compounds present in brewing water can affect pH, color, aroma, and taste. For example, "sulfates make hops taste astringent, while chlorine can create a medicinal off-flavor. The presence of bacteria can spoil a batch of beer. Even small chemical disruptions in a brewer's water supply

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when considering any changes to the rules or their enforcement.").

[8] *Available at* https://www.brewersassociation.org/statistics-and-data/national-beer-stats/ (last visited June 14, 2022).

[9] *Available at* https://www.brewersassociation.org/statistics-and-data/economic-impact-data/ (last visited June 14, 2022).

can influence factors like shelf life and foam pattern." *See* Allagash Brewing Company, et al., Comment letter on Revised Definition of "Waters of the United States" 84 Fed. Reg. 4154 (Feb. 14, 2019).[10]

Tess Hart, the co-founder and CEO of Triple Bottom Brewing in Philadelphia, knows the subtleties of Philadelphia water—the "main ingredient" of her company's beers—very well. The water has seasonal and unique qualities she has come to rely upon, for example, ones that make lagers easier to brew in the winter than in any other season.

To account for these intricacies, it is vital that brewers like Ms. Hart have predictable, clean water for their business operations.

Unexpected changes in water quality—for instance, due to pollution in adjacent wetlands upstream from a craft brewer's source water—can threaten the brewing process, consistency, and the craft brewer's bottom line. The less consistent the regulation, the more brewers face unanticipated water quality problems.

Petitioners' request to significantly curtail the scope of the Clean Water Act, therefore, is no trivial matter to the craft brewing industry. Craft brewers face ongoing water-quality issues, such as extreme fluctuations in chlorine levels, excessive mineral

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[10] *Available at* https://www.nrdc.org/sites/default/files/media-uploads/brewers_letter_opposing_dirty_water_rule_-_march_2019.pdf.

content, and low service pressure. A narrow judicial definition of "the waters of the United States" that would threaten the contaminant-content of water used by craft brewers, or of waters upstream from brewers' source water, would be a severe problem for the industry, particularly because, once contaminants make their way into the water supply, there is no quick fix.

2. Seafood

The seafood industry is also particularly dependent on the protections of the Clean Water Act. In recent years, the sector generated more than $200 billion in annual sales and supported 1.7 million jobs. Nat'l Oceanic and Atmospheric Admin., *U.S. Fishing and Seafood Industries Saw Broad Declines Last Summer Due to COVID-19* (Jan. 15, 2021).[11]

Nearly half of the country's domestically harvested seafood comes from the Gulf of Mexico. Env't Def. Fund, *Gulf of Mexico*.[12] Upstream pollution—in particular nitrogen and phosphorous runoff—is posing a grave threat to the Gulf seafood industry. Am. Sustainable Bus. Council, *Clean Water in the Upper Mississippi River Basin: Economic Importance, Threats, and Opportunities*, ASBC White Paper 1, 3.[13] Much of

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[11] *Available at* https://www.fisheries.noaa.gov/feature-story/us-fishing-and-seafood-industries-saw-broad-declines-last-summer-due-covid-19 (last visited June 14, 2022).

[12] *Available at* https://www.edf.org/oceans/gulf-mexico.

[13] *Available at* https://www.asbnetwork.org/clean-water-good-business-mississippi-river-basin (last visited June 14, 2022).

this runoff originates in the rivers, streams, and other bodies of water, like wetlands, in the Upper Mississippi River Basin, covering areas of Illinois, Iowa, Minnesota, Missouri and Wisconsin. *Id.* at 2 (describing the risks from "destruction [of] . . . wetlands . . . alter[ing] the flow and filtration of water throughout the basin, allowing more pollution to enter the [Mississippi] river and increasing the risk of flood"). Every summer, this runoff causes a hypoxic area or "dead zone"—an area of low to no oxygen that can kill fish and other marine life—to form in the Gulf of Mexico that has reached sizes large enough to cover the entire state of New Jersey. EPA, *Northern Gulf of Mexico Hypoxic Zone* (last updated on June 9, 2022).[14] It is estimated that nutrient pollution causes tens of million dollars of losses to the domestic seafood industry. EPA, *Nutrient Pollution, The Effects: Economy*.[15] Petitioners' test would strip protections from much of the wetlands in the Upper Mississippi River Basin. *See* Resp. Br. 30.

The seafood industry also drives the economy in the coastal plain of South Carolina. But each wetland area that is filled in for development creates more voluminous and more polluted storm water runoff. *See* Resp. Br. 14 (discussing filtering functions of wetlands). According to Rick Baumann, who has operated Murrells Inlet Seafood for more than 50 years, this increased runoff flows downstream to estuaries and

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[14] *Available at* https://www.epa.gov/ms-htf/northern-gulf-mexico-hypoxic-zone (last visited June 14, 2022).

[15] *Available at* https://www.epa.gov/nutrientpollution/effects-economy (last visited June 14, 2022).

rivers and has caused the state health department to close shellfish beds upon which seafood companies rely. These estuaries are also the nursery grounds for all the recreational gamefish and commercially harvested fish in the region, which is one of the fastest growing in the country. As less seafood is harvested, businesses like Mr. Baumann's struggle to meet demand, and rising prices make it increasingly difficult to even to offer local seafood to customers. This stress ripples through the entire local economy, negatively impacting charter and commercial fishing operations that help sustain tourism. Am. Sustainable Bus. Council, Comment letter on Revised Definition of "Waters of the United States" at 1-2 (Feb. 7, 2022).[16]

C. Agriculture

Despite the deregulatory agenda of some large agricultural operations, robust protections under the Clean Water Act are an enormous concern for farmers who are simply trying to make a living off of their land. *See* Luke and Sally Gran, *Clean water can increase farm profits, grow Iowa's economy*, Des Moines Register (Nov. 18, 2016).[17] Agricultural operations contributed $136.7 billion to the economy in 2016, but these operations required nearly 40% of all fresh water

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[16] *Available at* https://www.asbnetwork.org/sites/main/files/file-attachments/asbn_wotus_comment_2022_jan_0.pdf?1646060823.

[17] *Available at* https://www.desmoinesregister.com/story/opinion/abetteriowa/2016/11/18/clean-water-can-increase-farm-profits-grow-iowas-economy/93979374/ (last visited June 14, 2022).

withdrawals. Am. Sustainable Bus. Council, *The Business Case for EPA Action on Clean Water* at 1.[18]

As a coalition of small famers and advocates recently explained in comments to the EPA:

> Farmers need clean water for crops and livestock, as well as for drinking, cooking, and numerous other uses around our families' homes. Wetlands help reduce pollution and protect farming operations from flooding. Headwater, seasonal, and rain-dependent streams supply water to larger streams and rivers from which farmers draw water for irrigation and for animals to drink. If upstream industries are allowed to destroy or contaminate these critical water bodies without limit, they put farmers' livelihoods at risk.[19]

The Clean Water Act protects these interests by, among other things, requiring "oversight of polluters that bulldoze protected waters," and controlling "the amount of pollutants that industrial operations can discharge into those waters." *Id.*

As discussed below, these benefits outweigh the modest burdens of complying with the Act for many if not most American farmers. *See below* Section III.

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[18] *Available at* https://www.asbcouncil.org/sites/main/files/file-attachments/asbc_business_case_for_clean_water_for_website.pdf (last visited June 14, 2022).

[19] Whiskey Creek Angus et al., Comment Letter on Proposed Rule to Revise Definition of "Waters of the United States" at 1 (Feb. 7, 2022), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0719.

Alfonso Abeyta, a fifth-generation rancher and farmer in Colorado and a board member of NLFR, understands the need for robust protections under the Act because his family farm was impacted by toxic waste water from a nearby mine, unconnected by any continuous surface connection. Mr. Abeyta, writing about his experiences, spoke to the need to faithfully adhere to the intended scope of the Act, explaining that "[a]gricultural producers, rural communities and diverse water users across America are counting on" robust protection of the nation's waters. Alfonso Abeyta, *[Clean Water Act] Rule critical for Colorado*, Coyote Gulch (Oct. 27, 2014).[20]

Likewise, Matt Maier, the owner of Thousand Hills Lifetime Grazed—which uses regenerative practices to graze cattle—relies on a natural tributary to flow through his pastures. Clean water is invaluable to him and his company. In particular, Minnesota wetlands adjacent to his pastures help maintain grazing food and a biodiverse habitat for his cattle. These wetlands would be at risk if the Court adopted petitioners' position. It is vital to Thousand Hills Lifetime Grazed to protect wetlands, maintaining their rural community's access to clean water and ensuring their livestock can flourish.

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[20] *Available at* https://coyotegulch.blog/2014/10/27/clean-water-act-rule-critical-for-colorado-alfonso-abeyta/.

D. Manufacturing

U.S. manufacturing employs over 12 million people and relies on clean water for nearly every step of production. Am. Sustainable Bus. Council, Comment letter on Revised Definition of "Waters of the United States" 84 Fed. Reg. 4154 (Feb. 7, 2022).[21]

Manufacturing companies use more than 9 trillion gallons of fresh water every year. EPA, Factsheet, *The Clean Water Rules for: Communities*.[22]

In 2014, exports of semiconductors alone were worth over $40 billion, behind only aircraft and automobiles. Am. Sustainable Bus. Council, *The Business Case for EPA Action on Clean Water* at 1.[23] Creating an integrated circuit requires a total of approximately 2200 gallons of clean water. *Id.* And in the textile industry, a single mill can use 200 tons of fresh water per ton of dyed fabric. *Id.*

The automotive industry, which is the country's largest manufacturing sector and is responsible for 3% of its GDP, also depends upon access to clean water. David Isaiah, *Water, water, everywhere in vehicle manufacturing*, Automotive World (Oct. 6, 2014).

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[21] *Available at* https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0727.

[22] *Available at* https://19january2017snapshot.epa.gov/sites/production/files/2015-05/documents/fact_sheet_communities_final_0.pdf (last visited June 14, 2022).

[23] *Available at* https://www.asbcouncil.org/sites/main/files/file-attachments/asbc_business_case_for_clean_water_for_website.pdf (last visited June 14, 2022).

By some estimates, producing a car uses over 39,000 gallons of water for various processes, including surface treatment and coating, paint spray booths, washing, rinsing, hosing, cooling, air-conditioning systems, and boilers. *Id.*

Increased upstream pollution would negatively impact these and other manufacturing operations and exacerbate existing problems of water scarcity. *See generally* Prakash Rao et al., *Evaluation of U.S. Manufacturing Subsectors at Risk of Physical Water Shortages*, 53 Env't Sci. Tech. 2295 (2019).

E. Outdoor recreation

The outdoor recreation and tourism industries rely heavily on clean water and flourishing wetlands. Roughly 40% of the American population 16 years and older participates in wildlife activities such as hunting, fishing, and wildlife watching. Press Release, U.S. Dep't of the Interior, New 5-Year Report Shows 101.6 Million Americans Participated in Hunting, Fishing & Wildlife Activities (Sept. 7, 2017).[24] In 2016, over 35 million Americans went (and spent $46.1 billion on) fishing. U.S. Fish & Wildlife Serv., 2016 Nat'l Survey of Fishing, Hunting, and Wildlife-Associated Recreation

[24] *Available at* https://www.doi.gov/pressreleases/new-5-year-report-shows-1016-million-americans-participated-hunting-fishing-wildlife (last visited June 14, 2022).

at vi.[25] Outdoor watersports—including fishing, kayaking, rafting, canoeing, and scuba diving—alone generate nearly $175 billion per year. Am. Sustainable Bus. Council, *ASBC Says Trump Administration Finalization of the New Waters of the US Rule is Not Probusiness* (Jan. 23, 2020).[26]

Even amidst trip cancellations and lockdowns during the pandemic, in 2020, the outdoor recreation industry supported 4.3 million jobs, and accounted for $374.3 billion—or nearly 2%—of the United States' entire gross domestic product. *Id.*; Bureau of Econ. Analysis, *Outdoor Recreation Satellite Account, U.S. and States, 2020* (Nov. 9, 2021).[27]

The industry relies on clean water and pristine wetlands to attract tourists and outdoor enthusiasts. Weakened water protections would devastate the animal and plant life as well as the natural beauty that serve as a primary draw for outdoor activity. Strong water protections are also crucial for the safe enjoyment of outdoor recreation in and around water. Am. Sustainable Bus. Council, Revised Definition of

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[25] A*vailable at* https://www.census.gov/content/dam/Census/library/publications/2018/demo/fhw16-nat.pdf (last visited June 14, 2022).

[26] *Available at* https://www.asbnetwork.org/media-release/asbc-says-trump-administration-finalization-new-waters-us-rule-not-probusiness.

[27] *Available at* https://www.bea.gov/sites/default/files/2021-11/orsa1121.pdf.

"Waters of the United States" 84 Fed. Reg. 4154 (Feb. 14, 2019).[28]

F. Ecological restoration

The ecological restoration industry likewise relies on clear and robust enforcement of the Clean Water Act, and in particular, a consistent, durable definition of the "waters of the United States" to inform project investments.

The industry is estimated to contribute $25 billion in annual output and 225,000 jobs to the United States economy. Todd K. BenDor et al., *Defining and evaluating the ecological restoration economy*, 23 Restoration Ecology 209. The same study found that per $1 million invested in ecological restoration, an average of 33 jobs are created, and that the sector has an employment multiplier of between 1.48 and 3.8 additional jobs supported for every ecological restoration job. *Id.* To put this economic impact in perspective, the ecological restoration industry is now documented as providing more jobs than the well-known iron and steel, logging, and coal mining sectors. *Id.*

Amicus ERBA's members—private sector businesses involved in conservation and ecological restoration investments—rely on the consistent application of environmental law and policy to be able to properly assess the environmental markets. The businesses that

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[28] *Available at* https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0727.

make up the industry engage in projects to restore America's waters and habitats and have years of experience successfully providing wetland offsets for permittees under the federal agencies' longstanding *Rapanos* definition and guidance.

ERBA promotes compensatory mitigation and private investment in ecological restoration to offset impacts to natural resources and coastline communities. Ecological Restoration Bus. Ass'n, *Mission and About Us.*[29] ERBA's public comments reflect the harm from regressive-industry attempts to narrow federal regulation. This deregulatory campaign and the uncertainty it has created "dis-incentivizes investment in wetland and stream restoration and subsequently places growth in the broader ecological restoration industry . . . at risk."[30] Most compensatory projects require years of planning and upfront capital expenditure. Regulatory uncertainty and the patchwork approach that would result from curtailing the scope of federal protections would create problems for mitigation sponsors and permittees. Investment in mitigation options and responsible economic development depends on available ecological offsets for efficient permitting.

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[29] *Available at* https://ecologicalrestoration.org/about-erba (last visited June 14, 2022).

[30] Ecological Restoration Bus. Ass'n, Revised Definition of "Waters of the United States" 84 Fed. Reg. 4154 (Feb. 14, 2022) (citing Todd K. BenDor et al., *Defining and evaluating the ecological restoration economy*, 23 Restoration Ecology, 209), https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0680.

One ERBA member company partnered with a private equity fund that holds half a billion dollars in assets and was initially motivated to invest as much as 10-20% of their fund towards development of wetland and stream mitigation offsets. The member planned to use that investment to expand their ecological restoration projects and operations in one state and enter six new state markets. However, due to the uncertainty surrounding the "waters of the United States," the company ultimately only invested $20 million in the wetland and stream sector, equating to a missed economic opportunity of a potential additional investment in the range of $30-80 million. The fund manager is now working with the company to shift investment towards markets with better demand and price stability, an economic loss for the growing ecological restoration sector and public who lose out on the benefits of restored wetlands and streams.

Beyond loss of jobs and business growth, deterred investment means permanent loss of critical ecological capacities that provide immeasurable economic value in water quality and flood water retention services to communities. A study attempting to capture the economic value of carbon sequestration, denitrification, and waterfowl habitat at restored wetland sites within a single geographic feature (the Mississippi Alluvial Valley) estimated the value of those three services at more than $297 million.[31] This already significant

[31] W. Aaron Jenkins et al., *Valuing ecosystem services from wetlands restoration in the Mississippi Alluvial Valley*, 69 Ecological Economics, 1051 (Nov. 22, 2009).

economic value is itself an incomplete estimate, considering the other known wetlands benefits of flood storage, timber value, diverse nutrient sequestration, and non-waterfowl habitat.

Petitioner's proposed continuous-surface-connection test will shrink the positive economic growth of the ecological restoration industry that would have a ripple effect with multiple economic consequences: loss of job growth momentum, loss of permitting efficiencies for permittees with fewer mitigation options available, and loss of highly valuable ecological services provided by wetlands that are allowed to be impacted without compensation.

G. Real estate

Clean water is also important for the real estate industry—home values can erode by as much as $85,000 each on land near water with high nutrient pollution levels. Am. Sustainable Bus. Council, Comment letter on Revised Definition of "Waters of the United States" 84 Fed. Reg. 4154 (Feb. 7, 2022).[32]

Wetlands play a critical role in preserving property values—particularly on waterfront properties—because they filter pollutants, store water, and provide flood control. *See* Resp. Br. 14.

Hugo Neu is an ASBN member that developed a 130-acre coworking and business incubator site at

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[32] *Available at* https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0727.

Kearny Point in Jersey City, New Jersey. According to Mr. Neu, emerging science indicates that, in addition to their other benefits, wetlands in New Jersey contain a native bacterium capable of defluorinating perfluorooctanoic acids (PFOAs) and perflurooctane sulfonic acids (PFOS), which may make them biodegradable. *See* XiaoZhi Lim, *Can microbes save us from PFAS?*, Chemical and Engineering News, March 21, 2021.[33] The development of the Kearny Point site—a former shipping yard that was an EPA superfund site—incorporated both wetlands restoration and constructed wetlands. *See* Am. Sustainable Bus. Council, *Hugo Neu at Kearny Point, Kearny NJ*; Marie Ruff, *Kearny Point: Flexible, Creative Workspace for the New Economy*, Commercial Real Estate Development Association Blog (Nov. 11, 2021).[34]

More generally, people throughout the country value living near healthy clean water. EPA, *The Economic Benefits of Protecting Healthy Watersheds* at 3 (Apr. 2021).[35] As the EPA has explained:

> Studies from Maine and Minnesota show that home values declined by tens of thousands of dollars with declines in water quality. The

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[33] *Available at* https://cen.acs.org/environment/persistent-pollutants/microbes-save-us-PFAS/99/i10.

[34] *Available at* https://www.asbnetwork.org/sites/main/files/file-attachments/cleanwater-kearnypoint.pdf?1610554995 (last visited June 14, 2022); *Available at* https://blog.naiop.org/2021/11/kearny-point-flexible-creative-workspace-for-the-new-economy/.

[35] *Available at* https://www.epa.gov/sites/default/files/2015-10/documents/economic_benefits_factsheet3.pdf.

> aggregate effect of an increase in property values attributed to good water quality on a single lake equates to millions of dollars per lake in these areas. . . . Clean and healthy waterfronts boost property values and revenues for adjacent retail and commercial businesses, too. Waterfront business properties are attractive to customers and have greater property value premiums when they are near clean waters. Preserving healthy watersheds and protecting open space while providing access to people has the potential to boost local revenues while providing attractive amenities.

Id.

The Clean Water Act's coverage of wetlands protects real property, both physically and economically. And as research and innovation develop, wetlands can even become a feature of property development, helping to turn a former EPA superfund site into an innovative and resilient business incubation campus.

II. The Clean Water Act is a comprehensive law intended to restore and protect the integrity of the nation's waters.

Petitioners and their *amici* urge the Court to adopt a bright-line, deregulatory "continuous-surface-connection" definition of "the waters of the United States" that would remove federal protection from much of the nation's wetlands. But that proposed reading contravenes the natural reading of the text, particularly as understood in light of more recent legislative

enactments, and recent decisions by the Court interpreting the Clean Water Act.

Furthermore, removing these protections would cause significant harm to *amici* and their business members. The supposed clarity that petitioners claim will be achieved by their proposed test is a mirage. In reality, lowering the federal floor of protection by narrowing the Clean Water Act will force businesses, particularly those operating in multiple jurisdictions, to learn and comply with an inconsistent patchwork of state and local regulations.

A. Text, structure, and history confirm that wetlands that are chemically, physically, and biologically connected to traditionally navigable waters are covered by the Act.

Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As relevant here, the Act prohibits the unpermitted discharge of any pollutant—including "dredged spoil," "rock," and "sand"—into "the waters of the United States." 33 U.S.C. §§ 1311(a), 1362(6), (7), (12).

As respondents explain, the definition of "the waters of the United States" is naturally read to encompass wetlands adjacent to a traditionally navigable water, even when those wetlands are separated from the navigable water by a man-made barrier. Resp. Br. 19-24. This understanding is confirmed by Congress's

explicit endorsement in 1977 of the Corps of Engineers' inclusion of "adjacent wetlands" in the definition of "the waters of the United States." *Id.* at 21 (citing 33 U.S.C. § 1344(g)(1)).

More recently, in supporting mitigation banking efforts like those conducted by *amicus* ERBA's members, Congress has reaffirmed its understanding that the Act reaches wide swaths of wetlands. Indeed, the entire industry of mitigation banking has developed based on that understanding. *See*, *e.g.*, 10 U.S.C. § 2694b(a) (authorizing Secretary of Defense to "make payments to a wetland mitigation banking program or . . . mitigation sponsor approved in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks" when "engaged in an authorized activity that may or will result in the destruction of, or an adverse impact to, a wetland"); *see also* Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 C.F.R. § 58605 (1995) ("The purpose of this guidance is to clarify the manner in which mitigation banks may be used to satisfy mitigation requirements of the Clean Water Act (CWA) Section 404 permit program.").

B. Petitioners' proposed test would saddle businesses with a burdensome patchwork of inconsistent state regulations.

As respondents explain, the Army Corps of Engineers and the EPA—as well as the federal courts—have long understood the Act to protect more than just

those wetlands possessing a continuous surface connection. *See* Resp. Br. 3. This understanding is the *status quo* that businesses have operated under for decades. *See generally id.*

Petitioners and their *amici* argue that wetlands like the ones at issue here should now be categorically excluded from the Act's coverage because they lack a continuous surface connection to a traditionally navigable water—and claim that that such an approach would be good for business.

But adopting the continuous-surface-connection test would add to, rather than ease, the regulatory burden for many businesses. Not only would this dramatic lowering of the federal "floor" result in a "substantial reduction" in federal protection of the water sources upon which many businesses rely, it would also lead to an unpredictable patchwork of state regulation that businesses would be forced to navigate. *See* Cong. Rsch. Serv., Redefining *Waters of the United States* (WOTUS): Recent Developments 16, 20, 23 (Sept. 30, 2021).[36]

States have dramatically different regulatory regimes. For example, even if individual states wanted to protect their local business industries from a rollback in the Act's protections, doing so will be difficult. In 2020, the EPA and the Corps identified the following

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[36] *Available at* https://crsreports.congress.gov/product/pdf/R/R46927.

regulatory realities that would hinder many states from implementing protections:

- "[S]ome state laws . . . constrain a state's authority to regulate more broadly than the federal 'floor' set by the CWA";
- "Thirteen states have adopted laws that require their state regulations to parallel federal CWA regulations";
- "Some state laws limit the application of state regulations to certain industries, certain types of permits, or certain types of resources"; and
- "Twenty-four states have adopted laws that require extra steps or findings of benefits in order to impose state regulations beyond federal requirements."

EPA and Dep't of the Army, Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of the "Waters of the United States" (Jan. 23, 2020).[37]

Thus, if petitioners succeed in significantly lowering the federal floor of protection provided by the Clean Water Act, some states will heavily regulate; others will not. Some states will utilize particular types of permitting authority; others will not. Some states will have the financial and regulatory capacity to regulate; others will not.

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[37] *Available at* https://www.epa.gov/sites/default/files/2020-01/documents/rpa_-_nwpr_.pdf.

Businesses already have insight into just how damaging the adoption of petitioners' proposed rule would be. Estimates suggest that 18% of streams and 51% of wetlands nationwide would be excluded from federal protection under the Navigable Waters Protection Rule—a rule that similar to petitioners' proposed rule, would have greatly reduced the Act's protections. Cong. Rsch. Serv., Redefining *Waters of the United States* (WOTUS): Recent Developments 22.[38] And petitioners' rule is even more extreme in its approach to wetlands. Under the Navigable Waters Protection Rule, initial data showed that only 8.3% of waters were found to be covered after a jurisdictional determination—a steep drop from the 41% from those protected under post-*Rapanos* guidance, and the 42% under the previous Clean Water Rule.[39]

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[38] The 18% figure is likely very conservative. This is because the National Hydrography Dataset (NHD), which was used in the preliminary analysis of the Navigable Waters Protection Rule, underestimates the percentage of streams that are ephemeral. *See*, *e.g.*, EPA and Dep't of the Army, Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules Definition, 12 (Sept. 15, 2019), https://www.epa.gov/sites/default/files/2019-09/documents/wotus_rin-2040-af74_final_ea_508compliant_20190905.pdf (noting that the NHD "does not map many ephemeral streams outside of the arid West" and that "the actual percentage of ephemeral streams across the country is likely higher than 18 percent since many are not mapped or are mapped as intermittent").

[39] Hannah Northey, *Exclusive: Trump rule imperils more than 40,000 waterways*, E&E News (March 19, 2021), *available at* https://www.eenews.net/stories/1063727993 ("91% of waters EPA reviewed under the Navigable Waters Protection Rule didn't quality for federal protection."); EPA, *Clean Water Act Approved*

In contrast to these steep changes, much of industry prefers the durability of a "familiar regulatory regime . . . including a significant nexus analysis." Ecological Restoration Bus. Ass'n, Revised Definition of "Waters of the United States" 84 Fed. Reg. 4154 (Feb. 14, 2022).[40] As succinctly reported in the National Law Review, "generally speaking, the regulated community prefers one standard to many standards."[41] Indeed, many businesses have come to rely upon the regulatory *status quo*, and having access to unquestionably safe, clean water sources. ERBA, for example, stands at the crossroads of representing both regulated entities and entities engaged in the business of delivering regulatory compliance. "[D]urability remains ERBA's chief concern." Ecological Restoration Bus. Ass'n,

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Jurisdictional Determinations (last accessed June 15, 2022), *available at* https://watersgeo.epa.gov/cwa/CWA-JDs/ (calculating using total number of jurisdictional determinations issued under relevant rule as denominator and number of jurisdictional determinations with positive jurisdictional finding as numerator).

[40] *Available at* https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0680.

[41] Jeffrey R. Porter, *Yes, Patchwork Makes for Great Quilts but Not for Environmental Regulation and PFAS Are No Exception*, 12 Nat'l L. Rev. 165 (2021), https://www.natlawreview.com/article/yes-patchwork-makes-great-quilts-not-environmental-regulation-and-pfas-are-no (quoting a former EPA official as stating: "[N]othing is worse for industry than a patchwork of states having different requirements, where at the end of the day, it does not help interstate commerce—where California has certain restrictions, Colorado has a different one. And then Maine has something completely different.").

Revised Definition of "Waters of the United States" 84 Fed. Reg. 4154 (Feb. 14, 2022).[42]

III. For *amici* and their members, the benefits of the robust protection required by the Clean Water Act outweigh the burdens.

Adopting a bright-line rule to administer a complex federal statute is not always the best means to effectuate the statutory text and Congress's objectives. As the Court explained in *County of Maui*, applying a bright-line test to disputes under the Act may be easier to administer, but would be "inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes." *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020).

For *amici* and their members, the benefits of robust protections for wetlands under the Clean Water Act greatly outweigh the costs of having to apply a more fact-specific test to determine whether a wetland is protected under the Act.

A. Clear legal guidelines need not come at the expense of the Act's critical protections.

Petitioners and their supporters—including organizations representing other members of the business community—argue repeatedly that the post-*Rapanos*

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[42] *Available at* https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0680.

landscape has made regulation and enforcement under the Act too uncertain and unpredictable. *Amici* here agree that clarity is important in any regulatory regime. But *amici* disagree that clarity requires a deregulatory lowest-common-denominator approach to interpreting the Clean Water Act.

Whatever confusion exists about the scope of jurisdiction under the Act results primarily from the fact that no opinion in *Rapanos* commanded a majority of the Court, which as the Chief Justice predicted, left the lower courts and regulated entities "to feel their way on a case-by-case basis." *See Rapanos*, 547 U.S. 715, 758 (Roberts, C.J., concurring). The Court can resolve this confusion by adopting respondents' position in this case—which is supported by the Act's text, structure, and history—and rejecting petitioners' narrow and atextual continuous-surface-connection test. *See Maui*, 140 S. Ct. 1462, 1478 (2020) (Kavanaugh, J., concurring) (noting that Act did not "establish a bright-line test," but that the Court could nevertheless "translate the vague statutory text into more concrete guidance").

B. Petitioners and their *amici* exaggerate the burdens of complying with the Act.

The *amici* supporting petitioners repeatedly invoke the specter of onerous regulation, permitting, and compliance. This narrative is greatly exaggerated given that the vast majority of Section 404 authorizations occur under the Corps' streamlined general permits rather than site-specific permits, as respondents

have explained. *See* Resp. Br. 37; *see also* Cong. Rsch. Serv., The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments (Jan. 2, 2017) (as of 2017, over "97% of the Corps' [CWA] regulatory workload is processed in the form of general permits" which have broader application and lesser review);[43] Whiskey Creek Angus et al., Comment Letter on Proposed Rule to Revise Definition of "Waters of the United States" at 2 (Feb. 7, 2022) ("In the rare instances that agricultural operations need permits, fast-track permits are often available.").[44]

Moreover, many activities engaged in by small businesses are expressly exempted from the Act. This includes, for farms, "ordinary agricultural discharges" and common agricultural practices like "building or maintaining stock ponds or irrigation ditches, maintaining drainage ditches, and building farm roads using best management practices." *Id.* at 1–2. Thus, most "[f]arms have nothing to fear from the Clean Water Act." *Id.*

And permit approval is exceedingly common. Indeed, the Corps has reported that "[n]ationwide, less than one percent of all requests for permits [under the Act] are denied. Those few applicants who have been denied permits usually have refused to change the design, timing, or location of the proposed activity." U.S.

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[43] *Available at* https://www.everycrsreport.com/files/20170112_97-223_271c5b98b058e7b84bab465be90e05777cf735ea.pdf.

[44] *Available at* https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0719.

Army Corps of Eng'rs, *Regulatory Program Frequently Asked Questions*.[45]

Amici supporting petitioners also point to inflated and inaccurate costs associated with permit applications. The EPA under the leadership of both political parties has found costs are both lower than petitioners and their *amici* say, and they have remained reasonably flat. *See* EPA and Dep't of the Army, Economic Analysis for the Navigable Waters Protection Rule: Definition of "Waters of the United States" 18 (Jan. 22, 2020) ("The Corps unit cost estimates ($15,100 per individual permit; $4,500 per general permit) are adjusted from 1999$ to 2018$ using the CPI-U.");[46] EPA and Dep't of the Army, Economic Analysis for the Proposed "Revised Definition of 'Waters of the United States'" Rule (Nov. 17, 2021) ("The Corps unit cost estimates are adjusted from 1999$ to 2020$ using the CPI-U ($15,500 to $37,300 per individual permit; $4,700 to $15,500 per general permit)").[47]

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Any complex regulatory regime can be subject to critique and might benefit from added clarity. The Clean Water Act is no exception. But the Court can grant that clarity with added durability by speaking

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[45] *Available at* https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Frequently-Asked-Questions/ (last visited June 14, 2022).

[46] *Available at* https://www.epa.gov/sites/default/files/2020-01/documents/econ_analysis_-_nwpr.pdf.

[47] *Available at* https://www.epa.gov/system/files/documents/2021-11/revised-definition-of-wotus_nprm_economic-analysis.pdf.

with one voice and adopting one test that is faithful to the Act's text, structure, and history.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MAX E. RODRIGUEZ
ALISON BOROCHOFF-PORTE
POLLOCK COHEN LLP
60 Broad Street, 24th Floor
New York, NY 10004
(212) 337-5361

BENJAMIN D. BATTLES
Counsel of Record
POLLOCK COHEN LLP
50 Lakeside Avenue
Burlington, VT 05401
(802) 793-5512
ben@pollockcohen.com

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