No. 18-609

In the
Supreme Court of the United States

JOSEPH DAVID ROBERTSON,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER JOSEPH DAVID ROBERTSON

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QUESTIONS PRESENTED

1. Is the Clean Water Act term "navigable waters" void for vagueness, as members of this Court have suggested?

2. Should this Court revisit its fractured decision in *Rapanos v. United States*, 547 U.S. 715 (2006), to clearly and authoritatively interpret "navigable waters" under the Clean Water Act?

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IDENTITY AND INTEREST OF AMICUS CURIAE

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) submits this brief *amicus curiae* in support of Petitioner Joseph David Robertson and urges the Court to grant his Petition.[1]

NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the Nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to

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[1] Petitioner's counsel has filed a blanket consent to the filing of *amicus curiae* briefs. Respondent's counsel received timely notice of NFIB Legal Center's intent to file this brief and granted consent to do so.

NFIB Legal Center certifies that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than NFIB Legal Center, its members, or its counsel made a monetary contribution to this brief's preparation and submission.

firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The question of the jurisdictional reach of the Clean Water Act has perplexed businesses for decades, especially following this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). Whether or not a business owner's property contains a jurisdictional water, the exorbitant cost of finding out—and then processing a permit under the Act to make use of that property—can be significant, if not prohibitive. NFIB Legal Center believes that its unique perspective, as a representative of the small business community, will help the Court in its consideration of the Petition in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Time and again, this Court has assured Americans that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fed. Commc'n Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). That is why the "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.* 253, 258 (striking down Federal Communication Commission's standards that

"failed to give [two broadcasters] fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent," in violation of the Fifth Amendment's Due Process Clause). If a law is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," the law "violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (reaffirmed by *Fed. Commc'n Comm'n*, 567 U.S. at 253); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (same).

Yet nearly everyone who has considered the issue agrees that the jurisdictional reach of the Clean Water Act—anchored in the term "waters of the United States" (33 U.S.C. § 1362(7))—is "notoriously unclear," "hopelessly indeterminate," and "difficult" to define. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 624 (2018) ("[D]efining that statutory phrase ['waters of the United States'] . . . is a contentious and difficult task."); *Sackett v. Envtl. Prot. Agency*, 566 U.S. 120, 132-133 (Alito, J., concurring) (observing that the jurisdictional reach of the Act is "notoriously unclear" and "hopelessly indeterminate"). As a consequence, "[m]any landowners do not have 'fair notice' that their lands may be subject to federal regulation under the [Clean Water Act]." Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, 2012 Cato Sup. Ct. Rev. 139, 161 (2012). The acute problem of discerning the meaning of "waters of the United States"—and ultimately whether one's land is a wetland subject to potentially-crippling federal regulation under the Act—only worsened after *Rapanos*. That decision

"fueled a vortex of regulatory uncertainty for stakeholders, agencies, and the lower courts." Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 Envtl. L. 277, 282 (2016).

The remarkable consensus about just how vague the term "waters of the United States" is—coupled with the Act's pervasiveness in the day-to-day lives of Americans and their businesses—calls for this Court's intervention.

This case presents the Court with the opportunity to put an end to the decades-long confusion over the Act's jurisdictional reach, which past Court decisions and shifting agency interpretations have failed to resolve. The regulatory risks and uncertainty that businesses across the country regularly face under the prospect of civil and criminal enforcement are simply too great. The Court should grant the Petition to decide whether, on its face or understood in light of Justice Kennedy's concurrence in *Rapanos*, the Act provides "fair notice" of what waters are subject to federal regulation under the Clean Water Act. *Connally*, 269 U.S. at 391; *Fed. Commc'n Comm'n*, 567 U.S. at 253.

ARGUMENT

THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER THE ACT'S JURISDICTIONAL DEFINITION—ON ITS FACE OR IN LIGHT OF JUSTICE KENNEDY'S CONCURRENCE IN RAPANOS—IS UNCONSTITUTIONALLY VAGUE

The Petition demonstrates the extent to which this Court, as well as lower court judges, have struggled with the vagueness of the Clean Water Act's jurisdictional reach. Petition at 15-18. As recently as this year, a unanimous Court recognized the difficulty of defining the jurisdictional term "waters of the United States" under the Act. *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 624 ("What are the 'waters of the United States'? As it turns out, defining that statutory phrase . . . is a contentious and difficult task."). In other Clean Water Act cases, some Members of this Court have pointedly criticized the vagueness of that term, to the point of describing the problem as a "cause for concern." *See, e.g.*, *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, Thomas, Alito, JJ., concurring).

The fractured decision in *Rapanos* did not help. Chief Justice Roberts predicted that *Rapanos* would leave "lower courts and regulated entities . . . hav[ing] to feel their way on a case-by-case basis," not knowing—based on the text and judicial precedent—when or how the Act applies. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring). The Chief Justice was right. After *Rapanos*, one lower court characteristically remarked that Justice Kennedy's

concurrence (which several circuit courts of appeals have looked to as the controlling opinion[2]) "leaves no guidance on how to implement its vague, subjective centerpiece." *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006). If the text of the Act itself was vague before *Rapanos*, the situation seemed to worsen after *Rapanos*.

But confusion over what constitutes "waters of the United States" under the Act has plagued not just the Judiciary. Scholars, the regulated public, and both friend and foe of an expansive reading of the Act alike have recognized the vagueness of the Act's jurisdictional reach.

Consider, for example, the view of the Act's enforcers—the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (collectively, "agencies")—under the prior Administration. The agencies conceded that the Act's jurisdictional definition, as written and interpreted in light of Justice Kennedy's *Rapanos* concurrence, is difficult to decipher. They acknowledged that, after *Rapanos*, both "the public" and "agency staff" still lacked "the kind of information needed to ensure timely, consistent, and predictable jurisdictional determinations." 80 Fed. Reg. 37054, 37056. The "vagueness" problem seems to have been the primary motive behind the agencies' 2015 rule dubbed the

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[2] *See United States v. Robertson*, 875 F.3d 1281, 1289 (9th Cir. 2017) (finding Justice Kennedy's test controlling); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) (same); *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (same); *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011) (same).

Waters of the United States Rule ("2015 Rule"). *Id.* at 37055 ("In this final rule, the agencies clarify the scope of 'waters of the United States' that are protected under the Clean Water Act (CWA).").

Scholars, too, have recognized the troubling state of confusion surrounding the Act's jurisdictional reach, especially since the fractured decision in *Rapanos*. One environmentalist scholar described that decision as "the most significant—if not most befuddling—of the Clean Water Act (CWA) decisions." James Murphy, *Muddying the Waters of the Clean Water Act:* Rapanos v. United States *and the Future of America's Water Resources*, 31 Vt. L. Rev. 355, 355 (2007). As another scholar noted, "[t]he combined impact of the fractured *Rapanos* decision and the Guidance [issued by the agencies post-*Rapanos*] have left the wetlands jurisdictional determination process in disarray." Kenneth S. Gould, *Drowning in the Wetlands Jurisdictional Determination Process: Implementation of* Rapanos v. United States, 30 U. Ark. Little Rock L. Rev. 413, 414 (2008).

At the other end of the ideological spectrum, scholar Paul J. Larkin, Jr., of The Heritage Foundation has argued that "waters of the United States" cannot be easily interpreted and applied, especially after *Rapanos*. Paul J. Larkin, Jr., *The "Waters of the United States" Rule and the Void-for-Vagueness Doctrine* 4 n.23 (Heritage Foundation Legal Memorandum No. 207, June 22, 2017).[3] Since *Rapanos*, he notes, the lower courts have been "[l]eft

[3] Available at https://www.heritage.org/sites/default/files/2017-06/LM-207_0.pdf (last visited on December 9, 2018).

with the task of trying to apply largely irreconcilable jurisdictional standards," and the federal circuit courts of appeals "are all over the lot as to how to define that term consistently with *Rapanos*." *Id.* The agencies' 2015 Rule did nothing to improve the "vagueness" problem,[4] exacerbating the constitutional concerns raised in the Petition in this case:

> The EPA and USACE have not defined that term in a manner that is readily understandable by the average person. (In fact, experts would have difficulty applying that rule in a consistent manner.) The need to clearly identify conduct prohibited by the criminal law is a critical element of what we know as the "rule of law"—the proposition that ours is a government ruled by the law, not by the dictates of men—a concern that is at its zenith when Congress attaches a criminal punishment to a legal rule. Several related doctrines—such as the due process requirement that the government must clearly identify illegal conduct in advance, the rule of statutory construction that unclear or ambiguous terms in a law should be interpreted in a defendant's favor, and the principle that

[4] To add to the confusion, the 2015 Rule is now applicable in 26 states. *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018) In 24 states, pre-2015 regulations and guidance on "waters of the United States" applies. *See* https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update (last visited December 9, 2018).

> vague criminal statutes are deemed void precisely because they do not afford the average person that notice—all become critically important at that point. Those rules exist to give effect to the principle that the government cannot use the criminal justice system to regulate conduct that it has not clearly defined so that everyone has the opportunity to choose whether or not to obey its commands.

Id. According to Professor Steven Eagle, "[t]he Clean Water Act presents a potentially dire juxtaposition for landowners, in that it combines far-reaching consequences for land use, a complex and largely subjective regulatory scheme, and substantial civil and criminal penalties for even unknowing violations." Steven J. Eagle, *Advancing Judicial Review of Wetlands and Property Rights Determinations:* Army Corps v. Hawkes Co., 2016 Cato Sup. Ct. Rev. 257, 274 (2016).

If the "experts"—i.e., the Judiciary, scholars and the agencies responsible for enforcing the Act—cannot discern the statute's jurisdictional reach, then *a fortiori* an ordinary person "of common intelligence must [also] necessarily guess at its meaning and differ as to its application." *Fed. Commc'n Comm'n*, 567 U.S. at 253. Simply put, nobody understands the scope of the federal government's authority under the Clean Water Act—a law that exposes countless individuals and businesses to potential criminal sanctions. 33 U.S.C. §§ 1319(c). Worse, the federal government has been aggressive about criminally prosecuting

violators of the Clean Water Act, making the need to resolve the "vagueness" problem all the more pressing. *See, e.g.*, Larkin, *supra*, at 3 n.23 (citing, *inter alia*, *United States v. Caldwell*, 626 Fed. Appx. 683 (9th Cir. 2015) (affirming convictions for Clean Water Act violations); *United States v. Wilmoth*, 476 Fed. Appx. 448 (11th Cir. 2012) (same); *United States v. Long*, 450 Fed. Appx. 457 (6th Cir. 2011) (same); *United States v. Panyard*, 403 Fed. Appx. 17 (6th Cir. 2010) (same); *United States v. Agosto-Vega*, 617 F.3d 541 (1st Cir. 2010) (vacating defendant's convictions for violations of the Clean Water Act); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) (affirming convictions for violating the Clean Water Act)).

The stakes for the ordinary business or individual property owner in America could not be greater. Given the lack of a clear and objective definition of federal jurisdiction under the Act, the process of obtaining a permit to make use of one's own property can be extraordinarily—and sometimes prohibitively—expensive. David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Res. J. 59, 74 (2002) (Under the Clean Water Act, "[t]he mean individual permit application in our sample costs over $271,596 to prepare [in 2002 dollars] (ignoring the cost of mitigation, design changes, costs of carrying capital, and other costs) . . . ."). Among other things, the permit process usually involves hiring experts—just to figure out if one's property has jurisdictional waters to begin with. *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994 (8th Cir. 2015) (Kelly, J., concurring) ("In my

view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property").

Further, given the subjective and ambiguous criteria for identifying jurisdictional waters (especially under Justice Kennedy's test), permit delays average a shocking 788 days. *Rapanos*, 547 U.S. at 721. And that's *if* the landowner has the time and the means to stay the course through to a jurisdictional determination and, ultimately, a final permit decision. Often, the Corps will request "more and more information . . . until eventually the applicant loses staying power." *Moore v. United States*, 943 F. Supp. 603, 612 (E.D. Va. 1996) (reporting "compelling testimony" of a former Corps engineer).

Frequently, the Court is faced with a vague statute whose practical reach is limited to a relatively small class of potential violators. *See, e.g.*, *Sessions v. Dimaya,* 138 S. Ct. 1204, (2018) (holding that residual clause of the federal criminal code's definition of "crime of violence," as incorporated into the Immigration and Nationality Act's definition of aggravated felony, was void for vagueness); *Fed. Commc'n Comm'n*, 567 U.S. at 243-44 (concerning vague application of statute applicable to broadcasters). The Clean Water Act is different. Potentially ***anyone*** who owns property and wants to

make some use of it can be swept up by the Act's regulatory mandates. But as a unanimous Court put it in *Hawkes*, "[i]t is often difficult to determine whether a particular piece of property contains waters of the United States," and "there are important consequences if it does," given "the substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit from the Corps." *Hawkes*, 136 S. Ct. 1807, 1812 (2016). As a consequence, the question whether the statute's jurisdictional definition is vague, particularly as understood through the lens of Justice Kennedy's concurrence in *Rapanos*, is of nationwide and pressing importance.

CONCLUSION

The Clean Water Act was enacted over 45 years ago, during which time the courts and the agencies have wrestled with the meaning of "waters of the United States," and tried to provide guidance to the regulated public. Unfortunately, those efforts have been met with little or no success. Without decisive action by the Court,[5] the term will remain "hopelessly indeterminate." *Sackett*, 566 U.S. at 133 (Alito, J., concurring). And, as Members of this Court have rightly acknowledged, "[v]ague laws invite arbitrary

[5] "Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act," but "Congress has done nothing to resolve this critical ambiguity." *Sackett*, 566 U.S. at 133 (Alito, J. concurring). There is no reason to believe that Congress will take up the task of clarifying the Act's jurisdictional reach—at least not voluntarily.

power." *Sessions*, 138 S. Ct. at 1223 (Gorsuch, J., concurring in part and in the judgment).

Something must be done. The Court should grant the petition and decide if the Act's jurisdictional definition is vague, either on its face or through the prism of Justice Kennedy's concurrence in *Rapanos*. If it ***is*** vague, then the Court should consider whether the *Rapanos* plurality can save the Act's jurisdictional definition from a finding of unconstitutional vagueness—or whether the only viable option is to void that definition and compel the Congress to better delineate the limits of federal jurisdiction. For all these reasons, the Court should grant the Petition.

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Respectfully submitted,

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