No. 21-454

In The Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation (SLF) is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic®. Since 1976, SLF has been going to court for the American people when the government overreaches. SLF works to combat government overreach, guard individual liberty, protect free speech, and secure property rights in the courts of law and public opinion.

Because of its overreach of federal authority, the Ninth Circuit's interpretation of the *Rapanos* decision in this matter should be reversed. Direction should be given to regulators applying *Rapanos* and crafting yet another attempt to define WOTUS.

SUMMARY OF ARGUMENT

From the regulations governing the Agencies' assertion of federal jurisdiction over the Sacketts' land, through several failed rulemakings, and as foreshadowed in the Agencies' currently proposed rule, the Agencies have strayed further and further afield of the text of 33 U.S.C. § 1251 et seq. (the Clean Water Act or CWA), the limits of U.S. Const. Art. I, § 8, cl. 3 (the

[1] Rule 37 statement: The parties either provided blanket consent or were notified that Amicus intended to file this brief and consented to its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

Commerce Clause), and the directives of this Court and several lower courts.

At the core of the problem is the baffling *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") decision that has confused the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (the "Agencies"), courts, and landowners to the point of being its own unconstitutionally vague standard. Even the author of the "significant nexus" concept, Justice Kennedy, now calls it "notoriously unclear" and notes its "crushing" consequences. *Army Corps v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring). The meaning of "significant nexus" is unclear even to experts but impenetrable to an average landowner trying to follow the law.

Elevating the single justice "significant nexus" standard to the predominant test is a misapplication of this Court's instruction under *Marks v. United States*, 430 U.S. 188 (1977) ("*Marks*"). If *Marks* is to be applied, the "narrowest" reading of *Rapanos* must yield a test supported by a majority of justices who concurred in the result. This would net a WOTUS definition that covers, per the plurality, all traditional navigable waters, their relatively permanent and at least seasonally flowing tributaries, and all adjacent ponds and wetlands with a continuous surface connection, but that is limited, per the concurrence, to such waters having a significant nexus with the traditional navigable water.

However, a *Marks* analysis may be inappropriate here because Justice Kennedy's opinion was not a logical subset of the plurality and none of the *Rapanos* opinions is clearly narrowest. Finding *Rapanos* established no controlling precedent would free the Court to provide clear instruction and end the contortions that have plagued the courts and Agencies as they have struggled conform to an unworkable standard. It would also enable the Court to take a hard look at the Commerce Clause limitations on the Agencies' regulatory authority.

Federal jurisdiction under the Commerce Clause extends only to three areas: (1) "channels of interstate commerce;" (2) the "instrumentalities of interstate commerce;" and (3) "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Because the CWA regulates *waters* and not *instrumentalities* or *activities*, only the first avenue is available. However, under the rules as applied to the Sacketts, as currently in effect, and as proposed, the Agencies seek to regulate large swaths of water and land with no meaningful connection to channels of interstate commerce.

This Court should curtail that unlawful seizing of federal authority and instruct the Agencies that under the CWA and the Constitution, federal jurisdiction over water extends only to:

a. Traditional navigable waters as understood at the time the CWA was enacted, rooted in the

definition set forth in *The Daniel Ball*, 77 U.S. 557, 563 (1870).

b. Tributaries of traditional navigable waters that are relatively permanent, at least seasonally flowing, and contribute sufficient threshold flow, up to the top of the reach meeting that threshold.

c. Other adjacent waters, of certain threshold size, connected to traditional navigable waters by a relatively permanent, at least seasonally flowing surface connection.

ARGUMENT

A. The Agencies are applying unconstitutional, unlawful rules, invalidated by this and other courts.

Not only is the Agencies' assertion of federal jurisdiction under the CWA unconstitutional and unlawful, but many courts have found as much to no result. The Agencies' only option when courts invalidate central elements of their regulation defining WOTUS is to return to the last legally valid regulation. But the Agencies have ignored some adverse decisions, selectively interpreted others, and misapplied the rest, and continue to apply unconstitutional, invalid rules through a lens of impenetrable guidance. This Court should reject this unconstitutional overreach of Agency authority and provide direction as to the lawful contours of Agency jurisdiction.

1. The current WOTUS definition is unconstitutionally vague.

Justice Alito observed in the first iteration of this matter, "The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Four years earlier, Justice Scalia noted, "The Corps' enforcement practices vary somewhat from district to district because 'the definitions used to make jurisdictional determinations' are deliberately left 'vague.' GAO Report 26." *Rapanos*, 547 U.S. at 727.

Vague regulations—particularly vague criminal regulations[2]—violate constitutional due process rights and cannot stand. "'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). A regulatory standard must be vacated if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory

[2] For merely negligent CWA violations, the landowner is subject to fines of up to $37,500 per day of noncompliance and imprisonment for up to a year. *See* 33 U.S.C. § 1319(c)(1), adjusted per 40 C.F.R. § 19.4; *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring); *Rapanos*, 547 U.S. at 721.

enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). The current regulatory regime fails on both counts.

To understand the current definition of WOTUS, a landowner must wade through 1980s-era regulations this Court found impossibly vague in 2006 and 2012, several enigmatic Supreme Court decisions, EPA guidance documents purporting to explain those decisions, and numerous circuit and district court attempts at further interpretation, and then guess how a local enforcement agent might apply all that law. Within this morass, the regulated community has no idea what conduct is prohibited, and regulators have no hope of consistent application.

To cite just a few examples, the regulations create a category of jurisdictional waters called "other waters," which include waters that "***could*** affect interstate . . . commerce including any such waters [w]hich . . . ***could*** be used by interstate . . . travelers for recreational or other purposes." 33 C.F.R. § 328.3(a)(3) (2008). How a landowner or field agent might guess as to whether someone from out-of-state might enjoy fishing or canoeing on a small pond or stream is a mystery.

The Agencies further assert jurisdiction over all tributaries of traditional navigable waters, interstate waters, or "other waters." *See* 33 C.F.R. § 328.3(a)(5) (2008). However, the Agencies define a tributary to include the entire "reach of the stream," with flow characteristics decided according to the entire stream. EPA, "Clean Water Act Jurisdiction Following the U.S.

Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," Dec. 2008 (*Rapanos* Guidance), p. 6. And rather than measuring significant volumes of water, these flow characteristics are specifically aimed at identifying "tributaries" where water is *absent*—"high water mark," "bed and banks," "water staining," or "sediment sorting"—and may be based not even on the tributary itself but the entire watershed. *Id.* at pp. 9-10. Thus, the flow through a parcel may be so intermittent and trivial that it is unclear whether it is part of any larger waterbody. Without expert analysis or Agency clarification, no property owner could possibly know whether a trickle through her property implicates the CWA, and no field agent could hope to apply the regulation consistently.

Presuming one could theoretically identify federal "tributaries," the *Rapanos* Guidance then establishes federal jurisdiction over all waters with a "significant nexus" to those tributaries and certain other covered waters. To make this determination, a landowner must assess the "flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters." *Id.*, p. 8. This analysis includes many considerations outside the knowledge or expertise of a typical landowner. For example, the Agencies may consider "historic records of water flow," the provision of "habitat services," or a "significant" nexus from the flow of sediment or the complete reverse, trapping sediment.

See id., p. 11. If reasonable hydrologists, marine scientists and botanists could disagree as to a water's "significance," no landowner or field agent could possibly understand the rules or apply them consistently.

And this assessment applies not only to wetlands near traditional navigable waters but also to wetlands several steps removed from such waters. Wetlands "adjacent" (which the Agencies unlawfully interpret functionally[3]) to "non-navigable tributaries that are not relatively permanent" also become jurisdictional if the Agencies deem they have a significant nexus with a "traditional navigable water" (again, interpreted in ways that are neither traditional nor require actual navigation). *See id.*, p. 8.

In other words, a landowner of a damp property could look hard for a nearby tributary and reasonably find none, but an agent could later assert that an offsite occasional trickle, typically invisible to the eye, is subject to federal jurisdiction. That agent could then decide that the wetlands at issue, together with the invisible tributary, have a significant nexus with a jurisdictional water miles away. *See id.*, p. 10. Though the landowner's inability to perceive the federal jurisdiction over her property is completely understandable, she would face crippling fines for failure to secure a

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[3] *See Summit Petroleum v. EPA*, 690 F.3d 733, 744 (6th Cir. 2012) ("'adjacent' is not ambiguous between 'physically proximate' and merely 'functionally related'"), citing *Rapanos*, 547 U.S. at 748.

federal permit, plus the loss of use of her property, without recompense.

To avoid such risk, a landowner might engage the services of a costly environmental professional, obtain a scientific opinion on whether her land is subject to federal jurisdiction, and coordinate with the Agencies to confirm their agreement. This effort costs thousands of dollars and at least several months. *See* U.S. DOT, FHWA, "Army Corps of Engineers Regulatory Guidance Letter on Jurisdictional Determinations" (May 6, 2009), https://www.environment.fhwa.dot.gov/legislation/other_legislation/natural/laws_usacememo.aspx ("While the RGL states that the Corps is committed to finalizing both preliminary and approved JDs within 60 days of submittal, factors such as Corps workload and complexity of the aquatic resource delineation may delay a decision from the Corps."). And, at the end of that process, the Agencies may disagree with the landowners' expert assessment, thus necessitating a permit and beginning another lengthy and costly process. *See Rapanos*, 547 U.S. at 721 ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. . . . Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.").

Complying with the law should not be this hard. Waters of true federal significance should be obvious. Properties should be bought, sold and developed without undergoing months or even years of expert

analysis. And people should understand the rules *before* they are fined and prosecuted. These are foundational aspects of our private property and due process rights. The Agencies and the regulated community need this Court's direction to rein in the behemoth WOTUS problem that has unfolded over the last few decades.

2. The current WOTUS definition violates the Commerce Clause.

Although this Court has found the Clean Water Act does not extend federal authority to its constitutional limits (*see Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*")), the Agencies exceed even those further bounds of the Constitution. Indeed, several courts have recognized as such and the Agencies have ignored their direction. This Court should reject the Agencies' disregard of judicial directives and reestablish the constitutional limits on Agency authority.

Congress' authority under the Commerce Clause extends only to three areas: (1) "channels of interstate commerce;" (2) the "instrumentalities of interstate commerce;" and (3) "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. Because the Clean Water Act is designed to regulate water bodies rather than activities, the first category of Commerce Clause regulation is the only available avenue for federal jurisdiction here. Indeed, nothing "in the legislative history . . . signifies that Congress

intended to exert anything more than its commerce power over navigation" as authorized by the Commerce Clause. *SWANCC*, 531 U.S. at 168, n. 3.

As this Court long ago established, the third avenue for regulation under the Commerce Clause is only available to regulate "commercial activity" with a "substantial" and "economic" effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 551 (1995) *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 551-52 (2012). *See also United States v. Morrison*, 529 U.S. 598, 611 (2000) ("*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."). However, the CWA and the WOTUS regulations seek to regulate water, not activity, whether economic or not.

In the context of CWA regulation, this Court has reasoned, "[W]e would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." *SWANCC*, 531 U.S. at 173. In that case, the Agencies suggested the petitioner's landfill operation might qualify as the targeted economic activity. *See id.* This Court questioned whether there was sufficient intersect between even that commercial activity and "navigable waters." But many property uses are entirely noncommercial, such as the use of one's own bare hands to place rocks in a streambed to strengthen its banks. Here, the Sacketts' sought merely to build their family home.

Many of the waters the Agencies define as federal are clearly not and have no relation to "channels of interstate commerce." Even the Agencies' interpretation of "traditional navigable waters" far exceeds the "channels of interstate commerce" limitation. These include waters that are currently used, were historically used, or are "susceptible to being used in the future for commercial navigation, including commercial waterborne recreation," "for example, boat rentals, guided fishing trips, or water ski tournaments." *See* 33 C.F.R. § 328.3(a), (c) (2008); U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, Appendix D, "Traditional Navigable Waters"; 86 Fed. Reg. 69,372, 69,417 (Dec. 7, 2021). However, any lake or stream of sufficient size to scull a kayak might be susceptible to a boat rental but have no ability to channel interstate commerce. And even under a category three Commerce Clause analysis, a water could be "susceptible to being used" in interstate commerce but only to an entirely insubstantial degree.

Having exceeded their Commerce Clause limits in defining "traditional navigable waters," the Agencies then run continually further afield of their Commerce Clause limits with each successive category of claimed jurisdictional waters.

For example, the Agencies assume jurisdiction over a category of "other waters" that "*could* affect interstate . . . commerce including any such waters [w]hich . . . *could* be used by interstate . . . travelers for recreational or *other* purposes." 33 C.F.R. § 328.3(a)(3) (2008). Here again, under the Commerce Clause, the

threshold for federal jurisdiction is not the water's use in interstate commerce but the regulated activity's interstate commercial nature. But even if the third category test were applicable, every isolated fishing pond or stream that could conceivably be attractive to an out-of-state person would not qualify as a water having a "substantial economic effect on interstate commerce" as required to remain within the bounds of the Commerce Clause. *Sebelius*, 567 U.S. at 551. *See also N. Am. Dredging Co. of Nev. v. Mintzer*, 245 F. 297, 300 (9th Cir. 1917) (explaining a water's "sufficien[cy] for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes" is insufficient to qualify a water as "navigable").

Indeed, courts have already spoken on this issue and have vacated these provisions. In *United States v. Wilson*, the Fourth Circuit found the "regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce." 133 F.3d 251, 257 (4th Cir. 1997). Because the regulation does not require "that the regulated *activity* have a *substantial* effect on interstate commerce," it poses "serious constitutional difficulties" and appears "to exceed congressional authority under the Commerce Clause." *Id.* (first emphasis added). The court concluded because Congress did not intend the CWA to be unconstitutional, the regulation exceeded the scope of the CWA. *See id.* ("[T]he Army Corps of Engineers exceeded its congressional authorization

under the Clean Water Act, and . . . , for this reason, 33 C.F.R. § 328.3(a)(3) (1993) is invalid."). The Agencies barely paid lip service to the *Wilson* decision and did not remove the "could affect" language from any of their subsequent regulations or guidance documents.

The District of Columbia District Court was similarly troubled by the "could affect interstate commerce language" and vacated a comparable WOTUS definition. *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 187 (D.D.C. 2008). The court ordered EPA to return to its 1973 regulation, the last effective regulation before the invalidated 2002 regulation. *See id.* at 186 ("[V]acatur will . . . merely restore the previous regulatory definition of 'navigable waters' pending further proceedings."). This is because "[t]he effect of invalidating an agency rule is to reinstate the rule previously in force." *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). EPA complied but did not make comparable adjustments to other CWA regulations.

The Agencies do not have this option of continuing to apply judicially invalidated rules, particularly rules invalidated on constitutional grounds. *See United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now says what the court has prescribed."); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it."). However, this has historically been the Agencies' response to contrary judicial opinions. *See Rapanos*,

547 U.S. at 726 ("Following our decision in *SWANCC*, the Corps did not significantly revise its theory of federal jurisdiction under § 1344(a).").

The Agencies' overreach does not stop there. They further claim jurisdiction over all interstate waters and all tributaries of their core set of waters, however small and insignificant. *See* 33 C.F.R. § 328.3(a)(2), (4) (2008). Nonnavigable, nearly invisible trickles are neither channels nor instrumentalities of interstate commerce and indeed have no effect on interstate commerce, regardless of whether they cross state lines. Justice Kennedy recognized this problem in his *Rapanos* opinion: "The merest trickle, if continuous, would count as a "water" subject to federal regulation." 547 U.S. at 769. Nevertheless, here again, the Agencies did not withdraw the unlawful regulations, and their *Rapanos* Guidance continues to claim jurisdiction over these waters.

The Agencies expand on this unlawful base by claiming authority over certain waters that are "adjacent" or have a "significant nexus" with jurisdictional waters or their tributaries even if these waters are completely physically separate and have no commercially relevant interconnection to a channel of interstate commerce. 33 C.F.R. § 328.3(a)(7), (c) (2008); *Rapanos* Guidance, pp. 8-12.

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935)

(Cardozo, J., concurring). That is what the Agencies have long done in their interpretation of WOTUS. By extending federal jurisdiction over an unending sequence of ever-more-attenuated connections to navigable waters, the Agencies have "asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Rapanos*, 547 U.S. at 722. Such regulation "of immense stretches of intrastate land . . . [is] an unprecedented intrusion into traditional state authority." *Id.* at 738. The Agencies' current interpretation of WOTUS, including the applicable regulations and *Rapanos* Guidance, no longer bears any reasonable relationship to interstate commerce.

This Court should reject the Agencies' unconstitutional overreach, enforce the basic controlling effects of judicial decisions, and clarify that federal regulatory authority is limited to channels of interstate commerce.

3. The current WOTUS definition encroaches on the traditional province of the states.

In the Clean Water Act, Congress charged the Agencies with protecting both the "chemical, physical, and biological integrity" of "navigable waters" and "the primary responsibilities and rights of States" to prevent water pollution and manage their land and water resources. 33 U.S.C. § 1251. The Agencies have strayed

far from this original commission and now interpret WOTUS to place primary responsibility for water regulation on the federal government. This violates both the CWA and the constitutionally mandated balance of state and federal power.

"Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power." *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). *See also SWANCC*, 531 U.S. at 174 ("the States [have] traditional and primary power over land and water use"). Preserving this balance of power is important not only for constitutional but also practical reasons. In a country as large as ours, "the varied topographies and climates . . . call for varied water quality solutions." *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1275 (5th Cir. 1980).

But the expansion of authority under the Agencies' interpretation leaves very little, if any, water for state regulation. Every pond or stream with a fish, every tributary of such a water up to its tiniest, ephemeral headwater trickle, and every wetland with any ecological connection to such waters are subsumed within federal jurisdiction. If few waters of any meaningful size remain for the states, the Agencies are not "honor[ing] the policy of cooperative federalism that informs the Clean Water Act [or] . . . attend[ing] the shared responsibility for safeguarding the nation's waters." *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015).

Recognizing the states' primary responsibility over land and water regulation means not merely giving states a share of the paperwork but preserving their rights to regulate a water differently or even not at all. The Agencies have long run afoul of this constitutional and Clean Water Act directive. This Court should inform the Agencies of the limits of federal jurisdiction and restore the states' primary authority over their own lands and waters.

4. The current WOTUS definition violates this Court's *Rapanos* decision.

The Agencies and courts are at sea in interpreting *Rapanos* and, indeed, many of this Court's fragmented decisions. *Marks v. United States* is at the heart of this confusion, particularly for decisions where the concurrence is not a logical subset of the plurality.[4] Courts have applied *Marks* to reach an interpretation of *Rapanos* contrary to this Court's holding. This would be an ideal occasion either to clarify how to apply *Marks* correctly or to establish *Marks*' inapplicability to circumstances like *Rapanos*.

The *Marks* Court instructs as follows:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of

[4] This Court granted cert several years ago to clarify this issue. *See Hughes v. United States*, 138 S. Ct. 1765, 1779 (2018). But this Court was ultimately able to decide the case without resolving the debate over *Marks*.

> the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

430 U.S. at 193.

However, "[t]he *Marks* Court did not elaborate on how to identify the narrowest grounds." *United States v. Hughes*, 849 F.3d 1008, 1012 (11th Cir. 2017) (quoting Bryan A. Garner, et al., The Law of Judicial Precedent 199–200 (2016)). "In the face of this confusion, two main approaches have emerged: one focusing on the reasoning of the various opinions and the other on the ultimate results." *United States v. Davis*, 825 F.3d 1014, 1020 (9th Cir. 2016). In the first, the holding becomes that opinion which is the "logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *King*, 950 F.2d at 781. In the second, "the narrowest ground [i]s the rule that 'would necessarily produce results with which a majority of the Justices from the controlling case would agree.'" *Davis*, 825 F.3d at 1021 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 694–97 (3d Cir. 1991)).

Because Justice Kennedy's concurrence is not a logical subset of Justice Scalia's plurality, applying the reasoning-based approach to *Marks* is problematic. Indeed, the principle of "narrowest grounds" is unclear for any biconditional rule such as the definition of WOTUS. *See* Steinman, A., "Nonmajority Opinions and

Biconditional Rules," 128 Yale L.J. Forum (Mar. 2018), https://www.yalelawjournal.org/forum/nonmajority-opinions-biconditional-rules. Is a test that makes more waters jurisdictional while making fewer waters non-jurisdictional "narrowest" or the converse? Courts disagree and, when they reach an impasse, seem to choose based on the result they like best. For example, the Eleventh Circuit follows Kennedy's concurrence, finding his standard the "narrowest" because it is "less far-reaching (i.e., less restrictive of CWA jurisdiction)." *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007). But the First Circuit reasoned that "it seems just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality), because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *United States v. Johnson*, 467 F.3d 56, 63 (1st Cir. 2006). Apparently not liking that result, the First Circuit elected instead to take its direction from the dissent and find federal jurisdiction whenever either the plurality's or the concurrence's test applied. *Id.*, at 64-66.

Several circuit courts likewise follow this approach of applying the dissenting opinion in interpreting *Rapanos*. *See*, *e.g.*, *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). Although not in this context, the Ninth Circuit has also expressed support for this approach. *See Davis*, 825 F.3d at 1025 (reasoning that "we assume but do not decide that dissenting

opinions may be considered in a *Marks* analysis," while acknowledging "that in *King*, the D.C. Circuit explicitly stated that it was not 'free to combine a dissent with a concurrence to form a *Marks* majority.' *King*, 950 F.2d at 783").

The Agencies also follow an either/or approach. *See Rapanos* Guidance, p. 3 (citing Stevens' dissent to justify incorporating both the plurality's and the concurrence's standards). For example, they adopt Justice Scalia's "relatively permanent" criterion for jurisdictional tributaries, despite Justice Kennedy's criticism of that standard as being a government overreach. *See Rapanos* Guidance, p. 1 ("The agencies will assert jurisdiction over . . . [n]on-navigable tributaries of traditional navigable waters that are relatively permanent. . . ."); *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring) ("The merest trickle, if continuous, would count as a 'water' subject to federal regulation. . . ."). And they adopt Justice Kennedy's "significant nexus" test (*see Rapanos* Guidance, pp. 8-11) despite the plurality's lengthy critique of that approach. *See Rapanos*, 547 U.S. at 753-57 (calling Justice Kennedy's "significant nexus" analysis a mischaracterization of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) that eschewed case-by-case determinations, a substitution of the purpose for the text of the statute, the creation of a "new statute all on his own," and, ultimately, "turtles all the way down").

This amalgam approach is an improper application of *Marks* and is unfaithful to the *Rapanos* decision. The Eleventh Circuit explains:

> *Marks* talks about those who "concurred in the judgment[]," not those who did not join the judgment. *Marks*, 430 U.S. at 193. It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an "either/or" test, whereby CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied.

Robison, 505 F.3d at 1221. The Agencies even acknowledge in their Guidance this approach is directly contrary to the direction of the Eleventh Circuit. *See Rapanos* Guidance, p. 3, citing *Robison*. Nevertheless, the Agencies remain steadfast in this perspective both now and in their next rulemaking.

The either/or approach is also contrary to the weight of judicial authority. Most courts interpret *Rapanos* according to Justice Kennedy's concurrence, although they reach that result in different ways. The Ninth Circuit provides plainly that in a 4-1-4 decision, the concurrence is necessarily controlling. *See N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007). The Eleventh Circuit reasons that Kennedy's concurrence is the narrowest grounds because it "will classify a water as 'navigable' more frequently than Justice Scalia's test." *Robison*, 505 F.3d at 1221. The Seventh Circuit found Kennedy's concurrence "narrower (so far as reining in federal authority is concerned)" and deemed it further persuasive that whenever Kennedy's test is satisfied, five justices would agree (including the four dissenters). *United*

States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006). In the Fourth Circuit, the parties conveniently agreed. *See Precon Dev. Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 288 (4th Cir. 2011). The Agencies simply disregard this authority, even within the circuits it applies.

But making Justice Kennedy's test the law is also a misapplication of *Marks* and a distortion of *Rapanos*. Following his opinion has the effect of "turn[ing] a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be." *King*, 950 F.2d at 782.

Instead, a results-based perspective on the *Marks* analysis may prove more useful. Five of the *Rapanos* justices voted to reverse the District Court's and the Court of Appeals' findings of federal government jurisdiction over the waters at issue. Four of the justices voted to affirm. Of the five *Rapanos* Justices who "concurred in the judgment" (*Marks*, 430 U.S. at 193), they would only agree that a water body is subject to federal jurisdiction when it meets both Justice Scalia's permanent/continuous test and Justice Kennedy's significant nexus test. Therefore, the result of *Rapanos* is not either/or but both.

This approach also makes logical sense. An unimportant trickle should not be sufficient to invoke federal jurisdiction, but it makes an excellent starting

point because of its visual clarity. It provides an unambiguous standard, without resort to experts and years of lost commercial opportunity and the myriad other problems with a case-by-case analysis that have long troubled this Court (*see Rapanos*, 547 U.S. at 753). And the significant nexus backdrop ensures inconsequential connections are not elevated beyond their importance or their capacity for regulation under the Commerce Clause.

B. This Court should provide a clear standard.

Whether through an application of *Marks* or a wholesale new approach, this Court should provide a clear standard to the Agencies. The significant nexus test the lower courts have extracted from *Rapanos* has sent the Agencies on a wild goose chase in search of a lawful regulation. Having now thrice failed to draft a rule within their constitutional and statutory limits, the Agencies clearly need a better guide. Either a proper application of *Marks* or a new construct based on the statutory text and Constitution would net somewhat similar results. But the benefit of a wholly new standard would be to remove the unhelpful *Rapanos* precedent and its hefty baggage entirely.

1. This Court's precedent provides some support for abandoning *Marks*.

This Court recently considered the application of *Marks* to the fragmented decision of *Apodaca v. Oregon*, 406 U.S. 404 (1972). *See Ramos v. Louisiana*, 140

S. Ct. 1390 (2020). The lone concurring decision in that case was more extreme than Justice Kennedy's concurrence in *Rapanos*, but much of the analysis is comparable.

This Court struggled with the difficulty in determining which opinion would be the "narrowest and controlling." 140 S. Ct. at 1403. And the Court found that, where there is no such opinion, the lone concurrence cannot bind the Court. Rather, the decision becomes merely an unexplained ruling binding only on the parties. *Id.* at 1404. In such a situation, *Marks* has "nothing to do with th[e] case." *Id.* at 1403.

Part of this Court's reasoning leaned on the concurring opinion's deviation from prior precedent, and Justice Kennedy arguably did not stray quite so far. But Kennedy did develop an entirely new test only tenuously rooted in past precedent. Giving his novel and unsupported test the force of law makes little more sense.

Just like in *Ramos*, there is logic to this Court finding *Rapanos* binding only as to the parties and providing untethered guidance based on the text of the CWA, the Constitution and the decades of Supreme Court precedent both before and after the passage of the CWA. Much of that history has been lost over the last 15 years in chasing the elusive significant nexus standard that even Justice Kennedy came to question.

2. Traditional navigable waters should include only channels of interstate commerce.

The foundation of the Agencies' authority and the source of all further derivative authority under the CWA is "navigable waters." *See SWANCC*, 531 U.S. at 172 ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.")

The term "navigable waters of the United States" did not originate with the CWA but was borne out of a long history with origins in the British legal system, the Commerce Clause of the U.S. Constitution, and a chain of judicial decisions. *See*, *e.g.*, *id.* (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407–408 (1940)). The Agencies cannot interpret this term as if it were an undefined, malleable construct. Congress deliberately selected a term that had already been well-defined by federal courts when it could have chosen any other word or phrase to express its intentions. And Congress further colored this term by making the preservation of states' primary authority over water regulation one of the primary goals of the CWA. This background must underpin the entire WOTUS regulation. Most fundamentally, this Court should direct the Agencies to restore the "traditional navigable waters" concept that originally framed the CWA.

The term "navigable" in this context was defined by this Court to mean "highways for commerce, over which trade and travel are or may be conducted" and "navigable waters of the United States" was defined to mean waters that "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *The Daniel Ball*, 77 U.S. at 563; *see also Appalachian Elec. Power Co.*, 311 U.S. at 406 (referencing "the generally accepted definition of The Daniel Ball").

This definition is also consistent with the framework of the Commerce Clause, which authorizes federal regulation over "channels of interstate commerce." *Lopez*, 514 U.S. at 558-59. *See also Appalachian Elec. Power Co.*, 311 U.S. at 404 ("The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution, art. I, § 8, cl. 3. 'The Congress shall have Power * * * To regulate Commerce * * * among the several States.' It was held early in our history that the power to regulate commerce necessarily included power over navigation."). Indeed, "[t]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *Id.*, quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964).

To remain true to the navigability intent of the CWA and the "channels of commerce" limitation of the

Commerce Clause, a water must have utility for commercial trade and deliberate travel, not merely waterborne recreation. As this Court has explained:

> It is not . . . every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698–99 (1899). *See also North American Dredging Co. of Nevada v. Mintzer*, 245 F. 297, 300 (9th Cir. 1917):

> Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense . . . , nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation.

The Court should direct the Agencies to restore this longstanding "highways for commerce" concept as the foundation of their definition of WOTUS.

3. Tributaries and adjacent waters must be sizeable and hydrologically connected to navigable waters.

Courts have expanded upon *The Daniel Ball* definition over time to include certain tributaries and

wetlands that contribute flow to traditional navigable waters. But the Agencies' right to regulate these waters is not absolute but derivative of their authority over traditional navigable waters. *See*, *e.g.*, *SWANCC*, 531 U.S. at 167 (2001) ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes."); *United States v. Wilson*, 133 F.3d 251, 256 (4th Cir. 1997) ("Congress may also regulate the discharge of pollutants into nonnavigable waters to the extent necessary to protect the use or potential use of navigable waters as channels or instrumentalities of interstate commerce."). Both the CWA and the Constitution limit the scope of lawful regulation of these waters. Replacing *Rapanos* with a clear statement of that scope would be profoundly beneficial to the Agencies and the regulated community and perhaps prevent yet another failed attempt at a lawful WOTUS definition.

First, and as perhaps should be intuitive, the tributaries or other adjacent waters must actually be present. As Justice Scalia aptly stated, "the CWA authorizes federal jurisdiction only over 'waters,' " not the shape of streambeds. *Rapanos*, 547 U.S. 715, 731, 736, fn 7 (2006). "The plain language of the statute simply does not authorize [the Agencies'] 'Land Is Waters' approach to federal jurisdiction." *Id.*, at 734. "[A]t bare minimum," the CWA contemplates "the ordinary presence of water." *Id.* Where water is absent, the Agencies have no jurisdiction.

Thus, to qualify for federal jurisdiction, the tributary or the adjacent water body's connection to a

navigable water must be relatively permanent and at least seasonally flowing.

Due process further demands that water actually be present for any federal regulation because no ordinary landowner could expect to run afoul of the Clean *Water* Act if he develops dry land or develops isolated waters with no discernible water connection to a federal water. The criminal consequences of CWA violations make enforcement unjust when water is absent.

As Justice Scalia further noted, the presence of water is a necessary but not sufficient condition. *See Rapanos*, 547 U.S. 715, 736, fn 7 ("relatively continuous flow is a necessary condition for qualification as a 'water,' not an adequate condition"). Because the Agencies' regulatory authority is only over the actual channel of commerce, the mere presence of a tributary or hydrological connection with an adjacent water is insufficient to bestow jurisdiction upon the Agencies. "[I]n a statute concerned with downstream water quality," "[t]he merest trickle," even if continuous, should not "count as a 'water' subject to federal regulation." *Rapanos*, 547 U.S. at 769 (2006) (Kennedy, J., concurring). Rather, the tributary or adjacent water must contribute sufficient flow or be of sufficient size to meaningfully impact the navigable water.

Thus, the Agencies should promulgate regulations setting thresholds for jurisdiction over tributaries and adjacent waters designed around flow volumes, acreage, and other clearcut metrics of meaningful effect. The clarity of such regulations would further serve due

process goals because flow and volume calculations are generally accessible and not subjective. In contrast, the ecological and marine systems' analyses the Agencies currently mandate often require highly specialized, lengthy and costly expert analysis.

The Agencies have posited that a navigable water may be significantly affected by the *absence* of a hydrological connection such as through sediment trapping. But there is no authority in the CWA or the Constitution for such a "land is waters" approach to federal jurisdiction. Certainly if activities will directly cause sediment to enter a federal water, those activities may be regulated for that effect. But the Agencies may not regulate activities that affect only land and nonfederal waters under a theory that all water and land is fundamentally interconnected. While scientifically true, such a theory does nothing to inform the CWA and the constitutional limits on Agency jurisdiction.

The Agencies' authority is limited to significant tributaries and adjacent waters that meaningfully impact traditional navigable waters through a relatively permanent, at least seasonally flowing surface hydrological connection.

4. Interstate waters and isolated intrastate waters are not subject to federal jurisdiction.

Under the "channels of interstate commerce" avenue for regulation under the Commerce Clause, the Agencies may not regulate any water that is not

connected to a traditional navigable water, regardless of whether the water crosses state lines. Indeed, regulation of interstate waters makes no more sense than regulating mountain ranges that cross state lines. The mere traverse of state lines is simply irrelevant to the question of whether a water functions as a channel of commerce.

If the Agencies wished to regulate interstate waters or other waters not adjacent to a traditional navigable water, the Agencies' authority would stem not from the first prong of the Commerce Clause analysis but from the third, "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59.

But unlike the fairly broad authority granted the federal government over "channels of interstate commerce," federal jurisdiction stemming from the third prong is limited to *commercial activities* with a *substantial, economic* effect on interstate commerce. *See Sebelius*, 567 U.S. at 551-52.

Because of the ecological focus of the CWA (to restore and maintain the "chemical, physical and biological integrity of Nation's waters," § 1251(a)) and the Agencies' environmental mandate, the Agencies have not focused their regulation of waters disconnected from traditional navigable waters on activities or economics. Instead, all justification for the regulation of such waters has been their marine, biological and ecological interconnectedness with the broader systems of waters in this country.

Such scientific connection is insufficient to demonstrate the substantial economic effect necessary for the assertion of federal jurisdiction. Moreover, a *water*'s effect on interstate commerce is independent of an *activity*'s commercial nature, and it is the latter that the third category of a Commerce Clause analysis targets. *See SWANCC*, 531 U.S. at 173. And the Agencies have not even begun to parse which commercial activities, rather than which waters, have a significant economic effect on interstate commerce such that federal jurisdiction is possible.

Because interstate waters and isolated intrastate waters do not qualify for federal jurisdiction under the first category of the Commerce Clause analysis and because a category three analysis is inapplicable to the regulation of these waters, the Agencies have no authority to regulate these waters.

5. The final definition should include only navigable waters and their sizeable, interconnected tributaries and adjacent waters.

This Court should end the Agencies' continued flailing at a lawful definition and provide clear direction. Under the Agencies' CWA and Constitutional authority, they may assert federal jurisdiction only over the following waters:

a. Traditional navigable waters as understood at the time the CWA was enacted, rooted in the definition set forth in *The Daniel Ball*.

b. Tributaries of traditional navigable waters that are relatively permanent, at least seasonally flowing, and contribute sufficient threshold flow, up to the top of the reach meeting that threshold.

c. Other adjacent waters, of certain threshold size, connected to traditional navigable waters by a relatively permanent, at least seasonally flowing surface connection.[5]

CONCLUSION

For the foregoing reasons, SLF respectfully requests this Court reverse the Ninth Circuit's finding of federal jurisdiction over the Sacketts' property, clarify that Justice Kennedy's significant nexus test is not the controlling opinion of *Rapanos*, and find either (a) that *both* Justice Scalia's test and Justice Kennedy's test must be satisfied for federal jurisdiction or (b) that *Rapanos* was binding only upon its parties and provide

[5] Two other categories of waters that are typically included in the Agencies' WOTUS definition—territorial seas and impoundments—are subsumed within the constructs set forth here and separate inclusion only muddles what should be a simple and clear rule.

direction as to the contours of federal jurisdiction over water.

Respectfully submitted,

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