No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT, ET UX.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Michael Pepson
Counsel of Record
Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae

April 14, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Rules

Federal Register

Other Authorities

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. One of those ideas is that the separation of powers and federalism protect liberty. Another is that ordinary people like the Sacketts are constitutionally entitled to due process of law before the government may deprive them of property rights and impose draconian penalties. As part of this mission, AFPF appears as *amicus curiae* before federal and state courts.

AFPF believes the real-world stakes here are high and radiate beyond the facts of this case. The practical and financial burdens foisted on state and local governments and important industries like the agricultural sector, not to mention an untold number of private property owners throughout the Nation, by EPA's efforts to redraw the boundaries of its power under the Clean Water Act ("CWA" or "Act") cannot be

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than amicus made any monetary contributions intended to fund the preparation or submission of this brief.

overstated. The Nation needs certainty about the scope of EPA's regulatory authority under the Act.

SUMMARY OF ARGUMENT

This case is not about what constitutes sound environmental policy. Instead, it is about EPA's longstanding efforts to circumvent statutory and constitutional limits on its regulatory power under the CWA by reimagining the statutory phrase "waters of the United States" to encompass, among other things, parcels of land suitable for homebuilding, as happened here. EPA's regulatory approach is inconsistent with the ordinary meaning of the statute and violates the structural limitations of federalism and separation of powers, as well as infringing due process.

The CWA establishes a permitting structure that authorizes EPA to regulate "navigable waters," 33 U.S.C. § 1344(a), defined as "the waters of the United States, including the territorial seas," *id.* at § 1362(7). It does not permit, let alone clearly authorize, EPA to unilaterally expand the scope of its regulatory power under the Act to extend to soggy land—often miles away from "navigable waters" as any ordinary person would understand the term (*i.e.*, relatively permanent bodies of water that could at least be navigated by a small vessel)—as "waters of the United States." Nor does it authorize EPA to regulate normal land-based irrigation activities of agricultural operations and the like. Or prairie potholes, for that matter. And it does not authorize EPA to regulate private property owners like the Sacketts, who simply wanted to build a house on a 2/3 acre parcel of land they own in an

area already developed by other homeowners, based on the say-so of a government bureaucrat.

The decision below mistakenly concluded otherwise. The Ninth Circuit's atextual interpretation of the Act's sweep fails as a straightforward matter of statutory interpretation. *See* Pet. Br. 5, 45–48. But if it were otherwise, the Act itself would be unconstitutional for at least three reasons.

First, the decision below misinterpreted the Act to grant the federal government authority it does not have to regulate private property. Under our system of federalism, state and local governments are primarily tasked with regulating land use, including through development permits. *See* U.S. Const. amend. X. A broad construction of the phrase "waters of the United States" to extend to the Sacketts' private land-use decisions would likely exceed constitutional limits on Congress's authority to regulate navigation under the Commerce Clause. Regardless, subject to limits on Congress's enumerated powers and other constraints on federal power, if Congress wishes to significantly alter this balance between state and federal authority, it must clearly say so. Congress, by any reasonable account, did not do so here.

Second, the decision below misinterpreted the Act to delegate to EPA power to make important public policy decisions of vast economic and political importance that the Constitution requires to be made by the People's elected representatives in Congress through the intentionally difficult legislative process.

Third, the Ninth Circuit's application of the judicially created "significant nexus" test, at the least,

stands in serious tension with the Constitution's due process requirement of fair notice regarding required or permitted conduct, in addition to authorizing and encouraging arbitrary enforcement practices. This is particularly so because violations of the Act's onerous compliance requirements expose property owners to draconian civil and *criminal* penalties. It cannot be the case that ordinary homeowners must consult with hydrologists to determine the extent of their obligations under the Act and, on top of that, still live under the sword of Damocles, as underscored by the dramatic ebb and flow of the government's interpretation of the scope the Act as elections change administrations. As the Sacketts' decade-plus odyssey back and forth to this Court underscores, EPA's jurisdictional determination process does little to ameliorate these constitutional problems.

Finally, even if the question presented by this case were close—it is not—the Act's sweep should be interpreted narrowly, consistent with the rules of lenity and *contra proferentem*. And any pleas for deference to EPA's purported technical expertise should be rejected out of hand. After all, the Act criminalizes a broad array of innocuous industrial and commercial conduct, in addition to severe civil sanctions.

This Court should reverse the judgment below, reject the Ninth Circuit's application of the judicially created "significant nexus" test, and clarify, once and for all, that the statute's sweep extends only to waters of the United States that can physically be navigated.

ARGUMENT

I. THE ACT'S SWEEP SHOULD BE LIMITED TO NAVIGABLE-IN-FACT WATERS CONNECTED TO TRADITIONAL NAVIGABLE WATERS.

The CWA grants federal control over "navigable waters," 33 U.S.C. § 1344(a), which the statute defines as "the waters of the United States, including the territorial seas," 33 U.S.C § 1362(7). "When called on to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption." *BP P.L.C. v. Mayor of Balt.*, 141 S. Ct. 1532, 1537 (2021). This Court should do so here, also interpreting the statute against the backdrop of bedrock constitutional requirements, as well as "doctrines like lenity and *contra proferentem* [that] have played an essential role in our law for centuries, resolving ambiguities where they persist." *Wooden v. United States*, 142 S. Ct. 1063, 1086 n.11 (Gorsuch, J., joined by Sotomayor, J., concurring in judgment).

"The term 'navigable waters' has a well-known meaning, but the broader term 'waters of the United States' is not defined by the Clean Water Act and has presented a difficult issue for this Court." *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1484 n.4 (2020) (Alito, J., dissenting) (citing *Rapanos v. United States*, 547 U. S. 715 (2006)).[2] *Amicus* acknowledges

---

[2] "For a century prior to the CWA, [the Court] had interpreted the phrase 'navigable waters of the United States' in the Act's

that this Court has interpreted "the waters of the United States" to extend beyond traditional navigable waters. *See, e.g., Rapanos,* 547 U.S. at 730–31 (plurality).

The statutory qualifiers "navigable" and "of the United States" should be read in harmony to restrict the statute's scope to navigable-in-fact bodies of water capable of reaching interstate waterways, consistent with the ordinary meaning of those words and constitutional limits on federal power.[3] *See* Paul J. Larkin, Jr., *The "Waters of the United States" Rule and the Void-for-Vagueness Doctrine*, The Heritage Foundation, No. 207, at 12 (June 22, 2017), *available at* https://ssrn.com/abstract=3046861; *see also SWANCC*, 531 U.S. at 168 ("Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974" when its 1974 regulations

---

predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (plurality) (citing *The Daniel Ball*, 77 U.S. 557, 10 Wall. 557, 563, (1871); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940)).

[3] *Cf. Rapanos*, 547 U.S. at 731 (plurality) ("We need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act."). For those who find legislative history useful, *see Milner v. Dep't of the Navy*, 562 U.S. 562, 573–74 (2011), nothing in it "signifies that Congress intended to exert anything more than its commerce power over navigation," *Solid Waste Agency of North Cook County (SWANCC) v. United States Army Corps of Eng'rs*, 531 U.S. 159, 168 n.3 (2001), when it passed the CWA in 1972. *E.g.*, not including the high seas. *See Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923) (Congress presumed to legislate domestically absent clear statement).

narrowly defined "navigable waters" consistent with traditional definition). Absent such a reading, the statute itself would likely not pass constitutional muster.[4] *See* Sean G. Herman, *A Clean Water Act, If You Can Keep It*, 13 Golden Gate U. Envtl. L.J. 63, 72–84 (2021) (suggesting the CWA's definition of "waters of the United States" violates the nondelegation doctrine and is also void for vagueness); *see also* Larkin, *supra*, at 5 (suggesting 2015 WOTUS Rule was unconstitutionally vague).

II. THE GOVERNMENT'S INTERPRETATION OF THE ACT CONFLICTS WITH THE ACT'S TEXT AND STRUCTURE, AND COMMON SENSE.

In any event, the government's "essentially boundless view of the scope of its power" under the CWA, *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring), defies comprehension. "Most Americans would be surprised to learn that dry land might be treated as 'navigable waters' under the [CWA]." *United States v. Lucero*, 989 F.3d 1088, 1091 (9th Cir. 2021) (criminal prosecution under CWA for "companies . . . dump[ing] dirt and debris on lands near the San Francisco Bay"); *see also United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) ("In a reversal of terms that is worthy of Alice in Wonderland, the regulatory hydra which emerged from the [CWA] mandates in this case that a

---

[4] If, "after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction," *see Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2291 n.9 (2021) (citation omitted), this Court should construe it to comply with the Constitution.

landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned[.]"). That makes no sense.

"[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Com v. FCC*, 476 U.S. 355, 374 (1986). And if Congress wanted EPA to regulate land under the CWA, it would presumably have said so.[5] *See also Ala. Ass'n of Realtors v. HHS,* 141 S. Ct. 2485, 2489 (2021) (*per curiam*) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." (cleaned up)); *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020) (Congress must speak clearly "if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."). It did not.

Yet "federal administrative officials have concluded that the CWA applies to activities (*e.g.*, building homes) that are unlike the ones that gave rise to the CWA (*e.g.*, dumping pollution into a stream) and in places that the average person would find it impossible to believe are 'waters of the United

---

[5] *Cf. Yates v. United States*, 574 U.S. 528, 552 (2015) (Alito, J., concurring in the judgment) ("Titles can be useful devices to resolve doubt about the meaning of a statute." (cleaned up)).

States' (*e.g.*, areas miles away from water)." Larkin, *supra*, at 12.[6]

So too here. The Sacketts "own a 2/3-acre *residential lot* in Bonner County, Idaho. Their property lies just north of Priest Lake, but is separated from the lake by several lots containing permanent structures." *Sackett v. EPA*, 566 U.S. 120, 124 (2012) (emphasis added); *see also* Cert. App. A–4 (describing site as "soggy residential lot"); EPA CA9 Answering Br. 8. Nonetheless, a government ecologist filled out an "Approved Jurisdictional Determination Form," and through this check-the-box exercise concluded the Sacketts' residential lot fell within EPA's authority to regulate "navigable waters" under the CWA. *See* Cert. App. C-1–C-22.

This Court should reject EPA's through-the-looking-glass efforts to reimagine "navigable waters" to include privately owned land, even if it is sometimes soggy. *Cf.* Lewis Carroll, Through the Looking Glass ("'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.'"). As Petitioners explain, *see* Pet. Br. 45, 49–52, nothing in the CWA purports to authorize EPA's assertion of jurisdiction to regulate the Sacketts' parcel of land under the

---

[6] For example, the Corps has deemed "property [to] contain[] 'water of the United States' because its wetlands had a 'significant nexus' to the Red River of the North, *located some 120 miles away*." *United States Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 596 (2016) (emphasis added).

CWA. *See also* Cert. App. E–1 (satellite photo of Sackett site). That should end the matter.

III. THE CONSTITUTION CABINS THE REACH OF 33 U.S.C. § 1362(7).

If the Ninth Circuit's reading of 33 U.S.C. § 1362(7) is correct—it is not[7]—then the statute is unconstitutional for at least three reasons. First, it exceeds Congress's authority to regulate the navigable waters under the Commerce Clause. Second, it interprets the Act to delegate power the Constitution grants only to Congress. And third, it violates due process. This overbroad reading of the statute triggers so many constitutional breaches that it is almost certainly in error. *Cf. Van Buren v. United States,* 141 S. Ct. 1648, 1661 (2021) (rejecting overbroad reading of criminal statute, noting "the fallout" of the Government's position "underscores the implausibility of the Government's interpretation" and "is 'extra icing on a cake already frosted'" (quoting *Yates*, 574 U. S. at 557 (Kagan, J., dissenting)).

---

[7] Of course, "Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2207 (2020).

A. EPA's Expansive Reading of the Act Would Exceed the Scope of Congress's Authority Under the Commerce Clause.

1. Congress Cannot Confer on EPA Regulatory Authority It Does Not Have.

Before Congress can confer power on an administrative agency, it must first have that power itself. Congress's power is derived only from grants in the Constitution and subject to constraints therein. After all, the federal government "is acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Without a constitutional grant of authority to Congress, it simply cannot act. *See Murphy v. NCAA,* 138 S. Ct. 1461, 1476 (2018) ("The Constitution confers on Congress not plenary legislative power but only certain enumerated powers."); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 647 (2012) (Scalia, J., dissenting).

"The CWA presumably was passed as an exercise of Congress' authority 'to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.'" *Cnty. of Maui*, 140 S. Ct. at 1481 (Thomas, J., dissenting) (quoting U.S. Const., Art. I, §8, cl. 3.). When the "Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring); *see also id.* at 599 (Thomas, J., concurring) ("From the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress

only limited powers, notwithstanding the Commerce Clause.").

To be sure, the federal government's power to regulate navigation under the Commerce Clause was first recognized in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), in which the Court explained the word "commerce" "comprehends, and has been always understood to comprehend, navigation within its meaning," *id.* at 193; the "deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right," *id.* at 195; and thus, the "power of Congress, . . . comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes,'" *id.* at 197; *see also Gilman v. City of Philadelphia,* 70 U.S. 713, 740 (1865) (Clifford, J., dissenting) ("Public navigable rivers . . . are rivers of the United States in the sense of . . . the Constitution[.]"); Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 125–26 (2001) (discussing evidence Framers understood navigation to be "commerce").

But the Framers did not grant Congress plenary legislative power. For example, as Justice Thomas has explained, "despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns[.]" *Lopez*, 514 U.S. at 591 (Thomas,

J., concurring) (citing The Federalist No. 17); *see* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Instead, under our system of federalism, the "general power of governing" belongs to the States, not the federal government, which has no general police powers.[8] *See NFIB v. Sebelius*, 567 U.S. at 535–36. Within their borders, and "subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states," states have primary authority to regulate the water and the land beneath the water. *Ill. C. R. Co. v. Illinois*, 146 U.S. 387, 435 (1892);[9] *see*

---

[8] "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (cleaned up).

[9] From ancient times the law has recognized the right of the people to access navigable waters. "The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests. The principle arises from ancient doctrines." *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 284 (1997) (citing Institutes of Justinian, Lib. II, Tit. I, § 2 (T. Cooper transl. 2d ed. 1841) ("Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common")). "American law adopted as its own much of the English law respecting navigable waters, including the principle that submerged lands are held for a public purpose." *Coeur D'Alene Tribe*, 521 U.S. at 284–85. "When the Revolution took place the people of each State became

also SWANCC, 531 U.S. at 174 (noting "States' traditional and primary power over land and water use"). Similarly, "[r]egulation of land use, as through the issuance of the development permits . . . , is a quintessential state and local power." *Rapanos*, 547 U.S. at 738 (plurality) (citation omitted).

2. The Act Should Be Construed Consistent with Federalism Principles and Limits on Federal Power.

The Act's "waters of the United States" language should be interpreted against the backdrop of federalism, the traditional authority of the States to regulate water and land use, and limits on Congress's enumerated powers.

This Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *Cowpasture River Pres. Ass'n*, 140 S. Ct. at 1849–50; *see Cnty. of Maui*, 140 S. Ct. at 1490 (Alito, J., dissenting) ("The Court has required a clear statement of congressional intent when an administrative agency seeks to interpret a statute in a way that entails 'a significant impingement of the States' traditional and primary power over land and

---

themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government." *Gilman*, 70 U.S. at 726 (cleaned up).

water use[.]'" (citing *SWANCC*, 531 U.S. at 174)); *see also Ala. Ass'n of Realtors,* 141 S. Ct. at 2489. Here, Congress did not authorize, let alone clearly authorize, EPA to regulate the Sacketts' property as a "water of the United States," as the Ninth Circuit mistakenly allowed EPA to do. *See* Cert. App. A-32–A-36. *Cf. Rapanos*, 547 U.S. at 738 (plurality) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase 'the waters of the United States' hardly qualifies." (citation omitted)); *SWANNC*, 531 U.S. at 174 ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference."). If Congress had done so, the CWA itself would likely exceed limits on Congress's Commerce Clause power.[10]

This Court has previously rejected interpretations of the CWA "stretch[ing] the outer limits of Congress's commerce power and rais[ing] difficult questions about the ultimate scope of that power." *Rapanos,* 547 U.S. at 738 (plurality) (citing *SWANCC*, 531 U.S. at

---

[10] *Cf. United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) ("Were this regulation a statute, duly enacted by Congress, . . . at least at first blush, it would appear to exceed congressional authority under the Commerce Clause. This regulation is not, however, a statute. Absent a clear indication to the contrary, we should not lightly presume that merely by defining 'navigable waters' as 'the waters of the United States,' Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner." (citing 33 U.S.C. § 1362(7))).

173). And it should do so here. As Paul Larkin has explained:

> It is possible . . . to construe the term "waters of the United States" in a manner that remains faithful to its Commerce Clause origins and is readily applicable by the average person. That construction—*a body of water that can be used by ark, raft, or boat to reach a traditional navigable water*—allows the federal government to protect navigation and the water quality of much of the nation's creeks, rivers, streams, and lakes without putting the average member of the public at risk of violating the criminal law.

Larkin, *supra*, at 12.

Congress's authority to regulate "waters of the United States" should be subject to a commonsense limit that ordinary people of the Framers' generation would have immediately recognized: waters that can be used to transport goods and people. As Paul Larkin has thoughtfully explained, the test for EPA jurisdiction under the CWA should be simple: an "[a]rk, [r]aft, or [d]ugout [c]anoe [r]ule":

> In order for a water to be a "water of the United States," it must not only be connected to an interstate water and capable of contributing to international or interstate commerce, but also be navigable. One way to determine whether a water body qualifies is

> whether it will support the use of an ark, raft, or dugout canoe to reach one of the traditional forms of United States waters such as the Ohio, Mississippi, or Missouri Rivers or one of the Great Lakes.

Id. This approach "would satisfy the requirements of both the Commerce Clause and the Due Process Clause and allow the federal government to protect from pollution the waters that the Framers would have understood as falling within federal regulatory authority." *Id.*

The alternative to this common sense—and constitutional—approach would be to embrace the notion that occasionally-soggy private land can be a "navigable water" and accept the ramifications thereof. Down that rabbit hole lurk some interesting effects. Consider, first, that "navigable water" must be held in trust for the People and thus must be accessible to them. *See also Coeur D'Alene Tribe*, 521 U.S. at 284–86. That is, the public must be granted access to boat, fish, swim, or engage in other typical uses of public waters. *See, e.g., Martin v. Waddell's Lessee,* 41 U.S. 367 (1842) (holding that the public right to access the navigable waters precluded the ejection of oyster fisheries from a tidal river of New Jersey when ownership of the land beneath the navigable water was asserted pursuant to the charters Charles II gave to his brother the Duke of York in 1664 and 1674, which authorized the Duke to establish a colony in America.). The fact that here, at most, members of the public could moisten their toes in the yard would not undermine their right of access if the land is deemed to be "navigable."

Second, access to reach the soggy land by the public must be preserved, which, because it is inaccessible by boat via another body of water, would require an overland route or public easement, appropriating a right to invade the property and creating a compensable physical taking. *See also Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). Notably, this would not require that the soggy land itself be deemed "taken";[11] the easement over dry land to create access to the soggy land would be an independent taking regardless of how the soggy land was treated. *See Moffitt v. United States*, 147 Fed. Cl. 505, 518 (2020) (imposition of right-of-way over railbed for recreational trail was compensable taking).

There is, of course, no indication here the public has been granted access to the Sackett's soggy land, that their right to exclude the public has been compromised, or that they have been compensated for an easement to reach the soggy ground. Nor is there any indication that such an outcome was ever contemplated. If the Sackett's lot includes navigable water, then both the Sacketts and the public are owed a reckoning for water that should be held in the public trust. *See supra* note 9.

---

[11] *But see Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979) (holding that, after owners dredged a marina and then connected it to a bay in the Pacific Ocean, which caused it to fall within definition of "navigable waters of the United States," they could not be required to make the marina open to the public without compensation from the government).

B. 33 U.S.C. § 1362(7), as Interpreted by the Ninth Circuit, Would Unconstitutionally Grant EPA Legislative Power.

Second, if this Court were to accept the Ninth Circuit's interpretation of the CWA, the statute would be an unconstitutional delegation of Congress's legislative powers. *Cf. Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021) ("[T]o put 'extra icing on a cake already frosted,' the government's interpretation of § 264(a) could raise a nondelegation problem." (citation omitted)). *But cf.* Herman, 13 Golden Gate U. Envtl. L.J. at 72–84.

1. The Constitution Bars Congress from Transferring Its Legislative Powers.

"The federal government's powers . . . are not general but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate . . . . It must also act consistently with the Constitution's separation of powers." *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring). Indeed, "[t]he primary protection of individual liberty in our constitutional system comes from . . . the separation of the power to legislate from the power to enforce from the power to adjudicate." Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1915 (2014). For as James Madison famously wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may

justly be pronounced the very definition of tyranny." The Federalist No. 47.

To guard against tyranny and protect liberty, "the Constitution . . . vest[s] the authority to exercise different aspects of the people's sovereign power in distinct entities." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Subject to bicameralism and presentment, U.S. Const. Art. I, § 7, cl. 2, Article I of the Constitution vests "[a]ll legislative Powers herein granted" in Congress, U.S. Const. Art. I, § 1—not the Executive branch. *See Gundy*, 139 S. Ct. at 2123 (confirming "assignment of power to Congress is a bar on its further delegation"); *Loving v. United States*, 517 U.S. 748, 758 (1996) ("[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."). Article II tasks the Executive Branch with faithfully executing the law. U.S. Const. Art. II, § 3. Article III "vests the judicial power exclusively in Article III courts[.]" *Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring). "That is the equilibrium the Constitution demands. And when one branch impermissibly delegates its powers to another, that balance is broken." *Tiger Lily*, 5 F.4th at 673.

Nor may Congress duck the Constitution's accountability checkpoints by divesting itself of its legislative responsibilities. As Chief Justice Marshall observed: "It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). Instead, the Constitution requires "important subjects . . . must be entirely regulated by the legislature itself[.]" *Id.* at 43; *see also Paul v.*

United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting denial of *certiorari*). In other words, "important choices of social policy" must be "made by Congress, the branch of our Government most responsive to the popular will." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in judgment). "It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people." *Id.* at 687 (Rehnquist, J., concurring).

Accordingly, Congress cannot delegate its legislative power to other entities, such as EPA. *See Shankland v. Washington*, 30 U.S. 390, 395 (1831) (Story, J.) ("[T]he general rule of law is, that a delegated authority cannot be delegated."). To the contrary, the Constitution specifically bars Congress from doing so, vesting all legislative power in Congress alone. U.S. Const. Art. I, § 1; *see also* Philip Hamburger, *Is Administrative Law Unlawful*? 388 (2014) ("Americans clearly understood how to write constitutions that expressly permitted the subdelegation of legislative power to the executive, and they did not do this in the federal constitution."). Indeed, "[i]f Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'" *Gundy*, 139 S. Ct. at 2134– 35 (Gorsuch, J., dissenting) (quoting Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002)).

"[I]t would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its

goals." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (Harlan, J.)). For "[b]y shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have."[12] *Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring). But that is at least arguably what Congress did in 1972 when it enacted the CWA, punting on critical questions of the statute's reach. *See also* Herman, 13 Golden Gate U. Envtl. L.J. at 84 ("Congress failed to make that tough policy decision in 1972 with the Clean Water Act."). If so, that presents a constitutional problem.[13]

2. If the CWA Authorized EPA's Sweeping Assertion of Jurisdiction, the Act Would Be Unconstitutional.

The scope of sites that should be subject to federal regulation under the CWA's permitting structure is

---

[12] *Cf. NFIB v. DOL, OSHA,* 142 S. Ct. at 668 (Gorsuch, J., concurring) ("Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives.").

[13] As one federal district court observed in the context of criminal prosecution brought under the CWA: "A jurisprudence which allows Congress to impliedly delegate its criminal lawmaking authority to a regulatory agency such as the Army Corps—so long as Congress provides an 'intelligible principle' to guide that agency—is enough to make any judge pause and question what has happened. Deferent and minimal judicial review of Congress'

an important public policy choice. And a major and difficult one at that, with vast political and economic implications, particularly given the burdens and compliance costs associated with assertion of CWA jurisdiction.

"These designations carry huge implications for landowners and developers, because a designation means that they have to comply with section 404 of the CWA, which is costly and resource-intensive." Jacob Finkle, Note, *Jurisdictional Determinations: An Important Battlefield in the Clean Water Act Fight*, 43 Ecology L.Q. 301, 302 (2016); *see also United States Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594 (2016) ("It is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does."). "Section 404 permits demand extensive efforts from property owners to protect waters of the United States. This constrains the types of activities that can be pursued on the land and reduces that land's utility." Finkle, 43 Ecology L.Q. at 307. As Justice Scalia observed in *Rapanos*:

> The burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial. In deciding whether to grant or deny a permit, the

---

transfer of its criminal lawmaking function to other bodies, in other branches, calls into question the vitality of the tripartite system established by our Constitution." *Mills*, 817 F. Supp. at 1555.

> U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot . . . . 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. . . . These costs cannot be avoided[.]

Rapanos, 547 U.S. at 721 (citation omitted).

Put simply, the jurisdictional sweep of the CWA's permitting regime—and the obligations it imposes—impacts state and local governments and untold numbers of private citizens throughout the Nation. *See Ohio v. U.S. Army Corps of Eng'rs*, 803 F.3d 804, 808 (6th Cir. 2015) (staying the 2015 WOTUS rule, noting "the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines[.]").

"Under our Constitution, the authority to make laws that impose obligations on the American people is conferred on Congress, whose Members are elected by the people." *Biden v. Missouri*, 142 S. Ct. 647, 659 (2022) (Alito, J., dissenting). Accordingly, it is for Congress to determine whether EPA may regulate large swaths of allegedly sometimes soggy land (including farmland) under the CWA permitting regime through the deliberately difficult legislative

process, subject, of course, to other constraints on federal power. *Not* EPA.

In any event, if the Act truly did purport to permit EPA to determine *whether* to subject large swaths of land and various sectors of the national economy to the Act's onerous compliance requirements (it does not), the Act itself would be unconstitutional.[14] *Cf. NFIB v. DOL, OSHA,* 142 S. Ct. at 669 (Gorsuch, J., concurring) ("[I]f the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority." (emphasis in original)).

C. The Ninth Circuit's Jurisdictional Test Violates Due Process.

1. Lack of Fair Notice

In addition to being repugnant to federalism and separation of powers, the Ninth Circuit's jurisdictional test violates the Fifth Amendment by failing to provide property owners with

---

[14] "The regulatory volleyball happening since [1972] is a symptom of an underlying problem with the statute." Herman, 13 Golden Gate U. Envtl. L.J. at 84. "Without definition or criteria from Congress to guide their way, the agencies' answers from the last ten presidential administrations" as to what falls within the definition of "waters of the United States" "have shown that the question is a Rorschach Test. To one administrator, a prairie pothole could be a jurisdictional water. To another, it's not." *Id.* at 65. *Cf. Cnty. of Maui*, 140 S. Ct. at 1481 (Thomas, J., dissenting) (suggesting this type of "administrative guidance" is "constitutionally suspect").

constitutionally adequate notice of what the law prohibits or requires. "[T]he Clean Water Act 'impose[s] criminal liability,' as well as steep civil fines, 'on a broad range of ordinary industrial and commercial activities.'" *Rapanos*, 547 U.S. at 721 (plurality) (quoting *Hanousek* v. *United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari)). It "imposes a regime of strict liability[.] . . . Thus, the consequences to landowners even for inadvertent violations can be crushing." *Cnty. of Maui*, 140 S. Ct. at 1489 (Alito, J., dissenting) (cleaned up). Yet, the Act's reach is unascertainable. *See also* Tr. of Oral Arg., *Army Corps of Engineers v. Hawkes Co.*, No. 15-290, at 18 (U.S. Mar. 30, 2016) (observing "the Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice.").

To be sure, the statute's text limits its reach to "navigable waters," 33 U.S.C. § 1344(a), defined as "the waters of the United States, including the territorial seas," 33 U.S.C § 1362(7). But "Congress did not define what it meant by 'the waters of the United States'; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate." *Sackett*, 566 U.S. at 133 (Alito, J., concurring); *see also* Herman, 13 Golden Gate U. Envtl. L.J. at 77–78 ("Does this phrase include only waters, or does it also include wetlands, pocosins, bogs, and desert swales? Does the phrase reach only traditionally navigable-in-fact waters, or does it encompass all waters—whether navigable or otherwise?").

As a result, "[t]he 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*, 566 U.S. at 132 (Alito, J., concurring); *accord Hawkes*, 578 U.S. at 602 (Kennedy, J., joined by Thomas, Alito, JJ., concurring) (noting that "the reach and systemic consequences of the Clean Water Act remain a cause for concern"). Accordingly, as Justice Kennedy, joined by Justices Thomas and Alito, have suggested, the CWA's reach "raise[s] troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Hawkes*, 578 U.S. at 603 (Kennedy, J., joined by Thomas, Alito, JJ., concurring). That is a major constitutional problem.

After all, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

For as Justice Holmes has explained:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the

> common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

McBoyle v. United States, 283 U.S. 25, 27 (1931). And "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." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). So too here.[15] *See also* Herman, 13 Golden Gate U. Envtl. L.J. at 85 ("To know what the law requires, go ask your local lawyer or hydrologist. Though be forewarned: Their good advice will expire with the next court case or next presidential election.").

2. Danger of Arbitrary Enforcement

There is yet another related constitutional problem. The Ninth Circuit's amorphous jurisdictional test creates fertile grounds for seriously discriminatory enforcement. "Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *Davis*, 139 S. Ct. at 2325. Criminal laws that "authorize and even encourage arbitrary and discriminatory enforcement"

---

[15] A proposed rule, titled "Revised Definition of 'Waters of the United States,'" recently issued by EPA and the Corps, showcases the Act's fundamental fair-notice due process problems. *See generally* 86 Fed. Reg. 69,372 (Dec. 7, 2021).

may be invalidated for vagueness. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *see also Grayned*, 408 U.S. at 108 ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966) (finding due process violated if "judges and jurors [are] free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case"). That is precisely what the Ninth Circuit's test does.

IV. TO THE EXTENT DOUBTS PERSIST AS TO THE ACT'S SWEEP, IT SHOULD BE NARROWLY CONSTRUED UNDER THE RULE OF LENITY.

Finally, any pleas by EPA for deference to its views on the scope of its own jurisdiction and power should be rejected out of hand. *See United States v. Apel*, 571 U.S. 359, 369 (2014); *Abramski v. United States*, 573 U.S. 169, 191(2014). *Cf. Guedes v. BATFE*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement concurring in denial of certiorari) ("[W]hatever else one thinks about *Chevron*, it has no role to play when liberty is at stake."). Instead, to the extent "traditional tools of statutory interpretation yield no clear answer," *see Wooden,* 142 S. Ct. at 1085–86 U.S. ____ (Gorsuch, J., joined by Sotomayor, J., concurring in judgment), to the question presented, the CWA must be narrowly construed against the government, consistent with the rule of lenity, particularly because it is a hybrid statute carrying both civil and criminal penalties, *see Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *see*

also Larkin, *supra*, at 5 ("Whatever interpretation is appropriate for a criminal prosecution must also be applied in a civil suit."). For as Justice Scalia has explained, "if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings."[16] *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (Scalia, J., joined by Thomas, J., statement respecting denial of certiorari).

"The maxim that penal statutes should be narrowly construed is one of the oldest canons of interpretation." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 128 (2010). Indeed, "[t]hat rule is 'perhaps not much less old than' the task of statutory 'construction itself.'" *Davis*, 139 S. Ct. at 2333 (quoting *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76, 95 (1820) (Marshall, C.J.)). Under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359–60 (1987).

Application of the rule of lenity confirms that the statute's reach should be cabined to physically navigable waters, not soggy land. And the CWA's famously unclear reach cries out for application of

---

[16] "Historically, lenity applied to all 'penal' laws—that is, laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines." *Wooden,* 142 S. Ct. at 1086 n.10 (Gorsuch, J., joined by Sotomayor, J., concurring in judgment).

that principle of statutory interpretation, which "works to enforce the [due process] fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws." *Wooden,* 142 S. Ct. at 1082 (Gorsuch, J., joined by Sotomayor, J., concurring in judgment).

Construing the Act narrowly, consistent with the rule of lenity, also respects the separation of powers. For as Justice Scalia explained: "This venerable rule not only vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008). And as Justice Gorsuch recently observed, under the Constitution, "[a]ny new national laws restricting liberty require the assent of the people's representatives and thus input from the country's 'many parts, interests and classes.' Lenity helps safeguard this design by preventing judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities." *Wooden,* 142 S. Ct. at 1083. (Gorsuch, J., joined by Sotomayor, J., concurring in judgment) (citations omitted).

Fundamental fairness also counsels in favor of construing any ambiguities in the statute against the interest of the government, which, after all, wrote it. *See also Wash. State Dep't of Licensing v. Cougar Den, Inc.,* 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in judgment) ("After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power

of the pen."). Under this common law rule of contract interpretation, the benefit of the doubt goes to the Sacketts, not EPA. *See also Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 63 (1995) ("Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result.").

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

Michael Pepson
Counsel of Record
Cynthia Fleming Crawford
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae April 14, 2022