No. 21-454

In the Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 25 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTERESTS OF *AMICI CURIAE*

The *amici* States of West Virginia, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming have a sovereign interest in safeguarding their land and water resources. They act as stewards of the environment within their borders, and they own and care for millions of acres of land themselves. At the same time, the States also have a strong interest in ensuring that federal preferences do not entirely swallow state and local ones, even in the environmental context. After all, "[t]he vertical separation of powers between the national government and the States"—paired with the horizontal separation among the federal branches—"provide[s] the soundest protection of liberty any people has known." JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 11 (2018).

The decision below threatens both these interests. By construing the Clean Water Act to reach places with only tenuous connections to navigable, interstate waters, the Ninth Circuit's approach would saddle States with implementing a vast scheme of federal water regulation. States' own efforts at conservation, tailored to local needs, would fall by the wayside. Federalism would become an afterthought, too, even though Congress wrote the CWA to "recognize, preserve, and protect the primary responsibilities and rights of States" to mitigate pollution and "develop[] and use" water resources. 33 U.S.C. § 1251(b). If the CWA applies to any damp piece of land with an indeterminate "nexus" to interstate waters, then the Constitution's and the statute's balance among the

sovereigns will come askew. The Court should restore the CWA to its proper position—complementing States' water-conservation efforts instead of displacing them.

INTRODUCTION

When Michael and Chantell Sackett set out to build a house on a piece of land in Idaho's panhandle, they probably could not have imagined that they were igniting a decade-plus power struggle with the federal government. Back in 2004, the Sacketts had secured necessary local permits and were ready to start construction when federal regulators descended on their property. The land, officials told the Sacketts, might contain "wetlands" regulated under the CWA. These wetlands could be "waters"—not "of Bonner County" or "of Idaho"—but "of the United States." 33 U.S.C. §§ 1344, 1362(7). So even though the property didn't contain or connect with any interstate, navigable waters, the Sacketts needed to go through the long and expensive process of obtaining a federal permit. Otherwise, they would risk the "criminal penalties and steep civil fines" for which the CWA's "regime of strict liability" is known. *Cnty. of Maui* v. *Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1489 (2020) (Alito, J., dissenting).

Stories like the Sacketts' have become regrettably common in the years since the Court's split decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006). After the 4-1-4 opinions in that case, lower courts and agencies have struggled with what constitutes "the waters of the United States"—and therefore subjects a given piece of land or body of water to CWA regulation. Taking a cue from Justice Kennedy's solo concurrence in *Rapanos*, many courts (including the one below) have held that a

"significant nexus" between wetlands and a traditional navigable water is enough for jurisdiction.

But as the decision below shows, a nexus "significant" in theory is often insignificant in practice. The Ninth Circuit said the Sacketts' land contained "waters of the United States" because it sits across the road from an unnamed stream that feeds into a creek that "eventually flows" into a navigable lake. See App. A-34. In another case, a California court found that ephemeral streams—in which water flowed only a few hours a year—had a significant nexus with navigable waters miles away. *United States* v. *HVI Cat Canyon, Inc.*, 314 F. Supp. 3d 1049, 1063 (C.D. Cal. 2018). In still another case, a court held that wetlands were covered waters where they "contribute[d] shallow subsurface flow" into a flood control channel almost two miles away that eventually fed into a "navigable" swamp. *Universal Welding & Fabrication, Inc.* v. *U.S. Army Corps of Eng'rs*, No. 4:14-CV-00021-TMB, 2015 WL 12661934, at *8 (D. Alaska Oct. 1, 2015). This Court, too, encountered a case in which federal regulators deemed wetlands to have a "significant nexus" with a river "some 120 miles away." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 578 U.S. 590, 596 (2016). Quite an odd understanding of "significance."

And save perhaps for the federal government, this approach to the CWA is working for just about no one. "Virtually all water, polluted or not, eventually makes its way to navigable water." *Cnty. of Maui*, 140 S. Ct. at 1470. So any land bearing a bit of water carries a risk that an agency or court may find a "significant nexus" with navigable waters. Because of that possibility, individuals are left guessing whether they will be subject to federal regulation, and communities suffer as regulatory fights and diverted resources tie up economic development for

years. Meanwhile, the States struggle to apply the significant aspects of the CWA they implement and wonder how much room they have to maneuver within their own environmental laws.

Approaching the CWA with greater respect for the statutory text and constitutionally grounded canons of construction would free the States and the public from this regulatory murkiness. *Rapanos* itself shows how these principles lead to a definition of "the waters of the United States" that works. In treating the statutory text as a meaningful limit on jurisdiction instead of a springboard for it, the plurality concluded that the CWA reaches nonnavigable wetlands only when they are both adjacent to and have a "continuous surface connection" with "a relatively permanent body of water connected to traditional interstate navigable waters." 547 U.S. at 742 (plurality op.). The Court should use the same approach to map the statute's boundaries here. In any event, the amorphous significant nexus test captured in the opinion below—a test that garnered one lone vote in *Rapanos*—cannot stand.

SUMMARY OF ARGUMENT

The Court should reject the "significant nexus" test for defining "the waters of the United States."

I. The Ninth Circuit's decision shows how the significant nexus test usurps state authority. The test encompasses all manner of intrastate waters with little meaningful connection to navigable waters. These are the waters within the States' zone of sovereign authority. The Court should make clear that the CWA does not displace the States' important, traditional role stewarding these resources.

II. The boundaries of "the waters of the United States" must be rooted in the CWA's text. Yet the significant nexus test can't claim pedigree in the statute's words—it stems from over-read dicta run amok. The Court should follow cues from the *Rapanos* plurality opinion and parse the statute's language for a definition that shows genuine respect for the words Congress used.

III. The significant nexus test presents serious constitutional concerns by pressing the limits of Congress's Commerce Clause powers. Avoiding this issue is another mark in favor of a more restrained, text-based view of the CWA's jurisdictional sweep.

IV. The Court should not blind itself to the significant nexus test's real-world consequences. After nearly two decades of experimentation, the test has shown itself a confusing, unworkable standard. It imposes serious costs, encourages litigation, and leaves relevant stakeholders in the dark—by operating in vague terms, it is effectively no definition at all. Adopting a clearer reading of the CWA would put a stop to that. And most importantly, it would re-center the CWA around its text and the principles of cooperative federalism that animate it.

ARGUMENT

I. The Significant Nexus Test Offends Traditional State Authority.

A. Federalism matters when it comes to statutory interpretation. After all, the "proper division of authority between the Federal Government and the States" is "our oldest question of constitutional law." *New York* v. *United States*, 505 U.S. 144, 149 (1992). Just as old is the States' broad "residuary and inviolable sovereignty," *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (quoting THE

FEDERALIST NO. 39, at 245), which allows the States to "pursu[e] [their] legislative objectives," *Shelby Cnty., Ala.* v. *Holder*, 570 U.S. 529, 543 (2013). Preserving this balance of power between the States and the federal government "is not just an end in itself." *Id.* Rather, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.*

Courts thus often read statutes in a way that strengthens federalism interests like these. In *McDonnell* v. *United States*, for example, this Court favored a "more limited reading" of a criminal law that was free of "federalism concerns" and "supported by both text and precedent." 136 S. Ct. 2355, 2373 (2016). A construction that would have left the statute's "outer boundaries ambiguous and involve[d] the Federal Government in setting standards" of "good government for local and state official[s]," however, ended on the cutting-room floor. *Id.* That decision was not alone: The Court rightly hesitates before construing statutes to limit the traditional sovereign powers of the States. See, *e.g.*, *Bond* v. *United States*, 572 U.S. 844, 862 (2014) ("[I]t is fully appropriate [when construing statutes] to apply the background assumption that Congress normally preserves 'the constitutional balance between the National Government and the States.'"); *Jones* v. *United States*, 529 U.S. 848, 850 (2000) (refusing to upset the "federal-state balance in the prosecution of crimes" when construing federal arson statute); see *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."). Even when a statute is "designed to advance cooperative federalism," the Court has "not been reluctant to leave a range of permissible

choices to the States." *Wis. Dep't of Health & Fam. Servs.* v. *Blumer*, 534 U.S. 473, 495 (2002).

And when it comes to areas of traditional state powers, the Court frequently puts federalism to work through a clear-statement rule. This means that Congress must speak clearly if it wants to alter the "usual constitutional balance of federal and state powers." *Bond*, 572 U.S. at 858. The canon recognizes that Congress's ability to "legislate in areas traditionally regulated by the States" is an "extraordinary power in a federalist system," so courts "must assume Congress does not exercise [that power] lightly." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Clarity is no low bar, either: Congress must employ "exceedingly," *U.S. Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020), or "unmistakably" clear language, *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). Short of that, statutes "will *not* be deemed to have significantly changed" the federal-state "balance." *United States* v. *Bass*, 404 U.S. 336, 349 & n.16 (1971) (collecting cases; emphasis added).

B. Intrastate water regulation is on the state side of this balance, as the Court has long seen local land and water management as "the quintessential state activity." *FERC* v. *Mississippi*, 456 U.S. 742, 767 n.30 (1982). Indeed, the States' "power to control navigation, fishing, and other public uses of water" is "an essential attribute of [state] sovereignty." *Tarrant Reg'l Water Dist.* v. *Herrmann*, 569 U.S. 614, 631 (2013) (cleaned up). Those rights are "obvious, indisputable," and "omnipresent." *Hudson Cnty. Water Co.* v. *McCarter*, 209 U.S. 349, 356 (1908).

Congress has respected that traditional power through a "determination to avoid unconstitutional invasion of the [water-related] jurisdiction of the states." *First Iowa*

Hydro-Elec. Co-op. v. *Fed. Power Comm'n*, 328 U.S. 152, 171 (1946). For decades, it has given "purposeful and continued deference to state water law," and repeatedly "recognized," "encouraged," and "protect[ed]" the States' rights over their own waters. *California* v. *United States*, 438 U.S. 645, 653-54 (1978); see also *Sporhase* v. *Nebraska ex rel. Douglas,* 458 U.S. 941, 959 (1982) (describing "37 statutes and the interstate compacts [that] demonstrate Congress' deference to state water law"); *United States* v. *New Mexico*, 438 U.S. 696, 702 (1978) (Congress has "almost invariably deferred to the state law" when addressing "whether federal entities must abide by state water law").

Pollution control is no different. Even in that context, Congress routinely treats "federal intervention in water quality regulation as an intrusion into the states' spheres of authority." Robin Kundis Craig, *Adapting Water Federalism to Climate Change Impacts: Energy Policy, Food Security, and the Allocation of Water Resources*, 5 ENV'T & ENERGY L. & POL'Y J. 183, 206 (2010). The CWA itself was one of the first times Congress stepped into the "water quality" space, and there only reluctantly. *Id.* So it is hardly surprising that Congress placed state-authority considerations at the heart of the CWA's "cooperative federalism." *New York*, 505 U.S. at 167. Yes, the CWA aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). But Congress also stressed its intent to "recognize, preserve, and protect the *primary responsibilities and rights of States*" as to pollution control and "the development and use … of land and water resources." *Id.* § 1251(b).

Among other things, the CWA advances this goal by expressly empowering States to implement its provisions.

See, *e.g.*, 33 U.S.C. §§ 1311(b)(1)(C) & (e)(3)(A) (States set water quality standards for covered waters), 1341(a) (States can issue water quality certifications for federal permits issued for projects within their borders), 1342 (States can administer CWA's permitting regimes). Congress also "respect[ed] the States' concerns," *S.D. Warren Co.* v. *Maine Bd. of Env't Prot.*, 547 U.S. 370, 386, (2006), guaranteeing that the Act does not "interfere any more than necessary with state water management," *Nat'l Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982). This federal restraint allows a "strong current of federalism" to flow through the statute. *District of Columbia* v. *Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980); accord *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 873 (7th Cir. 1989) ("[N]umerous courts have recognized the primacy of state and local enforcement of water pollution controls as a theme that resounds throughout the history of the Act." (cleaned up)).

A key benefit of this cooperative federalism framework is that States remain "free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington* v. *Texas*, 441 U.S. 418, 431 (1979). The States understand better than federal regulators the unique (and ever-changing) hydrological and geological challenges facing their local environments. West Virginia protects the rivers rolling through the Alleghenies while Florida handles its Everglades. Arizona and Utah address the challenges arid environments pose to their rivers. And Idaho and Mississippi craft solutions with an eye to the unique characteristics of the wetlands in their respective jurisdictions.

Indeed, exercising their authority to solve problems and protect intrastate waters and other natural resources is exactly what the States have done. See

States.Pet.Amicus.6-7 & nn.2-6 (cataloguing state statutes defining state waters and wetlands, regulating water quality, protecting water purity, and mitigating pollution). The States were out in front when it came to wetlands regulation, too—several States enacted wetlands protection statutes *before* Congress passed the CWA, and many more followed within the next few years. See Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENV'T L. 1, 48 (1999).

C. With this background in mind, it comes as no surprise that the Court has refused to define "the waters of the United States" to effect a "federal takeover" of water management and pollution control. Ryan P. Murphy, *Did We Miss the Boat? The Clean Water Act and Sustainability*, 47 U. RICH. L. REV. 1267, 1275 (2013). Instead, the Court has insisted that the definition must avoid "a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). Thus, "[t]he Court in *SWANCC* and a plurality in *Rapanos* were unwilling to accept [an] assertion of jurisdiction over what looked like places traditionally regulated by the states." *Am. Farm Bureau Fed'n* v. *EPA*, 792 F.3d 281, 302 (3d Cir. 2015).

The phrase "'the waters of the United States,'" after all, "hardly qualifies" as a clear statement of congressional intent to abrogate state authority. See *Rapanos*, 547 U.S. at 738 (plurality op.). It might even be an *anti*-clear statement. The term defines the jurisdictional term "navigable waters." 33 U.S.C. § 1362(7). That phrase, in turn, shows "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." *SWANCC*, 531 U.S. at 172. It matters as well that Congress used other phrasing that denotes limited regulatory reach rather than expansive prescriptive powers—like "the waters" and not just "water" "of the United States." See *infra* Part II. Congress thus clearly *foreclosed* a construction that would bring "virtually all planning of the development and use of land and water resources by the States … under federal control." *Rapanos*, 547 U.S. at 737 (plurality op.) (cleaned up). And thank goodness for that. Water-resource management often presents "complicated issues that are better suited to individualized local solutions." *Cnty. of Maui*, 140 S. Ct. at 1488-89 (Alito, J., dissenting). If Congress had meant for the federal government to sort out those matters instead of the States, it would have said so.

It's thus no exaggeration to say that these ideas—the States' constitutionally protected roles on the one hand, Congress's and this Court's commitment to the CWA's program of cooperative federalism on the other—work in concert *only* under a restrained reading of the CWA. See, *e.g.*, Andrea Driggs, et al., *Just Add Water: Permitting, State Sovereignty, and the Marble Cake Debate*, 35 NAT. RES. & ENV'T 45, 45 (2020) ("The larger the universe of federal 'waters,' of course, the smaller the role of the states in a scheme that purportedly gave them an important role to play."); Roni A. Elias, *Waters of the United States*, 52 TULSA L. REV. 57, 65 (2016) ("[T]he extension of federal authority [over navigable waters] must be carefully drawn to avoid unnecessary incursions upon the states' primary power to regulate land and water use.").

That makes it a problem that the significant nexus test is not narrow in the least. As the *Rapanos* dissent observed, that approach "treats more of the Nation's waters as within the Corps' jurisdiction" than the plurality's test. 547 U.S. at 810 n.14 (Stevens, J., dissenting). The concurrence itself conceded that "the significant-nexus requirement may not align perfectly with the traditional extent of federal authority." *Id.* at 782 (Kennedy, J., concurring in the judgment). The plurality, in turn, rightly responded that even this concession "tests the limit of understatement." *Id.* at 738 n.9 (plurality op.). And the significant nexus test "aligns even worse with the preservation of traditional state land-use regulation." *Id.*

Real-world facts tell the same story. In just one State—Kansas—a significant nexus test that reaches ephemeral streams (as the Ninth Circuit seems to apply it) would put under federal jurisdiction more than 100,000 miles of mostly dry land. See Comments of the Waters Advocacy Coalition on the Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, EPA-HQ-OW-2011-0880, at 35 (Nov. 13, 2014), https://bit.ly/3NXIdGY. That change would quadruple the statute's geographic reach in the State. *Id.* And Kansas' experience is no fluke. If ephemeral streams qualify as covered "waters," even a smaller State like West Virginia would see 8,000 new miles of surface flow pushed under the federal umbrella. See States.Pet.Amicus.12. Now consider the havoc in States with even more potentially covered waters, like Alaska with its hundreds of millions of acres of wetlands, or Florida where wetlands cover nearly a third of the State.

In contrast, a more limited, textually grounded view of "the waters of the United States" would preserve a

meaningful zone of truly *state* regulatory authority. States could continue to design different "water quality solutions" based on "the varied topographies and climates" around the country. *Miss. Comm'n on Nat. Res.* v. *Costle*, 625 F.2d 1269, 1275 (5th Cir. 1980). The CWA would no longer threaten millions of additional acres with onerous regulation, but would remain tied directly to the realm of traditionally navigable waters in which Congress rightfully operates. Rock quarries, storm drains, and the like would remain firmly in local control, where they have always been.

The choice is clear. Principles of federalism generally and in the CWA specifically call for a more controlled understanding of "the waters of the United States" than the significant nexus test could ever provide.

II. The Significant Nexus Test Conflicts With The CWA's Text.

The Court could also reject the Ninth Circuit's approach without a federalism assist: A closer look at the significant nexus test's origins reveals its sharp departure from the statutory text.

A. Justice Kennedy understood "the waters of the United States" as not only "waters that are or were navigable in fact or that could reasonably be so made," but also features with a "significant nexus" to them. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). This nexus requirement, he concluded, offered reliable "assurance" that a nonnavigable water "significantly affects the chemical, physical, and biological" integrity of navigable waters. *Id.* at 779-81. And that requirement would require courts and agencies to define the "waters of the United States" by making "case-by-case" assessments premised on quasi-scientific factors. *Id.* at 782.

There's a threshold oversight in this formulation: The operative phrase—"significant nexus"—exists nowhere in the statute. Nor does it grow from the words that *are* there. Justice Kennedy's *Rapanos* analysis instead "le[ft] the Act's 'text' and 'structure' virtually unaddressed." *Rapanos*, 547 U.S. at 753 (plurality op.); accord Sam Kalen, *Is "Significant Nexus" Really Significant? Justice Kennedy's Concurrence in* Rapanos, NAT. RES. & ENV'T, SUMMER 2007, at 9, 10 ("Nothing suggests that the significant nexus test is rooted in any statutory or regulatory language."). Significant nexus is merely a "judicially crafted rule." *Rapanos*, 547 U.S. at 807 (Stevens, J., dissenting).

The only textual hook for the test is a callback to Congress's purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Rapanos*, 547 U.S. at 779-80 (Kennedy, J., concurring in the judgment) (quoting 33 U.S.C. § 1251(a)). Yet that appeal is a risky foundation given Congress's parallel purpose of preserving States' traditional stewardship roles. See 33 U.S.C. § 1251(b). Beyond that, "a court is not free to disregard [statutory] requirements simply because it considers them … unsuited to achieving the general purpose in a particular case." *Comm'r* v. *Gordon*, 391 U.S. 83, 93 (1968). The Court should "read the statute according to its text." *Hui* v. *Castaneda*, 559 U.S. 799, 812 (2010).

And even if the Court were inclined to go further afield, history and practice do not support the significant nexus test, either. The Court has looked before to the "original [administrative] interpretation of the CWA" because there is "no persuasive evidence that the [Army] Corps [of Engineers] mistook Congress' intent in 1974." *SWANCC*, 531 U.S. at 168. Yet there is no nexus language in the

agencies' early regulations and guidance. EPA's general counsel opined shortly after the CWA's passage that it reached only navigable waters, tributaries of those waters, and certain other interstate waters. See ENV'T PROT. AGENCY, OFF. GEN. COUNSEL, MEANING OF THE TERM "NAVIGABLE WATERS" (Feb. 13, 1973), 1973 WL 21937. Similarly, the Corps' original implementing regulations construed jurisdictional waters to be only those that "are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974). In contrast, the significant nexus test has "a relatively short lineage," having been drawn from the *SWANCC* decision issued just five-and-a-half years before. Lawrence R. Liebesman, et al., *Rapanos v. United States: Using Proximate Causation and Foreseeability Principles to Save a CWA Flawed Jurisdictional Process*, AM. LAW INST. 13, 16 (2010).

SWANCC's "significant nexus" reference did not purport to rewrite federal jurisdiction in the way Justice Kennedy conceived. The Court in *SWANCC* declined to treat as "the waters of the United States" certain isolated waters that migratory birds used as a habitat. 531 U.S. at 167. On the way to that conclusion, *SWANCC* acknowledged an earlier decision saying that Congress intended to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)). But *SWANCC* cabined that earlier holding's reach— "based in large measure upon Congress' unequivocal acquiescence to, and approval of" certain regulations that read the CWA "to cover wetlands adjacent to navigable waters" only because they were "inseparably bound up with the 'waters' of the United States." *Id.* (quoting *Riverside*

Bayview, 474 U.S. at 134). This inseparability, then, is the original context for the phrase that has caused so much trouble: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed [the Court's] reading of the CWA in *Riverside Bayview Homes*." *Id.* at 167-68 (quoting *Riverside Bayview*, 474 U.S. at 131-32 n.8; emphasis added); see also *Rapanos*, 547 U.S. at 755 (plurality op.) (calling "significant nexus" a "cryptic characterization" of *Riverside Bayview*).

In other words, *SWANCC* used "significant nexus" as shorthand to describe bodies of water that had a direct and continuous tie to navigable waters—a connection so close that the waters were functionally inseparable. The phrase also distinguished language in a prior case; *SWANCC* did not use it to define "the waters of the United States" directly. And even if it had, *SWANCC*'s conception of "significant nexus" sounds closer to the standard the *Rapanos* plurality opinion described than to the concurrence's broad test. *Compare SWANCC*, 531 U.S. at 167 (explaining that waters "inseparably bound up" with navigable waters had a "significant nexus" that rendered them waters of the United States), *with Rapanos*, 547 U.S. at 755 (plurality op.) ("Wetlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter indistinguishable from waters of the United States.").

B. The Court should set aside the sprawling significant nexus test in favor of an interpretation rooted in and limited by the words Congress chose. The former "substitut[es] the purpose of the [CWA] for its text." *Rapanos*, 547 U.S. at 755 (plurality op.). The Court should focus instead on the statute's language, as "even purpose as most narrowly defined … sheds light only on deciding

which of various textually permissible meanings should be adopted." A. SCALIA & B. GARNER, READING LAW 57 (2012).

This case's outcome should be pinned to Congress's words. The *Rapanos* plurality, for instance, emphasized aspects of the phrase "the waters of the United States" that confirm a narrower jurisdictional reach. Congress chose "the definite article ('the') and the plural number ('waters')," which shows "plainly that § 1362(7) does not refer to water in general." 547 U.S. at 732 (plurality op.). Further, "waters" is ordinarily understood to mean "permanent, standing or flowing bodies of water 'forming geographical features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes,'" as well as "wetlands with a continuous surface connection to" them. *Id.* at 739, 742.

This reasoning tracks *SWANCC*'s reliance on another textual clue to the CWA's limits—that Congress linked "waters of the United States" with the word "navigable." 531 U.S. at 172; see also *Rapanos*, 547 U.S. at 731 (plurality op.) ("[T]he qualifier 'navigable' is not devoid of significance."). The *Rapanos* plurality's "continuous … connection" language in fact echoes the traditional definition of navigable waters: "a continued highway over which commerce is or may be carried on." *The Daniel Ball*, 77 U.S. 557, 563 (1870). It makes sense on the ground as well. It is hard to navigate ephemeral streams and lands only sometimes wet.

The words Congress used outside the definitional provision also lead to the same result. Rejecting the significant nexus test would respect Congress's choice to "categorize[] the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters'" themselves. *Rapanos*, 547 U.S. at 735

(plurality op.) (describing separate statutory definition of "point source"). Terms for those features exist elsewhere in the CWA. *Id.* at 735-36. And where Congress expressly defines one category of things, courts need and should not stretch another term to reach the same things, too. See *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 669 (2007) ("[W]e have cautioned against reading a text in a way that makes part of it redundant."). Even in the purpose provisions Justice Kennedy favored, Congress sought to eliminate the "discharge of pollutants *into* the navigable waters," not eliminate discharge of pollutants that indirectly *affect* those waters. 33 U.S.C. § 1251(a)(1). So here again, a restrained definition shows greater respect for the ordinary rules of statutory construction, as "[s]tatutes should be interpreted as a 'symmetrical and coherent regulatory scheme.'" *Mellouli* v. *Lynch*, 575 U.S. 798, 809 (2015).

In short, any understanding of "the waters of the United States" should remain firmly focused on the statute. "Significant nexus" is not.

III. The Significant Nexus Test Presents Serious Constitutional Concerns.

The Court also does not race to embrace statutory constructions that might raise constitutional problems. Quite the opposite: "Courts should … construe statutes to avoid not only the conclusion that they are unconstitutional, but also grave doubts upon that score." *United States* v. *Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021) (cleaned up). Thus, the Court construed the CWA at least twice to avoid the question whether an expansive definition of jurisdictional waters would exceed Congress's powers under the Commerce Clause. See *Rapanos*, 547 U.S. at 738 (plurality op.) (rejecting

significant nexus test on this ground); *SWANCC*, 531 U.S. at 173 (rejecting broad agency construction of same provision based on similar concerns). It should do so again here.

The significant nexus test runs headlong into Article I, Section 8. The phrase "the waters of the United States" does more than mark which waters Congress thought it would make sense to bring under federal control. It also links the CWA to Congress's "Commerce Clause powers"—that is, the only authority for federal legislation in the first place. *United States* v. *Lucero*, 989 F.3d 1088, 1095 (9th Cir. 2021). And "the power to regulate commerce, though broad indeed, has limits." *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 58 (2003).

The significant nexus test traverses them. The Court could fairly say that wetlands with a direct and permanent connection to navigable waters—such that they are an inseparable part of those waters—are "channels of interstate commerce." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 536 (2012) ("*NFIB*") (opinion of Roberts, C.J.) (cleaned up). But the test breaks down when it starts reaching distant waters that only "affect" in some way "other covered waters more readily understood as navigable." *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

For one thing, biological effects on navigable waters via complex chains of causation quickly become too attenuated to answer whether an upstream discharge is an "activit[y] that [will] substantially affect interstate commerce." *NFIB*, 567 U.S. at 536. For another, the CWA does not limit itself to regulating ordinary economic activities—the statute governs even purely *intra*state waters and lands no matter what purpose they might serve. Yet at least "thus far in our Nation's history," the

Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Taylor* v. *United States*, 579 U.S. 301, 306 (2016); see also *Gonzales* v. *Raich*, 545 U.S. 1, 38 (2005) (Scalia, J., concurring in the judgment) ("Congress may regulate noneconomic intrastate activities only where the failure to do so could … undercut its regulation of interstate commerce." (cleaned up)). Because the CWA is not a goods-and-services regulation, combining an indirect economic focus with a too-broad jurisdictional hook pushes it dangerously close to laws governing guns near schools and making violence against women a federal crime, which fell outside the Clause's scope. See *United States* v. *Morrison*, 529 U.S. 598, 617 (2000); *United States* v. *Lopez*, 514 U.S. 549, 567 (1995).

The Court is also especially careful not to over-extend Congress's Commerce Clause powers when, as here, federal jurisdiction comes at the expense of traditional state powers. See *supra* Section I. After all, in cases of state versus federal authority, the Commerce Clause and the Tenth Amendment are "mirror" images. *New York*, 505 U.S. at 156. Reading the Commerce Clause to give too much power to Congress could thus "devour the essentials of state sovereignty." *Maryland* v. *Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting). And enshrining the significant nexus test would pose a genuine risk of letting the Commerce Clause "embrace effects upon interstate commerce so indirect and remote" as to "effectually obliterate the distinction between what is national and what is local." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

It's best to avoid these issues entirely. Construing "the waters of the United States" in line with traditionally

understood navigable waters and those with direct and continuous connections to them would do exactly that.

IV. The Significant Nexus Test Burdens Both States and the Public.

One last reason counsels for a narrower reading: The significant nexus test has hurt almost everyone involved in or subject to CWA regulation. Significant doubt that Congress intended these harms confirms the text's more limited reach.

A. The federal permitting process is expensive and takes years. Twenty years ago, the "average applicant for an individual permit spen[t] 788 days and $271,596 in completing the process," and in total the private and public sectors spent "over $1.7 billion" every year "obtaining wetlands permits." *Rapanos,* 547 U.S. at 721 (plurality op.). Today, experts estimate that permittees will need to spend another "$113 and $276 million for increased permit and mitigation costs on an annualized basis" because of EPA's movement towards the significant-nexus standard. See Dan Bosch, The Biden WOTUS: Breadth and Uncertainty, AMERICAN ACTION FORUM: INSIGHT (Nov. 19, 2021), https://bit.ly/3E4RgkT.

Those are just the front-end costs. Violating the CWA can trigger tens of thousands of dollars in civil fines, along with criminal penalties that can land the violating party in prison depending on how determined the enforcing entity is to send a message. See, *e.g.*, *United States* v. *Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) (denying post-conviction relief in CWA case to "a landowner who place[d] clean fill dirt on a plot of subdivided dry *land*"). On top of that, if parties think federal agencies go too far designating the lands within the CWA's reach, they have to incur substantial legal fees to stand a chance at winning

in court. (Witness the decade-and-a-half epic this case has become.) These sizeable back-end costs—and all the attendant delay—come at the expense of the regulated public and the economic development stymied along the way.

And although the goal of reducing water pollution certainly justifies some costs, the significant nexus test's breadth and uncertainty make them unjustifiably worse. See *Rapanos*, 547 U.S. at 809 (Stevens, J., dissenting) (predicting that the "significant nexus" text would "creat[e] additional work for all concerned" because of its vagueness "which will inevitably increase the time and resources spent processing permit applications"). It is almost impossible for parties to know what will or won't be deemed subject to federal jurisdiction. Perhaps because of that, property values can take a substantial hit once regulators suggest that a given piece of land may contain "waters of the United States." See generally *Bergen Cnty. Assocs.* v. *Borough of E. Rutherford*, 12 N.J. Tax 399 (N.J. Tax. Ct. 1992) (reducing property assessment of roughly $20 million to just under $1 million largely because of the "severe developmental restraints—indeed the prohibitions—imposed by federal regulatory agencies" enforcing the CWA). Buyers would rather avoid the headache.

Part of the explanation for this costly confusion is that "significant nexus" functions as no real standard. The phrase is not an industry term of art; it "hold[s] only a semantic meaning," making it "challenging" to "ensur[e] that the language is properly applied." Natalia Cabrera, *Using HGM Analysis to Aggregate Wetlands as 'Similarly Situated' Under the Rapanos 'Significant Nexus' Test*, 42 B.C. ENV'T AFF. L. REV. 65, 91 (2015). Because it is not "used for classification or explanation by

aquatic resource scientists," it "result[s] in unclear application by Corps field staff who must quickly assess whether an area falls under CWA jurisdiction." *Id.* And the test remains "fraught with difficulties even once regulators get past these linguistic questions to the brass tacks of implementation." Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of* Rapanos v. United States, 30 U. ARK. LITTLE ROCK L. REV. 413, 444 (2008). At the very least, it "require[s] significant and expensive examinations, testing and synthesis, all to be undertaken by the landowner's expert consultants and agency personnel." *Id.* In other words, still more time and money at the regulated parties' expense.

The Ninth Circuit's opinion is a prime example of the dysfunction that will persist if the significant nexus test remains in place. The Sacketts' land may not actually contain wetlands, much less wetlands that are "adjacent to navigable waters," and thus "inseparably bound up with the 'waters' of the United States." *SWANCC*, 531 U.S. at 167. The lot is "soggy" and near a "large wetlands complex" that "drains into an unnamed tributary" connected to a creek that feeds into a lake. App. A-4, A-8. "Subsurface flow" or three degrees of separation from a navigable water might be all it takes to keep the Sacketts from building their home—but maybe not. App. A-34-35. Regardless, they have been in a state of uncertainty for 15 years. And after these years of litigation, scores of agency discussions and negotiations, and multiple technical analyses along the way, they *still* do not know for certain whether their land is part of "the waters of the United States."

Other examples abound. Thanks to the significant nexus test's indeterminacy, a muddled mix of land and

waters have fallen within the CWA's grasp. See States.Pet.Amicus.10-13 (summarizing an array of court holdings and agency findings regulating certain geographic features as "the waters of the United States," including a mostly dry rock quarry, fully separated wetlands, permafrost, "test pits," intermittent and ephemeral waters and streams, and others); Editorial Staff, *Regulations are all wet*, AUGUSTA CHRONICLE (Feb. 11, 2019, 5:01 PM), https://bit.ly/3r6MbDm (discussing the ponds, impoundments, and irrigation ditches of a small nursery in rural Georgia that may be subject to potentially crushing federal regulation). These examples show how few true limits there are to a standard that turns on "case-by-case" assessments of "ecological significance." See *Rapanos*, 547 U.S. at 754 (plurality op.). In short, "[a]ny piece of land that is wet at least part of the year" may find itself a covered "wetland[]." *Sackett* v. *EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

B. The significant nexus test improperly burdens the States as well. It creates unjustified work, conflict, and displacement—maybe even preemption—of state authorities. The States, after all, implement huge swaths of the CWA's substantive programs. An expansive and uncertain standard makes that task exponentially harder.

Take the States' role in implementing the "arduous, expensive, and long" permitting regime for the National Pollutant Discharge Elimination System ("NPDES"). *Hawkes Co.*, 578 U.S. at 601; see 33 U.S.C. § 1342(b). All but three States have assumed that responsibility. See *S. Cal. All. of Publicly Owned Treatment Works* v. *EPA*, 8 F.4th 831, 834 (9th Cir. 2021) ("The EPA has transferred permitting authority to 47 States."). That's no small assumption. Back in 2015, state environmental protection agencies spent nearly 1.6 million hours and almost $70

million each year processing NPDES permits. See OFF. OF MGMT. & BUDGET, EPA ICR NO. 0229.21, ICR SUPPORTING STATEMENT, INFORMATION COLLECTION REQUEST FOR NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PROGRAM (RENEWAL), at 17, tbl. 12.1 (Dec. 2015), https://bit.ly/3KIPY1z. In the seven years since, as courts and regulators adopted more aggressive understandings of "the waters of the United States," those numbers have continued to grow. States, tribes, territories, and the District of Columbia now spend just short of 2.5 million hours and $130 million on these permits. See OFF. OF MGMT. & BUDGET, EPA ICR NO. 0229.25, ICR SUPPORTING STATEMENT: INFORMATION COLLECTION REQUEST FOR NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PROGRAM (RENEWAL), at 20, tbl. 12-1 (July 2021), https://bit.ly/3JI8Lst. These figures will balloon further if a loose understanding of "significant nexus" takes hold.

Moving to other examples, the scope of "the waters of the United States" will also determine how States set and report on water quality standards. 33 U.S.C. §§ 1311(b)(1)(C) & (e)(3)(A), 1315(b)(1)(A)-(B). It will determine how often States need to issue certifications to federal permit applicants. *Id.* § 1341. And perhaps of most relevance here, it will determine the reach of the CWA's dredge and fill limitations on wetlands. *Id.* § 1344. This portion of the Act imposes serious costs on States as well as property owners. For example, when Virginia considered assuming authority under CWA Section 404, it estimated the cost at "18 million dollars over the first 5 years, and 3.4 million annually thereafter." VA. DEP'T OF ENV'T QUALITY, STUDY OF THE COSTS AND BENEFITS OF STATE ASSUMPTION OF THE FEDERAL § 404 CLEAN WATER ACT PERMITTING PROGRAM 2 (Dec. 2012), https://bit.ly/3jAx693. "[M]ost states" have decided not to

assume control over Section 404 implementation precisely because of these high funding costs. See, *e.g.*, ARIZ. DEP'T OF ENV'T QUALITY, CLEAN WATER ACT § 404 PROGRAM TECHNICAL WORKING GROUP – FEES WHITE PAPER 10 (Dec. 20, 2018), https://bit.ly/3vfLEjP. If the Court reads "the waters of the United States" to further swell the Act's reach, States will have even more reason to decline implementation authority—at the expense of the CWA's cooperative federalism objective and the locally focused solutions it encourages.

Many States' comparatively limited resources put these present and projected costs into perspective. As it is, too few bodies and dollars are available to implement too broad a program. See, *e.g.*, Hunter S. Higgins, *Deference, Due Process, and the Definition of Water: Dredging the Clean Water Act*, 20 U. DENV. WATER L. REV. 305, 322-23 (2017). One survey of state water regulators, for instance, "suggested a national gap of approximately $280 million between federal spending and [a]ctual spending"; the States "were hundreds of millions of dollars short of what they needed to meet their minimum obligations under the CWA." CHERYL BARNES, ET AL., CLEAN WATER ACT IMPLEMENTATION: REVISITING STATE RESOURCE NEEDS 26 (2019), https://bit.ly/3M5uBYt; see also Gould, *supra*, at 444 (as early as 2008, "[a]necdotal evidence abound[ed] that the significant nexus test has markedly strained the wetlands jurisdictional determination process"). In short, as federal regulators and lower courts have raced to expand the CWA's reach, the associated implementation burdens have been more than many States can reasonably bear.

A narrower, text-focused reading of the CWA would remove these impossible burdens and allow States to redirect efforts to more fruitful ends, as Congress

intended. Those projects might be specialized localized regulation, more efficient reviews, or just about anything else. Every dollar a State like West Virginia spends implementing *federal* permitting regimes for intermittent mountain streams and other intrastate waters is one less dollar for other *locally needed* environmental protection efforts. And geographically tailored ventures like these are far better than tying up beneficial land improvement projects in the red tape of constantly changing regulatory demands.

A more restrained reading of the Act would head off broader economic harms to the States, too. Agency waffling and overreach in the CWA context cost States tax revenues, stall jobs creation, and create other broad macroeconomic effects. More expansive federal jurisdiction could also "have a stifling [e]ffect on the growth of our cities and towns." Lakshmi Lakshmanan, *The Supreme Court Wades Through the Clean Water Act to Determine What Constitutes the "Waters of the United States,"* 14 MO. ENV'T L. & POL'Y REV. 371, 391-92 (2007). Nothing—not the CWA's text, its context, or the constitutional principles on which Congress built it—suggests that Congress meant to bludgeon state economies in this way.

* * * *

Years after *Rapanos*, even Justice Kennedy seemed to express some buyer's remorse: "[T]he reach and systemic consequences of the [CWA] remain a cause for concern," and the statute "continues to raise troubling questions." *Hawkes Co.*, 573 U.S. at 602-03 (Kennedy, J., concurring). These concerns and questions continue to lurk today. The CWA was written to forge a genuine "partnership between the States and the Federal Government," *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992), based on

mutual respect and regulatory predictability. When these are the stakes, the only response that rises to the occasion is one that reads the CWA narrowly, with fidelity to the text's limits and its embedded cooperative federalism ideals.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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