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* STATE OF ALASKA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE STATE OF ALASKA[1]

Alaska takes seriously its "traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cty. (SWANCC)* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). The State has strict environmental laws and skilled regulators to manage and protect its vast quantities of local, non-navigable water, working in balance with the Environmental Protection Agency and Army Corps of Engineers' limited authority over navigable waters. The text of the Clean Water Act supports that balance. The Act was intended to "recognize, preserve, and protect the primary responsibilities and rights of States." 33 U.S.C. § 1251(b).

But, emboldened by the Ninth Circuit's and other lower courts' endorsement of a far-reaching, atextual interpretation of "navigable waters," federal agencies have asserted jurisdiction over land and water that fall plainly within the sphere of state and local authority. This drains meaning from the Act's recognition of state authority. And it burdens Alaska in particular.

With more land, water, and wetlands than any other State—and a unique need to build infrastructure and develop and protect its resources—Alaska is

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[1] Petitioners have consented to Alaska filing an amicus brief in this matter and Respondents have provided blanket consent. See this Court's Rule 37.3(a).

disproportionately harmed by the agencies' "immense expansion of federal regulation of land use," including to over "half of Alaska." *Rapanos* v. *United States*, 547 U.S. 715, 722 (2006) (plurality opinion). Alaska has a strong interest in this Court construing "navigable waters" in a way that remains true to the Act's text and respects state authority over local land and water.

INTRODUCTION AND SUMMARY OF ARGUMENT

Alaska is home to over three million lakes, more than 900,000 navigable rivers and streams, and 63 percent of the Nation's wetlands. Over 174 million acres of Alaska's 365-million-acre landmass have been classified as wetlands. U.S. Army Corps of Eng'rs, *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region* 4 (2007), https://go.usa.gov/xurHu (Regional Supplement). Alaska has an immense diversity of climates and landforms. Its northern and western regions are characterized by "[v]ast expanses of treeless tundra." *Id.* at 5. There, temperatures and precipitation are low and subterranean permafrost traps water near the surface. Alaska's southeastern region is humid and temperate; precipitation is abundant and bedrock is shallow. Alaska's interior has rolling hills, mountainous slopes, snaking rivers, and expansive lowland forests. The federal agencies have deemed millions of acres of features in these diverse regions to be wetlands potentially subject to the Act—from "wet and moist tundra" overlaying permafrost in the north and west, to muskegs and floodplains in the interior, to forested slopes in the rainy southeast. See *id.* at 5–6. In Alaska, it

seems, federal agencies find "water, water, everywhere," even without "any drop to drink." Samuel Taylor Coleridge, *The Rime of the Ancient Mariner* 17 (D. Appleton & Co. ed., 1857).

Alaska's ubiquitous non-navigable water and wetlands—the vast majority of which remain undeveloped—make the State disproportionately burdened by federal incursion into public infrastructure projects and private development. Under an expansive reading of the Clean Water Act's key jurisdictional phrases, the State's ability to manage its land and water is hampered. The Act was crafted to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). It should be read to do just that, not to unnecessarily tether States and the public to an albatross of regulatory uncertainty, inefficiency, and expense.

Alaska respectfully urges the Court to bear in mind the impact of its ruling on States, and Alaska in particular, and to provide clear direction on the scope of federal jurisdiction under the Act. Construing the statutory terms "navigable waters" and "waters of the United States" in line with their traditional, ordinary meanings will give States and the public needed jurisdictional certainty. Under such a reading, Alaska may count on federal authority covering only those wetlands that are indistinguishable from plainly jurisdictional waters, such as those waters that form "relatively permanent, standing, or continuously flowing bodies." *Rapanos* v. *United States*, 547 U.S. 715, 739

(2006) (plurality opinion). This plain, common-sense reading most faithfully aligns with text, precedent, and respect for state and local authority—authority States like Alaska have the expertise and will to exercise.

ARGUMENT

I. The "significant nexus" test empowers unchecked overreach in Alaska.

Wetlands are often at the Clean Water Act's jurisdictional frontier. Though wetlands are not themselves traditionally "navigable waters," the Court has upheld the application of the Act to wetlands that physically abut them. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). This alone has placed a cloud of potential federal authority on wetlands that sit at the banks of Alaska's hundreds of thousands of miles of traditionally navigable rivers and streams. And with the Ninth Circuit definitively adopting the "significant nexus" test as "the governing standard," Pet. App. A-26, vastly more wetlands may fall under the Act. Nearly half of Alaska's landmass is now shrouded with jurisdictional uncertainty.

Rapanos's fractured decision provided little concrete guidance. See *Rapanos* v. *United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). Writing alone, Justice Kennedy would have deemed wetlands to be "navigable waters" if they shared a "significant nexus" with *actual* navigable waters; that is, if the wetlands "alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other

covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in the judgment).

Resting on thin ecological threads woven between distant lands and waters, federal agencies and lower courts have unfortunately applied the significant nexus test to subsume most local, non-navigable waters and wetlands. See, *e.g.*, *N. Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993, 1000–01 (9th Cir. 2007) (holding a gravel pit was jurisdictional and noting, in addition to overflow, shared animal populations and seepage through wetlands and an underground aquifer); *United States* v. *HVI Cat Canyon, Inc.*, 314 F. Supp. 3d 1049, 1063 (C.D. Cal. 2018) (holding usually dry drainages had a significant nexus to navigable water ten miles away); *Precon Dev. Corp., Inc.* v. *U.S. Army Corps of Eng'rs*, 984 F. Supp. 2d 538, 540 (E.D. Virg. 2013) (applying the significant nexus test as a "flexible ecological inquiry"). The decision below is no different, applying the significant nexus test to find jurisdiction through linkages between a property, a wetland, a creek, and a lake. Pet. App. A-35.

A. Jurisdictional ambiguity propels jurisdictional expansion. That is particularly troubling for Alaska. Under the "significant nexus" test's "flexible ecological inquiry," *Precon Dev. Corp., Inc.* v. *U.S. Army Corps of Eng'rs*, 633 F.3d 278, 294 (4th Cir. 2011), any local water can eventually be linked to a navigable waterbody. This leads to a "significant impingement of the States' traditional and primary power over land and water use" on an especially grand scale in Alaska. See *Solid Waste Agency of N. Cook*

Cty. (SWANCC) v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). That is true both because of Alaska's sheer quantity of water and its unique northern environments. Three examples stand out: permafrost wetlands, wetland mosaics, and forested wetlands.

Nearly 85 percent of Alaska's landmass rests on permafrost—layers of frozen rock, soil, and sediment. *Permafrost and Periglacial Hazards*, Alaska Dep't of Nat. Res., https://go.usa.gov/xur6V (last visited Apr. 13, 2022). By blocking drainage, permafrost can cause seasonally thawed surface soils to retain water and show characteristics of wetlands (like hydric soils and hydrophytic vegetation). 33 C.F.R. § 328.3(c)(16).

These permafrost wetlands can thus subject "broad swaths of Alaska's North Slope" to federal jurisdiction. See Letter from Jason Brune, Comm'r, Alaska Dep't of Envtl. Conservation, to Vance Stewart III and John Goodin, Off. of the Assistant Sec'y of the Army & Off. of Wetlands, Oceans & Watersheds, U.S. Envtl. Prot. Agency 2 (Sept. 3, 2021), https://go.usa.gov/xur6H. Permafrost may also allow the agencies to reach beyond arctic tundra and into forests and up hillsides. The Corps, for example, has identified patches of permafrost on north-facing slopes as wetlands candidates. See Regional Supplement 6. Changing temperatures will make the jurisdictional landscape all the more uncertain, with thawing permafrost making some locations display more wetland-like characteristics and others display less. See *id.* at 23–24; Lindsey Flagstad et al., Univ. of Alaska Anchorage, *Wetlands Across Alaska: Statewide Wetland Map and Assessment of Rare Wetland Ecosystems* 9

(2018). Permafrost can make for unstable ground, but it should not do the same for federal jurisdiction.

Alaska is also home to wetland mosaics, areas described by the Corps as landscapes "where wetland and non-wetland components are too closely associated to be easily delineated or mapped separately." Regional Supplement 97. That is because mosaics do not exist as discernable bodies of water, but as land with "complex microtopography"—like one-foot gaps between tussocks or ten-foot dips between hummocks. *Ibid.* The Corps has noted examples of mosaics in myriad settings, including in north-facing slopes or in areas where wildfires have damaged permafrost. *Ibid.* Including mosaics as complexes of "similarly situated" wetlands under the significant nexus test significantly overrepresents the extent of jurisdictional wetlands in Alaska. See Pet. App. A-35 n.14 (noting historical evidence of "a single wetland complex"); Flagstad 25 (explaining that excluding mosaics and lands that could be classified as either wetland or upland reduces the estimate of wetlands in Alaska from 43 percent of the landmass to 22 percent).

Alaska also has unique forested wetlands. In regions like coastal southeast Alaska, 70-inch annual rainfall leads to hydrophytic vegetation and pockets of hydric soils on hillsides and slopes. These can have no connection to a navigable waterbody other than groundwater flow. But with subsurface connections as an allowable criterion under the significant nexus test, these forests too can be deemed jurisdictional. See Pet. App. at A-35 n.14; U.S. Senate Comm. on Env't and Pub. Works, *From Preventing Pollution of*

Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land: A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act 7 (2016) ("[T]he Corps has already begun to claim that movement of water through a groundwater aquifer is a hydrologic connection that expands the Corps' jurisdiction.").

B. Unchecked agency overreach under the significant nexus test impedes Alaska's ability to meet its social and economic needs. As Justice Alito has observed, "[a]ny piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act." *Sackett* v. *Envtl. Prot. Agency*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). In Alaska, this has real impacts on the ability to develop critical infrastructure and access resources.

Take for example the State's work assisting with the design of basic sanitation infrastructure in Chefornak, a western Alaska village that, like many others, has no community-wide wastewater facility. There, a majority of homes lack flush toilets and collect waste in "honey buckets" that are dumped in a pond. Over 3,300 homes throughout Alaska are in this situation, with resulting rates of invasive pneumococcal disease that are "among the highest in the world." *Alaska Water and Sewer Challenge*, Alaska Dep't of Envtl. Conservation, https://dec.alaska.gov/water/water-sewer-challenge/ (last visited Apr. 13, 2022). The State has been working with the community to find an

economical solution—one that will meet basic sanitation needs at a cost that can be sustained. Alaska's efforts, however, have been stymied by expansive interpretations of the Act's reach.

As is common in Alaska, Chefornak is near water, with a river, lakes, and wetlands at hand. A boardwalk traverses the village. The only feasible area for a wastewater lagoon is surrounded by wetlands that the Corps has classified as "waters of the United States." As a result, wastewater needs to be fully compliant with water quality standards before discharge. This makes the only legal option a full-fledged, lined, two-cell wastewater treatment plant. That would cost, at a minimum, $8 million to build (an average of $20,259 per resident) plus operating expenses that would add $115 per month to utility bills. In rural Alaska those costs are simply prohibitive. As a result, the project has been suspended.

An expansive interpretation of the Act forecloses creative solutions in communities like this. Were "waters of the United States" read more narrowly, the State could work with the community to build an economical, partially lined lagoon designed to use the surrounding wetlands' natural filtration functions. This could be made to satisfy water quality standards before water reaches the nearest traditionally navigable waterbody—meeting the community's basic needs while ensuring that navigable waters are protected. As it stands now, that is not an option and the status quo continues—with consequences for the environment and human health alike.

Or take the construction of an airport in Angoon, a coastal southeast community accessible only by boat or seaplane. A land-based airport will help Angoon connect to essential services, including emergency medical transport. Much of the area is surrounded by temperate rainforest. The Corps concluded the project area included nearly 300 acres of jurisdictional wetlands. The bulk of these were "bog forests"—areas that can be populated by tall conifers and dense undergrowth and that under any common understanding of the phrase, would not be considered "waters." The Corps issued a permit under the Act, but it came at no small cost: the Corps required the State to pay $3.6 million for wetlands mitigation credits and $60,000 toward removing abandoned boats in a nearby bay. Of course, the airport construction itself was designed to protect the aquatic environment, with stream diversions protecting fish passage and minimizing impact on surrounding habitat. The State should be able to build critical infrastructure in an environmentally sound manner without the Corps compelling it to funnel public funds to mitigation banks.

Alaska also bears the cost of the agencies' fluctuating interpretations of "waters of the United States." The regulatory climate is unpredictable, with an agency determining one year that a project is in a jurisdictional wetland and then, after a change of administration, that it is not. This is precisely what happened at three commercial facilities near the City of North Pole. First, the Corps applied its 2015 definition to determine that the facilities could be regulated. The facilities applied for the necessary permits and adjusted their operations. Then years later, the Corps

shifted its definition of "waters of the United States" and determined the facilities were not covered. The determination might flip again. Indeed, the agencies' most recent proposed rulemaking would adopt a version of the "significant nexus" test that largely eliminates any discernable boundaries. See 86 Fed. Reg. 69,372, 69,430 (Dec. 7, 2021) (defining "significant" as "more than speculative or insubstantial effects"). With no certainty, the public is left making decisions in the dark—and subject to criminal and civil liability for guessing wrong.

Jurisdictional uncertainty makes critical infrastructure development all the more difficult in Alaska's already challenging environment. And the federal permitting process itself leads to delays and increased costs. Much of Alaska has an extremely short summer construction season. But a standard dredge-and-fill permit takes the Corps about half a year (the Angoon airport permit took seven months), and permits for large projects can take several years. Development opportunities are missed season after season. See *Impacts of the Proposed Waters of the United States Rule on State and Local Government and Stakeholders: Hearing before the Subcomm. on Fisheries, Water, & Wildlife, Comm. on Env't & Pub. Works*, 114th Cong. 3 (2015) (statement of Michelle Hale, Dir., Div. of Water, Alaska Dep't of Envtl. Conservation).

C. Alaska's government also experiences substantial costs from broad, shifting interpretations of the federal agencies' jurisdiction. As the Act's reach

expands, Alaska's Department of Environmental Conservation must do more mandatory inspections and reporting under its delegated Clean Water Act section 402 program and more section 401 certification analyses. It faces more litigation as parties challenge its work implementing the Act. The department is actively redesigning its permitting system to increase predictability, but keeping pace with changing definitions squanders state resources.

The State also shoulders the costs of complying with the Act as a developer and landowner. Alaska's Department of Transportation and Public Facilities, which secures the largest number of section 404 permits in Alaska, faces more analyses under the National Environmental Policy Act and more expensive compensatory mitigation. With little degraded wetlands needing improvement and the limited availability of private land (only 12 percent of the State), compensatory mitigation in Alaska is particularly difficult. The Corps has rejected proposals to create a state-managed in-lieu-fee program that could provide alternatives to project-specific mitigation or expensive mitigation credits. And the Corps often directs the use of project lands for mitigation avoidance or imposes costly project modifications. This restricts Alaska's ability to use its own lands. Alaska's Department of Natural Resources, the State's landholding agency, has more difficulty developing resources on state lands that could secure rental, royalty, and tax revenues.

In short, the federal agencies and lower courts' broad interpretation of the Act's jurisdictional reach

has burdened Alaska's governments, industries, and communities.

II. The Court should provide jurisdictional certainty by reading the Act in line with text, precedent, and respect for state authority over local matters.

Adopting a limited, textual reading of the Act will clear the cloud of jurisdictional uncertainty that hampers necessary projects in States like Alaska. Jurisdictional waters should be relatively permanent, geographic waterbodies aligned with the ordinary understanding of the key phrases "the waters of the United States" and "navigable waters." The Court should read the Act to confer federal authority over intrastate wetlands only when they are indistinguishable from and comprise the borders of waters that are themselves jurisdictional. In line with principles of federalism that lie at the core of the Act and the Constitution, States should have authority to independently manage and protect what is clearly local land and water.

A. The Court should read the Act in a way that is true to its text. In defining "navigable waters," Congress chose not to refer to water in general, but to "*the waters* of the United States." 33 U.S.C. § 1362(7). This distinction carries meaning. See *Rapanos*, 547 U.S. at 732 (plurality opinion). As the *Rapanos* plurality explained, "the waters" means water "'[a]s found in steams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such

streams or bodies.'" *Ibid.* (alterations in original) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)). The ordinary meaning of the term does not independently capture wetlands—be they the Sacketts' soggy parcel or damp tundra overlaying permafrost. Instead, it captures "relatively permanent, standing or flowing bodies of water." *Ibid.*

Reading "waters" as relatively permanent *bodies* of water is bolstered by the Act's prohibition of discharges into "navigable waters." 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). Though the Court described the phrase "navigable waters" as having "limited import" because the Act employs it as a defined term, *Riverside Bayview*, 474 U.S. at 133, the Court should not disregard its ordinary and traditional meaning. "In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly where there is dissonance between the ordinary meaning and the reach of the definition." *Bond* v. *United States*, 572 U.S. 844, 861–62 (2014) (refusing to "brush aside the ordinary meaning" of the term "chemical weapon" despite a far-reaching statutory definition).

The Act should not be read to confer jurisdiction over features that "no one would ordinarily describe" as navigable waters. *Id.* at 862. Traditionally, "navigable waters" had to be discrete bodies of water that were "'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (plurality opinion) (citing *The Daniel Ball*, 10 Wall. 557, 563 (1871); *United States* v. *Appalachian Elec. Power Co.*, 311

U.S. 377, 406 (1940)). No ordinary meaning of "navigable waters" would allow for the agencies' assertion of jurisdiction over complexes of wetlands, expanses of tundra, or temperate rainforests physically separated from or tenuously linked to traditionally navigable waterways.

Moreover, reading text in line with its ordinary meaning does not do away with *all* federal authority over wetlands. Instead, wetlands can be included as part of "navigable waters" where they share a physical surface connection to those waters that makes them "as a practical matter *indistinguishable*." *Id.* at 755 (emphasis in original). Jurisdictional wetlands would thus be identified where there is "boundary-drawing ambiguity" on the banks of a navigable water. *Id.* at 748–49. This conforms to the Court's affirmance of jurisdiction over "a wetland that actually abuts on a navigable waterway" in *Riverside Bayview*, 474 U.S. at 135. And it is true to the Act's use of the word "wetlands" in its reservation of federal dredge-and-fill authority over "those waters which are presently used, or are susceptible to use . . . as a means to transport interstate or foreign commerce shoreward . . . including *wetlands adjacent* thereto." 33 U.S.C. § 1344(g)(1).

Any other application of the Act to wetlands—such as one tied to water's inherent interconnectivity across ecosystems—substitutes a feature that may *affect* navigable waters for navigable waters themselves. See *Rapanos*, 547 U.S. at 755 (plurality opinion). Language intended to set jurisdictional boundaries then becomes boundless.

That is what has happened under the lower courts' application of Justice Kennedy's "significant nexus" test. Indecipherable jurisdictional borders continue "to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *U.S. Army Corps of Eng'rs* v. *Hawkes Co., Inc.*, 578 U.S. 590, 603 (2016) (Kennedy, J., concurring). This results from wedding jurisdictional boundaries to the chemical, physical, and biological interplay between wetlands and downgradient waters. See *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment). But ecological connections are ill-suited for boundary drawing; after all, in ecology, "[w]hen we try to pick out anything by itself, we find it hitched to everything else in the universe." John Muir, *My First Summer in the Sierra* 211 (Houghton Mifflin ed., 1911). Congress's invocation of "navigable waters" and "waters of the United States" as jurisdictional markers could not have been intended to capture such breadth. As the *Rapanos* plurality explained, "exclusive focus on ecological factors," paired with "total deference to the Corps' ecological judgments, would permit the Corps to regulate the entire country as 'waters of the United States.'" 547 U.S. at 749.

"Predictability, or . . . 'reckonability,' is a needful characteristic of any law worthy of the name." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989) (quoting Karl N. Llewellyn, *The Common Law Tradition* 17 (Little, Brown ed., 1960)). A textual reading of "the waters of the United States" would give States like Alaska just that.

Rather than a roving search for jurisdiction in the water-logged gaps between grassy tussocks, among the trees of a mist-soaked hillside, or in the permafrost lying under millions of acres of tundra, the agencies' jurisdiction would be distinctly bounded at the banks of Alaska's navigable streams and waterbodies.

B. A limited, textual reading is also supported by the Court's precedent. In first upholding the application of the Act to a wetland in *Riverside Bayview*, the Court emphasized the boundary-drawing context in which the question arose. 474 U.S. at 132. The reality is that "the transition from water to solid ground is not necessarily or even typically an abrupt one," yet as the Court explained, the Corps was still tasked with finding "some point at which water ends and land begins." *Ibid.* Recognizing that "problem of defining the bounds of its regulatory authority," the Court condoned the agency's reliance on the Act's "concern for protection of water quality and aquatic ecosystems" to determine that it may "encompass wetlands adjacent to waters as more conventionally defined." *Id.* at 132–33. The Court thus upheld the application of the Act to "a wetland that actually abuts on a navigable waterway." *Id.* at 135.

After *Riverside Bayview*, the federal agencies pushed their jurisdictional claim further, but were rebuffed. In *SWANCC*, the Court rejected the agencies' habitat-based assertion of jurisdiction over an abandoned sand and gravel pit. 531 U.S. at 167. The Court was clear that the Act's jurisdictional phrase "navigable waters" still had meaning—it showed Congress

rested its enacting authority on "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. The Court emphasized the import of the wetland's adjacency—noting that "was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.* at 167. The Act extended no jurisdiction, the Court held, over "ponds that are *not* adjacent to open water." *Id.* at 168 (emphasis in original).

In *Rapanos*, the Court considered whether a wetland that was also "not adjacent to navigable-in-fact waters" could be "waters of the United States." See *Sackett*, 566 U.S. at 124 (describing *Rapanos*). The Court answered "no." *Ibid.* Under either the plurality decision or Justice Kennedy's concurrence, the Court's precedent would not allow the agencies to claim jurisdiction over wetlands linked to distant navigable waters through remote or insubstantial connections. See *Raponos*, 547 U.S. 735 (plurality opinion) (explaining that in *Riverside Bayview* "nowhere did [the Court] suggest that the 'waters of the United States' should be expanded to include, in their own right, entities other than hydrographic features more conventionally identifiable as 'waters'" (internal quotation marks omitted) (quoting *Riverside Bayview*, 474 U.S. at 131)); *id.* at 780 (Kennedy, J., concurring in the judgment) ("The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case.").

The Court's precedent does not support the agencies and lower courts' sweeping interpretation of "navigable waters" to include wetlands lacking discernable surface connections to bodies of water. Moreover, by simply defining wetlands as "navigable waters," the agencies can duck the Act's limited authority over point-source discharges to groundwater. See *Cty. of Maui* v. *Haw. Wildlife Fund*, __ U.S. __, 140 S.Ct. 1462, 1476 (2020); see also *id.* at 1478 (Kavanaugh, J., concurring) (noting the holding "adheres to Justice Scalia's analysis in *Rapanos*"). Rather than determine if a discharge to a wetland reaches a navigable water in a manner similar to a direct discharge, *id.* at 1476, the agencies may simply deem the wetland itself a "navigable water" and regulate the discharge out of the gate.

C. A limited, textual reading is further supported by the Act's and the Constitution's respect for state authority over local matters. "Regulation of land use, as through the issuance of the development permits"—at issue both in *Rapanos* and here—"is a quintessential state and local power." *Rapanos*, 547 U.S. at 738 (plurality opinion). The Act should be read in a manner that allows States to wield that authority.

A "strong current of federalism" runs through the Act. *Dist. of Columbia* v. *Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980). Congress elected to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b). The

Court has highlighted this time and again. *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 737 (plurality opinion); see also *Cty. of Maui*, 140 S.Ct. at 1471, 1476. The Act does not intend for the Corps and the EPA to oversee ordinary homebuilding, local wastewater facility design, or rural airport construction where none of it occurs in a navigable waterbody.

Recognition of States' authority over local matters goes beyond the Act, too; it is central to our constitutional framework. "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond*, 572 U.S. at 854. Differences in federal and state authority exist for a reason: within "the tension between federal and state power lies the promise of liberty." *Gregory* v. *Ashcroft*, 501 U.S. 452, 459 (1991). Legislating "in areas traditionally regulated by States," therefore, is "an extraordinary power in a federalist system" and one that the Court "must assume Congress does not exercise lightly." *Id.* at 460.

The Court should read the Act's jurisdictional phrases to limit, not expand, the federal agencies' reach into traditional state territory. It is a "well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond*, 572 U.S. at 858 (cleaned up) (quoting *Gregory*, 501 U.S. at 460); see also *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, __ U.S. __, 140 S.Ct. 1837, 1849–50 (2020). That intent must be shown in the statute's

text: "if the Federal Government would 'radically readjust the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit' about it." *Bond*, 572 U.S. at 858 (cleaned up) (quoting *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)); see also *ibid.* (citing *SWANCC*, 531 U.S. at 174). This is particularly important where a law, like the Act, may control intrastate crimes. See *id.* at 859–60. Here there is no indication that the Act intended to usurp state authority. To the contrary, it "explicitly calls for" "state and local conservation efforts." *Rapanos*, 547 U.S. at 745 (plurality opinion).

Moreover, the Act should be read to prevent the agencies and lower courts from continuing to "stretch[] the outer limits of Congress's commerce power." *Rapanos*, 547 U.S. at 738 (citing *SWANCC*, 531 U.S. at 173). Congress's Commerce Clause authority is broad, but "not unlimited." *SWANCC*, 531 U.S. at 173. Sweeping assertions of jurisdiction over local water and land "raise significant constitutional questions." See *ibid.* An activity impacting the natural environment may always have downstream effects, however imperceptible, just like any local commercial activity might, in theory, have some impact on interstate commerce. "Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring). But that does not make it constitutionally permissible to regulate without limit.

Applying the Act to wetlands that are remote from traditionally navigable waters and connected only through a chain of ecological relationships "would obliterate the distinction between what is national and what is local." *Ibid.* Congress provided no clear statement that it intended to so push its Commerce Clause authority. To the contrary, by tying jurisdiction to "navigable waters" it invoked 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.

Resting the interpretation of the Act "plainly and simply, upon the limited meaning that can be borne by the phrase 'waters of the United States'" preserves the Act's respect for State's powers and avoids straying to the edges of the Commerce Clause. *Rapanos*, 547 U.S. at 753 (plurality opinion). And although it may ultimately be the Court's "job . . . to follow the text even if doing so will supposedly undercut a basic objective of the statute," *Baker Botts L.L.P.* v. *ASARCO LLC*, 576 U.S. 121, 135 (2015) (internal quotation marks omitted), here the Court can follow the text *and* further the Act's objectives. As Congress contemplated, the States can continue to exercise their authority to protect local water quality.

III. States like Alaska responsibly manage their waters and will continue to do so.

Water that is not a "water of the United States" is not, for that reason, unprotected. Instead, it is protected by state rather than federal law. Greater state authority over waters would not undermine the Act's

objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a)—it would simply leave space for a different governmental body to further this objective. States have the prerogative and incentive to fill this space and to balance their power with facilitating local needs. Alaska, for its part, is well-poised to maintain the chemical, physical, and biological integrity of its waters.

A. Enshrined in Alaska's constitution is a directive to manage replenishable natural resources—everything from fish to forests—under a "sustained yield principle." Alaska Const., art. VIII, § 4. This balances "maximum use of natural resources with their continued availability to future generations." *West* v. *State, Bd. of Game*, 248 P.3d 689, 696 (Alaska 2010) (quoting The Alaska Constitutional Convention, *Proposed Constitution for the State of Alaska: A Report to the People of Alaska* (1956)). Embedded in this directive is a promise to protect Alaska's waters.

Alaska law broadly prohibits "pollution of the air, land, subsurface land, or water of the state." Alaska Stat. § 46.03.710. It defines "pollution" to include "the contamination or altering of water, land, or subsurface land," in ways that create nuisances or make them "unclean, or noxious, or impure, or unfit." *Id.* § 46.03.900(20). And it empowers the State to prevent, control, and abate this pollution. *Id.* § 46.03.020.

The State exercises its power responsibly. Following the Exxon Valdez oil spill, for example, Alaska amended its environmental laws to make them more

protective, created an oil spill contingency plan requirement to prevent similar spills, and annually revisits the standards. The State has adopted an antidegradation policy which requires all state waters to meet federal water quality standards. Alaska Admin. Code tit. 18, § 70.015. And it has adopted state-level water quality protections that are more stringent than federal standards—including quantitative groundwater and surface water cleanup standards for oil and hazardous substances. See, *e.g.*, *id.* § 75.345.

Alaska's regulatory programs are comprehensive in scope. Alaska regulates discharges to waters and wetlands, manages wastewater treatment and disposal, provides financial assistance for water and wastewater facilities, supports waterbody assessment and remediation, and monitors and reports on water quality. See *id.* chs. 70, 72, 83. It oversees several water quality programs, covering everything from point-source discharges to stormwater runoff, nonpoint-source pollution, and even cruise ship releases. See Alaska Stat. § 46.03.100; Alaska Admin Code tit. 18, ch. 69; *id.* §§ 83.310, 83.610. The State meticulously tracks metrics affecting its water quality—collecting information like temperature, turbidity, and pH, as well as biological, habitat, soil, and sediment data. The scope of monitoring extends beyond specific projects, to include streams, beaches, impaired waters, and priority areas.

All of these programs are rigorous. And they apply equally to surface water, wetlands, and groundwater, regardless of whether they are deemed "waters of the United States."

B. State-level programs can be nimbler and more tailored. Alaska, for example, has developed a general permitting system for stormwater runoff (a common source of harmful pollution) that covers construction activities affecting at least one acre. This system regulates both stormwater and non-stormwater pollution. *Storm Water Program*, Alaska Dep't of Envtl. Conservation, https://go.usa.gov/xuYq5 (last visited Apr. 13, 2022). Housing disparate activities in a single authorization reduces costs for the regulators and regulated alike. And efficiency does not compromise effectiveness: stormwater runoff is still cleaned up to water quality standards.

State-level programs also allow States to manage their public resources in ways that meet local needs. In Alaska, the State holds and manages approximately 60 million acres of tidelands, shorelands, and submerged lands, as well as all water in the State. Alaska requires that any "use of water" be in the public interest and considers impacts "on water quality, navigation, and fish and wildlife." Alaska Stat. §§ 46.15.010–.270; *Tulkisarmute Native Cmty. Council* v. *Heinze*, 898 P.2d 935, 950 (Alaska 1995). Alaska also enforces specific water protections for its unique public areas. For example, users of forest land must monitor and report likely impacts on water quality. Alaska Admin. Code tit. 11, § 95.825. Water-related activities are restricted in a state preserve to protect nesting bald eagles. See, *e.g.*, *id.* §§ 21.010, .120. And streams bearing Alaska's abundant anadromous fish (like salmon) are protected, with developers needing approval from the State's habitat biologists for any activ-

ity that may pollute specified anadromous waterbodies, or else face penalties or a misdemeanor prosecution. Alaska Stat. §§ 16.05.871, .881, .896, .901. Alaska's habitat biologists are a microcosm of the wealth of expertise that Alaska has protecting its waters. Habitat biologists alone scrutinize over 1,500 permit applications each year and monitor permitted projects to ensure they will not harm fish habitat. For special areas, habitat biologists develop comprehensive management plans to protect fish, wildlife, and their water and wetland habitats. *E.g.*, Alaska Admin. Code tit. 5, § 95.520. Like many of Alaska's agency experts, habitat biologists are essential for ensuring that the State's replenishable natural resources are available for future generations.

State-level efforts, like Alaska's, are tailored to local conditions and leverage local insight. And they reflect States' prerogatives to balance their local ecological and economic needs. Burdensome federal encroachment on States' powers over local lands and waters hinders States' abilities to meet their unique needs and, ultimately, is unnecessary to maintain the chemical, physical, and biological integrity of local water.

* * *

Alaska urges the Court to consider the disproportionate burden that States like Alaska bear from unnecessary, overbroad interpretations of the Clean Water Act. Alaska respectfully supports a narrow, textual understanding of the Act's key jurisdictional

phrases. By reading the Act to confer federal jurisdiction over only waterbodies in the traditional sense and wetlands that are indistinguishable from and comprise the borders of those waterbodies, the Court can align its interpretation with the Act's text and its respect for state authority over state water. The Clean Water Act allows for nothing more.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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