No. 21-454

In The
Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, Administrator,
Respondents.

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

BRIEF AMICUS CURIAE OF DUARTE NURSERY, INC., IN SUPPORT OF PETITIONERS

TIMOTHY KASSOUNI
Counsel of Record
Kassouni Law
455 Capitol Mall, Suite 604
Sacramento, CA 95814
Telephone: (916) 930-0030
timothy@kassounilaw.com

RONDA AZEVEDO LUCAS
Lucas Law
19738 August Ave.
P.O. Box 696
Hilmar, CA 95324
Telephone: (916) 468-8208
ralucaslaw@outlook.com

Counsel for Amicus Curiae
Duarte Nursery, Inc.

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)?

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

Supreme Court Rules

Interest of Amicus Curiae

Pursuant to Sup. C. R. 37.3, Duarte Nursery, Inc. ("Duarte") respectfully submits this brief *amicus curiae* in support of Petitioners.[1]

Duarte has several interests in this case stemming from its nightmare experience dealing with the U.S. Army Corps of Engineers's ("Corps") prosecution under the "guidance" issued by the Corps and the U.S. Environmental Protection Agency ("EPA") in 2008 interpreting the Court's *Rapanos* decision.[2] (*Rapanos v. United States*, 547 U.S. 715 (2006) (hereinafter "*Rapanos*"). Duarte is interested, first and foremost, in the Federal Water Pollution Control Act, or Clean Water Act ("Act") being applied as written by Congress so that ordinary people can understand and apply it, which is not presently happening. When it was passed in 1972, the Act represented one piece of legislation – amongst a comprehensive suite of similarly enacted legislation –which sought to protect the environment while recognizing and preserving the roles of state and local governments. The Act embodied a constructive bargain amongst clean water advocates, farmers, municipalities, state governments and the public at

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[1] No counsel for any party authored this brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of this brief. No person (other than the *amici curiae*, their members, or their counsel) made any such monetary contribution. Written consent for *amici curiae* participation in this case was granted by counsel of record for all parties pursuant to Sup. C. R. 37.3 (a).

[2] The Act grants authority to both the Corps and EPA. As used in this brief any reference to the Corps acknowledges and includes EPA as set forth in the Act and its implementing regulations.

large to protect the nation's navigable waters. In the intervening decades, the agencies and some lower courts have eviscerated Congress's carefully constructed bargain, ignoring their language and intent and the Court's holdings, by reading the Act to have essentially limitless boundaries. These limitless boundaries have led to regulations that give no fair warning and, in practice, have led to the delegation of basic policy matters to the Corps's employees who arbitrarily regulate and even criminalize everyday activities like plowing a field to plant food in areas vastly removed from navigable waters or building your dream home on a parcel that is surrounded by prior development. Even the Corps admits it is not making entirely scientific judgments. "Significant nexus is not a purely scientific inquiry" but requires "scientific **and policy judgment, as well as legal interpretation**." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37060, 37057 (June 29, 2015) (emph. added).

Under the Corps's current practices, no showing of actually discharging a pollutant into a navigable water body is required, and the burden of proving that you have not discharged a pollutant into a navigable water body, which is the case for Duarte, has been thrust upon individual citizens. This process can take decades, cost millions of dollars, and forces citizens to go through a civil process while concurrently being threatened with criminal prosecution and loss of liberty. Duarte provides a real world example of the dangers with this limitless approach.

Duarte was started in 1988 by third generation farmers Jim and Anita Duarte and their sons John and Jeff Duarte. Duarte began as a small grape vine nursery and has grown to employ roughly 600 employees and 400 seasonal workers. Jim and Anita's sons are now the second generation of owners with three generations of Duartes currently involved in operations. Duarte's story embodies the American dream proving that through hard work and commitment, law abiding citizens can achieve success. For Jim and Anita, success is building a family business that future generations will be proud to be involved in and giving back to their community.

Duarte's nightmare began in November 2012. Duarte had high hopes that, working with the Corps through its attorney, the Corps's misunderstanding could be easily resolved. These hopes were soon dashed, and Duarte was prosecuted by the Corps, for plowing a field a few inches deep in California's Central Valley, some 8 miles from the nearest navigable water (the Sacramento River) to plant wheat. The property at issue is located in Tehama County and was purchased by Duarte in early 2012. The property had been in rotational cultivation since at least the 1960s with cattle grazing on the parcel whenever it had not been in dryland crop production. When not being grazed, the property had been plowed, burned, dried out, irrigated, planted to small grains, hayed, and otherwise disturbed many times in the decades before the Corps asserted wetlands jurisdiction and prosecuted Duarte for failing to obtain a permit under the Act.

Duarte instructed third parties to plant, maintain and harvest a winter wheat crop on this property consistent with the property's agricultural history and the Act's "farming exemption."[3] Duarte relied on an engineering report provided by the previous owner, the Natural Resource Conservation Service's confirmation that wheat had been previously grown on the entire parcel, and the plain language of the Act's 404 agriculture exemption. Based on this information, Duarte did not believe a permit was required to farm its property. Duarte also took the additional precaution of instructing the third party to adjust the farming equipment thus ensuring the chisel plow did not exceed more than 12 inches in the soil. The property was dry at the time of the plowing, and the plowing resulted in tillage of approximately 4-7 inches.

Because Duarte attempted to follow the Act and take extra precautions, the Corps labeled Duarte a "flagrant" violator. Rather than working with Duarte, the Corps refused to provide the information it was relying upon and ignored Duarte's constitutional protections by insisting Duarte provide evidence of its alleged wrong doing to aid in the Corps's ongoing investigation while simultaneously demanding Duarte stop all activities on its property under threat of civil and criminal

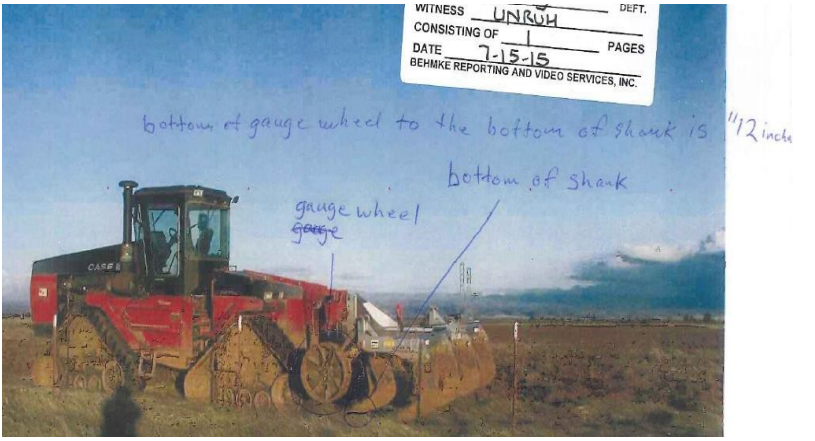
[3] Specifically, section 404(f)(1)(A) was added to the Act to expressly eliminate any requirement to obtain a permit for "discharge: (A) from normal farming . . . and ranching activities such as plowing." 33 U.S.C. § 1344(f)(1)(A). Moreover, the Corps has by regulation recognized that "plowing" "will never involve a discharge." 33 U.S.C. § 323.4(a)(1)(iii)(D).

penalties. As a result, Duarte, in 2013, sued the Corps for denying its due process rights.

In 2013 shortly after Duarte filed its suit, the Corps discussed their Duarte enforcement with EPA. Under official Corps policy, enforcement matters are referred to EPA for further action. However, EPA declined to pursue the Duarte enforcement because Duarte's lawsuit was a "complicating factor." Normally, EPA's decision to not pursue an enforcement action results in the agencies dropping the matter. Here, however, the Corps took the extraordinary step of involving the Department of Justice to sue Duarte because, as a Justice attorney asserted, Duarte sued us so we had to sue them.

This fiasco originated from a Project Manager in the Redding Corps's office, a single person regulatory unit covering five counties, driving by the Duarte property and noticing farming equipment parked. He testified it was raining so he did not get out of his vehicle but took pictures from the side of the road. He stated he believed there was a large agricultural conversion going on violating the Act. Later, the Project Manager admitted he had assumed the neighboring property was part of Duarte's parcel and the equipment he saw on that parcel raised the red flag. These assumptions were erroneous. Based on his drive by and ignorance of the difference between "deep ripping" and "plowing," he opened an investigation and issued a Cease and Desist Letter against Duarte. Farmers, for centuries, have interchangeably used the phrase "ripped" and "plowed" in common parlance without regard to the depth of the tillage. In reality, Duarte

was simply using a standard tractor and chisel plow to plant wheat – a normal farming practice necessary to grow anything.



Corps's Photo of Tractor on Duarte Property, Marked Up by Third Party

The Cease and Desist Letter's attachment "Appendix A, The Clean Water Act" reads in part:

Section 309 (33 USC §1319) states in part:

> (c) Criminal penalties -
>
> (1) . . . (A) Any person who negligently violates Section . . . 1311 . . .shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both ...
>
> (2) ... (A) Any person who knowingly violates section ... 1311 … shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of

> violation, or by imprisonment for not more than 3 years, or by both ...
>
> (d) Civil penalties; ... any person who violates section ... 1311 ... and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $ 25,000 per day for each violation. In determining the amount-of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. . ..

The small wetlands on Duarte's property consist of vernal pools and wetland swales formed atop thick subsurface layers of restrictive soils that essentially block water from percolating into the groundwater and cover less than five percent of the property. During the rainy season, water rests atop these restrictive layers; areas that become saturated from the top of the restrictive layer up to the ground surface form wetlands. As might be expected, given these conditions, the property's wetlands persist and coexist with the previous agricultural activities there and continue to this day. The following facts did not stop the Corps from asserting jurisdiction over dry farmland and aggressively prosecuting Duarte: 1) the subsurface restrictive layers were never disturbed by Duarte's activities; 2) the plowing and wheat planting did not convert any waters to dry land as

confirmed by the Corps and the Department of Justice's own experts; 3) Duarte's 2012 plowing did not affect the flow, circulation, or reach of any wetlands on the property; and 4) Duarte's plowing and tilling of the farmland never resulted in the discharge of any pollutant into navigable waters.

Shallow Tillage at Duarte Property, with Wetlands in Full Bloom and Wheat Growing

Duarte was prosecuted under the Corps "guidance" issued in 2008 which solely relied on Justice Kennedy's opinion in the *Rapanos* case. The Corps clearly interpreted the "case by case" basis language to untether them from any real restraint by Congress and have set up a regulatory system by which Corps personnel can and do randomly chose to move the goal posts set by Congress and the Courts to flex their regulatory might and assail ordinary citizens without the benefit of any Constitutional protections. The Corps contended Duarte could owe over a hundred million dollars in fines – not for discharging pollutants but for failing to get a permit

on a property that was eight miles from a river – with the threat of criminal prosecution ever present.

Duarte, facing the fact the lower courts are often inconsistent with the prior rulings of this Court and could again move the goal posts set by Congress, was forced to make a very difficult decision; continue forward in the courts in order to face the Ninth Circuit and its robust history of empowering the Corps's unlimited jurisdiction thereby risking the entire Duarte family losing everything, perhaps even their freedom, while destroying the livelihoods of their hard working and loyal employees or settle. There was no choice. Duarte settled paying $1.1 million and is subjected to certain injunctive relief. Duarte's consent decree specifies that much of the injunctive relief may be reduced if the law on what is navigable waters changes. Today, like the Sackett property, Duarte's property sits idle. Duarte is unable to use its property as it intended. Duarte, the Sacketts and countless other citizens are at the mercy of this Court to resolve this issue in a manner that any common citizen can interpret.

Summary of Argument

In order to address the Court's question presented, one must go back to basics. The Court must first look at the language Congress passed when it implemented the amendments on October 18, 1972 and, thus, created the Act as we know it today. This review cannot be done in a vacuum. Statutes must be interpreted so as to be entirely harmonious with all laws as a whole. Contemporaneous with Congress's passage of the

Act, Congress passed other legislation that evoked protections to improve air quality, preserve protect and restore the coastal zone, protect species and populations of marine mammals, provide for the conservation of endangered and threatened species of fish, wildlife, and plants, preserve, restore, and improve wetlands, and to restore and maintain the chemical, physical, and biological integrity of the Nation's water.

Every word within a statute is there for a purpose and should be given its due significance. The Court's role is to construe laws in harmony with their original legislative intent recognizing that the passage of no amount of time can change that original intent. And while undertaking this role, the Court must remember that perhaps the most important element is whether or not the statute and the Court's application of it give the common man a reasonable opportunity to know what is prohibited so he may act accordingly. This edict has even more importance when interpreting and applying the Act because the consequences are so high. Merely failing to obtain a permit because of one's good faith belief the Corps does not have jurisdiction can easily result in millions of dollars in fines and penalties, the inability to use one's property as one wishes for years if not decades and, most egregious, the real life consequence of losing one's liberty. The loss of liberty makes and should make the law intolerant of error.

Argument
I.
Congress Granted the Corps Broad but Limited Jurisdiction Under the Act.

In order to answer the presented question, the Court must first look to the original language of the statute when originally enacted. "The starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987); The passage of no amount of time can change the original legislative intent of the law. "Courts should construe laws in harmony with the legislative intent…." *Foster v. United States*, 303 U.S. 118, 120 (1938.)

The Act is the principal law governing pollution of the nation's surface waters. This legislation, originally enacted in 1948, was totally revised by amendments in 1972 which give the Act its current dimensions. Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816. The 1972 legislation spelled out ambitious programs for water quality improvement that have since been expanded. The Act's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's water" by, in part, setting a national goal of eliminating "the discharge of pollutants into navigable waters" and "provid[ing] for the protection and propagation of fish, shellfish, and wildlife, and provid[ing] for recreation in and on the water." *Id.* at § 101 (a)(1), (2). (emph. added).

The Act expressly defined:

> "navigable waters" as "**the waters** of the United States, including the territorial seas." *Id* at. § 502(7), 886 (emph. added).
> "discharge of a pollutant" and "discharge of pollutants" as, "any addition of any pollutant **to navigable waters** from any point source, any addition of any **pollutant to the waters** of the contiguous zone **or the ocean** from any point source…." *Id*. at § 502(12), 886 (emph. added).

Of course, "[s]tatutory language cannot be construed in a vacuum," *Sturgeon v. Frost*, 577 U. S. ___, ___ (2016) (slip op., at 12) (internal quotation marks omitted), and so we must also consider "the discharge of pollutants into navigable waters" in its statutory context. As Chief Justice Roberts has noted, "[a]djectives modify nouns—they pick out a subset of a category that possesses a certain quality." *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U. S. ____, ____ (2018) (slip op., at 8). It follows that "navigable waters" is the subset of "waters" that are "navigable," and thus it is "navigable waters" that Congress intended the Corps to have jurisdiction over under the Act.[4] As this Court noted in its *Rapanos* plurality decision, "[t]he only natural definition of the term 'waters,' our prior and subsequent judicial construction of it, clear evidence from other provisions of the statute and this Court's canons of construction all confirm that 'the

[4] Even the Corps originally adopted this narrow view of its own authority under the Act. Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12115, 12119 (April 3, 1974); *Id*. at 40 Fed. Reg. 31320, 31325-31326 (July 25, 1975).

waters of the United States' in § 1362(7) cannot bear the expansive meaning that the Corps would give it." *Rapanos*, 547 U.S. at 731.

The Act's statutory structure affirms the Court's opinion above and elucidates Congress's desire to limit the Corps's authority, and thus the need to obtain a federal permit to use one's property, to navigable waters.[5] The Act could have defined "navigable waters" as "waters of the United States" but it did not. Instead, Congress used "the waters," indicating the original definition did not refer to water in general, but "'the waters' refers more narrowly to water as found in streams and bodies forming geographical features such as oceans, rivers and lakes, or the flowing or moving masses, as waves or floods, making up such streams or bodies." *Rapanos,* 547 U.S. at 732 (quoting Webster's New International Dictionary 2882 (2 ed. 1954)). Read in conjunction with the Act's entire statutory construct, it is clear "navigable waters" means something more discrete than all waters.

As noted above, Congress defined "discharge of a pollutant" to include "any addition of any pollutant **to navigable waters** from any point source." Clean Water Act of 1972, Pub. L. No. 92-500 § 502(12), 86

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[5] "PERMITS FOR DREDGED OR FILL MATERIALS
Sec. 404. (a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material **into the navigable waters** at specified disposal sites." Clean Water Act of 1972, Pub. L. No. 92-500 § 404(a), 86 Stat. 884 (emph. added).

Stat. 886 (emph. added). Congress separately defined "point source" to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id*. at § 502(14), 86 Stat. 887. Thus, Congress defined "point source" to encompass conveyance systems and watercourses that intermittently contain water and separated these intermittent or occasional flows from "the waters of the United States." Every word within a statute is there for a purpose and should be given its due significance. *Russello v. United States*, 464 U.S. 16, 23 (1983). When the Act is read in its totality, it is clear the Act confers jurisdiction only over relatively permanent bodies of water and not wetlands and even dry land miles from these permanent bodies.

To further determine what Congress's intention was when defining "navigable waters," and specifically whether Congress intended the term to include all wetlands, the Court must look to the totality of Congress's actions in the early 1970s and the entire body of laws enacted. Statutes must be interpreted so as to be entirely harmonious with all laws as a whole. The pursuit of this harmony is often the best method of determining the meaning of specific words or provisions which might otherwise appear ambiguous. It is, of course, true that "[s]tatutory construction is a holistic endeavor" and the meaning of a provision is "clarified by the remainder of the statutory scheme . . . ." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*,

484 U.S. 365, 371 (1988) (internal quotations omitted).

The 1970s was a seminal decade for environmental protection wherein Congress passed a suite of legislation creating a holistic, comprehensive approach to environmental protection.[6] In each act it passed, Congress set forth specific goals and gave specific jurisdiction to discrete agency administrators and secretaries to achieve the respective goals Congress set forth. For example, the EQIA specifically set forth the "national policy for the environment which provides for the enhancement of environmental quality…"and asserts "[t]he primary responsibility for implementing this policy rests with State and local governments." Environmental Quality Improvement Act of 1970, Pub. L. No. 91-224, §§ 202(b)(1), (2), 84 Stat. 114. Further, in 1977, under the authority of the National Environmental Policy Act, Executive Order 11990 was issued for the protection of wetlands. Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (May 24, 1977). Notably, section 1(b) states, "[t]his Order does not apply to the issuance by Federal agencies of permits, licenses, or allocations to private parties for activities involving wetlands." *Id.* When considering these laws as a whole, it is clear Congress was well aware of the

[6] In its first year came the creation of the Environmental Protection Agency, the passage of the Clean Air Act of 1970, Environmental Quality Improvement Act of 1970 ("EQIA"), and The Water Bank Act. Congress then passed, amongst others, the Act, the Marine Mammal Protection Act of 1972, Coastal Zone Management Act of 1972, and the Endangered Species Act of 1973.

existence of wetlands, and indeed, had passed legislation to protect and restore wetlands in a variety of venues, but not specifically in the Act.

The Act, when passed in 1970, was completely void of the word "wetlands," and in its existence today, the Act uses that word only six times. In the Act's 1977 amendments, Congress added the word "wetlands" three times, two of which were in reference to "the National Wetlands Inventory" in the context of best management planning and appropriations. Clean Water Act of 1977, Pub. L. No. 95-217 §§ 34(B)(v), (b)(2), 91 Stat. 1578. The other reference authorized transfer of permitting authority to the states under the Act except for discharges to certain classes of waters and "wetlands **adjacent thereto**." *Id*. at § 67(b)(g)(1), 91 Stat. 1601. In 1990, Congress added the word "wetlands" two times in the text of the "Great Lakes Critical Programs Act of 1990" specifically within the Lake Champlain drainage basin. Pub. L. No. 101-596 §§ 120(g), 304(B)(ii), 104 Stat. 3008, 3010. In 2000, Congress added the word "wetlands" once in the text of the "Chesapeake Bay Restoration Act of 2000." Pub. L. No. 106-457 § 117(g)(1)(D), 114 Stat. 1971. In 2016, Congress added the final "wetlands" through the text of the "Water Infrastructure Improvements for the Nation Act" concerning prioritizing appropriations. Pub. L. No. 114-322 § 5005(B)(iv), 130 Stat. 1890 (2016). As this statutory evolution demonstrates, when Congress did use the word "wetlands" as far as a waterbody was concerned, Congress tied that reference to proximity to navigable waters and/or a clearly defined geographical area (*i.e.*, wetlands **adjacent to** waters, Lake Champlain, and

Chesapeake Bay) and not the limitless, nebulous expanse asserted by the Corps today.

Clearly, Congress had the knowledge and opportunity to define navigable waters to include "wetlands" in the Act if it so chose. Congress did not. As the *Rapanos* plurality stated, "[i]n any event, a Comprehensive National Wetlands Protection Act is not before us, and the wis[dom] of such a statute is beyond our ken. What is clear, however is that Congress did not enact one when it granted the Corps jurisdiction over only the *waters* of the United States." *Rapanos*, 547 U.S. at 745-746 (internal citations and quotations omitted). And, absent "overwhelming evidence of acquiescence" the Court is "loath to replace the plain text and original understanding of [the Act] with an amended agency interpretation." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 169-170 n. 5 (2001) (Hereinafter "*SWANCC*"). Clearly, Congress never granted or intended to grant the Corps or any other agency jurisdiction under the Act over all wetlands and certain dry lands. Rather, the Act authorizes federal jurisdiction only over certain "waters" (*i.e.*, "relatively permanent bodies of water"). Clean Water Act of 1972, Pub. L. No. 92-500 § 502(7), 86 Stat. 886; *Rapanos*, 547 U.S. at 731, 734.

The term "waters" was defined by Congress and originally interpreted by the Corps and the Court in a manner every citizen understood because it gave fair warning. The Corps has taken us far afield from this understanding.

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . .Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone. . .than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) (internal quotations and footnotes omitted). The Court should take this opportunity to revert back to Congress's plain language and intent, thereby avoiding the vagueness the Corps has created allowing it to arbitrarily and discriminately enforce against innocent citizens.

II.
The Ninth Circuit Did Not Apply the Proper Test in Determining the Corps's Jurisdiction Over Wetlands Under the Act.

A. The Ninth Circuit, Among Other Courts and the Corps, Have Improperly Chosen "Significant Nexus" Ignoring Congressional Intent and Supreme Court Holdings.

The Court, prior to *Rapanos*, had asserted and subsequently affirmed a well-founded majority opinion, grounded in the statutory text, concerning the jurisdictional and geographic scope of the Act. The Act regulates discharges of pollutants to "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). The Court affirmed that navigable waters did include wetlands actually abutting a navigable-in-fact river because such wetlands are part of "the transition from water to solid ground." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985) (hereinafter *Riverside Bayview*). In *SWANCC*, the Court majority held the Act does not allow regulation of ponds that are not adjacent to open water affirming its rationale and holding in *Riverside Bayview* that proximity to navigable waters is determinative and the Corps went too far including lands not adjacent or abutting navigable waters. *SWANCC*, 531 U.S. at 168. Despite the consistent rationale and clear holding of both of these Supreme Court opinions, the Corps and some lower courts repeatedly ignored the Court's determination that the Act's grant of jurisdiction stops where navigable-in-fact waters have transitioned to solid ground, and continued to regulate far afield, like Duarte's wheat field some 8 miles from the nearest navigable water.

In 2008, shockingly, the Corps gave itself wide latitude in determining which opinion it felt met its goals, in essence choosing a single Justice's opinion

over the prior Court holdings in *Riverside Bayview*, *SWANCC*, and the *Rapanos* plurality opinion. The Ninth Circuit has errantly endorsed and affirmed the Corps's choice in the present case. When no single rationale explaining the Court's **judgment** in a particular case garners a majority, the holding "may be viewed as that position taken by those Members who concurred in **the judgments** on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (emph. added). As applied to *Rapanos*, Justice Kennedy's opinion, rather than being the narrowest grounds for the decision, in fact represented the broadest rationale receiving no additional support from other Justices and thus, should be afforded little to no precedential affect. No other Justice joined in this opinion, and the plurality opinion, expressing the rationale and judgment of four Justices, expressly criticized it. *Rapanos*, 547 U.S. at 753-757. It was inappropriate, therefore, for the Ninth Circuit to use the "significant nexus" test, and its decision must be overturned.

B. The Act Does Not Support a "Significant Nexus" Test to Determine Jurisdiction Over Wetlands.

The Act does not impose federal jurisdiction over wetlands. The "significant nexus" test contains zero contextual support from the Act's actual language as originally written. As noted above, Section 404 of the Act authorizes the Corps to issue permits for dredge and fill material "**into navigable waters.**" Clean Water Act of 1972, Pub. L. No. 92-500 § 404(a), 86 Stat. 884 (emph. added). After initially construing the Act to cover only waters

navigable in fact, in 1975 the Corps issued interim final regulations redefining "the waters of the United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce." Revised Definition of "Waters of the United States," 40 Fed. Reg. 31320 (July 25, 1975). More importantly for present purposes, the Corps construed the Act to cover all freshwater wetlands that were **adjacent to** other covered waters. A "freshwater wetland" was defined as an area that is "periodically inundated" and is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 33 C.F.R. § 209.120(d)(2)(h) (1976). Since then, the Corps has inflicted ever expanding federal regulation of land use under the Act without Congress making **any** change to the relevant sections of the Act. The Corps, merely through regulatory fiat, interpret their jurisdiction under "the waters of the United States" to cover more than 300 million acres of land – including half of Alaska and an area the size of California in the lower 48 states. *Rapanos,* 547 U.S. at 722.

This brazen assertion of federal land use control is justified to control the discharge of "dredged or fill material," (*i.e.*, dirt, rocks, and substrate) "which unlike traditional water pollutants, are solids that do not readily wash downstream" and actually make it into the navigable waterbody. *Id*. at 723. Importantly, the Act does not contain a single reference to a "significant nexus" test to determine the Corps's authority. "That

phrase[, significant nexus,] appears nowhere in the Act…." *Id*. at 755. Instead, the "significant nexus" test "simply rewrites the statue, using for that purpose the gimmick of significant nexus." *Id*. at 756.

"The only natural definition of the term 'waters,' our prior and subsequent jurisdiction constructions of it, clear evidence from other provisions of the statute, and this Court's cannons of construction all confirm that 'the waters of the United States' in §1362(7) cannot bear the expansive meaning that the Corps would give it." *Id*. at 731-732. Thus, the Corps's interpretation and application of the Act is impermissible under not only the Court's cannons of construction but also because it results "in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. Under the guise of "significant nexus" the Corps set up a construct to regulate wetlands, regardless of their proximity to navigable waters and whether activities in those wetlands will actually result in the discharge of a pollutant into navigable waters, for the purpose of regulating an area Congress never authorized. In so doing, the Corps improperly usurped the legislative and democratic process because, in the Corps's own words, the "significant nexus" test "requires scientific **and policy judgment as well as legal interpretation**." Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37060, 37057 (June 29, 2015) (emph. added).

Unlike the Court, the Corps has focused not on Congress's intent and grant of jurisdiction to control

the discharge of pollutants into navigable waters but instead has granted itself, improperly, the authority to regulate virtually all wetlands by ignoring the Act's purpose and contradicting Congress. "It is the policy of Congress to recognize, preserve and protect the primary responsibilities of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…." Clean Water Act of 1972, Pub. L. No. 92-500 § 101(b), 86 Stat. 816. Regulation of land use, as through the issuance of the development permits sought by petitioners in this case, is a quintessential state and local power. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 767-768, n. 30 (1982); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). "But the expansive theory advanced by the Corps, rather than preserving the primary rights and responsibilities of the States [has brought] 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. The extensive federal jurisdiction the Corps has granted itself allows them to function as a *de facto* regulator of vast stretches of intrastate land, and the agency has repeatedly demonstrated its enthusiastic willingness to exercise the scope of discretion that would befit a local planning commission or zoning board.

The Corps has eviscerated the Act's carefully constructed balance between state and federal authority over land use. The Court allows such conduct only with a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into state authority. *BFP v. Resolution*

Trust Corp., 511 U.S. 531, 544 (1994). "The phrase 'the waters of the United States' hardly qualifies." *Rapanos*, 547 U.S. at 738. "It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that significantly affect the chemical, physical, and biological integrity of waters of the United States. It did not do that, but instead explicitly limited jurisdiction to waters of the United States." *Id*. at 756 (internal quotations omitted). The "principle problem" with Justice Kennedy's significant nexus test is its creation in "utter isolation from the text of the Act." *Id*. at 754-755. The Act does not grant the Corps jurisdiction over wetlands and never uses the phrase "significant nexus." The Ninth Circuit's ruling in this case is in error and must be reversed.

C. "Significant Nexus" is Inconsistent with the Court's Prior Decisions Regarding the Act's Application to Wetlands.

The Court has already reached a sensible majority opinion concerning the Act's application to wetlands vis-à-vis the phrase "navigable waters," and it is not the "significant nexus" test. "Justice Kennedy's reading of 'significant nexus' bears no easily recognizable relation to either the case that uses it (*SWANCC*) or to the earlier case that that case purported to be interpreting (*Riverside Bayview*)." *Id*. at 753. This "significant nexus" standard "certainly does not come from *Riverside Bayview*, which explicitly rejected such case-by-case determinations of ecological significance for the *jurisdictional* question of a wetland is covered,

holding instead that *all* physically connected wetlands are covered." *Id*., *Riverside Bayview,* 474 U.S. at 135, n.9. Further, the "significant nexus test" "cannot be derived from *SWANCC's* characterization of *Riverside Bayview,* which emphasized that the wetlands which possessed a significant nexus in that earlier case 'actually abutted on a navigable waterway,' and which *specifically rejected* the argument that physically unconnected ponds could be included based on their ecological connection to covered waters." *Rapanos,* 547 U.S. at 754; *SWANCC*, 531 U.S. at 167.

In *Riverside Bayview*, the Court accepted that navigable waters could include wetlands **actually abutting a navigable-in-fact water** (a river) because such wetlands are part of "the transition from water to solid ground." *Riverside Bayview*, 474 U.S. at 132 (emph. added). In reaching that conclusion, the Court focused on proximity. "More importantly for present purposes, the Corps construed the Act to cover all 'freshwater wetlands' that were **adjacent to other covered waters**." *Id*. at 124 (emph. added). The Court stated it "must determine whether respondent's property is an '**adjacent wetland**' within the meaning of the applicable regulation…." *Id* at 126 (emph. added). The Court held it was reasonable "in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands **adjacent to** [*i.e*., abutting] but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" *Id*. at 131 (emph. added). The Court's "holding was based in large measure upon Congress' unequivocal

acquiescence to, and approval of, the Corps' regulations interpreting the [Act] to cover wetlands **adjacent to** navigable waters. [The Court] found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands inseparably bound up with the waters of the United States." *SWANCC,* 531 U.S. at 167 (emph. added).

In upholding inclusion of wetlands abutting a river — principally due to the difficulty of drawing a clear boundary between the two because of proximity — the Court never envisioned nor suggested, even in dicta, 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.'" *Rapanos,* 547 U.S. at 735. In fact, when deciding *Riverside Bayview*, the Court did not "express any opinion" on whether the Corps had authority to regulate discharges of fill material into wetlands **not adjacent to** bodies of open water. *Riverside Bayview*, 474 U.S. at 131-132, n. 8. Had the Corps stopped its authoritarian march at this point, we would not be before the Court today. Unfortunately, the Corps continues to assert sweeping jurisdiction beyond adjacent wetlands and is now in conflict with Congress because it has shattered the bounds Congress imposed.

The Corps has ignored the Court's assertion "the qualifier 'navigable' is not devoid of significance," as well as the Court's focus on adjacency for the basis of jurisdiction under the Act. The Court unequivocally stated "nonnavigable,

isolated, intrastate waters", which did not "actually abu[t] on a navigable waterway" were not "waters of the United States" and thus under the Corps jurisdiction. *SWANCC,* 531 U.S. at 171; *Id* at 167. The Court affirmed *Riverside Bayview* did not establish "the jurisdiction of the Corps extends to ponds that are not adjacent to open water." *Id*. at 168. In both of these holdings, the Court focused on the close connection between waters and the wetlands they gradually blend into – a focus on proximity, which the Court characterized as "the *significant nexus* between wetlands and 'navigable waters' that informed [the Court's] reading of the [Act]…." *Rapanos,* 547 U.S. at 741. The Court expressly rejected "the ecological considerations upon which the Corps relied in *Riverside Bayview*… provid[ing] and *independent* basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.' *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction." *Id*. at 741-742. Despite this repudiation, a singular Justice's opinion has given rise to a mythical "significant nexus test" that is supported neither by the Act nor the Court's holdings. The Ninth Circuit's (and many other courts') understanding of what the Court meant by "significant nexus" bears no semblance to the Court's actual holdings nor the Act's language. The proper focus for determining jurisdiction under the Act is navigable-in-fact waters and any actually abutting, adjacent, wetlands.

Conclusion

The term "the waters of the United States" cries out for a limiting construction ordinary people can understand. As we have learned in the intervening years following *Rapanos*, allowing agency personnel to make up for the shortcomings in a vague interpretation of the Act's application on a case-by-case basis under the auspices of applying the "significant nexus" test is a treacherous endeavor. The "significant nexus" test and the Corps assertions of jurisdiction unconstitutionally impose on a lay person a duty found nowhere at common law – a duty to retain a bevy of experts including an attorney, biologist, geologist, hydrologist, and countless others – to attempt to determine what the Act means before using their private property. Neither Congress, the courts nor agency bureaucrats should be allowed to use indecipherable terminology to shift this burden to private citizens. In essence, the government is asking the Supreme Court to do Congress's job by construing the Act, a federal criminal law, to demand that the average person undertake an expensive and arguably unconstitutional burden Congress has never before imposed on the public. This Court can and should immediately rectify this fiasco by ruling "navigable waters" means just what a majority of this Court has previously said: navigable-in-fact water and actually abutting, adjacent, wetlands but nothing more. This is a rule that comports with an ordinary meaning of the statutory text that is clear, and easy for the citizenry to both understand and apply. For the foregoing reasons, Amicus respectfully submits the decision of the court below should be reversed.

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Respectfully submitted,

TIMOTHY KASSOUNI
Counsel of Record
Kassouni Law
455 Capitol Mall, Suite 604
Sacramento, California
95814
Telephone: (916) 930-0030
timothy@kassounilaw.com

RONDA AZEVEDO LUCAS
Lucas Law
19738 August Ave.
P.O. Box 696
Hilmar, CA 95324
Telephone: (916) 468-8208
ralucaslaw@outlook.com

Counsel for Amicus Curiae
Duarte Nursery, Inc.