No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,

v.

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

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

BRIEF OF OUTDOOR RECREATION AND CONSERVATION ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JENNIFER S. WINDOM
Counsel of Record
SHIKHA GARG
KRAMER LEVIN ROBBINS RUSSELL LLP
2000 K Street, NW
Washington, DC 20006
(202) 775-4500
jwindom@kramerlevin.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. ADOPTING PETITIONERS' POSITION WOULD HAVE DEVASTATING IMPACTS ON THE NATION'S WATERS 6

A. Substantial Water Resources Would Lose Federal Protection Under Petitioners' Proposed Test 6

B. These Waters Are Crucially Important For Wildlife, Recreational, And Economic Interests 12

II. PETITIONERS' PROPOSED TEST DEFIES THE CLEAN WATER ACT'S TEXT, STRUCTURE, AND PURPOSE 29

A. By Ignoring Actual Hydrological Connections, Petitioners' Proposed Test Frustrates The Act's Text And Statutory Purpose 29

B. Petitioners' Proposed Test Is Unclear And Unworkable 33

CONCLUSION 35

TABLE OF AUTHORITIES

Cases **Page(s)**

Cnty. of Maui v. Haw. Wildlife Fund,
140 S. Ct. 1462 (2020) 31, 32, 34

Conservation Law Foundation v. EPA,
No. 20-cv-10820-DPW (D. Mass.) 23, 26, 27

Rapanos v. United States,
547 U.S. 715 (2006) ..... *passim*

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,
531 U.S. 159 (2001) 5, 22

South Carolina Coastal Conservation League v. Wheeler,
No. 2:20-cv-01687-DCN (D.S.C.) 15

United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,
484 U.S. 365 (1988) 30

United States v. Atl. Rsch. Corp.,
551 U.S. 128 (2007) 30

United States v. Cundiff,
555 F.3d 200 (6th Cir.), *cert. denied*,
558 U.S. 818 (2009) 4

United States v. Donovan,
661 F.3d 174 (3d Cir. 2011), *cert. denied*, 566 U.S. 990 (2012) 4

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Lucas,
516 F.3d 316 (5th Cir.), *cert. denied*,
555 U.S. 822 (2008) 4

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) ..... *passim*

Statutes

33 U.S.C. § 1251 ..... *passim*

33 U.S.C. § 1344 ..... 3, 30

33 U.S.C. § 1362 ..... 3, 29

54 U.S.C. § 100751 26

Other Authorities

2016 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION, U.S. FISH & WILDLIFE SERV. (2018) 24

Laurie Alexander, et al., *Featured Collection Introduction: Connectivity of Streams and Wetlands to Downstream Waters*, 54:2 J. AM. WATER RESOURCES ASS'N 287 (Apr. 2018) 12, 13, 16

TABLE OF AUTHORITIES—Continued

Page(s)

Donna Anderson, *Economic Impact of Recreational Trout Angling in the Driftless Area* (Nov. 2016).....24

Ass'n of State Wetland Managers, *Status and Trends Report on State Wetland Programs in the United States* (Mar. 2016), https://bit.ly/3wH7TzK 9

Sarah Bowman & London Gibson, *"Last Line of Defense": New Bill Would Strip Protections for Many of Indiana's Wetlands*, INDYSTAR (Jan. 25, 2021), https://bit.ly/3NSbC4u 9

J. R. Brooks, et al., *Estimating Wetland Connectivity to Streams in the Prairie Pothole Region*, 54 WATER RESOURCES RES. 955 (Jan. 2018).....22

Bureau of Econ. Analysis, *Outdoor Recreation Satellite Account, U.S. and States, 2019* (Nov. 10, 2020), https://bit.ly/3Qcn2lE.....25

Cally Carswell, *Simply Irreplaceable: Wetlands*, Water Educ. Colorado (Jan. 5, 2011), https://bit.ly/3ah9t3T.....18

TABLE OF AUTHORITIES—Continued

Page(s)

Brett Chase, *Indiana Dunes Beaches Reopen After U.S. Steel Spills Iron Into Lake Michigan*, CHICAGO SUN TIMES (Sept. 29, 2021) 26

Clean Water Protections, Izaak Walton League of Am., https://bit.ly/3sRsPTt 10, 11

Nicole Cordan, *In New Mexico, Pecos River Sustains Communities, Traditions, and Wildlife*, PEW (July 22, 2020), https://bit.ly/3yTsjZc 19

Robert Costanza, et al., *The Global Value of Coastal Wetlands for Storm Protection*, 70 GLOB. ENV'T CHANGE 1 (2021) 28

Ducks Unlimited, *California Wetlands Straining to Support Drinking Water, Habitat* (Nov. 15, 2021), https://bit.ly/3zDvcOb 12

Ducks Unlimited, *Prairie Pothole Region*, https://bit.ly/3yUwZhu 21

Dirk van Duym, Outdoor Recreation Satellite Account: National and State Statistics 2012-2019, BUREAU ECON. ANALYSIS (2020), https://bit.ly/3myc3FF 23

TABLE OF AUTHORITIES—Continued

Page(s)

Joanna Endter-Wada, et al., *Protecting Wetlands for People: Strategic Policy Action Can Help Wetlands Mitigate Risks and Enhance Resilience*, 108 J. ENV'T SCI. & POL'Y 37 (June 2020) 28

EPA, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (Jan. 2015).....*passim*

EPA, ECONOMIC ANALYSIS FOR THE NAVIGABLE WATERS PROTECTION RULE: DEFINITION OF "WATERS OF THE UNITED STATES" (Jan. 22, 2020), https://bit.ly/3wC1mrh.....16

EPA, ECONOMIC ANALYSIS FOR THE PROPOSED "REVISED DEFINITION OF 'WATERS OF THE UNITED STATES'" RULE (Nov. 2021).....7

EPA, *Economic Benefits of Wetlands* (May 2006), https://bit.ly/3a5DnrA 24, 27

EPA, *Protecting the Nation's Waters Through Effective NPDES Permits: A Strategic Plan* (June 2001), https://bit.ly/3lBGJFe 6

TABLE OF AUTHORITIES—Continued

Page(s)

EPA, *Wetlands: Protecting Life and Property from Flooding* (May 2006), https://bit.ly/3Nse95d.....27

John S. Jacobs, et al., *More Flooding, Fewer Fish: Freshwater Wetland Loss in the Houston Area, 1992-2010*, TEX. A&M (2015).....28

Anne Janik, *Rocky Mountain Wetland Provides Fen-tastic Habitat for High Altitude Plants, Wildlife*, U.S. Dep't of Agric., https://bit.ly/3Ny03z5.....18

Bret Jaspers & Lauren Gilger, *Water Rule Leaves Ephemeral Streams Unprotected*, KJZZ (Jan. 23, 2020), https://bit.ly/3PFonB1.....11

Matthew P. Jones & William F. Hunt, *Stormwater BMPs for Trout Waters: Coldwater Stream Design Guidance for Stormwater Wetlands, Wet Ponds, and Bioretention*, N.C. STATE U. COOPERATIVE EXTENSION (2008).....28

David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act and the Demand for Water Quality*, 134 Q. J. ECON. 349 (2019).....6

TABLE OF AUTHORITIES—Continued

Page(s)

Rebecca L. Kihslinger, *WOTUS Proposal Poses Challenge for States*, ENV'T L. INST. (Feb. 18, 2019), https://bit.ly/38NWu9g 9

Kate Klaus, *The Clean Water Act Flows in a New Direction, Leaving Wetlands Protection Largely to the States*, YALE ENV'T REV. (May 14, 2019), https://bit.ly/3wB81Ra 21

Lainie R. Levick, et al., THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST, EPA (Nov. 2008) 8, 9, 15

Bobby Magill, *New Mexico Says It Can't Halt Pollution Under Feds' Water Rule*, BLOOMBERG L. (Sept. 16, 2020), https://bit.ly/3wFdlTT 11

Missouri River, Izaak Walton League of Am., https://bit.ly/3MD1ix5 15

Jared Mott, *Saving Millions of Birds with One Bill*, Izaak Walton League of Am. (May 24, 2021), https://bit.ly/3MD4mJJ 17

TABLE OF AUTHORITIES—Continued

Page(s)

Jared Mott, *Sportsmen and Women Know Prairie Potholes Too*, Izaak Walton League of Am. (Jan. 15, 2019), https://bit.ly/3PA8JqK 21, 22

Siddharth Narayan, et al., *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*, NATURE (2017) 28

Nat'l Parks Conservation Ass'n, *Clean Water for Parks and Communities Restored* (Nov. 18, 2021), https://bit.ly/3MDbLss 25

Nat'l Parks Conservation Ass'n, *Position on Waters of the U.S. Regulations* (June 12, 2019), https://bit.ly/3sRgBdI 20

Nat'l Park Serv., 2019 NATIONAL PARK VISITOR SPENDING EFFECTS: ECONOMIC CONTRIBUTIONS TO LOCAL COMMUNITIES, STATES, AND THE NATION (2020) 25

Nat'l Park Serv., *Great Marsh Trail*, https://bit.ly/3tmFWwg 26

Nat'l Park Serv., *HIS Park Report*, https://bit.ly/3G6IaFj 26

TABLE OF AUTHORITIES—Continued

Page(s)

Nat'l Park Serv., *Water Quantity*, https://bit.ly/3LEJQqF 25

Nat'l Wildlife Fed'n, Comments on Revised Definition of "Waters of the United States" (Apr. 15, 2019) 23, 33

Nat'l Wildlife Fed'n, et al., *Hunters and Anglers: Fueling Our Nation's Economy and Paying for Conservation* (2014), https://bit.ly/3wCan3v 24

New Ohio Law Eases State Regulation of Some Streams, ASSOCIATED PRESS (Apr. 25, 2022), https://bit.ly/3GRFgoc 10

News Release: Outdoor Recreation Satellite Account, U.S. and States, 2019, BUREAU ECON. ANALYSIS (Nov. 10, 2019), https://bit.ly/3xouO3n 23, 24

Parks with Clean Water Act 303(d)-Listed Impairments, Nat'l Park Serv. (last updated Nov. 29, 2021), https://bit.ly/3MFKoxS 26

TABLE OF AUTHORITIES—Continued

Page(s)

PECOS RIVER BASIN STUDY – NEW MEXICO: EVALUATION OF FUTURE WATER SUPPLY AND DEMAND FOR IRRIGATED AGRICULTURE IN THE PECOS BASIN IN NEW MEXICO, U.S. DEP'T INTERIOR (Sept. 2021) 20

David A. Peterson, et al., WATER QUALITY IN THE YELLOWSTONE RIVER BASIN, U.S. DEP'T INTERIOR (2004) 15

Janette Rosenbaum, *Think Water in America Is Clean? That's a Mistake*, Izaak Walton League of Am. (Dec. 23, 2020), https://bit.ly/3wMaWXg 15

Julie M. Sibbing, *Down the Drain: The Destruction of Waters and Wildlife in the Southwest*, Nat'l Wildlife Fed'n (Nov. 2004) 25

Special Report on Fishing, Outdoor Indus. Ass'n (July 21, 2020), https://bit.ly/39mpuW7 24

TABLE OF AUTHORITIES—Continued

Page(s)

ABIGAIL A. TOMASEK, ET AL., WASTEWATER INDICATOR COMPOUNDS IN WASTEWATER EFFLUENT, SURFACE WATER, AND BED SEDIMENT IN THE ST. CROIX NATIONAL SCENIC RIVERWAY AND IMPLICATIONS FOR WATER RESOURCES AND AQUATIC BIOTA, MINNESOTA AND WISCONSIN, 2007–08, U.S. DEP'T INTERIOR (2012) 27

Tongue River Reservoir State Park, Montana Fish, Wildlife & Parks, https://bit.ly/3lBM3IK..... 16

Trout Unlimited, *Everything You Wanted to Know: Rio Grande Cutthroat Trout* (July 29, 2021), https://bit.ly/3PDPhJN 19

Mac Stone, Wetlands in the Everglades (Dec. 12, 2018), https://bit.ly/3MDOFlf 22

Linda K. Vance, GEOGRAPHICALLY ISOLATED WETLANDS AND INTERMITTENT/EPHEMERAL STREAMS IN MONTANA (Jan. 2009), https://bit.ly/3yS52GV..... 14

TABLE OF AUTHORITIES—Continued

Page(s)

Glenn Watkins, *How the Clean Water Act Protects the River of Grass*, Nat'l Wildlife Fed'n (Jan. 8, 2016), https://bit.ly/39JArki.....22, 23

Why Healthy Wetlands Are Good News for Deer Hunters, WIS. WETLANDS ASS'N (Nov. 14, 2016), https://bit.ly/3xf6xN8 25

Oliver E.J. Wing, et al., *Inequitable Patterns of US Flood Risk in the Anthropocene*, 12 NATURE 156 (Feb. 2022).....28

Ariel Wittenberg & Kevin Bogardus, *EPA Falsely Claims 'No Data' on Waters in WOTUS Rule*, POLITICO (Dec. 11, 2018), https://bit.ly/3wDzWS3 7

Yizhou Zhuang, *Quantifying Contributions of Natural Variability and Anthropogenic Forcings on Increased Fire Weather Risk Over the Western United States*, 118 PROCEEDINGS OF THE NAT'L ACAD. SCI. 1 (Sept. 2021) 29

BRIEF OF OUTDOOR RECREATION AND CONSERVATION ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici represent recreation and conservation organizations committed to the preservation of the nation's water resources. Healthy waters sustain fish and other wildlife and support the $788 billion domestic outdoor recreation industry, including hunting, fishing, and water activities within the nation's parks and other outdoor spaces. Dirk van Duym, Outdoor Recreation Satellite Account: National and State Statistics 2012-2019, BUREAU ECON. ANALYSIS, at 3 (2020), https://bit.ly/3myc3FF.

The American Fly Fishing Trade Association represents the business of fly fishing, which includes manufacturers, retailers, outfitters, and guides across the nation. The protection and enhancement of fish habitat is the foundation of the fly fishing industry.

Backcountry Hunters & Anglers is a non-profit sportsmen's organization with 40,000 members. It is dedicated to North America's outdoor heritage of hunting and fishing in a natural setting, through education and work on behalf of wild public lands, waters, and wildlife.

---

[1] No counsel for a party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel made a monetary contribution to this brief's preparation or submission. Petitioners and Respondents have consented to the filing.

Founded in 1922, the Izaak Walton League (the "League") fights for clean air and water, healthy fish and wildlife habitat, and conservation of our natural resources for future generations. The League plays a unique role in supporting community-based science and local conservation and has a long legacy of shaping sound national policy.

The National Parks Conservation Association ("NPCA") is a non-profit and non-partisan organization with more than 1.6 million members and supporters dedicated to improving and protecting the National Park System. The National Park System includes spectacular rivers, stunning lakes, expansive oceans, and other majestic water resources across the United States. Protecting these park waters is crucial to NPCA's mission.

The National Wildlife Federation ("NWF") represents more than 6 million conservation-minded hunters, anglers, and outdoor enthusiasts nationwide, including through its affiliate organizations across 52 States and territories. Conserving the nation's wetlands, streams, and rivers is at the core of NWF's mission, and NWF has been advocating for Clean Water Act protections since 1972.

The Theodore Roosevelt Conservation Partnership ("TRCP") is a non-profit organization dedicated to ensuring that all Americans have quality places to hunt and fish. TRCP works to sustain healthy habitat and clean water for wildlife, representing more than 100,000 members, and working with diverse partner groups that represent today's leading hunting, fishing, and conservation organizations.

Trout Unlimited ("TU") is a non-profit organization with 370,000 members, who are anglers dedicated to conserving, protecting, and restoring the nation's trout and salmon fisheries and their watersheds. TU staff and volunteers, working with landowners and agency partners, restore hundreds of miles of waters each year.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Water Act, 33 U.S.C. § 1251 *et seq*. ("CWA" or the "Act"), was enacted by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In part, it regulates "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "navigable waters" is broadly defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). This case concerns the appropriate test for determining when wetlands constitute "waters of the United States" under the Act.

There is no dispute that at least some wetlands fall within the Act's jurisdiction. *See* Clean Water Act of 1977, Pub. L. No. 95-217, § 67(b), 91 Stat. 1566, 1601 (1977), codified at 33 U.S.C. § 1344(g)(1) (authorizing transfer of permitting authority except for discharges to certain covered waters, "including wetlands"); *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985).

In *Rapanos v. United States*, 547 U.S. 715 (2006), Justice Scalia, writing for himself and three other Members of the Court, concluded that wetlands constitute "waters of the United States" under the Act

if they have "a continuous surface connection" to "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Id.* at 739, 742 (plurality opinion) (cleaned up). Justice Kennedy, in a concurring opinion, concluded that wetlands are regulated by the Act so long as they "possess a 'significant nexus' to" traditional navigable waters. *Id.* at 759 (Kennedy, J., concurring); *see id.* at 780 (stating that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either 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'").

Here, Petitioners propose that a wetland is subject to federal jurisdiction only if it has a continuous surface water connection to a "water" *and* that adjacent water is itself among what Petitioners would deem "waters of the United States." Pet. Br. 5-6. To this extent, their proposal closely resembles the approach to wetlands jurisdiction articulated by the plurality in *Rapanos*. But that reading of the Act has never been espoused by a majority of this Court nor adopted as controlling by any court of appeals. *See, e.g.*, *United States v. Donovan*, 661 F.3d 174, 181-82, 184 (3d Cir. 2011), *cert. denied*, 566 U.S. 990 (2012) (noting that the First, Third, Seventh, Eighth, and Eleventh Circuits have declined to adopt the *Rapanos* plurality test as the sole test for determining CWA jurisdiction); *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir.), *cert. denied*, 558 U.S. 818 (2009) (same); *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir.),

cert. denied, 555 U.S. 822 (2008) (same). And it is unfaithful to the federal regulatory jurisdiction that Congress reserved half a century ago.

1. Adoption of Petitioners' test could deny federal protection to the majority of the nation's wetlands. But, as this Court has recognized, Congress intended to regulate under the Act some waters not navigable in the traditional sense, including some wetlands. *Riverside Bayview*, 474 U.S. at 133; *see also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001); *Rapanos*, 547 U.S. at 731 (plurality opinion).

Congress intended to regulate waters like those on Petitioners' property. Those waters are part of a larger wetlands complex adjacent to the traditional navigable water of Priest Lake and connected to that lake on one side by shallow subsurface water flow, separated only by a man-made road. Because pollution, degradation, or destruction of such wetlands affects the physical, chemical, and biological integrity of downstream waters, restricting CWA jurisdiction as Petitioners propose would cause widespread damage to fish and wildlife and devastate the nation's outdoor recreation economy.

2. The Court need not risk those dire consequences. The test advanced by Petitioners relies on a flawed reading of the CWA's text, structure, and purpose. The significant-nexus test the Ninth Circuit applied in this case, on the other hand, is faithful to the CWA by appropriately focusing its inquiry on whether the feature in question affects the chemical, physical, and biological integrity of other covered waters. Moreover, Petitioners' test is confusing and introduces unavoidable practical difficulties that

make it more difficult—not easier—to apply than the significant-nexus test.

ARGUMENT

I. ADOPTING PETITIONERS' POSITION WOULD HAVE DEVASTATING IMPACTS ON THE NATION'S WATERS

The CWA seeks to achieve water quality that, among other things, "provides for the protection and propagation of fish, shellfish, and wildlife" and "for recreation in and on the water." 33 U.S.C. § 1251(a)(2). The Act has been effective, leading to substantial improvements in water quality over the last 50 years. *See, e.g.*, EPA, *Protecting the Nation's Waters Through Effective NPDES Permits: A Strategic Plan*, at 1 (June 2001), https://bit.ly/3lBGJFe; David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act and the Demand for Water Quality*, 134 Q. J. ECON. 349, 352 (2019).

Under the radically restrictive jurisdiction Petitioners propose, however, the majority of wetlands in the United States could lose CWA protection, and state protections would not make up for the loss of federal protections. The degradation of wetlands and other waters would cause catastrophic harm to the fish and wildlife that depend on these resources. That increase in water pollution, in turn, would have dire consequences for the outdoor recreation economy.

A. Substantial Water Resources Would Lose Federal Protection Under Petitioners' Proposed Test

Petitioners' proposed test (and the *Rapanos* plurality's test from which it is derived) would deny

CWA jurisdiction to the majority of the nation's wetlands.

The first step of Petitioners' proposed test borrows from the *Rapanos* plurality's reading of the Act, such that a wetland would qualify for CWA jurisdiction only if it has a "continuous surface-water connection" with an adjacent feature ordinarily referred to as a water. Pet. Br. 22-23; *Rapanos*, 547 U.S. at 739, 742.[2] That requirement could deny federal protection to *more than half* of all wetlands in the country, amounting to more than 60 million acres in the continental United States, because those wetlands do not have a continuous surface connection to an adjacent body of water. Ariel Wittenberg & Kevin Bogardus, *EPA Falsely Claims 'No Data' on Waters in WOTUS Rule*, POLITICO (Dec. 11, 2018), https://bit.ly/3wDzWS3 (citing EPA and Army Corps of Engineers presentation estimating 51% of wetlands lack a continuous surface connection because they do not "directly touch[] a water[] of the U.S."); EPA, ECONOMIC ANALYSIS FOR THE PROPOSED "REVISED DEFINITION OF 'WATERS OF THE UNITED STATES'" RULE, at App. F (Nov. 2021) (hereinafter "EPA, ECONOMIC ANALYSIS") (estimating 118 million acres of wetlands in contiguous United States).

[2] As discussed *infra* (at 33), Petitioners do not explain what qualifies as a "continuous" surface connection to another water, including whether such connection must exist always, the majority of the time, or during certain times of year.

Petitioners' test also could strip CWA protection from substantial non-wetland waters.[3] Under their proposed test, a wetland must be adjacent to a feature Petitioners would describe as a "water." Pet. Br. 5-6. Petitioners define a "water" as a "relatively permanent, standing, or continuously flowing bod[y] of water" referred to as a water in ordinary parlance. Pet. Br. 16 (quoting *Rapanos*, 547 U.S. at 739 (plurality op.)), 5-6. Although Petitioners do not explain what this means, adopting their definition of "water" could exclude from CWA protection the more than 59% of streams in the contiguous United States that are intermittent or ephemeral, meaning that they have flowing water seasonally or only after precipitation events. Lainie R. Levick, et al., THE ECOLOGICAL AND HYDROLOGICAL SIGNIFICANCE OF EPHEMERAL AND INTERMITTENT STREAMS IN THE ARID AND SEMI-ARID AMERICAN SOUTHWEST, EPA, at 5 (Nov. 2008). Lacking a continuous flow year-round, these intermittent and ephemeral streams—totaling almost five million miles—would likely fail Petitioners' proposed test for CWA jurisdiction. EPA, ECONOMIC ANALYSIS, at App. F (estimating 4.7 million miles of intermittent and ephemeral streams).

Regionally, the scale of resources that could lose federal protection is even more pronounced. In the

---

[3] Although this case concerns only the proper test for determining when wetlands are "waters of the United States" under the Act, Petitioners' proposed test covers all waters, not just wetlands. *Amici* agree with Respondents that the proper test for non-wetland waters is not before the Court. Resp. Br. 44 n.3. The Court should reject any effort by Petitioners—whose waters are part of a larger wetland complex and clearly fall within the Act's scope—to use this case as a vehicle through which to address CWA jurisdiction more broadly. However, because Petitioners' proposed test as articulated necessarily impacts non-wetland waters, *amici* address streams and other waters that would suffer under Petitioners' interpretation of the Act.

drier Southwest, more than 80% of all streams are intermittent or ephemeral. EPA, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE, at 2-29 (Jan. 2015) (hereinafter "EPA CONNECTIVITY REPORT"). In Arizona alone, 94% of streams could be denied protection. Levick, *supra*, at 5.

If federal protections were removed, the health of those resources would depend solely on the strength of state regulation. Unfortunately, state regulation of water resources is not robust. Fewer than half of the States even have a permitting program for freshwater wetlands, let alone effective mechanisms in place for ensuring that wetlands are adequately protected. Rebecca L. Kihslinger, *WOTUS Proposal Poses Challenge for States*, ENV'T L. INST. (Feb. 18, 2019), https://bit.ly/38NWu9g. And States often lack necessary resources and funding to establish adequate wetland protection programs. A 2015 analysis of state wetland program staffing revealed that 7 States lacked *any* staff working on wetland monitoring and assessment, and another 11 States had less than one fulltime employee dedicated to wetland monitoring. Ass'n of State Wetland Managers, *Status and Trends Report on State Wetland Programs in the United States*, at 69 (Mar. 2016), https://bit.ly/3wH7TzK. Many States also reported loss of funding for state wetland programs and inadequate training, compounding the difficulty of establishing the necessary protections for wetlands at the state level. *Id.* at 70.

Additionally, in several States that do have wetland protection programs, there have been recent efforts to roll back those protections. For instance, Wisconsin, Michigan, North Carolina, and Indiana recently passed laws excluding substantial portions of wetlands from state protections. Kihslinger, *supra*

(discussing Wisconsin, Michigan, and North Carolina); Sarah Bowman & London Gibson, *"Last Line of Defense": New Bill Would Strip Protections for Many of Indiana's Wetlands*, INDYSTAR (Jan. 25, 2021), https://bit.ly/3NSbC4u; *see also New Ohio Law Eases State Regulation of Some Streams*, ASSOCIATED PRESS (Apr. 25, 2022), https://bit.ly/3GRFgoc (restricting state regulation of ephemeral streams).

Because most States' laws are far weaker than the Act, protections for wetlands, streams, and other waters would be weakened if CWA jurisdiction were restricted and federal protections no longer reached the majority of these waters. Thirty-two States offer weaker regulatory protections than the Act. *Clean Water Protections*, Izaak Walton League of Am. ("League"), https://bit.ly/3sRsPTt. And another dozen States are downstream from States where protections would be weakened if Petitioners' proposal were accepted, imperiling the health of their waters as well. *Id.* The map below shows in red the States where protections would be weakened if Petitioners' position were adopted. It shows in orange those States downstream from States with weaker protections. Only a small handful of States, shown in green, would likely maintain similar levels of protection of water resources if CWA jurisdiction were curtailed. *Id.*[4]

[4] The States shown in red and orange also contain federal lands downstream from waters that could lose federal protection under Petitioners' proposal.

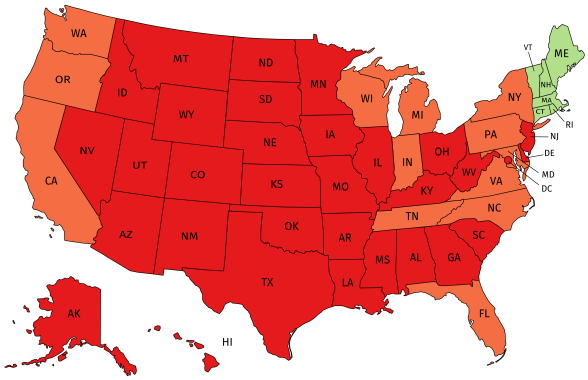

Figure 1: Map Depicting Loss of Water Protections
Source: *Clean Water Protections*, *supra*

Even if some States wish to enhance statewide protections, it would take time to build up those protections. *See* Bret Jaspers & Lauren Gilger, *Water Rule Leaves Ephemeral Streams Unprotected*, KJZZ (Jan. 23, 2020), https://bit.ly/3PFonB1 (noting that, because Arizona has no state regulatory regime, it could take "several years" to develop state regulations for ephemeral streams and other waters that could lose federal protection); Bobby Magill, *New Mexico Says It Can't Halt Pollution Under Feds' Water Rule*, BLOOMBERG L. (Sept. 16, 2020), https://bit.ly/3wFdlTT (explaining there is "no ready substitute under state laws and budgets to maintain critical surface water protections provided by the [CWA]"). In the interim, downstream states and federal waters would lack protection, and there would be nothing preventing these waters—as well as the wildlife supported by these waters—from suffering potentially irreversible damage.

B. These Waters Are Crucially Important For Wildlife, Recreational, And Economic Interests

The health of wetlands and similar resources is inextricably linked to the health of other waters, including traditional navigable waters. Narrowing CWA protections would thus have considerable downstream impacts on fish, wildlife, and recreation throughout the United States.

1. As the Court recognized in *United States v. Riverside Bayview Homes, Inc.*, wetlands "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic species." 474 U.S. 121, 134-35 (1985) (internal quotation marks and alterations omitted). Indeed, wetlands are critical to maintaining the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Wetlands regulate waterflow, filter out pollutants, and disperse sediment. EPA CONNECTIVITY REPORT, at ES-2-4. In the absence of wetlands, pollutants would flow unencumbered downstream. Protection of wetlands and downstream waters thus also impacts the quality of water used in municipal water supplies and in agriculture, particularly in the Western United States. Laurie Alexander, et al., *Featured Collection Introduction: Connectivity of Streams and Wetlands to Downstream Waters*, 54:2 J. AM. WATER RESOURCES ASS'N 287, 295 (Apr. 2018); Ducks Unlimited, *California Wetlands Straining to Support Drinking Water, Habitat* (Nov. 15, 2021), https://bit.ly/3zDvcOb.

Petitioners claim that wetlands are "not 'waters' in their own right" (Pet. Br. 6), but that assertion ignores hydrological reality. Wetlands—even so-called "isolated" or "non-adjacent" wetlands that lack a continuous surface connection to another body of

water—can be fundamentally linked to the chemical, physical, and biological integrity of downstream waters. EPA CONNECTIVITY REPORT, at ES-3-4. As the illustration below demonstrates, some isolated wetlands still maintain subsurface hydrological connections to streams, rivers, and other bodies of water. And after precipitation events, overflow from wetlands can result in temporary, but still significant, surface water connections between wetlands and other waters. Alexander, *supra*, at 289.

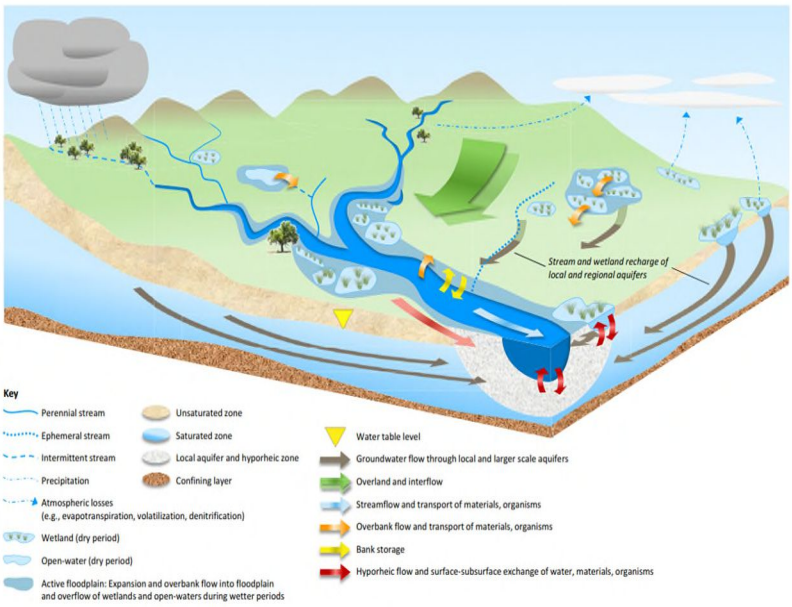

Figure 2: Diagram of Hydrologic Flow Paths
Source: Alexander, *supra*, at 289

Accordingly, studies have shown that isolated wetlands can "perform all wetland functions, and in some cases[,] perform as well or better than their non-isolated counterparts" when it comes to creating habitats for plant, fish, and wildlife. Linda K. Vance, GEOGRAPHICALLY ISOLATED WETLANDS AND

INTERMITTENT/EPHEMERAL STREAMS IN MONTANA, at 20 (Jan. 2009), https://bit.ly/3yS52GV.

Likewise, intermittent and ephemeral streams can have important connections to other waters. These are streams that sometimes flow into other waters, depending on the season or whether there has been a recent precipitation event. During times when these waters are flowing, it is readily evident how these streams impact the health of downstream waters.

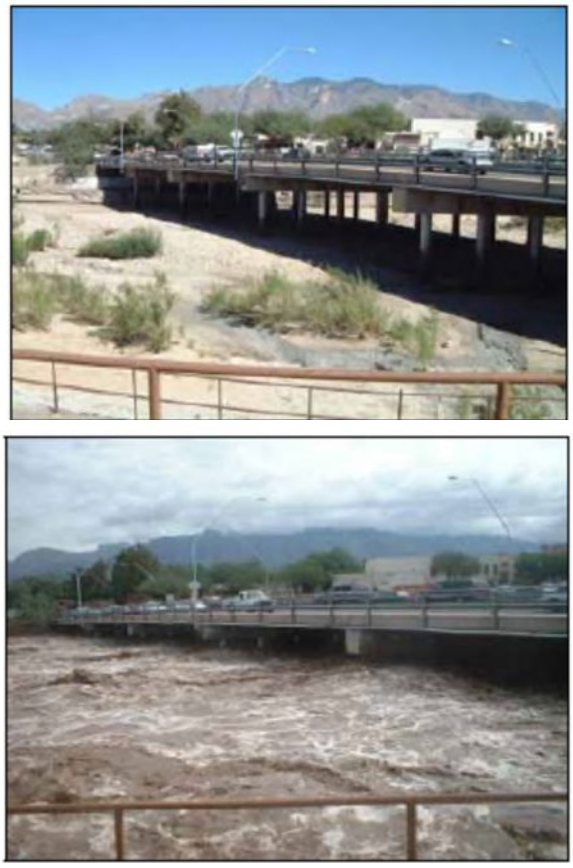

Figure 3: Comparison of Rillito River in Tucson, Arizona, Between Dry and Wet Periods
Source: Levick, *supra*, at 65

Indeed, the majority of tributaries that ultimately form large rivers are small headwaters made up of intermittent and ephemeral streams. EPA CONNECTIVITY REPORT, at 6-1. The Missouri River, for example, starts out as a "braid of tiny streams that you might not even notice or that might appear only a few weeks out of the year." Janette Rosenbaum, *Think Water in America Is Clean? That's a Mistake*, League (Dec. 23, 2020), https://bit.ly/3wMaWXg. Yet, as those waters flow downstream, they build up to the impressive Missouri River, which flows through 10 States and parts of Canada. *Missouri River*, League, https://bit.ly/3MD1ix5. Under Petitioners' proposed test, the ephemeral headwaters of the Missouri River could lose federal protection, allowing them to be polluted or filled in, eventually degrading the Missouri River itself.

Similarly, in Montana's Tongue River Basin, 35% of waters could lose federal protection if this Court were to adopt Petitioners' continuous-surface-connection requirement for wetlands and relatively-permanent standard for streams. Br. Amici Curiae Trout Unlimited, et al., *South Carolina Coastal Conservation League v. Wheeler*, No. 2:20-cv-01687-DCN, at 27 (D.S.C. July 17, 2020). As the health of those streams and wetlands degrades, more sediment would flow downstream, causing increased pollution in the Tongue River Basin. The Tongue River is an important tributary to the Yellowstone River, so pollution in the Tongue River Basin would inevitably degrade the majestic Yellowstone River. David A. Peterson, et al., WATER QUALITY IN THE YELLOWSTONE RIVER BASIN, U.S. DEP'T INTERIOR, at 4 (2004).

Figure 4: Tongue River
Source: *Tongue River Reservoir State Park*, Montana Fish, Wildlife & Parks, https://bit.ly/3lBM3IK

The impact of intermittent and ephemeral streams is particularly pronounced in the drier Southwest, where these streams are the predominant type of streams in the region. Alexander, *supra*, at 293 (describing intermittent and ephemeral streams as "major driver[s]" in establishing the biological and chemical integrity of southwestern rivers). Even when intermittent and ephemeral streams lack surface water, they often still have water below the ground, which supports plant and animal life. EPA, ECONOMIC ANALYSIS FOR THE NAVIGABLE WATERS PROTECTION RULE: DEFINITION OF "WATERS OF THE UNITED STATES," at 108 (Jan. 22, 2020), https://bit.ly/3wC1mrh; EPA CONNECTIVITY REPORT, at 3-21. It is no surprise, then, that the EPA has time and time again concluded that wetlands and intermittent and ephemeral streams "are clearly connected to downstream waters in ways that profoundly influence downstream water integrity." EPA CONNECTIVITY REPORT, at ES-7; *see also id.* at 6-10 ("[T]he amount of water or biomass contributed

by a specific ephemeral stream in a given year might be small, but the aggregate contribution of that stream over multiple years, or by all ephemeral streams draining that watershed in a given year or over multiple years, can have substantial consequences on the integrity of the downstream waters.").

2. The CWA explicitly seeks to "provide[] for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. § 1251(a)(2). Yet, fish and other wildlife depend on the health of waters that could lose protections under Petitioners' proposed test. More than 150 bird species and 200 species of fish rely on wetlands for their survival. Jared Mott, *Saving Millions of Birds with One Bill*, League (May 24, 2021), https://bit.ly/3MD4mJJ.

Trout populations would be particularly harmed under Petitioners' proposed interpretation of CWA jurisdiction. For instance, in Colorado, the Rocky Mountain Fens are unique environments that foster a large population of trout and other fish.

Figure 5: Rocky Mountain Fen
Source: Anne Janik, *Rocky Mountain Wetland Provides Fen-tastic Habitat for High Altitude Plants, Wildlife*, U.S. Dep't of Agric., https://bit.ly/3Ny03z5

These fens are "peat-forming wetlands, created when wetland plants die leaving mats of dead and decaying plant matter." Janik, *supra*. Because it takes about 2,000 years to accumulate 8 inches of peat, most Colorado fens are estimated to be 4,000 to 10,000 years old. *Id.* These precious resources are thus impossible to replace once damaged. Chief among the rich plant and animal life fens support are trout, which thrive in the cool, clean water provided by the fens. Cally Carswell, *Simply Irreplaceable: Wetlands*, Water Educ. Colorado (Jan. 5, 2011), https://bit.ly/3ah9t3T. Without federal protection, however, the fens' water quality would likely degrade, and the trout population would decline irreversibly. Trout Unlimited ("TU"), Comments on Waters of the United States, at 3-4 (Feb. 7, 2022) (explaining the harm to fens if excluded from CWA jurisdiction for

lacking a continuous surface connection to navigable waters).

The Rio Grande cutthroat trout also would face increased threats under more restrictive CWA jurisdiction. The cutthroat trout population has declined considerably over the last century and can now be found in less than 10% of the streams they used to occupy. TU, *Everything You Wanted to Know: Rio Grande Cutthroat Trout* (July 29, 2021), https://bit.ly/3PDPhJN. But the streams where these trout currently live are predominantly headwater streams. *Id.*

Figure 6: Upper Pecos River in New Mexico
Source: Nicole Cordan, *In New Mexico, Pecos River Sustains Communities, Traditions, and Wildlife*, PEW (July 22, 2020), https://bit.ly/3yTsjZc

These waters already face threats from erosion and runoff from construction and extractive activities. Cordan, *supra*. And, since some of the headwaters are ephemeral or intermittent, they could be excluded from CWA protection under Petitioners' proposed test, leaving them increasingly vulnerable to increased pollution. *See* PECOS RIVER BASIN STUDY – NEW MEXICO: EVALUATION OF FUTURE WATER SUPPLY AND

DEMAND FOR IRRIGATED AGRICULTURE IN THE PECOS BASIN IN NEW MEXICO, U.S. DEP'T INTERIOR, at 10 (Sept. 2021).

The Great Smoky Mountains National Park provides another example of how the loss of CWA protections would decimate trout populations and hurt recreational trout fishing. The park's native brook trout population faces a dire threat from increased acidity of the streams in which they live. Out-of-park wetlands in the area, though not connected by a surface connection to the streams, provide an effective buffer for acidity. Nat'l Parks Conservation Ass'n ("NPCA"), *Position on Waters of the U.S. Regulations* (June 12, 2019), https://bit.ly/3sRgBdI. Without protections for those wetlands, the likelihood that the streams become too acidic to support their trout populations would increase dramatically. *Id.*

The nation's waterfowl population also would be adversely affected under Petitioners' proposed approach. Half of all ducks in the United States originate in one region—the Prairie Pothole Region located across 5 States in the Upper Midwest.

Figure 7: Prairie Pothole Region
Source: Kate Klaus, *The Clean Water Act Flows in a New Direction, Leaving Wetlands Protection Largely to the States*, YALE ENV'T REV. (May 14, 2019), https://bit.ly/3wB81Ra

This vast region of wetlands, commonly known as America's "duck factory," consists of millions of shallow depressions left behind by receding glaciers from the last ice age. Ducks Unlimited, *Prairie Pothole Region*, https://bit.ly/3yUwZhu. Millions of ducks and geese pass through the prairie potholes and nest in the grasslands. *Id.* Numerous other bird species also depend on these prairie potholes. In all, more than 300 species of wildlife depend on prairie potholes during their lifespan, whether for breeding, migration pit stops, or for raising their young. Jared Mott, *Sportsmen and Women Know Prairie Potholes Too*, League (Jan. 15, 2019), https://bit.ly/3PA8JqK. But, because these wetlands do not contain a continuous surface connection to a larger body of

water, Petitioners would have them excluded from the CWA's protections.[5]

Another region that would lose significant protections under Petitioners' proposed restrictions is the "River of Grass"—impacting the iconic Everglades National Park in Florida.

Figure 8: Everglades National Park
Source: Mac Stone, Wetlands in the Everglades (Dec. 12, 2018), https://bit.ly/3MDOFlf

The Everglades Park is located at the bottom of its watershed, meaning that its health depends on the health of its upstream waters. Glenn Watkins, *How the Clean Water Act Protects the River of Grass*, Nat'l

[5] Unlike the isolated ponds in *SWANCC*, the prairie potholes extend across multiple States and have hydrological connections to downstream waters that support hundreds of species. Mott, *Sportsmen and Women*, *supra*; J. R. Brooks, et al., *Estimating Wetland Connectivity to Streams in the Prairie Pothole Region*, 54 WATER RESOURCES RES. 955, 970-71 (Jan. 2018); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 171-72 (2001).

Wildlife Fed'n ("NWF") (Jan. 8, 2016), https://bit.ly/39JArki. Because of urban development over the last century, much of the water that previously flowed into the Everglades has been diverted for other uses. *Id.* Therefore, "[t]he remaining small streams and wetlands of the Everglades watershed are more important than ever." *Id.* Yet about half of all rivers, streams, and wetlands in the Everglades watershed could no longer qualify for CWA protection under Petitioners' proposed approach. *See* NWF, Comments on Revised Definition of "Waters of the United States," at 86 (Apr. 15, 2019) (explaining that half of all rivers, streams, and wetlands in the Everglades watershed would lose protections if CWA jurisdiction eliminated ephemeral streams and wetlands lacking a continuous surface connection to other waters); Declaration of Stacy Woods, ¶¶ 53, 8, *Conservation Law Foundation v. EPA*, No. 20-cv-10820-DPW (D. Mass. Oct. 15, 2020) (hereinafter "Woods Declaration") (noting that 81% of wetlands in one of the park's watersheds lack continuous surface connections to other waters). Without federal protections, harmful pollution would flow into the Everglades, accelerating the park's loss of wetlands and imperiling substantial plant and animal life. NWF, Comments, *supra*, at 85-86.

3. The degradation of the health of wetlands and other waters and the ensuing harm to fish and wildlife would have enormous economic consequences. In 2019, outdoor recreation accounted for $788 billion in consumer spending in the United States and supported 5.2 million jobs. Dirk van Duym, Outdoor Recreation Satellite Account: National and State Statistics 2012-2019, BUREAU ECON. ANALYSIS, at 3 (2020), https://bit.ly/3myc3FF; *News Release: Outdoor Recreation Satellite Account, U.S. and States*, 2019, BUREAU ECON. ANALYSIS, at Table 4 (Nov. 10, 2019), https://bit.ly/3xouO3n. In 2016, more than 103 million

Americans participated in wildlife-related recreation. 2016 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION, U.S. FISH & WILDLIFE SERV., at 4 (2018). On a state level, too, the economic impact of outdoor recreation cannot be overstated. For example, in 2015, recreational angling in the Driftless Area generated $1.6 billion in economic benefits to the local economies of Wisconsin, Iowa, and Minnesota. Donna Anderson, *Economic Impact of Recreational Trout Angling in the Driftless Area*, at 12 (Nov. 2016). Other forms of outdoor recreation, such as water sports, also contribute significantly to the nation's economy. Annually, Americans spend approximately $137 billion on kayaking, rafting, canoeing, scuba diving, and other water and recreation activities. *News Release*, *supra*, at Table 2. These outdoor activities, of course, depend on the health of the nation's waters. There can be no trout angling without abundant trout populations, no safe swimming in polluted waters, and so on.

Given the devastating impacts of removing CWA protections from the habitats of trout populations, it is no surprise that the fishing industry would especially suffer from adoption of Petitioners' position. Over 50 million Americans fished at least once during 2019. 2020 Special Report on Fishing, Outdoor Indus. Ass'n (July 21, 2020), https://bit.ly/39mpuW7. Fishing and hunting contribute $200 billion to the economy annually and support 1.5 million jobs. NWF, et al., *Hunters and Anglers: Fueling Our Nation's Economy and Paying for Conservation* (2014), https://bit.ly/3wCan3v. This would not be possible without healthy wetlands, which play a crucial role in the life cycle of up to 90% of fish caught recreationally, not to mention 75% of fish and shellfish commercially harvested. EPA, *Economic Benefits of Wetlands* (May 2006), at 2 https://bit.ly/3a5DnrA. Wetlands also play a crucial role in the lifecycle of game species, such as

waterfowl and whitetail deer. Julie M. Sibbing, *Down the Drain: The Destruction of Waters and Wildlife in the Southwest*, NWF, at 5, 7-9 (Nov. 2004); *Why Healthy Wetlands Are Good News for Deer Hunters*, WIS. WETLANDS ASS'N (Nov. 14, 2016), https://bit.ly/3xf6xN8.

National parks would face unique threats if CWA jurisdiction were significantly narrowed because those parks, though federally owned, would be unable to protect park waters that are downstream from waters solely under state jurisdiction. National parks contain more than 150,000 miles of rivers and streams and more than 4 million acres of water bodies. Nat'l Park Serv. ("NPS"), *Water Quantity*, https://bit.ly/3LEJQqF. These waters are integral aspects of many parks; visitors rely on clean water for drinking, fishing, and swimming, and clean water supports wildlife habitats and ecosystems. In 2019, the National Park System received more than 328 million visitors. NPS, 2019 NATIONAL PARK VISITOR SPENDING EFFECTS: ECONOMIC CONTRIBUTIONS TO LOCAL COMMUNITIES, STATES, AND THE NATION, at 10 (2020). Visitors provide significant economic benefits to the areas surrounding national parks, contributing $21 billion to the local economy in regions near parks in 2019. *Id.* Unsurprisingly, visitors rank water quality or water access as a top-five most valued attribute for parks. NPCA, *Clean Water for Parks and Communities Restored* (Nov. 18, 2021), https://bit.ly/3MDbLss. Without clean water, visitors cannot fish or engage in other water-based recreational activities—all of which contributed almost $24 billion to the economy in 2019. Bureau of Econ. Analysis, *Outdoor Recreation Satellite Account, U.S. and States, 2019* (Nov. 10, 2020), https://bit.ly/3Qcn2lE.

Though waters within national parks fall under other federal authority (54 U.S.C. § 100751(b)), many water bodies that flow through national parks originate outside park boundaries. National parks, therefore, depend on the CWA for protection because pollution that originates outside of the parks impairs downstream park waters. Without CWA protection, the health of these federally owned lands would depend on the strength of state regulations.

The current health of national park waters demonstrates that these parks need *more* (not less) water protection. Two-thirds of parks already have impaired waters. *Parks with Clean Water Act 303(d)-Listed Impairments*, NPS (last updated Nov. 29, 2021), https://bit.ly/3MFKoxS (242 out of 430 parks have water impairments). Much of this impairment can be linked to out-of-park upstream pollution. For instance, the Indiana Dunes National Park is home to the Great Marsh—the biggest internal wetland on the Lake Michigan shoreline. NPS, *Great Marsh Trail*, https://bit.ly/3tmFWwg. The park's waters are already 69% impaired, in part because of nearby industrial activity. NPS, *HIS Park Report*, https://bit.ly/3G6IaFj; Brett Chase, *Indiana Dunes Beaches Reopen After U.S. Steel Spills Iron Into Lake Michigan*, CHICAGO SUN TIMES (Sept. 29, 2021), https://bit.ly/3NsdNfc. Under Petitioners' proposed test, at least 39-56% of streams and 86% of wetlands within one of the park's watersheds would be denied CWA protection, likely exacerbating the pollution and hydrological disturbances in the park's waters, including the Great Marsh. Declaration of Kurt Fesenmyer, ¶ 8, *Conservation Law Foundation v. EPA*, No. 20-cv-10820-DPW (D. Mass. Oct. 15, 2020) (hereinafter "Fesenmyer Declaration") (noting 39-56% of streams within the Chicago River watershed are ephemeral); Woods Declaration ¶¶ 55, 8 (noting 86% of total wetlands in the Chicago River watershed lack

a continuous surface connection to other waters). Similarly, in the St. Croix National Scenic Riverway in Wisconsin and Minnesota, recent external agricultural and urban development has polluted the riverway's waters. ABIGAIL A. TOMASEK, ET AL., WASTEWATER INDICATOR COMPOUNDS IN WASTEWATER EFFLUENT, SURFACE WATER, AND BED SEDIMENT IN THE ST. CROIX NATIONAL SCENIC RIVERWAY AND IMPLICATIONS FOR WATER RESOURCES AND AQUATIC BIOTA, MINNESOTA AND WISCONSIN, 2007–08, U.S. DEP'T INTERIOR, at 3 (2012). Under Petitioners' test, at least 64-77% of streams and 26% of wetlands in the riverway's watershed could be denied protections. Fesenmyer Declaration ¶ 13 (noting 64-77% of streams within the Namekagon River watershed are ephemeral); Woods Declaration ¶¶ 58, 8 (noting 26% of total wetlands in the Namekagon River watershed lack a continuous surface connection to other waters). Without CWA protection, the quality of these, and many other, parks' waters would inevitably degrade.

In addition to recreational benefits, wetlands provide economic benefits in the form of critical flood protection. Wetlands are "natural buffers" capable of soaking up and storing floodwater. EPA, *Economic Benefits of Wetlands*, *supra*, at 1. A single acre of wetlands can store about one million gallons (three-acre feet) of water. EPA, *Wetlands: Protecting Life and Property from Flooding* (May 2006), https://bit.ly/3Nse95d. Wetlands release floodwaters slowly, which reduces downstream damage. EPA, *Economic Benefits of Wetlands*, *supra*, at 1. Indeed, the fact that some wetlands are *not* connected permanently at the surface to another body of water is what enables them to be important sources of flood protection by absorbing waters that would otherwise immediately inundate other areas. Those flood prevention benefits are far from trivial. During Hurricane Sandy in 2012, wetlands are estimated to

have prevented $625 million in flood damage. Siddharth Narayan, et al., *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*, NATURE, at 5 (2017). And loss of wetlands is estimated to have cost the city of Houston, Texas, more than $600 million in flood damage between 1992 and 2010. John S. Jacobs, et al., *More Flooding, Fewer Fish: Freshwater Wetland Loss in the Houston Area, 1992-2010*, TEX. A&M, at 2 (2015).

Wetlands also generate economic benefits in the form of drought relief. During drier periods, wetlands help to maintain adequate flows of streams and rivers by slowly releasing water. This helps alleviate drought conditions, which bring elevated fire risk, particularly in the Western region of the country. Joanna Endter-Wada, et al., *Protecting Wetlands for People: Strategic Policy Action Can Help Wetlands Mitigate Risks and Enhance Resilience*, 108 J. ENV'T SCI. & POL'Y 37 (June 2020). The slow release of wetlands water also keeps water temperatures cooler during dry periods, which helps support trout and other cold water fish populations. *See* Matthew P. Jones & William F. Hunt, *Stormwater BMPs for Trout Waters: Coldwater Stream Design Guidance for Stormwater Wetlands, Wet Ponds, and Bioretention*, N.C. STATE U. COOPERATIVE EXTENSION, at 7 (2008).

The flood and drought protection provided by wetlands is increasingly critical. As the frequency of severe weather events increases, loss of wetlands would undermine efforts to mitigate against damage even more. Robert Costanza, et al., *The Global Value of Coastal Wetlands for Storm Protection*, 70 GLOB. ENV'T CHANGE 1, 9 (2021). Economic losses in the United States due to flooding are expected to rise more than 25% in the next 30 years. Oliver E.J. Wing, et al., *Inequitable Patterns of US Flood Risk in the Anthropocene*, 12 NATURE 156, 157 (Feb. 2022).

Likewise, droughts and wildfires are expected to occur with increasing frequency and intensity, particularly in already dry regions like the Southwest. EPA CONNECTIVITY REPORT, at B-50; Yizhou Zhuang, *Quantifying Contributions of Natural Variability and Anthropogenic Forcings on Increased Fire Weather Risk Over the Western United States*, 118 PROCEEDINGS OF THE NAT'L ACAD. SCI. 1, at 1 (Sept. 2021).

II. PETITIONERS' PROPOSED TEST DEFIES THE CLEAN WATER ACT'S TEXT, STRUCTURE, AND PURPOSE

Petitioners' proposed test could strip critical protections from an enormous number of wetlands and other water resources in the United States. Those practical consequences are grave—grave enough that Congress could not possibly have intended them. The text, structure, and purpose of the CWA all confirm that Petitioners' proposed test is too restrictive. And the practical problems with the test provide an additional reason to reject it.

A. By Ignoring Actual Hydrological Connections, Petitioners' Proposed Test Frustrates The Act's Text And Statutory Purpose

1. The Act prohibits unlawful discharges into "navigable waters." 33 U.S.C. § 1362(12). "Navigable waters," in turn, are defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). That text is capacious. It reflects Congress's intent to extend the Act's protections broadly, not narrowly, as Petitioners contend.

Justices of this Court have repeatedly recognized that the Act's jurisdiction extends beyond traditionally navigable waters. In *Riverside Bayview*, for example, the Court observed that "the term

'navigable' as used in the Act is of limited import" because Congress "evidently intended . . . to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." 474 U.S. at 133. Accordingly, the Court concluded that reading several provisions of the CWA *in pari materia* "suggest[ed] strongly that the term 'waters' as used in the Act [did] not necessarily exclude 'wetlands.'" *Id.* at 138 n.11. Indeed, the Court noted that other provisions of the statute explicitly define "waters" to include "wetlands." *Id.* at 138 (citing 33 U.S.C. § 1344(g)(1)).

Similarly, in his controlling opinion in *Rapanos*, Justice Kennedy recognized that "the text [of the CWA] is explicit in extending the coverage of the Act to some nonnavigable waters." 547 U.S. at 768 (Kennedy, J., concurring). Quoting the same CWA provision cited in *Riverside Bayview*, he observed that the provision necessarily defined "navigable waters" to include more than just "waters 'presently used' or 'susceptible to use' in interstate commerce." *Id.* To avoid rendering that provision a nullity—a result this Court seeks to avoid, *see, e.g.*, *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 136-37 (2007); *United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 375 (1988)—the "waters of the United States" must encompass more than just traditionally navigable waters.

Petitioners' test is at odds with Justice Kennedy's interpretation, which the Ninth Circuit correctly applied here. Indeed, Petitioners appear to restrict the *Rapanos* plurality's narrow view of federal jurisdiction even further. Petitioners would require that any jurisdictional wetland have a continuous surface connection to an adjacent "waterbod[y] subject to Congress's authority over the channels of interstate commerce." Pet. Br. 6. So, if a wetland has a

continuous surface connection to a non-navigable tributary that in turn connects to a navigable river, the wetland could be excluded from CWA jurisdiction under Petitioners' test, even though it may qualify for protection under the *Rapanos* plurality's reasoning. Applying Petitioners' proposed interpretation of CWA jurisdiction to wetlands and other bodies of water would thus strip additional waters of federal protection. This Court should not countenance such a cramped (and incorrect) reading of the Act's text.

2. Petitioners' proposed reading is also inconsistent with the Act's structure and purpose.

Congress's purpose, as reflected in the language of the Act, was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), with the goal that "the discharge of pollutants into the navigable waters be eliminated by 1985," *id.* § 1251(a)(1). The Act is explicitly aimed at advancing the "protection and propagation of fish, shellfish, and wildlife" and promoting "recreation in and on the water." *Id.* § 1251(a)(2).

In *Riverside Bayview*, the Court explained that "Congress chose to define the waters covered by the Act broadly" because it recognized that the effects of pollution are far-reaching and that the goal of "[p]rotection of aquatic ecosystems" thus "demanded broad federal authority to control pollution." 474 U.S. at 132-34. Similarly, in the recent *County of Maui* decision, this Court reasoned that reading the Act's jurisdiction too narrowly would pervert the structure of the CWA—which was clearly designed to minimize the addition of pollutants to the navigable waters. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1471-75 (2020).

The test applied by the Ninth Circuit—widely accepted and long applied by the lower courts—more faithfully advances these stated goals. It comports with this Court's recognition that wetlands can affect the health of nearby lakes or streams, even when not connected to such waters on the surface. *See Riverside Bayview*, 474 U.S. at 463 ("[W]etlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands."); *cf. Cnty. of Maui*, 140 S. Ct. at 1473 (rejecting as too narrow an interpretation of the CWA that excluded regulation of pollution that reached navigable waters via groundwaters). And it recognizes the critical importance that wetlands play in keeping downstream waters healthy. *See Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring) ("[W]etlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage.").

By focusing exclusively on whether there is a surface connection, however, Petitioners ignore other connections that may matter more. Taking their proposal by its own terms, for example, a wetland that connects to a river six months out of the year—mixing water and (if they are present) pollutants—may fall outside the ambit of the Act, even though there is an obvious hydrological connection that can carry pollutants. So too a wetland that serves important drainage and filtering purposes for an adjacent lake, even though there is a narrow strip of dirt separating them. Indeed, and as discussed above, there are millions upon millions of miles of streams, and millions upon millions of acres of wetlands, that could lose protection under Petitioners' proposed reading of the CWA. *See supra*, at 7-8. That cannot be what Congress intended.

B. Petitioners' Proposed Test Is Unclear And Unworkable

Petitioners repeatedly claim that their proposed test is simpler to apply than the "significant nexus" test applied by the Ninth Circuit. *See, e.g.*, Pet. Br. 47 ("[T]he two-step framework is clear [and] easy to apply."); *id.* at 48 (claiming that Petitioners' test "requires only normal visual observation to apply"). In fact, Petitioners' proposed test presents several practical difficulties that their brief ignores.

First, Petitioners insist that the subject wetland have a "continuous" surface connection to a water. *See* Pet. Br. 25-29. But, they nowhere explain what that means. In the context of water resources, a "continuous" connection can be difficult to discern and often depends on the moment of measurement. A wetland, for example, could have a continuous surface connection to a river until a hundred-year drought severs it. Or a wetland might suddenly gain a surface connection to another body of water thanks to a hundred-year flood. Petitioners' test produces different results, depending on the timing of assessment and the rainfall conditions preceding assessment. That inconsistency renders Petitioners' test unworkable; no property owner can expect predictable, consistent results as to whether a water on their property is jurisdictional if the answer depends on rainfall conditions immediately before the assessment.

The same ambiguity is present in Petitioners' definition of a "water" as a "relatively permanent, standing, or continuously flowing bod[y] of water." Pet. Br. 16. The Gila River, for example, runs for some 650 miles through New Mexico and Arizona but can dry up in the summer if too much of its flow is diverted for irrigation purposes. *See* NWF, Comments, *supra*, at 34. Under Petitioners' proposed test, it is unclear

whether this lengthy, interstate river would qualify as a "water" within the Act's jurisdiction.

Other aspects of Petitioners' proposed test present difficulties. On the one hand, Petitioners characterize the waters entitled to protection under the CWA as "traditional navigable waters and intrastate navigable waters that link with other modes of transport to form interstate channels of commerce." Pet. Br. 42. But, on the very same page of their brief, they contend that Congress intended to extend its regulatory power to "that class of pollutant discharges that would *end up* in those waters subject to its channels of commerce power." *Id.* (emphasis added). Discharges of pollutants into waters that are *not* "traditional navigable waters" can still "end up" in "traditional navigable waters"; as discussed above, the key question is what kind of hydrological connection exists. *See, e.g.*, *Cnty. of Maui*, 140 S. Ct. at 1469. If Congress intended to regulate discharges of pollution that can reach traditionally navigable waters—as this Court recognized in *County of Maui* (*id.* at 1473)—then hydrological testing would still be required to determine whether point-source pollution flowing through wetlands or streams connects with those supposedly traditional navigable waters. If the "significant nexus" test is complex, then Petitioners' test is equally so.

There is still more to belie the idea that Petitioners' test is so "clear." Pet. Br. 47. Petitioners seek to define the waters of the United States as including "intrastate navigable waters that link with other modes of transport to form interstate channels of commerce." *Id.* at 42. But even some traditionally navigable waters sometimes lack a "link" to other waters. And Petitioners do not explain what types of "links" suffice. Would, for example, recreational canoers portaging their canoes from one stream to

another qualify as a "link" sufficient to establish jurisdiction?

In sum, Petitioners ask this Court to adopt a test for wetlands jurisdiction that is unsupported by the text, structure, or stated purpose of the Clean Water Act. And the test they propose presents enormous practical difficulties in application.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted.

JENNIFER S. WINDOM
Counsel of Record
SHIKHA GARG
KRAMER LEVIN ROBBINS RUSSELL LLP
2000 K Street, NW
Washington, DC 20006
(202) 775-4500
jwindom@kramerlevin.com

Counsel for Amici Curiae

June 17, 2022