No.

In the Supreme Court of the United States

JEFFREY ANDREWS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Jeffrey Andrews resides on his family farm in Connecticut. His farm contains a short reach of an unnamed tributary to the Farm River, but no portion of the farm has a continuous surface water connection to that tributary or to the Farm River.

In 2020, the United States—acting on behalf of the Environmental Protection Agency—brought an enforcement action alleging that Mr. Andrews' earthmoving projects to improve his farm disturbed wetlands that qualify as "navigable waters" under the Clean Water Act.

In *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023), this Court held that EPA may only regulate those wetlands that are "as a practical matter indistinguishable" from covered waters. The Second Circuit nevertheless upheld EPA's authority over Mr. Andrews' farm by omitting *Sackett*'s indistinguishability requirement, and by holding that, even after *Sackett*, EPA may regulate wetlands lacking a continuous surface water connection to covered waters.

The question presented is:

Was the Second Circuit correct to uphold Clean Water Act authority over wetlands that are not "as a practical matter indistinguishable" from covered waters?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the caption.

STATEMENT OF RELATED CASES

These proceedings are directly related to the above-captioned case under Rule 14.1(b)(iii):

Andrews v. Hall, No. 3:22-cv-00267-MPS (D. Conn. Mar. 28, 2022).

Andrews v. Hall, No. 3:22-cv-00269-MPS (D. Conn. Mar. 28, 2022).

Andrews v. Hall, No. 3:22-cv-00280-MPS (D. Conn. Mar. 28, 2022).

Andrews v. Vatti, No. 3:22-cv-00332-MPS (D. Conn. Mar. 28, 2022).

Andrews v. Vatti, No. 3:22-cv-00333-MPS (D. Conn. Mar. 28, 2022).

Andrews v. Vatti, No. 3:22-cv-00334-MPS (D. Conn. Mar. 28, 2022).

Andrews v. Vatti, No. 3:22-cv-00335-MPS (D. Conn. Mar. 28, 2022).

Andrews v. Shea, No. 3:22-cv-00950-KAD (D. Conn. Oct. 28, 2022).

Andrews v. Bianco, No. 3:22-cv-01335-KAD (D. Conn. Nov. 28, 2022).

Andrews v. Hall, Nos. 22-1298, 22-1299, 22-1300, 22-1301, 22-1302, 22-1303, 2023 WL 309609 (2d Cir. Jan. 19, 2023).

Andrews v. Vatti, No. 22-01308 (2d Cir. Jan. 19, 2023).

Andrews v. Hall, No. 22-02564 (2d Cir. Feb. 3, 2023).

United States v. Andrews, No. 3:20-cv-01300-JCH, 677 F. Supp. 3d 74 (D. Conn. Jun. 12, 2023).

Andrews v. Dooley, No. 3:22-cv-01185-VAB (D. Conn. Jul. 11, 2023).

Andrews v. Grillot, No. 3:22-cv-00873-KAD, 2023 WL 5228179 (D. Conn. Aug. 15, 2023), *judgment entered* Aug. 21, 2023.

Andrews v. United States, No. 1:24-cv-01088-EHM (Ct. Fed. Cl. Feb. 28, 2025).

United States v. Andrews, No. 24-1479, 2025 WL 855763 (2d Cir. Mar. 19, 2025).

Andrews v. United States, No. 25-1926 (Fed. Cir. Sep. 29, 2025).

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TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Andrews respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the Second Circuit is not reported but is available at 2025 WL 855763, and is reproduced in the Appendix beginning at 1a. The opinion of the United States District Court for the District of Connecticut is reported at 677 F. Supp. 3d 74, and is reproduced in the Appendix beginning at 8a. The Second Circuit's order denying rehearing is reproduced in the Appendix at 47a.

JURISDICTION

The date of the decision sought to be reviewed is March 19, 2025. On July 24, 2025, the Second Circuit denied a petition for rehearing. On September 24, 2025, this Court granted an application for an extension of time to file a petition for writ of certiorari, to and including November 21, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

33 U.S.C. § 1362(7): "The term 'navigable waters' means the waters of the United States, including the territorial seas."

INTRODUCTION

Petitioner Jeffrey Andrews is a poultry and cattle farmer from rural Connecticut. For the last fifteen years, Mr. Andrews has been subjected to enforcement activity by the United States government. Mr. Andrews found himself in this position because the

United States Environmental Protection Agency and the United States Army Corps of Engineers contend that his family farm is subject to federal authority under the Clean Water Act (CWA). According to these agencies, Mr. Andrews is liable for as much as $2 million in civil penalties, *see infra* note 8, because, before beginning various earthmoving projects to improve his farm, he failed to obtain a CWA permit from the Corps. EPA and the Corps have remained steadfast in their position, even though no area where Mr. Andrews performed his projects is a "stream[], ocean[], river[], [or] lake[]," *Sackett v. U.S. Env't Prot. Agency*, 598 U.S. 651, 671 (2023) (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion)), and even though the project areas are readily distinguishable from, and lack a continuous surface water connection to, any such water body, *see infra* Reasons Part III.

The CWA authorizes EPA and the Corps to regulate discharges of "pollutants" from "point sources" into "navigable waters," 33 U.S.C. §§ 1311(a), 1362(12)—defined to include "the waters of the United States," *id.* § 1362(7). This definition functions as an absolute limitation on EPA and the Corps' authority—these agencies may regulate discharges of pollutants to "navigable waters," but no further. Between 1973 and 2023, however, the agencies steadily expanded their claimed authority by broadly interpreting the term "navigable waters" to the point where it reached "almost all waters and wetlands" in the country. *Sackett*, 598 U.S. at 669. As a result, ordinary citizens seeking to make reasonable use of their property were left "in a precarious position." *Id.* Worse still, EPA and the Corps pursued this course of conduct notwithstanding this Court's intervening twice to rein in the

agencies' extravagant view of their own authority. *See Rapanos*, 547 U.S. 715; *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANNC*), 531 U.S. 159 (2001).

In *Sackett* this Court again corrected EPA and the Corps' aggrandized view of their CWA regulatory authority. *See Sackett*, 598 U.S. at 657. In *Sackett*, this Court unanimously rejected the test upon which the agencies had most recently staked their authority to broadly regulate—the so-called "significant nexus" test. *See id.* at 684; *id.* at 715-16 (Kavanaugh, J., concurring in the judgment). And a majority set forth a clear standard for CWA authority. Under *Sackett*, EPA and the Corps may only regulate (1) "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes,'" *id.* at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)); and (2) "wetlands that are 'as a practical matter indistinguishable'" from such waters, *id.* at 678 (quoting *Rapanos*, 547 U.S. at 755 (plurality opinion)).

Sackett necessitated a dramatic break from EPA and the Corps' historical practices. Yet even after *Sackett*, landowners like Mr. Andrews find themselves subject to expansive claims of CWA authority over their properties. Indeed, in the wake of *Sackett*—in Mr. Andrews' case and others—the agencies have assiduously sought to minimize *Sackett*'s impact on their authority to regulate. *See infra* notes 12-14. This response demonstrates the lamentable continuation of a familiar pattern of agency insubordination. As this Court observed, after every prior loss before this Court, EPA and the Corps remained committed to

an overly broad view of their own authority. *See Sackett*, 598 U.S. at 666-67 (recounting this history).

The Second Circuit recently acquiesced in this renewed effort from the agencies. In affirming that Mr. Andrews was liable for violating the CWA by discharging dredged and fill material into alleged wetlands, the Second Circuit disregarded *Sackett*'s requirement that regulable wetlands must be "as a practical matter indistinguishable" from covered waters. *See* App. 5a. And—in defiance of *Sackett*'s express requirements—the Second Circuit held that EPA and the Corps may continue regulating even those wetlands lacking a continuous surface water connection to covered waters. *See* App. 5a.

This Court should again intervene to rein in the claimed authority of two agencies "whose disregard for the statutory language has been so long manifested." *Rapanos*, 547 U.S. at 756 n.15 (plurality opinion). The decision below is irreconcilably in conflict with *Sackett*. *See infra* Reasons Part I. Making matters worse, if left undisturbed, the Second Circuit's decision will stand as a regrettable endorsement of the pattern of intransigence that has come to characterize EPA and the Corps' attitude toward this Court's decisions. *See infra* Reasons Part II. Finally, Mr. Andrews' case is an excellent vehicle to end EPA and the Corps' continued refusal to heed the CWA's requirements—the record is clear that the alleged wetlands on Mr. Andrews' farm are not regulable under *Sackett*'s test, properly construed. *See infra* Reasons Part III.[1]

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[1] The Court may wish to consider summary disposition. Summary disposition is appropriate because the decision below rests

STATEMENT OF THE CASE

A. EPA and the Corps target Jeffrey Andrews' projects to improve his family farm

In 2001, Jeffrey Andrews and his wife Lynn Cooke Andrews purchased two adjoining parcels of land—approximating 72 acres in Wallingford, Connecticut ("northern parcel"), and North Branford, Connecticut ("southern parcel") (together, the "farm"). Local Rule 56(a)1 Statement in Support of Plaintiffs' Motion for Summary Judgment on Liability (SOUMF) at 1 ¶¶ 2-3, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-2 (filed Oct. 21, 2022).[2]

Aside from being Mr. and Mrs. Andrews' place of residence, the farm is primarily maintained in pasture for purposes of raising chickens and cattle. Crossing the northern parcel is approximately 690 linear feet of an unnamed tributary of the Farm River (the "unnamed tributary"). *See* App. 12a. The unnamed tributary has a "well-formed" bank with an ordinary high-water mark and is described by the government's expert as perennial. Declaration of Raymond Putnam in Support of Motion for Preliminary Injunction (Putnam Decl.) at 12 ¶ 39, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 8-5 (filed Sep. 3, 2020).

Offsite lie two additional tributaries of the Farm River. First, to the north lies a tributary flowing into

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on a grievous legal error of great magnitude. *See infra* Reasons Part IV.

[2] On December 28, 2011, Mr. and Mrs. Andrews transferred ownership of the farm to their children, Wesley W. Andrews, Colton C. Andrews, and Ellery E. Andrews. *See* App. 11a-12a. Mr. and Mrs. Andrews have, however, continued to reside on, and farm, the property.

the unnamed tributary from the east (the "northeast tributary"). *See* Exhibit A to Declaration of Peter M. Stokely: Aerial Photography Interpretation and Geographic Information System Analysis of the Andrews' Site in Wallingford, CT (Stokely Report) at 8-10, 21, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-4 (filed Oct. 21, 2022). Second, to the south lies a tributary flowing southward to join the unnamed tributary (the "southern tributary"). *See id.* The northeast tributary is described by the government's expert as intermittent. *See* Exhibit A to Declaration of T. Andrew Earles: Analysis of Hydrology & Regulatory Status of Unnamed Tributary and Other Tributaries to the Farm River and Riparian & Wetland Areas on Andrews' Property (Earles Report) at 12, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-6 (filed Oct. 21, 2022). The southern tributary flows only during rainfall-runoff events and is described as ephemeral. *See id.*

Other than during rainfall-runoff events, no surface water connection exists between the farm and the unnamed tributary, and the farm and the southern tributary. *See* Earles Report at 13-15, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-6 (filed Oct. 21, 2022). There is likewise no continuous surface water connection between the farm and the northeast tributary. *See id.* at 12 (observing intermittent flow and "drying up" in the northeast tributary).

A graphic depiction of the farm showing the unnamed tributary is as follows:

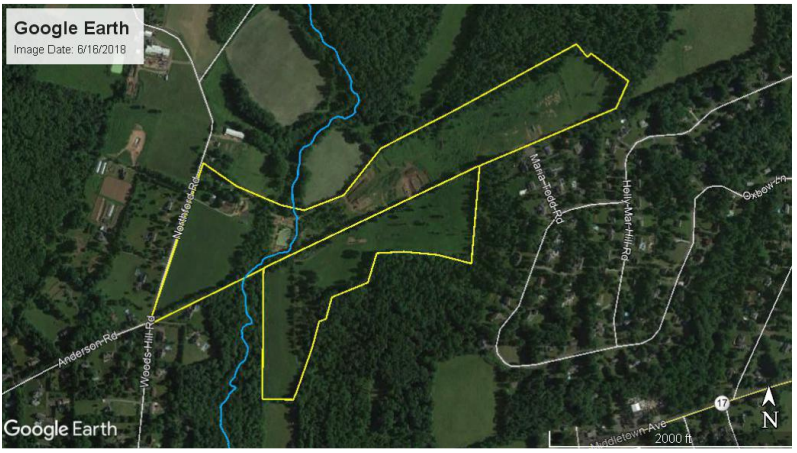

Exhibit A to Complaint, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 1-1 (filed Sep. 2, 2020).

From 2008 through 2020, Mr. Andrews performed a variety of earthmoving and other projects to improve the farm. *See* SOUMF at 5-6, ¶¶ 31-34, 38, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-2 (filed Oct. 21, 2022). Following a telephone call from a Town of Wallingford wetland enforcement officer, on April 27, 2010, the Corps opened an enforcement file as to these activities. App. 16a. This was followed by a 2011 site visit in which officials from the Corps entered the farm and asserted that it contains "wetlands" subject to regulation as "navigable waters" under the CWA. App. 16a. These officials directed Mr. Andrews to cease work until he obtained authorization from the Corps. App. 16a. Following further investigation, on November 12, 2017, the Corps referred the matter to

EPA for enforcement. App. 17a. The Corps then issued a Notice of Violation and Cease and Desist letter to Mr. and Mrs. Andrews on March 20, 2018. App. 17a. And on May 16, 2018, EPA sent notification letters to Mr. and Mrs. Andrews and their children reiterating the Corps' assertion of authority and threatening enforcement for alleged violations of the CWA. App. 17a.

EPA followed up with a series of information and access requests issued pursuant to CWA section 308, 33 U.S.C. § 1318. App. 17a. EPA then secured an *ex parte* administrative warrant, and between May 20, 2019, and June 17, 2019, conducted a series of site visits. App. 17a-18a. Soon thereafter, EPA sent the Andrews family a Notice of Clean Water Act Violations, threatening further enforcement. App. 18a.

B. The CWA and decades of unlawful wetlands regulation

The CWA regulates discharges of "pollutants" from "point sources" to "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). Although the CWA defines "territorial seas," it does not define "the waters of the United States." *Id.* § 1362(8).

Nonexempt discharges to "navigable waters" require a permit from either EPA (called a National Pollutant Discharge Elimination System, or NPDES, permit) or, if the discharge involves "dredged or fill material," from the Corps (commonly called a Section

404 permit). *See* 33 U.S.C. §§ 1342(a), 1344(a).[3] In practice, the CWA's permitting regime is time-consuming and expensive. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594-95 (2016) (observing that a Section 404 permit typically takes more than two years and $270,000 in consulting costs to secure). Even if obtained, a permit can result in significant changes to the applicant's intended operations and may substantially limit the use of the property. *See* Daniel R. Mandelker, *Practicable Alternatives for Wetlands Development Under the Clean Water Act*, 48 Env't L. Rep. News & Analysis 10894, 10913 (2018) ("The [Clean Water Act's] practicable alternatives requirement functions . . . as a conditioned permit that requires project modifications to reduce a development's effect on wetlands resources."). A person who discharges pollutants without a required permit, or who violates permit conditions, risks administrative compliance orders, administrative penalties, civil penalties and injunctions, and even criminal prosecution. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52-53 (1987). These penalties are severe. *See Sackett*, 598 U.S. at 660 ("[The CWA] imposes what have been described as 'crushing' consequences 'even for inadvertent violations.'" (quoting *Hawkes Co.*, 578 U.S. at 602 (Kennedy, J., concurring))). The CWA also authorizes private citizen suits to enforce its requirements. *See* 33 U.S.C. § 1365.

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[3] The CWA authorizes the agencies to delegate their permitting authorities to the states. *See* 33 U.S.C. §§ 1342(b), 1344(g).

The significant costs and liabilities that the CWA can impose underscore the vital importance of clearly demarcating its geographic reach—that is, the meaning of the term "navigable waters." *See Sackett*, 598 U.S. at 661. Unfortunately, since the early days of the CWA's implementation, EPA and the Corps have construed their own authority in the broadest and most vaguely opaque terms possible.

In the years immediately following the CWA's enactment, EPA and the Corps embarked upon a series of rulemakings in which they purported to extend the scope of "navigable waters" to the outer limits of Congress's power to regulate interstate commerce. *See Rapanos*, 547 U.S. at 724 (plurality opinion) (citing 42 Fed. Reg. 37,122, 37,144 n.2 (Jul. 19, 1977)). Thus, federal permitting authority was asserted not just over interstate waters, but also intrastate waters with various asserted relationships to interstate or foreign commerce, as well as all tributaries of such waters, and all "wetlands" "adjacent" to, *i.e.*, bordering, contiguous, or neighboring, any regulated water. *Id.* (citing 33 C.F.R. § 328.3(a)(1), (a)(3), (a)(5), (a)(7), and § 328.3(c) (2004)).

Between 1985 and 2006, this Court addressed the geographic scope of the agencies' authority three times.

First, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court upheld the agencies' regulation of wetlands that were immediately adjacent to, and "inseparably bound up with," navigable-in-fact waters. *Id.* at 131 & n.8, 134.

The agencies "responded to *Riverside Bayview* by expanding their interpretations even further."

Sackett, 598 U.S. at 665. Among other things, the agencies stretched their claimed authority to cover isolated waters used by migratory birds, under the so-called "Migratory Bird Rule." *Rapanos*, 547 U.S. at 725 (plurality opinion) (citing 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986)). This brought the agencies back to this Court in 2001. That year, in *SWANNC*, 531 U.S. 159, the Court struck down the Migratory Bird Rule, thereby rejecting the agencies' attempted regulation of "nonnavigable, isolated, intrastate waters." *Id.* at 166-69, 171.

Undeterred, and mere "[d]ays" after the Court rendered its decision, EPA and the Corps "issued guidance that sought to minimize *SWANCC*'s impact." *Sackett*, 598 U.S. at 666. This brought the agencies before this Court yet again. In 2006, in *Rapanos*, 547 U.S. 715, a majority of the Court held the agencies' broad interpretation of "navigable waters" to be invalid insofar as it would reach all tributaries of traditionally navigable waters and all wetlands adjacent to such tributaries. *Id.* at 728 (plurality opinion); *id.* at 759 (Kennedy, J., concurring in the judgment). But no opinion explaining why the CWA cannot be so construed garnered a majority of the Justices' votes.

Writing for three other members of the Court, Justice Scalia argued that the scope of the agencies' authority can extend no further than "waters," *id.* at 731 (plurality opinion), and that the ordinary meaning of "waters" includes "only those 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 (plurality opinion) (quoting *Waters*, Webster's New International Dictionary 2882

(2d ed. 1934)). As for wetlands, Justice Scalia argued that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 742.

Although Justice Kennedy provided the fifth vote to support the Court's judgment, he disagreed with the plurality's rationale. *Id.* at 759 (Kennedy, J., concurring in the judgment). Justice Kennedy concluded that the CWA does not necessarily foreclose the regulation of occasionally flowing waters. *Id.* at 770-72. And he rejected the plurality's standard for wetlands authority, instead proposing a broad "significant nexus" standard. *Id.* at 759. According to this standard, a wetland could be regulated if it, either alone or in combination with other "similarly situated" wetlands in the "region," significantly affects the physical, chemical, and biological integrity of a traditional navigable water. *Id.* at 779-80.

"In the decade following *Rapanos*, the EPA and the Corps issued guidance documents that 'recognized larger grey areas and called for more fact-intensive individualized determinations in those grey areas.'" *Sackett*, 598 U.S. at 667 (quoting Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 Yale J. on Reg. 165, 231 (2019)). Then followed a "flurry," *Sackett*, 598 U.S. at 668, of unsuccessful rulemakings, which—with limited exception—continued to broadly construe the agencies' authority, *see id.* at 668-69.

C. The United States sues Mr. Andrews

It was during this period of regulatory flux that the government filed suit against the Andrews family. On September 2, 2020, the United States—on behalf of EPA—filed a civil enforcement action against Mr. Andrews, his wife, and his children. *See* App. 18a.[4] The government alleged that they had violated section 301 of the CWA, 33 U.S.C. § 1311, by discharging dredged and fill material into wetlands allegedly subject to federal authority, without a permit. *See* App. 8a. The government also alleged that the Andrews family had violated section 308 of the CWA, 33 U.S.C. § 1318, by failing to respond to EPA's information requests. *See* App. 8a.[5]

The government moved for summary judgment as to liability.[6] As to its section 301 claim, the government argued that the farm historically contained a 16.3 acre "wetland complex"; that this wetland complex was "adjacent to" the unnamed tributary such that it was in its entirety subject to EPA and the Corps' CWA authority; and that Mr.

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[4] The basis for jurisdiction in the district court was 28 U.S.C. §§ 1331, 1345. *See* Complaint at 2 ¶ 4, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 1 (filed Sep. 2, 2020).

[5] The Andrews family's counsel withdrew from the matter in late 2021, and Mr. Andrews represented himself *pro se* for the remainder of the proceedings below. *See* App. 2a, 20a-21a. Mr. Andrews' wife and children did not enter *pro se* appearances, and on May 31, 2022, had default entered against them. *See* App. 12a n.1.

[6] Proceedings in the district court were bifurcated into liability and remedy phases. After the district court's entry of summary judgment as to liability, the district court then considered the appropriate remedy. The remedy phase is ongoing. *See* App. 39a-45a.

Andrews therefore violated CWA section 301 by discharging dredged and fill material into approximately 13.3 acres of those wetlands without a permit. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment on Liability at 26-36, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-1 (filed Oct. 21, 2022). The government argued that the alleged 16.3-acre wetland complex was subject to CWA authority under both the *Rapanos* plurality's test, and the significant nexus test. *See id.* at 26-36. But as noted above, the facts in the record demonstrate that, other than during rainfall-runoff events, no surface water connection exists between the alleged wetlands and the unnamed tributary. *See* Earles Report at 13-15, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-6 (filed Oct. 21, 2022). Accordingly, in arguing that the alleged wetlands were subject to federal authority under the *Rapanos* plurality's test, the government took the position that the test "does not require surface water to be continuously present between the wetland and the tributary," much less that the wetland be indistinguishable from the tributary. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment on Liability at 34-35, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-1 (filed Oct. 21, 2022).

D. This Court's decision in *Sackett*

While Mr. Andrews' case was pending in the district court, EPA was back at this Court. On May 25, 2023, in *Sackett*, 598 U.S. 651, this Court concluded "that the *Rapanos* plurality was correct: the CWA's

use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water "forming geographic[al] features" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'" *Id.* at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)).

As for wetlands, the Court concluded that "wetlands must qualify as 'waters of the United States' in their own right." *Id.* at 676. Thus, EPA and the Corps may regulate only those wetlands that are "'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the "water" ends and the "wetland" begins.'" *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)). This "occurs when wetlands have 'a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands.'" *Id.* (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)).

E. The district court rules against Mr. Andrews

Just eighteen days after this Court issued its decision in *Sackett*, on June 12, 2023, the district court granted summary judgment against Mr. Andrews as to liability for his alleged violations of CWA section 301. *See* App. 24a-36a.[7] In so doing, the district court determined that the unnamed tributary is a "relatively permanent" water and therefore covered under *Sackett*. App. 32a-33a. It also determined that the entire 16.3-acre alleged "wetland complex" is subject

[7] The district court also granted summary judgment as to Mr. Andrews' alleged CWA section 308 violations. *See* App. 36a-37a.

to federal authority. App. 31a-33a. In reaching this conclusion, the district court determined that the *Rapanos* plurality's test (and thus *Sackett*'s) requires only a "'continuous physical connection' to covered waters." App. 33a (quoting *Rapanos*, 547 U.S. at 747, 751 n.13, 755 (plurality opinion)). Accordingly, the district court concluded that the alleged wetlands "abut[ting]," App. 31a-32a, the unnamed tributary—along with the existence of "continuous surface flow paths link[ing] the wetlands with the Unnamed Tributary" during rainfall-runoff events, App. 33a—was sufficient.

On May 3, 2024, the district court entered a default and final judgment.[8] App. 39a-40a. Mr. Andrews then timely appealed to the Second Circuit. App. 3a.

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[8] The district court entered final judgment against Mr. Andrews as to liability. App. 39a-40a. In light of the other defendants' prior default, the district court entered default judgment against Lynn Cooke Andrews, Wesley Andrews, Colton Andrews, and Ellery Andrews. App. 39a-40a. The district court also, among other things, issued an injunction requiring the Andrews family to restore the allegedly disturbed wetlands. *See* App. 40a-45a. The district court will assess civil penalties following completion of restoration. *See* App. 45a. These penalties could be substantial. *See* Ruling and Order on Remedy (Doc. No. 250) and Motion to Dismiss (Doc. No. 253) at 37, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 256 (filed Mar. 27, 2024) ("[A] penalty of $2 million against Mr. Andrews for the section 301 violations . . . is appropriate, subject to possible reduction . . . .").

F. The Second Circuit affirms EPA and the Corps' broad claim of authority to regulate Mr. Andrews' farm

At the Second Circuit, the government continued to argue that *Sackett* does not require a continuous surface water connection and that a wetland's mere "physical abutment" to a covered water will suffice. *See* United States' Answering Brief at 25-27, Second Circuit case no. 24-1479, docket no. 44 (filed Sep. 24, 2024).

On March 19, 2025, the Second Circuit agreed,[9] holding tersely that "the CWA does not require surface water but only soil that is regularly 'saturated by surface or ground water.'" App. 5a (quoting 33 C.F.R. § 328.3(c)(1)).[10]

On July 24, 2025, the Second Circuit denied Mr. Andrews' petition for panel rehearing. App. 47a.

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[9] Before reaching the merits, the Second Circuit addressed its jurisdiction. The Second Circuit noted that a finding of liability is typically not treated as a final decision under 28 U.S.C. § 1291. App. 3a-4a. Yet because the order appealed from entered injunctive relief, the Second Circuit concluded that it had appellate jurisdiction under 28 U.S.C. § 1292(a)(1). App. 4a.

[10] The Second Circuit also affirmed Mr. Andrews' liability for the alleged violations of CWA section 308, App. 4a-5a, and it rejected various arguments Mr. Andrews made under the Submerged Lands Act and the United States Constitution, App. 5a-6a. Mr. Andrews does not seek this Court's review as to those issues.

REASONS FOR GRANTING THE PETITION

I. The decision below is irreconcilably in conflict with *Sackett*

A. The decision below ignores *Sackett*'s requirement that regulable wetlands must be indistinguishable from covered waters

1. Indistinguishability is the central requirement of *Sackett*'s test

Key to *Sackett*'s test is that regulable wetlands "must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." 598 U.S. at 676. "Wetlands that are separate from [regulable waters,]" on the other hand, "cannot be considered part of those waters, even if they are located nearby." *Id.* *Sackett* phrases this indistinguishability requirement in various ways. *See id.* at 678 (requiring "'that there is no clear demarcation between "waters" and wetlands[]'" (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion))); *id.* at 678-79 ("This requires the party asserting jurisdiction . . . to establish . . . 'that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.'" (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion))). But the essential point is clear: "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 755 (plurality opinion)). Indeed, so central is *Sackett*'s indistinguishability requirement that the Court's ultimate conclusion that the Sacketts' property was not subject to federal authority hinged on the distinguishability of the wetlands at issue. *See id.* at 684 ("The wetlands on the

Sacketts' property are distinguishable from any possibly covered waters.").

Sackett placed this emphasis on indistinguishability because the CWA seeks to protect "waters"—such as rivers, lakes, and streams—so that features like wetlands that are typically regarded as non-waters, *see id.* at 674, can be regulated only when they "qualify as 'waters of the United States' in their own right," *id.* at 676. *Accord* Royal C. Gardner, *Waters of the United States: POTUS, SCOTUS, WOTUS, and the Politics of a National Resource* 95 (Island Press 2024) ("But wetlands fell outside Justice Scalia's constricted view of 'the waters': Wetlands generally were not 'waters of the United States.'"). That the CWA contains an oblique reference to "wetlands adjacent" to certain waters in a provision concerning permitting, 33 U.S.C. § 1344(g)(1), did not counsel otherwise. Rather, the Court held that this reference to "adjacent wetlands" must be "harmonize[d]" with the "operative" term "waters." *Sackett*, 598 U.S. at 676. Thus, to be regulated, an "adjacent wetland" must be "indistinguishably part of a body of water[.]" *Id.* In other words, regulation of "indistinguishabl[e]" adjacent wetlands is permissible—but only incidentally to the CWA's regulation of true "waters." *Cf. id.*

2. The Second Circuit's failure to acknowledge—let alone apply—the indistinguishability requirement conflicts with *Sackett*

The Second Circuit ignored *Sackett*'s central indistinguishability requirement. Indeed, the Second Circuit's recitation of *Sackett*'s test—and its application

of that test to the facts of this case—is stated entirely as follows:

> The CWA applies to wetlands that have "a continuous surface connection" with "relatively permanent bod[ies] of water connected to traditional interstate navigable waters." . . . So the CWA does not require surface water but only soil that is regularly "saturated by surface or ground water." . . . And Andrews fails to rebut the expert report concluding that his property had wetlands connected to traditional navigable waters.

App. 5a (quoting respectively *Sackett*, 598 U.S. at 678, and 33 C.F.R. § 328.3(c)(1)).

The Second Circuit's reading—which entirely omits *Sackett*'s central indistinguishability requirement—is plainly in conflict with *Sackett*. To recite and apply *Sackett*'s test in such a manner as to completely elide the indistinguishability requirement makes a wash of *Sackett*'s central holding: that the CWA only regulates "waters," *Sackett*, 598 U.S. at 671, so that features like wetlands that are typically regarded as non-waters, *see id.* at 674, can be regulated only when they "qualify as 'waters of the United States' in their own right," *id.* at 676. *Accord* Rebecca L. Kihslinger, et al., *Unpacking the Revised WOTUS Rule*, 53 Env't L. Rep. 10887, 10892 (2023) (emphasizing that the word "indistinguishable" in *Sackett* is "not a mere rhetorical flourish").

Indeed, the pared-down "continuous surface connection" test applied by the Second Circuit cannot be reconciled with *Sackett*—no matter how one reads the opinion. It is true that the word "indistinguishable" occurs in a separate sentence from the phrase "continuous surface connection." *See Sackett*, 598 U.S. at

678. It is also true that *Sackett* states "[t]hat [indistinguishability] occurs when wetlands have 'a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands.'" *Id*. (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)). This might excuse the omission of the *specific word* "indistinguishable" from the Second Circuit's recitation and application of *Sackett*'s test. But it does not justify omission of the *requirement* that there be "no clear demarcation" between water and wetland. And the requirement that there be "no clear demarcation" between water and wetland is functionally identical to the requirement that the water and wetland be "indistinguishable." *See Demarcate*, Webster's New World College Dictionary 392 (5th ed. 2014) ("to mark the difference between; distinguish; separate"); *Demarcate*, Oxford Dictionary of English 464 (3d ed. 2010) ("separate or distinguish from").

A "continuous surface connection" test shorn of the indistinguishability requirement also defies common sense. It is possible for two features to have a continuous surface connection—which, the government contended below, can include a physical *though non-aquatic* connection, *see* United States' Answering Brief at 25-27, Second Circuit case no. 24-1479, docket no. 44 (filed Sep. 24, 2024)—while still being distinguishable. For example, a wetland abutting a road is clearly distinguishable from the road—even if there is a continuous *physical* connection between wetland and road. *Cf. Sackett*, 598 U.S. at 662 ("'[W]etlands' . . . on the other side of a 30-foot road."). Likewise, when placing one's palm on a table, there is a continuous physical surface connection between palm and table. Yet nobody would dispute that palm and table

are clearly distinguishable. Hence, when *Sackett* states that a "wetland [must] ha[ve] a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins," *id.* at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)), the Court is specifying a particular *type* of "continuous surface connection." That is, one where it is "difficult to determine where the '*water*' ends and the 'wetland' begins." *Id.* (emphasis added). In other words, indistinguishability is not merely the outcome of a continuous surface connection—it is a central requirement of the test. The Second Circuit thus failed to qualify the "continuous surface connection" concept, as *Sackett* expressly qualified it.

The Second Circuit's disregard for the central "indistinguishability" (or, alternatively, "no clear demarcation" or "difficult to determine") requirement is irreconcilable with *Sackett*—no matter how one reads *Sackett*.

B. The decision below contradicts *Sackett*'s requirement that there must be a continuous surface *water* connection between a wetland and covered water

1. Regulable wetlands must have a continuous aquatic surface connection to covered waters—the Second Circuit's holding to the contrary conflicts with *Sackett*

In determining that there is a "continuous surface connection" between the alleged wetlands on the farm and the unnamed tributary, the Second Circuit held that "the CWA does not require surface water but only

soil that is regularly 'saturated by surface or ground water.'" App. 5a (quoting 33 C.F.R. § 328.3(c)(1)).

This position is contradicted by *Sackett*, which expressly contemplates that any surface connection between water and wetland must be aquatic. *Sackett*, 598 U.S. at 678 (contemplating that surface water must be continuously present, absent "temporary interruptions . . . because of phenomena like low tides or dry spells"); *id.* (referencing a wetland that has an "unimpaired connection with the open sea up to the head of tidal influence" as an example of a covered wetland (quoting 33 U.S.C. § 2802(5)).

The Second Circuit's rejection of an aquatic surface connection requirement also further demonstrates its disregard for *Sackett*'s central indistinguishability requirement. As discussed above, *Sackett*'s indistinguishability test "requires the party asserting jurisdiction over adjacent wetlands to establish . . . 'that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.'" *Sackett*, 598 U.S. at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)). A defining characteristic of a "water" is the continuous presence of surface water. *See id.* at 671 ("the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water'" (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion))). On the other hand, while *some* wetlands may contain continuously present surface water, "wetlands" *as a class* are not defined by the presence of surface water. *See* 33 C.F.R. § 328.3(c)(1) ("*Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil

conditions."). *See also* 88 Fed. Reg. 3004, 3051 (Jan. 18, 2023) ("no scientific or regulatory definition of wetlands demands year-round surface water"). Thus, in the absence of the continuous presence of surface water, there can be no "difficult[y] . . . determin[ing] where the '*water*' ends and the 'wetland' begins." *Sackett*, 598 U.S. at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)) (emphasis added).

The Second Circuit's position is even contradicted by the separate opinions in *Rapanos*—which each understood the *Rapanos* plurality as requiring a *water* connection. *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring in the judgment) ("when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters"). *Cf. also id.* at 805 (Stevens, J., dissenting) ("Under this view, wetlands that *border* traditionally navigable waters or their tributaries and perform the essential function of soaking up overflow waters during hurricane season—thus reducing flooding downstream—can be filled in by developers with impunity, as long as the wetlands lack a surface connection with the adjacent waterway the rest of the year." (emphasis added)).[11]

[11] The Second Circuit's rejection of a surface *water* connection requirement also conflicts with a recent decision from the Eleventh Circuit. *See Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, 146 F.4th 1080, 1089-90 (11th Cir. 2025) (emphasizing lack of a continuous flow of water through culverts and pipes, or because of tidal exchange, in concluding that citizen-suit plaintiffs had failed to sufficiently allege that the wetland at issue was subject to CWA regulation under *Sackett*'s test).

2. The Second Circuit's emphasis on the regulatory definition of "wetlands" compounds its conflict with *Sackett*

In rejecting the argument that surface water must be continuously present for a wetland to meet *Sackett*'s test, the Second Circuit relied heavily on EPA and the Corps' regulatory definition of "wetlands." *See* App. 5a. According to the Second Circuit, this definition "does not require surface water but only soil that is regularly 'saturated by surface or ground water.'" App. 5a (quoting 33 C.F.R. § 328.3(c)(1)).

The Second Circuit's reasoning compounds the conflict with *Sackett*. Whether an area meets the regulatory definition of a wetland is merely a *predicate* to *Sackett*'s test. *Sackett* did not concern the agencies' regulatory definition of "wetlands." Rather, *Sackett* was concerned with the test for identifying a smaller class of wetlands—that is, *jurisdictional* wetlands. *See Sackett*, 598 U.S. at 675 ("*[S]ome* wetlands must qualify as 'waters of the United States.'" (emphasis added)).

At best, the Second Circuit confused the two discrete inquiries present in any CWA action—whether the subject area contains "wetlands" as scientifically defined in the agencies' regulations versus whether those wetlands are subject to federal authority. At worst, the premium placed by the Second Circuit on the regulatory definition of wetlands implies that the mere presence of saturated soil—a necessary characteristic for *all* wetlands, *see* 33 C.F.R. § 328.3(c)(1)—is enough to satisfy *Sackett*. That is not the law. *See Rapanos*, 547 U.S. at 745-46 (plurality opinion) ("[A] Comprehensive National Wetlands Protection Act is

not before us . . . [w]hat is clear, however, is that Congress did not enact one when it granted the Corps jurisdiction over only 'the *waters* of the United States.'").

II. The Court should intervene now lest the decision below stand as an endorsement of EPA and the Corps' continued refusal to conform their conduct to the CWA

Now is the right time for the Court to again weigh in on the scope of the CWA. As noted above, between 1973 and 2023, EPA and the Corps adopted an "essentially boundless view of the scope of [their] power," *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring), emboldening themselves to exercise authority "that would befit a local zoning board," *id.* at 738 (plurality opinion). Worse still, the agencies pursued this course of conduct notwithstanding this Court's intervening twice to rein in their claimed authority to regulate. *See Rapanos*, 547 U.S. 715; *SWANNC*, 531 U.S. 159. The agencies' failure to heed these prior decisions is well documented. *See Sackett*, 598 U.S. at 667 ("In the decade following *Rapanos*, the EPA and the Corps issued guidance documents that 'recognized larger grey areas and called for more fact-intensive individualized determinations in those grey areas.'" (quoting Parrillo, *supra* at 231)); *id.* at 666 ("Days after our decision, the agencies issued guidance that sought to minimize *SWANCC*'s impact."); *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) ("Rather than refining its view of its authority in light of our decision in *SWANCC* . . . the Corps chose to adhere to its essentially boundless view of the scope of its power." (citing *SWANCC*, 531 U.S. 159)). The outcome of the agencies' intransigence was that ordinary citizens seeking to make reasonable use of their property—and faced

with potentially "crushing," *Hawkes Co.*, 578 U.S. at 602 (Kennedy, J., concurring)), consequences—were left "with little practical alternative but to dance to the [agencies'] tune," *Sackett v. U.S. Env't Prot. Agency*, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

In *Sackett*, this Court intervened again to correct this untenable situation. *See Sackett*, 598 U.S. at 657. Yet within months of *Sackett* being decided, one court had already observed the agencies' familiar pattern of defiance. *See Lewis v. United States*, 88 F.4th 1073, 1080 n.7 (5th Cir. 2023) (lamenting the Corps' "utter unwillingness to concede its lack of regulatory jurisdiction in this case following *Sackett*" and "admonish[ing]" the Corps not to pursue further action against the Lewis family). EPA and the Corps' continued intransigence then became further evident through their subsequent litigation conduct. For example, the agencies have vigorously sought to minimize *Sackett*'s indistinguishability requirement—going so far as to characterize *Sackett*'s indistinguishability language as "nonessential information." Response Brief of Federal Appellees at 16-17, *White v. U.S. Env't Prot. Agency*, No. 24-1635 (4th Cir. Dec. 20, 2024), 2024 WL 5210158, at *16-17.[12] And just as the

[12] *See also* Plaintiff's Opposition to Defendant's Motion to Dismiss at 11, *United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113 (D. Idaho Jun. 7, 2024), 2024 WL 4816724 ("The word 'indistinguishable' is not a separate element of adjacency, nor is it alone determinative of whether adjacent wetlands are 'waters of the United States[.]'"); Federal Defendants' Combined Memorandum in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' and Business Intervenors' Motions for Summary Judgment at 42, *West Virginia v. U.S. Env't Prot. Agency*, No. 3:23-cv-00032 (D.N.D. Apr. 26, 2024), ECF No. 210

government did here, the agencies have universally argued that they may continue to regulate wetlands lacking even a continuous *water* connection to a regulable water. *See* Response Brief of Federal Appellees at 23, *White*, No. 24-1635 ("*Sackett* does not mention, much less require, a surface 'water' connection.").[13]

(same); Federal Defendants' Combined Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment at 44-45, *Texas v. U.S. Env't Prot. Agency*, No. 3:23-cv-00017 (S.D. Tex. Apr. 2, 2024), 2024 WL 2980869 (same); Plaintiff United States of America's Opposition to Defendants' Motion for Judgment on the Pleadings at 10, *United States v. Valentine*, 751 F. Supp. 3d 617 (E.D.N.C. 2024) (No. 5:22-cv-00512), 2024 WL 1495519 (Jan. 26, 2024) ("Neither *Sackett*, the *Rapanos* plurality opinion, nor any other case has stated that wetlands must be literally indistinguishable from open water."); United States' Opposition to Defendants' Post-Judgment Motion Regarding *Sackett v. EPA*, 598 U.S. 651 (2023) at 11, *United States v. Sweeney*, No. 2:17-cv-00112 (E.D. Cal. Jan. 25, 2024), 2024 WL 5471328 ("The thrust of defendants' motion is their incorrect assertion that 'after *Sackett*, only wetlands that are indistinguishable from waters are regulated.'" (cleaned up; citations omitted)); United States' Reply in Support of United States' Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment at 30, *United States v. Sharfi*, No. 2:21-cv-14205 (S.D. Fla. Dec. 22, 2023), ECF No. 158 ("*Sackett* does not state that the two must be indistinguishable[.]").

[13] *See also* Federal Defendants' Combined Memorandum in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' and Business Intervenors' Motions for Summary Judgment at 43, *West Virginia*, No. 3:23-cv-00032 ("Plaintiffs and Intervenors mistakenly read *Sackett* to require a continuous surface *water* connection between wetlands and covered waters."); Federal Defendants' Combined Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment at 45, *Texas*, No. 3:23-cv-00017 (same); Plaintiff United States of America's Opposition to Defendants' Motion for Judgment on the Pleadings at 14, *Valentine*, 751 F. Supp. 3d 617

The agencies appear to have treated the district court's early decision in this case as a windfall—repeatedly citing it to support their position on both of these points.[14]

(No. 5:22-cv-00512) ("Sackett does not require the United States to plead specifically that wetlands are 'aquatic[.]'"); United States' Opposition to Defendants' Post-Judgment Motion Regarding *Sackett v. EPA*, 598 U.S. 651 (2023) at 17, *Sweeney*, No. 2:17-cv-00112 (arguing that "*Sackett* did not" require "that there be a 'continuous surface *water* connection'"); United States' Reply in Support of United States' Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment at 29, *Sharfi*, No. 2:21-cv-14205 ("A continuous surface connection includes where a wetland actually abuts another covered water[.]").

[14] *See* Opposition to Plaintiff's Motion for Preliminary Injunction at 20-21, *White v. U.S. Env't Prot. Agency*, 737 F. Supp. 3d 310 (E.D.N.C. 2024) (No. 2:24-cv-00013), ECF No. 24 (May 7, 2024) ("And lower courts applying the continuous surface-connection requirement agree that proof of physical abutment suffices." (citing *United States v. Andrews*, 677 F. Supp. 3d 74, 87-88 (D. Conn. 2023))); Federal Defendants' Combined Memorandum in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' and Business Intervenors' Motions for Summary Judgment at 44-45, *West Virginia*, No. 3:23-cv-00032 (same); Federal Defendants' Combined Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment at 47, *Texas*, No. 3:23-cv-00017 (same); Plaintiff United States of America's Opposition to Defendants' Motion for Judgment on the Pleadings at 12, *Valentine*, 751 F. Supp. 3d 617 (No. 5:22-cv-00512) ("[T]he court found no requirement to show that the wetlands were literally 'indistinguishable' from waters of the United States." (citing *Andrews*, 677 F. Supp. 3d at 87-88)); United States' Opposition to Defendants' Post-Judgment Motion Regarding *Sackett v. EPA*, 598 U.S. 651 (2023) at 13, *Sweeney*, No. 2:17-cv-00112 (citing *Andrews*, 677 F. Supp. 3d at 79); United States' Reply in Support of United States' Motion for

EPA and the Corps' attempts to evade *Sackett*'s requirements have been met with mixed success. Some lower courts have rejected the agencies' post-*Sackett* arguments. *See United States v. Sharfi*, No. 2:21-cv-14205, 2024 WL 4483354, at *13 (S.D. Fla. Sep. 21, 2024), *report and recommendation adopted*, 2024 WL 5244351 (S.D. Fla. Dec. 30, 2024) ("Plaintiff ignores this indistinguishability requirement, which becomes meaningless if abutment alone establishes a 'continuous surface connection.'"); *United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113, 2024 WL 4008545, at *4 n.2 (D. Idaho Aug. 29, 2024) ("The Government still needs to connect any wetlands it believes Ace Black Ranches' has polluted with the River via a sufficient surface-water connection."). While other courts—following the lead of the lower courts in this case—have been more receptive. *See United States v. Valentine*, 751 F. Supp. 3d 617, 623 (E.D.N.C. 2024) (citing *Andrews*, 677 F. Supp. 3d at 88); *United States v. Sweeney*, No. 2:17-cv-00112, 2024 WL 4527260, at *4 (E.D. Cal. Oct. 18, 2024) (same).

The decision below stands as a regrettable endorsement of EPA and the Corps' renewed effort to expansively define their own authority. This once again "puts many property owners in a precarious position." *Sackett*, 598 U.S. at 669. EPA and the Corps' intransigence should not be rewarded. This Court should intervene now to again rein in the claimed authority of two agencies "whose disregard for the statutory language has been so long manifested." *Rapanos*, 547 U.S. at 756 n.15 (plurality opinion).

Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment at 29, *Sharfi*, No. 2:21-cv-14205 (citing *Andrews*, 677 F. Supp. 3d at 87-88).

III. Mr. Andrews' petition provides an excellent vehicle for this Court to correct EPA and the Corps' continued refusal to conform their conduct to the CWA

This Court can readily put a stop to EPA and the Corps' renewed intransigence. This case provides the Court with the right vehicle for making that happen. This is because the record is clear that the alleged wetlands on Mr. Andrews farm are not subject to federal authority under *Sackett*'s test, properly construed.

The government did not argue below that the alleged wetlands on the farm are visually indistinguishable from the unnamed tributary. Instead, the government took the position that mere "physical abutment" between the wetlands and unnamed tributary—even in the absence of a continuous surface water connection—was sufficient. *See* United States' Answering Brief at 25-27, Second Circuit case no. 24-1479, docket no. 44 (filed Sep. 24, 2024); Memorandum in Support of Plaintiffs' Motion for Summary Judgment on Liability at 34-35, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-1 (filed Oct. 21, 2022). Indeed, according to the government's experts, the unnamed tributary to which the alleged wetlands abut has a clearly discernable bank with an ordinary high-water mark. Putnam Decl. at 12 ¶ 39, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 8-5 (filed Sep. 3, 2020) (observing "the presence of a well-formed stream bank with an ordinary high-water mark"). It is therefore doubtful that any reasonable person would have "difficult[y] . . . determin[ing]," *Sackett* 598 U.S. at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)), where the unnamed tributary

ends and the alleged wetlands begin. The alleged wetlands are not "as a practical matter indistinguishable," *id.* at 678 (quoting *Rapanos*, 547 U.S. at 755 (plurality opinion)), from the unnamed tributary.

Similarly, the undisputed facts in the record show that there is no *continuous* surface water connection between the alleged wetlands and the unnamed tributary. Instead, and as discussed above, other than during rainfall-runoff events, any hydrologic connection between the alleged wetlands and the unnamed tributary is limited to a subsurface connection. *See* Earles Report at 13-15, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-6 (filed Oct. 21, 2022).[15]

IV. The Court may wish to consider summary disposition to correct the Second Circuit's grievous misapprehension of *Sackett*

In light of the Second Circuit's plain failure to follow this Court's controlling decision in *Sackett*, the Court may wish to consider summary disposition. Summary disposition is appropriate here because the decision below rests on a clear legal error of great magnitude. *See Pakdel v. City & Cnty. of San Fran-*

[15] Given that proper application of *Sackett*'s test yields a different conclusion, it is also fundamentally unjust that Mr. Andrews should be forced to live with the Second Circuit's error. Mr. Andrews is currently subject to a mandatory injunction to restore the alleged wetlands. *See* App. 40a-45a. And after that restoration process is complete, he could face as much as $2 million in civil penalties. *See* Ruling and Order on Remedy (Doc. No. 250) and Motion to Dismiss (Doc. No. 253) at 37, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 256 (filed Mar. 27, 2024).

cisco, 594 U.S. 474, 479 (2021) (vacating and remanding where Ninth Circuit took an approach "contrary" to the holding and reasoning of a recent Supreme Court decision); *CNH Indus. N.V. v. Reese*, 583 U.S. 133, 134 (2018) (reversing and remanding because the lower court's decision "cannot be squared" with controlling Supreme Court precedent); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (vacating and remanding where the lower court's "interpretation" of a federal statute "was both incorrect and inconsistent with clear instruction in the precedents of this Court").

As discussed, the decision below cannot be squared with *Sackett*, for two reasons. First, it ignored *Sackett*'s central indistinguishability requirement. *See supra* Part I.A. Second, it concluded that regulable wetlands need not have a continuous surface *water* connection to covered waters. *See supra* Part I.B.

Further counseling in favor of summary disposition is that the undisputed facts show that the alleged wetlands on Mr. Andrews' farm are distinguishable from, and contain no continuous surface water connection to, any possibly covered waters. *See supra* Part III. The Second Circuit's errors thus warrant reversal.

The consequences of the Second Circuit's errors also extend well beyond this case. In *Sackett*, this Court intervened—for the third time in twenty-five years—to correct the agencies' aggrandized view of their own power. *See Sackett*, 598 U.S. at 666-68. Yet within months of *Sackett* being decided—in Mr. Andrews' case and others—EPA and the Corps were already seeking to evade *Sackett*'s clear requirements. *See supra* notes 12-14. In so doing, the agencies re-

peated a pattern of defiance characteristic of their response to each of this Court's prior decisions reining in their CWA authority. *See supra* Part II. The decision below stands as a regrettable endorsement of the agencies' post-*Sackett* conduct. Summary disposition is thus appropriate to dissuade the agencies from continuing to pursue other property owners with unlawfully expansive claims of CWA authority.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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