No. 25-668

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

It has now been three years since this Court decided *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023). In that time, the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers have assiduously sought to minimize *Sackett*'s impact on their authority to regulate wetlands under the Clean Water Act (CWA). This continues a familiar pattern of misconduct that has occurred in the wake of each prior decision from this Court reining in these agencies' claimed CWA regulatory authority.

Petitioner Jeffrey Andrews finds himself and his family farm caught up in EPA and the Corps' latest effort to maintain an aggrandized view of the CWA's reach. When Mr. Andrews' case reached the Second Circuit, that court acquiesced in the agencies' intransigence, endorsing an approach to the agencies' CWA authority that is irreconcilably in conflict with *Sackett*.

Respondent the United States asks this Court to ignore EPA and the Corps' defiance of *Sackett* and let the Second Circuit's decision stand. Yet in opposing Mr. Andrews' petition, the government does not argue that Mr. Andrews' reading of *Sackett* and the CWA are incorrect. It also does not renew its arguments that Mr. Andrews' family farm is properly regulable under the CWA. Nor does it doubt that the CWA's scope is a question of great importance. Instead, the government: (i) argues that the Second Circuit's failure to apply *Sackett*'s central indistinguishability requirement is not properly presented for this Court's review—even though the Second Circuit unquestionably

considered whether Mr. Andrews' family farm contains regulable wetlands under *Sackett*; (ii) argues that Mr. Andrews' petition is a poor vehicle for addressing the *continuous* surface water connection requirement established by *Sackett* because Mr. Andrews purportedly conceded the existence of a hydrological surface connection; (iii) attempts to sidestep the irreconcilability of the Second Circuit's decision with *Sackett* by creatively yet unconvincingly rehabilitating the Second Circuit's decision; (iv) contends that EPA and the Corps should be given *yet another* opportunity to correct course and adopt a lawful definition of "the waters of the United States"; and (v) argues that review in this Court is premature because the precise consequences Mr. Andrews will suffer as a result of being found conclusively liable for violating the CWA have not yet fully crystallized, and because the agencies might (but might not) cut Mr. Andrews a break in a future final rule—even while declining to suggest that Mr. Andrews could entirely avoid civil penalties or remedial liability.

As explained below, these arguments against the Court's review are unconvincing.

ARGUMENT

I. Whether Mr. Andrews' family farm contains regulable wetlands is properly presented for this Court's review

The government argues that the Second Circuit's failure to apply *Sackett*'s indistinguishability requirement is not properly presented to this Court because Mr. Andrews "did not raise in either of the courts below the question whether *Sackett* imposes an 'indistinguishability' requirement" and because "[t]he

courts below likewise did not consider whether *Sackett* imposes an 'indistinguishability' requirement." Brief for the United States in Opposition (BIO) 11-12.

The government misconceives what is at issue. It apparently views the operative question as being "*whether Sackett* imposes an 'indistinguishability' requirement." *Id.* (emphasis added). But *Sackett* unquestionably imposes an indistinguishability requirement. *See Sackett*, 598 U.S. at 678 ("In sum, we hold that the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" (quoting *Rapanos v. United States*, 547 U.S. 715, 755 (2006) (plurality opinion))). And *Sackett* is clear on its face that this indistinguishability requirement is the central and operative component of its test for federal wetlands authority. *See* Petition for Writ of Certiorari (Pet.) 18-22; Brief of *Amici Curiae* States of West Virginia, Nebraska, and 21 Other States in Support of Petitioner (Amici States Br.) 11-13. Accordingly, when Mr. Andrews argues that the Second Circuit's grievous failure to apply or even acknowledge *Sackett*'s indistinguishability requirement warrants this Court's review, *see* Pet. 19-22, he is simply requesting a proper application of *Sackett*'s test for determining whether the wetlands on his family farm are regulable "waters of the United States," *see* Pet. i.

That question—whether Mr. Andrews' family farm contains regulable wetlands under *Sackett*'s test—was unquestionably considered by the Second Circuit. *See* App. 5a (affirming that the alleged wetlands on Mr. Andrews' farm are regulable under *Sackett* (citing *Sackett*, 598 U.S. at 678)). And with that question having been resolved unfavorably by the Second Circuit, Mr. Andrews is entitled to press arguments here that

the Second Circuit's recitation and application of *Sackett*'s test were incorrect. *Cf. Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). Of course, the clearest argument for why the Second Circuit's application of *Sackett* is grievously wrong—and why this Court's review is necessary—is that the Second Circuit ignores the central indistinguishability component of *Sackett*'s test.

In any event, the government's actions elsewhere betray its true understanding of the issues presented by the decisions below. In the wake of the district court's decision below, the government cited its victory over the *pro se* Mr. Andrews in several other cases questioning the scope of EPA and the Corps' CWA regulatory authority. *See* Pet. 29-30 n.14. In at least two of those cases—both civil enforcement actions—the centrality of *Sackett*'s indistinguishability requirement was squarely raised by the defendants, and in both cases the government offered the district court's decision below for the contra-proposition that indistinguishability is not the operative component of *Sackett*'s test.[1] The government cannot have it both

[1] *See* Plaintiff United States of America's Opposition to Defendants' Motion for Judgment on the Pleadings at 12, *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) ("[T]he court found no requirement to show that the wetlands were literally 'indistinguishable' from waters of the United States." (citing *United States v. Andrews*, 677 F. Supp. 3d 74, 87-88 (D. Conn. 2023))); United States' Opposition to Defendants' Post-Judgment Motion Regarding *Sackett v. EPA*, 598 U.S. 651 (2023) at 17-18, *United States v. Sweeney*, No. 2:17-cv-00112 (E.D. Cal. Jan. 25,

ways—arguing opportunistically in other forums that Mr. Andrews' case supports its position on indistinguishability, while opposing review here on the grounds that *Sackett*'s indistinguishability requirement is not presented by the decisions below. The government cannot credibly argue that the decisions below do not properly present *Sackett*'s indistinguishability requirement, after previously taking the position that the district court's treatment of *Sackett*'s indistinguishability requirement is so clear as to qualify as persuasive authority supporting the government's (erroneous) position on that question.

II. Mr. Andrews' alleged concession that hydrological surface connections exist on his farm is immaterial to his request for this Court's review

The government argues that this case is a "poor vehicle," BIO 15, for addressing *Sackett*'s surface *water* connection requirement because Mr. Andrews "'admitted' that a surface-water connection exists between the wetlands on his property and covered waters," *id.* at 12 (quoting App. 28a).[2] The government

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2024), 2024 WL 5471328 (arguing that *Sackett*'s "'as a practical matter indistinguishable' phraseology is not the operative part of the 'continuous surface connection' requirement" and offering *Andrews* for the alternative proposition that "courts applying the 'continuous surface connection' requirement have agreed that the United States may satisfy it with proof that the wetlands in question abut covered waters." (citing *Andrews*, 677 F. Supp. 3d at 79)).

[2] The government also questions whether *Sackett*'s surface water connection requirement is fairly included in the question presented. BIO 12. It is. A wetland cannot meet *Sackett*'s test for indistinguishability in the absence of the continuous presence of surface water. *See* Pet. 23-24.

so argues because Mr. Andrews failed to respond to a request for admission "that he (or others working under him) had placed dredged or fill material into wetlands 'that are hydrologically connected by surface waters to navigable waters.'" *Id.* at 13 (quoting Exhibit 1 to Declaration of Redding Cofer Cates at 5, U.S. District Court District of Connecticut case no. 3:20-cv-01300, docket no. 224-3 (filed Oct. 21, 2022)).

Even accepting that this constitutes a concession regarding surface hydrological connections between the alleged wetlands on Mr. Andrews' farm and the unnamed tributary, any such concession is immaterial to Mr. Andrews' request for this Court's review. This is because *Sackett* does not require just *any* hydrological surface connection. It requires that any such connection be *continuous*. *See* Pet. 22-23. *See also 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"). Indeed, the government appears to acknowledge that there is a relevant distinction between a surface water connection and a *continuous* surface water connection. *See* BIO 14-15.

The record conclusively establishes that any surface water connection between the alleged wetlands and the unnamed tributary is not continuous but instead only exists following rainfall-runoff events. *See* Pet. 6, 32. And the government cites no evidence to the contrary. *See* BIO 2-10, 12-15. Hence, the record at most establishes that water on occasion will flow from the alleged wetlands on Mr. Andrews' farm to the unnamed tributary. But the existence of any such *non*continuous surface hydrological connection poses no barrier to this Court's granting Mr. Andrews relief

upon proper application of *Sackett*'s test which, contrary to the Second Circuit's ruling, requires a *continuous* flow of surface water. Mr. Andrews' purported concession is therefore no reason for this Court to decline review of the exceptionally important question of *Sackett*'s requirements.[3]

III. The government's attempt to rehabilitate the Second Circuit's ruling is not credible and only further underscores the importance of review in this Court

The government attempts to sidestep the irreconcilability of the Second Circuit's decision with *Sackett* by arguing that the Second Circuit did not definitively reject *Sackett*'s continuous surface *water* connection requirement. BIO 13-14. This creative attempt to rehabilitate the decision below is not convincing, for two related reasons.

First, the government's reading of the decision below is inconsistent with its position at the Second Circuit. There, Mr. Andrews argued that his property contains "no surface water and no surface water connection." Brief of Appellant Jeffrey Andrews at 11, Second Circuit case no. 24-1479, docket no. 46 (filed Oct. 4, 2024). The government on the other hand expressly argued that *Sackett* does *not* require a surface water connection and that a wetland's mere "physical abutment" to a covered water will suffice. *See* United

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[3] The government notes that it argued below that a temporary connection resulting from rainfall-runoff events is sufficient to satisfy *Sackett*'s test. *See* BIO 5. But it does not affirmatively press that argument here. *See id.* at 12-15. This, combined with the indisputably *non*continuous connection between the alleged wetlands and the unnamed tributary, renders this case an unusually good vehicle for summary reversal. *See* Pet. 32-34.

States' Answering Brief at 25-27, Second Circuit case no. 24-1479, docket no. 44 (filed Sep. 24, 2024). It strains credulity to now suggest that in ruling in the government's favor, the Second Circuit was not persuaded by, and therefore did not adopt, the government's arguments.

Second, the government's current reading is inconsistent with its previous reading of the decisions below. As noted above, *see supra* Part I, after the district court's decision was issued, the government took a victory lap. Besides offering the district court's decision to minimize *Sackett*'s indistinguishability requirement, the government repeatedly offered that decision to argue that the agencies may continue to regulate wetlands lacking a surface *water* connection to a regulable water. *See* Pet. 29-30 n.14. The government cannot now credibly argue that the Second Circuit decision—and the district court decision which it "track[s], BIO 14—held otherwise.

In any event—and even were the government's about-face credible—the conflict between the government's prior reading of the decisions below and the reading it offers in its brief in opposition only further underscores the need for this Court's review. This conflict demonstrates that the decisions below are *at the very least susceptible* of supporting an erroneous view of *Sackett*'s surface water connection requirement. This is a problem made more acute by the "growing trail of post-*Sackett* errors" in the lower courts, Amici States Br. at 15-16, and because the district court's decision has already been cited repeatedly to affirm broad CWA authority over private land, *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).

IV. EPA and the Corps' proposed rulemaking in no way undercuts the need for this Court's review

The government also argues that this Court should defer review of the question presented because the agencies are undertaking yet another rulemaking to define "the waters of the United States." *See* BIO 15-16. The agencies' proposed rulemaking does not eliminate the need for this Court's intervention, for three reasons.

First, the government's argument mirrors the one it made in opposition to the Sacketts' petition for certiorari. *See* Brief for the Respondents in Opposition at 10, *Sackett v. U.S. Env't Prot. Agency*, 598 U.S. 651 (2023) (No. 21-454), 2021 WL 5568045 (U.S. Nov. 24, 2021) ("Further review is also unwarranted at this time because the EPA and the Corps have issued for comment a proposed revision to the regulations defining 'waters of the United States.'"). The government's plea for deference to a pending rulemaking did not stop this Court from granting certiorari in *Sackett*, and it should not stop it from doing so here.

Second, *Sackett* was not decided yesterday. In the three-year period since *Sackett* was issued, EPA and the Corps have repeatedly sought to enforce the CWA in an unlawfully overbroad manner—using Mr. Andrews' case and many others to press a variety of arguments minimizing *Sackett*'s impact on their regulatory authority. *See* Pet. 27-30. This pattern of mis-

conduct hardly entitles the agencies to this Court's deferral to *yet another*[4] rulemaking—a point made stronger by the agencies' long track record of ignoring this Court. *See Sackett*, 598 U.S. at 666-67 (noting this phenomenon).

Third, even setting aside EPA and the Corps' misconduct in the wake of *Sackett*—and assuming that this time the agencies are serious about conforming their conduct to the CWA—it is apparent that they may still benefit from this Court's guidance. Notwithstanding *Sackett*'s clear terms, *see* Pet. 18-24, the agencies appear uncertain about what *Sackett* requires. The government represents that EPA and the Corps are seeking public comment on *three alternative approaches* for determining the requisite connection between wetlands and covered waters. BIO 15. One of these alternatives precisely mirrors the illegal approach endorsed by the Second Circuit. *See id.* (noting that the agencies are considering adopting an approach "that would require only that the wetland 'abut[]' a jurisdictional water" (quoting 90 Fed. Reg. 52,498, 52,530 (Nov. 20, 2025)). *See also* 90 Fed. Reg. at 52,530 ("This approach would categorically cover all wetlands and all lakes and ponds that abut a jurisdictional water . . . regardless of whether they are characterized by surface water at least during the wet season."). "[F]oreclosing some of the options the agencies are considering," BIO 15, is hardly a reason for this Court to defer review, if said "options" are on their face irreconcilable with this Court's precedents.

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[4] Since *Sackett* was decided, EPA and the Corps have already issued one rule purporting to define "the waters of the United States." *See* 88 Fed. Reg. 61,964 (Sep. 8, 2023).

V. Nothing about the posture of this case suggests that this Court's review would be premature

The government makes two arguments for the proposition that the purportedly "interlocutory posture" of this case renders this Court's review premature. BIO 16. Neither argument is persuasive.

First, the government argues that the ongoing nature of the remedial proceedings in the district court counsels against this Court's review. *Id.* But the district court and Second Circuit's decisions definitively and finally conclude that Mr. Andrews violated the CWA by discharging dredged and fill material into "waters of the United States" without a permit. *See* App. 6a, 36a. While it is true that the precise consequences Mr. Andrews will suffer because of that determination of liability will crystallize during the district court's remedial proceedings, there is nothing that could happen in the ordinary course of those proceedings that would further ripen *the merits* of Mr. Andrews' liability. The government also does not suggest that Mr. Andrews could entirely avoid civil penalties or remedial liability.

Second, the government again invokes EPA and the Corps' proposed rulemaking, this time to downplay Mr. Andrews' predicament on the theory that Mr. Andrews may be able to rely on a future final rule to seek relief from the district court's injunction. BIO 16. But the government offers no reason for Mr. Andrews to be hopeful. The government provides no timeline for finalization of the proposed rule. *See id.* at 15. It therefore offers no reason to believe that the rule will be finalized before the entry of final judgment in Mr. Andrews' case. Indeed, the government does not even

commit that the agencies will complete their proposed rulemaking at all. *See id.* at 16 ("*if* and when") (emphasis added). And even if the agencies do complete their proposed rulemaking expeditiously, one possible approach under consideration precisely mirrors the unlawful approach under which the Second Circuit upheld CWA authority over Mr. Andrews' farm. *See* 90 Fed. Reg. at 52,530. Finally, the prospect of future relief via rulemaking does nothing to remedy that Mr. Andrews is in the meantime required to undertake the costs associated with complying with the restorative injunction. *See* App. 41a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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