No. 25-908

In The
Supreme Court of the United States

THE GLYNN ENVIRONMENTAL COALITION, INC., ET AL.,
Petitioners,

v.

SEA ISLAND ACQUISITION, LLC,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF GEORGIA CONSERVATION VOTERS, SCIENCE FOR GEORGIA, AND OGEECHEE RIVERKEEPER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

As provided for under Supreme Court Rule 37, *amici curiae* move for leave to file the following Brief of *Amici Curiae* Georgia Conservation Voters, Science for Georgia, and Ogeechee Riverkeeper in Support of Petitioners Glynn Environmental Coalition, Inc., Center for a Sustainable Coast, Inc., and Jane Fraser.

Counsel of record for all parties received notice of *amici*'s intent to file their brief on February 25, 2026—seven days before the filing deadline. Petitioners consented to the filing of this brief. Respondent Sea Island Acquisition, LLC, opposes the filing on notice grounds, but will not respond to this motion. *Amici* acknowledge that they did not provide notice of their intent to file an *amici curiae* brief at least 10 days before the filing deadline as required under Rule 37.2.

Good cause exists to allow *amici* to file their brief notwithstanding the truncated notice period afforded to the parties. The original counsel for *amici curiae* were preparing for a trial scheduled to begin on March 9, 2026, and lost sight of Rule 37.2's requirement in the press of business. They provided notice as soon as they realized their mistake, on February 25, 2026, and then withdrew from this representation. Undersigned counsel agreed to represent *amici* pro bono only a few days before filing, so as to ensure their important perspectives on this case could be brought to the Court.

There is no possibility of prejudice, as Respondent has elected to waive a response. If the Court calls for a response, it will reset the deadline for amicus briefs

and Respondent will have had more than the 10-days notice required by the rules. In all events, if the Court calls for a response, *amici curiae* could cure any defect by refiling the brief on the new deadline.

Amici respectfully submit that if Respondent did suffer any prejudice from a three-day delay in receiving notice, it is outweighed by the interests in providing the Court with *amici*'s unique perspectives on the critical issues presented in the pending Petition. As described more completely in their brief, *amici* are Georgia-based environmental organizations with a keen understanding of the crucial role of citizen suits in Clean Water Act enforcement and the immense and unfair burden foisted upon would-be private attorneys general by the Eleventh Circuit's erroneous decision.

For these reasons, *amici* respectfully submit this motion for leave to file the attached Brief of *Amici Curiae* Georgia Conservation Voters, Science for Georgia, and Ogeechee Riverkeeper in Support of Petitioners.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

Amici are Georgia Conservation Voters, Science for Georgia, and Ogeechee Riverkeeper.[2]

Through their work, *amici* support wetland protection efforts by equipping community members and leaders with the knowledge needed to understand and respond to the impacts of wetland loss. Georgia is home to more than 7.7 million acres of wetlands—about one-fifth of the state's surface area.[3] Wetlands provide invaluable ecological and economic benefits to Georgians—including flood control, sustainable commercial harvesting, and recreation.[4] Georgia wetlands contribute not only to the ecological and economic diversity of Georgia but provide a natural resource of profound beauty that both locals and tourists can and do appreciate. Despite their value to

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[1] As called for under Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Notice was provided to the parties seven days before the filing of this brief and its accompanying Motion for Leave to File.

[2] More information about the missions and activities of *amici* can be found at their respective websites: gcvoters.org (Georgia Conservation Voters); https://scienceforgeorgia.org/ (Science for Georgia); and https://www.ogeecheeriverkeeper.org/ (Ogeechee Riverkeeper).

[3] U.S. Geological Survey, *National Water Summary on Wetland Resources*, Water Supply Paper 2425, at 8 (1996), https://pubs.usgs.gov/wsp/2425/report.pdf.

[4] Ga. Dep't of Nat. Res., Env't Prot. Div., *Coastal Stormwater Supplement to the Georgia Stormwater Management Manual*, at 2-2 to 2-3, 2-5 to 2-6 (1st ed. Apr. 2009), https://bitly.cx/DFpaq.

the state, Georgia's wetlands have historically been, and continue to be, highly vulnerable. Many of the state's watersheds have experienced 25- to 30-percent losses of original wetland acreage, and approximately 50 percent of the remaining wetlands are classified as being only in fair to poor condition.[5]

Amici submit this brief in support of the Petition because the issue it presents—whether a Clean Water Act permittee's waiver of "any challenge" to the jurisdictional status of a wetland "in any federal court" does not extend to citizen suits and is limited to government suits to enforce permit conditions—is significant to the missions and work of *amici*. The Eleventh Circuit's limitation on CWA citizen suits is one that will directly impact Georgia communities and beyond. By eroding CWA citizen suit enforcement, the Eleventh Circuit's decision undermines the clearly stated objective of the CWA—to protect the waters of the United States and our nation's ecosystems. As organizations that empower Georgians to advocate for positive environmental change in their communities, *amici* have a strong interest in seeing the decision of the Eleventh Circuit reviewed and reversed.

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[5] Forest Stewards Guild & Flint Riverkeeper, *Restoring Georgia's Wetland Forests*, at 4 (Dec. 2021), https://bitly.cx/pRQUx.

SUMMARY OF ARGUMENT

Citizen suits play a vital role in ensuring compliance with the CWA, permitting citizens to act as private attorneys general and to prosecute violations of the Act. Citizen suits both provide an avenue for "vigorous enforcement" of the CWA where the federal government "fail[s] to exercise [its] enforcement responsibility," S. Rep. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730, and empower citizens to remedy how CWA violations affect their lives. The Eleventh Circuit's decision endangers the continued vitality of this critical enforcement mechanism.

In requiring citizens to prove the "continuous surface connection" necessary to establish wetland jurisdiction under *Sackett v. EPA*, 598 U.S. 651, 678-79 (2023), when bringing CWA enforcement actions against landowners, the Eleventh Circuit effectively precluded enforcement of jurisdictional waivers provided in conjunction with expedited permitting. Given the practical difficulties of proving wetland jurisdiction after permit-related activity has occurred on the wetland, the Eleventh Circuit erected an unnecessary—and in some cases, insurmountable—barrier to private and state enforcement of the CWA. What's more, the Eleventh Circuit created a potential enforcement gap that is readily susceptible to exploitation. If the decision below is left standing, landowners in the Eleventh Circuit can reap the benefits of expedited permitting but later escape the related regulatory obligations when citizens, states, or anyone other than the Army Corps of Engineers seek to enforce them.

Amici support Petitioners in full. This Court should grant the Petition and reverse the decision below to confirm that a jurisdictional waiver precludes "any challenge" by a landowner to the jurisdictional status of a wetland "in any federal court"—including in an enforcement action brought by a citizen pursuant to the CWA's citizen suit provision.

ARGUMENT

I. The Eleventh Circuit's Decision Frustrates the Critical Role of Citizen Suits in Clean Water Act Enforcement.

The CWA aims "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Achieving this goal is dependent on private enforcement of the Act through citizen suits. By refusing to enforce jurisdictional waivers in the context of citizen suits, the Eleventh Circuit's decision significantly impedes the fundamental objectives of the CWA.

A. Citizen Suits Serve as a Supplementary Enforcement Mechanism Critical to Ensuring Compliance with the Text and Statutory Purpose of the Clean Water Act.

The CWA authorizes any citizen, state, or local agency to commence a civil action against any person alleged to be in violation of "an effluent standard or limitation." *See* 33 U.S.C. §§ 1362(5), 1365(a)(1), (g). As relevant here, an effluent standard or limitation includes any permit regarding the discharge of

dredged or fill material. *See id.* §§ 1365(f), 1311(a), 1344.

Congress created this citizen suit provision in recognition that federal governmental enforcement was not enough, and that private and state enforcement would be essential in achieving the CWA's statutory purpose. *See* 33 U.S.C. § 1251(e) ("Public participation in the . . . enforcement of any regulation, standard, effluent limitation, plan, or program . . . shall be provided for . . . [and] encouraged . . . by the Administrator and the States."). In so doing, Congress intended that citizens be treated "as welcomed participants in the vindication of environmental interests." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 890 F. Supp. 470, 487 (D.S.C. 1995) (quoting *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985)). As pioneered by the Clean Air Act, citizen suit provisions brought a "new constituency to the regulatory bargaining table," empowering states and private individuals "to litigate personal interests in environmental values" and advocate for the "full enforcement of environmental standards." Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 Colo. Nat. Res., Energy & Env't L. Rev. 61, 63–64 (2014).

Citizen suits create an avenue for "vigorous enforcement" of the CWA "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." S. Rep. No. 92-414, at 64, *reprinted in* 1972 U.S.C.C.A.N. at 3730. While "[t]he primary responsibility for enforcement [of the CWA] lies with

the government," *see StarLink Logistics, Inc. v. ACC, LLC*, 101 F.4th 431, 447 (6th Cir. 2024), significant costs and administrative burdens often hinder government enforcement of the CWA, *see, e.g.*, Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1280–81 (1995) (describing funding challenges related to Section 404 program assumption efforts by two states). Citizen suits can thus "serve as a check to ensure the state and federal government are diligent in prosecuting [CWA] violations," *The Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 523 F.3d 453, 456 (4th Cir. 2008) (quoting *Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007)), allowing "citizens 'to abate pollution when the government cannot or will not command compliance,'" *id.* (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987)).

In this way, the citizen suit provision establishes a collaborative partnership between private citizens and the government in protecting the nation's waters—encouraging the government to enforce environmental regulations and providing a supplementary enforcement mechanism where or when the government fails to do so, "both spur[ring] and supplement[ing] government enforcement actions." S. Rep. No. 99-50, at 28 (1985); *accord Weiler v. Chatham Forest Prods.*, 392 F.3d 532, 536 (2d Cir. 2004) ("Citizen suit provisions were designed not only to 'motivate government agencies' to take action . . . , but also to make citizens partners in the

enforcement of the Act's provisions." (quoting *Wilder v. Thomas*, 854 F.2d 605, 613 (2d Cir. 1988))).

Crucially, Congress did not limit this enforcement mechanism to individual members of the public. Rather, "citizen" is defined to include individual members of the public, nonprofit and other nongovernmental organizations, and, as mentioned, municipalities and states. 33 U.S.C. §§ 1362(5), 1365(g); *see also U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 616 & n.9 (1992) ("A state is a 'citizen' under the CWA . . . and is thus entitled to sue under [§ 1365(a)]."); *Deschutes River All. v. Portland Gen. Elec. Co.*, 249 F. Supp. 3d 1182, 1191 (D. Or. 2017) ("[S]tates do have authority to enforce any violation of an effluent standard or limitation pursuant to the citizen suit provision."); *cf.* 33 U.S.C. § 1365(h) (permitting state governor to commence civil action under citizen suit provision where federal government fails to enforce violation occurring in another state that is causing an adverse effect on the public health or welfare, or causing violation of water quality requirement in the governor's state).

B. Private Citizens Are Uniquely Positioned to Enforce the Clean Water Act Given Their Proximity to and Lived Experiences with Violations of the Act.

Private citizens are well-suited for enforcement because they are often better positioned to identify, and are directly impacted by, violations of the CWA. By sharing their lived experiences, private citizens give depth and humanity to CWA enforcement—providing unique experiences and perspectives as

actual participants in and users of affected areas—with access to information not necessarily captured in public data or routinely presented to government regulators. Congress has recognized the importance of providing the public with "a genuine opportunity to speak on the issue of protection of its waters," noting that "[t]he scrutiny of the public . . . is extremely important in insuring expeditious implementation of the [CWA]." S. Rep. No. 92-414, at 72, *reprinted in* 1972 U.S.C.C.A.N. at 3738. But under the Eleventh Circuit's ruling, the public has no opportunity to speak. Not in the expedited permit process and—if the jurisdictional waiver is so broadly applied—not in an enforcement action under § 1365(a). Quick approval on the front end with notice-and-comment avoided becomes non-reviewable after-the-fact, and critical voices are never given an opportunity to "speak on the issue."

Essential voices and critical evidence will be lost. Consider, for example, *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp, Texas*, No. 6:17-CV-0047, 2019 WL 2716544 (S.D. Tex. June 27, 2019). There, a community-based nonprofit organization sought declaratory relief against a plastic manufacturing company, claiming it had violated, and continued to violate, its National Pollutant Discharge Elimination System ("NPDES") permit by illegally discharging plastic pollutants into nearby water sources. *Id.* at *2. In prosecuting their claim, the plaintiffs introduced nearly 2,500 samples of pollutants they and their witnesses had collected and stored in zip-lock bags, as well as photographs and videos taken by the plaintiffs. *Id.* at *4. Further, plaintiffs offered testimony of multiple community

members, including a named plaintiff, who provided detailed accounts of their experiences with the manufacturers' plastic pollutants and the impact on local aquatic life in the area. *Id.* at *4, *10. This evidence was critical in establishing the plaintiffs' claims, and their entitlement to the requested declaratory relief, because the NPDES permit prohibited "discharge of floating solids or visible foam in other than trace amounts." *Id.* at *3 (quoting defendant's permit). In light of the plaintiffs' copious evidence, the court found in favor of the plaintiffs and granted their requested declaratory judgment. *Id.* at *9–10.[6]

Similarly, in *Georgia v. City of East Ridge, Tennessee*, 949 F. Supp. 1571 (N.D. Ga. 1996), the plaintiffs—a group of citizens, the state, and several state agencies—filed a citizen suit against a municipality, alleging that a sewer owned and maintained by the municipality had repeatedly discharged raw sewage without a permit in violation of the CWA. *Id.* at 1573–74. The citizens provided credible eyewitness testimony and introduced into evidence dated photographs and videos of the raw sewage and other materials flowing from the sewer. *Id.* at 1574, 1576–77. Based on this evidence, the district court held that the plaintiffs established

[6] This ruling was reversed and remanded on other grounds by *San Antonio Bay Estuarine Waterkeeper v. Formosa Plastics Corp. Texas*, 852 F. App'x 816, 820 (5th Cir. 2021), where the Fifth Circuit disagreed with the district court's interpretation of the parties' consent decree. The Fifth Circuit's decision, however, does not call into question the evidentiary findings of the district court or the significance of the plaintiffs' extensive evidence.

multiple CWA violations by the municipality. *Id.* at 1579 & n.7.

These cases are but two of countless illustrations of the irreplaceable role citizens' stories play in environmental litigation. In addition to the evidentiary benefits, citizen involvement in CWA enforcement empowers those citizens to share their lived experiences in an actionable way.

Here, Petitioner Jane Fraser has lived and worked near the now-destroyed wetland for over three decades and cares about it deeply. As such, she brings a unique, lived perspective to this matter and should be given an opportunity to tell her story, and provide a court with evidence of how Respondent's actions have contravened the Clean Water Act.

C. Citizen Suit Enforcement of the Clean Water Act Has Led to Important Strides in Environmental Jurisprudence and the Regulation of Environmentally Destructive Practices.

Citizen suits play a significant role in bringing unregulated, environmentally harmful practices to the forefront of the regulatory space. This type of litigation includes states pursuing CWA citizen suits. *See Georgia*, 949 F. Supp. at 1579 (holding that Georgia and intervenor plaintiffs satisfied elements required to establish CWA violation); *see also, e.g.*, *Okanogan Highlands All. v. Crown Res. Corp.*, 544 F. Supp. 3d 1092, 1094 (E.D. Wash. 2021) (Washington as § 1365 citizen-suit plaintiff); First Am. Compl., *Utah v. Envtl. Restoration, LLC*, No. 2:17-cv-00866-TS

(D. Utah Jan. 4, 2018), ECF No. 93 (Utah as § 1365 citizen-suit plaintiff).

Consider the example of Concentrated Animal Feeding Operations ("CAFOs")—agricultural facilities where animals destined for slaughterhouses are kept and fed until they reach market weight. *See Animal Feeding Operations (AFOs)*, U.S. Envtl. Prot. Agency, https://tinyurl.com/bdcsbbut (last visited Mar. 3, 2026). CAFOs impact water quality through the production and discharge of animal waste.[7] Yet many CAFOs largely evaded regulation by taking advantage of certain regulatory exemptions—including the agricultural stormwater discharge exemption, which exempted certain discharges from regulation. *See* 33 U.S.C. § 1362(14); 40 C.F.R. §§ 122.23(e), 122.42(e).

That changed following *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) ("*CARE*"). There, the plaintiffs filed a citizen suit against a dairy farm for water pollution resulting from the farm's extensive manure operations. *Id.* at 115–16. The district court granted judgment as a matter of law in the dairy farm's favor,

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[7] EPA previously estimated that confined livestock and poultry generates approximately 500 million tons of manure each year—more than three times the amount of human sanitary waste generated annually in the country. *See* NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7180 (Feb. 12, 2003); *see also* Elise Pohl & Sang-Ryong Lee, *Local and Global Public Health and Emissions from Concentrated Animal Feeding Operations in the USA: A Scoping Review*, 21 Int'l J. Env't Res. & Pub. Health 916 (2024), https://doi.org/10.3390/ijerph21070916 ("With more than 21,000 CAFOs in the USA, each can produce up to 1.6 million tons of waste annually." (footnotes omitted)).

in part based on the court's belief that no reasonable juror could find that certain discharges were not exempted as agricultural stormwater discharges given that crops were grown on fields *adjacent* to the dairy cows. *Id.* at 122-23. The Second Circuit reversed and, in so doing, narrowed the scope of the CAFO agricultural stormwater discharge exemption. In its view, crops must be grown in the *same* area in which livestock is confined to exempt a facility from regulation under the CWA. *Id.* at 123.

The NPDES program was subsequently expanded as a direct result of *CARE*. *See* Coplan, *supra*, at 99 & nn.134-36. In proposing revisions to the CAFO regulations, the EPA expressly relied on *CARE* in defining (and limiting) the scope of the agricultural storm water discharge exemption. *See id.* at 99 & n.134 (citing NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 66 Fed. Reg. 2960, 3029 (Jan. 12, 2001)). Absent citizen suit enforcement, the EPA presumably would have continued adhering to its vague regulations and pattern of inaction—both of which failed to serve the CWA's overarching regulatory purpose. This case, among others, is representative of the substantial body of environmental litigation that has driven meaningful and measurable environmental change, and serves as a reminder of the critical role citizen suits play in developing regulatory agendas to further CWA objectives.

D. The Eleventh Circuit's Decision Jeopardizes the Continued Vitality of this Private Enforcement Mechanism.

Citizen suits are, and should continue to be, a constant in the changing tide of government enforcement efforts under the CWA. But the Eleventh Circuit's decision risks eroding what remains of that essential private enforcement tool.

As relevant here, a preliminary jurisdictional determination ("PJD") is a "written indication[] that there *may* be waters of the United States on a parcel." 33 C.F.R. § 331.2 (emphasis added). A PJD is typically issued at the request of a landowner who wishes "to voluntarily waive or set aside questions regarding CWA[] jurisdiction over a particular site, usually in the interest of allowing the landowner . . . to move ahead expeditiously to obtain a Corps permit authorization." U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 08–02, Jurisdictional Determinations 3 (June 26, 2008), https://tinyurl.com/y8ye7rey; *see also Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 37 (D.C. Cir. 2015). The PJD provides a "shortcut into the permitting process," allowing a landowner who is willing to accept a PJD to proceed directly to permitting without the delay and expense of a definitive jurisdictional ruling. *Nat'l Ass'n of Home Builders*, 786 F.3d at 37.

But this shortcut is not without a price. The U.S. Army Corps of Engineers conditions the PJD-based permit on the landowner's agreement to a jurisdictional waiver. *See, e.g.*, Pet. App. 9a. The jurisdictional waiver ensures that the landowner,

having taken a shortcut in the permitting process, does not later deny that the permit-based activities were subject to federal regulation in the first place.

This jurisdictional waiver is broad and "[o]n its face . . . seem[s] to encompass citizen suits against violations of the permit." Pet. App. 10a. Yet the Eleventh Circuit refused to enforce the waiver accordingly. In so doing, the Eleventh Circuit erected a significant barrier to vital citizen suit enforcement actions, frustrated the fundamental objective of the CWA, and set a harmful precedent for the future of environmental litigation.

II. Requiring Citizens to Prove Wetland Jurisdiction Under the Clean Water Act Is Impracticable and Wastes Litigant and Judicial Resources.

Requiring citizens to prove wetland jurisdiction after permit-related activity has occurred—rather than enforcing jurisdictional waivers as written—is impracticable, inefficient, and technically and financially burdensome.

The CWA prohibits the discharge of dredge or fill materials into "navigable waters" without a permit, but what constitutes "navigable waters" has been the subject of much debate. In *Rapanos v. United States*, 547 U.S. 715 (2006), a plurality of this Court held that "waters of the United States," as that phrase is used in the CWA, "includes only those relatively permanent, standing or continuously flowing bodies of water," and that a wetland is covered by the CWA only if it has "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.* at 739, 742. Justice Kennedy, by contrast, concluded that "navigable waters" include waters or wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be made so." *Id.* at 759 (Kennedy, J., concurring in the judgment). Under this test, wetlands are covered by the CWA "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.'" *Id.* at 780.

Following *Rapanos*, federal agencies elected to apply the "significant nexus" test, which they deemed "consistent with the statutory text and legislative history" of the CWA. *See, e.g.*, Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3006, 3143 (Jan. 18, 2023).

But in *Sackett*, this Court conclusively held that the CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." 598 U.S. at 678 (quoting *Rapanos*, 547 at 755 (plurailty opinion)). This requires the party asserting jurisdiction over adjacent wetlands to establish that (1) the adjacent body of water constitutes "waters of the United States," i.e., a relatively permanent body of water connected to traditional interstate navigable waters; and (2) "the wetland has 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)).

This inquiry is technically demanding, often requiring affidavits, reports, and testimony from hydrological experts and submission and analyses of historical documentation, including photographs, topographical and hydrological maps, and surveys. This burden is difficult enough when the wetland exists. It becomes nearly impossible to satisfy where, as here, permit-related activity has already occurred such that the wetland no longer exists at all.

This case is illustrative. Petitioners alleged that the subject wetland was within the same basin as Dunbar Creek, a water of the United States, and that the creek was downstream of the wetland. Pet. App. 6a-7a. Petitioners also submitted an expert affidavit explaining that the wetland was connected to a nearby salt marsh via culverts and pipes, and that the salt marsh was adjacent to and directly connected by surface and ground water to the creek. *Id.* at 17a-18a. The expert affidavit further explained that, before the permit-related activity on the wetland, the wetland and creek were connected by tidal exchange, through which the wetland supplied nutrients to the salt marsh and to the creek. *Id.* at 18a. The expert affidavit also explained the connection between the wetland and creek following Sea Island's permit-related activity. *Id.*

Because the wetland has been filled in and covered with sod, excess unabsorbed chemicals from fertilizer are incorporated into both surface runoff and ground water each time it rains. Pet. App. 17a. The contaminated water then enters the salt marsh. And because the salt marsh is tidal, the contaminated

water flows into the creek each time tidal flooding occurs. *Id.* at 17a-18a.

Despite this detailed proffer, the Eleventh Circuit deemed the expert affidavit insufficient to permit the inference that there was a "continuous surface connection" between the wetland and the creek. Pet. App. 21a. If detailed expert analysis of the hydrological connections between an extant wetland and other bodies of water is insufficient, what hope do citizen-plaintiffs have when the wetland has been filled and sodded in violation of a nationwide permit? The evidence that once might have established the requisite continuous surface connection has been destroyed by the very conduct the citizen-plaintiffs seek to remedy—i.e., the filling of the wetland. And while it may be theoretically possible to prove this jurisdictional connection at the pleading stage with historical documentation and expert analysis in some cases, requiring private citizens to do so in every case will be exceptionally expensive—and, realistically, quixotic—at the outset of the case before the parties have undertaken any discovery.

These burdens are precisely why the Corps requires jurisdictional waivers in connection with its expedited permitting process in the first place. And these burdens apply equally—if not more forcefully—where the enforcement action is initiated by an individual member of the public, a nonprofit organization, a state, or another interested person.

III. The Eleventh Circuit's Decision Transforms a Jurisdictional Waiver, on Which a Preliminary Jurisdictional Determination Is Conditioned, into a Hollow Formality.

The Eleventh Circuit's decision turns the carefully crafted regulatory framework for preliminary jurisdictional determinationss on its head: it allows a landowner to reap the benefits of expedited permitting, and later escape the related regulatory obligations when citizens—whether individual members of the public, nonprofit organizations, states, or other interested persons—seek to enforce them. And because the CWA depends heavily on enforcement by citizen suit given the federal government's limited resources and the difficulty of detecting violations on private land, the Eleventh Circuit's decision, if allowed to stand, will create a significant gap in CWA enforcement that will create perverse incentives for landowners to seek expedited permits where jurisdictional waivers are but an empty promise.

More specifically, under the Eleventh Circuit's decision, a permittee may: (i) request a preliminary jurisdictional determination regarding a wetland in order to receive expedited permit approval; (ii) agree to the jurisdictional waiver as a condition of permit authorization; (iii) undertake activities on the wetland under the protection of the permit; and (iv) if faced with the prospect of citizen-suit enforcement, assert that the wetland was never jurisdictional in the first place under *Sackett*'s exacting inquiry. A permittee thereby avoids the repercussions of the representations made to secure the permit, and

defeats enforcement actions by any private attorney general while retaining the benefit of the permit.

This is not a hypothetical concern—it happened here. And it will not be an isolated event. The Corps makes tens of thousands of preliminary jurisdictional determinations and thus requires tens of thousands of jurisdictional waivers annually.[8] The sheer volume of such expedited permits and accompanying jurisdictional waivers underscores a simple truth. If the Eleventh Circuit's decision stands that a jurisdictional waiver is binding only in a Corps-initiated permit enforcement action, then the jurisdictional waiver is nothing more than a hollow formality.

[8] The Corps estimates that it issues approximately "90,000 permits" and "50,000 jurisdictional determinations" annually. *Regulatory: Permits*, U.S. Army Corps of Eng'rs, https://tinyurl.com/5s6mu22m (last visited Mar. 3, 2026).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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