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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL SACKETT, ET UX., )

Petitioners, )

v. ) No. 21-454

ENVIRONMENTAL PROTECTION AGENCY, )

ET AL., )

Respondents. )

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Washington, D.C.

Monday, October 3, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

DAMIEN M. SCHIFF, ESQUIRE, Sacramento, California; on behalf of the Petitioners.

BRIAN H. FLETCHER, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-454, Sackett versus EPA.

Mr. Schiff, you're up first this year.

ORAL ARGUMENT OF DAMIEN M. SCHIFF

ON BEHALF OF THE PETITIONERS

MR. SCHIFF: Thank you, Mr. Chief Justice, and may it please the Court:

It's now going on 16 years since Petitioners Mike and Chantell Sackett began construction of a house on a vacant lot in a largely built-out subdivision. Yet, their home-building plans remain on hold to this day because EPA remains steadfast in its view that their property contains navigable waters, subject to regulation under the Clean Water Act. But under no plausible interpretation of that term does the agency have such authority.

Now the statute defines navigable waters as the waters of the United States and so explicitly requires that EPA establish two things before it may regulate.

First, there must be a water, that is,

1 a hydro-geographic feature that in ordinary  
2 parlance would be referred to as a type of  
3 stream, creek, river, lake, or the like. A  
4 wetland, however, is none of those things, and  
5 so it can be regulated as a water only to the  
6 extent that it blends into and thus becomes  
7 indistinguishable from an abutting water.

8           Second, the water has to be of the  
9 United States, that is, for all practical  
10 purposes, a navigable in fact water.

11           Now this test is vastly superior to  
12 the significant nexus test for a number of  
13 reasons. First and most importantly, the  
14 two-step framework closely adheres to the  
15 textual limits that Congress itself imposed on  
16 the agency.

17           Second, by faithfully adhering to  
18 those limits, the test faithfully vindicates all  
19 of Congress's purposes, not just its  
20 water-quality purposes, but also its desire to  
21 preserve the state's traditional preeminence  
22 over land and water resources.

23           And, thirdly, it's an  
24 easy-to-administer test. Ordinary citizens can  
25 use their own eyes to reliably determine whether

1 or not their land is regulated.

2 And under this two-step framework,  
3 it's clear that the Sacketts' property contains  
4 no waters, much less waters of the United  
5 States, and so they should be entitled to a  
6 declaration that their property is not subject  
7 to EPA's authority.

8 JUSTICE THOMAS: Mr. Schiff, can --  
9 can intrastate, purely intrastate, navigable  
10 bodies of water be waters of the United States?

11 MR. SCHIFF: Yes, Justice Thomas.

12 JUSTICE THOMAS: And how is that, if  
13 it's purely intrastate?

14 MR. SCHIFF: If -- as a statutory  
15 matter, if that intrastate navigable water  
16 connects with some form of interstate  
17 transportation such that there could be a  
18 continuous channel of interstate commerce, then  
19 that water could be regulated.

20 JUSTICE THOMAS: So what does that  
21 mean?

22 MR. SCHIFF: I'll give you an example,  
23 Your Honor, the Great Salt Lake. The Great Salt  
24 Lake is not a traditional navigable water, even  
25 though it's navigable in fact, precisely because

1 it doesn't hook up to any other waters to flow  
2 interstate. But, obviously, there are a lot of  
3 forms of nonaquatic transportation that can get  
4 you there and that can sustain an interstate  
5 channel of commerce.

6 So that's an example of a water body  
7 that, though wholly intrastate, would qualify as  
8 a statutory matter as a water of the United  
9 States.

10 JUSTICE THOMAS: So why isn't that met  
11 here?

12 MR. SCHIFF: Well, Your Honor, there  
13 is no allegation whatsoever that the Sacketts  
14 discharge any pollutants --

15 JUSTICE THOMAS: No, I'm --

16 MR. SCHIFF: -- into Priest Lake.

17 JUSTICE THOMAS: -- well, if the -- I  
18 think the -- the question -- the issue would be,  
19 if there is nearby a body of water that could be  
20 considered navigable, that possibly the wetland  
21 could be associated or connected with that in  
22 some way.

23 MR. SCHIFF: Your Honor, the --

24 JUSTICE THOMAS: I mean, don't you  
25 have a ditch? You have a body of water and you

1 have sort of a nexus with it with the land?

2 MR. SCHIFF: Justice Thomas, mere  
3 adjacency itself cannot justify the agency's  
4 statutory jurisdiction for a number of reasons.  
5 The text of the statute says -- setting aside  
6 even "of the United States," the text says that  
7 if it's not even a water, it can't even be  
8 regulated.

9 And the plain meaning of "water," as  
10 elucidated by dictionary definitions and what  
11 have you, is not -- is streams, creeks, rivers,  
12 what have you, not wetlands.

13 JUSTICE KAGAN: But doesn't that,  
14 Mr. Schiff, ignore the import of 1344(g)(1)?  
15 Which really specifically says that when we're  
16 talking about waters, we're talking about --  
17 including their wetlands, 1344(g)(1) says.

18 So, if we're going to be fair to the  
19 text of the statute, isn't there a pretty  
20 powerful indication that wetlands are included,  
21 adjacent wetlands are included? And then we can  
22 talk about what the word "adjacent" means, but  
23 adjacent wetlands are included.

24 MR. SCHIFF: Absolutely, Justice  
25 Kagan, there's no doubt that some wetlands are,



1 in fact, regulated. And the question is, what  
2 kind of wetlands?

3 Now adjacency in the context of 404(g)  
4 clearly means physically touching. For example,  
5 if I were to say I own two adjacent parcels of  
6 land --

7 JUSTICE KAGAN: Well, you say that's  
8 clearly true, but, in fact, when you look to our  
9 normal indicators of statutory meaning, first,  
10 we look to dictionaries, and if you look to  
11 dictionaries, both legal and non-legal, what  
12 they show is that adjacency actually is not the  
13 same as touching or contiguity, that adjacency  
14 has something to do with proximity, of course.

15 But the -- the definitions are  
16 actually remarkably explicit about the fact that  
17 two things can be adjacent to each other without  
18 touching each other.

19 MR. SCHIFF: Justice Kagan, if I could  
20 respectfully disagree, certainly, adjacency in  
21 the abstract can have more than one meaning, but  
22 in the particular context of comparing  
23 relationships between topographic features, as  
24 that word is obviously employed in 404(g)(1), I  
25 think the only plausible understanding of that

1 term is physically touching.

2 JUSTICE KAVANAUGH: Well, why --

3 CHIEF JUSTICE ROBERTS: I'm not sure

4 --

5 JUSTICE KAVANAUGH: -- did E- --

6 CHIEF JUSTICE ROBERTS: -- I'm not  
7 sure that's right. I -- I don't know whether  
8 they're topographical features or not, but you  
9 would readily say that a train station is  
10 adjacent to the tracks even though it's not  
11 touching the tracks?

12 MR. SCHIFF: That is right. Mr. Chief  
13 Justice, that is correct. However, the example  
14 that I was going to give is, if I were to say  
15 that I own two adjacent parcels of land, I don't  
16 think anyone would just think -- simply think  
17 that I meant I own two parcels of land in the  
18 neighborhood.

19 But that necessarily implies that  
20 they're physically touching, and it's that  
21 particular --

22 JUSTICE KAGAN: Well, let me give you  
23 another example. I grew up in an apartment  
24 building in New York City. If I say there are  
25 two adjacent apartment buildings, do they have

1 to be touching each other? Or it could be, you  
2 know, one is across a side street, you know.

3 MR. SCHIFF: Again, Justice Kagan --

4 JUSTICE KAGAN: I mean, I would say  
5 that those -- you know, those two apartment  
6 buildings are adjacent to each other because  
7 there's no other apartment building in between  
8 them, even if they're not touching each other.

9 MR. SCHIFF: Again, Justice Kagan, I  
10 would say that when we're speaking specifically  
11 about physical topographic features, natural  
12 features like wetlands and other water bodies, I  
13 think that physically touching requirement is  
14 essential and is the -- the meaning of adjacency  
15 as used in 404(g). That is, in fact, actually  
16 --

17 JUSTICE JACKSON: But, Mr. Schiff,  
18 isn't the issue what Congress would have  
19 intended with respect to adjacency and there was  
20 a regulation that defined adjacency to include  
21 neighboring? And as far as I know, Congress  
22 used the term "adjacency" and didn't adjust it  
23 to try to make clear the touching requirement  
24 that you say was intended by the term.

25 MR. SCHIFF: Yes, Justice Jackson.

1 Every single time that argument has been  
2 advanced by the government, it has been rejected  
3 by this Court. In Rapanos, the plurality  
4 opinion rejected out hand the idea that 404(g)  
5 represents a ratification of the Corps' broad  
6 understanding of adjacency. Justice Kennedy's  
7 opinion doesn't even give it consideration.

8 SWANCC, for its part, said 404(g) is  
9 unenlightening as to the meaning of waters of  
10 the United States.

11 JUSTICE JACKSON: All right. Well,  
12 let me -- let me -- let me try to bring some  
13 enlightenment to it by asking it this way.

14 You say the question is which wetlands  
15 are covered, which I agree with, but I guess my  
16 question is, why would Congress draw the  
17 coverage line between abutting wetlands and  
18 neighboring wetlands when the objective of the  
19 statute is to ensure the chemical, physical, and  
20 biological integrity of the nation's waters?

21 So are you saying that neighboring  
22 wetlands can't impact the quality of navigable  
23 waters?

24 MR. SCHIFF: Justice Jackson, not at  
25 all. However, it's also important to

1 acknowledge that Congress was balancing concerns  
2 here. On the one hand, there is a water quality  
3 issue.

4 But, on the other hand, there's a very  
5 important federalism issue, so important that  
6 actually Congress put in the text of the Act  
7 that one of the purposes of the Act is to  
8 preserve traditional state authority over land  
9 and water resources.

10 JUSTICE JACKSON: I didn't read that  
11 as a purpose, I mean, that Congress said our  
12 objective is to address or make sure that we  
13 maintain the integrity of the waters.

14 It was one of the policies in  
15 achieving that objective that we care about  
16 states' rights, but -- or federalism concerns,  
17 but I didn't see that as Congress's primary  
18 objective or even, you know, a main objective  
19 with respect to the Clean Water Act.

20 MR. SCHIFF: That is true, Justice  
21 Jackson, although this Court in SWANCC very much  
22 relied upon however you would like to call it  
23 this principle of federalism to adopt a narrow  
24 construction.

25 JUSTICE SOTOMAYOR: But, counsel --

1 JUSTICE KAVANAUGH: Well --

2 JUSTICE SOTOMAYOR: -- how can you say  
3 they wanted a narrow construction when they were  
4 very, very clear in the statute in 1341(g) that  
5 the Corps couldn't give states jurisdiction over  
6 adjacent wetlands to that navigable water?

7 You are not disputing that Priest Lake  
8 is a navigable water, correct?

9 MR. SCHIFF: That is correct, Your  
10 Honor.

11 JUSTICE SOTOMAYOR: It's 62 miles  
12 long. It carries people. It's an instrument in  
13 transport. That's the definition of traditional  
14 navigable waters.

15 So as I see the question here is what  
16 did Congress mean by adjacent? And now we're  
17 going -- you are saying it requires a continuous  
18 water surface, but how about a natural being?  
19 Even the Trump administration in -- it came  
20 close to adopting your meaning, exempted berms.  
21 It exempted beaver dams. It exempted those two  
22 items and they would stop continuous surface  
23 flow.

24 So how does your -- where does your  
25 definition come from?

1           MR. SCHIFF: Justice Sotomayor, if I  
2 could go back first to the first point about  
3 404(g) and also in partial response to Justice  
4 Jackson's question, even in Riverside Bayview,  
5 which is the only time that this Court has  
6 actually upheld the Agency's assertion of  
7 jurisdiction, even there, at most, the Court was  
8 willing to say is that 404(g) simply means that  
9 wetlands are not necessarily excluded from the  
10 definition of waters, but it wasn't even  
11 prepared to adopt a general affirmation of  
12 adjacency.

13           In part, that's because none of the  
14 1977 amendments had anything to do with the  
15 definitional text. And I think this is in  
16 response to your second question, Justice  
17 Sotomayor, where does the text come from?

18           Well, it comes from that unchanged  
19 definitional text. Congress did not change the  
20 term "the waters of the United States." And a  
21 water is, again, in ordinary parlance, we would  
22 submit, something that is other than a wetland.  
23 And the only way that one can plausibly regulate  
24 it is if one has what was at issue in Riverside  
25 Bayview --

1 JUSTICE KAVANAUGH: But -- but --

2 MR. SCHIFF: -- where it --

3 JUSTICE KAVANAUGH: -- the -- I'm  
4 sorry. EPA had by that time, as Justice Jackson  
5 said, indicated that the term "adjacent wetland"  
6 would include wetlands separated by berms or  
7 dunes or man-made dikes or levies from the  
8 navigable water. Okay. So EPA as of '77 had  
9 made that clear in the term "adjacent wetland,"  
10 explicitly made that clear.

11 And then Congress uses the term  
12 "adjacent wetland." And my understanding is  
13 every administration since 1977, but correct me  
14 if I'm wrong, has stuck with adjacent wetland  
15 includes those wetlands separated by berms,  
16 dunes, dikes, or levies from the navigable  
17 water.

18 So why shouldn't we read adjacent  
19 wetland in the statute to mean what EPA has  
20 said, as Justice Jackson asked, and what  
21 significance should it have that every  
22 administration since then has included those  
23 wetlands as covered by this statute?

24 MR. SCHIFF: Justice Kavanaugh, in  
25 answer to your -- to your first question, I



1 think, again, it goes back to the text, that if  
2 one accepts the proposition that waters -- their  
3 ordinary meaning as employed by Congress does  
4 not normally include wetlands, then that raises  
5 a textual difficulty, how can wetlands --

6 JUSTICE KAVANAUGH: But -- but  
7 Riverside Bayview said the contrary to that,  
8 obviously. It said wetlands are included. The  
9 statute refers to adjacent wetlands. EPA has  
10 said since '77 that "adjacent" means those  
11 wetlands even if separated by berms, dunes,  
12 levies, or dikes.

13 MR. SCHIFF: Well, Justice Kavanaugh,  
14 I -- I don't want to necessarily die on this  
15 hill because, obviously, the facts in this  
16 record are such that --

17 JUSTICE KAVANAUGH: Let's put aside  
18 the facts of this case --

19 MR. SCHIFF: All right.

20 JUSTICE KAVANAUGH: -- because this  
21 case is going to be important for wetlands  
22 throughout the country and we have to get it  
23 right.

24 So why wouldn't a wetland separated by  
25 a berm, dune, levy, or dike be covered, contrary

1 to what the last 45 years have suggested?

2 MR. SCHIFF: In response to the second  
3 part of your question, Justice Kavanaugh, about  
4 the fact that the agencies have consistently  
5 interpreted this over a long period of time, I  
6 think Justice Scalia appropriately responded to  
7 that argument in the Rapanos plurality where he  
8 says it's a sort of now 40-year adverse  
9 possession of statutory authority.

10 So I would say the mere fact that it's  
11 been interpreted that way can't convert the fact  
12 that if one accepts that waters as ordinarily  
13 understood and not just in the dictionary but in  
14 our yellow brief --

15 JUSTICE KAVANAUGH: Well, I would  
16 agree with that but for the initial history of  
17 when Congress put that term "adjacent wetland"  
18 in, or I would think that has some force at  
19 least but for that.

20 JUSTICE BARRETT: And can I ask just a  
21 clarifying question to Justice Kavanaugh's? If  
22 you could help me with the timing, because, as  
23 Justice Kavanaugh says, you know, one argument  
24 that the government makes and that would have  
25 some force is that the regulation defined

1 "adjacent" in the way Justice Kavanaugh's  
2 pointing out.

3 What is the timing? Because I  
4 understand that that regulation was adopted in  
5 1977 and 1344(g) was passed in 1977.

6 MR. SCHIFF: Yes, Justice Barrett. My  
7 understanding -- and it was actually a  
8 regulation from the Army Corps, not from the  
9 EPA. But the Army Corps had a series of  
10 regulations, and the final version was issued in  
11 1977, I think shortly before -- I think maybe --

12 JUSTICE BARRETT: So it wasn't like an  
13 old soil. It was pretty proximate in time to  
14 the enactment of 1344(g)?

15 MR. SCHIFF: I believe, Justice  
16 Barrett, it was about one or two months prior to  
17 the enactment of -- of the 1977 amendment.

18 JUSTICE KAVANAUGH: Well, the Act was  
19 December, and this was, I think, in the summer.  
20 But wasn't this discussed? The whole question  
21 of wetlands was a big part of the discussion in  
22 the '77 amendments, or am I wrong about that?

23 MR. SCHIFF: No, you're absolutely  
24 right, Justice Kavanaugh. And, again, the  
25 Sacketts certainly don't dispute that -- that

1 wetlands are, in fact, regulated.

2 But, again, I would go back to Justice  
3 Scalia's analysis in the plurality opinion, one  
4 cannot read the legislative history of the '77  
5 amendments to then conclude that every jot and  
6 tittle of the Corps' regulations were then  
7 affirmed. And, in fact, again, I would go back  
8 to Riverside Bayview --

9 JUSTICE KAGAN: But there was --  
10 there's an even lengthier history. I mean,  
11 before the regulations become the regulations,  
12 there's a whole controversy about it because the  
13 first Corps regulation was much more along the  
14 lines of what you are proposing.

15 And then there was a big brouhaha and  
16 the Corps was interpreting it too narrowly, and  
17 the Corps essentially changed its mind, and  
18 everybody was aware that this had happened, that  
19 the Corps first came out of the blocks with a  
20 narrow interpretation and, you know, was  
21 essentially convinced to reverse itself on the  
22 theory that it was not reflective of what  
23 Congress had wanted.

24 MR. SCHIFF: Justice Kagan, I would  
25 say one answer is that if -- if Your Honor is

1 referring to, say, a failed legislative  
2 proposal, I mean, I don't think one can really  
3 put much --

4 JUSTICE KAGAN: I -- I'm not really  
5 referring to that. I'm sort of referring to a  
6 story that I don't think anybody disputes about  
7 the history here, which is that the first  
8 regulation, the first interpretation is quite  
9 narrow, and there was blow-back, and the Court  
10 changes its mind.

11 And so everybody's aware on a sort of  
12 continuing basis of this issue. It's not as  
13 though the -- you know, the regulation came out  
14 and -- and then the statute was amended, all  
15 within a month, and nobody had time to -- to  
16 think about this question. I mean, people had  
17 been thinking about this question almost the  
18 entire time in the interim between the initial  
19 statute and the amendment.

20 MR. SCHIFF: That is true, Justice  
21 Kagan, but I think there's a lack of  
22 commensurability here in that the relevant Corps  
23 regulation during this period that you note was  
24 a regulation purporting to interpret the "waters  
25 of the United States."

1                   Now it would seem passing strange in  
2 my view for Congress to say: We're going to  
3 resolve this lengthy administrative dispute by  
4 entirely ignoring the statutory text that the  
5 regulation that has caused the dispute is  
6 related to, and, instead, we're going to effect  
7 what amounts to a significant expansion of  
8 federal authority over land use by including in  
9 a parenthetical in a provision that deals with  
10 permit transfer a reference to adjacent  
11 wetlands.

12                   That seems to me just to be an  
13 unlikely way for Congress to effect what would  
14 be a significant unbalancing --

15                   JUSTICE SOTOMAYOR: Counsel --

16                   MR. SCHIFF: -- of traditional --

17                   JUSTICE KAVANAUGH: Let's --

18                   JUSTICE SOTOMAYOR: -- counsel, in  
19 SWANCC, we said directly the 1977 amendment  
20 showed "Congress's unequivocal acquiescence to  
21 and approval of the Corps' regulations  
22 interpreting the Act to cover wetlands adjacent  
23 to navigable waters."

24                   There, we faced the question and said,  
25 at least as to that definition, Congress was

1 clear. So my problem with your point is even  
2 Rapanos, Justice Scalia, recognized, whether  
3 it's scientifically accurate or not, that what  
4 navigable waters can be is anything that's  
5 adjacent to what we think of as traditional  
6 navigable waters.

7 No one's suggesting you can put a boat  
8 on a wetland. It would sink. You can't put a  
9 boat of certain sizes or many near the shore  
10 line because they would sink. There's not  
11 enough water there to hold them up.

12 So I don't understand how the wetland  
13 has to be navigable. It does have to be  
14 adjacent because it's part of that river. And  
15 Rapanos suggested it's hard to tell where the  
16 beginning of the wetland is and where the  
17 beginning of the -- of the water is. Whether  
18 that's true or not is irrelevant.

19 Congress defined the term as navigable  
20 waters and adjacent wetlands. So, if I take  
21 that as their definition, why don't we say that  
22 something that is near qualifies? And so the  
23 question becomes what's near enough, isn't it?

24 MR. SCHIFF: Justice Sotomayor, I  
25 would respectfully disagree. I think this would

1 be a totally different case if Congress, in  
2 fact, had defined navigable waters as the waters  
3 of the United States plus adjacent wetlands,  
4 which is precisely what the Corps regulation was  
5 trying to do in the '70s. But Congress hasn't  
6 done that. In fact, it studiously avoided  
7 touching that central definitional provision for  
8 the last 50 years.

9           With respect, though, Justice  
10 Sotomayor, to your point about how -- why do  
11 wetlands have to be navigable, they don't have  
12 to be navigable. Certainly, in the normal  
13 delimitation of any water, you're always going  
14 to have a point at which navigability, in fact,  
15 towards the banks of a river, for example, is  
16 going to disappear. But that doesn't change the  
17 fact that one can plausibly define a river, say,  
18 up to its ordinary high water mark and  
19 understand that water-ward of that mark one  
20 might not have navigability at all points.

21           And I think the same thing is true  
22 when it comes to defining the outer scope of  
23 waters with respect to abutting wetlands, that  
24 as one approaches the shore, it may not become  
25 physically possible to navigate, but one can



1 still reasonably say that one hasn't yet  
2 completely departed the water.

3 JUSTICE JACKSON: But, counsel, why --  
4 why is it that your conception of this does not  
5 relate in any way to Congress's primary  
6 objective? Do you dispute that the primary  
7 objective as stated in the statute, I guess it's  
8 at 1251, is that Congress cared about making  
9 sure that the chemical, physical, and biological  
10 integrity of the nation's waters was protected?

11 MR. SCHIFF: Justice Jackson, we don't  
12 dispute that. However, no statute pursues its  
13 purpose or objective -- or its objective at all  
14 costs, that -- that the limitations in the  
15 statute are as much a part of its purpose as its  
16 affirmative authorization.

17 JUSTICE JACKSON: So why didn't  
18 Congress say "immediately adjacent"? If they  
19 were trying to achieve something different than  
20 what the regulations had said about adjacency,  
21 if they were balancing their concerns about  
22 protecting the integrity of the navigable waters  
23 with the property interests and the states'  
24 rights to control it, why didn't they say  
25 "immediately adjacent" in terms of the -- of the

1 wetlands coverage?

2 MR. SCHIFF: Justice Jackson --

3 JUSTICE SOTOMAYOR: A footnote, why  
4 didn't they use the word they used elsewhere,  
5 "abutting"?

6 JUSTICE JACKSON: "Abutting."

7 MR. SCHIFF: Well, Justice Jackson, I  
8 don't believe the term "abutting" appears in the  
9 statute, but one reason why Congress --

10 JUSTICE SOTOMAYOR: Oh, it actually  
11 does. Assume it does. There are other sections  
12 that use the word "abutting."

13 MR. SCHIFF: Well, Justice Sotomayor  
14 and Justice Jackson, I would say with respect to  
15 the question of immediate adjacency, I think one  
16 reason why Congress didn't bother is because I  
17 don't believe Congress was at all thinking that  
18 404(g) would have any impact upon the scope of  
19 the Act.

20 Again, if Congress intended to want to  
21 definitively change the scope of the Act, one  
22 would think that the most natural move would  
23 have been to amend the definition of navigable  
24 waters.

25 JUSTICE JACKSON: But can I -- can I

1 -- can I just -- I'm sorry. You suggest that  
2 the balancing, that the limitation is about the  
3 concerns with respect to the state's  
4 administration, and 1344(g) is precisely where  
5 they're talking about what is left to the state  
6 versus the federal government. And in that  
7 statute, it just uses "adjacent."

8           So I -- with respect, that seems to me  
9 to be exactly where they would have made clear  
10 that the federal government's scope of authority  
11 was abutting or immediately adjacent, and we're  
12 leaving the rest to the states, under your own  
13 theory of what they were trying to do.

14           MR. SCHIFF: Justice Jackson, my -- my  
15 disagreement there is that that presupposes that  
16 Section 404 already regulates the universe of  
17 all wetlands and that it's essentially a -- a  
18 federal privilege whether or not any of that  
19 regulatory authority will be given back to the  
20 states.

21           But I don't believe that that's at all  
22 what Congress intended. I think Congress  
23 recognized that, setting aside the Clean Water  
24 Act, there would be a significant swath of land  
25 use and water regulation that would remain to

1 the states.

2           And I think one good example to prove  
3 that point is, as we discuss in the briefs,  
4 non-point source pollution. Everyone recognizes  
5 that non-point source pollution is a serious  
6 water quality issue, but it's never been  
7 disputed that the Clean Water Act doesn't reach  
8 that, which I think emphasizes that the purpose  
9 of Congress in enacting the Clean Water Act was  
10 not at all costs let's clean up water quality as  
11 much as we can. It was a balancing to recognize  
12 that some water quality measures, like wetlands  
13 regulation, inevitably, as the Sacketts' case  
14 demonstrates, inevitably converts EPA and the  
15 Corps into land use administrators.

16           JUSTICE JACKSON: So can I just ask  
17 you, so the reason why in your view Congress  
18 includes wetlands or thinks some wetlands should  
19 be in there is what? Is it because they can't  
20 be distinguished or because those wetlands  
21 affect the water quality of navigable waters?

22           MR. SCHIFF: Justice Jackson, I think  
23 the main answer is that precisely the rationale  
24 that Riverside Bayview gave, that inevitably, in  
25 delimiting any true waters, one will have to

1 pick a point at which land ends and water  
2 begins, and in that intermediate zone, there  
3 will be things like wetlands.

4 JUSTICE JACKSON: But, if you read  
5 Riverside Bayview carefully, it looks to me as  
6 though we were talking about the Corps'  
7 rationale, not Congress's, that we were saying  
8 the difficulty of being able to tell land from  
9 water is the reason that the Corps thought it  
10 should -- should or could include the abutting  
11 wetlands, but it doesn't suggest that that was  
12 Congress's reason, that Congress said something  
13 about wetlands because it would be too difficult  
14 to distinguish.

15 So is there something in the text or  
16 the history of the statute that points to that  
17 concern as being one of Congress?

18 MR. SCHIFF: Yes, Justice Jackson. I  
19 would go back again to the definitional text,  
20 that Congress used the term "waters." Congress  
21 knew about wetlands. Congress knew about how  
22 wetlands affect water quality even in 1972.

23 In our yellow brief at pages 4 and 5,  
24 we cite a number of examples in the years  
25 leading up to 1972 where Congress in a variety

1 of acts explicitly distinguished between  
2 wetlands and other types of waters.

3           So Riverside Bayview certainly adopts,  
4 in our view, the idea that -- that waters are  
5 ambiguous when applied to the facts on the  
6 ground, and that ambiguity necessarily means  
7 that some wetlands will be regulated, and to  
8 justify that perhaps mild excursion from the  
9 text, Riverside Bayview noted the Corps'  
10 ecological judgments, that those judgments  
11 supported the categorical rule that where the  
12 line-drawing problem arises, that is when  
13 Congress can regulate these wetlands as waters.

14           JUSTICE BARRETT: Mr. Schiff, let me  
15 follow up on Justice Jackson's question.  
16 1344(g) is the biggest problem for you, clearly.

17           Is your answer to Justice Jackson --  
18 she's pointing out that in the parenthetical in  
19 1344(g), where it gives the state -- well,  
20 1344(g) gives the state permitting authority but  
21 accepts navigable waters, essentially, including  
22 wetlands adjacent thereto, if we read "waters of  
23 the United States" as you propose, does that  
24 mean that wetlands fall in another world where  
25 neither states nor federal -- nor the federal

1 government can regulate them?

2 MR. SCHIFF: No, not at all, Justice  
3 Barrett. I mean, certainly, there will be many  
4 wetlands that will still be regulated, even if  
5 the Court adopts the -- the -- the -- the test  
6 the Sacketts have offered precisely because of  
7 this line-drawing problem, that -- that there  
8 will be wetlands that cannot be readily  
9 distinguished from adjoining waters.

10 JUSTICE BARRETT: But you're --

11 CHIEF JUSTICE ROBERTS: Thank --

12 JUSTICE BARRETT: -- you're assuming  
13 your -- oh, sorry.

14 CHIEF JUSTICE ROBERTS: Go ahead.

15 JUSTICE BARRETT: You're assuming the  
16 adjacent -- you're assuming that we adopt your  
17 -- I'll save it for my -- my round, that's fine.

18 CHIEF JUSTICE ROBERTS: Counsel, thank  
19 you. We've been talking a lot about adjacency,  
20 but your test also addresses the question of  
21 continuity. Are you saying in your brief that  
22 there is no wetland if, for example, in a few  
23 weeks in July, you know, the ground dries up and  
24 there isn't a immediate connection between wet  
25 area and the navigable water?

1           MR. SCHIFF: No, Mr. Chief Justice. I  
2 mean, we make allowance for this normal  
3 circumstances understanding that what should  
4 guide the line-drawing standard application is  
5 what would in normal circumstances be the case.

6           So, if we're --

7           CHIEF JUSTICE ROBERTS: Well, is it  
8 normal circumstances if it's from the fall to  
9 the spring, but June, July, and August, it's --  
10 you don't have that kind of connection?

11          MR. SCHIFF: If on a normal yearly  
12 basis there would not be a continuous  
13 connection, then I think it would be very hard  
14 to fit the wetland into the rationale of the  
15 line-drawing problem standard precisely.

16          CHIEF JUSTICE ROBERTS: And not simply  
17 in the area that's dried up, but you would say  
18 the entire area that is normally connected but  
19 isn't for three months in the summer, that whole  
20 area is not a wetland?

21          MR. SCHIFF: No, Mr. Chief Justice.  
22 If I understand the hypothetical correctly, it's  
23 not that it suddenly defederalizes everything.  
24 But, certainly, it's difficult to understand  
25 textually how one can regulate an area as a



1 water if on a regular basis there is no water  
2 there, much that --

3 CHIEF JUSTICE ROBERTS: Does the  
4 summer count as a regular basis? It just dries  
5 up in the summer. It's pretty common, I think,  
6 for wetlands or at least adjacent waters in many  
7 situations.

8 MR. SCHIFF: Mr. Chief Justice, it's  
9 certainly a regular occurrence. And,  
10 admittedly, this is one of the cases at the  
11 margin where I would say with respect to any  
12 legal rule there's going to be difficult cases.  
13 And perhaps that could be reduced through  
14 further agency rulemaking, but I think what's  
15 important and what we haven't really discussed,  
16 which the Court hasn't noted much yet, is  
17 comparing whatever shortcomings there may be in  
18 the line-drawing problems test to the  
19 shortcomings that are orders of magnitude  
20 greater from the only other game in town, the  
21 significant nexus test, both in terms of its  
22 lack of fidelity to the text, in terms of its  
23 subversion of the federal structure, in terms of  
24 its much greater difficulty in application.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 JUSTICE THOMAS: Counsel, I'd like to  
4 just give you a minute to at least comment on  
5 what we have said about 1344(g) in SWANCC and  
6 what the Court has said about it in Riverside,  
7 because, as I recall, we suggested that it did  
8 not control the definition of waters or  
9 certainly did not have an overwhelming impact on  
10 the definition of waters.

11 MR. SCHIFF: Thank you, Justice  
12 Thomas. Yes. In terms of the case law, no  
13 decision of this Court has ever relied upon  
14 404(g) to affirm the version of adjacency that  
15 the EPA and the Corps advance. The most was  
16 Riverside Bayview, which said that 404(g) simply  
17 means that some wetlands will be regulated, but  
18 the Court was not willing to go much beyond  
19 that.

20 And with respect to how "adjacent"  
21 actually appears in 404(g), given the context of  
22 physical topographic features, I think the most  
23 plausible understanding of that term is that  
24 Congress simply meant that those wetlands that  
25 are physically touching, the very facts that

1 were at issue in Riverside Bayview, the fact  
2 that Riverside Bayview's property was  
3 essentially a cattail marsh that blended into  
4 Lake Saint Clair. And I think that is the most  
5 that 404(g) says.

6 And, again, that's a -- a proposition  
7 that the Sacketts' test is fully consistent  
8 with. The Sacketts acknowledge that some  
9 wetlands can be regulated under the line-drawing  
10 problem standard. It's just that nothing in  
11 404(g) can reasonably be interpreted to  
12 represent some general congressional  
13 ratification of the Corps' adjacency regulation  
14 from 1977.

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Alito?

17 JUSTICE ALITO: Well, this case will  
18 have -- may have a -- an important nationwide  
19 effect, but we do decide concrete cases in  
20 controversy, so I would like you to address the  
21 theory that the government uses to determine  
22 that the Sacketts' property constitutes wetlands  
23 that can be regulated.

24 The property, as I understand it, is  
25 separated from wetlands by a road, isn't that

1 right?

2 MR. SCHIFF: Yes, Justice Alito, by --  
3 by a road and then a roadside ditch on the other  
4 side of the road. That ditch then spills about  
5 a half mile downstream into Kalispell Creek,  
6 which then itself spills another thousand feet  
7 from that point into Priest Lake.

8 JUSTICE ALITO: And how does the water  
9 from the Sacketts' property get to the ditch?

10 MR. SCHIFF: The short answer, Justice  
11 Alito, is that the water doesn't get to the  
12 ditch. It doesn't get to the wetlands. It  
13 doesn't get to Priest Lake. There is no surface  
14 connection from the Sacketts' property to any  
15 plausible water.

16 JUSTICE ALITO: Well, what is the  
17 government's theory of how the water from the  
18 Sacketts' property gets to the wetlands?

19 MR. SCHIFF: The government doesn't  
20 have a theory for that, which I think  
21 underscores how broad the significant nexus test  
22 is.

23 The government's theory is that the  
24 wetlands on the other side of the road, which  
25 are not connected to the Sacketts' property,

1 that those can be combined with the Sacketts'  
2 property on some theory that they're similarly  
3 situated and only because the government then  
4 combined this 36 acres of wetlands that it could  
5 then conclude that there was a significant  
6 relationship to Priest Lake.

7 JUSTICE ALITO: So it's only by  
8 combining the water from the Sacketts' property  
9 with this large wetlands that it comes to the  
10 conclusion that there's a significant ecological  
11 effect on Priest Lake?

12 MR. SCHIFF: Yes, Justice Alito.

13 JUSTICE ALITO: Priest Lake is  
14 navigable?

15 MR. SCHIFF: Yes.

16 JUSTICE ALITO: Does it cross a state  
17 line?

18 MR. SCHIFF: No, it does not cross a  
19 state line.

20 JUSTICE ALITO: If someone puts a boat  
21 in Priest Lake, is it possible to get to another  
22 state from Priest Lake?

23 MR. SCHIFF: One would probably have  
24 to negotiate some rapids through Priest River,  
25 but I think it's fair to say that Priest Lake

1 would certainly qualify as a water of the United  
2 States according to the interpretation that the  
3 Sacketts have offered.

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Sotomayor?

7 JUSTICE SOTOMAYOR: Yes.

8 Counsel, I think that there has been a  
9 misreading, and I obviously could be doing it,  
10 but I have read Justice Kennedy's significant  
11 nexus test, and as I read his decision, he was  
12 of the view that adjacency defined wetlands that  
13 were adjacent to navigable waters and that he  
14 was applying the significant nexus test to deal  
15 with non-navigable waters that might be waters  
16 of the United States.

17 And so I think that there are two  
18 issues in this case. Justice Alito referenced  
19 only one of them, which is whether or not the  
20 tributary that runs from the bay fen to the  
21 Sacketts' site, whether that is a marshland that  
22 -- that constitutes a water of the United  
23 States. That's what the Ninth Circuit saw.

24 But there is also the Sackett site  
25 running directly to Priest Lake, and that

1 Sackett site does run across -- below a road and  
2 below some houses. I believe the government's  
3 position -- and it can speak for itself when it  
4 gets up -- is that that connection is very  
5 direct, that there is a subsurface flow, not a  
6 groundwater flow, but a subsurface flow of  
7 water.

8           Isn't that -- am I correct about the  
9 factual nature of this case?

10           MR. SCHIFF: Justice Sotomayor, you're  
11 correct that the record contains some evidence  
12 to the effect that there is a subsurface flow  
13 from the fen wetlands that are north of the  
14 site, south underneath the Sacketts' property.

15           JUSTICE SOTOMAYOR: I'm not going that  
16 far. I'm going from the Sackett site to Priest  
17 Lake. There -- there's some evidence there's a  
18 subsurface flow there.

19           MR. SCHIFF: That is correct.

20           JUSTICE SOTOMAYOR: Now, as I  
21 understand it, there's a difference between  
22 groundwater and subsurface flows. Am I correct  
23 about that too?

24           MR. SCHIFF: I don't believe, Justice  
25 Sotomayor, that EPA has ever made such a -- such

1 a distinction. And, certainly, in the position  
2 of someone like the Sacketts, there practically  
3 is no distinction. Whether it's subsurface or  
4 really subsurface --

5 JUSTICE SOTOMAYOR: Well, I think --

6 MR. SCHIFF: -- one can't see it.

7 JUSTICE SOTOMAYOR: -- no, it's not  
8 that hard. I mean, if -- if -- yes, you can see  
9 it, and you can see subsurface water when you  
10 put your foot in the sand and you can feel it  
11 underneath the top of the sand. You can feel it  
12 in how watery your soil is. I mean, it's not  
13 impossible to know that there's a subsurface.  
14 You could put a stake or a plot or something  
15 into it and feel it immediately or have it  
16 spring up immediately.

17 So there is a difference between  
18 groundwater and subsurface water, isn't there?

19 MR. SCHIFF: Justice Sotomayor, I  
20 don't believe legally there really is any  
21 distinction. Again, if -- if the relevant point  
22 is can one distinguish anything on the Sacketts'  
23 property from Priest Lake, whether it's  
24 subsurface or substantial --

25 JUSTICE SOTOMAYOR: But you don't



1 think there's a -- there's a difference?

2 MR. SCHIFF: Well, one thing, Justice  
3 Sotomayor, that I think is problematic with  
4 relying upon any sort of subsurface connection  
5 is that it essentially renders the test  
6 limitless. I mean, it's hard to imagine --

7 JUSTICE SOTOMAYOR: Why?

8 MR. SCHIFF: -- it's hard to imagine  
9 any property in this country that does not have  
10 some degree of subsurface flow at whatever depth  
11 that will ultimately -- I mean, the hydrological  
12 cycle is unified. Ultimately, that water is  
13 going to flow to some surface water.

14 It's hard to imagine that Congress  
15 could have intended, especially in a statute  
16 that imposes such significant penalties for  
17 someone who guesses wrong as to whether or not  
18 his or her property is regulated --

19 JUSTICE SOTOMAYOR: Well, that goes  
20 back to Justice Jackson's point, that what  
21 Congress was concerned about was ensuring the --  
22 the sanctity of our waters and that those things  
23 that directly discharged into it would be safe,  
24 to keep our waters safe.

25 MR. SCHIFF: Well, Justice Sotomayor,

1 I also think Congress was concerned about --  
2 about the sanctity of -- of -- of freedom and  
3 private property rights and ensuring that people  
4 at least have fair notice as to whether their  
5 property is going to be regulated. If the test  
6 --

7 JUSTICE SOTOMAYOR: Well, I mean --

8 MR. SCHIFF: -- is surface to  
9 subsurface --

10 JUSTICE SOTOMAYOR: -- why is it their  
11 -- whatever test, even yours right now, as you,  
12 in your answers to the Chief Justice, said that  
13 we'll have to define what a normal season is,  
14 we're going to have to define how many days are  
15 continuous. So it's not a question that any  
16 test that's being proposed won't have some lack  
17 of security for homeowners. But one thing about  
18 the EPA process is you can always get -- you  
19 could always ask the EPA for an opinion as to  
20 whether or not you fall within the definition.

21 MR. SCHIFF: Yes, Justice --

22 JUSTICE SOTOMAYOR: And you then have  
23 an opportunity to fight that definition,  
24 correct?

25 MR. SCHIFF: That is correct, Justice

1 Sotomayor, but I think that actually indicates  
2 why something like the significant nexus test is  
3 so problematic. It's hard to imagine any other  
4 statutory system in the federal code that  
5 requires a potentially regulated party to  
6 initiate a rather expensive and time-consuming  
7 process just to find out whether, in fact, one  
8 is regulated.

9           And that's precisely why the  
10 jurisdictional determination process has been  
11 developed in the age of the significant nexus,  
12 because it is a test that's very difficult to  
13 know whether, in fact, one is regulated.

14           JUSTICE SOTOMAYOR: Well, that test  
15 applies, as I mentioned, only to connections  
16 that are not directly with waters. That's a  
17 different issue. But that's not how we've been  
18 -- that's not how you briefed this case or what  
19 we're looking for. We're looking for a  
20 definition that has to do with a connection that  
21 exists with traditional navigable waters.

22           We may have to develop, as was the  
23 insight of Justice Kennedy in Rapanos, a  
24 different test like the significant nexus test  
25 for those connections, like here, where there

1 might be a tributary somewhere else.

2 MR. SCHIFF: Justice Sotomayor, I  
3 would say that if the test is subsurface  
4 connections to a traditional navigable water, I  
5 guarantee you that this case or something like  
6 it will be back here in another 16 years and we  
7 will be back in the same place that we have been  
8 with property owners not knowing whether they  
9 are regulated, with the states not knowing what  
10 test to apply --

11 JUSTICE SOTOMAYOR: That's assuming  
12 it's sub -- sub -- -- subsurface water is not  
13 differentiated between groundwater.

14 MR. SCHIFF: Justice Sotomayor, again,  
15 I don't think that there is certainly a legal  
16 distinction that EPA has ever articulated  
17 between the two. And, moreover, I think, as a  
18 practical matter to the property owner, if it's  
19 subsurface, it doesn't necessarily follow that  
20 one standing in a marsh -- the Sacketts'  
21 property certainly wasn't a marsh, and there's  
22 no reason that --

23 JUSTICE SOTOMAYOR: Only because they  
24 put gravel in it.

25 MR. SCHIFF: I'm sorry, Your Honor?

1 JUSTICE SOTOMAYOR: Only because they  
2 put gravel in it.

3 MR. SCHIFF: Well, the original state  
4 of the property was before the -- the top soil  
5 was taken out and the gravel was put on it. It  
6 looked like a buildable lot. In fact, it was  
7 zoned as a buildable lot. It has a sewer  
8 hookup. It has an address. Neighbors around  
9 that property have built.

10 There was -- there's no sense that  
11 this property is something that one might think,  
12 ah, there's water somehow flowing underneath,  
13 that that connects it to Priest Lake. That's  
14 not the type of topography.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Justice Kagan?

18 JUSTICE KAGAN: Mr. Schiff, do you  
19 think there's any third position? I mean, I --  
20 I understand that you don't like the significant  
21 nexus test, but I'm going back really to Justice  
22 Kavanaugh's point about, you know, take  
23 something like you just create a dam so that --  
24 and the dam breaks up any idea that there is a  
25 continuous surface connection.

1           So, if I think, well, in that kind of  
2           situation, it just -- it just can't -- you can't  
3           be right, but I also understand some of your  
4           points about the significant nexus test, is  
5           there anything in the middle?

6           MR. SCHIFF: To some extent, Justice  
7           Kagan. I think a middle position is the idea of  
8           the nature of the barrier. I think this came up  
9           a little bit, whether it's a natural barrier or  
10          whether it's a permanent legal barrier like the  
11          roads that bound the Sacketts' property.

12          But, in a sense, it's not a  
13          particularly satisfactory middle position  
14          because it still doesn't really afford  
15          appropriate fidelity to the text. Again, if  
16          Congress -- Congress could tomorrow enact a  
17          statute saying --

18          JUSTICE KAGAN: Well, I think I'm  
19          asking you to assume that 1344 means more than  
20          you think it means and suggests that there is  
21          something in the text that says we're supposed  
22          to figure out what it means for an adjacent  
23          wetland, for a wetland to be adjacent.

24          So, if -- if I'm thinking of Justice  
25          Kavanaugh's example and thinking that looks

1 pretty adjacent to me, but, on the other hand,  
2 I'm thinking of some of the objections that you  
3 have as to the Kennedy test, you know, what do I  
4 do from there? You know, call it a backup  
5 position, call it a compromise position, call it  
6 whatever you want, is there a third option?

7 MR. SCHIFF: In that sense, Justice  
8 Kagan, I think there is. I mean, it's  
9 exemplified by the facts of the Sacketts' case  
10 in that there's not even a -- a -- there's no  
11 surface connection, much less any -- there's no  
12 surface connection from the Sacketts' property  
13 to any plausible water.

14 I mean, I think certainly --

15 JUSTICE KAGAN: That's just repeating  
16 your test. I'm asking you for a test that's  
17 different from your test.

18 MR. SCHIFF: Well, I -- I would -- I  
19 would hesitate a little bit to say it's the same  
20 thing because our test is the line-drawing  
21 problem test. But one could say that whether  
22 there might be marginal challenges about  
23 defining boundaries in other cases, certainly,  
24 where there's no surface connection, there  
25 cannot be any plausible argument that the

1 wetland itself is -- is inseparably bound up  
2 with an abutting water.

3 JUSTICE KAGAN: So your answer is no.  
4 Okay. Thank you.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Justice  
7 Gorsuch.

8 JUSTICE GORSUCH: I'd like to return  
9 to where Justice Sotomayor left off, and that is  
10 adjacency. If we're going to have something  
11 more than a continuous water surface test like  
12 we did in Riverside Bayview, if we're going to,  
13 excuse me, expand beyond that, why not just look  
14 at the geographic proximity between this  
15 property and -- and the lake?

16 The lake is the -- the waters of the  
17 United States that -- that -- that -- that EPA  
18 wishes to protect, understandably. They've got  
19 a circuitous route across a road, down a  
20 drainage ditch to an unnamed tributary to a  
21 named tributary to the lake. That's their  
22 adjacency theory. It's kind of a daisy wheel  
23 spun out from -- from the lake.

24 But that -- that's rather complicated  
25 when one looks at the map, I mean, and it's the



1 back of the petition appendix, the picture.  
2 You're -- you're blocked from -- from -- from --  
3 from the lake. Why isn't that just adjacent  
4 enough?

5 Now there's a subdivision between you  
6 and the lake, I understand, but pretty close. A  
7 lot closer route that way than this -- this  
8 rather convoluted path around.

9 MR. SCHIFF: Justice Gorsuch, I -- I  
10 think the reason why that's not satisfactory,  
11 and I recognize that I've given this answer in  
12 more than one form several times already this  
13 morning, but I would still go back again to the  
14 text.

15 It was -- obviously, Congress knows  
16 about wetlands. It included a reference to  
17 wetlands in 404(g) among other places. It chose  
18 not to include that in the definitional section.

19 That has to mean something, and what  
20 that means is that the relevant jurisdictional  
21 entity is water. If something cannot be  
22 reasonably classified as a water, taking into  
23 account the line-drawing problem standard, then  
24 the answer is simply Congress hasn't authorized  
25 it. Maybe it is a good idea in terms of water

1 quality, but that's for Congress to decide,  
2 obviously, not for the Court.

3 And that really has to be why mere  
4 geographic closeness can't justify the  
5 contratextual conclusion that a  
6 two-third-of-an-acre residential lot with a  
7 sewer hookup with an address and a mailbox is  
8 somehow considered a water of the United States.

9 JUSTICE GORSUCH: And -- and -- and --  
10 and that is what's being asked, is -- is a  
11 person who purchased a property with -- with a  
12 sewer hookup a block from the lake with a  
13 subdivision between you and the lake and a road  
14 on the other side is supposed to know that  
15 that's a water of the United States, that piece  
16 of property, or else what?

17 What -- what are the -- what are the  
18 penalties associated with this? What -- what  
19 was threatened to your clients and what -- what  
20 does one face in these circumstances?

21 MR. SCHIFF: Well, certainly, for the  
22 Sacketts in particular, they were threatened  
23 with significant civil and administrative  
24 penalties and, of course, also the continuing  
25 liability of having to restore the property to

1 the way it was before they began any work.

2 But also there is lingering over all  
3 of this discussion the threat of criminal  
4 penalties, and I think this is particularly  
5 important because the waters of the United  
6 States is as much relevant to the criminal  
7 portions of the Clean Water Act as the civil  
8 portions. It's the same text. And I think that  
9 should give the Court particular concern in  
10 indulging any sort of malleable or somewhat  
11 unclear or flexible test exemplified by the  
12 significant nexus test.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh?

16 JUSTICE KAVANAUGH: You keep  
17 emphasizing the text, but you agree that some  
18 wetlands are covered as waters of the United  
19 States, correct?

20 MR. SCHIFF: That is correct, Justice  
21 Kavanaugh.

22 JUSTICE KAVANAUGH: And so the  
23 question then becomes, as I see it, does the  
24 statute, does the text, cover only bordering or  
25 contiguous wetlands, or does it also cover what

1 we might call neighboring wetlands?

2 Is that an appropriate way to phrase  
3 what you think the precise dispute is?

4 MR. SCHIFF: Yes, that is correct,  
5 Your Honor.

6 JUSTICE KAVANAUGH: Okay. And on  
7 404(g), which, as Justice Barrett says, is -- is  
8 critical here to the case, is your argument that  
9 404(g) does not control or even illustrate what  
10 qualifies as waters of the United States, or is  
11 your argument that "adjacent," the word in  
12 404(g), does not mean neighboring or nearby but  
13 requires actual touching?

14 MR. SCHIFF: Justice Kavanaugh, I --

15 JUSTICE KAVANAUGH: Or both?

16 MR. SCHIFF: Justice Kavanaugh, I -- I  
17 -- I would say it's both. I would say, again,  
18 falling precisely like Riverside Bay, which is  
19 essentially the zenith of -- of this Court's  
20 indulgence of -- of EPA and the Corps'  
21 interpretation of the Act.

22 At most, Riverside Bayview was willing  
23 to say that 404(g) simply means that what we  
24 can't interpret waters to categorically exclude  
25 wetlands. And that's all that the Court was

1 willing to say. But the --

2 JUSTICE KAVANAUGH: Once you get  
3 there, aren't you a little bit separated from  
4 the text as you see the text? In other words, I  
5 don't know that you really agree with Riverside  
6 Bayview when it comes down to it. You're not  
7 asking for it to be overruled.

8 MR. SCHIFF: Well, Justice Kavanaugh,  
9 to be frank, we weren't all textualists then,  
10 but today --

11 JUSTICE KAVANAUGH: So -- but then --  
12 then you're asking us to put what you're calling  
13 a textual limit on something that's divorced  
14 from the text to begin with, it sounds to me  
15 like, rather than going with neighboring, which  
16 is the ordinary dictionary definition of  
17 "adjacent" and also would -- would -- well, I'll  
18 leave it there.

19 MR. SCHIFF: Well, Justice Kavanaugh,  
20 with respect to -- to -- to the ordinary  
21 understanding of adjacency, I certainly agree  
22 that in the abstract adjacent has more than one  
23 meaning. But I do believe that in the context  
24 of 404(g), where it's trying to describe  
25 relationships between topographic features, that

1 the most reasonable understanding, really, the  
2 only plausible understanding, is that it means  
3 physically touching.

4           Again, when you combine it with the  
5 fact that the central definitional section --

6           JUSTICE KAVANAUGH: Last question, why  
7 did seven straight administrations not agree  
8 with you?

9           MR. SCHIFF: Well, I wouldn't quite  
10 say it's seven straight. At least the -- under  
11 the Trump Administration, their proposal was  
12 certainly closer to -- to what the text --

13           JUSTICE KAVANAUGH: Wait. No, let's  
14 be clear. They said that it would still be  
15 covered even if it was separated by a berm or  
16 dune, for example.

17           MR. SCHIFF: No, that is correct, and  
18 --

19           JUSTICE KAVANAUGH: And under your  
20 test, that would not be covered?

21           MR. SCHIFF: That is correct, Justice  
22 Kavanaugh. And I don't presume to know more  
23 than -- than those -- those seven prior  
24 administrations, but what I do know is what is  
25 the text that Congress has used, and nothing can

1       supersede that.

2                   JUSTICE KAVANAUGH: Thank you.

3                   CHIEF JUSTICE ROBERTS: Justice  
4       Barrett?

5                   JUSTICE BARRETT: Mr. Schiff, can you  
6       explain to me why you wouldn't lose? Because I  
7       take it you're saying that you wouldn't lose if  
8       we adopt a broader definition of "adjacent,"  
9       akin to the one that Justice Kagan is proposing.

10                  MR. SCHIFF: Justice Barrett, I may  
11       have misspoken. If "adjacent" means that  
12       something is not adjacent if there is a man-made  
13       barrier as opposed to a natural barrier, then,  
14       obviously, here, the Sacketts' property is  
15       bounded by man-made barriers.

16                  And so what I meant to say is that --  
17       is that whether or not if the Court thought that  
18       natural barriers might not defeat jurisdiction,  
19       the Court could also say that at least here,  
20       with man-made barriers, there is no  
21       jurisdiction.

22                  JUSTICE BARRETT: Okay. I think -- I  
23       think I didn't articulate my question clearly  
24       enough.

25                  MR. SCHIFF: Sorry.

1 JUSTICE BARRETT: So part of what  
2 you've said is that 1344(g), Congress was doing  
3 something different, and that it didn't modify  
4 the definition of waters of the United States  
5 that was existing.

6 Okay. So here's my question. It  
7 seems to me -- and this was kind of what Justice  
8 Jackson was getting at -- that that might be  
9 true, that 1344(g) was doing something  
10 different, but what it was doing was carving out  
11 what the states could and could not regulate.

12 And if "adjacent" means something  
13 broader -- and this is what I was just starting  
14 to ask you when time expired -- if "adjacent"  
15 means something broader, then it seems to me  
16 that there is a category of wetlands that nobody  
17 could regulate.

18 So it seems to me that even though  
19 1344(g) was doing something different and even  
20 though Congress didn't modify the definition of  
21 waters of the United States, that adjacent  
22 matters to this case, and if we adopt the  
23 definition Justice Kagan is proposing, that you  
24 would lose. Am I right?

25 MR. SCHIFF: Justice Barrett, if I



1 understand what -- what Justice Kagan is  
2 proposing, that -- that neighboringness or near  
3 closeness is sufficient, then necessarily then  
4 the Sacketts property and a lot of other  
5 property in this country is going to be  
6 regulated.

7 JUSTICE BARRETT: So, in that respect,  
8 1344(g) does qualify or cast light on the  
9 definition in 1362(7) of waters of the United  
10 States?

11 MR. SCHIFF: It certainly does.  
12 And -- and as I responded to Justice Kavanaugh,  
13 the way it casts light is to indicate that to  
14 some extent wetlands are going to be regulated.  
15 The extent to which they're regulated, I think  
16 that has to be -- it's in a sense  
17 a-tail-wagging-the-dog problem.

18 JUSTICE BARRETT: But that -- but that  
19 depends on our accepting the narrower definition  
20 of "adjacent," correct? I mean, I see why your  
21 whole theory hangs together if adjacent means  
22 abutting.

23 MR. SCHIFF: Right, Your Honor.  
24 And -- and what I mean by "tail wagging the dog"  
25 is that I don't think it's really appropriate to

1 -- to look at how "adjacent" is used in 404(g)  
2 and then use that to sort of reinvent what the  
3 central definitional section from Section 502  
4 is.

5           Rather, it's the other way around.  
6 It's precisely because Section 502 was not  
7 changed that the criterion remains waters, that  
8 that must then inform what "adjacent" means in  
9 Section 404.

10           JUSTICE BARRETT: And is the idea  
11 partly that because 1344(g) was enacted in 1977  
12 and 1367 -- or 1362(7), was that 1972?

13           MR. SCHIFF: Yes, that's correct.

14           JUSTICE BARRETT: But, in any event,  
15 it was preceding, that the later legislation  
16 doesn't cast light on what the original meaning  
17 of "waters of the United States" was?

18           MR. SCHIFF: Well, it's certainly not  
19 definitive. It's not a ratification. And I  
20 don't want to go too far, Justice Barrett, in  
21 saying that it means nothing, because, again,  
22 Riverside Bayview says it does mean something.

23           But, again, it would be strange, it  
24 would be sort of an inversion of statutory  
25 interpretation to say that this parenthetical

1 reference in a provision dealing principally  
2 with permit transfer authority suddenly  
3 backfills and dramatically changes the scope of  
4 the central definitional portion of the Act,  
5 again, a portion that is as much at issue in  
6 criminal prosecution as it is in civil matters.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Jackson?

10 JUSTICE JACKSON: Sorry. So you've  
11 said several times that Riverside Bayview said,  
12 at most, that some wetlands could be regulated.  
13 But, under your test, it appears that you're  
14 requiring visual indistinguishability. And I'm  
15 trying to assess whether or not Riverside  
16 Bayview actually gets you there.

17 In that case, was it clear that the  
18 marsh area was visually indistinguishable from  
19 the abutting creek?

20 MR. SCHIFF: Yes, Justice Jackson,  
21 that is precisely how the government argued it  
22 in its briefing and at oral argument. We quote  
23 that portion in our reply brief where the  
24 emphasis is on how -- I believe these are the  
25 words that were used -- that from Riverside

1 Bayview, it would not be an exaggeration to say  
2 that one, after wading through a cattail marsh,  
3 could then swim into Lake St. Clair, that it was  
4 a -- a continuous body of water that at some  
5 point ended. And the Court, in looking at those  
6 facts, said that it's appropriate to defer to  
7 the Corps and the EPA in saying that the water  
8 ends at this point because we can't otherwise  
9 say whether it's reasonable to have it end at an  
10 earlier point.

11 JUSTICE JACKSON: But do you think  
12 that that's -- is that going to be the case in  
13 every situation, that it's indistinguishable as  
14 to when the marsh ends or the wetlands end and  
15 the creek begins? I'm just trying to imagine  
16 whether people were really confused in Riverside  
17 Bayview as to which part was wetland and which  
18 part was water, and is that your test, we have  
19 to have a visual indistinguishability?

20 MR. SCHIFF: Justice Jackson, there  
21 may have -- there was certainly a dispute among  
22 the parties as to the proper characterization of  
23 the facts, but I think what matters is -- are  
24 two things.

25 One is how the government presented

1 those facts to the Court and how the Court  
2 ultimately crafted a decision based upon those  
3 facts, meaning that the Court concluded that, as  
4 it said, between dry land and open water, the  
5 transition is not necessarily or even typically  
6 an abrupt one and that you have all sorts of  
7 features in between those two points.

8           And the Court said that it's not our  
9 place to second-guess the agency determination  
10 that in drawing the boundaries of waters, which  
11 is the central jurisdictional term, in drawing  
12 the boundaries of waters, it's not unreasonable  
13 that there may be some semi-aquatic features  
14 that are brought into that boundary.

15           JUSTICE JACKSON: So, under your test,  
16 in future cases, are we going to be debating in  
17 every case the extent to which there really is  
18 visual indistinguishability?

19           MR. SCHIFF: Absolutely not, Your  
20 Honor. And I think that if there were disputes,  
21 those disputes would be -- would pale in  
22 comparison to the number of disputes that have  
23 percolated throughout the lower courts over the  
24 last 16 years with respect to the significant  
25 nexus test.

1                   This test, the line-drawing problem  
2 test, is much simpler to apply.

3                   JUSTICE JACKSON: Thank you.

4                   CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6                   Mr. Fletcher.

7                   ORAL ARGUMENT OF BRIAN H. FLETCHER

8                   ON BEHALF OF THE RESPONDENTS

9                   MR. FLETCHER: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11                   As the discussion so far illustrates,  
12 everyone agrees that the waters protected by the  
13 Clean Water Act include some adjacent wetlands.  
14 The narrow but important question presented in  
15 this case is whether wetlands lose protection if  
16 they're separated from other waters by a barrier  
17 like a berm or a road.

18                   Overwhelming scientific evidence and  
19 essentially undisputed scientific evidence shows  
20 that those sorts of barriers do not diminish  
21 wetlands' essential role in protecting the  
22 integrity of other waters. And as Justice  
23 Kavanaugh emphasized, for 45 years, the EPA and  
24 the Army Corps have recognized that the presence  
25 of such a barrier does not categorically strip a

1 wetland of the Act's protections.

2           This Court should uphold that  
3 longstanding interpretation for three reasons.  
4 First, in 1977, Congress was presented with  
5 proposals to limit the Act's coverage that  
6 sounded very much like the proposal that you  
7 just heard, and it rejected them. Instead, it  
8 adopted Section 1344(g), which includes express  
9 textual recognition that the waters covered by  
10 the Act include adjacent wetlands.

11           The Court recognized in SWANCC, in the  
12 language that Justice Sotomayor quoted, that  
13 that was an unequivocal approval of the Corps'  
14 regulation on adjacent wetlands.

15           Second, this Court unanimously upheld  
16 those regulations in Riverside Bayview. Now  
17 it's true that the marsh at issue in that case  
18 happened to directly abut a creek such that one  
19 could wade from one and then swim in the other.  
20 But the Court did not rely on any difficulty in  
21 identifying the boundary between the creek and  
22 the lake, and there wasn't one.

23           Instead, the Court relied on what it  
24 called the agency's ecological judgment that  
25 wetlands significantly affect neighboring

1 waters. And the presence of a berm or other  
2 barrier does not sever that connection. In  
3 fact, as the 2020 Navigable Waters Protection  
4 Act emphasized, the presence of a river berm can  
5 itself be evidence of the close connection  
6 between the river and the neighboring wetlands.

7 Third and finally, the agencies are  
8 now doing what members of this Court have  
9 repeatedly urged them to do by promulgating  
10 regulations that recognize and appropriately  
11 limit the coverage of the Act. Those  
12 regulations incorporate the significant nexus  
13 test, which is a limiting construction that  
14 ensures that the Act reaches only those wetlands  
15 that must be covered to reach the traditional  
16 navigable waters in which the federal interest  
17 is indisputable.

18 CHIEF JUSTICE ROBERTS: So --

19 MR. FLETCHER: I welcome the Court's  
20 questions.

21 CHIEF JUSTICE ROBERTS: -- is -- under  
22 the position of the federal government, is a  
23 ecological and biological connection between  
24 wetlands and navigable waters enough to bring  
25 the wetlands into coverage? In other words, dry



1 land between it, but underneath -- you know, we  
2 had that case in Hawaii that indicated how far  
3 --

4 MR. FLETCHER: Yeah.

5 CHIEF JUSTICE ROBERTS: -- underneath  
6 it could go.

7 There is a biological connection. You  
8 know, you put some tracing materials in the  
9 wetlands, and they do find their way to the  
10 lake. Is that enough under your view?

11 MR. FLETCHER: Not any connection.  
12 We're not talking about the possibility that  
13 some molecules of water eventually make their  
14 way from the wetlands into the lake, but,  
15 instead, what we take to be the significant  
16 nexus standard from Justice Kennedy's opinion in  
17 Rapanos, which traces back to SWANCC and  
18 Riverside Bayview, that demands a significant  
19 effect.

20 CHIEF JUSTICE ROBERTS: So how --  
21 well, what does that mean? I mean, how much of  
22 a biological connection does there have to be?

23 MR. FLETCHER: So the agencies now  
24 have, you know, more than a decade of experience  
25 applying this in practice, and they explained in

1 the guidance that they issued after Rapanos and  
2 have sort of reiterated and refined in the NPRM  
3 that they just issued in December of 2021 the  
4 factors that they consider in assessing  
5 significant nexus, and it includes things like  
6 distance to the tributary, distance to the  
7 downstream traditional navigable water, the  
8 volume of the flow, the hydrology of the area,  
9 the presence of other wetlands.

10 I acknowledge it --

11 CHIEF JUSTICE ROBERTS: So -- so, if  
12 the Sacketts or anybody else are walking around  
13 the area, they could look at something and see  
14 how long -- what -- what's the -- the distance  
15 factor?

16 MR. FLETCHER: So the distance factor  
17 isn't a bright-line rule. You know, here, the  
18 fact --

19 CHIEF JUSTICE ROBERTS: Okay. So they  
20 know it's not a bright-line rule, but they have  
21 to figure out -- if a certain amount of whatever  
22 kind of tracing thing you use is deposited in  
23 the wetlands, they then have to figure out if  
24 that makes it all the way to the lake, no matter  
25 how far away it is.

1                   And I think, as your -- your friend  
2                   pointed out, I forget what the phrasing was,  
3                   but, you know, water goes everywhere eventually,  
4                   right, and so there's probably going to be a  
5                   biological or ecological connection of some  
6                   sort.

7                   MR. FLETCHER:   So I'd say a couple  
8                   things.

9                   First of all, this case is focused on  
10                  provisions addressing adjacent wetlands.  There  
11                  are other provisions of the regulation dealing  
12                  with isolated waters that aren't at issue here.  
13                  But, for purposes of this case, there has to be  
14                  a showing of adjacency.

15                  And, right now, the Corps and the EPA  
16                  have not tried to reduce that to a bright-line  
17                  rule.  They tried that approach in the 2015  
18                  rule, and that was criticized by many as being  
19                  arbitrary.

20                  CHIEF JUSTICE ROBERTS:  Have they  
21                  tried to reduce it to a vague rule?

22                  MR. FLETCHER:  Yeah, I think -- I  
23                  think they've said reasonable proximity, and  
24                  they've said that reasonable proximity depends  
25                  on the hydrology of the area.  If you have a

1 flat floodplain where often floods from the  
2 river reach waters or wetlands that are at some  
3 distance from the river --

4 CHIEF JUSTICE ROBERTS: So somebody  
5 looking around the lot would have to look at the  
6 wetlands, if they can see them, and the lake and  
7 say is that reasonable proximity or not?

8 MR. FLETCHER: That's right. Yes,  
9 that is the standard. And I --

10 CHIEF JUSTICE ROBERTS: That's the --  
11 that's the standard that is used in criminal  
12 prosecutions as well?

13 MR. FLETCHER: That's correct, Mr.  
14 Chief Justice, but I don't think that's an  
15 unusual standard in regulatory or criminal  
16 statutes. And as the most recent example, I'd  
17 point to the Court's last Clean Water Act case,  
18 County of Maui, where the Court adopted a  
19 standard for indirect discharges into the  
20 navigable waters, and the dissents criticized  
21 that standard because it was a multifactor test  
22 that was not capable of being reduced to precise  
23 rules.

24 CHIEF JUSTICE ROBERTS: Yeah, but the  
25 sewage plant was pretty proximate to the ocean,

1 right? How far apart -- away was it?

2 MR. FLETCHER: I don't remember  
3 exactly how far apart, but it was pretty  
4 proximate. But, on the other hand, the  
5 Sacketts' wetland is pretty proximate to the  
6 tributary and the lake. We're talking about 30  
7 feet to the tributary and just 300 feet to the  
8 lake itself.

9 CHIEF JUSTICE ROBERTS: Well, yeah, in  
10 the Hawaii case, though, we were talking about a  
11 big sewage plant.

12 MR. FLETCHER: So that's right, Mr.  
13 Chief Justice, and I guess -- I think this --  
14 this gets to another issue in the case, which is  
15 that what we're talking about now is whether  
16 wetlands are brought within the Act's coverage  
17 at all.

18 The fact that they're covered by the  
19 Act does not mean that development is  
20 prohibited. It just means that development has  
21 to be permitted. And if the Sacketts' wetlands  
22 would not significantly affect or degrade Priest  
23 Lake because of their location or their size or  
24 anything else, that's something that's  
25 appropriately taken into account in the

1 permitting process. This is just about which  
2 wetlands are going to have some examination to  
3 make sure that that degradation does not occur.

4 JUSTICE KAGAN: Can I ask you to  
5 clarify some of the answers that you just gave  
6 to the Chief Justice? I mean, the statutory  
7 language is of adjacency, and at certain points  
8 in your answer, you suggested that the  
9 significant effects test is really just the test  
10 that you use to evaluate whether there's  
11 sufficient adjacency.

12 At another point when you talked to  
13 the Chief Justice, you said that the test was  
14 reasonable proximity. Is reasonable proximity  
15 the same as significant nexus? Is -- is -- is  
16 what you're doing trying to figure out how,  
17 other than by demanding strict contiguity, one  
18 defines adjacency, and then, you know, dealing  
19 with the hard issue of it just doesn't seem as  
20 though it should be 50 but not 51, but I think  
21 what the Chief Justice is asking you is, well,  
22 what do you look to then, you know, name the  
23 three things that matter when you're saying is  
24 something adjacent enough?

25 MR. FLETCHER: Right. So "significant

1 nexus" and "adjacency" are separate concepts.  
2 Adjacency traces back to the original  
3 regulations from 1975 and 1977, picked up in  
4 Section 1344(g). The agencies have long said  
5 that adjacent wetlands are covered.

6 In Rapanos, Justice Kennedy's  
7 concurrence said that for traditional navigable  
8 waters, he accepted that adjacency alone was  
9 sufficient to justify inclusion. But, for  
10 wetlands that were adjacent to tributaries  
11 further upstream, Justice Kennedy thought that  
12 some additional showing had to be made.

13 JUSTICE KAGAN: Okay. Then, if you're  
14 going to separate them, which I had thought that  
15 you hadn't done, so my mistake, but if you're  
16 going to separate them, where does the  
17 significant nexus test come from?

18 MR. FLETCHER: So I think it's a --  
19 it's a limiting construction that limits the --  
20 sort of the broad language of the statute is  
21 waters of the United States, and as I think the  
22 Court has recognized, that could conceivably  
23 cover literally every body of water in the  
24 country.

25 We know it doesn't mean that. We also

1 know it means something more than just navigable  
2 waters. And so we need a test to figure out  
3 which additional waters are covered. And what  
4 the significant nexus test does is it says it's  
5 permissible to sweep in additional waters if  
6 they significantly affect the traditional  
7 navigable waters that were the sort of core  
8 focus of the Act.

9 JUSTICE KAGAN: Well, you haven't told  
10 me where that comes from. I mean, it might --  
11 it sounds like a very good idea to have such a  
12 test, but where does it come from?

13 MR. FLETCHER: From this Court's cases  
14 which say you have to give effect to two things.  
15 The term being defined is "navigable waters,"  
16 but the definition is broad and doesn't include  
17 any requirement of navigability.

18 And the way we read Riverside Bayview  
19 and SWANCC is to say you can include other  
20 waters that are not themselves navigable, but  
21 the justification for including them has to be  
22 their effects on the traditional navigable  
23 waters that are the core of the statute. Things  
24 like migratory birds -- that was the issue in  
25 SWANCC -- aren't good enough.



1                   JUSTICE BARRETT: And they need not be  
2 adjacent. So what Justice Kagan's question is  
3 getting to -- and I want to make certain I  
4 understand it because it's important to me --  
5 the significant nexus test is separate and  
6 apart, so it can be not adjacent, but so long as  
7 there's a significant nexus, it's still covered,  
8 it's untethered from 1344(g) in that respect?

9                   MR. FLETCHER: I want to be very clear  
10 to distinguish between what we think you have to  
11 decide in this case and then also, in candor,  
12 tell you what the agency's view is about other  
13 circumstances.

14                   So this case is about the regulations  
15 dealing with adjacent wetlands, and as to those  
16 wetlands, the agencies think they're covered if  
17 they're adjacent to traditional navigable waters  
18 or if they're adjacent to upstream tributaries  
19 and they satisfy the significant nexus test.

20                   It's an additional limiting  
21 construction that --

22                   JUSTICE BARRETT: Okay.

23                   MR. FLETCHER: -- that narrows the  
24 scope of the Act. The agency --

25                   JUSTICE ALITO: What is your -- I'm

1 sorry.

2 MR. FLETCHER: I was just going to say  
3 the agencies have also said -- and this is  
4 reflected in the Notice of Proposed Rulemaking  
5 -- they would cover other waters even if they  
6 weren't adjacent to navigable waters if they  
7 could satisfy the significant nexus test, but  
8 that's not really before you here because  
9 everyone agrees that if you accept our view that  
10 "adjacent" means neighboring, then the Sacketts'  
11 wetlands are covered.

12 I'm sorry, Justice Alito.

13 CHIEF JUSTICE ROBERTS: Justice Alito.

14 JUSTICE ALITO: What is your  
15 understanding of the term "waters"?

16 MR. FLETCHER: We think it -- so our  
17 understanding of it is reflected in the agency's  
18 regulations, which have for 45 years spelled out  
19 the different sorts of waters that are covered.  
20 I think, if I were to try -- going to reduce it  
21 to a phrase, it would be geographic features  
22 that are characterized by the presence of  
23 waters.

24 And I think where I'd part ways with  
25 my friend is that I'd say that's not just lakes,

1 streams, and rivers. It's also marshes and  
2 swamps.

3 JUSTICE ALITO: Any geographic feature  
4 that has water in it at least at some period  
5 during the course of the year, that -- that  
6 falls within the term "waters"?

7 MR. FLETCHER: So, again, as I said,  
8 this is something that the agencies have fleshed  
9 out over many decades, and one of the things  
10 that they've done is exclude both because of  
11 particular statutory provisions excluding  
12 particular types of waters and also because the  
13 agencies as a matter of regulation have excluded  
14 things like irrigation ditches, waste treatment  
15 systems, small erosional features, those sorts  
16 of things. So I don't --

17 JUSTICE ALITO: They can be man- --

18 MR. FLETCHER: -- want to say --

19 JUSTICE ALITO: -- they can be  
20 man-made features, right?

21 MR. FLETCHER: That's correct, yes.

22 JUSTICE ALITO: Why aren't irrigation  
23 ditches included?

24 MR. FLETCHER: I think irrigation  
25 ditches aren't included both because the -- the

1 agencies have made the determination that it  
2 doesn't make sense to include them and also  
3 because, typically, irrigation ditches bring  
4 water from the waters of the navigable waters,  
5 canals, rivers, things like that, and distribute  
6 it on out into rivers. They're not bringing  
7 water back into the navigable waters.

8 JUSTICE ALITO: Well, if we forget  
9 about everything the agencies have done and  
10 everything this Court has said about the  
11 question of what constitutes waters, what would  
12 you say is the definition of waters? Is it -- a  
13 definition was provided by the plurality opinion  
14 in Rapanos. You disagree with that. Does it  
15 include any place in the United States that has  
16 water in it?

17 MR. FLETCHER: No, I don't think it  
18 does. I accept the -- the Rapanos plurality's  
19 idea that it has geographic features  
20 characterized by the presence of water. I'd go  
21 further than that and say that wetlands can  
22 easily fit that description.

23 And I acknowledge that there are some  
24 difficult cases about how do you distinguish  
25 between a wash and an intermittent or a seasonal

1 stream or a river. Those cases really aren't  
2 before you here. This is a case about whether  
3 adjacent wetlands are waters, and I think, on  
4 that point, the sort of clearest place to look  
5 is Section 1344(g).

6 JUSTICE ALITO: No, but we need to  
7 know what "waters of the United States" means.  
8 That's what we're interpreting. We're really  
9 not interpreting 1344(g).

10 1344(g) may shed some light on what is  
11 meant by "waters of the United States," but  
12 we're interpreting what is meant by that phrase,  
13 that cryptic phrase, a strange phrase, "waters  
14 of the United States."

15 MR. FLETCHER: So I agree exactly with  
16 the description of what the Court ought to do.  
17 And my point was just that it's a difficult  
18 problem of how to interpret it and apply it to  
19 all of the different water features in the  
20 country.

21 And I was trying to emphasize the  
22 specific question before you is what to do about  
23 wetlands adjacent to other waters. And on that  
24 point, 1344(g)'s text and history I think speak  
25 very clearly and provide in our view dispositive

1 guidance about how to interpret and apply that  
2 general statutory language to this particular  
3 category.

4 JUSTICE KAVANAUGH: But the text  
5 doesn't say in referring to adjacent in 1344(g)  
6 whether that means bordering or contiguous and  
7 stop there or also include neighboring, as the  
8 regulation does.

9 And as I understand, the case really,  
10 as your brief set it out, comes down to, okay,  
11 what about a wetlands separated by a berm or  
12 dune or by a dike or levy?

13 And on that question, I -- I suppose,  
14 since Congress hasn't specified that it goes  
15 that extra step, why not let Congress figure out  
16 where the line is?

17 I mean, I think that's the toughest  
18 hurdle you face, is that Congress -- we've  
19 gotten, as Justice Alito, says from waters to  
20 adjacent and now from contiguous or neighboring  
21 to -- contiguous or bordering to also  
22 neighboring, and shouldn't that be Congress's  
23 job? So what's your general response to that?

24 MR. FLETCHER: So I think, if you look  
25 at 1344(g) in context, Congress has answered

1 this question. We think you'd get there past  
2 just directly abutting and to neighboring on the  
3 dictionary definitions alone, the definitions we  
4 cite at page 22 of our brief, but I don't think  
5 you need those here because of the history  
6 against which Congress acted.

7 And, Justice Barrett, this goes to  
8 your question about the chronology. The Corps  
9 of Engineers first defined the waters of the  
10 United States to include adjacent wetlands in  
11 1975, and interim regulations issued in 1975,  
12 and those regulations said adjacent or  
13 contiguous to and so I think already made it  
14 clear that we're not just limiting to contiguous  
15 right here.

16 JUSTICE KAVANAUGH: Then it spelled it  
17 out only in '77.

18 MR. FLETCHER: Then, in July of 1977,  
19 it spelled it out. It said we're deleting  
20 contiguous because that's a subset of adjacency  
21 and we're making explicit that the presence of a  
22 barrier like a berm or a dune is not enough to  
23 defeat adjacency.

24 And then Congress comes along in  
25 December of 1977 and in this carveout in 1344(g)

1 which is dividing up which waters are going to  
2 be covered by the states, which are going to be  
3 reserved to the federal governments.

4           And in doing that, Congress drew a  
5 line that was reflected in the Corps'  
6 regulations. The Corps had, when it expanded  
7 jurisdiction out, it said we're going to phase  
8 in this expansion of our jurisdiction. We're  
9 going to start with traditional navigable waters  
10 and their adjacent wetlands and then we're going  
11 to move to other things later.

12           And what Congress did in 1344(g) was  
13 say the federal government is going to keep  
14 permitting authority over phase one and the  
15 states can take permitting authority over  
16 everything else.

17           And I think that context makes it  
18 especially clear that Congress was picking up  
19 the concept of adjacency that was reflected in  
20 the Corps' regulations.

21           JUSTICE KAVANAUGH: And it's kind of a  
22 bank shot way to do it, you would acknowledge  
23 that?

24           MR. FLETCHER: So I guess, Justice  
25 Kavanaugh, I think --



1 JUSTICE KAVANAUGH: And you used the  
2 phrase "shed light on." What does -- what does  
3 that mean?

4 MR. FLETCHER: Well, I think it  
5 confirmed that the agency's understanding was  
6 correct. So, you know, this is the term, waters  
7 of the United States. The Corps, the EPA, the  
8 Department of Justice, the courts all  
9 interpreted that to reach adjacent wetlands.

10 And Congress was then presented with a  
11 lot of the same objections you're hearing now  
12 with people saying this is too much of an  
13 intrusion on the states, this is messing with  
14 farming and ranching and other activities. And  
15 there was a serious proposal to curtail the  
16 jurisdiction in the way that they suggest. But  
17 --

18 JUSTICE KAGAN: Can I --

19 JUSTICE KAVANAUGH: And Congress  
20 carved out --

21 JUSTICE ALITO: If 13- --

22 JUSTICE KAVANAUGH: -- farming and  
23 agricultural activities?

24 MR. FLETCHER: Exactly right. It did  
25 something different. It said we're not going to

1 accept a proposal to carve out wetlands from the  
2 Act's coverage entirely.

3           Instead, we're going to do two  
4 things -- three things actually. We're going to  
5 carve out certain activities like farming and  
6 ranching. We're going to transfer permitting  
7 authority over some wetlands to the states to  
8 give the states a greater role in things. And  
9 then we're going to ratify this concept of  
10 general permits to streamline the permitting  
11 process.

12           So it was sensitive to these concerns,  
13 but it rejected the idea of carving off wetland  
14 coverage in the way that Petitioners are now --

15           JUSTICE ALITO: If 1344 -- I'm sorry.

16           CHIEF JUSTICE ROBERTS: Justice  
17 Gorsuch.

18           JUSTICE GORSUCH: Thank you.

19           Mr. Fletcher, I just want to  
20 understand your concept of adjacency and how it  
21 differentiates from substantial nexus.

22           So your -- your first point was that  
23 if it's adjacent to a water of the United  
24 States, we're done. We don't do the substantial  
25 nexus test. And I want to understand how much

1 adjacency is adjacent.

2 And I think you indicated that you --  
3 you thought that this property -- and I just  
4 want to make sure I heard you right -- that this  
5 property is adjacent indeed to a water of the  
6 United States because it's close enough to  
7 Priest Lake itself.

8 MR. FLETCHER: So I want to -- that is  
9 my view.

10 JUSTICE GORSUCH: Okay.

11 MR. FLETCHER: I want to be clear  
12 about how the case has developed, though.

13 JUSTICE GORSUCH: I -- I -- I just  
14 want to make sure --

15 MR. FLETCHER: Okay.

16 JUSTICE GORSUCH: -- I just want to  
17 understand that's the view of the government.  
18 Despite the fact that there's a subdivision  
19 between this property and the lake, it's still  
20 adjacent to the lake?

21 MR. FLETCHER: That's the government's  
22 view. That --

23 JUSTICE GORSUCH: And it's adjacent  
24 why? What's the definition of "adjacency"  
25 that's independent from substantial nexus? And

1 then I have a couple follow-ups to that.

2 MR. FLETCHER: Sure. So it's -- the  
3 agency's understanding of adjacency is, you  
4 know, neighboring, and we have -- they have  
5 cached that out by saying it's a reasonable  
6 proximity to a covered water.

7 JUSTICE GORSUCH: Is there a mileage  
8 limit to that?

9 MR. FLETCHER: So they haven't tried  
10 to do that. They did try that in the 2015 rule.  
11 They said there anything within a hundred feet  
12 or anything within a hundred-year floodplain and  
13 1500 feet. And they were --

14 JUSTICE GORSUCH: But those have been  
15 rejected.

16 MR. FLETCHER: Those have been  
17 rejected.

18 JUSTICE GORSUCH: So does a reasonable  
19 landowner have any idea? So, for example, in  
20 Priest Lake, I imagine that most of the water  
21 flow and rainfall and snowfall in quite a large  
22 geographic area drains into the lake eventually  
23 or wishes to, unless diverted.

24 Would that whole watershed be adjacent  
25 to?

1 MR. FLETCHER: So I don't think so,  
2 Justice Gorsuch. And also as -- I am  
3 sympathetic to the idea of how does a landowner  
4 know under the standard whether their land is  
5 covered. It's important to recognize that there  
6 are other limits too. They have to actually be  
7 wetlands. So --

8 JUSTICE GORSUCH: No, I understand  
9 that. I'm just asking about adjacency.

10 MR. FLETCHER: Understood.

11 JUSTICE GORSUCH: How does anyone  
12 know, any reasonable person know, within maybe  
13 several hundred square miles in -- in a  
14 watershed that drains into a body of water that  
15 is a water of the United States, know whether or  
16 not their -- their land is adjacent to?

17 MR. FLETCHER: So I think we are  
18 talking about adjacency, and that may not be  
19 something that gives you bright-line rules, but  
20 it rules out things that are many miles away.

21 JUSTICE GORSUCH: Does it?

22 MR. FLETCHER: In -- in my --

23 JUSTICE GORSUCH: Are you sure the EPA  
24 would take that view?

25 MR. FLETCHER: In -- I've asked this

1 question. The agencies have told me they do not  
2 draw bright-line rules. They do not think 300  
3 feet is unreasonable for adjacency.

4 JUSTICE GORSUCH: So how about 3,000  
5 feet? Could be?

6 MR. FLETCHER: I don't -- I don't know  
7 the answer to that, Justice Gorsuch.

8 JUSTICE GORSUCH: Could it be three  
9 miles?

10 MR. FLETCHER: I -- I don't think it  
11 could be three miles.

12 JUSTICE JACKSON: Is there a process  
13 for --

14 JUSTICE GORSUCH: One -- I'm -- I'm  
15 sorry. I'm just -- I'm just -- so -- so it  
16 couldn't be three miles?

17 MR. FLETCHER: I don't think it could,  
18 Justice Gorsuch.

19 JUSTICE GORSUCH: Could it be two  
20 miles?

21 MR. FLETCHER: That, again, when we  
22 start to talk about miles, that sounds too far  
23 to be adjacent -- to reasonably be proximate to.

24 JUSTICE GORSUCH: One mile?

25 MR. FLETCHER: Again -- and I see

1 where this is headed.

2 (Laughter.)

3 MR. FLETCHER: But, again, I think --

4 JUSTICE GORSUCH: So, if the federal  
5 government doesn't know, how is a person subject  
6 to criminal time in federal prison supposed to  
7 know?

8 MR. FLETCHER: So the agencies, in  
9 recognition of this problem, make available free  
10 of charge jurisdictional determinations as to  
11 any property. They also publicize their manuals  
12 and make available on websites every  
13 jurisdictional --

14 JUSTICE GORSUCH: Their manuals,  
15 though, don't tell us the answer.

16 MR. FLETCHER: So I understand,  
17 Justice Gorsuch, and I -- I think you could make  
18 similar criticisms and -- and the dissenting  
19 Justices did make similar criticisms of the  
20 functional equivalent to an indirect discharge  
21 standard in County of Maui. And the Court  
22 recognized that sometimes Congress gives us laws  
23 where the text isn't susceptible to bright-line  
24 rules. I think adjacency is one of those that  
25 cannot be --

1 JUSTICE GORSUCH: I'm done on  
2 adjacency. I've got some substantial nexus  
3 questions, but I've got a colleague who wants to  
4 ask a question first.

5 JUSTICE JACKSON: Yes, I just -- I  
6 just wanted to follow up on Justice Gorsuch's  
7 very fair points, which were my points. How do  
8 -- how do people know? Is there a process by  
9 which a homeowner can ask?

10 MR. FLETCHER: Yes. Any homeowner can  
11 ask the Corps for a jurisdictional  
12 determination. The Corps makes those available  
13 free of charge.

14 JUSTICE JACKSON: And so you're not  
15 really facing criminal liability without the  
16 opportunity to get an assessment from the  
17 government regarding your particular  
18 circumstances?

19 MR. FLETCHER: That's correct.

20 JUSTICE JACKSON: All right. And --

21 JUSTICE ALITO: And what happens if  
22 this -- if the -- the government's determination  
23 based on this multifactor test is that you can't  
24 develop your property? Then what recourse does  
25 the homeowner have?



1 MR. FLETCHER: The homeowner can  
2 challenge that determination. If we're talking  
3 about a determination that you can't develop,  
4 that wouldn't just be a jurisdictional  
5 determination. That would have to also be a  
6 permitting decision --

7 JUSTICE ALITO: Yeah. Okay. But --

8 MR. FLETCHER: -- because just being  
9 covered doesn't mean you can't develop.

10 JUSTICE ALITO: -- what if the  
11 homeowner doesn't agree with the jurisdictional  
12 decision?

13 MR. FLETCHER: This Court's decision  
14 in Hawkes makes clear that the homeowner can  
15 seek judicial review of that at that point,  
16 without potentially incurring any penalties, can  
17 challenge the jurisdictional determination there  
18 and can also seek a permit, you know, and that  
19 is -- I think it's important to emphasize just  
20 again that being covered by the Clean Water Act  
21 doesn't mean no development. It means review.

22 And the Corps have -- have taken a lot  
23 of steps at the Congress's behest to streamline  
24 the process through the availability of  
25 nationwide permits for things like road

1 construction, for the development of dams, for  
2 single-family home construction, in order to --

3 JUSTICE BARRETT: But the  
4 site-specific which is applicable to the  
5 Sacketts, you don't dispute in your brief that  
6 that can cost hundreds of thousand dollars and  
7 be years and years? It's just the general  
8 permitting that gets you out of that and gets  
9 you in the \$14,000 range in the shorter time  
10 period?

11 MR. FLETCHER: So we think the several  
12 hundred thousand dollars is exaggerated for the  
13 site-specific permits as well. The same source  
14 that we cite on page 37 of our brief for the 4-  
15 to 14,000 for nationwide permits gives numbers  
16 of 17,000 to 35,000 dollars as the usual cost --

17 JUSTICE BARRETT: Site-specific?

18 MR. FLETCHER: For site-specific,  
19 that's right. And it's also important to  
20 recognize that those site-specific permits often  
21 involve much bigger projects that could be major  
22 developments spanning many, many acres. So  
23 that's the agency's best estimate of the cost of  
24 a simple --

25 JUSTICE BARRETT: So Rapanos was just

1 wrong in citing that statistic?

2 MR. FLETCHER: In our view, that  
3 statistic is not consistent with the best  
4 information we have now. And that's from the  
5 2021 regulatory impact analysis of the  
6 re-issuance of the nationwide permits.

7 JUSTICE SOTOMAYOR: Your -- your  
8 adversary, the other side -- I shouldn't call  
9 them adversary -- your -- the other side argued  
10 that Mr. Sackett could not tell this was a  
11 marshland. Is that true? Because you said the  
12 first thing is it has to be a wetland.

13 MR. FLETCHER: So I don't know what  
14 Mr. Sackett could tell, and I don't want to  
15 speak to that. What I can speak to is what's in  
16 the record, which is communications from the  
17 Army Corps to the prior owner in 1996 saying  
18 this is a jurisdictional wetland, you would need  
19 a permit to build, here's information about how  
20 to seek nationwide permits.

21 And we also have the pictures of the  
22 property that are at Petition Appendix 37 to 39  
23 and also in the Joint Appendix. Now we don't  
24 have pictures before it was filled in with  
25 gravel, but the pictures after it was filled in

1 with gravel show that the parts that are not  
2 filled with gravel have standing water in them.

3 And also the Sacketts' own  
4 environmental consultant who came and looked at  
5 the property confirmed the Corps' judgment that  
6 these are wetlands.

7 I think it's also worth emphasizing  
8 that although they're now separated by the  
9 larger fen across the street by Kalispell Bay  
10 Road, historically, before the road was built,  
11 that wasn't true. It was all part of one  
12 wetlands complex, and the whole fen drained down  
13 through the Sacketts' property and into Priest  
14 Lake.

15 JUSTICE KAVANAUGH: Is it possible --

16 JUSTICE SOTOMAYOR: Counsel --

17 JUSTICE KAVANAUGH: Go ahead.

18 JUSTICE SOTOMAYOR: Just one last  
19 question, and borrowing from Justice -- what  
20 Justice Kagan did before, as you can probably  
21 tell, some of my colleagues are dubious that  
22 this is precise enough definition, adjacency, to  
23 survive.

24 So is there another test? Not the  
25 Rapanos test, not the adjacency test, not the

1 significant nexus test. But is there another  
2 test that could be more precise and less  
3 open-ended than the adjacency test or the  
4 significant nexus test that you use? Is there  
5 some sort of connection that could be  
6 articulated?

7 MR. FLETCHER: So I'd say a couple  
8 things about that.

9 I'd say, first of all, that if you're  
10 in that world, you're past the sort of  
11 line-drawing problem or the notion that wetlands  
12 aren't really waters and so are only covered if  
13 they're indistinguishable, and, instead, we're  
14 making a judgment about which wetlands are  
15 appropriate to cover because of their effect.

16 JUSTICE SOTOMAYOR: Exactly.

17 MR. FLETCHER: Now there are different  
18 ways to draw that line. Justice Kennedy  
19 articulated the significant nexus test. The --

20 JUSTICE SOTOMAYOR: But that's -- but  
21 that's when it's not adjacent, correct?

22 MR. FLETCHER: That's when it's not  
23 adjacent to a traditional navigable water.

24 JUSTICE SOTOMAYOR: Right. I want to  
25 go --

1           MR. FLETCHER: That does apply to  
2 adjacent to a tributary.

3           JUSTICE SOTOMAYOR: -- because we seem  
4 to be searching for wetlands adjacent --

5           MR. FLETCHER: Right.

6           JUSTICE SOTOMAYOR: -- so let's stick  
7 to that.

8           MR. FLETCHER: Right. So, for  
9 wetlands adjacent, if you wanted a sort of  
10 crisper, clearer definition of adjacent, I --  
11 as I think my colloquy with Justice Gorsuch  
12 illustrates, I think it's difficult to say that  
13 there's one single bright-line answer. The  
14 agencies are taking comment on this and are  
15 considering whether there are things that they  
16 could do to provide greater clarity to the  
17 regulated public on all parts of the test,  
18 including adjacency and significant nexus.

19           The 2015 rule, as we discussed, tried  
20 to draw some bright-line rules. Those were  
21 criticized as arbitrary and overinclusive, which  
22 is the problem with bright-line rules, that  
23 they're overinclusive or underinclusive. But I  
24 certainly think there is a range of reasonable  
25 understandings of what adjacency means, and also

1 I know you're focused on that, but significant  
2 nexus too.

3 JUSTICE KAGAN: Did I just understand  
4 you to say that the rule that you're issuing  
5 may, in fact, have more guidance than we  
6 currently have as to what "adjacency" means?

7 MR. FLETCHER: I don't want to  
8 represent what's coming in the forthcoming rule  
9 because it's not issued yet. By definition, the  
10 agencies haven't finished their deliberation. I  
11 will say they've sought comment on how to cache  
12 out, how to crystallize this significant nexus  
13 test and the adjacency framework that it is a  
14 part of. And they've also said that even after  
15 this rulemaking, they are interested in --

16 JUSTICE KAGAN: When is the rulemaking  
17 coming down?

18 MR. FLETCHER: So it's with OMB now.  
19 It's public that in September it went over to  
20 the Office of Management and Budget for  
21 interagency review. The agencies have told me  
22 that they still expect to issue it by the end of  
23 the year.

24 JUSTICE KAVANAUGH: Is it possible for  
25 you to be correct about the adjacent test as

1 articulated so far, but the Sacketts win?

2 MR. FLETCHER: I don't think so,  
3 Justice Kavanaugh. I don't --

4 JUSTICE KAVANAUGH: And why is that?

5 MR. FLETCHER: So I don't take them to  
6 be disputing that if adjacency means something  
7 more than just directly abutting or contiguous  
8 with, then their property satisfies that  
9 standard because it's just 30 feet away from the  
10 tributary across the street.

11 JUSTICE GORSUCH: -- across the street  
12 because that's -- that's where we need the  
13 substantial nexus test, right?

14 MR. FLETCHER: No, the substantial  
15 nexus has to go to the navigable water, sort of  
16 downstream navigable water.

17 JUSTICE GORSUCH: Oh, I thought -- I  
18 thought, if you're adjacent to a water of the  
19 United States, you're good to go.

20 MR. FLETCHER: I'm sorry. Yes, yes,  
21 yes.

22 JUSTICE GORSUCH: Okay, but -- so you  
23 need substantial nexus if you're working through  
24 the tributary, which is, if you look at the  
25 appendix, that great picture at the end is



1 across the street, through a ditch, and then  
2 down through a creek, and then it eventually  
3 gets to the water of the United States. And so,  
4 for that, you need the substantial nexus between  
5 the Sacketts' property across the road and into  
6 the ditch at least, right?

7 MR. FLETCHER: So, yes, but with a  
8 couple caveats if I -- if I could.

9 JUSTICE GORSUCH: Okay.

10 MR. FLETCHER: You're right that you  
11 do need to satisfy the significant nexus test if  
12 you're relying --

13 JUSTICE GORSUCH: Yeah. Right.  
14 Significant nexus.

15 MR. FLETCHER: -- on adjacent to a  
16 tributary.

17 JUSTICE GORSUCH: Yeah. Yeah. Okay.  
18 So we're going that way. Does it -- first of  
19 all, does the significant nexus have to be to  
20 the ditch across the road or all the way down to  
21 the -- the lake?

22 MR. FLETCHER: All the way down to the  
23 lake.

24 JUSTICE GORSUCH: Okay.

25 MR. FLETCHER: That's the limiting

1 work that it does. It says --

2 JUSTICE GORSUCH: Okay. Great.  
3 That's helpful. How much? It's the same  
4 question, different test.

5 MR. FLETCHER: Yeah.

6 (Laughter.)

7 JUSTICE GORSUCH: And -- and the Chief  
8 kind of alluded to this already. How many parts  
9 per million of what kind of stuff has to get  
10 from the Sacketts' property across the road into  
11 a ditch, I don't know how far -- how many  
12 thousands of feet over to a -- a -- a creek, and  
13 then from the creek down into the lake?

14 MR. FLETCHER: So I'm going to give  
15 you a similar answer, which is to say I can give  
16 you qualitative --

17 JUSTICE GORSUCH: But you don't know?

18 MR. FLETCHER: No, no. Respectfully,  
19 Justice Gorsuch, in law, I think there's a  
20 qualitative standard with guideposts that isn't  
21 determinative.

22 JUSTICE GORSUCH: You can call up your  
23 local friendly agent and he'll tell you, yes or  
24 no?

25 MR. FLETCHER: Will tell you here are

1 the guidelines that the agencies use. They'll  
2 tell you free of charge what they think. And if  
3 you don't like what they think, you're free to  
4 challenge that in court, yes.

5 JUSTICE GORSUCH: Okay. So that's --  
6 so we don't know until he comes out and tells  
7 you? I mean, is there -- what -- what is the  
8 standard? I mean, give me your best shot.

9 MR. FLETCHER: So it's do the wetlands  
10 with other similarly situated wetlands  
11 significantly affect the chemical, biological,  
12 or physical integrity of downstream waters.

13 JUSTICE GORSUCH: And what does that  
14 mean?

15 MR. FLETCHER: The agencies look at  
16 the functions that are typically performed by  
17 wetlands, like retention of flood waters,  
18 filtering of pollutants, provision of flow  
19 during dry periods, and they look at the  
20 distance, they look at the amount of flow from  
21 the wetland and other wetlands down to the  
22 downstream navigable water, and they look at the  
23 climate.

24 JUSTICE GORSUCH: How is that  
25 different than adjacent?

1           MR. FLETCHER: So I think adjacent is  
2 focused on reasonable proximity.

3           JUSTICE GORSUCH: I thought that was  
4 part of the test you just gave me too.

5           MR. FLETCHER: Distance -- distance is  
6 one factor, but what the significant nexus test  
7 says is that if you're going to be relying on  
8 adjacency to some upstream tributary, that's not  
9 good enough to justify coverage. You have to  
10 show that that has a significant effect on the  
11 downstream navigable waters. It makes it harder  
12 to include wetlands that are adjacent only to  
13 tributaries and not to navigable waters.

14           JUSTICE GORSUCH: Thank you.

15           JUSTICE BARRETT: Mr. Fletcher, is the  
16 government estopped -- is the Corps or the EPA  
17 estopped from going after you if you get a  
18 jurisdictional determination and they say, yeah,  
19 not within our jurisdiction, not a wetland, then  
20 are you protected?

21           MR. FLETCHER: That's my understanding  
22 at least for five years. Jurisdictional  
23 determinations are good for five years, and I  
24 think one of the reasons that this Court gave in  
25 Hawkes for why those are judicially reviewable

1 final agency action is because they're binding  
2 on the Corps and the EPA for that five-year  
3 period.

4 JUSTICE BARRETT: One other question.  
5 So the significant nexus test -- do you want me  
6 to stop?

7 CHIEF JUSTICE ROBERTS: Go ahead.  
8 Yeah.

9 JUSTICE BARRETT: The significant  
10 nexus test, you said, is separate and apart and  
11 the subject of a different rulemaking and that  
12 the agency has a broader view than adjacency,  
13 than adjacency would be here.

14 So the significant nexus test, I take  
15 it, would be grounded in waters of the United  
16 States and not 1344(g)?

17 MR. FLETCHER: That's right, yes.

18 JUSTICE BARRETT: And if -- if we  
19 accepted the significant nexus test, we wouldn't  
20 even really need 1344(g) because it would be  
21 broader than adjacency?

22 MR. FLETCHER: I think potentially  
23 that's right. But I think that's what makes --  
24 1344(g) makes this case about adjacent wetlands  
25 an even easier case and doesn't require you to

1 pass on the validity of that broader theory.

2 JUSTICE BARRETT: But, if waters of  
3 the United States already included everything  
4 with a significant nexus, then why does  
5 adjacency even matter in 1344(g)?

6 MR. FLETCHER: Well, I think adjacency  
7 still matters in 1344(g) because that's express  
8 textual confirmation that Congress understood  
9 that adjacent wetlands are covered. The  
10 agencies, as reflected in the rulemaking, think  
11 that the Act's coverage goes beyond that in ways  
12 that might subsume the adjacent wetlands theory,  
13 but I think, for purposes of this case, 1344(g)  
14 would be -- still be very, very instructive.

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 Justice Thomas?

18 JUSTICE THOMAS: Mr. Fletcher, it --  
19 it seems as though when there's a body of water  
20 and a nearby wetland, there's a presumption that  
21 it's covered by the Clean Water Act. The -- and  
22 then the -- the homeowner or whomever owns it or  
23 attempts to develop it has to opt out in some  
24 way.

25 Can you give me an example of a body

1 of water and nearby land that is automatically  
2 or presumptively excluded from coverage?

3 MR. FLETCHER: Sure. So I think, if I  
4 understand the question, the agencies have  
5 defined some automatic exclusions. You know, in  
6 addition to just anything that doesn't satisfy  
7 the significant nexus test, they've ruled out  
8 things like certain ditches that are excavated  
9 in uplands, small erosional features, things  
10 that are isolated and --

11 JUSTICE THOMAS: No, I mean, you know,  
12 I grew up in -- in low country Georgia and you  
13 had standing water. That was normal.

14 And I'm thinking of something that's  
15 natural like that, that is presumptively not  
16 covered and is not near -- not bordering on -- I  
17 don't want to use the term adjacent. I'm done  
18 with that word.

19 (Laughter.)

20 JUSTICE THOMAS: Bordering on a body  
21 of water.

22 MR. FLETCHER: Sure. So I -- I don't  
23 know that the agencies have talked in terms of  
24 presumptively not covered. I think the best  
25 thing that I can point you towards is in the

1 2021 NPRM, and this is at page 69432.

2 The agencies, in explaining that the  
3 significant nexus test really has teeth,  
4 explained that they routinely conclude that  
5 waters aren't covered and they give half a dozen  
6 or so specific examples of the types of isolated  
7 things that are definitely waters but still  
8 aren't covered because they don't have enough of  
9 a connection to the downstream now.

10 JUSTICE THOMAS: So, in other words,  
11 if I were still living there, I wouldn't know  
12 until you told me?

13 MR. FLETCHER: No, Justice Thomas,  
14 respectfully, I -- I disagree with that. I  
15 think that if you have an isolated body of  
16 water, an isolated, you know, farm pond or  
17 something like that, there are some things that  
18 are categorically excluded.

19 If you're not in one of those  
20 categories, the question that you'd have to ask  
21 is, is there -- is this adjacent to or is there  
22 a significant nexus with the navigable waters?  
23 And I think, for an isolated body of water, the  
24 answer to that would be no.

25 JUSTICE THOMAS: And could you --



1 if -- if I were concerned about the authority of  
2 EPA to regulate a purely intrastate body of  
3 water or associated wetland, where would I find  
4 the authority for that, or would you give me  
5 your best argument for the authority of the --  
6 of the government to regulate that?

7 MR. FLETCHER: Sure. I think it's  
8 authority that's common ground between us and  
9 Petitioners --

10 JUSTICE THOMAS: Yeah.

11 MR. FLETCHER: -- that the Commerce  
12 Clause gives the federal government the  
13 authority to regulate the channels of interstate  
14 commerce, including navigable waters, whether  
15 they're interstate or intrastate, if they can be  
16 used in -- to transport commerce, that's within  
17 the commerce power. That's common ground  
18 between the parties.

19 And then also, and this is the next  
20 step, that authority extends beyond just things  
21 that happen in the channels but also things that  
22 happen outside the channels but could damage  
23 them. That's something that's been  
24 uncontroversial since the 1899 Rivers and  
25 Harbors Act, which extended up to tributaries

1 and the banks of tributaries of navigable  
2 waters, and it's really necessary for Congress  
3 to be able to protect the channels of commerce  
4 to also be able to protect activities that  
5 affect those channels.

6 JUSTICE THOMAS: What is a channel of  
7 commerce? I am talking about a purely  
8 intrastate, for example, a lake, purely  
9 intrastate. How does that get to be a channel  
10 of commerce?

11 MR. FLETCHER: So I'd -- I'd point to  
12 the same case that my friend did, the Great Salt  
13 Lake was at issue in some litigation between  
14 Utah and the United States.

15 And what the Court said is, even  
16 though it's intrastate and there's no water  
17 connection to some out-of-state body, you could  
18 still move commerce across it and that commerce  
19 could be moving in intrastate if you married up  
20 the transport over water with transport over  
21 land.

22 JUSTICE THOMAS: Is there a lot of  
23 transportation over the Great Salt Lake?

24 MR. FLETCHER: Apparently not. That's  
25 why it was in litigation. But the Court held

1 that a little bit from the 1880s was enough.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: I guess  
4 there's less and less.

5 Justice Alito?

6 JUSTICE ALITO: Does your  
7 understanding of "waters of the United States"  
8 take into account any of the clear statement  
9 rules that have been invoked on the other side,  
10 for example, the effect on federalism, the fact  
11 that you're reading an awful lot into a  
12 parenthetical in 1344(g).

13 Your -- your -- your argument is that  
14 with this parenthetical, Congress did something  
15 that has major importance.

16 And also the fact that there may be a  
17 vagueness problem. Do you take any of that into  
18 account?

19 MR. FLETCHER: I think -- yes. I  
20 think those considerations are all reflected in  
21 this Court's prior decisions. And we take the  
22 significant nexus test to be consistent with  
23 those decisions and to be a limiting  
24 construction, a narrowing construction on the  
25 covered waters that make sure that the covered

1 waters include all the waters that are necessary  
2 to achieve the goal that I talked about with  
3 Justice Thomas and that leave waters that are  
4 aren't essential to that goal to the states to  
5 regulate.

6 JUSTICE ALITO: Okay. So it sounds  
7 like your understanding of "waters of the United  
8 States" is any -- I come back to my earlier  
9 question -- anything in the United States that  
10 has water in it if it has an ecological effect  
11 on -- on -- on waters -- on navigable waters, is  
12 that right? And then these clear statement  
13 rules narrow that? That's your interpretation  
14 of the phrase "waters" -- "waters"?

15 MR. FLETCHER: I wouldn't say any  
16 effect is good enough. I think the concept is  
17 --

18 JUSTICE ALITO: Significant.

19 MR. FLETCHER: -- significant nexus  
20 from this Court's cases, but, yes.

21 JUSTICE ALITO: Would you win if  
22 1344(g) had not been enacted?

23 MR. FLETCHER: I think we would. I  
24 think the Corps of Engineers and the EPA got it  
25 right the first time when they said adjacent

1 wetlands are regulated under the plain text of  
2 the statute. What 1344 does for you is that it  
3 tells you that Congress looked at this problem,  
4 considered proposals to cut back the Act, and  
5 then essentially approved the Corps'  
6 interpretation in express statutory text while  
7 adopting other changes to the Act to deal with  
8 some of the concerns that were raised.

9 JUSTICE ALITO: Just out of curiosity,  
10 what is your understanding of "of the United  
11 States"? Does that mean in the United States?  
12 Does it mean something else?

13 MR. FLETCHER: I think it means more  
14 than just "in the United States." We take it to  
15 mean waters in which there's a federal interest,  
16 waters that affect the navigable waters that are  
17 -- where the federal interest is indisputable.  
18 We take it to be sort of reiterating that point.

19 JUSTICE ALITO: That would extend  
20 very, very far, would it not?

21 MR. FLETCHER: It's true that the  
22 Act's coverage is broad. It's been understood  
23 as broad from the beginning. And that was  
24 Congress's intent, you know, was to  
25 comprehensively regulate the waters of the

1 United States because the prior system that  
2 relied primarily on states had proved  
3 insufficient, in part because this isn't a  
4 problem that the states can solve by themselves  
5 because pollution that happens in one state or  
6 the destruction of wetlands in one state have  
7 consequences that may be felt in many states  
8 downstream that can't themselves regulate to  
9 address it.

10 JUSTICE ALITO: Do you doubt that  
11 Congress could regulate dry land on the theory  
12 that it has a significant -- together with other  
13 similar pieces of dry land, it has a significant  
14 effect on interstate commerce?

15 MR. FLETCHER: I think I would  
16 probably defend such a law. And I think the  
17 Rivers and Harbors Act was a version of that  
18 which said you can't place refuse on the banks  
19 of tributaries to navigable waters because it  
20 could wash downstream into the navigable waters.  
21 But I think that's, you know, stretching out  
22 further certainly than Congress did here.

23 JUSTICE ALITO: So, if that's the  
24 limitation on "of the United States," it's not  
25 much of a limitation?

1           MR. FLETCHER: So, Justice Alito, I  
2 disagree, and I think the -- the proof is sort  
3 of in the pudding. The agencies have told us,  
4 in proposing to recodify the significant nexus  
5 test that we're defending here today, that it  
6 has real teeth, that they routinely conclude  
7 that it's not satisfied, and that something like  
8 25 percent of jurisdictional determinations made  
9 under the post-Rapanos guidance conclude that  
10 there is no jurisdiction under the Act.

11           So I think that that's real concrete  
12 evidence that this is broad because Congress's  
13 purpose was broad, but it's not unlimited.

14           JUSTICE ALITO: What the agencies have  
15 done, I would imagine, is to take a very broad  
16 provision that can be re- -- can be read to give  
17 them almost plenary authority and make some  
18 pragmatic judgments about how far they want to  
19 go based on all sorts of factors. Is that  
20 unfair?

21           MR. FLETCHER: I -- I don't think it's  
22 unfair in the sense that I think pragmatism,  
23 administrability, considerations of policy have  
24 factored into this rulemaking, I'm sure. But I  
25 think I -- the thing I'd add to what you said is

1 that the agencies have also been mindful,  
2 especially in the ongoing rulemaking, of the  
3 guidance provided by this Court's decisions,  
4 which have significantly narrowed the agencies'  
5 interpretation from where it was in the '80s.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Sotomayor?

9 JUSTICE SOTOMAYOR: I just want to be  
10 clear, you're defending the significant nexus  
11 test with respect to use when it's not adjacent  
12 to navigable waters, correct?

13 MR. FLETCHER: That's correct.

14 JUSTICE SOTOMAYOR: But -- so are you  
15 giving up the argument that the Sackett  
16 property -- that the Sackett wetland is covered  
17 by the Act simply because it is adjacent to  
18 Priest Lake? I thought --

19 MR. FLETCHER: So this is -- I didn't  
20 get a chance to get this out in response to  
21 Justice Gorsuch. What I wanted to say is the  
22 agencies do think and argued previously that the  
23 wetland is adjacent to the lake itself. The  
24 district court upheld that determination. We  
25 didn't renew that argument in the Ninth Circuit



1 or in our briefs in this Court. We relied on  
2 adjacency to the tributary and the additional  
3 showing of a significant nexus to Priest Lake.  
4 So that's how the case has been briefed and  
5 argued as it comes to this Court. But if you're  
6 asking about the agencies' view --

7 JUSTICE SOTOMAYOR: Why did you give  
8 it up?

9 MR. FLETCHER: I don't know why that  
10 decision was made. I would guess that it's  
11 because adjacency to the tributary is in some  
12 ways a simpler test. It's only 30 feet from the  
13 tributary, and because we felt confident that we  
14 could make this showing of significant nexus  
15 down to Priest Lake, it was the sort of simpler  
16 way to justify the conclusion that the property  
17 is covered.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?  
19 Justice Gorsuch?

20 JUSTICE KAVANAUGH: I just want to  
21 follow up on Justice Gorsuch's earlier questions  
22 because I think he identified something that  
23 this Court's overwhelmingly been concerned about  
24 for decades, mens rea and not punishing innocent  
25 people who make a mistake, an innocent mistake.

1           So what assurance can you provide on  
2 that front that some of the hypotheticals about  
3 someone being penalized for making a mistaken  
4 but reasonable judgment about the status of  
5 their land will not, in fact, be punished?

6           MR. FLETCHER: So I'd say a couple  
7 things.

8           The first one is this Court made the  
9 point in Maui that the civil penalties  
10 provisions direct courts to consider things like  
11 essentially mens rea or culpability in deciding  
12 the amount of civil penalties, and as the Court  
13 said there, it was confident the district courts  
14 would take that into account. In the agencies'  
15 experience, they do.

16           On the criminal side of the house,  
17 it's true that the -- 1319(d) of the Act does  
18 provide for criminal -- potential criminal  
19 liability for negligent or knowing violations.  
20 As a matter of practice, the agencies tell me  
21 that it's very unusual to bring criminal  
22 prosecutions absent sort of willful conduct.

23           JUSTICE KAVANAUGH: And then, I mean,  
24 to state the obvious, that negligent provision  
25 is a red flag, so what -- what do you have to

1 say about that?

2 MR. FLETCHER: Yeah, understood. So  
3 I'd say two things.

4 You know, first, as a matter of  
5 practice, I think it's rare for simple -- in  
6 fact, very unusual for simple negligence to give  
7 rise to criminal liability, that criminal  
8 prosecutions are brought only when there's some  
9 sort of serious aggravating conduct.

10 And the other thing that I'd say is,  
11 you know, we think that standards like this, you  
12 know, as reflected in County of Maui, where  
13 there was a similar multifactor standard that  
14 also potentially gave rise to criminal  
15 liability, that didn't stop the Court from  
16 adopting that standard, we think the same should  
17 be true here.

18 And we think if you really had a case  
19 where there was someone who was being criminally  
20 prosecuted and had a claim that the statute was  
21 vague as applied to them, that they didn't have  
22 fair notice, they could always bring an  
23 as-applied vagueness challenge in the criminal  
24 prosecution.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett?

3 JUSTICE BARRETT: I want to return to  
4 Justice Sotomayor's point because I want to make  
5 sure that I understand exactly what the scope of  
6 your argument is.

7 As you're arguing the case in this  
8 Court, to win, we have to find that you're right  
9 about significant nexus, Justice Kennedy's  
10 position in Rapanos, because you're not really  
11 relying for purposes of this case on the 1344(g)  
12 adjacency language, is that correct?

13 MR. FLETCHER: We're relying on  
14 adjacency to the tributary, which requires us to  
15 make a showing of significant nexus. So we do  
16 have to have both --

17 JUSTICE BARRETT: Both?

18 MR. FLETCHER: -- as we briefed the  
19 case. But I think also it's worth emphasizing  
20 that Petitioners aren't challenging the  
21 significant nexus finding, and also I think  
22 they've conceded essentially that if you get  
23 past their idea that adjacent includes only  
24 things that directly touch, then their property  
25 is adjacent because it's only 30 feet away

1 across the road.

2 JUSTICE BARRETT: Okay. And then, to  
3 follow up on Justice Alito's points about waters  
4 of the United States, if we put aside 1344(g)  
5 for a moment, and we're thinking about  
6 significant nexus here. Justice Thomas says he  
7 grew up in the low country of Georgia, and I  
8 grew up in New Orleans. The whole thing is  
9 below sea level. So, you know, there are  
10 aquifers that run right underneath it. You --  
11 we have no basements because, you dig far enough  
12 in anybody's yard, you hit water, and all of  
13 that runs into Lake Pontchartrain and the  
14 Mississippi River navigable waters.

15 So would that view of the Clean Water  
16 Act and the definitions of "waters of the United  
17 States" mean that anybody who constructed on a  
18 lot or built a backyard pool has to get a  
19 jurisdictional determination from the Corps  
20 before proceeding?

21 MR. FLETCHER: No, I don't think so,  
22 Justice Barrett.

23 JUSTICE BARRETT: Why not?

24 MR. FLETCHER: Because the -- these  
25 requirements all apply only if you're talking

1 about wetlands, which has a particular  
2 scientific definition reflected in the  
3 regulations. It requires --

4 JUSTICE BARRETT: But -- but -- but  
5 your view of the statute wouldn't be so limited,  
6 would it?

7 MR. FLETCHER: The statute, we think,  
8 does -- is limited to wetlands. We don't argue  
9 that things that don't qualify as wetlands can  
10 be waters of the United States. So --

11 JUSTICE BARRETT: Okay. Why -- why  
12 would that be? Because of 1344(g)? Because  
13 nothing in the statutory definition of waters of  
14 the United States -- I mean if you're talking  
15 about something that has a significant nexus,  
16 presumably subsurface water would.

17 MR. FLETCHER: So -- but we don't  
18 think that you could call groundwater a water of  
19 the United States. We don't argue that water --  
20 groundwater is covered.

21 JUSTICE BARRETT: Hmm-mmm.

22 MR. FLETCHER: And to Justice  
23 Sotomayor's point, we think that subsurface flow  
24 can be evidence of a connection between two  
25 bodies of water, but you have to be talking

1 about waters. We think wetlands, like swamps  
2 and marshes and fens like the one at issue here  
3 are waters of the United States or can be if  
4 they satisfy the test, and someone's backyard in  
5 New Orleans, if it doesn't meet the definition  
6 of a wetland, is not a water -- even potentially  
7 a water of the United States.

8 JUSTICE BARRETT: But what about  
9 debris on the bank of the river, the example  
10 that you gave? So it's not on the river  
11 itself --

12 MR. FLETCHER: Yep.

13 JUSTICE BARRETT: -- but it's on dry  
14 land.

15 MR. FLETCHER: I took that to be a  
16 question about the scope of Congress's  
17 constitutional authority --

18 JUSTICE BARRETT: Okay.

19 MR. FLETCHER: -- and I was giving  
20 that as an example of the Rivers and Harbors  
21 Act, in order to protect the channels of  
22 interstate commerce, the aquatic channels of  
23 interstate commerce, extending its authority up  
24 onto land. We don't argue that Congress has  
25 done that here. Here it's about waters of the

1 United States --

2 JUSTICE BARRETT: So it --

3 MR. FLETCHER: -- specifically  
4 wetlands.

5 JUSTICE BARRETT: -- hasn't used full  
6 Commerce Clause authority, in your view, in the  
7 Clean Water Act?

8 MR. FLETCHER: That's correct.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Jackson?

11 Thank you, counsel.

12 Mr. Schiff.

13 REBUTTAL ARGUMENT OF DAMIEN M. SCHIFF  
14 ON BEHALF OF THE PETITIONERS

15 MR. SCHIFF: Whatever the deficiencies  
16 in the line-drawing problem test, they pale in  
17 comparison to the significant nexus test. In  
18 response to Justice Thomas -- Thomas's question  
19 about the channels of commerce, the significant  
20 nexus test is far, far broader than a  
21 traditional understanding of the channels of  
22 commerce, as shown by this very case.

23 The Sacketts -- there's no evidence  
24 that anything the Sacketts did affected any  
25 channel of commerce. It's the mere fact that



1 they put gravel on their lot that now they're  
2 fully regulated under the Clean Water Act. And  
3 that raises Justice Alito's point about canons  
4 of construction and federalism.

5 Building a single family home in a  
6 residential subdivision is the quintessence of  
7 local government authority and yet the  
8 significant nexus test inevitably causes that to  
9 be regulated.

10 J.D.s are expensive. There is an  
11 entire industry of environmental consultants  
12 whom one has to hire to fill out an adequate  
13 application to the Corps.

14 Sure, the Corps doesn't charge you but  
15 your consultant will definitely charge you an  
16 arm and a leg just to have a chance to find out  
17 whether one is, in fact, regulated.

18 JUSTICE JACKSON: Counsel, can I --  
19 can you just speak to the representation that  
20 was made about the Sacketts' property in  
21 particular and the fact that prior to their  
22 purchasing it, there was some concern about the  
23 property being a wetland?

24 MR. SCHIFF: Justice --

25 JUSTICE JACKSON: Did I misunderstand

1 that? I -- I thought --

2 MR. SCHIFF: No --

3 JUSTICE JACKSON: I thought they went  
4 into it knowing that this might be a wetland.

5 MR. SCHIFF: No, no. There was a  
6 jurisdictional determination done in 1996 by a  
7 prior owner. The Sacketts were not aware of  
8 that.

9 Even --

10 JUSTICE JACKSON: Would they have been  
11 as a part of the purchase agreement? Shouldn't  
12 they --

13 MR. SCHIFF: The Sacketts --

14 JUSTICE JACKSON: -- have gathered  
15 information about the property prior to  
16 purchasing it?

17 MR. SCHIFF: Justice Jackson, in -- IN  
18 the record, the Sacketts' testimony is that  
19 there was no indication either from the county,  
20 building department, in their deed of title,  
21 anywhere that this was a wetland. Moreover,  
22 even if they had been aware, that jurisdictional  
23 determination would have given them no comfort  
24 because it --

25 JUSTICE JACKSON: But did -- did they

1 see the property? I understood in the pictures  
2 that you could tell that at least part of it was  
3 a wetland by looking at it. So --

4 MR. SCHIFF: I believe Mr. Fletcher  
5 was referring to after the initial work had been  
6 done, and the pictures show that there is water  
7 on the property but that doesn't show how it was  
8 before.

9 But if -- if I could go back though to  
10 the question of the jurisdiction --

11 JUSTICE JACKSON: But you keep talking  
12 about notice and fair notice and property owners  
13 not being able to tell or know about this issue  
14 and I'm just trying to clarify with respect to  
15 the Sacketts, there seem to have been a prior  
16 determination that the land was wetland before  
17 they bought it, and whether or not they knew,  
18 they could have known, I presume.

19 So why is this unfair in this  
20 situation with respect to the government now  
21 asserting that authority?

22 MR. SCHIFF: Justice Jackson, that  
23 determination had expired several years before  
24 the -- the -- the Sacketts even purchased the  
25 property. As Mr. Fletcher explained, typically

1 jurisdictional determinations are only valid for  
2 five years.

3           Moreover, that determination was done  
4 even before this decision -- this Court's  
5 decision in Rapanos. So even if the Sacketts  
6 had been aware of it, it would have given them  
7 no -- no -- no notice whatsoever.

8           CHIEF JUSTICE ROBERTS: We'll give you  
9 an extra minute for your rebuttal.

10           MR. SCHIFF: Thank you, Mr. Chief  
11 Justice.

12           The last point I'd like to make is  
13 with respect to compensatory mitigation, simply  
14 that obtaining a permit is a very expensive  
15 process. It's true that the Corps does not  
16 charge for permits, but the Corps will never  
17 give a permit unless one provides compensatory  
18 mitigation.

19           And we cite studies from the amicus  
20 briefs at pages 20 and 21 of the yellow brief  
21 where the annual cost of compensatory mitigation  
22 under the Corps' program is in the billions of  
23 dollars.

24           This is not an easy process. It's not  
25 a cheap process. And in terms of notice, it's

1 not a fair process for property owners who have  
2 to deal with the significant nexus test which is  
3 why this Court should definitively jettison that  
4 test.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel. The case is submitted.

7 (Whereupon, at 11:52 a.m. , the case  
8 was submitted.)

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## Official

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