No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT, ET UX.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

BRIEF OF SEN. SHELLEY MOORE CAPITO, REP. SAM GRAVES, AND A COALITION OF 199 MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of the United States Congress, some of whom sit on committees with jurisdiction over the Clean Water Act ("CWA"). Amici have an interest in maintaining Congressional authority to define, within constitutional limits, the boundaries of federal jurisdiction. To that end, amici desire to present this Court with its views on how the text, purposes, structure, and history of the CWA support a more limited scope of federal control over "navigable waters" that is embodied in Justice Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality op.).

Like the members of Congress that enacted the CWA, amici support policies that protect the environment while also ensuring that States retain their traditional role as the primary regulators of land and water resources, and that farmers, manufacturers, small business owners, and property owners like the Petitioners in this case can develop and use their land free of over-burdensome, job-killing federal regulations. These entities need certainty about the scope of "waters of the United States" under the Clean Water Act, and the Court's endorsement of

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

the Scalia test would provide that long-needed certainty.

Senator Shelley Moore Capito is a United States Senator for West Virginia and Ranking Member of the U.S. Senate Committee on Environment and Public Works. Representative Sam Graves is the United States Representative for Missouri's Sixth Congressional District and Ranking Member of the U.S. House Committee on Transportation and Infrastructure. A complete list of amici is provided in the Appendix to this brief.

SUMMARY OF ARGUMENT

Since the earliest days of the Republic, Congress has exercised its power to regulate the channels of interstate commerce to adopt regulations governing the navigable waters of the United States. Starting in the late nineteenth century and culminating in the adoption of the Clean Water Act of 1972, Congress used this authority to keep our Nation's waters free of pollution harmful to the environment. The means Congress has consistently selected to accomplish that goal is cooperative federalism—"a partnership approach in environmental legislation"—whereby neither the Federal Government nor the States tackle environmental challenges alone. Comm. on Pub. Works. Legislative History of the Water Pollution Control Act Amendments of 1972 ("CWA 1972 History") at 1271 (statement of Sen. Randolph).

Consistent with our constitutional structure, Congress intended that the Federal Government would play a limited part in regulating waterways, while States would retain their historic role as the principal stewards of lands and waters within their jurisdiction. This approach reflected a recognition that the "Federal Government by itself cannot achieve the kind of environment [Congress] want[s]." *Id.*

The text, purposes, structure, and legislative history of the CWA reinforce Congress's commitment to cooperative federalism. Congress limited its jurisdiction in the statute to "navigable waters," defined as "waters of the United States," whose plain

meaning, developed over a century of prior enactments and judicial decisions, extended only to "relatively permanent, standing or continuously flowing bodies of water." *Rapanos*, 547 U.S. at 739 (plurality op.).

Confirming this limited understanding, Congress expressly provided in the text of the CWA that it was the policy of the United States "to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources," 33 U.S.C. § 1251(b), and empowered States to protect the quality of waters within their jurisdiction, *see, e.g.*, *id.* §§ 1315(b), 1319(a), 1342(a), (b).

Due to uncertainty created by more recent judicial decisions regarding the scope of "waters of the United States," however, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have been emboldened over time to infringe on the role of the States, extending the Federal Government's jurisdiction into everything from mudflats to ponds to prairie potholes. These "increasingly broad interpretations" of what constitutes "waters of the United States" have resulted in an "immense expansion of federal regulation of land . . . without any change in the governing statute." *Rapanos*, 547 U.S. at 722, 725 (plurality op.).

In *Rapanos*, this Court confronted the question of whether the CWA extended to non-navigable, isolated wetlands. No opinion of this Court garnered a majority. As a result, the EPA and the Corps have

added further confusion by applying a constantly changing back and forth set of guidance and rules starting with the 2008 guidance, followed by a much broader and overreaching 2015 Clean Water Rule, that was itself followed by the reasonable and more easily administrable 2020 Navigable Waters Protection Rule ("NWPR"), supported by several *amici*, that adhered to Justice Scalia's test. Unfortunately, in 2021, the EPA and the Corps revoked the 2020 rule and are now considering an expansion of federal jurisdiction akin to the 2015 rule.

Justice Scalia's plurality opinion in *Rapanos* recognized that the term "navigable waters" imposed more meaningful constraints on federal bureaucratic overreach, consistent with its textual and historical limitation to "relatively permanent, standing or continuously flowing bodies of water," *Rapanos*, 547 U.S. at 739—constraints to which the agencies have failed to adhere consistently. Under Justice Scalia's test, wetlands could only qualify if they have a "continuous surface connection" to stable bodies of water that rendered them "*indistinguishable*" from such waters. *Id.* at 755, 772 (emphasis in original).

By contrast, Justice Kennedy's separate opinion in *Rapanos* proposed a "significant nexus" standard that would allow federal agencies to regulate local land so long as it possessed some attenuated ecological connection to navigable waters. *Id.* at 759 (Kennedy, J., concurring). This amorphous, judge-made standard has given the EPA and the Corps all the leash they need to undermine Congress's intent, "exercise[] the

discretion of an enlightened despot," and displace the judgment of "local zoning board[s]." *Id.* at 721, 738 (plurality op.).

This Court should resolve the confusion that has now plagued lower courts for decades and led to significant regulatory uncertainty by adopting the test proposed by Justice Scalia. In doing so, it would honor the more limited, cooperative role Congress intended for the Federal Government to play in combating water pollution, consistent with the Constitution, and recognize the primary role of the States in preserving our environment.

ARGUMENT

I. CONGRESS INTENDED TO ADOPT A COOPERATIVE APPROACH WITH STATES UNDER THE CLEAN WATER ACT THAT WOULD LIMIT FEDERAL CONTROL.

A. The Statutory Terms "Navigable Waters" and "Waters of the United States" Have A Limited Meaning That Protects The Prerogatives of the States Over Water and Land Management.

In enacting the CWA, Congress drew upon over 150 years of history, precedent, and prior legislation that established the limited contours of the key statutory terms "navigable waters" and "waters of the United States." That extensive pre-enactment history

establishes that the plain meaning of these terms require that covered waters must, at minimum, be "relatively permanent, standing or continuously flowing bodies of water," *Rapanos*, 547 U.S. at 739 (Scalia, J.). While the Corps initially interpreted these terms in the CWA consistently with Congress's intended meaning, decades of judicial and administrative improvisation have resulted in federal overreach, confusion, and crippling costs on property owners like the Sacketts. This Court should stanch the bleeding and respect the boundaries of the CWA that Congress originally put in place.

When Congress uses the phrase "navigable waters," it invokes its traditional power to regulate interstate commerce under the U.S. Constitution. *See* U.S. Const. art. I, sec. 8, cl. 3. As Chief Justice Marshall recognized in *Gibbons v. Ogden*, 22 U.S. 1, 21-22 (1824), "the United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters," and to do so "for purposes of trade and navigation." (Emphasis omitted). Throughout our Nation's history, this Court has repeatedly recognized Congress's power "to secure the uninterrupted navigability of all navigable streams within the limits of the United States." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899); *see also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940). While both Congress and the courts expanded over time what they understood could fall within the contours of "navigable waters," the accepted understanding of this term never expanded beyond the

relatively permanent bodies of water described in Justice Scalia's plurality opinion in *Rapanos*.

The history of Congress's legislative efforts in this area starts roughly in 1838, when Congress enacted a statute that made it unlawful for a steamboat operator to transport goods "in or upon the bays, lakes, rivers, or other navigable waters of the United States" without a license. 5 Stat. 304 (1838). This Court later interpreted the statute's phrase "navigable waters of the United States," consistent with its constitutional underpinnings, to mean those waters that are "navigable in fact," or in other words "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce . . . ." *The Daniel Ball*, 77 U.S. 557, 563 (1870); *accord United States v. The Montello*, 78 U.S. 411 (1870). This Court then applied the same "basic concept of navigability" in several subsequent cases. *Appalachian Elec. Power Co.*, 311 U.S. at 406 n.22 (collecting cases).

Against this backdrop, Congress repeatedly adopted the term "navigable waters" in later statutes in a similar manner to encompass continuous bodies of water. The Rivers and Harbors Act of 1899, for example, the Nation's first federal environmental statute, made it unlawful to discharge refuse into "any navigable water of the United States . . . whereby navigation shall or may be impeded or obstructed." 30 Stat. 1121 (1899). And in the Federal Water Power Act of 1920, Congress defined "navigable waters" as "those parts of streams or other bodies of water . . . which either in their natural or improved

condition . . . are used or suitable for use for the transportation of persons or property in interstate or foreign commerce . . . ." 41 Stat. 1063 (1920).

Whatever the precise formulation Congress used, this Court continued to apply and develop the test for "navigable waters" elaborated in *Daniel Ball* and similar cases. *See Appalachian Elec. Power Co.*, 311 U.S. at 406-07. For example, the Court extended the concept of "navigable waters" to those that were once navigable in fact, *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921), and those that could with reasonable improvement become navigable in fact, *Appalachian Elec. Power Co.*, 311 U.S. at 407-09; *see also* Petitioners Br. 35-36. But the waters at issue were still relatively permanent standing or flowing bodies of water.

Such was the state of the law when, in 1972, Congress enacted the Clean Water Act, which made unlawful the discharge or "addition of any pollutant to navigable waters from any point source," 33 U.S.C. §§ 1311(a), 1362(12), and defined "navigable waters" as "waters of the United States, including the territorial seas," *id.* § 1362(7). Despite its general prohibition on covered discharges, the Act authorized the EPA and the Corps to issue permits for releasing pollutants into "navigable waters." *Id.* §§ 1311(a), 1344(a), (d).

Congress's use of the phrase "navigable waters" in the CWA followed over a hundred years of Congressional enactments and constitutional and

statutory elucidation in the courts. Indeed, given Congress's repeated readoption of the phrase following numerous decisions of this Court, "it presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (noting that "repetition of the same language in a new statute" reflects incorporation of prior judicial decisions that "settled [its] meaning"). Accordingly, as this Court observed, the phrase "navigable waters" has "the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("*SWANCC*").

To be sure, Congress in the CWA defined "navigable waters" as "waters of the United States," rather than use the collective phrase "navigable waters of the United States," as it had in some prior statutes. But as this Court observed, this "separate definitional use" does not "constitute[] a basis for reading the term 'navigable waters' out of the statute." *Id.* As recognized in Justice Scalia's plurality opinion, "the Act's use of the traditional phrase 'navigable waters' . . . confirms that it confers jurisdiction only over relatively *permanent* bodies of water." *Rapanos*, 547 U.S. at 734 (plurality op.) (emphasis in original). In short, Congress's unremarkable decision to make

"navigable waters" a defined term in the CWA cannot be read as sufficient intent to depart from over a century of established statutory usage and case law. *Cf. Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989) (presuming that Congress intends to adopt past judicial interpretations of a concept "absent an express statement to the contrary").

Even apart from that history, the plain meaning of the term "waters of the United States" is not broad enough to authorize the EPA and the Corps to regulate subsurface or soggy land unconnected to any navigable waterway. As Justice Scalia explained in his plurality opinion in *Rapanos*, the ordinary public meaning of that term at the time Congress adopted it encompassed "streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." 547 U.S. at 732 (quoting Webster's New International Dictionary 2882 (2d ed. 1954)). Therefore, "waters of the United States" must "include only relatively permanent, standing or flowing bodies of water." *Id.* And this Court's case law, both before and after adoption of the CWA, confirms that the term "waters" was never extended so far as to encompass ephemeral streams or intermittent flows. *See Daniel Ball*, 77 U.S. at 563 (using "waters" and "rivers" as synonyms); *Appalachian Elec. Power Co.*, 311 U.S. at 407-09 (using "navigable waters" and "waterways" interchangeably); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (describing

"rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'").

B. The CWA's Purposes and Structure, Supported by the Federalism Canon, Reinforce Congress's Commitment To Partner with the States.

The CWA's express statutory purposes reinforce the statute's operative text. One such purpose, as the Ninth Circuit in this case noted, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Sackett v. EPA*, 8 F.4th 1075, 1079 (9th Cir. 2021) (quoting 33 U.S.C. § 1251(a)). But the Ninth Circuit gave short shrift to the CWA's complementary policy "to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). As this Court has previously noted, the CWA "establishes distinct roles for the Federal and State Governments" with respect to environmental protection. *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). And contrary to what the EPA or the Corps may argue, there is no reason why "the state and local conservation efforts that the CWA explicitly calls for are in any way inadequate for the goal of preservation." *Rapanos*, 547 U.S. at 745 (plurality op.).

Federal regulation is not the end-all, be-all, and States can and do protect water quality under State

law. In fact, as explained in the States' amici brief in support of the petition for certiorari, "many States have implemented laws and regulations that are more protective of their waters than if the CWA alone applied. Many define the 'state waters' over which they assert jurisdiction more broadly that 'waters of the United States.'" States Br. 6. In many States, "state waters" include wetlands and most other waters including ephemeral streams and subsurface waters that are not waters of the United States. *Id.* at 6-7.

The principle of cooperative federalism runs throughout the structure of the statute. For instance, the CWA "requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters." *PUD No. 1*, 511 U.S. at 704 (citing 33 U.S.C. §§ 1311(b)(1)(C), 1313). States are then responsible for enforcing those standards, 33 U.S.C. § 1319(a), and providing a water quality certification before the Federal Government may issue a license for activities that could result in pollution of intrastate waters, *id.* § 1341(a). States may even administer, with federal approval, their own permit programs for discharges into waters within their jurisdiction. *See id.* § 1342(b). The CWA also charges States with monitoring, and reporting biennially to the Federal Government on, the quality of all waters within the States' purview. *See id.* § 1315(b).

Other structural considerations reinforce the Federal Government's limited jurisdictional role. For example, the CWA distinguishes "navigable waters"

from "point sources," and prohibits the discharge or "addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. § 1362(12)(A) (emphases added). Unlike "navigable waters," which constitute relatively permanent bodies of water, "point sources" include land-based features like "ditch[es], channel[s], and conduit[s]" that only intermittently carry water from one location to another. *Rapanos*, 547 U.S. at 735-36 (plurality op.) (citing 33 U.S.C. § 1362(14)). It would make no sense to describe such land-based conveyances as a "point source" for discharge *to* "navigable waters" if the dry land were itself covered "waters of the United States" subject to federal permitting.

Indeed, Congress did not even intend for all possible point sources and discharges to be covered by the CWA, as "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). For example, the CWA does not forbid the discharge of dredged or fill material when it involves activities like farming or ranching; maintaining or rebuilding damaged dikes, dams, or levees; building farm stock ponds; and, in some cases, creating or maintaining farm or service roads, among other things. 33 U.S.C. § 1344(f)(1). These exceptions to the discharge prohibition would be rendered meaningless if Congress had intended federal regulators' permitting authority, via the phrase "navigable waters," to reach every patch of occasionally wet earth.

The carefully balanced and reticulated scheme created by Congress in the CWA cannot operate as

intended so long as the EPA and the Corps can interpret the term "navigable waters" to reach every local, isolated, or intermittent deposit of water. Indeed, the "extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board." *Rapanos*, 547 U.S. at 738 (plurality op.).

Even absent Congress's clear textual expressions of purpose, reinforced by structure, to empower the States to act as the principal regulators of local lands and waters, ordinary canons of construction would prohibit federal agencies from adopting such expansive superintendence of state and local affairs. That is because, "[t]o displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'" *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994) (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)).

This Court has repeatedly described the regulation of private property as "an essential state interest" requiring a clear statement from Congress. *Id.*; *see also United States Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849-50 (2020) (requiring "exceedingly clear language" to "significantly alter the balance between federal and state power and the power of the Government over private property"). And "[r]egulation of land use, as through the issuance of the development permits

sought by [the EPA and the Corps under the CWA], is a quintessential state and local power." *Rapanos*, 547 U.S. at 738 (plurality op.) (citing *FERC v. Mississippi*, 456 U.S. 742, 767-68 (1982)).

Applying this canon to the CWA, this Court has "f[ound] nothing approaching a clear statement from Congress" to justify agency action that would "result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. That is unsurprising. Far from a clear statement to *displace* traditional state and local power, the CWA *expressly empowers* States to take the reins of ensuring water quality within their boundaries. And even assuming that phrases like "navigable waters" or "waters of the United States" "were ambiguous as applied to intermittent [water] flows"—they are not—such latent ambiguity "hardly qualifies" as a clear statement capable of supporting an "unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 737-38 (plurality op.).

C. The CWA's Legislative History, and Subsequent Congressional Actions, Confirm Congress's Intent To Limit Its Jurisdiction To Traditional Navigable Waters.

Because "the text and reasonable inferences from it give a clear answer against the Government"—and its practically boundless assertion of authority under the CWA—"that, as we have said, is the end of the

matter." *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (internal quotation marks omitted). There is thus no need for this Court to read tea leaves from the legislative history debates to discern the CWA's plain meaning. But to the extent the Court deems it relevant, the CWA's legislative history and subsequent Congressional actions corroborate the limitations in federal authority contained in the plain text, express purposes, and structure of the statute, and reinforce support for Justice Scalia's *Rapanos* test.

Legislative History. The Senate Conference Report accompanying the CWA did not define "navigable waters," but it included a statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, p. 144 (1972). While the EPA and the Corps have attempted to use this language as support for expansive federal authority, this Court has correctly deduced that "neither this [statement], nor anything else in the legislative history to which [the federal agencies] point, signifies that Congress intended to exert anything more than its commerce power over navigation." *SWANCC*, 531 U.S. at 168 n.3. That inference is sound, as it would have been odd for Congress in 1972 to suddenly invoke something other than its historic power to regulate navigable waters, which even the dissent in *SWANCC* conceded "continued nearly a century of usage." *Id.* at 182 (Stevens, J., dissenting).

What the conferees meant, instead, was that the traditional test for navigable waters (first described in *Daniel Ball*) had since developed to encompass all relatively stable, continuous bodies of water (even if not navigable in fact), consistent with Justice Scalia's approach. The history does not support, however, any desire by Congress to extend its reach to any activity, on any parcel of land, that might have some attenuated ecological connection to traditional bodies of water, as Justice Kennedy proposed in *Rapanos*.

Related legislative history confirms this Court's understanding of the conferees' limited meaning. For example, the CWA's chief architect, Senator Edmund Muskie, in explaining the Conference Report, concurred that the term "navigable waters" should be construed broadly. CWA 1972 History at 178. But for Muskie, that meant that the term should "include *all water bodies*, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact." *Id.* (emphasis added). In Muskie's view, echoing the test set forth in *Daniel Ball* and its progeny, "such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation . . . a continuing highway over which commerce is or may be . . . conducted today." *Id.*

Representative John Dingell, too, citing the Conference Report, rejected a "narrow" or "technical" definition of "navigable waters." *Id.* at 250. But for Dingell, like Muskie, that simply meant a fulsome

view of what constitutes relatively stable bodies of water. For example, Dingell rejected the idea that waters needed to actually cross state lines, recognizing that "it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation." *Id.* at 250. "The gist of the Federal test," Dingell explained, "is the waterway's use as a highway." *Id.* (internal citation and quotation marks omitted).

Dingell also believed that the term "navigable waters" encompassed two developments in the case law since the time of *Daniel Ball*. Specifically, navigable waterways included those "susceptible of being used . . . with reasonable improvement," and waterways "which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera." *Id.* (citing cases, including *Appalachian Elec. Power Co.*, 311 U.S. at 407-10).

While individual legislators may have differed in their precise understanding of the scope of the CWA, these statements reinforce the plain meaning of the words "navigable waters" and "waters of the United States" as limited to relatively permanent bodies of water. Neither Muskie, Dingell, nor the conferees, suggested that isolated waters or lands intermittently occupied by water could be considered "waters of the United States" via some ecological connection with distant rivers or seas.

This conclusion finds further support in legislators' understanding of the CWA's general

approach to cooperative federalism. As Senator Jennings Randolph remarked, the Senate Committee on Public Works that drafted the CWA "has continued the emphasis on a partnership approach in environmental legislation so that State and local governments are involved to a high degree in pollution abatement and control." CWA 1972 History at 1271. The Committee members, he continued, "realize[d] that a clean environment cannot be created and sustained by legislative action alone," and that "the Federal Government by itself cannot achieve the kind of environment we want." *Id.* That cooperative approach also augurs a circumscribed definition of "navigable waters."

In support of broader authority to regulate local lands and waters, the EPA and the Corps may point to parts of the legislative history that describe the CWA as enacting a "comprehensive" regime for regulating environmental pollution. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317-19 & n.12 (1981) (collecting relevant floor statements). But as this Court understood, Congress's adoption of a comprehensive federal approach to pollution control merely forecloses *courts* from applying federal common law, or "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence," to displace or supplement the specific measures chosen by Congress. *Id.* at 316-17. One paragraph earlier, the Court reasoned that more rigorous "evidence of a clear and manifest purpose" would be required to prevent the *States* from exercising their historic police powers. *Id.* As explained above, such evidence is

lacking from, and indeed is refuted by, the text and structure of the CWA (and even its legislative history). The Court in *City of Milwaukee* itself recognized that the CWA established a partnership between the State and Federal Governments for combating pollution. *See id.* at 327.

By honoring the traditional division of labor between the Federal and State Governments inherent in the terms "navigable waters" and "waters of the United States," courts show respect for the "comprehensive" scheme adopted by Congress in the CWA. Indeed, it was Congress's hope that the statute's specificity would mean Congress would not have to "continually . . . look over the shoulders of the administrators" applying it. CWA 1972 History at 1272 (statement of Sen. Randolph). Unfortunately, that has not proven true, as courts have slackened the reins that Congress put in place around the Federal Government's authority. The resulting uncertainty could be eliminated through adoption of Justice Scalia's textually and historically supported test. By contrast, courts that apply the freewheeling "significant nexus" test invented by Justice Kennedy in *Rapanos* or similar tests do precisely what the Court in *City of Milwaukee* deemed impermissible—fashion vague and indeterminate judge-made rules to further the perceived equitable purposes of the statute.

Despite the agencies' recent revisionist reading of the legislative history, the Corps initially correctly understood the limited nature of federal jurisdiction under the CWA. In 1974, the Corps defined "navigable

waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974). That construction echoed the traditional test for "navigable waters" suggested by the Conference Report and the statements of Muskie and Dingell. That reasonable and textually supported interpretation was vacated, however, in a short order issued by a federal district court in *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975)—setting in motion a decades-long exercise in judicial and administrative lawmaking that led ultimately to this case.

The district court's error in *NRDC v. Callaway* consisted in misreading the Senate Conference Report as indicating that Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." 392 F. Supp. at 686. But as explained above, and affirmed by this Court in *SWANCC*, Congress had the more modest ambition of incorporating into the CWA, pursuant to its authority over navigation, all relatively permanent, stable, continuous bodies of water.

Even assuming, however, that "the [CWA's] legislative history is somewhat ambiguous," *SWANCC*, 531 U.S. at 168 n.3, the appropriate response to that would be to apply the "plain text and original understanding of [the] statute." *Id.* at 169 n.5.

Eschewing clear text in favor of selective reliance on some legislators' statements, but not others, is an exercise akin to "entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

By reading selections of legislative history to discern an unbridled purpose of regulating any activity with a tenuous connection to the Nation's waters at any cost, opinions like the *Rapanos* dissent (*see* 547 U.S. at 804 (Stevens, J., dissenting)) apply a Through the Looking Glass approach to statutory interpretation, giving pride of place to a partial view of Congressional goals over the balance reflected in the enacted text. "If courts fe[el] free to pave over . . . statutory texts in the name of more expeditiously advancing a policy goal, [they] risk failing to take account of legislative compromises essential to a law's passage and, in that way, thwart rather than honor the effectuation of congressional intent." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019) (cleaned up). By adopting Justice Scalia's approach, courts would honor Congress's conscious choice of a cooperative federalism regime that provides significant federal oversight of major waterways but leaves States as the principal regulators of their own lands and waters.

Subsequent Actions. Congressional actions following the 1972 adoption of the CWA further show that, despite increasingly aggressive agency interpretations of the statute, Congress has not wavered in its traditional understanding of the term

"navigable waters." In 1977, Congress made amendments to the CWA, but without changing or elaborating on the terms "navigable waters" or "waters of the United States." The Senate Report, describing the draft ultimately adopted by Congress, confirmed that "[t]he [C]ommittee [on Public Works'] amendment does not redefine navigable waters." S. Rep. No. 95-370, 75 (1977). Rather, Congress sought to "assure continued protection of all the Nation's waters, [while] allow[ing] States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the [C]orps program." *Id.* Congress in 1977, therefore, continued to respect both the limited understanding of federal jurisdiction over "navigable waters" and the cooperative federalism approach embedded in the CWA.

In more recent years, as the EPA and the Corps adopted ever more expansive constructions of what constitute "waters of the United States," Congress has either expressed its disapproval of such novel and aggressive agency interpretations or tried to rein them in. For example, Congress passed a bipartisan joint resolution under the Congressional Review Act to overturn a 2015 rule that the EPA and the Army Corps of Engineers issued that had an expansive definition of "waters of the United States" building off of Justice Kennedy's significant nexus test from *Rapanos*. S.J. Res. 22, 114th Cong. (2016). This rule survived Congressional nullification only because President Obama—whose EPA wrote the 2015 rule—vetoed the resolution.

Further, a recent Congressional budget resolution applauded the "Navigable Waters Protection Rule," (NWPR) a policy that limits the reach of the Federal Government under the Clean Water Act. S. Amdt. 655 to S. Con. Res. 5, 117th Cong. (2021). As Senator Capito explained in support of the latter resolution, the EPA's efforts at expanding the definition of "waters of the United States" beyond the traditional understanding of "navigable waters" "would completely redefine and reframe all water policy," creating uncertainty that would "devastate farmers, manufacturers, and small business owners"—a prediction that has proven prescient. 167 Cong. Rec. S453 (2021). As Senator Capito and her colleagues thus recognized, the EPA's approach represented a break from, rather than a continuation of, Congress's long-held understanding of the term. Further, the NWPR closely adhered to the statute and the test proposed by Justice Scalia. Congress therefore endorsed Justice Scalia's test embodied in the NWPR under the budget resolution as the proper reading of the statute and Congress's intent.

Far from failing to act in response to aggressive agency overreach, *contra Rapanos*, 547 U.S. at 797 (Stephens, J., dissenting), these Congressional actions show that Congress has consistently maintained its position on the limited, traditional scope of the term "navigable waters" in the CWA—endorsing Justice Scalia's test while disapproving Justice Kennedy's test. The post-enactment history of the CWA stands in continuity with prior legislative enactments and case law, dating back to the early days of the Republic,

that understood "navigable waters" as limited to relatively permanent bodies of water. At minimum, there is nothing that has happened in Congress since 1972 that could constitute the "overwhelming evidence of acquiescence" in an agency interpretation required to overcome the "plain text and original understanding of a statute." *SWANCC*, 531 U.S. at 169-70 & n.5; *Rapanos*, 547 U.S. at 749-50 (plurality op.).

II. THIS COURT SHOULD ADOPT JUSTICE SCALIA'S TEST TO REIN IN AGENCY OVERREACH THAT DEFIES CONGRESS'S INTENT AND CAUSES SUBSTANTIAL ECONOMIC HARM.

This case presents an ideal opportunity for the Court to honor Congress's intent to limit federal jurisdiction under the CWA. That result would respect the Congressionally appointed and constitutionally supported role for the States under the statute. It also would provide much needed guidance to lower courts and clarity to farmers, ranchers, businesses, and property owners like the Petitioners. Moreover, it would place the EPA and the Corps on sound footing moving forward, as they have historically taken a mile whenever this Court has given them an inch of interpretive legroom, leading to constantly changing federal jurisdiction and associated harm to regulated entities and States.

This Court has not hesitated to conclude that the "plain text and import" of the CWA rules certain

agency interpretations out of bounds. *SWANCC*, 531 U.S. at 169-70; *see also Rapanos*, 547 U.S. at 731-32 (plurality op.). This Court, for example, invalidated the EPA's "Migratory Bird Rule," which would have subjected "ponds and mudflats" contained in an "abandoned sand and gravel pit," and isolated from any traditional waterway, to federal jurisdiction. *SWANCC*, 531 U.S. at 174. To provide certainty, now is the time to set clearer guardrails for all water features, emphasizing once and for all, as Justice Scalia put it, that "[t]he plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction." *Rapanos*, 547 U.S. at 734 (plurality op.).

This Court could curb agencies' discretion by limiting it to those cases where, in Justice Scalia's formulation, wetlands' "physical connection" to navigable waterways "makes them as a practical matter *indistinguishable* from waters of the United States." *Id.* at 755 (plurality op.) (emphasis in original). Without a clearly worded decision endorsing Justice Scalia's test, the definition of "waters of the United States" will continue to whipsaw from one Administration to the next. These ever-changing regulatory definitions continue to create (as it has already created) confusion and havoc in the lives of unsuspecting farmers, small businesses, and property owners. Armed with an amoebic "significant nexus" test, the EPA and the Corps have been emboldened to extend federal jurisdiction into isolated and intermittent wet patches like mudflats, sandflats, ponds, and even prairie potholes. *See* 33 C.F.R.

§ 328.3(a)(3). Unable to predict where the EPA or the Corps will claim authority next, homeowners are caught unawares when the Federal Government comes knocking. That mission creep carries not only threats to individual liberties, but also a steep price tag, with average permit applicants spending over two years and $271,596 (as of 2006) to complete the process—separate and apart from the legal fees often required to contest federal jurisdiction. *See Rapanos*, 547 U.S. at 721 (plurality op.).

As has been observed time and again, the EPA's preferred definition of "waters of the United States" is so expansive that it would embrace even the most inconsequential accumulations of water. *See, e.g.*, *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (Torruella, J., dissenting) (noting that the "significant nexus" "leaves the door open to continued federal overreach"). Indeed, in recognition of how far-reaching its asserted regulatory authority extended, the EPA in 2015 felt the need specifically to exempt "[p]uddles" because they would "otherwise meet the terms" of its seemingly limitless definition. 33 C.F.R. § 328.3(b)(4)(vii) (2015).

The draconian economic and expansive political consequences of this position further illustrate the extent to which federal agencies have deviated from Congressional intent by creatively reimagining the scope of the terms "navigable waters" and "waters of the United States" under the CWA. This Court can have "confiden[ce] that Congress could not have intended to delegate a decision of such economic and

political significance to an agency in so cryptic a fashion." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Rather, the EPA's "claim to extravagant statutory power over the national economy" is "unreasonable" because it would bring "about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014). Congress must "speak clearly if it wishes to assign to an agency decisions of [such] vast economic and political significance." *Id.* (internal quotation marks omitted).

Far from clearly authorizing federal agencies to act as nationwide land czars, Congress made clear its intent in legislative text, structure, and history to establish a limited federal regulatory presence in cooperation with the States. In the CWA, Congress selected language that, from practically the Founding, was understood both to exercise limited jurisdiction and to preserve the States' traditional role as the principal regulators of local waters and lands. But this intent has now been turned on its head. Through the "significant nexus" test, the EPA and the Corps can instead use any ecological connection between land and nearby water as a pretext for intrusive central planning. This case presents an opportunity for the Court to finally put the genie back in the bottle and endorse the historically grounded and administrable test proposed by Justice Scalia. Only then will Congress's dual purposes of cooperative federalism and environmental protection in the CWA be fully vindicated.

CONCLUSION

For the foregoing reasons, and those stated by the petitioners, the Court should reverse the Ninth Circuit.

Respectfully submitted,

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April 18, 2022

APPENDIX

APPENDIX A

The Members of Congress participating as amici are:

Senator Shelley Moore Capito of West Virginia

Senate Republican Leader Mitch McConnell of Kentucky

Representative Sam Graves of Missouri
6th Congressional District

Minority Leader Kevin McCarthy of California
23rd Congressional District

Senator John Barrasso, M.D., of Wyoming

Senator Marsha Blackburn of Tennessee

Senator Roy Blunt of Missouri

Senator John Boozman of Arkansas

Senator Mike Braun of Indiana

Senator Richard Burr of North Carolina

Senator Bill Cassidy, M.D., of Louisiana

Senator John Cornyn of Texas

Senator Tom Cotton of Arkansas

Senator Kevin Cramer of North Dakota

Senator Mike Crapo of Idaho

Senator Ted Cruz of Texas

Senator Steve Daines of Montana

Senator Joni K. Ernst of Iowa

Senator Deb Fischer of Nebraska

Senator Lindsey O. Graham of South Carolina

Senator Charles E. Grassley of Iowa

Senator William F. Hagerty of Tennessee

Senator Josh Hawley of Missouri

Senator John Hoeven of North Dakota

Senator Cindy Hyde-Smith of Mississippi

Senator James M. Inhofe of Oklahoma

Senator Ron Johnson of Wisconsin

Senator John Kennedy of Louisiana

Senator James Lankford of Oklahoma

Senator Cynthia M. Lummis of Wyoming

Senator Roger Marshall, M.D., of Kansas

Senator Jerry Moran of Kansas

Senator Lisa Murkowski of Alaska

Senator Rand Paul, M.D., of Kentucky

Senator Rob Portman of Ohio

Senator James E. Risch of Idaho

Senator Marco Rubio of Florida

Senator Ben Sasse of Nebraska

Senator Rick Scott of Florida

Senator Tim Scott of South Carolina

Senator Richard Shelby of Alabama

Senator Dan Sullivan of Alaska

Senator John Thune of South Dakota

Senator Thom Tillis of North Carolina

Senator Pat Toomey of Pennsylvania

Senator Tommy Tuberville of Alabama

Senator Roger F. Wicker of Mississippi

Senator Todd Young of Indiana

Representative Steve Scalise of Louisiana
1st Congressional District

Representative David Rouzer of North Carolina
7th Congressional District

Representative Robert B. Aderholt of Alabama
4th Congressional District

Representative Rick W. Allen of Georgia
12th Congressional District

Representative Mark Amodei of Nevada
2nd Congressional District

Representative Kelly Armstrong of North Dakota
At-Large Congressional District

Representative Jodey C. Arrington of Texas
19th Congressional District

Representative Brian Babin, D.D.S., of Texas
36th Congressional District

Representative James R. Baird of Indiana
4th Congressional District

Representative Jim Banks of Indiana
3rd Congressional District

Representative Andy Barr of Kentucky
6th Congressional District

Representative Cliff Bentz of Oregon
2nd Congressional District

Representative Jack Bergman of Michigan
1st Congressional District

Representative Stephanie Bice of Oklahoma
5th Congressional District

Representative Andy Biggs of Arizona
5th Congressional District

Representative Dan Bishop of North Carolina
9th Congressional District

Representative Lauren Boebert of Colorado
3rd Congressional District

Representative Mike Bost of Illinois
12th Congressional District

Representative Mo Brooks of Alabama
5th Congressional District

Representative Ken Buck of Colorado
4th Congressional District

Representative Larry Bucshon, M.D., of Indiana
8th Congressional District

Representative Ted Budd of North Carolina
13th Congressional District

Representative Tim Burchett of Tennessee
2nd Congressional District

Representative Michael C. Burgess, M.D., of Texas
26th Congressional District

Representative Kat Cammack of Florida
3rd Congressional District

Representative Jerry L. Carl of Alabama
1st Congressional District

Representative Earl L. “Buddy” Carter of Georgia
1st Congressional District

Representative Steve Chabot of Ohio
1st Congressional District

Representative Liz Cheney of Wyoming
At-Large Congressional District

Representative Ben Cline of Virginia
6th Congressional District

Representative Andrew S. Clyde of Georgia
9th Congressional District

Representative James Comer of Kentucky
1st Congressional District

Representative Eric A. “Rick” Crawford of Arkansas
1st Congressional District

Representative Dan Crenshaw of Texas
2nd Congressional District

Representative John R. Curtis of Utah
3rd Congressional District

Representative Rodney Davis of Illinois
13th Congressional District

Representative Scott DesJarlais, M.D., of Tennessee
4th Congressional District

Representative Jeff Duncan of South Carolina
3rd Congressional District

Representative Neal P. Dunn, M.D., of Florida
2nd Congressional District

Representative Jake Ellzey of Texas
6th Congressional District

Representative Tom Emmer of Minnesota
6th Congressional District

Representative Randy Feenstra of Iowa
4th Congressional District

Representative A. Drew Ferguson IV of Georgia
3rd Congressional District

Representative Michelle Fischbach of Minnesota
7th Congressional District

Representative Chuck Fleischmann of Tennessee
3rd Congressional District

Representative Russ Fulcher of Idaho
1st Congressional District

Representative Matt Gaetz of Florida
1st Congressional District

Representative Mike Gallagher of Wisconsin
8th Congressional District

Representative Andrew R. Garbarino of New York
2nd Congressional District

Representative Mike Garcia of California
25th Congressional District

Representative Bob Gibbs of Ohio
7th Congressional District

Representative Carlos Gimenez of Florida
26th Congressional District

Representative Louie Gohmert of Texas
1st Congressional District

Representative Bob Good of Virginia
5th Congressional District

Representative Lance Gooden of Texas
5th Congressional District

Representative Paul A. Gosar, D.D.S., of Arizona
4th Congressional District

Representative Garret Graves of Louisiana
6th Congressional District

Representative Mark Green, M.D., of Tennessee,
7th Congressional District

Representative H. Morgan Griffith of Virginia
9th Congressional District

Representative Glenn Grothman of Wisconsin
6th Congressional District

Representative Michael Guest of Mississippi
3rd Congressional District

Representative Brett Guthrie of Kentucky
2nd Congressional District

Representative Andy Harris, M.D., of Maryland
1st Congressional District

Representative Vicky Hartzler of Missouri
4th Congressional District

Representative Kevin Hern of Oklahoma
1st Congressional District

Representative Yvette Herrell of New Mexico
2nd Congressional District

Representative Jaime Herrera Beutler of Washington
3rd Congressional District

Representative Jody Hice of Georgia
10th Congressional District

Representative Clay Higgins of Louisiana
3rd Congressional District

Representative French Hill of Arkansas
2nd Congressional District

Representative Ashley Hinson of Iowa
1st Congressional District

Representative Richard Hudson of North Carolina
8th Congressional District

Representative Bill Huizenga of Michigan
2nd Congressional District

Representative Darrell Issa of California
50th Congressional District

Representative Ronny L. Jackson of Texas
13th Congressional District

Representative Chris Jacobs of New York
27th Congressional District

Representative Bill Johnson of Ohio
6th Congressional District

Representative Dusty Johnson of South Dakota
At-Large Congressional District

Representative Mike Johnson of Louisiana
4th Congressional District

Representative Jim Jordan of Ohio
4th Congressional District

Representative John Joyce, M.D., of Pennsylvania
13th Congressional District

Representative John Katko of New York
24th Congressional District

Representative Mike Kelly of Pennsylvania
16th Congressional District

Representative Trent Kelly of Mississippi
1st Congressional District

Representative Young Kim of California
39th Congressional District

Representative Darin LaHood of Illinois
18th Congressional District

Representative Doug LaMalfa of California
1st Congressional District

Representative Doug Lamborn of Colorado
5th Congressional District

Representative Robert E. Latta of Ohio
5th Congressional District

Representative Jake LaTurner of Kansas
2nd Congressional District

Representative Debbie Lesko of Arizona
8th Congressional District

Representative Julia Letlow of Louisiana
5th Congressional District

Representative Billy Long of Missouri
7th Congressional District

Representative Barry Loudermilk of Georgia
11th Congressional District

Representative Blaine Luetkemeyer of Missouri
3rd Congressional District

Representative Nancy Mace of South Carolina
1st Congressional District

Representative Nicole Malliotakis of New York
11th Congressional District

Representative Tracey Mann of Kansas
1st Congressional District

Representative Thomas Massie of Kentucky
4th Congressional District

Representative Tom McClintock of California
4th Congressional District

Representative David B. McKinley, P.E., of West Virginia
1st Congressional District

Representative Cathy McMorris Rodgers of Washington
5th Congressional District

Representative Daniel Meuser of Pennsylvania
9th Congressional District

Representative Carol D. Miller of West Virginia
3rd Congressional District

Representative Mary E. Miller of Illinois
15th Congressional District

Representative Mariannette Miller-Meeks, M.D., of Iowa
2nd Congressional District

Representative John R. Moolenaar of Michigan
4th Congressional District

Representative Alex X. Mooney of West Virginia
2nd Congressional District

Representative Barry Moore of Alabama
2nd Congressional District

Representative Blake Moore of Utah
1st Congressional District

Representative Markwayne Mullin of Oklahoma
2nd Congressional District

Representative Gregory F. Murphy, M.D., of North Carolina
3rd Congressional District

Representative Troy E. Nehls of Texas
22nd Congressional District

Representative Dan Newhouse of Washington
4th Congressional District

Representative Ralph Norman of South Carolina
5th Congressional District

Representative Jay Obernolte of California
8th Congressional District

Representative Burgess Owens of Utah
4th Congressional District

Representative Steven M. Palazzo of Mississippi
4th Congressional District

Representative Greg Pence of Indiana
6th Congressional District

Representative Scott Perry of Pennsylvania
10th Congressional District

Representative August Pfluger of Texas
11th Congressional District

Representative Bill Posey of Florida
8th Congressional District

Delegate Aumua Amata Coleman Radewagen of American Samoa
At-Large Congressional District

Representative Guy Reschenthaler of Pennsylvania
14th Congressional District

Representative Hal Rogers of Kentucky
5th Congressional District

Representative John Rose of Tennessee
6th Congressional District

Representative Matthew M. Rosendale, Sr., of Montana
At-Large Congressional District

Representative Chip Roy of Texas
21st Congressional District

Representative John H. Rutherford of Florida
4th Congressional District

Representative Austin Scott of Georgia
8th Congressional District

Representative Mike Simpson of Idaho
2nd Congressional District

Representative Adrian Smith of Nebraska
3rd Congressional District

Representative Jason Smith of Missouri
8th Congressional District

Representative Pete Stauber of Minnesota
8th Congressional District

Representative Michelle Steel of California
48th Congressional District

Representative Elise M. Stefanik of New York
21st Congressional District

Representative Chris Stewart of Utah
2nd Congressional District

Representative Claudia Tenney of New York
22nd Congressional District

Representative Glenn "GT" Thompson of Pennsylvania
15th Congressional District

Representative Tom Tiffany of Wisconsin
7th Congressional District

Representative David G. Valadao of California
21st Congressional District

Representative Jeff Van Drew of New Jersey
2nd Congressional District

Representative Beth Van Duyne of Texas
24th Congressional District

Representative Ann Wagner of Missouri
2nd Congressional District

Representative Tim Walberg of Michigan
7th Congressional District

Representative Jackie Walorski of Indiana
2nd Congressional District

Representative Michael Waltz of Florida
6th Congressional District

Representative Randy Weber of Texas
14th Congressional District

Representative Daniel Webster of Florida
11th Congressional District

Representative Bruce Westerman of Arkansas
4th Congressional District

Representative Roger Williams of Texas
25th Congressional District

Representative Robert J. Wittman of Virginia
1st Congressional District

Representative Steve Womack of Arkansas
3rd Congressional District