No. 21-454

In the Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, Administrator,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA AND 20 OTHER STATES IN SUPPORT OF PETITIONER

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

DAVID C. TRYON*
MICHAEL R. WILLIAMS**
Special Counsel

Counsel for Amicus Curiae *State of West Virginia*

[additional counsel listed at end]

QUESTION PRESENTED

Should *Rapanos* v. *United States*, 547 U.S. 715 (2006), be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Like all States, *amici* States West Virginia, Alabama, Alaska, Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming have a substantial interest in safeguarding the waters within their borders. "[T]he … power to control navigation, fishing, and other public uses of water, is an essential attribute of [state] sovereignty." *Tarrant Reg'l Water Dist.* v. *Herrmann*, 569 U.S. 614, 631 (2013) (cleaned up); see also *Kansas* v. *Nebraska*, 574 U.S. 445, 480 (2015) ("Authority over water is a core attribute of state sovereignty."). Indeed, over a century ago, the Court declared that States' rights over rivers and other intrastate waters are "obvious, indisputable," and "omnipresent." *Hudson Cnty. Water Co.* v. *McCarter*, 209 U.S. 349, 356 (1908). Water management, then, stands as one of the States' most important and longstanding interests.

Congress has honored this sovereign prerogative by showing "purposeful and continued deference to state water law." *California* v. *United States*, 438 U.S. 645, 653 (1978). For example, Congress has "almost invariably deferred to the state law" when addressing "whether federal entities must abide by state water law." *United States* v. *New Mexico*, 438 U.S. 696, 702 (1978). And at various times and in various ways, Congress has confirmed its "policy … to recognize the interests and rights of the States in determining the development of the

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

watersheds within their borders and likewise their interests and rights in water utilization and control." 33 U.S.C. § 701-1; see also *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 959 (1982) (describing "37 statutes and the interstate compacts [that] demonstrate Congress' deference to state water law").

The Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, is no different. While crafting new federal mechanisms to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id.* § 1251(a), Congress simultaneously "recognize[d], preserve[d], and protect[ed] the *primary* responsibilities and rights of States" when it comes to pollution mitigation and "the development and use … of land and water resources," *id.* § 1251(b) (emphasis added). The CWA thus created a program of "cooperative federalism." *New York* v. *United States*, 505 U.S. 144, 167 (1992). It "anticipates a partnership between the States and the Federal Government," *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992), not a wholesale shift of state conservation power to federal regulators.

Nevertheless, decisions like the one below have turned the CWA into a jurisdictional cudgel. By too broadly interpreting the Act's key jurisdictional phrase—"waters of the United States"—the Ninth Circuit and other lower courts have blessed a federal power grab that expands the CWA to waters that are not "navigable" under even the most generous common understanding of the term. See 33 U.S.C. § 1362(7) (defining "navigable" waters); see also *id.* § 1362(12) (defining "discharge of a pollutant" to cover the "addition of any pollutant to navigable waters"). The result is an erosion of the Act's intended partnership in favor of federal power over the vast majority of water resources within the States.

These ill-advised cases trace largely to the fractured decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006). There, a plurality of the Court offered a workable, text-based, and constitutionally sound definition of "waters of the United States." *Id.* at 739, 742. But without five justices supporting that definition, lower courts struggle to draw a consistent jurisdictional line, and many have traded the plurality's view for the case-by-case "significant nexus" test from Justice Kennedy's concurring opinion. That indeterminate test has allowed the Environmental Protection Agency ("EPA") to extend its reach to all manner of intrastate waters *and lands*, including the parcel at issue here—which apparently has no surface water connection to a body of water. See Pet. 7.

This Court should end the division *Rapanos* brought in its wake and restore Congress' intended assignment of responsibility. An approach similar to the *Rapanos* plurality's would show sufficient respect for the States' sovereign prerogatives while removing the confusion over the CWA's scope that has plagued regulated parties and imposed weighty, unwarranted costs on the States and their people. And it would reinstate the *genuinely* cooperative federalism that Congress intended.

The CWA has an important role to play in ensuring clean water for our country's interstate waters. But it should not be allowed to engulf every other water law. *Amici* urge the Court to grant certiorari and adopt, once and for all, a workable, reasonable definition of "waters of the United States."

SUMMARY OF ARGUMENT

Rapanos was a missed opportunity to bring much needed clarity to an otherwise ambiguous provision of the

Clean Water Act. The Court now has another chance to explain what the central jurisdictional phrase of the Act means. It should take it.

I. As things stand, the CWA usurps state authority in otherwise local water management matters. States have historically held the primary role in managing and preserving our nation's waters—but courts and agencies have now extended the CWA to puddles, ditches, and drains in a way that neither the statute nor the Constitution can support.

II. Further, these interpretations have been inconsistent. Currently, identifying "the waters of the United States" is an onerous process. Even once that process unwinds, the indefinite "significant nexus" standard often leads to arbitrary enforcement and frustration for all parties. This confusion imposes substantial costs on the States and the individuals and businesses within our borders.

III. Given these problems, the Court should grant the petition and embrace the *Rapanos* plurality's test: "'the waters of the United States' include only relatively permanent, standing or flowing bodies of water." *Rapanos*, 547 U.S. at 732 (plurality op.). That construction is most consistent with the text that Congress chose. And it gives an understandable, appropriately constrained scope to the Act. The federal government retains its role as the guardian of truly national, navigable waters; the States retake their place as guardians of state waters; and citizens can move forward knowing what, when, and how the various rules apply.

The CWA promises an opportunity for genuinely cooperative federalism while advancing the important

objective of clean water for all. *Amici* States respectfully ask that the Court grant the petition to renew that promise.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant The Petition To Restore Respect For States' Water Rights.

A. As co-sovereigns in our federal system, "States retain broad authority in … pursuing their legislative objectives." *Shelby Cnty., Ala.* v. *Holder*, 570 U.S. 529, 543 (2013). The Tenth Amendment and our entire constitutional structure insist that States "retain a residuary and inviolable sovereignty." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (quoting THE FEDERALIST NO. 39, at 245). Indeed, this division of powers between federal and state governments is an essential aspect of "protect[ing] the liberty of the individual from arbitrary power." *Bond* v. *United States*, 572 U.S. 844, 863 (2014). And "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington* v. *Texas*, 441 U.S. 418, 431 (1979).

States' sovereign interests and expertise are on full display when it comes to protecting our nation's precious water resources—state authority to regulate local lands and waters "is perhaps *the* quintessential state activity." *FERC* v. *Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added). This means that "except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters." *California*, 438 U.S. at 662. Accordingly, this Court has sought to prevent "significant impingement of the States' traditional and primary power

over land and water use." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*").

And the States have not hesitated to flex their authority. Indeed, 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 than "waters of the United States."[2] Often, those definitions extend to ephemeral and intermittent waters and wetlands—expressly, with no need to impose a "nexus" gloss on the statutory text.[3] The States independently enforce their own water-quality laws, too. Those standards might account for construction that may impact state waters, for instance.[4] Many States administer comprehensive wetland-protection programs that include dredge-and-fill measures, mitigation requirements, and water quality monitoring.[5] And, of

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[2] See, *e.g.*, Iowa Code § 455B.171(41); Md. Code., Envir. § 5-101(l); Minn. Stat. § 115.01(22); Neb. Rev. Stat. § 81-1502(21); N.D. Cent. Code § 61-01-01; Or. Rev. Stat. § 536.007(12); Tex. Water Code §§ 26.001(5), 26.023.

[3] See, *e.g.*, Ariz. Rev. Stat. §§ 45-101(9), 49-201(41); 7 Del. Admin. Code § 74012.0; Minn. Stat. § 103G.005(15), (17); Or. Rev. Stat. § 196.800(15); Tenn. Code § 69-3-103(46); Tex. Water Code § 11.021; Wyo. Stat. § 35-11-103(c)(vi).

[4] See, *e.g.*, Fla. Stat. § 403.088; Iowa Code § 455B.173; Md. Code, Envir. § 5-502; Minn. Stat. § 103G.301; Neb. Rev. Stat. § 81-1506(2)(f); Or. Rev. Stat. § 390.835.

[5] See, *e.g.*, Ark. Code § 15-22-1007; Ind. Code §§ 13-18-22-1 to -11; Fla. Stat. §§ 373.019(27), 373.414; Md. Code,

course, state requirements include water-purity and pollution standards.[6]

Collectively, these provisions provide comprehensive protections for intrastate waters and other natural resources within state borders. In West Virginia, for example, "[i]t is unlawful for any person" without a state-issued permit to "allow sewage, industrial wastes or other wastes, or the effluent therefrom, produced by or emanating from any point source, to flow into the waters of this state." W. Va. Code § 22-11-8(b)(1). The Legislature then defined "waters of the state" to embrace *all* wetlands and *all* water, on or beneath the earth's surface—the only exceptions are farm ponds, industrial settling basins, and water treatment facilities (which are separately regulated). *Id.* § 22-11-3(23). Every state permit limits the amount of pollutants that may flow into the waters of the State, *id.* § 22-11-8(b)(4); state regulations limit the "maximum contaminant levels permitted for groundwater," too, *id.* § 22-12-4(b). And these limits must be sufficient to "provide protection for"

Envir. §§ 5-903 to -911; Minn. Stat. §§ 103G.221 to -2375; N.Y. Envtl. Conserv. Law §§ 24-0101 to -1305; Or. Rev. Stat. §§ 196.674, 196.678; Tex. Water Code § 11.502.

[6] See, *e.g.*, Ariz. Rev. Stat. §§ 45-401 to 45-704; Ark. Code §§ 15-22-906, -915; Ky. Rev. Stat. §§ 224.70-100 to -150; Fla. Stat. §§ 403.062 to -623; Iowa Code §§ 455B.176A, 455B.186, 455B.263, 455B.267; Md. Code, Envir., § 9-314; Minn. Stat. § 115.03; Mo. Rev. Stat. §§ 644.006 to -150; Mont. Code §§ 75-5-101 to -641; Neb. Rev. Stat. § 81-1504; N.M. Stat. §§ 74-6-1 to -17; N.D. Cent. Code §§ 61-28-01 to -09; Or. Rev. Stat. §§ 448.265, 468B.020; Wyo. Stat. § 35-11-301.

"hydrologically connected … surface water and other groundwater." *Id.* § 22-12-4(c).

States have good reason to act decisively when protecting their vital water resources. Because local officials are literally "on the ground," States understand better their local environments' unique hydrological challenges. After all, the Florida Everglades presents different water-management concerns than the mountain rivers of West Virginia. See U.S. Geological Survey, *National Water Summary on Wetlands Resources, State Summary Highlights*, https://water.usgs.gov/nwsum/WSP2425/state_highlights_summary.html (describing 11 million acres of wetlands in Florida versus the small pocket of wetlands occupying "less than 1 percent" of West Virginia's surface area). Even water features of the same general type can raise state-level complexities: wetlands in southeastern Alaska, for example, are much different from the wetlands of the Mississippi Delta.

What's more, States can often respond to changing conditions faster than the federal government. With a more direct line to constituents and stakeholders, local legislators often have a better sense of local needs even aside from site-specific geology and hydrology. And with increasing public attention on environmental issues, States are motivated to push for environmental controls that will attract citizens looking for clean water and a pleasant living environment—rather than engaging in the "race to the bottom" that so many feared decades ago. See, *e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1212-13 (1992) (explaining why "existing models provide no support for [race-to-the-bottom] arguments" and concluding that "even if there

were a race to the bottom over environmental regulation," federal intervention "would be inadvisable because it would have the undesirable effect of skewing other state regulatory or fiscal decisions").

In sum, States have the expertise and incentives to continue fulfilling their traditional, constitutionally protected role as primary guardians of the nation's waters.

B. In the Clean Water Act, Congress recognized that this vital role calls for a careful calibration of state and federal water regulation—one that permits federal involvement but ultimately respects the paramount role of the States in water management.

Congress wrote its purpose right into the text: "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate [water] pollution." 33 U.S.C. § 1251(b). Far from throwaway rhetoric, Congress employed this language to address concerns from States that the CWA would become a "federal takeover" of water management and pollution control. Ryan P. Murphy, *Did We Miss the Boat? The Clean Water Act and Sustainability*, 47 U. RICH. L. REV. 1267, 1275 (2013); see also *S.D. Warren Co.* v. *Maine Bd. of Env't Prot.*, 547 U.S. 370, 386 (2006) ("[The CWA] provides for a system that respects the States' concerns."). And Congress went beyond a mere statement of purpose; a "strong current of federalism" runs throughout the statute. *District of Columbia* v. *Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980); accord *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 873 (7th Cir. 1989) ("[N]umerous courts have recognized the primacy of state and local enforcement of water pollution controls as a theme that resounds throughout the history of the Act." (cleaned up)). For example, Congress allowed many key

decisions, such as whether a permit should issue under the National Pollutant Discharge Elimination System, to remain in the hands of the States. 33 U.S.C. § 1342(b). In short, "Congress did not want to interfere any more than necessary with state water management." *Nat'l Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982).

This Court has also repeatedly recognized that federalism is baked into the definition of "waters of the United States." Congress tied the definition to "navigable waters"; that phrase, in turn, shows "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." *SWANCC*, 531 U.S. at 172. And by referring to "*the waters* of the United States" (rather than just "water of the United States"), Congress repudiated any intent to bring "virtually all planning of the development and use of land and water resources by the States under federal control." *Rapanos*, 547 U.S. at 737 (plurality op.) (cleaned up; emphasis added).

C. Congress' constitutionally required system of respect, however, has gone awry. Relying on Justice Kennedy's broad "significant nexus" test and other language from *Rapanos*, both courts and administrative agencies have extended the CWA to areas that Congress never could have expected would fall under the federal government's domain—and as a result, have shrunk the category of *intra*state waters almost out of existence.

According to some courts, for instance, a rock quarry pit, a bit of water that was "dry most of the year," and a roadside ditch are all "the waters of the United States." *N. Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007); *United States* v. *HVI Cat Canyon, Inc.*, 314 F. Supp. 3d 1049, 1062 (C.D. Cal. 2018); *Cal.*

Sportfishing Prot. Alliance v. *Chico Scrap Metal, Inc.*, 124 F. Supp. 3d 1007, 1017 (E.D. Cal. 2015). Even before *Rapanos*, the Ninth Circuit had found that a wetland separated from a traditionally navigable body of water by a seventy-foot-high berm and a maintenance road met the "significant nexus" standard. See *Baccarat Fremont Devs., LLC* v. *U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1152, 1157 (9th Cir. 2005). "It is hard to imagine how almost anything could stop the courts … from finding a 'significant nexus'" if that berm or a near-total absence of water "is not enough." Thomas J. Philbrick, *From Asahi to WOTUS: Why "Significant Nexus" Falls Short*, 9 LSU J. ENERGY L. & RESOURCES 165, 189 (2021). Indeed this very case—involving a parcel of land separate from discernible "wetlands," let alone navigable waters—drives home how far lower courts have departed from the Act's cooperative federalism constraints.

The agencies have been even more aggressive than the courts in extending the Act's purported reach. A report from the U.S. Senate Committee on Environment and Public Works details how the Army Corps of Engineers and the EPA have sought to apply the CWA to rocks, tire ruts, parking-lot puddles, roadside drainage, "test pits," permafrost, and ephemeral drainage.[7] Based on incidents

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[7] See U.S. Senate. Comm. On Env't & Pub. Works, *From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles, and Dry Land: A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency Under the Clean Water Act* (Sept. 20, 2016), *available at* https://www.epw.senate.gov/public/cache/files/7b469fe4-62c3-4ea9-9ce2-bedbf5179372/wotus-committee-report-

like these, it is no exaggeration that "[a]ny piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act." *Sackett* v. *EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Even Justice Kennedy noted after *Rapanos* that "the reach and systemic consequences of the Clean Water Act remain[ed] a cause for concern"—in other words, the Act "continues to raise troubling questions." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1816-17 (2016) (Kennedy, J., concurring).

Consider ephemeral and intermittent waters as one example of the consequences of reading "the waters of the United States" too broadly. The *Rapanos* plurality explained that "waters of the United States" "does not include channels through which water flows intermittently or ephemerally." *Rapanos*, 547 U.S. at 739. But some lower courts have looked to Justice Kennedy's concurrence to hold that the phrase *can* reach "intermittent streams." See, *e.g.*, *United States* v. *Lippold*, No. 06-30002, 2007 WL 3232483, at *6 (C.D. Ill. Oct. 31, 2007). In West Virginia alone, that one (seemingly small) interpretive variance would subject at least 8,000 additional miles of surface flow to federal jurisdiction.[8]

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final1.pdf; see also Philbrick, *supra*, at 189 (noting other starling examples of the Agencies' assertions of jurisdiction based on significant nexus).

[8] See EPA, PERCENTAGE OF SURFACE DRINKING WATER FROM INTERMITTENT, EPHEMERAL, AND HEADWATER STREAMS IN WEST VIRGINIA (Dec. 2009), *available at* https://www.epa.gov/sites/default/files/2015-06/documents/2009_12_29_wetlands_science_surface_drinking_water_surface_drinking_water_wv.pdf.

Thousand-mile interpretations add up across a nation, and the bulk they place on the federal side of the scale pushes Congress' intent increasingly out of balance.

Indeed, a former head of the EPA and a former Assistant Secretary of the Army jointly declared that under the "significant nexus" test, the CWA threatens to subject almost every drop of water within States to federal jurisdiction.[9] More than that, the Act has become a "federal *land* grab." *Id.* (emphasis added). When features that meet no commonly understood sense of "water" are swept into the waters of the United States, the States' authority over their own lands is threatened, too.

This situation is untenable. Granting certiorari would allow the Court to renew the CWA's promise of a primary state role. The Court should act to heal the wound to state sovereignty that too-broad interpretations of the CWA have opened these many years.

II. The Court Should Grant The Petition To Resolve The Chronic Confusion Over The CWA's Division Of State And Federal Jurisdiction.

The Court's intervention is needed even aside from the affronts to federalism with an Act untethered from its statutory and constitutional restraints. A wrong interpretation is bad enough, but lower courts, regulated parties, and the States cannot even identify with any

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[9] See Anthony Wheeler and R.D. James, *Trump Administration's WOTUS Definition Ends Decades of Confusion, Federal Overreach*, THE KANSAS CITY STAR (Jan. 27, 2020), *available at* https://www.kansascity.com/opinion/article239612438.html.

confidence the line between state and federal waters. This confusion is costly, and only this Court can end it.

A. Defining "waters of the United States" "is a contentious and difficult task," *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 623 (2018), and everyone involved with implementing and enforcing the CWA has been casting for guidance for too long. As Petitioners explained, see Pet. 11-12, this Court has weighed in three times over the meaning of the term—in 1985, 2001, and 2006. See *Rapanos*, 547 U.S. at 757; *SWANCC*, 531 U.S. at 171; *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). And rather than setting confusion to rest in this important area of the law, questions over the CWA's scope have multiplied even more after the fractured decision in *Rapanos*.

The Agencies issued guidance after *SWANCC* and *Rapanos*—and later found both attempts inadequate. 80 Fed. Reg. 37054, 37056 (June 29, 2015). In 2015, the Agencies tried again to "clarify" the definition of "waters of the United States." *Id.* at 37054. But that proposal spawned "over 1 million public comments," *id.* at 37057, and the final rule triggered an immediate congressional rejection via the Congressional Review Act, which President Obama then vetoed. See Message to the Senate Returning Without Approval Legislation Regarding Congressional Disapproval of an Army Corps of Engineers and Environmental Protection Agency Rule on the Definition of "Waters of the United States" Under the Clean Water Act, 2016 DAILY COMP. PRES. DOC. 24 (Jan. 19, 2016), 2016 WL 212569. The Agencies' most recent attempt in 2017 to further clarify its guidance—starting from the same uncertain legal framework—was similarly controversial. *E.g.*, 85 Fed. Reg. 22250, 22260 (Apr. 21, 2020) (noting "approximately 690,000 comments"

received). Both rounds of agency rulemaking also led to massive and ultimately inconclusive litigation. After the 2015 rule, for instance, "industry groups, more than half the states, and several environmental groups filed lawsuits challenging the rule in multiple federal district and appeals courts." CONGRESSIONAL RESEARCH SERVICE, "WATERS OF THE UNITED STATES" (WOTUS): CURRENT STATUS OF THE 2015 CLEAN WATER RULE 7 (2018).

Courts and commenters are confused, too. There have been "several thousand law review articles" on issues related to the Question Presented. Christopher D. Thomas, *Can Anyone Define Wotus? A Cranky History of Clean Water Act Jurisdiction*, 44 FED. LAW. 47 (2018). As for lower courts, "the real difficulty comes in determining which—if any—of the three main opinions [in *Rapanos* they] should look to for guidance." *United States* v. *Cundiff*, 555 F.3d 200, 207-08 (6th Cir. 2009). As the Petition explains (at 17-20), courts are hopelessly divided whether to follow the plurality opinion, Justice Kennedy's "significant nexus" opinion, or a combination.

Even worse for lower courts, the "*Marks*" test for divining precedential effect has proven to be a poor fit for *Rapanos*. In a fractured opinion, usually "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (citation omitted). Yet it is unclear here what position that might be: Justice Kennedy's concurrence recognizes that "neither the plurality nor the dissent addresses the nexus requirement," and for its part, the concurrence repeatedly rejected key aspects of the plurality and dissent. *United States* v. *Robison*, 521 F. Supp. 2d 1247, 1252 (N.D. Ala. 2007); see also, *e.g.*,

United States v. *Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (finding *Marks* inapplicable when applying *Rapanos*).

There is thus no clear course for lower courts under *Rapanos*. In short, they are left in the doubly difficult position of having neither clear direction from this Court nor an agreed second-best path forward under *Marks*.

B. States and regulated parties bear the costs from these years of uncertainty.

First, the States carry a heavy load making (and often defending in court) many detailed hydrologic analyses every year. See, *e.g.*, *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015) (noting that the 2015 rule would have required North Dakota to "among other things, undertak[e] jurisdictional studies for every proposed gas, oil, or water pipeline project"). Doing so under an uncertain and often shifting legal standard is an unjustified burden.

Currently 47 States have received authority to implement the National Pollutant Discharge Elimination System ("NPDES") permitting regime pursuant to Section 1342(b). This means that the burdens of unknown or expanded CWA jurisdiction fall directly on the States and their environmental protection agencies. This Court has lamented that the NPDES process is "arduous, expensive, and long." *Hawkes*, 136 S. Ct. at 1815. Quite right: State environmental protection agencies spend nearly 1.6 million hours and nearly a million dollars each year processing NPDES permits.[10] And NPDES is only

[10] See EPA, ICR NO. 0229.21, SUPPORTING STATEMENT, INFORMATION COLLECTION REQUEST FOR NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)

one of many responsibilities the CWA entrusts to the States. States must set water quality standards for all covered waters, 33 U.S.C. § 1311(b)(1)(C), (e)(3)(A); 40 C.F.R. §§ 130.3, 131.3(i), 131.4(a), then apply Total Maximum Daily Loads for any waters that fail to meet those standards, 40 C.F.R. § 130.7. These water-quality responsibilities come with a reporting requirement on "all navigable waters in [each] State." 33 U.S.C. § 1315(b)(1)(A)-(B). States must provide certifications for federal permit applicants, too. *Id.* § 1341.

If this Court gives "the waters of the United States" a more restrained construction, then States can appropriately redirect some of these extensive efforts to localized regulation of their own choosing—just as the cooperative federalist scheme anticipated. But more generally, regardless *what* the answer is, having resolution will itself better focus state resources and help avoid duplicative and unnecessarily prolonged reviews. Sending beneficial land improvement projects to regulatory purgatory costs States untold tax revenues, stalls jobs creation, and forfeits other non-monetary benefits for our States' residents. And constantly changing regulatory requirements and varying court interpretations undermine the States' abilities to pass and implement their *own* water and land use regulations. Without a clear directive of what waters fall within the federal government's jurisdiction—and thus how much effectively remains of the category of intrastate waters—it is harder from both resource and political accountability

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PROGRAM (RENEWAL) at *17, tbl. 12.1 (Dec. 2015), *available at* https://www.reginfo.gov/public/do/DownloadDocument?objectID=60917402.

standpoints for States to fulfill their constitutional roles effectively.

Second, the people and businesses in our States are hurt by ever-changing jurisdictional goalposts. As the *Rapanos* plurality pointed out, the "average applicant for an individual permit spends 788 days and $271,596 in completing the process," and "over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits." *Rapanos*, 547 U.S. at 721 (plurality op.). These massive costs can lead to delayed development or no development at all—a particularly weighty loss if it turns out the Act did not actually reach the waters in question. And even unintended violations of the Act can lead to bankruptcy-inducing fines; again, the Court need look no further than the Agencies' 2007 threats against the Sacketts of tens of thousands of dollars of fines for each day of non-compliance on their 0.63 acre lot. Pet App. B-2 to B-3.

Currently, the maximum civil fines for CWA violations are $55,800 per day, per violation.[11] Criminal penalties can be up to $25,000 per day and two years in prison for negligent violations, and more for knowing violations.[12] And some courts mandate a top-down fine approach, imposing the maximum fine amount unless the court determines (after making specific factual findings) that

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[11] Memorandum from Susan Parker Bodine, Asst. Adm'r for Enf't and Compliance, EPA, to Off. of Civ. Enf't, EPA (Jan. 15, 2020), *available at* https://www.epa.gov/sites/default/files/2020-01/documents/2020penaltyinflationruleadjustments.pdf.

[12] EPA, CRIMINAL PROVISIONS OF WATER POLLUTION, https://www.epa.gov/enforcement/criminal-provisions-water-pollution.

the party meets the "factors spelled out in" the statute. *E.g.*, *Atl. States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990). Others have taken the opposite approach. *E.g.*, *United States* v. *Gulf Park Water Co.*, 14 F. Supp. 2d 854, 858 (S.D. Miss. 1998) (collecting cases). Further, fines continue to accrue even during any legal proceedings challenging EPA orders. The potential liability for even small infractions can thus keep many landowners from stepping onto the regulatory playing field in the first place.

Third, sending the Agencies on another round of rulemaking before resolving this central legal issue will further compound these harms. Recently, the Agencies announced that they will "write a [new] rule to define WOTUS that is grounded in … the law" and "consistent with the relevant Supreme Court decisions." See Press Release, EPA and Army Announce Next Steps For Crafting Enduring Definition of Waters of the United States (July 30, 2021), 2021 WL 3260511. Yet it is far from clear what that means while *Rapanos*' multiple opinions remain the best word on the CWA's reach. The most likely result is more time-intensive and costly rounds of rulemaking and litigation in the lower courts that stand to make the current confusion even worse. By contrast, taking up the clean question of law the Petition presents would allow the Agencies and the States to invest these resources into developing and enforcing smart rules to protect our nation's water resources—with a clear understanding of which waters fall on the inter- and intrastate sides of the line.

III. The Court Should Reverse the Ninth Circuit's All-Encompassing View Of Federal Water Jurisdiction.

This case shows just how problematic the "significant nexus" test has become. The Ninth Circuit concluded that the Sacketts' property comprised part of "the waters of the United States" because their "soggy residential lot" lay across a road from a "large wetlands complex" that "drains into an unnamed tributary" that in turn feeds a creek that then runs from the property and finally empties into a lake. *Sackett* v. *EPA*, 8 F.4th 1075, 1079, 1081 (9th Cir. 2021). According to the Ninth Circuit, the lot's supposed adjacency to the "relatively permanent" unnamed tributary and its relationship to "similarly situated" wetlands were enough to give the EPA jurisdiction. *Id.* at 1091-93. The court was further unwilling to "second guess" the agency's technical judgment that the Sacketts' lot affected the "chemical, physical, and biological integrity" of the lake. *Id.* at 1093.

The attenuated line of connection between the Sacketts' land and navigable waters illustrates how courts have lost their way when it comes to the CWA. The Court should correct this error by granting the Petition and giving the *Rapanos* plurality authoritative weight.

First, the plurality's reading is truer to the CWA's text than the Ninth Circuit's broad-sweeping significant-nexus test. As the plurality explained, "[t]he use of the definite article ('the') and the plural number ('waters') shows plainly that § 1362(7) does not refer to water in general." *Rapanos*, 547 U.S. at 732 (plurality op.). Further, "waters" is ordinarily defined to mean "permanent, standing or flowing bodies of water … forming geographical features." *Id.* at 732-33. Were there any confusion on that score, Congress' choice to link "waters

of the United States" with "navigable" waters dispels it, as "navigable" waters are ordinarily understood to be permanent water features. *Id.*

In contrast, the "significant nexus" test is not drawn from the statutory text, but comes instead from *SWANCC*'s "cryptic characterization" of *Riverside Bayview*. *Rapanos*, 547 U.S. at 755 (plurality op.). The test's indeterminate language permitted the Ninth Circuit to extend the CWA to transient waters that were three (or more) degrees separated from any water traditionally understood to be navigable. This Court should return the statute to a footing found in the text.

"The second problem with" the significant-nexus approach "is its inconsistency with the design and structure of the statute as a whole." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 353 (2013). In particular, "the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'" *Rapanos*, 547 U.S. at 735 (plurality op.). "The separate classification of ditches, channels, and conduits—which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow—shows that these are, by and large, not 'waters of the United States.'" *Id.* at 735-36 (cleaned up). "Significant nexus" effectively muddles the statutory categories, rendering one or the other superfluous. Here, for instance, the Ninth Circuit relied on an impermanent channel and "subsurface flow" to conclude that the Sacketts' lot was covered. *Sackett*, 8 F.4th at 1092-93 & nn.13-14.

Using the significant-nexus test in the way the Ninth Circuit did here also "raise[s] a multitude of constitutional problems," counseling again that the plurality's definition

should prevail. *Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005). Most obviously, Congress used the phrase "waters of the United States" to set a meaningful, constitutional boundary: it "is a jurisdictional element, connecting the Clean Water Act to Congress's Commerce Clause powers." *United States* v. *Lucero*, 989 F.3d 1088, 1095 (9th Cir. 2021). But an enigmatic "nexus" definition sets no boundary. As practice and this case underscore, see *supra* Part I, it permits the federal government to extend its reach to all manner of lands that have no traditional ties to navigable waters and, thus, interstate commerce—courts then defer to these "technical" jurisdictional judgments without applying meaningful scrutiny. Implementing agencies can thus use the ambiguity inherent in the standard to rationalize their way into jurisdiction in almost any case, commerce-related or not. Yet "we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity." *Rapanos*, 547 U.S. at 738 (plurality op.).

Lastly, the *Rapanos* plurality's approach affords greater respect than the Ninth Circuit's for the States' roles in water management. When it comes to the CWA, "[c]lean water is not the only purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions." *Rapanos*, 547 U.S. at 755-56 (plurality op.) (citing 33 U.S.C. § 1251(b)); see also *McCreary Cnty., Ky.* v. *ACLU of Ky.*, 545 U.S. 844, 861 (2005) (noting how courts should consider purpose in construing a statute). And this Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *U.S. Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020) (rejecting

construction of Mineral Leasing Act that would have converted thousands of acres of private and state-owned land to national-park land). The CWA lacks any such language. See *Rapanos*, 547 U.S. at 738 (plurality op.) (explaining that "the phrase 'the waters of the United States' hardly qualifies" as a sufficiently clear statement of an intent to abrogate state authority). Even so, decisions like the Ninth Circuit's effectively sideline the States from water management and environmental regulation.

To address these federalism and text-based concerns, the Court should grant the Petition and explain "precisely how to read Congress' limits on the reach of the Clean Water Act." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring). Properly understood, the Act and the constitutional principles it enshrines require reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

DAVID C. TRYON*
MICHAEL R. WILLIAMS**
Special Counsel

*admitted in Ohio; practicing under supervision of West Virginia attorneys

**admitted in the District of Columbia, Michigan, and Virginia; practicing under supervision of West Virginia attorneys

Counsel for Amicus Curiae *State of West Virginia*

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TREG R. TAYLOR
Attorney General
State of Alaska

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CHRIS CARR
Attorney General
State of Georgia

THEODORE E. ROKITA
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

DANIEL CAMERON
Attorney General
State of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

ERIC SCHMITT
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

JOHN FORMELLA
Attorney General
State of New Hampshire

WAYNE STENEHJEM
Attorney General
State of North Dakota

JOHN M. O'CONNOR
Attorney General
State of Oklahoma

KEN PAXTON
Attorney General
State of Texas

ALAN WILSON
Attorney General
State of South Carolina

SEAN D. REYES
Attorney General
State of Utah

JASON RAVNSBORG
Attorney General
State of South Dakota

BRIDGET HILL
Attorney General
State of Wyoming

Counsel for Amici *States*