No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, ADMINISTRATOR,
Respondents.

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

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KERRY L. MCGRATH
ERICA N. PETERSON
ANTHONY R. GUTTMAN
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW, Suite 900
Washington, D.C. 20037
(202) 955-1500

ELBERT LIN
Counsel of Record
HUNTON ANDREWS KURTH LLP
951 East Byrd Street, East Tower
Richmond, VA 23219
elin@HuntonAK.com
(804) 788-8200

Counsel for Amicus Curiae
(Additional counsel listed on inside cover)

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ADDITIONAL COUNSEL FOR *AMICUS CURIAE*

ANDREW R. VARCOE
STEPHANIE A. MALONEY
U.S. CHAMBER
LITIGATION CENTER
1615 H STREET, NW
WASHINGTON, D.C. 20062
(202) 463-5337

QUESTION PRESENTED

Whether the U.S. Court of Appeals for the 9th Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7).

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Many industries in which the Chamber's members operate are regularly confronted by issues concerning the scope of the Clean Water Act (CWA or the Act) and are adversely affected by the uncertain reach of federal jurisdiction under the CWA. Without clear guidance from this Court, the Chamber's members will continue to endure an expensive, vague, and time-consuming process whenever they need to determine whether a project or activity will impact waters subject to federal jurisdiction under the CWA. Indeed, the substantial burdens that this uncertainty causes, including the expense of this regulatory process and the exorbitant potential penalties

[1] Counsel of record for all parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

for even inadvertent violations of the Act, often lead the Chamber's members to avoid or abandon valuable activities and projects altogether.

INTRODUCTION AND SUMMARY OF ARGUMENT

To answer the question presented, this Court need look no farther than the decision that effectively gave rise to it: *Rapanos* v. *United States*, 547 U.S. 715 (2006). That fractured decision has led to confusion in the lower courts and substantial swings in interpretation by the agencies charged with implementing the Clean Water Act.[2] Yet, *Rapanos* includes within it a simple path forward. In short, the Court can and should adopt the *Rapanos* plurality's test for determining whether wetlands are "waters of the United States" under the Clean Water Act, and reject the concurrence's significant nexus test. The plurality's test is correct as a matter of law. And though it does not answer every question about CWA jurisdiction, it is sufficient to resolve this case and to provide significant and needed clarity to the numerous industries affected by the CWA.

I. This Court should adopt the *Rapanos* plurality's reading of "waters of the United States" for several reasons. Most importantly, the plurality's test follows from the statutory text as understood in light of basic principles of statutory interpretation that this Court has repeatedly reiterated in the years since *Rapanos*. Moreover, the significant nexus test produces unpredictable and

[2] The agencies are the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (collectively, the agencies).

questionable results. And finally, the significant nexus test fails several clear statement rules.

II. A clearly delineated reading of "waters of the United States" is critical for business and consistent with environmental protection. The reality is that permitting costs can and do inhibit project development, including important climate, clean energy, resilience, and water management projects. A clear and predictable understanding of "waters of the United States" is needed to reduce these substantial costs and to ensure they are not imposed more broadly than required. Further, it is plain from the CWA that Congress never intended to require federal CWA permitting over all water resources. Other regulatory tools are better suited to protecting the water quality of transitory and ephemeral waters.

ARGUMENT

I. This Court Should Adopt the *Rapanos* Plurality's Analysis.

The *Rapanos* plurality concluded that there is "only [one] plausible interpretation" of "waters of the United States." 547 U.S. at 739 (plurality opinion). The term "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Ibid.* And it decidedly does not "encompass[] transitory puddles or ephemeral flows of water." *Id.* at 733. In turn, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and

wetland, are 'adjacent to' such waters." *Id.* at 742. That continuous connection, the plurality explained, makes the wetlands "as a practical matter *indistinguishable* from waters of the United States" and thus supports the "legal judgment" that the wetlands are themselves such waters. *Id.* at 755.

In contrast, Justice Kennedy opined in his concurring opinion that "jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (Kennedy, J., concurring in judgment). That nexus, he explained, "must be assessed in terms of the statute's goals and purposes." *Ibid.* Specifically, "wetlands possess the requisite nexus . . . if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. According to Justice Kennedy, "the rationale for Clean Water Act regulation" of wetlands is that they "can perform critical functions related to the integrity of other waters." *Id.* at 779.

For at least the following reasons, this Court should adopt the *Rapanos* plurality analysis over the significant nexus test as the correct reading of the CWA. *First*, the plurality's test, unlike the significant nexus test, accords with the text of the Act and follows from settled principles of statutory interpretation that this Court has often reiterated in the years since *Rapanos*. *Second*, the significant nexus test's departure from the statutory text, and the test's inherent subjectivity, has resulted, as the plurality anticipated, in unpredictable and highly questionable results. *Third*, the unpredictability and

manipulability of the significant nexus test, in turn, further warrant its rejection under several of this Court's clear-statement rules for interpreting statutes.

A. The *Rapanos* plurality followed established principles of statutory interpretation that this Court has often reiterated.

1. In the years since *Rapanos*, this Court has repeatedly stressed that statutory interpretation begins with the text. *Ross* v. *Blake*, 578 U.S. 632, 638 (2016) ("Statutory interpretation, as we always say, begins with the text."); *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1169 (2021) ("We begin with the text."). This requires careful attention to the specific words Congress chose, including, as relevant here, the use of the definite article. *Nielsen* v. *Preap*, 139 S. Ct. 954, 965 (2019) (giving meaning to "Congress's use of the definite article in 'when the alien is released'"). *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1483 (2021) (finding "'the notice'" at a particular "'time'" refers to "a discrete moment, not an ongoing endeavor"). Or the use of the plural, rather than singular, form. *Life Techs. Corp.* v. *Promega Corp.*, 137 S. Ct. 734, 742 (2017).

In discerning what Congress meant by particular statutory terms, this Court looks to ordinary meaning as set forth in dictionaries. See, *e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) (use of dictionaries to define "provide"); *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 (2020) (dictionary definition of "free from"). This is particularly so where a statutory term is undefined. *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176 (2021)

("Where Congress does not furnish a definition of its own, we generally seek to afford a statutory term 'its ordinary or natural meaning.'"); *Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) ("It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'"). But even when a statutory term or phrase is defined, this Court has stressed that the individual words retain some of their ordinary meaning. For example, this Court found it was required to give effect to the word "habitat" in the defined term "critical habitat" as the statutory definition explained only what makes habitat critical, not what makes it "habitat." *Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368–69 (2018).

Unless this Court finds the statute ambiguous, the "'analysis begins *and ends* with the text.'" *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2380 (quoting *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014) (emphasis added)); see also *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (where statute is "'unambiguous,'" "'our inquiry begins with the statutory text, and ends there as well'") (quoting *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) (plurality opinion)); *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (citations omitted) ("We must enforce plain and unambiguous statutory language according to its terms.").

And ambiguity, this Court has stressed, is rare. For both rules and statutes, "a court must exhaust all the 'traditional tools' of construction" before finding ambiguity. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting

Chevron U.S.A. Inc. v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, n.9 (1984)). Put simply, "hard interpretive conundrums . . . can often be solved." *Ibid.*; see also *Wooden* v. *United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring) ("[A] court must exhaust all the tools of statutory interpretation . . . [and having done so] often determines the best reading of the statute."); *Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring in judgment) ("If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the [law] at issue.").

As a result, assessments of the policy and perceived purpose of a statute are often of no importance. When the text dictates a result—which, as noted, this Court has said should almost always be true—there is no place for freestanding appeals to policy and purpose. See *Badgerow* v. *Walters*, No. 20-1143, 2022 WL 959675, at *8 (U.S. Mar. 31, 2022) (rejecting policy arguments because "Congress has made its call"). In the last five years, this Court has turned aside "surmise about legislative purpose and arguments from public policy," *HollyFrontier*, 141 S. Ct. at 2181, and rejected the Government's "last ditch effort to salvage its atextual interpretation" of an immigration statute by resorting to the alleged purpose and legislative history of a statute, *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2119 (2018); see also *N.L.R.B.* v. *SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) (when the statutory "text is clear, [the Court] need not consider this extra-textual evidence"); *Chamber of Commerce of the U.S.* v. *Whiting*, 563 U.S. 582, 598–99 (2011) (declining to defer to a statute's alleged purpose and history "[a]bsent any textual basis").

2. The *Rapanos* plurality's analysis tracks all of these principles. The opinion begins and ends with the text when considering the phrase "the waters of the United States." It gives due weight to Congress's choice of the definite article "the" and the plural term "waters," concluding that Congress referred not to water in general but "more narrowly to water[s]." *Rapanos*, 547 U.S. at 732 (plurality opinion). The opinion then notes that "the waters" is undefined and so refers to the dictionary. *Ibid.* (quoting Webster's New International Dictionary 2882 (2d ed. 1954)). Finally, the opinion also looks to the ordinary meaning of "navigable waters"—connoting "at bare minimum, the ordinary presence of water"—even though this term is defined in the statute to mean "the waters of the United States." *Id.* at 734.

The plurality also hewed closely to the text in determining when adjacent wetlands are jurisdictional. The statutory text refers to adjacent wetlands as a subset of "navigable waters" or "waters of the United States." See 33 U.S.C. § 1344(g) (referring to "navigable waters . . . including wetlands adjacent thereto"). Thus, the plurality explained, there must be "an adequate basis for a legal judgment that adjacent wetlands may be defined [themselves] as waters under the Act." *Rapanos*, 547 U.S. at 741 (plurality opinion); see also *id.* at 755 (there must be a "nexus [that] could *conceivably* cause them to *be* 'waters of the United States'"). That is what led the plurality to conclude that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 742. That

physical connection satisfies the text by ensuring that the wetlands are "as a practical matter *indistinguishable* from waters of the United States." *Id.* at 755.

Finally, the plurality's analysis is also consistent with this Court's recent and strenuous admonitions that statutory ambiguity rarely, if ever, occurs. The plurality acknowledged that "'waters of the United States' is in *some* respects ambiguous," but it did not stop there. *Id.* at 752. Applying all the tools of statutory construction, it ultimately identified the "only plausible interpretation" of the phrase "the waters of the United States," determining that this phrase "includes only those relatively permanent, standing[,] or continuously flowing bodies of water," *id.* at 739, and does not include ephemeral waters, like "storm drains [or] dry ditches" because "[t]he *scope* of that ambiguity . . . does not conceivably extend to whether storm drains and dry ditches are 'waters,'" *id.* at 752.

3. Justice Kennedy's concurring opinion in *Rapanos* does not follow these principles. Instead, it relies on the perceived policy and purpose of the statute, as both Justice Kennedy and the plurality explained. As the plurality noted, the concurring opinion would lead "[o]ne [to] think . . . that the crucial provision of the text of the CWA was a jurisdictional requirement of 'significant nexus' between wetlands and navigable waters." *Id.* at 754–55. But "that phrase appears nowhere in the Act." *Id.* at 755. "Instead of limiting its meaning by reference to the text it was applying," the concurring opinion resorts to "the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purposes." *Ibid.*

Indeed, Justice Kennedy admitted as much. He reasoned that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (Kennedy, J., concurring in judgment). And that nexus, in turn, "must be assessed in terms of the statute's *goals and purposes*." *Ibid.* (emphasis added). He then proceeded to discuss just one of Congress's stated purposes in the CWA—to "'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'" *ibid.* (quoting 33 U.S.C. § 1251(a))—and then incorporated that language verbatim into his significant nexus test. *Id.* at 780 (finding jurisdiction where wetlands "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'").

That is the opposite of how this Court interprets statutes. If there is any lesson from the Court's precedents on statutory interpretation since *Rapanos*, it is that statutory purpose is, as the *Rapanos* plurality said, the "last resort of extravagant interpretation." *Id.* at 752 (plurality opinion). Last Term, for example, the majority and the dissent in *HollyFrontier* found very little common ground in a dispute over the meaning of a part of the Clean Air Act. The one thing they did agree on was the importance of being guided by text and structure, and not purpose. 141 S. Ct. at 2183 (noting that "our analysis can be guided only by the statute's text," as "both sides can offer plausible accounts of legislative purpose and sound public policy"); *Id.* at 2190 (Barrett, J., dissenting) ("In the end, the parties' dueling accounts of purpose underscore the wisdom of sticking to the statutory text and structure.").

B. The significant nexus test produces unpredictable and highly questionable results.

1. The significant nexus test not only fails to comport with established principles of statutory interpretation, but also allows for unpredictable and often sweeping assertions of federal jurisdiction. The significant nexus test relies on subjective determinations about when a nexus is "significant" and what it means to affect the "chemical, physical, and biological integrity" of a water. That provides little certainty as to which waters may or may not be covered, as evidenced by the wide range of conflicting decisions in the lower courts over the last fifteen years.

One area of disagreement is about whether any, and if so how much, flow is required to establish a significant nexus. In *United States* v. *Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006), for example, the court held that "the connection of generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow." *Id.* at 613. But another court found jurisdiction over a creek that was "dry during much of the year" based on the existence of flow after precipitation events. *United States* v. *Moses*, 496 F.3d 984, 991 (9th Cir. 2007).

Another area of disagreement concerns whether—and, if so, how much—distance from a navigable water makes a difference. The Fourth Circuit has noted that it can "imagine . . . that wetlands next to a tributary with minimal flow might be significant to a river one quarter mile away, whereas wetlands next to a tributary with

much greater flow might have only insubstantial effects on a river located twenty miles away." *Precon Dev. Corp., Inc.* v. *U.S. Army Corps of Eng'rs*, 633 F.3d 278, 294–95 (4th Cir. 2011) (remanding for Corps to gather evidence of a significant nexus), remanded to 984 F. Supp. 2d 538, 562 (E.D. Va. 2013) (finding a significant nexus), aff'd, 603 F. App'x 149, 150 (4th Cir. 2015). Other courts have similarly acknowledged that the "considerable distance" from navigable waters might cause "any connection between them to be speculative and insubstantial at best." *Hawkes Co., Inc.* v. *U.S. Army Corps of Eng'rs*, No. 13–107 ADM/TNL, 2017 WL 359170, at *2, 4 (D. Minn. Jan. 24, 2017) (insufficient evidence to establish a significant nexus based on flow events, volume, duration, and frequency of flow for wetlands located more than 90 river miles and 40 aerial miles from the nearest navigable water); see *Lewis* v. *United States*, No. 18-1838, 2020 WL 4798496, at *7 (E.D. La. Aug. 18, 2020) ("'As the distance from the tributary to the navigable water increases, it [is] increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus . . . .'"). But some courts have concluded that tens or even hundreds of miles do not preclude a finding of a significant nexus. See, *e.g.*, *United States* v. *Vierstra*, 803 F. Supp. 2d 1166, 1172 (D. Idaho 2011) (finding a significant nexus even though the defendant claimed "the closest navigable water is 421 miles away"); *United States* v. *HVI Cat Canyon, Inc.*, 314 F. Supp. 3d 1049, 1063–64 (C.D. Cal. 2018) (noting that a distance of "'tens of miles'" between a wetland and traditional waters did not preclude the existence of CWA jurisdiction).

Lower courts have even reached different conclusions about whether the significant nexus test is limited to wetlands or applies to other water features, such as tributaries. Compare *Benjamin* v. *Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1215 n.2 (D. Or. 2009) ("Justice Kennedy limits the applicability of his legal standard to wetlands adjacent to jurisdictional waters."), and *Simsbury-Avon Pres. Soc'y, LLC* v. *Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 227 (D. Conn. 2007) ("[T]he Court considers whether the . . . site is a 'wetland' to which the *Rapanos* analysis is applicable."), aff'd on other grounds, 575 F.3d 199 (2d Cir. 2009), with *Envtl. Prot. Info. Ctr.* v. *Pac. Lumber Co.*, 469 F. Supp. 2d 803, 823 (N.D. Cal. 2007) (analyzing CWA jurisdiction over a non-navigable tributary using the significant nexus standard), and *Vierstra*, 803 F. Supp. 2d at 1171–72 (noting that "[i]t is an open question as to whether Justice Kennedy's concurrence applies in the tributary context").

Adding to the complexity and unpredictability is the breadth of evidence that courts have accepted to establish a significant nexus. Courts have said that the test can be satisfied by "[q]uantitative or qualitative evidence." *Precon Dev. Corp.*, 603 F. App'x at 151–52. Some circuits say that no "'laboratory analysis' of soil samples, water samples, or [ ] other tests" are required to prove a significant nexus. *United States* v. *Cundiff*, 555 F.3d 200, 211 (6th Cir. 2009). Instead, they have accepted expert testimony about wetlands performing "ecological functions," such as "temporary and long-term water storage, filtering of the acid runoff and sediment from [a] nearby mine, and providing an important habitat for plants and wildlife." *Id.* at 211; see also *Foster* v. *U.S. Envtl. Prot. Agency*, No. 14-

16744, 2017 WL 3485049, at *13 (S.D. W.Va. Aug. 14, 2017) (noting testimony that wetlands "support[] and exchang[e] aquatic life with downstream waters" and "process[] nutrients, materials, and pollutants"); *United States* v. *Donovan*, 661 F.3d 174, 186 (3d Cir. 2011) (noting testimony that wetlands "help to remove nitrogen," "help sequester pollutants," and "play[] an important role in the 'aquatic food web'").

The 2015 Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015), which was "guided by" the significant nexus test, perhaps best illustrates just how malleable the test can be. The agencies claimed that the Rule was fully consistent with Justice Kennedy's concurrence. But at least one court disagreed, finding the 2015 Clean Water Rule overbroad and explaining that the Rule's definition of "tributary" included "vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term." *North Dakota* v. *U.S. Envtl. Prot. Agency*, 127 F. Supp. 3d 1047, 1056 (D.N.D. 2015). Past application of the significant nexus standard, the court further concluded, led to "EPA regulation of waters that [did] not bear any effect on the 'chemical, physical, and biological integrity' of any navigable-in-fact water." *Id.* at 1056.

2. The subjective nature of the significant nexus test also has allowed the agencies to assert jurisdiction over vast amounts of dry and mostly dry land. For example, applying the significant nexus test, the Fourth Circuit found that the Corps had jurisdiction over wetlands adjacent to a man-made drainage ditch that connected to another ditch that in turn flowed into the Northwest River three miles downstream. *Precon Dev. Corp.*, 603 F. App'x

at 151. The court found jurisdiction despite evidence that the second ditch contained flow only after "two-year, ten-year, and fifty-year storm events," and that the Northwest River "ha[d] flooded twice in the past fifteen years." *Id.* at 152, 154. Courts have also found jurisdiction over a creek that was "dry during much of the year," *United States* v. *Moses*, 496 F.3d 984, 991 (9th Cir. 2007), a channel that "sometimes run[s] dry," *San Francisco Baykeeper* v. *W. Bay Sanitary Dist.*, 791 F. Supp. 2d 719, 766 (N.D. Cal. 2011), and drainages that have flow for just a few days to approximately a month per year, *HVI Cat Canyon, Inc.*, 314 F. Supp. 3d at 1061, 1063.

The agencies have also successfully asserted jurisdiction under the significant nexus test over isolated water features. In one case, a court found that the significant nexus test reached constructed salt ponds that are walled off from San Francisco Bay. *San Francisco Baykeeper* v. *U.S. Envtl. Prot. Agency*, 492 F. Supp. 3d 1030, 1037 (N.D. Cal. 2020). In another, the court found jurisdiction over a wetland separated from a covered water by a fifteen-foot "strip of dry upland." *United States* v. *Bailey*, 516 F. Supp. 2d 998, 1007 (D. Minn. 2007). The significant nexus test has even been found to reach an isolated "[p]ond and its wetlands" based on evidence that they "support substantial bird, mammal and fish populations" that are part of "the Russian River ecosystem." *N. Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007).

This jurisdictional overreach is amplified by Justice Kennedy's invitation to aggregate similarly situated wetlands in assessing the existence of a significant nexus. See *Rapanos,* 547 U.S. at 780 (Kennedy, J., concurring in

judgment). The 12-year dispute over a property in *Orchard Hill Building Co.* v. *U.S. Army Corps of Engineers* is illustrative of how far this principle might go. 893 F.3d 1017 (7th Cir. 2018). There, the Corps aggregated 165 wetlands in a general watershed to claim jurisdiction over a 13-acre area located 11 miles from the nearest navigable water source. *Id.* at 1023. This ambitious effort failed, because the agency did not even attempt to "show[] or explain[] how that land is in fact similarly situated." *Id.* at 1026; see *Precon Dev. Corp.*, 633 F.3d at 292–93 (affirming jurisdiction over aggregated wetlands because Justice Kennedy's aggregation instruction "is a broad one, open for considerable interpretation and requiring some ecological expertise to administer"). Nevertheless, the Corps' aggressive invocation of the aggregation principle in *Orchard Hill Building Co.* shows how broadly the significant nexus test potentially sweeps.

C. The significant nexus test fails multiple clear-statement rules.

The unpredictable and extensive reach of the significant nexus test not only presents immense practical challenges for regulated entities, but also provides further reason for rejecting the test. The test triggers and fails at least three of this Court's clear-statement rules.

In several cases, this Court has held that it will interpret a federal statute to have certain effects only with clear indication from Congress. *First*, a clear statement is required where a statutory interpretation "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531

U.S. 159, 174 (2001) (*SWANCC*) (citing *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)). *Second*, this Court avoids statutory interpretations that "assign to an agency decisions of vast 'economic and political significance'" or "bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization." *Util. Air Regulatory Grp.* v. *Envtl. Prot. Agency*, 573 U.S. 302, 324 (2014). *Third*, "longstanding principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey* v. *United States*, 495 U.S. 411, 422 (1990).

All three of these clear-statement rules support the *Rapanos* plurality's reading of the CWA over the significant nexus test. As described below, the significant nexus test triggers all three clear-statement rules. And yet there is no clear indication in the CWA that Congress intended the significant nexus test. There is certainly nothing in the Act that evinces a clear intent to sweep in land features such as ephemeral washes—perhaps the most critical practical disagreement between the plurality test and the significant nexus test. Compare *Rapanos*, 547 U.S. at 733 (plurality opinion) (rejecting coverage of "transitory puddles or ephemeral flows of water"), with *id.* at 769 (Kennedy, J., concurring in judgment) (concluding that ephemeral streams and ditches should be covered).

First, clear congressional authorization is required for the significant nexus test because it "result[s] in significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. In *SWANCC*, this Court invoked the federalism clear-statement rule when the agencies sought to reach isolated

"ponds and mudflats." *Ibid.* The significant nexus test has proven to be similarly far-reaching. Fifteen years ago, the *Rapanos* plurality predicted that the significant nexus test could be used to grant the federal government "the scope of discretion that would befit a local zoning board." 547 U.S. at 738 (plurality opinion). And as explained above, that prediction has borne out. The significant nexus test has allowed the agencies to assert authority over vast stretches of water and land, including usually dry channels and isolated wetlands. *Supra* Part I.B.

In addition, the significant nexus test has resulted in the imposition of substantial added regulatory responsibilities on states that administer permit programs. For example, in 2015, EPA projected that the Clean Water Rule would impose upon the States additional obligations of between $798,000 and $1.3 million for the CWA Section 404 program and between $527,000 and $770,000 per year for the National Pollutant Discharge Elimination System program. See EPA, Economic Analysis of the EPA-Army Clean Water Rule 19, 25–28 (May 20, 2015).[3]

Second, the significant nexus test requires a clear statement because it endows the agencies with transformative and expansive authority. In *UARG*, this Court declined to grant, without a clear statement from Congress, "[t]he power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide." 573 U.S. at 324. Such expansive authority, this Court said,

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[3] https://www.epa.gov/sites/default/files/2015-06/documents/50 8-final_clean_water_rule_economic_analysis_5-20-15.pdf (last visited Apr. 13, 2022).

"falls comfortably within the class of authorizations" for which it has required "clear congressional authorization." *Ibid.* More recently, this Court rejected an eviction moratorium imposed by the Centers for Disease Control in response to the COVID-19 pandemic, reasoning that under the agency's view of the statute it could exercise "a breathtaking amount of authority" to "mandate free grocery delivery" or "free computers to enable people to work from home." *Ala. Ass'n of Realtors* v. *Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

The significant nexus standard similarly represents a transformative expansion of the agencies' authority. The CWA envisioned a limited federal role in the regulation of water resources, as it expressly "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of States" over "land and water resources." 33 U.S.C. § 1251(b). But as the plurality pointed out—and as the last fifteen years have shown—the significant nexus test grants the federal government the wide-ranging authority "to function as a *de facto* regulator of immense stretches of intrastate land." *Rapanos*, 547 U.S. at 738 (plurality opinion).

Third, and finally, the severe penalties imposed for violations of the CWA underscore that if Congress had intended to vest authority in the agencies to regulate under the significant nexus test, such a grant of authority should have been expressly stated. Under the Fifth and Fourteenth Amendments, neither the federal government nor the States may deprive individuals of "life, liberty, or property without due process of law." U.S. Const. amends. V, XIV. That guarantee requires that governments seeking to take a person's freedom or

possessions adhere to "those settled usages and modes of proceeding" found in the common law. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855). Those "settled usages" include the rule that the law must provide fair notice of what it demands. See *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1224–25 (2018) (Gorsuch, J., concurring in part and concurring in judgment); *Connally* v. *Gen. Const. Co.*, 269 U.S. 385, 391 (1926). Thus, "[i]n the construction of a penal statute, it is well settled . . . that all reasonable doubts concerning its meaning ought to operate in favor of the [defendant]." *Harrison* v. *Vose*, 50 U.S. (9 How.) 372, 378 (1850). These "longstanding principles of lenity . . . preclude [a court's] resolution of the ambiguity . . . on the basis of general declarations of policy in the statute and legislative history." *Hughey*, 495 U.S. at 422. The rule of lenity applies to statutes like the CWA that impose both civil and criminal penalties. *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." (citing *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality opinion)).

For this reason, as well, this Court should reject the easily manipulated significant nexus test in favor of the *Rapanos* plurality's test. As discussed, the plurality opinion appropriately identifies the "only plausible interpretation" of the phrase "the waters of the United States" after applying all the tools of statutory construction, and thus does not implicate the rule of lenity. See *Wooden*, 142 S. Ct. at 1075 (Kavanaugh, J., concurring) ("a court must exhaust all the tools of statutory

interpretation before resorting to the rule of lenity"); *id.* 1085–86 (Gorsuch, J., concurring) ("Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step . . . is to lenity."). But even if the phrase remained ambiguous after applying the relevant tools, the rule of lenity would require the rejection of the significant nexus test and the adoption of the plurality's test.

II. A Clearly Delineated Understanding of "Waters of the United States" Is Critical for Business and Consistent with Environmental Protection.

A. Predictability and efficiency are necessary for key infrastructure and other economically beneficial projects to move forward.

CWA permitting can impose significant costs. One study found that estimated permitting costs range from $3,100 to $217,600 for general permits and from $10,900 to $2,376,800 for individual permits, when adjusted to 2020 dollars. David Sunding & Gina Waterfield, Review of the Environmental Protection Agency and Department of the Army 2021 Economic Analysis for the Proposed "Revised Definition of 'Waters of the United States'" Rule at 12 (Feb. 7, 2022) (Sunding/Waterfield).[4] But that is far from all. The cost of permitting includes not only the expenses associated with the permitting process itself, but the wide variety of other expenses that lead up to or arise out of that process, including costs relating to avoidance or mitigation

[4] https://www.afpm.org/sites/default/files/issue_resources/Final-Exhibit-10.pdf (last visited Apr. 13, 2022).

measures. *Id.* at 9–11. Avoidance and minimization measures, for example, encompass the actions taken to analyze appropriate alternatives and select the least-damaging project type, configuration, or location. *Id.* at 9; see also 40 C.F.R. § 230.92. Mitigation measures are those taken to offset unavoidable project impacts. *Ibid.* These costs are significant and may exceed those associated with the actual permitting process itself. Sunding/Waterfield at 9–10.

Pre-construction delays can also "add tens of thousands to millions of dollars to a project's bottom line." U.S. Chamber of Commerce, Comment Letter on Proposed Revised Definition of "Waters of the United States" at 1 (Feb. 7, 2022) (Chamber Comment Letter).[5] Among other things, developers waiting for permits must carry capital, which may increase interest expenses on loans. David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 82 (2002). The longer the regulatory process takes, the greater the total costs. *Id.* And the more complex the test for determining jurisdiction, the longer the regulatory process will take.

A clear and predictable understanding of "waters of the United States" is needed to reduce these substantial costs and to ensure they are not imposed more broadly than required. For example, a small mining company in Wyoming has incurred thousands of dollars in unnecessary investigation and analysis costs to determine whether

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[5] https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0437 (last visited Apr. 13, 2022).

certain features were jurisdictional under the CWA and to complete the CWA section 404 permitting process. Chamber Comment Letter at 4. The relevant mining operations are in a part of the arid west where total participation ranges from 5 to 12 inches annually, about half of which typically falls as short duration, high intensity rainstorms and half as winter snow. *Ibid.* As a result, most of the drainage flows only in response to these infrequent precipitation events and would be classed as ephemeral drainages. *Ibid.* The Corps ultimately determined that no Section 404 permit was required, but only after the company incurred substantial costs in both time and money. *Ibid.* Under the plurality's test, this mining company would not have had to undergo the permitting process simply to determine that it never needed a permit in the first place.

What is more, the reality is that permitting costs can and do inhibit project development, including important climate, energy transition, resilience, and water management projects. To supply electricity while meeting renewable energy and other climate goals, for instance, utilities must construct, maintain, repair, and upgrade thousands of miles of critical infrastructure, which sometimes must cross wetlands and other waters. Utility Water Act Group, Comment Letter on Proposed Revised Definition of "Waters of the United States" at 5 (Feb. 7, 2022).[6] Moreover, at existing and new generating facilities, maintenance and construction are regularly performed on stormwater conveyances (such as canals, ditches, washes, swales, and arroyos) and other water management

[6] https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0601 (last visited Apr. 13, 2022).

features (such as cooling ponds, spill diversion ditches, and intake and discharge canals). *Id.* at 7. Overly expansive and unpredictable CWA jurisdiction inevitably delays and potentially hinders all of these efforts. *Id.* at 56; see also Chamber Comment Letter at 1 ("Efficient [CWA] permitting is needed to accelerate project delivery that will promote infrastructure improvements that are needed to implement the Administration's plan for economic growth, including the ambitious policy agenda on the climate, environmental stewardship, and environmental justice.").

Uncertain and costly permitting can also hurt conservation efforts. For example, farmers ordinarily have an incentive to try to preserve topsoil on their land through mitigation activities. American Farm Bureau Federation, et al., Comment Letter on Proposed Revised Definition of "Waters of the United States" at 6 (Feb. 7, 2022); Pennsylvania Farm Bureau, Comment Letter on Proposed Revised Definition of "Waters of the United States" at 3 (Feb. 7, 2022).[7] But if they must apply for a federal permit to determine whether they can engage in those efforts at all and then incur yet more expense if they must actually obtain the permit, farmers may simply choose not to undertake any of these efforts, resulting in environmental degradation rather than conservation. *Ibid.*

[7] https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0388 and https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0314, respectively (last visited Apr. 13, 2022).

B. Other legal and regulatory tools are better suited to protecting the water quality of transitory and ephemeral waters.

A clearly delineated understanding of "waters of the United States" is also fully consistent with ensuring the protection of transitory and ephemeral waters. It is plain from the CWA that Congress never intended to require federal CWA permitting over all water resources. The statute clearly contemplates that some waters are to be protected through other means—including state, tribal, and local action, as well as federal action under other authorities.

To begin with, the CWA contemplates in numerous provisions a robust role for state and tribal regulation. It reserves to the States "primary responsibilities and rights" over "land and water resources." 33 U.S.C. § 1251(b). And it expressly allows both States and Tribes to promulgate regulations stricter than those mandated by the CWA. *Id.* §§ 1370, 1377. Moreover, the statute affirmatively requires States to develop—subject to EPA approval—various state management plans, water quality standards, and total maximum daily loads. For example, each State must promulgate a comprehensive Water Quality Management Plan that sets forth the best management practices to control significant nonpoint sources of pollution. *Id.* §§ 1288, 1313(e).

Congress also provided in the CWA technical and financial assistance to state, municipal, and other federal agency programs that improve water quality. This assistance includes grants for States to address nonpoint

source pollution, *id.* § 1329, as well as grants related to sewer stormwater discharge prevention, *id.* § 1255(a)(1), and point and nonpoint source pollution in river basins, *id.* § 1255(b). The programs also cover waste-management, waste-treatment, and pollutant-effects, *id.* § 1255(d), as well as reduction of agricultural and sewage pollution in rural areas, *id.* § 1255(e).

C. A decision from this Court adopting the *Rapanos* plurality's test would provide significant and needed clarity to all businesses and landowners.

By adopting the *Rapanos* plurality standard, this Court would provide significant and needed clarity to the numerous industries and landowners affected by CWA jurisdiction. Such a holding would make clear that "waters of the United States" "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *Rapanos*, 547 U.S. at 739 (plurality opinion), and "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation," *id.* at 742. Importantly, adopting this standard would clarify that "transitory puddles," "ephemeral flows of water," and "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States'" are excluded. *Id.* at 733, 742.

As shown, many of the problems that have plagued regulated entities over the past fifteen years have resulted from the vagueness of the significant nexus test regarding

precisely these sorts of land and water features. By clarifying that such features are not subject to CWA jurisdiction, this Court will provide much needed certainty and predictability to regulated entities, while respecting the statutory text that Congress enacted.[8]

[8] Further questions about the scope of the CWA's jurisdiction will undoubtedly remain. For example, the Sacketts did not contest EPA's designation of Priest Lake as a traditionally navigable water, and thus the question of what constitutes a traditionally navigable water is not presented in this case. Importantly, the Sacketts' property does not have a continuous surface connection to any water.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

HUNTON ANDREWS KURTH LLP
ELBERT LIN
Counsel of Record
951 East Byrd Street, East Tower
Richmond, VA 23219
elin@HuntonAK.com
(804) 788-8200

KERRY L. MCGRATH
ERICA N. PETERSON
ANTHONY R. GUTTMAN
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW,
Suite 900
Washington, D.C. 20037
(202) 955-1500

ANDREW R. VARCOE
STEPHANIE A. MALONEY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae

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