No. 25-668

In the Supreme Court of the United States

JEFFREY ANDREWS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, NEBRASKA, AND 21 OTHER STATES IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Congress preserved State water regulatory authority when it passed the Clean Water Act. And it limited federal oversight to navigable waters. In this way, "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). Amici States have a substantial interest in preserving this important partnership.

But for decades, federal officials have ignored statutory text, constitutional order, and Congress's intent by assuming more power for themselves. And the partnership weakened as federal power came to the fore. The result? Federal agencies asserted the same authority over the Mississippi River, "an abandoned sand and gravel pit in northern Illinois," and about everywhere in between. *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 162 (2001).

It's taken this Court several tries to keep the agencies in-bounds. Repeatedly, it has reminded agencies—and lower courts—that the "waters of the United States" addressed by the Clean Water Act are not *all* waters *in* the United States. Federal agencies were reminded that States continue to hold "traditional and primary power over land and water use" within their jurisdictions. *SWANCC*, 531 U.S. at 174. Yet when federal agencies ignored that message a second time, the Court pushed back again. *Rapanos* v. *United States*, 547 U.S. 715 (2006) (plurality op.). And when two more decades of fighting and confusion continued anyway, the Court spoke up a

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

third time to settle the debate on the Clean Water Act's narrow reach once and for all. *Sackett* v. *EPA*, 598 U.S. 651 (2023).

So now we have an answer. *Sackett* tells us that federal authority extends only to wetlands that are "as a practical matter indistinguishable" from covered waters. *Id.* at 678 (cleaned up). In other words, a wetland must have a "continuous surface connection" with an adjacent covered body of water. *Id.* (cleaned up). The test, then, is straightforward: federally regulated waters must be traditional navigable waters or so functionally inseparable from those waters that it's necessary to regulate them.

Still, judging from the decision below, lower courts are still reluctant to embrace *Sackett*'s plain rule. Here, the Second Circuit expanded the Clean Water Act's scope to pull in a Connecticut farmer's land that has no continuous surface connection to traditional navigable waters outside "rainfall-runoff events." Pet.6. That farmer may now be liable for up to $2 million in civil penalties. *Id.* at 32 n.15.

The decision below does not respect *Sackett*. So this Court should remind lower courts—again—that the Act does not extend to everywhere water might be. The Court should grant the petition and summarily reverse—and reinstate the Clean Water Act's state-federal relationship once more.

SUMMARY OF ARGUMENT

Sackett resolved a decades-long argument. Yet lower courts still stretch the Clean Water Act's scope. The Court should grant the petition to vindicate States' rights, remind lower courts how to apply *Sackett*, and correct a clear error.

I. States have plenary authority to regulate waters within their borders. The federal government has power over water, too, but it's not absolute. Both the Constitution's structure and Congress's authorization in the CWA place real constraints on federal power. But courts and agencies have often forgotten these first principles. And this regulatory overreach upsets the balance Congress struck.

II. *Sackett* restored order. The decision confirmed what this Court already explained: The "waters of the United States" encompasses only wetlands that are as a "practical matter indistinguishable" from navigable waters. Unfortunately, though, some lower courts continue to misapply *Sackett*—with the Second Circuit's decision here being a prime example. The court applied a definition of "waters of the United States" that soaks up virtually all wetlands in the country.

III. When lower courts "water down" *Sackett*, real harms result. Regulated parties are forced to expend substantial time and money. States, too, are compelled to spend enormous sums. And for what? States have already shown an appetite and ability to regulate waters within their borders effectively.

The Court should grant the petition and summarily reverse lest lower courts tread indefinitely on States' water rights and this Court's precedents.

REASONS FOR GRANTING THE PETITION

I. States are—and always have been—the primary water regulators.

Understanding the Clean Water Act starts with understanding how water regulation has traditionally functioned. After all, "statutes are construed by courts

with reference to the circumstances existing at the time of the[ir] passage." *United States* v. *Wise*, 370 U.S. 405, 411 (1962). In other words, "the law as it stood when the act was passed must enter into [its] construction." *D'Arcy* v. *Ketchum*, 52 U.S. 165, 175 (1850). And here, that background confirms that water regulation is not a top-down, federally controlled enterprise. Quite the opposite.

A. Since the Founding, States have had the power to regulate waters within their borders. *Gibbons* v. *Ogden*, 22 U.S. 1, 70-75 (1824). As sovereigns, States hold the "absolute right" to their "waters[] and the soil under them." See, *e.g.*, *Martin* v. *Waddell's Lessee*, 41 U.S. 367, 367 (1842). This plenary responsibility encompasses the "full power to regulate" waters to "promote the peace, comfort, convenience, and prosperity of [the States'] people." *Escanaba & Lake Mich. Transp. Co.* v. *City of Chicago*, 107 U.S. 678, 683 (1883).

States take this responsibility seriously. Many have enshrined this power in their constitutions. See, *e.g.*, FLA. CONST. art. X, § 11 (laying claim to "navigable waters within the boundaries of the state" (cleaned up)); N.M. CONST. of 1912, art. XVI (same). Others have granted their citizens state water rights. See, *e.g.*, CAL. CIV. CODE of 1872 §§ 1410-1422 (water rights acquired by appropriation); COLO. CONST. of 1876, art. XVI, § 6 (preserving the right to divert water). Still others have even given their citizens specific guarantees. For example, Alaska allows "[f]ree access to the navigable or public waters of the State." ALASKA CONST. art. VIII, § 14. Massachusetts assures a "right to clean … water." MASS. CONST. art. XCVII. And Alabama's constitution provides "[t]hat all navigable waters shall remain forever public highways, free to the citizens of the state … without tax, impost, or toll." ALA. CONST. art I, § 24.

States have used their water rights to regulate virtually every aspect of their water. They've regulated tide-water beds, *Pollard* v. *Hagan*, 44 U.S. (3 How.) 212 (1845), harbor pilots, *Cooley* v. *Bd. of Wardens of Port of Phila.*, 53 U.S. (12 How.) 299 (1851), bridges, *Gilman* v. *City of Philadelphia*, 70 U.S. (3 Wall.) 713, 729 (1865), fisheries, *McCready* v. *Virginia*, 94 U.S. 391 (1876), and canals, *Kansas* v. *Colorado*, No. 105, 1994 WL 16189353, at *18 (U.S. Oct. 3, 1994). States have recognized rights over "ditches, drains, flumes, … and aqueducts," MONT. CONST. art. IX, § 3, and exempted those areas from property tax, UTAH CONST. art. XIII, § 3. They've even managed water coming from federal reservoirs within their jurisdictions. *California* v. *United States*, 438 U.S. 645 (1978). Thus, States have "always exercised" their water regulation "power." *Gilman*, 70 U.S. at 729.

Wetlands are no exception. Regulating "wetlands is clearly within the scope of the police power of [a] State." *Sibson* v. *State*, 336 A.2d 239, 240 (N.H. 1975). It is unsurprising, then, that many States have chosen to exercise control over these valuable water resources for a variety of welfare-promoting reasons like "flood," "storm," "erosion," pollution, and recreational control. *E.g.*, *Spears* v. *Berle*, 397 N.E.2d 1304, 1306 n.2 (N.Y. 1979). Indeed, at least 30 States directly regulate wetlands in some form or fashion.[2]

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[2] See ALA. CODE § 9-7-10 *et seq.*; CAL. PUB. RES. CODE § 6303 *et seq.*; CONN. GEN. STAT. § 22a-28 *et seq.*; DEL. C. tit. 7, § 6604; FLA. STAT. § 373.016 *et seq.*; GA. CODE § 12-5-280 *et seq.*; IND. CODE §§ 13-18-22-1, 13-30-10-6; IOWA CODE § 456B.13; 20 ILL. COMP. STAT. 830/1-1 *et seq.*; LA. STAT. ANN. § 49:214.1 *et seq.*; ME. REV. STAT. tit. 38, § 480-A *et seq.*; MD. CODE, ENV'T § 16-102 *et seq.*; MASS. GEN. LAWS ch. 130, § 105; MICH. COMP. LAWS § 324.30301 *et seq.*; MINN. STAT. §§ 103G.221, 103G.245; MISS. CODE § 49-27-9; NEB. REV. STAT. §§ 81-1502, 81-1506; N.H. REV. STAT. § 482-A:1 *et seq.*; N.J. STAT. § 13:9B-1 *et seq.*;

On the other hand, federal water regulation doesn't enjoy the rich plenary intrastate water history of its State counterparts. To be sure, the Commerce Clause allows Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I § 8, cl. 3. Applying that power, the Court has recognized that the federal government holds a meaningful role in regulating "navigable waters." See *Gibbons*, 22 U.S. at 70-75; Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 WASH. U. L. REV. 1642, 1670-71 (2013). But many wetlands are not "navigable in fact." See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129-30 (1985). That does not mean *all* wetlands fall outside the ambit of the Clean Water Act; as discussed below, traditional navigability is not the sole metric used to properly cabin the Act's scope. But all exercises of federal regulatory power must lie "within the scope of the [C]onstitution." *McCulloch* v. *Maryland*, 17 U.S. 316, 421 (1819). And "the power to regulate commerce, though broad indeed, has limits." *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (cleaned up). *Some* wetlands lie beyond those limits and outside the federal government's regulatory reach.

B. The Clean Water Act didn't try to upset the historical balance between state and federal authority over water. On the contrary, it expressly preserved State sovereignty. Congress passed the CWA "to restore and

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N.Y. ENV'T CONSERV. LAW § 24-0103 *et seq.*; N.C. GEN. STAT. § 113A-113 *et seq.*; N.D. CENT. CODE § 61-32-03; OHIO REV. CODE § 6111.021; OR. REV. STAT. §§ 196.800, 196.805; 32 PA. STAT. § 693.1 *et seq.*; 2 R.I. GEN. LAWS ANN. § 2-1-18 *et seq.*; S.C. CODE §§ 48-39-10, 48-39-30 *et. seq.*; VT. STAT. tit. 10, § 905b; VA. CODE § 62.1-44.5; WASH. REV. CODE §§ 90.48.020, 90.48.080; WIS. STAT. §§ 23.32, 61.351, 281.31; WYO. STAT. § 35-11-308 *et seq.*

maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). But Congress also intended "to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution, [and] to plan the development and use … of land and water resources." *Id.* § 1251(b). So Congress struck a balance. It commanded the federal government to "co-operate" with States and local agencies. *Id.* § 1251(g). The Act thus formed a "partnership" among States and the federal government, *Arkansas*, 503 U.S. at 101, one "grounded in the basic constitutional requirements of federalism" *and* "a complex statutory blend of state and federal power," Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL L. 113, 123 (2003).

In the CWA, Congress split up the relevant roles that States and the federal government play to address water pollution. Among other things, States "manage the construction grant program" "and implement the permit programs." 33 U.S.C. §§ 1251(b), 1342, 1381-1388. They set and revise their own water quality standards, see *id.* § 1313(b)-(c), identify waters for regulation, see *id.* § 1313(d), and maintain a regulatory plan, see *id.* §§ 1313(e), 1329. By contrast, EPA "administer[s]" the CWA in "consult[ation]" and "cooperation with the States." See *id.* § 1251(b), (d)-(e). It makes grants to State and local agencies, *id.* §§ 1251(b), 1252(c), 1281-1302f, 1381-1389, develops programs, *id.* § 1252(a), and sets permit standards, *id.* §§ 1341-1346, 1361-1377a. EPA and the Army Corps of Engineers may also enforce some of the provisions of the Act—at times in conjunction with the States. *Id.* § 1319(a)(1).

Congress respected its constitutional limitations. It anchored the federal government's role to a jurisdictional phrase: "navigable waters." See, *e.g.*, 33 U.S.C. § 1342(a)(4). And it defined "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). "[S]treams, oceans, rivers, and lakes" are generally considered "waters" that might then fall within the statute's jurisdictional ambit. *Sackett*, 598 U.S. at 671 (cleaned up). That classification makes sense. These geographic features are "traditional[ly] navigable." *Id.* at 672. So as "channels of interstate commerce," *United States* v. *Lopez*, 514 U.S. 549, 558-559, (1995), they fit neatly into Congress's commerce power.

C. A few years later, however, Congress amended the CWA. The amendment allowed States to administer discharge permit programs. 33 U.S.C. § 1344(g). But Congress confined the States' programs to "(1) any waters of the United States, (2) except for traditional navigable waters, (3) 'including wetlands adjacent thereto.'" *Sackett*, 598 U.S. at 675 (citing 33 U.S.C. § 1344(g)(1)). The term "adjacent" wetlands sowed confusion—and opportunism.

Courts agreed the term brought "something more than traditional navigable waters" within the CWA's jurisdictional sweep. *Rapanos*, 547 U.S. at 731 (plurality op.); see also *Riverside Bayview*, 474 U.S. at 133 (concluding that Congress intended to regulate "at least some waters that would not be deemed 'navigable' under the classical understanding of that term"). The tricky question was where and how to draw the line.

EPA and the Corps tried their hand at it several times. They have revised their definition of "waters of the United States" more than seven times in the past 30 years. See, *e.g.*, 58 Fed. Reg. 45036 (Aug. 25, 1993); 80 Fed. Reg. 37104

(June 29, 2015); 83 Fed. Reg. 5208 (Feb. 6, 2018); 84 Fed. Reg. 56667 (Oct. 22, 2019); 85 Fed. Reg. 22338 (Apr. 21, 2020); 88 Fed. Reg. 3142 (Jan. 18, 2023); 88 Fed. Reg. 61968 (Sept. 8, 2023). But they brushed aside States' powers in the process. They effectively stretched "waters of the United States" to encompass "virtually any land feature over which rainwater or drainage passes and leaves a visible mark." *Rapanos*, 547 U.S. at 724-25 (citing 33 C.F.R. § 328.3(a) (2004)).

The path forward remained unclear after a fractured opinion in *Rapanos*. A plurality of the Court rejected the increasingly broad interpretation. *Rapanos*, 547 U.S. at 742. It recognized that such an overextension would "impinge[]" state water regulatory rights. *Id.* at 738 (cleaned up). It maintained that those rights are a part of "quintessential state and local power." *Id.* But in a concurring opinion, Justice Kennedy alone adopted a "significant nexus" standard, which did "not align perfectly with the traditional extent of federal authority." *Id.* at 782. Under his "significant nexus" test, wetlands would be evaluated on a "case-by-case basis." *Id.*

Decades of mass confusion ensued. Lower courts struggled to apply a standard "plagued with uncertainty." *West Virginia* v. *EPA*, 669 F. Supp. 3d 781, 792-94, 801-04 (D.N.D. 2023). And EPA revised its regulations to include the problematic "significant nexus standard," which encompassed "waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters." *Revised Definition of "Waters of the United States,"* 88 Fed. Reg. 3004, 3006 (Jan. 18, 2023); see also EPA, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN

RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES 1 (2008), https://bit.ly/4jmyuds (adopting a fact-specific analysis). This definition pushed federal authority to a climax. Statutory jurisdiction was determined on a "fact-specific" analysis, considering things like the "flow characteristics and functions of the tributary" and "hydrologic and ecological factors." *Id.*

This decades-long evolution disrupted the "constitutionally mandated balance of power between the States and the Federal Government." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991) (cleaned up). And it contradicted the CWA's stated intent to preserve State regulatory authority, thereby displacing state regulators despite their proven effectiveness.

II. The decision below exemplifies how lower courts still misapply the jurisdictional test.

A. *Sackett* should have restored constitutional order and congressional restraints. The Court drew a definitive line—reaffirming that the term "navigable" limits the federal government's regulatory reach. See *Sackett*, 598 U.S. at 671 (noting that the Court has "refused to read 'navigable' out of the statute").

Emphasizing the CWA's "deliberate use of the plural term 'waters,'" this Court explained that the CWA was primarily intended to encompass "those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes." *Id.* (cleaned up). But, recognizing Congress's reference to "wetlands adjacent []to" navigable waters, 33 U.S.C. § 1344(g)(1), the Court concluded that "statutory context shows that *some* wetlands qualify as

'waters of the United States,'" *Sackett*, 598 U.S. at 675 (emphasis added).

Sackett squared this circle by holding that the CWA applies to wetlands that "qualify as 'waters of the United States' in their own right." *Id.* at 676. In short, the CWA encompasses wetlands that are "as a practical matter indistinguishable from waters of the United States." *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742). Wetlands fall into this category when they have a "continuous surface connection" to a jurisdictional stream, lake, river, or ocean such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* (cleaned up). In the absence of a "clear demarcation" between two geographic water features, one of which is unquestionably part of the "waters of the United States," the CWA applies.

Sackett's "indistinguishable" test materially altered the universe of CWA jurisdictional waters. Under the previously prevailing "significant nexus" test, "almost all … wetlands across the country" were theoretically subject to CWA jurisdiction. *Sackett*, 598 U.S. at 667 (citing, inter alia, *Clean Water Rule: Definition of "Waters of the United States*," 80 Fed. Reg. 37054, 37056 (June 29, 2015)). It was not unheard of for federal regulators to find a significant nexus between wetlands and traditionally navigable waters hundreds of miles away. *E.g.*, *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 578 U.S. 590, 596 (2016). After *Sackett*, covered waters bear a closer connection to traditional waters that Congress first had in mind in 1972.

To be sure, determining where "water ends and land begins" is still "often no easy task." *Riverside Bayview*, 474 U.S. at 132. Indeed, it is *because* the transition from "water to solid ground is not necessarily or even typically

an abrupt one," *id.*, that many wetlands—those that are indistinguishable from a nearby covered river, stream, lake, or ocean—will fall within the CWA's jurisdictional sweep. But many others will not. Some are quite distinguishable.

B. After *Sackett*, some courts have now gotten the message. In *United States* v. *Sharfi*, for example, the approximately 4.5-mile gap between a "tidally-influenced" creek and wetlands on the defendant's property was enough to preclude CWA jurisdiction. No. 21-CV-14205, 2024 WL 4483354, at *11 (S.D. Fla. Sept. 21, 2024), *report and recommendation adopted*, 2024 WL 5244351 (S.D. Fla. Dec. 30, 2024). The record in *Sharfi* included aerial video that showed "obviously dry conditions" predominating between the site of the wetlands and the jurisdictional creek miles away. *Id.* at *3. This separation from traditional waters precipitated the court's conclusion that the "wetlands on [the] Defendants' property [were] distinguishable from any possibly covered waters." *Id.* at *14.

The Fifth Circuit reached a similar conclusion in *Lewis* v. *United States*, 88 F.4th 1073 (5th Cir. 2023). There, the court found no CWA jurisdiction over land primarily used as a timber plantation despite the presence of wetlands on portions of the property. *Id.* at 1076, 1078. The Army Corps of Engineers had found jurisdiction by tracing a series of connections from those wetlands. *Id.* at 1077. It started with a roadside ditch connected to a culvert. *Id.* The culvert connected to an unnamed ephemeral stream. *Id.* And that stream connected to a relatively permanent named creek. *Id.* Ultimately, the Corps traced the wetlands to a traditionally navigable bay some 10 to 15 miles away. *Id.* The Fifth Circuit, relying in part on photographs of the

property in question, found that it was "not difficult to determine where the 'water' ends and any 'wetlands' on [the landowner's] property begin" because there was "simply no connection whatsoever." *Id.* at 1078. And because the wetlands were not indistinguishable from an undisputed water of the United States, there was "no factual basis as a matter of law for federal Clean Water Act regulation" of the property. *Id.*

Smaller gaps can also preclude jurisdiction. In *Glynn Environmental Coalition, Inc.* v. *Sea Island Acquisition, LLC*, a district court relied on images that showed a "clear demarcation" between wetlands on the property in question and a jurisdictional creek that was only "hundreds of feet away." No. CV 219-050, 2024 WL 1088585, at *5 (S.D. Ga. Mar. 1, 2024). The presence of various intervening features meant that there was no surface connection between the wetlands and the creek. *Id.* Accordingly, the court concluded that those wetlands were not "indistinguishable" from a jurisdictional water under *Sackett*. *Id.*

The Eleventh Circuit affirmed. The court acknowledged that the wetlands sat "in some proximity" to the jurisdictional creek, and the "flow of water moves generally from wetland to creek." *Glynn Env't Coal., Inc.* v. *Sea Island Acquisition, LLC*, 146 F.4th 1080, 1089 (11th Cir. 2025). But record evidence showed that the wetlands were separated from the creek by "sections of upland and the roads." *Id.* at 1090. And there was nothing establishing a "continuous surface connection to a water of the United States." *Id.* Without any evidence of such a connection—that is, without something that made it difficult to distinguish between the wetlands and a clearly jurisdictional water—CWA jurisdiction did not lie. *Id.* at 1091.

C. While *Sackett* should have resolved any confusion over the CWA's regulatory scope—and has in many lower courts—others continue to ignore it.

Take the decision below, which purports to apply *Sackett*. Faithful application requires more than an empty reference to controlling authority. The Second Circuit pays lip service to this Court by citing *Sackett*. But its implementation is mistaken at best. A critical takeaway from *Sackett* is that existence of a surface connection, standing alone, does not establish jurisdiction. Such a connection is a necessary, but not sufficient, condition. It may have been enough to create a "significant nexus." See *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring). But *Sackett* requires more.

The Second Circuit's decision does not adhere to what *Sackett* requires. The court begins its brief outline of the controlling rule by reciting the necessity of a "continuous *surface* connection" (and dutifully citing *Sackett*). Pet.App.5a (emphasis added). But things quickly veer off course. The court makes no mention of the indistinguishability requirement. Instead, it turns its gaze to the regulatory definition of "wetlands." *Id.* (citing 33 C.F.R. § 328.3(c)(1)). Relying on that definition, the court proclaims—contrary to what it just said—that "the CWA does not require surface water but only soil that is regularly saturated by surface or ground water." *Id.* (cleaned up). And then, without further analysis, it announces its conclusion: The connection between the wetlands on Petitioner's property and traditional navigable waters establishes CWA jurisdiction.

The lack of fidelity to *Sackett* is obvious. The court never tried to apply—nor even mention—*Sackett*'s express indistinguishability holding. In its place is the reference to the regulatory definition of wetlands and a

focus on groundwater. Contra *Vill. of Oconomowoc Lake* v. *Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) ("Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters."). At best, that reference was unnecessary; it is undisputed that there were wetlands on Petitioner's property. At worst, it was an attempt to provide cover for a recalcitrant adherence to the now-discarded significant nexus test. Either way, the decision below is wrong. Palpably so.

Unfortunately, the Second Circuit's decision only exemplifies a growing trail of post-*Sackett* errors.

Some courts still believe that wetlands with clear separation from rivers fall within the CWA's regulatory sweep. For example, in Washington, one court held that wetlands were under CWA jurisdiction despite a clear 30- to 75-foot separation. See *Waste Action Project* v. *Girard Res. & Recycling LLC*, No. 2:21-cv-00443-RAJ-GJL, 2024 WL 4366978, at *14 (W.D. Wash. Sept. 4, 2024). Another court in the same district distinguished *Sackett* in a similar way. *United States* v. *Bobby Wolford Trucking & Salvage, Inc.*, No. C18-0747 TSZ, 2023 WL 8528643, at *2 (W.D. Wash. Dec. 8, 2023). A court in Massachusetts tried to create an escape hatch by claiming they couldn't see from "aerial photographs" "what infrastructure exists and that could definitively form or sever a continuous surface connection." *Conservation L. Found., Inc.* v. *Town of Barnstable*, No. 24-cv-11886-ADB, 2025 WL 1596278, at *6 (D. Mass. June 5, 2025). And a court in Virginia refused to reverse its earlier jurisdictional ruling where "four miles" separated wetlands from traditional navigable waters. *Precon Dev. Corp.* v. *U.S. Army Corps of Eng'rs*, No. 2:24-cv-337, 2025 WL 510234, at *4 (E.D. Va. Feb. 14, 2025).

Still, other courts have resorted to "parsing" *Sackett*'s language—rather than applying it—to evaluate EPA's jurisdictional reach. *White* v. *EPA*, 737 F. Supp. 3d 310, 326 (E.D.N.C. 2024). And a New Jersey court failed to consider *Sackett* altogether. *N.J. Dep't of Env't Prot.* v. *Hexcel Corp.*, No. A-1889-22, 2024 WL 1693714, at *4-5 (N.J. Super. Ct. App. Div. Apr. 19, 2024). Such confusion will only result in further splintered application.

This Court should grant review to correct these errors and provide needed clarity. *Sackett* was intended to resolve definitional confusion that "sparked decades of agency action and litigation" and replace the competing "array" of interpretations of the CWA's reach with a straightforward, relatively easy-to-administer rule. See *Sackett*, 598 U.S. at 663, 666. The previous paradigm left many landowners paralyzed by uncertainty about the CWA's jurisdictional sweep. The only antidote is consistent and predictable jurisdictional determinations. That outcome is only possible if the lower courts faithfully apply *Sackett*. The Second Circuit didn't do so below, so this Court should intervene.

III. "Watering down" *Sackett* tramples state authority and imposes unnecessary costs.

A. The CWA was always intended to be an exercise in cooperative federalism. See pp. 3–7, *supra*; see also, *e.g.*, *Sierra Club* v. *U.S. Army Corps of Eng'rs*, 909 F.3d 635, 647 (4th Cir. 2018). Indeed, it is "one of the" statutory genre's "clearest examples." Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal—or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 447, 456 (2018). Decades of overreach by federal regulators eroded the role that, properly

understood, the CWA reserves for the States. Enforcing *Sackett*'s jurisdictional paradigm will restore the balance that Congress originally intended.

Restoring that balance comes with numerous benefits. At the threshold, "authority over water is a core attribute of state sovereignty." *Kansas* v. *Nebraska*, 574 U.S. 445, 480 (2015) (Thomas, J., concurring and dissenting in part). States have a compelling interest in both the preservation and productive use of water resources within their territory. A properly cabined CWA ensures that States are not deprived of this significant sovereign prerogative.

The resulting local control increase will also be beneficial. The CWA's "cooperative federalism framework encourages states to experiment with different regulatory approaches." *Naturaland Tr.* v. *Dakota Fin. LLC*, 41 F.4th 342, 353-54 (4th Cir. 2022) (Quattlebaum, J., dissenting). The freedom to experiment, coupled with the comparative ease of enacting and amending state-level environmental laws, means "States are better equipped than the federal government to quickly act to protect [adjacent, non-adjoining] waterbodies" like wetlands. John C. Colson, *Implications for "Adjacent" Waterbodies After* Sackett *v.* EPA, 12 TEX. A&M L. REV. 1305, 1325 (2025). State regulators also benefit from familiarity and local expertise that allow them to tailor regulation to the "precise circumstances of each … watershed." *Id.*; see also Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 52 (1999) ("[T]he ecological value and function of a wetland is going to be determined, in large part, by its location and surroundings."). This allows state regulatory regimes to "respond to changing information about what types of protections are worthwhile." *Wetlands,*

Waterfowl, and the Menace, supra, at 50. And, ultimately, this greater proximity makes "State and local wetland regulation … more effective" than federal efforts. *Id.* at 53.

Thus, adherence to and enforcement of *Sackett* will not leave our Nation's many non-jurisdictional wetlands unprotected. As Congress understood when it enacted the CWA, States are ready and able partners, fully capable of exercising stewardship over these vital resources.

B. Beyond the damage it does to the federal-state balance of power, federal overreach like that seen here also comes with a substantial price tag for States and other regulated parties. "[N]o statute yet known pursues its stated purpose at all costs." *Stanley* v. *City of Sanford*, 606 U.S. 46, 58 (2025) (cleaned up). But in applying the CWA too expansively, courts below sometimes act like it does.

Despite Congress's "laudable intent" in passing the Act, President Nixon predicted long ago that it would likely "br[eak] the budget." Veto of the Federal Water Pollution Control Act Amendments of 1972, 1 PUB. PAPERS 990 (Oct. 17, 1972). Though he made this prediction about the *federal* budget, he was more than accurate when it came to *state* budgets. Indeed, economists estimate that the Clean Water Act has cost the entire country an almost unimaginable $2.8 trillion (2017 USD). David A. Keiser & Joseph S. Shapiro, *US Water Pollution Regulation over the Last Half Century: Burning Waters to Crystal Springs?*, 33 J. ECON. PERSPECTIVES 51 (2019), *available at* https://tinyurl.com/cn55xt8. This staggering number might be more palatable if the federal government bore most of that cost. But federal spending only accounts for $0.6 trillion. *Id.* at Online Appendix B, *available at*

https://tinyurl.com/2dxtknte. States, local municipalities, and industry have shouldered the brunt of the load at $2.2 trillion. *Id.* And this number only considers overall economic burdens.

Regulated parties suffer more acute pain. Parties who "fill material in locations denominated 'waters of the United States'" must obtain relevant permits. *Rapanos*, 547 U.S. at 721; see also 33 U.S.C. §§ 1311, 1344, 1362(12)(A). These permits are expensive. For instance, "[t]he average applicant for an individual permit" spent more than $270,000 by 2001. *Rapanos*, 547 U.S. at 721 (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RES. J. 59, 74-76 (2002)). This can aggregate to "over $1.7 billion" each year by the "private and public sectors obtaining wetlands permits." *Id.* (cleaned up).

Landowners incur other significant costs. When landowners fill in their properties with "dirt and rocks," *Sackett*, 598 U.S. at 662, for example, they may be required to deal with onerous mitigation costs that could stretch "to the tune of $770,000," see Jason S. Johnston, *Environmental Permits: Public Property Rights in Private Lands and the Extraction and Redistribution of Private Wealth*, 96 NOTRE DAME L. REV. 1559, 1567 (2021). Mere coverage under the Act devalues their home prices at an average of 4% compared to non-regulated properties. See, *e.g.*, KATHERINE A. KIEL, THE IMPACT OF WETLANDS RULES ON THE PRICES OF REGULATED AND PROXIMATE HOUSES: A CASE STUDY 4 (2007). As a result, developers eschew investment in these lands. See, *e.g.*, Hannah Druckenmiller et al., *Extended Abstract:*

Consequences of Land Use Regulation Under the Clean Water Act 3 (Working Paper, 2025).

Yet, tangible burdens are not the only form of tax these regulations extract. Regulated parties must pay with their time as well. Just to obtain a permit, the process can take over two years from start to finish. *Rapanos*, 547 U.S. at 721. Never mind other "disadvantage[s]," *Michigan* v. *EPA*, 576 U.S. 743, 752 (2015), like "auditing, insurance, financial, personnel, and other management systems associated with" compliance, *Becerra* v. *San Carlos Apache Tribe*, 602 U.S. 222, 228 (2024). Regulated parties expend resources "learning about rights, rules, and demands." Aske Halling & Martin Baekgaard, *Administrative Burden in Citizen-State Interactions: A Systematic Literature Review*, 34 J. PUB. ADMIN. RESEARCH & THEORY 180, 181 (2024). Indeed, they must often overcome the subjective hurdles imposed by government actors playing the role of "enlightened despot[s]." *Rapanos*, 547 U.S. at 721. All these disadvantages take time—and by extension, money.

One would expect these costs to come with extraordinary results. But "it is unclear whether the Clean Water Act has been effective or whether water pollution has decreased at all." Jonathan H. Adler, *The Clean Water Act at 50: Is the Act Obsolete?*, 73 CASE W. RESERVE L. REV. 207, 208 n.8 (2022) (quoting David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act and the Demand for Water Quality*, 134 Q.J. ECON. 349, 350 (2019)). Indeed, "the goal of eliminating all surface water pollution within thirteen years of the CWA's adoption appears to be wildly aspirational, and perhaps even to amount to foolhardy optimism." Robert L. Glicksman & Matthew R. Batzel, *Science Politics, Law, and the Arc of the Clean Water Act: The Role of*

Assumptions in the Adoption of a Pollution Control Landmark, 32 WASH. U. J. L. & POL'Y 99, 105 (2010). "[T]he CWA in fact has come nowhere close to meeting its goals." JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY (CONCEPTS AND INSIGHTS) 180 (5th ed. 2019). As this Court declared before, it is not "rational ... to impose billions [never mind *trillions*] of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan*, 576 U.S. at 752.

Though it is still early to know the full extent *Sackett* will relieve States, industry, and taxpayers of these enormous and extra-statutorily imposed regulatory burdens, early estimates are promising. For instance, EPA initially opined that at least 1.2 million miles of ephemeral streams and 63% of wetlands could be impacted by *Sackett*. EPA, *Public Webinar: Updates on the Definition of "Waters of the United States,"* at 24:09-24:18, (YouTube, Sept. 12, 2023, 03:00 PM EST), https://tinyurl.com/ywh6wsmp. Others estimate that up to "eighty-two million acres … of nontidal wetlands" could be outside the Clean Water Act's jurisdiction after *Sackett*. See, *e.g.*, Adam C. Gold, *Putting WOTUS on the Map: Estimating the Implications of* Sackett *v.* EPA *on Wetland Protections*, 38 TUL. ENV'T L.J. 269, 273 (2025). Assuming permit-seekers choose to develop all these lands, and the lands would have been subject to EPA mitigation requirements, see 33 C.F.R. § 332.4(c); 40 C.F.R. § 230.92, States and industry partners could expect more than $5 trillion (2015 USD) in regulatory savings, see EPA, ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE 40 (2015) ("[A]verage unit costs ranging from $41,572 to $111,985 per acre of wetlands mitigated and from $95 to $1,000 per linear foot of stream mitigation."). And there are still potential economic

benefits from cultivating the land for residential, commercial, and agricultural use.

As a matter of logic, these saving and investment opportunities are unavailable when lower courts expand the definition of "waters of the United States" back to what it's been for the past several decades. Such definitions pull properties back into the Clean Water Act's regulatory eddy. See, *e.g.*, *Precon Dev. Corp.*, 2025 WL 510234, at *4. So the lower courts must strictly adhere to *Sackett*, and this Court should keep careful watch to prevent further erosion of the holding.

As parties spiral down this whirlpool, irrational costs to the aggregate tune of trillions of dollars make development prohibitively expensive. That cost explains why many choose to stay out of businesses implicating water issues completely. See Druckenmiller, *supra*, at 3 (finding higher developer request rates where similarly situated land is outside the Clean Water Act's jurisdiction).

After *Sackett*, States and other parties shouldn't have any doubt what lands they may improve without incurring inordinate regulatory costs. Still, farmers like Mr. Andrews continue to face oppressive federal action when his property only connects with other waters during "rainfall-runoff events." Pet.6. Such a temporary, intermittent connection leaves no court wondering where the water begins and where it ends. Yet, Mr. Andrews—like States and so many others—may have to pay millions of dollars for federal overreach. *Id.* at 32 n.15.

* * *

The Clean Water Act as implemented over the past 50 years has drained State reserves, industry resources, and the average taxpayer. *Sackett* cleared the debris of

unlawful regulatory requirements, making way for lawful regulatory savings and economic investment. But lower courts continue to misapply—or ignore—*Sackett*'s instructions. State sovereignty and coffers need intervention now. The Court should grant the petition to remind the lower courts that they must not overextend "waters of the United States" at state, industry, and taxpayers' economic demise.

CONCLUSION

The Court should grant the petition for certiorari and summarily reverse.

Respectfully submitted.

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