No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT & CHANTELL SACKETT, *Petitioners*,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*.

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

BRIEF OF AMICI CURIAE U.S. MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

William W. Buzbee
GEORGETOWN UNIVERSITY
LAW CENTER
william.buzbee@law.
georgetown.edu
Sara A. Colangelo
Counsel of Record
Jack H.L. Whiteley
GEORGETOWN LAW
ENVIRONMENTAL LAW
& JUSTICE CLINIC
600 New Jersey Ave., NW
Washington, D.C. 20001
(202) 661-6543
sara.colangelo@law.
georgetown.edu

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are current members of Congress committed to protection of this nation's varied waters through the Clean Water Act (the Act), 33 U.S.C. § 1251 et seq. Huge progress has been made in protecting this nation's waters, but polluting and filling still threaten to destroy wetlands and other waters that provide valuable services to fisheries, wildlife, recreation, health, and drinking water. The resolution of this matter could have a profound impact on whether that progress is sustained. This brief highlights the express choices Congress made in the Act regarding what waters are protected, the roles Congress assigned to the federal government and states, and the Act's explicit criteria to guide waters protection based on each particular waters' setting and functions. Of the current judicial tests for the Act's jurisdiction, the "significant nexus" test articulated by Justice Anthony Kennedy in *Rapanos v. United States*, 547 U.S. 2208, 2236-52 (2006) (Kennedy, J. concurring in the judgment), most closely respects these choices.

Amici also write to counter the atextual and policy-driven arguments of Petitioners and their allies. The Court should decline their pleas to rewrite the Act and, through a jurisdiction-shrinking test, supplant waters-specific assessments that, under the Act, must be tested through the crucible of regulatory proceedings. *Amici* urge this Court to respect the

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[1] Under this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel made a monetary contribution to the preparation of submission of this brief. The parties have consented to its filing.

policies in the statute Congress enacted and jurisdictional boundaries that have governed, regardless of party control of the White House or Congress, for almost fifty years.[2]

INTRODUCTION

The Supreme Court focused this case on a specific question, asking "the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act, 33 U.S.C. § 1362(7)." *Amici* members of Congress focus on the answers the statute provides. Congress in the Act did not ask litigants to substitute their policy preferences in this science-intensive area. Nor can courts remake statutes with a judicial "thumb on the scale," but must give statutes a "fair reading." *BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1538-39 (2021) (citations omitted).

Congress crafted a detailed Act, guiding the U.S. Army Corps of Engineers (the Army Corps), the U.S. Environmental Protection Agency (EPA) (collectively the Agencies), and later reviewing courts when a particular controversy and record come before them.[3] Specifically, Congress defined what it wanted protected ("the waters of the United States"), how it wanted that protection provided (express pollution prohibitions and water quality and science-based criteria aimed at preventing waters' degradation), and who should implement those protections (the Agencies and the States). It also made a nuanced set of

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[2] The Administration of Donald J. Trump is the only administration to have sought a major weakening of the Act.

[3] *Amici* leave to others questions about finality, ripeness, or standing for the Petitioners in this case.

federalism-linked choices about federal and state roles.

No one-size-fits-all test should displace what Congress enacted. But that is what Petitioners propose. They cherry-pick snippets of statutory language or history they prefer, impose inapplicable interpretative canons and clear statement requirements, add language that is not in the statute, and tell tales of regulatory overreach that lack any record support. Petitioners sidestep the Act's text and structure, especially the two provisions that most directly provide the criteria responsive to this Court's question. They downplay the Act's many provisions that specify environmental, health, and science-driven criteria for decision-making to prevent degradation of waters' functions and quality. And they ignore the Act's key provisions that set forth pervasive antipollution mandates and make clear federalism choices that must be respected. They ignore the "careful congressional focus" and express "goal[s]" and "detailed" "means" to achieve them "la[id] out" through the Act's "text and structure." *American Hospital Ass'n v. Becerra*, __U.S. __, __ (2022) (slip op. at 2, 8-10). Petitioners' policy preference-driven arguments cannot erase the Act's text. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (stating "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law"); John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. Pa. L. Rev. 2209, 2240-50 (1995) (reviewing William N. Eskridge, *Dynamic Statutory Interpretation* (1994)) (arguing for statutory text's primacy to avoid "the antithesis of the rule of law" where interpreters, including judges, "'substitute

their own pleasure to the constitutional intentions of the legislature'") (quoting *The Federalist* No. 78 (Alexander Hamilton)).

SUMMARY OF ARGUMENT

The Act's text and structure answer the Court's question. The Act sets forth mandates and criteria that unmask Petitioners' requests as legally untenable, atextual policy preferences. The Act's pervasive antipollution mandates aim to fulfill three specified "integrity" goals: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Other provisions set forth criteria regulators must assess and that govern decision-making under the Act. The Act charges EPA and the Corps with responsibility for rendering these types of scientifically driven judgments, both in devising general regulations and later in assessing permit applications for industrial pollution discharges or for dredge or fill disposals.

The Act is also a strongly federalizing law, setting ambitious antipollution and antidegradation goals. Congress set protective minimum federal floors, while allowing states to do more to protect their waters and citizens, to govern water allocations, and to operate permit programs under cooperative federalism structures. The Act's balanced federalism choices are not now up for revision. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547 (2007) (exploring forms of statutory federal-state power allocations and implications of regulatory floors).

The national protections of the Act also drive home why any test requiring continuous flow or surface connections for federal jurisdiction, as Petitioners and allies prefer, would radically revise the Act. No "proper test" can be true to the Act yet abruptly judicially unprotect vast regions of the country. The Act is a uniform national law, applicable not only in the eastern United States, where flowing and surface-connected waters are common, but also in the states of the arid west and southwest where even more precious and desperately needed waters rarely fit this description.

In addition, because the Act and the setting of the Sacketts' grievances easily satisfy any possible constitutional test for federal power, no judicial redrafting under the auspices of constitutional avoidance is appropriate. Commerce linkages between polluting activities, the nation's varied waters and their functions are many. Furthermore, the Agencies' powers here are expressly stated and longstanding; no abrupt policy change is at issue that would trigger this Court's "major questions" canon. Instead, the Corps and EPA engaged in the ordinary work that the Act asks of them, as they have done since the 1970s.

This brief also addresses one additional point. It counters the unprecedented contention of Petitioners and their allies that federal jurisdiction is automatically lost if a water is blocked at the surface by a road or houses. The Act clearly refutes such a claim.

The congressional *Amici* urge the Court, in its deliberations over the "proper test" for federal wetlands jurisdiction, to respect the Act's text and allow the Agencies to continue to do their

congressionally assigned, science-intensive work, as they have done for over fifteen years with the overlay of Justice Kennedy's *Rapanos* "significant nexus" framework. The text- and structure-rooted "significant nexus" formulation respects the Act's operative criteria, the Act's federalism choices, and regulators' science-intensive roles, all aimed at preventing pollution harms to our nation's valuable waters.

ARGUMENT

I. The Clean Water Act's text, structure, and decision-making frameworks are focused on water quality, and "waters of the United States" must be understood in light of these congressionally enumerated decisions

The Act's key provisions govern *what* waters are protected, set forth criteria for *when* and *why* waters are to be protected from dredge or fill disposals, and assign expert regulators' roles. The Court should decline Petitioners' invitation to ignore these clear congressionally enacted mandates. Their policy preferences cannot "override the text of the statute" and "this Court is not the forum to resolve [their] policy debate." *American Hospital*, slip op. at 8, 13.

A. Congress's definition of waters must be read in the Act's linguistic and operational context, which defeats any claim that the law is focused only on shipping or the channels of commerce

Congress in 1972 added its crucial definition for "navigable waters," defining them as "the waters of the United States." 33 U.S.C. § 1362(7). This was an expansive definition that went beyond law developed

under the earlier Rivers and Harbors Act of 1899. William W. Sapp, et al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term "Navigable Waters,"* 36 ELR 10190, 10195-96, 10200-03 (2006). The Act's words, implementation history, and most case law for nearly fifty years concur that the Act's language extends protection of waters to the extent authorized under the Constitution. *Id.* (citing a conference report and court opinions characterizing the 1972 Act's protections as intended to "be given the broadest possible constitutional interpretation"). The Supreme Court partly cut back on this reach in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) [hereinafter *SWANCC*], giving the word "navigable" weight to reject federal jurisdiction over an isolated pond based on use by migratory birds.

Despite recent years' conflicts over waters jurisdiction, this Court has never deviated from its correct conclusion that the Act's protections extend beyond a mere focus on "navigable-in-fact" waters used for large-scale shipping, barges and the like. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124-25 (1985) (unanimously upholding jurisdiction for adjacent "low-lying, marshy land" although not navigable "under a classic understanding of that term" and not "inundated" with water); *SWANCC*, 531 U.S. at 167-71 (stating that conclusion but declining "next step"); *Rapanos*, 547 U.S. at 731 (plurality op.) (Scalia, J.) (agreeing waters protected are "broader than the traditional understanding of that term" but advocating shrinking jurisdiction); *id.* at 759-62, 768 (Kennedy, J., concurring in the judgment) (agreeing "Congress intended a broader

meaning for navigable waters" than just those used for "interstate commerce"). The four *Rapanos* dissenters agreed that the Act extends jurisdiction beyond navigable-in-fact waters. *Id.* at 788, 807 (Stevens, J. dissenting, joined by Justices Souter, Ginsburg, and Breyer).

That the Act's protections extend beyond a mere focus on shipping-like uses of waters, but primarily to regulate polluting activities that impair waters' *quality* and *functions*, is clear in the statute and also well within congressional power. It has long been settled that federal Commerce Clause power over the nation's waters does not only concern their use as channels of commerce. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940) (concluding "the authority of the United States is the regulation of commerce on its waters. *Navigability . . . is but a part of this whole*") (emphasis added); *see also Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 276-83 (1981) (upholding federal regulation of surface mines due to commerce-related environmental harms, polluters' commerce connections, benefits of clean environment, and goal of preventing harmful interjurisdictional competition degrading environment). *See infra* Part III (reviewing constitutional grounds for the Act).

B. Congress established express water quality and functions-based criteria that govern decision-making over discharges of dredged or fill material

The Court's framed question requires engagement with the Act's criteria for determining "waters" protection in the wetlands setting. The 1972 Act focuses on environmental effects and waters'

functions, setting forth strong criteria to prevent degradation of wetlands' quality and functions. Furthermore, the 1977 amendments reaffirmed and strengthened the Act's wetlands protections, as this Court has unanimously recognized. *Riverside Bayview*, 474 U.S. at 135-39 (concluding 1977 language "reflects congressional recognition that wetlands are a concern" of the Act).

Wetlands protection is shaped by Section 404 and its strong strictures on any disposal of dredge or fill materials in waters, as determined in light of particular waters' functions.[4] Congress's detailed environmental antidegradation criteria are both in Section 404 and its key cross-reference to Section 403(c). *See* 33 U.S.C. §§ 1344(a) (stating permit requirements and process), 1344(c) (authorizing EPA to "prohibit" a discharge with "unacceptable adverse effect" on "water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife, or recreational areas"), 1344(e) (providing "general permit" option for "categor[ies] of activities" with "minimal cumulative adverse effect on the environment").

Section 404's most detailed criteria for wetlands protection are through its cross-reference to Section 403(c). In these provisions, Congress instructs EPA, "in conjunction" with the Army Corps, to develop "guidelines" for protection of dredge or fill "disposal

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[4] Industrial pollution effluents and oil spills could be discharged into wetlands, and hence could implicate both the Act's industrial discharge and oil spill provisions. Pollution discharges of either type are prohibited unless allowed by a permit. 33 U.S.C. §§ 1311(a) (setting forth permit requirement), 1319 (making unpermitted discharges illegal).

sites" regulated under Section 404 "based upon criteria comparable to" those set forth in Section 403(c) to prevent harms from ocean discharges. 33 U.S.C. § 1344(b). Section 404 thus incorporates by reference Section 403(c)'s protective criteria. These linked provisions have provided the backbone for decades of regulations and adjudicatory determinations protecting wetlands. 33 C.F.R. Part 328 (regulations providing "Definition of Waters of the United States"); 33 C.F.R. Part 230 (regulations setting forth guidelines for assessing dredge or fill disposal).[5]

Section 404 and its Section 403(c) cross-reference must shape the "proper test" for wetlands waters' protection. This provision focuses on preventing "degradation" from pollution discharges that would cause environmental harm or impair "human health" or "welfare." 33 U.S.C. § 1343(c)(1)(A). Subsection A mandates a protective water quality and functions focus, requiring regulation of "disposal of pollutants" that would cause "degradation" to, *inter alia*, "plankton, fish, shellfish, wildlife." *Id.* Subsection B prioritizes safeguarding of "biological, physical, and chemical processes," and "ecosystem diversity, productivity, and stability." 33 U.S.C. § 1343(c)(1)(B). Subsection C protects "esthetic, recreation, and economic values." 33 U.S.C. § 1343(c)(1)(C). And subsection F prohibits filling if there is a "land-based alternative." 33 U.S.C. § 1343(c)(1)(F). Section 403(c)(2) also emphasizes the science-based judgments

[5] Unless otherwise indicated, citations to the C.F.R. are to pre-2015 regulations. For a review of subsequent regulatory actions and judicial responses that have left pre-2015 law most relevant, *see* Brief for the Respondents at 12-13, *Sackett v. EPA*, No. 21-454 (June 10, 2022) (reviewing this history).

required: if there is "insufficient information" to make a judgment about effects under the required guidelines, "no permit shall be issued."

Further, Section 404 is explicit that it is not just about protecting waters for navigation or ship-linked uses; that is an "addition[al]" concern. Petitioners tellingly fail to cite or engage this provision. After specifying these environmental criteria and anti-fill presumptions, Section 404 adds that regulators can "*additionally*" take into account "navigation and anchorage" concerns. 33 U.S.C. § 1344(b) (emphasis added). That key word is no surplusage, but central to—or, more accurately, devastating to—the claims of Petitioners and their allies. *Chicago v. Fulton*, 141 S. Ct. 585, 591 (2021) (rejecting a reading that would "render the central command" of a term "superfluous"). The Act's water quality provisions similarly state that navigation is a secondary "consideration." *See also* 33 U.S.C. § 1313(c)(2)(A) (after listing environmental, health, and welfare factors for water quality-based regulation, adding "and *also taking into consideration* their use and value for navigation") (emphasis added).

Against this statutory evidence, Petitioners and their allies offer arguments built through a series of atextual assertions that ignore the statute Congress enacted. They supply new language or policies wholly absent from the Act. Most importantly, they take the word "waters" and detach it from both the conduct targeted in the statute—dredge or fill disposals and other pollution discharges—and the water quality and functions-focused criteria Congress spelled out to guide waters' assessments. Such arguments, divorced from the Act's operative terms and "overall structure,"

ultimately "make little sense." *American Hospital,* slip op. at 11.

The Act does not have some vague focus on water, but provides lengthy, reticulated criteria for when and why waters should be protected from degradation from pollution. As this Court has repeatedly emphasized, "'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 320 (2014) (*UARG*) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Words "take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). To "discern that ordinary meaning, those words must be read and interpreted in their context, not in isolation." *Southwest Airlines Co. v. Saxon*, __ U.S. __, __ (2022) (slip op., at 3) (citations omitted).

Congress regulates discharges into waters to protect them for their functions explicitly spelled out in the Act. Those enacted policies must be respected. And Justice Kennedy's "significant nexus" test, discussed below, closely tracks both the statute's criteria and its longstanding implementing regulations.

C. Congress's 1977 Amendments strengthened wetlands protections, as reflected in this Court's unanimous decision in Riverside Bayview

The 1977 addition of Section 404(g) provided a new cooperative or delegated program option for Section 404 permitting that confirmed wetlands are protected by the Act. This 1977 delegated program amendment contains a carveout that preserves federal

power over "navigable waters" used "as a means to transport interstate or foreign commerce," as well as "including wetlands adjacent thereto." 33 U.S.C. § 1344(g). The implications of the structure of these linked provisions are clear: First, wetlands are expressly covered by the Act. Second, when the federal government delegates states primacy with Section 404 work, it must be over something other than traditional navigable-in-fact waters and their "adjacent wetlands." What would be left? All other waters that, through pollution, would be "degrad[ed]" in the ways that this section focuses on: dredge or fill disposals that convert wetlands to land—as the Sacketts were doing, J.A. 10-15, 18, 20, 22-23—or that block or fill other smaller water categories such as tributaries.

This express 1977 inclusion of "wetlands" in the Act's text proves the error of Petitioners' and their allies' focus on large bodies of water and their insistence that the Act only protects waters that are channels of commerce. The unanimous *Riverside Bayview* case upheld jurisdiction for waters much like those at issue with the Sacketts due substantially to the 1977 amendments. *Riverside Bayview*, 474 U.S. at 129-39 (not requiring "inundation" for "low-lying, marshy" wetlands and concluding the 1977 amendments strengthened the Army Corps' authority to protect wetlands as "'implementing congressional policy'") (citation omitted). Even those who unsuccessfully tried to narrow the Act's wetlands coverage in 1977 saw the Act as protecting wetlands. *Id.* at 136-37 (reviewing this history). Other amendments were enacted, but the Act's jurisdictional waters language and protective criteria emerged untouched. *See* Sapp, *supra* 7, at 10209-12 (tracing language defeated, added, and retained).

Thus, in Section 404, Congress regulated pollution to preserve waters' integrity and functions. The same is true of the Act's water quality provisions; they too focus on effects and functions. *See, e.g.*, 33 U.S.C. §§ 1312-15 (setting forth health, environmental, and recreational criteria for water quality-based regulation). The Act is not focused on shipping, or only on waters as channels, or only on interstate movements. The text is clear and demolishes such claims.

Among current judicially framed "waters" tests, Justice Kennedy's *Rapanos* "significant nexus" language implements these statutory criteria, meshes with longstanding regulations, and recognizes the expert science-intensive work agencies must do in assessing particular sites and types of waters. It focuses on the functions of wetlands waters, especially the ways wetlands "filter and purify" water and reduce pollution flows, harms, and flooding, sometimes even due to "the absence of an interchange of waters." *Rapanos,* 547 U.S. at 775-78 (Kennedy, J., concurring in the judgment). For this reason, the *Rapanos* dissenters agreed with protecting "significant nexus" waters, creating a numerical majority. *Rapanos*, 547 U.S. at 808-09 (Stevens, J. dissenting, joined by Justices Souter, Ginsburg, and Breyer) (explaining how Court majorities voted to protect both "significant nexus" waters and the less protective but differently framed plurality waters).

Justice Scalia's plurality limitation language argued for confining the Act's protections to permanently flowing and surface-connected waters. This argument, built heavily on dictionary parsing of the words "waters," was rejected by five justices.

Despite Justice Scalia's longstanding advocacy of textualism as a means to constrain judicial overreach and error, his plurality opinion oddly fails to quote or address Congress's statutory text criteria just reviewed. Moreover, the predictable effect of the Scalia plurality test, mostly resulting from its atextual methodology, would be to exclude much of the arid west and southwest from the Act's protection. As the federalism discussion below establishes, nothing in the Act supports a test that would leave the nation's most precious and scarce waters least protected. It would contravene the law enacted by Congress.

II. Congress already allocated authority between the states and federal government in the Act, so federalism concerns do not justify limiting protected waters

The 1972 Act and 1977 amendments enacted a powerful federal law creating a uniform baseline of protections, yet also provided an unusually large and varied set of federalism provisions. The detail and variety of these federalism choices render any judicial redrawing of the Act's federalism choices inappropriate. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 178 (2010) ("[S]tatutory alterations made in the name of undifferentiated social values risk undoing the legislative bargain."); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harv. L. Rev. 2003, 2008 (2009) ("When judges enforce freestanding 'federalism,' they ignore the . . . bargains and tradeoffs that made their way into the document.").

A. The Act's federalism text and structure provide a clear delineation of federal and state roles

States' important roles under the Act function within an array of delineated federalism choices that must be respected. These provisions reflect the following congressional choices: National protections of the country's waters, through strong antipollution mandates, are not up for negotiation. States are welcome to do more, to retain their water allocation primacy, and to remain the main land use regulators if not contravening the Act. They are also welcome to assume implementation primacy under cooperative delegated program structures much like those offered under most federal environmental laws.

Petitioners rely heavily on an opening purpose provision of the Act, Section 101(b). It does indeed affirm the ongoing importance of state environmental protection efforts. It does not, however, undo the rest of the Act, supplant more specific federalism allocations, or override the statute's operative provisions focused on waters' quality and functions. In the language Petitioners most emphasize, this provision states it is congressional "policy" to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." The purpose of state involvement is hence to "*prevent, reduce, and eliminate pollution,"* not to authorize it. 33 U.S.C. § 1251(b) (emphasis added).

That state and local governments are the chief regulators of land use remains true. Land use form

and infrastructure investments, for example, remain within state and local judgment. It is where construction or other development leads to pollution or filling of protected waters that the Act's mandates and permit provisions kick in. Accordingly, complementary and intertwined state and federal efforts are welcomed, with waters protection the shared end.

Other more specific federalism allocations confirm the complementary antipollution roles Congress envisioned. Importantly, like most federal environmental laws, the Act clearly authorizes states to be more stringent or act in additional ways to protect their waters. Two provisions govern here. Aligned with the general declarations of Section 101(b), Section 505(e) preserves state common law protections alongside federal law. Additional protection through state regulation is also authorized, as long as it is not "less stringent" than federal requirements, *see* 33 U.S.C. §§ 1365(e), 1370, as this Court has confirmed. *International Paper Co. v. Ouellette*, 479 U.S. 481, 497-500 (1987) (recognizing the ability of states where pollution originates to impose nuisance liability and regulate more stringently than federally required).

The Act also authorizes additional state waters protections even if in tension with federal authorizations. *See* 33 U.S.C. § 1341 (providing state certification process linked to water quality obligations for federally licensed or permitted actions). Section 404 similarly contains its own dredge or fill-specific savings clause that can constrain federal activities. 33 U.S.C. § 1344(t). Likewise, Section 313 compels federal land and facilities managers to comply with state water-quality protections. 33 U.S.C. § 1323.

Importantly for western regions often experiencing water scarcity and other jurisdictions protecting or regulating water allocations, Section 101(g) preserves states' authority over "allocat[ion] of quantities of water." 33 U.S.C. § 1251(g).

These express choices about federal requirements alongside realms of preserved state authority counsel against judicial rebalancing of the Act's federalism choices. *See Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (assessing "structure and operation" of statute in light of federalism to reject Attorney General claim of power contrary to statutory power allocations to specified federal actors and states).

B. The Act's federalism text and structure retain major state implementation roles to further the Act's environmental goals

The Act's opening declarations also indicate how the Act welcomes state involvement either through participation in federal proceedings, *see* 33 U.S.C. § 1251 (b) (mentioning state "consult[ation]" with the Agencies), or by offering states delegated program cooperative federalism options. *See* 33 U.S.C. §§ 1342(b)-(k) (setting forth terms of industrial discharge permitting delegated program option), §§ 1344(g)-(k) (setting forth delegated program terms for dredge or fill permitting). And because most states regulate through a mix of their own laws, under delegated program structures, or to meet federal requirements, any judicial redrawing of federal Act jurisdiction through this case could create legal chaos. It could also disrupt varied ways states and federal regulators, often through federal regional offices, long ago worked out pragmatic modes of interaction. *See* Dave Owen,

Regional Federal Administration, 63 U.C.L.A. L. Rev. 58, 98-99, 115 (2016).

Petitioners and their allies also fail to acknowledge a key option that answers many questions about the Act's practical application under different scenarios. The Act authorizes "general" "nationwide" permits for categories of activity unlikely to cause cumulatively harmful effects. *See* 33 U.S.C. § 1344(e). Such categorical treatment resolves many questions expeditiously and facilitates balancing of private and state choices about commercial activity involving dredge or fill disposal in waters with the Act's protective mandates. Indeed, the Sacketts were encouraged to investigate a nationwide general permit option. J.A. 10, 12.

C. Congress established uniform national protections in the Act that would be undermined by proposed tests largely eliminating protections in major parts of the country

The federalism choices and logic of the Act also provide a crucial lens for seeing why the Petitioners' preferred test for wetlands "waters" jurisdiction is legally untenable. No "proper test" for wetlands jurisdiction can destroy the Act's national uniform baseline protections by writing off arid states or excluding other states, areas, or communities from the Act's protections. No Court majority has ever supported the Petitioners' view that the Act encompasses only "permanent" or "continuous surface connection" waters, and for good reason. Such a test would controvert the Act's express national safeguards for water protection.

The Act is replete with provisions setting uniform baseline standards, guidelines, and procedures for

waters assessments and pollution control.[6] Site-specific assessments, including water protections calibrated to a water's uses, are part of the federalism logic of the Act. For example, the mandated Section 404 regulations crafted with reference to Section 403(c) are uniform national standards focused on dredge or fill activities' effects on waters' varied types and functions. *See supra*, Part I. Similarly, industrial discharge "effluent limitations" are set uniformly, under Sections 301 and 306, by industrial categories, for all "point sources" discharging pollutants, with more stringent requirements set for "new sources," 33 U.S.C. §§ 1311(b)(2)(A), 1316(b)(1)(A), or if a water remains impaired. 33 U.S.C. § 1311(b)(1)(C). This Court recognized such categorical regulation as necessary to serve the Act's goal of "national uniformity." *E. I. du Pont de Nemours & Co. v. Train*, 420 U.S. 112, 129, 138 (1977).

The national uniformity goal arose to correct past deficiencies in waters protection. This Court identified the pre-1972 Act as flawed due to its "focus[] on the tolerable effects rather than the preventable causes of water pollution" and "the awkwardly shared federal and state responsibility for promulgating such standards." *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202–203 (1976).[7] Accordingly, lawmakers designed the Act to impose

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[6] *See, e.g.*, 33 U.S.C. §§ 1318 (preserving state monitoring and enforcement authority if applicable "at least [to] the same extent" as required by the Act), 1370 (allowing additional "not less stringent" state regulation).

[7] *See also* Marc. C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. Mich. J.L. Reform 863, 871–72 (1986) (discussing state strategies prior to 1972 to entice industry).

uniform regulatory requirements. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 Mich. L. Rev. 570, 601–02 (1996) (reviewing rationales for strengthened federal regulation); *accord Hodel,* 452 U.S. at 281-82 (noting uniform mining regulation was "essential" to prevent "destructive interstate competition" undermining environmental protections).

Petitioners' advocated test is contrary to Congress's nationally uniform Act design. Such a test would imperil scarce water resources where most needed and the communities that depend on water quality and functions for their health and welfare.[8] Wetlands in the arid and semi-arid southwest, for example, would be left substantially less protected under such a regime. *See, e.g.*, S. Mažeika, et al., *Distorting science, putting water at risk*, 369 Science

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[8] Health risks are prioritized throughout the Act. *See, e.g.*, 33 U.S.C. §§ 1251(a) (integrity goals), 1251(a)(3) (prohibition of toxic discharges as "national policy"), 1313(c) ("public health" requirement for water quality standards), 1314(l) (requiring toxics pollution regulation to "assure protection of public health" and "recreational activities"), 1343(c) (in provision incorporated by reference in Section 404, stating guidelines must address "human health or welfare," "recreation," and effects on "fish"). Low-income populations, tribes, and other communities of color with high rates of fish consumption would be especially endangered by newly unregulated pollution discharges that would cause fish contamination. *See, e.g.*, EPA, *Fish Consumption and Environmental Justice: A Report Developed from the National Environmental Justice Advisory Council*, 2 (2002). Likewise, loss of flood protection functions of wetlands would endanger these same populations because their residences are disproportionately concentrated in flood prone areas. *See, e.g.*, Eric Tate et al., *Flood exposure and social vulnerability in the United States*, 106 Nat. Hazards 435 (2021) (finding communities of color overrepresented in flood-prone areas).

766, 767 (2000) (in critique of Trump administration regulation based substantially upon the *Rapanos* plurality, reporting that "preliminary analysis predicts wide-spread losses of wetland functions," especially "in arid and semi-arid regions") (*citations omitted*).

Preservation of wetlands and their associated flood mitigation functions, as well as prioritization of "human health" effects, are thus uniform baseline policy enacted into law by Congress.[9] No test for waters jurisdiction can eliminate protection for vast regions of the country and conform to the national reach of the Act.

III. The links between pollution, commerce, and waters' functions easily satisfy the Commerce Clause and render the constitutional avoidance doctrine inapplicable

Petitioners' allies also argue that the Court should shrink jurisdiction to avoid alleged constitutional questions about federal Commerce Clause authority. But the Act's commerce linkages, waters' many commercial functions, Court precedents, and the very facts of the Sacketts' site and work leave no question about federal authority.

Pervasive waters and commerce linkages have endured for centuries and would have been obvious to the Constitution's Framers. During the founding era, waterways were essential to economic development.[10]

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[9] *See* EPA, *Functions and Values of Wetlands*, EPA 843-F-01-002c at 1 (Mar. 2002) (noting that wetlands reduce flood risk).

[10] *See, e.g.,* Edith McCall, *Conquering the Rivers: Henry Miller Shreve and the Navigation of America's Inland Waterways*

Rivers and their tributaries, some so tiny and temporary that no one would try to navigate them today, provided the best, and sometimes the only, routes for transporting lumber, wheat, furs, and other goods from westward settlements to coastal cities and foreign markets.[11] Mountain streams powered mills for grinding grain and sawing lumber,[12] and wetlands provided habitats for fish and wildlife critical to settlers' livelihoods.[13] Waterways large and small supported technological innovation, diverse industries, and westward expansion. Rivers and creeks were "highways" to the frontier, where exploration along tributaries and streams uncovered valuable natural resources, encouraging further settlement beyond the Appalachian Mountains.[14] Most critical, waterways inspired national unity in the aftermath of the Revolution—connecting western

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1 (1984); U.S. Army Engineer Water Resources Support Center, *National Waterways Study – A Framework for Decision Making – Final Report* III-35 (1983); Robert W. Harrison, U.S. Army Engineer Water Resources Support Center, The United States Waterways and Ports: A Chronology, Volume 1, 1541-1871 1 (1980).

[11] Earl E. Brown, *Commerce on Early American Waterways: The Transport of Goods by Arks, Rafts and Log Drives* 44-45 (2010) (discussing settlers' shipment of products down rivers and creeks to markets); Robert J. Kapsch, *The Potomac Canal: George Washington and the Waterway West* 23 (2007).

[12] *See, e.g.*, Brown, *supra* note 11, at 8; Kapsch, *supra* note 11, at 23.

[13] *See, e.g.*, McCall, *supra* note 10, at 17; John C. Pearson, *The Fish and Fisheries of Colonial Virginia*, 22 Wm. & Mary Q. 213, 216 (1942) (describing settlers' dependence on fish in seventeenth century Virginia).

[14] Brown, *supra* note 11, at 7 (2010) (describing early colonists' commerce-linked uses of "canoes on the rivers and creeks like we use highways today.").

territories and coastal cities not only geographically but also socially, economically, and politically.[15] The Framers thus recognized the need for interstate cooperation and federal oversight to realize the benefits of the nation's waters.[16]

Commerce Clause jurisprudence reflects these many rationales for protecting the nation's waters. Rivers, tributaries, and wetlands are crucial to commerce, are often harmed by commercial activities, and through their protection improve the nation's health, environment, recreation, and associated commerce. Sometimes their role is as "channels" or "instrumentalities" of commerce, and sometimes they are subject to federal protection due to "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The aggregate impact of the regulated class of activities matters; the Court does not just look at individual regulatory actions in isolation. *Gonzalez v. Raich*, 545 U.S. 1, 23 (2005); *see id.* at 37 (Scalia, J. concurring).

Contrary to Petitioners' and their allies' claims, however, nothing in the Act's textual choices support the argument that it only protects waters that are functioning as "channels" of interstate commerce. Water features unconnected to large-scale shipping have substantial effects on interstate commerce, even without continuous surface connections. Concern with

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[15] Kapsch, *supra* note 11, at 21 (2007) (discussing waters and communications linking "inland territories to the coastal colonies").

[16] *See, e.g.*, William J. Hull & Robert W. Hull, *The Origin and Development of the Waterways Policy of the United States* 9-10 (1967) (discussing how Hamilton and Jefferson linked economic development and waters to the new nation's prosperity).

those effects and functions is reflected in the Act's protective antidegradation criteria, *see* Part I, in longstanding regulations, in *Riverside Bayview*, and also in the Kennedy "significant nexus" test. By storing water, wetlands preserve dry-season flows, allowing navigation of waterways and making year-round water use possible for farmers and other businesses. *See* EPA, *Connectivity of Streams & Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* 3-5 (Jan. 2015) (summarizing peer reviewed science regarding functions of diverse types of waters). Prohibiting the pollution of wetlands and tributaries protects their own important functions prioritized in the Act's language and also protects downstream waters and states. Sapp, *supra* 7, at 10203-04, 10210-11. Wetlands and smaller water features also serve as buffers, absorbing storm flows, providing a site for pollutants to break down, and reducing downstream harms. EPA, *Functions and Values of Wetlands* (2001). Downstream states, cities, property owners, agricultural users, fishing businesses, and recreational users all benefit from these protections. Vast commercial value is thus both preserved and generated through these functions of the nation's varied waters.

With their rhetorical claims of regulatory overreach imposed for allegedly inconsequential ends, Petitioners and their allies try to turn the Court's focus from an obvious commerce rationale for regulation here. Businesses polluting and filling waters are themselves engaged in commerce, and they cause massive harms through industrial discharges, filling for residential or commercial development, and resource extraction. As long established, the federal

government has unquestioned authority to regulate pollution and risks of industrial activity, whether into waters, other environments, or to protect health. *Appalachian Power*, 311 U.S. at 426 (stating federal jurisdiction over navigation "is but a part" of the whole Commerce Clause power); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941) (upholding federal power to protect watersheds for flood control); *Hodel*, 452 U.S. at 275-93 (upholding commerce-linked rationales for mining regulation). There is no Commerce Clause question here about the Act and congressional power.

IV. The major questions doctrine, if it applies at all, supports the Act's longstanding reach

Some of Petitioners' supporting *amici* raise clear statement rules or seek to shoehorn the major questions doctrine into their arguments to tilt the interpretive playing field in their direction. But those arguments simply do not fit. The regulatory work at issue is clearly statutorily authorized and has been similarly carried on for decades.

Most importantly, that the Act was a major piece of national legislation is irrefutable, as this Court has repeatedly recognized. The Court has called it "'the most comprehensive and far reaching'" environmental law that "Congress ever had passed" and that established "'an all-encompassing program of water pollution regulation." *Ouellette*, 479 U.S. at 489, 492 (1987) (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 317-18 & n. 12 (1981) (*Milwaukee II*). The Act's powerful national protections are not grounds for

shrinking the Act, but require judicial respect for the legislative choices of Congress.

As recently articulated by the Court, the major questions doctrine builds on the understanding that Congress is unlikely to hide "elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). The Court has invoked the doctrine when agencies claim to find authority for some ambitious, far-reaching, and new initiative in statutory language not previously understood to grant such authority. *See Alabama Association of Realtors v. Dept. of Health and Human Services*, 141 S. Ct. 2485, 2489 (2021) (building on *UARG,* 570 U.S. at 324, and *Brown & Williamson*, 529 U.S. at 133, to reject new agency claim of power to order an eviction moratorium due to the COVID-19 pandemic). Similarly, the Court has at times invoked the doctrine to decline deference when a mismatch exists between a law's regulatory tasks and the expertise of the agency. *See King v. Burwell*, 576 U.S. 473, 485-86 (2015). The underlying idea is skepticism, based on statutory signals, that Congress actually meant to authorize exercises of newfound agency turf or ambition. This doctrine often links to a judicial search for a "clear statement" authorizing the agency power.

With language of outrage, but without citation to actual record evidence of overreach, Petitioners and allies nonetheless call for this doctrine's application. Here, however, EPA and the Corps were working as they have for five decades. Under statutory terms in place since 1972 and more detailed regulatory standards in effect *since 1975*,[17] the Army Corps

[17] For EPA, jurisdiction would date back to 1973.

clarified that its jurisdiction extended to "[f]reshwater wetlands including marshes, shallows, swamps and, similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation." 40 Fed. Reg. 31320, 31324 (July 15, 1975). *See also* 40 C.F.R. 328.3(b) (in 1986 promulgated regulation similarly defining "wetlands"). Actions under similar regulations in a setting akin to the Sacketts' circumstances were unanimously affirmed in *Riverside Bayview*. 474 U.S at 124.

Likewise, the roles the Act assigned to EPA and the Corps draw on their respective areas of expertise. This is not an agency asserting novel authority or doing work unrelated to its expertise. The Agencies have since 1972 been serving the roles assigned to them under the Act, working with their own scientists, and consulting with local or state counterparts. Their expertise is beyond dispute, as is the Act's clear authorizations. *See* 33 U.S.C. § 1361(a) (authorizing EPA to prescribe regulations in furtherance of the Act); *see also* 33 U.S.C. §§ 1344(a) (assigning Section 404 permit authority to the Army Corps), 1344(b) (assigning to EPA obligation to draft guidelines for Section 404 permitting, with cross-reference to Section 403(c) criteria).

This case's regulatory setting is thus utterly unlike any case where the major questions doctrine has been invoked. A fair reading of the Act, especially its operative provisions' criteria for waters protection and federal and state roles, affirms the agencies' longstanding views of their authority. Those statutory provisions rule.

V. The Act's text refutes any claim jurisdiction is automatically severed when human construction blocks a protected water

Petitioners and allied *amici* repeatedly assert as self-evident that a disputed water cannot be jurisdictional if at the surface level it is separated from otherwise jurisdictional waters by a road, berm, or other barrier. Any argument that waters are automatically rendered not jurisdictional by such manmade barriers is contradicted by the Act's text and structure, plus decades of opposing agency and court views. The Act's very focus is on waters' functions. The Act cannot be reconciled with a test that would authorize destruction or degradation of waters due to the lack of a surface water connection even when such waters provide environmental, recreational, and health-linked functions expressly requiring protection under the Act.

Yet petitioners are trapped by their own facts into asserting that major but legally untenable claim: the Sacketts' site and activities are almost indistinguishable from the *Riverside Bayview* setting, except that the Sackett site's surface connections to a tributary, a mapped and observed wetlands complex, and navigable-in-fact Priest Lake a mere 300 feet away, are separated by a road and a line of houses. J.A. 19, 25-50; *Riverside Bayview*, 474 U.S. at 124-25 (reviewing wetlands setting). The property possesses obvious aquatic features, wetland characteristics, and is surrounded by other waters. J.A. 26-50. It also has a direct, "shallow subsurface flow" to Priest Lake. J.A. 42-43. Such waters have long been protected due to the Act's antidegradation operative provisions reviewed in

Part I, as this Court has confirmed. *See Riverside Bayview*, 474 U.S. at 134-35.

Although jurisdictional waters can cease to exist in particular limited settings,[18] the Act makes this the exception to its protective reach. First, the heart of Section 404 prevents waters from being destroyed by unpermitted dredge or fill material so they no longer function as waters. That is its textual, operational mandate. As stated in implementing regulations, "filling operations in wetlands" are "among the most severe environmental impacts covered." 40 C.F.R. § 230.1(d).

Multiple other provisions further defeat any claim that human constructions obviously and automatically render a site nonjurisdictional. For example, 1977 exclusions for assorted activities came with an express caveat, that "farm roads" and other similar roads must avoid "impair[ing]" waters. 33 U.S.C. § 1344(f)(1)(E). Section 404(f) likewise mandates permits for discharges "incidental to *any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject*," where waters might be "impaired" or "reduced." 33 U.S.C. § 1344(f)(2) (emphasis added). Under this provision, turning a water into land for a new "use"—say, for example, draining a wetland, or

[18] Waters can lose their jurisdictional status in specified circumstances. Permits allowing fill can render them nonjurisdictional. "Changes" in a water's jurisdictional status can occur due to natural processes. 40 C.F.R. § 328.5. "Man-made" changes, however, can only alter jurisdictional lines after Army Corps "examin[ation]" and "verif[ication]." *Id.*

diverting or blocking waters—even if involving mere incidental discharges, must still have a permit.

Reflecting this enduring law, implementing regulations dating back to the 1970s mirror this understanding: waters "used in the past" for interstate commerce or in tidal settings remain waters. 40 C.F.R. § 328.3(a)(1). "Impoundments" of waters remain waters. 40 C.F.R. § 328.3(a)(4). "Adjacent" waters are defined as "bordering, contiguous, or neighboring," and they remain jurisdictional "adjacent wetlands" even if "separated from other waters of the United States by man-made dikes or barriers, natural river beams, beach dunes and the like." 40 C.F.R. § 328.3(a)(4), as codified in 1977. 42 Fed. Reg. 37, 122, 37, 144 (July 19, 1977).[19] EPA and the Army Corps have long instructed field investigators to consider past wetland hydrology despite recent human construction alterations. *See, e.g.,* U.S. Army Corps of Eng'rs, U.S. EPA, U.S. Fish and Wildlife Service, & U.S.D.A. Soil Conservation Service, *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, 13, 31, 50-55 (1989).

Finally, the Court also must avoid creating a new evasive strategy where opportunistic developers (or others) would simply alter land contours to create a barrier between protected waters and adjacent wetlands they wish to develop. Petitioners' mistargeted new test would risk opening precisely the type of "large and obvious loophole" that the Court foreclosed in *County of Maui, Hawaii v. Hawaii*

[19] This definition remained largely unchanged until the Trump administration's quickly rejected regulation. *See supra* note 2.

Wildlife Fund. 140 S. Ct. 1462, 1473 (2020). It rejected Maui's argument that any intervening media (air, land, or groundwater) after a discharge would automatically disrupt jurisdiction, identifying evasion risks: "If [so], then why could not the pipe's owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea? We do not see how Congress could have intended to create such a large and obvious loophole…." *Id.* at 1473 *(citing The Emily*, 22 U.S. 381, 390 (1824) (rejecting an interpretation that would facilitate 'evasion of the law')). The Court must ensure that any possible new "proper test" does not invite evasion of the Act's jurisdiction, thereby devastating the nation's wetlands and other waters with newly unregulated filling and dredging. The Act's explicit criteria for waters' protection preclude any such outcome.

In conclusion, *Amici* members of Congress ask this Court to retain the enduring, successful, bipartisan protections of the Act. The Court should respect the policies Congress enacted into law in 1972 and strengthened in 1977. It must reject calls for a new jurisdiction-shrinking test based on policy predilections that clash with the Act. The Act's text provides clear protective criteria that Petitioners and allied *amici* ignore, plus it refutes their echoed but atextual arguments that the Act is only focused on navigational uses of waters and waters as channels of interstate commerce. The Act is a powerful antipollution statute that, in all of its provisions, prioritizes waters' integrity and mandates the protections of waters for their environmental,

fisheries, health, and recreational functions. All actions by agencies, the states, those regulated, or this Court must conform to those congressionally set national policies.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

William W. Buzbee
GEORGETOWN UNIVERSITY LAW CENTER
william.buzbee@georgetown.edu
Sara A. Colangelo
Counsel of Record
Jack H.L. Whiteley
GEORGETOWN LAW ENVIRONMENTAL LAW & JUSTICE CLINIC
600 New Jersey Ave., NW
Washington, D.C. 20001
(202) 661-6543
sara.colangelo@law.georgetown.edu

June 17th, 2022

APPENDIX

LIST OF *AMICI*

1. **Placeholder Name**
   Position