No. 21-454

In The Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,

Petitioners,

v.

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

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN EXPLORATION AND MINING ASSOCIATION, NATIONAL MINING ASSOCIATION, ALASKA MINERS ASSOCIATION, ARIZONA MINING ASSOCIATION, IDAHO MINING ASSOCIATION, INDUSTRIAL MINERALS ASSOCIATION—NORTH AMERICA, MINING MINNESOTA, MONTANA MINING ASSOCIATION, NEVADA MINING ASSOCIATION, NEW MEXICO MINING ASSOCIATION, UTAH MINING ASSOCIATION, AND WYOMING MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

INTERESTS OF *AMICI CURIAE*

Amici curiae[1] are leading national and state mining associations whose members have been active since the 19th century in the entire mining life cycle, beginning with prospecting and exploration, advancing through development and mineral extraction and processing, and concluding with mine reclamation and closure.

American Exploration and Mining Association (AEMA) is a 125-year-old organization with 1,800 members, more than 80 percent of which are small businesses or work for them. National Mining Association (NMA) is a national trade association whose 250-plus members include most of the producers of the nation's coal, metals, agricultural and industrial minerals; the manufacturers of mining equipment; and other firms serving the mining industry. The Industrial Minerals Association—North America (IMA-NA) is a trade association whose members mine or process industrial minerals critical to the manufacturing, agricultural, energy, and tech industries in the United States (and Canada and Mexico).

The Alaska Miners Association, Arizona Mining Association, Idaho Mining Association, Mining Minnesota,

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[1] Pursuant to Rule 37.2(a), counsel for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity other than *Amici*, their members, and their counsel made a monetary contribution to its preparation and submission.

Montana Mining Association, Nevada Mining Association, New Mexico Mining Association, Utah Mining Association, and Wyoming Mining Association come from nine states that collectively produced more than $31 billion worth of nonfuel minerals in 2020, according to the United States Geological Survey.[2]

Amici's members routinely seek permits pursuant to the Clean Water Act (CWA or Act) and therefore have a keen interest in issues concerning the scope of the Act, especially the need for a clear and consistent definition of Waters of the United States (WOTUS). They conduct mining operations in numerous regions across the U.S. with varying geographies and hydrologic patterns. Some operate in the arid West, where potentially regulated "waters" may not even be wet. Others operate in geographic regions where an unduly expansive definition of WOTUS threatens the substantial state-level regulation of waters and hence the cooperative federalism established by the Act. *Amici* do not seek laxity, but rather certainty. Many state programs regulate a broader universe of waters than is covered under *any* definition of covered federal waters.[3] That certain waters fall outside the jurisdiction of the Act does not leave them unprotected, but merely

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[2] U.S. Geological Survey, *Mineral Commodity Summaries 2021*, at 10, Table 3 (2021), https://pubs.usgs.gov/periodicals/mcs2021/mcs2021.pdf.

[3] Nevada, for instance, provides state-law protection to all state waters, not just WOTUS, including all groundwater. Nev. Rev. Stat. § 445A.465. Arizona similarly requires a permit for all surface or subsurface discharges that may reach an aquifer. A.R.S. § 49-241.

protected by the proper State-level authority. As West Virginia and twenty other states noted at the *cert* stage, many states assert jurisdiction over waters beyond those that fall within anyone's definition of WOTUS. "Often, those definitions extend to ephemeral and intermittent waters and wetlands—expressly, with no need to impose a "nexus" gloss on the statutory text." Brief of Amici Curiae State of West Virginia and 20 Other States in Support of Petitioner, at 6.

All *Amici* and their members must contend with the definition of WOTUS. That definition determines the scope of two of the Act's two major permitting programs. Section 404(a) of the Act, 33 U.S.C. § 1344(a), regulates the discharge of dredged or fill material into "navigable waters." It is the 404 program that is the source of the Sacketts' legal headaches, but the same definition controls Section 402 of the Act, 33 U.S.C. § 1342. Section 402 authorizes the discharge of "pollutants"[4] into covered waters from a "point source,"[5] subject to permits containing discharge limitations based upon both water quality and technical feasibility.

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[4] The term "pollutant" is broadly defined, and includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

[5] The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14).

Those permits are known as National Pollutant Discharge Elimination System ("NPDES") permits, and today are issued by forty-seven authorized states.[6]

SUMMARY OF ARGUMENT

Fifty years after the promulgation of the modern Clean Water Act, there is no indication that either Congress or administrative agencies can or will implement a durable and clear definition of waters subject to CWA jurisdiction. As a result, *Amici* have been forced to navigate ambiguous regulations that seemingly change with every new political administration and conflicting lower court decisions regarding the definition of WOTUS. This rollercoaster of changing regulations has created significant uncertainty that impedes the mining and minerals industry's ability to move forward with projects needed to support the nation's infrastructure development, energy production, and supply chain independence. Moreover, the nebulous "significant nexus" test for determining the scope of federal jurisdiction has swept into federal control even ordinarily dry features, delaying and driving up the cost of mine permitting exponentially.

[6] U.S. EPA, *NPDES State Program Authority*, https://www.epa.gov/npdes/npdes-state-program-authority (last visited Apr. 14, 2022).

This Court now has the opportunity to provide much-needed clarity for the mining and minerals industry.

The Court's charge is to determine "whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act, 33 U.S.C. § 1362(7)."

The answer to that question is a definitive no, for reasons set forth below. The five decades of uncertainty, only partially addressed by the Court's prior jurisprudence, call for the Court's answer to comprehensively address the boundaries of CWA jurisdiction. Parties need guidance on whether there remains any appropriate use of the "significant nexus" test. Addressing the unjustified impediments to development of the Sacketts' tiny parcel under one provision of the Act is necessary but not sufficient. Regulatory uncertainty and over-reach cripple large swaths of the American economy. That uncertainty has particularly substantial impacts on the mining and minerals industry, recognized yet again this month by the President as having national security significance.[7]

Amici—and the nation's economy—cannot continue waiting for the possibility that Congress will

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[7] Presidential Determination No. 22-11 of March 31, 2022, Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as amended, 87 Fed. Reg. 19775 (Apr. 6, 2022) ("To promote the national defense, the United States must secure a reliable and sustainable supply of such strategic and critical materials").

someday choose to more robustly define WOTUS, the most fundamental term of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*. The Court cannot compel Congress to provide that sort of statutory relief. But the Court *can* provide further guidance to the lower courts and agencies, whose WOTUS jurisprudence and rulemaking efforts have created a federal program far broader in scope than Congress intended or the Constitution permits. Sixteen years ago, the Chief Justice lamented that regulated parties were required to indefinitely "feel their way on a case-by-case basis" when trying to understand their obligations under the Act. *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). That remains true today, especially for the mining industry, and "the costs of uncertainty are so great." *County of Maui v. Haw. Wildlife Fund* (hereinafter, *Maui*), 140 S. Ct. 1462, 1491 (2020) (Alito, J., dissenting). The Court has long bemoaned the lack of clarity regarding federal authority under the Act. Defining WOTUS has proven to be "contentious and difficult." *Nat'l Ass'n of Mfrs. v. Dep't of* Defense, 138 S. Ct. 617, 624 (2018). "The reach of the Clean Water Act is notoriously unclear." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Indeed, that lack of clarity "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 602-03 (2016) (Kennedy, Thomas, and Alito, JJ., concurring).

In its ruling below, 8 F.4th 1075 (9th Cir. 2021), the Ninth Circuit determined that the Sacketts' "soggy residential lot" is a covered WOTUS because it satisfied (only) the "significant nexus" test set forth by Justice Kennedy in his concurrence in *Rapanos*. The Ninth Circuit expressly relied on Justice Kennedy's concurrence. *Id.* at 1091. In *Rapanos*, Justice Kennedy had opined that the Act regulates wetlands that have a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." 547 U.S. at 759 (citation omitted).[8]

The Ninth Circuit opinion rejected the Sacketts' contention that whether a wetland is a WOTUS must be determined instead by Justice Scalia's four-justice plurality opinion from *Rapanos*. The plurality concluded that the Act regulates only "relatively permanent, standing or continuously flowing bodies of water" and "wetlands with a continuous surface connection" to such waters. *Id.* at 716, 717.[9]

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[8] The latest agency effort to define WOTUS again relies on the "significant nexus" test even as to dry drainage features. And that elastic concept is further invoked to suggest federal regulation may be justified over larger tracts or even entire ecoregions, through aggregation of "similarly situated" features. No clarity is provided when the common factor of such "similarly situated" features is that they are normally dry. *Revised Definition of Waters of the United States*, 86 Fed. Reg. 69,372 (Dec. 7, 2021).

[9] The Ninth Circuit further asserted that its use of the Kennedy test was compelled by its prior ruling in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), that "Justice Kennedy's concurrence provides the controlling rule of law" from *Rapanos*. *Id.* at 999-1000. The court in *Healdsburg* had so concluded after finding that Justice Kennedy's rationale

The Ninth Circuit's ruling misinterprets the plain language and intent of the CWA, misunderstands *Rapanos*, and purports to create a regulatory regime that exceeds Congress' authority under the Commerce Clause. That ruling, if not corrected, will continue to wreak havoc with an industry critical to America's economy—particularly in the arid West, which is the center of gravity for much of the nation's mining and minerals activity.[10]

ARGUMENT

I. The Mining Industry Needs Clarity and Regulatory Certainty To Permit the Projects the Nation Needs.

A. The Mining Industry Is Critically Important to the Nation's Economy.

It is vitally important to the mining industry and the nation that this Court, once and for all, provide certainty and clarity on the scope of federal jurisdiction under the CWA. Mining and minerals development are critical to the American economy, as Congress has repeatedly acknowledged since at least the enactment of

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was the "narrowest ground" for the court's fractured decision, as instructed in *Marks v. United States*, 430 U.S. 188 (1977). *Id.* at 999. As discussed further below, *Marks* aside, the Ninth Circuit's adoption of the significant nexus test cannot be reconciled with the terms of the Act or the Court's Commerce Clause jurisprudence.

[10] U.S. Geological Survey, *Mineral Commodity Summaries 2022* (2022), https://pubs.usgs.gov/periodicals/mcs2022/mcs2022.pdf.

the 1872 General Mining Law, codified at 30 U.S.C. §§ 21 *et seq*. *See*, *e.g.*, 30 U.S.C. § 21a (developing domestic mineral resources is critical for national security); 43 U.S.C. § 1701(a)(12) (recognizing "the Nation's need for domestic sources of minerals").

The importance of domestic mining today is greater than ever. *See* Exec. Order No. 13953, Addressing the Threat to the Domestic Supply Chain From Reliance on Critical Minerals From Foreign Adversaries and Supporting the Domestic Mining and Processing Industries, 85 Fed. Reg. 62539, 62540 (Sept. 30, 2020) ("our Nation's undue reliance on critical minerals, in processed or unprocessed form, from foreign adversaries constitutes an unusual and extraordinary threat"); Exec. Order No. 14017, America's Supply Chains, 86 Fed. Reg. 11849 (Feb. 24, 2021) (calling for update on work conducted pursuant to Executive Order 13953). Noting that "minerals remained fundamental to the U.S. economy," the U.S. Geological Survey (USGS) estimated that in 2020 American mines produced nonfuel minerals worth $82.3 billion. Nevertheless, USGS warned that the United States imported more than half of the 46 top nonfuel minerals consumed in the economy.[11]

Indeed, the domestic mining industry provides raw materials required for nearly every major objective of the Biden-Harris Administration from infrastructure to manufacturing to electrification. After signing legislation making historic investments in the

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[11] *Mineral Commodity Summaries 2021*, *supra* note 2 at 6.

nation's infrastructure, President Biden issued Executive Order (E.O.) 14052, Implementation of the Infrastructure Investment and Jobs Act. Among other priorities, the E.O. promises to "help rebuild America's roads, bridges, and rails; expand access to clean drinking water; [and] work to ensure access to high-speed internet throughout the Nation."[12] None of these infrastructure investments can be completed without mining. From foundations to roofs, power plants to wind farms, roads and bridges to communications grids and data storage centers, America's infrastructure projects begin with mining. Roads, railways, appliances, buildings, stadiums, bridges, airports, and other structures are supported by steel—a material dependent on mining. Seventy percent of the world's steel requires coal for its production, and six billion tons of steel are used in the U.S. National Highway System.

Transportation electrification is a central pillar of the Biden-Harris Administration's domestic policy agenda, with a goal to electrify the federal fleet and electrify 50 percent of all new car sales by 2030.[13] This goal to rapidly electrify the U.S. vehicle fleet will accelerate the demand for mined metals and minerals and put pressure on already strained supply chains. The White House's own supply chain report projected that

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[12] Exec. Order 14052, Implementation of the Infrastructure Investment and Jobs Act, 86 Fed. Reg. 64335, 64335 (Nov. 18, 2021).

[13] Exec. Order 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, 86 Fed. Reg. 70935, 70936 (Dec. 8, 2021).

electrifying just 20 percent of domestic light-duty vehicles would require approximately 25, 49, and 22 percent of the total global nickel, lithium, and cobalt (respectively) that was mined in 2019.

Furthermore, mining is at the core of this Administration's energy priorities. *Amici's* members mine the raw materials supporting the nation's electric grid: 19 percent of U.S. electricity comes from coal, 20 percent of electricity is generated from nuclear energy powered by uranium, and 29 different minerals are required to deliver electricity to our homes and businesses. The metals *Amici's* members mine are also critical components in renewable energy sources. For instance, 4.7 tons of copper are needed for a single wind turbine, and 10 percent of the global silver demand is used in the production of solar panels. Many of the minerals that play a role in providing energy are critical minerals, as recently defined by the USGS.[14] Continuing the regulatory uncertainty that delays their development will stymie the objectives of Presidential Determination No. 22-11.

B. Uncertainty Regarding the Scope of WOTUS Impairs the Ability to Efficiently Permit Mining Projects.

The regulatory uncertainty resulting from the "significant nexus" test has made it exponentially more difficult for all regulated parties to permit their

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[14] 2022 Final List of Critical Minerals, 87 Fed. Reg. 10,381, 10,382 (Feb. 24, 2022).

projects. Because it is so broad, that test can capture features that are ordinarily dry or isolated from anything approaching a navigable water. The vague and inherently subjective nature of the significant nexus test makes it difficult for project developers and even agency field staff to implement on the ground. It also invites citizen suit litigation, producing further delay and cost.

The costs and delays are particularly severe for the mining industry. Unlike distinct development parcels, mining operations occupy larger geographic areas—frequently dozens of square miles. Their development and operational life can easily extend over decades. And the costs of developing mines can easily run into the billions. Numerous global authorities, including national governments and expert mining consultancies, have repeatedly acknowledged the uniquely capital-intensive nature of mining.[15]

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[15] *See*, *e.g.*, Government of Canada, *Capital Expenditures Information Bulletin* (May 2021), https://www.nrcan.gc.ca/capital-expenditures/17980 ("Mining projects are large-scale operations that have extended lead times and entail a sizeable upfront investment in machinery, equipment, infrastructure and site preparation that can extend over multiple years."); David Humphreys, *Mining investment trends and implications for minerals availability* 4 (Polinares Working Paper n. 15 2012), http://pratclif.com/2015/mines-ressources/polinares/chapter3.pdf ("Mining is a capital intensive industry, with new mine developments typically requiring extensive ground preparation, the construction of plant, the acquisition of specialized equipment and the creation of facilities for the disposal of mine waste. Not uncommonly they will also require the building of railways, ports and power stations."); United Nations, *United Nations Handbook on Selected Issues for*

In addition to being capital-intensive, mining projects are typically planned years in advance. Mining operations often encompass large areas of land[16] that require complex onsite stormwater, groundwater, and process water management. Mine developers design and often modify projects to avoid impacts to WOTUS.

Taxation of the Extractive Industries by Developing Countries, at 345 (2017), https://www.un.org/esa/ffd/wp-content/uploads/2018/05/Extractives-Handbook_2017.pdf ("From an investor standpoint, extractive industries investment also has special considerations as compared to regular investments: while the resources are finite, their extraction and development are risky and very capital intensive, with large investment required at the front end of the project life and a long lead time until profitability is achieved. On top of that, the business will require specific expertise for extraction and development."); Keith R. Long et al., *The Principal Rare Earth Elements Deposits of the United States—A Summary of Domestic Deposits and a Global Perspective*: USGS Scientific Investigations Report 2010–5220, at 23 (2010), https://pubs.usgs.gov/sir/2010/5220/downloads/SIR10-5220.pdf ("The largest of currently (2010) proposed new REE mining operations, including Mountain Pass, California, have reported premining capital requirements of a half a billion dollars or more."); National Mining Association, *SNL Metals & Mining: Permitting, Economic Value and Mining in the United States*, at 30 (June 19, 2015), https://nma.org/wp-content/uploads/2016/09/SNL_Permitting_Delay_Report-Online.pdf ("Until this stage of the mining process, the exploration/mining company will have seen outflows of $75-265 million, without any offsetting revenue.").

[16] In a limited study of hardrock mine site plans in 2016, the U.S. Government Accountability Office reported that the sixty-eight sites averaged 529 acres, with the largest extending to 8,470 acres. U.S. Gov't Accountability Office, *Hardrock Mining: BLM and Forest Service Have Taken Some Actions to Expedite the Mine Plan Review Process but Could Do More* (2016), https://www.gao.gov/products/gao-16-165.

But they cannot do so if they cannot readily determine which waters are subject to federal control and which are left to the States. Mining operators also need a WOTUS definition that can be relied upon for more than one or two years before changing again. That stability can only be guaranteed by this Court's definitive explanation of the statutory and constitutional constraints on the definition.

As the recent global pandemic has demonstrated, the nation's energy, manufacturing, technology, defense, and medical supply chains are fragile. America's reliance on foreign countries and geopolitical rivals for minerals and other materials that could be sourced domestically exposes the nation's economy and way of life to unacceptable risks. Despite the United States' vast mineral reserves, cumbersome permitting processes make the country import-dependent for many key minerals. Inefficient permitting systems already impact the domestic mining sector's ability to meet demand. Continued inefficiency would jeopardize the industry's contributions to helping this Administration achieve its goal to build resilient supply chains and revitalize American manufacturing and growth. The lack of clarity on the rules of the road, such as which waters need permits under the CWA, only exacerbates the inefficient permitting processes. The President's infrastructure and clean energy plans are dependent on the critical minerals and materials *Amici's* members mine.

Due to regulatory uncertainty and bureaucracy, the U.S. has one of the longest permitting processes in the world for mining projects. Necessary government

authorizations now take approximately seven to ten years to secure.[17]

These delays do not yield any environmental benefits justifying the significant additional costs to project proponents. There are real world consequences for permitting delays. Unexpected delays alone can reduce a typical mining project's value by more than one-third, and the higher costs and increased risk that can arise from a prolonged permitting process can cut the expected value of a mine in half before production even begins. Permitting delays, moreover, increase U.S. reliance on foreign minerals, as investment dollars for mining projects flow to more favorable destinations. According to the USGS' Mineral Commodity Summaries 2021, U.S. import dependence for key mineral commodities has doubled over the past two decades, with the U.S. now 100 percent import-reliant for seventeen key minerals and more than 50 percent import-reliant for an additional twenty-nine key mineral commodities.[18]

U.S. mineral import reliance continues to increase just as mineral demand from essential industries, such as energy and transportation, is expected to soar. The World Bank sees mineral demand for advanced energy technologies jumping 500 percent by midcentury. Further delays in the domestic mining industry's

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[17] SNL Metals & Mining, *Permitting, Economic Value, and Mining in the United States* (June 15, 2015), https://nma.org/wp-content/uploads/2016/09/SNL_Permitting_Delay_Report-Online.pdf.

[18] *Mineral Commodity Summaries 2021*, *supra* note 2.

permitting processes can have far-reaching consequences on virtually every aspect of our society.

Properly clarifying and narrowing the definition of WOTUS immediately is further compelled by the Court's recent ruling in *Maui.* In *Maui*, the Court held that NPDES permits are also required for discharges to groundwater that are "functionally equivalent" to discharges into a navigable surface water. 140 S. Ct. at 1481. In that case, the relevant navigable surface water was the Pacific Ocean, a half-mile away. The Court opined that the factors governing functional equivalency included the distance to the nearest navigable surface water. In *dicta*, the majority opinion stated that "permitting requirements likely do not apply" to an underground discharge fifty miles and potentially "many years" away from the nearest navigable water, since such a discharge would not be the functional equivalent of a direct discharge to surface water. *Id.* at 1476-77. The holding in *Maui* is a further signal that the Act mandates a clear and narrowly tailored definition of WOTUS. The majority in *Maui* could not have intended that this functional equivalence evaluation be performed within a 49-mile radius of any water subject to the amorphous "significant nexus" test.

Given the staggering investment costs associated with mining, properly defining WOTUS is paramount. Defining WOTUS so broadly that the CWA effectively becomes a federal land use law is inconsistent with both congressional intent and the Commerce Clause that provides the constitutional basis for the Act.

II. The Ninth Circuit Decision Exacerbated This Regulatory Uncertainty and Should Be Reversed.

A. The Ninth Circuit Incorrectly Held That WOTUS Can Be Regulated Solely Based on the "Significant Nexus" Test.

The Ninth Circuit's holding is premised on its mistaken belief that the controlling rationale from *Rapanos* is the "significant nexus" test articulated by Justice Kennedy. The appellate court asserted this result was compelled by the *Marks* rule for interpreting the controlling rationale in the face of fractured Supreme Court opinions. *Marks v. United States*, 430 U.S. 188 (1977). While it was struggling to apply *Marks* to *Rapanos*, however, the Ninth Circuit failed to pay heed to the text of the Act and the limits to Congress' power to regulate the channels of commerce. As explained below, while a *Marks* analysis also reveals the Ninth Circuit's error, the text of the Act and the limits of Congress' power to regulate the channels of interstate commerce would control in any event.

In *Rapanos*, five justices agreed that the Corps had interpreted "waters of the United States" more broadly than was allowed under the Act (and, likely, the Commerce Clause). The five concurring justices wrote two opinions, a plurality opinion by Justice Scalia and a concurrence by Justice Kennedy.

The five concurring justices in *Rapanos* disagreed, however, on the governing rationale. Justice Scalia wrote for himself, Chief Justice Roberts, and Justices

Alito and Thomas. Justice Scalia's plurality opinion concluded that the federal Act regulates only "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters, plus wetlands that feature a continuous surface connection to them. 547 U.S. at 716. Justice Kennedy, meanwhile, opined that the Act regulates wetlands that have a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (citation omitted). The requisite nexus of a wetland, Justice Kennedy continued, could be demonstrated "either alone or in combination with similarly situated lands in the region" whenever they "significantly affect the chemical, physical, *and* biological integrity of other covered waters." *Id.* at 780 (emphasis added).

Under no interpretation of *Marks* is the Ninth Circuit correct that Justice Kennedy's test alone provides the controlling rationale of *Rapanos*.[19] One cannot conclude that either rationale is a "logical subset" of the other. Justice Kennedy contended the plurality's continuous surface connection factor was "inconsistent with the Act's text, structure, and purpose." *Id.* at 776. Justice Scalia asserted that the "significant nexus" test merely stated that "whatever affects waters is waters." *Id.* at 757. He asserted that Justice Kennedy's

[19] The Court also has the option, of course, of reexamining the confusing *Rapanos* decision in full. *Nichols v. United States*, 511 U.S. 738, 745-46 (1994) ("This degree of confusion following a splintered decision . . . is itself reason for reexamining that decision.").

approach "simply rewrites the statute, using for that purpose the gimmick of 'significant nexus.'" *Id.* at 756.

Were this Court inclined to invoke *Marks*, the controlling rationale of the *Rapanos* majority could only be that regulating a non-navigable wetland is permissible if it satisfies *both* tests. This is the narrowest position taken in the two opinions. *Marks*, 430 U.S. at 193. Between them, the two opinions agree only that the Act regulates water bodies that satisfy both Justice Scalia's "relatively permanent and continuous" criterion and Justice Kennedy's "significant nexus" test. That is, *Rapanos* can only be read to allow regulation of waters that: a) maintain a relatively permanent flow that reaches traditional navigable water; and b) adjacent wetlands that significantly affect the chemical, physical, *and* biological integrity of such covered waters, because of the frequency and duration of their continuous surface connection. Again, of course, *Marks* aside, using the significant nexus test alone to define WOTUS cannot be squared with either the Act or the Commerce Clause.[20]

[20] Both the terms of the Act and the limits of Congress' Commerce Clause power *would* allow the Court to adopt Justice Scalia's plurality opinion.

B. The Plain Language of the CWA and Congressional Intent Do Not Support Regulating WOTUS Based on the "Significant Nexus" Test Alone.

WOTUS cannot be read to fundamentally change the meaning of the term it defines: "navigable waters." Nor, given the Commerce Clause, can it be used to justify federal regulation of the nation's waters beyond the authority of Congress to regulate the channels of commerce.

More than twenty years ago this Court made clear "what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). The Court added that the legislative history of the Act does not suggest that "Congress intended to exert anything more than its commerce power over navigation." *Id.* at 168 n.3. *Cf. The Daniel Ball*, 77 U.S. 557, 563 (1870) (Commerce Clause extends to commercial activity on waters "when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States").

There is simply nothing in the text of the statute or in its legislative history to suggest Congress intended to exercise federal jurisdiction over all areas from which water molecules might someday travel to

a navigable-in-fact water. The text itself rejects the proposition that Congress intended to displace the traditional state and local regulation of other waters. The Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . ." 33 U.S.C. § 1251(b) (emphasis added). It is no accident that the CWA is found in Title 33 of the United States Code, entitled "Navigation and Navigable Waters."

"The Clean Water Act anticipates a partnership between the States and the Federal Government[.]" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). That partnership does not limit the States to merely implementing federal mandates under agency oversight. *Rapanos*, 547 U.S. at 737-39 (plurality op.). States and not the federal government have full primacy on regulation of waters that fall outside the definition of WOTUS, of course. Even within the WOTUS universe, States also have primary responsibility for establishing the water quality standards for waters within their jurisdiction. 33 U.S.C. § 1313(c)(1), (2)(A). The Act leaves to States the regulation of non-point source of pollutants, even to those waters defined as WOTUS.

C. Failing To Reverse the Ninth Circuit's Reliance on the "Significant Nexus" Factor Alone Would Create a CWA That Exceeds Congress' Power Under The Commerce Clause.

The Ninth Circuit's conclusion that regulation of a 0.63-acre parcel is a federal matter redressable by Congress' power under the Commerce Clause is also mistaken. The Ninth Circuit position effectively is that any water with a "significant nexus" to a navigable-in-fact water likewise must have a substantial effect on interstate commerce. That is not the case. The lone constitutional basis for the CWA is Congress' power to regulate interstate commerce. Under Article 1, Section 8 of the Constitution, "Congress shall have Power . . . [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. That power is not unlimited. The Ninth Circuit's ruling produces an Act whose scope is constitutionally impermissible.

Even at its most expansive, Congress' authority under the Commerce Clause supports federal legislation in three areas only: 1) "channels of interstate commerce"; 2) "the instrumentalities of interstate commerce"; and 3) "activities that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609 (2000) (quotation marks and citation omitted); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

As explained above, the text and history of the CWA make clear that the Act is supported only by the first of the three prongs, Congress' authority to regulate the "channels of interstate commerce." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 2 (1824). That power authorizes regulation of only those waters that are among the "natural highways" of interstate commerce. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). Only these waters can be properly characterized as the "public property of the nation." *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1865) (referring to "public property"). "Waters" that have no continuous surface connection to surface water in another state or a territorial sea bear no relation to the navigability concerns that undergird this strand of Commerce Clause jurisprudence. Nor do such waters qualify as "instrumentalities of interstate commerce."

Even if Congress had intended to do more than regulate waters as channels of interstate commerce, it could permissibly regulate only that conduct that would "*substantially* affect interstate commerce." *Morrison*, 529 U.S. at 609 (emphasis added) (citation omitted). Congress cannot regulate waters merely because they have a purported "significant nexus" to navigable-in-fact waters; there must be a "substantial effect" on interstate commerce itself as well. To the extent executive branch agencies (sporadically) and some lower courts have relied on this prong of the Commerce Clause, they fail to recognize the Court's recent jurisprudence.

For Congress' exercise of authority to be lawful under the third prong, the regulated activity's effect on interstate commerce must be both *substantial* and *economic*. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 551 (2012); *Morrison*, 529 U.S. at 611 ("where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor").

For instance, in recent years the Court rejected federal regulation of "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce" in *Morrison*, 529 U.S. at 617. The Court has also noted with approval a series of earlier cases holding that the Commerce Clause did not permit Congress to automatically regulate activities such as "production," "manufacturing," and "mining." *Lopez*, 514 U.S. at 554 (citing *Wickard v. Filburn*, 317 U.S. 111, 121 (1942)); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not part of it."); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) ("Mining brings the subject-matter of commerce into existence. Commerce disposes of it.").

The Court has regularly warned that the commerce power cannot be used to regulate "indirect and remote" effects on interstate commerce that "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1,

37 (1937)). The Ninth Circuit's view that Congress can regulate waters that are neither interstate nor navigable would do precisely that. *See also Rapanos*, 547 U.S. at 722 (plurality opinion) (noting "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute"); *id.* at 738 (plurality) (noting expansive interpretation "stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power," and expecting "a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity"); *Solid Waste Agency*, 531 U.S. 159 at 173 (noting but not reaching "significant constitutional questions" raised by expansive interpretation of the CWA's reach).

Enough economic damage has been done because of the continued uncertainty about whether the Commerce Clause justifies federal regulation of waters that are not interstate or navigable, or adjacent to and inseparably bound up with such waters. Only a robust ruling by this Court can clarify what waters are truly fit for national regulation.

CONCLUSION

For the foregoing reasons, *Amici* believe that the Ninth Circuit must be reversed. The Court should clarify that federal authority under the Act extends only to those waters that qualify as navigable "channels of

interstate commerce," along with adjacent wetlands that are inseparably bound up with such open waters, or, should *Rapanos* be retained, the plurality's opinion.

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