No. 21-454

In the Supreme Court of the United States

MICHAEL SACKETT, ET UX.,

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 FOURTEEN NATIONAL AGRICULTURAL ORGANIZATIONS AS *AMICI CURIAE* 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).

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BRIEF OF FOURTEEN NATIONAL AGRICULTURAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

The *amici* are national organizations that represent among them much of the Nation's agricultural production.[1] Their members grow plentiful and affordable meat, produce, and fiber that feed and clothe Americans, or manufacture the fertilizers that help make our agriculture so productive. *Amici* are the American Farm Bureau Federation, American Sheep Industry Association, American Soybean Association, American Sugar Alliance, Family Farm Alliance, National Association of Wheat Growers, National Corn Growers Association, National Cotton Council, National Council of Farmer Cooperatives, National Pork Producers Council, The Fertilizer Institute, United Egg Producers, USA Rice Federation, and U.S. Poultry & Egg Association. They are described in an addendum to this brief.

Amici's members grow virtually every agricultural commodity produced commercially in the United States, including much of the U.S. wheat, corn, rice, soybean, cotton, wool, sugar, milk, poultry, egg, pork, lamb, and beef supply. Agriculture and livestock-related industries contributed over $1 trillion to the U.S.

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties have consented to this filing.

gross domestic product in 2020 and employed 20 million people. USDA, Economic Research Serv., *Ag and Food Sectors and the Economy* (Feb. 24, 2022).

This brief describes the great importance to agricultural land-users of establishing clear standards to determine whether property contains "waters of the United States" (WOTUS) subject to the permitting requirements and enforcement mechanisms of the Clean Water Act (CWA). It describes too the significant problems farmers face because of the broad, uncertain, and shifting definitions of WOTUS adopted by EPA and the U.S. Army Corps of Engineers (the Agencies). Because the agricultural community has been among the primary victims of the 50-years of agency overreach and regulatory chaos that once again brings WOTUS to this Court, *amici* have been at the forefront of efforts to clarify the law.

Amici's efforts to obtain a clear and durable definition of WOTUS that comports with Congress's intent and with constitutional limitations have varied from organization to organization, but include participating as *amici* in *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and *Rapanos* v. *U.S. EPA*, 547 U.S. 715 (2006), and as prevailing parties in *National Association of Manufacturers* v. *Department of Defense*, 138 S. Ct. 617 (2018) (*NAM*); filing comments on rule proposals;[2] and challenging in court, or intervening to

[2] For example, all *amici* commented on the Agencies' latest proposed Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372 (Dec. 7, 2021) (Revised Definition). See the February 7, 2022, comments of AFBF *et al*., ASA, NCGA, Family Farm Alliance, TFI, and the umbrella Waters Advocacy Coalition (WAC), collected at EPA Docket ID EPA-HQ-OW-2021-0602.

defend, the Agencies' regulations.[3] *Amici* have decades of experience working to improve the understanding of WOTUS before the Agencies and in courts at every level, and their members bear the burden of ongoing uncertainty about that concept every day. *Amici* believe that their considerable experience will assist this Court in resolving this important case.

SUMMARY OF ARGUMENT

As each opinion in *Rapanos* acknowledges, and this Court's rephrasing of the question presented here confirms, determining whether a wetland is a "water of the United States" depends on first understanding the proper test for WOTUS. The plurality in *Rapanos* defined WOTUS in a clear and workable way based on the plain meaning of the CWA's text, the statutory context of the relevant language, and core constitutional principles. It recognized that the Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" applies

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[3] For example, some *amici* were plaintiffs in two suits in which courts held unlawful the 2015 WOTUS rule, 80 Fed. Reg. 37,054 (June 29, 2015) (2015 Rule): *Georgia* v. *Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *American Farm Bureau Federation* v. *EPA*, No. 15-cv-165 (S.D. Tex. Sept. 12, 2018), Dkt. 87 (*AFBF*), and were intervenor-defendants in suits challenging the 2020 Navigable Waters Protection Rule, 85 Fed. Reg. 22,250 (Apr. 21, 2020) (NWPR). *E.g.*, *Colorado* v. *U.S. EPA*, No. 20-1238 (10th Cir. Mar. 2, 2021) (reversing preliminary injunction against NWPR); *South Carolina Coastal Conservation League* v. *Regan*, No. 20-cv-01687 (D.S.C. July 15, 2021), Dkt. 147 (remanding NWPR to Agencies without vacatur). A declaration filed in the WOTUS litigations by Don Parrish, Senior Director of Regulatory Affairs, AFBF, details the impact of overbroad and uncertain WOTUS jurisdiction on agriculture. Decl. of Don Parrish, *Environmental Integrity Project* v. *Regan*, No. 20-cv-1734 (D.D.C. Sept. 3, 2021), Dkt. 35-1 (Parrish Decl.).

only to "waters of the United States," not any wet area anywhere, and is subject also to "the policy of 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 * * * of land and water resources * * *." 33 U. S. C. §1251(a), (b). Despite the plurality's clear explanation of the limits of WOTUS, the Agencies have failed to provide a durable definition of WOTUS.

In shifting guidance and rules that have resulted in far more litigation than clarity, the Agencies have distorted the limits set forth in the *Rapanos* plurality's opinion. They also have taken an outlandishly expansive view of the phrase "significant nexus" used by Justice Kennedy in his solitary concurrence, while ignoring the constraints that Justice Kennedy put on that concept. As a result, the Agencies assert jurisdiction over not only wetlands and wet areas isolated and distant from navigable waters, but also ditches, intermittent streams, ephemeral drainages, interstate ponds and many other features. This is not the first time federal agencies have flouted the plain language of environmental laws to serve their own purposes—see, *e.g.*, *NAM*, *supra*, and *Weyerhaeuser* v. *U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018) (unanimously rejecting contorted agency interpretations of the CWA and Endangered Species Act, respectively)—but it may be the most egregious. Nothing in the CWA authorizes the Agencies' massive federal land-grab, which subjects *amici*'s members to crushing penalties, criminal charges, and a costly and burdensome permitting regime—but much contradicts it.

The Agencies have had their chance. Their repeated failures—with rule after rule held unlawful by

the courts—show that it is time for this Court to confirm the plurality's soundly reasoned definition in *Rapanos* and make clear that the Agencies may not deviate from that definition. If Congress wants to give the Agencies broader jurisdiction than the current statute allows, at the expense of the States whose "primary" authority over land and water Congress expressly protected, 33 U.S.C. § 1251(b), it knows how to do so. Major interference with land-use and traditional local authority over it—especially so vast as that perpetrated by the Agencies under the CWA—must rest on a clear statement by Congress, not on Agency manipulation of a malleable phrase like "significant nexus" that cannot be located anywhere in the text of the statute.

ARGUMENT

I. Agriculture bears the brunt of expansive and ambiguous WOTUS definitions

A. Broad and unclear WOTUS definitions impose enormous burdens on agriculture

There are more than 2 million farms and ranches in the U.S., which use nearly 900 million acres of land for crops, pasture, or grazing. USDA, *Farms and Land in Farms* 4 (Feb. 2020). Those farms and ranches provide domestic food security, employ 20 million people, contribute $1 trillion each year to our GDP, and export around $150 billion of products annually. *Ag and Food Sectors, supra*; USDA, *2020 U.S. Agricultural Export Yearbook*. For *amici*'s members, whether the land they farm or for which they produce farm-critical nutrients includes "waters of the United States" is a question of enormous practical importance. They need certainty on that question to adequately manage their

land in a financially and environmentally sustainable manner.

Without clarity about the meaning of WOTUS, farm operations carry the risk of substantial civil penalties,[4] criminal fines and imprisonment for even *negligent* violations, and costly-to-defend suits by environmental activists. 33 U.S.C. §§ 1319(c), 1365. Avoiding those risks means foregoing all practical use of an area of a farm that *might* be WOTUS—for the Agencies may treat even building a fence in a wetland as a violation of the CWA, let alone moving dirt, spreading fertilizer, or other active farming. See 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993) (the "very low" "threshold" before "truly *de minimis* activities" turn into "adverse effects on any aquatic function" could preclude even "walking" or "bicycling" through a jurisdictional feature). A farmer reported, for example, creating a 15-foot buffer around drainage ditches to ensure that fertilizers or pesticides did not reach those ditches, which eliminated 5 per cent of his field from production. Decl. of Robert Reed at ¶ 14, *Georgia*, *supra* (Sept. 26, 2018), Dkt. 208-4.

Alternatively, a landowner must engage in costly and disruptive dealings with the Corps of Engineers so that it may determine—based on highly subjective criteria—whether and where WOTUS is present. That

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[4] *E.g.*, *Borden Ranch P'ship* v. *U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2000) ($500,000 civil penalty plus wetlands restoration for plowing in a wetland to change the crop-type grown), aff'd by equally divided Court, 537 U.S. 99 (2002); *Duarte Nurseries* v. *U.S. EPA*, No. 13-cv-2095 (E.D. Cal. Dec. 8, 2017), Dkt. 342 ($1 million settlement of agency claim that farming activity disturbed wetlands).

process typically requires the landowner to hire professional consultants, and it is complicated by the Agencies' history of shifting regulatory positions, which may make the Corps' jurisdictional determinations of little value.[5] If the Corps concludes that jurisdictional features are present, CWA permitting, mitigation, and compliance costs may be prohibitive. The costs of obtaining a permit "are significant" and the process "arduous." *Hawkes,* 578 U.S. at 594, 601. "[O]ver $1.7 billion is spent each year" for wetland permits. *Rapanos,* 547 U.S. at 721 (plurality). A jurisdictional determination decreases the value of land by $600 an acre or more, and mitigation can run to thousands of dollars per linear foot to be developed. Parrish Decl., *supra*, ¶¶ 43-45. These costs may force a business to abandon projects or take land out of use. *Id.* ¶¶26-30, 33.

The meaning of WOTUS at the margins is particularly fraught for farmers and ranchers. They know that navigable rivers and their tributaries with permanent flow are protected by federal law. But they routinely contend with far more ambiguous features, such as low spots in fields, ditches, drains, stock watering and storage ponds, seasonal features that are often dry, or ephemeral washes that are almost always dry. Consider the following examples, and the plight of the farmer faced with deciding if the pictured features are WOTUS:

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[5] The Agencies have announced that while jurisdictional determinations they made under the NWPR remain "valid" for the usual five years, see generally *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 578 U.S. 590 (2016), jurisdiction for permitting purposes will be redetermined under whatever rule prevails at the time. EPA, *Current Implementation of Waters of the United States* (Dec. 20, 2021).

Farmers and ranchers should not have to guess whether such features, so far removed from any reasonable concept of navigable waters, are WOTUS. Current and proposed rules, however, lack clear guidance and may well reach such features.

B. The Agencies' latest proposed rule fails to adhere to the CWA or to provide clear guidance to agriculture

Amici discuss in Part III the legal implications of the Agencies oft-shifting definitions of WOTUS. But reviewing just their latest effort—the proposed Revised Definition, 86 Fed. Reg. 69,372 (Dec. 7, 2021)—shows how unrelated to the statute the Agencies' claims to regulate land-use have become and how desperate is the need for this Court to supply the clear standards the Agencies will not. No matter that these

rules are not yet final: they illustrate the stunning breadth of the Agencies' claimed authority, with federal tentacles reaching deeper and deeper into private land and into local land- and water-use decisions. Despite warnings from members of this Court, the Agencies have "chose[n] to adhere to [their] essentially boundless view of the scope of [their] power." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

1. The physical connection and significant effect standards are hopelessly vague

The proposed Revised Definition rests on malleable and uncertain concepts that give the Agencies *carte blanche* to regulate whatever they like. As a sop to the *Rapanos* plurality, the Agencies include as WOTUS "relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to" navigable or interstate waters or tributaries. 86 Fed. Reg. at 69,449. But their test is not the plurality's. It does not require, for example, that a feature connect to navigable water—connection to distant non-navigable tributaries, wetlands, or interstate waters is enough. *Id.* at 69,434, 69,449. Those are just the sort of "insubstantial hydrological connections" that the plurality held insufficient for jurisdiction. *Rapanos*, 547 U.S. at 728.

Even if a farmer could determine whether a feature meets the Agencies' physical connection standard, the farmer still must wrestle with the alternative "significant nexus" basis for jurisdiction, which is vaguer still. A feature is WOTUS if "either alone or in combination with similarly situated waters in the region," it "significantly affect[s] the chemical, physical, or biological integrity" of a traditional navigable water

or interstate water. 86 Fed. Reg. at 69,449-50. "Similarly situated," "in the region," "significantly affects," and "chemical, physical, or biological integrity" are highly ambiguous and potentially extremely expansive concepts.

"*Similarly situated*" waters that will be lumped together to determine jurisdiction include "waters that are providing common, or similar functions for downstream water such that it is reasonable to consider their effect together." 86 Fed. Reg. at 69,439. That leaves a farmer uncertain what "functions" are similar enough in type or in magnitude to satisfy this vague "reasonableness" standard.

The Agencies concede the malleability of the undefined term "*in the region.*" They could implement the concept, they say, using "watershed frameworks" or "an ecoregion which serves as a spatial framework for the research, assessment, management, and monitoring of ecosystems and ecosystem components." 86 Fed. Reg. at 69,439-40. A farmer wondering if a low spot in a field is WOTUS, in other words, needs to look not just at his or her own land, but at any feature that might be deemed "similar" located anywhere in a potentially vast and ill-defined area.

"*Significantly affect*" does not entail true significance. It "means more than speculative or insubstantial effects" on any function of waters or wetlands. And in applying that minimally-demanding standard the Agencies look to vague factors like "distance," "hydrologic factors," the waters that have been determined to be "similarly situated," and "climatological variables." These undefined and non-exclusive concepts ensure no farmer can ever look at a field and know whether it contains WOTUS until the Agencies tell

him that is what they have determined in the particular case. 86 Fed. Reg. at 69,449.

In combination, these vague concepts could reach any spot in the Nation that has ever been wet. The isolated ponds this Court held in *SWANCC* were not WOTUS would be WOTUS, because the migratory birds that used those ponds for breeding and food also use navigable waters in the same "watershed" or "ecoregion," so that the ponds have a more than speculative effect on the "*biological integrity*" of a navigable water. *Cf.* 2015 Rule, 80 Fed. Reg. at 37,106 (provision of "life-cycle dependent aquatic habitat" for activities of "breeding" or "feeding" is a "significant nexus" to navigable water). Ultimately, *any* effect, however indirect or tenuous, is enough, and neither the "significant effect" nor "chemical, physical, or biological integrity" factors are a meaningful constraint on WOTUS jurisdiction. Together, these obscure definitions put farmers in a situation where they have no regulatory certainty and few tools to be able on their own to understand what is a WOTUS and what is a puddle.

2. Common farm and ranch features would be treated as WOTUS by the proposed rule

A few (of many possible) examples from the proposed Revised Definition show the regulatory quagmire that farmers and ranchers face.

Ephemeral drainages. An ephemeral feature is one in which water flows only in response to precipitation, which in parts of the country may be very sparse. The 2020 NWPR excluded ephemeral features from CWA jurisdiction because drainages or washes that are usually dry cannot properly be described as

"waters," and because this Court in *Rapanos* recognized that duration, volume, and frequency of flow are vital to identifying WOTUS and that "any hydrologic connection" is not enough. 547 U.S. at 784 (Kennedy J., concurring); see *id.* at 732 n.5 (plurality) (distinguishing between "a wash and seasonal river").

In removing that limitation in the proposed Revised Definition, the Agencies again open farmers and ranchers up to the risk that ephemeral features distant from navigable water will be deemed to be regulated "tributaries" or to have a significant nexus with navigable waters. See 86 Fed. Reg. at 69,437 (ephemeral waters in the arid west may be jurisdictional under the significant nexus standard). Consistent with the *Rapanos* plurality opinion, this Court should tell the Agencies (again) that ephemeral drainages are categorically not WOTUS.

Ditches. The *Rapanos* plurality explained that "ditches" with "intermittent flow" are not WOTUS. 547 U.S. at 735-736; see *id.* at 733-34 ("intermittent or ephemeral flow" found in "drainage ditches" or "storm sewers and culverts" are not WOTUS). Justice Kennedy agreed that "ditches" "remote from any navigable-in-fact water" and "carrying only minor water volumes" are not WOTUS. *Id.* at 780-782.

The Agencies disagree. The Revised Definition excludes from WOTUS only "ditches constructed wholly in uplands and draining only uplands with *ephemeral* flow." 86 Fed. Reg. at 69,433 (emphasis added). That leaves a farmer with drainage ditches—which are critical to maintaining field conditions and protecting crop yield—wondering whether a ditch that may have been constructed decades earlier was created in uplands, and whether its flow will be treated as enough to make the ditch a WOTUS. This Court should make

clear (again) that any ditch that does not contribute relatively permanent flow to navigable water is not a WOTUS.

Interstate waters. One perplexing aspect of the Agencies' definitions of WOTUS over the years has been its insistence that non-navigable interstate waters are WOTUS simply by virtue of them crossing state boundaries, and that a feature's physical or ecological connection to a non-navigable interstate water makes that feature also a WOTUS. *E.g.*, 86 Fed. Reg. at 69,373 (WOTUS include "interstate waters" and "their adjacent wetlands," and features that have a physical connection to interstate waters or have a "significant effect" on them). In other words, non-navigable interstate waters are treated the same as traditional navigable waters.

That is wrong. As the district court correctly held in *Georgia*, "the inclusion of all interstate waters in the definition of 'waters of the United States,' regardless of navigability, extends the Agencies' jurisdiction beyond the scope of the CWA because it reads the term navigability out of the CWA." 418 F. Supp. 3d at 1358. Applying that ruling—and after conducting their own exhaustive legal analysis of this Court's decisions and the regulatory and legislative history—the Agencies in the 2020 NWPR removed interstate waters from the definition of WOTUS. See 85 Fed. Reg. at 22,282-86. Yet the Agencies now propose to restore this legally baseless jurisdiction, which compounds the problems for farmers trying to comply with the law. It is time for this Court to make clear that because navigability must be given some meaning, CWA jurisdiction does not extend to "interstate waters divorced from any notion of commercial

navigability" (or to wetlands adjacent to them). *Id.* at 22284.

II. The Court in *Riverside Bayview*, *SWANCC*, and *Rapanos* set forth the test for determining if features are waters of the United States

The Agencies would substitute interconnectedness to navigable water—a physical connection, or some effect, of any type or degree—for the legal rules that must govern their decisions. The Agencies attribute their authority to regulate every nook and cranny of the Nation to "science." *E.g.*, 86 Fed. Reg. at 69,373 (rejecting prior administration's law-based approach, believing it "diminish[ed] the appropriate role of science"), 69,390-94. But determining the jurisdictional reach of the CWA is a legal question of statutory construction, not a purely scientific issue. See 85 Fed. Reg. at 22,271 ("science cannot dictate where to draw the line between Federal and State or tribal waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA"). And the *Rapanos* plurality, building on earlier decisions, carefully explained how the statute must be construed to achieve its goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

A. This Court set important limits on the scope of the Agencies' authority under the CWA in *Riverside Bayview* and *SWANCC*

Before *Rapanos*, this Court made clear that the term "waters of the United States" in the CWA encompasses more than traditionally navigable waterways,

such as certain wetlands, but that Congress's retention of the "navigable" qualifier in the statute was meant to impose a meaningful limit on the scope of federal jurisdiction. Thus, relatively permanent bodies of water are "waters" within the CWA, and adjacent wetlands may be within the reach of federal jurisdiction if they physically abut otherwise covered waters in such a way that it is difficult to delineate where a water ends and land begins. The Court also held that the reach of federal jurisdiction is necessarily restricted by the CWA's purpose to preserve the States' rights and responsibilities concerning pollution abatement and land and water use and planning, so that an interpretation of the statute that markedly infringes on those state prerogatives is inconsistent with Congress's aims.

In *United States* v. *Riverside Bayview Homes, Inc.*, the Court examined whether the Agencies were allowed to require a permit under CWA Section 404(a) to place fill materials on a wetland adjacent to a lake. In determining whether wetlands were within federal authority, the Court stated that the CWA requires the Agencies to "choose some point at which water ends and land begins." 474 U.S. 121, 132 (1985). The Court acknowledged that this is "no easy task" because "between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs, in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land." *Ibid*.

The Court concluded that Congress intended to permit the Agencies to exercise jurisdiction over some wetlands: those that are "adjacent" to covered waters. The Court reasoned that the focus of the statute is on "maintaining and improving water quality," and to serve that interest the CWA prohibits discharges into

"navigable waters." *Id.* at 132-133. In defining "navigable waters" as WOTUS, "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133. Those non-navigable waters include some wetlands. *Ibid.*

Still, though the term "navigable" in "navigable waters" "is of limited import," Congress did not intend "to abandon traditional notions of 'waters' and include in that term 'wetlands' as well." *Ibid.* To determine which wetlands could be included as "waters," the Court explained that wetlands *adjacent* to navigable waters "play a key role in protecting and enhancing water quality" *if* they are "inseparably bound up with" a covered water. *Id.* at 133-134. Accordingly, the CWA applies to wetlands that are "*adjacent* to water as more conventionally defined." *Id.* at 133 (emphasis added). The Court specified that covered waters include "open waters" such as "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" *Id.* at 131-132.

In *SWANCC*, the Court invalidated the "migratory bird rule" under which the Agencies purported to exercise Section 404(a) jurisdiction over an abandoned sand and gravel pit that provided habitat for certain birds. This decision rested in part on the Court's recognition that the scope of the CWA is limited by the statutory purpose to preserve the rights and responsibilities of States to prevent pollution and to plan land use and development. 531 U.S. at 166, 172-173; see 33 U.S.C. § 1251(b); 85 Fed. Reg. at 22,254, 22,262. State authority in these areas is a core aspect of state

sovereignty, *FERC* v. *Mississippi,* 456 U.S. 742, 767 n.30 (1982), and agency intrusion into it violates the Tenth Amendment. *Hodel* v. *Va. Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 286-87 (1981).

The Court held that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. The Court found no such clear indication in the CWA: "Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States * * * to plan the development and use * * * of land and water resources.'" *Id*. at 174. Therefore, the CWA must be read "to avoid the significant constitutional and federalism questions raised" by an expansive interpretation of the Agencies' jurisdiction that would intrude on these traditional areas of state power. *Ibid*.

The Court also determined that the CWA is "clear" and does not permit the exercise of federal jurisdiction over "nonnavigable, isolated, intrastate waters." *Id*. at 172. In reaching that decision, the Court acknowledged that *Riverside Bayview* approved the exercise of jurisdiction "over wetlands that *actually abutted* on a navigable waterway." 531 U.S. at 167 (emphasis added). The Court explained that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview*" but that holding did not extend to wetlands or isolated waters "that are not adjacent

to bodies of open water." *Ibid.* Although *Riverside Bayview* noted that the term "navigable" was of "limited import," that term still "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172.

B. The *Rapanos* plurality correctly applied the limiting principles from *Riverside Bayview* and *SWANCC* to define the scope of the Agencies' jurisdiction

In *Rapanos*, the plurality and Justice Kennedy agreed that "the qualifier 'navigable' is not devoid of significance." 547 U.S. at 731 (plurality); *id.* at 778 (Kennedy, J.) ("the word 'navigable' in 'navigable waters' [must] be given some importance"). They also agreed that the CWA reaches some waters and wetlands that are not navigable-in-fact but have a substantial connection to navigable waters. *Id.* at 739, 742 (plurality); *id.* at 784-85 (Kennedy, J.). And they agreed that "environmental concerns provide no reason to disregard limits in the statutory text." *Id.* at 778 (Kennedy, J.); *id.* at 748-749 (plurality) ("total deference to the Corps' ecological judgmen[t] would permit the Corps to regulate the entire country as 'waters of the United States'").

Applying the plain language of the statute and the holdings of *Riverside Bayview* and *SWANCC*, the *Rapanos* plurality concluded that WOTUS encompasses "only relatively permanent, standing or flowing bodies of water" and that it cannot include "transitory puddles or ephemeral flows of water." *Id.* at 732-733 (plurality); see *id.* at 739 (WOTUS "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that

are described in ordinary parlance as 'streams[,] * * * oceans, rivers, [and] lakes'"). Indeed, because "navigable" "carries some of its original substance," a WOTUS must "at bare minimum," include "the ordinary presence of water." *Id.* at 734 (plurality). Both *Riverside Bayview* and *SWANCC* described "navigable waters" as "open waters"; thus typically dry channels, which unquestionably are not open waters, cannot be considered navigable waters under the statute. *Id.* at 735. And as *SWANCC* recognized, extending federal jurisdiction to intermittent or ephemeral flows would impinge the States' rights and responsibilities in the absence of a clear statutory indication that Congress intended to do so. *Id.* at 737-738. WOTUS therefore "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739.

Turning to the question of wetland adjacency to a covered water, the *Rapanos* plurality explained that *Riverside Bayview* extended WOTUS to some wetlands because of the "difficulty of delineating the boundary between water and land." *Id.* at 740. The plurality also stated that *SWANCC* described the close connection of a wetland that "gradually blend[s]" into a covered water as a "significant nexus." *Id.* at 741. But without the "actual abutment" of a wetland to an open, navigable water present in *Riverside Bayview*, there is "no boundary-drawing ambiguity" and therefore no justification for calling a wetland a water. *Id.* at 748-749. Wetlands that have only an intermittent, physically remote hydrologic connection to a navigable water are not covered because they "do not implicate the boundary drawing problem of *Riverside Bayview*" and therefore do not have the "significant nexus" required by *SWANCC*. *Id.* at 742. Wetlands do have the requisite "significant nexus" when their

"physical connection" to a covered, open water "makes them as a practical matter *indistinguishable* from waters of the United States." *Id*. at 755.

The plurality further reasoned that physical connectedess to a covered water (so that it is difficult to tell where the water ends and the wetland begins), and not ecological significance to a water, must be the rule, because *Riverside Bayview* stated that the CWA could reach physically connected wetlands "lacking in importance to the aquatic environment." *Id*. at 747 (citing *Riverside Bayview*, 474 U.S. at 135 n.9). Similarly, the plurality explained that *SWANCC* found ecological connections irrelevant to the question of whether physically isolated waters were within the Agencies' jurisdiction. *Id*. at 742 (citing *SWANCC*, 531 U.S. at 167, 171). In its straightforward application of these holdings, the plurality concluded that wetlands that do not have a continuous surface connection to a covered water are not within the Agencies' power because there is no difficulty in those cases "to determine where the 'water' ends and the 'wetland' begins" and ecological considerations cannot substitute for such a connection. *Id*. at 742.

III. The Agencies deserve no deference for their revolving definitions of WOTUS

As the *Rapanos* plurality explained, the statutory term "waters" is at its core clear, not ambiguous, and constrains how the Agencies may define WOTUS. It does leave some leeway to define, for example, the line between relatively permanent, intermittent, and ephemeral waters—but that discretion is further limited by the need to give the term "navigable" some importance, by Congress's policy to preserve the States' authority over land- and water- use, and by structural features of the CWA. See 85 Fed. Reg. at 22,252-54

(examining structural features of the Act delineating federal and state roles).

Within the areas where the Agencies do have discretion to define WOTUS by rule, they also may change their mind. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009); *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). When an agency changes direction, it must provide a "reasoned explanation" for doing so. *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221-222 (2016). There is, however, a difference between the reasoned exercise of discretion to change direction and inconsistent flip-flopping to try to maximize the federal reach regardless of statutory language, context, and precedent. In the case of WOTUS, the Agencies' actions over decades show they have forfeited any claim to deference and need to be told plainly by this Court how to interpret the Act.

1. The Agencies have demeaned this Court's rulings at every step. They treated *Riverside Bayview* as saying nothing about the limits of adjacency, and *SWANCC* as merely striking down the migratory bird rule. See 85 Fed. Reg. at 22,256. They made a mockery of the *Rapanos* plurality's "relatively permanent" standard by defining it to include low flow for a few months, and looked to a highly distorted reading of Justice Kennedy's lone concurrence to reach remote, desiccated features. They sought to insulate their case-by-case jurisdictional determinations from judicial review (*Sackett* v. *EPA*, 566 U.S. 120 (2012); *Hawkes*), and they now say that jurisdictional determinations are largely worthless anyway. See *supra* n.6. Only clear direction from this Court can end this game of cat-and-mouse, in which the regulated community are the losers.

2. The regulatory history shows that the Agencies are playing games designed to aggrandize their own power, not faithfully seeking a clear and durable definition of WOTUS.

For a decade after *Rapanos*, the Agencies failed to produce any rule at all, promulgating instead "guidance" that failed to guide. See U.S. EPA, Memo, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos* v. *United States & Carabell* v. *United States* 1 (Dec. 2, 2008) (asserting jurisdiction over navigable waters and their adjacent wetlands, relatively permanent nonnavigable tributaries of navigable waters and wetlands that abut them, nonnavigable tributaries that have a significant nexus with a navigable water, and wetlands adjacent to them that have such a significant nexus). That guidance—to which the Agencies have currently reverted pending finalization of their new rule—could well reach all of the features pictured at pp. 8-10, *supra*, but provided no clear principle to make that determination.

At the urging of the regulated community and States seeking clearer standards, the Agencies promulgated a rule defining WOTUS in 2015. But far from increasing clarity, that rule introduced expansive and arbitrary concepts that are impossible to locate either in the CWA or in this Court's precedent. For example, the 2015 Rule:

- defined a jurisdictional tributary to include features that contribute flow to a navigable or interstate water as indicated by the presence of a bed and bank and ordinary high water mark (OHWM) (80 Fed. Reg. at 37,105)—even though a single rain event in the arid west can create a bed, bank and

OHWM—without regard to whether the flow is "perennial, intermittent, or ephemeral" or of any specific volume or frequency or duration (*id.* at 37,076);

- introduced an arbitrary definition of an "adjacent" feature that is jurisdictional because any part of it is located within 100 feet of the OHWM of a navigable or interstate water or tributary, or is located within the 100-year floodplain of and not more than 1,500 feet from such a water;
- arbitrarily applied a case-by-case significant nexus analysis to any feature located within the 100-year floodplain of any navigable or interstate water and any feature located within 4,000 feet of the OHWM of such waters or their tributaries;[6] and
- defined "significant nexus" to mean a feature that alone or in combination with other similarly situated waters within the same watershed had more than a speculative or insubstantial effect on the chemical, physical, or biological integrity of navigable or interstate water. *Id.* at 37,106.

Unsurprisingly, these arbitrary, vague, but expansive definitions did not pass muster with the courts. The 2015 Rule was stayed nationwide by the Sixth Circuit, because it was "far from clear" that it

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[6] The Agencies acknowledged that "the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea." U.S. EPA and Department of the Army, *Economic Analysis of the EPA-Army Clean Water Rule* 11 (May 20, 2015).

could be squared with even the most generous reading of this Court's precedent. *In re EPA,* 803 F.3d 804, 807 (6th Cir. 2015), vacated*,* 713 Fed. App'x 489 (6th Cir. 2018). After the Sixth Circuit lost jurisdiction (see *NAM*, *supra)*, district courts issued preliminary injunctions covering more than half of the country.

The District Court in North Dakota enjoined the rule in 13 States because plaintiffs were "likely to succeed on the merits of their claim that the EPA has violated its grant of authority." *North Dakota* v. *EPA,* 127 F. Supp. 3d 1047, 1051 n.1, 1055 (D.N.D. 2015). Enjoining the 2015 Rule in another 11 States, the Southern District of Georgia agreed that it was "plague[d]" by the "fatal defect" that it reached drains, ditches, and streams "remote from any navigable-in-fact" water. *Georgia* v. *Pruitt,* 326 F. Supp. 3d 1356, 1364-65 (S.D. Ga. 2018) (quoting *Rapanos,* 547 U.S. at 781 (Kennedy, J., concurring)). The Southern District of Texas enjoined the Rule in another three States. *AFBF*, *supra* n.4. Accordingly, the rule was enjoined in 27 States.

Ultimately, district courts in Texas and Georgia held the 2015 Rule unlawful. The Texas court concluded that it "'is not sustainable on the basis of the administrative record'" and remanded it to the Agencies. *Texas* v. *EPA,* 389 F. Supp. 3d 497, 506 (S.D. Tex. 2019). The Georgia court held that asserting jurisdiction over all "interstate waters" impermissibly reads the term "navigable" out of the statute; the "tributary" definition extended federal jurisdiction beyond that allowed under the CWA; and asserting jurisdiction over all waters "adjacent" to all tributaries was an impermissible construction. *Georgia,* 418 F. Supp. 3d at 1363-68. And it held that "the WOTUS Rule's vast expansion of jurisdiction

over waters and land traditionally within the states' regulatory authority" constituted a "substantial encroachment" into state power that "cannot stand absent a clear statement from Congress." *Id.* at 1370, 1372. The court remanded the Rule to the Agencies because, recognizing its serious shortcomings, the Agencies had by then begun to reconsider it in new rulemakings.

That series of failures in court is part of the backdrop to the Agencies' decision to promulgate a narrower and more certain rule in 2020, the NWPR, that much more closely hewed to the *Rapanos* plurality opinion. 85 Fed. Reg. at 22,250. But some States and environmental groups challenged the NWPR, and although the Agencies asked for remand without vacatur in light of their plans to revisit the rule, two courts remanded the NWPR with vacatur. *Pascua Yaqui Tribe* v. *EPA*, No. 20-cv-00266, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021); *Navajo Nation* v. *Regan*, No. 20-cv-602, 2021 WL 4430466 (D.N.M. Sept. 27, 2021). The Agencies acquiesced nationwide in those rulings, reverted to the flawed 2008 Guidance (see EPA, *Current Implementation of Waters of the United States* (Dec. 20, 2021)), and proposed the equally flawed 2021 Rule, described in Part II. And if that rule is ever finalized, it too will be challenged because it is no more authorized by the CWA than the 2015 Rule that was held unlawful.

This pirouetting over the meaning of WOTUS—Agencies alternately stretching to expand their jurisdiction or trying to craft a narrower and clearer rule, and courts holding every rule unlawful—is untenable in a rule that controls, in the agricultural sector alone, the use of nearly a billion acres of land and carries huge civil penalties and jail time for violations. And it

leads one to ask what possible claim to deference the Agencies could have given this history of failure. This Court's reaffirmation of the *Rapanos* plurality's WOTUS standard, and its rejection of any "significant nexus" standard for lack of any support in the text of the CWA, would bring this debacle to an end.

3. The breadth given to the term "waters of the United States" by the Agencies in 2008, 2015, and their new proposal has all the hallmarks of a major question of "'vast economic and political significance.'" *Ala. Ass'n of Realtors* v. *Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam). The definition of WOTUS results in the direct regulation of private conduct under which land users must obtain permits or face severe civil and criminal liability. Each expansion of WOTUS "cast[s] doubt on the full use and enjoyment of private property throughout the Nation." *Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring). Each expansion also federalizes decisions about local land and water use that traditionally lie within the power of the States—a power that Congress explicitly intended the CWA to preserve and protect. *SWANCC*, 531 U.S. at 172. And each expansion invokes the limits of Congress's powers under the Commerce Clause. *Ibid.* By promulgating definitions of WOTUS that give themselves "essentially limitless" power over land use nationwide *(Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring)), the Agencies have distorted our federalism, infringed on private property rights, and micromanaged the conduct of a majority of rural land users. Determining what land and water features are WOTUS falls easily within the range of decisions that this Court has deemed to be "major questions." See, *e.g.*, *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (holding a major question to be involved when EPA findings under the

Clean Air Act would "require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide").

Before an agency can decide major questions of this sort, "the Act [must] plainly authoriz[e]" the agency's action. *Nat'l Fed'n of Indep. Bus.* v. *Dep't of Labor*, 142 S. Ct. 661, 665 (2022) (*NFIB*). The CWA plainly authorizes the Agencies to regulate "waters" of the United States, and ties that term to the defined phrase, "navigable waters." The plurality in *Rapanos* explained what that means.

The CWA does *not* plainly authorize the Agencies to assert jurisdiction over ditches, intermittent streams, ephemeral drainages, interstate ponds, or wet areas that are connected to navigable waters only by virtue of some "chemical, physical, or biological" nexus. The major questions doctrine means that the Agencies may not regulate those features and thereby make unauthorized decisions with grave economic and political consequences. See *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring) ("administrative agencies [that] seek to regulate the daily lives and liberties of millions of Americans * * * must at least be able to trace that power to a clear grant of authority from Congress"). Indeed, the long history of the Agencies' aggrandizement of their own power in this area makes this a classic case for application of the major questions doctrine, because the Agencies have "assume[d] responsibilities far beyond [their] initial assignment." *Id.* at 669 (Gorsuch, J., concurring).

In fact, were the meaning of the term "waters of the United States" not reasonably clear from the language Congress used, the context of that language, the structure of the CWA, and the constitutional back-

ground of federalism and property rights, the non-delegation doctrine would surely be triggered. Once the *Rapanos* plurality's conclusions based on standard principles of statutory interpretation are abandoned —as the Agencies abandoned them in their 2008 Guidance, 2015 Rule, and current proposed rule— there is no "intelligible principle" left to guide their rulemaking. Our Constitution's core principle of separation of powers prohibits such "intrusions into the private lives and freedoms of Americans by bare edict," allowing them "only with the consent of their elected representatives." *Id.* at 669 (Gorsuch, J., concurring); see also *Dep't of Transp.* v. *Ass'n of Am. R.R.s*, 575 U.S. 43, 61 (2015) (Alito, J., concurring). Reaffirming the *Rapanos* plurality's clear interpretation of WOTUS avoids the "significant constitutional questions" that would otherwise arise under the non-delegation doctrine. *SWANCC*, 531 U.S. at 173.

For 50 years now, bar the aberration of the vacated 2020 NWPR, "EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase ['waters of the United States']." *Sackett*, 566 U.S. at 133 (Alito, J., concurring). Enough is enough. Traditional tools of statutory construction supply a core of clear meaning, far narrower than what the Agencies keep reaching for, which this Court should enforce.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

DESCRIPTION OF THE AMICI CURIAE

Each *amicus* advocates for regulatory standards and policies that enable the success of the industry members they represent. The *amici* are as follows:

American Farm Bureau Federation (AFBF), https://www.fb.org, is the "voice of agriculture" formed to represent farm and ranch families.

The American Sheep Industry Association (ASI), https://www.sheepusa.org, is the national trade association representing the 100,000 farms and ranches that produce America's lamb and wool).

American Soybean Association (ASA), www.soygrowers.com, represents U.S. soybean farmers on domestic and international policy issues important to the soybean industry. ASA has 26 affiliated state associations representing 30 soybean-producing states and more than 500,000 soybean farmers.

American Sugar Alliance (ASA), https://sugaralliance.org, represents the more than 11,000 sugarcane and sugarbeet farmers in the United States as well as the employees in our mills, processors, and refineries. ASA is dedicated to preserving a strong domestic sugar industry.

Family Farm Alliance (Alliance), https://www.familyfarmalliance.org, is a grassroots, nonprofit organization composed of family farmers, ranchers, irrigation districts, and allied industries in 16 Western States. The Alliance's mission is to ensure the availability of reliable and affordable irrigation water supplies to Western farmers and ranchers.

National Association of Wheat Growers (NAWG), https://wheatworld.org/, works with its 20

affiliated state associations and many coalition partners on issues as diverse as federal farm policy, environmental regulation, the future commercialization of emerging technologies in wheat, and uniting the wheat industry around common goals.

National Corn Growers Association (NCGA), https://www.ncga.com, represents nearly 40,000 corn farmers nationwide and the interests of more than 300,000 growers with the mission "to create and increase opportunities for corn growers to help them sustainably feed a growing world."

National Cotton Council (NCC), https://www.cotton.org, is the unifying force of the U.S. cotton industry, bringing together representatives from the seven industry segments in the 17 cotton-producing states of the Cotton Belt to ensure the ability to compete effectively and profitably in the raw cotton, oilseeds and U.S.-manufactured products market at home and abroad.

The members of the **National Council of Farmer Cooperatives** (NCFC), https://ncfc.org, are regional and national farmer cooperatives, which handle, process, and market almost every type of agricultural commodity; furnish farm supplies; and provide credit and related financial services, including export financing.

National Pork Producers Council (NPPC), http://nppc.org/about-us, is the global voice for the Nation's 60,000 pork producers with the mission to "fight[] for reasonable legislation and regulations" that protect the livelihood of pork producers.

The Fertilizer Institute (TFI), https://www.tfi.org, represents the nation's fertilizer industry, including producers, importers, retailers, wholesalers

and companies that are engaged in all aspects of the fertilizer supply chain. Fertilizer is a key ingredient in feeding a growing global population, which is expected to surpass 9.5 billion people by 2050. Half of all food grown around the world today is made possible through the use of fertilizer.

United Egg Producers (UEP), https:// unitedegg.com, is the advocate for the needs and interests of U.S. egg producers responsible for more than 90 percent of all eggs produced in the U.S, and provides industry leadership and member services related to animal well-being and hen housing, biosecurity and disease prevention, environment, food safety and government relations.

USA Rice Federation (USARF), https://www.usarice.com, is the global advocate for all segments of the U.S. rice industry with the mission to ensure the health and vitality of a unified U.S. rice industry by advocating on behalf of farmers, millers, merchants, and allied businesses.

U.S. Poultry & Egg Association (USP&E), https:// www.uspoultry.org, is the world's largest and most active poultry organization with the mission to serve as the voice for the feather industries.