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

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KIMBERLY S. HERMANN
SOUTHEASTERN LEGAL FOUNDATION
560 West Crossville Rd., Ste. 104
Roswell, Georgia 30075

JENNIFER A. SIMON
Counsel of Record
KAZMAREK MOWREY CLOUD LASETER LLP
1230 Peachtree St., NE, Ste. 900
Atlanta, Georgia 30309
(404) 812-0126
jsimon@kmcllaw.com

Counsel for Amicus Curiae

October 20, 2021

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. This case is critical and fortuitously timely	4
B. This case is critical to ensure the Agencies apply and develop constitutional, lawful rules	7
1. The current WOTUS definition is unconstitutionally vague	7
2. The current WOTUS definition violates the Commerce Clause	12
3. The current WOTUS definition encroaches on the traditional province of the states	17
4. The current WOTUS definition violates this Court's *Rapanos* decision	18
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 16

Am. Petroleum Inst. v. Johnson, 541 F. Supp. 2d 165 (D.D.C. 2008) 14, 15

Army Corps v. Hawkes Co., 136 S. Ct. 1807 (2016) 3

Connally v. General Constr. Co., 269 U.S. 385 (1926) 8

FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) 8

Hughes v. United States, 138 S. Ct. 1765 (2018)........19

In re: Envt'l Protection Agency and Dep't of Def. Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015), No. 15-3751 (6th Cir.).........1

In re EPA, 803 F.3d 804 (6th Cir. 2015) 18

King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) 3, 20, 21, 23

Marbury v. Madison, 5 U.S. 137 (1803)....................15

Marks v. United States, 430 U.S. 188 (1977)......*passim*

Miss. Comm'n on Nat. Res. v. Costle, 625 F.2d 1269 (5th Cir. 1980)....................18

N. Am. Dredging Co. of Nev. v. Mintzer, 245 F. 297 (9th Cir. 1917)....................13

TABLE OF AUTHORITIES—Continued

Page

N. California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007)....................................23

Nat'l Assoc. of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018)..2

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)..13

Nichols v. United States, 511 U.S. 738 (1994)..............6

Pascua Yaqui Tribe v. EPA, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021)..5

Paulsen v. Daniels, 413 F.3d 999 (9th Cir. 2005) 15

Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682 (3d Cir. 1991)..20

Precon Dev. Corp. v. U.S. Army Corps of Engineers, 633 F.3d 278 (4th Cir. 2011) 23

Rapanos v. United States, 547 U.S. 715 (2006)..*passim*

Sackett v. EPA, 566 U.S. 120 (2012) 8

SLF v. EPA, No. 15-cv-02488 (N.D. Ga.) 1

SLF v. EPA, No. 15-13102 (11th Cir.), transferred, No. 15-3885 (6th Cir.)....................................1

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)...........12, 13, 17

Summit Petroleum v. EPA, 690 F.3d 733 (6th Cir. 2012)..11

TABLE OF AUTHORITIES—Continued

Page

United States v. Bailey, 571 F.3d 791 (8th Cir. 2009) 21

United States v. Davis, 825 F.3d 1014 (9th Cir. 2016) 19, 20, 21

United States v. Donovan, 661 F.3d 174 (3d Cir. 2011) 21

United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) 23

United States v. Hughes, 849 F.3d 1008 (11th Cir. 2017) 19

United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) 20, 21

United States v. Mead Corp., 533 U.S. 218 (2001) 15

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 22

United States v. Robison, 505 F.3d 1208 (11th Cir. 2007) 20, 22, 23

United States v. Williams, 553 U.S. 285 (2008) 8

United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) 14

Wickard v. Filburn, 317 U.S. 111 (1942) 13

STATUTES

33 U.S.C. § 1251 17

33 U.S.C. § 1319(c)(1) 8

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS

33 C.F.R. § 328.3(a)(3) (1993) 14

40 C.F.R. § 19.4 8

40 C.F.R. § 230.3(s) 9, 13, 14, 15, 16

38 Fed. Reg. 34,164 (Dec. 11, 1973)............................15

38 Fed. Reg. 13,528 (May 22, 1973)............................15

39 Fed. Reg. 4,532 (Feb. 4, 1974) 15

OTHER AUTHORITIES

EPA, *Current Implementation of Waters of the United States*, https://www.epa.gov/wotus/current-implementation-waters-united-states 5

EPA, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, Dec. 2008 (Rapanos Guidance) 5

EPA, *Intention to Revise the Definition of "Waters of the United States,"* https://www.epa.gov/wotus/intention-revise-definition-waters-united-states 6

Bryan A. Garner, et al., *The Law of Judicial Precedent* (2016)..19

TABLE OF AUTHORITIES—Continued

Page

U.S. DOT, FHWA, *Army Corps of Engineers Regulatory Guidance Letter on Jurisdictional Determinations* (May 6, 2009), https://www.environment.fhwa.dot.gov/legislation/other_legislation/natural/laws_usacememo.aspx............11

Steinman, A., *Nonmajority Opinions and Biconditional Rules*, Yale L.J. (Mar. 2018), https://www.yalelawjournal.org/forum/nonmajority-opinions-biconditional-rules....................20

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation (SLF) is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic®. Since 1976, SLF has been going to court for the American people when the government over-reaches. SLF works to combat government overreach, guard individual liberty, protect free speech, and secure property rights in the courts of law and public opinion.

SLF has been at the heart of the Waters of the United States (WOTUS) definitional rulemaking efforts and associated legal challenges for nearly a decade. SLF filed comments on the Obama administration's proposed rule on November 14, 2014 (*see* EPA-HQ-OW-2011-0880-19466) and filed several of the first legal challenges to the final WOTUS Rule issue in 2015. *See SLF v. EPA*, No. 15-cv-02488 (N.D. Ga.); *SLF v. EPA*, No. 15-13102 (11th Cir.), transferred, No. 15-3885 (6th Cir.), and consolidated, *In re: Envt'l Protection Agency and Dep't of Def. Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015)*, No. 15-3751 (6th Cir.).

---

[1] Rule 37 statement: The parties were notified that Amicus intended to file this brief more than 10 days before its filing and consented to its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; Amicus alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

Following the Sixth Circuit's jurisdictional rulings, SLF submitted briefing in support of the National Association of Manufacturer's successful petition for certiorari to the Supreme Court. *See* Resp'ts' Br. in Supp. of Pet. for Cert*., Nat'l Assoc. of Mfrs. v. Dep't of Def.*, No. 16-299 (U.S. Oct. 5, 2016), cert. granted, 137 S. Ct. 811 (2017). SLF was also active in the successful Supreme Court litigation. *See* Resp'ts' Br. in Supp. of Pet., *Nat'l Assoc. of Mfrs. v. Dep't of Def.*, No. 16-299 (U.S. Apr. 2017); 138 S. Ct. 617 (2018).

Because of its overreach of federal authority, the Ninth Circuit's interpretation of the *Rapanos* decision in this matter should be reversed. The Sacketts' cert petition should be granted and direction given to regulators applying *Rapanos* and crafting yet another attempt to define WOTUS.

SUMMARY OF ARGUMENT

This is a seminal moment in the evolution of the contours of "Waters of the United States" (WOTUS). EPA seized federal jurisdiction over the Sacketts' land in 2007 under a mostly invalidated set of regulations and a misinterpretation of this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). After two failed attempts at a new WOTUS definition under two administrations, EPA and the Army Corps of Engineers (Corps) (together, the Agencies) are back where they started. They have returned to the 1980s-era regulations in effect in 2007, guided by *Rapanos*

and its jumbled progeny. And in this mess, they announced the beginning of yet a third rulemaking effort. Before millions more taxpayer dollars are wasted and our court systems again subsumed with WOTUS litigation, this Court can speak to this quagmire and establish clarity.

Rapanos has baffled the Agencies, courts, and landowners to the point of being its own unconstitutionally vague standard. Much of the present confusion is driven by the nebulous "significant nexus" standard presented in the concurrence. Even its author Justice Kennedy now calls it "notoriously unclear" and notes its "crushing" consequences. *Army Corps v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring). The meaning of "significant nexus" is unclear even to experts but impenetrable to an average landowner trying to follow the law.

Only by the Agencies' and some lower courts' errant interpretation of *Rapanos* was this problem created. They have "turn[ed] a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be." *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991). Because Justice Kennedy's opinion was not a logical subset of the plurality, it is not the controlling opinion of the Court under *Marks v. United States*, 430 U.S. 188, 193 (1977) and so should not be the law.

Instead, recognizing the due process rights at issue and states' primary authority over property regulation, the "narrowest" reading of *Rapanos* should be that which is most restrictive of federal government authority. Here, that would be a WOTUS definition that covers, per the plurality, all traditional navigable waters, their relatively permanent and continuously flowing tributaries, and all adjacent ponds and wetlands with a continuous surface connection, but that is limited, per the concurrence, to such waters having a significant nexus with the applicable traditional navigable water. This would essentially establish a presumption of jurisdiction for every water meeting the plurality's definition that is rebuttable if the water has no significant economic effect on the navigable water.

ARGUMENT

A. This case is critical and fortuitously timely.

Rarely does the Court have an opportunity to hear a case at so timely a juncture. EPA enforced against the Sacketts in 2007, on the heels of *Rapanos* and according to the 1980s-era regulations in effect. The following fourteen years have been subsumed by multiple failed rulemakings, endless litigation, a sea of conflicting court decisions, and untold waste of time and resources expended all to build a house on shifting sand. After all this, the Agencies are back where they

started and again at the precipice of another flailing journey.

Last month, following the District Court for the District of Arizona's order[2] vacating and remanding the latest WOTUS definition, the Agencies announced this return to the 1980s-era regulations and the post-*Rapanos* guidance. *See* EPA, *Current Implementation of Waters of the United States*, https://www.epa.gov/wotus/current-implementation-waters-united-states (reporting that the Agencies "are interpreting 'waters of the United States' consistent with the pre-2015 regulatory regime until further notice. [This includes] . . . the guidance materials listed below."); EPA, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States* & *Carabell v. United States*, Dec. 2008 (*Rapanos* Guidance).

Agents across the country are now applying the same 1980s-era regulations, interpreted according to *Rapanos*, that controlled the Sacketts' case in 2007. In doing so, they are making critical decisions about the fate of people's property. Those decisions have enormous consequences, either subjecting that property to an expensive and time-consuming federal regulatory scheme or enabling landowners to follow typically more efficient state-level processes. The differences in costs and time both in aggregate and to each individual landowner are staggering. *See Rapanos*, 547 U.S. at 721 ("The average applicant for an individual permit

---

[2] *Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021).

spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. . . . Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.”).

Meanwhile, EPA has announced an intent, first to make its return to those 1980s-era regulations and post-*Rapanos* Guidance official in a first-step rule-making effort, and then to promulgate yet another attempt to interpret the scope of their CWA authority. *See* EPA, *Intention to Revise the Definition of “Waters of the United States*,” https://www.epa.gov/wotus/intention-revise-definition-waters-united-states. If history is any guide, this effort will likely be followed by nationwide district court litigation, with the same patchwork results as the matter winds through the various district and circuit courts. And all-the-while, individual landowners will remain befuddled over whether the federal government controls their property or not.

This Court can end the entire quagmire now and clarify the holding of *Rapanos* and the scope of the Agencies’ authority. “This degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision.” *Nichols v. United States*, 511 U.S. 738, 746 (1994).

The time for this Court to act could not be more optimal. Any later hearing would come too late—after the costly rulemaking, after the protracted litigation,

and after countless landowners invest hundreds of thousands of dollars merely to understand what rules apply to their properties.

This Court should grant the Sacketts' petition for writ of certiorari.

B. This case is critical to ensure the Agencies apply and develop constitutional, lawful rules.

The Agencies' only option when courts invalidate central elements of their regulation defining WOTUS is to return to the last legally valid regulation. The rules the Agencies are currently applying were vacated, either directly or implicitly, by several courts. The Agencies have ignored some adverse decisions, selectively interpreted others, and misapplied the rest, and continue to apply unconstitutional, invalid rules through a lens of impenetrable guidance. This Court should grant cert to correct this unconstitutional overreach of Agency authority and provide direction as to the lawful contours of the Agencies' future regulation.

1. The current WOTUS definition is unconstitutionally vague.

Justice Alito observed in the first iteration of this matter, "The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act."

Sackett v. EPA, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Four years earlier, Justice Scalia noted, "The Corps' enforcement practices vary somewhat from district to district because 'the definitions used to make jurisdictional determinations' are deliberately left 'vague.' GAO Report 26." *Rapanos*, 547 U.S. at 727.

Vague regulations—particularly vague criminal regulations[3]—violate constitutional due process rights and cannot stand. "'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). A regulatory standard must be vacated if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285,

[3] For merely negligent CWA violations, the landowner is subject to fines of up to $37,500 per day of noncompliance and imprisonment for up to a year. *See* 33 U.S.C. § 1319(c)(1), adjusted per 40 C.F.R. § 19.4; *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). *See also Rapanos*, 547 U.S. at 721 (internal quotation marks and citations omitted):

> [T]he Clean Water Act imposes criminal liability, as well as steep civil fines, on a broad range of ordinary industrial and commercial activities. In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines.

304 (2008). The current regulatory regime fails on both counts.

To understand the current definition of WOTUS, a landowner must wade through 1980s-era regulations this Court found impossibly vague in 2006 and 2012, several Supreme Court decisions that interpret and constrict those regulations (including *Rapanos* which lacks a majority), EPA guidance documents purporting to explain those decisions, and numerous circuit and district court attempts to interpret those materials, and then guess how a local enforcement agent might apply all that law. Within this morass, the regulated community has no idea what conduct is prohibited, and regulators have no hope of consistent application.

To cite just a few examples, the regulations create a category of jurisdictional waters called "other waters," which include waters that "*could* affect interstate . . . commerce including any such waters [w]hich . . . *could* be used by interstate . . . travelers for recreational or other purposes." 40 C.F.R. § 230.3(s). How a landowner or field agent might guess as to whether someone from out-of-state might enjoy fishing or canoeing on a small pond or stream is a mystery.

The Agencies further assert jurisdiction over all tributaries of traditionally navigable waters, interstate waters, or "other waters." *See* 40 C.F.R. § 230.3(s). However, the Agencies define a tributary to include the entire "reach of the stream," with flow characteristics decided according to the entire stream. *Rapanos* Guidance, p. 6. Thus, the flow on any particular parcel

may be both intermittent and trivial to the extent it is unclear whether it forms part of a larger waterbody or not. Without expert analysis or Agency clarification, no property owner could possibly know whether a trickle through her property implicates the CWA, and no field agent could hope to apply the regulation consistently.

Presuming one could theoretically identify federal "tributaries," the *Rapanos* Guidance then establishes federal jurisdiction over all waters with a "significant nexus" to those tributaries and certain other covered waters. To make this determination, a landowner must assess the "flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters." *Id.*, p. 8. This analysis includes many considerations outside the knowledge or expertise of a typical landowner. For example, the Agencies declare their right to consider "historic records of water flow," the provision of "habitat services," or a "significant" nexus formed either through allowing sediment to flow or the complete reverse, trapping sediment. *See id.*, p. 11. If reasonable hydrologists, marine scientists and botanists could disagree as to a water's "significance," no landowner or field agent could possibly understand the rules or apply them consistently.

And this assessment applies not only to wetlands near traditionally navigable waters but also to wetlands that are several steps removed from such waters. Wetlands "adjacent" (which the Agencies unlawfully

interpret functionally[4]) to "non-navigable tributaries that are not relatively permanent" also become jurisdictional if the Agencies deem they have a significant nexus with a "traditional navigable water" (again, interpreted in ways that are neither traditional nor require actual navigation). *See id.*, p. 8.

In other words, a landowner of a damp property could look hard for a nearby tributary and reasonably find none, but an agent could later assert that an off-site occasional trickle, typically invisible to the eye, qualifies as jurisdictional. And that agent could then decide that the wetlands at issue, together with the invisible tributary, have a significant nexus with a jurisdictional water miles away. *See id.*, p. 10. And, though the landowner's inability to perceive the federal jurisdiction over her property is completely understandable, she would nevertheless face crippling fines for failure to secure a federal permit, plus the loss of use of her property, without recompense.

To avoid such risk, a landowner might engage the services of a costly environmental professional, obtain a scientific opinion on whether her land is jurisdictional, and coordinate with the Agencies to confirm their agreement. This effort costs thousands of dollars and at least several months. *See* U.S. DOT, FHWA, *Army Corps of Engineers Regulatory Guidance Letter on Jurisdictional Determinations* (May 6, 2009),

[4] *See Summit Petroleum v. EPA*, 690 F.3d 733, 744 (6th Cir. 2012) ("'adjacent' is not ambiguous between 'physically proximate' and merely 'functionally related'"), citing *Rapanos*, 547 U.S. at 748.

https://www.environment.fhwa.dot.gov/legislation/other_legislation/natural/laws_usacememo.aspx ("While the RGL states that the Corps is committed to finalizing both preliminary and approved JDs within 60 days of submittal, factors such as Corps work load and complexity of the aquatic resource delineation may delay a decision from the Corps."). And, at the end of that process, the Agencies may disagree with the landowners' expert assessment.

Complying with the law should not be this hard. Waters of true federal significance should be obvious. Properties should be bought, sold and developed without undergoing months or even years of expert analysis. And people should understand the rules *before* they are fined and prosecuted. These are foundational aspects of our private property and due process rights. The Agencies and the regulated community need this Court's direction to rein in the behemoth WOTUS problem that has unfolded over the last few decades.

2. The current WOTUS definition violates the Commerce Clause.

Although this Court has found the Clean Water Act does not extend federal authority to its constitutional limits (*see Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001)), the Agencies exceed even those further bounds of the Constitution. Indeed, several courts have recognized as such and the Agencies ignored their direction. This

Court should grant cert to clarify the CWA and Commerce Clause limits on Agency authority and to reestablish the primacy of the Constitution over Agency action.

The Agencies' interpretation of "traditional navigable waters" is neither traditional nor bears any relationship to navigability and has come far from the CWA-era understanding of that term. *See id.* at 168, n. 3 (nothing "in the legislative history . . . signifies that Congress intended to exert anything more than its commerce power over navigation").

For example, the Agencies assume jurisdiction over all waters that "*could* affect interstate . . . commerce including any such waters [w]hich . . . *could* be used by interstate . . . travelers for recreational or *other* purposes." 40 C.F.R. § 230.3(s). Every isolated fishing pond or stream that could conceivably be attractive to an out-of-state person for any reason hardly qualifies as "traditionally navigable." And certainly such a water would not qualify as having a "substantial economic effect on interstate commerce" as required to remain within the bounds of the Commerce Clause. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 551 (2012) (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)). *See also N. Am. Dredging Co. of Nev. v. Mintzer*, 245 F. 297, 300 (9th Cir. 1917) (explaining a water's "sufficien[cy] for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes" is insufficient to qualify a water as "navigable").

Indeed, courts have already spoken on this issue and have vacated these provisions. In *United States v. Wilson*, the Fourth Circuit explained that the "regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce." 133 F.3d 251, 257 (4th Cir. 1997). Because the regulation does not require "that the regulated activity have a *substantial* effect on interstate commerce," it poses "serious constitutional difficulties" and appears "to exceed congressional authority under the Commerce Clause." *Id.* The court concluded Congress could not have intended the CWA to be unconstitutional and, therefore, the regulation must be beyond the scope of the CWA. *See id.* ("[T]he Army Corps of Engineers exceeded its congressional authorization under the Clean Water Act, and . . . , for this reason, 33 C.F.R. § 328.3(a)(3) (1993) is invalid."). The Agencies barely paid lip service to the *Wilson* decision and, further, did not remove the "could affect" language from any of their subsequent regulations or guidance documents. That language remains codified at 40 C.F.R. § 230.3(s).

The District Court for the District of Columbia was similarly troubled by the "could affect interstate commerce language" and vacated a comparable WOTUS definition. *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 187 (D.D.C. 2008). The court ordered EPA to return to its 1973 regulation, the last effective regulation before the invalidated 2002

regulation. *See id.* at 186 ("[V]acatur will . . . merely restore the previous regulatory definition of 'navigable waters' pending further proceedings."). This is because, generally, "[t]he effect of invalidating an agency rule is to reinstate the rule previously in force." *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). EPA complied but did not make comparable adjustments to other CWA regulations.

The Agencies do not have this option of continuing to apply rules courts have invalidated, particularly rules invalidated on constitutional grounds.[5] *See United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now says what the court has prescribed."); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it.").

The Agencies then expand on this unlawful base by claiming jurisdiction over all tributaries of these waters, however small and insignificant. *See* 40 C.F.R. § 230.3(s). Nonnavigable, nearly invisible trickles are neither channels nor instrumentalities of interstate commerce and indeed have no effect whatsoever on interstate commerce, regardless of whether they cross state lines. Justice Kennedy recognized this overreach

[5] The last legally valid rules were those from 1973 and 1974 (38 Fed. Reg. 34,164, 34,165 (Dec. 11, 1973); 38 Fed. Reg. 13,528, 13,529 (May 22, 1973); and 39 Fed. Reg. 4,532, 4,533 (Feb. 4, 1974)), interpreted according to later jurisprudence.

in his *Rapanos* opinion: "The merest trickle, if continuous, would count as a "water" subject to federal regulation." 547 U.S. at 769. Nevertheless, here again, the Agencies did not remove the unlawful regulations from the Code, and their *Rapanos* Guidance continues to claim jurisdiction over these waters.

The Agencies further claim authority over certain waters that are "adjacent" or have a "significant nexus" with jurisdictional waters or their tributaries even if these nearby waters are completely physically separate and have no commercially-relevant interconnection. 40 C.F.R. § 230.3(s); *Rapanos* Guidance, pp. 8-12.

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring). That is what the Agencies have long done in their interpretation of WOTUS. By extending federal jurisdiction over an unending sequence of ever-more-attenuated connections to navigable waters, the Agencies have "asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Rapanos*, 547 U.S. at 722. Such regulation "of immense stretches of intrastate land . . . [is] an unprecedented intrusion into traditional state authority." *Id.* at 738. The Agencies' current interpretation of WOTUS, including the applicable regulations and

Rapanos Guidance, no longer bears any reasonable relationship to interstate commerce.

This Court should grant cert to rein in the Agencies' overreach under the Commerce Clause and enforce the basic controlling effects of judicial decisions.

3. The current WOTUS definition encroaches on the traditional province of the states.

In the Clean Water Act, Congress charged the Agencies with protecting both the "chemical, physical, and biological integrity" of truly "navigable waters" and "the primary responsibilities and rights of States" to prevent water pollution and manage their land and water resources. 33 U.S.C. § 1251. The Agencies have strayed far from this original commission and are now interpreting WOTUS in ways that place primary responsibility for the regulation of water on the federal government. This is a violation of both the Clean Water Act and the constitutionally mandated balance of state and federal power.

"Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power." *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality). *See also SWANCC*, 531 U.S. at 174 ("the States [have] traditional and primary power over land and water use"). Preserving this balance of power is important not only for constitutional purposes but also for

practical reasons. In a country as large as ours, "the varied topographies and climates . . . call for varied water quality solutions." *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1275 (5th Cir. 1980).

But the expansion of authority under the Agencies' interpretation leaves very little, if any, water for state regulation. Every pond or stream with a fish, every tributary of such a water up to its tiniest, ephemeral headwater trickle, and every wetland with any ecological connection to such waters are subsumed within federal jurisdiction. If few waters of any meaningful size remain for the states, the Agencies are not "honor[ing] the policy of cooperative federalism that informs the Clean Water Act [or] . . . attend[ing] the shared responsibility for safeguarding the nation's waters." *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015).

Recognizing the states' primary responsibility over land and water regulation means not merely giving states a share of the paperwork but preserving their rights to regulate a water differently or even not at all. The Agencies have long run afoul of this constitutional and Clean Water Act directive. This Court should grant cert to restore the appropriate federal-state balance.

4. The current WOTUS definition violates this Court's *Rapanos* decision.

The Agencies and courts are at sea in interpreting *Rapanos* and, indeed, many of this Court's fragmented decisions. *Marks v. United States* is at the heart of this

confusion, particularly for decisions where the concurrence is not a logical subset of the plurality.[6] This would be an ideal occasion to resolve both the proper interpretation of *Rapanos* and the precedential effect of this Court's fragmented decisions.

The *Marks* Court instructs as follows:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

430 U.S. at 193.

However, "[t]he *Marks* Court did not elaborate on how to identify the narrowest grounds." *United States v. Hughes*, 849 F.3d 1008, 1012 (11th Cir. 2017) (quoting Bryan A. Garner, et al., *The Law of Judicial Precedent* 199–200 (2016)). "In the face of this confusion, two main approaches have emerged: one focusing on the reasoning of the various opinions and the other on the ultimate results." *United States v. Davis*, 825 F.3d 1014, 1020 (9th Cir. 2016). In the first, the holding becomes that opinion which is the "logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly

[6] This Court granted cert several years ago to clarify this issue. *See Hughes v. United States*, 138 S. Ct. 1765, 1779 (2018). But this Court was ultimately able to decide the case without resolving the debate over *Marks*.

approved by at least five Justices who support the judgment." *King*, 950 F.2d at 781. In the second, "the narrowest ground [i]s the rule that 'would necessarily produce results with which a majority of the Justices from the controlling case would agree.'" *Davis*, 825 F.3d at 1021 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 694–97 (3d Cir. 1991)).

Because Justice Kennedy's concurrence is not a logical subset of Justice Scalia's plurality, applying the reasoning-based approach to *Marks* may be problematic. Indeed, the principle of "narrowest grounds" is unclear for any biconditional rule such as the definition of WOTUS. *See* Steinman, A., *Nonmajority Opinions and Biconditional Rules*, Yale L.J. (Mar. 2018), https://www.yalelawjournal.org/forum/nonmajority-opinions-biconditional-rules. Is a test that makes more waters jurisdictional while making fewer waters nonjurisdictional "narrowest" or the converse? Courts disagree and, when they reach an impasse, seem to choose based on the result they like best. For example, the Eleventh Circuit follows Kennedy's concurrence, finding his standard the "narrowest" because it is "less far-reaching (i.e., less-restrictive of CWA jurisdiction)." *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007). But the First Circuit reasoned that "it seems just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality), because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *United States v. Johnson*, 467

F.3d 56, 63 (1st Cir. 2006). Apparently not liking that result, the First Circuit elected instead to take its direction from the dissent and find federal jurisdiction whenever either the plurality's or the concurrence's test applied. *Id.*, at 64-66.

Several circuit courts likewise follow this approach of applying the dissenting opinion in interpreting *Rapanos*. *See*, *e.g.*, *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). Although not in this context, the Ninth Circuit has also expressed support for this approach. *See Davis*, 825 F.3d at 1025 (reasoning that "we assume but do not decide that dissenting opinions may be considered in a *Marks* analysis," while acknowledging "that in *King*, the D.C. Circuit explicitly stated that it was not 'free to combine a dissent with a concurrence to form a *Marks* majority.' *King*, 950 F.2d at 783").

The Agencies also follow an either/or approach. *See Rapanos* Guidance, p. 3 (citing Stevens' dissent to justify incorporating both the plurality's and the concurrence's standards). For example, they adopt Justice Scalia's "relatively permanent" criterion for jurisdictional tributaries, despite Justice Kennedy's criticism of that standard as being a government overreach. *See Rapanos* Guidance, p. 1 ("The agencies will assert jurisdiction over . . . [n]on-navigable tributaries of traditional navigable waters that are relatively permanent. . . ."); *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring) ("The merest trickle, if continuous, would count as a 'water' subject to federal regulation. . . .").

And they adopt Justice Kennedy's "significant nexus" test (*see Rapanos* Guidance, pp. 8-11) despite the plurality's lengthy critique of that approach. *See Rapanos*, 547 U.S. at 753-57 (calling Justice Kennedy's "significant nexus" analysis a mischaracterization of *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) that eschewed case-by-case determinations, a substitution of the purpose for the text of the statute, the creation of a "new statute all on his own," and, ultimately, "turtles all the way down").

This amalgam approach is an improper application of *Marks* and is unfaithful to the *Rapanos* decision. The Eleventh Circuit explains:

> *Marks* talks about those who "concurred in the judgment[ ]," not those who did not join the judgment. *Marks*, 430 U.S. at 193. It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an "either/or" test, whereby CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied.

Robison, 505 F.3d at 1221. The Agencies even acknowledge in their Guidance this approach is directly contrary to the direction of the Eleventh Circuit. *See Rapanos* Guidance, p. 3, citing *Robison*. Nevertheless, the Agencies remain steadfast in this perspective both now and in the next rulemaking.

The either/or approach is also contrary to the weight of judicial authority. Most courts interpret

Rapanos according to Justice Kennedy's concurrence, although they reach that result in different ways. The Ninth Circuit provides plainly that in a 4-1-4 decision, the concurrence is necessarily controlling. *See N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007). The Eleventh Circuit reasons that Kennedy's concurrence is the narrowest grounds because it "will classify a water as 'navigable' more frequently than Justice Scalia's test." *Robison*, 505 F.3d at 1221. The Seventh Circuit found Kennedy's concurrence "narrower (so far as reining in federal authority is concerned)" and deemed it further persuasive that whenever Kennedy's test is satisfied, five justices would agree (including the four dissenters). *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006). In the Fourth Circuit, the parties conveniently agreed. *See Precon Dev. Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 288 (4th Cir. 2011).

But making Justice Kennedy's test the law is also a misapplication of *Marks* and a distortion of *Rapanos*. Following his opinion has the effect of "turn[ing] a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be." *King*, 950 F.2d at 782.

Instead, a results-based perspective on the *Marks* analysis may prove more useful. Five of the *Rapanos* justices voted to reverse the District Court's and the Court of Appeals' findings of federal government

jurisdiction over the waters at issue. Four of the justices voted to affirm. Of the five *Rapanos* Justices who "concurred in the judgment" (*Marks*, 430 U.S. at 193), they would only agree that a water body is subject to federal jurisdiction when it meets both Justice Scalia's permanent/continuous test and Justice Kennedy's significant nexus test. Therefore, the result of *Rapanos* is not either/or but both.

This approach also makes logical sense. An unimportant trickle should not be sufficient to invoke federal jurisdiction, but it makes an excellent starting point because of its visual clarity. It provides an unambiguous standard, without resort to experts and years of lost commercial opportunity and the myriad other problems with a case-by-case analysis that have long troubled this Court (*see Rapanos*, 547 U.S. at 753). And the significant nexus backdrop ensures inconsequential connections are not elevated beyond their importance or their capacity for regulation under the Commerce Clause. In practice, a significant nexus analysis will seldom be necessary because most waters covered under the plurality's approach would also satisfy Justice Kennedy's test.

By joining both tests, the regulated community receives clarity, the intent of *Rapanos* is effectuated, and the Agencies remain within their constitutional bounds. This Court should grant cert to so clarify the *Rapanos* decision.

CONCLUSION

For the foregoing reasons, SLF respectfully requests this Court grant the Sacketts' Petition for Writ of Certiorari.

Dated: October 20, 2021

Respectfully submitted,

KIMBERLY S. HERMANN
SOUTHEASTERN LEGAL FOUNDATION
560 West Crossville Rd., Ste. 104
Roswell, Georgia 30075

JENNIFER A. SIMON
Counsel of Record
KAZMAREK MOWREY CLOUD LASETER LLP
1230 Peachtree St., NE, Ste. 900
Atlanta, Georgia 30309
(404) 812-0126
jsimon@kmcllaw.com

Counsel for Amicus Curiae