No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT AND CHANTELL SACKETT,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL REGAN, ADMINISTRATOR,
Respondents.

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. In fulfillment of its mission, NELF has filed numerous amicus briefs in this Court in a great variety of cases.

NELF appears as an amicus in this case because NELF believes that the Petition presents an issue of singular national importance. NELF urges this Court to grant certiorari so that it may reexamine its badly split decision in *Rapanos v. United States*, 547 U.S. 715 (2006), a decision which has confused the lower courts, such as the Ninth Circuit here. Only this Court is able to correct the circuit court's decision and, in doing so, place federal jurisdiction on a sound statutory footing, so that both property owners and the Government will have clear, authoritative guidance as to the jurisdictional reach

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and no person or entity other than NELF made any monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2(a), NELF has given timely 10 day notice to all counsel of record and has obtained the consent of all counsel of record. On September 28, 2021 Petitioners filed a blanket consent to the filing of amicus briefs, and by letter dated October 15, 2021 the Acting Solicitor General granted his consent to the filing of this brief.

of "the waters of the United States" under the Clean Water Act.

NELF has therefore filed this brief to assist the Court in deciding whether to grant certiorari in this important case.

SUMMARY OF REASONS FOR GRANTING THE PETITION

After fifteen years, the split decision in *Rapanos* has failed to yield a cogent, satisfactory holding when examined by the lower courts employing the guidance found in *Marks*. Instead, it has engendered its own split among lower courts as they struggle to make sense of *Rapanos*. In the past this Court has recognized that such a situation warrants a reexamination of the legal question involved. It should do so here too.

The "significant nexus" test discovered by the *Rapanos* concurrence rests in fact on a "passing phrase" used by the Court in an earlier case and wrenched woefully out of context by the concurrence. Its use should be abandoned in favor of the careful, textualist plurality opinion.

REASONS FOR GRANTING THE PETITION

I. Lower Courts Are "Baffled and Divided" By *Rapanos*; This Court Should Reexamine That Decision and Clarify the Law.

In his concurring opinion in *Rapanos v. United States*, Chief Justice Roberts expressed his dismay at the "essentially limitless" and "boundless" jurisdiction claimed by the Army Corps of Engineers under the Clean Water Act, 86 Stat. 884, as

amended, 33 U.S.C. §§1251-1388. 547 U.S. 715, 757-58 (2006). *See also Sackett v. U.S. Envtl. Protection Agency,* 566 U.S. 120, 133 (2012) (Alito, J., concurring) ("the EPA and the Army Corps of Engineers interpreted the phrase ['the waters of the United States'] as an essentially limitless grant of authority"). The Chief Justice also expressed his foreboding that, in the absence of a majority opinion in *Rapanos*, "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis" through the murky waters of federal jurisdiction under the Act. *Rapanos*, 547 U.S. at 758.

In the years since *Rapanos* was decided, the Chief Justice's foreboding has been amply borne out in courts throughout the nation. As discussed in the Petition at 17-20, lower courts, using as their guide *Marks v. United States*, 430 U.S. 188 (1977), have rung all the changes in what jurisdictional rule may be culled out of the badly split *Rapanos* decision. The frustration felt by the lower courts is palpable. *See*, e.g., *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) ("neither the plurality's test nor Justice Kennedy's can be viewed as relying on narrower grounds than the other"); *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) ("The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction."); *United States v. Freedman Farms, Inc*., 786 F. Supp. 2d 1016, 1018 (E.D.N.C. 2011) ("neither the plurality opinion nor the concurring opinion is a precise subset of the other"); *United States v. Donovan*, No. 96-484, 2010 WL 3000058, at *3 (D. Del. July 23, 2010) ("no single opinion in *Rapanos* is a logical subset of any other opinion"); *United States v. Bailey*, 571 F.3d 791, 798

(8th Cir. 2009) ("Because there is little overlap between the plurality's and Justice Kennedy's opinions, it is difficult to determine which holding is the narrowest."). On divergent readings of *Rapanos* by courts, *see also* Bryan A. Garner et al., *The Law of Judicial Precedent* 209-10 (2016).

Here, nonetheless, the Ninth Circuit viewed Justice Kennedy's concurrence as the "narrowest opinion" and hence as a "logical subset" of the plurality opinion. *Sackett v. U.S. Envtl. Protection Agency*, 8 F.4th 1075, 1089-90 (9th Cir. 2021) (cleaned up). Since he openly jettisoned two important legal limitations on federal jurisdiction as limned in the plurality opinion, *Rapanos*, 547 U.S. at 768-774, his concurrence appears more plausibly to be the *superset* of the plurality, rather than its subset.

Consistent with this conclusion is the plurality's own vociferous objections to the concurrence, calling it, in backhanded fashion, sometimes only "a more moderate flouting of statutory command" than the dissent but at other times "more extreme." *Rapanos*, 547 U.S. at 756. The plurality explicitly rejected Justice Kennedy's "significant nexus" test as no test at all, rejecting as well the atextual reasoning the so-called test is based on. *Id*. at 753-757 ("utter isolation from the text"). In declaring that the concurrence "invite[es] [the agency] to try the same expansive reading" of the Act as before, *id*. at 757 n.15, the justices in the plurality certainly did not appear to believe that the concurrence formed a narrow jurisdictional subset of the plurality's own opinion. *See also id*. at 739 n.9 (noting concurrence more likely to encroach on traditional state land-use regulation). The concurrence in turn rejected the plurality's reasoning, criticizing it for thwarting

fulfillment of the "purpose" of the Act. *Id*. at 767-778. The dissent, calling down a pox on both houses, pointedly rejected the judgment and both the plurality and concurrence's path to reaching it. *Id*. at 798-809. In short, the three opinions appear repugnant to each other.

As the Sacketts' own protracted legal battle with the federal government illustrates, too much is at stake for this Court to leave them and the agencies rudderless and to "feel their way on a case-by-case basis," in the words of the Chief Justice. As Professor Steven Eagle has observed, "[t]he Clean Water Act presents a potentially dire juxtaposition for landowners, in that it combines far-reaching consequences for land use, a complex and largely subjective regulatory scheme, and substantial civil and criminal penalties for even unknowing violations." Steven J. Eagle, *Advancing Judicial Review of Wetlands and Property Rights Determinations:* Army Corps v. Hawkes Co., 2016 Cato Sup. Ct. Rev. 257, 274 (2016).

This Court has stated that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Federal Communications Commission v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Professor Eagle's observation is especially apt therefore because the jurisdictional reach of the Clean Water Act remains "contentious and difficult" to define, "notoriously unclear," and "hopelessly indeterminate." *National Association of Manufacturers v. Dep't of Defense*, 138 S. Ct. 617, 624 (2018) ("[D]efining that statutory phrase ['waters of the United States'] . . . is a contentious and difficult task."); *Sackett*, 566 U.S. at 132-133

(Alito, J., concurring) ("notoriously unclear," "hopelessly indeterminate").

This case therefore presents the Court with an invaluable, urgently needed opportunity to reexamine the key jurisdictional question of the Clean Water Act, a question that has caused so much decisional turmoil in the lower courts. There certainly is ample precedent for doing so. As this Court once observed in a similar situation:

> We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it. This degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision.

Nichols v. United States, 511 U.S. 738, 745–46 (1994).

In *Grutter v. Bollinger* too, this Court, quoting *Nichols*, decided to reexamine an earlier case because lower courts had "struggled" to discern whether the position taken by only one justice was binding when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices." 539 U.S. 306, 325 (2003). Such is exactly the situation confronting the Court today with respect to the *Rapanos* one-justice concurrence.

The Court therefore should grant certiorari and reexamine the scope of federal jurisdiction under the Act, so that courts, agencies, and property owners will not have to continue to "feel their way on a case-by-case basis."

II. The Decision Below Is Wrong Because The "Significant Nexus" Test It Uses Is Wrong.

The *Rapanos* dissent got one thing right: the concurrence's proposed jurisdictional test is based on this Court's "passing use" of the phrase "significant nexus" in one case one time. 547 U.S. at 808. To the extent that lower courts are employing that purported test by itself (as did the Ninth Circuit in this case) or together with the plurality opinion, that fact would be an additional compelling reason to grant the petition and to reexamine the jurisdictional question.

The concurrence introduced this test to the world in the following way:

> In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (*SWANCC*), the Court held, under the circumstances presented there, that to constitute "'navigable waters'" under the Act, a water or wetland must possess a "significant nexus" to waters that are or were navigable in fact or that could reasonably be so made. *Id.*, at 167, 172, 121 S.Ct. 675. In the instant cases neither the plurality opinion nor the dissent by Justice STEVENS chooses to apply this test; . . . .

Rapanos, 547 U.S. at 759.

The wording clearly suggests that in *SWANNC* the Court applied a jurisdictional test that the wetlands there, like other wetlands, had to pass in order to be subject to federal jurisdiction under the Clean Water Act. The putative test apparently consists of possessing a "significant nexus" of one sort or another to navigable waters.

In fact, however, in *SWANNC* the Court used the words "significant nexus" not to denote any test it used there, but rather to describe a particular reason (i.e., adjacency to covered waters) that wetlands were found to be within the jurisdiction of the Act in *another* case, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). 531 U.S. at 167.

The *Rapanos* concurrence went on to say, equally misleadingly, "Consistent with *SWANNC* and *Riverside Bayview* . . . [t]he required nexus must be assessed in terms of the statute's goals and purposes." *Id* at 779.

> Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."

Id. at 780.

Again, because *SWANNC*'s reference to *Riverside Bayview* was descriptive and not prescriptive, no such free-standing, "significant nexus" test of the effects of some waters on "the chemical, physical, and biological integrity of other covered waters" is found in *Riverside Bayview*, and in *SWANNC* the Court did not intend to conjure one into existence.

SWANNC itself makes all this clear, saying that in *Riverside Bayview*:

> . . . we held that the [Army] Corps [of Engineers] had § 404(a) jurisdiction over wetlands that actually *abutted on a navigable waterway*. . . . [O]ur holding was based in large

> measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands *adjacent to navigable waters*. . . . We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "*inseparably bound up with the 'waters' of the United States*."

531 U.S. at 167 (emphasis added). When are wetlands "inseparably bound up with" the jurisdictional "waters of the United States" and so subject to federal jurisdiction? As this passage from *SWANNC* says, when they "abut" and are "adjacent" to those waters. *See also Riverside Bayview*, 474 U.S. 134 ("adjacent wetlands are inseparably bound up with the 'waters" of the United States'").

Hence, *SWANNC* concludes, "It was the significant nexus [of adjacency] between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." 531 U.S. at 167. That is why, the *SWANNC* Court immediately adds, "we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are *not adjacent* to bodies of open water.'" *Id*. (quoting *Riverside Bayview*) (emphasis added).

It was, then, from these passages about the importance of adjacency in disambiguating the legal status of the wetlands in *Riverside Bayview* that the concurrence contrived a "significant nexus" test focused, not on adjacency, but on the "effects" of some waters on "the chemical, physical, and biological integrity of other covered waters." *Rapanos*, 547 U.S. at 780.

By contrast, unlike both the concurrence and dissent, which give considerable weight to vague "effects" and "purposes," the plurality opinion rests on a careful, concrete analysis of statutory text and structure. Its sound interpretive approach is marked by repeated references to the meaning and common usage of the terms and words used in any thorough discussion of jurisdiction under the Act. *See id*. at 730-39. It is noteworthy in particular for its firm, salutary rejection of the ecological approach taken by the concurrence. *See id*. at 741-42.

The use by lower courts of the *Rapanos* concurrence is therefore a strong additional reason for this Court to revisit the crucial jurisdictional issue dealt with in that case.

CONCLUSION

For the reasons given above, this Court should grant the petition for certiorari.

Respectfully submitted,

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