No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT, ET UX.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* WATER RESOURCE MANAGEMENT ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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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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INTERESTS OF AMICI CURIAE[1]

The National Association of Wetland Managers (NAWM) is a national organization of state and tribal regulators and other professionals who implement key provisions of the Clean Water Act (CWA or Act), as well as state and tribal regulations. NAWM promotes the use of sound science, law, and policy in state and tribal water-protection programs.

The Association of State Floodplain Managers (ASFPM) is a scientific and educational organization with over 7,000 members, including floodplain managers, government officials, and industry representatives. It is dedicated to reducing flood loss through education, research, and awareness.

The American Planning Association (APA) is an organization of over 40,000 planning professionals who work to create sustainable communities. Through education and outreach, the association helps planners promote the health, safety, and economic wellbeing of all residents of developments.

The American Water Works Association (AWWA) is an international, nonprofit, scientific, and educational society, dedicated to providing solutions to ensure the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

effective management of water. AWWA is the largest water association in the United States. Its 4,303 public water system members supply roughly 80% of the drinking water and treat nearly half the wastewater in the United States.

The New England Interstate Water Pollution Control Commission (NEIWPCC) advances water quality in the Northeast through collaboration with, and service to, its member states. It brings together water quality professionals, scientists, and other experts from across state boundaries to collaborate on clean water and environmental protection.

The activities of amici's members are subject to the CWA's requirements, and their goals are supported by the Act's protections.

SUMMARY OF ARGUMENT

On the front lines of our country's water management stand wetland managers, floodplain managers, planners, and water treatment professionals. Wetland managers work at the federal, state, and tribal levels, in collaboration with private actors, to protect the Nation's headwaters, wetlands, streams, and tributaries—the sources of most of the Nation's water supply. Floodplain managers rely on state and federal protections to prevent flooding. Community planners work alongside developers and architects to ensure that newly built communities will have safe and reliable supplies of water. And water treatment professionals strive to provide Americans with safe, affordable drinking water.

These critical efforts would be significantly compromised by Petitioners' narrow interpretation of the Clean Water Act's key jurisdictional phrase, "waters of the United States" (WOTUS), with devastating national consequences. Petitioners' reading would undermine the "chemical, physical, and biological integrity" of our Nation's waters, allow for greater "discharge of pollutants," and jeopardize "water quality"—all contrary to the Act's goals. 33 U.S.C. § 1251(a).

In *Rapanos v. United States*, 547 U.S. 715 (2006), the dispositive opinion held that WOTUS reaches all water bodies that have a "significant nexus with navigable waters." *Id.* at 759 (Kennedy, J., concurring in the judgment). Such waters, Justice Kennedy explained, are "integral parts of the aquatic environment." *Id.* at 779.

Petitioners (at 22-24) propose abandoning that interpretation and replacing it with a novel test that is more restrictive than any standard adopted by this Court or applied by the EPA or Army Corps of Engineers (Corps). Petitioners ask this Court to read WOTUS to reach wetlands only if they have "a continuous surface water connection" to a "hydrographic feature ordinarily referred to as a 'water,'" such that "it is difficult to say where the wetland ends and the 'water' begins." Petitioners also ask this Court to limit WOTUS to waters that are navigable in fact. This test is narrower than the *Rapanos* plurality's interpretation rejected by Justice

Kennedy. If adopted, it would dramatically curtail the scope of the Clean Water Act and, in turn, severely impede the work of frontline professionals who protect our Nation's waters.

I. Petitioners' proposed interpretation of WOTUS would exclude vast swaths of the Nation's waters from coverage under the Act, including vulnerable waters that substantially benefit human welfare. The result would be a reduction in drinking water quality, more frequent severe floods, and barriers to development.

II. Individual states' decisions about water pollution and regulation often yield externalities.[2] If federal regulation is curtailed, upstream states will be able to allow many more discharges and shift the costs of regulation to downstream states, which will face greater threats to water quality. Uneven state regulation will also lead to costs and uncertainty: States will have to undertake the efforts previously taken by the federal government; downstream water managers and developers will struggle to predict upstream water quality; and multistate entities will face varied regulations.

III. States would face sizable regulatory gaps under Petitioners' narrow reading of WOTUS. Most states' regulatory schemes are built on the cooperative federal-state partnership embedded in the Act. Were the federal role to be curtailed, state regulatory

[2] In this brief, references to "states" include tribes that have received authority to be treated as states under 33 U.S.C. § 1377.

programs would need to be significantly reworked. Even if that could be accomplished, state-level regulators would face substantial inefficiencies and added costs, and states would find it hard to tackle some challenges, such as oil spills, at all.

ARGUMENT

The critical efforts of water management professionals would be greatly compromised by the restrictive interpretation of "waters of the United States" advanced by Petitioners. The Act has long protected wetlands, headwaters, and streams that are crucial to maintaining water quality and preventing floods, but may not be navigable in fact and may lack a permanent flow or a continuous surface water connection to traditional navigable waters. This federal regulatory scheme is particularly important given what is at stake: Watersheds are interstate in nature, and water flows from upstream states to downstream states. Coordination by a federal agency is essential to avoid the externalities and inequities that would otherwise inevitably result.

I. Petitioners' narrow construction of WOTUS would leave substantial waters unregulated, to disastrous effect.

The narrow interpretation of WOTUS advanced by Petitioners would leave waters that have no continuous surface water connection to permanent waters, as well as waters that are not navigable in

fact, outside federal regulation. Because these waters are important for protection of drinking water quality, flood prevention, and sensible community planning, the impact would be severe.

Waters now covered by the Act but excluded under Petitioners' reading include headwaters and intermittent and ephemeral streams, as well as many wetlands—all of which perform vital functions but may not flow year-round, may lack a continuous surface connection to permanent waters, or may not be navigable in fact. Headwaters are the source of nearly 60% of the total annual flow to Northeastern streams and rivers. EPA, EPA/600/R-14/475F, *Connectivity of Streams & Wetlands to Downstream Waters*, at ES-8 (2015), https://bit.ly/3GKYbRp (2015 EPA Report). Requiring a continuous surface water connection would exclude at least 60% of the stream length in the United States. *See, e.g.*, *Supreme Court Decisions on Water Resources: Hearing Before the Subcomm. on Fisheries, Wildlife, and Water*, 109th Cong. (2006) (statement of Chuck Clayton, Immediate Past President, The Izaak Walton League of America). It would also exclude 51% (if not more) of the Nation's wetlands. *See, e.g.*, EPA FOIA Response at 5 (Sept. 5, 2017), https://bit.ly/3tC9Z34; *see also* Miranda Green, *Internal EPA document contradicts agency over existence of water rule data*, HILL (Dec. 11, 2018), https://bit.ly/3xpxMVf. Requiring that waters be navigable in fact would exclude even more.

In some regions, these requirements would exclude the vast majority of waters: 80-90% of streams in the West flow only seasonally or after a hard rain, Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 875 (2004), and 88% of the wetlands in a major region of the Upper Midwest are geographically isolated. T.E. Dahl, *Status and Trends of Wetlands in the Conterminous United States 1997-2009*, U.S. FISH & WILDLIFE SERV., at 20 (2014), https://bit.ly/3aqDdLB. The 2020 Navigable Waters Protection Rule (NWPR), 85 Fed. Reg. 22,250 (Apr. 21, 2020), largely adopted the *Rapanos* plurality's test and was thus broader than Petitioners' proposed interpretation, but New Mexico estimates nearly 90% of its water resources were unprotected under the NWPR.[3] *See Comment Letter on "Waters of the United States,"* ASS'N OF STATE WETLAND MANAGERS, at 8 (Oct. 4, 2021), https://bit.ly/3xssdp0 (Comment Letter). Effective regulation of critical waters in the Western United States would thus be particularly undermined by Petitioners' interpretation of WOTUS.

Drinking Water Quality. Waters that would be excluded by Petitioners' reading are extremely

[3] The NWPR was subsequently vacated in *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021), and the EPA is not presently applying it, *Current Implementation of Waters of the United States*, EPA, https://bit.ly/3NSvy7e.

important to drinking water quality. More than 58% of headwater streams essential to public drinking water systems that use surface water would lose vital protection if a continuous surface water connection were required; that would affect the quality of drinking water consumed by more than 117 million Americans. *See Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.*, EPA, at 1 (2009), https://bit.ly/3HsqtAO.

For example, one of the Act's important protections for drinking water is the National Pollutant Discharge Elimination System (NPDES). The NPDES program authorizes the EPA and delegated states to issue permits for discharges of harmful pollutants and to impose conditions on these permits. 33 U.S.C. § 1342. Under Petitioners' reading, NPDES permits would be required only for discharges to navigable-in-fact waters, which would significantly compromise the Act's goals "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). According to the EPA, a reading of WOTUS that excludes headwaters and other intermittent or ephemeral streams would leave more than 40% of the wastewater discharges with NPDES permits newly unregulated. Letter from Assistant Administrator Benjamin H. Grumbles, *reprinted in* Amicus Br. of Ass'n of State Wetland Managers et al., *Rapanos*, 2006 WL 139206, at *3a (Jan. 13, 2006). All of the conditions on these permits,

which reduce the hazards to human health from discharges, would likewise be erased, allowing pollutants to flow much more freely into the watershed. These waters would also lose protection from filling or burial. *See* 33 U.S.C. § 1344.

Loss of protection for headwaters and wetlands is especially significant because they serve as filters. *See* W.H. Lowe & G. E. Likens, *Moving Headwater Streams to the Head of the Class*, 55 BIOSCIENCE 196, 196 (2005); 2015 EPA Report at ES-3. These waters collect pollutants and thus reduce the amount of nutrient and pollutant runoff downstream. John A. Morrice et al., *Alluvial characteristics groundwater-surface water exchange and hydrological retention in headwater streams*, 11 HYDROLOGICAL PROCESSES 253 (1998); Ken J. Hall & Bruce C. Anderson, *The toxicity and chemical composition of urban stormwater runoff*, 15 CAN. J. CIV. ENG'G 98 (1988). Headwaters and wetlands are more efficient at pollutant removal than other waters thanks to the slow, sometimes infrequent, rate at which water moves through them. J.L. Meyer & J.B. Wallace, *Lost linkages in lotic ecology: rediscovering small streams*, ECOLOGY: ACHIEVEMENT AND CHALLENGE 310 (M.C. Press et al., eds. 2001). Thus, it is particularly important to keep these waters within the Act's jurisdiction.

Protecting water at its source (*i.e.*, in headwaters and wetlands) is one of the most efficient methods of ensuring clean drinking water. *See, e.g.*, Cathy Kellon,

Communicating Source Water Protection Efforts in Consumer Confidence Reports, AM. WATER WORKS ASS'N, at 20 (2018), https://bit.ly/3MLKVNW. "Congress recognized" in the Act that "it is essential that discharge of pollutants be controlled at the source." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (quoting S. REP. NO. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742). Wetland and water resource managers must target their efforts at source waters because it is less costly and more effective to prevent a loss in water quality than to treat contaminated water later on. *Id.* Treatment is not effective for all toxic chemicals, metals, and pesticides, and treatment plants cannot immediately respond to emergent contaminants. *See id.* at 6; National Primary Drinking Water Regulations: Long Term 2 Enhanced Surface Water Treatment Rule, 68 Fed. Reg. 47,640, 47,646 (Aug. 11, 2003); VLADIMIR NOVOTNY, WATER QUALITY (2d ed. 2002); GUNTHER F. CRAUN ET AL., MICROBIAL PATHOGENS AND DISINFECTION BY-PRODUCTS IN DRINKING WATER (2001). Without a coordinated federal-state partnership regulating discharges into waters with downstream effects, preventative drinking water quality measures become exceedingly difficult to implement because, as explained below, *infra* Section II, states cannot control discharges occurring in other states. States that draw their drinking water from interstate waters will face the risk of significantly increased back-end treatment costs if their neighboring states do not impose

meaningful controls, as well as uncertainty about whether their treatment systems will be able to effectively remediate polluted waters.

Flooding. Flood prevention efforts would also be compromised if WOTUS were read as Petitioners propose. Floodplain managers depend upon federal protection of waters such as wetlands, headwaters, and other streams that may have a subsurface hydrological connection to the floodplain but may not be navigable or may lack a continuous surface water connection. *See* 2015 EPA Report at 2-44. Wetlands, for example, are crucial for reducing the effects of flood hazards—especially intense storms, winter snowpacks, and droughts—because they moderate the baseflow of waters that pose flood threats and control the transport of sediment downstream. *Nonpoint source impacts on primary headwater streams*, OHIO ENVTL. PROT. AGENCY, at 1 (2015), https://bit.ly/3akrL4b (Ohio EPA 2015). By storing and controlling the release of water, wetlands reduce the low-flow and high-flow extremes that cause both floods and droughts. *See* 2015 EPA Report at ES-9.

Wetlands also slow the erosion of river, lake, and channel banks by acting as natural sponges for overflow events. *See* Charles A. Taylor & Hannah Druckenmiller, *Wetlands, Flooding, and the Clean Water Act*, 112 AM. ECON. REV. 1334, 1337, 1352 (2022); 2015 EPA Report at B-52, B-55. The berms and other barriers that often separate wetlands from

traditional navigable waters are crucial in slowing water rates and, therefore, limiting flood losses. 2015 EPA Report at B-29, B-52, B-55. The Corps already spends more than $900 million annually on maintenance dredging of navigable waters to prevent floods. Corps, *Pub. L. 116-20 Damage Repair Estimate* (Sept. 25, 2019), https://bit.ly/3PWooAM. Without federal regulation, destruction and pollution of vital wetlands would greatly increase the costs of dredging. *See* Ohio EPA 2015, at 1.

Measured conservatively, the flood losses caused by development of wetlands are far greater than the expense of the federal permitting process. *See* Taylor & Druckenmiller at 1336. The average hectare (roughly 2.5 football fields) of wetlands lost between 2001 and 2016 cost society $1,840 annually in National Flood Insurance Program (NFIP) claims alone. In developed areas, that amount rose to more than $8,000. *Id.* at 1334. These expenses cannot be controlled by regulating only navigable-in-fact waters and wetlands with a continuous surface water connection to them. The most valuable wetlands for flood reduction are located 500 to 750 meters from the stream or river they drain into ($21,178 per hectare nationwide and $63,276 per hectare in developed areas). *Id.* at 1352.[4] Their separation from

[4] These estimates are notably conservative because they only account for claims submitted to NFIP. Many people fail to file flood claims or are ineligible to file, and this study estimates only

permanently flowing waters is precisely what makes these wetlands so important: They are less likely to be fully saturated and thus more likely to have capacity to absorb overflows from flowing waters before they reach developments. *Id.* In total, wetland losses between 2001 and 2016 cost taxpayers more than $600 million each year in NFIP claims alone. *Id.* at 1356. Excluding crucial flood barriers from the Act and allowing the loss of wetlands to accelerate would impose far steeper costs.

Development and planning. Clean water is critical to development. To ensure a new community can thrive for decades (and longer), developers and architects rely on community planners, who assess water supply, water quality, and flood and stormwater management. Cynthia Bowen, *What is Planning?*, AM. PLANNING ASS'N, https://bit.ly/3Q1pqeL; *Water and Planning*, AM. PLANNING ASS'N, https://bit.ly/3xaXOLU. Among other tasks, these planners ensure a sustainable water supply and account for water treatment costs and flood risks. Brian Campbell et al., *APA Policy Guide on Water*, AM. PLANNING ASS'N (July 15, 2016), https://bit.ly/3N8ltmN.

Successful plans assume that wetlands, streams, ponds, and other natural waters—many of which lack

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the flood-related costs of destroying wetlands and headwaters—not the costs to water quality.

a continuous surface water connection to traditional navigable waters—will store and reuse stormwater and runoff. *Id.* Excluding these waters from federal regulation would substantially increase the risk of their destruction or contamination because discharges of pollutants into water supplies would surely be more common. In existing communities, planners would struggle to identify new sources of water to ensure a sufficient, reliable, and safe water supply in the future. More generally, increased concern about the long-term health of water sources would impede analysis of water supply and demand, inject uncertainty, and thereby hamper future development. *See* 2015 EPA Report at ES-5; Lowe & Likens at 196 (upstream discharges into headwaters wetlands, and intermittent and ephemeral streams contaminate the downstream watershed). Absent confidence that source waters will remain healthy, developers may choose not to shoulder the risk of potential future costs, such as water cleanup, sediment removal, artificial wetland creation, and water treatment facilities. *See* TOM DANIELS & KATHERINE DANIELS, THE ENVIRONMENTAL PLANNING HANDBOOK FOR SUSTAINABLE COMMUNITIES AND REGIONS 229 (2003).

II. The externalities associated with water pollution and regulation require a collaborative federal-state solution.

Because watersheds often span multiple states, one state's polluting activities and regulations affect

other states. *See* S. REP NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672 (greater federal role required because isolated state enforcement harms interstate water quality); *A Compilation of Cost Data Associated with the Impacts and Control of Nutrient Pollution*, EPA, at ES-1 (2015), https://bit.ly/3m9NDCb (compiling data on externalities) (EPA Cost Data). For this reason, conflicts between "a state that introduces pollutants to a waterway and a downstream state that objects" have been a "font of controversy since the founding of the Nation." *Arkansas v. Oklahoma*, 503 U.S. 91, 98 (1992).

Petitioners' test would shift the burden of addressing water pollution—which comes from sources throughout a watershed—by excluding from federal regulation all discharges except those into larger waterbodies. The waters with the greatest impact on the United States' interstate watersheds would lose federal protection. *See* 2015 EPA Report at ES-5; Lowe & Likens at 196. Effective pollutant control, however, requires an equitable distribution of costs among a broader group of actors, including both upstream and downstream states.

Recognizing that the quality of water in downstream states depends upon upstream activities, the Act creates systems for interstate cooperation that take account of these externalities. Under 33 U.S.C. § 1341(a)(2), for example, the federal EPA

Administrator determines whether a "discharge [by a permit applicant] may affect … the quality of the waters of any other State." *Id.* If so, he must notify the neighboring state, which then determines whether the discharge will violate water quality requirements. *Id.* The Administrator may work with the downstream state to develop permit conditions that will ensure compliance with water quality requirements. *Id.* Similarly, 33 U.S.C. §§ 1342(b)(3) and (5) ensure that NPDES permits take account of neighboring states' concerns. The Act's systems of cooperation allow a neutral federal agency to prevent upstream states from offloading pollution onto downstream states.[5] Petitioners' interpretation of WOTUS would eliminate this tool for addressing interstate pollution and make it difficult for downstream wetland and water resource managers to maintain their states' waters.

[5] Prior to the Act, conflicts between states arising from upstream pollution were resolved in this Court under "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The Act preempts federal common law and replaces it with "a comprehensive regulatory program supervised by an expert administrative agency." *Id.*

A. Leaving most water regulation to states alone would create perverse incentives.

Under the reading of WOTUS in place today, the cost of regulation is borne by both upstream and downstream states. Petitioners' interpretation creates risks of moral hazard: Heavily polluting states may choose not to regulate because they need not bear the costs of doing so, even while retaining the economic benefits of their polluting activity. Downstream states, by contrast, may be forced to bear enormous regulatory costs, as they pay to clean up out-of-state pollution as it flows in. *See, e.g.*, EPA Cost Data at I-3 (downstream external costs exceed upstream treatment cost).

Petitioners' narrow reading would also create a classic free-rider problem, in which some states benefit from their neighbors' regulations even as they reap the economic advantages of polluting activity. "Unlike an apple that can be bought and consumed by one person," all those "who live downstream from wetlands benefit from the role wetlands play in slowing floodwaters, whether they paid to conserve the wetlands or not." James Salzman, *Creating Markets for Ecosystem Services*, 80 N.Y.U. L. REV. 870, 882 (2005). An upstream state that pays to clean up its waters passes benefits to all downstream states. Residents of those downstream states will enjoy the clean drinking water paid for by the upstream state

but may choose to reduce their own costs by polluting further downstream without regulation.

The Mississippi River Basin provides the paradigmatic example of these problems. The Upper Mississippi River system drains an area of 190,000 square miles in Minnesota, Wisconsin, Iowa, and Missouri and a small portion of Indiana and South Dakota. Only about 1,300 miles—less than 1% of the system—are navigable. The remaining 99% comprises the non-navigable tributaries, ditches, and non-contiguous wetlands that would be excluded by Petitioners' interpretation of WOTUS. *See* Amicus Br. of Ass'n of State Wetland Managers et al., *Rapanos*, 2006 WL 139206, at *22. These waters contribute to the flows of the navigable portions of the system and help to control the flow of nutrients and sediment into the navigable waters. Janet Larsen, *Dead Zones Increasing in World's Coastal Waters*, EARTH POL'Y INST. (June 16, 2004), https://bit.ly/3xbbAiv.

Filling these waters, as would be possible without a permit under Petitioners' test, would exacerbate transmission of nitrogen-rich fertilizer in storm runoff into the mainstream Mississippi system. William J. Mitsch, et al., *Reducing Nitrogen Loading to the Gulf of Mexico from the Mississippi River Basin*, 51 BIOSCIENCE 373, 373-74 (2001). Existing wetland losses have already substantially increased the amount of nitrogen entering the Gulf of Mexico. *Id.*; Nancy Rabalais, et al., *Beyond science into policy: Gulf*

of Mexico Hypoxia and the Mississippi River, 52 BIOSCIENCE 129, 129-30 (2002).

These excessive nitrogen levels have helped create a "dead zone" in the Gulf, with levels of oxygen too low to support aquatic life. This dead zone adversely affects the environment and economy of the Gulf Coast, including through financial losses in what was once the most valuable fishery in the United States. *Integrated Assessment of Hypoxia in the Northern Gulf of Mexico*, NAT'L SCI. & TECH. COUNCIL, at 7 (2000), https://bit.ly/3m9i2Au; Martin D. Smith et al., *Seafood Prices Reveal Impacts of Major Ecological Disturbance*, 114 PROC. NAT'L ACAD. SCI. 1512, 1512 (2017). But 85% of nitrogen arriving at the dead zone originated not in coastal states but rather in the Upper Mississippi watershed. D.A. Goolsby et al., *Flux and Sources of Nutrients in the Mississippi-Atchafalaya River Basin*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., at 40 (1999), https://bit.ly/3aIZwwt. Without the protections of the Act, this problem would grow only worse because dischargers in upstream states could freely pass additional pollutants downstream.

B. Under Petitioners' reading of WOTUS, downstream states would suffer poorer water quality and outsized flood risk.

Drinking water quality is best maintained by a reading of WOTUS that facilitates federal, state, and

local protection of waters at their sources, such as wetlands and headwaters. As with the Mississippi River Basin, those source waters may lie in one state, flow across boundaries, and be deposited in a downstream state. Absent federal regulation, the upstream state may have exclusive control of the downstream state's surface water supply. If the upstream state chooses not to regulate, the residents of the downstream state will bear the cost of remediation and will likely have poorer drinking water and higher costs. *See supra* Section I.

Flood prevention likewise depends upon protection of wetlands and headwaters, which slow the damaging flow rates of floodwaters, allowing sediment to settle rather than travel farther downstream. *See supra* Section I. Floods are generally driven by upstream changes in water temperatures, rainfall, and snowmelt, which culminate in the overflow of rivers in downstream states, sometimes many states away. *See* Bruno Merz et al., *Causes, Impacts and Patterns of Disastrous River Floods*, 2 NATURE REVS. EARTH & ENV'T 592, 594 (2021) (downstream floods larger than upstream causes). Downstream states are therefore dependent on the flood mitigation activities of upstream states. A federal standard provides a critical tool for regulating wetlands and headwaters by providing a minimum level of protection across all states.

C. Developers depend on the certainty afforded by a floor of uniform nationwide regulation.

Developers and planners require a predictable floor of uniform nationwide regulation because communities draw from interstate watersheds that do not respect city and state borders. *Climate Change Policy Guide*, AM. PLANNING ASS'N, at C.9.2 (2020), https://bit.ly/3NLsDNE (Climate Change Policy Guide); *see also* John R. Nolon, *Flexibility in the Law: The Re-engineering of Zoning to Prevent Fragmented Landscapes*, N.Y.L.J. 5, 7 (Feb. 18, 1998) (jurisdictional boundaries drawn without regard to watersheds). Regional planning coalitions are often organized around watershed geography that crosses state lines. Climate Change Policy Guide at G.1.5. For example, there are 21 major hydrologic regions in the United States, each of which contains a major drainage basin, *Hydrologic Unit Maps*, U.S. GEOLOGICAL SURVEY, (Feb. 9, 2022), https://on.doi.gov/3MfnUm6, and often centers on an interstate body of water, such as the Mississippi River. *Id.* Efforts to establish and maintain a sustainable water supply in the face of development are organized not around state borders but rather around these 21 hydrologic regions. Climate Change Policy Guide at G.1.5.

Planners will not be able to readily account for watersheds that cross jurisdictional boundaries if

they cannot rely on a predictable floor of federal regulation for the waters that Petitioners would exclude from WOTUS. A uniform baseline level of protection for all waters makes planning far more efficient than if the quality and availability of water supplies depend upon the regulatory decisions of multiple states acting without coordination. Planners would need to evaluate each of these separate regimes and gauge the likelihood that pollution from upstream states would contaminate a community's future water supply. Providing accurate valuations of land would become far more difficult, planning would become more costly, and in some instances, development would be delayed or thwarted entirely. *See* DANIELS & DANIELS, *supra*, at 229.

III. State, tribal, and local governments would struggle to fill the regulatory gaps that would be left by Petitioners' test for WOTUS.

States, tribes, and municipalities would strain to fill the regulatory gap that would result if Petitioners' restrictive reading of WOTUS were adopted.

A. Much state and tribal regulation is integrated with the federal scheme.

Congress intended the Act as "a partnership between States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological

integrity of the Nation's waters.'" *Arkansas*, 503 U.S. at 101 (citing 33 U.S.C. § 1251(a)). That is how it has worked in practice for fifty years—states have woven their own regulatory programs into the federal framework, and water managers and planners at the federal, state, and tribal levels have collaborated to ensure effective, efficient protection of waters.

The Act explicitly preserves and allocates substantial roles in federal programs to state governments, while providing for federal regulation of polluting activities. Regulation is integrated, and in most states, there is no freestanding state backstop to protect and manage waters not covered by Petitioners' reading of the Act's scope. Adopting Petitioners' interpretation would curtail state-level management of waters removed from federal jurisdiction, as well.

One key example is the permitting and certification authority conferred on the federal government and the states by the Act to limit discharged pollutants, promote wetlands' filtration and ecosystem services, and ensure development will not cause flooding. To get a federal permit for any activity that may result in any discharge of dredged or fill material or other pollutants into WOTUS, a property owner must first obtain a certification from the state that the discharge will comply with effluent limitations and clean water standards under state and federal law. *See* 33 U.S.C. §§ 1341 (certification requirement), 1342 (permits for pollutant

discharges), 1344 (permits for dredged or fill material). When a state issues a certification, it may impose conditions on the certified discharge, including best management practices, inspection requirements, or payments to support mitigation measures. *See id.* § 1341. A state may also, for example, mandate safeguards to prevent fuel spills or limitations on the use of heavy equipment to prevent erosion. *Section 401 Certification Best Practices*, ASS'N OF STATE WETLAND MANAGERS, at 11 (2012), https://bit.ly/3wZcMEu.

Narrowing the scope of WOTUS under Petitioners' test would limit states' ability to use this critical tool for ensuring permits and licenses are consistent with states' water protection goals. Approximately 21 states rely exclusively on their federal certification power to protect and manage their wetlands, and six more states manage most of their waters through their federal certification authority. Brenda Zollitsch & Jeanne Christie, *Status and Trends Report on State Wetland Programs in the United States*¸ ASS'N OF STATE WETLAND MANAGERS, at 27 (2016), https://bit.ly/3M7hF3S. These states have established their own clean water standards, *e.g.*, 5 Colo. Code Regs. § 1002-82, but use their certification authority under the Act to ensure consistency with those standards. All of this would be upended if Petitioner's reading of WOTUS were adopted.

Even states that manage their aquatic resources at the state level and have assumed federal permitting programs would lose regulatory capabilities. Forty-seven states have assumed responsibility under the Act for the permitting of pollutant discharges under the NPDES program, 33 U.S.C. § 1342(b), *Idaho DEQ Becomes 47th State to Assume NPDES Authority*, ENVTL. COUNCIL OF STATES (Aug. 27, 2021), https://bit.ly/38JtQq1, and three states have assumed authority to permit discharges of dredged or fill material, 33 U.S.C. § 1344(g); *EPA Announces Historic Approval of Florida's Request to Administer the Clean Water Act Section 404 Program*, EPA (Dec. 17, 2020), https://bit.ly/3NSkY00. Contrary to the West Virginia amicus brief's claim (at 9) that narrowing WOTUS is necessary for local water management, state assumption of responsibility promotes local responses to "local concerns, community needs, and environmental conditions." Brian R. Levey, *When States Assume: Fulfilling Congress's Objectives Under the Clean Water Act's Wetlands Program*, 35 NAT. RESOURCES & ENV'T 9 (2020). When states assume responsibility for permitting under the NPDES or Section 404 program, they may regulate discharges of pollutants to WOTUS. Under Petitioners' narrow reading of WOTUS, the scope of state permitting authority would be greatly reduced, and the states would presumably need to expand state-level water quality programs to compensate for the rollback of the federal program.

B. Petitioners' interpretation of WOTUS would result in inefficiencies and impose heavy costs on the states.

Not only would Petitioners' interpretation of WOTUS unwind much state regulation, but states would also find it challenging and costly to craft new protections to fill the regulatory gap. Comment Letter at 5. The Clean Water Act requires states to develop water quality standards for WOTUS, and narrowing WOTUS would leave many of those standards without effect under the Act. *See* 33 U.S.C. § 1313. States that rely on their power conferred by the Act to certify, *id.* § 1341, or grant permits, *id.* §§ 1342(b), 1344(g), would have to devise new regulations. Those states, along with states that already have freestanding state-level programs, would also face additional complexities and costs in implementing Petitioners' proposed test for WOTUS.

Contrary to Petitioners' claims (at 46-48), their proposed standard—particularly the requirement of a "continuous surface water connection" to navigable waters—would sow much confusion because it would necessitate regular assessment of whether there is such a connection. Water levels frequently change and can be affected by water withdrawals, such as for irrigation or drinking water. For many wetlands, field staff may be able to determine only seasonally where the water ends and the wetland begins. Heavy rainfall

may cause a berm to be breached, while unusually dry summer days may cause waters to recede below a normally subsurface barrier. As climate change accelerates, and droughts and floods become more common, it will be more difficult to determine the surface-level continuity of some waters. *See* Hossein Tabari, *Climate change impact on flood and extreme precipitation increases with water availability*, 10 SCI. REP. 13,768 (2020).

It would be time consuming and costly for states to develop substitutes for the federal permitting program. States would have to respond to a deluge of permit applications that otherwise would have been handled in the Corps' Section 404 nationwide permitting process.[6] The strain on state resources would be exacerbated by a likely loss of federal funding for grant programs. *See, e.g.*, 33 U.S.C. § 1383(c) (listing grant programs, including for compliance with provisions limited to WOTUS); Cong. Research Serv., R43871, Funding for EPA Water Infrastructure (2019).

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[6] For example, following the implementation of the NWPR, which largely adopted the *Rapanos* plurality's restrictive test, some permit applicants in Washington State asked that the wetlands and other waters affected by their projects be considered WOTUS—despite the term's narrower scope under the NWPR—so they could access the more efficient nationwide permit process rather than Washington's individual permit program. Comment Letter at 8.

C. Petitioners' interpretation of WOTUS would require individual states to assume new roles in responding to interstate disasters.

States would also likely be left to respond to disasters that now are largely the province of the federal government. For example, the Act provides the federal government with significant responsibility for prevention and clean-up of oil spills that occur on or in WOTUS. 33 U.S.C. § 1321. Few states have the resources and administrative capacity for those tasks, and none has interstate jurisdiction. If WOTUS is narrowed, however, the federal government will lose significant powers to prevent or remediate oil spills at their source.[7]

For example, in 2010, an oil pipeline burst and spilled over 1,000,000 gallons of heavy crude oil into Michigan's Talmadge Creek wetlands, which lack a surface water connection to the Kalamazoo River and are separated from it by several miles. The EPA responded with a multi-year effort to contain and clean up the oil, spending over $1 billion. Had these wetlands been excluded from WOTUS, the federal

[7] This consequence could well extend beyond the CWA. At least one circuit has interpreted the scope of "navigable waters" under the Oil Pollution Act (OPA) to be coextensive with WOTUS under the CWA. Thus, Petitioners' interpretation could erode protections under the OPA, as well. *See In re Needham*, 354 F.3d 340, 344 (5th Cir. 2003).

government would not have been able to respond with the Act's tools at the site of the spill. Instead, its efforts could begin only miles away, once the spill had spread to cover 35 miles of the Kalamazoo River. *See Enbridge 2010 Kalamazoo River Oil Spill – Natural Resource Damage Assessment and Restoration*, U.S. FISH & WILDLIFE SERV., https://bit.ly/3NmjEmj.

Petitioners' position would exclude from the Act's scope a wide range of waters with multistate implications that cannot be handled by state, tribal, or local governments alone. That position is inconsistent with the objective of the Act to provide a federal solution to the nationwide challenge of water pollution. *See* 33 U.S.C. §§ 1251(a), (d).

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CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Respectfully submitted,

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