No. 21-454

In The
Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, Administrator,
Respondents.

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

BRIEF AMICUS CURIAE OF THE PROPERTY AND ENVIRONMENT RESEARCH CENTER IN SUPPORT OF PETITIONERS

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Interest of Amicus Curiae

The Property and Environment Research Center (PERC) is a nonprofit research institute that aligns markets, incentives, and people together to advance conservation.[1] PERC is the national leader in market-based conservation solutions, with over forty years of creative research and a network of respected scholars and practitioners. PERC pioneered an approach to conservation that explores how clear and secure property rights, voluntary cooperation, and incentives can deliver effective and lasting conservation outcomes better than top-down regulation. *See* Shawn Regan & Tate Watkins, *A Different Shade of Green*, 39 PERC Reports 30 (2020);[2] Terry L. Anderson & Gary Libecap, ENVIRONMENTAL MARKETS: A PROPERTY RIGHTS APPROACH (2014); Terry L. Anderson & Donald R. Leal, FREE MARKET ENVIRONMENTALISM (rev'd ed. 2001). PERC and its affiliated scholars have produced extensive scholarship on how this approach can restore fisheries and streams, conserve wildlife migration corridors, and reduce environmental conflict. Donald R. Leal, *Fencing the Fishery: A Primer on Ending the Race to Fish* (PERC 2002); [3] Hertha Lund & Brandon Scarborough, *Saving Our Streams:*

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[1] All parties have consented to the filing of this brief. PERC affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PERC, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] https://www.perc.org/2020/07/06/a-different-shade-of-green/.

[3] https://www.perc.org/wp-content/uploads/2002/06/guide_fish.pdf.

Harnessing Water Markets (PERC 2007); [4] Whitney Tilt, *Elk in Paradise: Conserving Migratory Wildlife and Working Lands in Montana's Paradise Valley* (PERC 2020).[5] PERC has also participated as amicus curiae in cases involving property rights, individual liberty, and environmental stewardship. *See, e.g., Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020); *High Lonesome Ranch v. Garfield Cnty.*, No. 21-1020 (10th Cir. argued Jan. 18, 2022); *Ross v. Acadian Seaplants, Ltd.*, 206 A.3d 283 (Me. 2019).

Specific to the Clean Water Act, PERC's research has analyzed how broad and vague federal regulations can alienate private landowners, complicate voluntary conservation efforts, and crowd out state alternatives. Henry Holmes, *Protecting Wetlands: Environmental Federalism and Grassroots Conservation in the Prairie Pothole Region*, 10 Ariz. J. of Envtl. L. & Pol'y 365 (2020); R. David Simpson, *What Went Wrong With WOTUS: Reflections on Economic Valuation and Environmental Regulation*, PERC Policy Series No. 59 (2019); [6] Jonathan H. Adler, *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 Harv. Envtl. L. Rev. 67 (2007). Such regulations make wetlands a liability for private landowners, whereas an approach that makes wetlands an asset to landowners who conserve and restore them can deliver better, more reliable results.

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[4] https://www.perc.org/2007/08/01/saving-our-streams/.

[5] https://www.perc.org/2020/07/16/elk-in-paradise-conserving-migratory-wildlife-working-lands-montana/.

[6] https://www.perc.org/ wp-content/uploads/2019/04/ps-59-what-went-wrong-wotus.pdf.

Summary of Argument

Fifty years after the enactment of the Clean Water Act, its reach is clear as mud. The agencies charged with implementing the act have repeatedly tried and failed to develop a workable, stable, and legally defensible interpretation of the "waters of the United States" regulated under the act.[7] 33 U.S.C. § 1362(7). All the while, landowners have been left to navigate the "notoriously unclear" quagmire well aware that "the consequences . . . for even inadvertent" missteps "can be crushing." *U.S. Army Corps of Eng'rs v. Hawkes*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring). *See Rapanos*, 547 U.S. at 758 (Roberts, J., concurring) (Rapanos' lack of a majority opinion is "unfortunate" because "regulated entities will now have to feel their way on a case-by-case basis.").

This case presents another opportunity for the Court to settle the proper test for determining when wetlands are regulated under the Clean Water Act. The Ninth Circuit applied the "significant nexus" test, see *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), a vague standard under which landowners cannot readily determine whether their land is subject to federal regulation and which has spawned sustained conflict. In the past, this test has been justified on the assumption that broader federal jurisdiction is more

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[7] *See* 51 Fed. Reg. 41,206 (1986) *declared unlawful in significant part by SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); 68 Fed. Reg. 1,991 (2003) (proposed rulemaking in response to *SWANCC* that "went nowhere," *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, J., concurring)); 80 Fed. Reg. 37,054 (2015) *enjoined by N. Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); 85 Fed. Reg. 22,250 (2020) *enjoined by Pasqua Yaqui Tribe v. EPA*, No. 20-cv-266 (D. Ariz. 2021).

conducive to the statute's purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). *See, e.g., Rapanos*, 547 U.S. at 775–76 (Kennedy, J. concurring).

Such assumption merits caution. Clarity and administrability, rather than the breadth of federal jurisdiction alone, are critical factors for whether a test advances the statute's purpose. A vague test can cause federal enforcement efforts to be unfocused or haphazard, make wetlands a liability for private landowners, and breed ill will between landowners, conservation interests, and regulators. *See Protecting Wetlands*, *supra* at 373. This can ultimately discourage wetland conservation and restoration. *See id*. Moreover, "conservation groups and state and local governments cannot know where their efforts are most needed if they do not know where federal regulatory authority ends and the need for additional efforts begins." *See* Jonathan H. Adler, *Redefining the Waters of the United States*, 34 PERC Reports 38 (2015).[8] Therefore, it is essential that this Court adopt a clear interpretation of the Clean Water Act's reach that can be readily applied in the real world.

Argument

I. Wetlands provide valuable benefits that can encourage conservation and restoration

Today, wetlands occupy approximately 5.5% of the contiquous United States. *See* T.E. Dahl, U.S. Fish

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[8] https://www.perc.org/2015/12/04/redefining-the-waters-of-the-united-states/.

& Wildlife Serv., *Status and Trends of Wetlands in the Coterminous United States 2004 to 2009* (2011).[9] While acknowledging the difficulty of determining historic wetland presence, the U.S. Fish and Wildlife Service estimates this is approximately 50% of the wetland area present during the founding era. *See* T.E. Dahl, U.S. Fish & Wildlife Serv., *Wetlands Losses in the United States 1780s to 1980s* (1990).[10] This significant decline is due, in large part, to the benefits of wetlands not being understood or appreciated. *Id.* at 2. Historically, wetlands were deemed to be wastelands, unproductive areas that served as homes for mosquitoes and other pests. *Id*. *See Leovy v. United State*s, 177 U.S. 621, 636 (1900) (describing wetlands as a nuisance). Indeed, the federal government maintained an active policy of destroying wetlands well into the 20th century. *See* David F. Gerard, *Federal Flood Politics: 150 Years of Environmental Mischief*, in GOVERNMENT VERSUS ENVIRONMENT 59 (Donald R. Leal & Roger E. Meiners eds., 2002).

People now appreciate more fully the many public and private benefits of wetland conservation. Wetlands rival the biological productivity of rain forests and coral reefs. *See* EPA, *Functions and Values of Wetlands* (2002).[11] They produce 31% of the country's plant species. *See Protecting Wetlands*, supra at 367. They provide habitat to more than a

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[9] https://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-in-the-Conterminous-United-States-2004-to-2009.pdf.

[10] https://www.fws.gov/wetlands/documents/Wetlands-Losses-in-the-United-States-1780s-to-1980s.pdf.

[11] https://nepis.epa.gov/Exe/ZyPDF.cgi/200053Q1.PDF?Dockey=200053Q1.PDF

third of the species listed under the Endangered Species Act. *See id.* They support populations of birds, wildlife, and fish valued by hunters and animal watchers. *See Functions and Values of Wetlands*, *supra*; EPA, *Economic Benefits of Wetlands* (2006).[12] And, of course, they store and filter water, serving a critical function for flood control and water quality. *See Economic Benefits of Wetlands*, *supra*.[13]

These benefits can encourage private landowners to conserve or restore wetlands and support a market for such conservation. The incentives of private landowners are particularly important to wetland conservation because, unlike traditionally navigable waters,[14] wetlands are typically in private ownership. According to Environmental Protection Agency estimates, 75% of wetland acres in the contiguous United States are on private land. EPA, *Threats to Wetlands* (2001).[15]

Landowners may be self-motivated to conserve or restore wetlands because, for instance, wetlands protect their surrounding property from flooding or

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[12] https://www.epa.gov/sites/default/files/2021/01/documents/economic_benefits_of_wetlands.pdf.

[13] Wetlands vary in quality and function, with each producing a mix of benefits depending on factors that are often quite localized. This variation and the importance of local impacts affects whether conservation is best pursued federally, by states, or through private efforts. *See What Went Wrong With WOTUS?*, *supra* at 29.

[14] *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 589–91, 603 (2012) (discussing state ownership of navigable waters, the federal navigational servitude over these waters, and application of the public trust doctrine to them).

[15] https://www.epa.gov/sites/default/files/2021-01/documents/threats_to_wetlands.pdf.

erosion. But they may also do it simply because they value their land's environmental amenities. *See* Martin Doyle, *A Permit Runs Through It*, 37 PERC Reports 26 (2018).[16] *Cf.* Robert Bonnie, et al., *Understanding Rural Attitudes Toward the Environment and Conservation in America*, Duke Nicolas Institute for Environmental Policy Solutions Report (2021)[17] (survey finding that rural Americans value conservation but are skeptical of regulation, especially federal regulation, as the means to protect the environment).

Where landowners are not so motivated or the benefits of wetlands are enjoyed primarily by others, those beneficiaries can often provide the needed incentives for wetland conservation and restoration. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation* 29 Envtl. L. 1, 56–62 (1999). Conservation organizations regularly negotiate with landowners to obtain easements conserving wetlands or contracts to restore them. *See Protecting Wetlands*, *supra* at 395–98. *See also* Ducks Unlimited, *Legacy for Landowners*.[18]

For instance, prairie potholes are a type of small, shallow wetland that collects rainwater and snowmelt and provides critical habitat for ducks and other

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[16] https://perc.org/2018/12/06/a-permit-runs-through-it/.
[17] https://nicholasinstitute.duke.edu/sites/default/files/publications/understanding-rural-attitudes-toward-environment-conservation-america.pdf.
[18] https://www.ducks.org/conservation/national/legacy-for-landowners.

waterfowl in Montana, Wyoming, and the Dakotas. *See* Ducks Unlimited, *Preserve Our Prairies: Progress Report* (2018).[19] To conserve these populations, Ducks Unlimited has purchased lands containing high-value habitat from willing sellers, compensated landowners for easements conserving habitat, and provided financial incentives for landowners to adopt duck- and wetland-friendly practices. *See Protecting Wetlands*, *supra* at 395–98. Between 2012 and 2017, the organization worked with landowners to conserve 500,000 acres of habitat in the region. *See Preserve Our Prairies*, *supra*. Without these incentives, landowners may have converted these areas to crop-production, reducing the presence of prairie potholes and duck habitat. *See Protecting Wetlands*, *supra* at 396–97.[20]

Landowners may also be induced to conserve or restore wetlands by being compensated for the downstream water quality-benefits they provide. For instance, New York City keeps its water-treatment costs low through a variety of programs that compensate landowners who conserve wetlands within the watersheds of the city's drinking-water supply. *See* New York City Dept. of Envtl. Prot., *Wetlands in the Watersheds of the New York City Water Supply System* 21–22 (2009).[21] *See also* Reed

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[19] https://www.ducks.org/Portals/0/GPR/Preserve%20Our%20Prairies_2018_F%20email.pdf.

[20] Many prairie potholes are isolated from navigable waters, making it unlikely (although not impossible, given the vagaries of the significant nexus test) that a federal permit would have been required. *See Protecting Wetlands*, *supra* at 370 n.20.

[21] https://www1.nyc.gov/assets/dep/downloads/pdf/environment/science-research/wetlands.pdf.

Watson & Brandon Scarborough, *Cheney Lake Watershed: Farming Water Quality in Kansas*, PERC Case Study (2010).[22]

Similar incentives can also come from mitigation of prototypical water pollution. Under the Clean Water Act, for instance, an entity discharging a pollutant may mitigate this impact by purchasing credits generated from restoring wetlands that filter a similar amount of pollution. *See* EPA, *Water Quality Trading Scenario: Nonpoint Source Credit Exchange* in WATER QUALITY TRADING TOOLKIT FOR PERMIT WRITERS 2 (2007)[23] (describing how wetland restoration can generate mitigation credits in a water-quality market). In this way, the Clean Water Act can encourage wetland conservation and restoration even for wetlands that are not deemed waters of the United States, just as it can encourage reductions of nonpoint source pollution even though it is not directly regulated under the statute. *See* Bruce Yandle, *Markets for Water Quality*, 26 PERC Reports 14 (2008).[24]

Finally, landowners can be encouraged to conserve and restore wetlands through government programs that directly compensate for such efforts. The federal government has several programs that acquire conservation easements to protect wetlands or subsidize wetland restoration. *See* EPA, *EPA and Other Federal Grants That Include Wetlands*

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[22] https://www.perc.org/wp-content/uploads/2010/09/Cheney_Lake_CS.pdf.
[23] https://www.epa.gov/sites/default/files/2016-04/documents/wqtradingtoolkit.pdf.
[24] https://www.perc.org/2008/09/12/markets-for-water-quality/.

Restoration.[25] *See also* PERC, *Public-Private Partners Restore Wetlands* (2011) (describing one landowners efforts to restore 500 acres of wetlands with the support of public and private partners).[26] These programs can deliver wetland conservation at significantly lower cost than regulation. *See* Jonathan H. Adler, *Money or Nothing: The Adverse Consequences of Uncompensated Land Use Controls*, 49 Boston College L. Rev. 301, 357 (2008). As an exercise of Congress' spending power, these programs do not raise the same enumerated power and due process concerns as criminal regulation. *See id.*; *Wetlands, Waterfowl, and Mr. Wilson*, *supra* at 63–66.

The common thread to these approaches is that they reward private landowners for the many public and private benefits their wetlands provide. In so doing, they make wetlands an asset that landowners are motivated to protect and improve, rather than a liability to avoid. These approaches also encourage conservation interests, governments, and landowners to confront tradeoffs, including prioritization of those wetlands with the most valuable benefits and that can be conserved at the lowest cost.

II. Uncertain regulation can make wetlands a liability for landowners and complicate conservation efforts

Whether the test for federal jurisdiction under the Clean Water Act advances the statute's purpose of restoring the quality of the nation's waters depends,

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[25] https://www.epa.gov/wetlands/epa-and-other-federal-grants-include-wetlands-restoration.

[26] https://www.perc.org/2011/08/01/public-private-partners-restore-wetland/.

in part, on how it affects the incentives for private landowners to cooperate in wetland conservation and restoration. More federal regulation over wetlands "does not always translate into more conservation[.]" *See Redefining the Waters of the United States*, *supra*. Where the test for federal jurisdiction is unclear and difficult for most landowners to apply, the risks and high costs associated with federal regulation can alienate landowners, make wetland features a liability for them, and strain relationships between landowners, conservation organizations, and government agencies.

Unlike the voluntary approaches described above, regulation makes wetlands a liability for landowners rather than an asset. The Clean Water Act can impose significant burdens on private landowners. It may interfere with common land use activities or require a costly permit. *See Hawkes*, 578 U.S. at 602 (Kennedy, J., concurring) (The Clean Water Act "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."). This risk may encourage the preemptive destruction or degradation of wetlands before they can be discovered by federal regulators, although the extent of such practice is unknown. *See Money or Nothing*, *supra* at 318, 331–32.

The Clean Water Act regulates not only those activities that harm jurisdictional waters but also beneficial activities that incidentally result in modest fill, such as altering a site's typography to affect drainage, installing weirs or culverts to increase water flowing to the wetland, or adding hydric soil. *See* Interagency Workgroup on Wetland Restoration,

An Introduction and User's Guide to Wetland Restoration, Creation, and Enhancement (2003).[27] This can discourage wetland restoration by penalizing such environmentally beneficial action with the threat of future regulatory consequences. *See Money or Nothing*, *supra* at 331–32. *See also A Permit Runs Through It*, *supra* (describing the "permitting hell" one Oregon rancher faced when trying to restore wetlands on private property). The federal government has, for instance, prosecuted private landowners for altering wetlands those same landowners had created. *See Money or Nothing*, *supra* at 331–32. *See also Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990). Thus, unless a landowner can be sure that a restored wetland would not result in federal control over her property, she may be reluctant to invest in restoration. *See Protecting Wetlands*, *supra* at 373 ("When regulation is uncertain, there are perverse incentives for property owners not to alter wetlands on their property—even if doing so would improve their quality . . .").[28]

The magnitude of this disincentive should not be discounted. As this Court has observed, the average cost to obtain an individual 404 permit is $271,596

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[27] https://www.csu.edu/cerc/documents/AnIntroductionandUsersGuidetoWetlandsRestoration.pdf.

[28] *Cf.* Jonathan Wood, *Prospecting for Pollution: The Need for Better Incentives to Clean Up Abandoned Mines*, PERC Public Lands Report 14–15 (2020), https://www.perc.org/wp-content/uploads/2020/02/prospecting-for-pollution-abandoned-mines.pdf (explaining that the risk of Clean Water Act liability is a significant obstacle to restoring abandoned mine sites).

and the average delay to receive the permit is more than 2 years. *See Hawkes Co.*, 578 U.S. at 594-95. According to a 2015 Environmental Protection Agency economic analysis, expanding the "waters of the United States," such that the number of wetland permits increased between 3 and 5% would raise annual permitting costs by $30 to 80 million. *See* EPA, *Economic Analysis of the EPA-Army Clean Water Rule* 39 (2015).[29] This estimate suggests a total annual cost for landowners of between $1 and 1.6 billion. *See id.*[30] It bears emphasizing that these are only permitting costs, *i.e.* the cost to determine whether one's land is subject to federal jurisdiction and to ask for federal permission to use it. If a permit is granted, landowners may also face significant mitigation costs. *See id.* at 40–42 (reporting that mitigating costs can be up to $621,166 per acre of wetland impacted by a project). Therefore, for the average landowner, the risk that federal agents will deem their land subject to federal regulation is no small matter.

Under the test applied by the Ninth Circuit in this case, landowners cannot simply look at their property or publicly accessible information and know whether the land contains jurisdictional wetlands. According to that test, wetlands are subject to federal regulation

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[29] https://www.epa.gov/sites/default/files/2015-06/documents/508-final_clean_water_rule_economic_analysis_5-20-15.pdf.

[30] Such costs stand in even sharper relief when compared to how efficiently the federal government conserves wetlands when it bears the costs. *See Money or Nothing*, *supra* at 357–58 (collecting studies showing that federal permitting conserves wetlands at a cost of approximately $1 million per acre compared to $1300 per acre and $600 per acre under compensation-based programs).

if they "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.'" *See Sackett*, 8 F.4th at 1088. This test charges landowners with knowing not only a watershed's complex subsurface hydrology but also what federal regulators will later deem "similarly situated" lands, how they will define "the region," and how they will aggregate different wetlands to determine whether they "significantly affect" downstream navigable waters. This series of vague terms in the judicially-created significant nexus test can ensnare homeowners and modest landowners who may have never heard of the Clean Water Act much less know how its obscure phrases are interpreted and applied. *Cf. Hawkes*, 578 U.S. at 602 (Kennedy, J., concurring).[31] The challenge of a vague jurisdictional test is complicated even further because sites that federal regulators deem to be jurisdictional wetlands "either may have wetland characteristics only some portion of the time, or may not look like what many people visualize as wetlands." *See* Cong. Res. Serv., *Wetlands: An Overview of Issues* 3 (2017).[32] Therefore, determining jurisdiction under the vague test often requires hiring one or more expensive experts or seeking a federal agency's opinion on the matter. *See*

[31] Another way in which a vague test can have significant downsides is that it fails to give regulated advanced notice so that they can conform their conduct to them. This notice is critical here because it is generally much cheaper to conserve a wetland before it is damaged than attempt to restore it after the fact. *See Money or Nothing*, *supra* at 358.

[32] https://crsreports.congress.gov/product/pdf/RL/RL33483.

Hawkes, 578 U.S. at 594 (describing the process of seeking a jurisdictional determination).

This uncertainty about the scope and applicability of federal regulation breeds conflict and distrust between regulators, landowners, and conservation interests. *See Protecting Wetlands*, *supra* at 392. This is clear not only from the substantial litigation that has arisen over the Clean Water Act. *See, e.g., Hawkes Co.*, 578 U.S. 590; *Rapanos*, 547 U.S. 715; *SWANCC*, 531 U.S. 159; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). But it is also shown by the bitter fights over any rulemaking to clarify the meaning of "waters of the United States." *See What Went Wrong with WOTUS?*, *supra* at 4 (explaining that while EPA has generally downplayed the significance of these regulatory changes, landowners and some environmental organizations view themselves as engaged in "a high-stakes battle").

Conflict generated by uncertain federal regulation can affect landowner willingness to participate in voluntary conservation initiatives. Landowners may also be wary of granting access to their land to hunters, anglers, and others who benefit from wetlands and the habitat they provide, for fear that it will draw the attention of regulators. *Cf.* Stephen Polasky & Holly Doremus, *When the Truth Hurts: Endangered Species Policy on Private Land With Imperfect Information*, 35 J. Env't Econ. & Mgmt. 22 (1998) (explaining that regulatory burdens associated with the presence of endangered species has caused landowners to deny access to regulators, scientists, and conservation interests).

According to a recent survey of rural Americans by Duke's Nicolas Institute for Environmental Policy

Solutions, landowners tend to distrust environmental organizations they perceive as embracing top-down regulation and benefiting from the conflict such regulation generates. *See Understanding Rural Attitudes Toward the Environment*, *supra* at 24. Consequently, conservation organizations that wish to collaborate with private landowners must work hard to overcome distrust and to demonstrate their commitment to win-win solutions. *See id*. *See also Protecting Wetlands*, *supra* at 365–66. A vague standard for federal jurisdiction can reduce the incentive for conservation groups to pursue such solutions if they perceive regulation as obviating any need to work with landowners or they cannot easily determine where their efforts would have the greatest impact. *See Redefining the Waters of the United States*, *supra*. In these ways, broad and uncertain federal regulation can crowd-out more flexible and innovative private alternatives.

Thus, clarity and administrability are critical to determining whether a test of wetland jurisdiction under the Clean Water Act advances the statute's purpose or undermines it. A vague test that makes wetlands a liability for landowners and that breeds ill will between landowners, conservation interests, and regulators can discourage wetland conservation and restoration.

III. Uncertain federal regulation can also crowd out state innovation

Uncertainty over the reach of the Clean Water Act may also stall state innovation in wetland conservation. Where such state efforts would be more comprehensive, more focused, benefit from local

knowledge, or avoid conflict, federal crowding-out of such efforts can undermine conservation.

One of the chief values of federalism is the potential to discover new and better ways to pursue policy goals through experimentation and innovation. This is what led Justice Brandeis to analogize states to laboratories of democracy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

However, for state policymakers to pursue such approaches, they must have the policymaking room to pursue them and incentives to take risks. *See When is Two a Crowd?*, *supra* at 94–106. Federal regulation can crowd-out state innovation where, for instance, the costs on a state's residents of being subject to both federal and state regulatory regimes are high, as are the costs to the state of setting up its regime, and the marginal benefits that the state regime can produce are uncertain. *See id*. at 101. State policymakers also have reduced incentives to invest in innovative approaches where the federal government is already substantially regulating because they can't be sure that they will receive credit for success. *See id*. at 104.

An uncertain standard of federal jurisdiction over wetlands "may crowd out potentially complementary efforts by state and local governments" by making it difficult to determine where their efforts are needed and by reducing the likelihood that a state or local policy maker will get credit for any benefits they create. *Redefining the Waters of the United States, supra*. *See Protecting Wetlands*, *supra* at 367. State wetland protections preceded federal regulation under the Clean Water Act. *When is Two a Crowd?*, *supra* at 109. By 1975, when federal authority over wetlands

was established, all fourteen states in the contiguous United States with more than 10% of their land area as wetlands had adopted wetland-protection measures. *See id.* at 110. Once federal authority was asserted, however, the rate at which additional states developed wetland programs slowed. *See id. See also* Terry Anderson & P.J. Hill, *Environmental Federalism: Thinking Smaller*, PERC Policy Series No. 8 (1996).[33] When this Court has sought to rein in federal jurisdiction, states have considered and sometimes adopted their own programs to fill gaps. *See id*. at 113–14. However, when federal agencies reasserted broad authority under unclear standards, the incentive for state reforms waned. *See id.*

That the states with the greatest share of wetlands moved first significantly undercuts the "race to the bottom" rationale usually offered to justify federal regulation of these features. *See Wetlands, Waterfowl, and Mr. Wilson*, *supra* at 49. *See also When is Two a Crowd?*, *supra* at 111. Instead, it suggests that states with the most wetlands also were the first to perceive the significant local benefits those wetlands provide and, therefore, were motivated to conserve them. *See Wetlands, Waterfowl, and the Menace of Mr. Wilson*, *supra* at 49.

Today, state policymakers appear to be primarily motivated by the politics of federal regulation rather than devising their own innovative programs. Many of the challenges to recent regulatory efforts to define waters of the United States, for instance, have been brought by opposing states. *See, e.g., Cal. v. Wheeler*, 20-cv-3005 (N.D. CA. filed May 1, 2020) (challenging

[33] https://www.perc.org/wp-content/uploads/2018/02/ps8.pdf.

federal authority as too narrow); *North Dakota*, 127 F. Supp. 3d 1047 (challenging federal authority as too broad). Over two-thirds of states have enacted laws forbidding state agencies from regulating beyond what federal law requires, even though this is not a stable line but one which may change with the vicissitudes of presidential politics. *See Protecting Wetlands*, *supra* at 385. That state policymakers are limiting state authority in this way suggests they are responding more to the politics of federal regulation than identifying the best policy for their state. *See id*. at 370, 388 (discussing the political economy of state conflict over Clean Water Act jurisdiction and the potential for reduced conflict to affect state policymakers' incentives).

Of course, states may err if they take on a bigger role in wetland conservation. So too may federal regulators, a concern made more pressing by the dramatic changes in federal jurisdiction from one administration to the next and the balkanization of jurisdiction as federal courts enjoin agency interpretations in some states but not others. *See* Cong. Res. Serv., *"Waters of the United States" (WOTUS): Current Status of the 2015 Clean Water Rule* (2018).[34] But federalism nonetheless can mitigate this error risk, by limiting it to a single state rather than extending an error nationwide.[35] Federalism also allows comparisons across states that can inform better policy and promote accountability

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[34] https://www.everycrsreport.com/files/20181212_R45424_0e40d77c4246e4ca5760991d8a7a1fac88d7be85.pdf.

[35] As noted earlier, until relatively recently, federal policy encouraged the destruction of wetlands. *See Federal Flood Politics*, *supra*.

for policy outcomes. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

Conclusion

Conserving wetlands and the numerous public and private benefits they provide is an important goal. But the means of pursuing that goal can significantly affect whether it is achieved. Previously, members of this Court have assumed that the broadest interpretation of "waters of the United States" is most conducive to advancing the Clean Water Act's purpose of improving water quality, even if it results in a vague and difficult-to-apply test for assessing federal jurisdiction. However, uncertainty over the extent of federal regulation can also undermine wetland conservation where it makes wetlands a liability for private landowners, discourages landowners from working with conservation organizations to restore wetlands, and crowds out innovative state conservation programs. Therefore, to the extent this Court's interpretation of "waters of the United States" is guided by statutory purpose, it should adopt a clear standard that landowners and others can reasonably apply on the ground.

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Respectfully submitted,

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