# **SUPREME COURT OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES MICHAEL SACKETT, ET UX., ) Petitioners, ) v. ) No. 21-454 ENVIRONMENTAL PROTECTION AGENCY, ) ET AL., ) Respondents. )

Pages: 1 through 124 Place: Washington, D.C. Date: October 3, 2022

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ MICHAEL SACKETT, ET UX., ) 3 4 Petitioners, ) 5 ) No. 21-454 v. б ENVIRONMENTAL PROTECTION AGENCY, ) 7 ET AL., ) 8 Respondents. ) 9 - - - - - - - - - - - - - - - - -10 11 Washington, D.C. 12 Monday, October 3, 2022 13 14 The above-entitled matter came on for oral argument before the Supreme Court of the United 15 16 States at 10:03 a.m. 17 18 **APPEARANCES:** 19 DAMIEN M. SCHIFF, ESQUIRE, Sacramento, California; on 20 behalf of the Petitioners. BRIAN H. FLETCHER, Principal Deputy Solicitor General, 21 22 Department of Justice, Washington, D.C.; on behalf 23 of the Respondents. 24 25

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1 PROCEEDINGS 2 (10:03 a.m.) 3 CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-454, 4 Sackett versus EPA. 5 6 Mr. Schiff, you're up first this year. 7 ORAL ARGUMENT OF DAMIEN M. SCHIFF ON BEHALF OF THE PETITIONERS 8 9 MR. SCHIFF: Thank you, Mr. Chief Justice, and may it please the Court: 10 11 It's now going on 16 years since 12 Petitioners Mike and Chantell Sackett began construction of a house on a vacant lot in a 13 14 largely built-out subdivision. Yet, their 15 home-building plans remain on hold to this day 16 because EPA remains steadfast in its view that 17 their property contains navigable waters, 18 subject to regulation under the Clean Water Act. 19 But under no plausible interpretation of that 20 term does the agency have such authority. 21 Now the statute defines "navigable 2.2 waters" as the waters of the United States and 23 so explicitly requires that EPA establish two 24 things before it may regulate. 25 First, there must be a water, that is,

1 a hydro-geographic feature that in ordinary 2 parlance would be referred to as a type of stream, creek, river, lake, or the like. A 3 wetland, however, is none of those things, and 4 so it can be regulated as a water only to the 5 extent that it blends into and thus becomes 6 7 indistinguishable from an abutting water. Second, the water has to be of the 8 United States, that is, for all practical 9 purposes, a navigable in fact water. 10 11 Now this test is vastly superior to 12 the significant nexus test for a number of reasons. First and most importantly, the 13 14 two-step framework closely adheres to the 15 textual limits that Congress itself imposed on 16 the agency. 17 Second, by faithfully adhering to 18 those limits, the test faithfully vindicates all 19 of Congress's purposes, not just its 20 water-quality purposes, but also its desire to 21 preserve the state's traditional preeminence 2.2 over land and water resources. 23 And, thirdly, it's an easy-to-administer test. Ordinary citizens can 24 25 use their own eyes to reliably determine whether

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1 or not their land is regulated. 2 And under this two-step framework, it's clear that the Sacketts' property contains 3 no waters, much less waters of the United 4 States, and so they should be entitled to a 5 6 declaration that their property is not subject 7 to EPA's authority. JUSTICE THOMAS: Mr. Schiff, can --8 9 can intrastate, purely intrastate, navigable bodies of water be waters of the United States? 10 MR. SCHIFF: Yes, Justice Thomas. 11 12 JUSTICE THOMAS: And how is that, if 13 it's purely intrastate? 14 MR. SCHIFF: If -- as a statutory 15 matter, if that intrastate navigable water 16 connects with some form of interstate 17 transportation such that there could be a continuous channel of interstate commerce, then 18 19 that water could be regulated. 20 JUSTICE THOMAS: So what does that 21 mean? 2.2 MR. SCHIFF: I'll give you an example, 23 Your Honor, the Great Salt Lake. The Great Salt 24 Lake is not a traditional navigable water, even 25 though it's navigable in fact, precisely because

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it doesn't hook up to any other waters to flow
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 2
      interstate. But, obviously, there are a lot of
 3
      forms of nonaquatic transportation that can get
      you there and that can sustain an interstate
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 5
      channel of commerce.
 6
                So that's an example of a water body
 7
      that, though wholly intrastate, would qualify as
      a statutory matter as a water of the United
8
 9
      States.
10
                JUSTICE THOMAS: So why isn't that met
11
     here?
12
                MR. SCHIFF: Well, Your Honor, there
13
      is no allegation whatsoever that the Sacketts
14
     discharge any pollutants --
15
                JUSTICE THOMAS: No, I'm --
16
                MR. SCHIFF: -- into Priest Lake.
17
                JUSTICE THOMAS: -- well, if the -- I
18
      think the -- the question -- the issue would be,
19
      if there is nearby a body of water that could be
      considered navigable, that possibly the wetland
20
      could be associated or connected with that in
21
22
     some way.
                MR. SCHIFF: Your Honor, the --
23
24
                JUSTICE THOMAS:
                                 I mean, don't you
25
     have a ditch, you have a body of water, and you
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1 have sort of a nexus with it with the land? 2 MR. SCHIFF: Justice Thomas, mere 3 adjacency itself cannot justify the agency's statutory jurisdiction for a number of reasons. 4 The text of the statute says --5 6 setting aside even "of the United States," the 7 text says that if it's not even a water, it can't even be regulated. 8 9 And the plain meaning of "water," as elucidated by dictionary definitions and what 10 11 have you, is not -- is streams, creeks, rivers, 12 what have you, not wetlands. 13 JUSTICE KAGAN: But doesn't that, 14 Mr. Schiff, ignore the import of 1344(g)(1), 15 which really specifically says that when we're 16 talking about waters, we're talking about --17 including their wetlands, 1344(g)(1) says. 18 So, if we're going to be fair to the 19 text of the statute, isn't there a pretty 20 powerful indication that wetlands are included, 21 adjacent wetlands are included? And then we can 2.2 talk about what the word "adjacent" means, but 23 adjacent wetlands are included. 24 MR. SCHIFF: Absolutely, Justice 25 Kagan, there's no doubt that some wetlands are,

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1 in fact, regulated. And the question is, what 2 kind of wetlands? 3 Now adjacency in the context of 404(q)clearly means physically touching. For example, 4 if I were to say I own two adjacent parcels of 5 6 land --7 JUSTICE KAGAN: Well, you say that's clearly true, but, in fact, when you look to our 8 normal indicators of statutory meaning, first, 9 we look to dictionaries, and if you look to 10 11 dictionaries, both legal and non-legal, what 12 they show is that adjacency actually is not the 13 same as touching or contiguity, that adjacency 14 has something to do with proximity, of course. 15 But the -- the definitions are 16 actually remarkably explicit about the fact that 17 two things can be adjacent to each other without touching each other. 18 19 MR. SCHIFF: Justice Kagan, if I could 20 respectfully disagree, certainly, adjacency in 21 the abstract can have more than one meaning, but 2.2 in the particular context of comparing 23 relationships between topographic features, as 24 that word is obviously employed in 404(g)(1), I 25 think the only plausible understanding of that

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1 term is physically touching. 2 JUSTICE KAVANAUGH: Well, why --3 CHIEF JUSTICE ROBERTS: I'm not sure 4 JUSTICE KAVANAUGH: -- did E- --5 CHIEF JUSTICE ROBERTS: -- I'm not 6 7 sure that's right. I -- I don't know whether 8 they're topographical features or not, but you 9 would readily say that a train station is 10 adjacent to the tracks even though it's not 11 touching the tracks? 12 MR. SCHIFF: That is right. Mr. Chief 13 Justice, that is correct. However, the example 14 that I was going to give is, if I were to say 15 that I own two adjacent parcels of land, I don't 16 think anyone would just think -- simply think 17 that I meant I own two parcels of land in the neighborhood, that that necessarily implies that 18 19 they're physically touching, and it's that 20 particular --21 JUSTICE KAGAN: Well, let me give you 22 another example. I grew up in an apartment 23 building in New York City. If I say there are 24 two adjacent apartment buildings, do they have to be touching each other, or it could be, you 25

1 know, one is across a side street, you know? 2 MR. SCHIFF: Again, Justice Kagan --3 JUSTICE KAGAN: I mean, I would say that those -- you know, those two apartment 4 buildings are adjacent to each other because 5 6 there's no other apartment building in between 7 them, even if they're not touching each other. 8 MR. SCHIFF: Again, Justice Kagan, I 9 would say that when we're speaking specifically 10 about physical topographic features, natural 11 features like wetlands and other water bodies, I 12 think that physically touching requirement is 13 essential and is the -- the meaning of adjacency 14 as used in 404(q). That is, in fact, actually 15 16 JUSTICE JACKSON: But, Mr. Schiff, 17 isn't the issue what Congress would have intended with respect to adjacency and there was 18 a regulation that defined "adjacency" to include 19 20 neighboring? And as far as I know, Congress used the term "adjacency" and didn't adjust it 21 2.2 to try to make clear the touching requirement 23 that you say was intended by the term. MR. SCHIFF: Yes, Justice Jackson. 24 25 Every single time that argument has been

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advanced by the government, it has been rejected 1 2 by this Court. In Rapanos, the plurality 3 opinion rejected out of hand the idea that 404(q) represents a ratification of the Corps's broad 4 understanding of adjacency. Justice Kennedy's 5 opinion doesn't even give it consideration. 6 7 SWANCC, for its part, said 404(g) is unenlightening as to the meaning of "waters of 8 the United States." 9 10 JUSTICE JACKSON: All right. Well, 11 let me -- let me -- let me try to bring some 12 enlightenment to it by asking it this way. 13 You say the question is which wetlands 14 are covered, which I agree with, but I guess my 15 question is, why would Congress draw the 16 coverage line between abutting wetlands and 17 neighboring wetlands when the objective of the 18 statute is to ensure the chemical, physical, and 19 biological integrity of the nation's waters? 20 So are you saying that neighboring 21 wetlands can't impact the quality of navigable 2.2 waters? 23 MR. SCHIFF: Justice Jackson, not at 24 all. However, it's also important to 25 acknowledge that Congress was balancing concerns

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here. On the one hand, there is a water quality 2 issue. 3 But, on the other hand, there's a very important federalism issue, so important that 4 actually Congress put in the text of the Act 5 6 that one of the purposes of the Act is to 7 preserve traditional state authority over land and water resources. 8 JUSTICE JACKSON: I didn't read that 9 10 as a purpose, I mean, that Congress said our 11 objective is to address or make sure that we 12 maintain the integrity of the waters. 13 It was one of the policies in

14 achieving that objective that we care about 15 states' rights, but -- or federalism concerns, but I didn't see that as Congress's primary 16 17 objective or even, you know, a main objective 18 with respect to the Clean Water Act.

19 MR. SCHIFF: That is true, Justice 20 Jackson, although this Court in SWANCC very much 21 relied upon, however you would like to call it, 2.2 this principle of federalism to adopt a narrow 23 construction.

24 JUSTICE SOTOMAYOR: But, counsel --25 JUSTICE KAVANAUGH: Well --

| 1  | JUSTICE SOTOMAYOR: how can you say               |
|----|--|
| 2  | they wanted a narrow construction when they were |
| 3  | very, very clear in the statute in 1341(g) that  |
| 4  | the Corps couldn't give states jurisdiction over |
| 5  | adjacent wetlands to that navigable water?       |
| 6  | You are not disputing that Priest Lake           |
| 7  | is a navigable water, correct?                   |
| 8  | MR. SCHIFF: That is correct, Your                |
| 9  | Honor.   |
| 10 | JUSTICE SOTOMAYOR: It's 62 miles                 |
| 11 | long. It carries people. It's an instrument in   |
| 12 | transport. That's the definition of traditional  |
| 13 | navigable waters.                                |
| 14 | So as I see the question here is what            |
| 15 | did Congress mean by "adjacent"? And now we're   |
| 16 | going you are saying it requires a continuous    |
| 17 | water surface. But how about a natural being?    |
| 18 | Even the Trump Administration in who came        |
| 19 | close to adopting your meaning, exempted berms.  |
| 20 | It exempted beaver dams. It exempted those two   |
| 21 | items and they would stop continuous surface     |
| 22 | flow.  |
| 23 | So how does your where does your                 |
| 24 | definition come from?                            |
| 25 | MR. SCHIFF: Justice Sotomayor, if I              |

1 could go back first to the first point about 2 404(q) and also in partial response to Justice 3 Jackson's question, even in Riverside Bayview, which is the only time that this Court has 4 actually upheld the Agency's assertion of 5 6 jurisdiction, even there, at most, the Court was 7 willing to say is that 404(g) simply means that wetlands are not necessarily excluded from the 8 definition of waters, but it wasn't even 9 prepared to adopt a general affirmation of 10 11 adjacency. 12 In part, that's because none of the 13 1977 amendments had anything to do with the definitional text. And I think this is in 14 15 response to your second question, Justice 16 Sotomayor, where does the text come from? 17 Well, it comes from that unchanged 18 definitional text. Congress did not change the 19 term "the waters of the United States." And a 20 water is, again, in ordinary parlance, we would 21 submit, something that is other than a wetland. 2.2 And the only way that one can plausibly regulate

24 Bayview --

23

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JUSTICE KAVANAUGH: But -- but --

it is if one has what was at issue in Riverside

| 1  | MR. SCHIFF: where it                             |
|----|--|
| 2  | JUSTICE KAVANAUGH: the I'm                       |
| 3  | sorry. EPA had by that time, as Justice Jackson  |
| 4  | said, indicated that the term "adjacent wetland" |
| 5  | would include wetlands separated by berms or     |
| б  | dunes or man-made dikes or levies from the       |
| 7  | navigable water. Okay. So EPA as of '77 had      |
| 8  | made that clear in the term "adjacent wetland,"  |
| 9  | explicitly made that clear.                      |
| 10 | And then Congress uses the term                  |
| 11 | "adjacent wetland." And my understanding is      |
| 12 | every administration since 1977, but correct me  |
| 13 | if I'm wrong, has stuck with adjacent wetland    |
| 14 | includes those wetlands separated by berms,      |
| 15 | dunes, dikes, or levies from the navigable       |
| 16 | water.   |
| 17 | So why shouldn't we read "adjacent               |
| 18 | wetland" in the statute to mean what EPA has     |
| 19 | said, as Justice Jackson asked, and what         |
| 20 | significance should it have that every           |
| 21 | administration since then has included those     |
| 22 | wetlands as covered by this statute?             |
| 23 | MR. SCHIFF: Justice Kavanaugh, in                |
| 24 | answer to your to your first question, I         |
| 25 | think, again, it goes back to the text, that if  |

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1 one accepts the proposition that waters -- their 2 ordinary meaning as employed by Congress does 3 not normally include wetlands, then that raises a textual difficulty, how can wetlands --4 JUSTICE KAVANAUGH: But -- but 5 6 Riverside Bayview said the contrary to that, 7 obviously. It said wetlands are included. The statute refers to adjacent wetlands. EPA has 8 9 said since '77 that "adjacent" means those 10 wetlands even if separated by berms, dunes, 11 levies, or dikes. 12 MR. SCHIFF: Well, Justice Kavanaugh, 13 I -- I don't want to necessarily die on this 14 hill because, obviously, the facts in this 15 record are such that --16 JUSTICE KAVANAUGH: Let's put aside 17 the facts of this case --MR. SCHIFF: All right. 18 19 JUSTICE KAVANAUGH: -- because this 20 case is going to be important for wetlands 21 throughout the country and we have to get it 22 right. 23 So why wouldn't a wetland separated by 24 a berm, dune, levy, or dike be covered, contrary to what the last 45 years have suggested? 25

| 1  | MR. SCHIFF: In response to the second            |
|----|--|
| 2  | part of your question, Justice Kavanaugh, about  |
| 3  | the fact that the agencies have consistently     |
| 4  | interpreted this over a long period of time, I   |
| 5  | think Justice Scalia appropriately responded to  |
| б  | that argument in the Rapanos plurality where he  |
| 7  | says it's a sort of now 40-year adverse          |
| 8  | possession of statutory authority.               |
| 9  | So I would say the mere fact that it's           |
| 10 | been interpreted that way can't convert the fact |
| 11 | that if one accepts that waters as ordinarily    |
| 12 | understood and not just in the dictionary but in |
| 13 | our yellow brief                                 |
| 14 | JUSTICE KAVANAUGH: Well, I would                 |
| 15 | agree with that but for the initial history of   |
| 16 | when Congress put that term "adjacent wetland"   |
| 17 | in, or I would think that has some force at      |
| 18 | least but for that.                              |
| 19 | JUSTICE BARRETT: And can I ask just a            |
| 20 | clarifying question to Justice Kavanaugh's? If   |
| 21 | you could help me with the timing, because, as   |
| 22 | Justice Kavanaugh says, you know, one argument   |
| 23 | that the government makes and that would have    |
| 24 | some force is that the regulation defined        |
| 25 | "adjacent" in the way Justice Kavanaugh's        |

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1 pointing out. 2 What is the timing? Because I 3 understand that that regulation was adopted in 1977 and 1344(g) was passed in 1977. 4 MR. SCHIFF: Yes, Justice Barrett. My 5 6 understanding -- and it was actually a 7 regulation from the Army Corps, not from the 8 EPA. But the Army Corps had a series of regulations, and the final version was issued in 9 10 1977, I think shortly before -- I think maybe --11 JUSTICE BARRETT: So it wasn't like an 12 old soil. It was pretty proximate in time to the enactment of 1344(q)? 13 14 MR. SCHIFF: I believe, Justice 15 Barrett, it was about one or two months prior to 16 the enactment of -- of the 1977 amendment. 17 JUSTICE KAVANAUGH: Well, the Act was 18 December, and this was, I think, in the summer. 19 But wasn't this discussed? The whole question 20 of wetlands was a big part of the discussion in 21 the '77 amendments, or am I wrong about that? MR. SCHIFF: No, you're absolutely 2.2 23 right, Justice Kavanaugh. And, again, the 24 Sacketts certainly don't dispute that -- that 25 wetlands are, in fact, regulated.

1 But, again, I would go back to Justice 2 Scalia's analysis in the plurality opinion. One 3 cannot read the legislative history of the '77 amendments to then conclude that every jot and 4 tittle of the Corps's regulations were then 5 affirmed. And, in fact, again, I would go back 6 7 to Riverside Bayview --JUSTICE KAGAN: But there was --8 9 there's an even lengthier history. I mean, 10 before the regulations become the regulations, 11 there's a whole controversy about it because the 12 first Corps regulation was much more along the 13 lines of what you are proposing. 14 And then there was a big brouhaha and 15 the Corps was interpreting it too narrowly, and 16 the Corps essentially changed its mind, and 17 everybody was aware that this had happened, that the Corps first came out of the blocks with a 18 19 narrow interpretation and, you know, was essentially convinced to reverse itself on the 20 theory that it was not reflective of what 21 2.2 Congress had wanted. 23 MR. SCHIFF: Justice Kagan, I would say one answer is that if -- if Your Honor is 24 25 referring to, say, a failed legislative

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| 1  | proposal, I mean, I don't think one can really   |
|----|--|
| 2  | put much   |
| 3  | JUSTICE KAGAN: I I'm not really                  |
| 4  | referring to that. I'm sort of referring to a    |
| 5  | story that I don't think anybody disputes about  |
| 6  | the history here, which is that the first        |
| 7  | regulation, the first interpretation is quite    |
| 8  | narrow, and there was blow-back, and the Court   |
| 9  | changes its mind.                                |
| 10 | And so everybody's aware on a sort of            |
| 11 | continuing basis of this issue. It's not as      |
| 12 | though the you know, the regulation came out     |
| 13 | and and then the statute was amended, all        |
| 14 | within a month, and nobody had time to to        |
| 15 | think about this question. I mean, people had    |
| 16 | been thinking about this question almost the     |
| 17 | entire time in the interim between the initial   |
| 18 | statute and the amendment.                       |
| 19 | MR. SCHIFF: That is true, Justice                |
| 20 | Kagan, but I think there's a lack of             |
| 21 | commensurability here in that the relevant Corps |
| 22 | regulation during this period that you note was  |
| 23 | a regulation purporting to interpret the "waters |
| 24 | of the United States."                           |
| 25 | Now it would seem passing strange in             |
|    |  |

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| 1  | my view for Congress to say: We're going to     |
|----|---|
| 2  | resolve this lengthy administrative dispute by  |
| 3  | entirely ignoring the statutory text that the   |
| 4  | regulation that has caused the dispute is       |
| 5  | related to, and, instead, we're going to effect |
| 6  | what amounts to a significant expansion of      |
| 7  | federal authority over land use by including in |
| 8  | a parenthetical in a provision that deals with  |
| 9  | permit transfer a reference to adjacent         |
| 10 | wetlands.                                       |
| 11 | That seems to me just to be an                  |
| 12 | unlikely way for Congress to effect what would  |
| 13 | be a significant unbalancing                    |
| 14 | JUSTICE SOTOMAYOR: Counsel                      |
| 15 | MR. SCHIFF: of traditional                      |
| 16 | JUSTICE KAVANAUGH: Let's                        |
| 17 | JUSTICE SOTOMAYOR: counsel, in                  |
| 18 | SWANCC, we said directly the 1977 amendment     |
| 19 | showed "Congress's unequivocal acquiescence to  |
| 20 | and approval of the Corps's regulations         |
| 21 | interpreting the Act to cover wetlands adjacent |
| 22 | to navigable waters." There, we faced the       |
| 23 | question and said, at least as to that          |
| 24 | definition, Congress was clear.                 |
| 25 | So my problem with your point is even           |

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Rapanos, Justice Scalia, recognized, whether
 it's scientifically accurate or not, that what
 navigable waters can be is anything that's
 adjacent to what we think of as traditional
 navigable waters.

6 No one's suggesting you can put a boat 7 on a wetland. It would sink. You can't put a 8 boat of certain sizes or many near the shore 9 line because they would sink. There's not 10 enough water there to hold them up.

11 So I don't understand how the wetland 12 has to be navigable. It does have to be adjacent because it's part of that river. 13 And Rapanos suggested it's hard to tell where the 14 15 beginning of the wetland is and where the 16 beginning of the -- of the water is. Whether 17 that's true or not is irrelevant.

18 Congress defined the term as navigable 19 waters and adjacent wetlands. So, if I take that as their definition, why don't we say that 20 21 something that is near qualifies? And so the 2.2 question becomes what's near enough, isn't it? 23 MR. SCHIFF: Justice Sotomayor, I 24 would respectfully disagree. I think this would 25 be a totally different case if Congress, in

1 fact, had defined "navigable waters" as the 2 waters of the United States plus adjacent wetlands, which is precisely what the Corps 3 regulation was trying to do in the '70s. 4 But Congress hasn't done that. In fact, it 5 studiously avoided touching that central 6 7 definitional provision for the last 50 years. 8 With respect, though, Justice 9 Sotomayor, to your point about how -- why do 10 wetlands have to be navigable, they don't have to be navigable. Certainly, in the normal 11 12 delimitation of any water, you're always going to have a point at which navigability, in fact, 13 towards the banks of a river, for example, is 14 15 going to disappear. But that doesn't change the 16 fact that one can plausibly define a river, say, 17 up to its ordinary high water mark and understand that water-ward of that mark one 18 19 might not have navigability at all points. 20 And I think the same thing is true

when it comes to defining the outer scope of waters with respect to abutting wetlands, that as one approaches the shore, it may not become physically possible to navigate, but one can still reasonably say that one hasn't yet

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1 completely departed the water.

| 2  | JUSTICE JACKSON: But, counsel, why               |
|----|--|
| 3  | why is it that your conception of this does not  |
| 4  | relate in any way to Congress's primary          |
| 5  | objective? Do you dispute that the primary       |
| 6  | objective as stated in the statute, I guess it's |
| 7  | at 1251, is that Congress cared about making     |
| 8  | sure that the chemical, physical, and biological |
| 9  | integrity of the nation's waters was protected?  |
| 10 | MR. SCHIFF: Justice Jackson, we don't            |
| 11 | dispute that. However, no statute pursues its    |
| 12 | purpose or objective or its objective at all     |
| 13 | costs, that that the limitations in the          |
| 14 | statute are as much a part of its purpose as its |
| 15 | affirmative authorization.                       |
| 16 | JUSTICE JACKSON: So why didn't                   |
| 17 | Congress say "immediately adjacent"? If they     |
| 18 | were trying to achieve something different than  |
| 19 | what the regulations had said about adjacency,   |
| 20 | if they were balancing their concerns about      |
| 21 | protecting the integrity of the navigable waters |
| 22 | with the property interests and the states'      |
| 23 | rights to control it, why didn't they say        |
| 24 | "immediately adjacent" in terms of the of the    |
| 25 | wetlands coverage?                               |

1 MR. SCHIFF: Justice Jackson --2 JUSTICE SOTOMAYOR: A footnote, why 3 didn't they use the word they used elsewhere, 4 "abutting"? 5 JUSTICE JACKSON: "Abutting." 6 MR. SCHIFF: Well, Justice Jackson, I 7 don't believe the term "abutting" appears in the 8 statute, but one reason why Congress --9 JUSTICE SOTOMAYOR: Oh, it actually Assume it does. There are other sections 10 does. 11 that use the word "abutting." 12 MR. SCHIFF: Well, Justice Sotomayor 13 and Justice Jackson, I would say with respect to 14 the question of immediate adjacency, I think one 15 reason why Congress didn't bother is because I 16 don't believe Congress was at all thinking that 17 404(g) would have any impact upon the scope of 18 the Act. 19 Again, if Congress intended to want to 20 definitively change the scope of the Act, one 21 would think that the most natural move would 2.2 have been to amend the definition of "navigable waters." 23 24 JUSTICE JACKSON: But can I -- can I 25 -- can I just -- I'm sorry. You suggest that

the balancing, that the limitation is about the concerns with respect to the state's administration, and 1344(g) is precisely where they're talking about what is left to the state versus the federal government, and in that statute, it just uses "adjacent." So I -- with respect, that seems to me

to be exactly where they would have made clear that the federal government's scope of authority was abutting or immediately adjacent, and we're leaving the rest to the states, under your own theory of what they were trying to do.

MR. SCHIFF: Justice Jackson, my -- my disagreement there is that that presupposes that Section 404 already regulates the universe of all wetlands and that it's essentially a -- a federal privilege whether or not any of that regulatory authority will be given back to the states.

But I don't believe that that's at all what Congress intended. I think Congress recognized that, setting aside the Clean Water Act, there would be a significant swath of land use and water regulation that would remain to the states.

1 And I think one good example to prove 2 that point is, as we discuss in the briefs, 3 non-point source pollution. Everyone recognizes that non-point source pollution is a serious 4 water quality issue, but it's never been 5 6 disputed that the Clean Water Act doesn't reach 7 that, which I think emphasizes that the purpose of Congress in enacting the Clean Water Act was 8 9 not at all costs let's clean up water quality as 10 much as we can. It was a balancing to recognize 11 that some water quality measures, like wetlands 12 regulation, inevitably, as the Sacketts' case demonstrates, inevitably converts EPA and the 13 14 Corps into land use administrators. 15 JUSTICE JACKSON: So can I just ask 16 you, so the reason why in your view Congress includes wetlands or thinks some wetlands should 17 18 be in there is what? Is it because they can't 19 be distinguished or because those wetlands 20 affect the water quality of navigable waters? 21 MR. SCHIFF: Justice Jackson, I think 2.2 the main answer is that precisely the rationale

that Riverside Bayview gave, that inevitably, in deliminating any true waters, one will have to pick a point at which land ends and water

begins, and in that intermediate zone, there
 will be things like wetlands.

3 JUSTICE JACKSON: But, if you read Riverside Bayview carefully, it looks to me as 4 though we were talking about the Corps's 5 6 rationale, not Congress's, that we were saying 7 the difficulty of being able to tell land from 8 water is the reason that the Corps thought it 9 should -- should or could include the abutting 10 wetlands, but it doesn't suggest that that was 11 Congress's reason, that Congress said something 12 about wetlands because it would be too difficult 13 to distinguish.

14 So is there something in the text or 15 the history of the statute that points to that 16 concern as being one of Congress?

17 MR. SCHIFF: Yes, Justice Jackson. Ι 18 would go back again to the definitional text, 19 that Congress used the term "waters." Congress 20 knew about wetlands. Congress knew about how 21 wetlands affect water quality even in 1972. 2.2 In our yellow brief at pages 4 and 5, 23 we cite a number of examples in the years 24 leading up to 1972 where Congress in a variety

25 of acts explicitly distinguished between

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1 wetlands and other types of waters.

| 2  | So Riverside Bayview certainly adopts,           |
|----|--|
| 3  | in our view, the idea that that waters are       |
| 4  | ambiguous when applied to the facts on the       |
| 5  | ground, and that ambiguity necessarily means     |
| б  | that some wetlands will be regulated. And to     |
| 7  | justify that perhaps mild excursion from the     |
| 8  | text, Riverside Bayview noted the Corps's        |
| 9  | ecological judgments, that those judgments       |
| 10 | supported the categorical rule that where the    |
| 11 | line-drawing problem arises, that is when        |
| 12 | Congress can regulate these wetlands as waters.  |
| 13 | JUSTICE BARRETT: Mr. Schiff, let me              |
| 14 | follow up on Justice Jackson's question.         |
| 15 | 1344(g) is the biggest problem for you, clearly. |
| 16 | Is your answer to Justice Jackson                |
| 17 | she's pointing out that in the parenthetical in  |
| 18 | 1344(g), where it gives the state well,          |
| 19 | 1344(g) gives the state permitting authority but |
| 20 | excepts navigable waters, essentially, including |
| 21 | wetlands adjacent thereto. If we read "waters    |
| 22 | of the United States" as you propose, does that  |
| 23 | mean that wetlands fall in another world where   |
| 24 | neither states nor federal nor the federal       |
| 25 | government can regulate them?                    |

| 1  | MR. SCHIFF: No, not at all, Justice              |
|----|--|
| 2  | Barrett. I mean, certainly, there will be many   |
| 3  | wetlands that will still be regulated, even if   |
| 4  | the Court adopts the the the the test            |
| 5  | the Sacketts have offered precisely because of   |
| б  | this line-drawing problem, that that there       |
| 7  | will be wetlands that cannot be readily          |
| 8  | distinguished from adjoining waters.             |
| 9  | JUSTICE BARRETT: But you're                      |
| 10 | CHIEF JUSTICE ROBERTS: Thank                     |
| 11 | JUSTICE BARRETT: you're assuming                 |
| 12 | your oh, sorry.                                  |
| 13 | CHIEF JUSTICE ROBERTS: Go ahead.                 |
| 14 | JUSTICE BARRETT: You're assuming the             |
| 15 | adjacent you're assuming that we adopt your      |
| 16 | I'll save it for my my round, that's fine.       |
| 17 | CHIEF JUSTICE ROBERTS: Counsel, thank            |
| 18 | you. We've been talking a lot about adjacency,   |
| 19 | but your test also addresses the question of     |
| 20 | continuity. Are you saying in your brief that    |
| 21 | there is no wetland if, for example, in a few    |
| 22 | weeks in July, you know, the ground dries up and |
| 23 | there isn't a immediate connection between wet   |
| 24 | area and the navigable water?                    |
| 25 | MR. SCHIFF: No, Mr. Chief Justice. I             |

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1 mean, we make allowance for this normal 2 circumstances understanding that what should quide the line-drawing standard application is 3 what would in normal circumstances be the case. 4 So, if we're --5 CHIEF JUSTICE ROBERTS: Well, is it 6 7 normal circumstances if it's from the fall to the spring, but June, July, and August, it's --8 9 you don't have that kind of connection? 10 MR. SCHIFF: If on a normal yearly 11 basis there would not be a continuous 12 connection, then I think it would be very hard to fit the wetland into the rationale of the 13 14 line-drawing problem standard precisely. 15 CHIEF JUSTICE ROBERTS: And not simply 16 in the area that's dried up, but you would say 17 the entire area that is normally connected but isn't for three months in the summer, that whole 18 19 area is not a wetland? MR. SCHIFF: No, Mr. Chief Justice. 20 21 If I understand the hypothetical correctly, it's 2.2 not that it -- it suddenly defederalizes 23 everything. But, certainly, it's difficult to 24 understand textually how one can regulate an area as a water if on a regular basis there is 25

1 no water there, much that --

2 CHIEF JUSTICE ROBERTS: Does the
3 summer count as a regular basis? It just dries
4 up in the summer. It's pretty common, I think,
5 for wetlands or at least adjacent waters in many
6 situations.

7 MR. SCHIFF: Mr. Chief Justice, it's 8 certainly a regular occurrence. And, 9 admittedly, this is one of the cases at the 10 margin where I would say with respect to any 11 legal rule there's going to be difficult cases. 12 And perhaps that could be reduced through 13 further agency rulemaking.

14 But I think what's important and what 15 we haven't really discussed, which the Court hasn't noted much yet, is comparing whatever 16 17 shortcomings there may be in the line-drawing 18 problems test to the shortcomings that are 19 orders of magnitude greater from the only other 20 game in town, the significant nexus test, both 21 in terms of its lack of fidelity to the text, in 2.2 terms of its subversion of -- of the federal 23 structure, in terms of its much greater 24 difficulty in application.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

| 2  | Justice Thomas?                                  |
|----|--|
| 3  | JUSTICE THOMAS: Counsel, I'd like to             |
| 4  | just give you a minute to at least comment on    |
| 5  | what we have said about 1344(g) in SWANCC and    |
| 6  | what the Court has said about it in Riverside,   |
| 7  | because, as I recall, we suggested that it did   |
| 8  | not control the definition of "waters" or        |
| 9  | certainly did not have an overwhelming impact on |
| 10 | the definition of "waters."                      |
| 11 | MR. SCHIFF: Thank you, Justice                   |
| 12 | Thomas. Yes. In terms of the case law, no        |
| 13 | decision of this Court has ever relied upon      |
| 14 | 404(g) to affirm the version of adjacency that   |
| 15 | the EPA and the Corps advance. The most was      |
| 16 | Riverside Bayview, which said that 404(g) simply |
| 17 | means that some wetlands will be regulated. But  |
| 18 | the Court was not willing to go much beyond      |
| 19 | that.  |
| 20 | And with respect to how "adjacent"               |
| 21 | actually appears in 404(g), given the context of |
| 22 | physical topographic features, I think the most  |
| 23 | plausible understanding of that term is that     |
| 24 | Congress simply meant that those wetlands that   |
| 25 | are physically touching, the very facts that     |

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1 were at issue in Riverside Bayview, the fact 2 that Riverside Bayview's property was 3 essentially a cattail marsh that blended into 4 Lake St. Clair. And I think that is the most that 404(q) says. 5 6 And, again, that's a -- a proposition 7 that the Sacketts' test is fully consistent with. The Sacketts acknowledge that some 8 9 wetlands can be regulated under the line-drawing 10 problem standard. It's just that nothing in 11 404(q) can reasonably be interpreted to 12 represent some general congressional 13 ratification of the Corps's adjacency regulation 14 from 1977. 15 JUSTICE THOMAS: Thank you. 16 CHIEF JUSTICE ROBERTS: Justice Alito? 17 JUSTICE ALITO: Well, this case will 18 have -- may have a -- an important nationwide 19 effect, but we do decide concrete cases in 20 controversy, so I would like you to address the 21 theory that the government uses to determine 2.2 that the Sacketts' property constitutes wetlands 23 that can be regulated. 24 The property, as I understand it, is 25 separated from wetlands by a road, isn't that

1 right? 2 MR. SCHIFF: Yes, Justice Alito, by --3 by a road and then a roadside ditch on the other side of the road. That ditch then spills about 4 a half mile downstream into Kalispell Creek, 5 which then itself spills another thousand feet 6 7 from that point into Priest Lake. JUSTICE ALITO: And how does the water 8 9 from the Sacketts' property get to the ditch? 10 MR. SCHIFF: The short answer, Justice 11 Alito, is that the water doesn't get to the 12 ditch. It doesn't get to the wetlands. Ιt doesn't get to Priest Lake. There is no surface 13 14 connection from the Sacketts' property to any 15 plausible water. 16 JUSTICE ALITO: Well, what is the 17 government's theory of how the water from the 18 Sacketts' property gets to the wetlands? 19 MR. SCHIFF: The government doesn't 20 have a theory for that, which I think 21 underscores how broad the significant nexus test 2.2 is. 23 The government's theory is that the 24 wetlands on the other side of the road, which 25 are not connected to the Sacketts' property,

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1 that those can be combined with the Sacketts' 2 property on some theory that they're similarly 3 situated and only because the government then combined this 36 acres of wetlands that it could 4 then conclude that there was a significant 5 6 relationship to Priest Lake. 7 JUSTICE ALITO: So it's only by combining the water from the Sacketts' property 8 9 with this large wetlands that it comes to the 10 conclusion that there's a significant ecological 11 effect on Priest Lake? MR. SCHIFF: Yes, Justice Alito. 12 JUSTICE ALITO: Priest Lake is 13 14 navigable? 15 MR. SCHIFF: Yes. 16 JUSTICE ALITO: Does it cross a state 17 line? 18 MR. SCHIFF: No, it does not cross a 19 state line. 20 JUSTICE ALITO: If someone puts a boat in Priest Lake, is it possible to get to another 21 2.2 state from Priest Lake? 23 MR. SCHIFF: One would probably have 24 to negotiate some rapids through Priest River, 25 but I think it's fair to say that Priest Lake

1 would certainly qualify as a water of the United 2 States according to the interpretation that the 3 Sacketts have offered. JUSTICE ALITO: Thank you. 4 CHIEF JUSTICE ROBERTS: Justice 5 6 Sotomayor? 7 JUSTICE SOTOMAYOR: Yes. Counsel, I think that there has been a 8 9 misreading, and I obviously could be doing it, but I have read Justice Kennedy's significant 10 11 nexus test, and as I read his decision, he was 12 of the view that "adjacency" defined wetlands 13 that were adjacent to navigable waters and that 14 he was applying the significant nexus test to 15 deal with non-navigable waters that might be 16 waters of the United States. 17 And so I think that there are two 18 issues in this case. Justice Alito referenced 19 only one of them, which is whether or not the 20 tributary that runs from the bay fen to the 21 Sacketts' site, whether that is a marshland that 2.2 -- that constitutes a water of the United 23 States. That's what the Ninth Circuit saw. But there is also the Sackett site 24 25 running directly to Priest Lake, and that

1 Sackett site does run across -- below a road and 2 below some houses. I believe the government's position -- and it can speak for itself when it 3 gets up -- is that that connection is very 4 direct, that there is a subsurface flow, not a 5 6 groundwater flow, but a subsurface flow of 7 water. Isn't that -- am I correct about the 8 factual nature of this case? 9 10 MR. SCHIFF: Justice Sotomayor, you're 11 correct that the record contains some evidence 12 to the effect that there is a subsurface flow from the fen wetlands that are north of the 13 14 site, south underneath the Sacketts' property at 15 Priest Lake. 16 JUSTICE SOTOMAYOR: I'm not going that 17 far. I'm going from the Sackett site to Priest Lake. There -- there's some evidence there's a 18 19 subsurface flow there. 20 MR. SCHIFF: That is correct. 21 JUSTICE SOTOMAYOR: Now, as I 22 understand it, there's a difference between 23 groundwater and subsurface flows. Am I correct 24 about that too? 25 MR. SCHIFF: I don't believe, Justice

1 Sotomayor, that EPA has ever made such a -- such 2 a distinction. And, certainly, in the position of someone like the Sacketts, there practically 3 is no distinction. Whether it's subsurface or 4 really subsurface --5 JUSTICE SOTOMAYOR: Well, I think --6 7 MR. SCHIFF: -- one can't see it. JUSTICE SOTOMAYOR: -- no, it's not 8 that hard. I mean, if -- if -- yes, you can see 9 it, and you can see subsurface water when you 10 11 put your foot in the sand and you can feel it 12 underneath the top of the sand. You can feel it in how watery your soil is. I mean, it's not 13 14 impossible to know that there's a subsurface. 15 You could put a stake or a plot or something 16 into it and feel it immediately or have it 17 spring up immediately. 18 So there is a difference between 19 groundwater and subsurface water, isn't there? 20 MR. SCHIFF: Justice Sotomayor, I 21 don't believe legally there really is any 2.2 distinction. Again, if -- if the relevant point 23 is can one distinguish anything on the Sacketts' 24 property from Priest Lake, whether it's 25 subsurface or substantial --

1 JUSTICE SOTOMAYOR: But you don't 2 think there's a -- there's a difference? 3 MR. SCHIFF: Well, one thing, Justice Sotomayor, that I think is problematic with 4 relying upon any sort of subsurface connection 5 6 is that it essentially renders the test 7 limitless. I mean, it's hard to imagine --JUSTICE SOTOMAYOR: Why? 8 9 MR. SCHIFF: -- it's hard to imagine any property in this country that does not have 10 11 some degree of subsurface flow at whatever depth 12 that will ultimately -- I mean, the hydrological cycle is unified. Ultimately, that water is 13 14 going to flow to some surface water. 15 It's hard to imagine that Congress 16 could have intended, especially in a statute 17 that imposes such significant penalties for 18 someone who guesses wrong as to whether or not his or her property is regulated --19 JUSTICE SOTOMAYOR: Well, that goes 20 back to Justice Jackson's point, that what 21 2.2 Congress was concerned about was ensuring the --23 the sanctity of our waters and that those things 24 that directly discharged into it would be safe, 25 to keep our waters safe.

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MR. SCHIFF: Well, Justice Sotomayor, 1 2 I also think Congress was concerned about -about the sanctity of -- of -- of freedom and 3 private property rights and ensuring that people 4 at least have fair notice as to whether their 5 6 property is going to be regulated. If the test 7 \_ \_ JUSTICE SOTOMAYOR: Well, I mean --8 MR. SCHIFF: -- is surface to 9 subsurface --10 11 JUSTICE SOTOMAYOR: -- why is it their 12 -- whatever test, even yours right now, as you, in your answers to the Chief Justice, said that 13 14 we'll have to define what a normal season is, 15 we're going to have to define how many days are 16 continuous. So it's not a question that any 17 test that's being proposed won't have some lack of security for homeowners. But one thing about 18 19 the EPA process is you can always get -- you 20 could always ask the EPA for an opinion as to whether or not you fall within the definition. 21 MR. SCHIFF: Yes, Justice --2.2 23 JUSTICE SOTOMAYOR: And you then have 24 an opportunity to fight that definition, 25 correct?

1 MR. SCHIFF: That is correct, Justice 2 Sotomayor, but I think that actually indicates 3 why something like the significant nexus test is so problematic. It's hard to imagine any other 4 statutory system in the federal code that 5 6 requires a potentially regulated party to 7 initiate a rather expensive and time-consuming process just to find out whether, in fact, one 8 9 is regulated. 10 And that's precisely why the 11 jurisdictional determination process has been 12 developed in the age of the significant nexus, because it is a test that's very difficult to 13 14 know whether, in fact, one is regulated. 15 JUSTICE SOTOMAYOR: Well, that test 16 applies, as I mentioned, only to connections 17 that are not directly with waters. That's a 18 different issue. But that's not how we've been 19 -- that's not how you briefed this case or what we're looking for. We're looking for a 20 21 definition that has to do with a connection that 2.2 exists with traditional navigable waters. We may have to develop, as was the 23 24 insight of Justice Kennedy in Rapanos, a 25 different test like the significant nexus test

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| 1  | for those connections, like here, where there    |
|----|--|
| 2  | might be a tributary somewhere else.             |
| 3  | MR. SCHIFF: Justice Sotomayor, I                 |
| 4  | would say that if the test is subsurface         |
| 5  | connections to a traditional navigable water, I  |
| 6  | guarantee you that this case or something like   |
| 7  | it will be back here in another 16 years and we  |
| 8  | will be back in the same place that we have been |
| 9  | with property owners not knowing whether they    |
| 10 | are regulated, with the states not knowing what  |
| 11 | test to apply                                    |
| 12 | JUSTICE SOTOMAYOR: That's assuming               |
| 13 | that sub sub subsurface water is not             |
| 14 | differentiated between groundwater.              |
| 15 | MR. SCHIFF: Justice Sotomayor, again,            |
| 16 | I don't think that there is certainly a legal    |
| 17 | distinction that EPA has ever articulated        |
| 18 | between the two. And, moreover, I think, as a    |
| 19 | practical matter to the property owner, if it's  |
| 20 | subsurface, it doesn't necessarily follow that   |
| 21 | one standing in a marsh the Sacketts'            |
| 22 | property certainly wasn't a marsh, and there's   |
| 23 | no reason that                                   |
| 24 | JUSTICE SOTOMAYOR: Only because they             |
| 25 | put gravel in it.                                |

MR. SCHIFF: I'm sorry, Your Honor?

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2 JUSTICE SOTOMAYOR: Only because they 3 put gravel in it. MR. SCHIFF: Well, the original state 4 of the property was, before the -- the top soil 5 6 was taken out and the gravel was put on it, it 7 looked like a buildable lot. In fact, it was zoned as a buildable lot. It has a sewer 8 9 hookup. It has an address. Neighbors around 10 that property have built. 11 There was -- there's no sense that 12 this property is something that one might think, ah, there's water somehow flowing underneath, 13 14 that that connects it to Priest Lake. That's not the type of topography. 15 16 CHIEF JUSTICE ROBERTS: Thank you, 17 counsel. Justice Kagan? 18 19 JUSTICE KAGAN: Mr. Schiff, do you 20 think there's any third position? I mean, I --21 I understand that you don't like the significant

22 nexus test, but I'm going back really to Justice 23 Kavanaugh's point about, you know, take 24 something like you just create a dam so that --25 and the dam breaks up any idea that there is a

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1 continuous surface connection. 2 So, if I think, well, in that kind of 3 situation, it just -- it just can't -- you can't be right, but I also understand some of your 4 points about the significant nexus test, is 5 6 there anything in the middle? 7 MR. SCHIFF: To some extent, Justice Kagan. I think a middle position is the idea of 8 the nature of the barrier. I think this came up 9 10 a little bit, whether it's a natural barrier or 11 whether it's a permanent legal barrier, like the 12 roads that bound the Sacketts' property. 13 But, in a sense, it's not a 14 particularly satisfactory middle position 15 because it still doesn't really afford 16 appropriate fidelity to the text. Again, if 17 Congress -- Congress could tomorrow enact a 18 statute saying --19 JUSTICE KAGAN: Well, I think I'm asking you to assume that 1344 means more than 20 21 you think it means and suggests that there is 2.2 something in the text that says we're supposed 23 to figure out what it means for an adjacent 24 wetland, for a wetland to be adjacent. 25 So, if -- if I'm thinking of Justice

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1 Kavanaugh's example and thinking that looks 2 pretty adjacent to me, but, on the other hand, 3 I'm thinking of some of the objections that you have as to the Kennedy test, you know, what do I 4 do from there? You know, call it a backup 5 position, call it a compromise position, call it 6 7 whatever you want, is there a third option? MR. SCHIFF: In that sense, Justice 8 9 Kagan, I think there is. I mean, it's exemplified by the facts of the Sacketts' case 10 11 in that there's not even a -- a -- there's no 12 surface connection, much less any -- there's no surface connection from the Sacketts' property 13 14 to any plausible water. 15 I mean, I think certainly --16 JUSTICE KAGAN: That's just repeating 17 your test. I'm asking you for a test that's different from your test. 18 19 MR. SCHIFF: Well, I -- I would -- I 20 would hesitate a little bit to say it's the same 21 thing because our test is the line-drawing 2.2 problem test. But one could say that whether there might be marginal challenges about 23 24 defining boundaries in other cases, certainly, 25 where there's no surface connection, there

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1 cannot be any plausible argument that the 2 wetland itself is -- is inseparably bound up 3 with an abutting water. JUSTICE KAGAN: So your answer is no. 4 5 Okay. Thank you. 6 (Laughter.) 7 CHIEF JUSTICE ROBERTS: Justice Gorsuch? 8 JUSTICE GORSUCH: I'd like to return 9 to where Justice Sotomayor left off, and that is 10 11 adjacency. If we're going to have something 12 more than a continuous water surface test like we did in Riverside Bayview, if we're going to, 13 14 excuse me, expand beyond that, why not just look 15 at the geographic proximity between this 16 property and -- and the lake? 17 The lake is the -- the waters of the 18 United States that -- that -- that EPA 19 wishes to protect, understandably. They've got a circuitous route across a road down a drainage 20 21 ditch to an unnamed tributary to a named 2.2 tributary to the lake. That's their adjacency 23 theory. It's kind of a daisy wheel spun out from -- from the lake. 24 25 But that -- that's rather complicated

1 when one looks at the map, I mean, and it's the 2 back of the petition appendix, the picture. You're -- you're blocked from -- from -- from --3 from the lake. Why isn't that just adjacent 4 5 enough? 6 Now there's a subdivision between you 7 and the lake, I understand, but pretty close. A 8 lot closer route that way than this -- this 9 rather convoluted path around. 10 MR. SCHIFF: Justice Gorsuch, I -- I 11 think the reason why that's not satisfactory, 12 and I recognize that I've given this answer in 13 more than one form several times already this 14 morning, but I would still go back again to the 15 text. It was -- obviously, Congress knows about 16 wetlands. It included a reference to wetlands 17 in 404(q) among other places. It chose not to include that in the definitional section. 18 19 That has to mean something, and what 20 that means is that the relevant jurisdictional 21 entity is water. If something cannot be 2.2 reasonably classified as a water, taking into 23 account the line-drawing problem standard, then 24 the answer is simply Congress hasn't authorized

25 it. Maybe it is a good idea in terms of water

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1 quality, but that's for Congress to decide, 2 obviously, not for the Court. And that really has to be why mere 3 geographic closeness can't justify the 4 contratextual conclusion that a 5 two-third-of-an-acre residential lot with a 6 7 sewer hookup with an address and a mailbox is somehow considered a water of the United States. 8 JUSTICE GORSUCH: And -- and -- and --9 and that is what's being asked, is -- is a 10 11 person who purchased a property with -- with a 12 sewer hookup a block from the lake with a subdivision between you and the lake and a road 13 14 on the other side is supposed to know that 15 that's a water of the United States, that piece 16 of property, or else what? 17 What -- what are the -- what are the 18 penalties associated with this? What -- what 19 was threatened to your clients and what -- what does one face in these circumstances? 20 21 MR. SCHIFF: Well, certainly, for the 2.2 Sacketts in particular, they were threatened 23 with significant civil and administrative penalties and, of course, also the continuing 24 25 liability of having to restore the property to

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1 the way it was before they began any work. 2 But, also, there is lingering over all of this discussion the threat of criminal 3 penalties, and I think this is particularly 4 important because the waters of the United 5 States is as much relevant to the criminal 6 7 portions of the Clean Water Act as the civil portions. It's the same text. And I think that 8 9 should give the Court particular concern in 10 indulging any sort of malleable or somewhat 11 unclear or flexible test exemplified by the 12 significant nexus test. 13 JUSTICE GORSUCH: Thank you. 14 CHIEF JUSTICE ROBERTS: Justice 15 Kavanaugh? JUSTICE KAVANAUGH: You keep 16 17 emphasizing the text, but you agree that some 18 wetlands are covered as waters of the United 19 States, correct? 20 MR. SCHIFF: That is correct, Justice 21 Kavanaugh. 2.2 JUSTICE KAVANAUGH: And so the 23 question then becomes, as I see it, does the statute, does the text, cover only bordering or 24 25 contiguous wetlands, or does it also cover what

1 we might call neighboring wetlands? 2 Is that an appropriate way to phrase 3 what you think the precise dispute is? MR. SCHIFF: Yes, that is correct, 4 Your Honor. 5 6 JUSTICE KAVANAUGH: Okay. And on 7 404(g), which, as Justice Barrett says, is -- is critical here to the case, is your argument that 8 9 404(g) does not control or even illustrate what qualifies as waters of the United States, or is 10 11 your argument that "adjacent," the word in 12 404(g), does not mean neighboring or nearby but 13 requires actual touching? 14 MR. SCHIFF: Justice Kavanaugh, I --15 JUSTICE KAVANAUGH: Or both? 16 MR. SCHIFF: Justice Kavanaugh, I -- I 17 -- I would say it's both. I would say, again, falling precisely like Riverside Bay, which is 18 19 essentially the zenith of -- of this Court's indulgence of -- of EPA and the Corps's 20 21 interpretation of the Act. 2.2 At most, Riverside Bayview was willing 23 to say that 404(g) simply means that we can't 24 interpret waters to categorically exclude 25 wetlands. And that's all that the Court was

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1 willing to say. But the --

2 JUSTICE KAVANAUGH: Once you get 3 there, aren't you a little bit separated from the text as you see the text? In other words, I 4 don't know that you really agree with Riverside 5 6 Bayview when it comes down to it. You're not 7 asking for it to be overruled. MR. SCHIFF: Well, Justice Kavanaugh, 8 9 to be frank, we weren't all textualists then, 10 but today --11 JUSTICE KAVANAUGH: So -- but then --12 then you're asking us to put what you're calling 13 a textual limit on something that's divorced 14 from the text to begin with, it sounds to me 15 like, rather than going with neighboring, which 16 is the ordinary dictionary definition of 17 "adjacent" and also would -- would -- well, I'll 18 leave it there. 19 MR. SCHIFF: Well, Justice Kavanaugh, 20 with respect to -- to -- to the ordinary understanding of "adjacency," I certainly agree 21 2.2 that in the abstract "adjacent" has more than 23 one meaning. But I do believe that in the 24 context of 404(q), where it's trying to describe 25 relationships between topographic features, that

1 the most reasonable understanding, really, the 2 only plausible understanding, is that it means 3 physically touching. Again, when you combine it with the 4 fact that the central definitional section --5 6 JUSTICE KAVANAUGH: Last question, why 7 did seven straight administrations not agree 8 with you? MR. SCHIFF: Well, I wouldn't quite 9 10 say it's seven straight. At least the -- under 11 the Trump Administration, their proposal was 12 certainly closer to -- to what the text --JUSTICE KAVANAUGH: Wait. No, let's 13 14 be clear. They said that it would still be 15 covered even if it was separated by a berm or 16 dune, for example. 17 MR. SCHIFF: No, that is correct, and 18 19 JUSTICE KAVANAUGH: And under your 20 test, that would not be covered? 21 MR. SCHIFF: That is correct, Justice 2.2 Kavanaugh. And I don't presume to know more 23 than -- than those -- those seven prior administrations, but what I do know is what is 24 25 the text that Congress has used, and nothing can

1 supersede that. 2 JUSTICE KAVANAUGH: Thank you. 3 CHIEF JUSTICE ROBERTS: Justice 4 Barrett? JUSTICE BARRETT: Mr. Schiff, can you 5 6 explain to me why you wouldn't lose? Because I 7 take it you're saying that you wouldn't lose if we adopt a broader definition of "adjacent," 8 9 akin to the one that Justice Kagan is proposing. 10 MR. SCHIFF: Justice Barrett, I may 11 have misspoken. If "adjacent" means that 12 something is not adjacent if there is a man-made 13 barrier as opposed to a natural barrier, then, 14 obviously, here, the Sacketts' property is 15 bounded by man-made barriers. 16 And so what I meant to say is that --17 is that whether or not if the Court thought that 18 natural barriers might not defeat jurisdiction, 19 the Court could also say that at least here, with man-made barriers, there is no 20 jurisdiction. 21 2.2 JUSTICE BARRETT: Okay. I think -- I 23 think I didn't articulate my question clearly 24 enough. 25 MR. SCHIFF: Sorry.

1 JUSTICE BARRETT: So part of what 2 you've said is that 1344(q), Congress was doing 3 something different and that it didn't modify the definition of "waters of the United States" 4 that was existing. 5 6 Okay. So here's my question. Ιt 7 seems to me -- and this was kind of what Justice Jackson was getting at -- that that might be 8 9 true, that 1344(g) was doing something 10 different, but what it was doing was carving out 11 what the states could and could not regulate. 12 And if "adjacent" means something 13 broader -- and this is what I was starting to 14 ask you when time expired -- if "adjacent" means 15 something broader, then it seems to me that 16 there is a category of wetlands that nobody 17 could regulate. 18 So it seems to me that even though 19 1344(q) was doing something different and even 20 though Congress didn't modify the definition of "waters of the United States," that adjacent 21 2.2 matters to this case, and if we adopt the 23 definition Justice Kagan is proposing, that you 24 would lose. Am I right? 25 MR. SCHIFF: Justice Barrett, if I

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1 understand what -- what Justice Kagan is 2 proposing, that -- that neighboringness or mere 3 closeness is sufficient, then, necessarily then, 4 the Sacketts' property and a lot of other property in this country is going to be 5 6 regulated. 7 JUSTICE BARRETT: So, in that respect, 1344(q) does qualify or cast light on the 8 definition in 1362(7) of waters of the United 9 10 States? 11 MR. SCHIFF: It certainly does. 12 And -- and as I responded to Justice Kavanaugh, 13 the way it casts light is to indicate that to 14 some extent wetlands are going to be regulated. 15 The extent to which they're regulated, I think 16 that has to be -- it's in a sense 17 a-tail-wagging-the-dog problem. 18 JUSTICE BARRETT: But that -- but that 19 depends on our accepting the narrower definition 20 of "adjacent," correct? I mean, I see why your 21 whole theory hangs together if "adjacent" means 22 abutting.

23 MR. SCHIFF: Right, Your Honor.
24 And -- and what I mean by "tail wagging the dog"
25 is that I don't think it's really appropriate to

1 -- to look at how "adjacent" is used in 404(g) and then use that to sort of reinvent what the 2 3 central definitional section from Section 502 4 is. Rather, it's the other way around. 5 6 It's precisely because Section 502 was not 7 changed that the criterion remains waters, that that must then inform what "adjacent" means in 8 Section 404. 9 10 JUSTICE BARRETT: And is the idea 11 partly that because 1344(q) was enacted in 1977 and 1367 -- or 1362(7), was that 1972? 12 13 MR. SCHIFF: Yes, that's correct. 14 JUSTICE BARRETT: But, in any event, 15 it was preceding, that the later legislation 16 doesn't cast light on what the original meaning 17 of "waters of the United States" was? 18 MR. SCHIFF: Well, it's certainly not 19 definitive. It's not a ratification. And I don't want to go too far, Justice Barrett, in 20 21 saying that it means nothing, because, again, 2.2 Riverside Bayview says it does mean something. 23 But, again, it would be strange, it would be sort of an inversion of statutory 24 25 interpretation to say that this parenthetical

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| 1  | reference in a provision dealing principally    |
|----|---|
| 2  | with permit transfer authority suddenly         |
| 3  | backfills and dramatically changes the scope of |
| 4  | the central definitional portion of the Act,    |
| 5  | again, a portion that is as much at issue in    |
| 6  | criminal prosecution as it is in civil matters. |
| 7  | JUSTICE BARRETT: Thank you.                     |
| 8  | CHIEF JUSTICE ROBERTS: Justice                  |
| 9  | Jackson?  |
| 10 | JUSTICE JACKSON: Sorry. So you've               |
| 11 | said several times that Riverside Bayview said, |
| 12 | at most, that some wetlands could be regulated. |
| 13 | But, under your test, it appears that you're    |
| 14 | requiring visual indistinguishability. And I'm  |
| 15 | trying to assess whether or not Riverside       |
| 16 | Bayview actually gets you there.                |
| 17 | In that case, was it clear that the             |
| 18 | marsh area was visually indistinguishable from  |
| 19 | the abutting creek?                             |
| 20 | MR. SCHIFF: Yes, Justice Jackson,               |
| 21 | that is precisely how the government argued it  |
| 22 | in its briefing and at oral argument. We quote  |
| 23 | that portion in our reply brief where the       |
| 24 | emphasis is on how I believe these are the      |
| 25 | words that were used that from Riverside        |

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1 Bayview, it would not be an exaggeration to say 2 that one, after wading through a cattail marsh, could then swim into Lake St. Clair, that it was 3 a -- a continuous body of water that at some 4 point ended. And the Court, in looking at those 5 6 facts, said that it's appropriate to defer to 7 the Corps and the EPA in saying that the water ends at this point because we can't otherwise 8 say whether it's reasonable to have it end at an 9 earlier point. 10

11 JUSTICE JACKSON: But do you think 12 that that's -- is that going to be the case in every situation, that it's indistinguishable as 13 14 to when the marsh ends or the wetlands end and 15 the creek begins? I'm just trying to imagine 16 whether people were really confused in Riverside 17 Bayside as to which part was wetland and which part was water, and is that your test, we have 18 19 to have a visual indistinguishability?

20 MR. SCHIFF: Justice Jackson, there 21 may have -- there was certainly a dispute among 22 the parties as to the proper characterization of 23 the facts, but I think what matters is -- are 24 two things.

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25 One is how the government presented
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those facts to the Court and how the Court ultimately crafted a decision based upon those facts, meaning that the Court concluded that, as it said, between dry land and open water, the transition is not necessarily or even typically an abrupt one and that you have all sorts of features in between those two points.

8 And the Court said that it's not our 9 place to second-guess the agency determination 10 that in drawing the boundaries of waters, which 11 is the central jurisdictional term, in drawing 12 the boundaries of waters, it's not unreasonable 13 that there may be some semi-aquatic features 14 that are brought into that boundary.

JUSTICE JACKSON: So, under your test, in future cases, are we going to be debating in every case the extent to which there really is visual indistinguishability?

MR. SCHIFF: Absolutely not, Your Honor. And I think that if there were disputes, those disputes would be -- would pale in comparison to the number of disputes that have percolated throughout the lower courts over the last 16 years with respect to the significant nexus test.

1 This test, the line-drawing problem 2 test, is much simpler to apply. 3 JUSTICE JACKSON: Thank you. 4 CHIEF JUSTICE ROBERTS: Thank you, 5 counsel. 6 Mr. Fletcher. 7 ORAL ARGUMENT OF BRIAN H. FLETCHER ON BEHALF OF THE RESPONDENTS 8 9 MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court: 10 11 As the discussion so far illustrates, 12 everyone agrees that the waters protected by the Clean Water Act include some adjacent wetlands. 13 14 The narrow but important question presented in 15 this case is whether wetlands lose protection if 16 they're separated from other waters by a barrier 17 like a berm or a road. 18 Overwhelming scientific evidence and 19 essentially undisputed scientific evidence shows that those sorts of barriers do not diminish 20 21 wetlands' essential role in protecting the 2.2 integrity of other waters. And as Justice 23 Kavanaugh emphasized, for 45 years, the EPA and 24 the Army Corps have recognized that the presence 25 of such a barrier does not categorically strip a

1 wetland of the Act's protections.

| 2  | This Court should uphold that                   |
|----|---|
| 3  | longstanding interpretation for three reasons.  |
| 4  | First, in 1977, Congress was presented with     |
| 5  | proposals to limit the Act's coverage that      |
| б  | sounded very much like the proposal that you    |
| 7  | just heard, and it rejected them. Instead, it   |
| 8  | adopted Section 1344(g), which includes express |
| 9  | textual recognition that the waters covered by  |
| 10 | the Act include adjacent wetlands.              |
| 11 | The Court recognized in SWANCC, in the          |
| 12 | language that Justice Sotomayor quoted, that    |
| 13 | that was an unequivocal approval of the Corps's |
| 14 | regulation on adjacent wetlands.                |
| 15 | Second, this Court unanimously upheld           |
| 16 | those regulations in Riverside Bayview. Now     |
| 17 | it's true that the marsh at issue in that case  |
| 18 | happened to directly abut a creek such that one |
| 19 | could wade from one and then swim in the other. |
| 20 | But the Court did not rely on any difficulty in |
| 21 | identifying the boundary between the creek and  |
| 22 | the lake, and there wasn't one.                 |
| 23 | Instead, the Court relied on what it            |
| 24 | called the agency's ecological judgment that    |
| 25 | wetlands significantly affect neighboring       |

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1 waters. And the presence of a berm or other barrier does not sever that connection. 2 In fact, as the 2020 Navigable Waters Protection 3 Act emphasized, the presence of a river berm can 4 itself be evidence of the close connection 5 6 between the river and the neighboring wetlands. 7 Third and finally, the agencies are now doing what members of this Court have 8 9 repeatedly urged them to do by promulgating 10 regulations that recognize and appropriately 11 limit the coverage of the Act. Those 12 regulations incorporate the significant nexus 13 test, which is a limiting construction that 14 ensures that the Act reaches only those wetlands 15 that must be covered to reach the traditional 16 navigable waters in which the federal interest 17 is indisputable. 18 CHIEF JUSTICE ROBERTS: So --19 MR. FLETCHER: I welcome the Court's 20 questions. 21 CHIEF JUSTICE ROBERTS: -- is -- under 2.2 the position of the federal government, is a 23 ecological and biological connection between 24 wetlands and navigable waters enough to bring the wetlands into coverage? In other words, dry 25

1 land between it, but underneath -- you know, we 2 had that case in Hawaii that indicated how far 3 MR. FLETCHER: 4 Yeah. CHIEF JUSTICE ROBERTS: -- underneath 5 6 it could go -- there is a biological connection. 7 You know, you put some tracing materials in the wetlands, and they do find their way to the 8 9 lake. Is that enough under your view? 10 MR. FLETCHER: Not any connection. 11 We're not talking about the possibility that 12 some molecules of water eventually make their 13 way from the wetlands into the lake, but, 14 instead, what we take to be the significant 15 nexus standard from Justice Kennedy's opinion in 16 Rapanos, which traces back to SWANCC and 17 Riverside Bayview, that demands a significant 18 effect. 19 CHIEF JUSTICE ROBERTS: So how --20 well, what does that mean? I mean, how much of a biological connection does there have to be? 21 2.2 MR. FLETCHER: So the agencies now 23 have, you know, more than a decade of experience 24 applying this in practice, and they explained in 25 the guidance that they issued after Rapanos and

| 1  | have sort of reiterated and refined in the NPRM  |
|----|--|
| 2  | that they just issued in December of 2021 the    |
| 3  | factors that they consider in assessing          |
| 4  | significant nexus, and it includes things like   |
| 5  | distance to the tributary, distance to the       |
| б  | downstream traditional navigable water, the      |
| 7  | volume of the flow, the hydrology of the area,   |
| 8  | the presence of other wetlands.                  |
| 9  | I acknowledge it                                 |
| 10 | CHIEF JUSTICE ROBERTS: So so, if                 |
| 11 | the Sacketts or anybody else are walking around  |
| 12 | the area, they could look at something and see   |
| 13 | how long what what's the the distance            |
| 14 | factor?  |
| 15 | MR. FLETCHER: So the distance factor             |
| 16 | isn't a bright-line rule. You know, here, the    |
| 17 | fact   |
| 18 | CHIEF JUSTICE ROBERTS: Okay. So they             |
| 19 | know it's not a bright-line rule, but they have  |
| 20 | to figure out if a certain amount of whatever    |
| 21 | kind of tracing thing you use is deposited in    |
| 22 | the wetlands, they then have to figure out if    |
| 23 | that makes it all the way to the lake, no matter |
| 24 | how far away it is.                              |
| 25 | And I think, as your your friend                 |

1 pointed out, I forget what the phrasing was, 2 but, you know, water goes everywhere eventually, 3 right, and so there's probably going to be a 4 biological or ecological connection of some 5 sort. 6 MR. FLETCHER: So I'd say a couple 7 things. First of all, this case is focused on 8 9 provisions addressing adjacent wetlands. There are other provisions of the regulation dealing 10 11 with isolated waters that aren't at issue here. 12 But, for purposes of this case, there has to be 13 a showing of adjacency. 14 And, right now, the Corps and the EPA 15 have not tried to reduce that to a bright-line rule. They tried that approach in the 2015 16 17 rule, and that was criticized by many as being 18 arbitrary. 19 CHIEF JUSTICE ROBERTS: Have they 20 tried to reduce it to a vague rule? 21 MR. FLETCHER: Yeah, I think -- I 22 think they've said reasonable proximity, and 23 they've said that reasonable proximity depends 24 on the hydrology of the area. If you have a 25 flat floodplain where often floods from the

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1 river reach waters or wetlands that are at some 2 distance from the river --3 CHIEF JUSTICE ROBERTS: So somebody looking around the lot would have to look at the 4 wetlands, if they can see them, and the lake and 5 6 say is that reasonable proximity or not? 7 MR. FLETCHER: That's right. Yes, that is the standard. And I --8 CHIEF JUSTICE ROBERTS: That's the --9 that's the standard that is used in criminal 10 11 prosecutions as well? 12 MR. FLETCHER: That's correct, Mr. 13 Chief Justice, but I don't think that's an 14 unusual standard in regulatory or criminal 15 statutes. And as the most recent example, I'd 16 point to the Court's last Clean Water Act case, 17 County of Maui, where the Court adopted a 18 standard for indirect discharges into the 19 navigable waters, and the dissents criticized that standard because it was a multifactor test 20 21 that was not capable of being reduced to precise 2.2 rules. 23 CHIEF JUSTICE ROBERTS: Yeah, but the 24 sewage plant was pretty proximate to the ocean, 25 right? How far apart -- away was it?

1 MR. FLETCHER: I don't remember 2 exactly how far apart, but it was pretty 3 proximate. But, on the other hand, the Sacketts' wetland is pretty proximate to the 4 tributary and the lake. We're talking about 30 5 feet to the tributary and just 300 feet to the 6 7 lake itself. 8 CHIEF JUSTICE ROBERTS: Well, yeah, in the Hawaii case, though, we were talking about a 9 10 big sewage plant. 11 MR. FLETCHER: So that's right, Mr. 12 Chief Justice, and I guess -- I think this --13 this gets to another issue in the case, which is 14 that what we're talking about now is whether 15 wetlands are brought within the Act's coverage 16 at all. 17 The fact that they're covered by the 18 Act does not mean that development is 19 It just means that development has prohibited. 20 to be permitted. And if the Sacketts' wetlands would not significantly affect or degrade Priest 21 2.2 Lake because of their location or their size or 23 anything else, that's something that's 24 appropriately taken into account in the 25 permitting process. This is just about which

1 wetlands are going to have some examination to 2 make sure that that degradation does not occur. 3 JUSTICE KAGAN: Can I ask you to clarify some of the answers that you just gave 4 to the Chief Justice? I mean, the statutory 5 6 language is of adjacency, and at certain points 7 in your answer, you suggested that the significant effects test is really just the test 8 9 that you use to evaluate whether there's 10 sufficient adjacency. 11 At another point when you talked to 12 the Chief Justice, you said that the test was reasonable proximity. Is reasonable proximity 13 14 the same as significant nexus? Is -- is -- is 15 what you're doing trying to figure out how, 16 other than by demanding strict contiguity, one 17 defines adjacency, and then, you know, dealing with the hard issue of it just doesn't seem as 18 19 though it should be 50 but not 51, but I think 20 what the Chief Justice is asking you is, well, what do you look to then, you know, name the 21 2.2 three things that matter when you're saying is 23 something adjacent enough? MR. FLETCHER: Right. So "significant 24 25 nexus" and "adjacency" are separate concepts.

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1 Adjacency traces back to the original 2 regulations from 1975 and 1977 picked up in 3 Section 1344(q). The agencies have long said that adjacent wetlands are covered. 4 In Rapanos, Justice Kennedy's 5 concurrence said that for traditional navigable 6 7 waters, he accepted that adjacency alone was sufficient to justify inclusion. But, for 8 9 wetlands that were adjacent to tributaries 10 further upstream, Justice Kennedy thought that 11 some additional showing had to be made. 12 JUSTICE KAGAN: Okay. Then, if you're going to separate them, which I had thought that 13 14 you hadn't done, so my mistake, but if you're 15 going to separate them, where does the 16 significant nexus test come from? 17 MR. FLETCHER: So I think it's a --18 it's a limiting construction that limits the 19 sort of -- the broad language of the statute is "waters of the United States," and as I think 20 the Court has recognized, that could conceivably 21 2.2 cover literally every body of water in the 23 country. We know it doesn't mean that. 24 We also 25 know it means something more than just navigable

1 waters, and so we need a test to figure out 2 which additional waters are covered. And what the significant nexus test does is it says it's 3 permissible to sweep in additional waters if 4 they significantly affect the traditional 5 navigable waters that were the sort of core 6 7 focus of the Act. JUSTICE KAGAN: Well, you haven't told 8 9 me where that comes from. I mean, it might -it sounds like a very good idea to have such a 10 11 test, but where does it come from? 12 MR. FLETCHER: From this Court's cases 13 which say you have to give effect to two things. The term being defined is "navigable waters," 14 15 but the definition is broad and doesn't include any requirement of navigability. 16 17 And the way we read Riverside Bayview 18 and SWANCC is to say you can include other 19 waters that are not themselves navigable, but 20 the justification for including them has to be 21 their effects on the traditional navigable 2.2 waters that are the core of the statute. Things 23 like migratory birds -- that was the issue in 24 SWANCC -- aren't good enough.

25 JUSTICE BARRETT: And they need not be

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1 adjacent. So what Justice Kagan's question is 2 getting to -- and I want to make certain I 3 understand it because it's important to me -the significant nexus test is separate and 4 apart, so it can be not adjacent, but so long as 5 there's a significant nexus, it's still covered, 6 7 it's untethered from 1344(g) in that respect? MR. FLETCHER: I want to be very clear 8 9 to distinguish between what we think you have to 10 decide in this case and then also, in candor, 11 tell you what the agency's view is about other 12 circumstances. 13 So this case is about the regulations 14 dealing with adjacent wetlands, and as to those 15 wetlands, the agencies think they're covered if 16 they're adjacent to traditional navigable waters 17 or if they're adjacent to upstream tributaries 18 and they satisfy the significant nexus test. 19 It's an additional limiting 20 construction that --21 JUSTICE BARRETT: Okay. 2.2 MR. FLETCHER: -- that narrows the 23 scope of the Act. The agency --24 JUSTICE ALITO: What is your -- I'm 25 sorry.

| 1  | MR. FLETCHER: I was just going to say            |
|----|--|
| 2  | the agencies have also said and this is          |
| 3  | reflected in the Notice of Proposed Rulemaking   |
| 4  | they would cover other waters if even if         |
| 5  | they weren't adjacent to navigable waters if     |
| 6  | they could satisfy the significant nexus test,   |
| 7  | but that's not really before you here because    |
| 8  | everyone agrees that if you accept our view that |
| 9  | "adjacent" means neighboring, then the Sacketts' |
| 10 | wetlands are covered.                            |
| 11 | I'm sorry, Justice Alito.                        |
| 12 | CHIEF JUSTICE ROBERTS: Justice Alito?            |
| 13 | JUSTICE ALITO: What is your                      |
| 14 | understanding of the term "waters"?              |
| 15 | MR. FLETCHER: We think it so our                 |
| 16 | understanding of it is reflected in the agency's |
| 17 | regulations, which have for 45 years spelled out |
| 18 | the different sorts of waters that are covered.  |
| 19 | I think, if I were to try going to reduce it     |
| 20 | to a phrase, it would be geographic features     |
| 21 | that are characterized by the presence of        |
| 22 | waters.  |
| 23 | And I think where I'd part ways with             |
| 24 | my friend is that I'd say that's not just lakes, |
| 25 | streams, and rivers. It's also marshes and       |

1 swamps. 2 JUSTICE ALITO: Any geographic feature 3 that has water in it at least at some period during the course of the year, that -- that 4 5 falls within the term "waters"? 6 MR. FLETCHER: So, again, as I said, 7 this is something that the agencies have fleshed out over many decades, and one of the things 8 that they've done is exclude both because of 9 10 particular statutory provisions excluding 11 particular types of waters and also because the 12 agencies as a matter of regulation have excluded 13 things like irrigation ditches, waste treatment 14 systems, small erosional features, those sorts 15 of things. So I don't --16 JUSTICE ALITO: They can be man- --17 MR. FLETCHER: -- want to say --18 JUSTICE ALITO: -- they can be 19 man-made features, right? 20 MR. FLETCHER: That's correct, yes. 21 JUSTICE ALITO: Why aren't irrigation ditches included? 2.2 23 MR. FLETCHER: I think irrigation 24 ditches aren't included both because the -- the 25 agencies have made the determination that it

1 doesn't make sense to include them and also 2 because, typically, irrigation ditches bring 3 water from the waters of the navigable waters, canals, rivers, things like that, and distribute 4 it out into rivers. They're not bringing water 5 6 back into the navigable waters. 7 JUSTICE ALITO: Well, if we forget about everything the agencies have done and 8 9 everything this Court has said about the 10 question of what constitutes waters, what would 11 you say is the definition of "waters"? Is it --12 a definition was provided by the plurality opinion in Rapanos. You disagree with that. 13 14 Does it include any place in the United States 15 that has water in it? 16 MR. FLETCHER: No, I don't think it 17 does. I accept the -- the Rapanos plurality's idea that it has geographic features 18 19 characterized by the presence of water. I'd go 20 further than that and say that wetlands can 21 easily fit that description. 2.2 And I acknowledge that there are some 23 difficult cases about how do you distinguish between a wash and an intermittent or a seasonal 24 25 stream or a river. Those cases really aren't

1 before you here. This is a case about whether 2 adjacent wetlands are waters, and I think, on 3 that point, the sort of clearest place to look 4 is Section 1344(q). JUSTICE ALITO: No, but we need to 5 know what "waters of the United States" means. 6 7 That's what we're interpreting. We're really 8 not interpreting 1344(q). 1344(g) may shed some light on what is 9 meant by "waters of the United States," but 10 11 we're interpreting what is meant by that phrase, 12 that cryptic phrase, a strange phrase, "waters of the United States." 13 14 MR. FLETCHER: So I agree exactly with 15 the description of what the Court ought to do. 16 And my point was just that it's a difficult 17 problem of how to interpret it and apply it to 18 all of the different water features in the 19 country. 20 And I was trying to emphasize the 21 specific question before you is what to do about 22 wetlands adjacent to other waters. And on that 23 point, 1344(g)'s text and history I think speak 24 very clearly and provide in our view dispositive 25 guidance about how to interpret and apply that

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1 general statutory language to this particular 2 category. 3 JUSTICE KAVANAUGH: But the text doesn't say in referring to adjacent in 1344(g) 4 whether that means bordering or contiguous and 5 stop there or also include neighboring, as the 6 7 regulation does. And as I understand, the case really, 8 as your brief set it out, comes down to, okay, 9 10 what about a wetlands separated by a berm or 11 dune or by a dike or levy? 12 And on that question, I -- I suppose, 13 since Congress hasn't specified that it goes 14 that extra step, why not let Congress figure out 15 where the line is? 16 I mean, I think that's the toughest 17 hurdle you face, is that Congress -- we've 18 gotten, as Justice Alito, says from waters to 19 adjacent and now from contiguous or neighboring 20 to -- contiguous or bordering to also 21 neighboring, and shouldn't that be Congress's 2.2 job? So what's your general response to that? 23 MR. FLETCHER: So I think, if you look 24 at 1344(g) in context, Congress has answered 25 this question. We think you'd get there past

1 just directly abutting and to neighboring on the 2 dictionary definitions alone, the definitions we cite at page 22 of our brief, but I don't think 3 you need those here because of the history 4 against which Congress acted. 5 6 And, Justice Barrett, this goes to 7 your question about the chronology. The Corps of Engineers first defined "the waters of the 8 9 United States" to include adjacent wetlands in 10 1975. An interim regulation was issued in 1975, 11 and those regulations said adjacent or 12 contiguous to and so I think already made it clear that we're not just limiting to contiguous 13 14 right here. 15 JUSTICE KAVANAUGH: Then it spelled it 16 out only in '77. MR. FLETCHER: Then, in July of 1977, 17 18 it spelled it out. It said we're deleting 19 contiguous because that's a subset of adjacency 20 and we're making explicit that the presence of a 21 barrier like a berm or a dune is not enough to 2.2 defeat adjacency. 23 And then Congress comes along in December of 1977 and in this carveout in 1344(q) 24 25 which is dividing up which waters are going to

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1 be covered by the states, which are going to be 2 reserved to the federal governments. 3 And in doing that, Congress drew a 4 line that was reflected in the Corps's regulations. The Corps had, when it expanded 5 6 jurisdiction out, it said we're going to phase 7 in this expansion of our jurisdiction. We're going to start with traditional navigable waters 8 9 and their adjacent wetlands and then we're going to move to other things later. 10 11 And what Congress did in 1344(q) was 12 say the federal government is going to keep permitting authority over phase one and the 13 14 states can take permitting authority over 15 everything else. 16 And I think that context makes it 17 especially clear that Congress was picking up 18 the concept of adjacency that was reflected in 19 the Corps's regulations. 20 JUSTICE KAVANAUGH: And it's kind of a bank shot way to do it, you would acknowledge 21 2.2 that? 23 MR. FLETCHER: So I guess, Justice Kavanauqh, I think --24 25 JUSTICE KAVANAUGH: And you used the

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1 phrase "shed light on." What does -- what does 2 that mean? 3 MR. FLETCHER: Well, I think it 4 confirmed that the agency's understanding was correct. So, you know, this is the term, 5 "waters of the United States." The Corps, the 6 7 EPA, the Department of Justice, the courts all interpreted that to reach adjacent wetlands. 8 And Congress was then presented with a 9 10 lot of the same objections you're hearing now 11 with people saying this is too much of an 12 intrusion on the states, this is messing with farming and ranching and other activities. And 13 14 there was a serious proposal to curtail the 15 jurisdiction in the way that they suggest. But 16 \_ \_ 17 JUSTICE KAGAN: Can I --18 JUSTICE KAVANAUGH: And Congress 19 carved out --JUSTICE ALITO: If 13- --20 21 JUSTICE KAVANAUGH: -- farming and 22 agricultural activities? 23 MR. FLETCHER: Exactly right. It did 24 something different. It said we're not going to 25 accept a proposal to carve out wetlands from the

1 Act's coverage entirely.

| 2  | Instead, we're going to do two                  |
|----|---|
| 3  | things three things actually. We're going to    |
| 4  | carve out certain activities like farming and   |
| 5  | ranching. We're going to transfer permitting    |
| 6  | authority over some wetlands to the states to   |
| 7  | give the states a greater role in things. And   |
| 8  | then we're going to ratify this concept of      |
| 9  | general permits to streamline the permitting    |
| 10 | process.  |
| 11 | So it was sensitive to these concerns,          |
| 12 | but it rejected the idea of carving off wetland |
| 13 | coverage in the way that Petitioners are now    |
| 14 | JUSTICE ALITO: If 1344 I'm sorry.               |
| 15 | CHIEF JUSTICE ROBERTS: Justice                  |
| 16 | Gorsuch.  |
| 17 | JUSTICE GORSUCH: Thank you.                     |
| 18 | Mr. Fletcher, I just want to                    |
| 19 | understand your concept of "adjacency" and how  |
| 20 | it differentiates from substantial nexus.       |
| 21 | So your your first point was that               |
| 22 | if it's adjacent to a water of the United       |
| 23 | States, we're done.                             |
| 24 | MR. FLETCHER: Right.                            |
| 25 | JUSTICE GORSUCH: We don't do the                |

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1 substantial nexus test. And I want to 2 understand how much adjacency is adjacent. 3 I think you indicated that you -- you 4 thought that this property -- and I just want to make sure I heard you right -- that this 5 6 property is adjacent indeed to a water of the 7 United States because it's close enough to Priest Lake itself. 8 9 MR. FLETCHER: So I want to -- that is 10 my view. 11 JUSTICE GORSUCH: Okay. 12 MR. FLETCHER: I want to be clear 13 about how the case has developed, though. 14 JUSTICE GORSUCH: I -- I -- I just 15 want to make sure --16 MR. FLETCHER: Okay. 17 JUSTICE GORSUCH: -- I just want to 18 understand that's the view of the government. 19 Despite the fact that there's a subdivision 20 between this property and the lake, it's still 21 adjacent to the lake? 2.2 MR. FLETCHER: That's the government's 23 view. That --24 JUSTICE GORSUCH: And it's adjacent 25 why? What's the definition of "adjacency"

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1 that's independent from substantial nexus? And 2 then I have a couple follow-ups to that. 3 MR. FLETCHER: Sure. So it's -- the agency's understanding of "adjacency" is, you 4 know, neighboring, and we have -- they have 5 6 cached that out by saying it's a reasonable 7 proximity to a covered water. 8 JUSTICE GORSUCH: Is there a mileage limit to that? 9 10 MR. FLETCHER: So they haven't tried 11 to do that. They did try that in the 2015 rule. 12 They said there anything within a hundred feet 13 or anything within the hundred-year floodplain 14 and 1500 feet. And they were --15 JUSTICE GORSUCH: But those have been 16 rejected. 17 MR. FLETCHER: Those have been 18 rejected. 19 JUSTICE GORSUCH: So does a reasonable 20 landowner have any idea? So, for example, in Priest Lake, I imagine that most of the water 21 2.2 flow and rainfall and snowfall in quite a large 23 geographic area drains into the lake eventually or wishes to, unless diverted. 24 25 Would that whole watershed be adjacent

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     to?
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               MR. FLETCHER: So I don't think so,
 3
      Justice Gorsuch. And, also, as -- I am
      sympathetic to the idea of how does a landowner
 4
 5
     know under the standard whether their land is
     covered. It's important to recognize that there
 6
7
      are other limits too. They have to actually be
     wetlands. So --
8
                JUSTICE GORSUCH: No, I understand
 9
10
      that.
            I'm just asking about adjacency.
11
                MR. FLETCHER: Understood.
12
                JUSTICE GORSUCH: How does anyone
13
     know, any reasonable person know, within maybe
14
      several hundred square miles in -- in a
15
     watershed that drains into a body of water that
16
      is a water of the United States, know whether or
17
     not their -- their land is adjacent to?
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                MR. FLETCHER: So I think we are
19
      talking about adjacency, and that may not be
20
      something that gives you bright-line rules, but
21
      it rules out things that are many miles away.
2.2
                JUSTICE GORSUCH: Does it?
23
               MR. FLETCHER: In -- in my --
24
                JUSTICE GORSUCH: Are you sure the EPA
25
     would take that view?
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1 MR. FLETCHER: In -- I've asked this 2 question. The agencies have told me they do not 3 draw bright-line rules. They do not think 300 4 feet is unreasonable for adjacency. JUSTICE GORSUCH: So how about 3,000 5 б feet? Could be? 7 MR. FLETCHER: I don't -- I don't know the answer to that, Justice Gorsuch. 8 9 JUSTICE GORSUCH: Could it be three miles? 10 MR. FLETCHER: I -- I don't think it 11 12 could be three miles. 13 JUSTICE JACKSON: Is there a process 14 for --15 JUSTICE GORSUCH: One -- I'm -- I'm 16 sorry. I'm just -- I'm just -- so -- so it 17 couldn't be three miles? 18 MR. FLETCHER: I don't think it could, 19 Justice Gorsuch. 20 JUSTICE GORSUCH: Could it be two 21 miles? 22 MR. FLETCHER: That, again, when we 23 start to talk about miles, that sounds too far 24 to be adjacent -- to reasonably be proximate to. 25 JUSTICE GORSUCH: One mile?

MR. FLETCHER: Again, I see where this 1 2 is headed. 3 (Laughter.) MR. FLETCHER: But, again, I think --4 JUSTICE GORSUCH: So, if the federal 5 6 government doesn't know, how is a person subject 7 to criminal time in federal prison supposed to know? 8 9 MR. FLETCHER: So the agencies, in recognition of this problem, make available free 10 11 of charge jurisdictional determinations as to 12 any property. They also publicize their manuals and make available on websites every 13 14 jurisdictional --15 JUSTICE GORSUCH: Their manuals, 16 though, don't tell us the answer. 17 MR. FLETCHER: So I understand, 18 Justice Gorsuch, and I -- I think you could make 19 similar criticisms and -- and the dissenting Justices did make similar criticisms of the 20 functional equivalent to an indirect discharge 21 2.2 standard in County of Maui. And the Court 23 recognized that sometimes Congress gives us laws 24 where the text isn't susceptible to bright-line 25 rules. I think adjacency is one of those that

1 cannot be --2 JUSTICE GORSUCH: I'm done on 3 adjacency. I've got some substantial nexus questions, but I've got a colleague who wants to 4 5 ask a question first. 6 JUSTICE JACKSON: Yes, I just -- I 7 just wanted to follow up on Justice Gorsuch's very fair points, which were my points. How do 8 9 -- how do people know? Is there a process by 10 which a homeowner can ask? 11 MR. FLETCHER: Yes. Any homeowner can 12 ask the Corps for a jurisdictional determination. The Corps makes those available 13 14 free of charge. 15 JUSTICE JACKSON: And so you're not 16 really facing criminal liability without the 17 opportunity to get an assessment from the 18 government regarding your particular 19 circumstances? 20 MR. FLETCHER: That's correct. 21 JUSTICE JACKSON: All right. And --2.2 JUSTICE ALITO: And what happens if 23 this -- if the -- the government's determination based on this multifactor test is that you can't 24 25 develop your property? Then what recourse does

1 the homeowner have? 2 MR. FLETCHER: The homeowner can 3 challenge that determination. If we're talking about a determination that you can't develop, 4 that wouldn't just be a jurisdictional 5 determination. That would have to also be a 6 7 permitting decision --8 JUSTICE ALITO: Yeah. Okay. But --MR. FLETCHER: -- because just being 9 covered doesn't mean you can't develop. 10 JUSTICE ALITO: -- what if the 11 12 homeowner doesn't agree with the jurisdictional 13 decision? 14 MR. FLETCHER: This Court's decision 15 in Hawkes makes clear that the homeowner can 16 seek judicial review of that at that point, 17 without potentially incurring any penalties, can 18 challenge the jurisdictional determination there and can also seek a permit, you know, and that 19 20 is -- I think it's important to emphasize just 21 again that being covered by the Clean Water Act 2.2 doesn't mean no development. It means review. 23 And the Corps have -- have taken a lot 24 of steps at Congress's behest to streamline the process through the availability of nationwide 25

1 permits for things like road construction, for 2 the development of dams, for single-family home construction, in order to --3 JUSTICE BARRETT: But the 4 site-specific which is applicable to the 5 6 Sacketts, you don't dispute in your brief that 7 that can cost hundreds of thousand dollars and be years and years? It's just the general 8 9 permitting that gets you out of that and gets 10 you in the \$14,000 range in the shorter time 11 period? 12 MR. FLETCHER: So we think the several 13 hundred thousand dollars is exaggerated for the 14 site-specific permits as well. The same source 15 that we cite on page 37 of our brief for the 4 16 to 14,000 dollars for nationwide permits gives 17 numbers of 17,000 to 35,000 dollars as the 18 usual cost --19 JUSTICE BARRETT: Site-specific? 20 MR. FLETCHER: -- for site-specific, that's right. And it's also important to 21 2.2 recognize that those site-specific permits often 23 involve much bigger projects that could be major 24 developments spanning many, many acres. So 25 that's the agency's best estimate of the cost of

1 a simple --2 JUSTICE BARRETT: So Rapanos was just 3 wrong in citing that statistic? MR. FLETCHER: In our view, that 4 statistic is not consistent with the best 5 information we have now. And that's from the 6 7 2021 regulatory impact analysis of the re-issuance of the nationwide permits. 8 9 JUSTICE SOTOMAYOR: Your -- your adversary, the other side -- I shouldn't call 10 11 them adversary -- your -- the other side argued 12 that Mr. Sackett could not tell this was a marshland. Is that true? Because you said the 13 14 first thing is it has to be a wetland. 15 MR. FLETCHER: So I don't know what 16 Mr. Sackett could tell, and I don't want to 17 speak to that. What I can speak to is what's in 18 the record, which is communications from the 19 Army Corps to the prior owner in 1996 saying this is a jurisdictional wetland, you would need 20 21 a permit to build, here's information about how 2.2 to seek nationwide permits. 23 And we also have the pictures of the 24 property that are at Petition Appendix 37 to 39 25 and also in the Joint Appendix. Now we don't

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1 have pictures before it was filled in with 2 gravel, but the pictures after it was filled in 3 with gravel show that the parts that are not filled with gravel have standing water in them. 4 And, also, the Sacketts' own 5 6 environmental consultant who came and looked at 7 the property confirmed the Corps's judgment that these are wetlands. 8 9 I think it's also worth emphasizing 10 that although they're now separated by the 11 larger fen across the street by Kalispell Bay 12 Road, historically, before the road was built, 13 that wasn't true. It was all part of one 14 wetlands complex, and the whole fen drained down 15 through the Sacketts' property and into Priest 16 Lake. 17 JUSTICE KAVANAUGH: Is it possible --18 JUSTICE SOTOMAYOR: Counsel --19 JUSTICE KAVANAUGH: Go ahead. 20 JUSTICE SOTOMAYOR: Just one last 21 question, and borrowing from Justice -- what 22 Justice Kagan did before, as you can probably 23 tell, some of my colleagues are dubious that 24 this is precise enough definition, adjacency, to 25 survive.

1 So is there another test? Not the 2 Rapanos test, not the adjacency test, not the 3 significant nexus test. But is there another test that could be more precise and less 4 open-ended than the adjacency test or the 5 significant nexus test that you use? Is there 6 7 some sort of connection that could be articulated? 8 9 MR. FLETCHER: So I'd say a couple 10 things about that. 11 I'd say, first of all, that if you're 12 in that world, you're past the sort of line-drawing problem or the notion that wetlands 13 14 aren't really waters and so are only covered if 15 they're indistinguishable, and, instead, we're 16 making a judgment about which wetlands are appropriate to cover because of their effect. 17 18 JUSTICE SOTOMAYOR: Exactly. 19 MR. FLETCHER: Now there are different ways to draw that line. Justice Kennedy 20 articulated the significant nexus test. The --21 2.2 JUSTICE SOTOMAYOR: But that's -- but 23 that's when it's not adjacent, correct? MR. FLETCHER: That's when it's not 24 25 adjacent to a traditional navigable water.

1 JUSTICE SOTOMAYOR: Right. I want to 2 go --3 MR. FLETCHER: That does apply to adjacent to a tributary. 4 JUSTICE SOTOMAYOR: -- because we seem 5 6 to be searching for wetlands adjacent --7 MR. FLETCHER: Right. 8 JUSTICE SOTOMAYOR: -- so let's stick 9 to that. 10 MR. FLETCHER: Right. So, for 11 wetlands adjacent, if you wanted a sort of 12 crisper, clearer definition of "adjacent," I --13 as I think my colloquy with Justice Gorsuch 14 illustrates, I think it's difficult to say that 15 there's one single bright-line answer. The agencies are taking comment on this and are 16 17 considering whether there are things that they 18 could do to provide greater clarity to the 19 regulated public on all parts of the test, 20 including adjacency and significant nexus. 21 The 2015 rule, as we discussed, tried 2.2 to draw some bright-line rules. Those were 23 criticized as arbitrary and overinclusive, which 24 is the problem with bright-line rules. They'll 25 be overinclusive or underinclusive. But I

1 certainly think there is a range of reasonable understandings of what "adjacency" means, and 2 3 also I know you're focused on that, but significant nexus too. 4 JUSTICE KAGAN: Did -- did I just 5 6 understand you to say that the rule that you're 7 issuing may, in fact, have more guidance than we currently have as to what "adjacency" means? 8 MR. FLETCHER: I don't want to 9 represent what's coming in the forthcoming rule 10 11 because it's not issued yet. By definition, the 12 agencies haven't finished their deliberation. I 13 will say they've sought comment on how to cache 14 out, how to crystallize the significant nexus 15 test and the adjacency framework that it is a 16 part of. And they've also said that even after 17 this rulemaking, they are interested in --18 JUSTICE KAGAN: When is the rulemaking 19 coming down? MR. FLETCHER: So it's with OMB now. 20 21 It's public that in September it went over to 2.2 the Office of Management and Budget for 23 interagency review. The agencies have told me 24 that they still expect to issue it by the end of 25 the year.

1 JUSTICE KAVANAUGH: Is it possible for 2 you to be correct about the adjacent test as articulated so far, but the Sacketts win? 3 MR. FLETCHER: I don't think so, 4 Justice Kavanauqh. I don't --5 6 JUSTICE KAVANAUGH: And why is that? 7 MR. FLETCHER: So I don't take them to be disputing that if "adjacency" means something 8 9 more than just directly abutting or contiguous 10 with, then their property satisfies that standard because it's just 30 feet away from the 11 12 tributary across the street. 13 JUSTICE GORSUCH: -- across the street 14 because that's -- that's where we need the 15 substantial nexus test, right? 16 MR. FLETCHER: No, the substantial 17 nexus has to go to the navigable water, sort of 18 downstream navigable water. 19 JUSTICE GORSUCH: Oh, I thought -- I 20 thought, if you're adjacent to a water of the 21 United States, you're good to go. 2.2 MR. FLETCHER: I'm sorry. Yes, yes, 23 yes. 24 JUSTICE GORSUCH: Okay, but -- so you 25 need substantial nexus if you're working through

1 the tributary, which is, if you look at the 2 appendix, that great picture at the end is 3 across the street, through a ditch, and then down through a creek, and then it eventually 4 gets to the water of the United States. And so, 5 6 for that, you need the substantial nexus between 7 the Sacketts' property across the road and into 8 the ditch at least, right? 9 MR. FLETCHER: So, yes, but with a couple caveats if I -- if I could. 10 11 JUSTICE GORSUCH: Okay. 12 MR. FLETCHER: You're right that you 13 do need to satisfy the significant nexus test if 14 you're relying --15 JUSTICE GORSUCH: Yeah. Right. 16 Significant nexus. 17 MR. FLETCHER: -- on adjacent to a 18 tributary. 19 JUSTICE GORSUCH: Yeah. Yeah. Okay. So we're going that way. Does it -- first of 20 all, does the significant nexus have to be to 21 2.2 the ditch across the road or all the way down to 23 the -- the lake? 24 MR. FLETCHER: All the way down to the 25 lake.

1 JUSTICE GORSUCH: Okay. 2 MR. FLETCHER: That's the limiting 3 work that it does. It says --JUSTICE GORSUCH: Okay. Great. 4 That's helpful. How much? It's the same 5 question, different test. 6 7 MR. FLETCHER: Yeah. 8 (Laughter.) JUSTICE GORSUCH: And -- and the Chief 9 10 kind of alluded to this already. How many parts 11 per million of what kind of stuff has to get 12 from the Sacketts' property across the road into a ditch, I don't know how far -- how many 13 thousands of feet over to a -- a -- a creek, and 14 15 then from the creek down into the lake? 16 MR. FLETCHER: So I'm going to give 17 you a similar answer, which is to say I can give 18 you qualitative --19 JUSTICE GORSUCH: But you don't know? 20 MR. FLETCHER: No, no. Respectfully, Justice Gorsuch, in law, I think there's a 21 2.2 qualitative standard with guideposts that isn't determinative. 23 24 JUSTICE GORSUCH: You can call up your 25 local friendly agent and he'll tell you, yes or

1 no? 2 MR. FLETCHER: Will tell you here are 3 the guidelines that the agencies use. They'll tell you free of charge what they think. And if 4 you don't like what they think, you're free to 5 6 challenge that in court, yes. 7 JUSTICE GORSUCH: Okay. So that's -so we don't know until he comes out and tells 8 9 you? I mean, is there -- what -- what is the 10 standard? I mean, give me your best shot. MR. FLETCHER: So it's do the wetlands 11 12 with other similarly situated wetlands 13 significantly affect the chemical, biological, 14 or physical integrity of downstream waters. 15 JUSTICE GORSUCH: And what does that 16 mean? 17 MR. FLETCHER: The agencies look at 18 the functions that are typically performed by 19 wetlands, like retention of flood waters, 20 filtering of pollutants, provision of flow 21 during dry periods, and they look at the 2.2 distance, they look at the amount of flow from 23 the wetland and other wetlands down to the downstream navigable water, and they look at the 24 25 climate.

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1 JUSTICE GORSUCH: How is that 2 different than adjacent? MR. FLETCHER: So I think adjacent is 3 focused on reasonable proximity. 4 JUSTICE GORSUCH: I thought that was 5 6 part of the test you just gave me too. MR. FLETCHER: Distance -- distance is 7 8 one factor, but what the significant nexus test 9 says is that if you're going to be relying on 10 adjacency to some upstream tributary, that's not 11 good enough to justify coverage. You have to 12 show that that has a significant effect on the downstream navigable waters. It makes it harder 13 14 to include wetlands that are adjacent only to 15 tributaries and not to navigable waters. 16 JUSTICE GORSUCH: Thank you. 17 JUSTICE BARRETT: Mr. Fletcher, is the government estopped -- is the Corps or the EPA 18 19 estopped from going after you? If you get a 20 jurisdictional determination and they say, yeah, not within our jurisdiction, not a wetland, then 21 2.2 are you protected? 23 MR. FLETCHER: That's my understanding, at least for five years. 24 25 Jurisdictional determinations are good for five

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1 years, and I think one of the reasons that this 2 Court gave in Hawkes for why those are 3 judicially reviewable final agency action is because they're binding on the Corps and the EPA 4 for that five-year period. 5 6 JUSTICE BARRETT: One other question. 7 So the significant nexus test -- do you want me 8 to stop? 9 CHIEF JUSTICE ROBERTS: Go ahead. 10 Yeah. 11 JUSTICE BARRETT: The significant 12 nexus test, you said, is separate and apart and 13 the subject of a different rulemaking and that 14 the agency has a broader view than adjacency, 15 than adjacency would be here. 16 So the significant nexus test, I take 17 it, would be grounded in waters of the United States and not 1344(g)? 18 19 MR. FLETCHER: That's right, yes. JUSTICE BARRETT: And if -- if we 20 21 accepted the significant nexus test, we wouldn't 22 even really need 1344(g) because it would be 23 broader than adjacency? 24 MR. FLETCHER: I think potentially 25 that's right. But I think that's what makes --

| 1  | 1344(g) makes this case about adjacent wetlands  |
|----|--|
| 2  | an even easier case and doesn't require you to   |
| 3  | pass on the validity of that broader theory.     |
| 4  | JUSTICE BARRETT: But, if waters of               |
| 5  | the United States already included everything    |
| б  | with a significant nexus, then why does          |
| 7  | adjacency even matter in 1344(g)?                |
| 8  | MR. FLETCHER: Well, I think adjacency            |
| 9  | still matters in 1344(g) because that's express  |
| 10 | textual confirmation that Congress understood    |
| 11 | that adjacent wetlands are covered. The          |
| 12 | agencies, as reflected in the rulemaking, think  |
| 13 | that the Act's coverage goes beyond that in ways |
| 14 | that might subsume the adjacent wetlands theory, |
| 15 | but I think, for purposes of this case, 1344(g)  |
| 16 | would be still be very, very instructive.        |
| 17 | JUSTICE BARRETT: Thank you.                      |
| 18 | CHIEF JUSTICE ROBERTS: Thank you.                |
| 19 | Justice Thomas?                                  |
| 20 | JUSTICE THOMAS: Mr. Fletcher, it                 |
| 21 | it seems as though when there's a body of water  |
| 22 | and a nearby wetland, there's a presumption that |
| 23 | it's covered by the Clean Water Act. The and     |
| 24 | then the the homeowner or whomever owns it or    |
| 25 | attempts to develop it has to opt out in some    |

1 way. 2 Can you give me an example of a body 3 of water and nearby land that is automatically or presumptively excluded from coverage? 4 MR. FLETCHER: Sure. So I think, if I 5 6 understand the question, the agencies have defined some automatic exclusions. You know, in 7 8 addition to just anything that doesn't satisfy 9 the significant nexus test, they've ruled out 10 things like certain ditches that are excavated 11 in uplands, small erosional features, things 12 that are isolated and --13 JUSTICE THOMAS: No, I mean, you know, 14 I grew up in -- in low country Georgia and you 15 had standing water. That was normal. 16 And I'm thinking of something that's 17 natural like that that is presumptively not covered and is not near -- not bordering on -- I 18 19 don't want to use the term "adjacent." I'm done 20 with that word. 21 (Laughter.) 2.2 JUSTICE THOMAS: Bordering on a body 23 of water. MR. FLETCHER: Sure. So I -- I don't 24 25 know that the agencies have talked in terms of

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| 1  | presumptively not covered. I think the best     |
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| 2  | thing that I can point you towards is in the    |
| 3  | 2021 NPRM, and this is at page 69432.           |
| 4  | The agencies, in explaining that the            |
| 5  | significant nexus test really has teeth,        |
| 6  | explained that they routinely conclude that     |
| 7  | waters aren't covered, and they give half a     |
| 8  | dozen or so specific examples of the types of   |
| 9  | isolated things that are definitely waters but  |
| 10 | still aren't covered because they don't have    |
| 11 | enough of a connection to the downstream now.   |
| 12 | JUSTICE THOMAS: So, in other words,             |
| 13 | if I were still living there, I wouldn't know   |
| 14 | until you told me?                              |
| 15 | MR. FLETCHER: No, Justice Thomas,               |
| 16 | respectfully, I I disagree with that. I         |
| 17 | think that if you have an isolated body of      |
| 18 | water, an isolated, you know, farm pond or      |
| 19 | something like that, there are some things that |
| 20 | are categorically excluded.                     |
| 21 | If you're not in one of those                   |
| 22 | categories, the question that you'd have to ask |
| 23 | is, is there is this adjacent to or is there    |
| 24 | a significant nexus with the navigable waters?  |
| 25 | And I think, for an isolated body of water, the |

1 answer to that would be no. 2 JUSTICE THOMAS: And could you --3 if -- if I were concerned about the authority of EPA to regulate a purely intrastate body of 4 water or associated wetland, where would I find 5 6 the authority for that, or would you give me 7 your best argument for the authority of the --8 of the government to regulate that? MR. FLETCHER: Sure. I think it's 9 10 authority that's common ground between us and 11 Petitioners --12 JUSTICE THOMAS: Yeah. MR. FLETCHER: -- that the Commerce 13 14 Clause gives the federal government the 15 authority to regulate the channels of interstate 16 commerce, including navigable waters, whether 17 they're interstate or intrastate, if they can be 18 used in -- to transport commerce, that's within 19 the commerce power. That's common ground 20 between the parties. 21 And then also, and this is the next 2.2 step, that authority extends beyond just things that happen in the channels but also things that 23 24 happen outside the channels but could damage 25 them. That's something that's been

uncontroversial since the 1899 Rivers and 1 2 Harbors Act, which extended up to tributaries and the banks of tributaries of navigable 3 waters, and it's really necessary for Congress 4 to be able to protect the channels of commerce 5 6 to also be able to protect activities that 7 affect those channels. JUSTICE THOMAS: What is a channel of 8 9 commerce? I am talking about a purely 10 intrastate, for example, a lake, purely 11 intrastate. How does that get to be a channel 12 of commerce? 13 MR. FLETCHER: So I'd -- I'd point to 14 the same case that my friend did, the Great Salt 15 Lake was at issue in some litigation between 16 Utah and the United States. 17 And what the Court said is, even 18 though it's intrastate and there's no water connection to some out-of-state body, you could 19 20 still move commerce across it and that commerce 21 could be moving in intrastate if you married up 2.2 the transport over water with transport over 23 land. 24 JUSTICE THOMAS: Is there a lot of 25 transportation over the Great Salt Lake?

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1 MR. FLETCHER: Apparently not. That's 2 why it was in litigation. But the Court held 3 that a little bit from the 1880s was enough. JUSTICE THOMAS: Thank you. 4 CHIEF JUSTICE ROBERTS: I quess 5 6 there's less and less. 7 Justice Alito? 8 JUSTICE ALITO: Does your understanding of "waters of the United States" 9 take into account any of the clear statement 10 11 rules that have been invoked on the other side, 12 for example, the effect on federalism, the fact 13 that you're reading an awful lot into a 14 parenthetical in 1344(q). 15 Your -- your -- your argument is that with this parenthetical, Congress did something 16 17 that has major importance. 18 And also the fact that there may be a 19 vagueness problem. Do you take any of that into 20 account? 21 MR. FLETCHER: I think -- yes. Ι 2.2 think those considerations are all reflected in 23 this Court's prior decisions. And we take the significant nexus test to be consistent with 24 those decisions and to be a limiting 25

1 construction, a narrowing construction on the 2 covered waters that make sure that the covered 3 waters include all the waters that are necessary to achieve the goal that I talked about with 4 Justice Thomas and that leave waters that aren't 5 essential to that goal to the states to 6 7 regulate. JUSTICE ALITO: Okay. So it sounds 8 9 like your understanding of "waters of the United 10 States" is any -- I come back to my earlier 11 question -- anything in the United States that 12 has water in it if it has an ecological effect 13 on -- on -- on waters -- on navigable waters, is 14 that right? And then these clear statement 15 rules narrow that? That's your interpretation 16 of the phrase "waters" -- "waters"? 17 MR. FLETCHER: I wouldn't say any 18 effect is good enough. I think the concept is 19 \_ \_ 20 JUSTICE ALITO: Significant. 21 MR. FLETCHER: -- significant nexus 22 from this Court's cases, but, yes. 23 JUSTICE ALITO: Would you win if 24 1344(q) had not been enacted? 25 MR. FLETCHER: I think we would. Т

1 think the Corps of Engineers and the EPA got it 2 right the first time when they said adjacent wetlands are regulated under the plain text of 3 the statute. What 1344 does for you is that it 4 5 tells you that Congress looked at this problem, 6 considered proposals to cut back the Act, and 7 then essentially approved the Corps's 8 interpretation in express statutory text while adopting other changes to the Act to deal with 9 some of the concerns that were raised. 10 11 JUSTICE ALITO: Just out of curiosity, 12 what is your understanding of "of the United States"? Does that mean in the United States, 13 14 or does it mean something else? 15 MR. FLETCHER: I think it means more 16 than just "in the United States." We take it to 17 mean waters in which there's a federal interest, waters that affect the navigable waters that are 18 -- where the federal interest is indisputable. 19 We take it to be sort of reiterating that point. 20 JUSTICE ALITO: That would extend 21 2.2 very, very far, would it not? 23 MR. FLETCHER: It's true that the 24 Act's coverage is broad. It's been understood as broad from the beginning. And that was 25

1 Congress's intent, you know, was to 2 comprehensively regulate the waters of the 3 United States because the prior system that relied primarily on states had proved 4 insufficient, in part because this isn't a 5 6 problem that the states can solve by themselves 7 because pollution that happens in one state or the destruction of wetlands in one state have 8 consequences that may be felt in many states 9 10 downstream that can't themselves regulate to 11 address it. 12 JUSTICE ALITO: Do you doubt that 13 Congress could regulate dry land on the theory 14 that it has a significant -- together with other 15 similar pieces of dry land, it has a significant 16 effect on interstate commerce? 17 MR. FLETCHER: I think I would 18 probably defend such a law. And I think the 19 Rivers and Harbors Act was a version of that 20 which said you can't place refuse on the banks 21 of tributaries to navigable waters because it 2.2 could wash downstream into the navigable waters. 23 But I think that's, you know, stretching out

24 further certainly than Congress did here.

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JUSTICE ALITO: So, if that's the

| 1  | limitation on "of the United States," it's not   |
|----|--|
| 2  | much of a limitation?                            |
| 3  | MR. FLETCHER: So, Justice Alito, I               |
| 4  | disagree, and I think the the proof is sort      |
| 5  | of in the pudding. The agencies have told us,    |
| б  | in proposing to recodify the significant nexus   |
| 7  | test that we're defending here today, that it    |
| 8  | has real teeth, that they routinely conclude     |
| 9  | that it's not satisfied, and that something like |
| 10 | 25 percent of jurisdictional determinations made |
| 11 | under the post-Rapanos guidance conclude that    |
| 12 | there is no jurisdiction under the Act.          |
| 13 | So I think that that's real concrete             |
| 14 | evidence that this is broad because Congress's   |
| 15 | purpose was broad, but it's not unlimited.       |
| 16 | JUSTICE ALITO: What the agencies have            |
| 17 | done, I would imagine, is to take a very broad   |
| 18 | provision that can be re can be read to give     |
| 19 | them almost plenary authority and made some      |
| 20 | pragmatic judgments about how far they want to   |
| 21 | go based on all sorts of factors. Is that        |
| 22 | unfair?  |
| 23 | MR. FLETCHER: I I don't think it's               |
| 24 | unfair in the sense that I think pragmatism,     |
| 25 | administrability, considerations of policy have  |

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| 1  | factored into this rulemaking, I'm sure. But I   |
|----|--|
| 2  | think I the thing I'd add to what you said is    |
| 3  | that the agencies have also been mindful,        |
| 4  | especially in the ongoing rulemaking, of the     |
| 5  | guidance provided by this Court's decisions,     |
| 6  | which have significantly narrowed the agencies'  |
| 7  | interpretation from where it was in the '80s.    |
| 8  | JUSTICE ALITO: Thank you.                        |
| 9  | CHIEF JUSTICE ROBERTS: Justice                   |
| 10 | Sotomayor?                                       |
| 11 | JUSTICE SOTOMAYOR: I just want to be             |
| 12 | clear, you're defending the significant nexus    |
| 13 | test with respect to use when it's not adjacent  |
| 14 | to navigable waters, correct?                    |
| 15 | MR. FLETCHER: That's correct.                    |
| 16 | JUSTICE SOTOMAYOR: But so are you                |
| 17 | giving up the argument that the Sackett          |
| 18 | property that the Sackett wetland is covered     |
| 19 | by the Act simply because it is adjacent to      |
| 20 | Priest Lake? I thought                           |
| 21 | MR. FLETCHER: So this is I didn't                |
| 22 | get a chance to get this out in response to      |
| 23 | Justice Gorsuch. What I wanted to say is the     |
| 24 | agencies do think and argued previously that the |
| 25 | wetland is adjacent to the lake itself. The      |

1 district court upheld that determination. We 2 didn't renew that argument in the Ninth Circuit 3 or in our briefs in this Court. We relied on adjacency to the tributary and the additional 4 showing of a significant nexus to Priest Lake. 5 So that's how the case has been briefed and 6 7 argued as it comes to this Court. But if you're asking about the agencies' view --8 9 JUSTICE SOTOMAYOR: Why did you give 10 it up? 11 MR. FLETCHER: I don't know why that 12 decision was made. I would guess that it's 13 because adjacency to the tributary is in some 14 ways a simpler test. It's only 30 feet from the 15 tributary, and because we felt confident that we 16 could make this showing of significant nexus 17 down to Priest Lake, it was the sort of simpler way to justify the conclusion that the property 18 is covered. 19 20 CHIEF JUSTICE ROBERTS: Justice Kagan? 21 Justice Gorsuch? 2.2 JUSTICE KAVANAUGH: I just want to 23 follow up on Justice Gorsuch's earlier questions 24 because I think he identified something that this Court's overwhelmingly been concerned about 25

1 for decades, mens rea and not punishing innocent 2 people who make a mistake, an innocent mistake. 3 So what assurance can you provide on that front that some of the hypotheticals about 4 someone being penalized for making a mistaken 5 6 but reasonable judgment about the status of 7 their land will not, in fact, be punished? 8 MR. FLETCHER: So I'd say a couple 9 things. The first one is this Court made the 10 11 point in Maui that the civil penalties 12 provisions direct courts to consider things like 13 essentially mens rea or culpability in deciding 14 the amount of civil penalties, and as the Court 15 said there, it was confident the district courts 16 would take that into account. In the agencies' 17 experience, they do. 18 On the criminal side of the house, 19 it's true that the -- 1319(d) of the Act does provide for criminal -- potential criminal 20 21 liability for negligent or knowing violations. 2.2 As a matter of practice, the agencies tell me 23 that it's very unusual to bring criminal prosecutions absent sort of willful conduct. 24 25 JUSTICE KAVANAUGH: And then, I mean,

1 to state the obvious, that negligent provision 2 is a red flag, so what -- what do you have to say about that? 3 MR. FLETCHER: Yeah, understood. 4 So 5 I'd say two things. You know, first, as a matter of 6 7 practice, I think it's rare for simple -- in fact, very unusual for simple negligence to give 8 rise to criminal liability, that criminal 9 prosecutions are brought only when there's some 10 11 sort of serious aggravating conduct. 12 And the other thing that I'd say is, 13 you know, we think that standards like this, you 14 know, as reflected in County of Maui, where 15 there was a similar multifactor standard that 16 also potentially gave rise to criminal 17 liability, that didn't stop the Court from 18 adopting that standard, we think the same should 19 be true here. And we think, if you really had a case 20 where there was someone who was being criminally 21 22 prosecuted and had a claim that the statute was 23 vague as applied to them, that they didn't have 24 fair notice, they could always bring an 25 as-applied vagueness challenge in the criminal

1 prosecution. 2 JUSTICE KAVANAUGH: Thank you. Justice 3 CHIEF JUSTICE ROBERTS: 4 Barrett? JUSTICE BARRETT: I want to return to 5 6 Justice Sotomayor's point because I want to make 7 sure that I understand exactly what the scope of 8 your argument is. 9 As you're arguing the case in this 10 Court, to win, we have to find that you're right about significant nexus, Justice Kennedy's 11 12 position in Rapanos, because you're not really 13 relying for purposes of this case on the 1344(g) 14 adjacency language, is that correct? 15 MR. FLETCHER: We're relying on 16 adjacency to the tributary, which requires us to 17 make a showing of significant nexus. So we do 18 have to have both --19 JUSTICE BARRETT: Both? 20 MR. FLETCHER: -- as we briefed the 21 case. But I think also it's worth emphasizing 2.2 that Petitioners aren't challenging the 23 significant nexus finding, and also I think 24 they've conceded essentially that if you get 25 past their idea that adjacent includes only

things that directly touch, then their property
 is adjacent because it's only 30 feet away
 across the road.

JUSTICE BARRETT: Okay. And then, to 4 follow up on Justice Alito's points about waters 5 6 of the United States, if we put aside 1344(g) 7 for a moment, and we're thinking about significant nexus, you know, Justice Thomas says 8 9 he grew up in the low country of Georgia, and I 10 grew up in New Orleans. The whole thing is 11 below sea level. So, you know, there are 12 aquifers that run right underneath it. You --13 we have no basements because, you dig far enough 14 in anybody's yard, you hit water, and all of 15 that runs into Lake Pontchartrain and the 16 Mississippi River, navigable waters. 17 So would that view of the Clean Water 18 Act and the definitions of "waters of the United 19 States" mean that anybody who constructed on a 20 lot or built a backyard pool has to get a jurisdictional determination from the Corps 21 2.2 before proceeding?

23 MR. FLETCHER: No, I don't think so,24 Justice Barrett.

25 JUSTICE BARRETT: Why not?

1 MR. FLETCHER: Because the -- these 2 requirements all apply only if you're talking 3 about wetlands, which has a particular scientific definition reflected in the 4 regulations. It requires --5 JUSTICE BARRETT: But -- but -- but --6 7 but your view of the statute wouldn't be so limited, would it? 8 9 MR. FLETCHER: The statute, we think, 10 does -- is limited to wetlands. We don't argue 11 that things that don't qualify as wetlands can 12 be waters of the United States. So --13 JUSTICE BARRETT: Okay. And why --14 why would that be? Because of 1344(g)? Because 15 nothing in the statutory definition of waters of 16 the United States -- I mean, if you're talking 17 about something that has a significant nexus, 18 presumably, subsurface water would. 19 MR. FLETCHER: So -- but we don't 20 think you could call groundwater a water of the 21 United States. We don't argue that water --2.2 groundwater is covered. 23 JUSTICE BARRETT: Mm-hmm. 24 MR. FLETCHER: And to Justice 25 Sotomayor's point, we think that subsurface flow

| 1  | can be evidence of a connection between two      |
|----|--|
| 2  | bodies of water, but you have to be talking      |
| 3  | about waters. We think wetlands, like swamps     |
| 4  | and marshes and fens like the one at issue here, |
| 5  | are waters of the United States or can be if     |
| б  | they satisfy the test, and someone's backyard in |
| 7  | New Orleans, if it doesn't meet the definition   |
| 8  | of a wetland, is not a water even potentially    |
| 9  | a water of the United States.                    |
| 10 | JUSTICE BARRETT: But what about                  |
| 11 | debris on the bank of the river, the example     |
| 12 | that you gave? So it's not on the river          |
| 13 | itself   |
| 14 | MR. FLETCHER: Yep.                               |
| 15 | JUSTICE BARRETT: but it's on dry                 |
| 16 | land.  |
| 17 | MR. FLETCHER: I took that to be a                |
| 18 | question about the scope of Congress's           |
| 19 | constitutional authority                         |
| 20 | JUSTICE BARRETT: Okay.                           |
| 21 | MR. FLETCHER: and I was giving                   |
| 22 | that as an example of the Rivers and Harbors Act |
| 23 | in order to protect the channels of interstate   |
| 24 | commerce, the aquatic channels of interstate     |
| 25 | commerce, extending its authority up onto land.  |
|    |  |

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1
     We don't argue that Congress has done that here.
     Here, it's about waters of the United States --
 2
 3
                JUSTICE BARRETT: So it --
                MR. FLETCHER: -- specifically
 4
 5
     wetlands.
 6
                JUSTICE BARRETT: -- hasn't used its
 7
      full Commerce Clause authority, in your view, in
      the Clean Water Act?
8
 9
                MR. FLETCHER: That's correct.
                CHIEF JUSTICE ROBERTS: Justice
10
11
      Jackson?
12
                Thank you, counsel.
13
                Mr. Schiff.
14
               REBUTTAL ARGUMENT OF DAMIEN M. SCHIFF
15
                   ON BEHALF OF THE PETITIONERS
16
                MR. SCHIFF: Whatever the deficiencies
17
      in the line-drawing problem test, they pale in
      comparison to the significant nexus test.
18
                                                  In
19
      response to Justice Thomas -- Thomas's question
     about the channels of commerce, the significant
20
     nexus test is far, far broader than a
21
2.2
      traditional understanding of the channels of
      commerce, as shown by this very case.
23
                The Sacketts -- there's no evidence
24
25
      that anything the Sacketts did affected any
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1 channel of commerce. It's the mere fact that 2 they put gravel on their lot that now they're 3 fully regulated under the Clean Water Act. And that raises Justice Alito's point about canons 4 of construction and federalism. 5 Building a single-family home in a 6 7 residential subdivision is the quintessence of 8 local government authority, and yet the 9 significant nexus test inevitably causes that to 10 be regulated. 11 JDs are expensive. There is an entire 12 industry of environmental consultants whom one has to hire to fill out an adequate application 13 14 to the Corps. 15 Sure, the Corps doesn't charge you, 16 but your consultant will definitely charge you 17 an arm and a leg just to have a chance to find 18 out whether one is, in fact, regulated. 19 JUSTICE JACKSON: Counsel, can I --20 can you just speak to the representation that 21 was made about the Sacketts' property in 2.2 particular and the fact that prior to their 23 purchasing it there was some concern about the 24 property being a wetland? 25 MR. SCHIFF: Justice --

1 JUSTICE JACKSON: Did I misunderstand 2 that? I -- I thought --3 MR. SCHIFF: No --JUSTICE JACKSON: -- I thought they 4 went into it knowing that this might be a 5 6 wetland. 7 MR. SCHIFF: No, no. There was s jurisdictional determination done in 1996 by a 8 prior owner. The Sacketts were not aware of 9 that. Even --10 11 JUSTICE JACKSON: Would they have been 12 as a part of the purchase agreement? Shouldn't 13 they --14 MR. SCHIFF: The Sacketts --15 JUSTICE JACKSON: -- have gathered 16 information about the property prior to 17 purchasing it? 18 MR. SCHIFF: Justice Jackson, in -- in the record, the Sacketts' testimony is that 19 20 there was no indication either from the county, building department, in their deed of title, 21 22 anywhere that this was a wetland. 23 Moreover, even if they had been aware, that jurisdictional determination would have 24 25 given them no comfort because it --

1 JUSTICE JACKSON: But did -- did they 2 see the property? I understood in the pictures 3 that you could tell that at least part of it was a wetland by looking at it. So --4 MR. SCHIFF: I believe Mr. Fletcher 5 was referring to after the initial work had been 6 7 done, and the pictures show that there is water 8 on the property, but that doesn't show how it was before. 9 But if -- if I could go back, though, 10 11 to the question of the jurisdictional --12 JUSTICE JACKSON: But you keep talking 13 about notice and fair notice and property owners 14 not being able to tell or know about this issue, 15 and I'm just trying to clarify with respect to 16 the Sacketts, there seem to have been a prior 17 determination that the land was wetland before they bought it, and whether or not they knew, 18 19 they could have known, I presume. 20 So why is this unfair in this 21 situation with respect to the government now 22 asserting that authority? MR. SCHIFF: Justice Jackson, that 23 24 determination had expired several years before 25 the -- the -- the Sacketts even purchased the

1 property. As Mr. Fletcher explained, typically, 2 jurisdictional determinations are only valid for 3 five years. Moreover, that determination was done 4 even before this decision -- this Court's 5 6 decision in Rapanos. So, even if the Sacketts 7 had been aware of it, it would have given them no -- no -- no notice whatsoever. 8 9 CHIEF JUSTICE ROBERTS: We'll give you an extra minute for your rebuttal. 10 11 MR. SCHIFF: Thank you, Mr. Chief 12 Justice. The last point I'd like to make is 13 14 with respect to compensatory mitigation, simply 15 that obtaining a permit is a very expensive 16 process. It's true that the Corps does not 17 charge for permits, but the Corps will never 18 give a permit unless one provides compensatory 19 mitigation. And we cite studies from the amicus 20 21 briefs at pages 20 and 21 of the yellow brief 2.2 where the annual cost of compensatory mitigation 23 under the Corps's program is in the billions of dollars. 24

25 This is not an easy process. It's not

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1
      a cheap process. And in terms of notice, it's
 2
      not a fair process for property owners who have
      to deal with the significant nexus test, which
 3
 4
      is why this Court should definitively jettison
 5
      that test.
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                CHIEF JUSTICE ROBERTS: Thank you,
      counsel. The case is submitted.
7
8
                (Whereupon, at 11:52 a.m., the case
9
      was submitted.)
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