No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,

PETITIONERS,

V.

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

RESPONDENTS.

On Writ of Certiorari to the
U.S. Court of Appeals for the Ninth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U. S. C. § 1362(7)?

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INTERESTS OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

Amicus is interested in this case because the protection of private property rights is a core value vital to a free society. To that end, the Liberty Justice Center represents property owners in a variety of cases around the country. *See, e.g., Mendez v. Chicago*, Cook County Illinois Chancery Court No. 16 CH 15489. *Amicus* also believes that standardless delegations of regulatory authority are constitutionally infirm and pursues litigation to oppose such delegations. *See, e.g., Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, No. 5:21-CV-071-H, 2022 U.S. Dist. LEXIS 59557 (N.D. Tex. Mar. 31, 2022) (challenging delegation of horseracing regulation to a private organization).

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amicus funded its preparation or submission. Counsel timely provided notice to all parties of their intention to file this brief, and counsel for each party consented.

SUMMARY OF ARGUMENT AND INTRODUCTION

Vague pronouncements license capricious enforcement. For 15 years, Michael and Chantell Sackett have watched multiple presidential administrations bounce back and forth as to just what Congress' commands mean, with their rights and those of property owners like them held in limbo.

The Sacketts stand liable for staggering fines for violating a standard that neither administrations nor courts can agree on—and that this Court itself could not reach consensus on the last time it considered the matter. *See Rapanos v. United States*, 547 U.S. 715 (2006). But there's a straightforward explanation for this confusion, and Congress is to blame. The Clean Water Act defines "navigable waters" simply as "waters of the United States." 33 U.S.C. § 1362(7). This statutory definition does not provide proper notice or a sufficiently intelligible principle and therefore is an impermissible delegation of authority, allowing standardless regulation by an executive agency in violation of the structural requirements of the Constitution. The ordeal suffered by the Sacketts, see Pet. 14-17, demonstrates the pitfalls of such standardless delegation.

Congress's circular definition of "waters of the United States" cannot provide an intelligible principle because, in the first place, it is not intelligible. The statutory scheme uses the term "navigable waters" to mean something inconsistent with both ordinary usage and legal tradition, leaving courts and regulated parties floating adrift and subject to the arbitrary de-

terminations of executive agencies. The resulting regime provides no notice to property owners like the Sacketts, no guidance for courts, and no limitation on the power of the executive. Under the circumstances, *amicus* submits that the best solution is to cut this Gordian Knot and affirm that enacting sweeping, national regulation requires more of Congress than tautology.

ARGUMENT

I. The jurisdiction claimed by the government is grounded in an unconstitutional delegation of legislative authority.

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The opening sentence of the Constitution specifies that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. The Nondelegation doctrine is at bottom an attempt to take this provision seriously: there is a legislative power to *make* laws, and "all" such power resides in the Congress. *See Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring) ("[T]he separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it.").

The President, by contrast, is not empowered to make laws; instead, the document states that "[t]he executive Power shall be vested in a President." U.S.

Const. art. II, § 1, cl 1. The Congress writes the laws, and the President carries out the laws that Congress writes. Implicit in this setup is the premise that neither branch may delegate its sphere of power to any other. "The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense [if there is no limit on delegations]." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002).

The premise that these powers must be separated, and delegations avoided, is not some modern invention; rather, it predates the founding. Commentators as far back as Lord Coke affirmed that the King could not "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament." *Ass'n of Am. R.R.*, 135 S. Ct. at 1243 (Thomas, J., concurring) (quoting *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K.B. 1611)). Blackstone likewise wrote that when "the right both of making and of enforcing the laws . . . are united together, there can be no public liberty." 1 William Blackstone, Commentaries 142 (1765). John Adams, in drafting the Massachusetts state constitution, expressly provided that "[t]he executive shall never exercise the legislative and judicial powers . . . to the end it may be a government of laws and not of men." Mass Const. pt. 1, art. XXX. James Madison warned that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison).

The principle is likewise recognized in early Supreme Court cases, with Chief Justice Marshall declaring "[i]t will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825). The basic principle is so well acknowledged that some years later the Court described it as such: "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

Recognizing these concerns, this Court has a long-developed doctrine limiting Congress's discretion to delegate its legislative prerogatives. As Justice Rehnquist explained:

> First, and most abstractly, [the nondelegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Indus. Union Dep't, AFL-CIO v. API, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (internal citation omitted). The Court therefore requires that any grant of regulatory authority include an "intelligible principle" that will form the basis of agency action, but what exactly this means in practice requires elaboration.

The basic requirement that derives from the Court's cases is that "Congress must set forth standards sufficiently definite and precise to enable Congress, the courts, and the public to ascertain whether Congress's guidance has been followed." *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Yakus v. United States*, 321 U. S. 414, 426 (1944)). The onus is on Congress to "expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce." *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari). The Court's cases also acknowledge that "no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it." *Mistretta,* 488 U.S. at 415 (Scalia, J., dissenting).

But this is not a reason to abandon the exercise, because courts "may not—without imperiling the delicate balance of our constitutional system—forgo [their] judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law." *Ass'n of Am. R.R.*, 135 S. Ct. at 1246 (Thomas, J., concurring). Even where a line is not readily apparent, "the inherent difficulty of line-drawing is no excuse for

not enforcing the Constitution." *Ass'n of Am. R.R.,* 135 S. Ct. at 1237 (Alito, J., concurring). The failure to enforce these requirements undermines democratic trust and accountability, since "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *Id.* (quoting *Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting)).

Such requirements do not undermine the functioning of a proper regulatory scheme, since "the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). Nondelegation principles "do not prevent Congress from obtaining the assistance of its coordinate Branches," *Mistretta*, 488 U.S. at 372 (1989), and few doubt "the inherent necessities of government coordination." *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

Yet "recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." *Schechter Poultry*, 295 U.S. at 530. It is no excuse that Congress was "too busy or too divided and can therefore assign its responsibility of making law to someone else." *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting). Our constitutional structure requires that each Congressional enactment "furnishes a declaration of policy or a standard of action."

Panama Ref. Co. v. Ryan, 293 U.S. 388, 416 (1935). It falls to Congress, and Congress alone, to "establish primary standards, devolving upon others the duty to carry out the declared legislative policy." *Id.* at 426. Courts therefore must reject regimes in which they find "an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944).

Ultimately, what is proscribed by the nondelegation doctrine is the *making of law*. Blackstone "defined a 'law' as a generally applicable 'rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'" *Ass'n of Am. R.R.*, 135 S. Ct. at 1244 (Thomas, J., concurring). Where an agency accrues to itself the prerogative to enact such rules, they have transgressed the constitutional boundaries. The failure to do so endangers the liberty guaranteed to each of us as citizens, as past failures to uphold these principles should remind us. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 104 (1943) (approving the delegation of authority to military commanders to intern citizens of Japanese descent).

II. "Waters of the United States" is not a sufficiently intelligible principle for federal jurisdiction.

The Clean Water Act, in defining its grant of jurisdiction as the "waters of the United States," does not provide a sufficiently intelligible principle to guide—

and, what is most important, constrain—agency action. The statute does not give regulated parties a discernible basis for determining the boundaries of Congress' scheme. And it does not provide the courts a sufficient basis to adjudicate the agency's assertion of authority. In other words, it is not "sufficiently definite and precise to enable Congress, the courts, and the public to ascertain whether Congress's guidance has been followed." *Gundy,* 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

The CWA prohibits the "discharge of any pollutant by any person," with certain exceptions. 33 U.S.C. § 1311(a). The term "discharge of a pollutant" is defined to include the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Navigable waters are defined as "the waters of the United States, including territorial seas." 33 U.S.C. § 1362(7). A "point source" is any "conveyance . . . from which pollutants are or may be discharged," such as a pipe or a ditch. 33 U.S.C. § 1362(14). "Pollutants" are defined broadly to include both substances that are toxic or dangerous as well as fill material such as rocks or sand. 33 U.S.C. § 1362(6).

The definition of "navigable waters" circularly as "waters of the United States" provides no basis for limiting agency discretion. This failure of definition is aggravated by the fact that other provisions of the Act make clear that the term "navigable waters" "includes something more than traditional navigable waters." *Rapanos v. United States*, 547 U.S. 715, 731 (2006) (plurality opinion). "For a century prior to the CWA,

[the Supreme Court] had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Id.* at 723 (citing *The Daniel Ball*, 77 U.S. 557 (1871)). But various portions of the Act, *see, e.g.*, 33 U.S.C. § 1344(g)(1), make clear that Congress did not base its scheme in a traditional, or even coherent, understanding of which "waters" are "navigable." *See Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001). Rather, it left the agency to *define its own jurisdiction*, undermining the necessary limits on executive authority.

The result of this undefined discretion has been expansive, and inconsistent, application of agency authority. The first set of regulations issued by the Army Corps limited the scope of the Act to waters that were navigable in a traditional sense. *See Solid Waste Agency*, 531 U.S. at 169. But a few years later, a new administration "deliberately sought to extend the definition of 'the waters of the United States' to the outer limits of Congress's commerce power" by issuing a new, and much broader interpretation. *Rapanos*, 547 U.S. at 724. These claims of federal jurisdiction metastasized to eventually engulf more or less the entire country. As the plurality opinion in *Rapanos* described it:

> The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit--whether man-made or natural, broad or narrow, permanent or ephemeral--through which rainwater or drainage may occasionally or intermittently flow. On this view, the

> federally regulated 'waters of the United States' include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory 'waters of the United States' engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a 'water of the United States.'

Rapanos, 547 U.S. at 722. And since "the definitions used to make jurisdictional determinations are deliberately left vague," *id.* at 727, how can one know when the standards are not met? This arbitrary and all-reaching view extends to the exercise of permitting decisions, where he U. S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as 'economics,' 'aesthetics,' 'recreation,' and 'in general, the needs and welfare of the people.'" *Id.* at 721.

This Court has at various points pushed back on this enlightened despotism. For instance, it rejected the Corps' claim that "an abandoned sand and gravel pit" was a water of the United States. *Solid Waste Agency*, 531 U.S. at 162. In *Rapanos,* the Court further clarified that the Corps could not push its jurisdictions past all limits, but no single standard for determining "waters of the United States" could garner majority

support. The plurality opinion, written by Justice Scalia and joined by three colleagues, would have held that the term in the statute should "include only relatively permanent, standing or flowing bodies of water," and therefore "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." 547 U.S. at 739, 741. Justice Kennedy, writing for himself, would have held instead that the "Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (Kennedy, J., concurring). Following *Rapanos,* EPA and the Corps issued a guidance memo stating that they would claim jurisdiction using *both* the plurality and concurrence standards, whichever suited them in any particular case. Joint Memorandum of EPA and the Army Corps, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States *&* Carabell v. United States¸ Dec. 2, 2008.[2].

In 2015, the agencies issued yet another regulation defining their jurisdiction. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015). As one district court put it in striking the rule down, this new definition of supposedly "navigable waters" was so broad, and disconnected from any sense of navigation, that "it read[] the term navigability out of the CWA." *Georgia v. Wheeler*,

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[2] https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents-under-cwa-section-404.

No. 2:15-cv-00079, 2019 U.S. Dist. LEXIS 142152, at *47 (S.D. Ga. Aug. 21, 2019). On January 23, 2020, the agencies issued yet another new definition, which itself was recently struck down by a district court. *Pasqua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 U.S. Dist. LEXIS 163921 (D. Ariz. Aug. 30, 2021). The Biden Administration has since announced yet another new definition, for which the comment period ended February 7, 2022. *See* 86 Fed. Reg. 69,372.

These various rules over the years by various administrations have embraced greater and lesser scopes of coverage. But even less expansive claims of authority are emblematic of the standardless discretion granted to the agencies here. "The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001). "The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority." *Id.* And while the Government has so far pursued the Sacketts for civil penalties, this arbitrarily defined statute also contemplates criminal prosecution. 33 U.S.C. § 1319(c). That these definitions bounce back and forth from administration to administration, representing not a coherent policy of Congress but the whim of executive preference, further renders the agencies' authority suspect. *See Christopher v. SmithKline Beecham Corp.,* 567 U.S. 142, 157 (2012) (denying deference to the Labor Department's repeatedly changing interpretations of the Fair Labor Standards Act).

CONCLUSION

The Clean Water Act grants the executive "an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment." *Panama Ref.*, 293 U.S. at 416. Such a delegation of executive authority cannot be squared with a government of limited and enumerated powers.

For these reasons, and those stated by the Petitioners, the decision below should be reversed.

Respectfully submitted,

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