SUPREME COURT OF THE UNITED STATES

No. 21–454

MICHAEL SACKETT, ET UX., PETITIONERS *v.* ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

[May 25, 2023]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring.

I join the Court's opinion in full. The Clean Water Act (CWA) confines the Federal Government's jurisdiction to "'navigable waters,'" defined as "the waters of the United States." 33 U. S. C. §§1311(a), 1362(7), (12). And the Court correctly holds that the term "waters" reaches "'only those relatively permanent, standing or continuously flowing bodies of water "'forming geographic[al] features'" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'" *Ante*, at 14 (quoting *Rapanos* v. *United States*, 547 U. S. 715, 739 (2006) (plurality opinion)). It also correctly holds that for a wetland to fall within this definition, it must share a "'continuous surface connection to bodies that are "waters of the United States" in their own right'" such that "'there is no clear demarcation between "waters" and wetlands.'" *Ante*, at 21 (quoting *Rapanos*, 547 U. S., at 742 (plurality opinion)).

However, like the *Rapanos* plurality before it, the Court focuses only on the term "waters"; it does not determine the extent to which the CWA's other jurisdictional terms—"navigable" and "of the United States"—limit the reach of the statute. *Ante*, at 14–18; *Rapanos*, 547 U. S., at 731 (plurality opinion). I write separately to pick up where the

Court leaves off.

I

The CWA's jurisdictional terms have a long pedigree and are bound up with Congress' traditional authority over the channels of interstate commerce. *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 168, and n. 3, 172, 173–174 (2001) (*SWANCC*). That traditional authority was limited in two ways. First, the water had to be capable of being used as a highway for interstate or foreign commerce. Second, Congress could regulate such waters only for purposes of their navigability—by, for example, regulating obstructions hindering navigable capacity. By the time of the CWA's enactment, the New Deal era arguably had relaxed the second limitation; Congress could regulate navigable waters for a wider range of purposes. But, critically, the statutory terms "navigable waters," "navigable waters of the United States," and "waters of the United States" were still understood as invoking only Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce. The CWA was enacted, and must be understood, against that key backdrop.

A

As the Court correctly states, "land and water use lies at the core of traditional state authority." *Ante*, at 23; see also *ante*, at 2. Prior to Independence, the Crown possessed sovereignty over navigable waters in the Colonies, sometimes held in trust by colonial authorities. See R. Adler, The *Ancient Mariner* of Constitutional Law: The Historical, Yet Declining Role of Navigability, 90 Wash. U. L. Rev. 1643, 1656–1659 (2013); R. Walston, The Federal Commerce and Navigation Powers: *Solid Waste Agency of Northern Cook County*'s Undecided Constitutional Issue, 42 Santa Clara L. Rev. 699, 721 (2002) (Walston). Upon Independence, this

sovereignty was transferred to each of the 13 fully sovereign States. See *Martin* v. *Lessee of Waddell*, 16 Pet. 367, 410 (1842) ("[W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government"). Thus, today, States enjoy primary sovereignty over their waters, including navigable waters—stemming either from their status as independent sovereigns following Independence, *ibid.*, or their later admission to the Union on an equal footing with the original States, see *Lessee of Pollard* v. *Hagan*, 3 How. 212, 230 (1845) ("The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. . . . The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states"); see also M. Starr, Navigable Waters of the United States—State and National Control, 35 Harv. L. Rev. 154, 169–170 (1921). The Federal Government therefore possesses no authority over navigable waters except that granted by the Constitution.

The Federal Government's authority over certain navigable waters is granted and limited by the Commerce Clause, which grants Congress power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. From the beginning, it was understood that "[t]he power to regulate commerce, includes the power to regulate navigation," but only "as connected with the commerce with foreign nations, and among the states." *United States* v. *Coombs*, 12 Pet. 72, 78 (1838) (Story, J., for the Court); accord, *Gibbons* v. *Ogden*, 9 Wheat. 1, 190 (1824) ("All America understands . . . the word 'commerce,' to comprehend navigation. It was so un-

derstood, and must have been so understood, when the constitution was framed"); see also R. Barnett, The Original Meaning of the Commerce Clause, 68 U. Chi. L. Rev. 101, 125–126 (2001) (Barnett); R. Natelson, The Legal Meaning of "Commerce" in the Commerce Clause, 80 St. John's L. Rev. 789, 807–810 (2006). In fact, "shipping . . . was at that time the indispensable means for the movement of goods." Barnett 123. The Commerce Clause thus vests Congress with a limited authority over what we now call the "channels of interstate commerce." *United States* v. *Lopez*, 514 U. S. 549, 558–559 (1995); see also *American Trucking Assns., Inc.* v. *Los Angeles*, 569 U. S. 641, 656–657 (2013) (THOMAS, J., concurring).

This federal authority, however, does not displace States' traditional sovereignty over their waters. "The power to regulate commerce comprehends the control *for that purpose*, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie." *Gilman* v. *Philadelphia*, 3 Wall. 713, 724–725 (1866) (emphasis added). And, traditionally, this limited authority was confined to regulation of the channels of interstate commerce themselves. *Corfield* v. *Coryell*, 6 F. Cas. 546, 550–551 (No. 3,230) (CC ED Pa. 1823) (Washington, J., for the Court). It encompassed only "the power to keep them open and free from any obstruction to their navigation" and "to remove such obstructions when they exist." *Gilman*, 3 Wall., at 725. Thus, any activity that "interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by congress." *Coombs*, 12 Pet., at 78. But, activities that merely "affect" water-based commerce, such as those regulated by "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State," are not within Congress' channels-of-commerce authority. *Gibbons*, 9 Wheat., at 203; see also *Corfield*, 6 F. Cas., at 550.

This understanding of the limits of Congress' channels-of-commerce authority prevailed through the end of the 19th century. The Court's cases consistently recognized that Congress has authority over navigable waters for only the limited "purpose of regulating and improving navigation." *Gibson* v. *United States*, 166 U. S. 269, 271–272 (1897); see also *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 56, 63 (1921) ("The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation"). And, this Court was careful to reaffirm that "technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers" as determined by "local law." *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 60 (1913).

The River and Harbor Acts of 1890, 1894, and 1899 illustrate the limits of the channels-of-commerce authority. The 1890 Act authorizes the Secretary of War to "prohibi[t]" "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction." §10, 26 Stat. 454. The 1894 Act made it unlawful to deposit matter into "any harbor or river of the United States" that the Federal Government has appropriated money to improve and prohibited injuring improvements built by the United States in "any of its navigable waters." §6, 28 Stat. 363.

Congress consolidated and expanded these authorities in the 1899 Act. Section 10 of the Act prohibits "[t]he creation of any obstruction . . . to the navigable capacity of any of the waters of the United States," requires a permit to build "structures in any . . . water of the United States," and makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity" of any water, "within the limits of any breakwater, or of the channel of any navigable water of the United States." 30

Stat. 1151 (codified, as amended, at 33 U. S. C. §403). In addition, §13 of the Act, sometimes referred to as the "Refuse Act," prohibits throwing, discharging, or depositing "any refuse matter . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 30 Stat. 1152 (codified, as amended, at 33 U. S. C. §407). Section 13 also prohibits depositing material "on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed." *Ibid.*

Three things stand out about these provisions. First, they use the terms "navigable water," "water of the United States," and "navigable water of the United States" interchangeably. 33 U. S. C. §§403 and 407; see also V. Albrecht & S. Nickelsburg, Could *SWANCC* Be Right? A New Look at the Legislative History of the Clean Water Act, 32 Env. L. Rev. 11042, 11044 (2002) (Albrecht & Nickelsburg). As a result, courts have done the same in decisions interpreting the River and Harbor Acts. See, *e.g.*, *United States* v. *Stoeco Homes, Inc.*, 498 F. 2d 597, 608–609 (CA3 1974); *New England Dredging Co.* v. *United States,* 144 F. 932, 933–934 (CA1 1906); *Blake* v. *United States*, 181 F. Supp. 584, 587–588 (ED Va. 1960).

Second, Congress asserted its authority only to the extent that obstructions or refuse matter could impede navigation or navigable capacity. Thus, in *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690 (1899), this Court recognized that any "act sought to be enjoined" under the 1890 Act must be "one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream." *Id.*, at 709; accord, *Lake Shore & Michigan Southern R. Co.* v. *Ohio*, 165 U. S. 365, 369 (1897) (holding

that federal jurisdiction over "navigable waters" was limited to preventing "interfering with commerce"). Similarly, in *Wisconsin* v. *Illinois*, 278 U. S. 367 (1929), this Court interpreted the 1899 Act in light of the constitutional prohibition on Congress "arbitrarily destroy[ing] or impair[ing] the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end." *Id.*, at 415.[1] The touchstone, thus, remained actual navigation.

Third, §13 of the Act requires some form of surface water connection between a tributary and traditionally navigable waters. See 33 U. S. C. §407 (prohibiting depositing refuse "into any tributary of any navigable water from which the same shall float or be washed into such navigable water"). To be sure, the Refuse Act also prohibits leaving refuse "on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water." *Ibid.* But, this prohibition reflects nothing more than Congress' traditional authority to regulate acts done on land that directly impair the navigability of traditionally navigable waters. See *Rio Grande Dam & Irrigation Co.*, 174 U. S., at 708 (explaining that the Act reaches "any obstruction to the navigable capacity, and anything, wherever done or however

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[1] Courts had long carefully enforced limits on Congress' navigation authority in prosecutions brought under the Act of July 7, 1838, ch. 191, 5 Stat. 304 (Steamboat Acts of 1838), which prohibited the transportation of goods "upon the bays, lakes, rivers, or other navigable waters of the United States" by certain steamboats. See, *e.g.*, *The Seneca*, 27 F. Cas. 1021 (No. 16,251) (DC Wis. 1861); see also *The James Morrison*, 26 F. Cas. 579, 582 (No. 15,465) (DC Mo. 1846) (holding that the 1838 Act did not reach a ship whose "employment ha[d] no other than a remote connection with 'commerce or navigation among the several states;' no more connection than has the farmer who cultivates hemp, tobacco or cotton for a market in other states—the miner who digs and smelts lead—the manufacturer who manufactures for the same market, or the traveler who intends purchasing any of these articles").

done, . . . which tends to destroy the navigable capacity of one of the navigable waters of the United States"); see also *Northern Pacific R. Co.* v. *United States*, 104 F. 691, 693 (CA8 1900); *Coombs*, 12 Pet., at 78. It does not mean that the land itself is a navigable water.[2]

The history of federal regulation of navigable waters demonstrates that Congress' authority over navigation, as traditionally understood, was narrow but deep. It only applied to a discrete set of navigable waters and could only be used to keep those waters open for interstate commerce. See *Port of Seattle*, 255 U. S., at 63; *Rio Grande Dam & Irrigation Co.*, 174 U. S., at 709. Yet, where Congress had authority, it displaced the States' traditional sovereignty over their navigable waters and allowed Congress to regulate activities even on land that could directly cause obstructions to navigable capacity. *Gilman*, 3 Wall., at 724–725; *Coombs*, 12 Pet., at 78.

In light of the depth of this new federal power, it was carefully limited—mere "effects" on interstate commerce were not sufficient to trigger Congress' navigation authority. As one District Court presciently observed in interpreting the term "navigable waters of the United States" in the Steamboat Act of 1838:

> "To make a particular branch of commerce or trade within a state, a part of the commerce among the several states, it would not be sufficient that it was remotely connected with that commerce among the several states; for almost everything and every occupation and employment in life are remotely connected with

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[2] The early 20th century also saw the Reclamation Act of 1902, ch. 1093, 32 Stat. 388; Federal Power Act, ch. 285, 41 Stat. 1063; Oil Pollution Act, 1924, ch. 316, 43 Stat. 604; and Flood Control Act of 1936, ch. 688, 49 Stat. 1570, all of which relied on navigability. See Walston 724–726. Although the Acts were also designed to achieve incidental benefits such as pollution control, Congress located its authority in preserving navigation. *Ibid.*

> that commerce or navigation. And if congress has the right to regulate every employment or pursuit thus remotely connected with that commerce, of which they have the control, then it has the right to regulate nearly the entire business and employment of the citizens of the several states. . . . Yet, if congress has the power to regulate all these employments, and a thousand others equally connected with that commerce, then it can regulate nearly all the concerns of life, and nearly all the employments of the citizens of the several states; and the state governments might as well be abolished. It is not sufficient, then, that navigation, or trade, or business of any kind, within a state, be remotely connected, or, perhaps, connected at all with 'commerce with foreign nations, or among the several states, or with the Indian tribes,' it should be a part of that commerce, to authorize congress to regulate it." *The James Morrison*, 26 F. Cas. 579, 581 (No. 15,465) (DC Mo. 1846).

The Court's observation that "federal regulation was largely limited to ensuring that 'traditional navigable waters' . . . remained free of impediments," *ante*, at 2, thus does no more than reflect the original understanding of the federal authority over navigable waters.

B

As noted above, the scope of Congress' authority over waters was defined by the traditional concept of navigability, imported with significant modifications from the English common law.[3] Thus, Congress could regulate only "naviga-

[3] The English rule tied navigability to the ebb and flow of the tides, but began to be eroded in America as early as the Northwest Ordinance of 1787 due to the superior commercial capacity of American inland rivers. See *The Daniel Ball*, 10 Wall. 557, 563 (1871); *Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 454–457 (1852); see also *Economy Light & Power*

ble waters." Consistent with that backdrop, the term "navigable waters"—used interchangeably with "waters of the United States" and "navigable waters of the United States"—referred to the waters subject to Congress' traditional authority over navigable waters until the enactment of the CWA.

1

The term "navigable waters" has been in use since the founding to refer to the highways of commerce that were key to the Nation's development. Great cities like Philadelphia and St. Louis emerged at first as commercial ports along these navigable waters. The Framers recognized that "Providence has in a particular manner blessed" our country with "[a] succession of navigable waters" that "bind [the Nation] together; while the most noble rivers in the world, running at convenient distances, present [Americans] with highways for the easy communication of friendly aids and the mutual transportation and exchange of their various commodities." The Federalist No. 2, p. 38 (C. Rossiter ed. 1961) (J. Jay). These "vast rivers, stretching far inland" have been of "transcendent importance" to our Nation's economic expansion by forming "great highways" for commerce. L. Houck, Law of Navigable Rivers xiii (1868).

This Court authoritatively set out the scope of the term "navigable waters of the United States" in the seminal case of *The Daniel Ball*, 10 Wall. 557 (1871). That case arose under the Steamboat Act of 1838, which prohibited the transportation of goods "upon the bays, lakes, rivers, or other navigable waters of the United States." §2, 5 Stat.

Co. v. *United States*, 256 U. S. 113, 120 (1921) ("[I]t is curious and interesting that the importance of these inland waterways, and the inappropriateness of the tidal test in defining our navigable waters, was thus recognized by the Congress of the Confederation [in the Northwest Ordinance] more than 80 years before this court decided *The Daniel Ball* . . . and more than 60 years before *The Propeller Genesee Chief*").

304. This Court held that the term "navigable" refers to waters that are "navigable in fact," meaning that "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 10 Wall., at 563. The Court then explained that navigable waters are "of the United States," "in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *Ibid.*; see also *The Montello*, 11 Wall. 411, 415 (1871) ("If . . . the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State"). It is this "junction" between waters to "for[m] a continued highway for commerce, both with other States and with foreign countries," that brings the water "under the direct control of Congress in the exercise of its commercial power." *The Daniel Ball*, 10 Wall., at 564. The definition of a "navigable water of the United States" was thus linked directly to the limits on Congress' commerce authority: A navigable water of the United States was one that was ordinarily used for interstate or foreign commerce.

Wetlands were generally excluded from this definition. In *Leovy* v. *United States*, 177 U. S. 621 (1900), for example, the Court employed the *Daniel Ball* test to hold that the term "navigable waters of the United States," as used in the 1890 River and Harbor Act, did not "prevent the exercise by the State of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current

of small streams not used habitually as arteries of interstate commerce." 177 U. S., at 632. The Court observed that applying the Act to wetlands reclamation "would extend the paramount jurisdiction of the United States over all the flowing waters in the States." *Id.*, at 633. "If such were the necessary construction of the" term "navigable water," the Court explained, the River and Harbor Act's "validity might well be questioned." *Ibid.* But, the Court declined to interpret the Act to reach the wetlands, because it recognized that the phrase "navigable waters of the United States" encompassed only those waters reached by the traditional channels-of-commerce authority:

> "When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the States, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes." *Ibid.*

The Court thus held that the mere use of a wetland by fishermen was not sufficient to make the wetland a navigable water of the United States; it "was not shown that passengers were ever carried through it, or that freight destined to any other State than Louisiana, or, indeed, destined for any market in Louisiana, was ever, much less habitually, carried through it." *Id.*, at 627.[4]

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[4] *Leovy* v. *United States* also reflected the law's longstanding hostility to wetlands: "If there is any fact which may be supposed to be known by everybody, and, therefore, by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances." 177 U. S., at 636. Traditionally, the only time wetlands were the subject of federal legislation was to aid the States in draining them.

The *Daniel Ball* test, with minor variations, marked the limits of federal jurisdiction over waters up to the enactment of the CWA. For instance, in *Economy Light & Power Co.* v. *United States*, 256 U. S. 113 (1921), the Court applied *The Daniel Ball* but expanded it to hold that the River and Harbor Act of 1899 reaches waters that are not currently capable of supporting interstate commerce, though they once did. 256 U. S., at 123–124. And, in *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377 (1940), the Court applied *The Daniel Ball* to reach waters that could be made navigable with reasonable and feasible improvement. 311 U. S., at 408–409. While these cases expanded the outer boundaries of the term, creating an expanded form of the *Daniel Ball* test, they reflect the Court's longstanding view that the statutory term "navigable water" required application of the *Daniel Ball* test.

2

In the New Deal era, as is well known, this Court adopted a greatly expanded conception of Congress' commerce authority by permitting Congress to regulate any private intrastate activity that substantially affects interstate commerce, either by itself or when aggregated with many similar activities. See *Wickard* v. *Filburn*, 317 U. S. 111, 127–129 (1942); see also *United States* v. *Darby*, 312 U. S. 100, 119 (1941). Yet, this expansion did not fundamentally change the Court's understanding that the term "navigable waters" referred to waters used for interstate commerce. Thus, in *Appalachian Elec.*, the Court continued to apply the concept of navigability to determine the scope of Congress' Commerce Clause authority to require licenses under

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See, *e.g.*, Swamp Land Act of 1850, ch. 84, 9 Stat. 519; see also S. Johnson, Wetlands Law: A Course Source 25–26 (2d ed. 2018). Wetlands preservation only gained traction due, in large part, to advances in firearms technology that made waterfowl hunting feasible. G. Baldassarre & E. Bolen, Waterfowl Ecology and Management 10–14 (1994).

the Federal Water Power Act for the construction of hydroelectric dams in "navigable waters." 311 U. S., at 406–410. Only after applying the *Daniel Ball* definition to determine that the river in question was navigable did the Court hold that Congress had plenary authority over the erection of structures in the river, regardless of whether the structure actually impeded navigability. 311 U. S., at 423–426. While this represented an expansive application of the old concept that Congress can prevent obstructions to navigable capacity, see *supra*, at 4, 7–8, *Appalachian Elec.* made clear that the *term* "navigable waters" remained tethered to Congress' traditional channels-of-commerce authority—not to the broader conceptions of the commerce authority adopted by the Court at that time.

The next year, in *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941), the Court reaffirmed that the term "navigable waters," this time as used in the Flood Control Act of 1936, was to be interpreted in light of the expanded *Daniel Ball* test. 313 U. S., at 522–525. Significantly, *Oklahoma* was decided mere months after *Darby*, one of the most significant cases expanding the scope of the commerce authority. 312 U. S., at 119. However, *Oklahoma* did not so much as mention *Darby* in construing the jurisdiction Congress conveyed in the term "navigable waters." Instead, it cited *Darby* only in passing and to support the argument that, once a river is deemed navigable under the channels-of-commerce authority, Congress has authority to protect "the nation's arteries of commerce" by regulating intrastate activities on nonnavigable parts and tributaries of the navigable river lest such activities "impai[r] navigation itself." *Oklahoma*, 313 U. S., at 525. This was nothing more than an application of the principle that Congress can regulate activities that obstruct navigable capacity. Thus, even as the Court expanded the Commerce Clause in other contexts, it continued to understand that the term "navigable waters" refers solely to the aquatic

channels of interstate commerce over which Congress traditionally exercised authority.

3

This understanding of the term "navigable waters"—*i.e.*, as shorthand for waters subject to Congress' authority under the *Daniel Ball* test—persisted up to the enactment of the CWA. See, *e.g.*, *Stoeco Homes, Inc.*, 498 F. 2d, at 608–609; *United States* v. *Joseph G. Moretti, Inc.*, 478 F. 2d 418, 428–429 (CA5 1973); see also D. Guinn, An Analysis of Navigable Waters of the United States, 18 Baylor L. Rev. 559, 579 (1966) ("[T]he test of *The Daniel Ball* and *Appalachian Power Co.* are religiously cited as being the basis for the holding on the issue of navigability"). As a court observed near the time of the CWA's enactment, "[a]lthough the definition of 'navigability' laid down in *The Daniel Ball* has subsequently been modified and clarified, its definition of 'navigable water of the United States,' insofar as it requires a navigable interstate linkage by water, appears to remain unchanged." *Hardy Salt Co.* v. *Southern Pacific Transp. Co.*, 501 F. 2d 1156, 1167 (CA10 1974) (citations omitted). This Court's cases, too, continued to apply traditional navigability concepts in cases under the River and Harbor Acts right up to the CWA's enactment. See *United States* v. *Standard Oil Co.*, 384 U. S. 224, 226 (1966) (holding that spilling oil in a navigable water was prohibited by the Refuse Act (§13 of the 1899 Act) because "its presence in our rivers and harbors is both a menace to navigation and a pollutant"); *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 487–491 (1960) ("diminution of the navigable capacity of a waterway" required for violation of the Refuse Act). Thus, on the eve of the CWA's enactment, the term "navigable waters" meant those waters that are, were, or could be used as highways of interstate or foreign commerce.

II

This history demonstrates that Congress was not writing on a blank slate in the CWA, which defines federal jurisdiction using the same terms used in the River and Harbor Acts: "navigable waters" and "the waters of the United States," 33 U. S. C. §§1311(a), 1362(7), (12). As explained above, courts and Congress had long used the terms "navigable water," "navigable water of the United States," and "the waters of the United States" interchangeably to signify those waters to which the traditional channels-of-commerce authority extended. See *supra*, at 6. The terms "navigable waters" and "waters of the United States" shared a core requirement that the water be a "highway over which commerce is or may be carried," with the term "of the United States" doing the independent work of requiring that such commerce "be carried on with other States or foreign countries." *The Daniel Ball*, 10 Wall., at 563. The text of the CWA thus reflects the traditional balance between federal and state authority over navigable waters, as set out by *The Daniel Ball*. It would be strange indeed if Congress sought to effect a fundamental transformation of federal jurisdiction over water through phrases that had been in use to describe the traditional scope of that jurisdiction for well over a century and that carried a well-understood meaning.[5]

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[5] In fact, when Congress has wished to depart from this traditional meaning, it has done so expressly, as in parts of the Federal Power Act, §23, 41 Stat. 1075 (requiring approval for dam construction "across, along, over, or in any stream or part thereof, other than those defined herein this chapter as navigable waters"); the Federal Water Pollution Control Act, ch. 758, §2(a), 62 Stat. 1155 (as amended, 86 Stat. 816) (authorizing federal-state cooperation to abate water pollution in "interstate waters" and their tributaries); and the Water Quality Act of 1965, 79 Stat. 905–906 (authorizing grants to research abatement of pollution into "any waters"); see *Hardy Salt Co.* v. *Southern Pacific Transp. Co.*, 501 F. 2d 1156, 1168 (CA10 1974) (noting that Congress only departs from the expanded *Daniel Ball* test by using "clear and explicit language," as it did in parts of the Federal Power Act).

The Army Corps of Engineers originally understood the CWA in precisely this way. In its 1974 regulation establishing the first CWA §404 permitting program,[6] the Corps interpreted the term "the waters of the United States" to establish jurisdiction over the traditional navigable waters as determined by the expanded *Daniel Ball* test, noting also that the term is limited by Congress' navigation authority. 39 Fed. Reg. 12115. The Corps anchored its jurisdiction in the expanded *Daniel Ball* test, defining "navigable waters" to include "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 CFR §209.120(d)(1) (1974); see also §§209.260(d)(1)–(3) (requiring "[p]ast, present, or potential presence of interstate or foreign commerce," "[p]hysical capabilities for use by commerce," and "[d]efined geographic limits of the water body"). The regulations also made clear that traditional navigability factors were the baseline for CWA jurisdiction: "It is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." §209.260(e)(1).

Almost immediately, however, a few courts and the recently created Environmental Protection Agency (EPA) rejected this interpretation. Instead, they interpreted the CWA to assert the full extent of Congress' New Deal era authority to regulate anything that substantially affects interstate commerce by itself or in the aggregate. See *United States* v. *Ashland Oil & Transp. Co.*, 504 F. 2d 1317, 1323–1329 (CA6 1974); *P. F. Z. Properties, Inc.* v. *Train*, 393 F. Supp. 1370, 1381 (DC 1975); *National Resource Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (DC 1975);

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[6] Section 404 authorizes the Corps to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U. S. C. §§1344(a), (d).

United States v. *Holland*, 373 F. Supp. 665, 669, 672–674 (MD Fla. 1974); 40 CFR §125.1(o) (1974) (initial EPA CWA definition). The courts that reached this conclusion relied almost exclusively on legislative history and statutory purpose. See, *e.g.*, *Holland*, 373 F. Supp., at 672 ("The foregoing [legislative history] compels the Court to conclude that the former test of navigability was indeed defined away in the [CWA]"). But signals from legislative history cannot rebut clear statutory text, and the text of the CWA employs words that had long been universally understood to reach only those waters subject to Congress' channels-of-commerce authority. See *supra*, at 15.

These courts and the EPA had only one textual hook for their interpretation: In defining the term "navigable waters" as "the waters of the United States," the CWA seemed to drop the term "navigable" from the operative part of the definition. Seizing on this phrasing, the EPA's general counsel asserted in 1973 that "the deletion of the word 'navigable' eliminates the requirement of navigability. The only remaining requirement, then, is that pollution of waters covered by the bill must be capable of affecting interstate commerce." 1 EPA Gen. Counsel Op. 295 (1973). Similarly, the District Court that vacated the Corps' original CWA definition held, without any analysis or citation, that the term "the waters of the United States" in the CWA is "not limited to the traditional tests of navigability." *National Resource Defense Council*, 392 F. Supp., at 671.

That interpretation cannot be right. For one, the terms "navigable waters" and "the waters of the United States" had long been used synonymously by courts and Congress. The CWA simply used the terms in the same manner as the River and Harbor Acts. Moreover, no source prior to the CWA had ever asserted that the term "the waters of the United States," when not modified by "navigable," reached any water that may affect interstate commerce. Instead, *The Daniel Ball* made clear that "[t]he phrase 'waters of the

United States, in contradistinction from the navigable waters of the States,' . . . distinguishes interstate from intrastate waters." Albrecht & Nickelsburg 11049 (quoting *The Daniel Ball*, 10 Wall., at 563); accord, 1 A. Knauth, Benedict on Admiralty §44, p. 96 (6th ed. 1940) ("The inland lakes of various States are navigable but, having no navigable outlet linking them with our system of water-ways, have never been held to be public *waters of the United States*" (emphasis added)). The text of the CWA extends jurisdiction to "navigable waters," and—precisely tracking *The Daniel Ball*—clarifies that it reaches "the waters of the United States," rather than the navigable waters of the States.

Thus, the CWA's use of the phrase "the waters of the United States" reinforces, rather than lessens, the need for a water to be at least part of "a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *The Daniel Ball*, 10 Wall., at 563. At most, the omission of the word "navigable" signifies that the CWA adopts the expanded *Daniel Ball* test—that includes waters that are, have been, or can be reasonably made navigable in fact—in its statutory provisions. The Federal Government's interpretation, by contrast, renders the use of the term "navigable" a nullity and involves an unprecedented and extravagant reading of the well-understood term of art "the waters of the United States." See Albrecht & Nickelsburg 11049 ("EPA's conclusion is ahistorical as well as illogical").[7] "*[T]he* waters *of* the

[7] To be sure, the CWA is more aggressive in regulating navigable waters than the River and Harbor Acts. But, the increased stringency is not accomplished by expanding jurisdiction. The Acts use the same jurisdictional terms. Instead, the difference between them lies in the expanded scope of activities that the CWA regulates and its shift from an enforcement and injunctive regime to a previolation licensing regime. See Albrecht & Nickelsburg 11046. I express no view on the constitutionality of this regime as applied to navigable waters or on the Court's holding in *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377

United States" does not mean *any* water *in* the United States.

There would be little need to explain any of this if the agencies had not effectively flouted our decision in *SWANCC*, which restored navigability as the touchstone of federal jurisdiction under the CWA, and rejected the key arguments supporting an expansive interpretation of the CWA's text. We expressly held that Congress' "use of the phrase 'waters of the United States'" in the CWA is not "a basis for reading the term 'navigable waters' out of the statute"—directly contradicting the EPA's 1973 interpretation, upon which every subsequent expansion of its authority has been based. 531 U. S., at 172. We also held that the Corps did not "mist[ake] Congress' intent" when it promulgated its 1974 regulations, under which "'the determinative factor'" for navigability was a "'water body's capability of use by the public for purposes of transportation or commerce.'" *Id.*, at 168 (quoting 33 CFR §209.260(e)(1)). In doing so, we rejected reliance on the CWA's "ambiguous" legislative history, which the EPA had used "to expand the definition of 'navigable waters'" to the outer limit of the commerce authority as interpreted in the New Deal. 531 U. S., at 168, n. 3.[8] Instead, we made clear that Congress did not intend

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(1940), that Congress can regulate things in navigable waters for purposes other than removing obstructions to navigable capacity. I note, however, that before the New Deal era, courts consistently construed statutes to authorize only federal actions preserving navigable capacity in order to avoid exceeding Congress' navigation authority. See *supra*, at 8–13.

[8]The historical context demonstrates that it was the Corps' failure to regulate to the full extent of Congress' navigation power, not its commerce power generally, that led to the enactment of the CWA. See Albrecht & Nickelsburg, 11047 (explaining that the CWA's legislative history is better interpreted "as the Supreme Court in *SWANCC* read it, to mean simply that Congress intended to override previous, unduly narrow agency interpretations to assert its broadest constitutional authority over *the traditional navigable waters*"); see also S. Bodine, Examining the Term "Waters of the United States" in Its Historical Context, C.

"to exert anything more than its commerce power over navigation." *Ibid.*; see also *id.*, at 173 (rejecting the Government's argument that the CWA invokes "Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce").

SWANCC thus interpreted the text of the CWA as implementing Congress' "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made"—*i.e.*, the expanded *Daniel Ball* test. 531 U. S., at 172 (citing *Appalachian Elec.*, 311 U. S., at 407–408).[9] And, consistent with the traditional link between navigability and the limits of Congress' regulatory

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Boyden Gray Center for the Study of the Administrative State Policy Brief No. 4 (2022).

[9] Section 404(g), added by the 1977 CWA Amendments, does not demonstrate that the CWA departs from traditional conceptions of navigability. That provision states that States may administer permit programs for discharges into "navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . , including wetlands adjacent thereto)." 91 Stat. 1601 (codified, as amended, at 33 U. S. C. §1344(g)). This provision thus authorizes States to establish their own permit programs over a discrete class of traditionally navigable waters of the United States: those that once were navigable waters of the United States, but are no longer navigable in fact. See *Economy Light & Power Co.*, 256 U. S., at 123–124. Some have asserted that this nonjurisdictional provision—the function of which in the statute is to *expand* state authority—signals that Congress actually intended an unprecedented expansion of federal authority over the States. *Rapanos* v. *United States*, 547 U. S. 715, 805–806 (2006) (Stevens, J., dissenting); see also *post*, at 3–5 (KAVANAUGH, J., concurring in judgment); *post*, at 1–3 (KAGAN, J., concurring in judgment). But, as the Court explains, not only is §404(g) not the relevant definitional provision, its reference to "wetlands" is perfectly consistent with the commonsense recognition that some wetlands are indistinguishable from navigable waters with which they have continuous surface connections. *Ante*, at 18–22, 27. To infer Congress' intent to upend over a century of settled understanding and effect an unprecedented transfer of authority over land and water to the Federal Government, based on nothing more

authority, *SWANCC* noted that any broader interpretation would raise "significant constitutional and federalism questions" and "result in a significant impingement of the States' traditional and primary authority over land and water use." 531 U. S., at 174. Both in its holdings and in its mode of analysis, *SWANCC* cannot be reconciled with the agencies' sharp departure from the centuries-old understanding of navigability and the traditional limits of Congress' channels-of-commerce authority.

In sum, the plain text of the CWA and our opinion in *SWANCC* demonstrate that the CWA must be interpreted in light of Congress' traditional authority over navigable waters. See Albrecht & Nickelsburg 11055 (noting that *SWANCC* "states more than once that Congress' use of the term 'navigable waters' signifies that Congress intended to exercise its traditional authority over navigable waters, and not its broader power over all things that substantially affect commerce"). Yet, for decades, the EPA (of its own license) and the Corps (under the compulsion of an unreasoned and since discredited District Court order) have issued substantively identical regulatory definitions of "the waters of the United States" that completely ignore navigability and instead expand the CWA's coverage to the outer limits of the Court's New Deal-era Commerce Clause precedents.

III

This case demonstrates the unbounded breadth of the jurisdiction that the EPA and the Corps have asserted under the CWA. The regulatory definition applied to the Sacketts' property declares "intrastate" waters, wetlands, and various other wet things to be "waters of the United States" if their "use, degradation or destruction . . . *could affect* inter-

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than a negative inference from a parenthetical in a subsection that preserves state authority, is counterintuitive to say the least.

state or foreign commerce." 40 CFR §230.3(s)(3) (2008) (emphasis added). To leave no doubt that the agencies have entirely broken from traditional navigable waters, they give several examples of qualifying waters: those that "are or could be used by interstate or foreign travelers for recreational or other purposes," those "[f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce," those that "are used or could be used for industrial purposes by industries in interstate commerce," "[t]ributaries of" any such waters, and "[w]etlands adjacent to" any such waters. §§230.3(s)(3)(i)–(iii), (5), (7). This definition and others like it are premised on the fallacy repudiated in *SWANCC*: that the text of the CWA expands federal jurisdiction beyond Congress' traditional "commerce power over navigation." 531 U. S., at 168, n. 3.

Nonetheless, under these boundless standards, the agencies have "asserted jurisdiction over virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow," including "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." *Rapanos*, 547 U. S., at 722 (plurality opinion). The agencies' definition "engulf[s] entire cities and immense arid wastelands" alike. *Ibid.* Indeed, because "the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface," "any plot of land containing such a channel may potentially be regulated." *Ibid.*

If this interpretation were correct, the only prudent move for any landowner in America would be to ask the Federal Government for permission before undertaking any kind of development. See Tr. of Oral Arg. 86, 116–117. This regime turns Congress' traditionally limited navigation authority on its head. The baseline under the Constitution, the CWA, and the Court's precedents is state control of waters. See

SWANCC, 531 U. S., at 174 (reaffirming "the States' traditional and primary power over land and water use"); *Leovy*, 177 U. S., at 633 (repudiating an interpretation of the 1899 Act that would render practically every "creek or stream in the entire country" a "navigable water of the United States" and "subject the officers and agents of a State . . . to fine and imprisonment" for draining a swamp "unless permission [was] first obtained from the Secretary of War"). By contrast, the agencies' interpretation amounts to a federal police power, exercised in the most aggressive possible way.

Thankfully, applying well-established navigability rules makes this a straightforward case. The "wetlands" on the Sacketts' property are not "waters of the United States" for several independently sufficient reasons. First, for the reasons set out by the Court, the Sacketts' wetlands are not "waters" because they lack a continuous surface connection with a traditional navigable water. See *ante*, at 27. Second, the nonnavigable so-called "tributary" (really, a roadside ditch) across the street from the Sacketts' property is not a water of the United States because it is not, has never been, and cannot reasonably be made a highway of interstate or foreign commerce. See *SWANCC*, 531 U. S., at 172. Third, the agencies have not attempted to establish that Priest Lake is a navigable water under the expanded *Daniel Ball* test. The lake is purely intrastate, and the agencies have not shown that it is a highway of interstate or foreign commerce. Instead, the agencies rely primarily upon interstate tourism and the lake's attenuated connection to navigable waters. See U. S. Army Corps of Engineers, G. Rayner, Priest Lake Jurisdictional Determination (Feb. 27, 2007); see also Brief for National Association of Home Builders of the United States as *Amicus Curiae* 21–24. But, this is likely insufficient under the traditional navigability tests to which the CWA pegs jurisdiction. See *supra*, at 10–13; accord, Tr. of Oral Arg. 119 (EPA counsel conceding that Congress "hasn't used its full Commerce Clause authority" in

the CWA). Finally, even assuming that a navigable water is involved, the agencies have not established that the Sacketts' actions would obstruct or otherwise impede navigable capacity or the suitability of the water for interstate commerce. See *Rio Grande Dam & Irrigation Co.*, 174 U. S., at 709.

This is not to say that determining whether a water qualifies under the CWA is *always* easy. But, it is vital that we ask the right question in determining what constitutes "the waters of the United States": whether the water is within Congress' traditional authority over the interstate channels of commerce. Here, no elaborate analysis is required to know that the Sacketts' *land* is not a *water*, much less a water of the United States.

IV

What happened to the CWA is indicative of deeper problems with the Court's Commerce Clause jurisprudence. The eclipse of Congress' well-defined authority over the channels of interstate commerce tracks the Court's expansion of Congress' power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. As I have explained at length, the Court's Commerce Clause jurisprudence has significantly departed from the original meaning of the Constitution. See *Gonzales* v. *Raich*, 545 U. S. 1, 58–59 (2005) (dissenting opinion); *Lopez*, 514 U. S., at 586–602 (concurring opinion). "The Clause's text, structure, and history all indicate that, at the time of the founding, the term '"commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes.'" *Raich*, 545 U. S., at 58. This meaning "stood in contrast to productive activities like manufacturing and agriculture," and founding era sources demonstrate that "the term 'commerce' [was] consistently used to mean trade or exchange—not all economically gainful activity that has some attenuated connection

to trade or exchange." *Ibid.* (citing *Lopez*, 514 U. S., at 586–587 (THOMAS, J., concurring); Barnett 112–125).[10] By departing from this limited meaning, the Court's cases have licensed federal regulatory schemes that would have been "unthinkable" to the Constitution's Framers and ratifiers. *Raich*, 545 U. S., at 59 (opinion of THOMAS, J.).

Perhaps nowhere is this deviation more evident than in federal environmental law, much of which is uniquely dependent upon an expansive interpretation of the Commerce Clause. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 281–283 (1981); see also Brief for Claremont Institute's Center for Constitutional Jurisprudence as *Amicus Curiae* 17–25. And many environmental regulatory schemes seem to push even the limits of the Court's New Deal era Commerce Clause precedents, see *Hodel*, 452 U. S., at 309–313 (Rehnquist, J., concurring in judgment), to say nothing of the Court's more recent precedents reining in the commerce power. See, *e.g.*, *SWANCC*, 531 U. S., at 173–174; cf. *Rancho Viejo, LLC* v. *Norton*, 334 F. 3d 1158, 1160 (CADC 2003) (Roberts, J., dissenting from denial of rehearing en banc) ("The panel's approach in this case leads to the result that regulating the taking [under the Endangered Species Act] of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating 'Commerce among the several States'" (ellipsis omitted)).

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[10] Further scholarship notes that the term "commerce" as originally understood "was bound tightly with the *Lex Mercatoria* and the sort of activities engaged in by merchants: buying and selling products made by others (and sometimes land), associated finance and financial instruments, navigation and other carriage, and intercourse across jurisdictional lines." R. Natelson, The Legal Meaning of "Commerce" in the Commerce Clause, 80 St. John's L. Rev. 789, 845 (2006). This "did not include agriculture, manufacturing, mining, *malum in se* crime, or land use. Nor did it include activities that merely 'substantially affected' commerce; on the contrary, the cases included wording explicitly distinguishing such activities from commerce." *Ibid.*

The Court's opinion today curbs a serious expansion of federal authority that has simultaneously degraded States' authority and diverted the Federal Government from its important role as guarantor of the Nation's great commercial water highways into something resembling "a local zoning board." *Rapanos*, 547 U. S., at 738 (plurality opinion). But, wetlands are just the beginning of the problems raised by the agencies' assertion of jurisdiction in this case. Despite our clear guidance in *SWANCC* that the CWA extends only to the limits of Congress' traditional jurisdiction over navigable waters, the EPA and the Corps have continued to treat the statute as if it were based on New Deal era conceptions of Congress' commerce power. But, while not all environmental statutes are so textually limited, Congress chose to tether federal jurisdiction under the CWA to its traditional authority over navigable waters. The EPA and the Corps must respect that decision.