SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL SACKETT, ET UX.,   )

        Petitioners,   )

          v.   ) No. 21-454

ENVIRONMENTAL PROTECTION AGENCY,)

ET AL.,   )

        Respondents.   )

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Pages: 1 through 124

Place: Washington, D.C.

Date: October 3, 2022

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11   Washington, D.C.

12   Monday, October 3, 2022

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14   The above-entitled matter came on for oral

15   argument before the Supreme Court of the United

16   States at 10:03 a.m.

17

18   APPEARANCES:

19   DAMIEN M. SCHIFF, ESQUIRE, Sacramento, California; on

20   behalf of the Petitioners.

21   BRIAN H. FLETCHER, Principal Deputy Solicitor General,

22   Department of Justice, Washington, D.C.; on behalf

23   of the Respondents.

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 1                    P R O C E E D I N G S
 2                                    (10:03 a.m.)
 3            CHIEF JUSTICE ROBERTS:  We will hear
 4   argument first this morning in Case 21-454,
 5   Sackett versus EPA.
 6            Mr. Schiff, you're up first this year.
 7            ORAL ARGUMENT OF DAMIEN M. SCHIFF
 8               ON BEHALF OF THE PETITIONERS
 9            MR. SCHIFF:  Thank you, Mr. Chief
10   Justice, and may it please the Court:
11            It's now going on 16 years since
12   Petitioners Mike and Chantell Sackett began
13   construction of a house on a vacant lot in a
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
22   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,
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1   a hydro-geographic feature that in ordinary

2   parlance would be referred to as a type of

3   stream, creek, river, lake, or the like. A

4   wetland, however, is none of those things, and

5   so it can be regulated as a water only to the

6   extent that it blends into and thus becomes

7   indistinguishable from an abutting water.

8   Second, the water has to be of the

9   United States, that is, for all practical

10   purposes, a navigable in fact water.

11   Now this test is vastly superior to

12   the significant nexus test for a number of

13   reasons. First and most importantly, the

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

22   over land and water resources.

23   And, thirdly, it's an

24   easy-to-administer test. Ordinary citizens can

25   use their own eyes to reliably determine whether

1   or not their land is regulated.

2   And under this two-step framework,

3   it's clear that the Sacketts' property contains

4   no waters, much less waters of the United

5   States, and so they should be entitled to a

6   declaration that their property is not subject

7   to EPA's authority.

8   JUSTICE THOMAS: Mr. Schiff, can --

9   can intrastate, purely intrastate, navigable

10   bodies of water be waters of the United States?

11   MR. SCHIFF: Yes, Justice Thomas.

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

18   continuous channel of interstate commerce, then

19   that water could be regulated.

20   JUSTICE THOMAS: So what does that

21   mean?

22   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

1   it doesn't hook up to any other waters to flow

2   interstate. But, obviously, there are a lot of

3   forms of nonaquatic transportation that can get

4   you there and that can sustain an interstate

5   channel of commerce.

6   So that's an example of a water body

7   that, though wholly intrastate, would qualify as

8   a statutory matter as a water of the United

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

20   considered navigable, that possibly the wetland

21   could be associated or connected with that in

22   some way.

23   MR. SCHIFF: Your Honor, the --

24   JUSTICE THOMAS: I mean, don't you

25   have a ditch, you have a body of water, and you

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

4 statutory jurisdiction for a number of reasons.

5 The text of the statute says --

6 setting aside even "of the United States," the

7 text says that if it's not even a water, it

8 can't even be regulated.

9 And the plain meaning of "water," as

10 elucidated by dictionary definitions and what

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

22 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,

1   in fact, regulated. And the question is, what

2   kind of wetlands?

3   Now adjacency in the context of 404(g)

4   clearly means physically touching. For example,

5   if I were to say I own two adjacent parcels of

6   land --

7   JUSTICE KAGAN: Well, you say that's

8   clearly true, but, in fact, when you look to our

9   normal indicators of statutory meaning, first,

10   we look to dictionaries, and if you look to

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

18   touching each other.

19   MR. SCHIFF: Justice Kagan, if I could

20   respectfully disagree, certainly, adjacency in

21   the abstract can have more than one meaning, but

22   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

1   term is physically touching.

2   JUSTICE KAVANAUGH: Well, why --

3   CHIEF JUSTICE ROBERTS: I'm not sure

4   --

5   JUSTICE KAVANAUGH: -- did E- --

6   CHIEF JUSTICE ROBERTS: -- I'm not

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

18   neighborhood, that that necessarily implies that

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

25   to be touching each other, or it could be, you

1   know, one is across a side street, you know?

2   MR. SCHIFF: Again, Justice Kagan --

3   JUSTICE KAGAN: I mean, I would say

4   that those -- you know, those two apartment

5   buildings are adjacent to each other because

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(g). That is, in fact, actually

15   --

16   JUSTICE JACKSON: But, Mr. Schiff,

17   isn't the issue what Congress would have

18   intended with respect to adjacency and there was

19   a regulation that defined "adjacency" to include

20   neighboring? And as far as I know, Congress

21   used the term "adjacency" and didn't adjust it

22   to try to make clear the touching requirement

23   that you say was intended by the term.

24   MR. SCHIFF: Yes, Justice Jackson.

25   Every single time that argument has been

1   advanced by the government, it has been rejected

2   by this Court. In Rapanos, the plurality

3   opinion rejected out of hand the idea that 404(g)

4   represents a ratification of the Corps's broad

5   understanding of adjacency. Justice Kennedy's

6   opinion doesn't even give it consideration.

7   SWANCC, for its part, said 404(g) is

8   unenlightening as to the meaning of "waters of

9   the United States."

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

22   waters?

23   MR. SCHIFF: Justice Jackson, not at

24   all. However, it's also important to

25   acknowledge that Congress was balancing concerns

1   here. On the one hand, there is a water quality

2   issue.

3   But, on the other hand, there's a very

4   important federalism issue, so important that

5   actually Congress put in the text of the Act

6   that one of the purposes of the Act is to

7   preserve traditional state authority over land

8   and water resources.

9   JUSTICE JACKSON: I didn't read that

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,

16   but I didn't see that as Congress's primary

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,

22   this principle of federalism to adopt a narrow

23   construction.

24   JUSTICE SOTOMAYOR: But, counsel --

25   JUSTICE KAVANAUGH: Well --

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 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
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1   could go back first to the first point about

2   404(g) and also in partial response to Justice

3   Jackson's question, even in Riverside Bayview,

4   which is the only time that this Court has

5   actually upheld the Agency's assertion of

6   jurisdiction, even there, at most, the Court was

7   willing to say is that 404(g) simply means that

8   wetlands are not necessarily excluded from the

9   definition of waters, but it wasn't even

10   prepared to adopt a general affirmation of

11   adjacency.

12   In part, that's because none of the

13   1977 amendments had anything to do with the

14   definitional text. And I think this is in

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.

22   And the only way that one can plausibly regulate

23   it is if one has what was at issue in Riverside

24   Bayview --

25   JUSTICE KAVANAUGH: But -- but --

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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
6    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

4   a textual difficulty, how can wetlands --

5   JUSTICE KAVANAUGH: But -- but

6   Riverside Bayview said the contrary to that,

7   obviously. It said wetlands are included. The

8   statute refers to adjacent wetlands. EPA has

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 --

18   MR. SCHIFF: All right.

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

25   to what the last 45 years have suggested?

 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

 6   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

1   pointing out.

2   What is the timing? Because I

3   understand that that regulation was adopted in

4   1977 and 1344(g) was passed in 1977.

5   MR. SCHIFF: Yes, Justice Barrett. My

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

9   regulations, and the final version was issued in

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

13   the enactment of 1344(g)?

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?

22   MR. SCHIFF: No, you're absolutely

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

4   amendments to then conclude that every jot and

5   tittle of the Corps's regulations were then

6   affirmed. And, in fact, again, I would go back

7   to Riverside Bayview --

8   JUSTICE KAGAN: But there was --

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

18   the Corps first came out of the blocks with a

19   narrow interpretation and, you know, was

20   essentially convinced to reverse itself on the

21   theory that it was not reflective of what

22   Congress had wanted.

23   MR. SCHIFF: Justice Kagan, I would

24   say one answer is that if -- if Your Honor is

25   referring to, say, a failed legislative

        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

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

1   Rapanos, Justice Scalia, recognized, whether

2   it's scientifically accurate or not, that what

3   navigable waters can be is anything that's

4   adjacent to what we think of as traditional

5   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

13   adjacent because it's part of that river. And

14   Rapanos suggested it's hard to tell where the

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

20   that as their definition, why don't we say that

21   something that is near qualifies? And so the

22   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

3   wetlands, which is precisely what the Corps

4   regulation was trying to do in the '70s. But

5   Congress hasn't done that. In fact, it

6   studiously avoided touching that central

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

11   to be navigable. Certainly, in the normal

12   delimitation of any water, you're always going

13   to have a point at which navigability, in fact,

14   towards the banks of a river, for example, is

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

18   understand that water-ward of that mark one

19   might not have navigability at all points.

20   And I think the same thing is true

21   when it comes to defining the outer scope of

22   waters with respect to abutting wetlands, that

23   as one approaches the shore, it may not become

24   physically possible to navigate, but one can

25   still reasonably say that one hasn't yet

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

10   does. Assume it does. There are other sections

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

22   have been to amend the definition of "navigable

23   waters."

24   JUSTICE JACKSON: But can I -- can I

25   -- can I just -- I'm sorry. You suggest that

1   the balancing, that the limitation is about the

2   concerns with respect to the state's

3   administration, and 1344(g) is precisely where

4   they're talking about what is left to the state

5   versus the federal government, and in that

6   statute, it just uses "adjacent."

7   So I -- with respect, that seems to me

8   to be exactly where they would have made clear

9   that the federal government's scope of authority

10   was abutting or immediately adjacent, and we're

11   leaving the rest to the states, under your own

12   theory of what they were trying to do.

13   MR. SCHIFF: Justice Jackson, my -- my

14   disagreement there is that that presupposes that

15   Section 404 already regulates the universe of

16   all wetlands and that it's essentially a -- a

17   federal privilege whether or not any of that

18   regulatory authority will be given back to the

19   states.

20   But I don't believe that that's at all

21   what Congress intended. I think Congress

22   recognized that, setting aside the Clean Water

23   Act, there would be a significant swath of land

24   use and water regulation that would remain to

25   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

4   that non-point source pollution is a serious

5   water quality issue, but it's never been

6   disputed that the Clean Water Act doesn't reach

7   that, which I think emphasizes that the purpose

8   of Congress in enacting the Clean Water Act was

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

13   demonstrates, inevitably converts EPA and the

14   Corps into land use administrators.

15   JUSTICE JACKSON: So can I just ask

16   you, so the reason why in your view Congress

17   includes wetlands or thinks some wetlands should

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

22   the main answer is that precisely the rationale

23   that Riverside Bayview gave, that inevitably, in

24   deliminating any true waters, one will have to

25   pick a point at which land ends and water

1   begins, and in that intermediate zone, there

2   will be things like wetlands.

3   JUSTICE JACKSON: But, if you read

4   Riverside Bayview carefully, it looks to me as

5   though we were talking about the Corps's

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. I

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.

22   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

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

6   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

6   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

1   mean, we make allowance for this normal

2   circumstances understanding that what should

3   guide the line-drawing standard application is

4   what would in normal circumstances be the case.

5   So, if we're --

6   CHIEF JUSTICE ROBERTS: Well, is it

7   normal circumstances if it's from the fall to

8   the spring, but June, July, and August, it's --

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

13   to fit the wetland into the rationale of the

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

18   isn't for three months in the summer, that whole

19   area is not a wetland?

20   MR. SCHIFF: No, Mr. Chief Justice.

21   If I understand the hypothetical correctly, it's

22   not that it -- it suddenly defederalizes

23   everything. But, certainly, it's difficult to

24   understand textually how one can regulate an

25   area as a water if on a regular basis there is

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

16   hasn't noted much yet, is comparing whatever

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

22   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

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

5   that 404(g) says.

6   And, again, that's a -- a proposition

7   that the Sacketts' test is fully consistent

8   with. The Sacketts acknowledge that some

9   wetlands can be regulated under the line-drawing

10   problem standard. It's just that nothing in

11   404(g) 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

22   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

4   side of the road. That ditch then spills about

5   a half mile downstream into Kalispell Creek,

6   which then itself spills another thousand feet

7   from that point into Priest Lake.

8   JUSTICE ALITO: And how does the water

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. It

13   doesn't get to Priest Lake. There is no surface

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

22   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,

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

4   combined this 36 acres of wetlands that it could

5   then conclude that there was a significant

6   relationship to Priest Lake.

7   JUSTICE ALITO: So it's only by

8   combining the water from the Sacketts' property

9   with this large wetlands that it comes to the

10   conclusion that there's a significant ecological

11   effect on Priest Lake?

12   MR. SCHIFF: Yes, Justice Alito.

13   JUSTICE ALITO: Priest Lake is

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

21   in Priest Lake, is it possible to get to another

22   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

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 1    would certainly qualify as a water of the United

 2    States according to the interpretation that the

 3    Sacketts have offered.

 4              JUSTICE ALITO:  Thank you.

 5              CHIEF JUSTICE ROBERTS:  Justice

 6    Sotomayor?

 7              JUSTICE SOTOMAYOR:  Yes.

 8              Counsel, I think that there has been a

 9    misreading, and I obviously could be doing it,

10    but I have read Justice Kennedy's significant

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

22    -- that constitutes a water of the United

23    States.  That's what the Ninth Circuit saw.

24              But there is also the Sackett site

25    running directly to Priest Lake, and that
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1   Sackett site does run across -- below a road and

2   below some houses. I believe the government's

3   position -- and it can speak for itself when it

4   gets up -- is that that connection is very

5   direct, that there is a subsurface flow, not a

6   groundwater flow, but a subsurface flow of

7   water.

8   Isn't that -- am I correct about the

9   factual nature of this case?

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

13   from the fen wetlands that are north of the

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

18   Lake. There -- there's some evidence there's a

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

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 1    Sotomayor, that EPA has ever made such a -- such

 2    a distinction.  And, certainly, in the position

 3    of someone like the Sacketts, there practically

 4    is no distinction.  Whether it's subsurface or

 5    really subsurface --

 6              JUSTICE SOTOMAYOR:  Well, I think --

 7              MR. SCHIFF:  -- one can't see it.

 8              JUSTICE SOTOMAYOR:  -- no, it's not

 9    that hard.  I mean, if -- if -- yes, you can see

10    it, and you can see subsurface water when you

11    put your foot in the sand and you can feel it

12    underneath the top of the sand.  You can feel it

13    in how watery your soil is.  I mean, it's not

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

22    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 --
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 1   JUSTICE SOTOMAYOR: But you don't

 2   think there's a -- there's a difference?

 3   MR. SCHIFF: Well, one thing, Justice

 4   Sotomayor, that I think is problematic with

 5   relying upon any sort of subsurface connection

 6   is that it essentially renders the test

 7   limitless. I mean, it's hard to imagine --

 8   JUSTICE SOTOMAYOR: Why?

 9   MR. SCHIFF: -- it's hard to imagine

10   any property in this country that does not have

11   some degree of subsurface flow at whatever depth

12   that will ultimately -- I mean, the hydrological

13   cycle is unified. Ultimately, that water is

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

19   his or her property is regulated --

20   JUSTICE SOTOMAYOR: Well, that goes

21   back to Justice Jackson's point, that what

22   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.

1   MR. SCHIFF: Well, Justice Sotomayor,

2   I also think Congress was concerned about --

3   about the sanctity of -- of -- of freedom and

4   private property rights and ensuring that people

5   at least have fair notice as to whether their

6   property is going to be regulated. If the test

7   --

8   JUSTICE SOTOMAYOR: Well, I mean --

9   MR. SCHIFF: -- is surface to

10   subsurface --

11   JUSTICE SOTOMAYOR: -- why is it their

12   -- whatever test, even yours right now, as you,

13   in your answers to the Chief Justice, said that

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

18   of security for homeowners. But one thing about

19   the EPA process is you can always get -- you

20   could always ask the EPA for an opinion as to

21   whether or not you fall within the definition.

22   MR. SCHIFF: Yes, Justice --

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

4   so problematic. It's hard to imagine any other

5   statutory system in the federal code that

6   requires a potentially regulated party to

7   initiate a rather expensive and time-consuming

8   process just to find out whether, in fact, one

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,

13   because it is a test that's very difficult to

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

20   we're looking for. We're looking for a

21   definition that has to do with a connection that

22   exists with traditional navigable waters.

23   We may have to develop, as was the

24   insight of Justice Kennedy in Rapanos, a

25   different test like the significant nexus test

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.

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

2   JUSTICE SOTOMAYOR: Only because they

3   put gravel in it.

4   MR. SCHIFF: Well, the original state

5   of the property was, before the -- the top soil

6   was taken out and the gravel was put on it, it

7   looked like a buildable lot. In fact, it was

8   zoned as a buildable lot. It has a sewer

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,

13   ah, there's water somehow flowing underneath,

14   that that connects it to Priest Lake. That's

15   not the type of topography.

16   CHIEF JUSTICE ROBERTS: Thank you,

17   counsel.

18   Justice Kagan?

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

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

4   be right, but I also understand some of your

5   points about the significant nexus test, is

6   there anything in the middle?

7   MR. SCHIFF: To some extent, Justice

8   Kagan. I think a middle position is the idea of

9   the nature of the barrier. I think this came up

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

20   asking you to assume that 1344 means more than

21   you think it means and suggests that there is

22   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

 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

 4   have as to the Kennedy test, you know, what do I

 5   do from there? You know, call it a backup

 6   position, call it a compromise position, call it

 7   whatever you want, is there a third option?

 8   MR. SCHIFF: In that sense, Justice

 9   Kagan, I think there is. I mean, it's

10   exemplified by the facts of the Sacketts' case

11   in that there's not even a -- a -- there's no

12   surface connection, much less any -- there's no

13   surface connection from the Sacketts' property

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

18   different from your test.

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

22   problem test. But one could say that whether

23   there might be marginal challenges about

24   defining boundaries in other cases, certainly,

25   where there's no surface connection, there

 1   cannot be any plausible argument that the

 2   wetland itself is -- is inseparably bound up

 3   with an abutting water.

 4   JUSTICE KAGAN: So your answer is no.

 5   Okay. Thank you.

 6   (Laughter.)

 7   CHIEF JUSTICE ROBERTS: Justice

 8   Gorsuch?

 9   JUSTICE GORSUCH: I'd like to return

10   to where Justice Sotomayor left off, and that is

11   adjacency. If we're going to have something

12   more than a continuous water surface test like

13   we did in Riverside Bayview, if we're going to,

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 -- that EPA

19   wishes to protect, understandably. They've got

20   a circuitous route across a road down a drainage

21   ditch to an unnamed tributary to a named

22   tributary to the lake. That's their adjacency

23   theory. It's kind of a daisy wheel spun out

24   from -- from the lake.

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.

3   You're -- you're blocked from -- from -- from --

4   from the lake. Why isn't that just adjacent

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(g) among other places. It chose not to

18   include that in the definitional section.

19   That has to mean something, and what

20   that means is that the relevant jurisdictional

21   entity is water. If something cannot be

22   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

1   quality, but that's for Congress to decide,

2   obviously, not for the Court.

3   And that really has to be why mere

4   geographic closeness can't justify the

5   contratextual conclusion that a

6   two-third-of-an-acre residential lot with a

7   sewer hookup with an address and a mailbox is

8   somehow considered a water of the United States.

9   JUSTICE GORSUCH: And -- and -- and --

10   and that is what's being asked, is -- is a

11   person who purchased a property with -- with a

12   sewer hookup a block from the lake with a

13   subdivision between you and the lake and a road

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

20   does one face in these circumstances?

21   MR. SCHIFF: Well, certainly, for the

22   Sacketts in particular, they were threatened

23   with significant civil and administrative

24   penalties and, of course, also the continuing

25   liability of having to restore the property to

1   the way it was before they began any work.

2   But, also, there is lingering over all

3   of this discussion the threat of criminal

4   penalties, and I think this is particularly

5   important because the waters of the United

6   States is as much relevant to the criminal

7   portions of the Clean Water Act as the civil

8   portions. It's the same text. And I think that

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?

16   JUSTICE KAVANAUGH: You keep

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.

22   JUSTICE KAVANAUGH: And so the

23   question then becomes, as I see it, does the

24   statute, does the text, cover only bordering or

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?

4   MR. SCHIFF: Yes, that is correct,

5   Your Honor.

6   JUSTICE KAVANAUGH: Okay. And on

7   404(g), which, as Justice Barrett says, is -- is

8   critical here to the case, is your argument that

9   404(g) does not control or even illustrate what

10   qualifies as waters of the United States, or is

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,

18   falling precisely like Riverside Bay, which is

19   essentially the zenith of -- of this Court's

20   indulgence of -- of EPA and the Corps's

21   interpretation of the Act.

22   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
 4    the text as you see the text?  In other words, I
 5    don't know that you really agree with Riverside
 6    Bayview when it comes down to it.  You're not
 7    asking for it to be overruled.
 8              MR. SCHIFF:  Well, Justice Kavanaugh,
 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
21    understanding of "adjacency," I certainly agree
22    that in the abstract "adjacent" has more than
23    one meaning.  But I do believe that in the
24    context of 404(g), where it's trying to describe
25    relationships between topographic features, that
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1       the most reasonable understanding, really, the
2       only plausible understanding, is that it means
3       physically touching.
4                    Again, when you combine it with the
5       fact that the central definitional section --
6                    JUSTICE KAVANAUGH:  Last question, why
7       did seven straight administrations not agree
8       with you?
9                    MR. SCHIFF:  Well, I wouldn't quite
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 --
13                   JUSTICE KAVANAUGH:  Wait.  No, let's
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
22      Kavanaugh.  And I don't presume to know more
23      than -- than those -- those seven prior
24      administrations, but what I do know is what is
25      the text that Congress has used, and nothing can
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1   supersede that.

2   JUSTICE KAVANAUGH: Thank you.

3   CHIEF JUSTICE ROBERTS: Justice

4   Barrett?

5   JUSTICE BARRETT: Mr. Schiff, can you

6   explain to me why you wouldn't lose? Because I

7   take it you're saying that you wouldn't lose if

8   we adopt a broader definition of "adjacent,"

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,

20   with man-made barriers, there is no

21   jurisdiction.

22   JUSTICE BARRETT: Okay. I think -- I

23   think I didn't articulate my question clearly

24   enough.

25   MR. SCHIFF: Sorry.

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1               JUSTICE BARRETT:  So part of what
2     you've said is that 1344(g), Congress was doing
3     something different and that it didn't modify
4     the definition of "waters of the United States"
5     that was existing.
6               Okay.  So here's my question.  It
7     seems to me -- and this was kind of what Justice
8     Jackson was getting at -- that that might be
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(g) was doing something different and even
20    though Congress didn't modify the definition of
21    "waters of the United States," that adjacent
22    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

     5   property in this country is going to be

     6   regulated.

     7   JUSTICE BARRETT: So, in that respect,

     8   1344(g) does qualify or cast light on the

     9   definition in 1362(7) of waters of the United

    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

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 1    -- to look at how "adjacent" is used in 404(g)

 2    and then use that to sort of reinvent what the

 3    central definitional section from Section 502

 4    is.

 5              Rather, it's the other way around.

 6    It's precisely because Section 502 was not

 7    changed that the criterion remains waters, that

 8    that must then inform what "adjacent" means in

 9    Section 404.

10              JUSTICE BARRETT:  And is the idea

11    partly that because 1344(g) was enacted in 1977

12    and 1367 -- or 1362(7), was that 1972?

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

20    don't want to go too far, Justice Barrett, in

21    saying that it means nothing, because, again,

22    Riverside Bayview says it does mean something.

23              But, again, it would be strange, it

24    would be sort of an inversion of statutory

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

1   Bayview, it would not be an exaggeration to say

2   that one, after wading through a cattail marsh,

3   could then swim into Lake St. Clair, that it was

4   a -- a continuous body of water that at some

5   point ended. And the Court, in looking at those

6   facts, said that it's appropriate to defer to

7   the Corps and the EPA in saying that the water

8   ends at this point because we can't otherwise

9   say whether it's reasonable to have it end at an

10   earlier point.

11   JUSTICE JACKSON: But do you think

12   that that's -- is that going to be the case in

13   every situation, that it's indistinguishable as

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

18   part was water, and is that your test, we have

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.

25   One is how the government presented

1   those facts to the Court and how the Court

2   ultimately crafted a decision based upon those

3   facts, meaning that the Court concluded that, as

4   it said, between dry land and open water, the

5   transition is not necessarily or even typically

6   an abrupt one and that you have all sorts of

7   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.

15   JUSTICE JACKSON: So, under your test,

16   in future cases, are we going to be debating in

17   every case the extent to which there really is

18   visual indistinguishability?

19   MR. SCHIFF: Absolutely not, Your

20   Honor. And I think that if there were disputes,

21   those disputes would be -- would pale in

22   comparison to the number of disputes that have

23   percolated throughout the lower courts over the

24   last 16 years with respect to the significant

25   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

8   ON BEHALF OF THE RESPONDENTS

9   MR. FLETCHER: Thank you, Mr. Chief

10   Justice, and may it please the Court:

11   As the discussion so far illustrates,

12   everyone agrees that the waters protected by the

13   Clean Water Act include some adjacent wetlands.

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

20   that those sorts of barriers do not diminish

21   wetlands' essential role in protecting the

22   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

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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

6   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

1   waters. And the presence of a berm or other

2   barrier does not sever that connection. In

3   fact, as the 2020 Navigable Waters Protection

4   Act emphasized, the presence of a river berm can

5   itself be evidence of the close connection

6   between the river and the neighboring wetlands.

7   Third and finally, the agencies are

8   now doing what members of this Court have

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

22   the position of the federal government, is a

23   ecological and biological connection between

24   wetlands and navigable waters enough to bring

25   the wetlands into coverage? In other words, dry

1   land between it, but underneath -- you know, we

2   had that case in Hawaii that indicated how far

3   --

4   MR. FLETCHER: Yeah.

5   CHIEF JUSTICE ROBERTS: -- underneath

6   it could go -- there is a biological connection.

7   You know, you put some tracing materials in the

8   wetlands, and they do find their way to the

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

21   a biological connection does there have to be?

22   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

6   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.

8   First of all, this case is focused on

9   provisions addressing adjacent wetlands. There

10   are other provisions of the regulation dealing

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

16   rule. They tried that approach in the 2015

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

1   river reach waters or wetlands that are at some

2   distance from the river --

3   CHIEF JUSTICE ROBERTS: So somebody

4   looking around the lot would have to look at the

5   wetlands, if they can see them, and the lake and

6   say is that reasonable proximity or not?

7   MR. FLETCHER: That's right. Yes,

8   that is the standard. And I --

9   CHIEF JUSTICE ROBERTS: That's the --

10   that's the standard that is used in criminal

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

20   that standard because it was a multifactor test

21   that was not capable of being reduced to precise

22   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?

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 1              MR. FLETCHER:  I don't remember
 2    exactly how far apart, but it was pretty
 3    proximate.  But, on the other hand, the
 4    Sacketts' wetland is pretty proximate to the
 5    tributary and the lake.  We're talking about 30
 6    feet to the tributary and just 300 feet to the
 7    lake itself.
 8              CHIEF JUSTICE ROBERTS:  Well, yeah, in
 9    the Hawaii case, though, we were talking about a
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    prohibited.  It just means that development has
20    to be permitted.  And if the Sacketts' wetlands
21    would not significantly affect or degrade Priest
22    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
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 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

 4   clarify some of the answers that you just gave

 5   to the Chief Justice? I mean, the statutory

 6   language is of adjacency, and at certain points

 7   in your answer, you suggested that the

 8   significant effects test is really just the test

 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

13   reasonable proximity. Is reasonable proximity

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

18   with the hard issue of it just doesn't seem as

19   though it should be 50 but not 51, but I think

20   what the Chief Justice is asking you is, well,

21   what do you look to then, you know, name the

22   three things that matter when you're saying is

23   something adjacent enough?

24   MR. FLETCHER: Right. So "significant

25   nexus" and "adjacency" are separate concepts.

 1   Adjacency traces back to the original

 2   regulations from 1975 and 1977 picked up in

 3   Section 1344(g). The agencies have long said

 4   that adjacent wetlands are covered.

 5   In Rapanos, Justice Kennedy's

 6   concurrence said that for traditional navigable

 7   waters, he accepted that adjacency alone was

 8   sufficient to justify inclusion. But, for

 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

13   going to separate them, which I had thought that

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

20   "waters of the United States," and as I think

21   the Court has recognized, that could conceivably

22   cover literally every body of water in the

23   country.

24   We know it doesn't mean that. 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

3   the significant nexus test does is it says it's

4   permissible to sweep in additional waters if

5   they significantly affect the traditional

6   navigable waters that were the sort of core

7   focus of the Act.

8   JUSTICE KAGAN: Well, you haven't told

9   me where that comes from. I mean, it might --

10   it sounds like a very good idea to have such a

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.

14   The term being defined is "navigable waters,"

15   but the definition is broad and doesn't include

16   any requirement of navigability.

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

22   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

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 --

4   the significant nexus test is separate and

5   apart, so it can be not adjacent, but so long as

6   there's a significant nexus, it's still covered,

7   it's untethered from 1344(g) in that respect?

8   MR. FLETCHER: I want to be very clear

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.

22   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

4   during the course of the year, that -- that

5   falls within the term "waters"?

6   MR. FLETCHER: So, again, as I said,

7   this is something that the agencies have fleshed

8   out over many decades, and one of the things

9   that they've done is exclude both because of

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

22   ditches included?

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,

4   canals, rivers, things like that, and distribute

5   it out into rivers. They're not bringing water

6   back into the navigable waters.

7   JUSTICE ALITO: Well, if we forget

8   about everything the agencies have done and

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

13   opinion in Rapanos. You disagree with that.

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

18   idea that it has geographic features

19   characterized by the presence of water. I'd go

20   further than that and say that wetlands can

21   easily fit that description.

22   And I acknowledge that there are some

23   difficult cases about how do you distinguish

24   between a wash and an intermittent or a seasonal

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(g).

5   JUSTICE ALITO: No, but we need to

6   know what "waters of the United States" means.

7   That's what we're interpreting. We're really

8   not interpreting 1344(g).

9   1344(g) may shed some light on what is

10   meant by "waters of the United States," but

11   we're interpreting what is meant by that phrase,

12   that cryptic phrase, a strange phrase, "waters

13   of the United States."

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

1   general statutory language to this particular

2   category.

3   JUSTICE KAVANAUGH: But the text

4   doesn't say in referring to adjacent in 1344(g)

5   whether that means bordering or contiguous and

6   stop there or also include neighboring, as the

7   regulation does.

8   And as I understand, the case really,

9   as your brief set it out, comes down to, okay,

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

22   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

 3   cite at page 22 of our brief, but I don't think

 4   you need those here because of the history

 5   against which Congress acted.

 6   And, Justice Barrett, this goes to

 7   your question about the chronology. The Corps

 8   of Engineers first defined "the waters of the

 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

13   clear that we're not just limiting to contiguous

14   right here.

15   JUSTICE KAVANAUGH: Then it spelled it

16   out only in '77.

17   MR. FLETCHER: Then, in July of 1977,

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

22   defeat adjacency.

23   And then Congress comes along in

24   December of 1977 and in this carveout in 1344(g)

25   which is dividing up which waters are going to

 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

 5   regulations. The Corps had, when it expanded

 6   jurisdiction out, it said we're going to phase

 7   in this expansion of our jurisdiction. We're

 8   going to start with traditional navigable waters

 9   and their adjacent wetlands and then we're going

10   to move to other things later.

11   And what Congress did in 1344(g) was

12   say the federal government is going to keep

13   permitting authority over phase one and the

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

21   bank shot way to do it, you would acknowledge

22   that?

23   MR. FLETCHER: So I guess, Justice

24   Kavanaugh, I think --

25   JUSTICE KAVANAUGH: And you used the

 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

 5   correct. So, you know, this is the term,

 6   "waters of the United States." The Corps, the

 7   EPA, the Department of Justice, the courts all

 8   interpreted that to reach adjacent wetlands.

 9   And Congress was then presented with a

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

13   farming and ranching and other activities. And

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 --

20   JUSTICE ALITO: If 13- --

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

 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

 5   make sure I heard you right -- that this

 6   property is adjacent indeed to a water of the

 7   United States because it's close enough to

 8   Priest Lake itself.

 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?

22   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"

 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

 4   agency's understanding of "adjacency" is, you

 5   know, neighboring, and we have -- they have

 6   cached that out by saying it's a reasonable

 7   proximity to a covered water.

 8   JUSTICE GORSUCH: Is there a mileage

 9   limit to that?

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

21   Priest Lake, I imagine that most of the water

22   flow and rainfall and snowfall in quite a large

23   geographic area drains into the lake eventually

24   or wishes to, unless diverted.

25   Would that whole watershed be adjacent

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 1    to?

 2              MR. FLETCHER:  So I don't think so,

 3    Justice Gorsuch.  And, also, as -- I am

 4    sympathetic to the idea of how does a landowner

 5    know under the standard whether their land is

 6    covered.  It's important to recognize that there

 7    are other limits too.  They have to actually be

 8    wetlands.  So --

 9              JUSTICE GORSUCH:  No, I understand

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?

18              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.

22              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.

5   JUSTICE GORSUCH: So how about 3,000

6   feet? Could be?

7   MR. FLETCHER: I don't -- I don't know

8   the answer to that, Justice Gorsuch.

9   JUSTICE GORSUCH: Could it be three

10   miles?

11   MR. FLETCHER: I -- I don't think it

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?

1   MR. FLETCHER: Again, I see where this

2   is headed.

3   (Laughter.)

4   MR. FLETCHER: But, again, I think --

5   JUSTICE GORSUCH: So, if the federal

6   government doesn't know, how is a person subject

7   to criminal time in federal prison supposed to

8   know?

9   MR. FLETCHER: So the agencies, in

10   recognition of this problem, make available free

11   of charge jurisdictional determinations as to

12   any property. They also publicize their manuals

13   and make available on websites every

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

20   Justices did make similar criticisms of the

21   functional equivalent to an indirect discharge

22   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

 4   questions, but I've got a colleague who wants to

 5   ask a question first.

 6   JUSTICE JACKSON: Yes, I just -- I

 7   just wanted to follow up on Justice Gorsuch's

 8   very fair points, which were my points. How do

 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

13   determination. The Corps makes those available

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 --

22   JUSTICE ALITO: And what happens if

23   this -- if the -- the government's determination

24   based on this multifactor test is that you can't

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

4   about a determination that you can't develop,

5   that wouldn't just be a jurisdictional

6   determination. That would have to also be a

7   permitting decision --

8   JUSTICE ALITO: Yeah. Okay. But --

9   MR. FLETCHER: -- because just being

10   covered doesn't mean you can't develop.

11   JUSTICE ALITO: -- what if the

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

19   and can also seek a permit, you know, and that

20   is -- I think it's important to emphasize just

21   again that being covered by the Clean Water Act

22   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

25   process through the availability of nationwide

1   permits for things like road construction, for

2   the development of dams, for single-family home

3   construction, in order to --

4   JUSTICE BARRETT: But the

5   site-specific which is applicable to the

6   Sacketts, you don't dispute in your brief that

7   that can cost hundreds of thousand dollars and

8   be years and years? It's just the general

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,

21   that's right. And it's also important to

22   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?

4   MR. FLETCHER: In our view, that

5   statistic is not consistent with the best

6   information we have now. And that's from the

7   2021 regulatory impact analysis of the

8   re-issuance of the nationwide permits.

9   JUSTICE SOTOMAYOR: Your -- your

10   adversary, the other side -- I shouldn't call

11   them adversary -- your -- the other side argued

12   that Mr. Sackett could not tell this was a

13   marshland. Is that true? Because you said the

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

20   this is a jurisdictional wetland, you would need

21   a permit to build, here's information about how

22   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

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

4   filled with gravel have standing water in them.

5   And, also, the Sacketts' own

6   environmental consultant who came and looked at

7   the property confirmed the Corps's judgment that

8   these are wetlands.

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

4   test that could be more precise and less

5   open-ended than the adjacency test or the

6   significant nexus test that you use? Is there

7   some sort of connection that could be

8   articulated?

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

13   line-drawing problem or the notion that wetlands

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

17   appropriate to cover because of their effect.

18   JUSTICE SOTOMAYOR: Exactly.

19   MR. FLETCHER: Now there are different

20   ways to draw that line. Justice Kennedy

21   articulated the significant nexus test. The --

22   JUSTICE SOTOMAYOR: But that's -- but

23   that's when it's not adjacent, correct?

24   MR. FLETCHER: That's when it's not

25   adjacent to a traditional navigable water.

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 1                    JUSTICE SOTOMAYOR:  Right.  I want to
 2       go --
 3                    MR. FLETCHER:  That does apply to
 4       adjacent to a tributary.
 5                    JUSTICE SOTOMAYOR:  -- because we seem
 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
16       agencies are taking comment on this and are
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
22       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
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 1   certainly think there is a range of reasonable

 2   understandings of what "adjacency" means, and

 3   also I know you're focused on that, but

 4   significant nexus too.

 5   JUSTICE KAGAN: Did -- did I just

 6   understand you to say that the rule that you're

 7   issuing may, in fact, have more guidance than we

 8   currently have as to what "adjacency" means?

 9   MR. FLETCHER: I don't want to

10   represent what's coming in the forthcoming rule

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?

20   MR. FLETCHER: So it's with OMB now.

21   It's public that in September it went over to

22   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

3   articulated so far, but the Sacketts win?

4   MR. FLETCHER: I don't think so,

5   Justice Kavanaugh. I don't --

6   JUSTICE KAVANAUGH: And why is that?

7   MR. FLETCHER: So I don't take them to

8   be disputing that if "adjacency" means something

9   more than just directly abutting or contiguous

10   with, then their property satisfies that

11   standard because it's just 30 feet away from the

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.

22   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

4   down through a creek, and then it eventually

5   gets to the water of the United States. And so,

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

10   couple caveats if I -- if I could.

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.

20   So we're going that way. Does it -- first of

21   all, does the significant nexus have to be to

22   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.

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 1                JUSTICE GORSUCH:  Okay.

 2                MR. FLETCHER:  That's the limiting

 3      work that it does.  It says --

 4                JUSTICE GORSUCH:  Okay.  Great.

 5      That's helpful.  How much?  It's the same

 6      question, different test.

 7                MR. FLETCHER:  Yeah.

 8                (Laughter.)

 9                JUSTICE GORSUCH:  And -- and the Chief

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

13      a ditch, I don't know how far -- how many

14      thousands of feet over to a -- a -- a creek, and

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,

21      Justice Gorsuch, in law, I think there's a

22      qualitative standard with guideposts that isn't

23      determinative.

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

4   tell you free of charge what they think. And if

5   you don't like what they think, you're free to

6   challenge that in court, yes.

7   JUSTICE GORSUCH: Okay. So that's --

8   so we don't know until he comes out and tells

9   you? I mean, is there -- what -- what is the

10   standard? I mean, give me your best shot.

11   MR. FLETCHER: So it's do the wetlands

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

22   distance, they look at the amount of flow from

23   the wetland and other wetlands down to the

24   downstream navigable water, and they look at the

25   climate.

1   JUSTICE GORSUCH: How is that

2   different than adjacent?

3   MR. FLETCHER: So I think adjacent is

4   focused on reasonable proximity.

5   JUSTICE GORSUCH: I thought that was

6   part of the test you just gave me too.

7   MR. FLETCHER: Distance -- distance is

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

13   downstream navigable waters. It makes it harder

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

18   government estopped -- is the Corps or the EPA

19   estopped from going after you? If you get a

20   jurisdictional determination and they say, yeah,

21   not within our jurisdiction, not a wetland, then

22   are you protected?

23   MR. FLETCHER: That's my

24   understanding, at least for five years.

25   Jurisdictional determinations are good for five

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

4   because they're binding on the Corps and the EPA

5   for that five-year period.

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

18   States and not 1344(g)?

19   MR. FLETCHER: That's right, yes.

20   JUSTICE BARRETT: And if -- if we

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

6   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

 4   or presumptively excluded from coverage?

 5   MR. FLETCHER: Sure. So I think, if I

 6   understand the question, the agencies have

 7   defined some automatic exclusions. You know, in

 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

18   covered and is not near -- not bordering on -- I

19   don't want to use the term "adjacent." I'm done

20   with that word.

21   (Laughter.)

22   JUSTICE THOMAS: Bordering on a body

23   of water.

24   MR. FLETCHER: Sure. So I -- I don't

25   know that the agencies have talked in terms of

1   presumptively not covered. I think the best

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

4   EPA to regulate a purely intrastate body of

5   water or associated wetland, where would I find

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?

9   MR. FLETCHER: Sure. I think it's

10   authority that's common ground between us and

11   Petitioners --

12   JUSTICE THOMAS: Yeah.

13   MR. FLETCHER: -- that the Commerce

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

22   step, that authority extends beyond just things

23   that happen in the channels but also things that

24   happen outside the channels but could damage

25   them. That's something that's been

1   uncontroversial since the 1899 Rivers and

2   Harbors Act, which extended up to tributaries

3   and the banks of tributaries of navigable

4   waters, and it's really necessary for Congress

5   to be able to protect the channels of commerce

6   to also be able to protect activities that

7   affect those channels.

8   JUSTICE THOMAS: What is a channel of

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

19   connection to some out-of-state body, you could

20   still move commerce across it and that commerce

21   could be moving in intrastate if you married up

22   the transport over water with transport over

23   land.

24   JUSTICE THOMAS: Is there a lot of

25   transportation over the Great Salt Lake?

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.

4   JUSTICE THOMAS: Thank you.

5   CHIEF JUSTICE ROBERTS: I guess

6   there's less and less.

7   Justice Alito?

8   JUSTICE ALITO: Does your

9   understanding of "waters of the United States"

10   take into account any of the clear statement

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(g).

15   Your -- your -- your argument is that

16   with this parenthetical, Congress did something

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. I

22   think those considerations are all reflected in

23   this Court's prior decisions. And we take the

24   significant nexus test to be consistent with

25   those decisions and to be a limiting

 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

 4   to achieve the goal that I talked about with

 5   Justice Thomas and that leave waters that aren't

 6   essential to that goal to the states to

 7   regulate.

 8   JUSTICE ALITO: Okay. So it sounds

 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(g) had not been enacted?

25   MR. FLETCHER: I think we would. I

 1   think the Corps of Engineers and the EPA got it

 2   right the first time when they said adjacent

 3   wetlands are regulated under the plain text of

 4   the statute. What 1344 does for you is that it

 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

 9   adopting other changes to the Act to deal with

10   some of the concerns that were raised.

11   JUSTICE ALITO: Just out of curiosity,

12   what is your understanding of "of the United

13   States"? Does that mean in the United States,

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,

18   waters that affect the navigable waters that are

19   -- where the federal interest is indisputable.

20   We take it to be sort of reiterating that point.

21   JUSTICE ALITO: That would extend

22   very, very far, would it not?

23   MR. FLETCHER: It's true that the

24   Act's coverage is broad. It's been understood

25   as broad from the beginning. And that was

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 1      Congress's intent, you know, was to

 2      comprehensively regulate the waters of the

 3      United States because the prior system that

 4      relied primarily on states had proved

 5      insufficient, in part because this isn't a

 6      problem that the states can solve by themselves

 7      because pollution that happens in one state or

 8      the destruction of wetlands in one state have

 9      consequences that may be felt in many states

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

22      could wash downstream into the navigable waters.

23      But I think that's, you know, stretching out

24      further certainly than Congress did here.

25              JUSTICE ALITO:  So, if that's the
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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,

6   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

 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

4　adjacency to the tributary and the additional

5　showing of a significant nexus to Priest Lake.

6　So that's how the case has been briefed and

7　argued as it comes to this Court.　But if you're

8　asking about the agencies' view --

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

18　way to justify the conclusion that the property

19　is covered.

20　　　　　　CHIEF JUSTICE ROBERTS:　Justice Kagan?

21　　　　　　Justice Gorsuch?

22　　　　　　JUSTICE KAVANAUGH:　I just want to

23　follow up on Justice Gorsuch's earlier questions

24　because I think he identified something that

25　this Court's overwhelmingly been concerned about

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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

4      that front that some of the hypotheticals about

5      someone being penalized for making a mistaken

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.

10              The first one is this Court made the

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

20     provide for criminal -- potential criminal

21     liability for negligent or knowing violations.

22     As a matter of practice, the agencies tell me

23     that it's very unusual to bring criminal

24     prosecutions absent sort of willful conduct.

25              JUSTICE KAVANAUGH:  And then, I mean,
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1   to state the obvious, that negligent provision

2   is a red flag, so what -- what do you have to

3   say about that?

4   MR. FLETCHER: Yeah, understood. So

5   I'd say two things.

6   You know, first, as a matter of

7   practice, I think it's rare for simple -- in

8   fact, very unusual for simple negligence to give

9   rise to criminal liability, that criminal

10   prosecutions are brought only when there's some

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.

20   And we think, if you really had a case

21   where there was someone who was being criminally

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

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1    prosecution.
2              JUSTICE KAVANAUGH:  Thank you.
3              CHIEF JUSTICE ROBERTS:  Justice
4    Barrett?
5              JUSTICE BARRETT:  I want to return to
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
11   about significant nexus, Justice Kennedy's
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
22   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
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1   things that directly touch, then their property

2   is adjacent because it's only 30 feet away

3   across the road.

4   JUSTICE BARRETT: Okay. And then, to

5   follow up on Justice Alito's points about waters

6   of the United States, if we put aside 1344(g)

7   for a moment, and we're thinking about

8   significant nexus, you know, Justice Thomas says

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

21   jurisdictional determination from the Corps

22   before proceeding?

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

24   Justice Barrett.

25   JUSTICE BARRETT: Why not?

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1                    MR. FLETCHER:  Because the -- these
2      requirements all apply only if you're talking
3      about wetlands, which has a particular
4      scientific definition reflected in the
5      regulations.  It requires --
6                    JUSTICE BARRETT:  But -- but -- but --
7      but your view of the statute wouldn't be so
8      limited, would it?
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 --
22     groundwater is covered.
23                   JUSTICE BARRETT:  Mm-hmm.
24                   MR. FLETCHER:  And to Justice
25     Sotomayor's point, we think that subsurface flow
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 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

 6   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.

2     Here, it's about waters of the United States --

3               JUSTICE BARRETT:  So it --

4               MR. FLETCHER:  -- specifically

5     wetlands.

6               JUSTICE BARRETT:  -- hasn't used its

7     full Commerce Clause authority, in your view, in

8     the Clean Water Act?

9               MR. FLETCHER:  That's correct.

10              CHIEF JUSTICE ROBERTS:  Justice

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

18    comparison to the significant nexus test.  In

19    response to Justice Thomas -- Thomas's question

20    about the channels of commerce, the significant

21    nexus test is far, far broader than a

22    traditional understanding of the channels of

23    commerce, as shown by this very case.

24              The Sacketts -- there's no evidence

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

 4   that raises Justice Alito's point about canons

 5   of construction and federalism.

 6   Building a single-family home in a

 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

13   has to hire to fill out an adequate application

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

22   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 --

4   JUSTICE JACKSON: -- I thought they

5   went into it knowing that this might be a

6   wetland.

7   MR. SCHIFF: No, no. There was s

8   jurisdictional determination done in 1996 by a

9   prior owner. The Sacketts were not aware of

10   that. Even --

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

19   the record, the Sacketts' testimony is that

20   there was no indication either from the county,

21   building department, in their deed of title,

22   anywhere that this was a wetland.

23   Moreover, even if they had been aware,

24   that jurisdictional determination would have

25   given them no comfort because it --

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 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
 4    a wetland by looking at it.  So --
 5              MR. SCHIFF:  I believe Mr. Fletcher
 6    was referring to after the initial work had been
 7    done, and the pictures show that there is water
 8    on the property, but that doesn't show how it
 9    was before.
10              But if -- if I could go back, though,
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
18    they bought it, and whether or not they knew,
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?
23              MR. SCHIFF:  Justice Jackson, that
24    determination had expired several years before
25    the -- the -- the Sacketts even purchased the
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 1   property. As Mr. Fletcher explained, typically,

 2   jurisdictional determinations are only valid for

 3   five years.

 4   Moreover, that determination was done

 5   even before this decision -- this Court's

 6   decision in Rapanos. So, even if the Sacketts

 7   had been aware of it, it would have given them

 8   no -- no -- no notice whatsoever.

 9   CHIEF JUSTICE ROBERTS: We'll give you

10   an extra minute for your rebuttal.

11   MR. SCHIFF: Thank you, Mr. Chief

12   Justice.

13   The last point I'd like to make is

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.

20   And we cite studies from the amicus

21   briefs at pages 20 and 21 of the yellow brief

22   where the annual cost of compensatory mitigation

23   under the Corps's program is in the billions of

24   dollars.

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

1   a cheap process. And in terms of notice, it's

2   not a fair process for property owners who have

3   to deal with the significant nexus test, which

4   is why this Court should definitively jettison

5   that test.

6   CHIEF JUSTICE ROBERTS: Thank you,

7   counsel. The case is submitted.

8   (Whereupon, at 11:52 a.m., the case

9   was submitted.)

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