Sackett v. EPA

(May 25, 2023)

JUSTICE ALITO delivered the opinion of the Court.

This case concerns a nagging question about the outer reaches of the Clean Water Act (CWA), the principal federal law regulating water pollution in the United States. * * * The Act applies to "the waters of the United States," but what does that phrase mean? Does the term encompass any backyard that is soggy enough for some minimum period of time? Does it reach "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [or] playa lakes?" How about ditches, swimming pools, and puddles?

For more than a half century, the agencies responsible for enforcing the Act have wrestled with the problem and adopted varying interpretations. On three prior occasions, this Court has tried to clarify the meaning of "the waters of the United States." But the problem persists. When we last addressed the question 17 years ago, we were unable to agree on an opinion of the Court. Today, we return to the problem and attempt to identify with greater clarity what the Act means by "the waters of the United States."

I.A.

The CWA is a potent weapon. It imposes what have been described as "crushing" consequences "even for inadvertent violations." Property owners who negligently discharge "pollutants" into covered waters may face severe criminal penalties including imprisonment. These penalties increase for knowing violations. On the civil side, the CWA imposes over $60,000 in fines per day for each violation. And due to the Act's 5-year statute of limitations, and expansive interpretations of the term "violation," these civil penalties can be nearly as crushing as their criminal counterparts.

The Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly enforce the CWA. * * * [T]he Corps controls permits for the discharge of dredged or fill material into covered waters. See §1344(a). The costs of obtaining such a permit are "significant," and both agencies have admitted that "the permitting process can be arduous, expensive, and long." Success is also far from guaranteed.* * *

Due to the CWA's capacious definition of "pollutant," its low mens rea, and its severe penalties, regulated parties have focused particular attention on the Act's geographic scope. * * * [T]he CWA prohibits the discharge of pollutants into * * * "navigable waters," which it defines as "the waters of the United States, including the territorial seas," 33 U. S.

C. §§1311(a), 1362(7). The meaning of this definition is the persistent problem that we must address.

B.

[In 2004], Michael and Chantell Sackett * * * purchased a small lot near Priest Lake, in Bonner County, Idaho. In preparation for building a modest home, they began backfilling their property with dirt and rocks. A few months later, the EPA sent the Sacketts a compliance order informing them that their backfilling violated the CWA because their property contained protected wetlands. The EPA demanded that the Sacketts immediately " 'undertake activities to restore the Site' " pursuant to a " 'Restoration Work Plan' " that it provided. The order threatened the Sacketts with penalties of over $40,000 per day if they did not comply.* * *

According to the EPA, the "wetlands" on the Sacketts' lot are "adjacent to" (in the sense that they are in the same neighborhood as) what it described as an "unnamed tributary" on the other side of a 30-foot road. That tributary feeds into a non-navigable creek, which, in turn, feeds into Priest Lake, an intrastate body of water that the EPA designated as traditionally navigable. To establish a significant nexus, the EPA lumped the Sacketts' lot together with the Kalispell Bay Fen, a large nearby wetland complex that the Agency regarded as "similarly situated." According to the EPA, these properties, taken together, "significantly affect" the ecology of Priest Lake. Therefore, the EPA concluded, the Sacketts had illegally dumped soil and gravel onto "the waters of the United States."

The Sacketts filed suit under the Administrative Procedure Act, alleging that the EPA lacked jurisdiction because any wetlands on their property were not "waters of the United States." [The district court entered summary judgment for the EPA and the Ninth Circuit affirmed, holding that the CWA covers adjacent wetlands with a significant nexus to a traditional navigable water and that the Sacketts' lot satisfied that standard. The Supreme Court granted cert. "To decide the proper test for determining whether wetlands are "waters of the United States."] * * *

III. ***

A.

We start, as we always do, with the text of the CWA. As noted, the Act applies to "navigable waters," which had a well-established meaning at the time of the CWA's enactment. But the CWA complicates matters by proceeding to define "navigable waters" as "the waters of the United States," §1362(7), which was decidedly not a well-known term of art. This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt. And for the reasons explained below,

we conclude that the Rapanos plurality was correct: the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.' "

This reading follows from the CWA's deliberate use of the plural term "waters." That term typically refers to bodies of water like those listed above. See, e.g., Webster's Second 2882; Black's Law Dictionary 1426 (5th ed. 1979); Random House Dictionary of the English Language 2146 (2d ed. 1987) This meaning is hard to reconcile with classifying " ' "lands," wet or otherwise, as "waters." ' "

This reading also helps to align the meaning of "the waters of the United States" with the term it is defining: "navigable waters." Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read "navigable" out of the statute, holding that it at least shows that Congress was focused on "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U. S., at 172; see also Appalachian Electric, 311 U. S., at 406–407; The Daniel Ball, 10 Wall., at 563. At a minimum, then, the use of "navigable" signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans.

More broadly, this reading accords with how Congress has employed the term "waters" elsewhere in the CWA and in other laws. The CWA repeatedly uses "waters" in contexts that confirm the term refers to bodies of open water. See 33 U. S. C. §1267(i)(2)(D) ("the waters of the Chesapeake Bay"); §1268(a)(3)(I) ("the open waters of each of the Great Lakes"); §1324(d)(4)(B)(ii) ("lakes and other surface waters"); §1330(g)(4)(C)(vii) ("estuarine waters"); §1343(c)(1) ("the waters of the territorial seas, the contiguous zone, and the oceans"); §§1346(a)(1), 1375a(a) ("coastal recreation waters"); §1370 (state "boundary waters"). The use of "waters" elsewhere in the U. S. Code likewise correlates to rivers, lakes, and oceans.

Statutory history points in the same direction. The CWA's predecessor statute covered "interstate or navigable waters" and defined "interstate waters" as "all rivers, lakes, and other waters that flow across or form a part of State boundaries." 33 U. S. C. §§1160(a), 1173(e) (1970 ed.) (emphasis added); see also Rivers and Harbors Act of 1899, 30Stat. 1151 (codified, as amended, at 33 U. S. C. §403) (prohibiting unauthorized obstructions "to the navigable capacity of any of the waters of the United States"). * * *

The EPA argues that "waters" is "naturally read to encompass wetlands" because the "presence of water is 'universally regarded as the most basic feature of wetlands.'" But that reading proves too much. Consider puddles, which are also defined by the ordinary

presence of water even though few would describe them as "waters." This argument is also tough to square with *SWANCC*, which held that the Act does not cover isolated ponds, or *Riverside Bayview*, which would have had no need to focus so extensively on the adjacency of wetlands to covered waters if the EPA's reading were correct. Finally, it is also instructive that the CWA expressly "protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." §1251(b). It is hard to see how the States' role in regulating water resources would remain "primary" if the EPA had jurisdiction over anything defined by the presence of water.

B.

Although the ordinary meaning of "waters" in §1362(7) might seem to exclude all wetlands, we do not view that provision in isolation. The meaning of a word "may only become evident when placed in context," and statutory context shows that some wetlands qualify as "waters of the United States."

In 1977, Congress amended the CWA and added §1344(g)(1), which authorizes States to apply to the EPA for permission to administer programs to issue permits for the discharge of dredged or fill material into some bodies of water. In simplified terms, the provision specifies that state permitting programs may regulate discharges into (1) any waters of the United States, (2) except for traditional navigable waters, (3) "including wetlands adjacent thereto."

When this convoluted formulation is parsed, it tells us that at least some wetlands must qualify as "waters of the United States." The provision begins with a broad category, "the waters of the United States," which we may call category A. The provision provides that States may permit discharges into these waters, but it then qualifies that States cannot permit discharges into a subcategory of A: traditional navigable waters (category B). Finally, it states that a third category (category C), consisting of wetlands "adjacent" to traditional navigable waters, is "includ[ed]" within B. Thus, States may permit discharges into A minus B, which includes C. If C (adjacent wetlands) were not part of A ("the waters of the United States") and therefore subject to regulation under the CWA, there would be no point in excluding them from that category. Thus, §1344(g)(1) presumes that certain wetlands constitute "waters of the United States."

But what wetlands does the CWA regulate? Section 1344(g)(1) cannot answer that question alone because it is not the operative provision that defines the Act's reach. Instead, we must harmonize the reference to adjacent wetlands in §1344(g)(1) with "the waters of the United States," §1362(7), which is the actual term we are tasked with interpreting. The formulation discussed above tells us how: because the adjacent wetlands

in §1344(g)(1) are "includ[ed]" within "the waters of the United States," these wetlands must qualify as "waters of the United States" in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA.

This understanding is consistent with §1344(g)(1)'s use of "adjacent." Dictionaries tell us that the term "adjacent" may mean either "contiguous" or "near." Random House Dictionary 25; see Webster's Third New International Dictionary 26 (1976); see also Oxford American Dictionary & Thesaurus 16 (2d ed. 2009) (listing "adjoining" and "neighboring" as synonyms of "adjacent"). But "construing statutory language is not merely an exercise in ascertaining 'the outer limits of a word's definitional possibilities,' " and here, "only one . . . meanin[g] produces a substantive effect that is compatible with the rest of the law." Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.

In addition, it would be odd indeed if Congress had tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs. We have often remarked that Congress does not "hide elephants in mouseholes" by "alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions." We cannot agree with such an implausible interpretation here.

If §1344(g)(1) were read to mean that the CWA applies to wetlands that are not indistinguishably part of otherwise covered "waters of the United States," it would effectively amend and substantially broaden §1362(7) to define "navigable waters" as "waters of the United States and adjacent wetlands." But §1344(g)(1)'s use of the term "including" makes clear that it does not purport to do—and in fact, does not do—any such thing.. It merely reflects Congress's assumption that certain "adjacent" wetlands are part of "waters of the United States."

This is the thrust of observations in decisions going all the way back to *Riverside Bayview*. In that case, we deferred to the Corps' decision to regulate wetlands actually abutting a navigable waterway, but we recognized "the inherent difficulties of defining precise bounds to regulable waters." * * *

In Rapanos, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that "waters" may fairly be read to include only those wetlands that are "as a practical matter indistinguishable from waters of the United States," such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." That occurs when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." We agree with this formulation of when wetlands are part of "the waters of the

United States." We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.

In sum, we hold that the CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

[In Part IV of the opinion, the Court rejected EPA's argument that wetlands adjacent to navigable waters are "waters of the United States" as long as they have a "significant nexus" to traditional navigable waters. The Court relied on a canon of statutory construction that provides that Congress must use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the government over private property." The Court concluded that regulation of land and water use lies at the core of traditional state authority and that Congress did not include exceedingly clear language to change that balance. The Court also noted that the EPA's interpretation of the statute would conflict with the CWA's policy, in Section 101(b), to "preserve" the States' "primary" authority over land and water use. Finally, the Court applied another "clear statement" canon of statutory construction, the rule of lenity, which counsels courts to avoid interpretations of statutes that impose punitive sanctions unless the statutes are clear. The Court determined that the CWA did not provide clear support for EPA's interpretation of the statute and the "significant nexus" test.] * * *

VI.

In sum, we hold that the CWA extends to only those "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," so that they are "indistinguishable" from those waters. This holding compels reversal here. The wetlands on the Sacketts' property are distinguishable from any possibly covered waters.

JUSTICE KAVANAUGH, with whom JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON join, concurring in the judgment.

I agree with the Court's reversal of the Ninth Circuit. In particular, I agree with the Court's decision not to adopt the "significant nexus" test for determining whether a wetland is covered under the Act. And I agree with the Court's bottom-line judgment that the wetlands

on the Sacketts' property are not covered by the Act and are therefore not subject to permitting requirements.

I write separately because I respectfully disagree with the Court's new test for assessing when wetlands are covered by the Clean Water Act. The Court concludes that wetlands are covered by the Act only when the wetlands have a "continuous surface connection" to waters of the United States—that is, when the wetlands are "adjoining" covered waters. In my view, the Court's "continuous surface connection" test departs from the statutory text, from 45 years of consistent agency practice, and from this Court's precedents. The Court's test narrows the Clean Water Act's coverage of "adjacent" wetlands to mean only "adjoining" wetlands. But "adjacent" and "adjoining" have distinct meanings: Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, and (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. By narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States. Therefore, I respectfully concur only in the Court's judgment. * * *

I * * *

The ordinary meaning of the term "adjacent" has not changed since Congress amended the Clean Water Act in 1977 to expressly cover "wetlands adjacent" to waters of the United States. Then as now, "adjacent" means lying near or close to, neighboring, or not widely separated. Indeed, the definitions of "adjacent" are notably explicit that two things need not touch each other in order to be adjacent. "Adjacent" includes "adjoining" but is not limited to "adjoining." See, e.g., Black's Law Dictionary 62 (rev. 4th ed. 1968) (defining "adjacent" as "Lying near or close to; sometimes, contiguous; neighboring; . . . may not actually touch"); Black's Law Dictionary 50 (11th ed. 2019) (defining "adjacent" as "Lying near or close to, but not necessarily touching"); see also, e.g., Webster's Third New International Dictionary 26 (1976) (defining "adjacent" as "to lie near, border on"; "not distant or far off "; "nearby but not touching").

By contrast to the Clean Water Act's express inclusion of "adjacent" wetlands, other provisions of the Act use the narrower term "adjoining." Compare 33 U. S. C. §1344(g) with §§1321(b)–(c) ("adjoining shorelines" and "adjoining shorelines to the navigable waters"); §1346(c) ("land adjoining the coastal recreation waters"); see also §1254(n)(4) ("estuary" includes certain bodies of water "having unimpaired natural connection with open sea"); §2802(5) (" 'coastal waters' " includes wetlands "having unimpaired connection with the

open sea up to the head of tidal influence"). The difference in those two terms is critical to this case. Two objects are "adjoining" if they "are so joined or united to each other that no third object intervenes." 1968 Black's 62 (comparing "adjacent" with "adjoining"); see ibid. ("Adjoining" means "touching or contiguous, as distinguished from lying near to or adjacent"); see also Black's Law Dictionary 38–39 (5th ed. 1979) (same); Webster's Third 26–27 (similar). As applied to wetlands, a marsh is adjacent to a river even if separated by a levee, just as your neighbor's house is adjacent to your house even if separated by a fence or an alley.* * *

II

Longstanding agency practice reinforces the ordinary meaning of adjacency and demonstrates, contrary to the Court's conclusion today, that the term "adjacent" is broader than "adjoining." * * * Since 1977, when Congress explicitly included "adjacent" wetlands within the Act's coverage, the Army Corps has adopted a variety of interpretations of its authority over those wetlands—some more expansive and others less expansive. But throughout those 45 years and across all eight Presidential administrations, the Army Corps has always included in the definition of "adjacent wetlands" not only wetlands adjoining covered waters but also those wetlands that are separated from covered waters by a man-made dike or barrier, natural river berm, beach dune, or the like. * * *

That longstanding and consistent agency interpretation reflects and reinforces the ordinary meaning of the statute. The eight administrations since 1977 have maintained dramatically different views of how to regulate the environment, including under the Clean Water Act. Some of those administrations promulgated very broad interpretations of adjacent wetlands. Others adopted far narrower interpretations. Yet all of those eight different administrations have recognized as a matter of law that the Clean Water Act's coverage of adjacent wetlands means more than adjoining wetlands and also includes wetlands separated from covered waters by man-made dikes or barriers, natural river berms, beach dunes, or the like. That consistency in interpretation is strong confirmation of the ordinary meaning of adjacent wetlands.

III * * *

The Court's "continuous surface connection" test disregards the ordinary meaning of "adjacent." The Court's mistake is straightforward. The Court essentially reads "adjacent" to mean "adjoining." As a result, the Court excludes wetlands that the text of the Clean Water Act covers - and that the Act since 1977 has always been interpreted to cover. * * *

The Court also invokes federalism and vagueness concerns. The Court suggests that ambiguities or vagueness in federal statutes regulating private property should be construed in favor of the property owner, particularly given that States have traditionally regulated private property rights. To begin with, the Federal Government has long regulated the waters of the United States, including adjacent wetlands.

In any event, the decisive point here is that the term "adjacent" in this statute is unambiguously broader than the term "adjoining." On that critical interpretive question, there is no ambiguity. We should not create ambiguity where none exists. And we may not rewrite "adjacent" to mean the same thing as "adjoining," as the Court does today.* * *

IV

The difference between "adjacent" and "adjoining" in this context is not merely semantic or academic. The Court's rewriting of "adjacent" to mean "adjoining" will matter a great deal in the real world. In particular, the Court's new and overly narrow test may leave long-regulated and long-accepted-to-be-regulable wetlands suddenly beyond the scope of the agencies' regulatory authority, with negative consequences for waters of the United States. For example, the Mississippi River features an extensive levee system to prevent flooding. Under the Court's "continuous surface connection" test, the presence of those levees (the equivalent of a dike) would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project. Likewise, federal protection of the Chesapeake Bay might be less effective if fill can be dumped into wetlands that are adjacent to (but not adjoining) the bay and its covered tributaries. Those are just two of many examples of how the Court's overly narrow view of the Clean Water Act will have concrete impact.

As those examples reveal, there is a good reason why Congress covered not only adjoining wetlands but also adjacent wetlands. Because of the movement of water between adjacent wetlands and other waters, pollutants in wetlands often end up in adjacent rivers, lakes, and other waters. Natural barriers such as berms and dunes do not block all water flow and are in fact evidence of a regular connection between a water and a wetland. Similarly, artificial barriers such as dikes and levees typically do not block all water flow, and those artificial structures were often built to control the surface water connection between the wetland and the water. The scientific evidence overwhelmingly demonstrates that wetlands separated from covered waters by those kinds of berms or barriers, for example, still play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control. In short, those

adjacent wetlands may affect downstream water quality and flood control in many of the same ways that adjoining wetlands can.

The Court's erroneous test not only will create real-world consequences for the waters of the United States, but also is sufficiently novel and vague (at least as a single standalone test) that it may create regulatory uncertainty for the Federal Government, the States, and regulated parties. As the Federal Government suggests, the continuous surface connection test raises "a host of thorny questions" and will lead to "potentially arbitrary results." For example, how difficult does it have to be to discern the boundary between a water and a wetland for the wetland to be covered by the Clean Water Act? How does that test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent? How "temporary" do "interruptions in surface connection" have to be for wetlands to still be covered? How does the test operate in areas where storms, floods, and erosion frequently shift or breach natural river berms? Can a continuous surface connection be established by a ditch, swale, pipe, or culvert? The Court covers wetlands separated from a water by an artificial barrier constructed illegally, but why not also include barriers authorized by the Army Corps at a time when it would not have known that the barrier would cut off federal authority? The list goes on.

Put simply, the Court's atextual test—rewriting "adjacent" to mean "adjoining"—will produce real-world consequences for the waters of the United States and will generate regulatory uncertainty. I would stick to the text. There can be no debate, in my respectful view, that the key statutory term is "adjacent" and that adjacent wetlands is a broader category than adjoining wetlands. To be faithful to the statutory text, we cannot interpret "adjacent" wetlands to be the same thing as "adjoining" wetlands.

* * *

In sum, I agree with the Court's decision not to adopt the "significant nexus" test for adjacent wetlands. I respectfully disagree, however, with the Court's new "continuous surface connection" test. In my view, the Court's new test is overly narrow and inconsistent with the Act's coverage of adjacent wetlands. The Act covers adjacent wetlands, and a wetland is "adjacent" to a covered water (i) if the wetland is contiguous to or bordering a covered water, or (ii) if the wetland is separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. The wetlands on the Sacketts' property do not fall into either of those categories and therefore are not covered under the Act as I would interpret it. Therefore, like the Court, I would reverse the judgment of the

U.S. Court of Appeals for the Ninth Circuit and remand for further proceedings. But I respectfully concur only in the Court's judgment.

JUSTICE KAGAN, with whom **JUSTICE SOTOMAYOR** and **JUSTICE JACKSON** join, concurring in the judgment.

Like Justice Kavanaugh, "I would stick to the text." * * * In excluding all the wetlands [that are not contiguous or bordering other waters of the United States], the majority's " 'continuous surface connection' test disregards the ordinary meaning of 'adjacent.' " The majority thus alters—more precisely, narrows the scope of—the statute Congress drafted.

And make no mistake: Congress wrote the statute it meant to. The Clean Water Act was a landmark piece of environmental legislation, designed to address a problem of "crisis proportions." How bad was water pollution in 1972, when the Act passed? Just a few years earlier, Ohio's Cuyahoga River had "burst into flames, fueled by oil and other industrial wastes." And that was merely one of many alarms. Rivers, lakes, and creeks across the country were unfit for swimming. Drinking water was full of hazardous chemicals. Fish were dying in record numbers (over 40 million in 1969); and those caught were often too contaminated to eat (with mercury and DDT far above safe levels). So Congress embarked on what this Court once understood as a "total restructuring and complete rewriting" of existing water pollution law. The new Act established "a self-consciously comprehensive" and "all- encompassing program of water pollution regulation." Or said a bit differently, the Act created a program broad enough to achieve the codified objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." §1251(a). If you've lately swum in a lake, happily drunk a glass of water straight from the tap, or sat down to a good fish dinner, you can appreciate what the law has accomplished.

Vital to the Clean Water Act's project is the protection of wetlands—both those contiguous to covered waters and others nearby. As this Court (again, formerly) recognized, wetlands "serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (citation omitted). * * * At the same time, wetlands play a crucial part in flood control (if anything, more needed now than when the statute was enacted). And wetlands perform those functions, as Justice Kavanaugh explains, not only when they are touching a covered water but also when they are separated from it by a natural or artificial barrier—say, a berm or dune or dike or levee. * * * Small wonder, then, that the Act—as written, rather than as read today—covers wetlands with that kind of connection. Congress chose just the word needed to meet the Act's objective. A wetland is protected when it is "adjacent" to a covered water—not merely when it is "adjoining" or "contiguous" or "touching," or (in the majority's favorite made-up locution) has a "continuous surface connection."

Today's majority, though, believes Congress went too far. In the majority's view, the Act imposes unjustifiably "crushing consequences" for violations of its terms. * * * Surely something has to be done; and who else to do it but this Court? It must rescue property owners from Congress's too-ambitious program of pollution control.

So the majority shelves the usual rules of interpretation—reading the text, determining what the words used there mean, and applying that ordinary understanding even if it conflicts with judges' policy preferences. * * * As the majority concedes, the statute "tells us that at least some wetlands must qualify as 'waters of the United States.' " More, the statute tells us what those "some wetlands" are: the "adjacent" ones. And again, as Justice Kavanaugh shows, "adjacent" does not mean adjoining. So the majority proceeds to its back-up plan. It relies as well on a judicially manufactured clear-statement rule. When Congress (so says the majority) exercises power "over private property"—particularly, over "land and water use"—it must adopt "exceedingly clear language." There is, in other words, a thumb on the scale for property owners—no matter that the Act (i.e., the one Congress enacted) is all about stopping property owners from polluting.

Even assuming that thumb's existence, the majority still would be wrong. As Justice Kavanaugh notes, clear-statement rules operate (when they operate) to resolve problems of ambiguity and vagueness. And no such problems are evident here. One last time: "Adjacent" means neighboring, whether or not touching; * * * That congressional judgment is as clear as clear can be—which is to say, as clear as language gets. And so a clear-statement rule must leave it alone. * * * A court may, on occasion, apply a clear-statement rule to deal with statutory vagueness or ambiguity. But a court may not rewrite Congress's plain instructions because they go further than preferred. That is what the majority does today in finding that the Clean Water Act excludes many wetlands (clearly) "adjacent" to covered waters. * * *

Today's pop-up clear-statement rule is explicable only as a reflexive response to Congress's enactment of an ambitious scheme of environmental regulation. It is an effort to cabin the anti-pollution actions Congress thought appropriate. And that, too, recalls last Term, when I remarked on special canons "magically appearing as get-out-of-text-free cards" to stop the EPA from taking the measures Congress told it to. *See West Virginia v. EPA*, 597 U. S., at ___–___ (dissenting opinion) There, the majority's non-textualism barred the EPA from addressing climate change by curbing power plant emissions in the most effective way. Here, that method prevents the EPA from keeping our country's waters clean by regulating adjacent wetlands. The vice in both instances is the same: the Court's appointment of itself as the national decision-maker on environmental policy.

So I'll conclude, sadly, by repeating what I wrote last year, with the replacement of only a single word. "[T]he Court substitutes its own ideas about policymaking for Congress's. The

Court will not allow the Clean [Water] Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much." Because that is not how I think our Government should work—more, because it is not how the Constitution thinks our Government should work—I respectfully concur in the judgment only.

[The **Concurring Opinion of Justice Thomas, joined by Justice Gorsuch**, is omitted. In the opinion, Justice Thomas argued that Congress only has power under the Commerce Clause to regulate waters that are "highway[s] over which commerce is or may be carried." In addition to advocating for a narrower interpretation of "navigable waters" under the Clean Water Act, Justice Thomas leveled broader criticisms at the Supreme Court's Commerce Clause jurisprudence generally. Thomas argued that the Commerce Clause, based on the original intent of its authors, should only regulate "selling, buying and bartering," or transporting for those purposes, and should not regulate "productive activities like manufacturing and agriculture". He singled out federal environmental law as particularly constitutionally suspect, in light of its dependence for existence on an expansive reading of the Commerce Clause.]