On October 3, the U.S. Supreme Court heard oral arguments in *Sacket v. EPA*, case number 21-454. The question presented was whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" (WOTUS) under the Clean Water Act (CWA), 33 U. S. C. §1362(7). The Ninth Circuit held that the Sackett's property contains wetlands that are adjacent to a tributary of Priest Lake, and that those wetlands together with other wetlands in the area have a significant nexus to Priest Lake. The parties did not dispute that Priest Lake is a navigable water.

Damien Schiff represented the petitioners, the Sacketts, and Brian Fletcher represented the respondents, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps).

Fletcher noted that the agencies' new proposed rule was submitted to the Office of Management and Budget (OMB) for interagency review in September, and that the agencies expect it to be published for public comment by the end of 2022. He said: "Those regulations incorporate the significant nexus test, which is a limiting construction that ensures that the Act reaches only those wetlands that must be covered to reach the traditional navigable waters in which the federal interest is indisputable."

The parties agreed that some wetlands fall within federal jurisdiction under CWA §1344(g)(1), but disagreed on the scope of such jurisdiction and which wetlands should be included. Schiff argued in favor of a two-step test for wetlands that involved identifying a hydrographic feature that is navigable-in-fact, and abutting wetlands that blend into and become indistinguishable from those waters. He argued that the test fulfilled all of Congress's purposes, and was easier to administer than the significant nexus test because ordinary citizens "can use their own eyes to reliably determine whether or not their land is regulated."

Many of the Justices raised questions about interpretations of "adjacent," from an obvious physical connection on the surface, to a subsurface connection at increasing distances from a navigable water or a tributary to a navigable water, as well as seasonal continuity of water. They asked about natural and man-made barriers, such as berms and roads, and whether those should disrupt the jurisdictional connection. Fletcher argued, "Overwhelming…and essentially undisputed scientific evidence shows that those sorts of barriers do not diminish wetlands' essential role in protecting the integrity of other waters."

Justice Kavanaugh acknowledged that "…this case is going to be important for wetlands throughout the country and we have to get it right." Justice Alito noted that CWA §1344(g) may shed light on whether the wetlands at issue in this case are jurisdictional, but the Court really needed to interpret what "waters of the United States" means. Fletcher acknowledged that while there are features that easily fit that description – and he included wetlands – there are also difficult cases such as washes and intermittent or seasonal streams. He said that "…it's a difficult problem of how to interpret it and apply it to all of the different water features in the country."

The Justices also questioned the timeline for agency interpretation and regulations, the 1977 Congressional amendment to the CWA, Court interpretations of jurisdiction over wetlands, and how those actions or interpretations have impacted the scope of jurisdiction over time.

Justice Sotomayor inquired about the difference between subsurface flow and groundwater flow, noting that it shouldn't be that hard to know there is subsurface water "when you put your foot in the sand and you can feel it underneath the top of the sand. You can feel it in how watery the soil is…. You could put a stake…into it and feel it immediately or have it spring up immediately." Schiff noted that there was no legal distinction, or that EPA had never made such a distinction. He also argued that relying on any sort of subsurface connection would essentially render the test of jurisdiction to be limitless in a unified hydrologic cycle.

Justices Thomas and Barrett noted that they grew up, respectively, in the low country of Georgia where there was standing water not bordering on navigable waters, and in New Orleans where they couldn't dig basements because the water table was too near the surface but all the water flowed into navigable waters. In response to their questions regarding whether landowners in those places would need to seek a jurisdictional determination or permit, Fletcher noted that groundwater and certain other waters are excluded from CWA jurisdiction. "If you're not in one of those categories, the question that you'd have to ask is…is this adjacent to or is there a significant nexus with the navigable waters? And I think, for an isolated body of water, the answer to that would be no."

Several other questions touched on the origin and relevance of the significant nexus test. Justice Kagan asked where the significant nexus test comes from, and Justice Barrett asked at what point the significant nexus test applied

to wetlands. Fletcher noted that the test arises out of the Supreme Court's cases interpreting "waters of the United States" to mean something more than navigable waters, but there must still be a connection with navigable waters. For wetlands that are directly adjacent to navigable waters, he said those are covered by CWA §1344(g). For wetlands that are adjacent to upstream tributaries, they must satisfy the significant nexus test.

Justice Jackson asked Schiff: "You say the question is which wetlands are covered, which I agree with, but I guess my question is, why would Congress draw the [jurisdictional] coverage line between abutting wetlands and neighboring wetlands when the objective of the statute is to ensure the chemical, physical, and biological integrity of the nation's waters?" Justice Sotomayor agreed, noting that Congress was concerned about ensuring the sanctity of our waters and that things directly discharged into it would be safe.

Schiff argued that Congress did not intend for the CWA to cover all waters in order to meet the objective of the statute. "I think Congress recognized that…there would be a significant swath of land use and water regulation that would remain to the states. And I think one good example…is…non-point source pollution. Everyone recognizes that non-point source pollution is a serious water quality issue, but it's never been disputed that the [CWA] doesn't reach that, which I think emphasizes that the purpose of Congress in enacting the [CWA] not at all costs…. It was a balancing to recognize that some water quality measures, like wetlands regulation…inevitably converts EPA and the Corps into land use administrators." He pointed to Riverside Bayview and noted that "…one will have to pick a point at which land ends and water begins, and in that intermediate zone, there will be things like wetlands." He added that Congress was also concerned with private property rights and ensuring that people had fair notice as to whether their property would be regulated.

Chief Justice Roberts asked how much of an ecological or biological connection there needed to be between wetlands and navigable waters to bring the wetlands under CWA jurisdiction. Fletcher said: "We're not talking about the possibility that some molecules of water eventually make their way from the wetlands into the lake…. " Rather, he said, there must be some significant effect, and listed some of the factors the agencies have considered with more than a decade experience under the post-Rapanos guidance, including "…distance to the tributary, distance to the downstream traditional navigable water, the volume of the flow, the hydrology of the area, the presence of other wetlands."

Justice Kagan asked whether there was a different alternative to identifying which waters are jurisdictional, some compromise to the tests that have been put forward so far. There did not appear to be one.

Justice Thomas inquired how a purely intrastate body of water could be regulated under the Clean Water Act, and both attorneys explained the reach of the Commerce Clause to waters that have been used to transport commerce that becomes interstate commerce when combined with land transportation. Each referenced a case involving the Great Salt Lake in Utah. It was unclear from the oral arguments whether this was the same case referenced in the amicus brief of the National Association of Home Builders regarding navigable waters, *Utah v. United States*, 403 U.S. 9 (1971), which only addressed the question of navigability as it applied to whether the state held titled to the bed of the lake. Justice Thomas asked: "Is there a lot of transportation over the Great Salt Lake?" Fletcher responded: "Apparently not. That's why it was in litigation. But the Court held that a little bit from the 1880s was enough."

Justice Jackson disagreed with Schiff's characterization of Congressional preservation of traditional state authority over land and water resources as a "purpose of the Act." She said: "I didn't read that as a purpose, I mean, that Congress said our objective is to address or make sure that we maintain the integrity of the waters. It was one of the policies in achieving that objective that we care about states' rights…or federalism concerns, but I didn't see that as Congress's primary objective or even…a main objective with respect to the Clean Water Act."

Justice Alito noted the vagueness of CWA §1344(g) and its implications for federalism. Fletcher pointed to the Court's prior decisions that have considered those issues. He said: "And we take the significant nexus test to be consistent with those decisions and to be a limiting construction, a narrowing construction on the covered waters include all the waters that are necessary to achieve the goal…and that leave waters that aren't essential to that goal to the states to regulate." Justice Alito pressed him saying that interpretation would extend the federal government's jurisdiction "very, very far," Fletcher said, "It's true that the Act's coverage is broad. It's been understood as broad from the beginning. And that was Congress's intent…to comprehensively regulate the waters of the United States because the prior system that relied primarily on states had proved insufficient, in part because that isn't a problem that the states can solve by themselves because pollution that happens in one state or the destruction of wetlands in one state have consequences that may be felt in many states downstream that can't themselves regulate to address it." Fletcher also noted that while Congress's purpose was broad, the agencies' jurisdiction isn't unlimited, saying "…something like 25 percent of jurisdictional determinations made under the post-Rapanos guidance conclude that there is no jurisdiction under the Act."

While Fletcher asserted that a homeowner could request a jurisdictional determination at no charge from the Corps of Engineers, Schiff argued that the application process was complex and required costly professional assistance to complete. Schiff said: “It’s hard to imagine any other statutory system in the federal code that requires a potentially regulated party to initiate a rather expensive and time-consuming process just to find out whether, in fact, one is regulated.” He added that “…in the age of the significant nexus [test, it’s] very difficult to know whether, in fact, one is regulated.”

Chief Justice Roberts and Justice Gorsuch inquired about the level of complexity for a reasonable landowner, whether there was a bright-line rule, a specific distance that provided notice of potentially jurisdictional waters. Fletcher noted that the agencies tried that approach in the 2015 rule, but it was rejected as arbitrary, and that the agencies have not tried to reduce that to a bright-line rule in the new rulemaking. Chief Justice Roberts asked: “Have they tried to reduce it to a vague rule?” Fletcher responded that the agencies have said there must be a reasonable proximity that depends on the hydrology of the area.

Justice Gorsuch inquired about the penalties associated with not recognizing that a property is a water of the United States. Schiff noted the significant civil and administrative penalties that come with the lack of certainty for the regulated community, as well as the potential criminal penalties that fall under the same statutory text and regulatory interpretation of what waters are covered. “I think that should give the Court particular concern in indulging any sort of malleable or somewhat unclear or flexible test exemplified by the significant nexus test.”

Justice Kavanaugh said: “I just want to follow up on Justice Gorsuch’s earlier questions because I think he identified something that this Court’s overwhelmingly been concerned about for decades, *mens rea*and not punishing innocent people who make a mistake, an innocent mistake.” Fletcher noted that it is very unusual to bring criminal prosecutions absent willful conduct, and if someone was criminally prosecuted, they could bring a claim that the statute was vague as it applied to them.