What wetlands and waterbodies does the Clean Water Act protect? Congress failed to provide a clear answer when it passed the statute, and the issue has been a bone of contention ever since. The Biden Administration is in the process of issuing a new regulation on the subject. Normally, you'd expect the Supreme Court to wait to jump in until then. Instead, the Court reached out to grab *Sackett v. EPA*, where landowners take a really extreme position on the subject. Not a good sign.

A little quick background: The term "navigable waters" traditionally meant water bodies that could be used for transportation. When it passed the Clean Water Act, Congress redefined the term to mean "waters of the United States." Everyone agrees that this term covers at least traditional navigable waters and wetlands on their shores. But what else is covered? The Supreme Court has issued several rather confusing issues on the subject. The lower courts read the Court's decisions to include wetlands and tributaries that have a "significant nexus" with traditional navigable waters. In one of those decisions, Justice Scalia and three other conservatives favored a much narrower definition, which was more or less tracked in later Trump Administration regulation.

The landowners in *Sackett* take a position that would restrict federal jurisdiction even more than Scalia or Trump. In their brief, they argue for a two-step test:

- "Step one: is the wetland inseparably bound up with a "water"—i.e., a stream, ocean, river, lake, or similar hydrogeographic feature that in ordinary parlance would be called a "water"—by means of a continuous surface-water connection, such that it is difficult to tell where the wetland ends and the "water" begins?
- "Step two: is the 'water' among 'the waters of the United States,' i.e., those waterbodies subject to Congress's authority over the channels of interstate commerce?"

As the government's brief points out, under this test a wetland would lose federal protection if someone builds a road or levee across it, or even if a flood leaves a natural berm of soil between the two. Any of those events would eliminate the "continuous surface-water connection." Moreover, the government points out, this test would eliminate federal jurisdiction over non-navigable tributaries of navigable streams. This makes no sense: the Clean Water Act's goal is to prevent pollution, not barriers to navigation.

One thing to watch for: will the Court apply the major questions doctrine, as it did in

West Virginia v. EPA? If the Court gives a narrow reading to the *West Virginia* case, it shouldn't apply the doctrine. Unlike the climate change regulation involved in *West Virginia v. EPA*, federal jurisdiction over wetlands involves a central provision of the statute and does not involve an unprecedented claim of regulatory authority by the agency. The agency has claimed regulatory authority going beyond the Scalia approach since before the Bush Administration. If the Court nonetheless relies on the major question doctrine, it will be expanding the doctrine beyond the *West Virginia* ruling.

Given the ways in which the landowners' approach goes beyond Scalia and Trump, it may go too far even for this highly conservative group of judges. Still, I wouldn't want to put a lot of money on that bet.