No. 25-___

In the Supreme Court of the United States

THE GLYNN ENVIRONMENTAL COALITION, INC., CENTER FOR A SUSTAINABLE COAST, INC., AND JANE FRASER,

Petitioners,

v.

SEA ISLAND ACQUISITION, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

John A. Brunini
Laura D. Heusel
BUTLER SNOW LLP
1020 Highland Colony Parkway, Suite 1400
Ridgeland, MS 39157

Kevin K. Russell
Counsel of Record
Daniel Woofter
RUSSELL & WOOFTER LLC
1701 Pennsylvania Avenue NW, Suite 200
Washington, DC 20006
(202) 240-8433
kr@russellwoofter.com

QUESTION PRESENTED

The Clean Water Act generally prohibits filling in wetlands that qualify as "waters of the United States." *See* 33 U.S.C. § 1311(a). Landowners who want to confirm whether wetlands on their property fall within that definition may obtain an "approved jurisdictional determination" from the U.S. Army Corps of Engineers, which is subject to judicial review. 33 C.F.R. § 331.2; *see U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597-99 (2016). Landowners may also, however, forego that process and simply seek a permit from the Corps based on a "preliminary jurisdictional determination." *See* 33 U.S.C. § 1344(a); 33 C.F.R. § 331.2. Those who do agree that "all wetlands and other water bodies on the site affected in any way by that activity are jurisdictional waters of the United States" and that accepting the permit "precludes any challenge to such jurisdiction . . . in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court." Pet. App. 9a.

The question presented is:

Is a Clean Water Act permittee's waiver of "any challenge" to the jurisdictional status of a wetland "in any Federal court" limited to government suits to enforce permit conditions, thereby allowing jurisdictional challenges in suits by states and private citizens under the Act's citizen suit provision?

PARTIES TO THE PROCEEDINGS

The caption contains all the names of all the parties to the proceedings below.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *The Glynn Environmental Coalition, Inc., Center for a Sustainable Coast, Inc., Jane Fraser v. Sea Island Acquisition, LLC*, 146 F.4th 1080 (11th Cir. 2025).
- *The Glynn Environmental Coalition, Inc., Center for a Sustainable Coast, Inc., Jane Fraser v. Sea Island Acquisition, LLC*, 26 F.4th 1235 (11th Cir. 2022).
- *The Glynn Environmental Coalition, Inc.; Center for a Sustainable Coast, Inc.; and Jane Fraser v. Sea Island Acquisition, LLC*, No. CV 219-050 (S.D. Ga. Mar. 1, 2024).

RULE 29.6 STATEMENT

The Glynn Environmental Coalition, Inc., has no parent corporation and no publicly listed company owns 10% or more of its stock. Center for a Sustainable Coast, Inc., has no parent corporation and no publicly listed company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

The nation's wetlands are one of its most important, and vulnerable, resources. They act as filters for our drinking water, buffers against rising sea levels and seasonal flooding, and essential habitats for plants and animals, including fully half of the country's endangered species.[1] Yet, since the nation's founding, we have lost more than half of our original wetlands and what remains is shrinking at an alarming and accelerating rate.[2]

Protecting our remaining wetlands is one of the central purposes of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* To that end, the statute generally prohibits filling in wetlands falling within the statute's purview, except as permitted by the U.S. Army Corps of Engineers ("Corps"), subject to important conditions and limitations. Congress understood that government enforcement of these protections would be insufficient. It therefore enacted a broad citizen suit provision, deputizing affected members of the public to act as "private attorneys general" to supplement the government's efforts. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981) (citing 33 U.S.C. § 1365(g)). And it defined states as "citizens" entitled to enforce the Act through these citizen suit provisions. *See U.S. Dep't of Energy v. Ohio*, 503 U.S.

---

[1] *See* U.S. EPA, EPA 843-F-01-002d, Threats to Wetlands 1 (Sept. 2001), https://tinyurl.com/4ppd54ra; U.S. Fish & Wildlife Serv., Status and Trends of Wetlands in the Coterminous United States 2009 to 2019 Report to Congress (2024) ("Status and Trends"), https://tinyurl.com/mpv395w3; U.S. EPA, *Why are Wetlands Important?*, https://tinyurl.com/53ymcn89 (last updated July 23, 2025) ("Why are Wetlands Important").

[2] *See* Status and Trends, *supra*, p. 17.

607, 614 n.5 (1992) (citing 33 U.S.C. § 1365(a), (g); 42 U.S.C. § 6972).

The Eleventh Circuit's decision in this case will impede the work of those private attorneys general as well as the government itself. The question its decision presents arises from a problem that occurs when a landowner seeks a permit to fill a wetland without first obtaining an official determination from the Corps as to whether that water resource falls within the scope of the Clean Water Act. Frequently, the work allowed by the permit will make it difficult, if not impossible, to determine after the fact whether the wetlands were sufficiently connected to the nation's navigable waterways to fall within the Act's jurisdiction. And that would create real problems for proving jurisdiction in any subsequent action alleging that the landowner disregarded permit conditions or otherwise violated the statute.

The Corps could have addressed this dilemma by refusing to consider permit applications until the landowner had obtained an approved jurisdictional determination from the Corps. That process involves "extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property," *U.S. Army Corps of Eng's v. Hawkes Co.*, 578 U.S. 590, 597 (2016), and preserves a record of the relevant jurisdictional evidence, in the event of any future dispute. But as an accommodation to landowners wishing to avoid the delay and expense of that process, the Corps instead accepts applications for permits without such a determination, on the condition that permittees waive "any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court." U.S.

Army Corps of Eng'rs, Regulatory Guidance Letter No. 16-01, app. 2, ¶ 2(6) (Oct. 2016) ("RGL 16-01").

In this case, the Eleventh Circuit engrafted two extratextual limitations into that waiver. First, the court held that the waiver applies only in actions to enforce the permit's conditions, thereby allowing a landowner to contest jurisdiction in any other kind of proceeding (*e.g.*, a government enforcement action alleging illegal dumping of barrels of toxic waste into the wetland before obtaining the permit). Pet. App. 10a-11a. Second, the Eleventh Circuit held that the waiver does not apply to citizen suits at all. *Id.* 11a-13a. Both limitations conflict with the plain language of the waiver's text and will dramatically undermine enforcement of the statute unless this Court intervenes.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-31a) is reported at 146 F.4th 1080. The decision of the district court (Pet. App. 32a-45a) is unreported but available at 2024 WL 1088585.

JURISDICTION

The judgement of the court of appeals was entered on July 29, 2025. Pet. App. 1a. The court of appeals denied a timely petition for rehearing on August 29, 2025. *Id.* 46a. Justice Thomas extended the time for filing this petition through January 26, 2026. No. 25A582. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 1365(a) of the Clean Water Act provides, in relevant part:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any

> citizen may commence a civil action on his own behalf--
>
> > (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

STATEMENT OF THE CASE

I. Legal Background

A. General Scheme Of The Clean Water Act

In 1972, recognizing that prior federal efforts to protect the nation's water resources had "been inadequate in every vital aspect," Congress enacted what is now known as the Clean Water Act. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 310 (1981) (quoting S. Rep. No. 92-414, at 7 (1971)). The Act's overarching objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to ensure "the protection and propagation of fish, shellfish, and wildlife" that depend on those waters. 33 U.S.C. § 1251(a), (a)(2); *see also PUD No. 1 of Jefferson*

Cnty. v. Washington Dep't of Ecology, 511 U.S. 700, 704 (1994).

This includes checking the runaway destruction of wetlands. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33, 136-39 (1985). After slowing to an extent in the middle of the last century, net wetland losses accelerated during the first decades of this century.[3] The U.S. Fish and Wildlife Service reports that the annual "rate of net wetland loss" "accelerated by over 50%" between studies covering 2004-2009 and 2009-2019.[4] Those losses are catastrophic. Wetlands serve as filters for the nation's waters, preventing agricultural runoff and other pollutants from reaching larger rivers and water sources.[5] They also afford vital protection for flood-prone areas, absorbing and slowly releasing heavy rains and storm surges.[6] It is estimated that wetland losses between 2001 and 2016 cost taxpayers more than $600 million each year in claims against the National Flood Insurance Program alone.[7] Filtering rain and flood waters through wetlands also slows and limits the transport of sediment downstream, helping slow erosion and the filling of navigation channels.[8] In addition,

---

[3] Status and Trends, *supra*, p. 8.

[4] *Id.* p. 17.

[5] *See, e.g.*, *id.* p. 28; Why are Wetlands Important, *supra*; U.S. EPA, Off. of Rsch. & Dev., Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence ES-2-3 (Jan. 2015) ("Connectivity Report").

[6] *See* Connectivity Report, *supra*, pp. ES-2-3; *see also* Charles A. Taylor & Hannah Druckenmiller, *Wetlands, Flooding, and the Clean Water Act*, 112 Am. Econ. Rev. 1334, 1337, 1352 (2022).

[7] Taylor & Druckenmiller, *supra*, p. 1356.

[8] *See* Status and Trends, *supra*, p. 10; Why are Wetlands Important, *supra*; Connectivity Report, *supra*, pp. ES-2-3.

"[r]oughly half of the species protected under the U.S. Endangered Species Act are wetland-dependent, including the American crocodile, chinook salmon, whooping crane, bog turtle, manatee, and several orchid species."[9] About "80% of protected birds [also] depend on wetlands."[10]

To protect such vital resources, the Clean Water Act "established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." *City of Milwaukee*, 451 U.S. at 310-11. In particular, the Act prohibits "the discharge of any pollutant" into the "waters of the United States." *See* 33 U.S.C. §§ 1311(a), 1362(6)-(7), (12)(A). "Pollutants" include dredged or other fill materials. *Id.* § 1362(6). The Corps may issue permits for discharges, including to fill in wetlands covered by the Act, but only when certain conditions are met. *Id.* § 1344.[11] The permit holder is shielded from enforcement actions by the government and private plaintiffs for otherwise unlawful discharges so long as the permit conditions are observed. *Id.* § 1344(p).

Congress deemed essential public participation in the creation—and enforcement—of clean water standards. *See* 33 U.S.C. § 1251(e) (declaring that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator . . . shall be provided for, encouraged, and assisted by the Administrator and the States").

---

[9] Status and Trends, *supra*, p. 10 (citation and footnotes omitted).

[10] *Ibid.* (footnote omitted).

[11] The Corps typically will issue a permit only if the applicant has also obtained the necessary certifications from the state in which the project takes place. *See* 33 U.S.C. § 1341(a)(1).

Consistent with that philosophy, Congress provided for citizen suits for violations of the statute's most essential provisions to supplement government efforts. *See id.* § 1365(a)(1). In bringing such actions, citizens operate as "private attorneys general." *Nat'l Sea Clammers*, 453 U.S. at 16-17. States are likewise authorized to enforce the Act through the same provision by virtue of falling under the Act's definition of a "citizen." *See U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 614 n.5 (1992) (citing 33 U.S.C. § 1365(a), (g); 42 U.S.C. § 6972).

B. Clean Water Act Permitting

The Corps issues individual and nationwide permits. Individual permits are specific to a particular property and may only be awarded after publication of the application and an opportunity for public hearings. 33 U.S.C. § 1344(a). That process can be time-consuming and costly. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594-95 (2016). Accordingly, the Act also allows the Corps to issue general nationwide permits for certain categories of activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1).

In deciding whether to issue either kind of permit, the Corps considers "probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). The Corps then "balance[s]" the "benefits which reasonably may be expected to accrue from the proposal . . . against its reasonably foreseeable detriments." *Ibid.*

C. Jurisdictional Waivers

Of course, a permit is required only if the affected waters fall within the jurisdictional scope of the Act. The statute regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. §§ 1311(a), 1362(7), (12)(A). The "waters of the United States" include "those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes, as well as any wetland having a continuous surface connection with that water." *Sackett v. EPA*, 598 U.S. 651, 671, 678 (2023) (cleaned up). A continuous surface connection can exist despite "temporary interruptions in surface connection" caused, for example, by "low tides or dry spells." *Id.* at 678. Moreover, "a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the [Act]." *Id.* at 678 n.16.

Because it sometimes can be difficult to determine whether a particular parcel of property contains "jurisdictional waters," landowners can ask the Corps to issue an "'approved jurisdictional determination' stating the agency's definitive view on that matter." *Hawkes*, 578 U.S. at 593; *see also* 33 C.F.R. § 331.2; RGL 16-01, *supra*. An approved jurisdictional determination is subject to judicial review. *See Hawkes*, 578 U.S. at 596-97, 602.

A landowner wishing to avoid the expense and delay of obtaining an approved jurisdictional determination may elect to seek a "preliminary jurisdictional determination" through a truncated procedure. *See* RGL 16-01, *supra*, p. 3. At the end of that process, the Corps will determine whether the property may contain jurisdictional waters. *See Hawkes*, 578 U.S. at 595 (citing 33 C.F.R. § 331.2). The applicant can then decide to

either seek a formal, approved determination (and, if necessary, judicial review of that decision) or to accept the preliminary determination and apply for a permit. *See Sackett*, 598 U.S. at 670-71.

If the landowner elects to apply for a permit, it acknowledges that:

> accepting a permit authorization . . . *constitutes agreement* that all wetlands and other water bodies on the site affected in any way by that activity *are jurisdictional waters of the United States*, and *precludes any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court.*

Pet. App. 9a (emphasis added); *see also* RGL 16-01, app. 2, ¶ 2(6).

II. Factual Background

Respondent Sea Island operates a hotel on St. Simon's Island in Georgia. Respondent wished to fill in certain wetlands on its property and cover them with sod. Pet. App. 6a. Water from those wetlands naturally flowed into an adjacent salt marsh and, from there, into Dunbar Creek, a traditionally navigable waterway. *Id.* 6a-7a. The wetland and the marsh were artificially separated by a private road built by respondent's predecessor, but the water flow between the two was maintained via culverts and pipes. *Id.* 7a, 18a. The wetlands acted as a filter for water making its way into Dunbar Creek and were home to a variety of bird species, including egrets, herons, cranes, gulls, osprey, and pelicans, as well as plant species adapted to wetlands. Amended Complaint ¶ 44.[12]

---

[12] The Amended Complaint is found beginning at page 237 of the Eleventh Circuit Appendix, Volume II.

Because the project would require a permit unless the wetlands fell outside the jurisdiction of the Clean Water Act, respondent sought a preliminary jurisdictional determination from the Corps. Pet. App. 2a. The Corps concluded that the wetland "might contain 'waters of the United States.'" *Ibid.* Respondent elected not to seek an approved jurisdictional determination, from which it could have sought judicial review if it believed that the wetlands fell outside the purview of the Clean Water Act. *Ibid.* Instead, respondent applied for a permit. *See ibid.*

Since no nationwide permit was available for filling in wetlands for mere landscaping purposes, respondent was required to seek an individual permit. Doing so would have subjected its request to public notice and comment. It also would have required respondent to convince the Corps that the benefits of its landscaping project outweighed the environmental damage of eliminating a portion of the Island's protective wetlands. *See* 33 C.F.R. § 320.4(a) (requiring the Corps to conduct a public interest review).

To avoid this scrutiny, respondent instead applied for Nationwide Permit 39. Pet. App. 4a. That permit allows landowners, under certain specified conditions, to fill wetlands "for the construction . . . of commercial and institutional building foundations and . . . attendant features . . . necessary for the use and maintenance of the structures." Reissuance of Nationwide Permits, 77 Fed. Reg. 10184, 10279 (Feb. 21, 2012). In creating that Nationwide Permit, the Corps determined that when the requirements of the permit are satisfied, the public benefits of creating new commercial or institutional facilities outweighs the environmental costs. *See* 33 C.F.R. § 320.4(a).

To obtain the permit, respondent falsely represented that it intended to build a new office building and parking lot over the filled-in wetland. *See* Amended Complaint ¶ 115. However, planning documents submitted to county authorities immediately before and after requesting the Clean Water Act permit showed no such building. *See id.* ¶¶ 126-28. Instead, the final construction plans given to the county candidly identified the wetlands area proposed to be impacted as "PERMANENT SODDING." *See id.* ¶ 127.

After securing the permit, respondent filled in the wetland and covered it with sod. Pet. App. 6a; Amended Complaint ¶ 121. It never constructed any office building or parking lot on the site. Pet. App. 6a. As a consequence, it failed to comply with the requirements of Nationwide Permit 39, which would not have been issued in the first place but for respondent's false representations.

III. Procedural History

Petitioners are local environmental groups and a private citizen living near the now-destroyed wetland. Had respondent filed for an individual permit, petitioners would have been entitled to participate in public hearings on whether the permit should be granted. And had respondent told the truth about its plans, petitioners could have opposed the application on the ground that the environmental costs of the project far outweighed any public benefit from replacing a diverse and vibrant wetland with a lawn.

1. When it became apparent that respondent had no intention of building on the site, and therefore had obtained its permit through deception, petitioners filed this action under the Act's citizen suit provision. The district court initially dismissed for lack of standing, but the Eleventh Circuit reversed. *See* Pet. App. 7a; *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, 26 F.4th

1235 (11th Cir. 2022). On remand, the district court again dismissed, this time on the ground that the wetland was not a part of the "waters of the United States" under this Court's intervening decision in *Sackett v. EPA*, 598 U.S. 651 (2023). *See* Pet. App. 44a-45a. The court acknowledged petitioners' argument that respondent had waived the right to challenge the jurisdictional status of the wetland in the course of obtaining its permit. *Id.* 40a-41a. But the court believed that respondent's challenge "is an argument that cannot be waived." *Id.* 41a.

2. Petitioners appealed but the Eleventh Circuit affirmed. The court did not accept the district court's holding that respondent's argument was non-waivable.[13] The court further acknowledged that "[o]n its face, the capacious language of the waiver would seem to encompass citizen suits against violations of the permit." Pet. App. 10a. But it nonetheless concluded that the waiver did not extend to this action for three reasons.

First, the court believed that because the waiver is triggered by acceptance of a permit, that "framing defines the scope of the waiver." Pet. App. 10a. Although applicants agree not to challenge jurisdiction in "'any . . . compliance or enforcement action,'" the court believed that the "text is best read to mean any enforcement *of the permit*." *Ibid.* (emphasis in original). Accordingly, the Eleventh Circuit held that even in an enforcement action by the government, permittees are free to challenge jurisdiction if the plaintiff alleges, for example, that the landowner was discovered to have dumped barrels of toxic waste into the wetland for years before seeking the permit.

---

[13] The Eleventh Circuit also rejected respondent's arguments that *Sackett* had deprived the district court of subject matter jurisdiction and rendered the case moot. Pet. App. 15a.

Second, although the court acknowledged that a "'judicial compliance or enforcement action'" may encompass actions brought by private citizens, it nonetheless thought that the "phrases most naturally mean administrative or compliance actions brought *by the Corps* to enforce the permit." Pet. App. 12a (emphasis added). This precludes enforcing the waiver both in citizen suits and in actions by agencies other than the Corp, such as the Environmental Protection Agency, or a state.

Third, excluding citizen suits was consistent with the court's view that permits "function like contracts between the Corps and the permit holder." Pet. App. 12a-13a (finding that the waiver operates as a kind of quid pro quo for "an expedited determination and a shortcut into the permitting process" (cleaned up)). "And under general contract law, only a party to a contract or an intended third-party beneficiary may sue to enforce the terms of a contract." *Id.* 13a (cleaned up).

Accordingly, the Eleventh Circuit refused to enforce the waiver against respondent and proceeded to decide whether the complaint adequately alleged that the subject wetland fell within the jurisdiction of the Clean Water Act. The panel concluded that it did not, finding that petitioners had failed to sufficiently allege a continuous surface connection between the wetland and Dunbar Creek. Pet. App. 17a. The court acknowledged that petitioners had provided an expert report documenting that when it rains, excess water from the wetland enters the adjacent salt marsh, which is "'directly connected by surface and ground water to Dunbar Creek.'" *Id.* 17a-18a. It further recognized that the expert testified that "prior tidal exchange occurred between Dunbar Creek and the wetland." *Id.* 18a (cleaned up). But the Court found this insufficient to

plausibly allege a "continuous" surface connection, noting that at the time of the permit application, "the roads and sections of upland already divided the wetland from the salt marsh." *Ibid.* The court did not point to anything in the Complaint indicating that this road had been lawfully constructed between the wetland and the marsh, and respondents provided no evidence that a permit from the Corps for such construction had ever been obtained. *Id.* 17a-21a; *see Sackett*, 598 U.S. at 678 n.16.

Judge Pryor wrote a concurrence to his own opinion for the court, writing separately to express his view that the Act does not "allow citizen suits to enforce permits issued under section 1344," a defense respondent had not raised on appeal, the district court never addressed, and no other member of the panel embraced. Pet. App. 23a.[14]

The panel subsequently denied a timely petition for panel rehearing. Pet. App. 46a.

REASONS FOR GRANTING THE PETITION

The court of appeals misapplied this Court's precedents and the basic rules governing motions to dismiss in determining that the subject wetlands fell outside the jurisdiction of the Clean Water Act. But the Eleventh Circuit committed an even more fundamental and far-reaching error in reaching that question in the first place. The court acknowledged that the Corps has reasonably provided that if a landowner desires a Clean Water Act permit, it must either first obtain an official determination from the Corps that the Act applies to the subject waters or waive any challenge to such jurisdiction in "*any* . . . . judicial compliance or enforcement action" in

[14] After briefing was completed, the Court ordered the parties to be prepared to discuss this question at oral argument. C.A. Doc. 45. It then granted the parties' motions to submit supplemental briefs on the topic. C.A. Docs. 47 & 53.

"*any* administrative appeal or in *any* Federal court." Pet. App. 9a (emphasis added). By its plain terms that waiver applies to all enforcement actions, including citizen suits. The Eleventh Circuit nonetheless refused to give that unmistakable language its unambiguous breadth.

That error is consequential and should be corrected in this case. At the very least, if the Court has any doubts about the court of appeal's ruling or the importance of the question presented, it should call for the views of the United States, which has unique insights into both issues.

I. The Eleventh Circuit's Construction Of The Waiver Language Is Wrong.

The Eleventh Circuit acknowledged that "[o]n its face, the capacious language of the waiver would seem to encompass citizen suits against violations of the permit." Pet. App. 10a. After all, the waiver applies to "'any'" enforcement proceeding in "'any Federal court,'" *id.* 9a, which obviously includes this case brought under the Act's private attorney general provision. As this Court has repeatedly explained, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *see also, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008) ("Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind."). Thus, the "term 'any' ensures that the definition has a wide reach." *Boyle v. United States*, 556 U.S. 938, 944 (2009).

The Eleventh Circuit gave three reasons for reading "any" to mean "some," but none has any merit.

1. First, the court reasoned that because the waiver was required in exchange for a permit, it should be read

to apply only to actions for "enforcement *of the permit*." Pet. App. 10a (emphasis in original). Perhaps the Corps could have decided that the waiver should be qualified in that way, but that limitation is nowhere to be found in the waiver's text. *See, e.g.*, *Gonzales*, 520 U.S. at 5 (where the drafters "did not add any language limiting the breadth of that word," a court is not free to give the term "any" less breadth than its plain meaning requires).

In similar circumstances, this Court has rejected attempts to read such avowedly unrestricted language as containing implicit qualifications. *See Dep't of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 130-31 (2002) ("Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related criminal activity,' precludes any knowledge requirement."); *Gonzales*, 520 U.S. at 9 (acknowledging dissent's policy concerns with broad reading, but responding that "the straightforward language of § 924(c) leaves no room to speculate about congressional intent"); *Harrison v. PPG Indus.*, Inc., 446 U.S. 578, 592-93 (1980) (rejecting policy argument in favor of narrow reading of phrase "any other final action" on ground that this "is an argument to be addressed to Congress, not to this Court" where giving language its natural reading "is not wholly irrational"); *see also Gallardo By & Through Vassallo v. Marstiller*, 596 U.S. 420, 433-34 (2022) (rejecting reliance on "possible unfairness" of broad reading of "any rights" to "payment for medical care" because interpretation is "dictated by the Medicaid Act's text, not our sense of fairness" (cleaned up)).

Indeed, this Court has relied on the breadth of the word "any" to reach results that it has acknowledged Congress may not have intended, noting that the "fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity.

It demonstrates breadth." *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007) (citation omitted).

Here, in contrast, there is nothing surprising about the Corps' requirement that applicants waive the right to challenge the jurisdictional status of the waters under review in "any" future proceeding, even if the proceeding was not brought by the Corps to enforce a permit. The work a permit allows will often make it substantially more difficult, perhaps impossible, to determine the prior jurisdictional status of the waters. This case provides a good example. Suppose that after the permit were issued and the wetland filled, the Corps discovered that respondent had been illegally burying barrels of toxic chemicals from its hotel in the wetland for years. Deciding whether the wetland *used to* have a "continuous surface connection" with the adjacent marsh and Dunbar Creek at the time of the dumping, *see Sackett*, 598 U.S. at 670-71, would be exceedingly difficult once the wetland had been destroyed and most evidence of its original water flow lost.

The Eleventh Circuit nonetheless suggested that "*any* . . . compliance or enforcement action" should be read to mean *some subset of* compliance or enforcement actions because waivers require a "voluntary, intentional relinquishment" of a "known right." *See* Pet. App. 10a-11a (quotation marks omitted). But the best way to ensure that a waiver is knowing and voluntary is to interpret it according to its unambiguous meaning. Even in contexts in which courts strain to give waivers narrow constructions—such as waivers of sovereign immunity—they will still give the waiver a broad reading when "the words of a statute are unambiguous, as they are here." *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (cleaned up); *see also, e.g.*, *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 58 (2024) ("[I]t is error to grant

sovereign immunity based on inferences from legislative history in the face of clear statutory direction waiving that immunity.").

2. The court also believed that two canons of construction supported its reading.

First, the panel noted that the waiver arises from a "preliminary jurisdictional determination," which it viewed as "focus[ing] on enforcement actions by the Corps." Pet. App. 11a. Invoking the principle that "a 'text must be construed as a whole,'" the court concluded that this meant that "there is little reason to think that the waiver binds [respondent] in citizen suits." *Ibid.* (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts § 24, at 167 (2012)). That is incorrect.

The whole-text canon might be implicated if petitioners' reading rendered some other part of the text surplusage or gave the same terms different meanings in the same document. *See* Scalia & Garner, *supra*, § 24, at 167. But the Eleventh Circuit identified no such consequence here. The only aspect of the statute as a whole that the panel cited was the fact that the waiver arises from a permit application, which it seemingly took as an indication that the purpose of the waiver was to relieve the Corps from having to prove jurisdiction in actions to enforce the permit. Pet. App. 11a. But that reasoning represents the kind of "abuse" of the canon of which Justice Scalia warned. *See* Scalia & Garner, *supra*, § 24, at 167-68 ("It is not a proper use of the canon to say that since the overall purpose of the statute is to achieve *x*, any interpretation of the text that limits the achieving of *x* must be disfavored."). As discussed above, the context the Eleventh Circuit cited might, at most, provide a reason why the Corps could have chosen to write a

narrower waiver; it is no basis for departing from the waiver's clear text.[15]

The panel also invoked the associated-words, or *noscitur a sociis*, cannon. Pet. App. 12 (citing Scalia & Garner, *supra*, § 31, at 195). It observed that the waiver extends to a list of forums, some of which are limited to actions brought by the Corps (*e.g.*, an "'administrative . . . action'" or "'administrative appeal'"). Pet. App. 12a. From this, the court reasoned that although the remaining forums are *not* so limited (*i.e.*, "'judicial compliance or enforcement action'" in "'any Federal court'"), they should nonetheless be given a restrictive reading to match the narrower scope of the other references. *Ibid.* This reasoning fails as well.

As Justice Scalia explained, in applying the associated-words canon, courts must identify a "common quality" shared by *all* the words. *See* Scalia & Garner, *supra*, § 31, at 196. Moreover, the "common quality suggested by a listing should be its most general quality—the least common denominator, so to speak—relevant to the context." *Ibid.* This Court has therefore repeatedly reversed lower courts for invoking the cannon to cherry pick a meaning shared by only *some* of the words in a list to narrow the otherwise ordinary meaning of a remaining term. *See, e.g.*, *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 409 (2011); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilso*n, 559 U.S. 280, 287-88 (2010).

---

[15] The panel's premise that preliminary jurisdictional determinations are focused on government enforcement actions is also wrong. Indeed, preliminary jurisdictional determinations play no role in enforcement actions at all because they are not binding on the Corps or the landowner. *See Hawkes*, 578 U.S. at 595.

In this case, what the items in the list have in common—their least common denominator—is that each is a forum in which a jurisdictional challenge could be made. That *some* of the forums are limited to government enforcement actions is not a basis for giving the other terms an unnaturally restricted meaning nowhere else suggested in the text.

In the end, no canon of construction can justify departing from the plain and utterly unambiguous language of the waiver provision the Corps wrote. "Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923). "They have no place, as this court has many times held, except in the domain of ambiguity." *Ibid.*; *see, e.g.*, *United States v. Stevens*, 559 U.S. 460, 474 (2010) (associated-words canon applies only to interpretation of an "ambiguous term" and is not applicable where text "contains little ambiguity"); *Harrison*, 446 U.S. at 588-89 (refusing to apply closely related *ejusdem generis* canon to construe phrase "any other final action" because the cannon, "while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty" (cleaned up)).

3. Finally, the court of appeals concluded that "permits based on preliminary jurisdictional determinations function *like* contracts between the Corps and the permit holder" and therefore should be enforceable only by a "party" to that contract, which excludes private parties and states invoking the citizen suit provision. Pet. App. 12a-13a (emphasis added). The analogy is inapt.

To begin, those who apply for, and obtain, a government permit are not parties to a contract with the

government. Instead, a permit represents the government's exercise of regulatory authority to control pollution, not a negotiated exchange of promises between equal parties. Permit holders are participants in a regulatory regime, with the consequences of their decisions dictated by regulations and other legal materials that are interpreted in accordance with the usual rules for construing legal texts—hence, the Eleventh Circuit's reliance on cannons of statutory construction in interpreting the waiver.

Nor are petitioners mere bystanders to this supposed "contract." Congress expressly elevated the role of affected citizens to that of "private attorneys general" when they act to enforce certain statutory obligations. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981). Acting in that capacity, they perform a role more akin to a government enforcer than a beneficiary to a contract. For example, the plaintiff may seek civil penalties payable to the U.S. Treasury. *See* 33 U.S.C. § 1365(a) (cross-referencing *id.* § 1319(d)); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987). Conversely, consistent with their quasi-government enforcement role, plaintiffs in a citizen suit may not seek personal, backward-looking relief, such as damages. *See Gwaltney*, 484 U.S. at 59, 61; *Nat'l Sea Clammers*, 453 U.S. at 18.

The statute further provides that a citizen suit is not permitted if the government itself has already "commenced and is diligently prosecuting" an enforcement action, *see* 33 U.S.C. § 1365(b)(1)(B), reflecting that "the citizen suit is meant to supplement . . . governmental action," *Gwaltney*, 484 U.S. at 59-60 (duplicate citizen and government suits barred "presumably because governmental action has rendered" the citizen suit "unnecessary"). And when a citizen suit is

filed, the plaintiff must serve a copy of the complaint on the Attorney General and Administrator, 33 U.S.C. § 1365(c)(3), who then have the option of intervening in the litigation. Likewise, citizen plaintiffs must give the government 45 days' notice before entry of any consent judgment, *ibid.*, allowing the government to submit any objections it may have to the decree.

Because citizen suits by private individuals and states serve the same fundamental function as a government enforcement action, it is entirely appropriate that the waiver the Corps required to facilitate enforcement of the statute would apply to a citizen suit as well. The basic problem the waiver addresses—that once the permit work is done, proving jurisdiction will be made far more difficult, and perhaps impossible—applies whether the enforcement action is initiated by the U.S. Attorney General, a private attorney general, or a state.

The government's enforcement interests are thus frustrated if the waiver is not enforced as written, regardless of who initiated the case. When meritorious private suits are stymied because the defendant has destroyed jurisdictional evidence after promising not to contest jurisdiction in "any Federal court," the government loses the opportunity for the benefits of appropriate enforcement (including the possibility of civil penalties, injunctions, and settlements) and is saddled with the task of having to undertake the litigation itself or let potentially significant violations escape a remedy if it lacks the resources to take over the case.

II. The Question Presented Is Important And Should Be Decided In This Case.

The Court should not delay correcting the Eleventh Circuit's wrong and harmful decision.

1. Although it is difficult to find public information on the number of waivers each year, it appears to be in the thousands. As discussed, a waiver arises every time a landowner applies for a permit without first seeking an approved jurisdictional determination. The Corps reports issuing "90,000 permits a year"[16] and making some "50,000 jurisdictional determinations."[17] Of those jurisdictional determinations, only a few thousand appear to be approved jurisdictional determinations—by petitioners' count, there were fewer than 4,000 in 2025.[18] Accordingly, from all appearances, the vast majority of the tens of thousands of permits issued each year are based on preliminary jurisdictional determinations and subject to the waiver provision at issue in this case.

As discussed above, the decision below diminishes the effectiveness of those waivers—and, consequently, enforcement of the statute—in two important ways. First, the Eleventh Circuit held that "the waiver applies only to actions to enforce the permit authorization." Pet. App. 10a. By its plain terms, that holding applies to any enforcement action, brought by private parties, a state, or the government. Moreover, the reasons the Eleventh Circuit gave for its holding—that the waiver arises in the context of a permit application and implicates permittees'

---

[16] U.S. Army Corps of Eng'rs, *Environmental Program*, https://www.usace.army.mil/Missions/Environmental/ (last visited Jan. 25, 2026).

[17] U.S. Army Corps of Eng'rs, *Regulatory Permits*, https://www.iwr.usace.army.mil/Missions/Value-to-the-Nation/Regulatory/Regulatory-Permits/ (last visited Jan. 25, 2026).

[18] This is based on a review of the Corps' online database of approved jurisdictional determinations. *See* U.S. Army Corps of Eng'rs, USACE Regulatory Permits Database, https://permits.ops.usace.army.mil/orm-public# (last visited Jan. 25, 2026). The database does not include preliminary jurisdictional determinations.

right to make a "know[ing]" waiver, *see* Pet. App. 10a-11a—do not turn on the identity of the plaintiff. Accordingly, unless the Court intervenes, even the Corps is now precluded from relying on the waiver in any action to enforce provisions of the Act (say, those prohibiting pollution prior to obtaining the permit) even if the permittee has destroyed some or all of the jurisdictional evidence through the work authorized by the permit (*e.g.*, by filling in a wetland).

Second, the court held that the waivers do not apply in citizen suits. Pet. App. 11a. That holding will impair private and state enforcement of the statute in multiple ways. As just discussed, it will allow landowners to obtain a permit without the Corps undertaking an official approved jurisdictional determination, destroy much of the evidence needed for anyone (including states or private attorneys general) to prove jurisdiction, then contest jurisdiction in any state or private enforcement action alleging noncompliance with the permit or the statute.

As this Court has noted, it "is often difficult to determine whether a particular piece of property contains waters of the United States." *Hawkes*, 578 U.S. at 594. Identification of wetlands requires a landowner or a consultant to document the presence of hydric soils, hydrophytic vegetation, and the hydrology of the area, in accordance with technical procedures published by the Corps.[19] Identification of former soils, vegetation, and hydrology is even more difficult, and may be impossible, when the defendant has destroyed much of the

---

[19] *See* U.S. EPA, *What is a Jurisdictional Delineation under CWA Section 404?*, https://www.epa.gov/cwa-404/what-jurisdictional-delineation-under-cwa-section-404 (last visited Jan. 25, 2026).

jurisdictional evidence. And it is expensive, typically requiring plaintiffs to hire experts to conduct extensive surveys and studies to establish the connection between wetlands and other waterways. *Cf. Hawkes*, 578 U.S. at 594-95 (discussing cost and time required to obtain permits).

The unfortunate effects of the Eleventh Circuit's rule are particularly acute in cases like this. Here, the size of the lost wetland is modest, making it difficult for environmental plaintiffs to raise the funds necessary to bring enforcement actions if required to prove the jurisdictional status the landowner agreed not to challenge when applying for the permit. Yet the cumulative effect of such small-scale developments has substantially contributed to the loss of more than half the nation's original wetlands since European settlement.[20]

The Court should act immediately to remove this barrier to fulsome enforcement of the Clean Water Act to protect the nation's wetlands. Further percolation is unnecessary. The Question Presented is purely legal and entirely straightforward. The harm of waiting far outweighs any potential benefit.

III. If Necessary, The Court Should Call For The Views Of The United States.

If the Court is unsure whether the Eleventh Circuit misconstrued the Corps' waiver provision, or whether any misconstruction warrants correction, it should call for the views of the United States.

As discussed, the decision below established an important limitation on the Government's ability to enforce the Act (as well as on the ability of states to effectively use the citizen suit provision). The court did

---

[20] *See* Status and Trends, *supra*, pp. 17, 24.

so without hearing from the United States, which has not participated in the litigation to this point. Moreover, the United States is obviously well positioned to address the intended meaning of the waiver provision. And it could provide the Court useful insight into the practical implications of the decision below, including for the Corps' own enforcement program.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John A. Brunini
Laura D. Heusel
BUTLER SNOW LLP
1020 Highland Colony Parkway, Suite 1400
Ridgeland, MS 39157

Kevin K. Russell
Counsel of Record
Daniel H. Woofter
RUSSELL & WOOFTER LLC
1701 Pennsylvania Avenue NW, Suite 200
Washington, DC 20006
(202) 240-8433
kr@goldsteinrussell.com

January 26, 2024

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JULY 29, 2025

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-10710

THE GLYNN ENVIRONMENTAL COALITION, INC., CENTER FOR A SUSTAINABLE COAST, INC., JANE FRASER,

Plaintiffs-Appellants,

versus

SEA ISLAND ACQUISITION, LLC,

Defendant-Appellee.

Opinion of the Court

Appeal from the United States District Court
for the Southern District of Georgia.
D.C. Docket No. 2:19-cv-00050-JRH-BWC.

Before WILLIAM PRYOR, CHIEF JUDGE, and GRANT and KIDD, Circuit Judges.

WILLIAM PRYOR, Chief Judge:

This appeal requires us to decide whether a property owner waived its right to challenge federal jurisdiction

over its property under the Clean Water Act, and, if not, whether the citizen-suit complaint against that property owner sufficiently alleges that the property contained "waters of the United States." 33 U.S.C. §§ 1362(7), 1365(a)(1). Sea Island Acquisition, LLC, owns a 0.49-acre parcel on St. Simons Island, Georgia, that contained a wetland. To determine whether it needed a permit to fill the wetland, Sea Island requested a preliminary jurisdictional determination from the United States Army Corps of Engineers. The Corps determined that the parcel might contain "waters of the United States" subject to the Clean Water Act and allowed Sea Island to fill the wetland under a nationwide general permit. After Sea Island filled the wetland, Jane Fraser, the Glynn Environmental Coalition, and the Center for a Sustainable Coast sued Sea Island for violations of the Clean Water Act. Sea Island moved to dismiss the complaint on the ground that the wetland did not satisfy the test for "waters of the United States" under *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 143 S. Ct. 1322, 215 L. Ed. 2d 579 (2023). The district court dismissed the complaint. We affirm.

I. BACKGROUND

We begin with the statutory and regulatory provisions that govern this appeal. The Clean Water Act prohibits "the discharge of any pollutant by any person" into "navigable waters," "[e]xcept as in compliance with" certain sections of the statute. 33 U.S.C. §§ 1311(a), 1362(12)(A). The Act defines "'navigable waters'" as "the waters of the United States," *id.* § 1362(7), and "'pollutant[s]'" as "dredged spoil, solid waste, . . . rock, sand, [and] cellar dirt," among other things, *id.* § 1362(6).

Appendix A

The Environmental Protection Agency and the United States Army Corps of Engineers "jointly enforce" the Clean Water Act. *Sackett*, 143 S. Ct. at 1330. For its part, the Corps "may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a), (d). Corps regulations define "fill material" as "material placed in waters of the United States where the material has the effect of . . . [r]eplacing any portion of a water of the United States with dry land" or "[c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1) (2024). A permit issued under section 1344 shields the permit holder from enforcement actions brought by the government or by citizen plaintiffs alleging a violation of section 1311's unlawful-discharge prohibition. 33 U.S.C. § 1344(p). As part of the permitting scheme, "[a] ny applicant for a Federal license or permit" to discharge pollutants must also submit a certification from the state where the discharge will originate that attests that the "discharge will comply with the applicable provisions of " the Clean Water Act. *Id.* § 1341(a)(1).

The Corps may issue permits that allow landowners to engage in otherwise prohibited fill activity. *See id.* § 1344(a); 33 C.F.R. §§ 320.2(f), 323.1 (2024). Section 1344 allows for individual or general permits. The Corps may "issue general permits . . . for any category of activities involving discharges of dredged or fill material if . . . the activities . . . are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). The

Corps administers a nationwide permit program under this authority. *See* 33 C.F.R. §§ 330.1, 330.5 (2024). If a landowner submits that his proposed activity complies with an existing nationwide general permit, the landowner "may, and in some cases must, request . . . confirmation that an activity complies with the terms and conditions of " a nationwide permit. *Id.* § 330.6(a)(1).

Nationwide Permit 39, a general permit issued in 2012, allowed landowners to fill wetlands "'for the construction . . . of commercial and institutional building foundations and . . . attendant features . . . necessary for the use and maintenance of the structures.'" *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, 26 F.4th 1235, 1238 (11th Cir. 2022) (alterations in original) (quoting Reissuance of Nationwide Permits, 77 Fed. Reg. 10184-01, 10279 (Feb. 21, 2012)). The Georgia Environmental Protection Division issued a conditional Water Quality Certification "for all projects that were allowed by Permit 39." *Id.*; *see* 33 U.S.C. § 1341(a)(1).

Landowners who anticipate that they might need a permit to dredge or fill their land may "solicit a written, site-specific Jurisdictional Determination . . . from the Corps" to establish whether the Clean Water Act applies to their property. *Nat'l Ass'n of Home Builders v. Env't Prot. Agency*, 786 F.3d 34, 37, 415 U.S. App. D.C. 191 (D.C. Cir. 2015). These jurisdictional determinations are "written Corps determination[s] that a wetland . . . is subject to regulatory jurisdiction under Section 404 of the Clean Water Act." 33 C.F.R. § 331.2 (2024). In other words, they "reflect[] the agency's judgment about whether and

to what extent a property contains jurisdictional waters, and hence is or is not subject to regulatory jurisdiction under the Clean Water Act." *Home Builders*, 786 F.3d at 37 (citing 33 C.F.R. §§ 320.1(a)(6), 331.2, 325.9 (2024)).

The Corps may issue either preliminary or approved jurisdictional determinations. Preliminary jurisdictional determinations are "written indications that there may be waters of the United States on a parcel [of land]." 33 C.F.R. § 331.2 (2024). Preliminary determinations are advisory only and cannot be appealed. *Id.* Approved jurisdictional determinations, by contrast, are final "Corps document[s] stating the presence or absence of waters of the United States on a parcel [of land]." *Id.* Unlike preliminary determinations, approved determinations "are clearly designated appealable actions." *Id.*; *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599, 136 S. Ct. 1807, 195 L. Ed. 2d 77 (2016) (explaining that approved jurisdictional determinations are final agency actions).

Sea Island owns a hotel on St. Simons Island, Georgia. On January 10, 2013, Sea Island requested permission from the Corps to fill 0.49 acres of wetland near that hotel. Its request explained that the company would fill the wetland to construct a new office building and parking lot, so it sought coverage under Nationwide Permit 39. On February 20, the Corps verified that Permit 39 covered Sea Island's proposed activity and issued "a preliminary jurisdictional determination that the 0.49-acre parcel of land might be a wetland." *Glynn Env't*, 26 F.4th at 1238. According to a form submitted as part of Sea Island's request, if Sea Island accepted the Corps's permit

verification, its acceptance would "constitute[] agreement that all wetlands . . . on the site affected in any way by that activity are jurisdictional waters of the United States." The form stated that the agreement would "preclude[] any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court."

Sea Island filled the wetland after it received the permit verification. But it never constructed an office building or parking lot on the filled wetland. Instead, it covered the land with sodding.

Jane Fraser, the Glynn Environmental Coalition, and the Center for a Sustainable Coast sued Sea Island under the Clean Water Act's citizen-suit provision for illegally filling the wetland. *See* 33 U.S.C. § 1365(a). Their amended complaint alleged "[n]oncompliance with Section 404 of the Clean Water Act," *id.* §§ 1311(a), 1344, because Sea Island failed to comply with Permit 39; and "[n]oncompliance with Section 401 of the Clean Water Act," *id.* §§ 1311(a), 1341, because Sea Island failed to comply with Georgia's Water Quality Certification. It sought declaratory judgments that Sea Island's authority to fill the wetland under Permit 39 had "expired without compliance" or that the authority was "invalid and void *ab initio*"; and it alleged that Sea Island's "[f]ill [a]ctivities" were "[u]npermitted" in violation of Section 301(a) of the Clean Water Act, *id.* § 1311(a).

The amended complaint alleges that the property is "within the same basin as [Dunbar Creek] and [the creek]

is downstream of the" property. And it alleges that the creek and the wetland "are waters of the State of Georgia and waters of the United States." Attached maps of the area show that the wetland was near a salt marsh, which was in turn adjacent to Dunbar Creek. The maps show that the salt marsh, an area of upland, the roads into and out of Sea Island's hotel parking lot, the median between those roads, and another area of upland separated the wetland from Dunbar Creek. An attached expert affidavit explains that the wetland was connected to the salt marsh "via culverts and pipes" and that "[t]he salt marsh is adjacent to and directly connected by surface and ground water to Dunbar Creek." The expert stated that before the wetland was filled, "[p]rior tidal exchange between Dunbar Creek and the Subject Wetland . . . would have supplied nutrients to the salt marsh and Dunbar Creek." Now, "[e]ach time it rains," the expert stated, "the excess unabsorbed amount of chemicals" from fertilizing the sodding that covers the filled wetland "is incorporated into both surface runoff and ground water, and eventually enter[s] the . . . salt marsh . . . to the west of the Subject Wetland." And "[b]ecause the salt marsh is tidal, each time tidal flooding occurs, . . . the water will 'pick up' a fresh dose of the excess chemicals[,] and . . . [the] contaminated water then flows back into Dunbar Creek when the tide ebbs."

Sea Island moved to dismiss the amended complaint. The district court granted that motion to dismiss on the ground that the environmentalists lacked standing to sue. We vacated the order because Fraser had alleged an injury in fact. *See Glynn Env't*, 26 F.4th at 1243. On remand, Sea Island renewed its motion to dismiss for failure to state a claim. The district court ordered supplemental briefing.

Before the district court ruled on the motion to dismiss, the Supreme Court decided *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 143 S. Ct. 1322, 215 L. Ed. 2d 579 The parties then submitted further supplemental briefing, and the district court granted Sea Island's motion to dismiss on the ground that the amended complaint failed to allege facts that would establish that the wetland was a water of the United States under *Sackett*.

II. STANDARD OF REVIEW

"We review the dismissal of a complaint *de novo*." *Aaron Priv. Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1335 (11th Cir. 2019). We accept as true the allegations in the complaint and attached exhibits and draw all reasonable inferences in favor of the plaintiffs. *Miljkovic v. Shafritz & Dinkin, P.A.*, 791 F.3d 1291, 1297 & n.4 (11th Cir. 2015).

III. DISCUSSION

We divide our discussion into two parts. First, we explain that Sea Island did not waive its challenge to jurisdiction over its property, under the Clean Water Act, for the purposes of this citizen suit. Second, we explain that the environmentalists' complaint failed to allege sufficient facts to satisfy *Sackett*.

Appendix A

A. Sea Island Did Not Waive Its Challenge to the Corps's Jurisdiction over the Wetland in this Action.

As discussed above, the preliminary jurisdictional determination conditioned Sea Island's acceptance of its permit coverage on a waiver. The Corps determined that "[t]he wetlands/other waters on the subject property *may be* waters of the United States within the jurisdiction of Section 404 of the Clean Water Act." And the Corps stated that it had "determined that the proposed activity [was] authorized under [Permit 39]." But the Corps also informed Sea Island that accepting Permit 39 coverage based on the preliminary determination would constitute an acceptance of the Corps's jurisdiction over the wetland:

> [A]ccepting a permit authorization . . . or undertaking any activity in reliance on any form of Corps permit authorization based on a preliminary [jurisdictional determination] constitutes agreement that all wetlands and other water bodies on the site affected in any way by that activity are jurisdictional waters of the United States, and precludes any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court.

The environmentalists contend that Sea Island waived its right to contest jurisdiction over its wetland, under the Clean Water Act, when it accepted coverage under Permit 39 based on the preliminary jurisdictional determination.

Sea Island responds that it did not intentionally and voluntarily waive its right to raise jurisdictional arguments in defense of a citizen suit. We agree with Sea Island.

A waiver is valid and enforceable only if it constitutes "the voluntary, intentional relinquishment of a known right." *Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1359 (11th Cir. 2018) (citation and internal quotation marks omitted). On its face, the capacious language of the waiver would seem to encompass citizen suits against violations of the permit. But three aspects of the waiver and the preliminary jurisdictional determination counsel against applying it to this suit.

First, the waiver applies only to actions to enforce the permit authorization, not actions to enforce any provision of the Clean Water Act. The waiver begins by defining the actions that trigger it: "accepting a permit authorization . . . or undertaking any activity in reliance on any form of Corps permit authorization based on a preliminary [jurisdictional determination]." That framing defines the scope of the waiver. Although the waiver then says that it will apply in "any . . . compliance or enforcement action," the text is best read to mean any enforcement *of the permit*. Otherwise, the waiver would apply to any violation of Clean Water Act related to the property, without regard to the permitted activity. That reading would take the language of the waiver out of context, stretching any "voluntary, intentional relinquishment" beyond the scope of the "known right." *Id.* (citation and internal quotation marks omitted). Sea Island did not waive its jurisdictional challenge for the purposes

of suits alleging violations of the Clean Water Act outside of the permit. At a minimum, the environmentalists cannot invoke the waiver to avoid the jurisdictional defense against their claims that arise under other sections of the Act. *Cf. Hawkes Co.*, 578 U.S. at 598-99 (explaining that an approved jurisdictional determination does not protect a landowner from citizen suits alleging non-permit-based violations of the Clean Water Act).

Second, the preliminary jurisdictional determination focuses on enforcement actions brought by the Corps, so there is little reason to think that the waiver binds Sea Island in citizen suits. Both the preliminary jurisdictional determination and the request form concern administrative actions and proceedings related to the Corps's jurisdiction to permit or regulate Sea Island's ability to fill the wetland. That context suggests that the waiver also concerns only actions taken by the Corps.

It is a familiar canon that a "text must be construed as a whole." *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts § 24, at 167 (2012); *accord United States v. Tigua*, 963 F.3d 1138, 1143 (11th Cir. 2020) (consulting the surrounding provisions in a statute to discern the meaning of a section). "The entirety of the document . . . provides the context for each of its parts," so we must consider the whole legal document to determine which "one of the possible meanings that a . . . phrase can bear is compatible with" other portions of the text. Scalia & Law, *supra*, at 167-68. We also presume that "[a]ssociated words bear on one another's meaning." *Id.* § 31, at 195; *accord United States*

v. Hastie, 854 F.3d 1298, 1303 (11th Cir. 2017) (explaining that a list of examples in a statute informed the meaning of a term). "When several . . . words . . . are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." READING LAW, *supra*, at 195. Associated words need not form a list for their meanings to be related. *Id.* at 197.

The context of the request for the preliminary jurisdictional determination concerns only Sea Island's application for coverage under Permit 39 and the Corps's assessment of that application. And the phrase "in any Federal court" follows the phrases "in any administrative or judicial compliance or enforcement action" and "in any administrative appeal." Those phrases most naturally mean administrative or compliance actions brought by the Corps to enforce the permit. Although one might also construe "any . . . enforcement action" to encompass citizen suits, the context of the waiver and the administrative focus of the rest of its language undermine the environmentalists' argument that Sea Island intentionally and voluntarily waived a known right. *See Searcy*, 902 F.3d at 1359.

Third, section 1344 permits based on preliminary jurisdictional determinations function like contracts between the Corps and the permit holder. As the District of Columbia Circuit has explained, property owners seeking preliminary determinations often intend "'to voluntarily waive or set aside questions regarding [Clean Water Act] jurisdiction' over their property . . . [because that] jurisdiction is clear or is otherwise not worth contesting."

Home Builders, 786 F.3d at 37 (quoting U.S. Army Corps Of Eng'Rs, No. 08-02, Guidance Letter: Jurisdictional Determinations (June 26, 2008)). In return, the landowner receives an expedited determination and "a shortcut into the permitting process." *Id.* That agreement involves only the Corps and the landowner. And under general contract law, "only a party to a contract or an intended third-party beneficiary may sue to enforce the terms of a contract." *Interface Kanner, LLC v. JPMorgan Chase Bank, N.A.*, 704 F.3d 927, 932 (11th Cir. 2013). That rule counsels against allowing the environmentalists to enforce the waiver. They were not a party to the preliminary jurisdictional determination, so they cannot invoke the waiver in that agreement.

The environmentalists argue that Sea Island should be "estopped" from arguing that the Corps lacked jurisdiction over its wetland because "it acquiesced to the determination" by accepting the Corps's authorization under Permit 39. Judicial estoppel "preclude[s] [a party] from 'asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'" *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (quoting 18 James Wm. Moore et al., Moore's Federal Practice § 134.30, at 134-62 (3d ed. 2000)), *overruled on other grounds by Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017) (en banc). This doctrine applies to "inconsistent position[s] under oath in a separate proceeding" and where the "inconsistent positions were calculated to make a mockery of the judicial system." *Slater*, 871 F.3d at 1181 (citation and internal quotation marks omitted). Where judicial

estoppel applies, we have discretion whether to invoke it. *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (first explaining the discretionary nature of the doctrine and then defining factors that "inform the decision whether to apply the doctrine in a particular case").

Judicial estoppel does not apply here. Sea Island did not litigate an "inconsistent position . . . in a separate proceeding." *Slater*, 871 F.3d at 1181. At most, Sea Island conceded in its initial motion to dismiss that it "applied for and received a permit . . . to fill jurisdictional waters" under the pre-*Sackett* definition of "waters of the United States." But even if we thought that Sea Island had argued an opposing position, we would not exercise our discretion to estop it from now contesting Clean Water Act jurisdiction over its property. The Supreme Court altered the jurisdictional test between the time that Sea Island accepted its section 1344 permit and the dismissal of the environmentalists' complaint. *See Sackett*, 143 S. Ct. at 1341. That change is reason enough to allow Sea Island's jurisdictional argument, notwithstanding the waiver made a decade before *Sackett*.

B. The Environmentalists Failed Sufficiently to Allege a Continuous Surface Connection Between the Wetland and a Water of the United States.

As a threshold matter, Sea Island argues that *Sackett* deprived the district court of jurisdiction over this suit. It argues that "*Sackett* . . . eliminates federal subject matter jurisdiction over the specific claims alleged in

[the environmentalists'] Amended Complaint" because "*Sackett* clarified that 'waters of the United States' excludes Sea Island's property." But Sea Island conflates subject-matter jurisdiction with legislative jurisdiction over "waters of the United States." "As frequently happens," Sea Island frames "a contention that there is some barrier to granting" the environmentalists' claims "in terms of an exception to jurisdiction of subject matter." *Lauritzen v. Larsen*, 345 U.S. 571, 575, 73 S. Ct. 921, 97 L. Ed. 1254 (1953). But "[a] cause of action under our [federal] law was asserted here, and the [district] court had power to determine whether it was or was not well founded in law and in fact." *Id.* So the district court had subject-matter jurisdiction over the suit, even if the Act did not extend legislative jurisdiction over the injury.

Sea Island also argues that "after *Sackett*, there is no longer any continuing violation to be corrected, any effluent standard or limitation to be enforced, or any waters of the United States to be restored," so the case is moot. But Sea Island "confuses mootness with the merits." *Chafin v. Chafin*, 568 U.S. 165, 174, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013). That the environmentalists' claims fail under the *Sackett* test may doom their claims on the merits, but "[a]s long as the parties have a concrete interest . . . in the outcome of the litigation, the case is not moot." *Id.* at 172 (citation and internal quotation marks omitted). The environmentalists' complaint may fail, but it is not "so implausible that it is insufficient to preserve jurisdiction." *Id.* at 174.

"To establish a [Clean Water Act] violation, the plaintiffs must prove that (1) there has been a discharge; (2) of a pollutant; (3) into waters of the United States; (4) from a point source; (5) without a . . . permit." *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008 (11th Cir. 2004); *see also* 33 U.S.C. §§ 1311(a), 1362(7), (12) (prohibiting discharge of pollutants, then defining discharge as "any addition of any pollutant to navigable waters" and navigable waters as "the waters of the United States"). To survive a motion to dismiss, the environmentalists had to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). To sustain their claims, the environmentalists' complaint had to allege sufficient facts to support the conclusion that the wetland was a water of the United States.

As the Supreme Court ruled in *Sackett*, the Clean Water Act "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." 143 S. Ct. at 1344 (citation and internal quotation marks omitted). To establish that a wetland is sufficiently "'indistinguishable'" from a neighboring water of the United States, the environmentalists must allege "'first, that the adjacent body of water constitutes "waters of the United States" . . . ; 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.'" *Id.* at 1341 (alterations adopted) (quoting *Rapanos v. United States*, 547 U.S. 715, 742, 755, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (plurality opinion)).

The amended complaint contains few allegations to suggest that the wetland might be a water of the United States. It alleges that the "basin" of the subject wetland "includes Dunbar Creek," and "Dunbar Creek . . . is downstream of the Subject Wetland." But those uncontested allegations tell us only that the wetland sits in some proximity to Dunbar Creek and that the flow of water moves generally from wetland to creek. The complaint also alleges that both the wetland and the basin "are waters of the State of Georgia and waters of the United States." But that allegation constitutes no more than a conclusory recital of an element of a Clean Water Act violation. *See Iqbal*, 556 U.S. at 678; *Parker*, 386 F.3d at 1008. The complaint also lists various flora and fauna found in the wetland. Although that information might be relevant to the determination that a property is a wetland for other purposes, it tells us nothing about whether the wetland is a "water of the United States" under *Sackett*.

The environmentalists point to their expert's affidavit. The expert stated that "[e]ach time it rains, the excess unabsorbed amount of chemicals" from fertilizers on the filled wetland "is incorporated into both surface runoff and ground water, and eventually enter[s] the . . . salt marsh." The salt marsh, he added, "is tidal" and "is adjacent to and directly connected by surface and ground water to

Dunbar Creek." The expert also stated that "[t]here is a direct connection between the Subject Wetland and the adjacent salt marsh via culverts and pipes," and "[p]rior tidal exchange" occurred between Dunbar Creek and the wetland.

None of the expert's factual statements permits the inference that there was a "continuous surface connection" between the wetland and a water of the United States. At best, the expert offers that culverts and pipes might sometimes connect the wetland to the other bodies of water mentioned, but that fact does not tell us whether the connection is continuous. As for the "[p]rior tidal exchange," the expert does not state that the wetland itself was tidal—only the salt marsh. And "[p]rior tidal exchange" does not support the conclusion that the wetland was tidally connected to a water of the United States when Sea Island requested verification that Permit 39 covered its activities. At that time, the roads and sections of upland already divided the wetland from the salt marsh. So the expert's statements do not tell us whether the wetland had a continuous surface connection to a water of the United States but for "phenomena like low tides." *Sackett*, 143 S. Ct. at 1341 (noting that intermittent ebbs in the tide will not suffice to break a continuous surface connection). Although we construe all reasonable inferences in favor of the environmentalists' complaint, the expert affidavit fails to provide sufficient facts to support a claim under the Clean Water Act.

The environmentalists also point to Sea Island's preliminary jurisdictional determination request. That

document reports that, at some data points, the wetland exhibited up to two inches of surface water, a high water table, ground saturation, hydric soils, and wetland hydrology. Although each of these facts might suggest that the property was a wetland in the colloquial or scientific sense, none supports the conclusion that the wetland had a "continuous surface connection" to a water of the United States. *See Sackett*, 143 S. Ct. at 1341 (citation and internal quotation marks omitted).

Finally, several of the documents contain maps showing the wetland relative to Sea Island's hotel, the roads into and out of the hotel, the salt marsh, and Dunbar Creek. But those maps reveal that the wetland was separated from the salt marsh and creek by sections of upland and the roads. The only possible surface connection shown in the maps would flow through pipes and culverts. The environmentalists provide no information about whether there is a continuous flow through those manmade connections. *See Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023) (finding ditches and culverts insufficient to establish a continuous surface connection under *Sackett*). So the maps fail to present sufficient facts to support the environmentalists' claims.

The environmentalists argue that their allegation that the wetland, salt marsh, and creek are "waters of the United States" sufficiently alleged jurisdiction because that assertion was a statement of fact that the district court must accept as true. We disagree. As discussed above, the status of a body of water as a "water[] of the United States" is an element of a claim under the

Clean Water Act. *See Parker*, 386 F.3d at 1008. So the environmentalists' bare assertion fails to support their claim. *See Iqbal*, 556 U.S. at 678.

The precedents that the environmentalists cite do not undermine this conclusion. For example, in the only Eleventh Circuit precedent that the environmentalists offer, *United States v. Robison*, we stated that "whether [the creek in question] does or does not actually satisfy [the waters of the United States] test . . . [was] a question for the jury in the first instance." 505 F.3d 1208, 1224 n.21 (11th Cir. 2007). But that statement reflected only that there were disputed facts about the body of water that fell within the purview of the jury. *Id.* at 1211-12. That the "waters of the United States" question warranted jury review in *Robison* does not mean that the environmentalists' conclusory assertion that the wetland was a water of the United States suffices to survive a motion to dismiss.

Next, the environmentalists attack the district court's treatment of the facts alleged in the complaint and the attached documents. They argue first that the district court drew an inference against them by stating that "'the fact that the Subject [Wetland] and Dunbar Creek are in the same basin *does not necessarily establish* there is a "continuous surface connection" between them.'" But the district court was correct that this allegation was insufficient to support the conclusion that there was such a connection. The environmentalists also target the ruling that their allegations failed to "*establish*" jurisdiction, contending that they need only show "plausib[ility]."

But none of the facts the environmentalists offer—the wetland's "'High Water Table,'" "surface 'Saturation,'" soil and vegetation characteristics, or connection to the salt marsh—reveals anything from which we might infer a continuous surface connection to a water of the United States.

The environmentalists last fault the district court for consulting the aerial maps to determine that there was a "clear demarcation" between the wetland and salt marsh. But the environmentalists submitted these maps as attachments to their complaint, and the district court was entitled to rely on that information. *Gill ex rel. K.C.R. v. Judd*, 941 F.3d 504, 514 (11th Cir. 2019) ("[W]hen exhibits attached to a complaint contradict the general and conclusory allegations of the pleading, the exhibits govern." (citation and internal quotation marks omitted)). Although Sea Island could not have destroyed the Corps's jurisdiction by illegally constructing the road between the wetland and the salt marsh to create a "demarcation," *see Sackett*, 143 S. Ct. at 1341 n.16, the amended complaint contains no allegation that a surface connection would exist but for the road, much less that the roads were constructed to illegally circumvent coverage under the Clean Water Act.

In short, the environmentalists' complaint fails to allege sufficient facts to support a conclusion that the wetland had a continuous surface connection to a water of the United States under *Sackett*. Without that element, the environmentalists' claims fail. The district court did not err.

IV. CONCLUSION

We **AFFIRM** the dismissal of the environmentalists' amended complaint.

WILLIAM PRYOR, Chief Judge, concurring:

I write separately to explain an additional reason that Sea Island did not waive its challenge to federal jurisdiction over its property. As Sea Island argued in the district court, in its initial brief in this Court, and in its supplemental brief, section 1365 of the Clean Water Act does not allow citizen suits to enforce permits issued under section 1344. *See* 33 U.S.C. §§ 1344, 1365. Because there could be no citizen suit based on a violation of the permit, Sea Island could not have knowingly and voluntarily waived its defense against a citizen suit by accepting the permit verification from the United States Army Corps of Engineers. I would join the Fifth and Third Circuits and hold that the environmentalists lack the authority to enforce a permit issued under section 1344. And Sea Island did not waive its jurisdictional challenge to their other claims because it could not have knowingly and voluntarily relinquished a defense to a suit that it could never have reasonably anticipated.

The Clean Water Act provides that "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation." *Id.* § 1365(a)(1)(A). Citizen suits under this provision are enforcement actions. *See Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, 734 F.3d 1297, 1304 (11th Cir. 2013) (noting that citizen suits should not "nullify the statutory preference for governmental enforcement"); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52-53 (1987) (comparing citizen suits to government

enforcement actions). But the Clean Water Act does not allow citizens to enforce every violation of the Act. Instead, it defines a limited number of "'effluent standard[s] or limitation[s]'" that citizens may enforce. *See* 33 U.S.C. § 1365(f).

Two of those standards or limitations are relevant here. First, citizens may sue for "unlawful act[s] under subsection (a) of section 1311," *id.* § 1365(f)(1), which prohibits "the discharge of any pollutant" into a "water[] of the United States" without a permit or other exception, *id.* §§ 1311(a), 1362(7), (12). Second, a citizen may sue to enforce "a permit or condition of a permit issued under section 1342." *Id.* § 1365(f)(7). The citizen-suit provision does *not* include an enumerated authorization to enforce a permit or condition of a permit issued under section 1344, like the one issued to Sea Island.

Sea Island argues that the absence of a statutory provision allowing citizens to sue for section 1344 permit violations means that citizens cannot enforce those permits. The environmentalists respond that citizens may enforce section 1344 permit violations through the general authorization to sue for an unlawful discharge under section 1311(a). *Id.* § 1365(f)(1). Sea Island has the better argument.

When interpreting a statute, we generally "'give[] effect'" to "'every word and every provision'" in the statute so that none will "'needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.'" *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019)

(quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts § 26, at 174 (2012)). The environmentalists argue that they have a right to sue under section 1365(f)(1) because a violation of a section 1344 permit is also a violation of section 1311(a). But, as noted above, the citizen-suit provision specifies that citizens may sue to enforce "a permit or condition of a permit issued under section 1342," 33 U.S.C. § 1365(f)(7), even though a violation of a section 1342 permit is also an "unlawful act" under section 1311(a), *see id.* §§ 1311(a), 1365(f)(1). Under the environmentalists' reading, citizens could sue for section 1342 permit violations under section section 1365(f)(1). That interpretation would render section 1365(f)(7) superfluous.

Another canon of statutory interpretation makes clear that section 1365(f) *excludes* citizen suits for violations of section 1344 permits. When a statute enumerates a list of potential violations, "[t]he expression of one thing implies the exclusion of others." Scalia & Garner, *supra*, § 10, at 107. And when a statute includes "a range of specific possibilities" that "'can reasonably be thought to be an expression of all that shares in the grant or prohibition involved,'" the "inescapable" conclusion is that the list is exhaustive. *Est. of Cummings v. Davenport*, 906 F.3d 934, 942 (11th Cir. 2018) (quoting parenthetically Scalia & Garner, *supra*, § 10, at 107). Here, the Clean Water Act provides eight specific statutory provisions that citizens may sue to enforce. *See* 33 U.S.C. § 1365(f). That the Act omits any mention of section 1344 in this list indicates that citizens may not sue to enforce section 1344 permits.

The Fifth Circuit reached the same conclusion in *Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356 (5th Cir. 2012). Our sister circuit explained that "the unmistakably clear language of [section] 1365(f)([7])," enumerating a cause of action for section 1342 permit violations, "would have been unnecessary" if citizens could challenge permit violations under section 1365(f)(1). *Id.* at 359. Based on the "established rule of statutory interpretation that no provision should be construed to be entirely redundant," the Fifth Circuit concluded that section 1365(f)(7) provided the exclusive cause of action for citizen suits against section 1342 permit violations. *Id.* at 358-59. Because the Clean Water Act contained no parallel provision for section 1344 permit violations, it held that no such cause of action existed. *Id.* at 360

The Third Circuit has reached the same conclusion. *See Harmon Cove Condo. Ass'n v. Marsh*, 815 F.2d 949, 950-51, 954 (3d Cir. 1987) (holding that the citizen-suit provision of the Clean Water Act "does not authorize an action" based on a section 1344 permit). And so have several district courts. *See, e.g., Nw. Env't Def. Ctr. v. U.S. Army Corps of Eng'rs*, 118 F. Supp. 2d 1115, 1118 (D. Or. 2000) ("There are no implied private causes of action under the [Clean Water Act]; the court therefore has no authority to read into subsection (f)([7]) a definition which would include permits issued by the Corps. . . . [Plaintiff] has no cause of action under [section] 1365(a)(1) because the permits in question were issued under [section] 1344, not [section] 1342." (citation omitted)); *Naturaland Tr. v. Dakota Fin., LLC*, 531 F. Supp. 3d 953, 964-65 (D.S.C. 2021) (citing *Atchafalaya Basinkeeper*, 682 F.3d at 357)

("Notably missing from the list of effluent standards enforceable in a citizen suit is a standard or limitation in a . . . permit issued under [section] 1344 . . . . Enforcement of a [section] 404 permit is solely within the discretion of the Army Corp[s] of Engineers. The [Clean Water Act] does not provide for a citizen['s] suit."), *rev'd on other grounds*, 41 F.4th 342 (4th Cir. 2022); *Jones v. Rose*, No. CV 00-1795-BR, 2005 WL 2218134, at *23 (D. Or. Sept. 9, 2005) ("[A] violation of a [section] 404 permit condition cannot form the basis for a citizen suit under [section] 1365(a)(1)."); *Watkins v. Lawrence County*, No. 3:17-cv-272-DPM, 2018 WL 6265107, at *1-2 (E.D. Ark. Apr. 11, 2018) (citing *Atchafalaya Basinkeeper*, 682 F.3d 356) ("[T]he County's alleged violations of [its section 1344] permit aren't covered by [section] 1365."); *Pub. Emps. for Env't Resp. v. Schroer*, No. 3:18-CV-13-TAV-HBG, 2019 WL 11274596, at *7-8 (E.D. Tenn. June 21, 2019) (discussing *Atchafalaya Basinkeeper*, 682 F.3d at 359, and concluding that "Plaintiffs . . . have no cause of action against defendant for violating the conditions of a [section] 404 permit").

In response to these arguments, the environmentalists contend that Congress blessed citizen suits for section 1344 permit violations "[b]y implication" by including a cross-reference to section 1365 in section 1344(p). Section 1344(p) states that "[c]ompliance with a permit" under section 1344 "shall be deemed compliance, for purposes of section[] . . . 1365 of this title, with section[] 1311." The environmentalists maintain that this cross-reference supports the conclusion that citizens may sue for section 1344 permit violations.

Section 1365(f)(7) forecloses the environmentalists' proposed interpretation. As discussed, the enumerated list of violations in section 1365(f) compels the conclusion that any provision not mentioned is not susceptible to a citizen suit. *See*Scalia & Garner, *supra*, § 10, at 107. That section 1342 permits are listed but section 1344 permits are not suggests that Congress did not intend citizen suits to enforce the latter. As the Fifth Circuit explained, "[i]t would be especially odd for Congress to provide citizen suits for [section] 1342 permit condition violations so plainly in the text of [section] 1365(f)([7]) and simultaneously to bury the right to sue for [section] 1344 permit condition violations within a tri-level maze of statutory cross-references." *Atchafalaya Basinkeeper*, 682 F.3d at 359.

Moreover, the same language that might imply a cause of action in section 1344(p) also appears in section 1342(k), but Congress nonetheless provided an express citizen-suit cause of action for section 1342. *See* 33 U.S.C. § 1342(k) (stating that "[c]ompliance with a permit issued" under section 1342 "shall be deemed compliance, for purposes of section[] . . . 1365 of this title, with section[] 1311"). If Congress intended the cross-reference to stand alone and create an implied private right of action for permit violations under either section 1342 or section 1344, it need not have included section 1365(f)(7) at all. But the Supreme Court has already explained that the "elaborate enforcement provisions" in the Clean Water Act—like the eight specific citizen-suit authorizations— foreclose any assumption "that Congress intended to authorize by implication additional judicial remedies for private citizens

suing under [the Act]." *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981); *accord Harmon Cove Condo.*, 815 F.2d at 954. In other words, the Clean Water Act makes explicit the universe of causes of action that it permits. And to read an implied private right of action into the statute would be to ignore not only the Supreme Court's interpretation of this statute but also its repeated warnings not to "'permit anything short of an unambiguously conferred right to support a cause of action.'" *Joseph v. Bd. of Regents of the Univ. Sys. of Ga.*, 121 F.4th 855, 865 (11th Cir. 2024) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)).

Other provisions of the Clean Water Act also confirm that where Congress intended to allow enforcement actions for section 1344 permits, it said so. Section 1319 authorizes the Administrator of the Environmental Protection Agency to issue a compliance order or "bring a civil action" if he finds that a "person is in violation of section 1311 . . . of this title, *or* is in violation of any permit condition or limitation implementing any of [that] section[] . . . in a permit issued under section 1344 of this title by a State." 33 U.S.C. § 1319(a)(3) (emphasis added); *see also id.* § 1344(g) (allowing states to issue permits under this section with federal authorization). That section also allows criminal penalties against anyone who "negligently violates section 1311 . . . *or* any permit condition or limitation implementing any of [that] section[] . . . in a permit issued under section 1344 of this title by the Secretary of the Army or by a State." *Id.* § 1319(c)(1)(A) (emphasis added). Congress plainly distinguished between violations of section 1311

and violations of section 1344 permits. And Congress understood how to make that distinction clear. That no such language appears in section 1365 suggests that there is no corresponding authority for a citizen suit.

Finally, the environmentalists argue that this interpretation of section 1365(f) creates its own superfluity problem. They contend that relying on section 1365(f)(7) to conclude that the citizensuit provision does not allow suits for section 1344 permit violations renders section 1344(p) "and its cross-references to" sections 1311 and 1365 "meaningless." Not so. As we explained in *Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, "[s]ection 1342(k) affords an absolute defense" to permit holders against citizen suits alleging violations of section 1311 or other provisions of the Clean Water Act. 734 F.3d at 1303. Considering the parallel language in section 1344(p), that subsection must provide a matching "absolute defense." *See id.* But that defense is triggered when an enforcement action alleges that the permit holder's activities violate section 1311 or another section of the Clean Water Act—not when the enforcement action alleges a violation of the permit. *See* 33 U.S.C. § 1344(p) (stating that compliance with a permit constitutes compliance with "sections 1311, 1317, and 1343"); *Black Warrior Riverkeeper*, 734 F.3d at 1303 (explaining that section 1342(k)'s "absolute defense" applies "against citizen suits based on violations of sections 1311, 1312, 1316, 1317, and 1343"). So the absolute defense still stands for permit holders sued under other provisions of the Act. That citizens may not sue for violations of the permit does not render section 1344(p) or the cross-references superfluous.

Sea Island could not have knowingly and voluntarily waived its jurisdictional challenge for citizen suits because the Clean Water Act does not allow citizens to enforce section 1344 permits. In other words, the Clean Water Act does not provide a cause of action for the environmentalists' claim alleging a violation of section 1344. Because Sea Island could not have waived a defense to a cause of action that does not exist *and* because, as the panel opinion explains, the waiver is best read not to operate against citizen suits, I agree that the waiver found in the preliminary jurisdictional determination does not bar Sea Island's challenge to jurisdiction under the Clean Water Act.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION, FILED MARCH 1, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CV 219-050

THE GLYNN ENVIRONMENTAL COALITION, INC.; CENTER FOR A SUSTAINABLE COAST, INC.; AND JANE FRASER,

Plaintiffs,

v.

SEA ISLAND ACQUISITION, LLC,

Defendant.

ORDER

This matter is before the Court on remand from the Eleventh Circuit. (Docs. 42, 43, 44.) On January 29, 2021, the Court found Plaintiffs lacked Article III standing and granted Defendant's motion to dismiss. (Doc. 34.) On appeal, the Eleventh Circuit vacated the Court's January 29, 2021 Order and remanded the case for further proceedings. (Doc. 42.) Accordingly, the Court now readdresses Defendant's motion to dismiss. (Doc. 26.) For the following reasons, Defendant's motion is **GRANTED**.

Appendix B

I. BACKGROUND

The facts of this case are presented in the Court's prior Orders and are summarized and supplemented as necessary below. (*See* Docs. 23, 34.)

On January 10, 2013, Defendant applied to the United States Army Corps of Engineers ("Corps") under Nationwide Permit 39 ("NWP 39") to fill 0.49 acres of land located at 100 Salt Marsh Lane, St. Simons Island, Georgia ("Subject Property") for the purpose of constructing an office building and parking lot. (Doc. 24, ¶¶ 2, 112-15.) The Corps, using its then-existing regulations, completed a preliminary Jurisdictional Determination ("JD"),[1] which provided Defendant notice that the Subject Property "may be waters of the United States" within the Corps' jurisdiction. (Doc. 24-1, at 1, 8, 16; Doc. 24-8, at 36-37.) On February 20, 2013, the Corps authorized Defendant to fill the Subject Property for the proposed project under NWP 39. (Doc. 24, ¶¶ 3, 117-18.)

On April 17, 2019, Plaintiffs brought this citizen suit to enforce certain provisions of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1389. (Docs. 1, 24.) Plaintiffs allege Defendant did not comply with the CWA and conducted unpermitted filling activities in violation of

1. A preliminary JD is a non-binding, written indication that a parcel may contain "waters of the United States" and is "advisory in nature and may not be appealed." (Doc. 24-1, at 8.) On the other hand, an approved JD is the Corps' official determination that a parcel contains "waters of the United States," and these decisions are appealable. (Id. at 9, 11.)

the CWA. (Doc. 24, ¶¶ 154-64, 169-72, 182-85.) Moreover, Plaintiffs seek a declaratory judgment that Defendant's authorization to act under NWP 39 has expired without Defendant's compliance and is invalid and void ab initio. *(Id.* ¶¶ 165-68, 173-81.) Defendant first filed its motion to dismiss on April 6, 2020. (Doc. 26.) On January 29, 2021, the Court granted Defendant's motion to dismiss, finding Plaintiffs lacked Article III standing because they failed to establish they suffered an injury-in-fact. (Doc. 34, at 13.) Plaintiffs appealed, and on April 1, 2022, the Eleventh Circuit reversed and remanded the case to this Court for further proceedings. (Docs. 37, 42.) The Eleventh Circuit's mandate was then made the order of this Court, and the Court reopened this case on April 20, 2022. (Docs. 43, 44, 48.)

At the time the Corps issued Defendant NWP 39, and at the time Plaintiffs brought this lawsuit, the Corps asserted jurisdiction over "wetlands" that had a "significant nexus" to a traditional navigable water. (Id. ¶ 78; Doc. 63, at 8-11.) However, on May 25, 2023, the Supreme Court decided *Sackett v. Environmental Protection Agency*, which rejected the "significant nexus" test as the test to determine whether a parcel is a "wetland" under the CWA. 598 U.S. 651, 679, 143 S. Ct. 1322, 215 L. Ed. 2d 579 (2023). In *Sackett*, the Supreme Court adopted the test first pronounced by a plurality in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006):

> [T]he 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 'waters 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."

598 U.S. at 678-79 (alterations adopted) (quoting *Rapanos*, 547 U.S. at 755, 742).

On June 8, 2023, Defendant filed a notice of supplemental authority and motion for leave to file supplemental briefing in support of its motion to dismiss, apprising the Court of the *Sackett* decision and requesting leave to file supplemental briefing addressing *Sackett*'s impact on this case. (Doc. 59.) The Court granted Defendant's motion over Plaintiffs' opposition. (Docs. 60, 61.) Defendant filed supplemental briefing on September 22, 2023, and Plaintiffs responded on October 6, 2023. (Docs. 62, 63.) The motion has now been fully briefed and is ripe for the Court's review.

II. LEGAL STANDARD

In considering a motion to dismiss under Rule 12(b)(6), the Court tests the legal sufficiency of the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), *overruled on other grounds by Davis*

v. Scherer, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). Pursuant to Federal Rule of Civil Procedure 8(a), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" to give the defendant fair notice of both the claim and the supporting grounds. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Although "detailed factual allegations" are not required, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 555).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). The plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct." *Id*. The Court must accept all well-pleaded facts in the complaint as true and construe all reasonable inferences therefrom in the light most favorable to the plaintiff. *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1261 (11th Cir. 2006). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557). A plaintiff's pleading obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "Nor does a complaint suffice

if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Furthermore, "the court may dismiss a complaint pursuant to [Rule] 12(b) (6) when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993).

III. DISCUSSION

All of Plaintiffs' claims seek to enforce the CWA. (Doc. 24, IT 154-185.) According to Defendant, the CWA does not apply because the Subject Property is not a "wetland," and thus not "waters of the United States" subject to the CWA's protection, post-*Sackett*. (Doc. 62, at 1-3.) Defendant argues, since the CWA does not apply, Plaintiffs' amended complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b) (6). (*Id.*)

Plaintiffs argue the Court should not dismiss this case, even after *Sackett*. (Doc. 63, at 4-13.) First, Plaintiffs argue *Sackett* does not apply retroactively to the facts of this case. (*Id.* at 4-7.) Second, even if *Sackett* applies, Defendant waived its argument that the Subject Property is not protected by the CWA. (*Id.* at 7-8, 13.) Third, regardless of which standard applies to the Subject Property, Plaintiffs have sufficiently alleged it is a "wetland." (*Id.* at 8-13.) The Court addresses the Parties' arguments below.

Appendix B

A. Whether This Case Implicates *Sackett*

The Court finds *Sackett* is implicated under the facts of this case. The CWA prohibits "the discharge of any pollutant by any person." 33 U.S.C. § 1311(a). "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362 (12)(A). Under the CWA, "pollutant" includes dredged spoil, rock, sand, and agricultural waste discharged into water. *Id.* § 1362(6). The CWA defines "navigable waters" as "the waters of the United States." *Id.* § 1362(7). "The Environmental Protection Agency (EPA) and the [Corps] jointly enforce the CWA." *Sackett*, 598 U.S. at 661. The Corps is permitted, under 33 C.F.R. § 323.3(a), to issue permits "for the discharge of dredged or fill material into waters of the United States." The Corps has defined "waters of the United States," as used in 33 C.F.R. § 323.3(a), to include "wetlands" adjacent to those waters. 33 C.F.R. § 328.3(a)(4); *see also* 33 C.F.R. § 323.2(a).

Plaintiffs allege the CWA is implicated here because the Subject Property is a "wetland," and Defendant violated the CWA by filling the Subject Property and not complying with the CWA's permitting provisions. (Doc. 24, ¶¶ 1, 2, 9, 22, 40, 141-53, 169-72, 182-85.) If the Subject Property is not a "wetland," Defendant argues, then any purported filling of the Subject Property did not run afoul of the CWA, and all of Plaintiffs' claims fail. (Doc. 62, at 2.) Thus, the question becomes whether the Subject Property is a "wetland." Because the Supreme Court in *Sackett* "granted certiorari to decide the proper test for determining whether wetlands are 'waters of the United

States,'" the Court finds the *Sackett* decision is squarely implicated here. 598 U.S. at 663.

B. Whether *Sackett* Applies Retroactively

Because *Sackett* is implicated, the Court turns to whether *Sackett* applies retroactively. Plaintiffs argue *Sackett* has no retroactive effect on the Subject Property's jurisdictional status. (Doc. 63, at 4-7.) In Plaintiffs' view, the *Sackett* decision provided the Corps and EPA with guidance for determining whether property qualifies as a "wetland." (*See id.* at 4.) Plaintiffs note that, after *Sackett*, the Corps and EPA amended their definitions of "wetlands" to comply with *Sackett's* test and specifically stated the new "Conforming Rule" would become effective on September 8, 2023. (*Id.* (citing 88 Fed. Reg. 61,964 (Sept. 8, 2023) (codified at 33 C.F.R. § 328 & 40 C.F.R. § 120)).) Because the Conforming Rule's language does not explicitly provide that it applies retroactively, Plaintiffs conclude neither the Conforming Rule nor the *Sackett* decision apply retroactively. (*Id.* at 5 (citing *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1351 (11th Cir. 2005); *Jones Creek Invs., LLC v. Columbia Cnty.*, No. CV 111-174, 2016 U.S. Dist. LEXIS 17720, 2016 WL 593631, at *5 (S.D. Ga. Feb. 12, 2016)).) The Court disagrees.

Sackett did more than simply provide the Corps and EPA with guidance. The *Sackett* decision created a new rule of federal law when it held "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." 598 U.S. at 684 (quoting *Rapanos*, 547 U.S. at 742, 755). The Supreme Court did not only create a new rule; but it also applied the new rule to the parties before it. *See id.* (explaining the new rule compelled reversal because "[title wetlands on the Sacketts' property are distinguishable from any possibly covered waters [of the United States]" then reversing and remanding for further proceedings consistent with the Supreme Court's opinion).

> When [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Supreme Court's] announcement of the rule.

Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). Because the Supreme Court applied a rule of federal law - its interpretation of the CWA - to the parties before it in *Sackett*, this Court must give full retroactive effect to the decision. *See id.* Therefore, the Court finds *Sackett* applies retroactively.

C. Whether the Subject Property is a "Wetland" Under *Sackett*

The Court now turns to whether the Subject Property, as described in Plaintiffs' amended complaint, satisfies the *Sackett* test. Plaintiffs argue the Court should not address this issue because Defendant waived its argument that

the Subject Property is not a "wetland" by (1) obtaining a preliminary JD as opposed to an approved JD; and (2) raising it for the first time in its supplemental briefing. (Doc. 63, at 7-8, 13.) However, Defendant's argument – that the Court should apply the *Sackett* decision – is an argument that cannot be waived because it is the Court's duty to apply a Supreme Court decision retroactively to the facts of a non-final case if the Supreme Court applies an applicable rule of federal law to the parties before it. *See Harper*, 509 U.S. at 90 ("[The Supreme] Court's application of a rule of federal law to the parties before [it] *requires every court* to give retroactive effect to that decision." (emphasis added)). As discussed above, the Supreme Court applied a rule of federal law to the parties in *Sackett. See* 598 U.S. at 684. Accordingly, the Court has a duty to apply the decision retroactively to the facts of this case, even though they predate the Supreme Court's decision in *Sackett. See Harper*, 509 U.S. at 97.

The CWA only extends to wetlands that are indistinguishable from "waters of the United States" as a practical matter. *Sackett*, 598 U.S. at 678 (internal quotation marks and citation omitted). The Parties do not dispute, at least for purposes of Defendant's motion to dismiss, that Dunbar Creek is a traditional navigable water, and thus a "water[] of the United States' in [its] own right." (Doc. 62, at 2 n.1); *see also Sackett*, 598 U.S. at 678, 684 (citation omitted). Accordingly, to establish the Subject Property is a "wetland" covered by the CWA, Plaintiffs must show: (1) the Subject Property is adjacent to Dunbar Creek; and (2) the Subject Property has a continuous surface connection with Dunbar Creek, making

it difficult to determine where Dunbar Creek ends and the Subject Property begins. *Sackett*, 598 U.S. at 678-79.

Plaintiffs argue they met the *Sackett* standard by

> sa[ying] the Subject [Property] is a jurisdictional Water of the United States, alleging that water from the Subject [Property] flows via "both surface runoff and groundwater" to salt marsh adjacent to Dunbar Creek, and by relying on their expert Matthew Schweisberg's affidavit [stating] "[t]here is a direct connection between the Subject [Property] and the adjacent salt marsh via culverts and pipes."

(Doc. 63, at 11 (citing (Doc. 24-13, at 4)).) The Court disagrees. First, Plaintiffs' allegation that "[t]he Subject [Property] and its basin that includes Dunbar Creek . . . are . . . waters of the United States" is a legal conclusion, not a factual allegation, and must be disregarded. *See Chapman v. U.S. Postal Serv.*, 442 F. App'x 480, 482-83 (11th Cir. 2011) ("In considering a motion to dismiss, a court should eliminate any legal conclusions contained in the complaint, and then determine whether the factual allegations, which are assumed to be true, give rise to relief." (citation omitted)). The only remaining allegations in Plaintiffs' amended complaint describing the Subject Property's proximity to Dunbar Creek is that they are both located in the same basin. (*See* Doc. 24, 5151 40, 41.) However, the fact that the Subject Property and Dunbar Creek are in the same basin does not necessarily establish there is a "continuous surface connection" between them. *See Sackett*, 598 U.S. at 678-79.

Moreover, Plaintiffs' contention that water will eventually reach Dunbar Creek by "surface runoff and groundwater" and Plaintiffs' expert's statement that the Subject Property and nearby salt marsh are directly connected "via culverts and pipes" do not sufficiently allege the Subject Property is a "wetland" under *Sackett*. (Doc. 63, at 11; Doc. 24-13, at 4.) Neither Plaintiffs' allegations nor Plaintiffs' expert's affidavit establish the Subject Property "has a continuous *surface* connection with [Dunbar Creek], making it difficult to determine where [Dunbar Creek] ends and the [Subject Property] begins." *Sackett*, 598 U.S. at 678-79 (emphasis added) (citation omitted).

In fact, the images attached to Plaintiffs' amended complaint show there is a "clear demarcation" between the Subject Property and Dunbar Creek.[2] (Doc. 24-1, at 5, 24; Doc. 24-8, at 7, 10, 54, 58; Doc. 24-9, at 1; Doc. 24-11, at 1); *see also Sackett*, 598 U.S. at 678. Plaintiffs provide survey images that outline the Subject Property and show Dunbar Creek to the west. (Doc. 24-1, at 5; Doc. 24-8, at 7, 10.) Based on the key provided, Dunbar Creek is hundreds of feet away from the Subject Property. (Doc. 24-8, at 10.) Between the Subject Property and Dunbar Creek (from west to east) there is: a salt marsh; upland; the road leading from Sea Island Road to Defendant's hotel; a median; the road from Defendant's hotel to Sea Island Road; and, finally, the Subject Property. (Doc. 24-1, at 24; Doc. 24-8, at 54, 58; Doc. 24-9, at 1; Doc. 24-11, at

2. The Court may consider these images because Plaintiffs have attached them to the amended complaint. *See Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000).

1.) Because these images establish a "clear demarcation" between the Subject Property and Dunbar Creek, Plaintiffs' amended complaint fails to demonstrate there is a "continuous surface connection" between them and fails under the *Sackett* test. 598 U.S. at 678.

To be sure, Plaintiffs' expert opines that, "[b]ecause the salt marsh is tidal, each time tidal flooding occurs, . . . the water will 'pick up' a fresh dose of the excess chemicals and become contaminated," then the water will "flow[] back to Dunbar Creek when the tide ebbs." (Doc. 24-13, at 3.) Even though "phenomena like low tides or dry spells" do not necessarily sever a water's surface connection with a parcel for CWA purposes, as the Court discussed above, nothing in or attached to the amended complaint indicates Dunbar Creek ever has a surface connection with the Subject Property, even when the tides change. *See Sackett*, 598 U.S. at 678.

Because Plaintiffs failed to allege facts indicating the Subject Property is adjacent to Dunbar Creek and has such a continuous surface connection to it that it is "indistinguishable" from it, Plaintiffs fail to meet the *Sackett* test for whether a parcel is a "wetland," and thus "waters of the United States," under the CWA. Furthermore, the images attached to Plaintiffs' amended complaint indicate there is a clear demarcation between Dunbar Creek and the Subject Property. (*See* Doc. 24-1, at 5, 24; Doc. 24-8, at 7, 10, 54, 58; Doc. 24-9, at 1; Doc. 24-11, at 1); *see also Sackett*, 598 U.S. at 678. Because *Sackett* applies retroactively to this case, and because the amended complaint does not satisfy the test promulgated

in *Sackett*, the amended complaint does not sufficiently allege the Subject Property is a "wetland," thus it is not "waters of the United States" and does not invoke the CWA's protections. *See* 33 U.S.C. §§ 1311(a), 1362(12)(A), 1362(7), 1344; *see also* 33 C.F.R. §§ 323.3(a), 328.3(a)(4). Since each of Plaintiffs' claims are predicated on the CWA's application, Plaintiffs' amended complaint shall be dismissed.

IV. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant's motion to dismiss (Doc. 26) is **GRANTED**. The Clerk is **DIRECTED** to **TERMINATE** all pending motions and deadlines, if any, and **CLOSE** this case.

ORDER ENTERED at Augusta, Georgia, this 1st day of March, 2024.

/s/ J. Randal Hall
J. RANDAL HALL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 29, 2025

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-10710

THE GLYNN ENVIRONMENTAL COALITION, INC.,
CENTER FOR A SUSTAINABLE COAST, INC.,
JANE FRASER,

Plaintiffs-Appellants,

versus

SEA ISLAND ACQUISITION, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 2:19-cv-00050-JRH-BWC

Before WILLIAM PRYOR, CHIEF JUDGE, and GRANT and KIDD, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellants is DENIED.