No. 07-1512

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. LUCAS, JR., *et al.*

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

Amici will address the first and second questions presented:

1. In applying *Rapanos v. United States*, 547 U.S. 715 (2006), to determine federal jurisdiction over wetlands under the Clean Water Act, are federal courts bound to apply the analysis of the plurality decision, the concurrence, or some other standard?

2. Under whichever approach the Court chooses, did the Fifth Circuit err in holding that federal jurisdiction under the Act extends to a wetland that merely "neighbors" a "tributary" of a navigable water, without requiring that the wetland have a *continuous* surface connection with a relatively permanent body of water, or that it *significantly* affect the quality of traditional navigable waters?

TABLE OF CONTENTS

TABLE OF CONTENTS cont.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES cont.

Page(s)

TABLE OF AUTHORITIES cont.

Statutory and Regulatory Provisions

OTHER

INTERESTS OF THE *AMICI CURIAE*

The National Association of Home Builders ("NAHB") and the Chamber of Commerce of the United States of America ("Chamber") have received the parties' written consent to file this *amicus curiae* brief supporting Petitioner.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. Its members are frequently subject to regulation under the Clean Water Act ("CWA"). As a result, NAHB has developed comprehensive familiarity with the CWA's permitting requirements, provides compliance advice to its members, and has witnessed numerous situations where federal regulators have exercised authority beyond the CWA's limits.

The Chamber is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, *amici* state that their counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amici* made a monetary contribution to its preparation.

This case is important to the *amici* because it involves the scope of the jurisdiction of the federal government over certain waterbodies under the CWA. Many of *amici*'s members have had development plans ruined by the Corps' assertion of CWA jurisdiction over their property. Other members have been denied the potential economic benefits that result from development. As the principal voice of the American business community, the Chamber is well-suited to present the interests of business in this case.

NAHB and the Chamber frequently participate as party litigants and *amicus curiae* to safeguard the rights and interests of their members. NAHB was a recent petitioner in a CWA case, *NAHB v. Defenders of Wildlife*, 551 U.S. ---, 127 S.Ct. 2518 (2007). Attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as *amicus curiae* or "of counsel," in a number of matters involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

SUMMARY OF ARGUMENT

I. ***Which Test From Rapanos Controls?:*** The 4-1-4 decision in *Rapanos v. United States*, 547 U.S. 715 (2006), failed to articulate a unifying theory to determine the scope of "navigable waters" under the CWA. A pronounced split among the circuit courts of appeals has thus developed on the "correct" test for ascertaining the CWA's scope. Millions of acres of property will remain in regulatory limbo until a majority of this Court announces the guiding test for "navigable waters" jurisdiction.

II. ***Guidance is Necessary to Clarify the Meaning of "Traditional Navigable Waters":*** In *Rapanos*, both the plurality and concurrence articulated that CWA jurisdiction is tied to traditionally navigable waters ("TNWs"). *Infra* pp. 17-18. The courts below incorrectly equated navigable-in-fact waterbodies with TNWs.

III. ***The Court Below Should Have Applied the Rule of Lenity:*** Neither the courts nor the agencies have a clear understanding "waters of the United States" covered by the CWA. 33 U.S.C. § 1362(7). Because of the ambiguity, the Fifth Circuit should have resolved questions of the Act's coverage in the Petitioners' favor and found that the wetlands at issue are not within the CWA.

ARGUMENT

I. THE LOWER COURTS NEED GUIDANCE ON WHICH TEST FROM *RAPANOS* CONTROLS QUESTIONS OF CWA JURISDICTION.

A. The "Narrowest Grounds of Concurrence" from *Rapanos* are Impossible to Discern.

The Petition describes the tests for Clean Water Act ("CWA") jurisdiction announced by the different *Rapanos* opinions—in particular, the "relatively permanent waterbody" test used by Justice Scalia in his plurality opinion, and the "significant nexus" test used by Justice Kennedy in his concurrence in the judgment. Pet. at 4-6. Petitioners also set forth (Pet. 14-16) the circuit conflict on whether and how the principles from *Marks v. United States*, 430 U.S. 188 (1977), apply to discern a holding from *Rapanos*, where a majority of the Justices failed to agree on a categorical test for CWA coverage. The oft-cited "rule" from *Marks* is:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those members who *concurred in the judgments on the narrowest grounds*."

Marks, 430 U.S. at 193 (emphasis added) (citations omitted). The *Marks* formulation has not been a favorite of this Court. "This test is more easily stated than applied," and it is "not useful to pursue the

Marks inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745-46 (1994).

Hidden in Chief Justice Roberts's concurrence, there is a single, oblique reference to *Marks*:

> It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. See *Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (discussing *Marks v. United States*, 430 U.S. 188 …(1977)).

Rapanos, 547 U.S. at 758 (Roberts, C.J., concurring). Thus, the Chief Justice did not rely on *Marks* as direct authority, but simply noted the case as "discuss[ed]" in *Grutter*.[2] None of the individual *Rapanos* opinions provides any analysis of *Marks*, or

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[2] In *Grutter*, the Court questioned whether Justice Powell's lone concurrence in the 4-1-4 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), decision was controlling under *Marks*. It found that it was not necessary to answer that question as a majority of the Court ultimately endorsed Justice Powell's view. *Grutter*, 539 U.S. at 325. *Grutter* does not extol *Marks* as a model of clarity, but rather cites *Nichols*, to recognize that *Marks* "has so obviously baffled and divided the lower courts …." *Id.* at 325 (citing *Nichols*, 511 U.S. at 745-46).

how *Marks* may be used to make sense of the Justices' differing approaches for CWA coverage.

Nonetheless, the Seventh and Ninth Circuits have applied *Marks* to determine that the "narrowest grounds" from *Rapanos* means the CWA jurisdictional test that is least restrictive of the government's authority. These circuits have concluded that Justice Kennedy's "significant nexus" test governs because it provides the Corps and EPA with the broadest regulatory purview. See *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) ("This test is narrower (so far as reigning in federal authority is concerned) than the plurality's in most cases …"); *No. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007) (Justice Kennedy's concurrence "is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases").

But why are the "narrowest grounds" equated with the least restrictions (and hence broadest assertion) on *government authority*? Especially under a statute such as the CWA—which can result in civil and criminal sanctions, and imprisonment if violated—shouldn't the "narrowest grounds" mean the least restrictions on otherwise *lawful private conduct*? Indeed, the First Circuit criticized *Gerke* as "[c]urious" and "without explanation," and decided it is "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality), because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause."

United States v. Johnson, 467 F.3d 56, 61, 63 (1st Cir. 2006).[3]

Moreover, the Eleventh Circuit has somewhat followed the Seventh and Ninth Circuits, by deciding that *Rapanos*'s "narrowest grounds" means the least curtailment of federal authority. But that court makes matters even more confusing, because it would vary the governing CWA jurisdictional test from case to case. In *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), the Eleventh Circuit wrote that "in factual circumstances different from *Rapanos*, Justice Scalia's test may be less restrictive of CWA jurisdiction," and that "[t]his case is arguably one in which Justice Scalia's test may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test, despite the fact that Justice Kennedy's test, as applied in *Rapanos*, would treat more waters as within the scope of the CWA." *Id*. at 1122-23. One can imagine the confusion that will

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[3] In *Johnson*, Judge Torruella wrote separately to stress his belief that the Justice Scalia's *Rapanos* plurality provided the lone controlling analysis, because the "significant nexus" test raises serious constitutional concerns:

> I cannot concur that Justice Kennedy's seemingly opaque 'significant nexus' test is a constitutional measure of federal regulatory jurisdiction .... [The plurality's test] strikes a constitutional balance between federal and state regulatory interests, and our nation's interest in clean water and the individual land owner's right to manage their *[sic]* property in accordance with their dreams and aspirations, whether economic or otherwise.

467 F.3d at 66-67 (Torruella, J., concurring in part, dissenting in part).

arise within the Eleventh Circuit where the district courts must decide if they are dealing with facts like *Rapanos* (where Justice Kennedy's approach will control), or unlike *Rapanos* (where the plurality approach will control). When is a CWA jurisdictional case like, or unlike, *Rapanos*?

The folly in deeming "significant nexus" a broader assertion of federal jurisdiction compared to the plurality's approach is evident in cases decided since *Rapanos*. For example, on another occasion the Ninth Circuit decided that the CWA did not cover a pond because "Justice Kennedy's controlling concurrence explained that *only wetlands* with a significant nexus to a navigable-in-fact waterway are covered by the Act." *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) (emphasis added). The Ninth Circuit said: "[W]e emphasize that [the significant nexus] standard was for wetlands …." *Id*. at 708. Thus, *Baykeeper* interprets significant nexus to *not* reach ponds, pools, creeks, or other non-wetland features.[4] In contrast, the *Rapanos* plurality could consider such features as statutory "navigable

[4] *Baykeeper* correctly placed bounds around "significant nexus" as only allowing coverage *vis-à-vis* wetlands, considering that the primary basis for Justice Kennedy's theory was *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). See, *e.g.*, *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (relying on *Riverside Bayview*, and stating: "As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone").

waters" if they constitute "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features ….' " *Rapanos*, 547 U.S. at 739 (Scalia, J.). Accordingly, the plurality might deem a feature like Walden Pond as within the CWA, while the "significant nexus" test would not stretch so far—because Walden Pond is *not* a wetland. From this perspective, the significant nexus test is *more* restrictive of Corps jurisdiction; more types of features *escape* CWA coverage under Justice Kennedy's approach compared to the breadth of Justice Scalia's analysis, which reaches non-wetlands. Hence, following *Baykeeper*, the *Rapanos* plurality might be considered "the narrowest grounds" of concurrence.

Precisely because of the arbitrariness in discerning which test places greater limits on federal authority, the First Circuit rejected the course of the Seventh, Ninth, and Eleventh Circuits. In *Johnson*, 467 F.3d 56 (1st Cir. 2006), the First Circuit acknowledged "the shortcomings of the *Marks* formulation in applying *Rapanos*." 467 F.3d at 64. *Johnson* thus ruled that "[t]he federal government can establish jurisdiction over the target sites if it can meet *either the plurality's or Justice Kennedy's standard* as laid out in *Rapanos*." *Id*. at 66 (emphasis added). In fact, Justice Stevens suggested this same approach in his *Rapanos* dissent, 547 U.S. at 810 n.14 ("[I]n these and future cases the United States may elect to prove jurisdiction under either test").[5]

[5] Other lower courts have adopted *Johnson*'s either/or approach. See *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun*

It is no wonder that the lower courts have rapidly devolved into conflict on the scope of CWA coverage. Does *Marks* even apply to lend interpretive assistance to *Rapanos*? If so, how does it apply and what are the "narrowest grounds" of concurrence among the Justices? Does "significant nexus" control? Does "relatively permanent waterbody" control? Can either test be used? Is there some other test? Since *Rapanos* was decided in 2006, the underlying petition in the case at bench is the eighth request seeking this Court's guidance on how property owners and regulators should determine if an aquatic feature is subject to federal CWA control.[6] The conflict is mature, the confusion is resolute, and things will get worse, unless this Court rapidly intervenes to lay some ground rules for interpreting *Rapanos*. Respectfully, the petition should be granted.

Club, 472 F. Supp. 2d 219, 226-27 (D. Conn. 2007), appeal docketed, No. 07-0795CV (2d Cir. Mar. 2, 2007); *United States v. Cundiff,* 480 F.Supp. 2d 940, 944 (W.D. Ky. 2007); *United States v. Bailey*, 516 F.Supp.2d 998, 1006 (D. Minn. 2007).

[6] The Court has denied certiorari in *Gerke Excavating, Inc.*, 464 F.3d 723, *cert. denied*, 128 S. Ct. 45 (2007); *Johnson*, 467 F.3d 56, *cert. denied*, 128 S. Ct. 375 (2007); *City of Healdsburg*, 496 F.3d 999, *cert. denied*, 128 S. Ct. 1225 (2008); *United States v. Heinrich*, 184 Fed. Appx. 542 (7th Cir. 2006), *cert. denied*, 127 S.Ct. 2974 (2007); *United States v. Morrison*, 178 Fed. Appx. 481 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 270 (2007); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005), *cert. denied*, 127 S.Ct. 1258 (2007); and *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), *cert. denied*, 544 U.S. ----. 2008 WL 743960 (June 23, 2008).

B. Specific Areas of Consensus Among the *Rapanos* Justices *are* Discernable—and Should be Announced by a Majority of This Court.

As the First Circuit stated, "one might sensibly conclude … that the 'narrowest grounds' are simply understood as the 'less far-reaching common ground.' " *Johnson*, 467 F.3d at 63 (citations omitted). Again, to detect a court holding among five Justices, the *Marks* formulation requires an examination of those differing opinions that "concurred in the judgments." *Marks*, 430 U.S. at 193. Any holding from *Rapanos* must therefore be limited to an examination of Justice Scalia's plurality and Justice Kennedy's concurrence—because only those opinions garnered support from five Members who concurred in the judgment by vacating the Sixth Circuit's too-expansive interpretation of the CWA.[7] Justice Stevens's dissent does not factor into this calculus because it did not vacate the Sixth Circuit.[8] With the approaches taken by Justices Scalia and Kennedy thus placed in proper focus, there are important points of consensus that this Court should firmly announce to aid regulators and property owners in

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[7] See *Rapanos*, 547 U.S. at 757 (plurality) ("We vacate the judgments of the Sixth Circuit in both No. 04-1034 *[Rapanos]* and No. 04-1384 *[Carabell]*, and remand both cases for further proceedings"); *id*. at 787 (Kennedy, J. concurring) ("In these consolidated cases I would vacate the judgments of the Court of Appeals ….")

[8] *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting) ("I would affirm the judgments in both cases ….").

answering questions of CWA jurisdiction. Illustrative areas of agreement between the plurality and concurrence are as follows:

- **The CWA's scope is not restricted to traditional navigable waters.**
  - Plurality: "[T]he Act's term 'navigable waters' includes something more than traditional navigable waters ...." *Rapanos*, 547 U.S. at 731. The plurality "affirmatively reject[ed]" an interpretation that the CWA "include[s] only navigable-in-fact waters." *Id*. at 751.
  - Concurrence: "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters" that are not in fact navigable." *Id*. at 779.

- **The word "navigable," in the phrase "navigable waters," has meaning.**
  - Plurality: "[T]he traditional term 'navigable waters' ... carries *some* of its original substance ...." *Id*. at 734.
  - Concurrence: "[T]he dissent reads a central requirement out [of the CWA]—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance." *Id*. at 778. "Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id*. at 779.

- **A mere hydrological connection can <u>*not*</u> provide the basis for CWA jurisdiction.**
  - <u>Plurality:</u> Rejecting the federal government's hydrologic connection theory in deciding that the phrase " 'the waters of the United States' . . . cannot bear the expansive meaning that the Corps would give it." *Id*. at 731-732. "[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." *Id*. at 736 n.7.
  - <u>Concurrence:</u> Criticizing the dissent because it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters." *Id*. at 778. "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id*. at 784-785.

- **Hypothetical, speculative, or eventual water flows do <u>*not*</u> support CWA jurisdiction.**
  - <u>Plurality:</u> "[T]he phrase 'the waters of the United States' includes *only* those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes." *Id*. at 739 (emphasis added). "*[O]nly* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands,

are 'adjacent to' such waters and covered by the Act." *Id*. at 742.

- Concurrence: "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, *however remote and insubstantial*—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case." *Id*. at 780 (emphasis added). "When … wetlands' effects on water quality *are speculative or insubstantial*, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id*. at 780 (emphasis added). In remanding *Carabell* back to the Sixth Circuit, Justice Kennedy stated that "[t]he conditional language in [the Corps's] assessments—'potential ability,' 'possible flooding'—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps' claims …." *Id*. at 786. In *Carabell*, "the Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge …. *[M]ere adjacency* to a tributary of this sort *is insufficient;* a similar ditch could just as well be located many miles away from any navigable-in-fact water and *carry only insubstantial flow* towards it." *Id*. at 786 (emphasis added).

- **Mere presence of an ordinary high water mark does not render a feature a jurisdictional "tributary," or the wetlands next to such a feature jurisdictional "adjacent wetlands."**

- Plurality: As set out above, "'the waters of the United States' includes *only* those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features'...." *Id*. at 739 (emphasis added). And, as to wetlands, *only* those with a "continuous surface connection to bodies that are 'waters of the United States' in their own right ...." *Id*. at 742 (original emphasis).
- Concurrence: "[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an *ordinary high-water mark .... This standard* presumably provides a rough measure of the volume and regularity of flow. ... *[T]he breadth of this standard*—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—*precludes its adoption as the determinative measure* of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered *by this standard* might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id*. at 781-782 (emphasis added).

- **CWA jurisdiction is not lost simply because a waterbody is regularly wet during certain seasons and dry during others.**

- Plurality: Recognizing that the Los Angeles River would be jurisdictional under the CWA, and stating: "We … do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day continuously flowing stream postulated by Justice STEVENS' dissent …." *Id*. at 733 n.5. "[N]o one contends that federal jurisdiction appears and evaporates along with water in such regularly dry channels." *Id*. at 733 n.6.
- Concurrence: "The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river … Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete … over a length of some 50 miles … Though this particular waterway *might satisfy the plurality's test*, it is illustrative of what often-dry watercourses can become when rain waters flow." *Id*. at 769-770 (emphasis added).

- **As a general matter "navigable waters" and "point sources" are ***not*** the same thing, and normally a feature can't be both.**
  - Plurality: The CWA's definitions "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." *Id*. at 735.
  - Concurrence: "[E]ven were the statute read [as the plurality does] to require continuity of flow for navigable waters, certain waterbodies *could*

> *conceivably* constitute both a point source and a water." *Id*. at 772 (emphasis added).

Amicus does not offer these points as an exhaustive list of all areas in which Justices Scalia and Kennedy agree. But these examples of consensus are important and, if articulated cohesively by a majority of Justices in a single opinion, would go a long way toward yielding proper and predictable CWA implementation in the field.

II. GUIDANCE FROM THIS COURT IS NECESSARY TO CLARIFY THE MEANING OF "TRADITIONAL NAVIGABLE WATERS."

After years of analyzing the CWA and advising their members on how to comply with it, *amici* believe that the genesis for many problems with the Act's implementation derive from the confusingly similar nature of the terms used to define its jurisdictional scope. Regulators, lawyers, and (with due respect) courts use different phrases pertaining to "navigable" features interchangeably and imprecisely. The Court should view the petition as an opportunity to provide all stakeholders with a shared understanding of basic CWA terminology.

The CWA covers "navigable waters," which are defined to mean the "waters of the United States." 33 U.S.C. §§ 1362(7), (12). Corps authority under Section 10 of the Rivers and Harbors Act of 1899 ("RHA"), 33 U.S.C. § 403, extends to the "navigable waters of the United States." 33 U.S.C. § 403. As noted above, both Justices Scalia and Kennedy agreed that the CWA's scope encompasses more than RHA waters, or

the traditionally navigable waters ("TNWs"). *Supra* p. 12. Yet, the determination of a feature as a TNW is the crucial, foundational component of each of their CWA analyses. Justice Scalia wrote that one "finding" necessary to determine if a wetland is covered by the CWA is if the "adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to *traditional interstate navigable waters*) …." *Id.* at 742 (emphasis added). Justice Kennedy stated that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and *navigable waters in the traditional sense*." *Id.* at 779 (emphasis added) (Kennedy, J., concurring). *Amici* submit that great clarity would be lent to CWA jurisdictional issues if this Court defines the factors that comprise navigable waters in the "traditional sense."

Indeed, the district court's jury instruction confused a TNW with a "navigable-in-fact" waterbody, as follows:

> Wetlands are adjacent to a navigable body of water if there is a significant nexus between the wetlands in question and a *navigable-in-fact* waterway.

United States v. Lucas, 516 F.3d 316, 323-24 (5th Cir. 2008) (emphasis added). In *Rapanos*, however, Justice Kennedy, provided that wetlands must have a significant nexus to a *TNW*, not a "navigable-in-fact" waterbody. *Supra* p. 18. As discussed below, just because a waterbody is "navigable-in-fact" does not necessarily mean it is a TNW.

A. The *Rapanos* Plurality and Concurrence Relied on *The Daniel Ball* and *Appalachian Electric* in Discussing TNWs.

In portraying waters that are navigable in the traditional sense, Justice Kennedy cited *The Daniel Ball*, 77 U.S. 557 (1870), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). He explained that the "traditional understanding of the term 'navigable waters of the United States'" is those "waters susceptible to use in *interstate* commerce." *Id*. at 760 (emphasis added). Thus, when Justice Kennedy refers to "navigable waters in the traditional sense" (TNWs), he is ostensibly referring to the "navigable waters of the United States." *Id*. at 779, 760.

Similarly, the *Rapanos* plurality relied on *The Daniel Ball* and *Appalachian Electric*, in explaining traditional federal control over water features:

> For a *century prior* to the CWA, we had interpreted the phrase "navigable waters of the United States" in the Act's predecessor statutes to refer to interstate waters that are "navigable in fact" or readily susceptible of being rendered so. *The Daniel Ball*, 10 Wall. 557, 563, 19 L.Ed. 999 (1871); see also *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 ... (1940).

Rapanos, 546 U.S. at 723 (emphasis added).

B. A Waterbody is a TNW if it Satisfies Three Criteria.

In *The Daniel Ball*, 77 U.S. 557 (1870), the Supreme Court interpreted the term "navigable waters of the United States." The case involved a steam vessel that was allegedly operating in violation of a federal law prohibiting unlicensed vessels from transporting merchandise or people upon the "'bays, lakes, rivers, or other *navigable waters of the United States*.'" *Id*. at 557 (emphasis added). Resolving the dispute, the Court first determined whether such transport was being conducted on a navigable water of the United States. According to Justice Field, the answer was found in the river's navigable capacity:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as *highways for commerce, over which trade and travel are or may be conducted* in the *customary modes of trade and travel on water*. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting other waters, a *continued highway over which commerce is or may be carried on with other States or foreign countries* in the customary modes in which such commerce is conducted by water.

Id. at. 564 (emphasis added). Thus, under *The Daniel Ball*, TNWs must contain a navigation element, a commerce element, *and* an interstate element.[9] Waters are TNWs if they are: (1) "navigable in fact" (*i.e.*, support boat traffic); *and* (2) constitute a highway of commerce for trade or travel; *and* (3) form in their ordinary condition, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries.[10]

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[9] *See also Escanaba Co. v. Chicago*, 107 U.S. 678, 682 (1883) ("[t]he power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in-fact so far as it may be necessary to ensure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the states or with foreign countries"); *The Montello*, 87 U.S. 430, 442 (1874) (explaining it is *not* "'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable'" (quoting Chief Justice Shaw in *Rowe v. Granite Bridge Corp.*, 38 Mass (21 Pick.) 344 (1838))); *United States v. Rio Grande Dam & Irrigation Co*., 174 U.S. 690, 698 (1899) (finding the Rio Grande was *not* navigable in the Territory of New Mexico and that "[t]he mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river"); *Leovy v. United States*, 177 U.S. 621, 633 (1900) (explaining that the jury was incorrectly informed that "the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, … is sufficient to constitute a navigable water of the United States").

[10] In Appendix D of the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/jd_guidebook_051207final.pdf* (2007) (hereinafter *Guidebook*), the Corps and EPA relied on *United States v. Holt State Bank*, 270 U.S. 49

Subsequently, in *Appalachian Electric*, the Court, building on the standard set forth in *The Daniel Ball*, declared "[a] waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken." *Appalachian Electric*, 311 U.S. at 407. Thus, through "reasonable improvements" it is possible to make "an interstate waterway available for traffic," thus bringing it within the power of Congress. *Id*. at 408. The Court acknowledged, however, that "reasonable improvements" must be tempered by economic practicality: "[t]here must be a balance between costs and need at a time when the improvement would be useful." *Id*. at 407-408. Thus, in *Appalachian Electric*, the Court established the principle that if a waterbody requires "reasonable improvements" to satisfy *The Daniel Ball* test, it will still be considered a navigable water of the United States.

(1926) *United States v. Utah*, 283 U.S. 64 (1931) and *Utah v. United States*, 403 U.S. 9 (1971), to determine which waterbodies are "traditional navigable waters." *Guidebook*, app. D (2007) (Appendix D is titled *Legal Definition of "Traditional Navigable Waters"*). The relevant inquiry for purposes of CWA jurisdiction, however, must be whether Congress had authority over the water in question pursuant to the Commerce Clause. This was *not* the issue in *Holt State Bank* or the *Utah* cases. In those cases, the controversy focused on whether the respective water features were navigable for purposes of deciding if their beds fell within state or federal ownership under the "equal footing" doctrine—wholly irrelevant to questions of CWA jurisdiction in light of how Justices Scalia and Kennedy perceived TNWs in *Rapanos*.

Consequently, reading *The Daniel Ball* and *Appalachian Electric* together, waterbodies that have traditionally been within the federal government's authority—the "navigable waters of the United States"—are those waterbodies that:

- Support the customary modes of travel on the water (*i.e.*, boat traffic);
- Are, were, or with reasonable improvements could be used as commercial highways that transport goods; *and*
- Form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries.

Thus, whether a waterbody supports boat traffic—a component of making it navigable-in-fact—does not end the TNW inquiry. Such a feature may not qualify as a TNW *unless* it also serves as part of a highway of commerce that is interstate. In other words, a "navigable-in-fact" waterbody is not a TNW if it does not also form in its ordinary condition, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries. The Court should grant certiorari to clarify the important distinction between TNWs, navigable-in-fact waters, and waters subject to Corps authority under the CWA.

III. THIS COURT SHOULD APPLY THE RULE OF LENITY TO RESOLVE AMBIGUITIES ON THE MEANING OF STATUTORY "NAVIGABLE WATERS."

In the CWA, Congress defined "navigable waters" as "the waters of the United States." 33 U.S.C. §1362(7). It failed, however, to provide a definition of "waters of the United States." As the Court has recognized, the legislative history of the CWA clarifies that it reaches more than TNWs. *Supra* p. 12. The extent of the reach, however, is far from apparent. As shown in Parts I and II, there no clear understanding of when wetlands and nonnavigable waters are or are not "water of the United States." The agencies have failed to develop a new regulation that clearly defines the term even after five of the Justices suggested that such a regulation is necessary. *Rapanos*, 547 U.S. at 726, 757-58, 811-12 (Scalia, J., plurality opinion; Roberts, C.J., concurring opinion; Breyer, J., dissenting opinion). Furthermore, the courts cannot even agree on the proper test for determining if a geographic feature is a "water of the United States." *Supra*, pp. 4-10. Yet, three people are in jail for *knowingly* discharging pollutants from a point source into waters of the United States without a permit. 33 U.S.C. §§ 1311, 1319(c).

Because the definition of "navigable waters" as "waters of the United States" is imprecise and because the agencies' regulations have done little to clarify the meaning, the court below should have construed any ambiguity in favor of the defendants.

As this Court recently explained: "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008) (plurality opinion). Two policies serve as the basis for the rule of lenity. First, it serves to protect a person's right to fair warning: "Application of the rule of lenity ensures that criminal statutes will provide *fair warning* concerning conduct rendered illegal …." *Liparota v. United States*, 471 U.S. 419, 427 (1985), *Santos*, 128 S. Ct. at 2025 ("[N]o citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed"). Second, because of the "seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971) (internal citations omitted); *Santos*, 128 S. Ct. at 2025 (explaining that application of the rule "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead").

Even after examining the language of the CWA, its structure, and legislative history, uncertainty remains over whether Congress intended to extend the scope of the CWA to the wetlands on the Petitioner's property. This is illustrated by the District Court's desire to have "some clue as to what might be factors that could be considered in determining whether there is a significant nexus between the wetland and navigable body of water, in fact." Pet. at 10.

Principles of fairness require this Court's review to ensure that any ambiguities concerning whether the wetlands at issue are within the scope of the CWA be resolved in Petitioners' favor.

CONCLUSION

For all of the foregoing reasons, the petition should be granted.

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547

U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States*, 128 S.Ct. 750 (2008); and *Summers v. Earth Island Inst.*, No. 07-463, *cert. granted*, 128 S.Ct. 1118 (2008).