No. 08-223

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MCWANE, INC., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant review to provide guidance to lower courts on how to apply the fragmented ruling in *Rapanos v. United States*, 547 U.S. 715, 767 (2006), to alleged violations of the Clean Water Act, where the government's proposed guidance would not alter the outcome in this case and would rarely if ever affect the Act's reach.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The United States of America is the petitioner in this Court. The United States brought this prosecution in the district court and was the appellee and cross-appellant in the court of appeals.

The following parties are respondents and cross-petitioners in this Court: McWane, Inc.; James Delk; and Michael Devine. All respondents were defendants in the district court. Respondent McWane, Inc., was an appellant in the court of appeals. Respondents Delk and Devine were appellants and cross-appellees. Charles Barry Robison was a defendant in the district court. He is not, however, a respondent or cross-petitioner in this Court pursuant to Supreme Court Rule 12.6.

Pursuant to this Court's Rule 29.6, undersigned counsel state that McWane, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–41a) is reported at 505 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. The court of appeals denied petitions for rehearing on March 27, 2008. Pet. App. 42a–59a. On June 14, and again on July 18, Justice Thomas extended the time within which to file the petition for a writ of certiorari, eventually up to and including August 22, 2008. The petition for a writ of certiorari was filed on August 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The government seeks review of a question that, even if answered in its favor, would not affect the outcome of this or possibly any other case. Even the government concedes that the court of appeals' interpretation of this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), will *not* alter the outcome of a prosecution or civil enforcement action in the "vast majority" of cases. Pet. 28. In fact, no court of appeals in the two years since *Rapanos* has concluded that the interpretation urged by the government would alter the outcome on the facts before it. The government is therefore left to argue that the result it seeks would make for a "substantially more efficient and straightforward" enforcement scheme. Pet. 28. Whatever the merits of that assertion, the

agencies responsible for enforcement of the Clean Water Act have both the power and the duty to seek such a result in the first instance through regulations that—at long last—comply with the law. Until those agencies have promulgated such rules, it is premature for this Court to return to an issue that recently failed to produce an opinion joined by a majority of its Members.

1. Respondents are McWane, Inc., James Delk, and Michael Devine. McWane manufactures cast iron piping, flanges, valves, and fire hydrants. Pet. App. 1a–2a, 7a. This case concerns its plant in Birmingham, Alabama. *Id.* at 2a. Mr. Delk was General Manager of the plant; Mr. Devine was Plant Manager. *Id.* at 3a.

On July 28, 2004, the government filed a superseding indictment charging respondents and others with violations of the Clean Water Act ("CWA") and related offenses. The CWA prohibits the discharge of pollutants into "navigable waters," which are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1362(7), 1311(a), 1362(12)(A). All of the counts concerned the alleged discharge of process wastewater from the plant into Avondale Creek between May 1999 and January 2001.

Avondale Creek is a shallow, non-navigable creek that runs through and underneath downtown Birmingham and eventually flows next to the plant. Over the years, it has been moved for drainage purposes, channelized and substantially straightened; parts of it run in underground pipes. Trial Tr. 4403; DX 1036 (aerial photograph showing straightened

portions of Avondale Creek as part of a solid yellow line and underground portions as a dotted yellow line) (App. 1a). As the court of appeals explained, at the point where it meets the McWane plant, the creek is more than forty-five miles from the Black Warrior River, the nearest navigable-in-fact waterway. Pet. App. 3a–4a. Avondale Creek flows into Village Creek, which flows twenty-eight miles to a dam that runs "'all the way across Village Creek[,]'" Pet. App. 4a, forming Bayview Lake, which leads—after a waterfall—to Locust Fork, flowing another twenty miles to the Black Warrior River. *Id.*; Trial Tr. 186. The government's position at trial was that the Black Warrior River was the only navigable-in-fact waterway at issue.

2. More than six months before trial, respondents and the other defendants jointly moved to dismiss the CWA counts on the ground that Avondale Creek—the sole point of discharge alleged in the superseding indictment—was not a "navigable water" within the scope of the Act. Emphasizing this Court's holding in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001), respondents argued that the CWA does not apply to non-navigable waters, like Avondale Creek, unless they have a "significant nexus" to waters that are navigable-in-fact. Respondents explained that Avondale Creek bore no such nexus to the Black Warrior River, the closest navigable-in-fact waterway.

In response, the government urged the district court to ignore *SWANCC* as "irrelevant to the law governing Avondale Creek[.]" Dist. Ct. Docket Entry ("DE") 148, at 29 (capitalization of argument heading

altered). The government argued that the court should instead proceed based on the incorrect assumption that Avondale Creek would be within the reach of the CWA simply by virtue of its remote and indirect connection to the Black Warrior River, irrespective of whether the creek had any effect on the river. In particular, the government mistakenly argued that "tributaries" that eventually "flow into a navigable water are covered under the CWA regardless of size, distance, continuity or nature." *Id.* at 24.

On March 3, 2005, the district court denied respondents' motion to dismiss. Without definitively ruling on the level of proof that would be required at trial, the district court reasoned that it was possible that the government could present evidence sufficient to satisfy the jurisdictional element of the CWA counts.

3. Respondents stood trial for six weeks, during which eighty witnesses testified and thousands of pages of exhibits were received into evidence. Despite respondents' arguments on the proper standard for proving the jurisdictional element of the CWA claims, the government failed to offer *any* evidence of a significant nexus between Avondale Creek and the Black Warrior River. Pet. App. 10a–11a, 19a–20a.

At the close of the government's case, respondents and the other defendants filed a joint motion for judgment of acquittal. DE 331. Among other things, they again argued that the government failed to present evidence sufficient for a reasonable jury to find that the discharges in question were into navigable waters. *Id*. at 9 n.7. The court rejected that claim as to respondent McWane and reserved ruling

as to the other respondents. Trial Tr. 3484; Minute Entry (dated May 23, 2005). On July 15, 2005, the defendants renewed their motion for a judgment of acquittal, raising this argument yet again. DE 387, at 1 n.2.

The district court denied the renewed motion, DE 417, crediting the government's erroneous view that it could satisfy its burden with nothing more than proof that Avondale Creek, though in places little more than a shallow straight-lined drainage ditch, was indirectly, remotely, and intermittently connected to a navigable-in-fact waterway. Consistent with this ruling, the court instructed the jury that "navigable waters" include any stream that "may eventually flow directly or indirectly into a navigable stream or river" and that such stream may be "*manmade*" and flow "*only intermittently*." Pet. App. 11a (quoting jury instruction; emphasis in opinion). On June 10, 2005, the jury returned guilty verdicts on all but three of the CWA charges as well as on other related counts. Pet. App. 9a. The district court rejected the government's insistence on substantial terms of imprisonment, and it instead ordered heavy fines, a period of home confinement and other conditions of probation.[1]

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[1] The court explained that there had been no proof of financial greed or harm to any person or property. Sent. Hr'g Tr. 239–40 (Dec. 5, 2005). The trial judge added that he "just can't see it being reasonable to cause any of these three men to be incarcerated." *Id*. at 245; *see also id*. ("I feel strongly enough about it that if there is an appeal . . . I had rather see my judgment with regard to the conviction be reversed, than to see the

[Footnote continued on next page]

4. Respondents appealed their convictions, and the government cross-appealed respondents' sentences. Citing *SWANCC* and *Rapanos*, respondents again argued that the government failed to present evidence sufficient to prove a "significant nexus" between Avondale Creek and the Black Warrior River. Respondents emphasized that this failure entitled them to judgments of acquittal. They also argued, in the alternative, that the erroneous jury instruction on the definition of navigable waters required reversal.

The court of appeals reversed respondents' convictions. The court agreed that the government had relied on—and successfully urged the use of—an overly broad definition of navigable waters. In particular, it "join[ed] the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's 'significant nexus' test provides the governing rule of *Rapanos*" for determining which waters are within the jurisdiction of the CWA. Pet. App. 23a. And it reversed based on the defective instruction the government had urged. *Id*. at 26a.

The court of appeals held that the error was not harmless because "[t]he government did not present any evidence, through [its expert] or otherwise, about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River, and there was no evidence presented

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[Footnote continued from previous page]
sentence that I imposed be reversed. I feel that strongly about it.").

of any actual harm suffered by the Black Warrior River." *Id*. at 27a.[2] In fact, the court of appeals concluded that the government failed *even to investigate* the possibility of a significant nexus:

> On cross-examination, [government expert Fritz] Wagoner admitted that he did not conduct a "tracer test" to check the flow of Avondale Creek into the Black Warrior River. . . . Wagoner conducted no tests to measure the volume of water discharged from Avondale Creek or between the bodies of water that connect Avondale Creek and the Black Warrior River. He conceded that the water level in Avondale Creek was so low that he was able to walk through Avondale Creek all the way down to its intersection with Village Creek.

Id. at 4a.

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[2] The petition attempts to divert attention from this fact by referring to large quantities of "contaminant-laden wastewater," (Pet. 6) including hydraulic oil, that turned the water "white with pollution from bank to bank." *Id.* at 8. The jury, of course, was never asked to find whether any of this hyperbole was remotely true. And the government conveniently fails to mention that the oil that turned process wastewater milky white in color was as much as 99% water and 1% water-soluble oil, that this oil is highly visible in water, and that "white" process wastewater could be within permit limits for oil and grease. Trial Tr. 1247–48, 1330–31, 1609–10; GX 56, 114, 150 & 155. Finally, of course, the government presented no evidence that any of this discharged water ever reached the Black Warrior River.

Although the court of appeals agreed with respondents that the government's expert on the navigable waters element "did not testify as to *any* 'significant nexus' between Avondale Creek and the Black Warrior River," Pet. App. 27a (emphasis added), the court declined to address respondents' argument that they were entitled to judgments of acquittal due to the insufficiency of the proofs on that essential element. Relying on *United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996),[3] the court of appeals concluded that a new trial was allowed because the insufficiency of the evidence was accompanied by trial error—here, the overly broad navigable waters jury instruction that the government had successfully advocated—and, as a result, the government supposedly lacked "any incentive to present evidence that might have cured any resulting insufficiency or met Justice Kennedy's 'significant nexus' test." Pet. App. 32a. Thus, having intentionally failed to present, or even develop, evidence of a significant nexus between Avondale Creek and the Black Warrior River—and having done so in defiance of then-existing controlling authority (*i.e.*, *SWANCC*) and in the teeth of respondents' repeated objections—the government would be free to subject respondents to a second trial based on evidence that it will need to create in order to hypothesize about the flow conditions that might or might not have existed between Avondale Creek and the distant Black Warrior River more than seven years ago.

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[3] This Court abrogated *Sanchez-Corcino*'s ruling on an unrelated issue in *Bryan v. United States*, 524 U.S. 184 (1998).

5. Respondents and the government both petitioned the court of appeals for rehearing. The government argued that the court should reconsider its interpretation of *Rapanos* and sustain respondents' convictions. Respondents argued that the court's interpretation of the Double Jeopardy Clause was inconsistent with *Burks v. United States*, 437 U.S. 1 (1978), and its progeny, and that the court should remand, instead, for entry of judgments of acquittal. The court of appeals denied rehearing on both issues, with two judges dissenting. Pet. App. 42a–59a.

REASONS FOR DENYING THE PETITION

Since the events that formed the basis for this prosecution, a majority of the Court has twice rejected the jurisdictional theory on which the government relied. In *Rapanos*, the Chief Justice explained that five years earlier—well before trial in the instant case—the Court had declined to credit the government's "view that its authority" under the CWA "was essentially limitless." 547 U.S. at 757 (citing *SWANCC*, 531 U.S. at 171). The government's failure to "refin[e] its view of its authority in light of . . . *SWANCC*" led to a second defeat in *Rapanos*. 547 U.S. at 758.

In this case, after losing on the issue yet again, the government argues that eight Members of the Court in *Rapanos* (the four Justices in the plurality plus the four dissenters) defined "navigable waters" under the CWA to include a channelized and straightened shallow urban creek located *more than forty-five miles* from the nearest navigable-in-fact waterway. It is necessary for the government to prevail on its argument that the plurality opinion interprets the CWA in such an expansive manner in order

for it to avoid the same outcome as below—reversal of respondents' convictions.

But the government's view of the plurality opinion in *Rapanos* is mistaken. Because respondents' convictions must be reversed regardless of whether the plurality rule may be invoked, this case would not give the Court occasion to decide whether the government may ever rely on the plurality rule to prosecute under the CWA. And even if these tests *could* lead to different results in this case, review would affect very few other cases, if any at all. All or nearly all waters that satisfy the plurality rule would meet Justice Kennedy's significant nexus test as well. Even the government concedes this point. Pet. 28. Since review cannot lead to a different result in this case, and would in any event have such an effect in few other cases, the petition should be denied.

Unable to show that review would affect the outcome of a material number of cases, the government complains that the result below will make it more inconvenient to prove that a discharge is covered by the Act. But this inconvenience is entirely the making of those agencies charged with implementing the CWA—the Environmental Protection Agency and the Army Corps of Engineers. They have the ability to simplify the application of the Act by promulgating new rules that are consistent with the Act and this Court's precedent. They have not even attempted to do so. For this reason alone, review of the government's question presented is premature at best.

I. THIS CASE IS NOT A SUITABLE VEHICLE FOR RESOLVING A CIRCUIT CONFLICT BECAUSE THE RULINGS ON BOTH SIDES OF THE CONFLICT SUPPORT THE OUTCOME BELOW

The CWA extends only to "navigable waters," which it defines as "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1362(7), 1311(a), 1362(12)(A). The Court most recently construed the scope of the CWA in *Rapanos*, 547 U.S. 715 (2006). No opinion in that case commanded a majority of the Court. *Rapanos* produced five separate opinions, none of which was joined by more than four Justices. Those opinions set forth three different tests for determining the scope of the Act. The government correctly observes that a circuit conflict has begun to develop after *Rapanos* over how to apply that decision. Pet. 16. Contrary to the government's contention, however, this case would be a poor vehicle for trying to resolve that conflict.

1. The government's erroneous view that a circuit conflict could be resolved here arises from its overly expansive and self-serving interpretation of the four-Justice plurality opinion authored by Justice Scalia. 547 U.S. at 719–57. As the government construes the plurality opinion, it would extend coverage of the CWA to a *broader* category of tributaries than the "significant nexus" standard set forth in Justice Kennedy's concurring opinion and applied by the court of appeals. *But see* 547 U.S. at 756–57 (plurality opinion) (criticizing Justice Kennedy's approach because it would disallow only some, rather than all, of the government's "excesses"). Thus, the government claims that the Eleventh Circuit would have reached a different outcome here—affirming the convictions—had it applied the plurality test instead.

Pet. 16. The government is wrong. The plurality rule, like Justice Kennedy's rule, compels the reversal of respondents' convictions.

a. Justice Scalia's plurality opinion addressed both "wetlands" and "tributaries." With respect to wetlands, the plurality focused on the textual problem that *lands* are not *waters*: "The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction." *Rapanos*, 547 U.S. at 734.[4] In concluding that wetlands that are remote from covered waters are *not* within the CWA's reach, the plurality contrasted remote wetlands to those that are *adjacent* to water. *Id*. at 742. It reasoned that the CWA applies to wetlands when they cannot be readily distinguished from *abutting* covered waters. Therefore, on the plurality's view, establishing that wetlands are within the Act's coverage requires two findings:

> First, that 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); and second, that the wetland has a continuous surface connection

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[4] *See also Rapanos*, 547 U.S. at 731 ("[T]he CWA authorizes federal jurisdiction only over 'waters.'" (quoting 33 U.S.C. § 1362(7)); *id.* at 734 ("That limited effect includes, at bare minimum, the ordinary presence of water."); *id*. at 738 ("The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land . . . ."); *id*. at 739 n.9 (criticizing Justice Kennedy's concurring opinion because it allows the CWA to interfere with "traditional state land-use regulation.").

> with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

Id. (emphasis added; alteration in original).

The plurality disclaimed any intention to set forth a test, such as the one urged by the government, that addresses every requirement for *all waters* covered by the Act. *Id.* at 731. It did, however, address the government's expansive definition of "tributaries" (*id.* at 725–28) and describe the *minimum* characteristics of the waters that are within the Act's coverage in the course of its wetland analysis: "[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; ellipses and alterations in original) (quoting Webster's Second 2882). By clarifying that these are the "only" covered waters, the plurality made clear that temporary waters, manmade ditches and drains (which were the "tributaries" on which the government relied in *Rapanos, see id.* at 729) are not covered. But the plurality did not conclude that all waters meeting its description are necessarily covered. In fact, the plurality expressly clarified that "relatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." *Id*. at 736 n.7 (emphases in original).

b. The government now mistakenly argues the opposite view: that the plurality rule would allow it to prosecute any discharge into *any* relatively permanent water merely because it is possible to trace its surface flow, however slight, from the point of discharge through a limitless number of other non-

navigable waters, to a remote body of water that *is* navigable-in-fact. In particular, the government argues that the plurality's test would permit federal prosecution of any discharge into Avondale Creek based on evidence that this channelized, urban creek flowed "year-round" (or even if it flowed only seasonally) so long as it "ultimately fed into a traditional navigable water," irrespective of the distance or the number of barriers or other non-navigable water bodies between the two. Pet. 27.

The plurality squarely rejected this boundless knee-bone's-connected-to-the-thigh-bone approach to the definition of navigable waters. First, the plurality explained, the Act's reference to "the waters" precludes the notion that it covers *all* waters: "The use of the definite article ('the') and the plural number ('waters') shows plainly that § 1362(7) does not refer to water in general." *Rapanos*, 547 U.S. at 732. Then, the plurality approvingly explained that "the lower courts do not generally rely on characterization of intervening channels as 'waters of the United States' in applying" the CWA's prohibition of unauthorized discharges. *Id*. at 745. Rather, "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates [the Act], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.* at 743 (emphasis in original) (citing *United States v. Velsicol Chem. Corp*., 438 F. Supp. 945, 946-947 (W.D. Tenn. 1976); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (10th Cir. 2005)). It is the fact that pollutants in those cases naturally made their way from a point source to a navigable-in-fact water that triggered the Act's pro-

visions.[5] This reasoning demonstrates that waters downstream are *not* covered simply because they are downstream.[6]

c. Contrary to the government's relentlessly expansive position, the touchstone of the plurality rule is physical proximity between a point of discharge and navigable-in-fact water. *See, e.g.*, *Rapanos*, 547 U.S. at 742 ("*only* 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") (emphasis in original), 748 ("'adjacent' as used in *Riverside Bayview* is not ambiguous between 'physically abutting' and merely 'nearby'") & 755 ("Wetlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable*

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[5] For this reason, the plurality would recognize jurisdiction over discharges if the government had "prove[d] that the contaminant-laden waters ultimately reach[ed] covered waters." *Rapanos*, 547 U.S. at 745. As the court of appeals correctly explained, however, the government presented absolutely "no evidence" of the "effect that Avondale Creek's waters had or might have had on the Black Warrior River," Pet. App. 4a, much less evidence of the effect that the discharges themselves had on that navigable water. "Indeed, the district court observed that there was no evidence of any actual harm or injury to the Black Warrior River." *Id.*

[6] Indeed, the plurality specifically concluded that "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States'" are not covered simply because of their connection. *Id*. at 742.

from waters of the United States") (emphasis in original).

The plurality's analysis of the "tributaries" that had carried the discharges to the wetlands in *Rapanos*, and of the lower court cases that had accepted the government's expansive view of tributaries, leave no doubt that the reading now advanced by the government is untenable. The plurality's repeated references to "adjacency" clearly conveyed that tributaries must be physically proximate to a navigable-in-fact waterway to be covered by the Act without further inquiry, and that discharges into more remote waters are not covered by the Act unless the government affirmatively proves that any pollutants discharged in them actually reached a navigable waterway. *Id*. at 742–45.

In fact, the government is now back in Court ascribing to the plurality—incredibly—the type of "expansive definition of tributaries" that the plurality was not content merely to reject, but that it also, and with great effect, lampooned. Indeed, some of the lower court decisions that the plurality expressly rejected as inconsistent with *SWANCC* involved tributaries that were *less* remote than those involved in this case. *See* 547 U.S. at 725–26. Of particular relevance here, the plurality ridiculed the government's "sweeping assertions of jurisdiction" over a tributary in *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003), which the plurality described as "a 'roadside ditch' whose water took 'a winding, thirty-two-mile path to the Chesapeake Bay[.]'" *Id*. at 726–27. It strains credulity to think the plurality would uphold federal jurisdiction over the conduct prosecuted here—discharges into a shallow, channelized creek separated from the Black Warrior River by more

than forty-five miles, two additional intrastate tributaries, a dam, and a waterfall—where in *Deaton* there was a continuous path of tributaries from the ditch on the defendant's property to a navigable water (the Wicomico River) just *eight* miles away. 332 F.3d at 702 (further noting that "the Wicomico River flows into the Chesapeake Bay, a vast body of navigable water").

Notably, the other side of the circuit split that brought *Rapanos* to this Court was a Fifth Circuit case rejecting *Deaton*. The Fifth Circuit had concluded that the government's expansive definition of tributaries was "unsustainable under *SWANCC*," and had held that a body of water is subject to federal regulation only if it is "actually navigable or *adjacent* to an open body of navigable water." *United States v. Needham (In re Needham)*, 354 F.3d 340, 345–46 (5th Cir. 2003) (citation and internal quotation marks omitted; emphasis added); *see also id*. at 347 ("[T]he term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway.").

Thus, as *Rapanos* came to this Court, one side of the circuit split held that, under *SWANCC*, waters that were not navigable-in-fact could be covered by the CWA only if they were adjacent to a navigable-in-fact waterway; the other side of the split had been persuaded by the government to disregard *SWANCC* to hold that "tributaries," "wetlands," and even a patch of desert were covered by the CWA if the government could point to some "hydrological connection" to a navigable-in-fact waterway. Although even

a casual reader of the opinions that supported the judgment in *Rapanos* would conclude that the five Justices in the majority rejected the government's "hydrological connection" test, the government now imaginatively contends that the four Justices in the plurality actually *accepted* that test, but merely qualified it slightly to require a "surface" hydrological connection.

d. The plurality also stressed Congress' intent "to recognize, preserve, and protect the primary responsibilities and rights of States" to control pollution and "'plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" 547 U.S. at 722–23 (quoting the CWA). The government's theory of the CWA—which embraces every purely intrastate, "relatively permanent," not-navigable-in-fact tributary that is eventually connected to a navigable water through a potentially limitless number of like intrastate tributaries—is precisely the type of "expansive interpretation" that the plurality condemned because it "would 'result in a significant impingement of the States' traditional and primary power over land and water use.'" *Id*. at 737–38 (quoting *SWANCC*, 531 U.S. at 174).

It should come as no surprise that careful maintenance of this balance between federal and state authority is utterly inconsistent with the government's position. This Court came to that conclusion before *Rapanos*. It had previously recognized that "Congress intended the phrase 'navigable waters' to include at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *SWANCC*, 531 U.S. at 171 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S.

121, 133 (1985); internal quotations marks omitted). But in *SWANCC* the Court rejected the government's largely unbounded view of "what those waters might be," noting "it is also plausible, as petitioner contends, that Congress simply wanted to include all waters *adjacent* to 'navigable waters,' such as non-navigable tributaries and streams." 531 U.S. at 171 (emphasis added). The *Rapanos* plurality did not silently reverse course and validate the government's position that there need only be *some* surface connection, however remote and indirect, between a tributary and an impossibly distant navigable waterway.

e. There is yet another reason why the government's proof did not remotely meet the requirements set forth by the *Rapanos* plurality. The government failed to prove that Avondale Creek is "a relatively permanent body of water connected to traditional *interstate* navigable waters." *Rapanos*, 547 U.S. at 742 (emphasis added).

As the plurality noted, the Act requires proof of a discharge into waters "'*of the United States*.'" *Id*. at 731 n.3 (emphasis added). That "qualifier excludes intrastate waters, whether navigable or not." *Id.* Here, even if the Black Warrior River is navigable-in-fact, the government failed to prove, and—because the government successfully imposed its boundless view at trial—the jury never was asked to decide, that it is an *interstate* waterway. In fact, publicly available data from the United States Geological

Service show that the government could not have proven such a thing, even had it tried.[7]

f. So despite the government's conclusory assertions to the contrary, Avondale Creek is *outside* the coverage of the CWA according to the plurality rule, as well as Justice Kennedy's rule. Avondale Creek may be relatively permanent, and it might even have a remote hydrologic connection to a navigable-in-fact waterway—although the jury certainly never reached either conclusion. But Avondale Creek is not proximate to navigable-in-fact waters; it is over forty-five miles from the Black Warrior River. The two are separated by two other creeks, a lake, a waterfall, and a dam. Pet. App. 3a. There is no evidence that waters from Avondale Creek—much less any watery discharge therein—ever reached the Black Warrior River, much less that they reached a navigable-in-fact interstate waterway. *Id*. at 4a.

2. Perhaps recognizing the requirement of physical proximity, the government belatedly attempts to halve the distance between navigable-in-fact waters and Avondale Creek. If the government was consistent on one point before, during and after trial, it was the theory that discharges of pollutants into Avondale Creek violated the Clean Water Act

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[7] *See, e.g.*, USGS, Feature Detail Report on the Black Warrior River (available at http://geonames.usgs.gov/pls/gnispublic/-f?p=117:3:13481099116477521520::NO::P3_FID:159191) (documenting that the Black Warrior River begins and ends in Alabama and traverses six counties, all of which are in Alabama); State of Alabama, United States Department of Interior Geological Survey Map (available at https://store.usgs.gov/yimages-/PDF/37931.pdf).

because there is an indirect connection between Avondale Creek and the distant *Black Warrior River*. For the first time on appeal, after the *Rapanos* decision, the government belatedly attempted to switch streams, arguing that the discharges violated the CWA because a small portion at the end of the body of water into which Avondale Creek flows—Village Creek—allegedly is navigable-in-fact. Even on its assumption that this tactic is permissible, the government nonetheless concedes that Avondale Creek would be a distant "26.7 miles downstream" from the supposedly "navigable" waters. Pet. 8–9.

But this tactic is not remotely permissible. The government is precluded from attempting to rescue its invalid criminal convictions based on a theory that was never presented to, much less considered and decided by, the jury. *See, e.g.*, *Chiarella v. United States*, 445 U.S. 222, 236 (1980) ("[W]e cannot affirm a criminal conviction on the basis of a theory not presented to the jury . . . ."). As emphasized in all three of the reply briefs that respondents filed with the court of appeals, the jury was never asked to determine whether any part of Village Creek—which, in any event, is also wholly *intra*state—is navigable.

Indeed, at the sentencing hearing, the district court judge emphasized, with no dispute from the government, that "the only navigable stream that there was involved in this case was the Black Warrior River." Sent. Hr'g Tr. 138. And when the *defendants* attempted to cross-examine the government's expert witness to establish that Village Creek is *not* navigable-in-fact, the judge interrupted the examination to instruct the jury *not* to consider the navigability of Village Creek: "I want the jury to understand

that there's no proof required in this case that either Avondale Creek, nor Village Creek, has to be shown as being navigable." Trial Tr. 2243. Whether some jury could have theoretically concluded that Village Creek is navigable based on the sparse evidence that the government now attempts to marshal is irrelevant because "nothing in the instruction would have directed the jury, or even permitted it, to consider and apply that evidence in reaching its verdict." *Carella v. California*, 491 U.S. 263, 269 (1989) (Scalia, J., concurring). "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Id.* (quoting *Bollenbach v. United States*, 326 U.S. 607, 614 (1946)).

Even if the government *had* tried the case on the theory it waived, it failed to introduce evidence that would have allowed—much less compelled—a jury to conclude that Village Creek is navigable. The government contends that Village Creek is navigable because it is a "Section 10" water. Pet. 8, 9 & n.4.[8] With the benefit of more than three years of hindsight, the government now offers as its evidence of this freshly minted theory a single exhibit, GX177, a list of waterways that was drafted by the Army Corps of Engineers and not updated since 1977. Trial Tr. 2233–34. On its face, it states that Village Creek is navigable for just 1.3 miles—less than 3% of the creek's 44-mile length. And the exhibit contains

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[8] The government never even cited Section 10 in this case until *after* the court of appeals reversed respondents' convictions.

no explanation of how the Corps went about trying to define its own authority over Village Creek under Section 10. Consequently, it is impossible to tell from GX177 whether the Corps' decades-old list reflects the Corps' application of any legal standards—certainly any contemporary legal standards—relevant to the determination of navigability-in-fact.

Not surprisingly, the court of appeals declined the government's effort to salvage the convictions with a theory invented long after the jury had rendered its verdict. It held that the district court's instructions were erroneous because they did not "advise the jury to consider the chemical, physical, or biological effect of Avondale Creek on the *Black Warrior River*." Pet. App. 26a (emphasis added). At best the government comes before this Court with a disagreement over how the uncontroversial definition of *navigable-in-fact* waters should have been applied to the record in this case—a dispute surely unworthy of this Court's attention.

3. Even if the case *had* been tried on the theory that Village Creek was a navigable-in-fact waterway, and even if the government *had* introduced legally sufficient evidence under this theory, and even if the test favored by the plurality *would* allow prosecution of a discharge into Avondale Creek—none of which is true—together these things would *at most* establish that the court of appeals correctly rejected respondents' double jeopardy arguments for acquittal. There would nonetheless remain an independent reason that the outcome of this case—a new trial order—would remain unchanged. Even had there been legally sufficient evidence for a properly instructed jury to find guilt beyond a reasonable doubt (and there was not remotely that), respondents' convic-

tions would still have to be reversed because the government did not meet its burden of establishing that the undisputed instructional error was harmless beyond a reasonable doubt.

As the court of appeals explained, "[t]he problem in this case arises because the district court charged the jury that 'navigable waters' include 'any stream which may eventually flow into a navigable stream or river,' and that such stream may be *manmade* and flow '*only intermittently*[.]'" Pet. App. 11a (emphases added). Thus, it would not matter if natural origin and permanence were the only requirements for CWA coverage under the plurality's test, because the jury did not have *the opportunity to find* these elements proven. A judicial determination that a jury might have, or even probably would have, found those requirements to be met would blatantly violate respondents' right to trial by jury. A court simply may not usurp the jury's role by making *its own* findings to "cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." *Carella*, 491 U.S. at 269 (Scalia, J., concurring) (quoting *Cabana v. Bullock*, 474 U.S. 376, 384–85 (1986)). The violation of respondents' rights would be all the more egregious where—as here—the evidence that supposedly renders the error harmless beyond a reasonable doubt was the testimony of a single employee of one of the two government agencies that has defied this Court's rulings on the very question of whether a water is navigable within the meaning of the CWA.

There is another way in which the error cannot be considered harmless; it deprived respondents of a fair opportunity to rebut the government's case on

the navigable waters element. The record leaves no doubt that respondents repeatedly challenged the government's overbroad interpretation of the navigable-waters element from the outset, but the government successfully persuaded the trial judge of a sweeping view of the law that rendered irrelevant in that courtroom all the facts that the government now seeks to be taken as true. As the court of appeals noted, "defendants had no incentive to present evidence regarding a lack of continuous flow, because the district court clarified prior to trial that its definition of 'navigable waters' would include waters with either continuous or intermittent flow." Pet. App. 30a n.20.[9] Indeed, when defense counsel at-

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[9] The government feebly argues that respondents suffered no such prejudice because, in support of their position at trial that pollutant-laden discharges did not occur, their expert testified that "numerous species of fish and aquatic invertebrates" inhabited Avondale Creek "year-round" and "do not move out of the area." Pet. 10 n.5. The government does not explain how, even when viewed with the benefit of hindsight, testimony tending to show that certain species of fish were partial to the waters of Avondale Creek could have possibly helped respondents establish the entirely separate point of a lack of continuous flow between that industrial creek and a body of water dozens of miles away. Nor is it remotely apparent how the defense had a proper incentive to develop evidence on such an element when respondents were told that the jury was not going to be instructed to make such a finding.

For good measure the government fails to make clear that the defense exhibits it now cites *were never even admitted in evidence at trial*. *See id*. Rather, to the extent any were used it was solely for *demonstrative* purposes before a jury that was not properly instructed on how they could be used even if they *had* been admitted. *See* Trial Tr. 4402 (court allowed certain defense exhibits, which were added to the court record in an ancil-

[Footnote continued on next page]

tempted to establish, on cross-examination of the government's expert, that Avondale Creek and Village Creek were not navigable waters, the judge repeatedly interrupted to note, in the jury's presence, that the questions were irrelevant. Trial Tr. 2239–44. Thus, the instructional error is not harmless regardless of whether the plurality test may be applied and regardless of whether the government is entitled to defend the convictions using Village Creek as the navigable-in-fact water.

4. The government's ultimate rationale for review is "to clarify the operation of the *Marks* rule." Pet. 26. *Marks* sets forth the method for applying fragmented decisions of this Court: "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 v. United States*, 430 U.S. 188, 193 (1977) (ellipses in original; citation omitted).

The government's interpretation of *Marks* is wrong. *Marks* recognizes that precedent derives from *holdings*—that is, the judgments of courts—in cases or controversies, not from a prediction of future outcomes based on the sum of individual views from opposite sides of a ruling. The government acknowl-

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[Footnote continued from previous page]
lary hearing, to be used simply as demonstrative aids). It is impossible to conclude that the error of removing the correct definition of navigable waters from the jury was harmless under this or any other theory.

edges that "a dissenting opinion itself of course cannot supply a rule of law." Pet. 26. The government also observes that the *Marks* analysis "is not designed to gauge narrowness based on empirical predictions about the overall frequency with which various standards will produce a particular result." Pet. 23 n.8. Yet the government implausibly argues that a rule of law can be divined in just such a manner—by combining the views unsuccessfully advanced by dissenting Justices with the positions taken by fewer than a majority of the Justices concurring in a judgment. Pet. 25–26. Although dissenting opinions are frequently cited for the persuasiveness of their reasoning, the government's suggestion that they can be mixed and matched with other opinions to manufacture binding precedent is positively at odds with the most fundamental principles of *stare decisis*. *See, e.g.*, *Marks*, 430 U.S. at 193 (analyzing the holding from the "'position taken by *those Members who concurred* in the judgments . . . .'" (emphasis added; citation omitted)).

5. In any event, this case provides no opportunity to rule on *Marks*'s application to *Rapanos*. Because respondents prevail under both Justice Kennedy's and the plurality's interpretation of the CWA in *Rapanos*, there is no occasion to choose between the two.

In fact, for this very same reason the government vigorously opposes the petition for certiorari in *Lucas v. United States*, No. 07-1512 (filed on June 2, 2008), a case that also concerns the scope of the CWA after *Rapanos*. In that case, the court of appeals concluded that "the evidence presented at trial supports all three of the *Rapanos* standards and the jury's finding that" the defendants "were 'guilty beyond a

reasonable doubt'" of violating the CWA. *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008). In opposition to the defendants' petition for a writ of certiorari, the government argued that this Court should deny review of the *Lucas* decision because the result there would be the same "regardless of which of the *Rapanos* standards the Court found to be controlling." Br. for United States in Opp. to *Lucas* Cert. Pet., No. 07-1512, at 15 (filed Aug. 29, 2008). The government's argument applies fully here. Because resolution of the *Marks* issue would not alter the outcome reached below, review is not warranted.

II. REVIEW IS UNWARRANTED BECAUSE IT WOULD AFFECT FEW, IF ANY, OTHER CASES

Even if the outcome of this case could be affected, review of the application of *Marks* to *Rapanos* is premature and would affect few, if any, other cases. Despite the government's fixation on the issue, *Marks* is a sideshow. The relevant question here is not whether—as the government contends—*Marks* means the opposite of what it says, but, rather, what is the operative rule governing the reach of the CWA. Although the government acknowledges this point in a footnote, Pet. 16 n.6, it fails to explain why a majority of this Court is more likely to agree on a test today than it was a mere two years ago.

Moreover, there is not yet a conflict worthy of the Court's attention. As the Eleventh Circuit recognized, the Seventh and Ninth Circuits agree with the application of *Marks* to *Rapanos* that compelled the reversal of respondents' convictions below. Pet. App. 20a. There is but one outlying court of appeals: the First Circuit. The conflict it created in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), can be corrected by the First Circuit's *en banc* mechanism

without this Court's intervention. Unless and until another circuit agrees with the First Circuit's minority view, this "conflict" is not ripe for resolution by this Court. Indeed, if this issue were genuinely pressing enough to merit the Court's attention, the government would have been expected to acquiesce to review of *Johnson*, which created the conflict. Tellingly, the government *opposed* review of *Johnson*. Br. for United States in Opp. to *Johnson* Cert. Pet., No. 07-9 (filed Aug. 31, 2007).[10]

Further, if the plurality did construe the CWA to cover some waters that Justice Kennedy's rule would exclude, there is no reason to believe that a ruling that allows prosecution under the plurality's test, in addition to Justice Kennedy's, would affect but the rarest of cases. The government concedes that "the *vast majority* of waters encompassed by the *Rapanos* plurality's standard could *also* be shown to bear a 'significant nexus' to traditional navigable waters as that term is used in Justice Kennedy's concurrence." Pet. 28 (emphases added). The dissenting Justices in *Rapanos*, the Seventh Circuit, and the Ninth Circuit all reached a similar conclusion. *Rapanos*, 547 U.S. at 810 n.14 (assuming that Justice Kennedy's rule "will be controlling in most cases"); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007) (concluding that Justice Kennedy's rule would command a majority "in almost all cases");

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[10] One might fairly wonder, especially after the government opposed review in *Johnson*, why the government now seeks review here. On the evidence of *SWANCC* and *Rapanos*, the government intends to honor no interpretation that this Court might give the CWA unless the government wins.

United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006) (reasoning that Justice Kennedy's test would define waters of the United States more narrowly than the plurality test only in "a rare case"). Indeed, no court of appeals assessing the scope of the CWA after *Rapanos* has held that the plurality's rule would have brought within the Act any discharge that could not be pursued under Justice Kennedy's rule. Even the court of appeals here went no further than to opine that "the decision as to which *Rapanos* test applies *may* be outcome-determinative." Pet. App. 29a (emphasis added).[11]

Accordingly, to the extent the question presented "has spawned litigation across the nation" after *Rapanos*, *see* Pet. 18, the litigation to date has addressed an issue that remains purely hypothetical. It is too early to tell whether—much less, how often—the plurality's test would lead to a different result than Justice Kennedy's test. It therefore would be premature for the Court to grant certiorari based on this nascent circuit conflict.

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[11] The First Circuit did not hold that the availability of the plurality test would affect whether the discharge in *Johnson* fell within the Act's scope. It merely vacated summary judgment for the government and remanded for fact-findings that would enable the court to apply either test. 467 F.3d at 66.

III. THE QUESTION PRESENTED IS NOT RIPE FOR REVIEW BECAUSE THE RESPONSIBLE FEDERAL AGENCIES HAVE NOT YET PROMULGATED REGULATIONS THAT COULD MINIMIZE THE PRACTICAL DIFFICULTIES OF WHICH THE GOVERNMENT COMPLAINS

Recognizing—indeed, strategically making the case—that review *cannot* be grounded in an argument that the Eleventh Circuit's decision will significantly affect the scope of the Act, the government invites the Court to wade back into the CWA's bogs by arguing that the decision will have "significant practical ramifications" for enforcement agencies and landowners. Pet. 28–32. The same could be said, of course, about the interpretation of virtually any statute or regulation that agencies enforce. Review on that ground is particularly inappropriate here given the government's ability to ameliorate any such ramifications through agency rulemaking.

What sets the meaning of the term "navigable waters" apart from the multitude of issues offered up for this Court's review is not the issue's practical importance. Rather, it is the fact that the government yet again brings the issue to the Court before the agencies responsible for implementing the statute have so much as attempted to promulgate regulations that would carry out that duty in a manner consistent with the Court's rulings. As the Chief Justice observed little more than two years ago, the Court previously rejected the government's "view that its authority" under the CWA "was essentially limitless." *Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring) (referring to *SWANCC*). Yet after the Court repudiated the government's position, the Army Corps of Engineers and the Environmental

Protection Agency decided against revising their regulations to conform to the Court's decision. As the Chief Justice further explained, "[r]ather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power." *Id*. at 758. "The upshot" was "another defeat for the agency" in *Rapanos*. *Id*.

Now the government has returned to the Court in the same posture, seeking a judicial bandage where the appropriate response is to fashion a regulatory cure. Despite ample judicial guidance on how these agencies can accomplish what they purport to seek—a more efficient and straightforward process that would benefit the public and the regulated community, *see* Pet. 28–32—the EPA and the Corps *still* have not promulgated regulations reflecting "*some* notion of an outer bound to the reach of their authority." *Id*. (emphasis in original); *see also id*. at 812 (Breyer, J., dissenting) ("I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."). As Justice Kennedy's opinion noted, the government must "establish a significant nexus on a case-by-case basis" precisely because of "the potential overbreadth of the Corps' regulations." 547 U.S. at 782 (stating that case-by-case determinations are required "[a]bsent more specific regulations"). Instead of bringing their regulations into compliance with the law, the agencies once again ask *the Court* to bless their boundless interpretation of the CWA for the sake of "clear and administrable rules defining the scope of the CWA's coverage." Pet. 15.

As the Chief Justice predicted, "courts and regulated entities" have just begun "to feel their way on a case-by-case basis" through application of the CWA post-*Rapanos*. 547 U.S. at 758. "This situation is certainly not unprecedented. What is unusual in this instance, perhaps, is how readily the situation could have been avoided." *Id*. (citations omitted). Until the Corps and the EPA at least *try* to promulgate regulations that could avoid some of the "practical ramifications" of which they complain, this Court should reject the request to once again do that work for them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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