No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MCWANE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "significant nexus" standard described by the opinion concurring in the judgment in *Rapanos* v. *United States*, 547 U.S. 715, 767 (2006) (Kennedy, J.), establishes the exclusive rule of law for determining whether particular streams are "waters of the United States" covered by the Clean Water Act (CWA), 33 U.S.C. 1362(7), even in cases where CWA coverage has been established under the standards adopted by the four-Justice plurality in *Rapanos* and by the four *Rapanos* dissenters.

PARTIES TO THE PROCEEDINGS

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 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 and initially filed a notice of appeal in the court of appeals but subsequently dismissed his appeal and thus was not a party at the time of the court of appeals' decision. App., *infra*, 9a n.5. Thus, Robison would not appear to be a respondent in this Court pursuant to Supreme Court Rule 12.6 and would not appear to have an interest in the outcome of the petition.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-41a) is reported at 505 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. A petition for rehearing was denied on March 27, 2008 (App., *infra*, 42a-59a). On June 14, 2008, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 25, 2008. On July 18, 2008, Justice Thomas further ex-

tended the time to August 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are reproduced in the appendix to this petition: 33 U.S.C. 1311(a), 1319(c)(2)(A), 1362(7), and 1362(12); 33 C.F.R. 328.3(a); and 40 C.F.R. 230.3(s). App., *infra*, 60a-64a.

STATEMENT

Respondents, a manufacturing firm and two high-level executives, were convicted under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA), of conspiring to knowingly discharge pollutants into the waters of the United States and of a variety of substantive violations of the Act. In light of this Court's intervening decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006), the court of appeals vacated the convictions. While recognizing that its decision conflicted with the First Circuit's resolution of the same question, the court concluded that the phrase "waters of the United States" in the CWA bears the meaning identified in Justice Kennedy's opinion concurring in the judgment in *Rapanos*. The court further held that the jury instructions in this case did not embody Justice Kennedy's standard, and that the instructional error was not harmless.

Although the court of appeals acknowledged that the convictions might well have been affirmed under the interpretation of the phrase "waters of the United States" set forth by the four-Justice plurality in

Rapanos, and that "the decision as to which *Rapanos* test applies may be outcome-determinative in this case," App., *infra*, 29a, the court declined to decide that issue, *id.* at 29a-30a & n.20. Instead, the court found Justice Kennedy's opinion controlling, even though the four dissenting Justices in *Rapanos* made clear that they would find coverage under the CWA based on either the plurality's or Justice Kennedy's standard. *Id.* at 10a-25a. The court of appeals denied rehearing en banc over a written dissent. *Id.* at 42a-59a. That dissent noted that the panel's decision conflicts with this Court's decisions interpreting precedents with fragmented majorities, *id.* at 54a-55a; "gives no legal effect to a standard under which eight Justices would find CWA jurisdiction," *id.* at 43a; directly conflicts with the First Circuit's interpretation of *Rapanos*, *id.* at 59a; and concerns a matter of "exceptional importance," *id.* at 43a.

1. Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). Section 309(c)(2)(A) makes it a felony to commit a knowing violation of the CWA's discharge restrictions. 33 U.S.C. 1319(c)(2)(A). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) share responsibility for implementing and enforcing the CWA. The EPA and the Corps have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 40 C.F.R.

230.3(s) (EPA definition); 33 C.F.R. 328.3(a) (Corps definition). Those definitions encompass, *inter alia*, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 40 C.F.R. 230.3(s)(1), 33 C.F.R. 328.3(a)(1); "[t]ributaries" of traditional navigable waters, see 40 C.F.R. 230.3(s)(5), 33 C.F.R. 328.3(a)(5); and wetlands "adjacent" to other covered waters, see 40 C.F.R. 230.3(s)(7), 33 C.F.R. 328.3(a)(7).[1]

The CWA establishes two complementary permitting schemes. Section 402 authorizes the EPA, or a State with an approved program, to issue a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of pollutants other than dredged or fill material. See 33 U.S.C. 1342. Section 404 authorizes the Corps, or a State with an approved program, to issue a permit for the discharge of dredged or fill material. 33 U.S.C. 1344.

2. This Court has recognized that Congress, in enacting the CWA, "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987). In *Solid Waste Agency of*

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 40 C.F.R. 230.3(s), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, 40 C.F.R. 230.3(s)(1), this brief will refer to the latter as "traditional navigable waters."

Northern Cook County v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos*. *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See 547 U.S. at 729-730 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739 (plurality opinion), that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies, *ibid.*[2] Justice Kennedy interpreted

[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 547 U.S. at 732 n.5.

the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167); see *id.* at 779-780. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 810 & n.14 (Stevens, J., dissenting).

3. Respondents were convicted of discharging massive amounts of untreated industrial wastewater from a manufacturing plant into a stream that flowed yearround into other permanent streams that fed into traditional navigable waters.

a. Respondent McWane, Inc., is a large manufacturer of cast iron pipe, and respondents Delk and Devine are two high-level managers at McWane's Birmingham foundry. App., *infra*, 2a-3a. Over a period of years, respondents routinely discharged large quantities of untreated contaminant-laden wastewater from the foundry into a tributary of traditional navigable waters, in violation of the plant's CWA permit. *Id.* at 4a-6a. The operation of McWane's pipe-manufacturing machinery "utilizes a great deal of water," *id.* at 4a, and under each pipe-casting area was a basement to catch water that leaked out of the machines, *id.* at 5a. The water accumulating in the basements contained numerous contaminants, including hydraulic oil, excess iron, and trash. *Ibid.* When water levels in the basements rose too high, as they did on a weekly basis, that industrial wastewater had to be pumped elsewhere in order for the casting

machines to continue to manufacture pipe. *Id.* at 6a; Tr. 3037-3038.

McWane's NPDES permit for the Birmingham plant authorized the discharge of specified amounts of treated industrial wastewater into Avondale Creek from one discharge point (DSN001). App., *infra*, 5a. The permit also authorized the discharge of stormwater runoff from other discharge points at the plant (DSN002-DSN020). *Ibid.* The permit did not authorize the discharge of industrial wastewater from any point other than DSN001. *Ibid.*

By the late 1990s, McWane's Birmingham plant was in "disarray." App., *infra*, 5a-6a. Industrial wastewater regularly overflowed and "would then spill into the storm water runoff discharge points (DSN002-DSN020)," where it was not authorized for discharge under the permits, and would "flow into Avondale Creek." *Id.* at 6a. "One McWane employee described the extent of the * * * discharges as '[e]nough to drown a small village.'" *Ibid.*

The evidence also established the defendants' culpable knowledge and participation in a conspiracy. Defendants used diesel pumps and hoses, sometimes at night and during rainstorms to avoid detection, to pump wastewater directly into the stormwater drains, which emptied into Avondale Creek. Tr. 526, 1058, 1159, 1214-1215, 1361, 2890-2891. Respondent Delk "ordered McWane employees to pump process wastewater from the basements, despite knowing that the wastewater had nowhere to go but Avondale Creek," and he directed an employee to falsify a water sample. App., *infra*, 6a. Respondent Devine had actual knowledge of the terms of McWane's NPDES permit that he caused to be violated, but he stated that it would be "easier" for

McWane to pay fines than to fix the cause of its wastewater problems, and he directed a subordinate to lie to a state investigator about the cause of the discharges. *Id.* at 6a-7a, 34a.

The vast majority of the unpermitted discharges from the plant came from DSN002, a stormwater outfall pipe that empties directly into Avondale Creek approximately 1000 feet upstream from the creek's confluence with Village Creek.[3] Significant quantities of McWane's discharges were observed flowing into Village Creek, Tr. 147-148, 170-171, 189, 232, sometimes miles downstream, Tr. 1816-1818, 1860-1861, 2130-2132. The evidence showed Avondale Creek running white with pollution from bank to bank (GX76); revealed oil residue approximately six feet up Avondale Creek's bank at DSN002 (Tr. 254; GX15, GX24); and documented red pollutant plumes streaming into the creek (Tr. 251-252; GX24, GX25, GX27). Testimony and photographs from site visits during many different months over a two-year period showed a milky pollutant plume from Stormwater Outfall DSN002's point of discharge into Avondale Creek (GX35, GX37, GX53, GX63) and on into Village Creek (GX12, GX13, GX41, Tr. 258-260).

b. Avondale Creek flows into Village Creek. App., *infra*, 3a. From its confluence with Avondale Creek, Village Creek flows approximately 28 miles into and through Bayview Lake, which was created by damming Village Creek, where it joins the Locust Fork. *Ibid.* At a point 26.7 miles downstream from its confluence with

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[3] The parties agreed that Stormwater Outfall DSN002 was approximately 1000 feet upstream of the confluence of Avondale Creek with Village Creek. Compare Tr. 4479-4480, 4551, with CR 04-PT-199-S Docket Entry No. 87 (N.D. Ala. Sept. 23, 2004) (Defs.' J. Mot. at 10), DX90, DX1036.

Avondale Creek, Village Creek is a designated "Section 10 water" and thus a traditional navigable water for purposes of the CWA. GX177.[4] Further downstream, Village Creek flows into two other designated Section 10 waters (the Locust Fork and Black Warrior Rivers) and ultimately into the Gulf of Mexico. App., *infra*, 4a; GX177.

An EPA expert testified at respondents' trial that Avondale Creek is a perennial stream with a "continuous uninterrupted flow" into Village Creek. App., *infra*, 3a. The expert further testified "that there is 'a continuous uninterrupted flow' not only from Avondale Creek into Village Creek, but also from Village Creek through Bayview Lake and into Locust Fork, and ultimately into the Black Warrior River." *Id.* at 3a-4a; see *id.* at 16a; Tr. 2574-2575 (Avondale Creek is full of fish); Tr. 187 (stormwater management inspector testifying that Village Creek continues on after Bayview Lake); GX236 (United States Geological Survey map); GX240 (watershed map); Tr. 2230-2231 (EPA expert testifies about flow of Village Creek into and out of Bayview Lake); Tr. 183-186, 2236, 2247. Abundant additional uncontroverted evidence, including respondents' testimony and exhibits, established the perennial nature of, and sizable

[4] "Section 10 waters" are "navigable water[s] of the United States" subject to federal regulatory jurisdiction under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 and 403, and are among the traditional navigable waters covered by the CWA. See p. 4 & note 1, *supra*. Pursuant to its authority under 33 U.S.C. 401 and 403, and 33 C.F.R. Part 329, the Corps maintains a list of waters that it has determined qualify as "navigable waters of the United States."

flows in, Avondale and Village Creeks. See Tr. 236, 1114, 2027-2028, 4552-4554.[5]

c. In accordance with then-current Eleventh Circuit precedent, the jury at respondents' trial was instructed as follows:

> [A] "water of the United States" includes any stream which may eventually flow into a navigable stream or river. * * * The stream into which the discharge is made may be a natural or manmade [stream] and may flow continuously or only intermittently, as long as it may eventually flow directly or indirectly into a navigable stream or river whose use affects interstate commerce.
>
> A navigable stream or river is defined as one that is used or is susceptible of being used in its ordinary

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[5] The court of appeals suggested that respondents "had no incentive to present evidence regarding a lack of continuous flow." App., *infra*, 30a n.20. But in fact respondents, in an attempt to demonstrate that the extensive discharges of pollutant-laden waters could not have occurred, affirmatively sought to establish that Avondale Creek provides year-round habitat for numerous species of fish and aquatic invertebrates. See, *e.g.*, DX914-DX938; DX952-DX972, Tr. 4357, 4377-4380, 4408-4409. Respondents' expert testified that Avondale Creek supports a resident population of fish that do not move out of the area and that remain year-round in the segment of Avondale Creek next to McWane's Birmingham plant. See Tr. 4431-4435, 4476-4477; see also Tr. 75-76 (opening statement discussing abundance of fish at the McWane outfall); Tr. 4816 (same during closing argument). The court of appeals also noted that the EPA expert did not conduct "tracer tests" to confirm that water in the Avondale Creek flowed to the Black Warrior River, and that the expert was able to walk the length of Avondale Creek because of its low water level. App., *infra*, 30a n.20. Neither of those observations undercuts the overwhelming proof that Avondale Creek is a perennial stream connected to traditional navigable waters through other perennial tributaries.

> condition, as a highway for interstate commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

App., *infra*, 11a-12a (emphasis omitted).

d. After a six-week jury trial, respondents were convicted of, *inter alia*, multiple substantive CWA violations and one count of conspiracy to violate the CWA. App., *infra*, 8a-9a. McWane was sentenced to 60 months of probation and a $5,000,000 fine. *Id.* at 10a. Delk was sentenced to 36 months of probation and a $90,000 fine. *Id.* at 9a. Devine was sentenced to 24 months of probation and a $35,000 fine. *Id.* at 9a-10a.

4. Based on this Court's intervening decision in *Rapanos*, the court of appeals reversed respondents' CWA convictions and remanded for a new trial on those counts. App., *infra*, 1a-41a.

a. Because no opinion commanded a majority in *Rapanos*, the court of appeals turned to *Marks* v. *United States*, 430 U.S. 188 (1977), in which this Court stated that, "[w]hen 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 judgment[] on the narrowest grounds." *Id.* at 193 (internal quotation marks omitted). The court of appeals in this case construed that language in *Marks* to mean that, in identifying the controlling rule of law that emerged from *Rapanos*, a lower court must ignore the views of those Justices who dissented from the *Rapanos* Court's disposition of the case. See App., *infra*, 23a-24a. As between the plurality's standard and that of Justice Kennedy, the court deemed Justice Kennedy's "significant nexus" standard to be the "narrowest" grounds for the decision in *Rapanos* because "Jus-

tice Kennedy's test, at least in wetlands cases such as *Rapanos*, will classify a water as 'navigable' more frequently than Justice Scalia's test." *Id.* at 25a.

The court of appeals therefore "adopt[ed] Justice Kennedy's 'significant nexus' test as the governing definition of 'navigable waters' under *Rapanos*." App., *infra*, 25a. The court recognized that the First Circuit has "determined that it would uphold CWA jurisdiction in those cases in which *either* Justice Scalia's test or Justice Kennedy's test was satisfied." *Id.* at 22a (citing *United States* v. *Johnson*, 467 F.3d 56, 64-65 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007)). The court believed, however, that the First Circuit's approach was inconsistent with *Marks* because the First Circuit had taken into account the views of the *Rapanos* dissenters in identifying the rule of law that *Rapanos* established. See *id.* at 22a-23a, 29a-30a.

b. The court of appeals held that the jury instruction given at respondents' trial was not consistent with Justice Kennedy's "significant nexus" standard. The court explained that the jury instruction that defined the term "water of the United States" did not use the term "significant nexus" and did not "advise the jury to consider the chemical, physical, or biological effect of [the nonnavigable tributary] on the [traditional navigable water]." App., *infra*, 26a. The court further held that the instructional error was not harmless because the government had presented no evidence that would demonstrate a "significant nexus" between the tributary into which pollutants were discharged and the traditional navigable water into which the tributary flows. See *id.* at 26a-28a.

The court of appeals noted that "the district court's jury instruction was still erroneous even under Justice

Scalia's plurality opinion, because the instruction allowed the jury to find that [respondents'] discharges were into a 'navigable water' even if the jury also concluded that Avondale Creek flowed 'only intermittently.'" App., *infra*, 29a. The court recognized, however, that, under the *Rapanos* plurality's standard, "that error may well have been harmless, because [an EPA expert had] clearly and unambiguously testified that there is a continuous, uninterrupted flow between Avondale Creek and the Black Warrior River." *Ibid.* The court therefore stated that "the decision as to which *Rapanos* test applies may be outcome-determinative in this case." *Ibid.* The court did not resolve whether the convictions would have to be affirmed under the plurality's standard, however, because of its conclusion that only Justice Kennedy's opinion mattered. *Id.* at 30a n.20.

c. The court of appeals denied rehearing en banc, with two judges dissenting. App., *infra*, 42a-59a. The dissenting judges noted that the panel's decision conflicted with the First Circuit's ruling in *Johnson*. *Id.* at 59a. They further concluded that the panel's analysis "fails as a matter of common sense," since it precludes the CWA's application in circumstances—*i.e.*, where the *Rapanos* plurality's standard is shown to be satisfied but the plaintiff has not proved a "significant nexus" to traditional navigable waters within the meaning of Justice Kennedy's opinion—where eight Members of this Court would hold that the Act applies. *Id.* at 43a; see *id.* at 57a (describing that outcome as "bizarre"). Those judges also explained that the panel's error was one of "exceptional importance" because "[t]he large number of water bodies and wetlands in the [Eleventh Circuit], coupled with the significant pace of development, sug-

gests that later disputes over the scope of federal authority under the Act may occur with some regularity." *Id.* at 58a.

REASONS FOR GRANTING THE PETITION

In *Rapanos* v. *United States*, 547 U.S. 715 (2006), this Court issued a highly fractured 4-1-4 decision on the meaning of the term "waters of the United States" in the CWA. As the Chief Justice explained, "no opinion [in *Rapanos*] commands a majority of the Court on precisely how to read Congress' limits on the reach of the [CWA]." *Id.* at 758 (Roberts, C.J., concurring). Since the issuance of that decision, the courts of appeals have struggled to identify the controlling rule of law that emerged from the multiple opinions. The Eleventh Circuit's decision in this case creates an acknowledged circuit conflict on this seminal issue. App., *infra*, 20a, 23a; see *id.* at 58a-59a. Moreover, the court of appeals' analysis misinterprets *Rapanos* and this Court's precedents governing how to interpret fractured decisions; creates "bizarre outcome[s]," *United States* v. *Johnson*, 467 F.3d 56, 64 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007); will seriously impede enforcement of the CWA; and presents an issue of exceptional importance both to the government and to the regulated community. That decision should not be permitted to stand.

Abundant evidence showed that the stream into which respondents discharged pollutants flowed year-round and that it fed, through perennial waters, into a traditional navigable river. That evidence proved that the site of the discharges was part of the "waters of the United States" under the standards endorsed by eight Members of this Court in *Rapanos*—the four-Justice plurality and the four dissenters. The Eleventh Circuit

nevertheless held that, even if respondents' discharges were covered by the CWA under the standards supported by eight Justices, respondents' convictions must be reversed. The court based that holding on the fact that the jury instructions failed to embody the "significant nexus" standard that Justice Kennedy articulated in his *Rapanos* concurrence, and on the court's conclusion that the instructional error was not harmless.

As the court of appeals itself recognized, the court's determination that CWA coverage may be established *only* under Justice Kennedy's standard squarely conflicts with the First Circuit's decision in *Johnson*, which held that coverage may be shown either under that standard or under the standard adopted by the *Rapanos* plurality. In allowing the interpretation of a single Justice to prevail over the contrary views of the other eight Members of this Court, the Eleventh Circuit's decision produced what the court in *Johnson* termed a "bizarre outcome." 467 F.3d at 64. Indeed, as the dissenters from the denial of rehearing en banc explained, "this case has been remanded for a new trial even though, as the panel acknowledges, the current record may well establish jurisdiction under the [*Rapanos*] plurality's test, which eight Justices agree encompasses waters covered by the Act." App., *infra*, 57a. That result warrants this Court's review.

The question presented concerns a matter of "exceptional importance." App., *infra*, 58a (Wilson, J., dissenting from the denial of rehearing en banc). Both in deciding whether to pursue enforcement actions and in providing regulated parties with guidance about the legality of proposed discharges, the Corps and EPA need clear and administrable rules defining the scope of the CWA's coverage. The circuit conflict produced by the Eleventh

Circuit's decision creates substantial uncertainty over the appropriate standard for deciding whether particular tributaries and adjacent wetlands are "waters of the United States." That confusion will inevitably hinder the agencies' ability to implement the Act in a uniform and workable fashion. Thousands of bodies of water and innumerable individuals and companies are affected by the extent of federal protection of perennially flowing waters that feed through tributary systems into traditional navigable waters. Indeed, "in view of the geography of the [pertinent] states," the potential impact of this decision in the Eleventh Circuit alone is enormous. *Ibid.* Review by this Court is necessary to resolve the circuit conflict, clarify the applicable law, and ensure that waters covered by the CWA under the views of eight Justices do not lose the Act's protections because of a misinterpretation of *Rapanos*.[6]

A. The Court Of Appeals' Decision Creates An Acknowledged Circuit Conflict Over The Meaning Of *Rapanos*

As the court of appeals acknowledged, its holding that CWA coverage may be established only under the *Rapanos* plurality's standard directly conflicts with the First Circuit's decision in *Johnson*. See App., *infra*, 20a-23a, 29a-30a. In this case, the resolution of that question is likely to be "outcome-determinative" in deciding whether respondents' convictions are upheld. *Id.* at 29a.

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[6] Of course, if this Court grants certiorari, it is possible that five Justices may agree on what standard is appropriate for determining what streams are "waters of the United States" under the CWA. At a minimum, however, the Court should resolve the circuit conflict over the rule of law that emerges from *Rapanos*.

As the court of appeals recognized, an EPA expert testified "clearly and unambiguously" at respondents' trial that the tributary into which respondents discharged pollutants flowed year-round and that it fed into traditional navigable waters. App., *infra*, 29a. That testimony, as well as abundant other record evidence (see pp. 8-10, *supra*), overwhelmingly established CWA coverage of the discharges under the standards endorsed by the four-Justice *Rapanos* plurality, see 547 U.S. at 739, 742, and by the four dissenting Justices, see *id.* at 810 (Stevens, J., dissenting). The court of appeals did not decide that issue, however, because it held that the *Rapanos* plurality's standard is legally irrelevant and that Justice Kennedy's "significant nexus" standard is the controlling rule of law that lower courts must use in applying the CWA to tributaries of traditional navigable waters. App., *infra*, 29a-30a & n.20.

In *Johnson*, by contrast, the First Circuit "conclude[d] that the United States may assert jurisdiction over [particular] sites if it meets either Justice Kennedy's legal standard or that of the [*Rapanos*] plurality." 467 F.3d at 60. The court explained that, because the four *Rapanos* dissenters would find federal regulatory jurisdiction in any case where either of those standards is shown to be satisfied, that approach "provides a simple and pragmatic way to assess what grounds would command a majority of the Court." *Id.* at 64. The court also observed that, in a case where the plaintiff has established CWA coverage under the *Rapanos* plurality's standard but has not proved a "significant nexus" to traditional navigable waters within the meaning of Justice Kennedy's concurrence, treating Justice Kennedy's standard as controlling would produce "a bizarre outcome—the court would find no federal juris-

diction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation." *Ibid.* Thus, with respect to waters that have been shown to satisfy the plurality's standard for CWA coverage but have not been shown to satisfy that of Justice Kennedy, the First Circuit has unequivocally held that the CWA applies, and the Eleventh Circuit has unequivocally held that it does not.

The question that has divided the circuits is a recurring one that has spawned litigation across the nation. Two other circuits have discussed, without definitively resolving, the question whether the CWA applies to waters that have been shown to satisfy the *Rapanos* plurality's standard but not that of Justice Kennedy. In *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), cert. denied, 128 S. Ct. 45 (2007), the court remanded for further proceedings in light of *Rapanos* and stated that "Justice Kennedy's proposed standard * * * must govern the further stages of this litigation." 464 F.3d at 725. The court recognized, however, that "a rare case" may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality)," *ibid.*, and it did not specify what it regarded as the proper disposition of such a case.

Similarly in *Northern California River Watch* v. *City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), cert. denied, 128 S. Ct. 1225 (2008), the court stated that Justice Kennedy's concurring opinion in *Rapanos* constitutes "the narrowest ground to which a majority of the Justices would assent if forced to choose *in almost all cases*," and that the *Rapanos* concurrence "provides the controlling

rule of law *for our case*." 496 F.3d at 999-1000 (emphases added). The Ninth Circuit thus refrained from stating a categorical rule concerning the import of the fractured decision in *Rapanos*, and it did not specifically discuss the proper resolution of a coverage dispute involving waters that have been shown to satisfy the *Rapanos* plurality's standard but not that of Justice Kennedy.[7] But its decision illustrates the difficulty that courts have encountered in identifying the legal principles established by *Rapanos*.

B. Waters That Satisfy The Standards Of Eight Members Of The Court In *Rapanos* Are Covered Under A Proper Interpretation Of The CWA

The Eleventh Circuit erred in concluding that Justice Kennedy's "significant nexus" standard for determining CWA coverage provided the exclusive legal rule of decision in *Rapanos*. In holding that the government had failed to establish CWA coverage of the waters into which respondents discharged massive amounts of pollutants, the Eleventh Circuit did not question the government's contention that the waters were encompassed by the applicable regulatory definition. Under the regulations promulgated by the EPA and the Corps, which define the term "waters of the United States" to include "[t]ributaries" of traditional navigable waters, see 40 C.F.R. 230.3(s)(5), 33 C.F.R. 328.3(a)(5), the stream into which respondents discharged pollutants was unambiguously covered by the CWA. Rather, the court of appeals construed this Court's decision in *Marks* v. *United*

[7] Analysis of that question was unnecessary because the Ninth Circuit held that Justice Kennedy's standard *was* satisfied and that the wetlands at issue therefore were covered by the CWA. See 496 F.3d at 1000-1001.

States, 430 U.S. 188 (1977), to require that Justice Kennedy's "significant nexus" standard be treated as "the governing definition of 'navigable waters' under *Rapanos*." App., *infra*, 25a; see *id.* at 19a-25a. That conclusion is incorrect and at odds with this Court's own precedents.

1. In *Marks*, this Court stated that, "[w]hen 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 judgment[] on the narrowest grounds." 430 U.S. at 193 (internal quotation marks omitted). In some (if not most) fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment will be the only controlling principle on which a majority of the Court's Members agree. That was true in *Marks* itself, see *id.* at 193-194, where this Court discussed its prior fractured decision in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). In *Memoirs*, a three-Justice plurality concluded that the First Amendment precludes the States from banning sexually explicit books "unless [a book] is found to be *utterly* without redeeming social value." *Id.* at 419 (opinion of Brennan, J., joined by Warren, C.J., and Fortas, J.). Justices Black and Douglas, who concurred in the judgment (see *id.* at 421, 424), would have held "that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 193.

The Court in *Marks* stated that the rule of law adopted by the *Memoirs* plurality, rather than the "broader grounds" (*Marks*, 430 U.S. at 193) urged by Justices Black and Douglas, "constituted the holding of

the [*Memoirs*] Court and provided the governing standards." *Id.* at 194. Treatment of the *Memoirs* plurality's rationale as the controlling legal rule served to effectuate the will of a majority of this Court. As the District of Columbia Circuit has explained, "[b]ecause Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices: *Marks*' 'narrowest grounds' approach yielded a logical result." *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S. 1229 (1992).

The approach described in *Marks* will reliably effectuate the views of a majority of the Court, however, only when one ground of decision offered in a fractured ruling is "narrower" in the sense of being "a logical subset of other, broader opinions." *Johnson*, 467 F.3d at 63 (quoting *King*, 950 F.2d at 781). If Justice Kennedy's "significant nexus" standard were "narrower" than the plurality's standard in that sense—*i.e.*, if, in every case where Justice Kennedy's standard would preclude CWA coverage, the plurality's approach would lead to the same outcome (but the plurality's approach would also preclude jurisdiction in some cases where Justice Kennedy's would not)—Justice Kennedy's standard would appropriately be treated as the controlling rule of law that would command a majority of the Court where it applied. As the First Circuit recognized in *Johnson*, however, "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the [*Rapanos*] plurality would limit jurisdiction" because Justice Kennedy's standard will exclude at least some waters that the plurality would find to be covered. 467 F.3d at 64. The court explained that "a small sur-

face water connection to a stream or brook" would satisfy the plurality's standard for CWA coverage but might not constitute a "significant nexus" to traditional navigable waters under Justice Kennedy's standard. *Ibid.* The Seventh Circuit has likewise noted that, in "a rare case," Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1." *Gerke*, 464 F.3d at 725.

Indeed, the Eleventh Circuit's resolution of this case was premised on the court's understanding that some forms of proof may satisfy the *Rapanos* plurality's standard for CWA coverage but not that of Justice Kennedy. The court observed that, in its view, the government did not establish a "significant nexus," but that the proof may well have demonstrated a year-round flow between Avondale Creek and traditional navigable waters. See App., *infra*, 27a (explaining that, "[a]lthough [a government witness] testified that in his opinion there is a continuous uninterrupted flow between Avondale Creek and the Black Warrior River, he did not testify as to any 'significant nexus' between Avondale Creek and the Black Warrior River"); *id.* at 29a (noting that "[t]his case arguably is one in which Justice Scalia's test may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test"). And while the Eleventh Circuit reversed respondents' convictions under Justice Kennedy's "significant nexus" standard, the court recognized that affirmance of the convictions might be appropriate under the *Rapanos* plurality's standard. See *ibid.* (stating that "the decision as to which *Rapanos* test applies may be outcome-determinative in this case"). By contrast, if the court of appeals had viewed Justice Kennedy's standard as a logical subset of the plurality's, the court's conclusion that the instructional error in this

case "may well have been harmless" under the plurality's standard, *ibid.*, would have applied *ipso facto* to the harmlessness inquiry under Justice Kennedy's standard.[8]

Neither precedent nor logic supports the court of appeals' conclusion that Justice Kennedy's "significant nexus" standard must be treated as the controlling rule of law even when it yields an outcome inconsistent with a controlling legal principle endorsed by eight Members of this Court. In *Marks* itself, the purpose and effect of treating the *Memoirs* plurality's rationale as the "narrowest" ground of decision was to give controlling effect to a legal rule—*i.e.*, that books possessing any redeeming social value may not be prohibited on the basis of their prurient appeal—on which a majority of the *Memoirs* Court had agreed. See pp. 20-21, *supra*. Here, by contrast, the Eleventh Circuit's flawed application of *Marks* thwarted rather than effectuated the will of a majority of this Court's Members. *Marks* does not support that result, and the court of appeals offered no other justification for that "bizarre outcome." *Johnson*, 467 F.3d at 64; see App., *infra*, 57a; *King*, 950 F.2d at 782 ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force.").

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[8] The Eleventh Circuit incorrectly treated the "significant nexus" standard as the narrower of the two competing rationales based solely on the court's conclusion that "Justice Kennedy's test, at least in wetlands cases such as *Rapanos*, will classify a water as 'navigable' more frequently than [the plurality's] test." App., *infra*, 25a. But the *Marks* test is designed to identify a legal principle that enjoys the support of a majority of the Court in a fragmented decision. It is not designed to gauge narrowness based on empirical predictions about the overall frequency with which various standards will produce a particular result.

2. The Eleventh Circuit read *Marks* categorically to preclude consideration of the views of the *Rapanos* dissenters in identifying the legal rules established by that decision. See App., *infra*, 23a-24a. Taken in isolation, the *Marks* Court's statement that the "holding" of a fractured decision is the "position taken by those Members who concurred in the judgment[] on the narrowest grounds," 430 U.S. at 193 (internal quotation marks omitted), might suggest that lower courts, in determining the precedential effect of a fractured decision of this Court, should ignore the views of dissenting Justices. This Court has subsequently recognized, however, that in some cases the *Marks* test is "more easily stated than applied to the various opinions supporting the result," *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility'" in every case, *ibid.* (quoting *Nichols*, 511 U.S. at 745-746). Cf. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Grutter* and *Marks*, and noting that "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis" in determining whether particular waters are covered by the CWA under the fractured decision in *Rapanos*).

Indeed, as the judges who dissented from the denial of rehearing en banc pointed out (see App., *infra*, 54a-55a), this Court has often considered dissenting Justices' views in order to ascertain the legal principles established by prior fractured decisions. See *United States* v. *Jacobsen*, 466 U.S. 109, 115-118 (1984) (holding that the controlling legal standard in a prior case was established by a principle adopted by two Justices who wrote separately in the majority and four Justices who

joined the dissent); *Alexander* v. *Choate*, 469 U.S. 287, 293 & nn.8-9 (1985) (deriving the "two-pronged holding" of a prior case from a two-Justice opinion announcing the judgment of the Court, two opinions concurring in the judgment, and two dissenting opinions); *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement among the plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks*, as the holding of the Court); cf. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1007 (2008) (analyzing an opinion in a prior case concurring in part and concurring in the judgment, and a separate opinion in the same prior case concurring in part and dissenting in part, to identify a legal conclusion of "five Justices" to which the Court in the later case "adhere[d]"); *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1667, 1668 n.15, 1671 (2007) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 413-414 (2006) (same); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same).

In a fractured decision like *Rapanos*, no opinion for the Court exists and neither the plurality nor the concurring opinion is a "logical subset" of the other. In those circumstances, the principles on which a majority of the Court agreed may be illuminated by consideration of the dissenting Justices' views, particularly when, as here, the dissenting Justices have specifically identified the standards they would embrace. See *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting). Dissenting opinions that endorse legal principles articulated by Justices voting in the majority in a fractured decision such as

Rapanos may thus help to identify legal rules on which a majority of the Court agrees, and may thereby provide a basis for identifying the rule of law created by the case. Even though a dissenting opinion itself of course cannot supply a rule of law, consideration of the dissenting Justices' views, in cases with fragmented opinions and no narrowest ground for decision as in a traditional *Marks* analysis, may further the underlying purpose of the specific rule announced in *Marks*, *i.e.*, to effectuate the position of a majority of the Court.[9]

3. Review is warranted in this case not only to clarify the operation of the *Marks* rule—which is itself an important guidepost for interpreting this Court's decisions—but also to establish that waters that satisfy the *Rapanos* plurality's standard are "waters of the United States" under the CWA, as eight Justices in *Rapanos* agreed. The nation's waters include innumerable perennial or relatively permanent tributaries that connect to traditional navigable waters. The health and vitality of

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[9] Just as the views of eight Members of the Court should control in establishing CWA coverage on the facts of this case, the government could also establish CWA coverage of a particular water body by demonstrating a "significant nexus" to traditional navigable waters within the meaning of Justice Kennedy's *Rapanos* concurrence. Such a demonstration would be sufficient under the views expressed by a majority of the *Rapanos* Court (Justice Kennedy and the four dissenters), whether or not the government also satisfied the plurality's standard for CWA coverage. See *Johnson*, 467 F.3d at 66 ("The federal government can establish jurisdiction over [particular] sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*."); *id.* at 64 (noting that this approach "provides a simple and pragmatic way to assess what grounds would command a majority of the Court"). This case, however, does not present the question whether the CWA encompasses waters that are shown to satisfy Justice Kennedy's standard but are not shown to satisfy the plurality's.

those interconnected waters depends critically on protection of the tributary systems from pollutants that naturally wash downstream.

In this case, abundant record evidence demonstrated that the stream into which respondents discharged pollutants flowed year-round and that it ultimately fed into a traditional navigable river. See p. 10, *supra*. That evidence established that the stream was part of "the waters of the United States" under the standards adopted both by the four-Justice *Rapanos* plurality and by the four *Rapanos* dissenters. See 547 U.S. at 739, 742 (plurality opinion); *id.* at 810 & n.14 (Stevens, J., dissenting). Although the instructions given at trial would have permitted the jurors to find respondents guilty even if they concluded that Avondale Creek flowed intermittently, that error was harmless, under the standards adopted by eight Members of this Court in *Rapanos*, in light of the compelling record evidence presented to the jury that the flow was in fact perennial.

The court of appeals acknowledged that, under the *Rapanos* plurality's standard, the jury instructions' inclusion of intermittently flowing streams "may well have been harmless" error because the EPA expert "clearly and unambiguously testified that there is a continuous, uninterrupted flow between Avondale Creek and the Black Warrior River." App., *infra*, 29a. While the court thus recognized that its rejection of the plurality's standard "may be outcome-determinative," *ibid.*, it did not resolve that issue because of its incorrect selection of the "significant nexus" standard as the only controlling legal rule that can be derived from *Rapanos*. *Id.* at 30a n.20. That refusal even to consider the government's evidence of year-round flow to traditional navigable waters as rendering an instructional error harmless is fun-

damentally incorrect. There is no basis for setting aside the jury verdicts in this case absent a determination whether those verdicts can be sustained under the correct legal understanding of *Rapanos*. The judgment of the court of appeals should therefore be vacated and the case remanded for application of the correct legal standard to the evidence on harmless-error review.

C. The Question Presented In This Case Is One Of Great Practical Importance

The conflict created by the Eleventh Circuit has significant practical ramifications for the operation of a federal statute that affects countless waters, individuals, and corporations and that is vital to the protection of the aquatic environment. See App., *infra*, 58a-59a (Wilson, J., dissenting from the denial of rehearing en banc) (discussing the "exceptional importance" of the decision in this case in the Eleventh Circuit alone). We are informed by the relevant agencies 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. In many instances, however, it is substantially more efficient and straightforward for regulated entities, their consultants, and the government to verify whether a tributary is perennial and feeds into a traditional navigable water than to determine whether a "significant nexus" to traditional navigable waters exists. That is of particular importance in the enforcement context, where, under the "significant nexus" standard, juries would be asked to weigh often complex scientific evidence and the competing inferences to be drawn from expert testimony. And because Justice Kennedy's standard (at least until it is more

clearly elucidated by this Court or the lower courts) is less determinate than the plurality's, its application is likely to vary more widely from judge to judge, and from jury to jury.

Such uncertainty could seriously impede administration of the CWA programs EPA administers, particularly the NPDES permit program. See 33 U.S.C. 1342. Within the Eleventh Circuit, approximately 1500 of the 2300 NPDES permittees for which EPA has location information discharge into perennial streams that plainly satisfy the plurality standard. But in the wake of the Eleventh Circuit's requirement of a "significant nexus" showing for such waters (a nexus that the court of appeals apparently viewed not to be demonstrated by the perennial nature of the streams at issue here), existing NPDES permit holders who discharge into such waters may challenge EPA's authority to regulate them, either by direct challenge or by simply ignoring the permit requirements. New dischargers may decline to obtain permits. This could significantly expand the administrative burden in the NPDES program and necessitate increased enforcement actions and prosecutions. The circuit conflict may similarly hinder enforcement of the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, whose definition of the term "navigable waters," 33 U.S.C. 2701(21), tracks that of the CWA.

The Corps' administration of the Section 404 program (33 U.S.C. 1344) for discharges of dredged and fill material would likewise be impeded by a requirement that CWA coverage be established under the "significant nexus" standard. In administering that program, the Corps makes approximately 110,000 jurisdictional determinations each year, of which approximately 38,000 are formal (*i.e.*, "approved") determinations. See 33

C.F.R 331.2 (defining "jurisdictional determination"). During the past year, the three Corps districts whose areas of operations fall within the Eleventh Circuit issued approximately 6087 formal jurisdictional determinations. According to the Corps, in more than 90% of those determinations, the agency relied upon the *Rapanos* plurality's standard to establish CWA coverage, without additional analysis of a "significant nexus" to traditional navigable waters. We are informed that, within the Eleventh Circuit alone, approximately 28,215 additional hours of agency time would have been expended if the Corps had been required (as it now is under the court of appeals' decision in this case) to make all formal jurisdictional determinations under the "significant nexus" standard. That, in turn, will burden the regulated community by increasing the time and costs associated with obtaining a Section 404 permit.[10]

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[10] See, *e.g.*, Kenneth W. Starr, *The Roberts Court Gets Down to Business: The Business Cases*, 34 Pepp. L. Rev. 599, 606 (2007) (stating that, as a result of the fractured decision in *Rapanos*, "the planning commissioners, real estate developers, home owners, and the Sierra Club are left to languish in uncertainty"); G. W. Jones, Note, *Federal Wetlands Jurisdiction—The Quagmire of* Rapanos *v.* United States, 2 Pitt. J. Envtl. Pub. Health L. 79, 103 (2008) (explaining that the uncertainty as to which *Rapanos* standard controls will require the Corps "to make much more extensive determinations prior to granting or denying a fill permit," which "will only increase the already high costs associated with obtaining such a permit").

The petition for a writ of certiorari in *Lucas* v. *United States*, No. 07-1512, which is currently pending before this Court, also raises an issue concerning the standard or standards to be used in determining CWA coverage under the fractured decision in *Rapanos*. The petition in *Lucas*, and the briefs amicus curiae filed in support of that petition (one by the Pacific Legal Foundation and another by the National Association of Home Builders and the Chamber of Commerce), attest to the importance of the coverage question to members of the regulated com-

In other ways as well, the circuit conflict impedes the effective implementation of the CWA. Except in the First and Eleventh Circuits, the courts of appeals have not determined whether the CWA's coverage may be established through proof, without more, that the water into which a discharge occurs satisfies the *Rapanos* plurality's standard—and those two circuits diametrically disagree. The conflict and uncertainty pose especially serious difficulties in the criminal context. Individuals and corporations should not be immune from criminal penalties in one jurisdiction but subject to them in another. The conflict also jeopardizes the success of civil judicial and administrative CWA enforcement actions.

Unless and until this Court resolves the question presented here, the safest course for the government in a criminal prosecution or civil enforcement action is to attempt to establish CWA coverage under *both* the *Rapanos* plurality's standard and that of Justice Kennedy.[11] That burden, however, exceeds what *any* Mem-

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munity. The court of appeals in *Lucas*, however, expressly concluded that the evidence in that case was sufficient to establish CWA coverage *both* under the *Rapanos* plurality's standard *and* under that of Justice Kennedy. See *United States* v. *Lucas*, 516 F.3d 316, 326-327 (5th Cir. 2008). In this case, by contrast, the Eleventh Circuit stated that the choice between the two standards "may be outcome-determinative." App., *infra*, 29a. This case therefore provides a more suitable vehicle for determining whether the CWA covers waters that are shown to satisfy the *Rapanos* plurality's standard but have not been shown to possess a "significant nexus" to traditional navigable waters.

[11] Some lower courts have analyzed particular waters under both the *Rapanos* plurality's standard and that of Justice Kennedy. See *United States* v. *Lucas*, 516 F.3d 316, 326-327 (5th Cir. 2008), petition for cert. pending, No. 07-1512 (filed June 2, 2008); *United States* v. *Bailey*, 516 F. Supp. 2d 998, 1004-1011 (D. Minn. 2007), appeal pending, No. 08-1908 (8th Cir. filed Apr. 18, 2008); *United States* v. *Cundiff*, 480 F. Supp. 2d

ber of the *Rapanos* Court believed to be required. And any effort to obtain jury verdicts under both standards (to ensure that a judgment would not be reversed on the ground that the wrong standard was utilized) would require potentially confusing jury instructions and special-verdict forms. Those consequences are significant in any case tried to a jury, but they are particularly onerous in the important area of environmental prosecutions, which often involve prolonged trials. Review by this Court is necessary to resolve the existing circuit conflict, to alleviate the substantial and unnecessary burdens that the conflict places upon the responsible agencies' administration of the CWA, and to ensure that a stream covered by the Act under the views of eight Justices is not placed outside the CWA's protections.

940, 946 (W.D. Ky. 2007), appeal pending, No. 07-5630 (6th Cir. filed May 14, 2007); *Simsbury-Avon Pres. Soc'y, LLC* v. *Metacon Gun Club*, 472 F. Supp. 2d 219, 226-230 (D. Conn. 2007), appeal pending, No. 07-0795-cv (2d Cir. argued Aug. 4, 2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-17019

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

CHARLES BARRY ROBISON, DEFENDANT

MCWANE, INC., DEFENDANT-APPELLANT

JAMES DELK, MICHAEL DEVINE, DEFENDANTS-
APPELLANTS-CROSS APPELLEES

Oct. 24, 2007

OPINION

Before EDMONDSON, Chief Judge, HULL, Circuit Judge, and FORRESTER,[*] District Judge.

HULL, Circuit Judge:

Defendants McWane, Inc. ("McWane"), James Delk ("Delk"), and Michael Devine ("Devine") appeal their convictions for their roles in a Clean Water Act ("CWA") conspiracy (Count 1), as well as their convictions for

[*] Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.

substantive violations of the CWA (Counts 2, 3, 5, 7-19, 21, and 22).[1] After the defendants' convictions, the United States Supreme Court addressed how to define "navigable waters" under the CWA in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006). The definition of "navigable waters" in the jury charge in this case was erroneous under *Rapanos*, and the government has not shown that the error was harmless. Accordingly, we must vacate defendants' CWA convictions and remand the case for a new trial.

McWane also appeals its conviction for making a false statement to the Environmental Protection Agency ("EPA") (Count 24).[2] Because McWane was entitled to a judgment of acquittal on that charge, we vacate McWane's conviction on Count 24 as well.

I. BACKGROUND

A. Defendants

Defendant McWane is a large manufacturer of cast iron pipe, flanges, valves, and fire hydrants. McWane has numerous manufacturing plants. This case concerns McWane's plant in Birmingham, Alabama (hereinafter "the plant" or "McWane's plant").

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[1] Counts 12-19, 21, and 22 of the superseding indictment only charged McWane and Delk, while Counts 2, 3, 5, and 7-11 charged McWane, Delk, and Devine. Before the case was submitted to the jury, the government dismissed Count 11 as to Devine.

[2] Count 24—-the false statement count in the superseding indictment—was ultimately submitted to the jury as Count 23. For consistency, we refer to the false statement count throughout this opinion as "Count 24."

Defendants Delk and Devine, along with Charles "Barry" Robison and Donald Harbin, worked in management positions at McWane's plant at all relevant times.

Robison was McWane's Vice President of Environmental Affairs. Defendant Delk was the General Manager of the plant. Defendant Devine was the Plant Manager, and he reported to defendant Delk. Harbin was the Maintenance Manager, and he reported to defendant Devine.[3]

B. Avondale Creek

The CWA violations at issue involve McWane's discharge of pollutants into Avondale Creek, which is adjacent to McWane's plant.

Avondale Creek flows into another creek called Village Creek. In turn, Village Creek flows approximately twenty-eight miles into and through Bayview Lake, which was created by damming Village Creek. On the other side of Bayview Lake, Village Creek becomes Locust Fork, and Locust Fork flows approximately twenty miles out of Bayview Lake before it flows into the Black Warrior River.

At trial, the government presented testimony, *inter alia*, from an EPA investigator (Fritz Wagoner) that Avondale Creek is a perennial stream with a "continuous uninterrupted flow" into Village Creek. Wagoner testified that there is "a continuous uninterrupted flow" not

[3] When defendant Delk was hired as the General Manager—in 1998—Harbin was the Plant Manager. Defendant Delk demoted Harbin to the Maintenance Manager and hired defendant Devine to replace Harbin as the Plant Manager.

only from Avondale Creek into Village Creek, but also from Village Creek through Bayview Lake and into Locust Fork, and ultimately into the Black Warrior River.

On cross-examination, Wagoner admitted that he did not conduct a "tracer test" to check the flow of Avondale Creek into the Black Warrior River. Wagoner explained that a "tracer test" is a procedure whereby a "concentrated dye" is put into a body of water and tracked to determine "where that water body flows." 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. Furthermore, Wagoner testified that Village Creek is dammed (creating Bayview Lake) and that the dam runs "all the way across Village Creek." Wagoner's only site visit was in April 2005. This was more than four years after the violations at issue in this case.

The government presented no evidence, through Wagoner or otherwise, of the chemical, physical, or biological effect that Avondale Creek's waters had or might have had on the Black Warrior River. Indeed, the district court observed that there was no evidence of any actual harm or injury to the Black Warrior River.

C. Defendants' conduct

McWane's plant manufactures eighteen-foot and twenty-foot lengths of pipe. McWane utilizes a great deal of water in its pipe manufacturing processes. The water that runs out of the pipe manufacturing machines

is generally referred to as "process wastewater." The evidence at trial established that process wastewater accumulated in large amounts in basements under McWane's "eighteen-foot machine" and "twenty-foot machine." The process wastewater contained various contaminants, including hydraulic oil, excess iron, and trash.

The CWA authorizes the EPA, and states with programs approved by the EPA, to issue permits for the discharge of pollutants, in compliance with the National Pollutant Discharge Elimination Systems ("NPDES"). These permits are known as NPDES permits. The Alabama Department of Environmental Management ("ADEM") administers the NPDES program in Alabama.

McWane obtained an NPDES permit from ADEM that authorized McWane to discharge some process wastewater. Specifically, McWane's NPDES permit allowed it to discharge some treated process wastewater into Avondale Creek, but only from one discharge point at the plant ("DSN001"), and only if other discharge limits and bookkeeping requirements were met. McWane's NPDES permit also allowed it to discharge "storm water runoff from industrial activity" from other discharge points at the plant ("DSN002" through "DSN020"). McWane, however, was not permitted to discharge process wastewater from any point at the plant other than DSN001.

At trial, the government established that McWane discharged process wastewater into Avondale Creek from discharge points other than DSN001, in violation of the express provisions of its NPDES permit. Numerous former McWane employees testified that the plant was

in disarray by the late 1990s and that process wastewater was all over the plant. Process wastewater overflowed on a regular basis when it was pumped from the eighteen-foot machine and twenty-foot machine basements. The process wastewater would then spill into the storm water runoff discharge points (DSN002-DSN020) and flow into Avondale Creek.

One McWane employee described the extent of the process wastewater discharges as "[e]nough to drown a small village." Indeed, multiple witnesses testified that process wastewater from McWane's plant was regularly discharged into Avondale Creek. Harbin, for instance, testified that between May 1999 and January 2001, process wastewater was discharged into storm drains fifteen out of every twenty operating days per month. Other witnesses testified that the plant's basements were pumped (which led to the corresponding noncompliant wastewater discharge) every Friday night.

McWane's NPDES permit listed defendant Delk as one of two people with the authority and responsibility to prevent and abate violations of ADEM's regulations. Trial testimony established that defendant Delk was "everybody's boss" at the plant, and that on multiple occasions, defendant Delk ordered McWane employees to pump process wastewater from the basements, despite knowing that the wastewater had nowhere to go but Avondale Creek. Further testimony established that defendant Delk watched as wastewater spilled or was pumped into the center courtyard of the plant, and that Delk once instructed Harbin to falsify a water sample for inspectors.

Likewise, defendant Devine also ordered McWane employees to violate the NPDES permit. One former

employee, Troy Venable, testified that he overheard a conversation between defendant Devine and a McWane maintenance foreman in which Devine said that it would be "easier" for McWane to pay off its fines than to pay $70,000 to fix one of the sources of the problem. There was also testimony about two separate incidents in which defendant Devine ordered that excess process wastewater be pumped from the basements despite there being no appropriate place to put the water, and told employees that he did not care how the water got out of the plant as long as it was gone.

Additionally, McWane's former safety and personnel director, John Walsh, testified that on one occasion, an ADEM inspector came to inquire about pollutant discharges from the storm water discharge runoff points. According to Walsh, defendant Devine directed him to lie to the ADEM inspector and tell the inspector that the cause of the discharges was McWane's test-flushing of fire hydrants. Walsh testified that he complied with defendant Devine's instructions because he "was told to" and feared that if he did not, he would lose his job.

The EPA inspected the plant in April 2000, and subsequently required McWane to submit plant inspection reports and other documents concerning the plant. McWane responded with two separate document productions, on August 17, 2000, and September 15, 2000. The document productions were accompanied by certifications signed by Robison.

D. Indictment

In May 2004, a twenty-five count indictment was issued against McWane, Delk, Devine, Robison, and Don-

ald Bills (the plant engineer). The indictment was superseded in July 2004.

Count 1 of the superseding indictment alleged that defendants McWane, Delk, Devine, Robison, and Bills conspired: (1) to knowingly discharge pollutants into the waters of the United States in violation of McWane's NPDES permit and the CWA; (2) to defraud the United States; (3) to knowingly and willfully make false statements; and (4) to obstruct justice. Counts 2-11 alleged that defendants McWane, Delk, and Devine knowingly caused discharges of pollutants from a storm water outfall (DSN002) into Avondale Creek in each month from May 1999 through February 2000, in violation of McWane's NPDES permit and the CWA. Counts 12-22 accused McWane and Delk (but not Devine) of similar NPDES and CWA violations from March 2000 through January 2001.

Count 23 alleged that McWane, Delk, and Devine knowingly caused discharges of pollutants from the wastewater outfall (DSN001) on May 26, 1999, in violation of the maximum limits allowed by McWane's NPDES permit and the CWA. Count 24 charged McWane and Robison with making false statements to the EPA on or about August 17, 2000, and September 15, 2000. Finally, Count 25 alleged that McWane obstructed justice by providing false and misleading information to the EPA regarding its discharge of wastewater.

E. Trial

A jury trial was held in May and June 2005. At the close of the government's evidence, the district court: (1) dismissed Bills from the case;[4] (2) dismissed Robison

[4] Bills is not a party to this appeal.

from Count 1 (conspiracy), leaving Robison only in Count 24; (3) struck three of the four objects of the conspiracy in Count 1, leaving the sole object of the conspiracy as the knowing discharge of pollutants into the waters of the United States in violation of the NPDES permit and the CWA; and (4) dismissed Counts 23 and 25 in their entirety.

On June 10, 2005, the jury returned guilty verdicts on all remaining counts except Counts 4, 6, and 20. All three appellants here, McWane, Delk, and Devine, were convicted of conspiracy to violate the CWA (Count 1), as well as multiple substantive violations of the CWA. McWane, Delk, and Devine were convicted on Counts 2, 3, 5, and 7-10, and McWane and Delk were also convicted on Counts 11-19, 21, and 22. Additionally, McWane and Robison were convicted of making a false statement to the EPA (Count 24).[5]

F. Sentences

On December 5, 2005, the district court sentenced the defendants.

The district court sentenced: (1) Delk to 36 months' probation (including 6 months of nighttime home detention), and a fine of $90,000;[6] (2) Devine to 24 months'

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[5] Robison is no longer a party to this appeal. Robison initially filed a notice of appeal in this case, but he dismissed his appeal here as part of his resolution of a separate criminal case in Utah involving McWane's violations of the Clean Air Act. *See United States v. McWane, Inc.*, No. 2:05-cr-00811 (D. Utah Feb. 8, 2006).

[6] Defendant Delk's base offense level was 6. After a 4-level enhancement for Delk's leader/organizer role in the offense and other adjustments, the district court calculated Delk's total offense level to be 16. With a criminal history category of I, Delk's advisory guidelines range was 21-27 months' imprisonment.

probation (including 3 months of nighttime home detention), and a fine of $35,000;[7] and (3) McWane to 60 months' probation and a fine of $5 million.[8]

II. DISCUSSION

The parties' disagreement as to what constitutes a "navigable water" under the CWA is at the heart of this appeal.

A. Jury instruction on "navigable waters"

The CWA generally prohibits the discharge of pollutants into "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(12). Under the CWA, "navigable waters" are defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The parties agree that the definition of "navigable waters" is a key element of the CWA criminal offenses in this case.

Based on the Supreme Court's *Rapanos* decision, defendants contend that Avondale Creek is not a "navigable water" within the meaning of the CWA, and that the district court erroneously instructed the jury as to the definition of the term "navigable waters." The gov-

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[7] Defendant Devine's base offense level was 6. After a 3-level enhancement for Devine's manager/supervisor role in the offense and other adjustments, the district court calculated Devine's total offense level to be 15. With a criminal history category of I, Devine's advisory guidelines range was 18-24 months' imprisonment.

[8] The government cross-appeals the sentences of Delk and Devine. Additionally, Delk and Devine attempt to raise a sentencing issue in their response briefs to the government's cross-appeal. Because we vacate Delk's and Devine's convictions, we do not address any of the parties' sentencing arguments and dismiss the government's cross-appeal without prejudice.

ernment responds that Avondale Creek's connection with the Black Warrior River and/or Village Creek renders Avondale Creek a "navigable water" within the meaning of the CWA.[9]

The 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," as follows:

> As to Counts 2 through 22, a "water of the United States" includes any stream which may eventually flow into a navigable stream or river. The Government does not have to prove that the stream into which the discharge is made is itself navigable in fact. What it must prove is that the stream into which the discharge is made may eventually flow directly or indirectly into a navigable stream or river. *The stream into which the discharge is made may be a natural or manmade [stream] and may flow continuously or only intermittently, as long as it may eventually flow directly or indirectly into a naviga-*

[9] We review the legal correctness of the district court's "navigable waters" jury instruction *de novo*. *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000). We reject the government's argument that defendants failed to properly preserve an objection to the "navigable waters" jury instruction. Defendants repeatedly made clear to the district court their position as to the appropriate definition of a "navigable water" under the CWA. *See Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999). Thus, our review is *de novo*, not for plain error. Under *de novo* review, if we determine that there was error, we still must consider whether the government has carried its burden to show that the error was harmless. *See* Fed. R. Crim. P. 52(a).

> *ble stream or river whose use affects interstate commerce.*
>
> A navigable stream or river is defined as one that is used or is susceptible of being used in its ordinary condition, as a highway for interstate commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

(Emphasis added.)

The district court's jury charge was based, *inter alia*, on this Court's decision in *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997). In *Eidson*, we observed: (1) that Congress chose to define broadly the waters covered by the CWA; (2) that it was "well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce"; and (3) that courts repeatedly had recognized that tributaries to waters affecting interstate commerce—even when man-made or intermittently flowing—were subject to the CWA. *Eidson*, 108 F.3d at 1341-42.

However, the defendants' trial occurred before *Rapanos*, and the Supreme Court indicated in *Rapano*s that *Eidson's* "expansive definition" of "'tributaries'" is no longer good law. *Rapanos*, 126 S. Ct. at 2217 (plurality opinion) (citing, *inter alia*, *Eidson*, 108 F.3d at 1340-42). Even the government here tacitly concedes that the jury charge given by the district court in this case was erroneous to some extent in light of *Rapanos*. *See* Resp. Br. of United States, at 24-25. Nevertheless, the government contends that any error in the jury charge was harmless and does not require reversal.

Accordingly, we consider *Rapanos* in detail in order to determine exactly how and to what extent the district court's "navigable waters" instruction was erroneous. We then consider whether the incorrect jury instruction was harmless error.

B. Rapanos and the proper definition of "navigable waters"

In *Rapanos*, which involved two consolidated cases, the Supreme Court addressed how the statutory term "navigable waters" should be construed under the CWA. The consolidated cases involved the discharge of pollutants into four separate wetlands. *See Rapanos*, 126 S. Ct. at 2219 (plurality opinion). The wetlands at issue varied in terms of their precise connections to navigable-in-fact bodies of water, but the wetlands were all "near ditches or man-made drains that eventually empt[ied] into traditional navigable waters." *Id.* In the case of three of the four wetlands, it was "not clear whether the connections between the[ ] wetlands and the nearby drains and ditches [were] continuous or intermittent, or whether the nearby drains and ditches contain-[ed] continuous or merely occasional flows of water." *Id.* In the case of the fourth wetland, the ditch running alongside the wetland was "separated from it by a 4-foot-wide man-made berm" that was "largely or entirely impermeable to water." *Id.*

In both cases, the Sixth Circuit concluded that the wetlands were covered by the CWA. *Id.* The Supreme Court consolidated the cases and granted certiorari to decide whether the wetlands actually constituted "waters of the United States" under the CWA. *Id.* at 2220.

The entire Supreme Court agreed that the term "navigable waters" encompasses something more than traditionally "navigable-in-fact" waters. *Id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring); *id.* at 2255 (Stevens, J., dissenting). However, five Justices concluded that remand was necessary for consideration of whether the wetlands at issue were "navigable waters" covered by the CWA, and whether the EPA and the Army Corps of Engineers had impermissibly extended their regulatory authority under the CWA. *Id.* at 2220 (plurality opinion); *id.* at 2235-36 (Roberts, C.J., concurring); *id.* at 2236, 2241, 2251-52 (Kennedy, J., concurring).

Despite agreeing that the remand was necessary for further consideration of whether the wetlands at issue were covered by the CWA, the five-Justice majority fractured with regard to the proper definition of the term "navigable waters." Justice Scalia wrote for a four-Justice plurality, while Justice Kennedy provided the fifth vote for reversal. Justice Stevens dissented, joined by the remaining three Justices.[10]

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[10] Chief Justice Roberts filed a short separate concurrence but also joined Justice Scalia's plurality opinion, along with Justices Thomas and Alito; Justice Breyer filed a short separate dissent but also joined Justice Stevens's dissenting opinion, along with Justices Souter and Ginsburg. Thus, the three "main" opinions in *Rapanos* are Justice Scalia's plurality opinion (four Justices); Justice Kennedy's concurring opinion (one Justice); and Justice Stevens's dissenting opinion (four Justices).

1. Justice Scalia's plurality opinion

Although Justice Scalia's plurality opinion recognized that the statutory term " 'navigable waters' includes something more than traditional navigable waters," the plurality also emphasized that "the qualifier 'navigable' is not devoid of significance." *Id.* at 2220 (plurality opinion). According to the plurality, "navigable waters" include only "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 2225 (alteration in original) (citation omitted). The plurality emphasized that bodies of water such as streams, oceans, rivers, and lakes (*i.e.*, "navigable waters") are "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 2221.

Moreover, while the plurality was of the view that "relatively continuous flow is a *necessar*y condition for qualification as a 'water,'" relatively continuous flow, in and of itself, is "not an *adequate* condition" under the plurality's test. *Id.* at 2223 n.7.

The plurality also applied its test to the specific wetlands at issue in *Rapanos*. Noting that under prior precedent wetlands "adjacent to" navigable bodies of water were considered "waters of the United States," the plurality stated that "*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." *Id.* at 2226 (second emphasis added). "Wetlands with only an intermittent, physically remote

hydrologic connection to 'waters of the United States' . . . lack the necessary connection to covered waters. . . ." *Id.* To summarize, the plurality's test for "establishing that wetlands . . . are covered by the Act requires two findings: First, that the adjacent channel [to the wetland] contains 'a water of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 2227 (alteration omitted).

The plurality also noted that although it did not reach the issue, there was "no reason to suppose that [its] construction . . . [would] significantly affect[ ] the enforcement" of the CWA, in that "lower courts . . . have not characterized intermittent channels as 'waters of the United States.'" *Id.* The plurality observed that "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 CWA], even if the pollutants discharged . . . do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.* (citations omitted).

2. Justice Kennedy's concurrence

Justice Kennedy supplied the fifth vote for reversal and agreed with the plurality that the Sixth Circuit had failed to apply the proper test as to what constitutes a "navigable water." *See id.* at 2236 (Kennedy, J., concurring) (stating that the Sixth Circuit "recognized the [proper] test's applicability," but failed to apply it cor-

rectly). However, Justice Kennedy disagreed with the plurality over the substance of the proper test.

According to Justice Kennedy, the Supreme Court actually established the test for determining whether a "water or wetland" constitutes a "navigable water" under the CWA five years prior to *Rapanos*, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("*SWANCC*"). *See Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring). Citing *SWANCC*, Justice Kennedy wrote in his *Rapanos* concurrence that the applicable test for determining whether or not a "water or wetland" is "navigable" is the so-called "significant nexus" test. *See id.* at 2236 (Kennedy, J., concurring) (citing SWANCC, 531 U.S. at 167, 172, 121 S. Ct. at 680, 683). In Justice Kennedy's view, a "water or wetland" can only be "navigable" under the CWA if it possesses a " 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.*[11]

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[11] In reviewing the Supreme Court's prior precedent, Justice Kennedy also noted: "Taken together these cases establish that in some instances . . . the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus [in these latter instances], jurisdiction under the Act is lacking. Because neither the plurality or the dissent addresses the nexus requirement, this separate opinion, in my respectful view, is necessary." *Rapanos*, 126 S. Ct. at 2241 (Kennedy, J., concurring).

Because *Rapanos* was a wetlands case, Justice Kennedy's concurrence then focused on when a wetland meets the "significant nexus" test. A wetland meets the "significant nexus" test if, "either alone or in combination with similarly situated lands in the region, [it] significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 2248. "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*

Justice Kennedy also emphasized that a "mere hydrologic connection" between a wetland and a navigable-in-fact body of water would not necessarily be sufficiently substantial to meet his "significant nexus" test. *Id.* at 2250-51. According to Justice Kennedy, a "mere hydrologic connection . . . may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 2251. Under Justice Kennedy's test, the "required nexus must be assessed in terms of the statute's goals and purposes," which are to " 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id.* at 2248 (citation omitted).

3. Justice Stevens's dissent

Justice Stevens, writing for himself and three other Justices, would have upheld the Army Corps of Engineers' and EPA's broad interpretation of CWA jurisdiction and concluded that the wetlands at issue in *Rapanos* were "navigable waters," i.e., "waters of the United States." *Id.* at 2252 (Stevens, J., dissenting).

As aptly noted by Chief Justice Roberts in his concurrence, neither Justice Scalia's plurality opinion, Justice Kennedy's concurrence, nor Justice Stevens's dissent "command[ed] a majority of the Court on precisely how to read Congress'[s] limits on the reach" of the CWA. *Id.* at 2236 (Roberts, C.J., concurring). In addition, Justice Stevens's dissent noted that "while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand." *Id.* at 2265 (Stevens, J., dissenting).

Justice Stevens's dissent then stated that the four Justices joining his opinion would uphold CWA jurisdiction in all cases in which either the plurality's or Justice Kennedy's test is met, as follows:

> Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's *or* Justice Kennedy's test is satisfied —on remand each of the judgments should be reinstated if *either* of those tests is met.

Id. (first emphasis added).

C. The governing rule of Rapanos

Given the various opinions, the parties dispute what constitutes the governing definition of "navigable waters" under *Rapanos*. The defendants argue that only Justice Kennedy's concurrence (i.e., the "significant nexus" test) applies. The government responds that if Avondale Creek can be shown to satisfy *either* the plurality's test or Justice Kennedy's test, that is sufficient to sustain CWA jurisdiction in this case.

The circuits likewise are split on the question of which *Rapanos* opinion provides the holding. Both the Seventh and the Ninth Circuits concluded that Justice Kennedy's concurrence controls and adopted the "significant nexus" test. *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) ("*River Watch II*");[12] *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006), *cert. denied*,—U.S.—, 128 S. Ct. 45, 76 U.S.L.W. 3156, 2007 WL 1035893 (U.S. Oct. 1, 2007) (No. 06-1331). The First Circuit, on the other hand, concluded that because the dissenting *Rapanos* Justices would find jurisdiction under either Justice Scalia's plurality test or Justice Kennedy's "significant nexus" test, "'the United States may elect to prove jurisdiction under either test.'" *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) (citation omitted), cert. denied,—U.S.—, 128 S. Ct. 375, 76 U.S.L.W. 3186, 2007 WL 1999079 (U.S. Oct. 9, 2007) (No. 07-9). Because the Ninth Circuit in *River Watch II* ex-

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[12] The Ninth Circuit's *River Watch* case resulted in two opinions. In *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) ("*River Watch I*"), the issue was whether a rock quarry pit called "Basalt Pond" was subject to the CWA. Basalt Pond contained wetlands that were adjacent to a navigable-in-fact river. Applying Justice Kennedy's test, the Ninth Circuit concluded that "Basalt Pond and its wetlands possess . . . a 'significant nexus' to waters that are navigable in fact, because the Pond waters seep directly into the navigable Russian River." *River Watch I*, 457 F.3d at 1025; *see also S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) (stating that Justice Kennedy's *Rapanos* concurrence is "controlling").

Subsequently, in August 2007, the Ninth Circuit withdrew *River Watch I* and substituted an opinion that contained some additional explanation as to why Justice Kennedy's *Rapanos* test was "controlling . . . for [the *River Watch*] case" as well as for "almost all cases." *River Watch II*, 496 F.3d at 999-1000.

pressly adopted the Seventh Circuit's reasoning in *Gerke*, we review *Gerke* in detail, and then *Johnson*.

In *Gerke*, the Seventh Circuit, faced with a Supreme Court remand "in light of *Rapanos*," addressed which *Rapanos* opinion governed the further stages of the case before it. *Gerke*, 464 F.3d at 724-25. Citing *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L. Ed. 2d 260 (1977), the Seventh Circuit first noted that when a majority of the Supreme Court agrees only on the result of a case, lower courts "are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose." *Gerke*, 464 F.3d at 724. The *Gerke* court explained that it found Justice Kennedy's test to be "narrower (so far as reining in federal authority is concerned) . . . in most cases, though not in all . . . ." *Id.* at 724-25.

In support, the *Gerke* court noted that "[t]he plurality Justices [also] thought that Justice Kennedy's ground for reversing was narrower than their own, because they concluded their extensive and in places harsh criticism of the concurrence by saying that 'Justice Kennedy tips a wink at the agency [i.e., the Corps of Engineers], inviting it to try its same expansive reading again.'" *Id.* at 724 (quoting *Rapanos*, 126 S. Ct. at 2234 n. 15 (plurality opinion)). In that regard, the *Gerke* court observed that Justice Kennedy's concurrence "expressly rejected two 'limitations' imposed by the plurality on federal authority over wetlands" under the CWA. *Id.* (citation omitted).

The *Gerke* court surmised that in some wetlands cases Justice Kennedy would vote against finding CWA jurisdiction due to the lack of a "significant nexus," even when the plurality and the dissenting Justices would

vote for CWA jurisdiction due to a "surface-water connection" between "wetlands (however remote)" and "a continuously flowing stream (however small)." *Id.* at 725 (quotation marks and citation omitted). However, the *Gerke* court dismissed such instances as "rare" and concluded that, "as a practical matter," Justice Kennedy's concurrence provides "the least common denominator." *Id.*

In contrast, the First Circuit in *Johnson* determined that it would uphold CWA jurisdiction in those cases in which *either* Justice Scalia's test or Justice Kennedy's test was satisfied. *Johnson*, 467 F.3d at 64-65. Since—per Justice Stevens's dissent—the four dissenting Justices in Rapanos would vote to uphold CWA jurisdiction whenever either of the two tests were met, the First Circuit reasoned that the "simple and pragmatic" way to determine the governing standard was to find CWA jurisdiction in either situation. *Id.* at 64.

The First Circuit acknowledged *Marks*'s language that the holding of a fractured decision "is the position of the Justices 'who *concurred in the judgments* on the narrowest grounds . . . .'" *Id.* at 65 (quoting *Marks*, 430 U.S. at 193, 97 S. Ct. at 993). The First Circuit nevertheless cited various post-*Marks* cases in which, in the First Circuit's view, the Supreme Court itself had examined not only plurality and concurring opinions, but also dissenting opinions, in order to determine the holding of an earlier, fragmented Supreme Court decision. *See id.* at 65-66. The First Circuit concluded that its approach was therefore "particularly sound given that the Su-

preme Court itself has moved away from [rigid application of] the *Marks* formula." *Id.* at 65.[13]

For the reasons stated below, we join the Seventh and the Ninth Circuits' conclusion that Justice Kennedy's "significant nexus" test provides the governing rule of *Rapanos*.

Marks expressly directs lower courts, including this Court, that "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding . . . 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, 97 S. Ct. at 993 (emphasis added) (quotation marks and citation omitted); *see also United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1136 n.6 (11th Cir.), *cert. denied*,—U.S.—, 127 S. Ct. 146, 166 L. Ed. 2d 106 (2006). The "narrowest grounds" is understood as the "less far-reaching" common ground. *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1247 (11th Cir. 2001). We simply cannot avoid the command of *Marks*.

We are controlled by the decisions of the Supreme Court. Dissenters, by definition, have not joined the Court's decision. In our view, *Marks* does *not* direct

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[13] According to the First Circuit, "'*Marks* is workable—one opinion can be meaningfully regarded as "narrower" than another—only when one opinion is a logical subset of other, broader opinions.'" *Johnson*, 467 F.3d at 63-64 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*)). In the First Circuit's view, the "shortcomings of the *Marks* formulation in applying *Rapanos*" were actually highlighted by *Gerke*, in which the Seventh Circuit observed that there would be some cases in which the plurality's test would be satisfied, but Justice Kennedy's test would not, and vice-versa. *Id.* at 64.

lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented. *See King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (*en banc*) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority."). *Marks* talks about those who "concurred in the judgment[ ]," not those who did not join the judgment. *Marks*, 430 U.S. at 193, 97 S.Ct. at 993. It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an "either/or" test, whereby CWA jurisdiction would exist when either Justice Scalia's test or Justice Kennedy's test is satisfied. *See Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting). The fact that the dissenting Justices would uphold CWA jurisdiction under both Justice Scalia's test and Justice Kennedy's test is of no moment under *Marks*. Further, when the Supreme Court's Justices are interpreting their own prior opinions, they can always reconsider them and thus may look more broadly to the rationale in a dissent. We do not have that luxury.[14]

Thus, pursuant to *Marks*, we are left to determine which of the positions taken by the *Rapanos* Justices concurring in the judgment is the "narrowest," i.e., the least "far-reaching." *See Marks*, 430 U.S. at 193, 97 S. Ct. at 993; *Bd. of Regents*, 263 F.3d at 1247. The issue becomes whether the definition of "navigable waters" in the plurality or concurring opinions in Rapanos was less far-reaching (i.e., less-restrictive of CWA jurisdiction). *See Gerke*, 464 F.3d at 724-25.

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[14] The First Circuit's *Johnson* decision is nevertheless correct on this point: *Marks* does not "translate easily" to *Rapano*s. *Johnson*, 467 F.3d at 64.

Notably, Justice Kennedy's test, at least in wetlands cases such as *Rapanos*, will classify a water as "navigable" more frequently than Justice Scalia's test. *See Gerke*, 464 F.3d at 724-25; *Rapanos*, 126 S. Ct. at 2265 n.14 (Stevens, J., dissenting); *see also Johnson*, 467 F.3d at 64. This is because Justice Kennedy's concurrence rejected two "limitations" imposed by the plurality's test on the definition of "navigable waters." *Rapanos*, 126 S. Ct. at 2242 (Kennedy, J., concurring). Specifically, Justice Kennedy's concurrence rejected the plurality's requirement that "navigable waters" must be "relatively permanent, standing or flowing bodies of water," and also rejected the plurality's requirement of a "continuous surface connection." *Id.* at 2242-44 (quotation marks and citations omitted). As discussed later, in factual circumstances different from *Rapanos*, Justice Scalia's test may be less restrictive of CWA jurisdiction; however, in determining the governing holding in *Rapano*s, we cannot disconnect the facts in the case from the various opinions and determine which opinion is narrower in the abstract. Thus, pursuant to *Marks*, we adopt Justice Kennedy's "significant nexus" test as the governing definition of "navigable waters" under *Rapanos*. *See Gerke*, 464 F.3d at 725; *River Watch II*, 496 F.3d at 999-1000.

D. The jury instruction was erroneous and not harmless error

We next consider whether the district court's jury charge comported with Justice Kennedy's "significant nexus" test.[15]

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[15] The government tacitly concedes that the jury charge did not meet Justice Kennedy's "significant nexus" test. *See* Resp. Br. of United States at 24-25 ("The defendants correctly point out that the[ ] instructions do not precisely meet . . . . Justice Kennedy's standard . . . .").

Again, under Justice Kennedy's concurrence, a water can be considered "navigable" under the CWA only if it possesses a "significant nexus" to waters that "are or were navigable in fact or that could reasonably be so made." *Rapano*s, 126 S. Ct. at 2236 (Kennedy, J., concurring). Moreover, a "mere hydrologic connection" will not necessarily be enough to satisfy the "significant nexus" test. *Id.* at 2250-51. The district court here did not mention the phrase "significant nexus" in its "navigable waters" instruction to the jury or advise the jury to consider the chemical, physical, or biological effect of Avondale Creek on the Black Warrior River. Rather, the district court instructed the jury that a continuous or intermittent flow into a navigable-in-fact body of water would be sufficient to bring Avondale Creek within the reach of the CWA. As such, the instruction did not satisfy Justice Kennedy's "significant nexus" test and was erroneous.

Moreover, the government bears the burden of establishing that the jury charge error was harmless. *See Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 1837, 144 L. Ed. 2d 35 (1999) (concluding that "the omission of an element [from a jury instruction] is an error that is subject to harmless-error analysis"); *United States v. Olano*, 507 U.S. 725, 734-35, 113 S. Ct. 1770, 1778, 123 L. Ed. 2d 508 (1993) (when a defendant has made a timely objection and harmless-error review applies, the government has the burden of establishing that any error was harmless); *United States v. Mathenia*, 409 F.3d 1289, 1291-92 (11th Cir. 2005) (same).

In order to carry its burden, the government must establish that the error did not "affect [defendants'] substantial rights." Fed. R. Crim. P. 52(a). We have explained that in the case of non-constitutional error,[16] the government can meet this burden by showing that the error "did not affect the verdict, 'or had but very slight effect.'" *United States v. Hornaday*, 392 F.3d 1306, 1315 (11th Cir. 2004) (quoting *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S. Ct. 1239, 1248, 90 L. Ed. 1557 (1946)). If the government can establish " 'with fair assurance . . . that the judgment was not substantially swayed by the error,' the judgment is due to be affirmed even though there was error." *Id.* at 1315-16 (quoting *Kotteakos*, 328 U.S. at 764, 66 S. Ct. at 1248). Nevertheless, "[t]he non-constitutional harmless error standard is not easy for the government to meet. It is as difficult for the government to meet that standard as it is for a defendant to meet the third-prong prejudice standard for plain error review." *Mathenia*, 409 F.3d at 1292.

Here, the government failed to satisfy its burden. Although Wagoner (the EPA investigator) testified that in his opinion there is a continuous uninterrupted flow between Avondale Creek and the Black Warrior River, he did not testify as to any "significant nexus" between Avondale Creek and the Black Warrior River. The government did not present any evidence, through Wagoner or otherwise, about the possible chemical, physical, or biological effect that Avondale Creek may have on the

[16] We need not reach the question of whether the *Rapanos* error in this case was constitutional or non-constitutional, because, as explained momentarily, we conclude that the *Rapanos* error here was not harmless even under the less demanding harmless-error test for non-constitutional error.

Black Warrior River, and there was also no evidence presented of any actual harm suffered by the Black Warrior River.[17] Thus, the government failed to establish that the jury instruction error did not affect the jury's verdict or had but very slight effect, and the district court's "navigable waters" instruction was not harmless error.[18]

We recognize that the government, attempting to show harmless error, stresses that it presented evidence of a continuous flow between Avondale Creek (a relatively permanent, fixed body of water) and the Black Warrior River (a navigable-in-fact water), and argues that this evidence satisfies Justice Scalia's test. The government also emphasizes that even the Seventh Circuit in *Gerke* noted that there may be some cases in which Justice Kennedy would find no CWA jurisdiction, but Justice Scalia and the dissenting Justices *would*, and that as a practical matter (i.e., counting the *Rapanos*

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[17] We further note that prior to trial, the district court denied defendants' motion to dismiss the indictment and indicated that it would apply a broad, *Eidson*-based definition of "navigable waters" under which the government would not need to prove that pollutants actually reached a navigable body of water. Defendants thus arguably had no incentive to put on evidence of any lack of "significant nexus" between Avondale Creek and the Black Warrior River. *See, e.g., O'Connor v. Ohio*, 385 U.S. 92, 93, 87 S. Ct. 252, 253, 17 L. Ed. 2d 189 (1966) (declining to penalize criminal defendant for failing to anticipate a new rule of law announced after the defendant's trial).

[18] Because Avondale Creek is not adjacent to the Black Warrior River, but separated by Village Creek, Bayview Lake, and Locust Fork, there is no claim in this case that the "significant nexus" test could be met by the adjacency of Avondale Creek and the Black Warrior River. *See supra* note 11.

votes), defendants' convictions should be affirmed under Justice Scalia's test.

This case arguably is 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. *See Gerke*, 464 F.3d at 725 (recognizing the potential for such cases but classifying them as "rare"). To be sure, the district court's jury instruction was still erroneous even under Justice Scalia's plurality opinion, because the instruction allowed the jury to find that defendants' discharges were into a "navigable water" even if the jury also concluded that Avondale Creek flowed "only intermittently."[19] But under *Justice Scalia's* test, that error may well have been harmless, because Wagoner, the EPA investigator, clearly and unambiguously testified that there is a continuous, uninterrupted flow between Avondale Creek and the Black Warrior River. Under Justice Scalia's test, the district court's jury instruction error arguably "did not affect the verdict, 'or had but very slight effect.'" *Hornaday*, 392 F.3d at 1315 (citation omitted). Thus, the decision as to which *Rapanos* test applies may be outcome-determinative in this case, and so it is not surprising that the government advocates a practical, *Johnson*-style approach whereby all

[19] Under Justice Scalia's plurality opinion, a "navigable water" only includes relatively permanent, standing, or continuously flowing "fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Rapanos*, 126 S. Ct. at 2221-22, 2225.

votes—from plurality, concurring, and dissenting Justices—are counted.[20]

Nevertheless, as we have already discussed, *Marks* requires us to adopt the narrowest view of the Justices who concurred in the judgment in *Rapano*s. Thus, Justice Kennedy's test is the test against which we have measured the district court's jury instruction for harmless error. Justice Kennedy's test is also the test that the district court must apply on remand, for the reasons explained.[21]

E. Other CWA arguments

Defendants raise several other arguments related to their CWA convictions, all of which lack merit.

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[20] We also need not, and do not, determine whether the government in fact established harmless error under Justice Scalia's plurality opinion in *Rapanos*, because, as discussed, it would be inconsistent with *Marks* for us to follow and apply Justice Scalia's opinion. Indeed, defendants point out that Wagoner admitted on cross-examination, *inter alia*, that he did not conduct any "tracer tests" to verify continuous flow between Avondale Creek and the Black Warrior River; that he conducted no tests to measure the volume of discharge from Avondale Creek or between the bodies of water connecting Avondale Creek and the Black Warrior River; and that the water level of Avondale Creek was low enough that he was able to walk its length. Furthermore, 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. *See also supra* note 17.

[21] We express no opinion as to whether Avondale Creek does or does not actually satisfy Justice Kennedy's test; that is a question for the jury in the first instance.

First, all defendants contend that the district court's "navigable waters" error, discussed *supra*, entitles them to judgments of acquittal, and not merely new trials, because there was insufficient evidence that defendants discharged any process wastewater into a *Rapanos*-defined "navigable water.[22]

Preliminarily, we observe that on appeal, defendants do not contend that there was insufficient evidence that their discharges were into a "navigable water" as that term was *incorrectly* defined for the jury by the district court in the actual trial. Indeed, the government presented sufficient evidence that defendants' discharges were into a "navigable water" as the term was incorrectly defined by the district court, and so acquittal is not warranted on that ground.

Rather, defendants' contention is that they are entitled to judgments of acquittal based on the district court's *Rapanos* error. This argument, however, ignores our precedent stating that "[r]emand for a new trial is the appropriate remedy where . . . [any] insufficiency of evidence is accompanied by trial court error whose effect may have been to deprive the Government of an opportunity or incentive to present evidence that might have supplied the deficiency." *United States v. Sanchez-Corcino*, 85 F.3d 549, 554 n.4 (11th Cir. 1996), overruled on other grounds by *Bryan v. United States*, 524 U.S. 184, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998). Here, we need not evaluate whether there was insufficient evidence that defendants' discharges were into

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[22] We review the sufficiency of the evidence *de novo*, drawing all reasonable inferences in favor of the government. *United States v. Hernandez*, 433 F.3d 1328, 1332 (11th Cir. 2005), *cert. denied*, 547 U.S. 1047, 126 S. Ct. 1635, 164 L. Ed. 2d 346 (2006).

"navigable waters" as that term is properly defined under *Rapanos*. Instead, it is enough to note that the district court erroneously defined "navigable water" and made it clear to the parties far in advance of trial that it would continue to use its erroneous definition throughout the case. That decision deprived the government of any incentive to present evidence that might have cured any resulting insufficiency or met Justice Kennedy's "significant nexus" test.[23] Thus, under *Sanchez-Corcino*, we conclude that remand for a new trial is the appropriate remedy in this case.

Second, all defendants contend that there was insufficient evidence that any discharges of process wastewater occurred in specific months, as charged in the indictment, entitling defendants to a judgment of acquittal. However, defendants concede that the government put forth sufficient evidence that five of the charged CWA violations (Counts 2, 14, 16, 21, and 22) occurred as charged in the indictment. Moreover, Harbin testified that between May 1999 and January 2001, process wastewater was discharged into storm drains at least fifteen out of twenty operating days per month, and several former employees testified that pumping regularly occurred on Friday nights.

Third, Delk and McWane argue that there was insufficient evidence that they participated in a CWA conspiracy, and Delk further argues that there was insufficient evidence that he discharged any process wastewater or caused anyone else to discharge wastewater in violation of the CWA. We disagree. For example, Delk was one of two McWane employees designated as having

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[23] *See also supra* note 17.

responsibility for McWane's NPDES compliance, and witnesses testified that Delk gave orders to discharge process wastewater and once directed Harbin to falsify a water sample so that McWane could pass an inspection.

Fourth, we reject Delk's and Devine's argument that they were deprived of their due process rights to a fair trial when the district court struck three of the four objects of the CWA conspiracy from the indictment at the close of the government's case.[24] Delk and Devine primarily rely on *United States v. Adkinson*, 135 F.3d 1363 (11th Cir. 1998); however, that case is materially distinguishable. In *Adkinson*, four of the five objects of the conspiracy in the indictment did not state an offense under prevailing law, and the government presented evidence as to those four objects that was not relevant to the fifth object. *Adkinson*, 135 F.3d at 1372. The district court in *Adkinso*n only permitted the government to present such evidence because the government assured the district court that the prevailing law would change before the end of the trial; however, the expected change in the law did not occur in time. *Id.* at 1369-70. The district court in *Adkinson* then struck the four legally impermissible objects of the conspiracy *after* the trial, but at that point, the district court had allowed into evidence "[m]ountains of details relevant only tangentially, if at all, to the ultimately charged scheme." *Id.* at 1372. As this Court observed on appeal in

[24] Denials of motions to dismiss the indictment are reviewed for abuse of discretion, *see United States v. Waldon*, 363 F.3d 1103, 1108 (11th Cir. 2004), but underlying legal errors, including due process claims, are reviewed de novo, *see Agan v. Vaughn*, 119 F.3d 1538, 1541 (11th Cir. 1997).

Adkinson, the district court thus "obviously invited the jury to convict for conduct not, ultimately, even *alleged* to be a crime." *Id.* (emphasis added).

In contrast, the four objects of the CWA conspiracy in this case were legally proper under prevailing law, and the district court simply determined that the evidence did not support the objects that were ultimately struck. *Cf. Adkinson*, 135 F.3d at 1373 n.30 (noting that *Adkinson* was "not a case where perfectly proper charges [were] ultimately found by the court not to be supported by the evidence at trial"). Moreover, the district court stated that substantially all of the evidence relating to the stricken objects of the conspiracy also related to the CWA discharges, and defendants have failed to establish that the district court abused its discretion in that evidentiary ruling.[25]

Finally, we recognize that Devine argues that the government had to prove that Devine knew the terms of McWane's NPDES permit and knowingly violated the permit. We need not determine whether the district court should have required the government to establish that Devine knew the terms of McWane's NPDES permit. Any such error committed by the district court in this regard was harmless, because there was ample evidence presented that Devine *did* in fact know the terms of McWane's NPDES permit.

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[25] Evidentiary rulings are reviewed for an abuse of discretion. *See United States v. Henderson*, 409 F.3d 1293, 1297 (11th Cir. 2005), *cert. denied*, 546 U.S. 1169, 126 S. Ct. 1331, 164 L. Ed. 2d 47 (2006).

F. False statement in Count 24

McWane's last argument is that it is entitled to acquittal on Count 24, the false statement count. Under 18 U.S.C. § 1001, a conviction for making a false statement in a matter within the jurisdiction of the executive branch of the United States requires proof of five elements: "(1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction." *United States v. Herring*, 916 F.2d 1543, 1546 (11th Cir. 1990).

Count 24 against McWane concerns certifications that Robison signed on McWane's behalf and that McWane submitted to the EPA. There is no dispute that the statements in the certifications were material. Rather, McWane contends that the government presented insufficient evidence to satisfy elements two (falsity) and four (specific intent). Specifically, McWane contends that what Robison represented in the certifications was not false and that the government presented no evidence that Robison's certifications—as opposed to the underlying plant inspection reports prepared by other persons and submitted with the certifications—were false.

We first review the allegations in Count 24 and then explain why the record supports McWane's argument for several reasons.

First, the language of the certifications, introduced into evidence at trial, is materially different from the charge in Count 24, and thus the certifications themselves do not support that charge. Count 24 charged McWane and Robison with making a false statement to the EPA, in violation of § 1001, as follows:

> MCWANE, INC. and CHARLES "BARRY" ROBISON, the defendants, in a matter within the jurisdiction of [the EPA] . . . did knowingly and willfully make a materially false, fictitious, and fraudulent statement and representation that is, the defendants certified that documents submitted on or about August 17, 2000 and September 15, 2000, to EPA pursuant to a request under the [CWA] . . ., including "Daily . . . and Monthly . . . Inspection[ ]" forms, were "true, accurate, and complete," when in truth and fact, as defendants MCWANE and CHARLES "BARRY" ROBISON then well knew and believed, certain "Daily . . . and Monthly . . . Inspection" forms included in the submission to EPA were false.

In sum, Count 24 alleged that McWane and Robison's certifications falsely represented that the plant inspection reports submitted to the EPA "were 'true, accurate, and complete,' when in truth and fact," McWane and Robison well knew that certain of the submitted documents—plant inspection reports for January 1998 through March 2000—were false.[26]

However, McWane correctly points out that Robison, on McWane's behalf, did not certify that he *personally* knew that the attached documents—i.e., the plant inspection reports—were accurate, or even that he had *personally* reviewed the inspection reports. Rather, Robison certified only that the documents were prepared under his direction or supervision in accordance with a system designed to ensure that qualified personnel would properly gather and evaluate the documents,

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[26] We note that prior to trial, the scope of Count 24 was narrowed to encompass only the September 15, 2000 submission.

and that based on his inquiry of those persons who were responsible for gathering the documents, to the best of his knowledge, the documents were accurate. Specifically, the certifications in evidence, which Robison signed, state in full:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision, in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

In other words, Robison certified that *other qualified persons* had prepared the documents and advised him of the documents' accuracy. Because of the language in the certifications, Robison could truthfully make the representations included in the certifications even if the underlying documents included with the submissions were false.

Second, the government introduced no evidence that the plant inspection reports were prepared or gathered in a manner or a system other than that certified to by Robison. The government also presented no evidence that Robison did not inquire of the persons responsible for gathering the documents, as Robison represented in the certifications. And the government presented no evidence that upon inquiring of such persons, Robison

learned from such persons that the documents were not true or accurate. Indeed, the government acknowledged before the district court that it presented no evidence as to McWane's document-gathering "system" or Robison's "inquiries" of the persons responsible for gathering the documents. Thus, the government failed to prove that any of the statements *actually certified to* by Robison were false.

Third and most notably, McWane points out that the EPA *previously* required a certifying individual to certify that he or she had "personally examined" documents included in submissions, such as the one at issue here, but in 1983, the EPA eliminated the "personal examination" requirement. *Compare* 40 C.F.R. § 122.6(d) (1981) (requiring EPA certifications to state that "under penalty of law . . . I have personally examined and am familiar with the information submitted in this document and all attachments"), *with* 48 Fed.Reg. 39,611, 39,613 (Sept. 1, 1983) (eliminating the personal examination requirement). As such, the certifications in this case contained no representation that Robison had personally reviewed the documents in question or that he was vouching for the documents' accuracy based on his personal knowledge of the documents themselves. Rather, Robison only certified—and only had to certify—that others had prepared the documents, and that based on his inquiry of those who prepared the documents, the documents were accurate to the best of his knowledge.

The government responds that, notwithstanding the actual language of the certifications, Robison had personal knowledge of the problems at the plant, the plant inspection reports showed no problems at the plant, and therefore, Robison falsely certified that the inspection

reports were accurate. Even assuming without deciding that such offense conduct is adequately encompassed in Count 24, the government still presented no evidence that Robison ever personally reviewed the plant inspection reports or had personal knowledge of the contents of the plant inspection reports, which is needed to show that *his certifications* about the reports were false.

Certainly, the government introduced evidence that some of the plant inspection reports themselves were false. Indeed, Walsh (McWane's former safety and personnel director) testified that he was the employee who prepared the inspection reports at issue and that some of them were false. However, Walsh made clear that Robison was not among the several McWane employees who received copies of the inspection reports in the regular course of McWane's business.[27] Additionally, there were approximately 600 pages of documents attached to the certifications, and those documents included more than just the falsified inspection reports that accompanied the certifications at issue here.[28] The problem with

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[27] We stress that the government does not argue that McWane violated § 1001 by *submitting* false inspection reports to the EPA. Rather, the government concedes that under Count 24, it had to prove that the *certifications* themselves contained false statements. In other words, the government acknowledges that the false statements in the inspection reports, in and of themselves, are insufficient to sustain McWane's false statement conviction. Thus we necessarily focus on the language in the certifications.

[28] Chetan Gala, an EPA enforcement officer, testified that the post-inspection documents that McWane was required to produce (and that accompanied the certifications at issue in this case) included: (1) information about McWane's CWA permit for the plant; (2) information about entities that provided laboratory services to McWane; (3) McWane's discharge monitoring reports for a five-year period; (4) a diagram of McWane's plant; (5) McWane's "Best Management Prac-

the government's conclusory argument—that the evidence showed that Robison knew the inspection reports he submitted were false—is that Count 24 is a specific intent crime, and the government cannot point to any evidence that Robison *actually knew* the contents of the particular *inspection reports* accompanying the certifications or that Robison *actually knew* that those particular *inspection reports* contained false information.[29]

The government thus failed to establish that Robison's certified statements were knowingly false. At most, the government proved that Robison negligently submitted documents to the EPA, but that is insufficient. *See United States v. Baker*, 626 F.2d 512, 515-16 (5th Cir. 1980)[30] (stating that "in order to sustain a § 1001 conviction the government must prove that the defendant knowingly made a false statement with intent to deceive," and further stating that the specific intent requirement of § 1001 excludes "false statements made

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tices Plan," "Storm Water Pollution Prevention Plan," and "Spill Prevention Control and Countermeasure Plan," as well as the inspection reports, training records, and corrective action reports accompanying those plans; (6) the location where McWane's records were stored; (7) a schematic of the production process and related documents; (8) a description of the waste disposal system; and (9) CWA-related inspection reports by ADEM and related correspondence for a five-year period.

[29] Even Robison's contemporaneous notes fail to help the government, because the notes do not refer to any inspection reports and are not evidence that Robison had reviewed the contents of the particular inspection reports submitted to the EPA.

[30] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all Fifth Circuit decisions rendered prior to October 1, 1981.

by inadvertence, mistake, [or] carelessness") (quotation marks omitted).

Accordingly, we must conclude that McWane is entitled to a judgment of acquittal on Count 24.

III. CONCLUSION

For the foregoing reasons, defendants' convictions are reversed. The case is remanded for entry of a judgment of acquittal in favor of defendant McWane on the false statement count (Count 24). The case is remanded for a new trial as to all defendants on the CWA conspiracy count (Count 1) and for a new trial as to all defendants charged in the remaining substantive CWA counts (Counts 2, 3, 5, 7-19, 21, and 22).

REVERSED, VACATED, and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-17019

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

CHARLES BARRY ROBISON, DEFENDANT

MCWANE, INC., DEFENDANT-APPELLANT

JAMES DELK, MICHAEL DEVINE, DEFENDANTS-APPELLANTS, CROSS-APPELLEES

Mar. 27, 2008

ORDER

Before EDMONDSON, Chief Judge, and TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.[*]

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate

[*] Judge William H. Pryor, Jr., has recused himself and did not participate.

Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

WILSON, Circuit Judge, dissenting from the denial of rehearing en banc, in which BARKETT, Circuit Judge, joins:

The panel in this case vacated the defendants' convictions for conspiracy and for substantive violations of the Clean Water Act ("the Act" or "CWA"), holding that the jury charge was inconsistent with the Supreme Court's intervening decision in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L.Ed.2d 159 (2006). *Rapanos* was a 4-1-4 decision in which the plurality and Justice Kennedy set forth different standards for determining whether a water is within the scope of the Act. The panel held that Justice Kennedy's opinion provides the sole controlling standard, notwithstanding that the four *Rapanos* dissenters would uphold federal jurisdiction in cases where either test is satisfied.

In my view, the panel's decision cannot be reconciled with Supreme Court and Eleventh Circuit precedents addressing the proper application of fractured Supreme Court decisions. Moreover, the decision fails as a matter of common sense, as it gives no legal effect to a standard under which eight Justices would find CWA jurisdiction. This error is one of exceptional importance, implicating both the jurisdictional scope of the CWA and the interpretation of fragmented decisions generally. Accordingly, I would grant the United States' petition for rehearing en banc.

I. BACKGROUND[1]

The CWA prohibits the discharge of pollutants into "navigable waters," 33 U.S.C. §§ 1311(a), 1362(12), which are defined to mean "the waters of the United States, including the territorial seas," *id.* § 1362(7). The defendants were prosecuted for conspiracy to violate the CWA and for several substantive CWA violations arising out of the discharge of pollutants into Avondale Creek, a stream that indirectly feeds into the Black Warrior River. Relying on our decision in *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), the district court instructed the jury that a "water of the United States" includes any stream—whether it flows continuously or only intermittently—that may eventually flow into a navigable stream or river. The jury returned guilty verdicts against the defendants.

Following the defendants' convictions, the Supreme Court issued its *Rapanos* decision. *Rapano*s involved two consolidated cases in which the Court construed the terms "navigable waters" and "the waters of the United States" in relation to wetlands located near ditches or drains that eventually emptied into traditional navigable waters. *See Rapanos*, 547 U.S. at 729, 126 S. Ct. at 2219 (plurality opinion). The Court remanded the cases for consideration of whether the wetlands at issue fell within the scope of CWA jurisdiction. However, the five Justices comprising the majority were divided as to the proper standard to be applied in making that determination. Writing for a four-Justice plurality, Justice Scalia

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[1] The factual background and procedural history are set forth in greater detail in the panel opinion. *See United States v. Robison*, 505 F.3d 1208, 1211-14 (11th Cir. 2007).

construed the term "the waters of the United States" to include only "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, 126 S. Ct. at 2225 (alterations in original) (citation omitted). In the plurality's view, a wetland must have a "continuous surface connection" to such a water body in order to be covered by the Act. *Id.* at 742, 126 S. Ct. at 2226.

In a separate concurrence, Justice Kennedy concluded that a different standard is applicable. According to Justice Kennedy, a water or wetland is within the scope of CWA jurisdiction if it "possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759, 126 S. Ct. at 2236 (Kennedy, J., concurring) (citing *Solid Waste Agency of N. Cook County v. Army Corps of Engineers*, 531 U.S. 159, 167, 172, 121 S.Ct. 675, 148 L. Ed. 2d 576 (2001)). In Justice Kennedy's view, wetlands meet this "significant nexus" test if, "either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780, 126 S. Ct. at 2248.

Justice Stevens dissented in an opinion joined by three other Justices. The dissenters would have deferred to the Army Corps of Engineers' interpretation of the Act as encompassing the wetlands at issue. *Id.* at 788, 126 S. Ct. at 2252 (Stevens, J., dissenting). The dissent specifically noted that all four Justices who joined in the opinion would uphold CWA jurisdiction "in all other cases in which either the plurality's or Justice

Kennedy's test is satisfied." *Id.* at 810, 126 S. Ct. at 2265. The dissent further indicated that, although Justice Kennedy's standard likely would be controlling in most cases, "in the unlikely event that the plurality's test is met but Justice Kennedy's is not, courts should also uphold the Corps' jurisdiction." *Id.* at 810 n.14, 126 S. Ct. at 2265 n.14.

The defendants in this case argued on appeal that the district court's jury instruction was erroneous in light of *Rapanos* and that Avondale Creek is not a "navigable water" within the meaning of the CWA. The panel noted that there is a circuit split over which *Rapanos* opinion provides the controlling definition of that term. *United States v. Robison*, 505 F.3d 1208, 1219-20 (11th Cir. 2007). Ultimately, the panel relied on *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977), for the proposition that, in determining *Rapanos's* holding, it was not free to consider the views of the Justices who dissented. *Id.* at 1221. Instead, the panel believed that it must determine "which of the positions taken by the *Rapanos* Justices *concurring in the judgment* is the 'narrowest,' i.e., the least 'far-reaching.'" *Id.* (citations omitted) (emphasis in original). The panel concluded that Justice Kennedy's "significant nexus" test fits that description because, "at least in wetlands cases such as *Rapanos*, [it] will classify a water as 'navigable' more frequently than Justice Scalia's test." *Id.* Therefore, the panel adopted Justice Kennedy's test as the governing definition of "navigable waters." *Id.* at 1222.

Applying that standard, the panel held that the jury instruction failed to comport with the "significant nexus" test and thus was erroneous. *Id.* The panel determined

that this error was not harmless because the government presented no evidence about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River. *Id.* at 1223. Accordingly, the panel vacated the defendants' convictions and remanded the case for a new trial.

The panel recognized that "[t]his case arguably is one in which Justice Scalia's test may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test." *Id.* Therefore, the panel noted, "the decision as to which *Rapano*s test applies may be outcome-determinative in this case." *Id.* at 1224. Although the jury instruction was also erroneous under the plurality's test, the error "may well have been harmless" under that standard because a government witness "clearly and unambiguously testified that there is a continuous, uninterrupted flow between Avondale Creek and the Black Warrior River." *Id.* Nevertheless, in light of its conclusion that *Marks* required it to adopt Justice Kennedy's test, the panel determined that the harmless error analysis should be based on that standard alone. *Id.* For the same reason, the panel instructed the district court to apply Justice Kennedy's test on remand. *Id.*

II. DISCUSSION

A.

In *Marks*, the Supreme Court held: "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.'" 430 U.S. at 193, 97 S. Ct. at 993 (quoting *Gregg v. Georgia*, 428 U.S. 153,

169 n.15, 96 S. Ct. 2909, 2923 n.15, 49 L. Ed. 2d 859 (1976) (plurality opinion)). However, the Court has recognized that the *Marks* test is "more easily stated than applied" in certain cases, and that it has "baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745-46, 114 S. Ct. 1921, 1926-27, 128 L. Ed. 2d 745 (1994); *see also Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S. Ct. 2325, 2337, 156 L. Ed. 2d 304 (2003) (quoting *Nichols*); *Rapanos*, 547 U.S. at 758, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (citing *Grutter*'s discussion of *Marks*). I conclude that the *Marks* framework is ill-suited as a guide to determining the holding of *Rapanos*. As the First Circuit explained in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied*,—U.S.—, 128 S. Ct. 375, 169 L. Ed.2d 260 (2007), a review of *Marks* and the cases it relied upon reveals the limitations of the *Marks* rule in this context.

In *Marks*, the defendant asserted a due process challenge to his conviction for transporting obscene materials, arguing that he had been punished retroactively under a definition of obscenity established after his conduct occurred. The Court looked to a prior obscenity case, *Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), to determine the state of the law at the time of the offense. In *Memoirs*, the Court reversed a state court's finding that a book was obscene and thus unprotected under the First Amendment, but the Justices in the majority offered different rationales in support of the judgment. Writing for himself and two other Justices, Justice Brennan concluded that the book would not be protected if it were deemed obscene under a correct inter-

pretation of the applicable legal standard. *Memoirs*, 383 U.S. at 418-19, 86 S. Ct. at 977 (plurality opinion). Justice Stewart concurred based on his view that the First Amendment permits suppression of hardcore pornography only. *Id.* at 421, 86 S. Ct. at 979 (Stewart, J., concurring). And Justices Black and Douglas concurred on the grounds that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity. *Id.* at 421, 86 S. Ct. at 979 (Black, J., concurring); *id.* at 426, 86 S. Ct. at 981 (Douglas, J., concurring). The *Marks* Court determined that the position articulated in Justice Brennan's opinion represented the "narrowest grounds" for the judgment, and therefore that opinion constituted the holding of the Court. *Marks*, 430 U.S. at 194, 97 S. Ct. at 994.

The source of *Marks*'s "narrowest grounds" language, *Gregg v. Georgia*, was a death penalty case in which the Court considered its prior fragmented decision in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). In *Furman*, five Justices agreed that the imposition of the death penalty in the cases before the Court constituted cruel and unusual punishment. However, Justice Brennan and Justice Marshall would have reached the conclusion that capital punishment is per se unconstitutional. *Id.* at 305, 92 S. Ct. at 2760 (Brennan, J., concurring); *id.* at 369-70, 92 S. Ct. at 2793 (Marshall, J., concurring). The other three Justices agreed that the statutes at issue were invalid, but left open the question whether capital punishment ever may be imposed. Among these Justices, Justice Stewart and Justice White believed that the statutes violated the Eighth Amendment because they permitted the death penalty to be imposed arbitrarily and capriciously. *Id.* at 306, 92 S. Ct. at 2760 (Stewart, J., concur-

ring); *id*. at 310-11, 92 S. Ct. at 2763 (White, J., concurring). Justice Douglas deemed the statutes unconstitutional on the grounds that they were applied disproportionately against minorities and the poor due to their discretionary aspect and the ability of wealthier defendants to obtain superior counsel. *Id*. at 255-57, 92 S. Ct. at 2734-36 (Douglas, J., concurring). In *Gregg*, it was determined that the position taken by Justices Stewart and White represented the narrowest grounds for the judgment and thus constituted the Court's holding. *Gregg*, 428 U.S. at 169 n.15, 96 S. Ct. at 2923 n.15 (plurality opinion).

As these cases indicate, the *Marks* framework makes sense only in circumstances in which one Supreme Court opinion truly is "narrower" than another—that is, where it is clear that one opinion would apply in a subset of cases encompassed by a broader opinion. In *Memoirs*, for example, the Justices taking the absolutist view of the First Amendment would always rule in favor of protecting speech, while the Justices who believed that only non-obscene speech is protected would reach the same conclusion in a subset of those cases. Similarly, in *Furman*, the Justices who believed that capital punishment is per se unconstitutional would invalidate death sentences in all future cases. The Justices who limited their decisions to the death penalty statutes before the Court would agree with that result in a subset of such cases. In each instance, the "narrower" opinion "fit entirely within a broader circle drawn by the others." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). In other words, the Justices supporting the broader position would *always* agree with the result reached by the author of the narrower opinion in cases where the latter's test was satisfied.

Several of our sister circuits have recognized this limitation on *Marks*'s scope. *See, e.g., Johnson*, 467 F.3d at 64 ("[T]he 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other. When applied to future cases, the less sweeping opinion would require the same outcome in a subset of the cases that the more sweeping opinion would."); *King*, 950 F.2d at 781 ("*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions."); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir.) (same), *cert. denied*,—U.S.—, 127 S. Ct. 692, 166 L. Ed. 2d 536 (2006); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (same); *see also Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994) (finding that concurring opinion provided controlling rule under *Mark*s because that opinion "set forth as its standard a coherent subset of the principles articulated in the plurality opinion").

B.

Neither the *Rapanos* plurality's nor Justice Kennedy's test is a subset of the other. The two tests simply set forth different criteria for determining whether a water is within the scope of the CWA. Unlike the Justices in *Memoirs* and *Furman*, neither the plurality nor Justice Kennedy necessarily would agree with the outcome reached by the other in any given case. In many instances, Justice Kennedy's test would result in a finding of CWA jurisdiction where the plurality's test would not. In others, however, the plurality would find jurisdiction even if Justice Kennedy reached the opposite

conclusion. *See Johnson*, 467 F.3d at 64 (noting that *Rapanos* plurality would find jurisdiction in cases involving small surface water connection to stream or brook, but Justice Kennedy might not find significant nexus); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam) (same), *cert. denied*,—U.S.—, 128 S.Ct. 45, 169 L. Ed. 2d 12 (2007). The present case may fall within this latter category. As the panel recognized, the record here arguably establishes CWA jurisdiction under the plurality's test but not Justice Kennedy's. *Robison*, 505 F.3d at 1223. It thus is difficult to understand how either test can be characterized as "narrower" than the other, at least as that term is understood in *Marks*.

Nevertheless, the panel concluded that Justice Kennedy's test is narrower than the plurality's because, "at least in wetlands cases such as *Rapanos*, [it] will classify a water as 'navigable' more frequently." *Id.* at 1221. The panel based this conclusion on the fact that Justice Kennedy rejected two "limitations" imposed by the plurality's test: "the requirement that 'navigable waters' must be 'relatively permanent, standing or flowing bodies of water' and the requirement of a 'continuous surface connection.'" *Id.* at 1221-22 (citations omitted). However, Justice Kennedy's test imposes a limitation that is absent under the plurality's test: the showing of a "significant nexus" between the water at issue and "waters that are or were navigable in fact or that could reasonably be so made." *Rapano*s, 547 U.S. at 759, 126 S. Ct. at 2236 (Kennedy, J., concurring). Furthermore, Justice Kennedy rejected the plurality's test in part because he deemed it overinclusive in certain respects. *See id.* at 769, 126 S. Ct. at 2242 (Kennedy, J., concurring) (stating that, under plurality's test, "[t]he merest

trickle, if continuous, would count as a 'water' subject to federal regulation"); *id.* at 776-77, 126 S. Ct. at 2246 ("[B]y saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach."). Thus, Justice Kennedy's test is not uniformly narrower than the plurality's, and Justice Kennedy did not regard it as such.

Moreover, the *Marks* rule does not turn on the frequency with which a given test will be satisfied. Under *Marks*, the "narrowest" ground is that which reflects a common denominator implicitly supported by the Justices concurring in the judgment. *See King*, 950 F.2d at 781. As discussed, there is no such common denominator in *Rapano*s. Thus, however frequently it may result in CWA jurisdiction, Justice Kennedy's test is not "narrower" than the plurality's approach for purposes of *Marks*; it is a different standard altogether.

For these reasons, I agree with the First Circuit that *Marks* provides little, if any, guidance as to the proper interpretation of *Rapanos*. *See Johnson*, 467 F.3d at 64 (noting "the shortcomings of the *Marks* formulation in applying *Rapanos*"); *see also Carrizales-Toledo*, 454 F.3d at 1151 ("We do not apply *Marks* when the various opinions supporting the Court's decision are mutually exclusive."). The panel acknowledged these limitations, *see Robison*, 505 F.3d at 1221 n.14 (noting that "*Marks* does not 'translate easily' to *Rapanos*") (quoting *Johnson*, 467 F.3d at 64), but nonetheless concluded that *Marks* barred it from considering the views of the dissenting Justices in identifying *Rapanos*'s holding. As

discussed below, however, that conclusion is inconsistent with later Supreme Court and Circuit precedents approving the consideration of such views in circumstances similar to those involved here.

C.

In considering its own prior fragmented decisions, the Supreme Court has frequently analyzed dissents in combination with other opinions to identify the legal principles that have the support of a majority of the Justices. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594, 2607, 165 L. Ed. 2d 609 (2006) (citing concurring and dissenting opinions to establish majority support for legal proposition); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17, 103 S. Ct. 927, 937, 74 L. Ed. 2d 765 (1983) (finding that four dissenting Justices and concurring Justice formed majority to reaffirm controlling legal standard); *see also Waters v. Churchill*, 511 U.S. 661, 685-86, 114 S. Ct. 1878, 1893, 128 L. Ed. 2d 686 (1994) (Souter, J., concurring) (analyzing plurality, concurring, and dissenting opinions to identify legal test to be applied by lower courts); *Alexander v. Sandoval*, 532 U.S. 275, 281-82, 121 S. Ct. 1511, 1517, 149 L. Ed. 2d 517 (2001) (noting agreement between Justice who joined plurality and four dissenters). In the panel's view, however, the authority to consider dissenting opinions is confined to the Supreme Court. Lower courts, the panel believed, "do not have that luxury." *Robiso*n, 505 F.3d at 1221.

However, the Supreme Court has expressly approved the consideration of dissenting Justices' views by a court of appeals. In *Moses H. Cone* (a post-*Marks* case), the

petitioner argued that the *Colorado River* test[2] governing the entry of a stay of federal court proceedings had been overruled by a subsequent case, *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 98 S.Ct. 2552, 57 L. Ed. 2d 504 (1978). The Court rejected this argument, noting that the opinion announcing the judgment in *Will* garnered the support of only four Justices. Justice Blackmun provided the fifth vote for reversal but agreed with the dissenters that the *Colorado River* test was controlling. Thus, the Court in *Moses H. Cone* noted: "On remand, the Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority to require application of the *Colorado River* test." 460 U.S. at 17, 103 S. Ct. at 937.

We have followed the same approach in interpreting fractured Supreme Court decisions. For example, in *Martin v. Dugger*, 891 F.2d 807 (11th Cir. 1989), *overruling on other grounds recognized in Johnson v. Singletary*, 991 F.2d 663, 667 (11th Cir. 1993) (per curiam), we held that the district court had improperly relied on the plurality view in *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986), to determine the showing necessary for a court to consider the merits of a successive habeas petition. Instead, we looked to both the plurality opinion and the dissenting opinions in *Kuhlmann* to ascertain the legal principle agreed upon by a majority of the Court. *See Martin*, 891 F.2d at 808-09 & n.2. After analyzing these various opinions, we concluded:

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[2] *See Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

> Thus, a majority of the court agrees that a showing of innocence is a factor that may be appropriately considered. Although in *Kuhlmann* the premise that factual innocence is one of the grounds to be considered commands a "majority" only by grouping justices who disagree as to the result, nonetheless we believe this situation is sufficiently analogous to that of . . . *Marks v. United States* to warrant deference to the common ground among members of the fragmented Court. This is especially true as the three dissenting justices made explicit their agreement with the more limited premise (that factual innocence was one of the factors to consider), which was encompassed by the position of the four justice plurality.

Id. at 809 n.2 (citations omitted).

As in *Kuhlmann*, the dissenters in *Rapanos* explicitly stated their agreement with the narrower premises advocated by the Justices supporting the judgment. That is, they agreed that waters described by either the plurality's or Justice Kennedy's test are within the scope of CWA jurisdiction. *See Rapanos*, 547 U.S. at 810, 126 S. Ct. at 2265 (Stevens, J., dissenting). We thus do not need to speculate whether these Justices would find jurisdiction in this case if the record indicates that the plurality's test has been satisfied. They have stated unequivocally that they would do so.

Our decision in *McCullough v. Singletary*, 967 F.2d 530 (11th Cir. 1992), likewise took dissenting opinions into account as part of its analysis. In *McCullough*, we agreed with the Fifth Circuit's interpretation of *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), a fractured decision involving a defen-

dant's Eighth Amendment challenge to his sentence on grounds of proportionality. *See McCullough*, 967 F.2d at 535 (citing *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992)). The Fifth Circuit "appl[ied] a head-count analysis" of Harmelin—one that included consideration of the views of the four dissenting Justices—and concluded that "seven members of the Court supported a continued Eighth Amendment guaranty against disproportional sentences." *McGruder*, 954 F.2d at 316.

In light of this authority, I believe that the panel erred in basing its harmless error analysis exclusively on Justice Kennedy's test. The panel also should have considered whether the district court's erroneous jury instruction was harmless under the plurality's test. This "simple and pragmatic" approach, *Johnson*, 467 F.3d at 64, would have given recognition to the indisputable fact that there is majority support among the Justices for both the plurality's and Justice Kennedy's tests. Moreover, it might have avoided the bizarre outcome created by the panel decision: that this case has been remanded for a new trial even though, as the panel acknowledges, the current record may well establish jurisdiction under the plurality's test, which eight Justices agree encompasses waters covered by the Act. Had the panel concluded that the instructional error was not harmless under the plurality's test, it should have instructed the district court that the government may prove jurisdiction on remand under either the plurality's or Justice Kennedy's test. *See Rapanos*, 547 U.S. at 810 n.14, 126 S. Ct. at 2265 n.14 (Stevens, J., dissenting).

D.

The panel's error, I believe, is of sufficient magnitude as to warrant en banc consideration. Review by the full court is appropriate where a panel decision constitutes a "precedent-setting error of exceptional importance" and is "in direct conflict with precedent of the Supreme Court or of this circuit." 11th Cir. R. 35-3. For the reasons discussed above, I conclude that the panel's decision conflicts with the Supreme Court's decision in *Moses H. Cone* and with our decisions in *Martin* and *McCullough*. The exceptional importance of this error is apparent in view of the geography of the states in the Eleventh Circuit and the frequency with which CWA cases are likely to arise in this Circuit in the future. The large number of water bodies and wetlands in the region, coupled with the significant pace of development, suggests that later disputes over the scope of federal authority under the Act may occur with some regularity.[3]

An additional consideration supporting en banc review is the fact that the panel's opinion goes farther than the other circuit court decisions that have found Justice Kennedy's test to be the applicable *Rapanos* standard. No other circuit has held that the plurality's test is *never* applicable, even where, as here, that test may result in a finding of jurisdiction. Thus, the Ninth Circuit amended its original opinion in *Northern California River Watch v. City of Healdsburg* to note that Justice Kennedy's concurrence provided "the controlling

[3] The United States notes in its petition for rehearing en banc that many tributaries in this Circuit flow year-round and thus would readily satisfy the plurality's test.

rule of law for our case" and that it is "the narrowest ground to which a majority of the Justices would assent if forced to choose *in almost all cases*." 496 F.3d 993, 999-1000 (9th Cir. 2007) (emphasis added), *cert. denied*,—U.S.—, 128 S. Ct. 1225, 170 L. Ed. 2d 61 (2008).[4] The Seventh Circuit in *Gerke* held that Justice Kennedy's test "must govern the further stages of this litigation," 464 F.3d at 725, but did not hold that his test applies in all cases. In fact, the court arguably suggested to the contrary. *See id.* (noting that in a case involving a slight hydrological connection, Justice Kennedy might vote against a finding of jurisdiction "only to be outvoted 8-to-1."). Thus, the panel's decision not only conflicts with the First Circuit's ruling in *Johnson;* it also announces a more sweeping interpretation of *Rapanos* than that adopted by any other circuit.

Finally, I note that the reach of the panel's decision will not be confined to CWA cases. The decision will have relevance across a range of future cases involving the interpretation of a fractured Supreme Court decision. To ensure that our case law conforms to the Court's teachings on that issue and provides consistent guidance to courts in this Circuit, en banc review would have been proper in this case.

For these reasons, I respectfully dissent from the denial of rehearing en banc.

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[4] The court's initial opinion discussed *Rapanos* in more categorical terms. *See N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) ("Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law.").

APPENDIX C

1. 33 U.S.C. Section 1311(a) provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

2. 33 U.S.C. Section 1319 provides in pertinent part:

Enforcement

(c) Criminal penalties

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

* * * * *

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. * * *

3. 33 U.S.C. Section 1362 provides in pertinent part:

Definitions

* * * * *

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

4. 33 C.F.R. Section 328.3 provides:

Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

5. 40 C.F.R. Section 230.3(s) provides:

Definitions

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.