No. 08-223

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MCWANE, INC., ET AL., RESPONDENTS

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

BRIEF AMICUS CURIAE OF PETITIONERS IN NO. 07-1512 IN SUPPORT OF PETITIONER

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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.

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INTERESTS OF AMICI CURIAE

Amici are the petitioners in the pending case of *United States* v. *Lucas*, No. 07-1512.[1] As the United States recognizes in its petition (at 30 n.10), *amici's* petition presents the same essential issue that the United States presents here: specifically, which of the alternative standards articulated in *Rapanos* v. *United States*, 547 U.S. 715 (2006), governs the lower courts in determining the extent of federal jurisdiction under the Clean Water Act (CWA).

In addition to the *Marks* issue presented in both petitions, however, *amici* have also presented a separate question that would allow the Court to articulate the proper interpretation of whichever of the *Rapanos* standards the Court selects. And *amici's* case involves the scope of federal jurisdiction, not over perennially flowing streams, as in this case, but over wetlands—an area of far greater practical and legal importance.

Unlike the respondents in this case, moreover, the individual *amici* are currently serving prison terms based upon the lower courts' misinterpretation of the Clean Water Act and each of the standards articulated in *Rapanos*. As a direct result, one of the individual *amici*—Robbie Wrigley—is now being deprived of the opportunity to raise her young son to adolescence. And the other two individual *amici*—Robert Lucas and M.E. Thompson—are being deprived of the

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[1] The parties have consented to the filing of this brief. Under Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or its counsel made a monetary contribution to preparation or submission of this brief.

opportunity to spend their sunset years with family and friends. *Amici* therefore have a powerful interest in helping this Court provide needed guidance to lower courts—including those that have previously addressed the *Lucas* case—in determining the extent of federal jurisdiction under the Clean Water Act, particularly in the wetlands context.

ARGUMENT

As noted, the Government here seeks certiorari to determine how to interpret this Court's fractured decision in *Rapanos*, while the *Lucas* petitioners seek certiorari on that question as well as the broader question of *how* whichever standard the Court selects should be understood and applied. For that and other reasons discussed in Section I below, it makes sense for the Court to grant both petitions and consider them in tandem. Alternatively, as explained in Section II (and in the attached reply filed in support of *amici*'s petition), if the Court wishes to grant only one of these petitions, it should grant the *Lucas* petition, which provides a superior vehicle with which to resolve these difficult questions.

I. The Court should grant both petitions and consider them in tandem.

Amici agree with the Government that the *Marks* question presented in this case is the subject of an acknowledged and mature circuit conflict and is, in addition, an issue of profound practical importance—not only to the Government, but to businesses and other property owners throughout the nation. Indeed, according to the Environmental Protection Agency, as many as 300 million acres of wetlands blanket the United States, a third of them in the lower 48 states. EPA, *Wetlands: Status and Trends*,

http://www.epa.gov/OWOW/wetlands/vital/status.html (last updated Feb. 22, 2006). Depending on how the Government's jurisdiction is defined, moreover, it may exercise control over as little as 20 percent or as much as 90 percent of those wetlands. See Jon Kusler, Association of State Wetland Managers, *The SWANCC Decision: State Regulation of Wetlands to Fill the Gap* 6-8 (March 2004), at http://www.aswm.org/fwp/swancc/aswm-int.pdf. The extent of federal jurisdiction under the CWA is therefore a matter of critical importance in need of this Court's attention. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land * * *, we granted certiorari.").

The very importance of that issue, however, especially in the wetlands context, demands rejection of the Government's attempt to confine this Court's consideration to a single case arising in the quite different context of discharges directly into a perennial stream. The more sensible approach is to grant both petitions and hear them in tandem.

That approach is in keeping with the Court's past practice in analogous cases. Often during the past several Terms, when the Court has received two nearly simultaneous petitions raising similar or closely related issues, the Court has granted *both* petitions and considered the two cases in tandem. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Gratz* v. *Bollinger*, 539 U.S. 244 (2003) (considering in tandem two cases involving the constitutionality of affirmative action programs); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003) and *United States* v. *Navajo Nation*, 537 U.S. 488, 493 (2003) (considering in tandem suits over whether the

Government violated fiduciary duties to two native tribes); *Lockyer* v. *Andrade*, 538 U.S. 63 (2003) and *Ewing* v. *California*, 538 U.S. 11 (2003) (deciding in tandem two criminal cases involving California's "three-strikes" law); *Van Orden* v. *Perry*, 545 U.S. 677 (2005) and *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005) (hearing in tandem two cases on the public display of the Ten Commandments); *Hammon* v. *Indiana*, 547 U.S. 813 (2006) and *Davis* v. *Washington*, 547 U.S. 813 (2006) (deciding in tandem whether statements in a 911 call and to police constituted testimonial statements under *Crawford* v. *Washington*, 541 U.S. 36 (2004)); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) and *Meredith* v. *Jefferson County Bd. of Educ.*, 127 S. Ct. 2738 (2007) (considering in tandem whether school policies aimed at racial desegregation were unconstitutional); *Gonzales* v. *Carhart*, 127 S. Ct. 1610 (2007) and *Gonzales* v. *Planned Parenthood*, 127 S. Ct. 1610 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003 in tandem cases).

This procedure—hearing two closely related cases in tandem—has allowed the Court to consider the common issues more thoroughly and, ultimately, to give more comprehensive guidance to lower courts as to how to apply the legal standards the Court has adopted. For example, in *Grutter* and *Gratz,* both cases presented the broad issue of how to assess the constitutionality of affirmative action programs in higher education. Accordingly, the Court *could* simply have granted one of the cases and held the other pending the outcome of the first. But the two cases presented the affirmative action issue in two distinct contexts—one in the context of a law school admissions program that considered race subjectively, as

one of several factors; and the other in the context of a more objective undergraduate admissions program that automatically gave racial minorities a specific number of "points" based on the applicant's minority status. Given the differing factual settings in which the common issue arose, and the opportunity that both cases offered for providing guidance to the lower courts, the Court sensibly granted both petitions and heard the two cases in tandem.

Similar opportunities are offered by the two CWA cases now before the Court—this case and *Lucas*. Here again, the Court *could* simply grant one and hold the other pending decision in the first. But, as in *Grutter* and *Gratz* (and the other cases listed above), considering both cases together offers distinct advantages.

First, simultaneous consideration will allow the Court to more readily consider the scope of federal jurisdiction under the Clean Water Act in *both* of the contexts in which that issue arises most frequently—discharges into perennially flowing streams (as in this case) and the much more important context of discharges into wetlands—the context in *Lucas*. As another group of *amici* here have explained, "it is important to review CWA jurisdiction as it applies to *all* types of water bodies." Brief of *Amicus Curiae* American Farm Bureau Federation et al. (hereinafter "AFBF Brief"), No. 08-223, at 8 n.5.

Consideration of the jurisdictional question in the context of flowing streams alone—as the Government seeks here—would risk the adoption of a legal analysis that is both incomplete and less well suited to the wetlands context. For example, a decision in this case as to whether a perennially flowing stream con-

stitutes "waters of the United States" would not resolve the vexing and recurring issue of what it means for a *wetland* to be "adjacent" to navigable waters or their tributaries, and hence to constitute a "water of the United States" in its own right. See *Rapanos*, 547 U.S. at 728 (Scalia, J. plurality); *id.* at 760 (Kennedy, J. concurring); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). Nor would this case give the Court an opportunity to resolve a key issue presented by the *Rapanos* plurality and concurrence, namely, how close and continuous a connection there must be between a wetland and a "relatively permanent" body of water. See AFBF Brief at 16-19; Brief of *Amicus Curiae* National Ass'n of Homebuilders and Chamber of Commerce of the United States, No. 07-1512, at 13-16.

For all these reasons, simultaneous consideration of both cases offers the best chance of ensuring that the Court fully appreciates both contexts and crafts its analysis in a way that is well suited to both.

Second, simultaneous consideration of both cases will allow the Court to more readily consider the views of two different courts of appeals as to the proper legal standard. As explained in the *Lucas* reply brief (Appendix A at 8a-9a), the courts of appeals in these two cases adopted very different interpretations of the *Rapanos* plurality. And, as shown in the *Lucas* reply (App. A at 11a-12a), the lower courts are in disarray as to the proper understanding of the concurrence's "substantial nexus" standard. Furthermore, especially in the wetlands context, the Government has construed the scope of this test extremely broadly, well beyond any reasonable construction of the *Rapanos* concurrence. See AFBR Brief at 7-8. Simultaneous consideration of both

cases will thus make it easier for the Court, in responding to these divergent views, to articulate exactly what its chosen standard means, and how that standard (or those standards) is to be applied.[2]

Third, as explained in the *Lucas* reply brief (App. A at 15a-16a), simultaneous consideration of both cases will ensure that at least one party before the Court is defending each of the three positions offered by the various *Rapanos* opinions. In this case, the Government will no doubt continue to urge adoption of the *Rapanos* dissent—*i.e.,* that federal jurisdiction exists when the standard adopted by *either* the plurality or the concurrence is satisfied. Similarly, because of the Eleventh Circuit's observation that the Government had satisfied the *Rapanos* plurality, but *not* the concurrence, the respondents here will have a powerful incentive to urge the adoption of the concurrence alone. Thus, if the Court were to grant review in this case but hold *Lucas*, none of the *parties* before the Court would likely defend the *Rapanos* plurality. By contrast, the *Lucas* petitioners intend to argue—based in part on the rule of lenity—that, at least in the criminal context, the *Rapanos* plurality should control.

In all of these respects, moreover, this case differs markedly from *Rapanos*, in which the Court consoli-

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[2] Indeed, even if the Government were correct that *Lucas* is not the most "appropriate" vehicle for resolving the *Marks* question presented in both petitions—because the Fifth Circuit did not choose a single legal standard—that alleged deficiency would be eliminated by granting both petitions, considering them in tandem, and then using *Lucas* (at a minimum) as a vehicle for determining the proper understanding of whichever standard the Court chooses. But in any event, the Government's premise is wrong: As explained in the *Lucas* reply (at 3-4), *Lucas* is a perfectly appropriate for resolving the *Marks* issue as well.

dated the two underlying cases rather than consider them in tandem. Unlike these cases, both of the cases at issue in *Rapanos* arose in the wetlands context. See 547 U.S. at 729-730. Unlike these cases, moreover, both of the underlying cases in *Rapanos* had been decided by a single circuit—the Sixth—under the same legal standard. And unlike these cases, the landowners there did not have divergent legal interests, and were not pressing for materially different standards.

For all these reasons, the Court should grant both this petition and the *Lucas* petition, and hear both cases in tandem.

II. If the Court nevertheless wishes to limit itself to one case, it should grant the *Lucas* petition.

If the Court decides to grant only one petition, however, it should grant the *Lucas* petition. As explained in greater detail in the *Lucas* reply (App. A), *Lucas* is a superior vehicle for resolving the difficult questions of the Government's jurisdiction in Clean Water Act cases.

First, unlike this case, *Lucas* (as noted) involves discharges into what the Government claims are jurisdictional wetlands, which this Court has recognized as raising significant constitutional questions. See *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality); *id.* at 782 (Kennedy, J., concurring); see also App. A at 7a-8a. As *Rapanos* attests, moreover, interpreting the CWA in the wetlands context is in general more challenging—not just for the courts, but for governmental and private actors alike. And, as noted, the wetlands context is far more important as a practical matter than the flowing streams context—given that

the former context potentially comprises hundreds of millions of acres of land. Accordingly, if the Court were to choose only one CWA case to hear and decide on the merits, it would make far more sense to choose a wetlands case than a flowing streams case.

Second, the Eleventh Circuit here only applied the *Rapanos* plurality, whereas the Fifth Circuit in *Lucas* purported to apply both the *Rapanos* plurality and concurrence. *Lucas*, therefore, offers this Court an opportunity to provide lower courts with guidance on the proper application of either of those standards. It also gives this Court the opportunity to address the proper standards to apply to residential septic systems—also an issue of enormous practical importance. See App. A at 8a-9a.

Finally, because the *Lucas* petitioners were sentenced to long prison terms based solely on the Government's expansive interpretation of the CWA, that case brings into sharper focus the substantial liberty and due process interests implicated by a decision on the scope of the federal government's jurisdiction. See Appendix A at 14a-15a. Those interests are more readily apparent in the *Lucas* case, in which, as noted, the Fifth Circuit's misinterpretation of the CWA means that a young child must now grow up to adolescence without his mother's care, and two grandfathers may spend most if not all of their remaining twilight years in prison, without the company of family and friends.

CONCLUSION

For all these reasons, the Court should grant the petition and hear this case in tandem with *United States* v. *Lucas*, No. 07-1512. Alternatively, the

Court should hold this petition pending a decision on the merits in *Lucas*.

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