No. 08-223

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MCWANE, INC., ET AL.,

Respondent.

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

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

Duane J. Desiderio*
Thomas J. Ward
Jeffrey B. Augello
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200
* *Counsel of Record*

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INTEREST OF AMICUS CURIAE

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

This case is important to amicus because it involves the scope of the jurisdiction of the federal government over certain waterbodies under the CWA. Assertions of Army Corps of Engineers ("Corps") and Environmental Protection Agency ("EPA") permitting control over private property has had a significant impact on the development plans of NAHB's members throughout the nation. Many members have been

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Letters of consent are on file with the Clerk. 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 curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

denied the economic benefits that result from development, as a result of the CWA's complicated and arcane permitting processes.

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

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE FOR THE SAME REASONS THAT IT SHOULD ACCEPT REVIEW IN *UNITED STATES V. LUCAS.*

On June 2, 2008, petitioners in *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), *pet. for .cert. filed*, (June 2, 2008) (No. 07-1512), sought review of the Fifth Circuit's decision upholding their multi-year criminal convictions for, among other things, violations of sections 402 and 404 of the CWA. On July 7, 2008, NAHB and the Chamber of Commerce of the United States of America filed an amici curiae brief in support of the *Lucas* petitioners, advocating for a grant of certiorari. Br. of the National Association of Home Builders, *et al.*, as Amici Curiae Supporting Pet'rs, *Lucas v. United States*, No. 07-1512 (S. Ct. filed July 7, 2008) ("NAHB *Lucas* Amici Br.").

At their core, the petitions in both *Lucas* and the case at bench seek clarification of *Rapanos v. United States,* 547 U.S. 715 (2006), a 4-1-4 decision where a majority of this Court could not agree on an overarching test for jurisdiction of statutory "navigable waters" under the CWA. For the reasons that NAHB believes certiorari should be granted in *Lucas*, the Court should also accept *McWane* for review.

The very same split among the circuits, with an analysis of the very same universe of appellate decisions, discussed by NAHB in *Lucas* is again urged here by the United States as necessitating this Court's intervention. Compare NAHB *Lucas* Amici Br. at 4-10 with Cert. Pet. of the United States, *United States v. McWane,* No. 08-223 (S. Ct. filed Aug. 21, 2008) ("*McWane* Cert. Pet."), at 16-19. Indeed, in *Lucas* NAHB identified the court of appeals decision *in this case* as one of the main progenitors for the judicial disarray on the extent of the CWA's scope. NAHB *Lucas* Amici Br. at 7-8 (discussing *United States v. Robison,* 505 F.3d 1208 (11th Cir. 2007)). Both cases call for direction from this Court on the same issue.

Furthermore, questions about whether *Marks v. United States,* 430 U.S. 188 (1977), can be used to discern a holding from the fragmented *Rapanos* opinions,[2] is equally raised by both NAHB in *Lucas*

[2] In *Rapanos*, the Justices who concurred in the judgment announced two tests for determining CWA jurisdiction. The four-Justice plurality established the "relatively permanent

and the United State here as justification for a certiorari grant. Compare NAHB *Lucas* Amici Br. at 4-8 with *McWane* Cert. Pet. at 19-24. NAHB's submission in *Lucas* isolated the "narrowest grounds of concurrence" (*Marks*, 430 U.S. at 193)) that can be identified in the varying *Rapanos* opinions to discern a holding. See NAHB *Lucas* Amici Br. at 11-17 (identifying areas of consensus among Justices Scalia's and Kennedy's *Rapanos* opinions). If articulated in a single opinion, these areas of common ground would provide the regulated community and agency officials with proper and predictable CWA jurisdictional determinations in the field. Such a unified voice from the Justices is critical to resolution of the questions presented in both *Lucas* and *McWane*.

As NAHB offered in *Lucas*, the genesis of many problems with the CWA's implementation stem from a misunderstanding of the basic terminology used to define its jurisdictional scope. NAHB *Lucas* Amici Br. at 17-18. Confusion over the extent of "navigable waters," "the waters of the United States," "navigable waters of the United States," "traditional navigable waters," "navigable-in-fact waters" — all related terms, but each with distinct meanings and separate geographic reaches — has predictably yielded conflict in the courts and imprecision in agency determinations. *Lucas*, just like *McWane*, provides an appropriate vehicle for the Court to finally issue an opinion that moves all stakeholders closer to a shared understanding of these critical phrases. Unless all

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waterbody" test (547 U.S. at 742), while Justice Kennedy created the "significant nexus" test. *Id*. at 779-780.

interested parties are on the same page as to the meaning of these fundamental terms, clarity on the CWA's scope will only linger as a remote aspiration.

In particular, NAHB urged for clarification of the key phrase "traditional navigable waters." NAHB *Lucas* Amici Br. at 18-23. In *Rapanos*, both the plurality and concurrence acknowledged that a finding of CWA jurisdiction is inextricably linked to traditionally navigable waters ("TNWs").[3] However, in *Lucas*, the district court's jury instruction equated "navigable-in-fact" waterbodies with TNWs. *Lucas*, 516 F.3d at 323-24. The two are not interchangeable. Reading *The Daniel Ball*, 77 U.S. 557 (1870), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) together, the Court stated that a "navigable-in-fact" waterbody only qualifies as a TNW where it further forms, in its ordinary condition by itself or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries. NAHB *Lucas* Amici Br. at 20-23. With the understanding that a TNW determination serves as the foundation of any CWA analysis — but also with the recognition that all Justices believe the CWA reaches more than TNWs

[3] Justice Kennedy stated that that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and *navigable waters in the traditional sense*." *Rapanos*, 547 U.S. 715 at 779 (Kennedy, J., concurring) (emphasis added). Justice Scalia wrote that one "finding" necessary to determine if a wetland is covered by the CWA is if the "adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to a *traditional interstate navigable waters*)…." *Id.* at 742. (emphasis added).

(NAHB *Lucas* Amici Br. at 12) — NAHB again presses the Court to clarify the important distinction between TNWs, navigable-in-fact waters, and waters subject to federal agency authority under the CWA.

In its petition here, the United States references NAHB's *Lucas* Amici Brief and highlights the importance of issues regarding the CWA's scope to members of the regulated community. See *McWane* Cert. Pet. at 30-31, n. 10. However, after acknowledging that the *Lucas* petition likewise questioned the appropriate standard for determining the Act's scope under the fractured *Rapanos* decision, the United States reached the specious conclusion that *McWane* "provides a more suitable vehicle for determining CWA coverage." *Id.* at 31 n.10. While *McWane* may provide a superior vehicle for overturning a case lost by the United States at the Eleventh Circuit, it is no more appropriate than *Lucas* for resolving the fundamental issue of the "correct test" for determining the CWA's jurisdictional reach.

People are *in jail* in *Lucas*.[4] Surely from their perspective, their petition provides the better vehicle for this Court's review. The *Lucas* petition calls into

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[4] Defendant Robert J. Lucas was sentenced to serve 108 months in jail, 36 months of supervised release and ordered to pay $19,100 in penalties. Judgment, *United States v. Lucas*, No. 04-cr-60, (S.D. Miss. Dec. 21, 2005) (docket no. 223). Lucas's co-defendants were each sentenced to serve 87 months in jail, 36 months of supervised release and ordered to pay $15,000 and $3,300 in penalties, respectively. *Id.* (docket no. 219, 221). Lucas's two companies were sentenced to 60 months probation and ordered to pay a total of $5.3 million in fines and assessments. *Id.* (docket no. 215, 217). Defendants together

play the issue of whether the rule of lenity should be applied to construe the obvious ambiguities of the phrase "navigable waters" against federal inclinations toward criminal enforcement and imprisonment. See NAHB *Lucas* Amici Br. at 24-26.[5] Because uncertainty remains over whether Congress intended to extend the CWA's scope to the wetlands on the *Lucas* petitioners' property, amici asked this Court to resolve any question of the Act's coverage in Lucas's favor.

In sum, NAHB respectfully submits that the Court should grant certiorari in this matter as it should in *Lucas*.

II. THIS CASE AND *LUCAS* SHOULD BE CONSOLIDATED.

NAHB suggests that the Court consolidate *Lucas* and *McWane*. Case consolidation "is permitted as a

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were sentenced to pay an additional $1,407,400 in restitution, which is for 454 mitigation credits from the Old Fort Bayou Mitigation Bank located in Jackson, MS or any other appropriate mitigation bank near Jackson County, MS. *Id.* (docket no. 215, 217, 219, 221, 223).

[5] This Court has stated that two rationales support lenity as a canon of statutory construction. The first is that individuals are entitled fair warning that particular activities will subject them to criminal penalties. See, *e.g.*, *Crandon v. United States*, 494 U.S. 152, 158 (1990); *Liparota v. United States*, 471 U.S. 419 U.S., 427 (1985), *United States v. Bass*, 404 U.S. 336, 346 (1971). The second is that legislatures, rather than courts, should be responsible for defining precisely which actions are crimes. See, *e.g., Crandon,* 494 U.S. at 158 (1990); *Moskal v. United States*, 498 U.S. 103, 131 (1990); *Muscarello v. United States*, 524 U.S. 125, 150 (1998); *Bass*, 404 U.S. at 348 (1971).

matter of convenience and economy in administration." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933). This Court consolidated *Rapanos v. United States,* 376 F.3d 629 (6th Cir. 2004) and *Carabell v. U.S. Army Corps of Eng'rs,* 391 F.3d 704 (6th Cir. 2004) to achieve those purposes. Both cases dealt with the same issue of law — interpreting "navigable waters" under the CWA — and this Court consolidated them and filed one decision addressing both.

Pursuant to Rule 27.3, this Court should similarly order the consolidation of *McWane* and *Lucas*. Parties in both cases were criminally prosecuted for the unpermitted discharge of pollutants into statutory "navigable waters." They appealed their convictions in the lower courts, arguing that their alleged discharges were beyond regulatory control because they impacted nonnavigable tributaries that were neither themselves navigable nor connected to navigable waters. The outcome of both cases ultimately turned on whether the jury instructions embodied the appropriate *Rapanos* jurisdictional waters test. Because the facts and questions of law are substantially identical and a clear resolution of the issues would promote judicial economy by alleviating confusion regarding CWA coverage, consolidation of *Lucas* and *McWane* is appropriate.

CONCLUSION

The United States' petition is the ninth request that this Court has received since it decided *Rapanos*, asking for additional instruction on the scope of "navigable waters." See NAHB *Lucas* Amici Br. at

10, n. 6. That chorus will only grow louder from government officials and the regulated community until the Court issues guidance.

For all the foregoing reasons, certiorari should be granted in both *McWane* and *Lucas* and the cases should be consolidated.

September 22, 2008

Respectfully submitted.

Duane J. Desiderio*
Thomas J. Ward
Jeffrey B. Augello
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200
* *Counsel of Record*

APPENDIX A

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

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

U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States,* 128 S. Ct. 750 (2008); *Summers v. Earth Island Inst.,* 490 F.3d 687 (9th Cir. 2007), *cert. granted,* 128 S. Ct. 1118 (2008) (No. 07-463); *Entergy Corp. v. Envtl. Prot. Agency*, 475 F.3d 83 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); *Winter v. Nat. Res. Def. Council*, 518 F.3d 658 (9th Cir. 2008), *cert. granted,* 128 S. Ct. 2964 (2008) (No. 07-1239); and *Coeur Alaska, Inc. v. S.E. Alaska Cons. Council*, 486 F.3d 638 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2995 (2008) (No. 07-984, consol. with 07-990).