No. 06-1331

In the Supreme Court of the United States

GERKE EXCAVATING, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the wetlands in this case are "waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 502(7), 86 Stat. 886, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*); 33 U.S.C. 1362(7).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 464 F.3d 723. A prior opinion of the court of appeals is reported at 412 F.3d 804.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2006. A petition for rehearing was denied on December 1, 2006 (Pet. App. B1-B2). On February 12, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 2, 2007 (see Pet. App. C1-C2), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a civil enforcement action brought by the United States 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). The district court held that petitioner's unpermitted discharges into wetlands violated the CWA, 2004 WL 737522 (Apr. 6, 2004), and the court of appeals affirmed, 412 F.3d 804 (2005).

In June 2006, this Court granted petitioner's prior petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration in light of the Court's intervening decision in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006). 126 S. Ct. 2964. The court of appeals in turn remanded the case to the district court to consider the impact of *Rapanos*. Pet. App. A1-A4. Petitioner now seeks review of the court of appeals' remand order.

1. Congress enacted the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). 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). 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 Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforc-

ing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, inter alia, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1] The Corps regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c).

2. This Court has recognized that Congress, in enacting the CWA, "evidently 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) ("While the Act purports to regulate only 'navigable waters,' this term

[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 33 C.F.R. 328.3(a), 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, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), 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*, *supra*. *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See 126 S. Ct. at 2219 (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 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring in the judgment); *id.* at 2255 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 126 S. Ct. at 2225 (plurality opinion), that are connected to traditional navigable waters, *id.* at 2226-2227, as well as wetlands with a continuous surface connection to such water bodies, *id.* at 2227.[2] Justice Kennedy interpreted

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[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." 126 S. Ct. at 2221 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 2236 (Kennedy, J., concurring in the judgment); see *id.* at 2248.[3] In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also 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 2265-2266 & n.14 (Stevens, J., dissenting).

3. This case arises out of a civil enforcement action brought by the United States under the CWA. The government alleged that petitioner and others had violated the CWA by discharging fill material into wetlands on an undeveloped 5.8 acre tract in Tomah, Wisconsin, without a permit. 2004 WL 737522, at *1-*4. With respect to the government's claim against petitioner, the district court entered summary judgment for the United States. *Id.* at *20.

As the district court explained (2004 WL 737522, at *7), the principal contested issue in the case was whether the area into which petitioner had discharged fill material was part of "the waters of the United States" for purposes of the CWA. The district court

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[3] Justice Kennedy explained that wetlands "possess the requisite nexus" to traditional navigable waters "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 126 S. Ct. at 2248.

first examined the physical characteristics of the area where the discharge had occurred and concluded that it fell within the regulatory definition of "wetlands." *Id.* at *7-*10; see 33 C.F.R. 328.3(b). The court further determined that the wetlands were "adjacent"—defined by the regulations to mean "bordering, contiguous, or neighboring," see 33 C.F.R. 328.3(c)—to tributaries of traditional navigable waters. 2004 WL 737522, at *10-*17. In light of the hydrologic connection between the wetlands and traditional navigable waters, the district court agreed with the government that petitioner's discharge was covered by the Act. See *id.* at *16, *20. Petitioner was assessed a civil penalty of $55,000. See 412 F.3d at 805.[4]

4. The court of appeals affirmed. 412 F.3d 804 (2005). The court held that the wetlands at issue here are part of the "waters of the United States" as that term is defined in the Corps and EPA regulations implementing the CWA. *Id.* at 805-806. The court further held that the regulations reflect a permissible construction of the Act and that the statute, so construed, is a

[4] After the district court issued its order granting summary judgment for the government, petitioner and the other defendants entered into a stipulation with the government. See Appellant's C.A. App. Tab 2 (Dist. Ct. Docket No. 157). Petitioner and its co-defendants agreed to restore the wetlands and, after completion of restoration, not to fill or disturb any portion of the site again, except as approved by the Corps. See *id.* at 1-6. Pursuant to the stipulation and order, petitioner reserved the right to appeal on the question of CWA coverage with respect to the district court's imposition of a civil penalty and costs. See *id.* at 6. Petitioner expressly waived any right to appeal "relating to the restoration of the Site and the injunction against future Clean Water Act violations issued by the Court." *Id.* at 6-7. A consent decree entered by the district court the same day finally resolved all issues between the United States and the other defendants. See Appellant's C.A. App. Tab 3 (Dist. Ct. Docket No. 158).

valid exercise of congressional power under the Commerce Clause. *Id.* at 806-808.

5. In November 2005, petitioner filed a petition for a writ of certiorari (No. 05-623). In June 2006, this Court issued its decision in *Rapanos*. The Court subsequently granted the petition for a writ of certiorari in No. 05-623, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration in light of *Rapanos*. 126 S. Ct. 2964.

6. The court of appeals in turn remanded the case to the district court for further proceedings in light of *Rapanos*. Pet. App. A1-A4. The court of appeals stated that "Justice Kennedy's proposed standard * * * must govern the further stages of this litigation." *Id.* at A4. The court observed that

> any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality).

Ibid. 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.

The United States sought amendment of the court of appeals' opinion to clarify that the CWA term "waters of the United States" encompasses all wetlands that satisfy either the *Rapanos* plurality's standard or that of Justice Kennedy. Petitioner filed a petition for rehearing

en banc, arguing that the CWA encompasses only those wetlands that meet the *Rapanos* plurality's standard. The court of appeals denied the United States' request for clarification and petitioner's request for rehearing. Pet. App. B1-B2.

ARGUMENT

Petitioner seeks review of the court of appeals' holding that, if the wetlands at issue in this case are found to satisfy the "significant nexus" standard articulated in Justice Kennedy's concurring opinion in *Rapanos*, 126 S. Ct. at 2241, those wetlands are subject to federal regulatory jurisdiction under the CWA. That holding is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals did not apply this Court's decision in *Rapanos* to the wetlands at issue here, but instead remanded the case to allow the district court to perform that task in the first instance. Although petitioner contends that the court of appeals' remand order announced an erroneous legal standard, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). That course is particularly appropriate here because *no* court has yet applied

either of the legal standards set forth in *Rapanos* to the wetlands at issue in this case.

2. Petitioner contends (Pet. 4-5) that, under this Court's decision in *Marks* v. *United States*, 430 U.S. 188 (1977), the plurality opinion in *Rapanos* established the controlling legal standard for determining whether the CWA encompasses particular wetlands. Petitioner argues (Pet. 4-5) that, if a wetland satisfies Justice Kennedy's "significant nexus" standard but not that of the *Rapanos* plurality, it is not covered by the CWA. That argument lacks merit.

a. Under a proper understanding of *Rapanos*, the Corps and EPA may continue to exercise regulatory jurisdiction over any wetland that satisfies *either* the standard for CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 126 S. Ct. at 2265-2266 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the agencies' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members. See U.S. EPA & Dep't of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, at 3 & nn. 14-15 (June 5, 2007) <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>

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 the position taken by those Members who concurred in the judgment[] on

the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)). Taken in isolation, the *Marks* Court's reference to "those Members who concurred in the judgment[]" 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).

In some fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment may be the only controlling principle on which a majority of the Court's Members agree. In that situation, application of the rule announced in *Marks* provides a sensible approach to determining the controlling legal principles of the case. But in *Rapanos*, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a "lesser-included" version of the other.

In those circumstances, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. The dissenting opinions, by emphasizing controlling legal principles on which a majority of the Court agrees, may thereby contribute to an understanding of the law created by the case. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower federal court should adhere to the view

of the law that a majority of this Court has unambiguously embraced. See *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. *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1667, 1668-1669 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*, 126 S. Ct. 2594, 2607 (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).

Consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in *Marks*, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting the need to look to *Marks* in view of the absence of an opinion commanding a majority of the Court). The application of that approach here clearly supports finding the existence of federal regulatory jurisdiction whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members would find jurisdiction in either of those instances. See *id.* at 2265 (Stevens, J., dissenting).

b. Petitioner contends (Pet. 3-5, 8-13) that the lower courts must apply solely the standard set forth by the *Rapanos* plurality, not that of Justice Kennedy, in determining whether particular wetlands fall within the CWA's coverage. In petitioner's view, *Marks* requires that the *Rapanos* plurality opinion be treated as the

holding of the Court because the plurality opinion states the "narrowest grounds" for the Court's decision. Pet. 4 (quoting *Marks*, 430 U.S. at 193). That argument lacks merit.

In *Rapanos*, five Justices agreed that the judgments of the Sixth Circuit in the consolidated cases under review should be vacated and the cases remanded for further proceedings. See 126 S. Ct. at 2235 (plurality opinion); *id.* at 2252 (Kennedy, J., concurring in the judgment). The plurality concluded that a remand was necessary because the court of appeals had not determined, and the existing record provided an inadequate basis for deciding, whether the tributaries at issue "contain[ed] a relatively permanent flow" or whether the pertinent wetlands "possess[ed] a continuous surface connection" to those tributaries. *Id.* at 2235. Justice Kennedy found a remand to be appropriate because neither the Corps nor the lower courts in the consolidated cases had addressed the question "whether the specific wetlands at issue possess a significant nexus with [traditional] navigable waters." *Id.* at 2252; see *id.* at 2250-2252.

Because neither of those grounds for decision is inherently narrower than the other, it is logically impossible to identify a consensus "narrowest" position among the views of the Justices who concurred in the judgment. Petitioner is wrong in contending (Pet. 10) that, as a categorical matter, "when the [*Rapanos*] plurality standard is applied to find federal jurisdiction, the result would have the support of all nine Justices." Justice Kennedy observed that the plurality's test "covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)," 126 S. Ct. at 2246, and he indicated that at least some such wetlands would not fall within the CWA's coverage as he

construed the statute, see *id.* at 2246, 2249. As the court of appeals correctly recognized in the remand order at issue here, that aspect of the *Rapanos* concurrence suggests that, in "a rare case," Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1." Pet. App. A4; see *United States* v. *Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) (explaining that "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction" because there are certain cases in which "the plurality's jurisdictional test would be satisfied, but Justice Kennedy's balancing of interests might militate against finding a significant nexus").[5]

Moreover, even if all wetlands satisfying the *Rapanos* plurality's standard for CWA coverage would

[5] In *Johnson*, the court of appeals explained that, for purposes of *Marks* analysis, one ground of decision can reliably be identified as "narrower" than another only when the first rationale is a "logical subset" of the second. 467 F.3d at 63 (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S. 1229 (1992)). The court further explained that "[t]his understanding of 'narrowest grounds' as used in *Marks* does not translate easily to the present situation" because "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." *Id.* at 64. The court of appeals also observed that, "[s]ince *Marks*, several members of [this] Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced." *Id.* at 65. The First Circuit concluded that "[t]he federal government can establish jurisdiction over [wetlands] if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *Id.* at 66. The court explained that, because the four *Rapanos* dissenters would find federal regulatory jurisdiction in any case where either of those standards is satisfied, this approach "provides a simple and pragmatic way to assess what grounds would command a majority of the Court." *Id.* at 64.

also satisfy Justice Kennedy's "significant nexus" standard, petitioner would still be wrong in contending that the plurality's approach stated the "narrowest grounds" for decision within the meaning of the *Marks* rule. To the contrary, Justice Kennedy's concurrence would then state the "narrowest grounds" because it would impose the least restrictive limits on the exercise of regulatory authority by the Corps and EPA, and because it would reflect the narrowest disagreement with the judgments under review in *Rapanos* and with the approach advocated by the four dissenters. In *Marks*, the Court explained that the narrowest grounds for decision in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), were the rationale of the *Memoirs* plurality, which allowed some government regulation of obscene materials, rather than the "broader grounds" urged by Justices Black and Douglas, who 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* thus treated the rationale that imposed less sweeping constitutional constraints on the government's authority to regulate obscenity (and that reflected the narrowest disagreement with the judgment under review and with the approaches advocated by the dissenters) as the narrower grounds for the decision in *Memoirs*. Petitioner's contrary suggestion—that the plurality opinion in *Rapanos* must be deemed the narrowest grounds for the *judgment* if it adopted the narrowest view of federal regulatory *jurisdiction* under the CWA—is thus inconsistent with both the logic and the square holding of *Marks* itself.

c. Petitioner contends (Pet. 4, 10-14) that the circuits are divided with respect to the standard to be used in

identifying "the waters of the United States" in light of the various opinions in *Rapanos*. Contrary to petitioner's contention, the Seventh Circuit's decision in this case does not squarely conflict with any decision of another court of appeals. In any event, the other courts of appeals that have considered the issue have rejected the proposition, advanced by petitioner in this case, that wetlands satisfying Justice Kennedy's legal standard but not that of the *Rapanos* plurality fall outside the CWA's coverage.

Petitioner asserts (Pet. 13) that the First Circuit in *Johnson* "rejected the Seventh Circuit's conclusion in this case that under *Marks* Justice Kennedy's lone concurrence is controlling." As petitioner acknowledges (*ibid.*), however, the First Circuit in *Johnson* gave full effect to Justice Kennedy's "lone concurrence," holding that the "federal government can establish jurisdiction over [wetlands] if it can meet *either* the plurality's *or* Justice Kennedy's standard as laid out in *Rapanos*." 467 F.3d at 66 (emphasis added); see note 5, *supra*. The decision in *Johnson* provides no support for petitioner's contention that the CWA's coverage is limited to wetlands that satisfy the standard advocated by the *Rapanos* plurality. Nor is there any conflict between the First and Seventh Circuits with respect to the CWA's coverage of wetlands that satisfy Justice Kennedy's "significant nexus" standard. And while the Seventh Circuit (unlike the First Circuit) did not expressly hold that CWA jurisdiction would exist in the "rare case" (Pet. App. A4) in which the plurality's standard would be satisfied but Justice Kennedy's would not, the court did not foreclose that result either, and accordingly there is no conflict.

In *Northern California River Watch* v. *City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006), the court stated that Justice Kennedy's concurring opinion in *Rapanos* "provides the controlling rule of law." As in the instant case, however, the court did not specifically discuss the proper resolution of a coverage dispute involving wetlands that satisfy the *Rapanos* plurality's standard but not Justice Kennedy's. 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 *id.* at 1030-1031. A petition for rehearing with respect to the proper application of *Rapanos* is currently pending before the court of appeals in that case, so it is possible that the Ninth Circuit will revise its analysis. The court's opinion provides no support, however, for petitioner's contention that the *Rapanos* plurality opinion states the sole controlling rule of law.

Thus, the First, Seventh, and Ninth Circuits all agree that wetlands satisfying Justice Kennedy's "significant nexus" standard are covered by the CWA. The First Circuit in *Johnson* held that the CWA *also* encompasses wetlands that satisfy the *Rapanos* plurality's standard but not that of Justice Kennedy. The court in *Johnson* explained that, if the CWA term "waters of the United States" were read to exclude such wetlands, "there would be a bizarre outcome—the court would find no federal jurisdiction 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." 467 F.3d at 64. No other court of appeals has specifically addressed the proper treatment under *Rapanos* of wetlands that satisfy the plurality's standard but not that of Justice Kennedy. But even if a

circuit conflict existed with respect to the CWA's application to that category of wetlands, the instant case would be an unsuitable vehicle to resolve the question. That is so both because it is currently unclear whether petitioner's own wetlands fall within that category (see pp. 8-9, *supra*), and because petitioner *agrees* with the United States that wetlands in that category are covered by the CWA.

4. Petitioner contends (Pet. 16) that the "significant nexus" standard in Justice Kennedy's opinion "raises due process concerns" because it provides insufficient guidance to regulated parties. Under settled legal principles, however, petitioner can prevail in such a challenge only by showing that the CWA term "waters of the United States," if construed in accordance with Justice Kennedy's "significant nexus" standard, would be unconstitutionally vague as applied to petitioner's *own* conduct. See, *e.g.*, *United States* v. *Powell*, 423 U.S. 87, 92-93 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). Although petitioner asserts (Pet. 19) that the standard articulated in Justice Kennedy's concurrence may "result in inconsistent and unpredictable applications" in future cases, petitioner makes no effort to demonstrate that the "significant nexus" standard is impermissibly vague as applied to the circumstances of this case. In any event, because no court has yet applied the "significant nexus" standard to the wetlands at issue here, this Court's consideration of petitioner's due process claim would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2007