Will We Soon Have Clarity on Navigable Waters?: How the Supreme Court's October 2017 Term Set the Stage

By Tony Francois

Note from the Editor:

This article discusses the longstanding legal battle over the meaning of "navigable waters" in the Clean Water Act. It argues that several of the Supreme Court's recent decisions have cleared a path for a final answer to this lingering question.

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• United States v. Robertson, 875 F.3d 1281 (9th Cir. 2017), http://cdn.ca9.uscourts.gov/datastore/opinions/2017/11/27/16-30178.pdf.

• U.S. v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975), https://law.justia.com/cases/federal/district-courts/FSupp/391/1181/1494713/.

• Anthony Celebrezze, Jr., E. Dennis Muchnicki, J. Michael Marous, Mary Kay Jenkins-Smith, *Criminal Enforcement of State Environmental Laws: The Ohio Solution*, 14 Harv. Envtl. L. Rev. 217 (1990), https://heinonline.org/HOL/LandingPage?handle=hein.journals/helr14&div=12&id=&page=.

• Mark C. Rouvalis, *Restoration of Wetlands under Section 404 of the Clean Water Act: An Analytical Synthesis of Statutory and Case Law*, 15 B.C. Envtl. Aff. L. Rev. 295 (1988), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1577&context=ealr.

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The Clean Water Act (CWA) empowers the Environmental Protection Agency (EPA) to regulate "navigable waters."[1] Navigable waters are defined as "waters of the United States,"[2] but that term is left undefined in the law. Prior to 2006, EPA defined waters of the United States to include all non-navigable tributaries to navigable waters, and all wetlands adjacent to (broadly defined as bordering, contiguous, or neighboring) either navigable waters or their non-navigable tributaries.[3] These definitions were struck down by the Supreme Court in 2006 in *Rapanos v. United States* as exceeding the scope of the statutory term "navigable waters.[4] Following *Rapanos*, the EPA used informal guidance for several years to regulate tributaries and adjacent wetlands.[5] But in 2015, the EPA promulgated a new rule defining navigable waters even more broadly than it had previously.[6] This controversial rule was immediately challenged by landowners across the country who feared that streams and puddles on their land might soon invite federal government scrutiny and regulation, and consequently cause the value of their land to plummet. Some challenged the law after they were sentenced to fines and even jail time under criminal provisions of the CWA for polluting small bodies of water. Many of these challenges to the EPA's 2015 definition have, until recently, been on hold in the lower courts awaiting jurisdictional decisions, possible changes to the regulation, and clarifications of law that could affect their outcome.

But after the Supreme Court's October 2017 Term, the stage is set for a major decision on the geographic scope of the Clean Water Act. The Court decided three cases—one dealing with the CWA directly and two on related issues—that clear a path for such a decision by answering a threshold jurisdictional question, providing a useful framework for deciding vagueness cases, and shedding light on how lower courts should deal with fractured Supreme Court precedents. The Court held in *National Association of Manufacturers v. Department of Defense* (*NAM v. DOD*) that challenges to the EPA's 2015 regulation should be brought in district courts rather than courts of appeal in the first instance, a necessary jurisdictional clarification.[7] The Court's immigration-related decision in *Sessions v. Dimaya*[8] provided a development in void for vagueness law that may bear on how the Court decides the underlying substantive question under the CWA: What does navigable waters mean? The Court revisited a prior fractured

1 33 U.S.C. § 1311(a), § 1362(12).

2 33 U.S.C. § 1362(7).

3 33 C.F.R. §§ 328.3(a)(1), (a)(3), (a)(5), (a)(7), and 328.3(c) (2004).

4 547 U.S. 715 (2006).

5 *See* Cape Fear River Watch, Inc., v. Duke Energy Progress, Inc., 25 F. Supp. 3d 798, 808 (E.D.N.C. 2014) (describing post-*Rapanos* guidance).

6 80 Fed. Reg. 37053, June 29, 2015. *See* Pacific Legal Foundation, November 10, 2014 Comment Letter on Definition of "Waters of the United States" Under the Clean Water Act Proposed Rule – 79 Fed. Reg. 22188 (April 21, 2014), Docket EPA-HQ-OW-2011-0880 (detailing legal objections to then-proposed regulation), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14081.

7 138 S. Ct. 617, 623 (2018).

8 138 S. Ct. 1204 (2018).

decision in *Hughes v. United States*[9] without ultimately clarifying the rule in *Marks v. United States*,[10] leaving open the question of how lower courts should deal with fractured Supreme Court decisions like *Rapanos*.[11]

Meanwhile, the challenges to EPA's 2015 navigable waters regulation are slowly working their way through the lower courts. A petition for certiorari will soon be presented to the Supreme Court in another CWA case turning on the meaning of navigable waters: *United States v. Robertson*.[12]

I. The Supreme Court Decided Which Federal Courts Should Hear the Navigable Waters Definition Cases

In January, the Court decided *NAM v. DOD*, which resolved a threshold procedural issue necessary for the ongoing litigation over whether EPA's 2015 regulation defining "navigable waters" is legal.[13] One of the CWA's many technical provisions allocates alternative original jurisdiction over challenges to EPA actions in the federal district courts or federal circuit courts, depending on the type of EPA action being challenged.[14] Over a hundred plaintiffs filed several lawsuits against EPA's 2015 navigable waters definition in district courts around the country.[15] Some of the cases were dismissed on the ground that jurisdiction lay in the circuit courts.[16] In others, the district courts ruled that jurisdiction was proper.[17] Most of the plaintiffs also filed protective petitions for review in the circuit courts, which were consolidated in the Sixth Circuit. But the National Association of Manufacturers did not file a protective petition. Instead, it intervened in the consolidated circuit court proceeding and moved to dismiss it for lack of jurisdiction, arguing that jurisdiction was proper in the district courts.[18] The Sixth Circuit denied the motion and, in an unusual move, the Supreme Court granted certiorari to review that denial.[19]

NAM v. DOD holds that the district courts have original jurisdiction over the pending challenges to the 2015 navigable waters definition.[20] In *NAM*, the Court took a textualist approach to determine whether the CWA vests original jurisdiction in the district or circuit courts.[21] The CWA provides that suits should be filed originally in the federal circuit courts if they challenge EPA decisions that approve or promulgate an effluent limitation or other limitation under various provisions of the CWA, or that issue or deny any permit under 33 U.S.C. § 1342.[22] The unanimous Court rejected the government's atextual argument that the "practical effects" of the 2015 navigable waters definition effectively made it an "other limitation" by subjecting areas to permitting.[23] The Court also refused to extend what the government called a "functional interpretive approach" found in *Crown Simpson Pulp Co. v. Costle*.[24] *Crown Simpson* held that EPA vetoes of state-issued CWA permits were subject to immediate circuit court review because the veto is "functionally similar" to an EPA grant or denial of a permit, which is specifically subject to immediate circuit court review under the CWA.[25] In *NAM*, the Court limited *Crown Simpson* to its facts and rejected the government's call to extend a "functional interpretive approach" to other areas of the CWA.[26] The Court also rejected the government's appeals to judicial efficiency and national uniformity.[27]

Following *NAM v. DOD*, several of the cases challenging EPA's 2015 navigable waters definition are now moving forward in district courts. Three of those courts have enjoined the regulation's enforcement in 28 states.[28] One of the injunctions is being reviewed in the Eleventh Circuit,[29] but none has been resolved finally on the merits in district court. Given how broadly EPA defined "navigable waters" and the Supreme Court's ongoing interest in the issue, it seems certain that the Court will review these cases or otherwise address the question in similar litigation.[30]

9 138 S. Ct 1765 (2018) (revisiting Freeman v. United States, 564 U.S. 522 (2011)).

10 430 U.S. 188 (1977).

11 547 U.S. 715.

12 875 F.3d 1281 (9th Cir. 2017).

13 138 S. Ct. 617.

14 33 U.S.C. § 1369(b)(1).

15 *NAM*, 138 S. Ct. at 627. *See* In re Clean Water Rule: Definition of "Waters of the United States," 140 F. Supp. 3d 1340 (MDL Panel, 2015) (listing district court cases).

16 *NAM*, 138 S. Ct. at 627 (citing Murray Energy Corp. v. EPA, No. 1:15cv110, 2015 WL 5062506, at *6 (N.D. W. Va., Aug. 26, 2015)).

17 *Id.* (citing North Dakota v. EPA, 127 F. Supp. 3d 1047 (D.N.D. 2015)).

18 *Id.*

19 *Id.*

20 *Id.* at 623, 634.

21 *See id.* at 628-30 (interpreting "effluent limitation or other limitation"), *id.* at 631 (interpreting "issuing or denying any permit under section 1342").

22 33 U.S.C. § 1369(b)(1)(E), (F).

23 *Id.* at 630-31.

24 *NAM*, 138 S. Ct. at 631-32 (citing Crown Simpson Pulp Co. v. Costle, 445 U.S. 193 (1980)).

25 *Crown Simpson*, 445 U.S. at 196 (referring to the CWA provision found at 33 U.S.C. § 1369(b)(1)(F)).

26 *NAM*, 138 S. Ct. at 632.

27 *Id.* at 633-34.

28 *See* North Dakota v. EPA, 127 F. Supp. 3d at 1060, (enjoining 2015 navigable waters regulation in North and South Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, Wyoming, and New Mexico); Georgia v. Pruitt, 326 F. Supp. 3d 1356 (S.D. Ga. 2018) (enjoining 2015 navigable waters regulation in Georgia, Alabama, Florida, Indiana, Kansas, North and South Carolina, Utah, West Virginia, Wisconsin, and Kentucky); Texas v. EPA, No. 3:15-cv-00162, 2018 WL 4518230 (S.D. Texas, Sept. 12, 2018) (enjoining 2015 navigable waters regulation in Texas, Louisiana, and Mississippi).

29 *See* State of Georgia, et al v. Pruitt, et al., Eleventh Circuit Docket # 15-14035.

30 *See, e.g.*, *Rapanos*, 547 U.S. at 757-58 (Roberts, C.J., concurring) (lamenting the Army Corps' failure to adopt new rulemaking following the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001)); Sackett v. EPA, 566 U.S. 120, 133 (2012) (Alito, J., concurring) ("EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase."); U.S. Army Corps of Engineers v. Hawkes Co., Inc., 136 S. Ct. 1807,

II. Lawsuits Challenging the 2015 Navigable Waters Regulation Are Unlikely to Become Moot

The fact that EPA is rewriting its 2015 navigable waters definition probably does not lessen the likelihood of eventual Supreme Court review of that regulation.[31] The rewrite is not complete, and while EPA has predicted that it will be complete by the end of 2018, it remains uncertain whether that prediction will turn out to be accurate. As of this writing, a new proposed definition has not been published.[32]

The complexity of EPA's ongoing regulatory work further decreases the likelihood that the suits challenging the 2015 regulation will be mooted in the immediate future. In February 2018, EPA adopted what it called the Applicability Date Rule.[33] This rule purports to advance the date on which the 2015 Water Definition "is applicable" to February 2020, but without changing the effective date of the regulation.[34] Environmentalists and states have sued the EPA arguing that the Applicability Date Rule is invalid.[35] On August 16, 2018, the U.S. District Court for the District of South Carolina enjoined the Applicability Date Rule nationwide.[36] Thus far, EPA's gambit has done nothing to moot the pending lawsuits against the 2015 regulation.[37] Two of the three injunctions against the 2015 definition were entered months after the adoption of the Applicability Date Rule.[38]

Meanwhile, EPA is preparing two separate rulemakings, one to repeal the 2015 definition (the Repeal Rule) and another to adopt a new definition (the Replacement Rule).[39] The Repeal Rule is expected to be issued prior to the Replacement Rule,[40] and it is almost certain that environmental activists and some states will sue to invalidate the Repeal Rule.[41] The Repeal Rule proposes to rescind the 2015 regulation, which was in effect throughout most of the nation from August 28 to October 5, 2015, and adopt the previous regulations without substantively analyzing them. Since this re-adoption of the pre-2015 regulations without substantive comment was a legal flaw in the Applicability Date Rule it seems likely that the Repeal Rule will be at least temporarily enjoined, leaving the 2015 navigable waters definition and the suits against it in effect. The same environmental activists and states have also promised to sue over the Replacement Rule when it is adopted, with similar prospects for an injunction. This would leave the lawsuits against the 2015 regulation unmooted, despite the Trump Administration's best efforts to repeal and replace the Obama Administration's rule.

If a new Trump Administration regulation defining navigable waters goes into effect and survives legal challenge, the Supreme Court would likely address the definition of navigable waters in environmental plaintiff challenges to EPA's Replacement Rule.[42]

III. The Supreme Court Left for Another Day a Needed Clarification of How to Interpret Its Fractured Opinions

The Court's resolution of another case sets the stage for the Court to revisit its 2006 fractured decision in *Rapanos* on the definition of navigable waters. In June, the Court decided *Hughes v. United States*, holding that criminal defendants who are sentenced under certain types of plea agreements are eligible for resentencing if the Sentencing Guidelines were revised and their sentences were based on the revised Guidelines.[43]

What does that have to do with the Clean Water Act?[44] *Hughes* was granted to resolve a circuit split over how to apply the Supreme Court's 2010 fractured decision in *Freeman v. United States*.[45] Justice Kennedy, writing for a four-Justice plurality in *Freeman*, took the view that defendants who had entered plea agreements were eligible for resentencing if the *judge* had relied on the subsequently revised Guidelines in adopting the

1812 n.1 (2016) (noting adoption of 2015 navigable waters rule and its nationwide stay by the Sixth Circuit); *NAM*, 138 S. Ct. at 625 ("In 2015, responding to repeated calls for a more precise definition of "waters of the United States," the agencies jointly promulgated" the navigable waters regulation).

31 *See* EPA summary of ongoing rulemaking to revise its regulations defining "navigable waters" at https://www.epa.gov/wotus-rule/step-two-revise.

32 EPA submitted its proposed rule to redefine navigable waters to the Office of Management and Budget on June 15, 2018. *See* Timothy Coma, *EPA moves toward rewriting Obama water rule*, The Hill (June 15, 2018), http://thehill.com/policy/energy-environment/392447-epa-moves-toward-rewriting-obama-water-rule. The proposed rule has not been officially published for notice and comment.

33 83 Fed. Reg. 5200 (Feb. 6, 2018).

34 *Id.* at 5201.

35 States of New York, et al. v. USEPA and Army Corps, No. 18-cv-1030 (S.D.N.Y.); NRDC v. USEPA and Army Corps, No. 18-cv-1048 (S.D.N.Y.); South Carolina Coastal Conservation League, et al. v. Pruitt, No. 2-18-cv-330-DCN (D.S.C.).

36 South Carolina Coastal Conservation League, et al. v. Pruitt, 318 F. Supp. 3d 959 (2018).

37 EPA argued against an injunction in one of the pending lawsuits that the Applicability Date Rule weighed against enjoining the 2015 navigable waters regulation. *See* Texas v. EPA, S.D. Tex. No. 3:151-cv-00162, Dkt # 101 at 2.

38 Georgia v. Pruitt, 326 F. Supp. 3d 1356; Texas v. EPA, No. 3:15-cv-00162.

39 *See* EPA's explanation of its "two-step" process at Waters of the United States (WOTUS) Rulemaking, Rulemaking Process, EPA, https://www.epa.gov/wotus-rule/rulemaking-process.

40 *See* Waters of the United States (WOTUS) Rulemaking, Step One—Repeal, EPA, https://www.epa.gov/wotus-rule/step-one-repeal.

41 *See* Natural Resources Defense Council, Comment on the Proposed Rule Titled "*Definition of 'Waters of the United States' – Recodification of Preexisting Rules*" at 24-54 (Sept. 27, 2017), https://www.nrdc.org/sites/default/files/cwr-repeal-comments-devine-20170927.pdf.

42 *See id.*

43 138 S. Ct. at 1774-77.

44 Two amicus briefs filed in *Hughes* argued that the case was of critical importance to the Clean Water Act. *See* Brief Amici Curiae of Chantell and Michael Sackett and Duarte Nursery, Inc., in Support of Petitioner, Hughes v. United States, No. 17-155, 2018 WL 620239 (U.S. Jan. 25, 2018) (arguing that the plurality is the holding of *Rapanos* under *Marks*), and Brief Amicus Curiae for Agricultural, Building, Forestry, Livestock, Manufacturing, Mining, and Petroleum Business Interests in Support of Petitioner, Hughes v. United States, No. 17-155, 2018 WL 620238 (U.S. Jan. 29, 2018) (arguing that neither the plurality nor the concurrence is the holding of *Rapanos* under *Marks*).

45 564 U.S. 522.

sentence.[46] Justice Sotomayor separately concurred, agreeing that resentencing was possible for defendants sentenced under plea agreements, but only if the *plea agreement* referenced the applicable Guidelines.[47] Chief Justice Roberts, writing for four dissenters, would have held that plea bargainers are categorically ineligible for resentencing.[48]

The lower courts subsequently split on whether Justice Kennedy's plurality opinion or Justice Sotomayor's concurrence was the holding of *Freeman*.[49] When the Supreme Court decides a case without issuing a majority opinion, lower courts are to determine the case's holding, if any, under *Marks v. United States*.[50] Under *Marks*, the holding of a fractured decision is the opinion of those Justices who concurred in the judgment on the narrowest grounds.[51] Despite the apparent simplicity of this test, circuit courts have been bedeviled in their efforts to apply *Marks* consistently.[52]

The Supreme Court granted certiorari in *Hughes* on two questions involving how the lower courts should apply *Marks*,[53] and this drew the case within the ambit of CWA jurisprudence: any clarification of *Marks* in *Hughes* could have been applicable also to a case applying the Court's fractured *Rapanos* precedent. But the Court decided *Hughes* without addressing *Marks* by eliminating the original split in *Freeman*.[54] Justice Sotomayor abandoned her *Freeman* concurrence and joined in Justice Kennedy's view to form a majority on the legal issue.[55] As a result, the Court had no need to say anything substantive about *Marks*.[56]

The Court's failure to resolve the questions related to *Marks* in *Hughes* leaves those questions open for another day. The amicus briefing in *Hughes* on *Marks* and *Rapanos* highlighted the CWA as an important area in which the Court's clarification, either of how to apply *Marks* or of the underlying substantive question, is badly needed.

IV. The Court Decided an Important Void for Vagueness Case That May Bear On Its Ultimate View of Navigable Waters

Now that they know which courts have jurisdiction over their lawsuits, the *NAM* litigants (and those similarly situated) can get to the merits: What are "navigable waters" under the Clean Water Act, and does EPA's 2015 navigable waters definition fit within or exceed that meaning? The Court's March 2018 decision in *Sessions v. Dimaya* held a provision of the Immigration and Nationality Act (INA) unconstitutionally vague, and it provides possible insight into the answer to the first part of that question.[57]

One issue that has dogged the effort to determine what counts as navigable waters (given that some areas so designated are neither "navigable" nor even "water" for much of each year) is whether the statutory term is unconstitutionally vague. Since the Court's 2006 fractured decision in *Rapanos v. United States*, the lower courts have largely adopted Justice Kennedy's lone concurrence, which holds that "navigable waters" are determined through a case-by-case inquiry for a "significant nexus" between the wetlands or tributaries at issue and downstream traditionally navigable waters.[58] "Significant nexus" is determined across three separate criteria—physical, chemical, and biological—using highly subjective factors.[59] In practice, this interpretation of navigable waters frequently boils down to "I know it when I see it" subjective determinations by EPA or Army Corps field staff.[60]

Since *Rapanos*, members of the Supreme Court have observed that the "significant nexus" interpretation of "navigable waters" leaves regulated citizens with little or nothing to go on in figuring out if their property or activities are subject to the Act.[61]

46 *Id.* at 534.

47 *Id.* (Sotomayor, J., concurring).

48 *Id.* at 551 (Roberts, C.J., dissenting).

49 138 S. Ct. at 1771.

50 430 U.S. 188.

51 *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

52 *See* Nichols v. United States, 511 U.S. 738, 746 (1994) (*Marks* has "baffled and divided the lower courts that have considered it.").

53 *Hughes*, 138 S. Ct. at 1771-72.

54 *Id.* at 1772.

55 *See id.* at 1779 (Sotomayor, J., concurring).

56 *Id.* at 1772.

57 138 S. Ct. 1204.

58 *See* United States v. Johnson, 467 F.3d 56 (1st Cir. 2006); United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009); Gibson v. American Cyanamid Co., 760 F.3d 600 (7th Cir. 2014); United States v. Bailey, 571 F.3d 791 (8th Cir. 2009); Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007).

59 *Rapanos*, 547 U.S. at 758 (Kennedy, J., concurring).

60 The practice is so subjective and staff-dependent that the government takes the position that a formally adopted Jurisdictional Determination, which is the Army Corps' final word on whether a given feature is a "navigable water" under the Act, is nonetheless nonbinding on the EPA in its exercise of its parallel enforcement authority. *See Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring).

61 *See*, *e.g.*, *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) ("Lower courts and regulated entities will now have to feel their way on a case-by-case basis."); *Sackett*, 566 U.S. at 124 ("The Sacketts are interested parties feeling their way."); *id.* at 132 (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear."); *id.* at 133 (the phrase "waters of the United States" is "not a term of art with a known meaning" and is "hopelessly indeterminate"); *Hawkes*, 136 S. Ct. at 1812 ("It is often difficult to determine whether a particular piece of property contains waters of the United States."); *id.* at 1816-17 (Kennedy, Alito, Thomas, JJ., concurring) ("[T]he reach and systematic consequences of the Clean Water Act remain a cause for concern.") (quoting *Sackett*, 566 U.S. at 132 (Alito, J., concurring)); *NAM v. DOD*, 138 S. Ct. at, 625 ("In decades past, the EPA and Corps . . . have struggled to define and apply that statutory term."). *See also* Hawkes v. Army Corps, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) ("[T]he Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction . . . . This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to your property."); Orchard Hill Building Company v. Army Corps, 893 F.3d 1017, 1025 (7th Cir. 2018) ("Justice Kennedy did not define 'similarly situated'—a broad and ambiguous term . . .").

During oral argument in 2016's *U.S. Army Corps of Engineers v. Hawkes*, Justice Kennedy posed the following question:

> Well, I think—I think underlying Justice Kagan's question is that the Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice. What's the closest analogous statute that gives the affected party so little guidance at the front end?[62]

Dimaya held that 18 U.S.C. § 16(b), defining "crime of violence" for purposes of the INA, is void for vagueness.[63] The Court's analysis rested on the statute's use of two terms: "by its nature" (as applied to the noun "felony") and "substantial risk" (that physical force would be used in committing the crime). Both terms require an interpreting court to decide, without any standards, what crimes fall within the definition.[64] Relying heavily on its prior decision in *Johnson v. United States*, the Court noted that applying the "by its nature" provision requires a court to determine the "idealized ordinary case" of a given offense.[65] And that exercise yields no clear answer; it depends entirely on a given judge's opinion of what the essential nature or "platonic form" of a given crime involves.[66] Secondly, this indeterminacy is compounded by the requirement that the judge then determine whether the platonic form of a crime poses some threshold level of risk—a "substantial risk"—of violence.[67] The Court grants the constitutionality of applying a "substantial risk" standard, standing alone, to a defendant's conduct. It is the *combination* of the need to posit an idealized version of a crime with the question whether the idealized form poses a threshold risk level which crosses the line into vagueness.[68]

The same analytical approach is applicable to Justice Kennedy's interpretation in *Rapanos* of navigable waters under the CWA. As with the statute struck down in *Dimaya*, Justice Kennedy's *Rapanos* concurrence interprets the CWA term "navigable waters" to require two interacting determinations, one involving an idealized or otherwise undefinable condition ("wetlands . . . in combination with similarly situated lands in the region"), and the second overlaying a threshold relationship ("significantly affect" traditionally navigable waters).[69]

The "similarly situated within the region" provision requires a judge to make two idealized determinations: what two or more wetlands are "similarly situated" to each other, and what is "the region" within which those wetlands' situation must be similar? As interpreted by Justice Kennedy, "navigable waters" offers no guidance to answer either of these questions.[70] Wetlands can be similar in any number of ways: location, size, plant communities, length of inundation, type of connection to other features, animal communities that use or rely on them, soil types, etc.[71] They may, at the same time, be similar in some of these aspects and dissimilar in others. How is a judge (or regulated party, agency staff, administrative law judge, or citizen suit plaintiff or defendant) to determine whether any two or more wetlands are similarly situated to a degree that satisfies Justice Kennedy's interpretation of the CWA?[72] Nor is the platonic form of "the region" any more determinate. How large is a region? And how are its borders defined? If by watershed, how large a part of the watershed? The portion in which the similarly situated wetlands appear, or the entire watershed of the applicable traditionally navigable water? The larger the region (whether defined by a watershed or some other geographic concept), the more indeterminate "similarly situated" becomes.

In this respect, Justice Kennedy's "similarly situated within the region" interpretation of "navigable waters" is even less knowable for the regulated citizen or enforcement personnel than the "ordinary case" of any given crime under 18 U.S.C. § 16(b). Justice Kennedy's "significant nexus" requires two abstract determinations—"similarly situated" and "the region"—that entirely depend upon the subjective judgment of the reviewing court or enforcing agency staff, whereas the "ordinary case" of a crime only requires one such imaginative abstraction.

And exactly as in *Dimaya* and *Johnson*, this abstracted concept of similarly situated wetlands in a region is overlaid by an equally problematic significance threshold: a significant nexus with downstream traditionally navigable waters.[73] The combination of the idealized "similarly situated within the region" wetland combination that also "significantly affects" downstream, boat-floating, commerce-supporting rivers and lakes renders Justice Kennedy's reading of "navigable waters" hopelessly vague and far short of constitutional muster, as he indeed intimated during the *Hawkes* oral argument.

V. The Supreme Court Could Clear Up Navigable Waters in *Robertson v. United States*

In sum, *Hughes* leaves unresolved questions as to the application of *Marks v. United States*, which could be resolved in the context of a case addressing *Rapanos*, either through clarification of the *Marks* framework or by replacing the underlying fractured decision with a new majority opinion. And *Dimaya* offers a robust analytical framework demonstrating that

62 Transcript of Oral Argument at 18:11-19, *Hawkes*, 136 S. Ct. 1807, *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/ 2015/15-290_j5fl.pdf.

63 138 S. Ct. at 1210.

64 *Id.* at 1213-14.

65 138 S. Ct. at 1214 (quoting *Johnson*, 135 S. Ct. 2551, 2557 (2015)).

66 138 S. Ct. at 1214; *id.* at 1231-32 (Gorsuch, J., concurring).

67 *Id.* at 1214.

68 *Id.* (quoting *Johnson*, 135 S. Ct. at 2561).

69 547 U.S. at 780 (Kennedy, J., concurring).

70 *Id.* ("wetlands, either alone or in combination with similarly situated lands in the region").

71 *See, e.g.*, EPA, Classification and Types of Wetlands, https://www.epa.gov/wetlands/classification-and-types-wetlands#marshes.

72 The Supreme Court has interpreted or applied the term "similarly situated" in a variety of contexts, suggesting that while its meaning varies based on context, it suggests similarity in aspects or function rather than merely being nearby each other. *See*, *e.g.*, Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989) (applying notice provision under Age Discrimination in Employment Act for "similarly situated" employees).

73 *See Dimaya*, 138 S. Ct. at 1215-16.

EPA's 2015 navigable waters definition, to the extent it is based on Justice Kennedy's *Rapanos* concurrence, is invalid because that reading of the CWA is unconstitutionally vague.[74]

In addition to the litigation over the 2015 navigable waters definition, a petition has been filed in the Supreme Court in another CWA case. On July 10, 2018, the Ninth Circuit denied rehearing in a criminal appeal that clearly frames both the *Marks* and the void for vagueness issues: *United States v. Robertson*.[75]

The federal government prosecuted Mr. Robertson under the CWA[76] for his impacts to a 12-inch-wide, 18-inch-deep channel[77] carrying 2–3 garden hoses worth of flow,[78] several miles from the nearest actually navigable river in rural Montana. He was ultimately imprisoned for 18 months. One of Mr. Robertson's defenses is that the CWA's phrase "navigable waters" is void for vagueness.[79] The Ninth Circuit rejected that defense on the ground that Justice Kennedy's concurring opinion in *Rapanos* has been held by the Ninth Circuit to be the controlling definition of "navigable waters," which alone provides adequate notice of the law's requirements.[80] But the Ninth Circuit said nothing about whether "navigable waters" itself, as interpreted by Justice Kennedy, is void for vagueness.

In applying the *Marks* framework to the *Rapanos* decision to decide *Robertson*, the Ninth Circuit expressly held that circuit courts may use dissenting opinions to fashion a holding for fractured Supreme Court decisions.[81] The Ninth Circuit thus created a circuit split with the Seventh and DC Circuits on that precise question,[82] raising yet another question about *Marks* that warrants Supreme Court clarification.

Mr. Robertson's cert petition offers the Court a vehicle to apply the *Dimaya* framework to "navigable waters," as interpreted by both by the plurality and by Justice Kennedy, and to address whether Justice Kennedy's reading of navigable waters is even the controlling rule of law from *Rapanos* under *Marks.* Given the complexity of both the administrative rulemaking at EPA to adopt regulations defining navigable waters and the ongoing litigation over that process, it could be more efficient for the Supreme Court to resolve these questions in the context of Mr. Robertson's appeal from his criminal conviction. Such a decision could provide much needed guidance, for example, to EPA in its ongoing efforts to write the new definition of navigable waters.

A clear majority decision on the meaning of navigable waters could also end the interminable political battle over the scope of the CWA, in which the prevailing political faction uses its control of EPA and the Army to revise guidance and regulations in order to expand or contract the meaning of navigable waters to suit its constituents. This process has replaced the rule of law with naked partisanship. The Supreme Court should end the scrum by clearly and definitively ruling on the meaning of the term Congress actually enacted, restoring the rule of law to this important area.

74 Where there are multiple reasonable interpretations of a statute, the rule of lenity interacts with the void for vagueness doctrine to limit criminal statutes to activity clearly covered. *See* United States v. Lanier, 520 U.S. 259, 266 (1997) (discussing doctrine, reciting elements, and citing sources) (citing Liparota v. United States, 471 U.S. 419, 427 (1985), and others). This rule would require a preference for Justice Scalia's plurality opinion in *Rapanos* to the extent it interprets "navigable waters" without violating the Due Process fair notice requirement.

75 875 F.3d 1281, *rehearing and rehearing en banc den.* July 10, 2018. The author is counsel of record for Mr. Robertson.

76 *Id.* at 1286.

77 *See United States v. Robertson*, 9th Cir. Docket No. 16-30178, Excerpts of Record, Vol. 4 Dkt # 16-4 at 227:10-11.

78 *Id.* Excerpts of Record, Vol. 11, Dkt # 16-11 at 42:5-7.

79 875 F.3d at 1292.

80 *Id.* at 1293.

81 *Id.* at 1291.

82 *Compare Robertson*, 875 F.3d at 1292 (forming *Marks* holding by combining concurrence with dissent), *with* Gibson v. American Cyanamid Co., 760 F.3d 600, 621 (7th Cir. 2014) (dissents may not be used to form a holding under *Marks*); *see also* 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.").