

No. _____

In the
Supreme Court of the United States

DAVID ANTHONY NEWBOLD; BRIANA CAROLINE
STOCKETT; DEANNA NICOLE SMITH,
Petitioners,

v.

KINDER MORGAN SNG OPERATOR, L.L.C.;
SOUTHERN NATURAL GAS COMPANY, L.L.C.,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case raises a critical issue concerning the Fifth Circuit limiting the federal navigation servitude to the permanent channel of navigable waters, thereby ceding jurisdiction over the banks to the states. The servitude includes both the permanently flooded channel and its adjacent banks. The ordinary high-water mark defines the banks and establishes the upper limits of the servitude. *Howard v. Ingersoll*, 54 U.S. 381, 392 (1851). The banks are distinct from the permanently flooded channel, which is the ordinary low-water mark. *Howard*, 54 U.S. at 392; *Handly v. Anthony*, 18 U.S. 374, 380-81 (1820). Therefore, any attempts to merge these two lines will create an inconsistency in federal jurisdiction over navigable waters, and must be overruled.

Here, the questions presented are:

1. Whether the Fifth Circuit erred in forming new tests that use the permanently flooded channel and the line where *all* vegetation ceases to exist to define the ordinary high-water mark, thereby merging the ordinary high- and low-water marks and ceding jurisdiction over the banks of navigable waters to the states;
2. Whether the correct terrestrial vegetation test to determine the ordinary high-water mark is “the line below which the waters have so visibly asserted their dominion that terrestrial plant life ceases to grow, and therefore, the value for agricultural purposes is destroyed.” *Borough of Ford City v. United States*, 345 F.2d 645, 648 (3d Cir. 1965).

3. Whether the United States Corps of Army Engineers (“CORPS”), by acquiring the right to permanently flood Bayou D’Arbonne up to 65 feet above MSL, established its navigation servitude at that elevation.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court for the Western District of Louisiana and the United States Fifth Circuit Court of Appeals:

- *Newbold v. Kinder Morgan SNG Operator LLC*, 608 F.Supp.3d 406 (W.D. La. 2022), motion for summary judgment granted Jun. 21, 2022;
- *Newbold v. Kinder Morgan SNG Operator*, No. 22-30416, (5th Cir. 2023), opinion issued Mar. 14, 2023;
- *Newbold v. Kinder Morgan SNG Operator*, No. 22-30416, (5th Cir. 2023), petition for rehearing en banc denied Apr. 11, 2023.

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PETITION FOR WRIT OF CERTIORARI

David Anthony Newbold, Briana Caroline Stockett, and Deanna Nicole Smith, children of decedent, John Andrew Newbold, respectfully petition this Court to grant certiorari and either reverse the granting of summary judgment by the District Court, as affirmed by the Fifth Circuit, and remand this case back to the District Court for a trial on the merits, or, in the alternative, summarily vacate the lower courts' decisions and remand this case to the District Court to apply the correct law to the facts of this case.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit's opinion is attached as Appendix A. The United States District Court for the Western District of Louisiana's memorandum and judgment are attached as Appendix B and C respectively and are now reported as *Newbold v. Kinder Morgan SNG Operator LLC*, 608 F.Supp.3d 406 (W.D. La. 2022). The United States Court of Appeals for the Fifth Circuit's order denying Petitioners' Petition for Rehearing En Banc is attached as Appendix D.

JURISDICTION

The United States Fifth Circuit Court of Appeals affirmed the District Court's granting of Respondent's Motion for Summary Judgment on March 14, 2023, and denied the Petition for Rehearing En Banc on April 11, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3

[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

REGULATORY PROVISIONS INVOLVED

33 C.F.R. § 329.11(a) (1986)

(a) Jurisdiction over entire bed. Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

(1) The “ordinary high water mark” on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On April 4, 2020, Mr. John Andrew Newbold, the father of Petitioners, sustained severe injuries in a boating accident within the Bayou D'Arbonne National Wildlife Refuge ("the REFUGE") after the boat in which he was a passenger collided with a submerged sign on a pipeline right of way owned and operated by Respondents. (R. at 301-02, 425.) John Newbold ultimately died as a result of these injuries. (R. at 275-76.)

Petitioners, David Newbold, Briana Caroline Stockett, and Deanna Nicole Smith, filed suit in Louisiana state court on March 15, 2021, while John Newbold was still living. Petitioners sought damages for the harm caused by Respondents, Kinder Morgan SNG Operator, LLC and Southern Natural Gas Co., LLC, claiming Respondents' submerged sign violated federal law by obstructing U.S. navigable waters. (R. at 17.) On April 8, 2021, the case was removed by Respondents to the district court for the Western District of Louisiana. (R. at 167.) Just under a year later, John Newbold succumbed to his injuries on February 15, 2022. (R. at 275-76.)

On March 31, 2022, Respondents filed a Motion for Summary Judgment, arguing that the allision occurred outside U.S. navigable waters, as the site of the allision was above the ordinary high-water mark of Bayou D'Arbonne. (R. at 278.) On June 21, 2022, the District Court granted Respondents' Motion for Summary Judgment, ruling that the ordinary high-water mark was the elevation below which the land was permanently flooded and where no vegetation could survive: "By showing the area of the pipeline was 58 feet from the location where vegetation stops ... Kinder Morgan and SNG have shown that the location of the pipeline sign is above the [ordinary high-water mark] and not navigable". (App. at 26.)

Petitioners filed a Notice of Appeal on July 12, 2022. The Fifth Circuit upheld the District Court's ruling on March 14, 2023, placing the ordinary high-water mark at the permanent pool and explaining, "[t]he unvegetated channel is a neat, natural line by which the ordinary high-water mark may be established". (App. at 6, 9.) Subsequently, the Fifth Circuit denied Petitioners' request for rehearing en banc on April 11, 2023. (App. at 36-37.)

2. CONTESTED ISSUES OF LAW

For purposes of this writ application, there are no facts in dispute. The critical issue in this case is a legal one, namely, the proper test to determine the elevation of the ordinary high-water mark. Respondents argue, and the Fifth Circuit affirmed, that the ordinary high-water mark is located where the land is permanently flooded and where all vegetation is destroyed.

Petitioners submit that Respondents' definition of the ordinary high-water mark coincides precisely with the same criteria employed by this Court in *Handly v. Anthony* to establish the ordinary low-water mark. 18 U.S. 374, 380-81 (1820). It further disregards this Court's explicit directive in *Howard v. Ingersoll* to "reject, altogether, the attempt to trace [the ordinary high-water mark] by either ordinary low water or low water." 54 U.S. 381, 417 (1851). Rather, Petitioners assert that the correct test to determine the ordinary high-water mark is to locate the elevation of "the land upon which the waters have visibly asserted their dominion, the value of which for agricultural purposes is destroyed." *Borough of Ford City v. United States*, 345 F.2d 645, 648 (3d Cir. 1965).

Again, it is important to emphasize that there are no relevant factual disputes in this case. The issue before this Court is purely a matter of law. If Petitioners are employing the correct test as mandated by this Court, the elevation of the ordinary high-water mark is at 65 feet above MSL. The allision would therefore be within U.S. navigable waters, and accordingly, federal maritime law would apply.

If, conversely, Respondents are correct that the ordinary high-water mark is limited to the permanently flooded channel, then the ordinary high-water mark is at 52 feet above MSL, and the location of the allision is outside navigable waters. As a matter of law, federal maritime jurisdiction would end at the permanent pool of Bayou D'Arbonne, and, therefore, Louisiana tort law would apply to this case.

3. SUMMARY OF THE FACTS

On April 4, 2020, Mr. John Andrew Newbold, the father of Petitioners, sustained severe injuries in a boating accident within the REFUGE after the boat in which he was a passenger collided with a submerged sign on a pipeline right of way owned and operated by Respondents. (R. at 301-02, 425.) John Newbold ultimately died as a result of these injuries. (R. at 275-76.)

The CORPS, as part of the Ouachita and Black Rivers' Navigation Project, manages the water level of the Ouachita River and its tributary, Bayou D'Arbonne, to minimize flooding and ensure navigability. To fulfill this mission, Congress authorized the CORPS to acquire the land rights and servitudes necessary to accomplish this objective.

Under this congressional mandate, the CORPS was authorized to acquire fee title to all lands required to raise and maintain the permanent pool level of Bayou D'Arbonne at 52 feet above MSL. Later, the CORPS transferred title to the United States Fish and Wildlife Service ("USFWS"). (R. at 449-50, 471-72.) In the transfer, the CORPS reserved a navigation servitude which allowed it to permanently flood the lands along Bayou D'Arbonne up to an elevation of 65 feet above MSL, with seasonal flooding authorized between 65 and 70 feet above MSL. (R. at 449; 471-72). These rights, held by the CORPS, have consistently been acknowledged and recognized by the USFWS. (R. at 449.)

The USFWS, as part of its National Wetland Classification study, extensively researched the wetlands within the REFUGE, including Bayou D'Arbonne, to provide classification codes to each distinct section of a wetland that described its physical characteristics. (R. at 293, 449-52.) Part of the classification system is water modifiers, which involves extensive studies regarding the duration and timing of surface inundation over the various areas in the wetland. Through this study, the USFWS independently determined that the elevation of 65 feet above MSL was the limit at which Bayou D'Arbonne within the REFUGE is semi-permanently flooded, which includes the site of the allision. (R. at 293, 408, 449-50.) A semi-permanently flooded water regime is characterized by an area where surface water persists throughout the growing season in most years, with the water table usually at or very near the land surface. (R. at 409.) This prolonged soil inundation and decreased oxygen levels have destroyed the agricultural value of the land. These findings were further affirmed by testimony of Petitioners' expert, Robert M. Edmunds, who explained that due to the consistent presence of water, terrestrial vegetation associated with agriculture, grazing of cattle, and marketable timber would not survive in that area. (R. at 451-452.)

Based on the evidence detailed above and the terrestrial vegetation/ agricultural use test first mentioned in *Howard*, and later adopted in the Third, Eighth, Ninth, and Eleventh Circuit Courts, Petitioners determined that the ordinary high-water mark of Bayou D'Arbonne is 65 feet above MSL. Because the site of the allision, at 55 feet above MSL,

is below the elevation where the land is stripped of its agricultural use, Petitioners argued that the accident occurred within the banks of a navigable waterway and is therefore subject to federal maritime jurisdiction. In contrast, Respondents argued that the ordinary high-water mark of Bayou D'Arbonne is 52 feet above MSL, which is the elevation of its permanently flooded channel.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision has significant implications for the extent and scope of the federal jurisdiction over navigable waters. The federal government has regulatory jurisdiction, including the authority to improve navigation, over all navigable waterbodies. U.S. Const. art. I, § 8, cl. 3; 33 C.F.R. § 329.11(a) (1986). This authority is exercised through a navigation servitude, which includes the water, shores, bed, and banks of the river. 33 C.F.R. § 329.11(a) (1986); *United States v. Rands*, 389 U.S. 121, 122-23 (1967); *Howard v. Ingersoll*, 54 U.S. 381, 392 (1851). The shores of waterbodies are located at the permanent water level, which is the ordinary low-water mark. *Howard*, 54 U.S. at 392, *Handly v. Anthony*, 18 U.S. 374, 380-81 (1820). The banks, which establish the upper limits of the waterbody, are marked by the ordinary high-water mark. *Howard*, 54 U.S. at 415; *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 805 (1950). This Court has made it clear that a waterbody's banks are distinct from its permanently flooded channel. *Howard*, 54 U.S. at 392. Because the ordinary high-water mark is the boundary between the

federal and state governments' jurisdiction, it is crucial to ensure it is placed at the correct elevation.

Under the Fifth Circuit's ruling, the ordinary high-water mark, and therefore federal jurisdiction, ends at the permanent channel when the water is at its lowest ordinary state, effectively removing the banks from federal jurisdiction. Moreover, the Fifth Circuit has split from the Supreme Court and circuit courts throughout the United States who have been using the same terrestrial vegetation/agricultural use test to locate the ordinary high-water mark. This test has remained unchallenged for the past thirty years. The Fifth Circuit's decision will undoubtedly result in prolonged litigation and uncertainty in navigation law.

Additionally, by reducing the navigation servitude to the shores of waterbodies, the Fifth Circuit shifted control of the banks from the federal government to the states. This transfer of control to state jurisdiction undermines the rights and abilities of the federal government to regulate commerce, environmental protection, navigational safety, and water resource management within the Fifth Circuit. By granting this writ, this Court can immediately address and resolve this issue of exceptional importance while promoting uniformity and stability within our legal system, as contemplated by Fed. R. App. P. 35(a)(1). Therefore, we are asking that this Court grant certiorari and either reverse the granting of summary judgment by the District Court, as affirmed by the Fifth Circuit, and remand this case back to the District Court for a trial on the merits, or, in the alternative, summarily vacate the lower courts' decisions and remand this case to the

District Court to apply the correct law to the facts of this case.

I. The Decision Below Irreconcilably Splits from This Court and Several Circuit Courts' Precedents by Forming a New Test that Places the Ordinary High-Water Mark at the Permanent Pool of Navigable Waterbodies.

- a. By using the incorrect tests to determine the ordinary high-water mark, the Fifth Circuit merges the ordinary high- and low-water marks, which effectively transfers federal control of the banks of U.S. navigable waters to the states.**

The parties agree that the critical issue in this case is whether the allision occurred below the ordinary high-water mark of Bayou D'Arbonne and thus was in navigable waters. However, the parties differed in their understanding of the proper test to determine the elevation of the ordinary high-water mark. Petitioners assert that the correct test to use to determine the ordinary high-water mark is the line where the waters have visibly asserted their dominion upon the land below, which destroys its value for agricultural purposes. *Ford City*, 345 F.3d at 648. Further, agricultural value is destroyed when terrestrial vegetation, not all vegetation, is destroyed. *Id.* On the other hand, contrary to the cases cited in their own brief, Respondents contend that the ordinary high-water mark is located where the land is permanently flooded and all vegetation is destroyed. However, Respondents' test for the ordinary high-water mark is

the same test used to find the ordinary low-water mark, which would merge the two lines into one.

First, the Fifth Circuit erroneously merged the ordinary high-water and the ordinary low-water marks when it held that the high-water is reduced to the elevation where the land is permanently flooded. According to the Fifth Circuit, because the location of this allusion is not permanently flooded and is dry 67 percent of the time, it cannot be within the ordinary high-water mark. However, by basing its decision on the permanency of water and mathematical calculations, the Fifth Circuit contradicted numerous Supreme Court and circuit court cases.

In *Handly v. Anthony*, the Supreme Court determined that the ordinary low-water mark is where the waterbody is permanently flooded. 18 U.S. 374, 380-81 (1820). There, the Supreme Court was tasked with finding the boundary between two states by using the actual waters of a river (not the banks of the river, as with most other boundary cases). *Id.* at 380-81. The Court determined that if the water itself is the boundary, then only the permanent river could be used, which is the ordinary low-water mark. *Id.* This is because if other water marks were used, then the boundary would constantly shift due to the inevitable rise and fall of the river. *Id.* at 382. To ensure predictability, the permanent water level must be the boundary, and the Court noted that “the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark.” *Id.* at 380-81.

The ordinary high-water mark is distinct from the ordinary low-water mark. *See Howard*, 54 U.S. at 417; *Oklahoma v. Texas*, 260 U.S. 606, 632-33 (1923) (though these cases did not specifically hold that the ordinary high- and low-water marks are distinct, they both discuss the differences between the two lines to determine which should be used to locate the state boundaries). Therefore, if the ordinary low-water mark is at the permanent water level, then the ordinary high-water mark must be above that. By placing the ordinary high-water mark at the permanent pool of Bayou D'Arbonne, the Fifth Circuit erroneously merged the two lines, despite the Supreme Court's warning in *Howard*, and effectively eliminated the banks.

Further, though the Fifth Circuit implied that land within the ordinary high-water mark cannot be dry for a significant portion of the year by noting that "the location of the allision is on land that is dry 67 percent of the time...", (App. at 9), several Supreme Court and circuit court cases reject this position. Notably, the Supreme Court in *United States v. Kansas City Life Ins. Co.* recognized that areas that are dry up to 75 percent of the year can still be considered below the ordinary high-water mark. 339 U.S. 799, 801, 851 n. 2 (1950) (the pre-dam ordinary high-water mark was 420.4 feet above MSL, but the water did not exceed 419.6 feet above MSL for 75% of the year). Additionally, in *Howard v. Ingersoll*, the Supreme Court explained that the banks of rivers, which are established by the ordinary high-water mark, "may not be reached by the water for two-thirds of the year" 54 U.S. 381, 417 (1851). The Supreme Court has further explained that land within the ordinary high-water

mark may be “alternately covered and left bare, as there may be an increase or diminution in the supply of water,” and may be “left dry for months at a time.” *Alabama v. Georgia*, 64 U.S. 505, 515 (1859); *Oklahoma v. Texas*, 260 U.S. at 632 (similar to *Howard*, the banks were dry two-thirds of the year).

Each of the above cases emphasized the distinction between the ordinary high-water mark and the ordinary low-water mark. The Court in *Handly* placed the ordinary low-water mark at the same elevation of the permanent waters of a river, while the other Courts emphasized that the ordinary high-water mark is above that permanent water level. Further, it is not only expected that the land within the ordinary high-water mark will be occasionally dry, but as explicitly mentioned in *Kansas City Life Ins. Co., Howard*, and *Oklahoma v. Texas*, it may be dry more often than not. The Fifth Circuit dismissed these landmark cases by placing the ordinary high-water mark at the same elevation as the ordinary low-water mark, which resulted in the banks of Bayou D’Arbonne being eliminated.

Second, the Fifth Circuit erroneously determined that the ordinary high-water mark can also be found at the point in the waterbody where all vegetation is destroyed. This is vastly different from the universally accepted vegetation test that places the ordinary high-water mark at the point where terrestrial vegetation is destroyed, meaning vegetation with no agricultural use. *Ford City*, 345 F.2d at 648. The introduction of this novel test by the Fifth Circuit resulted in the same merging of the ordinary high- and ordinary low-water

marks because the line where all vegetation is destroyed is the same line where Bayou D'Arbonne is permanently flooded.

The circuit courts, in alignment with the Supreme Court, unanimously acknowledge that riverbanks are not devoid of all vegetation. The Third Circuit's ruling in *Ford City* specifically emphasized that the ordinary high-water mark is not determined by the complete destruction of all vegetation. *Id.* Instead, the ordinary high-water mark is established by identifying the elevation at which the land's agricultural value, and therefore terrestrial vegetation, is diminished due to significant and prolonged water coverage over the soil. *Id.* This approach is consistent with the Supreme Court's ruling in *Howard*, which took the water's impact on agricultural use into account when locating the ordinary high-water mark. 54 U.S. at 4115-16. By requiring the consideration of the agricultural use of the land when determining the type of vegetation present, these Courts ensure that the true ordinary high-water mark is identified.

In support of its decision to rewrite this test, the Fifth Circuit proposed that the existence of a neat, natural line on the bank created by the unvegetated channel eliminates the necessity for the terrestrial vegetation test. In formulating this unprecedented test, the Fifth Circuit relied on a selective quote extracted from *Ford City*, which stated:

The vegetation test is useful where there is no clear, natural line impressed on the bank. If there is a clear line, as shown by erosion, and other easily recognized characteristics such as

shelving, change in the character of the soil, destruction of terrestrial vegetation, and litter, it determines the line of ordinary high-water.

(App. at 9.) By focusing solely on this quote, the Fifth Circuit concluded that "[t]he *unvegetated* channel is a neat, natural line by which the ordinary high-water mark may be established," and thereby disregarded all other established principles of using the terrestrial vegetation/agricultural use test to determine the ordinary high-water mark. (App. at 9) (emphasis added). However, it is crucial to note that the specific dispute in *Ford City* was whether the vegetation test used to locate the ordinary high-water mark is the obvious line where all vegetation is destroyed or the line "where soil has been covered by water for sufficient periods of time to destroy its value for agricultural purposes." 345 F.2d at 647-48. The court emphatically held that the ordinary high-water mark cannot simply be the line where all vegetation is destroyed. *Id.* at 648, 650.

The Fifth Circuit ignored the emphasis *Ford City* placed on using the correct terrestrial vegetation test by disregarding further instructions found immediately after the quote it cited, which clarifies, "[a]lso a test of the distinct line is the destruction of terrestrial vegetation so these are not really two separate tests but must, of necessity, complement each other." *Id.* at 648. By omitting the terrestrial vegetation language from its opinion, the Fifth Circuit effectively rewrites *Ford City* to say "The vegetation test is useful where there is no clear, natural line impressed on the bank. If there is a clear line ... [that line] determines the line of

the ordinary high-water.” These redactions completely change the meaning of this passage and distorts the ruling in *Ford City*, which underscores the significance of the destruction of *terrestrial* (i.e., agriculturally useful) vegetation in determining the ordinary high-water mark; not *all* vegetation as suggested by the Fifth Circuit.

Ford City’s discussion of a clear, natural line was not meant to simplify the finding of the ordinary high-water mark. In fact, a clear, unvegetated line had been found in *Ford City*, and an expert used that clear line to incorrectly draw the ordinary high-water mark at a point several feet below the actual line. *Id.* at 649-51. However, the court rejected this expert’s finding and clarified “[w]hat the river ... actually destroys is the value of its soil for agricultural purposes.” *Id.* at 651. The court noted that this distinction is vital because using the correct test ensures that the court is accurately identifying the correct elevation. *Id.* By explaining that the clear line marks the transition from terrestrial vegetation to vegetation without agricultural value, *Ford City* serves to provide clarity and accuracy in establishing the legal boundaries along waterways, avoiding erroneous determinations based solely on the presence of a clear line that ignores the true features of the banks. Using the correct terrestrial vegetation test allows the court to verify whether the identified line is, indeed, the ordinary high-water mark without drawing the line too high or, in this instance, too low. Thus, the Third Circuit in *Ford City* court did not, in any respect, opine that just any clear line can be used to find the ordinary high-water mark.

By constructing the incorrect tests to determine the ordinary high-water mark, the Fifth Circuit reduced the ordinary high-water mark to the permanent pool of Bayou D'Arbonne, which led to the absurd result of combining the ordinary high- and low-water marks. Because the banks are found between these two marks, the Fifth Circuit's opinion effectively eliminated them. This disregard of the physical reality of the banks in defining the boundaries of navigable waters is legally flawed. Due to the consequences this precedent will have on federal jurisdiction over navigable waters, it is imperative for the Supreme Court to review and overturn the erroneous interpretation adopted by the Fifth Circuit.

b. This Court should grant this petition to ensure that the correct terrestrial vegetation/agricultural use test is consistently applied throughout the U.S. circuit courts to ensure uniformity in locating the banks of navigable waters.

The Fifth Circuit employed an erroneous vegetation test, which yielded an illogical conclusion that the ordinary high-water mark and the ordinary low-water mark coincide at the same elevation. To ensure these two lines remain distinct, it is essential to adopt the terrestrial vegetation/agricultural use test, as first mentioned in *Howard*, and later adopted in the Third, Eighth, Ninth, and Eleventh Circuit Courts. By applying this correct test consistently, two separate lines are identified, and the banks remain intact.

In the present case, Petitioners provided compelling and unrefuted evidence supporting the determination

that the ordinary high-water mark of Bayou D'Arbonne within the confines of the REFUGE is located at 65 feet above MSL. The evidence consists of the following: First, an extensive study conducted by the USFWS provided detailed information regarding vegetation and inundation that indicates the ordinary high-water mark is at an elevation of 65 feet above MSL. (R. at 293, 449-52.) Second, upon transfer of the REFUGE from the CORPS to the USFWS, the USFWS acknowledged that the CORPS retained a navigation servitude that permits the CORPS to permanently flood the REFUGE and Bayou D'Arbonne up to 65 feet above MSL, as well as to seasonally flood within the range of 65-70 feet above MSL. (R. at 449, 471-72.) Finally, the expert testimony of Robert Martin Edmunds confirmed that the site of the allision is semi-permanently flooded, rendering it unsuitable for agricultural purposes, meaning the terrestrial vegetation has been destroyed. (R. at 451-52.)

The National Wetland Classification system was developed by the USFWS in 1979 to classify and describe wetlands, including those within the confines of the REFUGE, based on their vegetation, hydrology, and soil characteristics. (R. at 293, 449-52.) Part of the classification system is water modifiers, which involves extensive studies regarding the duration and timing of surface inundation over the various areas in the wetland. The pool stage of Bayou D'Arbonne at 52 feet above MSL has been classified as permanently flooded, meaning water covers that land throughout the year for all years. (R. at 293, 449-50.) Further, the land below 65 feet above MSL has been classified as semi-permanently flooded, meaning water is present

throughout the growing season in most years. (R. at 293, 409, 449-50.) Finally, the land between 65-70 feet above MSL has been classified as seasonally flooded, where any water present during the growing season recedes before the end of that period. (R. at 293, 408, 449-50.)

Each of these classifications correspond to Petitioners' definition and placement of the ordinary high-water mark. The ordinary low- and high-water marks divide waterbodies into three regions. The land below the ordinary low-water mark is the permanent pool, the land above the ordinary low-water mark but below the ordinary high-water mark is the banks, and a certain amount of land above the ordinary high-water mark is considered seasonally flooded. Petitioners, through the definitions provided by several Supreme Court and circuit court as well as the use of several maps of the REFUGE, have been able to pinpoint the ordinary low-water mark at the elevation that the USFWS classified as permanently flooded, which is 52 feet above MSL; the ordinary high-water mark at the elevation classified as semi-permanently flooded, which is up to 65 feet above MSL; and the seasonal flooding beginning at 65 feet above MSL. (R. at 293, 408, 449-50.) The law and this evidence perfectly align. Respondents, on the other hand, limit the ordinary high-water mark to the elevation that the USFWS classified as permanently flooded, with anything above that considered seasonal flooding.

Petitioners' locations of the ordinary low-water mark, ordinary high-water mark, and seasonal flooding are further supported by the CORPS' navigation

servitude that was acquired after it built a dam that raised the water levels of Bayou D'Arbonne. (R. at 449, 471-72.) This servitude grants the CORPS the right to permanently flood the REFUGE up to 65 feet above MSL and to seasonally flood from 65-70 feet above MSL. (R. at 449.) These rights retained by the CORPS allowed it to raise and lower water levels within those parameters for navigation purposes. Originally, the land contained within the REFUGE was owned in fee title by the CORPS. (R. at 471-72.) However, due to the rise in water levels that the dam caused, the USFWS wanted to create a wildlife refuge in the area, and to facilitate this, the CORPS transferred that property to the USFWS. (R. at 471-72.) During this transfer, the CORPS maintained its navigation servitude, and the USFWS has continued to explicitly recognize the CORPS' rights over the land. (R. at 449.)

However, the Fifth Circuit refused to recognize the CORPS' right to flood up to 65 feet above MSL as its federal navigation servitude, stating:

At no point do the Plaintiffs assert that the Corps has, in fact, permanently flooded the Refuge, though the Comprehensive Conservation Plan notes that seasonal flooding may reach as high as 70 feet above MSL at times (a rise which the Plaintiffs attribute to the Corps' work). In response, the Defendants contend simply that '[t]he right to flood a national wildlife refuge, and not doing so, does not create navigable waters where none exist.'

(App. at 6.) Instead, the Fifth Circuit determined that the ordinary high-water mark, and thus the navigation

servitude, is limited to elevation that has been permanently flooded where all vegetation has been destroyed. (App. at 6-7, 10.) However, limiting the navigation servitude to the permanent pool leads to illogical consequences.

The CORPS' improvements have consistently flooded the land up to 65 feet above MSL for several months each year for the past thirty years. One of the primary benefits of the navigation servitude is that the federal government is shielded from liability caused by improvements made within its servitude. By limiting the navigation servitude to land that is permanently flooded, the Fifth Circuit severely limits the CORPS' ability to make navigation improvements, as any improvement that even slightly raised the water level would result in a taking. This restriction would also expose the CORPS to much more liability for exceeding its authority within the permanent pool. This precedent will have disastrous consequences in locations where Bayou D'Arbonne, or any navigable waterway, flows through private lands, as the CORPS would be liable to the landowners for the unauthorized flooding of their property. Obviously, this would force the CORPS into an unworkable situation due to the inevitable flooding above the permanent pool that results in the destruction of terrestrial vegetation and agricultural use. These absurd results highlight the importance of ensuring the distinction between the ordinary high-water mark, ordinary low-water mark, and seasonal flooding.

The USFWS classification system and the CORPS' navigation servitude are consistent with the terrestrial

vegetation/agricultural use test. As discussed above, the universally accepted vegetation test indicates that the ordinary high-water mark is the line where water is so consistently present that it changes the soil and destroys the terrestrial vegetation and agricultural value of the land. *Ford City*, 345 F.2d at 648. For over 150 years, this vegetation test has been carefully designed for the purpose of finding a single, specific line. Courts throughout the United States have focused on a change in vegetation, which is evidenced by a destruction of the land's agricultural value, rather than a complete destruction of vegetation. *Howard*, 54 U.S. at 415-16; *Paine Lumber Co. v. United States*, 55 F. 854, 856, 858-59, 864-65 (E.D. Wis. 1893); *Harrison*, 148 F. at 783; *Oklahoma v. Texas*, 260 U.S. at 630; *Kansas City Life Ins. Co.*, 339 U.S. at 809-10; *United States v. 21.54 Acres of Land*, 491 F.2d 301, 306 (4th Cir. 1973); *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 583-584 (Fed. Cl. 1975); *Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d at 1505-06; *Harrell*, 926 F.2d at 1042.

In each of the above cases, along with several other unmentioned cases from district courts across the United States, none of the courts simplify the terrestrial vegetation test to mean the destruction of all vegetation. Despite this extensive history of caselaw, the Fifth Circuit reached the conclusion that land covered in any vegetation whatsoever must be considered above the ordinary high-water mark. This holding affirmed Respondents' uninformed understanding of the term "seasonal flooding." Though Respondents never truly defined this term, Respondents used isolated quotes from cases such as

Harrell and *Ford City* without considering those quotes within the full context of each case. However, the courts in these cases attempted to prevent the ordinary high-water mark from being placed too high or too low. The courts' resolution to this problem was to consider the agricultural value of the land to ensure that the correct line was used. *Harrell*, 926 F.2d at 1042 (the Eleventh Circuit rejected the plaintiffs' attempt to extend the ordinary high-water mark three miles from the bank of a navigable river across land that had extensive agricultural use); *Ford City*, 345 F.2d at 651.

On the other hand, the USFWS has defined seasonal flooding as land where "water is present for extended periods especially early in the growing season, but is absent by the end of the season in most years." (R. at 408.) Because the water recedes much sooner than the water in semi-permanently flooded areas, the land can still be reclaimed for agricultural use. This definition compliments the complete terrestrial vegetation test, which is heavily focused on the land's agricultural value.

The Fifth Circuit's decision to draw the line between seasonal flooding and the ordinary high-water mark at the point where all vegetation is destroyed would lead to an absurd outcome because the ordinary high-water mark establishes the banks of a waterbody, and the banks are almost always covered in some form of vegetation. This is corroborated by the USFWS, which includes different types of wetland vegetation as part of its classification system that extends to every water regime, from permanently flooded to seasonally flooded land. The Third Circuit in *Ford City* recognized this to

be a problem because the different types of vegetation present could result in the incorrect ordinary high-water mark being drawn. The entire opinion was focused on ensuring that the terrestrial vegetation test was not diminished to a destruction of all vegetation test because this results in the ordinary high-water mark being erroneously drawn too low. Rather, there can be vegetation within the ordinary high-water mark because “[w]hat the river or action of the water actually destroys is the value of its soil for agricultural purposes,” not simply all vegetation. *Ford City*, 345 F.2d at 651.

Here, by classifying the location of the allision as semi-permanently flooded, the USFWS determined that the land is covered by water throughout the growing season. The excess water leads to poor soil aeration, reduced nutrient availability, and waterlogged conditions that are unfavorable to terrestrial plant life. Though the area is covered in wetland vegetation, this vegetation has been classified by the USFWS as hydrophytes, which thrive in areas that are at least periodically deficient in oxygen as a result of excessive flooding. This prolonged soil inundation and decreased oxygen levels have destroyed the agricultural value of the land.

Moreover, Petitioners presented testimony from an expert, Robert M. Edmunds, who affirmed that only wetland vegetation was present at the site of the allision, and the conditions caused by consistent inundation made the land unsuitable for agricultural use. (R. at 451-452) This consistency between the expert’s testimony and the USFWS’s findings support

Petitioners' position that the ordinary high-water mark of Bayou D'Arbonne is above its permanent pool where all vegetation ceases to exist. The location of the allision was at an elevation of 55 feet above MSL, which the law and evidence establish was below the ordinary high-water mark of Bayou D'Arbonne and therefore within federal maritime jurisdiction.

Notably, the Fifth Circuit's decision was not based on a rejection of Petitioners' evidence as untrustworthy or unreliable. Had the Fifth Circuit employed the universally accepted terrestrial vegetation/agricultural use test, it would have found two distinct lines marking the ordinary low- and ordinary high-water marks. Instead, the Fifth Circuit split from the extensive history of Supreme Court and circuit court cases by forming a new ordinary high-water mark test that focuses on the destruction of all vegetation, which led to the illogical merging of these two lines and elimination of the banks.

II. Because the Opinion Below Conflicts with This Court and Several Circuit Courts in Defining the Boundaries of Navigable Waters, there is an Issue of Exceptional Importance Regarding the Uniformity of the Navigation Servitude, and Thus, Maritime Jurisdiction Throughout the United States.

Because the ordinary high-water mark is the boundary between the federal and state governments' jurisdiction, it is crucial to ensure it is placed at the correct elevation. The Fifth Circuit clearly split from the Supreme Court and circuit courts by using the permanent waters to establish the ordinary high-water

mark, which reduces the navigation servitude to the shores of navigable waterbodies and transfers control of the banks to state jurisdiction. This will severely impact the federal government's authority to regulate commerce, environmental protection, navigational safety, and water resource management within the Fifth Circuit. It is therefore imperative that the Supreme Court review and overturn the erroneous interpretation adopted by the Fifth Circuit to prevent the collapse of the navigation law scheme and ensure the proper functioning of maritime jurisdiction.

Moreover, the terrestrial vegetation/agricultural use test used to define the ordinary high-water mark has been gradually formed for over 150 years and is so well-established that there has been no serious challenge to it for the past 30 years. Now, the Fifth Circuit has completely redefined that test and, if allowed to stand, will undoubtedly result in prolonged litigation and uncertainty in the law. Though the Third, Eighth, Ninth, and Eleventh Circuit Courts have explicitly accepted the terrestrial vegetation/agricultural use test, based on this opinion, other circuits could follow the Fifth Circuit by adopting its destruction of all vegetation test and eliminating the banks from federal control. This split will likely result in repeated litigation, resulting in a fragmented and inconsistent approach across different cases, districts, and circuits. By providing a clear and predictable framework, this Court's immediate intervention would prevent prolonged litigation and uncertainty, preserving judicial resources and upholding the integrity of the jurisdictional framework.

CONCLUSION

Given the central role of the navigation servitude in the framework of navigation law and the severe impact the Fifth Circuit's split will cause, it is urgent that the Supreme Court review this matter. By providing a clear and predictable framework, this Court's immediate intervention would prevent prolonged litigation and uncertainty, preserving judicial resources and upholding the integrity of the jurisdictional framework. It is therefore essential for the Court to rectify the disruption caused by the Newbold decision and restore order and predictability to the determination of federal jurisdiction as stated in Fed. R. App. P. 35(a)(1).

Based on the foregoing reasons, Petitioners respectfully request that this Court grant certiorari and either reverse the granting of summary judgment by the District Court, as affirmed by the Fifth Circuit, and remand this case back to the District Court for a trial on the merits, or, in the alternative, summarily vacate the lower courts' decisions and remand this case to the District Court to apply the correct law to the facts of this case.

Respectfully Submitted,

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