No. 99-323

In the Supreme Court of the United States

EDWARD HANOUSEK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in order to establish that a defendant "negligently" violated the Clean Water Act, 33 U.S.C. 1319(c)(1), the statute requires the government to prove "gross negligence"—*i.e.*, that the petitioner's conduct was a "gross deviation" from the standard of care that a reasonable person would observe in the situation.

2. Whether Section 1319(c)(1)(A) of the Clean Water Act violates due process by permitting misdemeanor criminal penalties to be imposed based on a standard of ordinary, as opposed to gross, negligence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 176 F.3d 1116. The opinion of the district court (Pet. App. 23a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1999. A petition for rehearing was denied on June 7, 1999 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on August 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury convicted petitioner of negligently violating the Clean Water Act's prohibition on the discharge of harmful quantities of oil into navigable waters of the United States, 33 U.S.C. 1321(b)(3), 1319(c)(1), based on his role in causing a rupture of a high-pressure oil

pipeline that resulted in the discharge of thousands of gallons of oil into the Skagway River in Alaska. The court of appeals affirmed the conviction. Pet. App. 1a-22a.

1. The Clean Water Act (CWA) is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In pertinent part, the Act prohibits the "discharge of oil or other hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone * * * in such quantities as may be harmful." 33 U.S.C. 1321(b)(3) (1994 & Supp. III 1997). Navigable waters for purposes of 33 U.S.C. 1321(b)(3) (1994 & Supp. III 1997) include all tributaries of traditionally navigable waters. 33 U.S.C. 1362(7); 40 C.F.R. 110.1.

The CWA authorizes a wide array of mechanisms by which the government may enforce the Act's prohibition on the unauthorized discharge of oil into waters of the United States. The Act may be enforced administratively through issuance of administrative compliance orders and imposition of civil administrative penalties. See 33 U.S.C. 1319(a) and (g), 1321(b)(6), 1344. The Act also authorizes the United States to bring a civil enforcement action in federal district court. 33 U.S.C. 1319(b). In such an action, the court may issue an injunction requiring compliance, and it may impose civil penalties of up to $25,000 per day for each violation of the Act, a permit, or an administrative compliance order, 33 U.S.C. 1319(d).

In addition, criminal penalties may be imposed on any person who "negligently" violates the prohibition in Section 1321(b)(3) against discharging harmful quantities of oil into waters of the United States. 33 U.S.C.

1319(c)(1). A first conviction for negligent discharge is a misdemeanor, punishable by a fine of not less than $2,500 nor more than $25,000 per day of violation, imprisonment for not more than one year, or both. 33 U.S.C. 1319(c)(1). Subsequent convictions of the same person for negligent violations may be punished with fines of up to $50,000 per day of violations and imprisonment of up to two years, or both. *Ibid.*

Criminal penalties may also be imposed on any person who "knowingly" violates Section 1321(b)(3). A first conviction for a knowing violation is a felony, punishable by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than three years, or both. 33 U.S.C. 1319(c)(2).

2. Petitioner was the roadmaster for the Pacific and Arctic Railway and Navigation Company (PARN), a firm that operated the White Pass and Yukon Railroad. As roadmaster, he was responsible for every detail of the "safe and efficient maintenance and construction" of the railroad and special projects, including, after May 1994, a rock removal project at a site referred to as Six-Mile, so named because it was six miles outside of the town of Skagway, Alaska. Pet. App. 7a. The purpose of the project was to realign a railroad curve and to obtain armor rock in order to extend a cruise ship dock in downtown Skagway. *Ibid.* From at least May 1994 until the oil spill in October 1994, petitioner, as supervisor and foreman of the rock-removal project, directed the day-to-day activities at the Six-Mile site, deciding what employees would be doing, how the rock would be removed, and where it would be placed. Gov't C.A. Br. 5-6.

At the Six-Mile site, a high-pressure oil pipeline, owned by Pacific and Arctic's sister company, the

Pacific and Arctic Pipeline, Inc., was at or above ground and ran parallel to the railroad tracks. The four-inch diameter pipeline was used to transport petroleum products from Skagway, Alaska, to White Horse, Yukon Territory, Canada. The Six-Mile site was located on an embankment 200 feet directly above the Skagway River. Pet. App. 7a; Gov't C.A. Br. 4.

The rock quarrying activity used dynamite to blast rock out of the hills and then used heavy equipment, such as a backhoe, to load the rock over the pipeline onto railroad cars. On occasion in this loading process, rocks would fall either from the backhoe bucket or from the train and alongside the tracks. Before petitioner took over supervisory responsibility for the project in May 1994, railroad ties, sand and ballast material had been placed over and along a 300-foot section of the pipeline in order to protect it. This preparatory precaution was the customary practice when using heavy equipment in the vicinity of the pipeline. After petitioner assumed responsibility for the project in May 1994, and the work area moved further along the tracks, petitioner failed to protect the additional sections of the exposed pipeline in any manner along the 1000-foot work site, except for a platform for a movable backhoe. Pet. App. 7a.

On October 1, 1994, a backhoe operator was engaged in his usual task of using a backhoe to load large rocks over the pipeline onto a train. After the train left, the operator noticed that rocks had fallen near the tracks. He moved the backhoe to sweep the rocks away from the railroad tracks. At this location, the pipeline was unprotected and covered with only a few inches of soil. The backhoe bucket struck the pipeline causing a rupture. As a result, an estimated 1000 to 5000 gallons

of heating oil were discharged over the course of many days into the adjacent Skagway River. Pet. App. 8a.

3. Petitioner was indicted on one count of negligently violating CWA Section 1321(b)(3).[1] In pertinent part, the district court instructed the jury that in order to find the petitioner guilty the government must prove that "[t]he particular defendant caused the discharge of oil" and "[t]he discharge was caused by the negligence of the particular defendant." C.A. E.R., Jury Instruction No. 8. The court defined negligence as follows (C.A. E.R., Jury Instruction No. 10):

> Negligence is the failure to use reasonable care. Reasonable care is that amount of care that a reasonably prudent person would use under similar circumstances. Negligence may consist of doing something which a reasonably prudent person would not do, or it may consist of failing to do something which a reasonably prudent person would do. A reasonably prudent person is not the exceptionally cautious or skillful individual, but a person of reasonable and ordinary carefulness.

Petitioner objected to this definition of negligence and contended that "negligently," 33 U.S.C. 1319(c)(1)(A),

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[1] Petitioner was also charged with one count of conspiring to provide false information to government officials in violation of 18 U.S.C. 371, 1001. The jury acquitted petitioner on that count. The government also charged M. Paul Taylor, an officer of Pacific and Arctic Pipeline Inc., with conspiracy to make false statements, six counts of making false statements, and negligently violating the CWA. The district court dismissed the negligent violation count against Taylor. The jury convicted Taylor of two counts of making false statements and acquitted him on the other counts relating to false statements. Gov't C.A. Br. 2. Taylor's appeal is pending before the Ninth Circuit.

must be defined as "a gross deviation from the standard of care that a reasonable person would observe in the situation." Pet. 5. The district court disagreed, holding that the plain language of the statute and the legislative history revealed that Congress intended to impose a simple negligence standard of reasonable care in Section 1319(c)(1)(A). Pet. App. 23a-25a.

A jury convicted petitioner of negligently violating Section 1321(b)(3) by discharging a harmful quantity of oil into a navigable water. The district court sentenced petitioner to six months of imprisonment, six months in a halfway house, and six months of supervised release, as well as a fine of $5000. Pet. App. 9a.

4. On petitioner's appeal, the court of appeals affirmed the conviction and sentence.[2] The court rejected petitioner's challenge to the jury instruction defining negligence. The court concluded that the plain language of the statute evidenced Congress's intent in 33 U.S.C. 1319(c)(1)(A) to impose an ordinary, rather than gross, negligence standard. The court observed that "[t]he ordinary meaning of 'negligently' is a failure to use such care as a reasonably prudent and careful person would use under similar circumstances." Pet. App. 10a. The court also reasoned that if Congress had intended to prescribe a heightened negligence standard it could have done so explicitly, as it did in a neighboring provision, 33 U.S.C. 1321(b)(7)(D), which provides for increased civil penalties where a violation is the result of "gross negligence or willful misconduct." Pet. App. 11a. The court further held that an ordinary negligence standard does not violate due process, particu-

[2] The opinion indicated that District Judge Stagg, sitting by designation, intended to file a separate dissenting opinion. Pet. App. 22a n.5. However, a dissenting opinion never issued.

larly because the CWA is a public welfare statute. *Id.* at 12a.[3]

ARGUMENT

No decision by this Court or any other court of appeals addresses, much less conflicts with, the Ninth Circuit's conclusions that Congress intended to impose a simple negligence standard of reasonable care in Section 1319(c)(1)(A) and that this standard does not violate due process. Because the judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals, further review is not warranted.

1. a. Petitioner makes no claim that the Ninth Circuit's interpretation of Section 1319(c)(1)(A) conflicts with any other federal court decision, but does assert that it conflicts with three state court decisions interpreting unrelated state statutes. Pet. 19. No such conflict exists, however. The cases he cites construe the intent of state legislatures rather than Congress, and the state statutory provisions at issue in those cases bear little resemblance to the CWA provision under which petitioner was convicted. *Santillanes* v. *State*, 849 P.2d 358 (N.M. 1993) (felony negligent child abuse statute); *State* v. *Ritchie*, 590 So. 2d 1139 (La. 1991) (negligent homicide); *State* v. *Grover*, 437 N.W.2d 60, 62 (Minn. 1989) (child abuse reporting statute which required reporting when a person "knows or has reason to believe" abuse has occurred did not encompass actor who had reason to know or believe, but negligently failed to recognize abuse).

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[3] The court also rejected petitioner's challenges to other jury instructions, to the sufficiency of the evidence, and to the district court's application of the sentencing guidelines. Pet. App. 14a-22a.

b. Petitioner suggests (Pet. 19-20) that the statutory interpretation issue in this case is important because allowing the Ninth Circuit's decision to stand "will lead to difficulty with the proper interpretation and application" of a provision of the Fastener Quality Act, 15 U.S.C. 5408(c)(3), which provides for felony sanctions for negligently failing to maintain records. But the Ninth Circuit's interpretation of the CWA was based not only on the plain meaning of the unadorned word "negligently," but also on the structure and legislative history of the CWA, including the fact that the term "gross negligence" appears elsewhere in the CWA. Thus, the interpretation of the Fastener Quality Act will not necessarily be governed by the holding here and should await a case presenting that question for resolution by the lower courts in the first instance.

c. In any event, the Ninth Circuit's interpretation of Section 1319(c)(1) is correct. Ascertaining the meaning of the term "negligently" in that provision is purely a matter of statutory construction. See *Staples* v. *United States*, 511 U.S. 600, 604 (1994) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). In this case, Congress's intent is reflected in the plain language and structure of the statute. When Congress wanted to establish a liability standard higher than ordinary negligence for purposes of the CWA, it said so expressly. In Section 1321(b)(7)(D), for instance, Congress rendered a certain category of defendants potentially liable for large civil penalties (not less than $100,000) for any violation of Section 1321(b)(3) that is the result of "*gross* negligence or willful misconduct." 33 U.S.C. 1321(b)(7)(D) (emphasis added). See also 33 U.S.C.

1321(f)(1)-(3) (providing for full recovery of removal costs from owners or operators where the discharge was the result of "*willful* negligence") (emphasis added). The absence of any such modifiers in Section 1319(c)(1), by contrast, leads to the conclusion that Congress intended to base liability under that Section on an ordinary negligence standard. As Representative Harsha stated during consideration of a proposal to expand the scope of the CWA penalty provisions, "I would like to call to the attention of my colleagues the fact that in this legislation we already can charge a man for simple negligence, we can charge him with a criminal violation under this bill for simple negligence." 118 Cong. Rec. 10,644 (1972).

Where, as here, Congress's intent is clear from the plain language of the statute and supported by legislative history, resort to the statutory construction aids on which petitioner relies (Pet. 18) is unnecessary. In any event, the aids do not compel the result petitioner propounds.

Citing *Staples*, 511 U.S. at 605, petitioner argues (Pet. 18) that Section 1319(c)(1) must be construed in light of common law principles, which petitioner claims would require a gross negligence standard. However, because the crime of negligently violating the CWA has no common law crime antecedent, common law principles need not be imported into the CWA. See *Morissette* v. *United States*, 342 U.S. 246, 257, 262 (1952). Moreover, the common law principle on which petitioner relied in the courts below applies to the felony of negligent *homicide*. In framing the misdemeanor provisions of the CWA, Congress was likely to have taken as a model not common law homicide but rather the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, the federal water pollution control statute

that preceded the CWA. The Rivers and Harbors Act has been construed by the lower courts as imposing misdemeanor level penalties under a strict liability regime. See 33 U.S.C. 411 (subjecting any person who "violate[s]" the Act's prohibitions against, *inter alia*, discharging refuse into navigable waters to a potential prison term of up to one year); *United States* v. *White Fuel Corp.*, 498 F.2d 619, 622 (1st Cir. 1974) (noting that 33 U.S.C. 411 has consistently been construed as a strict liability offense); but cf. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230 (1966) (reserving question).

Petitioner argues (Pet. 18) that the hierarchical penalty scheme under the CWA implies that a more culpable standard than ordinary negligence is necessary to support a conviction under Section 1319(c)(1). Petitioner's argument, however, misses the mark. It is well settled that civil liability under Section 1319 may be imposed on a strict liability basis. See, *e.g.*, 33 U.S.C. 1319(d) (providing civil penalties for "[a]ny person who violates," *inter alia*, certain enumerated provisions of the Act); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (interpreting CWA as imposing strict liability in civil cases); *Stoddard* v. *Western Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986). By contrast, "negligent[]" violations of the Act may be subject to misdemeanor level sanctions, 33 U.S.C. 1319(c)(1), and "knowing[]" violations may be subject to felony prosecutions, 33 U.S.C. 1319(c)(2).[4]

[4] Under the CWA's knowing endangerment provision, 33 U.S.C. 1319(c)(3), any person who "knowingly violates" the Act, and "who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury," may be subject to even more severe penalties than those allowed under Section 1319(c)(2).

Thus, although the need to preserve the hierarchical penalty structure may explain why Congress determined that negligence—rather than the strict liability scheme of the Rivers and Harbors Act—should be the predicate for misdemeanor liability, *any* negligence-based standard would preserve that hierarchical structure. The CWA's hierarchical penalty structure, therefore, provides no support for petitioner's claim that misdemeanor liability requires a showing of gross negligence.

Finally, contrary to petitioner's suggestion (Pet. 18), neither the rule of lenity nor the rule that statutes be construed to avoid substantial questions of constitutionality applies here, because there is no "grievous ambiguity" in the statute, see *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974), and there is no substantial constitutional impediment to Congress's imposing a simple negligence standard, see pp. 11-15, *infra*.[5]

2. a. Petitioner identifies no split of authority on the question whether Congress may constitutionally impose misdemeanor level penalties based on an ordinary negligence standard. Petitioner merely asserts that any such scheme would violate the Due Process Clause, and he urges this Court to grant certiorari in order to

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[5] Petitioner baldly asserts (Pet. 18) that a gross negligence standard is required to avoid unreasonable results. Application of the CWA in this circumstance does not offend reason or common sense. The petitioner is in a specialized occupation in a heavily regulated area, under which he directed and oversaw on a daily basis a project that involved exploding dynamite and removing large rocks using heavy equipment alongside an unprotected, high-pressure fuel pipeline. The jury found that the substantial oil spill was the inevitable result of petitioner's conduct in disregarding customary safety precautions while managing the project. The verdict is not an example of unreasonable application.

"flesh out the constitutional scope of mens rea." Pet. 16.[6]

Petitioner's second question presented asks whether it violates due process to "eliminat[e] mens rea for offenses punishable by significant terms of imprisonment of one year or more." Pet. i. That question, however, mischaracterizes the issues actually presented by this case in two respects. First, petitioner's offense of conviction was for a first-time negligent violation of the Act, which is punishable by a *maximum* of one year imprisonment, not "one year or more." Pet. i.[7] Second, petitioner incorrectly equates negligence with a "rigorous form of strict liability" standard, Pet. 16

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[6] Petitioner suggests (Pet. 15) that the present case provides a vehicle for resolving an asserted conflict among the courts of appeals as to whether the Migratory Bird Treaty Act (MBTA) violates due process by imposing felony level sanctions based on strict liability. *Ibid.* (citing *United States* v. *Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985), and *United States* v. *Engler*, 806 F.2d 425, 434-435 (3d Cir. 1986), cert. denied, 481 U.S. 1019 (1987)). This Court, however, does not grant review to issue advisory opinions regarding statutory provisions at issue in other cases. In any event, review of this case would have no impact on the cited MBTA cases. Aside from the fact that the MBTA provision in question was based on strict liability, not negligence, and involved a felony offense, not a misdemeanor, any conflict with respect to the scienter requirement under the MBTA was resolved by Congress in 1986, when it added a "knowing" intent requirement to the felony prohibition in response to the *Wulff* and *Engler* decisions. See Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, Tit. V, § 501, 100 Stat. 3590 (16 U.S.C. 707(b)).

[7] Whether it would be consistent with due process, in a particular case, to impose a felony-level sanction of up to two years of imprisonment on a person who, despite having already been convicted of a negligent violation of the CWA, proceeds to commit subsequent negligent violations of the Act, see 33 U.S.C. 1319(c)(1), is not presented in this case.

(quoting *Staples*, 511 U.S. at 607 n.3), *i.e.*, one that completely "eliminat[es] mens rea." Pet. i. To the contrary, negligence is itself among the traditional categories of criminal mental states. See *Liparota*, 471 U.S. at 423-424 n.5 (noting that the Model Penal Code recognizes four mental states: purpose, knowledge, recklessness, and negligence); *United States* v. *Ayo-Gonzalez*, 536 F.2d 652, 656 (1st Cir. 1976) (statute that eliminates mens rea is one that does not incorporate any "form of culpability, including negligence, as an element"), cert. denied, 429 U.S. 1072 (1977). The issue here is not, as petitioner frames it, whether a strict liability standard would contravene due process. Unlike strict liability, negligence incorporates an element of blameworthiness because it occurs only when a defendant deviates from the standard of care which a person can reasonably be expected to exercise in the situation.

In any event, this Court has stated that "where one deals with others and his mere negligence may be dangerous to them," strict liability does not offend due process. *United States* v. *Balint*, 258 U.S. 250, 252 (1922); see also *Morissette* v. *United States*, 342 U.S. 246, 256 (1952); *United States* v. *Dotterweich*, 320 U.S. 277, 281 (1943); see generally *United States* v. *Unser*, 165 F.3d 755, 762-763 (10th Cir. 1999), cert. denied, No. 98-1600 (Oct. 4, 1999) (citing cases such as *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960)).[8] If strict

[8] Petitioner identifies only one case holding that a strict liability standard violated due process, *Lambert* v. *California*, 355 U.S. 225 (1957). Cf. *Texaco, Inc.* v. *Short*, 454 U.S. 516, 537 n.33 (1982) (suggesting *Lambert* has limited application). *Lambert* held that due process was violated by a state statute imposing strict criminal liability for failing to register as a felon even though the defendant did not know of the duty to register. *Lambert* does not hold, however, that strict liability crimes are constitutionally impermis-

liability satisfies due process, then ordinary negligence must as well. See *State* v. *Hazelwood*, 946 P.2d 875, 884 & n.17 (Alaska 1997) (holding that negligence standard in analogous state-law context satisfies due process because "criminal penalties will be imposed only when the conduct at issue is something society can reasonably expect to deter" and the "overwhelming majority of jurisdictions allow crimes based on ordinary negligence").

b. Petitioner claims (Pet. 15-16) that due process is violated by the application of an ordinary negligence standard in this case, under the factors set forth in *Holdridge* v. *United States*, 282 F.2d 302, 310 (8th Cir. 1960), to evaluate the constitutionality of strict liability offenses. To the contrary, under the *Holdridge* criteria, Section 1319(c)(1)(A) comports with due process. Section 1319(c)(1)(A) is a "statutory crime * * * not taken over from the common law." *Ibid.* The penalty is "relatively small" because it is a misdemeanor. *Ibid.* As discussed above, Congress intended to impose an ordinary negligence standard. An ordinary negligence standard meets the statutory purpose by deterring conduct that would cause harmful pollution to waters of the United States. Furthermore, "the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person." *Ibid.* It is reasonable to expect persons to act in a non-negligent way, particularly where, as here, the defendant was responsible for a construction project that involved blasting and using heavy equipment around a high-pressure fuel pipeline located next to a river.

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sible. *Lambert*, 355 U.S. at 228. Moreover, petitioner does not suggest that *Lambert* controls this case.

Petitioner asserts that it violates due process to criminally punish him for a "simple accident someone else caused." Pet. 17. However, as the Ninth Circuit found, the jury instructions made clear that the petitioner "could be convicted only on the basis of his own negligent conduct and not on the basis of the negligence of others" and required the jury to find that petitioner's own negligence caused the oil spill. Pet. App. 15a-16a. Furthermore, the court of appeals found sufficient evidence supporting the jury's finding that petitioner's negligence caused the oil spill. *Id.* at 18a-20a. Testimony at trial established that the customary safety practice when working with heavy equipment in the vicinity of a high-pressure fuel pipeline is to build protections around the pipeline to prevent ruptures in the event of contact with heavy machinery or rock, rather than simply relying on machine operators not to make contact with the pipeline that they are working over and around. In the haste to quarry the rock at Six-Mile, petitioner failed to take the customary safety precautions. Thus, petitioner's claim that the ordinary negligence standard does not satisfy constitutional due process is without merit.

3. Petitioner claims that review is warranted to resolve a conflict among the circuits as to whether the CWA "is a 'public welfare' statute eliminating mens rea as a requirement for criminal convictions." Pet. 7. To the contrary, there is no conflict on any issue that would affect the court of appeals' holdings in this case.

a. To begin with, there is no conflict among the courts as to whether, in petitioner's words, the CWA "eliminat[es] mens rea as a requirement for criminal convictions." Pet. 7. Petitioner's alleged conflict presupposes that the courts which have characterized the CWA as a public welfare offense have eliminated mens

rea and instead imposed "strict criminal liability." Pet. 10. Petitioner, however, is in error. No court, regardless of whether it has characterized the CWA as a public welfare statute, has held that any of the CWA's criminal provisions impose strict liability.[9]

b. Petitioner relies (Pet. 10) on a single decision by the Fifth Circuit, *United States* v. *Ahmad*, 101 F.3d 386, 391 (1996), as the contrary decision that he believes creates a conflict with the present case. *Ahmad* addressed the meaning of a "knowing" violation of the CWA, see 33 U.S.C. 1319(c)(2)(A), and did not involve or purport to address the standard for negligence under the CWA. Thus, this case presents no conflict with *Ahmad*.

Ahmad departed from the analysis in the present case only to the extent that it is the only court of

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[9] As noted below, the cases cited by petitioner (Pet. 9-10) deal exclusively with the level of knowledge required to establish a felony "knowing" violation of the CWA pursuant to 33 U.S.C. 1319(c)(2)—a statutory provision which is not at issue here. The courts in those cases did not opine on the meaning of the term "negligently" in 33 U.S.C. 1319(c)(1), nor did they address whether imposing misdemeanor level penalties based on an ordinary negligence standard would violate due process. Moreover, to the extent that their analyses of the "knowingly violates" provision of the CWA was informed by the "public welfare offense" doctrine, not one of those courts construed the CWA as eliminating mens rea or imposing the form of truncated strict liability described in *Staples*, whereby the defendant is not required to "know the facts that make his conduct fit the definition of the offense." *Staples*, 511 U.S. at 608 n.3; see also *id.* at 612 n.6. See, *e.g.*, *United States* v. *Sinskey*, 119 F.3d 712, 717 (8th Cir. 1997) ("requiring the government to prove only that the defendant acted with awareness of his or her conduct does not render § 1319(c)(4) a strict liability offense"); *United States* v. *Wilson*, 133 F.3d 251, 263 (4th Cir. 1997) ("Even under this public welfare doctrine, however, true or rigid strict liability does not generally follow.").

appeals decision to state that the CWA is not a public welfare statute. However, the Fifth Circuit's determination in *Ahmad* that the CWA does not define a public welfare offense does not conflict with the holding in the present case. In *Ahmad*, as in the other cases cited by petitioner (Pet. 9-10), the court addressed whether the meaning of "knowingly violates" in 33 U.S.C. 1319(c)(2)(A) should be construed in light of the principles that underlie "public welfare" offenses. While the *Ahmad* Court decided that the statutory analysis at issue there should not be guided by the public welfare offense doctrine, the ultimate holding in that case—that a "knowing" violation of the Clean Water Act requires knowledge of the facts underlying the non-jurisdictional elements of the offense—has no bearing on the question presented here, *i.e.*, whether Congress intended the standard of negligence in 33 U.S.C. 1319(c)(1) to be ordinary or gross.[10] Furthermore, to the extent that petitioner alleges that the courts of appeals have been inconsistent in their analyses of the meaning of "knowingly violates" in the CWA, 33 U.S.C. 1319(c)(2), any such inconsistency among the courts with respect to a statutory provision that is irrelevant to the instant prosecution would not provide a basis for further review in this case.[11]

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[10] In the instant case, the Ninth Circuit found it unnecessary to resort to the public welfare doctrine as an aid to statutory interpretation. The court instead found that the plain language of the statute and legislative history alone were sufficient to conclude that the unadorned phrase "negligently violate" means ordinary negligence. Accordingly, the characterization of the CWA as a public welfare statute was not a factor in the Ninth Circuit's statutory interpretation in this case.

[11] In any event, the court of appeals' characterization of the CWA as a public welfare statute in this case was correct. Most

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1999

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public welfare offenses impose penalties for mishandling "deleterious devices or products or obnoxious waste materials," which by their very nature "put their owners on notice that they stand 'in responsible relation to a public danger.'" *Staples*, 511 U.S. at 611 (citations omitted). In such statutes, Congress intends for the defendant's familiarity with the regulatory requirements to be presumed so that the public health and safety may be fully protected. *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565 (1971). As the Second Circuit noted, "[t]he vast majority of the[] substances [subject to criminal regulation under the CWA] are of the type that would alert any ordinary user to the likelihood of stringent regulation." *United States* v. *Hopkins*, 53 F.3d 533, 539 (1995), cert. denied, 516 U.S. 1072 (1996). Moreover, as the Ninth Circuit observed, Congress was keenly aware that "the improper and excessive discharge of * * * [pollutants] can have serious repercussions for public health and welfare," and that the "dumping of sewage and other pollutants into our nation's waters is precisely the type of activity that puts the discharger on notice that his acts may pose a public danger." *United States* v. *Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1994) (citing legislative history), cert. denied, 513 U.S. 1128 (1995). For these reasons, every court of appeals, except the Fifth Circuit, has correctly characterized the CWA as a public welfare statute.