No. 17-155

In the Supreme Court of the United States

ERIK LINDSAY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE FOR AGRICULTURAL, BUILDING, FORESTRY, LIVESTOCK, MANUFACTURING, MINING, AND PETROLEUM BUSINESS INTERESTS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are trade associations whose members are responsible for a significant proportion of American agricultural, forestry, mining, and energy production, manufacturing, and construction.[1]

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. Through its state and county Farm Bureau organizations, AFBF represents about six million member families in all 50 states and Puerto Rico.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative, Better Practices, Better Planet 2020. The forest products industry accounts for approximately four percent of total U.S. manufacturing GDP, manufactures over $200 billion in products annually, and employs approximately 900,000 men and women.

The American Petroleum Institute (API) is a national trade organization representing over 650 com-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have provided written consent to the filing of this *amicus* brief.

panies involved in all aspects of the domestic and international oil and natural gas industry, including exploration, production, refining, marketing, distribution, and marine activities. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry.

The Leading Builders of America (LBA) is a national trade association representing 20 of the largest homebuilding companies in North America. Collectively, LBA members build approximately 35% of all new homes in America. Its purpose is to preserve home affordability for American families. LBA member companies build across the residential spectrum from first-time and move-up to luxury and active-adult housing. In each of these segments, its members are leaders in construction quality, energy efficiency, design, and the efficient use of land. Many of its members are also active in urban multi-family markets and also develop traditional and neo-traditional suburban communities.

The National Alliance of Forest Owners (NAFO) is a national advocacy organization committed to advancing federal policies that support the long-term economic, social, and environmental benefits of sustainably managed, privately owned forests. NAFO member companies own and manage more than 43 million acres of private working forests—forests that are managed to provide a steady supply of timber. NAFO's membership also includes state and national associations representing tens of millions of additional acres. NAFO works aggressively to sustain the ecological, economic, and social values of forests and

to assure an abundance of healthy and productive forest resources for present and future generations.

The National Association of Home Builders (NAHB) is a national trade association incorporated in Nevada. NAHB's membership includes more than 140,000 builder and associate members organized into approximately 700 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. Its members include individuals and firms that construct single-family homes, apartment buildings, condominiums, and commercial and industrial projects, as well as land developers and remodelers.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Cattlemen's Beef Association (NCBA) is the national trade association representing U.S. cattle producers, with more than 30,000 individual members and several industry organization members. NCBA represents more than 175,000 of America's farmers, ranchers and cattlemen who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political,

and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

The National Mining Association (NMA) is the national trade association of the mining industry. NMA's members include the producers of most of the Nation's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry.

The National Pork Producers Council (NPPC) is an association of 43 state pork producer organizations and the global voice in Washington, D.C., for the nation's 67,000 pork producers. NPPC conducts public policy outreach at both the state and federal level with a goal of meeting growing worldwide consumer demand for pork while simultaneously protecting the water, air, and other environmental resources that are in the care of or potentially affected by pork producers and their farms. NPPC and its members have engaged directly with EPA over the last two decades regarding the development of water quality standards and have made significant capital investments in the design and operation of farms to comply with these environmental regulations.

As frequent litigants in courts at every level, *amici* have a general interest in promoting clear principles for determining the precedential effect of this Court's decisions. In particular, each *amicus* is deeply interested in the scope of federal jurisdiction under the Clean Water Act and has participated in litigation and rulemaking addressing that issue over many years. In that area, uncertainty over the precedential effect of this Court's 4-1-4 decision in

Rapanos v. *United States*, 547 U.S. 715 (2006), has—it is no exaggeration to say—wreaked havoc in courts and agencies and among regulated communities. This Court's decision in *Marks* v. *United States*, 430 U.S. 188 (1977), has proved a murky standard for applying *Rapanos* and similarly divided decisions. As *amici* explain, a clearer set of principles for applying fractured decisions like *Rapanos* is readily available, would promote greater certainty, and would redirect party, judicial, and government resources from fruitless debates about how to apply *Marks* back to resolution of the underlying legal issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should take this opportunity to clarify the precedential effect of its decisions in which no rationale supporting the judgment enjoys majority support. This Court's guidance in *Marks* v. *United States*, 430 U.S. 188 (1977), has proved inadequate to the task. *Amici* illustrate the problem, and suggest its resolution, by examining one divided 4-1-4 decision that has proved especially problematic for *amici* and their members: *Rapanos* v. *United States*, 547 U.S. 715 (2006), which addressed the scope of federal authority under the Clean Water Act. By doing so, *amici* hope to illuminate the principles that should be applied in cases like these, whether it is with respect to *Rapanos*, or *Freeman* v. *United States*, 564 U.S. 522 (2011), or more generally.

Rapanos addressed the jurisdiction of the Environmental Protection Agency and the U.S. Army Corps of Engineers over the "waters of the United States," a term of art used in the Clean Water Act. While a majority of the Court agreed that the agencies had defined the "waters of the United States" too

broadly, the Justices divided regarding the appropriate test for defining those waters. Justice Scalia, writing for a plurality of four Justices, and Justice Kennedy, concurring separately, offered two very different tests, backed by two very different rationales. *Rapanos*, therefore, raises the same issue presented here: which, if any, of the opinions in a split decision is controlling.

The question of how *Rapanos* should be interpreted has been the subject of sustained controversy. In enacting their 2015 rule defining "waters of the United States," the Corps and the EPA relied heavily on Justice Kennedy's concurrence, as well as Justice Stevens's dissent. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053, 37,061 (June 29, 2015). The President recently instructed the agencies to reconsider that rule and instead "consider interpreting the term 'navigable waters' * * * in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos*." Exec. Order No. 13,778, § 3, 82 Fed. Reg. 12,497 (Feb. 28, 2017). Pursuant to that instruction, the agencies have filed a notice of proposed rulemaking indicating that they will "consider developing a new definition of 'waters of the United States' taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion." Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,902 (July 27, 2017).

The Court's decision in this case is likely to clarify how lower courts and agencies should interpret not only *Freeman*, but other decisions like *Rapanos*. In the pages that follow, we offer some thoughts regarding how courts should approach that task, in light of *Marks* and of general principles of judicial

authority—and how they should determine the precedential effect of *Rapanos* in particular. Ultimately, we submit that any coherent approach to similarly divided decisions would recognize the following principles:

1. A concurring opinion is controlling if, and only if, it offers a rationale that a majority of the Court would accept, which was decidedly not the case in *Rapanos*. A concurring rationale that is entirely distinct from and incommensurate with that of the plurality opinion can never be deemed the decision's binding holding.

2. A decision's holding may never be constructed by looking to the rationale urged by dissenters.

3. Even though a plurality and a concurrence may disagree on the rationale for the judgment, they may agree as to particular examples of how their rationales would play out. Such points of agreement by a majority of Justices are entitled to considerable weight.

4. Where no rationale enjoys majority support, and where the rationale of one opinion forming the majority cannot properly be characterized as a logical subset of another (as in *Rapanos*), the holding of the case is limited to the judgment on the particular facts. In the Clean Water Act context, that result is not problematic. Prior precedent addressing the issue will be left in place—for example, *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), and *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), in the case of Clean Water Act jurisdiction. And the Court will have other opportunities to address the issue and potentially resolve its divi-

sions. That result is preferable to the endless disputes over how to apply *Marks* that have marred the development of Clean Water Act law after *Rapanos*.

ARGUMENT

The Fractured *Rapanos* Decision Offers A Case Study That Should Inform The Court's Approach In This Case.

What the Court says in this case about how to construe a divided 4-1-4 decision (or any decision in which a rationale explaining the judgment does not enjoy majority support) will necessarily shed light on how courts should interpret other similarly split decisions—including the Court's decision in *Rapanos*. Like the decision in *Freeman*, *Rapanos* consisted of a four-Justice plurality opinion, a single-Justice concurrence, and a four-Justice dissent. Neither the plurality opinion nor the concurrence can be described as a logical subset of the other.

Rapanos addressed two distinct questions regarding the jurisdiction of federal agencies to regulate "waters of the United States" under the Clean Water Act—immensely important questions, given that "[t]he burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial," to say the least. 547 U.S. at 721 (plurality opinion). First, the Court considered whether the "waters of the United States" encompass any "channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Id.* at 722. Second, the Court considered "whether a wetland may be considered 'adjacent to' remote 'waters of the

United States,' because of a mere hydrologic connection to them." *Id.* at 740.

Justice Scalia, writing for himself, the Chief Justice,[2] and Justices Thomas and Alito, answered both questions in the negative. As to the first question, Justice Scalia reasoned that the statutory phrase "waters of the United States" refers to "relatively permanent, standing or flowing bodies of water," not "ordinarily dry channels through which water occasionally or intermittently flows." 547 U.S. at 732-733. As to the second question, the plurality concluded that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 742.

Justice Kennedy, writing for himself only, concurred in the judgment—but he applied a wholly distinct analytic framework to determine the scope of the "waters of the United States." To start, he concluded that the plurality's "first requirement" of "permanent standing water or continuous flow" made "little practical sense in a statute concerned with downstream water quality," and was not compelled by the statute's text. 547 U.S. at 769 (Kennedy, J., concurring in the judgment). Turning to the second question, he would hold that wetlands are sufficiently "adjacent" to "waters of the United States" if they

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[2] The Chief Justice also wrote separately to emphasize that "the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority," but instead "chose to adhere to [their] essentially boundless view of the scope of [their] power." 547 U.S. at 758 (Roberts, C.J., concurring).

possess a "significant nexus" to those waters, meaning that they "significantly affect the[ir] chemical, physical, and biological integrity." *Id.* at 779-780.

Justice Stevens, writing for himself and Justices Souter, Ginsburg, and Breyer, dissented. The dissenters accused the plurality of relying on an "arbitrary distinction" between permanent and intermittent flows of water, reasoning that "[i]ntermittent streams can carry pollutants just as perennial streams can." 547 U.S. at 801, 804 (Stevens, J., dissenting). The dissent would have deferred to the conclusion of the Corps that wetlands are "adjacent" to "waters of the United States" if they possess a hydrologic connection to those waters. *Id.* at 805. For that reason, the dissenters also rejected Justice Kennedy's imposition of a "significant nexus" requirement. *Id.* at 807-809. Regardless, Justice Stevens noted that "all four Justices who have joined this opinion would uphold the Corps' jurisdiction * * * in all other cases in which either the plurality's or Justice Kennedy's test is satisfied." *Id.* at 810.

In sum, *Rapanos* presents the same general question at issue here: how a court may determine which, if any, of the distinct opinions in a split decision are controlling. *Amici* now offer their own understanding of how to determine the precedential effect (or lack thereof) of such decisions, using *Rapanos* as our example.

A. Justice Kennedy's concurrence in *Rapanos* is not controlling.

Marks is of limited import in determining the precedential effect of a divided decision like *Rapanos*. Indeed, it establishes a very narrow rule: Where a concurring opinion adopts a narrower variant of the

plurality's reasoning, the concurring opinion may be considered the opinion of the Court (and vice versa). Beyond this "Russian nesting doll" situation, *Marks* has no application. It does not permit a court to give precedential effect to a concurrence that is simply *different* from—*i.e.*, neither a narrower nor a broader version of the reasoning of—the plurality opinion.

1. In *Marks*, the Court considered whether its decision in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts* ("*Memoirs*"), 383 U.S. 413 (1966), had established the applicable obscenity standard at the time the petitioner trafficked in allegedly obscene materials. 430 U.S. at 193. The majority opinions in *Memoirs* comprised a three-Justice plurality opinion holding that obscenity must be "utterly without redeeming social value"; "broader" opinions by Justices Black and Douglas holding that "the First Amendment provides an absolute shield" against obscenity prosecutions; and a similarly broad opinion by Justice Stewart holding that "only 'hardcore pornography' may be suppressed." *Id.* at 193-194. Put simply, all six Justices in the majority agreed that alleged obscenity receives significant constitutional protection, while disagreeing on exactly how much protection to afford.

Marks held that the plurality opinion in *Memoirs* was controlling. 430 U.S. at 194. The Court reiterated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

Because the plurality opinion would afford the least First Amendment protection to obscenity among the opinions concurring in the judgment, "[t]he view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards." *Id.* at 194.

Marks sets forth the rule that "[w]hen there is no majority opinion, the *narrower* holding controls." *Panetti* v. *Quarterman*, 551 U.S. 930, 949 (2007) (emphasis added). And since *Marks*, the Court and individual justices have reasoned that *Marks* is inapplicable where one opinion is neither narrower nor broader than another. See, *e.g.*, *Glossip* v. *Gross*, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting) (explaining that *Marks* was inapplicable where one opinion was "unrelated to, and thus not any broader or narrower than," the other); *Nichols* v. *United States*, 511 U.S. 738, 745 (1994) (declining to apply *Marks* where "[a] number of Courts of Appeals have decided that there is no lowest common denominator or 'narrowest grounds' that represents the Court's holding").

To serve as the narrower ground under *Marks*, an opinion "must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment." *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (emphasis added). That is the case where, for example, "the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position." *Id.* at 782. Ultimately, "[a] fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and

one opinion can reasonably be described as a logical subset of the other." *United States* v. *Davis*, 825 F.3d 1014, 1021-1022 (9th Cir. 2016) (en banc). Accord *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *Homeward Bound, Inc.* v. *Hissom Mem'l Ctr.*, 963 F.2d 1352, 1359 (10th Cir. 1992).

Conversely, there is *no* controlling opinion if "the plurality and concurring opinions do not share common reasoning whereby one analysis is a 'logical subset'" of the other. *United States* v. *Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013) (quoting *King*, 950 F.2d at 781). "Where no standard put forth in a concurring opinion is a logical subset of another concurring opinion (or opinions) that, together, would equal five votes, *Marks* breaks down." *United States* v. *Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009). Thus, "[w]hen no single rationale commands a majority of the Court, only the specific result is binding on lower federal courts." *Davis*, 825 F.3d at 1022.

Some courts of appeals, like the decision below, have taken a different approach, holding instead that an opinion is controlling if it "necessarily produce[s] *results* with which a majority of the Court from that case would agree," regardless of whether its *reasoning* overlaps in any meaningful way with the other opinions. Pet. App. 12a. But that approach would "turn a single opinion that lacks majority support into national law" (*King*, 950 F.2d at 782)—yielding the anomalous result that "the views of one justice, with whom no one concurs," represents "the law of the land." *Dague* v. *City of Burlington,* 935 F.2d 1343, 1360 (2d Cir. 1991). That is an untenable rule on its face. Instead, the Court should hold that an opinion is only controlling under *Marks* if it contains

reasoning with which a majority of the Court necessarily agreed.

2. In *Rapanos*, neither the plurality opinion nor Justice Kennedy's concurring opinion can reasonably be described as a "logical subset" of the other. Thus neither is controlling under *Marks*. See Pet. Br. 50.

As courts of appeals have repeatedly explained, in *Rapanos*, "neither the plurality's test nor Justice Kennedy's can be viewed as relying on narrower grounds than the other." *United States* v. *Donovan*, 661 F.3d 174, 182 (3d Cir. 2011). That is because "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction," or vice versa. *United States* v. *Johnson*, 467 F.3d 56, 64 (1st Cir. 2006). Accord *United States* v. *Freedman Farms, Inc.*, 786 F. Supp. 2d 1016, 1018-1019 (E.D.N.C. 2011) ("neither the plurality opinion nor the concurring opinion is a precise subset of the other"); *United States* v. *Donovan*, 2010 WL 3000058, at *3 (D. Del. July 23, 2010) ("no single opinion in *Rapanos* is a logical subset of any other opinion"). "Because there is little overlap between the plurality's and Justice Kennedy's opinions, it is difficult"—indeed, a self-defeating exercise—to try to "determine which holding is the narrowest." *United States* v. *Bailey*, 571 F.3d 791, 798 (8th Cir. 2009).

Underlining that the Justices' approaches were starkly different, each opinion "flatly reject[s] the other's view." *Cundiff*, 555 F.3d at 210. Justice Scalia contended that Justice Kennedy's opinion "leaves the Act's 'text' and 'structure' virtually unaddressed"—effectively "rewrit[ing] the statute, using for that purpose the gimmick of 'significant nexus.'" *Rapanos*, 547 U.S. at 753, 756 (plurality opinion). Justice Ken-

nedy responded that the plurality opinion "impose[s] two limitations * * * without support in the language and purposes of the Act or in our cases interpreting it." *Id.* at 768 (Kennedy, J., concurring in the judgment). As the Chief Justice put it, "no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act," and "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." *Id.* at 758 (Roberts, C.J., concurring).

Commentators have likewise concluded that Justice Kennedy's concurring opinion "lays out a framework far different from that offered by the plurality," and is therefore not a "logical subset" of the plurality's reasoning. G.W. Jones, Note, *Federal Wetlands Jurisdiction—The Quagmire of* Rapanos *v.* United States, 2 Pitt. J. Envtl. Pub. Health L. 79, 88 (2008). See also Jamison E. Colburn, *Governing the Gradient: Clarity and Discretion at the Water's Edge*, 62 Vill. L. Rev. 81, 91 (2017) ("Justice Kennedy's theory of the CWA's text, purpose, and doctrinal record differed substantially from the plurality's theory in this regard"). Justice Kennedy's opinion, therefore, cannot be designated the controlling opinion under *Marks*.[3]

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[3] See also, *e.g.*, Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos *v.* United States, 41 Suffolk U. L. Rev. 97, 121 (2007) ("the putative narrowest-grounds opinion 'does not fit entirely within a broader circle drawn by the' plurality") (quoting *King*, 950 F.2d at 782); Roni A. Elias, *More than a Rivulet Running to It: Making Sense of the Clean Water Act Jurisdiction After* Rapanos *v.* United States, 10 Appalachian Nat. Resources L.J. 29, 51 (2016) ("there is no significant commonality among any of the opinions in *Rapanos*"); Justin F. Marceau, *Plurality Decisions: Upward Flowing Precedent and*

Of course, several circuits have held that Justice Kennedy's opinion does "provid[e] the controlling rule of law" in *Rapanos*, even though the plurality expressly rejected its reasoning, which is logically distinct from the plurality's. See, *e.g.*, *Northern Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007). But those courts have wrongly concluded that an opinion may be deemed controlling under *Marks* even if it contains reasoning that none of the other Justices concurring in the judgment would adopt. Indeed, some of those courts have treated Justice Kennedy's opinion as controlling, even while acknowledging that in some cases it would yield a result *opposed* by eight Justices. See *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 724-725 (7th Cir. 2006). That result is plainly not authorized by *Marks*.

Nor does it make sense to say that Justice Kennedy's opinion is the "narrowest' because it is "least restrictive of the assertion of federal authority," given that "it seems just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority." *Johnson*, 467 F.3d at 63.

Acoustic Separation, 45 Conn. L. Rev. 933, 981 (2013) ("the Court's decisions that apply *Marks* suggest that there is no precedent"); Kristen M. Sopet, *Environmental Law/Administrative Law*—United States *v.* Rapanos*: Justice Stevens's Suggestion May Not Be the Yellow Brick Road, but It Is the Best Pathway to Oz*, 31 W. New Eng. L. Rev. 879, 908 (2009) ("[T]he *Marks* test will not yield an intelligible result when applied to *Rapanos*."); Ryan J. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795, 812 (2017) ("the jurisdictional test [Justice Kennedy] endorsed was not wholly subsumed within the plurality's test").

Thus, neither Justice Scalia's plurality opinion nor Justice Kennedy's concurring opinion, in isolation, can be deemed to set forth the holding of *Rapanos*.

B. Justice Stevens's dissenting opinion in *Rapanos* is not entitled to any weight.

Whatever weight is due to *concurring* opinions, courts should not give any weight to *dissenting* opinions, which necessarily do not support the Court's judgment. As the Court put it in *O'Dell* v. *Netherland*, 521 U.S. 151 (1997), *Marks* requires the court to identify "the narrowest grounds of decision among the Justices *whose votes were necessary to the judgment*." *Id*. at 160 (emphasis added). In *Rapanos*, that means that Justice Stevens's dissenting opinion cannot be deemed to set forth any controlling rules of law.

The Court in *Marks* "instruct[ed] lower courts * * * to ignore dissents." *Cundiff*, 555 F.3d at 208. As explained above, the Court held that "the holding of the Court may be viewed as that position taken by *those Members who concurred in the judgments* on the narrowest grounds"—*i.e.*, not those who expressly dissented from those judgments. *Marks*, 430 U.S. at 193 (emphasis added). Thus, "[t]he plain wording of *Marks* does not contemplate considering the position of dissenting Justices." *Freedman Farms, Inc.*, 786 F. Supp. 2d at 1021. See Marceau, 45 Conn. L. Rev. at 959 n.121 (counting the votes of dissenting Justices is "inconsistent with the plain language of the *Marks* formula").

The Court has repeatedly emphasized this limitation on the scope of the *Marks* rule. See, *e.g.*, *O'Dell*, 521 U.S. at 160; *Romano* v. *Oklahoma*, 512

U.S. 1, 9 (1994) (explaining that because "Justice O'Connor *supplied the fifth vote* in *Caldwell,* and concurred on grounds narrower than those put forth by the plurality, her position is controlling") (emphasis added). The votes of dissenting justices are, by definition, not necessary to the judgment, and therefore do not count under *Marks*.

In this respect, statements in dissenting opinions are similar to dicta. After all, "like dicta, statements in dissenting opinions are neither 'necessary to' nor even supportive of the judgment." Williams, 69 Stan. L. Rev. at 852. Treating them as more would change the nature of dissents, in which dissenters now "enjoy something of the liberty of a gadfly, as the outcome does not in fact depend on what they say." *United States* v. *Duvall*, 740 F.3d 604, 623 (D.C. Cir. 2013) (Williams, J., concurring in denial of en banc review). See also Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 1, 6 (2010) (acknowledging that the purpose of a dissent may be to "attract immediate public attention and, thereby, to propel legislative change").

For these reasons, the courts of appeals have held that "*Marks* does *not* direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented." *United States* v. *Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007). See also Pet. App. 7a (following *Robison*); *United States* v. *Robertson*, 875 F.3d 1281, 1292 (9th Cir. 2017) ("the dissent that did not support the judgment is out"); *Gibson* v. *American Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014) ("under *Marks,* the positions of those Justices who *dissented* from the judgment are not counted in trying to discern a governing holding from divided opinions"). A court simp-

ly may not "combine a dissent with a concurrence to form a *Marks* majority." *Palmer*, 950 F.2d at 783.

Because nothing in Justice Stevens's dissent in *Rapanos* "constitutes a portion of the judgment of the Court, * * * nothing in the dissent is part of the actual holding of the case." Jonathan H. Adler, *Reckoning with* Rapanos*: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 Mo. Envtl. L. & Pol'y Rev. 1, 14 (2006). A court may not give any controlling effect to the *Rapanos* dissent under *Marks*.

C. Courts should give weight to those conclusions shared by the plurality and concurring opinion in *Rapanos*.

Having cleared the brush, the question remains: What should a court do where neither of the opinions which make up the majority supporting the judgment is a logical subset of the other, obviating *Marks*? There are a number of options, each of which gives appropriate weight to the opinions rendered by the Court.

First, a court can apply *both* opinions to ascertain how a majority of the Justices would resolve the case at hand. If both opinions would arrive at the same result, then there is no need to determine which opinion is controlling. Application of that approach to *Rapanos* would require a court to apply the plurality's test and Justice Kennedy's "significant nexus" test, and find jurisdiction (or a lack thereof) if both would reach the same conclusion.

Second, a court can look for express points of agreement between the two opinions, and afford controlling weight to how a majority of the Justices would resolve specific issues. Application of that ap-

proach to *Rapanos* would yield a number of clear propositions of law that would assist a court (or agency) in assessing whether jurisdiction is present.

Third, it may be the case that *none* of the opinions in a split decision, or any parts of them, are controlling. In that case, the court—or the agency—should carefully consider each of the opinions rendered by the majority as persuasive authority. Application of that approach to *Rapanos* would require considering the plurality opinion and Justice Kennedy's concurrence as persuasive authority, in light of the cases that preceded *Rapanos* in which there were clear majority holdings, including *SWANCC* and *Riverside Bayview*.

We lay out each of these approaches in turn.

1. Applying both opinions.

The first option is the most straightforward: A court may apply *both* the plurality and the concurrence to ascertain how they would resolve the issue at hand. "Any result that would have been reached under every one of the judgment-supportive rationales constitutes a result that the lower court itself is similarly bound to reach in the later case." Williams, 69 Stan. L. Rev. at 803. Moreover, applying both opinions where they would yield convergent results allows the court to avoid resolving the often difficult question of which opinion is controlling or what rationale constitutes the holding of the case.

That was the approach of the Sixth Circuit in *Cundiff*, which held that "jurisdiction [was] proper * * * under each of the primary *Rapanos* opinions," and therefore declined to "decide here, once and for all, which test controls in all future cases." 555 F.3d at 208. Similarly, the Fifth Circuit in *United States*

v. *Lucas*, 516 F.3d 316, 327 (5th Cir. 2008), upheld a conviction under the Clean Water Act because "the evidence presented at trial supports all three of the *Rapanos* standards," meaning that the Court did not need to decide which opinion was controlling.

Under this approach, a court would require that Clean Water Act jurisdictional rules satisfy *both* the plurality opinion and Justice Kennedy's concurring opinion, because that is the narrowest "position" taken by the majority opinions, read together. *Rapanos* would therefore require that jurisdictional waters have a relatively permanent flow that reaches traditional navigable waters, that wetlands have a continuous surface connection to navigable waters, *and* that the flow or connection is sufficient in frequency, duration, and proximity to affect the chemical, physical, and biological integrity of covered waters to satisfy Justice Kennedy's significant nexus test.

In contrast, if under both opinions the relevant jurisdictional hook is *not* present, then five Justices would necessarily conclude that they do not fall within the Act. Thus, this approach serves to isolate comparatively "easy" cases where both the plurality and the concurrence would reach the same result.

2. Finding points of agreement.

Alternatively, the court may look for specific points of agreement between the plurality and concurring opinions—*i.e.*, "common ground shared by five or more Justices." *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992). This approach will usually yield some guidance, because "[o]nly in very rare cases do the opinions making up a majority of a court contain no common principles or common ground on which to derive any precedential holding

of the court." *FTC* v. *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1061 n.8 (D.C. Cir. 2008). See also Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 452-453 (1992) ("many decisions will contain majority agreement on some points and lack that level of consensus on other issues"). Even absent common ground as to the rationale employed, there may be agreement as to the result the Justices' disparate rationales would reach as to specific facts. That is the case with *Rapanos*.

The plurality opinion and Justice Kennedy's concurring opinion contain multiple points of agreement as to which types of features are jurisdictional and which are not. A subsequent court (or agency) faced with the question of jurisdiction over one of those features should be bound by that agreement of a majority of Justices, or at least give that agreement considerable weight. See Adler, 14 Mo. Envtl. L. & Pol'y Rev. at 11 (under this approach, "the grounds of agreement between Justice Kennedy and the plurality opinion authored by Justice Scalia, form the holding of the Court").

For example, the plurality and Justice Kennedy agreed that "the word 'navigable' in 'navigable waters' [must] be given some importance." *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring in the judgment). See *id.* at 731 (plurality opinion). They also agreed that the Clean Water Act "encompasses some waters not navigable in the traditional sense," but that have a substantial connection to navigable waters. *Duarte Nursery, Inc.* v. *United States Army Corps of Engineers*, 2017 WL 1105993, at *5 (E.D. Cal. Mar. 24, 2017). Of course, they disagreed whether the sufficient connection is "a continuous

surface connection," requiring a "relatively permanent standing or continuously flowing bod[y] of water (*Rapanos*, 547 U.S. at 739, 742 (plurality opinion)), or instead a "nexus" that is "significant" enough to "affect the chemical, physical, and biological integrity" of the navigable water (*id.* at 779-780 (Kennedy, J., concurring in the judgment)).

Despite this difference in characterizing the necessary connection, both Justice Kennedy and the plurality agreed that, applying their tests, "waters of the United States" do *not* include "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," much less the waters or "wetlands [that] lie alongside [such] a ditch or drain." 547 U.S. at 778, 781 (Kennedy, J., concurring in the judgment). See *id.* at 778-781 (identifying "volume of flow" and "proximity" as relevant factors and ruling out jurisdiction over features with a "remote," "insubstantial," or "speculative effect on navigable waters); *id.* at 733-734 (plurality opinion) (jurisdiction reaches "continuously present, fixed bodies of water"; "intermittent or ephemeral flow" of the sort found in "drainage ditches," "storm sewers and culverts," and "dry arroyos" is insufficient); *id.* at 742 (wetlands with "an intermittent, physically remote hydrologic connection" to jurisdictional waters lack a "significant nexus").

Under this common-denominator approach, those are points of law on which five Justices are necessarily in agreement—and therefore bind lower courts and agencies. But further issues as to which five Justices did not agree remain open for decision.

3. Treating all of the majority opinions as persuasive authority.

A third option is to hold that neither the plurality nor the concurring opinion in a split decision is controlling, and each serves as persuasive authority that courts may use in resolving similar questions in the future. This approach recognizes that "Court precedent should form only when a single rule of decision has the express support of at least five justices." Richard M. Re, *Beyond the* Marks *Rule* 1 (UCLA Sch. of Law, Pub. Law Research Paper No. 17-50, 2018), perma.cc/2ZJ3-T945. And it also has the advantage of allowing lower courts "to experiment with alternative rules and outcomes," which may assist the Court in resolving the issue that gave rise to the split in the first place. Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1625 (1992).

Under this approach, a court would not treat any opinion or combination of opinions as controlling and would instead use the Justices' writings in *Rapanos* as persuasive authority to be considered in determining the scope of jurisdiction under the Clean Water Act. Importantly, those merely persuasive opinions would need to be read through the lens of earlier decisions addressing Clean Water Act jurisdiction that do have clear holdings, such as *SWANCC* and *Riverside Bayview*. In no circumstance would it be permissible to read statements in any of the *Rapanos* opinions as having superseded the authoritative rulings in those earlier cases. At least one court has taken this approach. *United States* v. *Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 615 (N.D. Tex. 2006).

By relying on all of the non-dissenting opinions in *Rapanos*, the court or agency would also give

weight to the balance of interests that Congress considered in enacting the Clean Water Act. Justice Scalia's plurality opinion "comports with the text because it gives effect to the long-standing and well-established meanings of the crucial terms 'navigable waters' and 'waters of the United States," while also reflecting "[f]oundational principles of federalism." Elias, 10 Appalachian Nat. Resources L.J. at 57-58. Justice Kennedy's opinion recognizes the "[i]mportant public interests * * * served by the Clean Water Act in general and by the protection of wetlands in particular." *Rapanos*, 547 U.S. at 777. These opinions therefore serve as a useful guide to future questions of jurisdiction under the Clean Water Act, even if neither is controlling.

Ultimately, however, what a court cannot do is allow the opinion of one Justice, lacking support from a majority of the Court, to make national law. Any of the options discussed above would be far more consistent with *Marks*—and give appropriate weight to all of the Court's prior opinions.

D. Other common law jurisdictions agree with the approaches we have proposed.

The principles we describe above have been recognized in other common law jurisdictions in which separate opinions in support of a majority judgment have been the norm and the search for the *ratio decidendi* of a case across disparate opinions a more commonplace endeavor. See generally J.L. Montrose, *Ratio Decidendi and the House of Lords*, 20 Mod. L. Rev. 124, 127-130 (1957).

In those jurisdictions, dissenting decisions are afforded no weight in determining the holding of a fractured decision. As Professor Anthony Honore ex-

plained, "[t]he fundamental reason why the opinions of minority judges cannot form part of the *ratio decidendi* of a case is that they are not reasons for the order made by the court: a *ratio decidendi* is entitled to authority not as the opinion of one or more judges, but as the reason for a judicial order." A.M. Honore, *Ratio Decidendi: Judges and Court*, 71 Law Q. Rev. 196, 198 (1955). See, *e.g.*, *Federation Ins. Ltd.* v. *Wasson* [1987] HCA 34 (Austl.) ("it would not be proper to seek to extract a binding authority from an opinion expressed in a dissenting judgment"); *Garcia* v. *National Austl. Bank Ltd.* [1998] HCA 48 (Austl.) (a Justice of the Australian High Court "cannot speak for the Court unless his reasoning attracts the support, express or implied, of a majority of the participating Justices (disregarding for this purpose any who did not agree with the order of the Court disposing of the proceedings on the point in question")) (Kirby, J.).

And courts in those jurisdictions do not recognize opinions in which no rationale shares majority support as authoritative precedent beyond the particulars of the judgment. Thus, when the members of the U.K. House of Lords expressed different opinions about the meaning of a statute, "the decision in the House of Lords does not give us authoritative guidance." *Walsh* v. *Curry* [1955] NI 112, 125 (Black, L.J.) (N. Ir.) (addressing the divided decision of the three-justice majority in *George Wimpey & Co.* v. *British Overseas Airways Corp.* [1955] AC 169). In those circumstances, a subsequent "court is in a position to form its own judgment on the matter." *Id.* at 124 (MacDermott, L.C.J.). See also, *e.g.*, *Harper* v. *National Coal Bd.* [1974] QB 614, 621-622 (Denning, L.J.) (concluding that when a majority of the House of Lords divided 2-1 as to their rationale, "we cannot

say that any of the three in the majority was correct"); *Fellner* v. *Minister of the Interior* 1954 (4) SA 523 (App. Div.) (S. Afr.) ("there is no *ratio decidendi* of [a five judge] court unless at least three judges propound the same *ratio decidendi*"); *Perara-Cathcart* v. *The Queen* [2017] HCA 6 (Austl.) ("aggregation of the reasons for decision of members of the majority can sometimes fail to yield a ratio decidendi") (Gageler, J.); *Great W. Ry. Co.* v. *Owners of the S.S. Mostyn* [1928] AC 57, 73 (U.K.) ("if from the opinions delivered it is clear * * * what the ratio decidendi was which led to the judgment," it "is binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it") (Dunedin, L.J.).[4]

As with *Rapanos*, when there is a divided majority that does not fit the "Russian dolls" situation covered by *Marks*, a court should treat the case "as one which had no discernible *ratio* and regar[d] itself as free to follow * * * earlier decisions." Rupert Cross & J.W. Harris, Precedent in English Law 92 (4th ed. 1991).

* * *

Under these principles, neither the plurality opinion nor Justice Sotomayor's concurring opinion in *Freeman*, 564 U.S. 522, should be deemed to con-

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[4] The *Marks* rule too has an analogue in English common law. See, *e.g.*, *Gold* v. *Essex County Council* [1942] 2 KB 293, 298 (Greene, L.J.) (where "two members of the court base their judgments, the one on a narrow ground * * * and the other on wide propositions * * *, and the third member of the court expresses his concurrence in the reasoning of both, I think it right to treat the narrow ground as the real ratio decidendi").

trol in this case. Neither opinion is a "logical subset" of the other; as the Chief Justice explained, "[t]he plurality and the opinion concurring in the judgment agree on very little except the judgment." *Id.* at 544 (Roberts, C.J., dissenting). Thus, the court of appeals erred in holding that Justice Sotomayor's concurrence states the holding of *Freeman*. Pet. App. 2a-3a. The Court should instead adopt the approach we have described using *Rapanos* as a parallel example, and hold that both opinions are entitled to considerable weight to the extent they would yield the same result or agree on discrete legal issues, and should otherwise be treated as persuasive authority only.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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