UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 04-15442

NORTHERN CALIFORNIA RIVER WATCH,

Plaintiff - Appellee,

v.

CITY OF HEALDSBURG, and Does 1-10 inclusive,

Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION OF THE UNITED STATES, AS *AMICUS CURIAE*, TO CLARIFY THE COURT'S OPINION

INTRODUCTION

The United States of America, filing as amicus curiae pursuant to Federal Rule of Appellate Procedure 29,[1] moves this Court, pursuant to Federal Rule of

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[1] Rule 29 provides for the filing of amicus curiae briefs and specifically permits the United States file an amicus-curiae brief without the consent of the parties or leave of court. Fed. R. App. P. 29(a). This Court has accepted a variety of types of amicus curiae filings, including post-judgment filings. See, e.g., Newdow v. U.S. Congress, 313 F.3d 495, 496 (9th Cir. 2002) (denying a post-judgment

Appellate Procedure 27 and Ninth Circuit Rule 27, to clarify the Court's Opinion of August 10, 2006 to more fully explicate the legal standard by which federal regulatory jurisdiction may be established under the Clean Water Act (CWA) following the Supreme Court's decision in Rapanos v. United States/Carabell v. U.S. Army Corps of Engineers, 126 S. Ct. 2208 (2006). The August 10, 2006 Opinion is particularly important because it is the first decision of this Court, and of any federal court of appeals, to interpret and apply Rapanos.

As the United States is not a party to this case, our views on the proper construction of Rapanos were not available to the Court at the time of decision. The federal agencies responsible for implementing the CWA – the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers – are preparing guidance regarding the impact of Rapanos on jurisdiction over waters of the United States under the CWA, which should in the future give courts notice of the United States' views, but that guidance has not yet been finalized. We thus file this motion to provide our view that, under Rapanos, CWA jurisdiction may be

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motion of the U.S. Senate to intervene in order to file a petition for rehearing and rehearing en banc but declaring that the Court would "accept the petition and accompanying brief as an amicus brief"); R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 910-911 (9th Cir. 2005) (considering and denying "petition for panel rehearing of amicus curiae Washington Legal Foundation").

established if the legal standard set forth in either the plurality opinion or Justice Kennedy's concurring opinion is satisfied.[2/]

In the August 10, 2006 Opinion, the Court concluded that federal regulatory jurisdiction was established because the legal standard of Justice Kennedy's concurring opinion was satisfied. See Opinion (Op.). at 9302, 9309-10 (concluding that Justice Kennedy's opinion was controlling in that case). Because jurisdiction was established under Justice Kennedy's opinion, the Court had no occasion to consider whether CWA jurisdiction could be established under any other legal standard. As the Opinion will provide guidance to future decisions of the lower courts, however, it would be useful to clarify, as set forth in the analysis below, that the plurality opinion in Rapanos provides an alternative legal standard under which CWA jurisdiction may be established.

DISCUSSION

In concluding that Justice Kennedy's opinion in Rapanos is controlling, the Opinion relies on Marks v. United States, 430 U.S. 188 (1977). Marks declared that "[w]hen a fragmented Court decides a case and no single rationale explaining

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[2/] We understand that the City of Healdsburg is filing a petition for rehearing in this case. Thus, consideration of the United States' views in this post-judgment posture should not inconvenience the Court in terms of timing or use of judicial resources.

the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." Id. at 193 (internal quotation marks omitted). Taken in isolation, the Marks Court's reference to "those Members who concurred in the judgments" might suggest that courts, in determining the precedential effect of a fractured decision of the Supreme Court, should ignore the views of dissenting Justices. The Supreme Court has subsequently recognized, however, that in some cases the Marks test is "more easily stated than applied to the various opinions supporting the result," Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (quoting Nichols v. United States, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the Marks inquiry to the utmost logical possibility'" in every case, id. (quoting Nichols, 511 U.S. at 745-746).

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

other.[3/] In that instance, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower federal court should adhere to the view of the law that a majority of the Supreme Court has unambiguously embraced. See Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under Marks, as the holding of the Court); cf. League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); Alexander v. Sandoval, 532

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

U.S. 275, 281-282 (2001) (same). This Court itself recently recognized this principle. See United States v. Williams, 435 F.3d 1148, 1157 (9th Cir. 2006) (where there are splintered Supreme Court opinions, the Court of Appeals "need not find a legal standard in which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'") (quoting Planned Parenthood v. Casey, 947 F.2d 682, 693 (3d Cir. 1991), rev'd on other grounds, 505 U.S. 833 (1992)).

These cases demonstrate that consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in Marks because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. Rapanos, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (citing Marks due to the absence of an opinion commanding a majority of the Court). And the application of that approach here clearly supports finding the existence of federal regulatory jurisdiction whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members would find jurisdiction in either of those instances. See id. at 2265 & n.14 (Stevens, J., dissenting) ("Given that all four Justices who * * * joined [the dissenting] opinion would uphold the Corps' jurisdiction * * * in * * * cases in which either the plurality's or Justice Kennedy's test is satisfied[,]" "the

United States may elect to prove jurisdiction under either test.").[4]

An example of the importance of interpreting Rapanos to provide two alternative legal standards under which CWA jurisdiction may be established is Hubenka v. United States, 438 F.3d 1026 (10th Cir. 2006), which is currently pending before the Supreme Court on petition for a writ of certiorari to the Tenth Circuit (S. Ct. No. 05-11337). The case involves a challenge to the United States' jurisdiction over pollutant discharges into the Wind River in Wyoming, a tributary to a traditional navigable water that flows year-round. Id. at 1029. As the United States has argued, the Wind River clearly meets the legal standard for "waters of the United States" articulated by the plurality in Rapanos because it is a continuously flowing river that is connected to traditional interstate navigable waters. See 126 S. Ct. at 2225-2227. As the court of appeals' decision in Hubenka was issued prior to the Supreme Court's ruling in Rapanos, the Tenth Circuit had no occasion to discuss the application of Justice Kennedy's "significant nexus" test to the tributary at issue. Because the Wind River clearly meets the standard of the plurality opinion, however, it is unnecessary to determine whether it also meets the standard of Justice Kennedy's concurring

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[4] This dual test approach was recently adopted in United States v. Evans, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006) (unpublished opinion) after the court considered supplemental briefing by the parties, including the United States.

opinion.[5/]

Thus, the legal standard set forth by the plurality under certain circumstances may be more readily satisfied than the significant nexus analysis required by Justice Kennedy's opinion, and the Court's opinion should clarify that federal regulatory jurisdiction is established if the waters at issue satisfy the legal standard of either opinion.[6/]

[5/] A copy of the United States' brief in opposition to the Hubenka petition, setting forth these views in more detail, is attached.

[6/] The August 10, 2006 Opinion may suggest an unnecessarily narrow standard in another respect. It states that, under the legal standard set forth in Justice Kennedy's opinion, "it is apparent that mere adjacency of Basalt Pond and its wetlands to the Russian River is not sufficient for CWA protection." Op. at 9311. Under Justice Kennedy's opinion, a "significant nexus" is presumed to exist where wetlands are adjacent to navigable-in-fact waters. See Rapanos, 126 S. Ct. at 2248 (Kennedy J., concurring in judgment) ("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the [CWA] by showing adjacency alone."); see id. at 2249 ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction."). Therefore, CWA jurisdiction for such wetlands can be based on adjacency alone. This refinement to the "significant nexus" requirement of Justice Kennedy's opinion may be useful to future courts considering this issue.

CONCLUSION

The United States respectfully requests that the Court's Opinion be clarified to reflect the view that federal regulatory jurisdiction under the Clean Water Act may be established whenever the legal standard of the plurality or Justice Kennedy's concurrence is satisfied.

Respectfully submitted,

Katherine J. Barton
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026

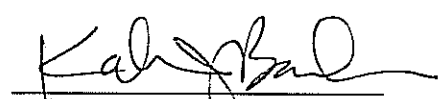
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of the United States, as Amicus Curiae, to Amend the Court's Opinion has been served upon the following counsel on this 23rd day of August 2006 by dispatching same by U.S. Mail First Class:

Charles M. Tebbutt
Western Environmental Law Center
1216 Lincoln Street
Eugene, OR 97401

Jack Silver
Law Office of Jack Silver
11220 Occidental Road
Santa Rosa, CA 05472

Peter W. McGaw
Archer Norris
2033 N. Main St.
P.O. Box 8035
Walnut Creek, CA 94596-3728



Katherine J. Barton
Environment & Natural Resources Division
Department of Justice
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026
(202) 353-7712

ATTACHMENT

No. 05-11337

IN THE SUPREME COURT OF THE UNITED STATES

JOHN HUBENKA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

GREER S. GOLDMAN
KATHERINE W. HAZARD
JOHN EMAD ARBAB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Wind River, which flows year-round and is a tributary of a navigable-in-fact river, is part of "the waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7).

IN THE SUPREME COURT OF THE UNITED STATES

No. 05-11337

JOHN HUBENKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 438 F.3d 1026.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2006. The petition for a writ of certiorari was filed on May 17, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioner was found guilty of three counts of knowingly discharging fill material into "waters of the

United States" without a permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A). He was sentenced to one year of probation (six months of which was home confinement) and was ordered to restore the riverbed into which the fill material had been discharged. The court of appeals affirmed. Pet. App. 1-8.

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. 1251 et seq. (Clean Water Act or CWA), "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "[d]ischarge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). It is a criminal offense to commit a knowing violation of Section 301(a). See 33 U.S.C. 1319(c)(2)(A).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by

the Act. See, e.g., 33 U.S.C. 1344(b) and (c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). That definition encompasses, inter alia, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1), as well as "tributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5).[1]

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (Riverside Bayview); see International Paper Co. v. Ouellette, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In Solid Waste

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362 and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. Id. at 166-174. The Court noted, and did not cast doubt upon, its prior holding in Riverside Bayview that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See id. at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in Rapanos v. United States, 126 S. Ct. 2208 (2006). Rapanos involved two consolidated cases in which the CWA had been applied to pollutant discharges into wetlands bordering on nonnavigable tributaries of traditional navigable waters. See id. at 2219 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See id. at 2220 (plurality opinion); id. at 2241 (Kennedy, J., concurring in the judgment); id. at 2255 (Stevens, J., dissenting). Four Justices would have interpreted the term as covering "relatively permanent, standing or continuously flowing bodies of water," id. at 2225 (plurality opinion), that are connected to traditional navigable waters, id. at 2226-2227, as well as wetlands with a continuous surface connection to such water bodies, id. at 2227. Justice Kennedy would have held that the term encompasses wetlands that

"possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." Id. at 2236 (Kennedy, J., concurring in the judgment); see id. at 2248 (wetlands "possess the requisite nexus" if the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'"). The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See id. at 2265 (Stevens, J., dissenting).

3. Petitioner is a manager for the LeClair Irrigation District and lives on a ranch near the Wind River in the vicinity of Riverton, Wyoming. Pet. App. 3. The court of appeals' opinion describes the Wind River as follows:

> The Wind River originates in Wyoming's Wind River Range, on the east slope of the continental divide near Togwotee Pass. From there, it flows southeast through the Wind River Indian Reservation. Near Riverton, Wyoming, the Wind River is joined by the Little Wind River and the Popo Agie River. Downstream from this confluence, the river is called the Big Horn River. Water in the Big Horn River flows north, joins the Yellowstone River in Montana, and eventually flows east into the Missouri River. The Wind River flows year-round, with higher volume in the late spring and early summer, and lower volume in the fall and winter.

Ibid. The court also noted that, "[i]n an average year, the Wind

River's peak runoff is in the range of 7000 to 8000 cubic feet per second." Id. at 3 n.1.

In March 2000, petitioner hired a heavy-equipment operator to construct a series of dikes in the north channel of the Wind River. Pet. App. 3. Using a bulldozer, the operator pushed river cobble from the north channel to form a dike at the point where the north and south channels diverge. Id. at 3-4. The dike blocked the north channel by directing high flows along the face of the dike and into the south channel. Id. at 4. The operator also constructed two additional dikes in the river. Ibid. None of the dikes was authorized by a CWA permit. Ibid. The Corps had previously notified petitioner that building dikes in the Wind River without a permit is a violation of the CWA. Id. at 3.

Petitioner was charged with three counts of knowingly discharging pollutants into the Wind River without a permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A). Pet. App. 2, 4. A jury found petitioner guilty on all three counts. Ibid.

4. The court of appeals affirmed. Pet. App. 1-8. The court explained that, under the regulatory framework in effect since 1975, the CWA "applie[s] not just to navigable-in-fact waters, but inter alia, to tributaries of navigable waters." Id. at 4 (citing 33 C.F.R. 328.3(a)(5)); see p. 3, supra. The court of appeals held that "the Corps' tributary rule is a permissible interpretation of the [CWA]" and is therefore entitled to deference under the

principles announced in Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984). Pet. App. 7; see id. at 4-7. Noting that "it is undisputed that the Wind River is a tributary of traditional navigable waters," the court concluded that, "under the Corps' tributary rule, the Wind River is a 'water of the United States' for purposes of the [CWA]," and that petitioner's dike-building activities therefore fell within federal regulatory jurisdiction. Id. at 7.

ARGUMENT

Petitioner contends (Pet. 4-9) that this Court should grant review to resolve a circuit conflict concerning the circumstances under which the Corps may exercise CWA jurisdiction over pollutant discharges into tributaries of traditional navigable waters. After the petition was filed, however, the Court issued its decision in Rapanos, and the various opinions in that case discussed at some length the application of the CWA to such tributaries. Based on the Tenth Circuit's unchallenged description of the Wind River's physical characteristics and its link to traditional navigable waters, it is clear that the river would be treated as part of the "waters of the United States" under the interpretive approaches taken by at least eight Members of the Court in Rapanos. Petitioner's claim therefore does not warrant this Court's review.

1. The four-Justice plurality in Rapanos would have imposed two conditions for CWA coverage of tributaries. First, the

plurality would have held that the phrase "waters of the United States" is limited to "those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes," and "does not include channels through which water flows intermittently or ephemerally." 126 S. Ct. at 2225 (brackets, ellipses, and internal quotation marks omitted).[2] Second, the plurality would have required that the tributary be "connected to traditional interstate navigable waters." Id. at 2227.

The court of appeals' opinion in this case makes clear that the Wind River satisfies those criteria. The court stated that "[t]he Wind River flows year-round, with higher volume in the late spring and early summer, and lower volume in the fall and winter." Pet. App. 3. The court also described the series of rivers through which water in the Wind River ultimately flows into the Missouri River. Id. at 2-3.

The four Justices who dissented in Rapanos would have upheld the determination of the Corps and EPA that the term "waters of the United States" encompasses intermittent as well as continuously-

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[2] Elsewhere in its opinion, the Rapanos plurality made clear that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." 126 S. Ct. at 2221 n.5.

flowing tributaries. See 126 S. Ct. at 2259-2262. The dissenting Justices stated explicitly, however, that they would sustain the exercise of federal regulatory jurisdiction under the CWA in all cases in which either the plurality's or Justice Kennedy's test for CWA coverage is satisfied. See id. at 2265 & n.14. It is therefore clear that the Wind River would be treated as part of the "waters of the United States" under the interpretive approaches adopted by at least eight Members of this Court.[3]

2. Petitioner does not dispute the court of appeals' statement that the Wind River flows throughout the year, and he acknowledges (Pet. 4) that water in the Wind River eventually reaches a traditional navigable waterway. Relying on In re Needham, 354 F.3d 340 (5th Cir. 2003), however, petitioner contends (Pet. 7-8) that discharges into tributaries are covered only if the

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[3] The court of appeals' decision in this case was issued before this Court's ruling in Rapanos, and the Tenth Circuit therefore had no occasion to discuss the application of Justice Kennedy's "significant nexus" test to the tributary at issue here. Because the court of appeals' description of the Wind River and its connection to traditional navigable waters makes clear that the river would be treated as part of the "waters of the United States" under the standards endorsed by at least eight Members of this Court in Rapanos, it is unnecessary for this Court to determine whether the "significant nexus" test would also be satisfied. By the same token, if in some other case it were determined that the waters into which pollutants were discharged had a "significant nexus" to traditional navigable waters under Justice Kennedy's concurrence, that finding would provide a sufficient basis for the exercise of federal regulatory jurisdiction, whether or not those waters satisfied the criteria set forth in the Rapanos plurality opinion. See Rapanos, 126 S. Ct. at 2265 & n.14 (Stevens, J., dissenting).

tributary is "adjacent" to a traditional navigable water. Although petitioner does not offer any standard for determining when a tributary is "adjacent" to the traditional navigable water into which it ultimately flows, the Fifth Circuit in Needham stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity." 354 F.3d at 347 n.12.

With respect to tributaries of traditional navigable waters, petitioner's proposed adjacency requirement is contrary to both the plurality and dissenting opinions in Rapanos. The Rapanos plurality would have remanded both of the consolidated cases to allow the lower courts to "determine, in the first instance, whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuing surface connection." 126 S. Ct. at 2235. The plurality did not suggest that the determination whether a particular tributary is part of the "waters of the United States" under the CWA might turn on the distance between a pollutant discharge and the nearest traditional navigable waters. Rather, the plurality opinion indicated that, if a tributary flows continuously, it is covered by the CWA if it is "connected to traditional interstate navigable waters." Id. at 2227. The dissenting Justices would have upheld the Corps' assertion of regulatory jurisdiction over all tributaries (whether

continuous or intermittent) of traditional navigable waters. See pp. 8-9, supra. Thus, regardless of the distance between the site of petitioner's discharges and the nearest traditional navigable water, the exercise of federal regulatory jurisdiction here was proper under the approaches taken by at least eight Members of the Court in Rapanos.

3. Plenary review of petitioner's claim would clearly be unwarranted, since the standards announced in Rapanos have not yet been applied by any court of appeals in this or any other case. Nor would it be appropriate for the Court to remand this case to the Tenth Circuit for further consideration in light of Rapanos. Because an inferior federal court could not properly disapprove an exercise of federal regulatory authority that would clearly satisfy the criteria endorsed by at least eight Members of this Court in Rapanos, a remand for further proceedings in this case would serve no useful purpose.

In Marks v. United States, 430 U.S. 188 (1977), this Court stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." Id. at 193 (internal quotation marks omitted). Taken in isolation, the Marks Court's reference to "those Members who concurred in the judgments" might suggest that lower courts, in

determining the precedential effect of a fractured decision of this Court, should ignore the views of dissenting Justices. This Court has subsequently recognized, however, that in some cases the Marks test is "more easily stated than applied to the various opinions supporting the result," Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (quoting Nichols v. United States, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the Marks inquiry to the utmost logical possibility'" in every case, ibid. (quoting Nichols, 511 U.S. at 745-746).

In some fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment may be the only controlling principle on which a majority of the Court's Members agree. In that situation, application of the rule announced in Marks provides a sensible approach to determining the controlling legal principles of the case. But in Rapanos, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a "lesser-included" version of the other.[4] In that instance, the principles

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[4] In Rapanos, five Justices agreed that the judgments of the Sixth Circuit in the consolidated cases under review should be vacated and the cases remanded for further proceedings. See 126 S. Ct. at 2235 (plurality opinion); id. at 2252 (Kennedy, J., concurring in the judgment). The plurality concluded that a remand was necessary because the court of appeals had not determined, and the existing record provided an inadequate basis for deciding, whether the tributaries at issue "contain[ed] a relatively permanent flow" or whether the pertinent wetlands "possess[ed] a continuing surface connection" to those tributaries. Id. at 2235.

(continued...)

on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. The dissenting opinions, by emphasizing controlling legal principles on which a majority of the Court agrees, may thereby contribute to an understanding of the law created by the case. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower federal court should adhere to the view of the law that a majority of this Court has unambiguously embraced. See Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under Marks, as the holding of the Court); cf. League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); Alexander v. Sandoval, 532 U.S. 275, 281-282 (2001) (same).

Consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in

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[4] (...continued)
Justice Kennedy found a remand to be appropriate because neither the Corps nor the lower courts in the consolidated cases had addressed the question "whether the specific wetlands at issue possess a significant nexus with [traditional] navigable waters." Id. at 2252; see id. at 2250-2252. Neither of those grounds for decision is inherently narrower than the other, thus making it logically impossible to identify a consensus narrowest position among the views of the Justices who concurred in the judgment.

Marks, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. Rapanos, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting the need to look to Marks in view of the absence of an opinion commanding a majority of the Court). And the application of that approach here clearly supports finding the existence of federal regulatory jurisdiction whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members would find jurisdiction in either of those instances. See id. at 2265 (Stevens, J., dissenting). Accordingly, in light of the fact that at least eight Members of the Court would find jurisdiction on the undisputed facts of this case, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

GREER S. GOLDMAN
KATHERINE W. HAZARD
JOHN EMAD ARBAB
Attorneys

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