No. 16-30178

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH DAVID ROBERTSON,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Montana, Helena Division

BRIEF AMICUS CURIAE OF CHANTELL AND MICHAEL SACKETT, JOHN DUARTE, AND DUARTE NURSERY, INC. IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Duarte Nursery, Inc., a corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Dated: July 21, 2017.

By: /s/ Anthony L. François

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IDENTITY AND INTEREST OF AMICI CURIAE CHANTELL AND MICAHEL SACKETT, JOHN DUARTE, AND DUARTE NURSERY, INC.

Amici Chantell and Michael Sackett are the plaintiffs in *Sackett v. EPA*, presently pending in the U.S. District Court for the District of Idaho, case no. 2:08-cv-00185-N-EJL. The Sacketts are challenging an administrative compliance order issued by the Environmental Protection Agency, which directs them to restore a homesite they own near Priest Lake, Idaho, on the ground that their property contains navigable waters for which no dredge and fill permit will be issued. *See generally Sackett v. EPA*, 566 U.S. 120, 122 (2012). On remand to the district court, the case is fully briefed on cross motions for summary judgment. The sole issue in the Sacketts' challenge to the compliance order is whether their property contains navigable waters. *See Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment on the Administrative Record*, Sept. 4, 2015, D. Idaho, case no. 2:08-cv-00185-EJL, ECF 103-1 at 13-24. A key basis on which the EPA defends its administrative determination that the Sacketts' property is a navigable water is that, in the agency's view, a putative wetland on the property meets the Kennedy test from *Rapanos*. *See United States' Combined Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of The United States' Cross-Motion for Summary Judgment*, Nov. 20, 2015, D. Idaho, case no. 2:08-cv-00185-EJL, ECF 105-1 at 21-27 (attempting to apply Justice Kennedy's

"significant nexus" test). If the Kennedy test were not the law of the Circuit, as held by the Court in *City of Healdsburg*, a significant ground for the EPA's enforcement order would be removed.

When this Court decided *United States v. Davis*, the Sacketts filed the decision with the district court as supplemental authority, arguing that *United States v. Davis* effectively overrules this Court's prior decision in *City of Healdsburg*. *See Plaintiffs' Notice of Supplemental Authority*, Aug. 4, 2016, D. Idaho, case no. 2:08-cv-00185-EJL, ECF 113.

Amici Duarte Nursery, Inc., and its president, John Duarte, are counterclaim-defendants in *Duarte Nursery v. United States Army Corps of Engineers*, pending in the Eastern District of California, case no. 2:13-CV-02095-KJM-DB. The United States is suing Duarte for alleged violations of the Clean Water Act, to wit plowing 450 acres of agricultural property, including approximately 20 acres of vernal pools and swales, which the United States alleges to be navigable waters under the Clean Water Act, without a permit from the Corps of Engineers. The district court ruled on summary judgment on June 10, 2016, that Duarte's property contains navigable waters that were plowed without a permit, based exclusively on Justice Kennedy's opinion in *Rapanos v. United States*, *see Order*, June 10, 2016, E.D. Cal., case no. 2:13-CV-02095-KJM-DB, ECF 195 at 29-31. The United States' summary judgment motion also relied exclusively on the Kennedy test to argue for jurisdiction

over Duarte's land. *See Brief in Support of United States' Motion for Summary Judgment on Its Counterclaim that Duarte Violated the Clean Water Act*, Oct. 26, 2015, E.D. Cal., case no. 2:13-CV-02095-KJM-DB, ECF 145-1 at 16-17. Duarte is currently awaiting a penalty trial, set to commence August 15, 2017, in which the United States is seeking a $2.8 million civil penalty for plowing his property. *See United States' Proposed Judgment*, May 26, 2017, E.D. Cal., case no. 2:13-CV-02095-KJM-DB, ECF 278-1 at 4.[1]

This Court issued its decision in *United States v. Davis* the first court day following the district court's June 10 liability ruling cited above. Duarte filed the *Davis* decision in support of a motion for reconsideration or certification of the June 10 liability ruling, arguing that *Davis* effectively overrules *City of Healdsburg*. *See Statement of Additional Authority: United States v. Davis*, June 14, 2016, E.D. Cal., case no. 2:13-CV-02095-KJM-DB, ECF 198.

This case raises an issue of significant interest to Amici relating to the proper test for determining the presence of "navigable waters" on their properties. This is a controlling issue of law in each of Amici's cases in the district courts, as it is in the present case for Appellant Robertson, and Amici respectfully offer their views on

[1] Duarte recently filed a petition for writ of mandamus, asking this Court to order the district court to stay further proceedings in *Duarte Nursery v. Corps of Engineers* pending this Court's decision in this case, following the district court's denial of Duarte's motion to stay on the same grounds. *See In re Duarte Nursery, Inc.*, Ninth Circuit Case No. 17-71983.

the question to this Court for its consideration in deciding *United States v. Robertson*.

SUMMARY OF ARGUMENT

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court sought to define the scope of the Clean Water Act. The Court split on a 4-1-4 vote. *Id.* Since then, the lower courts have struggled to determine which of those opinions controls the question whether wetlands are "navigable waters." *Compare United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) (Kennedy opinion controlling), *with United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (courts may rely on either the plurality or Kennedy concurrence).

This Court recently held that this Circuit is to interpret fractured Supreme Court decisions like *Rapanos* under a reasoning-based approach, in which one opinion supporting the judgment is narrower than another, and hence the holding, if it is a "logical subset" of another broader opinion supporting the judgment. *United States v. Davis*, 825 F.3d 1014, 1021 (9th Cir. 2016). The narrowest opinion embodies a position implicitly approved by at least five Justices who supported the judgment. *Id.*

The *Rapanos* plurality opinion is controlling, since Justice Kennedy largely agreed with the four Justices in the plurality, yet would himself have read the Act more broadly, while the plurality did not agree with his broader reading of the term

"navigable waters." The plurality opinion is a logical subset of the Kennedy opinion. Even the dissenters thought so, calling it "unlikely" that the plurality test would be met in circumstances where the Kennedy test would not. *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting).

In *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), this Court adopted the Kennedy concurrence as controlling. But that panel did not explain why it reached that result, and its opinion cannot be defended under the reasoning-based *Marks* analysis as now required by *Davis*. This Court's en banc *Davis* decision authorizes this panel of the Court to hold that *Davis* implicitly overruled *City of Healdsburg*.

ARGUMENT

I

THIS COURT'S EN BANC DECISION IN *UNITED STATES v. DAVIS* REQUIRES THE COURT TO RECOGNIZE THAT *CITY OF HEALDSBURG* IS NO LONGER THE LAW OF THE CIRCUIT

A. Any Three Judge Panel of This Court Can Hold That *United States v. Davis* Undermines *City of Healdsburg*

The Ninth Circuit holds that three judge panels may reexamine otherwise controlling circuit precedent in light of, among other authorities, an intervening en banc decision of the Ninth Circuit. *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc) (Supreme Court decisions); *Overstreet v. United Brotherhood of Carpenters and Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1205 n.8 (9th

Cir. 2005) (citing *Cerrato v. San Francisco Cmty. Coll. Dist.*, 26 F.3d 968, 972 n.15 (9th Cir. 1994) (en banc decisions of the Ninth Circuit)).

> We hold that in circumstances like those presented here, where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.

Miller v. Gammie, 335 F.3d at 893. The issues decided by the higher court need not be identical to allow a three judge panel to dispense with prior circuit authority. "Rather, the relevant court . . . must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.* at 900.

In *Overstreet*, a three judge panel examined a prior holding in *Nelson v. Int'l Brotherhood of Elec. Workers, Local Union No. 46*, 899 F.2d 1557 (9th Cir. 1990) (NLRB Regional Director entitled to injunction against unfair labor practices under Section 10(*l*) of the National Labor Relations Act if Director had "reasonable cause" to believe practices violate Section 8(b)(4)(ii)(B) of the Act), and concluded that a subsequent *en banc* decision of the Ninth Circuit interpreting a different provision of the Act relating to injunctions, *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 (9th Cir. 1994) (en banc) (Section 10(j) of the Act requires the application of ordinary standards for issuance of injunctions), had overruled the prior panel decision in *Nelson* as to Section 10(*l*). *Overstreet*, 409 F.3d at 1204-05. In analyzing

whether *Nelson*'s holding on Section 10(j) overruled *Miller*'s holding on Section 10(*l*), the Court focused on whether the reasoning of the two cases regarding what standard should apply was consistent, and noted that the later en banc decision had undermined the reasoning of the earlier panel decision. *Overstreet*, 409 F.3d at 1205-06.

Similarly, this Court is empowered to examine *City of Healdsburg* in light of the en banc Ninth Circuit's holding in *United States v. Davis* and conclude that *City of Healdsburg* is no longer controlling law in the Ninth Circuit. This Court should do so, because the reasoning-based application of *Marks*, as required and applied by *United States v. Davis*, irreconcilably undercuts the holding of *City of Healdsburg*.

B. The Reasoning-Based Application of *Marks*, Which *Davis* Newly Requires, Fatally Undermines *City of Healdsburg*

The Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq*., prohibits the discharge of dredged and fill material into "navigable waters" without a federal permit, 33 U.S.C. § 1344(a). In *Rapanos v. United States*, 547 U.S. 715 (2006), a fractured majority of the Supreme Court of the United States ruled, in the context of wetlands that do not directly abut traditionally navigable waters, that the term "navigable waters" in the Act was narrower than agency regulations defining the term. *id.* at 724; *id.* at 734 ("The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction."); *id.* at 759 (Kennedy, J., concurring) (lower court did not apply proper standard to determine

whether wetlands not abutting navigable waters were jurisdictional). The Justices supporting the judgment provided two different rationales for the judgment. Four joined in an opinion by Justice Scalia that gives a narrow reading of "navigable waters," while Justice Kennedy, reading the term "navigable waters" more broadly, concurred separately in the judgment.

1. The *Rapanos* Opinions

The issue in *Rapanos* was how to interpret the Clean Water Act's term "navigable waters" in the context of non-navigable-in-fact tributaries to navigable-in-fact waterways, and wetlands that do not physically abut navigable-in-fact waterways. 547 U.S. at 728, *id.* at 759 (Kennedy, J., concurring). The judgment of the Court in *Rapanos* was to remand the case because the lower courts had not properly interpreted that term. *Id.* at 757. The five Justices who supported the judgment arrived at it by two different interpretations of the term navigable waters. So the question in applying *Marks* to *Rapanos* is: what is the common denominator between the four Justice plurality, and Justice Kennedy's lone concurrence, in how they interpret the term "navigable waters?"

The plurality determined that the language, structure, and purpose of the Clean Water Act all limited federal authority to "relatively permanent, standing or continuously flowing bodies of water" commonly recognized as "streams, oceans, rivers and lakes" connected to traditional navigable waters. *Id.* at 732, *see also id.*

at 742. The plurality also authorized federal regulation of wetlands physically abutting these water bodies, such that they have an immediate surface water connection where the wetland and water body are "indistinguishable." *Id.* at 755.

Justice Kennedy joined the plurality in the judgment. But he proposed a broader interpretation of "navigable waters" than the plurality: the "significant nexus" test. *Id.* at 759 (Kennedy, J., concurring). Under this view, the federal government could regulate a non-abutting wetland if it significantly affects the physical, chemical, and biological integrity of a navigable-in-fact waterway. *Id.* at 779 (Kennedy, J., concurring).

The plurality and Justice Kennedy did agree on the following: that the issue in *Rapanos* was how to interpret the term "navigable waters" in the Act, *id.* at 728, *id.* at 760 (Kennedy, J., concurring); that the Court's prior decisions in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *Solid Waste Agency of N. Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), provided the controlling law, *Rapanos*, 547 U.S. at 734-35, *id.* at 767 (Kennedy, J., concurring); that the Act encompasses at least some tributaries that are not navigable in fact, *id.* at 730-31, *id.* at 767 (Kennedy, J., concurring); and that wetlands that physically abut navigable waters are "adjacent," *id.* at 742, *id.* at 759, 766 (Kennedy, J., concurring) (*Riverside Bayview* did not address non-adjacent wetlands), and are categorically also "navigable waters" under the Act, *id.* at 742, *id.* at 780 (Kennedy,

J., concurring). The key point of departure between them was the plurality's narrow reading of the term "significant nexus" (as describing only the type of physical intermingling that in *Riverside Bayview* prevented a clear distinction between the waters and the wetlands) and Justice Kennedy's broad reading of it (as categorically encompassing *Riverside Bayview*-type wetlands, in accord with the plurality, and including others on a case-by-case basis, with which the plurality disagreed).[2] *Compare* 547 U.S. at 754-55 (disagreement with Kennedy's broad reading of "significant nexus") *with id.* at 774 (Kennedy, J., concurring) (*Riverside Bayview* and *SWANCC* do not limit jurisdictional wetlands to those physically abutting jurisdictional tributaries).

2. Because No Opinion Commanded a Majority, This Court Must Interpret *Rapanos* Using the *Marks* Framework, as Authoritatively Clarified Last Year By This Court In *Davis*

Although *Rapanos* provided a clear majority as to the result, the judgment rested on a 4-1 split as to its rationale. Thus, to apply *Rapanos*, the lower courts must analyze it under *Marks v. United States*, 430 U.S. 188 (1977).

[2] The four Justices in the dissent took the view that the Corps could regulate essentially any feature that advanced the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters." *Id.* at 787, *et seq*. (Stevens, J., dissenting). In effect, the dissent would authorize federal regulation of the entire hydrological chain on the premise that virtually all waters are interconnected and therefore affect the integrity of the Nation's waters. In doing so, the dissent also would have deferred to the Army Corps' regulations defining "waters of the United States," which both the plurality and Justice Kennedy refused to do.

In *Marks* the Supreme Court held "[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.'" *Marks v. United States*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). While courts have found this rule difficult to apply in some cases, it is the only rule sanctioned by the Supreme Court for interpreting its split decisions.

The language of *Marks* is derived from the Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976). In *Gregg*, the Court examined *Furman v. Georgia*, 408 U.S. 238 (1972), which involved a challenge to the constitutionality of a Georgia death penalty statute. 428 U.S. at 169. In *Furman*, as in *Rapanos*, five Justices agreed in the judgments, but the Court was split on the legal standard that should be applied to death penalty cases. *Id.* Two Justices who concurred in the judgments felt that capital punishment was unconstitutional in all cases whereas the other three Justices believed that capital punishment was unconstitutional only in the circumstances presented in that case. *Id.* Thus in *Gregg*, the Court held: "Since five Justices wrote separately in support of the judgments in *Furman*, 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 169 n.15.

In *Marks*, the Supreme Court had to determine the standard for regulating obscene material. To answer that question, the Court turned to *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413 (1966), in which a majority of the Supreme Court held that a lower court incorrectly concluded a book was obscene and did not have First Amendment protection. *Memoirs*, 383 U.S. at 419. Three Justices in the plurality decided the book was protected from government regulation if it was otherwise "obscene" but had some social redeeming value. *Id.* at 421. Two other Justices concurred in the judgment, relying on what the Court called "broader grounds" that the First Amendment provided an absolute shield against government action to suppress obscenity. *Id.* And, a sixth Justice concurred in the judgment based on his view that only hardcore pornography may be suppressed. *Id.* at 421 (Stewart, J., concurring). As a logical subset of the other concurring opinions, the Court concluded in *Marks* that the three-justice plurality in *Memoirs* was the "narrowest grounds" for the judgment and the controlling opinion in the case.

C. In *United States v. Davis*, This Court Authoritatively Required the Use of the Reasoning-Based Approach to Applying *Marks*

The Ninth Circuit recently provided definitive guidance for applying *Marks* within the Circuit, in *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016).

In *Davis*, the Court examined a 4-1-4 split decision of the Supreme Court in *Freeman v. United States*, 564 U.S. 522 (2011). *Davis*, 825 F.3d at 1019. *Freeman*

dealt with whether a defendant who entered into a plea agreement could take advantage of a sentence reduction under the Sentencing Reform Act. *Davis*, 825 F.3d at 1019. Four Justices in the plurality held the defendant could almost always take advantage of the sentence reduction, so long as the sentence imposed reflected the Sentencing Guidelines then in effect. *Id.* Justice Sotomayor separately concurred, and would have held the defendant could only take advantage of the sentence reduction under certain circumstances, i.e., when the plea agreement incorporates or uses the appropriate Sentencing Guideline range. *Id.* at 1019-20. And, four Justices in the dissent held a defendant relying on a plea agreement could never take advantage of the sentence reduction under the Sentencing Reform Act. *Id.* at 1019.

To determine the controlling opinion, the Ninth Circuit started with *Marks*:

> When 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.

Davis, 825 F.3d at 1020 (quoting *Marks*, 430 U.S. at 193). The Court observed that after forty years, the courts are still struggling "to divine what the Supreme Court meant by the 'narrowest grounds,'" with two approaches emerging. *Id.* (quoting *Marks*, 430 U.S. at 193). One is the reasoning-based approach, whereby the court seeks to determine if there is a common reasoning among the concurring opinions such that one is a logical subset of the other, broader opinions. *Id.* at 1021. "In essence, the narrowest 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." *Id.* at 1020 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*). The other approach is results-based and defines "narrowest grounds" as "the rule that would necessarily produce results with which a majority of Justices from the controlling case would agree." *Id.* at 1021. Of the two, *Davis* held that courts in this Circuit are to use the reasoning-based approach:

> To foster clarity, we explicitly adopt the reasoning-based approach to applying *Marks*. This approach is not only consistent with our most recent case law, [] but also makes the most sense. 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. When no single rationale commands a majority of the Court, only the specific result is binding on lower federal courts.

Id. at 1021-22. Applying this interpretation of *Marks* to *Freeman*, the en banc court found the concurring opinions mutually exclusive in most cases; neither the plurality nor the lone concurrence is a subset of the other. *Davis*, 825 F.3d at 1021-22. Therefore the Court held that neither was controlling and that it could choose the more persuasive opinion to follow. *Id.* at 1024. *Marks* expressly limits the analysis of fractured opinions to those concurring in the judgment, but the en banc Ninth Circuit assumed without deciding that it could consider dissents.[3] *Davis*, 825 F.3d at

[3] For a good explanation for why a court should not use a dissenting opinion to find a controlling 'opinion' or result in a plurality-decided case, see Ryan Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795, 819 (Mar. 2017) ("Taking dissenters' views into account also conflicts

1025. But even that approach was unavailing in *Freeman* because neither the plurality position nor the lone concurrence is a logical subset of the dissent, or vice versa. *Davis*, 825 F.3d at 1025. The Court acknowledged some overlap among the opinions but no case in which one opinion would always agree with another. *Id.* at 1025-26.

In the absence of a controlling opinion, the Ninth Circuit concluded it could choose the opinion it found most persuasive, limited only by the result that a defendant relying on a plea agreement is not categorically barred from taking advantage of a sentence reduction under the Guidelines. *Id.* at 1026. In the end, the Court found the plurality the most persuasive and applied that opinion to the case. *Id.* at 1027.

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with the longstanding view that only statements in judicial opinions that are in some way "necessary" to the judgment in the precedent case are entitled to precedential effect. Because dissents, by definition, are not necessary to the judgment in the precedent case, they stand in a position similar to dicta and are thus, arguably, not entitled to precedential effect.") (internal citations omitted). This Court shares the view, post *Davis*, that only opinions supporting the judgment can be considered a holding of the Supreme Court under *Marks*. *See Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016) ("narrowest 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*.") (emphasis added (quoting *Davis*, 825 F.3d at 1020)).

D. *City of Healdsburg* States Without Substantial Analysis That the Kennedy Opinion Is the Holding of *Rapanos* Under *Marks*

Long before *Davis*, the Ninth Circuit was the first to apply the *Rapanos* decision. In *City of Healdsburg*, the Court summarily concluded that the Kennedy concurrence was controlling, with little discussion beyond a cursory citation to *Marks*: "Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment" and, therefore, "provides the controlling rule of law." *City of Healdsburg*, 496 F.3d at 999-1000 (quoting *Marks*, 430 U.S. at 193).[4] This summary conclusion falls well short of the *Marks* analysis by *Davis*. *See Davis*, 825 F.3d at 1024 (dismissing other circuit authorities that "engage with *Marks* only superficially, quoting its language with no analysis"). The panel gave no reason why it concluded that the Kennedy concurrence is controlling, other than to cite *United States v. Gerke*, 464 F.3d 723, itself a two-page opinion concluding without substantive application of *Marks* that the Kennedy opinion in *Rapanos* is controlling.[5]

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[4] It is not clear that all district courts in the Ninth Circuit treat *City of Healdsburg* as the law of the Circuit. *See Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1216 (D. Or. 2009) (*City of Healdsburg* limited to its facts, "navigable waters" can be determined under either plurality or Kennedy concurrence); *accord N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011) (*City of Healdsburg* does not foreclose use of plurality test).

[5] For a thorough critique of *Gerke* and other non-Ninth Circuit authorities on the matter, *see* M. Reed, Hopper, *Running Down the Controlling Opinion in Rapanos v.*

E. Under the Intervening Authority of *Davis*, Justice Kennedy's Lone Concurrence Cannot Be the Holding of *Rapanos v. United States*

In holding that Justice Sotomayor's lone concurrence in *Freeman* cannot be the case's holding under *Marks*, *Davis* notes that both the plurality and dissent strongly criticized Justice Sotomayor's concurrence. *Davis*, 825 F.3d at 1020 (citing *Freeman*, 564 U.S. at 533; *Id.* at 550 (Roberts, C.J., dissenting). "The dissenting opinion accurately stated that the plurality and concurrence "agree on very little except the judgment."" *Davis*, 825 F.3d at 1020 (quoting *Freeman*, 564 U.S. at 554 (Roberts, C.J., dissenting)).

Following on this analysis, and applying the reasoning-based approach of *Davis*, it is difficult to see how any single-Justice opinion of the Supreme Court could be considered the holding under *Marks*, where all eight other Justices criticize the one Justice's reasoning. *See Reyes v. Lewis*, 833 F.3d 1001, 1007-09 (9th Cir. 2016) (Judge Callahan, dissenting from denial of rehearing in banc). "Under the reasoning-based *Marks* rule, reasoning expressly rejected by at least seven Justices cannot be elevated to the status of controlling Supreme Court law." *Id.* at 1008.

As with *Freeman*, both the plurality and the dissent in *Rapanos* criticized Justice Kennedy's reasoning.

U.S., U. of Denv. Water L. Rev. (forthcoming Mar. 10, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983915.

The plurality opinion broadly critiques Justice Kennedy's concurring opinion. *Rapanos*, 547 U.S. at 753-57. It starts by rejecting Justice Kennedy's broad reading of the expression "significant nexus" (allowing a case-by-case determination as to non-abutting wetlands, which may be jurisdictional based on ecological as well as hydrological connections) as being irreconcilable with both *Riverside Bayview* and *SWANCC*. *Rapanos*, 547 U.S. at 753-54 (*Riverside Bayview* rejected case-by-case determinations, and *SWANCC* rejected mere ecological connection for "physically unconnected ponds"). From this, the plurality states: "In fact, Justice Kennedy acknowledges that neither *Riverside Bayview* nor *SWANCC* required, for wetlands abutting navigable-in-fact waters, the case-by-case ecological determination that he proposes for wetlands that neighbor nonnavigable tributaries." *Id.* at 754.

The plurality insists that the primary error in Justice Kennedy's analysis is what they find to be his failure to read *Riverside Bayview* and *SWANCC* with the text of the Act in mind. *Rapanos*, 547 U.S. at 754; *id.* at 755 ("Only by ignoring the text of the statute and by assuming that the phrase of *SWANCC* ("significant nexus") can properly be interpreted in isolation from that text does Justice Kennedy reach the conclusion that he has arrived at."). According to the plurality, Justice Kennedy bases his interpretation on the purpose rather than the text of the Act, but in doing so also fails to address federalism, which is the second coordinate purpose along with water quality. *Id.* at 755-56.

The plurality views Justice Kennedy's interpretation of "navigable waters" as narrower than the dissent's but broader than theirs. *Id.* at 756 ("Justice Kennedy's disposition would disallow some of the Corps' excesses, and in that respect is a more moderate flouting of the statutory command than Justice Stevens'.").

In short, the plurality rejects Justice Kennedy's reasoning on two grounds: too broad a reading of the phrase "significant nexus," and too broad a reading of the statute due to focusing on one of its two purposes to the exclusion of its other purpose and its text.

The dissent for its part "[did] not share [Justice Kennedy's] view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*." *Rapanos*, 547 U.S. at 807 (Stevens, J., dissenting). Further, the dissent objected to the fact that Justice Kennedy's case-by-case "approach will have the effect of creating additional work for all concerned parties." *Id.* at 809 (Stevens, J., dissenting). Finally, "[u]nlike Justice Kennedy, [the dissent saw] no reason to change *Riverside Bayview*'s approach—and every reason to continue to defer to the Executive's sensible, bright-line rule." *Id.* (Stevens, J., dissenting).

Hence, as with the plurality, the dissent objected to the Kennedy case-by-case approach, and considered his broad reading of "substantial nexus" to go beyond the meaning of the term as used in *SWANCC* and as a misreading of the Court's holding

in *Riverside Bayview*. *Rapanos*, 547 U.S. at 807-09 (Stevens, J., dissenting). And fundamentally, the dissent rejected Justice Kennedy's refusal to defer to the government's regulations. *Id.* at 810 (Stevens, J., dissenting).

As in *Davis*, which held that Justice Sotomayor's lone concurrence could not be the holding of *Freeman* under a reasoning-based approach to *Marks*, Justice Kennedy's lone concurrence—the reasoning of which was roundly rejected by all eight of the other Justices—cannot be the controlling opinion in *Rapanos*.

F. Under *Davis*, the Plurality Opinion Is the Narrowest Ground for the Decision In *Rapanos v. United States* and Is Therefore the Holding of the Case

The key question in properly framing the question "what is the narrowest opinion" in *Rapanos* is identifying what the judgment actually did in the decision. The Court remanded the case to the Seventh Circuit for further proceedings, after determining that the district and circuit courts had not applied a proper definition of "navigable waters." 547 U.S at 757. Since the Court did not decide the merits of the case, the only question of any import for applying the decision to other cases is "what does 'navigable waters' mean in the Clean Water Act?" From this perspective, the "narrowest opinion" is the one with the narrowest view of the meaning of "navigable waters."

The plurality summed up its reading of "navigable waters" this way: "[E]stablishing that wetlands . . . are covered by the Act requires two findings: first,

that the adjacent channel contains a "wate[r] of the United States" (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins. *Rapanos*, 547 U.S. at 742. The plurality's term "body of water" is limited to lakes, streams, and rivers. *Id.* at 732-33.

There are important aspects of this rule, and its reasoning, with which Justice Kennedy agreed. He agreed that the term being interpreted was "navigable waters," *Rapanos*, 547 U.S. at 760, and that the issue was whether wetlands that are not directly abutting are nonetheless jurisdictional, *id.* at 759. Both the plurality and Justice Kennedy take *Riverside Bayview*'s description of wetlands as actually abutting traditionally navigable waters as the outer scope of the term "adjacent." *Id.* at 740-41 n.10; *id.* at 759 (Kennedy, J., concurring) ("whether the term 'navigable waters' in the Clean Water Act extends to wetlands that do not contain and *are not adjacent to* waters that are navigable in fact") (emphasis added).

Justice Kennedy also expresses important points of commonality with the plurality's reasoning. "The plurality's opinion begins from a correct premise." That being, as *Riverside Bayview* holds, that the Act regulates "at least some waters that are not navigable in the traditional sense." *Rapanos*, 547 U.S. at 767. But, "[f]rom this reasonable beginning the plurality proceeds to impose two *limitations* on the

Act[.]" *Id.* at 768 (emphasis added). The two "limitations" are the two elements of the rule announced by the plurality: that "navigable waters" are only "relatively permanent, standing or flowing bodies of water" and that wetlands are only subject to the Act if they have a "continuous surface connection" to relatively permanent, standing, or flowing bodies of water. *Id.* at 768-69.

As to the question of relative permanence ("the plurality's first requirement," *id.* at 769), Justice Kennedy viewed the plurality's reading of *Riverside Bayview* as too narrow. *Rapanos*, 547 U.S. at 771. Justice Kennedy concluded that the Corps could reasonably construe the term "waters" more broadly to also include "impermanent streams." *Id.* at 770.

Turning to "[t]he plurality's second limitation," Justice Kennedy disagreed that *Riverside Bayview* limits the scope of wetlands included within the term "navigable waters" to just those which abut navigable waters so closely that they cannot be distinguished, or even that there be a continuous surface connection, however close. *Rapanos*, 547 U.S. at 772-73. Justice Kennedy also disagreed with the plurality's reading of *SWANCC* as requiring a surface connection between wetlands and navigable waters. *Rapanos*, 547 U.S. at 774. Ultimately, in light of various ecosystem functions that disconnected wetlands can perform, Justice Kennedy concluded that the Corps' broader definition of "adjacent" was reasonable. *Id.* at 775.

Justice Kennedy read *SWANCC* as "interpreting the Act to require a significant nexus with navigable waters" for wetlands to be subject to the Act. *Rapanos*, 547 U.S. at 776. But he ultimately concludes that this term has broader meaning than does the plurality. *Id.*

In short, Justice Kennedy's view is that the plurality reads "navigable waters" in the statute, the holding of *Riverside Bayview*, and the term "significant nexus" as used in *SWANCC*, too narrowly. By Justice Kennedy's own critique of the plurality, it is clear that he thinks it narrower than his reasoning.

At the same time, Justice Kennedy is in fundamental agreement with the plurality that those waters that the plurality generally considers "navigable" are covered by the Act. Considering the two categories of waters addressed in *Rapanos* (tributaries and wetlands), Justice Kennedy reads the Act as applicable to both permanent and "impermanent streams." *Id.* at 770. So the relatively permanent tributaries which the plurality reads the Act as covering are a logical subset of the broader category of both permanent and impermanent streams which Justice Kennedy would recognize under the Act.

And as to wetlands, Justice Kennedy agrees with the plurality that those wetlands which abut covered tributaries so closely that they cannot easily be distinguished are categorically covered by the Act. *Id.* at 780. The plurality would limit covered wetlands to this category, which is a subset of the broader group of

adjacent (as broadly defined by the Corps) to which Justice Kennedy reasons the Act may be applicable on a case-by-case basis. And critically, Justice Kennedy's reasoning as to directly abutting wetlands is that they have the "significant nexus" that his rule requires as a matter of course. *Id.*

This analysis shows that the relatively permanent tributaries and directly abutting wetlands covered by the plurality's rule are a logical subset of Justice Kennedy's broader reading of "navigable waters" under the Act, and that Justice Kennedy would generally see these waters as a subset of those his rule would include.

True, Justice Kennedy does claim that some waters that would meet the plurality's test might not have a "significant nexus" as he defines the term. *Id.* at 776. However, it is important to examine this claim to see if it is actually a fair reading of the plurality's test. We start by bearing in mind that the plurality limits its coverage of tributaries that are not navigable-in-fact to relatively permanent waters that can properly be described as lakes, rivers, and streams. *Id.* at 742. Justice Kennedy asserts the possibility that some of these waters might not have a significant nexus, but he does not explain how that would be. *Id.* at 776-77. In critiquing the plurality opinion, Justice Kennedy never identifies examples of relatively permanent tributaries that would not be covered by his rule, and misreads the plurality as applying the Act to "wetlands (however remote)" so long as there is a surface

connection, however minor. *Id.* at 776. This is not what the plurality says about wetlands. The plurality limits its reading of "navigable waters" to those relatively permanent waters that would normally be described as lakes, rivers, or streams. *Id.* at 742. One would not consider a mere trickle to be a stream; a passing read of the plurality shows that it certainly would not consider a mere trickle to be a stream.[6]

Nor does the plurality opinion admit of wetlands being covered by the Act based on a mere surface connection, "however remote." The plurality specifically rejects this. *Id.* at 742. Justice Kennedy's limited and inaccurate misreading of the plurality's reasoning cannot stand in for the actual reasoning of the plurality, and cannot defeat the fact that the plurality's actual reasoning is a logical subset of Justice Kennedy's.

The dissent also opined that "Justice Kennedy's approach … treats more of the Nation's waters as within the Corps' jurisdiction" than the plurality, and that it would be a rare case when the plurality test is met and the Kennedy test is not. *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting). And as with Justice Kennedy, the dissent provides no example of a tributary or wetland that would be covered by the plurality test and not by the Kennedy test.

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[6] Justice Kennedy's citation to the definition of a tributary as having a "perceptible ordinary high water mark" suggests that even Justice Kennedy does not believe that the plurality would consider a mere trickle to be a navigable water, since even the Corps' regulations do not do so. *Rapanos*, 547 U.S. at 761 (citing 33 C.F.R. § 328.4(c)); *id.* at 782.

So, following the reasoning based approach to applying *Marks*, as required under *Davis*, the proper reading of *Rapanos* is that the plurality opinion is a logical subset of Justice Kennedy's reasoning, and on the question actually addressed in *Rapanos* (i.e., what does "navigable waters" mean), the plurality is the narrower opinion and must be taken as the holding of the case.

CONCLUSION

In *Davis*, this Court newly adopted a reason-based approach to deciding the controlling decision in a fractured opinion like *Rapanos*. Since a reasoning-based approach to the *Rapanos* opinions requires the Court to conclude that the Scalia plurality controls the question of whether navigable waters are present, the Court must explicitly recognize that the *Davis* en banc decision implicitly overruled the prior contrary reading of *Rapanos* in *City of Healdsburg*. Having done so, the Court should then reverse Robertson's Clean Water Act convictions.

DATED: July 21, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, I electronically filed the foregoing **PROPOSED BRIEF AMICUS CURIAE OF CHANTELL AND MICHAEL SACKETT, JOHN DUARTE, AND DUARTE NURSERY, INC. IN SUPPORT OF DEFENDANT-APPELLANT** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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