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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

ANDREW R. WHEELER, as Administrator of the U.S. Environmental Protection Agency, et al.,

Defendants.

Case No. 3:20-cv-03005-RS

[PROPOSED] OPPOSITION TO CALIFORNIA'S MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

This Court may not enjoin or stay the Navigable Waters Protection Rule, at least as to that rule's exclusion of wetlands from the Defendants', Environmental Protection Agency and U.S. Army (Agencies), authority under the Clean Water Act. *See* 33 C.F.R. § 328.3(a)(4)[1] (proposed) (adjacent wetlands regulated); *id*. at § 328.3(c)(1) (proposed) (adjacent wetlands defined to exclude wetlands not abutting or flooded by other regulated features, or not separated from such features only by natural or permeable artificial barriers); 85 Fed. Reg. 22,250, 25,338-39 (Apr. 21, 2020). This is because the Agencies' reduction in the geographic footprint of Clean Water Act wetland regulation was not an exercise of agency discretion. Rather, it was compelled by a plain reading of the Act, under the controlling plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). That opinion holds that the plain text of the Act limits Clean Water Act regulation of wetlands to those that directly abut other regulated water bodies, to the degree that the end of one and the beginning of the other cannot be clearly discerned. *Rapanos*, 547 U.S. at 755.

For this reason, Plaintiffs' objections to alleged deficiencies in the Agencies' decision-making process under the Administrative Procedures Act are unavailing. *Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1099-1102 (D.C. Cir. 1996) (affirming a Department of Commerce antidumping proceeding in which the "plain language of the statute compel[led] the conclusion."). *See generally* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 2017 Yale L.J. 952, 965-66; *id*. at 966 ("As Judge Friendly put it, "[W]hen agency action is statutorily compelled, it does not matter that the agency which reached the decision required by law did so on a debatable or even a wrong ground, for remand in such a case would be but a useless formality.""") (citing Henry J. Friendly, Chenery *Revisited: Reflections on the Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 210).

Since the Agencies' removal of the class of wetlands they formerly regulated was compelled by the statute, Plaintiffs have no likelihood of success on the merits as to that issue, and the Court may neither stay nor enjoin the Navigable Waters Protection Rule.

[1] References to the Code of Federal Regulations without a date are to the version of the CFR adopted by the Navigable Waters Protection Rule.

II. The *Rapanos* Plurality Opinion Is the Controlling Supreme Court Interpretation of the Clean Water Act's Application to Wetlands

The controlling Supreme Court authority on whether wetlands, that do not abut navigable-in-fact rivers and lakes, are federally protected "navigable waters" under the Clean Water Act, is *Rapanos v. United States*, 547 U.S. 715 (2006).

Army regulations issued in 1986 defined "navigable waters" to include all non-navigable tributaries to navigable-in-fact waters, and all wetlands "adjacent to" (meaning "bordering, contiguous, or neighboring") navigable-in-fact waters and their non-navigable tributaries. 33 C.F.R. § 328.3(a)(5) (2005); *id*. at § 328.3 (a)(7) (2005); *see also id*. at § 328.3(c) (2005). In *Rapanos*, the Supreme Court invalidated these provisions, as beyond the scope of the statutory term "navigable waters" and exceeding the Commerce Power.

The issue in *Rapanos* was how to interpret whether "navigable waters" include wetlands that do not physically abut navigable-in-fact waterways. 547 U.S. at 728; *id*. at 759 (Kennedy, J., concurring). The judgment remanded the case because the lower courts and the Agencies had not properly interpreted that term. *Id*. at 757. The five Justices supporting the judgment adopted two different interpretations.

The plurality determined that the language, structure, and purpose of the Act all limit federal authority over non-navigable tributaries 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 739. The plurality limited wetlands to only those physically abutting such waters, where wetland and water are "indistinguishable." *Id*. at 755.

The plurality sharply critiqued "the breadth of the Corps' determinations in the field" and especially its continued reliance on an expansive interpretation of "adjacent" waters. *Id*. at 727. It emphasized that the term "waters of the United States" did not include all "water of the United States" but instead could only refers to "continuously present, fixed bodies of water." *Id*. at 732-33. The plurality explained that the definition of "waters of the United States" must be rooted in the traditional understanding of "navigable waters." *Id*. at 734. 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 regulated by the Act. *Id*. at 742.

Justice Kennedy joined in the judgment but interpreted the Act more broadly: the "significant nexus" test, under which the government can regulate a non-abutting wetland if it significantly affects the physical, chemical, and biological integrity of a navigable-in-fact waterway. *Id*. at 759, 779 (Kennedy, J., concurring).

Justice Kennedy shared the plurality's concern that an overly broad interpretation of the Act would read "navigable" out of the text, and disagreed that the Act covers "wetlands [that] lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id*. at 778 (Kennedy, J., concurring). Instead, non-navigable waters must have a "significant nexus with navigable waters." *Id*. at 779. Wetlands are regulable if "either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. This connection can't be "speculative or insubstantial." *Id*.

Since *Rapanos* has no majority opinion, this Court must determine which opinion, if any, is the holding, in order to rule on Plaintiffs' Motion for Preliminary Injunction.

A. The Supreme Court's Subsequent Application of *Rapanos* in Clean Water Act Cases Establishes That the *Rapanos* Plurality Controls

In April of 2020, the Supreme Court clearly showed that it reads the plurality as the controlling opinion in *Rapanos*. In *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Court addressed the question of whether, under the Clean Water Act, the movement of a pollutant from an injection well (a point source) through groundwater (not a point source) to the ocean (a navigable water) is a regulated "discharge." 140 S. Ct. at 1468. The Court issued a six-Justice majority opinion authored by Justice Breyer, *id*. at 1468-478, a concurrence by Justice Kavanaugh, *id*. at 1478-79 (Kavanaugh, J., concurring), and two separate dissents by Justices Thomas (joined by Justice Gorsuch), *id*. at 1479-1482 (Thomas, J., dissenting) and Alito, *id*. at 1482-1492 (Alito, J., dissenting). All four of these opinions cite the *Rapanos* plurality for its discussion of point sources under the Act, see *Rapanos*, 547 U.S. at 743-44, and apply that

discussion in disparate ways to whether pollutants moving through groundwater are "added" to the receiving ocean waters so as to constitute a discharge. *See* 140 S. Ct. at 1475 (citing *Rapanos*, 547 U.S. at 743) (nothing in statute requires that a pollutant move "directly" or "immediately" from its origin to navigable waters); *id*. at 1478 (Kavanaugh, J., concurring) (majority reading of "discharge" "adheres to the interpretation set forth in Justice Scalia's plurality opinion in *Rapanos*"); *id*. at 1482 (Thomas, J., dissenting) (*Rapanos* plurality does not decide the issue in this case); *id*. at 1487 n.5 (Alito, J., dissenting) (*Rapanos* plurality supports "daisy chaining" point sources). Every member of the Supreme Court joined one of these four opinions elaborating on the *Rapanos* plurality, with Justice Kavanaugh both joining the majority and writing separately to underline the role of the *Rapanos* plurality in the Court's *Maui* decision.

While the four judicial authors in *County of Maui* disagree about the meaning of the *Rapanos* plurality as it applies to the definition of "discharge," they all agree that the plurality is the opinion in *Rapanos* that bears on their decision. The *Rapanos* plurality is the precedent that the Supreme Court looked to in making its decision in *County of Maui*. No opinion in *County of Maui* cites the *Rapanos* concurrence.

This is consistent with, and grows organically from, the Supreme Court's prior citations to *Rapanos*. Before *County of Maui*, the Supreme Court cited *Rapanos* in nine cases. In *all* of those cases, the Court cited the plurality. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 706 (2006) (Scalia, J., dissenting) (citing *Rapanos*, 547 U.S. 715); *Exxon Shipping v. Baker*, 554 U.S. 471, 508 n.21 (2008) (citing *Rapanos*, 547 U.S. at 749); *Kucana v. Holder*, 558 U.S 233, 253 (2010) (citing *Rapanos*, 547 U.S. at 752); *PPL Montana, LLC v. Montana*, 566 U.S. 576, 592 (2012) (citing *Rapanos*, 547 U.S. at 730-31); *Sackett v. EPA*, 566 U.S. 120, 123 (2012) (citing *Rapanos*, 547 U.S. 715); *id*. at 133 (Alito, J., concurring) (citing *Rapanos*, 547 U.S. at 732-39); *Abramski v. U.S.*, 573 U.S. 139, 198 (2014) (Scalia, J., dissenting) (citing *Rapanos*, 547 U.S. at 752); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 268 (2015) (citing *Rapanos*, 547 U.S. at 757); *Army Corps v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1811-12, 1815 (2016) (citing *Rapanos*, 547 U.S. at 721-22); *National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 625 (citing *Rapanos*, 547 U.S. at 723); *id*. (citing *Rapanos*, 547 U.S. at 729, 757); *id*. at 633 (citing *Rapanos*, 547 U.S. at 729). By

contrast, the Court has only cited Justice Kennedy's *Rapanos* concurrence once, in Justice Kennedy's opinion in *PPL Montana*, immediately following his citation to the plurality. *See* 566 U.S at 592 (citing *Rapanos*, 547 U.S. at 761 (Kennedy, J., concurring in judgment)).

This pattern of adopting the concurrence is clearest in the Supreme Court's post-*Rapanos* cases that address questions arising under the Clean Water Act. *See Sackett v. EPA*, 566 U.S. 120, 123 (2012) (citing *Rapanos*, 547 U.S. 715); *id*. at 133 (Alito, J., concurring) (citing *Rapanos*, 547 U.S. at 732-39); *Army Corps v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1811-12, 1815 (2016) (citing *Rapanos*, 547 U.S. at 721-22); *National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 625 (citing *Rapanos*, 547 U.S. at 723); id. (citing *Rapanos*, 547 U.S. at 729, 757); id. at 633 (citing *Rapanos*, 547 U.S. at 729). And this pattern culminates in *County of Maui*, in which all four opinions debate whether the *Rapanos* plurality (contains precedent or dicta as to the definition of "discharge"). None of the Supreme Court's post-*Rapanos* Clean Water Act cases cite Justice Kennedy's concurrence; they all cite the plurality.

The Supreme Court has established that the plurality is the precedential holding of *Rapanos*. But even absent this clear and progressively more robust adoption of the *Rapanos* plurality by the Supreme Court, lower courts can identify the plurality as the holding of *Rapanos* by applying *Marks v. United States*, 430 U.S. 188 (1977).

B. This Court Must Apply *Rapanos* Using the *Marks* Framework as Clarified by the Ninth Circuit's Decision in *United States v. Davis*

Marks holds 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.'" *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

The Ninth Circuit recently provided definitive guidance for applying *Marks* in *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc), which examined a 4-1-4 split decision in *Freeman v. United States*, 564 U.S. 522 (2011). *Davis*, 825 F.3d at 1019. *Freeman* addressed 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 *Freeman*

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, arguing that a defendant could only take advantage of the sentence reduction when the plea agreement incorporates or uses the Sentencing Guidelines. *Id*. at 1019-20. Four dissenting Justices would have 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 *Freeman* 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 Ninth Circuit 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, which seeks common reasoning among the concurring opinions to see if one is a logical subset of the other, broader opinion. *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 the Justices from the controlling case would agree.'" *Id*. at 1021.

Of the two, *Davis* rejected the results-based approach and held that this Circuit is to use the reasoning-based approach:

> To foster clarity, we explicitly adopt the reasoning-based approach to applying *Marks*. . . . 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.

Shortly after *Davis*, the Ninth Circuit held that only opinions supporting the judgment can be examined as potential logical subsets of each other in determining a holding of the Supreme Court under *Marks*. *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)). While a dissent may be useful in assessing the reasoning of the opinions supporting the judgment and identifying which is the logical subset of the other, a dissent itself cannot be either the broader or narrower opinion for determining the holding.

1. Under *Davis*, the *Rapanos* Plurality is the Narrowest Ground for the Decision and is the Holding

The key to the question "what is the narrowest opinion" in *Rapanos* is identifying what the judgment did. The Court remanded the case to the Sixth Circuit for further proceedings, after determining that the Agencies and the lower courts had not properly defined "navigable waters." 547 U.S at 757. The Supreme Court arrived at this judgment through two different interpretations of 'navigable waters.' As such, the "narrowest opinion" is the one with the narrowest meaning of "navigable waters."

The plurality and concurrence show this. 547 U.S. at 729 ("In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute "waters of the United States" within the meaning of the Act."); *id.* (addressing landowners' contentions about the meaning of "navigable waters" and "waters of the United States"); *id.* at 739 (rejecting Army's "expansive interpretation" as an "[im]permissible construction of the statute") (quoting *Chevron v. N.R.D.C., Inc.*, 467 U.S. 837, 843 (1984)); *see also* 547 U.S. at 759 (Kennedy, J., concurring) ("These consolidated cases require the Court to decide 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."); *id.* at 759 ("The word 'navigable' in the Act must be given some effect.").

And the judgment in *Rapanos* confirms that the only issue in the case is how to interpret the Act. "We vacate the judgments of the Sixth Circuit . . . and remand both cases for further

proceedings." 547 U.S. at 757. Both opinions which supported this judgment did so because of an interpretation of the statute which differed from that applied by the Sixth Circuit. *Id*. ("Because the Sixth Circuit applied the wrong standard to determine if these wetlands are covered 'waters of the United States . . . .'"); *id*. at 757 (Kennedy, J., concurring) ("navigable waters" must have "significant nexus" to navigable in fact waters, supports remand "for proper consideration of the nexus requirement"). The only direction that the Sixth Circuit got from the Supreme Court in its further proceedings were the two opinions supporting remand, and the only legal rules on offer in either of those opinions is the meaning of "navigable waters." So, which of these two opinions is a logical subset of the other depends on how each interpreted the statute.

This accords with *Marks*, which applied the Supreme Court's prior fractured decision in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *Marks*, 430 U.S. at 193-94 (discussing *Memoirs*, 383 U.S. 413). *Memoirs* was a split decision, with three Justices stating that the First Amendment protected pornographic material unless it met three tests. 383 U.S. at 418. Two other Justices would read the First Amendment more broadly to protect all obscene material without limit. *Id.* at 421, 424 (Black and Douglas, JJ., concurring). *Marks* says that the narrower reading of the applicable constitutional provision controlled. Similarly, a reasoning-based approach to applying *Marks* to *Rapanos* must look at how broadly or narrowly the two opinions supporting the judgment interpret the applicable statutory provision.

In *Rapanos*, the Supreme Court ruled that the term "navigable waters" in the Act was narrower than the Agencies then-applicable regulations defining the term. 547 U.S. 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 adopted concentric rationales for the judgment. The plurality interprets "navigable waters" narrowly, while Justice Kennedy interprets it more broadly.

The point of departure between them is the plurality's narrow reading of the term "significant nexus" (as describing only the type of physical intermingling that prevents a clear distinction between the waters and the wetlands) and Justice Kennedy's broad reading of it (as

categorically encompassing abutting wetlands, in accord with the plurality, and also including others on a case-by-case basis, with which the plurality disagreed). *Compare Rapanos*, 547 U.S. at 754-55 (disagreement with Kennedy's broad reading of "significant nexus"), *with id*. at 774 (Kennedy, J., concurring) (prior Supreme Court decisions allow regulation of wetlands not physically abutting tributaries).

The plurality summed up 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.

Justice Kennedy agreed with important aspects of this. *Rapanos*, 547 U.S. at 759-60. "The plurality's opinion begins from a correct premise." That being 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). These "limitations" are the two elements of the plurality's rule: 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.

On relative permanence ("the plurality's first requirement," *id.* at 769), Justice Kennedy said the plurality's reading of *Riverside Bayview Homes* was too narrow. *Rapanos*, 547 U.S. at 771. Justice Kennedy concluded that the Army could read "waters" more broadly to include "impermanent streams." *Id*. at 770.

On "[t]he plurality's second limitation," Justice Kennedy disagreed that *Riverside Bayview Homes* limits regulated wetlands 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. Justice Kennedy concluded that the Army's broader definition of "adjacent" would be reasonable if limited to those wetlands with a significant nexus. *Id*. at 775.

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

At the same time, he agrees that those waters the plurality generally considers "navigable" are covered by the Act. 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 the concurrence recognizes.

Justice Kennedy also agreed with the plurality that wetlands which cannot easily be distinguished from covered tributaries 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 waters to which Justice Kennedy reasons the Act may apply on a case-by-case basis. And Justice Kennedy's reasoning as to directly abutting wetlands is that they categorically have the "significant nexus" that his rule requires. *Id*. Both opinions categorically include this class of wetlands.

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," and Justice Kennedy sees these waters as a subset of those his rule would include.

The concurrence does state that some waters meeting the plurality's test might lack a "significant nexus." *Id*. at 776. But this is not a fair reading of the plurality. The plurality limits its coverage of non-navigable tributaries to relatively permanent waters that can properly be described as lakes, rivers, and streams. *Id*. at 742. Justice Kennedy asserts that some of these waters might not have a significant nexus, without explaining how. *Id*. at 776-77 (Kennedy, J., concurring).

The concurrence never gives 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. But the plurality is limited to

those relatively permanent waters that would be called lakes, rivers, or streams "in normal parlance." *Id*. at 742. One using "normal parlance" would not call a mere trickle a stream.

Nor does the plurality admit regulation of wetlands based on a mere surface connection, "however remote." The plurality specifically rejects this. *Id*. at 742. Justice Kennedy's misreading of the plurality's reasoning cannot stand in for its actual reasoning. And that actual reasoning is a logical subset of Justice Kennedy's.

The *Rapanos* dissent also opines 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 Justice Kennedy's is not. *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting). No example is offered by the dissent either of a feature that would meet the plurality standard but lack a "significant nexus."

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 of what "navigable waters" means in the Clean Water Act, the plurality is the narrower opinion and is the holding.

2. Under *Davis*, Justice Kennedy's Lone Concurrence Cannot Be the Holding of *Rapanos*

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

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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.

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*.

C. The Ninth Circuit's Superseded Decision in *City of Healdsburg* Does Not Control the *Marks* Analysis of *Rapanos*

In arguing that Justice Kennedy's concurring opinion in *Rapanos* is binding on the agencies in this rulemaking, see Motion for Preliminary Injunction at 21-24, id. at 39:13-18, ECF 30, California does not cite the Ninth Circuit's decision in *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), that Justice Kennedy's concurrence is the holding of *Rapanos*. However, it is nevertheless worth noting here, that the subsequent intervening authority of *Davis* fatally undermines the results-based approach of *Healdsburg*, which is no longer precedent in the Ninth Circuit.

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1. Any District Court in This Circuit Can Hold That *Davis* Fatally Undermines *Healdsburg*

District courts may reexamine circuit precedent in light of intervening en banc decisions 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) (citation omitted) (en banc Ninth Circuit decisions)).

> We hold that . . . 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 district court 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* the Ninth Circuit examined its prior holding in *Nelson v. Int'l Brotherhood of Elec. Workers, Local Union No. 46, AFL-CIO*, 899 F.2d 1557 (9th Cir. 1990) (NLRB entitled to injunction under Section 10(l) of the National Labor Relations Act under "reasonable cause" standard), and concluded that its subsequent en banc decision 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 the standard was consistent, and decided that the later en banc decision had undermined the reasoning of the earlier panel decision. *Overstreet*, 409 F.3d at 1205-06.

This Court must reassess *Healdsburg* under the en banc Ninth Circuit's holding in *Davis*, and should conclude that *Healdsburg* no longer controls, because the reasoning-based approach to *Marks*, as required by *Davis*, is clearly irreconcilable with and fatally undermines *Healdsburg*.

2. *Healdsburg* Uses the Now Forbidden Results-Based Approach

Healdsburg summarily concluded that the *Rapanos* concurrence controls, 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." *Healdsburg*, 496 F.3d at 999-1000 (quoting *Marks*, 430 U.S. at 193). This is well short of the *Marks* analysis required 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"). *Healdsburg* gives no reason why it adopted the concurrence other than to cite *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), itself a brief opinion concluding without substantive application of *Marks* that the concurrence controls.

Fatally for *Healdsburg*, it states that the "concurrence is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." 496 F.3d at 999. This is the results-based approach which *Davis* rejected. *Healdsburg* also relies on Justice Stevens' dissent in *Rapanos* to say that Justice Kennedy's concurrence is a narrower subset of the dissent. 496 F.3d at 999. But this is rejected by *Cardenas*. And *Cardenas*' rejection of dissents for *Marks* analysis, following *Davis*, is further demonstration that the Ninth Circuit has moved on from the cursory and results-oriented *Marks* analysis used in *Healdsburg*.

Also fatally, *Healdsburg* relies almost exclusively on the Seventh Circuit's decision in *Gerke*. That in turn explicitly uses the results-based approach in selecting the concurrence:

> Thus, any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality)[.]

Gerke, 464 F.3d at 725 (emphasis in original).

Healdsburg is fatally undermined in two ways. It uses the results-based approach which *Davis* definitively rejects. And it uses the dissent as the broader opinion of which it concludes the concurrence is the narrower subset, in violation of *Cardenas*. *See also Gibson v. American Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014) (*Gerke* provides no authority for using dissenting opinions in *Marks* analysis). Under *Miller v. Gamie*, *Healdsburg* is no longer the law of this Circuit.

III. CONCLUSION

The *Rapanos* plurality is the controlling opinion of that decision, and holds that the Clean Water Act does not allow regulation of non-abutting wetlands. Because of this, the Agencies were legally compelled by the statute to eliminate from regulation the class of wetlands that are excluded in the Navigable Waters Protection Rule. Since this aspect of the Rule is legally compelled, Plaintiffs cannot demonstrate any likelihood of success on the merits, and are not eligible for preliminary injunctive relief. Absent any likelihood of success on the merits, the Court may neither stay nor enjoin the Rule. The Motion must be denied.

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Respectfully submitted,

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