No. 18-609

IN THE
Supreme Court of the United States

JOSEPH DAVID ROBERTSON,
PETITIONER,

V.

UNITED STATES,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 6, 2018

QUESTIONS PRESENTED

1. Does the Clean Water Act apply to non-navigable waters on private land that do not abut interstate waters?
2. Should lower courts consider dissenting opinions when using the reasoning-based test to craft a rule from split opinions?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. To these ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case concerns Cato because individual liberty is best preserved by constitutionally constrained administrative agencies, consistent with the boundaries of the Commerce Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Water Act ("CWA") expressly authorizes federal control over "navigable waters." 33 U.S.C. § 1344(a). It defines "navigable waters" as the "waters of the United States," 33 U.S.C § 1362(7). Nevertheless, the government argues here that the CWA extends to waters that are neither navigable, nor interstate, nor even abutting interstate waters.

The CWA is bounded both by its own text and the constitutional power to regulate interstate commerce. The CWA cannot confer more power than the Commerce Clause grants, and by its own language the act purports to "recognize, preserve, and protect the primary responsibility and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief and consented to its filing. No counsel for any party authored any part of this brief and no person or entity other than *amicus* funded its preparation or submission.

development and use (including restoration, preservation, and enhancement) of land and water resources." *Rapanos v. United States,* 547 U.S. 715, 737 (2006). While the *Rapanos* Court acknowledged that the CWA uses "navigable" as a defined term, which includes "waters of the United States," it also recognized that the term "navigable" was not devoid of meaning and had restrictive power. *Id.* at 731. If "waters of the United States" means anything, it must mean that there are some waters too removed from navigable, commercial waters to fall under the CWA's control.

Mr. Robertson's ponds, for example, are not "waters of the United States" in sense of those words. Robertson constructed his ponds on private land and, in the process, discharged "dredged and fill material into the surrounding wetlands and an adjacent tributary, which flows to Cataract Creek. Cataract Creek is a tributary of the Boulder River, which in turn is a tributary of the Jefferson River—a traditionally navigable water of the United States." *United States v. Robertson,* 875 F.3d 1281, 1286 (9th Cir. 2017). Mr. Robertson's ponds are four times removed from *any* navigable interstate water—and they do not abut waters that are navigable or interstate. His ponds are thus not subject to the CWA's jurisdiction and permit requirement.

The government reads the definition of "waters of the United States" contrary to this Court's decision in *Rapanos*. The plurality in *Rapanos* established that the "waters of the United States" *may* include non-navigable wetlands *only* where the channel at issue is "adjacent to a 'water of the United States,' (*i.e.* a relatively permanent body of water connected to traditional interstate navigable waters)" and "the wetland has a continuous surface connection with that water,

making it difficult to determine where the 'water' ends and the 'wetland' begins." 547 U.S. at 742 (emphasis added). That line-drawing problem is not implicated here; several clearly identifiable waters separate Robertson's ponds from the nearest navigable water. Under the plurality definition of "waters of the United States," Robertson's ponds are not "navigable waters."

The court below erred when it applied Justice Kennedy's "nexus" test instead of the plurality rule. The court simply assumed, that it could look to dissenting opinions when applying the "reasoning-based" test from *Marks v. United States*, 430 U.S. 188 (1977), to find the reasoning "to which a majority of the Justices would assent if forced to choose in almost all cases." *Robertson*, 875 F.3d at 1290. Lower courts have struggled with whether the test includes dissents or only concurrences combined with the majority. Yet when dissents are used, a single justice's reasoning can supersede a four-justice plurality. The "reasoning-based" test was not designed to allow dissenting justices to be weighted with concurring opinions to overthrow a plurality, but rather to find the reasoning most shared—the lowest common denominator, if you will—among justices who supported the Court's final judgment.

The circuits are split over whether to apply the plurality test agreed upon by four justices, or Justice Kennedy's singular "nexus" test. The *Rapanos* plurality's definition of "waters of the United States" better protects state and federal jurisdiction over their respective waters, gives clearer definition to "waters of the United States," places the burden of proof on government for restricting private water use, and will resolve the circuit split in favor of accountable legislative deliberation about the scope of the commerce power.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT APPLY TO NON-NAVIGABLE WATERS THAT DO NOT ABUT INTERSTATE WATERS

A. The Commerce Clause Does Not Permit the CWA to Reach Private Intrastate Waters

The interstate-commerce regulatory power extends beyond actual interstate activity only when those activities are economic, and when taken in the aggregate would substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995).

The wetlands regulation as applied here does not directly regulate "channels" or "instrumentalities of commerce," *id.* at 559, but regulates activity that may indirectly affect channels or instrumentalities. Accordingly, it is justifiable solely under *Lopez*'s third prong: as regulation of activity that "substantially affects" interstate commerce. *Id.* at 559–60. Yet, as *United States v. Morrison* made clear, isolated local activity cannot be aggregated under the substantial effects test unless the activity is itself "economic" in nature. 529 U.S. 598, 610 (2000). The Court later expressly reiterated *Morrison's* statement that, under the "substantial effects" test, "economic activity" forms the proper basis for aggregation. *See Gonzales v. Raich*, 545 U.S. 1,25 (2005).

Indeed, the *Raich* Court upheld the Controlled Substances Act not only because the CSA "directly regulates economic, commercial activity," including the "production, distribution, and consumption of commodities," *id.* at 26, but because the CSA does so with the intent to affect prices and distribution within a larger market. *Id.* at 19 n.29 (noting that in *Wickard v. Filburn*, Congress sought to "protect and stabilize"

the "wheat market," while Congress sought, under the CSA, to eradicate the marijuana market).

Here, there is no "commercial" or "economic" nexus between digging ditches to collect water and the regulation of interstate waters in the sense articulated by *Morrison* and *Raich*. *Lopez* directs our attention to "the activity being regulated"—here, literally, the digging of ponds to collect water. *See, e.g.*, *Rancho Viejo LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissental). Even if we assume *arguendo* that collecting water is the "distribution" or "consumption" of a commodity (since water can be bought and sold), and that the use of water will "affect" the going price for water nationally—multiplied across thousands of cornfields, bogs, sand boxes, drainage ditches, and maybe even bird feeders—no one can plausibly argue that the CWA is designed to regulate the price of water trafficked on the interstate market. Indeed, any such suggestion would raise serious concerns that the CWA is premised on pretextual justifications that both the majority and dissent in *Raich* suggested are impermissible. *Raich*, 545 U.S. at 25 n.34 (recognizing possibility of "'evasive' legislation" written "for the purpose of targeting purely local activity" but denying the CSA was such a statue); *id.* at 46 (O'Connor, J., dissenting) (warning of "evasive" legislative strategies in which Congress regulates "comprehensively," to receive deference under *Raich*, but does so "exclusively for the sake of reaching intrastate activity").

Finally, while the CWA prohibits the "discharging" of "dredge and fill" into a navigable water, that prohibition does not itself lengthen the statutory reach. *Rapanos*, 547 U.S. at 729 (denying CWA jurisdiction on the "nexus" theory of eventual intermixing of particles

and water from intrastate to interstate water).

CWA jurisdiction is bound by the Commerce Clause, which may reach outside actual interstate channels and instrumentalities of commerce only when the regulated activity is economic. Digging remote ponds far removed from navigable waters is not an economic activity that can be properly regulated by any statute that respects constitutional design.

B. CWA Jurisdiction Is Limited by the Textual Requirements of "Navigable Waters" and "Preserving the Rights of the States"

The *Rapanos* plurality held that "waters of the United States" is a term of art that extends beyond the traditional meaning of "navigable." *Id.* at 730–31. But the Court made two points in conjunction with this observation: First, "the qualifier 'navigable' is not devoid of meaning." *Id.* (quoting *Solid Waste Agency v. United States Army Corps of Eng'rs,* 531 U.S. 159, 172 (2001) ("*SWANCC*"). Second, the CWA expressly contemplates the states' having primary jurisdiction over at least some of the water in the United States. *Id.*

In *Rapanos,* the Court did not find it necessary to define "navigable." But the term "navigable waters" is not hopelessly ambiguous. This Court has long held that "navigable waters" are those "used or are susceptible of being used . . . as highways for commerce, over which trade and travel are or may be conducted." *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871). The term's plain meaning cannot generally support jurisdiction over water that is so far removed from trade or travel. As *Ex parte Boyer*, 109 U.S. 629 (1884), held, the "water of the United States" is that which encompasses "navigable water" used "for commerce between ports

and places of different States." *Id.* at 632.

For regulatory purposes, "waters of the United States" is a term of art that is broader than the plain meaning of the term. *Rapanos*, 547 U.S. at 730–31. Yet even terms of art, when susceptible of multiple interpretations, must be construed according to the meaning that best accords with, and does not render superfluous, the plain text of the act itself. *See*, *e.g.*, *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 741 (1989) (where the term "employee" is a term of art susceptible of several interpretations under the law of agency, the Court will choose the meaning most "consistent with the text of the Act."). Here, that rule dictates that the term "the waters of the United States" should not be construed to supplant or extinguish the textual term "navigable." Nor should the definite article and noun, "*the waters*," be read out of the statute in order to turn the phrase into just "water." The Court's precedent only allows for some control over waters that are non-navigable in the rare instances that they abut navigable waters. *Rapanos*, 547 U.S. at 730–35; *SWANCC*, 531 U.S. at 172.

Nor should the term "waters of the United States" be construed to extend beyond waters of the "United States" nationally, into waters of the states, locally. The text of the act acknowledges as a primary purpose the preservation of state authority in two ways. First, as noted above, the act contemplates the states having jurisdiction over some of the "waters of the United States," taking control where it is more practical for them to do so, such as wetlands that immediately abut interstate waters. *Rapanos*, 547 U.S. at 731. Second, the CWA explicitly states as a primary goal to "preserve, and protect the primary responsibilities and

rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources." *Id.* at 723. If "waters of the United States" is a term of art, and terms of art must be construed to give full meaning to the text of the CWA, then the term must be given a meaning that preserves both the "rights of the States" and "navigable." To construe the term as extending CWA jurisdiction to any water with a "hydrologic connection" is to destroy the meaning of both intrastate waters and "navigable."

C. The Nexus Test Is an Exception, Not a General Rule, for CWA Jurisdiction

The plurality in *Rapanos* was clear that the "significant nexus" test applied only in narrow circumstances. *Id.* at 727. The Court clarified it would look only to the "significant nexus" between a navigable and non-navigable water when the geographic boundary between waters presented line-drawing difficulties. *Id.* at 739.

The "nexus test" originated in *United States v. Riverside Bayview Homes, Inc.*, 474, U.S. 121 (1985). There, the Corps claimed CWA jurisdiction extended to private waters that immediately abutted traditionally navigable interstate waters. The Court upheld the inclusive jurisdiction. *Id.* at 135. However, it clarified that non-navigable intrastate waters that did not abut a navigable waterway were not included as "waters of the United States." *SWANCC*, 531 U.S. at 172 (internal citations omitted). Thus, the "nexus" test was only a narrow exception used when line-drawing between interstate and intrastate waters is difficult.

When the line is easy to draw, as here, the plurality offered a more general test for determining when the

CWA covers non-navigable waters. First, the water at issue had to be connected to an interstate, traditionally navigable water; second, the water must have a continuous surface connection with that navigable water, "making it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos*, 547 U.S. at 743. Mr. Robertson's rivulet empties into purely local and state waters and is miles from the nearest named interstate water, the Jefferson River. There is no difficulty in determining where Robertson's water ends and the interstate water begins—the two do not even touch, in any geographically reasonable sense.

Moreover, the plurality's general test alleviates several problems raised by the nexus test. The nexus test, if used as a general rule rather than a line-drawing exception, has no limit. As noted above, both the text of the CWA and Commerce Clause require some limit on federal power—that is, some delineation between *all* water in the country and "navigable waters" of the United States. The nexus test can draw no helpful limits between these terms. The Court noted under the Corps' increasingly expansive interpretations "the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.'" *Id.* at 729. Such an expansive test "stretched the term 'waters of the United States' beyond parody," *id.* at 734, and would "result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 738 (quoting *SWANCC*, 531 U.S. at 174).

The plurality test, in contrast, protects states' ability to control and police their own land and water resources. The Court expressed confidence that the states were adequate to the task of water management and preservation. *Id.* at 745. If the Court made the

nexus test the rule, it would bring "virtually all planning of the development and use of land and water resources by the States under federal control." *Id.* at 737.

II. DIVERGENT TREATMENT OF *RAPANOS* SHOWS WHY THIS COURT MUST CLARIFY THAT, WHEN APPLYING PRECEDENT WHERE THERE IS NO MAJORITY OPINION, COURTS SHOULD CONSIDER ONLY PLURALITY AND CONCURRING OPINIONS

The Court's current governing instruction for how to apply precedent with no majority opinion, taken from *Marks v. United States*, 430 U.S. 188 (1977), has become known as the "reasoning-based" test. "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 judgment* on the narrowest grounds.'" *Id.* at 194 (quoting *Gregg v. Georgia,* 428 U.S. 153 (1976)) (emphasis added). While the rule seems simple—look at the area of overlap among justices who voted for the bottom-line result—the Court never clarified what "narrowest grounds" meant and so opened up room for judicial confusion. To wit, what if the reasoning of the concurrences overlaps to a greater extent with that of the dissents? As a result, dissents have been given comparable weight to concurrences, creating a rule that defies the concept of majority voting. It has allowed a single justice's test to defeat a four-justice test based on a hypothetical guess as to which of the two all the justices might prefer if forced to choose.

In truth, the *Marks* rule can only be understood in the context of that decision's split. The Court used as

its illustrative example a case in which three justices joined in a controlling opinion and two justices concurred. *Marks*, 430 U.S. at 194. The three justices in the plurality articulated a narrower view than the two concurrences, so the Court held that on the "narrowest grounds" (not by sheer numbers), the three justices' reasoning controlled. *Id.* The Court said nothing of the opinions of the dissenting justices, however, and it certainly did not—as the lower court attempts here—compare two or three-justice reasonings with dissenting opinions to see if there was overlap or common ground by which to weigh controlling opinions.

There is a split in the lower courts over how to apply *Marks* to *Rapanos*, particularly over whether Justice Kennedy's nexus test should prevail over the four-justice plurality. The Seventh and Eleventh Circuits have found Justice Kennedy's opinion to be controlling because it reined in government power *less* than the plurality. *United States v. Gerke Excavating, Inc.,* 464 F.3d 723 (7th Cir. 2006); *United States v. Robinson*, 505 F.3d 1208 (11th Cir. 2007). The First, Third, and Eighth Circuits have held that CWA jurisdiction extends under either the plurality test or Justice Kennedy's, which is unhelpful for defendants wondering if they will receive the plurality's higher standard of protection. *United States v. Johnson,* 467 F.3d 56, 64–66 (1st Cir. 2006); *United States v. Donovan,* 661 F.3d 174 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). The Fourth Circuit has used the nexus test without deciding whether it actually controls. *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011). The Sixth Circuit also has not explicitly chosen one test over the other. *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009). Nor has the Fifth Circuit. *United States v. Lucas*, 516

F.3d 316 (5th Cir. 2008). The Ninth Circuit below, attempting to interpret *Marks*, assumed without deciding that it could look to dissenting opinions to determine what the "narrowest grounds" for concurring opinion's might be. *United States v. Robertson*, 875 F.3d 1281, 1290 (2017).

By considering the dissenting opinions in *Rapanos* to determine the holding of that case, the lower courts have imposed an extra, or different, requirement than did *Marks*. Some lower courts do not look merely to the concurring opinions to find the narrowest grounds but engage in guesswork as to what all the justices *might have* ruled. The Ninth Circuit explicitly acknowledged that it was engaged in this hypothetical reasoning, stating, "we held that Justice Kennedy's opinion was the controlling opinion . . . because it is 'the narrowest grounds *to which a majority of the justices would assent if forced to choose in almost all cases.*'" *Robertson*, 875 F.3d at 1289 (emphasis added).

But nowhere in *Marks* did the Court indicate that lower courts should guess at what justices might rule. Nor did it say that lower courts were to consider dissents. The only opinions mentioned are concurrences—those concurring with the plurality, not any overlap that might occur with the dissents.

The Court should thus use this case as a vehicle for clarifying that, in cases where there is no agreement on the reasoning behind a particular judgment, the rule is the ground on which the concurring opinion and pluralities agree—or that there is simply no rule at all.

CONCLUSION

For these reasons, and those stated by the Petitioner, the Court should grant the petition.

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December 6, 2018