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 OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

THOMAS J. WARD*
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200
tward@nahb.org
* *Counsel of Record*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders (NAHB) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS CURIAE*[1]

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

The cost of land development can affect whether a homebuilder can develop a viable community. Furthermore, the presence of "waters of the United States" on a homebuilders' property affects the cost of preparing the land. Thus, it is vital for NAHB's members to be able to simply and definitively determine whether aquatic features on their property fall within the United States Environmental Protection Agency's and United States Army Corps of Engineers' Clean Water Act authority.

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1 Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Relying on *Marks v. United States,* 430 U.S. 188 (1977), the court below ruled that Justice Kennedy's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) establishes the test for determining whether an aquatic feature falls within the Clean Water Act's jurisdiction.

The Court should grant certiorari because some of the courts of appeals disagree with the Ninth Circuit and have held that *Marks* cannot be applied to *Rapanos*. Further, since *Marks* can be interpreted in at least three different ways, even if *Marks* is to be applied, it is unclear how to apply it.

ARGUMENT

In the case below, the Court of Appeals for the Ninth Circuit addressed whether the Petitioner violated the Clean Water Act by discharging dredge and fill material into certain waterbodies. *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017). Specifically, the issue was whether the creeks and wetlands the Petitioner polluted were "waters of the United States." 33 U.S.C. § 1362(7).

To answer this question, the Ninth Circuit relied on this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). Unfortunately, *Rapanos* did not produce a majority opinion. The plurality held that a wetland is jurisdictional if 1) the adjacent channel is a relatively permanent body of water connected to a traditional interstate navigable water, and 2) the wetland has a continuous surface connection with that water. *Id*. at 742. Justice Kennedy concurred in the judgement, but held that wetlands are jurisdictional if they have a "significant nexus" to traditionally navigable waters. *Id*. at 779.

Following Ninth Circuit precedent, and relying on *Marks v. United States,* 430 U.S. 188 (1977), the court below held that Justice Kennedy's opinion is the controlling law in the Circuit because it "restricts federal authority less" than the plurality opinion. *Robertson*, 875 F.3d 1292.

Not all of the Circuit Courts of Appeals apply the formulation the Court developed in *Marks* to

Rapanos. Moreover, even if applicable, it is unclear how the lower courts should apply the formulation.

I. THE COURTS OF APPEALS DO NOT ALL AGREE THAT *MARKS* CAN BE APPLIED TO *RAPANOS*.

In *Marks*, the Court explained: "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." *Marks*, 430 U.S. at 193 (internal quotation marks omitted).

Since *Marks*, the Court and individual justices have explained that *Marks* is not applicable when one opinion is neither broader nor narrower than another opinion. *See, e.g*. *Glossip v. Gross*, 135 S. Ct. 2726, 2793 (2015) (Sotomayor, J., dissenting) (providing that Marks is not applicable when one opinion is "not any broader or narrower than" the other); *Nichols v. United States*, 511 U.S. 738, 745 (1994) (refusing to apply Marks when a "number of Courts of Appeals have decided that there is no lowest common denominator or 'narrowest grounds' that represents the Court's holding").

The Courts of Appeals for the First, Third and Eighth Circuits have declined to apply the *Marks* formulation to *Rapanos*. That is because "neither the plurality's test nor Justice Kennedy's can be viewed as relying on narrower grounds than the other." *United States v. Donovan*, 661 F.3d 174, 182

(3d Cir. 2011). In other words, "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction," or vice versa. *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006). *Accord United States v. Freedman Farms, Inc.*, 786 F. Supp. 2d 1016, 1018-1019 (E.D.N.C. 2011) ("neither the plurality opinion nor the concurring opinion is a precise subset of the other"); *United States v. Donovan*, No. 96-484, 2010 WL 3000058, at *3 (D. Del. July 23, 2010) ("no single opinion in *Rapanos* is a logical subset of any other opinion"). Therefore, "[b]ecause there is little overlap between the plurality's and Justice Kennedy's opinions, it is difficult"—indeed, a hopeless endeavor—to try to "determine which holding is the narrowest." *United States v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009).

In contrast, the Ninth Circuit applied *Marks* to the *Rapanos* decision. It understood the main issue in *Rapanos* to be "whether the breadth of the Corps' regulations was impermissible." *Robertson*, 875 F.3d 1291. According to the Ninth Circuit, the narrowest holding is the opinion joining the judgement that restrained the Corps the least. This, the court concluded, is Justice Kennedy's concurrence because it "restricts federal authority less" than the plurality. *Id.* at 1292.

The Ninth Circuit is not alone. The Seventh Circuit Court of Appeals applied *Marks* and concluded that Justice Kennedy's concurrence is the holding of *Rapanos* because his "test is narrower (so far as reining in federal authority is concerned) than the plurality's in most cases." *United States v. Gerke*

Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006). The Eleventh Circuit has also applied Marks, recognizing that "Justice Kennedy's test, at least in wetlands cases such as *Rapanos,* will classify a water as 'navigable' *more frequently* than Justice Scalia's test." *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (emphasis added). Yet it ruled that Justice Kennedy's opinion is "narrower." *Id.*

As illustrated above, the courts of appeals cannot even agree whether it is appropriate to apply the *Marks* formulation to *Rapanos*. The Court should grant certiorari to resolve this disagreement.

II. IT IS NOT CLEAR WHEN A POSITION IS THE "NARROWEST GROUNDS."

In *Marks,* the Court considered whether its decision in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Commonwealth of Mass.*, 383 U.S. 413 (1966) (hereinafter *Memoirs*) had established an obscenity standard at the time the petitioner had allegedly transported obscene materials in interstate commerce. A three-justice plurality held that to find the book to be obscene, the book had to satisfy three elements. *Id*. at 418. Further, it explained that the lower court had misapplied one of these elements. Therefore, the plurality held that the book was not obscene. *Id*. at 419-20.

Justices Black and Douglas concurred on the grounds that the "First Amendment provides an absolute shield against government action aimed at

suppressing obscenity." *Marks*, 430 U.S. at 193. Justice Stewart also concurred, "based on his view that only 'hardcore pornography' may be suppressed." *Id.* at 193.

In *Marks,* the Court ruled that of these opinions, the plurality's was the "narrowest grounds" and thus the holding of *Memoirs*. *Id.*

"It is an understatement to say that courts have struggled mightily to find the controlling legal rule by applying *Marks*." James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 Geo. L.J. 515, 538 (2011). "The main problem with the doctrine is that lower courts are unclear as to which opinion is in fact the narrowest application." Linas E. Ledebur, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 Penn St. L. Rev. 899, 911 (2009).

In *Marks*, the Court did not illuminate why the *Memoirs* plurality was the "narrowest" opinion. Furthermore, because that plurality can be viewed as the "narrowest" under different theories, it is unclear how to apply *Marks* to a case in which five-justice fail to agree on a single rational to support the judgement.

A. Least Restrictive of the Government.

In *Memoirs*, the plurality held that material is obscene if it: i) "appeals to a prurient interest in sex," ii) "is patently offensive" and iii) "is utterly without redeeming social value." *Memoirs*, 383 U.S. 418. The other *Memoirs* concurrences set a higher bar for

finding that material is obscene, and therefore their tests would make it more difficult for government to regulate "obscene" material. Thus, the *Memoir*s plurality opinion could be seen as the narrowest because it restricts the government's authority the least. Similarly stated, the plurality opinion provides speech with the least amount of protection. This, however, is a strange interpretation considering:

> Ceaseless vigilance is the watchword to prevent [the] erosion [of the First Amendment] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

Roth v. United States, 354 U.S. 476, 488 (1957). Given this admonition, why would the Court establish that an opinion that provides the least amount of constitutional protection is the "narrowest" and thus the holding of the Court?

B. The Law at the Time

A court could also interpret *Marks* through the lens of the law at the time of *Memoirs*. In 1966, the decision in *Roth* established the test for determining if speech was obscene. The *Memoirs* plurality interpreted that test as requiring three elements to coalesce for speech to be considered obscene. *Memoirs*, 430 U.S. at 418. One could argue that the

Memoirs plurality opinion simply held that the lower court had misapplied one of these elements. In contrast, Justices Douglas and Black both outright rejected *Roth*. *Memoirs*, 383 U.S. at 433 (Douglas, J., dissenting) (explaining that "the First Amendment leaves no power in government over expression of ideas."); *Ginzburg v. United States*, 383 U.S. 463, 476 (1966) (Black, J. dissenting) ("I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind . . ."). Moreover, Justice Stewart, while not rejecting *Roth*, would limit it to only one "class of material[s]," namely, "hardcore pornography." *Ginzburg*, 383 U.S. at 499 (Stewart, J., dissenting). Thus, one can contend that the plurality opinion is the "narrowest" because it changed the settled law the least.

C. Subset Analysis

Finally, one can argue that the *Memoir*s plurality is a subset of the other opinions that joined in the judgement and is therefore the "narrowest." The argument goes that if material is not obscene under the plurality's three-part test, then the other three justices (that concurred) would agree that the material is not obscene. Thus, the plurality is a subset of the other opinions. *See generally King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (providing that *Marks* is workable "only when one opinion is a logical subset of other . . ."). This argument, however, breaks down if material is determined to be obscene under the plurality's test.

In that situation, it is not clear how the other three justices that concurred in the judgement would rule.

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As illustrated above, there are various explanations that support *Marks'* determination that the *Memoirs* plurality opinion was the "narrowest." Since the Court itself, however, has not provided an explanation, it is no surprise that *Marks* has "baffled and divided" the lower courts. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols v. United States*, 511 U.S. 738 (1994)); s*ee e.g., United States v. Cundiff*, 555 F.3d 200, 208 (2009).

The Court should grant review in this case and provide a clear explanation why one opinion is "narrower" than another opinion.

CONCLUSION

It is not clear when to or how to apply *Marks* to a decision in which a majority of the Court has not assented to one rationale. NAHB respectfully requests the Court to grant certiorari in this matter and provide the courts of appeals with a clear explanation of when and how to apply *Marks*.

Dated: December 10, 2018

THOMAS J. WARD *
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200
tward@nahb.org
* *Counsel of Record*