No. _______

In the

Supreme Court of the United States

CHARLES JOHNSON, GENELDA JOHNSON,
FRANCIS VANER JOHNSON, and
JOHNSON CRANBERRIES, LLP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court stated that the controlling view in this Court's split decisions is "that position taken by those Members *who concurred in the judgments on the narrowest grounds*." (emphasis added). In putative reliance on *Marks*, the Seventh and Ninth Circuits have held that the controlling opinion in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), is the lone concurrence and that Clean Water Act jurisdiction *must* be based on Justice Kennedy's broad and undefined "significant nexus" test. Those circuits have therefore prohibited federal agencies from relying on the narrower plurality decision in *Rapanos* to establish Clean Water Act jurisdiction. In this case, the First Circuit held that the Seventh and Ninth Circuits are wrong and that Clean Water Act jurisdiction may be established based on *either* the Kennedy test or the plurality test.

In *Rapanos*, which opinion is controlling—the broad stand alone concurrence of Justice Kennedy, or the narrower opinion of the four Justice plurality as suggested by *Marks*? Or, may the courts simply adopt an either/or test of conflicting standards for establishing federal jurisdiction under the Clean Water Act?

LIST OF ALL PARTIES

Petitioners: Charles Johnson, Genelda Johnson, Francis Vaner Johnson, and Johnson Cranberries, LLP.

Respondents: United States of America.

CORPORATE DISCLOSURE STATEMENT

Johnson Cranberries, LLP, is wholly owned by Petitioners Charles Johnson and Genelda Johnson. It has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The challenged remand order of the Court of Appeals for the First Circuit is reported as *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), and is attached as Appendix (App.) C.

JURISDICTION

The remand order of the Court of Appeals for the First Circuit was entered on October 31, 2006. App. C. That court's denial of the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on February 21, 2007. App. A. On May 3, 2007, this Court granted an extension of time in which to file this Petition for Writ of Certiorari to and including June 28, 2007. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.
>
> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5)-(7) (CWA § 502(5)-(7)).

Federal regulations define "waters of the United States" to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use,

> degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
>
> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R § 328.3(a) (2005).

Federal regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c).

INTRODUCTION

In *Rapanos v. United States*, 126 S. Ct. 2208 (2006), a five Justice majority of this Court held that federal jurisdiction did not extend to wetlands under the Clean Water Act based solely on a hydrological connection between those wetlands and a navigable-in-fact waterway downstream. But this Court split on the test for establishing such jurisdiction. A four Justice

plurality interpreted the Clean Water Act narrowly to cover traditional rivers, lakes, and streams connected to navigable-in-fact waters, and those wetlands "indistinguishable" from these waters. But Justice Kennedy, who concurred in the judgment, interpreted the Act broadly so as to reach any wetland with a "significant nexus" to navigable-in-fact waters.

The Circuit Courts of Appeals are themselves split on how to apply this Court's *Rapanos* decision. Recently, in *United States v. Gerke Excavating, Inc*., 412 F.3d 804 (7th Cir. 2005), (petition for cert pending) (No. 06-1331), the Seventh Circuit held Justice Kennedy's "significant nexus" test was controlling. The Ninth Circuit came to the same conclusion in *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) (petition for rehearing pending). But, the First Circuit expressly rejected this reading of *Rapanos.* In this case, the First Circuit held that Clean Water Act jurisdiction could be extended to inland wetlands based on *either* the plurality test *or* Justice Kennedy's "significant nexus" test.

These Circuit rulings conflict with this Court's decision in *Marks v. United States*, 430 U.S. 188, 193 (1977), wherein this Court declared that in fragmented decisions "the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*" Under a literal reading of *Marks*, the "narrowest grounds" in *Rapanos* is the plurality position because it is a logical subset of the Kennedy test. But not all courts follow a literal reading of *Marks*. Indeed, there is general disagreement among the Circuits as to whether and how *Marks* applies to this Court's split decisions.

Review by this Court is necessary not only to resolve a clear and substantial conflict among the Circuit Courts as to enforcement of the Clean Water Act under *Rapanos*, but also to clarify this Court's interpretive rules for split opinions.

STATEMENT OF THE CASE

Petitioners (Johnsons) were cited for filling private wetlands without a federal permit under the Clean Water Act while converting their land to use as cranberry bogs—a recognized form of wetland. In defense, the Johnsons challenged the government's statutory jurisdiction. A fractured panel of the First Circuit upheld federal jurisdiction over the Johnsons' wetlands citing a "hydrological connection" to traditional navigable waters, although none of the panelists could agree on the nature of that connection. *See United States v. Johnson*, *see* Appendix D. Shortly thereafter, this Court invalidated that basis for jurisdiction in *Rapanos*.

In *Rapanos,* a five-justice majority of this Court held that something more than a "hydrological connection" between a wetland and a navigable-in-fact waterway was required for the exercise of federal jurisdiction under the Clean Water Act. But, no single rationale garnered a majority vote. As noted above, four Justices, forming a plurality, determined the Act required limiting federal authority to those "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams[,] . . . oceans, rivers [and] lakes" that are connected to traditional (or navigable-in-fact) waters. *Rapanos*, 126 S. Ct. at 2225 (Scalia, J.). The plurality would also authorize federal regulation of wetlands physically abutting these water bodies, but *only if* they contain a continuous surface water connection such that the wetland and the covered water are "indistinguishable." *Id.* at 2234. Ephemeral and insubstantial connections would not suffice. *Id.* at 2225. Justice Kennedy concurred in the judgment but proposed a broad and undefined "significant nexus" test for determining federal Clean Water Act jurisdiction. *Id.* at 2236 (Kennedy, J., concurring in the result). Under this test, any wetland would be subject to federal regulation if it is deemed to "significantly

affect" a traditional navigable waterway. *Id.* at 2248. The four Justices in the dissent supported the government's view that the agencies could choose to regulate essentially any water body to advance the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters," *id.* at 2252, *et seq*. (Stevens J., dissenting), but added that they would uphold federal jurisdiction in any case "in which either the plurality's or Justice Kennedy's test is satisfied." *Id.* at 2265.

In reliance on *Rapanos*, the Johnsons petitioned the First Circuit for rehearing. In response, the court vacated its prior decision and remanded with directions on how to apply the *Rapanos* decision. App. C. As a basis for choosing among this Court's disparate opinions, the First Circuit turned to the language in *Marks* directing the lower courts to rely on "that position taken by those Members *who concurred in the judgments on the narrowest grounds.*" 430 U.S. at 193 (emphasis added) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). But although the plurality and Justice Kennedy are the only members of the Court "who concurred in the judgments," the panel expressly rejected the Seventh and Ninth Circuit's adoption of the Kennedy test and instead followed the dissent's approach that authorizes federal regulation of wetlands if "either the plurality's or Justice Kennedy's test is satisfied." App. at C-17.

Thus the First Circuit created a conflict with its sister Circuits and misconstrued this Court's rule for interpreting split decisions.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER FEDERAL JURISDICTION MAY EXTEND TO WETLANDS BASED ON EITHER THE *RAPANOS* PLURALITY TEST OR THE KENNEDY "SIGNIFICANT NEXUS" TEST

In this case, the First Circuit expressly rejected the Seventh Circuit's (and by implication the Ninth Circuit's) understanding of and reliance on *Marks v. United States*, 430 U.S. 188, to interpret this Court's *Rapanos* decision. In *Marks*, this Court was clear: "[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.*' " 430 U.S. at 193 (emphasis added). Although this interpretive rule has been difficult in application, it has been recognized as the *only* approach sanctioned by this Court for interpreting its split decisions. *In re Michael Francis Cook*, 322 B.R. 336, 341 (2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

The language of *Marks* was not unique to that case. It derived from this Court's decision in *Gregg v. Georgia*, 428 U.S. 153. In *Gregg*, this Court examined *Furman v. Georgia*, 408 U.S. 238 (1972), which involved a challenge to the constitutionality of a Georgia death penalty statute. 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. 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. Thus in *Gregg*, this 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 . . . ." 428 U.S. at 169 n.15.

In *Gerke*, 464 F.3d 723, which also involves a jurisdictional challenge to federal regulation of inland wetlands, the Seventh Circuit putatively relied on *Marks* to interpret *Rapanos*, but it changed the wording of the *Marks* rule, and therefore the test. In *Gerke*, the court cited *Marks* for the proposition that

> [w]hen a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground.

Id. at 724.

This adulterated version of the *Marks* rule allowed the Seventh Circuit to aggregate the four dissenters in *Rapanos* with Justice Kennedy to find five Justices that would support Justice Kennedy's "significant nexus" standard for establishing federal jurisdiction over wetlands under the Clean Water Act. However, the court ignored the more persuasive argument that when the plurality standard is applied to find federal jurisdiction, it would have the support of all nine Justices. But under *Marks*, finding the support of five Justices is not the test, especially in a case like *Rapanos* where five or more Justices

would support more than one opinion. Rather, under *Marks*, lower-court judges are to look at the "narrowest grounds."

The First Circuit in this case found it curious that *Gerke* equated "narrowest grounds" with the opinion "least restrictive of federal authority." App. C-9. Although the cases on which *Marks* relied involved situations in which the "narrowest grounds" was the least restrictive of federal jurisdiction, the First Circuit observed that this was mere coincidence and that it "does not necessarily mean that the Supreme Court in *Marks* equated the 'narrowest grounds' . . . to the grounds least restrictive of the assertion of federal authority." *Id*. at C-12. "Such an equation," the court stated, "leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party." *Id*. Given the constitutional issue raised, the court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)," because, the court concluded, "that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id*.

In contrast to the Seventh Circuit's reading of *Marks* in *Gerke*, the First Circuit in this case opined that the "narrowest grounds" might sensibly be interpreted to mean the "less far-reaching-common ground," citing *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1247 (11th Cir. 2001), or the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases," citing Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 420-21 (1992). App. C-12 - C-13.

Relying on *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991), the First Circuit noted the D.C. Circuit found "*Marks* is

workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." App. at C-13. "In other words," the First Circuit explained, "the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other." *Id.* According to the First Circuit, *Marks* followed this approach. In *Marks* this Court examined *Memoirs v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966), in which a majority of this Court held that a lower court incorrectly concluded a book was obscene and did not have First Amendment protection. Three Justices decided that if materials are deemed obscene they should receive no First Amendment protection while two other Justices concluded that the First Amendment provided an absolute shield against government action. As a logical subset of the other, this Court concluded in *Marks* that the former opinion, excluding obscene materials from First Amendment protections, was the "narrowest grounds" for the judgment and the controlling opinion in the case.

Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-1604 (1992).

In this case, the First Circuit noted that the Kennedy "significant nexus" standard in *Rapanos* is not a "logical subset" of the plurality standard for federal jurisdiction over wetlands: "The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." App. at C-14. However, the First Circuit failed to consider the obvious possibility that the plurality standard is a "logical subset" of the Kennedy standard. This possibility was simply ignored. So broad is the Kennedy approach that the plurality found it barely distinguishable from the government's "any hydrological connection" test the majority struck down: "Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again." *Rapanos*, 126 S. Ct. at 2235 n.15.

Thus, in *Rapanos*, the plurality's jurisdictional standard is comparable to the narrower strict scrutiny standard, whereas the Kennedy "significant nexus" standard is comparable to the broader rational basis standard. As Justice Stevens observed, it would be an "unlikely event that the plurality's test is met but Justice Kennedy's is not." *Id.* at 2265 n.14.

In other words, the plurality opinion was decided on the "narrowest grounds," not because it's the most restrictive of federal authority, but because it is less sweeping and would require the same outcome in a subset of the cases as would the more sweeping Kennedy opinion. For this reason, the First Circuit rejected *Gerke*'s conclusion that under *Marks* Justice Kennedy's lone concurrence is controlling in *Rapanos*. Instead, the First Circuit held that "*Marks* does not translate easily to the present situation," App. C-14, and that the "federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as

laid out in *Rapanos*." App. C-17. This conflict creates a substantial disparity between these Circuits in the enforcement of the Clean Water Act which requires reconciliation by this Court.[1]

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER *MARKS* APPLIES TO THIS COURT'S SPLIT DECISIONS SUCH AS *RAPANOS*

As the First Circuit points out, a number of Circuits have abandoned this Court's *Marks* approach to split opinions or applied *Marks* selectively. Instead, they have sought to divine the controlling opinion in this Court's fragmented decisions, like *Rapanos*, by adopting a "pragmatic" approach to the situation. This approach involves assessing which grounds would "command a majority of the Court." App. at C-15. In *Tyler v. Bethlehem Steel Corp*., 958 F.2d 1176, 1182 (2d Cir. 1992), for example, the court concluded: "In essence, what we must do is find common ground shared by five or more justices." *See also United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) ("We need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.' ").

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[1]It addition to the Seventh Circuit in *Gerke*, the Ninth Circuit has also concluded, without explanation, that Justice Kennedy's "significant nexus" standard is controlling in *Rapanos* under the *Marks* rule, thus creating an additional conflict among the Circuits. *See Northern California River Watch v. Healdsburg*, 457 F.3d at 1029 (currently on petition for rehearing).

The courts that have adopted this approach are not particular as to the Justices that may be joined in a "majority." In contrast to the directive in *Marks*, that the controlling opinion must be found among those Justices who concurred in the judgments, some Circuits give equal weight to the dissenting Justices. The Seventh Circuit in *Gerke*, which purported to apply *Marks*, relied on the fact that "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)." *Gerke*, 464 F.3d at 725. The First Circuit in this case used similar logic to justify its determination that federal jurisdiction over wetlands could be established under either the plurality test in *Rapanos* or the Kennedy test:

> If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction.

App. at C-15.

In *Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs*, 842 F.2d 1436 (3d Cir. 1988), the Third Circuit examined *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), to determine the controlling opinion. In *Pennsylvania*, this Court was asked to address the availability of contingency fees under federal fee-shifting statutes. This Court split along the lines of *Rapanos* with four Justices in the plurality, four Justices in the dissent, and Justice O'Connor's lone concurrence in the judgments. The Third Circuit determined that "[b]ecause the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court" and is controlling. *Student*, 842 F.2d at 1451.

In *King v. Palmer*, 950 F.2d 771, the D.C. Circuit took a different approach. According to *Johnson*, the D.C. Circuit "refused to examine the points of commonality among Justice O'Connor's opinion and that of the dissent, relying mainly on a literal reading of *Marks's* [sic] language that the holding is the position of the Justices '*who concurred in the judgments* on the narrowest grounds.' " App. at C-15-C-16. The D.C. Circuit relied as well on the fact that this Court "had not explicitly applied *Marks* to situations where concurring and dissenting votes would be combined." App. at. C-16.

This widespread Circuit conflict has not gone unnoticed by this Court. This Court has remarked on how the *Marks*' inquiry has "so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 746 (1994). It is time, therefore, for this Court to address this conflict in the context of this case.

III

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE UNDEFINED "SIGNIFICANT NEXUS" STANDARD IMPOSED BY THE COURT BELOW RAISES DUE PROCESS CONCERNS

For more than 30 years, the Corps and EPA have failed to follow a consistent jurisdictional test under the Clean Water Act. A report from the General Accounting Office confirms that the Army Corps of Engineers' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004), *available at* http://www.gao.gov/new.items/d04297.pdf (last visited June 25, 2007) (GAO Report).

In addition to the inter-district inconsistences, the GAO Report concludes that even Corps staff working in the same office cannot agree on the scope of the Clean Water Act and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Clean Water Act. GAO Report at 22. This is more than a theoretical concern. This degree of uncertainty permeates the enforcement decisions of the Corps. In *Rapanos*, those decisions became the basis for multimillion dollar fines and criminal prosecution.

The right of the people to know when they have violated the law is deserving of greater safeguard than the convenience of the enforcing agency. But the scope of federal jurisdiction under the Clean Water Act is beyond the comprehension of ordinary people. The very definition of "wetlands" defies common sense. Federal regulations define "wetlands" as those areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). Under this definition, an area need be wet only "for one to two weeks per year" to qualify as a "wetland." Gordon M. Brown, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994). In other words, a "wetland" may be mostly dry land.[2]

No reasonable person would conclude that mostly dry land is subject to federal control as a jurisdictional wetland. Ocie Mills and his son found this out the hard way. These two were convicted in the Eleventh Circuit for filling "wetlands" on their

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[2] The definition of "discharge" also defies common sense. The Corps interprets that term to mean the mere movement of dirt in situ. *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001).

property without a permit—an act a district court characterized as the innocuous placing of clean fill on dry land:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corp of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable waters of the United States."

United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

For this offense, Mills and his son served 21 months in prison, one year in supervised release, paid $5,000 in fines, and were required to restore the site to its original condition. *Id*.

This Court has long held that "before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). *See also United States v. Lanier*, 520 U.S. 259, 267 (1997). But the "significant nexus" test provides no such clarity. To the contrary, as the *Rapanos* plurality points out, "Justice Kennedy's 'significant nexus' standard is perfectly opaque. When, exactly, does a wetland 'significantly affect' covered waters, and when are its effects 'in contrast . . . speculative or insubstantial?' " *Rapanos*, 126 S. Ct. at 2235 n.15.

Similar questions were raised by the district court in *United States v. Chevron Pipe Line Company*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006), the first case to apply the *Rapanos* decision. That case involved an accidental discharge of oil into a dry, unnamed drainage ditch that flowed only during

significant storm events. *Id*. at 607. Although the oil was cleaned up before it reached any water, as required by state law, and the nearest navigable-in-fact waterway was connected to the ditch by intermittent streams scores of miles away, the Corps of Engineers sought fines from the company for discharging into "navigable waters" without a federal permit. *Id*. at 607-608. Therefore, the court looked to *Rapanos* for guidance in determining the scope of federal jurisdiction.

The court was quick to dismiss the Kennedy approach as an unworkable standard. The court observed that Justice Kennedy "advanced an ambiguous test—whether a 'significant nexus' exists to waters that are/were/might be navigable." *Id*. at 613. According to the court, "[t]his test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?" *Id*. (citations omitted). Therefore, instead of relying on the Kennedy opinion, the court based its decision on existing Fifth Circuit precedent and "the Supreme Court's plurality opinion in *Rapanos v. United States*" and concluded there was no federal jurisdiction. *Id*. at 615. That decision underscores the real world difficulties that are created for the enforcing agencies and the trial courts when this Court does not provide clear limits on federal authority.

Thus, the "significant nexus" standard imposed by the court in *Gerke*, and authorized alternatively in this case, is sure to result in inconsistent and unpredictable applications of the law. Only the plurality test, with its clearer lines of demarcation, is likely to provide agency officials and the regulated public with consistent and predictable jurisdictional rules. As the dissent in this case observed, the "significant nexus" approach "leaves the door open to continued federal overreach" while the plurality's restriction on federal jurisdiction "strikes a constitutional balance" between federal power and individual rights. App. at. C-19 (Torruella, Circuit Judge, dissenting).

CONCLUSION

The First Circuit expressly rejected the holdings of the Seventh and Ninth Circuits that the Kennedy test is controlling under *Rapanos*. This created a direct conflict over federal wetland jurisdiction that must be resolved by this Court. The decision below also added to the substantial confusion among the Circuits as to how to apply *Marks* to this Court's split decisions. Inaction will result in continuing uncertainty as to Clean Water Act jurisdiction and undermine the Constitution's safeguards against arbitrary enforcement of the law.

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Respectfully submitted,

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