# BEWARE THE IDES OF *MARKS*: EXAMINING THE POSSIBLE FUTURE OF THE *MARKS* RULE IN THE ROBERTS COURT ERA

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*Under the* Marks *Rule, a fractured Supreme Court decision's controlling precedential value is assigned to the Justice's opinion that constitutes the "narrowest grounds" supporting the Court's judgment. Unfortunately, this seemingly simple standard has resulted in chaotic applications and geographically inconsistent results across the United States Courts of Appeals since the Court originally articulated the* Marks *Rule in 1977. For decades, the Court has not addressed the proper application of the* Marks *Rule, leaving the various circuits to develop their own approaches to applying the* Marks *Rule. In its 2020 decision in* Ramos v. Louisiana*, however, the Court acknowledged that the Justices have divergent approaches to applying the* Marks *Rule. The geographic inconsistency in interpreting Supreme Court decisions under such divergent approaches to applying the* Marks *Rule—as illustrated by the circuits' divergent interpretations of the Court's fractured decision in* June Medical Services L.L.C. v. Russo*—necessitates that the Court articulate a uniform application of the* Marks *Rule. This Comment analyzes what the Court's current composition could mean for the possible development of such a uniform application of the* Marks *Rule.*

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## INTRODUCTION

Writing for the majority of the Supreme Court in *Marks v. United States*,[1] Justice Lewis J. Powell, Jr., stated: "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."[2] These forty-four words, known as the *Marks* Rule, established the standard the Supreme Court and other federal courts use to assign precedential value to fractured Supreme Court decisions where at least five Justices do not sign on to a clear majority opinion.[3] In the decades since the *Marks* Rule's creation, the Court has chosen not to clarify the scope and depth of the proper application of the *Marks* Rule.[4] But because the *Marks* Rule is "more easily stated than applied," determining how best to apply it has "baffled and divided" the federal judiciary.[5] As a

1. 430 U.S. 188 (1977).

2. *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)) (internal quotation marks omitted).

3. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1430 (2020); United States v. Duvall, 740 F.3d 604, 610–11 (D.C. Cir. 2013).

4. *See* Hughes v. United States, 138 S. Ct. 1765, 1772 (2018); Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

5. *Id.* at 325 (quoting Nichols v. United States, 511 U.S. 738, 745–46 (1994)).

result, the United States Courts of Appeals have developed a divergent system of applications for the *Marks* Rule in an attempt to create a workable framework for interpreting fractured Supreme Court opinions.[6] This divergent system has resulted in the precedential value of fractured Supreme Court decisions varying by circuit, depending on each circuit's chosen application of the *Marks* Rule.[7]

During the October 2019 Term, in *Ramos v. Louisiana*,[8] the Supreme Court acknowledged that the Justices have divergent approaches to applying the *Marks* Rule.[9] While clarification of the proper application of *Marks* was not an issue certified before the Court in *Ramos*, the Justices' divergent approaches to applying the *Marks* Rule led them to reach three separate opinions on *Marks* grounds in the case.[10] The fractured nature of the *Ramos* opinions' divergent approaches to applying the *Marks* Rule would, ironically, need to be resolved via either the *Marks* Rule itself or a future opinion where five of the Justices clearly agree on the proper application of the *Marks* Rule. In the not too distant future, the Supreme Court will need to issue a clear majority opinion that addresses the proper application of the *Marks* Rule. This opinion would have a significant impact on the American legal system because the Court's application of the *Marks* Rule would establish the precedential value of other fractured Supreme Court decisions in widely varied areas of law.[11]

This Comment argues that the divergent applications of the *Marks* Rule in the various United States Courts of Appeals and the Justices' divergent approaches to applying the *Marks* Rule in *Ramos* illustrate the need for the Supreme Court to issue an opinion that clarifies the proper application of the *Marks* Rule. Part I of this

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6. *See* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1944–45 (2019) (discussing the circuit split over the proper application of the *Marks* Rule).

7. *Id.*

8. 140 S. Ct. 1390 (2020).

9. *See id.* at 1403 (Gorsuch, J., opinion for the Court); *id.* at 1416 n.6 (Kavanaugh, J., concurring); *id.* at 1430 (Alito, J., dissenting).

10. *See id.* at 1403 (Gorsuch, J., opinion for the Court); *id.* at 1416 n.6 (Kavanaugh, J., concurring); *id.* at 1430 (Alito, J., dissenting).

11. The following represent a fraction of the areas of law that will be impacted by a future opinion clarifying the proper approach to applying the *Marks* Rule: Abortion Law (June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020)); Administrative Law (Kisor v. Wilkie, 139 S. Ct. 2400 (2019)); Civil Procedure (Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010)); Criminal Law (Borden v. United States, 141 S. Ct. 1817 (2021)); Election Law (Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008)); Environmental Law (Rapanos v. United States, 547 U.S. 715 (2006)); and Immigration Law (Kerry v. Din, 576 U.S. 86 (2015)).

Comment surveys the development of the *Marks* Rule and its divergent applications in the federal courts prior to *Ramos*. Part II provides an overview of the *Ramos* opinion and the approaches articulated by the Justices in *Ramos* about how the *Marks* Rule should be applied. Part III explores the approaches to applying the *Marks* Rule taken by Justice Thomas, Justice Sotomayor, and Justice Barrett, because these three Justices did not address the *Marks* Rule in *Ramos*. Part IV demonstrates how the federal circuit courts currently give different weight to fractured Supreme Court decisions, depending on each circuit's chosen application of the *Marks* Rule. Part IV does so through the lens of the circuits' divergent treatment of the Supreme Court's recent 4-1-4 decision in *June Medical Services L.L.C. v. Russo*.[12]

## I. THE LANDSCAPE OF *MARKS* RULE JURISPRUDENCE

The Supreme Court first articulated the *Marks* Rule in its 1977 decision in *Marks v. United States*.[13] In *Marks*, the Court addressed a Fifth Amendment Due Process Clause challenge to an alleged ex post facto application of the *Miller v. California*[14] obscenity test.[15] Because the events leading to the petitioners' charges occurred after the Supreme Court decided *Memoirs v. Massachusetts*[16] but before the Supreme Court decided *Miller*, the petitioners argued that the older *Memoirs* test applied rather than the *Miller* test.[17] The respondent maintained that the *Miller* test applied because *Memoirs* had no binding precedential value as a plurality decision and because the *Miller* test did not "significantly change the law" from the *Roth v. United States*[18] test, which predated the *Memoirs* test.[19] To address which test governed the issue, the Court established the *Marks* Rule.[20] The Court held that the plurality opinion in *Memoirs* "provided the governing standards" because the view of the plurality constituted the "position taken by those Members who concurred in the judgments on the narrowest grounds."[21] The Court, however, did not clarify how it, lower federal courts, or litigants should ascertain what opinion constitutes the "narrowest grounds" in future cases.[22]

12. 140 S. Ct. 2103 (2020).
13. Marks v. United States, 430 U.S. 188, 193–94 (1977).
14. 413 U.S. 15 (1973).
15. *Marks*, 430 U.S. at 189–91.
16. 383 U.S. 413 (1966) (plurality opinion).
17. *Marks*, 430 U.S. at 191.
18. 354 U.S. 476 (1957).
19. *Marks*, 430 U.S. at 192–93.
20. *Id.* at 193.
21. *Id.* at 193–94.
22. *Id.*

In the post-*Marks* era, the United States Courts of Appeals have interpreted and applied the *Marks* Rule's "narrowest grounds" standard in divergent ways.[23] These divergent applications of the *Marks* Rule assign different precedential value to fractured Supreme Court decisions in different circuits.[24] As a result, the divergent applications cause some circuits to recognize a fractured Supreme Court decision as protecting a constitutional or statutory right while other circuits fail to recognize a fractured Supreme Court decision as protecting the same constitutional or statutory right.[25] In the October 2017 Term, the Supreme Court granted certiorari on a petition that asked the Court to clarify the proper application of the *Marks* Rule in *Hughes v. United States*.[26] While the Court acknowledged the issue posed by the divergent *Marks* Rule applications, the Court ultimately decided *Hughes* on other grounds without addressing the proper application of the *Marks* Rule.[27]

The *Hughes* decision left in place the current multifaceted framework for applying the *Marks* Rule, which follows four different applications of the *Marks* Rule across the lower federal courts. First, some circuits have adopted the Median Opinion application of the *Marks* Rule.[28] Under the Median Opinion application, a circuit treats the concurring opinion of the "median" Justice as the narrowest grounds for *Marks* purposes, making a concurrence written by such a median Justice binding in the circuit.[29]

Second, several circuits have adopted the Logical Subset application of the *Marks* Rule.[30] Under the Logical Subset application, a circuit interprets the *Marks* Rule to only give a concurrence precedential weight when the concurrence's rationale is

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23. *See* Re, *supra* note 6, at 1944–45.

24. These divergent applications of the *Marks* Rule can result in fractured Supreme Court decisions providing constitutional protections in some circuits but not providing the same protections in other circuits, as explained in Subparts IV.A and IV.C of this Comment.

25. *See infra* Subparts IV.B and IV.C. The implications from this result of the current *Marks* Rule framework are discussed in Subpart IV.D of this Comment.

26. 138 S. Ct. 1765, 1771–72 (2018).

27. *Id.* at 1772 ("[I]t will be unnecessary to consider [the proper application of the *Marks* Rule] . . . despite the extensive briefing and careful argument the parties presented to the Court concerning the proper application of *Marks*.").

28. *See, e.g.*, Bormuth v. County of Jackson, 849 F.3d 266, 279 (6th Cir. 2017).

29. *See* Re, *supra* note 6, at 1977.

30. *See, e.g.*, King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) ("[O]ne opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning . . . .").

a narrower "logical subset" of the plurality's more expansive rationale.[31]

Third, some circuits have adopted the All Opinions application of the *Marks* Rule.[32] This approach to the *Marks* Rule requires a consideration of all plurality opinions, concurring opinions, and dissenting opinions from a fractured Supreme Court decision. After all opinions are considered, circuits following the All Opinions application interpret the *Marks* Rule to give precedential value to whatever judgment and reasoning are agreed upon by five Justices.[33] The Justices need not be the same for the reasoning and the judgment because both the reasoning and the judgment have separate precedential value under the All Opinions approach.[34] If five Justices agree on any principle, then the principle will be recognized as binding precedent.[35]

Fourth, Professor Ryan C. Williams has proposed a Shared Agreement application of the *Marks* Rule.[36] Under the Shared Agreement application, the plurality opinions from a fractured Supreme Court decision constitute binding precedent when the rationale from each plurality opinion can be applied without contradicting the other plurality opinions.[37] However, if the rationales from the pluralities are irreconcilable and the application of one plurality would be outcome determinative, then the lower federal court is free to apply whichever plurality's rationale it considers more persuasive.[38]

This multifaceted approach to applying the *Marks* Rule has created a system that is ripe for reconsideration by the Supreme Court. Indeed, the four different applications are themselves open to interpretation within each circuit as judges debate whether an

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31. *See* Re, *supra* note 6, at 1980. The Logical Subset application has been criticized as being inconsistent with the original *Marks* decision, despite its popularity among the federal circuit courts. While an analysis of the critiques of the four primary applications exceeds the scope of this Comment, see Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 302 (2019), for a full critique of the Logical Subset application.

32. *See* Re, *supra* note 6, at 1988–89.

33. *See, e.g.*, United States v. Donovan, 661 F.3d 174, 182 (3d Cir. 2011).

34. *See* Re, *supra* note 6, at 1988–90.

35. *Id.* at 1988–89.

36. Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 802–03 (2017). While the federal judiciary has not adopted the Shared Agreement application on a widespread basis, the application bears mentioning since a federal district court cited the Shared Agreement application for the first time in September 2020. *See* Creasy v. Charter Commc'ns, Inc., 489 F. Supp. 3d 499, 503 (E.D. La. 2020).

37. Williams, *supra* note 36, at 836–37.

38. *Id.* at 837.

interpretation of a fractured Supreme Court decision constitutes the proper *Marks* Rule application under circuit precedent.[39] Accordingly, the Supreme Court needs to articulate a unified application of the *Marks* Rule that would prevent fractured Supreme Court decisions from having divergent precedential value across the different circuits. This unified application would provide needed clarity to the lower federal courts, resolve the circuit split over the proper application of the *Marks* Rule, and establish a clear standard for the Supreme Court, lower federal courts, and litigants to follow.

## II. *RAMOS V. LOUISIANA*: ILLUSTRATION OF THE NEED FOR *MARKS* RULE REFORM

The Supreme Court's decision from the October 2019 Term in *Ramos v. Louisiana* illustrates the need for clarification of the *Marks* Rule's proper application. In *Ramos*, the Court held that Louisiana's nonunanimous jury statute violated the right to a jury trial under the Sixth Amendment.[40] The Court in *Ramos* issued a very fractured decision, featuring five separate opinions.[41] The fractured nature of the decision stemmed from the Justices' debates over the proper application of the *Marks* Rule and the proper application of stare decisis.[42]

The *Ramos* decision implicated the *Marks* Rule because it turned on the precedential value of the Court's fractured decision in *Apodaca v. Oregon*.[43] The Justices issued three different opinions regarding the precedential value of *Apodaca* because they relied on divergent applications of the *Marks* Rule.[44] This split among the Court is

39. *See, e.g.*, Whole Woman's Health v. Paxton, 978 F.3d 896, 904 (5th Cir.), *reh'g en banc granted, opinion vacated*, 978 F.3d 974 (5th Cir. 2020) (en banc), *rev'd, injunction vacated, and judgment rendered*, 10 F.4th 430 (5th Cir. 2021) (en banc) (plurality opinion); *see also id.* at 916 (Willett, J., dissenting).

40. Ramos v. Louisiana, 140 S. Ct. 1390, 1391–92 (2020).

41. *Id.* at 1390 (listing the five separate opinions).

42. Most commentary on the *Ramos* decision has primarily focused on the decision's important implications on the doctrine of stare decisis. *See, e.g.*, Advisory Opinions, *Showing a Little Ankle*, THE DISPATCH (Apr. 20, 2020) (downloaded using Spotify) (focusing on the stare decisis implications of the Court's decision in *Ramos*); Amy Howe, *Opinion Analysis: With Debate over Adherence to Precedent, Justices Scrap Nonunanimous Jury Rule*, SCOTUSBLOG (Apr. 20, 2020, 2:28 PM), https://www.scotusblog.com/2020/04/opinion-analysis/ (same). This Part of this Comment focuses on the *Ramos* decision's equally significant implications on the future of the *Marks* Rule. For a reader interested in a different viewpoint on the *Ramos* decision's possible impacts on the future of the *Marks* Rule, see Nina Varsava, Essay, *Precedent on Precedent*, 169 U. PENN. L. REV. ONLINE 118, 120 (2020).

43. 406 U.S. 404 (1972) (plurality opinion).

44. *Ramos*, 140 S. Ct. at 1403 (Gorsuch, J., opinion for the Court); *id.* at 1416 n.6 (Kavanaugh, J., concurring); *id.* at 1430 (Alito, J., dissenting).

significant for two primary reasons. First, the conflict among the Justices over the proper application of the *Marks* Rule illustrates the ambiguous nature of the current *Marks* Rule framework.[45] While the Court refrained from clarifying the *Marks* Rule in *Ramos*, the fractured *Ramos* decision nonetheless highlights the need for the Court to take up a case that would resolve the proper application of the *Marks* Rule. Second, the three approaches to applying the *Marks* Rule articulated by the Justices who addressed the *Marks* question in *Ramos* show some commonalities with the Justices who did not address the *Marks* question in *Ramos*.[46] Thus, the Justices' approaches to the *Marks* Rule in *Ramos* suggest possible approaches, which the Court could adopt when it eventually articulates a uniform application of the *Marks* Rule. All three possible approaches outlined in *Ramos* are addressed, in turn, below.

### *A. Justice Gorsuch's Approach: Rejection of the Median Opinion Application*

In an opinion joined by the late Justice Ruth Bader Ginsburg and Justice Stephen Breyer, Justice Neil Gorsuch concluded that the *Marks* Rule had no impact on the Court's ability to interpret *Apodaca* because *Apodaca* lacked any precedential value.[47] Justice Gorsuch pointed out that Justice Powell's concurrence in *Apodaca* promoted the theory of dual-track incorporation, which would not have incorporated the Sixth Amendment to the states.[48] According to Justice Gorsuch, Justice Powell's reliance on dual-track incorporation meant that the concurrence had no precedential value because the Court had directly rejected dual-track incorporation prior to *Apodaca*.[49] Justice Gorsuch argued that ascribing precedential value to Justice Powell's concurrence would require the Court "to embrace a new and dubious proposition: that a single Justice writing only for

45. Re, *supra* note 6, at 1974; *Ramos*, 140 S. Ct. at 1403 (Gorsuch, J., opinion for the Court); *id.* at 1416 n.6 (Kavanaugh, J., concurring); *id.* at 1430 (Alito, J., dissenting).

46. Justice Sonia Sotomayor and Justice Clarence Thomas did not directly address the *Marks* Rule's implications on *Apodaca* in their opinions in *Ramos* because their opinions focused on other aspects of the case. *See Ramos*, 140 S. Ct. at 1408–10 (Sotomayor, J., concurring); *id.* at 1420–25 (Thomas, J., concurring). Justice Amy Coney Barrett had not joined the Court when *Ramos* was decided and thus took no part in the *Ramos* decision. *See id.* at 1390 (listing the names of the participating justices). The approaches taken by these three Justices are addressed in Part III.

47. *Ramos*, 140 S. Ct. at 1402–04 (Gorsuch, J., opinion for the Court).

48. *Id.* at 1398.

49. *Id.* at 1403–04.

himself has the authority to bind this Court to propositions it has already rejected."[50]

In Justice Gorsuch's view, recognition of Justice Powell's concurrence would require the Court to adopt a new rule that the Court in "*Marks* never sought to offer or defend."[51] An application of *Marks* that gives so much weight to a solo concurrence would, according to Justice Gorsuch, "destabilize [rather] than honor precedent"[52] and "do more to harm than advance *stare decisis*."[53] Further, Justice Gorsuch maintained that the overlap between the judgment of Justice Powell's concurrence and the judgment of the plurality in *Apodaca* was irrelevant.[54] Under Justice Gorsuch's approach to the *Marks* Rule, "stripped from any reasoning, a judgment alone cannot be read" to provide a binding precedent under *Marks* Rule analysis.[55] Thus, Justice Gorsuch concluded his analysis of the *Marks* issue in *Ramos* by stating that "*Marks* has nothing to do with this case."[56]

Justice Gorsuch's approach to applying the *Marks* Rule in *Ramos* appears to reject the Median Opinion application, limit the applicability of the All Opinions application, and interpret the *Marks* Rule as a variant of the Logical Subset application. The rejection of assigning binding precedential authority to a Justice's solo concurrence marks a strong rejection of the Median Opinion application. Likewise, Justice Gorsuch's limitation of the *Marks* Rule to only rationales, rather than judgments, appears to follow a limited version of the All Opinions application. Under this limited version of the All Opinions application, a concurrence only has precedential value to the extent that its rationale agrees with the plurality's rationale. Justice Gorsuch's approach to interpreting the *Marks* Rule thus appears to be much more similar to the Logical Subset application, which emphasizes overlapping rationales. However, unlike the standard Logical Subset application, Justice Gorsuch's approach does not seem to reject the idea that multiple opinions can be "stacked" together to count to the five votes necessary for a majority.

In this way, Justice Gorsuch's approach appears to be a hybrid of the All Opinions and Logical Subset applications, whereby all opinions can be considered only to the extent of overlapping rationales. Thus, under Justice Gorsuch's approach to the *Marks*

50. *Id.* at 1402.
51. *Id.* at 1403.
52. *Id.* at 1402.
53. *Id.* at 1403–04.
54. *Id.* at 1404.
55. *Id.* at 1403–04.
56. *Id.* at 1403.

Rule, the *Marks* Rule assigns no precedential value to any given opinion in a fractured Supreme Court decision unless five Justices agree on a rationale. Because Justice Breyer joined this section of Justice Gorsuch's opinion in *Ramos*, it appears that at least two Justices on the current Court ascribe to this rationale-focused application of the *Marks* Rule.

### *B. Justice Kavanaugh's Approach: A Two-Part Hybrid of the Median Opinion and All Opinions Applications*

In a solo concurrence in *Ramos*, Justice Brett Kavanaugh agreed with Justice Gorsuch that the Court should not follow the *Apodaca* decision, but he disagreed with Justice Gorsuch over the precedential value of the *Apodaca* decision under the *Marks* Rule.[57] Justice Kavanaugh argued that the *Marks* Rule applied to the Court's decision in *Apodaca* but that *Apodaca* should be overturned in *Ramos*.[58] Justice Kavanaugh maintained, however, that the *Apodaca* decision had precedential value under the *Marks* Rule, which could not be ignored unless the Court overturned *Apodaca*.[59] To reach this conclusion, Justice Kavanaugh applied his approach to the *Marks* Rule, which he had previously articulated in a concurring opinion in *United States v. Duvall*[60] as then-Judge Kavanaugh on the D.C. Circuit.[61] A careful analysis of Judge Kavanaugh's *Duvall* concurrence indicates that Justice Kavanaugh uses a hybrid approach to applying the *Marks* Rule, combining the Median Opinion and All Opinions applications of the *Marks* Rule.

In *Duvall*, Judge Kavanaugh's concurrence critiqued the United States Court of Appeals for the District of Columbia Circuit's prior application of the *Marks* Rule in *United States v. Epps*[62] as inconsistent with the Supreme Court's formulation of the *Marks* Rule and thus inconsistent with vertical stare decisis.[63] Judge Kavanaugh urged the D.C. Circuit to reevaluate its application of *Marks* in a future decision and to avoid "deciding certain cases in a manner inconsistent with Supreme Court precedent."[64] Judge Kavanaugh also outlined his approach to the *Marks* Rule as an alternative to the

57. *Id.* at 1416 n.6 (Kavanaugh, J., concurring).
58. *Id.* at 1416–17 n.6.
59. *Id.*
60. 740 F.3d 604 (D.C. Cir. 2013) (per curiam).
61. *Id.* at 607 (Kavanaugh, J., concurring).
62. 707 F.3d 337 (D.C. Cir. 2013).
63. *Duvall*, 740 F.3d at 618 (Kavanaugh, J., concurring) ("[I] recognize that *Marks* can sometimes seem like a Rubik's Cube. But in my view, the *Epps* decision jumped the rails.").
64. *Id.*

D.C. Circuit's application of the *Marks* Rule.[65] Judge Kavanaugh pointed out that the purpose of the *Marks* Rule "is for lower courts to reach results with which a majority of the Supreme Court in the relevant precedent would *agree*."[66] Judge Kavanaugh then stated that the *Marks* Rule applies to both the judgment and the reasoning of "a given Supreme Court case" since each category of precedent "binds all lower courts."[67]

With the *Marks* Rule's purpose and scope in mind, Judge Kavanaugh articulated a two-step approach to applying the *Marks* Rule.[68] First, the lower court should identify whether the Supreme Court decision features a concurrence that "occupies the middle ground" between a broadly decided opinion supporting the judgment and the dissenting opinion.[69] If such a concurrence exists, then the concurrence is binding because that opinion will allow lower courts "to decide cases consistently with the opinions of a majority of the Supreme Court in the relevant precedent."[70] Second, in cases where no clear "middle ground" opinion exists, Judge Kavanaugh identified a "logical corollary to the *Marks*" Rule: "lower courts should still strive to decide the cases before them in a way consistent" with the Supreme Court's fractured decision.[71] This logical corollary to the *Marks* Rule requires the lower courts to apply "the tests articulated in the Justices' various opinions in the binding case" before adopting "the result that a majority of the Supreme Court would have reached."[72] In Judge Kavanaugh's view, this two-step approach provides the lower federal courts with a "commonsense" and "foolproof way to reach the correct result" when applying the *Marks* Rule.[73]

Justice Kavanaugh applied this two-step approach to the *Marks* Rule in *Ramos*.[74] In the sixth footnote of his *Ramos* concurrence,

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65. *Id.* at 610.
66. *Id.* at 609.
67. *Id.*
68. *Id.* at 610.
69. *Id.*
70. *Id.*
71. *Id.* at 611.
72. *Id.*
73. *Id.* at 610–11. In footnote two of his concurrence in *Duvall*, Judge Kavanaugh pointed out that the Supreme Court would not be bound to the same extent as the lower federal courts by a *Marks* Rule analysis because the Supreme Court is free to abandon prior precedent as a matter of stare decisis. *Id.* at 611 n.2. However, as now-Justice Kavanaugh's concurrence in *Ramos* demonstrates, so long as the Supreme Court does not overrule or distinguish a prior precedent (like *Apodaca*), the *Marks* Rule identifies the precedent that the Supreme Court will follow. Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.6 (2020) (Kavanaugh, J., concurring).
74. *Id.* at 1417 n.6 (Kavanaugh, J., concurring).

Justice Kavanaugh rearticulated his approach to the *Marks* Rule from *Duvall*, provided a truncated version of his reasoning from *Duvall*, and then applied his two-step analysis to the facts of the case before the Court in *Ramos*.[75] Justice Kavanaugh identified the application of *Marks* to *Apodaca* as one of the "very rare occasions" where "it can be difficult to determine which opinion's reasoning has precedential effect under *Marks*."[76] Therefore, Justice Kavanaugh turned to the second prong of his *Marks* analysis to identify "the result of the [*Apodaca*] decision," which "constitutes a binding precedent . . . unless and until it is overruled by this Court."[77] Based on his two-step approach to the *Marks* Rule, Justice Kavanaugh concluded that *Apodaca*'s result was a binding precedent under *Marks*.[78]

Justice Kavanaugh's two-part hybrid approach to the *Marks* Rule can be seen as an application of *Marks* that combines the Median Opinion application and the All Opinions application.[79] In both *Duvall* and *Ramos*, the first part of Justice Kavanaugh's two-part approach to the *Marks* Rule identified whether a "middle ground" opinion exists between the plurality supporting the judgment and the dissent.[80] This first part of the two-part approach is a form of the traditional Median Opinion application. When a clear median opinion did not exist, Justice Kavanaugh then advocated the use of the All Opinions application as the second part of his two-part approach to the *Marks* Rule.

Justice Kavanaugh's two-part hybrid approach to the *Marks* Rule differs in two major ways from the approach advocated by Justice Gorsuch. First, Justice Gorsuch's approach to the *Marks* Rule rejects the utility of a Median Opinion approach, but Justice Kavanaugh utilizes the Median Opinion approach as the first part of his two-part approach to the *Marks* Rule. Second, Justice Gorsuch's approach to the *Marks* Rule discounts the separate precedential value of an

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1416 n.6.

79. Prior to *Ramos*, *Marks* Rule scholars debated whether to classify then-Judge Kavanaugh's concurrence in *Duvall* as endorsing a form of the All Opinions application or a form of the Logical Subset application. *Compare* Re, *supra* note 6, at 1992 n.253 (arguing that the *Duvall* concurrence endorsed the All Opinions application), *with* Varsava, *supra* note 31, at 302–03 (arguing that the *Duvall* concurrence endorsed a Logical Subset application). Justice Kavanaugh's emphasis in *Ramos* on the independent precedential value of a fractured decision's rationale and judgment indicates that his approach to *Marks* Rule should be seen as a form of the All Opinions application.

80. *Ramos*, 140 S. Ct. at 1417 n.6 (Kavanaugh, J., concurring); United States v. Duvall, 740 F.3d 604, 610 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

opinion's reasoning and an opinion's judgment, while Justice Kavanaugh's approach to the *Marks* Rule treats both the opinion's reasoning and the opinion's judgment as having independent precedential value. Despite the differences between these two approaches, both Justice Kavanaugh's approach and Justice Gorsuch's approach utilize a form of the All Opinions application. This openness to a form of the All Opinions application of the *Marks* Rule is shared by several other members of the Court,[81] and could prove very influential when the Court chooses to address the proper application of the *Marks* Rule.

### *C. Justice Alito's Approach: A Hybrid of the Median Opinion and All Opinions Applications*

Justice Samuel Alito articulated his approach to the *Marks* Rule in a dissent in *Ramos* that was joined in relevant part by Chief Justice John Roberts and Justice Elena Kagan.[82] Regarding the precedential value of the *Apodaca* decision's result, Justice Alito agreed with Justice Kavanaugh and disagreed with Justice Gorsuch.[83] In Justice Alito's view, *Apodaca*'s "result is a precedent" under *Marks* because the *Marks* Rule "ascribes precedential status to decisions made without majority agreement on the underlying rationale."[84]

Proceeding from this basic premise, Justice Alito articulated three other principles that guide his approach to the *Marks* Rule. First, Justice Alito maintained that "[t]he logic of the *Marks*" Rule permits the concurring opinion of a single Justice in the majority to "constitute the binding rule."[85] Justice Alito pointed to then-Judge Kavanaugh's opinion in *Duvall* as an example of the way a court should apply the *Marks* Rule to the median opinion of a fractured Supreme Court decision.[86] Second, Justice Alito argued that the *Marks* Rule permits a fractured Supreme Court decision to overrule a previous Supreme Court decision when at least five Justices in the fractured decision agree on the judgment.[87] Third, Justice Alito asserted that a concurrence's rationale is only binding under *Marks*

81. *See infra* Subparts II.C and III.D.

82. *Ramos*, 140 S. Ct. at 1425, 1430 (Alito, J., dissenting).

83. *Id.* at 1430.

84. *Id.* at 1429–30.

85. *Id.* at 1431.

86. *Id.* at 1431 n.14 (citing United States v. Duvall, 705 F.3d 479, 483 n.1 (D.C. Cir. 2013) (Kavanaugh, J., concurring)). The dissent's approval of Justice Kavanaugh's approach to the *Marks* Rule demonstrates an openness from at least four members of the Court in *Ramos* to follow Justice Kavanaugh's approach to *Marks*. As further discussed in Subpart III.D below, this approach seems likely to provide a baseline framework that the Court could use to articulate a clear and uniform application of the *Marks* Rule in a future case.

87. *Id.* at 1431.

when it does not decide a case on more expansive grounds than the other opinion supporting the judgment.[88] Specifically, in *Apodaca*, Justice Alito argued that the rationale from Justice Powell's concurrence was not binding on the Court because its expansive rationale did not constitute the narrowest grounds.[89] Rather, in Justice Alito's view, Justice Powell's expansive concurrence in *Apodaca* was only binding to the extent it agreed with the plurality in *Apodaca* as to the case's result.[90]

Justice Alito's three principles for applying the *Marks* Rule combine the Median Opinion and All Opinions applications of the *Marks* Rule. The first principle is a form of the Median Opinion application of the *Marks* Rule because the first principle involves looking for a median opinion between the broadest opinion supporting the judgment and the dissent. The second and third principles rely on a form of the All Opinions application because the second and third principles require the Court to evaluate every opinion in a fractured decision to ascertain which result will receive the support of five justices.

Justice Alito's approach to the *Marks* Rule closely mirrors Justice Kavanaugh's two-part approach to the *Marks* Rule. Just as Justice Kavanaugh's two-part approach to the *Marks* Rule involves the Median Opinion application as the first part and the All Opinion application as the second part, Justice Alito's approach to the *Marks* Rule relies on the Median Opinion application before turning to an All Opinions application when no median opinion exists. Further, just as Justice Kavanaugh's approach to the *Marks* Rule treats the rationale and the judgment of a fractured Supreme Court decision as having independent precedential value, Justice Alito's approach to the *Marks* Rule treats the rationale and the judgment of a fractured Supreme Court decision as having independent precedential value. As such, the approaches articulated by these two Justices (and endorsed by Chief Justice Roberts and Justice Kagan) are virtually identical, and a similar approach could provide the basis for the Court's adoption of a uniform approach to applying the *Marks* Rule.

Overall, the Justices' approaches to the *Marks* Rule in *Ramos* fall into two camps. In the first camp, Justice Gorsuch, Justice Ginsburg, and Justice Breyer endorsed a rationale-centric approach to the *Marks* Rule. The rationale-centric approach would limit the *Marks* Rule's applicability to rationales, reject the Median Opinion application, and reduce the overall amount of precedent recognized by the *Marks* Rule. In the second camp, Justice Kavanaugh, Justice

88. *Id.*
89. *Id.*
90. *Id.* at 1431–32.

Alito, Chief Justice Roberts, and Justice Kagan endorsed an approach that combines the Median Opinion and All Opinions applications to the *Marks* Rule. This hybrid approach encompasses both rationales and results, utilizes the Median Opinion application as the first part of the *Marks* analysis, and utilizes the All Opinions application as the second part of the *Marks* analysis. Neither camp fielded a clear majority opinion in *Ramos*; the Justices who addressed the *Marks* Rule issue split 4-3, while Justice Clarence Thomas and Justice Sonia Sotomayor did not address the *Marks* Rule issue at all.[91] In this way, *Ramos* illuminates the current Justices' approaches to applying the *Marks* Rule, but *Ramos* does not provide the clear majority opinion necessary to resolve the circuit split over the proper application of the *Marks* Rule. To resolve the chaos caused by the circuit split, five members of the Court will need to agree on the proper application of the *Marks* Rule in a future case.

## III. BEYOND *RAMOS*: THE OTHER JUSTICES' APPROACHES AND THE POSSIBLE FUTURE OF THE *MARKS* RULE

The approaches to applying the *Marks* Rule of the Justices who did not address the *Marks* Rule in *Ramos* must be considered when evaluating the possible future of the *Marks* Rule. The six current members of the Court who addressed the *Marks* Rule issue in the *Ramos* decision split 4-2.[92] To evaluate what a possible future application of the *Marks* Rule could look like, the approaches to the *Marks* Rule advocated by the Court's other three members, Justice Clarence Thomas, Justice Sonia Sotomayor, and Justice Amy Coney Barrett, are considered below.

### *A. Justice Thomas's Approach: Openness to the Median Opinion Application*

Justice Thomas addressed his view on the proper application of the *Marks* Rule while dissenting in *June Medical Services L.L.C. v. Russo*.[93] Arguing that the constitutionality of third-party standing in the abortion context had not been fully resolved by Supreme Court precedent, Justice Thomas pointed to the Court's fractured decision

91. *Id.* at 1408 (Sotomayor, J., concurring) (focusing on the stare decisis implications of overruling *Apodaca*); *id.* at 1421 (Thomas, J., concurring) (arguing that *Ramos* should have been decided under the Fourteenth Amendment's Privileges or Immunities Clause, not the Fourteenth Amendment's Due Process Clause).

92. In the wake of Justice Ginsburg's passing, the split addressed in Subpart II.C has changed from 4-3 to 4-2. *See* Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020), https://www.npr.org/2020/09/18/100306972/.

93. 140 S. Ct. 2103, 2148 n.4 (2020) (Thomas, J., dissenting).

in *Singleton v. Wulff*[94] as the only precedent that specifically addressed the issue.[95] The way Justice Thomas applied the *Marks* Rule to *Singleton* appears to reveal his approach to applying the *Marks* Rule.

In *Singleton*, the Court issued a fractured 4-1-4 opinion regarding whether doctors have third-party standing to challenge abortion regulations that impact their patients.[96] Four Justices concluded that the doctors could bring suit via third-party standing, and four other Justices, writing in dissent, concluded that the doctors could not bring suit via third-party standing.[97] In a concurring opinion, Justice John Paul Stevens concluded that the doctors had a personal financial interest, giving them individual standing to bring suit.[98] However, Justice Stevens did not conclude that the doctors had third-party standing because he was "not sure whether [third-party] analysis would, or should, sustain the doctors' standing . . . ."[99]

Under Justice Thomas's approach to the *Marks* Rule, Justice Stevens' concurrence in *Singleton* must be treated as "the controlling opinion" regarding third-party standing because "Justice Stevens' opinion 'concurred in the judgmen[t] on the narrowest grounds.'"[100] Justice Thomas's approach to applying the *Marks* Rule thus appears to be a variant of the Median Opinion approach to the *Marks* Rule, which four other Justices already endorsed in *Ramos*.[101] By treating the median concurrence as controlling, Justice Thomas's approach to the *Marks* Rule appears to follow the hybrid approach endorsed by Justice Kavanaugh, Justice Alito, Justice Kagan, and Chief Justice Roberts in *Ramos*. By contrast, Justice Thomas's approach does not follow the rationale-centric approach endorsed by Justice Gorsuch and Justice Breyer in *Ramos*. Indeed, in a footnote in his *June Medical* dissent, Justice Thomas appears to have distinguished his approach to applying the *Marks* Rule from the rationale-centric approach to applying the *Marks* Rule endorsed by Justice Gorsuch and Justice Breyer in *Ramos*.[102]

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94. 428 U.S. 106 (1976).

95. *June Med. Servs.*, 140 S. Ct. at 2147 (Thomas, J., dissenting).

96. *Singleton*, 428 U.S. at 108.

97. *Id.* at 108–18 (plurality opinion); *id.* at 122–31 (Powell, J., dissenting in part).

98. *Id.* at 121 (Stevens, J., concurring).

99. *Id.* at 121–22.

100. *June Med. Servs.*, 140 S. Ct. at 2148 (Thomas, J., dissenting) (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

101. *See supra* Part II.

102. *June Med. Servs.*, 140 S. Ct. at 2148 n.4 (Thomas, J., dissenting) ("[J]ustices of this Court have recently taken the position that this rule from *Marks*, does not necessarily apply in all 4–1–4 cases, and that such decisions can sometimes produce 'no controlling opinion at all.' But even under *their view*,

Accordingly, at least five Justices on the Supreme Court seem open to adopting the hybrid approach to the *Marks* Rule in a future Supreme Court decision. If these five Justices signed onto a clear, single majority opinion that adopted the hybrid approach to the *Marks* Rule, then the hybrid approach would constitute the binding application of the *Marks* Rule. However, if any one of these five Justices did not join the majority or only concurred in a future case, then the Court would not have sufficient votes to resolve the *Marks* Rule issue, unless the *Marks* Rule itself was applied to the Court's fractured decision. Thus, Justice Sotomayor's approach to the *Marks* Rule and Justice Barrett's approach to the *Marks* Rule should also be considered when evaluating the *Marks* Rule's possible future.

### *B. Justice Sotomayor's Approach: Recognizing the Need for* Marks *Rule Reform*

Justice Sotomayor has acknowledged the necessity of reforming the *Marks* Rule. While Justice Sotomayor has not articulated precisely how she thinks the *Marks* Rule should be applied, she addressed the need for *Marks* Rule reform in her concurrence in *Hughes v. United States*.[103] There, Justice Sotomayor joined the majority of the Court to reject a prior concurrence she wrote in *Freeman v. United States*,[104] which addressed the same issue raised in *Hughes*. In her *Hughes* concurrence, Justice Sotomayor explained why she joined the majority in rejecting the rule articulated in her prior concurrence in *Freeman*.[105] Because her *Freeman* concurrence resulted "in a 4-1-4 decision," Justice Sotomayor observed that her *Freeman* concurrence had "left lower courts confused as to whether the plurality or the concurring opinion controlled."[106]

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Justice Blackmun's plurality in *Singleton* would not be considered binding precedent." (emphasis added) (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1403 (2020) (Gorsuch, J., concurring))).

103. 138 S. Ct. 1765, 1778–80 (2018) (Sotomayor, J., concurring).

104. 564 U.S. 522, 534–44 (2011) (Sotomayor, J., concurring).

105. *Hughes*, 138 S. Ct. at 1778–79 (Sotomayor, J., concurring). Just as Justice Sotomayor chose not to concur in *Hughes*, the late Justice Antonin Scalia once chose not to concur in a case where he believed neither the dissent nor the majority resolved the case in the best manner. *See* Arizona v. Gant, 129 S. Ct. 1710, 1725 (2009) (Scalia, J., concurring) ("It seems to me unacceptable for the Court to come forth with a 4–to–1–to–4 opinion that leaves the governing rule uncertain . . . . I therefore join the opinion of the Court."). As both *Hughes* and *Gant* illustrate, crafting decisions just to avoid a *Marks* Rule quandary has become a recurring issue facing the Supreme Court. This problem heightens the need for the Court to issue a uniform approach for applying the *Marks* Rule, which would prevent the Justices from facing the same issue in future decisions.

106. *Hughes*, 138 S. Ct. at 1778 (Sotomayor, J., concurring).

Justice Sotomayor lamented that the *Freeman* concurrence had created "significant confusion" and caused a case's outcome to "turn[] on the Circuit in which the case [arose]."[107] Justice Sotomayor explained that these differing results, which stemmed from different circuits applying divergent applications of the *Marks* Rule to her concurrence, undermined "consistency, predictability, and evenhandedness."[108] Justice Sotomayor expressed an interest in "chart[ing] a new path forward" and "ensur[ing] that similarly situated defendants are subject to a uniform legal rule" across all the United States Courts of Appeals.[109] To "mitigate[] the inconsistencies and disparities" caused by the circuits' divergent applications of the *Marks* Rule to her *Freeman* concurrence, Justice Sotomayor joined the majority opinion in *Hughes*.[110]

Justice Sotomayor's willingness to overturn her *Freeman* concurrence appears to acknowledge the chaos caused by the divergent applications of the *Marks* Rule throughout the federal circuit courts. Justice Sotomayor's desire to avoid inconsistent outcomes among the federal circuit courts and to promote a uniform legal rule throughout the federal circuit courts reflect the vertical stare decisis concerns addressed by then-Judge Kavanaugh in *Duvall*.[111] These shared concerns could lead Justice Sotomayor to join an opinion clarifying the proper application of the *Marks* Rule when the Court eventually addresses the proper application of the *Marks* Rule.

### *C. Justice Barrett's Approach: An Unknown Approach to the* Marks *Rule*

As the Court's newest member, Justice Barrett has not yet had the opportunity to address her approach to applying the *Marks* Rule as a member of the Supreme Court. Previously, Justice Barrett's opportunity to do so was likewise limited because the issue of the *Marks* Rule's applicability only arose in one case, *Yafai v. Pompeo*,[112] while she served on the Seventh Circuit.[113] In *Yafai*, then-Judge Barrett applied a concurrence written by Justice Anthony Kennedy as the controlling standard for addressing the doctrine of consular

107. *Id.* at 1779.
108. *Id.*
109. *Id.* at 1779–80 (Sotomayor, J., concurring).
110. *Id.*
111. *See* United States v. Duvall, 740 F.3d 604, 618 (D.C. Cir. 2013) (Kavanaugh, J., concurring); *supra* Subpart II.B; *infra* Subpart IV.D.
112. 912 F.3d 1018 (7th Cir. 2019).
113. A Westlaw search of Justice Barrett's writings only returned this one result for "*Marks v. United States*" in any of her opinions or articles on the site.

nonreviewability in immigration cases.[114] Instead of grounding her opinion on a *Marks* Rule basis, Judge Barrett grounded her opinion on the Seventh Circuit's prior treatment of Justice Kennedy's concurrence.[115] In fact, Judge Barrett never referenced the *Marks* Rule directly in *Yafai*; only the dissent referenced the *Marks* Rule, arguing that its proper application should lead to a different result.[116] Thus, Judge Barrett's panel opinion in *Yafai* does not shed much light on how Justice Barrett might approach the *Marks* Rule in a future case.

### *D. All Approaches Considered: The Possible Future of the* Marks *Rule*

When all nine Justices' approaches to the *Marks* Rule are considered, it appears very likely that the Supreme Court would be open to addressing the proper application of the *Marks* Rule in a future decision. The 4-2 division of the Justices who addressed the *Marks* Rule in *Ramos* is likely 5-2 given Justice Thomas's approach to the *Marks* Rule in his *June Medical* dissent.[117] Moreover, Justice Sotomayor might be open to joining those five Justices given her dissatisfaction with the inconsistent results produced by the divergent *Marks* Rule applications and her desire to craft a "uniform legal rule" for the lower federal courts to follow.[118] Even though Justice Barrett's approach to applying the *Marks* Rule remains unknown, with Justice Sotomayor's vote, at least six Justices on the Court could issue a clear majority opinion endorsing Justice Kavanaugh's two-step hybrid approach to applying the *Marks* Rule. This six-Justice majority would be sufficient to adopt a uniform application of the *Marks* Rule.

## IV. A CASE STUDY IN *MARKS* RULE CHAOS: THE AFTERMATH OF *JUNE MEDICAL SERVICES L.L.C. V. RUSSO* IN THE LOWER FEDERAL COURTS

By clarifying the proper application of *Marks*, the Court would end the chaotic and inconsistent results that are caused by varied applications of the *Marks* Rule throughout the United States Courts of Appeals. The chaos created by this varied application of the *Marks* Rule can clearly be seen in the way the United States Courts of Appeals have applied the *Marks* Rule to the Court's recent fractured

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114. *Yafai*, 912 F.3d at 1021–22 (citing Kerry v. Din, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring)).

115. *Id.* at 1022 (citing Morfin v. Tillerson, 851 F.3d 710, 713–14 (7th Cir. 2017)).

116. *See id.* at 1027 n.7 (Ripple, J., dissenting).

117. *See infra* Subpart III.A.

118. Hughes v. United States, 138 S. Ct. 1765, 1778–80 (2018) (Sotomayor, J., concurring).

decision in *June Medical Services L.L.C. v. Russo*. These divergent applications of the *Marks* Rule to the *June Medical* decision provide an excellent case study in the chaos caused by the current *Marks* Rule framework, demonstrating the need for the Court to clarify the *Marks* Rule's proper application.

### *A.* June Medical Services L.L.C. v. Russo*: A Case Ripe for* Marks *Rule Analysis*

In *June Medical*, the Court issued a fractured 4-1-4 decision addressing whether a Louisiana admitting privileges statute unconstitutionally violated a woman's right to an abortion under the Fourteenth Amendment.[119] The plurality opinion, written by Justice Breyer, determined that the Louisiana statute imposed an unconstitutional burden on a woman's right to an abortion.[120] According to the plurality, the Court's decision in *Whole Woman's Health v. Hellerstedt*[121] had expanded the undue burden analysis established by the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[122] to require consideration of a statute's benefits in addition to its burdens.[123] The plurality interpreted *Hellerstedt* as requiring federal courts "to weigh the law's 'asserted benefits against the burdens' it imposes on abortion access."[124] Applying this benefits and burdens analysis to Louisiana's admitting privileges statute, the plurality concluded that it failed to pass constitutional muster.[125]

Justice Alito authored the dissenting opinion, which Justice Thomas, Justice Gorsuch, and Justice Kavanaugh joined in relevant part.[126] Those four Justices maintained that the *Hellerstedt* benefits

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119. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2111 (2020) (plurality opinion). Since this Comment was originally written and selected for publication, the Court has granted certiorari in *Dobbs v. Jackson Women's Health Organization*, a case addressing a Mississippi statute regulating abortion that could resolve some of the ambiguities from the fractured *June Medical* decision. *See* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert. granted sub nom.* Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. May 17, 2021), 2021 WL 1951792, at *1. In granting certiorari, however, the Court declined to address the proper application of *Marks* to *June Medical*, which was the second of the initial three questions articulated by the petitioners in their petition for certiorari. *See* Petition for Writ of Certiorari at i, *Dobbs*, No. 19-1392 (U.S. June 15, 2020), 2020 WL 3317135.

120. *June Med. Servs.*, 140 S. Ct. at 2112–13.

121. 136 S. Ct. 2292 (2016).

122. 505 U.S. 833 (1992) (plurality opinion).

123. *June Med. Servs.*, 140 S. Ct at 2112 (plurality opinion) (citing *Hellerstedt*, 136 S. Ct. at 2300).

124. *Id.* (quoting *Hellerstedt*, 136 S. Ct. at 2310).

125. *Id.* at 2113.

126. *Id.* at 2153 (Alito, J., dissenting).

and burdens analysis should be rejected by the Court as an improper expansion of the *Casey* standard.[127] The dissent thus argued that the case should be remanded to the district court for further proceedings under the *Casey* standard.[128]

In a solo concurrence, Chief Justice Roberts agreed with the plurality as to the unconstitutionality of the Louisiana statute, but Chief Justice Roberts disagreed with the plurality as to the *Hellerstedt* benefits and burdens analysis being the controlling standard.[129] The Chief Justice argued that *Hellerstedt* had not actually expanded the *Casey* test, writing that "*Casey*'s requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis" for an abortion regulation to be invalidated.[130] Chief Justice Roberts further argued that the Court's decision in *Hellerstedt* did not require "consideration of a regulation's benefits, and nothing in *Casey* commands such consideration."[131] The Chief Justice thus concluded that the *Casey* undue burden analysis and "[n]othing more" constitutes the controlling abortion regulation test.[132] Chief Justice Roberts applied the *Casey* analysis and concluded that Louisiana's admitting privileges statute was an unconstitutional regulation on a woman's right to an abortion.[133]

The *Marks* Rule problem created by the Supreme Court's fractured *June Medical* decision is thus readily apparent. Four Justices in *June Medical* reached the case's judgment for one reason; a concurring Justice agreed with the judgment but for a different reason than the plurality; and the dissent agreed with the concurring Justice's reasoning, in part, while disagreeing with the application of that reasoning and thus disagreeing with the judgment. The fractured *June Medical* decision has thus resulted in a fractured system of abortion jurisprudence throughout the federal circuits. As with all fractured Supreme Court decisions, the *June Medical* decision's fractured status has allowed different federal circuits to

127. *Id.* at 2154 ("*Casey* also rules out the balancing test adopted in *Whole Woman's Health*. *Whole Woman's Health* simply misinterpreted *Casey*, and I agree that *Whole Woman's Health* should be overruled insofar as it changed the *Casey* test.").

128. *Id.* at 2153. Justice Thomas issued an additional solo dissent where he argued that the case should have been remanded and dismissed for lack of standing under Article III. *Id.* at 2153 n.8 (Thomas, J., dissenting).

129. *Id.* at 2133–36 (Roberts, C.J., concurring).

130. *Id.* at 2139.

131. *Id.*

132. *Id.*

133. *Id.* ("Because Louisiana's admitting privileges requirement would restrict women's access to abortion to the same degree as Texas's law, it also cannot stand under our precedent.").

ascribe different weight to the *June Medical* decision, depending on each circuit's chosen application of the *Marks* Rule.[134]

### *B. Federal Courts Rejecting Chief Justice Roberts's Concurrence as Binding*

Lower courts in three federal circuits, following three different Logical Subset applications of the *Marks* Rule, have determined that either Justice Breyer's plurality opinion is the controlling opinion from *June Medical* or that *June Medical* has no controlling opinion under the *Marks* Rule.[135] The opinions that have rejected the applicability of Chief Justice Roberts's concurrence are addressed below.

In *American College of Obstetricians & Gynecologists v. United States Food & Drug Administration*,[136] the United States District Court for the District of Maryland became the first court to reject the precedential value of Chief Justice Roberts's concurrence under the *Marks* Rule.[137] Applying the Fourth Circuit's Logical Subset application of the *Marks* Rule to *June Medical*, Judge Theodore Chuang rejected the argument that Chief Justice Roberts's *June Medical* concurrence is a binding precedent under the *Marks* Rule.[138] Judge Chuang explained that "the holding of *June Medical Services* is fairly limited to the reasoning that represents a 'common denominator' that [Chief Justice Roberts] shared with the plurality."[139] Because the Chief Justice and the plurality in *June Medical* did not agree on a rationale, Judge Chuang concluded that Chief Justice Roberts's concurrence is a not a binding precedent.[140]

In *Whole Woman's Health Alliance v. Hill*,[141] the United States District Court for the Southern District of Indiana also determined that Chief Justice Roberts's concurrence lacks precedential value under the Seventh Circuit's approach to applying the *Marks* Rule.[142]

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134. *See infra* Subparts IV.B and IV.C.

135. *See* Reproductive Health Servs. v. Strange, 3 F.4th 1240, 1258–59 & n.6 (11th Cir. 2021); Planned Parenthood of Ind. & Ky. v. Box, 991 F.3d 740, 741–42, 748 (7th Cir. 2021); Whole Woman's Health All. v. Hill, 493 F. Supp. 3d 694, 732 (S.D. Ind. 2020) (applying the Seventh Circuit's approach to the *Marks* Rule); Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin., 472 F. Supp. 3d 183, 209 (D. Md. 2020) (applying the Fourth Circuit's approach to the *Marks* Rule).

136. 472 F. Supp. 3d 183 (D. Md. 2020).

137. *Id.* at 209.

138. *Id.*

139. *Id.* (citing A.T. Massey Coal Co. v. Massanari, 305 F.3d 226, 236 (4th Cir. 2002)).

140. *Id.*

141. 493 F. Supp. 3d 694 (S.D. Ind. 2020).

142. *Id.* at 732.

Judge Sarah Evans Barker applied the Seventh Circuit's Logical Subset application of the *Marks* Rule to the *June Medical* decision.[143] Under the Seventh Circuit's application, "*Marks* applies 'only when one opinion is a logical subset of other, broader opinions.'"[144] Because the Seventh Circuit rejects the All Opinions approach, Judge Barker only considered Justice Breyer's plurality opinion and Chief Justice Roberts's concurrence when performing the *Marks* Rule analysis on the *June Medical* decision.[145] Judge Barker concluded that "neither [opinion] can be considered a logical subset of the other" because the opinions "applied differing undue burden tests."[146] Under the Seventh Circuit's approach to the Logical Subset application of the *Marks* Rule, "there is no law of the land" without a single test endorsed by five Justices whose opinions support the judgment.[147] Thus, Judge Barker concluded that the *June Medical* decision does not provide a "controlling rule for applying the undue burden test in abortion cases."[148]

The Seventh Circuit agreed with Judge Barker's application of its approach to the *Marks* Rule in *Planned Parenthood of Indiana & Kentucky v. Box*.[149] In an opinion by Judge David Hamilton, the Seventh Circuit concluded that "[t]he *Marks* Rule does not turn everything" Chief Justice Roberts said in his concurrence "into binding precedent that effectively overruled *Whole Woman's Health*."[150] Because, at least in the Seventh Circuit, "[t]hat is not how *Marks* works."[151] Like Judge Barker in *Hill*, Judge Hamilton and the panel in *Box* acknowledged that the Seventh Circuit has "rejected using dissents in *Marks* assessments" and thus "decline[d] the State's invitation here to add together the Chief Justice's concurrence and the dissenting opinions and declare *Whole Woman's Health overruled*."[152] Instead, Judge Hamilton turned to the Logical Subset approach, a "model of the *Marks* [R]ule" that the panel viewed as "consistent with the substantial weight of authority."[153] He pointed

143. *Id.* at 732–33.

144. *Id.* at 732 (quoting Gibson v. Am. Cyanamid Co., 760 F.3d 600, 619 (7th Cir. 2014)).

145. *Id.* at 733.

146. *Id.* at 734.

147. *Id.* at 732. In essence, under the Seventh Circuit's approach to the Logical Subset application of the *Marks* Rule, any district court judge in the Seventh Circuit can disregard a Supreme Court opinion, like *June Medical*, when five Justices do not agree on the rationale underlying a judgment in a case.

148. *Id.* at 734.

149. 991 F.3d 740, 741–42 (7th Cir. 2021).

150. *Id.* at 741.

151. *Id.*

152. *Id.* at 746.

153. *Id.*

to "[t]he often-cited metaphor of Russian nesting dolls," explaining that "for the *Marks* [R]ule to apply," the narrowest opinion "must represent a common denominator of the Court's *reasoning*."[154] Accordingly, Judge Hamilton and the panel concluded that "[t]he logical subset approach to *Marks* applies here" and thus that "*Whole Woman's Health* remains binding on lower courts."[155]

In *Reproductive Health Services v. Strange*,[156] the United States Court of Appeals for the Eleventh Circuit likewise concluded that Chief Justice Roberts's concurrence lacks precedential value.[157] The per curiam panel wrote that "*Whole Woman's Health* recites the standard we must apply here," and *June Medical* "did not change that."[158] The panel rejected an All Opinions approach, reasoning that "the Court has instructed that we determine the holding of split decisions like *June Medical Services* not by counting to five, but by looking to the 'narrowest grounds' of agreement among the members of the Court *who concurred in the judgment*."[159] The panel thus rejected the argument that "the Chief Justice and the dissenters' rejection of benefits-versus-burdens balancing" could "resurrect some previous undue burden standard."[160] Rather, the panel endorsed a Logical Subset application of the *Marks* Rule, contending that Chief Justice Roberts's concurrence "cannot fairly be considered narrower than the plurality" because "the Chief Justice and the plurality

154. *Id.* (quoting King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991)).

155. *Id.* at 748. Judge Michael Kanne dissented, arguing that since the Supreme Court had originally remanded *Box* to the Seventh Circuit in light of the *June Medical* decision, "*June Medical* does have a real effect. The Supreme Court knows it, other circuits accept it, and a faithful application of *Marks* requires us to accept it, too." *Id.* at 753 (Kanne, J., dissenting). While acknowledging that other circuits to reach this result did so while "applying different standards" for applying *Marks*, Judge Kanne contended that "our own standards governing the application of the *Marks* [R]ule force the same results." Thus, Judge Kanne concluded that *June Medical* "demands that courts continue to apply *Casey*'s substantial obstacle test." *Id.* Of note, at the time of this Comment's publication, the Indiana Attorney General's Office had filed a petition for a writ of certiorari, asking the Supreme Court to clarify the scope of the *June Medical* decision in light of the circuit split on the issue. Petition for Writ of Certiorari at 22–25, *Box* (No. 20-1375). In the petition, Indiana argued that the Court should grant certiorari because *June Medical* "ha[d] been a disaster for lower courts to implement" as "[t]he circuits disagree[d] not only on which *June Medical* opinion controls, but also what it means to discern the narrowest common ground" under *Marks*. *Id.* Indiana thus urged the Court to "end the post-*June Medical* chaos over the controlling test." *Id.*

156. 3 F.4th 1240, 1258–59 & n.6 (11th Cir. 2021).

157. *Id.*

158. *Id.*

159. *Id.* at 1259 n.6 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

160. *Id.*

diverged on the reasoning supporting the result."[161] The panel thus concluded that the "analysis from *Whole Woman's Health* therefore continues to bind us."[162]

In sum, the Logical Subset application of the *Marks* Rule led the panels in *Box* and *Strange* and the district courts in *Hill* and *American College of Obstetricians* to treat Chief Justice Roberts's *June Medical* concurrence as lacking precedential value. Courts following the Fourth, Seventh, and Eleventh Circuits' Logical Subset applications to the *Marks* Rule have thus recognized the *Hellerstedt* benefits and burdens test as the controlling standard for abortion cases.[163]

### *C. Federal Courts Recognizing Chief Justice Roberts's Concurrence as Binding*

The Sixth and Eighth Circuits, as well as an en banc plurality of the Fifth Circuit, have held that Chief Justice Roberts's concurrence is the controlling opinion under their respective approaches to applying the *Marks* Rule.[164] Unlike the courts in the Fourth, Seventh, and Eleventh Circuits, which all applied a similar version of the Logical Subset application of the *Marks* Rule,[165] the Fifth and Sixth Circuits followed different versions of the Logical Subset application, and the Eighth Circuit followed a hybrid of the Median Opinion and

161. *Id.*

162. *Id.* The Eleventh Circuit was considering a petition for rehearing en banc at the time of this Comment's publication. *See* Appellants' Petition for Rehearing En Banc, Reproductive Health Servs. v. Bailey, 3 F.4th 1240 (11th Cir. 2021) (No. 17-13561). If the en banc Eleventh Circuit rejects the panel's approach and determines that Chief Justice Roberts's concurrence is controlling, then the Eleventh Circuit would join the Sixth Circuit and Eighth Circuit in this circuit split. The Sixth and Eighth Circuit's approaches are addressed in Subpart IV.C below.

163. As addressed in Subpart IV.C below, this result under this version of the Logical Subset application of the *Marks* Rule directly contradicts the result reached by the Sixth Circuit, following a different version of the Logical Subset application, and the Eighth Circuit, following a hybrid of the Median Opinion and All Opinion applications of the *Marks* Rule.

164. *See* Bristol Reg'l Women's Ctr, P.C. v. Slatery, No. 20-6267, 2021 WL 3412741, at *1–2 (6th Cir. 2021) (en banc); Pre-Term Cleveland v. McLoud, 994 F.3d 512, 524–25 (6th Cir. 2021) (en banc); EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418 (6th Cir. 2020); Little Rock Family Planning Servs. v. Rutledge, 984 F.3d 682, 687 n.2 (8th Cir. 2021); Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020) (per curiam); Whole Woman's Health v. Paxton, 10 F.4th 430, 440–42 (5th Cir. 2021) (en banc) (plurality opinion).

165. *See supra* Subpart IV.B.

All Opinions applications.[166] The Fifth, Sixth, and Eighth Circuits' applications are addressed, in turn, below.

In *Whole Woman's Health v. Paxton*,[167] a Fifth Circuit panel initially rejected the precedential value of Chief Justice Roberts's concurrence under the *Marks* Rule.[168] Writing for the panel, Judge James Dennis concluded that Chief Justice Roberts's concurrence lacked precedential value under the Fifth Circuit's Logical Subset application of the *Marks* Rule.[169] Judge Dennis explained that the Fifth Circuit's Logical Subset application only treats a concurrence as controlling when the concurrence constitutes a "logical subset" of the plurality opinion.[170] Judge Dennis concluded that Chief Justice Roberts's rejection of the *Hellerstedt* burdens and benefits analysis made it "impossible" for the concurrence to be a logical subset of Justice Breyer's plurality opinion because the plurality and the concurrence were "not logically compatible."[171] Accordingly, Judge Dennis determined that "*June Medical* thus does not furnish a controlling rule of law."[172] Because Judge Dennis concluded that the Logical Subset application of the *Marks* Rule rendered *June Medical* without precedential value, Judge Dennis and the panel held that *Hellerstedt*'s burdens and benefits analysis "retains its precedential

166. The circuit split over the proper application of the *Marks* Rule has thus created a circuit split over the controlling standard in abortion cases. And this circuit split over the proper application of the *Marks* Rule to *June Medical* raises the possibility that the Supreme Court will have to address the proper application of the *Marks* Rule in a future decision.

167. 978 F.3d 896, 904 (5th Cir.), *reh'g en banc granted, opinion vacated*, 978 F.3d 974 (5th Cir. 2020), *rev'd, injunction vacated, and judgment rendered*, 10 F.4th 430 (5th Cir. 2021) (en banc) (plurality opinion).

168. *Id.* at 904. Both Judge Dennis and Judge Don Willett, who dissented from the panel opinion, agreed that the Logical Subset application was the proper standard to apply in this case. *Compare id.*, *with id.* at 916 (Willett, J., dissenting). These two different approaches to the Logical Subset application of the *Marks* Rule, addressed in the two panel opinions, illustrate how the Supreme Court's ambiguous guidance on applying the *Marks* Rule has resulted in chaotic applications of its decisions, even on an intracircuit basis. The impact of these intracircuit splits over the proper application of the *Marks* Rule is compounded when combined with the circuit splits over the proper application of the *Marks* Rule. *See, e.g.*, Subpart IV.C. As such, the panel opinions in *Paxton* provide an excellent example of the chaotic system that the Supreme Court can end by clarifying the proper application of the *Marks* Rule.

169. *Paxton*, 978 F.3d at 904.

170. *Id.* (citing United States v. Duron-Caldera, 737 F.3d 988, 994 n.4 (5th Cir. 2013)).

171. *Id.*

172. *Id.*

force" and that accordingly "SB8 operates as an undue burden in all of its applications."[173]

The panel opinion was vacated by the full Fifth Circuit, which decided to rehear the case en banc.[174] The en banc rehearing of the case centered around whether Judge Dennis's approach to the Logical Subset application was correct under Fifth Circuit precedent.[175] The plurality of the en banc Fifth Circuit, in an opinion coauthored by Judge Jennifer Elrod and Judge Don Willett, reversed the panel decision.[176] The plurality of the en banc Fifth Circuit endorsed the view that Chief Justice Roberts's opinion is controlling under the Fifth Circuit's approach to applying the *Marks* Rule.[177] Judge Dennis dissented, reiterating his view from the panel opinion that the benefits and burdens test from *Hellerstedt* still controlled under the *Marks* Rule.[178] The Fifth Circuit's divergent applications of its approach to the *Marks* Rule in *Paxton* exemplify how the lack of uniformity in current *Marks* Rule jurisprudence permits different applications of the ambiguous rule, even to the same set of facts in a single case.

In *EMW Women's Surgical Center, P.S.C. v. Friedlander*,[179] the Sixth Circuit likewise recognized Chief Justice Roberts's concurrence as the controlling standard for abortion cases based on a hybrid

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173. *Id.* at 904, 912. Judge Dennis acknowledged that the panel's opinion created a circuit split with the Eighth Circuit. *Id.* at 904 n.5 (citing Hopkins v. Jegley, 968 F.3d 912, 915 (8th Cir. 2020)). But Judge Dennis dismissed the Eighth Circuit's application of the *Marks* Rule to *June Medical* as "not persuasive" because the Eighth Circuit's All Opinions application differs from the Fifth Circuit's Logical Subset application of the *Marks* Rule. *Id.* This divergent application of the *Marks* Rule by the Eighth Circuit is addressed in Subpart IV.B below. The circuit split over the precedential value of *June Medical*, created less than four months after *June Medical* was decided, illustrates the need for the Supreme Court to address the related circuit split over the proper application of the *Marks* Rule.

174. *Whole Woman's Health v. Paxton*, 10 F.4th 430, 436 (5th Cir. 2021) (en banc) (plurality opinion).

175. *Id.* at 439–42.

176. *Id.* at 434–36.

177. *Id.* at 440–42. A majority of the en banc Fifth Circuit could not agree on whether Chief Justice Roberts's *June Medical* opinion was controlling. *Id.* at 434. Some judges concurred only in the judgment, including Chief Judge Priscilla Owen and Judge Catharina Haynes. *Id.* at 434 n.**. In a separate concurrence, Chief Judge Owen argued that "it is unnecessary to decide" if Chief Justice Roberts's opinion would be controlling, because SB8 would be constitutional "[u]nder either governing parameter." *Id.* at 457 (Owen, C.J., concurring). The en banc rehearing thus did not produce a clear majority establishing *June Medical* opinion as controlling under the *Marks* Rule.

178. *Id.* at 478–80 (Dennis, J., dissenting).

179. 978 F.3d 418 (6th Cir. 2020).

approach to the *Marks* Rule.[180] Writing for the panel, Judge Joan Larsen concluded that Chief Justice Roberts's concurrence is a binding precedent under the *Marks* Rule based upon the Sixth Circuit's approach to the Logical Subset application of the *Marks* Rule.[181] Under the Sixth Circuit's approach to the Logical Subset application, a concurrence is the controlling opinion "whose rationale would invalidate the fewest laws going forward."[182] Judge Larsen observed that both Chief Justice Roberts's concurrence and "the plurality would invalidate any law . . . 'placing a substantial obstacle'" on a woman's right to an abortion.[183] Judge Larsen further observed that "the plurality would also invalidate any law" that failed the benefits and burdens balancing test from *Hellerstedt*.[184] As such, all laws invalid under Chief Justice Roberts's concurrence would be invalid under the plurality, but not all laws invalid under the plurality would be invalid under Chief Justice Roberts's concurrence.[185] Accordingly, the panel held that Chief Justice Roberts's *June Medical* concurrence "provides the governing standard" for abortion cases in the Sixth Circuit.[186] And the en banc Sixth Circuit endorsed the *Friedlander* panel's interpretation of the *June Medical* concurrence in *Pre-Term Cleveland v. McCloud*.[187]

Notably, however, a Sixth Circuit panel departed from the interpretation assigned in *Friedlander* just a few months later in *Bristol Regional Women's Center v. Slatery*.[188] This panel, which reached its decision between *Friedlander* and *Pre-Term Cleveland* being decided, endorsed the *Hellerstedt* benefits and burdens test that

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180. *Id.* at 433.

181. *Id.* This approach to the Logical Subset application mirrors the approach to the Logical Subset application used by Judge Willett in his *Paxton* dissent. *Compare id.*, *with* Whole Woman's Health v. Paxton, 978 F.3d 896, 917 (5th Cir.) (Willett, J., dissenting) ("The only difference between the plurality's formulation and that of the Chief Justice is the elimination of one variable from the left side of the equation . . . . In short, the Chief Justice's test is a narrower version of the plurality's test and thus a logical subset of it."), *reh'g en banc granted, opinion vacated*, 978 F.3d 974 (5th Cir. 2020), *rev'd, injunction vacated, and judgment rendered*, 10 F.4th 436 (en banc) (plurality opinion).

182. *Friedlander*, 978 F.3d at 431–32 (citing Memoirs v. Massachusetts, 383 U.S. 413 (1966)).

183. *Id.* at 432 (citing June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2120 (2020) (plurality opinion) (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016))).

184. *Id.*

185. *Id.* at 433.

186. *Id.* (quoting Grutter v. Bollinger, 288 F.3d 732, 741 (6th Cir. 2002), (en banc), *aff'd*, 539 U.S. 306 (2003)).

187. 994 F.3d 512, 524–25 (6th Cir. 2021) (en banc) (citing *Friedlander*, 978 F.3d at 432–34); *see id.* at 524 ("The *June Medical* concurrence was the narrowest opinion and, therefore, the governing law.").

188. 988 F.3d 329, 335–37 (6th Cir. 2021).

the *Friedlander* panel rejected.[189] In dissent, Judge Amul Thapar argued against the panel's departure from the Sixth Circuit's *Friedlander* precedent because, "as our court recently held, the Chief Justice's separate opinion in *June Medical* . . . provides the controlling legal rule."[190] Judge Thapar denounced the panel's "invitation to defy precedent" as "run[ning] counter to the settled rule of this and every other circuit: that 'the holding of a published panel opinion binds all later panels unless overruled or abrogated en banc or by the Supreme Court.'"[191] He concluded the dissent by writing that: "Abortion may be controversial. Following Supreme Court precedent shouldn't be."[192]

Ultimately, the en banc Sixth Circuit, in another opinion authored by Judge Thapar, reversed the *Slatery* panel.[193] The en banc Sixth Circuit reaffirmed the precedent established in *Friedlander* and *Pre-Term Cleveland*.[194] But the *Slatery* case illustrates a crucial point about the fractured applications of *Marks* under the current system: Sometimes judges within the same circuit do not agree on the precedential value of a *Marks* Rule application. And sometimes they disagree over the way the circuit's approach to the *Marks* Rule should be applied. This can lead—as in the *Slatery* case—to geographically inconsistent verdicts, even on an intracircuit level.[195]

In *Hopkins v. Jegley*,[196] the Eighth Circuit, applying a hybrid of the All Opinion and Median Opinion applications of the *Marks* Rule, likewise recognized Chief Justice Roberts's *June Medical* concurrence as the controlling standard for abortion cases.[197] The panel held that the concurrence is the controlling standard because Chief Justice Roberts provided the "necessary" vote for "holding unconstitutional Louisiana's admitting-privileges law."[198] This holding reflects a Median Opinion application of the *Marks* Rule. The panel further held that "[*i*]*n light of* Chief Justice Roberts's separate opinion . . . 'five Members of the Court reject[ed] the *Whole Woman's*

189. *Id.*
190. *Id.* at 346 (Thapar, J., dissenting).
191. *Id.* (quoting Wright v. Spaulding, 939 F.3d 695, 700 (6th Cir. 2019)).
192. *Id.* at 353.
193. Bristol Reg'l Women's Ctr, P.C. v. Slatery, No. 20-6267, 2021 WL 3412741, at *1–2 (6th Cir. 2021) (en banc).
194. *Id.* at *1–3, *2 n.1.
195. As explained in Subpart IV.D below, geographic inconsistency—both on an intracircuit basis and an intercircuit basis—runs contrary to the principle of vertical stare decisis, which is a crucial component of the rule of law in our national legal system.
196. 968 F.3d 912 (8th Cir. 2020) (per curiam).
197. *Id.* at 915.
198. *Id.*

*Health* cost-benefit standard."'[199] This second holding reflects an All Opinions application of the *Marks* Rule. Taken together, these holdings reflect a hybrid approach to the *Marks* Rule, combining the Median Opinion and All Opinions applications of the *Marks* Rule.[200] The Eighth Circuit reaffirmed this approach to applying the *Marks* Rule to *June Medical* in *Little Rock Family Services v. Rutledge*.[201]

In sum, the Sixth and Eighth Circuits, and an en banc plurality of the Fifth Circuit, have determined that Chief Justice Roberts's *June Medical* concurrence has controlling precedential value under those circuits' approaches to applying the *Marks* Rule. As it stands today, just over a year after *June Medical* was decided, a direct circuit split exists over the precedential value of Chief Justice Roberts's concurrence. And this circuit split perfectly illustrates how the current system of divergent *Marks* Rule approaches permits geographically inconsistent legal protections across the federal judiciary.

### *D. The Need for a Uniform Application of the* Marks *Rule: Eliminating Geographic Inconsistency and Restoring Vertical Stare Decisis*

The lack of a consistent, uniform application of the *Marks* Rule has permitted the chaotic development of abortion jurisprudence across the United States Courts of Appeals in the aftermath of *June Medical*. Specifically, the lack of a uniform application of the *Marks* Rule has allowed the lower federal courts to adopt a dual-track approach to abortion jurisprudence. Some courts apply the *Hellerstedt* benefits and burdens balancing test endorsed by the plurality in *June Medical*, while other courts apply the *Casey* undue burden test endorsed by Chief Justice Roberts's *June Medical* concurrence.[202] This dual-track approach to abortion jurisprudence illustrates the two primary problems with the current multifaceted applications of the *Marks* Rule: Geographically inconsistent results

199. *Id.* (emphasis added) (quoting June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting)).

200. This hybrid approach of the Median Opinion and All Opinions applications mirrors the hybrid approach articulated by then-Judge Kavanaugh in his *Duvall* concurrence. Because at least five members of the Court have expressed interest in applying this approach to the *Marks* Rule, this approach could be adopted by the Court, if it addresses the circuit split over the *Marks* Rule in the context of the resulting circuit split over the precedential value of the *June Medical* decision.

201. 984 F.3d 682, 687 n.2 (8th Cir. 2021). In a footnote, Judge James Loken and the unanimous panel observed that under the Eighth Circuit's approach to applying the *Marks* Rule, "Chief Justice Roberts's concurring opinion is controlling." *Id.* (citing *Jegley*, 968 F.3d at 915).

202. *See supra* Subparts IV.B and IV.C.

and judicial departure from vertical stare decisis. Both problems are addressed below.

First, the lack of a uniform application of the *Marks* Rule allows fractured Supreme Court decisions to be given different weight in a geographically inconsistent manner across the United States Courts of Appeals. The geographic inconsistency is readily apparent in the *June Medical* context since federal courts in six different circuits quickly assigned different weights to the *June Medical* decision in the first few months after *June Medical* was decided.[203] This issue with geographic inconsistency illustrates a consistent problem with the inconsistent applications of the *Marks* Rule.[204]

The city of Bristol, located on the border of Tennessee and Virginia, provides an excellent example of the extensive problems caused by geographic inconsistency.[205] Visitors to this Appalachian Mountain town can walk down State Street, a fittingly named thoroughfare that divides the city's Virginia portion from its Tennessee portion.[206] State Street thus also straddles the border between the Fourth Circuit (Virginia) and the Sixth Circuit (Tennessee).[207] Recall that courts in each of these circuits have assigned different precedential value to the Supreme Court's decision in *June Medical*, with the Sixth Circuit endorsing Chief Justice Roberts's concurrence and the District of Maryland endorsing Justice Breyer's plurality opinion.[208] If the Fourth Circuit adopted the District of Maryland's *Marks* Rule analysis for *June Medical*, then the Sixth Circuit and the Fourth Circuit would recognize two different standards of scrutiny in abortion cases. In this scenario, the level of constitutional scrutiny recognized under the *Marks* Rule would thus depend on whether the challenged regulation was adopted in Virginia

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203. *Id.*

204. *See* W. Jesse Weins, Note, *A Problematic Plurality Precedent: Why the Supreme Court Should Leave* Marks *over* Van Order v. Perry, 85 NEB. L. REV. 830, 865–66 (2007) (critiquing *Marks* as problematic and arguing that application of the *Marks* Rule would result in geographically inconsistent Establishment Clause jurisprudence).

205. *See Downtown Bristol*, DISCOVER BRISTOL, https://discoverbristol.org/signature_experience/downtown-bristol/ (last visited Aug. 15, 2021).

206. *See State Street: Bristol, Tennessee, and Bristol, Virginia*, AM. PLAN. ASS'N, https://www.planning.org/greatplaces/streets/2018/statestreet/ (last visited Aug. 15, 2021).

207. *See Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. CTS., https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Aug. 15, 2021).

208. *See supra* Subparts IV.B and IV.C.

or in Tennessee, making the right to an abortion subject to different scrutiny in each state.[209]

Second, the current multifaceted approach allows the lower federal courts to depart from principles of vertical stare decisis, which are the very principles the *Marks* Rule was designed to protect.[210] Vertical stare decisis is an absolute requirement under Article III of the United States Constitution.[211] As then-Judge Kavanaugh explained in his *Duvall* concurrence, vertical stare decisis mandates that the lower federal courts be "subordinate to that one Supreme Court . . . [and] decide cases in line with Supreme Court precedent."[212] This crucial component of our judicial system has long been recognized as an essential part of our government's constitutional design.[213] The lack of a uniform application of the *Marks* Rule permits federal courts, like the Southern District of Indiana in *Hill*, to declare that a fractured Supreme Court decision is

209. Bristol is not the only city that can experience intracity inconsistency under the *Marks* Rule. A few additional examples suffice to illustrate the problem caused by possible intracity inconsistent applications of the *Marks* Rule. Texarkana is located in both Arkansas (Eighth Circuit) and Texas (Fifth Circuit). *Texarkana*, http://www.arkansas.com/texarkana (last visited Aug. 15, 2021). Kansas City is located in both Kansas (Tenth Circuit) and Missouri (Eighth Circuit). John Eligon, *Kansas City Confusion: We're Not in Kansas Anymore. Or Are We?*, N.Y. TIMES (Feb. 3, 2020), https://www.nytimes.com/2020/02/03/us/kansas-city-missouri-trump-superbowl-tweet.html. Ardmore is located in both Tennessee (Sixth Circuit) and Alabama (Eleventh Circuit). *About the Greater Ardmore Chamber of Commerce*, https://greaterardmorechamber.com/about/history-of-ardmore/ (last visited Aug. 15, 2021). This intracity geographic inconsistency illustrates the geographic inconsistency problems caused by the current *Marks* Rule system, which allows intracity splits and circuit splits.

210. *See, e.g.*, United States v. Duvall, 740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("The *Marks* [R]ule is an essential aspect of vertical stare decisis . . . .").

211. *Id.* at 609 (citing U.S. CONST. art. III, § 1).

212. *Id.* at 609.

213. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is."); Marbury v. Madison, 5 U.S. 137, 180 (1803) ("[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."); *see also* ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 414 (2012) ("Stare decisis has been a part of our law from time immemorial, and [courts] must bow to it."); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 865 (1994) ("The claim that Article III commands 'inferior' federal court obedience to the 'Supreme' Court's pronouncements is quite powerful." (quoting U.S. CONST. art. III, § 1)).

"no law of the land,"[214] depending on their court's application of the *Marks* Rule. The current system of *Marks* Rule applications thus allows the lower federal courts to overrule or ignore fractured Supreme Court decisions, which, in effect, makes the Supreme Court subordinate to the lower federal courts. Accordingly, the current approach to the *Marks* Rule, which permits the lower federal courts to declare that a fractured Supreme Court decision is "no law of the land," contravenes the design of our constitutional system.

The geographic inconsistency and the departure from vertical stare decisis created by the inconsistent *Marks* Rule applications necessitate a uniform, consistent application of the *Marks* Rule that only the Supreme Court can provide. This uniform application of the *Marks* Rule would ensure that the legal protections recognized by the Supreme Court's fractured decisions, like *June Medical*, would apply consistently and fairly across all the lower federal courts. Such a uniform application of the *Marks* Rule would also restore vertical stare decisis by prohibiting lower federal courts from ignoring or overturning a fractured Supreme Court decision.

## CONCLUSION

The Supreme Court should end the inconsistent application of the *Marks* Rule across the lower federal courts by adopting a consistent, uniform application of the *Marks* Rule for all the federal courts to follow. In *Ramos v. Louisiana*, four Justices expressed an interest in adopting Justice Kavanaugh's hybrid approach of the Median Opinion and All Opinions application to the *Marks* Rule. Because Justice Thomas relied on a very similar approach to the *Marks* Rule in his *June Medical* dissent and because Justice Sotomayor has expressed an interest in ending the inconsistency caused by the current *Marks* framework, at least six members of the Supreme Court appear open to articulating a clear, uniform approach to applying the *Marks* Rule in the coming years. By adopting a uniform approach to applying the *Marks* Rule, the Supreme Court can ensure that the Court's fractured decisions will apply equally to all Americans, regardless of their geographic location, and can restore the system of vertical stare decisis contemplated by our nation's constitutional design.

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214. Whole Woman's Health All. v. Hill, 493 F. Supp. 3d 694, 732 (S.D. Ind. 2020).

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