No. _____

In the
Supreme Court of the United States

JOSEPH DAVID ROBERTSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Joseph David Robertson is an elderly Navy veteran who ran a fire fighting support truck business deep in the Montana woods. He dug some water supply ponds in and around a foot-wide, foot-deep channel carrying 2 to 3 garden hoses of flow, 40-plus miles from the Jefferson River, the nearest navigable waterway.

The United States criminally prosecuted Robertson for digging in "navigable waters" without a Clean Water Act permit, and for damaging federal property under 18 U.S.C. § 1361. The district court denied Robertson's motions for acquittal under Criminal Rule 29(c) during a first trial that ended in mistrial after a hung jury. On retrial, the second jury convicted, and the court sentenced him to 18 months in prison and $130,000 in restitution. The Ninth Circuit affirmed, holding that proof of "navigable waters" is governed by Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), that "navigable waters" is not void for vagueness, and that denials of Rule 29(c) motions in a first trial ending in mistrial are not appealable.

The questions presented are:

1. Is the Clean Water Act term "navigable waters" void for vagueness, as members of this Court have suggested? *See Sackett v. EPA*, 566 U.S. 120, 132-33 (2012) (Alito, J., concurring); *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816-17 (2016) (Kennedy, Alito, Thomas, JJ., concurring) (citing *Sackett*, 566 U.S. at 133 (Alito, J., concurring)).

2. Should this Court revisit its fractured decision in *Rapanos*, to clearly and authoritatively interpret "navigable waters" under the Clean Water Act?

3. Whether a defendant who is retried and convicted for an offense after a hung jury may appeal, after final judgment, the erroneous denial of his motion for judgment of acquittal during the first trial, as recognized in *United States v. Gulledge*, 739 F.2d 582, 584 (11th Cir. 1984), or whether the appellate courts may not review such denials, as the Ninth Circuit held below?

LIST OF ALL PARTIES

Petitioner Joseph David Robertson was the defendant and appellant below. The United States of America was the plaintiff and appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Joseph David Robertson is a natural person. There are no corporate parties in this case.

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PETITION FOR WRIT OF CERTIORARI

Joseph David Robertson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is published at *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017), and reproduced in the Appendix at A-1. The Ninth Circuit's unpublished order denying rehearing and rehearing en banc is reproduced in the Appendix at B-1. The district court's unpublished Amended Judgment is reproduced in the Appendix at C-1.

JURISDICTION

The district court entered the Amended Judgment on July 26, 2016. Petitioner timely appealed to the Ninth Circuit, whose opinion was entered on November 27, 2017. Petitioner timely sought rehearing and rehearing en banc, which the Ninth Circuit denied on July 10, 2018. On July 30, 2018, Associate Justice Kennedy granted Petitioner's motion for extension of time to file this petition for writ of certiorari to and including November 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the Constitution of the United States provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law;" U.S. Const. amend. V.

The Clean Water Act, 33 U.S.C. § 1251, *et seq.*, provides as follows:

"Except in compliance with . . . section . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

"The term "discharge of a pollutant" . . . means . . . any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12).

"The term "navigable waters" means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

STATEMENT OF THE CASE

Legal Background: The Confusing Legacy of Rapanos v. United States

The Clean Water Act, 33 U.S.C. § 1251, *et seq.*, regulates discharges of pollutants from point sources to "navigable waters." 33 U.S.C. § 1311(a), § 1362(12). The Act defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Nonexempt discharges require a permit from either the Environmental Protection Agency (EPA) or U.S. Army Corps of Engineers (Army Corps). The permitting regime is time-consuming,

expensive, and can require significant changes to the applicant's intended operations. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006).

A person engaged in unpermitted, nonexempt discharges or permit violations faces administrative cease-and-desist and compliance orders, administrative penalties, civil actions for monetary civil penalties and injunctive relief, and criminal prosecution. *See generally*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, *Inc.*, 484 U.S. 49, 52-53 (1987). Liability for violation of the Act is strict, without regard to the responsible party's intent or knowledge. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000). The burdens of the permitting regime, and the significance of the criminal penalties for violating it, make it critically important that the regulated public know what is meant by "navigable waters."

In 1974, EPA and the Army Corps adopted regulations defining "waters of the United States" consistently with this Court's long-standing definition of the term "navigable waters of the United States," appearing in predecessor statutes, as interstate waters that are navigable in fact or readily susceptible of being rendered so. *Rapanos*, 547 U.S. at 723 (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), and 39 Fed. Reg. 12115, 12119 (Apr. 3, 1974)). In 1975, the District Court for the District of Columbia enjoined this definition as too narrow. Rather than appealing that decision, the agencies rewrote their regulations more broadly. *Rapanos*, 547 U.S. at 724 (citing *NRDC v. Calloway*, 392 F. Supp. 685, 686 (D.D.C. 1975)). The new regulations purported to extend the scope of "navigable waters" to the outer

limits of Congress' commerce power. *Id.* (citing 42 Fed. Reg. 37122, 37144 n.2 (July 19,1977)).

By 1986, the agencies had stretched the term "navigable waters" to include interstate waters, intrastate waters with various relationships to interstate or foreign commerce, tributaries of such waters, and wetlands adjacent to (defined as bordering, contiguous, or neighboring) such tributaries and other waters. *Id.* at 724 (citing 33 C.F.R. § 328.3(a)(1), (a)(3), (a)(5), (a)(7), and §328.3(c) (2004)). The agencies also added isolated waters used by migratory birds. *Rapanos*, 547 U.S. at 724 (citing 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). By 2000, the agencies had swept "ephemeral streams" and "drainage ditches" with an ordinary high water mark within the ambit of "tributaries." *Id.* at 725 (citing 65 Fed. Reg. 12818, 12823 (Mar. 9, 2000)).

In *United States v. Riverside Bayview Homes, Inc.*, this Court upheld the regulation of nonnavigable wetlands as "navigable waters" as long as the wetlands "actually abut on" traditional navigable waters so closely that it is difficult to tell where one ends and the other begins. 474 U.S. 121, 135 (1985), *cited in Rapanos*, 547 U.S. at 724-25. Then in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANNC*), this Court struck down the Migratory Bird Rule, holding that the Act did not extend to "nonnavigable, isolated, intrastate waters." 531 U.S. 159, 171 (2001), *cited in Rapanos*, 547 U.S. at 726.

In *Rapanos*, this Court considered the agency regulations defining tributaries and adjacent wetlands as "navigable waters" and invalidated them for exceeding the scope of the Act. 547 U.S. at 728, *id.*

at 759 (Kennedy, J., concurring). Despite five Justices agreeing that the regulations exceeded the agencies' authority, they did not agree why.

A plurality of four Justices would have held that nonnavigable tributaries are only "navigable waters" if they are "relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." 547 U.S. at 739 (citing Webster's New Int'l Dictionary 2882 (2d ed. 1954). The plurality based this view on a textual analysis of the Act informed by its federalism purpose and relied on the Clear Statement Rule, both as to federal usurpation of local land use authority and Congress' exercise of its Commerce Clause power to its furthest limit. 547 U.S. at 738. As to wetlands, the plurality wrote that "navigable waters" includes only those wetlands abutting actually navigable waters or covered tributaries to the degree that, as in *Riverside Bayview*, it was doubtful where the wetland ends and the abutted waterway begins. *Id.* at 742.

Writing only for himself, Justice Kennedy concurred in the judgment and that the agency regulations including all tributaries and adjacent wetlands were overbroad. *Id.* at 759 (Kennedy, J., concurring). But he read "navigable waters" much more broadly than did the plurality, concluding that the term also encompassed intermittent tributaries, *id.* at 770, and wetlands that do not abut covered tributaries but which nonetheless have a significant nexus, determined alone or in combination with others "in the region," with actually navigable waters, determined on a case-by-case basis according to

physical, chemical, and biological factors, *id.* at 773-75.

The Chief Justice joined the plurality, but also concurred to lament the agencies' failure to issue valid new regulations after the *SWANCC* decision, and that due to the lack of a majority opinion in the case, "lower courts and regulated entities will now have to feel their way on a case-by-case basis." 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Marks v. United States*, 430 U.S. 188 (1977)).

Congress took the same action to clarify "navigable waters" after *Rapanos* as it did following *SWANCC*: nothing. The agencies adopted informal guidance in 2008, which used the reasoning of both the plurality and the concurrence as parallel bases for identifying "navigable waters." *See Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 808 (E.D.N.C. 2014) (discussing *Rapanos* Guidance).

The circuit courts are split on the application of *Rapanos*. Some hold under *Marks* that only the concurrence is binding. Others hold that jurisdiction may be proven under either the plurality or the concurrence. *Compare United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (jurisdiction under plurality and concurrence), *with United States v. Robison*, 505 F.3d 1208, 1211 (11th Cir. 2007) (jurisdiction under concurrence only).

Further, the decision below directly splits with the Seventh and DC Circuits on the question of whether a circuit court may consider a dissent in a fractured decision of this Court in applying *Marks*. *Compare United States v. Robertson*, 875 F.3d 1281,

1291 (9th Cir. 2017) (dissent in *Rapanos* combined with concurrence to conclude that concurrence controls), *with King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (no use of dissent in *Marks* analysis); *accord Gibson v. American Cyanamid. Co.*, 760 F.3d 600, 622 (7th Cir. 2014) (*Marks* bars use of dissents in applying *Rapanos*).

As the district court stated during Robertson's sentencing below, "there are significant legal questions in the Supreme Court itself about how to define 'waters of the United States.'" Appendix D-3.

In 2015, the agencies finalized a new regulation, once again broadly defining "navigable waters," based principally on Justice Kennedy's concurring *Rapanos* opinion. This rulemaking was met with multiple lawsuits in both the federal district and circuit courts. *See generally*, *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 625-27 (2018) (NAM). In *NAM*, this Court held that the district rather than circuit courts have jurisdiction over these lawsuits. *Id.* at 624.

Meanwhile, the current administration has announced its intent to repeal the 2015 Rule and adopt a new regulatory definition of "navigable waters," this time based on the *Rapanos* plurality instead of the concurrence. *See* www.epa.gov/wotus-rule/rulemaking-process. It remains unclear how soon this new regulation will be finalized.

One thing does appear clearly. As long as the fractured *Rapanos* decision stands, the agencies will continue to assert jurisdiction under either or both opinions, based on political and other considerations, with the now real prospect that succeeding

administrations will toggle the regulatory definition from plurality to concurrence and back to suit each other's electoral constituency.

In all of this, "regulated entities" (including Petitioner Robertson) remain left to feel their way on a case-by-case basis, under a statute that is "hopelessly indeterminate," interpreted disparately by the members of this Court and the lower courts, and administered by agencies that continue to assert their jurisdiction to the very outward boundaries of watersheds, over minute channels across which many "regulated entities" would step without noticing.

This case is about one of these waters.

Facts: A Foot-Wide Channel, at the Top of the Watershed, More Than 40 Miles from an Actually Navigable River

The "navigable water" at issue in this case is an unnamed channel, a foot or so wide and a foot or so deep, running through a clearing in the woods in Montana (the Pond Site), carrying two or three garden hoses worth of flow. Appendix G-2; G-5; G-7-8; K-1. The Pond Site is more than 40 miles distant from the nearest actually navigable water body, the Jefferson River. The unnamed channel flows downhill discontinuously about half a mile to drain into Cataract Creek, Appendix I-1, which then flows a further two miles to meet the Boulder River near Basin, Montana. From Basin, the Boulder River flows roughly 40 miles, first east alongside Interstate 15 to Boulder, Montana, and thence south alongside state

highway 69 to meet the Jefferson River near Cardwell, Montana. Appendix J-1.[1]

Forty-plus miles upstream from the Jefferson River is almost as far as one can follow the Boulder River, Cataract Creek, and then the unnamed channel uphill into the woods before running out of water entirely. There is almost no regular channel associated with flow uphill of the Pond Site, which itself is a mere 2,100 feet from the very top of the watershed. Appendix G-12-15.

The unnamed channel forms on or just below a patented mining claim called the White Pine Lode. It then crosses an unpatented mining claim called the Mohawk Lode, before entering another patented mining claim called the Manhattan Lode and then finding its way to Cataract Creek. The White Pine, Mohawk, and Manhattan Lodes sit just inside the boundary of the Beaverhead-Deerlodge National Forest. Appendix D-3-4; I-1 (Exhibit 15 showing patented claims in dark shading, with the Pond Site indicated by blue dot, and Forest boundary in dark red).

Petitioner Joe Robertson is an elderly Navy veteran. He owns the White Pine Lode and has lived there with his wife Carri for many years. They also

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[1] This Court can take judicial notice of the distance from the confluence of Cataract Creek with the Boulder River to its confluence with the Jefferson River as reflected in online mapping websites and the admitted exhibits in this case. *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012) (taking judicial notice of Google map distance determination) (citing *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1218 n.2 (10th Cir. 2007) (same, using different mapping website)).

owned the Manhattan Lode, but lost it in a tax sale in 2013. Robertson has also, at various times, owned the mineral rights associated with the Mohawk unpatented mining claim that sits between the White Pine and Manhattan Lodes. Appendix D-3-5.

The Robertsons ran a fire fighting support truck business until recently. Living deep in the woods in an increasingly fire-prone landscape, they were concerned about their safety and the vulnerability of their property. Appendix G-15-16. In 2013 and 2014, Joe Robertson dug a series of small water supply ponds in and about the unnamed channel at the Pond Site, with a view to being well prepared should fire strike near his home. Some of the ponds sit on the Manhattan Lode, and the government charges that others sit on the Mohawk. Appendix G-15-17.

Robertson dug the ponds without approval from the Forest Service to disturb the surface estate of the Mohawk Lode, and without permission from the Army Corps under the Clean Water Act.

Proceedings Below: Criminal Prosecution of Petitioner Robertson for Digging Ponds in the Foot-Wide Unnamed Channel

On May 22, 2015, the government indicted Robertson charging him with two counts of violating the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A) (Counts I and III) and one count alleging willful destruction of government property under 18 U.S.C. § 1361 (Count II). Appendix A-4-5. The district court denied several pretrial motions to dismiss or clarify the indictment, and the trial commenced on October 5, 2015. Appendix A-5. On October 6, Robertson once

again moved to dismiss Counts I and III, arguing that the current law defining "waters of the United States" violates due process on vagueness grounds because it is impossible to determine with any accuracy what constitutes a violation of the Clean Water Act. *Robertson,* 875 F.3d at 1292. The district court ultimately denied the motion. Appendix A-5, H-2.

Robertson's trial lasted four days. As to Counts I and III, the government offered no flow studies for the unnamed channel, and instead focused on an alleged ordinary high water mark of the channel. Appendix H-7. For Count II, the government relied primarily on cadastral maps to prove that Mr. Robertson's work occurred on the unpatented Mohawk Lode rather than the privately owned White Pine or Manhattan Lodes. Appendix H-11. The jury hung on all three counts. Appendix A-5, H-2.

Robertson moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, during trial and before the case was submitted to the jury, for insufficiency of evidence that the unnamed channel is "navigable waters" and that any of the ponds were located on the unpatented White Pine Lode. Appendix A-5, H-2. After the jury failed to return a verdict and the judge declared mistrial, Robertson once again moved for judgment of acquittal. Appendix A-5, H-2. The district court judge denied all motions and reset the trial. Appendix H-12.

The second trial began on April 4, 2016. Appendix A-5, E-1. At the second trial, the government significantly bolstered its evidence and changed its litigation strategy. For Counts I and III, the government introduced evidence from a new site investigation made after the first trial, in November

of 2015, Appendix E-4, and provided previously undeveloped evidence of the flow of the channel, Appendix E-4. For Count II, the government primarily relied on Forest Service boundary surveys to prove that Robertson's work occurred on the White Pine Lode, rather than the cadastral maps used in the first trial. Appendix E-2. On April 7, the jury found Robertson guilty on all counts. Appendix E-1, F-1-2.

At the second trial, Robertson renewed his motion to dismiss and made new motions for a judgment of acquittal. Appendix E-1. After the jury returned its verdict but before sentencing, Robertson filed a second motion to dismiss Counts I and III. Appendix A-5, D-2. Based on an intervening *en banc* decision from the Ninth Circuit, the second motion to dismiss argued that Justice Kennedy's opinion was not the controlling opinion of *Rapanos*. Appendix A-13, A-24, D-2. While the district court recognized the seriousness of the legal question of which *Rapanos* opinion controls, the court ultimately denied the second motion to dismiss. Appendix A-5, D-2-3. The judge sentenced Mr. Robertson to 18 months in prison for each of the three counts, one year of supervised release for each of Counts I and III, and three years of supervised release for Count II. In addition, the judge sentenced Robertson to pay $129,933.50 in restitution to the government. Appendix C-4, 10. All sentences were to run concurrently. *Id.*[2]

Robertson timely appealed his conviction to the Ninth Circuit. He argued that (1) the *Rapanos* concurrence is not the controlling opinion in that

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[2] Robertson completed his term of imprisonment on or about December 5, 2017, and is presently under supervised release and making payments on his restitution obligation.

decision, (2) the term "waters of the United States" is void for vagueness, and (3) the trial court should have granted his motions for judgment of acquittal from the first trial. Appendix A-6. Applying *Marks*, the Ninth Circuit held that Justice Kennedy's *Rapanos* concurrence is the controlling opinion and rejected Robertson's due process vagueness argument, holding that at the time of conviction a prior Ninth Circuit decision gave reasonable warning that the Clean Water Act applied. Appendix A-17-19. Finally, the court below, citing *Richardson v. United States*, 468 U.S. 317 (1984), determined that it could not review Robertson's motions for acquittal from his first trial. Appendix A-22.

On July 30, 2018, Justice Kennedy granted Mr. Robertson's application to extend the time to file this petition. *See* Supreme Court docket # 18A108. He now submits this petition, requesting that this Court grant certiorari to review the decision of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The meaning of "navigable waters" under the Clean Water Act is unfinished business; this case offers an ideal vehicle to rectify that situation. Recent decisions holding other criminal statutes void for vagueness suggest that any interpretation of the Act as covering substantially more than traditionally navigable waters is void for vagueness. Revisiting *Rapanos* would give this Court an immediate opportunity to clearly and authoritatively interpret

the Act, if it can be interpreted constitutionally, in a way that will provide fair notice to the public and proper direction to the agencies in their ongoing (and seemingly perpetual) rulemaking efforts. At the very least, the Court should direct the lower courts on the question of which, if either, of the opinions supporting the judgment in *Rapanos* is controlling.

The Court should also grant the petition to resolve a circuit split on whether a defendant may appeal the denial of a motion for judgment of acquittal at a first trial that ends in mistrial and is followed by conviction at a second trial. This is a significant question of criminal procedure that divides the lower federal and state courts. In those circuits and states following the decision below, the government is given an unjust advantage that vitiates the presumption of innocence and the beyond reasonable doubt standard of proof: it may retry a defendant after failing to meet its burden of proof at an initial trial, with no appellate review of its failure to meet the burden in the first trial.

ARGUMENT

I

THE COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER THE CLEAN WATER ACT TERM "NAVIGABLE WATERS" IS VOID FOR VAGUENESS

The Due Process Clause requires that criminal statutes afford adequate notice of what they proscribe to those who must comply. *United States v. Lanier*, 520 U.S. 259, 265-67 (1997) (discussing doctrine, reciting elements, and citing sources). The three related considerations of constitutionally fair notice

for criminal statutes include: (1) adequate specificity, such that people "of common intelligence" need not "guess at its meaning" and will not "differ as to its application"; (2) application of the rule of lenity to limit the interpretation of criminal statutes to activity clearly covered; and (3) exclusion of criminal liability where a judicial "gloss" that clarifies the law is applied for the first time. *Lanier*, 520 U.S. at 266 (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), and *Liparota v. United States*, 471 U.S. 419, 427 (1985)).

A. Members of This Court, and Lower Court Judges, Have Expressed Concern about the Vagueness of "Navigable Waters"

Justice Alito has described the phrases "navigable waters" and "waters of the United States" in terms that clearly call into question whether they are void for vagueness under the Due Process Clause: "The reach of the Clean Water Act is notoriously unclear." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Further, "[r]eal relief requires Congress to do what it should have done in the first place, provide a reasonably clear rule regarding the reach of the Clean Water Act." *Id.* at 133. "Congress did not define what it meant by "the waters of the United States"; the phrase was not a term of art with a known meaning; and the words themselves are *hopelessly indeterminate*." *Id.* (emphasis added).

Other members of this Court appear to have taken up the same concern. *Hawkes*, 136 S. Ct. at 1816 (Kennedy, Thomas, Alito, JJ., concurring) (citing *Sackett*, 566 U.S. at 130-131 (Alito, J., concurring)); *id.* at 1812 ("It is often difficult to determine whether a particular piece of property contains waters of the

United States."); *id.* at 1816-17 (Kennedy, Alito, Thomas, JJ., concurring) ("[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern."); *id.* at 1816 (citing *Sackett*, 566 U.S. at 132 (Alito, J., concurring)); *see NAM*, 138 S. Ct. at 625 ("In decades past, the EPA and the Corps . . . have struggled to define and apply that statutory term.").

During oral argument in *Army Corps of Engineers v. Hawkes*, Justice Kennedy went so far as to pose the following question:

> Well, I think—I think underlying Justice Kagan's question is that the Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice. What's the closest analogous statute that give the affected party so little guidance at the front end?[3]

Circuit court judges have also expressed concern about the difficulty of determining whether a given property contains "navigable waters." *See Hawkes Co., Inc. v. United States Army Corps of Engineers*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) ("[T]he Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction . . . . This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply

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[3] Transcript of Oral Argument at 18:11-19, *Hawkes*, 136 S. Ct. 1807, *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-290_j5fl.pdf.

to your property."); *Orchard Hill Building Company v. Army Corps*, 893 F.3d 1017, 1025 (7th Cir. 2018) ("Justice Kennedy did not define 'similarly situated'—a broad and ambiguous term . . . .").

By contrast, only a handful of district courts have addressed this question and concluded that the Act affords constitutionally adequate notice under the Due Process Clause. *United States v. Lucero*, No. 16-cr-00107-HSG-1, 2017 WL 9534005 (N.D. Cal. Nov. 14, 2017); *United States v. Rodriguez*, No. 1:CR-09-279-BLW, 2011 WL 1458231 (D. Idaho Apr. 15, 2011).

Even the judges of the Ninth Circuit below appeared concerned about this difficulty. During oral argument, Judge McKeown asked:

> It kind of goes back to the basic question of notice. If you can't even figure out which parts of the Venn Diagram fit together amongst all these lawyers and judges, how does a regular citizen figure it out?

Judge Gould followed with:

> I just have the problem in a criminal case as to whether with that sort of convoluted analysis under the *Marks* theory and sufficiently complex [sic] that our court took an en banc in *Davis* to have another run at it, whether a citizen

> is supposed to know that, and go to prison if they don't know that.[4]

And yet the Ninth Circuit concluded in its decision below that "navigable waters" is not void for vagueness based on the non sequitur that it had previously held in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), that Justice Kennedy's concurring opinion was the holding of *Rapanos* under *Marks*. Appendix A-20. *City of Healdsburg* may have established the law of the circuit on how to apply to *Rapanos*, but deciding which opinion is the holding under *Marks* is not directly germane to whether the Act itself (as interpreted by a single Justice of this Court or otherwise) is void for vagueness. Put another way, Justice Kennedy's interpretation of the Act may, for the sake of argument, be the controlling opinion of this Court, but that does not answer whether that (or any other) interpretation of the Act is void for vagueness.

B. This Court's Recent Decision in *Sessions v. Dimaya* Suggests That "Navigable Waters" Is Void for Vagueness

Sessions v. Dimaya held that 18 U.S.C. § 16(b), defining "crime of violence" for purposes of the Immigration and Nationality Act, is void for vagueness. 138 S. Ct. 1204, 1210 (2018). The Court's analysis rested on the statute's use of two terms: "by its nature" (as applied to the noun "felony") and "substantial risk" (that physical force would be used in committing the crime). Both terms require an

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[4] Available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012065, at 23:55-24:12 (McKeown, J.) and 27:13-42 (Gould, J.).

interpreting court to decide, without any standards, what crimes fall within the definition. *Id.* at 1213-14. Relying heavily on its prior decision in *Johnson v. United States*, the Court noted that applying the "by its nature" provision requires a court to determine the "idealized ordinary case" of a given offense. 138 S. Ct. 1204, 1214 (2018) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015)). That exercise yields no clear answer; it depends entirely on a given judge's opinion of what the essential nature—or platonic form—of a given crime involves. 138 S. Ct. at 1214; *id.* at 1231-32 (Gorsuch, J., concurring). Secondly, this indeterminacy is compounded by the requirement that the judge then determine whether the platonic form of a crime poses some threshold level of risk—a "substantial risk"—of violence. *Id.* at 1214. The *combination* of the need to posit an idealized version of a crime with the question whether the idealized form poses a threshold risk level crosses the line into unconstitutional vagueness. *Id.* (quoting *Johnson*, 135 S. Ct. at 2561).

The same analytical approach is applicable to the *Rapanos* concurrence. As with the statute struck down in *Dimaya*, the *Rapanos* concurrence interprets "navigable waters" to require two interacting determinations, one involving an idealized or otherwise undefinable condition ("wetlands . . . in combination with similarly situated lands in the region"), and the second overlaying a threshold relationship ("significantly affects" traditionally navigable waters)." 547 U.S. at 780 (Kennedy, J., concurring).

The "similarly situated within the region" provision requires a judge to make two idealized

determinations: what two or more wetlands are "similarly situated" to each other, and what is "the region" within which those wetlands' situation must be similar? As interpreted by Justice Kennedy, "navigable waters" offers no guidance to answer either of these questions. *Id.* ("wetlands, either alone or in combination with similarly situated lands in the region"). Wetlands can be similar in any number of ways: location, size, plant communities, length of inundation, type of connection to other features, animal communities that use or rely on them, soil types, etc.[5] They may, at the same time, be similar in some of these aspects and dissimilar in others. How is a judge (or regulated party, agency staff, administrative law judge, or citizen suit plaintiff or defendant) to determine whether any two or more wetlands are similarly situated to the requisite degree? Nor is the platonic form of "the region" any more determinate. How large is a region? And how are its borders defined? If by watershed, how large a part of the watershed? The portion in which the similarly situated wetlands appear, or the entire watershed of the applicable traditionally navigable water? The larger the region (whether defined by a watershed or some other geographic concept), the more indeterminate "similarly situated" becomes.

In this respect, Justice Kennedy's "similarly situated within the region" interpretation of "navigable waters" is even less knowable for the regulated citizen or enforcement personnel than the "ordinary case" of any given crime under 18 U.S.C.

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[5] *See, e.g.*, EPA, Classification and Types of Wetlands, https://www.epa.gov/wetlands/classification-and-types-wetlands#marshes (last updated July 5, 2018).

§ 16(b). Justice Kennedy's "significant nexus" requires two abstract determinations ("similarly situated" and "the region") that entirely depend upon the subjective judgment of the reviewing court or enforcing agency staff, whereas the "ordinary case" of a crime only requires one such imaginative abstraction. *See Orchard Hill Building Company*, 893 F.3d at 1025 ("Justice Kennedy did not define 'similarly situated'—a broad and ambiguous term . . . .").

And exactly as in *Dimaya* and *Johnson*, this abstracted concept of similarly situated wetlands in a region is overlaid by an equally problematic significance threshold: a significant nexus with downstream traditionally navigable waters. *See Dimaya*, 138 S. Ct. at 1215-16. The combination of the idealized "similarly situated within the region" wetland combination that also "significantly affects" downstream, boat-floating, commerce-supporting rivers and lakes renders the concurrence's reading of "navigable waters" hopelessly vague and far short of constitutional muster, as Justice Kennedy indeed intimated during the *Hawkes* oral argument.

C. The *Rapanos* Plurality Raises Similar Void for Vagueness Concerns

Riverside Bayview holds that non navigable wetlands which abut navigable waters, such that the end of one and the beginning of the other are not easy to distinguish, may be regulated under the Act. 474 U.S. at 132. *SWANCC* holds that isolated ponds exceed the scope of the Act and may not be regulated under it. 531 U.S. at 167. Somewhere between these two poles, regulated parties must be able to determine which waters are regulated and which are not. The *Rapanos* plurality expressly disclaimed a

comprehensive answer to this question. *Rapanos*, 547 U.S. at 731 ("We need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.").

The *Rapanos* plurality defines covered tributaries based on the dictionary definition of "waters" in Webster's New International Dictionary. 547 U.S. at 732. Among the features the plurality found to be included as "waters" are "streams." *Id.* at 733. The plurality stated the rule of law based on this analysis as limiting "navigable waters" to, inter alia, "relatively permanent, . . . continuously flowing bodies of water forming *geographic features* [] described in ordinary parlance as streams . . . ." *Id.* at 739 (citing Webster's Second) (internal quotation marks omitted and emphasis added). The plurality establishes no lower bound on the size of "stream" included within its definition, unless the expression "geographic features described in ordinary parlance" provides that boundary. *Id.*

The *Rapanos* plurality also rejects an interpretation of the Act that would extend its coverage in a way that tests the limits of Congress' authority under the Commerce Clause or interferes with local matters like land use, under the Clear Statement Rule. 547 U.S. at 737-38.

The clear application of this analysis is that while the plurality considers certain nonnavigable tributaries to be covered by the Act, this interpretation does not encompass every last "stream" no matter how small or far from an actually navigable river or lake. A line clearly sits somewhere, but cannot be discerned from the plurality's interpretation of the Act.

As with the concurrence, the plurality's interpretation of "navigable waters" relies on two interacting vague standards: whether a tributary is a "geographic feature described in ordinary parlance as a stream" and whether its size, location, or other characteristics would test the limits of the Commerce Power. The plurality, as much as the concurrence, is likely void for vagueness under *Dimaya*.

The Court should grant the petition to answer the question whether "navigable waters" under the Act is void for vagueness, either standing on its own or as interpreted by the plurality and/or concurrence in *Rapanos*.

II

THIS COURT SHOULD GRANT THE PETITION TO REVISIT ITS FRACTURED *RAPANOS* DECISION AND REPLACE IT WITH A CLEAR AND AUTHORITATIVE INTERPRETATION OF THE CLEAN WATER ACT

A. The Court Should Revisit *Rapanos* To Give the Act a Constitutionally Adequate Interpretation

If the Court concludes that an interpretation of "navigable waters" and "waters of the United States" is possible that does not run afoul of the void for vagueness doctrine, then it should grant the Petition in order to adopt such an interpretation of the Act.

The Due Process Clause requires application of the rule of lenity to limit the interpretation of criminal statutes to activity clearly covered. *Lanier*, 520 U.S. at 266 (citing *Liparota* and others).

Petitioner argues above that the Court should grant the petition to decide whether "navigable waters" is void for vagueness. As shown, the *Rapanos* concurrence, which the circuit courts have so far endorsed as either the holding of *Rapanos* or an alternate basis for jurisdiction, appears certainly to be void for vagueness under this Court's recent decision in *Dimaya*. Likewise, the *Rapanos* plurality presents serious void for vagueness problems. However, the Court should take this case to also consider whether the Act is susceptible of a constitutional interpretation. As *Liparota* and *Lanier* hold, when the courts find that an act of Congress is susceptible of both a constitutional and an unconstitutional interpretation, the rule of lenity compels the adoption of the constitutional alternative. *Lanier*, 520 U.S. at 266; *Liparota*, 471 U.S. at 427.

This Court should grant the petition, to replace the currently prevailing unconstitutional interpretation of the Act set forth in the *Rapanos* concurrence with an interpretation that affords the regulated public with constitutionally adequate notice.

B. The Court Should Use This Case To Cut Through the Thicket of Ongoing Regulatory and Litigation Chaos Over the Scope of "Navigable Waters"

Rapanos' fractured outcome amplified the confusion engendered by the Clean Water Act rather than resolving any of it. Instead of the one ambiguous and excessive regulatory standard for tributaries and adjacent wetlands (adopted through notice and comment rulemaking) which *Rapanos* struck down, the agencies spent nine years after 2006 using a non

binding guidance that asserted they could use either of the *Rapanos* interpretations of the statute to determine jurisdiction. As set forth above, some circuit courts have agreed with this view, while others have said only the concurrence may be used.

In 2015 EPA and the Corps adopted a new regulation that is generally "inspired" by the Kennedy test, although it has most of the same features that this Court determined to be illegal about the regulations invalidated in *Rapanos*. *See In re EPA*, (6th Cir. 2015) (staying 2015 Rule and explaining challengers' probability of success on the merits), *vacated for lack of jurisdiction per NAM*, *see In re United States Department of Defense*, 713 Fed. Appx. 489 (6th Cir. 2018).

Many lawsuits were filed over the 2015 regulation in the federal district courts and in the federal circuit courts. It took until January of 2018 to resolve which set of lawsuits the courts had jurisdiction over, and which were to be dismissed. *NAM*, 138 S. Ct. at 627. Those lawsuits continue now in the district courts, three of which have enjoined the 2015 Rule in a total of 28 states. *See Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *Texas v. EPA*, No. 3:15-CV-00162, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018).

Meanwhile, in 2017, the White House ordered a change of direction at the agencies from the *Rapanos* concurrence to the plurality as the basis for a regulatory definition. *See generally*, www.epa.gov/wotus-rule/rulemaking-process. This process has lumbered along for almost two years, involving three separate notice and comment rulemakings. *Id.* Only

one is actually complete, and it was promptly enjoined nationwide. *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018). Another pending rulemaking (the Repeal Rule) is intended to revoke the 2015 regulation and informally re-adopt the prior (illegal, as per *Rapanos*) regulations, and yet another pending rulemaking (the Replacement Rule) is intended to adopt a new regulation based on the plurality opinion. www.epa.gov/wotusrule/rulemaking-process.
Supporters of the 2015 Rule have vowed to sue over both the Repeal Rule and the Replacement Rule,[6] while the opponents of the 2015 Rule continue to slog their way through the district courts.

As a result, roughly half of the nation is subject to the illegal 2015 Rule, while the other half is subject to a regime in which the illegal pre-2015 regulations and guidance are used to enforce the Act.

It is impossible to say when (if ever) the resulting thicket of litigation will be sufficiently resolved to arrive in this Court. The pending rulemakings may render the litigation against the 2015 Rule moot, unless litigation over the pending Repeal or Replacement Rules results in injunctions against either or both of them.

Again, it is precisely the fractured nature of the *Rapanos* decision that stokes this chaos.

The framework is well established under *Rapanos* for each successive presidential administration to launch a new rulemaking to reset

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[6]*See* Sierra Club, *Trump & Pruitt Repeal the 2015 Clean Water Rule* (June 28, 2017), https://www.sierraclub.org/ohio/blog/2017/06/trump-pruitt-repeal-2015-clean-water-rule.

the regulation to the *Rapanos* opinion preferred by that administration's political coalition, ad infinitem.

The source of this mess is this Court's split decision in *Rapanos*, yielding two very different rules of decision, both of which the government claims the authority to enforce either through new regulations or informal and putatively non binding guidance. The answer to this ongoing pendulum of regulation and litigation is for this Court to revisit *Rapanos* now, in this case, and adopt a clear majority interpretation of "navigable waters" that provides the public, the agencies, and the lower courts with a rule of decision that makes sense of the statute and affords the due process minimum of constitutional notice. Indeed, as the district court below recognized, this case is the ideal case for resolving the confusion over the interpretation of "navigable waters." Appendix D-2-3.

An important aspect of this case that makes it the ideal vehicle to revisit *Rapanos* is that since it does not involve a regulatory interpretation of the Act; the Court can dispense with any and all issues related to *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and directly interpret the statutory text. Waiting until some or all of the ongoing litigation over the 2015 regulation reaches the Court will necessitate wading through the *Chevron* questions in order to address the central Clean Water Act question that this case presents cleanly.

C. The Court Should Grant the Petition To Resolve the Circuit Splits Over Which (If Either) Opinion in *Rapanos* Provides the Controlling Rule of Law

Last term in *Hughes v. United States*, 138 S. Ct. 1765 (2018), this Court granted certiorari on questions involving the proper application of *Marks v. United States* to this Court's fractured decisions. *Id.* at 1771-72. Ultimately, the Court was able to resolve the underlying issue of criminal procedure in *Hughes*, and did not need to address the *Marks* questions in that case. *Id.* This petition provides a sound vehicle for the Court to address two discrete questions arising under *Marks*, in the event it is not possible to arrive at a majority opinion to replace *Rapanos*.

As stated above, the circuit courts' disparate efforts to apply the various *Rapanos* opinions has resulted in at least two circuit splits, one on whether *Marks* applies to *Rapanos*, and one on whether dissents may be used in applying *Marks*.

First, the Ninth Circuit in the decision below joins the Seventh and Eleventh Circuits in holding that under *Marks*, the concurrence is the holding of *Rapanos*. *See Robertson*, 875 F.3d at 1291; *Gibson*, 760 F.3d at 621; *Robison*, 505 F.3d at 1221-22. By contrast, the First, Third, Sixth, and Eighth Circuits hold that *Marks* does not apply to *Rapanos*, and allow the government to follow both the plurality and the concurrence. *See Johnson*, 467 F.3d at 66; *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011).

This circuit split is not merely academic. The results are that in four federal circuits regulated entities are subject to jurisdiction under both the *Rapanos* plurality and concurrence, while in three others the government is limited to proving jurisdiction under the concurrence. The Clean Water Act should be enforced uniformly nationwide. The Court should grant the petition to eliminate the existing geographically based double standard.

The application of *Marks* to *Rapanos* has also yielded an important express split between the Seventh and Ninth and D.C. Circuits over whether *Marks* allows the use of dissents in determining the holding of a fractured decision of this Court. *Compare United States v. Robertson*, 875 F.3d at 1291 (dissent in *Rapanos* combined with concurrence to conclude that concurrence is holding under *Marks*), *with Gibson v. American Cyanamid. Co.*, 760 F.3d at 622 (*Marks* bars use of dissents in applying *Rapanos*); *King v. Palmer*, 950 F.2d at 783 (no use of dissent in *Marks* analysis).

Whether or not a dissent may be used to determine the holding of a fractured decision is an important question of law with wide ranging consequences, which the Court should resolve. This petition provides a sound vehicle for resolving that question, since it involves a complete disagreement between the Seventh and Ninth Circuits on the use of dissents in applying *Marks* to the same case.

III

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CIRCUIT SPLIT ON REVIEWABILITY OF ORDERS DENYING MOTIONS FOR ACQUITTAL IN A FIRST TRIAL ENDING IN MISTRIAL, FOLLOWED BY CONVICTION IN A SECOND TRIAL

In *Richardson v. United States*, this Court addressed whether criminal defendants may seek interlocutory review of orders denying judgments of acquittal following a mistrial to prevent their retrial, on the ground that retrial would violate double jeopardy. The answer is no. But this Court *did not* address whether a district court ruling on a motion for acquittal based on insufficient evidence can, like any other interlocutory ruling, be reviewed following final judgment after retrial.

In the decision below, the Ninth Circuit joined four other circuits in holding that *Richardson* prohibits such review. *See United States v. Achobe*, 560 F.3d 259, 265-68 (5th Cir. 2008); *United States v. Julien*, 318 F.3d 316, 321 (1st Cir. 2003); *United States v. Willis*, 102 F.3d 1078, 1081 (10th Cir. 1996); *United States v. Coleman*, 862 F.2d 455, 460 (3d Cir. 1988). In contrast, the Eleventh Circuit says that *Richardson* does not preclude post-judgment review. *United States v. Gulledge*, 739 F.2d 582, 584 (11th Cir. 1984). In the Eleventh Circuit, denial of a motion for judgment of acquittal in a first trial ending in a hung jury is assumed to be reviewable despite an individual's subsequent conviction in a second trial. *See, e.g.*, *United States v. Martinez*, No. 11-12131, 2013 WL 563158, at *1 (11th Cir. Feb. 15, 2013).

A criminal defendant's ability to challenge on appeal the legal sufficiency of the evidence presented at their first trial should not rise or fall based on where their prosecution takes place. Yet the circuit split here has allowed this very circumstance to prevail for 30-plus years. This Court should grant certiorari to resolve this express circuit split on a recurring and important issue.

A. The Circuits Are Split on This Question

Richardson holds that a retrial following the erroneous denial of a motion to acquit does not violate double jeopardy. But this Court did not address in *Richardson* whether a defendant can seek review of a sufficiency ruling in its own right on appeal from final judgment following a second trial. In the wake of *Richardson*, lower courts have split over this question.

1. The Eleventh Circuit Allows Post-Judgment Review of Sufficiency Rulings

In *United States v. Gulledge*, the district court denied the defendant's motion for acquittal at a trial that ended in a mistrial. 739 F.2d at 583-84. The defendant sought interlocutory review, challenging the sufficiency ruling and claiming that his retrial would violate double jeopardy. *Id.* at 584. A panel of the Eleventh Circuit rejected the double-jeopardy claim in light of the holding in *Richardson*. *Id.* at 584-85. But it matter-of-factly noted in dicta that a ruling on the sufficiency of evidence at the first trial, like any other interlocutory ruling, is reviewable after a final judgment is rendered. *Id.* at 584 ("[T]he purported insufficiency of the evidence in the first trial is reviewable by this court *only on appeal from a*

conviction after a second trial . . . .") (emphasis added). In the Eleventh Circuit this has been the view, *see United States v. Cooper*, 733 F.2d 91, 92 (11th Cir. 1984), and continues to be the view, *see Martinez*, 2013 WL 563158, at *1 (affirming denial of defendant's motion for judgment of acquittal based on sufficiency of evidence in the first trial that resulted in a hung jury); *United States v. Gavin*, No. 09-15518, 2010 WL 3373973, at *1 (11th Cir. Aug. 27, 2010) (same).

This interpretation comports with the common understanding of the reviewability of interlocutory rulings after a final judgment. *See, e.g.*, *United States v. Taylor*, 176 F.3d 331, 335 (6th Cir. 1999) ("It is elementary, however, that even though a party may not file an appeal from [an interlocutory ruling], that does not mean he may *never* obtain review of the decision, once a final order has been entered.") (emphasis added). The purpose of the final judgment rule contained in 28 U.S.C. § 1291 is not to preclude review of interlocutory rulings altogether, but "to combine in one review all stages of the proceeding." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

As a consequence, parties can seek review of allegedly prejudicial interlocutory rulings following final judgment. "The prohibition against immediate appeal . . . is offset by the rule that once appeal is taken from a truly final judgment that ends the litigation, earlier rulings generally can be reviewed." 15A C. Wright, *et al.*, Federal Practice and Procedure § 3905.1, at 249 (2d ed. 1991) (footnote omitted). The "appeal from final judgment opens the record and permits review of all rulings that led up to the judgment." *Id.* at 250-52 n.3 (collecting cases).

Consistent with this principle, this Court has repeatedly noted the availability of post-judgment review before disallowing interlocutory review of non final orders that fail the collateral order doctrine. *See, e.g.*, *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987).

2. Multiple Circuits Prohibit Post-Judgment Review of Sufficiency Rulings

The holding of the Ninth Circuit below, like the rulings of the four circuits on which it relies,[7] is directly at odds with the more logical position of the Eleventh Circuit. While it is true that "double jeopardy protections do not bar a second trial" after a jury deadlocks, *Robertson*, 875 F.3d at 1293, it does not logically follow that this principle prohibits the reviewability of a denied sufficiency motion after a final judgment is entered. Robertson did not argue on appeal after his conviction that his retrial violated double jeopardy. The attempted double jeopardy arguments made in *Richardson* were simply not present in the appeal before this Court. Robertson contended only that the district court erred by denying his motion to acquit at his first trial. Double jeopardy is "not implicated simply because the Government presented insufficient evidence at a previous trial." *Robertson*, 875 F.3d at 1294. But the Ninth Circuit found that Robertson's ability to challenge the sufficiency of the evidence at his first trial, unlike any other interlocutory ruling, was precluded based on *Richardson* anyway.

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[7] *See Achobe*, 560 F.3d at 265-68; *Julien*, 318 F.3d at 321; *Willis*, 102 F.3d at 1081; *Coleman*, 862 F.2d at 460.

But nothing in *Richardson* disturbs the well-settled rule that parties may seek review of interlocutory rulings after a final judgment. *See Yeager v. United States*, 557 U.S. 110, 123-24 (2009) (discussing *Richardson*'s applicability to double jeopardy arguments related to mistrial, not the reviewability of interlocutory rulings). *Richardson* addressed only whether a retrial following the erroneous denial of a motion to acquit would violate double jeopardy. This Court held retrial would not violate double jeopardy because the mistrial did not terminate jeopardy. *Richardson*, 468 U.S. at 325-26. The defendant in that case asserted only a double-jeopardy claim, because that was the only sort of claim that could be reviewed on an interlocutory basis under *Abney v. United States*, 431 U.S. 651 (1977). *See Richardson*, 468 U.S. at 320. *Richardson* simply did not address, and had no reason to address, whether the erroneous denial of the motion to acquit could be reviewed in its own right following final judgment just like any other interlocutory order.

The lack of double jeopardy below had *no effect* upon the reviewability of Mr. Robertson's denied motion for acquittal based on allegedly deficient evidence in his first trial after final judgment was entered in his second trial. Holding that "a criminal defendant cannot challenge the sufficiency of the evidence presented at a previous trial following a conviction at a subsequent trial" is not a "necessary extension" of the principle that double jeopardy does not bar that retrial. The two propositions are simply not related or analogous. It does no violence to the holding of *Richardson* to recognize that a defendant can challenge the legal sufficiency of the evidence presented by the government in the first trial at the

conclusion of the second trial. Simply put, the decision of the Ninth Circuit, like most of the circuit cases on which it relies, conflates a challenge to a sufficiency ruling with a double-jeopardy claim.

B. This Issue Is Both Recurring and Important

1. The Issue Arises Often

Even before the present circuit split over *Richardson*, this issue repeatedly arose in both federal and state courts, with lower courts almost uniformly allowing post-judgment review of denied motions for acquittal based on insufficient evidence. *See*, *e.g.*, *United States v. Bodey*, 607 F.2d 265, 267-68 (9th Cir. 1979) (defendant entitled to reversal "if the evidence at his first trial was insufficient"). Of the approximately 3,000 federal criminal trials each year, more than 130 are retrials following mistrials. *See* Admin. Office of the U.S. Courts, Judicial Business of the United States Courts 257 tbl.D-7, 279 tbl.D-13 (2008).

Mistrial rates in state courts, which hear more than 50,000 criminal trials each year, are even higher than federal courts. *See* Paula L. Hannaford-Agor, *et al.*, *Are Hung Juries a Problem?* 19-27, National Center for State Courts (Sept. 30, 2002). Some state courts currently allow post-judgment review of prior-trial sufficiency rulings, *see*, *e.g.*, *Ohio v. McGill*, No. 99CA25, 2000 WL 1803650, at *6-9 (Ohio Ct. App. Dec. 8, 2000), while others expressly relying on *Richardson* reject such claims, *see*, *e.g.*, *People v. Doyle*, 765 N.E.2d 85, 91 (Ill. App. Ct. 2002). These courts, like their federal counterparts, would benefit greatly from this Court's guidance on this question.

2. The Issue is Important to the Administration of Justice

The reviewability of prior sufficiency rulings at subsequent trials is a matter of grave importance to the administration of justice. Rather than the narrow question addressed in *Richardson* involving *when* defendants can seek review, this case presents the much broader question of whether such rulings *are reviewable at all*. The consequences of the rule applied below and in the four other circuits denying review is harsh. Defendants are forever barred from obtaining review, however patently erroneous the district court's ruling may have been.

The decision below thus leaves defendants not convicted at their first trial *worse off* than those who actually are convicted. If a jury convicts a defendant and the district court erroneously denies his motion to acquit, that individual can receive review of that denial on appeal. But under the Ninth Circuit's interpretation of *Richardson*, if a jury is unable to reach a verdict and there is a retrial, the error is unreviewable *forevermore*. This result is patently unjust.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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